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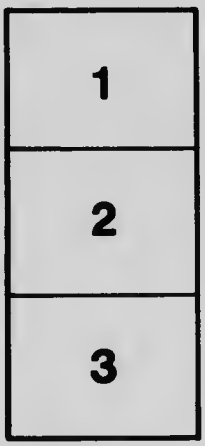

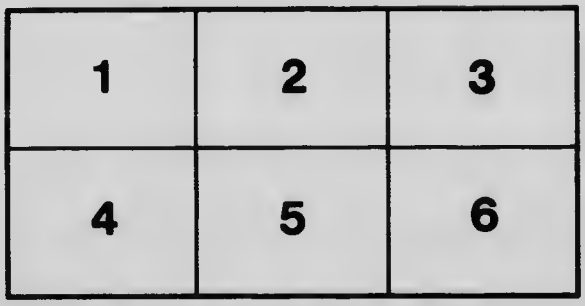

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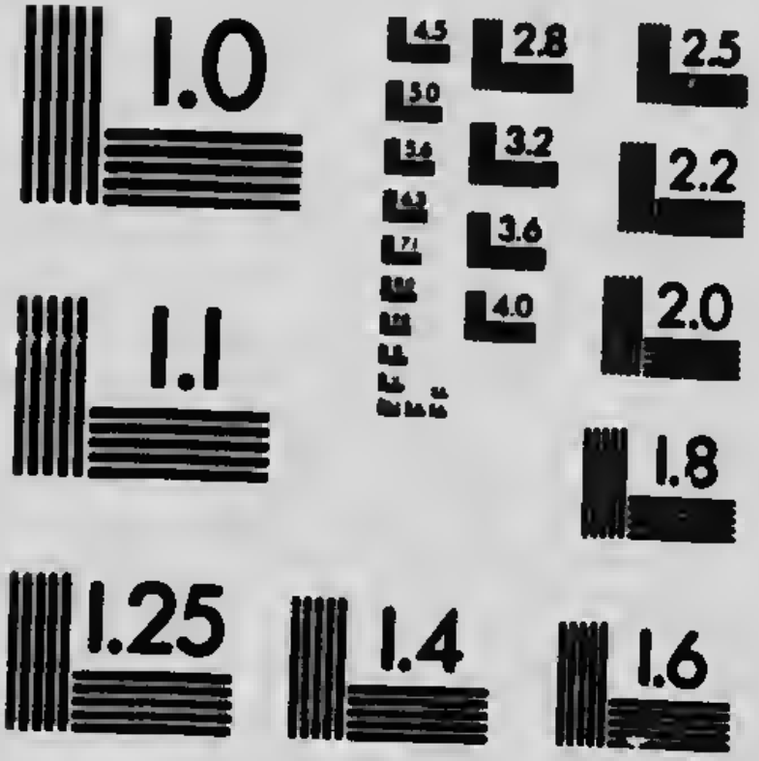

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A TREATISE

ON

THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW

VOLUME I.

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

BY

JOHN HENRY WIGMORE

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

IN FOUR VOLUMES

VOLUME I.

CANADIAN EDITION

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1905

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TO THE MEMORY OF

THE PUBLIC SERVICES AND THE PRIVATE FRIENDSHIP

OF

TWO MASTERS IN THE LAW OF EVIDENCE

CHARLES DOE OF NEW HAMPSHIRE

JUDGE AND REFORMER

AND

JAMES BRADLEY THAYER OF MASSACHUSETTS

HISTORIAN AND TEACHER

1574, Serjeant *Plowden*, in *Eyston* v. *Studd*, Plowden's Reports 465: "Our law, like all others, consists of two parts, viz., of body and soul. The letter of the law is the body of the law, and the sense and reason of it is the soul, *quia ratio legis est anima legis*. And the law may be resembled to a nut, which has a shell, and a kernel within; the letter of the law represents the shell, and the sense of it the kernel. So you will receive no benefit by the law if you rely only upon the letter."

1783, Lord Chief Justice *Mansfield*, in *R.* v. *Bembridge*, Howell's State Trials, XXII, 155: "The law does not consist in particular instances, though it is explained by particular instances and rules; but the law consists of principles, which govern specific and individual cases as they happen to arise."

1835, Mr. *Joseph Chitty*, Practice of the Law, 2d edition, Preface to Part II: "We all confess, but few adequately perceive, why it is so difficult to recollect a dry rule of practice; and we incorrectly impute to a defect of memory what in reality is attributable to our never having adequately known the subject. The simple truth is that reason or principle is the appropriate food of the mind; and it follows that no position is received with adequate appetite unless it be associated with the reason upon which it is founded."

1897, Mr. Justice *Oliver Wendell Holmes*, Address at Boston: "A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves and when the grounds for desiring that end are stated or are ready to be stated in words."

PREFACE.

In the Ninth Book of the Analects of the Confucian Sage this saying is recorded: "The Master said: 'There are some persons with whom we may pursue our studies in common, yet we shall find them unable to progress to general principles. Or, if they attain to principles, we shall find them unable to accept a common understanding of them. Or, if they reach this common understanding, we find them unable to use the principles with us in their applications.'" This saying comes true, often enough, for our profession of the law. Certainly it is verified in the law of Evidence. There was a stage in the history of its thought (and not so long ago) when it was seldom perceived to involve a system of general principles. When this perception came, in time, hardly any two writers were found to agree on the analysis and grouping of the system; and, sometimes, not even on the statement of the same principle. And to-day, as always, the chief practical difficulty in the law of Evidence lies in the application of it, — in distinguishing the bearings of different principles upon the same evidential fact.

The particular aspiration of this Treatise is, first, to expound the Anglo-American law of Evidence as a system of reasoned principles and rules; secondly, to deal with the apparently warring mass of judicial precedents as the consistent product of these principles and rules; and, thirdly, to furnish all the materials for ascertaining the present state of the law in the half a hundred independent American jurisdictions.

The first of these aims ought not to be the most difficult, possessing as we do in our Reports a thesaurus of judicial expositions, profuse and lucid, of the reasons and policies of our rules of Evidence. And yet it is to the law of Evidence least of all that the profession has been used to look for reasons. Rather (in common opinion) does that law, like Falstaff, yield no man a reason upon compulsion, — though they be indeed plenty as blackberries. Perhaps, to be sure, this is merely a part of the general tendency, induced amid the hurry and pressure of the practitioner's calling, to rest upon a rule of thumb or the latest and nearest case. "The gentlemen of the bar," declared John Horne Tooke, with the hostile sarcasm of a layman, conducting his own celebrated defence against eminent counsel, "are very wise indeed in all the applications of the law — because from thence arise all their fees; but in regard to the cause of the law, they very rarely consider it, — for no gain can arise to them from so doing." And yet the rules of Evidence, over

and above others, have come to bear, even within the profession itself, the stigma of technical arbitrariness and obstructive unreason. "My Evidence Bill," said a gentleman of legal attainments to Sir James Stephen, "would be a very short one; it would consist of one rule, to this effect: 'All rules of evidence are hereby abolished.'"

Nevertheless, when all is known and examined, the reproach is not merited. That distinguished legislator, Sir James Stephen himself (and the domination of his thought in our law of Evidence during the past generation has been rivalled only by that of Professor Thayer), was able, after a practical judicial experience second to no man's, to devote his greatest work "to prove the proposition that the English rules of Evidence are *not* a mere collection of arbitrary subtleties which shackle, instead of guiding, natural sagacity." Nor can it be charged to the judges, or to their declared judgments, that they have failed to supply the materials for a right apprehension of the law's reasoning. "Let all people," said Lord Chancellor Parker, two centuries ago, "be at liberty to know what I found my judgment upon; that so, when I have given it in any cause, others may be at liberty to judge of me"; and it is in this spirit that they have acted throughout the modern development of the law of Evidence. Their reasonings are scattered copiously through the pages of the Reports. It is not that the judges have failed to supply them; it is we who have failed to consider them. When Hobbes' Philosopher reproaches the Lawyer, in their Dialogue on the Common Laws, that "the great masters of the mathematics do not so often err as the great professors of the law," the Lawyer's retort is a just and appropriate one: "If you had applied your reason to the law, perhaps you would have been of another mind." The rules of Evidence, as recorded in our law, may be said to be essentially rational. The reason may not always be a good one, in point of policy. But there is always a reason.

If we are to save the law for a living future, if it is to remain manageable amidst the spawning mass of rulings and statutes which tend increasingly to clog its simplicity, we must rescue these reasonings from forgetfulness. A main attempt, therefore, in the following pages and in the preparation for them, has been to search out and to emphasize the accepted reasons for each rule. As an important aid to their exposition, the method has been employed of setting forth, by excerpts, the most influential, the most lucid, and the most carefully reasoned passages anywhere recorded in judicial annals, — the best things that have been said upon the rules of Evidence. *Multa ignoramus*, Coke warns us, *quæ non lateren*t, *si veterum lectio nobis esset familiaris*. The encyclopedic method, compiling in concise form the barren summaries of voluminous originals, may become an inevitable one in our law. But (as a great historian once lamented, in describing the downfall of classical learning in the Middle Ages) such a method is "a usual concomitant of declining literature; for it supersedes the use of the great writers, and effects the oblivion of good models." One of the greatest services (but little mentioned) of Professor Langdell's modern system of case-study in schools

of law has been to enlarge and perpetuate, for each new generation of the profession, this familiarity with good models of judicial reasoning. For the law of Evidence, the oblivion of the originals would have the worst consequences. But with these gleanings of the best passages, collated and preserved in form for convenient access, it may be hoped that the reasons of the law will not be buried from daily understanding and that the life of the rules will not be lost.

The second aim of this Treatise — the alignment of the mass of precedents as a consistent product of these principles and rules — would by some be thought to need nothing short of the forcible methods of a Procrustes. The mere mass of these precedents is bewildering. The pronouncements of independent Courts are in constant contrast. The inherent working of the rules of Evidence is to admit or exclude a fact according to the nature of the particular objection brought against it, and thus the very same fact may be found excluded and admitted with seeming inconsistency. These influences have brought the professional use of precedents to a singular pass. A recent President of the American Bar Association has criticised the present conditions in radical language: "A judge may decide almost any question any way, and still be supported by an array of cases. Cases are our counters, and there are no coins. Our legal arguments are for the most part a mere casino-like matching and unmatching of cases, involving little or no intellectual effort. The law is ceasing to be a question of principles, and is becoming a mere question of patterns." What the remedy is, for the profession and for the law at large, is another matter. But for the expounder of the law it is certainly a knotty problem how to exhibit in a treatise such consistency as may be found to exist amidst the mass of precedents. In the following pages, the effort has been made in several ways to emphasize those features which reduce the apparent inconsistencies. For one thing, the independence of the different Courts has been recognized, by arranging the rulings in the alphabetical order of jurisdictions, in chronological sequence within each jurisdiction, and by separating each group (where numerous rulings occur on the same point) by the italicized title of the State or Territory. The fact that there are half a hundred practically independent jurisdictions must be conceded and faced. What is the law? is a question which cannot be answered except as with fifty tongues speaking at once. What the law is in Illinois may well be not the law in Massachusetts or in California. It is time for the profession to discard the amiable pretence that precedents can be cited interchangeably. The treatise, on the one hand, is not to represent that the rule is unsettled because there are inconsistent rulings; for opposition is not inconsistency, and independence of jurisdiction leads naturally to opposition of rules. The practitioner, on the other hand, can often expect not much more of the treatise than to furnish the materials for ascertaining what is the rule in a particular jurisdiction. If this independence of jurisdiction be steadily recollected, three-quarters of the reproach of uncertainty disappears. Still further, much can be done to remove the remaining

inconsistency, for the law of Evidence in particular, by the use of copious cross-references. The chameleon-like application of the rules demands this. When Doe's statement, for example, regarding his tenancy of an estate, is offered in evidence, it is perfectly proper to admit it as a hearsay statement against interest, if he is shown to be deceased, or to receive it as a party's admission, if Doe is an opponent or predecessor in title, or to admit it as a possessor's verbal act, if Doe was a possessor; and it may be excluded in one ruling, from one of these points of view, and admitted in another, and excluded in a third, from another of these points of view; and yet there is no real inconsistency, nor any uncertainty, — except for those who do not know the character of their law of Evidence. For those, then, who realize these inherent possibilities in the law of Evidence (and none others should ever attempt to work with it), there is ample succor, through the mist of apparent uncertainties, if constant beacons of multiple reference be placed at every possible cross-roads. In the lack of a uniform nomenclature and of accepted catch-words for every rule, no one can anticipate all the turns of thought that may occur to each practitioner. But a great deal can by this means be done to direct the intelligent searcher to the various plausible aspects of the particular evidential fact which he desires to offer or to oppose.

The third aim of this Treatise — to furnish all the materials for ascertaining the present state of the law in each of the American jurisdictions — is something which has been undertaken, not because it is believed to be feasible in accurate completeness, but merely because it needs to be done, and therefore ought at least to be attempted. Of the particular features of the present attempt, only two of the most important need here be noted. First, under each rule (excepting those now wholly abolished, such as the general disqualification by interest), the early as well as the recent cases have been included. The judicial oblivion of many of the former has done more than anything else to create whatever there is of real uncertainty in the law. For example, in a Court on the Great Lakes, having fifty years of history, and some fourteen precedents under a certain rule, a recent opinion is found to cite two of these only, and yet to invoke needlessly half a dozen from other Courts, ignoring the round dozen of its own, — fortunately without happening to upset them. In an older Court, on the Atlantic, at about the same period, a new limitation of another rule is started, in unconscious disregard of its own prior rulings, and this modern novelty, soon followed elsewhere upon the solid authority of that Court, is set going into several other jurisdictions, and now breeds new controversy and annual uncertainty in a topic where settled peace had once reigned. The cases, then, and all the cases, should be the ultimate aim of one who would bear witness to the present state of the law.

Yet not the cases only; for a second and to-day equally vital part of the material lies in the statutes. How much our judicial law of Evidence has been overlaid and intertwined with statutes is almost incredible, until we come to take deliberate reckoning. In mere numbers, the citations of

statutes in the following pages are nearly one-fourth as many as the rulings. In practical significance, the proportion is scarcely less. Blackstone divided statutes into two classes, declaratory and remedial. The American statutes upon the law of Evidence may be included in three classes, — those which were necessary to remedy the common law, those which the legislators erroneously thought were necessary, and those which they knew were unnecessary. The first class includes those in which the common law was changed (and, beyond doubt, in most instances, with good cause); they number something more than a third of all. The second class embraces those which tried to remedy a supposed need, but did no more than the common law could have done without them, — had the legislators but known it. The third includes those codified enactments which were intended merely to declare what every one knew to be and wished to preserve in the law; some of these shafts, by missing the mark, have dealt dole to good law; many others, blunt and harmless, have been quietly pc d by the judges, whose principles have continued to date from the ori al precedents. It is fortunate that no Court has ever conceded to any Code a monopoly of the extant rules. The law of to-day, in any jurisdiction, is a blended mass. Statutes and rulings, old and new, must alike be scanned; and .ie time for a real Code has not yet come.

But a word of disclaimer must here be entered against any expectation of absolute completeness of citation in the following pages. Much is missing, — in part by necessity, in part by a choice based on what was feasible. All the material of the substantive law, often miscalled "evidence," is without the present purview, — such as the "evidence" necessary and admissible in burglary, in debt, and the like.[1] For a few rules, wholly created by statute, the judicial interpretations, where unmanageable in bulk and purely local in significance, and attainable in the ordinary annotations to statutory compilations, have been left aside. Certain groups of statutes, merely appurtenant to a statute of substantive law and certain to be discovered by any one having to do with the latter (such as the statutes defining the unlawful killing of game and then declaring possession of the game to be evidence of the killing), have had to be omitted. At the region where the rules of Evidence fade into the rules of procedure (for example, the procedure of taking depositions), or into the rules of substantive law (for example, the officers authorized to take acknowledgments of deeds), all doubts had to be solved against including such materials. In particular, in the last part of the work, where the functions of judge and jury, and kindred border topics, are dealt with, no more than a general survey of the rules, with a portion of the precedents, is attempted. Finally, there lurks, no doubt, at various points a residuum of undiscovered precedents. The excuse of Hallam may herein pardonably be invoked, that "an author who waits till all the requisite materials are accumulated to his hands is but watching the stream that will run

[1] This is the material covered in volumes II and III of Greenleaf on Evidence and Starkie on Evidence; in § 2, in the present work, an explanation of reasons is given.

on forever; and though I am fully sensible that I could have much improved what is now offered to the public by keeping it back for a longer time, I should but then have had to lament the impossibility of exhausting my subject." To those who reflect upon the difficulties of such a task, it is not necessary to make apology for the imperfections that may be discovered, or to point out the palliating circumstances.

Perhaps a closing word should be said for those pages given to the criticism of the existing law and to the history of its past. Something of each of these has a proper place. Sir James Stephen once laid down this canon: "A complete account of any branch of the law ought to consist of three parts, corresponding to its past, present, and future condition respectively; these parts are: Its history; A statement of it as an existing system; A critical discussion of its component parts, with a view to its improvement." That our law of Evidence can be improved upon, no one doubts. That the improvement must be gradual, yet unremitting, is equally certain, — at least if we believe, with Carlyle, that "all Law is but a tamed Furrow-field, slowly worked out and rendered arable from the waste Jungle." That the profession is interested, and that all practicable proposals for progress will have to come from or through the profession itself, must be conceded. Lord Ellenborough once disposed (to his own satisfaction) of a mild measure of reform by the argument that, if the rule of law were changed, "a lawyer who was well stored with these rules would be no better than any other man that is without them." No doubt the profession is to-day beyond the power of such a motive. It has shown again and again that its sympathies are rather with the noble sentiment of Erskine: "No precedents can sanction injustice; if they could, every human right would long ago have been extinct upon the earth." To those sympathies is addressed whatever of criticism has been ventured in the ensuing pages. *Valeat quantum valere potest.*

As for the history of this law, it need hardly be said that a great deal has remained hitherto undescribed, — if not unexplored. Its one master, now passed away, James Bradley Thayer, set the example and marked the lines for all subsequent research in this part of the subject. As rules directly appurtenant to jury trial, he made clear their development down to the 1600s, when the common-law system definitely obtained the upper hand of its rival, the canon-law system; and some of the rules he brought down to the present day. It was a part of the aim in this work to fill out the missing places, accepting the results already reached by him. Portions of this remaining history, as here set forth, had been seen and accepted by him; but a chief and irremediable disappointment has been that the portions later completed (which represented, indeed, a broader survey of the materials) lost the good fortune of his friendly perusal and possible concurrence.

J. H. W.

Northwestern University Law School,
Chicago, September 16, 1904.

CONTENTS.

PART I. — RELEVANCY.

CHAPTER III.

INTRODUCTORY. — GENERAL THEORY OF RELEVANCY.

CHAPTER IV.

TITLE I. — CIRCUMSTANTIAL EVIDENCE.

INTRODUCTORY. — GENERAL THEORY OF CIRCUMSTANTIAL EVIDENCE.

CHAPTER V.

SUB-TITLE I. — EVIDENCE TO PROVE A HUMAN ACT.

TOPIC I. — PROSPECTANT EVIDENCE.

CHAPTER VI.

CHAPTER VII.

TOPIC II. — CONCOMITANT EVIDENCE (OPPORTUNITY, ALIBI, ETC.).

CHAPTER VIII.

TOPIC III. — RETROSPECTANT EVIDENCE (TRACES, — MATERIAL, ORGANIC, AND MENTAL).

CHAPTER XI.

TOPIC VI. — EVIDENCE TO PROVE KNOWLEDGE, BELIEF, OR CONSCIOUSNESS.

CHAPTER XII.

TOPIC VII. — OTHER OFFENCES OR SIMILAR ACTS, AS EVIDENCE OF KNOWLEDGE, DESIGN, OR INTENT.

CHAPTER XIII.

Topic VIII. — Evidence to prove Habit, Status, Course of Business, or Custom.

CHAPTER XIV.

Topic IX. — Evidence to prove Emotion (Motive, Feeling, Passion).

CONTENTS.

CHAPTER XVII.

TITLE II. — TESTIMONIAL EVIDENCE.

INTRODUCTORY. — GENERAL THEORY OF TESTIMONIAL EVIDENCE.

CHAPTER XVIII.

SUB-TITLE I. — TESTIMONIAL QUALIFICATIONS.

INTRODUCTORY.

CHAPTER XIX.

TOPIC I. — ORGANIC CAPACITY.

SUB-TOPIC A. — MENTAL DERANGEMENT (INSANITY, IDIOCY, DISEASE, INTOXICATION).

CHAPTER XX.

SUB-TOPIC B. — MENTAL IMMATURITY (INFANCY).

CHAPTER XXI.

SUB-TOPIC C. — MORAL DEPRAVITY.

CHAPTER XXII.

Topic II. — Experiential Capacity.

CHAPTER XXIII.

Topic III. — Emotional Capacity.

Sub-Topic A. — Interest as a Testimonial Disqualification.

CHAPTER XXIV.

Sub-Topic B. — Marital Relationship as a Testimonial Disqualification.

CHAPTER XXV.

Topic IV. — Testimonial Knowledge.

CHAPTER XXVI.

TOPIC V. — TESTIMONIAL RECOLLECTION.

CHAPTER XXVII.

TOPIC VI. — TESTIMONIAL NARRATION OR COMMUNICATION.

CHAPTER XXVIII.

TOPIC VI. (*continued*). — CONFESSIONS OF AN ACCUSED PERSON.

VOLUME II.

CHAPTER XXIX.

SUB-TITLE II.—TESTIMONIAL IMPEACHMENT.

CHAPTER XXX.

Topic I. — Character, Mental Defects, Bias, etc., used as General Qualities to Discredit.

CHAPTER XXXI.

Topic II. — Evidencing Bias, Interest, and Corruption (by Conduct and Circumstances).

CHAPTER XXXII.

Topic III. — Evidencing Moral Character, Skill, Memory, Knowledge, etc. (by Particular Instances of Conduct).

CONTENTS.

CHAPTER XXXIII.

TOPIC IV. — SPECIFIC ERROR (CONTRADICTION)

CHAPTER XXXIV.

TOPIC V. — SELF-CONTRADICTION.

1. General Principle.

2. Collateral Matters Excluded.

3. Preliminary Warning Necessary.

4. What amounts to a Self-Contradiction or Inconsistency.

5. Explaining away the Inconsistency.

CHAPTER XXXV.

Topic VI. — Admissions.

1. General Theory.

2. What Statements are Admissions.

3. Vicarious Admissions (by other than the Party Himself).

CHAPTER XXXVI.

SUB-TITLE III. — TESTIMONIAL REHABILITATION.

Introductory.

A. After Impeachment of Moral Character.

CONTENTS.

CHAPTER XXXVII.

TITLE III.—AUTOPTIC PROFERENCE (REAL EVIDENCE).

PART II.—RULES OF AUXILIARY PROBATIVE POLICY.

CHAPTER XXXVIII.

INTRODUCTION.—GENERAL SURVEY OF AUXILIARY RULES.

CHAPTER XXXIX.

TITLE I. — PRELIMINARY RULES.

SUB-TITLE I. — PRODUCTION OF DOCUMENTARY ORIGINALS.

A. Introductory.

B. The Rule Itself.

(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.*"

CHAPTER XLI.

Sub-Topic B. — Preferred Reports of Prior Testimony.

Sub-Topic C. — Sundry Preferred Witnesses.

CHAPTER XLII.

Topic II. — Conclusive (or Absolute) Testimonial Preferences.

TITLE II. — ANALYTIC RULES: THE HEARSAY RULE.

CHAPTER XLIII.

INTRODUCTORY: THEORY AND HISTORY OF THE HEARSAY RULE.

CHAPTER XLIV.

SUB-TITLE I. — THE HEARSAY RULE SATISFIED.

TOPIC I. — BY CROSS-EXAMINATION.

In General.

1. Kind of Tribunal or Officer, as affecting Opportunity of Cross-examination.

2. Issues and Parties, as affecting Opportunity of Cross-examination.

3. Conduct of the Cross-examination itself, as affecting Opportunity of Cross-examination.

CHAPTER XLV.

TOPIC II. — BY CONFRONTATION.

1. General Principle of Confrontation.

2. Circumstances of Necessity Dispensing with Witness' Personal Presence.

CHAPTER XLVI.

SUB-TITLE II. — EXCEPTIONS TO THE HEARSAY RULE.

Introductory: General Theory of the Exceptions.

CHAPTER XLVII.

Topic I. — Dying Declarations.

CHAPTER XLVIII.

Topic II. — Statements of Facts against Interest.

CHAPTER XLIX.

TOPIC III. — DECLARATIONS ABOUT FAMILY HISTORY (PEDIGREE).

CHAPTER L.

TOPIC IV. — ATTESTATION OF A SUBSCRIBING WITNESS.

CHAPTER LI.

TOPIC V. — REGULAR ENTRIES.

CHAPTER LII.

TOPIC VI. — SUNDRY STATEMENTS OF DECEASED PERSONS.

CHAPTER LIII.

TOPIC VII. — REPUTATION.

VOLUME III.

CHAPTER LIV.

TOPIC VIII. — OFFICIAL STATEMENTS.

CHAPTER LV.

Topic IX. — Learned Treatises.

Topic X. — Commercial and Professional Lists, Registers, and Reports.

Topic XI. — Affidavits.

Topic XII. — Statements by a Voter.

CHAPTER LVI.

Topic XIII. — Declarations of a Mental Condition.

CHAPTER LVII.

Topic XIV. — Spontaneous Exclamations.

CONTENTS.

CHAPTER LVIII.

SUB-TITLE III. — HEARSAY RULE NOT APPLICABLE (VERBAL ACTS, *RES GESTÆ*, ETC.).

CHAPTER LIX.

SUB-TITLE IV — HEARSAY RULE AS APPLICABLE TO COURT OFFICERS (JURORS, JUDGE, COUNSEL, INTERPRETER).

CHAPTER LX.

TITLE III. — PROPHYLACTIC RULES.

SUB-TITLE I. — OATH.

SUB-TITLE II. — PERJURY-PENALTY.

SUB-TITLE III. — PUBLICITY OF TRIAL.

CHAPTER LXI.

SUB-TITLE IV. — SEQUESTRATION OF WITNESSES.

CHAPTER LXII.

SUB-TITLE V. — PRIOR NOTICE, OR DISCOVERY, OF EVIDENCE TO THE OPPONENT.

CONTENTS.

CHAPTER LXIII.

TITLE IV. — SIMPLIFICATIVE RULES.

SUB-TITLE I. — ORDER OF PRESENTING EVIDENCE.

CHAPTER LXIV.

SUB-TITLE II. — RULES OF EXCLUSION FOR CONFUSION OF ISSUES, UNFAIR PREJUDICE, OR UNDUE WEIGHT.

CHAPTER LXV.

SUB-TITLE III. — OPINION RULE.

TOPIC I. — GENERAL PRINCIPLE.

CHAPTER LXVI.

Topic II. — Opinion Rule Applied to Sundry Topics.

CHAPTER LXVII.

Topic III. — Opinion Rule, applied to Testimony to Moral Character and Professional Skill.

CHAPTER LXVIII.

TOPIC IV. — OPINION RULE, AS APPLIED TO HANDWRITING-EVIDENCE.

CHAPTER LXIX.

TITLE V. — QUANTITATIVE RULES.

SUB-TITLE I. — NUMBER OF WITNESSES REQUIRED.

TOPIC I. — RULES DEPENDING ON THE KIND OF ISSUE.

CHAPTER LXX.

SUB-TITLE II. — KINDS OF WITNESSES REQUIRED.

CHAPTER LXXI.

SUB-TITLE III. — VERBAL COMPLETENESS.

CHAPTER LXXII.

SUB-TITLE IV.—AUTHENTICATION OF DOCUMENTS.

CHAPTER LXXIII.

PART III.—RULES OF EXTRINSIC POLICY.

TITLE I.—RULES OF ABSOLUTE EXCLUSION.

CHAPTER LXXIV.

TITLE II.—RULES OF OPTIONAL EXCLUSION.

SUB-TITLE I.—PRIVILEGE, IN GENERAL.

CHAPTER LXXV.

SUB-TITLE II. — VIATORIAL PRIVILEGE.

CHAPTER LXXVI.

SUB-TITLE III. — TESTIMONIAL PRIVILEGE.

TOPIC A. — PRIVILEGED TOPICS.

SUB-TOPIC I. — SUNDRY PRIVILEGED TOPICS.

CHAPTER LXXVII.

SUB-TOPIC II. — PRIVILEGE FOR ANTE-MARITAL FACTS (HUSBAND OR WIFE TESTIFYING AGAINST THE OTHER).

1. In General.

2. Who is prohibited as Husband or Wife.

3. What is prohibited as Testimony.

4. What Testimony is Anti-Marital.

5. Anti-Marital Testimony admitted Exceptionally.

6. Exercise of the Privilege.

7. Statutory Changes.

CHAPTER LXXVIII.

SUB-TOPIC III. — PRIVILEGE FOR SELF-CRIMINATING FACTS.

1. In General.

2. Kinds of Facts protected from Disclosure.

3. Form of Disclosure Protected.

VOLUME IV.

Topic B. — Privileged Communications.

CHAPTER LXXIX.

Sub-Topic I. — Confidential Communications in General.

CHAPTER LXXX.

Sub-Topic II. — Communications between Attorney and Client.

CHAPTER LXXXVI.

BOOK II. — BY WHOM EVIDENCE MUST BE PRESENTED (BURDEN OF PROOF; PRESUMPTIONS).

TITLE I. — GENERAL THEORY.

CHAPTER LXXXVII.

TITLE II. — BURDENS AND PRESUMPTIONS IN SPECIFIC ISSUES.

CHAPTER LXXXVIII.

BOOK III. — TO WHOM EVIDENCE MUST BE PRESENTED (LAW AND FACT; JUDGE AND JURY).

CHAPTER LXXXIX.

BOOK IV. — OF WHAT PROPOSITIONS NO EVIDENCE NEED BE PRESENTED.

TITLE I. — JUDICIAL NOTICE.

1. General Principles.

2. Specific Facts Noticed.

CHAPTER XC.

TITLE II. — JUDICIAL ADMISSIONS.

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

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

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

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

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

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

LIST OF LATEST REPORTS CONSULTED.

II. Reports.

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

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

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

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

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

The latest volumes of English and C[illegible]n Reports consulted were as follows:

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

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

III. Citation of this Treatise.

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

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

EVIDENCE

IN

TRIALS AT COMMON LAW.

INTRODUCTION.

SCOPE OF THE SUBJECT, AND PRELIMINARY DISTINCTIONS.

CHAPTER I.

§ 1. **Definition of Evidence; Distinctions between Law and Fact; between Argument and Evidence.** In considering the precise scope to be assigned to the subject of Evidence or Proof, it is to be noticed that the general process of vindicating or enforcing legal rights and duties, both public and private, falls naturally into five stages: 1. The procurement of the parties' appearance before the tribunal, *i. e.* Process, in the narrow sense; 2. The ascertainment of the subject of the dispute, *i. e.* Pleading; 3. The attempt at demonstration by the parties of their respective positions, *i. e.* Trial; 4. The determination of the dispute by the tribunal, *i. e.* Verdict and judgment; and 5. The enforcement of the tribunal's determination, *i. e.* Execution, and the like. Clearly the present subject lies somewhere in the third stage. At that point (taking for example's sake a civil suit at common law) the parties have arrived at an issue, and it becomes the plaintiff's interest to demonstrate to the tribunal the existence of the legal relation (a right, as to him; a duty, as to the defendant) which he asserts, and the defendant's interest to show its non-existence.

(*a*) *Law and Fact, distinguished.* The material on which this claim of the plaintiff rests, if successful, is composite. Given certain facts or groups of facts, and the State predicates a legal relation between A and B, *i. e.* is ready to lend its force towards a more or less direct realization of that relation. The establishment of a given claim, then, involves the demonstration

(1) that certain facts or groups of facts exist, (2) that to the contingency of their existence the State attaches the legal consequence now asserted by the claimant. He has thus to satisfy the tribunal in two respects, (1) as to these facts, (2) as to the legal consequence asserted to be attached. In one sense, both these matters are "facts," — in the sense that everything in the cosmos is a fact or phenomenon. But the popular distinction between "fact" and "law" is here as accurate as the situation requires. The requirement is for phrases which shall set off in one class the rule that in this or that instance the State sanctions and will habitually enforce a legal relation of a specific content, and in another class the fact constituting the contingency in which the State predicates this relation. In the former class we are dealing with the general body of legal principles; in the latter, with all other phenomena, so far as they may come within the purview of the law.

That many phenomena (events, or facts) may not at first sight be simple to classify, or easy to deal with, does not affect the reality and positiveness of the distinction. For instance, the circumstance that John Doe owns the farm Blackacre, upon analysis, resolves itself as follows: The legal relation of ownership exists as between John Doe and all others, because (a) John Doe's father, owner of Blackacre, died without a will leaving John Doe his only legitimate child, and (b) under such circumstances the above legal relation attaches as between John Doe and all others. Here (b) is clearly a fact of legal rule, while (a) is for practical purposes an ordinary fact, but (a) may be in turn resolved into facts of legal rule (ownership, legitimacy, and the like) in composition with ordinary facts. In judicial practice, and not in theory only, the distinction will be maintained, for the judge will instruct the jury upon the legal rules necessary for them to know and obey in reaching their ultimate determination. Thus, though such a question as ownership may be handed over for determination to the part of the tribunal usually dealing with ordinary facts alone, the distinction is none the less preserved between legal principles and the other phenomena which we ordinarily call "facts." No closer distinction is here necessary for the determination of the general scope of the subject. It is apparent that the claimant has here two classes of material very different for the purposes of his demonstration. To persuade the tribunal of the existence of the asserted rule of law is a process having its own separate rules, not here involved. To persuade the tribunal of the existence of the required state of facts is the process with which the rules of Evidence or Proof, so called, are for the most part concerned.

(*b*) *Argument and Evidence, distinguished.* Within this line, however, must be distinguished two separate processes employing different classes of expedients. The claimant may conceivably offer to the tribunal the very phenomenon in its entirety which is to be the basis of the legal rule asserted; but an instance could hardly occur in practice. Ordinarily, the demonstration can be accomplished only by the use of a number of facts, the final logical result being the establishment of the desired conclusion.

The process would consist in the presentation of these elemental facts and in the piecing of them together so as to reach the conclusion. This process of presentation is a different one from the process of piecing together. The latter is Argumentation. The legitimate quality of Argumentation is the invocation, by counsel, of ordinary rules of logic and rhetoric in the combination of assumed facts. The rules governing this sub-process in the general process of judicial proof form a separate subject of law. It is sufficient here to note that Argument is to be distinguished from the presentation of Evidence.[1]

(*c*) *Definition of Evidence.* It is of little practical consequence to construct a formula defining what is to be understood as Evidence. Nevertheless, its content is capable of being stated. What we are concerned with is the process of presenting evidence for the purpose of demonstrating an asserted fact. In this process, then, the term Evidence represents:

Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a conviction, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.[2]

Of the definitions of legal evidence that have been proposed from time to time, some have been framed merely in view of emphasizing partial aspects of the subject, others have been intended to embody some theory or classification or the relation between certain parts of the law of evidence; and a comparison of them can hardly be made upon a common basis. Nevertheless, a collation of the classical definitions is interesting, if only for the singular variety of phrasing exhibited upon a subject apparently so simple and so exempt from practical controversy:

1768, Mr. Justice *Blackstone*, Commentaries, III, 367: "Evidence signifies that which makes clear or ascertains the truth of the very fact or point in issue, either on the one side or the other."

1824, Mr. *Thomas Starkie*, Evidence, I, 9: "That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as

[1] The distinction between argument and evidence is more precisely examined *post*, § 1806.

[2] A brief comment on some of these phrases and terms is worth while: (1) "Knowable"; this must be noted, because it is certain that no Court would listen to an attempted presentation of that which it considered not knowable. (2) "Event," "fact," "phenomenon"; it is difficult to choose between these terms; none of them is adequate; "fact" seems on the whole the least unsatisfactory. (3) "Considered with a view," etc.; this must be noted, because, for example, the situation of the counsel who is discussing the testimony of his witnesses with his associate in the office must be distinguished from his situation when he is putting the witness on the stand. (4) "Conviction, positive or negative"; it will be seen, in discussing the Burden of Proof, that the process of proof and disproof may be conceived of either as the establishment by both proponent and opponent of their own assertions, one of a given content, the other of a content exactly negative; or as the establishment by the proponent of conviction as to a given assertion and the destruction by the opponent of any conviction as to that assertion. It is not intended here to choose between those views, but merely to cover the case of both the proponent and opponent in the litigation. (5) "Truth of a proposition"; in judicial proceedings we must assume for practical purposes that the subjective phenomena of existence have an objective reality. With reference to the State's force, which the Court will put in motion, the Court's determination upon a question of fact makes that fact for practical purposes a reality. For the purposes of legal procedure, then, the "truth of a proposition" is the result of the Court's determination.

contradistinguished from all comment and argument on the subject, falls within the description of evidence."

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. I, c. I (Bowring's ed. vol. VI, p. 208): "By the term 'evidence' considered according to the most extended application that is ever given to it, may be, and seems in general to be, understood, any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact — a persuasion either affirmative or disaffirmative of its existence. . . . Taking the word in this sense, questions of evidence are continually presenting themselves to every human being, every day, and almost every waking hour of his life. . . . Hereafter, the only sense in which the word is used, is that in which the application of it is confined to juridical, or say legal, evidence. Under this limitation, then, evidence is a general name given to any fact, in contemplation of its being presented to the cognizance of a judge, in the view of its producing in his mind a persuasion concerning the existence of some other fact — of some fact by which, supposing the existence of it established, a decision to a certain effect would be called for at his hands."

1838, Mr. *W. Wills*, Circumstantial Evidence, 1: "Every conclusion of the judgment, whatever may be its subject, is the result of evidence, — a word which . . . is applied to denote the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."

1842, Mr. *John Bouvier*, editor, in Bacon's Abridgment, 1st Amer. ed., III, 242, tit. "Evidence": "Evidence is that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue; or, it is that which is legally submitted to a court and jury, or to either of them, to enable them to decide upon the questions in dispute or issue, as pointed out by the pleadings, and distinguished from all comments or arguments."

1849, Mr. *W. M. Best*, Evidence, §§ 11, 33: "Evidence, thus understood, has been well defined, — any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. 'Judicial evidence' may be defined [as] the evidence received by courts of justice in proof or disproof of facts the existence of which comes in question before them. By *facts* must here be understood the *res gestæ* of some suit or other matter to which when ascertained the law is to be applied; for although, in logical accuracy the existence or non-existence of a *law* is a question of fact, it is rarely spoken of as such either by jurists or practitioners."

1876, Mr. Justice *Stephen*, Digest of Evidence, Art. 1: "'Evidence' means — (1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; . . . (2) Documents produced for the inspection of the Court or judge."

1823, Mr. Justice *Edward Livingston*, Draft Code, Book of Definitions (Works, ed. 1872, II, 646): "Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied. Illustrations and developments of the different parts of this definition: I. A conviction produced by evidence which ought not according to the rules of true reason to have that effect is not a just conviction; the law therefore declares what effect different species of evidence ought to have in producing such conviction, and that evidence in its different degrees is called 'legal evidence.' . . . II. The word 'substantive,' in the definition is intended to exclude all such abstract propositions as can be demonstrated to be true or false by the reasoning power, without having recourse to the establishment of other facts. The propositions intended by the definition are either of fact or of law."

1842, Professor *Simon Greenleaf*, Evidence, § 1: "The word 'evidence,' in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."

1889, Professor *J. B. Thayer*, "Presumptions and the Law of Evidence," 3 Harv. Law Rev. 142: "What is our law of evidence? It is a set of rules which has to do with judicial investigations into questions of fact. . . . These rules relate to the mode of

ascertaining an unknown, and generally a disputed, matter of fact. But they do not regulate the process of reasoning and argument. . . . When one offers 'evidence,' in the sense of the word which is now under consideration, he offers to prove, otherwise than by mere reasoning from what is already known, a matter of fact to be used as a basis of inference to another matter of fact. . . . In giving evidence we are furnishing to a tribunal a new basis for reasoning. This is not saying that we do not have to reason in order to ascertain this basis; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element which is added is what we call the evidence. Evidence, then, is any matter of fact which is furnished to a legal tribunal — otherwise than by reasoning or a reference to what is noticed without proof — as the basis of inference in ascertaining some other matter of fact." [3]

§ 2. **Distinctions between Factum Probandum and Factum Probans; between Rules of Substantive Law and Pleading and of Evidence; between Materiality and Admissibility; between Facts not in Issue and Facts not Admissible.** When A is sitting in his office, pondering over an irregularity in the cashier's books, and B approaches him with an earnest proffer of documents and ore-specimens from a Colorado mine which he desires to prove to be a good investment for A's money, A will doubtless reply, "But I cannot listen to your evidence of the richness of the mine, for I am not at this moment considering any proposal to invest in that mine, or in any other asset. What I am now desirous of establishing is whether my clerk is dishonest or has merely made a blunder; and your proposition about the mine being not before me now, your evidence of it is beside the point." Just such a situation is daily presented in every court. Evidence is rejected, not because of any defect in the evidence, but because the proposition to which it is directed is not before the Court. The distinction thus becomes important between *factum probandum* and *factum probans*.

(1) Evidence is always a relative term. It signifies a relation between two facts, the *factum probandum*, or proposition to be established, and the *factum probans*, or material evidencing the proposition. The former is necessarily to be conceived of as hypothetical; it is that which the one party affirms and the other denies, the tribunal being as yet not committed in either direction. The latter is conceived of for practical purposes as existent, and is offered as such for the consideration of the tribunal. The latter is brought forward as a reality for the purpose of convincing the tribunal that the former is also a reality. No correct and sure comprehension of the nature of any evidential question can ever be had unless this double or relative aspect of it is distinctly pictured. On each occasion the questions must be asked, What is the Proposition desired to be proved? What is the Evidentiary Fact offered to prove it? Part of the confusion which often is found arises from the circumstance that each Evidentiary Fact may in turn become a Proposition to be proved, until finally some ultimate Evidentiary Fact is reached. For example, to prove the Proposition that a murder was committed by John Doe, the Evidentiary Fact may be offered that John Doe

[3] The same author repeats substantially this definition in his Preliminary Treatise, 263, published in 1898.

left the victim's house shortly after the murder; to prove this in turn, as a Proposition, the Evidentiary Fact may be offered that John Doe's shoes fit the track left near the house by the murderer; and this again, as a Proposition, may be evidenced by the statement of a witness on the stand who has placed the shoe in the tracks. Here each evidentiary fact in its turn becomes a proposition requiring the marshalling of new evidentiary facts, more or fewer according to its complexity. Any specific matter may be Proposition or Evidentiary Fact, according to the point of view of the moment. In one aspect, then, this distinction needs to be observed in that the significance of a ruling upon an offer of evidence may be otherwise misconceived, — as when, for example (according to our loose and inaccurate use of words), it is said that "evidence of" a person's age is offered; for here it cannot be told by the phrasing whether the age is the Evidentiary Fact or the Proposition.

(2) In a more important way the distinction is again frequently lost sight of by stating a ruling of substantive law or of pleading as if it were a ruling upon a question of evidence. For example, in an action of battery, upon a plea of not guilty, the defendant offers evidence to prove that the plaintiff used insulting words to the defendant before the attack, and this is rejected; here the ruling is in truth that insults constitute no excuse or no ground for mitigation of damages, — a ruling of substantive law; or, perhaps, that such a defence is not available upon a plea traversing the battery, — a ruling of pleading. It is certainly not a ruling upon a question of evidence; it is a ruling that the proposition desired to be proved is either not tenable, by the substantive law, or not issuable, by the law of pleading. The contrast is indicated by the terms Materiality and Admissibility, the former defining the status of the Proposition in the case at large, and the latter defining the relation of an Evidentiary Fact to some Proposition. The two problems are wholly distinct, and yet the inaccuracy of our usage tends constantly to confuse them. Although in some legal treatises the confusion has been perpetuated, yet the most careful modern writers have repeatedly called attention to the impropriety and the harmfulness of this inveterate error:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. VI, c. V (Bowring's ed. vol. VII, p. 560): "The question, on what facts the decision turns, is a question, not of evidence, but of the substantive branch of the law: it respects the *probandum*, not the *probans:* it does not belong to the inquiry, by what sort of evidence the facts of the case may be proved; it belongs to the inquiry, what are the facts of which the law has determined that proof shall be required, in order to establish the plaintiff's claim. This circumstance, obvious as it is, might easily be overlooked by one who had studied the subject only in the compilations of the English institutional writers; who, not content with directing that the evidence be confined to the points in issue, have farther proceeded, under the guise of laying down rules of evidence, to declare, on each occasion, what the points in issue are. One whole volume out of two which compose Mr. Phillipps's treatise on the Law of Evidence, — with a corresponding portion of the other treatises extant concerning that branch of the law, — is occupied in laying down rules concerning the sort of evidence which should be required in different sorts of actions or suits at law. But why should different forms of action require different sorts of evidence? The secur-

ities by which the trustworthiness of evidence is provided for, and the rules by which its probative force is estimated, if for every sort of cause they are what they ought to be, must be the same for one sort of cause as for another. The difference is not in the nature of the proof; it is in the nature of the facts required to be proved. There is no difference as between different forms of action, in reason, or even in English law, in respect of the rules relating to the competency of witnesses; nor, in general, to the admissibility or the proof of written documents; nor in respect of any other of the general rules of evidence. What Mr. Phillipps (I mention him only as a representative of the rest) professes, under each of the different forms of action, to tell you, is, what facts, in order to support an action in that form, it is necessary that you should prove. . . . But, to enumerate the facts which confer or take away rights, is the main business of what is called the civil branch of the law; to enumerate the acts by which rights are violated — in other words, to define offences — is the main business of the penal branch. What, therefore, the lawyers give us, under the appellation 'law of evidence,' is really, in a great part of it, civil and penal law. . . . Under the title Burglary, Mr. Starkie begins by saying, that on an indictment for burglary, it is essential to prove, 1st, A felonious breaking and entering; 2dly, of the dwelling-house; 3dly, in the night time; 4thly, with intent to commit a felony. He then proceeds to inform us, that there must be evidence of an actual or constructive breaking; for if the entry was obtained through an open door or window, it is no burglary. . . . Who does not see that all this is an attempt — a lame one, it must be confessed (which is not the fault of the compiler), but still an attempt — to supply that definition of the offence of burglary which the substantive law has failed to afford?"

1881, Mr. Justice *Oliver Wendell Holmes*, The Common Law, 120: "The principles of substantive law which have been established by the courts are believed to have been somewhat obscured by having presented themselves oftenest in the form of rulings upon the sufficiency of evidence. When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should. Thus, in *Crafton* v. *Metropolitan Railway Co.*,[1] the plaintiff slipped on the defendant's stairs and was severely hurt. The cause of his slipping was that the brass nosing of the stairs had been worn smooth by travel over it, and a builder testified that in his opinion the staircase was unsafe by reason of this circumstance and the absence of a handrail. There was nothing to contradict this except that great numbers of persons had passed over the stairs and that no accident had happened there, and the plaintiff had a verdict. The Court set the verdict aside, and ordered a nonsuit. The ruling was in form that there was no evidence of negligence to go to the jury; but this was obviously equivalent to saying, and did in fact mean, that the railroad company had done all that it was bound to do in maintaining such a staircase as was proved by the plaintiff. A hundred other equally concrete instances will be found in the text-books. On the other hand, if the Court should rule that certain acts or omissions coupled with damage were conclusive evidence of negligence unless explained, it would, in substance and in truth, rule that such acts or omissions were a ground of liability or prevented a recovery, as the case might be. Thus, it is said to be actionable negligence to let a house for a dwelling knowing it to be so infected with small-pox as to be dangerous to health, and concealing the knowledge."

1898, Professor *J. B. Thayer*, Preliminary Treatise on Evidence, 511–514: "A great portion of these rules [of evidence], as laid down by the Courts and by our text writers, are working a sort of intellectual fraud by purporting to be what they are not. To the utter confusion of all orderly thinking, a Court is frequently represented as passing on questions of evidence when in reality it is dealing with some other branch, either of substantive law or procedure. . . . What is the result of this? Utter confusion of thought,

[1] L. R. 1 C. P. 300.

and frequent injustice in decision. Of course when in reality men are discussing a question in the law of partnership, agency, or bankruptcy; or the ground and scope of equity jurisdiction in dealing with fraud, mistake, trusts, or the reforming of documents; or the rules for the construction and interpretation of language; and yet, out of an imagination that they are dealing with rules of evidence, go on to clothe their ideas in the phraseology of that subject; although a right result may be reached, it is not rightly reached, and bewilderment attends the process. . . . This error is deeply ingrained in our cases; and it is a subtle one. But you cannot possibly deal thoroughly and scientifically with this part of our law until the error is cast out, until it is purged of that mass of substantive law, and of mere rules of procedure, and reason, and logic which overloads it. There was a time when all that was said or read to the jury was spoken of as said *en evidence al jury*. The contrast in mind, when this was said, was between saying something to the Court, in pleading (in the days of oral pleading), and saying it to the jury. But now, for two or three centuries, we have been discussing the admissibility of what is offered in evidence, under a new branch of law, called the rules of evidence; as contrasted with its admissibility under the law of pleading and practice, and the substantive law. . . . It is then fundamental that not all determinations admitting or excluding evidence are referable to the law of evidence. Far the larger part of them are not. An innumerable company of questions, of the sort just alluded to, very often — more often than not, nay, much oftener than not — are dealt with in our text-books and cases as belonging to the law of evidence, when in real truth they ought to be carried to the border line of this subject and respectfully deposited on the other side."

(3) The question, therefore, "Of what Propositions may Evidence be offered?" is not answered by the law of evidence, except in a subordinate way. The answer to it is made in four parts. Evidence may be offered of such Propositions of fact as

(*a*) Are material by the substantive law to any right or duty, claim or defence;

(*b*) Are issuable in the case at bar by the terms of the pleadings under the rules of pleading;

(*c*) Are effective to relieve a party from the establishment of one of the preceding propositions;

(*d*) Are admissible by the law of evidence as evidentiary facts, and thus may become in turn Propositions to be proved.

The first and the second of these classes clearly do not involve the law of evidence. The third class is concerned with judicial admissions and their congeners;[2] such are really equivalent to a pleading, because they formally waive proof; they are therefore no part of the law of evidence except for the necessity of distinguishing them from other things miscalled admissions. The fourth class alone concerns intrinsically the law of evidence. It rests on the self-evident corollary that, since any Evidentiary Fact may in its turn become a Proposition (*supra*, par. (1)), evidence to prove it may then be offered. Thus the law of evidence is legitimately concerned solely with the relation between Evidentiary Facts and Propositions; how a given Proposition comes to be eligible for proof is not a part of the law of evidence.

§ 3. **Topical Analysis of the System of Evidence.** The Propositions of which evidence may be offered being thus given by the rules of substantive

[2] These are dealt with in Book IV, *post*.

law and of pleading, and the law of evidence concerning itself solely with the relation between Evidentiary Facts and such Propositions, the settlement of that relation involves obviously four distinct questions:

I. *What Facts may be presented as Evidence?* This is the question of Admissibility.

II. *By whom must Evidence be presented?* This is the question of Burden of Proof, and, incidentally, of Presumptions.

III. *To whom must Evidence be presented?* This involves the relation of function between Judge and Jury, as respectively deciding upon Law and Fact.

IV. *Of what Propositions in issue need no Evidence be presented?* This includes the topics ordinarily termed Judicial Notice and Judicial Admissions. The former (as will be seen) is in essence nothing more than a rule of burden of proof. The latter (as already noted in § 2) is in effect equivalent to a rule of pleading.

All of the last three topics verge towards the border line of what is in strictness the law of evidence. They involve and rest upon certain larger aspects of procedure which are independent of the evidential material. The question who has the burden of proof, for example, is of a piece with the questions who shall open and close the argument and whether certain allegations require an affirmative or negative pleading. They form a part of a treatise on evidence merely because their material is chiefly evidential material and because their problems have constantly to be discriminated from the strictly evidential problems.

There are, indeed, still other topics which, because their material is partly or chiefly evidential, might by a broad treatment be included in a system of evidence. For example, the rules of procedure in preparation for trial may raise the question whether an expected witness may be detained or bonded before trial begun, or whether testimony can be preserved by deposition taken before trial, or whether documents needed for evidence can be prevented from being carried out of the jurisdiction. So far as any of these rules of procedure affect the subsequent admissibility of the evidence, they plainly belong here; but as rules of procedure — *i. e.* telling whether a thing can or cannot be done before trial — they are in strictness not rules of evidence.[1] Again, the deliberations of the jury are governed by certain rules, prescribing the place of retirement, the behavior during retirement, the form of the verdict, and the like. Among these rules may be some which prescribe what effect of persuasion is to be attached to different sorts of evidence, and how the total strength or sufficiency of the jurors' persuasion is to be measured. All these rules belong together, and it is only incidentally that some of them concern evidential material.[1] Still again, a verdict and judgment may on appeal be set aside for various errors and defects; some of these errors may involve the circumstance that improper evi-

[1] These various incidental aspects of evidence are for practical reasons considered, more or less fully, in the appropriate places in the ensuing pages.

dence has been considered. But only as a part of the general system of appeal and revision can such rules be satisfactorily dealt with. They are a part of that system and not of the system of evidence.[2]

In these several ways, then, evidential material may be involved incidentally in various other parts of the system of procedure as a whole; but the admissibility of evidence — that is, the relation between Evidentiary Facts and given Propositions — is in strictness the boundary of the system of evidence intrinsically considered.

§ 4. **Distinctions between Trials in Chancery and at Law; between Civil and Criminal Trials; between Ex Parte and Responsory Proceedings; between Interlocutory and Adjudicatory Proceedings.** (1) *Chancery and Law.* The system of evidence in the Chancellor's court would form of itself a subject of broad scope. As a historical system it is independent of that of the common law in jury trials. It was built upon the ecclesiastical or canon law, and thus involves the whole story of Continental systems of proof. Down to the middle of the 1700s, the relation between the chancery and the common law systems seems not to have been questioned, — not so much because their independence was conceded, as because the common law until that time was hardly conscious of possessing a system. With the appearance of Chief Baron Gilbert's treatise on Evidence — the first of its kind — abont 1726, that consciousness becomes more apparent, and the question of the relations of the two begins to arise. But it seems to have been conceded or professed from the first by the court of chancery (according to its maxim that equity follows the law) that it accepted the rules of the common law as to the admissibility of evidence.[1] Its own methods of taking evidence continued, as of course; but it recognized the bindingness of the common law rules, and professed to apply them except so far as the method of written deposition made modification necessary. There was in truth comparatively little field for controversy, partly because the rules of evidence at common law were then not yet numerous, and partly because criminal cases and many civil issues which might raise common questions of evidence were wholly withdrawn from the cognizance of chancery. The orthodox and broad proposition, then, always was and has continued to be that the rules of evidence at common law trials obtained also in chancery.[2]

But a comprehensive and accurate statement of the practice of chancery would show important qualifications of this. The variances in chancery

[2] See note 1, *supra*.

[1] 1740, Henley *v.* Phillips, 2 Atk. 48 (said of witnesses).

[2] 1817, Grant, M. R., in Wood *v.* Strickland, 2 Meriv. 461, 464 (said to be in general the same; here slightly different as to notice to produce a document, because the depositions had already showed its need); *Circa* 1846, Mr. C. P. Cooper, Notes to Reports of Lord Cottenham's Cases in Chancery, I, 509 ("Conclusions drawn by the author from the various authorities in the books: Conclusion 1. That what is evidence in a court of law is evidence in a court of equity, and that evidence which is admissible in a court of law is admissible in a court of equity. Conclusion 2. That when it is said in some of the cases that the Court rejected evidence or held evidence to be inadmissible which would have been received or would have been held admissible at common law, it must not be understood that such evidence was absolutely rejected or was held entirely inadmissible, but only that it was laid aside, that it was put out of consideration, as regarded any decree or order binding the interest of the party against whom it was adduced").

practice may be classed under four heads. (a) The required mode of taking testimony in writing, instead of orally, was of course in itself a totally contrary rule.[3] Further, it led to several effects upon other rules, — in particular, as to the mode of taking objections to evidence (by motion to strike out an answer to an interrogatory), as to the rule of impeachment (by forbidding it after publication of the depositions), and as to the mode of cross-examination (by requiring the cross-interrogatories to be framed before the answers to the direct interrogatories, or even the interrogatories themselves, were known, — thus emasculating the cross-examination). (b) The chancery court enforced the tradition of the canon law requiring two witnesses to every material allegation; and this not only gave rise to the general rule about overcoming the defendant's oath, but also led to a few specific rules for characteristic chancery issues, such as divorce bills and wills of personalty. So, too, it perpetuated the canon law rule concerning confessions in divorce suits. (c) The court of chancery radically parted from the common law courts in granting discovery before and during trial, *i. e.* in denying the common law privilege of a party-opponent to refuse to testify personally or (substantially) to disclose any of his evidence at any time. In this important rule lay the chief characteristic contribution of Chancery to our law of evidence. In a few minor respects also it adopted a concededly different rule, — as when it required the summoning of all the attesting witnesses to a will of land, or when it occasionally admitted a deposition without cross-examination. (d) Finally, there were a few variant rules, often spoken of as rules of evidence, but really rules of procedure or of substantive law, — as when in chancery parol evidence was admitted to reform a deed.

The rules of evidence in Chancery, then, as a part of a system of procedure, are without the present purview. But it will be necessary from time to time to notice those rules, first, in so far as they may contradict a particular common law practice, secondly, in so far as the transfer of ecclesiastical and chancery jurisdiction has added to our system rules peculiar to their classes of litigation, and thirdly, in so far as statutes have improved the common law system by adopting for it the chancery rules.

(2) *Civil and Criminal Trials.* The rules of admissibility are in general the same for the trial of civil and of criminal causes. Not only in practice, but in principle and in spirit, there is no occasion for a distinction. The relation between an Evidentiary Fact and a particular Proposition is always the same, without regard to the kind of litigation in which that proposition becomes material to be proved. It is true that certain rules of admissibility are applicable in criminal cases only, — such as the rule of corroboration in perjury; but this is because the issues thereby evidenced arise in criminal cases only. It is also true that certain rules are modified or created for certain kinds of criminal issues, — such as the rules for admitting and corroborating an accused's confession, the rule for *corpus delicti*, the rule for bigamous

[3] A masterly analysis and contrast of the canon law and chancery methods is given in Professor Langdell's Equity Pleading, §§ 1–56.

marriage, and the rule for a party's character; but these are few in number, and are due to special considerations affecting a particular issue or a particular sort of evidence, rather than to general policy involved necessarily or usually in criminal cases. Still further, it is true that in the related branches of procedure concerned chiefly with evidence, particularly the burden of proof and the measure of the jury's persuasion, a different policy obtains for criminal cases in general; but this does not affect the rules of admissibility.

There are, then, by no means two systems of rules, distinct in history and in method, as was the case with the chancery practice. There is but one system of rules for criminal and for civil trials. This is the more worth emphasizing, because the occasional appearance, in works on the law, of the title "Criminal Evidence" has tended to foster the fallacy that there is some separate group of rules or some large number of modifications. On the contrary, much is lost in utility by attempting a separate treatment; for most of the large principles of evidence are equally illustrated in both kinds of trials, and cannot be adequately followed, either in theory or in authority, if the precedents in either class of cases are ignored. The fallacy, however, is an inveterate one, and has had repeatedly to be repudiated by judicial utterances:

1806, *Lord Melville's Trial*, 29 How. St. Tr. 746; prosecntion for the misapplicatlon of public funds as Treasurer of the Navy; certificates were offered, signed by the paymaster, the defendant's subordinate, acknowledging the receipt of £45,000 from the Exchequer; these were objected to as not competent in a criminal case to affect the defendant with responsibility; Mr. Serjeant *Best*, for their reception: "We must first prove that the money has been received, and after we have satisfactorily proved that, then comes the evidence to prove what has been its application after it has been received. . . . The learned counsel have endeavored to distinguish between civil and criminal cases. . . . There is a considerable distinction between civil and criminal cases, bnt that distinction consists rather in the number of facts to be proved than in the manner of proving any of them. It is necessary that more facts shonld be proved, for the purpose of showing that a man has money in his possession or has had money come into his possession, than to make him civilly responsible; but though more facts should be proved in one case than is necessary to be proved in the other, each particular fact is to be proved by precisely the same evidence;" Mr. *Plumer*, on the opposite side: "I desire it may be distinctly understood that I do not dispnte that the rnles of evidence are the same in both. . . . What is the distinction, then? . . . It is not that the rules of evidence are at all altered, bnt that when you are looking at the individual who stands in a civil relation, and are pursuing it with that view, there is an identity of persons between the agent and principal, and all that one has done or said is done or said by the other; . . . [but otherwise for criminal responsibility]. We are not contending that the rules of law are different in the two cases, but that the nltimate result of the inquiry makes that which is competent, legal, and proper in one case not so in the other." Lord Chancellor *Erskine* took the view that the certificate was admissible to show the authorized reception of the monies by the agent, but not that the money actually reached the defendant; and proceeded: "This first step in the proof must advance by evidence applicable alike to civil as to criminal cases; for a fact must he established by the same evidence, whether it is to be followed by a criminal or a civil conseqnence. But it is a totally different qnestion, in the consideration of criminal as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime."

1820, *Best*, J., in *R.* v. *Burdett*, 4 B. & Ald. 95, 122: "It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of evidence do not act upon this principle."

1884, *Grove*, J., in *R.* v. *Mallory*, 15 Cox Cr. 460: "I never heard that there was any difference [between civil and criminal cases] in the rules of evidence as to the admissibility of evidence; though there may be a difference in their application; and it may be that a piece of evidence, admissible in either class of cases, may not be sufficient in a criminal case [for conviction], that is, without further evidence; but the evidence is not the less admissible."

1883, *Sir James Stephen*, History of the Criminal Law, I, 437: "The rules as to the relevancy of the facts and as to the proof of relevant facts are, speaking generally, the same in relation to criminal as in relation to civil proceedings; for the manner in which a fact is to be proved has no necessary connection with the use to which it is to be applied when it has been proved. If it is necessary to show that a man is dead, the fact must be proved in the same way, whether it is proved in a criminal trial for murder or on the trial of a civil action for the recovery of an estate. Moreover the principles which determine whether or no a given fact is either in issue, or is or is not relevant to the issue, are the same whatever may be the nature of the case. Some of the more detailed rules of evidence, however, apply exclusively, and others most frequently, to criminal cases;" and he then names the presumption of innocence, the defendant's disqualification, confessions, dying declarations, and the defendant's character.

1853, *Ryland*, J., in *State* v. *Hays*, 23 Mo. 314: "There is no difference; what may be received in the one case may be received in the other, and what is rejected in one ought to be rejected in the other; a fact may be established by the same evidence, whether it is to be followed by a criminal or civil consequence."

1896, *Brickell*, C. J., in *Crawford* v. *State*, 112 Ala. 1, 21 So. 214: "While there is a broad distinction" as to burden of proof, "the general rules and tests as to the admissibility and relevancy of evidence are the same in each class of cases." [4]

(3) *Proceedings Ex Parte and Responsory, Interlocutory and Adjudicatory.* Evidence is constantly being offered to a judge in establishing the grounds of a motion made and heard *ex parte* only. In such cases the usual system

[4] *Accord: England:* 1788, Eyre, C. B., in Att'y-Gen'l *v.* LeMerchant, 2 T. R. 201, 202 (documentary evidence); 1796, Lawrence, J., in Stone's Trial, 25 How. St. Tr. 1314; 1817, Abbott, J., in R. *v.* Watson, 32 id. 492, 2 Stark. 116, 155; 1820, Best, J., in Queen Caroline's Trial, Linn's ed. I, 490; 1828, Best, C. J., in Strother *v.* Barr, 5 Bing. 136, 155; 1837, Coleridge, J., in R. *v.* Murphy, 8 C. & P. 306; 1839, Parke, B., in Leach *v.* Simpson, 5 M. & W. 309, 312; 7 Dowl. Pr. 513, 515; 1860, Lefroy, C. J., in R. *v.* Towey, 8 Cox Cr. 331; 1878, Grove, J., in Blake *v.* Assur. Soc., 14 Cox Cr. 252. *United States:* 1873, Gilpin, C. J., in State *v.* Carter, 1 Houst. Cr. C. 402, 411; 1849, Green, C. J., in West *v.* State, 22 N. J. L. 212, 242; 1856, Bartley, C. J., in Summons *v.* State, 5 Oh. St. 325, 352; 1875, Agnew, C. J., in Brown *v.* Schock, 77 Pa. 477; 1820, Nott, J., in State *v.* Rawls, 2 Nott & McC. 331, 333; 1840, McLean, J., in U. S. *v.* Winchester, 2 McLean 135, 138; 1879, Barrett, J., in State *v.* Potter, 52 Vt. 33, 38 (documentary evidence); 1817, White, J., in Warner *v.* Com., 2 Va. Cas. 95, 105; 1878, Staples, J., in Trogdon's Case, 31 Gratt. 862, 874.

A good illustration of an apparent, but only accidental difference, resulting from a combination of rules, is found in Vaughton *v.* R. Co., 12 Cox Cr. 580 (1874), where a statute exempted carriers from liability conditionally, except for felonious acts of their servants; in an action for damages, the case turning on whether the articles had been feloniously taken by the carrier's servants, the defendant failed to offer any testimony, even that of the suspected servants; and in deciding whether there had been any evidence for the jury, the Court pointed out (Kelly, C. B., 587) that in a criminal charge against the servants no inference could have been drawn from their failure to testify, while in a civil case the carrier's failure to offer testimony was highly significant, on the principle of § 285, *post*.

of rules of evidence is not applied, partly because there is no opponent to invoke them, partly because the judge's determination is usually discretionary,[5] and partly because it is seldom final. Occasionally the analogy of the ordinary rules is followed, but no regular practice seems to have developed except as prescribed by the local rules of court. The most notable deviation from the ordinary rules of evidence is seen in the use of affidavits, the cross-examination being dispensed with.[6]

So too, in all interlocutory proceedings, even when responsory and not *ex parte*, the usual system of rules is ignored, again partly because of the subsidiary and provisional nature of the inquiry, but chiefly because there is no jury, and the rules of evidence are, as rules, traditionally associated with a trial by jury.

§ 5. **Conflict of Laws; Distinction between Lex Fori and Foreign Laws.** When evidence is offered, is the Court ever required in determining its admissibility, to set aside temporarily the rules of the forum, and look to some foreign law for the rules of admissibility? On the general principle that procedure is determinable by the law of the forum, the answer must be in the negative; for the law of evidence is a part of the law of procedure. With this result practical convenience also coincides, as Lord Brougham, in his classical exposition of the principle, has pointed out:

1835, Lord *Brougham*, in *Yates* v. *Thomson*, 3 Cl. & F. 544, 587: "The truth with respect to men's actions, which form the subject-matter of their inquiry, is to be ascertained according to a certain definite course of proceeding, and certain rules have established that in pursuing this investigation some things shall be heard from witnesses, others not listened to; some instruments shall be inspected by the judge, others kept from his eye. This must evidently be the same course, and governed by the same rules, whatever be the subject-matter of investigation; nor can it make any difference whether the facts, concerning which the discussion arises, happened at home or abroad; whether they related to a foreigner domiciled abroad, or a native living and dying at home. As well might it be contended that another mode of trial should be adopted as that another law of evidence should be admitted in such cases. Who would argue that in a question like the present the Court of Session should try the point of fact by a jury according to the English procedure, or should follow the course of our dispositions or interrogatories in courts of equity, because the testator was a domiciled Englishman, and because those methods of trial would be applied in his case were the question raised here? The answer is, that the question arises in the Court of Session, and must be dealt with by the rules which regulate inquiry there. Now the law of evidence is among the chief of these rules; nor let it be said that there is any inconsistency in applying the English rules of construction and the Scotch ones of evidence to the same matter, in investigating facts by one law and intention by another. The difference is manifest between the two inquiries; for a person's meaning can only be gathered from assuming that he intended to use words in the sense affixed to them by the law of the country he belonged to at the time of framing his instrument. . . . But can it be contended, that, as often as an English succession comes in question before the Scotch Court, witnesses are to be admitted or rejected upon the practice of the English Courts; nay, that examination and cross-examination are to proceed upon those rules of our practice, supposing them to be (as they may possibly be) quite different from the Scotch rules? This would be mani-

[5] For the significance of discretion, see *post*, § 16.

[6] *Post*, § 1384; an example may be found in Liter's Estate (1897), 19 Mont. 474, 48 Pac. 753.

fostly a source of such inconvenience as no Court ever could get over. Among other embarrassments equally inextricable there would be this: that a host of English lawyers must always be in attendance on the Scotch Courts, ready to give evidence, at a moment's notice, of what the English rules of practice are touching the reception or refusal of testimony, and the manner of obtaining it; for those questions which, by the supposition, are questions of mere fact in the Scotch Courts, must arise unexpectedly during each trial, and must be disposed of on the spot in order that the trial may proceed. The case which I should however put, as quite decisive of this matter, comes nearer than any other to the one at bar, and it may, with equal advantage to the elucidation of the argument, be put as arising both in an English and in a Scotch Court. By our English rules of evidence no instrument proves itself, unless it be thirty years old, or is an office copy authorized by law to be given by the proper officer, or is the London Gazette, or is by some special Act made evidence, or is an original record of a Court under its seal, or an exemplification under seal, which is *quasi* a record. By the Scotch law all instruments prepared and witnessed according to the provisions of the Act of 1681 are probative writs, and may be given in evidence without any proof. Now suppose a will of personalty or any other instrument relating to personal property, attested by two witnesses and executed in England according to the provisions of the Scotch Act, is tendered in evidence before the Court of Session; it surely never will be contended that the learned Judges, on being satisfied that the question related to English personal succession, ought straightway to examine what is the English law of evidence, and to require the attendance of one or other of the subscribing witnesses, where the instrument is admissible by the Scotch law as probative. Of this I can have no doubt. But suppose the question to arise in England, and that a deed is executed in Scotland according to the Act of 1681 by one domiciled here, would any Court here receive it as proving itself, being only a year old, without calling the attesting witnesses? It would have a strange effect to hear the circumstance of there being two subscribing witnesses to the instrument, which makes it prove itself in the Parliament House of Edinburgh, urged in Westminster Hall as the ground of its admission without any parol testimony. The Court would inevitably answer, 'two witnesses — then, because there are witnesses, it cannot be admitted, but they must, one or other of them, be called to prove it.' The very thing that makes the instrument prove itself in Scotland makes it in England necessary to be proved by witnesses. I have, therefore, no doubt whatever that the rules of evidence form no part of the foreign law, according to which you are to proceed in disposing of English questions arising in Scotch Courts."

This general principle has received uniform recognition, both in England [1] and in the United States,[2] though its application seems rarely to have come

[1] 1816, Appleton *v.* Brayhrook, 2 Stark. 6; Black *v.* Brayhrook, ih. 7 (an office copy of a judgment in the island of Jamaica, excluded, though admissible in that island; "it is not reasonable that greater effect [than to domestic office copies] should be allowed to the office copy of an officer of a foreign court"); 1837, Don *v.* Lippmann, 5 Cl. & F. 1, 15, per Lord Brougham (general principle stated); 1837, Brown *v.* Thornton, 6 A. & E. 184 (charter-party made between plaintiff and defendant in Java, a Dutch possession, for delivery of goods at London or Antwerp; the contract was entered in the notary's book at Java as the original; by Dutch law, notarial copies of the original were receivable, but not by English law; "there is nothing to give the copies the weight of evidence except the Dutch law, and . . . we cannot here adopt a rule of evidence from foreign courts"); 1841, Tulloch *v.* Hartley, 1 Y. & C. 114 (examined copy of a record of a deed in Jamaica; though the party relied on a Jamaica statute making such copies admissible, Shadwell, V. C., admitted it on the ground that by the substantive law of Jamaica the record of the deed was equivalent to the original, and hence an examined copy was admissible, the original being not procurable); 1850, Bain *v.* Whitehaven R. Co., 3 H. L. C. 1, 19, per Lord Brougham; 1882, The Gaetano and Maria, L. R. 7 P. D. 137, 144, per Brett, L. J.

[2] 1874, Hoadley *v.* Northern Transp. Co., 115 Mass. 304 (citad *post*); 1900, Jones *v.* R. Co., 80 Minn. 488, 83 N. W. 446; 1839, Wilcox *v.* Hunt, 13 Pet. 378 (obscure; apparently the Louisiana rule as to calling attesting witnesses was held to prevail in an action in Louisiana on a contract made in New York);

into controversy. But there are certain apparent exceptions to it, which are in truth instances of separate principles and need to be distinguished:

(1) Some rule of substantive law as to the *validity of an act*, in form or in essentials, may be adopted from the foreign law, because of the parties' domicile or of the place of the transaction; and thus a question may arise whether a particular requirement is a rule of evidence or a rule of substantive law. The more common instances of this are the *parol evidence rule*, which is in truth a rule of substantive law (*post*, §§ 2400, 2425);[3] the rules for *interpretation* of contracts, which are rules of substantive law (*post*, §§ 2400, 2458);[4] the rule requiring *revenue stamps on documents*, which is sometimes a rule of evidence and sometimes a rule of substantive law (*post*, § 2456), according to the terms of the statute;[5] the rules of the *statute of frauds requiring writing*, which in the 4th and 17th sections are rules of evidence and in the remaining sections are rules of substantive law (*post*, § 2454);[6] and the rule requiring attestation as a formality for the *execution of wills*, which in that aspect is a rule of substantive law, but leads also to a rule of evidence requiring the summoning of these witnesses in preference to others.[7]

(2) Some rule of *jurisdiction* may be involved, which may make impossible the due management, in a foreign country, of certain steps in the preparation for trial, and thus may incidentally affect the available evidence, — for example, a rule in regard to taking depositions by commission sent abroad.[8] Or such a rule may give effect to the judgment of a foreign

1866, Fant *v.* Miller, 17 Gratt. 45 (cited *post*); 1903, Second Nat'l Bank *v.* Smith, — Wis. —, 94 N. W. 664 (notary's certificate of dishonor). *Undecided:* 1814, Clark *v.* Cochran, 3 Mart. La. 353, 361 (point considered but not decided, in regard to a Louisiana rule for expert testimony).

[2] *Accord*, and correct: 1879, Dunn *v.* Welsh, 62 Ga. 241 (New York bills of exchange indorsed in blank; the New York rule as to parol agreements for the indorser's liability, applied). *Contra* and incorrect: 1874, Hoadley *v.* Northern Transp. Co., 115 Mass. 304 (bill of lading given in Illinois for transportation to Massachusetts; general principle conceded that "the law of the place where the action is brought . . . controls the admission of evidence" and applied to the question of conclusiveness of assent to a bill of lading by accepting it).

[3] 1890, Foote, Private International Jurisprudence, 2d ed., 378.

[4] 1890, Foote, *ubi supra*, 354; 1883, Story, Conflict of Laws, 8th ed., §§ 260–262; 1850, Bristow *v.* Sequeville, 5 Exch. 275, 278 (Alderson, B.: "It is very different whether the law makes a stamp necessary to the validity of an instrument or to its admissibility in evidence; an unstamped deed is a valid contract here, although it cannot be given in evidence"); 1808, Randall *v.* Van Rensselaer, 1 Johns. 94 ("We do not sit here to enforce the revenue laws of other countries"); 1866, Fant *v.* Miller, 17 Gratt. 45, 61 (Rives, J., noting the distinction between invalidity and inadmissibility, and declining even in the former class of cases to enforce the foreign revenue law as merely making invalidity a penalty; Joynes, J., reaching the same result by somewhat different reasoning; the opinions are valuable).

[5] 1852, Peroux *v.* Brown, 12 C. B. 801, 824 ("The 4th section applies not to the solemnities but to the procedure"; therefore an oral contract made in France was held not enforceable in England without a written memorandum); 1874, Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 307.

[6] Lord Brougham, in Yates *v.* Thomson, quoted *supra*; Story on Conflict of Laws, § 630, cited *supra*. Another example is the following: 1864, Koster *v.* Merritt, 32 Conn. 246 (the law of Connecticut made a chattel sale with retention of possession void against creditors; the law of New York made it, not void, but only presumptively fraudulent; in an action in the former State on such a sale made in the latter State, the law of the place of sale was applied).

[7] The following illustrates the variety of such questions: 1884, Fawcus' Goods, L. R. 9 P. D. 241 (the German law forbidding the administration of oaths by foreign officers in Germany, an affidavit sworn before a German judge was received, under a statute sanctioning such oaths "in places where there are no such persons," viz. British consuls, as are ordinarily appointed to administer oaths). A careful discussion of some of these problems will be found in Von Bar's Private International Law, 2d ed. (1892), translated by Gillespie, § 392, and note RR.

court having jurisdiction, and thus obviate the necessity of making any proof of a claim.

(3) The law of evidence in the forum may, in its own principles, *implicitly refer to a foreign law* for the applicability of the principle, — as when the exception to the Hearsay rule admits all statements made by an official having an authority to make such statements (*post*, § 1630), and thus a foreign law will in effect control the admissibility of the statement.[9] Here, however, there is no displacement of the domestic rule by the foreign rule; the former is maintained, but is found to turn upon the foreign rule as one of its conditions.

§ 6. Same; Conflict of Federal and State Laws of the United States and Canada.

A. What is the application of the foregoing principle to the relation between Federal and State Courts in the United States?

(1) *In the Federal Courts*, their own rules of evidence would ordinarily have prevailed, for the Federal jurisdiction rests upon a sovereignty separate from that of the respective States. Nevertheless their situation is peculiar, for (apart from the District of Columbia and the Territories) there is not a separate physical territory within which their jurisdiction is exclusive, and, in consequence, the litigation before their trial sessions is commonly in the hands of a body of practitioners which primarily is a State bar and represents local habits and traditions. It would be therefore natural and highly convenient to follow so far as practicable the local rules of evidence. Such was the view of the founders of the Federal Government, who in 1789 directed the Federal Courts to follow local rules except when otherwise directed by Federal legislation.[1] This policy was continued in later enactments, which enlarged the scope of the rule, though they added numerous instances to the exceptions.[2] The effect of this legislation may be considered under three heads:

(*a*) In *chancery* proceedings, since the statute of 1862, the local State rules are applicable to the "competency of witnesses." But this provision seems to be ignored or narrowly construed in the Federal decisions.[3]

[9] Numerous examples of this will be found in §§ 1633, 1644, 1675, 1677, *post*; a discussion of the problem occurs in Von Bar, *ubi supra*, §§ 396, 397, and note 88. A neat illustration is the following: 1837, Tickner *v.* Roberts, 11 La. 14 (notarial protest from Alabama, not authenticated by a seal in the form of seal prescribed by the Alabama law, excluded). Brown *v.* Thornton and Appleton *v.* Braybrook, *supra*, might have been differently decided if this principle had been invoked.

[1] U. S. R. S. 1878, § 721 (repeating St. 1789, c. 20, s. 34: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply").

[2] U. S. R. S. 1878, § 858 (combining statutes of 1862, 1864, and 1865; after enacting certain provisions as to qualifications of witnesses, — set out *post*, § 488, — it continues: "In all other respects the laws of the State in which the trial is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty").

The specific Federal provisions upon evidence are placed with other statutes *post*, under the appropriate heads.

[3] 1889, Dravo *v.* Fabel, 132 U. S. 487, 489, 10 Sup. 170 (on a bill to set aside fraudulent deeds, the depositions of the defendants, taken by the plaintiffs, were held not to be governed by a Pennsylvania statute providing that an opponent should be regarded as a hostile witness, invok-

(*b*) In *admiralty* proceedings, the Federal Courts originally had their own rules of evidence;[4] but since 1862 the statute directs the adoption of the local State rules.

(*c*) *Common law* trials, being expressly named in the statute of 1789, have from the beginning been subject to the rule. Thus in the Federal courts a Federal statute prevails over the State rule upon the same subject,[5] but in the absence of a Federal statute the State rule is followed.[6] The State rules thus made applicable include statutory rules,[7] and they include all the rules of admissibility, even under the words "competency of witnesses" in U. S. R. S. § 858.[8] But by a singular and indefensible construction, *criminal cases* have been held not to be included under the term "trials at common law"

ing U. S. R. S. § 914, which in assimilating pleadings and practice to the local rules "expressly excepts equity and admiralty causes"; none of the ensuing rulings are cited, and the specific Federal provisions of §§ 721, 858, are ignored); 1902, Calivada C. Co. *v.* Hays, 119 Fed. 202, 207 (Dravo *v.* Fabel applied).

[4] 1859, The Ship William Jarvis, 1 Sprague 485, 486 (under St. 1789, State rules did not apply in admiralty); 1855, The Independence, 2 Curt. C. C. 350, 354 (same); 1847, The Steamboat Neptune, Olcott 480, 488 (same).

[5] 1876, Connecticut M. L. Ins. Co. *v.* Schaefer, 94 U. S. 457 (in this case the Court protects communications to attorneys on the ground that the Federal statute as to competency of parties does not expressly declare such communications admissible; this is a singular perversion of reasoning; the attorneys' rule is a rule of privilege; the State law as to privilege or qualification should have applied because not expressly superseded); 1880, Potter *v.* Bank, 102 U. S. 163 (Federal statute as to disqualification by interest, held to supplant a State statute on the subject); 1880, Page *v.* Brunstine, ib. 664 (R. S. § 858 held to override a Federal statute created for the District of Columbia); 1881, King *v.* Worthington, 104 id. 44, 50 (R. S. § 858 held to override an Illinois statute; the removal of a cause from a State to a Federal court makes the Federal rules of evidence thereafter controlling in the cause); 1884, *Ex parte* Fisk, 113 U. S. 713, 721, 5 Sup. 724 (Federal statutes, §§ 861–870, providing for depositions, held to override a New York statute providing for the written examination of an opponent before trial); 1890, Stephens *v.* Bernays, 42 Fed. 488 (Federal statute as to disqualification by interest, held to supplant a State statute on the subject); 1898, Stewart *v.* Morris, 32 C. C. A. 203, 89 Fed. 290; 1902, White *v.* Wansey, 53 C. C. A. 634, 116 Fed. 345 (Federal statute, § 858, declaring survivors incompetent, held to override the Michigan statute on that subject, though narrower in its exclusionary scope); 1900, Travis *v.* Ins. Co., 43 C. C. A. 653, 104 Fed. 486 (R. S. § 858, as to executors, etc., supplants a State statute on that subject).

[6] 1848, Sims *v.* Hundley, 6 How. 1, 6 (statute includes rules applicable to commercial cases, here, a notary's certificate); 1861, Vance *v.* Campbell, 1 Black 427, 430 (statute applied to enforce a State statute as to witness' competency); 1861, Hausknecht *v.* Claypool, ib. 431 (same); 1862, Wright *v.* Bales, 2 id. 535 (same); 1863, Ryan *v.* Bindley, 1 Wall. 66 (State statute held to prevail against a Federal Court rule as to witness' competency); 1884, Connecticut M. L. Ins. Co. *v.* Union Trust Co., 112 U. S. 250, 254, 5 Sup. 119 (New York statute as to physician's privilege, enforced); 1899, Camden & S. R. Co. *v.* Stetson, 177 U. S. 172, 20 Sup. 617 (New Jersey statute sanctioning compulsory examination of civil plaintiff, applied); 1899, National Cash Register Co. *v.* Leland, 37 C. C. A. 372, 94 Fed. 502 (Federal statutes are exclusive as to the mode of extracting testimony; statutory interrogatories in lieu of a bill of discovery are therefore excluded; this and the foregoing ruling are perhaps inconsistent).

[7] Cases cited *supra*, and the following: 1838, McNeil *v.* Holbrook, 12 Pet. 84, 89 (R. S. § 721 includes State statutes as to evidence); 1874, Packet Co. *v.* Clough, 20 Wall. 528, 537 (St. 1862, R. S. § 858, includes a State statute as to competency of wife to testify); 1897, Union P. R. Co. *v.* Yates, 25 C. C. A. 103, 79 Fed. 584. The interpretation of such a statute will usually follow that of the State Court, and where the statute has been copied, of the Court of the original State; 1897, Whitney *v.* Fox, 166 U. S. 637, 17 Sup. 713 (adopting the interpretation of the copying State, Utah, and not the original one, California, owing to peculiar circumstances). But this part of the doctrine trenches upon the great question of Gelpcke *v.* Dubuque (1 Wall. 175), and Swift *v.* Tyson (16 Pet. 1), whether the Federal Courts must follow the State Courts' interpretation of local statutes.

[8] 1884, Connecticut M. L. Ins. Co. *v.* Union Trust Co., 112 U. S. 250, 254, 5 Sup. 119 (R. S. § 721 includes all rules of evidence, not merely rules as to witness' competency; § 858 does not restrict this); 1899, Butler *v.* Fayerweather, 33 C. C. A. 625, 91 Fed. 458 (privileged communication to attorney: R. S. § 858, by "competency," signifies the rules of admissibility in general).

either in U. S. R. S. § 721[9] or in U. S. R. S. § 858;[10] in consequence of which the Federal rules for criminal trials are determinable by an artificial and unpractical test, which merely creates useless obscurity and complication and ought to be reformed by legislation.

(2) *In the State Courts*, the legislation of each jurisdiction is supreme, except so far as limited by the Federal Constitution. Consequently, the rules of evidence in the State Courts are not controlled in any manner by the Federal statutory legislation, although they are subject to such limitations as may be prescribed in any Federal constitutional provision (*post*, § 7) applicable to State legislation. The only rule concerning which any question has been raised seems to be the Federal statutory rule (prevailing at different periods) excluding documents not bearing a revenue stamp; but the State Courts have here refused, with practical unanimity, to recognize any binding effect in the Federal law.[11] It may be noted, however, that the Federal statute providing a mode for authenticating copies of judgments and other public records has always been accepted as making admissible a document so authenticated, — perhaps as an inference from the Federal constitutional provision exacting full faith and credit for judgments in other States of the Union.[12]

B. In *Canada*, the question presents itself under two heads: (1) What are the reserved powers of the Imperial Legislature? and (2) What is the extent of the Federal Dominion Legislature's jurisdiction over Provincial litigation? In each of these, it is further necessary to note how far the imperial and federal powers have been actually exercised to affect the rules of evidence.

(1) The British *Imperial* Legislature, in the British North America Act of 1867, has conferred upon the Dominion of Canada and its provinces an apparently unlimited jurisdiction over all matters of justice public and private.[13] Nevertheless, as a sovereign body, the British Legislature's power remains abstractly supreme, and it may therefore at any time by express

[9] 1851, U. S. *v.* Reid, 12 How. 361, 363 (St. 1789, by "trials at common law" does not include criminal cases; it was not intended to allow the State legislation to govern the rules of evidence in Federal criminal trials, but to adopt for Federal Courts the common law rule "which was then [in 1789] in force in the respective States"; so that "the rules of evidence in criminal cases are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed," subject to change by Congress, but not by State legislation).

[10] 1892, Logan *v.* U. S., 144 U. S. 263, 12 Sup. 617 (enforces the same construction for R. S. 1878, §§ 721, 858; the common law of Texas, as there adopted at the time of admission into the Union, applied; yet by U. S. *v.* Reid the only law adopted by implication was that of the States existing in 1789; *quære*, whether this implication under R. S. § 858 should also refer to the time of the State's creation, rather than to that of the statute's enactment; for the reason for taking the State law of 1789 was that the statute was then passed, not that the State was then created).

[11] 1867, Breese, J., in Latham *v.* Smith, 45 Ill. 29; 1872, Simrall, J., in Davis *v.* Richardson, 45 Miss. 499; 1899, Knox *v.* Rossi, 25 Nev. 96, 57 Pac. 179, 48 L. R. A. 305; 1901, Southern Ins. Co. *v.* Estes, 106 Tenn. 472, 62 S. W. 149 (pointing out that Sporrer *v.* Eifler, 1 Heisk. 638, and Miller *v.* Morrow, 5 Id. 689, repudiated Miller *v.* Morrow, 1867, 3 Coldw. 587; the rule being subsequently enforced in Walt *v.* Walsh, 10 Heisk. 321; Bangess *v.* Partee, 2 Tenn. Cas. 269); and cases cited *post*, § 2134. The only deliberate opinion to the contrary seems to be the following: 1872, Agnew, J., in Chartiers & R. T. Co. *v.* McNamara, 72 Pa. 278, 282 ("The taxing power being a clear Federal grant of power, and the disqualification, affixed to the writing as an instrument of evidence, being clearly proper to compel the payment of the tax"; Thompson, C. J., and Sharswood, J., diss.).

[12] *Post*, § 1681.

[13] B. N. A. Act, §§ 18, 56; subject, of course, to the usual royal veto. For notes of decisions on the general powers of the Dominion Parliament, see Bicknell & Kappele, Practical Statutes in force in Ontario, p. 50 (1900).

statute change the law of Canada.[14] In point of fact, however, it has only once, since the time of the British North America Act, made any law of evidence applicable in the Dominion, and that one was expressly left "subject to" any colonial law that might from time to time be enacted.[15]

(2) As between the *Provinces*[16] and the Dominion, the boundaries for the field of the law of evidence have not been precisely worked out. On the one hand, the Dominion may legislate for criminal justice.[17] On the other hand, the Provinces have exclusive control over civil justice;[18] subject to a reserved right in the Dominion to legislate for uniformity with the consent of the Provinces.[19] These powers of the Dominion Legislature appear to have been exercised, for the law of evidence, thus far, in only two important instances, the Criminal Code of 1892 (containing several rules of evidence) and the Evidence Act of 1893 (a measure of comparatively narrow scope).[20] These statutes have as yet been little construed,[21] but are not likely to raise any important controversy. Subject to these statutes, the Provincial rules of evidence apply in Dominion Courts,[22] as the State rules do in Federal Courts of the United States.

[14] Eng. St. 1865, c. 63 (Colonial Laws Validity Act), §§ 2, 3; 1898, Lefroy, Legislative Power in Canada, 208–231. In the absence of express statute, no application to Canada will be implied.

[15] The British evidence-statutes applicable to Canada (a list of which is compiled at p. xliii of vol. III, Ontario Revised Statutes 1897) appear to include only the following, on subjects of evidence: 1865, St. 28–9 Vict. c. 63, § 6 (proof of colonial laws; cited *post*, §§ 1680, 1684); 1843, St. 6–7 Vict. c. 22 (oath-capacity of uncivilized tribes; cited *post*, § 1829); 1851, St. 14–15 Vict. c. 99, § 11 (official documents admissible without proof of seal, etc.; cited *post*, § 2166); 1856, St. 19–20 Vict. c. 113 (empowering colonial courts to take depositions for use in civil or commercial litigation before a foreign tribunal); 1859, St. 22 Vict. c. 20 (similar, for depositions to be used in other parts of the British Dominions); 1859, St. 22–23 Vict. c. 63 (provision for obtaining a judicial certificate of the law obtaining in another part of the British Dominions; cited *post*, § 1674); 1861, St. 24 Vict. c. 11 (similar, for the law of foreign countries with whom a convention has been made; cited *post*, § 1674); St. 1868, 31–32 Vict. c. 37 (proof of proclamations, etc., by printed or certified copy; cited *post*, §§ 1680, 1684; in § 3 of the Act it is provided that "subject to any law that may be from time to time made by the Legislature of any British colony or possession, this Act shall be in force in every such colony and possession").

[16] That is, including Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, British Columbia, Manitoba, and Northwest Territories. The Dominion does not yet include Newfoundland.

[17] British North America Act 1867, § 91, par. 27 ("the procedure in criminal matters").

Ib. § 92, par. 14 ("procedure in civil matters").

[19] Ib. § 94 ("the procedure of all or any of the Courts in those three provinces" of Ontario, Nova Scotia, and New Brunswick).

For a discussion of these enumerated powers, see Lefroy, *ubi supra*, 305, 364, 425–494. For rulings involving the power over *criminal procedure*, see the following: 1882, Russell *v.* R., L. R. 7 App. Cas. 829; 1890, R. *v.* Wason, 17 Ont. App. 221; 1891, R. *v.* Hart, 20 Ont. 611 (powers of the provincial legislature to make witnesses competent in criminal cases, discussed); 1892, R. *v.* Bittle 21 id. 605 (similar); 1898, Lefroy, *ubi supra* (comments on some of the above rulings).

[20] Can. St. 1893, c. 31, § 21: ("In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpœna or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings").

[21] The following seem to be the principal instances: 1893, Weiser *v.* Heintzman, 15 Ont. Pr. 260, 407 (Can. St. 1893, c. 31, held not to supersede Ontario statutes for civil cases in "provincial litigation"; here for libel); 1896, O'Neil *v.* Attorney General, 26 Can. Sup. 122, 132 (Can. St. 1893 held not applicable to a suit in Quebec by a claimant of money seized in gambling rooms by officers); 1896, R. *v.* Douglas, 11 Manit. 401 (Can. St. 1893, discussed).

For Quebec, see Lafleur, Conflict of Laws in Quebec, 216 (1898).

[22] Can. St. 1893, quoted *supra*. But in the Northwest Territories (St. 1901, c. 10, § 1) the rules of the Canada Evidence Act of 1893 have been adopted, and presumably apply to civil cases equally.

§ 7. Constitutional Sanction of Rules of Evidence; Ex post Facto Laws; Legislative Alteration of Rules. A constitutional provision sanctioning a rule of evidence has the legal effect of making it unalterable by ordinary statutory legislation. It also has the practical effect of inducing most Courts to construe the rule (if one of exclusion) with unusual care to avoid the evasion of the Constitution, and with unusual and sometimes reprehensible technicality in favor of the party benefited by the rule.

(1) The rules of evidence which have been *expressly sanctioned* by the various Constitutions are comparatively few.[1] They include usually the privilege against *self-crimination*, with occasional limitations of its scope;[2] the accused's right to *confrontation*, or cross-examination of witnesses;[3] the rule for two witnesses in *treason*;[4] the accused's right to process for compelling the *attendance* of witnesses;[5] and the right of testifying without regard to defects of *theological belief*.[6]

(2) Apart from these rules expressly thus [illegible] against contrary legislative change, the *Legislature has the power* to alter or create any rule of evidence.[7] This is so for reasons inherent in the nature of legislative functions. It would never have been doubted except for certain aspects in which the rules of substantive law (by reason of the confusion of terms and of thought already explained in § 2) have tended to present themselves in the false guise of rules of evidence. This has notably happened in three classes of cases:

(*a*) Certain rules of formality or procedure, or even of clearly substantive law, — such as the statute of frauds, the statute of limitations, and the rule that a new promise or acknowledgment revives a barred debt, — having sometimes been discussed in terms of evidence, it was once suggested that the constitutional provisions against *ex post facto laws* changing vested rights might apply to some rules of evidence.[8] But this opinion is now generally repudiated;[9] even in the jurisdiction where it first made its appear-

[1] They are set out, *post*, under the respective topics.

[2] *Post*, § 2252.

[3] *Post*, § 1397.

[4] *Post*, § 2039.

[5] *Post*, § 2191.

[6] *Post*, § 1829.

[7] 1854, Pittsfield & F. P. R. Co. *v.* Harrison, 16 Ill. 81 (competency of stockholders as witnesses); 1868, Patterson *v.* Hansel, 4 Bush 654, 659 (making insufficiently recorded deed-copies receivable); 1892, Messimer *v.* McCrary, 113 Mo. 382, 389, 21 S. W. 17 (making certain witnesses incompetent since deposition taken); 1901, State *v.* Heldenbrand, 62 Nebr. 136, 87 N. W. 25, *semble*; 1853, Foster *v.* Gray, 22 Pa. 9, 13, 16 (making certified copies of sheriff's deeds formerly recorded receivable); to these cases add the citations *post*, § 1354, holding valid a change in the rules of presumption.

For the effect of statutes which by altering the qualifications of witnesses affect the use of *testimony given at a former trial*, see *post*, § 1409.

[8] 1798, Chase, J., in Calder *v.* Bull, 3 Dall. 386, 390 ("I will state what laws I consider *ex post facto* laws within the words and intent of the prohibition: 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; 2d. Every law that aggravates a crime, or makes it greater than it was when committed; 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; 4th. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender").

[9] 1868, Walthall *v.* Walthall, 42 Ala. 450 (statute removing disqualification by interest, held not within the prohibition); 1862, Ralston *v.* Lothain, 18 Ind. 303, 305 (St. 1861, p. 52, removing the disqualification of parties as witnesses, held constitutional); 1882, Robinson *v.* State, 84 id. 452 (statute allowing a certain kind of impeachment of witness, held not within the prohibition); 1874, Wormley *v.* Hamburg, 40

ance.[10] There can be no vested right in a rule of evidence. Those rules are merely methods for ascertaining facts. It must be supposed that a change of the law merely makes it more likely that the fact will be truly ascertained, — either by admitting evidence whose former suppression, or by suppressing

La. 22, 25 (Code §§ 2080, 3639, disqualifying survivors as witnesses, and changing the prior rule for parties to nonrious contracts, held constitutional); 1901, Burk *v.* Putnam, 113 Id. 232, 84 N. W. 1053 (change of rule as to testimony of husband and wife, held constitutional; "there is no vested right in a rule of evidence"); 1877, Laughlin *v.* Com., 13 Bush 261 (witness since made competent, admitted; point not expressly passed upon); 1899, Dunning *v.* West, 51 La. An. 618, 25 So. 306 (statute making witnesses competent, held not unconstitutional as retroactive; here, a new trial was granted to admit testimony thus made competent since the first judgment); 1862, Goshen *v.* Richmond, 4 Ali. 458 ("No party to a suit has a vested right to exclude his adversary or even a convict from testifying against him"); 1891, O'Bryan *v.* Allen, 108 Mo. 227, 230, 18 S. W. 892 (statute making a witness incompetent, not when the prohibition); 1896, Daggs *v.* Ins. Co., 136 id. 382, 38 S. W. 85 (in general); 1897, State *v.* Thompson, 141 id. 408, 42 S. W. 949 (under the fourth clause of the grouping in Calder *v.* Bull, *supra*, a law admitting proof of handwriting by specimens of additional sorts was held not invalid; Barclay, C. J., and Sherwood, J., diss., on special statutory grounds); 1859, Rich *v.* Flanders, 39 N. H. 304, 323, 329, 347, 362 (St. 1857, c. 1952, § 1, removing the disqualification of interest, held constitutional; "statutes changing the rules of evidence or of practice are to be classed with and treated like statutes affecting the remedy," and are effective for all cases, "unless they impair contracts or destroy vested rights" by merely employing the form of a rule of evidence; leading opinion on the subject, by Sargent, J.; Bell, C. J., and Bellows, J., diss., but the instances they adduce in support of their argument are really instances of changes in the substantive law, such as the rule requiring attestation as a formal element in the validity of a deed or will); 1873, Kent *v.* Gray, 53 Id. 576 (Rich *v.* Flanders apparently approved, *obiter*); 1880, Tabor *v.* Ward, 83 N. C. 291, 294 (St. 1879, c. 183, affecting the qualifications of witnesses in suits on bonds and judgments, held constitutional; "one can have no vested right in a rule of evidence"); 1898, First Meth. Ep. Church *v.* Fadden, 8 N. D. 162, 77 N. W. 615, *semble* (change of rule as to proof of corporate capacity, made since answer filed, applied); 1874, Weaterman *v.* Weaterman, 25 Oh. St. 560, 567 (statute making spouses competent against each other, applied to pending suits); 1875, John *v.* Bridgman, 27 id. 22, 43 (approving the preceding case); 1887, Strode *v.* Washer, 17 Or. 50, 16 Pac. 926 (the repeal of a statute making a tax deed *prima facie* evidence of the regularity of proceedings is valid to affect a purchaser under a deed made during the life of the statute, the statute merely affecting a rule of evidence and not creating a vested right); 1902, Saudberg *v.* State, 113 Wis. 573, 89 N. W. 505 (statute affecting the use of marriage registers, etc., held not *ex post facto*).

Contra: 1866, Hart *v.* State, 40 Ala. 32 (statute restricting to misdemeanors a former statutory rule requiring corroboration for an accomplice, held *ex post facto* for offences occurring before its passage; Walker, C. J., diss. in an acute opinion); 1867, State *v.* Johnson, 12 Minn. 476, 484 (statute making admissions, repute, etc., sufficient to prove marriage on bigamy charge, held to violate the provision; following Calder *v.* Bull); 1902, State *v.* Cincinnati T. & J. Co., 66 Oh. 182, 64 N. E. 68 (the Legislature may make rules of *prima facie* evidence for "future transactions" only); Vt. St. 1894, § 28 (no act, except relating to the competency of witnesses, shall affect a suit begun).

Distinguish the following, in which a rule of substantive law (*post*, § 2082) was involved: 1848, Dunbarton *v.* Franklin, 19 N. H. 257, 261 (statute providing that, after three years' cohabitation and repute and the decease of one of the two, the persons "shall be deemed to have been legally married," held to be within the provision, because "evidence which did not prove a marriage before the passage of the act . . . is made competent by the act").

[10] 1866, *Ex parte* Garland, 4 Wall. 333, 391, 394 (the dissenting judges seem to approve *obiter* the language of Calder *v.* Bull; the majority do not deal with the point); 1882, Kring *v.* Missouri, 107 U. S. 221, 228, 239, 2 Sup. 443 (Calder *v.* Bull cited; the fourth proposition by implication approved; and a law allowing a trial for murder in the first degree in spite of a conviction of murder in the second degree treated as a "rule of evidence" that "what was conclusive evidence of innocence of the higher grade of murder" should be rejected; four judges dissenting, but apparently not questioning the fourth proposition); 1884, Hopt *v.* Utah, 110 Id. 574, 587, 4 Sup. 202 (law making competent persons convicted of felony; held, not within the prohibition, because "statutes which simply enlarge the class of persons who may be competent to testify in criminal cases . . . do not attach criminality to any act previously done and which was innocent when done, . . . nor do they alter the degree or lessen the amount or measure of the proof which was made necessary to conviction when the crime was committed"; an alteration of the latter sort "might" be obnoxious to the prohibition); 1898, Thompson *v.* Missouri, 171 Id. 380, 18 Sup. 922 (law allowing comparison of handwriting-specimens, not forbidden; former general expressions repudiated).

evidence whose former admission, helped to conceal the truth. In either case no fact has been taken away from the party; it is merely that good evidence has been given the one, or bad evidence been taken from the other. In any event, the ascertainment of the truth cannot be supposed to depend on a particular piece of evidence. Quite apart from these considerations, the deprivation, whatever it may amount to (for example, in the creation of a new privilege for physicians, which would not rest on the ground of improving the means of truth), is not within the class of property deprivations which the principle of the *ex post facto* prohibition seeks to prevent.

(*b*) A rule of substantive law involving a *property right* may be protected by the Constitution, and thus a statute which in effect infringes that right may be invalid, even though it is expressed in terms of a rule of evidence; for example, a statute declaring a tax collector's deed of land sold for taxes to be conclusive evidence of due transfer of title may be ineffective as violating the rule that property shall not be taken without due process of law.[11] In this case the invalidity is due to the feature, not that it is a rule of evidence, but that it is a rule of substantive law.

(*c*) The legislative function is separate from the *judicial function;* and a statute which attempts in effect to exercise a judicial power is invalid. The judicial power involves the application of the law to concrete facts and, therefore, the investigation and establishment of the facts. Any statute which prevents the judicial body from ascertaining the facts in litigation coming properly before it is ineffective. It is on this ground that a statute which prescribes a conclusive effect for certain testimony may be held invalid.[12] Here, indeed, a genuine rule of evidence is involved (as distinguished from a rule of substantive law under the guise of evidence, as in par. (2), *supra*); but the invalidity would be due, not to any intrinsic lack of legislative control over the rules of evidence in general, but to the effect of that particular kind of a rule in depriving the judiciary of the exercise of its constitutional function.

§ 8. **General Survey of the Historical Development of the Rules of Evidence.** The details of the history of the rules of evidence can best be examined while considering the particular rules each in its place. But it is worth while to notice here summarily the historical development of the general system in its main features, and the relative chronology of the different rules. Some notion can thus be obtained of the influence of certain external circumstances on the rules at large and of some of the individual principles upon the others.[1]

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

[11] This class of cases is examined *post*, §§ 1353, 1354.

[12] The cases are examined *post*, §§ 1353, 1354.

[1] The authorities for the ensuing statements will be found cited in detail in the historical sections under the various Chapters *post*.

(1) *A. D. 700–1200.* Up to the period of the 1200s, the history of the rules of evidence, in the modern sense, is like the chapter upon ophidians in Erin; for there were none. Under the primitive practices of trial by ordeal, by battle, and by compurgation, the proof is accomplished by a *judicium Dei*, and there is no room for our modern notion of persuasion of the tribunal by the credibility of the witnesses;[2] for the tribunal merely verified the observance of the due formalities, and did not conceive of these as directly addressed to their own reasoning powers. Nevertheless, a few marks, indelibly made by these earlier usages, were left for a long time afterwards in our law. The summoning of attesting witnesses to prove a document, the quantitative effect of an oath, the conclusiveness of a seal in fixing the terms of a documentary transaction, the necessary production of the original of a document, — these rules all trace a continuous existence back to this earliest time, although they later took on different forms and survived for reasons not at all connected with their primitive theories.

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

(3) *A. D. 1500–1700.* By the 1500s, the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern system. With all the emphasis gradually cast upon the witnesses, their words and their documents, the whole question of admissibility arises. One first great consequence is the struggle between the numerical or quantitative system, which characterized the canon law and still dominated all other methods of proof, and the unfettered systemless jury trial; and it was not for two centuries that the numerical system was finally repulsed. Another cardinal question now necessarily faced was that of the competency of witnesses; and by the end of the 1500s the foundations were laid for all the rules of disqualification which prevailed thenceforward for more than two centuries, and in part still remain. At the same time, and chiefly from a simple fail-

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

ure to differentiate, most of the rules of privilege and privileged communication were thereby brought into existence, at least in embryo. The rule for attorneys, which alone stood upon its own ground, also belongs here, though its reasons were newly conceived after the lapse of a century. A third great principle, the right to have compulsory attendance of witnesses, marks the very beginning of this period. Under the primitive notions, this all rested upon the voluntary action of one's partisans; the calling of compurgators and documentary attestors, under the older methods of trial, was in effect a matter of contract. But as soon as the chief reliance came to be the witnesses to the jurors, and the latter ceased to act on their own knowledge, the necessity for the provision of such information, compulsorily if not otherwise, became immediately obvious. The idea progressed slowly; it was enforced first for the Crown, next for civil parties; and not until the next period was it conceded to accused persons. Thus was laid down indirectly the general principle that there is no privilege to refuse to be a witness; to which the other rules, above mentioned, subsequently became contrasted as exceptions. A fourth important principle, wholly independent in origin, here also arose and became fixed by the end of this period, — the privilege against self-crimination. The creature, under another form, of the canon law, in which it had a long history of its own, it was transferred, under stress of political turmoil, into the common law, and thus, by a singular contrast, came to be a most distinctive feature of our trial system. About the same period — the end of the 1600s — an equally distinctive feature, the rule against using an accused's character, became settled. Finally, the "parol evidence" rule enlarged its scope, and came to include all writings and not merely sealed documents; this development, and the enactment of the statute of frauds and perjuries, represent a special phase of thought in the end of this period. It ends, however, rather with the Restoration of 1660 than with the Revolution of 1688, or the last years of the century; for the notable feature of it is that the regenerating results of the struggle against the arbitrary methods of James I and Charles I began to be felt as early as the return of Charles II. The mark of the new period is seen at the Restoration. Justice, on all hands, then begins to mend. Cruelities which Matthew Hale permitted, under the Commonwealth, Scroggs refused, under James II. The privilege against self-crimination, the rule for two witnesses in treason, and the character rule — three landmarks of our law of evidence — find their first full recognition in the last days of the Stuarts.

(4) *A. D. 1700–1790.* Two circumstances now contributed independently to a further development of the law on two opposite sides, its philosophy and its practical efficiency. On the one hand, the final establishment of the right of cross-examination by counsel, at the beginning of the 1700s, gave to our law of evidence the distinction of possessing the most efficacious expedient ever invented for the extraction of truth (although, to be sure, like torture, — that great instrument of the continental system, — it is almost equally powerful for the creation of false impressions). A notable consequence

was that by the multiplication of oral interrogation at trials the rules of evidence were now developed in detail upon such topics as naturally came into new prominence. All through the 1700s this expansion proceeded, though slowly. On the other hand, the already existing material began now to be treated in doctrinal form. The first treatise on the law of evidence was that of Chief Baron Gilbert, not published till after his death in 1726. About the same time the abridgments of Bacon and of Comyns gave many pages to the title of Evidence;[3] but no other treatise appeared for a quarter of a century, when the notes of Mr. J. Bathurst (later Lord Chancellor) were printed, under the significant title of the "Theory of Evidence." But this propounding of a system was as yet chiefly the natural culmination of the prior century's work, and was independent of the expansion of practice now going on. In Gilbert's book, for example, even in the fifth edition of 1788, there are in all, out of the three hundred pages, less than five concerned with the new topics brought up by the practice of cross-examination; in Bathurst's treatise (by this time embodied in his nephew Buller's "Trials at Nisi Prius") the number is hardly more; Blackstone's Commentaries, in 1768, otherwise so full, are here equally barren. The most notable result of these disquisitions, on the theoretical side, was the establishment of the "best evidence" doctrine, which dominated the law for nearly a century later. But this very doctrine tended to preserve a general consciousness of the supposed simplicity and narrowness of compass of the law of evidence. As late as the very end of the century Mr. Burke could argue down the rules of evidence, when attempted to be enforced upon the House of Lords at Warren Hastings' trial, and ridicule them as petty and inconsiderable.[4] But, none the less, the practice had materially expanded during his lifetime. In this period, besides the rules for impeachment and corroboration of witnesses (which were due chiefly to the development of cross-examination), are to be reckoned also the origins of the rules for confessions, for leading questions, and for the order of testimony. The various principles affecting documents — such as the authorization of certified (or office) copies and the conditions dispensing from the production of originals — now also received their general and final shape.

(5) *A. D. 1790–1830.* The full spring-tide of the system had now arrived. In the ensuing generation the established principles began to be developed into rules and precedents of minutiæ relatively innumerable to what had gone before. In the Nisi Prius reports of Peake, Espinasse, and Campbell, centring around the quarter-century from 1790 to 1815, there are probably more rulings upon evidence than in all the prior reports of two centuries. In this development the dominant influence is plain; it was the increase of

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

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

printed reports of Nisi Prius rulings.[8] This was at first the cause, and afterwards the self-multiplying effect, of the detailed development of the rules. Hitherto, upon countless details, the practice had varied greatly on the different circuits; moreover, it had rested largely in the memory of the experienced leaders of the trial bar and in the momentary discretion of the judges. In both respects it therefore lacked fixity, and was not amenable to tangible authority. These qualities it now rapidly gained. As soon as Nisi Prius reports multiplied and became available to all, the circuits must be reconciled, the rulings once made and recorded must be followed, and these precedents must be open to the entire profession to be invoked. There was, so to speak, a sudden precipitation of all that had hitherto been suspended in solution. This effect began immediately to be assisted and emphasized by the appearance of new treatises, summing up the recent acquisitions of precedent and practice. In nearly the same year, Peake, for England (1801), and MacNally, for Ireland (1802), printed small volumes whose contents, as compared with those of Gilbert and Buller, seem to represent almost a different system, so novel were their topics. In 1806 Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules. In this respect it was epoch-making; and its author in a later time once quietly complained that its pages were "more often quoted than acknowledged." The room for new treatises was rapidly enlarging. Peake and MacNally, as handbooks of practice, were out of date within a few years, and no new editions could cure them. In 1814, and then in 1824, came Phillipps and Starkie, — in method combining Evans' philosophy with Peake's strict reflection of the details of practice. There was now indeed a system of evidence, consciously and fully realized. Across the water a similar stage had been reached. By a natural interval Peake's treatise was balanced, in 1810, by Swift's Connecticut book, while Phillipps and Starkie (after a period of sufficiency under American annotations) were replaced by Greenleaf's treatise of 1842.

(6) *A. D. 1830–1860.* Meantime, the advance of consequences was proceeding, by action and reaction. The treatises of Peake and Phillipps, by embodying in print the system as it existed, at the same time exposed it to the light of criticism. It contained, naturally enough, much that was merely inherited and traditional, much that was outgrown and outworn. The very efforts to supply explicit reasons for all this made it the easier to puncture the insufficient reasons and to impale the inconsistent ones. This became the office of Bentham. Beginning with the first publication, in French, of his Theory of Judicial Evidence, in 1818, the influence of his thought upon the law of evidence gradually became supreme. While time has only ultimately vindicated and accepted most of his ideas (then but chimeras) for other practical reforms, and though some still remain untried, the results of his proposals in this department began almost immediately to

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

be achieved. Mature experience constantly inclines us to believe that the best results on human action are seldom accomplished by sarcasm and invective; for the old fable of the genial sun and the raging wind repeats itself. But Bentham's case must always stand out as a proof that sometimes the contrary is true, — if conditions are meet. No one can say how long our law might have waited for regeneration, if Bentham's diatribes had not lashed the community into a sense of its shortcomings. It is true that he was particularly favored by circumstances in two material respects, — the one personal, the other broadly social. He gained, among others, two incomparable disciples, who served as a fulcrum from which his lever could operate directly upon legislation. Henry Brougham and Thomas Denman combined with singular felicity the qualities of leadership in the technical arts of their profession and of energy for the abstract principles of progress. Holding the highest offices of justice, and working through a succession of decades, they were enabled, within a generation, to bring Bentham's ideas directly into influence upon the law. One who reads the great speech of Brougham, on February 7, 1828, on the state of the common law courts, and the reports of Denman and his colleagues, in 1852 and 1853, on the common law procedure, is perusing epoch-making deliverances of the century.[6] The other circumstance that favored Bentham's causes was the radical readiness of the times. The French Revolution had acted in England; and as soon as the Napoleonic wars were over, the influence began to be felt. One part of public opinion was convinced that there must be a radical change; the other and dominant part felt assured that if the change did not come as reform, it would come as revolution; and so the reform was given, to prevent the revolution. In a sense, it did not much matter to them where the reform came about, — in the economic, or the political, or the juridical field, — if only there was reform. At this stage, Bentham's denouncing voice concentrated attention on the subject of public justice, — criminal law and civil procedure; and so it was here that the movement was felt among the first. As a matter of chronological order, the first considerable achievements were in the field of criminal law, beginning in 1820, under Romilly and Mackintosh; then came the political upheaval of the Reform Bill, in 1832, under Russell and Grey; next the economic regeneration, beginning with Huskisson and culminating with Peel in the Corn Law Repeal of 1846. Not until the Common Law Procedure Acts of 1852 and 1854 were large and final results achieved for the Benthamic ideas in procedure and evidence. But over the whole preceding twenty years had been spread initial and instructive reforms. Brougham's speech of February 7, 1828, was the real signal for the beginning of this epoch, — a beginning which would doubtless have culminated more rapidly

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

if urgent economic and political crises had not intervened to absorb the legislative energy.

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

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

Far otherwise in this country. The latest period in the development of the law of evidence is marked by a temporary degeneracy. Down to about 1870, the established principles, both of common law rules and of statutory reforms, were re-stated by our judiciary in a long series of opinions which, for careful and copious reasoning, and for the common sense of experience, were superior (on the whole) to the judgments uttered in the native home of our law. Partly because of the lack of treatises and even of reports, — partly because of the tendency to question imported rules and therefore to defend on grounds of principle and policy whatever could be defended, — partly because of the moral obligation of the judiciary, in new communities, to vindicate by intellectual effort its right to supremacy over the bar, — and partly also because of the advent, coincidently, of the same rationalizing spirit which led to the reformatory legislation, — this very necessity of restatement led to the elaboration of a finely reasoned system. The "mint, anise, and cummin" of mere precedent[7] were not unduly revered. There was always a reason given, — even though it might not always be a worthy reason. The pronouncement of Bentham came near to be exemplified, that "so far as evidence is concerned, the English practice needs no improvement but from its own stores. Consistency, consistency, is the one thing needful. Preserve consistency, and perfection is accomplished."[8]

But the newest States in time came to be added. New reports spawned a multifarious mass of new rulings in fifty jurisdictions, — each having theoretically an equal claim to consideration. The liberal spirit of choosing and test-

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

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

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

Of the change that is next to come, and of the period of its arrival, there seem as yet to be no certain signs. Probably it will come either in the direction of the present English practice — by slow formation of professional habits — or in the direction of attempted legislative relief from the mass of bewildering judicial rulings — by a concise code. The former alone might suffice. But the latter will be a false and futile step, unless it is founded upon the former; and in any event the danger is that it will be premature. A code fixes error as well as truth. No code can be worth casting, until there has been more explicit discussion of the reasons for the rules and more study of them from the point of view of synthesis and classification. The time must first come when, in the common understanding and acceptance of the profession, "every rule is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[9]

[9] Mr. Justice Holmes, quoted in the motto prefixed to the Preface.

BOOK I.

WHAT FACTS MAY BE PRESENTED AS EVIDENCE (ADMISSIBILITY).

INTRODUCTION.

GENERAL THEORY AND PROCEDURE OF ADMISSIBILITY.

CHAPTER II.

1. General Theory.

§ 9. **The Two Axioms of Admissibility; I. None but Facts having Rational Probative Value are Admissible.** The modern system of evidence rests upon two axioms. These underlie its whole structure. Implicitly, but none the less actually and positively, recognized in the practice of the courts and in the utterances of the judges, they were first distinctly formulated by the great master and expounder of the history of our law of evidence. The first is this:

I. *None but facts having rational probative value are admissible.* This principle is indeed axiomatic, for any system of evidence purporting to be rational. It assumes no particular doctrine as to the kind of ratiocination implied, — whether practical or scientific, coarse and ready or refined and systematic. It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis that it is calculated, according to the prevailing standards of reasoning, to effect rational persuasion:

1889, Professor *James Bradley Thayer*, "Presumptions and the Law of Evidence," "Law and Fact in Jury Trials," 3 Harvard Law Review 143, 4 id. 156:[1] "There is one precept to be mentioned, which is not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical systems, viz., that nothing which is not supposed to be relevant, *i. e.*, logically probative, shall be received. . . . Reasoning, the rational method of settling disputed questions, is the modern substitute for certain formal and mechanical tests which flourished among our ancestors for centuries, and in the midst of which the trial by jury emerged. When two men to-day settle which is the 'best man' by a prize-fight, we get an accurate notion of the old Germanic trial. Who is it that 'tries' the question? The men themselves. There are referees and rules of the game, but no determination of the dispute on the grounds of reason, — by the rational method. So it was with 'trial by battle' in our old law; the issue of right, in a writ of right, including all elements of law and fact, was 'tried' by this physical struggle, and the judges of the Common Pleas sat, like the referee at a prize-fight, simply to administer the procedure, the rules of the game. So of the King's Bench in criminal appeals; and so sat Richard II at the trial of the appeal of treason between Bolingbroke and Norfolk, as Shakespeare represents it in the play. So of the various ordeals; the accused party 'tried' his own case by undergoing the given requirement as to hot iron, or water, or the crumb. So of the oath; the question, both law and fact, was 'tried' merely by the oath, with or without fellow-swearers. The old 'trial by witnesses' was a testing of the question in like manner by their mere oath. So a record was said to 'try' itself. And so when out of the midst of these methods first came the trial by jury, it was the jury's oath, or rather their verdict, that 'tried' the case. How this mode of trial came to swallow up the others, and then to lose its chief features, and become shaped into an instrument of our modern purely rational procedure, is a long story, and is not for this place. But as we use the phrase 'trial' and 'trial by jury' now, we mean a rational ascertainment of facts, and a rational ascertainment and application of rules. What was formerly tried by the method of force or the mechanical following of forms, is now tried by the method of reason."

This notable passage fitly expresses the marked spirit of our law of evidence for the last century and a half, — that is, since the beginning of our consciousness of it as a system.[2] From the time of Erskine's eloquent, if rhetorical, pronouncement, that "the rules of evidence are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life,"[3] the emphasis on their rationality of method has been an increasing one. The rules of evidence, said the early Pennsylvania Court, "are founded in reason and good sense";[4] and such utterances typify the general spirit of the modern administration of the law. Among the innumerable indirect effects are to be noted the rules directed to prevent the jury from substituting passion and prejudice, instead of reasoning, as the foundation of their conclusion (*post*, § 1904); and the doctrine that even the Legislature cannot establish a rule of decision which will deprive the Judiciary of its power to investigate the facts by rational methods (*post*, § 1353).

[1] These passages were substantially reproduced by the learned author, in 1898, in his Preliminary Treatise on Evidence, 264, 198.

[2] It would seem that "divine testimonies" from responses, oracles, omens, augurs, dream-interpreters, or astrologers might be resorted to in even the most developed stage of the Roman procedure: Quintilian, De Institutione Oratoria, b. V, c. VII.

[3] 1794, Hardy's Trial, 24 How. St. Tr. 966.

[4] Yeates and Smith, JJ., in 1803, in Galbreath *v.* Eichelberger, 3 Yeates 515.

The resort to irrational methods, however, persisted sporadically in our history till a more recent date than we are accustomed to suppose. Trial by compurgation oath (or wager of law) was not formally abolished in England until 1833.[5] Trial by duel (or wager of battle) was not forbidden by law until 1819, and at least two instances of its recognition had occurred since 1800.[6] Trial by ordeal (of water, fire, and the like), however, was longest and hardest in dying. It had, to be sure, no longer been formally permitted in the English royal courts after the ecclesiastical law forbade it in 1215.[7] But it rested on a deep-rooted superstitious instinct which from time to time, in rude and popular justice, attempted to invoke it. It is certain that in the 1600s the corpse-touching ordeal (which seems to be the most persistent of superstitions) was judicially recognized on many occasions as probative;[8] and in the 1800s, in certain of the rural communities, it has been recorded even since the middle of the century.[9] No doubt these tests, as they still linger in popular beliefs, are entitled to be used indirectly in evidence, — that is, as indications of a guilty consciousness when the test is refused (*post*, § 275); but this is a different thing from giving them an intrinsic probative force:

1894, *Gantt*, P. J., in *State* v. *Wisdom*, 119 Mo. 539, 24 S. W. 1051 (admitting the fact that at the morgue the accused was requested, with others, to put his hand on the corpse of the murdered man, but refused): "The request to touch the body was evidently prompted by the old superstition of the ordeal of the bier in Europe in the middle ages. This superstition has come to this country with the emigration from other lands, and, although a creature of the imagination, it does to a considerable degree affect the opinions of a large class of our people. . . . The jury could consider that, while it was a superstitious test, still defendant might have been more or less affected by it. . . . There is not the slightest evidence that any member of the jury itself regarded the test itself as anything more than a groundless superstition."

[5] Thayer, Preliminary Treatise on Evidence, 34; in this treatise the history of all the earlier modes of trial is set forth.

[6] Thayer, ib. 45; 1817, Ashford v. Thornton, Woodall's Celebrated Trials, I, 39; 40 Hans. Parl. Deb. 1203–1207.

[7] Thayer, ib. 37; Pollock & Maitland, Hist. Eng. Law, II, 597; 1679, Gavan's Trial, 7 How. St. Tr. 311, 383 (the defendant, a Jesuit charged in the Popish Plot, invoked the old custom and law "for the prisoner to put himself upon the trial of ordeal, to evidence his own innocency"; L. C. J. North: "We have no such law now"; and the Court treated the request as a mere trick).

[8] 1629, Hertfordshire murder, 13 How. St. Tr. 1325 (the accused persons were tried on an appeal before Sir Nicholas Hyde, Chief Justice, and Sir J. Maynard reports that "because the evidence was so strange, I took exact and particular notice; the minister of the parish, and his brother the minister of the adjoining parish, deposed (and their statement was apparently received without objection) that the four defendants had been taken to the exhumed body and required each of them to touch it; and when a certain one touched it, a sweat came out on the body, the color changed, the eyes opened, and the finger dropped blood upon the ground"); 1688, Standefield's Trial, 11 How. St. Tr. 1371, 1387, 1393, 1403, 1417 (in Scotland; at the examination of a corpse two days buried, the defendant touched it in helping; and the effusion of blood that followed was treated as evidence, and it was argued by counsel that "God Almighty himself was pleased to bear a share in the testimonies which we produce"; this case is also alluded to by Scott, in the "Fair Maid of Perth"). So too the witchcraft cases involved similar credulities: 1702, Hathaway's Trial, 14 How. St. Tr. 639 (indictment as an impostor and cheat of one who claimed that a spell had taken away his power of swallowing; evidence was received for him of his expectoration of pins, etc.; but L. C. J. Holt made the issue for the jury his sanity, and not his bewitchment; the defendant was found guilty, and this trial is said to have checked the offering of such superstitious evidence).

[9] 1892, Lea, Superstition and Force, 4th ed., 367; for other modern instances, see Browne's History of Maryland, 179; Bentham, Judicial Evidence, b. V, c. XVI, § 6 (Bowring's ed., VII, 101); Browne, Practical Tests, 5 Green Bag, 13, *et passim*.

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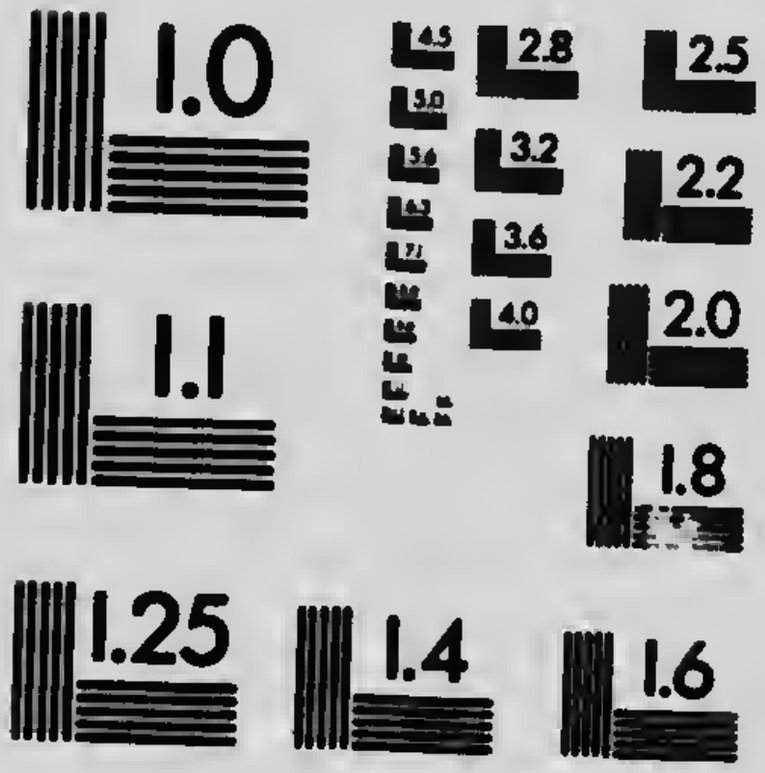

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The contrast, it may be noted, between employing rational and non-rational modes of proof is after all not between the use of scientific reasoning and the employment of superstitious ordeals; it is rather between employing the best standards we know and those which we realize are not the best. For instance, the acceptance of a *judicium Dei*, for the men of a certain time, *was* the rational and appropriate process, the method accepted and employed in every-day affairs as well as in legal proceedings.[10] It was when the combats and the ordeals came to be abused, and to be known to be abused, that these modes were no longer the best known to the times; and the passage from ordeals and oaths to the jury marked what was equivalent to a rejection of the irrational and an assent to the rational.[11] But the change here was of the outward mechanism only; the jurors themselves still were dominated by modes of argument and persuasion which we should to-day call superstitious; yet they were for the time the best, being the generally accepted. When science advanced and modes of thought improved, the time again came when the old ways were recognized as inferior; and so to-day the contrast between the best which is known to us and something inferior to that is between what we call rational and superstitious modes of thought. Thus there have been, in the history of our modes of proof, separate epochs, in each of which we progressed from what we were aware to be the inferior to what we had come to know as better; and this in a broad sense is the significance of the principle that the law of evidence is based on the employment of rational standards.

In the present day the last remnant of the irrational element is our law of new trials (*post*, § 21). The primitive ordeals of fire and of water were not more calculated to deify chance or chicanery as the arbiter of litigation than is this dominant contemporaneous practice of granting new trials for an immaterial slip in the rules of evidence. The most trifling error "works a reversal," in the same wizard-like manner that the mispronounced word in the superstitious formulas of the Germanic litigation lost for the party his cause. This modern doctrine is the more discreditable of the two. They knew no better, then. We do know better; yet we preserve this technical trumpery.

§ 10. **Same: II. All Facts having Rational Probative Value are Admissible, unless some Specific Rule forbids.** The second axiom on which our law of evidence rests is this: *All facts having rational probative value are admissible, unless some specific rule forbids.* It has been otherwise expressed as follows:

[10] The spirit of the following passage illustrates this: 1110–1200, *Prayer* at the boiling-water ordeal (Translations, etc., from the Original Sources of European History, vol. IV, no. 4, p. 9, Howland): "O God, Thou who within this substance of water hast hidden Thy most solemn sacraments, be graciously present with us who invoke Thee. . . . O Thou who perceivest hidden things and knowest what is secret, show and declare this by Thy grace, and make the knowledge of the truth manifest to us to believe in Thee."

[11] A good illustration of the beginning of this consciousness is fonnd in the Neapolitan Code of Emperor Frederic II; translated in Howland's Translations, *ubi supra*, 18, 21, and also given in the original in Lea, Superstition and Force, 422.

1889, Professor *James Bradley Thayer*, "Presumptions and the Law of Evidence," 3 Harvard Law Review 143:[1] "There is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence, viz., that, unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is logically probative is not, like the former precept, a necessary presnpposition in a rational system of evidence, . . . but yet . . . it is important to notice this also as being a fundamental proposition. In a historical sense, it has not been the fundamental rule to which the various exclusions were exceptions. . . . [But] the main propositions which I have stated should, in the order of thought, be first laid down and always kept in mind."

This axiom expresses the truth that legal proof, though it has peculiar rules of its own, does not intend to vary without cause from what is generally accepted in the rational processes of life; and that of such variations some vindication may, in theory, always be demanded. In other words, in the system of evidence the rules of exclusion are, in their ultimate relation, rules of exception to a general admissibility of all that is rational and probative.

This principle, then, does not mean that anything that has probative value is admissible; this would be an entire misconception.[2] The true meaning is that everything having a probative value is *ipso facto* entitled to be assumed to be admissible, and that therefore any rule of policy which may be valid to exclude it is a superadded and abnormal rule. Some of these rules may be extensive in scope — the hearsay rule, for example; or their applicability may in a particular case be so plain, on the face of the offer of evidence, that the objector has no burden of proving that his rule of exclusion is applicable. Nevertheless, when the rules of evidence are taken in view as a system, these rules of policy appear as merely so many reserved spaces in the vast territory of logically probative material:

1794, *Mr. Edmund Burke's Report to the House of Commons*, Debrett's History of Hastings' Trial, 1796, pt. VII, Suppl. p. xxiii, 31 Parl. Hist. 324: "Your Committee conceives that the trial of a cause is not in the arguments or disputations of the prosecutors and the counsel, but in the evidence, and that to refuse evidence is to refuse to hear the cause. Nothing, therefore, but the most clear and weighty reasons ought to preclude its production. Your Committee conceives that when evidence, on the face of it relevant, that is connected with the party and the charge, was denied to be competent, the burthen lay upon those who opposed it, to set forth the authorities, whether of positive statute, known recognized maxims and principles of law, passages in an accredited institute, code, digest, or systematic treatise of laws, or some adjudged cases, wherein the Courts have rejected evidence of that nature."

Circa 1823, Mr. Justice *Edward Livingston*, Introductory Report to the Code of Evidence (Works, ed. 1872, I, 421): "Ultimately, the whole machinery of jurisprudence, in all its branches, is contrived for the purpose of enabling the judging power to determine on the truth or falsehood of every litigated proposition. This is to be done by hearing and examining evidence; that is to say, hearing and examining everything that will contribute to bring the mind to the determination required. If we refuse to hear what

[1] This passage was reproduced by the learned author, in 1898, in his Preliminary Treatise, 265, 268.

[2] 1838, Coleridge, J., in Wright *v.* Tatham, 5 Cl. & F. 670 ("the fallacy that whatever is morally convincing, and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury").

will, in any degree, produce this effect, we must determine on imperfect evidence; and in proportion to the importance of the matter thus refused to be heard, must evidently be the chance of making an incorrect rather than a just determination. But, as in morals, we are forbidden to do evil that good may come of it, so, in legislation, we should refrain from doing that kind of good which may produce more than its equivalent in evil. The desirable end to be attained by the admission of every species of evidence, may be more than counterbalanced, in some instances, by the evil attending it; sometimes, in the shape of inconvenience and expense inseparable from its procurement; sometimes, from the danger of error arising from the deceptive nature of the evidence itself. The great art is to weigh these difficulties, and in those cases where they are most likely to preponderate, but in no others, to exclude the evidence."

1837, *Parke*, B., in *Wright* v. *Tatham*, 7 A. & E. 313, 384: "One great principle in this law [of evidence] is that all facts which are relevant to the issue may be proved."

1831, *Hosmer*, C. J., in *State* v. *Watkins*, 9 Conn. 53: "It is a universal rule of evidence that all facts and circumstances, upon which reasonable presumption or inference can be founded as to the truth of the issue or disputed fact, are admissible in evidence."

1849, Mr. *W. M. Best*, Evidence, § 2: "Facts which come in question in courts of justice are inquired into and determined in precisely the same way as doubtful or disputed facts are inquired into and determined by mankind in general, except so far as positive law has interposed with artificial rules to secure impartiality and accuracy of decision or exclude collateral mischiefs likely to result from the investigation."

1860, *Baldwin*, J., in *People* v. *Arnold*, 15 Cal. 481: "The object of a trial is to elicit the real state of the transaction, and the rules which govern or determine the introduction of testimony have relation to this end. These rules are not mere arbitrary, conventional regulations; they are founded in reason and good sense. Generally speaking, whatever has a tendency to prove a material part of the issue is admissible."

1862, *Pollock*, C. B., in *Milne* v. *Leisler*, 7 H. & N. 796: "The Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue and advance the search after truth."

1874, *Appleton*, C. J., in *State* v. *Benner*, 64 Me. 283: "It is an axiom in the law of evidence that no testimony should be excluded unless greater evil is seen as likely to arise from its admission than from its rejection."

1876, Sir *James Stephen*, Digest of Evidence, Introduction: "The great bulk of the law of evidence consists of negative rules declaring what, as the expression runs, is not evidence. The doctrine that all facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of and gives unity to all these express negative rules."

1878, *Coleridge*, C. J., in *Blake* v. *Assurance Co.*, L. R. 4 C. P. D. 94: "The law [of evidence] . . . with a few exceptions on the ground of public policy, now is that all which can throw light on the disputed transaction is admitted, — not of course matters of mere prejudice nor anything open to real moral or sensible objection, but all things which fairly throw light on the case."

In this respect the century of the 1800s witnessed a gradual but marked improvement in the practical enforcement of this principle. "People were formerly frightened out of their wits," said Chief Justice Cockburn, in 1861, "about admitting evidence, lest juries should go wrong. In modern times we admit the evidence and discuss its weight."[3] The whole period of the reforms of 1840–1870, while it was effecting the abolition of many of the outgrown exclusionary rules, was propagating and illustrating the cardinal truth that these rules were exceptions only, and must show cause for exist-

[3] R. *v.* Birmingham, 1 B. & S. 763.

ence. This moral attitude toward them is one which tends constantly to be relaxed in the mechanical routine of trial practice and the complexity of modern precedents. A recollection of the sturdy utterances of one of the champions of rationalism in a past generation of judges may serve to renew our courage amidst more modern temptations:

1853–55, *Lumpkin*, J., in *Johnson* v. *State*, 14 Ga. 61, and *Haynes* v. *State*, 17 id. 484: "The judges, both in England and in this country, are struggling constantly to keep open the door wide as possible, — aye, to take it off the hinges, to let in all facts calculated to affect the minds of the jury in arriving at a correct conclusion. . . . Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict. . . . This Court stands pledged, by its past history, for the abolition, to the extent of its power, of all exclusionary rules which shut out from the jury facts which may serve, directly or remotely, to reflect light upon the transaction upon which they are called upon to pass. For one case gained by improper proof, ninety-nine has been lost or improperly found on account of the parties being precluded by artificial rules from submitting *all* the facts to the tribunal to which is committed the decision of the cause. Verdicts, notwithstanding their etymological meaning (*vere dico*), will never speak the truth, because juries can never measure the power and influence of motives upon the actions of men, until the door is thrown wide open to all facts calculated to assist in the slightest manner in arriving at a correct conclusion in the pending controversy."

§ 11. **Classification of the Rules of Admissibility.** It follows, from the foregoing considerations, that the rules of admissibility may be grouped under three heads, the first dealing with the probative value of specific facts, the second including artificial rules which do not profess to define probative value but yet aim at increasing or safeguarding it, and the third covering all those rules which rest on extrinsic policies irrespective of probative value.

The first group of rules (Part I, *post*) attempts to define, for legal purposes, the amount of probative value which suffices to entitle a fact to be regarded as evidential. Here the law is concerned with the rules of logic and inference as applied in practical experience, *i. e.* with Relevancy. Circumstantial, Testimonial, and "Real" evidence are the three great classes; and each has its special problems.

The second group of rules (Part II, *post*) lays down auxiliary tests and safeguards, usually for particular kinds of facts, over and above the required minimum probative value. The hearsay rule, the rules of quantity, the rule of the oath, and a dozen others, belong here. An analysis of the general policy and relation of this group to the others is elsewhere made (§ 1171, *post*).

The third group of rules (Part III, *post*) invokes, for the exclusion of certain kinds of facts, extrinsic policies which override the policy of ascertaining the truth by all available means. These rules concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would

help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth. Most of these rules consist in giving certain kinds of persons an option — *i. e.* a Privilege — to withhold the evidential fact. The general nature of these rules is elsewhere examined more at length (§ 2175, *post*).

Finally a group of rules (Part IV, *post*) known as the Parol Evidence rule, but belonging really to the substantive law, remains to be considered, since by tradition it has been ranked among the rules of evidence.

§ 12. **Distinctions between Relevancy and Admissibility; between Proof, or Weight, and Admissibility.** Admissibility, then, is a quality standing between Relevancy, or Probative Value, on the one hand, and Proof, or Weight of Evidence, on the other hand. Admissibility signifies that the particular fact is relevant and something more, — that it has also satisfied all the auxiliary tests and privileges. It does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that it is received by the tribunal for the purpose of being weighed with other evidence.

(1) But the first of these distinctions has been questioned, as a matter of theory, by distinguished authority, and in two opposite directions:

(*a*) It has been maintained that *Relevancy is identical with Admissibility.* Such is the theory upon which a notable work of the last generation was constructed:

1876, Sir *James Stephen*, Digest of Evidence, Introduction:[1] "What then does the word [evidence] mean? The only possible answer is: It means that the one fact either is or else is not considered by the person using the expression to furnish a premiss or part of a premiss from which the existence of the other is a necessary or probable inference, — in other words, that the one fact is or is not relevant to the other. . . . The law has been worked out by degrees by many generations of judges who perceived more or less distinctly the principle on which it ought to be founded. The rules established by them no doubt treat as relevant some facts which cannot perhaps be said to be so. More frequently they treat as irrelevant facts which are really relevant, but exceptions excepted, all their rules are reducible to the principle that facts in issue or relevant to the issue, and no others, may be proved."

Either this generalization is wholly incorrect, or the difference of views reduces itself to a mere difference of phraseology. That most of the characteristic rules of admissibility are rules which do not prescribe anything about the relevancy, or probative value, of the facts they exclude is undoubted. All of the rules of Privilege, for example, are of that sort. The rules for the Order of Evidence assume the evidence to be relevant. The rule for Producing Documentary Originals concedes that a copy is relevant, even when excluding the copy. There is a group of rules defining the sufficiency of probative value, and the term Relevancy is a convenient one for them. If it be desired to enlarge that term, and make it synonymous with Admissibility, this can be done. But the rules for probative value, no matter what they be

[1] Another exposition of his theory is given by the learned author in his Indian Evidence Act, 122–126 (1872).

called, will remain distinct in nature from the other rules; and this distinction cannot be abolished merely by misusing the term Relevancy. The fallacy of that misuse has been well expounded as follows:

1889, Professor *James B. Thayer*, "Presumptions and the Law of Evidence," 3 Harvard Law Review 143:[2] "In stating thus our two fundamental conceptions, we must not fall into the error of supposing that relevancy, logical connection, real or supposed, is the only test of admissibility; for so we should drop out of sight the chief part of the law of evidence. When we have said (1) that, without any exception, nothing which is not supposed to be logically relevant is admissible; and (2) that, subject to many exceptions and qualifications, whatever is logically relevant is admissible, — it is obvious that, in reality, there are tests of admissibility other than logical relevancy. Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous and likely to be misused or overestimated by a jury; others, as being impolitic, *e.g.* unsafe for the State; others, on the bare ground of precedent. . . . [The law] assuming, as it does, that in general what is evidential is receivable, is occupied in pointing out what part of this mass of matter is excluded. It denies to this excluded part, not the name of evidence, but the name of admissible evidence. Admissibility is determined, first, by relevancy — an affair of logic and not of law; — second, but only indirectly, by the law of evidence which, in strictness, only declares whether matter which is logically probative is excluded. . . . It is here that Mr. Justice Stephen's treatment of the law of evidence is perplexing; indeed, it comes to have the aspect of a *tour de force*."

(*b*) On the other hand, it has been maintained that *there are no legal rules of Relevancy at all.* This favorite thesis of the great master of the history of these rules was thus stated by him:

1889, Professor *Thayer*, "Presumptions and the Law of Evidence," 3 Harvard Law Review 143, 145:[3] "How are we to know what these things are [that are logically probative]? Not by any rule of the law. The law furnishes no test of relevancy. For this it tacitly refers to logic, assuming that the principles of reasoning are known to its judges and ministers; just as a vast multitude of other things are assumed as already sufficiently known. . . . Admissibility is determined, first, by relevancy, — an affair of logic and not of law."

Here, after all, the difference is one of nomenclature only. The patent fact cannot be denied that there are thousands of judicial rulings which deal with pure questions of inference and probative value; they do this, not "tacitly" (as suggested in the passage above), but expressly. When the party is told that insanity in A cannot be inferred from the insanity of A's collateral relations, or that a consciousness of guilt can be inferred from flight, the material and method of this ruling is precisely the same as if the question were argued in a debating society or in a book of logic; the difference is that when the Court employs the process, the result is law. It is none the less law because it is also logic; and though this legal logic may lead to illogical law, still it is a legal precedent. Being a legal precedent, it

[2] This passage is also found in the learned author's Preliminary Treatise, 266.

[3] In the learned author's Preliminary Treatise, 270, this doctrine is further expounded. It was opposed by Mr. Jabez Fox, in an article entitled "Law and Logic," in 14 Harvard Law Review 39, to which a reply was made in 14 id. 139.

must be studied and observed by the profession. As law aims to represent justice, so the rules of relevancy aim to follow the principles of natural logic; but neither the success or failure of the law to square with natural justice, nor the success or failure of the Courts to be truly logical, justify us in holding that the law is nothing but the dictates of justice and of logic. So long as Courts continue to declare in judicial rulings what their notions of logic are, just so long will there be rules of law which must be observed. For these rules the only appropriate place is the law of evidence:

1863, *Bigelow*, C. J., in *Com.* v. *Jeffries*, 7 All. 548, 563: "No rule of evidence is better settled, or more clearly founded in good sense and sound policy, than that which authorizes presumptions or inferences of fact to be deduced from the proof of certain other facts. . . . The process of ascertaining one fact from the existence of another is essential to the investigation of truth, and prevails in courts of law as well as in the ordinary affairs of life."

1876, *Cushing*, C. J., in *State* v. *Lapage*, 57 N. H. 288: "Although undoubtedly the relevancy of testimony is originally a matter of logic and common-sense, still there are many instances in which the evidence of particular facts as bearing upon particular issues has been so often the subject of discussion in courts of law, and so often ruled upon, that the united logic of a great many judges and lawyers may be said to furnish evidence of the sense common to a great many individuals, and, therefore, the best evidence of what may be properly called common-sense, and thus to acquire the authority of law. It is for this reason that the subject of the relevancy of testimony has become, to so great an extent, matter of precedent and authority, and that we may with entire propriety speak of its legal relevancy."

(2) Admissibility, on the other hand, *falls short of Proof or Demonstration*. This is due partly to the circumstance that, in our system, the tribunal has traditionally been a divided one, so that the rule of law, uttered by the judge, merely declares what is sufficient to go to the jury, and the jury ultimately decide upon the total effect which we call Proof. But chiefly the distinction is due to the circumstance that each evidential fact is offered separately, and the quality of complete demonstration could therefore never be expected of it. Since the production of evidence takes time, and since one piece of evidence must precede another, the rules of admissibility, if there are to be any at all, can have nothing to do with the inquiry whether certain evidence effects complete proof. Weight, Proof, Demonstration, — these terms have no application until the evidence is all introduced and the jury are ready to retire. The effect of this peculiar feature of Admissibility upon the quality of probative value required is more particularly considered in contrasting Relevancy and Weight (*post*, § 27).

§ 13. **Multiple Admissibility; Evidence applicable to more than one Purpose.** It constantly happens that a fact which is inadmissible for one purpose is admissible for other purposes; while, on the other hand, a fact which is entirely admissible, so far as some rules are concerned, is excluded because it fails to satisfy some other rule. This paradox may be solved if we notice the analogy of candidates for an obstacle-race. Let us suppose that there are to be several races, — one for boys under sixteen years of

age, one for lawyers, and one for club-members. Now the ineligibility of A for the second or the third class of entries does not prevent his entering for the first, and conceivably he may be eligible in two different classes. But if after entering the race he fails to surmount any one of the half-dozen obstacles, he loses all chance of victory. So with evidentiary facts; the rules of substantive law, of pleading, and of relevancy are the conditions of entrance; the auxiliary rules and the rules of privilege are the obstacles which must then be evaded by the relevant material.

Now the peculiar operation of the auxiliary rules and the rules of privilege (*ante*, § 11) is that almost all of them are limited in their application; for example, the attesting-witness rule applies only to documents required by law to be attested, the hearsay rule applies only to utterances used testimonially, and so on. In the obstacle-race, the analogy would be presented by a single racecourse, with various obstacles, some of which were required for one class of entries but not for other classes, the races to be run at one time by the entries of all classes. Two situations may be presented, which typify the usual evidential difficulties:

(1) If A is a club-member, and if one of the obstacles in the club-members' race is a stream of water, then A, if he is unable to swim, will not enter that race; yet in the other races, in which that obstacle is not required, he may be ineligible, being neither a lawyer nor under sixteen years of age, even though he be amply able to vault the hurdles or surmount the other obstacles for the other classes. So, a letter containing a testimonial statement by a person who ought to have been called to the stand, is inadmissible under the hearsay rule; and if it cannot be used under the *res gestæ* doctrine, to which the hearsay rule does not apply, it must remain excluded, even though, had it come in under the *res gestæ* doctrine, it could have satisfied the rule for producing the original and the rule of authentication. In other words, *so far as an evidentiary fact is offered for a particular purpose, as being material to a certain issue and relevant to a certain proposition, it must satisfy all the rules applicable to it in that capacity.* In practical application this doctrine is constantly exemplified. It is sufficiently illustrated by its converse.

(2) Conversely, if A, though a club-member, is also as a lawyer eligible to enter the race not having the stream-obstacle, and would be permitted to pass over a bridge in the race for that class, it is no ground of objection to him that he cannot swim the stream as required for the club-members' class; further, it is no objection that perhaps the judges of the race will in the crowd be unable to distinguish who passed over the bridge and who swam the stream, and will by possibility award erroneously to A the prize in the club-members' class, thinking that he swam the stream. The reason is that the judges must be assumed to do their duty intelligently and to recollect that A was entered for the lawyers' race and not the club-members'. So, the letter above, if offered as an admission of the defendant, because shown to him and assented to, may be introduced without calling the writer

of it, because it is no longer offered as the writer's testimony but as the defendant's admission. In other words, *when an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity.* This doctrine, though involving certain risks, is indispensable as a practical rule:

1832, *Park*, J., in *Willis* v. *Bernard*, 8 Bing. 376, 383: "I agree that it is more desirable that such part of the evidence as does not apply to the point to be proved should be withdrawn altogether from the consideration of the jury. But in many cases that is impossible; as in Manning *v.* Clement, where the plaintiff alleged that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the defendant libelled him in his trade by publishing that the bitters were made to adulterate porter, *per quod* the plaintiff was ruined; it was held, that under the general issue, the defendant might give in evidence that the plaintiff's trade was illegal, although in doing this it also appeared that his bitters had been condemned in the Court of Exchequer, and that the libel was true. So in the case of prisoners where confessions are given in evidence which unavoidably involve the mention of others besides the party confessing. But the jury are always cautioned to exclude the statement as against any but the party confessing. They also received a proper caution in this case, and, subject to that, the letter was properly admitted."

1870, *Graves*, J., in *People* v. *Doyle*, 21 Mich. 221, 227: "Whenever a question is made upon the admission of evidence, it is indispensable to consider the object for which it is produced, and the point intended to be established by it. . . . It frequently happens that an item of proof is plainly relevant and proper for one purpose, while wholly inadmissible for another which it would naturally tend to establish. And when this occurs, the evidence when offered for the legal purpose can no more be excluded on the ground of its aptitude to show the unauthorized fact than its admission to prove such unauthorized fact can be justified on the ground of its aptness to prove another fact legally provable under the issue."

1892, *Peters*, C. J., in *State* v. *Farmer*, 84 Me. 440, 24 Atl. 985: "That evidence properly admissible for one purpose may be so perverted in its use as to affect a different and illegitimate purpose, is not altogether preventable. But such evidence cannot on that account be wholly rejected. The correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it."[1]

Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instruction of the Court suffices for that purpose; and the better opinion is that the opponent of the evidence must ask for that instruction; otherwise, he may be supposed to have waived it as unnecessary for his protection:

1855, *Mason*, J., in *Pegg* v. *Warford*, 7 Md. 582, 607: "But it has been said, that as this evidence was received for all or either of the three purposes for which it was offered, unless it was legally applicable to each, the jury might have been misled, and applied it to one of the purposes to which it did not relate. To avoid such a result, it was the duty of the counsel objecting to have pointed out specifically the purpose to which the testimony had no legal application, and to ask its exclusion for such purpose. . . . We must assume, where evidence has been offered generally, that it will be applied by the jury to

[1] *Accord:* 1892, Com. *v.* Trefethen, 157 Mass. 180, 186, 31 N. E. 961 (hearsay); 1893, Jamison v. People, 145 Ill. 357, 379, 34 N. E. 486.

the purposes to which it is legally applicable; and if counsel wish to guard against the contingency of a misapplication of the evidence by the jury, they should ask the court, as has been already said, to point out the branch of the case to which the evidence is not to be applied." [2]

§ 14. **Conditional Admissibility; Evidence admitted pending Subsequent Proof.** The *time* for determining the admissibility of a particular fact is ordinarily the time *when it is offered to the Court.* But the presentation of all the evidence in a cause occupies a length of time, and some of the evidentiary facts must necessarily await the others. Moreover, the convenience of obtaining all the information of each witness by consecutive questioning, together with other reasons of practical necessity, often oblige certain facts to be presented at a particular point of time. Thus these facts, when presented, may be as yet inadmissible, that is, they may be relevant only because of their connection with other facts not yet presented. This dilemma is solved by admitting them conditionally. Being admissible only in dependence upon other facts, they are received on the assurance of counsel that the specific other facts will be duly presented at a suitable opportunity before the close of the case.

The rules for conditional admissibility thus involve the general rules for the Order of Presenting Evidence, and are accordingly better examined under that head (*post*, § 1871).

§ 15. **Curative Admissibility; Prior Introduction of Inadmissible Evidence, as Estopping from Subsequent Objection to other Inadmissible Evidence.** Does one inadmissibility justify or excuse another? If the one party offers an inadmissible fact which is received, may the opponent afterwards offer similar facts whose only claim to admission is that they negative or explain or counterbalance the prior inadmissible fact? No one has doubted that if the opponent duly objected and was erroneously overruled in the first instance, he could not claim to present similar inadmissible facts, because his objection will save him, on appeal, from any harm which may accrue, and he needs no other protection. But if he did not object and accept, he has no such protection; and the question thus arises whether he can protect himself by retorting in kind.

On this subject three different rules are found competing for recognition in the different jurisdictions. (1) The first is that *the admission of an inadmissible fact, without objection by the opponent, does not justify the opponent in rebutting by other inadmissible facts:*

1875 *Loomis*, J., in *Phelps* v. *Hunt*, 43 Conn. 194, 199: "It is obvious that this whole subject matter, both of the direct and cross-examination, was wholly irrelevant, and ought not to have been entertained at all. . . . It is doubtless true that the inquiries ruled out on the cross-examination were in the main pertinent to the matter testified to in chief, and if the irrelevant matter in chief was allowed to have any effect it would have

[2] *Accord:* 1853, Cook v. Parham, 24 Ala. 21, 34 (reputation of an employee). *Contra, semble:* 1894, Dalton v. Dregge, 99 Mich. 25, 57; 1903, Harrison v. Garrett, — N. C. —, 43 S. E. 594.

been more just and fair to have allowed a reasonable opportunity for cross-examination upon the same subject; and if, when the questions on the cross-examination were excluded, the plaintiff had asked the Court to reject also all the kindred matter previously received, and the Court had refused, the plaintiff would have had a just ground for a new trial. But no objection whatever was made to the testimony in chief, neither at the time it was offered nor afterwards. The auditor seems to have allowed the parties to take their own course in the testimony until specific questions were raised on the cross-examination; and the decisions then made were according to law. The plaintiff seems to assume that if the cross-examination was pertinent to the examination in chief it necessarily makes the ruling erroneous. This proposition we do not accept. Where the plaintiff stands on matters *stricti juris*, it must appear that the particular ruling complained of was erroneous in law. We cannot hold that it was error in law to rule out, objection being made, what it would have been error to admit, merely because the Court had received without objection matter just as irrelevant before. The maxim 'Similia *similibus curantur*,' has been applied to some extent in the science of medicine, but the principle has never been recognized as applied to the cure of errors in law."

This rule is represented by some English authority and by a respectable number of American jurisdictions.[1]

(2) At the other extreme is a rule which declares that in general precisely the contrary shall obtain, *i. e.* the *opponent may resort to similar inadmissible evidence:*

1875, *Tilton* v. *Beecher*, N. Y., Abbott's Rep. II, 789; on the re-direct examination of Mrs. Moulton, the witness was asked to explain why she had advised a certain thing to be done, as stated by her on cross-examination; Mr. *Evarts*, for the defendant, objected that her answer on cross-examination had not been asked for and was irrelevant; Mr. *Fullerton*, for the plaintiff: "Your Honor knows perfectly well that when my learned friend upon the other side puts a question to the witness, and gets an answer that is not responsive, or does not suit him, he moves forthwith to strike it out, and does not rest until it is stricken out. But, on the other hand, if he puts a question to a witness, and gets an answer which is not responsive, but which he deems of some advantage to himself, he then fails to make such a motion, and lets it stand, perhaps, until some future time in the case when we, by a question, seek to take advantage of the answer, and then the argument is that it is irresponsive, and that we have no right to follow up the answer. Now, when counsel puts a question and gets an answer, and does not move to strike it

[1] *Eng.:* 1818, Shaw *v.* Roberts, 2 Stark. 455 (improper questions as to a nonsuit, held not to justify further inquiries on cross-examination). *Ga.:* 1900, Stapleton *v.* Monroe, 111 Ga. 848, 36 S. E. 428 (ordinarily); *Ill.:* 1875, Wickenkamp *v.* Wickenkamp, 77 Ill. 92, 96 ("This view of the question worked no hardship upon appellant; he had it in his power to exclude the improper evidence introduced by appellee from the jury upon motion, or he could have prepared an instruction directing the jury to disregard it"); 1900, Maxwell *v.* Durkin, 185 id. 546, 57 N. E. 433 (counter-evidence of character, excluded); *Me.:* 1874, Sturgis *v.* Robbins, 62 Me. 289, 292 (inadmissible evidence on cross-examination does not justify a re-examination on the same subject); *Md.:* 1853, Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242, 255 (fire set by a locomotive; rebuttal of irrelevant facts, not allowed; "the offering of improper evidence by one of the litigant parties never can justify the introduction of similar evidence by the other party"); 1854, Mitchell *v.* Sellman, 5 id. 376, 385; 1854, Warner *v.* Hardy, 6 id. 525, 539 (prescriptive possession); *Pa.:* 1837, Smith *v.* Dreer, 3 Whart. 154 ("cross-examination to irrelevant matter shall not bring it into the issue"); *U. S.:* 1830, Stringer *v.* Marshall, 3 Pet. 320, 337 (intimating that the rule might be different for "improper testimony calculated to make such an impression on the jury that no instruction given by the judge can efface it"); 1840, Philadelphia & T. R. Co. *v.* Stimpson, 14 id. 448, 461 (hearsay matter irrelevant to the cause).

This rule would not apply where there had been *no real opportunity to object* in the first instance: 1900, People *v.* Barone, 161 N. Y. 451, 55 N. E. 1083 (here the question in chief did not warn of the answer's incompetency; held, that the cross-examiner was not restricted to a motion to strike out).

out, but permits that answer to stand as evidence, then it *is* evidence, and we have a right to explain it, if it needs any explanation. The question we now put is, why she advised or suggested this short statement." Judge *Neilson:* "She may answer that."

This rule has also ample authority, and is perhaps to be regarded as the orthodox English rule.[2]

[2] *Eng.:* 1835, Blewatt *v.* Tregonning, 3 A. & E. 554, 581 (acts of prescriptive uses in other places than that in issue having been testified to on the defendant's cross-examination of the plaintiff's witness, the plaintiff's re-examination to explain away those acts was allowed; "the plaintiff was entitled to pursue it, unless the defendant got it struck out"); 1837, Duncombe *v.* Daniell, 8 C. & P. 222, 227 (matters stated in the plaintiff's opening, but not afterwards evidenced by him, allowed to be rebutted; Lord Denman, C. J.: "A statement cannot fail to make some impression and I think it competent for the opposite party to remove that impression"); *Ala.:* 1882, Ford *v.* State, 71 Ala. 385, 393 (rebuttal of testimony to sanity); 1889, Morgan *v.* State, 88 id. 223, 6 So. 761 ("the party first in fault cannot take any advantage of the ruling of the Court in favor of the other"; applied to the rebuttal of improper character evidence); 1891, Mobile & B. R. Co. *v.* Ladd, 92 id. 287, 9 So. 169 ("It is never erroneous to receive irrelevant evidence to rebut evidence of a like kind offered by the opposite party"; applied to the rebuttal of the irrelevant fact of the darkness of the night); 1899, McIntyre *v.* White, 124 id. 177, 26 So. 937 (wife's separate acknowledgment; irrelevant facts introduced may always be denied); *Ind.:* 1890, Perkins *v.* Hayward, 124 Ind. 449, 24 N. E. 1033 ("If a party opens the door for the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened"); *Ia.:* 1876, Artz *v.* R. Co., 44 Ia. 284, 286 (personal injuries; the defendant introduced a minister of the gospel, to prove conversations with the plaintiff after the injury, who testified, among other facts, to "offering the plaintiff the consolations of religion"; having then on cross-examination denied that he had refused to pray with the plaintiff, the plaintiff was allowed to prove this refusal, and an objection of irrelevancy was overruled; "this was clearly a continuation of the subject introduced by defendant, and objection cannot now be raised by the same party to the competency of the evidence"); 1877, Hale *v.* Philbrick, 47 id. 217 (false representations); 1885, Frost *v.* Rosecrans, 66 Ia. 405, 407, 23 N. W. 895 (fraudulent mortgages; rebuttal of irrelevant transactions allowed, to prevent prejudice); 1896, Spaulding *v.* R. Co., 98 id. 205, 67 N. W. 227 (personal injuries; rebuttal of improper opinion testimony allowed); 1903, Hamilton *v.* Mendota C. & M. Co., — id. —, 94 N. W. 282 (opinion testimony); *Me.:* 1851, State *v.* Sargent, 32 Me. 429 (here applied to an accomplice's testimony on a collateral point, because otherwise "if perceived to remain unimpeached when its truth might be tested," it might receive undue credit); 1880, Williams *v.* Gilman, 71 id. 21, 23 ("If the testimony be purely collateral, it was not for the plaintiff to call out collateral facts which might prejudice, and then object to an explanation"; here applied, in an action for negligence as a veterinary surgeon, to other instances of the defendant's treatment); *N. H.:* 1830, Grafton Bank *v.* Woodward, 5 N. H. 301, 309 (declarations of an agent for a contract); 1870, Janvrin *v.* Fogg, 49 id. 347 (admitting explanations of an offer of compromise improperly received); *N. Y.:* 1868, Blossom *v.* Barrett, 37 N. Y. 433, 437 (fraudulent marriage; contradiction of immaterial evidence as to property, allowed); 1873, Coleman *v.* People, 55 id. 81, 89 (*contra;* "A party does not acquire the right to give immaterial evidence because his adversary has done the same thing"; evidence of the receipt of other stolen goods, held to have been improperly admitted; no authority cited); 1895, People *v.* Buchanan, 145 id. 1, 39 N. E. 846 ("Even if the cross-examination had been as to facts not admissible in evidence, the rule seems to be that the witness may be re-examined as to evidence so given"; preceding cases ignored); *Pa.:* 1867, Sherwood *v.* Titman, 55 Pa. 77, 80 ("The defendant opened the door for the testimony, and cannot complain that it was not closed soon enough to suit him"; here applied in an action for criminal conversation); 1886, Swank *v.* Phillips, 113 id. 482, 489 (a disqualified witness of the defendant held improperly admitted, where the plaintiff had introduced another on the same subject; "that error could not be corrected by committing another"; preceding case not noticed); *Vt.:* 1897, State *v.* Slack, 69 Vt. 486, 38 Atl. 311 (mode of attacking character of a witness); 1898, Fuller *v.* Valiquette, 70 Vt. 502, 41 Atl. 579 (loss of support by husband's intoxication; the plaintiff having erroneously introduced evidence of prior intoxication, the defendant was allowed to rebut this); *Wash.:* 1896, Dutcher *v.* Howard, 15 Wash. 693, 47 Pac. 28 (cross-examination to irrelevant matter excuses a re-examination to the same matter); *W. Va.:* 1897, Sisler *v.* Shaffer, 43 W. Va. 769, 28 S. E. 721 ("Strange cattle having wandered through a gap made by himself, he cannot complain").

This rule would not apply where the original fact was not really introduced as evidence: 1844, Allen *v.* Hancock, 16 Vt. 230, 233 (re-examination to another instance of highway defects, not allowable if it was referred to on cross-examination merely to stimulate the witness' memory).

(3) A third form of rule, intermediate between the other two, is that the opponent may reply with similar evidence *whenever it is needed for removing an unfair prejudice which might otherwise have ensued from the original evidence*, but in no other case. This seems to be the true significance of what may be called the Massachusetts rule:

1864, *Bigelow*, C. J., in *Mowry* v. *Smith*, 9 All. 67: "The question then arises, how far the admission of incompetent and irrelevant evidence offered by one party, to which no objection is taken, renders it competent for the opposite party to introduce evidence of a similar character. There certainly must be some limit beyond which parties cannot be permitted to go, in extending issues of fact and bringing into a case matters which have no essential bearing on its real merits. Without indicating a general rule applicable to all cases of this nature, we think it may be safely said that a party should not be allowed to go farther than to prove facts which have a direct tendency to contradict and control the irrelevant or incompetent evidence which his adversary has introduced into the case. To this extent, it may be properly held that the latter has waived the strict rule of law applicable to such evidence, and is estopped from objecting to the proof of facts, by the opposite party, which can be properly deemed to be contradictory or in rebuttal of those offered by himself. It seems to us that the plaintiff was allowed to transcend this limit at the trial, in the introduction of evidence to which the defendant objected. He was not confined to disproof of the fact that he had charged the defendant with passing counterfeit money, which was the only ground of provocation which the latter had attempted to establish. The plaintiff was allowed to go much further, and to show the distinct and independent fact that the defendant had large sums of money in his possession, which he would take out in papers and show to persons about him, to the amount of several thousand dollars at a time. This was an irrelevant and immaterial fact, which not only had no bearing on the true issue between the parties, but did not tend to contradict or control the evidence which the defendant had introduced in mitigation of damages."[8]

The source of these divergent views is apparent enough. By the Courts adopting the first rule the emphasis is placed upon the circumstance that the opponent did not in the first instance object; hence, his waiver of objec-

[8] *Accord:* 1847, Connell v. Smith, 3 Kerr N. Br. 483 (refusal to perform contract of purchase; defendant's purchases at a cheaper price from other persons having been shown, he was allowed to explain the whole of these irrelevant transactions); 1903, Hoover v. State, — Ind. —, 68 N. E. 591 (defendant's irrelevant beer-drinking; testimony in denial or explanation, allowed); 1881, State v. Witham, 72 Me. 531, 535 (Peters, J.: "The introduction of immaterial testimony to meet immaterial testimony on the other side is generally within the discretion of the presiding judge. But if one side introduces evidence irrelevant to the issue, which is prejudicial and harmful to the other party, then, although it come in without objection, the other party is entitled to introduce evidence which will directly and strictly contradict it"; here, the birth of a child to an unmarried woman was improperly received to show the defendant's adultery; and evidence of other men's intercourse was received to explain away this irrelevant but prejudicial evidence); 1861, Brown v. Perkins, 1 All. 89, 96 (trespass in entering the plaintiff's shop and destroying goods; the plaintiff having volunteered the statement that no liquor was in his shop, the defendant was allowed to prove that liquor was found there; "it was too late to object to the question after he had voluntarily testified on the same subject"; but here the Court also thought the fact relevant to the issue); 1830, Stringer v. Marshall, 3 Pet. 320, 337 (see citation *supra*); 1868, Lytle v. Bond, 40 Vt. 618 (one erroneous admission does not justify another; but where the first fact is "a circumstance morally tending to render the disputed fact more probable," the opponent has a right "to do away with the impression it may create in the minds of the jury)."

But by the Massachusetts Court this rule does not give the opponent a fixed right to the counter-evidence; hence, if it was *rejected below*, the ruling will not be disturbed: 1875, Parker v. Dudley, 118 Mass. 602, 604 (bastardy; previous irrelevant improprieties of the complainant not admitted to contradict her testimony; "by failing to object to evidence on behalf of the complainant which was incompetent the respondent could not as of right claim to contradict it)."

tion leaves him without ground for maintaining that the original evidence was a wrong which estops the original offeror from now objecting. By the Courts adopting the second rule, on the other hand, the emphasis is placed upon the original party's voluntary action in offering the evidence, by which he virtually waived future objection to that class of facts. Both these circumstances of waiver are true; it is simply a question of relative emphasis; hence the contradictory views. But it may be noted that under the first rule, in almost all the cases, the counter-evidence had been rejected below, while under the second rule, in almost all the cases the counter-evidence had been admitted below; *i. e.* the Courts under both rules reached practically the same result in that they refused to disturb the ruling below. This points to the true rule, namely, that since each party is alike in the condition of *volenti non fit injuria, neither can complain of a ruling either admitting or rejecting,* — a waiver being predicable of both. The matter is thus left in the hands of the trial Court. Modify this in certain cases by conceding to the opponent, as of right, to use the curative counter-evidence when a plain and unfair moral prejudice would otherwise have inured to him, and the rule will be sufficiently flexible.

Certain other questions, apparently related, must here be distinguished; (1) whether certain facts *properly admissible in impeachment* of character may be rebutted or explained in a certain manner, as by the fact of *innocence of crime* (*post*, §§ 195, 1116), or of corroborative *consistent statements* (*post*, § 1122), and by explanatory evidence in general (*post*, §§ 1101–1144); (2) whether a *collateral fact* can be disproved by counter-evidence (*post*, §§ 1000–1015); (3) whether certain facts, in their order of presentation, may be put in on a *re-examination instead of on the direct examination* (*post*, § 1896).[4]

§ 16. **Judicial Discretion as applied to Admissibility; Distinction between Discretion and Unappealable Rulings.** The term "discretion," as applied to a trial Court's powers, may be used in several senses, which have not been, in our law, as often discriminated or as fully developed as they ought to be. It may mean (1) that the trial judge is controlled by *no fixed rules*, but may in each case decide according to good sense and justice without regard to precedents, either by himself or by a higher Court. In this meaning, nothing is involved as to the finality of the decision; it may or may not be appealable. (2) It may mean, on the contrary, that the trial judge decides according to some rule, but that in one or another respect his *decision is final;* and here it may be final (a) as to the law, *i. e.* the tenor of the rule, (b) as to the applicability of the rule to the facts, or (c) as to the existence of the facts.

[4] Compare also the rules for *waiver of objection* (*post*, § 18), whose principle is here partly involved. Under that head belongs the question whether a party who has originally objected to inadmissible evidence is to be deemed to have waived the objection by *subsequently* introducing similar evidence himself.

For the question whether an *instruction must be given* upon evidence admitted for both parties outside of the pleadings, see Thompson on Trials (1880), II, § 2310; 1902, Bomar *v.* Rosser, 131 Ala. 215, 31 So. 430.

For the present subject in general, see Thompson, *ubi supra;* Elliott, General Practice (1894), II, § 592.

The first of these meanings (1) is Discretion in the ordinary sense; the second (2) may be termed Finality of Ruling.

(1) Now *Discretion*, in this strict sense, is by our law not conceded to any trial judge on points of evidence, except perhaps in *ex parte* and interlocutory proceedings.[1] The whole spirit of our law requires the observance of precedents. The propriety of improving our system in this respect is a large question, which need not be here opened; the tenor of our law is plain. It is in this view that the following utterances were made:

1824, *Taylor*, C. J., in *State* v. *Candler*, 3 Hawks 398: "The superiority of our law [of evidence] consists in its laying down the rule, with its proper exceptions and limitations, and leaving nothing to the discretion of the Court."

1867, *Sawyer*, J., in *People* v. *Farrell*, 31 Cal. 584 (the trial judge had declared that the rules of evidence were to an extent flexible; this the Supreme Court repudiated): "If the law has really established certain rules of evidence, the Court, as we conceive, is bound to adhere to them, not only 'in all ordinary cases,' but in *all* cases, and such rules cannot properly 'be bent when they come in contact with' what may seem to the Court or jury in the particular case in hand to be 'reason and justice, so as to suit the case to which they are to be applied.'"

1896, *Benet*, J., in *Norris* v. *Clinkscales*, 47 S. C. 488, 25 S. E. 797: "The term 'discretion' implies the absence of a hard and fast rule. The establishment of a clearly-defined rule would be the end of discretion. And yet 'discretion' should not be a word for arbitrary will or unstable caprice. Nor should judicial discretion be, as Lord Coke pronounced it, 'a crooked cord,' but rather, as Lord Mansfield defined it, the 'exercising the best of their judgment upon the occasion that calls for it,' adding that 'if this discretion be wilfully abused . . . it ought to be under the control of this Court.' The Courts and text writers all concur that by 'judicial discretion' is meant sound discretion guided by fixed legal principles. It must not be arbitrary nor capricious, but must be regulated upon legal grounds, — grounds that will make it judicial. It must be compelled by conscience, and not by humor. So that when a judge properly exercises his judicial discretion he will decide and act according to the rules of equity, and so as to advance the ends of justice. There are two different kinds of discretion that may be exercised by the presiding judge, one of which is appealable, the other not. In the exercise of his exclusive right to decide a matter of fact, or to control the orderly conduct of trials, the discretion of the circuit judge will not be reviewed by this court. For example, in granting or refusing a new trial on the evidence, or in granting or refusing additional time for argument of counsel, or in deciding whether an admission or confession was made freely and voluntarily, so as to determine its admissibility as evidence, or in permitting a witness to be recalled, or in granting or refusing a motion for a continuance, or the like. In such matters no error of law can be committed, and no appeal can be taken."

(2) (*a*) *Finality*, as to the *tenor of the law*, is in our system never conceded to the trial judge. The very constitution of courts of appeal is of itself a demonstration.

(*b*) But finality as to the *application of the law* to the facts may conceivably admit of a different result. For example, let a certified copy of a deed be offered; the question arises whether the original should be produced; assume that the law of the jurisdiction is that a copy of a document is

[1] Distinguish the English legislation by which the Supreme Court is given power to alter the rules of evidence: 1894, St. 57 & 58 Vict. c. 16, § 3, Judicature Act (giving power to make rules of evidence in specified cases; explained in Boerlein v. Bank, 1895, 2 Ch. 488, 491).

admissible when the original is lost, and that loss consists in the inability to find after diligent and adequate search; and, further, that a recorded deed is not governed by that rule, but by the rule that the certified copy of a recorded deed may be used without proof of loss. Now here (a) the law is these rules; (b) the application of the law consists in declaring the offer to be governed by the first or the second rule; and (c) the facts consist in the diligent and adequate search followed by inability to find. Under (b), then, is the decision of the trial judge final? It might perhaps be. But in our system of law this seems never to be recognized, for rules of evidence. If the trial judge selects the wrong rule as applicable to the case, this error is deemed open to revision:

1896, *Benet*, J., in *Norris* v. *Clinkscales*, *supra*: "To the appealable class, in this State, belong all instances of the exercise of discretion which may disclose the commission of error of law. And, without going into detail, it is enough for the purposes of this case to say that, in deciding the preliminary question whether or not there has been sufficient proof of the loss of the written instrument to justify the admission of secondary evidence of its contents, it is possible that a circuit judge may commit error of law in the violation or misapplication of the rules of evidence, and therefore his exercise of discretion may be appealed from; and the appeal will lie, not because of any so-called 'abuse of discretion,' — a phrase unhappily framed, because implying a bad motive or wrong purpose, — but because his ruling may appear to have been made on grounds and for reasons clearly untenable."

(*c*) Finality as to the *findings of fact*, however, is by most Courts in theory, and by some Courts in practice, conceded to the trial judge.[2] In the instance above, for example, the facts as to a diligent and adequate search would be taken, upon appeal, as determined below.[3] This is the sensible and practical doctrine. A few Courts — notably that of New Hampshire (largely due to the influence of Chief Justice Doe) and of Massachusetts — systematically recognize it for substantially all the rules of evidence. On a few topics (such as the qualifications of an expert witness) almost all Courts enforce its recognition. On the remaining topics, most Courts profess an adherence to it, but nevertheless inconsistently waste their own time and that of the profession by recording at great length their opinions upon a thousand petty questions of fact preliminary to the admission of particular pieces of evidence. This is due chiefly to their usual qualification that the discretion is final unless it is "abused"; so the necessity of overhauling the facts in detail, to see whether discretion has been "abused," involves the very labor for the appellate Court and the very uncertainty for suitors which would be obviated by a doctrine of discretion, if it were worth anything at all. It is usually the appellate Court, not the trial Court, that "abuses" the doctrine of discretion. However, in theory at least, all Courts are found more

[2] This applies, of course, to such matters of fact only as fall within the province of the judge, not the jury (*post*, Book III).

[3] It will be noticed, further, that the attribution, in such a case, of finality on matters of fact signifies also, in effect, that the appellate Court will not define the rule of law any more minutely; for example, a holding that the sufficiency of the search is a question of fact for the trial judge signifies that no rule requiring search in a particular place or by a particular person will be laid down.

or less explicitly recognizing some concession of finality to the trial judge on the matters of fact upon which the application of the rules of evidence depend:

1870, *Foster*, J., in *Bundy* v. *Hyde*, 50 N. H. 116, 120: "By discretion — judicial discretion — we mean the exercise of final judgment by the [trial] Court in the decision of such questions of fact as from their nature and the circumstances of the case come peculiarly within the province of the presiding judge to determine, without the intervention and to the exclusion of the functions of a jury."

1894, *Wood*, J., in *Vaughan* v. *State*, 58 Ark. 353, 371, 24 S.W. 885: "The trial Court had a discretion [in determining the conditions preliminary to secondary evidence], which was only limited to the extent that it should not be abused. It is absolutely essential that circuit Courts be vested with such discretion. The judge is acquainted with the surroundings, sees and hears the witnesses, and is *the one* to be satisfied as to whether the conditions exist calling for the introduction of secondary evidence. . . . The Court should proceed cautiously and avoid capricious conclusions. Its judgment should be based upon investigations reasonable and satisfactory. It should have diligent inquiry made, or be satisfied from competent proof that inquiry would do no good. When it appears to us that such has been the course of the trial judge, we will not review his discretion to disturb his findings upon the facts before him. If the law requires certain fixed and unbending rules to be observed by the circuit judge in laying foundation for the admission of secondary evidence, then he has no discretion in the matter."[4]

2. Procedure in Questions of Admissibility.

§ 17. **The Offer of Evidence.** The procedure in raising and deciding questions of admissibility is a part of the general body of procedure, and cannot be fully treated except in that connection. But its details often depend intimately upon the doctrines of Admissibility, and a knowledge of the rules of procedure is necessary in considering many of the applications of those principles. A short survey of the rules and their reasons is therefore necessary at this point. The procedure as a whole falls into five separate stages: the Offer of Evidence, the Objection, the Ruling, the Exception, and the Judgment of Error.

The Offer of Evidence. The offer of evidence involves three kinds of questions, — the *time* of offering, the *form* of the offer, and its *tenor*. The first of these is better considered elsewhere (*post*, §§ 1866–1900), as a part of the general body of rules for the Order of Evidence. The other two belong properly here.

a. Form of the Offer. (1) The offer at the trial need not be in *writing;* it is ordinarily made by the counsel's oral presentation of a witness or a document or his oral statement of a question to a witness. But where the testimony is in the form of a deposition taken before trial, the questions are required to be in writing when the depositions are taken by the method of commission, *i. e.* when the counsel do not attend personally at the time of the witness' examination before the officer but prepare written interrogatories

[4] Further utterances may be found in the ensuing opinions: 1895, State v. Sawtelle, 66 N. H. 488, 32 Atl. 831; 1898, Martin v. Jennings, 52 S. C. 371, 29 S. E. 807.

to be sent to the officer;[1] the more usual method, however, consists in an oral examination by counsel personally attending, the questions and answers being written down after utterance.[2] In either case the deposition-document is usually required to be filed with the clerk of court before trial,[3] and is always formally offered at the trial, by being read by the counsel or handed to the clerk for reading.[4]

(2) The offers of specific facts are usually separated by being embodied in single successive *questions* to the witness. But in the discretion of the trial Court the witness may be permitted to relate a continuous narrative without interrogation. These matters involve rather the form of the witness' narration, including the use of photographs, maps, interpreters, and the like, and are considered under the head of Testimonial Narration (*post*, §§ 766–812).

(3) The offer must be a presentation of evidence *actually available:*

1903, *Ricks, J.*, in *Chicago City R. Co.* v. *Carroll*, Ill. , 68 N. E. 1087 (the plaintiff having been allowed, after the close of both cases, to offer evidence of the defendant's ownership of the car on which the injury occurred, and the defendant then desiring to offer, for the first time, evidence of the due inspection of the cars, the defendant's attorney said: "We desire to offer evidence on the question of inspection," and the Court replied: "I will not receive any evidence, except as to the ownership of this line, at this stage"; this was held not a sufficient offer): "No witness was put upon the stand. No question was asked. Nothing was done, except a mere conversation or talk had between counsel for appellant and the Court. Such procedure as that does not amount to an offer of evidence, and the remarks of the Court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered; and counsel cannot, by engaging in a mere conversation with the Court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the Court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand, and proceeded far enough till the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question, and allowed the Court to rule upon it, and then offered what was expected to be proved by the witness, if he was not allowed to answer the question asked."

The offer must therefore not be merely a verbal suggestion for invoking a ruling, nor a fallacious promise of expected material. It need not expressly appear, however, that a witness was corporally called to the stand, unless there are circumstances to raise the presumption that the offer was improper in one or the other of these respects.[5] An elusive violation of this principle

[1] For the distinction between these two methods, see *post*, §§ 802, 1376.

[2] The rules for interrogatories are briefly considered *post*, §§ 802–806.

[3] The statutes on this point may be found by consulting the citations *post*, §§ 1380–1382.

[4] For the duty of the proponent of a *document to show it to the opponent* before reading it to the jury, see *post*, § 1861.

[5] Such seems to be the result of the cases: 1877, Eschbach *v.* Hurtt, 47 Md. 61, 67 (a judicial statement that certain evidence will not be admitted is not the subject of exception where it does not appear that the party at the time produced or had present a witness to the fact, or so stated to the trial Court); 1878, Robinson *v.* State, 1 Lea 673, 674 (the party making the offer must show that he had the proper witness or the means of producing him, or in good faith so believed); 1884, Scotland Co. *v.* Hill, 112 U. S. 183, 186 ("If the offer is actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate Court must assume that the proof could have been made"). For additional illustrations of the application of the principle, see *post*, § 1808.

The following ruling is too technical, and presumably would not be followed: 1884, Higham *v.* Vanosdol, 101 Ind. 160, 162 (the record showed that, a witness being on the stand, "the defend-

occurs often on cr ss-examination to character, when facts of discreditable conduct are groundlessly asked about, in the hope that though denied they will be assumed by the jury as well founded (*post*, §§ 983, 1808). Here, since the cross-examiner is by another rule not allowed to prove such facts by extrinsic testimony, he is exempt from supporting his question by formal tender, and he thus abuses his advantage. Nothing but a strict exercise of judicial duty can avail to check this abuse.[6]

b. Tenor of the Offer. The general principle is that the offer must be judged exclusively by its specific contents regarded as a whole. This principle leads to several consequences. (1) If the evidentiary fact desired to be offered is in itself apparently irrelevant, or otherwise dependent on other facts for its admissibility, the offer must contain a statement of the *specific purpose*, or of all the *other facts necessary* to admissibility. This rests on the doctrine of conditional relevancy (*ante*, § 14, *post*, § 1871).[7] (2) If *several facts* are included in the offer, some admissible and others inadmissible, then the whole (if properly objected to) is inadmissible; in other words, it is for the proponent to sever the good and the bad parts.[8] (3) Similarly, an offer of a fact for *two purposes* is erroneous if the fact is inadmissible for one of the purposes, though it would have been admissible for the other if offered for that alone.[9] (4) An offer of a fact for an inadmissible purpose A is properly excluded, though the same fact would have been admissible for purpose B.[10] (5) Conversely, an offer of a fact for purpose B is properly admitted, even though the same fact would have been inadmissible if offered for purpose A; this follows from the doctrine of multiple admissibility (*ante*, § 13).

§ 18. **The Objection.** The initiative in excluding improper evidence is

ant offered to prove by the witness" a specific conversation set out in full; a ruling rejecting the offer was sustained, partly because "it does not appear that any question was asked the witness").

[6] For the doctrine of *conditional admissibility*, by which an offer, positively made, is received conditionally, see *ante*, § 14, *post*, § 1871.

[7] For the rule that an offer rejected in the form of a question must *show that the excluded answer would have been material*, in order to justify an appeal, see *post*, § 20, under Exceptions.

[8] 1895, Herndon *v.* Black, 97 Ga. 327, 22 S. E. 924; 1885, Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91 (libel; offer rejected to show that the witness "communicated all these facts" to the plaintiff; not all of the facts being admissible for a privileged communication, "it was counsel's duty to specifically state the facts which they expected to show that the witness communicated to their client; . . . the Court was not bound to analyze the testimony and sift out the competent from the incompetent"); 1903, Farleigh *v.* Kelley, — Mont. —, 72 Pac. 756.

[9] 1855, Phillips *v.* Hoyle, 4 Gray 568.

[10] 1849, Doe *v.* Beviss, 7 C. B. 456, 508 (a reeve's account-book, being offered as entries against a deceased person's interest, held properly rejected, and the proposal to admit them as admissions of the lord of the manor, by reason of the book being in the latter's possession, this ground of reception, not having been urged at the trial, was rejected; "it would be manifestly unjust to allow that ground to be taken now, seeing that, if it had been so put then, it might have been explained"); 1890, Royal Ins. Co. *v.* Duffus, 18 Can. Sup. 711 (insurance; the finding of matches and shavings near by, being properly excluded on an offer to evidence an incendiary origin, was not allowed to be afterwards maintained as an offer to evidence the extent of the fire); 1834, Goodhand *v.* Benton, 6 G. & J. 481, 488 ("For the purpose for which the account was offered in evidence, we think it clearly inadmissible and approve of its rejection by the County Court. . . . In the Court's rejection of the account, they do not declare it admissible evidence for no purpose; but simply that it was inadmissible for the purpose for which it was offered. It was still open to the appellant to offer it as evidence for any other purpose for which it was legally competent. Had the defendant offered the account generally, without specifying his object, or had stated it to be to contradict or discredit the testimony of the witness given on his examination in chief, . . . there could not have been a doubt as to its legal admissibility").

left entirely to the opponent, — so far at least as concerns his right to appeal on that ground to another tribunal. The judge may of his own motion deal with offered evidence; but for all subsequent purposes it must appear that the opponent invoked some rule of evidence. The function of the objection is first to signify that there is an issue of law, and, secondly, to give notice of the terms of the issue. An objection serves, for the rules of evidence, the same purpose as a demurrer for the rules of substantive law:

1835, *Mason, Sen.*, in *Gregory* v. *Dodge*, 14 Wend. 593, 617: "If a party will not object, he admits the competency of the witness. To allow of a different rule would lead to great injustice. It is a trite, but nevertheless a very equitable saying, if a party will not speak when he ought to, he shall not be heard when he wants to speak. If no objection be made, the [other] party is well justified in supposing that it is not intended to be made."

The procedure for objections may be considered under five heads, — the time, the form, the tenor, the waiver, and the burden of proof.

a. Time of the Objection. The general principle governing the time of the objection is that it must be made as soon as the applicability of it is known (or could reasonably have been known) to the opponent, unless some special reason makes a postponement desirable for him and not unfair to the proponent of the evidence.

(1) For evidence first taken *at the trial*, the objection may be to the disqualification of a particular witness in general or to the inadmissibility of an evidentiary fact contained in a specific question or document. An objection to a *witness' disqualification in general* must be made as soon as he is called to the stand and before his direct examination begins, provided his disqualification was then known. But the rule on this point has relaxed in modern times, owing to the increasing disuse of the formal *voir dire* or preliminary questioning; and the subject is better considered in connection with the general doctrine of Testimonial Qualifications (*post*, §§ 486, 586).

For evidence contained in a *specific question*, the objection must ordinarily be made as soon as the question is stated, and before the answer is given; unless the inadmissibility was due, not to the subject of the question, but to some feature of the answer:

1824, *Holroyd*, J., in *Bulkeley* v. *Butler*, 2 B. & C. 434, 443: "If the objection was known *a priori*, it should have been made before the evidence was given. But if it was not discovered until afterwards, then the judge should have been requested to strike the evidence out of his notes; and if after that he persevered in summing it up to the jury, that would have been good ground for tendering a bill of exceptions."

1871, *Bartol*, C. J., in *Marsh* v. *Hand*, 35 Md. 123, 127: "The bill of exceptions states that no notice had been given to produce the original; there was no admission or proof that the original had ever been received by the plaintiffs. It is very clear that the copy was not legal or admissible evidence. The bill of exceptions however states that it was offered, and a part of it read to the jury, when the plaintiffs' counsel made their objection. The Court decided that the objection came too late: 'that having allowed the first part of the letter to be read, the plaintiffs could not object to the reading of the balance, and that it was too late to object to the admission of the letter, in whole or

in part.' . . . The rule is well settled, 'that it is the duty of counsel, if aware of the objections to its admissibility, to object to the testimony at the time it is offered to be given,' and it has been embodied among the rules of the Superior Court, as follows: Rule 34. 'Every objection to the admissibility of evidence shall be made at the time such evidence is offered, or as soon thereafter as the objection to its admissibility shall have become apparent; otherwise, the objection shall be treated as waived.' This rule does not appear to us to have been infringed in this case by the appellants. It must have a reasonable interpretation. Its object is to prevent a party from knowingly withholding his objection, until he discovers the effect of the testimony, and then if it turns out to be unfavorable to interpose his objection. Such a course could not be allowed. It is very obvious from reading the bill of exceptions in this case, that such a purpose could not be justly ascribed to the plaintiffs' attorneys. There is nothing to show that they waived their objection or consented to the copy of the letter being read. It was not submitted to their inspection before it was offered, as is the usual and proper course. But it appears that in the hurry of the trial, probably from a momentary inadvertence on their part, a portion of the letter had been read to the jury, when the objection was interposed in good faith and with reasonable diligence. In our judgment it would be too strict and narrow a construction of the rule, to deny them under such circumstances, the right to make their objection."

1889, *Elliott*, C. J., in *Jones* v. *State*, 118 Ind. 39, 20 N. E. 634: "The question was in form and substance a proper one, and of course could not have been successfully assailed, so that an objection would have been unavailing. The appellant therefore did not lose the right to move to reject the answer by failing to object to the question. Where the question is a competent one, and the answer incompetent, the correct practice is to move to strike out the answer."[1]

(2) For evidence taken *by deposition before trial*, the general principle is that the objection should be made at the time of the taking (or in general by motion to suppress before trial[2]), if the ground of the objection was such as might have been obviated before trial, but otherwise not, because the officer has ordinarily no power to disallow answers; in other words, the objection before trial serves as a notice required by fairness to the opponent, rather than as a means of excluding the evidence or obtaining a ruling:

1835, *Walworth*, C., in *Gregory* v. *Dodge*, 14 Wend. 593, 595: "The object of requiring the objection to the competency of a witness to be made before his testimony is closed was to enable the party calling him to obviate the objection, if possible, by a release, or, if that could not be done, to give the party an opportunity of substantiating the facts by other witnesses. . . . The objection [against a deponent] to his competency and the nature of the interest or other disqualification should be distinctly stated, in the same manner as an objection to the competency of a witness is taken at the circuit: except that it will

[1] *Accord*: 1899, Coppin v. State, 123 Ala. 58, 26 So. 333; 1903, Yoder v. Reynolds, — Mont. —, 72 Pac. 417; 1903, Dobson v. Southern R. Co., — N. C. —, 44 S. E. 593; 1903, McGarrity v. R. Co., — R. I. —, 55 Atl. 718; 1894, Vermillion Co. v. Vermillion, 6 S. Dak. 466, 61 N. W. 802; 1880, Thompson, Trials, I, §§ 700, 715–720; 1894, Elliott, General Practice, II, § 594. An objection, upon its ground becoming known, must be made within a reasonable time thereafter: 1902, North v. Mallory, 94 Md. 305, 51 Atl. 89; and, in any case, before the end of the trial; 1901, Brady v. Nally, 151 N. Y. 258, 45 N. E. 547, 549. For the *reservation of the right* to object, see *infra*.

For the right to require the proponent of a *document* to show it to the opponent, so that he may object if necessary, see *post*, § 1861.

[2] The difference here will depend on the kind of deposition and the subject of objection. For example, an objection to the caption or other formality of course cannot be made until the document has been returned by the officers to the clerk; on the other hand, an objection to a written interrogatory in a commission is feasible before the commission is sent out.

not be necessary for the party making the objection to produce his evidence in support thereof previous to the examination of the witness."

1865, *Field*, J., in *York Co.* v. *Central R. Co.*, 3 Wall. 107, 113: "All objections of a formal character, and such as might have been obviated if urged on the examination of a witness, must be raised at such examination or upon motion to suppress. The rule may be different in some State courts; but this rule is more likely than any other to prevent surprise and secure the ends of justice. There may be cases where the rule should be relaxed."

1874, *Swayne*, J., in *Doane* v. *Glenn*, 21 Wall. 33, 35: "In such cases [of formal defects] the objection must be noted when the deposition is taken, or be presented by a motion to suppress before the trial is begun. The party taking the deposition is entitled to have the question of its admissibility settled in advance. Good faith and due diligence are required on both sides. When such objections, under the circumstances of this case, are withheld until the trial is in progress, they must be regarded as waived, and the deposition should be admitted in evidence. This is demanded by the interests of justice. It is necessary to prevent surprise and the sacrifice of substantial rights. It subjects the other party to no hardship. All that is exacted of him is proper frankness."[3]

But so broad a principle is seldom stated. The doctrine is usually dealt with in specific rules. Objections to the *procedure* of taking and the *form* of the document must be made before trial;[4] so also objections to the manner of the *interrogatories*, for example, as improperly leading the deponent,[5] or to the manner of the answers, as being insufficient or irresponsive.[6] On the other hand, objections to the *materiality* or *relevancy* of particular facts need not be made until the trial.[7] The *disqualification* of a witness is sometimes

[3] This general principle, by which the incurability of the objection is taken as the test, is found stated in the following cases also: 1901, Albers Commission Co. *v.* Sessel, 193 Ill. 153, 61 N. E. 1075 (good opinion, reviewing the Illinois rulings); 1865, Blackburn *v.* Crawfords, 3 Wall. 175, 191 (similar to York Co. *v.* Central R. Co., *supra*). The general subject is treated in the following works: 1880, Weeks, Depositions, §§ 389, 413, 423; 1880, Thompson, Trials, I, § 701; 1894, Elliott, General Practice, I, § 413. The local statute usually prescribes a rule.

[4] 1898, Meyer *v.* Rothe, 13 D. C. App. 97, 99; 1873, Delventhal *v.* Jones, 53 Mo. 460, 462 ("A party should not be permitted to lie by and lull his adversary into a false sense of security by failure to file any motion to suppress his depositions, thus induce him to announce himself ready for trial, and then count on springing the question of some informality on him for the first time when he offers to read those depositions in evidence"); 1854, Crowell *v.* Bank, 3 Oh. St. 406 ("Exceptions to depositions for other causes than the competency of the witness or the relevancy of the testimony should not be heard unless noted on the depositions, or notice thereof given to the opposite party before the cause is called for trial"); 1903, Willeford *v.* Bailey, — N. C. —, 43 S. E. 928; 1902, Neland *v.* Dealy, — N. D. —, 89 N. W. 325; 1877, Hord *v.* Colbert, 28 Gratt. 49, 54.

Contra, but clearly wrong: 1853, Mills *v.* Dunlap, 3 Cal. 94, 96 (motion to suppress for various informalities, made on the day of filing; "the motion was prematurely made; the proper time to have objected to the introduction of the deposition as testimony was when it was offered in proof upon the trial").

[5] 1831, Woodman *v.* Coolbroth, 7 Greenl. 181, 184; 1847, Glasgow *v.* Ridge, 11 Mo. 40; 1849, Walsh *v.* Agnew, 12 id. 525; 1850, Whipple *v.* Stevens, 22 N. H. 219, 224 (since it is an objection "which if brought to the attention of the opposite party might be obviated"); 1849, Chambers *v.* Hunt, 22 N. J. L. 552, 562; 1810, Sheeler *v.* Speer, 3 Binn. 133; 1823, Strickler *v.* Todd, 10 S. & R. 73; 1869, Hill *v.* Canfield, 63 Pa. 77, 84.

Contra, but wrong: 1823, Craddock *v.* Craddock, 3 Litt. 77 ("It would be obviously absurd to require the objection to be made where it could not be decided," applying this rule even to leading questions).

[6] 1846, Spence *v.* Mitchell, 9 Als. 744, 749; 1856, McCreary *v.* Turk, 29 Id. 244, 246; 1876, Louisville & N. R. Co. *v.* Brown, 56 id. 411, 413 ("The reason of the rule is that the objection is founded on a defect which can be cured; it is unlike an objection to the relevancy or competency of the evidence"); 1875, Sturm *v.* Ins. Co., 63 N. Y. 77, 87 ("He should take an earlier opportunity for action, so that, if [he is] successful, his opponent might move for a commission to examine his witness anew out of court or might obtain a personal attendance at the trial").

[7] 1847, Wall *v.* Williams, 11 Ala. 826, 834; 1859, Walker *v.* Walker, 34 id. 469, 472, *semble*; 1873, McCoy *v.* People, 71 Ill. 111, 116, *semble* ("It is the duty of a party who offers to read a deposition in evidence to know in advance that

removable by the party, sometimes not; and hence some Courts are found insisting on objection before trial,[8] others not;[9] the truth is that it must depend on the nature of the disqualification.[10] So, too, of the *auxiliary rules*, such as the production of a documentary original, or its authentication; in so far as these objections may be curable in the interval before trial, they should be made before t [11] When the *trial* comes, it is necessary to make formal objection, even when objection was already made before trial,[12] because the former objection was essentially only a notice to the proponent and there was no opportunity for securing a judicial ruling upon it. A failure to object at one trial precludes the opponent at any *subsequent trial* from further objection, for the reason and to the extent that a failure to object before the first trial would have precluded him;[13] and of course no objection at all will be heard when made for the first time in the *court of appeal*.[14]

b. Form of the Objection. An objection, like an offer, must be positive, not hypothetical or contingent; hence, it cannot be reserved or postponed by notifying the Court, at the time when it should be made, that it will possibly be made in the future;[15] unless, through the length of a deposition, for example, or a complication of relevancies, it is not practicable for the opponent to know whether there is ground for objection.[16] The test is, whether he at the time of the offer knows or could know the grounds; if he does, his decision must be absolute, not contingent.[17]

the questions and answers are relevant"); 1878, Myers *v.* Murphy, 60 Ind. 282, 285 ("the motion to suppress was made before the trial of the cause and at a time when the Court could not possibly know whether the depositions would be relevant or irrelevant"); 1897, Winters *v.* Winters, 102 Ia. 53, 71 N. W. 184 (confidential communication to a physician); 1901, Wanamaker *v.* Megraw, 168 N. Y. 125, 61 N. E. 112 (under C. C. P. § 611).

[8] 1863, Moshier *v.* Knox College, 32 Ill. 155, 163; 1835, Gregory *v.* Dodge, 14 Wend. 593 (quoted *supra*); 1825, U. S. *v.* One Case of Hair Pencils, 1 Paine 400; 1872, Shutte *v.* Thompson, 15 Wall. 151, 160.

[9] 1829, Talbot *v.* Clark, 8 Pick. 51, 56 ("All question as to the form of the interrogatories should be made before the commission goes, to give the other party opportunity to vary his interrogatories; but objections to the competency of a witness should be made to the Court at the trial"); 1858, Adams *v.* Wadleigh, 10 Gray 360; 1903, Woodard *v.* Cutter, — Nebr. —, 96 N. W. 54; 1854, Crowell *v.* Bank, 3 Oh. St. 406 (see citation *supra*). The local statute often declares a rule.

[10] 1901, Albers Commission Co. *v.* Sessel, 193 Ill. 153, 61 N. E. 1075 (incompetent survivor; the objection being here incurable).

[11] 1865, York Co. *v.* Central R. Co., 3 Wall. 107, 113 (see quotation *supra*; an objection on the ground that the original of a document, proved by copy, was not accounted for, was required to be made at the time of taking).

For the rules as to *notice of cross-examination*, see *post*, §§ 1377–1379.

[12] 1867, Fant *v.* Miller, 17 Gratt. 187, 227.

[13] 1862, Alverson *v.* Bell, 13 Ia. 308; 1856, Bartlett *v.* Hoyt, 33 N. H. 151, 162 ("The caption of a deposition, when it has been produced in court and the deposition which it contained has been permitted to be used unquestioned, has performed its office, and it would seem to be entirely idle . . . [to permit the opponent to object later] when he has already had that opportunity, and has in effect conceded it to be sufficient"); 1862, Randolph *v.* Woodstock, 35 Vt. 291, 294 ("The party taking it has the right to consider all objections relative to the taking waived, and may allow his witness to go out of the country, or not produce him on another trial, or take the risk of his decease, relying upon having secured his testimony").

[14] 1902, Stewart *v.* Conrad, 100 Va. 128, 40 S. E. 624; and cases cited *post*, par. (*c*).

For the *reservation of objection* till a deposition is read through, see *post*, § 19.

[15] 1835, Gregory *v.* Dodge, 14 Wend. 593, 595, 615 (a reservation of "every objection to the competency of the witness and all other legal exceptions," made at the outset of an examination, held insufficient when not followed by any formal and specific objection).

[16] *Post*, § 19, where reservation of rulings is dealt with.

[17] For conditional relevancy, see *post*, § 1871.

c. Tenor of the Objection. An objection is either general or specific in its tenor; that is, either it declares generally that the offered evidence is inadmissible, or it declares specifically that the evidence violates a named principle or rule of evidence.

(1) *General Objection.* The cardinal principle (no sooner repeated by Courts than it is forgotten by counsel) is that a *general objection, if overruled,* cannot avail:

1850, Lord *Brougham*, in *Bain* v. *Whitehaven & F. R. Co.*, 3 H. L. C. 1, 16; "Now is it necessary that when a party excepts to the reception of evidence, to the rejection of evidence, or to the direction of the judge given to the jury, whatever is the subject-matter of his exception, he must state the ground of his exception, otherwise he cannot except. It is not enough for him to say, 'I except to the receiving of A's evidence,' or 'I except to the rejection of A's evidence,' or 'I except to the first passage in the direction given by the learned judge to the jury.' If he objects to the reception of A's evidence, he must show why it should not be received, as by stating that A is an incompetent witness. If, on the other hand, he objects to the rejection of A's evidence, he must show why it should not be rejected, as, for instance, that A is a competent witness, and that his evidence is admissible, and that the rejection of his evidence is contrary to law. . . . In all these cases the ground of objection must be clearly stated, and beyond the ground of the objection thus stated, the Court is not at all bound to look."

1870, *Foster*, J., in *Bundy* v. *Hyde*, 50 N. H. 116, 121: "The exception is to the refusal of the Court to entertain such an objection [to interrogatories] unless accompanied by a specification of the grounds upon which the plaintiff claimed that the questions were incompetent. We think the judge very properly refused to entertain the objection. A judge presiding at the trial of a cause is not to be burdened with the duty of searching for objections to an inquiry put by counsel, which the opposing counsel is himself unable to discover, or which, if apparent to his own mind, he sees fit to conceal for no other purpose, apparently, than to prevent a full consideration of the objection and with the ultimate intent to take advantage of an error, in case of defeat, which might have been avoided if his views of the matter had been fairly and candidly expressed at the proper time."

1874, *Dunne*, C. J., in *Rush* v. *French*, 1 Ariz. 99, 123, 25 Pac. 816: "A party wishing the benefit of the remedy must, at the time he complains, show how he is hurt; in the language of the old authorities, he must lay his finger upon the point of objection. . . . He must not merely complain in a general way, and say that to let certain evidence in will hurt his case, and that under the law it ought to be excluded, and leave the judge and opposite side in the dark as to what principle of law he relies on, and compel them to decide haphazard, or else stop the trial of the cause, with a jury waiting, while the counsel examine the whole body of the law, from the earliest judicial expositions down to the latest act of the legislature, to see if they can discover any valid objection to the testimony. The opposing counsel can make no reply to a general objection, except to throw the whole responsibility upon the judge at once, or else begin systematically and argue that under any possible objection the testimony should come in. Many trials under such a system would practically never end. The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to choose his weapons, and the time and place to use them. Such things may do in love or war, when all things are said to be fair; but life is too short to transact business on such a system in courts of justice. . . . An objection that the testimony is 'irrelevant' without specifying wherein or how or why it is irrelevant will not be considered in the supreme court as raising any issue, if the testimony could, under any possible circumstances, have been relevant. An objection that the testimony is 'inadmissible' may be disregarded; it amounts to no more than the assertion that the evidence

is illegal; the objection should fully and specifically point out how it is inadmissible. When an objection is that the evidence offered is 'incompetent and illegal,' it is the duty of the Court to overrule it if the evidence was admissible for any purpose. An objection that evidence is 'incompetent' does not raise any issue as to whether the question is leading or not. The only way to raise such an issue is to object specifically that the question is leading. . . . The object of requiring the grounds of objection to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time, — and thus appeals could often be saved, delays avoided, and substantial justice administered."

1898, *Lacombe*, J., in *Signfus* v. *Porter*, 28 C. C. A. 443, 84 Fed. 430, 435: "The objection was not fairly called to the attention of the judge who tried the cause. The stock objection 'incompetent, irrelevant, and immaterial' covers a multitude of sins. There is hardly an objectionable question but what can be classified under one or other of these heads. Sometimes the real nature of the objection is so plain that the general phrase will be quite sufficient to indicate it; indeed, it may be quite apparent without any statement of the grounds of objection at all. But there are many other objections which rest upon some particular theory of the case, or upon some single fact in proof, which a judge may readily forget in the course of a long and intricate trial. It is only fair in such cases to require counsel to state clearly to the trial judge on what ground it is that they object. Certainly it is not fair to allow such a general dragnet as 'incompetent, irrelevant, and immaterial' to be cast over every bit of evidence in the case which counsel would like to keep out, and then to permit counsel, upon careful analysis of the printed narrative of the trial, to formulate some specification of error not thought of at the time, and which, if seasonably called to the Court's attention, might have been avoided or corrected." [18]

The only modification of this broad rule is that if on the face of the evidence, in its relation to the rest of the case, there appears no purpose what-

[18] *Accord:* 1881, Allen v. McDonald, 20 N. Br. 533; 1897, Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310 (impeaching one's own witness); 1897, Yaeger v. B. Co., — Id. —, 51 Pac. 190 (mode of cross-examining); 1895, Harris v. Lumber Co., 97 Ga. 465, 25 S. E. 519 (good opinion by Lumpkin, J.); 1903, Andrews v. State, — Ga. —, 43 S. E. 852; 1855, Pegg v. Warford, 7 Md. 582, 603; 1903, Cololn v. McCormick C. O. Co., — S. C. —, 44 S. E. 380; 1880, Garner v. State, 5 Lea 213, 218 (record); 1859, Campbell v. Campbell, 3 Head 325, 329 (contents of tax-books not produced); 1886, Noonan v. Mining Co., 121 U. S. 393, 7 Sup. 911 ("The objection 'incompetent, immaterial, and irrelevant' is not specific enough"); 1890, Patrick v. Graham, 132 id. 627, 629, 10 Sup. 194; 1890, District of Columbia v. Woodbury, 136 id. 450, 462, 10 Sup. 990; 1892, Toplitz v. Hedden, 146 id. 252, 254, 13 Sup. 70; 1897, New York El. Eq. Co. v. Blair, 25 C. C. A. 216, 79 Fed. 896 ("a specimen of a practice not to be encouraged, which is to object with a rattle of words that conceal the real nature of an objection capable of being removed on the spot, and to announce its true character for the first time in the appellate court"); 1896, Culmer v. Cliff, 14 Utah 291, 47 Pac. 35; 1870, Cornell v. Barnes, 26 Wis. 473, 480 ("A general objection to particular questions that they were irrelevant, or immaterial, or improper, was not sufficient").

Contra: 1870, Greenleaf v. R. Co. 30 Ia. 301, 303.

In Groh's Sons v. Groh, — N. Y. —, 68 N. E. 992 (1903), the opinion commits the fallacy of assuming that the terms "immaterial," "incompetent," and "irrelevant," have distinct and fixed meanings. In truth, they are too loose and interchangeable to be treated seriously as if they signified any particular ground of objection. The topic is dealt with in the following works: 1880, Thompson, Trials, I, § 693; 1894, Elliott, General Practice, II, § 584.

ever for which it could have been admissible, then a *general objection*, though *overruled*, will be deemed to have been sufficient:

1874, *Dunne*, C. J., in *Rush* v. *French*, 1 Ariz. 99, 123, 25 Pac. 816: "Perhaps the only limitation it can ever require is in those exceedingly rare cases where it is apparent on the face of the proposition that it is impossible the evidence is or can be made available for any purpose. As the object of requiring a specific objection is to enable the other party to obviate it if possible, if the objection is apparent, and it is clear that the defect cannot possibly be obviated, a specific objection would not help the adverse party, and in such case a general objection would be sufficient. But of course such cases will be very rare, and a prudent practitioner will hardly risk any point on a general objection."[19]

But when a general objection is *sustained* by the trial Court, it may be presumed that the reasons were apparent to all parties without statement; and as the exception is here to be taken by the proponent of the evidence, it is fair to require him to make clear therein the basis of his claim for its admissibility, if he had rested on any specific ground; hence, the general objection will suffice, if on the face of the evidence and the rest of the case there appears to be any ground of objection which might have been valid (or, otherwise stated, if there is any purpose for which the evidence would conceivably be inadmissible).[20]

(2) *Specific Objection.* A specific objection *overruled*, will be effective to the extent of the grounds specified, and no further. An objection, therefore, naming a ground which is untenable, cannot be availed of because there was another and tenable ground which might have been named but was not:

1821, *Gibson*, J., in *Wolverton* v. *Com.*, 7 S. & R. 273, 276 (refusing to consider an objection on appeal that the loss of an original record was not shown so as to admit secondary evidence, the objection at trial having been that parol evidence of a record was never admissible): "Now I take it to be an inflexible rule, and one of the utmost value, both in pleading and evidence, that whatever is not denied or made special ground of objection is conceded. Thus, if a party being called on for that purpose opens the par-

[19] This modification is recognized in the following cases: 1842, Lord Trimleatown v. Kemmis, 5 Cl. & F. 749, 776; 1861, Nightingale v. Scannell, 18 Cal. 315, 323; 1902, Kirby v. State, — Fla. —, 32 So. 836; 1862, Clauser v. Stone, 29 Ill. 114 ("the general rule is unquestionably that objections on the trial, to a paper or other evidence, must be specially pointed out, so that they may be obviated if possible; but this rule applies only to cases where the objection can be removed by evidence, or by the act of the party under the sanction of the Court, or by the action of the Court itself"); 1903, Chicago & E. I. R. Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096; 1901, Brewer v. Bowersox, 92 Md. 567, 48 Atl. 1060; 1859, Morris v. Henderson, 37 Miss. 492, 501; 1882, Heard v. State, 59 id. 545; 1898, Lipscomb v. State, 75 id. 559, 23 So. 210; 1852, Merritt v. Seaman, 6 N. Y. 168, 171 (general objection held good, where it could not have been obviated except by a change of parties); 1897, State v. Magone, 32 Or. 206, 51 Pac. 452; 1897, Pittsburgh & W. R. Co. v. Thompson, 27 C. C. A. 338, 82 Fed. 720; 1901, Mine & Smelter S. Co. v. Parke & L. Co., 47 C. C. A. 34, 107 Fed. 881, 884; 1898, Snowden v. Coal Co., 16 Utah 366, 52 Pac. 599; 1872, Ripon v. Bittel, 30 Wis. 614, 619 ("If there was any possible purpose for which the books were admissible as evidence, or any supposable state of case in which they ought to have been received, then it was not error to admit them").

[20] 1843, Comstock v. Smith, 23 Me. 202, 208 (deposition rejected; "it is not set forth that the rejection took place on account of interest in the deponent, or of informality in the caption, or for irrelevancy; . . . it should have appeared in the exceptions how and in what particulars the plaintiff was aggrieved"); 1897, Emrich v. Union Stockyard Co., 86 Md. 482, 38 Atl. 943; 1877, Tooley v. Bacon, 70 N. Y. 34 ("When evidence is excluded upon a mere general objection, the ruling will be upheld, if any ground in fact existed for the exclusion; it will be assumed, in the absence of any request, by the opposing party or the Court, to make the objection definite, that it was understood, and that the ruling was placed upon the right ground"),

ticular view with which he offers any part of his evidence, or states the object to be attained by it, he precludes himself from insisting on its operation in any other direction, or for any other object; and the reason is, that the opposite party is prevented from objecting to its competency in any view different from the one proposed. In like manner, a party may be called on to state the particular ground on which he rests an objection to competency, and if it fails him, it is not error to receive the evidence, although it be incompetent on other grounds. Where, therefore, there is a special objection, or, what is the same in effect, a general objection resting, not on collateral circumstances, but on the supposed existence of an abstract principle admitting of no exception, as was the case here, every ground of exception which is not particularly occupied, is to be considered as abandoned. For instance, a deposition is offered, and it is resisted exclusively on the ground, that the witness is interested, or that the evidence is irrelevant; would it not be palpably unjust in a court of error, to listen to an objection, that it did not appear there had been proof of notice, or that the deposition had in all respects been regularly taken? If the defect were pointed out in time, it might be supplied by further proof; or if that were impossible, the party would, at least, be apprised of the danger to ultimate success, which is necessarily incurred by pressing the admission of incompetent testimony. Here, if instead of urging the abstract operation of the rule, the defendants had objected that the case did not fall within the particular exception to it, now relied on, the plaintiffs might have been prepared to show that the execution actually came to the hands of the sheriff, or that it was lost or destroyed; but, as to that, the silence of their antagonists at the trial, had a direct tendency to lead them into a surprise."

1874, *Dunne*, C. J., in *Rush* v. *French*, 1 Ariz. 99, 122, 25 Pac. 816: "The Supreme Court, in examining a question as to whether a ruling of the court below on an objection to evidence was correct or not, will not consider any other grounds of objection to the evidence than those urged in the court below. This rule is of universal adoption in the courts of this country. . . . Counsel are held to the grounds of objection stated at the time they call for a decision of the judge below, because they are supposed to know the law of their case, and if they do not offer other objections they are supposed to waive them, and evidence admitted without valid objection should stand. Counsel must not be permitted to wink at the introduction of evidence to which they think there is a valid objection, hoping that it may benefit them, and if it goes the other way, move to exclude it; neither must they be permitted to plead inattention as an excuse. It is their business to be attentive on a trial, and if they miss a point by neglect, they must lose it. Neither can we allow them to strike between wind and water on the trial, and then go home to their books and study out other objections and urge them here. They must stand or fall upon the case they made below, for this court is not a forum to discuss new points of this character, but simply a court of review to determine whether the rulings of the court below on the case as presented were correct or not." [21]

[21] *Accord:* 1845, Ferrand v. Milligan, 7 Q. B. 730 (in proving a public right of way over the plaintiff's land, acts of repair by a township surveyor were proved by the defendant, and in rebuttal the plaintiff offered to show a contract of repair by which the plaintiff's steward agreed to pay the surveyor; the defendant's objection that the steward had no authority to make such a contract was overruled; on a motion for a new trial, the further ground of objection that the road to which the contract related was not the road in issue was repudiated, because not specified at the time of the ruling, "its admissibility having been decided upon *alio intuitu* by the learned judge"); 1838, Williams v. Wilcox, 8 A. & E. 314, 337 ("Justice requires this, not so much to the judge, as to the opposite party, who may be willing, as in the present case would probably have been done, rather to waive the benefit of the evidence than put his verdict in peril on the issue of the objection"); 1860, Reed v. Lamb, 6 H. & N. 75, 90; 1903, Brown v. State, — Fla. —, 35 So. 82; 1873, McCoy v. People, 71 Ill. 111, 115; 1851, Holbrook v. Jackson, 7 Cush. 136, 154 (entries in a mortgagor's books being admitted over an unsound objection based on the ground of some of them not being original and not being made by the parties themselves, the further ground of objection that some of them were made after transfer of title, and therefore could not be used as admissions of a grantor, was repudiated, because not specified at the time of the ruling); 1846, Monteeth v. Caldwell, 7 Humph. 13; 1873, Burton v. Driggs, 20 Wall. 125, 133.

Compare § 13, *ante* (multiple admissibility).

Here, also, however (as with a general objection), it would seem that the objection will be effective, though naming an untenable ground, if there is no purpose at all for which the evidence could have been admissible;[22] in other words, a specific objection (like a special demurrer) is at least as good as a general objection. So, too, a specific objection *sustained* (like a general objection) is sufficient, though naming an untenable ground, if some other tenable one existed.[23]

In any event the offer, in relation to the opponent's specific objection, is to be construed as a single whole, just as it must be for the proponent himself (*ante*, § 17); so that where the objection is to a question including *several facts*[24] or to the *entire testimony* of a witness,[25] and names a ground tenable for one part but not for others, it is insufficient; the opponent must specify, not only his ground, but also the part of the offer to which the ground is applicable.

d. Waiver of Objection. An objection may of course be expressly waived. Of implied waivers, the usual instance is that of failure to make the objection at the *proper time* (*supra*, par. 1). Another instance is the curing of an error of admission by the opponent's *subsequent use of evidence similar* to that already objected to;[26] and perhaps the *prior use* of similar inadmissible

[22] 1897, Presnell *v.* Garrison, 121 N. C. 366, 28 S. E. 409.

[23] 1877, Eschbach *v.* Hurtt, 47 Md. 61, 65 (an offer of testimony to defendant's reputation among men of the same business was rejected, sustaining the erroneous ground of objection that in malicious prosecution reputation was not in issue upon damages; but the exception was overruled on appeal because the reputation among a particular class of persons was improper; "what this Court must determine is whether the testimony offered was admissible, and not whether a right or wrong reason was assigned for its rejection"). Compare § 13, *ante*.

[24] 1859, Sayre *v.* Durwood, 35 Ala. 247, 251 (a specific objection to a question calling for an answer in part legal is ineffective; so also a motion to strike out an entire answer for a reason applicable to a part only); 1893, Davis *v.* Hopkins, 18 Colo. 155, 32 Pac. 70; 1898, Lipscomb *v.* State, 75 Miss. 559, 23 So. 210 (general rule stated; but in the opinion of Magruder, J., it appears to be somewhat qualified); 1903, State *v.* Ledford, — N. C. —, 45 S. E. 944; 1828, Elliott *v.* Peirsol, 1 Pet. 328, 337 ("Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case; if they do not fit, that is enough to authorize their rejection"); 1866, U. S. *v.* McMasters, 4 Wall. 680, 682.

[25] 1861, Myers *v.* People, 26 Ill. 173, 176 (objection to the whole testimony of a witness, held insufficient where a part of it related to other crimes and was inadmissible); 1885, Louisville N. A. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389 (motion to strike out certain testimony as a whole, part of which was admissible, held properly denied; "it is the duty of the party to select the competent from the incompetent testimony"); 1889, Jones *v.* State, 118 id. 39, 20 N. E. 634; 1839, Moore *v.* Bank, 13 Pet. 302, 310; 1845, Camden *v.* Doremus, 3 How. 515, 530 ("It could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence nor point to some definite or specific defect in its character, that the Court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view").

[26] 1874, Smith *v.* Gerow, 15 N. Br. 425; 1886, Gale *v.* Shillock, 4 Dak. 182, 29 N. W. 661 ("The general rule is that, where a party makes a valid objection to the introduction of evidence and afterwards puts in evidence proving the same facts, he waives his objection"); 1841, Sanders *v.* Johnson, 6 Blackf. 50, 52 ("The defendant waived the error by introducing another deposition by the same witness testifying to the same facts contained in that which was rejected"); 1842, Hayden *v.* Palmer, 2 Hill N. Y. 205, 209 ("This case [of a harmless error] is in principle like the case of a judge erroneously receiving evidence to a fact against the party; to which he excepts, but afterwards insists upon and proves the same fact himself; that has been often allowed to defeat the effect of the exceptions. I believe it has generally been called a waiver of the exception"). But it is otherwise where the subsequent evidence is introduced merely in *self-defence*, to explain or rebut the original evidence; 1900, Salt Lake City *v.* Smith, 43 C. C. A. 637, 104 Fed. 457.

evidence may be dealt with on the theory of waiver in advance (*ante*, § 15). No doubt other conduct of various sorts may require in fairness to be deemed a waiver.[27]

e. Burden of Proof. The burden of proving the grounds of an objection is ordinarily not upon the opponent; whether he objects on the ground that the original of a document is not produced, or that an attesting witness ought to be called, or that a dying declarant was not conscious of impending dissolution, the burden of establishing the preliminary facts essential to satisfy any rule of evidence is upon the party offering it. The opponent merely invokes the law; if it is applicable to the evidence, the proponent must make the evidence satisfy the law. To this general rule there are a few exceptions, based (like all solutions of the burden of proof) on experience and convenience in special classes of cases. These exceptions can better be considered in connection with the respective kinds of evidence involved; by way of example may be named the rules that a testimonial disqualification by insanity, infancy, or interest (*post*, §§ 484, 497, 508, 584) and the existence of an improper inducement to a confession (*post*, § 860) must be shown by the opponent of the evidence.

§ 19. **The Ruling.** The main question in regard to the judge's ruling upon an objection is whether it must be immediate upon the objection. A postponement of the time, or a subsequent revocation of the ruling, may affect the objecting party in two respects, namely, in his further management of his remaining evidence and in the impression upon the jury.

(1) An objecting opponent is *entitled to an immediate* and final ruling, before the close of the proponent's case, declaring the evidence admissible or inadmissible, either absolutely or conditionally (*ante*, § 14), in so far as otherwise he would be unable to know what evidence on his part in explanation or rebuttal would be needed:

1876, *Allen*, J., in *Lathrop* v. *Bramhall*, 64 N. Y. 365, 374: "The right to object to evidence as it is offered is a legal right of which the party cannot be deprived, and the right to object and to be heard upon the objection, necessarily implies a like right to a decision by a court or referee, and the refusal to entertain an objection or to pass upon it when made is a denial of a legal right to which an exception lies. . . . The judge or referee has, within proper limits, a discretion as to the order of proof, and may permit facts to be proved provisionally, subject to the condition that other facts shall be subsequently proved which are essential to the competency of the evidence admitted. But when all the facts, upon which the party relies for the admissibility of the evidence, have been put before the Court by him and he has rested his case, the adverse party is then entitled to a definite determination as to the competency of the evidence objected to. It is then no longer a question as to the order of proof, nor is it within the discretion of the Court to postpone the decision. . . . It was their right to know before entering upon their defence what evidence they had to meet, and they were necessarily embarrassed in their defence by the refusal of the referee to pass upon the questions made. A decision

[27] 1902, Rice v. Waddill, 168 Mo. 99, 67 S. W. 605 (taking a deposition of the opponent, though without filing it, held on the facts to be a waiver of objection to incompetency). Distinguish the rule that an error of *exclusion* is cured by the opponent's subsequent introduction of the same evidence: 1903, Lloyd v. Simons, — Minn. —, 95 N. W. 903; here it is not a waiver that cures, but the immateriality of the error (*post*, § 21).

adverse to the plaintiffs would not have prevented a renewed offer of evidence upon other facts appearing; and had the evidence been either rejected or admitted, the defendants might have shaped their defence entirely differently from what they were compelled to do, proceeding in ignorance of the fact whether the evidence was in or out of the case as against them."[1]

(2) An objecting opponent is *not entitled to an immediate* and final ruling, nor can he complain of a *subsequent revocation* of a ruling, merely in so far as the temporary admission of inadmissible evidence against his objection may obtain consideration for it in the minds of the jurors; for the instruction which will accompany the subsequent striking out of the evidence must be supposed to be obeyed by the jurors; except in extreme cases which obviously call for a stricter treatment:

1848, *Redfield*, J., in *Northfield* v. *Plymouth*, 20 Vt. 582, 591: "The question, made in regard to permitting the entire deposition of Duncan to be read to the jury, notwithstanding the general objection of the defendants, and the fact that it contained some irrelevant, and perhaps improper, evidence, is a question of practice, upon which the judge, who conducts the jury trial, must be allowed some reasonable discretion. If there were ample time, it might always be better to determine, in advance, how much of a deposition should be read to the jury even upon a general objection; and in practice, ordinarily, that will be done, where the objection is specific. But very often this course will require too much delay, and always the admissibility of evidence, at the opening of the case, depends so much upon what is expected to be proved thereafter, that great latitude must be allowed, or it may become necessary to reconsider the earlier determinations of the court as the trial progresses. And if improper evidence is admitted it may readily be set right in the charge. The recent English practice, upon this point, is much more liberal, than that which obtained as long ago as the time of Chief Justice Willes."[2]

1833, *Parker*, J., in *Hamblett* v. *Hamblett*, 6 N. H. 333, 346: "We cannot adopt the broad principle there [in New York] laid down, as sound law, applicable to all cases . . . [that an erroneous ruling cannot be cured by subsequent revocation and instruction]. The reason that the testimony so given in presence of the jury *might have* an influence, though they are directed to disregard it, would apply with equal force in all cases where anything irrelevant may have crept in during the course of the trial, and would entitle parties to a succession of new trials, until no sentence should have been uttered which by any possibility might have an undue influence, though the jurors were unconscious of any influence. It is apparent that the principle cannot be carried to this extent, and other authorities show it must fall far short of it, even if it can be supported in any degree. The rule respecting the testimony of interested witnesses, as laid down by Starkie and Phillipps, is that where it is discovered incidentally in the course of a cause that the witness is interested, his evidence will be struck out, although no objection has been made to him on the *voir dire*. . . . So where evidence which is competent in one view, and yet from its nature or connection proves something else, which would not be competent, and which might possibly have an effect upon the jury, the evidence is admitted, and the jury

[1] This passage is from a dissenting opinion; but the majority seemed to have differed merely in holding that the opponent was under the circumstances not disadvantaged by the postponement. A ruling, reserved and never rendered, upon an offer objected to and left pending, is therefore equivalent to a ruling of exclusion: 1903, Adams v. Elwood, — id. —, 68 N. E. 126 (following Lathrop v. Bramhall).

[2] The following case represents the early English practice: 1737, Smith v. Richardson, Willes 20, 23 ("It was said that a very great judge had frequently admitted evidence if doubtful whether it was evidence or not, and said he would afterwards tell the jury how far they ought to have regard to it; but this, though the practice of a very great man, was thought [by the present judges] to be of very dangerous consequence"); 1769, Tullidge v. Wade, 3 Wils. 18.

directed not to regard it as evidence, except for the purpose for which it is admissible. So where the confession of a prisoner implicates others, charged in the same indictment, the whole evidence is introduced, and the jury directed to disregard it as to the others. . . . Cases are of daily occurrence, also, where evidence is admitted, which, from a failure to connect it with other evidence, with which it had a necessary connection in order to be relevant, eventually turns out to be incompetent. The utmost caution cannot always prevent the introduction of evidence, which in the course of the trial is discovered to be clearly inadmissible, and if, in such cases, its introduction was to be regarded as ground for a new trial, on the application of the party objecting, the practice should be to stop the case, and begin *de novo* to another jury, for however strongly the jury were directed to disregard the testimony, it could not be shown that it had not had an influence upon the verdict, of which the jurors were not conscious — and yet it is not believed, that a practice of stopping a trial upon such account, ever prevailed in any court. . . . This rule respecting the introduction of incompetent testimony may admit of exceptions. If the testimony be of a nature to excite popular prejudice, and if there is good reason from the verdict to suppose that it must have influenced the jury improperly, notwithstanding the direction of the judge that it was to be disregarded, such case might furnish an exception, and the granting of a new trial be a proper exercise of the discretion of the Court." [3]

§ 20. **The Exception.** The exception serves a double purpose. It makes clear that the party unfavorably affected by the ruling is not satisfied but takes issue; and it sums up and preserves the precise terms of the ruling for the purposes of appeal.[1] Both of these are indispensable. Neither of them is attained by the objection alone. Yet the distinction between objection and exception tends to become confused, and in judicial opinions the rules for exceptions are sometimes spoken of when the rules for objections are really being dealt with. But their functions are distinct. No matter how plain and correct the objection, the exception is still necessary, even though the objector and the exceptor be the same party:

1842, *Abinger*, L. C. B., in *Gibbs* v. *Pike*, 9 M. & W. 351, 360: "I cannot agree to the principle of taking the statements of counsel on such a point. . . . He may tender a bill of exceptions, or he may first ask the judge to make a note of the tender, and if the request is denied, then tender his bill of exceptions."

1837, *Story*, J., in *Poole* v. *Fleeger*, 11 Pet. 185, 211: "In the ordinary course of things at the trial, if an objection is made and overruled as to the admission of evidence, and

[3] This view represents the only sound doctrine; but it is denied in several courts. Compare the following authorities: 1877, Wilmot *v.* Vanwart, 17 N. Br. 456, 462; 1903, Bell *v.* Clarion, — Ia. —, 94 N. W. 907; 1901, Ives *v.* Ellis, 169 N. Y. 85, 62 N. E. 138; 1903, Mauk *v.* Brundage, — Oh. —, 67 N. E. 152; 1830, Thompson, Trials, 1, § 723; 1894, Elliott, General Practice, 11, § 594.

Distinguish the question whether *after a case has been submitted* to a judge without a jury, he may cure an erroneous ruling duly excepted to, by striking out and disregarding the evidence in his deliberations: 1903, Robinson *v.* N. Y. El. R. Co., — N. Y. —, 67 N. E. 431.

[1] It was the latter reason which led chiefly to the statute originally providing for the mode of taking exceptions: 1285, St. 13 Edw. I, Westminster Second, c. 31 ("When one that is impleaded before any of the justices doth alledge an exception, praying that the justices will allow it, which if they will not allow, if he that alledged the exception do write the same exception and require that the justices will put to their seals for a testimony, the justices shall do so; and if one will not, another of the company shall; and if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff shew the exception written, with the seal of the justice put to," then if the justice admit his seal genuine, the exception shall be adjudged upon).

The history of the statute is noticed in the following works: 1895, Pollock & Maitland, History of the English Law, II, 663–669; 1838, Chitty, General Practice. IV, c. 1, § 1.

the party does not take any exception at the trial, he is understood to waive it. The exception need not, indeed, then be put into form, or written out at large and signed; but it is sufficient that it is taken, and the right reserved to put it into form, within the time prescribed by the practice or rules of the court."[2]

The rules for taking exceptions to rulings upon evidence fall under four heads, — time, form, tenor, and confirmation.

(1) *Time of the Exception.* The time of the exception, in some form or other, is to be immediately upon the ruling. In special circumstances, a later time prior to the end of the trial may suffice, and local rules of court often make express regulations. But an immediate claim is usually necessary:

1709, *Wright* v. *Sharp*, 1 Salk. 288: "A corporation-book was offered in evidence at the assizes to prove a member of the corporation not in possession, and refused. No bill of exceptions was then tendered, nor were the exceptions reduced to writing; so the trial proceeded, and a verdict was given for the plaintiff. Next term the Court was moved for a bill of exceptions, and it was stirred and debated in Court. It was urged, that the law requires *quod proponat exceptionem suam*, and no time is appointed for the reducing it into writing, and the party is not grieved till a verdict be given against him; and the same memory that serves the judges for a new trial will serve for bills of exceptions. On the other side it was said, that this practice would prove a great difficulty to judges, and delay of justice; that the precedents and entries suppose the exception to be written down upon its being disallowed, and the statute ought to be construed so as to prevent inconvenience; besides the words of the Act[3] are in the present tense, and so is the writ formed on the Act; *Holt*, C. J.: 'If this practice should prevail, the judge would be in a strange condition. He forgets the exception, and refuses to sign the bill, so an action must be brought. You should have insisted on your exception at the trial. You waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause on this point. The statute indeed appoints no time, but the nature and reason of the thing requires the exception should be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence; not that they need be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record.'"

1879, *Burks*, J., in *Danville Bank* v. *Waddill*, 31 Gratt. 469, 477: "In jury trials, I have always understood the rule to be, that if a party objects to a ruling of the presiding judge during the progress of the trial, either in admitting or excluding evidence, or giving or refusing instructions, or otherwise, and intends to except to such ruling, he must make known such intention at the time of the ruling, or at least before verdict, and if the bill of exceptions cannot be drawn up at once, liberty should be reserved to do so during the term, and if he neglect to prefer exceptions until after the verdict, he will not then be allowed to do so. One of the reasons for the rule requiring this promptness in taking the exception and giving notice thereof, is that an exception taken and made known for the first time at a subsequent period in the trial might affect very injuriously the rights of the opposing party; for, if he have reasonable notice of the exception, he may, perhaps, have it in his power at the time or during the trial to obviate or counteract it; and it would be unjust to allow his adversary to insist on the exception, and have the benefit of it, after, by his own negligence, or it may be by his contrivance, he has made it impossible to meet it."

[2] 1858, Lawton *v.* Tarratt, 4 All. N. Br. 1, 21 (Gibbs *v.* Pike approved); 1851, Lisbon *v.* Bath, 23 N. H. 1, 9 (failure to note, in a bill of exceptions, a particular objection made, held a waiver of the objection).

[3] Quoted in note *supra*.

(2) *Form of the Exception.* The exception must be *written*, for a main object is to preserve in it the fact and the terms of the dispute. A complete and formal writing may be postponed; but some memorandum there must be at the initial time:

1838, Mr. *Joseph Chitty*, General Practice, IV, c. 1, § 1: "A bill of exceptions need not be in complete form at the instant it is tendered; but the substance of it ought to be then put into writing, since it is to become a record. In practice, the points of the bill of exception are usually taken down in writing and signed by the counsel of each party, and the bill of exception is prepared at leisure, or at least without reprehensible hurry."

1880, *Strong*, J., in *Hunnicutt* v. *Peyton*, 102 U. S. 333, 353: "It is no doubt necessary that exceptions should be taken and, at least, noted before the renditlon of the verdict; but the reduction of the bills to form, and the signature of the judge to the bills, required for their attestation, or, as said in the Statute of Westminster, '*for a testimony*,' may be afterwards, during the term. In practice it is not usual to reduce bills of exception to form and to obtain the signature of the judge during the progress of the trial. Nor is it necessary. The Statute of Westminster did not require it. It would greatly and uselessly retard the business of courts were it required that every time an exception is taken the progress of the trial should be stayed until the bill could be reduced to form and signed by the judge. For this reason it has always been held that it need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over."

(3) *Tenor of the Exception.* The exception, as formally stated, must contain all that is necessary for determining the issue made. It must therefore include the offer of evidence, the objection with its reasons, the ruling, and the notice of exception taken. Furthermore, if the ruling was one excluding a question, so that the offering party is the exceptor, he must state the tenor of the *expected answer* to the question, and if the objecting party is the exceptor, then the tenor of the *answer given;* so that it may be seen whether this answer was favorable or unfavorable, and therefore whether he has lost by the one or been injured by the other. So far as admissibility may be dependent on other evidence introduced or offered to be, that other evidence must also be set out. Finally, with reference to determining the materiality of the error if any, the tenor of sufficient of the remaining evidence must be stated; but this is a consequence of the doctrine of new trials (*post*, § 21) and not of the doctrine of exceptions:

1874, *Dunne*, C. J., in *Rush* v. *French*, 1 Ariz. 99, 121, 25 Pac. 816: "The cases where we are called on to review rulings on the admission of evidence may be reduced to two classes: 1. When the party objecting was overruled and he appeals; 2. When the party objecting was sustained and the other side appeals. 1. In the first case, where the party objecting was overruled and he appeals, he must show by the record: (1) What the question was, and what answer was given to it, or what the evidence was which was introduced against his objection. This is important because the evidence admitted may not injure him. The answer may have been in his favor. It is not necessary that he should show clearly that he was injured, because that would often be impossible, but he must show that the evidence was admitted against his valid objection, which, it may be, has injured him; for the object of granting a review by this Court is not to determine the abstract questions as to whether the judge below ruled correctly or not, but to give relief in case a party may have been injured by an erroneous ruling. (2) He must set out

enough of the evidence to illustrate the point of his objection, and to raise the presumption that he may have been injured; but where error is shown, injury will be presumed, unless the contrary clearly appears. (3) He must show what kind of an objection was made, and to avail him here he must show that the objection as made was good. Then it is for the other party to see that the statement made contains a showing sufficient to sustain the admission of the evidence as against the objection made. The amount of showing the latter party depends upon the nature of the objection. If the party objecting interpose merely a general objection, all that is necessary is to show enough to obviate the general objection. If the objection is specific, all that is necessary is to show enough to obviate the specific objection as made. Beyond this, we cannot in reason require him to go. He should defend himself against the particular attack made, but we cannot ask him to fortify himself against all possible attacks which might have been made. 2. In the second case, where the party objecting was sustained, and the other side appeals and asks to have the ruling declared erroneous, the party appealing must see that the record shows: (1) What question he asked or what evidence he sought to introduce; (2) Sufficient of the other evidence to illustrate the admissibility of that offered; (3) That the evidence so offered was excluded; (4) That there is reasonable ground to presume that he may have been injured by such exclusion. The other party must see that the record shows good grounds of exclusion."

1903, *Lamar, J.*, in *Griffin* v. *Henderson*, 117 Ga. —, 43 S. E. 712: "While the motion says what she would have testified, it does not appear that the Court was informed thereof *at the time* he excluded her; and therefore we are not permitted to consider this assignment of error. . . . In a few instances there may be one exception, particularly in cross-examinations, where the examining counsel may not know what the answer would be, or is exercising a right to test the witness. But ordinarily the exclusion of oral testimony can be made available as error only by asking some pertinent question, and, if an objection is sustained, informing the Court at the time what the answer would be, so that he can then determine whether the fact is or is not material. It will not do to state thereafter what the witness would have answered. . . . If a new trial should be granted because the answer was excluded, it might happen that on the second trial the question would be again propounded, allowed, and the witness give hearsay, inadmissible, or irrelevant testimony, or the answer might be harmful instead of helpful, or the witness may reply, 'I do not know,' with the result that the time and money of the parties and the country has been wasted for so inconsequent a conclusion. That this is not unlikely to occur is shown by the experience of all practising lawyers, who have often seen a long and heated argument as to the right to ask a question, followed by the laughter of all bystanders when the Court held it competent, and the witness replied that he knew nothing about the matter. Parties can often agree in the presence of the Court as to what the witness would testify, or, if not, the witness or examining attorney can state what the answer would be; and, where the subject-matter is important, the judge may, in his discretion, retire the jury until its admissibility has been settled. We are well aware that the rule may be perverted into a means of getting inadmissible evidence before the jury, or, by forcing their constant withdrawal, retard the trial. The Courts must rely upon the good faith of counsel not to bring about such a result. But it would never do to grant a new trial until it appeared not only that the question was proper, but that the answer was material, and would have been of benefit to the complaining party." [4]

[4] *Accord:* Illustrating the case of an exception to *evidence admitted:* 1889, Smethurst *v.* Barton Sq. Church, 148 Mass. 261, 267, 19 N. E. 387; 1902, Rio Grande W. R. Co. *v.* Utah N. Co., — Utah —, 70 Pac. 859; 1862, Randolph *v.* Woodstock, 35 Vt. 291, 296 ("Suppose a party offers to prove by a witness some fact which is clearly improper and inadmissible, and the offer is objected to, but the inquiry is allowed, and the witness answers that he has no knowledge on the subject, is this error for which the party objecting is entitled to a new trial? We think not"); 1902, State *v.* Buck, 74 id. 29, 51 Atl. 1087. Illustrating the case of an exception to *questions excluded:* 1903, Griffin *v.* Henderson, 117 Ga. —, 43 S. E. 712 (see quotation *supra*); Andrews *v.* State, — id. —, 43 S. E. 852 (even on cross-examination, the motion for

(4) *Confirmation by Motion for New Trial.* By the orthodox English practice (doubtless still followed in some of our own jurisdictions) the remedies of new trial and of bill of exceptions were regarded as alternative and mutually exclusive.[5] Moreover, the bill of exceptions came to be only rarely chosen for establishing errors in evidence-rulings, partly because of its greater formality and expense, partly because the extensive discretion in granting new trials gave an ample remedy,[6] and partly because the tradition persisted (ever since the statute of Edward I) that a bill of exceptions involved in some degree a reflection on the trustworthiness of the trial judge, as being incapable or unwilling to note correctly the point of dispute.[7] But in the United States the orthodox practice fell extensively out of use. The bill of exceptions came to be the usual method of raising questions upon evidence,— chiefly, no doubt, because the English judicial custom of taking full notes of evidence was not kept up, except in early times in a few of the older jurisdictions. The two remedies not only ceased to be mutually exclusive, but a rule arose that a bill of exceptions *must be confirmed afterwards by a motion for a new trial*, as a condition precedent to the consideration of the bill on appeal. The reason for this rule has been thus stated:

1885, *Green*, J., in *Danks* v. *Rodeheaver*, 26 W. Va. 274, 298: "If either party were allowed to have the rulings of the Court below, which had been properly excepted to and a bill of exceptions taken at the proper time, reviewed without his making a motion for a new trial and its being overruled, he never would make such motion, when his only ground for it was these erroneous rulings against him during the trial; as, if he failed to make the motion, the appellate Court would have to presume, that such rulings were prejudicial to him; but if he be required to make such motion before he can avail himself of such rulings against him during the trial, he will afford his opponent an opportunity of having all the evidence spread upon the records, and when this is done, the appellate Court may see that these rulings at the trial were not really prejudicial to him, and in that case, though the rulings were against him, and he properly excepted to them and made them a part of the record, still the appellate Court will not reverse the case, though the rulings were erroneous, the presumption that they were prejudicial to him having been rebutted by the evidence in the case when all certified."[8]

new trial "should in some way indicate when the party had been injured by the exclusion"); 1883, Mills *v.* Winter, 94 Ind. 329, 331 (offer of witnesses to character, rejected; ruling sustained because "the party excepting should see to it that the bill of exceptions is so made up as to show affirmatively that the offer should have been sustained"); 1889, Kern *v.* Bridwell, 119 id. 226, 21 N. E. 664; 1901, Pittsburgh C. C. & St. L. R. Co. *v.* Martin, 157 id. 216, 61 N. E. 229 (for direct examination); 1902, Hoover *v.* Patton, 158 id. 524, 64 N. E. 10; 1903, Dunn *v.* State, — id. —, 67 N. E. 940 (reviewing the cases); 1901, Savary *v.* State, 62 Nebr. 166, 87 N. W. 34; 1897, State *v.* Noakes, 70 Vt. 247, 40 Atl. 249; 1868, Dreher *v.* Fitchburg, 22 Wis. 675, 680; 1903, Keffer *v.* State, — Wyo. —, 73 Pac. 556. The subject is treated in Elliott, General Practice (1894), II, § 587.

For the question whether in *chancery* admissible evidence, erroneously *rejected below*, should *on appeal be considered*, if preserved in the record, see Leavitt *v.* Bartholomew, — Nebr. —, 93 N. W. 856 (1901), and authorities cited.

[5] 1818, Doe *v.* Roberts, 2 Chitty 272; 1828, Tidd's Practice, 9th ed., II, 863.

[6] 1838, Chitty, General Practice, V, c. 1, § 1.

[7] Gibbs *v.* Pike, 9 M. & W. 351 (quoted *supra*); Bulkeley *v.* Butler, 2 B. & C. 445.

[8] The opinion in the above case collects and examines the authorities. *Accord:* 1853, Phelps *v.* Mayer, 15 How. U. S. 160. *Contra:* 1863, McCoy *v.* Julien, 15 Ia. 371, 374.

Distinguish the question whether a motion for a new trial is needed where the error alleged was a ruling that the evidence *as a whole was insufficient to go to the jury*; 1869, Smith *v.* Gillett, 50 Ill. 290, 300; this is a complicated question, involving the doctrine dealt with *post*, § 2494.

§ 21. **The Judgment of Error; Materiality, and New Trial.** An erroneous ruling having been made and excepted to, and the excepting party having received an adverse verdict on the law and the evidence, the great question on appeal then becomes,[1] *Shall a new trial be granted because of the erroneous admission or exclusion of the particular piece of evidence?* It is a great question, because, although it does not directly involve the tenor of the rules of evidence, yet the whole status of the law of evidence, as well as the efficiency of our methods of doing justice, is dependent upon the answer. Whether that law of evidence shall be a mere means to an end, — the end being a just settlement of particular controversies, — or whether it shall be an end in itself — an end so independent of justice, and so superior thereto, that it must be attained even at the cost of justice, — this depends practically upon whether it can be conceded that an erroneous ruling of evidence is *ipso facto* a ground for a new trial.

1. *The Orthodox English Rule, and the Exchequer Rule.* The original and orthodox English rule was plain. An erroneous admission or rejection of a piece of evidence was not a sufficient ground for setting aside the verdict and ordering a new trial, unless upon all the evidence it appeared to the judges that the truth had thereby not been reached:

1807, *R.* v. *Ball*, R. & R. 133: "Whether the judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was of itself sufficient to support the conviction, the Judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence, in such a way as to have no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought that as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have been received. But if the case without such improper evidence were not clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise."

Such was the rule in the King's Bench, in criminal[2] as well as in civil cases.[3] Such was the rule in the Common Pleas,[4] plainly stated in *Doe* v.

[1] The other questions on appeal concerning evidence have already been considered under other heads, — whether the *record* of the exception *must show* the evidence excluded or admitted (*ante*, § 20); whether an erroneous ruling can be *cured* by subsequent instruction of the trial Court (*ante*, § 19); whether a *ground of objection not named* upon the trial can be considered in the appellate Court (*ante*, § 18); and whether an erroneous ruling of admission is *waived* by the objector's own subsequent use of similar evidence (*ante*, § 18).

[2] 1781, Tinkler's Case, R & R. 133, note (all the Judges thought the evidence of a witness of the name of Parsons ought not in strictness to have been received; but as the evidence was ample without it, "the Judges did not think themselves bound to stop the course of justice"); 1807, R. *v.* Ball, R. & R. 133 (quoted *supra*); 1809, Lord Ellenborough, C. J., in R. *v.* Teal, 11 East 311 ("If the evidence [as to character] had been admitted, it could have made no difference, at least it ought not to have made any difference in the verdict"); 1810, R. *v.* Treble, R. & R. 164, Heath, J. Though there could not at this period be a new trial in cases of felony, but only a pardon of the prisoner, still the general judicial tendency of those times to favor the escape from the gallows was such as to make up, in the judicial mind, for this difference between the modern law and the earlier law as affecting the balance of risks.

[3] 1819, Abbott, C. J., in Tyrwhitt *v.* Wynne, 2 B. & Ald. 554, 559 (the mere erroneous ruling of rejection "will not be sufficient, for it must be further shown and substantiated that, if they had been received, they would have led to a probable conclusion in favor of the offering party"). In Edwards *v.* Evans, 3 East 451, 455 (1803), occurs a premonitory instance of the later rule.

[4] 1807, Mansfield, C. J., in Horford *v.* Wil-

Tyler. Such was equally the practice in Chancery,[5] when issues had been sent to a jury in a common law court. All this lasted down to the decade of 1830.

In that decade the Court of Exchequer, in *Crease* v. *Barrett*,[6] announced a rule which in spirit and in later interpretation signified that an error of ruling created *per se* for the excepting and defeated party a right to a new trial. The new Exchequer rule was speedily accepted in the other courts;[7] and for something more than a generation it remained the law of England, until it was reformed away, for civil causes, in 1875.[8]

The Exchequer rule duly obtained recognition in the United States in a

son, 1 Taunt. 12, 14 ("Neither will the Court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury"); 1830, Doe v. Tyler, 6 Bing. 561 (rule explicitly approved); so too, in the Federal Supreme Court, for new trials as distinguished from writs of error; 1828, Story, J., in M'Lanahan v. Ins. Co., 1 Pet. 170, 183 ("In such cases, the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the Court itself; if therefore upon the whole case justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial").

[5] 1805, L. C. Eldon, in Pemberton v. Pemberton, 11 Ves. 50, 52 ("If upon the whole [record] he is satisfied that justice has been done, though he may think that some evidence was improperly rejected at law, he is at liberty to refuse a new trial"); 1816, Bullen v. Michel, 4 Dow 297, 319, 330; 1826, Barker v. Ray, 2 Russ. 76; 1838, L. C. Cottenham, in Lorton v. Kingston, 5 Cl. & F. 269, 340 ("The true consideration always is whether upon the whole there appears to be such a case as enables the judge in equity satisfactorily to administer the equities between the parties without the assistance of another trial"). So, too, generally in this country to-day: 1903, Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56.

[6] 1835, Crease v. Barrett, 1 C. M. & R. 919, 932 (intimating that the only cases where the error would be ineffective were where the same fact was otherwise proved or not disputed and where a verdict in favor of the defeated party "would have been clearly and manifestly against the weight of evidence and certainly set aside upon application to the Court as an improper verdict"); 1846, Hughes v. Hughes, 15 M. & W. 701 (Alderson, B., declared the rule to be that "the Court will not grant a new trial if with the evidence rejected a verdict given for the party offering it would be clearly against the weight of evidence, or if without the evidence received there be enough to warrant the verdict"; confusing two different tests, and citing Doe v. Tyler and Crease v. Barrett without discrimination); 1847, Doe v. Langfield, 16 id. 497, 515 (approving Crease v. Barrett, Parke, B., applies the exception there stated, and here refuses a new trial since "no evidence was improperly rejected but such as was immaterial and if admitted would not have prevented a nonsuit").

[7] 1835, Rutzen v. Farr, 4 A. & E. 53 (the Exchequer rule in Crease v. Barrett followed, and the Common Pleas rule in Doe v. Tyler rejected); 1837, Wright v. Tatham, 7 A. & E. 313, 330 (Denman, C. J. "As this Court has so lately, on full consideration, and in conformity with a decision of the Court of Exchequer, renounced the discretion which was in that case [of Doe v. Tyler] exercised, we need not repeat our reasons for holding that . . . the losing party has a right to a new trial"); 1887, Coleridge, C. J., in R. v. Gibson, L. R. 18 Q. B. D. 537, 540 ("Until the passing of the Judicature Acts, the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial"). So also in *Canada*: 1895, Merritt v. Hepenstal, 25 Can. Sup. 150, 152, *semble*; 1867, Key v. Thomson, 1 Han. N. Pr. 295, 2 Id. 224, 228; 1877, Wilmot v. Vanwart, 17 N. Br. 456, 462; 1883, Doe v. Gilbert, 22 id. 576, 587.

[8] 1875, Judicature Act, 1883, Rules of the Supreme Court, Order 39, rule 6 ("A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence . . . unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned on the trial"); 1893, Pearce v. Lansdowne, 69 L. T. Rep. 316. So also in *Canada*: Can. Crim. Code 1892, § 746; N. Br. St. 1894, c. 8, § 47; N. Sc. Rules of Court 1900, Ord. 37, R. 6; 1897, R. v. Woods, 5 Br. C. 585, 590 (Dominion statute applied).

The reform had originally been introduced by Mr. (later Sir) James F. Stephen: 1872, Indian Evidence Act (Stephen's ed.), § 167 ("The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision").

majority of jurisdictions. In its most extreme form, and in language exhibiting in the most radical manner the theory that the rules of evidence form an end in themselves, the new doctrine — which had indeed given sporadic signs of independent growth — was now rapidly promulgated.[9] During the last generation, the Exchequer heresy has clearly gained the ascendance.

There are, to be sure, Courts that still cling to the old-fashioned notion, resting on the orthodoxy of *Doe* v. *Tyler*, and refusing to bow the knee to the Baal-worship of the rules of evidence.[10] A model example of such an opinion is the following:

1866, *Porter*, J., in *People* v. *Fernandez*, 35 N. Y. 40, 50: "The circumstances which were established by evidence, confessedly competent, were so conclusive as to the guilt of the prisoner that no honest jury could refuse to convict him of the crime. To acquit him would be to shield guilt from justice and deny the protection of law to the innocent. If, therefore, the Court below was right in holding that the judge erred in admitting additional evidence tending to the same conclusion, we think it was clearly wrong in reversing the conviction; for, upon the facts disclosed, the supposed error could work no legal injury to the prisoner. As it was shown, beyond all question, by undisputed and competent proof, that the accused was one of the murderers, we are under no legal or moral obligation to assume that the jury might have rendered a false verdict of acquittal but for the erroneous admission of other and needless evidence. In this respect, there is no distinction between civil and criminal cases. The reception of illegal evidence is presumptively injurious to the party objecting to its admission; but where the presumption is repelled, and it clearly appears, on examination of the whole record, beyond the possibility of reasonable doubt, that the result would have been the same, if the objectionable proof had been rejected, the error furnishes no ground for reversal."

[9] 1895, Miller, J., in State v. Callahan, 47 La. An. 497, 15 So. 50 ("The admission of illegal evidence in a civil case is comparatively unimportant. . . . But in a criminal case . . . it is for the jury to convict, and it is presumed to act on all the evidence submitted. . . . It is the right of the accused to be tried on legal evidence alone. . . . The conviction must be by legal evidence only"); 1808, Sewall, J., in Bartlet v. Delprat, 4 Mass. 708 ("And upon the whole, although the other facts appearing in this case leave very little doubt of the justice of the verdict, yet as the competency of the evidence excepted to is not supported by any of the authorities we have examined, we think the verdict must be set aside"); 1894, Com. v. White, 162 Mass. 403, 38 N. E. 707; 1886, Cobb, J., in Masters v. Marsh, 19 Nebr. 467, 27 N. W. 438 (excluding certain books of account: "While I do not think that the books would have proved any fact of the least value in the case had they been properly admitted, yet the party presenting them would scarcely be permitted to escape the consequence of an erroneous ruling on that ground"); 1874, Cole, J., in Schaser v. State, 36 Wis. 434 ("It may be shown by the most irrefragible proof that the defendant is guilty of the offence charged against him; but this does not justify the violation of well settled rules of evidence in order to secure his conviction"). So, too, the words of Mr. Justice Story have been forgotten in the Court which he distinguished: 1894, Waldron v. Waldron, 156 U. S. 380, 15 Sup. 383; 1898, Northern P. R. Co. v. Hayes, 30 C. C. A. 576, 87 Fed. 131 ("It is elementary that the admission of illegal evidence over objection necessitates a reversal").

[10] 1885, State v. Beaudet, 53 Conn. 536, 539, 4 Atl. 237 (if evidence excluded "could not properly have changed the result, then he was not aggrieved by the ruling"); 1846, McCleskey v. Leadbetter, 1 Ga. 551, 556 ("The Courts will not set aside a verdict on account of the admission of evidence which ought to have been rejected, provided there be sufficient without it to authorize the finding"); 1896, Gardner v. R. Co., 135 Mo. 90, 36 S. W. 214 ("The judgment was manifestly for the right party; and where such is the case, the judgment will not be reversed because some incompetent testimony was admitted"); 1839, State v. Ford, 3 Strobh. 528 (Earle, J., dissents as to the propriety of admitting certain evidence, but agrees to dismiss the motion for a new trial; for "in such a case as this, where the prisoner's guilt is very manifest . . . I think it would exhibit unnecessary squeamishness to say he has not been legally convicted on abundant evidence"). Instances of the sensible application of this rule are the following cases: 1903, Barber v. People, 203 Ill. 543, 68 N. E. 93; 1903, Copenhaver v. State, — Ind. —, 67 N. E. 453; 1903, Com. v. Lenousky, — Pa. —, 55 Atl. 977; 1903, Dyor v. Union R. Co., — R. I. —, 55 Atl. 688.

2. *Reason and Practical Working of the Exchequer Rule.* What can be said on behalf of the Exchequer rule? The theories advanced to support it have been chiefly two. The first is the theory that a party has a legal right to the judicial observance of the rules of evidence *per se*. The second is the theory that the judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be a usurpation of the jury's function. The whole doctrine, no doubt, has its deepest roots in the inveterate and unconscious professional instinct, which grows to venerate unduly the rules that form its daily mental pabulum. But there must at least be some ostensible reason; and these two have served in that capacity:

1835, *Parke*, B., in *Crease* v. *Barrett*, 1 C. M. & R. 919, 932: "The rule is there laid down [in the Common Pleas] much too generally; and it is obvious that if it were acted upon to that extent, the Court would in a degree assume the province of the jury; and besides, its frequent application would cause the rules of evidence to be less carefully considered."

1838, *Morton*, J., in *Ellis* v. *Short*, 21 Pick. 142, 144: "Some of the evidence objected to was not only clearly irrelevant, but might have prejudiced the jury against the plaintiff. We therefore find ourselves constrained to grant a new trial. We regret that we find it necessary to do this; because the action involves no principle of law, is attended with an expense disproportionate to its importance, has been fully and elaborately tried, and been brought to a result, which was entirely satisfactory and which there is very little reason to suppose will be changed on another trial, by the exclusion of the evidence which was improperly admitted. The English Courts and those of some of our sister States exercise a much broader discretion in relation to the granting of new trials than we do. Their practice is to refuse new trials for the improper admission or rejection of evidence, whenever, in their opinion, such erroneous admission or rejection of evidence, whether material or immaterial, ought not to have affected the verdict, or substantial justice has been done. This seems to us to trench upon the province of the jury. How can the Court know how much influence each particular piece of evidence had upon the minds of the jury, or that the illegal evidence was not the weight, however small it may be, which turned the balance, and that without it the opposite scale would not have preponderated? To sustain a verdict, under such circumstances, may be to make a decision contrary to the convictions, which the legal evidence would have produced upon the minds of the jury. . . . It is the province of the Court to guard the decisions of the jury from the influence of foreign or irrelevant matter and preconceived opinions and prejudices; and this imposes upon it the duty, on proper occasions, of giving to the jury an opportunity to revise its decisions; but never authorizes it to weigh the evidence or to determine how they should ultimately decide upon matters of fact."

1875, *Devine*, J., in *Pigg* v. *State*, 43 Tex. 112: "The refusal of the Court to permit the witness to answer the question [an opinion as to insanity] deprived the accused of a clear legal right. How far his defence may have been prejudiced by it, we cannot say. It is sufficient to know that it was his right to have the question answered by the witness, and that it was relied on as material to his defence."

As to this theory of *legal right*, it may be said in reply that no man has a legal right to have his cause wrongly decided, — for that is what this "right" comes to. He has indeed a legal right to a jury trial; and he has a right to a fair trial in general. But these are ends in themselves, because the one by constitution and the other by common sense of justice becomes a paramount object. But none can justify the exaltation of the ordinary rules of evidence,

which are mere instruments of investigation, into an end in themselves. As well might a gardener cut down a thriving vine because his henchman has used a hoe instead of a spade in planting it; or a farmer bring valuable bantams to the block because they were hatched by a meddlesome duck instead of by their lawful parent. A glance at common affairs will awaken us to the intrinsic absurdity of the theory of "legal right." As for the theory of *usurpation*, it ignores the doctrine and the history of the jury's function. It has always been under the control and correction of the trial judge and the appellate courts.[11] The judge determines questions of fact upon which the admissibility of evidence depends. The judge draws inferences of fact on a demurrer to evidence. The judge rules whether the whole evidence is sufficient to go to the jury, and whether the verdict is against the weight of evidence. He has never been without this revisory function. Moreover, upon a question of new trial, because of erroneous ruling on evidence, the appellate Court is not asked to overturn the verdict; on the contrary, it is asked to let the verdict stand, and the precise question which the appellate Court decides is, not whether the jury have been correct or incorrect, but whether, subtracting or adding the evidence admitted or excluded, the truth seems to be identical with the jury's verdict. This is a collateral question, and is entered upon merely as a help to avoiding, if possible, the disturbance of the verdict. The "usurpation," if any, consists in setting aside the verdict, not in confirming it. The advocates of the Exchequer rule concede that, for the purpose of overturning the verdict, they may scrutinize and interfere with it, so as to say that it goes against the weight of the whole mass of evidence; yet, for the purpose of supporting the verdict, they profess to be unable to weigh a particular piece of evidence, so as to say that it could not have affected the same weight of evidence. This is one of the most indefensible cases of Tweedledum *v.* Tweedledee that has ever been sanctioned in our books.

As to the practical working of the Exchequer rule, the results are lamentable. Whether in civil or criminal cases, it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling. Added to this is the indirect result produced upon the ever-lurking animal instinct of gregarious human brutality, which takes the failures of criminal justice as its pretext and sates itself with cruel lynchings. That the law has gone to the extremes of absurd and provoking technicality in applying this rule is plain enough, even in a casual glance through the reports. Some of the instances of its enforcement would seem incredible even in the justice of a tribe of African fetish-worshippers.[12] As types of

[11] The history of this is to be found in Thayer, Preliminary Treatise on Evidence, 183–253.

[12] The following instances have been here and there noted, and could be multiplied by the score: 1896, Louisville & N. R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989 (more than a dozen exceptions to rulings on evidence; one only of these being found wrong, though no substantial prejudice was asserted, a new trial was granted); 1896, Louisville & N. R. Co. *v.* Malone, 109 id. 509, 20 So. 33 (similar; here there were twenty rulings and exceptions); 1878, People *v.* Bell, 53 Cal. 119 (here the defendant's testimony that the deceased, with whose murder he was charged,

what is done in a lesser way every day in every court, they would explain well enough, even if there were no further reason, why poor men may hesitate to send their cause to trial, — why a rich oppressor or a desperate criminal may hope to tire out all endeavors to do justice on him, — why the decisive question for the suitor before litigation often is, not who is right, but who can longest endure, — why ignorant mobs have a patent pretext for distrusting the distant gallows and substituting a near-by tree or stake. Just so long as an erroneous ruling on evidence, however trifling, is described by the highest judges (and in many courts it habitually is) as "working a reversal," just so long will the reproach of technicality and futility mark our litigation. Until the rules of evidence cease to be assimilated to the play of a hand at whist or the operations of an automatic cash-register, they must remain, as often as not, the instruments of injustice.

Nor have there been wanting sage and courageous warnings from the Bench against the downward tendencies of the modern rule. Many judges — usually, though, as dissenters — have recorded their protests against its theory and their condemnation of its results. Their words and their example have remained thus far without much avail; but the time will come when they must be heeded:

1897, *Brannon*, J., diss., in *State* v. *Musgrave*, 43 W. Va. 672, 28 S. E. 813: "If we could say there was any misstep in matter of law in this long trial, it is one of very immaterial character, weighing not a feather in the trial, utterly inadequate to justify

was habitually profane, was erroneously allowed to be contradicted by the prosecution, and though the matter was held to have "had no reference whatever to the guilt or innocence of the defendant," a new trial was ordered, solely on this error); 1897, Murphy v. Backer, 67 Minn. 510, 70 N. W. 799 (new trial granted solely because of a single improper contradiction of a witness on a collateral point); 1903, State v. Faulkner, — Mo. —, 75 S. W. 116 (St. Louis municipal corruption case; judgment reversed, apparently on no other ground than two minor errors in the rules of evidence, and a quibble upon a variance between the indictment and an instruction); 1894, Carpenter v. Lingenfelter, 42 Nebr. 728, 60 N. W. 1022 (new trial granted for allowing the contradiction of a witness on an immaterial point); 1899, State v. Jefferson, 125 N. C. 712, 34 S. E. 648 (a mob had almost lynched the accused, at the time of the arrest; but a new trial was awarded on the merest quibble of evidence, while conceding that the whole evidence "warranted conviction"); 1897, Cutler v. Skeels, 69 Vt. 154, 37 Atl. 228 (eighteen exceptions; a new trial granted simply because the plaintiff's counsel in his address said that he knew his clients to be of good reputation and that this was the best kind of evidence for them); 1896, Carver v. U. S., 160 U. S. 553, 16 Sup. 388 (a dying declaration was sanctioned as admissible, but the deceased on a subsequent day had said to an inquirer that her former declaration "was true in every particular"; this being erroneously admitted, a new trial was granted solely because of the error; later the case was again reversed in 164 U. S. 694, 17 Sup. 228). The Federal Supreme Court has been especially callous in pushing the technical rule to extremes, notably in its treatment of some of the rulings of the late Judge Parker, of the Western Arkansas District, one of the greatest trial judges of the Federal bench, whose work for law and order in that region was inestimable; examples may be found in Allen v. U. S., tried in 1893, reversed in 150 U. S. 551, reversed again in 157 U. S. 675, finally affirmed in 1896 in 164 U. S. 492, 17 Sup. 154; in Starr v. U. S., reversed in 1894, in 153 U. S. 614, and again in 1897, in 164 U. S. 627, 17 Sup. 223; and in Brown v. U. S., reversed three times, in 150 U. S. 93, 159 U. S. 100, and 164 U. S. 221. Of the above three defendants (all charged with homicide) whose cases were reversed, Starr subsequently pleaded guilty to manslaughter and to several charges of robbery; Brown pleaded guilty to manslaughter; and Carver was on a third trial convicted of murder; in short, the appellate Court's total achievement proves to have consisted merely in blocking justice for several years, and to have helped to diminish, in a turbulent community, that respect for law and justice which the trial Court, if unhampered, was able to maintain. These cases give to volume 164 of the Federal Supreme Court reports an unenviable mark in our jurisprudence. An instance of a juster doctrine in the same Court is found in Motes v. U. S. (1899), 178 U. S. 458, 20 Sup. 993.

the reversal of a long, laborious trial bearing on its face of having been full, patient, and fair. The scope of harmless error is, in these days, widening. Courts do not nowadays, even in grave trials, reverse such trials for trivial errors evidently not affecting them; so light, and plainly playing so unimportant a part, as not to be appreciably influential or prejudicial when the whole trial, all in all, is regarded. In days gone by, technicalities and rigid procedure sprang up and were enforced to defend accused parties against the demand of monarchic power for conviction, and they then answered, 'Good purpose'; but in this country there is not the same need of them, as the danger now is that the guilty will go free, and something is necessary to protect the public against crime. The great press is declaiming against the courts for lax administration of criminal law. The New York World recently stated that statistics show that for ten years past only 2 20 per cent of homicides have been punished, and that the people are afraid of the courts, and for quick justice resort to lynch law; and further says that this is attributable to the laxity and languor with which the law is enforced, the quibbles, subtleties, and technicalties of the courts fortressing criminals, and causing the administration of justice to appear a mere mockery. Such, I observe, is now almost the universal expression of the press. I would not overturn the solemn verdicts of juries rendered after fair trials, and approved by the trial court, unless I could see that on the whole case something substantially wronging the prisoner had been done. I would therefore affirm."

1898, *Whitfield*, J., diss., in *Lipscomb* v. *State*, 75 Miss. 559, 23 So. 210, 228: "It must thus be clear, beyond all cavil, that this appellate tribunal is not a helpless prisoner, bound in the fetters of some supposed hard and fast rule requiring it to reverse cases where, first, erroneous instructions have been given; or, second, proper instructions have been refused; or, third, competent testimony has been excluded; or, fourth, incompetent testimony admitted; or, fifth, improper argument has been allowed; or, sixth, the trial court has erred in its rulings on the pleadings, — on the ground, merely, that such action of the Court, of the one kind or the other, constitutes error in law merely. Every one of these propositions is laid down as settled law. . . . With all deference, it seems to me that my brethren have clearly confounded the primary function of the jury to pass on the evidence and find the defendant guilty, if satisfied beyond a reasonable doubt, and the power which this appellate tribunal exercises in reviewing that finding of the jury. When the Court so reviews the finding of a jury in a criminal case, and reverses, as it repeatedly has done, on the sole ground that the evidence was manifestly insufficient to warrant the verdict of guilty, or affirm the jury's finding of guilt when that verdict is clearly right on the law applicable to the case and the competent testimony in the case, as it has also repeatedly done, this Court is not usurping the jury's primary function, and passing originally upon the guilt or innocence of the defendant, but is manifestly exercising its undoubted appellate power of reviewing and upholding or vacating the finding of the jury, as the case made may demand, in accordance with settled rules of law governing appellate jurisdiction. The practical inquiry is the true inquiry, and the practical rule must always be . . . that where substantial justice has been done, and the right result has been reached on competent testimony under the law applicable to the case, and no other reasonable verdict could be rendered than the one which was rendered, a reversal should not follow. The administration of justice is a practical thing. It should be administered in a practical way, so as, while not denying to any defendant any substantial right to which he is entitled by the law of the land, to protect society from violators of the law, and to secure the punishment of guilty men properly convicted." [18]

(3) *Future of the Exchequer Rule.* What is to be the remedy? Unfortunately, it does not seem to be merely in legislation. The fetters of the

[18] See also strong opinions by Wallace, J., diss., in People v. Stanley (1874), 47 Cal. 113, 119; Haight, J., diss., in People v. Koerner (1897), 154 N. Y. 355, 48 N. E. 730.

pernicious rule of the Exchequer were not forged by mere precedent, but by professional habit and tendency. They cannot be struck off by a simple statute. This has been tried; but in vain. There was already, at the very beginning, ample precedent and tradition for the better principle; yet the judges of the King's Bench and the Common Pleas and of our own Courts, when they could choose, made deliberate choice of the worse way. So, too, when legislation has sought to turn them back, they have persisted nevertheless, driven by this same strong technical instinct. In many jurisdictions there are statutes which expressly authorize and command that a new trial shall be granted only when justice requires it; and their object was to abolish the Exchequer rule. What was the consequence? In New York, for example, both the earlier statute [14] and the later statute [15] have proved alike ineffectual. In New Jersey the same fate ensued.[16] Occasionally, indeed, the true spirit has been communicated, — as in Kentucky.[17] But on the whole the effort

[14] N. Y. St. 1855, c. 337 (a new trial may be granted if the appellate court is satisfied "that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial"; 1858, Cancemi *v.* People, 16 N. Y. 507 (new trial granted for an erroneous ruling on character-evidence, merely because it was "*calculated* to mislead the jury as to the weight which the evidence should receive"); 1873, Stokes *v.* People, 53 N. Y. 174 (the deceased's threats communicated were admitted, but some threats uncommunicated were erroneously rejected; a new trial was granted, although the admission of the excluded evidence would simply have added to the number of threats proved).

[15] Here for a while something was achieved; and then the practice fell back into the old rut: N. Y. C. Cr. P. 1881, § 542 (the Court shall "give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties"); 1896, Gray, J., in People *v.* Hoch, 150 N. Y. 299, 301, 44 N. E. 976 ("The spirit of this legislation, as is its letter, is that if the accused has had a fair trial upon his accusation, and if this Court is satisfied that the conviction is sufficiently supported by competent evidence, that conviction shall stand"); 1897, People *v.* Conroy, 153 N. Y. 174, 185, 47 N. E. 258 (preceding case approved); 1897, People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889 (same); 1897, People *v.* Strait, 154 N. Y. 165, 47 N. E. 1090 ("That statute [C. Cr. P. § 542] is but little more than a codification of the previously established rule . . . ; neither that rule nor the statute affects the well-established principle that the rejection of competent and material evidence, which is harmful to the defendant and excepted to, presents an error requiring a reversal. Such a ruling affects a 'substantial right,' even though the appellate court, with the rejected evidence before it, would still come to the same conclusion reached by the jury; the defendant has the right to insist that material and legal evidence offered by him shall be received and submitted to the jury"). There are occasional signs of a better attitude; 1903, People *v.* Conklin, 175 id. 333, 67 N. E. 624.

[16] N. J. St. 1894, May 9, c. 163 (new trial is to be granted where any "manifest wrong or injury" has been suffered); 1897, Kohl *v.* State, 59 N. J. L. 445, 37 Atl. 73 (murder; the trial judge told the jury that a question was whether there was a motive, in particular, whether the deceased had any money; the defendant's mother, with whom the deceased lived, had said on the direct examination that the deceased showed no large sums of money, and on the cross-examination, that he had no money but a dollar a week; she was then allowed to be contradicted by B, who testified that she had elsewhere said the deceased had $800; this statement, however, it was ruled, not being precisely inconsistent with her direct examination, and not being available to impeach the cross-examination where she had been made the examiner's own witness, was therefore inadmissible, and hence there was no evidence to show that he had money, except this contradiction; "for that reason alone, the judgment, in my opinion, should be reversed and a new trial granted"). This ruling apparently led to another statute, which makes a further effort to control the judicial monomania (St. 1898, c. 237, § 136) by adding that "no judgment shall be reversed . . . for any error except such as shall or may have prejudiced the defendant in maintaining his defence upon the merits."

[17] Ky. Cr. C. 1877, § 340 ("A judgment of conviction shall be reversed for any error of law to the defendant's prejudice appearing on the record"); St. 1880, March 4 (amended by adding: "whenever upon the consideration of the whole case the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby"); 1880, Rutherford *v.* Com., 78 Ky. 639, 643 (dealing with the trial Court's erroneous refusal to allow the defendant to be present at a view; "If all the evidence that the jury could have received on the view . . . had been excluded, it is clear that the verdict must have been 'guilty of murder'; under such circumstances, we are authorized in saying that the record affirmatively shows that the error

has been fruitless. By an emasculating interpretation, or by a virtual obliteration, the statutes remain substantially null. Professional instinct from within, and professional pressure from without — the demands of the bar to be allowed to win by technicalities —, have been too strong.

But the thing can be done. It *has* been done. In England, to-day, the whole odious practice of misusing the rules of evidence as petty stratagems in litigious tactics has passed away. In the reports of decisions, there now occur annually not more than five rulings upon points of evidence, as against more than five hundred in the reports of the United States, — and that in a community almost half as populous as ours but more than twice as litigious. The reformatory legislation in England, commencing with the Common Law Procedure Act of 1852 and culminating in the Judicature Act of 1875 and the Rules of Court of 1883, seems to have been based upon a profound professional revolution, and to have signified not merely a change of rules but a change of spirit. The same thing is possible among us. No doubt the contributing conditions to such a change must be numerous. But among the marks of regeneration there must surely be found two vital ones:

First, the judge must cease to be merely an umpire at the game of litigation. Often he is little more. This, to be sure, is in part the continuance of a tradition, inherited from the spirit of gentlemanly sportmanship which dominated the administration of British justice. But it has been intensified, instead of lessened, by the spirit of strenuous struggle and unrestrained persistence which drives the bar of our country to wage their contests to the extreme of technicality. The judge weakly resigns himself to the position of "a mere automaton, or at most the attitude of the presiding officer of a deliberative assembly, with no greater powers than those of announcing the utterances or conclusions of others." [18] To this many circumstances conspire. But it is an old and a marked tendency among us; and, until it is rooted out, that early warning of one of the Nestors of our judiciary will still be worth heeding:

1852, *Nisbet*, J., in *Cook* v. *State*, 11 Ga. 53, 57: "It is to be feared, in these days of reform, that the Judges will be so strictly laced, as to lose all power of vigorous and healthful action. I have but little fear of judicial power in Georgia so aggrandizing itself, as to endanger any of the powers of other departments of the government; or to endanger the life and liberty of the citizen; or to deprive the Jury of their appropriate functions. The danger rather to be dreaded is making the Judges men of straw, and thus stripping the Courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law." [19]

complained of was not 'prejudicial' to the defendant").

[18] 1885, Poché, J., in State v. Ford, 37 La. An. 443, 461.

[19] The following case illustrates the way in which this has been brought about partly by the unlicensed efforts of the bar: 1897, Davis v. State, 51 Nebr. 301, 70 N. W. 984 (the trial judge's instruction was: "If the jury find from the evidence that all the incriminating circumstances . . . [leave a reasonable doubt], then you should by your verdict acquit him"; the phrase "incriminating circumstances" was objected to by the defence as unfair; but the Supreme Court rejected this claim in the following language: "It never was the intention of the law that the district judges of the state should abdicate their reason because a man was on trial charged with the commission of a crime; nor does the law of the land place the district judges in a strait-jacket in criminal trials, nor make of them mere machines to repeat certain general

Secondly, the maudlin sentimentality of judges in criminal cases must cease. Reverence for the Constitution is one thing, and a respect for substantial fairness of procedure is commendable; but the exaltation of technicalities of every sort merely because they are raised on behalf of an accused person is a different and a reprehensible thing. There seems to be a constant neglect of the pitiful cause of the injured victim, and the solid claims of law and order. All the sentiment is thrown to weight the scales for the criminal — that is, not for the mere accused, who may be assumed innocent, but for the man who upon the record plainly appears to be the villain that the jury have pronounced him to be. We have long since passed the period (as a modern judge has pointed out)[20] "when it is possible to punish an innocent man; we are now struggling with the problem whether it is any longer possible to punish the guilty." The dignity, the truth, and the lofty inspiration of great constitutional principles are frittered away and degraded. While on the one hand certain fundamental ideals of political liberty have come to be lightly questioned as impracticable or cynically ignored as obsolete, on the other hand the constitutional safeguards of procedure and evidence are invoked with such fatuous frequency and such misplaced technicality that their respect is lowered and their true purposes are defeated. "I do not understand," protested a great judicial interpreter of the organic law,[21] "that the Constitution is an instrument to play fast and loose with in criminal cases, any more than in any other; or that it is the business of Courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct." Yet they seem to make it their business. A false sentiment misapplies their energies. This they must unlearn. The epoch of governmental oppression has passed away; the epoch of individualistic anarchy has taken its place. They must learn the lesson of transferring the emphasis of their sympathies, — a lesson more than once read to them by the voices of their own fellow-members of the judiciary:

1805, *Smith*, B., on the trial of Mr. Justice *Johnson*, in 29 How. St. Tr. 353: "There may indeed be a tame and creeping and tradesmanlike mode of administering the law conceived; but it is not one which meets my ideas of the duties or station of a judge. Laws are but means; and though it be not our province to legislate but to interpret, yet we should not forget or fail to further the end and object of those laws which we are called upon to construe, namely, the preservation of public morals, the promotion of social order, and the establishment of good government, of our liberties, and of the constitution."

1873, *McCoy*, J., in *Eberhart* v. *State*, 47 Ga. 598, 610: "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and

propositious of law in their instructions." What was needed, however, was a stern rebuke, which should fittingly condemn the unscrupulous callousness of counsel capable of obstructing the course of justice by such impudent quibbles).

[20] 1893, Freeman, J., in Roper v. Territory, 7 N. Mex. 272, 33 Pac. 1014.

[21] 1883, Cooley, J., in People v. Murray, 52 Mich. 291.

criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal. But we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization; and we have reaped the fruits of it in the frequency with which bloody deeds occur."

This much had to be said here, in order to redeem the law of evidence from that reproach which belongs rather to the law of new trials. The rules of evidence are not arbitrary. They are not in themselves mere instruments of stratagem for the bar and of logical exercitation for the judiciary. As a whole and as a system, they are founded on rational purposes and practical experience. They are always reasoned, and usually reasonable. They have a right to exist, but not to be abused. As a system and as individual rules, they must be judged by themselves, and not by the improper consequences which the law of new trials has often caused to be attributed to their enforcement. That they have often seemed technical and inconsistent is due chiefly to the habit of ignoring the study of their reasons, — which nevertheless (as the ensuing pages attempt to exhibit) have been at all times copiously vouchsafed by the judges. That they are often difficult to apply is due mainly to their inherent nature, — to the possible applicability of scores of rules of exclusion at one and the same moment to one and the same offer of evidence. That they have in many respects been unpractical and unnecessary has been largely due to the occasional anachronous survival of rules which had arisen in a former epoch and had ceased to correspond to the new commercial and moral conditions, — such as the rule for attesting witnesses and the rule for disqualification by interest. But that they have gained, in great extent, the character of instruments of quibbling, chicane, and injustice, is due to other and extrinsic circumstances, and chiefly to the law of new trials. Like a false and artificial incubus — that spirit of darkness which visits and consorts with one against his will — the law of new trials has associated its reproach with the law of evidence. But this identity must be constantly repudiated, in our thought of the rules of evidence. We may then be satisfied to respect and preserve those rules for whatever is good in them; and we shall be the better able to perceive the extent of that good. Just as English legislators, after yielding to the twenty years' pleading of Romilly, discovered after all that the enjoyment of the right of property in chattels could survive, without the fancied protection of the penalty of death for larceny, — so we shall some day awake to be convinced that a system of necessary rules of evidence can exist and be obeyed, without affixing indiscriminately to every contravention of them the monstrous penalty of a new trial.

PART I.

RELEVANCY.

INTRODUCTORY:

GENERAL THEORY OF RELEVANCY.

CHAPTER III.

1. Kinds of Evidentiary Facts.

§ 24. **Classification of Evidentiary Facts.** There are two possible modes of proceeding for the purpose of producing persuasion on the part of the tribunal as to the Proposition at issue. The first is by the presentation of the thing itself as to which persuasion is desired. The second is the presentation of some independent fact by inference from which the persuasion is to be produced. Instances of the first are the production of a blood-stained knife; the exhibition of an injured limb; the viewing of premises by the jury; the production of a document. The second falls further into two classes, according as the basis of inference is (a) the assertion of a human being as to the existence of the thing in issue, or (b) any other fact; the one may be termed Testimonial or Direct Evidence, the other Circumstantial or Indirect Evidence.

The first mode above mentioned has been termed Immediate or Direct Real Evidence.[1] "Thus," says Mr. Best,[2] "where an offence or contempt is committed in presence of a tribunal, it has direct real evidence of the fact. So formerly, on an appeal of mayhem, the court would in some cases inspect

[1] Mr. Bentham, in his Treatise on Judicial Evidence (tr. Dumont, London, 1825), p. 12, used "real evidence" to mean the inferences from a *res*; this of course is a different usage.

[2] Chamberlayne's Best on Evidence, 1893, §§ 196, 197.

the wound, in order to see whether it were a mayhem or not. . . . Immediate Real Evidence is where the thing which is the source of the evidence is present to the senses of the tribunal." A preferable term is Autoptic Proference;[3] this avoids the fallacy of attributing an evidential quality to that which is in fact nothing more nor less than the thing itself. With reference to this mode of producing persuasion no question of relevancy arises. *Res ipsa loquitur.* The thing proves or disproves itself. No logical process is employed; only an act of sensible apprehension occurs, — apprehension of the existence or non-existence of the thing as alleged. Bringing a knife into Court is in strictness not giving evidence of the knife's existence. It is a mode of enabling the Court to reach a conviction of the existence of the knife, and is in that sense a means of producing persuasion, yet it is not giving evidence in the sense that it is asking the Court to perform a process of inference,[4] and it therefore gives rise to no questions of relevancy.[5] There is direct apprehension and conviction as to the truth or falsity of the desired proposition.

Though the classes of things that can become the subject of autoptic proference are few, yet within those classes its use is common. In addition to jury views of land, the production of movables associated with a crime, and the exhibition of personal injuries, the perusal of documents is the most usual instance of its employment. Though a document is generally evidential only as being the assertion of its writer, yet when it becomes desirable and allowable to prove the terms of the assertion (*i. e.* when its existence becomes in itself a proposition), it is obvious that we must either have some one tell about its contents, which would be using testimonial evidence, or must infer its existence circumstantially from some other fact, or produce the document itself for inspection, which would be Autoptic Proference.

Furthermore, though no question of relevancy can arise with reference to Autoptic Proference, yet there may be and are special rules for safeguarding its employment and preventing its dangers. These auxiliary rules are examined under that subject (*post*, §§ 1157–1168). Moreover, though relevancy is not involved in autoptic proference, yet there are in other connections certain questions of relevancy which commonly arise when it is employed. Some of these are, (*a*) Whether it is permissible to infer from voice, features, and other outward appearances, to inward qualities; this is a question of the relevancy of the former to the latter; the outward appearances are the only things autoptically presented; (*b*) Whether a jury may infer the race of a person from his skin-color or his hair, or may infer paternity from resemblance, and the like; these again are questions of relevancy,

[3] The propriety of these various terms is further examined in dealing with that mode of proof, *post*, § 1150.

[4] It might be said that the Court is to use the fact of its sense-perception as a basis of inference to a judgment; but this is a distinction which cannot be accepted in the law of evidence, because practically the Court recognizes none such and takes the results of its senses as immediate and full knowledge.

[5] Of course, the knife might become the source of an inference, *e. g.* as to the nature of a wound; but in that aspect it is merely circumstantial evidence.

for the real question is whether we have a right to assume the physiological generalization that a peculiarity of features is any indication of race or of relationship; (*c*) Whether models, photographs, etc., may be exhibited; this involves usually the inquiry whether they are substantially correct reproductions of the original, and concerns the principle of testimonial trustworthiness. Still further, certain of the auxiliary rules and the rules of privilege may be involved; for example, (*d*) Whether an accused person or a plaintiff in a suit for bodily injuries may be compelled to exhibit his person or submit to tests; (*e*) Whether the exhibition of certain things should be forbidden when it involves indecencies or the likelihood of unduly exciting prejudice; (*f*) Whether at a jury's view the hearsay rule has been violated by the reception of unsworn testimony. These are some of the instances in which autoptic proference is employed, and yet the rule involved is but an instance of some general principle belonging in another place.[6]

§ 25. **Distinction between Circumstantial and Testimonial Evidence.** Aside from Autoptic Proference, then, all evidence must involve an *inference from some Fact to the Proposition to be proved.* The kinds of inferences, with regard to the material taken as their subject, fall naturally into two great classes; or, rather, a single special class of evidentiary facts separates itself from the mass and calls for a distinct treatment, attended as it is with uniform and peculiar qualities affecting its probative features. A separate treatment is inevitably demanded by these qualities, long recognized in experience and acknowledged by jurists. This special class of facts is the assertions of human beings regarded as the basis of inference to the propositions asserted by them. This may be called Testimonial Evidence;[1] Direct Evidence is an alternative term sanctioned by usage, though not so satisfactory in theory. All remaining facts form a class known as Circumstantial Evidence. The distinction has been thus stated:

1824, Mr. *Thomas Starkie*, Evidence, I, 13: "Where knowledge cannot be acquired by means of actual and personal observation, there are but two modes by which the existence of a bygone fact can be ascertained: 1st, By information derived either immediately or mediately from those who had actnal knowledge of the fact; or, 2dly, by means of inferences or conclnsions drawn from other facts connected with the principal fact which can be snfficiently established. In the first case, the inference is founded on a principle of faith in human veracity sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the connection between the facts which are known and that which is unknown. In each case the inference is made by

[6] These varions principlee are considered in detail, *post*, §§ 1151–1168.

[1] The word "evidence" was until the middle of the 1700s used distinctively of testimonial evidence, — circumstantial evidence being either not reckoned with or else conceived of under the term "presumptione"; hence, in the trials of that period "an evidence" is used to mean "a witness": 1628, Coke upon Littleton, 282, *b*: ("Evidence, *evidentia*: This word in legall nnderstanding doth not only containe matter of record, . . . and writings nnder seale, . . . and other writings without seale, . . . which are called evidences, *instrumenta*; bnt in a larger sense it containeth also *testimonia*, the testimony of witnesses, and other proofes to be produced and given to a jury for the finding of any isane betweene the parties. And it is called evidence, becanse thereby the point in issue is to be made evident to the jury"); 1746, Lord Lovat's Trial, 18 How. St. Tr. 798; 1754, Canning's Trial, 19 id. 478, 488, 514, 580.

virtue of previous experience of the connection between the known and the disputed facts, although the grounds of such inference in the two cases materially differ."

1872, Sir *J. F. Stephen*, Indian Evidence Act, 38: "It will be found upon examination that inferences employed in judicial inquiries fall under two heads: —

(1) Inferences from an assertion, whether oral or documentary, to the truth of the matter asserted;

(2) Inferences from facts, which upon the strength of assertions are believed to exist,[3] to facts of which the existence has not been so asserted.

. . . This is the distinction usually expressed by saying that all evidence is either direct or circumstantial. . . . The truth is that each inference depends upon precisely the same general theory. . . . The judge hears with his own ears the statements of the witnesses and sees with his own eyes the documents produced in court. His task is to infer from what he thus sees and hears the existence of facts which he neither sees nor hears."

1873, *Gilpin*, C. J., in *State* v. *Carter*, 1 Houst. Cr. C. 402, 410: "As a matter of course, and from necessity, all judicial evidence must be either direct or circumstantial. When we speak of a fact as established by direct or positive evidence, we mean that it has been testified to by witnesses as having come under the cognizance of their senses, and of the truth of which there seems to be no reasonable doubt or question; and when we speak of a fact as established by circumstantial evidence, we mean that the existence of it is fairly and reasonably to be inferred from other facts proved in the case."

The special tests of this distinction and the peculiar results which follow from the segregation of assertive or Testimonial Evidence will be examined under that topic (*post*, § 475). It is here necessary merely to call attention to the existence of the distinction and to the general nature and limits of the class first to be considered — Circumstantial Evidence. The term "circumstantial" is unfortunately but inevitably fixed upon us.[3] It must suffice here to take note that this class embraces all offered evidentiary facts not being assertions from which the truth of the matter asserted is desired to be inferred. The doubtful instances lying on the line between the two classes may be examined in connection with the assertive or testimonial class (*post*, § 475).

In the grouping of Circumstantial Evidence, difficulty has arisen from not keeping in mind that most circumstantial evidentiary facts must ultimately in turn become themselves a Proposition[4] and be proved by testimonial evidence, and also from confining the latter term to assertions of some main fact in issue. For example, the finding of a bloody knife upon the accused after

[3] This, as will be seen, is too narrow; for the tribunal may learn the fact of its own knowledge, as by a jury's view or by judicial notice.

[3] An earlier term for this class was "presumptive evidence." The distinction between "presumption" in the sense of a mere circumstantial inference and in the sense of a rule of procedure affecting the duty of proof is dealt with elsewhere under Presumptions (*post*, § 2490). It may be noted here that the term is often met with in the sense of "inference," as applied to the probative value of ordinary circumstantial evidence, and as distinguishing it from testimonial evidence: 1810, Boyle, C. J., in Davis v. Curry, 2 Bibb 239 ("Evidence, whether written or oral, is either positive or presumptive. Positive evidence is the direct proof of the fact or point in issue; presumptive evidence consists in the proof of some other fact or facts from which the point in issue may be inferred"); 1873, Gilpin, C. J., in State v. Carter, 1 Houst. Cr. C. 402, 411 ("When the existence of the principal facts is deduced inferentially by a process of sound reasoning from facts or circumstances proved and established in the case, it is termed presumptive evidence"; and he later uses the phrase "circumstantial or presumptive evidence").

[4] For the distinction between a Proposition and an Evidentiary Fact, see *ante*, § 2.

a secret killing is a circumstance from which an important inference may be drawn; yet this fact of the finding must be proved by some person's assertion; here the special rules of assertive or testimonial evidence must be applied in receiving the assertion, and the ordinary rules of circumstantial relevancy in receiving the fact of finding, assuming it as proved by the assertion. But this mixture of both kinds is not necessary and inevitable. At one extreme, as in a jury's view of a corpse or in a matter of judicial notice, we may have a circumstance given us as the basis of inference without the intervention of an assertion. At the other extreme we may have assertions, as of the signing of a deed or of the perceived felonious abstraction of a bank-note, directly positing the main proposition of the pleadings, and needing no intervening inference, except from the fact of the assertion. But between these extremes lies the mass of ordinary evidence, for which at least two distinct steps of inference are required, — the inference from the fact of an assertion to the matter asserted, and then the inference from the matter asserted to another matter. Moreover, just as we may need even two or three inferences of the latter sort before reaching a main proposition of the pleadings, so (as in using hearsay) we may often need to use two inferences from assertions, — first from one assertion on the stand to the fact of the making of the extra-judicial assertion, and then from the latter to the truth of the matter asserted by it.

Now, so far as the principles of relevancy are concerned, it is apparent that it does not matter how we have come to our knowledge of these so-called "circumstances," *i.e.* things not assertions, — whether we get at them through believing assertions, or otherwise; what matters is the nature of the particular evidentiary fact in hand, whether it is assertive or circumstantial. In dealing with the probative value of the circumstantial class, we are to take the alleged circumstantial (or non-assertive) fact as assumedly proved, and then determine its relevancy. It is immaterial whether it has itself to be proved by testimony (as ordinarily) or by the tribunal's use of its own senses or existing knowledge (as occasionally).

§ 26. **Relative Value of the two Classes.** The rules of admissibility have nothing to say concerning the weight of evidence when once admitted. The relative weight of circumstantial and testimonial evidence, therefore, does not present itself in this place. Indeed, it can be said that there are no rules, in our system of evidence, prescribing for the jury the precise effect of any general or special class of evidence.[1] But the question has long been discussed, within and without the profession, whether circumstantial or testimonial evidence is relatively the more persuasive; and, rather to eradicate possible *a priori* misconceptions than to declare any positive rule of law, the judicial utterances have often dealt with this question:

1838, Mr. *William Wills*, Circumstantial Evidence, 26: "The best writers, ancient and modern, on the subject of evidence, have concurred in treating circumstantial as inferior

[1] For a systematic and detailed survey of the considerations affecting weight of testimony, see Bentham's Rationale of Judicial Evidence, b. IX, pt. VI, c. X (Bowring's ed. vol. VII, p. 563).

in cogency and effect to direct evidence; a conclusion which seems to follow necessarily from the very nature of the different kind of evidence.[2] But language of a directly contrary import has been so often used of late, by authorities of no mean note, as to have become almost proverbial.

"It has been said that 'circumstances are inflexible proofs; that witnesses may be mistaken or corrupted, but things can be neither.'[3] 'Circumstances,' says Paley, 'cannot lie.'[4] It is astonishing that sophisms like these should have passed current without animadversion. The 'circumstances' are assumed to be in every case established, beyond the possibility of mistake; and it is implied, that a circumstance established to be true, possesses some mysterious force peculiar to facts of a certain class. Now, a circumstance is neither more nor less than a minor fact, and it may be admitted of all facts, that they cannot lie; for a fact cannot at the same time exist and not exist: so that in truth the doctrine is merely the expression of a truism, that a fact is a fact. It may also be admitted that 'circumstances are inflexible proofs,' but assuredly of nothing more than of their own existence: so that this assertion is only a repetition of the same truism in different terms. It seems also to have been overlooked that circumstances and facts of every kind must be proved by human testimony; that although 'circumstances cannot lie,' the narrators of them may; and that, like witnesses of all other facts, they may be biased or mistaken. So far then, circumstantial possesses no advantage over direct evidence.

"A distinguished statesman and orator has advanced in unqualified terms the proposition, supported, he alleges, by the learned, that 'when circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof.'[5] Paley has said, with more caution, that 'a concurrence of well authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords.'[6] Mr. Baron Legge, upon the trial of Mary Blandy for the murder of her father by poison,[7] told the jury that where 'a violent presumption necessarily arises from circumstances, they are more convincing and satisfactory than any other kind of evidence, because facts cannot lie.' Mr. Justice Buller, in his charge to the jury in Captain Donellan's case, declared, 'that a presumption which necessarily arises from circumstances is very often more convincing and more satisfactory than any other kind of evidence, because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part if not all of those circumstances.'[8]

"It is obvious that the doctrine laid down in these several passages is propounded in language which not only does not accurately state the question, but implies a fallacy, and that extreme cases — the strongest ones of circumstantial, and the weakest of positive evidence — have been selected for the illustration and support of a general position. 'A presumption which necessarily arises from circumstances,' cannot admit of dispute, and requires no corroboration; but then it cannot in fairness be contrasted with and opposed to positive testimony, unless of a nature equally cogent and infallible. If evidence be so strong as necessarily to produce certainty and conviction, it matters not by what kind of evidence the effect is produced; and the intensity of the proof must be precisely the same, whether the evidence be direct or circumstantial. It is not intended to deny that circumstantial evidence affords a safe and satisfactory ground of assurance and belief; nor that in many individual instances it may be superior in proving power to other individual

[2] Menochius De Præsumptionibus, lib. 1. quest. 1. 6; Mascardus De Probationibus, vol. I, quest. 8. n. 8; Burnett on the C. L. of Scotland, p. 506; Starkie's Law of Evidence, vol. 1, pp. 515, 521 (2d ed.). The Theory of Presumptive Proof; Benth. Jud. Ev. vol. III, c. XV, s. IV.

[3] Burnett on the C. L. of Scotland, p. 523.

[4] Principles of Moral and Political Philosophy, b. VI, c. IX.

[5] Burke's Works, *ut supra*, vol. II, p. 624.

[6] Principles of Moral and Political Philosophy, b. VI, c. IX.

[7] State Trials, vol. XVIII, p. 1187.

[8] Gurney's Report of the Trial of John Donellan, Esq., for the wilful murder of Sir Theodosius Edward Allesley Broughton, Bart., at the Assize at Warwick, March 30th, 1781.

cases of proof by direct evidence. But a judgment based upon circumstantial evidence cannot, in any case be more satisfactory than when the same result is produced by direct evidence, free from suspicion of bias or mistake.

"Perhaps no single circumstance has been so often considered as certain and unequivocal in its effect, as the anno-domini water-mark usually contained in the fabric of writing-paper, and in many instance it has led to the exposure of fraud in the propounding of forged as genuine instruments. But it is beyond any doubt (and several instances of the kind have recently occurred) that issues of paper have taken place bearing the water-mark of the year succeeding that of its distribution, — a striking exemplification of the fallacy of some of the arguments which have been remarked upon. How often has it been iterated in such cases, that circumstances are inflexible facts, and facts cannot lie!

"The proper effect of circumstantial, as compared with direct evidence, was thus more accurately stated by Lord Chief Baron Macdonald. 'When circumstances connect themselves closely with each other, when they form a large and strong body, so as to carry conviction to the minds of a jury, it may be proof of a more satisfactory sort than that which is direct. In some lamentable instances it has been known that a short story has been got by heart, by two or three witnesses; they have been consistent with themselves, they have been consistent with each other, swearing positively to a fact, which fact has turned out afterwards not to be true. It is almost impossible for a variety of witnesses, speaking to a variety of circumstances, so to concert a story, as to impose upon a jury by a fabrication of that sort, so that where it is cogent, strong, and powerful, where the witnesses do not contradict each other, or do not contradict themselves, it may be evidence more satisfactory than even direct evidence; and there are more instances than one where that has been the case.'[9] In another case the same learned judge said, 'where the proof arises from a number of circumstances, which we cannot conceive to be fraudulently brought together to bear upon one point, that is less fallible than under some circumstances direct evidence may be.'"[10]

1846, *Gibson*, C. J., in *Com.* v. *Harman*, 4 Pa. St. 269, 271: "No witness has been produced who saw the act committed; and hence it is urged for the prisoner, that the evidence is only circumstantial, and consequently entitled to a very inferior degree of credit, if to any credit at all. But that consequence does not necessarily follow. Circumstantial evidence is, in the *abstract*, nearly, though perhaps not altogether, as strong as positive evidence; in the *concrete*, it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character, is not so satisfactorily proved, as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility. . . . The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact, as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect, but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam-engine. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good, as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief; that is, actual, and not technical

[9] Rex v. Patch, Surrey Spring Assizes, 1806.
[10] Rex v. Smith, for Arson, Old Bailey, June 15, 1813; Shorthand Report by Gurney.

disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear. Certain cases of circumstantial proofs to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years, in a country whose criminal code made a great variety of offences capital. The wonder is, that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is *legal* evidence to show the prisoner's guilt beyond a reasonable doubt; and circumstantial evidence is legal evidence."

1850, *Shaw*, C. J., in *Com.* v. *Webster*, 5 Cush. 295, 311: "Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood. But, in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question, that in the relation of cause and effect, they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and, from the form and number of the footprints, it can be determined with equal certainty, whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence."

1851, *Carruthers*, S. J., in *Coles* v. *Perry*, 7 Tex. 109, 115, 168: "I do not yield unqualified assent to the proposition, as a rule of law, that circumstantial evidence is never to be weighed against positive testimony. There may be cases, and there are cases every day occurring, where the testimony of a witness testifying positively to an asserted fact as transpiring within his view (and honestly testifying, too) is disproved and falsified by proof of facts and circumstances known to exist, and the existence of which is wholly incompatible with the fact deposed to. In such cases, circumstantial evidence outweighs positive testimony; and I think the present one of those cases. The saying often quoted, but with the most perverse application, both in ordinary conversation and in argument at the bar, that 'circumstances never lie, but a witness may,' is, when stated with legal precision, a truth." [11]

2. General Considerations affecting Relevancy.

§ 27. **Practical Necessities of Legal Controversy in general.** When a fact is offered as evidence, the very offering of it is an implication that it

[11] See also the earlier but very instructive exposition, in 1785, by Dr. William Paley, Principles of Moral and Political Philosophy, b. VI, c. IX, par. beginning, "There are two popular maxims"; and the striking passage in the argument of Attorney-General Knowlton, in Com. v. Border, Mass., 1898, quoted in 27 Amer. Law Rev. [illegible]

has some bearing on the proposition at issue, — that it tends naturally to produce a conviction about that proposition. The situation is thus in its elements the same as when the persons engaged are not occupied in a legal controversy. One might suppose that the question would be essentially one of the ordinary laws of reasoning, whether it were to be decided, as here, by a judge or a jury, or by the audience of a lecturer, or by a policeman notified of an alleged misdemeanor in his district, or by a class in rhetoric. But the application of the laws of reasoning is here attended with peculiar consideration not existing for any investigation but a judicial one.

(1) The *first* consideration is that, so far as the tribunal can attempt expressly to deal at all with logical questions, it can do so only roughly and loosely and in a general way. To begin with, in courts as elsewhere, while the laws of reasoning must underlie inevitably all the operations of reasoning, they are, as a rule, followed instinctively and not with conscious skill. Little attempt is made deliberately to recognize or to apply them. The process of demonstration and decision in legal tribunals is an employment of the principles of reasoning upon a grander scale than is found in any other activity of life; yet the methods of logic are seldom alluded to in terms by judges or by advocates. Again, wherever a rule or a principle may be adopted in the effort to employ the recognized tests of reasoning, no attempt can be made to furnish ideal tests. Details, refinements, contingencies, exact distinctions, which the ideal principle would demand, may be and must often be neglected in order that the test may be serviceable. Perhaps it may be necessary to take a mean of convenience, and to lay down a specific and unshifting rule which will sometimes operate arbitrarily or unequally. Where general principles are declared, they may satisfy themselves with reaching fairness in the main. Finally, the logical powers employed must be those of everyday life, not those of the trained logician or scientist. The conclusions and tests of everyday experience must constantly control the standards of legal logic. Moreover, the possibilities of fraud must exclude much that is probative but capable of abuse. These considerations rest on the circumstances of the situation, patent to all. In the main, they are created by the need of speed in the settlement of litigation, and the impossibility of expecting aught else in a proceeding where parties, witnesses, advocates, jury, and judge, represent so many grades of training and accomplishment. The principles of legal proof are in fact affected by these just as we should have expected them to be. This feature of the legal rules of relevancy has been emphasized, from different points of view, by two of the most original thinkers in the law of evidence:

1872, Sir *J. F. Stephen*, Indian Evidence Act, 33: "The leading differences between judicial investigations and inquiries into physical nature are as follows: 1. In physical inquiries the number of relevant facts is generally unlimited, and is capable of indefinite increase by experiments. In judicial investigations the number of relevant facts is limited by circumstances, and is incapable of being increased. 2. Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion

reached, and when a conclusion has been reached, it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at. In judicial investigations it is necessary to arrive at a definite result in a limited time; and when that result is arrived at, it is final and irreversible with exceptions too rare to require notice. 3. In physical inquiries the relevant facts are usually established by testimony open to no doubt, because they relate to simple facts which do not affect the passions, which are observed by trained observers who are exposed to detection if they make mistakes, and who could not tell the effect of misrepresentation, if they were disposed to be fraudulent. In judicial inquiries the relevant facts are generally complex. They affect the passions in the highest degree. They are testified to by untrained observers who are generally not open to contradiction, and are aware of the bearing of the facts which they allege upon the conclusion to be established. 4. On the other hand, approximate generalizations are more useful in judicial than they are in scientific inquiries, because in the case of judicial inquiries every man's individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific inquiries. 5. Judicial inquiries being limited in extent, the process of reaching as good a conclusion as is to be got out of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory."

1898, Professor *J. B. Thayer*, Preliminary Treatise on Evidence, 271–275: "It is a proper qualification when we use the phrase *legal* reasoning; not because, as compared with reasoning in general, it calls into play any different faculties or involves any new principles or methods, or is the creature of technical precepts; but because in law, as elsewhere, in adjusting old and universal methods to the immediate purposes in hand, special limitations, exclusions, and qualifications have to be taken into account. . . . This does not, like mathematical reasoning, have to do merely with ideal truth, with mere mental conceptions; it is not aiming at demonstration and ideally exact results; it deals with probabilities and not with certainties; it works in an atmosphere, and not in a vacuum; it has to allow for friction, for accident and mischance. Nor is it, like natural science, occupied merely with objective truth. It is concerned with human conduct, and all its elements of fraud, inadvertence, wilfulness, and uncertainty. Nor, as in history, is the purpose in hand merely that of ascertaining and setting forth the facts, or the habits, of human life and action. . . . The peculiar character and scope of legal reasoning is determined by its purely practical aims and the necessities of its procedure and machinery. Litigation imports, for the most part, as we have seen, a contest, and adversaries. It has in it, therefore, a personal element, and it requires not merely a consideration of what is just in general, but of what is just as between these adversaries. It has often to be conducted with the aid of a tribunal whose peculiarities in point of number and of physical and mental capacity, and whose danger of being misled, must constantly be considered. It must shape itself to various other exigencies of a practical kind, such as the time that it is possible to allow to any particular case, the reasonable limitations of the number of witnesses, the opportunities for reply, and the chance to correct errors. It must adjust its processes to general ends, so as generally to promote justice, and to discourage evil, to maintain long-established rights, and the existing governmental order. The judicial office is really one of administration. . . . While these are some of the chief characteristics of legal reasoning, it will be noticed that they are only, in the nature of them, so many reasonable accommodations of the general process to particular subject-matters and particular aims. Amidst them all the great characteristics of the art of reasoning and the laws of thought still remain constant. As regards the main methods in hand, they are still those untechnical ways of all sound reasoning, of the logical process in its normal and ordinary manifestations; and the rules that govern it here are the general rules that govern it everywhere, the ordinary rules of human thought and human experience, to be sought in the ordinary sources, and not in law books."

§ 28. **Judge and Jury as a Tribunal; Relevancy, as distinguished from Minimum Probative Value.** (2) The *second* condition peculiar to litigious proof is that the question with which the law of evidence in the strict sense has to do (that is, the rules regulating the production of evidence by opposing parties) is one of Admissibility, not of Demonstration or Proof (*ante*, § 12), — whether a particular fact is fit to be considered, and not whether it suffices for a demonstration. For example, the existence of a habit of doing a particular act under certain circumstances points forward to a doing of the act under those circumstances on a particular occasion. This is not a demonstration that the act was done, for the influence of the habit may have been counteracted by other considerations; there is not an invariable sequence. The jury may ultimately decide that the habit, with all the other circumstances, is not adequate to prove the doing; though the judge may at the outset have ruled that the course of conduct was at least sufficiently regular to have some value as an indication. The latter question is one of Admissibility, and under our system is a preliminary one for the judge only. The former question is one of completeness of proof; it is the final one, and is for the jury. Thus a peculiar and otherwise anomalous class of questions is raised. While the historian or the naturalist may as he pleases set aside and preserve data of the slightest helpfulness, or may pass judgment upon his facts immediately and finally, the legal tribunal is, with us, divided in function; the judge passes first upon the evidence and sets aside the tidbits for the jury; that which is not worth considering, for one reason or another affecting its value, never reaches the auxiliary functionaries, the jurors. This process, then, of determining the Admissibility of evidence, as distinguished from demonstrative and conclusive quality, is from the point of view of Logic a decidedly unique process, worked out clearly in no other department of life. Little considered by our logicians, it is a commonplace in the judicial experience. Its owes its persistence and emphasis (peculiar as it is to the Anglo-American legal system) in some part, no doubt, to the tradition of our practice which looks almost solely to the parties in a case for such evidence as may be mustered, leaving the judge almost entirely passive; for the question of the uselessness, or the contrary, of the spending of time on evidence offered is thus constantly required to be raised and settled at the outset. But chiefly it owes its origin, maintenance, and system to the separation of function between judge and jury. If this separation of judge and jury had not existed as it has, with all its history, nothing marked would probably have developed. Under the Continental systems, in which the jury is but a recent borrowing, little of the sort appears.

(*a*) This second feature, to some extent, eventuates merely in another phase of the first feature, the rough and practical quality already mentioned, noticeable in the whole law of probative value; for the Court will of course allow to be considered only such evidence as is worth submitting to men who will judge only by the most common and practicable tests. But to a

more important extent the effect is to require a generally higher degree of probative value for all evidence to be submitted to a jury than would be asked in ordinary reasoning. The judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning, has constantly seen fit to exclude matter which does not rise to a clearly sufficient degree of value. In other words, legal relevancy denotes, first of all, *something more than a minimum of probative value.* Each single piece of evidence must have a plus value.[1] This feature is seen in the form of scores of detailed rules, applying and shaping the fundamental principles of probative value, *i. e.* the rules of admissibility with reference to simple relevancy. There has been a raising of the standard of probative value all along the line, — very unequal in its effects, because it has been done without system, and with numerous inconsistencies; yet almost always done in pursuance of this spirit of safeguarding the decision of the jury, and on the whole with good practical results.

1794, Mr. *Edmund Burke*, *Report to the House of Commons*, Debrett's Hastings' Trial, 1796, Part VII, Suppl. p. xliii, 31 Parl. Hist. 357: "In the trials below, the Jndges decide on the competency of the evidence before it goes to the jury, and (uuder the correctives in the use of their discretion, state i hefore in this report) with great propriety and wisdom. Juries are taken promiscuous.. from the mass of the people; they are composed of men who in many instances, in most perhaps, were uever concerned in any causes, judicially or otherwise, before the time of their service. They have generally no previous preparation or possible knowledge of the matter to be tried; and they decide in a space of time too short for auy nice or critical disquisition. These Judges, therefore, of uecessity must forestall the evideuce where there is a doubt on its competence, and indeed observe much ou its credibility, or the most dreadful consequences might follow. The institntion of juries, if not thus qualified, could not exist."

1837, *Bosanquet*, J., in *Wright* v. *Tatham*, 7 A. & E. 375: "[The Ecclesiastical Courts] are constituted upon principles very differeut from those which regulate the courts of commou law. Where judges are authorized to deal both with the facts and the law, a much larger discretion with respect to the reception of evidence may uot unreasonahly be allowed than in courts of commou law, where the evideuce, if received by the judge, must necessarily be submitted entire to the jnry. By the rules of evideuce established in the courts of law, circumstances of great moral weight are often excluded, from which much assistance might in particular cases he afforded iu coming to a just conclusion, but which are uevertheless withheld from the cousideratiou of the jury upou general principles, lest they should produce an undue influeuce upon the minds of persons nnaccustomed to consider the limitations and restrictions which legal views npou the subject would impose." [2]

1898, Professor *J. B. Thayer*, Preliminary Treatise on Evidence, 2: "The very structure of the system thus produced points to the reasou, wheu we observe its constant, anxious, and over-anxious eudeavor to prevent the trihunal to which the evidence is principally addressed from heing coufused and misled, and from dealing with questions which it has no right to deal with. It might seem strange and uot worth while to keep alive so long a tribunal which has ueeded so mnch watchiug and so mauy safeguards, if oue did

[1] The degree of admissible probative valne is more particularly considered, for circumstantial evidence, *post*, § 38, and for testimonial evidence, *post*, §§ 475–478.

[2] The opinions of other jndges in the same report, and in the judgments delivered on appeal, in 5 Cl. & F. 670, point this out with similar tenor; thus, Lord Brougham, iu Wright *v.* Tatham, 5 Cl. & F. 670, 769 ("From the pecnliarity of the tribunal of the courts of commou law have arisen nine parts out of ten of the peculiarities of our law of evidence").

not recall the immense persistence of legal institutions and usages, as well as the deep political significance of the jury and its relation to what is most valued in the national history and traditions of the English race. It is this institution of the jury which accounts for the common-law system of evidence, — an institution which English-speaking people have had and used, in one or another department of their public affairs, ever since the Conquest."

§ 29. **Same: Relevancy, as distinguished from Weight or Proof.** (*b*) On the other hand, the judges constantly find it necessary to warn us that their function, in determining Relevancy, is not that of final arbiters, but merely of preliminary testers, *i. e.* that the evidentiary fact offered does not need to have strong, full, superlative, probative value, does not need to involve demonstration or to produce persuasion by its sole and intrinsic force, but merely to be worth consideration by the jury. It is for the jury to give it the appropriate weight in effecting persuasion. The rule of law which the judge employs is concerned merely with admitting the fact through the evidentiary portal. The judge thus warns the opponent of the evidence that he is not entitled to complain of its lack of absolute demonstrative power; a mere capacity to help in demonstration is enough for its admission:

1806, Mr. *W. D. Evans*, Notes to *Pothier*, II, 157 (No. 16, § VI): "The general rules of law concerning the admission and sufficiency of evidence, and the particular conclusion which a jury may draw from the evidence before them in a particular case, are two things which, as I have already more than once observed, whilst they differ most essentially in their nature and principle, are very subject to be confounded, and which therefore in every discussion should be most carefully kept distinct."

1837, *Tindal*, C. J., in *Wright* v. *Tatham*, 7 A. & E. 407: "The judge who presides at the trial, by admitting this evidence, is not determining, nor has he any right to determine, the question of the [testamentary] competency of the testator. That is a question which the jury are to decide, after the termination of a long course of conflicting evidence. All that the judge has to determine is whether a particular piece of evidence is at a particular period of the cause admissible for the consideration of the jury as the matter then stands."

1846, Lord *Brougham*, in *Irish Society* v. *Derry*, 12 Cl. & F. 641, 673: "The main error which ran through the argument of the very learned and ingenious counsel . . . was that they seemed to confound the purpose for which evidence was tendered and admitted, with the admissibility of that evidence. The evidence tendered to prove any point may be perfectly inadequate to prove that point. It may be such that if the learned judge put it to the jury, as sufficient proof, his directions to them upon that point might well be a subject of exception. Yet the same evidence might be perfectly well admitted and received for such purposes to which it was strictly and correctly applicable. . . Suppose that in a cause at Nisi Prius, the defendant produces a letter under my hand; that letter is received in evidence, though it may be very true it does not prove the fact for which purpose the defendant put it in. If the judge refuses to receive it, his direction is liable to be excepted against for that refusal. If he receives and states erroneously to the jury that it proves the point which it does not, his direction is liable to be excepted against upon another ground. But still it may be properly receivable in evidence, though it does not prove the matter, to prove which it was offered in evidence."

1829, *Marshall*, C. J., in *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 44: "This blending of an objection to the admissibility of evidence in the same application which questions its sufficiency is said to be not only unusual, but to confound propositions distinct in themselves. . . . It is undoubtedly true that questions respecting the admissibility of evidence

are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot with strict propriety be propounded at the same time."[1]

Thus, the judicial tests of Relevancy have this peculiar quality, in contrast with that of proof or evidence in general or in any other department of investigation:

(1) The required probative value is somewhat higher than it need otherwise have been, because the purpose is to select only such material as is worth laying before the jury;

(2) The required probative value, on the other hand, is far shorter than full proof, because the judge merely puts upon the material its ticket of admission as relevant, and leaves the weight, or final persuasive effect, for the jury to determine.

3. Modes of Inference and Types of Argument.

Two preliminary matters remained to be examined: 1. What is the logical form of inference or argument[2] employed in the use of litigious evidence? 2. What are the logical requirements, if any, as sanctioned by the Courts?

§ 30. **Form of Argument is Inductive.** The process of adducing evidence and passing upon probative value is and must be based ultimately on the canons of ordinary reasoning, whether explicitly or implicitly employed. It is therefore necessary to review the distinction which Logic makes between the two great types of Argument[1] or Proof — the Deductive and the Inductive forms. Modern Logic looks at this distinction without prejudice. Its tendency is to accept both types as capable of reduction to a single one. Nevertheless the distinction is a practical and substantial one, particularly in litigious proof. It is set forth with clearness and brevity by an eminent authority:

1884, Professor *Alfred Sidgwick*, Fallacies, A View of Logic from the Practical Side, 212 ff.: "The real foundation of Proof is always the recognition of resemblance and difference between things or events known and observed, and those which are on their trial, — whether such recognition is based (1) on knowledge already reached and formulated in names or propositions or (2) on direct observation and experiment. In proportion as we openly and distinctly refer to known principles (already generalized knowledge) is Proof *deductive;* in proportion as we rapidly and somewhat dimly frame new principles for ourselves from the cases observed is Proof *inductive, empirical,* or (in its loosest form) analogical. . . . The whole history of the rise and growth of knowledge (it has been also already remarked) is a record of fruitful rivalry and interaction between two opposite

[1] So also: 1840, Verplanck, Sen., in Mayor *v.* Pentz, 24 Wend. 676 ("That distinction between admissibility and credibility which our jurisprudence has always maintained"); 1897, Brickell, C. J., in Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435. As early as 1745 Chief Justice Willes had declared that "the distinction between the competency and credit of a witness is a known distinction" (Omichund *v.* Barker, 3 Atk. 21); but the first emphasis on it for evidence in general seems to have been given in Mr. Burke's Report, quoted *supra*, § 28.

For the distinction between the admissibility of a particular piece of evidence, and the judicial control over the *sufficiency of the evidence as a whole* to go to the jury, see *post*, §§ 2488, 2494.

[2] "Argument" is here used in the logician's sense of a "proposed inference," not in the sense of § 1, *ante*.

[1] See n. 2, § 29, *ante*.

processes. Observation of facts has demanded theory — statement of 'laws' or uniformities — to explain, and even to name, the things and events observed; theory in its turn has always been more or less liable to purging criticism of 'fact.' . . .

"Strictly speaking all Proof, so far as really *proof*, is deductive. That is to say, unless and until a supposed truth can be brought under the shadow of some more certain truth, it is self-supporting or circular. Unless we have some more comprehensive and better-tested generalization within the sweep of which to bring our thesis, we reach no foundation broader than itself; no assurance beyond what may be derived from the fact that nothing has yet been found to contradict the theory. For two elements, express or implied, are required for all rationalization: (1) a Principle or abstract indication (an assertion that a certain sign is trustworthy); (2) an Application of such Principle, or an assertion that the sign is present in the case or cases contemplated by the Thesis. In other words all rationalization may be represented syllogistically. . . . Just as Explanation always demands a reference to some wider Generality than that which is to be explained, so Proof always demands a reference to some wider Generality than that which is to be proved. To explain and to prove consist essentially in this. Both are forms of 'rationalization.' But there is yet a meaning in the distinction [between inductive and deductive], and, with certain limitations and apologies, I propose to make some use of it.

"Although the dependence of any Thesis on its Reason must be rationalized — *i. e.* must have the underlying principle made clear — before the testing operation can be called complete, yet in regard to special dangers it makes considerable difference whether that principle is at first definitely apprehended or not, — whether (as it is commonly expressed) the Proof professes to rely (1) upon laws known or supposed to be true, or (2) upon facts observed or supposed to be observed. We must distinguish, then, as far as possible, between that kind of Proof which rests openly and distinctly upon already generalized knowledge — Deductive Proof — and that which rests upon what may be loosely described as 'isolated facts' or 'perception of resemblance and difference' or 'observation and experiment' . . . or however the phrase may run, — that which is commonly known in its highest form as Inductive Proof, and in its lowest form as the Argument from Analogy. The required limitations in preserving the distinction appear to be, in the first place, a clear recognition that although in Induction the Principle or Law connecting the cases is in the case of *Inference* commonly dropped out of sight, or at least left highly indistinct, yet the whole cogency of Inductive *Proof* depends upon the extent to which such principle is first rendered definite and then confronted with observable or admitted fact. . . . The second difficulty in preserving the distinction lies in the fact that as a rule the Empirical and Deductive processes are found in combination, both being employed on the same subject-matter. . . . These two considerations make it of course extremely difficult in practice to label every argument at once with one or the other name. Sometimes, as where the Reason is a direct statement of the Principle itself, or again where it consists of a record of some experiment, no hesitation need practically be felt as to where the danger lies; but in a large number of cases we have no means of deciding whether the argument may best be classed as empirical or deductive or both. . . . But, because the distinction breaks down when pressure is put upon it, we need not consider it wholly worthless. It possesses a solid core of applicability, and if we can be content to use it as a rough guide in finding the weak point of an argument, much value may still be extracted from it in economy of time. . . . However we choose to name the two different kinds of arguments, the distinction between them has a certain real importance, as already shown; and all that is intended to be done with it is to recognize that so far as the given argument may be seen to belong to one or the other class, so far we are already on the track of special dangers."

A brief examination will show that in the offering of evidence in Court the form of argument is always inductive. Suppose, to prove a charge of murder,

evidence is offered of the defendant's fixed design to kill the deceased. The form of the argument is: "A planned to kill B; therefore, A probably did kill B." It is clear that we have here no semblance of a syllogism. The form of argument is exactly the same when we argue: "Yesterday, Dec. 31, A slipped on the sidewalk and fell; therefore, the sidewalk was probably coated with ice"; or, "Today A, who was bitten by a dog yesterday, died in convulsions; therefore, the dog probably had hydrophobia." So with all other legal evidentiary facts. We may argue: "Last week the witness A had a quarrel with the defendant B; therefore, A is probably biassed against B"; "A was found with a bloody knife in B's house; therefore, A is probably the murderer of B"; "After B's injury at A's machinery, A repaired the machinery; therefore, A probably acknowledged that the machinery was negligently defective"; "A, an adult of sound mind and senses, and apparently impartial, was present at an affray between B and C, and testifies that B struck first; therefore, it is probably true that B did strike first." In all these cases, we take a single or isolated fact, and upon it base immediately an inference as to the proposition in question.

It may be replied, however, that in all the above instances, the argument is implicitly based upon an understood law or generalization, and is thus capable of being expressed in the deductive or syllogistic form. Thus, in the first instance above, is not the true form: "Men's fixed designs are probably carried out; A had a fixed design to kill B; therefore, A probably carried out his design and did kill B"? There are two answers to this. (1) It has just been seen that every inductive argument is at least capable of being transmuted into and stated in the deductive form, by forcing into prominence the implied law or generalization on which it rests more or less obscurely. Thus it is nothing peculiar to litigious argument that this possibility of turning it into deductive form exists here also. It is not a question of what the form might be — for all inductive may be turned into deductive forms —, but of what it is, as actually employed; and it *is* actually put forward in inductive form. (2) Even supposing this transmutation to be a possibility, it would still be undesirable to make the transmutation for the purpose of testing probative value; because it would be useless. We should ultimately come to the same situation as before. Thus, in one of the instances above: "A repaired machinery after the accident; therefore, A was conscious of a negligent defect in it"; suppose we turn this into deductive form: "People who make such repairs show a consciousness of negligence; A made such repairs; therefore, A was conscious of negligence." We now have an argument perfectly sound deductively, *i. e.* if the premises be conceded. But it remains for the Court to declare whether it accepts the major premise, and so the Court must now take it up for examination, and the proponent of the evidence appears as its champion and his argument becomes: "The fact that people make such repairs indicates (shows, proves, probably shows, etc.) that they are conscious of negligence." But here we come again, after all, to an inductive form of argument. The consciousness of

negligence is to be inferred from the fact of repairs, — just as the presence of electricity in the clouds was inferred by Franklin from the shock through the kite-string, *i. e.* by a purely inductive form of reasoning. So with all other evidence when resolved into the deductive form; the transmutation is useless, because the Court's attention is merely transferred from the syllogism as a whole to the validity of the inference contained in the major premise; which presents itself again in inductive form. For all practical purposes, then, it is sufficient to treat the use of litigious evidentiary facts as inductive in form.

§ 31. **Practical Requirements of the Argument.** The next inquiry is, What are the peculiar dangers of the argument, the loopholes for error, the opportunities for false inference? By ascertaining these, we shall learn what safeguards or tests may be expected to be imposed by the Courts before admitting the evidence at all, and what opportunities of counter-argument are offered to the opponent.

These peculiar dangers and necessities are thus set forth by the same eminent authority:

1884, Professor *Alfred Sidgwick*, Fallacies, 270: "There is at bottom one primary source of fallacy in the inductive argument, call it by whatever name may be most convenient. We may name it, for instance, the danger of overlooking plurality of causes, or of neglecting possible chance or counteraction, or the possibility of unknown antecedents, or of arguing either *post hoc ergo propter hoc* or *per enumerationem simplicem*, or of neglecting to exclude alternative possibilities, or of forgetting that facts may bear more than one interpretation, or of stating the law too widely, or of failing to see below the surface, or — perhaps on the whole the best of all — of unduly neglecting points of difference. . . . [The form of argument is] a case or cases brought forward of which such law is asserted to be the best explanation. If, then, some better explanation is possible, the theory as stated is impeachable. . . . By the 'best' explanation is meant . . . that solitary one out of all possible hypotheses which, while explaining all the facts already in view, is narrowed, limited, hedged, or qualified, sufficiently to guard in the best possible way against undiscovered exceptions. . . . Hence, the 'best' explanation of the facts A and B and C is that explanation which, while neglecting certain points of difference among them, and thus forming some generalization, neglects only those differences which are 'unessential.' The best explanation of (*i. e.* generalization from) one solitary sequence observed is that which neglects only its unessential elements or features. . . . It is in every case, then, through undue neglect of the essential difference between the specific case or cases observed and the wider genus to which the assertion professes to refer, that we rise to a generalization not sufficiently guarded against possible exceptions. . . . All positive proof depends . . . on the care, the precautions with which observation has been interpreted and experiment conducted. So far only as these exclude alternative possibilities are they of real value. . . . Because all positive assertion can only justify itself . . . when mistakes have been either one by one eliminated or in a body prevented, the burden of doubt to be removed by evidence consists essentially in the group of alternative theories remaining undiscarded. . . . The important point is, always, to show that all other possible theories are weighed in the balance and found wanting, — that is to say, that all precautions have been taken against that crudest kind of unchecked generalization which the least trained mind possesses in the greatest abundance. This objection against a theory, that alternative theories are not yet discarded, appears, however, more directly applicable, more fruitful of results, against a concrete or an abstract-concrete thesis than against a directly abstract one. . . .

And the right of the theory chosen, over all its possible rivals, depends entirely upon the depth of our insight into the conditions under which the experiment or observation was really made. This is the main lesson of Logic as regards Induction. . . .[1] These alternatives have to be faced as possible explanations of each observed case; and the immediate question in each case is, What certainty can we obtain that the alternative chosen is the right one out of all those conceivable? The methods of Inductive Proof may be viewed as attempts to answer this question."

The peculiar danger, then, of Inductive Proof is that there may be other explanations than the desired one for the fact taken as the basis of proof. But in the study of Logic we are concerned with discovering the defects of a mode of Proof, while, in judicial rulings upon evidence, we are concerned (*ante*, § 29) merely with the propriety of admitting the fact at all, — with its quality as a possible *Inference*, not as absolute *Proof*. What are the safeguards and requirements and opportunities, then, which are suggested to us for this peculiar judicial process by the nature of the inductive argument? The Courts cannot evade the regular and necessary processes of human thought. If there are conditions necessary for the proper employment of inference, the judicial determinations may be tested by them, and will illustrate them, so far as conscious reasoning by persons of experience and training who are not professed logicians may be assumed to be generally and roughly correct. The circumstances that judicial reasoning on questions of probative value is usually not conducted professedly according to logical rules, and that it looks to practical purposes attainable by simple and rough rules, warn us not to attempt to test this reasoning too steadily and minutely by logical rules. But as the logical processes cannot be evaded, and as the Courts do profess to reason upon these subjects, it is both necessary and possible to study their rules, and to learn how far there are any logical tests and requirements recognized in judicial reasoning.[2] So far as the body of rules of judicial evidence puts itself in harmony with scientific logic, we must ascertain it; so far as some arbitrary test, or no test at all, is adopted, we must ascertain this also. And we must throughout remember the peculiarity of the judicial problem, separating it from the problem of scientific logic, *i. e.* the problem of determining merely when the point of admissibility has been reached, and not the point of absolute proof or demonstration.

§ 32. **Same: (1) with reference to the Proponent of Evidence.** If, then, the potential defect of inductive Proof is that the fact offered as the basis of the conclusion may be open to one or more other explanations or conclusions, the test or requirement for mere Admissibility (as distinguished from Proof) must be something far short of this in strictness. The failure to exclude a single other rational hypothesis would be from the standpoint of Proof a fatal defect; and yet, if only that single other hypothesis were open, there might still be an extremely high degree of probability for the conclusion first claimed. When Robinson Crusoe saw the human footprint on the sand, he could not argue inductively that the presence of another human

[1] P. 339.

[2] Compare Stephen, Indian Evidence Act, v, 14.

being was absolntely proved. There was at least (for example) the hypothesis of his own somnambulism. Nevertheless, the fact of the footprint was for his conclusion evidence of an extraordinary degree of probability, *i.e.* it passed beyond the line of mere Admissibility. The requirement or test, then, for this lower standard — Admissibility — would be something like this: Does the evidentiary fact point to the desired conclusion (not as the only rational hypothesis, but) as the hypothesis (or explanation) most plausible or most natural ont of the various ones that are conceivable? Or (to state the requirement more weakly), is the desired conclusion (not, the most natural, but) *a* natural or plausible one among the various conceivable ones? In practice it will be found that the Courts vary between these two, according to the practical possibilities of producing evidence and according to the dangers of its misuse. Sometimes they require in effect that the alleged conclusion (to which the evidentiary fact is directed) must be a more probable one than others; sometimes they merely reqnire that must be a probable or a possible one, irrespective of the greater probability of others.[1]

This general judicial attitude may be illustrated from various sorts of evidentiary facts. (1) The fact that A left the city soon after a crime was committed will be received by some Courts without further conditions, while others require that his knowledge that he was snspeeted shall first be shown. Here the evident notion is that the mere fact of departure by one unaware of the charge is open to too many innocent explanations; but the addition of the fact that A knew of the charge tends to put these other hypotheses into the background, and makes the desired explanation or conclusion — *i.e.* a guilty consciousness — stand out prominently as a more probable and plausible one. Even then there are other possible hypotheses — such as a summons from a dying relative or the fear of a yellow-fever epidemic in the city; bnt these are not the immediately natnral oncs, and the greater naturalness of the desired explanation suffices to admit the evidentiary fact of flight. (2) The fact that A makes repairs after an accident tends to the probable conclusion that he is conscious of the machine's being negligently defective. It is also open to the explanation, not perhaps equally probable, that he was conscious of its being merely defective, yet not negligently so. Nevertheless, the injustice of allowing the former inference to be made, if in truth the latter should be the correct one, is so great that (in the opinion of most Courts) the evidence should be excluded. Here the notion is that the desired explanation is not so preëminently the most probable one, as against others, as to make it desirable to consider it; the standard of the requirement being somewhat higher than in the preceding instance. (3) The fact that A before a robbery had no money, but after it had a large sum, is offered to indicate that he by robbery became possessed of the large sum of money. There are several other possible explanations, — the receipt of a legacy, the receipt of a debt, the winning of a gambling game, and the

[1] For judicial phrasings of the test for circumstantial evidence, see § 38, *post*.

like. Nevertheless, the desired explanation rises, among other explanations, to a fair degree of plausibility, and the evidence is received. (4) The fact that A, charged with stealing a suit of clothes, was a poor man is offered to show him to be the thief. Now the conclusion of theft from the mere fact of poverty is, among the various possible conclusions, one of the least probable; for the conclusions that he would preferably work or beg or borrow are all equally or more probable, and the hypothesis of stealing, being also a dangerous one to adopt as the habitual construction to be put on poor men's conduct, has the double defect of being less probable and more hard upon the innocent. Such evidence, then, is seldom admitted to show that conclusion. (5) The fact that a person of unbalanced delusions asserts on the stand that he saw A strike B would formerly have been excluded absolutely. But nowadays it is recognized that a delusion may affect the powers of observation and memory to a limited extent only, and may not concern the subject of the testimony. If it does concern that subject, the witness is excluded, because the hypothesis that the fact occurred as he states it is too feeble and improbable, alongside of the hypothesis that his delusion is the only source of his statement. But if the delusion does not concern that subject, then his statement is received, even though it is still possible that his statement has been affected by the delusion. Thus the notion is, as before, that the evidentiary fact — *i. e.* the assertion on the stand — will be received where the correctness of the assertion is at least one among probable hypotheses. (6) The fact that A makes his statement on the witness-stand in response to a leading question of his counsel is not received, because in experience the chances are so great that his answer is based on the counsel's suggestion and not on his own knowledge. On the other hand, where the leading question deals merely with the preliminary matters of his name, age, and residence, the answer is receivable because, there being so little motive for falsification on those subjects, the conclusion that he answered truly is far the most probable one. Still further, where the witness cannot be made to understand what the inquiry is about, his statement answering a leading question is received, because although the conclusion that he is falsifying is perhaps still as probable as ever, yet there is no other way of obtaining evidence from that source (*i. e.* this witness), and hence the evidentiary fact (*i. e.* his answer), though furnishing an inference otherwise so weak as to be inadmissible, comes in because of the paucity of material and the practical necessities of the situation. (7) Formerly the presence of a pecuniary interest of any sort sufficed to exclude a witness, *i. e.* to exclude the evidentiary fact of his assertion. It was always conceded (and often declared by the Courts) that the hypothesis that such persons' assertions were usually false was a contingent and less probable one; but the mere possibility that they might be false was enough to exclude them. To-day the law has harmonized its treatment of such assertions with the treatment of all other evidentiary facts, *i. e.* it does not allow the less probable hypothesis of falsity to exclude the evidence, particularly in view of the availability of other methods of overthrowing or

confirming that hypothesis. (8) The fact that A, the witness, has had a lawsuit with B, the defendant, is offered to show that A has feelings of animosity towards B which make it probable that he cannot testify correctly against him. Most Courts admit such evidence; but the Courts that reject it do so on the expressed theory that the inference of such animosity is a forced and unnatural one, and that the mere fact of a lawsuit is consistent with so many other more probable hypotheses that the evidence does not reach a sufficient degree of probative value.

Thus, throughout the whole realm of evidence, circumstantial and testimonial, the theory of the inductive argument, as practically applied from the standpoint of Admissibility, is that the evidentiary fact will be considered when, and only when, the desired conclusion based upon it is a more probable or natural, or at least a probable or natural, hypothesis, and when the other hypotheses or explanations of the fact, if any, are either less probable or natural, or at least not exceedingly more probable or natural. The degree of strength required will vary with different sorts of evidentiary facts, depending somewhat upon differing views of human experience with those facts, somewhat upon the practical availability of stronger facts, and somewhat upon the hardships of certain inferences in case they should be unfounded. But the general spirit and mode of reasoning of the Courts substantially illustrates the dictates of scientific logic.

§ 33. **Same: Occasional Subordinate Tests; Method of Agreement and Method of Difference.** The main question for the inductive argument being (in the words of Professor Sidgwick, already quoted), "What certainty can we obtain that the alternative chosen is the right one out of all those conceivable?," there have been stated by scientific logic several subordinate methods or processes of investigation which may be viewed as attempts to answer this question. Usually enumerated as five, they are reducible in essence to two, — the Method of Agreement and the Method of Difference. Occasionally they may be and are conveniently resorted to in the testing of judicial evidence.

(*a*) *Method of Agreement.* The canon which this applies may be thus stated: "Whatever circumstances can be excluded without excluding the phenomenon whose effect (or cause) is being sought; or can be absent notwithstanding its presence, are not causally connected with it. . . . The remainder, those circumstances which are not eliminated by this process, are supposed to be thus shown to be essential to the phenomenon, — to be the proved effect (or cause)."[1] From the point of view of Proof, then, when we argue that the observed instances of a, viz. a', a'', a''', being always followed by b, prove a to be the cause of b, we can avoid the danger of ignoring other causes as the true explanation, by providing that the various instances shall be attended by identically the same circumstances or conditions; then, and then only, when a, under identically the same conditions, is followed always by b, have we the right to claim that b is the effect of a and not of some

[1] Sidgwick, *ubi supra*, 340.

other cause. Applying this method from the standpoint of mere Admissibility, we of course do not need to exclude so rigorously the possibility of other explanations; accordingly our test would be whether the evidential instances occurred under substantially similar (not identically the same) conditions, *i. e.* so that the supposed conclusion is at least the more probable, though not the only possible, explanation. This subordinate test — which is merely a practical aid to the ultimate or fundamental one — will naturally be most available and useful where the evidential fact consists of a supposed parallel instance. To illustrate: (1) In showing that a person's illness was due to the eating of certain food, the fact is offered that other persons were ill after eating of the same food. Here the test naturally to be applied is whether the other illnesses occurred under substantially similar conditions of time, surroundings, and symptoms. (2) To show that a portion of a pavement caused an injury because dangerous to passers-by, the fact is offered that other persons who passed fell down at that place. Here a similar test is called for. Judicial annals contain a vast variety of instances in which this same subordinate test is the natural one to be applied, and is in practice used by the Courts.[2]

(*b*) *Method of Difference.* The canon of this method is:[3] "If an instance in which the phenomenon under investigation occurs, and an instance in which it does not occur have every circumstance in common save one, that one only occurring in the former; the circumstance in which alone the two instances differ is the effect, or the cause, or an indispensable part of the cause, of the phenomenon." As applied to the judicial purposes of Admissibility, the test of this argument becomes: In order to prove that x is the cause of b, by the fact that wherever x was present the effect b, b', b'', was found, and that wherever x was not present the different effects c or d were found, the various instances b, b', b'', c, and d are admissible if they were substantially similar to each other in all respects except the presence of x.

This test is of comparatively rare employment in judicial evidence, because it is rare that instances occur which fulfil this requirement, unless where pre-arranged experiments are possible. But so far as the conditions of the case admit the fulfilment of the requirement, the argument may be and is employed. To illustrate: The injury to the paint on the plaintiff's house is attributed by the defendant to sewer-gas; for this purpose, he is allowed to use the fact that "under conditions and circumstances as nearly as possible like those surrounding the plaintiff's house," except the presence of the sewer-gas, the injury to paint did not occur.[4]

The purpose in using both these subordinate tests is always the same general one, — to secure a fair probability for the claimed hypothesis, as against and in competition with other possible ones. It is enough to note here that these specific and accepted logical tests are occasionally available and are judicially applied in the admission of litigious evidence.

[2] *Post*, §§ 441–464, in particular.

[3] Sidgwick, *ubi supra*, 345.

[4] 1879. Eidt *v.* Cutter, 127 Mass. 524; see further § 442, *post*, and §§ 450–464.

§ 34. **Same: (2) with reference to the Opponent.** It is important to notice the double treatment of which every offer of evidence may admit. Where we are dealing with the general subject of Proof in Logic, the single inquiry is whether the argument offered as involving Proof does really fulfil the logical requirements. But wherever, in the applications of logical principles to specific practical purposes, two parties are found contending, the proponent and the opponent — as in a formal debate, a controversy of scientific investigators, and, preëminently, a trial at law —, the mode of argument must be studied from two points of view. It has been seen that, in applying the principles of logic to Admissibility, the judicial standard falls far short of the standard of complete Proof. Where even the possibility of a single other hypothesis remains open, Proof fails, though it suffices for Admissibility if the desired conclusion is merely the more probable, or a probable one, even though other hypotheses, less probable or equally probable, remain open. It is thus apparent that, by the very nature of this test or process, a specific course is suggested for the opponent. He may now properly show that one or another of these hypotheses, thus left open, is not merely possible and speculative, but is more probable and natural as the true explanation of the originally offered evidentiary fact. That fact has been admitted in evidence, but its force may now be diminished or annulled by showing that some explanation of it other than the proponent's is the true one. Indeed, every ruling upon the admissibility of such a fact is concerned with the question whether the proponent shall in advance discount or exclude some of these other hypotheses or whether they are so much less probable that it is safe to leave to the opponent the task of showing that one or more of them is the better explanation, if in truth it is.

Thus every sort of evidentiary fact may call for treatment in two aspects: 1. What is the extent to which other hypotheses must be excluded before the fact is admissible? 2. What are the other hypotheses which are then available for the opponent as explaining away the force of the fact thus provisionally admissible? This second aspect of each class of facts will hereafter be treated usually, for the respective subjects of Relevancy, under the head of Explanation. To illustrate: (1) In showing the defendant's connection with a murder, the fact is admitted of the finding of a knife, bearing his name, near the body of the deceased; the defendant, to refute the claimed conclusion that he was present with the knife at the murder, will be allowed to show that he lost the knife a month before; thus giving greater color of probability to the hypothesis that some one else was present with the knife. (2) To show the defendant's animosity against the deceased, the fact of a serious quarrel ten years before is offered; some Courts will exclude this, thinking that the claimed conclusion, namely, that the animosity existed at the time of the killing, is an hypothesis of too low relative probability; other Courts will admit it, believing that this hypothesis has sufficient *prima facie* probability, and leaving it to the opponent to show — *e. g.* by

the fact of a reconciliation in the interim — that the fact of the quarrel does not lead to the conclusion claimed. (3) To show the injurious vibrative qualities of a bridge in causing cracks in adjacent buildings, the fact of the existence of cracks in other adjacent buildings is received; this may be explained away by the fact that the operation of a railway, and not the bridge-vibrations, had been their cause.[1] (4) A witness must be shown in advance to have had adequate opportunity to observe the facts related, and to have sufficient experience to judge, if the matter is out of the ordinary; the hypothesis that he may be mendacious by disposition, being not a normal but an exceptional one, need not be discounted in advance by showing his good character for truth; but it is left to the opponent, if this derogatory circumstance exists, to show it; a showing of bad character will tend to explain away all his assertions as those of a confirmed liar. (5) The rest of a conversation or writing, of which a part has been received as an admission, may be presented by the opponent to explain away the apparent effect of the fragment; thus, to adopt Algernon Sidney's famous illustration (frequently used by Erskine in his arguments for the accused in the sedition trials of the 1790s), the prosecution, on a charge of blasphemy, might offer a statement of the defendant: "There is no God"; but this could be instantly explained away as part of a quotation from the Bible of the passage, "The fool hath said in his heart, 'There is no God.'" Such is the complementary process of Explanation, by the opponent, as suggested by and related to the evidentiary fact received from the proponent.[2]

It must be understood, of course, that the opponent's modes of opposition are not confined to this. He may also (2) deny the truth of the evidentiary fact itself; or (3) advance some new and different evidentiary fact tending to prove his own counter-proposition. But in neither case are we concerned here with any process of Explanation. In (2) there is no form of argument at all, but a simple denial of the fact; in (3) there is a wholly new argument, in which the opponent in turn becomes proponent and submits his material for admissibility according to the ordinary tests; *i. e.* it is an ordinary question of relevancy. To illustrate: To charge A with murder, the prosecution shows a specific threat, an old quarrel, and traces of blood on his clothes. The defendant answers: (1) Explaining away the old quarrel by showing an intervening reconciliation; explaining away the blood-traces by showing the recent killing of a chicken; this is the complementary process of Explanation suggested by the evidentiary facts of quarrel and blood, and is directed to diminishing their force; this complementary process depends for its conditions and possibilities upon those original facts; (2) Denying the specific threat; this is in itself no form of inference, and raises no question of relevancy; (3) Advancing the

[1] 1882, Abend *v.* Mueller, 11 Ill. App. 257.

[2] 1870, Graves, J., in Comstock *v.* Smith, 20 Mich. 348: "In cases of this kind, when the question is as to the relevancy of evidence in reply, the point is not whether the evidence offered is the most convincing or persuasive, but whether it tends to cut down, limit, explain, or obviate the defence in any part of it, or to illustrate some legitimate answer to the defence. In order to be relevant, it is not requisite that the testimony should be essential. It may be cumulative, it may be supererogatory, and still be relevant."

new facts of an alibi and of good character for peaceableness; here the defendant is simply a proponent of new evidentiary facts, just as the prosecution was for its own evidence; the question of relevancy is the ordinary one, and depends on precisely the same tests as the prosecution's original evidence.

All an opponent's modes are reducible to these three; but only in the first is he distinctively an opponent so far as the logical nature of his argument is thereby affected. In the second he does not argue at all; in the third he ceases to be an opponent, from the point of view of argument, and becomes himself the proponent of a new argument, which the original proponent may now attack as an opponent.

§ 35. **Same: Occasional Subordinate Forms.** It has been seen that the proponent's evidentiary fact is occasionally subjected to a subordinate test, usually involving a substantial similarity of conditions, and peculiarly useful in a few situations (*ante*, § 33). In the same way, the opponent, desirous of explaining away the force of an evidentiary fact by showing that another hypothesis is equally or more probable than the one claimed, finds that the process, just described in its common form, sometimes takes on a specific subordinate form peculiarly useful in certain situations. These forms, as noticed in judicial annals, seem to be practically three in number.

(1) *Explanation by Inconsistent Instances.* Where the proposition is that y is the effect of x, and the evidentiary fact is that in instances a, a', and a'', the circumstance y followed and the circumstance x was present, a convenient way of annulling the effect of these instances is to show that in a fourth instance a''' the circumstance x was present and yet the circumstance y did not follow.[1] To illustrate: In arguing that the vibrations of the defendant's railway bridge cracked the plaintiff's buildings at the eastern end, the injured condition of various buildings at that end is received for the plaintiff; to explain this away, the fact is received for the defendant that at the western end the vibrations were even more severe and yet no buildings there were cracked.[2] The requirement for this mode of explanation is merely that the inconsistent instances shall have occurred under substantially similar conditions, so as to exclude the likelihood that any other cause — *e.g.* in the above illustration, the peculiar strength of the buildings at the western end — could have counteracted the operation of the supposed cause. A chief use for this mode of argument is to demonstrate an alleged possibility or impossibility. When A's argument is that an event or deed x is possible or impossible, it is obvious that the whole force of his evidentiary facts is at once destroyed by a single instance of its impossibility or its possibility, provided the conditions are substantially similar in both cases. In this way the hypothesis originally set up as the exclusive one is shown not to be an exclusive one at all, by the fact that a contrary one has occurred in the instance offered by the opponent. A universal or absolute affirmative can be thus exploded equally as well as a universal or absolute negative. It is the universality of the alleged indication that lays it open to fatal attack by an inconsistent instance. To illus-

[1] Sidgwick, *ubi supra*, 275.

[2] 1882, Abend v. Mueller, 11 Ill. App. 256.

trate: (*a*) A burglar was alleged to have entered through a certain window; but the accused affirmed the impossibility of a man's getting through it; the prosecuting attorney suddenly put the frsme over the defendant's head and drew it completely down, thus disproving the alleged impossibility; (*b*) at a trial for murder, there was testimony that the accused was seen going up a certain hill, wearing a pepper-and-salt suit, the witness looking from the rear and facing the sun; experiments showed that under such circumstances it was impossible for an observer to distinguish any color at all; (*c*) at a trial for arson, the prosecution claimed that the fire was set with a candle set in a closed box so as to burn down into a bnnch of shavings; experiment showed that under the conditions alleged a candle would have gone out in a shorter interval than that which mnst have elapsed.[3]

(2) *Explanation by Dissimilarity of Conditions.* Where the proponent's evidentiary fact has been admitted under the subordinate test of § 33, *ante*, — the substantial similarity of conditions in the instances offered —, the opponent's course is naturally suggested; *i. e.* he may show that there is at least a residuum of dissimilar conditions which, though not originally sufficient to exclude, nevertheless suffices to diminish probative value, by making some other hypothesis a possible one, if not an equally probable one. To illustrate: (*a*) In arguing that arsenical wall-paper was the source of the plaintiff's illness, the fact that others living in the same house were affected by similar symptoms is received; to explain this away, evidence is received that the same symptoms customarily attend the eating of unsound oysters, and that the others, but not the plaintiff, had eaten oysters; thus the dissimilarity of conditions is emphasized as the possible source of erroneous explanation. (*b*) To prove the qnalities of a dental invention as a pain-killer, the fact is received that the patrons of the dentist using it had suffered pain under other dentists but not under him; to explain this away, it may be shown that they had never been under him before he used this pain-killer; thus emphasizing the dissimilarity of conditions to suggest that this dentist's personal skill, and not the invention, had prevented their pain.

(3) *Explanation by Cumulative Instances.* Where the proposition is that y is the effect of x, and the evidentiary fact is that in instances a, a', and a'', the circumstance y followed and the circumstance x was present, another way of annulling the effect of these instances is to show that in a fourth instance a''' the circumstance y again followed, and yet the circumstance x was not present. This argument is in a manner the opposite of (1) *supra*, and consists in offering other instances in which the same effect is found, but without the presence of the alleged causing circumstance; and thus forces us to look upon its presence in the proponent's original instances as merely accidental, and not really causative. The requirement of this argument is that the conditions of the additional instances shall be substantially similar in every respect except the alleged causing circumstance; for if they were not, then the elimination of the alleged cause as harmless is not accom-

[3] Cited by Mr. Irving Browne, Green Bag, 1893, 186 ff.

plished. For example, the fact of the defendant's flowage of certain lands of the plaintiff is alleged to be the cause of deterioration in their productiveness during the previous ten years; to refute this, the defendant offers the fact of similar deterioration of other lands that had not been subjected to the flowage; this is admissible only so far as the other lands are near by and presumably under the same influences of soil and climate.[4]

§ 36. **Summary.** It has thus been seen that every evidentiary fact or class of facts may call for two processes and raise two sets of questions: (1) the admissibility of the original fact from the proponent; (2) the admissibility of explanatory facts from the opponent. (1) The first is subjected to the test whether the claimed conclusion is a probable or a more probable one, having regard to conceivable interpretations of the fact; the rulings vary more or less upon different evidentiary facts, according to various considerations of experience; and occasionally specific subordinate tests are applied. (2) The second process consists in explaining away the original fact's force by showing the existence and probability of other hypotheses; for this purpose other facts affording such explanations are receivable from the opponent; and here also, occasionally, occur specific subordinate processes and tests. The detailed rules for the various sorts of evidence are of course more or less concrete and dogmatic; this or that evidence is or is not held to be relevant. But the principles underlying these rulings are the principles of applied logic that have just been outlined.

[4] 1838, Standish *v.* Washburn, 21 Pick. 237; *post*, §§ 443, 451.

TITLE I.

CIRCUMSTANTIAL EVIDENCE.

INTRODUCTORY:

GENERAL THEORY OF CIRCUMSTANTIAL EVIDENCE.

CHAPTER IV

§ 38. **Degree of Probative Value required.** It has just been seen (§ 31) that the general and broad requirement for relevancy is that the claimed conclusion from the offered fact must be a probable or a more probable hypothesis, with reference to the possibility of other hypotheses. This is not only the general principle that best describes the attitude of the Courts, but is also the expressed form of the test for specific kinds of facts. Nevertheless, there is naturally more or less variation of language in the phrasings put forth from time to time by the Courts. Generalizations of this principle for circumstantial (or "presumptive") evidence have frequently been attempted; and the following typical passages will serve as a guide to the general spirit in which the Courts apply the test of relevancy:

1794, *Gibson* v. *Hunter*, 2 H. Bl. 298; the defendant in error offered evidence of former acts to show knowledge and intent by the opponent, and his evidence was received; his statement of the principle, thus impliedly approved by the Court, was as follows: "The defendant in error humbly submits that it is competent to a jury to find matters of fact without direct or positive testimony of those facts and upon circumstantial evidence only, although the inference or conclusion to be drawn from the circumstances proved be not absolutely certain or necessary; that it is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried; and if the evidence has that tendency it ought to be received and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue."

1834, *Mattocks*, J., in *Richardson* v. *Turnpike Co.*, 6 Vt. 503: "The line between strengthening or confirming circumstances that have not a direct or certain tendency to prove the issue, and yet are not so remote as to be inadmissible, is not in all cases distinctly marked, and from the ever-shifting aspects that new cases present under the same issues, never can be distinctly defined. . . . In 1 Starkie [on Evidence], sec. 7, it is said that 'the great and general rule upon the subject seems to be this, — that all facts or circumstances upon which any reasonable presumption can be founded as to the truth or falsity of the issue or disputed fact are admissible in evidence.'"

1849, *Bell*, J., in *Stevenson* v. *Stewart*, 11 Pa. 308: "Great latitude is allowed to the reception of indirect, or, as it is sometimes called, circumstantial evidence. . . . This indirect evidence is sometimes drawn from the experience which enables us to trace a connexion between an ascertained collateral fact and the fact otherwise undetermined; and it is more or less cogent as this connexion is known to be more or less natural and frequent. Where antecedent experience shows this mutuality of relation to be constant or with a great degree of uniformity, the inference deducible, it is said, is properly termed a presumption. But this species of proof embraces a far wider scope than this. It in fact includes all evidence of an indirect nature, whether the inferences afforded by it be drawn from prior experience, or be a deduction of reason from the circumstances of the particular case, or of reason aided by experience. In the latter aspect, it is a conclusion the value of which obviously depends on the force and directness with which it is derived from the premises conceded or proved.

"But yet the competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry or to assist, though remotely, to a determination probably founded in truth. Indeed, to require a necessary relation between the fact known and the fact sought would sweep away many sources of testimony to which men daily recur in the ordinary business of life; and that cannot be rejected by a judicial tribunal without hazard of shutting out the light. Merely foreign matter must be avoided; but, though in appearance foreign, if it bear at all on the main subject, it must be heard. . . . The convincing power of the influence is for the jury, when weighing the value of the fact proved, — not for the judge, in determining the bare question of its relevancy; it is sufficient for the purposes of his inquiry that it has some affinity with the principal inquiry, though this may be weak or remote."

1861, *Woodward*, J., in *Stauffer* v. *Young*, 39 Pa. 460 (speaking of evidence to show fraud): "Whatever is not of a nature to beget mental conviction upon the point under inquiry is irrelevant evidence and should not be admitted; whatever is of that nature should be admitted. And of this moral quality of proofs the presiding judge is the arbiter; he admits and rejects, under our supervision, according to his estimate (not of the effect of the evidence, for that is for the jury, but according to his estimate) of the fitness of the evidence to conduct human reason to a sound conclusion on the point in question. . . . If any prescriptive rule in the law of evidence is applicable to the offer, the judge applies it, of course; if there be no such rule, he guides himself by the sound discretion I have indicated."

1863, *Bigelow*, C. J., in *Com.* v. *Jeffries*, 7 Ail. 548, 566: "To render evidence of collateral facts competent, there must be some natural, necessary, or logical connection between them and the inference or result which they are designed to establish. . . . It is sometimes difficult to mark with precision the line which separates the limits of just and reasonable inference from those of mere conjecture or surmise. This arises necessarily from the nature of indirect evidence. Being founded on the observation and experience of the mutual connection between facts and circumstances, the question of its competency is easy or difficult of solution according as such supposed connection is constant or more or less regular and frequent. But as a safe practical rule it may be laid down that in no case is evidence to be excluded of any fact or circumstances, connected with the principal transaction, from which an inference to the truth of a disputed fact can reasonably be made."

1871, *Cooley*, J., in *Stewart* v. *People*, 23 Mich. 75: "The proper test for the admissibility of evidence ought to be, we think, whether it has a tendency to affect belief in the mind of a reasonably cautious person who should receive and weigh it with judicial fairness."

1875, *Agnew*, C. J., in *Brown* v. *Schock*, 77 Pa. 479: "In a question of circumstantial evidence, the proof derived from the circumstances is a question of natural presumption

and is to be found by the jury; the strength of this proof depends on the probability resulting from the facts. . . . It is the right of the party to have this submitted to the jury, unless it is so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances."

1875, *Brickell*, C. J., in *Lerison* v. *State*, 54 Ala. 528: "The rule is clear and well-defined that facts and circumstances which when proved are incapable of affording any reasonable presumption or inference in regard to the material fact or inquiry involved are not admissible as evidence. The difficulty lies in its application."

1895, *McCabe*, C. J., in *Deal* v. *State*, 140 Ind. 354, 39 N. E. 930: "When evidence tends to prove a fact, however slight that tendency may be, it is admissible. That is the only guide the Court can have in determining the admissibility of evidence. . . . This is so for several reasons. One is that a party cannot be expected or required to prove the fact by a single item of evidence; and another reason is that the jury are the exclusive judges of the weight to be given to each item of evidence."

1902, *Walker*, J., in *Cohn* v. *Saidel*, 71 N. H. 558, 53 Atl. 800 (dealing with the question whether, in an action for malicious prosecution, the present defendants' submission to nonsuit in the former action warranted a conclusion that they had no probable cause in the beginning): "The argument is that that fact alone warrants the inference of a want of probable cause. But the fact of the nonsuit alone is direct evidence of no mental state on the part of the defendants, except that they did not desire to carry on the litigation at that time. It may be said that it establishes that fact conclusively. If it does, and if it might be inferred that they became nonsuit because, as then informed, they did not think they had a probable cause of action, it is necessary to go a step further in this mental operation, and to infer from this inference that the defendants, when they brought the suits, nearly a year before, upon information they then possessed, did not, as reasonable and prudent men, honestly believe they had a cause of action. There is no open and visible connection between the fact first proved, viz., that the defendants desired to withdraw their suits in April, 1900, and the fact to be proved, viz., that they had no probable cause of action in July, 1899. A great variety of reasons exist which may induce a plaintiff to become nonsuit, one of which may be that he has discovered or become convinced that he has no case. This, however, is but a mere conjecture. It is but one of a large number of sufficient reasons for such action. It cannot even be said to be the common or ordinary reason that induces a plaintiff to become nonsuit. In a particular case it may or it may not be the true reason. Unconnected with other evidence, it is pure conjecture. But one conjecture cannot be treated as a proved fact in order to reach another conjecture. The probative bearing of the evidence upon the point in issue is not logically clear and plain, but doubtful and involved, leading to no certain result. . . . The legitimate bearing or relevancy of evidence is ascertained by logic and reason applied in the conduct of a trial by jury. If it is illogical and unreasonable to allow the jury to draw conclusions from premises based upon simple conjecture, it is also illegitimate. The most that can be claimed in favor of the refusal to give the instruction requested in this case is that it is possible the defendants may have thought they had no probable ground of action when they became nonsuit, and hence, assuming that to be true, it is possible they were of the same mind when they brought their suits. This is piling conjecture upon conjecture, and reaching a result more by guessing than by the exercise of reason and logic. In a judicial tribunal mere guesses and conjectures cannot be substituted for the legal proof which the law requires. . . . In view of the fact that the reasons for becoming nonsuit are numerous, and that the plaintiff's belief that he had no cause of action in the beginning is probably a very rare one, the above rule would not seem to be reasonable, unless it is reasonable to require the defendant to prove his nonliability in the first instance. The logic of legal procedure does not lead to such a result."[1]

[1] Compare the following definitions: 1854, Scott, J., in Austin v. State, 14 Ark. 560 ("No facts are forbidden to be shown except such as are incapable of affording any reasonable

§ 39. **Same: "Collateral" Facts.** The term "collateral," sometimes here employed, has two senses, and is apt to mislead unless they are discriminated.

(1) The original and dominant sense of "collateral" as here applied (its application to the impeachment of witnesses — *post*, § 1021 — being a totally different one) is that of "immaterial." According to the principle of § 2, *ante*, no propositions can be proved except those which are properly in issue under the substantive law and the pleadings; hence, a fact evidencing a proposition not thus properly in issue is inadmissible, because immaterial. This it was at one time common to designate by the crude term "collateral":

1849, *Bell*, J., in *Stevenson* v. *Stewart*, 11 Pa. 308: "It is undonbtedly a rule governing the production and admission of evidence that the evidence offered must correspond with the allegations and be confined to the point in issne. The effect is to exclude merely collateral facts, having no connexion with the subject litigated, and therefore incapable of shedding light on the inquiry or affording gronnd for reasonable presumption or inference."

1865, *Chapman*, J., in *Shepard* v. *Ashley*, 10 All. 542: "One of the elementary rules of evidence is that it mnst be confined to the points in issne; and the reason of the rnle is that the attention of juries may not be distracted nor the public time consumed needlessly."

1890, *Foster*, J., in *Nickerson* v. *Gould*, 82 Me. 512, 514, 20 Atl. 86: "The evidence mnst be relevant to the issne, — that is, to the facts put in controversy by the pleadings. This rule prohibits the trial of collateral issues."

(2) But occasionally the term was used to signify "remotely probative" or "indirectly connected," *i. e.* directed to prove a proposition in issue, and yet possessing for that purpose a weak quality of relevancy; thus the fact might be possibly relevant, if a close enough connection and a real probative value should appear:

1854, *Eccleston*, J., in *Lee* v. *Tinges*, 7 Md. 236: "There is a rule of evidence which excludes *collaterol facts*, or snch as do not afford a reasonable presumption or inference as to the principal fact or matter in dispute."

1858, *Wright*, C. J., in *State* v. *Hinkle*, 6 Ia. 384: "Collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, are excluded."[1]

The practical difference between these two senses was that in the former sense the fact was always and clearly inadmissible, while in the latter sense

presumption or inference in elucidation of the matters involved in the issue"); 1855, Keener *v.* State, 18 Ga. 225 ("all facts upon wbicb any reasonable presumption or inference can be founded"); 1872, Valentine, J., in Sumner *v.* Blair, 9 Kan. 521, 528; 1851, Trull *v.* True, 33 Me. 367 ("Testimony cannot be excluded as irrelevant wbich would have a tendency, bowever remote, to establisb the probability or improbability of tbe fact in controversy"); 1824, Gibson, J., in Weidler *v.* Bank, 11 S. & R. 140 ("It will not be said that facts which by themselves can bave no other operation than to confuse and mislead by inducing a suspicion of the existence of some other necessary facts, where the presnmption is not a reasonable or natural one, onght therefore to be admitted"); 1870, Davis, J., in Ins. Co. *v.* Weide, 11 Wall. 438, 440 ("It is well settled tbat if the evidence offered conduces in any reasonable degree to establish the probability or improbability of tbe fact in controversy, it should go to tbe jnry").

[1] So also: 1873, Brooke *v.* Winters, 39 Md. 508 ("Tbe rule that excludes facts because they are collateral does not apply to facts wherever existing, if tbey may afford any reasonable presumption as to the matter in dispute").

it might be deemed admissible under some circumstances. A fact might thus deserve different fates, according as it was "collateral" in one or the other sense. This careless confusion of usage spread, until a kind of stigma began often to be intended in the epithet "collateral." It was appealed to in one sense in order to gain an argument involving its other sense. If an opposing counsel could stigmatize an offered fact as "collateral," he felt that he had struck a blow at its admissibility; and in this effort he had useful weapons, in the older passages in which a "collateral" fact, meaning an immaterial fact, was treated as necessarily inadmissible.[2] What is needed, therefore, is simply a mutual understanding of the sense in which the term is being used on a particular occasion. When it is used in the second sense to express remoteness of probative value, the fact in question may or may not be admissible, according to the standard judicially declared in § 38, *ante*; there is nothing decisive in its "collateralness."

§ 40. **Present and Future Relevancy.** A fact, when offered as evidence, may not be relevant, either because it goes to prove a subordinate proposition whose bearing is not yet apparent, or because it is relevant only in connection with some other fact not yet offered. Thus it is not now but may later in the trial become relevant. In this situation, (1) there is no objection to this fact in that it does not contain within itself all the necessary features of relevancy. It need not be *per se* relevant:

1831, *Hosmer*, C. J., in *State* v. *Watkins*, 9 Conn. 53: "If the fact consist of parts, or is provable by many circumstances, each of which conduces something to the establishment of it, then each part and each circumstance is admissible, although the point will not be established until the whole fact is proved."

On the other hand, (2) its relevancy must be made to appear by a preliminary and hypothetical statement of the additional facts or propositions that would make it relevant, with an engagement to make them good at the proper time:

1824, *Gibson*, J., in *Weidler* v. *Bank*, 11 S. & R. 139: "The evidence, therefore, as it was offered, presented facts which, isolated as they stand in the bill of exceptions were entirely irrelevant. . . . But the plaintiff contends that this may have been only a part of the chain of his evidence, and that what was deficient might afterwards have been supplied. . . . If it would be relevant, when taken in connexion with other facts, it ought to be proposed in connexion with those facts, and an offer to follow the evidence proposed with proof of those facts at the proper times. But the Court is not bound to spend its time in an inquiry which from the [present] showing of the party can produce no results. Dislocated circumstances may doubtless be given in evidence; particularly if there be no objection to the order of time; but the proposal of the evidence must contain in itself, by reference to something that has preceded it or that is to follow, information of the manner in which the evidence is to be legitimately operative."

1833, *Buchanan*, C. J., in *Davis* v. *Calvert*, 5 G. & J. 304: "It is sometimes difficult to ascertain whether a particular fact offered in evidence is connected with the issue, and will or will not become material in the progress of the investigation. In such cases, the Court

[2] Mr. Justice Doe, in Darling v. Westmoreland, 52 N. H. 405–6, has incisively exposed the fallacy of this ambiguous usage.

not clearly seeing that it is wholly foreign and irrelevant to the issue and cannot be connected with it by evidence of other facts and circumstances, it is proper and usual in practice to admit the proof, on the assurance of the counsel who tenders it that it will turn out to be pertinent and material; otherwise, material and important testimony might frequently and injuriously be excluded, which it is the province of the Court to guard against when it may be done. . . . And when it does not clearly appear *a priori* that a fact offered to be proved is collateral and irrelevant, there is generally less mischief to be done or apprehended by admitting it, though it should afterwards turn out to be collateral, than by the rejection of the proof of a fact only because, standing alone, it does not plainly appear to be connected with the issue, but may, when connected with other facts and circumstances, become material and important."

Nevertheless, it may sometimes be desirable for the counsel not to disclose immediately the full purpose of his inquiry, and it is usually and properly said that the discretion of the trial Court should determine whether it is better to insist on the disclosure then, or to allow the fact to come in upon the general promise of counsel to connect it. In the absence, however, of some such promise, a fact apparently irrelevant will not be treated on review as admissible because it might have been relevant on certain conditions.

Moreover, the Court will often, where the facts would be highly improper if irrelevant, require the other facts, instead of being postponed, to be first offered, so as to ensure the presence of the proper foundation and leave nothing to the sanguine expectations of counsel. This, however, is rather a question of the order of presenting evidence.

The only exception ordinarily recognized to this doctrine is made for facts sought on cross-examination, where it is often so important to conceal from the witness the bearing of his answer that great latitude is conceded.[1]

§ 41. **Circumstantial Evidence may be proved by the same Kind.** It was once suggested that an "inference upon an inference" will not be permitted, *i. e.* that a fact desired to be used circumstantially must itself be established by testimonial evidence;[1] and this suggestion has been repeated by a few Courts, and sometimes actually enforced.[2] There is no such rule; nor can be. If there were, hardly a single trial could be adequately prosecuted.[3] For example, on a charge of murder, the defendant's gun is found discharged; from this we infer that he discharged it, and from this we infer

[1] This subject is so closely connected with the general principles governing the Order of Evidence, that the detailed rules and the authorities are considered under that head *post*, § 1871.

[1] 1824, Starkie, Evidence, I, 57.

[2] 1896, Globe Accident Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563 ((1) that G. lifted a box of ashes was shown by the facts that he was seen filling the box with ashes, that afterwards it was seen filled on the street, and that G. usually carried it there; (2) that G. was shortly afterwards found badly strained in the abdomen was otherwise shown; but (3) the fact that he lifted the box of ashes was not allowed to be used to infer that the lift caused the strain, because of the above supposed rule); 1879, Biddle, J., in Binns *v.* State, 66 Ind. 428, 430 ("Inferences can not be drawn from inferences, . . . but inferences may be drawn from facts previously proved [*i. e.* by direct testimony]"); 1860, Donglass *v.* Mitchell, 35 Pa. 440; 1868, McAleer *v.* McMurray, 58 id. 126, 135; 1880, Philadelphia C. P. R. Co. *v.* Henrice, 92 id. 431; 1875, U. S. *v.* Ross, 92 U. S. 281 ("Whenever circumstantial evidence is relied upon to prove a fact, the circumstances themselves must be proved [by testimonial evidence], and not presumed [*i. e.* inferred from circumstantial evidence]"); 1879, Manning *v.* Ins. Co., 100 id. 693.

[3] 1820, Abbott, C. J., in R. *v.* Burdett, 4 B. & Ald. 95, 161 ("If no fact could be thus ascertained by inference in a court of law, very few offenders could be brought to punishment").

that it was his bullet which struck and killed the deceased. Or, the defendant is shown to have been sharpening a knife; from this we argue that he had a design to use it upon the deceased; and from this we argue that the fatal stab was the result of this design. In these and innumerable daily instances we build up inference upon inference, and yet no Court ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials, proceed upon such data. The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon.[4]

§ 42. **Irrelevancy and Multifariousness, or Practical Inconvenience, distinguished.** A circumstantial fact may be relevant, and thus far admissible, and yet be excluded by reason of one of the auxiliary principles dealt with in Part II (*post*, §§ 1171 ff.); in other words, it may have sufficient probative value to satisfy the logical requirements of Relevancy, and yet may be obnoxious to certain other principles of exclusion, particularly those of Confusion of Issues, Surprise, or Undue Prejudice (*post*, § 1906). For example, the moral disposition of an accused may be probatively of considerable value as indicating the probability of his doing or not doing a particular act of crime, yet it may be excluded because of the undue prejudice liable to be caused by taking it into consideration; for its probative value may be exaggerated, and condemnation be visited upon him, not for the act, but virtually for his character (*post*, § 55). Again, a witness' character as to veracity is probatively capable of being evidenced by specific mendacious acts of his; but if these were allowed to be evidenced without restriction, false testimony might be brought forward, specifying time, place, and conduct, and for lack of prior notice of these supposed details, it would be impossible for him to demonstrate their falsity; thus the principle of unfair surprise would be violated (*post*, §§ 979, 1849). Again, in proving the dangerous qualities of a place or a machine, repeated instances of its injurious operation would be of high probative value; yet the unrestricted admission of such instances might result in so multiplying the subordinate issues in a cause that confusion of mind would ensue and the main controversy would be lost sight of in the great mass of minor issues (*post*, §§ 443, 1863, 1906). Thus at every point the rules of relevancy are subject to be balked and counteracted by these auxiliary general principles of practical policy. The detailed consideration of their operation can be fully considered under the specific rules; but the following passages will suffice here to illustrate the judicial methods in allowing the one kind of principle to counteract the other:

1824, *Bayley*, J., in *May* v. *Brown*, 3 B. & C. 113, 127 (libel; the trial judge had admitted, in mitigation of damages, the general fact the plaintiff had published libels of the defendant, but not the particular libels; affirming this on appeal, the judges put the exclusion on

[4] The fallacy has been repudiated in the following case: 1897, Hinshaw v. State, 147 Ind. 334, 47 N. E. 158. Compare also Gibson, C. J., quoted *ante*, § 26, where the relative value of circumstantial and testimonial evidence is considered.

the following grounds): "The reason of the distinction is that the admission of evidence of particular facts would be calculated not only to produce general inconvenience, but would operate as a surprise upon the party against whom it is offered. [As to the latter,] when a party knows what the issue is, he knows on what points to prepare himself; he may also be prepared upon general points not connected with the issue; but he certainly would not be prepared upon particular points. [As to the former,] suppose, in answer to an action for a libel, the defendant gives in evidence that the plaintiff at another time published a libel of the defendant. There might be first a question whether the plaintiff did or did not publish; secondly, whether it was or was not true; and then in this action for one libel, the matter tried would be that which ought to be in issue in another action brought for another libel. Besides, if the defendant might give in evidence one libel, he might give in evidence twenty; and so instead of trying one point and one issue joined, twenty different issues would be tried at one time, the inconvenience of which would be incalculable."

1876, *Stone*, J., in *Mattison* v. *State*, 55 Ala. 224, 232: "In inquiries of fact dependent on circumstantial evidence for their solution, no certain rule can be laid down which will define with unerring accuracy what collateral facts and circumstances are sufficiently proximate to justify their admission in evidence. Human transactions are too varied to admit of such clear declaration of the rule. Whatever tends to shed light on the main inquiry, and does not withdraw attention from such main inquiry by obtruding upon the minds of the jury matters which are foreign or of questionable pertinency, is as a general rule admissible evidence. On the other hand, undue multiplication of the issues is to be steadily guarded against, as tending to divert the minds of jurors from the main issue."

In the natural order of treatment, all the principles and rules of Relevancy would here first be treated systematically by themselves; and then, in Part II, the various Auxiliary Rules of Convenience, applying to this or that class of relevant and otherwise admissible facts, would receive in their turn a separate and systematic treatment, accompanied by a re-survey of the classes of cases in which facts already sanctioned so far as relevancy went were nevertheless excluded by the doctrines of practical inconvenience, — just as the testimonial qualifications of witnesses are recognized to be a separate subject with determinate rules, while the occasional exclusionary rules of confidential communications, self-criminating testimony, and the like, are separately treated under the rules of privilege, without misleading results. But for many classes of circumstantial evidence this separation of treatment would be practically inconvenient and confusing. It will therefore be desirable, in the ensuing pages, while discussing the detailed rules of Relevancy, at the same time to consider the Auxiliary Rules of Convenience so far as they may affect the particular class of evidence considered. In this manner the net rule for a particular class of evidentiary facts can be set forth, though it may rest upon some combined principles of relevancy and of practical convenience.

But it is worth while to note that such rules can be properly used only by keeping in mind the composite nature of their principles. Under differing circumstances, one or the other of the principles may cease to operate, and then the rule would vary. To recur to the simile of an obstacle race (*ante*, § 13); suppose a series of three races, open respectively to adults, to

lawyers, and to club-members; suppose that one of the obstacles is a stream of water twenty feet deep and twenty feet across, so that no one has any chance for success who cannot swim. Now when we hear that A has failed to run in the race, although his name was entered, we cannot tell whether it is because he was disqualified as not being an adult or a lawyer or a club-member, or because he cannot swim; he may be eligible in one or in all three classes, and yet may be obliged to abandon his entry because he is no swimmer; or he may be able to swim but may be neither club-member nor lawyer nor adult. So with the exclusion of a fact to which some Auxiliary Rule of Convenience is capable of applying. The mere result of exclusion tells us nothing as to the reason or principle of exclusion. Yet it is necessary that we should know the kind of reason involved. The fact may be relevant, but in the particular instance objections to an auxiliary rule of policy; if so, we may be able to use it for some occasion to which that policy does not apply. Or, the fact may be objectionable to no such auxiliary policy, but merely irrelevant under the circumstances; if so, we may be able to cure its irrelevancy by changing the terms of our offer, and thus use it without hindrance. It is therefore indispensable when any fact or class of facts is found excluded, to ascertain if possible whether the reason of exclusion is based on its irrelevancy or on some auxiliary rule of policy. Without knowing these reasons, we are helpless and our rules are mere rules of thumb. In practice, Courts almost invariably indicate the reasons for exclusion. Though these reasons have seldom been much studied by the bar, the material is plentiful enough for a correct understanding of the principles concerned.

§ 43. **Classification of Circumstantial Evidence.** There are two important considerations that affect the classification of circumstantial evidence for convenient treatment. These considerations affect with equal force the classification of testimonial evidence (*post*, §§ 475, 875); but their bearings are there more easily apparent, and have been unconsciously accepted without question.

(1) The starting-point of the classification should be the proposition desired to be proved, rather than the evidentiary fact offered. The fundamental inquiry of relevancy is (*ante*, §§ 2, 3) whether the claimed conclusion is a probable inference from the offered fact. Now if we take a specific conclusion (proposition, *factum probandum*) as the starting-point, and ask in turn, whether it is relevantly evidenced by fact *a*, fact *b*, fact *c*, and so on, we are able to compare intelligently, without repetition, the various sources from which the conclusion or proposition is capable of being inferred; for it will often happen that the precise fact *a* will be irrelevant, while fact *a'*, a slightly altered circumstance, will be relevant; so that a comparison of the various circumstances or combinations of circumstances which may become or be made relevant is possible only by taking the *factum probandum* as a starting-point or centre, and swinging round the circle of the various offerable evidentiary circumstances. If, on the contrary, we were

to take each particular evidentiary fact in turn as the starting-point, and ask what various conclusions it is relevant to show, we should find that many distinct facts are available to evidence a single proposition, and thus an intelligent comparison of them would be difficult and much confusing repetition would be necessary. For these reasons, the basis of the classification should be the different kinds of propositions (*facta probanda*), so analyzed as to separate those which are essentially different in their requirements.

(2) A second consideration helps us to limit the field of classification, — the consideration that we are concerned, not with the conceivable kinds of propositions or of evidentiary facts, but only with such as have been made the subject of rules or rulings by the Courts. There are various plans of arrangement which might be justified, and there are scores of possible and curious lines of proof which the records of famous trials disclose. But we are here dealing, not with a general scheme of human life or of modes of proof, but with a limited body of rules brought forth by problems laid before the Courts for adjudication. Not every species of evidentiary fact or of inference is brought into the realm of judicial evidence, but chiefly certain common and frequently recurring matters affecting the usual crimes and civil disputes; and not every common kind of evidentiary fact is brought to the Supreme Courts for adjudication, but only those about which some doubt may be raised. Take, for instance, the proof of an alibi; until the very recent epoch of factious quibbling, a ruling upon evidence in connection with an alibi was exceedingly rare; and yet there could have been no more frequent an issue in a criminal case. Take, again, the immense number of rulings in the last half-century dealing with value-evidence; the problems and the evidence have always been conceivable, but they did not form the material of judicial rulings until disputes involving them became common, *i. e.* until the frequency of land-condemnation for public purposes since the era of railroads and municipal improvements, for here the values remained to be fixed by the tribunal instead of (as ordinarily) by the parties to contracts of sale.

Having in view these considerations, the most practicable classification consists in dividing the *facta probanda* into three groups:

I. A Human Act;

II. A Human Quality, Condition, or State;

III. A Fact or Condition of External Nature.

These three groups fall naturally apart, in our system, because in the first group the dominant and indirectly influential rule is the rule forbidding the admission of moral character to evidence an act, in certain classes of cases; and, in the second group, the rule excluding extrinsic testimony to particular acts of conduct holds a similar place; while in the third group the evidentiary facts and problems are almost naturally distinct from those of the first two. There are of course a few matters which do not plainly fall within one or another group; but this is inevitable under any classification.

Next, under each group, it will be convenient to arrange the evidentiary facts according as the proof or indication they afford is:

A. Prospectant;

B. Concomitant; or

C. Retrospectant.[1]

Instances under the second head are rare; an *alibi* is the usual one. But the distinction between the first and the third heads is always marked and often useful in hints. For instance, under Group I, above, the evidentiary facts of Character, Plan or Design, Motive, point forward to a future act; *i. e.* we take our stand before the time of the act, and argue that because of the person's character, design, or motive, he was likely, or not, to do the act in the future; while the fact of Consciousness of Guilt points backwards, *i. e.* we infer from his state of mind that he has been guilty of some crime in the past. In evidencing matters under Group II, this distinction becomes peculiarly useful; *e. g.* the fact of hereditary insanity as pointing forward to a defendant's insanity raises a question of relevancy essentially different from that raised by evidence of abnormal conduct exhibited by him; so also in proving an emotion or passion (motive), evidentiary circumstances such as family relationship, need of money, and the like, are offered as *a priori* indications, pointing forward to the probability of such an emotion being excited, while outward exhibitions of conduct, used for the same purpose, have an *a posteriori* value as showing that the emotion was the probable source of the evidentiary conduct. This distinction, then, while not always an essential one, at least provides a convenient order of arrangement, and is often serviceable in emphasizing related qualities of probative value.

In searching, then, for the true significance of a piece of evidence, it should always be remembered that the prime question serving as the key, not merely to this classification, but at all times to the use of evidence before the Courts, is: *What particular proposition is the fact offered to prove?* With the aid of this question, there will be little difficulty in discovering the specific problem which any particular kind of evidence involves.

[1] It is perhaps worth noting that this analysis was long ago hinted at by Burke, in his disquisition on evidence in the Report on Warren Hastings' Trial in 1794 (31 Parl. Hist. 342); "every circumstance," he remarks, "precedent, concomitant, and subsequent, become parts of circumstantial evidence."

SUB-TITLE I: EVIDENCE TO PROVE A HUMAN ACT.

TOPIC I: PROSPECTANT EVIDENCE.

SUB-TOPIC A: CHARACTER OR DISPOSITION, AS EVIDENCE OF A HUMAN ACT.

CHAPTER V.

§ 51. **Classification of Prospectant Evidence.** It is convenient (as pointed out *ante*, § 38) to arrange the order of evidentiary facts, when offered to prove the doing of a human act, according as the indication of the evidence is Prospectant, Concomitant, or Retrospectant.[1] Evidence of the first of these three classes is much the most voluminous, so far as it raises questions of admissibility, though it is probably not the most frequent in point of actual use in trials.

[1] The last two classes are dealt with in Chapters VII and VIII, *post*.

Evidentiary facts having Prospectant indications are of several sorts, which may be roughly grouped as follows: Character or Disposition; Habit or Custom; Emotion or Motive; Design or Plan; Physical Capacity (including Strength and Skill). The nature of the argument or inference in each instance is this: Because A had a Disposition, Habit, Emotion, Design, or Capacity to do (or not to do), an act x, therefore he probably did (or did not do) the act x alleged. Observe that the party alleging the act argues that the disposition indicates a doing of the act, while the party denying the act argues that the (opposite) disposition indicates a not-doing; the nature of the argument or inference being precisely the same in both cases, the difference being in the proposition to be proved. Of these different kinds of evidentiary facts, the tenor of our law suggests that the treatment of Character or Disposition should come first (though other arrangements are conceivable); for the practical reason that special and positive limitations are conceded to affect it, and that these limitations have sometimes mistakenly been supposed to apply to the other sorts of evidence. Indeed, the character-rule is the dominant one for this branch of the subject.

Sub-topic A: CHARACTER OR DISPOSITION, AS EVIDENCE OF A HUMAN ACT.

1. Preliminary Discriminations.

§ 52. **"Character" in Two Senses: Disposition, and Reputation of it.** There are two distinct problems of evidence about character, in which the common use of one word for two ideas has caused confusion: (1) Is a person's disposition — *i. e.* a trait, or group of traits, or the sum of his traits — relevant and admissible for certain purposes? (2) Whenever it is so admissible as an evidentiary fact and thus becomes in its turn a proposition to be proved, how is it to be evidenced, — by the community's reputation, and by that only, and on what conditions?

The first question is essentially one of Relevancy, though auxiliary policies often come in to exclude relevant character. The second question, however, is raised in an entirely different quarter and has nothing to do with relevancy; moreover, it has nothing to do with character as an evidentiary fact, but with the mode of proving character, assuming it to be properly provable either as an evidentiary fact or as an issue. Two special problems which the second question raises are concerned with the Hearsay Rule and with the Opinion Rule. The Hearsay Rule concerns the question whether Reputation-Hearsay, when offered to show Character, forms an exception to that rule, and on what conditions the exception is allowed, — what constitutes a reputation, from how many people must it arise, in what place and at what time, and so on (*post*, §§ 1608–1621). The Opinion Rule raises the question whether individual testimonial opinion or estimate of character is obnoxious to that rule, and operates (if so applied) to exclude the testimony of individuals based on personal observation of another's

character (*post*, §§ 1980–1987). At the present point, there is no question about the mode of getting at character; we assume that it is offered to be established in some proper way, and we ask how far this character (or actual disposition) is relevant to the present purpose. It is as if one had to decide whether he should spend a summer vacation at the mountains or at home, and also whether he should be able, in order to reach the mountains, to take a through train or should have to change cars; both these problems may have to be settled, and the acts both of travelling and of sojourning in the mountains are closely connected in point of time; but the considerations which affect the two problems have nothing in common; if we go, we shall do so in spite of having to change cars; and if we give up our journey, we shall take no train at all. Character and reputation are as distinct as are destination and journey. Nevertheless, the occasional use of the single term "character" for both actual disposition and reputation of it, and the circumstance that reputation is the most usual (and in some jurisdictions practically the only lawful) way of evidencing this actual disposition, has sometimes led even careful judges to define reputation and actual disposition, for all purposes of evidence, as the same, and to intimate that reputation alone is the thing involved:

1817, *Duncan*, J., in *Kimmel* v. *Kimmel*, 3 S. & R. 338: "Character and reputation are the same; the reputation which a man has in society is his character."

1854, *Redfield*, C. J., in *Powers* v. *Leach*, 26 Vt. 278: "'Character' and 'general character' are the same, of course, if by 'character' we understand the common estimation in which the man is held, by his acquaintance, for truth; and the books upon evidence so use the term. The word 'character' no doubt has an objective and subjective import, which are quite distinct. As to the object, character is its quality; as to the man, it is the quality of his mind, and his affections, capacity, and temperament. But as a subjective term, certainly in the minds of others, one's character is the aggregate or the abstract of other men's opinions of one. . . . It is the conclusion of the mind of the witness, in summing up the amount of all the reports he has heard of the man, and declaring his character for truth as held in the minds of his neighbors and acquaintances; and, in this sense, 'general character' and 'general report or reputation' are the same, as held in the books."

But this notion is certainly unfounded. The law itself clearly demonstrates this, because there is in fact more than one way of evidencing actual character. Reputation is not the sole way. Individual estimate was formerly always available, and still is in some jurisdictions (*post*, § 1980). Specific acts of conduct are also available for some purposes, especially to show a witness' character (*post*, § 977). If reputation were the essential and relevant fact, these other modes of proving character would be impossible; for the thing they are used to prove would be unrecognized in the law of evidence. The truth is that reputation is merely one of three possible modes of proving actual character. Even if it were the exclusive mode, by reason of considerations excluding other modes, it would be as reasonable to identify it with actual character as to identify the Red Line railroad with the town Millville simply because the other rail-

roads to Millville have been abandoned or blockaded. Character, then, is to be considered, for the purposes of relevancy, as the actual moral or psychical disposition, or sum of traits, and is to be distinguished from reputation or any other source of evidencing character;[1] and this the Courts have frequently emphasized:

1855, *Pearson*, J., in *Bottoms* v. *Kent*, 3 Jones L. 160: "As to the mode of proving character. The word has two meanings; to this may be ascribed the confusion of ideas met with in some of the cases. '*Character:* The peculiar qualities impressed by nature or by habit on the person, which distinguish him from others; these constitute his *real* character. The qualities which he is supposed to possess constitute his estimated character, or reputation': Webster's Dictionary. Is a man honest, is he good-natured, is he of a violent temper, is he modest and retiring or impudent and forward, — these all constitute traits of character and are facts. . . . A witness called to prove them can only give the opinion which he has formed by his observations of the conduct of the person under particular circumstances. . . . Has a man the estimated character, or reputation, of being honest, or of being good-natured, or passionate, or humane, or cruel, — this general character, as it is called, is also a fact; it is the opinion which those who are acquainted with him have formed in respect to his several traits of character. This is also a mode of proving real character, which is the object in view. But it is objectionable, because it is a mere approximation, and does not arrive at the fact itself. The opinion of a man's acquaintances that he is honest, or good-natured, etc., does not prove that he is so. Still, this mode of proof is less objectionable than that which depends on the individual opinion of witnesses, . . . therefore it is admissible in more instances than the other."

1876, *Berry*, J., in *State* v. *Lee*, 22 Minn. 409: "[The relevancy of character] does not rest upon the ground that *in general repute* the accused possesses a disposition which would render it unlikely that he would commit the crime, but upon the fact that he *possesses* the disposition, — a fact of which general repute is only evidence."

1884, *Campbell*, C. J., in *Pickens* v. *State*, 61 Miss. 567: "Reputation which is general, prevalent, concurred in generally by those familiar with one, is presumed to be indicative of actual character."

§ 53. **Conduct to evidence Character, distinguished from the Relevancy of Character itself.** There is also to be distinguished the use of specific conduct to evidence character from the admissibility of character itself to evidence something else. Thus, the prosecution in a criminal case may sometimes use the defendant's bad character as relevant; but it is not allowed to evidence that character (as a proposition to be proved) by specific acts of misconduct (*post*, § 194). The reasons affecting the admissibility of this kind of evidence to show character must be kept separate from the reasons affecting the use of character itself as evidential. The latter may be allowable, yet the other not. In civil cases the separation is equally important. Much will always depend on whether the fact of character is being offered as an evidentiary fact, or whether it is itself a proposition to be evidenced by conduct exhibiting the character.

§ 54. **Character as Evidentiary, distinguished from Character as an Issue on the Pleadings.** (1) The present question is, whether a person's charac-

[1] For passages further illustrating the distinction, see *post*, § 1608.

ter is admissible to show *the doing or not-doing of an act by him.* But there are two other ways in which character may be involved, — one an evidential question, the other not. (2) Whether a person's character is *evidentiary for any other purpose, e.g.* a wife's character to show that the husband's alienation of affection was a natural consequence, or a deceased's character to show that the defendant was reasonably afraid of an attack by the deceased. This use is less usual, but must be distinguished as not being offered to evidence the doing of an act by the person having the character. (3) Whether a person's character is under the legal principles and the pleadings of the case *one of the issues* in it; *e.g.* the character of a plaintiff in defamation, either as expressly brought in issue by a plea of truth, or as issuable in the assessment of damages; the character of an employee as involving the employer's liability to a fellow-servant for the selection of incompetent employees; the character of a house charged with being used for immoral traffic; and so on. Here no evidentiary use is made of the character; it merely plays a part in the legal issues of the case, and the nature of the litigation must be looked to in determining whether character is so involved. This aspect of character as an issue in the case has constantly to be distinguished.[1]

2. Character as evidentiary of an Act.

§ 55. (1) **Defendant in a Criminal Case; Relevancy of Character.** The evidentiary use of character for or against a defendant in a criminal case cannot be understood without separating the principles of Relevancy and of Undue Prejudice. As already pointed out (*ante*, §§ 42, 43), the first inquiry for all circumstantial evidence is whether it is relevant. If it is not, it cannot come in at all, and no further question arises. But if it is relevant, it may still be obnoxious to some independent policy of exclusion, some doctrine of Unfair Surprise or Undue Prejudice; and so far and so long as such a doctrine applies, the evidentiary fact, though relevant (*i. e.* having probative value) and therefore otherwise admissible, is to be excluded. Thus, as soon as this auxiliary policy ceases to apply, the fact, being relevant, is no longer prevented from entering. It thus becomes practically important to ascertain how far character, for the present purpose, may be, on the one hand, irrelevant, and how far, on the other hand, the objections to it may be based on grounds of auxiliary policy (*ante*, § 42, *post*, § 1904); for thus only can be understood the changing conditions of exclusion.

A defendant's character, then, as indicating the probability of his doing or not doing the act charged, *is essentially relevant.* As a matter of human nature in daily experience, this is not to be doubted. The character or disposition — *i.e.* a fixed trait or the sum of traits — of the persons we deal with is in daily life always more or less considered by us in estimating

[1] These separate uses of character are dealt with *post*, §§ 69–79.

the probability of his future conduct. As a matter of legal theory and practice, the case is no different. A defendant is allowed to appeal to his own good character to aid in the demonstration of his innocence; and the prosecution is allowed to use the opposite fact for the opposite purpose. The Courts have made it clear that a defendant's character is regarded as constantly having probative value on that question:

1837, *Patteson*, J., in *R.* v. *Stonnard*, 7 C. & P. 674: "The object of laying the latter [character] before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution"; *Williams*, J.: "It is evidence to induce them to say whether they think it likely that a person with such a character would have committed the offence."

1851, *Alderson*, B., in *R.* v. *Shrimpton*, 5 Cox Cr. 387: "You say he is not likely to have committed this offence, because he is a man of good character; then, in answer to that, they say he is likely, because he is not a man of good character"; *Compbell*, C. J.: "The question in issue is the good character of the prisoner, — whether or not he was likely to commit the offence of which he was charged."

1865, *Willes*, J., in *R.* v. *Rowton*, Leigh & C. 520, 540: "It is a mistake to suppose that because the prisoner only can raise the question of character, it is therefore a collateral issue. It is not. Such evidence is admissible because it renders it less probable that what the prosecution has averred is true; it is strictly relevant to the issue"; *Cockburn*, C. J.: "What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from the class of crime with which he stands charged."

1820, *Hosmer*, C. J., in *Stowe* v. *Converse*, 3 Conn. 325 (speaking of the use of "uniform profession, conduct, and conversation" to rebut a charge of infidelity): "From the life and conversation of a man, viewed conjointly, men in private life form an opinion of his character; and Courts and jurors must form their opinion in the same manner. . . . If the words and actions harmonize, they form a united whole; and every man who exhibits a good conversation out of his lips, as well as a fair example in his life, is entitled to the benefit of both, at all times and in all places."

1858, *Strong*, J., in *Concemi* v. *People*, 16 N. Y. 506: "The principle upon which good character may be proved is that it affords a presumption against the commission of crime. This presumption arises from the improbability, as a general rule, as proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur; but they are exceptions; the rule is otherwise. The influence of this presumption from character will necessarily vary according to the varying circumstances of different cases."

1876, *Berry*, J., in *State* v. *Lee*, 22 Minn. 409: "The purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and therefore did not commit, the crime with which he is charged."

§ 56. **Same: Defendant's Good Character always admissible in his favor.** Character being thus relevant, it follows that a defendant may offer his good character to evidence the improbability of his doing the act charged, unless there is some collateral reason for exclusion; and the law recognizes none such.

Up to the beginning of the 1800s, it is true, the admissibility was not recognized in this absolute form. There were two well understood limita-

tions, both based apparently on considerations of probative value, but both now entirely abandoned:

(1) It was once thought that character could be appealed to *in capital cases only:*

1802, Mr. *McNally*, Evidence, 320: "It has been heretofore held that a prisoner cannot examine to character, except *in favorem vitæ*, when charged on a capital indictment; but the rule is now wisely extended to all cases of misdemeanors. And this appears to have been the ancient practice. In *R.* v. *Brown*, 1798, . . . the point appears finally settled. . . . Lord Carlton, C. J. C. P., said he had conversed with many of the judges on the subject now before the court, who thought, as he did, that . . . evidence of such a nature might be very material; for example, suppose a man of very great property was indicted for perjury, where the object to be attained by the perjury was a mere trifle, for instance a shilling; or suppose a man to be charged with a riot or assault who was known to be of a peaceable and quiet disposition; evidence of character in such cases, directly encountering the nature of the charge in the indictment must be of the last importance. . . . Lord Kilwarden, C. J. K. B., agreed with Lord Carlton, and observed that the reason generally assigned for the admission of such evidence in capital cases only was altogether unsatisfactory to his mind. It was said to be '*in favorem vitæ*,' but he had no conception, according to the principles of sound sense and right reason, that character could be evidence in a case affecting the life of a man, and yet not evidence in a case affecting his freedom, his property, and his reputation."

1807, *Com.* v. *Hardy*, 2 Mass. 317; murder; *Parsons*, C. J., "said that he was of opinion that a prisoner ought to be permitted to give in evidence his general character in all [criminal] cases; for he did not see why it should be evidence in a capital case and not in cases of an inferior degree. In doubtful cases, a good general character, clearly established, ought to have weight with a jury; but it ought not to prevail against the positive testimony of credible witnesses"; *Sewall* and *Parker*, JJ., "said that they were not prepared to say that testimony of general character should be admitted in behalf of the defendant in all criminal prosecutions; but they were clearly of opinion that it might be admitted in capital cases, in favor of life."

It is now well understood to be admissible upon *charges of all grades*, even of mere misdemeanors.[1]

(2) It was also once thought that character was receivable *in doubtful cases only*, to turn the balance of evidence:

1808, Lord *Ellenborough*, C. J., to the jury in *Davison's Trial*, 31 How. St. Tr. 217: "If you do not know which way to decide, character should have an effect. But it is otherwise in cases which are clear. If it could be permitted to operate where a crime is clearly proved, it would always be brought forward; because there is hardly any one who has not at some time maintained a good character. . . . If the evidence were in even balance, character should make it preponderate in favor of a defendant; but in order to let character have its operation, the case must be reduced to that situation."

[1] 1874, State *v.* Kabrich, 39 Ia. 277 (in any "public offence"); 1878, State *v.* Northrup, 48 id. 584 ("all criminal cases where the object of the prosecution is to punish the offender for the crime"); 1900, State *v.* Wolf, 112 Ia. 458, 84 N. W. 536; 1903, State *v.* Cather, — id. —, 96 N. W. 722; 1850, Com. *v.* Webster, 5 Cush. 295, 324; 1857, State *v.* Henry, 5 Jones L. 65, 67; 1895, State *v.* Hice, 117 N. C. 782, 23 S. E. 357 (in this case it had been ruled below that the defendant's good character was not admissible unless he went on the stand, — a ruling exhibiting such an ignorance of fundamental notions as would seem scarcely credible, even in a time when ignorance is allowed so freely to thrust itself to the front); 1897, State *v.* Porter, 32 Or. 135, 49 Pac. 964 ("in a criminal action").

But it is now understood to be admissible without any such limitation.[2] The broad statements by some Courts that a defendant's character in criminal cases is "always admissible"[3] negative impliedly both the foregoing limitations. Whether, when admitted, it should be given weight except in a doubtful case, or whether it may suffice of itself to create a doubt, is a mere question of the weight of evidence, with which the rules of admissibility have no concern.[4]

(3) Where the doing of the act charged is not in dispute, because conceded, it has been said that character no longer has any probative function, and should not be received, since it certainly cannot be set up merely in excuse.[5] But, after all, so far as in criminal cases the criminal intent remains in issue, the good character of the defendant may be regarded as always relevant to disprove it; and the better way seems to admit it.[6]

§ 57. **Same: Defendant's Bad Character may not be offered against him.** There is just as much probative value in the argument, "A is quarrelsome, therefore he probably committed this assault," as in the argument, "A is peaceable, therefore he probably did not commit the assault"; and this is acknowledged in judicial opinion (*ante*, § 55). Here, however, a doctrine of auxiliary policy operates to exclude what is relevant, — the policy of avoiding the uncontrollable and unfair prejudice and possible unjust condemnation which such evidence might induce:

1865, *Willes, J., R.* v. *Rowton*, Leigh & C. 520, 540: "[Character evidence] is strictly relevant to the issue; bnt it is not admissible upon the part of the prosecution because, as my brother Martin says, if the prosecution were allowed to go iuto such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, npon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on throngh the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity;

[2] 1873, Kee *v.* State, 28 Ark. 155, 164; 1865, People *v.* Stewart, 28 Cal. 395 (overruling People *v.* Josephs, 7 id. 129, 1857); 1864, Jnpitz *v.* People, 34 Ill. 516, 521; 1867, Steele *v.* People, 45 id. 157; 1876, State *v.* Kinley, 43 Ia. 296; 1895, People *v.* Van Dam, 107 Mich. 425, 65 N. W. 277; 1899, State *v.* Sloan, 22 Mont. 293, 56 Pac. 364; 1790, State *v.* Wells, 1 N. J. L. 424, 429; 1857, State *v.* Henry, 5 Jones L. 65, 67; 1877, State *v.* Laxton, 76 N. C. 216, 218; 1898, State *v.* Blue, 17 Utah 175, 53 Pac. 978; 1899, Rowe *v.* U. S., 38 C. C. A. 496, 97 Fed. 779.

[3] 1874, Hamilton *v.* People, 29 Mich. 198; 1883, People *v.* Mead, 50 id. 233, 15 N. W. 95; 1859, Wesley *v.* State, 37 Miss. 327, 352; 1883, State *v.* King, 78 Mo. 556.

[4] This is a profitless question, which does not aid the jury at all. A discussion of the question may be fonnd in the following cases: 1903, Brazil *v.* State, — Ga. —, 43 S. E. 460; 1868, People *v.* Garbutt, 17 Mich. 27; 1878, State *v.* Northrup, 48 Ie. 584.

[5] 1807, Draper's Trial, 30 How. St. T. 1018 (criminal libel; "Do you think the defendent capable or incapable of publishing any statement of fects of the truth of which he was not perfectly convinced?" A. "Perfectly incapahle." Lord Ellenborongh: "I cannot suppose you meen it for any other purpose than as going in mitigation of punishment. . . . It cannot be offered in the shape of a defence. Good God! because one man says a thing and beceuse I may believe what he says, am I at liberty to dissemmate it all over the world? There is no color for it. I receive this for the purpose of mitigation of punishment. If the fact of publication were doubtful, and if it were referred to a man [ae defendant] who had such a character given to him, this wonld be evidence to go to the jury in anewer to the charge, end in that way it would be most materiel. But here you do not dispute that fect").

[6] 1873, Kee *v.* State, 28 Ark. 155, 164 (here, to disprove malice in murder); 1851, Davis *v.* State, 10 Ga. 103, 105 (murder).

because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice to the other ninety-nine"; *Martin*, B.: "There would be great danger that the prisoner would be tried on the evidence of character, instead of on that bearing more directly upon the offence charged."

1840, *Verplanck*, Sen., in *People* v. *White*, 24 Wend. 574: "The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of the law is due alike to the righteous and unrighteous. The sun of justice shines alike for the evil and the good, the just and the unjust. Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics, character, profession, manners, upon the minds of honest and well-intentioned jurors."

1872, *Doe*, J., in *Darling* v. *Westmoreland*, 52 N. H. 401, 406: "[There is] an exception (which is a peculiarity of precedents of English origin) excluding relevant evidence of a defendant's general and notorious disposition to commit such crimes or torts as that with which he is charged. . . . That such evidence is relevant, the law acknowledges by receiving, in criminal cases and in some civil cases, evidence of a defendant's good character in his favor, and allowing such evidence to be rebutted; and by receiving evidence of the character of witnesses and of other persons. The exclusion of such evidence is a plain departure from the general principle which admits relevant and material evidence. There is reason to believe that this exception originated in a usurpation of legislative power by English judges, led by a merciful impulse to mitigate the cruelty of a bloody criminal code by throwing obstacles in the way of its operation."

1876, *Cushing*, C. J., in *State* v. *Lapage*, 57 N. H. 289, 296: "It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English-speaking peoples, that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care, and, in short, that the trial is what the chemists and anatomists call *experimentum in corpore vili*."

1895, *Peckham*, J., in *People* v. *Shay*, 147 N. Y. 78, 41 N. E. 508: "Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence, in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of the whole past life of the accused, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. . . . In order to prove his guilt, it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."[1]

This policy of the Anglo-American law is perhaps more or less due to the

[1] The reasons for the rule were well and concisely put in a letter from the celebrated Dr. Parr to Sir S. Romilly, in 1811 (Life of Romilly, 3d ed., II, 180). Compare also § 194, *post*.

inborn sporting instinct of Anglo-Normandom — the instinct of giving the game fair play, — an instinct which asserts itself in other departments of our trial-law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot help operating with any jury, in or out of court. There are also indirect and more subtle disadvantages.[2] Our rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character.[3]

§ 58. **Same: Prosecution may Rebut.** After a defendant has attempted to show his good character in his own aid, the prosecution may in rebuttal offer as evidence his bad character.[1] The true reason for this seems to be, not any relaxation of the principle just mentioned, *i. e.* not a permission to show the defendant's bad character, but a liberty to refute his claim that he has a good one. Otherwise a defendant, secure from refutation, would have an absolute license to impose a false character upon the tribunal.[2]

[2] As suggested by Sir J. F. Stephan, quoted *post*, § 2251.

[3] 1872, People *v.* Fair, 43 Cal. 137, 149 (murder by a mistress; here the defendant had offered evidence that the acts of the deceased had ruined her prospects in life, and the prosecution's rebuttal evidence that her character for chastity was already bad was held improperly received; this is clearly wrong, for it tended to show that on alleged fact relied on by the defendant was false and there was no other way of showing its falsity); 1874, State *v.* Kabrich, 39 Ia. 277; 1900, State *v.* Beaty, 62 Kan. 266, 62 Pac. 658 (larceny; the bad character of the defendant's associates, excluded); 1862, State *v.* Tozier, 49 Me. 404; 1763, R. *v.* Doaks, 1 Quincy 90; 1850, Com. *v.* Webster, 5 Cush. 295, 325; 1866, State *v.* Creson, 38 Mo. 372; 1835, People *v.* White, 14 Wend. 113; 1840, People *v.* White, 24 Wend. 524, and *passim;* 1857, People *v.* Sharp, 107 N. Y. 427, 457, 14 N. E. 319; 1829, State *v.* Merrill, 2 Dev. 269, 277; 1847, State *v.* O'Neal, 7 Ired. 251; 1850, Fain *v.* Edwards, 11 id. 307. Sometimes a case falls near the line of other principles: 1897, Downey *v.* State, 115 Ala. 108, 22 So. 479 (gaming; question to the defendant, whether he followed gambling for a livelihood, excluded; compare §§ 92, 300, *post*); 1880, State *v.* Moelchen, 53 Ia. 310, 313, 5 N. W. 186 (the defendant' previous occupation in Europe as a soldier, admitted; that it should be argued that he was "trained to scenes of blood and carnage," would be improper; but this was not necessarily involved in the evidence).

For the question whether the defendant's *failure to produce evidence of good character* is to be understood as an admission that his character is bad, *see post*, § 290.

[1] 1722, Page, J., cited in Vin. Abr. XII, 48, tit. Evidence ("In criminal cases, when the prisoner calls persons to his reputation, this gives an handle to the Crown to give evidence of the prisoner's reputation"); 1665, R. *v.* Rowton, Leigh & C. 520 (Martin, B., who expressed a contrary opinion, asserted that "in no single recorded instance during the whole of that period [two hundred years] has evidence of general bad character been given in reply to evidence of the prisoner's good character"; but it was pointed out by Cockburn, C. J., and Willes, J., (1) that where good character could be shown, of course evidence of bad character would usually only be available in case these witnesses were false, and in such a case the prosecution's customary warning of rebuttal-testimony would deter the use of the defence's testimony; and (2) that the mention of rebutting evidence of the sort, as allowable, by the great lawyer-writers on Evidence of the early century, showed a practice, and not merely a principle). This case disposes of the contrary ruling in R. *v.* Burt, 5 Cox Cr. 284, 1851, Martin, B., and Erle, J. (giving no reasons, but apparently moved by considerations affecting the right of counsel to reply as based on the order of testimony). In the United States, the propriety of such evidence has been uniformly conceded: 1807, Parsons, C. J., in Com. *v.* Hardy, 2 Mass. 317 ("Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecutor may offer witnesses to disprove their testimony); 1858, Clifford, J., in U. S. *v.* Holmes, 1 Cliff. 111, 15 Fed. 382 ("Such evidence is never admitted until the accused . . . has laid the foundation for its introduction by offering evidence to show that he is of good character, and then the counterproof is properly admitted as rebutting testimony").

[2] *E. g.* Erle, J., in R. *v.* Rowton, *supra* ("If the prisoner, having a bad character, misleads

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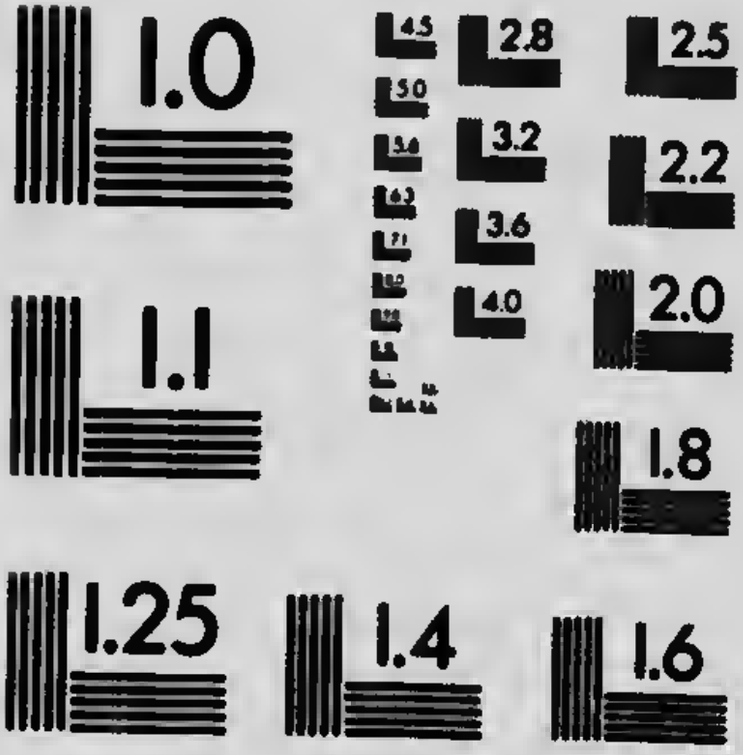

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§ 59. **Same: Kind of Character.** What limitations on these uses of a defendant's character are imposed by the principle of relevancy? In the first place, the character or disposition offered, whether for or against him, must involve the specific trait related to the act charged:

1663, *Dover's Trial*, 6 How. St. Tr. 539, 552; seditious publication; a witness testified that the defendant was a faithful member of the train-band; L. C. J. *Hyde:* "Do not mistake yourself. The testimony of your civil behavior, going to church, appearing in the trained bands, going to Paul's, being there at common service, — this is well. But you are not charged for this. A man may do all this, and yet be a naughty man in printing abusive books, to the misleading of the king's subjects."

1794, Mr. *Erskine*, arguing in *Hardy's Trial* and *Horne Tooke's Trial*, 24 How. St. Tr. 1076, 25 id. 348: "The meaning of witnesses to character is this; for instance, put the case of a man who is charged with a crime of a particular description, — suppose a man charged with an unnatural crime; would it be any evidence at all to that man's character that he paid his bills regularly, and that he was not a dishonest man, or anything of that sort? No; your examination to character must always be analogous to the nature of the charge; and you would there inquire whether he was a man of chastity; you would inquire into his regard for women, into his morals, and into his conversation, so as it might rebuff any such horrible and detestable idea having passed in his mind, that he was a man capable in the ordinary course of his life of entertaining such opinions and making use of such expressions. So if a man is indicted for any other offence, if a man is indicted for a robbery, I say I will show you that he was not a necessitous man, that he possessed a large fortune at that time, that he was a man whose ideas were moral and totally contrary to any such practice. That is the nature of character. . . . I speak to a most honorable person upon the bench, who lately tried Mr. Purefoy for the murder of Colonel Roper in a d[illegible]. What were the questions asked as to his character? Were they whether he was a good officer? Drilled his company well? Was a well-bred man? Whether he paid his debts? No; but whether he was a man of humanity. A gentleman came from a great distance to testify that humanity was the paramount characteristic of his disposition."

1817, *Turner's Trial*, 32 How. St. Tr. 1007; high treason; Mr. *Cross* (for the defence): "What has been his general character as far as you have known him?" Mr. *Gurney* (opposing): "I submit to your lordships that the proper question is as to loyalty"; Mr. *Denman* (for the defence): "If he is generally a respectable man, an inference arises that he is a loyal man"; Mr. *Gurney:* "If a man is indicted for felony, evidence is produced to his honesty; if for rape, to his chastity; and so on"; Mr. Justice *Abbott:* "As far as my experience goes, the inquiry into character is always adapted to the charge"; Mr. *Denman:* ". . . A man who had conducted himself peaceably and respectably was not likely to enter into wild schemes"; Mr. Justice *Abbott:* "The question was objected to as too general and therefore not applicable; it was not whether he was a peaceable man, but as to his general character."

1889, *McClellan*, J., in *Morgan* v. *State*, 88 Ala. 224, 6 So. 761: "The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant would not have committed the offence; and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act."[1]

the Court, . . . the false impression should be removed"); 1851, Alderson, B., and Campbell, C. J., in R. *v.* Shrimpton, 2 Den. Cr. C. 322; Clifford, J., in U. S. *v.* Holmes, *supra*. In Lord Mansfield's phrase (2 Atk. 339), the defendant, by going into his own character, gives "a challenge to the prosecutor."

[1] 1701, Captain Kidd's Trial, 14 How. St. Tr. 146 (murder; Kidd: "My lord, I have witnesses to produce for my reputation; . . . I can prove what service I have done for the king [as a king's officer, before I turned pirate]"; L. C. B. Ward: "What would that help you in this case of murder?)"; 1865, Martin, B., in R. *v.* Rowton, Leigh & C. 520, 537 (it must be "good character with respect to the species of

In the orthodox common-law practice, this principle was carried so far that the inquiry could be specifically directed to the defendant's capacity for committing the particular crime, and not merely to the abstract trait involved;[2] but this practice seems to have fallen into disuse.

crime charged against him"; Cockburn, C. J., was *contra*, but this is opposed to his remarks quoted *ante*, § 55); 1883, Kilgore *v.* State, 74 Ala. 7 (it must be a trait "having reference and analogy to the subject of the prosecution"); 1889, Morgan *v.* State, 88 id. 223, 6 So. 761 (assault with intent to kill; character for truth, excluded); 1897, Balkum *v.* State, 115 Id. 117, 22 So. 532 (battery upon a woman; character for "running after women" admitted); 1894, Chung Sing *v.* U. S., — Ariz. —, 36 Pac. 205 (selling spirits to Indians; character as a law-abiding citizen, excluded); 1878, Kee *v.* State, 28 Ark. 155, 164 (the character must be "such as would make it unlikely that the defendant would be guilty of the particular crime with which he is charged"); 1857, People *v.* Josephs, 7 Cal. 129 (attempt to rape; character for "morality and good behavior," and "general character," excluded, because the character ought to "bear some analogy and reference to the nature of the charge"); 1865, People *v.* Stewart, 28 id. 395 (murder; character for peace and quiet admitted); 1872, People *v.* Fair, 43 Id. 137, 147 (murder by a mistress; the defendant's character for unchastity not relevant to the act; "it is incorrect to say that the general character of the prisoner is received even in his own behalf"; it must be "general character as to the trait involved in the offence charged"); 1879, People *v.* Cseey, 53 id. 360 (it must be "in respect to the particular trait involved in the inquiry"); 1882, People *v.* Doggett, 62 id. 27, 29 ("traits involved in the charge"); 1901, People *v.* Chrisman, 135 id. 282, 67 Pac. 136 (larceny; defendant's habits "as to steadiness, drinking, or anything of that sort," excluded); 1899, Dorsey *v.* State, 108 Ga. 477, 34 S. E. 135 (on a charge of rape, the defendant, a negro, was shown to have followed the woman, a white, for some distance; held that "under the conditions surrounding the two races in this State," the negro race of the defendant and the white race of the woman could be considered as tending to rebut the explanation that he might be following merely to solicit consent to intercourse without force; this ruling will no doubt pass, in some communities; but all such race generalizations are dangerous; it would be equally logical, on a prosecution for lynching a negro, to hold that the white race of the defendant was some evidence that he was a member of the lynching mob); 1884, Tedens *v.* Schnmers, 112 Ill. 263, 267; 1874, Fletcher *v.* State, 49 Ind. 124, 131; 1879, State *v.* Bloom, 68 id. 54 (larceny; the defendant's evidence of good character limited to "honesty and integrity"); 1893, Carr *v.* State, 135 id. 1, 34 N. E. 583 (murder by poisoning; character for peace and quietude admissible); 1856, Gordon *v.* State, 3 Ia. 410, 415; 1876, State *v.* Kinley, 43 id. 295 (veracity, admitted on a perjury charge); 1879, State *v.* Curran, 51 Id. 112, 117 (seduction; character for virtue admitted, but not general good moral character); 1898; State *v.* Heacock, 106 Id. 191, 76 N. W. 654; 1852, State *v.* Parker, 7 La. An. 83, 88 (murder; character not restricted to peace and quietness, but may include kindness as a husband and father, honesty and integrity and purity of morals; yet the character admissible is defined by the majority of the Court merely as "such particular moral qualities as have pertinence to the charges"); 1868, People *v.* Garbutt, 17 Mich. 9, 16 (murder; defence, insanity; the defendant's reputation in the civil war as "a good and valiant soldier," excluded); 1899, Westbrooks *v.* State, 76 Miss. 710, 25 So. 491 (illegal sale of liquor; defendant's general good character excluded); 1858, State *v.* Dalton, 27 Mo. 15 (assault with intent to kill; character for peace, but not for industry, admitted); 1883, State *v.* King, 83 id. 556; 1903, State *v.* Auslinger, 171 id. 600, 71 S. W. 1041 (illegal voting; defendant's character for industry, held irrelevant; the Court is not bound to instruct upon irrelevant evidence of character, under Rev. St. 1899, § 2627, as amended by Laws 1901, p. 140, relating to written instructions); 1903, State *v.* Thornhill, id. 74 S. W. 832 (defendants' repute as gamblers, admitted in rebuttal of their repute for honesty and integrity); 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811 (character for honesty and integrity, on a charge of murder excluded); 1880, State *v.* Pearce, 15 Nev. 188, 190 ("the particular trait of character at issue" is the kind admissible); 1899, State *v.* Snover, 63 N. J. L. 332, 43 Atl. 1059 (carnal knowledge of one under age of consent; character for "morality, virtue, and honesty in living," admitted); 1860, Cathcart *v.* Com., 37 Pa. 108, 111 (wife-murder; character as a "kind-hearted man" excluded, but character for "peaceableness and regularity of conduct" admitted: this is finical); 1898, Poyner *v.* State, 40 Tex. Cr. 640, 48 S. W. 516 (incest; character as to "gentlemanly deportment and good moral character, allowed"); 1900, State *v.* Surry, 23 Wash. 655, 63 Pac. 557 (assault and battery while making an arrest; defendant's character as a conservative and conscientious peace officer, excluded; this is unsound). *Contra*, but inconsistent with other rulings *supra* in the same jurisdictions: 1894, Funderberg *v.* State, 100 Ala. 36, 14 So. 877 (general good character, admitted); 1863, Hopps *v.* People, 31 Ill. 385 (murder; the defence being insanity, the defendant's character "as a man and a citizen" was admitted); 1863, State *v.* Knapp, 45 N. H. 157 (rape; general good character of the defendant for morality having been received, the State was allowed to show his bad reputation as an illegal liquor seller).

[2] *E.g.*: 1803, Hedge's Trial, 28 How. St.

§ 60. **Same: Time and Place of Character.** This, as a question of Relevancy, is simple enough. (1) Character in one *place* stands on precisely the same footing as character in another place. The person is the same wherever he is, and it is with the person that the trait is concerned. (2) Character at an earlier or later *time* than that of the deed in question is relevant only on the assumption that it was substantially unchanged in the meantime; *i. e.* the offer is really of character at one period to prove character at another, and the real question is of the relevancy of this evidence to prove character, not of the character to prove the act; it therefore more properly involves the principle of § 191, *post*. Most of the doubts, however, raised by a variation of time or of place have no concern with relevancy, but with the hearsay use of reputation to evidence character. Thus, a reputation *post litem motam* may be untrustworthy; a reputation in a community other than the defendant's home may be ill-founded. These problems are therefore all discussed in connection with the Reputation exception to the Hearsay Rule (*post*, §§ 1615–1618).

§ 61. **Same: Defendant as a Witness.** When a defendant in a criminal case takes the stand in his own behalf, he occupies a double position. As a defendant, his character cannot be attacked by the prosecution; as a witness, it can be. The question is whether the former position should be so strictly guarded as to require the exclusion of evidence properly admissible against him in the latter capacity. This question can be better examined in connection with the impeachment of witnesses; and it is therefore dealt with *post*, § 890.

§ 62. (2) **Character of Complainant in Rape and similar Crimes.** The reasons of auxiliary policy which affect the use of a defendant's character by the prosecution are peculiar to that use, and do not affect the use of character as against other persons in a criminal case wherever it may be relevant. One of these relevant uses is that of the character of a rape-complainant for chastity. The non-consent of the complainant is here a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent:

1846, *Platt*, B., in *R.* v. *Ryan*, 2 Cox Cr. 115 (admitting testimony to the "decency and propriety" of the general conduct of the prosecutrix, an idiot): "It is important to consider whether a young person in such a state of incapacity was likely to consent to the embraces of this man; because if her habits, however irresponsible she might be, were loose and indecent, there might be a probability of consent being given and a jury might not think it safe to conclude that she was not a willing party."

1856, *Isham*, J., in *State* v. *Johnson*, 28 Vt. 514: "In all cases of this character, the assent of the witness to the act is the material matter in issue, and on that question the defence generally rests on circumstantial testimony. In determining that question, which is purely a mental act, it is important to ascertain whether her consent would from her previous habits be the natural result of her mind, or whether it would be inconsistent with her previous life and repugnant to all her moral feelings. Such habits as

Tr. 1403 ff. ("Do you believe, from what you know of their character, that the defendants are capable of committing a gross fraud upon their employers?"); and other earlier trials cited *supra*.

are imputed to the witness by this inquiry have a tendency to show such consent as the natural operation of her propensities, and rebut the inference or necessity of actual violence."

1895, *Garoutte*, J., in *People* v. *Johnson*, 106 Cal. 289, 39 Pac. 622: "This class of evidence is admissible for the purpose of tending to show the non-probability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed. In other words, this class of evidence goes to the question of consent only."

The admissibility of the complainant's character for chastity or unchastity is generally conceded;[1] and her habits as a prostitute are usually regarded as equivalent to a general trait of character.[2]

The same doctrine should apply to a charge of *enticement for prostitution*, because the question is whether the woman went of her own impulses or

[1] *Accord:* 1843, R. v. Tissington, 1 Cox Cr. 48, Abinger, C. B. ("general want of decency"); 1851, R. v. Clay, 5 id. 146, Patteson, J.; 1847, Camp v. State, 3 Kelly 417, 420; 1887, McQuirk v. State, 84 Ala. 435, 438, 4 So. 775; 1855, Pleasant v. State, 15 Ark. 624, 643, 653; 1856, People v. Benson, 6 Cal. 221, 223; 1899, People v. Shea, 125 id. 151, 57 Pac. 885 (following People v. Benson; McFarland, J., diss.); 1895, Rice v. State, 35 Fla. 236, 17 So. 286; 1902, Seals v. State, 114 Ga. 518, 40 S. E. 731; 1873, Shirwin v. People, 69 Ill. 56, 59; 1876, Dimick v. Downs, 82 id. 573; 1861, Wilson v. State, 16 Ind. 393, *semble;* 1834, South Bend v. Hardy, 98 id. 582; 1885, Anderson v. State, 104 id. 471, 4 N. E. 63, 5 N. E. 711; 1848, Carter v. Cavenaugh, 1 Greene Ia. 171, 175, *semble;* 1880, Com. v. Harris, 131 Mass. 336; 1888, People v. McLean, 71 Mich. 310, 38 N. W. 917; 1895, Brown v. State, 72 Miss. 95, 16 So. 202; 1895, State v. Duffey, 128 Mo. 549, 31 S. W. 98; 1861, State v. Forschner, 43 N. H. 89; 1835, O'Blenis v. State, 47 N. J. L. 279; 1857, People v. Jackson, 3 Park. Cr. 398; 1838, People v. Abbot, 19 Wend. 197; 1874, Woods v. People, 55 N. Y. 515; 1846, State v. Jefferaon, 6 Ired. 305; 1868, State v. Cherry, 63 N. C. 32; 1897, State v. Hairaton, 121 id. 579, 28 S. E. 492 (general character allowed, but not character for virtue, on the singular ground that the offering party may only ask for general character, though the witness, "of his own motion, may say in what respect it is good or bad"; a novel and groundless quibble); 1858, McCombs v. State, 8 Oh. St. 643, 646; 1862, McDermott v. State, 13 id. 331, 335; 1874, Titus v. State, 7 Baxt. 132, 135; 1898, State v. McCune, 16 Utah 170, 51 Pac. 818 (character for chastity); 1856, State v. Johnson, 28 Vt. 512 (Bennett, J., dissenting on another point); 1867, State v. Reed, 39 Vt. 417; 1864, Watry v. Ferber, 18 Wis. 500, 502 (civil action for rape; the woman's character held admissible, and equally in criminal cases). *Contra*, excluding *bad character:* 1877, State v. Morse, 67 Me. 429. Occasionally, too, a Court has been misled by the doctrine about presuming a witness' character to be good, and has therefore erroneously excluded the complainant's *good character* unless her character has first been impeached by the defendant: 1898, People v. Kuches, 120 Cal. 566, 52 Pac. 1002 (admitting good character in rebuttal of alleged lewd conduct); 1900, People v. O'Brien, 130 id. 1, 62 Pac. 297 (where the Court inconsistently held that there was no such strict presumption in a criminal case, and yet that evidence of good character was inadmissible; the opinion is confused in its notion of presumptions); 1903, Baker v. State, — Miss. —, 33 So. 716 (excluded, except after impeachment by the defendant).

[2] 1829, R. v. Barker, 3 C. & P. 589, Park and Parke, JJ. (that the prosecutrix had on one occasion acted the prostitute, admitted, after hesitation arising from R. v. Hodgson, *post*, § 200; perhaps in effect only a ruling as to testimonial discredit); 1871, R. v. Holmes, 12 Cox Cr. 143, per Kelly, C. B. ("the associate of common prostitutes, and such evidence of general loose character"); 1887, Stephen, J., in R. v. Riley, 16 Cox Cr. 195; 1855, Pleasant v. State, 16 Ark. 624, 643, 653, *supra, semble;* 1877, State v. Shields, 45 Conn. 256, 257, 260, 263 (former prostitution admitted, but the purpose not made clear); 1895, Rice v. State, 35 Fla. 236, 17 So. 286 (admitting "promiscuous intercourse with men, or common prostitution"); 1888, People v. McLean, Mich., *supra;* 1895, Brown v. State, Miss., *supra;* 1838, People v. Abbot, N. Y., *supra;* 1874, Woods v. People, N. Y., *supra;* 1846, State v. Jefferson, N. C., *supra;* 1874, Titus v. State, Tenn., *supra;* 1856, State v. Johnson, Vt., *supra*. Here the general habit must be distinguished from *particular acts of unchastity*, the admissibility of which has been much controverted (*post*, § 200). The complainant's *association with unchaste persons* is near the line, but ought to fall under the present principle: 1871, R. v. Holmes, cited above, *contra;* 1862, Eddy v. Gray, 4 All. 435, 439 (bastardy; bad character of the young men she associated with, excluded); 1900, State v. Taylor, 57 S. C. 483, 35 S. E. 729 (reputation of the house of complainant's abode, excluded).

yielded to persuasion.[3] But it should not apply in rape where the woman is below the *age of consent*;[4] and perhaps not in a charge of mere *assault with intent* to commit rape, or of *indecent assault*.[5]

The only difficulty in applying the principle is to distinguish between the use of character, as bearing on consent, and the use of specific acts of unchastity as a means of evidencing the character itself. The latter kind of evidence being in many jurisdictions excluded (*post*, § 200), the woman's character as evidenced by reputation is alone admissible in those jurisdictions; and it thus becomes necessary therein to discriminate between the general character or trait of unchastity and the specific acts of unchastity.[6]

§ 63. (3) **Character of Deceased in Homicide.** When the issue of self-defence is made in a trial for homicide, and thus a controversy arises whether the deceased was the aggressor, one's persuasion will be more or less affected by the character of the deceased; it may throw much light on the probabilities of the deceased's action:

1860, *Stephens*, J., in *Williams* v. *Fambro*, 30 Ga. 233, 235 (admitting the turbulent character of a slave, as indicating that he was killed in an act of insubordination, as claimed by the defendant W.): "To prove a proneness to insubordination, to be sure, does not prove an act of insubordination, but it does increase the probability of the story where there is, as there was in this case, other evidence suggestive of such an act. Such a story of the rebellion [as the defendant's], if told by a witness or indicated by circumstances ought to be more easily believed concerning a violent, turbulent negro, than concerning a meek, humble one. I think that any mind in search of truth in such a case, or finding itself in doubt, would want to know the character of the negro. . . . [The defendant] Williams' knowledge or ignorance [of the character] has nothing to do with that bearing of the character which I have pointed out. The sole purpose for which character was admissible in this case on the question of justification was, from the negro's general readiness for rebellion, to render more probable the evidence which tended to show an act of rebellion at the time he was killed; and this probability is evidently not affected in the slightest degree by Williams' previous knowledge. The light comes from the fact that the negro was one who was apt or likely to do such an act as the one imputed to him, and not from Williams' knowledge of the fact."

There ought, of course, to be some other appreciable evidence of the deceased's aggression, for the character-evidence can hardly be of value unless there is otherwise a fair possibility of doubt on the point; moreover, other-

[3] 1899, Gore *v.* Curtis, 81 Me. 403, 405, 17 Atl. 314 (indecent assault and battery, and solicitation to commit adultery; the plaintiff's character for unchastity admitted); 1890, Brown *v.* State, 72 Md. 468, 475, 20 Atl. 140, 180 (applying the rule to the case of female minor charged to have been enticed for purposes of prostitution; but confusing the question with that of discrediting a witness); Brown *v.* State, ib. 477 (admitting the minor's previous recent residence in a house of prostitution).

[4] 1895, People *v.* Johnson, 106 Cal. 289, 39 Pac. 622; 1903, People *v.* Wilmot, id., 72 Pac. 838; 1893, People *v.* Abbott, 97 Mich. 484, 485, 56 N. W. 862; 1898, State *v.* Whitesell, 142 Mo. 467, 44 S. W. 332; 1900, State *v.* Hilberg, 22 Utah 27, 61 Pac. 215.

[5] *Admitted:* 1817, R. *v.* Clarke, 2 Stark. 243; 1897, Gross *v.* Brodrecht, 24 Ont. App. 687 (indecent assault); 1893, Shields *v.* State, 32 Tex. Cr. 498, 502, 23 S. W. 893; 1903, Barton *v.* Bruley, — Wis. —, 96 N. W. 815 (indecent assault); *Excluded:* 1811, Davenport *v.* Russell, 5 Day 145, 148. Here though not admissible to evidence the woman's consent, which is not in issue, yet it might be relevant to show the defendant's natural expectation of her consent, on the principle of § 402, *post*. For the question whether the *complainant in rape or bastardy* can be *impeached as a witness* by general bad character, see *post*, § 923.

[6] See the citations in note 2, *supra*.

wise the deceased's bad character is likely to be put forward to serve improperly as a mere excuse for the killing, under the pretext of evidencing his aggression, and it is often feasible to obtain untrustworthy character-evidence for that purpose. In short, the same reasons for caution apply as in the case of uncommunicated threats when offered as involving a design of aggression, and thus evidencing a probable aggression, on the part of the deceased (*post*, § 110).

The reason for the hesitation, once observable in many Courts, in recognizing this sort of evidence, and the source of much confusion upon the subject, was the frequent failure to distinguish this use of the deceased's character from another use, perfectly well-settled, but subject to a peculiar limitation not here necessary, — the use of communicated character to show the fact and the reasonableness of the defendant's apprehension of violence (*post*, § 246). As the purpose there is to show the defendant's state of mind, it is obvious that the deceased's character, as affecting the defendant's apprehensions, must have become known to him; *i. e.* proof of the character must indispensably be accompanied by proof of its communication to the defendant; else it is irrelevant. In the present use, this additional element of communication is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief. This distinction, however, was at first not always appreciated by the Courts, nor clearly laid before them by counsel. Hence, a ruling excluding the present use of the evidence cannot always be taken as a repudiation of the present principle, but is often merely a ruling that the offer does not satisfy the doctrine of communicated character; and such a Court may in future recognize the present doctrine if the distinction is pressed upon it. Apart from a few such precedents, the principle is now generally accepted.[1]

[1] It may be noted that the doctrine is of course equally applicable in civil cases where a similar controversy arises (as in Williams *v.* Fambro, *infra*); it is also to be noted that the trait of character must be that of quarrelsomeness, turbulence, or violence: *Ala.*: 1839, Findlay *v.* Pruitt, 9 Port. 195, 199 (assault and battery; the plaintiff's reputation for a theft, held improperly admitted as a justificatiou); 1872, Fields *v.* State, 47 Ala. 603 (the deceased's character as a "violent, turbulent, revengeful, bloodthirsty, dangerous man," held admissible for "determining the turpitude of the crime and what should be the measure of the punishment to be inflicted"; no authorities cited); 1875, Eiland *v.* State, 52 id. 333 (character from the present point of view ignored); 1880, Roberts *v.* State, 68 id. 165 (same, *semble*); 1888, Hussey *v.* State, 87 id. 134, 6 So. 420 (question stated, but not decided); *Ark.*: 1874, Palmore *v.* State, 29 Ark. 248, 262, 263 (admitted as tending to explain "the conduct of the deceased at the time"); *Cal.*: 1858, People *v.* Murray, 10 Cal. 309 (admissible "when the circumstances of the conteat are equivocal" as to self-defence; but whether the present principle is intended by the Court is not clear); *Fla.*: 1899, Copeland *v.* State, 41 Fla. 320, 26 So. 319 (admissible only as significant of conduct of deceased at the time of the killing; character for "general cussedness," or for immorality, excluded); *Ga.*: 1860, Williams *v.* Fambro, 30 Ga. 233 (admitting the turbulent character of a slave, to show that he was probably killed, as claimed by the defendant, in an act of insubordination; see quotation *supra*); 1903, Dannenberg *v.* Berkner, id., 45 S. E. 682 (the plaintiff having made no attack, his character not known to the defendant was held inadmissible); *Kan.*: 1870, State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67 (admissible, under the limitation, apparently, that the question as to the aggressor must be in doubt); *Ky.*: 1896, Com. *v.* Hoskins, — Ky. —, 35 S. W. 284 (violent character admitted, but not mere bad moral character); *La.*: 1878, State *v.* Burns, 30 La. An. 679 (the character of the deceased is said to be excluded as a general rule, with a possible exception for communicated character; the early cases under § 246, *post*, are assumed as authorities); State *v.* John-

§ 64. (4) Parties in Civil Causes; Character generally excluded. It is to-day generally said that (subject to specific exceptions, some of them doubtful) the character of a party in a civil cause is inadmissible; *i. e.* that it cannot be used, as it is for or against a defendant in a criminal case, to indicate the

son, ib. 921 (intimating admissibility in a doubtful case, to show that the deceased had probably quarrelled with and been killed by some one else); 1883, State *v.* Garic, 35 Id. 970, 971 (a charge that it "tended to indicate that he [the deceased] was the assailant, and that the assault was felonious," apparently approved); 1893, State *v.* Nash, 45 Id. 1137, 1141, 13 So. 732, 734 (uncommunicated character, excluded); 1900, State *v.* Robinson, 52 Id. 616, 27 So. 124 (admissible; no precedents cited); *Md.:* 1877, Costley *v.* State, 48 Md. 175 (peculiar facts; the jealous character of the deceased, not admitted to show that the killing was the result of a quarrel arising from the deceased's jealousy of the defendant's intimacy with his wife); *Mich.:* 1868, People *v.* Garbutt, 17 Mich. 9, 15 (excluded; obscure); *Minn.:* 1860, State *v.* Dumphey, 4 Minn. 438, 445 (admissible where there is a doubt as to the premeditation of the defendant; but no distinction is made as to the deceased's knowledge of the character, and the opinion is not clear); *Miss.:* 1849, Jolly *v.* State, 13 Sm. & M. 223 (general dangerous character admissible "when the manner of the homicide is not fully known"); 1859, Wesley *v.* State, 37 Miss. 327, 346 (declared inadmissible, but with intimations that in a case of doubt it might be received; Jolly *v.* State not cited); *Mo.:* 1853, State *v.* Jackson, 17 Mo. 544 (obscure); 1886, State *v.* Rider, 90 id. 61, 1 S. W. 825, *semble* ("in determining the question as to who was the assailant," character admissible); *N. J.:* 1790, State *v.* Wells, 1 N. J. L. 424, 429 (admitted); *N. Y.:* 1876, Thomas *v.* People, 67 N. Y. 224, *semble* (admitted); 1886, People *v.* Druse, 103 id. 655, 8 N. E. 733 (same); *N. C.:* 1820, State *v.* Tackett, 1 Hawks 210, 213, 216 (murder of a slave; the deceased's disposition as a turbulent and insolent man, admitted); 1827, Pierce *v.* Myrick, 1 Dev. 345 (trespass for killing the plaintiff's negro; to rebut evidence of the killing being done in defence, evidence was received of the "peaceable and submissive character," "general good character and orderly deportment" of the slave); 1843, State *v.* Tilly, 3 Ired. 424 (murder of his employer by an overseer; because (1) no case of self-defence was made out, (2) it would show only arrogant language, (3) it was not properly proved, evidence was excluded of the deceased being "high-tempered, oppressive, and overbearing towards his overseers"; no precedents cited); 1848, State *v.* Barfield, 8 id. 344, 349 (murder; the character of the deceased as "violent, overbearing, and quarrelsome," excluded, because it would be admissible, if at all, only where the evidence was purely circumstantial; State *v.* Tackett distinguished); 1855, Bottoms *v.* Keut, 3 Jones L. 154 (the preceding cases, except Pierce *v.* Myrick, noticed, and the rule stated *obiter* as absolute, that "evidence of the general character of the deceased as to temper and violence is inadmissible"); 1859, State *v.* Hogue, 6 Id. 381, 384 (the character of the deceased, who had attacked the defendant, excluded; "there may be exceptions to the rule; State *v.* Tackett is admitted to be one"); 1859, State *v.* Floyd, ib. 392, 395, 398 (the temper and disposition of the deceased for violence, excluded, the parties having voluntarily engaged in a fight; no precedents cited); 1877, State *v.* Turpin, 77 N. C. 473, 480 (the general character of the deceased for violence admitted, apparently on the conditions that self-defence be in issue and that the evidence be circumstantial; the precedents examined and summed up); 1880, State *v.* Chavis, 80 id. 357 (self-defence in issue; the deceased's general character for violence excluded, on the authority of Hogue's and Barfield's cases; Turpin's case recognized, but treated as dealing with some different question); 1897, State *v.* Byrd, 121 id. 684, 28 S. E. 353 (admissible only where the evidence of the killing is wholly circumstantial; opinion obscure); 1899, State *v.* McIver, 125 Id. 645, 34 S. E. 439 (vicious temper and violence in anger, admitted); *Oh.:* 1860, Gandolfo *v.* State, 11 Oh. St. 114, 118 (generally inadmissible); 1875, Marts *v.* State, 26 id. 162, 168 (declared inadmissible, without discussion); *Pa.:* 1863, Com. *v.* Ferrigan, 44 Pa. 388 (general deportment for violence, rejected, there being no evidence as to a necessity for self-defence); *Tenn.:* 1846, Copeland *v.* State, 7 Humph. 479, 495 ("the character of the deceased" treated as throwing light on the question whether she was the aggressor; no objection of law had been raised); 1872, Williams *v.* State, 3 Heisk. 376, 396 (the deceased's violent character treated in the same way; no objection of law had been raised); *Tex.:* 1854, Henderson *v.* State, 12 Tex. 525, 530 (not admissible "as affording presumptive evidence that the party injured was the aggressor"; for it would be "very remote and merely possible conjecture"; but here there was no evidence of aggression by the deceased). It is commonly said that the State cannot offer the deceased's *peaceable character* until the defendant has questioned it (though there is no good reason for this limitation): 1858, Dukes *v.* State, 11 Ind. 557, 565; 1892, Fields *v.* State, 134 id. 46, 56, 32 N. E. 780; 1899, Tbrawley *v.* State, 153 id. 375, 55 N. E. 95 (the defendant's issue as to deceased's aggression sufficing to raise the question); 1894, State *v.* Eddou, 8 Wash. 292, 294, 36 Pac. 139, Hoyt, J., diss.).

For the use of *particular acts of violence* by the deceased, see *post*, §§ 198, 248.

For the use of the deceased's physical strength, see *post*, § 84.

likelihood that the act in issue was or was not done. This is laid down as a general rule, to which a specific exception, if any, must be clearly made out. This result, to be sure, was not always so clearly an accepted one.[1] But it is to-day almost everywhere accepted, subject to one or two occasional exceptions.

The reasons for this exclusion differ wholly from the reasons forbidding the prosecution's use of the character of an accused person; the two rules have nothing in common. The reasons advanced for the present rule are of two chief sorts. (1) A party's character is *usually of no probative value.* Where the issue is whether a contract was made or broken, whether money was paid or property improved by mistake, whether goods were illegally converted or a libel published, there no moral quality in the act alleged, or at any rate any moral quality that may have been present is ignored by the law; and moral character can therefore throw no light on the probability of doing or not doing. In torts involving violence or actual fraud, such a moral quality may appear; but, apart from these, it is (almost without exception) either non-existent or immaterial:

1854, *Martin*, B., in *Attorney-General* v. *Radloff*, 10 Exch. 97: "In criminal cases evidence of the good character of the accused is most properly and with good reason admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime. But in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty, alleged against him.

1791, *Thompson* v. *Church*, 1 Root 312; *qui tam* for an assault; the defendant's character as a malicious, quarrelsome man was rejected; *Per Curiam*: "The general character is not in issue. The business of the court is to try the case, and not the man; and a very bad man may have a very righteous cause."

[1] The notion that character might be resorted to is often advanced by counsel in the early 1800s; but the mainstay of this claim seems always to have been Ruan v. Perry, whose subsequent repudiation in its own court is seen in the line of New York cases following:

1805, Ruan v. Perry, 3 Caines 120 (the defendant, a naval officer, had ordered the plaintiff's vessel, a neutral, to lie to, and had taken her out of her course, by reason of which she was captured by a belligerent; the plaintiff charged fraudulent collusion with the belligerent captain; and the defendant's good character was received because the evidence was purely circumstantial; Tompkins, J.: "In actions of tort, and especially charging a defendant with gross depravity and fraud, upon circumstances merely, as was the case here, evidence of uniform integrity and good character is oftentimes the only testimony which a defendant can oppose to suspicious circumstances"); 1827, Fowler v. Ins. Co., 6 Cow. 673 (defence of fraud, in an action on an insurance-policy; the plaintiff's good character was excluded; Savage, C. J.: "A specific fraud is charged, that must be met on its own merits, unless supported only by circumstances, as in the case of Ruan v. Perry. . . . Every man must be answerable for every improper act; and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties"); 1832, Townsend v. Graves, 3 Paige Ch. 453, 455, Walworth, Ch. (character admissible in cases of "a crime, or any other act involving moral turpitude," if evidenced only "by circumstantial evidence or by the testimony of witnesses of doubtful credit"); 1837, Gough v. St. John, 16 Wend. 645 (action for false representations as to a third person's solvency; the defendant's good character for honesty and fairness in dealing was excluded; Cowan, J.: "Such evidence [of character] is, in general, confined to criminal prosecutions involving the question of moral turpitude. . . . The case of Ruan v. Perry is to the contrary; but that is virtually exploded. . . . I mean to be understood as speaking of the general distinction; I know there are exceptions; they lie in that class of actions, or rather of issues, where the general character is drawn in question by the pleadings or the points involved in a cause," naming slander, criminal conversation, and breach of marriage-promise, as some of the instances"); 1851, Pratt v. Andrews, 4 N. Y. 496 (inadmissible; general statement).

1826, *Marshall*, C. J., in *Etting* v. *Bank*, 11 Wheat. 59, 73 (action on an indorsement of a note as surety, against which the indorser set up a frauduient concealment of material facts): "If this case depended on the deservedly high character of the individuals who were engaged on the part of the Bank in the transactions in which the suit originated, — if elevation above the possibility of suspicion that they could have meditated anything believed by themselves to be legally or morally wrong could decide it, this cause would not have required the great efforts that have been bestowed upon it. The names which appear on this record [8] can never be connected with actual fraud; nor would any difficulty be found in protecting them from the imputation, were it possible that it could be made. But judicial inquiries are into the rights of the parties; and although high and honorable character has and ought to have great influence in weighing testimony in which that character is in any manner involved, yet, when the inferences from that testimony are drawn by others, and a Court is required to pronounce the law arising upon them, character is excluded from the view of the judge, and legal principles alone can be acknowledged as his guide."

The meat of this reason is found in the expression of the Connecticut Court, that "a very bad man may have a very righteous cause." (2) But there is, additionally, a complex reason of auxiliary policy (*ante*, § 42), which has been pointed out by several Courts as equally efficient for exclusion:

1820, *Hosmer*, C. J., in *Stow* v. *Converse*, 3 Conn. 345 (the plaintiff's good character not received to rebut a slander): "It is not only in contravention of the fundamental rule that evidence shall be confined to the issue, to admit such testimony; but it would be infinitely dangerous to the administration of justice. Instead of meeting a charge of misconduct by testimony evincive of not having misconducted, general character would become the principal evidence in most cases; and he who could throng the court with witnesses to establish his reputation in general would shelter himself from the wrongs he had perpetrated."

1847, *Wardlaw*, J., in *Smets* v. *Plunket*, 1 Strobh. 372, 375: "The evidence tendered towards this purpose [of showing the plaintiff incapable of fraud charged in a set-off], if it could have laid bare the heart of the plaintiff, and ascertained really the strength of his moral principles, would have been highly influential. But examinations in court into general character, according to reputation, usually distinguish only between two classes, the good and the bad, without wise discrimination between the infinite degrees and varieties which exist of either class. Of most persons there is really no general reputation as to character, and of some the general reputation is widely different from the truth, which a full knowledge of their motives, principles, and habits, would disclose. Sometimes upon trials the good are overthrown by unexpected assault, and often the bad are furnished and strengthened by the ready testimony which their influence procures in their favor; whilst many of their neighbors, who think ill of them, shrink from being examined, or, being examined, cannot say that the suspicions which they entertain, and which they feel rather than know that others entertain also, have been uttered so as to constitute a bad reputation. In investigations concerning character, feeling and prejudice are more frequently exhibited than in inquiries upon any other subject. The number of witnesses is often extended far beyond the limit which upon other topics the Court would indulge; and if there be contrariety of opinion, the matter is usually left at last in great uncertainty. If in every case where an act of dishonesty is imputed, the imputation may be met by such evidence, then there are few cases into which such evidence might not be introduced; trials would be insupportably tedious; and the result of a trial would as often depend upon the popularity of a party as upon the merits of his

[8] The counsel in the case were Daniel Webster, Roger B. Taney, William Wirt, and Thomas Addis Emmett.

case. These considerations suggest the propriety of adhering closely to the rules which have been established to regulate the admission of evidence of reputation concerning general character."

1864, *Aldis*, J., in *Wright* v. *McKee*, 37 Vt. 163: "Many considerations concur in rejecting such evidence in civil cases. Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed; and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced; it may then perhaps suffice to turn the wavering scales; very rarely can it be of substantial use in getting at the truth. It is uncertain in its nature, both because the true character of a large portion of mankind is ascertained with difficulty; and because those who are called to testify are reluctant to disparage their neighbors, — especially if they are wealthy, influential, popular, or even only pleasant and obliging. It is mere matter of opinion, and in matters of opinion men are apt to be greatly influenced by prejudice, partisanship, or other bias, of which they are unconscious; and in cases which are not quite clear they are apt to agree with the first one who speaks to them on the subject or to form their opinion upon the opinions of others. The introduction of such evidence in civil causes wherever character is assailed would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that is easily manufactured, is liable to abuse, and if in common use in the courts, as likely to mislead as to guide aright."

These two reasons combined seem to justify the fixed policy of our law in excluding the character of the parties to a civil cause when offered to prove or disprove the doing of an act. It is possible, however, to maintain that the reasons of policy should be yielded to in ordinary civil cases only; and that where a moral intent is marked and prominent in the nature of the issue, the defendant's good moral character should be received as in criminal cases. This view has in more modern opinions seemed to gain ground, and if only it can be phrased in a definite rule, it is worth recognizing:

1900, *Start*, C. J., in *Hein* v. *Holdridge*, 78 Minn. 468, 81 N. W. 522. "There would seem to be no logical reason why the same rule should not apply to civil actions in which the defendant is charged with a crime. . . . The rule seems to be one of practical convenience, for the purpose of avoiding the confusion of issues. On principle, however, it would seem that there ought to be exceptions to this general rule. . . . Inasmuch as the general rule is not based upon any philosophical reason, but is merely one of convenience, it ought not to be applied to cases where justice to the defendant requires that the inconvenience arising from a confusion of the issues should be disregarded, and he be permitted to give evidence of his previous good character, or, in other words, that such evidence ought to be received in a civil action when it is of a character to bring it within all of the reasons for admitting such evidence in criminal cases. Civil actions for an indecent assault, for seduction, and kindred cases, are of this character; for such cases are not infrequently mere speculative and blackmailing schemes. The consequences to the defendant of a verdict against him in such a case are most serious, for the issue as to him involves his fortune, his honor, his family. From the very nature of the charge, it often happens that an innocent man can only meet the issue by a denial of the charge, and proof of his previous good character. Ought a defendant in such a case to be deprived of the right to lay before the jury evidence of his previous good character, because it will tend to confuse the issue, while a defendant in a case where the State charges him with a simple assault, involving no more serious consequences than the payment, perhaps, of a fine of five dollars, is accorded the absolute right to give such evidence? . . . [But the doctrine] ought not to be extended to civil actions where the issue

relates to a simple assault, or to the fraud, deceit, or negligence of the defendant, or to similar actions, for they are not within the reasons we have suggested for the admission of evidence of good character in exceptional civil actions."[8]

[8] In the following cases the evidence was excluded, except where otherwise stated [the cases involving *negligence*, *defamation*, *malpractice*, and the *complainant's* character in *bastardy*, are dealt with *post*, §§ 65–68; certain rulings for *homicide in self-defence*, involving the *plaintiff's character*, have been noted in § 63, *ante*]: *Ala.*: 1837, Ward *v.* Herndon, 5 Port. 382, 385 (false representations); *Alaska*: C. C. P. 1900, § 671 (like Or. Annot. C., 1892, § 812); *Cal.*: C. C. P. 1872, § 2053 ("evidence of the good character of a party is not admissible in a civil action . . . unless the issue involves his character"); 1894, Anthony *v.* Grand, 101 Cal. 235, 237, 35 Pac. 859 (battery; defendant's peaceable character excluded); *Ark.*: 1896, Powers *v.* Armstrong, 62 Ark. 267, 35 S. W. 228 (good character to rebut a charge of fraudulent purchase); *Conn.*: 1786, Woodruff *v.* Whittlesey, Kirby 60, 62 (fraudulent transfer of property); 1820, Stow *v.* Converse, 3 Conn. 345 (quoted *supra*); 1828, Humphrey *v.* Humphrey, 7 Id. 117 (divorce for adultery); St. 1897, Mar. 3, c. 16 (in bastardy proceedings, "evidence of the good character of the accused for morality and decency prior to the alleged commission of the offence," is admissible, subject to rebuttal); *Ga.*: Code 1895, § 5159, Cr. C. § 993 ("The general character of the parties" is inadmissible, "unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct"); 1861, Boatright *v.* Porter, 32 Ga. 130, 140 (bad character of intermediate party in chain of title, excluded); 1890, Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 766, 12 S. E. 18 (character of plaintiff in insurance claim, the defendant alleging her husband to be still alive); *Ida.*: Rev. St. 1887, § 6084 (like Cal. C. C. P. § 2053); *Ill.*: 1869, Sprague *v.* Craig, 51 Ill. 288, 294 (breach of promise of marriage; defence, acts of unchastity; the plaintiff allowed to show her good character, "for the purpose of rendering it improbable that the charge is well-founded"); 1876, Crose *v.* Rutledge, 81 Id. 266 (crim. con.; defendant's bad character for chastity, excluded); *Ind.*: 1832, Rogers *v.* Lamb, 3 Blackf. 155 (malicious prosecution); 1841, Walker *v.* State ex rel. Corbin, 6 Id. 4 (bastardy); 1855, Church *v.* Drummond, 7 Id. 19 (fraudulent transfer); 1865, Cox *v.* Pruitt, 25 Ind. 92, 94 (seduction); 1877, Gebhart *v.* Burket, 57 Id. 379, 385 (civil arson); 1882, Haymond *v.* Saucer, 84 Id. 3, 14 (similar to Sprague *v.* Craig, Ill., *supra*); 1883, Houser *v.* State, 93 Id. 231 (bastardy); 1898, Vansickle *v.* Shenk, 150 Id. 413, 50 N. E. 381 (action to set aside fraudulent transfer; the grantor's reputation for honesty, excluded); 1899, Hilker *v.* Hilker, 153 Id. 425, 55 N. E. 81 (divorce, alleging wife's adultery; wife's character for chastity admissible on her behalf "to disprove the acts charged"); *Ia.*: 1881, Barton *v.* Thompson, 56 Ia. 571 (admitted only "where intention is the point in issue, and the proof consists of slight circumstances"; here excluded in an action for malicious burning); 1886, Stone *v.* Ins. Co., 68 Id. 737, 742, 28 N. W. 47 (defence of wilful burning, to an action for insurance-money; the plaintiff's good character excluded); *Kan.*: 1882, Simpson *v.* Westenberger, 28 Kan. 756 (transferee in fraud of creditors); *Me.*: 1829, Potter *v.* Webb, 6 Me. 14, 16, 18 (good character to disprove fraud in procuring a decree); 1841, Low *v.* Mitchell, 18 Id. 372, 374 (bastardy proceedings); 1849, Thayer *v.* Boyle, 30 Id. 475, 480 (trespass); 1877, Soule *v.* Bruce, 67 Id. 584 (trespass for battery); *Mass.*: 1835, Heywood *v.* Reed, 4 Gray 574, 576, 581 (assignee in fraud of creditors); 1891, Day *v.* Ross, 154 Mass. 14, 27 N. E. 676 (good character for peaceableness, in an action for battery); 1897, Geary *v.* Stevenson, 169 Id. 23, 47 N. E. 508 (the plaintiff's character, in an action for imprisonment, inadmissible, even though the offence set up in justification involves a crime); *Mich.*: 1886, Fahey *v.* Crotty, 63 Mich. 383, 29 N. W. 876 (battery; the defendant's good character, excluded; but where "wrong intention or moral turpitude" is in issue and is evidenced only circumstantially, character is admissible); 1897, Munroe *v.* Godkin, 111 Id. 183, 69 N. W. 244 (assumpsit for labor); 1897, Kingston *v.* R. Co., 112 Id. 40, 70 N. W. 315 (personal injury); 1902, Adams *v.* Elseffer, — Id. —, 92 N. W. 772 (assumpsit by an employer against his clerk for misappropriating moneys; defendant's good character excluded); *Minn.*: 1877, Schnek *v.* Hagar, 24 Minn. 339, 344 (action by a female minor for indecent assault; the defendant's character for chastity and morality, admitted in his favor); 1900, Hein *v.* Holdridge, 78 Id. 468, 81 N. W. 522 (father's action for daughter's seduction; defendant's character for chastity admitted, because the charge "involved the commission of a crime by him"; see quotation *supra*); *Miss.*: 1884, Leinkauf *v.* Brinker, 62 Miss. 255 (sale in fraud of creditors; the vendee's good character for honesty and fair dealing); *Mo.*: 1875, McKern *v.* Calvert, 59 Mo. 242 (seduction); 1877, Dudley *v.* McCluer, 65 Id. 241 (equitable proceeding to set aside a settlement obtained by fraud); 1892, Vawter *v.* Hultz, 112 Id. 633, 639, 20 S. W. 689 (action for death of plaintiff's husband; defendant's peaceable character excluded); *Mont.*: C. C. P. 1895, § 3381 (like Cal. C. C. P. § 2053); *Nebr.*: 1895, Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382 (civil action for filiation of a bastard); *N. H.*: 1830 Washburn *v.* Washburn, 5 N. H. 195 (divorce on the ground of the wife's adultery; the wife's character for unchastity); 1838, Matthews *v.* Huntly, 9 Id. 146, 148; 1866, Boardman *v.* Woodman, 47 Id. 120 (the sanity of a testatrix was impeached by showing that she had charged one S. with fraud in a transaction and the character of S. for honesty was offered; excluded, as not allowable in a civil case to rebut a charge of fraud); 1897, Warner *v.* Warner, 69 Id. 137,

§ 65. Same: Character of a Defendant or a Plaintiff charged with Negligence. A few Courts have shown an inclination to admit, exceptionally, the character of a person charged with a negligent act (contributory negligence, if a plaintiff), as throwing light on the probability of his having acted carelessly on the occasion in question; provided that the other evidence leaves

44 Atl. 908 (divorce for adultery; respondent's character as to virtue and chastity, admissible in trial Court's discretion); *N. Y.* (see citations *supra*, note 1); *N. C.*: 1840, Melton *v.* Lilly, 1 Ired. 118 (seduction; the defendant's general character as a "modest and retiring man," excluded); 1848, Beal *v.* Robeson, 8 Id. 276 (malicious prosecution; the defendant had prosecuted for robbery; the plaintiff offered evidence that the defendant had merely fallen while drunk; the defendant's general character for sobriety, excluded); 1855, Bottoms *v.* Kent, 3 Jones L. 154 (the propounder of a will, alleged by the caveator to have procured it by threats, not allowed to show his "easy, quiet temper and facile disposition"); 1899, Malcom *v.* Adams, 122 N. C. 222, 29 S. E. 333 (land sold; defendant's bad character, excluded); *N. D.*: 1899, Kinneberg *v.* Kinneberg, 8 N. D. 311, 79 N. W. 337 (assault with intent to rape; defendant's character for chastity, excluded); *Or.*: C. C. P. 1892, § 842 (like Cal. C. C. P. § 2053); 1896, Munkers *v.* Ins. Co., 30 Or. 211, 46 Pac. 850 (defence alleging a wilful firing by the plaintiff in an action on a policy; the plaintiff's character excluded); *Pa.*: 1819, Nash *v.* Gilkeson, 5 S. & R. 352 (assumpsit for money had and received; the defendant's good character excluded); 1819, Dietrick *v.* Dietrick, ib. 208 (good character to rebut a charge of fraud, not admissible, because "a man having a good character may commit a fraud"; but here, a will being attacked on the ground of fraudulent and undue influence by the devisee, in misrepresenting to the testator the moral character of the disinherited son's wife, her real character was allowed to be shown, as in issue upon the falsity of the representations); 1823, Anderson *v.* Long, 10 Id. 55, 60 (debt on bond; defence, fraud; the defendant's good character excluded, because not put in issue); 1825, Nussear *v.* Arnold, 13 Id. 323, 328 (same point, where the devisees had falsely represented their own character); 1854, Porter *v.* Seiler, 23 Pa. 424, 429 (trespass for stabbing; the injury had been given while the plaintiff was attempting by force to get possession of a carriage in which the defendant was; the defendant's character for peaceableness, the plea being self-defence, was rejected; the doctrine that it was receivable where the evidence was conflicting, expressly denied); 1855, Leckey *v.* Bloser, 24 Id. 401, 406 (breach of marriage-promise; plaintiff's good character not admitted to rebut evidence of her improper conduct); 1877, Battles *v.* Laudenslager, 84 Id. 446, 452 (a sharer in the fraud, not a party to the case); 1885, American Fire Ins. Co. *v.* Hazen, 110 Id. 530, 537 (wilful burning by the insured as a defence by the insurer; the insured's reputation for honesty, peace, and good order, excluded); *R. I.*: 1901, Markey *v.* Angell, 22 R. I. 343, 47 Atl. 882 (assault and battery); *S. C.*: 1825, Rhodes *v.* Bunch, 3 McC. 66, *semble* (trespass, with justification); 1847, Smets *v.* Plunkat, 1 Strobh. Eq. 372 (assumpsit; the defendant, in set-off, claimed a balance due from sales by the plaintiff, as commission-agent, which he had falsely suppressed; the plaintiff's good character was excluded; "in civil cases . . . evidence as to that character [of a party] cannot be offered to contradict an imputation of dishonesty or even of fraud"; quoted *supra*); 1901, Marshall *v.* Mitchell, 59 S. C. 523, 38 S. E. 158 (services to deceased; reputation of deceased for prompt payment, not admitted to show payment); *Tenn.*: 1859, Scott *v.* Fletcher, 1 Overton 488 ("In questions of tort, or *quasi* tort, where the injury is doubtful, character may be given in evidence"; Powel, J., doubted); 1870, Henry *v.* Brown, 2 Heisk. 213 (trespass for killing a heifer; defendant's good character for honesty, admitted; since "the charge is one involving moral turpitude"; Ruan *v.* Perry followed); 1872, Spears *v.* Ins. Co., 1 Baxt. 370 (insurance action; defence, the plaintiff's arson; the plaintiff's good character for honesty, admitted); 1889, Rogers *v.* Stokes, 87 Tenn. 215, 11 S. W. 215 (payee's fraud in the renewal of notes; the payee's good character for honesty, admitted); 1890, McBee *v.* Bowman, 89 Id. 140, 14 S. W. 481 (alleged forgery of a later will by a claimant; the claimant's good character admitted); 1902, Continental Bank *v.* First Nat'l Bank, 108 Id. 374, 68 S. W. 497 (false representations; "the rule in Tennessee is that in cases where a party is charged with a great moral wrong, he may introduce evidence of good character"); *U. S.*: 1804, Ketland *v.* Bissett, 1 Wash. C. C. 144, *semble* (evidence of good character excluded, because character had not been impeached); 1902, Morgan *v.* Barnhill, 55 C. C. A. 1, 118 Fed. 24 (civil action for homicide); *Vt.*: 1859, Lander *v.* Seaver, 32 Vt. 114 (trespass for a beating by the defendant as schoolmaster; the trial court having made the issue to turn on the presence of malice, the defendant's character as a "mild and moderate master" was held properly admitted for this purpose; but not upon the question whether a beating was given); 1864, Wright *v.* McKee, 37 Id. 161 (trover against a carrier for negligently losing a package of money; the facts were such that if the plaintiff's version were true, the defendant had been guilty of embezzlement; the defendant's good character was rejected as not admissible in civil cases; quoted *supra*); *Wash.*: 1903, Poler *v.* Poler, — Wash. —, 73 Pac. 372 (divorce for sodomy; respondent's character as a "law-abiding and moral man," excluded).

the matter in great doubt, or that the other evidence is purely circumstantial, or (as sometimes put) that there are no eye-witnesses testifying. The mainstay of this exceptional doctrine seems to have been the *obiter* suggestion in *Tenney* v. *Tuttle*.[1] Such evidence is no doubt likely to be of some probative value in such cases, and under the above limitations is hardly contrary to the ordinary policy of avoiding confusion of issues (*ante*, § 64). As a matter of law, however, the doctrine is maintained in a few jurisdictions only, and has been expressly repudiated in many.[2]

[1] 1861, Tenney *v.* Tuttle, 1 All. 185 (the defendant, in an action for injuries caused by a runaway horse, left standing untied, in the street, offered to show "his own character as a careful, prudent, and cautious man," as bearing on the question of whether he used ordinary care on this occasion; Metcalf, J., excluding it: "When the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care and caution that the defendant may sustain. If such evidence . . . is ever admissible in a case like this, we incline to the opinion that it is only when the plaintiff attempts to prove the defendant's negligence by merely circumstantial evidence, or, perhaps, by witnesses shown to be of doubtful veracity").

[2] *Eng.:* 1889, Stephen, J., in Brown *v.* R. Co., L. R. 22 Q. B. D. 393 (character for negligence, inadmissible); *Cal.:* 1893, Towle *v.* P. I. Co., 98 Cal. 342, 33 Pac. 207 (careful character of defendant's employee, excluded, distinguishing Ficken *v.* Jones, 28 id. 618); *Conn.:* 1874, Morris *v.* East Haven, 41 Conn. 252 (contributory negligence; plaintiff's character for prudence, shown from personal opinion, excluded); 1902, Mears *v.* R. Co., — id. —, 52 Atl. 610 (whether a piano was carefully moved on a rainy day; "nor did proof of the care he generally took on rainy days legitimately tend to show the care he actually took on any particular rainy day"; it is singular that such language can be put forth from the bench by those who in other relations would by their own actions repudiate it as illogical; this was an offer of habit); *Fla.:* 1886, Saussy *v.* R. Co., 22 Fla. 327, 329 (reputation of the defendant's servant, who caused the harm, excluded); *Ill.:* 1883, Chicago, R. I. & R. Co. *v.* Clark, 108 Ill. 113 (a brakeman's character as to being "habitually prudent, cautious, and temperate," held admissible, unless there had been "witnesses who saw the infliction of the injury"); 1893, Toledo, St. L. & K. C. R. Co. *v.* Bailey, 145 id. 159, 162, 33 N. E. 1089 (careful character of plaintiff's intestate, admitted, there being no eye-witnesses); 1898, Illinois C. R. Co. *v.* Ashline, 171 Ill. 318, 49 N. E. 521 (that the deceased, killed by a train, "was a man of careful habits," admissible where there are no eye-witnesses, "we are inclined to think"); 1900, Chicago & Alton R. Co. *v.* Pearson, 184 Id. 386, 56 N. E. 633 (deceased's habits of intemperance, excluded, where eye-witnesses of his conduct about the time of injury were available); 1901, Salem *v.* Webster, 192 id. 369, 61 N. E. 323 (plaintiff's habit as to rapid driving, admissible only "where there is no direct testimony as to the conduct at a particular time"); *Ind.:* 1871, Pittsburg, F. W. & C. R. Co. *v.* Ruby, 38 Ind. 295, 311, *semble* (of a railroad employee, to show negligence at a particular time, excluded); *Ia.:* 1893, Hall *v.* Rankin, 87 Ia. 261, 264, 54 N. W. 217 (action against a druggist for giving poison instead of medicine; defendant's careful character, excluded); 1899, McKay *v.* Johnson, 108 id. 610, 79 N. W. 390 (whether an engine's poor working was due to the plaintiff's mismanagement; plaintiff's character as a competent engineer, excluded; this is unsound); *Kan.:* 1890, Southern Kans. R. Co. *v.* Robbins, 43 Kan. 145, 148 (the contributory negligence of an injured party; his character for care or the opposite, excluded; yet "exceptions are made in some cases where there are no eye-witnesses of the accident, and better evidence cannot be obtained"; here there were eye-witnesses); 1898, Erb *v.* Popritz, 59 id. 264, 52 Pac. 871 (careful character of the injured person, excluded); *Me.:* 1852, Lawrence *v.* Mt. Vernon, 35 Me. 100, 104 (competency of the plaintiff's driver, to disprove contributory negligence, excluded); 1880, Dunham *v.* Rackliff, 71 id. 345, 349 (careless character of the defendant's driver, as showing negligence at the time, excluded); *Mass.:* 1824, Com. *v.* Worcester, Thacher Cr. C. 100, 102 (on a charge of violating an ordinance by driving at a trot in a city, the defendant's character as a careful driver was excluded, apparently because the carefulness of his act was immaterial); 1838, Adams *v.* Carlisle, 21 Pick. 146 (Shaw, C. J.: "that the person driving was commonly careful and skilful" is admissible to show care at a particular time); 1855, Baldwin *v.* R. Co., 4 Gray 383 (negligent character of the plaintiff's driver, to show actual carelessness; excluded only when proved by reputation, but not when proved by one having personal knowledge); 1856, Robinson *v.* F. & W. R. Co., 7 id. 92, 95 (admissibility doubted); 1861, Tenney *v.* Tuttle, 1 All. 185 (see citation *supra*); 1861, Gahagan *v.* R. Co., ib. 187 (keeping cars improperly across the highway; Tenney *v.* Tuttle followed); 1872, McDonald *v.* Savoy, 110 Mass. 49 (a plaintiff bound to prove due care in driving was not allowed, by a majority of the Court, to show "that he was commonly careful and skilful in driving his team"; following Tenney *v.* Tuttle); see also Whitney *v.* Gross, Hatt *v.* Nay, cited *post*, § 80, not expressly dealing with this question; *Minn.:* 1898, Fonda *v.* R. Co., 71 Minn. 438, 74 N. W. 166 (general incompetency of motor-

The chief difficulty here is (1) to determine whether the fact offered is really character (Disposition) or only a *Habit, i.e.* of prudent or negligent methods. The latter should in any case be admitted; and a comparison of the doctrine as to Habit (*post*, §§ 92, 96, 97) will show how many instances fall close to the line. It is necessary also to distinguish two other questions, not always kept separate in discussion: (2) whether in proving a negligent character, *specific former acts of negligence* may be used; this assumes the character to be admissible, and deals only with a mode of getting at it (*post*, § 199); (3) whether an *employee's negligent character* or his *negligent acts* are admissible to charge the employer with the knowing maintenance of an incompetent employee; this is concerned with character as in issue, not as evidentiary to an act (*post*, §§ 80, 249, 250).

§ 66. **Same: Character of a Plaintiff in Defamation to prove his Innocence.** When A is said by B to have been guilty of murder or of forgery, and in a suit for defamation is met by a plea of truth, so that the issue is whether A committed the crime of murder or of arson, it is supposed by some Courts that A should be allowed to invoke his *good character* for peaceableness or for honesty, as bearing on the probability of his having committed the crime which B is trying to prove against him. There is much reason for assimilating the situation to that of an accused person and taking it out of the rule applicable ordinarily to parties in civil cases, — not only because the plaintiff is repudiating an accusation of crime, but because an unfavorable outcome affects his character to a degree equivalent to a punishment and carries a significance wholly absent after the loss of an ordinary civil suit:

1824, Mr. *Thomas Starkie*, Evidence, II, 305, 643: "Where, indeed, the defendant justifies the slander which conveys an imputation of dishonesty, the case may admit

man, excluded); *Mo.*: 1896, Culbertson *v.* R. Co., 140 Mo. 35, 36 S. W. 834 (that a switchman was drunk at the time of giving a signal; excluded, because the fact of giving it was undisputed, and the only question was his negligence under the circumstances); *N. H.*: 1873, State *v.* M. & L. Railroad, 52 N. H. 549, *semble* (of an employee, to show whether he did or did not act carelessly, excluded); *N. Y.*: 1871, Warner *v.* R. Co., 44 N. Y. 465, 471 (former intemperate habits of a flagman on duty, held inadmissible to show neglect on the occasion in question; yet here the evidence of his drunkenness at the time and other facts affecting his conduct were fully before the jury; Hunt, C., dissenting); *Pa.*: 1874, Hays *v.* Miller, 77 Pa. 238 (counterclaim for injury caused by a collision with the plaintiff's tow-boat, while towing barges for the defendants; after evidence by the defendants tending to show that the plaintiff's servants carelessly caused the collision, the plaintiff offered to rebut by showing that the servants were "competent, skilful, and careful officers"; held, improper; for though the defendants might have rested their case on the plaintiff's selection of incompetent servants and the issue of their incompetence might thus have become legally material, yet here the only argument was from general character to conduct on the particular occasion, and this was held improper; "the jury will not confine the evidence of character to its true bearing upon the fact of negligence in the particular case, but set it up as *per se* a justification of the master"); 1888, Baltimore & O. R. Co. *v.* Colvin, 118 Pa. 230, 12 Atl. 337 (a flagman's reputation, not received to show him careless at the time in issue); *Tex.*: 1898, Missouri, K. & T. R. Co. *v.* Johnson, 92 Tex. 380, 48 S. W. 568 (plaintiff engineer's negligent habits, excluded; but certain exceptions are recognized); *U. S.*: 1896, Central Vt. R. Co. *v.* Ruggles, 21 C. C. A. 575, 75 Fed. 953 (intemperate habits of a watchman to show a specific failure of duty, excluded); 1898, Harriman *v.* Pullman P. C. Co., 29 C. C. A. 194, 85 Fed. 353 (employee's careful character, excluded); *Vt.*: 1884, Byrant *v.* R. Co., 56 Vt. 710, 712 (fire set by locomotive; the section-man's good character for care and prudence, excluded); *Wash.*: 1898, Carter *v.* Seattle, 19 Wash. 597, 53 Pac. 1102 (plaintiff's character for sobriety, not admitted to negative the fact of intoxication; treated as a question of negligence).

of a very different consideration, for there the party is charged with a crime, and in such a case character affords just the same presumption of innocence as if the party had been tried for the offence."

1853, *Nash*, C. J., in *Sample* v. *Wynn*, 1 Busbee 321 (charge of bestiality; plea of truth): "The nature of the crime charged upon the plaintiff is of the most odious character, the preferring of which is calculated to banish the individual charged from the ordinary intercourse of his fellow men, to brand him with an offence more odious than that which drove Cain into the wilderness and made him a wanderer upon the face of the earth. . . . The crime charged is detestable; and there is but one witness to the foul deed. In such a case, how can the purest man that lives shield himself from the effects of malice or revenge if not permitted to resort to such evidence?"

The only answer to this argument seems to be that it puts the plaintiff in a position relatively too favorable, as against the defendant, who already has the burden of proving his plea of truth:

1838, *Parker*, C. J., in *Matthews* v. *Huntly*, 9 N. H. 146 (charge of perjury; plea of truth; the plaintiff's general good character was rejected; after quoting the remark of Starkie, *supra*): "A party undertaking to justify, in an action of slander, should undoubtedly satisfy a jury of the fact; but he should not be held to make out the charge beyond all reasonable doubt, because the plaintiff is not on trial for the crime, and, whatever the verdict may be, no punishment or disability is incurred by him. And this being so, the plaintiff should not be permitted to avoid the evidence offered, in any other manner than he could be permitted to avoid similar evidence in any other civil suit. There is no hardship in this. A party may in many instances trust to his general character to exonerate him in public estimation from a charge or suspicion of particular misconduct; but if he brings a suit for the injury sustained by such charge, and the adverse party relies for justification upon its truth, the latter ought in justice to have that fact tried in the same way other facts are tried in civil cases."

With such plausible arguments on either side, it is natural that the state of the law in the various jurisdictions should differ.[1] There is, however, no

[1] *Eng.*: 1825, Cornwall v. Richardson, 1 Ry. & Mo. 305, Abbott, C. J. (stealing money; excluded); 1833, Powell v. Harper, 5 C. & P. 589 (libel charging the plaintiff with receiving stolen goods; justification; the plaintiff's "general character for honesty" was admitted on his behalf); *Ala.*: 1900, Hereford v. Combs, 126 Ala. 369, 28 So. 582 (perjury admissible); *Conn.*: 1820, Stow v. Converse, 3 Conn. 343, *semble* (to disprove a charge of infidelity, the plaintiff was allowed to give evidence of his "uniform profession, conduct, and conversation"; but to disprove a charge of exacting money illegally as an official, evidence of his character for honesty was rejected, as unavailable in civil cases to disprove an act); *Del.*: 1841, Parke v. Blackiston, 3 Harringt. 373, 375, Layton, J., diss. (excluded); *Ind.*: 1843, McCabe v. Platter, 6 Blackf. 405 (unchastity, excluded); 1844, Byrket v. Monohon, 7 id. 84 (perjury; admitted on the theory that he could show it if criminally prosecuted for perjury); 1861, Miles v. Vanhorn, 17 Ind. 249 (unchastity; excluded, following the McCabe case); 1867, Harm v. Wilson, 28 id. 301 (larceny; excluded, because there was no justification); 1873, Wilson v. Barnett, 45 id. 163, 168 (merely establishes the doctrine that one justifying a slanderous charge of crime must prove it beyond a reasonable doubt, as in criminal cases); 1876, Downey v. Dillon, 52 id. 442, 452 (citing the preceding case, admits the plaintiff's good character in a slander suit for a charge of perjury; distinguishing the earlier cases on this principle); 1877, Gebhart v. Burket, 57 id. 381 (preceding case approved); *Ia.*: 1887, Hanners v. McClelland, 74 Ia. 319, 37 N. W. 389 (excluded); *Mass.*: 1827, Harding v. Brooks, 5 Pick. 244 (slander, charging the plaintiff as "a liar, a knave, and a rascal"; justification; the plaintiff's evidence of good character was received, in order by "proof of the general tenor of his conduct and character to repel such imputations"; and it was apparently used to repel charges of specific misconduct); *N. H.*: 1839, Chesley v. Chesley, 10 N. H. 327, 330 (excluded); 1851, Severance v. Hilton, 24 id. 148 (excluded); *N. Y.*: 1848, Houghtaling v. Kilderhouse, 1 N. Y. 530 (poisoning the defendant's horses; plea of truth; plaintiff's good character excluded); 1851, Pratt v.

reason why the defendant should be thus exceptionally allowed to use the plaintiff's *bad character* as evidence of his probable guilt; and it is generally agreed that this use is inadmissible.[2] Distinguish from the present subject the question whether the plaintiff's *reputation* may be considered *in mitigation of damages* (*post*, § 70).

§ 67. **Same: Character of Defendant in Malpractice.** Where the action is for malpractice of a physician or other person engaging to use skill, the defendant's possession of due skill is usually put in issue under substantive law and the pleadings, and hence may of course be proved on the principle of §§ 70–79, *post*. But apart from this, and assuming that the question is as to his having done a particular act involving unskilful or improper methods, it would seem that his habitual qualities, if properly evidenced by repute or otherwise (*post*, §§ 1621,), were admissible as indicating his probable conduct; for it is a habit of training, rather than a moral trait, that is involved, and thus the principle of §§ 83, 92, *post*, should control, and not the character-rule. There is, however, little useful authority on the point.[1]

§ 68. (5) **Character of Third Persons (Adultery, Illegitimate Inheritance,**

Andrews, 4 Id. 496 (preceding case approved); *N. C.*: 1859, Burton *v.* March, 6 Jones L. 409, 412 (larceny, excluded).

[2] 1822, Jones *v.* Stevens, 11 Price 235, *semble*; 1825, Cornwall *v.* Richardson, 1 Ry. & Mo. 305, Abbott, C. J.; 1841, Parke *v.* Blackiston, 3 Harringt. 373, 375; 1834, Com. *v.* Snelling, 15 Pick. 337, 343 (criminal libel; bad character of the libellee, not admissible to show the truth of the charge of gaming and drugging a horse, whether in a civil or in a criminal case); 1843, Stone *v.* Barney, 7 Metc. 86, 92 (it is receivable even where the defendant justifies by pleading truth, but is used solely on the question of damages, *i. e.* assuming that the jury find the words to be false, then they may consider the plaintiff's character in assessing damages, but not till then; "it would be the duty of the Court to advise the jury that it could not be used to sustain the justification, but was properly introduced because both questions were before them, and if the justification failed, upon the evidence applicable thereto, they would consider the evidence of the character of the plaintiff in assessing damages . . ., but for other purposes the evidence would be irrelevant"); 1897, Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433; 1831, Dewit *v.* Greenfield, 5 Oh., Pt. 1, 226 (perjury; the plaintiff's bad character for veracity, excluded). *Contra*: *Ga.*: 1897, Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655 (frequent arson; plaintiff's bad character admissible on plea of truth); *Mich.*: 1892, Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119 (perjury and lying; on a plea of truth, the plaintiff's bad reputation for veracity was admitted). That the defendant may not here use the plaintiff's bad character to show the probability of his having done the things alleged in the slander, seems implied also in the decisions (*post*, § 73) denying the use of such character on a plea of justification when offered in mitigation of damages; for as the objection to that course is merely the possible misapplication of the character-evidence to the justification-plea (*i. e.* to prove the truth of the charge), the clear implication is that such an applic. would be inadmissible. Those, moreover, must be cases where the character would be usable evidentially to prove a specific act, for of course if the charge had touched the general character, it would have come directly in issue under the justification of truth.

[1] 1902, Baker *v.* Borello, 136 Cal. 160, 68 Pac. 591 (reputed skill of a physician, admitted, as involved in the plaintiff's duty to employ a reputable physician to attend to his injury); 1812, Grannis *v.* Branden, 5 Day 260, 271 (malpractice by a surgeon and midwife; after evidence by the defendant of his professional skill and character, the plaintiff was allowed to show that the defendant was without proper training, having formerly been a dancing-master, etc.; following the analogy of the rule in criminal cases); 1824, Jeffries *v.* Harris, 3 Hawks 105 (assumpsit for services as a physician; the plaintiff's poor character as a physician excluded, because "not put in issue by the nature of this action"; *aliter*, *semble*, if the plaintiff had represented himself as of a certain grade of skill); 1845, Mertz *v.* Detweiler, 8 W. & S. 376, 378 (action for malpractice; the defendant's evidence as to his skill and character as a surgeon, held "irrelevant"; "It may be said that his general qualifications might serve to shed light on the propriety of his practice in this particular instance, but it is light which would be less likely to lead to a sound conclusion than to lead astray"). Distinguish the use of *particular acts of incompetency* (*post*, §§ 202, 208).

Bastard's Filiation, Forged Will, Other Persons' Crimes); Character of Animals. Where the character offered is that of a *third person, not a party* to the cause, the reasons of policy (noted *ante*, § 64) for exclusion seem to disappear or become inconsiderable; hence, if there is any relevancy in the fact of character, *i. e.* if some act is involved upon the probability of which a moral trait can throw light, the character may well be received. On this principle it has been admitted to evidence the *illegitimacy* of one claiming an inheritance,[1] to evidence the adultery of a *co-respondent in divorce* or other third person,[2] and to show a different parentage for a *bastard* in filiation proceedings;[3] and the principle may equally apply (subject to the limitations of §§ 139–142, *post*) to evidence the commission of any *crime by a third person*, particularly the *forging* or coercing *of a will*.[4]

The character or disposition of an *animal* is no less relevant than that of a human being, as indicating his probable conduct on a particular occasion, and it is open to none of the objections of auxiliary policy (*ante*, §§ 57, 64) which affect the use of a party's character. It is therefore commonly conceded to be admissible.[5] The hesitation sometimes observed in the rulings

[1] 1732, Pendrell *v.* Pendrell, 2 Stra. 925 (issue to try heirship; the defendant was allowed "to prove the mother to be a woman of ill fame," as tending to show the plaintiff a bastard); 1810, Banbury Peerage Case, in App. to LeMarchant's Gardner Peerage Case, 458; 1856, Legge *v.* Edmonds, 26 L. J. Ch. 125, 135 (legitimacy as affecting title).

[2] 1860, Blackman *v.* State, 36 Ala. 295, 297 (adultery with a woman M.; the reputation of M. for unchastity, admitted as corroborative evidence); 1868, Clement *v.* Kimball, 98 Mass. 535 (action for boarding the defendant's wife; defence, separation and adultery; the bad reputation for chastity of men who visited the wife while so separated, excluded, because no other evidence of adultery was offered as a foundation; but "such testimony often becomes competent when there is other evidence in the case to show relations of an equivocal character"); 1880, Com. *v.* Gray, 129 id. 476 (on a charge of adultery against a husband, after showing suspicious association with a woman, the character of the woman as a prostitute or the contrary may be shown); 1877, Marble *v.* Merble, 36 Mich. 386 (divorce for adultery; "reputation," of an unspecified sort, admissible as "subsidiary" evidence; Clement *v.* Kimball approved). *Contra:* 1901, Guinu *v.* State, — Tex. Cr. —, 65 S. W. 376 (adultery; character of the third person, excluded). The following rulings seem sound: 1903, Burnett *v.* People, — Ill. —, 68 N. E. 505 (murder by persuading the deceased woman to a joint suicide; the deceased's good character for chastity, held inadmissible); 1902, State *v.* Chanute, 65 Kan. 682, 70 Pac. 870 (illegal sale of liquor; that the buyer, who did not testify, was a "spotter," inducing sales for the purpose of prosecution, excluded).

[3] 1811, Fall *v.* Overseers, 3 Munf. 495, 497, 502, 505 (complainant in bastardy prosecution; the woman's bad character for virtue admitted, apparently to prove the probability of another's parentage). The following case could have been decided on this principle: 1855, Zitzer *v.* Merkel, 24 Pa. 408 (seduction; the daughter's good character for chastity not admitted to disprove specific unchastities alleged by the defendant).

[4] 1820, Rowt's Adm'r *v.* Kile's Adm'r, Gilmer 102 (as part of the evidence to show that a third person had forged the instrument sued on, evidence of the person's "infamous character" held admissible; but this ruling was made before the modern doctrine was settled). Compare the following case: 1903, Ward *v.* Brown, — W. Va. —, 44 S. E. 488 (undue influence; good character of deceased attorney preparing the will, admitted, as an exception to the general rule). *Contra:* 1903, McElroy *v.* Phirk, — Tex. —, 76 S. W. 753 (character for integrity of a deceased third person, said to have destroyed improperly a lost will, excluded).

Compare the rule for *impeaching the character* of an *attesting witness* (*post*, § 1514), for *skill of a draftsman* of a document (*post*, § 87), and for *corroborating a witness* (*post*, § 1106), and some of the cases *ante*, § 64, n. 3.

[5] 1878, Maggi *v.* Cutts, 123 Mass. 535 (viciousness of a horse); 1897, Broderick *v.* Higginson, 169 id. 482, 48 N. E. 269 (habit of a dog to attack passing teams, admissible to show that he did it on a particular occasion). *Contra*, 1868, East Kingston *v.* Towle, 48 N. H. 57, 65 (the bad character of the defendant's dog as to sheep-killing, not admitted to evidence that he had killed particular sheep; Doe, J., dissenting; this would probably not be followed in the same Court to-day); 1896, Kelly *v.* Alderson, 19 R. I. 544, 37 Atl. 12 (a dog's character for peaceableness not admitted to show that the dog probably did not bite till assaulted; "this would set up the character of the dog against the plaintiff's oath," — an amusing piece of judicial reasoning).

has been due to the *time* at which the disposition is predicated in the offer; but here, as with human character (*ante*, § 60), the existence of a trait at a given time is evidence that it existed also for a reasonable time before and afterwards, and within liberal limits should therefore be received.[6]

3. Character as evidentiary for Other Purposes.

§ 69. **Character as evidencing a Third Person's Belief, Knowledge, or Motive.** The evidentiary uses of character just examined have the purpose in each case of indicating the likelihood that the person to whom the character is attributed did or did not do an act alleged. But a person's character may also have other evidentiary uses; and it is worth while here to point out the principles which they involve:

(1) *Character as affecting another Person's Belief or Reasonable Grounds for Belief.* There are several situations of this kind. Usually the character will be relevant only so far as attended with a reputation; for by means of the reputation the other person's belief or knowledge is best shown: (*a*) Character of a *deceased person*, as indicating a defendant's apprehension of aggression from the deceased (*post*, § 246); (*b*) Character of an *arrested person*, as indicating another person's reasonable ground for believing a charge of crime and for causing his arrest (*post*, § 258); (*c*) Character of an *employee*, as indicating his employer's knowledge of his incompetence (*post*, § 249).

(2) *Character as indicating a Motive;* this is an occasional use having various aspects (*post*, § 389).

4. Character as an Issue in the Case.

§ 70. (1) **Plaintiff's Reputed Bad Character as mitigating Damages for Defamation.** Where A sues B for defamation, and the issue is as to the proper amount of compensation, the question arises whether it is fair to measure his compensation by the quality of his original actual standing in the community, and, in particular, whether the fact that he had little or no reputation to lose may be considered as good reason for diminishing the damages accordingly. This question, it will be seen, is not one of the law

[6] 1900, Walrod *v.* Webster Co., 110 Ia. 349, 81 N. W. 598 (of horses after an accident, admitted); 1861, Chamberlain *v.* Enfield, 43 N. H. 356, 360 (his disposition for skittishness six or eight months after an accident, admitted, since "it may be safely laid down as a general rule (having its exceptions, no doubt) that neither horses nor men entirely change their characters, their habits, or their manners, in that space of time"); 1865, Whittier *v.* Franklin, 46 id. 23, 26; 1898, Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832 (character of a horse subsequent to an accident, excluded as of "slight practical value"); 1888, Turnpike Co. *v.* Hearn, 87 Tenn. 291, 10 S. W. 510 (whether a horse was unmanageable; his disposition before and after the accident admitted); 1898, Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445 (sheep-killing; dog's character since the time, admissible). Distinguish the proof of an animal's character when *in issue:* 1901, Willet *v.* Goetz, 125 Mich. 581, 84 N. W. 1071 (dog; here his good character was excluded, because the *scienter* had been clearly shown otherwise by vicious acts); 1898, Citizens' R. T. Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790 (ancestry of a dog, admitted to show his value). Distinguish also the use of *particular instances of conduct to evidence the animal's character* (*post*, § 201), and also to evidence the *owner's knowledge of that character* (*post*, § 251).

of evidence, *i. e.* character or reputation for character is not offered as having probative value to evidence the probability of something else. A principle of the law of damages is involved, *i. e.* whether compensation shall be regulated according to a certain fact, namely, quality of reputation; if yes, reputation becomes material; if no, reputation is immaterial, and will not be considered. It must also be noticed that we are no longer dealing with actual character, but with reputed character; and, furthermore, that this reputation is not offered evidentially (*ante*, § 52), but as an element brought into issue by the law of the case. The propriety of considering this element in fixing compensation must here be considered (though it is no question of evidence), for the purpose of distinguishing those precedents which involve it from those which involve genuinely a question of evidence.

(1) Whether in an action for *defamation* the defendant may use the *plaintiff's poor reputation* (or lack of reputation) *to mitigate the damages* has been one of the most controverted questions in the whole law. The arguments on each side are so strong, and the balance of convenience is so clear, according to the point of view taken, that it is no wonder that Courts have taken radically opposite views. The argument in favor of considering reputation has been thus expressed:

1818, Mr. *Holt*, note in Holt's N. P. 308: "The ground of the action on the case for a libel is the *quantum* of injurious damage which the person libelled either has or may be presumed to have sustained from the libellous matter. . . . [Thus] the reputation cannot be said to be injured where it was before destroyed. The plaintiff has previously extinguished his own character. He has, therefore, no basis for an action to recover compensation for the loss of character and its consequential damage. The law considers him as bringing an action of damage to a thing which does not exist."

1882, *Cave*, J., in *Scott* v. *Sampson*, L. R. 8 Q. B. D. 491: "Speaking generally, the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit, and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation, and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. 'To deny this would,' as is observed in Starkie on Evidence,[1] 'be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honorable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential.' It is said that the admission of such evidence will be a hardship upon the plaintiff, who may not be prepared to rebut it; and under the former practice, where the damages could not be pleaded to, and general evidence of bad character was allowed to be given under a plea of not guilty, there was something in this objection, which, however, is removed under the present system of pleading, which requires that all material facts shall be pleaded; and a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no

[1] 2 Starkie Evid. 306.

difficulty whatever, if he is a man of good character, in coming prepared with friends who have known him to prove that his reputation has been good."

1806, *Thompson*, J., in *Foot* v. *Tracy*, 1 Johns. 46: "It cannot be just that a man of infamous character should, for the same libellous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result, unless character be a proper subject of evidence before a jury. . . . As the legal intendment is that the action is brought to repair an injury done to a person's character in the estimation of the public, the jury must be left very much in the dark, in making a just reparation in damages, without being furnished with some data by which to estimate its value and susceptibility of injury. Though the inquiry may be, in some measure, vague and uncertain, and in some cases may lead to abuses, yet I have adopted it as being the least exceptionable course. Such inquiries may be legally made of witnesses as to enable the jury justly to appreciate the sources from which they form their opinion of the general character of a party and thereby prevent very great evil or imposition."

1818, 1820, *Nott*, J., in *Buford* v. *M'Luny*, 1 Nott & M. 269, *Sawyer* v. *Eifert*, 2 id. 515: "In every action at law the object is to recover reparation for some injury sustained. And where the injury is to property, the value of the article is the principal object of inquiry. And I can see no good reason why the value of character may not be investigated as well as that of any other commodity, when the reparation of character is the object of this suit. . . . It is said it would be taking a person by surprise thus to permit an inquiry into his character. But if the character of a witness, who is called upon in Court and compelled to give evidence without any previous notice, is not shielded from such an attack, how much less ought a party who has voluntarily brought his character into Court claim such an exemption? He commences with stating that he is a person of good name, fame, and reputation, and he ought to be always prepared to defend his allegation. A person is presumed to be always prepared to defend his general character, if he has a good one; if he has not, it ought to be exposed. . . . I hold that a woman ought not to be taken from the stews and brothels of a town, to be placed alongside of the most respectable ladies who equally adorn our drawing-rooms and our churches; nor that the high priest of vice and corruption should be ranked with the pious priest of the parish or the respectable bishop of the diocese. Where a person's character is such that he cannot safely trust it to a court and jury, slander can do him but little injury; and a person who is neither ashamed nor afraid to expose his character to the eye of the public ought not to be permitted to shelter it under the forms of law from the eye of a jury."

The meat of this argument is that a person should not be paid for the loss of that which he never had. The opposing argument lays stress on the abuses to which the use of such evidence is open:

1822, *Jones* v. *Stevens*, 11 Price 235, 256, 269, slander, charging the plaintiff with being a disreputable and unprofessional attorney; testimony to his general bad character and reputation as an attorney was held inadmissible under the general issue; *Graham*, B.: "There is a full concurrence of opinion amongst the whole Court that such general evidence of bad character, . . . and that principally on the grounds that a party can not be expected to be prepared to rebut it, and that, if it were to be received, any man might fall a victim to a combination made to ruin his reputation and good name, even by means of the very action which he should bring to free himself from the effects of malicious slander"; *Garrow*, B.: "If ever it should [become the law that such evidence should be admissible], the libeller will become a much more general character than we find him now; for he will derive protection and impunity from the apprehension and dread, with which the object of his malice would naturally be possessed, of resorting for redress to courts of justice to vindicate his name, where it would be permitted to the defendant to bring forward testimony of general bad character which from its nature it would be

impossible to disprove; whereby they in effect become the means of putting the libels of which they complain on the records of the courts of giving a wider circulation to the calumnies contained in them."

1806, *Livingston*, J., in *Foot* v. *Tracy*, 1 Johns. 46: "I am now satisfied that more mischief will follow from an adoption of such a rule than by excluding the investigation altogether, except when presented as a complete justification in the form of a special plea. . . . It is answered that a person of bad fame has no right to bring a suit, or, if he does, that he cannot expect the same compensation as those who have a character to lose. But no one, however low a man's reputation be, has a right to publish slanders of him, or to charge him with crimes of which he is innocent. If he confines himself to the truth, he can plead it; but if he will deal in general invective, or indulge his wit and venom by travelling out of the record, he must abide by the consequence. Nothing is better settled than that the truth of a libel or of slander cannot be relied on, in justification, unless pleaded. What is not permitted, then, directly, ought not to be tolerated in any other way. . . . [This result] will only impose on those who choose to publish their animadversions on the crimes or failings of others, which occupy so great a portion of our public papers, the task of proving by particular facts the truth of what they assert. Nor is there any hardship in this. Those who sport with the feelings of others, under the professions of zeal for the public good, on no other basis than that of common fame, which is not always an infallible guide, cannot complain if courts require from them, on these as on most other occasions, some better proof of their calumnies than general opinion. If every man who does not enjoy an unblemished reputation, or has the misfortune to be disesteemed by his neighbors, were fair game, in a country where the liberty of the press is so much perverted and abused, few indeed would escape."

1818, *Cheves*, J., dissenting, in *Buford* v. *M'Luny*, 1 Nott & M. 272: "1. It is alleged that the pleadings put the character of the plaintiff in issue. Now it is not true, in point of law, that the character of the plaintiff is put in issue . . . [since a plea denying the allegation would be demurrable]. 2. But it is said that the foundation of the damages given in actions of slander is the actual injury suffered by the plaintiff in his character. This is not true; it is upon the presumption of loss (little more than a legal fiction), and not upon the actual loss, that actions of slander are principally founded. . . . Are not the heaviest damages given when the slander is uttered against unsullied and impregnable character, — where the malice of the calumniator has been shot 'like a pointless arrow from a broken bow'? To the tottering and questionable character, the shafts of the slanderer are fatal and ruinous, . . . in such cases we know that the damages are usually nominal, though he injury is immeasurable and intolerable. Is it not, then, amusing ourselves with a phantom, when we suppose that the actual loss sustained by the sufferer is the real foundation of damages in actions of slander? There must be other and higher principles on which they are founded. Is it not obvious that the foundation of these damages is to be discovered in the general sanctity of character, which is considered as a shield, not against irreparable injury only, but against every possible assault upon the hallowed blessing of a good name? Even the wicked and the worthless are allowed this protection, as the infidel was once permitted to enter the Christian sanctuary. . . . Ought [the defendant] not to be subjected to heavier penalties for thus oppressing the fallen, perhaps the broken-hearted and repentant and reforming offender, than if he had, with equal malice but with less meanness, attacked the highest and most irreproachable man in the community? I should say he ought. [3.] But if the admission of this evidence were clear, according to analogy and theory, it ought to be rejected in practice from its immateriality to a fair defence, and from the abuses of which it will be susceptible. It is immaterial, because, as far as such a cause should operate, it has its full influence (and too much) through the knowledge of the jury. . . . It is susceptible to the greatest abuses. The person, not of unblemished reputation, must suffer every calumny that the tongue can utter, in silence; for if he seek redress against any specific slander, he must suffer the defects of his character to be exhibited and proclaimed in a court of justice by as many witnesses as the

fears or malice of the defendant may choose to call. A man laboring under a neighborhood calumny, though perfectly innocent, must be the victim of every specific slander that may be uttered against him. He dare not enter the portals of a court of justice, or he will be doomed to eternal infamy by a thousand tongues."

§ 71. **Same: the question as affected by the Pleadings.** The state of the pleadings may affect the situation radically, by giving opportunity for different issues and policies. There are four conceivable cases: (*a*) *General issue* pleaded; the amount of damages being customarily herein issuable, the plaintiff's bad repute is offered in mitigation; (*b*) *Justification* of truth pleaded; the defamatory charge *specific* (*e.g.* "A stole a horse from B"); the plaintiff's bad character offered to show the *probability of the theft*; (*c*) *Justification* pleaded; the charge *specific*; the plaintiff's bad repute offered in *mitigation* of damages, anticipating a possible finding against the defendant on the plea; (*d*) *Justification* pleaded; the charge *general* (*e.g.* "A is a thief"); the plaintiff's bad reputed character offered as involved in the plea.

(*a*) This is the ordinary case, raising the general question; the passages quoted in the preceding section deal with this case. It is the most favorable for the defendant, for here his claim is not affected by any possible impropriety of pleading, except the supposed argument of surprise, discussed above by the judges.

(*b*) This is a purely evidentiary use of character, and has been already elsewhere examined (*ante*, § 66).

(*c*) Here the question is (1) whether as a matter of pleading the issue of damages can properly be raised under a plea of justification, and (2), even if it is theoretically possible, whether it is not practically better to exclude the element of repute, because of the probable abuse of the opportunity by those who would make no real attempt to prove truth but would simply abuse the plaintiff's reputed character, and because a mere direction to the jury not to consider such character except in mitigation of damages would hardly be sufficient to keep them from letting it affect their verdict on the plea of truth.[1]

(*d*) Here, since the defamatory charge is general, and the reputed character is offered as showing the very fact in issue, the defendant seems to be safe; yet it is sometimes argued that, to avoid abuse of the situation and to prevent surprise, he can never even plead in justification the fact of general character, but must affirm specific acts and prove them as such.[2] It will be noticed

[1] For the best exposition of this case, see M'Nutt *v.* Young, 8 Leigh 542 (1837).

[2] The reasons are set forth in the following leading case: 1787, J'Anson *v.* Stuart, 1 T. R. 748, 752 (slander by charging the plaintiff as a "notorious swindler and common informer"; Ashurst, J.: "The defendant . . . when he took upon himself generally to justify the charge, must be prepared with the facts which constitute the charge, in order to enable him to maintain the plea. Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life"; Buller, J.: "If the plaintiff has been guilty of any act of swindling, the defendant must be taken to know them. He could not prove the justification, as he has pleaded it, by general evidence; but he has no justification unless he can prove the special instances; and, knowing them, he ought to put them on the record, that the plaintiff might be prepared to answer them"; here the plea was held bad on demurrer).

(*post*, § 73) that the jurisdictions are divided as to case (*a*); that only the Courts which admit in case (*a*) need to discuss case (*c*), and here again there is a division; that only the Courts that exclude in case (*a*) are likely to care to raise the question of case (*d*), and that the result of exclusion therein is rarely reached. It will also be noticed that the effect of excluding in both (*a*) and (*d*) is practically to prevent a defendant from using the plaintiff's bad character at all, either in justification or in mitigation.

§ 72. **Same: Kind of Character, Particular or General.** A further question that arises in those jurisdictions where the plaintiff's bad character is admitted in mitigation is whether *general* bad character can alone be used, or whether bad character for the *particular trait* involved in the defamation can alone be used. Most Courts, instead of allowing the use of either or both, prefer to make the use of one sort exclusive. The argument that *general character alone* should be considered is expounded as follows:

1847, *Coulter*, J., in *Steinman* v. *McWilliams*, 6 Pa. St. 175: "Can evidence of separate and particular departments of character be lawfully allowed? . . . How is character estimated? Certainly by its general import. It will not do to take up the Decalogue and inquire whether a man is generally reputed as addicted to fornication or adultery, to profane swearing, to Sabbath-breaking. . . . If this mode of destroying character was allowed in our courts, the standing of all men would be in peril. We have but few Catos among us; and if we had more, such individuals would hardly seek redress in our courts. But the law is not made for the protection of such men, but for the protection of that middle class all the world over, who have a sense of truth, honor, and virtue, and who are yet not above the infirmities of life; whose sensibility as to the value of character, and whose liability to err, make them more susceptible of wounds from the shaft of slander. The thousand wagging tongues of this world, sometimes in sport and sometimes in malice, make free with some department or quality of character of good men in the main; and if malice were allowed to seize hold of these reports and embody them in a court of justice to destroy character, few men would be safe. The truth is that it is only in general character that a man finds his true level in society; and that alone ought to mark his value."

This argument is answered as follows, by those who claim that a reputation for the particular trait involved is *equally* open to examination:

1864, *Strong*, J., in *Conroe* v. *Conroe*, 47 Pa. 202: "A man may have many virtues, and consequently a good general reputation, and yet be notorious for a single vice. If his virtues be called in question, it is an injury; but if only his vice be asserted, his injury is less. . . . [The plaintiff's] averment is not that her reputation for all the virtues which go to make up good character is fair, but that her reputation for chastity was sound; and it is that, she complains has been taken from her. Its real value was therefore a proper subject of inquiry."

The argument that the reputation for the *particular trait alone* should be considered is thus set forth:

1871, *Lyon*, J., in *Wilson* v. *Noonan*, 27 Wis. 614: "It is said that a person who brings such an action puts his reputation in issue; but it seems to be more accurate to say that he thereby puts it in issue in the particular wherein he claims that it has been assailed. Human reputation is complex in its nature. Because a man has a single vice, or even

more than a single vice, it does not follow from that circumstance that he is totally depraved. . . . He may be an incorrigible liar, and yet strictly honest in all his dealings. He may be a great scoundrel in pecuniary matters, and yet perfectly chaste. . . . Where a person's character for truth and veracity is falsely assailed, and he brings his action against the assailant to recover damages therefor, if his reputation for truth and veracity is good, on what sound principle can it be said that if such plaintiff is unchaste, or dishonest in business matters, or covetous, profane, or a sabbath-breaker, the damages to which he would otherwise be entitled shall be reduced to a nominal sum?"

§ 73. **Same: State of the Law in the Various Jurisdictions.** (1) So far as concerns the *question at large*, as affected by the pleadings (*ante*, §§ 70, 71), it will be noticed that to-day, in case (*a*), the repute is in most of the jurisdictions admitted; that only the Courts which admit in case (*a*) need to discuss case (*c*), and that here again the repute is commonly admitted; that the question in case (*d*) is not likely to be raised except in the few Courts that exclude in case (*a*),—although in England (*a*) is admitted and (*d*) is excluded. It may also be noted that the effect of excluding in both (*a*) and (*d*) is practically to prevent a defendant from using the plaintiff's bad repute at all, either in justification or in mitigation. (2) As to the *kind of repute* receivable, the exclusive admissibility of general character is no longer the law anywhere; the exclusive admissibility of the particular trait is maintained in perhaps half of the jurisdictions, and in the others the admissibility of both is recognized.[1]

[1] *England and Canada:* (1) *Character in mitigation or justification:* (*a*) The earlier rulings all inclined to admit bad reputa, under the *general issue*, in mitigation: 1716, Dennis *v.* Pawling, Vin. Abr. "Evidence," I, b, 16 (XII, 159); 1809, Knobell *v.* Fuller, Peake, Add. Cas. 189, Lord Keuyon, C. J.; 1803, R. *v.* Waring, 5 Esp. 13, Lord Alvanley, C. J.; 1809, Leicester *v.* Walter, 2 Camp. 251, Mansfield, C. J.; 1810, Williams *v.* Callender, Holt N. P. 307, note, Lord Ellenborough, C. J.; 1813, Anon. *v.* Moor, 1 M. & S. 284, K. B.; 1811, Snowdon *v.* Smith, 1 M. & S. 286, note, Chambre, J., *semble;* 1817, Newsam *v.* Carr, 2 Stark. 70, Wood B.; 1817, Mille *v.* Spencer, Holt N. P. 533, Gibbs, C. J., *semble;* 1822, Waithman *v.* Weaver, 11 Price 257, note, Abbott, C. J., doubtful; 1824, Ellershaw *v.* Robinson, 2 Stark. Ev. 641, n., Holroyd, J.; and the same opinion was indicated under the next rulings (*c*), refusing to receive it under a justification. Then came a series of rulings excluding it: 1822, Jones *v.* Stevens, 11 Price, 235; 1859, Bracegirdle *v.* Bailey, 1 F. & F. 536, Byles and Willes, JJ.; 1863, Myers *v.* Currie, 22 N. C. Q. B. 470; but the more recent opinion looks upon the earlier line as orthodox, and receives the evidence: 1882, Scott *v.* Sampson, L. R. 8 Q. B. D. 491. In Canada, statutory rules now usually admit it, subject to a notice of particulars: Ont. Rules of Court 1897, § 488 (where truth is not pleaded, character is not receivable in mitigation unless on seven days' notice of particulars); Man. Rev. St. 1902, c. 40, Rule 471 (like Ont. Rule 488); Newf. Cons. St. 1892, c. 50, Rules of Court 32, par. 16 (like Ont. Rule 488, requiring two days' notice); N. Sc. Rules 1900, Ord. 34, R. 30 (like Ont. Rule 488); (*c*) Its use under a *justification* was once thought improper: 1811, Snowden *v.* Smith, 1 M. & S. 286, note, Chambre, J.; but later the rulings were all in the other direction: 18—, Kirkman *v.* Oxley, 2 Stark. Ev. 306, *k*, Heath, J.; 1826, Mawby *v.* Barber, Ib. 641, *e*, Lord Tenterden, C. J.; 1836, Moore *v.* Oastler, ib., Lord Denman, C. J., and Parke, B.; 1837, Hardy *v.* Alexandar, Ib., Coltman, J.; 1833, Powell *v.* Harper, 5 C. & P. 590, 592, Parke, B.; Mr. Starkie also approved these rulings, believing it sufficient for the Court to tell the jury to apply the evidence only on the question of damages. (*d*) The exclusion of character on a justification of a general charge was supposed to have been settled by the following line of cases: 1787, J'Anson *v.* Stuart, 1 T. R. 748 (quoted *supra*, § 71); 1822, Jones *v.* Stevens, 11 Price 235, 273; 1842, Hickinbotham *v.* Leach, 10 M. & W. 361, Parke, B.; 1893, Zierenberg *v.* Labonchera, 2 Q. B. 183, 186 (approving J'Anson *v.* Stuart); (2) *Kind of Character.* The particular trait, as well as the general character, seems to be admissible: 1833, Powell *v.* Harper, 5 C. & P. 590, 592 (honesty); the exclusion of "particular credit" in Dennis *v.* Pawling, Vin. Abr. "Evidence," I, b, 16 (1716), vol. XII, 159, seems not to refer to the present subject, but to discrediting a witness by particular acts. *Alabama;* (1) (*a*); admitted; the limitation specified is intended to prevent the defendant's abuse of this opportunity by taking advantage of the destruc-

§ 74. Same: Rumors of the Crime charged, as affecting Reputation. In thus seeking to mitigate damages by showing the plaintiff's reputation to be

tion of a reputation destroyed by himself: 1834, Commone *v.* Weltera, 1 Port. 322, 327 (but not after the date of the charge); 1836, Waters *v.* Jones, 3 Id. 442, 450; 1846, Bradley *v.* Gibson, 9 Ala. 406; 1849, Scott *v.* McKinnish, 15 Id. 665 (but not after the date of the charge); *Connecticut*; (1) (*a*); admitted: 1792, Brunson *v.* Lynde, 1 Root 354; Seymour *v.* Merrills, Ib. 459; 1794, Austin *v.* Hanchet, 2 Id. 148; 1820, Stow *v.* Converse, 3 Conn. 346; 1822, Treat *v.* Browning, 4 Id. 414; 1825, Bennett *v.* Hyde, 6 Id. 24; *Delaware*, (1) (*a*); inconsistent rulings: 1838, Wooplee *v.* Burton, 2 Herringt. 446 (admissible); 1841, Perke *v.* Blackiston, 3 Id. 373, 375 (inadmissible, following Jones *v.* Stevens); (*c*) same condition; Wooplee *v.* Burton, *supra*; Perke *v.* Blackiston, *supra*; *Illinois*; (1) (*a*) and (*c*): admitted: 1842, Young *v.* Bennett, 5 Ill. 43, 47 (even where a plea of justification has been put in); 1858, Sheahan *v.* Collins, 20 Id. 328; *Indiana*; (1) (*a*) and (*c*): 1825, Henson *v.* Veatch, 1 Blackf. 371 (left undecided); 1841, Sanders *v.* Johnson, 6 Id. 52 (left undecided, at least where the plea is justification); 1842, Burke *v.* Miller, Ib. 155 (said *obiter* to be admissible on the general issue); 1843, McCabe *v.* Pletter, Ib. 405 (held admissible even under a justification); 1867, Bickanstaff *v.* Perrin, 27 Ind. 528 (admissibility recognized); *Iowa*; (1) (*a*): 1887, Henners *v.* McClelland, 71 Ia. 318, 322, 37 N. W. 399 (admitted); *Kentucky*; (1) (*a*); admitted: 1810, Eastland *v.* Caldwall, 2 Bibb 21, 28; 1880, Campbell *v.* Bannister, 79 Ky. 209; 1896, Ratcliff *v.* Courier-Journal, 99 Id. 416, 36 S. W. 177; (2) (*b*); particular trait only: Eastland *v.* Coldwall, *supra*; *Louisiana*; (1) (*c*); admitted; 1828, Kendrick *v.* Kemp, 6 Mart. N. S. La. 500; *Maine*; (1) (*a*); admitted: 1839, Smith *v.* Wyman, 16 Me. 14 (chastity); *Massachusetts*; (1) (*a*); admitted: 1810, Wolcott *v.* Hall, 6 Mass. 518 (Parsons, C. J.: "he ought not to obtain large damages, if his character is of little or no estimation in society"); 1817, Ross *v.* Lapham, 14 Id. 279 (but excluding evidence of the plaintiff's being an atheist); 1825, Bodwell *v.* Swan, 3 Pick. 376 (Parker, C. J.: "To a reputation already soiled, the injury is small"); 1834, Com. *v.* Snelling, 15 Id. 387, 344; 1843, Stone *v.* Varney, 7 Metc. 86; 1863, Chapman *v.* Ordway, 5 All. 595; 1863, Parkhurst *v.* Ketchum, 6 Id. 406; 1874, Peterson *v.* Morgan, 116 Mass. 350; 1875, Clark *v.* Brown, Ib. 509; 1881, Hastings *v.* Stetson, 130 Id. 76, 78; (*c*); admitted: Stone *v.* Varney, *supra* (*quoted supra*, § 66); (2); general character and particular trait admitted: Clerk *v.* Brown, *supra*; *Michigan*; (1) (*a*); admitted: 1877, Proctor *v.* Houghtaling, 37 Mich. 41, 44; 1883, Bathrick *v.* Detroit Post, 50 Id. 629, 642 (reputation before publication of the charge); 1897, Finley *v.* Widner, 112 Id. 230, 70 N. W. 433; 1897, Fowler *v.* Fowler, 113 Id. 575, 71 N. W. 1084; 1897, Georgia *v.* Bond, 114 Id. 196, 72 N. W. 232; (2) inconsistent rulings; 1883, Bathrick *v.* Post, *supra* (particular trait only); 1894, Thibault *v.* Sessions, 101 Id. 279, 290, 59 N. W. 624 (general character only); *Minnesota*; (1) (*a*); 1866, Simmons *v.* Holster, 13 Minn. 249, 257 (not decided); *Mississippi*; (1) (*a*); admitted: 1859, Powers *v.* Prestgroves, 38 Miss. 227, 241; *Missouri*; (1) (*a*); admitted: 1822, Anthony *v.* Stephens, 1 Mo. 254; (2); particular trait only: Anthony *v.* Stephens, *supra*; *New Hampshire*; (1) (*a*); admitted: 1833, Lamos *v.* Snell, 6 N. H. 413; 1851, Severance *v.* Hilton, 24 Id. 146; (2) general character and particular trait also: Lamos *v.* Snell, *supra*; *New York*; (1) (*a*); admissible, since the first case: 1806, Foot *v.* Tracy, 1 John. 46 (undecided; Kent, C. J., and Thompson, J., for, and Livingston, J., and Tompkins, J., against receiving it); 1824, Paddock *v.* Salisbury, 2 Cow. 811; 1829, Douglass *v.* Tousey, 2 Wend. 352 (since "defendants might indirectly contribute to the reputation of the plaintiff's bad character for the very purpose of reducing the damages in actions of slender already instituted against them," the reputation offered cannot be of the character after the words were uttered); 1829, King *v.* Root, 4 Id. 139; 1847, Hemer *v.* McFerlin, 4 Den. 509; (*c*); admitted: King *v.* Root, *supra*; Hamer *v.* McFerlin, *supra* ("[The other view] assumes that the jury could not discriminate between the proof offered to enstein the justification and that which relates to the damages merely; but I think the evil apprehended is more imaginary than real"); *North Carolina*; (1) (*a*); admitted: 1802, Vick *v.* Whitfield, 2 Hayw. 222; 1853, Sample *v.* Wynn, Busbee 320; *Ohio*; (1) (*a*); admitted: 1831, Dewit *v.* Greenfield, 5 Oh. 225; 1846, Fisher *v.* Patterson, 14 Id. 418, 425; *Pennsylvania*; (1) (*a*); admitted, but (*b*) doubtful: 1825, Anderson *v.* Long, 10 S. & R. 61, *obiter*; 1833, Smith *v.* Ruckecker, 4 Rawle 295 (undecided); 1835, Henry *v.* Norwood, 4 Watts 347, 350; 1847, Steinman *v.* McWilliams, 6 Pa. 170, 174 (admissible where a plea of not guilty is recorded; on a justification only, no decision given, the case going off on another point); 1864, Conroe *v.* Conroe, 47 Id. 198 (admissible on the general issue; but apparently not on a justification alone); 1865, Moyer *v.* Moyer, 49 Id. 210 (admitted; nothing said as to the bearing of pleadings); (2) The rulings have veered entirely around, originally admitting general character only, but now admitting only particular traits: 1833, Smith *v.* Ruckecker, 4 Rawle 295 (charge of whoring; evidence of the plaintiff's reputation for thieving, excluded); 1847, Steinman *v.* McWilliams, 6 Pa. 170, 175 (refusing to confine the plaintiff to reputation for veracity only, in an action for charging perjury; overruled in effect by the following cases, admitting particular traits); 1864, Conroe *v.* Conroe, 47 Id. 198 (chastity); 1865, Moyer *v.* Moyer, 49 Id. 210 (general character excluded, and only the particular trait admitted; Steinman *v.* McWilliams

susceptible of little or no injury, the defendant will sometimes attempt to attain his purpose by showing less than a total lack of reputation for general character or for the particular trait. If, for instance, the charge was that the plaintiff stole a horse, the defendant will offer to show that there was a prevalent rumor or a common belief that the plaintiff stole the horse; thus, the defendant will assert, his false charge could not have hurt the plaintiff by causing a belief in his guilt, because there was already a common belief in it, or at least a rumor of it. The argument for permitting this has never been better put than in the following passage:

1860, *Pigot*, C. B., dissenting, in *Bell v. Parke*, 11 Ir. C. L. 413, 425: "It is by putting extreme cases that the application of a principle can often be most clearly tested; let me put the case that I shall now describe. Suppose this to have happened: a gentleman employed in a railway-office is found in the office murdered, and circumstances of the very strongest suspicion attach upon one individual; the case is tried, the facts are fully investigated, the individual is acquitted; but there exists generally, in the community at large, a moral conviction that the party charged is guilty. . . . He is entitled to the benefit of his acquittal, and to the presumption of innocence which the law casts around one whose guilt has not been proved; no man can be justified in calling him a 'murderer,'—nay, the general impression may, if the truth were clearly known, be unjust. But, rightly or wrongly, he has lost his good name, and there exists a general reputation that he was guilty of the specific offence which I have described. . . . Is it just or reasonable that a man so covered with the reputation of having been guilty of an atrocious crime should be entitled to as large a measure of damages, for being called a murderer, as a person of unblemished fame, upon whose character the breath of slander had never been blown? . . . Suppose two successive cases presented in succession to the same jury; in one, the alleged murderer is plaintiff, in the other, the plaintiff is a man without a stain upon his character; I do not think it just or reasonable (and I cannot think that it will ultimately be established as the law of England) that the same measure of damages should be applied to each."

and Conroe *v.* Conroe cited but misread); *South Carolina;* (1) (*a*); admitted; 1818, Buford *v.* M'Lnny, 1 Nott & M. 268; 1820, Sawyer *v.* Eifert, 2 id. 511; 1833, Anon., 1 Hill S. C. 251, 253; 1836, Randall *v.* Holsenbake, 3 id. 177; (2) admitting general character and particular traits also: 1818, Buford *v.* M'Lnny, 1 Nott & M. 268, 270 (it is not allowable "for instance, where a person is accused of stealing, to prove by way of mitigation that he had committed murder or that he was a drunkard or a gambler; but the evidence must go to show that his character is so bad that he might well be suspected of the particular offence charged, and could not be injured by the report"); *Virginia;* (1) (*a*), admitted: 1837, M'Nutt *v.* Young, 8 Leigh 542; 1839, Lincoln *v.* Chrisman, 10 id. 338, 342 (except, possibly, where the slander charges nothing affecting the moral character); 1867, Adams *v.* Lawson, 17 Gratt. 259, *semble;* (*c*), admitted: 1837, M'Nutt *v.* Young, 8 Leigh 542 (perhaps the best single case on the subject); (2) admitting general character and particular traits also: 1837, M'Nutt *v.* Young, 8 Leigh 542; 1839, Lincoln *v.* Chrieman, 10 id. 343; *Vermont;* (1) (*a*) and (2): 1802, Smith *v.* Shumway, 2 Tyler 74 (bad general character excluded); *West Virginia;* (1) (*a*), admitted: 1869, Shroyer *v.* Miller, 3 W. Va. 158, 161; *Wisconsin;* (1) (*a*), admitted, but (*b*) unsettled: 1867, B—— *v.* I——, 22 Wis. 372 (chastity; both general issue and justification pleaded); 1871, Wilson *v.* Noonan, 27 id. 599, 612 (official integrity); 1880, Maxwell *v.* Kennedy, 50 id. 645, 7 N. W. 657, *semble* (horse-stealing); 1898, Candrian *v.* Miller, 98 id. 164, 73 N. W. 1004; (2), neither rule apparently settled upon: 1860, Haskins *v.* Lunsden, 10 id. 259, 369 (admissibility of general character doubted); 1867, B—— *v.* I——, *supra* (admissibility of general bad character assumed, for both general issue and justification); 1871, Wilson *v.* Noonan, *supra* (reserving the question whether general character may be shown; and intimating the negative); 1880, Maxwell *v.* Kennedy, *supra* (obscure); 1882, Campbell *v.* Campbell, 54 id. 90, 97, 11 N. W. 456 (poisoning; general character admissible, no distinction being made as to particular traits).

Distinguish the defendant's offer of his *own bad repute*, as indicating that his utterance was not believed and thus did no harm: 1881, Hastings *v.* Stetson, 130 Mass. 76, . . .

But there are grave objections to permitting such a practice, as the following passages make clear:

1800, *Fitzgerald*, B., in *Bell* v. *Parke*, 11 Ir. C. L. 413, 420: "A reputation there may be as to general character; and as general character is affected by a slander, it may be natural to show, by rumors or otherwise, what that reputation is. But there cannot, as it appears to me, be reputation as to the guilt of a particular offence, in the sense in which reputation is understood in the law of evidence."

1882, *Cave*, J., in *Scott* v. *Sampson*, L. R. 8 Q. B. D. 491: "It would seem that such evidence [rumors and suspicions as to the truth of the charge made by the defendant], is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumors and suspicions have in fact affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it, they are not relevant to the issue. To admit evidence of rumors and suspicions is to give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading, through the means of the publicity attending judicial proceedings, what he may have picked from the most disreputable sources, and what no man of sense who knows the plaintiff's character would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all those who know him best can say is that they have not heard anything of these rumors. Moreover, it may be that it is the defendant himself who has started them"; a question to a witness, whether he had heard anywhere the story which was the libel in question before he saw it in the defendant's journal, was excluded.

1836, *Gibson*, C. J., in *Long* v. *Brougher*, 5 Watts 440: "Surely it does not lessen the injury that the plaintiff's character, bleeding from a thousand wounds, has received only the finishing blow from the defendant. Who can say that it would not have weathered the storm had it not sunk at last under the accumulated weight of the defendant's wrongs? I am unable to see the justice of estimating character by fragments, or of treating as matter of extenuation the fact that the injured party had suffered the same prejudice from another. The blow may fall heavier on sensibilities morbid from the repetition of injury. The principle has no analogue in any other part of the law; for in the pursuit of reparation for trespass to my person, I am not to be told that my battered carcass was of little worth to me by reason of a previous beating. . . . In that predicament the condition of the sufferer is an aggravation of the wrong; inasmuch as the residue of a man's soundness, whether of body or character, is the more valuable to him, because it is all that he has to depend on. . . . Now it seems to be irreconcilable to the dictates of justice that previous outrage should be made an invitation to aggression by cheapening the consequences of it to the perpetrator, . . . [or] that a stale and exploded accusation may be made a pretext for its repetition."

The better arguments seem to require the exclusion of such evidence; and this is the result in the great majority of jurisdictions. The difficulty is, however, to draw the line between a mere rumor of the particular act charged and a general loss of reputation as to the particular trait involved in it; for the latter, as already seen (*ante*, § 73) is received in most jurisdictions. Thus in *King* v. *Root*, *infra*, the libel had charged the plaintiff with being in a state of beastly intoxication, and it was held that mere rumors of the act charged were inadmissible, while a bad reputation for excessive intoxication would be admissible. So far, then, as rumors of the sort have in effect destroyed the plaintiff's reputation to a real extent, it is proper enough to receive them; for this is only saying what all concede, that his reputation

may be shown. But the distinctions drawn and the phrasings used in the various decisions and jurisdictions differ considerably. It may be noticed, however, that some Courts recognize a third sort of thing, a reputation as to the act charged, — lying between a mere rumor as to the act, on one hand, and a reputation as to the particular trait involved, on the other; but this variation seems anomalous and unsound.[1]

[1] *England:* The reception of such evidence goes back to the case of Leicester *v.* Walter, 2 Camp. 251 (1809: libel; general issue; the right to dispute the damages under the general issue, being conceded, Mansfield, C. J., received evidence of "a general suspicion of the plaintiff's character," "general rumor," etc., "to show that he could receive little injury," "provided the reports got into many men's mouths"; follow Eamer *v.* Merle, unreported, by Lord Ellenborough, C. J., in which the damages upon a slander charging insolvency were mitigated by "rumors in circulation" to that effect); the subsequent treatment of the subject is well analyzed by Cave, J., summing up the cases in Scott *v.* Sampson, L. R. 8 Q. B. D. 491 (1882): "While such evidence appears to have been admitted by Lord Ellenborough, C. J., in Eamer *v.* Merle (not reported), and by Cresswell, J., with the approbation of Wightman, J., in Richards *v.* Richards, 2 Moo. & Rob. 557, and while its admissibility was supported by Pigot, C. B., in Bell *v.* Parke, 11 Ir. C. L. R. 413, it was doubted by Abbott, C. J., in Waithman *v.* Weaver, 11 Price 257 n. and by Coleridge, J., in Nye *v.* Thompson, 16 Q. B. 175, and it was held inadmissible by Fitzgerald and Hughes, BB., in Bell *v.* Parke, and by the whole Court of Exchequer, in Jones *v.* Stevens, 11 Price 235"; he then mentions Leicester *v.* Walter, 2 Camp. 251, as an early ruling of a peculiar sort; the only case omitted by the learned judge is Anon. *v.* Moor, 1 M. & S. 284, which received "reports in the neighborhood." The rule of exclusion seems settled for England by Scott *v.* Sampson. *Canada:* 1855, McGregor *v.* McArthur, 5 U. C. C. P. 493 (breach of promise; obscure); *Alabama:* 1834, Commons *v.* Walters, 1 Port. 323 (charge of receiving stolen goods; general suspicion in the neighborhood, before the charge, held admissible, as involving "loss of character"); 1846, Bradley *v.* Gibson, 9 Ala. 406 (charge that the plaintiff was a hog thief and had left Mississippi to avoid a trial for hog-stealing; such reports excluded, except that after showing bad general character, the reports might perhaps have been used to indicate its extent; the preceding case thus explained); Holley *v.* Burgess, ib. 730 (approving Bradley *v.* Gibson); *California:* 1901, Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576 (mere rumors of the act in question, excluded); *Connecticut:* 1820, Bailey *v.* Hyde, 3 Conn. 463, 466 ("reports in the neighborhood that he had been guilty of practices similar," admissible if they have circulated so far "as to have blemished the plaintiff's character"); 1822, Treat *v.* Browning, 4 id. 408, 414 (reports admitted as affecting the damages by amounting to "common fame or reputation"; purporting to follow Leicester *v.* Walter; here the slander was that the plaintiff had a bastard child); *Georgia:* 1897, Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655 (charge of arson; rumors of various arsons, excluded); *Illinois:* 1858, Sheahan *v.* Collins, 20 Ill. 328 (obscure ruling, but *semble* excluded); *Indiana:* 1825, Henson *v.* Veatch, 1 Blackf. 371 (left undecided); 1841, Sanders *v.* Johnson, 6 id. 54 (the mere existence of reports imputing the crime, without any showing as to their generality or their effect on the reputation, excluded, at least where the plea is justification); 1854, Kelley *v.* Dillon, 5 Ind. 428 (same as next case); 1867, Bickenstaff *v.* Perrin, 27 Ind. 528 (general suspicion or rumor of the acts imputed, but not the mere existence of *a* rumor or suspicion, admissible); *Iowa:* 1887, Hanners *v.* McClelland, 74 Ia. 320, 322, 37 N. W. 389 (rumors excluded, distinguishing Barr *v.* Hack, 46 id. 310, and in effect overruling it on this point); *Louisiana:* 1828, Kendrick *v.* Kemp, 6 Mart. N. S. 500 (that "the people of St. H. were in the habit of" abusing the plaintiff, excluded); *Massachusetts:* excluded in the following cases: 1810, Wolcott *v.* Hall, 6 Mass. 518; 1822, Alderman *v.* French, 1 Pick. 1, 17; 1843, Stone *v.* Varney, 7 Metc. 91; 1848, Watson *v.* Moore, 2 Cush. 140; 1874, Peterson *v.* Morgan, 116 Mass. 350; *Michigan:* 1877, Proctor *v.* Houghtaling, 37 Mich. 41, 44 (excluding "particular suspicions"); 1897, Wolff *v.* Smith, 113 id. 359, 70 N. W. 1010, *semble* (same); *Minnesota:* 1868, Simmons *v.* Holster, 13 Minn. 249, 257 (not decided); *Mississippi:* 1859, Powers *v.* Presgroves, 38 Miss. 227, 241 (excluded); *Missouri:* 1822, Anthony *v.* Stephens, 1 Mo. 254 (current report as to the fact charged, excluded); 1843, Moberly *v.* Preston, 8 id. 462, 466, *semble* (same); *New Hampshire:* 1827, Mason *v.* Mason, 4 N. H. 114, *semble* (common report, excluded); 1852, Dame *v.* Kenney, 25 id. 318 (reports excluded, even though they actually affect the reputation); *New York:* 1829, King *v.* Root, 4 Wend. 129, 140 (rumors excluded; but reputation for the class of act admitted, if "of the same quality or degree charged in the libel"; *i. e.* the damages for a charge of beastly intoxication not to be mitigated by reputation for the free use of liquors; but Mather, Sen., argues forcefully to the contrary, in dissenting at 158); 1838, Kennedy *v.* Gifford, 19 id. 298, 301 (reputation as to the charge, as well as rumors, excluded); *North Carolina:* 1826, Nelson *v.* Evans, 1 Dev. 9 (charge of theft; "general opinion and belief" of the plaintiff's guilt, admitted); 1861, Luther *v.* Skeen, 8 Jones L. 356 (reports of specific misconduct, excluded); *Ohio:* 1831, Dewit *v.* Greenfield, 5 Oh. 226 (general suspicion as to the

This use of such rumors, as negativing the harm done to the plaintiff's reputation, is to be distinguished from two other uses of similar facts, arising chiefly under the substantive law of defamation, but also forming the subject of much controversy in the past: (1) *Conduct* or rumored conduct of the plaintiff offered as constituting the defendant's *grounds for suspecting* the plaintiff of the offence charged, and thus indicating the absence of malice and going in mitigation of damages; the argument against this is that such matter, so far as it amounts to anything substantial, should be made to support a plea of truth; (2) the fact that the defendant did not originate the charge, but merely *heard it from others*, offered to negative malice and mitigate damages; the argument against this is that a wise law will not regard it as an extenuation. Both these subjects belong to the law of defamation; and, as the cases treating them are not likely to be confounded with evidentiary rulings upon character or repute, it is unnecessary to deal with them here. Moreover, the use of *particular acts of misconduct* to evidence the character or reputation usable under the principles of the preceding sections, though it involves an evidentiary question, is governed by wholly different considerations, and is treated *post*, §§ 207, 209.

§ 75. (2) **Plaintiff's Reputed Bad Character as mitigating Damages in Other Actions (Seduction, Crim. Con., Indecent Assault, Breach of Marriage Promise, Malicious Prosecution, etc.).** It is obvious that, on the principle so generally accepted for an action of Defamation, the same element may be considered, in mitigation of damages, in any other action in which the law of damages recognizes the harm to reputation as one of the elements of recovery. This has always been conceded for the action of *seduction*, for here the disgrace to the father must naturally be less or lacking if the daughter is already of bad reputation for chastity; her previous bad reputation may therefore be shown.[1] In the same way, in a husband's action for *criminal conversation*,

plaintiff's guilt of the act charged, admissible); 1846, Fisher *v.* Patterson, 14 id. 418, 425 (general reputation of a different analogous act, excluded); 1855, Van Derveer *v.* Sutphin, 5 Oh. St. 293, 298 (reports in general circulation as to the facts charged, excluded); *Pennsylvania:* 1833, Smith *v.* Ruckecker, 4 Rawle 295 (charge of whoring; rumors as to the plaintiff's illicit intercourse, excluded); 1836, Loug *v.* Brougher, 5 Watts 439 (reports of the same crime, excluded; quoted *supra*); *South Carolina:* 1831, Freeman *v.* Price, 2 Bail. 115 ("whether he had never heard anything against the reputation of the plaintiff," excluded; distinguishing it from the fact that the plaintiff "was generally suspected of the fact charged"; but the latter is not allowed in the authority cited); 1833, Anon., 1 Hill S. C. 251, 253 (apparently contradictory, in allowing suspicious facts to be shown; but the doctrine of suspicion as an excuse was probably in the court's mind); 1836, Randall *v.* Holsenbake, 3 id. 177 (may prove suspicious facts, as in preceding case; also "that the plaintiff was generally reported and suspected to be guilty of the crime imputed to him"); *United States:* 1900, Sun Print. & P. Ass'n *v.* Schenck, 40 C. C. A. 163, 98 Fed. 925 (prior rumors of the act, excluded); *Wisconsin:* 1860, Haskins *v.* Lumsden, 10 Wis. 359 (mere rumors excluded; "the existence of unfavorable and defamatory rumors and reports [as to the fact charged] is one thing, and a real loss of character and standing in [the] community quite another").

[1] 1808, Bamfield *v.* Massey, 1 Camp. 460, Lord Ellenborough, C. J., 1814, Dodd *v.* Norris, 3 id. 519, same judge; 1840, Carpenter *v.* Wall, 11 A. & E. 804; 1876, M'Creary *v.* Grundy, 39 U. C. Q. B. 316, 325; 1830, Drish *v.* Davenport, 2 Stew. 266, 270; 1811, Davenport *v.* Russell, 5 Day 145, 148; 1851, Robinson *v.* Burton, 5 Harringt. 335, 337; 1874, White *v.* Murtland, 71 Ill. 250, 264; 1859, Shattuck *v.* Myers, 13 Ind. 50; 1868, Bell *v.* Rinker, 29 id. 269; 1884, South Bend *v.* Hardy, 98 id. 580; 1848, Carter *v.* Cavanaugh, 1 Greene 171, 175, *semble;* 1807, Boynton *v.* Kellogg, 3 Mass. 189 (excluded so far as the bad character was acquired in consequence of the seduction); 1875, McKern *v.* Calvert, 59 Mo. 242 (excluded; whether as negativing an essential element of the plaintiff's

the wife's previous bad reputation may be shown.[2] Here and in the preceding action, the father's or husband's *own reputation* is, as such, apparently immaterial; but a distinction is to be made as to his actual conduct or character, for this, while not necessarily an excuse for the defendant, may well serve in mitigation, inasmuch as the loss of his wife's or daughter's virtue can mean little to a person of his behavior; thus the reputation is here received as evidence of the actual character.[3] The reputed character of the plaintiff in an action for *breach of promise of marriage*,[4] or for *indecent assault*,[5] or for *malicious prosecution*,[6] is necessarily involved in the measurement of damages; but not in the ordinary tort-actions for violence.[7] Yet where injury to *earning-capacity* is involved, the actual character may be material,[8] and conceivably also the reputed character for skill and the like.

§ 76. (3) **Plaintiff's Reputed Good Character as affecting Damages in Defamation, Seduction, Crim. Con., etc.** That the plaintiff may refute the imputations cast on his reputed character, under the doctrine of the preceding sections, is not doubted. But whether he may go into it until it has been attacked has been the subject of much difference of opinion. The

case, viz. his daughter's chastity, or in mitigation of damages, does not appear); 1805, Akerley *v.* Haines, 2 Caines 292 (*contra*, unchaste character of the daughter immaterial, as the loss of service is the basis of the claim); 1851, Pratt *v.* Andrews, 4 N. Y. 495, Bronson, C. J., *semble* (admissible); 1863, Hoffman *v.* Kemerer, 44 Pa. 452; 1858, Reed *v.* Williams, 5 Sneed 580, 582; 1858, Thompson *v.* Clendening, 1 Head 287, 296 (but not after the time of seduction); 1864, Watry *v.* Ferber, 18 Wis. 500, 503. For the woman's character, as a main part of the issue and not merely as mitigating damages, in a *criminal prosecution* or her *own statutory action* by the woman for seduction, see *post*, § 79.

[2] 1824, Starkie, Evidence, II, 305; 1811, Davenport *v.* Russell, 5 Day 145, 148; 1876, Crose *v.* Rutledge, 81 Ill. 266; 1851, Pratt *v.* Andrews, 4 N. Y. 495, Bronson, C.J. (approving Bamfield *v.* Massey and Dodd *v.* Norris); 1823, Anderson *v.* Long, 10 S. & R. 61; 1816, Ligon *v.* Ford, 5 Munf. 10, 16. Apparently the wife's or daughter's *actual character* would also be material as mitigating the injury to *feelings* (McKern *v.* Calvert, *supra*). For the use of *particular acts* as showing this actual character of the daughter, see *post*, §§ 210, 211.

[3] 1832, Norton *v.* Warner, 9 Conn. 172 (general moral character excluded; although his character as a husband is to be considered); 1851, Robinson *v.* Burton, 5 Harringt. 335, 338 (reputation here not admitted to show the dissolute character of the father to mitigate damages in an action for seduction, because it "can be proved by particulars"); 1858, Reed *v.* Williams, 5 Sneed 580, 582 (admitted); 1858, Thompson *v.* Clendening, 1 Head 287, 296 (admitted; but not the mother's reputation); 1900, Spellings *v.* Parks, 104 Tenn. 351, 58 S. W. 126 (seduction; bad reputation of plaintiff's mother, inadmissible). For the use of *particular acts* as showing this actual character of the father, see *post*, §§ 210, 211.

[4] 1855, McGregor *v.* McArthur, 5 U. C. C. P. 493; 1860, Burnett *v.* Simpkins, 24 Ill. 267; 1873, Williams *v.* Hollingsworth, 6 Baxt. 12, 16. Distinguish here the use of the woman's bad character as an *excuse for the breach* (*post*, § 77).

[5] Here both the actual and the reputed character would have a bearing: [illegible]7, Gross *v.* Brodrecht, 24 Ont. App. 687; 1889, Gore *v.* Curtis, 81 Me. 403, 405, 17 Atl. 314 (indecent assault; the plaintiff's character for unchastity, admitted); 1893, Miller *v.* Curtis, 158 Mass. 127, 130, 32 N. E. 1039 (indecent assault; damages to feelings; the plaintiff's virtue or the reverse, as affecting her shocked feelings, *semble*, admissible); 1882, Mitchell *v.* Work, 13 R. I. 645 (same; "the mental sufferings of a vulgar and licentious woman from an indecent assault would be less than that of a modest and virtuous woman"); 1903, Barton *v.* Brnley, — Wis. —, 96 N. W. 815. For the use of *particular acts* to evidence this character, see *post*, § 212.

[6] 1849, Bacon *v.* Towne, 4 Cush. 240; 1901, Hiersche *v.* Scott, — Nebr. —, 95 N. W. 494 (reputation of the plaintiff for insanity, admitted in an action for maliciously instituting proceedings to commit); 1900, Drummond *v.* Henderson, 62 Oh. 136, 56 N. E. 650 (malicious prosecution, against a magistrate; plaintiff's bad reputation for honesty admitted); 1891, Wolf *v.* Perryman, 82 Tex. 112, 120, 17 S. W. 772. Distinguish here the use of the plaintiff's ad character as evidencing *reasonable ground of suspicion* (*post*, § 258).

[7] 1851, Corning *v.* Corning, 6 N. Y. 97 (battery; excluded).

[8] 1895, Wright *v.* Crawfordsville, 142 Ind. 636, 639, 42 N. E. 227 ("vicious habit of becoming intoxicated," provable as affecting earning capacity of deceased in action for death).

better rule seems to be that his reputation is assumed to be good, and that he has therefore no need to sustain it until it has been attacked.[1]

§ 77. (4) **Plaintiff's Bad Character as an Excuse, or as otherwise in Issue; Breach of Promise of Marriage.** The character of a plaintiff, reputed or actual, may come into issue, under the substantive law and the pleadings, and thus becomes material. No principle of evidence is involved, until the question arises as to the mode of evidencing the character (*post*, §§ 202–208).[1]

In the action for *breach of promise of marriage*, to begin with, the actual bad character of the plaintiff as to chastity may be an excuse for terminating the contract, and is therefore material.[2]

§ 78. (5) **Same: Character of Houses of Ill-fame or of their Inmates.** In prosecutions for keeping a bawdy-house or house of ill-fame, it is often difficult to distinguish whether a question of evidence or a question of criminal law is involved; and much will depend on the elements of the crime as determined by the wording of the statute and by its judicial construction.

(*a*) *Character of the House.* If it distinctly appears in the statute that the repute of the house is the essential criminal fact, so that merely to keep a house of that reputation is the offence, then the reputation is a fact in issue, and the reputation may be shown, irrespective of the actual character or use of the house.[1] But if the actual character or use of the house is also or alone

[1] *Defamation: Excluded before attack:* 1841, Parke *v.* Blackiston, 3 Harringt. 373, 375 (absolutely, because the defendant is not allowed to attack it); 1843, McCabe *v.* Platter, 6 Blackf. 405; 1861, Miles *v.* Vanhorn, 17 Ind. 249; 1867, Hann *v.* Wilson, 28 id. 301; 1827, Harding *v.* Brooks, 5 Pick. 244, *semble;* 1851, Severance *v.* Hilton, 24 N. H. 148; 1852, Dame *v.* Kenney, 25 id. 324 (improper evidence of rumors is sufficient to constitute an attack); 1893, Blakeslee *v.* Hughes, 50 Oh. 490, 34 N. E. 793; 1893, Cooper *v.* Phipps, 24 Or. 357, 362, 33 Pac. 985; 1902, Clark *v.* North American Co. 203 Pa. 346, 53 Atl. 237 (it is immaterial whether the impeachment is made directly or by insinuation on cross-examination); *Admitted:* 1803, R. *v.* Waring, 5 Esp. 13, Alvanley, L. C. J.; 1813, Giveus *v.* Bradley, 3 Bibb 192, 195, *semble;* 1894, Stafford *v.* Journal Ass., 142 N. Y. 598, 37 N. E. 625 (admitted on the facts); 1853, Sample *v.* Wynn, Busbee 322; 1867, Adams *v.* Lawson, 17 Gratt. 250, 258; 1869, Shroyer *v.* Miller, 3 W. Va. 158, 161. *Seduction: Excluded before attack:* 1808, Bamfield *v.* Massey, 1 Camp. 460, Ellenborough, L. C. J.; 1814, Dodd *v.* Norris, 3 id. 520, same judge; 1876, Burke *v.* Scribner, 16 N. Br. 652 (breach of promise; after cross-examination to prior unchastity, the plaintiff's good character was admitted); 1851, Pratt *v.* Andrews, 4 N. Y. 493, Brouson, C. J., *semble* (particular acts of misconduct do not constitute such an attack); *Criminal Conversation:* 1800, R. *v.* Francis, 3 Esp. 116, Lord Kenyon, C. J. (the defendant pleaded the prosecutor's dissipated character, etc., in mitigation; but as his witnesses denied this, the prosecutor was not allowed to go into it); 1851, Pratt *v.* Andrews, N. Y. *supra*. *Malicious Prosecution:* 1855, Goldsmith *v.* Picard, 27 Ala. 142, 147, 153 (malicious attachment, whereby the plaintiff's business was injured; his good reputation as a merchant admitted); *Sundries:* 1813, Givens *v.* Bradley, 3 Bibb 192, 195 (battery; excluded).

[1] The following cases illustrate the variety of issues: 1776, Martyn *v.* Hind, Cowp. 437, 441 (the plaintiff's character and conduct as a justification for the defendant's removal of the plaintiff, suing for dismissal from his curacy); 1873, People *v.* Gates, 46 Cal. 52 (a statute punishing "open and notorious cohabitation"; the notoriety is provable as a fact in issue). The use of character to evidence *reasonable grounds for belief* (in malicious prosecution and the like) is dealt with *post*, §§ 246–258.

[2] 1801, Foulkes *v.* Sellway, 3 Esp. 236; 1796, Woodard *v.* Bellamy, 2 Root 354; 1897, Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386 (the bad character of the plaintiff being pleaded in defence, evidence of her good character was admitted in rebuttal); 1875, Von Storch *v.* Griffin, 77 Pa. 504. For the use of *particular acts* as showing this character, see *post*, § 206.

[1] 1846, Caldwell *v.* State, 17 Conn. 467, 472; 1873, State *v.* Morgan, 40 id. 44 (a statute punishing the keeping of a place "reputed" to sell liquors); State *v.* Buckley, ib. 246; 1880, State *v.* Thomas, 47 id. 546; 1879, King *v.* State, 17 Fla. 183, 190 ("ill-fame"; reputation admitted both of the house and of the individuals who resort to ' 1894, State *v.* West, 46 La. An. 1009, 1 So. 418 (reputation of the house, with ..t lacts, admitted to show it to

an element of the crime, then the question of the use of reputation is an evidentiary one, *i. e.* whether reputation, as an exception to the Hearsay rule, may be used to evidence the character; this is dealt with *post*, § 1620.[2]

(*b*) *Character of the Inmates.* A house of ill-fame, or disorderly or bawdy house, signifies a house commonly resorted to or lived in by prostitutes for purposes of prostitution; thus, one element in the offence of keeping it may be the kind of persons resorting to or living in it. Now it is usually understood by Courts that this element of the crime involves, not merely the actual but also the reputed character of these persons as prostitutes; in which case their reputed character becomes a fact in issue; and this is the general result of the precedents. It is of course conceivable that a Court may hold their actual character to be the essential thing, and then the evidentiary question is again raised, whether the reputation may be used to prove this. Since, however, the propriety of thus using the reputation is plain (*post*, § 1620, under the Hearsay rule), the distinction ought to be practically of little consequence.[3]

§ 79. (6) **Same: Criminal Prosecution or Statutory Action for Seduction.** Where by statute the crime of seduction is established or an action given to the woman, three cases arise. (1) Either the statute (as occasionally) describes the woman as of "chaste repute"; or (2) it describes her as of "chaste character"; or (3) it does not make any limitation of the sort. In the latter case, however, the Courts have almost uniformly (*post*, § 205) implied into the statute the requirement of (2); so that (2) and (3) stand practically on the same footing. Now in (1) the reputation is the thing in issue; the actual character is immaterial. The reputation is therefore provable without doubt;

be disorderly); 1893, State *v.* Hull, 18 R. I. 207, 26 Atl. 191 (reputation of the house or of its frequenters, admissible, but not of the defendant); 1873, Morris *v.* State, 38 Tex. 603 ("house for the purpose of public prostitution"; reputation admitted as "the subject of the inquiry"); 1875, Sylvester *v.* State, 42 id. 496 (same); 1872, State *v.* Brunell, 29 Wis. 435 (not clear whether reputation is treated as evidential or in issue). Of course the actual character, or use, of the house may also be shown (where the terms of the statute do not exclusively make repute the element). Whether this actual use may be shown by *particular instances* of prostitution, etc., is discussed *post*, § 204.

[2] There is also a third conceivable situation, viz., that the house must be one of prostitution both actually and by repute; in this case the reputation is in issue on the latter element, but the evidentiary question may arise whether it is also usable to prove the former.

[3] In most of the ensuing cases the distinction is not made, and the inmates' "character" is admitted: 1876, Wooster *v.* State, 55 Ala. 221; 1899, Demartini *v.* Anderson, 127 Cal. 33, 59 Pac. 207; 1866, State *v.* Jerome, 33 Conn. 265, 269; 1900, Howard *v.* People, 27 Colo. 396, 61 Pac. 595 (as well as that of the defendant); 1879, King *v.* State, 17 Fla. 183, 190 (see citation *supra*); 1898, Shaffer *v.* State, 87 Md. 124, 39 Atl. 313; 1856, Com. *v.* Kimball, 7 Gray 328; 1861, Com. *v.* Gannett, 1 All. 7; 1875, Com. *v.* Carloze, 119 Mass. 210; 1895, State *v.* Hendricks, 15 Mont. 194, 39 Pac. 94; 1851, Clementine *v.* State, 14 Mo. 113; 1860, State *v.* M'Gregor, 41 N. H. 407, 412; 1893, State *v.* Hull, 18 R. I. 207 (see citation *supra*); 1838, State *v.* McDowell, Dudley 345, 349 ("when the facts are proved that the defendants, common prostitutes, occupied particular houses . . ., a strong presumption of the character of the houses was raised"); 1833, U. S. *v.* Stevens, 4 Cr. C. C. 341 (on a count charging the defendant with suffering persons of ill-fame to come together, the reputation of the visitors of the house was admitted). Whether the character or occupation of such inmate may be shown by particular instances of prostitution, etc., is discussed *post*, § 204. The character of the *defendant himself* may not be used against him as defendant (*ante*, § 57), but his character as an inmate may well be; hence a variance of rulings: 1901, State *v.* Beebe, 115 Ia. 128, 88 N. W. 358 (whether the defendant's reputation for unchastity is receivable, not decided); 1893, State *v.* Hull, R. I., *supra* (excluded); 1900, Howard *v.* People, Colo., *supra* (admitted); 1900, Dailey *v.* State, — Tex. Cr. —, 55 S. W. 823 (admitted). Compare § 1620.

and the only question that can arise is whether particular acts of unchastity are usable (*post*, § 205). In (2) the actual character is the matter in issue. One question is whether particular acts of unchastity are usable to show it; this is dealt with elsewhere (*post*, § 205). Another question is whether reputation may be used to show the actual character; this involves the exception to the Hearsay rule, and is therefore discussed elsewhere (*post*, § 1620).

§ 80. (7) **Same: Character of an Employee, as affecting the Employer's Liability.** By the law of torts and agency, an essential fact in the liability of an employer may be the employee's character as an incompetent person (through negligence, intemperance, and the like), and the employer's *knowledge of this incompetence*. Thus the employee's character becomes a fact in issue, and will usually be evidenced through his reputation.[1] There is here no doubt, and no question of evidence. But the employer's knowledge of this character is also a fact in issue, and the same reputation may serve also to show this knowledge; this is an evidentiary question of the mode of evidencing Knowledge (dealt with *post*, § 1249). Besides these aspects, however, there are also occasional instances in which an employee's character may in other ways become material under the issues.[2]

[1] For evidence by Reputation, see *post*, §§ 1608–1621 (Hearsay Rule); for evidence by Specific Acts of Negligence, see *post*, § 208; for evidence by Individual Opinion, see *post*, §§ 1984, 1987 (Opinion Rule). For the wholly different question, whether the employee's character may be used to argue that he was or was not negligent on a given occasion, see *ante*, § 65.

[2] 1896, Louisville Ins. Co. v. Monarch, 99 Ky. 578, 36 S. W. 563 (the competency of the captain and crew of a steamboat lost, as showing that she was properly manned and therefore seaworthy); 1874, Cleghorn v. R. Co., 56 N. Y. 44 (that the culpable employee was known to the defendant to be of intemperate habits, admitted as involving a culpability of the defendant which would support exemplary damages).

TOPIC I (*continued*): PROSPECTANT EVIDENCE OF A HUMAN ACT.

SUB-TOPICS B, C, D, E: PHYSICAL CAPACITY, SKILL, OR MEANS; HABIT OR CUSTOM; DESIGN OR PLAN; EMOTION OR MOTIVE; AS EVIDENCE OF AN ACT DONE.

CHAPTER VI.

Sub-topic B: PHYSICAL CAPACITY, SKILL, OR MEANS, AS EVIDENCE OF AN ACT DONE.

§ 83. **General Principle.** As indicating the likelihood of a person doing or not doing an act in question, his physical capacity (or lack of it), his technical skill (or lack of it), and his possession (or lack) of the appropriate means or tools, are usually of sufficient probative value to be admissible. The circumstances of each case usually make it clear whether one of these data is in a given instance relevant; and no more detailed rules need to be laid down, nor has any important controversy arisen over the relevancy of this species of evidence. The considerations that have led to exclusion in a few instances have usually been considerations affecting some other use or aspect of the evidence, with which the present use was confounded. Thus, the rules against the use of a party's character as evidence (*ante*, §§ 55, 64) have sometimes been thought to require exclusion of facts wrongly construed as equivalent to character. Again, the rule against using an accused person's specific misconduct to show character (*post*, § 193), and limiting such misconduct, when used to show intent, by strict conditions (*post*, § 300), may sometimes be thought to operate against the fact of possession of criminal tools or other means. The general impropriety of using against an accused

person either character, or specific misconduct to show character, is so constantly in the mind of Courts that they occasionally ignore the possibilities of evidence from the present point of view, and, by a wrong construction of the purpose of the evidence, feel bound to apply to it exclusionary rules that have no concern with it. This much must be kept in mind as a key to rulings which are otherwise inexplicable and ought not to stand as precedents. As a general principle, then, the existence or lack of the physical capacity, skill, or means to do an act is admissible as some evidence of the possibility or probability of the person's doing or not doing it:[1]

1879, *Taylor, J.*, in *Ingalls* v. *State*, 48 Wis. 647, 651, 4 N. W. 785: "There can be no doubt as to the right of a person accused of crime to show that at the time of its commission he was physically incapable of committing it. There can be no doubt of the right of the accused to show that he was at the time prostrated by a disease which rendered it highly improbable that he could have endured the exertion and labor necessary to commit the crime. . . . In such case the intoxication is not shown for the purpose of excuse or mitigation of the offence charged, but as evidence tending to show that he was not present and did not commit the acts constituting the offence. Evidence of this kind would have but little weight against direct evidence showing the actual presence of the accused at the time and place when and where the crime was committed; but, certainly, in the absence of any such direct evidence, the accused may give in evidence any fact which would have a natural tendency to render it improbable that he was there and did the acts complained of; and the fact that drunkenness was the thing which tended to prove such improbability, can make no difference. If a man by voluntary drunkenness renders himself incapable of walking for a limited time, it is just as competent evidence tending to show that he did not walk during the time that he was so incapable, as though he had been so rendered incapable by paralysis of his limbs from some cause over which he had no control."

§ 84. **Strength.** The physical strength of a person may be of probative value to show that he was peculiarly capable or peculiarly incapable of doing the act in question.[1] How to evidence the strength is a different question; the use of *specific feats or other instances* of strength may be proper (*post*, § 220); a precedent admitting such evidence will usually be a precedent on the present subject also.

§ 85. **Intoxication.** A condition of intoxication by alcoholic liquor, as involving a peculiar condition of the body and faculties, may be of probative value as showing that the person could or could not do the act in question.[1]

[1] The contrary broad statement in Costelo *v.* Crowell, 139 Mass. 591, 2 N. E. 698 (1885), is unquestionably unsound, and is negatived by every day's trials.

[1] 1792, Goodtitle *v.* Brahsm, 4 T. R. 498 (physical inability from old age of a testator to write as long a document as the alleged will, admitted); 1838, Ellis *v.* Short, 21 Pick. 142 (bodily strength of a person arrested, as indicating the struggles made and therefore the force necessary to detain him, admitted); 1895, Thiede *v.* Utah, 11 Utah 241, 39 Pac. 837, 139 U. S. 510, 16 Sup. 62 (that the defendant was a powerful man, admitted, the death-wound having been caused by a blow requiring strength); 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 512 (physical strength; notice necessary where the fact of his strength was not otherwise material).

[1] 1895, Wright *v.* Crawfordsville, 142 Ind. 636, 42 N. E. 227 (admitting intoxication at the time of plaintiff's injury, to show probable contributory negligence); 1872, State *v.* Horne, 9 Kan. 128 (admitting intoxication at the time of a homicide, as showing incapacity to attack, etc.); 1883, Com. *v.* Ryan, 134 Mass. 223 (confirmed habits of drunkenness and debauchery as likely to cause death, admitted); 1843, Cummings *v.* Nichols, 13 N. H. 429 (Parker, C. J.: "If intemperance tends to produce irritability of the nervous system, weaken the muscular action, and impair the mental faculties — all which is controverted by few at

How to evidence intoxication or intemperance is a different question (*post*, § 235). Intemperance, or a *habit* of drinking, is not always to be distinguished from an intoxicated condition, but its evidential use rests often on a different principle (*post*, § 96).

§ 86. **Mental Powers.** The strength or feebleness of the mental or intellectual faculties may have probative value to show that an act was or was not done which required a certain amount or quality of such ability. The commonest use of this sort of evidence is in controversies over undue influence in executing a will; for the mental condition may indicate whether on a given occasion the testator succumbed to the influence. There may, however, be other situations where similar facts would be relevant.[1] In cases of *undue influence*, the usual evidentiary question is whether a previous or subsequent mental condition may be used to show the condition at the time in question (*post*, § 230).

§ 87. **Skill, Technical Knowledge.** The possession or lack of a special skill, dexterity, or knowledge, may be of probative value to show the probable doing or not doing of an act requiring such skill or knowledge. Of the scores of daily instances in trials, uses that have called for rulings are chiefly those of knowledge of *poisons* or the like,[1] skill in *imitation of handwriting*,[2] and experience in *drafting wills* and other legal documents.[3] Often this sort of

the present day, — evidence of its existence in any particular case certainly has a tendency to show that the labor and services of the subject of it are of less value, other things being equal"); 1902, Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736 (injury to a wagon-party in a highway; the party's intoxication, and their destination to a road house for a debauch, held admissible to show probable contributory negligence); 1890, Franklin *v.* Franklin, 90 Tenn. 49, 16 S. W. 557 (that a person who was alleged to have forged the will in question had used morphine and whiskey "to such excess as to impair his mind and affect his moral character, thus rendering him capable of perpetrating crimes which in a normal state he would have avoided"; held, admissible to show general criminal irresponsibility, but not to show specific capacity to commit a forgery); 1879, Ingalls *v.* State, 48 Wis. 647, 650 (larceny by cutting a hole in a window-pane, unfastening the window, and entering and taking certain goods in a store without disturbing other goods; evidence admitted that the defendant was at the time so drunk as to be incapable of the intelligent action thus required; see quotation *supra*).

[1] Perhaps the following cases belong here: 1897, Davis *v.* State, 51 Nebr. 301, 70 N. W. 984 (train-wrecking on Thursday; "the superstition or belief of [the defendant] D. that Thursday was a lucky day for him, and that anything he attempted on that day would succeed," admitted); 1847, Kauffman *v.* Swar, 5 Pa. St. 230 (action on a lost bond; plea, payment in full; replication, fraudulent procurement of a receipt in full; "the plaintiff's case was to be supported by proof of fraudulent practice, involving a great variety of transactions on the intellect of a weak and intemperate man; and to support it, required evidence of his general habits, thoughtlessness, and extravagance in transactions to many of which the defendant was not a party").

[1] 1781, Donellan's Trial, Eng. (murder by poisoning; in the library at the house of the defendant was a volume having the pages cut at a single place; at this place, the effect of the poison in question was described); 1833, Thompson *v.* Mosely, 5 C. & P. 501 (alteration of a bill by chloride of soda; evidence received that the alleged alterer was a surgeon and acquainted with that substance).

[2] 1892, Croom *v.* Sugg, 110 N. C. 259, 14 S. E. 748 (bond said to be a forgery; "it would unquestionably have been competent to prove . . . that the plaintiff . . . was unusually clever in imitating the handwriting of others"); *Contra:* 1860, Dow's Ex'r *v.* Spenny's Ex'r, 29 Mo. 390 (skill in imitating handwriting, not admitted to show forgery).

[3] 1872, R. *v.* Castro, alias Tichborne (education and experience used as negativing the authorship of documents; see citation, *post*, § 270); 1897, Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555 (the draughtsman of a will, who attested it; his experience and character as probate judge, etc., admitted to show that he "would see to it that the will was properly executed," the compliance with legal requirements being in issue); 1901, Claflin's Will, 73 Vt. 129, 50 Atl. 815 (testator's experience and habit of drawing wills, admitted to show probable due execution; compare the similar use of a style of spelling, *post*, § 99); *Not decided:* 1898, Throckmorton *v.* Holt, 12 D. C. App. 552, 581 (forgery of a will; the

evidential fact is not to be distinguished from character on the one hand — as in the case of a physician's skill (*ante*, § 67) — and from habit on the other hand (*post*, §§ 92–98).

How the skill or knowledge is to be evidenced is another question. Whether skill in imitation of handwriting may be evidenced by particular instances is a mooted subject (*post*, § 221). Mere knowledge, as distinguished from skill, involves similar controversies (*post*, §§ 259, 266), especially in regard to particular instances of forgery and the like (*post*, § 309).

§ 88. **Means, Tools, Apparatus.** The previous possession or lack of special means, tools, apparatus, and the like, may be of probative value to show the doing or not doing of an act requiring such means.[1] Here, however, the negative fact is the one which usually supports this argument; and the more prominent significance of the affirmative fact — *e.g.* the possession of a gun or knife — will usually be its indication of a design or plan to use it for the act in question (*post*, §§ 237, 304).

§ 89. **Possession or Lack of Money as affecting the Probability of a Loan, Payment or the like.** A man destitute of property or credit cannot lend a large sum of money; his lack of the capacity to make such a loan is of some probative value to show that he did not make it:

1729, *Hales' Trial*, 17 How. St. Tr. 293; forgery of a promissory note for £4700, payable to Samuel Lee; to show that the payee could not have lent such a sum, counsel asked: "Is Lee a man of worth?" Witness: "No, sir; he is not worth £5 in the world." Counsel: "What say you to this, Mr. Hales? . . . This note, they say that you published it as a true note, how should it come to pass that such a poor person as this Lee is should indorse over such a note to you?"

1860, *Pigot*, C. B., in *Dowling* v. *Dowling*, 10 Ir. C. L. 236, 239, 244: "It has been the constant practice of judges to receive such evidence . . .; proof that a party was in such circumstances that he *could* not has been received as evidence that he *did* not pay the money in question. . . . It is said that evidence of this kind will be a surprise upon the parties; and so it sometimes may be. . . . [But] few cases can be imagined in which a party may not be surprised by unexpected evidence produced by his adversary.

"legal attainments and literary culture and style of the testator," offered to show a certain will not to have been written by him; not decided). *Contra:* 1901, Throckmorton v. Holt, 180 U. S. 552, 21 Sup. 474 (will of a Judge-Advocate General of the U. S.; opinion as to its genuineness by a witness familiar with his style of composition, that the purporting will was not genuinely his, excluded; unsound; no authority cited).

[1] 1792, R. v. Lambe, Peake N. P. 141 (forgery of a bank-note by tracing with a camel-hair pencil; the possession of drawings in ink of the design on a bank-note admitted); 1808, R. v. Ball, 1 Camp. 324 (uttering a forged bank-note; possession of appropriate tools, admitted); 1839, Griffits v. Payne, 11 A. & E. 131 (plea of forgery to an action against the acceptor of a bill; evidence was rejected that the plaintiff had been in possession of a mass of bills among which were three with the defendant's forged acceptance, and that these had been circulated; this is unsound); 1895, Thomas v. State, 107 Ala. 13, 18 So. 229 (previous possession of a jug which was used to saturate with oil the place set on fire, admitted); 1874, People v. Brotherton, 47 Cal. 402 (possession of a material which would remove ink from checks similar to the one alleged to have been altered by defendant, admitted); 1870, Com. v. Choate, 105 Mass. 451 (arson; the prior possession of a peculiar kind of apparatus adapted for setting the fire in question, as showing "the requisite skill, materials, tools, and opportunity," admitted); 1889, Miller v. S. P. Co., 118 N. Y. 199, 23 N. E. 462 (to show that the defendant had the means of preventing an accident caused by the giving way of a stick of wood used as the toggle for a rope, the fact was admitted that thereafter a capstan bar near by was used and stood the strain); 1895, Nicholas v. Com., 91 Va. 741, 21 S. E. 364 (admitting the possession of an auger fitting a hole in the bottom of a boat which the defendant was charged with sinking).

. . . There would be little safety against unfounded demands supported by reckless swearing if circumstances of this kind, not too remote, could not be submitted to the judgment and common sense of a jury."

Such a *lack* of money or other resources is therefore relevant to show the improbability of the making of such a loan or payment.[1] It is possible that there are limits to this use of the evidence; but the circumstances of each case will suggest them, and no general exception seems to have been laid down.[2] As to the *time* of the lack of money, it may of course be so far anterior as to have no significance to the evidence; but the mere fact that the impecunious condition is anterior in time does not render it inadmissible.[3]

[1] *Eng.:* 1762, Lane *v.* Dighton, 1 Ambl. 409, 413 (evidence received that "before that time he was a poor person, and not able to pay for them [estates] out of his own money"); 1774, Mayor of Hull *v.* Horner, Cowp. 102, 109 (Lord Mansfield, C. J.; payment may be disproved "by showing the party not to have been in circumstances to pay"); 1805, Lench *v.* Lench, 10 Ves. Jr. 511, 518; 1808, Williams *v.* Gorges, 1 Camp. 217; 1812, Fladong *v.* Winter, 19 Ves. Jr. 196; 1837, Grenfell *v.* Girdlestone, 2 Y. & C. 662, 681; *U. S.:* 1866, Stebbins *v.* Miller, 12 All. 591, 594, 597; 1867, Winchester *v.* Charter, 97 Mass. 140, 143; 1868, Atwood *v.* Scott, 99 id. 177; 1871, Woodward *v.* Leavitt, 107 id. 453, 458; 1894, Bliss *v.* Johnson, 162 id. 323; 1894, Rosenthal *v.* Bishop, 98 Mich. 527, 531, 57 N. W. 573 (an $1100 order for whiskey by a druggist; the limited business of the druggist, considered, as making it unlikely); 1851, Demeritt *v.* Miles, 22 N. H. 523, 528; 1855, Wiggin *v.* Plumer, 31 id. 251, 268; 1880, Pontius *v.* People, 82 N. Y. 339, 349 (lack of means admitted to disprove the lending of $4000); 1852, Strimpfler *v.* Roberts, 18 Pa. 283, 296 (resulting trust in lands purchased in the name of a clerk; to show that the clerk did not buy them for himself, evidence was received of his inability to pay the large sums actually paid by him); 1861, Stauffer *v.* Young, 39 id. 455, 461, 462 (pecuniary inability to make an alleged loan, admitted); 1896, Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142 (defendant's high financial standing and plaintiff's small means, to show that defendant would probably not have given an alleged large note to plaintiff, admitted); 1884, Nash *v.* Hoxie, 59 Wis. 384, 386, 18 N. W. 408 (contract by the defendant to deliver logs to be sawed by the plaintiff; to disprove the making of the contract, the defendant's lack of logs such as alleged was rejected; this is sound; compare § 392, *post*); 1899, Williams *v.* Williams, 102 id. 246, 78 N. W. 419 (loan; the alleged lender's lack of means and the borrower's possession of ample means, admitted in disproof). *Contra*, but unsound: 1902, People *v.* Lapique, 136 Cal. 503, 69 Pac. 226, *semble* (forgery of a note in M.'s name; M.'s pecuniary condition, held inadmissible); 1861, Clark *v.* Fletcher, 1 All. 53, 56 (action for work done in tanning; evidence by the defendant of the plaintiff's insolvency, not admitted to show that the plaintiff had no teams with which he could have done the work; but evidence of the plaintiff's prior sale of all his teams was admitted for that purpose); 1901, Perkins *v.* Himmes, 200 Pa. 235, 49 Atl. 934 (insolvency of payee, and possession of funds by alleged maker, not admitted on an issue of execution of notes).

For lack of money as a *motive for crime*, see *post*, § 392.

[2] 1870, Sherwood, J., in Woods *v.* Gummert, 67 Pa. 137: ("Surely it is not to be inferred from this that wherever a plaintiff brings an action for goods sold and delivered, or money lent and advanced, or paid out, laid out, and expended, that it is competent to the defendant to give evidence of the pecuniary inability of the plaintiff, and thus raise an issue entirely collateral. What legitimate inference in such case can be drawn from the insolvency of the plaintiff? Men heavily indebted, and even keeping their creditors at bay, often have large transactions in borrowing and lending, and are possessed of considerable sums of money"; but he intimates the propriety of such evidence in some cases); 1844, Rowe *v.* Polkinghorne, 1 C. & K. 618 (smallness of income, to disprove a large purchase, excluded; but received to show that the wedding dresses supplied to the alleged debtor's daughter were more likely to have been supplied on the credit of the daughter's future husband than on the defendant's credit). These instances, however, involve rather the question of motive (*post*, § 392).

[3] 1860, Pigot, C. B., in Dowling *v.* Dowling, 10 Ir. C. L. 236, 243 ("It is said that this will open a wide issue for the jury as to time. Unquestionably it will; but it must be left to the discretion of the judge to take care that the evidence shall be confined within reasonable limits. Instances might be put in which it would be mere folly to give the slightest weight to such evidence, or indeed to admit it at all. . . . In the case of a merchant in extensive trade, no one would think it material to prove that thirty years ago he acted as a porter, in order to negative his ability to pay a debt or make a loan a year before the trial"). *Accord:* 1860, Dowling *v.* Dowling, *supra* (inability seven years before, with proof of intervening condition, admitted); 1851, Demeritt *v.* Miles, 22 N. H. 523, 528 (lack of money fifteen months before, admitted).

This must be distinguished from the general question how far *anterior possession* is admissible to show present possession (*post*, § 379).

The *possession* of money will usually not be admissible as making probable the payment or loaning of money.[4] But where the lack of money is alleged, as showing probable non-payment, this lack may be denied by evidence to the contrary, *i. e.* by proving possession.[5] Moreover, where the *presumption* of payment from *lapse of time* is sought to be raised, one way of supporting it is by showing that there were no obstacles in the interval to the collection of the claim, and, in particular, that the debtor was solvent and possessed of assets sufficient to satisfy the debt; this, however, is a different use of the evidence (*post*, §§ 224, 2517).

With what facts — *e. g.* the *non-payment of a debt* — this insolvency or destitution is to be evidenced, is a different question (*post*, § 224). The *sudden possession* of money, after the date of a theft, by one who had no money before it, as indicating an unlawful acquisition, also raises a different question (*post*, § 154). Still other distinct inquiries are whether *poverty* should be considered, as indicating a *motive for crime* (*post*, § 392); and whether there is to be a *presumption of payment by lapse of time* (*post*, § 2517).

Sub-topic C: HABIT OR CUSTOM.

§ 92. **General Principle.** Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt. Every day's experience and reasoning make it clear enough:

1861, *Flandrau, J.*, in *Walker* v. *Barron*, 6 Minn. 508, 512: "[Customs] may, like any other facts or circumstances, be shown when their existence will increase or diminish the probabilities of an act having been done or not done, which act is the subject of contest."

1873, *Sargent, C. J.*, in *State* v. *Railroad*, 52 N. H. 528, 532: "It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, [according] as he is in the habit of doing or not doing it."

1887, *Sherwood, J.*, in *Mathias* v. *O'Neill*, 94 Mo. 527, 6 S. W. 253 (admitting evidence of a bookkeeper's custom of handing over collateral notes to the teller, as indicating that it was done in this instance): "It is really immaterial, under the authorities cited, whether he was able to do more than to verify his entries and prove his invariable custom. These things being proven, the presumption arises therefrom that the usual course of business was pursued in this particular instance. Every one is presumed to govern himself by the rules of right reason, and consequently that he acquits himself of his engagement and duty. . . . Whenever it is established that one act is the usual concomitant of another, the latter being proved, the former will be presumed; for this is in accord with the experience of common life. It is simply the process of ascertaining one fact from the existence of another."

There is, however, much room for difference of opinion in concrete cases, owing chiefly to the indefiniteness of the notion of habit or custom. If we

[4] 1868, Atwood v. Scott, 99 Mass. 177 (because "experience is not sufficiently uniform to raise a presumption that one who has the means of paying a debt will actually pay it"); 1876, Higgins v. Andrews, 121 Mass. 293.

[5] 1876, Higgins v. Andrews, 121 Mass. 293; 1851, Wiggin v. Plumer, 31 N. H. 251, 269.

conceive it as involving an invariable regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity. Hence, it is easy to see why in a given instance something that may be loosely called habit or custom should be rejected, because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most instances. Whether or not such sufficient regularity exists must depend largely on the circumstances of each case.

There are two other difficulties that arise in connection with such evidence, both of them, however, depending on other doctrines of Evidence. (1) The idea of habit is sometimes difficult to distinguish from that of *Character*, — for example, where a negligent habit is charged; and if it is interpreted in the latter aspect, it may of course become obnoxious to the rule against the use of a party's character in civil cases (*ante*, § 64). (2) Assuming the relevancy of a Habit or Custom, the proof of it may often have to be made by marshalling various evidential instances as the basis of an inference to a habit or custom; this question — *how to evidence Habit or Custom* — is also a different one, dealt with elsewhere (*post*, §§ 370, 377).

§ 93. **Miscellaneous Instances.** Subject to the foregoing distinctions, the admissibility of a person's habit, usage, or custom as evidence that he did or did not do the act in question may be said to be universally conceded. Yet the distinctions named, as well as the individual circumstances going to affect the regularity of the habit, will from time to time affect its exclusion. Courts vary, moreover, in their liberality of application of the principle.[1] It

[1] *Eng.*: 1795, Lucas *v.* Novosilleski, 1 Esp. 296 (to prove payment of wages, evidence was offered of the defendant's custom of paying the workmen every Saturday night, and of the plaintiff's presence waiting with the rest; admitted, "as he worked under the same terms with the other workmen"); 1811, Evans *v.* Birch, 3 Camp. 10 (action against a milk-carrier for moneys not turned over to his employer; the regular course of business in paying over the receipts daily, admitted as showing payment); 1829, Sellen *v.* Norman, 4 C. & P. 81, note (course of paying wages every Saturday night, admissible); *Ala.*: 1877, Fincher *v.* State, 58 Ala. 221 ("The place at which F. [the accused] kept his gun and the habits of the family as to rising, when Mrs. D. [the witness] lived there [six months before], have a very remote bearing, if any, on the fact of where the gun was on the night preceding and the morning of the murder, and on the fact of whether the State's witnesses, members of the family, were up at a particular hour that morning," and were rejected); 1902, Hertsell *v.* Masterson, 132 Ill. 275, 31 So. 618 (defendant's custom to employ his clerks by the year, not admitted on the question whether the plaintiff's employment was by the month or the year); *Ga.*: 1895, Grantham *v.* State, 95 Ga. 459, 22 S. E. 281 (habit of gambling with X, as indicating that goods of X were obtained from him in gaming and not by burglary, admitted; compare § 85, *ante*); 1897, White *v.* State, 100 id. 659, 28 S. E. 423 (habit of carrying a pistol with one charge only, admitted to show that it was so carried till the moment of killing, and thus that it was not fully loaded and then partly fired); 1898, Oliver *v.* State, 106 id. 142, 32 S. E. 18 (carrying concealed weapon; habit of carrying it openly, not admitted for defendant); *Ill.*: 1865, American Express Co. *v.* Haggard, 37 Ill. 465, 469, 472 (non-delivery of a package; custom of the plaintiff's drivers in delivering, admitted; also, in rebuttal, past thieving habits of the particular driver); 1901, Sorenson *v.* Sorenson, 189 id. 179, 59 N. E. 555 (habitual partisan affiliations of a voter, admitted to evidence the tenor of his vote); *Ind.*: 1870, Foltz *v.* State, 33 Ind. 215 (business habits, admitted to evidence the selling of cigars); *Ia.*: 1861, Smith *v.* Clark, 12 Ia. 32 (whether a parol acceptance of a draft had been made; the defendant's custom to accept in writing only, admitted); 1874, Beiderbecke *v.* Transp. Co., 39 id. 500 (whether goods were to be delivered at D.; previous habit of the parties as to delivering goods, admitted); 1888, Riordan *v.* Guggerty, 74 id. 693, 39 N. W. 107 (the destruction of a telegram-original, evidenced by a custom of the office to destroy all such papers after six months); *Kan.*: 1899, Missouri P. R.

may be noted here, however, that the prohibitions of the *opinion rule* about testimony to usage or custom (*post*, § 1955), and as to the *parol evidence rule* concerning usage (*post*, §§ 2440, 2464), are not here involved in any way.

§ 94. **Course of Dealing in Sales and Agencies.** Where a transaction of selling, or of authorizing an agent to sell, has taken the form of a usual and fixed course of business between two persons, this habit is admissible to indicate the probable tenor of a particular transaction; the circumstances

Co. v. Moffatt, 60 Kan. 113, 55 Pac. 837 (former careful custom of deceased in approaching a railroad-crossing, admitted); *Md.*: 1837, Pocock v. Hendricks, 8 G. & J. 421, 427, 433 (whether a conveyance had been executed absolutely or conditionally, and whether it had been read over to the illiterate grantor; the habit of the draughtsman, a magistrate, to ask grantors whether they wished an absolute or a conditional conveyance, and to read over documents to the grantor before execution, excluded); *Ky.*: 1899, Tunks v. Vincent, — Ky. —, 51 S. W. 622 (a voter's regular party, admitted to show his vote); *Mass.*: 1901, Perlstein v. Express Co., 177 Mass. 530, 59 N. E. 194 (prescribed routes for defendant's drivers, admitted to show that the presence of one driver at a certain place was not in the course of duty); *Mich.*: 1877, Hamilton v. Billingsley, 37 Mich. 109 (to show that H. did not promise to go to a place on Sunday, the fact that he was a strict observer of the Sabbath was rejected); *Mo.*: 1862, Goodfellow's Exr's v. Meegan, 32 Mo. 280, 281, 284 (that it was not the custom for pasturers to become responsible for cattle, excluded); *Nebr.*: 1894, Lincoln V. P. & P. B. Co. v. Buckner, 39 Nebr. 83, 85, 57 N. W. 749 (injury from a pile of ashes; habitual deposit of ashes at that place, admitted to show defendant to be the source); 1898, Gate City Abstract Co. v. Post, 55 Nebr. 742, 76 N. W. 471 (to show the indexing of a judgment on the day of filing, the clerk's uniform custom received); 1898, Barr v. Post, 56 id. 698, 77 N. W. 123, *semble* (that "he never used profane language," admissible, to show non-user on a particular occasion); *N. H.*: 1877, Hall v. Brown, 58 N. H. 93 (injury at a highway blockaded by a train; to disprove the blockade, evidence was admitted of a practice of managing trains so as not to obstruct the highway); 1877, State v. Shaw, ib. 73 (a course of liquor-sales in a preceding month, admitted to show a specific sale; "where there is a question whether a particular act was done, the existence of any course of business according to which it naturally would have been done is a relevant fact"); 1900, Smith v. R. Co., 70 id. 53, 47 Atl. 290 (death at a crossing; deceased's "uniform habit of slackening the speed of his horse" at the crossing, admitted to show "that he did so on his fatal trip"); 1903, Stone v. R. Co., — id. —, 55 Atl. 359 (habitual speed of a particular train at a certain point, admitted); *N. Y.*: 1864, Dubois v. Baker, 30 N. Y. 369 (habit of carrying an inkstand, not admitted to show that it was in his possession on a certain day); *N. C.*: 1860, Ashe v. De Rosset, 8 Jones L. 240 (whether a receipt for rice was given by a miller; his habit to give a receipt, admitted); 1868, Vaughan v. R. Co., 63 N. C. 11 (whether goods had been received by a railroad company; its habit to weigh and mark goods when received, admitted, as showing that they would have been found marked); 1899, White v. Tripp, 125 id. 523, 34 S. E. 686 (whether a promise was to pay the debt of another; "usage and method of keeping accounts in such cases," admitted as corroborative); *Or.*: 1900, Wade v. R. Co., 36 Or. 311, 59 Pac. 875 (whether speed of cars on a particular occasion may be evidenced by customary speed; not decided); *Pa.*: 1850, Schoneman v. Fegley, 14 Pa. St. 376, 380 (whether a receipt was given for a payment; the person's usual practice of giving receipts, excluded, where the witness had no memory as to the specific act in question; explained in Meighen v. Bank, *infra*, as based on the witness' failure to give direct testimony to which the habit could be corroborative); 1855, Meighen v. Bank, 25 id. 288, 291 (whether a deposit was received; the habit of the cashier to enter deposits daily, and the absence of an entry, admitted to show no receipt of a claimed deposit, as corroborating the direct testimony; Schoneman v. Fegley explained); 1898, Wheeler v. Ahlers, 189 id. 138, 42 Atl. 40 (alteration of note by maker after indorsement; a card in the maker's writing, showing a practice in changing figures, admitted); 1898, Morris v. Gulley, 188 id. 534, 41 Atl. 731 (defendant's printed form of lease, not admitted to show terms of a particular lost lease); *Tenn.*: 1833, Leiper v. Erwin, 5 Yerg. 97 (that a creditor was habitually prompt in collecting, admitted to evidence the payment of a debt, other circumstances corroborating); 1881, Beuder v. Montgomery, 8 Lea 591 (similar); *Tex.*: 1896, McCray v. R. Co., 89 Tex. 168, 34 S. W. 95 (the duties of brakemen generally, inadmissible without showing that the same practice prevailed on all roads); *U. S.*: 1822, Bouldin v. Massie's Heirs, 7 Wheat. 153 (habit of never recording without a document of transfer, admitted); *Vt.*: 1867, Hine v. Pomeroy, 24 Vt. 211, 214, 219 (whether an attorney had directed a process-server to take N. and M. as receiptors; his uniform course of business to give no instructions as to receiptors, admitted as corroborative); 1901, Scott v. Bailey, 73 id. 49, 50 Atl. 557 (issue of payment; defendant's habit to pay the plaintiff personally, excluded).

For other examples, which involve the use of *particular instances* to evidence a habit or general plan, see *post*, §§ 370, 377. For the use of particular instances in *criminal cases*, see *post*, §§ 300–367.

will determine whether in a given case the relations have reached a sufficient degree of fixity to become relevant.[1] The usual doubt here, however, arises in the attempt to evidence this fixity by particular instances of the repetition of the transaction (*post*, § 371, 377).

§ 95. **Course of the Mail and Telegraph.** The fixed methods and systematic operation of the *Government's postal service* have been long conceded to be evidence of the due delivery to the addressee of mail matter placed for that purpose in the custody of the authorities. The conditions are that the mail matter shall appear to have conformed to the chief regulations of the service, namely, that it shall have been sufficiently prepaid in stamps, correctly addressed, and placed in the appropriate receptacle.[1] The habit of a

[1] 1866, Howard *v.* Shéward, L. R. 2 C. P. 148 (whether the defendant's servant, who had warranted a horse sold to the plaintiff, had authority to do so was disputed; and to show the probable non-existence of it, evidence was offered of a usage among horse-dealers not to warrant under the circumstances; the Court found that there was an ostensible authority, and therefore, per Willes, J., the usage "if not objectionable on the ground of remoteness, which I think it was, after all only amounted to a tacit direction from the principal to his agent not to warrant on this particular occasion," and was therefore legally ineffective); 1896, Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998 ("The jury, in the case at bar, were to determine whether it was probable that the plaintiff, after charging all the materials furnished on the order of Simeon Plumb for the construction of three houses in Bridgeport, to the defendant, as the principal for whom Plumb acted, and for whom it was not denied that he had authority to act, proceeded to furnish like materials for the construction of five other houses in Bridgeport on the order of Plumb, and to charge them to the defendant, when he really gave credit to Plumb, and dealt with him as the only party to the transaction. . . . If he has been selling to him the same line of goods previously, as an agent for a responsible principal, and claims that the sales in question were made in the same way and under the same circumstances, any evidence which renders a change of credit improbable is relevant to an inquiry as to whether such a change was made"); 1896, Hamilton *v.* Hastings, 172 Pa. 308, 34 Atl. 43 (to show the parties included in a sale, evidence of the state of accounts and of the former course of dealings was admitted "as tending to make the proposition in controversy more or less probable"); 1863, Schuchardt *v.* Allens, 1 Wall. 359, 363, 368 (false warranty, alleging the defendant warranted an article as fit to be used in the plaintiff's business; a broker was allowed to testify what kind of the article "he had been in the habit of selling the plaintiffs").

[1] This is universally conceded, and the strength of the evidence is even raised to a presumption (*post*, § 2534); the following list of citations does not attempt to be complete, because the decisions frequently involve also the matter of substantive law mentioned in note 6, *infra*: 1795, Saunderson *v.* Judge, 2 H. Bl. 509 (notice to an indorser; on objection that "it was not proved that the defendant received the letter which was put into the post-office," held that "the sending the letter by the post was sufficient evidence of notice"); 1836, Shipley *v.* Todhunter, 7 C. & P. 680, 686; 1834, Warren *v.* Warren, 1 C. M. & R. 250, 252 (Parke, B.: "If a letter is sent by the post, it is *prima facie* proof, until the contrary be proved, that the party to whom it is addressed received it in due course"); Cal. C. C. P. 1872, § 1963 (24); 1892, Young *v.* Clapp, 147 Ill. 176, 190, 35 N. E. 372; 1896, Ashley Wire Co. *v.* Ill. Steel Co., 164 id. 149, 158, 45 N. E. 410; 1890, Pennypacker *v.* Ins. Co., 80 Ia. 56, 45 N. W. 408; 1896, Goodwin *v.* Assur. Soc., 97 Id. 226, 66 N. W. 157; 1899, Watson *v.* Richardson, 110 id. 673, 80 N. W. 407; 1885, Sullivan *v.* Knykendall, 82 Ky. 483; 1896, Chase *v.* Surry, 88 Me. 468, 34 Atl. 270; 1901, Bostain *v.* Separator Co., 92 Md. 483, 48 Atl. 75; 1810, Munn *v.* Baldwin, 6 Mass. 316; 1870, Huntley *v.* Whittier, 105 id. 391 (distinguishing this rule and that of constructive notice, or due diligence, for commercial paper); 1895, McDowell *v.* Ins. Co., 164 id. 444, 41 N. E. 665; 1901, Lowry *v.* Saginaw S. P. Co., 128 Mich. 216, 87 N. W. 194; 1893, Dade *v.* Ins. Co., 54 Minn. 336, 56 N. W. 48 (proofs of loss); 1868, Phillips *v.* Scott, 43 Mo. 86, 89; 1899, National Mas. A. Ass'n *v.* Burr, 57 Nebr. 437, 77 N. W. 1098; 1897, State *v.* Howell, 61 N. J. L. 142, 38 Atl. 748; N. D. St. 1897, c. 110, § 3 (24); Or. C. C. P. 1892, § 776 (24); 1893, Jensen *v.* McCorkell, 154 Pa. 323, 325, 26 Atl. 366; 1857, Russell *v.* Buckley, 4 R. I. 525 (even for letters containing money); 1876, U. S. *v.* Babcock, 3 Dill. C. C. 571; 1883, Rosenthal *v.* Walker, 111 U. S. 185, 193, 4 Sup. 382; 1897, Dunlop *v.* U. S., 165 id. 486, 17 Sup. 375 (the course of delivery in the post-office, admitted as indicating that certain papers had come through the mail); 1898, Brown *v.* Frat. A. Assoc., 18 Utah 265, 55 Pac. 63; 1844, Oaks *v.* Weller, 16 Vt. 63, 70; 1897, McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375; 1899, Small *v.* Prentice, 102 id. 256, 78 N. W. 415.

The following early ruling seems to be the only one to the contrary: 1846, Allen *v.* Blunt, 2 Woodh. & Man. 121, 131 (mailing said to be

private person or commercial house, doing systematically a similar service, is equally relevant; the principle has been applied to an *express carrier's* delivery of packages[2] and to a *telegraph company's* transmission of telegrams.[3] The same application of the principle would admit a private person's usual course of business to evidence *any act of delivery or transmission*, such as the sending of a notice, or the placing of letters in the mail-box; the only differences are, first, that the fact of the governmental system will be judicially noticed without further evidence (*post*, § 2575), and secondly, that the course of business of an individual may under the circumstances not appear sufficiently fixed to be of probative value.[4] A consequence of the combination of these two applications of the principle is that, upon proper evidence of the habit of an individual commercial house as to addressing and mailing, the mere writing of a letter in the usual course of business may be evidence of its subsequent receipt by the addressee.[5]

Certain other principles must here be distinguished. (1) By the law of com-

not sufficient; it would be "a presumption contradicted daily by the immense dead-letter collections never received by correspondents").

[2] Cases cited *ante*, § 93, *passim*.

[3] *Can.*: N. Br. St. 1881, c. 14, § 2 (the delivery and receipt of a message at a telegraph-office for transmission shall be evidence of its transmission and its receipt by the addressee); 1888, White *v.* Flemming, 20 N. Sc. 335 (Com. *v.* Jeffries, *infra*, followed); *U. S.*: 1896, Eppinger *v.* Scott, 112 Cal. 369, 44 Pac. 723; 1863, Com. *v.* Jeffries, 7 All. 548, 563 (transmission by the operator in Boston of a message, relevant to show its receipt by the addressee in New York); 1897, Perry *v.* Bank, 53 Nebr. 89, 78 N. W. 538; 1885, Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 452, 3 N. E. 485; 1899, Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942.

The course of business in *telephone* transmission is equally relevant; but this is complicated with other principles, and is dealt with *post*, § 2155.

[4] 1815, Hetherington *v.* Kemp, 4 Camp. 193 (to show the sending of a letter, the usage of the counting-house in placing the letters on a table, and the testimony of the partner as to his habit of posting them, admissible); 1837, Hart *v.* Alexander, 7 C. & P. 746, 751 (whether a circular announcing a dissolution of partnership was sent; "the practice of the house to send circulars on every change in the firm," admitted; Lord Abinger, C. B.: "That does not show that a particular person received a circular, except upon the presumption that a jury may make upon the general habit"); 1866, Trabue *v.* Sayre, 1 Bush 129, 131 (to prove the writing and mailing of a notice, the habits of a notary and of the respective bank-officers having the duty of preparing and mailing notices were received); 1862, Union Bank *v.* Stone, 50 Me. 595, 597, 601 (the "usual course of proceeding and customary habits of business" of a notary and his clerk, admitted to show the giving of notice); 1831, Flack *v.* Green, 3 G. & J. 474 (to prove the forwarding of a notice, the general course of business of the firm to forward such notices, excluded); 1848, Bell *v.* Bank, 7 Gill 216, 227 (to prove the mailing of a notice, the invariable habit of the bank-messenger charged with that duty to mail such notices, admitted; explaining the ruling in Flack *v.* Green as based on the indefiniteness of the proof of the habit); 1859, Brailsford *v.* Williams, 15 Md. 150, 152, 159 (to prove the mailing of a notice, the custom of the firm to leave letters on the desk for the clerk to mail, held not sufficient; the clerk whose duty it was to mail the letters should have been called); 1837, Dana *v.* Kemble, 19 Pick. 112, 114 (letter left at a hotel, where the usage was regularly to distribute letters so left; held sufficient); 1903, Dowagiac M. Co. *v.* Watson, — Minn. —, 95 N. W. 884 (business custom of the plaintiff to mail notices of acceptance of contracts, excluded on the facts); 1810, Miller *v.* Hackley, 5 Johns. 375, 384 (the habit of a notary as to giving notice on the same day as demand, admitted to show that notice was given); 1826, Thallheimer *v.* Brinckerhoff, 6 Cow. 101 (whether a letter was sent; the clerk's invariable custom to mail letters as soon as copied, admitted); 1891, Beakes *v.* Da Cunha, 126 N. Y. 293, 27 N. E. 251 (whether notices were mailed on the 20th of the month; the person's habit to be at home on the 20th of each month for the purpose of transacting the business of that kind, admitted); 1825, Coyle *v.* Gozzler, 2 Cr. C. C. 625 (to show the making and mailing of a notice on a specified day, the notary's habit of giving notice on the day of making the demand was received); 1876, U. S. *v.* Babcock, 3 Dillon 571, 575 (telegrams delivered to a doorkeeper accustomed to distribute despatches to defendant's office, admitted).

[5] 1879, Trotter *v.* Maclean, L. R. 13 Ch. D. 574, 580; 1897, McKay *v.* Myers, 168 Mass. 312, 47 N. E. 98 (usual course of business, as indicating the mailing of a letter of which a copy had been kept).

mercial paper, actual receipt of *notice of dishonor* is, in certain conditions, unnecessary; the payee's due diligence (or, as sometimes improperly termed, the indorsee's constructive notice) suffices; hence a rule of commercial paper that the mere fact of seasonably mailing the notice suffices in law.[6] Here the fact of mailing is not used evidentially at all; for the receipt of the notice is not desired to be proved. (2) The receipt of a letter or telegram through the mails or telegraph-office may suffice as evidence of the *genuineness* of the letter or telegram, as being really sent by the person purporting to be its author; this rests on peculiar considerations and involves the principle of Authentication (*post*, §§ 2153, 2154). (3) When a letter is received through the mail, and the receiver desires to establish the time and place of posting, the *postmark* on the envelope is evidential. This involves two inquiries, first, whether the postmark may be assumed to be genuine, under the principles of Authentication (*post*, § 2152), and secondly, whether, under the exception to the Hearsay rule, the postmark, if genuine, can be treated as an official certificate of the act of marking and therefore be used as testimony without calling the postmaster himself to the stand (*post*, § 1674).

§ 96. **Habit of Intemperance.** In general, it would seem that, while a habit or fixed principle of abstaining from liquor would have value to show probable sobriety on a given occasion, yet "habits" of intemperance or intoxication could not be used for the contrary purpose; for the term "habit" here signifies thereby frequent indulgences, and not constant or periodical intoxication. If indeed a steady practice of intoxication can be shown, it would be equally probative. By reason of this looseness of meaning in the word "habit," the judicial applications of the principle are by no means uniform.[1] Distinguish the evidential use (*ante*, § 85) of a condition of intoxi-

[6] 1846, Woodcock *v.* Houldsworth, 16 M. & W. 124 (Parke, B.: "He has done all that was usual and necessary; and he does not guarantee the certainty or correctness of the post-office delivery"); 1848, Dunlop *v.* Higgins, 1 H. L. C. 381, 398; 1821, Hartford Bank *v.* Stedman, 3 Conn. 489; 1858, Loud *v.* Merrill, 45 Me. 516, 520.

[1] 1849, Alcock *v.* Assur. Co., 13 Q. B. 292 (the question was whether a stranded ship might have been got off without total loss if the captain had exercised good judgment at the time; evidence was received of his previous "drunken habits," as "tending to show that he probably was drunk, or that, in consequence of former drunkenness, his perceptions were imperfect"; this involves both the present use and that of § 85, *ante*); 1894, Cosgrova *v.* Pitman, 103 Cal. 268, 273, 37 Pac. 232 (habit of intemperance, admissible to show intoxication at a given time); 1903, Chesapeake & O. R. Co. *v.* Riddle, — Ky. —, 72 S. W. 22 (whether the injured person was intoxicated at the time; testimony "that he was a perfectly sober man, and that he [the witness] had never seen him take a drink in his life," excluded; this is not common sense); 1898, Sullivan *v.* Sullivan, 92 Me. 84, 42 Atl. 220 (divorce for habits of intoxication; defendant's reputation for sobriety before marriage, not admitted as tending to disprove the charge; treated as a question of character); 1862, Heland *v.* Allen, 3 All. 407, 408 (habits of sobriety or general character as a temperate man, not admissible to show that a plaintiff was not drunk at a given time); 1875, McCarty *v.* Leary, 118 Mass. 509, 510 (same); 1898, Edwards *v.* Worcester, 172 id. 104, 51 N. E. 447 (plaintiff's habits of sobriety, as tending to negative his intoxication, excluded); 1897, Kingston *v.* R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230 (whether the plaintiff was drunk at the time of the accident; previous habits of intoxication excluded); 1896, Lane *v.* R. Co., 132 Mo. 4, 33 S. W. 645 (Sherwood, J., delivering the opinion, but no other judges concurring on this point: "the habit of intoxication, when once proven to exist, is presumed to continue, and raises, in the case of an accident, a presumption of negligence, which stands until rebutted. . . . If evidence of the intemperate habits of a conductor of a railroad company may be gone into, in order to charge his employer with his negligence in case of an accident, though no intoxication be shown on that particular occasion, it is difficult to see why, in fairness and upon principle, the like rule should not prevail, and similar

cated incapacity as indicating that a certain act was or was not done while in that condition.

§ 97. **Habit of Negligence.** Negligence is, in one aspect, the not-doing of a particular act; but in another and more correct aspect, it is the doing of one act in a manner which amounts to negligence in that some other act is omitted which ought to have accompanied it. Regarded evidentially, the question is, Can there be a habit of not-doing? Undoubtedly, — at least so far as this signifies a habit of doing a different or the contrary thing; *e.g.* A habitually goes to his work through X street; therefore he habitually does not go through Y street. But this is not a final answer to the real doubt implied in the question, *i.e.* Can there be a habit of non-acting, of omitting a thing which might have been or ought to have been done? It would seem plain that there can be; and in this sense there is no reason why such a habit should not be used as evidential:

1873, *Sargent*, C. J., in *State* v. *M. & L. Railroad*, 52 N. H. 528, 532, 549 (indictment for negligently running over a person at a crossing; one of the issues was whether the bell had been rung and the whistle sounded; evidence was received that the same train, run by the same engineer and fireman, had sometimes passed the same crossing during the preceding year without those precautions; the testimony as to the actual doing or omitting on this occasion being in conflict): "It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done or omitted to be done without any particular intent or purpose to injure any one; it cannot apply to acts that are done intentionally, wilfully, or maliciously, because such acts are done with a specific object in view, and they are performed, not by force of habit, but with a definite purpose. . . . But when the question is, did these servants of the road, without any intention whatever and through mere negligence or carelessness, omit to give these signals on that occasion, we think the inquiry was properly made as to what they

evidence be admitted, and similar consequences follow, where a railroad company pleads the contributory negligence of one injured by its train"); 1871, Warner *v.* R. Co., 44 N. Y. 465 (previous habits of intoxication, not admitted to show intoxication at a particular time); 1874, Cleghorn *v.* R. Co., 56 id. 44, 46 (same); 1868, Pennsylvania R. Co. *v.* Books, 57 Pa. 339, 343 (evidence admitted of the intemperate habits of the conductor of the defendant's train; "it would cast upon the defendants the burthen of proving that he was not intoxicated at the time, and had used due care"); 1876, Huntington B. T. M. R. Co. *v.* Decker, 82 Pa. 119, 124 (superintendent's intemperate habits excluded, because he was not the cause of the injury; but the conductor's intemperate habits admitted, as "raising a presumption of negligence"); 1866, Thompson *v.* Bowie, 4 Wall. 467, 471 (action on notes; defence, that they were given for gambling debts; the fact that the defendant when drunk had a habit of gambling, excluded, though the notes were in the handwriting of a professional gambler and were payable to the keeper of a gambling house, and although the opinion, by Davis, J., concedes that "it is highly probable that the notes were executed by him for a gaming consideration"; this is a discreditable decision; Grier, J., diss.); 1896, Baltimore & O. R. Co. *v.* Henthorne, 19 C. C. A. 623, 73 Fed. 634 (intemperate habits of an engineer, not received to show that he was drunk at the time in question); 1895, Smith's Ex'r *v.* Smith, 67 Vt. 443, 32 Atl. 256 (habits of intoxication, admitted to show intoxication at a given time, a certain amount of other evidence being first offered). Some of the above rulings, it will be observed, are based upon a confusion of the present principle with that of the character rule (*ante*, § 64).

Distinguish the fact of intemperance as *constituting incompetence*, under the fellow-servant rule or under the rule for exemplary damages; 1872, Chicago & A. R. Co. *v.* Sullivan, 63 Ill. 293, 297 (an employee's intemperate habits, known to the employer, used as fixing his liability for the employee's incompetence); 1881, Michigan C. R. Co. *v.* Gilbert, 46 Mich. 176, 182, 9 N. W. 243 (same); 1885, Hilts *v.* R. Co., 55 id. 437, 444, 21 N. W. 878 (same); 1874, Cleghorn *v.* R. Co., 56 N. Y. 44, 46 (admissible, if known to the employer, as ground for exemplary damages).

had done before in that regard, and whether they had or had not grown habitually negligent of the requirements of the road in that particular. In this view of the case, we think the evidence was admissible, — not as evidence of character, not as evidence of fitness or unfitness, but simply as having some tendency to show that on this particular occasion these agents were more probably negligent and careless because they had before frequently neglected the same duty with impunity and had thus become habitually negligent in that regard."

The real difficulties here seem to be two: Is it possible to believe that careless action can ever be anything more than casual or occasional? If it is, are we not really predicating a careless disposition, rather than a genuine habit, and then are we not violating the rule against character in civil cases (*ante*, § 64) in employing such evidence? These doubts serve to explain the precedents that exclude such evidence; but it would seem that the doubts are not always well founded, and that such evidence is often of probative value, and is not attended by the inconveniences of character evidence.[1]

§ 98. **Habit as a substitute for Present Recollection.** It will be seen, in examining the qualifications of witnesses (*post*, §§ 734, 747) that a past recollection may be resorted to, if known to have been accurately recorded at the time; and one of the permissible ways for the witness to guarantee the accuracy of his record is to vouch for a habit of accurate recording. But theoretically such testimony may be resolved into circumstantial evidence of habit, neglecting the use of the record; or the record may be wanting, and thus the circumstantial evidence of habit alone is practically available. Thus, a notary may testify that his habit is always to mail a notice of protest, and this habit alone (apart from or in the absence of a minute of the sending) would be receivable to indicate the probability that a specific notice was sent:

1867, *Strong*, J., in *Eureka Ins. Co.* v. *Robinson*, 56 Pa. 264 (admitting evidence of the company's custom to send a notice, as indicating that the notice was sent): "We think it not uncommon in practice to corroborate the defective memory of a witness by proof of what was his habit in similar circumstances. Thus, a subscribing witness to a will or a bond, if unable to recollect whether he saw the testator or obligor sign the instrument or heard it acknowledged, is often permitted to testify to his own habit never to sign as a witness without seeing the party sign whose signature he attests or hearing that signature acknowledged. And it seems to be persuasive and legitimate supporting evidence."[1]

[1] 1893, East Tennessee V. & G. R. Co. *v.* Kane, 92 Ga. 187, 192, 18 S. E. 18 (action for the death of an engineer; defence, his own negligent act in using excessive speed; the engineer's habitual use of excessive speed, excluded on the facts; prior rulings discussed); 1885, Whitney *v.* Gross, 140 Mass. 232, 5 N. E. 619 (distinguishing between mere carelessness in driving a horse down hill on former occasions and training the horse so that he habitually broke into a rapid rate of speed, the latter being admissible); 1894, Brouillette *v.* R. Co., 162 id. 198, 204, 206, 38 N. E. 507 (the plaintiff's repeated boasts "about his ability to keep out of the way of trains and not get hurt," admitted, as bearing upon his "carefulness or readiness to take risks"); 1897, Mulville *v.* Ins. Co., 19 Mont. 95, 47 Pac. 651 (that the deceased made a practice of jumping on trains while in motion, excluded); 1873, State *v.* M. & L. Railroad, 52 N. H. 528 (admitted; see quotation *supra*); 1878, State *v.* B. & M. Railroad, 58 id. 410 (similar); 1896, Baker *v.* Irish, 172 Pa. 528, 532, 33 Atl. 558 (that the plaintiff "before the accident made a practice of attempting to jump out of the elevator" before it stopped; rejected, because too remote to show that he did so on this occasion). Cases involving a *careful habit* have been placed *ante*, § 93. For the use of *particular instances* to evidence the careful or careless habit, see *post*, §§ 199, 376.

[1] 1832, Den *v.* Downam, 1 Green N. J. 142

§ 99. **Traits of Handwriting and Spelling, to evidence Authorship of a Writing.** When we are shown a signature, and, without having seen X write it, or handle the document, we infer nevertheless from the appearance of the writing that X was the writer, our process of thought is that, since X has a peculiar style or habit of handwriting known to us in its features, therefore, whenever he writes, the writing must bear these peculiar marks, and thus a writing bearing these marks was the product of his hand. Just as we think, of a deed of violence, "This man's character, his plan, his emotions, would be likely to lead him to this deed," so we argue, "This man's handwriting would result in his penning such a signature as the one in issue." It is commoner to evidence the authorship of a signature by the direct testimony of those who declare it to resemble the general qualities of the alleged person's handwriting as known to them; there the style of writing is not expressly offered in evidence, but is merely the ground of their competency to testify. When handwriting is offered circumstantially in evidence, it is expressly described or shown to the jury as the source of their inference; for thus only does the trait of the handwriting become available for them as the basis of an inference. Now, the relevancy of handwriting-traits, as of probative value to show whether or not a given act of writing was done by the person alleged, has always been conceded, since the beginning of the 1700s. The difficulty that has arisen over handwriting-evidence has not been over the relevancy of handwriting-traits to show the authorship of a writing but over the mode of evidencing the handwriting-traits themselves. There is only one way of evidencing them by circumstantial evidence, and that is by examining one or more specimens of the writing of the person in question and drawing inferences as to its peculiar traits (on the principle of § 383, *post*). This, however, being a different question from the present one, and complicated by many collateral considerations, is treated elsewhere (*post*, §§ 1996–2021). The qualifications of witnesses to speak as to handwriting-traits involve also distinct questions (*post*, §§ 693–709).

A person's mode of *spelling* is also a trait which evidences whether or not a document with words spelled in a given way was probably executed by him. Spelling and handwriting alike seem to be more or less personal and physical traits, like corporal strength and manual skill, in their probative bearing. A peculiar mode of spelling has always been treated as relevant to evidence a document's authorship; but the subject is more conveniently dealt with in connection with the rules for handwriting (*post*, § 2024).

Sub-topic D: DESIGN OR PLAN.

§ 102. **General Principle.** The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done

(posting an advertisement of sheriff's sale; the sheriff's testimony to his "constant practice to do it [post it], without a single exception ever known by me," admitted). The principle is further exemplified by the citations *post*, § 747. The presumption from *regular performance of official duty* (*post*, § 2534) rests on the present principle.

or not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence of the plan is always used in daily life as the basis of an inference to the act planned. There is no question about the relevancy in general of such evidence:

1853. *Bigelow*, J., in *Cook* v. *Moore*, 11 Cush. 213, 216: "The existence in the mind of a deliberate design to do a certain act, when once proved, may properly lead to the inference that the intent once harbored continued and was carried into effect by acts long subsequent to the origin of the motive by which they were prompted."

The probative value of such a design or plan, for the purpose of admissibility, will depend chiefly on two elements, either of which may be very weak in a given instance, — the fixedness or absolute quality of the design, *i. e.* its subjection to no contingencies or conditions; and the specific direction of it to the act in question, *i. e.* its application, not merely to a class of acts indefinitely foreseen, but to the exact deed in question. The only questions of relevancy that have arisen are due to the probative importance of these elements.

§ 103. **Discrimination of other Principles.** It is necessary first to distinguish, from the relevancy of Design or Plan, certain very different evidential questions. (1) *Hearsay expressions of Design.* When it is sought to evidence a design or plan by expressions of the person alleged to have entertained it, the question immediately arises whether the Hearsay rule applies and whether such expressions may enter under some exception to it (*post*, §§ 1725, 1726). This has nothing to do with the relevancy of the design itself, when properly evidenced. (2) *Conduct as evidence of Design.* The design or plan being assumed to be relevant, a common source of evidencing it is the conduct of the person, *i. e.* not express assertions of it, but conduct circumstantially indicating it. This raises questions of relevancy, but very different ones from the relevancy of the design itself to evidence an act; just as the admissibility of conduct to evidence character raises different questions from the admissibility of character to evidence an act. Not only in theory, but in view of practical results, these two things are constantly to be distinguished; for, however relevant the design, the evidence to establish it may be inadmissible (*post*, §§ 237, 304). (3) *Design or Intention, distinguished from Intent.* The probative feature of an intention or design is its direction forward to the accomplishment of a purpose by action. That is why it is relevant to show the later doing of the act. This is a different thing from Intent, in the legal sense, *i. e.* the state of mind which accompanies an act and imparts to it a criminal or innocent quality. The two things are as different as the design with which a man buys a good cigar and his state of mind later when he is smoking it. His plan is, when buying, to smoke it; later, when his design is being fulfilled, his smoking is accompanied by sentiments of comfort and self-satisfaction. But his design may be frustrated and yet the accompanying sentiments may be experienced; as, if he loses the cigar and a friend gives him another. Or his design may be carried out, but the sentiments not be

experienced; as, if the cigar turns out to be a poor one. So, too, a person may design to write a document and this design is relevant to show that he did later write it; but his intent, while writing it, to make false representations depends on different considerations. Again, a person may design to take another's property, and this design is relevant to show the subsequent taking; but whether the taking was under a claim of right or with felonious intent involv- a different mental state. In short, the importance of design, plan, or intention, is chiefly its evidentiary aspect, as looking forward and tending to prove the act in question; while the important aspect of intent is chiefly not an evidentiary one at all, but one of substantive law, as a state of mind accompanying the act in question and necessary to its legal effect. Occasionally, to be sure, intent has an evidentiary significance, — as where an intent at an earlier time is used to indicate the existence of the same intent at a later time, but here the evidentiary use is to prove another mental state or condition, and not an act. The practical consequences of this distinction between design and intent are elsewhere dealt with (*post*, §§ 242, 300–371).

§ 104. **Miscellaneous Instances.** There is no situation in which a design to do an act would be irrelevant to show the doing of the act.[1] Since the chief difficulty is usually as to the Hearsay rule, the precedents under the exception for Statements of Intention (*post*, §§ 1725, 1726) are also material; for a ruling admitting expressions of design under that exception to the rule is usually a precedent also for the relevancy of the design.

§ 105. **Threats of one charged with Crime.** A threat to do a criminal act is in general admissible; the threat being receivable under the Hearsay exception or as an admission, and the design, thus evidenced, being relevant under the present principle:

1688, *Standsfield's Trial*, 11 How. St. Tr. 1371, 1373, 1377, 1385; parricide; it was proved that the defendant, who had been disinherited by his father, "did declare, threaten, and vow at several times that he would cut his throat," and did "swear, if he had a sword, he would run it through him," and the like; Hume, arguing for defendant: "[These circumstances] are but very remote and uncertain. For, as to that expression that the defender is alledged to have threatened his father's death, it is the opinion of all

[1] 1895, Burton *v.* State, 107 Ala. 68, 18 So. 240 (the intention of a witness, not now to be found, as showing that he had left the State, admitted); 1881, State *v.* Smith, 49 Conn. 380 (murder of a chief of police making an arrest, the deceased's intention, on leaving his house, "to go to arrest Chip Smith," admitted); 1884, State *v.* Jones, 64 Ia. 349, 352, 17 N. W. 911, 20 N. W. 470 (murder; deceased's intention to go to a place to buy cattle, admitted to show the reason of his presence near defendant's house); 1898, State *v.* Smith, 106 id. 701, 77 N. W. 499 (husband-poisoning; defendant's declarations, in seeking to hire rooms, that herself and her daughter would be alone, admitted); 1899, Throckmorton *v.* Com., — Ky. —, 49 S. W. 474 (Federal license to sell liquor, admissible to show probable possession); 1895, Baltimore & O. R. Co. *v.* State, 81 Md. 371, 32 Atl. 202 (an intention of taking a railroad journey, admitted to show that the deceased was proceeding to get a ticket); 1885, Com. *v.* Cotton, 138 Mass. 502 (keeping liquor with intent to sell; the defendant was driving a wagon of liquors through a no-license suburb of a city; evidence admitted of orders from his employers to go through that suburb without selling and to sell only upon reaching the region where sales were allowed); 1897, Inness *v.* R. Co., 168 id. 433, 47 N. E. 192 (intention to take the cars, admitted to show later conduct); 1901, Com. *v.* O'Brien, 179 id. 533, 61 N. E. 213 (intention of going with a certain object, admitted); 1894, Houston *v.* Gran, 38 Nebr. 687, 691, 57 N. W. 403 (damage by sale of liquor; defendant's instructions to his servants not to sell to the deceased, not admissible to disprove the sale; unsound). Compare the rulings upon conduct as evidence of design (*post*, §§ 237, 304).

lawyers who have written upon the subject that that is but a very remote presumption. And as Carpzovius expresses it (pt. 3, qu. 121, no. 51): 'Quod est indicium admodum periculosum, quippe cum homines sæpe nil minus faciant quam quod minas exequantur, et iracundia agitatus minas de crimine perpetrando sæpe jactet, ipso tamen animo fervore paulo post discusso, cohibeat manus, et abstineat a facinore illo, quod forsan ab alio postea committitur'"; King's Advocate, in reply: "And whereas it is answered to this qualification [*i. e.* circumstance] that the saying that a son would cut a father's throat is but a remote circumstance, it is replied that the law and all lawyers do agree that 'minæ præcedentes et damnum sequentum' is a most pregnant qualification [*i. e.* circumstance] of that party's crime, especially where the threats were to cut a father's throat, which of itself was so horrid and unnatural a villainy that it cannot be doubted he who durst vow it wanted but an occasion to act it, and it is acknowledged, that though this be the clearest presumption, yet *per se* it is not full probation, for though the son had both vowed and resolved, yet by an accident he might have been prevented. But the presumption at least lays the burden."

1810, Chief Justice *Swift*, Evidence, 136: "When one threatens to do an injury to another, and that or a similar injury afterwards happens, this furnishes ground to presume that he who threatened the fact was the perpetrator or instigator."

1873, *Grover*, J., in *Stokes* v. *People*, 53 N. Y. 175: "Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has in fact committed the crime; for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it."

1892, *Shiras*, J., in *Worth* v. *R. Co.*, 51 Fed. 173: "It is also said [by counsel] that a threat to do an act in the future is not proof that the person will in fact do the act threatened. It may not be proof conclusive, but it may be evidence competent to be considered with other facts in determining the question. Thus, if the two persons who made the threats in question had been charged, either civilly or criminally, with the tort of having wrecked the train, can it be questioned that on the trial of the case evidence of the threats made by them would have been competent as tending to show their complicity in the wrong done?"[1]

Such threats may also be circumstantially evidential of *hatred*, ill-feeling, or *malice* towards the injured person; in this way they are evidence to show this emotion (*post*, § 394), while the emotion itself is evidential (*post*, § 117) as an independent circumstance to show the act. But the practical difference is that almost any antagonistic expression may serve to denote ill-feeling, and rules can hardly be laid down for such evidence; while, on the other hand, regarding the expressions as indicating a design, the nature of the design may seriously affect its relevancy. That which would suffice as evidence of ill-

[1] The following miscellaneous examples raise no difficulty: 1760, Earl Ferrers' Trial, 19 How. St. Tr. 919 (killing); 1896, Wilson *v.* State, 110 Ala. 1, 20 So. 415; 1883, Casat *v.* State, 40 Ark. 517 (killing); 1889, Babcock *v.* People, 13 Colo. 521, 29 Pac. 817 (killing); 1877, Fulton *v.* State, 58 Ga. 224 (arson); 1887, Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, *passim* (killing); 1893, Painter *v.* People, 147 id. 462, 35 N. E. 64; 1902, Henry *v.* People, 198 id. 162, 65 N. E. 120; 1871, Cluck *v.* State, 40 Ind. 263, 270; 1895, State *v.* Windahl, 95 Ia. 470, 64 N. W. 420 (killing); 1897, State *v.* Millmeier, 102 id. 692, 72 N. W. 275; 1882, State *v.* Edwards, 34 La. An. 1012 (arson); 1884, State *v.* Birdwell, 36 id. 859, 861; 1896, State *v.* Pain, 48 id. 311, 19 So. 138; 1848, New Gloucester *v.* Bridgham, 28 Me. 68; 1869, Com. *v.* Madan, 102 Mass. 165 (killing); 1897, People *v.* Holmes, 111 Mich. 364, 69 N. W. 501; 1895, State *v.* Hayward, 62 Minn. 474, 65 N. W. 63 (killing); 1895, State *v.* Harlan, 130 Mo. 381, 32 S. W. 997 (killing); 1872, Maxwell *v.* State, 3 Heisk. 420; 1888, White *v.* Terr., 3 Wash. T. 397, 403, 19 Pac. 37 ("admissible in all cases"). Distinguish the question of a *co-indictee's* threats: 1901, State *v.* Weaver, 165 Mo. 1, 65 S. W. 308 (co-indictee's threats, inadmissible where no conspiracy at the time was shown; see *post*, § 1079).

feeling may show no design, or a design too indefinite to be relevant. Again, the expressions may be regarded as showing *intent*, or *malice* in the legal sense of a deliberate intent to do the act charged, and the presence of this intent at a former time may be evidential (*post*, § 242) of a later intent at the time of the act. The practical difference is (1) if the doing of the act is conceded, then the design is no longer needed to prove it; but the same evidence of expressions may still be useful to show intent; (2) in an offence where intent is immaterial, the intent-evidence is immaterial, yet the design to do the act may still be relevant. These are not much more than quibbles, for no harm is ordinarily done by admitting superfluous evidence; but if these quibbles are to be raised, they should be solved correctly; and the peculiar doctrines resulting from the raising of these quibbles are sometimes found to be hopelessly inconsistent and unsound.[2]

§ 106. **Same: Generic Threats.** It has been noted (*ante*, § 103) that the more specific a design is, the greater its probative value. There may come a point at which the design is too indefinite in its indications to be of any probative value; but the mere fact that it is generic, *i. e.* points towards a class of acts, however broad, does not in itself destroy its relevancy, provided the purpose might naturally include the act charged.[1]

[2] The rulings in North Carolina are in this condition: 1847, State *v.* Shepherd, 7 Ired. 195 (the fact that the deceased had bought the defendant's land at a sheriff's sale, that the defendant had threatened him with death if he took a deed, and that he had just taken the deed, admitted); 1880, State *v.* Norton, 82 N. C. 628 (assault and battery on S., the defendant's words two weeks before, when showing a pistol, that "If S. ever crossed his path he would send him to hell," rejected, because "neither malice nor intent nor knowledge nor motive forms any ingredient of the offence"); 1882, State *v.* Skidmore, 87 Id. 509, 512 (approving State *v.* Norton *obiter*; citing no other cases); 1887, State *v.* Thompson, 97 id. 496, 1 S. E. 921 (arson; threats to do injury to the son and the grandson of the occupant, admitted as showing general ill-will to the family, and a motive); 1892, State *v.* Rhodes, 111 Id. 647, 15 S. E. 1038 (arson; threats of harm against the son of the owner, admitted); 1895, State *v.* Goff, 117 id. 755, 23 S. E. 355 (threat to kill, as showing the defendant the aggressor; admitted with the obscure distinction that "while this was not competent as evidence of motive, it was admissible to show temper"); 1895, State *v.* Lytle, ih. 799, 23 S. E. 476 (threat to burn a house, admitted; but *semble*, not where the doing by the defendant is not disputed); 1896, State *v.* Mace, 118 id. 1244, 24 S. E. 798 ("Damn Bango Branch and everybody that lives on it; . . . I intend to kill some man this night," admitted, in the light of other circumstances); 1901, State *v.* Hunt, 128 id. 584, 38 S. E. 473 (declarations that he would go to the place where deceased was and "raise some hell," admitted).

[1] *Eng.*: 1873, R. *v.* Hagan, 12 Cox Cr. 357 (murder of a child brought up in the defendant's family; his remark a fortnight before, "The child is no good; he is eating the other children's food," admitted); *Ala.*: 1877, Commander *v.* State, 60 Ala. 1, 7 (murder; threat to kill any one who sued him under like circumstances, admitted, the deceased having sued him); 1891, Redd *v.* State, 68 id. 492, 497 (murder of a negro paramour; statements that "he did n't mind killing a negro, if he fooled with him, any more than he would a buck-rabbit," excluded); 1882, Ford *v.* State, 71 Id. 385, 396 (to kill some one, admitted); 1885, Clarke *v.* State, 78 id. 474, 477 (murder; threats against a third person, received exceptionally, because the defendant shot the deceased, mistaking him for the third person); 1895, Prater *v.* State, 107 id. 26, 18 So. 239 (arson; that the defendant belonged to a band of "white caps" who had posted threats to burn down the houses of a certain class of persons of whom the owner of the burned house was one, admitted); 1896, Drake *v.* State, 110 Id. 9, 20 So. 450 ("I will see you later," said after a quarrel, admitted); 1897, Linehan *v.* State, 113 id. 70, 21 So. 497 (that "he would show O. [the deceased] how to throw slurs on him," admitted); 1897, Burton *v.* State, 115 id. 1, 22 So. 585 (that he would "shoot some one," admitted); 1901, Cuddell *v.* State, 129 id. 57, 30 So. 76 (threats to kill "anybody that interfered," admitted); *Cal.*: 1896, People *v.* Craig, 111 Cal. 460, 465, 44 Pac. 186 (threats that "something would happen sure before it would end," and on certain conditions "he would put a hole through them," speaking of the members of a family, admitted on a charge of wife-killing); 1899, People *v.* Gross, 123 id. 389, 55 Pac. 1054 (that he would "wipe out the name" of the deceased's family, admitted); *Colo.*: 1899, Moore *v.* People, 26 Colo. 213, 57

§ 107. **Same: Conditional Threats.** It has been pointed out (*ante*, § 103) that the probative value of a design involves some notion of positiveness or

Pac. 857 (that "he would get the son of a bitch yet," admitted); *Conn.*: 1880, State *v.* Hoyt, 47 Conn. 518, 522, 539 (murder of father; the defendant's declaration, "I don't know but I shall kill some one in a week," admitted); *D. C.*: 1881, Guiteau's Trial, D. C., II, 95 (that the defendant in 1872 or 1873 said he would "shoot some of our public men," "would imitate Wilkes Booth," admitted); *Fla.*: 1866, Dixon *v.* State, 13 Fla. 636, 645 (the deceased being a policeman, threats of violence against "policemen," shortly before, admitted to show intent); *Ga.*: 1876, Stafford *v.* State, 55 Ga. 591, 593 (murder and robbery; a plan, of a week or so before, to rob others, admitted); 1878, Shaw *v.* State, 60 Id. 246, 250 (wife-murder by beating; a declaration, four years before, by the defendant while beating her, that he had a right to beat her, admitted); 1897, Shaw *v.* State, 102 Id. 660, 29 S. E. 477 (train-wrecking; defendant's statement that "he was going to have a wreck of his own some day," received); 1899, Harris *v.* State, 109 Id. 280, 34 S. E. 583 (murder of negro; defendant's remark, just before, "A negro took my woman, and I am gwine over there and get me a negro," admitted); *Ida.*: 1898, State *v.* Davis, — Ida. —, 53 Pac. 678 (murder of sheep-man; threats against sheep-men generally, admitted); 1897, State *v.* Larkins, — Id. —, 47 Pac. 945 (murder, "I have a dirty piece of business to do to-night," admitted); *Ill.*: 1886, Schoolcraft *v.* People, 117 Ill. 271, 277, 7 N. E. 649 (that "some serious" would occur, admitted); *Ind.*: 1893, Parker *v.* State, 136 Ind. 284, 287, 35 N. E. 1105 (threats to get even with a certain class of persons, which included the deceased, admitted); 1902, Wheeler *v.* State, 158 Id. 687, 63 N. E. 975 (threats against persons eating food intended for defendant's children, the deceased being such a person, admitted); 1903, Starr *v.* State, — Id. —, 67 N. E. 527 (threat to kill "the s— of a b—," admitted); *Ia.*: 1894, State *v.* Pierce, 90 Ia. 506, 512, 58 N. W. 891 (threats to kill any person who interfered in a certain way, admitted); 1896, State *v.* Helm, 97 Id. 378, 66 N. W. 751 (a threat that "some of the C. boys would die with their boots on some of these days," the deceased being a C.; admitted, but perhaps only as a self-contradiction); 1896, Laird *v.* Ass. Co., 98 Id. 495, 67 N. W. 385 (an angry husband to the deceased, his wife, "You'll run against a stump yet"); 1899, State *v.* Lightfoot, 107 Id. 344, 78 N. W. 41 (indefinite threats admitted); *Kan.*: 1872, State *v.* Horne, 9 Kan. 123, 128 (hostile desire to find the deceased, "By God, we want to see him," admitted); *Ky.*: 1896, Brooks *v.* Com., 100 Ky. 194, 37 S. W. 1043 ("he wanted some damned man to jump on him, so that he could kill him," admitted); 1901, Quinn *v.* Com., — Id. —, 63 S. W. 792 (murder; threats "that he would kill or be killed before he would go to the workhouse," admitted); *Mass.*: 1869, Com. *v.* Madan, 102 Mass. 1 (murder; threats to have revenge against certain witnesses, the deceased being one, admitted); 1887, Com. *v.* Chase, 147 Id. 597, 18 N. E. 565 (threats of harm to a person who had testified against the defendant, admitted to show that the defendant was the one who burned the former's barn); 1890, Com. *v.* Quinn, 150 Id. 401, 23 N. E. 54 (arson; the defendant's threats, after being formerly charged with robbery by the owner of the burned building, to "make him sweat for it," admitted); *Mo.*: 1879, State *v.* Guy, 69 Mo. 430 (a threat to kill an unnamed person, admitted); 1883, State *v.* Dickson, 78 Id. 438, 449 ("he shall not eat my bread and meat much longer," etc.); 1883, State *v.* Grant, 79 Id. 113, 137 (murder of a policeman; threats against "policemen," admitted); 1885, State *v.* McNally, 87 Id. 649 ("going to have blood before morning," admitted); 1885, Culbertson *v.* Hill, 1b. 553, 555 ("general or special"); 1889, State *v.* Crawford, 99 Id. 74, 12 S. W. 354 (vague threats, admitted); 1895, State *v.* Fitzgerald, 130 Id. 407, 32 S. W. 1113 (threats to kill some one and then himself, admitted); 1899, State *v.* Cochran, 147 Id. 504, 49 S. W. 558 (that he "would like to kill some damned old Grand Army man," and "would like to kill somebody before the week was out," admitted, though the deceased was not a member of the G. A. R.); *Nebr.*: 1903, Keatlug *v.* State, — Nebr. —, 93 N. W. 980 (general expressions of a plan to rob, admitted); *Nev.*: 1880, State *v.* Hymer, 15 Nev. 49, 54, per Beatty, C. J. (murder; statements, about three hours before, "It is the first time I have been drunk since I have been in town; I got drunk just to kill two or three —— in this town, and I'll do it, too," admitted; distinguishing State *v.* Walsh, 5 Id. 315, 1869, in which a threat was uttered against "a party" who had been talking about his wife, but the person was not identified with the deceased); *N. H.*: 1898, State *v.* Davis, 69 N. H. 350, 41 Atl. 267 (illegal sale of liquor; a letter declaring a general intention not to open a hotel unless he sold liquor in it, admitted; also a conversation telling a prospective tenant that he would have to sell liquor, admitted); *N. Y.*: 1865, People *v.* Kennedy, 32 N. Y. 141 (threats by the defendant, a discharged farm-hand, to do all the damage he could to the employer and to destroy his property, admitted to connect the defendant with the burning of the other's barn); 1873, Stokes *v.* People, 53 Id. 174 (general threats; he "would beggar him first and then kill him"; "I go prepared for him all the time; so sure as my name is Jim Fisk I will kill him"; per Grover, J., "the difference is only in degree" between these and more specific designs); 1874, Weed *v.* People, 56 Id. 628 (abortion; evidence admitted, after connecting the defendant with the act, of an advertisement issued by him, about two years before, offering advice and assistance in the procuring of miscarriages); 1897, People *v.* Sutherland, 154 Id. 345, 48 N. E. 518 (murder by shooting; showing a pistol on the same day shortly before, remarking, "This means business some day," received); 1898, People *v.*

absolutenes. The mere fact, however, that it is expressed in the alternative or with a condition or contingency does not destroy its probative value; but the intervening fulfilment of the condition should ordinarily be shown, if it occurred.[1]

§ 108. **Same: Time of Threats.** The element of fixedness is lacking, and the probative value disappears, if the threats were made at such a time anterior that the design cannot possibly be supposed to have continued throughout the interval. But no mere distance of time in itself should make the threats irrelevant. A design once formed presumably continues. The defendant may use the lapse of time as a circumstance explaining away the significance of the threats by indicating the probable abandonment of the design:

Decker, 157 id. 186, 51 N. E. 1018 (taking up a revolver, and saying to a wife, "I have your medicine if you do not do as I say," admitted); *N. C.:* (see citations *ante*, § 105); *Oh.:* 1865, Mimma *v.* State, 16 Oh. St. 221, 230 (threat to rob A, not admissible to show the killing of A, unless A was both robbed and killed); *Pa.:* 1865, Hopkins *v.* Com., 50 Pa. 9 (murder; the defendant, a sailor, had been in irons for turbulence; and after being released, and less than an hour before the killing, declared that he would kill somebody before twenty-four hours; admitted, for it was not "necessary that the premeditated malice should have selected its victim"; here the only issue was that of the degree of homicide); 1882, Abernethy *v.* Com., 101 id. 322, 324, 328 (threats to kill "somebody," admissible; but here they were followed by a specifying of a third person, and hence were held improperly considered); *S. D.:* 1895, State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430 (charge of poisoning a horse; threats during the preceding year to kill animals of that person admitted); *Tenn.:* 1844, Kinchelow *v.* State, 5 Humph. 9, 12 (larceny of a bag of flour, a proposal of the defendant to the witness, on the night of the larceny, to "join him in various schemes of forgery, larceny, kidnapping, etc." excluded); *Tex.:* 1892, Massey *v.* State, 31 Tex. Cr. 371, 379, 20 S. W. 758 (declaration that he intended to rape some person, admitted); 1898, Holley *v.* State, 39 Tex. Cr. 301, 46 S. W. 39 (threats not directed to deceased by name, inadmissible, unless otherwise shown to have signified or included him); *U. S.:* 1898, Stevenson *v.* U. S., 29 C. C. A. 600, 86 Fed. 106 (murder of a deputy marshal; threat made three months before "to kill the next damn marshal that arrested him," excluded; preposterous rule; 1900, Bird *v.* U. S., 180 U. S. 356, 21 Sup. 403 (quarrels and threats of assault upon another member of the same party of voyagers about a month before, excluded, partly as being a separate criminal act and partly as too remote; only two precedents cited for the first reason, and none for the second; opinion valueless); *Vt.:* 1878, State *v.* Smalley, 50 Vt. 736, 738, 749 (arson of the defendant's own house, to defraud the insurer; evidence of threats to be revenged on other persons, rejected, though the houses of the others had also been burned); *Wash.:* 1902, State *v.* Gates, 28 Wash. 689, 69 Pac. 385 (general threats against any person running into defendant's fishing net, admitted); *Wis.:* 1861, Benedict *v.* State, 14 Wis. 423 (murder; threats that a knife exhibited by him "would probably be the death of some person before the week was out," and the like, admitted; "such declarations . . . are not to be excluded because they are general, or because the accused did not choose fully to divulge his plans").

[1] 1881, Redd *v.* State, 68 Ala. 492, 496 (Brickell, C. J.: "Whatever may be its force, whether absolute or conditional, whether it indicates a purpose only contemplated or fully matured, it is admissible"); 1896, Phillips *v.* State, 62 Ark. 112, 34 S. W. 539 (that he "would make his wife come back home to him or beat her to death," admitted); 1878, Everett *v.* State, 62 Ga. 65, 70 (murder of a paramour; threats three years before that he would kill her before any other man should have her, admitted); 1902, Abbott *v.* Com., — Ky. —, 68 S. W. 124 (murder of a brother-in-law the day after his marriage; defendant's threats, a year before, to kill the deceased if he married the former's sister, admitted); 1896, Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563 (threat to burn the building "unless his mother got something out of the property," admitted, though she did get something out of the property); 1882, State *v.* Johnson, 76 Mo. 121, 124 (threat "to fix him if he fooled with him," admitted); State *v.* Adams, ib. 357 (similar); 1883, Carver *v.* Huskey, 79 id. 509 ("if they hunted in that neighborhood with hounds, he would kill them," admitted); 1899, State *v.* Sloan, 22 Mont. 293, 56 Pac. 364 (conditional threats, admitted); 1898, Com. Farrell, 187 Pa. 408, 41 Atl. 382 (defendant "swore he would get B.'s money, if he had to kill the old man to do so"; not admitted as evidence of defendant's robbery and murder of B., because "there is no legal presumption that such a threat will be executed"; a ruling supremely ridiculous); 1892, State *v.* Bradley, 64 Vt. 468, 470, 24 Atl. 1053 (murder of a paramour; threats six or eight months before, to kill her if she left him, admitted, "proof tending to show that the condition had transpired having been introduced"); 1895, State *v.* Bradley, 67 id. 465, 32 Atl. 240 (threats to kill under certain circumstances, admitted).

1881, *Brickell*, C. J., in *Redd* v. *State*, 68 Ala. 492, 496 (murder of a paramour; threats made two years before were admitted): "The length of time elapsing between the making of the threat and the criminal act, when the crime is to be proved only by circumstantial evidence, is of importance in determining the weight to be accorded to it. . . . If a long period intervenes, during which there were opportunities of doing the threatened injury, and there was no attempt to do it, and no repetition of the threat, it would be but a slight circumstance in connecting the accused with the injury, and there would be more reason for regarding it as having been a mere careless, thoughtless utterance, or idle bravado, or ebullition of temporary passion. The length of time would impair its probative force, but would not render it inadmissible. So the probative force of the threat would be increased if it was frequently repeated during the whole time intervening . . . and the same cause for ill-will and hate continued to exist; then it could be imputed to a malignant spirit, and a purpose that may have been vacillating but at last became fixed and settled."

1896, *Start*, C. J., in *Hale* v. *Life Ins. Co.*, 65 Minn. 548, 68 N. W. 182 (excluding threats of the deceased, in an action on an insurance policy, to commit suicide): "The declarations must, in order to be admissible in evidence, bear a reasonably close relation, in point of time, to the alleged act. The reason for the rule suggests and enforces the necessity of this relation between the declaration of the party and the doing of the alleged act by him. They must be so near in point of time as to justify a reasonable probability, in connection with the other evidence in the case, that the party in fact carried his declared intention into execution. No definite rule applicable to all cases can be laid down as to when, and when not, such declarations will be received. It is a matter largely in the sound discretion of the trial Court in each particular case."[1]

§ 109. **Same: Explaining away Threats.** Under the principle of Explanation (*ante*, § 34), the defendant may of course attempt to explain away the design-evidence. Thus, he may show that the lapse of time probably led to the abandonment of the design; or that it did not apply to the act charged; or that it was otherwise without real significance.[1]

[1] 1881, Redd v. State, 68 Ala. 492 (see quotation *supra*); 1889, Barnes v. State, 88 Id. 204, 207, 7 So. 38 (rape; expressions, uttered three months before, admitted); 1867, People v. Cronin, 34 Cal. 190, 200, 205 (lapse of time affects weight only; threats to kill, made nearly a year before, admitted); 1882, People v. Hong Ah Duck, 61 id. 387 (same principle; here threats to kill, made about a month before, were admitted); 1880, U. S. v. Neverson, 1 Mackey, D. C. 152, 169 (admitting threats made the summer before a killing in January); 1903, Johns v. State, — Fla. —, 35 So. 71 (threats three weeks before, admitted); 1896, McDaniel v. State, 100 Ga. 67, 27 S. E. 158 (threats "a considerable period beforehand," admitted); 1902, Abbott v. Com., — Ky. —, 68 S. W. 124 (threats a year before, admitted); 1859, Com. v. Goodwin, 14 Gray 55 (arson; threats of revenge one or two years before, admitted; admissibility "would not be affected" by "the length of time which intervened"); 1890, Com. v. Quinn, 150 Mass. 401, 23 N. E. 54 (arson; threats three years before; admitted in trial Court's discretion); 1892, Com. v. Holmes, 157 id. 233, 239, 32 N. E. 6 (wife-murder; threats at various times during nine years, admitted; their "remoteness" "was for the Court, in the exercise of its discretion"); 1896, Com. v. Crowe, 165 Id. 139, 42 N. E. 563 (a threat fourteen months before, admitted, the ill-feeling having continued); 1900, Com. v. Corkery, 175 Id. 460, 56 N. E. 711 (larceny; declarations three months before, admitted); 1896, Hale v. Life Ins. Co., 65 Minn. 548, 68 N. W. 182 (see quotation *supra*); 1882, State v. Adams, 76 Mo. 357 (lapse of time held immaterial; followed in later cases); 1883, State v. Grant, 79 Id. 137; 1883, Carver v. Huskey, ib. 509; 1885, State v. McNally, 87 id. 650; 1897, State v. Wright, 141 id. 333, 42 S. W. 934; 1899, Terr. v. Roberts, 9 Mont. 12, 14, 22 Pac. 132 (threats about two months before the shooting, admitted; "mere lapse of time does not exclude" such evidence); 1898, State v. Davis, 69 N. H. 350, 41 Atl. 267 (discretion of trial Court controls); 1892, State v. Bradley, 64 Vt. 466, 470, 24 Atl. 1053 (murder; threats of six or eight months before, admitted; time goes "not to the admissibility but to the weight").

[1] 1855, Atkins v. State, 16 Ark. 581 (explanation of circumstances under which threats to kill were uttered by defendant); 1846, State v. Duncan, 6 Ired. 236, 239 (evidence that the defendant was accustomed when angry to make threats of violence without carrying them out, excluded; unsound).

§ 110. **Threats by the Deceased against one charged with Homicide; General Principle.** Where on a charge of homicide the excuse is self-defence, and the controversy is whether the deceased was the aggressor, the deceased's threats against the accused are relevant. The deceased's design to do violence upon the defendant is of some value to show that on the occasion in question he did carry out, or attempt to carry out, his design. Moreover, it is the fact of his design, irrespective of its communication to the defendant, that is evidential:

1860, *Baldwin*, J., in *People* v. *Arnold*, 15 Cal. 481: "[The defendant urged] that this assault was not made by him, but that it was made by Sweeney [the deceased]; and to prove this, he proposed to show that Sweeney had armed himself with this pistol, that he had borrowed it, and that it was found at the place of the rencounter. He was permitted to show these facts, but he proposed to show a further fact, and that was that, at the time of Sweeney's getting the pistol, he declared what he meant to do with it. . . . This leads to the inquiry, whether the fact that A procures a weapon for a particular purpose conduces at all to show, in a question of conflicting proofs as to the manner in which he used it, what that manner was. We apprehend that if a man goes into a house, borrows a gun, goes out with it, saying that he means to use it on another, and a rencounter happens between him and that other, and the witnesses who see the difficulty differ, or the circumstances are equivocal, as to which one of the two commences the affray, that some light might be thrown upon this question, conducing to or towards its solution, by the proof of these facts as to A's procuring it and his motives in doing so. The jury might possibly, with some reason, conclude that as the weapon was procured for this purpose of assault on another, that purpose was fulfilled; that the assault, in other words, was made in pursuance of the intended purpose when the weapon was procured, and especially if other facts in corroboration of this conclusion existed. It is true there would be nothing conclusive in this. But the fact of the conclusiveness of this proof to establish the proposition which it is introduced to prove is not the decisive question; that question is, whether this item of fact be a matter proper to be considered by the jury in arriving at their conclusion upon this mooted point. And we have no doubt that it is."

1873, *Grover*, J., in *Stokes* v. *People*, 53 N. Y. 174: "[Why are such threats if communicated admissible?] For the reason that threats made would show an attempt to execute them probable, when an opportunity occurred, and the more ready belief of the accused would be justified to the precise extent of this probability. But an attempt to execute threats is equally probable, when not communicated to the party threatened, as when they are so; and when, as in this case [of self-defence alleged] the question is whether the attempt was in fact made, we can see no reason for excluding them in the former that would not be equally cogent for the exclusion of the latter."

1892, *Raney*, C. J., in *Wilson* v. *State*, 30 Fla. 242, 11 So. 556: "The principle of the admission of threats under such circumstances is that they tend to show that it was the intention of the deceased at the time of the meeting to attack the accused, or that he was seeking the latter's life, and hence they tend to prove that the former brought on the conflict, and consequently are relevant evidence. The philosophy of the matter is that where there has been an encounter, and it is not shown by direct evidence who was the assailant, threats of an intention to assail are some evidence of an assault having been made by the one who made the threats."

§ 111. **Same: Discriminations and Limitations.** (1) The use of *communicated threats* to show the defendant's apprehension of violence is to be distinguished (*post*, § 247), because the principle is different and does not need the

limitations of the present doctrine.[1] Nevertheless, as so few Courts in the beginning perceived the present use of threats, it was natural that some confusion should arise in the process of establishing the distinction, especially through the erroneous application of rulings from other jurisdictions. The distinction itself rests on the same principle as that between character used to show the probability of the deceased's act, and communicated character used to show the defendant's apprehensions (*ante*, § 63). Occasionally a Court still applies the same tests to both uses, communicated and uncommunicated; but the distinctness of the two uses is now generally understood.[2]

(2) A necessary condition of relevancy is that the fact of killing is conceded, and is justified as done in *self-defence*, and that the virtual controversy is whether there was in truth any need for defence, *i. e.* whether the deceased was the aggressor. This is universally settled, expressly or by implication.

(3) There is much opportunity for abuse of this sort of evidence. Not only may it be manufactured; but, even when genuine, it may be employed improperly to help the defendant by way of justification, — in certain communities at least, where the Courts have been compelled repeatedly to make clear the law that a threat to shoot another is no justification for the latter to kill on sight. For these reasons various limitations have been attempted: (a) The evidence of threats is inadmissible where there is clear evidence that the *defendant was the aggressor*. Most jurisdictions adopt this rule, and none seem to negative it. (b) Furthermore, it is only admissible (as most Courts provide) where there is some *other evidence of an aggression by the deceased*. This is usually expressed by saying that there must have been some "demonstration of hostility," or, more shortly, some "overt act," by the deceased. It is difficult to say whether this limitation originated in the *res gestæ* notion (*infra*) or in a rule of criminal law that an overt act is a necessary element of the justification of self-defence, or merely in a general policy of preventing the abuse of this evidence. At any rate, it seems a satisfactory limitation, provided the multiplication of quibbles as to "overt acts" is avoided by leaving the whole matter in the hands of the trial judge; for it prevents the defendant from trying to use the threats as a mere pretext for justifying the killing of one who was making no actual attempt to injure him. (c) Another condition, sometimes suggested,[3] but inconsistent with and more stringent than the preceding one, is that the evidence should be received only when there is *no other direct evidence* as to who was the aggressor, *i. e.* when there were no eye-witnesses. Perhaps in practice a combination of (b) and (c) would be the best; *i. e.* to admit the evidence when by eye-witnesses there was some other evidence of the deceased's aggression, *or* when there were no eye-witnesses to the affair. (4) Another and additional use, independent of

[1] "Evidence of communicated threats is intended to shed light upon the mental attitude of the prisoner towards the deceased when the homicide occurred; uncommunicated threats are evidence of the mental attitude of the deceased towards the prisoner" (Lucas, J., in State *v.* Evans, 33 W. Va. 426, 10 S. E. 792; 1889).

[2] Distinguish also the use of the deceased's expressions as evidence of *prior ill-feeling or malice*, and tending to prove present malice (*post*, § 396).

[3] As in Mississippi.

the preceding, receives the evidence in "*confirmation*" or "corroboration" of communicated threats. This is usually coupled with one of the preceding limitations as an alternative condition of admission.[4] (5) The doctrine of *res gestæ* is sometimes appealed to as the ground of receiving the evidence; and the same notion underlies the occasional suggestion that the threats "characterize" the deceased's conduct. This employment of *res gestæ* as a veil for obscurity of thought is elsewhere examined (*post*, § 1795); and it is enough here to say that it has no possible application to this kind of evidence, and cannot be made to fit its rules; and the sooner such phrases are abandoned, the better for clearness of legal thought. (6) In some jurisdictions it is impossible to ascertain the exact rule.[5] Previous precedents are ignored, inconsistent tests laid down in succeeding rulings, decisions in other jurisdictions are cited to the exclusion of local precedents; and the oftener the matter comes up for a ruling, the more it is obscured.[6]

[4] As in Florida and Kansas.

[5] As in Louisiana.

[6] The rulings in the various jurisdictions are as follows: *Alabama:* 1851, Powell *v.* State, 19 Ala. 577, 581 (a suggestion that there might be a proper use for uncommunicated threats); 1853, Carroll *v.* State, 23 id. 37 (threats two weeks before offered "to show the character of the conduct of the deceased" in his trespass; excluded, because the deceased actually used no violence, and because the threats should be nearer in time to the affray, and be part of the *res gestæ*); 1873, Burns *v.* State, 43 id. 374 (threats uncommunicated are admissible when they "form part of the *res gestæ*," on the theory that they "show the mental status of the deceased and his motive in going" to the place, and thus they "may enable the jury to determine who was the aggressor"; here threats made the same afternoon were received, and threats made the day before were rejected); 1880, Roberts *v.* State, 68 id. 163 (repudiating former limitations; the essential condition is that "the deceased had sought a conflict with the accused, or was making some demonstration, or overt act of attack" at the time of the killing; if so, "uncommunicated threats, recently made, are admissible for the purpose of showing the *quo animo* of such demonstration or attack," or for "corroborating those that are communicated," or, where the aggressor is doubtful, "to show who was probably the first assailant"); 1881, Green *v.* State, 69 id. 7 (preceding case affirmed); 1896, Gunter *v.* State, 111 id. 23, 20 So. 632 (admitted); 1899, Henson *v.* State, 120 id. 316, 25 So. 23 (mere general threat, not applying to defendant, excluded); *Arkansas:* 1855, Atkins *v.* State, 16 Ark. 568, 584 (present principle not considered); 1859, Coker *v.* State, 20 id. 53, 55 (same); 1860, Pitman *v.* State, 22 id. 353, 356 (recognizing the present principle, and admitting uncommunicated threats made on the day of the killing, as manifesting "the use he [the deceased] intended to make of the pistol, etc.," "the motive that was taking him to G.," and "his hostile feelings" towards the defendant); 1879, Harris *v.* State, 34 id. 469, 472 (no rule attempted, but the preceding case approved; the deceased's non-aggression being clearly shown, the threats were rejected); *California:* 1860, People *v.* Arnold, 15 Cal. 476, 481 (admitted; but *semble* only where the evidence was conflicting as to the aggressor); 1869, People *v.* Scoggins, 37 id. 676, 684, 696 (admitted, where there is other evidence — no definite measure being given — that the deceased was the aggressor); 1880, People *v.* Alivtre, 55 id. 263 (the preceding cases approved; no specific rule laid down); 1880, People *v.* Travis, 56 id. 251, 253 (threats admissible, *semble*; no authorities cited); 1880, People *v.* Carlton, 57 id. 83 (following Arnold's Case); *Colorado*, 1878, Davidson *v.* People, 4 Colo. 145 (former threat admitted "to show that at the time of the meeting the deceased was seeking the defendant's life"; here, in view of the existence of a long-standing feud and of threats at the time); 1889, Babcock *v.* People, 13 id. 515, 521, 29 Pac. 817 (length of time does not exclude; here, a year before); *Florida:* 1886, Bond *v.* State, 21 Fla. 738, 751 (admissible when so near the time of the killing as to be part of the transaction, or when the question of the aggression "is in any manner of doubt"); 1891, Garner *v.* State, 28 id. 113, 133, 9 So. 835 (same); 1892, Wilson *v.* State, 30 id. 234, 242, 11 So. 556 (same); 1894, Steele *v.* State, 33 id. 348, 350, 14 So. 841, *semble* (same); 1896, Lester *v.* State, 37 id. 382, 20 So. 232 (as showing that "the deceased was shot while he was in the act of endeavoring to carry out the threat"); 1903, Fields *v.* State, — id. —, 35 So. 185 (threats, and the habit of going armed, admissible, where there is "doubt as to who began the difficulty"); *Georgia:* 1846, Reynolds *v.* State, 1 Kelly, 222, 230, *semble* (admitting evidence that the deceased had armed himself just before the affray); 1848, Monroe *v.* State, 5 Ga. 85, 138, *semble* (self-defence; admitted to show "the state of feeling of the parties towards each other at the time of the act"); 1855, Haynes *v.* State, 17 id. 465, 482 (self-defence; "It is important to ascertain the temper and conduct of the parties, to determine who was most likely to have brought about the emergency"; admitting

§ 112. Testamentary and Contractual Plans and Intentions. Where the issue is whether a will was executed, or whether a will was revoked, or

threats); 1855, Keener *v.* State, 18 id. 194, 224, 228 (admitting evidence of threats to show the deceased's "evil intent" in going to where the defendant was; "remoteness or nearness of time" is immaterial as to admissibility); 1858, Hawkins *v.* State, 25 id. 207, 210 (the deceased's prior design to kill the defendant, excluded, the deceased being unarmed at the time of the killing); 1859, Lingo *v.* State, 29 id. 470, 483 (the doctrine ignored); 1869, Hoye *v.* State, 39 id. 718, 722 (Keener's Case held not applicable, as the deceased was unarmed at the time of the killing; prior threats excluded); 1871, Pound *v.* State, 43 id. 88, 129 (what the deceased said when taking an axe to the field; admissible according to circumstances); 1873, Peterson *v.* State, 50 id. 142 (recognizing Keener's Case, but regarding it as not to be extended); 1891, Vaughn *v.* State, 88 id. 731, 736, 16 S. E. 64 (excluded, where there was no hostile conduct at the time; the defendant's unsworn statement not sufficient to lay this foundation); 1892, May *v.* State, 90 id. 793, 797, 17 S. E. 108 (admitted where the aggressor was in doubt, Keener's Case approved; Vaughan's Case distinguished); 1893, Pittman *v.* State, 92 id. 480, 17 S. E. 856 (preceding case approved); *Illinois:* 1850, Campbell *v.* People, 16 Ill. 1 (admitted as furnishing "a reasonable inference that the deceased sought the defendant for the purpose of executing those threats"); 1870, Williams *v.* People, 54 id. 422, 426 (admitted); 1892, Siebert *v.* People, 143 id. 571, 590, 32 N. E. 431 (approving Campbell *v.* People); *Indian Terr.:* 1899, Helms *v.* U. S., — Ind. T. —, 52 S. W. 60 (deceased's hostile feelings, admissible, if self-defence is in issue); *Indiana:* 1871, Holler *v.* State, 37 Ind. 57, 60; 1881, Combs *v.* State, 75 id. 217 ("they supply grounds for an inference that the deceased was the assailant"); 1891, Bowlus *v.* State, 130 id. 227, 229, 28 N. E. 1115 (no rule particularized); 1898, Ellis *v.* State, 152 id. 326, 52 N. E. 82 (excluded here because there had been no aggression on the defendant); *Iowa:* 1875, State *v.* Woodson, 41 Ia. 428 (left undecided); 1876, State *v.* Maloy, 44 id. 104, 114 (excluded under the other principle, without noticing the present one); 1877, State *v.* Elliott, 45 id. 490 (excluded, unless, *semble*, the question of self-defence is in issue); *Kansas:* 1879, State *v.* Brown, 22 Kan. 222 (admissible when the question of aggression is "in any manner of doubt," or to corroborate communicated threats); 1880, State *v.* Scott, 24 id. 68, 70 (approving State *v.* Brown); 1890, State *v.* Spendlove, 44 id. 1, 24 Pac. 67 (same); *Kentucky:* 1855, Cornelius *v.* Com., 15 B. Mour. 539, 546 (admissible because "his intention to make an attack on the accused was an important matter, as well as the belief of the existence of such an intention"; also to corroborate the testimony as to communicated threats); 1890, Sparks *v.* Com., 89 Ky. 644, 20 S. W. 167 (threats by deceased showing his plan of aggression, admitted); 1897, Young *v.* Com., — id. —, 42 S. W. 1141 (threats admitted); 1897, Tudor *v.* Com., — id. —, 43 S. W. 187 (doctrine conceded; but where the defendant interfered in a fight between deceased and T., the deceased's threats against D. were excluded); 1901, Hollingsworth *v.* Warnock, — id. —, 65 S. W. 163 (here excluded as too general); *Louisiana:* 1851, State *v.* Bradley, 6 La. An. 554, 560 (excluding the evidence as an attempt at a plea of justification); 1869, State *v.* Gregor, 21 id. 473, 475 (excluded, but this principle not considered); 1878, State *v.* Ryan, 30 id. 1177 (excluded; no reason given); 1881, State *v.* Fisher, 33 id. 1344 (same); 1888, State *v.* Williams, 40 id. 168, 170, 3 So. 629 (citing decisions in other jurisdictions, but not the above cases, and admitting the evidence as "corroborating the evidence as to the communicated threats," and "establishing the purpose with which the deceased provoked the rencontre," and "confirming the reality of the danger" apprehended by the defendant); 1892, State *v.* Walsh, 44 id. 1122, 1131, 11 So. 811 (the trial Court's recital as to whether a foundation was laid is conclusive); 1893, State *v.* Harris, 45 id. 842, 845, 13 So. 199 (the rule of the preceding case recognized); 1893, State *v.* Depass, 45 id. 1151, 1152, 14 So. 77 (excluded, because the defendant's aggression was clear; no preceding case cited); 1895, State *v.* King, 47 id. 28, 16 So. 566 (threats offered to show merely "who was the aggressor," excluded, the matter being treated as governed by the overt-act rule of communicated threats, *post*, § 247, and the Williams Cases not being cited); 1896, State *v.* Compagnet, 48 id. 1470, 21 So. 46 (admitted, under the overt-act rule, *semble*); 1897, State *v.* Pruett, 49 id. 283, 21 So. 842 (see § 247, *post*); 1903, State *v.* Harrison, 111 La. —, 35 So. 560 ("some hostile demonstration" must be shown); *Maryland:* 1880, Turpin *v.* State, 55 Md. 462, 473, *semble* (admissible only in case of doubt as to the aggressor); *Michigan:* 1868, People *v.* Garbutt, 17 Mich. 9, 15 (excluded; obscure); 1878, People *v.* Lilly, 38 id. 277 (preceding deportment admitted as indicating his deportment at the time of the affray); Brownell *v.* People, ib. 736 *semble* (same); 1893, People *v.* Palmer, 96 id. 580 (admissible; no limitations stated); 1895, People *v.* Palmer, 105 id. 568, 63 N. W. 656 (similar); *Minnesota:* 1860, State *v.* Dumphey, 4 Minn. 438, 449 (uncommunicated threats excluded; the present principle not considered); *Mississippi:* 1859, Newcomb *v.* State, 37 Miss. 383, 400, 404 (uncommunicated threats, excluded, but the present principle not considered); 1877, Johnson *v.* State, 54 id. 430 (the whole subject reviewed in the light of the Wiggin's Case, U. S., *infra*, and the evidence held admissible only where there is doubt as to who was the aggressor, *i. e.* ordinarily, when there are no witnesses to the act, but not even then, if a lying-in-wait otherwise appears; the opinion of Chalmers, J., is one of the best on the subject); 1877, Holly *v.* State, 55 id. 424, 428 (citing no precedents, and apparently apply-

whether a will was made to have a certain tenor or provision (as where an alteration is at issue), the plan or design or prior intention of the testator

ing the same rule as for communicated threats, *q. v.*, in § 247, *post*); Kendrick *v.* State, ib. 436, 450 (approving Johnson's Case, and applying the same rule, though with a rider admitting such evidence where "peculiar circumstances" demand it); 1885, Moriarty *v.* State, 62 id. 654, 661 (applying the same rule, apparently, as in the case of communicated threats, *q. v.*, in § 247, *post*); 1896, Prine *v.* State, 73 id. 838, 19 So. 711 (admitted, under the rule of Johnson's Case); *Missouri:* 1871, State *v.* Sloan, 47 Mo. 604, 609 (admitted, in effect overruling McMillen *v.* State, 1850, 13 id. 30); 1876, State *v.* Elkins, 63 id. 159, 164 (admitted in doubtful cases, where the issue is self-defence); 1877, State *v.* Taylor, 64 id. 358, 361 (excluded, because no question of self-defence arose); State *v.* Brown, ib. 367, 375 (admitted); 1877, State *v.* Alexander, 66 id. 148, 161 (admissible where there is "evidence tending to show" the deceased to be the aggressor; "unless an attempt be made to execute the threat," it is irrelevant); 1879, State *v.* Guy, 69 id. 435 (excluded; obscure); 1882, State *v.* Eaton, 75 id. 586, 590 (admitted, *semble*); 1885, State *v.* McNally, 87 id. 650 (threats received); 1886, State *v.* Rider, 90 id. 54, 60, 1 S. W. 825 (admitting threats without restriction, to determine who was the assailant, but pointing out that they constitute no legal justification without an overt act); 1888, State *v.* Rider, 95 id. 476, 484, 8 S. W. 723 (threats apparently usable to show whether the deceased did make the first assault, and the requirement that there must be other evidence of aggression apparently repudiated); 1897, State *v.* Thomas, 138 id. 168, 39 S. W. 459, *semble* (inadmissible, where no other evidence of aggression is offered); 1898, State *v.* Hopper, 142 id. 478, 44 S. W. 272 (the vagueness of the threat held here to affect its weight only); 1901, State *v.* Smith, 164 id. 567, 65 S. W. 270 (admissible only "in case the evidence leaves a doubt as to whether the defendant or the deceased was the aggressor"); *Montana:* 1901, State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508 (threats held admissible; overt-act rule defined in detail); 1903, State *v.* Felker, 27 id. 451, 71 Pac. 668 (prior threats admitted; no definite rule stated); *New Jersey:* 1824, State *v.* Zellers, 7 N. J. L. 237 (excluded; the point apparently not considered); *New York:* 1873, Stokes *v.* People, 53 N. Y. 174 (see quotation *supra*); *North Carolina:* 1877, State *v.* Turpin, 77 N. C. 473, 479 (admitted as tending to show prior attack, the evidence being wholly circumstantial; also as corroborating communicated threats); 1882, State *v.* Skidmore, 87 id. 509, 511, 512 (mayhem; self-defence in issue; threats of the prosecutor, two weeks before, excluded; citing only State *v.* Norton, *ante*, § 105); 1897, State *v.* Byrd, 121 id. 684, 28 S. E. 353 (admissible only where the evidence of the killing is wholly circumstantial; opinion obscure); *Ohio:* 1850, Stewart *v.* State, 19 Oh. 302 (admitted); *Oregon:* 1894, State *v.* Tarter, 26 Or. 38, 41, 37 Pac. 53 (admissible where self-defence is in issue; also to corroborate communicated threats; also where the aggressor is doubtful on the evidence); *Pennsylvania:* 1881, Nevling *v.* Com., 98 Pa. 322, 337 (point not raised); *South Carolina:* 1890, State *v.* Bodie, 33 S. C. 130, 11 S. E. 624 ("there may be cases in which uncommunicated threats might be competent"); 1895, State *v.* Faile, 43 id. 52, 20 S. E. 798 (admissible; but, *semble* there must be other evidence of the deceased's aggression); *Tennessee:* 1846, Copeland *v.* State, 7 Humph. 479, 495 (the deceased's threats were treated by the Court as throwing light on the question of her aggressior; no objection of law had been raised); 1872, Williams *v.* State, 3 Heisk. 376, 396 (the deceased's threats were treated as indicating that he was the aggressor; no objection of law having been made); *United States:* 1876, Wiggins *v.* Utah, 93 U. S. 465 (the question who fired the first shot being in dispute, held that on the evidence the trial judge improperly treated the defendant's aggression as being beyond doubt, and therefore wrongly excluded the evidence of the threats of the deceased; Clifford, J., dissents, apparently only because there was no evidence rendering the defendant's aggression doubtful); 1895, Allison *v.* U. S., 160 id. 203, 16 Sup. 252 (admissible where there is a doubt); *Vermont:* 1847, State *v.* Goodrich, 19 Vt. 116, 120, *semble* (self-defence; a declaration of the injured person, while on his way to the defendant's house, that he wanted some powder to blow it up, admitted); *Washington:* 1888, White *v.* Terr., 3 Wash. T. 397, 403, 19 Pac. 37 ("admissible in all cases, whether or not the deceased was the first assailant and whether or not the deceased" made a demonstration at the time of the killing); 1896, State *v.* Cushing, 14 Wash. 527, 45 Pac. 45 (approving the preceding); 1897, State *v.* Cushing, 17 id. 544, 50 Pac. 512, *semble* (excluded); *West Virginia:* 1875, State *v.* Abbott, 8 W. Va. 743 (admissible to show the deceased's state of mind, but only after communicated threats have been shown); 1889, State *v.* Evans, 33 id. 417, 425, 10 S. E. 792 (same).

The prosecution may of course *rebut* the evidence of threats by counter-testimony of the *deceased's peaceful plans:* 1880, People *v.* Cariton, 57 Cal. 83, 85; 1891, People *v.* Powell, 87 id. 348, 362, 25 Pac. 481 (the deceased's declarations that he had no arms; his habit of not carrying them; and his refusal to carry them, excluded); 1899, State *v.* Chaffin, 56 S. C. 431, 33 S. E. 454 (deceased's expressions negativing hostile intent, admissible in rebuttal). It would seem also that, whenever the deceased's aggression is in issue, the prosecution could begin with its evidence of peaceful plans.

There may be sundry other cases in which the threats of a deceased person would be relevant apart from the present doctrine; *e. g.:* 1854, Com. *v.* Wilson, 1 Gray 339 (where the defend-

is relevant to show the doing or not doing of this alleged act, as of any other act. The argument is, "Because he planned to make a will, or planned to revoke a will, or planned to will property to A, therefore he probably carried out this plan." The relevancy of such a plan is well established:

1851, Lord *Campbell*, C. J., in *Doe* v. *Palmer*, 16 Q. B. 747 (issue whether an alteration in a will was made by the testator before or after execution): "[We may consider] whether if in a will which is not in the handwriting of the testator an alteration appears, evidence might be received of previous declarations by him that he intended to dispose of the property in the manner in which it is disposed of by the will in its altered form. If the draft of the will could be produced, corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it that before the will was executed the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ, for this purpose, from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? . . . It would not be very creditable to the law if such evidence were to be excluded, as a legal inference might be fairly drawn from it respecting the priority of two events, that is to say, the making of the alteration and the execution of the will, and I am not aware of any principle, rule of law, decided case, or dictum against the admissibility of such evidence. . . . They demonstrate that the alteration is not an afterthought."

1876, *Jessel*, M. R., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154 (admitting ante-testamentary declarations of a lost will's provisions): "It is not strictly evidence of the contents of the instruments; it is only evidence of the intention of the person who afterwards executes the instrument. . . . simply evidence of probability, — no doubt of a high degree of probability in some cases, and of a low degree of probability in others. The cogency of the evidence depends very much on the nearness in point of time of the declaration of intention to the period of the execution of the document"; *Mellish*, L. J.: "The declarations of the testator as to what he intended to put in his will, made either contemporaneously with or prior to the execution of his will, are obviously evidence which may corroborate the other testimony as to what is contained in the will, . . . because it is more probable that the testator has than that he has not made a particular devise or a particular bequest when he has told a person previously that he intended to make it, inasmuch as it shows that he had it in his mind to make such a will at the time he made that declaration."[1]

ant claimed to have done the killing under an insane delusion that the deceased was conspiring against him, the deceased's uncommunicated hostile expressions were admitted for the State, to show that there was real ground for the defendant's feeling and that it was no insane delusion); compare § 231, *post*.

[1] *Accord*: 1873, Keen v. Keen, L. R. 3 P. & D. 107 (Hannen, J.: "[A statement by the testator as to his alteration of mind tends to show] intention, from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion"); 1877, Dench v. Dench, L. R. 2 P. D. 60, 64 (to determine whether an alteration favoring H. D. was made before execution, prior declarations in H. D.'s favor were received); 1880, Gould v. Lakes, L. R. 6 P. D. 1 (Hannen, J.: "In considering whether or no several pieces of paper constitute the will, evidence would be admissible to show that it was the intention of the testator to make dispositions in conformity with those which are found upon the several sheets of paper. . . . The question of law would not be different if the suggestion were that the first sheet was a forgery or an interpolation by somebody after the event"; following Sugden v. St. Leonards); 1855, Davis v. Rogers, 1 Houst. 44, 74, 93 (the testator was said to be blind, and his intelligent execution was denied; his previous expressions of intention, instructions, and depositions, admitted to show his state of mind when signing); 1883, Hoppe v. Byers, 60 Md. 393 (intention before the execution of a will to make one of a certain tenor, held admissible to show that a document offered as a will is genuine and not forged, when other evidence of genuineness is also offered; following Sugden v. St. Leonards, and Gould v. Lakes); 1862, Converse v. Allen, 4 All. 512 (to show that the omission as legatees

Two other principles are to be discriminated. (1) The admissibility of the expressions or *utterances themselves*, to evidence the testator's plan, under an exception to the Hearsay rule, is well established, but raises a different question; the distinction between the various hearsay kinds of ante- and post-testamentary declarations is elsewhere discussed, with a survey of the subject (*post*, §§ 1734–1740). (2) The relevancy of one mental condition to show a *later* or *earlier* one is elsewhere treated (*post*, §§ 233, 241).

The same principle which admits a testator's designs as to a will serves also to admit the design of a person to make a *gift*[2] or to execute a *contract*.[3] Here, however, the usual source of difficulty is the use of particular instances of conduct to evidence this design or plan (*post*, §§ 238, 371, 377).

§ 113. **Plans of Suicide by the Deceased, in a charge of Homicide.** Where on a charge of homicide the defence offers the hypothesis of suicide to explain the death of the person whose killing is charged, one of the relevant pieces of evidence to show the suicide is a plan of suicide. This fact, however, has been sometimes excluded, not because irrelevant, but because a certain quantity of other evidence of suicide may be required before this can be received. This requirement is elsewhere discussed (*post*, § 138).

Sub-topic E: EMOTION OR MOTIVE.

§ 117. **General Principle.** The term "motive" is commonly used in a confusing way, as if there were but one thing and one evidential question in-

of children born illegitimate, was not accidental, previous declarations of intention were admitted; Bigelow, C. J.: "They tended to prove that [the testator] had then a fixed design in regard to the disposition of the estate, by which the appellants would be excluded from any share therein"); 1900, Wilton *v.* Humphreys, 176 Mass. 253, 57 N. E. 374 (whether a marginal addition to a codicil in different ink, the codicil reciting a part of the prior will, was there before execution; the testator's oral statement of the terms of the part thus recited, made two weeks before, held properly excluded in the trial Court's discretion, the will itself being in the testator's possession at the time of executing the codicil, and the prior declaration being therefore of little value on the facts); 1892, Hope's Appeal, 48 Mich. 520, 12 N. W. 682 (former intentions to change an existing will, admitted as bearing on the execution of an alleged later will); 1897, Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642 (undue influence; the devisees' plan to prevent the testatrix from leaving property to the plaintiff, admitted); 1896, Gardner *v.* Gardner, 177 Pa. 218, 35 Atl. 558 (testator's plan admitted, as pointing to non-revocation); 1899, Swope *v.* Donnelly, 190 Pa. 417, 42 Atl. 882 (genuineness of a will; declarations of testamentary intentions at various preceding times, excluded as too vague; opinion ill-considered); 1879, Johnson *v.* Brown, 51 Tex. 80 (testator's declarations admitted, on the question of a will's genuineness).

[2] 1846, Powell *v.* Olds, 9 Ala. 861, 864 (intention as to the nature of a gift afterwards made, admitted); 1899, Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791 (whether a deed was given on a certain condition in view of death; grantor's intention held relevant); 1886, Woodcock *v.* Johnson, 36 Minn. 217, 219 (issue whether a deed was forged; the fact "that he had previously directed the deed to be prepared precisely as it was executed, and with intent to execute it, would add probability to the testimony of those witnesses who testified that he directed his name to be signed to the deed"); 1898, Fellows *v.* Fellows, 69 N. H. 339, 46 Atl. 474 (whether a discharge was executed by a bondholder; his declarations of intention to do so, admitted). Compare the *verbal act* rule, *post*, § 1777.

[3] 1862, Kumler *v.* Ferguson, 7 Minn. 442 (to show the consideration actually paid, the preceding negotiations admitted); 1899, Aikin *v.* Oil Co., 189 Pa. 39, 41 Atl. 997 (terms of a contract; promise to sign a contract with certain terms, admitted); 1877, Torrey *v.* Nixon, 43 Wis. 142 (oral lease; dispute whether it was to P. or to N.; an unexecuted written lease to P., admitted as showing the probabilities). *Contra:* 1878, Richardson *v.* Robbins, 124 Mass. 105 ("previous talk of the parties," excluded to prove terms of a lost deed). Compare the use of *value as showing a motive* for the *price* of a sale (*post*, § 391).

The parol evidence rule (*post*, § 2430) would of course exclude prior negotiations when offered in competition with the terms of an existing document, and not, as here, to show what the terms of a lost document are.

volved. But there are two things, and two distinct evidential steps. (1) We may argue, first, that since a specific emotion or passion is likely to lead to the doing of the appropriate act — for example, desire for money to theft or robbery, or angry hostility to an act of violence —, the presence of such an emotion in the person in question is likely to lead to the deed in question. In this step of the argument we assume the emotion as a fact, proved somehow or other. Just as a specific sort of disposition, of habit, of plan, is likely to lead to the appropriate act, so a specific sort of emotion or passion has a similar evidential bearing. The basis of this inference is the living, impelling, active emotion, seeking for an outlet in volition. (1) But this emotion must in its turn be proved, — just as character, design, capacity, must be proved. This is the next step, and evidentially a very different one. Usually the evidence is circumstantial; and of two sorts, (*a*) conduct of the person, and (*b*) events about him tending to excite the emotion. In (*a*) his conduct is the expression and effect of the existing internal emotion. In (*b*) the outward facts are such as may be the stimulus and cause of the emotion. But what conduct and what outer events are of value as showing the probable existence of the emotion is a different question from the relevancy of the emotion to show the probability of an act induced for it. The latter (which is the present subject) raises practically no evidential disputes; the former raises a host of them (*post*, §§ 385–406).

The unfortunate ambiguity in the word "motive" thus reveals itself. That which has value to show the doing or not doing of the act is the inward emotion, passion, feeling, of the appropriate sort; but that which shows the probable existence of this emotion is termed — when it is of the sort (*b*) above, *i. e.* some outer fact — the "motive." For example, the prosecution of A by B in a suit at law may be said to have been a "motive" for A's subsequent burning of B's house. But in strictness the external fact of B's suit cannot be A's "motive"; for the motive is a state of mind of A; the external fact does tend to show the excitement of the hostile and vindictive emotion, but it is not identical with that emotion. This use of the word "motive" thus tends to obscure the double evidential step involved; for when it is said that B's suit may be offered in evidence as the "motive" for A's burning, we are apt to conceive ourselves as inferring directly from the suit (as the evidentiary fact) to the burning (as the proposition to be proved); when in truth there are two steps involved, — from the lawsuit to the emotion, and the emotion to the act. Although the evidential questions connected with the latter inference are practically none, nevertheless the true nature of the evidentiary questions connected with the former inference is much obscured when we fail to understand clearly what it is that we are trying to infer. Thus, the question of relevancy in the above illustration is, whether the fact of a lawsuit is of real probative value to show the probable excitement of a violently vindictive desire to destroy the opponent's property, and this inference may not be an admissible one. It ought, therefore, to be clearly understood that the "motive," in the correct sense, is the

emotion supposed to have led to the act, and that the external fact is merely the possible exciting cause of this "motive," and not identical with the "motive" itself; and the evidentiary question is, not whether that external fact is admissible as a motive, but whether it is admissible to show the probable existence of the emotion or "motive." It would be more conducive to clearness of thought if the word "motive," so misleading in its popular associations, could be abandoned altogether in discussing evidential questions.

§ 118. **Motive always Relevant, but never Essential.** (1) Conceiving an emotion, then, as a circumstance showing the probability of appropriate ensuing action, it is *always relevant:*

1868, *Woodruff*, J., in *Kennedy* v. *People*, 39 N. Y. 245, 254: "It is always a just argument on behalf of one accused that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive. On the other hand, proof of motive tends in some degree to render the act so far probable as to weaken presumptions of innocence and corroborate evidences of guilt."

1897, *Dale*, C. J., in *Son* v. *Terr.*, 5 Okl. 526, 49 Pac. 923: "Motive to commit crime, if shown, may in many cases be sufficient alone, almost, to induce a belief of guilt. Upon the other hand, where no motive for the commission of a crime can be shown it is almost impossible to convince the mind of guilt. Men do not ordinarily commit grave crimes unless there is in their minds a motive strong enough to overcome the natural repugnance against crime, and the fear of punishment which usually follows detection. This view of this question is so universally recognized as being true that it has become incorporated into the law, and in almost all cases where the guilt of a defendant depends upon the facts and circumstances in proof in the case the Court instructs the jury to consider the motive or lack of motive which the proof shows may or may not exist in the mind of a defendant on trial charged with crime."

All the questions of relevancy, then, can be, and should be for simplicity's sake, resolved into questions of the relevancy of evidence of this emotion. Thus, the relevancy of an intrigue by an alleged wife-murderer with a paramour raises the question, not whether lust is a sufficient emotion for murder, but whether the intrigue was a sufficient circumstance to excite a murderous impulse or emotion.

(2) It is sometimes popularly supposed that in order to establish a charge of crime, the prosecution *must show a possible motive.* But this notion is without foundation. Assuming for purposes of argument that "every act must have a motive," *i. e.* an impelling emotion (which is not strictly correct), yet it is always possible that this necessary emotion may be undiscoverable, and thus the failure to discover it does not signify its non-existence. The kinds of evidence to prove an act vary in probative strength, and the absence of one kind may be more significant than the absence of another; but the mere absence of any one kind cannot be fatal. There must have been a plan to do the act (we may assume); the accused must have been present (assuming it was done by manual action); but there may be no evidence of preparation; or there may be no evidence of presence; yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate

motive may be a great weakness in the whole body of proof;[1] but it is not a fatal one, as a matter of law. In other words, there is no more necessity, in the law of evidence, to discover and establish the particular exciting emotion, or some possible one, than to use any other particular kind of evidential fact:

1894, *Harlan, J.*, in *Pointer* v. *U. S.*, 151 U. S. 396, 413, 14 Sup. 410, approving the following charge by *Parker, J.*: "'The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed that it cannot be fathomed; and, as it does not require impossibilities, it does not require the jury to find it. Yet, if they do find it, it simply becomes an item of evidence in the case, which is only evidentiary at best, — that is, it is only an item of evidence going to show whether a particular party may have committed an act, and sometimes going to show the characteristics of that act.' It is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury. The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction."

1902, *Prentice, J.*, in *State* v. *Rathbun*, 74 Conn. 524, 51 Atl. 540: "The State was under no obligation to show a motive for the commission by the accused of the crime charged, much less a sufficient or adequate one. While it is a recognized rule of human conduct that crime is the response of the evil mind to some temptation, and that men of sound mind are rarely, if ever, prompted to commit crime without some impelling motive, it does not follow, and it is not the law, that the prosecution, to justify a conviction in a given case, must be so successful in fathoming the mysteries of the human mind and in revealing the possibly hidden secrets influencing it as to develop and disclose to the jury a motive sufficient and adequate for the commission of the offence. Recognizing the fact that crimes are generally committed from some motive, evidence tending to show the existence or non-existence of such motive is held to be admissible, and often forms an important factor in the inquiry as to the guilt or innocence of an accused. For the purpose of this evidential inquiry the sufficiency of the motive is most pertinent. It is pertinent, however, only in so far as it tends to furnish evidence indicative of guilt, or the reverse, to be considered and weighed in connection with the other evidence in the case. The other evidence may be such as to justify a conviction without any motive being shown. It may be so weak that, without a disclosed motive, the guilt of the accused would be clouded by a reasonable doubt."[2]

(3) An emotion may impel *against* as well as towards an act. Thus, a defendant's strong feelings of affection for a deceased person would work against the doing of violence upon him, and would thus be relevant to show the not-doing. This is also the significance of evidence that there was "no apparent motive" for a murder; for a state of emotional indifference — *i. e.* the absence of any anger, jealousy, or the like — is almost equally powerful in its operation against a deed of violence.[3] Sometimes, of course, such evidence merely negatives an alleged murderous emotion, or negatives the tacit possibility of it; but there is also this affirmative

[1] 1898, State *v.* Foley, 144 Mo. 600, 46 S. W. 733.

[2] *Accord:* 1900, Brunson *v.* State, 124 Ala. 37, 27 So. 410; 1897, People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; 1900, State *v.* Lucey, 24 Mont. 295, 61 Pac. 994; 1885, State *v.* Green, 92 N. C. 779, 782; 1877, Lanahan *v.* Com., 84 Pa. 80, 87.

[3] 1861, People *v.* Ah Fung, 17 Cal. 377; and the quotations *supra*.

aspect to the argument, namely, that emotional indifference makes against crimes.

(4) Where the doing of the *act is conceded*, and the dispute turns on an issue such as self-defence, there is in strictness no materiality for evidence which tends merely to prove the doing of the act, and, in particular, there is no evidential function remaining for the fact of emotion or motive. It does not necessarily follow that in criminal cases all such evidence should be excluded; for there are no pleadings to make clear what is conceded and what is not, and it is possible that the defence would improperly take advantage of the apparent failure of proof of the act. It has occasionally been said that the superfluousness of the evidence, and the possible unnecessary prejudice it might create against the defendant, require its exclusion;[4] but this seems an unwise rule.

§ 119. **"Motive" as a Fact in Issue.** In the proper sense of "emotion," a "motive" can seldom be a fact in issue under the substantive law. But in some of its loose popular senses, "motive" is frequently in issue, and these uses must be distinguished from the evidentiary use of emotion or "motive" as tending to prove the doing of an act. (1) "Motive" may be in issue, in the sense of *good or bad faith;* as where the motive of a transfer is charged to have been in fraud of creditors. (2) "Motive" may be in issue, in the sense of *purpose* aimed at in an act — a sense not materially different from the preceding one. (3) "Motive" may be in issue, in the sense of *reason or ground* for conduct; as where the motive of a wife for leaving her husband is disputed, or of employees for leaving their employer. (4) "Motive" may be in issue, in the sense of *malice* or *criminal intent*. The modes of evidencing these various states of mind are elsewhere dealt with (*post*, §§ 244–406).

[4] 1895, People v. Gress, 107 Cal. 461, 40 Pac. 752 (that the accused had endeavored to seduce the deceased's wife).

SUB-TITLE I (*continued*): EVIDENCE TO PROVE A HUMAN ACT.

TOPIC II: CONCOMITANT EVIDENCE (OPPORTUNITY, ALIBI, ETC.).

CHAPTER VII.

§ 130. **General Principle.** It has already been noted (§ 43), that convenience requires the grouping of the various kinds of evidentiary facts according as they come, in time, before, at, or after the act to be evidenced. The various facts of the first or Prospectant class have been examined (*ante*, §§ 51–119). The second or *Concomitant* class may now be considered. There is no radical distinction between the classes; they serve as convenient ways of subdividing the great mass of evidentiary facts and of associating those which are most closely related.

A fact having a Concomitant indication is one which is thought of as being in existence at the time of and in connection with the act to be proved; the logical indication or inference is that the person bearing that fact as a mark is thereby to be associated more or less closely with the act. There is a *negative* as well as an *affirmative* form of inference; the two being related much in the same way as good character (*ante*, § 55) points forward to the non-doing of a crime, while bad character points forward to its doing. In the Concomitant inference, there is the affirmative form, *e. g.* X was at the place of the murder, therefore he may have committed it; and the negative form, *e. g.* X was at a different place at the time of the murder, therefore he did not commit it. The theory of the former is that the fact of presence at the time is more or less intimately and necessarily associated with the doing of the act; the theory of the latter is that the fact of absence at the time is more or less certainly inconsistent with the doing of the act. Under each form of argument, there are opportunities for explaining away by other hypotheses the significance of the evidentiary fact, on the general theory of Explanation (*ante*, § 34).

So far as the scope of evidentiary facts is concerned (where the doing of a given act is disputed), the present class usually comprises a great

number of circumstances in the ordinary trial; but the occasions for laying down rules of evidence are comparatively few. Interesting illustrations from celebrated trials might be multiplied almost without number. But the present purpose is merely to examine such rules of limitation as may have been prescribed by the Courts.

A. Opportunity.

§ 131. **Nature of the Argument.** When an act is done, and a particular person is alleged to have done it (not through an agent but personally), it is obvious that his physical presence, within a proper range of time and place, forms one step on the way to the belief that he did it. It is true that another person may have done it, but the former is at least within the limited number of persons who could have done it, and thus is fit to become a subject for further investigation. Under the evidential canon that to a fair extent the possibility of other hypotheses must be first excluded (*ante*, § 31), it might be asked whether the mere possibility involved in Opportunity is not too slender, whether something more than mere opportunity, — for example, exclusive opportunity — should not first be shown. The answer to this is that, by the very showing of an opportunity, countless hypotheses are negatived; and the person charged, who might otherwise have been one of innumerable other persons at the time, is shown to have been one of the limited number who are in a position to do this particular act. In short, opportunity alone, and *not exclusive opportunity*, is a sufficient showing for admissibility. The circumstances involving Opportunity will of course vary with the facts of each case; and no rule of evidence seems to have been laid down. That the offer involves incidentally the doing of *another crime* by the defendant does not affect its propriety.[1] Since the showing of Opportunity leaves open all the hypotheses of other persons' equal opportunity, it is proper for the proponent of the evidence to strengthen it by cutting off, so far as possible, these other hypotheses, *i. e.* by showing that the person charged was one of a few only, or the sole person, having the opportunity. In other words, while the proponent need not, he *may* always show exclusive opportunity.[2]

§ 132. **Explaining away; Equal Opportunity for others.** If A is shown

[1] 1858, State *v.* Wentworth, 37 N. H. 196, 211 (indictment for placing an obstruction, viz. two stones, on a railroad track; evidence of the placing of iron rails on the track by the defendant not far away and within two hours of the placing in issue, admitted to show that the defendant was "in a situation to place the obstructions on the track"). For the authorities upon the general principle that the incidental use of other crimes is immaterial, see *post*, § 216.

[2] 1897, People *v.* Van Horn, 119 Cal. 323, 51 Pac. 538 (murder by an officer of an arrested person; defence, that a mob took the man from the defendant and killed him; the region being sparsely settled, the prosecution was allowed to show, in disproving the mob-story, that various persons living in the region were not near the place at the time in question); 1866, Miller *v.* People, 39 Ill. 466 (the prosecution showed that no other persons of the description of the robbers, except the defendants, were in the neighborhood at the time in question). The following ruling seems to ignore this perfectly accepted principle: 1878, State *v.* England, 78 N. C. 552 (evidence that tracks did not fit the defendant's brother's foot, excluded; "A did *not* commit the offence, therefore B *did*," held an unsound argument; misled by the rulings of the same Court *post*, § 142).

to have been in a building when a murder was committed, he immediately becomes — so to speak — an eligible person for the charge; he *may* have done the deed. If, now, admitting this fact, *i. e.* opportunity, he seeks to diminish its probative significance, an effective and usual way will be to show that there were in the same building, at the same time, two or ten or five hundred other persons. In so doing, he has pointed out the possibility of two or ten or five hundred other hypotheses, equally possible with that charged against him. The equal strength of these other hypotheses (as noted *ante*, § 34, in dealing with the logical theory of relevancy) takes away the significance of the fact of his opportunity, just in proportion to the number and degree of naturalness of the other hypotheses, — *i. e.* the hypotheses that each of the other persons had an equal opportunity. Such is the principle of explaining away Opportunity. Moreover, as counter-explanations which equally satisfy the evidentiary fact may always be offered, and without limit, there is no restriction on proving the presence of other persons having the same or approximate opportunities, — a principle will be seen (*post*, § 139) to be of much consequence. The practical employment of this method of weakening the proponent's evidence of Opportunity is frequent enough; but it seldom calls for judicial ruling.[1]

§ 133. **Same: Other Intercourse with Complainant in Bastardy, Seduction, or Rape.** On this principle it is permissible to show, in a *filiation* suit or *bastardy* prosecution, that the mother had intercourse with another man about the time designated by the period of gestation, for this predicates an equal possibility of conception through some one else's act;[1] and it would seem

[1] 1847, Pollard *v.* Lively, 4 Gratt. 73, 77 (to show that there was a second person in existence named B. P., a deed executed by one B. P. and probated was received). The *feasibility of self-infliction* of harm seems to come under this principle: 1895, State *v.* Lee, 65 Conn. 265, 280, 30 Atl. 1110 (a showing that wound could have been self-inflicted, allowed); 1875, Hitchcock *v.* Burgett, 38 Mich. 504 (explaining a renewed injury by the plaintiff's negligent abandonment of splints and crutches, instead of the defendant's careless surgery). *Sundry analogous cases:* 1885, Quinn *v.* Higgins, 60 Wis. 667, 24 N. W. 482 (the non-union of bones in a fracture having been charged to the defendant's unskilful setting, evidence was admitted of non-union occurring through other causes than improper setting); 1852, Lush *v.* McDaniel, 13 Ired. 487 (to show that a warranty of soundness in a slave was not broken, evidence that the venereal disease affecting her was not known to exist in the region of the vendor's plantation but did exist in the region of the vendee's, 75 miles distant).

[1] *Ill.:* 1874, White *v.* Murtland, 71 Ill. 250, 264 (seduction; loss of service through pregnancy; intercourse with others admissible to show the defendant not the cause of the pregnancy); *Ind.:* 1841, Walker *v.* State, 6 Blackf. 1 ("about the time" of begetting); 1853, Hill *v.* State, 4 Ind. 112 (same); 1859, Townsend *v.* State, 13 Id. 357 ("a period of time that would render it not improbable"); 1880, Whitman *v.* State, 69 Id. 448 (extended to the woman's action for seduction, where pregnancy by the defendant would enter into the damages); 1883, Benham *v.* Richardson, 91 Id. 82 (admitted); *Ia.:* 1895, State *v.* Wickliff, 95 Ia. 386, 64 N. W. 283, (admitted); 1899, State *v.* Seevers, 108 Id. 738, 78 N. W. 705 (admissible if relating to period of gestation); *Ky.:* 1824, Ginn *v.* Com., 5 Litt. 300 ("about the same time she charges him"); *Mass.:* 1862, Eddy *v.* Gray, 4 All. 435, 439 (excluded, if "at any point of time more than ten calendar months before the birth of the child"; unless gestation is shown to have been unusually protracted); 1875, Sabins *v.* Jones, 119 Mass. 167, 170 (excluded, because not within the proper period); 1877, Force *v.* Martin, 122 Id. 5 (excluding the evidence because no time was stated); 1879, Ronan *v.* Dugan, 126 Id. 176 (same); *Miss.:* 1859, Anon., 37 Miss. 54, 58 (admitted); *Nebr.:* 1895, Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. [illegible] ("at or near the time"); 1901, Erickson *v.* Sawmill, 62 Id. 368, 87 N. W. 166 (similar); 1902, Gatzmeyer *v.* Peterson, — Id. —, 94 N. W. 974 (cross-examination as to keeping company with other men, held not improperly excluded on the facts); *N. Y.:* 1890, Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 (admitted; here the action was a civil one for rape, but pregnancy was laid as damage and

that the mere fact of intimate association, or at least of improper familiarities, would be admissible, because this makes more possible the agency of some other man.[2] The *time* of the other intercourse should not be reckoned by any fixed rule.[3] But the issue of *paternity* must be involved. This is necessarily true of a filiation suit or bastardy prosecution, and also of a father's action for *seduction* where pregnancy is alleged as the cause of loss of service.[4] In a prosecution, however, for *rape* or *adultery*, paternity not being in issue, but merely the defendant's act of intercourse, the paternity and therefore the intercourse of another man is immaterial;[5] unless, indeed, the prosecution by inviting the issue, makes counter-evidence admissible (on the principle of § 15, *ante*).[6]

Certain other evidential uses of similar facts are here to be distingnished, such as the use of other acts of intercourse by a *complainant in rape*, to indicate her disposition or motive to consent (*post*, §§ 200, 402), and the use of particular instances of unchaste conduct to impeach the credit of a woman-witness (*post*, § 987); for both of these uses have their peculiar limitations, which may or may not in a given case be more favorable to admissibility than the preseut principle.

§ 134. **Same: Adultery to show Illegitimacy.** On the same principle, in an issue of illegitimacy, the wife's adultery would be evidential to show the

proved as a fact); *N. C.* 1876, State *v.* Bennett, 75 N. C. 305 (excluded, Rodman, J.: "It would only tend to prove the physiological fact that two men may have connexion with a woman about the same time, and one of them get her with child: it would not tend to rebut the presumption that the defendant was the one"); 1878, State *v.* Britt, 78 id. 439, 442 (admitted, questioning the preceding case, but distinguishing it because here the defendant totally denied his own intercourse with the woman); 1880, State *v.* Parish, 83 id. 613 (without other evidence, "insufficient to overcome the statutory presumption [of the woman's oath], and by itself incompetent"); 1899, State *v.* Warren, 124 id. 807, 32 S. E. 552 (intercourse with the mother by a third person abont the time of begetting, admissible; conflict of previous cases examined); *U. S.*: 1809, U. S. *v.* Collins, 1 Cr. C. C. 592 (admissible, if "not more than twelve months nor less than six before the birth of the child"); *Vt.*: 1856, State *v.* Johnson, 28 Vt. 512, 517, 523 (admitted); *Va.*: 1811, Fall *v.* Overseers, 3 Munf. 495, 502, 505 (admissible, per Roane, J.; yet excluded, per Brook, J., since the defendant had admitted his own intercourse, — a clearly unsound ruling); *Wis.*: 1891, Humphrey *v.* State, 78 Wis. 571, 47 N. W. 836 (admitted).

[2] 1902, Kelly *v.* State, 133 Ala. 195, 32 So. 56; 1895 State *v.* Wickliff, 96 Ia. 386, 64 N. W. 283. *Contra*: 1877, Rawles *v.* Ford, 56 Ind. 433 (bastardy; the complainant's declarations of preference for another man, at the time of alleged intercourse, excluded); 1882, Houser *v.* State, 86 id. 23[illegible] (bastardy; that the complainant kept company with other men about the alleged time of intercourse, excluded).

[3] See the quotations in the note *supra*; the following case contains the best statement: Benham *v.* Richardson, Ind., *supra*, n. 1, Best, C. ("The limit within which this enquiry may be made, is not, however, settled. This must necessarily depend upon the circumstances of each particular case. If conception is claimed to occur from a single act of coition the date of which is fixed, there is but little difficulty in determining the period within which this enquiry may be made; but if it follows three or four different acts of sexnal intercourse occurring at different times, and a fully developed child is born less than nine months thereafter, the enquiry ought to embrace a greater period of time, especially before the alleged acts of intercourse").

[4] Cases cited *supra*, n. 1.

[5] 1875, Com. *v.* O'Connor, 107 Mass. 219; 1881, State *v.* Witham, 72 Me. 531, 535.

[6] 1881, State *v.* Witham, *supra*; 1903, Knowles *v.* State, — Tex. Cr. —, 72 S. W. 398 (admitted on a charge of rape under the age of consent, where offered to contradict the prosecutrix' testimony that the defendant was the father of her child; Brooks, J., diss.). Occasionally some other issue makes it relevant: 1850, Nugent *v.* State, 18 Ala. 521 (abuse of a child S. by an attempt to know carnally; the existence in S. of venereal disease and of bruises being shown, the defendant was allowed to offer evidence of intercourse with S. by others, as showing the possibility of others being the cause); 1898, People *v.* Craig, 116 Mich. 388, 74 N. W. 528 (carnal knowledge of minor while a member of family; intercourse of prosecutrix with others, admitted to account for pregnancy proved).

paternity of her child to be her paramour's. But this is forbidden, except on certain conditions, by the so-called presumption of legitimacy (*post*, § 2527). The reason is that this fact does not actually prove the illegitimate paternity, but merely makes it possible or probable; and such an uncertainty of conclusion would be practically undesirable where an issue of inheritance is involved, especially in a country like England, where the interests of landed estates and the system of primogeniture were so important; while the paternity of an unmarried woman's child involves no such weighty considerations of general policy. Accordingly, the presumption of legitimacy forbids any investigation into the illegitimate paternity of a child born after marriage, except where the husband's non-access (*post*, § 137) during the period of gestation makes his paternity impossible, and thus the identity of the real father becomes a minor and corroborative fact only.

B. Essential Inconsistency.

§ 135. **General Principle.** It has been already pointed out (*ante*, § 130) that there is a negative form of the Concomitant inference, which is indeed, if not the more common, at least the more effective one. It may be termed the argument from Essential Inconsistency. Its usual theory is that a certain fact cannot coexist with the doing of the act in question, and, therefore, that if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act. The form sometimes varies from this statement; but its nature is the same in all forms. The inconsistency, to be conclusive in proof, must be *essential*, *i. e.* absolute and universal; but since, in offering evidence, we are not required to furnish demonstration but only fair ground for inference (*ante*, §§ 32, 38), the fact offered need not have this essential or absolute inconsistency, but merely a probable or presumable inconsistency; and its evidentiary strength will increase with its approach to absolute or essential inconsistency. There are five common cases of this form of the argument (though more are conceivable): 1. The absence of the person charged in another place (Alibi); 2. The absence of a husband (non-access), — a variety of the preceding; 3. The survival of an alleged deceased person after the supposed time of death; 4. The doing of a crime by a third person; and, 5. The self-infliction of the harm alleged, — resting on the same principle as the preceding instance.

§ 136. **Alibi.** The theory of an *alibi* is that the fact of presence elsewhere is essentially inconsistent with presence at the place and time alleged, and therefore with personal participation in the act. Thus, the evidentiary fact is a new affirmative proposition, considered as a *factum probandum*, though its logical operation is a negative one:

Ante 1726, *Gilbert*, C. B., Evidence, 145: "[The proof of an opponent] is not properly the proof of a negative, but the proof of the same proposition totally inconsistent with what is affirmed; . . . as if the defendant be charged with a trespass, . . . and if the fact be proved, he can only prove a proposition inconsistent with the charge, and that he was at another place at the time when the fact is supposed to be done, or the like."

1762, *Foster*, J., Crown Law, 3d ed. 368: "If it [alibi] appeareth to be founded in truth, it is the best negative evidence that can be offered. It is really positive evidence which in the nature of things necessarily implieth a negative."

1850, *Shaw*, C. J., in *Com.* v. *Webster*, 5 Cush. 295, 318; Bemis' Rep., 469: "When a fact has occurred, with a series of circumstances preceding, accompanying, and following it, we know that these must all have been once consistent with each other; otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence, upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail. Of this character is the defence usually called an *alibi*; that is, that the accused was *elsewhere* at the time the offence is alleged to have been committed. If this is true, it being impossible that the accused could be in two places at the same time, it is a fact incousistent with that sought to be proved, and excludes its possibility." [1]

It is obvious that the *alibi* argument is relevant only for disproving personal participation (in a broad sense) in the act, and does not affect an alleged co-operation as principal ordering the act elsewhere by an agent. Just what modifications might be necessary in the *alibi* argument where action is predicated at a distance without an agent but through thought-transference may be left for determination until the practicability of such action is judicially accepted.

The only question of a rule of admissibility that seems to arise is whether the *alibi* must be such as absolutely to preclude the possibility of presence at the alleged time and place of the act. It is sometimes said that this much must be shown.[2] Such expressions, however, seem in truth to refer only to the weight of the *alibi* argument, by pointing out that it falls short of complete proof except on those conditions; they mean merely that without them the argument is valueless or less valuable, not that the evidence is inadmissible. If they were intended to mean anything more, they are clearly unsound,[3] and would exclude nine *alibi* arguments out of ten. Even as affecting the weight of the argument (with which we have in this place no concern), such statements seem erroneous; for an *alibi* may not involve absolute impossibility, but only high improbability, and yet be convincing. The matter may be thus demonstrated. Suppose we are to argue that X's footprint near the house of a murder is evidentiary of his presence; no one would contend that in proving this fact as a *factum probandum* complete proof is necessary; any evidence that it is probably his footprint would be admissible. So, when the fact of X's presence elsewhere is offered in disproof of his participation any evidence rendering this fact probable is receivable.[4]

[1] Compare also Bentham, Rationale of Judicial Evidence, b. V, c. XVI, § 11 (Bowring's ed. vol. VII, p. 112).

[2] 1873, Agnew, J., in Briceland v. Com., 74 Pa. 463, 469 ("When a defence rests on proof of an *alibi*, it must cover the time when the offence is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of the murder; . . . for if it be possible that he could have been at both places, the proof of the *alibi* is valueless."

[3] *Accord:* 1879, Stuart *v.* People, 42 Mich. 255, 260, 3 N. W. 863; 1898, Ford *v.* State, 101 Tenn. 545, 47 S. W. 703.

[4] Thus all facts tending to show his presence elsewhere are admissible: 1894, State *v.* Delaney, 92 Ia. 467, 61 N. W. 189 (the defendant was in a room in a house; evidence admitted of the impossibility of passing to the street without waking other inmates).

There is no reason why, in proving the subsidiary fact of *alibi*, any different rule should be applied than is applied to the proof of other subsidiary facts. Thus, if X was at the other place one hour before the act, we argue that probably he was still there at the exact time, and hence that he could not have been at the place charged.[5] It may be added that the argument of *alibi* is not in theory confined to criminal acts, but may be equally applied to the disproof of *civil acts*, such as the execution of a deed.[6] Distinguish, as involving other principles, the evidential effect of the *fabrication of an alibi* (*post*, § 279), and the question of the *burden of proving an alibi* (*post*, § 2512).

§ 137. **Non-access of Husband to show Illegitimacy.** Since legitimacy of offspring implies a begetting by the husband, it would be relevant, in disproving legitimacy, to use his absence from the wife at the probable time of begetting as showing the impossibility of the act of begetting. For reasons of policy, however (already noted in § 134), it was long forbidden to employ this mode of proof, except in a very restricted form, namely, that the husband was not at the time *infra quattuor maria*. This doctrine has in modern times been much relaxed, if not entirely abandoned, so that the argument from non-access is now fully available. The scope of the doctrine is dealt with in connection with the presumption of legitimacy (*post*, § 2527).

§ 138. **Survival of the alleged Deceased.** Where the *corpus delicti* is disputed, and, for example, in a charge of homicide the alleged deceased is claimed by the defendant not to have been killed, the argument is obviously available that he is still alive, or was alive after the time of the supposed death, for this would be absolutely inconsistent with his death as supposed:

1762, *Foster*, J., Crown Law, 3d ed., 367: "A is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of B. C is afterwards indicted as accessory to this murder; and it cometh out upon the trial by incontestable evidence that B is still living. Lord Hale somewhere mentioneth a case of this kind. Is C to be convicted or acquitted? The case is too plain to admit of a doubt."

1850, *Shaw*, C. J., in *Com. v. Webster*, 5 Cush. 295; Bemis' Rep. 269, 295, 475: "It may be as well to consider now as at any other time that ground of defence on the part of the prisoner which has been denominated — not perhaps with precise legal accuracy — an *alibi*; that is, that the deceased was seen elsewhere out of the Medical College after the time when (by the theory of the proof on the part of the prosecution) he is supposed to have lost his life at the Medical College. It is like the case of an *alibi* in this respect, that it proposes to prove a fact which is repugnant to and inconsistent with the facts constituting the evidence on the other side. . . . Although the time alleged in the indictment is not material, and the act done at another time would sustain it, yet in point of evidence it may become material; and, in the present case, as all the circumstances shown on the other side, and relied upon as proof, tend to the conclusion that Dr. Parkman was last seen entering the Medical College, and that he lost his life therein, if at all, the fact of his

[5] The full logical effect of an *alibi*, however, arises only when by ordinary exertion the person could not have changed his place in season; 1898, Peyton *v.* State, 54 Nebr. 188, 74 N. W. 597 (instruction held too strict in requirements).

[6] 1897, Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195 (signing of a note); 1867, Doe *v.* Stevens, 36 Ga. 463, 473 (execution of deed); 1884, Nash *v.* Hoxie, 59 Wis. 384, 386, 18 N. W. 408 (contract).

being seen elsewhere afterwards would be so inconsistent with that allegation that (if made out by satisfactory proof) we think it would be conclusive in favor of the defendant." [1]

§ 139. **Commission of Crime by a Third Person.** If X is charged with homicide, committed by himself alone, and it is shown in disproof that Y did the killing, X is clearly exonerated; for the fact that Y has done it is inconsistent with and exclusive of X's guilt:

1833, *Gaston, J.*, in *State* v. *May*, 4 Dev. 328, 338 (larceny of a slave): "The criminal act imputed to the prisoner might as readily be committed by many as by one. . . . Both [W. M. and the defendant] might be guilty, or both might be innocent; and a common guilt or a common innocence was as presumable as the guilt of one only. . . . But proof that certain acts constituting a part of the criminal transaction itself were done by W. M. might have been of high importance to the prisoner by removing so much of the inference of guilt as would be raised were those acts brought home to him. . . . Proof that the taking was by other than the prisoner perhaps might repel this inference [of guilt], — not because the guilt of one shows the innocence of the other, but because proof that specific acts were done by one weakens or removes the presumption that the same acts were done by another."

There are, of course (as the preceding passage shows), cases in which X is by hypothesis in some way an accomplice of Y, either at a distance or as a personal sharer; and there is even the rare case of independent and double felonious acts upon the same object. To such cases the argument cannot apply. Apart from them, it is as cogent as an *alibi*. If the Man with the Iron Mask was the Duc de Vermandois, he could not have been the Général de Bulonde; and if the Tichborne claimant was Arthur Orton, he could not have been Roger Tichborne.

The question that arises, from the point of view of the rules of evidence, is whether, in evidencing this doing by a third person as a fact of disproof, any unusual requirements should be made as to the strength of the evidence before it can be admitted. Thus, to prove A guilty of murder, evidence of his threats (*i. e.* a design) to commit it are always admissible (*ante*, § 105); now, if the fact to be proved is that B committed the murder (as inconsistent with A's guilt), why should not B's threats be admitted, without further restriction, as A's are? It is true that evidence of B's threats alone would not go far towards proving B's commission; but it is not a question of absolute proof nor even of strong probability, but only of raising a reasonable doubt as to A's commission; and for this purpose the slightest likelihood of B's commission may suffice or at least assist. The evidence of B's threats, to be sure, may, in a given instance, be too slight to be worth considering; but it seems unsound as a general rule to hold that mere threats, or mere evidentiary facts of any one other sort, are to be rejected if unaccompanied by additional facts pointing towards B as the doer. Nevertheless, most Courts have shown an inclination to make some such restriction, and to insist that two or more

[1] In this case the prosecution were not allowed to show that the testimony of survival might be explained away by showing that there was another person in Boston easily mistakable for Dr. Parkman: a ruling which seems erroneous.

kinds of evidentiary facts pointing towards B must be offered, and that one kind alone will not be received. It is difficult to see the object of this restriction, because if the evidence is really of no appreciable value, no harm is done in admitting it; while if it is in truth calculated to cause the jury to doubt, the Court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but should afford the accused every opportunity to create that doubt. A contrary rule is cruel to a really innocent accused.

§ 140. **Same: Threats by a Third Person.** Threats are perhaps the commonest kind of evidence offered for this purpose. The rulings differ widely in their effect; but in general a wholly unnecessary strictness is shown, and the illiberal attitude of some Courts in this respect towards accused persons is in singular contrast with the maudlin tenderness otherwise often exhibited.[1]

§ 141. **Same: Motive of a Third Person.** A motive as evidence is perhaps not of such value as a threat; yet Courts seem more inclined to receive it.[1] There is no reason for requiring that it be coupled with other evidence in order to be admissible.

[1] 1861, People *v.* Williams, 18 Cal. 193 (threats to kill, by a third person, admitted); 1885, State *v.* Beaudet, 53 Conn. 543, 4 Atl. 237 (unspecified threats of a third person against the assaulted party, excluded; partly because too vague, partly because hearsay, partly because not accompanied by other evidence of the third person's guilt; opinion inconclusive and unsound); 1886, Schoolcraft *v.* People, 117 Ill. 271, 277, 17 N. E. 649 (murder; the deceased's statement that certain third persons, "whose wives he had been running after, would kill him some day," excluded); 1894, Carlton *v.* People, 150 id. 181, 188, 37 N. E. 244 (arson; threats of third person to burn all the property of the injured person, excluded); 1901, Keith *v.* State, 157 Ind. 376, 61 N. E. 716 ("isolated threats by third parties is not admissible"); 1878, Morgan *v.* Com., 14 Bush 106, 112 (murder; threats against the deceased's life, by a third person present at the affray, admitted, the third person being first shown present and thus by possibility connected with the act); 1889, State *v.* Crawford, 99 Mo. 74, 80, 12 S. W. 354 (arson; threats of burning by a third person, rejected as *res inter alios*, — as if the law of judgments had any connection with the process of drawing an inference; this ground of decision is absurd, for it would exclude the whole process of proof that another was the guilty person); 1896, State *v.* Taylor, 136 id. 66, 37 S. W. 907 (burglary; threats by another person to commit such a burglary, excluded, unless perhaps an overt act, etc., had followed); 1846, State *v.* Duncan, 6 Ired. 236, 239; 1877, State *v.* Davis, 77 Id. 483 (for these two cases, see *post*, § 142); 1893, State *v.* Fletcher, 24 Or. 295, 300, 33 Pac. 575 (threats, etc., by a third person, excluded; there must be "some appropriate evidence directly connecting that person with the *corpus delicti*"); 1891, Alexander *v.* U. S., 138 U. S. 353, 355, 11 Sup. 350 (the defendant and the deceased were seen together just before the latter's disappearance; evidence of threats by H. against the deceased, H. then being in search of the deceased, who was supposed to have eloped with H.'s wife, held admissible, subject to a certain discretion in the trial Court as to remoteness); 1892, Worth *v.* R. Co., 51 Fed. 171 (action by a passenger injured by the derailment of a car; evidence of the design of outsiders to wreck the train by derailment was admitted, no conditions being laid down, but other evidence being presented of the existence of a motive in certain outsiders, and of the presence of suspicious persons at the place); 1871, Crookham *v.* State, 5 W. Va. 510, 513 (prior threats to kill, and subsequent immediate flight, of a third person, excluded as "not pertinent"); 1899, Buel *v.* State, 104 Wis. 132, 80 N. W. 78 (murder; threats of third persons against the deceased, excluded).

[1] 1902, Tatum *v.* State, 131 Ala. 32, 31 So. 369 (deceased's declarations of a difficulty with R., and facts indicating a motive in R., held inadmissible); 1852, Crawford *v.* State, 12 Ga. 142, 145 (murder; the identity of the assailant not being directly testified to, evidence was admitted that just previously the deceased had had a quarrel with third persons); 1896, McElhannon *v.* State, 99 id. 672, 26 S. E. 501 (malicious mischief; motive in the prosecuting witness, admitted); 1854, State *v.* D'Angelo, 9 La. An. 46 (murder; that the deceased "had innumerable enemies," excluded as too vague; a showing that one or more designated enemies were present at the time of the killing would perhaps be admitted); 1878, State *v.* Johnson, 30 Id. 921 (murder, no eye-witnesses being present; evidence received, on the peculiar circumstances, of quarrels by the deceased, shortly previous, with other persons who had "more reason for committing the murder than the accused"); 1881, Com. *v.* Abbott, 130 Mass. 475 (murder of a woman; evidence was offered, to fix the murder on

§ 142. **Same: Miscellaneous Facts.** Of the other kinds of evidence, it can only be said that the inclination should always be to admit any one of them, unless totally without probative suggestion.[1] In particular, the *conviction of another person* for the same crime (assuming that it is predicated as the deed of one person, not of joint actors) should be received;[2] no techni-

a third person, that her husband had quarrelled with her, and that a stranger was seen near the place on the day of the killing; Colt, J.: "The existence of ill-feeling as a motive for the commission of crime will not alone justify submitting to a jury the question of the guilt of a person entertaining such a feeling. It becomes material only when offered in connection with other evidence, proper to be submitted, showing that the person charged with such ill-feeling was in fact implicated in the commission of the crime. . . . The mere claim made by counsel that there are circumstances which tend to implicate the person charged is not enough; there must be proof of such circumstances, or an offer to prove. The evidence that a stranger was in town at the time of the murder does not alone implicate the husband); 1903, Horn *v.* State, — Wyo. —, 73 Pac. 705 (motive and opportunity of a third person; "much must depend on the circumstances of each case"; here excluded).

[1] 1890, R. *v.* Dytche, 17 Cox Cr. 39 (felonious wounding; evidence that other persons, already convicted for the offence, were present and made the assault, and not the now defendants, admitted); 1846, Smith *v.* State, 9 Ala. 990, 995 (conduct of another to be admitted in rare cases only; Goldthwaite, J., dissenting); 1875, Levison *v.* State, 54 Id. 519, 527 ("The evidence of the guilt must relate to the *res gestæ*, and not to the declarations or conduct of the party on whom it is attempted to cast suspicion, subsequent to and having no immediate connection with the crime"; here excluding the flight of a third person); 1895, Whitaker *v.* State, 106 Id. 30, 17 So. 456 (unexplained flight of a third person, excluded); 1895, Crawford *v.* State, 112 Id. 1, 20, 21 So. 214 (murder; W.'s concealment of himself, held irrelevant on the facts, the defendant's actual deed of shooting being uncontroverted); 1862, Phillips *v.* State, 33 Ga. 281, 287 (larceny; pleased conduct of a third person upon the discovery of the article on the defendant's premises, the third person having been present at the time of the theft, admitted); 1900, Green *v.* State, 154 Ind. 655, 57 N. E. 637 (a dying declaration naming B., and not the defendant, as the murderer, B.'s threats, motive, and doings were admitted to prove B. the murderer, though not B.'s subsequent admissions of guilt); 1885, McPherrin *v.* Jennings, 66 Ia. 626, 24 N. W. 242 (death by unknown cause was rejected as an explanation of the plaintiff's horse's death); 1813, Logan *v.* Steele, 3 Bibb 230 (trespass by burning a barn and killing horses; the plaintiff having proved threats by the defendant, the defendant was allowed to prove that other enemies of the plaintiff "had also threatened to injure his property"); 1881, Com. *v.* Abbott, 130 Mass. 475 (cited *ante*, § 142); 1897, State *v.* Hack, 118 Mo. 92, 23 S. W. 1089 (third person's admissions of the larceny, excluded); 1833, State *v.* May, 4 Dev. 328, 331 (stealing a slave; evidence that another person, who lived near the slave, while the defendant lived at a distance, had been included in the original warrant for arrest, but had then fled the State, confessing himself guilty, excluded; but "direct evidence connecting W. with the *corpus delicti* would certainly have been admissible"; the offered evidence, if not followed by evidence of an "overt act," was merely "*res inter alios acta*"); 1846, State *v.* Duncan, 6 Ired. 236, 239 (accessory to murder; threats and arrest of other persons, excluded); 1873, State *v.* White, 68 N. C. 158 (larceny; suspicious conduct, and flight from the State, of a third person, excluded); 1874, State *v.* Haynes, 71 Id. 79 (conduct of another person, before and after the crime, admitted); 1875, State *v.* Bishop, 73 Id. 44, 46 (larceny; the familiarity of a third person with the premises, and his suspicious conduct on the night of the larceny, excluded); 1877, State *v.* Davis, 77 Id. 483 (murder; threats of a third person, and his departure for the deceased's house, excluded, on the reasoning of State *v.* May); 1880, State *v.* Baxter, 82 Id. 602 (larceny; another person's suspicious conduct, excluded); 1895, State *v.* Wallace, 44 S. C. 357, 22 S. E. 411 (a prosecuting witness was said to be the real thief, and other receipts of stolen property by him were admitted); 1864, State *v.* Barron, 37 Vt. 57, 60 (illegal sale of liquor; a habit of "gentlemen in travelling about the country to carry spirituous liquors in bottles with them," not admitted to explain the source of bottles found in the defendant's public-house); 1883, Lewis *v.* Barker, 55 Id. 23 (that a clerk in defendant's store had refused to work for him the day after it was burned; not admitted to show that the clerk had burned it); 1900, State *v.* Totten, 72 Id. 71, 47 Atl. 105 (robbery; certain conduct of a third person indicating his guilt, excluded); 1820, Rowt's Adm'r *v.* Kile's Adm'r, Gilmer, Va. 202 (action on an instrument of defendant; evidence of its forgery by the son of the payee, admissible; after "the agency of that person" in the forgery is made out, then that person's skill in imitating the hand in question would be admissible); 1871, Crookham *v.* State, 5 W. Va. 510, 513 (stabbing; threats and flight of another person, excluded).

[2] *Contra:* 1897, State *v.* Smarr, 121 N. C. 669, 28 S. E. 549 (that another had been convicted of the burglary charged, inadmissible); 1898, Chamberlain *v.* Pierson, 31 C. C. A. 157, 87 Fed. 420 (injury by derailment; to exonerate the defendant's employees, a conviction of third persons for causing the derailment was excluded). But of course mere *suspicion* is noth-

cality of the law of judgments should stand in the way; indeed, it is difficult to see why such a judgment should not be pleaded in bar. Certainly, the law must in some manner avoid the absurdity of convicting two persons for the same crime committable by one only. This same singular and inexcusable attitude of the Courts is seen also in the exclusion of a *third person's confession of guilt* under the exception to the Hearsay rule (*post*, § 1476), and of a *suicide's declarations* (*post*, § 143).

The general principle is applicable, it may be noted, equally to *civil cases*, such as the trespasses of animals.[3] Moreover, on the principle noticed already for the argument of opportunity (*ante*, § 132) the prosecution may in advance negative the argument by showing that other possible persons did not do the act.[4] The fact of *mistaken identity* seems also to be relevant in this connection; the argument is that a third person, not the one charged, was really involved, and the fact of the existence of a third person capable of being mistaken for the one charged is some evidence that he possibly or probably did the things attributed to the person charged.[5]

§ 143. **Suicide, or other Self-Infliction of Harm; Suicidal Plans.** If the deceased, with whose death the defendant is charged, committed suicide, obviously the defendant could not have killed the deceased. There ought to be no doubt about the admissibility of plans or desires to commit suicide, even where no other evidence of its particular probability or feasibility is offered. Its improbability or non-feasibility should be matter for rebuttal, and should not exclude the evidence of its probability. That the evidence may be manufactured is no reason for its exclusion; for it may also *not* be manufactured, and if not, it is most cogent. The distance in time ought not to exclude the evidence of plans; for it does not exclude evidence of a defendant's threats (*ante*, § 108). That the deceased's hearsay statements of plan are admissible under an exception to the Hearsay rule, is plain (*post*, § 1725). The relevancy of plans of suicide has been well expounded in the following passage:

1892, *Field*, C. J., in *Com.* v. *Trefethen*, 157 Mass. 180, 31 N. E. 961: "The nature of the case proved by the Commonwealth was such that it was not impossible that she had com-

ing; 1899, Brown *v.* State, 120 Ala. 342, 25 So. 182 (merely showing that another was suspected, excluded). Nor can the prosecution show that another person was acquitted, because this leaves still open the defendant's share in the act (except for the purpose mentioned in note 4, *infra*); 1893, People *v.* Mitchell, 100 Cal. 328, 334, 34 Pac. 698.

[3] 1895, Green *v.* Skoqvist, 57 N. J. L. 617, 31 Atl. 228 (trespass by cattle; the trespassers of other persons' cattle, admitted); *Contra*, but wrong: 1898, Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445 (sheep-killing; killing of other sheep by other dogs, not admissible to negative the guilt of defendant's dogs).

[4] 1897, Brant *v.* U. S., 168 U. S. 532, 18 Sup. 182 (where the probabilities lay between three persons).

[5] The argument is of course a common one, and only seldom has a ruling upon it been necessary: 1882, White *v.* Com., 80 Ky. 484 (mistaken identity allowed to be shown); 1881, State *v.* Witham, 72 Me. 531, 536 (adultery; testimony by a neighbor that the defendant had several times talked with the woman at her gate in the evenings of certain months; counter-testimony was admitted by a nearer neighbor that a person, not the defendant, had talked there during the same time; Peters, J.: "Of course, both statements cannot be true; still it cannot reasonably be said that the truth of the one would not lessen the probability of the truth of the other").

mitted suicide. If it could be shown that she actually had an intention to commit suicide, it would be more probable that she did in fact commit it than if she had no such intention. . . . It may be true that an unmarried woman pregnant with child, if she has an intention to commit suicide, does not always carry that intention into effect, although she have an opportunity; but it is impossible to say that the actual existence of such an intention does not tend to throw some light upon the cause of death of such a woman when found dead under circumstances not inconsistent with the theory of suicide. . . . If it could be shown that during the week before her death she had actually attempted to drown herself, and had been prevented from doing so, it seems manifest that this fact, according to the general experience of mankind, would have some tendency to show that she might have made a second attempt."

Such evidence has constantly been admitted, as the annals of celebrated trials illustrate; until the squeamish doubtings of modern times, hesitating to accept the suggestions of natural logic, and not happening to be provided with justifying authority, furnished a few instances of rejection. Such rulings are without support from any point of view.[1]

§ 144. **Same: Motive for Suicide.** For the same reason, an emotion or feeling impelling to suicide is relevant; and facts tending to show the existence of such an emotion — either events, *e. g.* the pregnancy of a seduced woman, or conduct, *e. g.* exhibitions of melancholy or despair (two kinds of evidence dealt with *post*, §§ 391, 394) — should be received to show it. Contrary facts tending to show emotions averse to suicide would be equally admissible.[1]

[1] 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1166 (murder, the issue being whether the deceased had committed suicide or was killed; evidence was received of her being melancholy and depressed; "she said her distemper lay in her mind, . . . and the sooner it did kill her the better; . . . she neglected herself in doing those things that were necessary for her health, in hopes it would carry her off, and often wished herself dead"); 1859, Jumpertz *v.* People, 21 Ill. 408 (intention to commit suicide, and consistency of the mode of death with suicide, admitted); 1892, Siebert *v.* People, 143 Id. 571, 584, 32 N. E. 431 (statements of suicidal intent excluded; no ruling on the question of relevancy); 1896, State *v.* Asbell, 57 Kan. 898, 46 Pac. 770 (admitted, there being a possibility of suicide); 1851, Preston, J., in State *v.* Bradley, 6 La. An. 559 (putting as admissible the supposed fact of a letter being found on the person of the deceased declaring an intention to commit suicide); 1882, Com. *v.* Felch, 132 Mass. 32 (abortion; to show a self-abortion of the deceased, her "purpose and intent" "would be if known a material aid in coming to a correct conclusion"; but her declarations of purpose were excluded); 1892, Com. *v.* Trefethen, 157 Id. 180 (intention to commit suicide, the defendant being the deceased's seducer, admitted; overruling Com. *v.* Felch; see quotation *supra*); 1896, Hale *v.* Life Co., 65 Minn. 548, 68 N. W. 182 (insurance policy; the deceased's threat to commit suicide, not admitted to show suicide, because made two years before); 1894, State *v.* Punshon, 124 Id. 448, 457, 27 S. W. 1111 (threats of deceased wife to kill herself, excluded, on the ground of hearsay); 1896, State *v.* Punshon, same decision affirmed on second trial, 133 id. 44, 34 S. W. 25; 1895, State *v.* Fitzgerald, 130 Id. 407, 32 S. W. 1113 (excluded, unless accompanied by an attempt to execute them; overruling State *v.* Ludwig, 70 id. 412); 1890, Smith *v.* Benef. Soc., 123 N. Y. 85, 25 N. E. 197 (suicide as a defence to an insurance policy; the deceased's design to commit suicide before taking out the policy, admitted); 1872, Blackburn *v.* State, 23 Oh. St. 146, 149, 165 (intention more than six years before, admitted); 1834, Boyd *v.* State, 14 Lea 161, 177 (a disposition and intention to commit suicide, held admissible, "as there is no direct testimony as to the fact of the homicide"); 1896, State *v.* Fournier, 68 Vt. 262, 35 Atl. 178 (question left undecided); 1898, State *v.* Marsh, 70 Id. 288, 40 Atl. 836 (deceased's declarations that he was giving his horse arsenic as medicine, offered to show that he had it and might have used it himself, excluded). Compare the citations *post*, § 1725.

[1] 1699, Spencer Cowper's Trial, Eng. (see citation *ante*, § 143); 1859, Jumpertz *v.* People, 21 Ill. 408 (evidence admitted of mental condition of cheerfulness, or the contrary, pointing towards or against suicide); 1896, State *v.* Punshon, 133 Mo. 44, 34 S. W. 25 (the deceased's "disordered condition of mind," excluded); 1872, Blackburn *v.* State, 23 Oh. St. 165 (a previous melancholy disposition, tending to sui-

cide, admitted; the interval between the death and the time testified to affecting only the weight of the evidence); 1884, Boyd v. State, 14 Lea 161, 177 (melancholy or despondent disposition relevant on the question whether suicide was committed; Deaderick, C. J.: "The conditions and surroundings at the time of death may be looked into if of a character likely to impel suicide"); 1899, Morrison v. State, 40 Tex. Cr. 478, 51 S. W. 358 (deceased's cheerful behavior up to time of death, admitted to disprove suicide); 1898, State v. Marsh, 70 Vt. 288, 40 Atl. 837 (state of health of deceased, considered). Compare the citations *post*, § 391 (motive for suicide).

SUB-TITLE I (*continued*): EVIDENCE TO PROVE A HUMAN ACT.

TOPIC III: RETROSPECTANT EVIDENCE (TRACES, — MATERIAL, ORGANIC, AND MENTAL).

CHAPTER VIII.

§ 148. **General Principle.** The convenience has already been explained (*ante*, § 43) of grouping the various kinds of evidentiary facts according as they come, in time, before, at, or after, the act to be proved. There is no radical distinction between these groups; they merely serve as a convenient index of arrangement, and very often throw light on the features of relevancy common to the kinds of facts in each group. There have now been considered the various kinds of evidentiary facts in the first two groups, *i. e.* facts having Prospectant and Concomitant indications; there remains the third group, namely, facts having a *Retrospectant* indication. The inference here looks backward from the evidentiary fact to the alleged act; *i. e.* taking our stand at the fact offered, we infer from it that at some previous time the act was or was not done. The common feature of this group of evidentiary facts is that they are all open to a similar source of weakness, and thus offer to the opponent a general mode of explaining away their force. Thus, if, to show that A on January 1 stole a bicycle, there is offered the fact of his possession of the bicycle on June 1, the probative force of this fact rests on the assumption that the hypothesis that will explain his possession is that he obtained the bicycle by stealing it. But there are also in truth other possible hypotheses, for example, that it was given or sold to him by the thief or by a purchaser from the thief, or that he found it. The question of admissibility is whether the hypothesis of his stealing is, among all hypotheses, *prima facie* sufficiently prominent to make the fact admissible (on

the general theory of Relevancy, *ante*, § 31); and, if it is admissible, the opponent may show that one of the other hypotheses is in truth a much more probable explanation (on the theory of Explanation, *ante*, § 34). So, if in proving the doing of an act by A as a mark of his identity with B, there is offered (as in the Tichborne case) the fact that A has a recollection of the event, or if, to disprove it, we offer the fact that A has no recollection of it, the opponent may show, in the first instance, that the recollection has come, not from having done the act, but from having heard or read about it; and, in the second instance, that the lack of recollection is due, not to not having done the act, but to the natural fading of memory. In short, the tests of relevancy and the opportunities of explanation are of the same general nature in this group of evidentiary facts. The general argument runs: Is the trace one whose possession (or lack of possession) by the person charged could be explained by the operation of other causes than the doing (or not doing) of the act in question?

The kinds of facts may best be roughly subdivided according to the mode in which such causes might operate, *i. e.* according as the connection between the evidentiary trace and the act in question is mechanical, organic, or mental. The typical case of the first sort is the possession of stolen goods; of the second sort, corporal resemblance as evidence of paternity; of the third sort, consciousness of guilt.

a. Mechanical Traces.

§ 149. **Miscellaneous Instances in Criminal Cases.** The presence upon the person or premises of articles, fragments, stains, tools, or any other resulting circumstance, is constantly employed as the basis of an inference that the person did an act with which these circumstances are associated. In general, however, few questions of relevancy arise. There are innumerable instances in the records of celebrated trials; but their relevancy is so patent that no occasion is given for rulings of law:

1850, Mr. W. *Wills*, Circumstantial Evidence, 3d ed., 96: "In a case of burglary, the thief had gained admittance to the house by means of a penknife, which was broken in the attempt, and part left in the window-frame; the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment. . . . In another case, identification was established by the correspondence of the wadding of fire-arms with part of a torn letter found in the prisoner's possession; and in a case on the Northern circuit, where a man had been shot by a ball, the wadding of the pistol, which stuck in the wound, was found to be part of a ballad, which corresponded with another part found in the pocket of the prisoner."

The few rulings recorded are merely the occasional instances in which such questions have been (usually quite without necessity) pushed to a decision in the higher Court.[1]

[1] 1892, Gilmore *v.* State, 99 Ala. 154, 159, 13 So. 536 (boot-tracks); 1897, Thornton *v.* State, 113 id. 43, 21 So. 356 (book and pencil); 1893, Whetston *v.* State, 31 Fla. 240, 250, 12 So. 661 (shoe-tracks excluded, because having no marked peculiarities); 1900, Ireland *v.* Com., — Ky. —, 57 S. W. 616 (slungshot, excluded on the facts); 1870, State *v.* Kingsbury, 58 Me. 238, 243 (fire set by kerosene; presence of kerosene stains on a shirt admitted); 1850, Webster's

It is to be noted that (on the principle of § 34, *ante*) the opponent may always *explain away* the indication by showing other hypotheses for the presence of the trace, — as where, on a charge of murder, the presence of blood-stains is explained by the killing of a chicken, or the presence of a weapon by the owner's previous loan of it to another person. It is also to be noted that an argument may be based *negatively* on such traces, — as where it is shown, on a charge of murder, that the murderer must have been stained with blood, while the accused bears no blood-stains and therefore could not have done the killing. To this also there is a counter-argument (of explanation) that the absence of such traces can be accounted for by their intervening destruction.

The question may be asked, What is the distinction between evidence of *traces* and evidence of *identity*? For example, to prove a murder, evidence is offered that a gun found in the defendant's possession is exactly fitted by the bullet found in the body of the deceased; what kind of evidence is this? The truth is that this evidentiary fact is really double and involves both kinds of inferences. The nature of the argument to prove identity (*post*, § 411) is that a certain fact offered is an essential mark of sameness of person, — in this instance, that the fit of the bullet is a necessary and unique mark of the slayer. The weakness of this type of argument is that the mark may not be necessarily associated with one person but may be common to a number of persons; and hence the mode of dealing with such evidence is to show that other persons also have the same mark, — here, that other persons in the neighborhood possessed guns of the same bore. Now the argument from traces assumes that the argument to identity has been settled and accepted, *i. e.* here it assumes that the use of the gun in question is an essential or sufficient mark of the murderer, and it then sets about to prove that the accused possessed that mark, *i. e.* used that gun; and to do this it offers the fact of its subsequent finding in the accused's possession. Here the weakness of the argument is an entirely new and different one, namely, the trace of subsequent possession does not necessarily indicate a use at the time of the murder, since the gun may be one which the accused has recently borrowed, or it may be his own gun which was lent to another person at the time of the murder. Thus, there are two wholly different evidentiary questions involved in the use of this evidence, — first, the question of identity, whether this individual gun is a necessary mark of the slayer; and secondly, the question of traces, whether its subsequent possession evidences its use at the time of the murder. The present type of argument, then, — the argument from traces to a former act, — is a distinct argument from that of identity.

Trial, 5 Cush. 295, 318, Barnes' Rep., 84 (the lower jaw of the deceased, etc., found on the defendant's premises); 1898, State *v.* Miller, 144 Mo. 26, 45 S. W. 1104 (pistols); 1897, State *v.* Campbell, 7 N. D. 58, 72 N. W. 935 (burglary; various tools, etc., admitted); 1898, State *v.* Garrington, 11 S. D. 178, 76 N. W. 326 (sack of defendant found on premises the next day, admitted); 1899, Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395 (the fact of the sale of some liquor being admitted, the presence of drunken men about the defendant's store was admitted to show that the liquor was intoxicating; compare R. *v.* Burton, cited *post*, § 152 and the cases in § 153); 1898, McBride *v.* Com., 95 Va. 818, 30 S. E. 454 (certain traces held inadmissible).

Although in some instances the same circumstance offered may give rise to both arguments, this is by no means necessary or usual, and there is no essential connection between the two kinds of arguments.

§ 150. **Brands on Animals and Timber.** When an animal is found in B's possession, and the animal bears a brand or other mark, and one of the issues is whether A is the owner of the animal, it is a natural and immediate inference that the animal belongs to the person who [illegible] bears, and, if that brand is A's, then to A. This inference, however [illegible] probable in the light of practical experience, is in truth a composite one, made up of two steps: (1) first, the inference, from the presence of A's usual mark, that A placed this particular mark, — a genuine argument under the present principle, from a trace to the source of the trace; and (2) secondly, the inference from the fact that A placed it there, to the [illegible] of A's ownership of the animal. The latter step of inference is [illegible] perhaps not less natural than the former, but it is more [illegible] in its effect. It would seem that the latter step of inference has been rarely conceded by Courts, as a matter of common law;[1] though the former step was universally conceded, it was said that the presence of A's brand was evidence of *identity* (*i. e.* of the animal being one of those originally branded by A), but not of *ownership*. This unduly cautious attitude has been generally corrected by legislation. In most of the stock-raising communities, the *brand on animals* is made evidence of ownership; though in order to encourage registration and thus prevent confusion, the rule is applied only to brands duly registered by law.[2] The

[1] It was in the following case: 1900, R. *v.* Forsythe, 4 N. W. Terr. 398 (a brand is on common law principles evidence of ownership; Rouleau, J., diss.; best opinion on this subject by McGuire, J.).

[2] *Can.*: *Dom.* St. 1900, c. 46, § 3, St. 1901, c. 42, § 2, adding to the Crim. Code 1892, § 707*a* (in criminal cases, the presence of a duly recorded brand or mark is to be evidence of ownership); *Man.* St. 1903, c. 6, § 6 (cattle-brand duly allotted shall be evidence of ownership, where title to cattle is involved); *N. W. Terr.*: Cons. Ord. 1898, c. 76, § 5, St. 1900, c. 22, § 5 ("the presence of a recorded brand on any stock" shall be evidence of the ownership of the animal); *U. S.*: *Colo.* Annot. Stats. 1891, § 4240 ("no evidence of ownership by brands shall be permitted" unless the brand is a recorded one); *Colo.* Annot. Stats. § 216 (auctioneer's stock-register of animals, required to be kept, "shall be evidence in any court where the trial of the right of property may be had"); § 4251 ("the brand on an animal," if recorded, shall be *prima facie* evidence of ownership); St. 1899, Apr. 6, c. 142, § 19 (earmarks may be used in evidence "in connection with the owner's recorded brand"); 1895, Chesnut *v.* People, 21 Colo. 512, 523, 42 Pac. 656 (recorded brand, admissible "merely as a mark of identification"); 1897, Brooke *v.* People, 23 id. 375; 48 Pac. 502 (unrecorded brand; same); *Nebr.* Comp. St. 1899, §§ 446, 3635 (proof of recorded brand, to be evidence of ownership of stock); St. 1903, c. 53 (brand duly recorded shall be evidence of ownership of cattle, horses, mules, or swine); *Nev.* Gen. St. 1885, § 4561 (on trial of offences concerning animals running at large upon a range, "the brand and other marks upon such animal shall be *prima facie* evidence of ownership"); § 761 (on trial of actions for possession of any animal marked or branded as provided by statute, "the mark and brand" shall be primary evidence of ownership); § 758 (certified copy by recorder under seal of recorded mark and brand, to be evidence of ownership in "any action" of all animals legally marked and branded); *N. Mex.* Comp. L. §§ 54, 57 ("the brand on an animal shall be *prima facie* evidence of the ownership of the person whose brand it may be, provided that such brand has been duly recorded"; "no evidence of ownership by brand shall be permitted" unless the brand has been duly recorded); 1891, Pryor *v.* Portsmouth C. Co., 6 N. Mex. 44, 27 Pac. 327 (instruction under the statute construed); 1892, Terr. *v.* Chavez, 6 id. 455, 30 Pac. 902 (the brand is evidence equally for an assignee of it); 1901, Gale *v.* Salas, — id. —, 66 Pac. 520 (statute applied); *N. D.* Rev. C. 1895, § 1540 (vent-brand is evidence of sale or transfer of stock); *Okl.* Stats. 1893, § 245 (recorded brand on stock, to be evidence of ownership); *Or.* St. 1893, p. 51 ("no evidence of ownership by brand" to be received unless the brand is recorded; when title to stock is involved, "the brand on an animal shall be *prima facie* evidence of ownership of the person whose brand it may be," provided tha

same policy has led, in timber-producing communities, to similar legislation for *marks on logs* and *timber*.[3] It would seem that the principle is equally applicable to other sorts of marks on property,[4] and in particular to the port-name of a vessel required by law to be marked on the hull.[5]

Distinguish the question whether the *official register* of brands or marks is admissible to show a person to be entitled to use the brand recorded as his; this is usually dealt with in the same legislation, but it falls under another principle (*post*, § 1674).

§ 151. **Postmarks on Envelopes.** The postmark on an envelope is, upon the same principle, admissible to show that the envelope bearing it had passed through the hands of the postal officials at the time and place indicated. Here, however, the question separates itself more distinctly into two others, — first, whether the postmark may be assumed genuine, without more evidence (*post*, § 2152), and if so, whether the postmark, regarded as a statement of tho postal official, may be admitted under the Hearsay exception for official statements (*post*, § 1674). This analysis might be applicable equally to the brands of stock and timber; but it seems not to have been made, and its recognition for postmarks only is due to the course of early English rulings.

§ 152. **Possession of Stolen Chattels.** On a charge of taking goods, the fact that A was found, subsequently to the taking, in possession of the goods

brand has been duly recorded; proof shall be made by a certified copy by the county clerk; an earmark for stock "shall be taken in evidence in connection with the owner's record brand" in all suits involving title to stock); 1899, State *v.* Hanna, 35 Or. 195, 57 Pac. 629; State *v.* Morse, ib. 462, 57 Pac. 631; *S. D.* Stats. 1899, § 3072 (recorded brand on stock is evidence of ownership); *Tex.* Annot. Stats. 1897, § 4930 ("No brands except such as are recorded by the officers named in this chapter shall be recognized in law as any evidence of ownership of the cattle, horses, or mules upon which the same may be used"); 1898, Turner *v.* State, 39 Tex. Cr. 327, 45 S. W. 1020 (larceny; brand recorded after the date of the alleged taking is not evidence of ownership under the statute; moreover, as evidence of identity it is unnecessary; prior cases on the latter point disapproved); 1900, Welch *v.* State, 42 id. 338, 60 S. W. 46 (preceding case approved, but treated as holding that the unrecorded or subsequently recorded brand is at least evidence of identity); 1899, Chowning *v.* State, 41 id. 81, 51 S. W. 946 (like Welch *v.* State; repudiating Tittle *v.* State, 30 Tex. App. 597); 1900, Walton *v.* State, 41 Tex. Cr. 454, 55 S. W. 566 (recorded brand is evidence of ownership, even in a county other than where recorded); 1903, Swan *v.* State, — id. —, 76 S. W. 464 (Turner case cited, but held not to exclude but merely to limit the purpose of a multiple brand as evidence); *Wash.* C. Stats. 1897, § 3439 (recorded stock-brand, to be evidence of ownership of animal); *Wyo.* St. 1890, c. 73, § 151 (on any indictment, "proof of the brand thereon shall be sufficient to identify all classes of live-stock, and proof of the ownership of such brand shall be *prima facie* evidence of the ownership of such live stock").

[3] Can. Crim. Code 1892, § 708 (in trials for certain offences concerning timber, a duly registered timber-mark shall be evidence of ownership of the timber); Fla. Rev. St. 1892, § 2026 (official stamp "appearing upon timber or lumber adrift," to be evidence of ownership); Minn. Gen. St. 1894, §§ 2405, 2413 (recorded log-mark on logs to be evidence of ownership); Mo. Rev. St. 1899, § 1505 (recorded mark on logs, lumber, etc., to be evidence of ownership); N. Y. Laws, 1880, c. 533, § 8 (presence of recorded mark on logs or timber, presumptive evidence of ownership of party recording); Oh. Rev. St. 1898, § 4364 (61) (registered trade-mark on timber, to be *prima facie* evidence of trade-mark proprietor's ownership of timber); Or. St. 1891, Feb. 20, § 4 (recorded mark on log or timber, to be evidence of ownership); Wash. C. & Stats. 1897, § 3131 (recorded mark on logs or timber afloat, to be evidence of ownership).

[4] 1903, Chicago City R. Co. *v.* Carroll, — Ill. —, 68 N. E. 1087 (injury by the defendant's railroad car; that the cars running on the line where the plaintiff was injured bore the inscription "Chicago City R. Co.," admitted); 1900, Ingraham *v.* Chapman, 177 Mass. 123, 58 N. E. 171 (presence of name on a dog's collar is some evidence of the person's ownership; "it is like the case of a brand or mark upon cattle").

[5] Compare Stearns *v.* Doe, 12 Gray 482, 486 (port-name on stern of vessel), *post*, § 1674; 1883, Com. *v.* Collier, 134 Mass. 203, 205 (label on barrel; cited *post*, § 415).

taken is relevant to show that he was the taker. It is true that several other hypotheses are conceivable as explaining the fact of his possession; nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary. There has never been any question of this:

1866, *Pollock*, C.B., in *R.* v. *Exall*, 4 F. & F. 922 (burglary; the three accused were seen near the place on the night in question, and the next morning the watch was found on Exall): "The law is that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession, — that is, to give an explanation of it which is not unreasonable or improbable. The strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong that it almost amounts to proof, because the reasonable inference is that the person must have stolen the property; in the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. . . . Such evidence is, no doubt, not conclusive. As an illustration of this, I may mention that I remember hearing the late Baron Gurney say that he once picked up something lying in the road and observed, 'Now if this has been stolen and I am found with it, I might be charged with the robbery.' The other circumstances in the case, however, will always aid or rebut the presumption, and it is not the less evidence because it is not conclusive evidence. It is *some* evidence, if its weight depends upon the circumstances, and especially on the nature of the possession, whether it is open and avowed or secret and concealed, and what is the nature of the account given of it. What the jury have to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is under the circumstances reasonable and probable or otherwise."

The use of this sort of evidence goes back as far as any in our law; for in the earlier system of Germanic law the possession of goods stolen gave rise to a peculiar and particularly speedy mode of procedure unfavorable to the accused. In modern times the fact of recent possession is also given a procedural effect, in that it casts upon the defendant the duty of producing an explanation, in default of which the case may be closed adversely to him. This effect of the evidence as a *presumption* is dealt with elsewhere (*post*, § 2513). The inquiry is here as to the admissibility of the evidence, and only one or two questions capable of dispute have ever been suggested. The *time* of the subsequent possession is immaterial. The lapse of a long interval opens a greater possibility of innocent explanations, and may prevent the raising of a presumption of law, but does not alter the relevancy of the fact.[1] Possession by a *husband* can probably not be used against the wife, unless the husband is shown to be ignorant of the presence of the articles.[2] The possession of goods of the *same kind* as the general class of goods from which the taking was done is receivable, even though the specific quantity or any quantity of the general mass cannot be identified or discovered or shown to be missing.[3] But these and other questions are almost invariably discussed

[1] 1862, R. *v.* Wilson, 2 F. & F. 123, Bramwell, B. (said to be "strong evidence," if "shortly after" the stealing; here seventeen months after; yet the evidence was used); 1846, Com. *v.* Montgomery, 11 Metc. 534, 537 ("at a period somewhat distant," sufficient).

[2] See *post*, § 2513.

[3] 1854, R. *v.* Burton, Dears. Cr. C. 282 (lar-

in judicial opinions from the point of view of the legal presumption to be attached to the evidence (*post*, § 2513), and not as involving a question of admissibility. Where a presumption is held to be created, the admissibility of the evidence is of course conceded, but where the presumption is refused, it is sometimes difficult to say whether the inadmissibility of the evidence is also intended to be declared.

§ 153. **Possession of Chattels as indicating other Crimes than Larceny.** Wherever goods have been taken as a part of the criminal act, the fact of the subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime. Thus such possession is receivable to prove the commission of other acts than the simple crime of larceny. It is receivable to show the commission of a burglary,[1] a forgery,[2] a counterfeiting,[3] a murder,[4] a liquor selling,[5] or any other crime in which either a chief or a subordinate result might be the possession of a material article. For the same reason, the possession of *burglar's tools* is relevant to show that the possessor committed burglary, provided it first appears that the burglary was committed with such tools.[6]

ceny of pepper; the defendant was found coming out of the warehouse with pepper in his pockets of a sort similar to that on the next floor above in the warehouse, but it could not be shown that any pepper was missing; Maule, J., admitting the evidence: "If a man go into the London Docks sober without means of getting drunk, and comes out of one of the cellers very drunk wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or any wine was missed"); 1881, Sartin *v.* State, 7 Lea 679 (stealing M's horse; the defendant when found was riding M's mule, and evidence was received of the stealing of M's mule on a day subsequent to that charged, in company with C, who when found was riding M's horse charged to have been stolen by the defendant); 1898, Parker *v.* U. S., 1 Ind. Terr. 592, 43 S. W. 858 (larceny of cattle; defendant's possession of other stolen cattle not received to identify those charged, because not taken from the same place). For other cases concerning the *possession of stolen goods* as evidence of crime on other evidential principles, see *post*, §§ 218, 414.

[1] 1878, Short *v.* State, 63 Ind. 376, 380; 1804, Com. *v.* Millard, 1 Mass. 6.

[2] 1861, Com. *v.* Talbot, 2 All. 161 (possession of a forged document by one claiming a benefit under it, admitted, to show forgery); 1885, State *v.* Yerger, 86 Mo. 33, 39 (possession of forged instrument is evidence of forgery of it).

[3] 1815, R. *v.* Fuller, R. & R. 308, by all the Judges (admitted to show a procuring with intent to utter).

[4] 1857, Williams *v.* Com., 29 Pa. 102, 103, 106 (murder; possession of money and watch of the deceased, admitted; "possession of the fruits of crime is of great weight in establishing the proof of murder, where that crime has been accomplished with robbery").

[5] Going into a place sober and coming out drunk evidences the *obtaining of liquor* therein: 1854, Meule, J., in R. *v.* Burton, Dears. Cr. C. 282 (quoted *ante*, § 152); 1859, Com. *v.* Taylor, 14 Gray 26; 1867, Com. *v.* Kennedy, 97 Mass. 224; 1889, Com. *v.* Finnerty, 148 id. 165, 19 N. E. 215; 1893, Com. *v.* Hurley, 158 id. 159, 33 N. E. 342. The following rulings probably depend upon the same principle: 1860, Com. *v.* Maloney, 16 Gray 20 (goings in and comings out of numbers of persons with jugs, etc., admitted to show liquor-selling); 1889, Com. *v.* Finnerty, 148 Mass. 165, 19 N. E. 215 (admitting the mere fact of frequent goings in and comings out, as under certain circumstances indicating the sale of liquor within); 1893, Com. *v.* Brothers, 158 id. 206, 33 N. E. 386 (same); 1899, Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395 (cited *ante*, § 149).

[6] 1865, People *v.* Winters, 29 Cal. 658 (but first it must be shown that a burglary was committed, and by the aid of such tools; otherwise "there is no connection, probable or possible, between it and an offence confessedly committed without the aid of such tools"); 1882, People *v.* Hope, 62 id. 291, 295 (same in substance); 1890, People *v.* Sansome, 84 id. 449, 453, 24 Pac. 143 (same principle applied); 1879, State *v.* Morris, 47 Conn. 179, 181 (burglary while armed; the possession of arms after emerging from the house admitted as evidence of their possession while in it); 1884, State *v.* Franks, 64 Ia. 39, 42, 19 N. W. 832; 1866, State *v.* Harrold, 38 Mo. 496, 498 (burglary; the finding of the goods stolen, and of the burglar's tools, admitted); 1872, State *v.* Dubois, 49 id. 573 (finding of burglars' tools, admitted). Distinguish the admission of burglar's tools, possessed *before the act*, to show a design (*post*, § 238, *ante*, § 88).

§ 154. **Possession of Money to evidence Larceny, etc.** The mere possession of *money* is in itself no indication that the possessor was the taker of money charged as taken, because in general all money is alike and the hypothesis that the money found is the same as the money taken is too forced and extraordinary to be receivable. Where the denominations of the money found and the money taken correspond in a fairly close way, the fact of the finding of that specific money would have probative value and be relevant, because the money found is fairly marked as identical with the money taken. Another mode, however, of making the fact of money-possession relevant is to show its *sudden possession*, *i. e.* to show that before the time of taking the person was without money, while immediately after that time he had a great deal; this reduces the hypotheses to such as involve sudden acquisition, and a dishonest acquisition thus becomes a natural and prominent hypothesis. On such conditions the possession of unidentified money becomes relevant.[1]

§ 155. **Same: Discriminations as to Stolen Chattels and Money.** The use of possession of stolen goods to show their stealing must be distinguished from the use of possession of *other stolen goods* to show a knowing receipt of stolen goods, the object there being to show knowledge or intent (*post*, § 323). The relevancy of lack of money to show a *motive for stealing* involves also a different question (*post*, § 392).[1] Whether a person may be *tried under the same indictment* for stealing and for knowing receipt of stolen goods, and be found guilty as an accessory of the theft, raises questions of criminal pleading.[2]

§ 156. **Possession of Receipt, and Instruments of Debt, to show Payment.** The payee of money naturally leaves behind him in the hands of the payor some document by way of receipt or evidence of payment. (1) Where this document is a *signed acknowledgment*, — in the strict sense, a receipt, — it is receivable as an Admission.[1] (2) Where this document is merely the

[1] 1897, Leonard *v.* State, 115 Ala. 80, 22 So. 564 (possession of money after a larceny, admitted); 1900, Turner *v.* State, 124 id. 59, 27 So. 272 (possession of money after a larceny, excluded on the facts); 1901, Leath *v.* State, 132 id. 26, 31 So. 108 (forgery; mere possession of a smaller sum of money, held inadmissible; a strained ruling); 1853, Gates *v.* People, 14 Ill. 433, 438 (that the defendant before a murder and robbery had no money, but after it had some resembling that taken, admitted); 1877, State *v.* Grebe, 17 Kan. 458, 460 (larceny; possession of money by one who had been poor, admitted); 1816, Com. *v.* Montgomery, 11 Metc. 534, 537 (larceny of bank bills and checks; principle applied); 1854, Boston & W. R. Co. *v.* Dana, 1 Gray 101 (embezzlement; insolvency before entering the employment and subsequent possession of property far exceeding his earnings in the employment, admitted; leading opinion); 1898, Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91 (false pretences by a city official having a salary of $1,200; deposits in bank at the time charged, too large to be accounted for by his salary, received); 1902, Com. *v.* Devaney, 182 id. 33, 64 N. E. 402 (robbery); 1897, Williams *v.* U. S., 168 U. S. 382, 18 Sup. 92 (extortion; large bank deposits by the defendant, about the times of the alleged offence, and in excess of his salary, held improperly submitted to the jury as evidence of dishonest acquisition, because there was no necessary connection between this excess and the alleged extorted sums; the Court treats the question as though the jury had been told that this proved guilt, though the trial Court merely said "you are at liberty to infer" an unfavorable explanation; the opinion is valueless and illustrates this Court's frequent confusion of the admissibility of evidence and its effect as a presumption); 1898, State *v.* Burns, 19 Wash. 52, 52 Pac. 316 (possession of any money when arrested, admitted).

[1] Compare also § 89, *ante* (lack of money as evidence of a capacity to pay or to lend).

[2] See State *v.* Ward, 49 Conn. 429, 439.

[1] For admissions in general as open to expla-

instrument of liability itself, customarily surrendered to the obligor upon satisfaction made, — *e. g.* a promissory note, a bond, — the possession of the instrument by the obligor may be relevant to show a past transaction of discharge. The circumstances in each case, however, must determine; for the party offering the evidence must be one who would naturally have received the instrument from the party now seeking for payment.[2] *Counter-explanations* may be shown by circumstances explaining the possession otherwise, as where the debtor has access to the place of custody of the instrument. But in judicial opinions few questions here arise except upon the propriety of creating a *presumption of payment* (*post*, § 2518), for this requires a much stronger quality of probative value than mere admissibility.[3]

§ 157. **Possession or Existence of a Document, to show Execution, Delivery, or Seisin.** The possession or existence of a document is connected with a number of inferences, most of them resting on the present principle, but some of them requiring for convenience to be treated elsewhere in connection with other principles.

(1) The *existence of a document* purporting to be *signed* by A is under all circumstances some evidence of A's *genuine execution* of it. But the question which has naturally arisen is whether under certain circumstances it is sufficient evidence of A's execution. That it is sufficient, in combination with one or more circumstances, is well recognized in a few classes of cases. The *age* of the document, together with its custody, and (if it is a deed of land) with the fact of possession of the land, suffices for its authentication (*post*, § 2137); the *official custody* of a purporting official document equally suffices (*post*, § 2158); the imprint of an *official seal* will often suffice to authenticate (*post*, § 2161); and the course of the mails may suffice for a *reply-letter* (*post*, § 2153). All these rules, however, are auxiliary rules of sufficiency, not rules of admissibility. It is necessary here merely to note that the rules are founded on an inference applying the present principle.

(2) The *existence of a document* in a certain *kind of place* — such as the grantee's custody or office of registry — may be sufficient evidence of the *delivery* of the document, so far as its delivery may be material. Here the usual question is not of the admissibility of the fact (which is conceded), but of its sufficiency to raise a presumption of law (*post*, § 2520).

nations, see *post*, § 1058. For a receipt as not conclusive but open to denial by *parol evidence*, see *post*, § 2432. For a receipt in *unproved handwriting*, as presumptively authenticated, see *post*, § 2148. For a receipt of a *third person*, as not admissible without calling him to the stand, see *post*, § 1456.

[2] Instances of the use of this evidence: 1800, Egg *v.* Barnett, 3 Esp. 196 (possession of a bill of exchange, bearing the plaintiff's indorsement as payee and the defendant's name as drawer); 1809, Suby *v.* Champlin, 4 Johns. 461, 468 (possession by surety of a bond for duties and of the collector's receipt).

[3] This explains the apparent illiberality of the following ruling: 1810, Lord Ellenborough, C. J., in Pfiel *v.* Vanbatenberg, 2 Camp. 439 (excluding the mere bill of exchange, when offered by the acceptor against the drawer to prove payment; "Show that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee, with his name upon them as acceptor? It is very possible that when they were left for acceptance he refused to deliver them back, and, having detained them ever since, now produces them as evidence of a loan of money").

(3) The *existence of a document in the house or among the goods* of A may be offered as evidence that A has had *possession* of it, or has otherwise dealt with it. Here the question is genuinely one of mere admissibility; and it is usually answered by holding that the fact of the document's discovery in that condition is admissible, provided the place was actually in A's control and provided the lapse of time has not made too probable the hypothesis of other persons' intrusion:

1581, *Campion's Trial*, 1 How. St. Tr. 1050, 1061; Campion the Jesuit being charged with treason in seducing subjects to take an oath of obedience to the Pope, *Anderson*, Queen's counsel, said: "These papers, thus found in houses where you were, show that for ministering such oaths you are a traitor. . . . For if a poor man and a rich man come both to one house, and after their departure a bag of gold be found hidden, forasmuch as the poor man had no such plenty and therefore could leave no such bag behind him, by common presumption it is to be intended that the rich man only, and no other, did hide it. So you, a professed papist, coming to a house, and there such reliques fonnd after your departure, how can it otherwise be implied than that you did both bring them and leave them there; so it is flat they came there by means of a papist, *ergo* by your means;" *Campion:* "Your conclusion had been necessary if you had also showed that none came into the house, of my profession, but I."[1]

From the foregoing inference must be distinguished the inference, from the existence of a document in A's possession, to his *knowledge of its contents* (*post*, § 260) or, still further, to his *approval of the contents* as his admission (*post*, § 1073).

(4) The *existence of a document of ownership of land* (a deed, lease, or license) may be evidence that the *maker of the document had possession of the land* at the time of making it. This doctrine, now well settled in English law, is applicable in proof of title by adverse possession in prior generations, where no evidence has survived except the documents themselves which embodied acts of claim of ownership. It used to be said occasionally that the deed was itself an act of possession; but this is incorrect; it is merely evidence of possession, in the nature of a trace or mark such as only a possessor is likely to have. The limitations of the doctrine are thus expounded:

1878, *Cairns*, L. C., in *Bristow* v. *Cormican*, L. R. 3 App. Cas. 641, 653, 668: "Old leases have always been considered to be admissible as being evidence facts of ownership. . . . [The circumstances of giving and taking them] are real transactions between man and man not intelligible except on the footing of title, or at least an honest belief in title." Lord *Blackburn:* "Inasmuch as after long time all the witnesses who could prove such possession are dead, the law permits ancient documents, either with or without evidence of ancient payment of rent, to be given as evidence from which the jury

[1] 1843, R. *v.* O'Connor, 4 State Tr. N. s. 935, 1045 (sedition; Rolfe, B.: "If time elapses between the apprehension of the party and his being taken away, and you find documents afterward in his possession, *non constat* but they came there afterwards"); 1848, R. *v.* O'Brien, 7 id. 1, 100, 193 (documents found in a portmanteau of the defendant after he had been arrested and others had had access to it, received); 1897, State *v.* Shive, 58 Kan. 783, 51 Pac. 274 (robbery; near the place was found an envelope addressed to one defendant and bearing the return-request of the other; excluded, because no possession of the envelope by either was shown).

may properly draw an inference that there was such possession. For in the ordinary course of things men do not make leases unless they act on them, and lessees do not pay rent unless they are in possession, so that the ancient payment of rent adds weight to the ancient indenture."

1847, *Collier*, C. J., in *Doe* v. *Eslava*, 11 Ala. 1028, 1030: "Ancient documents, it is said, are allowed to support ancient possession, though these documents are not proved to be part of any *res gesta*. They are admitted in such cases as forming a part of every legal transfer of title and possession by act of parties. . . . Care is first taken to ascertain their genuineness; and this is shown *prima facie* by proof that the document comes from the proper custody or by otherwise accounting for it."[2]

This doctrine is in itself simple, and the only difficulty has arisen in distinguishing it from two superficially related principles which usually come into application in the same sort of litigation. (*a*) One of these is the doctrine (referred to *supra*, par. 1) of presuming the genuineness of ancient deeds. As a part of that doctrine it has in some Courts been laid down that possession of the land must have been enjoyed by the grantee before his alleged ancient deed can be presumed genuine (*post*, § 2142); in that rule, then, it is the land-possession which is evidence of the document's genuineness; while in the present rule it is the document which is evidence of the land-possession. Moreover, in that rule it is the grantee's possession which is material, while in the present rule it is the lessor's or grantor's. Thus the two rules are really concerned with different evidential purposes, and rest on

[2] The line of cases is as follows: *Eng.*: 1783, Clarkson *v.* Woodhouse, 5 T. R. 412, 3 Doug. 189 (a custom to hold land exempt from common right; to show prescriptive exercise, leases of 71 and 123 years of age were received; Lord Mansfield, C. J.: "They are so old that nobody can speak to possession under them"); 1808, Rogers *v.* Allen, 1 Camp. 309 (alleged licenses of fishing and dredging, dated from 1661 to the end of that century, were objected to because no rent appeared to have been paid under them; Heath, J., thought this not necessary, "as they were of such an ancient date that it could not reasonably be supposed that evidence of such payments was still preserved; however, to give any weight" to them, the receipt of payment, or other acts of ownership, must be shown "in later times"); 1809, Doe *v.* Askew, 10 East 520 (to prove a custom of a widow's holding during chaste viduity, entries in the manor book of successions to estates so described were admitted, although no instances of the acting upon the custom by forfeiture for unchastity were testified to); 1829, Coombs *v.* Coether, M. & M. 398, *semble* (old lease-copies; possession not necessary for chapter-house leases, which were like public records); 1842, Doe *v.* Pulman, 3 Q. B. 622 (a counterpart of a lease, admitted, as equivalent to it, without accounting for the original lease or showing possession); 1862, Malcomson *v.* O'Dea, 10 H. L. C. 593, 614 (Willes, J.: "Ancient documents . . . purporting on the face of them to show exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession; this rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate"); 1878, in Bristow *v.* Cormican, L. R. 3 App. Cas. 641, 653 (see quotation *supra*); 1899, Blandy-Jenkins *v.* Dunraven, 2 Ch. 121 (ancient agreement in settlement of litigation for trespass, admitted as "evidence of an act of possession"; following Malcomson *v.* O'Dea); *Can.*: 1885, Esterbrooks *v.* Towse, 24 N. Br. 387, 398 (defendant claimed under the son of C., who had been in possession, presumably under a purchase from B, who had a power of attorney to sell, given by the administrator of A, the original grantee; all the parties prior to defendant being deceased, B's indorsement on the original grant to A, which was in C's possession, that B had sold the land to C, was held admissible, though on varying grounds; Wetmore, J., diss.); *U. S.*: 1870, Boston *v.* Richardson, 105 Mass. 351 (licenses, etc. of the city made 67 and more years ago, to use certain land, objected to because "no acts were proved to have been done under them"; the licenses were received, "at least when taken in connection with the evidence of the subsequent occupation," because "it would be impossible to supply the proof required"); 1889, Baeder *v.* Jennings, 40 Fed. 199 (certain old documents of title admitted as evidence of possession).

independent grounds. (*b*) The other principle is that of using deeds, or other land-documents, ancient or modern, as verbal acts accompanying an act of possession and signifying the scope of the claim of possession (*post*, § 1778). Here the possessor may be grantee or grantor; his possession is, with reference to the document, neither evidence of it nor evidenced by it; the document's genuineness or validity is immaterial; it merely colors and defines his claim, as a verbal part of his act of adverse possession.

(5) Finally, the reverse of the preceding inference (4) may be made; *i. e.* from the present *possession of land* the inference that there once *existed a deed* of it, now lost, may be made:

1844, *Gilchrist*, J., in *New Boston* v. *Dunbarton*, 15 N. H. 201, 205: "The jury may find, from the facts in a case, that a certain deed once existed, although there be no direct evidence of its execution. Where parties have occupied land and have conducted themselves precisely as they would have done if a deed had been made, it may be left to the jury to say whether a deed under which one of the parties claims ever had an existence. . . . Whether a fact which is unknown is to be presumed from its usual connection with other facts which are known would seem to be properly in all cases a question for the jury."

This is the logical foundation of the *presumption of a lost grant*, which after long service has finally degenerated into a mere rule of substantive law (*post*, § 2522), although the living principle of the original inference is still occasionally open to application.[3] It may be noted here that this inference, of a document's execution from the fact of land-possession, has no relation to the inference of *possession of the whole* of a piece of land from possession of a part (*post*, § 378).

§ 158. **Negative Traces**: (1) **Lack of News, to show Death or Loss.** Where certain results would have followed if an act or an event had occurred (or not occurred) the absence of those results is some indication that the act or event has not occurred (or occurred). A common class of evidence of this sort is that of *lack of news* to show probable *death* of a person or the probable *loss* of a ship; for as it is usual for living persons to be heard from directly or indirectly, by persons having an interest in knowing, and for ships' officers to leave word of their journey at the ports they touch or with the other ships they pass, the lack of any such news indicates their non-existence. Such evidence has always been received.[1] It is usually discussed, however, with reference to the legal *presumption of death*, founded on this evidence (*post*, § 2531). The fact of lack of news is admissible without regard to the time elapsed, and is not limited by the seven-year-period required for the

[3] 1869, Goodell v. Labadie, 19 Mich. 88 (agreement to exchange lands; deed performing this agreement by one party admitted to show probable performance by the other also); 1844, Downing v. Pickering, 15 N. H. 344, 350 (possession, plus an agreement to make the deeds, sufficient on the facts to go to the jury).

[1] A good example of such evidence in its various possibilities will be found in the Tichborne Case, R. v. Castro, Charge of C. J. Cockburn, *passim*. Other examples are as follows: 1763, Rowe v. Hasland, 1 W. Bl. 404, Lord Mansfield, C. J. (that a person "has not been heard of for many years," admissible to show death; here the person had lived in Liverpool); 1815, Watson v. King, 1 Stark. 121 (loss of a ship; evidence admitted that she had been last seen in a tempest in March, 1814, and never since heard from; Lord Ellenborough, C. J., "observed that this was the kind of proof usually given in actions against insurers, where the vessel is proved to have sailed and has not been heard of for two or three years").

presumption. In counter-explanation (*ante*, § 34) such facts as the infrequency of communication from the place the person went to, the fixed determination of the person to give up all connection with his former home, and the like, may of course be used to explain away the force of the fact of lack of news.[2]

§ 159. **Same: (2) Lapse of Time, to show Payment.** It is a natural propensity of creditors to realize their claims, when left unsatisfied, by process of law, within a fair space of time; and when it is found, after some time, that a creditor has not resorted to law for the realization of his claim, there is a natural inference that this failure was due to the lack of right and necessity to resort to law, *i. e.* that the claim had been satisfied by payment. The fact may be explained away by showing a more probable hypothesis (*ante*, § 34), for example, the insolvency of the debtor, his absence, or other circumstance likely to prevent the creditor from proceeding even though the claim was unpaid. The general evidentiary fact, however — lapse of time — is also the foundation of a legal *presumption of payment* (*post*, § 2517), and plays very little part in the theory of admissibility.

§ 160. **Same: (3) Lost Will; Lost Documents in general; Debtor's Fraud in Possession; Sundry Instances.** There are various other situations in which a retrospectant inference is permissible from the absence of certain results to the absence of certain causes. Most of these raise no doubt of admissibility and are commonly of importance only in the rules of presumption or elsewhere; the chief of these are the inference, from the *non-discovery of a will* once existing, to the testator's *revocatory destruction* of it (*post*, § 2523), the inference from the non-discovery of *any document* and the lapse of time, to the *loss of the document* (*post*, §§ 1195, 2522), and the inference, from a *debtor's continued possession of property*, after its mortgage or sale, of his fraudulent intent to defraud creditors by the transfer (*post*, §§ 336, 1082, 1779). In general, that a certain effect was not seen or heard by those who would naturally have seen or heard it had its cause occurred is some evidence of the non-occurrence.[1] But, though this situation can thus be treated as permitting an inference from circumstantial evidence, it is usually more natural to treat it as involving testimonial evidence; *i. e.* the argument is that witness A is qualified to testify that act X was not done by B, because A would have seen or heard it if it had been done; A's statement that it was not done is therefore receivable; thus, the principle of testimonial knowledge is here the controlling one (*post*, § 671).

[2] That the evidence of inability to find a person is not hearsay, see *post*, § 1789.

[1] 1805, R. *v.* Long Buckby, 7 East 45 (the fact that a document required to be stamped and sealed is not found recorded as so treated, admissible to show that it was not stamped); 1894, State *v.* Delaney, 92 Ia. 467, 61 N. W. 189 (to show that a person could not have left the house during the night, the fact admitted that other inmates were so situated that they must have been awakened, but were not).

b. Organic Traces.

Next are to be considered those retrospectant inferences which rest for their validity, not upon mechanical associations of effect and cause, but upon the working of organic natural laws, and usually upon some physiological principle. The fact offered as evidence is traced back to its cause through some physiological process to the originating act.

§ 164. **Birth during Marriage, to show Legitimacy.** When a child X is born to a wife A married to a husband B, it is natural to infer that the intercourse which begot the child was the intercourse of the husband B, *i. e.* that the child is legitimate. It is true that this inference is less strong where the birth occurs very shortly after the marriage; but even here the likelihood that the pre-marital intercourse was B's is greater than that it was another man's. It is also true that, even where the birth occurs a year or more after the marriage, it is possible that the begetting intercourse was another man's; but it is still exceedingly more likely that it was that of B the husband. Upon this likelihood is founded a rule of procedure, namely, the presumption of legitimacy (*post*, § 2527). No controversy of admissibility arises.

§ 165. **Same: Adultery of the Mother, to show Illegitimacy.** A birth during marriage having been shown by the proponent of legitimacy, the opponent, according to the theory of explanation (*ante*, § 34), would ordinarily be allowed to show that the birth could be accounted for otherwise than by the husband's begetting, *i. e.* could show the mother's intercourse with another man, about the probable time of conception, as accounting for the birth. In the same way, a person charged as the father of an unmarried woman's child might explain away the evidentiary fact of the birth of a child by showing the fact of her intercourse with other men about the time. This form of argument, however, seems more correctly to fall under the theory of multiple opportunity, and the rule of law accordingly has been examined under that head (*ante*, §§ 133, 134).

§ 166. **Resemblance of Child, to show Paternity.** If the corporal traits of the progenitor are or may be transmitted to the progeny, then a specific corporal trait of the progeny may point back to a person of similar trait as the progenitor, on the condition that the person so charged as progenitor is within the number of those who by association and opportunity may have had intercourse; for otherwise the possible number of similar persons would leave open too many hypotheses. The propriety of the inference rests on the supposed physiological likelihood that traits may be transmitted by procreation. The validity of this physiological principle, and therefore the propriety of the inference, is and always has been a matter of common knowledge:

1598, *William Shakspeare*, King John, Act I, Scene 1 (the king hears a lawsuit between Philip Faulconbridge, the supposed Bastard son of Sir Robert Faulconbridge's wife by Richard the Lion-hearted, and Robert Faulconbridge his younger brother, who claims the estates):

Bastard: "But that I am as well begot, my liege, . . .
Compare our faces and be judge yourself
If old Sir Robert did beget us both
And were our father and this son like him."
Elinor (queen-mother of Richard): "He hath a trick of Cœur-de-Lion's face;
The accent of his tongue affecteth him.
Do you not read some tokens of my son
In the large composition of this man?"
Bastard (who is more interested in proving himself Richard's son): "Sir Robert could do well; marry, to confess,
Could he get me? Sir Robert could not do it;
We know his handiwork. Therefore, good mother,
To whom am I beholding for these limbs?
Sir Robert never holp to make this leg."

1769, Lord *Mansfield*, C. J., in the *Douglas Peerage Case*, 2 Hargr. Collect. Jurid. 402: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike; and in an army of an hundred thousand men every one may be known from another. If there should be a likeness of features, there may be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas a family-likeness generally runs through all these; for in everything there is a resemblance, as of features, size, attitude, and action. . . . If Sir John Stewart, the most artless of mankind, was actor in the enlevement of Mignon and Sanry's [the supposed parents'] children, he did in a few days what the acutest genius could not accomplish for years. He found two children, the one the finished model of himself, and the other the exact picture in miniature of Lady Jane. It seems nature had implanted in the children what is not in the parents; for it appears in proof that in size, complexion, stature, attitude, color of the hair and eyes, nay and in every other thing, Mignon and his wife, and Sanry and his spouse, were *toto cœlo* different from and unlike to Sir John Stewart and Lady Jane Douglas. Among eleven black rabbits, there will scarce be found one to produce a white one."

1859, *Fowler*, J., in *Gilmanton* v. *Ham*, 38 N. H. 108, 113: "The practice of bringing before the jury, on trials for bastardy, the child whose paternity is sought to be established, when living, has been almost universal in this State, from the earliest recollection of the oldest practitioners. . . . If the child were referred to at all, its general appearance, its complexion and features, might properly be commented upon; and we think, under the well-established physiological law that like begets like, and that generally there is a striking resemblance, more or less strong and striking, between the parent and his child, it was a fair matter of argument before the jury, by the counsel on both sides, whether or not there had been anything in the complexion, appearance, and features of the child which the witness had produced and identified before them, tending to indicate its other parent."

The English practice seems always to have admitted this evidence without question.[1] In the United States the early practice was probably the same;

[1] 16—, Piercy's Case, 12 How. St. Tr. 1199 ("This James Piercy was a trunk-maker in the Strand; . . . one of his arguments to make you believe him a true descendant of the Piercys was that he was born with a mole on his body, as other of the Piercys had been, like a half-moon; the crescent being the crest of the Piercys earls of Northumberland"); 1743, Annesley v. Anglesea, 17 How. St. Tr. 1139, 1316, 1321; 1769, Douglas Peerage Case (quoted *supra*); 1797, Day v. Day, Trial, 3d ed., 827, quoted in Nicolas, Adulterine Bastardy, 140, and Hubback, Succession, 384 (Heath, J., received "evidence that the defendant bore a strong resemblance to his supposed father," and in summing up "admitted that resemblance was frequently fanciful, and therefore the jury should be well convinced that it did exist; but

but as the chief use of the evidence was found in filiation proceedings, to charge the defendant with the paternity of a bastard, the possible abuses of the evidence led to an unfortunate questioning of its validity under any circumstances:

1888, *Foster*, J., in *Clark* v. *Bradstreet*, 80 Me. 454, 456, 15 Atl. 56: "While it may be a well-known physiological fact that peculiarities of form, feature, and personal traits are oftentimes transmitted from parent to child, yet it is equally true as a matter of common knowledge that during the first few weeks, or even months, of a child's existence, it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period. Resemblance can then be readily imagined. . . . And in a trial in bastardy proceedings the mere fact that a resemblance is claimed would be too likely to lead captive the imagination of the jury, and they would fancy they could see points of resemblance between the child and the putative father."

Now it must be noted that this opinion (which is representative of others) does not dispute the validity of the inference from resemblance of features to paternity; its quarrel is with the difficulty of establishing the fact which is the foundation of the inference, namely, the resemblance. The answers to this objection are several. (1) The fanciful acceptance of a resemblance — which is the danger feared — is only likely where the child is so young as to have no decidedly marked features; and it is both proper and feasible to obviate this objection by excluding the evidence where the child is too young, either by leaving the matter to the trial Court's discretion, or by fixing a specific minimum age. (2) The physiological principle being perfectly well settled, it is poor policy to exclude invariably a piece of evidence that will usually be useful merely because it may occasionally be abused. (3) The Opinion rule cannot avail to exclude testimony to resemblance, because matters of identity, similarity, and the like are well settled to be not obnoxious to that rule (*post*, § 1974).

A number of Courts in the United States now exclude this kind of evidence, partly through misunderstanding the precedents in its favor, partly for the reasons above quoted. Moreover, by a curious contrariety of views, in some instances the evidentiary fact of resemblance is excluded only when offered through testimony of those who have seen the child; in other instances, only when offered by the presentation of the child in court. The partial exclusion of the former mode of evidence is based chiefly on the Opinion rule — the fallacy of which, in this application, needs no further exposition —; and partly also on the ease with which a resemblance can be affirmed in general terms, but the simple correction for this danger is to require detailed statements of specific traits, for the force of the inference rests on these and not on a general resemblance. The partial exclusion of the other mode of evidence — presentation of the child in court — rests

if they were so convinced, it was impossible to have stronger evidence"; this latter part of the remark of Mr. J. Heath has sometimes been omitted, when the former part was quoted, by Courts opposed to the use of the evidence, *e. g.* in Jones *v.* Jones, *infra*; Heath, J.'s ruling is also given in the abridged report of the case in Craik's English Causes Célèbres, 215, 223); 1837, Andrews *v.* Askey, 8 C. & P. 7, 9 (used without objection).

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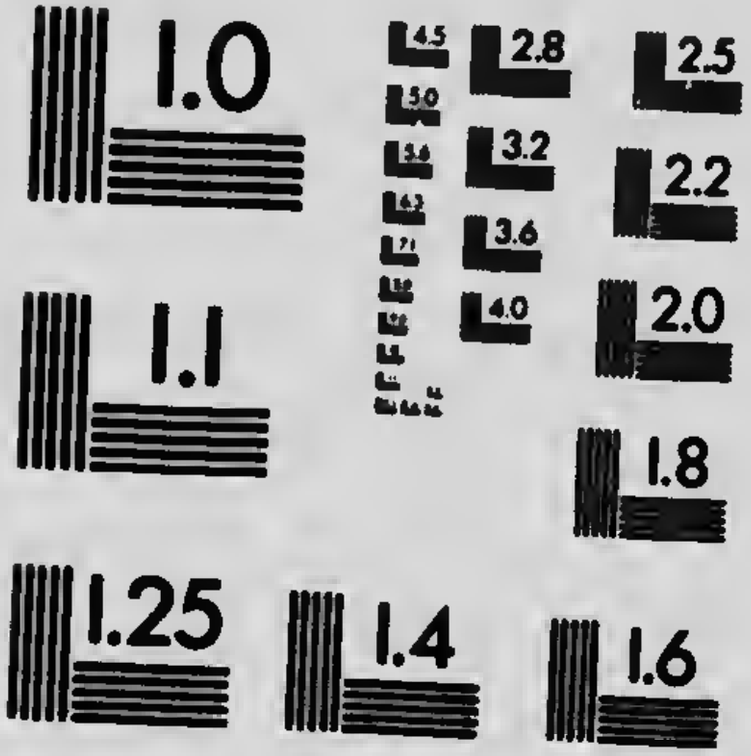

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on no good reason whatever, and is further considered under the principle involved (*post*, § 1160).

The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial Court old enough to possess settled features or other corporal indications.[2] It is to be noted that the evidence is relevant not merely in bastardy proceedings, but also in trying the legitimacy of a child born during marriage, whenever the presumption of legitimacy allows the issue to be raised (*post*, § 2527), as well as occasionally in other proceedings.

[2] The rulings in the various jurisdictions are as follows: *Ala.*: 1875, Paulk *v.* State, 52 Ala. 427, 429 (lack of resemblance to the defendant, or resemblance to another man who had opportunities of intercourse, admissible; but not resemblance to the children of the other man, because they might have their features from their mother; *semble*, also that resemblance may not be shown by testimony); 1902, Kelly *v.* State, 133 id. 195, 32 So. 56 (bastardy; child about a year old, allowed to be shown to the jury); *Cal.*: 1889, *Re* Jessup, 81 Cal. 408, 417, 21 Pac. 976 (inheritance; resemblance, as shown by photographs, allowed to be used to show paternity; inspection in Court declared much more valuable; *semble*, the opinion of witnesses, inadmissible); *Ind.*: 1862, Risk *v.* State, 19 Ind. 152 (age unstated; propriety of evidence doubted, because of the uncertainty of a mere infant's features, and because "it would involve the necessity of giving the alleged father in evidence"); 1870, Reitz *v.* State, 33 id. 187 (same); *Ia.*: 1874, Stumm *v.* Hummel, 39 Ia. 478, 480 (criminal conversation; resemblance assumed to be relevant); 1878, State *v.* Danforth, 48 id. 43, 47 (child three months old; resemblance excluded, there being no corroborating evidence); 1880, State *v.* Smith, 54 id. 104, 6 N. W. 153 (child two years and one month old; resemblance allowed to be considered as a general principle, the child being of sufficient age); 1900, State *v.* Harvey, 112 id. 416, 84 N. W. 535 (exhibition of child under two years, held improper); *Kan.*: 1895, Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337 (admitted); *Me.*: 1839, Keniston *v.* Rowe, 16 Me. 38 ("it was not the color or any peculiarity of conformation or form of features as matters of fact that were proposed to be proved; it was to prove a resemblance, which is matter of opinion," and therefore inadmissible); 1888, Clark *v.* Bradstreet, 80 id. 454 (a child six weeks old; resemblance, whether by exhibition or by testimony held irrelevant, apparently irrespective of the child's age); *Md.*: 1876, Jones *v.* Jones, 45 Md. 144, 151 (inheritance; "When the parties are before the jury, and the latter can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered"; but resemblance being "notional" and "fanciful," it cannot be shown by testimony); *Mass.*: 1862, Eddy *v.* Gray, 4 All. 435, 438 (excluded; here offered by witnesses, and declared obnoxious to the Opinion rule); 1867, Finnegan *v.* Dugan, 14 id. 197 (admitted as relevant; here the child was shown to the jury; no authorities cited); 1869, Young *v.* Makepeace, 103 Mass. 50, 54 (child shown to the jury; but testimony to the dissimilarity between the child and a third person, not present, but alleged by the defendant to be the real father, excluded; reasons confused and exact rule left obscure; Finnegan *v.* Dugan not cited); 1894, Farrell *v.* Weitz, 160 id. 288, 35 N. E. 783 (likeness not allowed to be shown by photograph of third person alleged as the father by defendant; *semble*, comparison by actual presence allowable; *Mich.*: 1884, People *v.* White, 53 Mich. 537 (resemblance of a young infant; "we do not well see how the jury could be prevented from noticing the child, which was properly enough in court"); *N. H.*: 1859, Gilmanton *v.* Ham, 38 N. H. 108, 113 (resemblance allowed to be considered; here by exhibition); 1900, State *v.* Saidell, 70 id. 174, 46 Atl. 1083 (resemblance on exhibition to jury, allowed to be considered); *N. J.*: 1888, Gaunt *v.* State, 50 N. J. L. 490, 493, 495, 14 Atl. 600 (fornication; resemblance admissible, without any apparent limitations; "the illusory nature of such resemblances rather imposing a duty on the Court in conjunction with the admission of the proof, than militating against the relevancy of the inquiry"; resemblance to be available either by inspection or through witnesses); *N. C.*: 1872, State *v.* Woodruff, 67 N. C. 89, *semble* (admissible); 1878, State *v.* Britt, 78 id. 439, 442 (resemblance to a third person, the alleged father, admitted); *Oh.*: 1892, Crow *v.* Jordan, 49 Oh. St. 655, 32 N. E. 750 (child allowed to be exhibited); *Tenn.*: 1846, Cannon *v.* Cannon, 7 Humph. 410, 411 (distribution of estate; resemblance used to evidence illegitimacy); *Tex.*: 1852, Higginbotham *v.* State, — Tex. Cr. —, 20 S. W. 360 (admitted); 1899, Hilton *v.* State, 41 id. 190, 53 S. W. 113 (adultery; resemblance of child seven months old, excluded); *Ut.*: 1901, State *v.* Neel, 23 Utah 541, 65 Pac. 494 (illicit intercourse; child not allowed to be exhibited, following Hanawalt *v.* State, *infra*); *U. S.*: 1809, U. S. *v.* Collins, 1 Cr. C. C. 592 (excluded, from witnesses); *Wis.*: 1895, Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489 (excluded, where the child was less than a year old; but perhaps admissible for an adult; the jury's inspection disapproved).

§ 167. **Corporal Traits, to show Race or Nationality.** A physiological principle, similar to the preceding one, but attended usually with more clearly marked results, tells us that the progeny of persons of one race receive from the progenitors certain corporal traits very different from the traits transmitted from a progenitor of another race. The presence of these peculiar traits of the race are therefore evidential to show a progenitor of the race bearing those traits. The admissibility of this evidence has never been doubted by Courts; though its use, since the abolition of slavery in this country, is now very rare, because the issues in which it is relevant can only be uncommon.[1] There seems no reason why similar evidence should not occasionally be usable to show *foreign birth* or origin from a foreign nation, even though from a people of the same race.[2]

§ 168. **Birthmarks, to show Events during Pregnancy; Venereal Disease, to show Adultery.** There remain two other instances of this form of inference, one as yet hardly accepted, the other fully conceded, in its scientific basis. (1) That a shock received by the mother during *pregnancy* may leave a mark upon the child has long been a popular belief. Should it ever receive scientific sanction in any defined terms, the child's corporal mark after birth may be taken as evidential of the act which produced it.[1] (2) That the existence of *venereal disease* in a husband is some evidence of an act of adultery on his part has always been conceded;[2] it is merely a question of the strength of the explanatory circumstances.

c. Mental Traces.

§ 172. **General Principle.** The struggle of a victim for his life, and the act of taking his life, may leave upon the perpetrator indelible traces of

[1] 1861, Daniel *v.* Guy, 23 Ark. 50, 51 (footformation, admitted as evidential of negro race); 1856, Bryan *v.* Walton, 20 Ga. 480, 508 (complexion, etc., of alleged slaves, considered to prove ancestry); 1864, Nave's Adm'r *v.* Williams, 22 Ind. 370 (color and featnres, to show race, admitted); 1835, Gentry *v.* McGinnis, 3 Dana Ky. 382, 388 (white color of an alleged slave, received to sbow white ancestry; "a black or mulatto complexion is *prima facie* evidence" of slavery, black anceators being necessarily slaves, and "one apparently a white person or an Indian," is *prima facie* free); 1839, Chancellor *v.* Milly, 9 id. 24 (appearance of an alleged slave, received to infer ancestry); 1888, Clark *v.* Bradstreet, 80 Me. 454, 457 (complexion, etc., admissible in determining race); Mo. Rev. St. 1899, § 2174 (illegal mixed marriage; jury "may determine the proportion of negro hlood in any party to such marriage from the appearance of such person"); 1826, Fox *v.* Lambson, 8 N. J. L. 275, 277 (black color raises a presumption of slavery); 1897, Warlick *v.* White, 76 N. C. 175, 178 (color of a child, to show black hlood, and therefore illegitimacy, admitted); 1846, White *v.* Collector, 3 Rich. 138, 140 (color admissihle to evidence race); 1806, Hudgin *v.* Wrights, 1 Hen. & M. 134, 137 (long, straigbt, hlack hair, and copper complexion, for Indians, and flat nose, woolly hair, and color of complexion, for negroes, admissible to show ancestry); 1811, Hook *v.* Pagee, 2 Munf. 379, 383 (complexion of an alleged slave, admitted to ahow ancestry); 1827, Gregory *v.* Bangh, 4 Rand. 611, 613 (complexion, etc., assumed proper to determine Indian anceatry).

[2] 1856, Dennis *v.* Brewater, 7 Gray 351, 353 (foreign birth; arrival as a child on a ship, foreign appearance, speech, and gestures, dark complexion, etc., held aufficient).

[1] Anon., cited hy Irving Browne, Green Bag, 1892, V, 555 (Mercer Co., Pa.; the complainant charged an assault upon her two weeka before hy the defendant in a lonely house; the defendant was held for trial, but three weeks before it occnrred, the complainant was delivered of a child, and on the child's throat and wrist appeared insrks of a thnmh, etc., auch as the complainant had alleged).

[2] 1794, Popkin *v.* Popkin, 1 Hagg. Eccl. 765, 767 ("Whether this disease is [sufficient] evidence of adultery may depend upon circumstances"); 1835, Johnson *v.* Johnson, 14 Wend. 637, 639, 641 (venereal disease contracted by a hnsband during the wife's absence is evidence of his adultery).

blood, wounds, or rent clothing, which point back to the deed as done by him; these traces come from a mechanical contact with the body, weapons, and other things involved in the deed, and they remain upon him or are divested from him by a mechanical process. But a deed may also leave traces upon the doer through other than a mechanical process, *i. e.* through a mental, moral, or psychological process. These traces may be as significant in their way as the others, — perhaps more so; and they may be equally relevant evidentially to show their bearer to be the doer of the act. These traces, like those of the other sorts, may be employed either *affirmatively* or *negatively*. The presence of such a trace may be used as indicating the doing of the act by the person bearing it; and the absence of the trace may be used as indicating the not doing it by the person not bearing the trace. The traces of this mental or psychological sort will be some form of a *mental condition*, — memory, belief, consciousness, knowledge, or whatever other name may be more usual and appropriate.

How to evidence this mental condition — by conduct or the like — is a different question. There is here involved simply the question, When is memory, consciousness, and the like, relevant to show the doing of a past act? The evidencing of this mental condition raises different and more complicated questions as to the significance of conduct; hence a consideration of the state of the law upon the various uses of the present sort of evidence can best be made in connection with the rules of conduct-evidence. Those rules in their details are elsewhere examined (*post*, §§ 265–293). It is enough here to summarize the chief types of inference of the present sort, and thus to exhibit the place of this inference in the general doctrine of Relevancy.

§ 173. **Consciousness of Guilt.** The commission of a crime leaves usually upon the consciousness a moral impression which is characteristic. The innocent man is without it; the guilty man usually has it. Its evidential value has never been doubted. The inference from consciousness of guilt to "guilty" is always available in evidence. It is a most powerful one, because the only other hypothesis conceivable is the rare one that the person's consciousness is caused by an insane delusion, and not by the actual doing of the act. The difficulty in connection with this evidence is, not its own relevancy to show the doing of the act — that is universally conceded —, but the mode of proving this consciousness of guilt in its turn by other evidence. There are two processes or inferences involved, — from conduct to consciousness of guilt, and then from consciousness of guilt to the guilty deed. The latter, belonging here, gives rise to no disputed questions of evidence. The former gives rise to many questions, due to the variety of conduct offerable in evidence. These questions are dealt with (*post*, §§ 273–291), in discussing evidence of consciousness or knowledge in general. It is worth while here to note this double step of inference involved; for it exhibits the true significance of the evidential use of conduct as indicating consciousness of guilt.

§ 174. **Consciousness of Innocence.** Just as the lack of mechanical or corporal traces may be used negatively (*ante*, § 158) to show the non-doing of an act, so the lack of guilty consciousness may be useful to show innocence of a crime. This lack of guilty consciousness — in other words, this consciousness of innocence — seems not to have been doubted by Courts as having in itself evidential value. But, assuming it to be relevant, a difficulty arises in the proof of it as a proposition, — the difficulty that the conduct offered to evidence it is so likely to be feigned and artificial. The disputed question, then, whether the conduct of an accused person is admissible in his favor, involves a doubt, not as to the evidential value of consciousness of innocence as indicating non-doing, but as to the evidential value of conduct as showing consciousness of innocence, — a problem elsewhere examined (*post*, § 293).

§ 175. **Belief or Recollection of Personal Doings, as Evidence of Identity.** All personal deeds are likely to leave some sort of a mark in the recollection or belief. The presence of that mark is some indication of the doing of the act recollected, and the absence of the mark is some evidence of the non-doing of the act. Where a person's identity is in issue, his recollection or non-recollection of experiences known to have occurred to the person with whom he is to be identified may often serve as useful evidence. For the reasons already stated, the rulings on this subject can best be examined elsewhere (*post*, § 270).

§ 176. **Same: Legitimacy, as evidenced by Parent's Conduct; Marriage, by "Habit"; Testamentary Execution, by the Deceased's Belief.** Among the most notable facts of life which are certain to leave marked traces on those into whose experience they enter are the facts of marriage, of the birth of children, and of the execution of a testament. Long tradition has recognized this, and has in these cases sanctioned the inference from subsequent belief or recollection to the prior act or experience. But the real difficulty lies in the inference from conduct to that belief, and, for the reason already noted, the details of the law can best be examined in another place, — the inference to legitimacy, under § 269, to marriage, under § 268, and to testamentary execution, under § 271.

§ 177. **Conduct of Animals, as evidencing a Human Act.** If the instinct or habit of animals can in a given case be supposed to be sensitive to the dealings of men with them, it would seem that the conduct of an animal may be trusted evidentially as indicating the human act which would naturally have caused the animal's conduct.[1] Such indications may be of two kinds. (1) The behavior of the animal may be a *trick* or other action *expressly taught* or *implicitly acquired* during his past association with a particular person; the possession of such a trick by a given animal will therefore serve to identify him as having been in that person's possession. This evidential use is well established in judicial practice, though it has

[1] For animal's conduct as evidencing the character or *disposition of the animal*, see *post*, § 201.

seldom been brought before courts of appeal.[2] (2) The behavior of the animal may be the result of an *impression* made on some *peculiarly strong sense* by a casual outward event or human act, incapable of being perceived by the human senses. The behavior of a horse in the vicinity of a concealed beast of prey is an instance of this. The custom, in certain of our communities, of tracking fugitives by bloodhounds, rests on a similar trait of those animals. It seems to be conceded that evidentially the fact that a well-trained bloodhound of good breed, after smelling a shoe or other article belonging to the doer of a crime, has tracked to the accused, is admissible to show that the accused was the doer of the criminal act.[3]

[2] Circa 1530, More's "Life of Sir Thomas More," quoted in Campbell's "Lives of the Chancellors," II, 37 (story of the beggar-woman's little dog, who was bought from a thief by the Chancellor's wife; the Chancellor allowed her to prove property by the dog's recognition of her); 1800, Anon., in Twiss' Life of Lord Eldon, I, 354 (quoted *post*, § 1152); 1888, State *v.* Ward, 61 Vt. 185, 17 Atl. 483 (where a complicated set of turnings on different roads must have been followed by the incendiary, evidence was admitted that the defendant's horse shortly after took the same turning without guidance); 1894, Chicago *Herald*, May 31 (a German saloonkeeper in Chicago lost his parrot; in the possession of an American saloonkeeper a similar parrot was found; the ownership of this parrot was claimed by both parties, each affirming that he had possessed and trained the parrot for a long time, and that the parrot would show the effect of this training in his language; at the trial before Justice of the Peace Eberhardt, the parrot would not speak; he was therefore committed temporarily to the custody of a police-captain; "Captain Barcel will keep the bird in custody, and will keep his ears strained to catch either 'Set 'em up again,' or 'Unser bier ist gut'"); 1900, Boston *Transcript*, Dec. 12 (in East Orange, N. J.; the larceny of a carrier pigeon by B. from E. was charged; the defendant claiming to be owner, the pigeon was released, and alighted later in E.'s barn).

[3] 1896, Simpson *v.* State, 111 Ala. 6, 20 So. 572, *semble* (that bloodhounds had tracked the defendant from the place of the crime, admitted, the dog's habit being never to leave a human track once scented); 1898, Pedigo *v.* Com., 103 Ky. 41, 44 S. W. 143 (admitted; DuRelle, J.: "It is difficult to lay down a general rule as to the introduction of testimony of this kind. . . . We think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him." Guffy, J., diss., in an able opinion); 1901, State *v.* Moore, 129 N. C. 494, 39 S. E. 626 (that a bloodhound trailed and pointed out the defendants, charged with larceny of meat and other things, was held inadmissible on the facts, without denying that it might be a "circumstance to be considered in connecting a person with an act"); 1903, Brott *v.* State, — Nebr. —, 97 N. W. 593 (behavior of bloodhounds in trailing the defendant, held inadmissible on the facts).

TITLE I (*continued*): CIRCUMSTANTIAL EVIDENCE.

SUB-TITLE II: EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION.

CHAPTER IX.

§ 190. **Nature of this Class of Evidence.** 1. The reasons for dividing into three groups the whole subject of Circumstantial Evidence have been already stated (*ante*, § 43). The groups being distinguished according to the propositions to be proved, the second group is now to be considered, namely, Evidence to prove a Human Quality, Condition, or other attribute. This group of propositions (*facta probanda*) separates itself from the first (Human Acts) with fair distinctness, not only because the circumstances available as evidence are usually distinct for the two groups, but also and chiefly because certain general considerations of policy, as well as of relevancy, run through the present group, constantly reappearing, and not only making various

analogies useful, but rendering it impossible to understand the rules of evidence for certain kinds of propositions without considering those for others. Though the distinction between the two groups is only a rough and practical one, nevertheless, it is in essence a real and unavoidable one, and is calculated to aid in the study of the evidential questions involved. It is also by no means an artificial one, but is fully in harmony with the attitude of the Courts towards the problems involved.

2. The various conceivable propositions to be proved may be reduced to the following well-defined sorts: Moral Character or Disposition; Physical and Mental Capacity; Design or Plan, and Intent; Knowledge, Belief, or Consciousness; Motive or Emotion; Habit or Custom, and Possession; Traits of Handwriting; Identity. A different analysis and order of treatment is conceivable; but with reference to the usefulness of putting in proximity those matters which throw light upon each other, this division and this order seem the most practical.

3. It will be understood that we are here *not concerned how the above human qualities come to be propositions* for proof.[1] We are concerned only to learn what facts will be admissible evidentially to prove the quality proposed for proof. For instance, character may be in issue through the pleadings in a suit for slander on a plea of justification, or in an action for personal injury as an element of the defendant's liability for an incompetent servant; or it may be used, not as in issue through the pleadings, but as evidential to prove a human act, for example, the good character of a defendant in a criminal case or his bad character in rebuttal. So, also, knowledge may be in issue in a suit to set aside a purchase in fraud of creditors, or it may be evidential only, as when it is offered to prove the doing of a past act as a mark of identity (*post*, § 270). In all these instances the quality which is termed character, knowledge, or the like, has somehow come into the case as a proposition to be proved; and the question how to evidence it presents itself equally whether the *factum probandum*, when once proved, is going in turn to be used itself evidentially to show some other fact, or is one of the very ultimate propositions made material by the pleadings. It is true that by tradition or by policy the mode of proof available in the one case may sometimes not be available in the other; but this is only an incidental and not a necessary or common feature.

4. Three species of evidential facts are available to show a human quality or condition.[2] (1) *Conduct;* this is the expression, in outward behavior or acts, of the quality or condition operating to produce effects. These results are the traces by which we may infer the moving cause. In point of time, conduct is closely associated with the internal condition giving rise to it; nevertheless, the indication is strictly not a concomitant, but a retrospectant

[1] For the distinction between *proposition*, the matter to be proved, and *evidentiary fact*, the evidence to prove it, see *ante*, § 2.

[2] This classification does not hold good for the last subject, Identity, above-mentioned; but that is to some extent anomalous, and its peculiarities need not be noticed here.

one (*ante*, § 43), because the argument is backwards from effect (conduct) to cause (internal condition). (2) ***External facts*** pointing forward to the probable coming into existence of the quality; for example, the victim's gold, as pointing forward to the defendant's probable desire to rob him, or the reputation of A's insolvency, as pointing forward to B's probable receipt of knowledge of it. In using this evidence, we take our stand beforehand and argue that the evidential fact probably gave rise to the emotion, knowledge, or intent to be proved. The indication is thus prospectant; while that of conduct is retrospectant. (3) There is also a third sort of fact, having either a prospectant or a retrospectant indication, and not exactly corresponding to either of the preceding sorts, namely, *prior or subsequent condition*, as showing condition at a given time. Thus, to prove insanity, we may offer (1) conduct as the effect illustrating its cause, mental aberration, (2) circumstances of unsuccessful business, domestic troubles, and the like, tending to bring on insanity; and (3) prior or subsequent insanity, pointing forwards or backwards to insanity at the time in question. So also, to show a husband's desire or motive to get rid of his wife, we may offer (1) his conduct exhibiting such a desire, (2) the existence of a paramour, tending to create such a desire, and (3) a prior desire, as pointing forward to its continued existence at the time in question. A similar general question presents itself in all evidence of this third sort, namely, how far before or after the time in question the survey may extend in considering the fact of prior or subsequent condition. For some subjects, all three of these sorts of evidence are available, perhaps with equal frequency; for others only one or two of them are available, at least usually; thus, to evidence character, facts of the second sort do not come into play at all, — unless the principles of heredity one day become so clearly ascertainable as to offer a sure basis of argument from ancestry. It is enough to note that in taking up the different *facta probanda* a convenient order of arrangement of the evidential facts may be based on this triple division.

5. The distinction between a pure principle of *Relevancy* and a doctrine of Auxiliary Policy (expounded *ante*, § 42) is in the present subject of constant importance. Our first question, for any kind of evidence, must be, Is it relevant, *i. e.* has it probative value enough to be considered? But even when it is relevant and would so far be admissible, it may still be shut out by some principle forbidding confusion of issues or undue prejudice, or other exclusionary doctrine of auxiliary policy (*post*, § 1904). It is practically necessary to treat in one place the two sets of considerations, relevancy and auxiliary policy, as applied to the same piece of evidence; but it must not be forgotten that the two are entirely distinct in function.

Topic I: Evidence to prove Character or Disposition.

§ 191. **Kinds of Evidence.** It is here assumed that Moral Character or Disposition is somehow in the case to be proved, — either as material under

the pleadings or as evidential to prove something else (*ante*, § 54). The question then here arises, what evidential facts may be used to prove it. Of the three sorts of facts just described, the *second* sort is here wholly unavailable; there is no external fact from which we can argue forward that a person will have a certain character. The *third* sort of fact, *prior or subsequent character*, as indicating character at the time in question, is undoubtedly available evidence; but its use is so complicated with the question of using reputation (under the Hearsay exception) at a prior or subsequent time, that both subjects can best be examined together; accordingly the use of prior or subsequent character, to evidence character at the time in question, is there dealt with (*post*, § 1617). The material here to be considered, therefore, is the *first* sort of evidence, — the sort by far the commonest and the only one that raises questions of serious difficulty. Under what condition, then, is conduct admissible to evidence Character?

1. Conduct to show Character of a Defendant in a Criminal Case.

§ 192. **Nature of the Inference; an Act is not evidential of another Act.** At the outset of this entire prospectant class of inferences, it must be noted that, where the doing of an act is the proposition to be proved, there can never be a direct inference from an act of former conduct to the act charged; there must always be a double step of inference of some sort, a *tertium quid*. In other words, it cannot be argued: "Because A did an act X last year, therefore he probably did the act X as now charged." Human action being infinitely varied, there is no adequate probative connection between the two. A may do the act once, and may never do it again; and not only may he not do it again, but it is in no degree probable that he will do it again. The conceivable contingencies that may intervene are too numerous.

Thus, whenever resort is had to a person's past conduct or acts as the basis of inference to a subsequent act, it must always be done *intermediately through another inference*. It may be argued: "A once committed a robbery; (1) therefore he probably has a thieving disposition; (2) therefore he probably committed this robbery"; or "(1) therefore he had some general design to commit certain robberies; (2) therefore he probably carried out that design and committed this robbery." Or it may be argued: "A gave money to his poor friend B; (1) therefore A probably is of a benevolent disposition; (2) therefore A probably did not commit the present robbery"; or "(1) therefore he probably had a kindly feeling towards B; (2) therefore he probably did not rob B." The impulse to argue from A's former bad deed or good deed directly to his doing or not doing of the bad deed charged is perhaps a natural one; but it will always be found, upon analysis of the process of reasoning, that there is involved in it a hidden intermediary step of some sort, resting on a second inference of character, motive, plan, or the like. This intermediate step is always implicit, and must be brought out. The result is that, when the ultimate proposition to be proved is the doing of an

act by a defendant, and resort is had evidentially to his past conduct, this is not in order to argue directly from act to act, but in order, by the past act, to evidence character, design, motive, or some other quality, and through that quality to infer that it led to the act charged. . . . make available such evidence of past conduct or acts, some use for it must be found as evidencing character, design, or other quality.

This principle has long been accepted in our law. That "the doing of one act is in itself no evidence that the same or a like act was again done by the same person," has been so often judicially repeated that it is a commonplace:

1872, *Agnew*, J., in *Shaffner* v. *Com.*, 72 Pa. 65: "It is a general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. . . . Logically the commission of an independent offence is not proof in itself of the commission of another crime."

1893, *Knowlton*, J., in *Miller* v. *Curtis*, 158 Mass. 127, 129: "That a person has committed one crime has no direct tendency to show that he committed another similar crime which had no connection with the first."

1896, *Martin*, J., in *People* v. *McLaughlin*, 150 N. Y. 365, 386, 44 N. E. 1041: "It is an elementary principle that the commission of one crime is not admissible in evidence to establish the guilt of a party of another."[1]

§ 193. **Particular Bad Acts to show the Defendant's Character; (1) Relevancy.** It has already been seen (*ante*, § 58) that if a defendant in a criminal case chooses to offer his good character (for the appropriate trait) as an argument that he probably did not commit the offence charged, the prosecution may by counter-evidence dispute the existence in him of the good character thus alleged; and it has also been seen that the fact thus to be proved or disproved is the real disposition or character, of which reputation or anything else is merely evidence (*ante*, § 52). The question thus arises how the character is to be proved or disproved. It has been noted (*ante*, §§ 52, 53) that there are three conceivable ways of evidencing it: (1) Reputation of the community; this is open to the objection of being Hearsay, and is dealt with *post*, § 1608; (2) Personal Knowledge or Opinion of those who know the defendant; this is open to the objection of the Opinion rule, and is dealt with *post*, § 1980; (3) Particular Acts of Misconduct, exhibiting the particular trait involved. This last sort of evidence is now to be considered.

The law here declares a general and absolute rule of exclusion. It is forbidden, in showing that the defendant has not the good character which he affirms, to resort to particular acts of misconduct by him. Is this prohibition based on the irrelevancy of such evidence, or on some reason of auxiliary policy (*ante*, § 42) which assumes its relevancy but sees reasons of policy for its exclusion? That such former misconduct is relevant, *i.e.* has probative value to persuade us of the general trait or disposition, cannot be doubted. The assumption of its probative value is made throughout the judicial opin-

[1] For similar utterances, see the cases cited *post*, §§ 300–371.

ions on this subject;[1] and the following acute analysis makes it entirely clear:

1876, *State* v. *Lapage*, 57 N. H. 275, 290; on a charge of murder committed in an attempt to rape, the fact of the defendant's recent rape of another person was offered; Mr. *Norris*, arguing for the defence: "Making no point of remoteness in time or space, let us see how well this evidence will bear analyzing. Premise to be proved: he committed a rape, in no way, except in kind, connected with this crime. Inference: a general disposition to commit this kind of offence. Next premise: this general disposition in him. Inference: he committed this particular offence. . . . It may be tried by the common test of the validity of arguments. Some men who commit a single crime have, or thereby acquire, a tendency to commit the same kind of crimes; if this man committed the rape, he might therefore have or thereby acquire a tendency to commit other rapes; if he had or so acquired such a tendency, and if another rape was committed within his reach, he might therefore be more likely to be guilty; if more likely to be guilty of rape, and if there was a murder committed in perpetrating or attempting to perpetrate rape, he might therefore be more likely to be guilty of this rape, and hence of this murder; a sort of an *ex-parte* conviction of a single rape, from which the jury are to find a general disposition to that kind of crimes, in order to help them out in presuming the commission of another rape as a motive or occasion of the murder. We can find nothing like it in the books." *Ladd*, J.: "But it is nevertheless argued on behalf of the State (if I have not wholly misapprehended the drift of the argument) that the evidence was admitted because, as matter of fact, its natural tendency was to produce conviction in the mind that the prisoner committed rape upon his victim at the time he took her life. . . . I shall not undertake to deny this. If I know a man has broken into my house and stolen my goods, I am for that reason more ready to believe him guilty of breaking into my neighbor's house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature — the teaching of human experience. If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. . . . Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort: does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive: The law is otherwise."

[1] For example, in the quotations in the next section, and also in the following: 1851, R. v. Shrimpton, 2 Den. Cr. C. 322 (Campbell, L. C. J.: "The question in issue is the good character of the prisoner; surely, whether the prisoner had been previously convicted is relevant to that"; Alderson, B.: "The prisoner raises the question of character, and the evidence of his former conviction is brought to show what his character really is").

§ 194. **Same: (2) Reasons of Policy.** It may almost be said that it is because of this indubitable relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charges, any or all of which may be mere fabrications. These reasons of auxiliary policy (*post*, § 1863), directed to prevent the risks of reaching verdicts through insufficient evidence, have operated to exclude that which is in itself relevant. For more than two centuries,[1] ever since the liberal reaction which began with the Restoration of the Stuarts, this policy, in one or another of its reasonings, has received judicial sanction, more emphatic with time and experience. It represents a revolution in the theory of criminal trials, and is one of the peculiar features, of vast moment, which distinguishes the Anglo-American from the Continental system of evidence:

1684, *Withins*, J., in *Hampden's Trial*, 9 How. St. Tr. 1053, 1103: "You know the case lately adjudged in this Court; a person was indicted of forgery, we would not let them give evidence of any other forgeries but that for which he was indicted, because we would not suffer any raking into men's course of life to pick up evidence that they cannot be prepared to answer to."

1692, *Holt*, L. C. J., in *Harrison's Trial*, 12 How. St. Tr. 833, 864, 874 (charge of murder; a witness was called to speak of some felonious conduct of the defendant three years before): "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is nothing to the matter."

1847, *Parke*, B., in *Att'y-Gen'l* v. *Hitchcock*, 1 Ex. 93: "We cannot enter into a collateral question as to the man's having committed a crime on some former occasion, one reason being that it would lead to complicated issues and long inquiries; and another, that a party cannot be expected to be prepared to defend the whole of the actions of his life."

[1] It is clear that before 1670–1680 the accused's prior record of misconduct could be considered: 1669, Hawkins' Trial, 6 How. St. Tr. 921, 935, 949 (larceny; details of a larceny from another person at another time, allowed to be given; L. C. B. Hale: "This, if true, would render the prisoner now at the bar obnoxious to any jury"); 1684, Hampden's Trial, cited *post* (the judge, in excluding such evidence invokes a "case lately adjudged in this court"). The case of Faulconer (1653; 5 How. St. Tr. 323, 354), which Sir J. Stephen has cited (Hist. Cr. Law, I, 368) as an early instance of such evidence, is hardly in point; for here the trial was for perjury, and the evidence was offered as "proofs to the credit of Faulconer," *i. e.*, rather looking upon him as a witness to be impeached. Lord Campbell, on the other hand (Lives of the Chief Justices, III, 24), erroneously gives Harrison's Trial, in 1692 (cited *post*) as the first case of exclusion. But at any rate the older practice died hard and slowly: 1695, R. *v.* Hains, Comb. 337 ("If the defendant give evidence of a general reputation, it may be answered by particular instances on the other side for the King").

Yet it is odd to find the following anachronistic remark in a judgment of Lord Mansfield, in 1742 (Clark *v.* Periam, 2 Atk. 339): "If there is a criminal prosecution, and the prisoner in order to strengthen the evidence for his character enters into particular facts to support it, this is called a challenge to the prosecutor, and then he may likewise examine to particular facts."

1851, *R.* v. *Oddy*, 2 Den. Cr. C. 264, *Campbell*, L. C. J.: "The moral weight of such evidence in any individual case would no doubt be great. But the law is a system of general rules; and it does not admit such evidence, because of the inconvenience which would result from it"; Mr. *Pickering*, for prosecution: "But in several analogous cases the law does admit such evidence, notwithstanding the inconvenience; and there the inconvenience, which is confessedly the only ground of exclusion, is tolerated in order that justice may not be defeated. The inconvenience is put upon two grounds; first, that of the prisoner being taken by surprise; secondly, of many different issues being raised"; *Campbell*, L. C. J.: "Yes; that is so"; Mr. *Pickering*: "If in such cases [as previous utterings of forgeries to show lutent] justice is not permitted to be defeated by the argument drawn from the inconvenience of raising different issues, why should it in the present case?" . . . *Campbell*, L. C. J.: "It would have been evidence of the prisoner being a bad man, and likely to commit the offences there charged. But the English law does not permit the issue of criminal trials to depend on this species of evidence."

1865, *Willes*, J., in *R.* v. *Rowton*, L. & C. 520, 541: "[Evidence of particular acts] is excluded, partly for the reason [irrelevancy] already given, and partly because no notice has been given to the other side that such an inquiry is going to be made. . . . The impossibility of giving such notice with respect to the prisoner's conduct would exclude such evidence, even if it were not excluded by general rules of policy."

1846, *Thacher*, J., in *Dowling* v. *State*, 5 Sm. & M. 686 (excluding evidence of cruelty to other slaves by an overseer charged with the murder of a slave): "A principal reason for this rule is that a party, having had no notice of such a course of evidence, may not have prepared himself to rebut it. It is not an answer to this to say that the matter in evidence, having no relation to the point in issue, cannot therefore influence the mind upon it; it may have the effect to withdraw the minds of the jury from the point in issue, and thus to mislead them. If the admitted evidence tend to prove that the prisoner has committed another and distinct offence, it may thus excite prejudice, and even raise the inference of the commission of the offence alone in question. It is of the last importance to a person charged with an offence that the facts laid before the jury should consist exclusively of the transaction, not only because he can be expected to come prepared to answer them alone, but because, even should he happen to be so prepared, it is so much irrelevant matter tending to confuse the minds of the jury and to take from him the benefit of their exclusive consideration of the merits of the matter solely in issue."

1858, Mr. John Norton *Pomeroy*, arguing in *People* v. *Stout*, 4 Park. Cr. 97: "In its administration of criminal jurisprudence, the civil law allows and requires such evidence. It investigates the antecedent character, disposition, habits, associates, business, — in short, the entire history of an accused person, to discover whether it is probable that he would commit the alleged crime. English and American criminal law, in its practical administration, confines itself to the investigation of the very crime charged, and restricts judicial evidence to circumstances directly connected with and necessary to elucidate the issue to be tried.[2] These two systems are diametrically opposed to each other, and whatever may be said of their comparative merits, the rule of the common law is so firmly established that it lies at the very foundation of criminal procedure, as an inseparable element of trial by jury. Trained judicial minds may be able to eliminate from a mass of irrelevant and general criminative facts those which directly bear upon the crime charged against the prisoner; but the very character of juries, and the theory of trial by jury, require that all prejudicial evidence tending to raise in their minds an antipathy to the prisoner, and which does not directly tend to prove the simple issue, should be carefully excluded from them."

1873, *Allen*, J., in *Coleman* v. *State*, 55 N. Y. 70: "A person cannot be convicted of

[2] When Campbell visited Paris, in 1819, and the French lawyers "laughed at our strictness" in excluding hearsay, "I retorted by pointing out the injustice of their practice" in character-evidence (Life of L. C. Campbell, I, 364). For some examples of French trials, see Stephen's History of the Criminal Law, I, Appendix.

one offence upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or indeed of any character. But the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offences to produce conviction of a single one."

1882, *Devens*, J., in *Com.* v. *Jackson*, 132 Mass. 20: "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defence, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."

1887, *Thayer*, J., in *State* v. *Saunders*, 14 Or. 300, 309, 12 Pac. 411: "Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs (no matter what explanation of them he attempts to make), it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this, — knows that juries are inclined to act from impulse, and to convict parties accused, upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case, if they think him a scapegrace or vagabond. That is human nature."

1888, *Hayne*, C., in *People* v. *Dye*, 75 Cal. 112, 16 Pac. 537 (excluding, on a trial for murder, evidence that he had attempted "to make money out of his wife's shame"): "The prosecution might with equal propriety have undertaken to get a verdict by proving that he was a horse-thief or a blackleg, or any other thing calculated to expose him to contempt. In a case which is at all doubtful, such a course would be almost certain to produce a conviction from an average jury. It is contrary to the first principles of justice to try a man for one crime and convict him of that because he may be guilty of another, or because he may be a low specimen of humanity."[3]

The reasons thus marshalled in various forms are reducible to three: (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) The tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offences; (3) The injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated. It is also said, by some judges, (4) that the confusion of new issues is a reason for avoiding such evidence; but this can play but a small and cumulative part, since this reason could be obviated, as it is with witnesses (*post*, § 979), by excluding extrinsic testimony and allowing proof by a record of prior conviction, or cross-examination, where the defendant waives his privilege by taking the stand; yet these means are never allowed. Thus it seems clear that the doctrine of confusion of issues, while it would operate to the extent of excluding extrinsic testimony, is nevertheless not in itself controlling and does not account for the full scope of the rule. The other three reasons are the vital ones.

These reasons, it may be noted, represent general policies and constant

[3] See also a good opinion by Dodge, J., in Paulson v. State (1903), — Wis. — , 94 N. W. 771.

quantities in our law of evidence, and reappear individually in other parts of it.[4] For example, the third — but not the first or the second — reappears in the use of particular misconduct against a witness; but it is there allowed to be satisfied by forbidding extrinsic testimony, while admitting judgments of conviction and cross-examination of the witness himself (*post*, § 979). Again, the first two reasons apply also, though not in equal strength, to the prosecution's use of general character against a defendant (*ante*, § 57); and accordingly that is forbidden except where the defendant has himself challenged inquiry into his character. Again, the third reason finds an analogy in the law of criminal pleading, in the rule that on an indictment charging only a single offence the issue must be confined to that offence, and no election is allowed to lay before the jury a number of such offences from which they are to select the one best proved.[5] Furthermore, it is to be noted, the judicial exposition of these reasons shows the fallacy of supposing, as some do, that the object of the rule is merely to show mercy to the guilty one, to give him a final chance for life and liberty by artificially handicapping the prosecution, — thus importing into courts of justice the notions of sportsmanship. On the contrary, the object is to prevent a person not guilty of the present charge from being improperly found guilty of it. If it be said that nevertheless this is still a spirit of kindness to the guilty, seeking to prevent his being punished now for what he has formerly done, the answer is that we are nevertheless protecting a person who is theoretically innocent of the present charge from being now found guilty of a past crime which he was not aware would be charged against him and which he has no opportunity to show to be fabricated. There is quite enough maudlin pity for criminals in our law in other respects; and we ought not to give support to that tendency by claiming on such grounds the doctrine here involved, — a doctrine which is in truth mainly designed to protect the innocent and not the guilty.

The rule thus expounded is so firmly established that it would be held to prevail even in jurisdictions where no express enunciation of it has been made.[6] It is constantly assumed or laid down in the rulings which expound

[4] Compare the general principles examined *post*, §§ 1863, 1904.

[5] See U. S. *v.* Mitchell, 2 Dall. 348, 357; State *v.* Bates, 10 Conn. 372, where the similarity of the reasons may be noticed. In these cases of course there is no attempt to argue evidentially from one offence to the other.

[6] The practical bearing of the rule, it is to be noted, is to exclude this class of facts on rebuttal by the prosecution; for the use of bad character in any form is already forbidden to the prosecution until the defendant has opened the subject (*ante*, § 57): *Can.*: 1888, R. *v.* Trigganzie, 15 Ont. 294, 299 (excluding a prior conviction for a similar crime; *Ala.*: 1856, Franklin *v.* State, 29 Ala. 20; 1859, Dupree *v.* State, 33 id. 388 (that the defendant was an escaped convict); 1887, Steele *v.* State, 83 id. 25, 3 So. 547; 1889, Moulton *v.* State, 88 id. 116, 6 So. 758; Morgan *v.* State, ib. 224, 6 So. 761; 1895, Murphy *v.* State, 108 id. 10, 18 So. 557 (that the witness, as sheriff, had often had a warrant out against the defendant); *Cal.*: 1888, People *v.* Dye, 75 Cal. 108, 112, 16 Pac. 537; 1898, People *v.* Lynch, 122 id. 501, 55 Pac. 248; 1900, People *v.* Lee Dick Lung, 129 id. 491, 62 Pac. 71; *Ill.*: 1869, McCarty *v.* People, 51 Ill. 231; 1871, Sutton *v.* Johuson, 62 id. 209; *Ind.*: 1895, Griffith *v.* State, 140 Ind. 163, 39 N. E. 440; *Ia.*: 1887, State *v.* Sterrett, 71 Ia. 387; 32 N. W. 387; 1890, State *v.* McGee, 81 id. 17, 19, 46 N. W. 764; 1895, State *v.* Tippet, 94 id. 646, 63 N. W. 445; *Kan.*: 1901, State *v.* Kirby, 62 Kan. 436, 63 Pac. 752; *Ky.*: 1882, White *v.* Com., 80 Ky. 485; 1898, Ballowe *v.* Com., — id. —, 44 S. W. 646; *La.*: 1893, State *v.* Donelon, 45 La. An. 744, 754, 12 So. 922; 1903, Cook *v.* State, 111 La. —, 35 So. 665 (but a character for violence when drinking is not within the prohibition of specific acts);

all the ensuing distinctions arising from the use of conduct to evidence some other fact than moral character.

§ 195. **Particular Good Acts, to show Defendant's Character.** Do any of the foregoing reasons apply to exclude the use by the defendant of his own particular good acts to evidence that good character which he is allowed to invoke? They do not seem to; and the propriety of the defendant's use of such evidence has been more than once judicially commended:

1786, *R.* v. *Brecknock*, McNally's Evidence, 322; indictment for murder; the witness, a clergyman, "being examined to the character of the prisoner, said he believed him to be the last man in the world who would have a thirst of blood, and he would give particular instances"; these instances being objected to, the offering counsel's argument was sustained, that "this rule as to particular instances does not hold when you call a witness to support a man's character, for then . . . the wit- may give his reasons for entertaining a good opinion of him."

1852, *Preston*, J., in *State* v. *Parker*, 7 La. An. 88: "It appears to me so reasonable and humane that I cannot think it inconsistent with the rules of evidence. The effort to avoid collateral issues seems sometimes to have excluded from the jury-box what every juryman would wish to learn, and to have trenched closely upon the principles of humanity. It is but the just reward of many good actions that they should be of some avail to a man in his utmost need, especially when by invoking their aid he throws himself open to all the opprobrium that can be cast upon him by the character he has acquired by his evil deeds."

That such was the practice up to the close of the 1700s is clear.[1] But, after a time, two of the reasons already noted, surprise and confusion of

Mass.: 1807, Com. *v.* Hardy, 2 Mass. 317 (Parsons, C. J.: "in such case there can be no examination as to particular acts"); 1876, Com. *v.* O'Brien, 119 id. 342 (here, a good character for peace and quiet, attempted to be disproved by showing a conviction for assault); *Mich.*: 1878, Brownell *v.* People, 38 Mich. 732, 736; *Miss.*: 1890, Kearney *v.* State, 68 Miss. 233, 238; 8 So. 292; *Mo.*: 1866, State *v.* Harrold, 38 Mo. 497; 1882, State *v.* Turner, 76 id. 351; *Nebr.*: 1881, Olive *v.* State, 11 Nebr. 1, 27, 7 N. W. 444; 1894, Patterson *v.* State, 41 id. 538, 59 N. W. 917; 1895, Basye *v.* State, 45 id. 261, 63 N. W. 811; *N. H.*: 1844, State *v.* Renton, 15 N. H. 174; *N. J.*: 1900, Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62; *N. Y.*: 1832, Townsend *v.* Gravea, 3 Paige, Ch. 453, 455; 1835, People *v.* White, 14 Wend. 113; 1887, People *v.* Sharp, 107 N. Y. 427, 457, 467, 14 N. E. 319; 1888, People *v.* Greenwall, 108 id. 801, 15 N. E. 404; *N. C.*: 1822, State *v.* Twitty, 2 Hawks 248, 258; 1855, Bottoms *v.* Kent, 3 Jones L. 156; 1877, State *v.* Laxton, 67 N. C. 218; 1888, State *v.* Bullard, 100 id. 486, 488, 6 S. E. 191 (but confusing the question with that of impeaching a witness' character); *Or.*: 1897, State *v.* Moore, 32 Or. 65, 48 Pac. 468; *R. I.*: 1892, State *v.* Ellwood, 17 R. I. 763, 766, 24 Atl. 782; *Wis.*: 1895, Fosdahl *v.* State, 89 Wis. 482, 62 N. W. 185 (prior convictions). The only modern instance of a contrary view seems to be the following, which must be regarded as a casual inadvertence: 1840, Story, J., in Bottomley *v.* U. S., 1 Story 135, 145, 1 Fed. 688 (importation of goods by bribery of the deputy-collector; other false entries were admitted as tending to overcome the "ordinary presumption of law in favor of . . . [the official's] general character being elevated above" such a fraud, so that "he who has the baseness to accept a bribe . . . in one case, withdraws from himself all the sanctity of his official character in other cases of a similar nature").

Compare the distinctions of § 988, *post*.

[1] 1696, Lowick's Trial, 13 How. St. Tr. 292 (how the defendant once heroically saved people's lives); 1742, Mansfield, L. C. J., in Clarke *v.* Periam, 2 Atk. 339; 1753, Murphy's Trial, 19 How. St. Tr. 725 (Mr. *Laroche*: "This is the second time I have come from Bristol to London to speak to Mr. Noads' character [jointly indicted]. I knew him at Bristol; . . . he behaved so well there that the gentleman recommended him to my brother-in-law, Mr. Henry Casamaijor, to transact his great affairs"; Mr. Alderman *Ironside*: "Mr. Noads has been concerned in an affair where I am interested, in which he has always acted with great diligence and prudence. I have trusted him with large sums of money; it has been in his power to have injured us, but I never had any occasion or room to doubt his honesty"); 1786, R. *v.* Brecknock, Ire. (cited *supra*).

issues, came to be thought applicable to a defendant's evidence of particular acts in his own favor:

1660, *Peters' Trial*, 5 How. St. Tr. 1116, 1137; murder of King Charles; *Peters:* "I have here a seal that the earl of Norwich gave me to keep for his sake for saving his life, which I will keep as long as I live"; L. C. B. *Bridgman:* "I am not willing at all to interrupt you or hinder you; [but] that which you speak of, doing good services, is not at all to the point. We do not question you for what good you have done, but for the evil you have done."

1794, *Eyre*, L. C. J., in *Horne Tooke's Trial*, 25 How. St. Tr. 359 (rejecting certain specific instances of conduct "in respect of the particularity of it"): "General character is general character; and it is not a collection of many moral or religious acts of a man's life, but the result of all. General character may be opposed by evidence; but if you are on the part of the prisoner to go into all the particulars of his life which are in his favor, you will have an undue advantage in that respect, because the crown cannot be prepared to oppose that evidence. We have very often gone into too many particulars upon evidence of general character; but whenever that point has been discussed, it has been found that the true way of examining to character was to the general character."

1808, *Alexander Davison's Trial*, 31 How. St. Tr. 187; fraud in public accounts by a former commissary-general; Lord *Moira* sworn (formerly general-in-command): "I never had the remotest ground for suspicion. . . . Shall I state the particulars?" L. C. J. *Ellenborough:* "One is very unwilling to diminish the scope of these inquiries, but the general inquiry is as to the general character"; *John Martin Leake* sworn; examined by Mr. *Holroyd*: "I believe you are one of the comptrollers of the army accounts?" "I am"; "In that character have you at any time had Mr. Davison's accounts before you?" "Yes"; "Have those been examined by you?" L. C. J. *Ellenborough:* "I really must interfere. It would be dangerous as a precedent to permit particular instances to be given in evidence where there can have been no notice. General evidence of general character is admissible; but this is certainly contrary to all rule"; Mr. *Holroyd:* "I ask this question to show Mr. Leake's means of knowledge"; L. C. J. *Ellenborough:* "You ask as to his knowledge of the examination of public accounts. Now would it be proper to try a collateral issue for which the other side cannot be prepared? It is as clear a rule of evidence as can be that you must not examine to particular facts." . . . Mr. *Holroyd:* "I ask this only as introductory of general character"; L. C. J. *Ellenborough:* "If you mean only to ask whether the witness has had such means of knowing him as to form the judgment he is about to give, I have no objection to that"; Mr. *Holroyd:* "Had you opportunities, from examining Mr. Davison's accounts, of knowing his general character?" "I have seen many of his accounts, and many of them were extremely regular; in the years 1794, 1795, and 1796, they were before the comptrollers"; L. C. J. *Ellenborough:* "I cannot admit this; you must go into general character."

By the opening of the 1800s, this had become established as the law of England.[2] Nevertheless (as illustrated in the last passage above), the ortho-

[2] 1787, Buller, J., in *J'Anson v. Stuart*, 1 T. R. 754; 1794, Horne Tooke's Trial, 25 How. St. Tr. 359 (L. C. J. Eyre intimates that the former practice is now definitely abandoned); 1798, O'Connor's Trial, 27 How. St. Tr. 31 (Earl of *Moira:* "I do not feel myself at all competent to speak to Mr. O'Connor's general character [for loyalty] from the little acquaintance I have had with him, but from a particular occasion —"; Mr. *Garrow:* "His lordship cannot state any particular fact"; Mr. *Plumer* argued for admitting the conversations as an expression of opinion; *Buller*, J.: "Suppose a man were indicted for murder, and he could bring a person to prove a particular act of humanity, you could not conceive that would be evidence"; 1808, Davison's Trial (quoted *supra*); 1809, Jones' Trial, 31 How. St. Tr. 309, 310; 1865, R. *v.* Rowton, Leigh & C. 541 (Willes, J.: "Evidence of particular acts is excluded, because a robber may do acts of generosity, and the proof of such acts is therefore irrelevant to the question whether he was likely to have committed a particular act of robbery"; yet Cockburn, C. J., more correctly said: "The prisoner cannot give evidence of particular facts, although

dox doctrine, that a witness to character could speak from personal knowledge of his disposition (*post*, § 1981), was conceded to allow such a witness, to some extent, to explain his reasons for his estimation of character by stating whatever striking conduct within his knowledge evinced the settled trait of character. Unfortunately, this orthodox and wise doctrine has itself been discarded in all but a few jurisdictions, and with it the availability of the present sort of facts given as the ground of such knowledge. Were the orthodox doctrine again to prevail, such evidence commends itself as valuable and just, for the reasons above stated by Mr. J. Preston; and the objections of surprise and confusion of issues would be practically obviated by the limitations under which it would thus be used.

There is in this country some early authority for its use;[3] but most Courts would to-day undoubtedly forbid it.[4] If, however, the prosecution has improperly used specific acts of misconduct against the defendant, the defendant should certainly be allowed to deny or explain it, on the principle of curative admissibility (*ante*, § 15).[5] Moreover, there are other principles by which a defendant may occasionally avail himself of conduct as evidence in his favor, — in particular, of conduct indicating *consciousness of innocence* (*post*, § 293), of *utterances* asserting his innocence (*post*, §§ 1142, 1731, 1732, 1785), and, in *sedition* charges, of conduct indicating a loyal state of mind (*post*, § 367).

§ 196. **Particular Misconduct of the Defendant (1) to Impeach his Credit as a Witness, or (2) to Increase his Sentence by reason of Prior Conviction.** (1) Where the defendant chooses to *take the stand as a witness*, he occupies two positions, — that of a defendant and that of a witness. In the former aspect, particular bad acts of his, as exhibiting character, cannot be used at all, whether shown by extrinsic testimony or brought out by cross-examination. But in the latter aspect such acts may be brought out (under certain limitations) by his cross-examination or by record of conviction (*post*, § 979–981). The question arises whether when he takes the stand, he should be treated as defendant or as witness, — whether policy requires that the former or the latter capacity should prescribe the rule for his treatment. This ques-

one fact would weigh more than the opinion of all his friends and neighbors.")

[3] 1810, Swift, Evidence, 141; 1830, Com. *v.* Robinson, Thacher Cr. C. 236, Thacher, J., *semble;* 1852, State *v.* Parker, 7 La. An. 83, 88 (murder of a woman; per Preston, J., only, evidence that he was "one of the last men who would willingly shed a woman's blood" received, with such good acts as form the "reasons of the witness for testifying to the good character," following R. *v.* Brecknock, which with the others "I do not find overruled"; but the majority speak of "general character" as alone admissible).

[4] 1888, Hussey *v.* State, 87 Ala. 133, 6 So. 420 (that he was a church-member, excluded; this ruling is intelligible enough from either standpoint); 1898, State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769 (assault with intent; questions by defendant's counsel as to never having been in quarrels before, excluded); 1897, Smalls *v.* State, 102 Ga. 31, 29 S. E. 153 (peaceable conduct of defendant while in jail, excluded); 1901, State *v.* Dexter, 115 Ia. 678, 87 N. W. 417; 1882, White *v.* Com., 80 Ky. 485 (good acts excluded, for the reasons of small probative value, confusion of issues, and surprise to the Commonwealth); 1899, State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038 (that the defendant had preached in church, excluded); 1900, State *v.* Coates, 22 Wash. 601, 61 Pac. 726.

[5] 1881, Olive *v.* State, 11 Nebr. 1, 27, 7 N. W. 444 (murder; why the defendant had on another occasion drawn a revolver on some one, allowed). *Contra:* 1895, Griffith *v.* State, 140 Ind. 163, 39 N. E. 440, *semble*.

tion can best be examined in dealing with the rules for witnesses' character (*post*, § 890). Furthermore, the act of taking the stand in his own favor is to some extent a waiver of his privilege against self crimination. Wherever it is treated as not being a waiver of the privilege so far as former crimes are asked after, this privilege alone would suffice to exonerate him from answering; and some Courts dispose of the question from this point of view alone (*post*, § 2277). But this (as noted in that place) is a superficial and inadequate way of disposing of it, for two reasons: (1) The privilege merely allows the defendant to decline to answer; it does not say whether the matter can be asked after, or whether it can properly be used even if the privilege is not claimed; which is the present question. (2) The privilege covers only criminating matters; while the present rule, if it applies, forbids inquiring into or using any misconduct whatever, whether criminal or not, as a source of exhibiting character. Hence the whole question must be determined independently of the bearing of a waiver of privilege.

(2) Under enlightened modern legislation for habitual criminals, the tribunal is authorized to *increase the sentence* of one whose offence, when established, is found to be the *second* or the *third offence* of the sort. The proof of the prior offence for that purpose does not militate against the rule forbidding the use of prior misconduct to evidence character, provided the purpose is kept distinct. But there are two types of these statutes. One of these, observing the spirit of the character-rule, permits the fact of prior conviction to be found by the judge or the jury upon proof reserved until a verdict of guilty has first been found by the jury:[1]

[1] ENG.: 1836, St. 6 & 7 W. IV, c. 111 (reciting that by a statute of 7 & 8 Geo. IV, c. 28, § 11, increased punishment was allowed for the subsequent felony, "and whereas since the passing of the said act the practice has been on the trial of any person for any such subsequent felony to charge the jury to inquire at the same time concerning such previous conviction, and whereas doubts may be reasonably entertained whether such practice is consistent with a fair and impartial inquiry as regards the matter of such subsequent felony, and it is expedient that such practice should from henceforth be discontinued," it is enacted that the jury shall not "inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony and shall have found such person guilty of the same," and that the reading of the statement of prior conviction in the indictment shall also be deferred; provided however that "if upon the trial of any person for any such subsequent felony as aforesaid, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor in answer thereto to give evidence of the indictment and conviction of such person for the previous felony." This statute was re-enacted in St. 14 & 15 Vict. c. 19, § 9, which was repealed and replaced in 1861 by St. 24 & 25 Vict. c. 96, § 116, and c. 99, § 37, which substitutes "offence" for felony; the provision has been construed in the following cases: 1851, Anon., 5 Cox Cr. 268; 1851, R. *v.* Shrimpton, 2 Den. Cr. C. 319, 5 Cox Cr. 387 (the statute phrase "if such person shall give evidence of his good character" includes testimony of good character obtained from an opposing witness on cross-examination); CAN.: *Can.* Rev. St. 1886, c. 106, § 115 (offences under the Temperance Act; procedure of proving prior offences prescribed), Crim. Code 1892, § 676 (substantially like the preceding, for criminal cases generally); *Man.* Rev. St. 1902, c. 101, § 214 (liquor offences; like Ont. R. S. 1897, c. 245, § 101; *N. W. Terr.* Cons. Ord. 1898, c. 89, § 105 (like Ont. R. S. 1897, c. 245, § 101); *Ont.* Rev. St. 1897, c. 245, § 101 (in trials for liquor offences, prior convictions shall not be inquired into till after conviction for the subsequent offence; procedure prescribed), St. 1902, c. 33, § 197 (replacing the preceding, but similar, for prosecutions under the liquor act); 1888, R. *v.* Triganzie, 15 Ont. 294 (statute construed); *P. E. I.* St. 1900, c. 3, § 15 (like Ont. R. S. 1897, c. 245); U. S.: *Cal.* P. C. 1872, § 1093, par. 1 ("If the indictment or information be for felony, the clerk must read it, and state the plea of the defendant to the jury; and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction"); 1890, People *v.* Sansome,

1890, *Belcher*, C. C., in *People* v. *Sansome*, 84 Cal. 449, 451, 24 Pac. 143: "The evident purpose of the provision of the Code above quoted was to keep from the jurors all knowledge that the person on trial before them had been previously convicted of criminal offence; and this is based upon the well-settled and familiar principles of law and right. In the first place, it is elementary law that every one accused of crime is presumed to be innocent until proved to be guilty, and is entitled to a fair and impartial trial before an unbiased jury. In the next place, it is well known that ordinary jurors are more ready to believe the accused guilty if it be understood by them that he has suffered a previous conviction for a similar offence."

The other type of statute, apparently formed by the supposed requirements of the unwise rule (existing in some jurisdictions) which allows the jury to fix a criminal sentence, permits the fact of prior conviction to be considered by the jurors before verdict;[2] this method is decidedly an inferior one.

1899, *DuRelle*, J., in *Hall* v. *Com.*, 106 Ky. 894, 51 S. W. 804: "It is earnestly urged that it was error to permit the introduction of evidence of former convictions at all until the jury should have first found her guilty under the charge for which she was then being tried; that it amounted to the admission of testimony to impeach her general character, which she had not put in issue, and enabled the commonwealth to show her to the jury in the light of a common thief, and rebut the presumption of innocence which the law gives her by evidence in chief upon a trial for grand larceny. It is painfully apparent that, with the circumstances shown as to the loss of the money, and evidence of two former convictions for grand larceny, the accused, who is an ignorant negro woman, had not the slightest chance that an average jury would entertain a reasonable doubt of her guilt, while, without the evidence of former convictions, there was a possibility that they might do so. There is a considerable force, therefore, in the proposition urged, that this procedure denied the accused a fair trial of the offence whereof she was accused. But the statute as to habitual criminals (Ky. St. § 1130) seems to have created an additional and higher degree of offence, viz. the commission of a felony, having been theretofore

84 Cal. 449, 24 Pac. 143 (where the trial judge alluded to it; see quotation *supra*); 1891, People v. Wheatley, 88 id. 117, 26 Pac. 95; 1895, People v. Thomas, 110 id. 42, 42 Pac. 456; *Haw.* Penal Laws, 1897, § 655 (after plea of guilty or conviction, a previous conviction of the same offance may be proved; except that if on the main trial good character is offered, the prosecutor is entitled "in answer thereto to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned; and the jury shall enquire concerning such previous conviction or convictions at the same time that they enquire concerning such subsequent offence"); *Okl.* Stats. 1897, § 5286, Stats. 1903, § 5574 ("after a plea or verdict of guilty . . . tha Court upon the suggestion of either party that there are circumstances which may properly be taken into view, either in aggravation or mitigation of the punishment, may in its discretion hear the same summarily at a specified time and upon such notice to the adverse party as it may direct"); 1899, Walburn v. Tarr, 9 Okl. 23, 59 Pac. 972 (under Stats. § 5286, allowing facts of aggravation to be considered by the judge after plea or verdict of guilty, evidence of misconduct, given before verdict and without instructions to disregard, is improper); *Wash.* St. 1903, c. 86 (the prior conviction is to be inqnired into after plea or conviction of guilt of the subsequent offence; procedure prescribed).

[2] *Ill.* Rev. St. 1874, c. 38, § 473, Laws 1883, p. 76 ("On any trial for any of said offeuces," burglary, etc., a former conviction "may be used in evidence against such party," provided the judgment is "set forth in apt words in the indictment"); § 477, Laws 1889, p. 112 (the prison record and criminal history of any one indicted under the foregoing statute "may be given in evidence upon any trial . . . for the purpose of proving a former conviction"); *Ky.* Stats. 1899, § 1130 (where sentence is to be increased for former conviction, "judgment in such cases shall not be given for the increased penalty unless the jury shall find, from the record and other competent evidence, the fact of former convictions"); 1899, Hall v. Com., 106 Ky. 894, 51 S. W. 804 (see quotation *supra*); *N. Y.* C. Cr. P. 1881, § 513 (against a person adjudged an habitual criminal and afterwards charged with crime, previous character may be proved as if he had first offered evidence thereon); 1898, People v. Sickles, 156 N. Y. 541, 51 N. E. 288 (the fact of former conviction may be put in before verdict rendered, because "the prior conviction enters as an ingredient into the criminality of the prisoner"; Bartlett, J., dissenting).

twice convicted of a felony, etc. To show the accused guilty of this degree of the offence charged, it is necessary to show the former convictions; and this, of course, is bound to prejudice the accused, — just as evidence showing malice is bound to prejudice the defendant in a murder case, — but it may be shown to make out a higher degree of the offence, which authorizes the severer punishment. . . . The statute requires the jury to find the fact of the former convictions. There is no provision for a separate trial of the fact of former conviction, nor do we think the statute intended there should be one. The law seems to work a hardship, but it is a hardship the Legislature alone can remedy."

§ 197. **Rumors of Misconduct, as testing a Witness supporting Character.** When the defendant offers his good character and a witness testifies to the defendant's good reputation for the trait in question, one way of testing the honesty and accuracy of the witness' assertion of the prevalence of this reputation is to find out from him whether this or that rumor of flagrant misconduct has come to his notice. If one or more such rumors are known to him, obviously his broad assertion of the prevalence of good reputation is more or less inconsistent with his knowledge of such rumors. The purpose of the inquiry is to show that one knowing of certain rumors has nevertheless rashly asserted a reputation inconsistent with the rumors. Thus, the defendant's misconduct is not inquired after as a fact to show his character; but as a rumor to discredit the witness' assertion. A question, therefore, which does not expressly refer to the witness' hearing of the conduct as rumored is improper, because it aims apparently at the conduct as a fact showing the defendant's character. Precisely the same principle is applicable to the cross-examination of one testifying to a witness' character; and the precedents are dealt with under that head (*post*, § 988).

2. Conduct to show Character of Other Persons evidentially used.

It has been seen (*ante*, §§ 62–68) that a person's character, as evidential to show his doing of an act, may occasionally be used for others than the accused in a criminal case. When character is thus evidential, may it be evidenced by particular acts of the person whose character is to be proved?

§ 198. **Character of Deceased, in Homicide, from Particular Acts of Violence.** When the turbulent character of the deceased, in a prosecution for homicide, is relevant (under the principle of § 63, *ante*), there is no substantial reason against evidencing the character by particular instances of violent or quarrelsome conduct. Such instances may be very significant; their number can be controlled by the trial Court's discretion; and the prohibitory considerations applicable to an accused's character (*ante*, § 194) have here little or no force.[1]

[1] 1902, State v. Beird, — Ia. —, 92 N. W. 694 (good opinion, by McClain, J.); 1899, State v. McIver, 125 N. C. 645, 34 S. E. 439 (an unmerciful beating to an employee on the same morning, admitted). *Contra:* 1899, Thornton v. State, 107 Ga. 683, 33 S. E. 673; 1903, Andrews v. State, — id. —, 43 S. E. 852; 1868, Com. v. Andrews (Mass.), Davis' Rep. 128, 156 (murder, said by defendant to have been committed in defence from an assault by the deceased for the purpose of buggery; evidence of the deceased's conduct indicating a passion and disposition to sodomy and buggery was excluded, except so far as it involved prior attempts by deceased on defendant); 1886, People v. Druse, 103 N. Y. 655, 8 N. E. 733 (instances of treat-

§ 199. **Negligence of Party in Civil Cases, from Particular Negligent Acts.** It has been seen (*ante*, § 65) that in a few jurisdictions the character of a defendant or of an employee or of a plaintiff for negligence or prudence may be used to show that he probably was not or was careful on a given occasion. Is it proper to evidence that character by particular instances of the trait? The reason of undue prejudice, which applied to a defendant in a criminal case (*ante*, § 194), has here a corresponding application, though a less dangerous one. The reason of unfair surprise is also applicable; for the party charged cannot even guess the time, place, and occasion that may be predicated for his supposed act, and has no means of showing the testimony to be fabricated. The reason of confusion of issues also operates, for disputes over other carelessness would soon obscure the main issue. Add to this that a careless act or two may be done by the most prudent person, and that particular instances, unless repeated and emphatic, throw little light on the general disposition. For these reasons, almost all Courts exclude such evidence, whatever their views may be (*ante*, § 65) as to the propriety of using the character, if otherwise evidenced, to show the probability or improbability of carelessness on a particular occasion.[1]

ing his domestic animals with cruelty, excluded); 1903, People *v.* Gainari, — id. —, 68 N. E. 112 (specific acts of violence to a third person, excluded).

Distinguish the use of such instances to show the *accused's apprehensions of violence* (*post*, § 248).

[1] *Ark.:* 1894, Little R. & M. R. Co. *v.* Harrell, 58 Ark. 454, 468, 24 S. W. 883, 25 S. W. 117 (prior negligent acts of the defendant's employee, not admissible to show negligence at the time); 1899, St. Louis, I. M. & S. R. Co. *v.* Strond, — id. —, 56 S. W. 870 (former misconduct by defendant's employee, excluded); *Cal.:* 1896, Pacheco *v.* Mfg. Co., 113 Cal. 541, 45 Pac. 833 (the faulty breaking of other shears in the same way as that by which the plaintiff was injured, excluded); 1896, Howland *v.* R. Co., 115 id. 487, 47 Pac. 255 (another collision, wholly unconnected, excluded); *Conn.:* 1874, Morris *v.* East Haven, 41 Conn. 252, 254 (contributory negligence; former instances of care or negligence, inadmissible); 1897, Laufer *v.* Traction Co., 68 id. 475, 37 Atl. 379 (street-railroad injury; carefulness of defendant at other times, excluded); *Ga.:* 1890, Augusta S. R. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706 (previous care in selecting drivers, excluded, because the issue was as to a specific act of the driver); 1898, Atlanta C. S. R. Co. *v.* Bates, 103 id. 333, 30 S. E. 41 (injury in alighting from a car; instances of plaintiff's careless slighting at other times, excluded); *Ida.:* 1894, Rumpel *v.* R. Co., — Ida. —, 35 Pac. 700 (blockading of streets by the same railroad at other times, not admitted to show negligence); *Ind.:* 1871, Pittsburg, F. W. & C. R. Co. *v.* Ruby, 38 Ind. 295, 311 (excluding former acts of a railroad employee, to show negligence at a particular time); *Ia.:* 1901, Dalton *v.* R. Co., 114 Ia. 257, 86 N. W. 272 (injury while driving across a railroad track; prior instances of plaintiff's having slept while riding in his buggy, excluded, partly because there were eye-witnesses); *Kan.:* 1890, Southern Kans. R. Co. *v.* Robbins, 43 Kan. 145, 149, 23 Pac. 113 (former acts of negligence inadmissible to show contributory negligence); *Md.:* 1886, Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 452, 5 Atl. 338 (former acts of negligence, excluded); *Mass.:* 1856, Robinson *v.* F. & W. R. Co., 7 Gray 92, 95 (negligence of the defendant's servants; prior negligent acts in running the train on other occasions, excluded, as involving collateral and confusing issues, and as "having no legal or logical tendency to prove the point in issue"); 1874, Maguire *v.* R. Co., 115 Mass. 239 (negligent stopping of street-car; former negligent stopping by the same driver, excluded); 1885, Whitney *v.* Gross, 140 id. 232, 5 N. E. 619 (former negligent overloading of a wagon excluded, to show negligent overloading on this occasion); 1887, Hatt *v.* Nay, 144 id. 186, 10 N. E. 807 (specific acts of negligence excluded on the grounds of surprise and of confusion of issues); 1894, Connors *v.* Morton, 160 id. 333, 35 N. E. 860 (same); 1896, Lewis *v.* Gaslight Co., 165 id. 411, 43 N. E. 178 (negligent laying of gaspipes in one place to show negligent laying in the case in hand, inadmissible); 1897, Olsen *v.* Andrews, 168 id. 261, 47 N. E. 90 (while "specific acts of negligence cannot be introduced to show the incompetency of a servant," yet "when conduct tending to show his qualifications or his physical fitness or unfitness for his work is properly before a jury upon one of the issues of the case," they may "consider it on the question of his competency"; here admitting evidence of nervous conduct and other singular behavior shortly before the acci-

Two other possible uses of particular acts of negligence or carefulness are here to be distinguished. (1) Where the character is not offered evidentially to prove an act, but is *already in issue* as a material proposition under the pleadings — as where the incompetency of an employee is for a fellow-servant the ground of the employer's liability, or where a physician is sued because though incompetent he held himself out as competent, — particular instances of carelessness or the reverse may conceivably be resorted to. The answer there need not be the same as here, because here the jury might be too apt to infer directly from the former careless act to the present one, while there the sole object is to prove the general trait and the proof stops there. The doctrine is examined elsewhere (*post*, § 208). (2) Where a person's character is required, by the law of the case, to be *known to a defendant* in order to make the latter liable, the doing by the former of a careless act may be thought to be sufficient, if known to the defendant, to put him upon inquiry

dent, the foreman having testified to notice to the superintendent of this conduct); *Mich.:* 1868, Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 111 (former negligence inadmissible; but here admitted to rebut the defendant's evidence of his employee's good character); 1881, Michigan C. R. Co. *v.* Gilbert, 46 id. 176, 179, 9 N. W. 243 (yardmaster's negligence; former acts of negligence not admitted to show negligence at the time in question); 1899, People *v.* Thompson, 122 id. 411, 81 N. W. 344 (negligent management of boiler; negligent absence of defendant from boiler-room on other occasions, inadmissible, except as showing that he had been warned of the danger of absence); *Minn.:* 1898, Fulmore *v.* R. Co., 72 Minn. 448, 75 N. W. 589 (motorman's negligent management shortly before the act charged, perhaps admissible); *N. H.:* 1879, Plummer *v.* Ossipee, 59 N. H. 59 (Allen, J.: "The defendants claimed that the plaintiff's husband was a fast and careless driver, and introduced in evidence particular instances of his fast and careless driving. The plaintiff was permitted to testify to other instances of his careful driving. . . . The evidence was relevant to the question of the husband's character for driving safely or otherwise"); 1903, Stone *v.* R. Co., — id. —, 55 Atl. 359 (injury at a railroad crossing; that the plaintiff had on former occasions driven carefully at the crossing, admitted); *N. Y.:* 1871, Warner *v.* R. Co., 44 N. Y. 465, 471 (former neglect or drunkenness of a flagman on duty, held inadmissible); 1874, Baulec *v.* R. Co., 59 id. 360 (*semble*, excluded; see quotation, *post*, § 250); *Oh.:* 1882, Desbrack *v.* State, 38 Oh. St. 365 (murder by poisoning; the attending physician's mistake was set up as the real cause of death; a druggist who had supplied the physician having testified to his carefulness, the defendant was allowed to show, on cross-examination that on several occasions prescriptions had been sent to him by the physician with mistakes such as "would have killed the patient," that he had returned them, and that the physician had admitted the mistakes and made corrections); *Pa.:* 1898, Woeckner *v.* Motor Co., 187 Pa. 206, 41 Atl. 28 (loss of services of child; to show negligent guarding by the plaintiff, previous "disconnected" acts excluded); *R. I.:* 1903, Dyer *v.* Union R. Co., — R. I. —, 55 Atl. 688 (defendant's failure to signal at other street-crossings, inadmissible); *S. C.:* 1898, Mack *v.* R. Co., 52 S. C. 323, 29 S. E. 905 (injury on a track not at a crossing; failure of the engineer to sound warning at previous crossings, admitted to show recklessness); *Tex.:* 1895, Cunningham *v.* R. Co., 88 Tex. 534, 31 S. W. 629 (excluding evidence of specific acts of negligence as showing negligent habits; but perhaps this case means only to admit such evidence where the character is in issue on the pleadings; see quotation, *post*, § 208); 1898, Missouri, K. & T. R. Co. *v.* Johnson, 92 id. 380, 48 S. W. 568 (plaintiff engineer's previous negligent conduct, excluded; certain exceptions recognized); *U. S.:* 1894, Southern Bell T. & T. Co. *v.* Watts, 13 C. C. A. 579, 66 Fed. 460 (negligence in adjusting a telephone wire; former similar carelessness by the same employee of the defendant, excluded, except to contradict his testimony as to the possibility of certain harm); 1896, Central Vt. R. Co. *v.* Ruggles, 21 C. C. A. 575, 75 Fed. 953 (fire caused by heated bearings; the stoppage of the oil-pipes by carelessness three years before, not admitted to show former carelessness, but admitted to show a tendency of the machinery); *Vt.:* 1896, Sullivan *v.* Salt Lake, 13 Utah 122, 44 Pac. 1039 (former careless management of freight cars in the same way, excluded); 1899, Stoll *v.* Daly Min. Co., 19 id. 271, 57 Pac. 295 (prior accidents to plaintiff in a mine, excluded); 1900, Konold *v.* R. Co., 21 id. 379, 60 Pac. 1021 (railroad employee's entries; incorrectness on other occasions, by him or other employees, excluded); *Wash.:* 1893, Christensen *v.* U. T. Line, 6 Wash. 75, 82, 32 Pac. 1018 (that a motorman had run at too high speed at other times, excluded).

Distinguish the principles of § 252 and §§ 437, 458, *post*.

and charge him with notice of the former's incompetency. This is not inconsistent with rejecting particular acts as evidence of the objective fact of incompetency; for while a single act might be unsatisfactory evidence of a general trait, yet, if this general trait is otherwise proved, the same single act might well suffice to warn the defendant and put him upon inquiry and thus charge him with notice of the other person's incompetency. This use of single acts as involving notice is dealt with elsewhere (*post*, § 250.)[2]

§ 200. **Character of Complainant in Rape Charge, from Particular Acts of Unchastity.** It is generally accepted (*ante*, § 62) that the bad character for chastity of the complainant in a rape charge is relevant and admissible to show the probability of her consent to the intercourse. In evidencing this character, may particular acts of the woman's unchastity be resorted to, as showing her to be a person more prone than another to have consented? No question of evidence has been more controverted. The relevancy of the fact is seldom doubted; but the arguments of unfair surprise, undue prejudice, and confusion of issues (*post*, § 1863) are thought to form serious objections. The classical opinion in favor of admissibility is the following:

1838, *Cowen*, J., in *People* v. *Abbot*, 19 Wend. 194: "The prosecutrix is usually, as here, the sole witness to the principal facts, and the accused is put to rely for his defence on circumstantial evidence. Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance is always received. . . . The connection must be absolutely against the will; and are we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? That triers should be advised to make no distinction in their minds between the virgin and a tenant of the stew, — between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex? And will you not more readily infer assent in the practised Messalina in loose attire, than in the reserved and virtuous Lucretia? . . . [After referring to evidence of common prostitution as admissible], It has been repeatedly adjudged that in the same view you may also show a previous voluntary connection between the prosecutrix and the prisoner. Why is this? Because there is not so much probability that a common prostitute or the prisoner's concubine would withhold her assent as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity? Shall I be answered that both are equally under the protection of the law? That I admit, and so are the common prostitute and the concubine. If either have in truth been feloniously ravished, the punishment is the same. But the proof is quite different. It requires that stronger evidence be added to the oath of the prosecutrix in one case than in the other."

The reasoning of the exclusionary rule is represented in the following passages:

1857, *Strong*, J., in *People* v. *Jackson*, 3 Park. Cr. 398 (here the question was asked whether the prosecutrix had had intercourse with Dr. M., her betrothed, while on the voyage to New York, and the Court called attention to the circumstances as being

[2] For former *accidents in highways, or defective operation of machines*, as showing a defective or dangerous quality in them, see *post*, § 458.

peculiar; but added): "In any case, a single aberration from virtue, in one whose general character for chastity is otherwise unimpeachable, would raise so slight an inference, if any, of non-resistance to a brutal outrage from a person (or indeed any one except him to whom she had already yielded) that it would not justify a departure from the ordinary rules of evidence. Besides, if proof of particular instances should be admissible, rebutting evidence would be allowable, and thus there might be one or more collateral issues to occupy the time and divert the attention of the jury. Such would be the evils if the prosecution could require previous and timely notice of the particulars of the intended attack upon the conduct of the complainant; but as no such notice can be exacted, there would be no means of meeting the evidence, often of the dissolute companions of the accused, however mistaken or corrupt it might be, and thus the character of an innocent and greatly abused female might be sacrificed and the ends of public justice be defeated."

1905, *Siddon*, J., in *Rice* v. *State*, 35 Fla. 236, 17 So. 286: "The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indication to warrant the conclusion that she would probably be guilty with any other man who sought such favors of her. If she was a woman of general bad reputation for chastity, or had been guilty of acts of lewdness with the defendant, the case would be different. In the first instance, the evidence would bear directly upon the question as to whether such a woman would be likely to resist the advances of any man; and, in the second, as to whether, having yielded once to the sexual embraces of the defendant, she would not be likely to yield again to the same person. The greatest objection to such testimony is that it introduces collateral issues, which have no direct bearing upon the defendant's guilt."

The better view seems to be that which admits the evidence. Between the evil of putting an innocent or perhaps an erring woman's security at the mercy of a villain, and the evil of putting an innocent man's liberty at the mercy of an unscrupulous and revengeful mistress, it is hard to strike a balance. But, with regard to the intensity of injustice involved in an erroneous verdict, and the practical frequency of either danger, the admission of the evidence seems preferable. In the opposing judicial opinions the writers respectively assume that the man is innocent and that the woman is wronged; and on these inconsistent assumptions, the conclusion reached by each is fair enough. But the real question is, Which state of fact is the commoner and the one most needing our protection? The answer to this must depend more or less on the experience and the sentiments of each community. The English precedents were for some time opposed to the use of such evidence; but it now seems to be admissible, subject to a limitation intended to avoid the objections of unfair surprise and confusion of issues, *i. e.* by allowing only the inquiry on cross-examination of the complainant, and by excluding extrinsic testimony.[1]

[1] *Eng.*: 1812, R. *v.* Hodgson, R. & R. 211, by all the judges (that the prosecutrix had had connection with another man a year before; excluded on the ground of surprise; but apparently treated only as affecting her testimonial discredit); 1817, R. *v.* Clarke, 2 Stark. 243, Holroyd, J. (same; but perhaps meant only as a ruling on testimonial discredit); 1834, R. *v.* Martin, 6 C. & P. 562, Williams, J. (whether the prosecutrix had previously had intercourse by consent with the accused, allowed; "I must say I never could understand the case of R. *v.* Hodgson, . . . it does appear to me to be not quite in strict accordance with the general rules of evidence"); 1843, R. *v.* Tissington, 1 Cox Cr. 48, Abinger, C. B. (citing Wood, B.; acts of solicitation by her to other men, rejected); 1843, R. *v.* Robins, ib. 55; 2 Moo. & Rob. 512 (for-

Historically, the vacillation and the obscurity in the English precedents, and the misconception in some American rulings, were due to the failure to distinguish a second question which usually presents itself at the same time, viz., How far may the character of the woman *as a witness* be attacked by particular instances of unchaste conduct? In the early 1800s it was already settled (1) that particular acts of misconduct presented by outside testimony could not be used, but were available through cross-examination only (*post*, § 979); and it was just being settled (2) that only misconduct affecting veracity-character could be so used against a witness (*post*, §§ 922, 982). Thus the effect of the first rule would be to exclude all extrinsic testimony of particular misconduct of the woman; while the effect of the second rule might be to exclude even on cross-examination any inquiry into acts of unchastity. Moreover the rule forbidding collateral contradiction (*post*, § 1003) was thought to have a bearing. Having regard to what was then passing in the minds of English judges, the earlier exclusion of the present class of evidence seems to have proceeded from the point of view of the rules about impeaching witnesses. Later, the consideration that there was another point of view became clearer to them, and thus the rulings changed. That the two points of view differ practically in their results is obvious. If regard is had solely to the witness-character of the woman, and we ignore her chastity-character as bearing on consent, the evidence will be excluded in two situations in which it would otherwise be admissible, viz., (*a*) where the woman does not take the stand as a witness, and (*b*) where she does take the stand in a jurisdiction (*post*, § 922) in which veracity-character and not general bad character of a witness is admissible, except in jurisdictions (*post*, § 982) where acts of unchastity in a woman are regarded as relevant to veracity-character.

The state of the law in the various jurisdictions of this country is not uniform; but the exclusionary rule prevails, in some form, in the greater number of jurisdictions.[2]

mer connection with other men, admitted; Coleridge, J., with Erskine, J., after the citation of the conflicting rulings: "It is not immaterial to the question whether the prosecutrix has had this connection against her consent, to show that she has permitted other men to have connection with her, which on cross-examination she has denied"; used as "a fact from which the jury may draw conclusions as to the probabilities of her story"); 1846, R. *v.* Page, 2 Cox Cr. 133 (rape by a father; former intercourse of the daughter with the father without making complaint, admitted); 1870, R. *v.* Cockcroft, 11 id. 410, Willes, J., and Martin, B. (excluded; but Willes, J., would allow the question to be put on cross-examination); 1871, R. *v.* Holmes, 12 id. 137 (before five judges; the question may be put to the prosecutrix, subject to her privilege not to answer; but no other evidence may be received; the reason given is that of surprise; but the Court confuses the question with that of discrediting a witness, and speaks of "contradictions" on collateral matters as not all weighable); 1887, R. *v.* Riley, 16 Cox Cr. 191 (excluded); *Can.:* 1877, Lalibert*é* *v.* R., 1 Can. Sup. 117, 131, 139, 142, 144 (the prosecutrix may be asked as to connection with other men, but a negative answer cannot be contradicted; 1897, Gross *v.* Brodrecht, 24 Ont. App. 687 (allowable on cross-examination only; here, indecent assault). Compare the cases *post*, §§ 986, 1005.

[2] *Ala.:* 1887, McQuirk *v.* State, 84 Ala. 435, 438, 4 So. 775 (excluded); *Ark.* 1855, Pleasant *v.* State, 15 Ark. 624, 643 (excluding outside testimony, because of the particular-act rule; and excluding cross-examination, because of the witness' disgrace-privilege, thus admitting in the latter case if the privilege is waived); *Cal.:* 1856, People *v.* Benson, 6 Cal. 221 (admitting "particular acts of lewdness"); 1898, People *v.* Kuches, 120 id. 566, 52 Pac. 1002 (habitual telling of lewd stories, not accompanied by lewd demeanor, not admissible);

It has been seen (*ante*, § 62) that the general character of the woman for unchastity is in such cases almost universally received. The question then arises whether the fact of being a *professional prostitute* is to be assimilated to such a general character; or whether it is to be regarded merely as particular misconduct, and therefore in most jurisdictions inadmissible. With reference to its real significance, and the absence of the dangers of unfair surprise and confusion of issues, it ought to take the former rank; and this is the general conclusion (*ante*, § 62).

1900, People *v.* Benc, 130 Id. 159, 62 Pac. 404 (excluded, even on cross-examination); *Conn.:* 1877, State *v.* Shields, 45 Coun. 256, 257, 260, 263 (former intercourse with others admitted, but on no clear principle); *Fla.:* 1895, Rice *v.* State, 35 Fla. 236, 17 So. 286 (excluded); *Ill.:* 1873, Shirwin *v.* People, 69 Ill. 56 (inadmissible; but admitted here to explain away the fact that the prosecutrix lacked the physiological marks of virginity, — a reason which would seem to be equally available in all such cases); 1876, Dimick *v.* Downs, 82 id. 533 (obscure); *Ind.:* 1861, Wilson *v.* State, 16 Ind. 393 (admitted); 1884, South Bend *v.* Hardy, 98 id. 582 (same); 1888, Bedgood *v.* State, 115 id. 275, 278, 17 N. E. 621 (question evaded; such intercourse with a member of the defendant's party here admitted, as tending to contradict on a material point); *Ia.:* 1897, State *v.* McDonough, 104 Ia. 6, 73 N. W. 357 (excluded); *Kan.:* 1895, State *v.* Brown, 55 Kan. 766, 42 Pac. 363 (excluded); *Ky.:* 1892, Cargill *v.* Com., 93 Ky. 578, 581, 20 S. W. 782 (excluded; but here also because the charge was of detaining for prostitution against her will; the latter ground of distinction is unsound); 1897, Brown *v.* Com., 102 id. 227, 43 S. W. 214 (undue liberties allowed to others, received); *La.:* 1903, State *v.* DeHart, 109 La. 570, 33 So. 605 (incest; carnal intercourse by the woman with other men, held inadmissible); *Mass.:* 1870, Com. *v.* Regan, 105 Mass. 593, *semble* (excluded); 1872, Com. *v.* McDonald, 110 id. 405 (undecided); 1880, Com. *v.* Harris, 131 id. 336 (excluded); 1893, Miller *v.* Curtis, 158 id. 127, 131, 32 N. E. 1039 (excluded); *Mich.:* 1871, Strang *v.* People, 24 Mich. 1, 6 (inadmissible, *semble*, by outside evidence; but questions to the prosecutrix are proper); 1888, People *v.* McLean, 71 id. 309, 38 N. W. 917 (approving the preceding; but also stating, without noting the conflict, that the question cannot be put on cross-examination); 1893, People *v.* Abbott, 97 id. 484, 486, 56 N. W. 862 (excluded); *Miss.:* 1859, Anon., 37 Miss. 58, *semble* (inadmissible); 1895, Brown *v.* State, 72 id. 997, 17 So. 278 (undecided); *Mo.:* 1898, State *v.* Whitesell, 142 Mo. 467, 44 S. W. 332 (excluded, on a charge of rape under the age of consent); *N. H.:* 1861, State *v.* Forschner, 43 N. H. 89 (excluded); 1863, State *v.* Knapp, 45 id. 154, *semble* (same); *N. M.:* 1899, Terr. *v.* Pino, 9 N. M. 598, 58 Pac. 393 (excluded); *N. Y.:* 1838, People *v.* Abbot, 19 Wend. 192, 194 (admissible; see quotation *supra*); 1857, People *v.* Jackson, 3 Park. Cr. 398 (inadmissible); 1874, Woods *v.* People, 55 N. Y. 517 (undecided); *N. C.:* 1846, State *v.* Jefferson, 6 Ired. 305 (kissing and other liberties, excluded); 1857, State *v.* Henry, 5 Jones L. 65, 70 (an act of lewdness, excluded, because not known to the defendant); 1868, State *v.* Cherry, 63 N. C. 32 (whether she had not been delivered of a bastard child, and whether she had not had intercourse with other men, admitted, as affecting credibility, on the doctrine of State *v.* Patterson, § 982, *post*, and without noticing State *v.* Jefferson, *supra*; but in the Jefferson case the cross-examination was not objected to and it was extrinsic evidence that was excluded, while here both question and extrinsic evidence were held proper; so that the two cases may be reconciled); *Oh.:* 1858, McCombs *v.* State, 8 Oh. St. 643, 646 (excluded); 1862, McDermott *v.* State, 13 id. 332 (same); *Or.:* 1901, State *v.* Ogden, 39 Or. 195, 65 Pac. 449 (inadmissible, even on cross-examination); *R. I.:* 1893, State *v.* Fitzsimon, 18 R. I. 236, 240, 27 Atl. 446 (excluded); *Tenn.:* 1874, Titus *v.* State, 7 Baxt. 132 (admissible); *Vt.:* 1856, State *v.* Johnson, 28 Vt. 512 (not allowed with extrinsic evidence, on the usual ground of surprise; but allowed on cross-examination, because "she is able to give satisfactory explanations, if such explanations can be made"; Bennett, J., dissented, because "no such presumption [of general unchastity] should be allowed to arise from a particular instance of an illicit connection with another person," *i. e.* the ground of irrelevancy); 1867, State *v.* Reed, 39 id. 417 (admissible); 1894, State *v.* Hollenbeck, 67 id. 34, 30 Atl. 696 (same); *Wis.:* 1864, Watry *v.* Forbes, 18 Wis. 500, 502 (civil action for rape; intercourse with others, admissible as "tending to disprove the probability of the use of force"; whether admissible on the criminal charge, not decided). Compare the cases cited *post*, §§ 986, 1005.

In actions for *indecent assault*, it would seem that the same principles apply; and the same attitudes would be taken upon this as upon the above subject: 1889, Goro *v.* Curtis, 81 Me. 403, 17 Atl. 314 (indecent assault and battery and solicitation to adultery; the plaintiff's prior acts of unchastity excluded); 1893, Miller *v.* Curtis, 153 Mass. 127, 129, 32 N. E. 1039 (same, *semble*).

In *bastardy* or *seduction*, where pregnancy is a part of the issue, similar evidence may be used for another purpose, explained *ante*, § 133.

Other *intercourse with the defendant himself* is sometimes offered in such cases, but involves in truth a different principle. Such conduct is not intended to show a general willingness or disposition to commit acts of unchastity, but merely an emotion towards the particular defendant tending to allow him to repeat the liberty; it is thus not only more cogent as evidence, but is not open to the objections advanced against evidence of intercourse with third persons; and its admissibility has always been conceded (*post*, §§ 399, 402).

§ 201. **Disposition of an Animal, from its Behavior in Particular Instances.** However correct the notion may be psychologically, we are usually more inclined, in the case of animals, to trust individual instances of conduct as illustrating disposition. "In proportion to the element of personality, of the interjection of the free will of a human being, we become more certain of the effects of the causative force and more ready to admit it."[1] Moreover, the doctrines of auxiliary policy (*ante*, § 199) are less applicable to such evidence. The doctrine of undue prejudice (*ante*, § 194) does not apply; for we do not recognize the animal as entitled to that careful protection from unfair condemnation which we accord to the accused human being. The doctrine of unfair surprise offers less of an objection than otherwise, because the possible range of the evidence is much smaller. The doctrine of confusion of issues still remains applicable, but the new issues that might be involved are in no way capable of the complexity and variety that are involved in proving the character-acts of a human being. For these reasons it is generally conceded that, in proving the disposition of an animal, particular instances of its conduct are admissible.

1864, *Bigelow*, C. J., in *Todd* v. *Rowley*, 8 All. 51, 58 (to show the timid and unsafe character of the plaintiff's horse, instances were admitted of his having shied so frequently, before and after the time of the injury, as to indicate a vicious habit): "The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind. Evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent and the result of a fixed habit at the time of the accident."[2]

[1] Mr. Barrows, in 14 Amer. L. Rev. 358.

[2] 1866, Worth v. Gilling, L. R. 2 C. P. 3 (attempts of a dog to bite, to show its ferocious nature, admitted); 1873, Whiteley v. China, 61 Me. 202 (conduct of a horse in similar places immediately before and after an accident, admitted to show injury to his temper and amiability to control); 1864, Todd v. Rowley, 8 All. 51 (see quotation *supra*); 1878, Maggi v. Cutts, 123 Mass. 535 (admitting a horse's vicious conduct); 1897, Broderick v. Higginson, 169 id. 482, 48 N. E. 269 (habit of an animal may be shown by "frequent observation of particular instances"); 1885, Kennon v. Gilmer, 5 Mont. 257, 265, 5 Pac. 847 (injury by a carrier using horses alleged to be unsafe; evidence of the horses shying, before and after the time in question, admitted); 1861, Chamberlain v. Enfield, 43 N. H. 356, 360 (acts of skittishness, admitted); 1865, Whittier v. Franklin, 46 id. 23, 26 (vicious acts, admitted); 1868, East Kingston v. Towle, 48 id. 57, 65 (the issue being whether the defendant's dog had killed the plaintiff's sheep, evidence of former sheep-killings by the dog was not admitted; Doe, J., dissenting; this ruling would probably not be followed in this jurisdiction to-day); 1898, Stone v. Langworthy, 20 R. I. 602, 40 Atl. 832 (conduct of the horse when driven by another, the day before, admitted to show his traits); 1899, Stone v. Pendleton, 21 id. 332, 43 Atl. 643 (a horse's prior conduct during the same drive, admitted to show its gentle disposition); 1900, Buckley v. Express Co., 22 id. 358, 48 Atl. 7 (prior

3. Conduct to show Character in Issue.

§ 202. **General Principle.** In the numerous classes of cases in which character may be established, not as evidential of the doing of an act (*ante*, §§ 55–68) nor as affecting notice or belief (*post*, §§ 246–258), but because by the principles of substantive law it is one of the propositions in issue (*ante*, §§ 70–80), the reasons which affect the use of particular acts to evidence the character may not apply as they do to such acts used as evidence of a defendant's character or other persons' character used evidentially (*ante*, §§ 192–201). It is indispensable to examine the precise application of these reasons to this class of cases. (1) The doctrine of probative value, or *relevancy*, remains the same; conduct is here as elsewhere a legitimate basis for inference to disposition or character. (2) The doctrine of *undue prejudice* disappears (except in a few instances), since there is no defendant (except in those instances) to be condemned penally and therefore likely to suffer unjustly for past misdeeds. Moreover, the risk of hasty and unjustifiable inference from one past act to the present act charged (*ante*, § 94) is wanting, since the ultimate thing to be proved is not the doing of an act, but a disposition. (3) The doctrine of *unfair surprise* remains the same, in one aspect, and yet not the same. Its application is not the same, in the sense that there is no prior notice that character would be offered evidentially; for here the law of the case warns beforehand that character will be an issue in it. But its application does remain the same, in the sense that there can be no anticipation as to the time, place, and kind of act that will be predicated as showing the character; and thus the impossibility of being prepared to disprove fabricated testimony and the unfairness of such a situation (*ante*, § 94, *post*, § 1849) remain precisely the same. It is this double aspect of the surprise-argument that causes most of the conflict of rulings upon this subject. (4) The doctrine of *confusion of issues* (*ante*, § 94, *post*, § 1904) is no longer so serious an objection, because, since a specific character is usually the issue, the use of particular instances of such a character keeps the general trend of the investigation within the lines of that issue as marked out by the substantive law of the case, and does not tend to such diversion of attention as would be possible in proving (for example) the character of an accused person. (5) There is a greater *practical necessity* for the use of specific instances of conduct, in this class of cases. In the preceding topics, where character is merely evidential of the act in issue, there will always be a dozen other and more cogent facts evidencing this act, and the restriction

instance of a horse's propensity to run away, admitted); 1898, Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445 (sheep-killing; defendant's evidence that his dogs did not kill any of his own sheep, and plaintiff's evidence that sheep-killing dogs never killed their owner's sheep, admitted). As to the *range of time* of such acts, the trial Court's discretion should control, having regard to the time of probable permanency of disposition: 1878, Maggi *v.* Cutts, 123 Mass. 535 ("the limit of time within which such misbehavior may be proved must depend largely upon the discretion of the presiding judge").

For the use of an animal's acts to show the *owner's notice of his propensity*, see *post*, § 251; for the use of an animal's acts to shew the *frightening quality of an external object*, see *post*, § 458. For the use of an animal's *general disposition*, as evidencing his probable conduct on a particular occasion, see *ante*, § 68.

of the evidence of character to reputation-evidence cuts off only a trifling portion of the total available evidence for the main issue. But where the character itself is the main issue (or one of them), the exclusion of the particular instances of conduct would leave the proving party restricted solely[1] to reputation-evidence as the single evidential source available for getting at the main issue (or one of the issues) in the case; and the generally indecisive and inferior nature of reputation-evidence makes it an unsatisfactory source to serve as the exclusive one available. Thus, there is here, as there is not in the former topics, a certain necessity for the use of particular acts or conduct, *i. e.* the loss of it would be felt as it would not be in the other cases.

It may be seen, then, that, apart from the doctrine of unfair surprise, everything points toward the propriety of allowing the use of particular instances of conduct to prove character wherever character is by the law of the case a proposition to be proved. This was the orthodox common-law view, enunciated in general and unequivocal terms:

1742 L. C. *Hardwicke*, In *Clark* v. *Periam*, 2 Atk. 337 (cross-bill to cancel a bond because given *ex turpi causa*, to wit, for criminal conversation with a lewd woman, the plaintiff): "The counsel insist . . . that the plaintiff is not entitled to examine to anything but her character in general, because it is impossible for Mrs. C. to be prepared to give an answer to the particular facts charged; for though everybody is supposed to be ready, to support a general character, yet not a particular fact. . . . As to the reason of the thing: In criminal prosecutions it comes in only collaterally and incidentally and is not the particular thing to be tried; and when that is the case, they are not supposed to be prepared with evidence. But compare this with cases where the character is the particular issue to be tried; suppose in the case of an indictment for keeping a common bawdy-house, without charging any particular fact; though the charge is general, yet at the trial you may give in evidence particular facts and the particular time of doing them; the same rule as to keeping a common gaming-house. This is the practice in all cases where the general behavior or quality or circumstance of the mind is in issue; as for instance, in *non compos mentis*, it is the experience of every day, that you give particular acts of madness in evidence, and not general only, that he is insane; so where you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined in general to his being a drunkard, but particular instances are allowed to be given. . . . Wherever the general life or conversation is put in issue, it is notice to the person who is charged that she should be prepared to take off the weight of that evidence; but where it comes in collaterally you shall be confined to general evidence. This seems to me to be the distinction, and the grounds of it; and if I was of a different opinion, I should overturn the constant course of this court and make the greatest confusion."

1811, *Roane*, J., in *Fall* v. *Overseers*, 3 Munf. 495, 505: "In all cases in which the general character or behavior is put in issue, evidence of particular facts may be admitted; for whatever is material to the issue each party must come prepared to prove or to deny."[2]

The doctrine is found constantly repeated in these broad terms, though seldom expressly decided except in connection with the particular classes of cases ensuing. It represents a general policy and tendency, which connects,

[1] Since personal opinion is usually excluded also: *post*, § 1980.

[2] *Accord:* 1767, Buller, Trials at Nisi Prius 295; 1835, People v. White, 14 Wend. 113 (because character is not collateral, and "it is impossible without particular facts to prove the charge"; no examples mentioned).

supports, and explains the various instances in which such evidence is admitted.

Nevertheless, it cannot be stated in these broad terms as an invariable rule. There are one or two settled exceptions to it; and there are other disputed instances in which some Courts refuse to accept it. This opposing tendency has occasionally, in modern times, gone so far that even the general validity of the doctrine is repudiated, — chiefly on the ground that it involves all the serious dangers protected against by the doctrine of unfair surprise:

1893, *Knowlton*, J., in *Miller* v. *Curtis*, 163 Mass. 127, 131, 32 N. E. 1039: "It is a general rule, which has been adhered to with great strictness in this Commonwealth, that when character is in issue, it may be shown only by evidence of general reputation, and not by proof of specific acts. . . . The principal reason for this rule is that a multiplicity of issues would be raised if special acts, covering perhaps a lifetime, could be shown. It might be necessary to go into the circumstances attending each act before it could be determined what its nature was and what effect should be given to it. It would be impossible for the opposing party to come prepared to meet evidence upon matters in regard to which he had no notice, and great injustice might be done by bearing biased and false testimony to which no answer could be made."

This passage is assuredly unsound as a statement of the general rule. The common law began rather with the doctrine of Lord Hardwicke as the general rule; and the exceptions, whether universally or only locally recognized, can hardly be said to justify a statement that the general rule favors exclusion rather than admission. The only satisfactory mode of decision is to consider by itself each instance where character may be in issue, note the application of the various reasons, and solve the problem for that instance; bearing always in mind these two general tendencies or policies operating respectively for admission and for exclusion. The various instances fall into a natural grouping according as character is an issue (1) by the substantive law of the case, *i. e.* as involved in the *cause of action*, or (2) by the remedial law, *i. e.* as affecting the *mitigation of damages*. In the latter group the various instances are apt to have something in common; in the former group the peculiar substantive law of each case is of prime consequence.

§ 203. **"Common" Offenders. (Cheats, Liquor-sellers, Barrators, Gamblers, Drunkards, etc.)** The typical case, to which Lord Hardwicke's rule applies, and for which it is as good law to-day as it ever was, is that of a charge of being a "common" offender of one sort or another, — a common cheat, a common gambler, a common drunkard, and the like. The peculiarity of the issue is that it involves not so much the inward disposition or trait of the person charged as his habitual doing of certain outward acts; and thus, while the issue is traditionally said to involve "character," it really involves rather a course of conduct as the thing to be proved. Thus, while reputation as to this course of conduct may be an admissible sort of evidence (*post*, § 1620), the most natural and cogent sort will be a series of particular acts of the kind charged. The only question would be as to the sufficiency of the number of these acts to justify the epithet of "common" or "habitual"; and this will

not affect the admissibility of any particular instance,[1] but will be a matter for the jury, under instructions of law from the judge. The objection of surprise may sometimes be a serious one; but the necessity of the situation must control, and in some instances the danger of surprise is obviated by requiring prior notice of the alleged instances that will be relied on.

For this purpose, then, evidence of particular acts is always admissible.[2] There may also be analogous instances in which the issue is practically the same, though not arising in a criminal charge against the person as defendant.[3] Distinguish here the use of particular instances to prove Habit in the strict sense, as not involving character (*post*, § 376).

§ 204. **House of Ill-fame.** It has already been seen (*ante*, § 78) that, apart from statutes constituting the repute of the house as the sole element of the crime of professional pandering, the character or use of the house and the character or occupation of the inmates may come into issue. Two questions having a bearing here are thus presented. (1) May particular instances of prostitution in the house be offered, as showing its habitual use or character? (2) May particular acts of prostitution by the inmates be offered, as showing their occupation or character as prostitutes? Both these questions should be answered in the affirmative, for the same reasons as in the preceding class of cases; the considerations affecting the question are practically identical.[1]

§ 205. **Seduction; Statutory Action or Prosecution.** Where by statute the seduction of an unmarried woman is made a crime against the State or a cause of civil action for the woman, the character of the woman is usually

[1] Unless, as in some jurisdictions, the statute specifies a minimum number of instances.

[2] 1767, Buller, Nisi Prius, 296; 1802, McNally, Evidence, 324 (both these writers declare the general doctrine; in barratry, notice of the specific acts charged is necessary); 1808, R. *v.* Roberts, 1 Camp. 399 (indictment for "conspiracy to carry on the business of a common cheat"; "cumulative instances are necessary to prove the offence"); 1864, Ingram *v.* State, 39 Ala. 247, 253 (doctrine recognized for a common barrator, common seller of liquor, etc.); 1895, Wright *v.* Crawfordsville, 142 Ind. 636, 642, 42 N. E. 227 (habit of intoxication, provable by specific acts); 1834, Com. *v.* Moore, 2 Dana Ky. 402 (common gambler); Com. *v.* Hopkins, ib. 419 (same); 1878, World *v.* State, 50 Md. 49, 54 (under St. 1864, c. 38, on a charge of being a "common thief," acts other than of stealing are not admissible, nor any acts done before the statutory period); 1855, Com. *v.* Whitney, 5 Gray 85 (common drunkard; no particular number of instances are necessary or sufficient); 1873, Com. *v.* McNamee, 112 Mass. 285 (in proving the defendant a "common drunkard," the facts of intoxication five to seven times within four months, sufficient to support a finding of "habitual drunkenness").

[3] 1876, Smith *v.* State, 55 Ala. 11 (where a statute forbada selling liquor to a person of "known intemperate habits"); 1852, McMahon *v.* Harrison, 6 N. Y. 443, 447 incompetency as administrator because of professional habits of gambling; his habits in November, 1848, when last heard from, "presumptive evidence" of similar habits in July, 1850).

[1] (1) Acts of prostitution to show the use of the house: 1900, Howard *v.* People, 27 Colo. 396, 61 Pac. 595 (keeping a house of ill-fame; acts at any time within the statutory period, admitted, the offence being a continuing one; former convictions for similar offences, admitted); 1846, Caldwell *v.* State, 17 Conn. 467, 473 (resort by particular prostitutes); 1896, Egan *v.* Gordan, 65 Minn. 505, 68 N. W. 103 (in an action to recover rent); 1860, State *v.* M'Gregor, 41 N. H. 407, 412 (acts of prostitution); 1863, Harwood *v.* People, 26 N. Y. 190 (repeated arrests at the house, of persons before convicted as prostitutes); 1863, Kenyon *v.* State, ib. 203, 209 ("particular facts, . . . such as the harboring of unchaste persons"); 1896, Lanpher *v.* Clark, 149 id. 472, 44 N. E. 182; ("such specific acts of immorality and impropriety" on the keeper's part "as tend to furnish a reasonable inference as to the real character of the place"); 1903, People *v.* Glennon, 175 id. 45, 67 N. E. 125 (admitted, on a charge of the defendant patrolman's neglect of duty in failing to arrest the persons keeping such a house); 1846, State *v.* Patterson, 7 Ired. 70. (2) Acts of prostitution to show the occupation of persons resorting to the house: *Contra:* 1861, Com. *v.* Gannett, 1 All. 7.

treated by the statute as affecting the crime or wrong.[1] Under such statutes several questions arise, involving the present principle:

(1) Where the statute applies to women of "chaste character," does this signify the actual inward character or disposition? If so, particular acts of unchastity are certainly relevant to disprove this actual character. Although the objection of unfair surprise is here as elsewhere a serious one, the practical necessity for resorting to this kind of evidence, and its cogency if believed, are perhaps greater than in any of these kindred topics. Accordingly, it is generally conceded that such instances may be offered by the defendant.[2]

(2) Where the statute applies to women of "good repute for chastity," it is clear that by the statutory terms the reputation is the thing in issue; and a particular act is obviously irrelevant to show reputation. Such acts are therefore inadmissible under these statutes.[3]

(3) Where the statute prescribes nothing expressly as to the woman's chastity, shall a requirement of actual chastity be implied into the statutory elements of the crime or the wrong? Having regard to the purpose of the statute and to the singular consequences of omitting such a requirement, it seems highly proper to make the implication:

1876, *Marston, J.*, in *People* v. *Clark*, 33 Mich. 112, 118: "In most of the States their statute makes the seduction of a woman of 'previous chaste character' an indictable offence, while there are no such words, nor any of like import, in ours; and the Courts [in those States] have held that the words 'previous chaste character' mean that she shall possess actual personal virtue, in distinction to a good reputation, and that a single act of illicit connection may therefore be shown on behalf of the defendant . . . The object of this statute was not to punish illicit cohabitation; its object was to punish the seducer who by his arts and persuasions prevails over the chastity of an unmarried woman. . . . If, however, she had already fallen, [there is no seduction.] . . . Then the chastity of the female at the time of the alleged act is in all cases involved."

[1] For the use of general character or of reputation in these cases, see *ante*, § 79.

[2] 1857, Andre *v.* State, 5 Ia. 389; 1865, State *v.* Carron, 18 id. 372, 375; 1871, State *v.* Shean, 32 id. 88, 92 ("It will not do if she possesses a reputation for chastity; she must be really so"); 1871, State *v.* Higdon, ib. 252 (same); 1880, West *v.* Druff, 55 id. 335, 336, 7 N. W. 636 ("conversations, acts, and associations are manifestations of character, and constitute the true index of the heart"); 1860, State *v.* Timmens, 4 Minn. 325, 334 (maintaining that there may be reformation); 1892, State *v.* Blize, 111 Mo. 464, 471, 20 S. W. 210; 1853, Crozier *v.* People, 1 Park. Cr. 453 (*contra*, Safford *v.* People, ib. 478, and Carpenter *v.* People, 8 Barb. 608, on the ground that the statutory term "chaste" may still be appropriately used of a woman who has had one act of illicit intercourse; but these are now practically repudiated by the next case); 1868, Kenyon *v.* State, 26 N. Y. 203, 208 ("specific acts of lewdness," admissible); 1873, Love *v.* Masoner, 6 Baxt. 24, 33.

[3] 1885, State *v.* Bryan, 34 Kan. 63, 69, 8 Pac. 260 (because the statute affects "any female of good repute"); 1881, Zahriskie *v.* State, 43 N. J. L. 640, 646 ("There is a distinction between actual personal virtue and 'good repute for chastity' as used in our statute; . . . it does not necessarily follow that they are co-existent"); 1896, Foley *v.* State, 59 id. 1, 35 Atl. 105 ("where the legislative language is unmistakably clear, it is the duty of the Court to enforce it in that sense"); 1876, Bowers *v.* State, 29 Oh. St. 542, 545 (the statute applied to "any female of good repute for chastity"; other illicit intercourse excluded; Welch, C. J.: "If she has repented of her past error and by her upright walk acquired an unimpeachable reputation for chastity, the law protects her against the man who overcomes her good resolves by a promise of marriage"). In Missouri the opposite view is now taken: 1883, State *v.* Brassfield, 81 Mo. 151, 157 ("There is a material difference between our statutes and those statutes under which such evidence has been held admissible in other States"); 1885, State *v.* Patterson, 88 id. 85, 95, 100 ("Our statute is worded a little differently, but in substance and effect is the same" as the others; in State *v.* Brassfield "we went too far"; Henry, C. J., diss., in a good opinion); 1888, State *v.* Wheeler, 94 id. 252, 7 S. W. 103 (preceding case approved).

1883, *Smith*, J., in *Polk* v. *State*, 40 Ark. 482, 486 (a statute punished "carnal knowledge of any female by virtue of any feigned or pretended marriage," etc.): "In every prosecution for seduction the character of the seduced female is involved in the issue; and character means in this connection, not her general reputation in the community, but the possession of actual personal chastity; . . . the Legislature never intended to send a man to the penitentiary for having had illicit connection with a prostitute or a woman of easy virtue where she had consented, even under a promise of marriage." [4]

(4) In the first and third cases preceding, does a "chaste character" mean merely the physical condition of virginity, or does it signify the moral disposition to be chaste? If the former, then nothing short of intercourse would be relevant; if the latter, then any lewd behavior would be relevant. The latter interpretation is generally accepted:

1857, *Woodward*, J., in *Andre* v. *State*, 5 Ia. 389, 395: "The statute is for the protection of the pure in mind, for the innocent in heart, who may have been led astray. . . . [Obscenity of language, indecency of conduct, and undue familiarity with men] serve to indicate the true character; they become exponents of it; and a defendant is not punished for an act with one whose conversation and manners may even have suggested the thought, and opened the way to him, as he would be for the same act with one innocent in mind and manners." [5]

(5) In any case, acts of unchastity *after the seduction* have no relevancy.[6]

§ 206. **Excuse for Breach of Promise of Marriage.** The unchaste character of the promisee, whether existing and concealed before the promise or supervening after the promise, may be treated as the breach of a condition or representation, and therefore as an excuse for refusal to fulfil the promise of marriage. In such a case, the unchaste character may be shown by a particular act of intercourse with another or by other lewd behavior, for the same

[4] *Ala.*: 1883, Wilson v. State, 73 Ala. 527, 533 (the statute applied to "any unmarried female"; held that "the statute is for the protection of the chastity of unmarried women, and the existence of the virtue at the time of the intercourse is a necessary ingredient of the offence"; but here an amendment had expressly so provided); 1888, Hussey v. State, 86 id. 34, 36, 5 So. 484; 1888, Munkers v. State, 87 id. 94, 97, 6 So. 357; 1896, Bracken v. State, 111 id. 68, 20 So. 636, *semble*; 1898, Smith v. State, 118 id. 117, 24 So. 55 (inquiry is as to actual chastity; in rebuttal, good character since the time of seduction is inadmissible); 1898, Suther v. State, ib. 88, 24 So. 43; *Ark.*: 1883, Polk v. State, Ark. (quoted *supra*); 1903, Walton v. State, — id. —, 75 S. W. 1; *Haw.*: 1896, Woodward v. Republic, 10 Haw. 416 (admitting particular acts); *Mich.*: 1873, People v. Brewer, 27 Mich. 133, 135, *semble*; 1876, People v. Clark, 33 id. 112, 118 (holding, nevertheless, that there may be a reformation, and thus that "if she has repented of that act and reformed, she may again be seduced"); 1879, People v. Knapp, 42 id. 267, 268, 3 N. W. 927; 1882, People v. Squires, 49 id. 487, 488, 13 N. W. 828 (maintaining that there may be a reformed chastity).

[5] *Accord*: 1888, Hussey v. State, 86 Ala. 34, 36, 5 So. 484, *semble* (acts of indecency); 1883, Polk v. State, 40 Ark. 482, 487 ("particular acts of immorality or indecorum"); 1857, Andre v. State, 5 Ia. 389, 395 (quoted *supra*); 1865, State v. Carrou, 18 id. 372, 375; 1871, State v. Shean, 32 id. 88, 90 ("acts of lewdness and immodesty"); 1871, State v. Higdon, ib. 262, 264 *semble*. *Contra*: 1898, People v. Kehoe, 122 Cal. 224, 55 Pac. 911 (seduction; "unchaste character" may be shown only by intercourse, not by mere indecencies).

[6] 1896, Bracken v. State, 111 Ala. 68, 20 So. 637; 1883, Polk v. State, 40 Ark. 482, 487; 1898, Keller v. State, 102 Ga. 506, 31 S. E. 92; 1876, People v. Clark, 33 Mich. 112, 117. Other intercourse *with the defendant himself* may also be admissible as throwing light upon the incidental question, which arises under some statutes, whether the seduction was upon a promise of marriage (*post*, §§ 399, 401). For particular acts as admissible to mitigate *damages* in the *parent's action for seduction*, see *post*, § 210.

On a charge of *adultery*, the woman's previous intercourse with others than the defendant is of course immaterial: 1879, People v. Knapp, 42 Mich. 267, 268, 3 N. W. 927.

reasons as in the preceding topic.[1] The use of such conduct as affecting the *mitigation of damages* (*post*, § 213) raises slightly different questions.

§ 207. **Justification of Defamation of Character.** Where a defendant in an action for defamation pleads the truth of his charge, and the charge is not of a specific act of misconduct, but of a general bad character or trait or habit or course of dealings, the proper mode of proof for him is often not an easy matter to discern. On the one hand, it is clear that, where he charges a habit or occupation or course of dealings, he must be allowed to use specific instances of it as cumulatively assisting to substantiate the general charge; and this, on the principle of § 202, *ante*, seems to be conceded generally.[1] On the other hand, so far as his charge concerned, not merely some outward course of conduct, but the plaintiff's inward and moral disposition — character, in the strict sense —, he is met by a doctrine which tells him (from the point of view of the surprise-argument) that this is unfair, that no plaintiff can be prepared to meet evidence ranging over his whole life, and that a simple and just mode of adducing the supposed facts is to plead them specifically as supporting the truth of the charge.[2] The difficulty is to draw the line be-

[1] 1801, Foulkes *v.* Sellway, 3 Esp. 236 (the plaintiff's bad character in defence to an action on a promise of marriage; evidence of an act of gross misconduct received); 1796, Woodard *v.* Bellamy, 2 Root 354 ("particular instances of unchastity" admitted); 1873, Sheahan *v.* Barry, 27 Mich. 217, 221 (considered here from the point of view both of excuse and of mitigation); 1895, Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 87 (same).

[1] 1880, R. *v.* Labouchere, 14 Cox Cr. 419, 428, 430 (libel charging that the prosecutor gained his livelihood in 1878 by card-sharping; evidence admitted of his having so gained a living in 1876 and 1877; to show this habit in given years, evidence of two instances of card-sharping was received, and it was left to the jury to say whether they would infer that the prosecutor, as charged, "lived by card-sharping"); 1899, Ratcliff *v.* Courier-Journal, 99 Ky. 416, 36 S. W. 177 (libel; to prove a charge that the plaintiff "has been in more rows than any other one man in this county," evidence was admitted of "many instances of quarrels and disturbances" in which he had taken part); 1896, Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. 182 (a charge of keeping a disorderly house; "such specific acts of immorality and impropriety on the part of the plaintiff as to furnish a reasonable inference as to the real character of the place," admitted).

[2] 1822, Jones *v.* Stevens, 11 Price 235 (charge of being a disreputable attorney; particular acts excluded on the ground of surprise, the reason being the same as under § 71, *ante*, where a quotation is given; the Court went even further, and declined to allow a truth-justification of a general charge to be supported by general evidence of bad character, its policy being to force all justifications of general slander to plead specific acts of the nature charged; these acts if thus pleaded, could be used to prove the charge true); 1882, Scott *v.* Sampson, 8 Q. B. D. 491 (libel for charging that the plaintiff had obtained £500 from G. under a threat of publishing certain facts, and had systematically abused his position as a dramatic critic and a journalist for the purpose of extorting money; the question was asked the plaintiff whether he had used his position as critic of the Daily Telegraph to injure or annoy an actor; Cave, J.: "Mr. Willes supported the question on the ground that it was material to the justification, as showing that the plaintiff had abused his position as critic for other purposes than that of extorting money; viz., for the purpose of grossly abusing a man whom he personally disliked. Lord Coleridge held — as I think rightly — that the question was not admissible as tending to prove justification; the natural meaning of the libel being that the witness abused his position as a critic for the purpose of extorting money. Mr. Willes now contends that it was also admissible as evidence tending to show the plaintiff's general bad character. I am of opinion that . . . as evidence of particular facts tending to show the plaintiff's disposition, it is therefore inadmissible"); 1899, Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878 (charge of being a drunkard; specific acts of drunkenness "not included within the lines marked out by the plea of justification," excluded); 1899, McGee *v.* Baumgartner, 121 Mich. 287, 80 N. W. 21 (specific acts excluded).

In the following instances there were such specific instances pleaded: 1868, Talmadge *v.* Baker, 22 Wis. 625 (Cole, J.: "The plaintiff in effect says, 'You have defamed my character by charging me generally with a propensity to steal [the charge was, "He is in the habit of picking up things"]'; 'True,' the defendant replies, 'I have so charged, and I propose to make good my words by showing that you have been guilty of various larcenies mentioned in my answer'"); 1902, Cunningham *v.* Underwood,

tween the two rules, and to determine when the charge involves disposition or trait of character and when it involves merely a habit or course of dealings. No Court seems yet to have furnished a satisfactory solution of this difficulty. It is after all chiefly one of pleading, for no one can doubt that, to prove a bad trait of character as charged, specific instances of its exhibition are relevant, and a mode of pleading which avoids the objection of unfair surprise would obviate the only impropriety of such evidence.

§ 208. **Incompetency of Employee or Physician.** In evidencing the incompetency of an *employee*, as a fact which if known to the employer may make him liable for injury to a fellow-employee, there is not always the same necessity for evidence of particular acts of incompetence, because in many jurisdictions personal opinion of those who know him is received (*post*, § 1984). Moreover, the possible range of the evidence is greater, and emphasizes the argument of unfair surprise, as well as that of undue prejudice (*ante*, § 94). Finally, there may be a limitation from the point of relevancy, since an act of mere negligence does not in itself show incompetence, nor does a single act of any sort necessarily show a lack of the general trait in question. These reasons have led some Courts to forbid this mode of proof:

1887, *Devens*, J., in *Hatt* v. *Nay*, 144 Mass. 186, 10 N. E. 807: "Because a servant may have been guilty of negligence on certain specified occasions, it by no means follows . . . that he might not ordinarily be a careful and skilful workman and properly employed as such. The investigation of other individual acts of alleged carelessness on the foreman's part would necessarily have a tendency to confuse the case by collateral inquiries, to protract it infinitely if those inquiries were carefully made, and to mislead and distract a Court or jury from the true issue."

There is, however, much to be said for the opposite view. A single act may signify little, but two or three of an extreme quality would signify everything. Fabricated testimony could be exposed, if notice were required and time were allowed. Proof by reputation is inconclusive, and needs to be reenforced. There is a danger of being too cautious in excluding evidence:

1895, *Denman*, J., in *Cunningham* v. *R. Co.*, 88 Tex. 534, 31 S. W. 629: "The pleadings and evidence, however, raise the issue as to Rownie's competency as a car inspector, which involves, first, his skill; and, second, his attentiveness to duty. If he was lacking in either of these qualities, he could not be said to be competent to perform the important duties required of him. It is a matter of common knowledge that some persons are by nature inattentive or thoughtless, and, as a result thereof, frequently neglect the performance of important duties, without any intention so to do. This mental quality can only be evidenced by the outward acts of the person, and, where its existence or nonexistence is in issue, evidence of such acts is admissible. If Rownie was an inattentive or thoughtless person, such mental quality was a relevant fact upon the issue as to whether he probably inspected the cars on the particular morning of the accident. . . . Thus it seems that frequent failures to perform this duty at different times would be competent evidence

53 C. C. A. 93, 116 Fed. 803, 809 (libel charging the plaintiff with "immoral," "dishonest," and "dishonorable" conduct; defendant allowed, on a plea of truth, to prove "specific instances of just such conduct as a defence, the justification having been pleaded with sufficient particularity).

For the use of other instances of *adultery or incest*, where such conduct has been charged by the defendant in defamation, see *post*, § 400.

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

The latter view seems on the whole the better. The direct rulings are comparatively few; and the state of the law is complicated by the frequent failure to distinguish two other related questions: (1) Whether, when character is offerable *evidentially to prove the negligent act* of a defendant or a plaintiff or a defendant's employee, this character may be shown by particular negligent acts (*ante*, § 199); the evidence here is of a narrower scope, but is offerable upon more numerous issues, than in the above case; (2) Whether particular acts of an employee may be used to show *knowledge* of his incompetency *by his employer* (*post*, § 250). In the former case the evidence is inadmissible in most jurisdictions; in the latter, it is admissible in most jurisdictions; while in the present case it is admitted in the majority of courts.[1]

Where the *unskilfulness* of a *physician*, or other professional person bound to furnish a certain quality of skill, is in issue as a part of the substantive law, it would seem that the same considerations apply, and that specific instances, if sufficiently marked, should be receivable.[2]

§ 209. **Mitigation of Damages**: (1) **Defamation.** It has already been seen that, exceptions and conditions apart, the reputed character of a plaintiff in an action of defamation is generally admissible in mitigation of damages, as involving the amount of his harm suffered (*ante*, §§ 70–73). So long as proof of character is made by reputation only, the true nature of the situation does not call for more accurate analysis; because, whether the reputation is itself

[1] *Cal.*: 1892, Smith *v.* Whittier, 95 Cal. 279, 292, 30 Pac. 529 ("Previous negligent acts," admissible); *Del.*: 1901, Giordano *v.* Brandywine Granite Co., Del., 3 Pennewill 423, 52 Atl. 332 (admissible); *Ill.*: 1899, Consolidated Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. 733 (mine-engineer's competency; his prior conduct admitted to show his "fitness or unfitness"); 1903, Metropolitan W. S. E. R. Co. *v.* Fortin, — id. —, 67 N. E. 977 (motorman of an elevated railroad; "that he had run past signals, had jerked the train he was pulling, and had been laid off and reprimanded" on former occasions, admitted); *Md.*: 1893, Baltimore *v.* War, 77 Md. 593, 598, 27 Atl. 85 (two or three accidents to the employee's elevator-cage the day before, excluded; no authority cited); *Mass.*: 1885, Keith *v.* N. H. & N. Co., 140 Mass. 175, 179, 3 N. E. 28 (admissible sometimes; here, the acts of a car-inspector, to show incompetency, 1887, Hatt *v.* Nay, 144 id. 186, 10 N. E. 807 (specific acts of negligence excluded; see quotation *supra*); 1893, Kennedy *v.* Spring, 160 id. 203, 205, 35 N. E. 779 (inadmissible; following Hatt *v.* Nay); 1894, Connors *v.* Morton, 160 id. 333, 35 N. E. 860 (same); *Minn.*: 1898, Morrow *v.* R. Co., 74 Minn. 480, 77 N. W. 303 (former conduct admitted to show incompetency); *N. J.*: 1897, State *v.* Swett, 61 N. J. 457, 38 Atl. 969 (incompetency to produce good material, set up as defence to an action for discharging an employee; good similar work by the plaintiff in another factory, admitted, citing Baulec *v.* R. Co., N. Y., *post*, § 250); *N. Y.*: 1897, Youngs *v.* R. Co., 154 N. Y. 764, 77 Hun 612, 49 N. E. 1106 (specific acts, receivable to show incompetency); 1898, Park *v.* R. Co., 155 id. 215, 49 N. E. 674 (same); *Tex.*: 1888, Honston & T. C. R. Co. *v.* Patton, — Tex. —, 9 S. W. 175 (repeated acts of carelessness by employee, admitted); 1895, Cunningham *v.* R. Co., 88 id. 534 (see quotation, *supra*); 1898, Galveston H. & S. A. R. Co. *v.* Davis, 92 id. 372, 48 S. W. 570 (single instances of a conductor's incompetence, excluded).

[2] Compare the citations *ante*, §§ 67, 87, *post*, § 221.

the material fact or is merely evidence of actual character, in either case it is receivable. But when particular acts of misconduct are offered in mitigation of damages, it then becomes necessary to determine whether *actual character* or *reputation* (*ante*, § 52) is the ultimate fact in respect of which the harm is suffered; for if it is the latter, then particular acts of misconduct are irrelevant; they have no bearing on reputation.

That the reputation is the ultimate fact seems clear. The harm for which compensation is asked is the loss of social relations, as involved in the diminished reputation of the plaintiff. The condition of that reputation shows the extent of his loss. In this view, particular acts of misconduct, if they have not affected his reputation, have no bearing on the issue; and if they have affected it, the reputation alone suffices to show this. It might be argued that the injury is also regarded as in part the wound to the feelings, the mental suffering, and that a person guilty of misconduct could not suffer as deeply as an innocent person from a false charge of like misconduct. This argument, however, has never been advanced, and it ignores the fact that the injury to feelings which the law of defamation recognizes is not the suffering from the mere making of the charge, but is that suffering which is caused by other people's conduct towards him in consequence of it; which brings the question back again to the point of view of reputation alone.

After all, the the fundamental reason for the rejection of particular misconduct in miti ation of damages is that these facts of misconduct are wholly without bearing on the proposition in issue; that is, they show merely, in the neat phrase of Mr. Justice Cave, "not that the plaintiff has not, but that he ought not to have, a good reputation"; and no further reason need be sought. It is important to recognize this; because other reasons, particularly those of unfair surprise and of confusion of issues, have also been advanced for the exclusion of such evidence, — reasons which assume that actual character is in issue and that particular acts, though relevant, are excluded by these considerations of auxiliary policy. But if these were true and effective reasons, they would also operate to exclude similar evidence when offered in other cases to mitigate damages where actual character, and not reputation, was really in issue, — as in the topics of the ensuing sections, where nevertheless evidence of such particular misconduct is concededly proper. Thus, if actual character for chastity is not to be proved, in mitigation of damages, by particular acts in an action for defamation, the same reasons should presumably impel the same Court to exclude the same evidence offered for the same purpose in an action for seduction; yet the same Court constantly excludes in the former action what it admits in the latter. The inevitable conclusion and the true solution of the apparent inconsistency is that different reasons are operating. In the action for defamation, the true and controlling reason is the immateriality of particular acts of misconduct. Thus a Court which excludes such evidence in that action, while it might or might not also exclude it in the other actions, is not inconsistent in admitting it in the latter. In actions of defamation, then, such evidence is

universally regarded as improper. The following passages illustrate the various reasons that have been judicially advanced:

1822, *Jones* v. *Stevens*, 11 Price 235, 265 (charge of being a disreputable and unprofessional attorney); *Richards*, C. B.: "I cannot . . . allow defendants to impeach all the transactions of a man's life who may have occasion to seek redress in courts of justice and throw on him the difficulty of showing an uniform propriety of conduct during all his existence. It would be impossible for any man to come prepared to meet such a charge"; *Wood*, B.: "If, as contended for, you could call witnesses, upon the plea of not guilty, to contradict the general introductory words [of the declaration as to the plaintiff's good character], what would be the consequence? We should have counsel getting up and saying, 'The plaintiff has alleged,' as in the present declaration, 'that he is a good, honest, just, and faithful subject of the realm. I propose to call twenty witnesses to prove that he is an immoral, dissolute man; twenty more to prove that he has committed acts of dishonesty; twenty more to prove that he is not a faithful subject, by proving that he has been guilty of sedition, treasonable practices, and even high treason.' Did any one ever hear such stuff as this? It might do in a farce upon the stage meant to excite laughter, but it surely cannot be tolerated in a court of justice."

1882, *Cave*, J., in *Scott* v. *Sampson*, L. R. 8 Q. B. D. 491: "As to the third head, or evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation; and to admit evidence of this kind is in effect, as was said in *Jones* v. *Stevens*, to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of."

1836, *Earle*, J., in *Randall* v. *Holsenbake*, 3 Hill S. C. 177: "The defendant may justify and prove the plaintiff guilty of the crime imputed to him. If he be afraid to hazard that course, he may under the general issue (as from a masked battery), prove, in mitigation of damages, facts and circumstances going to show a ground of suspicion and belief. He may prove that the plaintiff was generally reported and suspected to be guilty of the crime imputed to him. And he may prove that the plaintiff is a person of general bad character, and although he may not have committed that particular crime, yet he is not entitled to damages. This, in all conscience, ought to satisfy the most voracious appetite for defamation. To allow the defendant, in an action for words imputing one crime, and under the general issue which simply denies the speaking, to prove that the plaintiff had been guilty of any other crime, even of the same nature, would be to deliver the plaintiff bound hand and foot to his adversary. It would render nugatory all the forms of practice and pleading which experience has found necessary for the investigation of truth and to promote the ends of justice; for the plaintiff never could know what hidden transactions the industrious malice of his adversary might be prepared to drag to light."[3]

[3] Compare with the following cases the distinctions of those cited *ante*, § 73: *Eng.*: 1716, Dennis *v.* Pawling, Vin. Abr., "Evidence," I, *b*, 16 ("The baron would not allow . . . any particular credit to be given of the plaintiff, but if the defendant had a mind to examine to this, the question must be general"); 1701, Smithies *v.* Harrison, ib. 15, *semble* (same); 1787, Buller, Nisi Prius, 9, *semble* (same); 1797, Knobell *v.* Fuller, Peake Add. Cas. 139 (slander charging the obtaining money for procuring pardons; general issue; to mitigate the damages, Lord Kenyon, C. J., received evidence of facts pointing towards the plaintiff having done such things); 1822, Jones *v.* Stevens, 11 Price 235 (excluded; see quotation *supra*); 1836, Moore *v.* Oastler, 2 Stark. Ev. 641, note *e*, Lord Denman, C. J., and Parke, B. (excluded); 1859, Bracegirdle *v.* Bailey, 1 F. & F. 536, Byles and Willes, JJ. (same); 1882, Scott *v.* Sampson, L. R. 8 Q. B. D. 491 (same; see quotation *supra*); *Conn.*: 1792, Seymour *v.* Merrills, 1 Root 459 (excluded, "except those charged by the words," *i. e.* under a justification); *Del.*: 1838, Waples *v.* Burton, 2 Harringt. 446 (excluded); *Ill.*: 1858, Sheahan *v.* Collins, 20 Ill. 329 (excluded);

§ 210. **Same: (2) Father's Action for Seduction of Daughter.** The father's claim against the seducer of his daughter is based primarily on the loss of her services; but he is allowed to include also in the items of his loss for which compensation may be claimed (*a*) the impairment of the family honor or reputation, and (*b*) the mental suffering experienced by him in the loss of his daughter's chastity. Thus whatever affects either of these two elements is material to the issue, so far as the estimation of damages is concerned. From the point of view of (*a*) the daughter's prior reputation, as involving the family reputation, is material (*ante*, § 75). From the point of view of (*b*) the daughter's prior actual chaste character, as affecting the prior condition of his feelings, is also material (*ante*, § 75). Now particular acts of unchastity of the daughter are not relevant to show her reputation, but they are relevant to show her actual character.[1] For the latter purpose, then, the only question is whether, from the point of view of the arguments of surprise and confusion of issues (*ante*, § 194), such evidence should be excluded. It is generally conceded that these reasons do not stand in the way; and this conclusion seems just. *Particular acts* of unchastity by the *daughter* are therefore admissible.[2] That the *father's reputation*, as affecting his loss of

Ky.: 1880, Campbell *v.* Bannister, 79 Ky. 208 (excluded); *Me.:* 1839, Smith *v.* Wyman, 16 Me. 14 (charge, "you are a whore"; the "utmost latitude of examination," as to the plaintiff's having lived in a house of ill-fame, etc., admitted); *Mass.:* 1825, Bodwell *v.* Swan, 3 Pick. 376 (excluded, on the ground of surprise); 1863, Chapman *v.* Ordway, 5 All. 595 (excluded); 1863, Parkhurst *v.* Ketchum, 6 Id. 406 (same); 1881, McLaughlin *v.* Cowley, 131 Mass. 70, 72 (charge of murder and adultery; the plaintiff's former plea of guilty to an indictment for cheating, excluded); 1893, Miller *v.* Curtis, 158 Id. 127, 131, 32 N. E. 1039 (same); *Mich.:* 1877, Proctor *v.* Houghtaling, 37 Mich. 41, 44 (excluded); *N. H.:* 1833, Lamos *v.* Snell, 6 N. H. 413 (charge of stealing and being "thievish"; that the plaintiff harbored thieves, excluded); *N. Y.:* 1806, Foot *v.* Tracy, 1 Johns. 46 (excluded); 1827, Root *v.* King, 7 Cow. 635 (same); 1829, King *v.* Root, 4 Wend. 160, *semble* (same); *N. C.:* 1802, Vick *v.* Whitfield, 2 Hayw. 222 (excluded); *Oh.:* 1831, Dewit *v.* Greenfield, 5 Oh. 226 (excluded); 1846, Fisher *v.* Patterson, 14 Id. 418, 425 (same); *Pa.:* 1835, Henry *v.* Norwood, 4 Watts 347, 349 (excluded on the ground of surprise); *R. I.:* 1896, Folwell *v.* Journal Co., 19 R. I. 551, 37 All. 6 (excluded); *S. C.:* 1820, Sawyer *v.* Eifert, 2 Nott & M. 511, 515 (excluded, qualifying Buford *v.* M'Luny, 1 Nott & M. 268, 271); 1836, Randall *v.* Holsenbake, 3 Hill S. C. 177 (same); *Wis.:* 1871, Wilson *v.* Noonan, 27 Wis. 598, 603, 610 (excluded); 1890, Muetze *v.* Tuteur, 77 Id. 236, 243, 46 N. W. 123 (destruction of credit alleged: the number of the plaintiff's creditors, excluded).

The same rule should apply in *malicious prosecution*: 1891, Wolf *v.* Perryman, 82 Tex. 112, 120, 17 S. W. 772 (excluded). Distinguish the use of *prior libels by the plaintiff* upon the defendant, in mitigation: 1809, Finnerty *v.* Tipper, 2 Camp. 73 (defendant in his journal had charged the plaintiff with crime; plaintiff had proposed as a question in his debating society, "Whether the editor of S. Journal or a notorious pickpocket were the greater nuisance to society," and had caused boards announcing this to be carried through the street, and at the debate had argued in favor of the pickpocket; Mansfield, C. J.: "If a man is in the habit of libelling others, he complains with a very bad grace of being libelled himself. . . . But I cannot say that he loses his right to maintain an action"; though damages might thereby be mitigated).

[1] 1873, Love *v.* Masoner, 6 Baxt. 24, 29, 33 (Nicholson, C. J.: "The injury complained of by the plaintiff was the loss of a virtuous daughter and of her companionship and example to the other children and the wound to the feelings of the parent produced by this injury; the rejected proof, however, would show that plaintiff was under a delusion as to the virtue of his daughter, that she had already surrendered her chastity before she yielded to the embrace of the defendant").

[2] *Eng.:* 1808, Bamfield *v.* Massey, 1 Camp. 460 (having a child by another man); 1814, Dodd *v.* Norris, 3 Id. 519 (immodest conduct with defendant); 1823, Bate *v.* Hill, 1 C. & P. 100 (same, and improper company of others); 1837, Andrews *v.* Askey, 8 Id. 7, Tindal, C. J.; 1836, Verry *v.* Watkins, 7 C. & P. 308, Alderson, B. (particular acts of unchastity by the daughter with third persons); 1840, Carpenter *v.* Wall, 11 A. & E. 803; that the daughter "went about in a light manner" speaking of the father of her child); 1850, Thompson *v.* Nye, 16 Q. B. 175; *Ala.:* 1830, Drish *v.* Davenport, 2 Stew. 266, 270, *semble; Del.:* 1851, Robinson *v.* Bur-

reputation, is equally in issue, and that his *actual character*, as affecting the extent of his mental suffering, is equally in issue, has already been seen (*ante*, § 75). To show this actual character, *particular acts* of his own unchastity would seem to be receivable, for the same reasons as above.[3]

§ 211. **Same: (3) Husband's or Wife's Action for Crim. Con. or Alienation of Affections.** In the *husband's* action for criminal conversation or for alienation of affections, the actual character both of his wife and of himself are material to the issue (*ante*, § 75). For the same reasons therefore as in the foregoing topic, her character may be evidenced by particular acts of unchaste conduct;[1] and his character may be evidenced in the same way.[2]

In the *wife's* action for alienation of affections, the same considerations would apply;[3] but not in her action for loss of pecuniary support.[4]

§ 212. **Same: (4) Indecent Assault.** In a civil action for assault, where the assault is claimed to have been made for indecent purposes, the actual chaste character of the woman is material as affecting the extent of the shock to her feelings and thus the proper damages to be given (*ante*, § 75). The

ton, 5 Harringt. 335, 338 (improper conduct); *Ill.*: 1874, White *v.* Murtland, 71 Ill. 250, 264 (acts "of immorality or indecorum"; but only before the seduction, apparently because the father's loss then began); *Ind.*: 1859, Shattuck *v.* Myers, 13 Ind. 50; 1868, Bell *v.* Rinker, 29 id. 269 (*contra*; not citing the preceding case); Smith *v.* Yarvan, 69 id. 448, *semble* (*contra*); 1884, South Bend *v.* Hardy, 98 id. 580, 582 (going back to the first case); *Pa.*: 1855, Zitzer *v.* Merkel, 24 Pa. 408, *semble*; 1863, Hoffman *v.* Kemerer, 44 id. 452 (*contra*; either on cross-examination or by outside evidence; reputation is the only mode of proof); *Tenn.*: 1858, Reed *v.* Williams, 5 Sneed 580, 582 (admissible, by outside testimony); 1858, Thompson *v.* Clendening, 1 Head 287, 295 (admitted); 1860, Lea *v.* Henderson, 1 Cold. 116, 150 (excluded, because the reputation is foundation of the claim, and is not thereby necessarily injured); 1873, Love *v.* Masoner, 6 Baxt. 24, 33 (admissible, repudiating the preceding case). Of the following rulings the second is of course the better: 1813, Dodd *v.* Norris, 3 Camp. 519 (loss of service by seduction; to explain away the improper conduct of the plaintiff's daughter, a witness, with the defendant, evidence of a prior promise of marriage by him was rejected, and evidence only of an honorable paying of addresses was admitted, since otherwise the promise might be taken as an element in the recovery; the ruling is anomalous and poor); 1851, Robinson *v.* Burton, 5 Harringt. 335, 339, cited *supra* (to explain away acts of familiarity with the defendant by the daughter in an action for seduction, evidence was admitted that a promise of marriage had been made).

For particular acts of intercourse with others as explaining away the defendant's responsibility for her pregnancy, see *ante*, § 133.

[2] 1851, Robinson *v.* Burton, 5 Harringt. 335, 338 (the dissolute character of the father allowed to be shown by "any facts showing him to be of dissolute habits," or "his general habits of association with improper persons," or "declarations or conversations"). *Contra:* 1858, Reed *v.* Williams, 5 Sneed 580, 582 (excluded; venereal disease); 1858, Thompson *v.* Clendening, 1 Head 287, 296 (excluded; adultery).

[1] 1767, Buller, Nisi Prius, 27 (the wife's misconduct before marriage, etc., admissible to show no loss of affection and thus mitigate damages); 1797, Elsam *v.* Faucett, 2 Esp. 563 (subsequent misconduct of a seduced wife not admissible in mitigation of damages); 1850, Thompson *v.* Nye, 16 Q. B. 175, per Erle, Coleridge, and Wightman, JJ. (admitted); 1820, Torre *v.* Summers, 2 Nott & M. 269, 271 (both before and after leaving the husband; here, admitting intercourse with other men than the defendant).

[3] 1790, Hodges *v.* Windham, Peake 39 (here the husband's formerly suffering his wife's adultery with others was allowed to be an excuse for the defendant, — a doctrine probably unsound; but the admissibility of such conduct in mitigation would not have been doubted); 1801, Wyndham *v.* Wycombe, 4 Esp. 16 (the husband's open and notorious infidelity, admitted as a defence, — a doctrine going even further than the use of such facts in mitigation); 1802, Bromley *v.* Wallace, ib. 237 (similar facts allowed in mitigation but not in excuse); 1811, Fall *v.* Overseers, 3 Mumf. 495, 505, *semble* (wife's adultery, admissible, per Roane, J.).

[4] 1900, Wolf *v.* Frank, 92 Md. 138, 48 Atl. 132 (wife's unchaste conduct before separation, admitted to mitigate damages in her action for loss of husband's society).

[4] 1901, Kolb *v.* R. Co., 23 R. I. 72, 49 Atl. 392 (widow's action for husband's death; that plaintiff bore an illegitimate child since his death, not admitted in mitigation of damages).

unchaste character of the woman may be shown by particular acts, for the same reasons as in the preceding topics.[1]

§ 213. **Same**: (5) **Breach of Promise of Marriage.** For the same reasons as before, the unchaste character of the promisee of marriage, which is admissible in mitigation of damages (*ante*, § 75), may be shown by particular acts of unchastity.[1] Their use as evidencing character when offered to *excuse* the breach has been already noticed (*ante*, § 206).

4. Conduct independently usable evidentially for Other Purposes than to show Character (Design, Intent, Motive, etc.).

§ 215. **General Principle.** Suppose A to be charged with robbing the till in a store of which he is a sale-clerk; and suppose the facts to be offered against him (1) of having stolen the key of the till in the preceding week; (2) of having falsified his sale-book recently; (3) of having suffered large losses in gambling. From the point of view of the foregoing subject, these acts would all tend to show that he was of a dishonest and reckless disposition, and therefore disposed to steal from the till if opportunity offered. But from that point of view such acts would be wholly inadmissible, either in proving the charge in opening, or in rebutting his evidence of good character (*ante*, § 194). But that is not the only possible point of view. These acts may be relevant in other ways to show the commission of the crime, without in any way employing or suggesting their inference as to his character. They may justify other inferences which go to show his doing of the act charged. Thus, the purloining of the key may found an inference of Design or Plan, — a plan to use the key in some unlawful way for obtaining access to the till; or it may show Knowledge, — knowledge of the whereabouts of the till and of its valuable contents. So the falsification of his sale-book may show a Motive, — the desire to prevent his larcenies from being discovered; or it may show Design, — a general design to obtain money from his employers unlawfully. So the gambling losses may show Motive in another way, — the need and desire of money at any cost, to pay his losses. Whatever tended ordinarily to show such Knowledge or Design or Motive would otherwise have been admissible; and these acts are merely instances, from a variety of evidence, of classes of facts which would be evidential for their respective purposes.

Now this double or multiple possibility of use is an extremely common feature of evidence; and it is a well established principle, applied in numer-

[1] *Accord:* 1882, Mitchell *v.* Work, 13 R. I. 645 (indecent assault; that "the plaintiff had been unchaste in her relations with men," admitted, as "specific acts"); 1864, Walry *v.* Ferber, 18 Wis. 500, 503 (same, *semble*); 1903, Barton *v.* Bruley, —id.—, 96 N. W. 815 (acts of lewdness only, not beer-drinking, admissible). *Contra:* 1889, Gore *v.* Curtis, 81 Me. 403, 405, 17 Atl. 314 (indecent assault and battery and solicitation; the plaintiff's prior intercourse with others, inadmissible); 1893, Miller *v.* Curtis, 158 Mass. 127, 130, 32 N. E. 1039 (indecent assault; whether particular acts of lewdness are admissible to show the plaintiff's character, as affecting the shock to her feelings; *semble*, inadmissible).

[1] 1873, Sheahan *v.* Barry, 27 Mich. 217, 221; 1895, Siralton *v.* Dole, 45 Nebr. 472, 63 N. W. 875.

ous ways, that the inadmissibility of an evidential fact for one purpose does not prevent its admissibility for any other purpose otherwise proper (*ante*, § 13). In other words, if one door of entrance is closed to it, this does not prevent its entrance by other doors which may still remain open. Any other result would be unpractical and unreasonable in the highest degree. It would be as singular as a prohibition to a lame man to become a bookkeeper or a physician because he was incapable of becoming a circus-rider. This eligibility of evidence for one purpose, despite its ineligibility for another, is illustrated throughout the whole law of evidence. Reputation may be used, if it is a fact in issue, although it might not be admissible as hearsay to prove the fact reputed (*ante*, § 78). The unchaste acts of a complainant in rape may be admitted to disclose her unchaste character as evidence of consent (*ante*, § 200), although the same acts could not be received to impeach her veracity as a witness (*post*, § 987). Acts of an employee may be received to show the employer's knowledge of his incompetency (*post*, § 250), although they might not be admissible to show the employee's negligent character (*ante*, § 199). The misconduct of a defendant testifying for himself may be asked about to impeach his character as a witness (*post*, § 890), although they would not be received to show his character as an accused (*ante*, § 194). The uncommunicated threats or the character of a deceased person may be received to show him the aggressor in an affray (*ante*, § 110), although they would be inadmissible to show the defendant's belief in an impending attack (*post*, § 247). A testator's remarks about his relatives would be received to show the normal state of his affections, although they might be inadmissible to show directly the fact of duress (*post*, § 1734). In scores of these instances the principle is illustrated and established. Our law of evidence, as a workable system, would be impossible without it.

So far, then, as this general principle is concerned, the fact that a defendant's acts of misconduct would be inadmissible as showing his bad character does not in the slightest stand in the way of receiving the same acts in evidence if they are evidential for other purposes.

§ 216. **Criminality of Conduct Immaterial, if it is otherwise Relevant.** Is there, then, any reason why, for this particular class of facts, an exception should be made to the general canon of multiple admissibility, and facts relevant for some other purpose be rejected because they would be inadmissible if offered to show a bad character? In the great majority of instances in which such an exception has been sought to be established, the facts of conduct thus objected to are crimes; for obviously such conduct presents the clearest case in which the evidence is obnoxious to the character-rule, and the case in which the fact, if offered to show character, would most tellingly violate the spirit and the reasons of that rule. The question thus in effect becomes: Is the criminality of conduct a reason for excluding that conduct (when offered against an accused person) if it would be otherwise relevant and admissible?

Now the possibility of the abuse or misapplication of such evidence is no

reason for making such an exception. This possibility exists equally for all the other cases above-mentioned; and it is always open to the opponent, here as there, to have the jury fully instructed in the limited purpose and use of the evidence. Such an instruction, it is always understood, is an ample safeguard against abuse or misunderstanding. If it be said that here, in the case of an accused person, where past crimes are offered, there is greater danger of such abuse and greater risks of harm in case of abuse, there are two answers. One is dogmatic, that there is no difference in the rules of evidence for criminals and for civil cases (*ante*, § 4). The other is practical, that an exception such as is here suggested would handicap the State in its prosecution of the man of cumulative criminal daring. The greater the criminal brought to bar, the more closely the traces of his crimes were involved in other misdeeds, the more stupendous his scheme of crime culminating in the act charged, so much the more safe and invulnerable would he have rendered himself, if the law were made thereby to lose this evidential material. By every spot of blood with which he taints the steps of his criminal progress, he succeeds in increasing the safety of his new crimes. This is an ample reason, if no other were even conceivable, for refusing to make an exception, already antagonistic to principle and obnoxious to practical procedure. "No man," in the neat phrase of Mr. Justice Brewer, "can by multiplying crimes diminish the volume of testimony against him." It may be additionally noted that the chief reason for the character-rule, namely, the doctrine of unfair surprise (*ante*, § 194; *post*, § 1849) does not, after all, apply here; for it is plain that this class of facts does not range over the whole scope of the defendant's life (as character-evidence of particular misconduct would), but bears only on the immediate antecedents and concomitants in time of the act charged, — plan, knowledge, motive, intent, and the like; and there is thus ample warning beforehand of this scope of the inquiry. The argument of surprise has never been thought to have any bearing on any part of the evidence dealing with these common ingredients of the proof of any and every act.

This much attention to the suggested exception is called for, because the effort to secure it and the inclination to ask for it seems to be so persistent and so common at the Bar; and not because its validity has ever been recognized or implied. On the contrary, no fallacy has been more frequently or more distinctly struck at by denial, by argument, by explanation, on the part of the Courts. It has been rebuffed, rebuked, repudiated, discredited, denounced, so often that it ought by this time to have been abandoned forever.[1] That it does still crop up again from time to time is apparently due in part to the inherent difficulty of distinguishing between conduct as showing character and conduct as showing other things; but also to the failure to

[1] 1878, Lord Coleridge, C. J., in Blake *v.* Ass. Soc., 14 Cox Cr. 254 ("In any but an English court, and to any one but an English lawyer, the controversy whether this evidence is admissible or not, would seem, I imagine, supremely ridiculous; because it is admitted that it is most cogent and material to the plaintiff's claim").

appreciate that the rejection of past misconduct by the character-rule is never due simply to the incidental circumstance that it is misconduct, but to the fact that it is offered to show character and that herein consists its impropriety. If there is any other material or evidential proposition for which it is relevant, and if it is offered for that purpose, it is receivable, and its quality as misconduct or crime does not stand in the way. The persistency of this fallacy, and its utter lack of foundation, make it worth while to exhibit fully, from the utterances of the judges, their constant repudiation of the notion that the criminality of conduct offered for some relevant purpose is any objection to its reception:

1860, *Williams*, J., in *R.* v. *Richardson*, 2 F. & F. 346: "There is no principle of law which prevents that being put in evidence which might otherwise be so, merely because it discloses other indictable offences. . . . Evidence which is admissible for such a purpose is not the less so because it tends to prove the commission of other felonies by the prisoner."

1865, *Willes*, J., in *R.* v *Rowton*, Leigh & C. 520, 541: "There are cases in which it is allowable to go into the prisoner's antecedents, as for the purpose of showing that he has had opportunities of committing the offence, or that in a particular instance his act could not have been accidental. But these cases only establish the principle that a relevant fact which incidentally casts a slur upon the prisoner is not thereby rendered inadmissible when it is part of the direct evidence in the case."

1829, *Brockenbrough*, J., in *Walker's Case*, 1 Leigh 576: "It is proper that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances which tend to prove that the prisoner has been guilty of other crimes than that charged, . . . there is no reason why the criminality of such intimate and connected circumstances should exclude them, more than other facts apparently innocent. Thus, if a man be indicted for murder, and there be proof that the instrument of death was a pistol, proof that that instrument belonged to another man, that it was taken from his house on the night preceding the murder, that the prisoner was there on that night, and that the pistol was seen in his possession on the day of the murder just before the fatal act was committed, is undoubtedly admissible, although it has the tendency to prove the prisoner guilty of a larceny. Such circumstances constitute a part of the transaction; and whether they are perfectly innocent in themselves, or involve guilt, makes no difference as to their bearing on the main question which they are adduced to prove. But if the circumstances have no intimate connection with the main fact, if they constitute no link in the chain of evidence; then, supposing them innocent, their admission, to be sure, may do no harm, yet they ought to be excluded, because they are irrelevant; but if they denote other guilt, they are not only irrelevant, but they do injury, because they have a tendency to prejudice the minds of the jury, and for this additional reason they ought to be excluded."

1858, *Johnson*, J., in *People* v. *Wood*, 3 Park. Cr. 681: "The proper inquiry, when the circumstance is offered, is, Does it fairly tend to raise an inference in favor of the existence of the fact proposed to be proved? If it does, it is admissible whether such fact or circumstance be innocent or criminal in its nature. It does not lie with the prisoner to object that the fact proposed as a circumstance is so heinous in its nature and so prejudicial to his character that it shall not be used against him, if it bears upon the fact in issue. The atrocity of the act cannot be used as a shield under such circumstances, or as a bar to its legitimate use by the prosecution. If it could, many criminals might escape just and merited punishment solely by means of their hardened and depraved natures."

1874, *Kingman*, C. J., in *State* v. *Folwell*, 14 Kan. 109: "It would be a singular rule of law that a person accused of a grave crime could compel the exclusion of important and

relevant testimony merely by committing two felonies at the same time or so nearly connected that the one could not be proven without also proving the other."

1876, *Cushing*, C. J., in *State* v. *Lapage*, 57 N. H. 288: "I think we may assume, in the outset, that it is not the quality of an action, as good or bad, as unlawful or lawful, as criminal or otherwise, which is to determiue its relevancy. I take it to be generally true, that auy act of the prisoner may be put in evidence against him, provided it has any logical and legal tendency to prove any matter which is in issue between him and the State, notwithstanding it might have an indirect bearing, which in strictness it ought not to have, upon some other matter in issue."

1878, *Brewer*, J., in *State* v. *Adams*, 20 Kan. 319: "Whatever testimony tends directly to show the defendant guilty of the crime charged is competent, though it also tends to show him guilty of another and distinct offence. A party cannot by multiplying crimes diminish the volume of competent testimony against him."

1881, *Peters*, J., in *State* v. *Witham*, 72 Me. 531, 534: "It is no objection that, in attempting to prove one offence by the respondent's answers, another offence is proved or confessed by him, if the counection is such that the proof is relevant to the issue. That is unavoidable."

1888, *C. Allen*, J., in *Com.* v. *Robinson*, 146 Mass. 571, 16 N. E. 452: "While it is well settled in this Commonwealth that on the trial of an indictment the government cannot be allowed to prove other independent crimes for the purpose of showing that the defendant is wicked enough to commit the crime on trial, this rule does not extend so far as to exclude evidence of acts or crimes which are shown to have been committed as part of the same common purpose or in pursuance of it. . . . In such a case it makes no difference whether the preliminary acts are criminal or not; otherwise, the greater the criminal, the greater his immunity. Such preliminary acts are competent because they are relevant to the issue on trial; and the fact that they are criminal does not render them irrelevant. Suppose, for further example, one is charged with breaking a bank, and there is evidence that he had made preliminary examinations from a neighboring room; that his occupation of such room was accomplished by a criminal breaking and entering would not render the evidence incompetent."

1889, *Hemingway*, J., in *Billings* v. *State*, 52 Ark. 303, 309, 12 S. W. 574: "The general rule is well established, in civil as well as in criminal cases, that evidence shall be confined to the issne. It seems that the necessity for the enforcement of the rule is stronger in criminal cases. The facts laid before the jury should consist exclusively of the transaction that forms the subject of the indictment, and matters relating thereto; to enlarge the scope of the investigation beyond this would subject the defendant to the dangers of surprise against which no foresight might prepare and no innocence defend. Under this rule it is generally improper to introduce evidence of other offences. But if facts bear upon the offence charged, they may be proven, although they disclose some other offence. The test of admissibility is the connection of the facts offered with the subject charged. Such connection exists in a variety of cases."

1893, *Beatty*, C. J., in *People* v. *Walters*, 98 Cal. 138, 141, 32 Pac. 864, and *People* v. *Tucker*, 104 id. 440, 442, 38 Pac. 195: "It is trne that in trying a person charged with one offence it is ordinarily inadmissible to offer proof of another and distinct offence; but this is only because the proof of a distinct offence has ordinarily no tendency to establish the offence charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible; and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. . . . When such evidence is offered, the same considerations arise as upon the offer of other testimony: Is the evidence relevant and competent? Does it tend to prove any fact material to the issues?" [2]

[2] *Accord*: *Eng.*: 1804, R. *v.* Whiley, 2 Leach 4th ed. 985, 986; 1825, Burrough, J., in R. *v.* Moore, 2 C. & P. 235; 1836, R. *v.* Rooney, 7 C. & P. 517; 1843, Maule, J., in R. *v.* Tissington, 1 Cox Cr. 12; 1846, Maule, J., in R. *v.* Dossett, 2 C. & K. 306, 2 Cox Cr. 243; 1848, Erle, J.,

Occasionally this principle is spoken of as though it involved an exception to some otherwise general rule.[3] The truth is, however, that it is itself an illustration of the general principle, to which the character-rule is the exception. That general principle (*ante*, § 10) is that all facts affording any reasonable inference as to the act charged are relevant and admissible, including facts showing design, motive, knowledge, or the like, where these matters are in issue or relevant. To this general principle there is the important exception (*ante*, § 194), that conduct tending and offered to show bad moral character as evidence is inadmissible. Thus, so long as we avoid the realm of this exception and do not seek to attack the defendant's character, we are within the scope and sanction of the great general principle. We are in no sense saved by a mere exception; and we are further reënforced by the fundamental canon (*ante*, § 13) that admissibility for one purpose is not affected by inadmissibility for another:

1842, *Story*, J., in *Wood* v. *U. S.*, 16 Pet. 360: "They constitute exceptions to the general rule excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very substance of the rule; for whatever does legally conduce to establish the points in

in R. *v.* Bleasdale, 2 Cr. & K. 765; 1849, Pollock, C. B., in R. *v.* Geering, 18 L. J. M. C. 215; 1861, R. *v.* Weeks, Leigh & C. 18, 21, by five judges; 1864, Willes, J., in R. *v.* Reardon, 4 F. & F. 79; 1878, Blake *v.* Assur. Co., L. R. 4 C. P. D. 94, 102; *Ark.*: 1884, Melton *v.* State, 43 Ark. 367, 371; 1889, Billings *v.* State, 52 id. 303, 309, 12 S. W. 574 (disposing of the apparently contrary notion in Endaily *v.* State, 39 id. 280); *Cal.*: 1865, People *v.* Frank, 28 Cal. 507, 515 (the fact that an indictment is pending on the other charge is immaterial); 1885, People *v.* Cunningham, 66 id. 668, 670, 4 Pac. 1144, 6 Pac. 700, 846; 1887, People *v.* Rogers, 71 id. 565, 567, 12 Pac. 679; 1894, People *v.* Lane, 101 id. 513, 517, 36 Pac. 16; 1894, People *v.* Tomlinson, 102 id. 19, 24, 36 Pac. 506; 1896, People *v.* Craig, 111 id. 460, 468, 44 Pac. 186; 1896, People *v.* Sanders, 114 id. 216, 46 Pac. 153; 1897, People *v.* Ebanks, 117 id. 652, 49 Pac. 1049; People *v.* Wilson, ib. 688, 49 Pac. 1054; 1897, People *v.* Winthrop, 118 id. 85, 50 Pac. 390; 1899, People *v.* Pette, 123 id. 373, 55 Pac. 993; *Fla.*: 1898, Roberson *v.* State, 40 Fla. 509, 24 So. 474; *Ill.*: 1889, Farris *v.* People, 129 Ill. 521, 529, 21 N. E. 821; 1893, Painter *v.* People, 147 id. 463, 35 N. E. 64; 1897, Williams *v.* People, 166 id. 132, 46 N. E. 749; 1899, Schintz *v.* People, 178 id. 320, 52 N. E. 903; 1902, Henry *v.* People, 198 id. 162, 65 N. E. 120; 1903, Glover *v.* People, — id. —, 68 N. E. 464; *Ia.*: 1899, State *v.* Wrand, 108 Ia. 73, 78 N. W. 788; *Kan.* 1874, State *v.* Folwell, 14 Kan. 105, 109; 1878, State *v.* Adams, 20 id. 311, 319; *Me.*: 1881, State *v.* Witham, 72 Me. 531, 534; *Mass.*: 1869, Thayer *v.* Thayer, 101 Mass. 114; 1870, Com. *v.* Choate, 105 id. 458; 1877, Com. *v.* Scott, 123 id. 235; 1878, Com. *v.* Bradford, 123 id. 17, 45; 1882, Com. *v.* Jackson, 132 id. 45; 1884, Com. *v.* Corkin, 136 id. 429; 1886, Com. *v.* Blood, 141 id. 570, 575, 6 N. E. 769; 1888, Com. *v.* Schaffner, 146 id. 515, 16 N. E. 280; 1902, Higlister *v.* Freneh, 180 id. 299, 62 N. E. 264; *Mich.*: 1878, People *v.* Marble, 38 Mich. 117, 123; 1882, People *v.* Henssler, 48 id. 49, 52, 11 N. W. 804; 1896, People *v.* Macard, 109 id. 623, 67 N. W. 968; *Mo.*: 1866, State *v.* Harold, 38 Mo. 497; 1879, State *v.* Nugent, 71 id. 136, 141; *N. H.*: 1872, Darling *v.* Westmoreland, 52 N. H. 401, 406 (quoted *post*); 1898, State *v.* Davis, 69 id. 350, 41 Atl. 267; *N. J.*: 1838, State *v.* Robinson, 16 N. J. L. 508; *N. M.*: 1900, Terr. *v.* McGinnis, 10 N. M. 269, 61 Pac. 208; *N. Y.*: 1858, People *v.* Stout, 4 Park. Cr. 71, 114, 128, 138; 1874, Weed *v.* People, 56 N. Y. 628; 1874, Coleman *v.* People, 58 id. 556, 560; 1880, Pierson *v.* People, 79 id. 436; 1895, People *v.* Shea, 147 id. 78, 41 N. E. 508; 1896, People *v.* McLaughlin, 150 id. 386, 44 N. E. 1017; 1897, People *v.* Peckens, 153 id. 576, 47 N. E. 883; *N. D.*: 1896, State *v.* Kent, 5 N. D. 516, 67 N. W. 1052; *Or.*: 1881, State *v.* Wintzingerode, 9 Or. 153, 158; *Pa.*: 1863, Com. *v.* Ferrigan, 44 Pa. 386; 1878, Turner *v.* Com., 86 id. 70; *S. C.*: 1839, State *v.* Ford, 3 Strobh. 517, 524; *U. S.*: 1893, Moore *v.* U. S., 150 U. S. 57, 61, 14 Sup. 26; 1900, Wolfson *v.* U. S., 41 C. C. A. 422, 101 Fed. 430; *Vt.*: 1876, State *v.* Bridgman, 49 Vt. 212; *Va.*: 1829, Walker's Case, 1 Leigh 576; 1847, . irr *v.* Com., 4 Gratt. 534; 1867, Adams *v.* Lawson, 17 id. 259, *semble*.

[3] Thus, in People *v.* Cunningham, 66 Cal. 671, 4 Pac 1144, 6 Pac. 700, 846, *supra*, it is said that "as a general rule no evidence can be introduced respecting any other crimes than that charged," except so far as it "tends to prove the crime alleged."

issue is necessarily embraced in it, and therefore a proper subject of proof, whether it be direct or only presumptive."

1872, *Doe*, J., in *Darling* v. *Westmoreland*, 52 N. H. 401, 412: "It is sometimes erroneously supposed that such evidence is excluded because it is 'collateral.' The true reason seems to be the exception (established by ancient English, and adopted without due consideration by modern American authorities) which excludes evidence of a prisoner's character and disposition for the commission of such a crime as that alleged in the indictment on which he is being tried, and the fact that although the Courts who introduced the exception might trust themselves to weigh evidence of other crimes, solely on the question of physical strength or other question on which it might be competent, they would not trust juries. It is evident that the exception, not being sufficiently emphasized as an exception and a very peculiar one, has produced much confusion, by seeming to countenance the idea that the law has an antipathy against experimental knowledge in general."

On the other hand, where the facts offered consist of past misconduct, whether criminal or not, and being offered to show design, motive, intent, knowledge, or the like, are determined *not* to be relevant for any such purpose, it follows, as of course, that they are also obnoxious to the character-rule and must be excluded. If they had been innocent (as Mr. Justice Brockenbrough points out above), "yet they ought to be excluded, being irrelevant"; but where they involve past misconduct, "they are not only irrelevant, but they do injury," because they prejudice the accused by invoking his character, "and for this additional reason they ought to be excluded." They are admitted, then, whenever they are relevant otherwise than to character; and if they are not so relevant, they are excluded for the double reason of irrelevancy for the one purpose and impolicy for the other. Thus the only legitimate bearing of the character-rule is to impel to a greater caution in determining their relevancy in a given instance; because if we are too liberal or loose, in not exacting an adequate degree of relevancy or probative value for the allowable purposes, we admit evidence whose dominant bearing is a dangerous and forbidden one. But while greater care and caution is thus called for in applying to this class of evidence the tests of relevancy for design, motive, and the like, those tests themselves remain the same in scope, and, when once satisfied, avail to admit the evidence. Whatever avenues of relevancy — design, motive, knowledge, identity, and so on — were open to this class of facts before, are open to them still. We are merely to scrutinize more carefully their right to enter these avenues, because of the harm that may be done by erroneous or over-loose interpretation:

1854, *Scott*, J., in *Austin* v. *State*, 14 Ark. 559: "It is certainly true as a general rule, both in civil and criminal cases, that the evidence must be confined to the point in issue; and in criminal cases there is perhaps a greater necessity, if possible, than in civil proceedings to enforce the rule. But in neither class of cases does this rule exclude all evidence that does not bear directly upon the issue; on the contrary, all evidence is admissible which tends to prove it, and no facts are forbidden to be shown except such as are incapable of affording any reasonable presumption or inference in elucidation of the matters involved in the issue."

1861, 1863, *Bigelow*, C. J., in *Com.* v. *Shepard*, 1 All. 581, and *Com.* v. *Jeffries*, 7 Id. 567: "It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason, it is essential to the rights of the accused that, when such evidence is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent. . . . If it be asked what limit is to be placed on the range of such an inquiry, the answer is obvious: It cannot be extended to facts or circumstances which do not naturally or necessarily bear on the issue to be established, precisely as evidence of all collateral facts and circumstances must be confined to the proof of those which have a legitimate and direct connection with the principal transaction."

§ 217. **Summary of other Modes of Relevancy.** What are these other avenues of Relevancy by which such conduct may enter evidentially? They are limited only by the matters which, in the words of Mr. J. Bigelow, "naturally or necessarily bear on the issue to be established." These modes will be found throughout the whole scope of the system of relevancy, and the utility of such evidence may appear at any point. Nevertheless, the commonest instances of its use occur in the ensuing topics, because the matters there to be proved are those for which conduct most commonly serves as evidence. These matters may here be briefly enumerated, illustrating how under each head an act of misconduct may be, among other kind of facts, relevant: *Capacity* (physical strength or the like): on a charge of placing a large stone on a railroad track, the previous felonious placing of a rail on the track shows the defendant's strength-capacity for the act; *Habit* or *Custom:* to show a habit of omitting a signal at a railroad-crossing, previous instances of its omission are relevant; *Design* or *Plan:* to show a plan to rob a safe, the stealing of the key would be relevant; or to show a plan to murder a whole family and obtain their insurance-money, the killings of other insured members of the family would be admissible; *Knowledge* or *Belief:* to show knowledge of the counterfeit quality of a bank-bill, a former unsuccessful attempt to pass a similar one is relevant; *Intent:* to show intentional falsification of accounts, former incorrect entries of a similar sort tend to negative mistake; *Motive:* to show a probable desire in a husband to get rid of his wife, an adulterous relation with another woman is relevant; *Identity:* to assist in identifying a murderer, the commission of another murder by the defendant is relevant, if it appears that the same person committed both. In all these instances, and in others less frequent, the misconduct of a defendant may become relevant otherwise than as showing Character. In the following chapters the bearing of the present principle is amply illustrated.

§ 218. **Res Gestæ and Acts a part of the Issue; Inseparable Crimes.** There is, however, an additional class of cases in which the misconduct of a defendant may be received, irrespective of any bearing on character, and yet not as evidential of one of the above other matters (design, motive, or the like), or as relevant to any particular subsidiary proposition. That class

includes *other criminal acts which are an inseparable part of the whole deed.* Suppose that A is charged with stealing the tools of X; the evidence shows that a box of carpenter's tools was taken, and that in it were the tools of Y and Z as well as of X; here we are incidentally proving the commission of two additional crimes, because they are necessarily interwoven with the stealing charged, and together form one deed. The other two crimes are not offered as affecting A's character, nor do they affect his character; because all were done, if at all, as parts of a whole, and if we believe or disbelieve his doing of one part, we believe or disbelieve his doing of all. The two other crimes do not affect his character in the way forbidden by the reasons of the character-rule (*ante*, § 194) — *i.e.* by way of undue prejudice, in that we might condemn him now, though innocent of the act charged, because we are prejudiced by his former crimes; nor by way of unfair surprise, in that he cannot be prepared to defend himself against evidence of former misconduct of which he had no notice. While thus, on the one hand, these concomitant crimes are not obnoxious to the reasons of the character-rule, so also they are necessarily gone into in proving the entire deed of which the act charged forms a part. There is therefore not only a necessity for proving them, but no objection against proving them.[1]

[1] 1831, R. *v.* Salisbury, 5 C. & P. 155 (stealing bank-notes from a letter; the stealing of others from another letter, and replacing them by the ones in issue, admitted as a part of the transaction); 1862, R. *v.* Cobden, 2 F. & F. 833 (burglary; evidence of three other burglaries by the defendants on the same night was admitted, partly because "so intermixed that it is impossible to separate them," partly to explain the disposal of the property taken); 1899, People *v.* Piggott, 126 Cal. 509, 59 Pac. 31 (general principle stated); 1898, Roberson *v.* State, 40 Fla. 509, 24 So. 474 (finding stolen goods under a warrant to search for other stolen goods; nature of the warrant, excluded, because of the intimation of other crimes; unsound); 1898, Republic *v.* Tsunikichi, 11 Haw. 341, 344 (killing of a child at the same time with that of a woman, admitted); 1899, Republic *v.* Yamane, 12 id. 189, 217 (assault on another person at the same time, admitted); 1885, Turner *v.* State, 102 Ind. 425, 1 N. E. 869 (the possession of another stolen book, admitted, as contradicting the defendant's account of how he came into possession of the lot of books among which was the one charged); 1852, Terreil *v.* Allen, 7 La. An. 47, 48 (inveigling and stealing a slave; the capture of the slave in the defendant's quarters, admitted, though involving the crime of harboring; Preston, J.: "The same evidence that tends to prove one crime often tends to prove another; the firing a gun may tend to prove an attempt to kill, or manslaughter, by an actual killing; so the felonious taking of goods may be offered to prove a burglary as well as larceny"); 1857, State *v.* Munco, 12 id. 625 (charge of firing a gun with intent to kill; the fact of the other person being wounded, and a distinct crime shown, held admissible as a part of the proof of the offence charged); 1882, Stete *v.* Vines, 34 id. 1079, 1083 (another killing at the same time, by a member of the same party lying in wait, admitted); 1849, Com. *v.* M'Pike, 3 Cush. 181, 184 (manslaughter; to show the assault which ensued in the death, a conviction for it was received, with other evidence, but this was not to be used to show "his disposition to engage in such assaults"); 1888, Com. *v.* Schaffner, 146 Mass. 515, 16 N. E. 280 (on a charge of coloring milk, evidence of the milk being also of bad quality, held not inadmissible because it concerned a separate offence not necessarily involved); 1896, State *v.* Perry, 136 Mo. 126, 37 S. W. 804 (that other persons were killed within a few moments of the same time, admitted); 1897, State *v.* Porter, 32 Or. 135, 49 Pac. 964 (three persons killed within a few moments; the circumstances and conditions of all three deaths admissible); 1899, State *v.* Wong Gee, 35 id. 276, 57 Pac. 914 (another assault by defendant at the same time, admitted); 1899, State *v.* Hanna, ib. 195, 57 Pac. 629 (stealing of third person's horses at same time, admitted); 1898, Com. *v.* Roddy, 184 Pa. 274, 39 Atl. 211 (murder; traces of the escaping murderer, involving the stealing of another person's property, received); 1896, State *v.* Hayes, 14 Utah 118, 46 Pac. 752 (three men killed under the same circumstances; the deaths of two admitted on a charge of killing the third); 1895, State *v.* Craemer, 12 Wash. 217, 40 Pac. 945 (where an infant child was killed at the same time as the mother, all the circumstances were received).

For other instances involving the *stealing of chattels* from the same lot, see *ante*, § 152 (possession of stolen chattels) and *post*, § 414 (identity of chattels). For other instances involving contemporaneous *homicides*, see *post*, § 363 (other

It is sometimes said that such acts are provable as a part of the *res gestæ*. But this phrase is unsatisfactory, first, because it is obscure and indefinite, and needs further definition and translation before either its reason or its scope can be understood; and, secondly, because its very looseness and obscurity lend too many opportunities for its abuse. It is not too much to say that it is nowadays most frequently used merely as a cover for loose ideas and ignorance of principles. It is occasionally used to admit acts whose real function is to show Intent or Motive or Design. But the result is only to make rulings on evidence arbitrary and chaotic, when we ignore the correct purposes of admission and substitute an indefinite and meaningless phrase of this sort. The term *res gestæ* should be once for all abandoned as useless and vicious. Let it be said that such acts are receivable as "necessary parts of the proof of an entire deed," or "inseparable elements of the deed," or "concomitant parts of the criminal act," or anything else that carries its own reasoning and definition with it; but let legal discussion sedulously avoid this much-abused and wholly unmanageable Latin phrase.[2]

acts to show intent). Throughout the various classes of crimes dealt with in §§ 302–367, *post*, will be found further instances. For other instances of proof of an *inseparable crime*, see *post*, § 414 (evidence of identity).

[2] Its abuse in other senses is dealt with *post*, § 1765.

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION.

TOPICS II, III, IV, V: EVIDENCE TO PROVE PHYSICAL OR MENTAL CAPACITY, DESIGN OR INTENT.

CHAPTER X.

Topic II: EVIDENCE TO PROVE PHYSICAL CONDITION OR CAPACITY (STRENGTH, SKILL, HEALTH, ETC.).

§ 219. **General Principle.** It has been already noted (*ante*, § 190) that physical capacity or condition, like most other human attributes, may be evidenced in three ways: (1) by conduct or other manifestations indicating their inward source; (2) by external facts pointing forward to the existence of the quality or condition; (3) by the prior or subsequent existence of the quality or condition, pointing forward or backward to its existence at the time in question. The considerations which affect the validity of the various inferences are simple, depending chiefly on ordinary experience and common sense, and cause little difficulty. The doctrine just examined (*ante*, § 216), that the criminality of conduct which is in itself relevant is no objection to its reception, is frequently illustrated; and the necessity for applying it and for distinguishing the character-rule (*ante*, § 194) has given the occasion for most of the rulings. The objections of unfair surprise, undue prejudice, and confusion of issues (*ante*, §§ 194, 202) are here occasionally applicable. But they have ordinarily no real force.

The trial Court's discretion is best trusted to determine their validity in the light of the circumstances of each case.

§ 220. **Power or Strength, from Instances of Conduct exhibiting it.** Where a person's physical power or strength is a proposition to be proved, instances of the person's conduct and acts, manifesting the existence in him of such power or strength, are the natural and proper evidence of it. In limiting the use of this evidence, the trial Court's discretion should control, — a principle fully established in New Hampshire.[1]

§ 221. **Skill or Means, from Instances of its Exercise.** The possession of instruments adapted to do an act in question is evidence of capacity or ability to do it.[1] The skill to do the act may be evidenced by previous or subsequent conduct exhibiting it.[2] Skill or competence may also to some extent be inferred from ordinary appearance and conduct.[3] That a physician's competence or skill may be evidenced by marked instances of the presence or absence of it seems clear from the present point of view; but a

[1] 1838, Ellis *v.* Short, 21 Pick. 142 (false arrest; to prove the plaintiff's strength and power of violent resistance when drunk, the fact of his having on a former occasion when drunk thrown stones and resisted arrest with violence was excluded; unsound); 1858, State *v.* Wentworth, 37 N. H. 196, 211 (indictment for placing an obstruction, viz. two stones of considerable size, on a railroad track; the fact of the placing of iron rails on the track, near by, about the same time, by the defendant, was admitted as showing that the defendant "had the strength and ability to place them there"); 1863, State *v.* Knapp, 45 id. 148, 149, 154 (rape; to show the defendant's "capacity of overcoming such resistance as the prosecutrix might have offered, . . . evidence was received that he had once "taken a barrel of flour up in his hands before him and carried it several rods," had "carried a barrel of sugar some ten rods on his shoulder," etc.); 1879, Hilliard *v.* Beattie, 59 id. 462, 465 (the rate of pulse of other healthy men subjected to the same conditions as the plaintiff was held properly excluded in the trial Court's discretion); 1895, People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066 (the condition of the defendant, charged with murder, the act of stabbing being conceded, and his affection by syphilis, was held unnecessarily and improperly admitted to show his capacity to commit the assault, on the principle that it merely prejudiced the jury, and that "illegal evidence which has a tendency to excite the passions, arouse the prejudice, awaken the sympathies, or warp or influence the judgment of the jurors, in any degree, cannot be considered as harmless"); 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 512 (strength-tests, excluded, except on cross-examination to test accuracy).

For the relevancy of physical capacity, when properly evidenced, to show the doing or not-doing of an act, see *ante*, §§ 84, 85.

[1] 1876, Com. *v.* Brown, 121 Mass. 71, (abortion; the possession of a "speculum chair" and other instruments, admitted, as showing that the defendant had "the means and opportunity to commit the offence charged"). For other ruling, *see ante*, §§ 87, 88, and *post*, § 238; some of the rulings are difficult to place, as the evidential fact has often more than one aspect.

[2] 1885, Belt *v.* Lawes, Eng., described in Montague Williams' Reminiscences, II, 222 (libel, for charging that the plaintiff, a sculptor, did not make the works of art put forth by him as his own, but merely employed others and took their productions; the plaintiff was ordered by the judge to execute a second bust of a person of whom there was already in existence a bust claimed by the plaintiff to be his work; this the plaintiff did in a room adjoining the Court, under conditions arranged to prevent fraud; and the resulting bust "went a long way to determine the result of the trial," which was a verdict for £5000); 1885, Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698 (defence of forgery to a promissory note; evidence rejected of the plaintiff's having shown a person how to imitate notes by tracing; the character-rule was invoked as excluding evidence of "capacity and means" where directed to the act in issue and not the intent of the doer; the ruling is unsound). Compare the citations *ante*, § 87, *post*, §§ 309, 460, 461.

[3] 1885, Keith *v.* N. H. & N. Co., 140 Mass. 175, 180, 3 N. E. 28 ("the appearance and conduct [upon the stand] of a railroad car-inspector," admissible "to aid the jury in determining whether he was a person of suitable qualifications and of sufficient intelligence to be entrusted with so responsible a duty"; the "principle applies where the inquiry . . . relates to intelligence and understanding as well as to physical capacity"; 1890, Peaslee *v.* R. Co., 152 id. 155, 158, 25 N. E. 71 (sanctioning the preceding, where there is other evidence of incompetency); 1897, Olsen *v.* Andrews, 168 id. 261, 47 N. E. 90 (see the citation *ante*, § 199; here nervous conduct, etc., was admitted to show unfit physical condition of an employee).

confusion of moral character with technical skill has occasionally led to the judicial treatment of such evidence under the character-rules (*ante*, §§ 108, 67, 87).[4]

§ 222. **Age, from Appearance; Voice, from Utterances; Sight, from things seen.** Experience teaches us that corporal appearances are approximately an index of the age of their bearer, particularly for the marked extremes of old age and youth. In every case such evidence should be accepted and weighed for what it may be in each case worth. In particular, the appearance of an alleged minor may be considered in judging of his age;[1] a contrary rule would be pedantically over-cautious.[2]

[4] The rulings are therefore by no means consistent: 1807, R. *v.* Williamson, 3 C. & P. 635 (a midwife indicted for childbed-death caused by negligence; fourteen women were called, and six examined, who had been delivered by the accused; Ellenborough, L. C. J.: "From the evidence of the witnesses on his behalf it appears that he had delivered many women at different times, and from this he must have had some degree of skill"); 1831, R. *v.* Long, Old Bailey, before Bayley, B., Pelham's Chronicles of Crime, ed. 1891, II, 217, 227 (trial of a quack physician, for manslaughter by improper treatment; this accused called one Mr. A., who testified that "he had several times been under the care of the prisoner; he had an asthma, and subsequently a determination of blood to the head. The Attorney-General here interfered, and submitted that the course of the present examination ought to be confined to the general character of the prisoner; in which the Court, after hearing arguments from Mr. Alley and Mr. Phillips, acquiesced. Mr. Phillips endeavored to shake this decision, contending that as the indictment raised the question whether Mr. Long was grossly ignorant, or had been grossly careless, it was impossible to establish his innocence otherwise than by showing, as he verily believed they could, that he was both learned and skilful, and most attentive and humane in his practice of the healing art. Mr. Baron Bayley: 'We cannot go into specific cases; we must confine ourselves to general evidence.' Mr. Phillips resumed his argument at length; but the Attorney-General in reply said that if his learned friends found themselves at liberty to go into all the successful cases of the prisoner, he should go into his several failures in practice. The Court having repeated its former decision, the examination of Mr. A. was resumed, and he stated that the prisoner had attended him for several disorders, and he had the fullest reason to be satisfied with his skill, care, and attention. Mrs. A., the wife of Gen. A., Miss R., her sister, Mrs. P., Mrs. M., Mrs. Mc., and a vast number of other ladies and gentlemen were then examined, and every one bore testimony in the strongest manner to the skill, assiduity, and humanity of the prisoner, and to the extraordinary success which had uniformly attended his practice"; notice that what was excluded was only the details of particular cases, the general success of the accused's treatments being received); 1845, R. *v.* Whitehead, 3 C. & K. 202, Maule, J. (particular instances inadmissible; though the doctrine seems to have been violated in this very case); 1869, Key *v.* Thomson, 1 Han. N. Br. 295, 301 (malpractice; defendant's successful similar treatment of other cases, admitted to show the incorrectness of the plaintiff's witnesses' testimony as to the unskillfulness of his treatment); 1882, Dresbrack *v.* State, 38 Oh. St. 365 (see citation *ante*, § 199); 1898, Lacy *v.* Kossuth Co., 106 Ia. 16, 75 N. W. 689 (incompetency of physician, under statute; particular acts excluded). Compare also the citations *ante*, §§ 67, 87, and *post*, § 457.

[1] Can. St. 1900, c. 46, adding § 701 *a* to Crim. Code 1892 (in proving the age of a young person, on certain charges, the judge or jury "may infer the age from the appearance of the boy, girl, child, or young person"); 1901, Black *v.* Pate, 130 Ala. 514, 30 So. 434 (age of a voter); 1899, Jones *v.* State, 106 Ga. 365, 34 S. E. 174 (rape of girl of fifteen years; appearance of the girl, allowed to be considered in determining capacity to consent); 1896, Republic *v.* Parsons, 10 Haw. 601, 606 (sexual intercourse under age); 1898, Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632 (girl said to be under sixteen; jury allowed to consider appearance); 1902, People *v.* Elco, 113 Mich. 519, 91 N. W. 755 (criminal intercourse with a girl under sixteen); 1889, Elsner *v.* Supreme Lodge, 98 Mo. 645, 11 S. W. 991; 1900, State *v.* Thomson, 155 id. 300, 55 S. W. 1013; N. Y. Laws 1882, c. 340 (appearance to be evidence to the Court on dispute as to child's age); Laws 1883, c. 375, § 2 (same, on charge of selling firearms to minor); 1851, State *v.* Arnold, 13 Ired. 184, 192 (inspection of a defendant, to judge whether he was under fourteen); 1893, Jones *v.* State, 32 Tex. Cr. 108, 22 S. W. 149 (selling liquor to a minor; the buyer's appearance, admissible); 1903, Earl *v.* State, — id. —, 72 S. W. 175; 1888, Hermann *v.* State, 73 Wis. 248, 250, 41 N. W. 171 (knowing enticement of minor female; her appearance before jury allowed to be considered, her age being otherwise shown, as indicating whether the defendant must have known her to be a minor). Compare the doctrine as to *exhibiting the person to the jury*, *post*, § 1160.

[2] This is apparently the rule in Indiana; some of the rulings intimate an even more unjustifiable doctrine, namely, that the appearance of the person cannot be considered even in deter-

The quality of a *voice* may be evidenced by instances of utterance. But here the questions that have arisen concern rather the requirement of the oath (*post*, § 1824), the opinion rule (*post*, § 1977), the possibility of accurate knowledge founded on hearing only (*post*, § 660), and the relevancy of identifying circumstances (*post*, § 413).

The capacity of *sight* may be indicated by instances of its exercise; but this can best be considered in dealing with the modes of evidencing distance and other external facts (*post*, § 457).

§ 223. **Health or Disease, from Appearance, Occupation, or Heredity.** Corporal *appearances* and *conduct* as indications of the inward health or lack of it are relevant.[1] The questions which arise in connection with such evidence are due to other considerations than relevancy; these may involve the propriety of inspection of an injured body by the jury (*post*, § 1158), or the competency of lay witnesses to testify to health or disease, by interpreting corporal appearances (*post*, § 568), or the application of the opinion rule to testimony about appearances of health or disease (*post*, §§ 1974, 1975), or the application of the hearsay rule, or its exceptions, to the person's statements of pain or injury (*post*, §§ 1718, 1790).

Physical capacity may also be evidenced by the *hereditary* existence of a certain quality;[2] and the same test of admissibility would here be applied as for insanity (*post*, § 232). Capacity may also sometimes be evidenced *a priori* (on the principle noted *ante*, § 190) by circumstances likely to result in a physical injury or degeneration, — as when "expectation of life," in insurance cases, is affected by the *hazardous circumstances* of one's occupation.[3]

§ 224. **Pecuniary Capacity, from Borrowing or Non-Payment.** It has already been seen (*ante*, § 89) that a person's pecuniary capacity to pay a debt or to lend money is relevant to the probability of his paying or lending. To show his pecuniary condition as to this capacity, his conduct in borrowing or not paying thus becomes relevant. Nevertheless, a line is to be drawn; for the mere failure (for example) to pay a specific debt may be open to so

mining whether the liquor-seller acted in good faith in treating the person as an adult: 1876, Ihinger *v.* State, 53 Ind. 251, 253 (appearance before the jury, rejected; but testimony to appearance held competent, the issue being the defendant's good faith in selling liquor to an alleged minor); 1878, Robinins *v.* State, 63 id. 235, 237 (selling liquor to a minor; appearance rejected); 1878, Swigart *v.* State, 64 id. 598 (same); 1885, Bird *v.* State, 104 id. 385, 389, 3 N. E. 827 (same); 1887, Louisville, N. A. & C. R. Co. *v.* Wood, 113 id. 544, 550, 14 N. E. 572, 16 N. E. 197 (same, but treated as exceptional). In these rulings (except in the first) there is apparently no discrimination between the use of appearance before the jury and testimony to appearance; but possibly it is the former only (as in the first ruling) that is intended to be excluded. For a consideration of this erratic doctrine that *inspection by the jury* is improper, see *post*, § 1160.

For the use of such evidence to show the *liquor-seller's belief*, see *post*, § 257.

[1] 1867, R. *v.* Zeigert, 10 Cox Cr. 547 (murder by starving a child; the child's asking for bread admitted as an "act"); 1881, Cowley *v.* People, 83 N. Y. 477 (cited *post*, § 225).

[2] 1902, Birmingham Southern R. Co. *v.* Cuzzart, 133 Ala. 262, 31 So. 979 (injury to eyes; to prove the plaintiff's injury due to other causes, the defendant was not allowed to show the existence of eye ailments in other members of the plaintiff's family, without evidence of the "descendible quality" of such ailments).

[3] 1893, Birmingham M. R. Co. *v.* Wilmer, 97 Ala. 165, 170, 11 So. 886 (that the plaintiff was in an extra hazardous occupation, admitted); 1893, Townsend *v.* Briggs, 99 Cal. 481, 485, 34 Pac. 116 (the injured plaintiff's expectation of life being in issue, any facts about him lessening that expectation are admissible; here, his drinking habits).

many other explanations than total lack of the means (on the logical principle of § 32, *ante*) that it would have no appreciable probative value. There is room for much variety of circumstance in such evidence, and the discretion of the trial Court should control.[1]

§ 225. **Prior or Subsequent Condition.** In showing the existence at a given time of any physical condition (skill, strength, health, or the like), the existence of such a condition at a prior or subsequent time (being one of the classes of evidence noted *ante*, § 190) is evidential.[1] The limits of time over which such evidence may range must depend on the circumstances of each case as to the probability of intervening changes, and should be left entirely within the discretion of the trial judge. Other and analogous illustrations of the doctrine of prior and subsequent condition may be found elsewhere (*post*, §§ 233, 379, and 437).

2. Mental Capacity.

§ 227. **Modes of evidencing Mental Capacity circumstantially.** Mental capacity, like other human qualities or conditions (*ante*, § 190), may conceivably be evidenced circumstantially by three classes of facts, (1) the person's outward conduct, manifesting the inward and causing condition;

[1] The conflict of rulings illustrates the desirability of making no hard-and-fast rule: 1871, Woodward *v.* Leavitt, 107 Mass. 453, 458 (borrowing money to compromise with creditors, admitted); 1855, Wiggin *v.* Plumer, 31 N. H. 251, 270 (same, admitted in rebuttal of alleged non-borrowing); 1864, Angell *v.* Rosenbury, 12 Mich. 241, 252 ("among the particular facts admissible for the purpose, and thought to be of much weight, and most generally resorted to, is the return of an execution against the party unsatisfied"); 1875, Burr *v.* Wilson, 22 Minn. 206, 211 (same); 1880, Pontius *v.* People, 82 N. Y. 339, 349 (the defendant claimed that he had lent $4000 and taken a note; to disprove the likelihood of this, evidence was offered of his straitened pecuniary condition; Danforth, J.: "His conduct in regard to necessary expenses, his pecuniary necessities, the borrowing of money by himself at or about the time when he claimed to have advanced the complainant money, would all bear upon the question. So would the fact that small debts were contracted by him and not paid when due or after frequent request, indicate something in regard to pecuniary ability. . . . A man may indeed be willing to lend to his neighbor in time of need, and yet be unwilling to pay his debts in due season, although fully able to do both; but whether in any given case either one or both of these facts existed, would have to be determined from a variety of circumstances, and their force could properly be estimated by the jury"); 1902, Bank of State of N. Y. *v.* Southern N. Bank, 170 N. Y. 1, 62 N. E. 677 (insolvent condition of a firm on Feb. 26, held admissible to show its condition on Jan. 21 prior); 1870, Woods *v.* Gummert, 67 Pa. 136 (action for money advanced as agent in 1860–62; an unsatisfied execution against the plaintiff in 1858 was excluded; though the use of such evidence for some situations was conceded; Sharswood, J.: "If the defendant is allowed to show that the plaintiff owes debts which he does not pay, the plaintiff may certainly rebut the evidence by showing that he has a good defence to them; thus innumerable collateral issues might be introduced. . . . Now had the plaintiff been suing upon a paper alleged to be forged or procured by fraud, such evidence might have been admissible as having some weight in a case of doubt, especially if it was contemporaneous with the transaction in controversy"). Compare the citations *post*, §§ 379, 392.

[1] 1899, Sturdevant's Appeal, 71 Conn. 392, 42 Atl. 70 (condition of a person's leg a year before, admitted); 1892, Com. *v.* Campbell, 155 Mass. 537, 30 N. E. 72 (former facial appearance, admitted); 1893, Com. *v.* Morgan, 159 id. 378, 34 id. 458 (same); 1894, Gilbert *v.* R. Co., 160 id. 403, 36 N. E. 60 (former physical health; doubtful, or subject to the trial Court's discretion); 1903, State *v.* Scott, — Mo. —, 72 S. W. 897 (condition of prosecutrix in rape, some months later, admitted); 1881, Cowley *v.* People, 83 N. Y. 477 (condition of a starved child after the time charged, the child having changed only for the better, admitted); 1895, Taylorville, B. & H. R. Co. *v.* Warner, 88 Tex. 642, 32 S. W. 868 (personal appearance two years before, by photograph, admitted). For other instances where the condition in question was shown by photograph and the ruling also involved the use of prior or subsequent condition, see *post*, § 792.

(2) pre-existing external circumstances, tending to produce a special mental condition; and (3) the prior or subsequent existence of the condition, from which its existence at the time in question may be inferred. Each of these modes has its own special difficulties and problems.

§ 228. (1) **Insanity, in general, as evidenced by Conduct.** (1) Sanity and insanity are terms applicable to the mode of operation of the mind as judged by some accepted standard of normality. The mode of operation of the mind is ascertainable from the conduct of the person in question, *i. e.* from the effect produced by his surroundings on his mind when responding by action to those surroundings. Virtually, then, the mind is one, while the surroundings are multifold; and the mode of operation cannot be ascertained to be normal or abnormal except by watching the effects through a multifold series of causes. On the one hand, no single act can be of itself decisive; while, on the other hand, any act whatever may be significant to some extent. The first and fundamental rule, then, will be that *any and all conduct* of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for if a specific act does not indicate insanity it may indicate sanity. It will certainly throw light one way or the other upon the issue. "Upon this I believe that no difference of opinion will be found to exist," said Mr. Justice Patteson, in a celebrated case, "as to the principle on which such evidence is admissible. Every act of the party's life is relevant to the issue."[1] There can be no escape from this consequence. There is no distinction in kind (whatever there may be in degree) between one or another piece of conduct as evidence to be considered; *some* inference is always possible:

1836, *Denman*, L. C. J., in *Doe* d. *Tatham* v. *Wright*, 6 Nev. & M. 132, 146: "Such an issue [insanity] opens a wide door for the admission of evidence, as every transaction of the testator's life, every expression he ever used, and his manner of conducting himself on the most ordinary concerns, may have a bearing on the question."

1870, *Howe*, J., in *State* v. *Hays*, 22 La. An. 39, 40: "Insanity is a disease. It has its pathology and its symptoms, and it would seem that its existence can be determined only by a careful scrutiny of those symptoms. The tree is to be known by its fruits. The condition of the hidden mechanism is to be ascertained by those communicated movements which are external and apparent. To this end the usual expressions of a mental state are original and competent evidence. If they are the natural language of mental alienation, they furnish satisfactory and sometimes the only proof of its existence. It is true that such expressions may be feigned, and often are; but whether they were real or feigned is for the jury to determine. Hence the rule prevails that, as indicia of the mental condition, not only the acts, but the conversations, exclamations, and declarations of the person may be shown."[2]

No doubt a Court is occasionally found excluding this or that piece of

[1] 1838, Wright *v.* Tatham, 5 Cl. & F. 670, 715; so also Alderson, B., at p. 722.

[2] Compare the following opinions: 1851, Marianski *v.* Cairs, 1 Macq. Sc. App. 212, 218 (good opinion by Lord Truro); 1900, State *v.* Wright, 112 Ia. 436, 84 N. W. 541 ("in all cases involving the question of mental capacity, it is competent to go into the minutest details of the personal history" of the individual); 1900, Blume *v.* State, 154 Ind. 343, 56 N. E. 771 (handwriting and composition of letters, admitted); 1868, Shailer *v.* Bumstead, 99 Mass. 112 (see quotation *post*, § 233); 1854, Waterman *v.* Whitney, 11 N. Y. 157 (see quotation *post*, § 233).

conduct;[3] but such rulings, which cannot be defended on principle, are explainable usually as refusals to allow the incorrect impression to be given to the jury that the specific conduct raises a presumption of insanity[4] or has special weight in that direction. Moreover, a court on appeal may properly enough refuse a new trial merely for the rejection below of conduct which was not especially significant; but such decisions are in strictness not rulings upon the admissibility of evidence.

(2) Whether a certain piece of conduct ought to raise a *presumption of insanity* or of sanity, so as to shift the duty of producing evidence or otherwise to have special controlling force with the jury, is a different question, and is not a matter of the mere admissibility of the evidence. Such a question is often raised, for example, with regard to the fact of *suicide*. Rightly considered, "it stands as a fact, with all the other acts of the deceased's life,"[5] so far as its admissibility is involved. Nevertheless, it is sometimes ruled upon in terms of admissibility, though the language is even then applied where the question of presumption is the one really raised; such rulings are therefore considered elsewhere (*post*, §§ 2500, 2501), in dealing with presumptions.

(3) Sometimes the condition of insanity is exhibited in a belief which is a *delusion*, and it may thus become necessary, not only to prove the belief, but also to prove the facts which make it a false and unnatural belief. When a man says, "I am the Messiah," or "I am the Emperor of the United States," the falsity of the external fact is ascertainable without expressly evidencing it. But when his belief is that a brother is plotting to poison him, or that he is a millionaire, these facts must be expressly evidenced in disproof. Accordingly, as a part of the whole fact constituting the delusion, the external elements may be evidenced. The objection to this is usually that confusion of issues ensue (*ante*, § 42) or that undue prejudice or sympathy will be excited for one or another party concerned (*ante*, § 42); but these possibilities (subject, no doubt, to the trial Court's discretion) cannot be allowed to stand in the way of demonstrating a significant manifestation of mental condition.[6]

[3] 1868, People *v.* Garbutt, 17 Mich. 9, 16 ("unnatural and undue excitement" in a time of battle, excluded); 1895, Taylor *v.* U. S. 7 D. C. App. 27, 34 (accused's conversations in general, and apart from any specific one suggestive of insanity, excluded).

[4] See the next paragraph as to this.

[5] 1838, Duffield *v.* Morris, 3 Harringt. 375, 382.

[6] 1889, Burkhart *v.* Gladish, 123 Ind. 337, 42 N. E. 118 (facts to prove a delusion as to the adultery of the testator's wife, admitted); 1898, Manatt *v.* Scott, 106 Ia. 203, 76 N. W. 717 (declarations by deceased that T. had attempted to poison J. and had said that he would poison the deceased, admitted as indicating a delusion); 1871, State *v.* Jones, 50 N. H. 369, 382 (wife-murder; belief in the wife's adultery, admitted as showing an insane delusion); 1868, Rouch *v.* Zehring, 59 Pa. 78 (denying the doing of a thing which had in reality been done, admitted); 1896, Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246 (alleged insane belief that certain neighbors stole; the good reputation of these neighbors receivable, after proof of their innocence, to show the unreasonableness of the belief). In such a case, of course, the opponent may (on the logical principle of § 34, *ante*) prove facts which indicate that the belief was *not* a delusion: 1854, Com. *v.* Wilson, 1 Gray 337, 339 (murder of A; defence, insane delusion that A was conspiring against defendant; A's expressions of hostility admitted to show his real feelings, as evidence that defendant was not deluded); 1871, State *v.* Jones, 50 N. H. 369, 382 (the issue being whether the defendant's belief in his wife's adultery was a mere insane delusion, or was founded on rational grounds, particularly rumor, the existence of such a general rumor was received). Distinguish the

(4) On the same principle, when conduct is looked to as an index of the rationality of mental operations, all the facts upon which the conduct was based being essential to forming a standard of judgment, the *acts and communications of third persons*, may become relevant, — not as in themselves having value, but as the raw material (as it were) for the mental manufacture of the person in question. When Pharaoh forbad to give the Hebrews "straw to make brick as heretofore," and required that they "go and gather straw for themselves," yet should not "minish aught from your bricks of your daily task," it was in fact not humanly possible to fulfil the new exactions; yet no man could judge whether the people of Israel were idle or were overworked, merely from the fact that their tale of brick was not delivered to their masters. All human action, mental or physical, when judged as to the normality of its accomplishment, depends upon the material and means furnished for action. When Horace Hawes, the insane millionaire of San Francisco, said that Jesus Christ was the greatest man that ever lived, and that he himself was the second in rank, it was easy to judge the irrationality of the latter statement; yet we do not regard Napoleon as irrational because he believed himself the greatest general in the world's history. Just as the greatness of a man's executive achievement must be measured by comparing what he had to do and his means of doing with what he has actually done, so the rationality of his acts is to be ascertained only by comparing the results of his reasoning with the data that lay before him to be reasoned upon. Accordingly, when any act of his is found, preceded by third persons' acts or communications, the latter are essential to a judgment upon the former. The only requirements to be insisted upon, as necessary assumptions, are that the other person's acts or communications have come to the knowledge of the person in question, and that some act or treatment of them by him has ensued. This application of the principle has been expounded, once for all, in the opinions delivered in the much-argued case of *Wright* v. *Tatham;* where, in spite of irreconcilable difference of detail between the various judges, there was a general recognition of the principle at large:[7]

1837, *Wright* v. *Tatham*, 7 A. & E. 313, 376; 5 Cl. & F. 670, 736, 740; *Bosanquet*, J.: "The letters tendered in proof of the testator's capacity are stated to have been found after the testator's death, open and with the seals broken, in a cupboard under a bookcase in the testator's private apartment, among other letters, some of which had been answered, and others indorsed by him. . . . If the testator is shown to have dealt with the letters as a sensible man would deal with them, his doing so will afford evidence of his capacity. But, until it appears that he has acted personally in the matter, there is nothing from which any inference as to his state of mind can be drawn. Capacity or incapacity to make a will is the matter to be ascertained. In other words, the question is whether he has been in a condition to manage his own concerns, or whether his condition has been such that they must necessarily have been managed for him by others? Such

use of external facts *inducing* or *predisposing to* insanity, *post*, § 231; there it is not the truth or falsity of the facts that is involved, but merely the receipt of information to that effect.

[7] See this case in another aspect, *post*, § 1786.

being the real question to be tried, no presumption is to be made that any act bearing upon it was either done by the testator or by any other person for him, since the whole value of the act as evidence of the testator's mind depends upon the part which the testator himself has taken in it. The letters may have been opened, arranged, and deposited in the cupboard by the testator himself, or by his steward, attorney, or other agent. The facts are perfectly consistent with either view of the case." *Parke*, B.: "There is no direct proof whatever of these acts being done by the testator; and, as to indirect proof, to infer that the testator did the acts, is to assume the very fact to be proved. . . . For the purpose of showing his capacity to make a will, the evidence is offered; and, to prove that, a letter found in the repository, in an open state, with the indorsement of Mr. Barrow upon it, is produced to show that the testator was competent to open the letter and to read it over, and to refer it to his attorney. If it be asked to use all this as indirect evidence, that is, as an inference that he did the acts, how can I so use it, except upon the ground, that, if he was capable of such acts of business, it is to be presumed that he, and not some one else, did this? But that is to assume the degree of competence which the facts are adduced in order to prove. The argument, then, proceeds in a circle, — because he had sufficient ability to do these acts of ordinary business, therefore it is to be inferred that he did them; and because he did them, it is to be also inferred that he was of sufficient ability to do these acts of ordinary business. No such inference can be made without an assumption of the very fact in question." *Vaughan*, J.: "In the first place, it may be asked, is there any evidence of acts done by the testator upon the letters in question, or any one of them? (for any acts of the testator are of course evidence). I am of opinion that there is fair ground for such inference. Certain letters are found in a man's private room, in the cupboard of his bookcase, with the seals broken in company with other letters, some of which have indorsements in his handwriting, and others of which have been answered in his handwriting. Do not all these facts conspire to prove, at least almost irresistibly to invite the conclusion, that the letters in question had their seals so broken and were perused by him? It has been argued at the bar, that, to raise this presumption, we assume the man's competency, which is the point to be proved. A little reflection will, I think, show this reasoning to be vicious. In the first place, the argument does not assume any competency at all; and, in the second place, the competency which is inferred is not the competency which is disputed, namely, the competency to make a will. . . . And I infer that the testator was competent to open the seals and peruse the letters, because the answers and indorsements to the other letters in his handwriting prove him competent so to do, and we conclude that he actually did open and peruse these letters, because the fact of finding them opened in his private drawer, and in the company of letters which he must be taken to have opened and perused, furnishes cogent evidence that he opened and perused these. But we do not thereby even infer him competent to make a will. We conclude him competent to open and read a letter. The opening and perusing a letter are certainly acts, and therefore they stand upon the same footing with all the other acts of a man, and may be properly and primarily admitted. How far they are valuable elements in a body of proof, is another question, quite distinct from the present. . . . Thus we are carried on to the question, whether the contents of the rejected letters, or any of them, can throw any light upon and explain the acts so established; if they can, then of course they may be admitted; if not, they must be rejected. . . . I think I am warranted in saying that the contents of a letter cannot tend to clear up, or explain, or give any stamp of character to any act which does not from its nature import that the party apprehended or misapprehended its contents. . . . So, if it can be shown that a man has done any act in consequence of having read a letter, that letter will be a very valuable instrument to lead the mind to a proper estimate of the purpose or wisdom of such act. In all these cases, there is some act flowing from an apprehension or a misapprehension of the contents of the letter; and the contents are necessary to enable us to form a judgment of the soundness or absurdity of such apprehension. Or, if a person is proved by gestures or words to have shown certain signs of passion or

apathy upon reading a letter or hearing some intelligence, then those gestures or words, or that apparent disregard, will prove how he apprehended such contents; and such contents may therefore be received to lead us to an opinion of his temper or his sanity. But, in such cases, it is not the perusal of the letter, but the acts and conduct at the perusal, which are illustrated by the subject-matter of the letter; and there must be evidence of some such acts or states of mind, in order to justify the admission of such declarations. In some cases, indeed, the mere omission to do anything upon the receipt of intelligence, might be proof of a state of mind. In the present case, then, there is no fact presented to us but that of mere perusal and casting the eye over the contents. There is nothing, as applied to two of the letters, on which we can fairly found the presumption, that Mr. Marsden acted upon an apprehension of what they contained."

(5) In the foregoing sort of evidence, the *Hearsay rule* forms no objection to admitting the communications of third persons, because they are received without reference to the truth of their statements and without any credit being given to them testimonially; they are therefore not obnoxious to the Hearsay rule (as noted more fully *post*, § 1789). The same objection may also be made to receiving the *utterances of the person himself* (accused, testator, or the like) whose sanity is in question; and the answer is the same. Such utterances are not received as testimonial assertions by him to prove the facts asserted therein, but as indicating circumstantially the operations of his mind; accordingly, it is no violation of the Hearsay rule to receive them (*post*, § 1790).

(6) On the general principle of Relevancy (*ante*, § 34), any piece of conduct offered as indicating insanity may be explained away as equally or more consistent with some other hypothesis. That which appears to be an irrational act or utterance may, in the light of certain facts, be rational, or may be the result of some other abnormal mental condition than insanity (such as fever or intoxication). These *explanatory facts* are thus always admissible, providing only that they have in some degree an explanatory significance.[8] This much is indisputable, and is merely a simple application of a general principle. But there is a larger application of it in the present relation; for since insanity or sanity is the relation of the mind as a whole to life as a whole, and since the grades and distinctions between eccentricity and insanity are sometimes difficult to interpret, the operation of the mind in a single instance may be explainable, not merely by other facts and conduct at that very time, but also by facts and conduct at a different time. The mental operation at the moment may seem irregular, and an inference of general irregularity might thence be drawn; but, when noticed at other times, it may be perceived to be regular

[8] 1863, Hopps *v.* People, 31 Ill. 385, 388 (wife-murder; the defendant's coolness and unconcern at the deed being offered as evidence of insanity, the prosecution was allowed to show that he "had spent years of his early life in a perilous calling," namely, smuggling, "demanding at all times great coolness and hardihood, and therein . . . learned the deportment exhibited by him on this occasion"); 1876, Ross *v.* McQuiston, 45 Ia. 147 (a testator had made two wills at different times, and the contestants, after showing insanity at the time of the first, offered it as indicating by its rational character that the rationality of the second will was not conclusive of sanity at the time); 1894, People *v.* Miles, 143 N. Y. 383, 38 N. E. 456 (to explain away strange conduct, the fact of intoxication at the time was received); 1867, Wood *v.* Sawyer, Phillips 275 (peculiar conduct being offered to show insanity at the time, it was evidenced that these peculiarities were normal traits present even at times of conceded sanity).

enough on the whole. A larger scope of observation must often be taken in order to negative the erroneous inference from single acts that the whole, if known, would be similar to the single acts. This larger group of data, then, may properly be considered in order to explain away the apparent inference from isolated acts:

1858, *Clifford*, J., in *U. S.* v. *Holmes*, 1 Cliff. 98, 109: "One of the suggestions . . . was that the government, in attempting to rebut the testimony offered by the prisoner on this point [of insanity] should have been limited to the explanation or denial of the particular transactions, acts, conduct, and declarations introduced by the prisoner to make out his defence. . . . [It] cannot be sustained. Most men in the course of their lives, in times of excitement produced by disease or otherwise, do many strange and peculiar acts, and oftentimes give utterance to eccentric or unusual language; and it is obvious that if a person accused of crime may select and offer in evidence all the dark spots of his life, or every peculiar and unusual act and declaration, and be allowed to exclude all the rest, that many guilty offenders must escape and justice be often defeated, because the means of ascertaining the truth are excluded from the jury. . . . [Whenever the accused has offered his acts, conduct, and declarations, before and after the homicide,] the government may offer evidence of other acts, conduct, and declarations of the accused within the same period to show that he was sane and to rebut the evidence introduced by the defence."

§ 229. **Same: Testamentary Capacity.** That any and all conduct may be indicative of sanity or insanity is equally true for testamentary capacity as for criminal capacity. There is, to be sure, a different legal standard of capacity for the two situations, and accordingly more emphasis and legal significance will attach to certain kinds of cases in the one instance than in the other. Moreover, certain forms of mental abnormality might conceivably be excluded altogether from consideration by the definition of the substantive law; but the evidence to prove them would then be excluded because the facts to be proved by it would be immaterial and not because of the law of evidence (*ante*, § 2). The chief questions that arise specially in the proof of insanity as affecting testamentary capacity are thus rather a consequence of its special definition in the substantive law rather than of any difference in the rule of evidence. Only two of these seem worth noticing here, namely, the facts of former testamentary plans and of disinheritance of relatives in the will in issue. These two need special notice because such facts have other evidential uses which ought to be distinguished from the present one.

(1) The testator's capacity may be indicated, among other things, by his method of dealing with his property and other affairs. Whether they are treated by him intelligently or otherwise will be significant of capacity.[1] In particular, his *plans*, *conversations*, and *acts* (independently of the actual execution of the will) in reference to the *disposition of his property after death* will indicate whether his treatment of the subject is intelligent. Such facts

[1] Examples: 1893, Barber's Appeal, 63 Conn. 393, 412, 27 Atl. 973 (testator's diaries received); 1895, Bower v. Bower, 142 Ind. 194, 41 N. E. 523 (that the testator did not attend in person to his business, admitted); 1886, Woodcock v. Johnson, 36 Minn. 217, 218, 30 N. W. 894 (testator's acts and declaration "tending to show his comprehension or non-comprehension of daily occurrences in his business," admitted).

are therefore admissible, like all other conduct, as bearing on his capacity at the time:

1890, *Vanderburgh, J.*, in *Hammond* v. *Dike*, 42 Minn. 273, 44 N. W. 61 (admitting the fact that the testator, a week before his death, "had arranged to have his will changed in the way it was changed by the codicil [made on his death-bed] and his declarations on that subject"): "The question was substantially . . . whether he was able to and did comprehend the nature and effect of the transaction in its different bearings, including the subject-matter and the effect of the testamentary act upon his heirs and legatees named in the prior will. A testator may be of sound disposing mind and memory sufficient to sustain a will executed by him, though the state of his health and consequent mental condition may be unequal to business transactions of a more exacting nature; and his strength might hold out for the completion of a transaction involving but few details, and requiring his attention but a short time, while it would be insufficient for the disposition of a large estate under an elaborate will. Certainly, then, in determining the question of the capacity of the testator to understand the situation in which he stood in relation to the disposition of his estate, whether the subject was new or familiar to his thoughts, and what his previous intentions may have been, as shown by his acts or declarations, were important and material matters for the consideration of the jury. . . . If, then, the testator, in this instance, contemplated a change in the terms of his will, in view of an accession to his property, and had manifested his purpose so to do a short time before his sickness, these things would be material to be considered in determining whether he was able to understand, and did understand, the nature of the business in which he was engaged at the time he executed the codicil, and the scope and effect of the transaction. . . . Such declarations, especially if recent, inform the jury of the state of mind of the testator when confessedly sound, and so aid in determining whether the instrument is the product of the same will."[2]

This use of prior testamentary plans and the like is to be distinguished from their use to show that he did or did not execute a certain disputed will or make a certain disputed alteration (*ante*, § 112, *post*, § 1735), or to show whether he intentionally destroyed a will by way of revocation (*post*, §§ 1737, 1782), or to show whether a will charged to have been made under undue influence conforms to his normal wishes and plans (*post*, § 1738). These are all legitimate evidential uses, but they rest in each instance on different principles and perform different services.

(2) That the testator has omitted, or disfavored, or expressly *disinherited certain near relatives* who might have been expected to be his chief beneficiaries is a circumstance having some bearing upon his mental condition. The provisions of the will in this respect, however, are not in themselves the evidential facts. Taken alone, they are colorless; it is only in comparison with the state of his relationships that they become significant. If a will read, "I bequeath all my property to Joan of Arc, Maid of Orleans," our general knowledge supplies a fact which marks this bequest as a mental aberration. But if he bequeaths all "to my friend John Smith," and the facts are that John Smith is a well-to-do man, while an amiable wife and a large family of children are left totally unprovided for by the testator, it is only after comparison of these facts with the bequest that we infer a mental

[2] 1899, Nieman v. Schnitker, 181 Ill. 400, 55 N. E. 151 (previous wills at a sane period, admitted).

lack of balance. In short, the facts of the testator's family relationships are material to establish a standard of normal testamentary terms, — such terms as a rational man would presumably have sanctioned, and it is only after obtaining such a standard that it is possible to make inferences as to the rationality of the terms of the will. It is to this end that the facts of family relationship are considered:

1820, *Gibson*, J., in *Patterson* v. *Patterson*, 6 S. & R. 55: "Where a will is impeached for imbecility of mind in the testator, together with fraudulent practices by the devisees, the intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking into view the state of the testator's property, family, and the claims of particular individuals, is competent and proper for the consideration of the jury. The issue *devisavit vel non* involves the validity of the execution, and not the contents; yet, the contents, so far as they have a bearing on the question of execution, are pertinent, and with this view, the whole will is usually read. But the particular provisions of the will could have no practical influence on the question, without evidence of the circumstances and condition of the testator's family and property; for it is only by a comparison of these with each other, that an inference arises, as to the sanity of his mind, and its freedom of action. To justify a jury in invalidating a will, from its intrinsic evidence only, would require an extreme case, perhaps such as never can occur; but the disposition of the property may be so utterly absurd or unjust, as to induce a reasonable belief, that no man in his senses, and uncontrolled by an improper influence, would make it; and there may be cases, where this internal evidence, added to other proof, which would, of itself, leave the question doubtful, ought to turn the scale. In fact, the evidence of practice on the intellect of a weak man, is usually compounded of ingredients so various in their nature, and remote in their consequences and connexion, that the question of relevancy is often of very difficult solution. In such a case, the Court should lean in favor of admitting the evidence, to enable the jury to judge from a consideration of all the circumstances."

1833, *Buchanan*, C. J., in *Davis* v. *Calvert*, 5 G. & J. 269: "It is not of itself sufficient to avoid a will or testament, that its dispositions are imprudent, and not to be accounted for. But a will or testament may, by its provisions, furnish intrinsic evidence involving it in suspicion, and tending to show the incapacity of the testator to make a disposition of his estate with judgment and understanding, in reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty — such as a disposition of his whole estate, to the exclusion of near and dear relations, having the strongest natural claims upon his affection, a wife and children, for instance, or other near relations —, without any apparent or known cause, which alone would be a suspicious circumstance, although not furnishing *per se* sufficient ground for setting aside the instrument. This is but a single example, and not given as the only one, calculated to excite suspicion of the competency and freedom to act of a testator. The contents, therefore, of the will or testament itself, and the manner in which it was written and executed, together with the nature and extent of the estate of the testator; his family and connections; their condition and relative situation to him; the terms upon which he stood with them, and the claims of particular individuals; the condition and relative situation of the legatees or devisees named; the situation of the testator himself, and the circumstances under which the will or testament was made, are all proper to be shown to the jury, and often afford important evidence in the decision of the question of incapacity. And sometimes, if taken altogether, may, according to the degree of the injustice, absurdity, or unreasonableness of the dispositions attempted to be made of the property, tending to induce a reasonable doubt of the necessary sanity of the maker, and of his free agency uncontrolled by some undue influence, and the nature of the attending circumstances, and condition, and conduct, and character of those around him, justify a jury in deciding against the validity of the instrument, when its provisions, standing

alone, unattended by such circumstances, or not coupled with them, would not be sufficient."

1841, *Verplanck*, Sen., in *Stewart* v. *Lispenard*, 26 Wend. 255, 313: "If the testamentary disposition be in itself consistent with the situation of the testator and in congruity with his affections and previous declarations; if it be such as might naturally have been expected from one so situated, this is itself rational and legal evidence of no small weight to testamentary capacity; whilst the reverse will alone furnish occasion of doubt, demanding other evidence to refute it. The rationality of the act goes to show the reason of the person."

1854, *Perkins*, J., in *Addington* v. *Wilson*, 5 Ind. 137: "By our law, a person competent to make a will may entirely disinherit his children if he pleases to do so; nor can his motives for such an act, where it is done, be called in question. The right is absolute to dispose of all one's property, over and above the portion required to pay debts and expenses. The hardship of the case, therefore, when the children are disinherited, is of no weight further than a circumstance for the consideration of the jury in connection with the other evidence submitted tending to show insanity or other mental defect."

This use of such facts to evidence incapacity is generally conceded as proper.[8] It is desirable, however, to distinguish it from sundry other uses of analogous facts to evidence undue influence; these are noted in the ensuing section.

§ 230. **Same: Undue Influence.** The making of a will under undue influence signifies that the testator's mind was capable of being and was in fact so subjected to the control of another person that the former did not follow his own normal wishes and plans but yielded to the latter's volition. For the purpose of evidencing this condition, various sorts of facts are relevant, but the chief questions about them arise in connection with the Hearsay rule, and they need be noted here only in order to distinguish them from the foregoing classes of evidence on the issue of mental incapacity.

(*a*) The *facts of family relationship*, in comparison with the will's actual provisions, may be considered not only (as above) on the issue of sanity, but

[8] 1859, Stubbs v. Houston, 33 Ala. 564 (unnatural distribution of property, admissible); 1861, Fountain v. Brown, 38 id. 74 (same); 1810, Swift, Evidence, Conn., 140 ("If the disposition of the estate be very unreasonable and improper, as giving it to strangers, or all to one child, this will be a strong circumstance from whence to infer undue influence and want of understanding"); 1893, Crandall's Appeal, 63 Conn. 365, 28 Atl. 531 (approving the above passage); 1867, Roe v. Taylor, 45 Ill. 485 (prior will rejected as being of no value under the circumstances); 1868, Crum v. Thornley, 47 id. 192, 198 (principle conceded); 1902, Webster v. Yorty, 194 id. 408, 62 N. E. 907; 1854, Addington v. Wilson, 5 Ind. 137 (see quotation *supra*); 1889, Conway v. Vizzard, 122 id. 266, 270, 23 N. E. 771 (a testator's giving more to nieces and nephews than to sisters, no evidence of insanity, apart from other facts); 1894, Sim v. Russell, 90 Ia. 656, 57 N. W. 602 (unnatural distribution of property, admissible); 1894, Denning v. Butcher, 91 id. 429, 59 id. 70 (same); 1895, Bever v. Spangler, 93 id. 576, 61 id. 1080, *semble* (same); 1898, Manatt v. Scott, 106 id. 203, 76 N. W. 717 (same); 1833, Davis v. Calvert, 5 G. & J. 269 (see quotation *supra*); 1828, Clark v. Fisher, 1 Paige Ch. 171 ("the will itself is unreasonable on its face, when taken in connection with the amount of his property and the situation of his relatives, and this is always proper evidence to be taken into consideration in judging of the state of the testator's mind"); 1897, Burns' Will, 121 N. C. 336, 28 S. E. 519 (that a testator had disinherited his seven children, admissible).

Occasionally a Court is found rejecting such facts merely because in the circumstances they do not enlighten, or declaring them in effect not to raise a presumption of incapacity: 1889, Spratt v. Spratt, 76 Mich. 384, 391, 43 N. W. 627 (facts of kinship may be shown "as bearing upon the question of mental capacity"; but the omission of certain relations "is not an indication of mental incapacity"); 1892, Conch v. Gentry, 113 Mo. 248, 256, 20 S. W. 890 (that omitted children had worked in the fields, excluded); 1892, Maddox v. Maddox, 114 id. 35, 41, 21 S. W. 499 (similar).

also on the issue of undue influence.[1] The latter issue presupposes a due or normal standard of disposition which the testator might be expected to observe; and when a deviation is found, a possible inference is that the deviation was due to undue pressure.

(*b*) The *testator's conduct and utterances*, exhibiting *dislike*, *fear*, *anger*, or their opposite, towards particular persons, may serve to indicate his general condition of susceptibility to influence in certain quarters, and may thus be put in evidence for that purpose, in spite of the Hearsay rule (*post*, § 1738).

(*c*) The testator's prior and subsequent *testamentary plans and wishes*, as gathered from his conduct and utterances, may serve to indicate his normal testamentary attitude, which presumably would have been given effect in the will in issue, had no undue pressure been exerted. These may therefore be considered, in spite of the Hearsay rule, in order to reach a standard for judging of the undueness or abnormality of the will (*post*, § 1738).

(*d*) The testator's prior or subsequent *assertions as to the fact of undue influence* or of urgency or threats are usually excluded, because their natural but improper use would be to serve as mere testimonial assertions, inadmissible under the Hearsay rule (*post*, § 1738).

§ 231. (2) **Insanity, as evidenced by Predisposing Circumstances.** As human conditions of every sort are created or influenced by external environment, so too that diseased mental condition which we term insanity may be precipitated, intensified, or otherwise affected by external events coming to the apprehension of the person. Accordingly, circumstances calculated to induce this mental condition may always be admitted to evidence the probability of such affection; the only limitation is that the circumstance be in itself capable in some degree of producing such an effect, that it came to the person's knowledge, and that some further foundation for probability be laid by other evidence that there was a diseased mental condition:

1891, *Peckham*, J., in *People* v. *Wood*, 126 N. Y. 249, 259, 27 N. E. 362 (admitting evidence that a defendant, charged with killing his father-in-law, and now defending on the ground of insanity, had been told by his wife, a week before the killing, of an incestuous rape upon her by the father, the purpose being to show "an adequate cause for the state of mind existing subsequent to the communication, and . . . that in truth such communication acting upon a diseased and weakened brain produced insanity at the time of the commission of the crime"): "It is not disputed that a fall on the head, a physical injury to the brain, or other physical and sufficient cause for insanity, can be proved. . . . Any material fact which might account for or naturally lead to insanity at that moment may be proved. Why should not the defendant have the right to prove a moral cause which might act upon a brain already diseased and might result in insanity as naturally as blows upon the head? This, in connection with evidence tending to show insanity at the time of the act done, is proper. . . . In fine, the evidence is admitted on the ground that it is corroborative, more or less strongly, of the mental condition which the other and separate evidence in the case tends to prove."

[1] 1891, Eastis v. Montgomery, 95 Ala. 486, 492, 11 So. 204 (possession of property by omitted grandchildren, admissible as tending to show that "this exclusion was not unnatural"); 1903, Yorty v. Webster, — Ill. —, 68 N. E. 1068 (unequal distribution is some evidence); 1892, Maddox v. Maddox, 114 Mo. 35, 46, 21 S. W. 499 ("unjust discrimination" held not to "raise an inference" of undue influence); and cases cited in the foregoing section.

1871, *Worden, J.*, in *Sawyer* v. *State*, 35 Ind. 80, 84: "[It is claimed] that inasmuch as the infidelity of the deceased [wife, killed by the defendant], was a great wrong inflicted upon the defendant, and inasmuch as his mind would protractedly dwell upon the subject, the evidence was competent as tending to show the existence of an exciting cause of insanity. This argument assumes that a jury may infer the existence of insanity from proof merely of a cause that may tend to produce it, without any proof whatever that the effect followed the cause. If it were a case where a given effect *must* follow a cause, there would be force in the argument, because proof of the cause would be proof of the effect. But we know that the various causes that *may* tend to produce insanity very frequently fail to produce any such effect; and it seems to us that it is not competent to prove the existence of such exciting cause unaccompanied with some [other] proof that the effect followed the cause." [1]

§ 232. **Same: Hereditary Insanity.** That insanity of some varieties may be and even tends to be transmitted to descendants is an accepted pathological fact. Moreover, since it is equally true that it may pass over a generation or an individual before reappearing, it follows that insanity in collateral relatives may indicate an anterior ancestral tendency capable of appearing in other collateral branches. It seems to be generally conceded that ancestral and perhaps collateral insanity may therefore be put in evidence. Yet the irregularity of its operation, its frequent dependency on external provoking circumstances as a condition of bringing it into activity, and the possibilities of too much weight being given to its probative value, have led the Courts, almost unanimously, to impose some limitations on its admissibility. These limitations, in general, may be gathered from the following passages, but it will be seen that no clear settlement of them has been reached, except on the point that there must be some other accompanying evidence of insanity by conduct-manifestations (*ante*, § 234) on the part of the person himself:

1844, *Maule, J.*, in *R.* v. *Tucket*, 1 Cox Cr. 103 (receiving evidence of the insanity of a maternal grandfather): "It is a matter of fact and not a matter of law, that insanity is often hereditary in a family; but I think you should prove that in the first instance by the testimony of a medical man, and then your question will be legitimate."

1856, *Thomas, J.*, in *Baxter* v. *Abbott*, 7 Gray 71: "With the fact that the father and mother or either of them had been insane, that the insanity had appeared in them about

[1] 1871, Sawyer v. State, 35 Ind. 80, 83 (wife-murder; the wife's adultery not admitted to show insanity without concurrent evidence of insane conduct; see quotation *supra*); 1891, People v. Wood, 126 N. Y. 147, 27 N. E. 362 (see quotation *supra*).

It follows that the significance of such a fact can be *explained away* (on the principle of § 228, par. 6, *ante*) by conduct of the person showing that his *mind was not susceptible* to an influence from such circumstances: 1894, People v. Lana, 101 Cal. 513, 517, 36 Pac. 16 (murder; to disprove that the defendant's mind had been preyed upon, to the degree of derangement, by the belief that the deceased was trying to ruin his daughter, evidence was admitted of the incest of defendant and his daughter). *Contra*, but clearly unsound: 1901, State v. Kirby, 62 Kan. 436, 63 Pac. 752 (murder of alleged seducer of defendant's daug.. .r; to rebut the defendant's alleged mental excitement over the seduction, the prosecution was not allowed to prova the daughter's prior reputation for unchastity); 1896, People v. Strait, 148 N. Y. 566, 42 N. E. 1045 (wife-murder; after evidence of separation, offered to show a cause of insanity, evidence of adultery while separated from a prior wife, offered to show that the subsequent separation from the second wife could not have caused his mind to become unbalanced, was rejected).

Distingnish the present sort of evidence from that noted in § 228, par. 3, *ante*; there the delusion being the material thing, the falsity of the facts believed by him is essential; here, however, it is the belief alone that is material, whether or not the facts were as believed or not; accordingly, a rumor or reputation may suffice to create the belief, whether or not there be a foundation of fact.

the same age and in same form, its existence in the child is rendered more probable and is believed upon less perfect evidence. The transmission of this predisposition to insanity is matter of general observation, and is recognized by the best medical authorities."

1850, *Pearson*, J., in *State* v. *Christmas*, 6 Jones L. 471, 474: "[Hereditary insanity] would only be one link in the chain, and would not *per se* establish the fact. . . . [The authorities being conflicting, yet] thus far the way seems to be clear. In order to render it admissible, the species of insanity which is alleged and that which is offered to be proved in respect to members of the family must be of the same character; and the instances to be proven must have been notorious, so as to be capable of being established by general reputation, and not left to depend upon particular facts and proof about which witnesses may differ and the consequence of which would be to run off into numberless and endless collateral issues, so that in trying the question as to the insanity of one, the supposed insanity of half a dozen would be drawn in."

1868, *Cooley*, C. J., in *People* v. *Garbutt*, 17 Mich. 9, 17: "That insane tendencies are transmitted from parent to child there is now no longer a doubt; and though it was once ruled that proof that other members of the same family have decidedly been insane is not admissible either in civil or in criminal cases, yet this ruling has been rejected as unphilosophical and unsound, and it is now allowed to prove the insanity of either parent, — or even of a more remote ancestor, since it seems well established that insanity sometimes disappears in one generation and reappears again in the next. . . . [In this case, insanity of a brother was admitted.] It sometimes occurs that persons in vigorous health and correct habits, who have nevertheless entered into a marriage which violates some physiological law, may become parents of weak and diseased children only, so that insanity enters the family for the first time in the person of the children, but through qualities derived exclusively through the parentage. . . . If a family of several children should be found without known cause to be idiotic or subject to mental delusions, the inference of hereditary transmission would in many cases be entirely conclusive, notwithstanding the inability to point out anything of a similar character in any ancestor. Insanity in a part of the children only would be less conclusive; but the admissibility of the evidence in these cases cannot depend upon its quantity, and it could never be required that it should amount to a demonstration."

1875, *Bynum*, J., in *State* v. *Cunningham*, 72 N. C. 469, 474: "It is held admissible in corroboration. . . . To allow such evidence to go to the jury as independent proof of the insanity of the prisoner would be of the most dangerous consequence to the due administration of criminal justice; since there are but few persons, it is ascertained, who have not had ancestors or blood relations, near or remote, affected by some degree of mental aberration. To admit such testimony, then, under the conditions set forth in this case, would break down the strongest barriers to crime established by the laws of evidence as heretofore understood."

1877, *Agnew*, J., in *Laros* v. *Com.*, 84 Pa. 200, 209: "A Court is not bound to hear evidence of the insanity of a man's relatives . . . [or other collateral or secondary evidence] as grounds of a presumption of possible insanity, until some evidence has been given that the prisoner himself has shown signs of his own insanity."[1]

[1] The various limitations suggested are illustrated in the following rulings, many of which are virtually based only on the facts of the case in hand and should not serve as precedents: *Eng.*: 1760, Earl Ferrers' Trial, 19 How. St. Tr. 932, 937 (ancestral insanity admitted); 1813, M'Adam *v.* Walker, 1 Dow 148, 161, 167, 177 (left undecided; termed by Lord Eldon, L. C., a "very delicate question"; but most questions were to his mind delicate ones); 1838, Doe *v.* Whitefoot, 7 C. & P. 270, Gurney, B. (sister's insanity, excluded); 1840, R. *v.* Oxford, 9 id. 525, 533, 547, 4 State Tr. N. S. 497, 528 (before three judges; insanity of accused's grandfather, father, and brother, admitted); 1844, R. *v.* Tucket, 1 Cox Cr. C. 103 (see quotation *supra*); *Ark.*: 1898, Green *v.* State, 64 Ark. 523, 43 S. W. 973 (admissible only after evidence of insane conduct); *Cal.*: 1866, People *v.* Smith, 31 Cal. 466 (insanity of mother and aunt, held admissible, other evidence of "personal insanity" being in the case); *Conn.*: 1880, State *v.* Hoyt, 47 Conn. 518, 540 (sister's insanity admitted, and cross-examination to show it not from hereditary causes); *D. C.*: 1881, Guiteau's Trial, I, 520, II, 1386 *et passim* (the insanity of

§ 233. (3) **Prior and Subsequent Insanity.** A condition of mental disease is always a more or less continuous one, either in latent tendency or in manifest operation. It is therefore proper, in order to ascertain the fact of its existence at a certain time, to consider its existence at a prior or a subsequent time. The degree of continuity varies infinitely in various cases, and hence there can be little certainty in the inference from one period to another. Nevertheless, since it can never be known beforehand to what variety the case in question belongs in this respect, the facts of prior and subsequent existence cannot be absolutely known beforehand to be relevant. Much must depend on the type of insanity, as preliminarily indicated by the person's conduct at the time in question. There is also a further element of uncertainty in criminal cases, in that the accused has a strong motive to feign insanity after the act charged; and thus particular scrutiny is required in weighing the evidence of an accused person's subsequent insane conduct. In spite, however, of these uncertainties and difficulties, Courts are to-day universally agreed that both prior and subsequent mental condition, within some limits, are receivable for consideration; stress being always properly laid on the truth that these conditions are merely evidential towards ascertaining the mental condition at the precise time of the act in issue:

1822, *Washington*, J., in *Stevens* v. *Van Cleve*, 4 Wash. C. C. 262: "The point of time to be looked at . . . is that when the will was executed. . . . The law permits evidence

Guiteau's father and near relatives was allowed to be evidenced); 1900, Snell *v.* U. S., 16 D. C. App. 501, 511 (insanity in a second cousin, held inadmissible); *Ill.*: 1862, Snow *v.* Benton, 28 Ill. 306, *semble* (insanity of a mother, admitted); 1874, Meeker *v.* Meeker, 75 id. 260, 270 (paralysis of ancestors and near relations, excluded, because the testator's affection by paralysis was not disputed; "had it been a question of doubt, . . . we could see its pertinency"); 1883, Upstone *v.* People, 109 id. 169 (insanity of mother, sister, three brothers, and mother's sisters, admitted); *Ind.*: 1869, Bradley *v.* State, 31 Ind. 492, 495, 503, 510 (insanity of a half-sister, mother, her twin brother, and a cousin, admitted, but only in connection with other evidence of insane conduct of the defendant); 1871, Sawyer *v.* State, 35 id. 80, 84 (preceding case approved; see quotation *supra*); *Ia.*: 1868, State *v.* Felter, 25 Ia. 75 (insanity of ancestors, admissible); 1876, Ross *v.* McQuiston, 45 id. 147 (parental insanity, admissible); 1894, Sim *v.* Russell, 90 id. 656, 57 N. W. 601 (same); 1894, Denning *v.* Butcher, 91 id. 425, 59 id. 70 (same); 1897, State *v.* Van Tassel, 103 id. 6, 72 N. W. 497 (admissible as cumulative only, accompanying other evidence); 1899, State *v.* Robbins, 109 id. 650, 80 N. W. 1061 (murder; epilepsy of defendant's mother and brother and insanity of another brother, admitted); *Me.*: 1885, St. George *v.* Biddeford, 76 Me. 598, *semble* (admissible); *Md.*: 1902, Berry *v.* Safe D. & T. Co., 96 Md. 45, 53 Atl. 720 (insanity in other members of the family, held inadmissible except after evidence of insanity in the person in issue); *Mass.*: 1868, Com. *v.* Andrews, Davis' R. 133 (murder; insanity of various ancestral relatives, admitted); *Mich.*: 1868, People *v.* Garbutt, 17 Mich. 9, 17 (insanity of a brother, admitted; see quotation *supra*); *Minn.*: 1895, State *v.* Hayward, 62 Minn. 474, 65 N. W. 63 (ancestral insanity, admissible only to corroborate other and more direct evidence); *Mo.*: 1878, State *v.* Simms, 68 Mo. 305, 309 (insanity of aunt and sisters, held proper to be considered, even though no other evidence "directly" tended to prove insanity); 1887, State *v.* Pagels, 92 id. 307, 4 S. W. 931 (insanity of persons not shown to be connections, held not "material," as ground for a continuance); 1899, State *v.* Soper, 148 id. 217, 49 S. W. 1007 (insanity of collateral kindred, rejected on the facts); *N. J.*: 1846, State *v.* Spencer, 21 N. J. L. 196, 203, *semble* (admissible); *N. Y.*: 1882, Walsh *v.* People, 88 N. Y. 467 (insanity of "parents or relatives," admissible "in aid or corroboration of other proof"); *N. C.*: 1859, State *v.* Christmas, 6 Jones L. 471, 474 (see quotation *supra*); 1875, State *v.* Cunningham, 72 N. C. 469, 474 (insanity of uncles and aunts excluded, where there was no insane conduct of the accused himself in evidence; see quotation *supra*); *Tenn.*: 1875, Hagan *v.* State, 5 Baxt. 615 (insanity of a brother admitted, there being evidence of the accused's insane conduct); *U. S.*: 1858, U. S. *v.* Holmes, 1 Cliff. 98, 109, 110 (unspecified "hereditary insanity," admitted); *Vt.*: 1896, Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246 (intemperance of parent, without medical testimony to its significance, inadmissible).

of such prior and snbseqnent incapacity to be given. But nnless it bear npon that period and is of snch a natnre as to show incompetency when the wili was executed, it amounts to nothing."

1854, *Selden*, J., in *Waterman* v. *Whitney*, 11 N. Y. 157: "The insanity or incapacity of the testator may be proved, not as important in itself, but as a means of arriving at his condltion when the wili was executed. . . . [It is usefui] with a view to its reflex influence upon the question of his condition at the time of executing the will. . . . The object of the evidence is to show the mental state of the testator at the time when the will was executed. Of conrse, therefore, it is admissible oniy where it has a iegitimate bearing on that question, and of this the Court mnst judge, as in every other case where the relevancy of testimony is denied. If the judge can see that the evidence offered cannot jnstly be supposed to reflect any iight upon the mental condition of the testator at the time of making the will, he has an undouhted right to exclude it."

1858, *Clifford*, J., in *U. S.* v. *Holmes*, 1 Cliff. 98, 108: "His acts, conduct, and deciarations, not only throughout this voyage, but throughout his whole life, from early youth to the time of his arrest, had been introduced; . . . counsel had claimed and exercised the right to examine the witnesses so called npon aii such occurrences, acts, and declarations in the life and conduct of the prisoner as tended to show that he was insane. . . . Beyond douht the precise question to be tried in ali such cases is whether the accused was insane at the time he committed the act, and to that point ali the evidence must tend. Great difficulties surround the inquiry, and it is for that reason that the rules of law allow a wide range of testimony in the investigation."

1868, *Colt*, J., in *Shailer* v. *Bumstead*, 99 Mass. 112: "By common observation and experience the existence of many forms of mental development, especially that of weakness in those facuities which are an essential part of the mind itself, when once proved imply that the infirmity must have existed for some time. The inference is quite as conciusive that such condition mnst have had a gradnal and progressive development, requiring antecedent iapse of time, as that it will continue when once proved for any considerable period thereafter. . . . [Prior and snbsequent deciarations], if they are equally significant and no more remote in point of time, are equally competent, and may be quite as influential. . . . If therefore the statement or prior declaration offered has a tendency to prove a condition not in its nature temporary or transient, then, by the aid of the recognized rule that what is once proved to exist must be presumed to continue tili the contrary be shown, the declaration, though prior in time to the act the validity of which is questioned, is admissihie. Its weight wili depend upon its significance and proximity."

1880, *Gilfillan*, C. J., in *Pinney's Will*, 27 Minn. 283, 6 N. W. 791: "The gradual decay of his mental facuities from old age, . . . when it begins, is progressive and permanent; and if at one time it has reached such a stage that the man has become incapabie of doing bnsiness, it wonld be contrary to ali experience that he should recover. So, if in such a case it is shown that at any time subseqnent to that in question the man's faculties are so far nnimpaired that he is capabie of transacting hnsiness, it is evidence that they were so nnimpaired at the time in question."[1]

[1] *Eng.*: 1742, Sergeson *v.* Sealey, 2 Atk. 412 (inquisition of lunacy, found in 1726, and declaring insanity for eight years previous, admitted to show insanity in 1724); 1854, Beavan *v.* M'Donnell, 10 Exch. 184 (to show that the defendant's insanity on the day of the contract was such as to be necessarily apparent to the plaintiff, the defendant's insane conduct before and after that day was admitted; Platt, B.: "The question is one of degree only; the further off the evidence is carried, the weaker it may be; but it is still evidence, though, not proof, of the fact of knowledge"); *Ala.*: 1849, McLean *v.* State, 16 Ala. 679; 1886, Kramer *v.* Weinert, 81 id. 414, 415, 1 So. 26; 1895, Murphree *v.* Senn, 107 id. 424, 18 So. 264 (temporary aberration twenty years before, not admissible without evidence of intervening aberration); *Ark.*: 1859, Clinton *v.* Estes, 20 Ark. 219, 231; 1891, Bolling *v.* State, 54 id. 588, 599, 16 S. W. 658 (accused's conduct and language after a killing, admissible "whenever they are so connected with or correspond to evidence of disordered or weakened mental condition preceding the time of the offence as to strengthen the inference of continuance and carry it by the time to which the inquiry relates and thus establish its existence at that

There seems to be no agreed definition of the *limit of time* within which such prior or subsequent condition is to be considered; and in the nature of

time; or whenever they are of such a character as of themselves to indicate unsoundness to such a degree or of so permanent a natnre as to have required a longer period than the interval for its production or development"; following the language of Com. *v.* Pomeroy, Mass. *infra*); 1894, Green *v.* State, 59 id. 246, 248, 27 S. W. 5 (insanity twenty years before, excluded on the facts); 1898, Green *v.* State, 64 id. 523, 43 S. W. 973 (defendant's mental condition after arrest and during custody, admissible); *Cal.*: 1867, People *v.* Farrell, 31 Cal. 581 (no time limit can be fixed in general); 1885, Dalrymple's Estate, 67 id. 444, 7 Pac. 906; 1897, People *v.* Griffin, 117 id. 583, 49 Pac. 711 (feeble-mindedness six months later, admitted); *Conn.*: 1822, Grant *v.* Thompson, 4 Conn. 208; 1831, Kinne *v.* Kinne, 9 id. 101, *semble*; *Ill.*: 1862, Snow *v.* Benton, 28 Ill. 306, 308 (insanity ten or twelve years before, admitted); 1878, Reynolds *v.* Adams, 90 id. 147; 1893, Craig *v.* Southard, 148 id. 37, 46, 35 N. E. 361 (prior and subsequent mental condition of testator, admissible); 1897, Harp *v.* Parr, 168 id. 459, 48 N. E. 113 (prior mental condition of a testator, receivable); 1899, Nieman *v.* Schnitker, 181 id. 400, 55 N. E. 151 (testator's utterances before and after execution, admitted); 1903, Baker *v.* Baker, 202 id. 595, 67 N. E. 410 ("no fixed rule can be laid down"); *Ind.*: 1882, Dyer *v.* Dyer, 87 Ind. 13, 19 (mental condition of a testator the day before the will's execution, admitted); 1889, Staser *v.* Hogan, 120 id. 207, 217, 21 N. E. 911 ("It was proper to show the condition of the testator's mind at any time"); 1895, Bower *v.* Bower, 142 id. 194, 41 N. E. 523 (no fixed limits of time can be made); 1900, Enlow *v.* State, 154 id. 664, 57 N. E. 539; *Ia.*: 1868, State *v.* Felter, 25 Ia. 72, 75, 76; 1876, Ashcraft *v.* De Armood, 44 id. 233 (admitting evidence of continued preceding insanity; "It would be otherwise if her insanity were temporary in its nature, as where it was occasioned by the violence of disease or where she was subject to lucid intervals"); 1876, State *v.* Lewis, 45 id. 20 (defendant's condition subsequent to the time of the act, admitted); 1876, Ross *v.* McQuiston, ib. 147; 1884, State *v.* Jones, 64 id. 349, 355, 357, 360, 17 N. W. 911; 1895, Bever *v.* Spangler, 93 id. 576, 61 N. W. 1072; *Kan.*: 1897, State *v.* Newman, 57 Kan. 705, 47 Pac. 831 (condition "shortly before or after the homicide," admissible); *La.*: 1870, State *v.* Hays, 22 La. An. 39 (accused's conduct and language before and after the time charged, admissible); *Me.*: 1870, Robinson *v.* Adams, 62 Me. 412; 1885, St. George *v.* Biddeford, 76 id. 598; *Md.*: 1833, Davis *v.* Calvert, 5 G. & J. 269 (testator's mental condition "both before and after that period," admissible); 1888, Spencer *v.* State, 69 Md. 28, 13 Atl. 809 (accused's condition three years before, excluded on the facts); 1902, Jones *v.* Collins, 94 id. 403, 51 Atl. 398; *Mass.*: 1820, Somes *v.* Skinner, 16 Mass. 348, 358 (admitting previous extreme weakness of mind, to show present susceptibility to undue influence); 1841, Peaslee *v.* Robbins, 3 Metc. 164 (indorser's insanity, before and after indorsement, admitted); 1868, Shaller *v.* Bumstead, 99 Mass. 112 (see quotation *supra*); 1871, White *v.* Graves, 107 id. 327; 1876, Com. *v.* Pomeroy, 117 id. 148 (accused's subsequent condition admitted; see the phrasing followed in Bolling *v.* State, Ark. *supra*); 1878, Davis *v.* Davis, 123 id. 598; 1879, May *v.* Bradlee, 127 id. 420; 1882, Potter *v.* Baldwin, 133 id. 428; 1890, Lane *v.* Moore, 151 id. 87, 90, 23 N. E. 828; 1890, Woodward *v.* Sullivan, 152 id. 470, 25 N. E. 837; 1891, Dumangue *v.* Daniels, 154 id. 483, 485, 28 N. E. 900 (subsequent mental condition admissible; the trial Court's discretion to control as to time); 1896, Howes *v.* Colburn, 165 id. 385, 43 N. E. 125 (approving the trial Court's limitation to a period from about eight years before the execution of the will to about two and a half years after); 1896, Laplante *v.* Mills, ih. 487, 43 N. E. 294 (mental condition of a boy a year after his injury, received; "a boy who is dull at fifteen probably was dull at fourteen"); *Mich.*: 1893, Haines *v.* Hayden, 95 Mich. 332, 351, 54 N. W. 911 (subsequent mental condition, admitted on the facts); *Minn.*: 1880, Pinney's Will, 27 Minn. 282, 6 N. W. 791 (see quotation *supra*); 1895, State *v.* Hayward, 62 id. 474, 65 N. W. 63 (temporary delusions, of a different sort from that alleged against the witness, and existing some time before the trial, excluded); *Mo.*: 1897, State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554 (liberal range of time allowed); 1897, Rhoades *v.* Fuller, 139 id. 179, 40 S. W. 760 (insanity twenty days later, excluded, partly because proved by a probate judgment of guardianship; see *post*, § 1671); 1901, Hamburger *v.* Rinkel, 164 id. 398, 64 S. W. 104; *Nev.*: 1889, State *v.* Lewis, 20 Nev. 342, 22 Pac. 241 (approving Com. *v.* Pomeroy, Mass.); *N. H.*: 1871, State *v.* Jones, 50 N. H. 369, 382 (insanity "for a period of many years before the act," admitted); 1876, State *v.* Kelley, 57 id. 549 (insanity two months before, admitted); 1898, Pritchard *v.* Austin, 69 id. 367, 46 Atl. 188; *N. J.*: 1846, State *v.* Spencer, 21 N. J. L. 196, 203 ("Evidence of former attacks of insanity amounts to about this: It does not show that the prisoner *was* insane at the time of the homicide; but if there is *any* independent evidence that he was so, the former insanity increases the probability"); *N. Y.*: 1854, Waterman *v.* Whitney, 11 N. Y. 157 (see quotation *supra*); 1888, People *v.* Hawkins, 100 id. 408, 410, 11 N. E. 371, *semble* (accused's insanity two months later, admissible); 1891, People *v.* Wood, 126 id. 249, 272, 27 N. E. 362 (diseased condition of the accused's brain, when examined by physicians, admitted to show insanity at the time of the killing charged); 1893, People *v.* Taylor, 138 id. 398, 404, 34 N. E. 275 (condition during the four months between the homicide and the trial, admitted); 1896, People *v.* Nino, 149 id. 317, 43 N. E. 853 (admitting language of the accused to the expert examining

things no definition is possible. The circumstances of each case must furnish the varying criterion, and the determination of the trial judge ought to be allowed to control:

1853, *Isham*, J., in *Robinson* v. *Hutchinson*, 26 Vt. 47: "Weakness of mind at the time of making the will may be inferred from weakness subsequent, . . . when the declarations were made so near the time of the execution of the will that a reasonable conclusion may be drawn as to the state of mind of the testatrix at the time the will was executed."

1868, *Colt*, J., in *Shailer* v. *Bumstead*, 99 Mass. 112: "[The declaration's] weight will depend upon its significance and proximity. It may be so remote in point of time, or so altered in its import by subsequent changes in the circumstances of the maker, as to be wholly immaterial and wisely to be rejected by the judge."

1889, *Clark*, J., in *Herster* v. *Herster*, 122 Pa. 230, 16 Atl. 342: "The weakness of mind and consequent susceptibility to influence which is admissible in such a case must be shown to exist at the very time of the testamentary act. . . . The limitations which govern the admission of this quality of evidence must depend largely on the character of the unsoundness to be proved. There are types of mental unsoundness which appear suddenly and may be of short duration, and in such cases the proof, to be of any avail, must come near to the precise time when the act was performed; but the decadence of old age and many forms of mental derangement and imbecility are of slow advancement, and proof of their distinct development at any given period will afford pretty clear ground to infer their existence for a long period, either before or after, with a considerable degree of certainty. . . . The Court must judge, in each particular case, how far it will be profitable to extend the rule before and after the precise date in question. . . . Of course the objective point of inquiry, in every case, is the state of mind at the precise date of the testamentary act."

1890, *C. Allen*, J., in *Lane* v. *Moore*, 151 Mass. 87, 90 (holding that the mental condi-

him in jail for insanity); 1896, People *v.* Hoch, 150 id. 291, 44 N. E. 977 (examination of the accused, made just before and during trial, admitted); *N. C.:* 1820, State *v.* Scott, 1 Hawks 24, 25, 32 (homicide; conduct and utterances on the morning after, excluded; Henderson, J., diss., holding them admissible "not to prove the truth of the facts declared," but to allow inferences); 1839, Norwood *v.* Marrow, 4 Dev. & B. 451, 578 (subsequent insane conduct, admitted; practically repudiating State *v.* Scott); 1880, State *v.* Vann, 82 N. C. 631, 633 (insane language of the accused after the act, excluded); *Oh.:* 1878, Wheeler *v.* State, 34 Oh. St. 394, 396 (inquisition of lunacy four years before, admitted); *Okl.:* 1901, Queenan *v.* Terr., 11 Okl. 261, 71 Pac. 218; *Pa.:* 1821, Ramhler *v.* Tryon, 7 S. & R. 93; 1822, Irish *v.* Smith, 8 id. 576; 1845, Chess *v.* Chess, 1 Pa. St. 163; 1850, McTaggert *v.* Thompson, 14 id. 154; 1851, Londen *v.* Blythe, 16 id. 542; 1854, Wilkinson *v.* Pearson, 23 id. 120; 1861, Stauffer *v.* Young, 39 id. 455, 462, *semble;* 1871, Pidcock *v.* Potter, 68 id. 351; 1884, First Nat'l Bank *v.* Wireback's Ex'r, 106 id. 46; 1889, Herster *v.* Herster, 122 id. 289, 16 Atl. 342 (see quotation *post*); 1893, Hindman *v.* Van Dyke, 153 id. 243, 246, 25 Atl. 772 (condition four years before, admitted); 1895, Com. *v.* Bezek, 168 id. 603, 32 Atl. 109; *U. S.:* 1822, Stevens *v.* Van Cleve, 4 Wash. C. C. 262 (see quotation *supra*); 1858, U. S. *v.* Holmes, 1 Cliff. 98, 108 (see quotation *supra*); 1896, St. Louis I. M. & S. R. Co. *v.* Greenthal, 23 C. C. A. 100, 77 Fed. 150 (insanity three weeks before, admitted; following U. S. *v.* Holmes); *Vt.:* 1853, Robinson *v.* Hutchinson, 26 Vt. 47 (see quotation *supra*); 1862, Fairchild *v.* Bascomb, 35 id. 398, 417 (condition four years before, admitted); *W. Va.:* 1878, Dinges *v.* Branson, 14 W. Va. 100, 105 (prior testamentary declarations, admitted to show capacity at a later time to recollect and carry out a plan); *Wis.:* 1874, Burnham *v.* Mitchell, 34 Wis. 117, 134; 1889, Giles *v.* Hodge, 74 id. 360, 366, 34 N. W. 163; 1896, French *v.* State, 93 id. 325, 67 N. W. 706 (a time subsequent held not too remote on the facts); 1899, Small *v.* Champney, 102 id. 61, 78 N. W. 407 (mental condition when adjudicated insane, presumed to continue subsequently, but not to have existed antecedently, unless with other evidence of similarity of mental condition at prior time); 1901, Hempton *v.* State, 111 id. 127, 86 N. W. 596 (insanity fourteen years before, admitted).

The question whether an *inquisition or adjudication of lunacy* is admissible at all raises a question of an exception to the Hearsay rule, *post*, § 1671. Supposing it admissible, then it evidences insanity at the time of inquisition, and the present question — of the relevancy of insanity at that time — is then the same as in cases where the insanity is otherwise evidenced by conduct or the like.

Compare the cases cited *post*, §§ 1738, 1739.

tion before and after a given time, if near enough, is relevant to show the condition at that time when it is in issue): "The judge will determine whether the time is so remote, or whether the circumstances have so changed, that declarations then made would not be deemed satisfactory evidence tending to show the person's condition at the earlier period."[2]

§ 234. **Other Principles affecting Proof of Insanity, discriminated.** The only inquiry in this place is with the evidencing of mental capacity by circumstantial evidence. Other principles specially affecting the proof of capacity are dealt with elsewhere, and are chiefly the following: the qualifications, as to *experience*, of a witness to sanity (*post*, § 568); the qualifications of a witness, as to his *observation* of the person in question (*post*, § 689); the exception to the Hearsay rule, admitting *utterances* of the person in question (*post*, § 1734); the exception to the Hearsay rule, admitting *reputation* to prove insanity (*post*, § 1621); the exception to the Hearsay rule, admitting an official *inquisition* or *adjudication* upon insanity (*post*, § 1671); and the application of the Opinion rule to testimony to insanity (*post*, § 1933).

§ 235. **Intoxication.** Intoxication, as a mental condition of temporary stupefaction, may be evidenced circumstantially in the same general modes that are available (*ante*, § 227) for mental capacity or condition in general. (1) It may be evidenced by the person's *conduct*.[1] (2) It may be evidenced by *predisposing circumstances, i. e.* by the drinking of intoxicative liquor.[2] (3) It may be evidenced by his *prior or subsequent condition* of intoxication within such a time that the condition may be supposed to be continuous.[3]

[2] This relegation to the trial judge's discretion is also approved in the following cases cited *supra*: Clinton *v.* Estes, Ark.; Enlow *v.* State, Ind.; Dumangue *v.* Daniels, Mass.; Wilkinson *v.* Pearson, Pa. The length of time which has in various cases been recognized as within the proper range of consideration is illustrated in the citations of the foregoing note.

[1] 1897, State *v.* Harris, 100 Ia. 188, 69 N.W. 413 (burglary; to disprove the fact of the defendant's intoxication at the time, evidence admitted of a robbery by him on the same evening); 1896, Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287 (battery; boisterous and belligerent conduct of the defendant just beforehand, admitted to show the extent of the intoxicated condition in which the plaintiff alleged the defendant was).

[2] 1805, Tuttle *v.* Russell, 2 Day 202 ("Can a Court say that evidence to show that a man has within an hour before drunk a quart of rum is not relevant to prove that the man is drunk? . . . It is barely possible that the consequence of a man's drinking a quart of rum may not be drunkenness, but generally it is not only a highly probable but a certain consequence. Courts and juries in weighing evidence are to calculate on probabilities, not possibilities"; this was the argument, as affirmed by the Court); 1858, McDowell *v.* Boston, 26 Ga. 535 (the mere taking of laudanum at unspecified times was held not enough to show general impairment or temporary affection by it); 1845, Fleming *v.* State, 5 Hump. 564 (drinking a pint of brandy, admitted). For the use of intoxication as *discrediting a witness*, see *post*, § 933.

[3] 1900, Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242 (divorce for habitual intemperance; habits after date of complaint, admitted); 1883, Upstone *v.* People, 109 Ill. 169, 175 (murder when intoxicated; intoxication the day before, admitted); 1857, Com. *v.* Howe, 9 Gray, 113 (prior and subsequent intoxication, to show intoxication at the time of a confession, admitted); 1901, Raynor *v.* R. Co., 129 N. C. 195, 39 S. E. 821 (intoxication at 3.45 P.M., held no evidence of intoxication at 11 A.M. the same day; "neither drunkenness nor soberness is necessarily a continuing state; both conditions are liable to rapid and frequent fluctuations"; this ruling throws an odd light on the manners of inebriety in that jurisdiction); 1855, McCandless *v.* McWha, 25 Pa. 95 (prior intemperate habits, admitted). This use of a prior continuing condition is to be distinguished from the use of an *intemperate habit as evidence of an act of drinking* done as a part of the habitual course of conduct (*ante*, § 96), and from the use of a condition of *intoxication* as evidencing *incapacity to do a specific act* (*ante*, § 85).

Topic IV: Evidence to prove Design or Plan.

§ 237. **General Principle.** The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act designed or planned (*ante*, §§ 102–113). An utterance in which a design or plan is asserted is admissible under an exception to the Hearsay rule (*post*, § 1725). The question here is how such a design or plan may be otherwise evidenced, *i. e.*, circumstantially. Of the three conceivable sorts of circumstantial evidence (*ante*, § 190), only two are practically available, viz.: (1) Conduct, as indicating the inward existence of a design; (2) Prior or subsequent existence of the design, as indicating its existence at the time in question.

Design or Plan is to be carefully distinguished from Intent. In many parts of the substantive law, particularly in the criminal law, the state of mind accompanying an act becomes legally important, and is for such purposes one of the propositions in issue. This may be termed Intent. It is not used evidentially to prove something else; it is one of the ultimate parts of the issue. Design or Plan, on the other hand, has almost invariably (except where a conspiracy is charged) a purely evidential use; the inference is to be from the design to the act, and thus the design must in its turn be evidenced. The two are practically as well as theoretically to be distinguished, because the conduct that evidences Intent (as may be seen *post*, §§ 302–304) is often of a different sort and needs fewer restrictions than conduct evidencing Design.

Design must also be distinguished from Emotion or Motive (anger, jealousy, and the like). Thus, threats of violence may evidence both a Design and an Emotion. Conduct as evidencing Emotion is dealt with elsewhere (*post*, §§ 394–406).[1]

§ 238. **Sundry Instances (Tools, Materials, Liquor Licenses, Preparations, Journeys, Experiments, Inquiries, Prophecies, and the like).** The kinds of conduct which may evidence a design are innumerable in their variety. Any act, which under the circumstances and according to experience as naturally interpreted and applied would indicate a probable design, is relevant and admissible. It is true that the design indicated may be too indefinite to be itself relevant as evidence of an act (*ante*, § 106); but this does not affect the relevancy of the conduct to evidence that design. Most evidence of this sort needs no judicial ruling to determine its relevancy, and the precedents deal with only a limited number of the possible uses of such evidence. The discretion of the trial Court should control in all these cases; it is impossible to lay down any general rule that will be definite enough to serve as a solution for each instance; and it is poor policy to attempt in a Supreme Court to pass upon the probative value of each given piece of con-

[1] The occasionally hazy condition of judicial reasoning and nomenclature in this field is illustrated in an opinion (State *v.* Goff, 117 N. C. 755, 23 S. E. 355) admitting evidence of threats to kill as indicating which party was the aggressor, but using this singular distinction: "while this was not competent as evidence of motive, it was admissible to show temper."

duct. Any attempt to reconcile all the rulings is hopeless; there is no reason why they should be treated as binding precedents. The question is always one of experience and common sense in each case. The general judicial attitude is shown in the following passage:

1878, *Brewer*, J., In *State* v. *Adams*, 20 Kan. 320 (burglary; the four defendants held a meeting to arrange for the crime; a bar of iron and a pair of pincers were alone necessary, and these the defendant brought; the facts were admitted of the defendant having taken a carpenter's brace from a store and hidden it; a third person removed it, and the defendant never used it); "Would not the act be one tending to show preparation, — a preparation made fruitless by the unexpected act of another? Could it not be shown that the one charged with homicide immediately prior thereto was providing himself with several weapons, though one only was used? . . . If one weapon he stole, another he borrowed, and one (his own) he put in order, would proof as to the first be incompetent while evidence as to the others was admissible? . . . If no act or conduct of the defendant could be shown unless the motive therefor or the connection between it and the crime were made indisputably clear, the range of inquiry would be limited and narrow. It is enough that the act has an apparent or probable connection with the crime, and then the motive of the defendant and the weight of it as testimony are to be considered by the jury. . . . Must it be affirmatively shown that each weapon was procured with reference to the homicide before evidence concerning its procurement is competent? Or are the facts concerning all to be put in evidence, leaving their weight to be determined by the jury?"; and the latter is approved.

The acquisition or possession of instruments, tools, or other means of doing the act, is admissible as a significant circumstance; the possession signifies a probable design to use; the instruments need not be such as are entirely appropriate, nor such as were actually put to use.[1] In particular, the adver-

[1] 1855, R. *v.* Jarvis, 7 Cox Cr. 53 (the possession of a number of false coins, wrapped in separate papers, etc., admitted to show a plan to utter them); 1886, Finch *v.* State, 81 Ala. 41, 42, 49, 1 So. 565 (borrowing a knife just before the affray in which the knife was used, admitted as "an act of preparation"); 1898, People *v.* Cuff, 122 Cal. 589, 55 Pac. 407 (poisoning by strychnia; defendant's purchase of chloroform, admitted); 1899, Mobley *v.* State, 41 Fla. 621, 26 So. 732 (murder by stabbing; purchase of poison and taking it to deceased's house, admitted as indicating a general design to kill deceased); 1887, Spies *v.* People, 122 Ill. 1, 141, 12 N. E. 865, 17 N. E. 898 (the fact that many men came promptly to a place and procured bombs simultaneously, held to point to an "expectation that bombs would be found at that place at that time," and thus to tend to establish a specific plan for their use); 1858, State *v.* Hinkle, 6 Ia. 384 (wife-poisoning; previous possession of arsenic, admitted); 1884, State *v.* Franks, 64 Id. 39, 42, 19 N. W. 832 (burglary; prior possession of burglar's tools, admitted); 1901, State *v.* Wayne, 62 Kan. 636, 64 Pac. 68 (possession of tools appropriate to a burglary, though not exclusively so, admissible); 1849, Com. *v.* Wilson, 2 Cush. 590 (burglary of the City Hall in Charlestown; evidence was rejected of the possession of a key fitted to open the door of the Lancaster Bank); 1849, Com. *v.* Williams, ib. 584 (burglary; the possession of burglar's tools, admitted); 1870, Com. *v.* Choate, 105 Mass. 451 (arson; after evidence tending to show that the fire was set by means of a box containing a lighted candle and combustible materials, and not adapted to any but incendiary purposes, the fact was admitted of the defendant's possession of a similar box before the fire in question, as showing, with other things, "a use of his shop for the purpose of preparing boxes and materials for setting incendiary fires, including the fire alleged, in the same place, and all instigated by one motive"; distinguishing Com. *v.* Wilson, *supra*); 1876, Long *v.* State, 52 Miss. 23, 34 (murder by shooting; procuring a pistol on the same morning, admitted); 1888, State *v.* Rider, 95 Mo. 474, 485, 8 S. W. 723 (murder; the procurement of a pistol just beforehand, admitted); 1897, People *v.* Scott, 153 N. Y. 40, 46 N. E. 1028 (getting a revolver out of pawn a few days before, admitted, to show deliberate intent); 1849, U. S. *v.* Burns, 5 McLean 23, 26 (possession of instruments for counterfeiting, admitted); 1889, State *v.* Webster, 21 Wash. 63, 57 Pac. 361 (murder; defendant's purchase and possession of cantharides just before the shooting, admitted on the facts). Compare the cases cited *ante*, § 88. For the *subsequent possession of stolen chattels*, as indicating the act of stealing, see *ante*, § 153.

tisement or possession of the apparatus or a license for gaming,[2] or selling liquor,[3] evidences a design to game or to sell.

The *presence* of a person *at a place* or a *journey towards it*, together with behavior showing a desire for secrecy, may indicate a design to commit an unlawful act there.[4] But the indications of secrecy are not essential. In a civil case, for instance, a person's turning down the street to a railroad station would be some indication that he planned taking the train; so too, waiting openly under arms is some indication of a plan to use them, lawfully or unlawfully. The significant thing is the going to or being in a place under conditions which naturally suggest the supposed plan as a possible or probable explanation.[5] Where a person makes *inquiries*, either by word of mouth or by messenger, or by *experimentation* searches for knowledge, it is natural to infer that he designs to use the knowledge thus sought; and if the knowledge is needed or is adapted to help in doing the act in question, the inquiries or experiments are thus evidential of a design to do the act.[6] *Obscure intima-*

[2] There are a number of statutes dealing in the same way with this and related offences, but they are usually intended to lay down a rule for the burden of proof (*post*, § 2500), and do not add anything new to the law of admissibility. The following are merely a few examples: Mass. St. 1895, c. 419, § 8 (advertising, etc., a ticket, etc., for lottery, evidence of the existence of the lottery, etc.); 1895, Com. *v.* Gormen, 164 Mass. 549, 42 N. E. 94 (possession of policy slips, evidence of intent to game).

[3] Conn. Gen. St. 1887, § 3107 (Federal liquor license or tax-payment, to be evidence, with the possession of liquor, of possession with illegal intent); 1899, Guy *v.* State, 90 Md. 29, 44 Atl. 997 (Federal liquor license is evidence of sale); Mass. St. 1887, c. 414 (exposure of signs, etc., is evidence that liquor is there for sale); N. H. Pub. St. 1891, c. 112, § 25 (exposure of signs, labelled bottles, etc., or a Federal liquor-tax receipt, is admissible to show the illegal keeping of liquor); 1887, State *v.* Spaulding, 60 Vt. 228, 233, 14 Atl. 769 (Federal license, admissible to show actual sales; "for if he had the intent to do an act, it would be more probable that he did it than it would be if he had no such intent"); Vt. St. 1894, § 4476 (payment of Federal liquor-tax, to be evidence of being a common seller and of keeping a liquor-nuisance).

[4] 1829, R. *v.* Wilson, 1 Law. Cr. C. 112 (murder in a churchyard; the fact was offered that just before the affair the defendant and two others "were lurking there clandestinely with a bundle of cloth; the object being to raise a presumption that they were there with an evil intent, and *ergo* that they must have had malice against all persons coming in their way and likely to interrupt them;" Littledale, J., rejected it); 1896, Smalls *v.* State, 99 Ga. 25, 25 S. E. 614 (waiting out in a field, armed, for a pursuing officer, admitted).

[5] A man's presence in a brothel is some evidence that he intended to and did commit *adultery*: 1828, Astley *v.* Astley, 1 Hagg. Eccl. 714, 720; 1831, Kenrick *v.* Kenrick, 4 id. 114, 138 (citing other cases); 1878, Latham *v.* Latham, 30 Gratt. 307, 312 ("Such an act, wholly unexplained, might be considered evidence of guilt, but it is clearly not one which precludes explanation"). So, too, the fact of a man and woman, not husband and wife, spending the night alone in the same sleeping-room: 1798, Williams *v.* Williams, 1 Hagg. Consist. 299; 1887, Com. *v.* Clifford, 145 Mass. 97, 13 N. E. 345.

[6] 1891, Bolling *v.* State, 54 Ark. 588, 596, 16 S. W. 658 (murder; buying a gun and practising shooting, a few weeks before, admissible); 1786, State *v.* Green, Kirby 89 (adultery; evidence admitted that the defendant hired a person to go to the woman's house and see whether her husband was at home); 1896, Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422 (evidence of inquiries about cocaine, and of its known effects and use, in procuring abortions, admitted to show a plan to procure one); 1861, Com. *v.* Hersey, 2 Ill. 173, 177 (murder of a woman by poisoning; an inquiry two or three years before as to the methods of procuring abortions, excluded); 1885, Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698 (defence of forgery to a promissory note; evidence rejected of the plaintiff's having shown a person how to imitate notes by tracing, the character-rule being invoked; unsound); 1882, Walsh *v.* People, 88 N. Y. 462, 466 (murder by stabbing with a knife; a conversation of the defendant about the effect of throwing pepper into another's eyes and the punishment for it was admitted, as "tending to show that the prisoner was meditating the infliction of a personal injury upon some one and [with other evidence] a personal injury to the deceased"; evidence was also admitted of his having had the knife, used in the killing, sharpened on that morning, and of having the same morning asked the position of the heart in the body); 1899, State *v.* Mowry, 21 R. I. 376, 43 Atl. 871 (inquiries for a weapon like that used in a murder, and the presence of such a weapon at a third person's house, admitted). Compare some of the citations *ante*, § 106.

tion and allusions are often significant. Words of a person, uttered beforehand, indicating a knowledge that an event is about to occur or an act to happen, tend to show a design to do it or to coöperate in it, so far as it was not definitely expected or foreknown by others, because in that case the knowledge could be possessed only by the one planning it or privy to the plan; and the probative value of such evidence would vary with the particularity and exclusiveness of the foreknowledge thus indicated:

1752, *Blandy's Trial*, 18 How. St. Tr. 1122, 1132; the defendant had frequently told the servants that her father, the deceased, with whose murder she was charged, would not live long, basing the prophecy on the sight of his apparition and other things; *Bathurst*, arguing for the prosecution: "Mark how the destruction of this poor man is ushered into the world. Apparitions, noises, voices, music, reported to be heard from time to time in the deceased's house; even his days are numbered out, and his own child limits the space of his life but till the following month of October. What could be the meaning of this but to prepare the world for a death that was predetermined? Who could limit the days of a man's life but a person that knew what was intended to be done towards the shortening of it?"

1880, *Loomis*, J., in *State* v. *Hoyt*, 47 Conn. 518, 538: "Remote and obscure allusions to the act in contemplation are admissible as tending to show an existing disposition or design. . . . The fact that the language might possibly have an innocent meaning did not prevent its consideration by the jury, who would of course be called upon to decide whether such was the fact, or whether it was a dark hint thrown from a mind that already felt the shadow of the coming tragedy."[7]

§ 239. **Explanations of Incriminating Facts.** According to the logical principle of Explanation (*ante*, § 34), it is always open to the person against whom such conduct is offered to explain away its force by showing some other hypothesis to be equally or more natural, as the reason for the conduct,

[7] 1895, People v. Evans, — Cal. —, 41 Pac. 444 (the defendant spoke in the third person, saying that the man who had killed R. meant also to kill the deceased before he stopped); 1880, State v. Hoyt, 47 Conn. 518, 522, 538 (murder of a father; the defendant's declarations, in the previous May, that he should not be there to gather the corn they were planting, but should be in Kansas, admitted; also, "Folks talk about me; I will come home drunk some time and give them something else to talk about"); 1858, People v. Potter, 5 Mich. 1, 5 (just before coming to the place of the affray, the defendant remarked that "he had been reading 'Jack Rand,' and he should not be surprised if he should turn highwayman sometime, for he had been struggling with poverty long enough," and, at the same time holding an open dirk-knife, said "if any man piled onto him, he would stick him"; this evidence was admitted, on the principle that "every occurrence, every remark, and the whole conduct of the prisoner, from the time he and the deceased came together until the consummation of the crime, are competent . . . for the purpose of illustrating the act itself by showing the influences which operated to produce the catastrophe, to establish malice, and to justify the act or mitigate the crime"); 1874, State v. Gailor, 71 N. C. 88, 90 (arson; the defendant's remark that "he would not be surprised if in three weeks there would not be a building on this hill, from the threats of B. M.," a third person, admitted); 1885, State v. Green, 92 id. 779, 782 (the crime being supposed to have been committed for money paid by another, evidence was admitted that the defendant said he would soon have some money); 1876, Continental Ins. Co. v. Delpeuch, 82 Pa. 235 (the deceased's pointing out his property just before death, held not relevant to show suicidal design); 1829, Rowt v. Kile, 1 Leigh 217, 223 (instrument alleged to have been forged by J. R.; a remark of his that "his pen had not forgot to write," held not improperly excluded); 1895, Nicholas v. Com., 91 Va. 741, 21 S. E. 364 (the defendant's statements on several occasions that the deceased had heart disease and was liable to die at any time). Some of the rulings cited under § 106, *ante*, could be as well considered from the present point of view. The following case is odd: 1903, Hainsworth v. State, — Ala. —, 34 So. 203 (murder; defendant's facial expression at a prayer-meeting two hours before, admitted).

than the design which it is claimed to evidence. Any explanation which is at all plausible should be received.[1]

§ 240. **Similar Offences or Other Acts to show Plan or System.** In the cases just considered, the conduct carried within itself the suggestion of design or plan. But acts which in themselves or alone carry no such suggestion may, when multiplied, or when compared with other acts or circumstances, suggest a common plan as the explanation or solution of the compared data. This kind of evidence has many difficulties; and the whole subject, for reasons of convenience, is dealt with elsewhere (*post*, §§ 300–371), where the distinction between the various uses of such evidence for proving Design, Intent, and Knowledge can best be examined.

§ 241. **Prior or Subsequent Design.** The time of a Design or Plan is seldom material. Wherever it is, the general principle (*ante*, § 190) is applied that the existence of a prior or subsequent condition is relevant to show its existence at the time in question; the length of the allowable interval depending on whether, under the circumstances of the case, there is any real probability that the continuance of the condition was interrupted. The application of the principle may be seen in the rulings dealing with design or plan as evidence of an act (*ante*, §§ 102–113).

Topic V: Evidence to prove Intent.

§ 242. **General Principle.** The state of mind which accompanies an act is often of legal consequence as forming an ingredient necessary for the attachment of certain consequences.

(1) *Criminal Intent.* The state of mind accompanying a forbidden act is frequently an element material to make the act a crime. This state of mind, often spoken of as "malice," differs in different crimes. In no case is it malice in the sense of mere hostile feeling or enmity; for a religious fanatic who kills to please his Deity and to save his victim from the taint of heresy, or a parent who kills his child to save it from starvation, may have legal "malice." This state of mind is also to be distinguished from design or plan, which, as already noted (*ante*, § 237), is a purpose or aim, considered with reference to its future fulfilment. The notion of Intent, in crimes, may be also, in a broad sense, that of ultimate purpose or object, but it is regarded simply as a state of mind co-existing with the act, and is of a conglomerate nature peculiar to itself. Thus, when A shoots a pistol whose ball strikes X, A's state of mind as he shot may have been that he was pulling the trigger of a pistol whose ball would (a) strike a tree, (b) strike Z,

[1] 1881, People *v.* Malaspina, 57 Cal. 628 (reason for carrying a pistol, admitted); 1898, People *v.* Cuff, 122 id. 589, 55 Pac. 407 (poisoning by strychnia; custom of the place to have strychnia for vermin, admissible to explain the defendant's possession); 1822, Prindle *v.* Glover, 4 Conn. 266 (showing an innocent reason for a suspicious haunting of the premises on which the trespass took place); 1876, Com. *v.* Bowers, 121 Mass. 45 (adultery; the defendants were found in a bed-room at night; the fact that their plans in going to the town were innocent, excluded, apparently because the appearances against them were so strong); 1877, Com. *v.* Blair, 123 id. 242 (abortion; similar ruling); 1877, State *v.* English, 67 Mo. 136 (the defendant's journey to the place of a larceny, explained as called for by his business).

(c) strike a person, X, who was about to assault A himself. The criminal law tells us whether either of these states of mind is criminal; but it does not need to generalize in one phrase or term the exact nature of all possible criminal states of mind; it merely defines the criminal state of mind essential for each respective crime. The idea of criminal Intent, then, usually partakes of deliberateness, knowledge, object, and the like; its absence is often indicated by the ideas of mistake, good faith, reasonable belief, and the like. So far as evidence of it is concerned, the evidence of emotion, of knowledge, or of design has a bearing only so far as emotion, or knowledge, or design, enter by the criminal law as constituents of criminal Intent. In other words, there is no special evidence of Intent (with the exception to be mentioned) apart from evidence of emotion, of knowledge, of design. If those elements affect criminal intent (as they usually do), then whatever evidence would serve to prove those elements would be receivable, but no new or peculiar principle of evidence would be involved. If, for example, the charge is of breaking and entering with intent to steal, obviously "intent" here signifies "design," or "plan," and whatever would otherwise be receivable to show design would also be here receivable, — in particular, the conduct throwing light on the design of the person's entrance.[1] So if one is charged with wife-murder, his ill-feeling towards the wife would be an ingredient of criminal Intent, and whatever evidence would be otherwise suitable to show motive (*i. e.* ill-feeling) would be receivable here also. So on a charge of uttering counterfeit notes, knowing them to be spurious, knowledge is an ingredient of the criminal intent, and whatever evidence would be otherwise suitable to show knowledge would here be appropriate. In short Intent as a separate proposition for proof does not commonly exist. Knowledge, emotion, and design, are distinct from each other, and have more or less distinct modes of proof. But as Intent is constituted of one or more of these as ingredients, it forms no separate title of proof; for each of the ingredients is to be proved in the way proper to itself.

There is, however, one element in Intent which is distinct from any of those above, and may thus have to be shown by different evidence. This is the element of deliberateness or wilfulness, — the negative of inadvertence, accident. Thus, one who incorrectly writes the addition of a column of figures may do so inadvertently or intentionally; one who knocks over a lamp and sets fire to a house may do so inadvertently or deliberately. This element is distinct from that of ignorance, or mistake through ignorance (*i. e.* the absence of knowledge). For instance, one who utters a counterfeit bill may have known it to be counterfeit, but may pay it out by inadvertence, having drawn from

[1] 1886, Reed, J., in State *v.* Teeter, 69 Ia. 718, 27 N. W. 485 ("It often occurs in human experience that the mere fact that a particular act has been done affords the best evidence of the motive or intention with which it was done. If one was to break and enter a building which was known to be on fire, the reasonable presumption from his act would be that his intention was either to attempt the extinguishment of the fire or the rescue of the property or persons within it. So if one was to be found in the night time in the act of breaking into a building in which money or property of great value was deposited, his act would give very strong evidence indeed of the motive or purpose which prompted it").

the wrong part of his pocket-book. So, on the other hand, one who sells tainted milk does not do it by accident, though he is ignorant of its bad quality. In other words, one may lack knowledge and yet act deliberately, or one may have knowledge and yet act inadvertently. Thus, this distinct element in criminal Intent consists not alone in the voluntary movement of the muscles (*i. e.* in action), nor yet in a knowledge of the nature of an act, but in the combination of the two, — *the specific will to act, i. e.* the volition exercised with conscious reference to *whatever knowledge the actor has* on the subject of the act.[2] We do not necessarily show this in showing knowledge; and, conversely, we may find this conceded and still have to show criminal knowledge. For instance, on the one hand, a person might know arsenic to be poisonous, and yet might administer it inadvertently to another; so that independently of showing his past knowledge of its nature, it might also be necessary to negative his inadvertence. On the other hand, a person might deliberately pull the trigger of a firearm though ignorant that it was loaded; and thus the deliberateness of the act — *i. e.* the combination of voluntary action with all the knowledge which the person had — would be unquestioned, and the further proof required would be that peculiar to showing knowledge of the particular firearm's contents. There may always thus be a residuum, apart from knowledge, which remains to be proved.

This residuum, the element of deliberateness, the negative of inadvertence or accident, may of course be evidenced by the surrounding circumstances and the conduct, as other mental states are. It may also be evidenced by Design; for, *e. g.*, one who has planned to kill another is very unlikely to have acted inadvertently in shooting at him. It may also be evidenced by Knowledge, for one who knows, *e. g.* that arsenic is poisonous is less likely than otherwise to administer it inadvertently. It may also be evidenced by Emotion; for one who is angry with another is less likely than otherwise to strike him inadvertently. All these elements, independently useful and provable as bearing on the doing of the act, help also to throw light on the intent accompanying the act. But there is one peculiar mode of evidencing this deliberateness — the negative of inadvertence or accident — which stands by itself, in the sense that it may have no bearing distinctively on a previous Design or on a previous Knowledge or on a previous Emotion, and yet may help to throw light on deliberateness, this distinctive residuum, — namely, *other similar acts*. The doctrine of chances and the experience of conduct tell us that accident and inadvertence are rare and casual; so that the recurrence of a similar act tends to persuade us that it is not to be explained as inadvertent or accidental. The rulings dealing with this kind of evidence are for the sake of convenience dealt with elsewhere (*post*, §§ 300–371), in connection with the other principles to be distinguished.

(2) *Testamentary Intent.* The state of mind accompanying an act dealing with a will is frequently of consequence as an ingredient of the total act. A tearing or a cancelling of a will may or may not be a revocation according as

[2] Compare Austin's distinction between Will and Intention, quoted *post*, § 2413.

it is done deliberately and knowingly or the reverse. The peculiar element of Intent, here as in the preceding case, consists not merely of knowledge of the nature of the paper, but in action with the presence of such knowledge and with the foresight of the consequences. Circumstances, conduct, knowledge, former design, and the like, — all evidence this element of intent, and no distinct principle of evidence is involved. Other similar acts have rarely a bearing; so far as they have, they are admissible (*post*, § 370). Former design to revoke, as indicating probable intent at the time of destroying or cancelling, is admissible (*ante*, § 112, and *post*, § 1737). Subsequent belief in revocation, as pointing back to an intent to revoke, may also be admissible (*post*, §§ 271, 1737). The Hearsay rule is here the chief obstacle to be considered (*post*, § 1737).

(3) *Sundry Intents.* In other cases the intent accompanying an act may be material, as in an act of delivery, payment, or the like, and the intent is evidenced, as in the preceding cases, by conduct and circumstances. The only question of evidence that arises is as to the application of the Hearsay rule to language accompanying the act (*post*, §§ 1770–1786).

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION.

TOPIC VI: EVIDENCE TO PROVE KNOWLEDGE, BELIEF, OR CONSCIOUSNESS.

CHAPTER XI.

§ 244. **General Analysis of the Subject.** The notions of Knowledge, Belief, and Consciousness are not precisely identical; but they have a com-

mon feature, which is the typical one so far as concerns the modes of evidencing these mental states. That feature is most nearly expressed by the term Consciousness, *i. e.* presence in the mind of an impression as to a given fact. Thus, a person's Knowledge of a city's streets may be inferred from his conduct in finding his way through them unerringly; his Consciousness of guilt may be inferred from his conduct in fleeing from arrest; his Belief in a friend's innocence of embezzlement may be inferred from his conduct in trusting him with money. The respective terms are by usage more usually associated with different relations in which this impression of mind arises; the term Belief is used commonly when the impression is thought of as bearing on present or future action, Consciousness when thought of as bearing on past action, and Knowledge when thought of in connection with the reality of external objects.

These states of mind may or may not, considered in themselves, be in issue or be evidential of something else; *e. g.*, a person's state of mind as to the city's streets may not be evidential to show their actual condition, but may be legally material otherwise; his impression as to his own guilt may be evidential of that, but not of something else; his impression as to a friend's innocence may not be evidential of his innocence, but may be material in other respects. We are here not concerned, in theory at least, with the way in which one of these states of mind has come to be an object of proof, either as being in issue or as being itself evidential of something else. The substantive law tells us when any one of these states of mind is legally material to the issue; and the principles governing their relevancy evidentially to prove an act have already been considered (*ante*, §§ 172–177). It is assumed that somehow this kind of state of mind — impression, consciousness, knowledge, belief — is in the case, either as material to the issue or as relevant to prove something; and the question is how it is in its turn to be evidenced.

Of the three modes of evidencing a state of mind (*ante*, § 190), the first two are here the commonest, the third rarely calls for a ruling. (1) Conduct or behavior (including language not used assertively) illustrates and points back to the state of mind producing it; and the state of mind which is variously termed knowledge, belief, or consciousness, shows itself in the conduct of its bearer. (2) External circumstances, calculated by their presence or occurrence to bring about the state of mind in question, are also available to show the probability that consciousness, knowledge, or belief subsequently ensued. (3) A prior or subsequent state of mind indicates, within certain limits, its existence at the time in question. These three typical modes of evidencing consciousness, knowledge, or belief, have each their peculiar and common features, and must be examined separately. The inferences in the respective modes have so much in common that it is profitable to group them together. The second of the above modes will for convenience' sake be considered first.

1. External Circumstances as evidencing Knowledge, Belief, or Consciousness.

§ 245. **General Principle.** There are, in a broad analysis, four kinds of circumstances (events or things) which may point forward to the probability that a given person received a given impression (*i. e.* obtained knowledge, formed a belief, or was made conscious): (1) The *direct exposure* of the fact to his sense of sight, hearing, or the like; (2) The *express* making of a *communication* to him; (3) The *reputation* in the community on the subject, as leading probably to an express communication; (4) The *quality of the occurrence*, as leading either to actual perception by his senses, or to express communication.

Throughout all these four modes there run two considerations, affecting some modes more strongly than others: (*a*) The probability that the person received an impression of any fact at all; and (*b*) The probability that from the particular occurrence he would gain an impression as to the specific fact in question. Doubt may arise upon either of these points, and the various modes above are stronger or weaker in one or the other of these considerations. The four modes may now be examined more in detail.

(1) *Direct exposure of the fact to the senses.* Here there is seldom any doubt as to the element (*b*) above; the question usually is whether the fact in question was brought within the range of the senses so as probably to be perceived at all. The typical case is the possession of a document. If a deed or a notice was laid on A's desk, the probability (greater or less according to circumstances) is that A read it. But actual possession by A is not necessary; the posting of a placard in a street through which A habitually passes is some evidence that A ultimately came to see and understand its contents. Occasionally the element (*b*) above is the emphatic one; for example, where A is charged with selling liquor to B, a minor, the appearance of B, as indicating A's knowledge of B's minority or his belief in B's maturity, was the fact brought before A, and the question is whether it would probably have informed him as to the further specific fact, namely, B's age.

(2) *Express communication.* Little difficulty can arise here. There may be a question as to whether the communication came from a source which the person was fairly bound to consider authentic; but this would be a question of substantive law, involving the elements of good faith, constructive notice, or the like. There may also be a question as to the interpretation of the communication, — whether its sense could properly be taken as of one sort or another; but this also is a question of substantive law.

(3) *Reputation.* Here the element (*a*) is the important one. The probative considerations are that, when a matter is so much talked of in a community that a reputation arises about it, a member of that community, in his ordinary intercourse with others, will come to hear it mentioned, *i. e.* by express communication; and the question is whether the probability is that

there would be such a general discussion and whether the person is likely to have learned of that discussion. The first part of this inquiry — whether a reputation can arise — depends on the nature of the matter; the second part depends on the situation of the person in question.[1]

(4) *Quality of the occurrence*, in general. Sundry cases here combine the considerations of all the preceding modes, as well as of both the elements (*a*) and (*b*) above. Thus, a former accident to apparatus owned by A may indicate that A learned of the defect in the apparatus, either because he probably observed the former accident or because he probably was told of it by his subordinate having charge of the apparatus, or because complaint was probably made to him; and not only is the probability (*a*) of his having learned of the former accident thus involved, but also the probability (*b*) that the former accident would have revealed to him specifically the existence of the defect. So, also, a former act of violence by the deceased, in order to have any value to show the slayer's ground for apprehension of an attack, must (*a*) not only have been communicated to the slayer, (*b*) but also must be such as would create a belief in the deceased's probable aggression.

Such being the various modes in which the evidence may operate, nevertheless in a given situation, as where an employer is to be charged with knowledge of an employee's incompetency, or a defendant accused of murder is to show belief in the deceased's probable aggression, the knowledge, belief, or consciousness may be sought to be evidenced by more than one of the above modes. Practically, therefore, it is more convenient to group the cases, not according to the above modes of operation, but according to the various ultimate facts the knowledge or belief of which is to be shown.

§ 246. (1) **Defendant charged with Murder; Reputation of the Deceased.** Where a defendant charged with murder asserts that he killed in self-defence, his state of mind at the time of the killing becomes material; and an important element in determining his justification is his belief of an impending attack by the deceased. The reputation of the deceased for a violent, dangerous, or turbulent disposition is a circumstance which would contribute to such a belief:

1848, *Lumpkin*, J., in *Monroe* v. *State*, 5 Ga. 137: "Reasonable fear, under our code, repels the conclusion of malice; and has not the character of the deceased for violence much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted? Does it make no difference whether my adversary be a reckless and overbearing bully, having a heart lost to all social ties and order and fatally bent on mischief, or is a man of Quaker-like mien and deportment, one who never strikes except in self-defence and then evincing the utmost reluctance to shed blood? Who, knowing the character of Kyd the pirate, or of the infamous John A. Murrell, would not instantly, upon their approach armed with deadly weapons, act upon the presumption that robbery or murder or both were contemplated? We apprehend

[1] Whether the reputation of a fact is admissible to prove the fact itself is a question of the Hearsay rule, treated *post*, §§ 1580–1626, and has nothing to do with the present subject.

that the imminence of the danger, as well as the chances of escape, will depend greatly upon the temper and disposition of our foe."

1856, *Walker*, J., in *Franklin* v. *State*, 29 Ala. 17: "Conduct of a man of peaceable character and harmless deportment might pass by without exciting a reasonable apprehension of impending peril; while on the other hand the same conduct from a man of notoriously opposite character and habits might reasonably produce a consciousness of the most imminent peril and a conviction of the necessity of prompt defensive action. Whenever such bad character on the part of the deceased thus illustrates the circumstances attending a homicide, and the circumstances, so illustrated, tend to produce a reasonable belief of imminent danger in the mind of the slayer, the character, as mingled with the transaction, is a part of it, and is indispensable to its correct understanding."

1856, *Fisher*, J., in *Cotton* v. *State*, 31 Miss. 511: "The hostile demonstrations of two men may in every respect be the same; yet the party threatened may be placed in imminent peril from the conduct of one, and feel not the slightest apprehension of danger from the other. . . . One may excite fear and the greatest apprehension of danger, while the same demonstrations on the part of another may only excite mirth and ridicule. The question is in both cases the same, — Was there imminent danger to the life or to the person of the party threatened? As part of the means of arriving at the truth of this fact, the peculiar character of the hostile party is as much a fact for the consideration of the jury as any other fact in issue; and the jury must determine from the hostile demonstrations whether there was such danger of *this party's* executing his felonious design as to justify the party killing in doing so."

1875, *Roberts*, C. J., in *Horbach* v. *State*, 43 Tex. 250: "A man's character for violence, dependent upon his irascible temper, overbearing disposition, and reckless disregard of human life, is as much a part of himself as his judgment and discretion, his sight or hearing, his strength, his size, his activity, or his age, — any one of which may become a material fact to give a correct understanding of his conduct and the intention with which an act is done by him, and are therefore part of the *res gestæ* when pertinent to the act sought to be explained. Their office in evidence is adjective, or auxiliary to a substantive fact to which they are pertinent and without which they are irrelevant and immaterial. They are helps to the understanding in construing human conduct. The mind cannot reject or disregard them. They, and all like helps, ever have been and ever will be elements in the formation of belief as to what a man designs by an act to which they are pertinent. . . . If then the character of the assailant in any case has helped to form a reasonable belief in the mind of the assailed that his life was then in danger, when the acts alone would fail to do it, the jury should in some way be informed of the character of the assailant, as well as of his acts, to enable them to understand that the belief was a reasonable one. . . . It is scarcely necessary to go into an explanation of the condition of things in this country which imperatively requires the admission of the proof of the character of the deceased for violence. . . . It is well and generally known that there are some violent and dangerous men in this country, who are in the habit of carrying pistols, belted behind them and in their pockets, who never think of fighting in any other way than with deadly weapons, who are expert in using them, and who, especially when intoxicated, bring on and press to the extreme of outrage their deadly encounters for causes and provocations that would be regarded as utterly trivial by peaceable men; and that if one of such persons, while engaged in an angry altercation, should suddenly step back and rapidly throw his hand behind him, it might readily be understood by those who saw it to mean that he was in the act of drawing a pistol to use it. The same act by one of the great mass of our peaceable citizens who are not in the habit of carrying weapons would suggest no such thought, and in such case the pistol would have to be drawn and exhibited before any such thing would be conceived, unless there had been some very extraordinary provocation. This state of things here is a substantial reality, well known and ostensible to the perception of every one at all familiar with the subject; and men act upon it, and are compelled to act upon it, in defending themselves from

deadly assaults. . . . It may be deduced from these authorities that the general character of the deceased for violence may be proved when it would serve to explain the actions of the deceased at the time of the killing; that the actions which it would serve to explain must first be proved before it would be admissible as evidence; that if no such acts were proved as it would serve to explain, its rejection when offered in evidence would not be error; and that, if rejected when a proper predicate has been established for its admission, it is held to be error. . . . In arraying the facts to establish that he acted in self-defence, if an act of the deceased at the time of the killing is of doubtful import, or is otherwise of a character that it would be explained and construed more favorably for the accused by adding to it the proof of the character of the deceased for violence, then such proof is admissible."

(*a*) *Overt act.* The abstract validity of this reasoning cannot be doubted. That the deceased's reputation should in such situations be accepted as affecting the defendant's apprehensions is clear. But the unconditional and indiscriminate admission of such evidence is dangerous The danger is, not only that the deceased's reputed character, once in evidence, will be appealed to as justifying the deliberate destruction by private hands of a detested malefactor, but also that, though no plausible situation of self-defence is otherwise evidenced, this evidence will be improperly used to confuse the issue as if there were real doubt about the necessity for defence and the apprehension of danger. These considerations, and the rarity in some regions of the possibility of *bona fide* apprehensions based on such sources,[1] have induced a few Courts to decline to recognize this evidence at all. The others have usually laid down certain conditions intended to prevent its abuse. A common limitation is the broad one that other evidence shall be offered which serves to bring self-defence fairly into issue, — some appreciable evidence of the deceased's prior aggression, or of ground to believe in impending aggression, — for it is not always clear which is judicially meant. By some Courts it is said (more strictly) that the issue of self-defence (*i. e.*, presumably, the impending of an attack) must be in doubt. Another and more specific form of limitation is the doctrine of "overt act," peculiarly developed in Louisiana and Florida. The notion here is that the deceased's reputation can have a *bona fide* bearing on the defendant's apprehension only where there occurs, at the time of the affray, some conduct of the deceased which might be otherwise colorless, but when interpreted by his known character becomes apparently an act of aggression. Thus there must be some "overt act," *i. e.* of possible aggression, before the reputation-evidence can be received. This is a wise and fair limitation, provided it be not further refined by details which degenerate into quibbles, — a proviso not always observed. In few Courts has any one form of these limitations been clearly laid down or consistently followed.

Two peculiar questions may arise under the overt-act form of the doctrine. (1) Shall the question whether an overt act is sufficiently evidenced to lay

[1] Differences of social conditions may obviously in some communities or parts of the community make the bearing of such sources of apprehension much more real and frequent than in others.

the foundation for the reputation-evidence be *left entirely* in the hands of the *trial Court?* Unless our law is to become a mass of quibbles which no practitioner can master and every murderer will welcome, the answer must be in the affirmative.[2] (2) May the defendant's mere unsworn assertion of an overt act (where permitted instead of his sworn testimony) be considered as in itself some evidence of an overt act? It certainly should be;[3] but whether it is sufficient evidence for the trial Court should never be considered on appeal.

(*b*) *Kind of character.* The kind of reputed character of the deceased which should affect the defendant's apprehension may be any trait that would naturally lead the former to make unprovoked aggression. Various phrasings are employed by the Courts to define this trait.[4]

(*c*) The reputation of a *third person* is relevant only so far as the third person at the time of the affray is associated with the deceased in the apparent aggression.[5]

(*d*) It is assumed throughout that the reputation offered was *known to the defendant.* Reputation in the neighborhood where both live is sufficient with nothing more. Reputation in any other place must be specifically shown to have been probably brought to the defendant's attention; his sojourn in the place where it prevailed would suffice.[6]

(*e*) In *civil cases* of assault or battery, or, for example, in a prosecution for *rape*, a similar situation — *i. e.* apprehension as affected by the opponent's reputation — may be presented, and similar evidence should be received.[7]

[2] 1885, Poché, J., in State *v.* Ford, 37 La. An. 443, 461: "Does the rule governing the admission of such testimony content itself with *testimony* of an overt act by the deceased, or does it require *proof* of such an act? . . . In passing on such a question, the trial Judge must of necessity be clothed with the authority to decide whether a proper foundation has been laid for the proffered evidence and that authority necessarily includes the discretion to ignore and not consider testimony which his reason refuses to believe." For the rulings on this point, see the precedents at the end of this section.

[3] *Contra:* 1886, Bond *v.* State, 21 Fla. 738, 759; 1894, Steele *v.* State, 33 id. 348, 351, 14 So. 841. But since the accused has been enabled, in this jurisdiction, not merely to make a statement, but to become a witness (c. 4400, St. 1895, amending R. S. § 2908), it is properly held that his testimony alone may supply the overt act required: 1896, Hart *v.* State, 38 id. 39, 20 So. 805; Allen *v.* State, 38 id. 44, 20 So. 807.

[4] 1883, Williams *v.* State, 74 Ala. 18 (as a "turbulent, violent, and bloodthirsty man"); 1893, Garner *v.* State, 31 Fla. 170, 175, 12 So. 638 (must be a "violent and dangerous" character); 1891, Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115 ("strength, ferocity, vindictiveness, quarrelsomeness, etc."); 1881, Spivey *v.* State, 58 Miss. 858, 864 (admitting character as "violent, dangerous, or regardless of human life," but not as "overbearing, turbulent, or impetuous," because "the inquiry should be limited to such features of character as have a tendency to throw light on the apprehension of the accused because of that character"). Other phrasings will be found *infra* in the citations at the end of this section.

[5] 1895, Goldsmith *v.* State, 105 Ala. 8, 16 So. 933 (excluded; yet here the third person was taking part in the affray); 1898, Anderson *v.* U. S., 170 U. S. 481, 18 Sup. 689 (murder of captain and mate; trial for the latter only; captain's ferocious character excluded; unsound, on the facts).

[6] The cases are cited in note 13, *infra*, at the end of this section. But the defendant's knowledge may be obtained otherwise than by reputation: 1901, State *v.* Burton, 63 Kan. 602, 66 Pac. 633 (defendant's personal knowledge or belief, however obtained, is admissible). But a *witness' personal knowledge or opinion* of the deceased's character, even if it were admissible under the Opinion rule (*post*, § 1983) would not serve here, because it would not show the defendant's knowledge: 1899, State *v.* Shalwell, 22 Mont. 559, 57 Pac. 281.

[7] 1897, Golder *v.* Lund, 50 Nebr. 789, 70 N. W. 397 (civil action, admitted); 1871, Strang *v.* People, 24 Mich. 1, 5 (where the prosecutrix gave as a reason for not complaining of an uncle's rape that he had been violent to his wife, etc.). For further illustrations of this class of evidence, see *post*, § 140.

(*f*) The *strength* of the deceased may conceivably affect the defendant's apprehensions,[8] and also his potency for harm as indicated by his habitual *carrying of weapons* or his possession of them at the time of the affray;[9] these facts, if known to the defendant, should be considered as properly affecting his apprehensions.

(*g*) The prosecution may *rebut* the evidence of bad reputation, just as it may attempt to disprove any other allegation of the defence.[10] Most Courts refuse to allow the deceased's good reputation to be shown except in rebuttal of an alleged bad reputation.[11] Yet it is difficult to see, if a genuine issue of self-defence is raised, why the prosecution should not be allowed to show, independently of such rebuttal, the deceased's good reputation as throwing light on the defendant's just apprehensions.[12]

(*h*) The *actual character* of the deceased, though *unknown* to the defendant, is admissible in most jurisdictions, from another point of view and therefore under different conditions, as evidencing the deceased's probable aggression (*ante*, § 63). A comparison of the rulings in each jurisdiction and of the requirements made for the two kinds of evidence is profitable.

(*i*) The tests applied in admitting *communicated threats* (*post*, § 247) are often the same as for the present subject, for the principle is in effect identical.

(*j*) The principle of admitting *communicated single acts of violence* by the deceased (*post*, § 248) is also the same, though the same tests are not applicable in every respect.

The state of the law in the various jurisdictions, on the chief aspects of the rule (*a* and *b* above), varies only in respect to the particularity of definition attempted for the conditions of admissibility. In three jurisdictions, however (Delaware, Maine, and Massachusetts), the whole doctrine seems to be rejected.[13]

[8] 1871, State *v.* Collins, 32 Ia. 38; 1896, Smith *v.* U. S., 161 U. S. 85, 16 Sup. 483; 1880, State *v.* Nett, 50 Wis. 524, 527, 7 N. W. 344.

[9] 1902, Cawley *v.* State, 133 Ala. 128, 32 So. 227; 1897, People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495 (allowing the prosecution to deny this); 1902, People *v.* Adams, 137 id. 580, 70 Pac. 662; 1897, Daniel *v.* State, 103 Ga. 202, 29 S. E. 767; 1897, McDonall *v.* People, 168 Ill. 93, 48 N. E. 86; 1858, Payne *v.* Com., 1 Metc. Ky. 370, 379; 1888, King *v.* State, 65 Miss. 576, 582, 5 So. 97; 1900, State *v.* Yokum, 14 S. D. 84, 84 N. W. 389 (deceased's reputed habit of carrying firearms, admissible; reversing the ruling in s. c. 11 id. 544, 79 N. W. 835; Corson, J., diss.); 1902, State *v.* Ellis, 30 Wash. 369, 70 Pac. 963; 1903, State *v.* Crawford, — id. —, 71 Pac. 1030. Compare the cases cited *ante*, § 111.

[10] 1885, Davis *v.* People, 114 Ill. 86, 95, 29 N. E. 192; 1858, Dukes *v.* State, 11 Ind. 557, 565; 1892, Fields *v.* State, 134 id. 46, 56, 32 N. E. 780; 1876, Thomas *v.* People, 67 N. Y. 218, 224.

[11] 1870, People *v.* Anderson, 39 Cal. 704; 1891, People *v.* Powell, 87 id. 348, 362, 25 Pac. 481; 1871, Pound *v.* State, 43 Ga. 88, 129; 1874, State *v.* Potter, 13 Kan. 414, 423; 1895, State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733; 1872, Dock *v.* Com., 21 Gratt. 909, 912.

[12] *Accord:* 1842, Carroll *v.* State, 3 Humph. 315, 317.

[13] *Ala.:* 1833, Quesenberry *v.* State, 3 Stew. & P. 308, 315 ("if the circumstances were such as to leave any doubt" as to the necessity of self-defence," admissible); 1853, Pritchett *v.* State, 22 Ala. 39 (admitted in cases of self-defence, because it "might very reasonably justify a resort to more prompt measures of self-preservation"; but the deceased "forfeits no right to his life," until "by an actual attempt to execute his threats, or by some act or demonstration at the time of killing, taken in connection with such character or threats, he induces a reasonable belief," etc.; this is the foundation of the "overt-act" doctrine, advanced later); 1856, Franklin *v.* State, 29 id. 10, 14 (character for turbulence, violence, revengefulness, bloodshed, and the like, admissible where the deceased's conduct in the light of the character would excite apprehen-

§ 247. (1) Defendant charged with Murder; (*b*) Threats by the Deceased. On the same principle as that of the preceding section, threats of violence

sion; not limited to doubtful cases); 1875, Eiland *v.* State, 52 id. 333 (same; "it should never be received when at the time of the killing there is no act or word of the deceased which can be illustrated or explained by it, or when there is not evidence conducing to show the killing was in self-defence"); 1880, Roberts *v.* State, 68 id. 165 (same; adopting the same phrasing as in the case of threats; see *post*, § 247); 1882, De Arman *v.* State, 71 id. 360 (bad character for peacefulness, admitted; not necessary to use any special form of words, such as "bloodthirsty," "quarrelsome," etc.); 1882, Storey *v.* State, ib. 329, 841 (admissible "in all cases where an issue of self-defence properly arises"); 1883, Williams *v.* State, 74 id. 18, 20 (admitted, citing the last three cases); 1889, Smith *v.* State, 88 id. 77, 7 So. 52 (principle affirmed); 1891, Amos *v.* State, 96 id. 120, 124, 11 So. 424 (not admitted where there were no facts that could excite a belief of peril); 1893, Karr *v.* State, 100 id. 4, 14 So. 851 (no conditions specified); 1898, Naugher *v.* State, 116 id. 463, 23 So. 26; 1898, Rufus *v.* State, 117 id. 131, 23 So. 144 (excluded, the defendant being "clearly at fault"); 1908, Morrell *v.* State, — Id. —, 84 So. 208 (excluded, there being no evidence of an overt act); *Ark.:* 1874, Palmore *v.* State, 29 Ark. 248, 261, 263 (admitted); *Cal.:* 1858, People *v.* Murray, 10 Cal. 309 (admissible "when the circumstances of the contest are equivocal" as to self-defence); 1861, People *v.* Lombard, 17 id. 816, 820 (admissible "where the immediate circumstances of the killing render it doubtful whether the act was justifiable or not"); 1871, People *v.* Edwards, 41 id. 640, 643 (like People *v.* Murray); 1896, People *v.* Howard, 112 id. 135, 44 Pac. 464 (admissible "in rare cases"); 1899, People *v.* Griner, 124 id. 19, 56 Pac. 625 (distinction between "character" and "general reputation," not decided); *Colo.:* 1878, Davidson *v.* People, 4 Colo. 145, 150 (admitted, if an attack by the deceased is shown); *Del.:* 1845, State *v.* Thawley, 4 Harringt. 562 (excluded, on the theory that it is no excuse; Harrington, J., dubit.); *Fla.:* 1886, Bond *v.* State, 21 Fla. 738, 756 (excluded, because there was no evidence of hostile conduct at the time); 1891, Garner *v.* State, 28 id. 113, 136, 9 So. 835 (admissible when there was "some demonstration which," though otherwise innocent, "when received or considered in connection with or illustrated by such character, may arouse a reasonable belief of imminent peril" of death or great bodily harm; the Court to determine whether evidence of such exists, solving doubts in favor of the defendant); 1893, s. c. 31 id. 170, 174, 12 So. 638 (same); 1893, Roten *v.* State, 31 id. 514, 523, 12 So. 910 (admissible only after evidence of a hostile demonstration or overt act); 1894, Steele *v.* State, 33 id. 348, 350, 14 So. 841 (same as Garner *v.* State, *semble*); 1896, Hart *v.* State, 38 id. 39, 20 So. 805; Allen *v.* State, ib. 44, 20 So. 807; *Ga.:* 1848, Monroe *v.* State, 5 Ga. 85, 137 (admitted); 1855, Keener *v.* State, 18 id. 194, 220 (same); 1855, Bowle *v.* State, 19 id. 7 (same); 1892, Croom *v.* State, 90 id. 430, 17 S. E. 1003 (character for violence towards negroes, excluded); 1903, Dannenberg *v.* Berkner, — id. —, 45 S. E. 682 (rule applied); *Ida.:* 1868, People *v.* Stock, 1 Ida. 218 (admissible, if the circumstances "raise a doubt" in regard to self-defence); *Ill.:* 1885, Davis *v.* State, 114 Ill. 86, 95, 29 N. E. 192, *semble* (that he was "a good man in a fight," admissible); 1902, Carle *v.* People, 200 id. 494, 66 N. E. 82 (admissible, after other evidence tending to show the deceased's aggression); *Ind.:* 1858, Dukes *v.* State, 11 Ind. 556, 565 (admitted where a question of self-defence arose); 1864, Fahnestock *v.* State, 23 Id. 231, 237, *semble* (general character for violence when intoxicated, admissible); 1884, Boyle *v.* State, 97 id. 322, 324 (character admitted); 1891, Bowlus *v.* State, 130 id. 227, 28 N. E. 1115 (same); *Kan.:* 1864, Wise *v.* State, 2 Kan. 419 (admissible, *semble*, where from other circumstances it appears that "the defendant was justified in believing himself in danger"); 1874, State *v.* Potter, 13 id. 414, 423 (admissible, *semble*, where there is a doubt as to self-defence and the testimony "may serve to explain the conduct of the deceased"); 1878, State *v.* Riddle, 20 id. 711, 714 (excluded on no clear rule; here there was an assault by the deceased, but not such as to excite fear of serious harm); 1879, State *v.* Scott, 24 id. 68, 70 (admitted; no rule stated); 1902, State *v.* Spangler, 64 id. 661, 68 Pac. 39 (admissible); *Ky.:* 1858, Payne *v.* Com., 1 Metc. 370, 379 (character, and the habit of carrying concealed deadly weapons, admitted; no general test laid down); 1871, Bohannon *v.* Com., 8 Bush 481, 488 (*semble*, admissible); 1893, Riley *v.* Com., 94 Ky. 266, 270, 22 S. W. 222 (admitted); *La.:* 1850, State *v.* Chandler, 5 La. Au. 489 (excluded; no reason given); 1854, State *v.* D'Augelo, 9 id. 48 (same; Slidell, C. J., intimating possible exceptions); 1855, State *v.* Brien, 10 id. 453 (same as Chandler's case); 1856, State *v.* Jackson, 12 id. 679 (same); 1878, State *v.* Robertson, 30 id. 340 (admitted where aggression by the deceased is shown, and *semble* previous threats; the above cases ignored); State *v.* Burns, ib. 679 (the preceding case ignored, the early cases cited; the evidence rejected, as under a general rule, intimating that on a proper showing of self-defence, it might be admissible); 1880, State *v.* Vance, 32 id. 1177 (excluded, because no action evincing a hostile purpose at the time was offered, a prior conditional threat not sufficing); State *v.* Ricks, ib. 1098 (admissible, when "threats and hostile acts or demonstrations are proven"); 1881, State *v.* Jackson, 33 id. 1087 (admissible, if there was an "assault or hostile demonstration" at the time, prior threats not being a sufficient foundation); 1882, State *v.* McNeely, 34 id. 1022 (admissible in connection with previous threats alone); 1883, State *v.* Garic, 35 id. 970, 971 (a charge that it could be considered, "in con-

against the defendant, uttered by the deceased, and brought to the knowledge of the defendant, are relevant to show his belief of impending danger from the deceased.

nection with proof of an overt act," apparently approved); State *v.* Claude, ib. 71, 74 (admissible when "any assault or hostile demonstration" or other circumstances showing belief of danger is proved); 1884, State *v.* Watson, 36 id. 148 (admitted, if there were "threats made and communicated, followed by some act on the part of the deceased to induce the belief or apprehension that the threats were about" to be executed); State *v.* Birdwell, ib. 859, 861 (admissible only in case of an "overt act, assault, or hostile demonstration" at the time, and not merely of the use of previous threats); 1885, State *v.* Saunders, 37 id. 339 (admissible in case of a "hostile demonstration, overt act, or threats"; citing only State *v.* Garic); State *v.* Ford, ib. 443, 460 (same test; the trial Court is to determine whether the preliminary overt-act evidence suffices); State *v.* Janvier, ib. 644 (same); State *v.* Kervin, ib. 782 (same); State *v.* Jackson, ib. 806 (same); 1888, State *v.* Williams, 40 id. 168, 3 So. 629 *semble* (same); 1890, State *v.* Cosgrove, 42 id. 753, 7 So. 714 (same); 1891, State *v.* Paterno, 43 id. 514, 9 So. 442 (rejecting the character because of the "absence of danger and necessity for self-defence"; none of the above cases cited); 1892, State *v.* Christian, 44 id. 950, 954, 11 So. 589 (same as State *v.* Ford, including the rule of trial Court's discretion); 1893, State *v.* Stewart, 45 id. 1164, 1166, 14 So. 143 (same); State *v.* Nash, ib. 1137, 1141, 13 So. 732, 734 (rejecting the character because not communicated and because no overt act was shown); State *v.* Carter, ib. 1326, 14 So. 30 (dangerous character not received in mitigation, unless "hostile demonstration" is shown); 1894, State *v.* Barker, 46 id. 798, 802, 15 So. 98 (trial Court's findings control, unless affirmatively shown erroneous); State *v.* Williams, ib. 703, 15 So. 82 (same as State *v.* Ford; the "overt act" must be "some demonstration . . . of such character as to impress upon him that he was in imminent danger of his life or some great bodily harm"); State *v.* Beck, ib. 1419, 16 So. 368 (same as State *v.* Ford); State *v.* Green, ib. 1522, 16 So. 867 (same); 1895, State *v.* Vallery, 47 id. 182, 16 So. 745 (admissible, where there is "a hostile demonstration"; the trial Court's discretion controls); 1896, State *v.* Compagnet, 48 id. 1470, 21 So. 46 (same); 1901, State *v.* Napoleon, 104 La. 164, 28 So. 972 (admitted; no cases cited). From this maze of twisting precedents, which none but a Louisiana practitioner should be condemned to unravel, four conclusions may be ventured: (1) The law of to-day goes back only to Birdwell's and Ford's cases, in which the phrasing of the limitation and the doctrine of the trial Court's discretion are established; (2) Some later cases still (erroneously, it would seem) treat threats at the time of the affray as equivalent to an overt act of aggression; (3) In the Paterno case, the doctrine is laid down that the deceased's character and threats are also evidential as explaining away the inference of the defendant's malice from his prior preparations; this doctrine is apparently unsound as far as concerns the character-evidence; see *post*, § 247; (4) The Court of Louisiana had still in the above period to learn two truths essential to the successful administration of justice; first, that the fundamental duty of a Supreme Court is to be familiar with its own decisions, and either to repeat them or to overrule them, but not to ignore them; secondly, that a due self-respect and a regard for the course of justice requires that a stern rebuke be given to the continued agitation by unscrupulous practitioners of questions of law once settled, and that no attention, other than to give such a rebuke, be paid in an opinion to exceptions taken purely for the purpose of gambling on the Court's inadvertence; since 1896, some appreciation of this duty is perceivable in the diminished number of rulings. *Me.:* 1837, State *v.* Field, 14 Me. 244 (the deceased's character as "quarrelsome, savage, and dangerous," excluded, as not amounting to an excuse; the present point of view was emphasized by the counsel, but was apparently not understood by the Court); *Mass.:* 1845, Com. *v.* York, 7 Law Reporter, Mass. 497, 507 (character rejected, as without precedent and leading to multifariousness); 1854, Com. *v.* Hilliard, 2 Gray 294 ("general character and habits" as a "quarrelsome, fighting, vindictive, and brutal man of great strength," not admitted to show "reasonable cause to fear great bodily harm"; because "such evidence is too remote and uncertain"); 1858, Com. *v.* Mead, 12 id. 167 (the defendant shot the deceased while the latter was choking him, as alleged; the fact was excluded, following the preceding case, of the deceased's remarkable strength and of his skill and practice as a garroter by seizing another by the throat in a peculiar and dangerous mode); *Mich.:* 1868, People *v.* Garbutt, 17 Mich. 9, 15, (excluded, because insanity, not self-defence, was the defence); 1878, Brownell *v.* People, 38 id. 782, 735 (that the deceased was "a powerful men of violent temper," admitted); *Minn.:* 1860, State *v.* Dumphey, 4 Minn. 438, 445 (admissible where there is doubt as to the premeditation of the defendant; opinion not clear); *Miss.:* 1849, Jolly *v.* State, 13 Sm. & M. 223, 225, *semble* (admissible, if the deceased appears as the aggressor); 1856, Cotton *v.* State, 31 Miss. 504 (character admissible); 1859, Wesley *v.* State, 37 id. 327, 346 (admissible, where the defendant had ground to apprehend an attack); 1872, Chase *v.* State, 46 id. 683, 703 (excluded, although the issue of self-defence was raised and strong evidence of it offered; the opinion is confused, and, though citing authorities profusely, does not show understanding of the principle); 1872, Harris *v.* State, 46 id. 319, 325 (approving the Chase case); 1881, Spivey *v.* State, 58 id. [illegible] 864 (admissible, where there is apparent danger from some overt act

(*a*) As in the preceding topic, considerations of policy call for some *restrictions* calculated to secure the *bona fide* use of such evidence. These may

indicating a present purpose to do the accused some greatly bodily harm"); 1885, Moriarty *v.* State, 62 Id. 654, 661 (expressing the rule substantially as in the preceding case); 1888, King *v.* State, 65 id. 576, 582, 5 So. 97 (character admissible, approving the preceding case); 1898, Smith *v.* State, 75 id. 542, 23 So. 260 (the defendant's testimony alone is enough to "lay the predicate" of "some testimony" of an overt act); *Mo.:* 1853, State *v.* Jackson, 17 Mo. 544, 548 (excluded here, because no issue of self-defence was made); 1859, State *v.* Hicks, 27 Id. 588, 590 (admitted, the issue being self-defence and the other evidence creating a doubt); 1872, State *v.* Keene, 50 Id. 357, 360 (same); 1874, State *v.* Bryant, 55 id. 75, 78 (holding that character as a "desperate and dangerous" man, and not merely as to "peace and quiet," should have been admitted); 1875, State *v.* Harris, 59 id. 550, 552, 556 (admitted, but with the intimation that the deceased must appear to have made some demonstration at the time); 1876, State *v.* Elkins, 63 Id. 165 (admissible in doubtful cases of self-defence); 1893, State *v.* Pettit, 119 id. 410, 414, 24 S. W. 1014 (admitted); 1893, State *v.* Kennade, 121 Id. 405, 415, 26 S. W. 347 (excluded, because not communicated); *Mont.:* 1898, State *v.* Shafer, 22 Mont. 17, 55 Pac. 526 (admitted; there being evidence of deceased's aggression); 1899, State *v.* Shadwell, 22 Id. 573, 57 Pac. 281 (similar); *Nev.:* 1880, State *v.* Pearce, 15 Nev. 188, 191 (admissible, where "the circumstances are such as to raise a doubt" as to self-defence); *N. Y.:* 1866, People *v.* Lamb, 41 N. Y. 360, 366 (admissible only "where the defendant had reason to be in fear" of life or great bodily harm); 1881, Abbott *v.* People, 86 Id. 461, 469 (admissible only "where it is shown that an assault has been committed or threatened at the time when the homicide is committed or immediately preceding it, or is intimately connected with it so as to justify" action in self-defence); *N. C.:* 1877, State *v.* Turpin, 77 N. C. 473, 477 (character as a violent and dangerous man; uncommunicated character also admissible, under § 63, *ante;* the limitation is made that there must be evidence tending to show self-defence, and that the evidence be wholly circumstantial; for the first time the necessity of communication is recognized in this State; the local precedents cited do not deal at all with the present question); 1879, State *v.* Chavis, 80 id. 357 (State *v.* Turpin recognized); 1893, State *v.* Rollins, 113 id. 722, 732, 18 S. E. 394 (excluded, where not known to defendant); 1897, State *v.* Byrd, 121 id. 684, 28 S. E. 353 (admissible, but only where there is "other evidence tending to show self-defence" or where "the evidence of the killing is entirely circumstantial"; but the latter seems to be said of uncommunicated character only); *Oh.:* 1860, Gandolfo *v.* State, 11 Oh. St. 114, 118, *semble* (admissible); 1875, Marts *v.* State, 26 id. 162, 168 (same); *Or.:* 1894, State *v.* Morey, 25 Or. 241, 255, 35 Pac. 655, 36 Pac. 573 (admissible, when there is evidence "tending to show that the defendant was assailed by the deceased and in apparent danger"); *Pa.:* 1794, Pennsylvania *v.* Robertson, Add. 246 (murder of an Indian in self-defence; the reputation of the time that the Indians were in an angry mood, and the bad repute of the deceased, considered by the Court as affecting the defendant's state of mind); 1867, Com. *v.* Lenox, 3 Brewst. 249, 251 (reputed character admissible "if the case showed" that the defendant was "under reasonable fear of his life from the deceased at the time"); 1868, Com. *v.* Ferrigan, 44 Pa. 388 (general deportment as to violence, rejected, there being no evidence of aggression calling for self-defence); 1893, Com. *v.* Straesser, 153 Id. 451, 456, 26 Atl. 17 (admissible, if the issue is self-defence and if knowledge is shown); *S. C.:* 1860, State *v.* Smith, 12 Rich. 430, 443 ("a character and habits of violence, treachery, etc., such as might beget reasonable apprehensions of grievous bodily harm"); 1888, State *v.* Turner, 29 S. C. 34, 41 (admissible; it must not be merely "bad character, as contradistinguished from character for violence, ferocity, vindictiveness, etc., etc."); *Tenn.:* 1836, Wright *v.* State, 9 Yerg. 342 (malicious stabbing; self-defence not alleged; the deceased's character as a "turbulent, insolent, saucy fellow" held inadmissible, as not extenuating the offence); 1842, Carroll *v.* State, 3 Humph. 315, 317 (no general rule); 1859, Harmon *v.* State, 3 Head 243 (the desperate and dangerous character of the deceased, "in connection with previous threats," held admissible, on self-defence pleaded, as "explanatory of the state of defence in which the defendant placed himself"; the requirement of communication implied only); 1872, Williams *v.* State, 3 Helsk. 376, 397 (the deceased's violent character, known to the defendant, treated as admissible, the issue being self-defence); 1873, Jackson *v.* State, 6 Baxt. 452, 458, 466 (*semble*, same); *Tex.:* 1854, Henderson *v.* State, 12 Tex. 525, 530 (not clear); St. 1858, Feb. 12, Pen. Code 1895, art. 713 ("where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made; but the same shall not be regarded as affording a justification for the offence unless it be shown that at the time of the homicide the person killed by some act then done manifested an intention to execute the treat so made. In every instance where proof of threats has been made, it shall be competent to introduce evidence of the general character of the deceased. Such evidence shall extend only to an inquiry as to whether the deceased was a man of violent or dangerous character, or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made"); 1871, Dorsey *v.* State, 34 Tex. 651, 658 (applying the preceding); 1875, Horbach *v.* State, 43 id. 242, 255 (pointing out that the

be, and frequently are, the same as those applied (in the preceding topic) to the use of the deceased's character. But they are less frequently laid down for the present class of evidence, apparently for two reasons, — first, because there is less danger of improperly using the deceased's threats in justification for the killing (less danger, that is, than where he can be shown to be an abandoned ruffian, a curse to the community), and, secondly, because specific threats of violence have a more decided bearing on the probability of aggression than mere dangerousness of character. It is therefore to be noted that the rulings on the two subjects in a given jurisdiction are not necessarily mutually applicable.[1]

(*b*) Wherever the *overt-act* limitation is adopted, the rule should prevail (as in the preceding topic) that the trial Court's discretion determines the sufficiency of the evidence of an overt act.[2]

(*c*) The threats are required to have been *communicated* to the defendant, *i. e.* brought to his notice in some way; otherwise they have no bearing for the present purpose.

(*d*) The use of *uncommunicated threats*, as showing the probability of the deceased having been the aggressor, involves a different principle (dealt with *ante*, § 110); but the respective precedents are not always duly discriminated.

The state of the law in the various jurisdictions varies chiefly in the phrasing of the generally accepted conditions of admissibility.[3]

Code section was chiefly intended to settle a controversy as to the admissibility of threats, and is therefore not exclusive of character-evidence relevant under other conditions not therein specified; admitting character-evidence additionally to explain acts of the deceased at the time "of doubtful import," are capable of being "construed more favorably for the accused" by such evidence); 1892, Evers *v.* State, 31 Tex. Cr. 318, 324, 20 S. W. 744 (excluded, where no "act indicating any purpose" to kill or harm defendant was shown); 1893, Skaggs *v.* State, ib. 563, 21 S. W. 257 (reputation of the deceased acquired after the killing, excluded); *U. S.*: 1896, Smith *v.* U. S., 161 U. S. 85, 16 Sup. 483 (Gray, J.: "that the deceased had the general reputation of being a quarrelsome and dangerous person was competent, especially if his character in this respect was known to the defendant"; the "especially" here is an uncertain phrase, indicating an unfamiliarity with the principle); *Va.*: 1884, Harrison *v.* Com., 79 Va. 374 (admissible where "a case of self-defence is *prima facie* made out"; but the deceased's reputation, not the witness' personal opinion, is alone admissible); *Vt.*: 1876, State *v.* Lull, 48 Vt. 581 (admitted; here the character as "a violent and desperate man"); *Va.*: 1872, Dock *v.* Com., 21 Gratt. 909, 911 (admissible; giving no general rule); 1900, Jackson *v.* Com., 98 Va. 845, 36 S. E. 487 (excluded, because the evidence did not tend to show self-defence); *Wash.*: 1896, State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20 (excluded, because there was no contention of self-defence), *W. Va.*: 1889, State *v.* Evans, 33 W. Va. 417, 424, 10 S. E. 792 (excluding hearsay — spoken of as reputation — to the influence of one of the two persons killed over the other, as affecting the defendant's reasonable fear; here it was perfectly immaterial whether the influence existed, and therefore whether reputation could be used to prove its existence); 1901, State *v.* Morrison, 49 id. 210, 38 S. E. 481 (theory of admission pointed out); 1901, State *v.* Madison, ib. 96, 38 S. E. 492 (admissible only where there is some evidence of self-defence); *Wis.*: 1880, State *v.* Nett, 50 Wis. 524, 527 (admitting such evidence where the circumstances raise a question as to self-defence; and distinguishing on that ground the earlier ruling of Brucker *v.* State, 19 id. 539; 1865).

[1] The rulings are collected *infra*, note 3.

[2] 1897, State *v.* Pruett, 49 La. An. 283, 21 So. 842 (discretion of the trial Court as to overt acts conceded; but irrespective of this the defendant is entitled, under Act 99 of 1896, to have the testimony as to the alleged overt act taken down in writing for review); 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 512 (discretion conceded).

[3] *Eng.*: 1713, Nobie's Trial, 15 How. St. Tr. 740 (the deceased broke into the defendant's room with a constable to arrest him, and the defendant stabbed him in alleged self-defence; evidence was admitted that the deceased had once before "drawn his sword upon him, and once brought a pistol to his chambers on purpose to shoot him"); *Ala.*: 1851, Powell *v.* State, 19 Ala. 577, 581 (admitted); 1853, Pritchett *v.*

§ 248. (1) Defendant charged with Murder: (c) Violent Acts of the Deceased. If it could be shown that the deceased had just before been running

State, 22 id. 42 (where the circumstances indicate self-defence; for the beginning of the "overt act" doctrine, as here applied, see § 246, *ante*); 1853, Carroll *v.* State, 23 id. 28, 36; 1859, Dupree *v.* State, 33 id. 380, 386; 1872, Hughey *v.* State, 47 id. 97, 103 (as "threats unaccompanied by acts" of aggression could not possibly excuse, mere threats alone are not receivable); 1875, Powell *v.* State, 52 id. 1 (communicated threats received); 1877, Payne *v.* State, 60 id. 80, 86 (no evidence of aggression by the deceased; threats made two weeks before, excluded; Pritchett's Case misunderstood); 1878, Myers *v.* State, 62 id. 603 (the jury should not consider the deceased's threats, unless there was "a present, impending purpose on his part, real or apparent, to put such threats into immediate execution"; *i. e.* the threats are admitted, and the absence of an "overt act" merely weighs with the jury, — a true construction of Pritchett's Case); 1878, Polk *v.* State, ib. 239 (threats of J. admitted, as an excuse upon a charge of carrying concealed weapons); 1880, Roberts *v.* State, 68 id. 164 (admissible only when "the deceased had sought a conflict with the accused, or was making some demonstration, or overt act of attack"; "in other words, the circumstances must properly raise a case of self-defence"; hence, such threats "cannot be excluded if there is the slightest evidence tending to prove a hostile demonstration"); 1881, Green *v.* State, 69 id. 8, 10 (threats a week before, excluded; but, as there was evidence of aggression, the ruling seems erroneous); 1898, Jones *v.* State, 116 id. 468, 23 So. 135 (excluded where there was "no act or hostile demonstration," etc.); 1901, Harkness *v.* State, 129 id. 71, 30 So. 73 (excluding threatening conduct, as distinguished from threatening words, on an improper application of the principle of § 951, *post*; Sharpe and Dowdell, JJ., properly dissenting); 1901, Willingham *v.* State, 130 id. 35, 30 So. 429 (Harkness *v.* State followed, by a majority); 1902, Andrews *v.* State, 134 id. 47, 32 So. 665 (overt-act rule, applied); 1902, Ragsdale *v.* State, ib. 24, 32 So. 674 (same); 1903, Johnson *v.* State, — id. — , 34 So. 209 (excluded, there being no evidence of aggression); *Ark.*: 1855, Atkins *v.* State, 16 Ark. 568, 584 (admitted); 1859, Coker *v.* State, 20 id. 53, 55; 1860, Pitman *v.* State, 22 id. 354, 356; 1874, McPherson *v.* State, 29 id. 225, 228 (the limitation suggested that threats are not admissible if there is no evidence tending to show apprehension of injury; no authorities cited); Palmore *v.* State, ib. 248, 261, 263 (admitted not only to throw light on the defendant's state of mind at the time of the affray, but also to negative the apparent malice of having armed himself beforehand); 1879, Harris *v.* State, 34 id. 469, 472 (admissible); *Cal.*: 1860, People *v.* Arnold, 15 Cal. 476, 480 (admissible); 1861, People *v.* Lombard, 17 id. 316, 320 (admissible; but not legally sufficient as a defence unless followed by an overt act); 1869, People *v.* Scoggins, 37 id. 676, 683 (same); 1879, People *v.* Taing, 53 id. 602 (excluded here because no preliminary showing of any kind was made); 1880, People *v.* Travis, 56 id. 251, 253 (threats admissible; no authorities cited or rule laid down); *Fla.*: 1886, Bond *v.* State, 21 Fla. 738, 752 (admissible when there are "circumstances which might reasonably cause him to believe that the deceased at the time of the killing had a purpose to carry them out"; though "no exact definition of an overt act can probably be given"); 1889, Smith *v.* State, 25 id. 517, 521, 6 So. 482 (same); 1891, Garner *v.* State, 28 id. 113, 133, 9 So. 835 (admissible when there is, "at least apparently, a hostile demonstration, or overt act of attack, tending to show" danger with other phrasings; the Court to determine whether evidence of such exists and to solve doubts in favor of the defendant); 1894, Steele *v.* State, 33 id. 348, 350, 14 So. 841, *semble* (same); 1902, Lane *v.* State, — id. — , 32 So. 896 ("there must be some evidence of the overt act"); *Ga.*: 1846, Reynolds *v.* State, 1 Kelly 222, 230, *semble* (overt act not necessary); 1847, Hudgins *v.* State, 2 Ga. 173, 181 (communicated threats admissible; here excluded only on the absurd ground that the informant, who told the defendant, "Yonder comes J. A., and he will kill you," expressed his "opinion" only; see the Opinion rule, *post*, § 1938); 1848, Howell *v.* State, 5 Ga. 48, 54; Monroe *v.* State, ib. 85, 135 ("naked threats unaccompanied with personal violence," excluded); 1855, Keener *v.* State, 18 id. 194, 218, 225 (the deceased's demeanor and threats just before the affray, admitted; the limitation of Monroe's case in effect repudiated; no overt act necessary); 1858, Hawkins *v.* State, 25 id. 209 (same as Hudgins' case); 1859, Llogo *v.* State, 29 id. 470, 483 (threats uncommunicated, rejected); 1881, Coxwell *v.* State, 66 id. 309 (previous communicated threats admitted); *Ind.*: 1863, DeForest *v.* State, 21 Ind. 23, 26 (admitted); 1883, Wood *v.* State, 92 id. 269, 273 (same); 1900, Enlow *v.* State, 154 id. 664, 57 N. E. 539 (same); *Ia.*: 1871, State *v.* Collins, 32 Ia. 36; 1875, State *v.* Woodson, 41 id. 425, 428; 1876, State *v.* Maloy, 44 id. 104, 114; 1877, State *v.* Elliott, 45 id. 490 (admitted in all of these cases); *Kan.*: 1879, State *v.* Brown, 22 Kan. 222, 230 (assumed as admissible); 1880, State *v.* Scott, 24 id. 68, 70 (admitted; no rule stated); 1901, State *v.* Burton, 63 id. 602, 66 Pac. 633 (admitted); *Ky.*: 1855, Cornelius *v.* Com., 15 B. Monr. 539, 546 (admissible); 1869, Young *v.* Com., 6 Bush 318, *semble* (same); 1865, Philips *v.* Com., 2 Duv. 328, 329 (same); 1870, Carico *v.* Com., 7 Bush 124, 129 (same); 1871, Bohannon *v.* Com., 8 id. 481, 488, *semble* (same); 1882, Lightfoot *v.* Com., 80 Ky. 521, *semble* (same); 1896, Com. *v.* Hoskins, — id. — , 35 S. W. 284 (admissible; but here they were too indefinite); 1896, Grayson *v.* Com., — id. — , 35 S. W. 1035 (threats of a year before, held not improperly excluded, but not threats of a month before);

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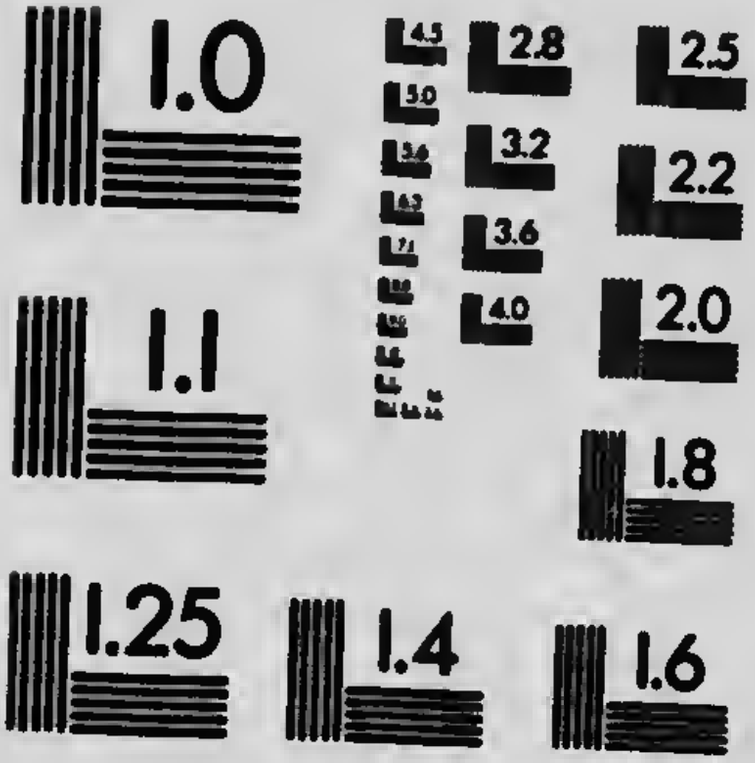

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amuck in the streets, and that the defendant was informed that the deceased was on his way towards the defendant's locality, it is difficult to believe that

1903, Morrison *v.* Com., — id. — , 74 S. W. 277 (overt-act rule apparently adopted); *La.:* 1859, State *v.* Mullen, 14 La. An. 577, 579, *semble* (admissible); 1878, State *v.* Robertson, 30 id. 340 (same); State *v.* Ryan, ib. 1177, *semble* (same); 1880, State *v.* Cooper, 32 id. 1034, *semble* (same); State *v.* Vance, ib. 1177, *semble* (same; but conditional threats excluded); 1881, State *v.* Jackson, 33 id. 1687, *semble* (admissible); State *v.* Fisher, ib. 1344, *semble* (same); 1884, State *v.* Birdwell, 36 id. 859, 861 (threats alone, without an "overt act, assault, or hostile demonstration" at the time, excluded); 1885, State *v.* Ford, 37 id. 443, 460 (same test; the trial Court to determine whether the preliminary overt-act evidence suffices); State *v.* Labuzan, ib. 489 (same); State *v.* Janvier, ib. 644 (same); 1886, State *v.* Spell, 38 id. 20 (same); 1887, State *v.* Brooks, 39 id. 817, 2 So. 493 (same as State *v.* Birdwell); 1889, State *v.* Demareste, 41 id. 617, 6 So. 136 (same as State *v.* Ford); 1890, State *v.* Cosgrove, 42 id. 753, 7 So. 714 (same); 1891, State *v.* Wilson, 43 id. 840, 9 So. 490 (same as State *v.* Birdwell, but phrasing the preliminary condition as "threat or hostile demonstration"); 1892, State *v.* Jackson, 44 id. 160, 161, 163, 10 So. 600 (same as State *v.* Ford; the deceased's ability to carry out the threats, not sufficient to admit them); [illegible]3, State *v.* Harris, 45 id. 842, 845, 13 So. 299 (same as State *v.* Ford, emphasizing the trial Court's discretion); 1894, State *v.* Green, 46 id. 1522, 16 So. 367 (same); 1895, State *v.* King, 47 id. 28, 16 So. 566 (same); 1895, State *v.* Vickers, ib. 1574, 18 So. 639 (threats must be communicated); 1896, State *v.* Compagnet, 48 id. 1470, 21 So. 46 (same as King's case); 1897, State *v.* Pruett, 49 id. 283, 21 So. 842 (an overt act not required, where the only purpose was to explain away the defendant's expressed intention to kill the deceased, by showing his reasons for so threatening, *i. e.* to negative malice); 1898, State *v.* Wiggins, 50 id. 330, 23 So. 334 (admissible if an "overt act or hostile demonstration" is shown; the trial Court's discretion to determine this); 1899, State *v.* Frierson, 51 id. 706, 25 So. 396 (rule applied; trial judge's certificate not treated as sufficient on the subject of overt act; no authorities cited); 1903, State *v.* Tasby, 110 id. — , 34 So. 300 (whether the trial judge's report as to the absence of evidence of an overt act is conclusive, not clear); 1903, State *v.* Forbes, 111 id. — , 35 So. 710 (the Court remarks upon the importance of preserving "the stability of judicial decisions"; the trial judge's finding held conclusive); 1904, State *v.* Thomas, ib. — , 35 So. 914 (threats, without an overt act, not admissible "as part of the *res gestæ* and in mitigation"); *Md.:* 1880, Turpin *v.* State, 55 Md. 462, 473 (admitted only when there was an overt act at the time and the defendant was in apparent imminent danger); *Mich.:* 1868, People *v.* Garbutt, 17 Mich. 9, 15 (excluded, because insanity, not self-defence, was the issue); 1878, Brownell *v.* People, 38 id. 732, 735, 736 (threats and conduct admitted on the issue of self-defence); People *v.* Lilly, ib. 276 (admitting "language, manner, and acts"); 1902, People *v.* Tillman, — id. — , 92 N. W. 499 (battery; plaintiff's prior attack upon defendant, admitted); *Minn.:* 1860, State *v.* Dumphey, 4 Minn. 438, 449 (threats made ten days beforehand, admissible); *Miss.:* 1859, Wesley *v.* State, 37 Miss. 327, 346 (admissible, where the defendant had ground to fear an attack); New comb *v.* State, ib. 383, 400, *semble* (if communicated, admissible); 1870, Evans *v.* State, 44 id. 762, 772 (excluded, because the other evidence showed no possible case for self-defence); 1872, Harris *v.* State, 46 id. 319, 323 (excluded, for the same reason); 1877, Johnson *v.* State, 54 id. 430, 435 (reviewing all the cases, and concluding that the issue must be self-defence, and there must be testimony tending to show a demonstration by the deceased); Holly *v.* State, 55 id. 424, 428 (excluded, because there was no evidence of any "overt act" or "demonstration" which in the light of the threats could reasonably have caused fear of their execution); Kendrick *v.* State, ib. 436, 449, 450 (apparently applying the same rule); 1885, Moriarty *v.* State, 62 id. 654, 661 (expressing the rule substantially as in Holly's Case); 1900, Johnson *v.* State, — id. — , 27 So. 880 (threats held improperly excluded); Oden *v.* State, — id. — , 27 So. 992 (threats held properly excluded on the facts); *Mo.:* 1853, State *v.* Jackson, 17 Mo. 544, 548 (excluded, no issue of self-defence being made, and the threats not being recent); 1856, State *v.* Hays, 23 id. 287, 310 (same); 1871, State *v.* Sloan, 47 id. 604 (approving the Hays case, but admitting here threats made continuously to within a recent time, the issue being self-defence); 1872, State *v.* Keene, 50 id. 357 (similar facts); 1875, State *v.* Harris, 59 id. 550, 552, 556 (admitted; but with intimations that there must be an attempt to execute); 1876, State *v.* Elkins, 63 id. 159, 163 (no general rule attempted; intimations that the threats must be fairly recent and that there must be an attempt to execute them at the time); 1877, State *v.* Alexander, 66 id. 148, 162 (admissible, if there is "evidence tending to show" the deceased the aggressor); 1879, State *v.* Guy, 69 id. 435 (threat excluded; obscure); 1882, State *v.* Harris, 76 id. 364 (threat received); 1897, State *v.* Reed, 137 id. 125, 38 S. W. 574 (admissible only where the issue of defence is raised); 1898, State *v.* Albright, 144 id. 638, 46 S. W. 620 (admissible only in connection with an overt act); 1900, State *v.* Hollingsworth, 156 id. 178, 56 S. W. 1087 (conditional threats admitted; compare § 107, *ante*); 1901, State *v.* Smith, 164 id. 567, 65 S. W. 270 (admissible); *Nebr.:* 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811 (admissible, "where it is claimed that the killing was in self-defence"); *Nev.:* 1873, State *v.* Hall, 9 Nev. 58 (admissible only when at the time "something was done which would induce

any Court would decline to consider this conduct as bearing on the defendant's apprehensions. The fact that the circumstance creating apprehension is

a reasonable man" to fear death or serious bodily harm); *N. J.:* 1824, State *v.* Zellers, 7 N. J. L. 237 (admissible); *N. M.:* 1900, Terr. *v.* Hall, 10 N. M. 545, 62 Pac. 1083 (admissible "where there is proof of a hostile demonstration by the deceased at the time of the killing"; confused opinion); Terr. *v.* Pratt, ib. 138, 61 Pac. 104 (an anonymous threatening letter, if rightfully believed by the defendant to come from the deceased, is admissible); *N. Y.:* 1835, People *v.* Rector, 19 Wend. 589, 614 (murder at the defendant's door, the deceased standing there, and the defendant having been summoned by knocks on the door just before; the fact was admitted of a riotous breaking of the defendant's house a few nights before, and of threats to return, though the defendant did not know whether the deceased was one of that party; Bronson, J., dissenting, at 601); 1873, Stokes *v.* People, 53 N. Y. 174 (threats admissible, "as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased, when in the absence of such threats such acts and motions would cause no such belief"); *N. C.:* 1844, State *v.* Scott, 4 Ired. 415 (the threats apparently held admissible, but treated as in this instance not important, since the deceased was not doing anything which could be referred to this design to injure); 1877, State *v.* Turpin, 77 N. C. 473, 476 (threats admissible); 1897, State *v.* Byrd, 121 id. 684, 28 S. E. 353 (admissible only where there is "other evidence of tending to show self-defence" or where "the evidence of the killing is entirely circumstantial"; but the latter seems to be said of uncommunicated threats only); *Or.:* 1870, State *v.* Dodson, 4 Or. 64 (uncommunicated threats, held properly excluded, when offered to show the defendant's apprehension; whether admissible for the purpose of showing deceased's actual intent, under § 110, *ante*, not decided; communicated threats, admitted); 1897, State *v.* Porter, 32 id. 135, 49 Pac. 964 (communicated threats of a third person not acting with the deceased, excluded); 1898, State *v.* Bartmess, 33 id. 110, 54 Pac. 167 (admissible; the conditions obscurely stated); *Pa.:* 1867, Com. *v.* Lenox, 3 Brewst. 249, 251 (admissible, "if the case showed" that the defendant was "under reasonable fear of his life from the deceased at the time"); 1881, Nevling *v.* Com., 98 Pa. 322, 336, *semble* (admissible, if there is evidence of a necessity for self-defence); *S. C.:* 1860, State *v.* Smith, 12 Rich. 430, 443 (admissible); 1890, State *v.* Bodie, 33 S. C. 130, 11 S. E. 624 (same); State *v.* Wyse, ib. 591, 12 S. E. 556, *semble* (same); *Tenn.:* 1858, Rippy *v.* State, 2 Head 218 ("previous threats, or even acts of hostility, . . . will not of themselves excuse the slayer; but there must be some words or overt acts at the time clearly indicative of a present purpose to do the injury; past threats and hostile actions or antecedent circumstances can only be looked to in connection with present demonstrations as grounds of apprehension"; this was said in repudiating the argument of the defendant that, after hearing of such recent threats, "he had a right to kill the deceased on sight"); 1872, Williams *v.* State, 3 Heisk. 376, 395 (the same doctrine laid down, and such threats assumed to be admissible); 1873, Jackson *v.* State, 6 Baxt. 452, 454 ("the doctrine of the above cases approved, but the distinction pointed out that the evidence of former threats must be received and considered without any attempt on the judge's part to exclude it until some overt act at the time is shown; a decision reserved for such an extreme case as that of the deceased being asleep at the time); *Tex.:* 1854, Lander *v.* State, 12 Tex. 462, 484 (a full discussion of the proposition that prior threats are in themselves no legal excuse; but no decision as to admissibility); St. 1858, Feb. 12, Pen. Code 1895, art. 713 (quoted *ante*, § 246); 1870, Myers *v.* State, 33 Tex. 525, 542 (the Code is to be interpreted by common-law principles; threats are admissible only when they are distinctly directed against the defendant's life and when it is "unequivocally shown" that the deceased "was doing some act at the time of the killing which manifested an intention to carry the threat into execution"); 1871, Dorsey *v.* State, 34 id. 651, 657, *semble* (same); 1875, Horbach *v.* State, 43 id. 242, 255, 259 (declaring the object of the Code section to have been to settle a controversy as to the admission of threats, and holding that threats are admissible "as independent evidence without first having established a predicate for their admission by the proof of acts done at the time of the killing"; not citing Myers *v.* State); Irwin *v.* State, ib. 236, 241 (adopting apparently the same rule; but here holding not improper the rejection of cumulative evidence of threats which if admitted could not have served as a legal defence under the above section, because no act of violence at the time was shown); 1893, Mealer *v.* State, 32 Tex. Cr. 102, 107, 22 S. W. 142 (excluded, where the defendant "was in no possible danger" at the time); *U. S.:* 1895, Alliaon *v.* U. S., 160 U. S. 203, 16 Sup. 252 (threats admissible); 1896, Wallace *v.* U. S., 162 id. 466, 16 Sup. 859 (same); *Vt.:* 1847, State *v.* Goodrich, 19 Vt. 117, 121 (previous affrays between the parties, and former attacks by the injured person on the defendant's house, and threats by the former, held not improperly rejected because not so offered as to indicate any influence in causing in the defendant a just fear of harm); *Wash.:* 1888, White *v.* Terr., 3 Wash. T. 397, 403, 19 Pac. 37 ("admissible in all cases"); 1896, State *v.* McGonigle, 14 id. 594, 45 Pac. 20 (excluded because there was no contention of self-defence); 1896, State *v.* Cushing, ib. 527, 45 Pac. 145; 1897, s. c., 17 id. 544, 50 Pac. 512 ("overt act of attack" and "apparent imminent danger" of life therefrom are necessary; purporting to follow the Louisiana rule); *W. Va.:* 1875, State *v.* Abbott, 8 W. Va. 743, 759 (admissible; rule

a single act or series of acts, instead of a general character, does not necessarily destroy its capacity to create apprehension. Nor does its distance in time from the moment of the affray necessarily have that effect. Such particular acts may or may not in a given case be calculated to create apprehension; but there is no reason for a fixed rule of exclusion, invariably forbidding their consideration:

1884, *Niblack*, J., in *Boyle* v. *State*, 97 Ind. 322, 326: "As in personal conflicts every man is permitted within reasonable limits to act upon appearances and to determine for himself when he is in real danger, it would seem to follow, as an inevitable consequence, that whoever relies upon appearances and a reasonable determination upon such appearances, as a defence in a case of homicide, ought to be allowed to prove every fact and circumstance known to him and connected with the deceased which was fairly calculated to create an apprehension for his own safety."

Nevertheless, in the majority of jurisdictions, such evidence was, for a long time, absolutely excluded. In some instances this was probably due to a notion that the deceased's character is sought objectively to be shown by particular acts (on the principle of § 198, *ante*); but the real purpose is merely to show such conduct as would naturally excite apprehension, whether it objectively indicates a fixed trait of character or not. Certainly all analogies of the law (apart from the common sense of the situation) favor such evidence; for if particular vicious acts of an animal are relevant to show that its owner was warned of its viciousness (*post*, § 251), and if particular misconduct of an employee is relevant to show that his employer was warned of his incompetency (*post*, § 250), then particular deeds of unscrupulous violence may well be deemed relevant to show an apprehension of violence from such a person. The true solution is to exercise a discretion, and to admit such facts when common sense tells us that they could legitimately affect a defendant's apprehensions. The state of the law in more recent times has come on the whole to favor the admissibility of such facts.[1]

obscure); 1889, State v. Evans, 33 id. 417, 425, 10 S. E. 792 (same).

The following ruling shows a different application of the same principle: 1857, People v. Shea, 8 Cal. 538 (assault with intent to kill; the prosecuting witness' reason for going armed, viz. that he had been told of something the defendant had said, admitted).

The threats of a *third person*, not joining in the deceased's overt act, should ordinarily be excluded: 1903, State v. Forbes, 111 La. —, 35 So. 710 (leaving it to the trial Court's discretion; Monroe, J., diss.; here the defendant claimed to have been aiming at the third person).

[1] *Eng.*: 1866, R. v. Hopkins, 10 Cox Cr. 229 (to show the defendant's state of mind when he killed his wife with a knife, evidence was received that the wife had often before attacked him and nearly strangled him, that his neck was sensitive with old abscesses, and that the wife on this occasion rushed at his neck); *Ala.*: 1884, Jones v. State, 76 Ala. 15 (excluded); 1888, Davenport v. State, 85 id. 336, 5 So. 152 (same); *Ark.*: 1882, Campbell v. State, 38 Ark. 498, 508 (excluded); *Cal.*: 1865, People v. Henderson, 28 Cal. 465, 469, *semble* (recent acts of violence excluded, only because not communicated); 1891, People v. Powell, 87 id. 348, 362, 25 Pac. 481 (quarrels with other persons, inadmissible); *Del.*: 1874, State v. Woodward, 1 Houst. Cr. C. 455, 458 (shooting a trespasser; previous marandings and personal violence by others in the neighborhood, excluded, there being no act of aggression at the time by the deceased); *Fla.*: 1891, Garner v. State, 28 Fla. 113, 138, 9 So. 835 (excluded); 1893, S. C., 31 id. 170, 175, 12 So. 638 (same); 1855, Bowie v. State, 19 Ga. 7 (excluding the fact that the deceased had fled from the law in Tennessee, but intimating that if the crime would in its nature "excite the fears of a reasonable man," the fact might be received); 1871, Pound v. State, 43 id. 88, 128 (excluded, unless so connected with

§ 249. (2) **Employer of an Incompetent Employee**: (*a*) **Reputation of the Employee.** Where by the substantive law an employer's liability for injuries done by his employee depends upon his selection of a competent employee, it is well settled in all jurisdictions that the reputation of the employee is receivable to show that the employee's character in respect to competency was known to the employer. It is sometimes pointed out that the reputation in a given instance may obtain in such a narrow or remote circle of persons that it is not likely to have brought notice of the character to the employer (on the logical principle of § 245, par. 3, *ante*); but this is simply a corollary of the general principle. The principle is unquestioned, and has been applied without express decision in numerous cases.[1]

the killing as to "form a link," etc.); 1892, Croom *v.* State, 90 id. 430, 17 S. E. 1003 (excluded); 1897, Powell *v.* State, 101 id. 9, 29 S. E. 309 (excluded); *Ind.:* 1884, Boyle *v.* State, 97 Ind. 322, 326 (former shooting and stabbing, etc., admitted); 1891, Bowlue *v.* State, 130 id. 227, 230, 28 N. E. 1115 (admitted); 1900, Enlow *v.* State, 154 id. 664, 57 N. E. 539 (admitted); *Ia.:* 1902, State *v.* Sale, — Ia. —, 92 N. W. 680 (deceased's violence at a remote prior time, excluded); State *v.* Beird, — id. —, 92 N. W. 694 (instances of specific acts of violence on the same evening, held admissible); *Kan.:* 1901, State *v.* Burton, 63 Kan. 602, 66 Pac. 633 (admissible); *La.:* 1898, State *v.* Fontenot, 50 La. An. 537, 23 So. 634 (excluded); *Mich.:* 1893, People *v.* Harris, 95 Mich. 87, 91, 54 N. W. 648 (admissible); *Miss.:* 1885, Moriarty *v.* State, 62 Miss. 654, 661 (various desperate acts, excluded; general reputation alone admissible); 1888, King *v.* State, 65 id. 576, 582, 5 So. 97 (that the deceased had made deadly assaults on others, to the defendant's knowledge, excluded); *Mont.:* 1899, State *v.* Shadwell, 22 Mont. 573, 57 Pac. 281 (deceased's riotous conduct towards others on the same evening in defendant's presence, admitted; but "specific acts of violence" at other times, excluded; opinion not well considered); 1901, State *v.* Shadwell, 26 id. 52, 66 Pac. 508 (prior ruling approved); 1903, State *v.* Felker, 27 id. 451, 71 Pac. 668 (prior assaults by the deceased upon the same person, admitted); *N. Y.:* 1874, Eggler *v.* People, 56 N. Y. 642 (particular instances of exhibitions of temper, excluded); 1876, Thomas *v.* People, 67 id. 222 (the making of assaults with a knife upon various other persons, some time before, excluded); *Or.:* 1900, State *v.* Mims, 36 Or. 315, 61 Pac. 888 (excluded); *Pa.:* 1893, Com. *v.* Straesser, 153 Pa. 451, 456, 26 Atl. 17 (single act of violence, unexplained, inadmissible); *S. C.:* 1897, State *v.* Dill, 48 S. C. 249, 26 S. E. 567, *semble* (excluded; but here merely cumulative); *Tex.:* 1893, Skaggs *v.* State, 31 Tex. Cr. 563, 21 S. W. 257 (said to be sometimes admissible); 1903, Connell *v.* State, — id. —, 75 S. W. 512 (patricide; specific acts of violence to other members of the family, excluded); *U. S.:* 1898, Andersen *v.* U. S., 170 U. S. 481, 18 Sup. 689 (murder of captain and mate; trial for the latter only; maltreatment of the defendant by the captain and by the mate on preceding occasions, excluded on the facts, because no overt act at the time of killing was shown; no authorities cited).

[1] 1853, Cook *v.* Parham, 24 Ala. 21, 34; 1872, Chicago & A. R. Co. *v.* Sullivan, 63 Ill. 293, 297 (intemperate habits); 1894, Western Stone Co. *v.* Whalen, 151 id. 482, 38 N. E. 243 (captain of a towing vessel); 1903, Metropolitan W. S. E. R. Co. *v.* Fortin, 203 id. 454, 67 N. E. 977 (motorman of an elevated railroad); 1871, Pittsburg F. W. & C. R. Co. *v.* Ruby, 38 Ind. 294, 311 (train-conductor); 1895, Cherokee Co. *v.* Dickson, 55 Kan. 62, 39 Pac. 691; 1880, Dunham *v.* Rackliff, 69 Me. 345, 349, *semble;* 1894, Norfolk W. R. Co. *v.* Hoover, 79 Md. 253, 263, 29 Atl. 994 (intemperate habits); 1861, Gahagan *v.* R. Co. 1 All. 187, 190 (that a flagman was "careful, attentive, and temperate" in his "general habits and behavior"); 1865, Gilman *v.* R. Co., 10 id. 233, 235, 239 (intemperate habits); s. c., 1866, 13 id. 433, 444 (same); 1890, Monahan *v.* Worcester, 150 Mass. 439, 23 N. E. 228 (that he was "physically weak and partially blind and deaf"); 1895, Driscoll *v.* Fall River, 163 id. 105, 39 N. E. 1003 (reputation "of a foreman amongst a few workmen employed under him," excluded, as not likely to give notice to or require attention from the employer); 1902, Carson *v.* Canning, 180 id. 461, 62 N. E. 964 (reputation of an employee "around the building," held not improperly admitted); 1870, Davis *v.* R. Co., 20 Mich. 105, 123 (engineer; a reputation, but not mere casual remarks, admissible); 1885, Hilts *v.* R. Co., 55 id. 437, 442, 21 N. W. 878 (intemperate habits); 1873, State *v.* M. & L. Railroad, 52 N. H. 539, 549, *semble;* 1897, Yonngs *v.* R. Co., 154 N. Y. 764, 49 N. E. 1106 (like next case); 1898, Park *v.* R. Co., 155 id. 215, 49 N. E. 674 (reputation receivable to show knowledge of incompetency, after specific acts showing the fact of it; here a reputation ten years before was excluded); 1896, Texas & P. R. Co. *v.* Johnson, 89 Tex. 519, 35 S. W. 1042 (reputation of the wrong-doing servant among his fellow-employees, held sufficient to fix upon the employer a knowledge of his inefficiency, but not to fix such knowledge upon the plaintiff-employee, though he and the other

It is to be noted that the substantive law may be such that the evidential question, whether such reputation was likely to reach the employer, does not arise; *i.e.*, it may be held that if a reputation of incompeteucy had arisen, then, even if the employer did not in fact hear of the reputation, yet his failure to learn of such an easily knowable thing is in itself negligence, as a matter of law, in that it involves failure to make inquiry concerning competence:

1870, *Cooley*, J., in *Davis* v. *R. Co.*, 20 Mich. 105, 123: "If the defendants continue a man in their employ who is so notoriously unfit as to have established a general reputation to that effect, it is unreasonable (the plaintiff argues) to suppose the officers of the defendants ignorant of that fact; unless we excuse their want of information on the ground of neglect of duty on their part to their employees and the public, so gross as to make it proper and just to hold them responsible to the same extent as if they were fully informed of all the facts."

1890, *Field*, J., in *Monahan* v. *Worcester*, 150 Mass. 440, 23 N. E. 228: "If a person is incompetent for the work he is employed to do, the fact that he is generally reputed in the community to want those qualities which are necessary for the proper performance of the work certainly has some tendency to show that the master would have found out that the servant was incompetent, if proper means had been taken to ascertain the qualifications of the servant."[2]

§ 250. (2) **Employer**: (*b*) **Acts of an Employee.** Since reputation is after all created originally by conduct, the use of reputation, for the purpose just noticed, gives also, by implication, a sanction to the probative value of particular acts of misconduct as giving warning of incompetency. Experience, too, in general as well as in the business of employers, tells that particular acts of incompetency are the usual and sufficient source of judgment upon an employee's incompetency. The only objection, then, can arise from the doctrines of confusion of issues and of unfair surprise (*ante*, § 202); yet, since the evidence is so closely connected with the issue of the pleadings, since it has a comparatively small range of time and place, and since the facilities of procuring testimony to expose a fabricated charge are ample, an objection on this score does not seem serious. The natural view, that such particular acts, if not isolated or lacking in marked significance, may in a given case be admissible as calculated to give warning to the employer, is well set forth in the following passage:

1874, *Allen*, J., in *Baulec* v. *R. Co.*, 59 N. Y. 356, 358: "When character, as distinguished from reputation, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation or want of adaptation to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts . . . that the actual qualities, the true characteristics of

servants were upon the same division and were personally acquainted; the opinion is a labored attempt to explain this absurdity); 1896, Baltimore & O. R. Co. *v.* Henthorne, 19 C. C. A. 623, 73 Fed. 634 (engineer's reputation for intemperance); 1896, Central Vt. R. Co. *v.* Ruggles, 21 id. 575, 75 Fed. 953; 1899, Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295. Distinguish the question what sort of reputation is admissible, under the Hearsay exception, to prove the *fact of the employee's incompetence* (*post*, §§ 1615, 1616, 1621), and the question of substantive law whether the employee's character is in issue (*ante*, § 80). The rulings upon these distinct principles are occasionally confused.

[2] *Accord:* Gilman *v.* R. Co. and Norfolk & W. R. Co. *v.* Hoover, *supra*.

individuals, those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility, are known. . . . [But only a single instance of carelessness in eight years' service was here shown.] A single act of casual neglect does not *per se* tend to prove the party to be careless and imprudent and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a railroad crossing; but such fact would not tend to prove him a careless and negligent servant of the company. . . . The question in this case was whether the single occurrence detailed by the witness, in connection with other circumstances and with his general character and conduct, was such as to make it necessary for the defendant, in the exercise of proper care and prudence such as the law enjoins, to discharge this switchman. I am clearly of opinion that there was not sufficient evidence to go to the jury."[1]

While it is to-day generally conceded that such evidence is admissible, it is not usually specified whether the acts of incompetence must be by other evidence shown to have come to the employer's notice. It would seem that where the act is so flagrant that it would ordinarily be observed by or reported to the employee's superior officer, no other evidence would be required as a condition precedent to admission.

From the foregoing use distinguish the more controverted questions whether an employee's particular acts of negligence may be used directly to evidence the *character itself*, either as in issue (*ante*, § 208) or as offered evidentially (*ante*, § 199).

§ 251. (3) **Owner of Vicious Animal.** Where against the owner of an animal a *scienter* is to be proved — the knowledge of the animal's vicious quality —, *reputation* of the animal is relevant, on the principle of the foregoing topics; though the occasion for resorting to it is naturally rare.[1] *Particular acts* of viciousness are also relevant, for similar reasons, and this application of the principle is long established in tradition.[2]

[1] *Accord:* 1871, Pittsburg, F. W. & C. R. Co. *v.* Ruby, 38 Ind. 294, 311; 1895, Evansville & T. H. R. Co. *v.* Tothill, 143 id. 49, 41 N. E. 709 (that a train-dispatcher had often run trains ahead of their schedule time; admitted on the question of the employer's notice of incompetency); 1886, Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 452, 5 Atl. 338, *semble;* 1894, Norfolk & W. R. Co. *v.* Hoover, 79 id. 253, 264, 29 Atl. 994; 1898, Cox *v.* R. Co., 170 Mass. 129, 49 N. E. 97 (a watchman's habits of intoxication, for some years previous, receivable, as showing that the defendant might have discovered them by reasonable diligence); 1870, Davis *v.* R. Co., 20 Mich. 105, 124; 1881, Michigan C. R. Co. *v.* Gilbert, 46 Mich. 176, 179, 9 N. W. 243; 1900, Shaw *v.* R. Co., 123 id. 629, 82 N. W. 618 (previous practice of mail agent in throwing mail-bag, admitted to show notice to the railroad company); 1874, Chapman *v.* R. Co., 55 N. Y. 579, 585, *semble;* 1874, Paulee *v.* R. Co., 59 id. 356 (see quotation *supra*); 1895, Cunningham *v.* R. Co., 88 Tex. 534, 31 S. W. 629 (repudiating R. Co. *v.* Scott, 68 id. 694, 5 S. W. 501; R. Co. *v.* Rowland, 82 id. 171, 180, 18 S. W. 96 (disapproving the Frazier case, Pa., *infra*); 1898, Galveston, H. & S. A. R. Co. *v.* Davis, 92 id. 372, 48 S. W. 570 (provided the incompetence is otherwise shown); 1895, Baltimore & O. R. Co. *v.* Camp, 13 C. C. A. 233, 65 Fed. 952, 958 (going to sleep on duty, etc.; "the entire record" of K. as an employee in the capacity concerned, admitted); 1899, Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295 (usually a single act will not suffice). *Contra:* 1896, Columbus R. R. Co. *v.* Christian, 97 Ga. 56, 25 S. E. 411 (following Frazier *v.* R. Co., Pa.); 1860, Frazier *v.* R. Co., 38 Pa. 104 (negligence of the defendant in employing a careless conductor; other acts of carelessness on the conductor's part, known to the defendant, rejected, because character is not to be evidenced by specific acts).

[1] 1796, Jones *v.* Perry, 2 Esp. 482 (common report that defendant's dog had been bitten by a mad dog, admitted as indicating a duty to secure him); 1889, Wormsdorf *v.* R. Co., 75 Mich. 472, 475, 42 N. W. 1000 (reputation of a horse among the railway employees for fractiousness).

[2] 1866, Worth *v.* Gilling, L. R. 2 C. P. 3 (previous attempts of a dog to bite, admitted to show

§ 252. (4) **Owner or Possessor of a Dangerous Machine or Place.** Of the four ways (*ante*, § 245) in which knowledge of the dangerous qualities of a thing or place might be obtained by its owner or possessor, the first two seldom raise here any evidential question. Direct *exposure to the senses*[1] and *express communication*[2] are of course always legitimate modes of evidencing knowledge of the dangerous condition of a machine or place. The *reputation* of the place or machine, and the fact that its dangerousness or the existence of the defect was *reputed* or *generally talked about*, would be relevant as showing the probable carrying of information by some one to the person charged;[3] usually the question is one of constructive notice, not an evidential one. The *nature of the defect* itself, as likely to lead to discussion and report, is always a relevant circumstance.[4] The *length of time* of its existence (especially for a defect in a highway) is in such cases an additional circumstance always admissible;[5] but this becomes a question of substantive law, inasmuch as the length of time is commonly held to be capable of amounting in law to constructive notice, and by statute or otherwise a specific period is frequently established as constituting a default based on constructive notice.

The *occurrence of former injuries* at the same place or machine, and the existence of *defects in other parts of it*, are equally admissible, though less cogent in the probabilities suggested. The element (*a*) (*ante*, § 245) requires that the prior injury or defect should be such as would probably lead to a general publication of it or to a report being carried to the person charged (or his agent); and the element (*b*) (*ante*, § 245) requires that the prior injury or defect should be one which if known would naturally warn the person charged of the existence of the defect in question; for example, if it is an injury or "accident," it should have occurred in substantially the same place and mode; if it is another defect (as, in another part of the same

the owner's knowledge of its disposition); 1856, Arnold *v.* Norton, 25 Conn. 92 (single bite of a dog); 1876, Graham *v.* Nowlin, 54 Ind. 391 (to show knowledge of the glandered condition of a mule sold, the fact was admitted of the existence of the same disease in the defendant's horses and his knowledge of it); 1844, Kittredge *v.* Elliott, 16 N. H. 77 (single bite of a dog); 1850, Cockerham *v.* Nixon, 11 Ired. 269 (single attack of a bull); 1850, McCaskill *v.* Elliot, 5 Strobh. 196, 197 (single bite of a dog); 1876, Keenan *v.* Hayden, 39 Wis. 558 (dog).

[1] 1883, Dotton *v.* Albion, 50 Mich. 129, 132, 15 N. W. 46 (injury at a cross-walk; "the further fact stands unquestioned that the street-commissioner actually resided in plain sight of this cross-walk"); 1888, Noyes *v.* Gardner, 147 Mass. 505, 508, 18 N. E. 423 (that one of the selectmen passed daily over a walk, admitted).

[2] 1892, Smith *v.* Whittier, 95 Cal. 279, 290, 292, 30 Pac. 529 (direction to the owner of an elevator by the maker, as showing the former's knowledge of its proper mode of use).

[3] 1891, Knowlton, J., in Chase *v.* Lowell, 151 Mass. 422, 426, 24 N. E. 212: "The fact that it [the highway-defect] was generally talked about in the community is a circumstance which may properly be considered. In such a case, notoriety derives its force as evidence, not merely from its suggestion that the defect was of such a kind that the authorities would have been likely to discover it in the first instance with their own eyes, but quite as much from the probability that their attention would have been brought by others to a matter which was generally talked about and in which they were interested." *Accord:* 1867, Chicago & A. R. Co. *v.* Shannon, 43 Ill. 345 (admitting reputation of the unsafeness of a boiler); 1890, Chase *v.* Lowell, 151 Mass. 422, 426, 24 N. E. 212 (remarks made about a defect by persons looking at it, admitted; practically repudiating Hinckley *v.* Somerset, 145 id. 326, 328, 337, 14 N. E. 166 (1887), where conversations about it were excluded.

[4] 1860, Donaldson *v.* Boston, 16 Gray 508 ("Upon the question of notoriety, the jury might consider whether the obstruction of travel was of such a nature that, if citizens passing by had seen it, they would have been likely to have forthwith informed such officers of its existence").

[5] 1890, Chase *v.* Lowell, *supra*.

sidewalk), it should be so closely associated with the one in question that the discovery of the former would naturally lead to the discovery of the latter or would warn of its existence. The facts of prior injuries and of other defects are generally conceded to be admissible, subject to certain varieties in the phrasing of the rule.[6] Distinguish the use of such prior injuries

[6] *Cal.:* 1873, Malone *v.* Hawley, 46 Cal. 409, 413 (defect in an elevator; a former fall of the same elevator from a similar cause, admitted to show notice); *Colo.:* 1895, Colorado M. & I. Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42 (leaving open an elevator-door on former occasions, admitted); *Ill.:* 1866, Chicago *v.* Powers, 42 Ill. 169, 173 (death by falling off a bridge insufficiently lighted; the fact that another person had fallen off the same bridge, admitted to show notice, on the part of the defendant's agents, of the condition of the bridge); 1894, Bloomington *v.* Legg, 151 Id. 9, 14, 37 N. E. 696 (injury at a drinking-fountain; prior injuries admitted); *Ind.:* 1881, Delphi *v.* Lowery, 74 Ind. 520, 523 (injuries of other persons at the bridge where the intestate was drowned, admitted to show notice to the city); *Ia.:* 1878, Moore *v.* Burlington, 49 Ia. 136, 137 (previous pilings of lumber at a place, admitted); 1884, Ruggles *v.* Nevada, 63 id. 185, 18 N. W. 866 (condition of a sidewalk "along there," excluded, chiefly as not amounting to constructive notice of a particular defect); 1887, Armstrong *v.* Ackley, 71 id. 76, 80, 32 N. W. 180 (condition of another part of a continuously unsafe sidewalk, admitted; distinguishing the preceding case); 1897, Faulk *v.* Iowa Co., 103 id. 442, 72 N. W. 757 (defect in railing at or near the place in question, admitted); 1900, Wilberding *v.* Dubuque, 111 Id. 484, 82 N. W. 957 (prior injuries at a highway defect, admitted); 1902, Yeager *v.* Spirit Lake, 115 id. 593, 88 N. W. 1095 (other injuries on the same sidewalk, admitted); 1903, Kircher *v.* Larchwood, — id. —, 95 N. W. 184 (condition of adjacent sidewalk, admitted to show notice); *Mass.:* 1887, Hinckley *v.* Somerset, 145 Mass. 326, 328, 337, 14 N. E. 166 (prior similar highway-accident, about the same place, admitted); 1888, Noyes *v.* Gardner, 147 Id. 505, 508, 18 N. E. 423 (the condition of other planks in the same sidewalk, admitted); *Mich.:* 1883, Dotton *v.* Albion, 50 Mich. 129, 131, 15 N. W. 46 (other defects in the same cross-walk, admitted); 1886, Smith *v.* Sherwood, 62 id. 159, 165, 28 N. W. 806 (other horses' shying at the same hole, admitted; "as more or less publicity would naturally be given to such occurrences, it tended to show that knowledge of such dangerous character was brought to the attention" of the defendant); 1889, Dundas *v.* Lansing, 75 id. 499, 504, 507, 42 N. W. 1011 (the defective condition of a street-crossing being the cause of the injury, the condition of the sidewalks "in the vicinity," "a block or more each way," and even express notice of the latter condition, held inadmissible as "too remote and indefinite"; the source of error in the opinion is that it relies upon inapplicable line of precedents, cited in § 458, *post*, which are not the law in Michigan); 1889, Tice *v.* Bay City, 73 Id. 209, 44 N. W. 52 (defective condition of sidewalk "at other places beyond the defect which caused the injury," excluded); 1890, Campbell *v.* Kalamazoo, 80 id. 655, 659, 45 N. W. 652 (other defects of various sorts in the sidewalk in front of the same lot of land, admitted); 1890, O'Neil *v.* West Branch, 81 id. 544, 546, 45 N. W. 1023 ("other defects of long standing, existing in close proximity to the defect which causes the injury," admissible); 1891, Lombar *v.* East Tawas, 86 id. 14, 20, 48 N. W. 947 (other accidents at the same hole, admissible as tending "to show constructive notice to defendant; and, where the accident results in death or great bodily injury, it may by reason of its publicity tend to show actual notice"); 1892, Fuller *v.* Jackson, 92 Id. 191, 205, 52 N. W. 1075 (the three preceding cases approved); 1893, Corcoran *v.* Detroit, 95 id. 84, 86, 54 N. W. 692 (defects in other parts of the road in the vicinity, admitted); 1894, Edwards *v.* Three Rivers, 102 Id. 153, 60 N. W. 454 ("condition of the walk in the vicinity of the accident," admissible); 1895, Strudgeon *v.* Sand Beach, 107 id. 496, 65 N. W. 616 (defective parts of the sidewalk in the same block, admitted); 1896, Moore *v.* Kalamazoo, 109 id. 176, 66 N. W. 1089 (that others stepped into the same hole in the sidewalk, admitted); 1898, Butts *v.* Eaton Rapids, 116 id. 539, 74 N. W. 872 (condition of a walk six or eight months previously, admitted; condition of "whole length" in front of certain premises, admitted); 1900, Boyle *v.* Saginaw, 124 id. 348, 82 N. W. 1057 (condition of sidewalk in front of other lots, admitted); *Minn.:* 1883, Gude *v.* Mankato, 30 Minn. 256, 258, 15 N. W. 175 (condition of the sidewalk "at and near the place," admissible); 1895, Burrowa *v.* Lake Crystal, 61 id. 357, 63 N. W. 74 (former accidents, admitted); *Mo.:* 1899, Young *v.* Webb City, 150 Mo. 333, 51 S. W. 709 (admitted); *Nebr.:* 1886, Plattsmouth *v.* Mitchell, 20 Nebr. 228, 230, 29 N. W. 5.3 ("bad condition of the sidewalk in general at the place," admitted); *N. H.:* 1857, Willey *v.* Portsmouth, 35 N. H. 303, 310 (former giving way of a culvert); *N. J.:* 1899, Exton *v.* R. Co., 62 N. J. L. 7, 42 Atl. 486 (former disorderly conduct making a carrier's premises dangerous, admitted to show notice); *Pa.:* 1898, Potter *v.* Natural Gas Co., 183 Pa. 757, 39 Atl. 7 (condition of a road up to a few weeks before, admitted); 1901, Fitzgerald *v.* E. E. Illum. Co., 200 id. 540, 50 Atl. 161 (defective insulation; that the wire had given out sparks for several weeks, admitted, as showing the defect to have "existed for such a period that it ought to have been known," by reason of its duty of "constant oversight and repair"); 1903, Reid *v.* Linck, — id. —, 55 Atl. 849 (prior instances of falling

or other defects to show *objectively the actual dangerous quality* of the thing or place (*post*, §§ 437–458); the precedents under that principle often incidentally deal with this use also.

§ 253. (5) **Purchaser from an Insolvent or Lunatic.** Where a transfer of property by an insolvent is in issue as being in fraud of creditors, and knowledge by the transferee of the transferor's insolvency is to be shown, the reputation of the transferor as to solvency is relevant to show the probability of that knowledge, provided it is a reputation in a locality frequented by the transferee. This is equally true whether the offeror of the evidence is attempting to show that the transferee believed in the transferor's solvency or that he was aware of the latter's insolvency.

(1) Such a reputation of *solvency* is evidence of a belief in that solvency upon the same principle that reputation of a deceased's dangerous character (*ante*, § 246) evidences an apprehension of danger from him:

1855, *Metcalf*, J., in *Bartlett* v. *Decreet*, 4 Gray 113: "The testimony is admissible . . . on the ground that man's belief, as to matters of which they had not personal knowledge, is reasonably supposed to be affected by the opinions of others who are about them."

1855, *Merrick*, J., in *Heywood* v. *Reed*, 4 Gray 579: "Individuals cannot in general resort to the most authentic sources of information to ascertain the pecuniary responsibility of parties with whom they deal. They are obliged to act upon opinions entertained and adopted in view of circumstances which are merely external and apparent, and hence they may well be presumed to be in some degree influenced in their transactions by the business credit and pecuniary standing which a party has acquired and maintained among his neighbors and acquaintances. When his motives to action in pecuniary transactions are called in question, considerations of this kind deserve attention." [1]

through an elevator-shaft, admitted to show knowledge of its danger); *R. I.*: 1871, Smith v. R. Co., 10 R. I. 24, 27 (other fires set by the defendant's engines, but only prior, not subsequent, to the one in question; compare § 452, *post*); 1903, McGarrity v. R. Co., — id. —, 55 Atl. 718 (condition of telltales in a freight yard at other times, admissible to show the defendant's knowledge of their defective condition); *S. C.*: 1887, Bridger v. R. Co., 27 S. C. 456, 3 S. E. 860 (injury at a turntable; former injuries of others there, excluded, unless knowledge of them had been brought home to the defendant; present question ignored); *S. D.*: 1903, Waterhouse v. Schlitz B. Co., — S. D. —, 94 N. W. 597 (collapse of other buildings of like construction, admitted to show notice); *Tenn.*: 1900, Illinois C. R. Co. v. Wyatt, 104 Tenn. 432, 58 S. W. 308 (condition of adjacent platform-planking, admitted to show notice); *U. S.*: 1898, Valley R. Co. v. Keegan, 31 C. C. A. 255, 87 Fed. 849 (other defects in a railroad yard, admissible to show notice by an employee); *Utah*: 1894, Thomas v. Springville, 9 Utah 426, 430, 35 Pac. 503 (shying of other horses at a hole, admissible); *Wash.*: 1897, Elster v. Seattle, 18 Wash. 304, 51 Pac. 394 (injuries to others at the same place in a sidewalk, a week or ten days before, admitted to show notice); 1900, Piper v. Spokane, 22 id. 147, 60 Pac. 138 (similar; and also "declarations of other persons at the same time"); 1903, Shearer v. Buckley, — id. —, 72 Pac. 76 (condition of a street in the same block, admitted); *Wis.*: 1870, Weisenberg v. Appleton, 26 Wis. 56, 58 (general condition of a sidewalk sufficient, if known, to involve negligence, irrespective of knowledge of a particular defect); 1872, Ripon v. Bittel, 30 id. 614, 620 (same); 1882, Sullivan v. Oshkosh, 55 id. 508, 513, 13 N. W. 468, *semble* (general condition of a sidewalk, available to show notice of a particular defect); 1885, Spearbracker v. Larrabee, 64 id. 573, 575, 25 N. W. 555 (holes in a bridge at other places, admitted); 1889, Shaw v. Sun Prairie, 74 id. 105, 42 N. W. 271 (condition of a sidewalk "in the vicinity," "or the general bad condition of the same street, sidewalk, or bridge," admissible); Spaulding v. Sherman, 75 id. 77, 79, 43 N. W. 558, *semble* (same); 1891, Propsom v. Leatham, 80 id. 608, 611, 50 N. W. 586 (condition of a bridge at other points, admitted); 1900, Shafer v. Eau Claire, 105 id. 239, 81 N. W. 409 (similar).

[1] *Accord:* 1855, Bartlett v. Decreet, 4 Gray 113 (quoted *supra*); 1855, Heywood v. Reed, ib. 579 (quoted *supra*); 1861, Carpenter v. Leonard, 3 All. 33; 1862, Whitcher v. Shattuck, ib. 319, 321 (mortgage); 1865, Metcalf v. Munson, 10 id. 492.

(2) Such a reputation of *insolvency* is evidence of knowledge of that insolvency in the same way that reputation of an employee's incompetency (*ante*, § 249) evidences the employer's probable knowledge of it:

1858, *Stone*, J., in *Price* v. *Mazange*, 31 Ala. 701, 707: "Ability to pay, responsibility to the coercive power of an execution, is a weighty consideration with one who parts with his goods on credit. . . . It is difficult to believe that merchants and traders will not learn the pecuniary condition of their customers when that condition so vitally affects them and is notorious in the neighborhood in which they are operating."[2]

An *express communication* would also be receivable to show notice of insolvency;[3] and similarly, express assertions by the transferor would have some (if little) probative value to show the transferee's belief in his solvency.[4] The use of reputation to show *the fact of insolvency or solvency itself* is a different question, involving the propriety of making an exception to the Hearsay rule (*post*, § 1623).

On the same principle the reputation of the *insanity* of a transferor would be admissible to show probable notice of the insanity by the transferee.[5]

§ 254. (6) **Adverse Possessor, Receiver of Stolen Goods, and other Dealers with Property.** On the same principle, reputation of a property-interest may serve to evidence knowledge or good faith wherever that state of mind is important in dealings with the property. Thus, the owner's knowledge of an *adverse possession* set up as the foundation of a prescriptive title may be evidenced by the notoriety or repute of the possession.[1]

So, too, a *purchaser's* knowledge of *equitable or other interests* may be evidenced by reputation;[2] and, the good or bad faith of one *purchasing* or

[2] 1843, Branch Bank v. Parker, 5 Ala. 736 (Ormond, J., diss.); 1845, Lawson v. Orear, 7 id. 784, *semble;* 1858, Price v. Mazange, 31 id. 701, 704, 707 (that he was "notoriously insolvent"; see quotation *supra*); 1883, Humea v. O'Bryan, 74 Id. 81 (Somerville, J.: "The rule should in our opinion have no application to persons living at a distance in another State, unless they are shown to have had an opportunity of hearing the common report by frequently visiting the residence of the alleged partners, or otherwise"); 1885, Kuglar v. Garner, 74 Ga. 765, 768 (note obtained by fraud and duress; "public notoriety" of the circumstances admitted to show the indorsee's knowledge); 1840, Brander v. Ferriday, 16 La. 296, 299 (mortgage); 1848, Denny v. Dana, 2 Cush. 169 (setting aside a fraudulent preference; evidence that the business of the debtor was known in the community to be ruinous to those engaged in it); 1854, Lee v. Kilburn, 3 Gray 594; 1862, Cook v. Mason, 5 All. 212; 1875, Sweetser v. Batea, 117 Mass. 468; 1894, Bliss v. Johnson, 162 id. 323, 38 N. E. 446; 1848, Benoist v. Darby, 12 Mo. 196, 205; 1899, Webb v. Atkinson, 124 N. C. 447, 32 S. E. 737; 1893, Hinds v. Keith, 6 C. C. A. 231, 57 Fed. 10, 13 U. S. App. 222, 227 (notoriety of insolvency, not admissible to show buyer's knowledge, if not within the same community).

[3] 1829, Vacher v. Cocks, M. & M. 355 (letters to a bankrupt, not as evidence of the fact of insolvency, but of his knowing that his condition was insolvent).

[4] 1861, Carpenter v. Leonard, 3 All. 33 (*bona fides* of a mortgagee; the express statements of the mortgagor admitted to show the former's grounds for believing in his solvency).

[5] 1860, Romilly, M. R., in Greenslade v. Dare, 20 Beav. 290, rejected it on the singular ground that "to admit evidence of general reputation to fix a defendant with knowledge of a fact, while that evidence would not be admissible to prove the fact itself, appears to me to be a violation of the first principle," etc.

[1] 1858, Brown v. Cockerell, 33 Ala. 38, 47; 1899, Tennessee Coal I. & R. Co. v. Linn, 123 id. 112, 26 So. 245 (after evidence of the adverse possession); 1899, Knight v. Knight, 178 Ill. 553, 53 N. E. 306 (title by prescription; reputation of ancestor's possession admissible to show notoriety of it and adversity of claim); 1880, Sparrow v. Hovey, 44 Mich. 63, 6 N. W. 93; 1894, Maxwell Land-Grant Co. v. Dawson, 151 U. S. 586, 603 14 Sup. 458. Distinguish the question whether reputation is admissible, under the Hearsay exception, to evidence title directly (*post*, § 1626).

[2] 1901, Stephenson v. Kilpatrick, 166 Mo. 262, 65 S. W. 773 (to show notice, by a pur-

receiving stolen goods,[3] or otherwise unlawfully dealing with chattels,[4] may be evidenced by repute or by express communications made to him.

§ 255. (7) **Dealer with a Partnership.** The modes usually available for showing notice of a dissolution of partnership, as against one who has dealt with its members after dissolution, are the first three already noted (*ante*, § 245), namely (1) exposure to observation, *i. e. publication* where the person would be likely to have seen it, (2) *express communication*, and (3) *reputation* or notoriety. (1) Here the only evidential question seems to be whether the newspaper containing the notice must be shown to have been subscribed to or taken by the person to be notified; but this question is rarely raised as one of admissibility, and is generally treated as one either of constructive notice or of the sufficiency of evidence on all the facts of the case.[1] (2) An express communication raises no evidential question. (3) A reputation or notoriety of dissolution serves to evidence knowledge;[2] but here the

chaser at a sale, of plaintiff's interest in the property, the community's general knowledge of certain litigation was held relevant). The following is another use: 1903, Jennings *v.* Rooney, — Mass. —, 67 N. E. 665 (fact of a conversation admitted, to show that a vendee obtained first knowledge of the property from the broker and not from the vendor).

[3] 1824, R. *v.* Whitehead, 1 C. & P. 67 (conspiracy to defraud by B. and W.; to show W.'s good faith in the representations made to him by B., it was proved that "B. was a clergyman and most respectably connected"); 1859, R. *v.* Wood, 1 F. & F. 497 (receiving stolen goods; vendor's declarations to defendant, admitted); 1855, Spivey *v.* State, 26 Ala. 90, 93, 103 (larceny; statements to defendant of supposed owner, admitted to show defendant's good faith); 1879, State *v.* Waitz, 52 Ia. 227, 2 N. W. 1102 (larceny; information to the defendant that the things were not the property of the owner, admitted); 1857, People *v.* Rando, 3 Park. Cr. 336, 339, 341 (to disprove guilty knowledge of stolen goods possessed, evidence of the statements by the person bringing them, which induced the defendant to receive them, was offered; Peabody, J., diss.: "They should be admitted, not as evidence of the truth of the facts, but as evidence that such statements were made, without regard to the truth or falsity of them"; here rejected, erroneously, by the majority; but in 1881, in People *v.* Dowling, 84 N. Y. 485, the passage quoted was made the law).

[4] 1870, State *v.* Graham, 46 Mo. 490 (maliciously killing H.'s hog; instructions given to defendant to kill his employer's hogs, admitted to show his belief).

[1] The earlier English cases are subjoined, in order to illustrate the method of dealing with such evidence: 1795, Godfrey *v.* Macauley, Peake 155 (notice of dissolution of partnership; Lord Ellenborough, C. J.: "The *Gazette* was not [conclusive] evidence of notice, any more than any other newspaper; . . . but in all cases, if published in the neighborhood of a person, it ought to be left to the jury whether he had notice of it or not"); 1816, Leeson *v.* Holt 1 Stark. 186 (notice of a carrier's responsibility; Lord Ellenborough, C. J., "said that he would receive evidence of the advertisement in the *Gazette*, but that unless it were proved that the party was in the habit of reading the *Gazette*, the evidence would be of little avail. . . . The advertisement in the *Times* was not admissible at all without proof that it was taken in by the party. The first instance in which such evidence was received was a case where a person . . . inserted a notice in a provincial Sunday paper, and the Court held that it was admissible in evidence because it was probable that the party had seen it, since he took in the paper and the advertisement related to his business." "It appeared that D. had occasionally read the *Times* newspaper, and Lord Ellenborough then admitted the advertisement contained in it to be read"); 1816, Jenkins *v.* Blizard, Ib. 418, 420 (dissolution of partnership; "the notice had been advertised in the *Morning Chronicle* once only, and it did not appear that this individual paper had ever reached the plaintiffs," though it was proved that they took in the paper regularly; admitted); 1817, Munn *v.* Baker, 2 id. 255 (notice of a carrier's responsibility; an advertisement in the *Gazette*, rejected by Lord Ellenborough, C. J., "without proof of the plaintiff's having read the *Gazette*, since he might be expected to look into the *Gazette* for notices of the dissolution of partnerships, but not for notices by carriers of the limitation of their responsibility"); 1825, Rowley *v.* Horne, 3 Bing. 2 (notice by a carrier in a weekly paper to which the plaintiff subscribed; admitted, but held not sufficient); 1837, Hart *v.* Alexander, 7 C. & P. 746, 749, 751, 753; 2 M. & W. 484 (advertisements of dissolution of partnership in various newspapers, admitted). The following modern case illustrates that it is not a question of admissibility: 1898, Amer. F. I. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068.

[2] 1883, Haines *v.* O'Bryan, 74 Ala. 81 (reputation of a dissolution of partnership, admitted; Somerville, J.: "It is based upon the probability that the plaintiff would be likely to

question tends to become one of constructive notice or ostensible partnership, and thus of substantive law.

§ 256. (8) **Maker of False Representations.** Where a representation is made as to the *credit of a third person* to whom a loan or a sale is to be made, and in an action of deceit the knowledge of the incorrectness of the representations is to be shown, the reputation of the third person as to solvency or insolvency is relevant (on the principle of § 253, *ante*).[1] In general, wherever the knowledge of the incorrectness of representations is to be shown, any of the modes of evidence already noted in § 245 may become available.[2]

§ 257. (9) **Seller of Liquor to Intemperate or Minor.** (*a*) Where a statute forbids the selling of liquor to a person of known intemperate habits, the *reputation* of the vendee for *intemperance* is relevant to show probable knowledge by the seller;[1] and the other modes noted *ante*, § 245, would be equally available. (*b*) Where a statute forbids the knowing selling of liquor to a minor, the *appearance* of the vendee would be admissible as affecting the seller's probable knowledge (*ante*, § 222).

§ 258. (10) **Party Prosecuting or Arresting without Probable Cause.** (*a*) Where in an action for *malicious prosecution* or *false arrest*, the issue arises whether the prosecutor had reasonable grounds and acted in good faith, the bad *reputation* of the now plaintiff is a circumstance bearing on this state of mind, and is admissible.[1] There is no reason why *particular acts* of similar

know a fact of which no one else in the neighborhood seemed to be ignorant"); 1838, Cowen, J., in Halliday *v.* McDougall, 20 Wend. 81, 89 ("Where a partnership has existed in fact, but has been dissolved, and a third person has yet dealt with one of the partners, and sues them all, insisting that he acted on the credit of the former concern, the question whether a partner who has retired shall yet be holden on a contract of the others, may depend on his having been known as a partner, for the notoriety of the fact may have influenced the conduct of the plaintiff").

[1] 1837, Ward *v.* Herndon, 5 Port. 382, 384 ("no man is presumed to be so much of a recluse as not to know what is generally known and talked of in his neighborhood").

[2] 1839, Com. *v.* Call, 21 Pick. 515 (false pretences; collecting money by representing himself to be an agent; to show that he had before that time to his knowledge been dismissed from his agency, evidence was received that he was dismissed for having lost his employer's money at a house of ill-fame).

[1] 1854, Elam *v.* State, 25 Ala. 53, 57; 1855, Stanley *v.* State, 26 id. 26 (excluded; but this case is repudiated in Stallings *v.* State, *infra*); 1859, Stallings *v.* State, 33 id. 425, 427 (indictment for selling liquor to one known to be intemperate; notoriety in the neighborhood admitted as indicating defendant's knowledge); 1876, Smith *v.* State, 55 id. 12; 1879, Tatum *v.* State, 63 id. 151.

The following statute illustrates another application of the same principle: Ia. Code 1897, § 2422 (illegal liquor sales; "general reputation of the place kept," admissible to show "knowledge of the owner").

[1] 1773, Fabrigas *v.* Mostyn, 20 How. St. Tr. 94 ("While you knew Mr. Fabrigas what character did he bear? or how did he behave himself, as far as you had an opportunity of observing?" "As far as I could observe, he behaved very well, and had a very good character." . . . "While you knew him, I ask you, what was his behavior?" . . . "He always behaved with very great decency and decorum"; again at 142); 1799, Rodriguez *v.* Tadmire, 2 Esp. 721 (bad reputation as showing reasonable cause for suspicion, admitted); 1841, Downing *v.* Butcher, 2 Mo. & Rob. 374; 1890, Halifax Banking Co. *v.* Smith, 29 N. Br. 462 (general principle conceded; but two judges dissenting as to its applicability); 1894, Olsen *v.* Lantaium, 32 id. 526 (principle applied); 1855, Martin *v.* Hardesty, 27 Ala. 458; 1873, Oliver *v.* Pate, 43 Ind. 132, 138; 1811, Gregory *v.* Thomas, 2 Bibb 286; 1849, Bacon *v.* Towne, 4 Cush. 240; 1887, Dorsey *v.* Clapp, 22 Nebr. 564, 568, 35 N. W. 389, *semble*; 1896, Beckman *v.* Souther, 68 N. H. 381, 36 Atl. 14 (as bearing on the plaintiff's replication of excess of force; the matter in each case to be left entirely to the trial Court's discretion). *Contra*, but unsound: 1817, Newsam *v.* Carr, 2 Stark. 69; 1876, Fitch *v.* Murray, Wood Manit. 74, 88. There is no reason why the plaintiff's *good repute* should not be received on his part, on the same issue; 1897, Geary *v.* Stevenson, 169 Mass. 23,

misconduct by the now plaintiff should not be equally admissible, on the same principle (*ante*, § 248) that particular acts of violence by a deceased person are admitted to show the apprehensions of a defendant charged with homicide.[2] (*b*) In the same way, when in a prosecution for *assaulting an officer* or *resisting an arrest*, the officer's right to arrest, and incidentally his reasonable ground for suspicion, comes in issue, the *reputation*[3] of the arrested person, and also prior *particular acts*[4] of similar misconduct, should be receivable as affecting his grounds of suspicion. (*c*) So, too, in any of the preceding actions, or in an actiou for battery involving a similar issue, the *express communications* of third persons are relevant to show the belief or good faith of the person arresting or prosecuting.[5]

§ 259. (11) **Utterer of Forged or Counterfeit Paper or Money, Possessor of Stolen Goods, etc.** Knowledge or notice is an essential ingredient of many crimes; and in some of these the knowledge may be acquired from former dealings with the same article or similar articles; *i. e.* on the princi-

47 N. E. 508 (plaintiff's good reputation, to negative probable cause). *Contra*. 1899, Claiborne *v.* R. Co., 46 W. Va. 363, 33 S. E. 262 (false arrest of a passenger; plaintiff's good character not admitted).

For the use of reputation in *mitigation of damages* in such actions, see *ante*, § 75. For the use of the *testimony* at the *original trial*, see *post*, § 1416.

[2] The precedents are for the most part to the contrary: 1799, Rodriguez *v.* Tadmire, 2 Esp. 721 (bad character as ground for suspicion and prosecution; particular acts excluded; though the plaintiff, suing for malicious prosecution, was allowed to ask); 1899, Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380 (transaction ten years before, giving defendant ground to suspect plaintiff of larceny, inadmissible); 1811, Gregory *v.* Thomas, 2 Bibb 286 (excluded); 1902, Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72 (embezzlement of other articles from the same owner, admissible to show the owner's good faith in prosecuting); 1887, Dorsey *v.* Clapp, 22 Nebr. 564, 568, 35 N. W. 389 ("particular acts" of the arrested party said to be inadmissible to show the prosecutor's good faith; but the acts here excluded were such as could afford no reasonable suspicion of the charge made).

[3] *Contra*, but clearly wrong: 1864, R. *v.* Turberfield, L. & C. 495 (assault upon a constable; the issue being whether the constable had reasonable grounds for suspecting the accused of a felony; the question to the constable, "What did you know had been the prisoner's previous character?" was held improper).

[4] 1898, State *v.* Healey, 105 Ia. 162, 74 N.W. 916 (murder while deceased was attempting to arrest; robbery of third persons by other persons just before, received to show the deceased's reason for arresting); 1895, State *v.* Foley, 130 Mo. 482, 32 S. W. 973 (asking a defendant whether he was concerned in a former attempt to rob, allowed, as showing that the officer for an assault on whom he was now on trial had reason to arrest him on suspicion of the former offence).

Distinguish the following question: 1903, People *v.* Glennon, 175 N. Y. 45, 67 N. E. 125 (patrolman's neglect of duty in failing to arrest the keepers of a disorderly house; specific conduct of the inmates, admitted to show the defendant's knowledge of its character).

[5] 1773, Fabrigas *v.* Mostyn, 20 How. St. Tr. 137 (false imprisonment; defence, fear of the raising of a seditious mob by the plaintiff; statements to the defendant that a mob was being raised by plaintiff, admitted to show defendant's apprehensions; see the quotstion *post*, § 1785); 1821, Redford *v.* Birley, 1 State Tr. N. s. 1071, 1174 (battery in dispersing a mob: whether persons expressed to the magistrates their apprehensions of danger, admitted, not as evidence of the alarm but as facts on which the magistrates might properly have acted; for a further consideration of the classes of evidence connected with mob violence, see *post*, § 1790); 1854, Main *v.* McCarty, 15 Ill. 441 (battery; plea, resistance to the defendant while arresting; "what did persons in the crowd say" to the officers, admitted); 1849, Bacon *v.* Towne, 4 Cush. 240 (malicious prosecution; third person's information to the defendant, admitted); 1870, Friend *v.* Hamill, 34 Md. 298, 308 (information to plaintiff, admitted in an action for malicious prosecution); 1868, Simmons *v.* Holster, 13 Minn. 249, 258 (reasonable ground for charging the plaintiff as a thief, to disprove malice; the defendant had made the charge on the faith of Mrs. J.'s statement to him of what she had seen; Mrs. J.'s bad character for veracity was then admitted to show that the defendant "could not reasonably rely upon her statements"; compare Hastings *v.* Stone, Mass., cited *ante*, § 73); 1869, Castner *v.* Sliker, 33 N. J. L. 507, 508 (battery; plea, self-defence; statements of bystanders declining to interfere, admitted to show whether the defendant had reason to expect assistance).

For the application of the Hearsay rule here, see *post*, § 1789.

ple of the fourth mode (noted *ante*, § 245), one experience with counterfeit money or with stolen goods may conceivably result in revealing the counterfeit or stolen character of the article, so that a knowledge arises which is applicable to the subsequent dealing now charged as criminal because done with knowledge. It is, however, so difficult to distinguish this use of former dealings to show Knowledge from the use of former dealings to show Intent or to show Design, that all three subjects are best dealt with together (*post*, §§ 300–371).

§ 260. (12) **Possessor of a Document.** The possession of a document is an important and often the only circumstance to show that its possessor has by reading it become aware of its contents; the inference rests on the probable operation of the element (1) already noted (*ante*, § 245):

1581, *Campion's Trial*, 1 How. St. Tr. 1050, 1066; Campion, the Jesuit, being charged with administering treasonable oaths, and a certain papist book being found in his "budget," *Anderson*, Queen's counsel, asked him: "To what end, then, should you carry this book about you if you were not purposed to do as it prescribeth?" *Campion:* "Many casualties and events may happen whereby a man may be endangered, ere he beware, by the carrying of a thing whereof he knoweth not, — as, either the malice of others that privily convey it amongst his other provisions, or his own negligence or oversight which marketh not attentively what he took with him."

1837, *Bosanquet*, J., in *Wright* v. *Tatham*, 7 A. & E. 313, 364, 376: "Knowledge of letters and of other things found in a place accessible to him in his own house or apartments, may sometimes be presumed; such as writings connected with the charge, upon a charge of treason; notes or other documents forged or partly forged, upon a charge of forgery; instruments of coining or house-breaking, upon charges of coining or burglary."[1]

This use of such evidence needs however to be distinguished from its use for other purposes, which are frequently associated in the same litigation; for (a) it may be used to evidence an *assent* to the document's contents or an *admission* of their truth (*post*, §§ 1073, 1074), or (b) the presence of the document *on a person's premises or among his effects* may be used to evidence his possession of it at a prior time (*ante*, § 157), and thus to lead to one of the

[1] 1817, R. v. Watson, 2 Stark. 116 (placard); 1822, Scott v. Waithman, 3 id. 170 (possession by sheriff of writs giving information); 1843, R. v. Zulueta, 1 C. & K. 215, 224 (here not traced in fact to his possession); 1851, Holbrook v. Jackson, 7 Cush. 136, 147, 153 (transfer in fraud of creditors; books of the vendor, not a party, admitted to show his knowledge of his insolvency, irrespective of the authorship of the entries; "every merchant must be presumed to know and in fact from his balance sheet and books generally does know the state of his concerns"; for the question whether a partner or shareholder may be charged with notice of the *books* of the *firm or corporation*, see *post*, § 1074); 1901, People v. Higgins, 127 Mich. 291, 86 N. W. 812 (possession of a manuscript story of a murder, in the accused's handwriting, admitted).

Distinguish the question whether *keeping a document* is a *waiver of the right to dissent or rescind:* 1898, McMaster v. Ins. Co., 30 C. C. A. 532, 87 Fed. 63, 171 U. S. 687, 18 Sup. 944, 183 U. S. 25, 22 Sup. 10; 1902, Bostwick v. Ins Co., — Wis. —, 89 N. W. 538, 92 N. W. 246; or is an *admission of the truth* of its contents (*post*, § 1073).

The following much-debated ruling rests on the present principle, together with that of § 148, *ante*, and the opinions are instructive, and are quoted *ante*, § 228, in considering evidence of insanity: 1837, Wright v. Tatham, 7 A. & E. 313, 325, 364, 369, 376, 390, 407; s. c., 5 Cl. & F. 670, 694, 703, 710, 716, 723, 736, 741, 767, 774 (a letter found in M.'s bookcase-cupboard, opened; if M. had been a person of sound mind, the inference would be that he had opened, read, and deposited it; but as his sanity was the main issue, the inference was not allowed by a majority of the judges).

above inferences; or (c) the possession of a document may serve other evidential purposes already sufficiently compared (*ante*, §§ 156, 157).

§ 261. **Miscellaneous Instances of Belief or Knowledge evidenced by Circumstances.** In the four ways already noted (*ante*, § 245), belief or knowledge of various other facts may be properly evidenced. (1) By direct *exposure to the senses*, the observed appearance of a person or thing may evidence some quality material to the issue.[1] (2) *Express communication* is always a proper mode of evidencing knowledge or belief.[2] Communication to a *husband* or *wife* is always receivable to show probable knowledge by the other (except where they are living apart or are not on good terms), because, while it is not certain that the one will tell the other, and while the probability is less upon some subjects than upon others, still there is always some probability, — which is all that can be fairly asked for admissibility.[3] (3) *Reputation*, or general discussion in a community or a part of it, may be useful in a variety of ways as showing the probability of knowledge or belief by a member of the community or a local circle.[4]

2. Conduct, as Evidence of Knowledge, Belief, or Consciousness.

§ 265. **General Principle.** It has already been pointed out (*ante*, § 244) that a second chief sort of evidence for proving that mental state which is termed Knowledge, Belief, or Consciousness, consists of Conduct of the person to whom the mental state is attributed. In this sort of evidence, we argue from an observed effect — conduct — to the probable cause — a specific mental state; and not, as in the preceding sort (*ante*, §§ 245, 261), from cause to effect, *i. e.* from outward events to an ensuing mental state. The basis of

[1] 1874, Jaques *v.* Sax, 39 Ia. 370 (a minor's being engaged in business; appearance admitted); 1888, Hermann *v.* State, 73 Wis. 248, 41 N. W. 171 (personal appearance of a girl, admitted to show whether the defendant knew the girl to be under 21, in a prosecution for keeping a house of ill-fame knowing an inmate to be under 21).

[2] 1831, Taylor *v.* Willans, 2 B. & Ad. 845, 855, 858 (a letter to a justice of the peace, purporting to be from a Judge; admitted merely to show why the justice admitted an accused to bail); 1858, Tobin *v.* Shaw, 45 Me. 347 (the issue being whether the plaintiff's voluntary destruction of letters would prevent her from producing secondary evidence of them under the principle of § 1198, *post*, her sister was allowed to tell what advice she gave the plaintiff about destroying them, so as to negative the charge of fraudulent destruction); 1857, Com. *v.* Castles, 9 Gray 121 (charge that the defendant substituted a false deed for a deed which W. supposed he was signing: the difference in the deeds being shown, a prior conversation of the defendant with a third person was admitted to show that the defendant knew what W. was really intending to sign); 1869, Williams *v.* Poppleton, 3 Or. 143 (consultation by other surgeons with one charged with malpractice).

[3] The precedents tend to be too strict: 1842, Oden *v.* Stubblefield, 4 Ala. 41 (Collier, C. J.: "It by no means follows that the wife informs the husband of everything she may hear, especially if it be not likely to interest or affect him in some way. Now it does not appear [in a case where notice of a previous unrecorded sale of slaves by the plaintiff to a third party was charged] that the defendant had or was about to acquire an interest in the slaves at the time the wife heard the deed from the plaintiff spoken of, so that it cannot be reasonably intended that she repeated what she heard"); 1843, Petrie *v.* Rose, 5 W. & S. 364, 366 (slander by a wife; communication of suspicious facts, tending to negative malice, to the husband of the defendant, held properly rejected).

[4] 1875, Clinton *v.* Howard, 42 Conn. 294, 310 (to show the diminished value of a frightened horse, evidence was admitted as to the extent of local knowledge of the horse having run away through this fright); 1888, Tucker *v.* Constable, 16 Or. 407, 409, 19 Pac. 13 (statutory action for unlawfully gelding an animal knowing it to be kept for covering; reputation, *semble*, held admissible; but here the indefinite fact that the animal was "generally known" to be so kept, was held insufficient); 1888, State *v.* Flint, 60 Vt. 304, 310, 319, 14 Atl. 178 (notoriety of a crime in a village by a certain time, admitted to show knowledge by one there).

the inference, here as elsewhere, is our experience of the operation of human nature. The general principle of Relevancy (*ante*, §§ 31, 38) applies, that the evidential fact should be received whenever the *factum probandum* is at least a fairly possible or a probable inference, though not the conclusive or the most probable one.

But it is not in the application of the principle of Relevancy that the special difficulties of this subject are found. In only two or three of its applications are there any controverted points; the notable ones, perhaps, are the questions as to the inference from Innocent Conduct (*post*, § 293) and the inference from Non-Production of Testimony (*post*, §§ 285–291. The peculiar problem of this subject lies rather in the fact that conduct admissible enough from the present point of view may also be regarded as being in effect an assertion and therefore as obnoxious to the Hearsay rule, which excludes the use of testimonial assertions made out of court. For example, on an issue of legitimacy, the parents' conduct, in treating the child as legitimate, is a circumstance from which may easily be inferred their belief in his birth since marriage, and from that belief may be inferred the ultimate fact; yet, this conduct of theirs is also, in another view, equivalent to a declaration of his legitimacy, and thus a hearsay statement, not to be received except as an admission of the parties to the suit or under some specific exception to the Hearsay rule. It is this double aspect of the conduct-evidence that presents the chief difficulty of principle. Again, when a person's utterances are offered as indicating his knowledge of a fact mentioned by him, the utterance may circumstantially reveal the *factum probandum*, his knowledge; yet the utterance cannot be used as an assertion, to evidence the truth of the fact asserted, because the Hearsay rule forbids; and thus it is necessary constantly to discriminate between the circumstantial and the testimonial use of such utterances.

The specific uses of conduct-evidence may now be noticed in detail, keeping in mind that the circumstantial use of such evidence presents little difficulty on principles of relevancy, and that it is the testimonial use which is obnoxious to Hearsay rule and thus creates a special complication.[1]

§ 266. **Conduct and Utterances, as Evidence of Knowledge or Belief, as a Fact in Issue.** Conduct and word-utterances may betray the knowledge or belief of the actor or speaker, in so far as the specific act or utterance is of a tenor which cannot well be supposed to have been willed without the inner existence of that knowledge or belief. For example, A's act of boarding a railroad train is some evidence of his belief as to the destination of the train; B's act of taking a purse, found by him in the street, to the house of X, is some evidence that he knows or believes X to be the loser of the purse. So, also, for the verbal[1] utterance; A's mention of Charles the Great or Roentgen rays or

[1] For the distinction between circumstantial and testimonial evidence, see *ante*, § 25, *post*, § 479.

[1] "Verbal" is here used in its proper sense of "that which is expressed in words"; it is not synonymous with "oral," which is the term of contrast with "written."

the Klondike is some evidence that he knows or is aware of the existence of such a person, thing, or place. For such instances of conduct, including utterances, as evidence of knowledge or belief, there can be no general test of relevancy; ordinary experience usually suffices, without controversy, to tell us whether the inference is at least a fairly possible one, and therefore whether the evidence is admissible. Every trial illustrates the principle; and such judicial rulings as have been made are seldom of use as precedents:

1703, *Hathaway's Trial*, 14 How. St. Tr. 639, 654; cheating by pretending to be bewitched; one Dr. M. had been reviled by the populace for helping to exonerate Sarah M., who had been tried for bewitching the defendant; it was argued that "other people's censuring the doctor cannot be brought as evidence against my client"; but L. C. J. *Holt* answered: "What other people have said, abstractedly considered, ought not to affect Richard Hathaway. But if there be evidence that Hathaway hath been guilty of deceit and a design to deceive people, will you not allow it to be given in evidence that the people have been deceived? . . . Now Dr. Martin's evidence is what Hathaway did and that people did believe him to be bewitched." [2]

The important thing is that, so far as the evidential fact consists in an utterance of words, it is receivable for the present purpose, as circumstantial evidence; and that, so long as it is offered for that purpose only and not as an assertion to be credited like testimony, it is not obnoxious to the Hearsay rule. For example, A's mention of X's insolvency is receivable as circumstantial evidence of A's knowledge, but not as testimonial evidence of X's insolvency. The distinction is elsewhere examined, from the point of view of the Hearsay rule (*post*, § 1790); it is enough to note here that it is well established:

[2] 1759, Eugene Aram's Trial, Eng. (one Daniel Clark having been missing for thirteen years, a human skeleton was discovered and suspected to be his; at an inquest, Aram and Houseman, with whom Clark had been seen just before his disappearance, were summoned; and Houseman, when shown the bones, said: "This is no more Daniel Clark's bone than it is mine"; whence it was inferred that he knew something of the whereabouts of Clark; and he subsequently confessed, pointing out Clark's skeleton at an entirely different place); 1879, State *v.* Allen, 47 Conn. 132 (language by the accused implying knowledge); 1895, Leslie *v.* State, 35 Fla. 182, 17 So. 558 (an offer to return stolen property, as showing knowledge that it was stolen); 1850, Com. *v.* Webster, Mass., Bemis' Rep. 178 (the defendant had asked whether they had found the whole of Dr. Parkman's body; indicating a knowledge that it had been cut up); 1896, Cary *v.* Crowe, 165 Mass. 139, 42 N. E. 563 (laughter, showing knowledge of the place of an arson); 1903, Hayes *v.* Pitts-Kimball Co., — id. —, 67 N. E. 248 (whether deceased was conscious before death; his utterances admitted); 1880, State *v.* Howard, 82 N. C. 627 (murder; language showing that the defendant knew the deceased had money in his house); 1853, Moore *v.* State, 2 Oh. St. 500, 506 (a few days after a murder by strangling, the defendant remarked that he could kill a man by strangling and described the process; admitted as indicating that the accused's mind was running on the subject, as the guilty person's would be); 1899, Slavens *v.* R. Co., 38 C. C. A. 151, 97 Fed. 255 (injured person's declarations showing knowledge of danger, admitted; here justified under the *res gestæ* notion, *post*, § 1745); 1896, Forbes *v.* Morse, 69 Vt. 220, 37 Atl. 295 (to show that a letter was written after July 30, the mention therein of facts occurring since that date was held some evidence); 1901, State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676 (language indicating a knowledge of the circumstances of the murder, admitted). The following case rests on peculiar facts: 1886, R. *v.* Gunnell, 16 Cox Cr. 154 (under a statute exempting a bankrupt who first "disclosed" his malfeasance under examination, certain remarks of M. indicating his knowledge of the malfeasance were excluded). This class of utterances may also be offered as *admissions*, when the person is an adverse party, a grantor, or the like (*post*, §§ 1076, 1081, 1083, 1086).

1810, *DuBost* v. *Beresford*, 2 Camp. 511; libel: "Lord Ellenborough held . . . that the declarations of the testators while they looked at the picture in the exhibition-room were evidence to show that the figures portrayed were meant [rather, were understood] to represent the defendant's sister and brother-in law."

1890, *Knowlton*, J., in *Chase* v. *Lowell*, 151 Mass. 422, 24 N. E. 212 (notice of the rottenness of a tree's roots was in issue, and to show knowledge by the city the evidence mentioned was offered): "The acts of persons in looking at the roots were an important part of the evidence. From this it might be inferred that they noticed the decayed condition of the roots. . . . The remarks made at the time rendered it certain that the view of the roots gave notice of the defect to those who then saw them."

1892, *Field*, C. J., *Com.* v. *Trefethen*, 157 Mass. 188, 31 N. E. 961: "Suppose that it had been denied at the trial that the deceased knew that she was pregnant, testimony that she had said that she was pregnant would be some evidence that she knew it, [though not that she was so.]"[3]

It is to be noted that there is a specific *Hearsay exception* for assertions as to declarant's mental condition; and thus an utterance of that particular sort —*e. g.* "I know where the money is," as distinguished from "The money is hid in my house"—is receivable equally by either of the two avenues, as circumstantial evidence and as a testimonial assertion; so that Courts seldom discriminate carefully; the use of such utterances under the Hearsay exception is considered *post*, §§ 1714, 1731. This exception includes also assertions of an internal state of physical suffering, existing at the time of the assertion, but not of a past condition (*post*, 1718).

Nevertheless, this Hearsay exception, being subject to certain limitations, will often not suffice for the purpose in hand, and the present, or circumstantial, use of such utterances may become the only available one. For example, in actions on *life-insurance policies*, where the deceased's misrepresentations as to his health are in issue, his statements as to a prior illness would be inadmissible under the Hearsay exception to prove that illness, and might also not be receivable as a party's admissions (under § 1081, *post*); and yet, if the fact of the illness were otherwise evidenced, the deceased's statement might be receivable as circumstantial evidence of his knowledge of it.[4]

[3] Other illustrations are found in the preceding note.

[4] 1901, Towne *v.* Towne, 191 Ill. 178, 61 N. E. 426 (insured's conduct and declarations admitted, on the issue of his knowledge of the contents of a certificate held by him); 1875, Swift *v.* Ins. Co., 63 N. Y. 187 (the issue being whether a statement by the insured that he had not had scrofula was knowingly false, the insured's statements, made within a year previous, to persons who saw him walk lame and saw a sore in his side, as to the cause of the ailment, were admitted, as tending "to prove with more or less certainty, as the cause and character of the ailment are more or less in the common and unskilled knowledge of men, that the cause and character of it are known to him"; the opinion somewhat obscurely justifies the use of these statements also as admissions; it also requires that the statements be not too remote); 1876, Edington *v.* Ins. Co., 67 id. 193 (similar); 1877, Dilleber *v.* Ins. Co., 69 id. 256, 260 (similar); 1896, Mutual L. I. Co. *v.* Seeley, 19 C. C. A. 331, 72 Fed. 980 (affidavits of third persons, the contents not being known to insured, excluded; Swift *v.* Ins. Co. cited); 1899, McGowan *v.* Supreme Court, 104 Wis. 173, 80 N. W. 603 (insured's statements of a condition of disease too remote in time to be material, not received as admissions; but, after other evidence of his condition at the time of application, held admissible to evidence his knowledge of that condition); 1902, Rawson *v.* Ins. Co., 115 id. 641, 92 N. W. 378 (insured's statements in 1895, admitted to show his knowledge of a disease, regardless of their remoteness from the issuance of a policy in 1896, where the alleged false representation was that he had never had the disease). If the insured's knowledge is immaterial under the issues, then his statements are not receivable: 1880, Union Cent. L. I. Co. *v.* Cheever, 36 Oh. St. 201, 208.

§ 267. **Conduct as Evidence of Belief, and thus of the Fact Believed; General Principle.** In the cases dealt with in the foregoing section, the knowledge or belief — *i. e.* the mental condition — to be evidenced was of itself material to the issue as a *factum probandum*, — *e. g.* whether an insured knew of his illness, or whether the public were made to believe in a certain defamatory meaning. There is however a large class of cases where the belief or knowledge or consciousness (whatever may be the appropriate usage of terms for the mental condition) is of service only evidentially, as forming a second step of inference to some other fact which forms the ultimate object of proof. It has already been noted (*ante*, § 172) that an act or event may be evidenced, retrospectively, by the traces left by it, and that, in theory, these evidential traces may be not merely physical and organic, but also mental or psychical, *i. e.* the evidence would consist in the consciousness or belief of some person as to the happening or doing of the prior event or act, which has left its impression on him. But, since his belief or consciousness can itself be evidenced only by his conduct or utterances, there would always be two steps of inference involved in using that belief or consciousness, — first, the conduct or utterance to evidence the belief, and next, the belief to evidence the act or event believed. Now the former of these inferences is of the class here concerned; and it is at this point, therefore, that we are able to take up the question whether, as a whole, this double step of inference is allowable.

What, then, are the objections to it? Plainly, that it is practically often equivalent to the inference from testimonial evidence, and that therefore we should be violating the Hearsay rule by accepting an extra-judicial assertion as evidence of the fact asserted. For example, on an issue of the existence of a lost will, suppose the fact to be offered that the deceased on his death bed told his daughter, "My will is in the iron chest"; or, on an issue of legitimacy, suppose the fact to be offered that the parents always treated the child as their own. In these instances suppose it to be argued that the deceased's utterance indicates circumstantially his belief in the will's existence, and that his belief in turn indicates the fact of the will's existence; or that the parents' conduct leads to the inference that they believed the child to have been born to them after marriage, and that this belief evidences the fact of such birth. Such a double circumstantial inference is in theory perfectly possible and proper. But, after all, is not the process practically equivalent to accepting the deceased's declaration and the parents' conduct in a purely assertive and testimonial fashion, *i. e.* to admitting directly their assertions about the will and the child, precisely if they were on the stand and credit were asked for their testimonial assertions to that effect? And if such evidence were allowed to come in as circumstantial, could not any and every hearsay statement be brought in upon the same plea, by resolving it into a double inference, namely, by translating A's assertion, that he saw M strike N, into an inference from his utterance to his belief and from his belief to the fact asserted? Short of such an extreme deduction, it seems at first sight

impossible to stop. It is plain enough that the settled analogies in the rules of circumstantial inference, as well as the modes of reasoning in every-day affairs, justify us in claiming that the inference from conduct to belief and from belief to the fact believed is, in theory at least, a legitimate one. Yet, on the other hand there is force in the argument that the pretended double inference of a circumstantial sort is equivalent to giving credit to a testimonial assertion, and involves therefore a danger of evasion of the Hearsay rule. The latter argument has been well set forth in the following passages:

1838, *Vaughan*, J., in *Wright* v. *Tatham*, 5 Cl. & F. 670, 733 (the sending of letters to a testator by various persons was offered as conduct or "treatment" tending to show their belief in his sanity, and thus the fact of that sanity): "Acts performed by strangers, expressive not merely of opinion, but of the strongest conviction, even in cases where such conviction conflicts altogether with the interest of the person entertaining it, — even such acts as these the law will not allow to be presented to the minds of jurymen as evidence. They are merely opinions expressed in different language, — in the language of conduct instead of the language of words. They may be acts involving a great sacrifice of personal interest, as the payment of a policy of insurance by an underwriter on a marine loss; and therefore as moral evidence they may be very cogent. Yet does the law, more rigid and inflexible, resist the weight of such moral evidence, although in the ordinary transactions common sense and experience might possibly yield to it. As acts of strangers, the law regards them as personal admissions, which cannot affect third parties; as the opinions of strangers, they bear the general insufficiency and infirmity of hearsay evidence, without any claim to the privilege which in some peculiar subjects of inquiry is extended to that class of proof."

Parke, B., in the same case (in the lower Court), 7 A. & E. 313, 386: "For example, if a wager to a large amount had been made as to the matter in issue by two third persons, the payment of that wager, however large the sum, would not be admissible to prove the truth of the matter in issue. You would not have any right to present it to the jury as raising an inference of the truth of the fact on the ground that otherwise the bet would not have been paid. It is after all nothing but the mere statement of that fact with strong evidence of the belief of it by the party making it. . . . [To the same sort of evidence] belong the supposed conduct of the family or relations of a testator, taking the same precautions, in his absence, as if he were a lunatic; his election, in his absence, to some high and responsible office; the conduct of a physician, who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family. All these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements, not on oath, but implied in or vouched for by the actual conduct of persons by whose acts the litigant parties are not to be bound. The conclusion at which I have arrived is that proof of a particular fact, which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath [in court] would be of itself inadmissible."

What exit did the common law take from this dilemma? It followed that instinct of compromise which has affected so many British institutions; it conceded something to both principles. In a few specific instances, mostly of traditional inheritance, it yielded fully to the theory of circumstantial inference; in a large group of other instances, it yielded in fact, but only because the evidence was commonly there also admissible for other reasons, and

thus it became practically of no consequence which theory was relied on for its reception; and in all remaining instances it denied the propriety of the circumstantial inference and insisted on the application of the Hearsay rule to conduct which was equivalent to an extra-judicial assertion. These three classes of cases may now be briefly noticed in advance.

(*a*) First, where the desired inference leads up to a *personal deed*, of radical force and natural psychologic significance, and thus the circumstantial nature of the inference strongly dominates the testimonial aspect, a few classes of cases are recognized in which the former is conceded to be legitimate. The distinction thus reached is a fairly practical one. For example, a criminal act leaves usually on the mind a deep trace, in the shape of a consciousness of guilt, and from this consciousness of guilt we may argue to the doing of the deed by the bearer of the trace. The reliance is not upon the testimonial credit of the person, but upon psychologic forces closely analogous to the forces of external nature. As an axe leaves its mark in the speechless tree, so an evil deed leaves its mark in the evil doer's consciousness. But as soon as that type of consciousness is left aside, and we turn to a consciousness based upon any other past experience, *i. e.* upon the impressions from hearing or seeing another's deed or an outward event in general, we are dealing with that commonplace sort of mental trace or impression which is the basis of ordinary assertions and testimony, and the circumstantial use of it becomes merged and swallowed up in the testimonial use. On some such real basis of distinction as this, then, we find that the circumstantial use of conduct and belief is plainly allowed by the law to be resorted to in a few classes of cases covering some sort of personal deed of emphatic significance and effect. Of those classes, the following are chiefly to be noted: (1) a Consciousness of Guilt, as evidenced by flight or the like (*post*, §§ 273–291); this is ordinarily offered against the defendant in the case, and thus might be accounted for under the second class (*b*, *infra*), but it is also receivable of a third person, to show him to be the guilty one and thus to exonerate the defendant (*ante*, § 142), and must therefore be reckoned under the present head;[1] (2) a Belief in a Marriage, as evidenced by the conduct of a pair living and treating each other as husband and wife (*post*, § 268); this has been from time immemorial received, whether or not the persons are parties or privies to the suit, and is a plain use of the double circumstantial inference; (3) a Belief in Legitimacy, as evidenced by the treatment of a child by its alleged parents (*post*, § 269); this, again, is a tradition of long standing, and can be justified only on circumstantial grounds; (4) a Belief in Personal Name, Family History, and the like, as evidenced by conduct and language, and as tending to prove identity with a person in issue (*post*, § 270); this is recognized in a few instances only, but seems nevertheless orthodox; (5) a Belief in a Testamentary Act, as evidenced by the alleged testator's conduct and

[1] This is also shown by the fact that the rules for Confessions (*post*, § 821) are treated as not applicable to such conduct.

utterances (*post*, § 271); this use of such evidence has been sanctioned by a few judges, but there is a decided repudiation of it by others.[3]

(*b*) In the second class of cases is to be included that sort of conduct which is received only when it emanates from a *party to the cause* or a *witness*, and can therefore be equally justified as involving an *admission* on a *self-contradiction*. Such conduct, for example, as the fabrication or suppression of evidence, the failure to produce important witnesses or documents, indicates a consciousness that one's cause is a bad one or a weak one, and from this consciousness or belief may be inferred the fact that it is bad or weak, *i. e.* that facts essential for its support are lacking (*post*, §§ 273–293). So also, from a witness' failure on a former trial to state a fact which he now asserts, may be inferred that he did not then believe it and thus that it did not in truth occur. In criminal causes, such guilty conduct on the part of the accused may be treated as a trace of his own criminal deed, and thus would fall under the first class (*a*), above examined; and it is in fact so treated, by receiving it also when proved for persons other than the accused and by not applying to it the rules for confessions. But in civil causes, and for witnesses, the belief or consciousness relates back usually to some act or event not a personal deed, — as, for example, in the case of the assignee of a contract or the principal of a tortious agent, — and thus would fall usually without the class in which the circumstantial inference would be the primary one. Accordingly, while the circumstantial inference is always an underlying one and a real one, the assertive value of the evidence becomes more apparent; and in consequence, such conduct can be received only so far as there is some other avenue of entrance which removes from it the obstacle of the Hearsay rule. Two such ways are open; such conduct from a party, even if treated as a plain assertion, is at any rate an Admission, and is therefore receivable as such in any case; such conduct from a witness is receivable as a self-contradiction or an act of corruption, and therefore receivable in any case. The result is that while the evidence is indeed conduct, and not assertion, yet the objection that it is equivalent to assertion, and therefore obnoxious to the Hearsay rule, is obviated by receiving it only when it is predicated of a party or a witness. In other words, the inference from conduct remains essentially circumstantial, but the danger of the conduct being accepted also as assertion is cured by restricting it to those cases where it would be received even though it were unmixed assertion. Hence it is sometimes judicially spoken of as an admission, or an "admission by conduct." More correctly speaking, it is still conduct, but the doctrine of admissions serves to remove from it the reproach of its potential quality as an assertion. In short, the doctrine of admissions is not the reason for its reception, but is the reason for its not being excluded. All evidence, therefore, of that class is properly to

[3] Another class of cases, not properly belonging here, consists of those in which the conduct of third persons is received as evidence of the dangerousness of a place, or the like (*post*, §§ 459 ff.).

be treated here, in collation with other inferences of a similar sort from conduct to belief or consciousness.[8]

(*c*) Whatever remains, then, in the way of conduct-evidence as supporting an inference of the person's belief and thus of the fact believed, is in general, apart from the two preceding groups, declared inadmissible, as being too open to construction as assertions and therefore as mere hearsay. The reasoning on which this result is reached is sufficiently set forth in the passages from *Wright* v. *Tatham*, above quoted. The language of those opinions ignores, to be sure, the well-settled exceptions of the first group (*a*) just summarized; but, apart from these allowances, it fairly represents the general attitude of the law. Whatever instances of opposite tendency may be noted in the following sections, and however well-founded these may be in a given case, they must be regarded as casual and unusual.

§ 268. **Marriage, as evidenced by Conduct or Habit.** When the fact of marriage is in issue — whether a consensual or a ceremonial marriage — the subsequent conduct of the man and the woman said to have been the parties to it is receivable to evidence the marriage. This conduct is traditionally spoken of as "habit"; and this common source of proof, with the reputation-evidence which usually accompanies it, has come to be known by the phrase "habit and repute."[1] The logical nature of the argument indicates it plainly to fall under the present principle; that is, from the conduct of the man and the woman as married persons may be inferred their firm belief that they were at some prior time made husband and wife, and from this belief may be inferred the fact. That this sort of evidence is admissible seems not to have been questioned; there is an important question, depending upon a different principle, whether it is alone *sufficient evidence* of a marriage (*post*, §§ 2082–2088); there is another principle which governs the use of *reputation* as evidence of marriage (*post*, §§ 1602–1604); and there is still another principle which admits *hearsay declarations* of marriage under the Family-History exception to the Hearsay rule (*post*, § 1480 ff.); but the propriety of the present sort of evidence, exceptional though it is (as already pointed out in § 267), seems not to have been doubted. This is partly due to the circumstance that in any event it would commonly have been receivable from another point of view, — for example, as falling under the above Hearsay exception, when the persons in question were deceased; or as Admissions of a party, when the person whose conduct was offered, or his successor in interest, was a party to the cause. But, at any rate, it has commonly been used when no such mode of justifying it was tenable, and its propriety is now too firmly established to be for a moment questionable. The following passage, from a writer the most learned and comprehensive in his familiarity with the traditions and the lore of genealogical controversies, serves to illustrate the scope of this class of evidence:

[8] So far, however, as witnesses are concerned, it is impracticable, in treatment, to separate this sort of evidence from other analagous sorts of impeaching evidence, and the principles are discussed together, *post*, §§ 956 ff., 1040 ff.

[1] This term is further defined *post*, § 2083.

1844, Mr. *J. Hubback*, Succession, 247: "The parties' assertions of marriage and the general reputation of the fact may be evidenced with as much strength and distinctness by actions as by words. Thus the former may appear by their elopement and return as married persons. Their visiting with families of respectability was successfully relied on in the claim to the Say and Sele Barony, and was dwelt upon as a strong fact by Abbott, C. J., in summing up the evidence in the case of Beer *v.* Ward. And similar weight was ascribed to the fact of a husband procuring a woman to be presented at Court as his wife. . . . Proof of the observance of customs which are peculiar to the entry upon or subsistence of the state of marriage is evidence of the same description, and will assist the inference that the contract has been duly constituted. By the civil law the Roman custom of *traductio ad domum* was a conclusive presumption of matrimony, and by the canon law similar weight was ascribed to it, if observed in places where it was a solemnity usual upon bringing brides to their husband's houses. So in England the circumstances of the man impaling the woman's arms with his own upon his plate, seals and carriage, and in another case that of the father of the person whose legitimacy was disputed having appointed with the clergyman a day for the mother to be churched, were severally treated as carrying considerable weight in evidence of marriage. On the same principle, the assumption by the woman of the name of the man, the *gestatio annuli*, or wearing by her of her wedded ring, or (in countries where a difference exists) of apparel peculiar to married women, are acts, which, if they be done *sciente, vidente, et patiente viro*, may be considered as so many tacit declarations by the parties of the existence of a marriage between them. To these circumstances may be added that of the parties joining as husband and wife in fines or other assurances for the purpose of passing the right of the latter to dower, and the entry in the register of the woman's burial by the description of the wife or widow of the man. And the mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference of greater or less strength, that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, is to be moral rather than immoral, and credit is to be given to their own assertions, whether express or implied, of a fact peculiarly within their own knowledge."

It may be noted that upon this principle a *certificate of marriage* which otherwise would be receivable only under the Hearsay exception (*post*, § 1645), may, if found in the person's possession, be admissible as exhibiting the person's belief as to his marriage.[2] The principle is also sometimes extended to admit, on an issue of *breach of marriage-promise*, the woman's subsequent conduct (in preparing a wedding-outfit, and the like) as evidence of her prior act of assent to the promise.[3]

[2] 1886, Camden *v.* Belgrade, 78 Me. 204, 209, 3 Atl. 652 ("a paper found in the possession of one of the parties to the alleged marriage, or produced by such party, purporting to be a marriage certificate, is admissible upon the ground that such a possession or such a production of it is equivalent to a declaration of such party that the facts stated in the certificate are true, . . . without separate and distinct evidence of its genuineness or that it was given by one acting in an official capacity"). Distinguish the following case: 1848, Com. *v.* Morris, 1 Cush. 391 (adultery; unauthenticated certificate in possession of a woman said to be defendant's wife, excluded, her conduct not being evidence against him).

It has been suggested that conduct as a married person *after cohabitation is ended* is inadmissible, but this is perhaps not necessarily so; 1881, Dysart Peerage Case, L. R. 6 App. Cas. 489, 499, 502 (legitimacy of a child born in 1863, of an alleged informal marriage with A in 1844, another marriage with B having been openly celebrated in 1851; the husband's declarations, after 1851, of the first woman being his lawful wife, excluded; his conduct and statements "as one of the alleged marrying parties" up to that date would have been receivable; but after that date, the *res gestæ* of the first cohabitation being ended, his statements were solely testimonial; the principle of party's admissions or of the pedigree exception being not here available). *Contra:* 1886, Camden *v.* Belgrade, 78 Me. 204, 212, 3 Atl. 652. Compare the citations *post*, § 1770.

[3] The cases are collected *post*, § 1770.

§ 269. **Legitimacy, as evidenced by Parents' Conduct.** Upon an issue of the legitimacy of a child, the conduct of the parents towards the child is admissible on the present principle, as involving an inference from the parents' conduct to their belief as to the fact on which the legitimacy depends (time of birth, time of marriage, identity of the child, and the like), and then from that belief to the fact itself. Such evidence has traditionally been received since Solomon's day; though perhaps the more easily, inasmuch as it would usually, as in the case of marriage-conduct (*ante*, § 268), be also defensible under the Family-History exception to the Hearsay rule, when the parents were deceased, or under the doctrine of Admissions, when the parents or their successors in interest are parties to the cause. But its orthodoxy from the present point of view is not only established by its traditional reception free from any reference to the limitations of those two special doctrines, but also is plainly declared as a matter of theory by the exposition of eminent judges:

The Judgment of Solomon, First Book of the Kings, III, 16: "Then came there two women, that were harlots, unto the king, and stood before him. And the one woman said, O my lord, I and this woman dwell in one house; and I was delivered of a child with her in the house. And it came to pass the third day after that I was delivered, that this woman was delivered also: and we were together; there was no stranger with us in the house, save we two in the house. And this woman's child died in the night, because she overlaid it. And she arose at midnight, and took my son from beside me, while thy handmaid slept, and laid it in her bosom, and laid her dead child in my bosom. And when I rose in the morning to give my child suck, behold, it was dead: but when I had considered it in the morning, behold, it was not my son, which I did bear. And the other woman said, Nay; but the living is my son, and the dead is thy son. And this said, No, but the dead is thy son, and this is my son. Thus they spake before the king. Then said the king, The one saith, This is my son that liveth, and thy son is the dead; and the other saith, Nay; but thy son is the dead, and my son is the living. And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other. Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it. Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof. And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do judgment."[1]

1810, L. C. *Eldon*, in *Banbury Peerage Case*,[2] App. to LeMarchant's Gardner Peerage Case, 490: "Evidence of the conduct of the supposed parents of the child appears to me to be admissible evidence upon this question [of legitimacy]. My lords, when two women each claimed a particular child as hers, and called upon a person to decide between them, he ordered that the child should be severed into two parts, and that each take half; the true mother instantly waived her claim; and he decided, upon that, that the child was hers. What is the lesson which this story teaches? Not, perhaps, that mere declarations are evidence in such a case; for such declarations may be made for a temporary purpose

[1] A similar judgment is attributed in Japan by tradition to the great judge Oka Tadasuke, who lived in the early 1700s. By the Japanese version, the judge orders the two claimants to grasp the child and pull each one towards herself, the strongest to be the victorious claimant. The judgment is found in a popular collection known as "Oka Seidan," and has been translated by Mr. Walter Dening, in his "English Readers for Japanese High Schools," Book I, p. 131.

[2] Lord Eldon's remarks are also given in Nicolas, Adulterine Bastardy, 524.

(In that case both women made declarations, and one of course made false declarations); but it teaches that the conduct of a parent, the feelings of a parent — those feelings being inferred from such conduct — afford us some evidence assisting us in arriving at a right conclusion as to the matter in controversy. It has been argued at the bar that mere declarations of parents on such subjects are not admissible evidence to affect a question of legitimacy, and that conduct is precisely the same thing; that it is substantially nothing more than a declaration; that it is only a declaration by deed instead of by word. I will not say that all simple declarations are evidence in such a case; but I will say that the conduct of a husband and wife towards a person claiming to be their legitimate child is in some cases admissible evidence upon the question whether the husband and wife had sexual intercourse at such time as by the course of nature that child might have been the fruit of that intercourse. It is often a most material species of evidence. It is not always, but it is frequently a safe ground for inference; for it comes from the least suspicious source, that is, from the very individuals who are the most interested to give a different testimony. If there ever was a case where circumstantial evidence of this description is admissible, it is this."

1810, Lord *Redesdale*, ib. 439, 447: "Acknowledgment of a child by the reputed father and mother as their child is generally the only evidence of the fact even that the child is the child of the woman, unless evidence of the persons present at its birth can be produced; and such acknowledgment is sufficient evidence, if not rebutted by clear evidence to the contrary."

1890, *Clark*, J., in *Woodward* v. *Blue*, 107 N. C. 407, 12 S. E. 453 (Mourning Crisp, a mulatto, claimed as widow of Underzine Pelot, a slave of Greenlea, and Emily Woodward Blue as daughter of the marriage; the defence denied the marriage, and affirmed Greenlea to have been the father of Emily by Mourning; Greenlea's treatment of Emily was offered in evidence): "There being evidence to show non-access by the husband, the jury should not have been cut off from a knowledge of how Greenlea treated the child. It may be that it could have been shown that he betrayed fondness and affection for it, showed anxiety in its illness, lavished money on it, or educated it; and sur[illegible] these things would be strongly corroborative of the evidence of the defendant, for it would be hardly expected that a white man should so act towards the child of Underzine his negro slave. 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?"[3]

§ 270. **Identity, as evidenced by Belief and Knowledge of Personal Doings, Family History, and the like.** On an issue of personal identity, the present principle finds one of its simplest and commonest applications. The situation is this: Whether X is A is the fact in issue; A is shown to have done a certain act, to have had certain marked and individual experiences; if X did this act or had this experience, he probably is A; thus, as indicating whether X did or had it, the fact of his present belief or consciousness or recollection becomes relevant, and therefore his conduct as evidencing that belief. This sort of evidence, of the commonest use in the affairs of everyday life, has of course its weaknesses; the fact of X's belief or recollection of the act may be explained away as due, not to his having actually done

[3] The authorities are few, because the matter has seldom been disputed; compare the cases cited under the Hearsay exception, *post*, § 1497, and also the following: 1856, Legge v. Edmonds, 26 L. J. Ch. 125, 139 (admitting the parents' conduct, but excluding letters as not mere conduct); 1904, Locklayer v. Locklayer, — Ala. —, 35 So. 1008 (negro birth); 1898, Erwin v. Bailey, 123 N. C. 628, 31 S. E. 844 (quarrels as to child's legitimacy, admitted).

For the question *whose declarations* as to *illegitimacy* are receivable under the Family-History exception to the Hearsay rule, see § 1494, *post*. Compare also § 1790, *post*.

the act, but to his having heard of it from others; while the fact of his non-recollection may also be explainable as due merely to that failure of memory which increases in proportion to the lapse of time and the insignificance of the act. Thus the strength of the inference is proportionate, on the one hand (when he claims to recollect), to the improbability of the person's having learned of the act from others, and, on the other hand (when he fails to recollect), to the improbability of a forgetfulness of the particular act. The theory of this sort of evidence, and its application, are well expounded in that marvellous feat of judicial skill and endurance, the charge of the presiding judge in the second Tichborne trial:[1]

1874, *Cockburn*, C. J., in *R.* v. *Castro* (alias Orton, alias Tichborne), Official Report of the Charge, I, 16; II, 327, 403; the claimant to the rich Tichborne estate purported to be Roger, the long-lost son, who had been given up for dead, after the news of his loss at sea, some twenty years before, in a vessel last heard of off the coast of South America; Roger had been brought up a Catholic, and attended a Catholic school at Stonyhurst, but had spent most of his youth in France, where he became more fluent in French than in English; he afterwards served a while in the army; he was some twenty-five years of age when he left on his travels. The claimant had lived for most of his manhood-life in the backwoods of Australia; and was said to be really Arthur Orton, a butcher of Wapping. At the civil trial for the title to the estates, in 1871,[2] the claimant's case finally broke down and was not submitted to the jury; he was then, in 1874, put on trial for perjury and convicted; in this trial he was not competent as a witness, but his testimony at the civil trial was used against him; and it is in this cross-examination that most of the instances referred to by the Chief Justice were found. On the claimant's cross-examination by Sir J. Coleridge, it appeared that though Roger had been three years at Stonyhurst School and lived on the quadrangle, the claimant thought that the quadrangle was "a part of a building"; that, though Roger had studied Latin and Greek, the claimant replied, when asked "Was Cæsar in verse or prose," "I don't recollect"; and "Was Cæsar a Latin writer or a Greek writer?" "I can't say; I suppose it was Greek"; and when shown a copy of Virgil, "It appears to me to be Greek"; and when asked, "Is mathematics the same thing as chemistry?" "I have no recollection"; and "Has Euclid anything to do with mathematics?" "I don't know"; and when asked, "What is physiology?" "The formation of the head, I believe"; and when asked the meaning of the Stonyhurst motto, "Laus Deo Semper," answered "They mean, 'The laws of God forever.'" A list of Roger's library was read to him; he thonght that the "Theatre de P. Corneille" was written "by one of the Fathers"; asked as to the "Life of John Bunyan," whether he was "a sportsman, a general, a bishop, a master of fox hounds, or a prize-fighter," the claimant said it was "difficult to give an answer to such a question";[3] taking up these instances, the Chief Justice commented as follows: "Although outward appearance may deceive, yet if you are acquainted with what has passed through the mind of a man, and another man were to come forward and say, 'I am that man,' you

[1] The charge alone occupies two printed octavo volumes of some seven hundred pages each.

[2] Reported by Heywood, s. v. Tichbourne *v.* Lushington, in book form; the above-cited passages are found at pp. 200 ff., 390 ff.

[3] A neat summary of the various points of identity and difference between the defendant and Roger Tichborne and Arthur Orton will be found, in the form of an itemized list, in Charles Reade's "Readiana," in the chapter on "The Doctrine of Coincidences," first letter. Besides the instances above quoted, there were scores of others, notably, the defendant's ignorance of the contents of the sealed packet deposited by Roger when leaving England (Charge, I, 630 ff.), and of Roger's peculiar amusement of stupefying flies with cigar-smoke (Charge II, 162, 167). It may be supposed that the strong presumption created by the extraordinary fact that Roger's own mother recognized and to the day of her death received the defendant as her son could never have been satisfactorily met except by this mass of striking evidence of the defendant's lack of the mental traces of Roger's early life.

have only to ask him as to the events of the other man's life, those at least which must have remained impressed on his memory, and which, therefore, if he be the man, he must of necessity retain, to enable him to demonstrate that he is the man he says he is, or to enable you to pronounce that he is not. If his memory is not the memory of the man he seeks to personate, if he does not know the events of that man's life, if he does not know what thoughts, what feelings, what emotions, that man's mind underwent, he cannot be the individual. . . . Now you are in danger, in an inquiry of this nature, of being led into error by one of two alternatives. You may require too much; you may be satisfied with too little. You may require too much if you expect a man . . . to recollect every trifling individual occurrence of his life. . . . But there are things which it is next to impossible any one should forget, and in respect of those things we are entitled to require that a man should exhibit some knowledge when you know that they happened to a person whom he represents himself to be. . . . You must consider what it is you may fairly and reasonably and justly expect that a man should recollect. . . . Again, you may . . . also be satisfied with too little if you are led to accept, as true genuine knowledge, that which is not the honest production of the unaided memory, but knowledge derived from extraneous and adventitious sources. This is the danger into which persons too credulous have before now been led by imposture. . . . [He] may have acquired that knowledge from without, instead of possessing it from within. . . . What, then, are the things which would have impressed themselves on the mind and memory of a boy growing up into the period of adult life? For the recollections of boyhood still cling to us in after years with the freshness of the age to which they belong, and, though less vivid, even those of childhood do not wholly disappear. . . . [After the recital of various instances, the cross-examination is then quoted]: 'Do you recollect [from your studies] whether Cæsar was written in verse or prose? No, I do not. — . . . Did you ever do any Cæsar? I do not remember whether I did or not. — Is Cæsar a Latin writer or a Greek?' . . . To which comes the memorable answer, 'I should suppose Cæsar is Greek.' . . . Cæsar a Greek! Would Roger, do you think, have made that mistake? When Roger read Cæsar, did he believe he was reading Latin, or did he believe he was reading Greek? Is that a thing about which a person could make a mistake? Do you think that is what a man would be likely to forget?"

This application of the principle receives constant use in trials where personal identity is in issue, though few rulings need to be made or come to be recorded.[4] When the person in question is deceased, the Family-History excep-

[4] 1846, Smith *v.* Earl Ferrers, Cherer's Rep. 34, 323 (breach of marriage-promise; the plaintiff put in a long series of letters alleged to have been written to the plaintiff by the defendant, containing promises of marriage; the defendant claimed that the plaintiff had forged the letters herself; from the matters mentioned in the letters it was sought to be inferred that the plaintiff alone could not have known the things mentioned, but in fact they equally indicated that the defendant could not have written them because they mentioned numerous things that never happened to him; the defendant's case was clearly made out, and a nonsuit was taken; the case is an extraordinary one, in respect of the audacity of the claim, the ingenuity of the young woman, and the narrow escape of the defendant from the imposture); 1889, Howard *v.* Russell, 75 Tex. 171, 179, 12 S. W. 525 (the identity of B. with S. being in question, B.'s statements as to his change of name, his residence, and his reasons for the change, were admitted); 1900, Smith *v.* Russell, 23 Tex. Civ. App. 554, 56 S. W. 687 (statements, by a person to be identified, as to coming from South Carolina, and being a single man, admitted); 1900, Nehring *v.* McMurrian, 94 Tex. 45, 57 S. W. 943 (statements by the person as to his name, family members, birthplace, etc., admitted). The conduct of *third persons* seems equally admissible to identify: 1855, Willis *v.* Quimby, 31 N. H. 485, 487 (trespass; to prove defendant's identity, a deposition was offered, referring to "a man they said was J. M. I."; admissible, since "the only knowledge men generally have of the names of others is derived from the fact that they hear them so called"); 1877, Gillian *v.* State, 3 Tex. App. 132, 134, (conspiracy; "there was a man present that the crowd called W. G.," held not alone sufficient to prove identity, because of the motives for false appellation under the circumstances; but held admissible on the principle of Willis *v.* Quimby).

tion to the hearsay rule has usually served to admit his statements and his conduct; yet it is important to remember that much would properly be received from the present point of view would be excluded if offered under the hearsay exception.[5]

§ 271. **Testamentary Execution, as evidenced by the Testator's Belief and Declarations.** If the fact of recollection or belief or knowledge of a past act is generally indicative as a mental trace of the doing of the act, and if the person's conduct and utterances are indicative of that belief, it would follow that the theory applies equally where the doing of a testamentary act is in issue. If A, for example, an alleged testator, has clearly exhibited belief in the existence of a certain will of his the inference is natural that . . as in fact executed it; otherwise, except on the hypothesis of an insane delusion, he could hardly have acquired the belief or consciousness of having done the act. So, too, if he has the belief that he has made no will, this tends to persuade us that in fact he has not. The truth is that there is, for that step of the inference (*i. e.* from his belief to the past act) no ground for hesitation, either in principle or in practical good sense. The real doubt and weakness lies in the other and prior step of the inference, namely, from the person's conduct and utterances to his belief. Were we once firmly persuaded that the person actually possessed such a belief, we could not refuse to treat it as a strong piece of evidence. But how are we asked to conclude that he has the belief? From his conduct and utterances, by circumstantial inference, and it is here that the objections begin to have force. In the first place, and as a matter of circumstantial inference purely, it must be conceded that the probability of his feigning this conduct, in order to deceive designing relatives and to obtain peace and quiet, is in general experience not a small one; the circumstantial value of such evidence of his real belief may thus be thought too trifling. In the next place, it may be objected that the conduct and utterances thus offered are after all equivalent to mere assertions by him of the fact of his execution (or non-execution) of a will, and are therefore inadmissible as hearsay statements, since their assertive significance is so plain that their circumstantial use becomes a mere pretext. If, however, we can bring ourselves to consider these objections as forced and captious, the plain fact remains that such evidence would be admissible, in strict accordance with the general principle already examined (*ante*, § 267). This view has been taken by a number of Courts, more or less explicitly. In the following passages this view is phrased in one form or another:

1876, *Hannen*, J., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 203: "Believing, as I do, the testator . . . [showed] a belief in his mind that the will was in existence at a time subsequently to that at which he could have revoked it, I am led to the conclusion that he had not in fact revoked it."

1844, *Marshall*, J., in *Steele* v. *Price*, 5 B. Monr. 69 (admitting, on the question of

[5] See the citations under the Family-History exception to the Hearsay rule, *post*, § 1502, and also the discussion of principle in § 1791, *post*. In §§ 413, 667, *post*, are collected cases involving other modes of proving Identity; the use of Traces of Crime, as examined *ante*, §§ 149–154, sometimes involves what would loosely be termed a question of identity.

revocation, evidence of intention at different times and of a belief, just before death, that he still had a will, the will being in fact lost): "There is no principle of law or reason which either requires or can enable the mind to resist the accumulated force of that evidence of internal feeling and intention which is furnished by the uniform and unvarying tenor of a man's conduct and conversations through a long series of years."

1847, *Ormond*, J., in *McBeth* v. *McBeth*, 11 Ala. 60 (the testator's declarations as to the existence of a will which could not be found were admitted on the issue of revocation): "It is then very clear that at this time he supposed the will to be in existence, and [this] repels the presumption of a voluntary cancellation or destruction of it previous to that time. . . . The necessary inference from the declarations of the testator a short time before his death is that he supposed it was then in existence, consequently did not by any act of his destroy or revoke it."

1867, *Appleton*, C. J., in *Collagan* v. *Burns*, 57 Me. 458 (a subsequent intention not to revoke, as declared by the testator to his wife in various ways, was held admissible on the question whether the tearing of a torn will had been done by him and with intent to revoke): "The condition of the testator, . . . the state of his affections, when proved, may raise an improbability almost amounting to an impossibility that the testator himself intentionally destroyed his will; . . . they may show that up to the time of his death he believed his will was existing and would act upon his property, and consequently that its non-appearance, or its torn appearance, was the result of some cause other than the wish or intentional act of the deceased. . . . The evidence of the testator's declarations was offered to negative the intention to destroy and the fact of destruction of the will in question, by showing the true relation of the parties, the entire absence of intention to destroy, and hence the improbability of any destruction, intentional or otherwise, of the will by the party by whom it is conceded to have been made."

But this mode of reasoning has not been accepted by a majority of Courts. Some judges prefer, in admitting such evidence, to treat it frankly as a direct hearsay assertion which merits an exception of its own to the Hearsay rule. Others, representing perhaps the greater number of Courts, also regard the conduct and utterances as obnoxious to the Hearsay rule, but refuse to concede any exception for their benefit, and thus exclude them.[1] This variety of views, together with the possibilities of using a testator's declarations for certain other purposes by general concession, make it impracticable to examine at this point the general state of the law in regard to these related uses of such evidence; the authorities are collected and the various principles examined in dealing with the Hearsay rule (*post*, §§ 1736–1740). It is enough here to note that there is a plausible place, under the present principle, for the circumstantial use of such conduct and utterances.

§ 272. **Sundry Inferences from Belief to Past Acts; Contracts, Appointments to Office, etc.** The same mode of reasoning may of course, upon occasion, be resorted to in evidencing the execution of a contract or the doing of any other important act. No doubt this would frequently bring us into

[1] Very rarely, however, has a Court plainly considered and rejected the circumstantial argument as above explained; it is usually merely ignored. In the following case it was expressly repudiated: 1860, Boylan *v.* Meeker, 28 N. J. L. 274, 279 ("the plaintiffs relied upon the declarations and conduct of M. . . . to show that while living he never knew of the existence of such a will, and that therefore he had never knowingly executed the paper"; Whelpley, J., alone noticed this argument, in saying, "nor does ignorance of a fact, at a time long subsequent to its occurrence, raise a necessary presumption that the mind was never acquainted with it"; but his real reason for exclusion seems to have been the Hearsay rule, *post*, § 1736).

plain conflict with the Hearsay rule. But no doubt also such a reasoning process is constantly illustrated in the trials of every day, without any objection being conceived; and the following passage illustrates how wide an application the principle may receive while remaining within orthodox analogies:

1858, *Erle*, J., in *R.* v. *Forderingbridge*, E. B. & E. 678, 684 (admitting conduct of master and apprentice to show the previous execution of an indenture of apprenticeship): "The execution here is whether upon this evidence a reasonable man would infer that the man had been bound apprentice. I know of no rule of law requiring technical proof of the existence of an indenture of apprenticeship, or of any other deed, or which prohibits the presumption of the existence of the deed from the circumstances. . . . The relations of landlord and tenant, of partnership, of marriages, are frequently presumed from the conduct of the parties being consistent with that state of things, and more consistent with that than with any other."

In its application to *contracts* and *deeds*, the principle is probably oftener applied than the number of recorded rulings indicates.[1] It has also an application in proof of the fact of appointment or election to office,[2] although here the reputation-element is probably the most important; the inference is at any rate so well conceded that the *presumption of title to office* (*post*, § 2535) is founded upon it. In other instances than these there seem to be few rulings upon this use of the inference.[3]

§ 273. **Conduct, as evidence of Guilt; (1) Conduct in general; Demeanor when Charged or Arrested.** It has already been seen (*ante*, § 267) that one of the common and established uses of the mode of reasoning here involved is the inference from guilty conduct to the commission of the guilty deed; and the place of this inference in the general scheme of evidence-rules need be no further considered. So far as the employment of it in practice is concerned, the real opening for controversy arises in the first step of the inference, and not in the second. No one doubts that the state of mind which we call "guilty consciousness" is perhaps the strongest evidence (on the principle of § 172, *ante*) that the person is indeed the guilty doer; nothing but an hallucination or a most extraordinary mistake will otherwise explain its presence.[1]

[1] 1858, R. *v.* Forderingbridge, E. B. & E. 678 (to prove that J. D. had executed with B. an indenture of apprenticeship, the fact of J. D.'s working in the shop of B. like other apprentices, of B.'s treating him as an apprentice, etc., was held sufficient); 1896, Wrigley *v.* Cornelius, 162 Ill. 92, 44 N. E. 406 (issue whether the defendant had ordered of the plaintiff 10,000 pictures or only 5,000 and as many more as he should need; evidence admitted that the plaintiff, immediately after receiving the order, had made a contract with a third person for 10,000 frames, to be delivered to the defendants, as throwing light on the terms of the contract). Compare the cases under Interpretation, *post*, § 2465.

[2] 1860, Com. *v.* McCue, 16 Gray 226 (assault on the field-driver of a town; "the testimony of H. that he was a field-driver and had acted as such implies that he acted under the belief that he had been legally elected and qualified").

[3] 1743, Annesley *v.* Anglesea, 17 How. St. Tr. 1139, 1144 (to prove the delivery of Lady Altham of a child and heir in 1715, the fact was offered "that a bonfire was made upon this happy event, and drink publicly given to the neighbors and people who came in to testify their joy"; perhaps this rather illustrates § 269, *ante*); 1897, State *v.* Lee, 69 Conn. 186, 37 Atl. 75 (abortion; subsequent fear of the defendant shown by the woman just after the alleged attempt at abortion, admitted to indicate the fact of the alleged violence).

[1] That this sort of evidence may be used for a defendant to prove a *third person* guilty, see *ante*, § 142.

That the rule for *confessions* does not apply to the use of guilty conduct, see *post*, § 821.

But, in the process of inferring the existence of that inner consciousness from the outward conduct, there is ample room for erroneous inference, and it is in this respect chiefly that caution becomes desirable and that judicial rulings upon specific kinds of conduct become necessary.

In general, it may be premised, any and all conduct *may* be open to this inference. The kinds of behavior which may properly suggest such a cause are beyond enumeration; they are as various and as changeable as men's dispositions and emotions. No conduct is conclusive; but, on the other hand, no conduct is entirely without significance, greater or less according to the circumstances:

1850, *Parsons*, J., in *Johnson* v. *State*, 17 Ala. 618, 624: "We cannot say that facts, such as silence, which indicated unusual seriousness at such a moment, are inadmissible as evidence tending in some degree to show the prisoner's guilty knowledge of the condition of his wife, or to show his crime itself. Doubtless such a circumstance by itself should weigh but little and it should be received with great caution, but we cannot say that it was wholly inadmissible. . . . A flight is universally admitted as evidence of the guilt of the accused, though not conclusive. If we take a flight as evidence of fear, and fear as evidence of a known cause of dread or apprehension, we arrive thus at the inference of crime. But it is sufficient perhaps for all practical purposes to regard a flight as immediate evidence of crime, because it betrays conscious guilt. In this instance, then, we take the flight, a thing of itself harmless and innocent, as evidence of conscious guilt, a necessary consequence of the crime itself, and the conscious guilt, of which the flight was evidence, is proof, in its turn, of the crime. In this instance, therefore, it is certain that the law admits evidence of the party's conduct, merely to prove his conscious guilt, which is proof of crime. Now this conscious guilt is merely internal, but the law allows that proof of it which consists of outward signs. Is a flight the only outward evidence of conscious guilt? So far from it, any indications of it, arising from the conduct, demeanor, or expressions of the party, are legal evidence against him. The law can never limit the number or kind of such indications."

1853, *Caldwell*, J., in *Moore* v. *State*, 2 Oh. St. 502: "From our knowledge of the human mind and its workings, we expect, with almost positive certainty, that when it is the sole repository of so dreadful a secret it will affect the conduct and sayings of the person; hence the mind naturally looks to these with the most anxious scrutiny, and would require for its satisfaction, if such a thing were possible, a complete transcript of the person's conduct and sayings. . . . Sometimes a person is detected as the author of a crime by showing an unusual anxiety to discover the perpetrator; at other times the discovery is led to by the person showing too much indifference. In some instances the observation that the person appears to know too much about the transaction leads to the discovery; at other times the inquiry is started by his appearing to know too little. These are generally acts that in themselves show no disposition to do mischief; but it is because they are unnatural, because they tend to the conclusion that they are produced by a mind conscious of its guilt, that they are provable against the accused. They are in themselves nothing, except as showing the state of mind of the party."

1878, *Brickell*, C. J., in *McAdory* v. *State*, 62 Ala. 154, 159: "Any indications of a consciousness of guilt by a person suspected of or charged with crime, or who may after such indications be suspected or charged, are admissible evidence against him. The number of such indications it is impossible to limit, nor can their nature or character be defined. Presumptions or inferences may be, and often are, founded on circumstances which, of themselves, independent of the accusation, would not be ground of crimination. It is largely a question of fact, rather than a question of law, for the determination of the jury, whether particular conduct, or particular expressions of the accused, refer to a crimi-

nal offence, and spring from his consciousness of guilt. When it is clear that they have no relation to the offence, and that they ought not to have any influence with the jury, it is the duty of the Court to reject them as evidence. But however minute or insignificant they may be, shedding but a dim light upon the transaction, if they have a tendency to elucidate it they must be admitted."

Yet experience tells us that no fixed relations of inferences can be predicated for the same conduct in different persons. The same symptom is often the result of exactly opposite psychological conditions. This sort of evidence is admitted because there is a certain degree of uniformity in its meaning, but the variations from uniformity are so frequent, and depend so much upon personal character and local circumstances that no fixed rules should be laid down. Repeated judicial warnings tell us that the evidence is merely to be estimated as best we can in the light of our knowledge of human nature in general and of the accused in particular:

1846, *Ormond*, J., in *Smith* v. *State*, 9 Ala. 990, 995: "The conduct of one accused of crime is the most fallible of all competent testimony. Those emotions or acts which might be produced in one person by a sense of guilt, or by the stings of conscience, might be exhibited by another, differently constituted, by an overwhelming sense of shame, and the degradation consequent upon a criminal accusation; the same cause producing opposite effects in different persons, owing to weakness or strength of nerve, and other inexplicable moral phenomena."

1850, *Shaw*, C. J., in *Webster's Trial*, Mass., Bemis' Rep. 486: "Such are the various temperaments of men, and so rare the occurrence of the sudden arrest of a person upon so heinous a charge [as murder], that who of us can say how an innocent or a guilty man ought or would be wholly likely to act in such a case, or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, though conscious of innocence, will always appear calm and collected? Or that a guilty man who, by knowledge of his danger, might be somewhat braced up for the consequences, would always appear agitated? Or the reverse? Judge you concerning it."

1881, *Miller*, J., in *Greenfield* v. *State*, 85 N. Y. 86: "Such indications, however, are by no means conclusive, and must depend greatly upon the mental characteristics of the individual. Innocent persons, appalled by the enormity of a charge of crime, will sometimes exhibit great weakness and terror, and those who have been crushed with the weight of a great sorrow will manifest the greatest composure and serenity in their grief and meet it without the shedding of a tear. While the manifestations at such a time sometimes indicate excitement and great disturbance of the physical system, and do not always sanction an inference of guilt, they are admissible evidence for the jury to pass upon in view of the circumstances."

The general principle, as applied to the conduct of one accused of crime, finds illustration in a great variety of instances. In those which have led to judicial rulings, there has seldom resulted an exclusion, because usually none but conduct having at least plausibly a guilty significance is commonly offered.[2]

[2] 1850, Johnson v. State, 17 Ala. 618, 623 (see quotation *supra*); 1875, Levison v. State, 54 id. 519, 527 ("demeanor when arrested," admitted); 1878, McAdory v. State, 62 id. 154, 159 (questions by the defendant to the witness, of the former's own motion, as to the latter being in search of the culprit, held admissible on the facts; see quotation *supra*); 1882, Beale v. Posey, 72 id. 323 (demeanor admissible); 1896, Boykin v. People, 22 Colo. 496, 45 Pac. 419 (demeanor of the accused during the trial, admitted); 1898, Miller v. Dill, 149 Ind. 326, 49 N. E. 272 (forgery set up as a defence to a note; the payee's conduct in attempting to dispose of the

Among these inexhaustible varieties of conduct, there are a few sorts which recur often and possess some uniform feature that gives rise to doubt or controversy. These may now be taken up in detail.

§ 274. **Same: (2) Demeanor during Trial.** It has been judicially maintained that the demeanor of an accused person in court during the trial is too elusive to be justifiably considered as any indication whatever of his guilty consciousness:

1892, *Baker*, J., in *Purdy* v. *People*, 140 Ill. 50, 29 N. E. 700: "Evidence may be introduced which was not anticipated; a witness may greatly exaggerate a trifling circumstance, or may deliberately make a misstatement; a witness may fail to testify to a fact which the defendant fully believed was within the knowledge of such witness and would be stated by him; exaggerated denunciation may be indulged in by attorneys; the presiding judge may decide contrary to the expectations in regard to the admissibility of certain evidence, or may rule a point of law against him. Under these and other like circumstances, a prisoner (and especially in a trial where his life was at stake) might frequently (and especially so if he was not a hardened criminal) demean himself while under the influence of his disappointment, fears, and feelings, in such a manner that an observer would regard his conduct and demeanor as indicative of guilt. It would be illogical and unjust, under circumstances, such as stated, to deduce a conclusion unfavorable to the defendant."[1]

But none of the supposed dangers of mistake apply with any more force to this particular sort of conduct than to conduct in general. Moreover, it is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory. No other Court seems ever to have sanctioned such a proposal:

1896, *Campbell*, J., in *Boykin* v. *People*, 22 Colo. 496, 45 Pac. 419: "We know it to be a fact, grounded in human nature, that the conduct of a defendant or of a party to a suit

note, admitted); 1903, State v. Dennis, — Ia. —, 94 N. W. 235 (demeanor when identified); 1886, State v. Baldwin, 36 Kan. 10, 11, 12 Pac. 318 (admitting the accused's apathy as to a sister's death, charged against him; also the fact that he "was nervous and showed a great deal of fear" when arrested); 1883, People v. Wolcott, 51 Mich. 615 (excitement while boot-tracks were examined; excluded as depending too much on personal peculiarities); 1902, State v. Brown, 168 Mo. 449, 68 S. W. 568 (accused's reluctance to have his shoe measured, held admissible); 1875, Lindsay v. People, 63 N. Y. 143, 155 (turning pale when arrested, admitted); 1881, Greenfield v. People, 85 id. 75, 85 (wife-murder; the defendant's failure to shed tears the next morning, admitted; demeanor "at the time of his arrest, or soon after the commission of the crime, or upon being charged," is admissible; see quotation *supra*); 1897, State v. Coudotte, 7 N. D. 109, 72 N. W. 913 (attempted suicide of an Indian under arrest, not evidential of guilty consciousness); 1853, Moore v. State, 2 Oh. St. 500, 506 (murder; conduct when informed of the finding of the body of the deceased, admitted; see quotation *supra*); 1875, Smith v. State, 42 Tex. 444, 447 (readiness to deliver up on demand a hog alleged to have been stolen, admitted); 1898, Holt v. State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829 (that he "tucked his head and looked like he had done something wrong," when charged, admitted); 1901, Weaver v. State, 43 id. 340, 65 S. W. 534 (defendant's refusal, after arrest, to look on the body of the deceased, excluded, on the special principle of § 1072, *post*); 1879, Dean v. Com., 32 Gratt. 912, 924 (admitting a failure to exhibit natural interest in the crime).

Compare also the citations under §§ 394, 396, *post*.

[1] 1884, Rider v. People, 110 id. 11, 13, *semble* (accused's demeanor admissible, when "on the witness-stand and during the trial"); 1892, Purdy v. People, 140 id. 46, 49, 29 N. E. 700 (forbidding to consider his demeanor during the trial where he has not taken the stand; see quotation *supra*); 1892, Siebert v. People, 143 id. 571, 593, 32 N. E. 431 (approving Purdy's case).

during the trial is more or less potential, and has necessarily more or less influence with the Court and jury upon the question of his credibility. . . . If this be so, we fail to perceive the vice in an instruction telling the jury that they may do the very thing which common experience and common observation teach that the human mind inevitably will do." [2]

§ 275. **Same: (3) Refusal to Undergo a Superstitious Test.** The popular trust in certain superstitious and irrational tests of guilt is much more widespread in this country than is commonly supposed; and it is not rare for the police or interested persons to employ these superstitions as a means of obtaining a clue. The refusal of a suspected person to undergo such a test would properly be evidential of his guilty consciousness; although it would be also open to explanation as due to his repugnance to an unpleasant situation or to ignorance of the superstition:

1875, *Brickell*, C. J., in *Gassenheimer* v. *State*, 52 Ala. 316: "The conduct, demeanor, and words of one charged with crime, about the time of its commission or of its discovery, or on his arrest for or on accusation of it, are admissible in evidence against him. The mental emotion he exhibits is a criminative fact of more or less force as it is connected with other facts and circumstances. Alarm, confusion, anger, resentment, or despair, may be evinced, and may spring from a consciousness of guilt. In the olden time it was a popular superstition that the corpse of the slain would bleed afresh if touched by the murderer; and it was deemed almost conclusive of guilt that he who was charged with the murder refused to lay his finger on the body or to take his hand; in recent years persons suspected of murder have been required to touch the dead body, not because the old superstition was indulged, but that its effect on them — the emotion produced and manifested — could be observed."

1894, *Gantt*, P. J., in *State* v. *Wisdom*, 119 Mo. 539, 24 S. W. 1051 (testimony was offered that at the morgue the defendant was requested with others to put his hand on the corpse of the murdered man, but he refused): "It was simply a test proposed by some bystander, and it was offered as showing the manner in which the three suspects conducted themselves when it was proposed. While defendant had a perfect right to decline, either because of his instinctive repugnance to the unpleasant task, or because no one had a right to subject him to the test, and his refusal might not prejudice him in the minds of a rational jury; on the other hand, a consciousness of guilt might have influenced him to refuse to undergo the proposed test, however unreasonable it was, and it is one of the circumstances of the case that the jury could weigh."

1894, Feb. 21, Boston *Transcript*: "B. G. was on trial for the larceny of $365 from Simon Melnikoff, his lodging-house keeper. It will be remembered that when the crime was discovered seven persons who could possibly have taken the money were requested to step into a dark room in Melnikoff's house and touch a live hen fastened on a table. They were told that when the guilty party touched her she would make an outcry. Unknown to the men who entered the room the hen had been saturated with blueing. An inspection of the hands of the men who entered the room showed that all but Goldstein had touched the hen. His hands bore no marks of blueing, and when he was informed of the trick that had been played on him he said he did not understand the condition of the test to be that he must place his hand on the hen. Judge *Sherman* admitted this testimony and in commenting on the weight it should have with the jury said: 'This test was not applied to determine who was guilty from the result of the thing itself, but it was

[2] *Accord*: 1893, Brewer, J., in Graves v. U. S., 150 U. S. 118, 14 Sup. 40.
In the Guiteau trial, for the killing of President Garfield, the accused's singular demeanor during trial was a chief source of evidence. Compare § 946, *post* (witness' demeanor).

believed that the guilty one, in the uneasy state of his conscience, would be overcome with dreadful superstitiou and avoid carrying out the test.'" [1]

§ 276. **Same: (4) Flight, Escape, Resistance, or Concealment.** Flight from justice, and its analogous conduct, have always in human experience been deemed indicative of a consciousness of guilt. The wicked flee, even when no man pursueth; but the righteous are bold as a lion. In our primitive system of law, the accused who fled, whether innocent or guilty, suffered forfeiture and escheat;[1] though this was rather a mode of deterring him from refusing to appear for judgment than an evidential rule.[2] It is to-day universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself:

1796, L. C. J. *Eyre*, in *Crossfield's Trial*, 26 How. St. Tr. 216: "The prosecution say — and they say truly — if they make out that the conduct of the prisoner has been that he has either originally withdrawn himself from justice or that he has taken pains to secrete himself from justice after he was apprehended, that those are circumstances which do at least infer a consciousness of very great guilt, and, if there be no other reason assigned for the conduct of the party, very much corroborating and supporting the charges."

1850, *Parsons*, J., in *Johnson* v. *State*, 17 Ala. 618, 624: "A flight is universally admitted as evidence of the guilt of the accused, though not conclusive. If we take flight as evidence of fear, and fear as evidence of a known cause of dread or apprehension, we arrive thus at the inference of crime. . . . In this instance, then, we take the flight, a thing of itself harmless and innocent, as evidence of conscious guilt, a necessary consequence of the crime itself; and the conscious guilt, of which the flight was evidence, is proof in its turn of the crime. In this instance, therefore, it is certain that the law admits evidence of the party's conduct merely to prove his conscious guilt, which is proof of crime."

1896, *Parker*, J., in the Federal District Court for Western Arkansas, charging the jury in *Starr* v. *U. S.*, 164 U. S. 627, 17 Sup. 224, and in *Alberty* v. *U. S.*, 162 U. S. 499, 16 Sup. 864: "The law says that a man is to be judged by his consciousness of the right or wrong of what he does, to some extent. If he flees from justice because of that act, if he goes to a distant country, and is living under an assumed name because of that fact, the law says that is not in harmony with what innocent men do, and jurors have a right to consider it as an evidence of guilt, because he is an eyewitness to the occurrence, he knows how it did transpire, he is presumed to have a consciousness of that act. . . . It is a principle of human nature — and every man is conscious of it, I apprehend — that, if he does an act which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct of a man who is conscious that he has done an act which is innocent, right, and proper. The truth is — and

[1] To these instances add the following: 1828, State v. Guild, 10 N. J. L. 171 (refusal to touch a corpse; admitted below, not criticised on appeal). The *illegality* of compelling such a test would be immaterial: *post*, § 2183. But distinguish the case of a refusal to submit one's feet to measurement, or the like; if this be regarded as compulsory *self-crimination*, then the refusal could not be admissible: *post*, § 2265.

For the principle which excludes such tests as in themselves a mode of proving guilt, see *ante*, § 9.

[1] 1607 (?), *Coke*, 5 Rep. 109 b, Foxley's Case: "For although he be found Not Guilty, yet he shall forfeit his goods by the flying, *quia fatetur facinus qui judicium fugit*, and the law will not admit any proof against this presumption"; so also in 3 Inst. 232, 233.

[2] Pollock & Maitland, Hist. Eng. Law, II, 588.

it is an old scriptural adage — 'that the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Men who are conscious of right have nothing to fear. They do not hesitate to confront a jury of their country, because that jury will protect them. It will shield them, and the more light there is let in upon their case the better it is for them. We are all conscious of that condition, and it is therefore a proposition of the law that, when a man flees, the fact that he does so may be taken against him, provided he does not explain it away upon some other theory than that of his flight because of his guilt."

This principle has been so many times sanctioned that its frequent modern repetition has become redundant;[3] no further judicial attention should be

[3] In the following rulings the circumstance offered is flight, unless otherwise specified; and the evidence was admitted where not otherwise stated: *Eng.:* 1826, R. v. Hazy, 2 C. & P. 458 (trespass; running away from the premises when detected, admitted as evidence of not being there by permission); *Ala.:* 1853, Campbell v. State, 23 Ala. 44, 75 (plan to escape); 1856, Martin v. State, 28 id. 71, 81 (escape); 1871, Murrell v. State, 46 id. 89, 91 (same); 1875, Levison v. State, 54 id. 519, 527; 1877, Bowles v. State, 58 id. 335 (and that the flight was beyond the jurisdiction may be shown); 1881, Sylvester v. State, 71 id. 23, 26; 1883, Ross v. State, 74 id. 536; 1885, Clarke v. State, 78 id. 478; 1895, Whitaker v. State, 106 id. 30, 17 So. 456; 1895, Jackson v. State, 106 id. 12, 17 So. 333 (flight and assumption of *alias*); 1896, White v. State, 111 id. 92, 21 So. 330; *Ark.:* 1867, Flanagin v. State, 25 Ark. 92, 95 (concealment when inspected with others in order to be identified); 1881, Burris v. State, 38 id. 221, 225 (flight and escape); *Cal.:* 1873, People v. Strong, 46 Cal. 302 (escape, admissible, but, *semble*, not unless he knows the cause of the arrest); 1873, People v. Stanley, 47 id. 113, 118 (escape); 1880, People v. Wong Ah Ngow, 54 id. 151, 153 (same; but it does not raise a presumption); 1897, People v. Winthrop, 118 id. 85, 50 Pac. 390 (hiding, taking an assumed name, carrying around newspaper accounts of the crime); 1897, People v. Ashmead, ib. 508, 50 Pac. 681 (failure to return and claim the stolen goods taken from him, admitted); 1898, People v. Vidal, 121 id. 221, 53 Pac. 558 (flight from arrest for another crime, excluded); 1900, People v. Lee Dick Lung, 129 id. 491, 62 Pac. 71 (but not the mere receipt of letters from other persons advising flight); 1900, People v. Flannelly, 128 id. 83, 60 Pac. 670 (resistance to arrest); *D. C.:* 1900, Funk v. U. S., 16 D. C. App. 478, 491 ("a confession of a contemplated assault for the purpose of escaping," admitted); *Fla.:* 1903, Carr v. State, — Fla. —, 34 So. 892 (resistance); *Ga.:* 1852, Whaley v. State, 11 Ga. 123, 126 ("It is argued that this attempt to bribe the guard, in order to effect his escape, is consistent with innocence. But that is no test. Is it not an index of guilt?"); 1858, Revel v. State, 26 id. 275, 281 (escape); 1879, Smith v. State, 63 id. 168, 170; 1886, Sewell v. Vincent, 76 id. 836 (unless explained); 1897, Hudson v. State, 101 id. 520, 28 S. E. 1010; *Ida.:* 1870, People v. Ah Choy, 1 Ida. 317, 320 (admissible, but only to indicate the perpetrator; where the act is not denied, and the degree of homicide alone in question, excluded; this seems unsound, for there may be a guilty consciousness of the malice of the killing); 1901, State v. Lyons, — Id. —, 64 Pac. 236; *Ill.:* 1874, Barron v. People, 73 Ill. 258, 260 (giving "straw bail" and forfeiting the recognizance; passing under an *alias*); 1893, Jamison v. People, 145 id. 357, 376 (murder; "the circumstances of the pursuit and capture of the defendant by the crowd of people," when he fled, admitted); *Ind.:* 1850, Porter v. State, 2 Ind. 435, 436; 1862, Hittner v. State, 19 id. 48, 50 (attempt to escape); 1877, Waybright v. State, 56 id. 122, 125 (flight does not create a real presumption of law); 1881, Batten v. State, 80 id. 394, 400; 1897, Amerson v. State, 147 id. 445, 46 N. E. 901 (resistance to arrest); 1900, Barton v. State, 154 id. 670, 57 N. E. 515 (failure to appear for trial when under recognizance); *Ia.:* 1867, State v. Arthur, 23 Ia. 430, 432 (escape); 1877, State v. James, 45 Id. 412 (same); 1879, State v. Fowler, 52 Id. 103, 105, 2 N. W. 983 (resistance to a demand for the weapon, excluded); 1883, State v. Rodman, 62 id. 456, 458, 17 N. W. 663 (attempt to escape); 1890, State v. Van Winkle, 80 Id. 15, 18, 45 N. W. 388 (departure sufficient, if occurring after knowledge that he was or would be charged); 1895, State v. Minard, 96 Id. 267, 65 N. W. 147 (murder; the defendant's leaving the funeral procession on hearing that he was to be charged with the crime, admitted); 1895, State v. Seymore, 91 id. 699, 63 N. W. 663; 1900, Wise v. Schloesser, 111 id. 16, 82 N. W. 439 (breach of promise and seduction; doubted for civil cases; the doubt is unfounded); *Kan.:* 1897, State v. Thomas, 58 Kan. 805, 51 Pac. 228; 1902, State v. Stewart, 65 id. 371, 69 Pac. 335; *Ky.:* 1860, Plummer v. Com., 1 Bush 76, 78; 1878, Kennedy v. Com., 14 id. 345; 1888, Basham v. Com., 87 Ky. 440, 9 S. W. 284 (flight or concealment) 1891, Baker v. Com., — Ky. —, 17 S. W. 625; 1895, Clark v. Com., — id. — , 32 S. W. 131 (attempt to escape from jail); 1900, Saylor v. Com., — id. —, 57 S. W. 614 (failing to appear under a bail bond, admitted); *La.:* 1878, State v. Bentty, 30 La. An. 1267 (attempt to break jail); 1879, State v. Dufour, 31 id. 804 (escape); 1896, State v. Harris, 48 id. 1189, 20 So. 729; 1901, State v. Middleton, 104 La. 914, 28 So. 904; 1901, State v. Baptiste, 105 id. 661, 30 So. 146; *Me.:* 1879, State v. Frederic, 69 Me. 400,

paid to any bill of exceptions so presumptuous as to raise the question. There remain only a few details that can be open to comment:

(*a*) It is occasionally required by a Court that the accused should have been *aware* that he was charged or suspected. This is unnecessary; it is the act of departure that is itself evidential; ignorance of the charge is merely a circumstance that tends to explain away the guilty significance of the conduct.

(*b*) It has sometimes been said that an *unexplained* flight is the admissible evidence. But this is obviously unsound. The prosecution cannot be expected to negative beforehand all conceivable innocent explanations. The fact of flight is of itself significant; it becomes most significant when after all no explanation is forthcoming.

(*c*) The flight of *another person* is relevant so far only as the accused has connived at it;[4] and it may then also become relevant as an act of suppression of testimony (*post*, § 278).

403 (allowable for flight when sought for arrest; whether he had been informed of the charge or not); *Mass.*: 1876, Com. *v.* Tolliver, 119 Mass. 315 (flight or concealment); 1895, Com. *v.* Acton, 165 id. 11, 42 N. E. 329 (hiding beer from officers searching for liquor illegally kept; the intimation that this might be rejected if the search was illegal and the defendant knew this seems to be improper, because that would furnish merely a counter-explanation of the conduct); *Mich.*: 1867, People *v.* Pitcher, 15 Mich. 397, 406 (concealment); 1878, Probasco *v.* Cook, 39 id. 717, 718 (resistance when arrested); 1895, People *v.* Caldwell, 107 id. 367, 374, 65 N. W. 216; 1900, People *v.* Keeps, 123 id. 231, 81 N. W. 1097 (escape from jail of convict for another offence knowing of the present charge against him); *Miss.*: 1849, Cicely *v.* State, 13 Sm. & M. 202, 221 (hiding); *Mo.*: 1851, Fanning *v.* State, 14 Mo. 386, 390 (attempt to escape); 1857, State *v.* Phillips, 24 id. 475, 484; 1873, State *v.* Williams, 54 id. 170 (attempt to escape after arrest); 1882, State *v.* Mallon, 75 id. 357 (breaking or attempting to break jail); State *v.* King, 78 id. 557; 1897, State *v.* Evans, 138 id. 116, 39 S. W. 462 (the mere fact of presence in another State when arrested is not enough); 1898, State *v.* Hopper, 142 id. 478, 44 S. W. 272 (mere return to home near by is not a flight); 1899, State *v.* Garrison, 147 id. 548, 49 S. W. 508 (escape from jail); *Mont.*: 1900, State *v.* Lucey, 24 Mont. 295, 61 Pac. 994 (inability of searchers to find the defendant); *Nebr.*: 1898, McVey *v.* State, 55 Nebr. 777, 76 N. W. 438 (that the police had searched for the defendant unsuccessfully, admitted); 1901, George *v.* State, 61 id. 669, 85 N. W. 840 (going to another part of the State); *N. H.*: 1856, State *v.* Rand, 33 N. H. 216, 225 ("the act of flying and escaping from the place, concealment and disguise of the person, and other acts and conduct of the like character"); *N. Y.*: 1839, People *v.* Rathbun, 21 Wend. 509, 518 (advising an accomplice to break jail, admitted); 1880, Ryan *v.* People, 79 N. Y. 593, 601 (keeping out of the sheriff's way); *N. D.*: 1896, State *v.* Kent, 5 N. D. 516, 67 N. W. 1052; *Pa.*: 1877, Lanahan *v.* Com., 84 Pa. 80, 86; *Tenn.*: 1844, Tyner *v.* State, 5 Humph. 386 ("We are told by an early and most venerable authority that the wicked fly when no one pursues; and we are told elsewhere that conscience makes men cowards"); *Tex.*: 1899, Buchanan *v.* State, 41 Tex. Cr. 127, 52 S. W. 769 (flight after a preliminary charge of another tenor for the same crime, but before indictment, not excluded); *Utah*: 1900, State *v.* Morgan, 22 Utah 162, 61 Pac. 527; *Vt.*: 1901, State *v.* Shaw, 73 Vt. 149, 50 Atl. 863; *Va.*: 1902, Anderson *v.* Com., 100 Va. 860, 42 S. E. 865 (escape).

In the Federal Supreme Court, the evidential admissibility of the circumstance is conceded in a series of cases, in some of which however a charge of a trial judge (Parker, J., of Ark. W. D.) is disapproved for using the term "presumption": 1896, Hickory *v.* U. S., 160 U. S. 408, 16 Sup. 327; 1896, Alberty *v.* U. S., 162 id. 509, 16 Sup. 864; 1896, Allen *v.* U. S., 164 id. 492, 17 Sup. 154; 1897, Starr *v.* U. S., 164 id. 227, 17 Sup. 223. These cases, on the point of presumption, are ill-advised in their attempts to assume the position of monitor over a great and experienced trial judge. In the Alberty case, the charge did not bear the construction put upon it above. In the Allen case, the opinion repudiates the notion that flight creates a "presumption," and then, in the very next paragraph, itself declares that fabrication of testimony creates a "presumption." Compare § 21, *ante*, note, §§ 2490, 2511, *post*.

[4] 1873, People *v.* Stanley, 47 Cal. 113, 118 (escape of a co-indicter, excluded); 1867, People *v.* Pitcher, 15 Mich. 397, 406 (flight of an accomplice; admitted, the defendant having instigated the flight); 1879, Cummins *v.* People, 42 id. 142, 3 N. W. 305 (flight of an accomplice, found with the defendant when arrested, admitted); 1839, People *v.* Rathbun, 21 Wend. 509, 518 (cited in the preceding note).

(*d*) Whether the fact of flight raises a *presumption of law* is a question of the rules of presumption (*post*, §§ 2490, 2511).

(*e*) On the logical principle of Explanation (*ante*, § 32), the accused may always endeavor to destroy the guilty significance of his conduct by facts which indicate it to be equally or more consistent with some other hypothesis than that of a consciousness of guilt:

1878, *Cofer*, J., in *Kennedy* v. *Com.*, 14 Bush 346 (the accused offered to show that he fled, while being conducted to jail, because "the jail to which he was being conducted was in a filthy condition"): "When flight has been proved as furnishing evidence of guilt, it is competent for the accused to prove other causes which may have influenced him to fly, and leave the jury to decide whether his flight was caused by a consciousness of guilt and apprehension of conviction, or by such other causes as he may prove to have existed. But it would be clear that a mere aversion to lawful imprisonments could not be allowed to be given in evidence for that purpose. . . . The appellant [by appealing to the judge] thus had in his power the means of relieving himself from the danger which he claims to have apprehended from the condition of the jail. . . . Evidence of apprehended danger, in order to be admissible to rebut the inference of guilt which may be drawn from an escape and flight, should show such danger as could not have been readily, efficiently, and with entire safety provided against by the accused, either by his own act or through the instrumentality of the officers of the law."

Such attempts at explanation are sometimes declared improper; but the general and sounder tendency is to admit them freely, leaving to the jury to pass their plausibility.[5]

§ 277. **Conduct, as evidence of Consciousness of a Weak Cause; (1) General Theory.** The second class of cases already noted (§ 267, par. *b*) includes those in which the inference is towards an act or event not necessarily a personal deed, and thus the circumstantial nature of the evidence is less marked (though not less real) in comparison with its testimonial nature. For example, when A, the defendant in an action by B for slander, bribes a witness to assist in proving a plea of truth as to B's misdoing, A's conduct

[5] 1885, Chambles v. State, 78 Ala. 466, 468 (certain explanatory evidence, held irrelevant); 1902, Sanders v. State, 131 id. 1, 31 So. 561 (acts of a lynching mob three weeks after the flight, excluded); 1892, U. S. v. Cross, 20 D. C. 378 (explanation admitted); 1858, Golden v. State, 25 Ga. 527, 531 (fear of an attack from one who had already assaulted him, admitted), 1881, Batten v. State, 80 Ind. 394, 400 (fear of violence from bystanders, admitted); 1885, Welch v. State, 104 Id. 347, 352, 3 N. E. 850 (excluded, because no evidence of the flight had been offered); 1901, Bradburn v. U. S., 3 Ind. T. 604, 64 S. W. 550 (that he had been advised to leave, to avoid vengeance by the deceased's friends, allowed); 1899, State v. Desmond, 109 Id. 72, 80 N. W. 214 (defendant's attempt to escape, held explainable as due to fear of mob violence); 1866, Plummer v. Com., 1 Bush 76, 78 (fear of violence from soldiers and from the mob, admitted); 1876, Com. v. Tolliver, 119 Mass. 314 (the defendant having denied that he concealed himself and affirmed that he went about openly, evidence that he was disguised when going about was admitted); 1895, People v. Caldwell, 107 Mich. 374, 65 N. W. 218 ("It is always open to the person to make explanation of the reason of his escape, to show that he was not prompted by a consciousness of guilt," but a voluntary return after escape did not furnish such explanation); 1856, State v. Hays, 23 Mo. 287, 316 (explanation allowed); 1857, State v. Phillips, 24 Id. 484 (popular excitement as a reason for flight, not admitted here, because it did not yet exist at the time of flight, nor could it be apprehended); 1882, State v. Mallon, 75 id. 355 (maltreatment admitted, in explanation); 1883, State v. King, 78 id. 557 ("the presumption or inference from guilt arising from flight may be modified or overthrown by testimony showing that the flight of the defendant was occasioned by other causes than consciousness of guilt"); 1896, State v. Taylor, 134 id. 109, 35 S. W. 92 (that he was willing to return when arrested, not admitted). Compare the doctrine *post*, § 293, as to conduct indicating *consciousness of innocence*.

is some evidence of a consciousness that his cause is a weak one; and yet A can ordinarily have no personal knowledge, one way or the other, of B's misdeed, so that his belief or consciousness is not a mark or a trace of his own past act, but is an impression founded on all that he has been able to learn by inquiry. Thus if A were a third person, the evidential use of his conduct amounts to little more than using his hearsay assertion, and the objection expounded in Wright *v.* Tatham (quoted *supra*, 267) applies in fullest force. Consequently, such evidence would have to be confined to the conduct of parties in the cause, since for them it would at any rate be receivable as an admission; for any assertion by an opponent in the cause may be offered against him as an admission (*post*, § 1048). It is true that, so far as the conduct is that of a criminal defendant, it may be referred to a consciousness of his personal deed, and thus would fall under the first class already noted (§ 267, par. *a*; § 273). But the sort of conduct in question — suppression of evidence, bribery of witnesses, non-production of evidence, and the like — is a matter of law receivable equally against civil parties, and must therefore be treated in the light of this broader use. It is enough, then, for practical purposes to note that this kind of conduct, though circumstantial in its nature, is guarded against evidential misuse as hearsay by using it, in *civil cases*, only when predicated of the *party opponent*, *i. e.* only when it could be treated as an admission; while in *criminal cases*, though not so theoretically so restricted, practically it does not exceed the same limits except in the rare instances when it is offered to prove a third person the really guilty party (*ante*, § 142).

So far as regards the nature of the conduct which is open to this inference, all that can be said, in generalizing, is that there are broadly two sorts; first, conduct indicating a consciousness of the weakness of the cause in general, — bribery, destruction of evidence, and the like; and, secondly, conduct indicating a consciousness of the weakness of a specific element in the cause, — failure to produce a particular witness or a document, and the like. In the former, the inference is an indefinite one, that the whole cause must be an unfounded one since such means are employed to sustain it; in the latter, the inference is a definite one, that the specific witness or document bears unfavorably on the cause.

§ 278. **Same: (2) Falsehood, Fraud, Fabrication and Suppression of Evidence, Bribery, Spoliation, and the like.** It has always been understood — the inference, indeed, is one of the simplest in human experience — that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one, and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause. The nature of the

inference, in general, may be gathered from the following passages, which deal with one or another variety of conduct of this character:

1743, *Craig dem. Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1217; in this celebrated case the plaintiff claimed to be the legitimate son of the defendant's brother, and the true heir to the estates and peerage; he showed that at the age of 14 he had been kidnapped by the defendant's procurement and transported to Pennsylvania, and after 15 years' slavery had escaped back to England and instituted a suit to obtain his rights; while on the way to begin proceedings, he joined the gamekeeper of a friend in catching some poachers, and one of them was killed by a shot from his gun, which he claimed went off accidentally; he had been tried for murder and acquitted;[1] he now proposed to show "that the relations of the deceased, being convinced that the killing was only accidental, had intended a very slight prosecution, but that the defendant, who was in no way related to or acquainted with the person killed, employed a solicitor and carried on a severe prosecution against Mr. Annesley at a very great expense, and declared 'he would spend £10,000 to get him hanged';" the purpose of this evidence was to "strengthen that evidence of the defendant's spiriting away the lessor of the plaintiff, and show the defendant's continued design of removing this gentleman from any possibility of asserting his birthright"; *Mounteney*, B. (for admission): "The foundation of my opinion is this: Every act done by the defendant, which hath a tendency to show a consciousness in him of title in the lessor of the plaintiff, must I think be admitted, beyond all controversy, to be pertinent and legal evidence in the present cause. I think that the evidence now offered hath that tendency, and consequently is proper to be admitted. This evidence of the prosecution, in my apprehension, stands exactly on the same footing with the evidence of the kidnapping, . . . for I can by no means enter into the distinction of lawful and unlawful acts, which seems to have so much weight with my lord chief baron. That unlawful act was not therefore, in my apprehension, to be admitted in evidence because unlawful, but because it had a tendency to show such a consciousness as I have mentioned in the defendant; and if the carrying on the prosecution (which must be admitted to be a very extraordinary, though lawful, act of the defendant) hath the same tendency, it ought upon the same principle to be admitted"; Dawson, B., was at first undecided, but later[2] agreed with Mounteney, B. Chief Baron *Bowes* also, in charging the jury, finally showed his accord with the same general principle, in thus alluding to the kidnapping: "You will also consider whether these acts are not evidence to satisfy you that the defendant, in his own thoughts and way of reasoning, considered the staying of the boy here as what might some way prejudice his title. But whether, as insisted upon by the plaintiff's counsel, you ought to take this as an admission on the part of the defendant that the plaintiff was the lawful son of Lord Altham [earl of Anglesea], will deserve further consideration. Undoubtedly there is a violent presumption, because no man is supposed to be wicked without design, and the design in this act must be some way or other relative to the title; but whether or no it was the opinion of the trouble he might have from this lad that induced him to do the act, or a consciousness that the lad was the son of Lord Altham, must be left to your determination."

1870, *Cockburn*, C J., in *Moriarty* v. *R. Co.*, L. R. 5 Q. B. 319: "The conduct of a party to the cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defence if he is defendant, is honest and just, — just as it is evidence against a prisoner that he has said one thing at one time and

[1] R. v. Annesley, ib. 1093; this great controversy led to three trials; the first, R. v. Annesley, was for the above murder; the second, Annesley v. Anglesea, was for the title to the estates; and the third, R. v. Heath, 18 How. St. Tr. 1, was for perjury committed by the chief witness for the defendant at the second trial. The remarkable feature is that, though the jury found for the claimant in the second trial, yet in the third, in which the whole cause was virtually re-tried, the jury acquitted of perjury the chief witness against the claimant at the second trial.

[2] Ib., p. 1244.

another at another, as showing that recourse to falsehoods leads fairly to an inference of guilt. Anything from which such an inference can be drawn is urgent and important evidence with a view to the issue. So, if you can show that a plaintiff has been suborning false testimony, and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that it is conclusive; I fully agree that it should be put to the jury with the intimation that it does not always follow, because a man, not sure he shall be able to succeed by righteous means, has recourse to means of a different character, that that which he desires, namely, the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it; . . . but it is always evidence."

1873, *Cockburn*, C. J., in *R.* v. *Castro* (Tichborne Case), Charge to the Jury, I, 813: "These falsehoods [of the defendant], however, must not operate unduly to the prejudice of the defendant beyond this, that falsehood is a badge of fraud; and a case which is sought to be supported by means of deception may *prima facie*, until the contrary be shown, be taken to be a bad and dishonest case; and, further, the recourse to fraud and falsehood necessarily engenders distrust."

1850, *Shaw*, C. J., in *Com.* v. *Webster*, 5 Cush. 295, 316: "To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion without just cause on other persons, — all or any of which tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused. But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs."

1862, *Bigelow*, C. J., in *Egan* v. *Bowker*, 5 All. 452 (admitting evidence of subornation of a witness): "The inference is a reasonable and proper one that a person having an honest and fair debt will not endeavor to support it by falsehood and fraud; and the fact that he resorts to such means of proof has a tendency to show that he knows he cannot maintain his suit by evidence derived from pure and incorrupt sources."

1875, *Ross*, J., in *Green* v. *Woodbury*, 48 Vt. 6: "All authorized attempts of a party to suppress the testimony of the other party are clearly admissible, and are evidence that in such party's own conviction his case will not bear full examination. They show a consciousness in such party of the weakness of his own cause."

1874, *State* v. *Reed*, 62 Me. 145; the following charge was approved: "There is no reason, if he is innocent, for withholding a single truth; there is every reason for uttering it if innocent. If guilty, if he does not confess, the resort in all cases is or must ever be to falsehood, evasion, or silence. . . . Each falsehood uttered by way of exculpation becomes an article of circumstantial evidence of greater or less inculpatory force."

As the general principle applies in common to all these forms of fraud, it is not necessary, nor is it usually possible, to discriminate the precedents that apply it in one or another form. Roughly classifying them, they admit all forms of *personal falsification* by the party in the course of the litigation;[3]

[3] 1873, Walker v. State, 49 Ala. 398, 401 (lying explanation of suspicious circumstances); 1875, Lavison v. State, 54 id. 519, 527 ("fabrication of evidence"); 1894, Jones v. State, 59 Ark. 417, 27 S. W. 601; s. c. 61 id. 88, 32 S. W. 81 ("false, improbable, and [or] contradictory statements" explaining suspicious circumstances against him); 1897, Hinshaw v. State, 147 Ind. 334, 47 N. E. 158 (telling a false story); 1874, State v. Benner, 64 Me. 267, 289 (false stories); 1880, People v. Arnold, 43 Mich. 303, 306, 5 N. W. 385 (defendant's statement at the prior trial, admitted and allowed to be shown false; Curley, J.: "It betrays a consciousness that, unless the jury are made to believe a falsehood, the case against the party is sufficient to convict him"; Christiancy, J., diss., but his opinion seems to rest on the rule that a witness is not to be contradicted on a collateral point, — a rule not here applicable, because it is the party's fabrication as defendant, not as witness, that is offered); 1902, Com. v. Devaney, 182 Mass. 33, 64 N. E. 402 (lying); 1901, State v. Furgerson, 162 Mo. 668, 63 S. W. 101 (false

the *fabrication* or *manufacture of evidence*, by *forgery, bribery, subornation*, and the like;[4] the *suppression of evidence*, by *intimidation, eloignment*, or *concealment* of witnesses or material objects,[5] or by the *destruction* or *spoliation* of documents (*post*, § 291) or other material objects.[6]

stories, etc.); 1874, State *v.* En, 10 Nev. 277, 281 (larceny; different statements as to how possession was obtained, admitted); 1874, Coleman *v.* People, 58 N. Y. 556, 560 (false statements received "as showing a consciousness of wrong"); 1869, U. S. *v.* Randall, Deady 524, 542, 543 (contradictions, misstatements, falsifications of entries); 1896, Wilson *v.* U. S., 162 U. S. 613, 16 Sup. 895 (false stories); 1879, Dickerson *v.* State, 48 Wis. 288, 293, 4 N. W. 321 (false stories). *Contra*, but unsound: 1881, Burris *v.* State, 38 Ark. 221, 225 (an affidavit for continuance to secure absent witnesses had stated that they would prove threats of the deceased; on the trial these witnesses were offered by the State to testify that they had never heard such threats nor told the defendant about them; excluded, on the theory that the defendant's character was attacked; the present use of such evidence was ignored; it showed a corrupt falsification by the defendant).

Distinguish the improper attempt to argue from the falsity of the defendant's case as a whole; this would be a begging of the question; 1892, Com. *v.* Trefethen, 157 Mass. 180, 199, 31 N. E. 961 ("To argue that, by the other evidence, the defendant is shown to be guilty and that therefore his denial of guilt is false and is additional evidence against him, ought not to be permitted").

[4] 1743, Craig dem. Annesley *v.* Anglesea, 17 How. St. Tr. 1217 (see quotation *supra*); 1806, Vowles *v.* Young, 13 Ves. Jr. 140 (forgery of a register; Erskine, L. C.: "Every case must depend upon its own circumstances"); 1870, Moriarty *v.* R. Co., L. R. 5 Q. B. 314 (attempts to suborn witnesses, by the plaintiff and by C. acting under his authority; Blackburn, J.: "I think there is no case or authority in which the present point was actually ruled, except the celebrated case of Annesley *v.* Earl of Anglesea"; the proper inference is that "he was very doubtful about his case, — not necessarily that he thought his case untrue, but that it was not a good one"; see quotation *supra*); 1876, Lacey *v.* Hill, L. R. 4 Ch. D. 537, 543 (Jessel, M. R.: "No man makes fictitious entries and commits forgeries except to conceal that which he knows ought to be concealed for his own credit; and therefore no one can doubt for a moment that Sir R. Harvey was perfectly well aware that he was committing these frauds"); 1882, Chicago C. R. Co. *v.* McMahon, 103 Ill. 485, 487 (attempt to bribe a witness; "it is in the nature of and implies an admission that he has no right to recover if the case was tried on the evidence as it exists,—that it is not sufficient to recover unless aided by suppressing evidence or the fabrication of more evidence"); 1903, U. S. Brewing Co. *v.* Ruddy, 203 id. 306, 67 N. E. 799 (subornation of witnesses); 1862, Egan *v.* Bowker, 5 All. 449, 451 (suborning a witness, admitted, though the deposition had not been used); 1877, Com. *v.* Wallace, 123 Mass. 400 (attempt to bribe an arresting officer); 1881, Lynch *v.* Coffin, 131 id. 311, *semble* (attempt to suborn a witness); 1874, People *v.* Mason, 29 Mich. 31, 39 (attempt to influence a witness and to bribe jurymen); 1903, Baker *v.* State, — Miss. —, 33 So. 716 (defendant's request to B. to testify falsely if called, B. not being called, excluded; unsound); 1877, State *v.* Brown, 76 N. C. 222, 224 (using false testimony; but the falsities of a witness of the defendant must of course have been known to him beforehand); 1895, State *v.* Reinhart, 26 Or. 466, 38 Pac. 825 (false entries of account); 1898, McHugh *v.* McHugh, 186 Pa. 197, 40 Atl. 410 (attempt to suborn witnesses and to corrupt jurors, admitted; that defendant was acting as executrix only, immaterial); 1855, State *v.* Williams, 27 Vt. 724, 726 (deposition); 1896, Allen *v.* U. S., 164 U. S. 492, 17 Sup. 154 (using false testimony).

[5] 1888, Vye *v.* Alexander, 28 N. Br. 89, 93, 94, *semble* (libel; defendant's change of signature since litigation began, admissible to prove consciousness of guilt); 1889, Alexander *v.* Vye, 16 Can. Sup. 501 (foregoing case affirmed); 1857, Liles *v.* State, 30 Ala. 24 (ordering his wife to hold her tongue about the matter, admitted); 1875, Levison *v.* State, 54 Ala. 519, 528 (a conversation with his associate, "Lie still, and keep your damned mouth shut," admitted); 1895, People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (intimidation of witness); 1898, People *v.* Clausen, 120 id. 381, 52 Pac. 658 (failure of pawnbroker to enter goods in book required by law, evidence of guilty knowledge that they were stolen); 1896, State *v.* Hogan, 67 Conn. 581, 35 Atl. 508 (keeping away a witness); 1900, Keesler *v.* State, 154 Ind. 242, 56 N. E. 232 (intimida-

[6] 1898, Roberson *v.* State, 40 Fla. 509, 24 So. 474 (burning a house to destroy evidence of burglary, admitted); 1903, Weightnovel *v.* State, — id. —, 35 So. 856 (abortion); 1881, Betts *v.* State, 66 Ga. 508, 512 (murder; throwing away money taken from the deceased); 1862, Com. *v.* Hall, 4 All. 306 (swallowing a counterfeit bill when arrested on the charge of uttering counterfeit bills); 1877, Com. *v.* Wallace, 123 Mass. 400 (illegally keeping liquor with intent to sell; destruction of the liquors); 1882, Com. *v.* Daily, 133 id. 577 (same; intentional breaking of a bottle); 1892, Com. *v.* Sullivan, 156 id. 487, 31 N. E. 647 (same; destruction of liquor); 1904, Harper *v.* State, — Miss. —, 35 So. 572 (hypodermic injections, to prevent the victim from telling, excluded; absurd); 1883, State *v.* Dickson, 78 Mo. 438, 448 (murder; burying the dead body in a hole, and false statements as to the cause of the deceased's disappearance, admitted).

§ 279. **Same: Other rules discriminated; Confessions, Impeachment of Witnesses, Failure to prove Alibi, etc.** In applying the principle to the foregoing instances, no difficulty arises except so far as it becomes necessary to discriminate certain other principles.

(*a*) The rules of limitation for an accused's *confession of guilt* do not apply to conduct of the foregoing sorts, because a confession, properly so called, is a direct assertion of the incriminating fact and does not include within its definition mere conduct used circumstantially (*post*, § 821).

(2) A witness may be impeached by his *corrupt conduct* consisting in bribery or subornation of other witnesses or of court-officers; this is dealt with elsewhere (*post*, §§ 957 ff.).

(3) The mere *failure to produce* witnesses, documents, or chattels must be distinguished from the suppression or concealment of them; the inference from the former conduct is a more restricted one (examined elsewhere, *post*, §§ 285–291). In particular, the *failure to establish an alleged alibi* is to be distinguished from the use of perjury or subornation in an unsuccessful attempt to prove the *alibi*; the latter admits of the usual broad inference from fraud, but the former amounts to nothing more than an inability to prove the specific fact of *alibi*:

1866, *Welch*, J., in *Toler* v. *State*, 16 Oh. St. 585: "The defendant's case is often much weakened by an unsuccessful attempt to prove an *alibi*. But this result happens, not because of any implied or technical admission involved in the attempt, but because of fraud and subornation of perjury manifested in the attempt. . . . In no case can the attempt be held to involve an admission of crime, nor the simple failure to establish it afford any presumption of the defendant's presence at the time and place when and where the crime was committed. . . . It can have no effect upon the question of his presence at the place charged, otherwise than by disclosing falsehood and prevarication and thus affording general evidence of guilt."[1]

tion of witnesses; "such conduct is regarded as in the nature of an admission that the party has a bad case, which cannot be supported by honest proof"); 1878, State *v.* Hudson, 50 Ia. 157 (furnishing money for an accomplice's escape); 1844, State *v.* Bruce, 24 Me. 72 (property obtained by threats; its subsequent concealment admitted); 1877, Com. *v.* Wallace, 123 Mass. 400 (illegal liquor-selling; concealment of bottles); 1895, Com. *v.* Welch, 163 id. 372, 40 N. E. 103 (liquor-selling; refusal to let an officer see something hidden under the clothing and shaped like a bottle); 1899, Adams *v.* Swift, 172 id. 521, 52 N. E. 1068 (concealing identity after a collision); 1900, Jones *v.* Shattuck, 175 id. 415, 56 N. E. 736 (refusal to disclose one's name, on request, after a collision, admitted); 1899, State *v.* Rozum, 8 N. D. 548, 80 N. W. 480 (intimidation of witness); 1864, State *v.* Barron, 37 Vt. 57, 61 (getting witnesses out of the way); 1898, State *v.* Taylor, 70 Vt. 1, 39 Atl. 447 (refusal to give name, age, and residence, to attending physician after arrest, held admissible, by a majority of the Court); 1882, Snell *v.* Bray, 56 Wis. 156, 162, 14 N. W. 14 (letters to a witness urging non-appearance; also letters urging a particular tenor of testimony). To these add tho code-provisions cited *post*, § 285, which cover the present sort of conduct also.

[1] *Accord:* 1876, Porter *v.* State, 55 Ala. 107; 1902, Tatum *v.* State, 131 id. 32, 31 So. 369; 1883, Kilgore *v.* State, 74 id. 8; 1881, People *v.* Malaspina, 57 Cal. 628; 1869, White *v.* State, 31 Ind. 262, 264 ("The fabrication of an *alibi*, like the wilful introduction of false and fabricated evidence in support of any other ground of defence, is a circumstance against the accused"; but not the mere failure to succeed in showing an *alibi*); 1878, Turner *v.* Com., 86 Pa. 54, 73; 1898, Ford *v.* State, 101 Tenn. 454, 47 S. W. 703. *Contra:* 1870, State *v.* Josey, 64 N. C. 56, 59, *semble* (mere failure to prove an *alibi* suffices).

But any inference which merely accepts the failure of evidence to deny the fact, as indicating the truth of the fact, is permissible on the principle of § 285, *post:* 1865, Gordou *v.* People, 33 N. Y. 501, 508 (inference allowable for failure to account for whereabouts); 1879, Dean's Case, 32 Gratt. 912, 925 ("the failure unexplained to assert the defence of an *alibi* when it could first be made [here, at the preliminary examination], and if true would be conclusive, is always regarded . . . as a most

§ 280. **Same: Fraud in Separate Litigation; Fraud by Agents.** (1) The use of fraudulent practice in a *separate litigation* has of itself no other significance than a reflection on the opponent's general character as an unscrupulous man, and is of course from that point of view inadmissible (*ante*, §§ 55, 64). But, so far as the other litigation involves substantially the same issue or object as the present one, a party's fraudulent conduct in the former, indicating a consciousness of the weakness of his cause, carries the same indication for the present cause, since by hypothesis the two causes are substantially the same with reference to the party's motives. On principle, then, the misconduct of the party in other litigation should be received, provided the issue involved was in effect the same, or provided the interests at stake in that and the present litigation are so united that the motive to succeed unlawfully in the present case might be supposed to be furthered by fraud in the former one.[1] (2) Where the fraudulent act — bribery, intimidation, spoliation, or the like — has personally been committed by *an agent* or other third person, and not by the party-opponent himself, it is obvious that the act must be brought home to the party's connivance or sanction, express or implied, in order to use it as indicating any consciousness on his part of a weak cause. In thus connecting it with the party, it is to be noted, on the one hand, that no mere technical theory of agency will suffice to charge him; for it is not a question of legal liability, but of actual moral connivance. On the other hand, no less should mere technical deficiencies of proof be allowed to exonerate him; due regard to the common probabilities of experience should be paid. For example, if a witness has been suborned by B, a clerk in the defendant's bank, it is idle to argue that such a clerk has no implied authority to tamper with witnesses, and therefore that some conversation or letter of the defendant, expressly authorizing B's errand, must be proved. Why should B meddle in such fashion, except upon some hint or order from the defendant? The relation between the two, together with common experience, should suffice to admit the fact, leaving to the defendant the opportunity to exculpate himself, as he easily could if innocent of any share. The common probabilities of such cases cannot be ignored; and it is better to admit such

suspicious circumstance," as indicating that the *alibi* was false).

[1] The precedents do not show the sanction of any general rule; the phrasing above, in its second proviso, is illustrated by the first of the ensuing cases: 1743, Craig dem. Annesley *v.* Anglesea, 17 How. St. Tr. 1217 (see quotation *ante*, § 278; Bowes, C. B., seems to have dissented); 1896, Georgia R. & B. Co. *v.* Lyhrend, 99 Ga. 421, 27 S. E. 794 (a false affidavit in connection with a former trial of the same cause; Atkinson, J., diss., because of the incidental admission of facts affecting character); 1899, Fuller *v.* Fuller, 108 id. 256, 33 S. E. 865 (attempted subornation in another case, excluded); 1899, State *v.* Seevers, 108 Ia. 738, 78 N. W. 705 (institution of a collateral prosecution against complainant to hinder present trial, admitted); 1839, Com. *v.* Sacket, 22 Pick. 394 (offer of reward, on behalf of the opponent, for his testimony in a class of cases including the present, admitted; but here the impeachment of the witness seems alone to have been in mind); 1881, Hastings *v.* Stetson, 130 Mass. 76 (attempt to bribe a juror at a former trial of the same case, admitted); 1866, State *v.* Staples, 47 N. H. 113 (an offer of a bribe to a witness for help in a series of charges including the present, admitted).

For the use of similar evidence to *impeach a witness as corrupt*, see *post*, §§ 957–963, 1040; some of these cases involved witnesses who were also parties, and they might serve as precedents under the present head. Compare also the use of *other frauds* as evidence of *intent or plan* (*post*, §§ 333, 340, 352).

facts in the fair certainty that an innocent party can protect himself, than to exclude them by requiring such a degree of connecting proof as practically gives a general immunity to fraud and chicanery. Most Courts exhibit an undue tenderness for technicality in dealing with such evidence, and shut their eyes, with solemn pretence, to that which every one must believe to be deserving of strong suspicion. No general rule seems to have found acceptance; but the wide variety of judicial attitude may be seen in the following passages:

1820, *Abbott*, C. J., in *The Queen's Case*, 2 B. & B. 302 (answering the question, Whether the offer of a bribe, to a person not called as a witness, by one employed as an agent to procure evidence, is admissible): "This is a lawful employment necessary in many cases, . . . and, being a lawful employment, it is to be presumed, until the contrary be shown, that the employer means and intends that his agent shall execute it by lawful means. . . . The prosecutor may, up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent; it is no less consistent that, having been informed of it, he may have rejected it with indignation and have repudiated the proffered testimony and withholden the witness from the Court; and if he be absent from the trial, which frequently happens, it may be impossible to prove his ignorance in the one case or the propriety of his conduct in the other. . . . [Nevertheless] I am by no means prepared to say that in no case and under no circumstances appearing at a trial it might not be fit and proper for a judge to allow proof of this nature to be submitted."

1901, *Vann*, J., in *Nowack* v. *R. Co.*, 166 N. Y. 433, 60 N. E. 32: "If an honest man by mistake employs a dishonest one to look up witnesses for him, and the latter, through excess of zeal, resorts to bribery, although it was never thought of by his employer, it is better, for cleanliness and purity in the administration of justice, that the facts should be shown, with the fullest opportunity for explanation, than to exclude all evidence of the evil acts upon the ground that they were not authorized; because authority may properly be inferred from the nature of the employment. In such a case all doubt should be resolved, if possible, in the interest of clean evidence and the exposure of foul practices."[2]

[2] The precedents seem to furnish no accepted rule or test: 1743, Craig dem. Annesley *v.* Angleseа, 17 How. St. Tr. 1217 (see quotation *supra*, § 278); 1820, The Queen's Case, 2 B. & B. 302; s. c. Queen Caroline's Trial, Linn's ed., III, 168, 177, 184 (offer of bribe, made by A, not a witness, to B, not a witness, A being the party's agent to procure witnesses, but no authority to offer bribes being expressly shown; excluded, because the party *may* have been wholly ignorant of it; unsound, for (1) it is possible that the party was ignorant, but it is entirely unlikely; common probability suggests connivance as the most likely explanation, and a party's bribes can otherwise be hardly ever proved; (2) repeated instances of the sort indicate a general plan to bribe, on the principle of § 343, *post*, and from that may be inferred the probable bribery of other persons actually examined as witnesses, and this circumstance, no matter who gave the bribe, would be admissible under § 962, *post*; see the argument of Mr. Wilde and Lord Erskine, at pp. 172, 178, *ubi supra*); 1856, Martin *v.* State, 28 Ala. 71, 81 (suppression of evidence; third person's conduct, inadmissible unless a connection with the party is shown); 1870, Winchell *v.* Edwards, 57 Ill. 41, 48 (fabrication by a former party in interest, admitted); 1882, Chicago C. R. Co. *v.* McMahon, 103 id. 485, 488 (a clerk of the company offered the bribe; the solution is worked out by the doctrine of scope of employment, as making the principal responsible for malicious acts); 1902, Ashcraft *v.* Com., — Ky. —, 68 S. W. 847 ("that the prisoner's father, or any other person than the prisoner, had bribed or offered to bribe a witness in the case, could not be a relevant fact against the prisoner"); 1899, State *v.* Harris, 51 La. An. 1105, 26 So. 64 (admissions of subornation by a relative, not shown to be an agent, excluded); 1825, Com. *v.* Robbins, 3 Pick. 63 (husband's attempt to suborn the prosecutor not to testify, excluded as not made with the defendant-wife's privity); 1883, Com. *v.* Ryan, 134 Mass. 223, 225 (suppression of evidence by a prosecuting officer in a criminal case; undecided); 1888, Com. *v.* Locke, 145 id. 401, 14 N. E. 621 (same; destruction of liquors by the defendant's barkeeper, admitted); 1888, Com. *v.* McHugh, 147 id. 401, 18 N. E. 74 (same; destruction by a person present, without the defendant's objection, admitted); Com. *v.* Downey, 148 id. 14, 18 N. E. 584 (same; destruction of liquor by the defendant's wife, admitted); 1888, Com. *v.* Gillon, 148 id. 15, 18 N. E. 584 (same as Com. *v.* Downey); 1860, Dillin *v.* Peo-

§ 281. **Same: Explaining away the Suspicious Conduct.** On the general logical principle of Explanation (*ante*, § 32) the opponent may always introduce such facts as serve to explain away, on some other hypothesis, the apparent significance of the fraudulent conduct. A consciousness of the weakness of the cause is the natural inference, but not the only possible one, from such conduct; and there is nothing to prevent the admission of facts which make some other inference more plausible.[1]

§ 282. **Same: (3) Taking Precautions to remedy or prevent Injury; Conveying Property; Insuring against Risks.** The opponent's conduct in taking precautions to prevent an apprehended injury, or to remedy one already inflicted, may sometimes indicate a consciousness of wrong, in respect either to the party's identity as the wrongdoer or to his culpability in doing the act. For example, the precautions taken by the *owner of an animal* alleged to be vicious would be some evidence of his knowledge of that viciousness;[1] the *conveyance of property*, during litigation or just prior to it, may be evidence of the transferor's consciousness that he ought to lose;[2] the procurement of an *abortion* may indicate consciousness of the procurer's paternity;[3] and other

ple, 8 Mich. 357, 370 (attempts by accused's counsel and friends, to induce a witness' absence; "such testimony should only be allowed to go to the jury when some evidence accompanies it upon which the jury may inquire as to the prisoner's knowledge of and complicity in it"); 1903, People *v.* Salsbury, — id. —, 96 N. W. 936 (it must appear that the attempt to bribe was with the "consent or approval" of the party, "or at least knowledge or expectation that it had been or would be made"); 1896, Matthews *v.* Lumber Co., 65 Minn. 372, 67 N. W. 1008 (admissible if the agency is shown; here the person was only an officer of the law); 1878, State *v.* Rothschild, 68 Mo. 52, 54 (inducements to leave the State, made by persons not shown to be connected with defendant, excluded), 1901, State *v.* Huff, 161 id. 459, 61 S. W. 900 (improper attempts by a person claiming to represent the party, but not shown to be authorized, excluded); 1901, Nowack *v.* R. Co., 166 N. Y. 433, 60 N. E. 32 (a corrupt offer by one concededly an agent to interview witnesses, admitted, the party being a corporation; Landon, Haight, and O'Brien, JJ., diss.; see quotation *supra*); 1883, Tullis *v.* State, 39 Oh. 200 (that money had been offered, though not by the opponent's agent, admitted); 1876, Heslop *v.* Heslop, 82 Pa. 537 (efforts to tamper with a witness, by the defendant and her son jointly, admitted); 1899, Luttrell *v.* State, 40 Tex. Cr. 651, 51 S. W. 930 (subornation by defendant's attorney; excluded for lack of proof of authority); 1893, Baltimore & O. R. Co. *v.* Rambo, 8 C. C. A. 6, 59 Fed. 75, 82 (attempt at bribery by the "special agent" of the defendant, admissible); 1875, Green *v.* Woodbury, 48 Vt. 5 (attempt to keep a witness away; "such acts must be the acts of the party, either directly or by authorization").

Distinguish the use of evidence of bribery or the like for the purpose of *impeaching a particular witness*, *post*, §§ 957–963.

Compare the rulings in regard to using a *compromise by an authorized person*, *post*, § 1062.

[1] 1903, Sherrill *v.* State, — Ala. —, 35 So. 129 (an explanation made some time after the flight, excluded); 1859, Com. *v.* Goodwin, 14 Gray 55 (as tending to explain away his falsehoods, the defendant was not allowed to show that he had formerly acknowledged the truth in the matter; apparently too strict a ruling); 1881, Lynch *v.* Coffin, 131 Mass. 311 (fabrication of evidence; explanation allowed); 1883, Homer *v.* Everett, 91 N. Y. 641, 646 (permitting an explanation of an alleged attempt to suborn); 1903, Evans *v.* State, — Tex. Cr. —, 76 S. W. 467 (flight.)

Compare the principle allowing explanation of an *admission* (*post*, § 1058) and of a *witness' prior self-contradiction* (*post*, § 1044).

[1] 1796, Jones *v.* Perry, 2 Esp. 483 (the precaution used in tying up a dog, admitted to show defendant's knowledge that it was fierce and dangerous); 1900, Sanders *v.* O'Callaghan, 110 Ia. 574, 82 N. W. 969 (keeping a dog chained so that it would not bite is an admission of his vicious character); 1883, Montgomery *v.* Koester, 35 La. An. 1091, 1093 (similar); 1888, Brice *v.* Baner, 108 N. Y. 428, 431, 15 N. E. 695 (similar).

[2] *Contra:* 1898, Miller *v.* Dill, 19 Ind. 326, 49 N. E. 272 (mere fact of conveyance of property, not received as an admission of a debt); 1892, Tile Co. *v.* Snyder, 93 id. 325, 53 N. W. 359, *semble* (that the defendant had disposed of his property pending suit, excluded); 1901, Hocks *v.* Sprangers, 113 Wis. 123, 87 N. W. 1101 (defendant's attempts to dispose of his property, excluded).

[3] 1881, McIlvain *v.* State, 80 Ind. 71 (bastardy; the fact that the defendant had, after the complainant's pregnancy, procured abortion-medicine for her, admitted); 1894, Badder *v.* Keefer, 100 Mich. 272, 273, 58 N. W. 1007 (bas-

instances may well occur. But it is plain that the prior provision of *insurance against* a certain class of *risks* can permit no such inference; first, because insurance is mainly intended to guard against inevitable injuries for which no one may be to blame; and, secondly, even so far as it is intended to cover injuries caused by the insured's culpability (*e. g.* employer's liability insurance), this affords no indication of the insured's belief as to the specific injury at issue, for to assume that it was one of the class of injuries insured against is to beg the question.[4] It must be admitted that the same argument might to some extent be used on behalf of owners taking precautions for animals; this, however, would then give reason to doubt the doctrine laid down above for that class of cases.

§ 283. **Same: Repairs of a Machine, Highway, or the like, after an Injury.** If machines, bridges, sidewalks, and other objects, never caused corporal injury except through the negligence of their owner, then his act of improving their condition, after the happening of an injury thereat, would indicate a belief on his part that the injury was caused by his negligence. But the assumption is plainly false; injuries may be and are constantly caused by reason of inevitable accident, and also by reason of contributory negligence of the injured person. To improve the condition of the injury-causing object is therefore to indicate a belief merely that it has been *capable of causing such an injury*, but indicates nothing more, and is equally consistent with a belief in injury by mere accident, or by contributory negligence, as well as by the owner's negligence. Mere capacity of a place or thing to cause injury is not the fact that constitutes a liability for the owner; it must be a capacity which could have been known to an owner using reasonable diligence and foresight, and a capacity to injure persons taking reasonable care in its use. On this ground, then, namely, that the supposed inference from the act of improvement is not the plain and most probable one, such acts may be excluded. To be sure, it may be argued that, on the general theory of Relevancy (*ante*, §§ 31, 38), it would suffice for admissibility if merely the inference was a fairly possible one, — leaving it to the opponent to argue that it was the less probable one. Theoretically, it would be perhaps difficult to deny this. But in the present instance an argument of policy has always been invoked to strengthen the case for exclusion. That argument is that the admission of such acts, even though theoretically not plainly improper, would discourage all owners, even those who had genuinely been careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their disadvantage; and thus not only

tardy; defendant's inquiries of a physician for what was "good to get a young lady out of a fix," admitted); 1868, Fox *v.* Stevens, 13 Minn. 252; 1903, Gatzmeyer *v.* Peterson, — Nebr. —, 94 N. W. 974 (bastardy; defendant's offer to obtain medical aid to get rid of the child, admitted).

[4] 1894, Anderson *v.* Duckworth, 162 Mass. 251, 38 N. E. 510 (admitting a conversation for other reasons, but cautioning against the use of this fact referred to in it); 1899, Manley *v.* Minneap. Paint Co., 76 Minn. 169, 78 N. W. 1050 (employer's indemnity policy, not admissible as an admission of negligence); 1902, Casselmon *v.* Dunfee, 172 N. Y. 507, 65 N. E. 494 (similar); 1897, Sawyer *v.* Shoe Co., 69 Vt. 486, 38 Atl. 311 (similar).

Distinguish the use of such evidence to show a *motive* in the employer *to be negligent* or indifferent in care (*post*, § 391), or to show a *bias* in his *testimony* (*post*, § 949).

would careful owners refrain from improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would by refraining from improvements subject innocent persons to the risk of the recurrence of the injury. Whatever, then, might be the strength of the objection to such evidence from the point of view of relevancy alone, the added considerations of policy suffice to make clear the impropriety of resorting to it. On one or another or both of these grounds have most Courts rested their reasoning:

1869, *Bramwell*, B., in *Hart* v. *R. Co.*, 21 L. T. R. N. S. 263: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be (as I have often had occasion to tell juries) to hold that, because the world gets wiser as it gets older, therefore it was foolish before."

1892, *Coleridge*, L. C. J., in *Beever* v. *Hanson*, 25 L. J. Notes of Cases 132: "Now a perfectly humane man naturally makes it physically impossible that a particular accident which has once happened can happen again, by fencing or covering, or at any rate making safe the particular thing from which it arose. That, however, is no evidence of, and I protest against its being put forward as evidence of negligence. A place may be left for a hundred years unfenced, when at last some one falls down it; the owner, like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him."

1883, *Mitchell*, J., in *Morse* v. *R. Co.*, 30 Minn. 468, 16 N. W. 358: "Such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."

1889, *Elliott*, J., in *Terre Haute & I. R. Co.* v. *Clem*, 123 Ind. 18, 23 N. E. 965: "The effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs, he does it under penalty. . . . True policy and sound reason require that men should be encouraged to improve or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers. A rule which so operates as to deter men from profiting by experience and availing themselves of new information has nothing to commend it; for it is neither expedient nor just."

Accordingly, it is conceded, in almost all courts, that no act in the nature of repairs, improvement, substitution, or the like, done after the occurrence of an injury, is receivable as evidence of a consciousness, on the part of the owner, of negligence, connivance, or other culpability in causing the injury.[5]

[5] In three or four jurisdictions only is there any inclination to qualify or to repudiate this doctrine; the early contrary cases in Pennsylvania raised the question generally, and were followed in Georgia, Iowa, Kansas, and Minnesota; but since Morse *v.* R. Co., in Minnesota, and Columbia R. Co. *v.* Hawthorne, in the Federal Court, there has been little disposition to concede any force to the Pennsylvania view, and it has apparently been discarded in most courts where it was originally accepted: *England:* 1869, Hart *v.* R. Co., 21 L. T. R. N. S. 261 (injury by a railroad collision; subsequent improvement of tracks excluded); 1892, Beever *v.*

There may of course be other evidential purposes for which the acts in question may be relevant; in that event, they are to be received, subject to a

Hanson, 25 L. J. Notes of Cases 132 (injury on cogs of a machine; subsequent boarding of the cogs, excluded); *Canada:* 1900, Cole *v.* R. Co., 19 Ont. Pr. 104 (subsequent safeguards, excluded); *Alabama:* 1896, Louisville & N. R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33 (the mere fact of repairs, held inadmissible; but in determining the condition at the time of the accident, the repairs may be considered); *California:* 1891, Sappenfield *v.* R. Co., 91 Cal. 48, 61, 27 Pac. 590 (injury by failure of the pin in the drawhead of a car; subsequent adoption of an improved pin, excluded); 1896, Turner *v.* Hearst, 115 id. 394, 47 Pac. 129 (the discharge of the reporter, after the libellous publication, excluded); 1900, Limburg *v.* Gleuwood L. Co., 127 id. 598, 60 Pac. 176 (wagon accident; subsequent remedy of defect, excluded); 1903, Kahn *v.* Triest-Rosenberg Co., — id. — , 73 Pac. 165 (boiler-explosion; subsequent precaution, held inadmissible); 1903, Dyas *v.* Southern P. Co., — id. —, 73 Pac. 972 (subsequent condition of a derrick structure, admitted to show its condition at the time in question, though incidentally involving a mention of the fact of repairs); *Colorado:* 1874, Kansas P. R. Co. *v.* Miller, 2 Colo. 442, 468 (washing away of a bridge; subsequent different construction, admissible to show "that the first one was inadequate," but not to show negligence); 1888, Colorado Electric Co. *v.* Lubbers, 11 id. 505, 508, 19 Pac. 479 (injury to employee by electric shock; defendant's subsequent warning to employees as to mode of doing work, excluded); 1893, Anson *v.* Evans, 19 id. 274, 277, 35 Pac. 47 (subsequent renewal of ropes, excluded); Annot. Stats. 1891, § 3706 (railroad's appointment of appraiser for damage done by fire set, not to be evidence that fire "was set out or caused by the operating of such railroad"); *Connecticut:* 1884, Nailey *v.* Carpet Co., 51 Conn. 524, 526 (injury at a door; subsequent closing-up of the door, excluded); 1901, Waterbury *v.* Waterbury T. Co., 74 id. 152, 50 Atl. 3 (subsequent restoration of a railing, not received as evidence that it was the defendant's workmen who had taken it down); *Georgia:* 1898, Atlanta C. S. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41 (street-railroad company's rule for motormen at a certain place, received as an admission of its danger); 1902 Georgia S. & F. R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405 (subsequent removal of a post near a railroad track, considered; "our faith in the correctness [of our prior decisions admitting such evidence], which in the past had already been much shaken, has succumbed . . . ; we do not, however, distinctly announce that those decisions are now overruled," — a singularly unjudicial utterance); *Idaho:* 1898, Giffen *v.* Lewiston, — Ida. —, 55 Pac. 545 (injury at a sidewalk; subsequent repairs excluded); *Illinois:* 1882, Warren *v.* Wright, 103 Ill. 298, 302 (falling of a sidewalk; the fact and mode of rebuilding afterwards, excluded); 1890, Hodges *v.* Percival, 132 id. 53, 56, 23 N. E. 423 (falling of an elevator; subsequent construction of an air-cushion beneath it, excluded); 1891, Marder *v.* Leary, 137 id. 319, 323, 26 N. E. 1093 (elevator accident; improvements after the accident, inadmissible); 1892, Weber Wagon Co. *v.* Kell, 139 id. 644, 650, 29 N. E. 714 (injury from a slippery floor; subsequent change of the floor, held inadmissible); 1894, Bloomington *v.* Legg, 151 id. 9, 15, 37 N. E. 696 (removal of the injuring article, inadmissible); 1899, Howa *v.* Medaria, 183 id. 288, 55 N. E. 724 (machine; subsequent repairs excluded); 1902, Taylorville *v.* Stafford, 196 id. 288, 63 N. E. 624 (subsequent repairs of a sidewalk, held not receivable as an admission, but only to explain a difference of measurement); *Indiana:* 1883, Lafayette *v.* Weavar, 92 Ind. 477, 479 (injury at a sidewalk; subsequent repairs excluded); 1889, Terre Haute & I. R. Co. *v.* Clem, 123 id. 15, 23 N. E. 965 (injury at a railroad crossing; subsequent repairs excluded; repudiating the *obiter dictum* in Goshen *v.* England, 119 id. 368, 373, 21 N. E. 977); 1891, Board *v.* Pearson, 129 id. 456, 28 N. E. 1120 (falling of a bridge; defendant commissioners' resolution to renew the bridge, excluded); 1898, Sievers *v.* P. B. & L. Co., 151 id. 642, 50 N. E. 877 (subsequent change of operation of an elevator, excluded); *Iowa:* 1877, Cramer *v.* Burlington, 45 Ia. 627, 629 (injury at a sidewalk; subsequent repairs excluded, but on the theory that the acts of an agent, to operate as admissions, must be contemporaneous); 1882, Hudson *v.* R. Co., 59 id. 581, 584, 13 N. W. 735 (same); 1883, Coates *v.* P. Co., 62 id. 491, 17 N. W. 760 ("The existence of a general order [to block all frogs on the line] was important only as a circumstance in the nature of an admission that without some protection frogs are dangerous to employees"); 1897, Henmi *v.* R. Co., 102 id. 25, 70 N. W. 746 (fire from a locomotive; subsequent repairs considered); 1900, Sylvester *v.* Casey, 110 id. 256, 81 N. W. 455 (sidewalk-injury; subsequent repairs, held inadmissible); 1901, Wimber *v.* R. Co., 114 id. 551, 87 N. W. 505 (photograph of a track, showing the subsequent removal of the guard-rail in which plaintiff's foot had been caught, held properly admitted on the facts); *Kansas:* 1873, St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47, 56 (fire from engine-sparks; subsequent change of the smoke-stack, admitted); 1877, Atchison T. & S. F. R. Co. *v.* Retford, 18 id. 245, 249 (injury at a track near a coal-chute; subsequent removal of the track, admitted); 1885, Emporia *v.* Schmidling, 33 id. 485, 488, 6 Pac. 893 (injury at a sidewalk; subsequent removal of the walk admitted to show it defective, but not to show notice); 1886, St. Louis & S. F. R. Co. *v.* Weaver, 35 id. 412, 432, 11 Pac. 408 (derailment at a washed-out culvert; subsequent erection of a larger culvert, admitted); *Kentucky:* 1897, Taylor *v.* R. Co., — Ky. —, 41 S. W. 551, *semble* (repairs to an engine said to have emitted sparks, excluded); *Maryland:* 1894, Washington C. & A. T. *v.* Case, 80 Md. 36,

caution restricting their use to the specific proper purpose. In particular, (*a*) when the defendant's liability depends upon whether a landlord or his

30 Atl. 571 (defective bridge; repairs fourteen months later, excluded); *Massachusetts:* 1890, Menard *v.* R. Co., 150 Mass. 386, 388, 23 N. E. 214 (injury at a railroad crossing; subsequent placing of a flagman there, excluded); 1891, Shinners *v.* Merrimack Locks, 154 id. 168, 28 N. E. 10 (fall of a bank of earth; subsequent treatment of the bank, excluded); 1892, Downey *v.* Sawyer, 157 id. 418, 32 N. E. 654 (injury at a wool-feeding machine; change of apparatus not admissible to show former defect or former negligent use); 1894, McGuerty *v.* Hale, 161 id. 51, 53, 36 N. E. 682 (subsequent covering of gearing, excluded); 1895, Chalmers *v.* Mfg. Co., 164 id. 532, 42 N. E. 98 (machine; substitution of another machine, excluded); 1897, Dacey *v.* R. Co., 168 id. 479, 47 N. E. 418 (injury at a switch; subsequent construction of a different kind of switch, excluded); *Michigan:* 1883, Fulton Works *v.* Kimball, 52 Mich. 146, 149, 17 N. W. 733 (injury at a bridge; subsequent repairs, excluded); 1891, Lombar *v.* East Tawas, 86 id. 14, 18, 48 N. W. 947 (injury at a sidewalk; subsequent repairs, excluded); 1892, Thompson *v.* R. Co., 91 id. 255, 260, 51 N. W. 995 (injury at a crossing; subsequent removal of a building, excluded); 1893, Noble *v.* R. Co. 98 id. 249, 57 N. W. 126 (injury by a car-horse shying; subsequent separation of horses, excluded); *Minnesota:* the evidence was here at first thought admissible, following the Pennsylvania rulings; 1874, O'Leary *v.* Mankato, 21 Minn. 65, 68 (injury at a ditch near a bridge; subsequent covering of the ditch, admitted); 1877, Phelps *v.* Mankato, 23 id. 276, 279 (injury at a post in a street, subsequent removal of the post, admitted); 1881, Kelly *v.* R. Co., 28 id. 98, 108, 9 N. W. 588 (injury at a railroad crossing; subsequent repairs, admitted); but this view was afterwards repudiated; 1883, Morse *v.* R. Co., 30 id. 465, 468, 16 N. W. 358 (derailment at a switch; subsequent repairs, excluded); 1893, Day *v.* Lumber Co., 54 id. 523, 525, 528, 56 N. W. 213 (injury by emission of furnace-sparks; subsequent improvement in the smoke-stack, excluded); 1897, Hammargren *v.* St. Paul, 67 id. 6, 69 N. W. 470 (sidewalk; subsequent repairs, excluded); *Missouri:* 1882, Ely *v.* R. C., 77 Mo. 34, 46 (derailment at an embankment; subsequent alterations, excluded); 1885, Hipsley *v.* R. Co., 88 id. 348, 354 (railroad accident; subsequent repairs of the track, excluded); *New Hampshire:* 1892, Aldrich *v.* R. Co., 67 N. H. 250, 29 Atl. 408 (subsequent replacement of a switch by a new kind, excluded; Martin *v.* Towle, 59 id. 31, so far as inconsistent, overruled); *New Jersey:* 1899, Flanigan *v.* Guggenheim S. Co., 63 N. J. L. 647, 44 Atl. 762 (injury from alleged defective ladder; ladder's destruction by defendant's employee after the injury, admissible as accounting for plaintiff's non-production of it and as discrediting employee's exculpatory testimony); *New York:* 1871, Reed *v.* R. Co., 45 N. Y. 575 (derailment of a car; subsequent placing of new ties in the vicinity, excluded); 1874, Dougan *v.* Champlain Co., 56 id. 1, 8 (falling off a steamer-deck; subsequent boarding-up of the rail, excluded); 1877, Baird *v.* Daly, 68 id. 547, 551 (swamping of a scow; subsequent towing of the scow at reduced speed, excluded); 1878, Dale *v.* R. Co., 73 id. 468 (injury on a narrow bridge; subsequent erection of a wider one, excluded on the facts; but evidence of subsequent repairs said *obiter* to be admissible); 1878, Sewell *v.* Cohoes, 75 id. 45, 54 (injury at a low bridge; subsequent removal of the bridge, held inadmissible to show negligence); 1888, Corcoran *v.* Peekskill, 108 id. 151, 154, 15 N. E. 309 (injury at an area; subsequent fencing of the area, excluded); 1891, Getty *v.* Hamlin, 127 id. 636, 27 N. E. 399 (bridge accident; subsequent repairs, excluded); *Pennsylvania:* 1865, Pa. R. Co. *v.* Henderson, 51 Pa. 315, 320 (injury on a railroad platform; subsequent removal of the platform, admitted); 1871, West Chester & P. R. Co. *v.* McElwee, 67 id. 311, 314 (injury on a railroad track; subsequent change in the track, admitted); 1873, McKee *v.* Bidwell, 74 id. 218 (injury at an elevator-opening; subsequent placing of a gas-light there, admitted); 1895, Lederman *v.* R. Co., 165 id. 118, 30 Atl. 725 (injury at railroad crossing; subsequent erection of gates there, admitted, "to rebut an inference that the gates were there at the time of the accident"); 1902, Smith *v.* Philadelphia Traction Co., 202 Pa. 54, 51 Atl. 345 (substitution of a new system of sanding tracks, held not evidence of negligence); 1902, Baron *v.* Reading Iron Co., 15 274, 51 Atl. 979 (prior cases overruled; "in the later cases the rule has been recognized with reluctance, and doubt suggested as to its validity; the time has come when we should distinctly say that we do not approve the rule"; subsequent alteration of a railroad platform, here excluded); 1902, Elias *v.* Lancaster, 203 id. 638, 53 Atl. 507 (preceding case followed); *Rhode Island:* 1902, McGarr *v.* National & P. W. Mills, — R. I. —, 53 Atl. 320 (subsequent repairs to belting, excluded); *South Carolina:* 1897, Farley *v.* C. B. & S. Co., 51 S. C. 222, 28 S. E. 193 (subsequent precautions at a machine; question undecided; McIver, C. J., for rejection); *Tennessee:* 1900, Illinois C. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308 (subsequent repairs, excluded); *Texas:* 1889, Gulf C. & S. F. R. Co. *v.* McGowan, 73 Tex. 355, 362, 11 S. W. 336 (washing out of a culvert; subsequent widening, excluded; but not as an absolute rule); 1889, Missouri P. R. Co. *v.* Hennessey, 75 id. 155, 158, 12 S. W. 608 (injury at a railroad crossing; subsequent lighting of the crossing, excluded); 1890, Gulf C. & S. F. R. Co. *v.* Compton, ib. 667, 675, 13 S. W. 667 (railroad accident; subsequent precautions, excluded); *United States:* 1886, Osborne *v.* Detroit, 36 Fed. 36, 38 (injury at a defective sidewalk; subsequent repairs, admitted; no authority cited); 1892, Columbia R. Co. *v.* Hawthorne, 144 U. S. 202, 12 Sup. 591 (injury at a machine; subse-

tenant was in control of premises, or upon whether a municipal corporation was exercising authority over a highway, the acts of control of such a person are provable, and an act of repair done after the injury may chance to be such an act.[6] (*b*) Again, since the condition of a place or thing at the time of an injury may always be evidenced by showing its condition before or after that time, provided no substantial change has occurred (*post*, § 437), the description of the condition of the place subsequent to the injury may necessarily involve a mention of the fact of repairs;[7] but this use of the fact should be guarded against misuse for the forbidden purpose. (*c*) Furthermore, the failure to observe a precaution *required by law* may, if unexcused, be in itself a ground of liability, though it is sometimes dealt with in terms of a rule of evidence.[8]

§ 284. **Same: (4) Failure to Prosecute; Failure to make Complaint; Failure to explain Innocence.** (1) In general, a *delay* in instituting a prosecution,[1] or a reluctance, overcome only by the instigation of others,[2] is some indication —

quent placing of safeguards, excluded); 1900, Southern Pacific Co. *v.* Hall, 41 C. C. A. 50, 100 Fed. 760 (subsequent change of railroad hydrant, excluded); 1902, Choctaw O. & G. R. Co. *v.* McDade, 50 C. C. A. 591, 112 Fed. 889; s. c. on appeal, — U. S. —, 24 Sup. 24 (changes of construction in a waterspout, admitted solely as affecting the measurement of its dimensions); *Utah:* 1896, Jenkins *v.* Irrigation Co., 13 Utah 100, 44 Pac. 829 (change in the method of using an irrigation ditch, made after suit brought, admitted to show consciousness of former negligence); *Vermont:* 1834, Richardson *v.* W. & R. T. Co., 6 Vt. 496, 504 (injury by the falling of a bridge; subsequent erection of a stronger bridge, intimated to be not admissible); 1901, McGovern *v.* Smith, 73 id. 52, 50 Atl. 549 (injury at a crossing; defendant's maintenance of electric signals at other crossings, held no evidence of negligence in not having them at this crossing); 1901, Sias *v.* Consol. Lighting Co. ib. 35, 50 Atl. 554 (that the defendant, being the employer of the plaintiff, had furnished medical or nursing assistance, held not receivable); *Washington:* 1893, Christensen *v.* U. T. Line, 6 Wash. 75, 83, 32 Pac. 1018 (discharge of the defendant's employee causing the injury, excluded); 1894, Bell *v.* W. C. S. Co., 8 id. 27, 28, 35 Pac. 405 (subsequent changes in machinery, not admissible to show negligence); 1899, Carter *v.* Seattle, 21 id. 585, 59 Pac. 500 (sidewalk injury; subsequent repairs, excluded); 1871, Castello *v.* Landwehr, 28 Wis. 522, 530 (subsequent safeguards for a bridge, excluded); 1890, Lang *v.* Sanger, 76 id. 71, 74, 44 N. W. 1095 (planing-mill accident; subsequent repairs, excluded); 1894, Anderson *v.* R. Co., 87 id. 195, 202, 58 N. W. 79 (railroad accident; subsequent precaution as to speed, excluded); 1895, Jennings *v.* Albion, 90 id. 22, 62 N. W. 926 (subsequent repairs, excluded); 1898, Green *v.* Water Co., 101 id. 258, 77 N. W. 722 (supplying contaminated water; precautions after the injury, excluded); 1901, Kreider *v.* Wisconsin R. P. & P. Co., 110 id. 645, 86 N. W. 662 (subsequent repair of machinery, excluded).

But it would seem that precautions taken *before the injury* might in some aspects be receivable; 1902, Chicago & A. R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784 (adoption of a rule requiring flags and torpedoes in a certain exigency, held an admission "that ordinary care required the course of conduct prescribed").

[6] 1883, Lafayette *v.* Weaver, 92 Ind. 477, 479 (repairs as acts of dominion by a city over a street; but the Court here practically infringes on the preceding rule by allowing this evidence even though "the city's obligation . . . were sufficiently shown by other evidence"; this is going too far); 1870, Manderschid *v.* Dubuque, 29 Ia. 73, 82 (repairs done to a highway by a city, admitted as acts of dominion); 1879, Readman *v.* Conway, 126 Mass. 374 (on the question whether landlord or tenant had the control of and the duty to repair a platform, the acts of the landlord in making repairs after the injury were admitted); 1878, Sewell *v.* Cohoes, 75 N. Y. 45, 54 (injury at a low bridge built, by a coal company on land owned by the defendant city; subsequent removal of it by the defendant, admitted as an act of control involving responsibility); 1899, Siglin *v.* R. Co., 35 Or. 79, 56 Pac. 1011 (acts of repair of a fence admitted to show ownership).

[7] A few instances of this occur in the citations of note 5, *supra*; *e. g.* in Alabama and Iowa.

[8] The following statute is typical: Ohio St. 1898, Apr. 13, p. 113 (failure of a factory proprietor to make alterations or safeguards ordered by inspector "shall be *prima facie* evidence of negligence").

[1] 1895, Fussell *v.* State, 93 Ga. 350, 21 S. E. 97. *Contra:* 1902, Davis *v.* Hamilton, — Mich. —, 92 N. W. 512 (libel; plaintiff's failure to sue or otherwise call defendant to account for prior similar utterances by defendant, not receivable as an admission).

[2] 1876, Rogers *v.* People, 34 Mich. 345.

perhaps only a slight one in fact — of a consciousness of the weakness of one's cause. So also is the failure to sue or prosecute in the jurisdiction or court which would naturally be sought.[3] These are but a few illustrations of a great variety of the party's conduct which may be and constantly is inquired into as affecting his belief in the merits of his cause. Like all similar circumstances, it is of course open to explanation.[4]

(2) The *failure to complain* speedily of a *rape* is universally conceded to be a damaging circumstance against the woman making the charge. There is much question here over the allowable methods of explaining away, or meeting beforehand, this inference; and as the doctrines of impeachment and rehabilitation of witnesses are mainly concerned, the subject is examined in detail elsewhere (*post*, §§ 1134–1140).

(3) The *woman's failure in travail to name her seducer*, the father of her bastard, is by old tradition in some jurisdictions receivable as a significant fact. Here, too, the doctrines about witnesses come to be concerned, and the subject is examined elsewhere (*post*, § 1141).

(4) The failure to lodge immediate *information of a robbery* is similarly a circumstance discrediting the charge; for like reasons it is dealt with in another place (*post*, § 1142).

(5) The *failure to protest one's innocence*, on being arrested for a crime — a circumstance perhaps not to be distinguished from the conduct already considered in § 273 — leads to the question whether the fact of such protestation may be shown to repel in advance the inference that might otherwise have been made; this is considered elsewhere (*post*, § 1144).

(6) The *failure to explain the possession of stolen goods*, when arrested, is a significant circumstance which gives rise to the question whether an explanation actually made at the time is receivable; this trenches upon the Hearsay rule, and with other related questions is there considered (*post*, § 1781).

§ 285. **Failure to Produce Evidence, as indicating Unfavorable Tenor of Evidence; (1) in general.** The consciousness indicated by conduct may be, not an indefinite one affecting the weakness of the cause at large, but a specific one concerning the defects of a particular element in the cause. The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted. The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the

[3] 1894, Merritt *v.* R. Co., 162 Mass. 326, 38 N. E. 447.
[4] Cases cited *supra*.

inference that its tenor is unfavorable to the party's cause. Ever since the case of the chimney-sweeper's jewel, this has been a recognized principle:

1722, *Armory* v. *Delamirie*, 1 Strange 505; a chimney-sweeper's boy, finding a jewel, took it to the defendant, a jeweler, for appraisal, but the defendant would not restore it. In an action of trover, in proving the value, "the Chief Justice [Pratt] directed the jury that unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did."[1]

1774, Lord *Mansfield*, C. J., in *Blatch* v. *Archer*, Cowp. 66: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."

1820, *Best*, J., in *R.* v. *Burdett*, 4 B. & Ald. 122: "If the opposite party has it in his power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just. . . . The law does not impose impossibilities on parties; it expects that a man who has the means of knowing who may be witnesses shall call them."

1806, Mr. *W. D. Evans*, Notes to Pothier II, 128: "When weaker and less satisfactory testimony is tendered in support of a fact the nature of which will admit of elucidation from proofs of a more direct and explicit character, the same caution which rejects evidence of an inferior degree when higher evidence might be produced will awaken suspicion; and it will reasonably be supposed that a more perfect exposition of the subject would have laid open deficiencies and objections which a more obscure and uncertain representation was intended to conceal."

1846, *Nelson*, J., in *Clifton* v. *U. S.*, 4 How. 247: "One of the general rules of evidence, of universal application, is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degrees of proof, speaking in a more general and enlarged sense of the terms. . . . Even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher, . . . the same presumption exists in full force and effect against the party withholding the better evidence, especially when it appears, or has been shown, to be in his possession or power, and must and should in all cases exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled."

1877, *Brewer*, J., in *State* v. *Grebe*, 17 Kan. 458 (approving an instruction that "where evidence which would refute or explain certain facts and circumstances of a grave and suspicious nature is peculiarly within the defendant's knowledge and reach, and he makes no effort to procure that testimony," an inference may arise): "It seems to us that that clause is only a recognition of a well-understood principle of human action. The instinct of self-preservation impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. Every man will do what he can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. We all know this. We all expect it. Whenever then a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists. Will not a man, who can, explain that which unexplained will stamp him a criminal and consign him to the felon's cell? The criminal law furnishes in its rules more than one illustration of this principle. The pos-

[1] Of course the mode of reasoning was understood and applied long before this case. An earlier record of it is found in Ward v. Apprice, 6 Mod. 264 (1705), quoted *post*, § 291.

session of recently-stolen property casts upon the possessor the duty of explaining such possession. Why? Because the fact and manner of acquiring that possession are peculiarly within his knowledge and reach, and the instinct of self-preservation will compel him to give an explanation thereof consistent with his innocence, if any such explanation exists. Other illustrations might be cited, but it is scarcely necessary. The principle itself rests in the common knowledge and conviction of all."

This undoubted general principle has been frequently applied in numerous rulings, most of which throw no special light upon its doubtful features and are of little service as precedents.[2]

§ 286. **Same: (2) Witnesses not Produced. (*a*) Witnesses Unavailable or Privileged.** There remains some uncertainty in the judicial treatment of

[2] *Eng.:* 1754, Canning's Trial, 19 How. St. Tr. 312; 1794, Rowan's Trial, 22 id. 1140, 1142, 1170; 1798, Bond's Trial, 27 id. 605; 1835, Boyce *v.* Chapman, 2 Bing. N. C. 222 (issue as to the stealing of the plaintiff's goods by the defendant's porter; the defendant's failure to call the porter, admitted); 1839, Tracy Peerage Case, 10 Cl. & F. 154, 180, 189 (failure to produce available witnesses, taken as negativing the fact alleged); 1874, Vaughton *v.* R. Co., 12 Cox Cr. 580, 588 (similar facts); 1880, R. *v.* Labouchere, 14 id. 419, 432, Cockburn, C. J. (libel charging that the prosecutor gained his livelihood by card-sharping; that certain co-players were not produced by the prosecutor, was allowed to be considered; "you may fairly ask yourselves whether, if these persons had not been associated with the prosecutor in the evil practices alleged, he would not have been eager to produce them as witnesses to rebut the charges made against him"); *Can.:* 1878, Briggs *v.* McBride, 17 N. Br. 663, 666; 1899, Hesse *v.* St. John R. Co., 30 Can. Sup. 218, 225, 234 (personal injury); *Alaska* C. C. P. 1900, § 673 (like Or. Annot. C. 1892, § 845); *Cal.* C. C. P. 1872, § 1963 (it is to be presumed "that evidence wilfully suppressed would be adverse, if produced," and "that higher evidence would be adverse, from inferior being produced"); *Conn.:* 1895, Throckmorton *v.* Chapman, 65 Conn. 441, 454, 32 Atl. 930 (conveyance in fraud of creditors; inference allowed for failure to call the debtor and his wife); *Fla.:* 1895, Leslie *v.* State, 35 Fla. 171, 17 So. 555 (failure to call a person who could have explained an alleged larceny; inference allowed); *Ga.:* 1883, Mitchell *v.* State, 71 Ga. 128, 137 (homicide); 1885, Gainesville & J. S. R. Co. *v.* Wall, 75 id. 282 (failure of defendant to produce fireman of engine, in an action for killing a cow); 1885, Davis *v.* R. Co., ib. 645, 648 (similar); 1885, East Tennessee V. & G. R. Co. *v.* Cutler, ib. 904, *semble* (similar); 1886, Savannah F. & W. R. Co. *v.* Gray, 77 id. 440, 442, 3 S. E. 158 (similar; but on the facts the inference was held not proper); 1887, Harrison *v.* Kiser, 79 id. 588, 592, 4 S. E. 320 (employer's liability; inference denied on the facts); Code 1895, § 5163, Cr. C. § 989 (a presumption arises, "where a party has evidence in his power and within his reach . . . and omits to produce it, or having more certain and satisfactory evidence in his power relies on that which is of a weaker and inferior nature," that the opponent's "charge or claim is well founded"); *Ind.:* 1897, Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 158; *Ia.:* 1883, State *v.* Rodman, 62 Ia. 456, 458, 17 N. W. 668; *Kan.:* 1877, State *v.* Grebe, 17 Kan. 458; *La.:* 1899, Pruyn *v.* Young, 51 La. An. 820, 25 So. 124; *Me.:* 1890, Freeman *v.* Fogg, 82 Me. 408, 411, 19 Atl. 907; *Mass.:* 1860, Com. *v.* Clark, 14 Gray, 367, 370, 373; 1862, Whitney *v.* Bailey, 4 Atl. 173, 175; 1895, Com. *v.* McCabe, 163 Mass. 102, 37 N. E. 777; *Mich.:* 1875, Wallace *v.* Harris, 32 Mich. 380, 394; 1879, People *v.* Gordon, 40 id. 716, 720; 1882, Ruppe *v.* Steinbach, 48 id. 465, 466, 12 N. W. 658; *Mo.:* 1879, State *v.* Degunia, 69 Mo. 485, 490; *Mont.* C. C. P. 1895, § 3266 (like Cal. C. C. P. § 1963); *N. H.:* 1900, Hersey *v.* Hutchins, 70 N. H. 130, 46 Atl. 33; *N. Y.:* 1860, People *v.* Dyle, 21 N. Y. 578 (inferences allowable from failure to contradict an accomplice on a material point); *N. C.:* 1876, State *v.* Smallwood, 75 N. C. 104, 106 (inference allowed from failure to call a witness overhearing a confession); *Or.* Annot. Code, 1892, § 845, ed. 1902, § 788 (similar to Cal. C. C. P. § 1963); *Pa.:* 1856, Fowler *v.* Sergeant, 1 Pa. 355 (malpractice; failure to call an assisting surgeon); 1883, Rice *v.* Com., 102 id. 408, 411 (seduction; failure to call a person present at an alleged confession of the defendant); *U. S.:* 1874, Steamship Ville du Havre, 7 Ben. 328, 332, 16 Fed. 943 (failure to call a steward who had trimmed a light, to show what condition the light was in); 1880, U. S. *v.* Schindler, 18 Blatch. 227, 230, 3 Fed. 338; 1883, The Fred M. Laurence, 15 Fed. 635; 1896, Kirby *v.* Tallmadge, 160 U. S. 379, 383, 16 Sup. 349; 1897, The Joseph B. Thomas, 81 Fed. 578 (failure to produce probable eye-witnesses); 1902, *Re* Kellogg, 113 Fed. 120, 130; 1902, Sanntry *v.* U. S., 55 C. C. A. 148, 117 Fed. 132 (principle applied to proof of the value of timber cut by a trespasser); 1903, Marande *v.* R. Co., — C. C. A. —, 124 Fed. 42; *W. Va.:* 1892, Robinson *v.* Woodford, 37 W. Va. 377, 391, 16 S. E. 602; 1902, Garber *v.* Blatchley, 51 id. 147, 41 S. E. 222; 1903, Vandervort *v.* Fouse, 52 id. 214, 43 S. E. 112 (but using the entirely improper phrase that a "conclusive presumption" is raised).

certain conditions preliminary to the inference. It is plain that the inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural to suppose that he would have been produced if the facts known by him had been favorable. What are the additional elements which justify us in saying that it would have been natural?

(*a*) In the first place, the person must be *within the power* of the party to produce. This is unquestioned.[1] This lack of power may be due to the person's absence from the jurisdiction, or to his illness, or to other circumstances.[2] In particular, it may be due to the *party's ignorance* of the whereabouts of the witness or of the witness' possession of useful information,[3] or of the need of proving the facts in question;[4] for here knowledge is essential to power. Further, it may be due to the person's *disqualification* as a witness.[5] When the witness is *privileged*, and the privilege is independent of the party's control, the witness' claim of privilege renders the party unable to use his testimony;[6] but it would seem that the witness should at least have been summoned and asked, for he may waive his privilege.[7] But where the privilege is one which lies *within the control of the party* himself, it is obvious that the employment of the witness is in fact within the party's power; and thus, so far as the present principle is concerned, the inference might be justified. Nevertheless, the question arises whether thus the privilege might not be undermined and destroyed by indirection; and this depends so much on the nature of the privilege that it is better examined under the heads of the respective privileges.[8]

Of course, a rule of evidence other than a rule of privilege for the party is a means of excluding evidence which he is always entitled to take advantage of; and his objection to prohibited evidence (or his failure to waive an objection) cannot in any way be construed to his disadvantage,[9] since by

[1] This is mentioned or assumed in almost all the cases, *e. g.*: 1876, Schnell *v.* Toomer, 56 Ga. 168, 171; 1887, People *v.* Sharp, 107 N. Y. 427, 463, 14 N. E. 319; 1902, State *v.* Buckman, 74 Vt. 309, 52 Atl. 427.

[2] Compare the circumstances allowed in explanation: *post*, § 287.

[3] 1896, State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429; 1902, McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438 *semble* (the testimony must be within the peculiar knowledge of the opponent; but the objecting party must show that it was not).

[4] Compare the rule as to notice to produce documents, *post*, § 291. Whether a *corporation* can be defaulted for its failure to cause its officer, being out of the jurisdiction, to appear as a witness, is considered in Central Grain & S. Exch. *v.* Board of Trade, C. C. A., 125 Fed. 463 (1903).

[5] 1900, Knox *v.* State, 112 Ga. 373, 37 S. E. 416 (failure to call a minor, not shown competent, who was an eye-witness, not to be considered; Little, J., diss., because the witness was competent); 1862, Carter *v.* Beals, 44 N. H. 408, 413 (party's husband disqualified; but otherwise, where he is as joint defendant qualified to testify for himself); 1893, Graves *v.* U. S., 150 U. S. 118, 120, 14 Sup. 40 (wife alleged to have been present at a place with defendant, and desired so as to allow of identification; she was incompetent, both for and against him; failure to produce her, not admissible).

[6] This seems not to be questioned.

[7] This situation would be chiefly likely to occur for a witness privileged not to produce documents, under the principle of § 2211, *post*; see the cases as to non-production of documents, *post*, § 291. Compare the rule permitting the use of copies of documents in a third person's hands, but requiring that at least a demand or service of process be first shown: *post*, §§ 1211–1213.

[8] For the privilege between *husband and wife*, see *post*, §§ 2243, 2340; for the privilege between *attorney and client*, see *post*, § 2322; for the privilege against *self-crimination*, see *post*, §§ 2272, 2273. The effect of claiming a privilege as a *civil party* may be sufficiently examined here, in § 289, *post*.

[9] 1901, Laird *v.* Laird, 127 Mich. 24 86

hypothesis the evidence is prohibited, not for his personal sake on grounds independent of the value of the evidence, as privileged evidence is (*post*, § 2196), but because of the untrustworthiness of the evidence. No doubt a party usually does take advantage of such rules because the forbidden evidence is unfavorable, and no doubt the opponent constantly seeks by innuendo to give an unfavorable meaning to such objections. But the rules of evidence could never be enforced if parties were not guaranteed free scope in calling attention to the impending violation of the rules; and it is universally assumed and understood that no inference can lawfully be urged in consequence of such objections.

§ 287. **Same: (*b*) Witnesses Prejudiced or Inferior in Value.** (*b*) In the next place, the inference is clearly not a proper one where the person in question is one who by his position would likely be so *prejudiced* against the party that the latter could not expect to obtain from him the unbiassed truth.[1] Furthermore, it seems plain that possible witnesses whose testimony is for any reason comparatively unimportant, or cumulative, or inferior to what is already utilized, might well be dispensed with by a party on general grounds of expense and inconvenience, without any apprehension as to the tenor of their testimony. In other words, put somewhat more strongly, there is a general limitation (depending for its application on the facts of each case) that the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be *superior* in respect to the fact to be proved. This limitation should not be enforced with any strictness; otherwise it would become practically objectionable; but on principle it is sound, and has often been recognized:

1885, *Stone*, C. J., in *Carter* v. *Chambers*, 79 Ala. 223, 224, 231 (disapproving a charge that "if a party has a witness within his power to produce, and fails to produce him, the presumption is fair that the witness if produced would not support the right of the party"): "Carried to its extent, it would require of a suitor that he should produce all the witnesses, no matter how numerous they might be, who knew anything of the transaction. . . . There is a rule, and a just one, that if a party has a witness possessing a peculiar knowledge of the transaction, and supposed to be favorable to him, and fails to produce such witness when he has the means of doing so, this, in the absence of all explanation, is ground of suspicion that such better-informed testimony would make against him."[2]

N. W. 436 (failure to waive objection to incompetency by survivorship).

[1] 1882, State v. Cousins, 58 Ia. 250, 12 N. W. 281 (inference not allowable for a failure to call an alleged accomplice). This doctrine is implied in the following cases: 1895, Com. v. McCabe, 163 Mass. 98, 39 N. E. 777 (illegal keeping of liquor; the failure of the defendant to produce persons present at the time of the seizure, allowed as ground for inference; their probable relations to the defendant being such as to make it useless for the prosecution to call them, when it had other evidence); 1898, Fonda v. R. Co., 71 Minn. 438, 74 N. W. 166 (defendant's failure to call the employee who injured the plaintiff, admissible, though he was equally accessible to plaintiff).

[2] *Accord:* 1852, Patten v. Rambo, 20 Ala. 485 (two physicians had examined a slave, whose soundness was in issue; one only was called; the failure to call the other held no ground for an inference, without a showing that his testimony would have been more valuable); 1884, Jackson v. State, 77 id. 18, 21, 25 (two eye-witnesses of a homicide; no inference allowed against the prosecution for producing one only; so also for hearers of a dying declaration); 1885, Carter v. Chambers, 79 id. 223, 224, 231 (driver of the defendant's carriage, who ran over the plaintiff, not called; a charge that the failure to produce any available witness justifies an inference, rejected); 1892, Haynes v. McRae, 101 id. 318, 13 So. 270 (purchaser from an attached debtor, suing the sheriff; failure of the plaintiff to call

§ 288. **Same: (*c*) Witnesses Equally Available to Both Parties.** (*c*) It is commonly said that no inference is allowable where the person in question is equally available to both parties;[1] particularly where he is actually in court;[2] though there seems to be no disposition to accept such a limitation absolutely or to enforce it strictly.[3] Yet the more logical view is that the failure to produce is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances.[4] To prohibit the inference entirely is to reduce to an arbitrary rule of uniformity that which really depends on the varying significance of facts which cannot be so measured.

§ 289. **Same: (*d*) Party himself failing to Testify.** At common law the party-opponent in a *civil case* was ordinarily privileged from taking the stand (*post*, § 2217); but he was also disqualified; and hence the question could rarely arise whether his failure to testify could justify any inference

the debtor as to the consideration of the sale, etc., held no ground for inference); 1900, Louisville & N. R. Co. *v.* Sullivan, 128 id. 95, 27 So. 760 (defendant's failure to call fireman of engine; no inference allowed); 1898, People *v.* Dole, — Cal. —, 51 Pac. 945 (C. C. P. § 1963, par. 6; "weaker" held hardly a proper synonym for "inferior"); 1867, Doe *v.* Stevens, 36 Ga. 463, 473 (execution of a deed denied; held that proof by witnesses to an alibi, instead of witnesses to handwriting or the like, raised no inference). So, too, *a fortiori*, where it does not appear what the witness would testify to: 1886, State *v.* Starnes, 94 N. C. 973, 975.

For the rule in a few jurisdictions that *all eye-witnesses* must be called in criminal cases by the prosecution, see *post*, § 2079.

[1] 1897, Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; 1899, Brock *v.* State, 123 id. 24, 26 So. 329 (defendant's failure to call one jointly indicted but separately tried for adultery: Tyson, J., rightly dissenting on the ground that a witness is not in truth "accessible" if, though present and compellable, he "may be so hostile to the prosecution or so connected with the defendant that his testimony would be unavailable to the State"); 1899, Coppin *v.* State, ib. 58, 26 So. 333 (similar); 1858, Scovill *v.* Baldwin, 27 Conn. 316, 318; 1900, Ray *v.* Camp, 110 Ga. 818, 36 S. E. 242; 1882, Haymond *v.* Saucer, 84 Ind. 3, 13; 1887, Coleman *v.* State, 111 Ind. 563, 569, 13 N. E. 100; 1881, State *v.* Rosier, 55 Ia. 517, 8 N. W. 345; 1882, State *v.* Cousins, 58 id. 250, 12 N. W. 281; 1902, Erie R. Co. *v.* Kane, 55 C. C. A. 129, 118 Fed. 223, 239, *semble* (no inference to be drawn against either party, where the witness was an employee of defendant but was summoned by plaintiff and in court); 1901, McCabe's Will, 73 Vt. 175, 50 Atl. 804 (but here stated in modified form). On this ground the following case apparently rests: 1887, Blackman *v.* State, 78 Ga. 592, 595, 3 S. E. 418 (trial having been postponed, on defendant's motion, to enable him to procure witnesses to an alibi, and the witnesses attending but not being called, no inference as to guilt was held allowable).

[2] 1891, Pollak *v.* Harmon, 94 Ala. 420, 10 So. 156 (purchase from an attached debtor; both grantors being in court, it was held that no suspicion or presumption could arise against the purchaser for not calling them); 1892, Bates *v.* Morris, 101 Ala. 282, 286, 13 So. 138 (the husband of the plaintiff, in Court and available for both parties; inference not allowed); 1895, Crawford *v.* State, 112 id. 1, 23, 21 So. 214; 1885, Davis *v.* R. Co., 75 Ga. 645, 648.

[3] 1878, McAdory *v.* State, 62 Ala. 154, 157, 162 (presence of witnesses not called; left to trial Court's discretion); 1897, Western & A. R. Co. *v.* Morrison, 102 Ga. 319, 29 S. E. 104 (failure to put on the stand a material witness, who is however produced in Court, may be commented on by counsel; Simmons, C. J., diss.); 1899, Harriman *v.* R. Co., 173 Mass. 28, 53 N. E. 156 (failure to call a witness available for both; left to jury to infer upon the circumstances); 1900, Story *v.* R. Co., 70 N. H. 364, 48 Atl. 288 (defendant's failure to produce the engineer who had caused the accident, held admissible, even though plaintiff might have taken his deposition; yet "ordinarily no inference can be drawn because a witness equally at the command of each party is not called"); 1899, Frank Waterhouse Co. *v.* Rock Land A. M. Co., 38 C. C. A. 281, 97 Fed. 466 (opponent's failure to produce an employee to whom leave of absence has been granted, open to inference, the proponent having fruitlessly subpœnaed him); 1892, Arbuckle *v.* Templeton, 65 Vt. 205, 211, 25 Atl. 1095 (inference not allowable from a mere omission to ask a witness while on the stand, because the opponent also might have asked).

[4] 1894, Mitchell *v.* R. Co., 68 N. H. 96, 116, 34 Atl. 674 (fireman, conductor, and M., being within ear-shot of a train, were not called to testify as to the bell-ringing; either party held entitled to argue as to the inference from this); 1901, State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097 (undecided); 1892, Robinson *v.* Woodford, 37 W. Va. 377, 392, 16 S. E. 602, *semble*.

against him. But since the general abolition both of the privilege and the disqualification (*post*, §§ 2218, 577), the party has become both competent and compellable like other witnesses; and the question plainly arises whether his conduct is to be judged by the same standards of inference. This question should naturally be answered in the affirmative:

1862, *Appleton*, J., in *Union Bank* v. *Stone*, 50 Me. 595, 599: "There was evidence proving or tending to prove that a notice of demand and non-payment had been given the defendant. He had been notified to produce it, and did not. He was present and not a witness. If he had never received such a notice, he knew it, and, knowing it, would be little likely to omit an opportunity of stating a fact thus conclusively in his favor. The evidence tended strongly to charge him. A word from his lips might exonerate him from all liability. . . . If notice had been received, and the defendant knew it, he might well be silent. The utterances of the truth would establish the plaintiff's claim. . . . If he were a witness, he must either state the truth or a falsehood. If he testified truly, his hope of a successful defence was at an end. The defendant does not offer his own testimony. He prefers the adverse inferences which he cannot but perceive may be drawn therefrom, to any statements he could truly give or to any explanations he might make. He prefers any inferences to giving his testimony. Why? Because no inferences can be more adverse than would be the testimony he would be obliged by the truth to give. — The fact of not testifying was obvious to the jury. . . . No Court could perceive such a fact without attaching some degree of importance — more or less — to its existence, according to the necessity of the testimony and the emergencies of the defence. No judge exists who would not, if the trial had been before him, regard this as a fact bearing on his decision. To direct a jury to disregard it would be to direct them to disregard a fact existent, material, and probative. However much so directed, they could not fail to perceive, and, perceiving, could not avoid regarding it."

1875, *Agnew*, C. J., in *Brown* v. *Schock*, 77 Pa. 471, 478: "A man of ordinary intelligence must know that his failing to appear, when he had a strong motive to appear, would be evidence against him; if he relies upon his ability to disprove the motive imputed, he takes the risk, but he leaves the effect of his conduct, as a matter of evidence for the opposite side, to go to the jury."

1901, *Blanchard*, J., in *Bastrop State Bank* v. *Levy*, 106 La. 586, 31 So. 164: "Judicial tribunals are established to administer justice between litigants, and the first and most important step to that end is the ascertainment of the truth of the controversies which come before them. It is only when the truth is ascertained that the law can be properly applied in the just settlement of disputes. Litigants owe the duty of assisting in every legitimate way in the elucidation of the truth. When a defendant can by his own testimony throw light upon matters at issue, necessary to his defence and peculiarly within his own knowledge if the facts exist, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the facts do not exist."

The only dissent from this view seems to be based on that subtle sentiment of honor (scarcely capable of appreciation outside of the Southern States) which recognizes the repugnance that an honorable and sensitive man feels to placing himself in a situation where his word may be doubted by reason of his interested motives. The legislation making parties competent has not even yet been received in those communities without scruple and apprehension. Where such motives of delicacy prevail, it would obviously be unfortunate to place the party in the dilemma of either violating his scruples by testifying or of suffering discredit by remaining silent:

1877, *Bleckley*, J., in *Thompson* v. *Davitte*, 59 Ga. 472, 480: "The request [which was properly refused] was based on the assumption that because the proponnder was present and competent to testify, he was bound to do so, or else suffer by his failure to offer himself as a witness in his own case. We think, on the contrary, that it is becoming, and to be commended, in a party not to testify, if he can avoid it without positive injury to the cause of truth and justice. As long as he is unheard, there should be no presumption that his silence is counseled by prudence rather than by modesty. While his case should not gain by his forbearance to testify, neither should it lose by it. Public policy forbids that a suitor should feel constrained to mount the witness-stand for no purpose but to let the jury know that he has something to say in his favor, or to show them that he can face the terrors of a cross-examination without breaking down. The encouragement of anything like competition in swearing would be too sure to breed perjury. Let those testify in their own behalf who voluntarily present themselves; but let no uncharitable imaginations light upon those who stay away, merely because they might swear if they would."

These standards of honor, however, cannot be expected to be considered in the Courts of other communities not affected by them in daily life. Moreover, it does not appear that the Southern Courts are either unanimous or rigorous in applying them. It would be generally agreed, to be sure, that the mere fact of the party's failure to testify is not of itself open to inference; it is his failure when he could be a useful and natural witness (*ante*, § 287) that is significant. But, granting this much, it is to-day conceded, except in a few Courts or in peculiar instances, th[illegible]he party's conduct is to be judged by the standard of other witnesses.[1] [illegible]party's refusal to submit to a

[1] 1831, Taylor v. Willans, 2 B. & Ad. 845, 856 (malicious prosecution; the prosecutor's failure to testify at the prosecution, held not inapt "under the very peculiar circumstances of this case, to raise an inference that his motive was a consciousness that he had no probable cause for instituting the prosecution"); 1858, Tufts v. Hatheway, 4 Allen N. B. 62 (trover for cordwood taken; the defendant's failure to testify as to the exact quantity, usable to infer the amount to be unfavorable to him); 1880, McGar v. Adams, 65 Ala. 106, 110 (agent's good faith; defendant's failure to take the stand, held not necessarily to raise an inference, where, on the facts, he might "properly rely on that which his adversary introduces, when it is without contradiction"); 1895, Throckmorton v. Chapman, 65 Conn. 441, 32 Atl. 930 (inference allowed; but here it did not appear that the absence was unexplained, and the circumstance hence could not be considered); 1875, Emory v. Smith, 54 Ga. 273, *semble* (no inference allowed); 1877, Thompson v. Davitte, 59 id. 472, 480 (see quotation *supra*); 1878, Moore v. Wright, 90 Ill. 470 ("it was a personal privilege"; no inference allowed); 1899, Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577; 1901, Bastrop State Bank v. Levy, 106 La. 586, 31 So. 164; 1903, Safe Deposit & T. Co. v. Turner, — Md. —, 55 Atl. 1023; 1873, McDonough v. O'Neil, 113 Mass. 92, 96 (inference allowed); 1884, Lynch v. Peabody, 137 id. 92 (same); 1889, Mooney v. Davis, 75 Mich. 188, 193, 42 N. W. 802 (party's failure to testify in denial of certain representations attributed to him, held open to inference); 1890, Cole v. R. Co., 81 id. 156, 159, 45 N. W. 983 (personal [illegible]; plaintiff's failure to testify, held open to [illegible]rence on the facts; the rule is applicable where the party "possesses knowledge of the facts in controversy unknown to others who have been called as witnesses and such facts would supply positive evidence of what would otherwise be established by inference from other facts"); 1893, Cole v. R. Co., 95 id. 77, 80 (same case on re-trial; plaintiff's failure to testify, held open to inference); 1896, Connell v. McNett, 109 id. 329, 67 N. W. 344 (silence at a former trial; inference allowed); 1901, Bunckley v. Jones, 79 Miss. 1, 29 So. 1000 (failure of plaintiff and his father to testify, held admissible under the circumstances); N. M. Comp. L. 1897, § 3022 (if opposing party fails to testify when summoned, it shall be taken "as an admission *pro confesso*, unless otherwise ordered by the Court," and judge may non-suit, order a general finding, or postpone on terms); 1877, Bleecker v. Johnson, 69 N. Y. 309, 311 (failure to call one of the defendants, held to authorize "the jury to say whether under all the circumstances the absence of the defendant was suspicious, so as to authorize an unfavorable inference"); 1868, Devries v. Phillips, 63 N. C. 53, 55 (no inference from the mere failure to call; but there may be "according to the circumstances, as the introduction or non-introduction of any other witness might be com-

physical examination should likewise be open to inference, for he is virtually withholding evidence; and this is generally conceded (*post*, § 2220); the curious thing is that it is equally conceded by Courts which decline to compel a submission and thus in effect recognize a privilege.

The failure of the *accused* in a *criminal case* to take the stand ought to permit, so far as the present principle is concerned, the same inference as for witnesses and parties in general. But here the question arises whether the use of such an inference would not indirectly infringe on the privilege; and this can best be considered after examining the privilege (*post*, §§ 2272, 2273).

§ 290. **Same: (*e*) Sundry Distinctions: Criminal Cases; Good Character; Experts; Experiments; Depositions; Explanations; Nature of Inference; Burden of Proof; Presumptions.** (1) The principle under consideration applies equally in *criminal cases* as in civil cases, both for the prosecution as for the accused.[1] So far, however, as it affects the accused, some complications arise in discriminating the generally prohibited inference from the accused's *own failure to testify* by claiming privilege, and the permissible inference from his *failure to produce other evidence;* and such problems are therefore best considered in connection with the privilege against self-crimination (*post*, §§ 2272–2273). One thing only (which does not involve the effect of the privilege) may be noted here, namely, that by general concession the accused's failure to produce testimony to his *good character* is not open to the inference that the character is bad, since otherwise the rule (*ante*, § 57) would be evaded, that the prosecution cannot invoke and prove his bad character until he offers to prove his character good.[2]

mented on"); 1898, Weeks *v.* McNulty, 101 Tenn. 495, 48 S. W. 809 (inference not allowable, if his testimony could add nothing valuable); 1895, Kirby *v.* Tallmadge, 160 U. S. 379, 383, 16 Sup. 349 (failure of defendants to take the stand to explain an alleged fraudulent purchase; inference allowed); 1885, Hefflebower *v.* Dietrick, 27 W. Va. 16, 23 (inference allowed against a defendant who did not testify to facts within his knowledge; the result partly affected by the presence of a demurrer to evidence).

The following principles are distinct from the foregoing, although in their application the difference is sometimes obscured: (1) that the failure of a witness (or party) to give certain *testimony at a former trial* which he now gives amounts to a self-contradiction (*post*, § 1042); that a party's *silence during adverse testimony* may sometimes be equivalent to assent and therefore to an admission of its truth (*post*, § 1072); that a party's *failure to deny in a chancery answer* the allegations of the bill may amount to an admission; this is a question of chancery pleading (Langdell, Equity Pleading, § 84).

The effect of a party's *failure to produce a document* is dealt with in § 291, *post*.

[1] The cases cited *ante*, *passim*, illustrate this; in particular, the passage quoted from Mr. J. Brewer in § 284.

[2] 1898, People *v.* Gleason, 122 Cal. 370, 55 Pac. 123; 1874, Fletcher *v.* State, 49 Ind. 134; 1874, State *v.* Kabrich, 39 Ia. 277; 1876, State *v.* Dockstader, 24 id. 486; 1878, State *v.* Northrup, 48 id. 584; 1881, Olive *v.* State, 11 Nebr. 1, 29, 7 N. W. 444; 1840, People *v.* White, 24 Wend. 524, 546, 554, 555, 560, 584 (Walworth, Ch., diss. at 537; this case overrules People *v.* Vane, 12 Wend. 82; 1834); 1845, People *v.* Bodine, 1 Den. 281, 292, 314; 1831, State *v.* Collins, 3 Dev. 118; 1847, State *v.* O'Neal, 7 Ired. 251; 1881, State *v.* Sanders, 84 N. C. 729; 1895, Com. *v.* Weber, 167 Pa. 153, 31 Atl. 481; 1839, State *v.* Ford, 3 Strobh. 522, 527, *semble* (here holding that the absence of good-character evidence simply leaves the defendant without such a benefit as it might have given in persuasion, and *semble*, that this is not the same as directing an inference that the character is bad); 1899, McKnight *v.* U. S., 38 C. C. A. 115, 97 Fed. 208. The only jurisdiction in which any doubt remains is that of Maine; 1844, State *v.* McAllister, 24 Me. 139, 144 (inference allowed); 1854, State *v.* Upham, 38 id. 261 (*contra*); 1862, State *v.* Tozier, 49 id. 404 (left undecided). But note that it is incorrect to say (as in Mullen *v.* U. S., 46 C. C. A. 22, 106 Fed. 892; 1901) that the accused's good character is presumed; this inconsistently gives him the untrammelled benefit

(2) The *kind of witness* or evidence is immaterial. The inference, for example, may be drawn from a failure to use *expert testimony*,[3] or a failure to employ *experiments* or samples or like instructive evidence.[4] So also the *form* of the testimony withheld is immaterial; the failure to *take a deposition*, where it could have been taken,[5] or to *use a deposition*, where it has been taken by the party not using it,[6] may be equally open to inference.

(3) In any event, the party affected by the inference may of course *explain* it away[7] by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for non-production.[8]

(4) The *inference* (supposing the failure of evidence not to be explained

of evidence which if he had introduced might have been disputed. What really happens, or ought to, is that the defendant's character is simply a non-existent quantity in the evidence; this distinction has sometimes been expressly pointed out; 1901, Addison *v.* People, 193 Ill. 405, 62 N. E. 235; 1880, Knight *v.* State, 70 Ind. 380.

[3] 1898, McKim *v.* Foley, 170 Mass. 426, 49 N. E. 625 (signature denied; failure to call experts said to have been consulted, admissible, in trial Court's discretion; doctrine may be applied to expert witnesses); 1901, Vergin *v.* Saginaw, 125 Mich. 499, 84 N. W. 1075 (failure to call physicians who had examined plaintiff's injuries; inference allowed); 1901, Wilkins *v.* Flint, 128 id. 262, 87 N. W. 195; 1886, Bullard *v.* R. Co., 64 N. H. 27, 31, 5 Atl. 838 (personal injury; plaintiff's failure to call one of the physicians consulted by her, held to be open to inference).

[4] 1900, Concord L. & W. P. Co. *v.* Clough, 70 N. H. 627, 47 Atl. 704 (failure to show subsoil at a view). *Contra:* 1880, Philadelphia *v.* Rule, 93 Pa. 15, 18 (action for pavement laid; failure to present samples of work done, held not to be considered); 1893, U. S. Sugar Refin. *v.* Allis Co., 6 C. C. A. 121, 9 U. S. App. 550, 552, 56 Fed. 786 (rule refused to be applied to a buyer's failure to test a machine as evidence of its defects).

For a *party's* failure to submit to *corporal examination* of his injuries, see *post*, § 2220.

For the non-production or concealment of *chattels* or other *material objects*, see *post*, § 291.

[5] Compare the cases cited *ante*, *passim*, and the following: 1895, Leslie *v.* State, 35 Fla. 171, 17 So. 555 (allowing comment on a failure to take out a commission, after filing interrogatories, for an alleged witness, so material that the failure indicated that the witness was a fictitious person); 1884, Judevine *v.* Weeks, 57 Vt. 278, 281. *Contra:* 1901, Lindle *v.* Com., — Ky. —, 64 S. W. 986 (introducing an affidavit for continuance containing the testimony of supposed absent witnesses, and then proving that the witnesses were present and that their testimony had not been offered by the accused either on the stand or by affidavit, held improper; this ruling seems unsound).

[6] 1882, Learned *v.* Hall, 133 Mass. 417, *semble;* 1885, Com. *v.* Haskell, 140 id. 128, 2 N. E. 773 (on the facts, held a matter for the jury to determine).

Distinguish the question whether the taking and filing of a deposition is such an adoption of it as amounts to an *admission of its truth* (*post*, § 1075); and also the question whether the opponent may use a deposition taken but not used by the other party (*post*, § 1389).

[7] On the general principle of Explanation, *ante*, § 34.

[8] Some of the following circumstances would have sufficed to forbid in the first instance any comment on the failure to produce: 1875, Com. *v.* Costello, 119 Mass. 214 (that the missing witnesses had been threatened by the prosecuting officer with prosecution for perjury on a collateral charge, and had fled the jurisdiction); 1895, Com. *v.* McCabe, 163 id. 98, 39 N. E. 777; 1897, Runnill *v.* Ash, 169 id. 341, 47 N. E. 1017 (failure to look for probable evidence; reasons for failure, allowed); 1898, Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121 (witness' illness, admitted in explanation); 1875, Pease *v.* Smith, 61 N. Y. 477, 482 (trover for goods stolen by the defendant's porter; the plaintiff allowed to show that the porter was then in prison for the theft, as explaining why he was not produced); 1885, Hoard *v.* State, 15 Lea 321 (person not summoned, shown to be mentally incapable); 1895, Weatherford M. W. & N. R. Co. *v.* Duncan, 88 Tex. 611, 32 S. W. 878 (a showing that the witnesses had been subpœnaed but were in defendant's employ); 1874, Durgin *v.* Danville, 47 Vt. 95, 105 (a former willingness to be examined, held allowable to explain away a later refusal on the score of feebleness). *Contra*, but clearly unsound: 1882, Learned *v.* Hall, 133 Mass. 417 (failure to use a deposition; explanation of the reasons forbidden, as involving a new issue over the merits of the witness).

away) is of course that the tenor of the specific unproduced evidence would be contrary to the party's case, or at least would not support it. In other words, the inference does not affect indefinitely the merits of the whole cause, as it does when fraudulent conduct is involved (*ante*, § 277), but affects specifically and only the evidence in question.[9]

(5) The opponent whose case is a denial of the other party's affirmation has no *burden of persuading the jury;* and, therefore, until the burden of producing evidence has shifted, he has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden. This distinction has been recognized [10] and is unquestionable; but it has been little developed in its application. The nature of the two burdens of proof (*post*, §§ 2485, 2487) is here involved.

(6) So, too, where by the *pleadings* or otherwise a party has *judicially admitted* a fact favoring his opponent, the opponent may rely on this admission, and his failure to produce evidence to prove the admitted fact cannot be taken as evidence against the truth of the admission.[11]

(7) In a few instances the question arises whether conduct of the present sort raised a *presumption of law, i.e.* shifts to the opponent the burden of producing evidence. These instances are examined in dealing with the various presumptions of law (*post*, §§ 2490, 2524).

(8) Whether a *new trial* should be granted on the ground of the successful party's withholding of evidence [12] depends upon the law of new trials (*ante*, § 21), and does not involve the admissibility of evidence.

§ 291. **Same: (3) Documents or Chattels Destroyed or not Produced.** The applicability of the general principle to an opponent's non-production or suppression of documents or chattels has always been assumed. From the beginning of the recognition of the principle in England, some sort of inference has been acknowledged to be legitimate.[1] In this country, similarly,

[9] In the following opinion the two inferences were erroneously interchanged: 1887, Allen, J., in Blecker *v.* Johnson, 69 N. Y. 309, 311, 313 (the jury, on failure of the defendant to call a co-defendant, "might take a less favorable view of the testimony on the part of the defence," but should not infer "that his testimony would be adverse to the defendants").

[10] 1897, Brill *v.* Car Co., 80 Fed. 909 (the plaintiff was bound to prove an intent in the defendant to infringe; the defendant's failure to adduce testimony to the contrary, held to be no evidence).

[11] 1893, East Tennessee V. & G. R. Co. *v.* Kane, 92 Ga. 187, 192, 18 S. E. 18.

[12] As in Standen *v.* Edwards, 1 Ves. Jr. 133.

[1] *Eng.:* 1617, R. *v.* Arundel, Hob. 109 (title to a manor, claimed by the king; the title-deeds being "very vehemently suspicions to have been suppressed" on the defendants' behalf, the decree gave the land to the king "till the defendants should produce the deeds"); 1698, Anon., 1 Ld. Raym. 731 (Holt, C. J., said, "that if a man destroys a thing that is designed to be evidence against himself, a small matter will supply it"; and so "a copy sworn" was admitted to prove a note of defendant torn by him); 1705, Ward *v.* Apprice, 6 Mod. 264 ("if very slender evidence be given against him, then, if he will not produce his books, it brings a great slur upon his cause"); 1706, Sanson *v.* Rumsey, 2 Vern. 561 (the defendant, having burnt certain articles of marriage-settlement, was kept in jail "until he had consented to admit the articles were to the effect in the bill"); 1718, Young *v.* Holmes, 1 Strs. 70 (ejectment for a leasehold; "it being proved the defendant had the lease in her custody, and refusing to produce it, an attorney who had read it was allowed to give evidence of its contents;

the tradition has been continued and steadily enforced, in numerous instances, where the opponent has destroyed, suppressed, or refused or failed to produce a document or chattel whose contents or quality came into issue or became relevant under the issues.[3]

and the C. J. [Parker] said, he would intend it made against the defendant, it being in her power, if it was otherwise, to show the contrary"); 1721, Dalston *v.* Coatsworth, 1 P. Wms. 731 (bill for relief against suppression of a deed; decree made according to the contents as testified to); 1722, Armory *v.* Delamirie, 1 Stra. 505 (jewel refused to be produced by bailee; see quotation *ante*, § 285); 1749, Cookes *v.* Hellier, 1 Ves. Sr. 234 (L. C. Hardwicke: "If deeds or writings are destroyed by a party who would take benefits thereof, a court of equity *in odium spoliatoris* will go farther than a court of law"); 1764, R. *v.* Smith, 3 Burr. 1475 (charge of trading without a license; refusal to produce it held to be sufficient evidence); 1769, Roe *v.* Harvey, 4 id. 2484, 2489 (the plaintiff in ejectment would not produce a deed affecting his title; L. C. J. Mansfield observed that the Court "leave the refusal to do it, after proper notice, as a strong presumption to the jury"); 1807, Clunnes *v.* Peggy, 1 Camp. 8 (sale of liquor; proof of bottles delivered, and nothing more; the jury authorized to assume that only the cheapest liquor of the plaintiff was therein); 1815, The Hunter, Dods. Adm. 480, 486 (spoliation "generates a most unfavorable presumption"); 1826, James *v.* Bion, 2 Sim. & St. 600, 606 (non-production of receipts, treated as "evidence that these receipts afford inferences unfavorable" to that party); 1826, Barker *v.* Ray, 2 Russ. 63, 73 (discussing the jurisdiction of Chancery in cases of spoliation, and negativing the existence of an absolute presumption; Lord Eldon, L. C.: "To say that if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be in a great many instances going a great length"); 1841, Curlewis *v.* Corfield, 1 Q. B. 814 (non-production of a letter called for, held relevant to show its contents to be as claimed); 1854, Gray *v.* Haig, 20 Beav. 219, 224 (bill for an account; destruction by a party of documents of unsettled accounts, held ground for presuming "everything most unfavorable to him which is consistent with the rest of the facts"); 1857, Sutton *v.* Devonport, 27 L. J. C. P. 54 (to verify a description identifying a document, it was offered, but was objected to by the other party and was withdrawn; held, that the jury might infer it to be as described); 1858, Att'y-Gen'l *v.* Dean & Canons, 24 Beav. 679, 706 (suppression of a deed affecting title is "always to be taken most strongly against the persons" keeping it back); *Can.:* 1895, St. Louis *v.* R., 25 Can. Sup. 649 (account-books, etc.). *Contra*, but never law, being merely a casual aberration: 1813, Cooper *v.* Gibbons, 3 Camp. 363 (sale of goods, the defendant setting up a joint debtor; the non-production of his books by the plaintiff after notice, not allowed to be considered).

[3] *Cal.:* 1866, Lease *v.* Clark, 29 Cal. 664, 668 (refusal to produce an original deed in possession; inference may be drawn, though an alleged copy is offered); *Conn.:* 1843, Merwin *v.* Ward, 15 Conn. 377 (party's books; whether an inference could be drawn from secondary evidence, undecided; but no presumption of law, and *semble*, no inference can arise where the documents would not be admissible without the opponent's consent); *Ga.:* 1878, Davis *v.* Alston, 61 Ga. 225, 228 (no inference allowable, where the Court rules that the document need not be produced); *Ill.:* 1846, Rector *v.* Rector, 8 Ill. 105, 119 (failure to produce bond; inference allowed as to contents); 1868, Law *v.* Woodruff, 48 id. 399 (breach of marriage-promise, the defendant's failure to produce the plaintiff's letters, after the defendant's answers to them had been introduced by them to the plaintiff, held not to raise a presumption, nor to require an unfavorable construction of defendant's letters); 1877, Gage *v.* Parmelee, 87 id. 329, 341 (partnership-settlement; inference from destruction of account-books, held on the facts not to overcome the weight of evidence); 1878, Downing *v.* Plate, 90 id. 268, 272 (contract and indorsements burned; inference to be drawn against the spoliator); 1882, Anderson *v.* Irwin, 101 id. 411, 415 (destruction of a will; slight evidence by the propounder, held to suffice); 1891, Carter *v.* Troy Lumber Co., 138 id. 533, 539, 28 N. E. 932 (no inference to be drawn from non-production where the document could be used only by the opponent's consent, moreover, that the production might prove "injurious to his case," other than by showing the contents and inferences from them to be as alleged, held not a proper inference from a failure to produce); 1902, Momence Stone Co. *v.* Groves, 197 id. 88, 64 N. E. 335 (rule applied to non-production of a book); *Ind.:* 1857, Thompson *v.* Thompson, 9 Ind. 323, 332 (presumption from spoliation, not conclusive); *La.:* 1871, Lucas *v.* Brooks, 23 La. An. 117 (inference not drawn, upon the facts of the case from a destruction); 1884, Crescent C. I. Co. *v.* Ermann, 36 id. 841 (bills indicating to whom credit was given; inference drawn from non-production); 1902, Johnson *v.* Levy, 109 La. 1036, 34 So. 68 (inference allowed for certain drafts not produced); *Me.:* 1829, Emerson *v.* Fisk, 6 Greenl. 200, 206 (inference allowable, but only after notice before trial to produce); 1858, Tobin *v.* Shaw, 45 Me. 331, 349 (inference allowable if notice to produce has been given); 1878, Davis *v.* Jones, 68 id. 393 (book of accounts; inference allowable from non-production); *Mass.:* 1830, Thayer *v.* Ins. Co., 10 Pick. 326, 329 (like Cross *v.* Bell, N. H., *infra*); 1859, Beecher *v.* Dennistou, 13 Gray 354 (conversion of watch, etc.; defendant's concealment of them from plaintiff's value-witnesses held

Nevertheless, there remains much uncertainty as to the precise nature of the inference and the conditions in which it may legitimately be drawn. At the outset, certain unquestionable points may be removed from the discussion. (1) It is not here a question of a *presumption of law*, *i. e.* of a rule

not to be without significance; opinion obscure); 1886, Berney *v.* Dinsmore, 141 Mass. 42, 5 N. E. 273 (conversion of pearl-ring; rule of Armory *v.* Delamirie, that the value of the best jewels should be presumed, repudiated; expert's testimony to value of a similar article should be taken); *Mich.*: 1871, Page *v.* Stephens, 23 Mich. 357, 363 (books of account; inference allowable from non-production); 1893, Lamble's Estate, 97 Id. 49, 55, 56 N. W. 223 (destruction of a second will by the parties benefited by the first is evidence that contents were as claimed against them; and is also evidence of due statutory execution); 1901, Battersbee *v.* Calkins, 128 Id. 569, 87 N. W. 760 (inference allowed, on the facts); *Miss.*: 1878, Botts *v.* Wood, 56 Miss. 136, 440 (spoliation, the inference can only be drawn when there is other evidence of contents; and it cannot be drawn when the other evidence fully supports the spoliator's claim); *Mo.*: 1882, Pomeroy *v.* Benton, 77 Mo. 64, 35 (partnership account; defendant's destruction of book of account, after suit brought, held to be open to inference; careful opinion); 1886, State *v.* Chamberlain, 89 Id. 129, 134, 1 S. W. 145 (destroying or concealing forged notes, inference allowable); *N. H.*: 1856, Cross *v.* Bell, 34 N. H. 82, 88 (the inference not to be drawn simply from the fact of non-production; but if some secondary evidence is given of the contents, "and such evidence is imperfect, vague, and uncertain, every intendment and presumption is to be made against the party who might remove all doubt by producing the higher evidence"); *N. Y.*: 1820, Jackson *v.* M'Vey, 18 Johns. 331, 334 (inference allowed from non-production, after some evidence of contents had been given); 1831, Life & Fire Ins. Co. *v.* Ins. Co., 7 Wend. 31, 34 (the same; the rule of this case is stated in full in Cross *v.* Bell, N. H., *supra*); *N. C.*: 1841, Little *v.* Marsh, 2 Ired. Eq. 18, 27, *semble* (inference allowable from spoliation); *Or.*: 1895, Connell *v.* McLaughlin, 28 Or. 230, 42 Pac. 218 (there must be other evidence of contents than the inference from non-production; but speaking of it confusedly as a presumption of law); 1896, Schreyer *v.* Mills Co., 29 id. 1, 43 Pac. 719 (inference allowable from non-production); *Pa.*: 1826, Wishart *v.* Downey, 15 S. & R. 77, 79 (non-production of a receipt for money; inference allowable); 1837, McReynolds *v.* McCord, 6 Watts 288, 290 (destruction by the opponent; "before he can be fixed with the character of a spoiler, the purport of the paper must be proved to have been what it is surmised to have been"); 1870, Frick *v.* Barbour, 64 Pa. 120 (assumpsit; the non-production of receipts, held open to inference); *Tex.*: 1890, Martin Brown Co. *v.* Perrill, 77 Tex. 199, 203, 13 S. W. 975 (no inference allowable, for documents inadmissible as irrelevant); *U. S.*: 1817, The Pizarro, 2 Wheat. 227, 241 (per Story, J., "a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the Court," but not always a ground for refusal of further evidence, nor, in prize cases, a substantive cause for condemnation); 1844, Hanson *v.* Eustace, 2 How. 653 ("the refusal to produce books, under a notice, lays the foundation for the introduction of secondary evidence," and "all inferences shall be taken from the inferior evidence most strongly against the party refusing to produce"; but "the refusal itself raises no presumption of suspicion or imputation to the discredit of the party, except in a case of spoliation or equivalent suppression"; "in other words, with the exception just mentioned, the refusal to produce books or papers upon notice is not an independent element from which anything can be inferred as to the point which is sought to be proved by the books or papers"; this is too narrow); 1846, Clifton *v.* U. S., 6 Id. 242, 247 (falsely invoicing to defraud the customs; inference allowed where the books of account, and one of the sellers, being available, were not produced to show the prices); 1873, Chaffee *v.* U. S., 18 Wall. 516, 528, 544 (revenue frauds; defendant's failure to produce his books, held not to throw the burden of explanation upon him and to serve to remove reasonable doubt; poor opinion); 1884, U. S. *v.* Flemming, 18 Fed. 907, 916 (fraudulent gambling in stocks; inference allowable, from failure to produce account-books, that they would not help the defendant's case); 1893, Runkle *v.* Burnham, 153 U. S. 216, 225, 14 Sup. 837 (power of attorney; non-production held open to inference); 1900, Missouri K. & T. R. Co. *v.* Elliott, 42 C. C. A. 188, 102 Fed. 96, 102 (failure to produce train books, held open to inference); *Utah*: 1898, McIntyre *v.* Mining Co., 17 Utah 213, 53 Pac. 1124 (failure to produce a contract-copy because he was not sure that it was correct and was advised by counsel that if not correct it could not be used, *semble*, evidence of its terms being as claimed by opponent); *W. Va.*: 1886, Bindley *v.* Martin, 28 W. Va. 773, 789 (contract of sale; the effect of withholding documents is not "to supersede the necessity of other evidence" but to furnish "matter of inference in weighing the effect" of other evidence). To the above rulings are to be added the statutory provisions collected *post*, § 1858, in dealing with the right to *inspect an opponent's documents before trial*; on his failure to permit such inspection or to produce at the trial, it is provided in a majority of jurisdictions that the Court may direct the jury to presume the contents to be as the demandant alleges it to be.

shifting the burden of producing evidence. There may be such a rule (*post*, § 2524), but, if it exists, it is independent of and additional to the present principle. Here the sole question is whether the jury may legitimately draw a certain inference from a certain fact. (2) If the document is the subject of a *privilege*, the inference is not available. This much may be here assumed, because the nature of a privilege is usually held to be incompatible with the allowance of an inference from exercising the privilege. It is true that, while at common law the privilege of an opponent in a civil case to withhold his documents was fully recognized (*post*, § 2219), nevertheless during all that time the courts permitted an inference to be drawn against the opponent refusing to produce.[3] But, since the general abolition of the privilege of a civil party, the propriety of such a ruling is removed from practical importance, and in the privileges that continue to exist the doctrine of the incompatibility of the privilege with an inference from its exercise is generally conceded.[4] (3) If a failure to produce on one's own behalf is the fact in question, it is at least necessary (under the general principle, *ante*, § 286), that the document be in the party's *power to produce;* and if a refusal to produce on behalf of the opponent is the fact relied upon, it is at least necessary that a *demand or notice* by the opponent should have been made, because otherwise it does not appear that the party was not willing to produce.[5] (4) Upon the same general principle, namely, that the inference can arise only where the document was one that could have been used if produced, it is obvious that the inference is not available from mere non-production where the *document* would have been *inadmissible* on the possessor's or the demandant's behalf or is declared by the Court to be unnecessary or useless.[6] These plain postulates being removed from consideration, the real field for controversy remains, namely, (*a*) whether the inference alone will *suffice* as evidence of the *contents of the document* in question, and (*b*) whether there is in this respect any difference between *spoliation* or destruction and mere *refusal* or failure to produce.

(*a*) First, then, we meet with a strong current of authority which disfavors the sufficiency of the inference as of itself evidence of the contents. This view is carefully stated in the following passage:[7]

1806, Mr. *W. D. Evans*, Notes to *Pothier*, II, 145: "What is said [by Lord Mansfield][8] respecting leaving the refusal as a presumption to the jury should be received with considerable qualification; for it cannot be admitted that such a presumption should

[3] All the cases cited *supra*, before the middle of the 1800s, illustrate this.

[4] For the privilege against *self-crimination*, see *post*, §§ 2264, 2273; the privilege against *anti-marital testimony*, see *post*, §§ 2233, 2243; the privilege against *marital communications*, see *post*, §§ 2337, 2340; the privilege against *communications between attorney and client*, see *post*, §§ 2307, 2322.

[5] As in Emerson *v.* Fisk, Me. The rules for the time and form of notice would naturally be the same as those for the notice which permits the non-possessor to use secondary evidence (*post*, §§ 1202–1210).

[6] As in Merwin *v.* Ward, Conn.; Carter *v.* Lumber Co., Ill.; Martin Brown Co. *v.* Perrill, Tex.; compare also Davis *v.* Alston, Ga.; Law *v.* Woodruff, Ill. Compare the rule as to inference from *unanswered letters* (*post*, § 1073).

[7] It is less lucidly stated in Hanson *v.* Eustace, U. S., *supra*, note.

[8] In Roe *v.* Harvey, *supra*, note 1.

stand instead of all other evidence and supply the total deficiency of proof. It is only in weighing the effect and substance of evidence in its nature adequate to the support of a fact in question that the jury can take into consideration the opportunity allowed to the opposite side of contradicting the evidence if false, or of destroying the inference from it if erroneous, and thereby conclude that evidence otherwise suspicious is true, or that an inference otherwise slight and feeble is correct."

But, after all, why is any additional evidence required as a matter of law? All that is asked is that the jury be allowed to make the inference if they are in truth convinced to that effect. What hardship or unfairness is involved to the possessor of the document? He has deliberately failed to show, by production, that which it was in his power to show, and he has by hypothesis given no other fact in explanation than the apparent one, namely, that he is afraid to submit the document to the tribunal's inspection. If there were any risk of the inference being too strong, would he not immediately make production? And does not his failure to do so indicate that the production would, in his belief, be more damaging to him than any inferences which the tribunal may make for lack of the document itself? Add to this that no one who withholds evidence can be in any sense a fit object of clemency or protection. The truth is that there is no reason why the utmost inference logically possible should not be allowable, namely, that the contents of the document (when desired by the opponent), are what he alleges them to be, or (when naturally a part of the possessor's case), are not what he alleges them to be. The existence of a contrary view seems to be due chiefly to two distinct influences. One of these is the general tendency at common law to regard litigation as a sport of high quality, and to concede to the parties the right to hamper and obstruct their opponents, so far as may be, by the retention of such casual advantages (including the possession of documents) as chance has placed in their hands at the outset. This spirit has been totally discountenanced at the present day by the statutes which almost universally have given the power of forcing an opponent to disclose beforehand his documentary evidence, and have thus radically condemned the gaming theory of the British common law (*post*, §§ 1847, 1859). The other influence is due to a half-conscious recognition of a logical requirement which must be kept in mind and yet does not properly affect the general principle. For example, when A desires to prove his title by a deed from X to Y, describing the land he claims, and upon B's failure to produce it, A shows that B has burned a deed from X to Y and argues that the deed be taken to read as he alleges, and B maintains that the burned deed, though from X to Y, concerned a piece of land totally different from the land in controversy, it is obvious that A has not yet made out a case ripe for inference; he is arguing from the supposed fact that B has destroyed the deed that A wants, but it does not yet appear that the destroyed deed *was* the one which A wants. In the words of an eminent judge, "the act of a spoiler [*i. e.* of a desired document] is in its nature equipollent to a confession; but before he can be fixed with the character of a spoiler, the purport of the paper must be proved to

have been what it is surmised to have been."[9] In short, we must at least avoid the fallacy of begging the question. Thus, when B denies the identity of the document spoliated or the identity of the document failed to be produced, no inference can be drawn until the jury find the fact against B's denial, and obviously this cannot be done until some evidence of this identity has been introduced by A. It is this consideration of caution, this logical requirement, which seems to account partly for the rule as laid down by some Courts that some evidence of the contents of the document must be introduced as a preliminary to the use of the inference.[10] Keeping in mind, then, the object of the requirement, the rule might correctly be stated as follows: The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor, *provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one* as to whose contents it is desired to draw an inference. In applying this rule, care should be taken not to require anything like specific details of contents, but merely such evidence as goes to general marks of identity.

(*b*) In answering the preceding question, the second one has also been answered. There is no distinction, in the present connection, between spoliation and non-production. If the latter admits of the inference, certainly the former does also. But so far as spoliation or suppression partakes of the nature of a fraud, it is open to the larger inference already examined (*ante*, § 278), namely, a consciousness of the weakness of the whole case. In that respect it differs, of course, from a mere withholding of the document. It is in respect of an inference to the contents of the document that there is no difference between the two acts.

Certain discriminations of other principles remain to be noticed. (1) The failure to produce a certain kind of document sometimes affords an inference of the *document's non-existence*,[11] and in various classes of cases a statutory rule of this sort has been created.[12] These rules, however, seem after all to be no more than an indirect method of placing upon the defendant in a criminal case the burden of producing evidence (*post*, § 2511); for while leaving on the prosecution the burden of proving that the defendant has not a license or certificate (as the case may be), the fact of his failure to produce one is made sufficient evidence of non-possession, *i. e.* in effect he must prove that he has it and this proof he must make by production. Had the burden fallen originally on the defendant of pleading and proving his license (as it natu-

[9] 1837, McReynolds *v.* McCord, 6 Watts 288, 290 (the opponent had destroyed a paper obtained from the plaintiff's witness).

[10] The question cannot usually arise for a refusal to produce; for a refusal is usually made upon a specific demand and thus the identity of the document is likely to be apparent.

[11] 1845, State *v.* Simons, 17 N. H. 83, 88 (illegal liquor-selling; non-possession of a license inferable from non-production of it).

[12] There are probably scores of such statutes, all told; the following are examples: Mass. St. 1894, c. 508, § 67 (failure to produce certificate of minor's proper age for employment, evidence of illegal employment); N. Y. Laws 1896, c. 376, § 62 (refusal to produce peddler's license on demand, evidence of non-possession).

rally would have fallen), such statutes would not have been necessary. (2) Whether the non-production of a *self-criminating document* may be the subject of an inference is considered under the head of the privilege against self-crimination (*post*, § 2264). (3) The opponent's refusal to produce may serve as a ground for permitting the use of a *copy or other secondary evidence*, under other rules (*post*, §§ 1199–1210). (4) The effect of spoliation as evidence, not merely of the contents, but also of the *due execution* of the document, is more conveniently noticed elsewhere (*post*, § 2132).

§ 292. **Silence, as equivalent to an Admission.** Silence, when the assertion of another person would naturally call for a dissent if it were untrue, may be equivalent to an assent to the assertion. This, however, fixes the party, by adoption, with the other person's assertion, and thus it ceases to be a question of conduct-evidence, and involves a genuine admission in express words. For that reason it is dealt with under the head of Admissions (*post*, §§ 1071–1072).

§ 293. **Conduct, as evidence of Consciousness of Innocence (Accused's Voluntary Surrender, Refusal to Escape, Demeanor, etc.).** If guilt leaves the psychological mark which we term "consciousness of guilt," and if this is available as evidence (*ante*, § 273), then the absence of that mark (which for want of a better term may be spoken of as "consciousness of innocence") is some indication of the absence of guilt, *i. e.* of not having done the deed charged. No Court seems to repudiate this proposition (*ante*, § 174); but the tendency to reject evidence of a consciousness of innocence is rather due to a distrust of the inference from conduct to that consciousness, since the conduct is often feigned and artificial. Such distrust, however, seems improper. Certainly in the inferences of ordinary life we attach as much weight to that inference as to the inference of consciousness of guilt; the bearing of one accused person as consciously innocent impresses us no less strikingly than the bearing of another as consciously guilty. Moreover, it is judicially conceded (as noticed *ante*, § 273) that the inference of consciousness of guilt is a highly dubious one, and that the evidence is never to be emphasized or treated as of much value. If this be so, why should we strain a doubt to admit a dubious inference against the accused, and yet refuse to admit in his favor a scarcely more dubious one? Such an attitude is wholly inconsistent with itself and is out of harmony with the spirit of our law. Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations. With singular perversity, however, a majority of the Courts profess to refuse to allow conduct to be considered for the purpose of drawing an inference of consciousness of innocence; but one con-

sequence of this is the frequent occurrence of inconsistent rulings by the same Court.[1]

[1] *Eng.:* 1679, Green's Trial, 7 How. St. Tr. 159, 207 (Witness: "It was a good evidence of his innocency that, when he had notice of it, he did not fly. . . . All that I say is, if flight be a sign of guilt, as no doubt it is — 'Adam, *ubi es?*' — and courageousness is a sign of innocency, then this man is innocent"); 1758, Barnard's Trial, 19 id. 833 (charge of sending threatening letters to the Duke of Marlborough; the letters twice made appointments for the Duke to come and pay the blackmail, at Kensington and at Westminster Abbey; he went, and on both occasions found the defendant passing, but, on accosting him, was answered that he knew not what the Duke meant; the defendant, a respectable bridge-builder, admitted his presence on those occasions, but denied all knowledge of the letters, and was allowed to prove, by his family and others, his public and frequent expression of surprise that the Duke should accost him in that singular way); *Ala.:* 1850, Oliver *v.* State, 17 Ala. 587, 595 (that the accused went to town to surrender himself, but was persuaded not to do it till he had obtained bailmen, inadmissible; except under § 281, *ante*, to explain away flight); 1853, Campbell *v.* State, 23 id. 44, 79 ("the prisoner could no more make his appearance or conduct evidence than he could his declarations or admissions"; excluding evidence that "he appeared surprised on being informed of the murder"); 1867, Hall *v.* State, 40 id. 698, 700, 706 ("conduct and statements," excluded, for the same reason); 1872, Birdsong *v.* State, 47 id. 68, 71, 77 (like Oliver *v.* State); 1886, Jordan *v.* State, 81 id. 20, 23, 31, 1 So. 577 (refusal to escape, excluded; it would be "to allow him to make evidence for himself"); 1895, Henry *v.* State, 107 id. 22, 19 So. 23 (demeanor excluded; same reason); 1896, Dorsey *v.* State, 110 id. 38, 20 So. 450 (going voluntarily to the police-station, after hearing of the charge, excluded); White *v.* State, 111 id. 92, 21 So. 330 (immediate surrender to the police, admitted); 1901, Vaughn *v.* State, 130 id. 18, 30 So. 669 (defendant's voluntary surrender, excluded); *Cal.:* 1879, People *v.* Montgomery, 53 Cal. 576 (refusal to escape when able, excluded); 1896, People *v.* Shaw, 111 id. 171, 43 Pac. 598 (voluntary surrender, excluded); *Ga.:* 1860, Pinkard *v.* State, 30 Ga. 759 (putting an officer on the track of the real criminal, admitted); 1895, Boston *v.* State, 94 id. 590, 21 S. E. 603 (voluntary surrender, admitted); 1897, Kennedy *v.* State, 101 id. 559, 28 S. E. 979 (failure to escape from jail, excluded); *Kan.:* 1868, Lewis *v.* State, 4 Kan. 309 (failure to accept an opportunity to escape when others did, admitted; then explained away by the fact that the accused was ill); *Mass.:* 1861, Com. *v.* Hersey, 2 All. 173, 177 (refusal to escape, excluded); *Mich.:* 1860, Dillin *v.* People, 8 Mich. 357, 367 (subsequent mental condition or utterances, not admissible, except as part of the *res gestæ* or as explaining away facts introduced by the prosecution; here admitted for the latter purpose, by the majority); *Mo.:* 1890, State *v.* Musick, 101 Mo. 260, 274, 14 S. W. 212 (voluntary surrender, excluded); 1892, State *v.* Smith, 114 id. 406, 424, 21 S. W. 827 (same); 1900, State *v.* Strong, 153 id. 548, 55 S. W. 78 (that defendant went for a physician after the stabbing, excluded); 1899, State *v.* McLaughlin, 149 id. 19, 50 S. W. 315 (voluntary surrender, excluded); *N. Y.:* 1839, People *v.* Rathbun, 21 Wend. 509, 519 (refusal to escape, excluded); *N. C.:* 1903, State *v.* Wilcox, — N. C. —, 44 S. E. 625 (refusal to escape, excluded; Connor, J., doubting); *S. C.:* 1852, State *v.* Valgneur, 5 Rich. L. 391, 403 ("the conduct of the accused, whether before or after he is charged . . . is a source of evidence, sometimes for him as well as the prosecution"); *W. Va.:* 1903, State *v.* Bickle, — W. Va. —, 45 S. E. 917 (failure to escape from jail, when he might have done so, excluded). Compare the citations *post*, §§ 1144, 1732, 1765, 1781, concerning the admissibility of an accused's *protestations of innocence* or other explanatory statements; and of an accused's expressions of loyalty in *sedition* cases, *post*, § 367.

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION.

TOPIC VII. OTHER OFFENCES OR SIMILAR ACTS, AS EVIDENCE OF KNOWLEDGE, DESIGN, OR INTENT.

CHAPTER XII.

1. General Principles.

§ 300. **Discrimination between Various Principles.** In the two foregoing Chapters have been examined the principles upon which Knowledge, Intent, and Design may be evidenced. It remains to examine here the admissibility of similar offences or acts (*i. e.* similar to the one charged) offered for the purpose of showing such a Knowledge, Intent, or Design. Since the conditions may differ under which the same conduct will evidence one or another of these propositions, it is essential to compare the respective conditions before determining what test to apply to the offered evidence. Practically, the difference of theory may be important; for if these conditions are less stringent for one purpose than for another, and if the one purpose is by the nature of the issue a proper one, while the other is not, all will depend on the precise purpose involved and the requirements appropriate to it.

It is worth while at this point to re-state briefly the distinction between Knowledge, Intent, and Design. (1) *Knowledge* signifies a being aware (*ante*, § 244); and, in the usual case of the present sort, this knowledge has to refer to the nature of a thing used in the alleged crime. Even where the doing of the act involved is not disputed, a knowledge existing at the time of the act may be in dispute. Thus, proof of knowledge becomes a usual necessity for certain offences, such as the uttering of forged or counterfeit paper and the possession of stolen goods; while it is rarely an element to be proved in other offences, such as robbery, rape, and homicide. (2) *Intent* involves often nothing more than knowledge or hostile feeling; or, what is practically not very different, if knowledge or hostile feeling (malice) can be shown specifically, there may be inferred immediately the criminal intent, without further evidence. But Intent more frequently signifies (*ante*, § 242) merely the absence of accident, inadvertence, or casualty, — a varying state of mind which is the contrary of an innocent state of mind, whatever may be pointed out by the nature of the crime as an innocent state of mind. Thus, in homicide the criminal intent may signify the absence of good faith as to self-defence or the absence of inadvertence; in assault with intent to rape, the criminal intent is a design to rape, instead of any other design; in embezzlement, the criminal intent is a will to hold the money unlawfully, as distinguished from a will to hold it for the owner or from a merely inadvertent possession. This element, then, of Intent — simple in its generality, yet changeable — is a different thing from Knowledge. In a given offence — as

in uttering counterfeit money — the proof of Knowledge may practically affect the proof of Intent; but in such a case the evidence is directed specifically to show Knowledge and is governed by the rules appropriate to that subject. But if the issue does not involve specifically the element of Knowledge, then the rules about evidencing Knowledge have no application. In short, Intent may sometimes be indirectly got at by proving Knowledge; but this is not necessary nor is it (for most kinds of offences) usual; and since in any case Intent may be conceived of apart from Knowledge, the mode of proving Intent is a problem distinct from that of proving Knowledge, even where the latter is also concurrently available. (3) *Design*. The peculiarity of Intent, as a *factum probandum*, is that an act is assumed as done by the defendant, and the issue is as to the kind of state of mind accompanying it. Design or Plan, however (with reference to present bearings), is not a part of the issue, an element of the criminal fact charged, but is the preceding mental condition which evidentially points forward to the doing of the act designed or planned (*ante*, §§ 237, 242). Thus, the peculiarity of Design is that the act is not assumed to be proved, and the design is used evidentially to show its probable commission. It is obvious that something more definite and positive is here involved than in the case of Intent. In proving Intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it. In proving Design, the act is still undetermined, and the proof is of a working plan, operating towards the future with such force as to render probable both the act and the accompanying state of mind. The Intent is a mere appendage of the act; the Design is a force producing the act as a result.

§ 301. **Theory of evidencing Knowledge.** In resorting to former offences or other similar acts to show Knowledge, it is sufficient to invoke the general principles of proving Knowledge, as already set forth. It may perhaps be practicable to employ acts of conduct as exhibiting *a posteriori* the inward state of mind (according to the principle of § 265, *ante*), — as when a person, finding his counterfeit coin closely examined by his vendor, attempts to run away. But such a case presents no problem of the present sort. The problem now to be dealt with — the use of evidence of former offences — involves the other general mode of showing knowledge, namely, the use of external circumstances likely *a priori* to have produced Knowledge. It has been seen (*ante*, § 245) that this mode of proof rests on the following process of thought. When fact X is used to show a person's knowledge of fact A, it is assumed (a) that through fact X there probably was received an impression by the person; and (b) that this impression would probably result in notice or warning of fact A. Thus, (a) a prior injury to an employee by a machine would probably have come to the employer's notice in some way, and (b) the notice of the accident would probably reveal to him the defect in the machine. These two elements may not both be doubtful in a given case, but they are always impliedly present if the inference is to have any validity. Apply this to the class of cases we

are now concerned with. Suppose A's knowledge of the poisonous nature of a substance X is to be shown; suppose the fact offered that he once gave it to a sick dog and that the dog died; if we are to base an inference of probable knowledge upon this, it is because we believe it probable (a) that the dog's death came to his notice, and (b) that the fact of the death would suggest to him that it was the substance X and not the illness that caused the dog's death. Again, suppose A's knowledge of the counterfeit nature of a certain silver dollar is to be shown; suppose the fact offered that he twice passed counterfeit ten-dollar bank-notes; if we are to base on this an inference of probable knowledge, it is because we believe it probable (a) that in the course of using the bank-notes, at one time or another up to their final disposal, some one probably doubted to him their genuineness, and (b) that a doubt as to the genuineness of the bank-notes would probably suggest a doubt as to the genuineness of the silver dollar. Again, if A's knowledge of the stolen character of a bar of iron is to be shown, and the fact is offered that he has also received and possessed a stolen bicycle, then our inference must assume (a) that A's receipt of the bicycle was under such circumstances as to suggest its vendor or pledgor to be a thief, or as to result in a reclamation by the owner and a warning to the defendant; so that (b) when the bar of iron was offered to A, by the same or another vendor or pledgor, the circumstances were such that the former transaction would naturally suggest that this bar of iron also was stolen.

Such, then, is the strict and legitimate scope of evidence of other similar acts to show Knowledge. The process of thought is: The other act must probably have resulted in some sort of warning or knowledge; this warning or knowledge must probably have led to the knowledge in question. There may occasionally be a logical short-cut or a condensation of this process — as where A at a former attempt to pass the same counterfeit bill, was expressly told that it was counterfeit —; but such cases cause no difficulty; and the difficulty that does arise can always be accounted for by a doubt as to one or the other of the above two elements. The principle is clearly enough seen in its application in the detailed rules of the ensuing sections; but it has also been expounded, more or less incompletely, in various judicial utterances:

1846, *Maule*, J., in *R.* v. *Dossett*, 2 C. & K. 307: "If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was because he had administered it to another person who had died."

1849, *Cresswell*, J., in *R.* v. *Cooper*, 3 Cox Cr. 547 (false charge of indecent conduct towards S. with the intent of extorting money, evidence of a previous obtaining of money by such means was offered): "If the prisoner is proved to have stated on other occasions that he had obtained money by the same means that are stated to have been used in this case, is it not a fair inference to make to the jury that his object was to obtain money here?" Serjt. *Ballantine*, for the defendant: ". . . That does not show that he had an intention to obtain money at this particular time. . . . Suppose the charge was breaking into a house with intent to steal; the fact of his having broken into the

house before would show that he knew how the offence was to be accomplished, but it could not be adduced to show what his intention was on the second occasion; and this shows the difference between proof of knowledge and that of intention." *Cresswell, J.*: "The question is whether on this occasion he did an act with the design of effecting a certain object. One step in the proof would be to show that he would be likely to know that a certain result would follow; and if it can be proved out of his own mouth that he was aware that such a result would be produced, it is one ingredient in the necessary proof that he contemplated it. Suppose a charge against a man that he attempted to procure abortion; the same medicine might be administered with that intention or without it; if it could be shown that he had often given that medicine before and that he knew that abortion had always followed, surely that would be evidence against him. Or if, on a charge of wounding, a certain instrument had been used by the prisoner with a dangerous result, would not that be admissible to show that he knew the consequences of using it?"[1]

§ 302. **Theory of evidencing Intent.** To prove Intent, as a generic notion of criminal volition or wilfulness, including the various non-innocent mental states accompanying different criminal acts, there is employed an entirely different process of thought. The argument here is purely from the point of view of the doctrine of chances, — the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (*i. e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (*i. e.* discharge towards the same

[1] Other passages are as follows: 1882, Devens, J., in Com. *v.* Jackson, 132 Mass. 18 ("It is the knowledge which it may be inferred he must have derived from other transactions . . . that makes the evidence admissible as affording just ground for inference against him as to intent in the matter under examination"); 1811, Mitchell, C. J., in State *v.* Smith, 5 Day 175, 178 ("It is lawful to prove that the prisoner attempted to utter the note at different times and places where it had been suspected and challenged as false"); 1832, U. S. *v.* Roudenbush, 1 Baldw. 514 (the Court admits the uttering of other notes "if their general resemblance to the one laid in the indictment is such that a person who knows the one to be a counterfeit could not reasonably believe the others were genuine"; and excludes them if they are "so unlike in appearance that an honest man might think one good though the other was known to be bad"); 1873, Allen, J., in Coleman *v.* People, 55 N. Y. 81, 90 (referring to evidence of former receipt of stolen goods: "There must be such a connection of circumstances that a natural inference may be drawn that, if the prisoner knew one article was stolen, he would also be chargeable with knowledge that another was").

object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, *i. e.* a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defence or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, *i. e.* criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offence according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent. The general canon of logical inference already examined (*ante*, §§ 31, 32) is here applied and illustrated.

Such is the theory of evidencing Intent, as expounded, in various phrasings and for all sorts of offences, in repeated judicial utterances:

1848, Mr. *Holmes*, arguing in *R.* v. *Mitchel*, 6 State Tr. N. s. 599, 632 (challenging an array as not selected by the sheriff with impartial intent, and offering to show a disproportion between the Catholics and Protestants qualified and those actually summoned; the contention being approved by the Court): "We don't put it on the ground of religion. If a man were playing hazard, if all is fair and the dice are not loaded, there can be no honester game; but if one man always throws 'crabs,' as it is called, while the other always throws in his own favor, the presumption is that the dice are loaded. So in this case there is strong evidence that all is not right. If the natural result of the proportionate number of those qualified to be placed on the panel should be that there would be on it two Catholics to one Protestant, and that we find that, so far from that being the case, there are of Protestants five to one on the panel, is it not the natural presumption that there has not been fair dealing in the construction of the panel?"

1874, *Coleridge*, C. J., in *R.* v. *Francis*, L. R. 2 C. C. R. 128: "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether at the time he did it he had a guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so oftener than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last."

1878, *Grove*, J., in *Blake* v. *Assurance Co.*, L. R. 4 C. P. D. 94, 98: "When the question is whether an act was or was not fraudulent, acts of a similar kind are given in evidence to show intention. I remember in a housebreaking case in which I was counsel, a man was found under suspicious circumstances in a bedroom; it was set up that he was there courting the servant; to show a guilty intention, Erle, C. J., admitted evidence of the fact that he was seen in the house a week before under circumstances equally suspicious and which rebutted the idea that he was there for the purpose of courting. . . . To take the common instance of fraud committed by means of begging letters. If a single letter to one individual only were proved, the evidence would probably be insufficient for a conviction; but the particular transaction is shown to be a guilty one by proving that the person charged has done the same thing twenty times before, and that in each case he has told false stories and given fictitious names. Then is there any rule of law to exclude this evidence? I am of opinion that there is not. Where the act itself does not *per se*

show its nature, the law permits other acts to be given in evidence for the purpose of showing the nature of the particular act; as, for instance, in cases of uttering counterfeit coin, even in some cases of murder, and generally wherever it is necessary to show the intent with which the act was done. . . . [So in this case] if you show similar shams, carried out under the same false name, and that the defendants are the people who put the money in their pocket in each case, the difficulty arising from any possibility of mistake in the case is removed, and the jury may reasonably be called upon to infer that the defendants intended to pocket the money of the plaintiff in the particular case."

1840, *Story*, J., in *Bottomley* v. *U. S.*, 1 Story 135 (to show defendant's fraudulent intent in undervaluations of imports, other instances were offered): "It appears to me clearly admissible upon the general doctrine of evidence in cases of conspiracy and fraud, where other acts in furtherance of the same general fraudulent design are admissible, first, to establish the fact that there is such a conspiracy and fraud; and, secondly, to repel the suggestion that the acts might be fairly attributed to accident, mistake, or innocent rashness or negligence. In most cases of conspiracy and fraud, the question of intent or purpose or design in the act done, whether innocent or illegal, whether honest or fraudulent, rarely admits of direct and positive proof; but it is to be deduced from various circumstances of more or less stringency and often occurring, not merely between the same parties, but between the party charged with the conspiracy or fraud and third persons. And in all cases where the guilt of the party depends upon the intent, purpose, or design with which the act was done, or upon his guilty knowledge thereof, I understand it to be a general rule that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge. . . . [After illustrating by the doctrines about counterfeit money, stolen goods, etc.] In short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence."

1876, Mr. *Clark*, Attorney-General, arguing, in *State* v. *Lapage*, 57 N. H. 245, 261 (the argument being approved by the Court): "Suppose the defendant were tried for breaking and entering the store at the north end of Elm Street in Manchester — the most northern of all the stores on that street — with intent to steal; suppose it were proved that he broke and entered that store; that he was arrested as soon as he entered it, and the only question were whether he intended to steal; suppose there were one hundred other stores on that street, and he had broken and entered every one of them, and stolen something in every one of them, beginning at the south end of the street and taking the stores in succession, on his burglarious march from one end of the street to the other; suppose he did all this in one night, and was completing his night's work when arrested; on the question of his intent in entering the one hundred and first store, would any one think of objecting to evidence of his one hundred larcenies in the other one hundred stores? His robbing one hundred stores would tend to show that he intended to rob the one hundred and first, just as his passing counterfeit money in the one hundred would tend to show that he intended to pass counterfeit money found in his possession in the one hundred and first. There would be no difference between his presence in the one hundred and first store, and his having counterfeit money in his pocket in that store, that would, on the question of intent, affect the admissibility of the evidence of what he had done in the other hundred stores. Suppose, instead of robbing stores, he had robbed persons, going from one end of the street to the other, and knocking down and robbing one hundred men, one after the other, and not touching a single woman; suppose when he had knocked down the one hundred and first man, and before he had had time to rob him, he had been arrested, and the question were whether he intended to rob him, — whether his last offence were an attempt to rob, or a mere assault, or an assault with intent to kill; would anybody suppose his robbing the other hundred men, after he knocked them down, was no evidence of the intent with which he knocked down number one hundred and one? Suppose the one hundred and one persons whom he assaulted were women; suppose he

touched no man; suppose he had unsuccessfully attempted to ravish one hundred of them, and were arrested at the instant of his knocking down the one hundred and first, and the question were whether his last assault were a mere assault, or an assault with intent to commit a robbery, or an assault with intent to commit a rape; suppose the last woman assaulted should die of her injuries, and the defendant were indicted for her murder; . . . how would you expect, if you were the prosecuting officers, to find any better evidence of the defendant's intent than his attempts upon the other one hundred women? . . . If a ship master lands in Congo, obtains a cargo of blacks, and carries them to Cuba, and four years and four months afterwards he is found at another place on the African coast, as far from Congo as Pembroke Academy is from St. Beatrice, with a hundred blacks in his possession, — would anybody think that his proved intent on the former occasion had, as a matter of fact, no tendency to show what he intended to do on the latter occasion? . . . No man on earth would refuse to hear it, or to consider it, unless he were bound by some arbitrary and irrational rule overriding his understanding, and dictating a course at war with his common sense. . . . It is the spontaneous and irreversible judgment of every grade of intellect that has appeared, or is likely to appear, in this state of existence. It is an involuntary and unavoidable perception of the inherent and self-evident relations of conduct and intention; a mental revelation as natural as memory, and as trustworthy and unanswerable as consciousness."

1876, *Cushing*, C. J., in *State* v. *Lapage*, 57 N. H. 245, 291: "Another class of cases consists of those in which it becomes necessary to show that the act for which the prisoner was indicted was not accidental, — *e. g.* where the prisoner had shot the same person twice within a short time, or where the same person had fired a rick of grain twice, or where several deaths by poison had taken place in the same family, or where children of the same mother had mysteriously died. In such cases it might well happen that a man should shoot another accidentally, but that he should do it twice within a short time would be very unlikely. So, it might easily happen that a man using a gun might fire a rick of barley once by accident, but that he should do it several times in succession would be very improbable. So, a person might die of accidental poisoning, but that several persons should so die in the same family at different times would be very unlikely. So, that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents. So, in the case of embezzlement effected by means of false entries, a single false entry might be accidentally made; but the probability of accident would diminish at least as fast as the instances increased."

1896, *Taft*, J., in *Penn M. L. Ins. Co.* v. *M. L. B. & T. Co.*, 19 C. C. A. 286, 72 Fed. 422: "It is a well established rule of evidence that, where the issue is the fraud or innocence of one in doing an act having the effect to mislead another, it is relevant to show other similar acts of the same person having the same effect to mislead, at or about the same time, or connected with the same general subject-matter. The legal relevancy of such evidence is based on logical principles. It certainly diminishes the possibility that an innocent mistake was made in an untrue and misleading statement, to show similar but different misleading statements of the same person about the same matter, because it is less probable that one would make innocent mistakes of a false and misleading character in repeated instances than in one instance."

It will be seen that the peculiar feature of this process of proof is that the *act itself is assumed to be done*, — either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent. This explains what is a marked feature in the rulings of the Courts, namely, a disinclination to insist on any feature of common

purpose or general scheme as a necessary requirement for the other acts evidentially used. It is not here necessary to look for a general scheme or to discover a united system in all the acts; the attempt is merely to discover the intent accompanying the act in question; and the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent. The argument is based purely on the doctrine of chances, and it is the mere repetition of instances, and not their system or scheme, that satisfies our logical demand.

Yet, in order to satisfy this demand, it is at least necessary that prior acts should be *similar*. Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the similarity of the instance. Suppose the blowing up of an American warship in Havana Harbor to be in question; the blowing up of various ships of various other nations in the preceding fifty years would have no significance as to the accidental nature of the occurrence (except to show that such an accident is possible); the blowing up of an American warship in the preceding year in Algiers would have scarcely more significance; but the blowing up of an American warship in the same year in Cadiz or in the same harbor of Havana would have striking significance. So, where the intent of an erroneous addition in a bookkeeper's accounts is in issue, the erroneous addition of a bill rendered to a former employer ten years before would have no significance, because it is still within the limits of ordinary casual error that such things should occur at intervals; but several other erroneous additions in the bookkeeper's own favor in the same year and the same book of accounts go to exclude the explanation of casual error, and leave deliberate intent as the more probable explanation. In short, there must be a similarity in the various instances in order to give them probative value,—as indeed the general logical canon requires (*ante*, § 33).

It is just this requirement of similarity which leaves so much room for difference of opinion and accounts for the bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction and in cases of the same offence. Some judges incline to treat the judicial test of probative value as identical with the common-sense test, and to admit such instances as bear a similarity liberally interpreted by the standard of every-day reasoning. Other judges set their faces firmly against every instance which is not on all fours with the offence in issue, regardless of the consideration that justice consists quite as much in protecting the public against evil doers as in showing mercy to those whose guilt has been more or less skilfully concealed. It is hopeless to attempt to reconcile the precedents under the various heads; for too much depends on the tendency of the Court in dealing with a flexible principle. One Court will be certain to exclude everything that is not too clearly probative for even technical quibblers to oppose, and sometimes will exclude even that. Another Court will accept whatever has real probative value. Something, however, may perhaps be gained by realizing, as to the

former, that it is not the law, nor precedent, nor principle, nor policy, that will account for such rulings, but merely a rooted inclination to take the stricter view and a preference to err in favor of criminals and against innocent victims.

§ 303. **Same: Anonymous Intent.** It will be seen that the strength of the foregoing kind of inference does not rest exclusively on a given person's connection with the prior injurious transactions. It is possible to negative accident or inadvertence, and to infer deliberate human intent, without forming any conclusion as to the personality of the doer. Thus, if A's cellar-window is found broken, and the pieces falling inside, one morning after a high wind, he may well assume the probability that the force of the wind blew the glass in; but if on the next morning and the next he again finds a window broken in the same way, though no high wind prevailed the night before, he gives up the hypothesis of the force of the wind as the explanation, and concludes that a deliberate human effort was the highly probable cause of the breakage, although he can form no notion whatever of the personality of the doer. It is thus clear that innocent intent — accident, inadvertence, or the like — may be negatived by *anonymous instances* of the previous occurrence of the same or a similar thing. After assuming or proving the defendant's connection with the deed charged, then, to negative innocent intent, resort is had to the anonymous instances; and they may have equal force for that purpose, whether they are connected with the defendant or not. This mode of proof is not infrequently resorted to; and the following passage illustrates its judicial sanction:

1847, *Pollock*, C. B., in *R.* v. *Bailey*, 2 Cox Cr. 311 (arson; the fire had originated near the kitchen, where the accused stayed as servant; evidence was offered of two fires occurring shortly before in the prosecutor's shop and warehouse attached, though no connection of the prisoner or any one else with these was shown): "I think this is clearly evidence, and may be used at all events for the purpose of showing that the present fire which was the third on the same premises within so short a time, could not have been the result of accident. Surely, if a man finds certain mysterious circumstances to arise day after day in his establishment, he is at liberty to refer to them, if only for the purpose of showing that they could not have had their origin in accident and that a repetition of them could only lead to the conclusion that they resulted from malice and design. This course of evidence is not without precedent and authority, moreover; for on the trial of Donellan for the murder of Sir Theodosius Broughton by administering him some poison, evidence was given that a certain tree, which hung over a deep and dangerous brook near a spot where Sir Theodosius was accustomed to fish, had been sawn almost in two by some unknown person. This was proved to show that some one entertained a design against the life of Sir Theodosius, for he was accustomed to stand on that tree while engaged in fishing; and the natural presumption was that whoever cut the tree did so with the design of precipitating the deceased into the water. Those facts were given in evidence on the trial of Donellan for murdering Sir Theodosius afterwards, and were received, though quite unconnected with the prisoner, in order to show that some one entertained a design on his life and that the probability was that he had not come to a natural death."

The only limitation upon this mode of proof is that the defendant's doing of the act in issue must be shown by other evidence at some stage of the trial;

and the anonymous instances should not be received until the trial Court is satisfied with the amount of evidence introduced or pledged for showing that connection.

§ 304. **Theory of evidencing Design or System.** When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's Design or Plan to do it (*ante*, § 102). This in turn may be evidenced by conduct of sundry sorts (*ante*, § 234) as well as by direct assertions of the design (*post*, § 1725). But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similarity, which suffices for evidencing Intent (*ante*, § 302). The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a pre-existing design, system, plan, or scheme, directed forwards to the doing of that act. In the former case (of Intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the doing of the act charged as a part of its consummation. In the former case, the result is to give a complexion to a conceded act, and ends with that; in the present case, the result is to show (by probability) a positive design which in its turn is to evidence (by probability) the doing of the act designed. The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.* Thus, where the act of passing counterfeit money is conceded, and the intent alone is in issue, the fact of two previous utterings in the same month might well tend to negative innocent intent; but where the very act of uttering is disputed — as, where the defendant claims that his identity has been mistaken —, and the object is to show that he had a general system or plan of working off a quantity of counterfeit money and did carry it out in this instance, the fact of two previous utterings may be in itself of trifling and inadequate significance. So, on a charge of assault with intent to rape, where the intent alone is disputed, a prior assault on the previous day upon the same woman, or even upon another member of her family, might have probative value; but if the assault itself is disputed, and the defendant attempts, for example, to show an *alibi*, the same facts might be of little or no value, and it might be necessary to go further and to show (for example) that the defendant on the same day, with a confederate guarding the house, assaulted other women in the same family who escaped, leaving the complainant as the only woman accessible to him for his purpose. This requirement of common features for the various acts pointing to a common plan or system as their natural explanation has been set forth by the judges in varying phrases:

1878, *Lindley*, J., in *Blake* v. *Assurance Co.*, L. R. 4 C. P. D. 94, 106: "I agree that in order to prove that A has committed a fraud on B, it is neither sufficient nor even relevant to prove that A committed fraud upon C, D, and E. Stopping there, I admit

that proposition. But let it be shown that the fraud on B is one of a class of other transactions having common features, then I disagree altogether with that proposition. . . . The answer to the objection that evidence of frauds on other persons cannot be admitted is that this transaction is one of a class, that there are features in common, the features in common being a false pretence and a knowledge of that false pretence on the part of the defendant company; and the moment that is shown the plaintiff's case is established."

1858, *Smith*, J., in *People* v. *Stout*, 4 Park. Cr. 127: "When several felonies are connected together as parts of one scheme or plot, like the different acts in a drama, and all tend to a common end, then they may be given in evidence to show the process of motive and design in the final crime."

1888, *C. Allen*, J., in *Com.* v. *Robinson*, 146 Mass. 571, 17 N. E. 452: "[In the case of] acts or crimes which are shown to have been committed as part of the same common purpose or in pursuance of it, in such cases there is a distinct significant probative effect, resulting from the continuance of the same plan or ... from the [illegible] other acts in pursuance thereof. It is somewhat of the nature of the [illegible] declarations of intention, but more especially of preparations for the commission of the crime which is the subject of the indictment. If, for example, it could be shown that a defendant had formed a settled purpose to obtain certain property which could only be got by doing several preliminary things, the last of which in the order of time was criminal, the government might show, on his trial for the commission of that last criminal act, that he had formed the purpose to accomplish the result of obtaining the property, and that he had done all of the preliminary things which were necessary to that end. This would be quite plain if the evidence of the purpose were direct and clear, — as, if a letter in the defendant's handwriting should be discovered, stating in terms to a confederate his purpose to obtain the property by the doing of the several successive acts the last of which was the criminal act on trial. In such case, no one would question that proof might be offered that the defendant had done all the preliminary acts referred to, which were necessary steps in the accomplishment of his purpose. But such purpose may also be shown by circumstantial evidence. It is, indeed, usually the case that intentions, plans, purposes, can only be shown in this way. Express declarations of intention, or confessions, are comparatively rare; and therefore all the circumstances of the defendant's situation, conduct, speech, silence, motives, may be considered. The plan itself, and the acts done in pursuance of it, may all be proved by circumstantial evidence, if they are of themselves relevant and material to the case on trial. . . . It is sometimes said that such evidence may be introduced where the several crimes form part of one entire transaction; but it is perhaps better to say, where they have some connection with each other, as a part of the same plan or induced by the same motive."

It will be seen that the difference between requiring *similarity*, for acts negativing innocent intent, and requiring *common features indicating common design*, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity. This is another reason why the precedents are so difficult to reconcile; for the Courts have not always perceived that there are in truth these two distinct purposes and therefore two distinct tests for such evidence. Nevertheless the distinction is a real one. It is to be seen in concrete illustrations, even though in abstract definition it is not easy to formulate. The clue to the difference is best gained by remembering that in the one class of cases the act charged is assumed as done, and the mind asks only for something that will negative innocent intent; and the mere prior occurrence of an act similar in its gross

features — *i. e.* the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer — may suffice for that purpose. But where the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test. An occasional error in judicial rulings is to require the higher conditions of the present test where only the preceding test (for Intent) is needed. Thus, to show that certain representations as to goods sold (the making of the representations and their falsity being assumed) were deliberately and knowingly made, and not innocently, the former making of like representations about the same goods to the same or other persons is clearly of value to negative innocent intent; yet in at least one jurisdiction, in such cases, the Court has in terms required that these evidential instances shall be so connected by common features as to indicate a general fraudulent scheme or system. This is a misapplication of the stringent theory of Design or System to a case where the theory of Intent is alone involved. Such misapplications of the rigorous requirements of the Design principle are also met with in rulings upon other kinds of crimes; but the error involved in such rulings may be perceived by an analysis of the purposes of the evidence in a given case.

Two necessary limitations are to be observed in the use of this class of evidence of Design. (1) *Anonymous acts* are not available, as they are for evidencing Intent (*ante*, § 303); for the whole purpose of the evidence is to fix a design upon the defendant, as making it likely that he carried it out, and thus that it was he who did the act charged. Nevertheless, in the order of proof it may not be possible to evidence the defendant's connection with the previous acts until the acts themselves have been testified to; and hence the trial Court, applying the general principle of conditional admissibility (*ante*, § 14) may admit the latter portion of the evidence on the assurance that the defendant's connection with those acts will later be duly evidenced.[1] (2) The object being to argue to the act charged from a design or plan to do it, the prior acts are received to show that system; since, however, it may require a number of acts and circumstances to furnish the desired mass of conduct illustrating this design or system, and since the production of only parts or fragments of it would in effect violate the principle and remain in evidence merely as affecting the defendant's character, *the trial Court must pass upon the offer beforehand*, to see whether if offered in its entirety it satisfies the proper test and is sufficient to go to the jury; and (on the same principle of § 14, *ante*) must, if the offer is sanctioned, require an assurance that it will be forthcoming in its entirety.[2]

[1] The following is an example: 1865, People v. Frank, 28 Cal. 507, 518 (the order of proof being in the discretion of the trial Court). Compare §§ 1870, 1871, *post* (order of evidence).

[2] The following is an example: 1888, Com. v. Robinson, 146 Mass. 579 (the judge merely deciding that there was sufficient strength in the evidence to submit it to the jury, but not thereby giving it any greater weight with the jury).

§ 305. **Criminality of Act Immaterial; Character Rule, distinguished.** It has already been noted (*ante*, § 216) that the criminality of prior acts thus offered does not affect their admissibility. Either they are relevant, by the above tests, or they are not; if they are not, they are rejected because they are irrelevant; if they are, they are received in spite of their criminality. The only bearing of the latter quality is that, if they are irrelevant, it furnishes another reason for excluding them, namely, the reason of Undue Prejudice, as enforced in the Character rule (*ante*, § 194); for these other criminal acts would not merely be irrelevant, but would go to evidence the defendant's character and career as bad and thus to create undue prejudice, — a mode of argument against him that is forbidden by a fundamental principle. It is, however, to this reluctance to violate the Character rule that is due the strictness shown by the Courts in excluding prior criminal acts which do not strictly fulfil the rigorous tests just examined. If the admission of irrelevant evidence had been the only consequence of an error in the ruling, there would undoubtedly have been seen a greater liberality in the judicial application of the foregoing tests. The unsatisfactory result has been that, in this narrow and over-cautious anxiety not to infringe upon the Character rule, evidence highly appropriate to show Knowledge, Intent, or Design, and amply fulfilling the proper tests for that purpose, has often been excluded.

Of the other objections (than undue prejudice) from the point of view of that auxiliary policy which creates the Character rule (*ante*, § 194), the objection of Unfair Surprise is the only one that could be supposed to be here applicable. But it has never been treated by the Courts as of consequence. This rational and practical conclusion is easily understood when it is remembered that any other conclusion might result in shutting out most of the appropriate evidence, of this and other sorts, to prove a crime. The legal objection of unfair surprise, so far as it is ever recognized, is not founded on the notion that the opponent was not in fact anticipating this specific evidence (*post*, §§ 1845, 1849), but on the notion that he could not by possibility have anticipated evidence which might easily be fabricated beyond detection; and the objection is recognized as having force only when the evidence offered is of a class capable of involving the entire range of the person's life. Evidence tending to show, not the defendant's entire career, but his specific knowledge, motive, design, and the other immediate matters leading up to and succeeding the crime, is of a class always to be anticipated and is in each given instance rarely a surprise; moreover, the kernel of the objection of unfair surprise, namely, the impossibility of exposing fabricated evidence, is wanting where the evidence deals with matters so closely connected with a crime as design, motive, and the like:

1804, *Ellenborough*, C. J., in *R.* v. *Whyley*, 2 Leach Cr. L., 4th ed. 985: "The observations respecting prisoners being taken by surprise and coming unprepared to answer or defend themselves against extrinsic facts is not correct. The indictment alleges that the prisoner uttered this note *knowing* it to be forged; and they must know that without the

reception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged, or whether it was uttered under circumstances which showed their minds to be free from that guilt."

§ 306. **Other Evidential Purposes Discriminated.** Other similar acts by a defendant may of course be available for other purposes than to show Knowledge, Intent, or Design. These other uses and their distinction from the present one will usually be apparent. It is worth while, however, to point out those which are often available at the same time as the present ones: (1) *Motive.* To show the hostility towards the deceased of a defendant charged with murder, a former assault by him upon the deceased would be relevant (*post*, § 396). Owing to the occasional failure of Courts to distinguish between Motive (Emotion) — the state of feeling impelling towards an act — and Intent — the mental state accompanying an act —, it is not always possible to know whether a ruling admitting such evidence is meant to deal with the subject of Motive or Intent. Its relevancy to show Motive (hostility) has never been doubted. (2) *Identity.* To identify a defendant as the perpetrator of the crime charged, it may become necessary to show former conduct of his, known to be the conduct of the perpetrator (*post*, § 413, *ante*, § 218). (3) *Inseparable acts.* In evidencing the act charged, it may be necessary to describe an affair which involves a number of acts, one or more others of which will also be crimes. Such proof is receivable, because it is inseparable from the act charged (*ante*, § 218). Courts often employ that principle — especially in proving deeds of violence (*post*, § 362) — as the sufficient source of admission, where that of Intent might equally have sufficed.

It remains now to take up the various kinds of offences charged, and examine under each head the application of the foregoing principles to the use of other similar acts to evidence Knowledge, Intent, and Design.

2. Forgery and Counterfeiting.

§ 309. **General Principle.** The chief forms of offence connected with forged and other counterfeit documents or money are: (1) making the false article; (2) possessing it knowingly with intent to utter; (3) knowing utterance of it. In the last two, the defendant's knowledge is always in issue; in the first, it is occasionally in issue, as where the act of writing is conceded but an authority is claimed. In all of them the criminal intent, including knowledge and other elements, will be in issue. In any of them, the act charged — making, possessing, or uttering — may be disputed, and a plan or system may be offered to evidence the doing; but this will rarely happen except in the first class of offences.

§ 310. **Evidence of Knowledge; (1) Other Utterings.** The principle here applicable (*ante*, § 301) is that a former utterance is likely to have resulted in a questioning of the false article by the person to whom it was presented,

and thus the attention of the defendant would have been called to its suspicious nature. The former utterance is thus relevant as showing that the defendant thereby probably acquired the knowledge charged.[1]

Two questions here arise, as indicated by the general principle for evidencing Knowledge *a priori* (*ante*, § 301): (1) Is the fact of a prior *successful utterance* likely to have given warning of the article's false character? Does it not rather show that no such warning was in fact received? In some of the cases it clearly appears that the defendant did receive such notice through an unsuccessful attempt,[2] or that his conduct betrayed such knowledge,[3] and in one ruling it is intimated that the prior uttering must have been an unsuccessful one.[4] Nevertheless no such requirement is laid down in the remaining rulings. One way to explain this is to suppose that the rulings proceeded from the point of view of Intent, for which purpose (*post*, § 312) the mere fact of uttering suffices; but this is incorrect, because in other aspects the Knowledge principle is consistently applied. The truth seems to be that though the single fact of successful utterance is not likely to have resulted in warning at that precise occasion, yet the person receiving the money or paper would probably ultimately have discovered its falsity or have had it returned to himself by some later transferee, and would then have notified the defendant if he could be found; and thus, except in infrequent cases, the chances of the defendant's receiving warning after even a successful utterance are appreciable and become very great with each additional utterance. (2) Even assuming that through the prior occasion a warning came to the defendant, would the warning about that piece of paper or money have involved a fair warning about the one charged, unless the two were of a *similar sort?* All Courts answer this in the negative, and require that the former article have some similarity to the one in question; for otherwise there is no probability of knowledge having been thereby received.[5] But, naturally, no general fixed rule can be laid down to determine what similarity should be required. The rulings exhibit views of all degrees of liberality and narrowness.[6]

§ 311. **Same**: (2) **Other Possession.** The possession of other forged or counterfeit articles operates in a different way to show Knowledge. The mere fact of possession has in itself no force for this purpose, though it may be relevant to show Intent (*post*, § 312). But the possession may involve conduct betraying a knowledge of the falsity of the article, — as where counterfeit coins are separately wrapped in paper[1] or counterfeit paper is kept secreted,[2] or tools are also found;[3] and thus the prior knowledge applies

[1] The cases are arranged by jurisdictions, *post*, § 318; the above principle is illustrated in various cases.
[2] R. *v.* Forster, Eng.
[3] R. *v.* Phillips, Eng.
[4] State *v.* Smith, Conn.
[5] As well set forth in U. S. *v.* Roudenbush, U. S.
[6] R. *v.* Millard, R. *v.* Sunderland, R. *v.* Hodgson, R. *v.* Kirkwood, R. *v.* Martin, R. *v.* Phillips, R. *v.* Ball, R. *v.* Forster, Eng.; Stalker *v.* State, Conn.; State *v.* Saunders, Ia.; Lindsey *v.* State, Oh.; Martin *v.* Com., Va.; State *v.* Twitty, N. C.; U. S. *v.* Doebler, U. S.
[1] R. *v.* Jarvis, Eng.
[2] State *v.* Hess, Oh.
[3] State *v.* Antonio, S. C.

equally to the article in question. Here, moreover, similarity of the article would probably be immaterial, for the concealment indicates a general criminal knowledge.

§ 312. **Evidence of Intent: (1) Other Utterings.** The principle here applicable (*ante*, § 302) proceeds merely upon the doctrine of chances; it does not attempt to show knowledge or any other possible element of Intent; but it endeavors to negative inadvertence and any other innocent explanation. It argues that the oftener a like act has been done, the less probable it is that it could have been done innocently.[1] (*a*) It is therefore immaterial whether the other attempt to utter was *unsuccessful*, or whether it resulted in notice to the utterer; it is the bare fact of the uttering, or of the attempt to utter, that is evidential. (*b*) As to the *similarity of the article* uttered, it follows that the act as a whole must be like the act charged; so that the test is here in general the same as when it is desired to show Knowledge (*ante*, § 310). No effort seems to have been made to define more closely the similarity to be required;[2] but at least it seems clear that the specific principle applicable to evidence of Knowledge — a similarity such as would have warned the utterer of the falsity of the article in question (*ante*, § 310) — has no application here.

§ 313. **Same: (2) Other Possession.** The principle here operates precisely in the same way, — not as tending to show a probable warning, but as negativing, by repetition of instances, the possibility of innocent explanation.[1] The practical difference between the use of such facts to show Knowledge and to show Intent is that in the former case (*ante*, § 311) something more than possession is theoretically necessary, while here the mere fact of possession is evidential.[2] The difference is also brought out by this, that another possession *after* the act charged would be evidential of Intent,[3] while it could in no way be evidential of anterior knowledge.

§ 314. **The foregoing Principles Compared.** It is thus seen that the principles to be followed in evidencing Knowledge and Intent differ to some extent at certain points, — each one being in some respects more exacting, in some more lax, in its requirements than the other. Moreover, the Courts seem at some times to have the one principle in view, at some times the other. Which of the two is to control? Neither; and both. The truth is that Intent in general, as well as Knowledge in particular, is in this class of offences always open to be proved; that either object, or both, may be aimed

[1] 1887, Peckham, J., in People *v.* Sharp, 107 N. Y. 467, 14 N. E. 319 ("A man might think the money he passed was good, and he might be mistaken once or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit"); see also R. *v.* Francis, quoted *ante*, § 302.

[2] See the cases cited *ante*, note, § 310.

[1] 1829, State *v.* Houston, 1 Bail. 300 ("His having a number of others of the same description is evidence of a general guilty purpose, of which the act under consideration is only a part: one may by accident come into the possession of a single counterfeit note or coin, but when he is possessed of many or passes many, it must be attributed to something more than accident"); 1853, Thurman, J., in Farrer *v.* State, 2 Oh. St. 73 ("The best evidence of this *scienter* . . . is proof that the accused had more spurious money in his possession than would be likely to come into the hands of an honest man in the ordinary course of business").

[2] See for example the cases in England and Massachusetts.

[3] As in Com. *v.* Price, Mass.

at; but that the evidence should be appropriate to the purpose it is aimed at. The confusion of precedents seems to have come from instinctive perception of the requirements of one or the other of the principles, accompanied by a failure to observe that there were in reality two principles equally available. Every piece of evidence offered in the present connection has these two avenues of entrance, and its right to enter by either, on the general principle of multiple admissibility (*ante*, § 13), should be liberally construed.

§ 315. **Evidence of Design or System.** Where the act itself (forging, uttering, or the like) is disputed, and the resort of proof is to a plan or system as tending to show the doing of the act, the prior acts offered must be something more than an individual instance or two; they must be so connected by common features as to suggest a system or plan (*ante*, § 304). (1) This sort of evidence has not always been intelligently treated by the Courts. It has occasionally been received;[1] it has occasionally been properly rejected;[2] but there are other rejections which cannot be supported,[3] and still others which can only be described as ridiculous and tending to dishonor our law of evidence.[4] (2) Evidence amounting to proof of system or design may of course be employed also where the act is not disputed, and the Intent alone (*ante*, § 312) is in issue;[5] the evidence here being merely stronger than is absolutely essential. But it would be erroneous to require such a systematic connection where proof of Intent alone is desired.

§ 316. **Time of other Acts.** (1) Whether *subsequent* acts of uttering should be admitted was in England at one time doubted;[1] but the doubt was afterwards solved in favor of admission,[2] and does not seem in this country to have received any support.[3] Subsequent possession is equally admissible.[4] This result emphasizes the difference between evidencing Knowledge and evidencing Intent; for the subsequent uttering could of course result in no warning which should show Knowledge at the anterior time charged; while, in evidencing Intent, it is the repetition of instances that tends to negative innocence in particular instances, and thus it is immaterial whether the instances are found occurring before or after the act charged. (2) The *length of time* over which we may range in search of evidential instances is obviously determinable by no fixed rule. The precedents illustrate various lengths of time.[5] The discretion of the trial Court should here control.[6]

[1] Roupell *v.* Haws, Eng.; Blalock *v.* Randall, Ill.; Card *v.* State, Ind.; Carver *v.* People, Mich.

[2] Viney *v.* Barss, Balcetti *v.* Serani, Eng.

[3] Graft *v.* Lord Bertie, Eng.; Franklin *v.* Franklin, Tenn.; Redding *v.* Redding's Est., Vt.

[4] Dodge *v.* Haskell, Me.; Costelo *v.* Crowell, Mass.; Keith *v.* Taylor, Vt.

[5] Com. *v.* White, Mass.; Finn *v.* Com., Va.

[1] R. *v.* Taverner, R. *v.* Smith.

[2] R. *v.* Forster.

[3] People *v.* Frank, Cal.; Thomas *v.* State, Ind.; State *v.* Mix, Mo.; Peck *v.* State, Tenn.; Hendrick's Case, Va.

[4] Com. *v.* Price, Mass.

[5] R. *v.* Wylie, R. *v.* Hough, R. *v.* Ball, R. *v.* Millard, Eng.; State *v.* Smith, Stalker *v.* State, Conn.; People *v.* Frank, Cal.

[6] Distinguish the question of *criminal pleading* whether, *as the act charged*, any criminal act may be proved as of a time not specified in the indictment; this is sometimes governed by a statute, for the present class of cases; *e. g.*, Me. Pub. St. 1883, c. 120, § 8.

§ 317. **Sundry Limitations.** (1) The *falsity* of the other articles (forged or counterfeit) uttered or possessed must of course be shown.[1] But the defendant's knowledge of their falsity need not be shown.[2] The very kernel of the principle (either of Knowledge or of Intent) is that the fact of the uttering tends, in one way or another, to show the defendant's knowledge at the time in issue, either by the probable warning received or by the improbability of innocent intent in repeated instances; and the assumption throughout is that the bare fact of utterance tends to show this. (2) A possession or utterance by a *co-conspirator*, as making the defendant equally responsible if the other person was acting in connection with the defendant, involves a different principle from the present.[3] (3) Whether the *contents* and the uttering of another false article may be evidenced by the defendant's *admission* is a question of the rule requiring the production of an original (*post*, §§ 1205, 1255).

§ 318. **State of the Law in the Various Jurisdictions.** The precedents in the various jurisdictions exhibit the application of the foregoing principles, both in civil and criminal cases, with more or less consistency.[1] The falsifi-

[1] R. *v.* Forbes, Eng.; People *v.* Whiteman, Cal.; Peck *v.* State, Tenn.

[2] Com. *v.* Bigelow, Mass., requires this; but the doctrine is not repeated in later rulings.

[3] 1827, U. S. *v.* Craig, 4 Wash. C. C. 729 (parts of the tools were found in other persons' possession, shown to be connected with the defendant in their operations).

[1] *Eng.:* 1684, Lady Ivy's Trial, 10 How. St. Tr. 555, 621 (to prove the defendant's title-deeds forged, the fact was admitted of her forging a number of deeds to support her title); 1777, Graft *v.* Lord Bertie, Peake Evid. 72 (to prove that a deceased attesting-witness had attested a forgery, the fact was offered that other bonds attested by him were forgeries; the objection was made that the plaintiff "could not be prepared to support the authority of other deeds"; and with hesitation Lord Mansfield rejected the evidence); 1792, Balcetti *v.* Serain, Parke 142, Buller, J. (action on a bill claimed to be forged by the drawer's clerk; the fact of a previous forgery of the defendant's name to another acceptance by the same clerk was rejected as not sufficiently connected); 1794, Gibson *v.* Hunter, 2 H. Bl. 288 (H. drew a bill on G., payable to F. (a fictitious person) or order, and indorsed in F.'s name; the plaintiff, a *bona fide* holder for value, sued G., and in order to show that G. knew this particular F. to be a fictitious person, offered the fact of the former issuance of such bills with irregularities and suspicious circumstances of such a nature that they must have made G. aware of the fictitiousness of F.'s name, and it was admitted); 1795, Vmey *v.* Barss, 1 Esp. 293, Kenyon, L. C. J. (action against the acceptor of a bill; defence, that it was a forgery by the drawer; evidence of other similar forgeries by the drawer, excluded); 1804, R. *v.* Wylie, 1 B. & P. N. R. 92, 2 Leach 4th ed., 983 (indictment for uttering a forged bank-bill; the fact of three previous utterings in the preceding month to other persons was admitted; Ellenborough, L. C. J.: "The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such a case the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions; it would not make the evidence inadmissible"); 1806, R. *v.* Hough, R. & R. 120, by all the Judges present (uttering a forged bill; the possession when arrested of three other bills upon the same drawee, admitted to show *scienter*); 1807, R. *v.* Ball, ib. 132; by all the Judges present except one (uttering a forged bank-note; the utterance of a similar one three months before, and the possession, at some previous time, of fifteen others, admitted, "subject to observations as to the weight of it, which would be more or less considerable according to the number of the other notes, the distance of time at which they were put off, and the situation of life of the prisoner, so as to make it more or less probable that so many notes should pass through his hands in the course of business"; Chambre, J., dissenting, partly on the ground of surprise); 1808, R. *v.* Ball, 1 Camp. 324 (uttering a forged bank-note; the fact admitted, to show knowledge, of the utterance of various notes of similar manufacture in the preceding six months; Heath, J.: "Everything that you said or did was proper to be admitted to show your knowledge of the forgery"); 1809, R. *v.* Taverner, Carr. Suppl. 195, Ellenborough, L. C. J., Thomson, C. B., and Lawrence, J. (uttering forged bank-notes; an uttering five weeks later excluded, "unless the latter uttering was in some way connected with the principal case or it could be shown that the notes were of the same manufacture"); 1813, R. *v.* Millard, R. & R. 245 (uttering a forged bank-note; the fact of uttering forged notes of

cation of documents in other frauds than forging and counterfeiting is dealt with elsewhere (*post*, § 341).

other denominations and of the same and another bank two, five, and twelve months before respectively, held admissible; here the evidence was excluded, as not showing that they were forged; but some judges "seemed to doubt" whether the difference of qualities and the distance of time did not exclude the evidence); 1825, R. *v.* Moore, 2 C. & P. 235, Burrough, J. (charge of possessing an edger, for marking money round the edge, with intent to use it; the fact received of his having so used it); 1827, R. *v.* Smith, ib. 633, Vaughan, B. (uttering a forged note; another uttering, charged in a second count, excluded, because so charged; and even the use of other uncharged utterings was said to have been questioned by many able lawyers; this ruling never represented the law); 1827, R. *v.* Hodgson, 1 Lew. Cr. C. 103 (to show guilty knowledge of a forged Edinburgh bank-note, the uttering by the defendant of forged Paisley bank-notes was doubted by Hullock, B., his own opinion being for admission, but many judges being thought by him to be against it; here the evidential notes were the subject of another indictment); 1828, R. *v.* Sunderland, ib. 102 (to show guilty knowledge of a forged Rochdale bank-note, the discovery on the defendant's person of two forged Bank of England notes was admitted); 1829, R. *v.* Phillips, ib. 105, Bayley, B. (to show guilty uttering of a bank-note, the conduct was admitted of the defendant while previously uttering other forged notes; also, the former uttering of a £1 note was admitted to show knowledge in uttering a £5 note); 1830, R. *v.* Kirkwood, ib. 103 (facts similar to R. *v.* Hodgson; Littledale, J., "without hesitation overruled the objections"); 1830, R. *v.* Martin, ib. 104, Littledale, J. (similar to R. *v.* Kirkwood); 1831, R. *v.* Smith, 4 C. & P. 411, Gaselee, J. (uttering a forged acceptance; other similar utterances in the next month of forged bills having the same parties' names, admitted, but subject to reservation for the Judges, because occurring subsequent to the charge in issue); 1835, R. *v.* Forbes, 7 C. & P. 224 (forging a bill, the issue being whether the defendant *bona fide* believed himself to have authority to sign; the fact of another similar forgery admitted to show intent; "clear proof" of the other forgery required); 1836, R. *v.* Ball, 1 Moo. Cr. C. 470, 7 C. & P. 429, by all the Judges (uttering forged Austrian notes; the fact of a recent forging and uttering of Polish notes, admitted "in support of the *scienter*"); 1837, R. *v.* Page, 4 B. & Ad. 122 (counterfeit utterance; possession of another counterfeit piece, admitted); 1855, R. *v.* Forster, Dears. Cr. C. 456, by five Judges (to prove a guilty uttering on Dec. 12, an uttering of a similar piece on Dec. 11 was shown; on that occasion the shopkeeper told the defendant the piece was bad, whereupon she promised she would bring her husband and her daughter to show where she got it, but she did not return; a subsequent uttering on Jan. 4 also admitted; the uttering of a shilling was admitted to show knowledge in uttering a crown); 1855, R. *v.* Jarvis, 7 Cox Cr. 53, Dears. Cr. C. 552, before five Judges (knowing possession of counterfeit coin; the discovery in different pockets, of many other coins of similar style and make, each wrapped in paper, was admitted); 1861, R. *v.* Weeks, Leigh & C. 18, by five Judges (knowing possession of a counterfeiting mould; previous utterance of a bad half-crown, not shown to fit the mould, admitted to show *scienter*); 1863, Roupell *v.* Haws, 2 F. & F. 784 (the defendants claimed title, against the heir-at-law, under a deed of gift from the testator; evidence of other forgeries (letters, leases, etc.) of the testator's son were received as showing under the circumstances a system to defraud of which the forgery of the deed of gift was a part); 1867, R. *v.* Goodwin, 10 Cox Cr. 534, Mellor, J. (another uttering admitted to show knowledge; ruled also that a former conviction of false uttering could not alone be admitted to show knowledge); *Ala.:* 1849, Tharp *v.* State, 15 Ala. 749 (counterfeit utterance; previous passing of "other and similar spurious coin," admissible); 1903, Wright *v.* State, — Id. —, 34 So. 1009 (forgery; another forged order about the same time, admitted); *Ariz.:* 1902, Qualey *v.* Terr., — Ariz. —, 68 Pac. 546 (falsification of books; other alterations of entries in the same book, admitted); *Cal.:* 1865, People *v.* Frank, 28 Cal. 507, 515, 517 (forgery; other forged notes or bills "uttered at or about the same time," "whether of the same kind or a different kind," admissible to show knowledge; the time before or after the charge in question being largely in the trial Court's discretion); 1866, People *v.* Farrell, 30 id. 316 (possession with intent to utter; sale of such counterfeit coin to a confederate, admissible to show intent); 1896, People *v.* Sanders, 114 id. 216, 46 Pac. 153 (forgery; murder by the defendant of the person whose name was forged, before the date of the writing, admitted to show knowledge); 1896, People *v.* Whiteman, ib. 338, 46 Pac. 99 (forgery; other utterings admissible if clearly shown to be forged); 1898, People *v.* Creegan, 121 id. 554, 53 Pac. 1082 (forgery; a series of swindling schemes in other States a few months before, excluded); 1899, People *v.* Bird, 124 id. 32, 56 Pac. 639 (forgery; other similar forgeries, unconnected with defendant, held admissible to show intent only, after evidence of the *corpus delicti*); 1902, People *v.* McGlade, — Cal. —, 72 Pac. 600 ("other forgeries of similar instruments about the same time admitted); *Conn.:* 1811, State *v.* Smith, 5 Day 175, 178 (counterfeit utterance; Mitchell, C. J.: "It is lawful to prove that the prisoner attempted to utter the note at different times and places where it had been suspected and challenged as false"); 1832, Stalker *v.* State, 9 Conn. 341 (uttering a base half-dollar; evidence held admissible of other coins "on the same day or near the time," but not of the possession of an engraving like an

3. False Pretences or Representations.

§ 320. General Principle; Three Modes of Evidencing. The utterance of forged paper or counterfeit money is simply one species of false representa-

unsigned bank-note; because "there must be a strong connexion in the subject matter"]; *Ia.*: 1852, Hoskins *v.* State, 11 Ga. 92, 95 (altering the paper, admissible on a charge of making, to show intent); 1892, Lascelles *v.* State, 90 Id. 347, 355, 375, 16 S. E. 945 (forgery; false representations as to wealth to the person defrauded, admitted); *Ill.*: 1867, Steele *v.* People, 45 Ill. 152, 157 (forgery; "other forged checks," admitted); 1875, Blalock *v.* Randall, 76 id. 224, 229 (to show that R. had forged B.'s name, B. having concededly signed his name to documents of another sort, evidence was admitted of R.'s having fraudulently obtained the signatures of other persons by a method similar to that alleged by B.); 1880, Fox *v.* People, 95 id. 71, 75 (forgery; previous passing of "similar bills," admissible); 1893, Anson *v.* People, 148 id. 494, 503, 35 N. E. 145 (forgery; possession of other forged instruments about the same time, admitted to show intent and knowledge, though not to show the fact of forging); *Ind.*: 1852, McCartney *v.* State, 3 Ind. 354 (other utterings of notes upon the same and different banks, admissible); 1859, Bersch *v.* State, 13 id. 439 (obscure); 1876, Harding *v.* State, 54 id. 359, 365 (forgery; other forged notes offered to the same parties at the same time, admitted); 1879, Robinson *v.* State, 66 Id. 331, 334 (forgery; another forged note, made to secure the same debt, but in a different name, admitted); 1885, Thomas *v.* State, 103 Id. 432, 2 N. E. 808 (utterings of similar forged instruments shortly before or after, admissible); 1886, Card *v.* State, 109 id. 415, 420, 9 N. E. 591 (forgery of a note; thirteen other forged notes with the same payee but a different maker, admitted; "in order to prove system, isolated crimes are admissible from which system may be inferred"; applying this to a charge of forgery); *Ia.*: 1885, State *v.* Breckenridge, 67 Ia. 204, 25 N. W. 130 (forgery; other forgeries to show intent; left undecided); 1886, State *v.* Saunders, 68 id. 370, 27 N. W. 455 (forgery of a note to another person; question reserved; "the doubt seems to be whether the paper must not be of the same character or manufacture and precisely similar"); 1901, State *v.* Prins, 113 id. 72, 84 N. W. 980 (forgery; other forgeries of similar documents, admissible to show intent); 1902, State *v.* Prins, 117 id. 505, 91 N. W. 758 (forgery; other unspecified forgeries, admitted); *Ky.*: 1897, Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772 (forgery; possession of similar forged checks, admitted to show intent); 1901, First National Bank *v.* Wisdom, — id. —, 63 S. W. 461 (forgery of other notes by the same person as a part of one scheme, admitted); *Me.*: 1844, State *v.* McAllister, 24 Me. 139, 143 (counterfeit utterance; uttering of another bill on the same bank, admitted); 1879, Dodge *v.* Haskell, 69 id. 429 (D. sued the defendant's testator on a note signed by him as surety for S.; defence, alteration by S. before delivery; evidence of the finding in the desk of S., who had absconded, numbers of forged and altered notes, blank and partly written notes, bearing the signatures of the testator and other persons, was excluded, on the theory that the argument from former forgeries and from bad character was inadmissible); *Md.*: 1880, Bishop *v.* State, 55 Md. 138, 144 (forged uttering; utterings of similar forged instruments about the same time, admitted); *Mass.*: 1844, Com. *v.* Bigelow, 8 Metc. 235 (counterfeit utterance; former knowing passing, admitted); 1845, Com. *v.* Stearns, 10 id. 256 (former utterances, admissible); 1849, Com. *v.* Miller, 3 Cush. 243, 250 (uttering a forged promissory note; the utterance of thirty other similar ones, at or near the same time, admitted); 1858, Com. *v.* Price, 10 Gray 473 (possession with intent to utter; the fact received of the subsequent possession of counterfeit bills of banks in other States, to show intent); 1862, Com. *v.* Hall, 4 All. 306 (uttering; possession at the same time of another counterfeit bill, admitted to show intent); 1865, Com. *v.* Edgerly, 10 id. 184 (possession with intent to utter; previous possession of and attempts at uttering other counterfeit money, admitted to show "guilty knowledge"); 1882, Com. *v.* Jackson, 132 Mass. 18 (counterfeit utterance; Devens, J.: "It is the knowledge which it may be inferred he must have derived from other transactions, and not the intent that the defendant had in other transactions, that renders the evidence admissible as affording just ground for inference against him as to intent in the matter under examination"); 1888, Com. *v.* White, 145 id. 394, 14 N. E. 611 (forging bills for hides, the bill being used by the defendant as a voucher to the employer that the hides were bought by customers, thus enabling the defendant to obtain cash on them; the fact was received of the fabrication of many other bills of a like sort, before and after those in issue, not to show that a forgery was committed, but to show the defendant's fraudulent intent and knowledge); *Mich.*: 1878, Carver *v.* People, 39 Mich. 786 (forgery; a general scheme shown to use forged instruments of the sort and in the way in question); 1893, Pearson *v.* Hardin, 95 id. 360, 366, 54 N. W. 904 (action against accommodation indorser; plea, that the note was raised; the fact that other notes indorsed by him at the same time were raised, excluded); *Mo.*: 1851, State *v.* Mix, 15 Mo. 153, 160 (utterings of other counterfeit bank-notes, of a similar kind, to other persons, before and after the time charged, admitted to show guilty knowledge); State *v.* Wolff, ib. 173 ("other acts of passing counterfeit money," admissible); 1893, State *v.* Minton, 116 Mo. 605, 611, 22 S. W. 808 (forgery of a deed; other forged deeds by defendant under the

tion, — a representation in conduct instead of in words. Thus, the general principles of evidencing Knowledge, Intent, and Design, as examined for the

same name and in the same region, admitted to show intent and knowledge); 1898, State *v.* Hodges, 144 Id. 50, 45 S. W. 1093 (uttering a check; similar utterance a few days previously, admitted to show intent); *Nebr.*: 1899, Davis *v.* State, 58 Nebr. 465, 78 N. W. 930 (forgery of railroad ticket; other sales of such tickets to other persons by the defendant on the same day, admitted); 1901, Burlingim *v.* State, 61 Id. 276, 85 N. W. 77 (inciting forgery of a deed; another forged deed of the same land, admitted to show intent); *N. J.*: 1810, State *v.* Van Houten, 2 N. J. L. 248 (other utterings on the same day of other counterfeit bills on the same bank, admitted by the majority, to show knowledge and intent); 1838, State *v.* Robinson, 16 Id. 507 (another uttering of a note on the same bank, admitted; "Vanhouten's case . . . has been followed ever since in this State"; acquittal on the charge of the other uttering, held immaterial); 1897, Ryan *v.* State, 60 Id. 552, 38 Atl. 672 (counterfeit money; evidence of former offences, rejected on the facts); *N. Y.*: 1855, People *v.* Thoms, 3 Park. Cr. 256, 270 (possession with intent to utter; other altered notes found in the possession of the accused, admitted; but notes found in his wife's possession, who had just come from his house, excluded); 1874, People *v.* Corbin, 56 N. Y. 363 (forgery of A's name, the defendant's claim being that he had authority to write it, but the prosecution claiming a revocation of the authority; other forgeries, about the same time, of his father-in-law's name, excluded); 1887, People *v.* Everhardt, 104 Id. 591, 11 N. E. 62 (utterance of a forged check; utterance "of other forged checks by him upon other occasions," admitted to negative innocent uttering); 1900, Boyd *v.* Boyd, 164 Id. 234, 58 N. E. 118 (whether the defendant forged an assignment of a certificate of redemption in the name of a deceased judgment-creditor; a similar forged assignment in the same hand and covering a similar transaction, admitted, on the principle of § 303, *ante*, to show that "an act which had been done by some one was in fact done by the person who designed and pursued the plan"; "there is neither reason nor authority to support the proposition that it must always be limited to cases where motive is material"); *N. C.*: 1822, State *v.* Twitty, 2 Hawks 248, 258 (uttering a bank-note; former utterings of counterfeits of other banks, admitted to show knowledge); *Oh.*: 1831, State *v.* Hess, 5 Oh. 9 (the possession of other counterfeit bank-notes, secreted about the house, admitted); 1846, Reed *v.* State, 15 Id. 217 (other counterfeit utterances about the same time, admissible; here of the same bank); 1862, Griffin *v.* State, 14 Oh. St. 55, 62 (uttering; the possession of counterfeit money similar in character, admissible); 1882, Lindsey *v.* State, 38 Id. 507 (uttering a forged warranty deed; other forged warranty deeds and also deeds of trust admitted to show knowledge; sameness of kind in the other articles not being essential); *Pa.*: 1895, Penna. Co. *v.* R. Co., 153 Pa. 160, 164, 25 Atl. 1043 (conversion; forged letter of attorney in issue; other draft forgeries found in defendant's desk of the signatures in question, admitted as showing a plan to forge the one in issue); 1899, Wheeler *v.* Ahlers, 189 Id. 138, 42 Atl. 40 (alteration of a note by the maker after indorsement; similar alterations by the same person of similar notes transferred to plaintiff, admitted); *S. C.*: 1816, State *v.* Antonio, 2 Constl. Ct. 776, 783, 791, 797, 806 (the possession of "instruments calculated to coin money," offered to show the *quo animo* in passing; admitted, as not involving unfair surprise and as tending to show "that he must have had a knowledge of the baseness of the metal of which the false dollar was composed"; Nott, J., dissenting, because it "did not prove that he knew this dollar to be counterfeit; . . . unless indeed there was some proof, by comparison or otherwise, that these were the moulds in which the dollar passed by the defendant was cast"); 1829, State *v.* Houston, 1 Bail. 300 (forgery; possession of other such instruments, admitted to show intent; quoted *ante*, § 313); 1900, State *v.* Allen, 56 S. C. 495, 35 S. E. 204 (forgery of school certificates; forgery of other similar certificates for the same county within five months later, admitted); *Tenn.*: 1840, Peck *v.* State, 2 Humph. 78, 86 (uttering false silver dollars; other utterings of similar coins, if distinctly shown, held admissible, whether before or after the time in issue; "the accidents of trade can hardly be supposed to have placed in his possession so much spurious money"); 1885, Foute *v.* State, 15 Lea 712, 719 (uttering forged bills for jail fees; the fact of uttering "other forged bills for jail fees," admitted "to prove the *scienter*"); 1890, Franklin *v.* Franklin, 90 Tenn. 48, 16 S. W. 557 (a will alleged to be forged by F.; other forgeries held admissible to show guilty motive "if it had been shown that he had written this will and the defence was that it was written innocently or by direction of the testator"; but "it was not competent to show that he had *written* this will by proof that he had forged other papers"); *Tex.*: 1893, Strang *v.* State, 32 Tex. Cr. 219, 228, 22 S. W. 680 (forged utterance; that the defendant had embezzled other funds of the employer, held inadmissible, by a majority); *U. S.*: 1827, U. S. *v.* Moses, 4 Wash. C. C. 726 (like U. S. *v.* Roudenbush, 8 Pet. *infra*); 1832, U. S. *v.* Roudenbush, 1 Baldw. 514 (uttering; "if their general resemblance to the one laid in the indictment is such that a person who knows the one to be a counterfeit could not reasonably believe the others were genuine . . . , [other utterings are admissible, . . . but therefore inadmissible] when the notes are on different banks or so unlike in appearance that an honest man might think one good, though the other was known to be bad"); 1832, U. S. *v.* Doehler, 1 Baldw. 519, 524 ("if the note is of the same kind or character," other utterings are admissible); 1834, U. S.

preceding topic, apply equally to the present topic. It will be here necessary only to call attention to the specific application of those principles (*ante*, §§ 301–304). In a false representation or pretence, there is involved — alike in all the varieties of offence, and in most civil cases as well as in criminal cases — the general notion of Intent to deceive. Within this, and usually decisive in showing it (but capable, as already noted, of being evidenced by a separate principle), is the element of Knowledge. Lastly, in the (here unusual) case where the act of making the representations is disputed, and resort is had to a system or design to prove it, the stricter test applicable to proving Design may be invoked.

(1) *Knowledge.* Other former acts of a similar sort may in certain conditions show the likelihood of a warning being received (*ante*, § 301);[1] but this specific form of proof is rarely brought out clearly. No doubt with every prior occasion of the sort the probability grows that the prior promisees would have sought out and charged the defendant with the falsity of the representations; but this reasoning does not appear to be used by the Courts.

(2) *Intent.* The argument (*ante*, § 302) to the improbability of innocent intent from the repetition of similar acts is the apparently accepted ground for the use of this class of evidence. (*a*) As to the *similarity* of the other representations, no attempt has been made by the Courts to lay down a general test. The precedents illustrate a wide variety of ruling on this point.[2] A common-sense liberality is the best guide for decision. (*b*) As to the *length of time* over which the evidence should range, it is equally impossible to fix a general test; the circumstances of each case must determine.[3] *Subsequent* representations are equally admissible with prior ones;[4]

v. Roudenbush, 8 Pet. 288 (apparently recognizing the general doctrine by implication that other utterings are admissible to show intent); 1849, U. S. *v.* Burns, 5 McLean 23, 26 (uttering; possession of other coins, admissible); 1879, U. S. *v.* Brooke, 3 McArth. 315, 317 (obtaining money by a deed of trust on property got shortly before by a forged deed, admitted to show intent in a prosecution for forging the deed); *Va.:* 1827, Finn *v.* Com., 5 Rand. 701, 709 (efforts of the accused to procure counterfeit money, expressed intentions to go where it could be got, and to cultivate the acquaintance of a counterfeiter, admitted as showing a *scienter*); 1830, Martin *v.* Com., 2 Leigh 745 (counterfeit uttering; uttering another note of a different amount, on a bank in the same State, admitted); Spencer *v.* Com., ib. 751, 756 (other forged notes, admitted); 1834, Hendrick's Case, 5 id. 769, 773, 776 (uttering a forged check; the fact admitted, to prove "guilty knowledge," of uttering forged checks on other banks on the day after); *Vt.:* 1830, Keith *v.* Taylor, 3 Vt. 153 (to prove that the name of E. as witness on a note purporting to be the defendant's had been forged by D., a former holder of the note, the fact was offered (1) that D. had written the body of the note; (2) that D. had forged another note, of the same date and about the same amount, with the name of the same E. as witness, but with a different person as maker; excluded); 1897, Redding *v.* Redding's Est., 69 Id. 500, 38 Atl. 230 (other forgeries, not admitted to show the commission of the one in question); 1859, State *v.* Morton, 8 Wis. 352 (possession with intent; evidence to show *scienter* not stated; but evidence for the defendant that he had examined a "counterfeit-detector," admitted).

[1] Allen *v.* Millison, Ill.; State *v.* Bokien, Wash.; R. *v.* Francis, Eng.

[2] For example, Tarbox *v.* State, Oh.; Simons *v.* Vulcan Co., Pa.; Butler *v.* Watkins, U. S.

[3] 1880, Earl, J., in People *v.* Shulman, 80 N.Y. 373, note: ("it is obviously impossible to lay down any general rule limiting the time within which such transactions must have taken place. . . . Each case, as to the application of this rule, must depend largely upon its own circumstances, and not unfrequently the limit of them must rest entirely in the discretion of the judge presiding at the trial"); 1880, Meyer *v.* People, ib. 364, 372 (approving the preceding).

[4] Hathaway's Trial, R. *v.* Saunders, Eng.; State *v.* Call, N. H.; People *v.* Shulman, N. Y.; U. S. *v.* Snyder, U. S.

because, on the principle of Intent (*ante*, § 316), it is the repetition of them that is significant, and a subsequent instance reduces the probability of innocence equally as well as a prior one. (c) *Knowledge of the falsity* of the other representations need not be shown;[6] for, if it could be shown, there would be an end of the proof, and practically the present question would never need to be discussed. It is the mere recurrence of similar incorrect (not necessarily knowingly false) representations which leads to the belief that they could not have been made innocently; we may assume that any given one might have been innocent, but cannot concede this when we notice the recurrence.

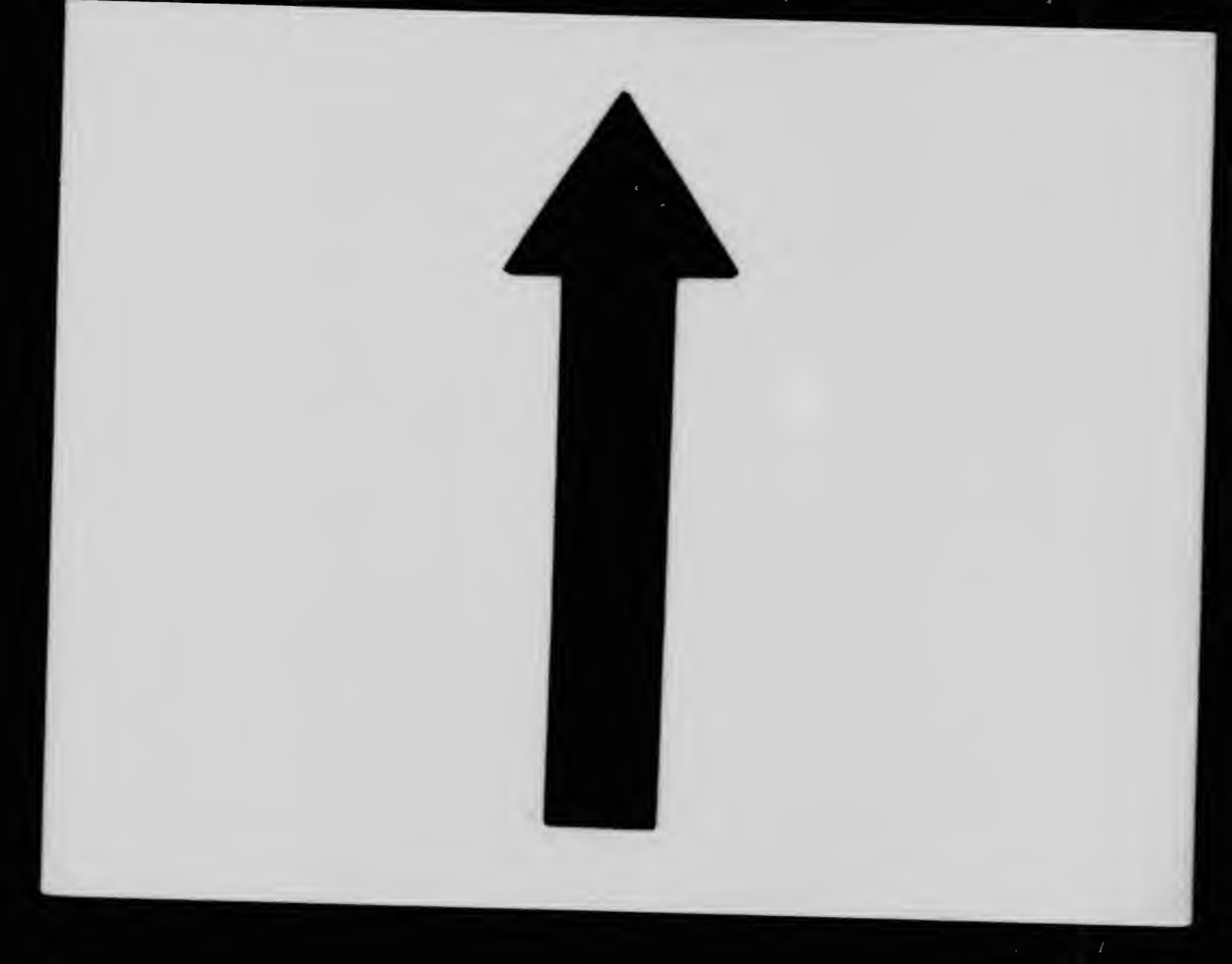
(3) *Design.* When the very act of making the representations is to be proved, and a system or design is to be argued from, the evidence is to be restricted by the rigorous rule applicable to that purpose (*ante*, § 304), *i. e.* there must be shown a connection of features, in all the instances, so strong as to indicate a system throughout them. What is to be noted is that occasionally a Court is found applying the same test where the doing of the act is not disputed, but the intent alone is in issue.[6] This is a wholly misplaced strictness, out of harmony with all other analogies, and resting on a confusion of Intent and System.

§ 321. **State of the Law in the Various Jurisdictions.** The precedents in the various jurisdictions exhibit the application of the foregoing principles with more or less consistency, and concern both civil and criminal cases.[1]

[5] Jordan *v.* Osgood, Mass.; U. S. Ins. Co. *v.* Wright, Oh.; Hall *v.* Naylor, N. Y.; compare Mayer *v.* People, N. Y.

[6] Hall *v.* Naylor, People *v.* Peckens, N. Y.; Com. *v.* Jackson, Mass.; see also the Maine cases. Of course, as stronger evidence of Intent, the prior acts may be so cumulated as to show a system, as in Carnell *v.* State, Md.; but it is one thing to allow such a system to be shown (which nobody would oppose) and quite another to require that it be shown.

[1] *Eng.*: 1702, Hathaway's Trial, 14 How. St. Tr. 664 (cheating by pretending to be bewitched by one Sarah M., so that he fasted, went into a trance, etc., through her bewitching; the popular belief was that the sorcery was true, for many people had seen him fasting for twelve weeks; to show that the fasting was a fraud, in that he secretly took food, evidence to that effect was offered covering the last two weeks of it, which, however, fell after the date of the information charging him, and was therefore objected to; L. C. J. Holt: "It is an evidence of his cheating since that time, and that out of the information [*i. e.* not charged]; but it is an evidence also to prove that his pretended fasting before was a mere deceit; for he then pretended to have fasted ten weeks before he came hither, and after pretends to continue fasting in the same manner; if that be proved to be a fraud, it is strongly to be inferred that this pretended fasting before was so too"); 1808, R. *v.* Roberts, 1 Camp. 399 (conspiracy by fraudulent representations to obtain goods; the defendants had held themselves out as wealthy in their mode of life; representations to that effect to another tradesman were admitted); 1824, R. *v.* Whitehead, 1 C. & P. 67 (cheating by false representations as to B.'s property; B.'s representations to the defendant, similar to those of the defendant to others, were admitted to show that the defendant was misled by B.; this is really a mode of proving good faith, under § 256, *ante*); 1831, Irving *v.* Motly, 7 Bing. 548, *semble* (other purchases by representations under similar circumstances, admitted to show fraud); 1856, R. *v.* Roebuck, D. & B. 24, before all the judges but one (obtaining money by offering to pawn a chain of false silver; the fact admitted of a subsequent offering of a similar false chain, and of the possession of twenty-six similar false chains); 1860, R. *v.* Holt, 8 Cox Cr. 411 (before five judges; the fact of another unauthorized obtaining of money near the same time, not admitted to show intent); 1864, R. *v.* Fuidge, L. & C. 390 (false pretences; the fact of the false obtaining of a similar article three days later was rejected, no reasons being given); 1871, R. *v.* Stenson, 12 Cox Cr. 111 (false pretences by causing an order to be given to A., a bookseller, purporting falsely to be from S., a lady of quality, for a book sold by the defendant; the fact of the sending of other false orders of the same sort was received to show the intent); 1874, R. *v.* Francis, L. R. 2 C. C. R. 128 (to show guilty knowledge of the falsity of a ring offered for pawn as a diamond, the fact was received of the offering, shortly before, to other pawnbrokers,



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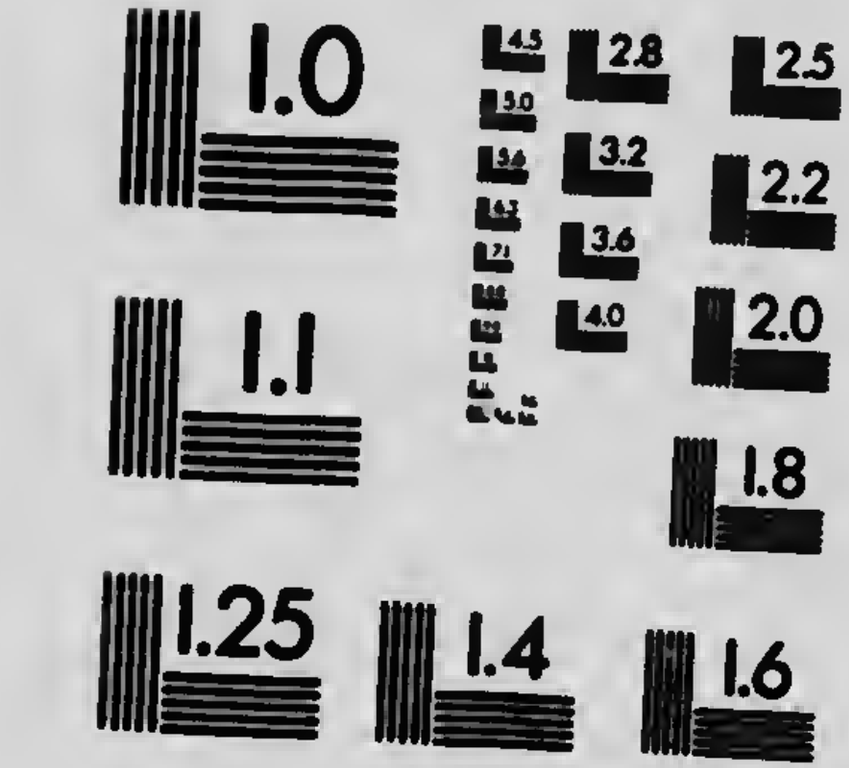

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4. Knowing Possession or Receipt of Stolen Goods.

§ 324. **Other Possession of Stolen Goods; (1) Knowledge Principle.** The act of possession is in this class of cases (except rarely) conceded, and the

of a false gold chain and of other alleged diamond rings; in one of the instances the broker told the accused that the diamond was not genuine; quoted *ante*, § 302); 1875, R. *v.* Saunders, 1 Q. B. D. 19 (false pretences by advertising to give work and requesting money by mail to pay for the preliminary instructions; the fact received, to show intent, of a number of other persons having been induced afterwards by him in the same way to forward money on such advertisements); 1878, Blake *v.* Assurance Soc., 14 Cox Cr. 246, L. R. 4 C. P. D. 94 (action to recover a premium obtained by false pretences; H. agreed to lend money to the plaintiff, on condition that he insured his life with the defendant; the defendant insured his life, but H. failed to make the loan; to show that the defendant was in fraudulent collusion with H. for the purpose of obtaining premiums, the fact was admitted of similar policies issued and similar defaults of H. with reference to other persons, the person H. being a mere figurehead or fictitious person; quoted *ante*, § 302); 1899, R. *v.* Rhodes, 1 Q. B. 77 (false pretences in obtaining eggs; the obtaining of eggs from other persons by similar pretences shortly afterwards, admitted as "part of a scheme to fraud"); 1900, R. *v.* Ollis, 2 Q. B. 758, 764 (falsely passing a check upon no funds; similar passing of a check on the same bank to another person about the same time, held admissible, though the defendant had been acquitted of the latter charge on a trial therefor; Bruce and Ridley, JJ., diss.); *Can.:* 1897, Mutual Life Ins. Co. *v.* Jonah, 1 N. Br. Eq. 482 (insurance policy; prior and subsequent similar frauds, admissible); 1889, Kidd *v.* Henderson, 22 N. Sc. 57 (false representations inducing a contract; the plaintiff's similar false representations to others, admitted, by two judges, and *semble*, by all); *Ala.:* 1897, Martin *v.* Smith, 116 Ala. 639, 22 So. 917 (contents of paper signed; false representations as to a similar paper shortly before, excluded on the facts); 1899, Bomar *v.* Rosser, 123 id. 641, 26 So. 510 (similar representations, to one other person, about the same patent, not admitted to show the making of representations in issue); *Ark.:* 1898, White *v.* B. & F. G. Co., 65 Ark. 278, 45 S. W. 1060 (fraudulent purchase; other purchases about the same time, admissible only when connected by a common purpose); *Conn.:* 1805, Gardner *v.* Preston, 2 Root 205 (case for fraudulent representations as to T.'s solvency; similar representations to other merchants in the same town about the same time, admitted, as showing a combination to defraud; here, however, the combination was alleged in the declaration); 1899, Elwell *v.* Russell, 71 Conn. 462, 42 Atl. 862 (fraudulent representations as to a mortgage, subsequent conduct, admitted); *Ill.:* 1871, Allin *v.* Millison, 72 Ill. 201 (sale of a patent-right; the fact admitted that other purchasers had complained to the seller of the patent's worthlessness); 1902, Du Bois *v.* People, 200 id. 157, 65 N. E. 658 (similar transactions in a "confidence game" with other persons about the same time, admitted to show guilty knowledge); *Ind.:* 1882, Strong *v.* State, 86 Ind. 208 (false pretences to be a travelling Mason in distress; the fact excluded of a former false pretence of the same sort in an adjoining State a few years before, because such evidence is limited to cases where the act charged does not on the evidence carry with it "an evident implication of a criminal intent," as it did here; Elliott, J., diss.); 1897, Crum *v.* State, 148 id. 401, 47 N. E. 833 (larceny by trick, in furnishing counterfeit money; the fact of "other like crimes about the time," admitted to show intent; overruling Strong *v.* State, *supra*); *Ia.:* 1882, State *v.* Rivers, 58 Ia. 102, 108, 12 N. W. 117 (false representations to a bank that a mortgage was a first lien; the defendant's bank account before and after the transaction, and other matters, admitted as indicating his intent); 1888, State *v.* Jamison, 74 id. 613, 617, 38 N. W. 509 (false representation of the contents of a mortgage in obtaining a signature to it; a prior similar pretence to the same person with a similar instrument, admitted); 1897, State *v.* Brady, 100 id. 191, 69 N. W. 290 (obtaining money by false warrants; former false warrants, admitted to show intent and also to show a systematic scheme of fraud); 1901, State *v.* Dexter, 115 id. 678, 87 N. W. 417 (obtaining property under false pretences; purchases from others on similar representations, admitted); 1902, State *v.* Soper, — id. —, 91 N. W. 774 (false pretences; similar representations to others about the same time, admitted to show intent); *Ky.:* 1897, Roche *v.* Coleman, 19 Ky. L. Rep. 985, 42 S. W. 739 (false representations as to shares of stock; similar representations to other persons, not received to show the fact of making); *Me.:* 1826, McKenney *v.* Dingley, 4 Me. 172 (similar pretences as to solvency, to persons in the same town, about the same time, admitted; *semble*, that a general plan must have existed); Seaver *v.* Dingley, ib. 306, 320 (similar, but more limited, evidence received; and no plan required, *semble*); 1840, Hawes *v.* Dingley, 17 id. 341 (similar case; like fraudulent purchases of others about the same time, admissible; the testimony said "in most cases" to have involved a formed design thus to defraud, but such design apparently not held necessary); *Md.:* 1897, Carnell *v.* State, 85 Md. 1, 36 Atl. 117 (false representations as to money in bank; similar pretences as to such money, to another person, about the same time, admitted, first, to show guilty knowledge, and, secondly, to show that he had "devised a scheme to obtain goods wherever and from whomsoever he could" by such representations); *Mass.:* 1832, Rowley *v.* Bigelow, 12 Pick. 307, 311 (trover for goods bought with fraudulent intent not to pay; the fact of

question is as to the criminal intent, and specifically, as to the knowledge accompanying the possession. In what way does the fact of possession of

similar purchases of like articles about the same time, admitted to show the fraudulent purpose); 1842, Com. *v.* Stone, 4 Metc. 43, 47 (cheating by knowingly passing the bill of a broken bank; evidence admitted of the passing of other similar bills, to show the *scienter*); 1848, Com. *v.* Eastman, 1 Cush. 189, 195 (conspiring to obtain goods from S. under pretence of buying and with intent not to pay; purchases from nine other persons under the same circumstances of insolvency, etc., admitted to show intent); 1857, Wiggin *v.* Day, 9 Gray 97 (replevin for goods obtained with fraudulent intent not to pay; evidence received of purchases of large amounts of personalty from others at the same time of insolvency, and their secreting); 1872, Jordan *v.* Osgood, 109 Mass. 457 (replevin for goods bought with intent not to pay, and bought under false pretences as to solvency; the fact was rejected of similar false representations to other persons at or about the same time; Morton, J.: "The transaction proposed to be proved for the purpose of showing the fraud which is the subject of controversy must be shown by some evidence, direct or circumstantial, to be so connected with it as to make it apparent that the defendant had a common purpose in both; but if the transaction is distinct and with no connection of design, it is not admissible. . . . The mere fact [in this case] that an insolvent trader makes misstatements as to his pecuniary condition does not justify the inference that he has formed a general scheme to cheat," and there being no other evidence of it, "the evidence of these distinct transactions therefore was not competent"; this opinion was rendered in full view of the preceding line of cases, and of those dealing with transfers in fraud of creditors (*post*, § 333), and was apparently intended to overrule the above line of cases, as well as those cited under § 333 except Williams *v.* Robbins, which it rehabilitates and makes law; the result is to apply the rigorous System rule (*ante*, § 304) even where the object is merely to show intent, a result wholly unsound, as already suggested (*ante*, § 320), and out of harmony with the rule in other analogous situations; but this misapplication of the System rule in Massachusetts does not seem to extend beyond the present topic of false pretences, that of fraudulent transfers (*post*, § 333), and perhaps that of embezzlement (*post*, § 331)); 1875, Haskins *v.* Warren, 115 id. 523, 538 (goods purchased fraudulently; the fact of other purchases admitted under the rule of Jordan *v.* Osgood); 1874, Com. *v.* Coe, ib. 481, 501 (cheating by the false pretence that a certificate of stock was genuine; the fact admitted of the use of other false certificates about the same time, to negative "casual and accidental" possession, and "to show guilty knowledge"); 1882, Com. *v.* Jackson, 132 id. 16 (false pretences as to the soundness of a horse; the fact of three similar false warranties in the preceding two months, rejected, as not indicating any single scheme or plan, "any more than the various robberies of a thief"); 1886, Com. *v.* Blood, 141 id. 575, 6 N. E. 769 (false pretences about the same article to other persons, admitted as parts of one fundamental scheme); 1902, Com. *v.* Lubinsky, 182 id. 142, 64 N. E. 966 (obtaining of goods from other persons about the same time by the same pretences, admitted to show intent; the Court still employs the language of the narrower rule as to a "common scheme to defraud"); *Mich.*: 1879, Shipman *v.* Seymour, 40 Mich. 274, 280 (other purchases on similar false representations of solvency, two months before, admitted); 1880, Cook *v.* Perry, 43 id. 623, 626, 5 N. W. 1054 (sale; subsequent similar representations about the same property, made to a decoy, admitted); 1882, People *v.* Hensaler, 48 id. 49, 52, 11 N. W. 804 (procuring indorsement to a note; similar previous false representations about other notes to the same person, admitted); 1886, People *v.* Wakely, 62 id. 297, 303, 28 N. W. 871 (sale; "previous acts of the same kind," admissible); 1887, Ross *v.* Miner, 67 id. 410, 35 N. W. 60 (obtaining goods by false pretences as to credit, etc.; purchases from others, and "the whole business" of the defendant, admitted); 1888, Stubly *v.* Beachboard, 68 id. 401, 422, 36 N. W. 192 (false representations as to encumbrances on the same lands to other parties, about the same time, admitted); *Minn.*: 1898, State *v.* Wilson, 72 Minn. 522, 75 N. W. 715 (obtaining money by personating an officer; that the defendant "had been engaged in practising like cheats," admitted to show intent); 1899, State *v.* Southall, 77 id. 296, 79 N. W. 1007 (false pretences by circulating "time checks"; circulation of others of the same tenor, admitted to show knowledge and intent); *Mo.*: 1892, State *v.* Jackson, 112 Mo. 585, 588, 20 S. W. 674 ("confidence game"; similar prior obtaining of money from another person three months before, admitted); 1897, Davis *v.* Vories, 141 id. 234, 42 S. W. 707 (fraudulent representations as to a copyright; similar representations, held admissible); 1898, State *v.* Turley, 142 id. 403, 44 S. W. 267 (similar representations to other merchants about the same time, admissible to show intent); 1898, State *v.* Wilson, 143 id. 334, 44 S. W. 722 (fraudulently obtaining and disposing of goods; similar transactions with other sellers on the same day in the same city, admitted to show intent); *Nebr.*: 1887, Cowan *v.* State, 22 Nebr. 519, 524, 35 N. W. 405 (obtaining goods by false pretences; such acts "in two other cases, entirely distinct and separate" from that at bar, excluded); 1896, Johnson *v.* Gulick, 46 id. 817, 65 N. W. 883 (similar representations to other persons, not admitted to show the fact of making those charged); 1898, Morgan *v.* State, 56 id. 696, 77 N. W. 64 (similar representations to another person shortly before, excluded); 1903, Barbar *v.* Martin, — id. —, 93 N. W. 722 (fraudulent representations to another stockholder, admitted); *Nev.*: 1900, Swinney *v.* Patterson, 25 Nev. 411, 62 Pac. 1

other stolen goods at other times throw light upon this knowledge or this intent?

(fraudulent representations in obtaining a note; similar ones made about the same time to other persons in the same place, admitted to show intent); *N. H.*: 1839, Bradley *v.* Obear, 10 N. H. 477 (replevin for a horse bought by false representations of solvency; the fact received of the purchase of another horse about the same time by "similar fraudulent representations"); 1852, Angier *v.* Ash, 26 id. 109 ("acts or declarations evincing a fraudulent intention or purpose, if connected in point of time," admissible); 1868, State *v.* Call, 48 id. 126, 132 (cheating by false statements as to solvency; the mortgaging of most of his personalty within three days thereafter, to a third person, admitted to show intent); 1873, Hnvey *v.* Grant, 52 id. 589 (trover for goods bought with intent not to pay; purchases from other persons about the same time while insolvent, admitted; the limits of time being a question of fact in each case); *N. Y.*: 1841, Cary *v.* Hotaling, 1 Johns. 311, 316 (purchase; similar representations to another person the day before, admitted tn show intent); 1808, Allison *v.* Matthieu, 3 Johns. 235 (trover for goods obtained by false representations in buying furniture for L., said to be a rich foreigner but really lacking in means and now absconded; the fact received, to show the intent, of similar representations about the same time to other persons); 1859, Hall *v.* Naylor, 18 N. Y. 588 (Comstock, J.: "K. & Co. concealed the fact of their insolvency, with a design of procuring the goods and not paying for them, it was a fraud which rendered the sale void if the plaintiff [seller] chose sn to regard it. On the trial of such an issue, the *quo animo* of the transaction is the fact to be arrived at; and it is therefore competent to show that the party accused was engaged in other similar frands at or about tho same time. The transactions must be so connected in point of timo, and so similar in their other relations, tbat tbe same motive may reasonahly be imputed to them all"; and accordingly evidence of a prior false representation not fraudulent was rejected); 1861, Hennequin *v.* Naylor, 24 id. 139 (a case arising out of the same insolvency; this stricter rule was not applied, Hall *v.* Naylor not heiug cited, and mere prior purchases from nthers on the eve of suspension were admitted to show intent); 1864, Hathorne *v.* Hodges, 28 id. 486, 489 (other purchases while insolvent, admitted in the same way); 1874, Bielschofsky *v.* People, 60 id. 616 (false representations to obtain money; tbe same fraud on another person a day or twn before, admitted; no cases cited); 1875, Weymsn *v.* People, 62 id. 623 (larceny by obtaining goods hy false representations; the procuring of goods from others by the same means, about the same time, admitted, on the principle of Hall *v.* Naylor, that "the similarity in their leading features and characteristics justified the conclusion that tbey were pervaded and controlled by the same general intention"); 1880, People *v.* Sbulman, 80 id. 373, note (obtaining goods by false pretences; other such fraudulent obtalnings, after and before, admitted; Hall *v.* Naylor's rule followed, that the transactions must have "some relation to or connectinn with the main transaction"); 1880, Mayer *v.* People, ib. 364, 369, 372 (the same rule lsid down, tbst the other acts, which may be either before or after the time ln question, must show "a general purpose or scheme to obtain goods fraudulently," but the fact offered was merely of other false (*i. e.* incorrect) representations of solvency, and not of other fraudulent (*i. e.* knowingly false) representations, nor did the Court prescribe such a limitation); 1881, Shipply *v.* People, 86 id. 376, 380 (larceny by falae pretences; a "similar transaction" with another person, admitted, citing the last two cases); 1887, People *v.* Dimick, 107 id. 13, 31, 14 N. E. 178 (representations as to insurance after knowledgo of loss; other similsr representations during the same season, as to other cargoes, admitted to show intent); 1897, People *v.* Peckens, 153 id. 576, 47 N. E. 883 (larceny by false representationa; transactions with other parties tending to show a fraudulent scheme to use the same devices, admissible, "provided the dealings are sufficiently connected in point of time and character to authorizo an inference that the transaction was in pursuance of the same general purpose"); *N. C.*: 1894, State *v.* Walton, 114 N. C. 783, 784, 18 S. E. 945 (false representations to a treasurer as to orders for money; other instances of the sort, admitted); 1897, State *v.* Durham, 121 id. 546, 28 S. E. 26 (similar representations to another person about the same time, admitted); *Oh.*: 1878, U. S. Ins. Co. *v.* Wright, 33 Oh. St. 533 (fraudulent representations by an insurance agent; similar representations to others excluded, because not shown to be false nor known by him to be false); 1883, Tarbox *v.* State, 38 id. 581 (representations as to the breeding, etc., of two horses; "similar offences" shortly before, in another State, admitted to show knowledge); *Pa.*: 1868, Simons *v.* Vulcan Co., 61 Pa. 202, 204, 218 (assumpsit for money obtained by false representations in selling oil-lands; other prospectuses by the defendant, issued about the same time, admitted to show fraud); 1872, Com. *v.* Yerkes, Phila. Com. Pleas, 29 Leg. Intell. 60; 12 Cox Cr. 208, 215, 225, 226 (larceny and false pretences by obtaining a check from the City Treasurer for a purchase aa agent for the sinking fund, never made in fact; the fact that upon similar previous transactinns checks were thus given by the Treasurer on transactions to be perfected in the future, not received to show innocent intent; two Judges dissenting); 1893, Schofield *v.* Schiffer, 156 id. 65, 73, 27 Atl. 69 (similar representations hy a debtor-buyer to third persons, admitted to show intent); 1896, White *v.* Rosenthal, 173 id. 175, 33 Atl. 1027 (action for deceit by false representations of solvency; a series of purchases admitted as indicating a scheme to obtain by fraud); *R. I.*: 1902, State *v.* Letourneau, — R. I. — , 51 Atl. 1048 (selling

(1) *Knowledge Principle.* From the point of view of the Knowledge principle the argument requires (*ante*, § 301) that the former possession be such as is likely to have led to a knowledge or a warning of the stolen character of those goods, and that such warning would have naturally warned the defendant also of the stolen character of the goods in question. (*a*) As to the first element, it may be assumed that the receipt of stolen goods is in itself always more or less likely to result in a warning, chiefly because the owner is apt to follow them up and reclaim them, but also in part because a purchase not made in the ordinary course of trade has often suspicious features about the vendor's offer. (*b*) As to the second element, the warning thus obtained can affect the subsequent receipt of other goods upon one condition only, namely, that there is a similarity in the transactions, *i. e.* that the same person comes to dispose of the second article, or that the second article is of the same lot as the first. From these points of view, then, what are the essential limitations?

(*a*) The *mere fact of possession* would seem to be sufficient, as probably leading to a warning through the reclamation of the goods; and it is not necessary additionally to show that the receipt was accompanied by circumstances calculated in themselves to excite suspicion, or that the possession was so concealed as to show guilty knowledge. The latter features, however, are present in some of the precedents, though they do not seem to be treated as a requirement for every instance.[1] There are therefore three possible atti-

pills on false representations; similar sales to other persons after the sale charged, excluded; no authority cited); *Tenn.:* 1870, Defreese *v.* State, 3 Heisk. 53, 62 (larceny by a fraudulent card trick; evidence admitted of other occasions when the defendant and his confederate used it to win money from other persons); 1891, Rafferty *v.* State, 91 Tenn. 655, 663, 16 S. W. 728 (representations as to loss by fire, made to obtain insurance money; evidence admitted of thirteen different claims of fire-loss by the defendant, within three years, in various cities, under different aliases, and of the similarity of the representations in those cases as to the articles lost; compare § 340, *post*); *U. S.:* 1859, Castle *v.* Bullard, 23 How. 172, 186 (fraudulent sale by an agent to an insolvent purchaser; similar connivance in purchases by the same person from others than the plaintiff, about the same time, admitted to show intent); 1868, Lincoln *v.* Claflin, 7 Wall. 132, 138 (case for obtaining goods by false representations as to assets; "other similar fraudulent transactions of the same parties with others, made about the same time," admitted to show intent); 1871, Butler *v.* Watkins, 13 Wall. 456, 464 (deceit; to show intent, the plaintiff was allowed to show "similar conduct towards another, at about the same time, and in relation to a like subject," here, the business of selling the plaintiff's goods for him); 1882, U. S. *v.* Snyder, 4 McCr. 618, 621 (false return as postmaster, in order fraudulently to increase his compensation, during the quarter ending Dec. 31, 1880; evidence admitted of similar false returns before and after that time, to show intent); 1894, Mudsill M. Co. *v.* Watrous, 9 C. C. A. 415, 61 Fed. 163, 172, 179 (fraudulent salting of ore-samples to induce a purchase; the salting of samples in prior negotiations of purchase with other persons, admitted as showing a plan to tamper with the samples; the opinion is one of the best illustrations of the principles of this chapter); 1896, Penn M. L. Ins. Co. *v.* Mechanics' S. B. & T. Co., 19 id. 286, 72 Fed. 413, 421 (whether a false answer in an insurance application was made with intent to deceive; similar false answers in applications for other policies, admitted); 1898, Spurr *v.* U. S., 31 id. 202, 87 Fed. 701 (false certification of checks by a bank president knowing the account to be deficient; prior approval of illegal stock-speculations of the cashier by the defendant, admitted to show intent); 1899, Bacon *v.* U. S., 38 id. 37, 97 Fed. 35 (false report to comptroller by president of national bank; previous false reports, admitted to show intent); *Va.:* 1878, Trogdon's Case, 31 Gratt. 862, 870 (obtaining goods by false pretences; "similar representations about the same time to other persons," admitted); *Wash.:* 1896, State *v.* Bokien, 14 Wash. 403, 44 Pac. 889 (drawing a check knowingly on no funds; other such previous drawings excluded; a ruling clearly wrong; if any interim deposits had been made, it was for the defendant to make this explanation).

[1] *E. g.* R. *v.* Hinley, R. *v.* Primelt, Eng.; Lewis *v.* State, Kan.

tudes to take as to this element: The mere fact of possession suffices; or, The possession must have been obtained under suspicious circumstances; or, Neither of these suffices, and former *knowing* possession is alone sufficient. The first view is that represented in most Courts in this country; the second is sometimes hinted at; the third is represented by R. *v.* Oddy, in England, — reached not so much on the above reasoning, as on the doctrine of auxiliary policy (*ante*, § 42), a doctrine which if rightly interpreted would exclude evidence of former possession under all conditions whatever.

(*b*) But it remains to be shown that such knowledge or warning would involve warning of the stolen character of the goods in question. In other words, there must be also shown a *similarity* in the transactions, either as to the person bringing the goods or as to their kind, such as would bring the former knowledge or warning to bear in the present instance. What circumstances constitute sufficient similarity is a matter about which no fixed rule can be laid down;[2] but it seems clear that this requirement in its general notion is essential upon the present principle. Moreover, it applies equally whether the proof is of former mere possession or of knowing possession;[3] because the possession is supposed merely to lead up to the inference of knowing possession (by element *a*, above), and when there is thus shown a knowing possession (directly or by this inference) it remains still to show that the former knowledge would have a bearing on the present knowledge, and it is just here that the similarity of the goods or the identity of their vendor is significant. Thus, even the former knowing possession of wholly different goods obtained from a different person could show nothing as to knowledge of the goods charged. From the point of view, then, of the Knowledge principle, it is necessary and sufficient to show (*a*) former receipt and possession (and, perhaps, under suspicious circumstances) (*b*) of goods similar as to the person bringing them or as to their kind or otherwise.

§ 325. **Same**: (2) **Intent Principle**. From the point of view of the Intent principle, the test of admission may be very different. The reasoning of this argument (*ante*, § 302) is that the recurrence of a like act lessens by each instance the possibility that a given instance could be the result of inadvertence, accident, or other innocent intent. Accordingly, the argument here is that the oftener A is found in possession of stolen goods, the less likely it is that his possession on the occasion charged was innocent. It is not a question of specifically proving Knowledge; it is merely a question of the improbability of an innocent Intent. Several practical differences result: (1) It is immaterial whether in the other instances a *knowing* possession is shown. It is the mere fact of the repeated possession of other stolen goods that lessens the chances of innocence. (2) It is immaterial that the other goods were *similar* in kind to those charged, or were received from the same person. On the contrary, the greater the variety of the goods and of the sources they came from, the more striking the coincidence, and the more

[2] Coleman *v.* People, N. Y.

[3] State *v.* Wood, Conn.

difficult to believe that the explanation is an innocent one. (3) It is immaterial whether the other possessions occurred before or after the possession charged; it is the multiplication of instances that affects our belief, and not the time of their occurrence, — provided the time is not so distant as to be accountable for on the theory of chance acquisition. There are precedents which illustrate all the above three conclusions (except the last), *i. e.* which do not require that knowing possession be shown, nor that any similarity in the goods or the vendor be shown; and these precedents thus appear to go distinctly upon the theory of Intent, as above set forth, rather than upon the theory of Knowledge.

So far as concerns the reconciliation of the precedents, it may be said (a) that both the above theories (of Knowledge and of Intent) are legitimate; that it is open to show specifically Knowledge, if so desired, or to show, more generally, Intent; and that evidence which satisfies either of these purposes is proper, on the principle of multiple admissibility (*ante*, § 13); but that the two ought to be discriminated and to be employed intelligently, and without confusing the one with the other; (b) that the force of an argument based on the Intent theory lies in the multiplication of instances; that a single instance has from this point of view little or no weight; and that therefore it is much better, in accepting a single instance, to test it by the Knowledge theory, while in accepting several instances it is sufficient to judge it by the looser but then equally satisfactory Intent theory.

§ 326. **Same: State of the Law in the Various Jurisdictions.** In the light of the foregoing explanation, the precedents in the various jurisdictions, even in the same court, will be seen to be not always consistent; but the significance of each precedent can perhaps be understood by comparing it with the logical requirements of each principle.[1]

[1] *Eng.*: 1826, R. *v.* Dunn, 1 Moo. Cr. C. 146, by all the Judges (knowing receipt of stolen goods; the fact of having received and pledged, within five months, various other goods stolen from the same persons and brought to the defendant by the same person, was admitted, "as an ingredient to make out the guilty knowledge"); 1833, R. *v.* Davis, 6 C. & P. 177, Gurney, B. (the finding on the accused of many other goods stolen from the same person, admitted; also their receipt at previous times; except the receipt of other articles charged in the indictment); 1843, R. *v.* Hinley, 2 Mo. & Rob. 524, 1 Cox Cr. 12, Maule, J. (knowing receipt of stolen goods; repeated acts of receiving stolen property "under circumstances which must have shown him that the property was not honestly obtained," admitted); 1851, R. *v.* Oddy, 2 Den. Cr. C. 264 (knowing receipt of stolen goods; the fact was rejected of the possession, at the same time, of four other pieces of cloth stolen by some one three months before from another mill and belonging to different persons; Pickering, for the prosecution: "It must be conceded that the moral weight of such evidence is irresistible. Suppose a thousand articles, all stolen at different times, either from the same or different persons, and all of them to be found in the possession of the prisoner; could any one doubt that he received them with a guilty knowledge? . . . Is the rule to be confined to cases which are in all particulars identical with Dunn's Case? Or is the evidence admissible if the goods have been received from the same person, though stolen from a different person or at a different time? Or will it be admissible if the other articles were only stolen from the same person, though received from a different one or at a different time?"; Alderson, B.: "Here the evidence merely went to show that the prisoner was in possession of other property which had been stolen in the previous December, and not that he had received such property knowing it to be stolen. Now the mere possession of stolen property is evidence, *prima facie*, not of receiving, but of stealing; and to admit such evidence in the present case would be to allow a prosecutor, in order to make out that a prisoner had *received* property with a guilty knowledge, which had been stolen in March, to show that the prisoner had in the December previous *stolen* some other property from another place and belonging to

§ 327. Other Modes of Evidencing. Needless to say, there are other modes of evidencing the knowledge or the intent of the person possessing

other persons"; Campbell, L. C. J., went chiefly on grounds of the Character rule); 1858, R. *v.* Primelt, 1 F. & F. 51 (to show knowing receipt of stolen lead, the fact was admitted of eleven sales of lead of the same sort, false names being given, and the lead in one case being certainly stolen). The result of R. *v.* Oddy was a legislative change of the law: 1871, St. 34–35 Vict. c. 112, § 19: "... evidence may be given ... that there was found in the possession of such person other property stolen within the preceding period of twelve months, ... for the purpose of proving that such person knew the property [for which he is indicted] to be stolen." The possession offered in evidence under this statute must be possession at the time he is found in possession of the property charged in the indictment: 1884, R. *v.* Carter, 15 Cox Cr. 448; affirming R. *v.* Drage, 14 id. 85, Bramwell, L. J., and solving the doubt of Keating, J., in R. *v.* Harwood, 11 id. 388. The soundness of this limitation may be questioned; but at any rate it is clear that the whole provision is based on the Intent theory. But by the second half of the same statutory section, the possession at other times than the time charged may be shown by the fact that the defendant has "within five years immediately preceding been convicted of any offence involving fraud or dishonesty ... for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen," provided seven days' notice in writing is given. The object of using only the conviction of the offence, instead of proving the offence in the ordinary way, is apparently to obviate Lord Coleridge's objection of unfair surprise and confusion of issues (*ante*, § 194), advanced in R. *v.* Francis, as the main reason for the Character rule; for those objections do not apply to proof by record of conviction. The theory of using the former offence under this clause is clearly that of Intent, not of Knowledge. *Can.* Crim. Code, 1892, §§ 716, 717 (like Eng. St. 1871, *supra*; substituting three for seven days' notice); *Ala.*: 1875, Gassenheimer *v.* State, 52 Ala. 313, 318 (the stolen cotton being found at daybreak in the defendant's store, the fact was rejected that during the preceding week persons had been seen going into the store just before daybreak with sacks of cotton and coming out with the sacks empty); *Conn.*: 1881, State *v.* Wood, 49 Conn. 429, 440 (holding it to be necessary and sufficient that the other goods were received from the same person, but not that they were of the same kind or stolen from the same place; the opinion makes no distinction between former knowing receivings and mere receivings); *Ind.*: 1895, Goodman *v.* State, 141 Ind. 35, 39 N. E. 939 (the stolen thing charged as received by the defendant was a calf, and the knowing receipt of a stolen horse was given in evidence); *Kan.*: 1868, Lewis *v.* State, 4 Kan. 306 (larceny; the fact was admitted of the finding of many other stolen articles in premises carefully equipped for concealing such things, to show guilty knowledge, because "of the general knowledge men have that such an assortment would not be innocently gathered and secured"); *Mass.*: 1861, Devoto *v.* Com., 3 Metc. 418 (possession of other stolen goods, admitted); *Mo.*: 1851, State *v.* Wolff, 15 Mo. 168, 172, *semble* (possession of "various other articles of stolen property," admissible); 1866, State *v.* Harrold, 38 id. 497 (approving State *v.* Wolff); 1894, State *v.* Flynn, 124 id. 480, 27 S. W. 1105 (other articles stolen about the same time from the same and other persons, admitted); *Nebr.*: 1902, Goldsberry *v.* State, — Nebr. —, 92 N. W. 906 (other transactions with stolen goods, admitted on the facts); *N. Y.*: 1857, People *v.* Rando, 3 Park. Cr. 335, 339 ("a series of other acts of the like character," irrespective of the kind of goods or source of obtaining, admitted "to show the knowledge" and "to rebut any presumption of innocent mistake"); 1873, Coleman *v.* People, 55 N. Y. 81, 90, and 58 id. 556, 560 (knowing receipt of twenty-two bars of pig-iron, the property of Burke; evidence rejected of the defendant's possession of some iron-railing stolen from Briggs; both lots had been bought by the defendant from boys, but not the same boys; Allen, J., after noting the limitations sometimes put, that the articles must have been stolen from the same person and brought to the defendant by the same person: "It is unnecessary to say that all these qualifications must exist; but to warrant the introduction of such evidence there must be such a connection of circumstances that a natural inference may be drawn that, if the prisoner knew one article was stolen, he would also be chargeable with knowledge that another was. ... The Briggs iron had no connection with the pig-iron; it was taken from another place, belonged to another person, was of a different character, and received at another time and — for aught that appears — some of it from different persons. Assuming therefore that the prisoner received the Briggs iron and was chargeable with knowledge that it had been stolen, would that circumstance logically or legally charge him, or tend to charge him, with knowledge that the pig-iron was stolen?"; and the Court answered in the negative, while holding that "every case must depend upon its own circumstances"); 1874, Copperman *v.* People, 56 id. 591 (knowing receipt of two parcels of sewing-silk; the knowing receipt from the same person of similar articles stolen from the same place, admitted); 1881, People *v.* Dowling, 84 id. 486 (the rule is laid down, citing Coleman *v.* People, that other possession is admissible if the property was stolen from the same person and obtained from the same person, *and* if there is such a connection of circumstances, etc.; but this is a careless statement, and is probably entitled to no consideration); 1901, People *v.* Grossman, 168 id. 47, 51, 60 N. E. 1050 (larceny of similar goods from the same owners by the same sellers to defendant, admissible); 1903,

the goods charged. The fact itself of their possession is some evidence of probable knowledge,[1] on the theory that the mode of acquisition would as a rule raise suspicion; and in a given instance the circumstances of acquisition — for example, the low price paid[2] — may be available to strengthen this probability. Moreover, the conduct of the defendant in concealing the possession may, as always (*ante*, §§ 276, 278), evidence guilty knowledge. The possession of stolen goods in other evidential aspects has been considered elsewhere (*ante*, §§ 152–155).

5. Embezzlement.

§ 329. **General Principle.** Here the act of taking the property is usually conceded or otherwise proven, and the purpose of using other acts of the sort is to show the criminal knowledge or intent. (1) The *Knowledge* principle (*ante*, § 301) has here little scope for application. It may occasionally happen that a former error in accounting would be likely to result in warning of it to its maker, but this does not in itself carry any probability of disclosure of the later error charged or of knowledge of the nature of the property taken. (2) The *Intent* principle (*ante*, § 302) is the usually appropriate one, and is the one generally accepted by the Courts as governing the use of such evidence. Its theory is that the recurrence of similar takings of property, or, as in the usual case, similar incorrect entries in account-books, suffices to negative mistake or inadvertence on the occasion charged.[1] No doubt the other instances must have occurred under circumstances fairly similar (*ante*, § 302); but no fixed rule is possible on this subject; whether the other acts must appear to have been done in the same employment or in the same series of accounts, or in the same account-book, must depend on the circumstances of each case. (3) The *System* principle (*ante*, § 304) may equally be applicable here, where it is desired to argue from a system of embezzlements to the very act of taking in issue, and not merely to the intent in taking. As to this certain limitations may be noticed. (a) A few Courts are found saying[2] that evidence of other acts is receivable "not to prove that the defendant took the money," but to prove

People *v.* Doty, 175 id. 164, 67 N. E. 303 (knowing receipt of a stolen cowhide; receipt of other stolen hides from the same thieves, but stolen from other owners, admitted; two Judges diss.); *N. C.:* 1881, State *v.* Murphy, 81 N. C. 741 (larceny of a hog; possession in the same pen of another hog belonging to another person, admitted; the opinion fails to appreciate the bearings of the question); *Oh.:* 1872, Shriedley *v.* State, 23 Oh. St. 130, 142 (possession of other goods, known to have been stolen, and received from the same thief, admissible); *S. C.:* 1893, State *v.* Crawford, 39 S. C. 343, 350, 17 S. E. 799 (possession of other kinds of stolen goods, admitted); *Wash.:* 1893, State *v.* Humason, 5 Wash. 499, 503, 32 Pac. 111 (cattle; possession of other cattle, not shown to be stolen, excluded).

[1] 1845, R. *v.* Brett, 1 Cox Cr. 261; 1862, R. *v.* Deer, Leigh & C. 240.

[2] 1860, People *v.* Levison, 16 Cal. 98.

[1] 1888, Manisty, J., in R. *v.* Stephens, *infra;* 1887, Peckham, J., in People *v.* Sharp, 107 N. Y. 468, 14 N. E. 319 ("A man indicted for the embezzlement of funds by false entries might claim, with some degree of plausibility perhaps, that the entry was a mistake; but the probability of such mistakes would be greatly lessened by proof that other false entries of the same kind had been made at or about the same time by the same person").

[2] R. *v.* Stephens Eng.; Com. *v.* Tuckerman, Mass.

that "if he took it, it was done with fraudulent intent." This is unsound, if it is meant absolutely to exclude the inference from System evidence under any conditions; for where the requirements of that principle (*ante*, § 304) are met, such evidence is admissible even to show the very act of taking if it is disputed. (b) Occasionally an intimation is seen [3] that the other acts, even when used merely to prove Intent, must be tested by the System rule (*ante*, § 304), *i. e.* must be so connected as to appear to be parts of a general system of embezzlement. This is also unsound; all that is required is that the other acts should have been done under sufficiently similar conditions to negative the reasonable chances of casual error. (c) In using the other acts to prove Intent, where the very act charged is also disputed, it is not necessary to apply the System test; the Intent evidence may be left to the jury with instructions not to use it unless they first believe from other evidence that the act charged was done.[4]

§ 330. **Other Principles, discriminated.** (1) To avoid the dangers of *variance* between indictment and proof, statutes have occasionally provided that upon an indictment charging a specific act of embezzlement a certain range of time in the proof is to be allowable. This provision deals with the time of the substantive offence charged, and will be strictly construed; [1] but it has no concern with the time of other acts used merely as evidential of the substantive offence. (2) Other questions of variance, or of the identity or the scope of the substantive offence are equally to be distinguished from the present question as to the evidential use of other acts.[2]

§ 331. **State of the Law in the Various Jurisdictions.** The precedents in the various jurisdictions illustrate with more or less consistency the foregoing principles, and concern both civil and criminal cases.[1]

[3] Com. *v.* Tuckerman, Mass.

[4] R. *v.* Stephens, Eng.

[1] Mass. Pub. St. 1882, c. 203, § 44 (In prosecutions for embezzlement or fraudulent conversion, evidence is admissible of any such act within six months after the time alleged); 1882, People *v.* Donald, 48 Mich. 491, 12 N. W. 669 (prior embezzlements in June and September received at the trial; conviction held improper, apparently because they were offered as the very substance of the indictment, which charged embezzlement in November; a statute allowing a range of six months after the date charged excludes impliedly any prior offence); 1889, State *v.* Cornhauser, 74 Wis. 42, 41 N. W. 959 (same).

[2] 1871, R. *v.* Balls, L. R. 1 C. C. R. 328 (whether on an indictment for embezzling 1*l.* 1*s.* the embezzlement of sums separately within a short time might be shown in order to prove the total).

[1] *Eng.:* 1861, R. *v.* Richardson, 2 F. & F. 343, 8 Cox Cr. 448, Williams, J. (embezzlement by a clerk, by increasing the figures of cash-payments and keeping the difference of money; the fact of many other incorrect entries of the same sort was admitted to negative mistake); 1861, R. *v.* Proud, L. & C. 97, 102 (embezzlement by false entries; other incorrect entries admitted, *semble*, to show guilty intent); 1864, R. *v.* Reardon, 4 F. & F. 79, Willes, J. (other takings, admitted to negative mistake); 1888, R. *v.* Stephens, 16 Cox Cr. 387 (on a charge of embezzlement of three separate sums, from the same master in the course of the same work, the evidence for all the counts was held properly considered under each; Manisty, J., quoting with approval Roscoe on Evidence: "'This cannot be done merely with a view of inducing the jury to believe that, because the prisoner has committed a crime on one occasion, he is likely to have committed a similar offence on another; but only by way of anticipation of an obvious defence, — such as that the prisoner did the act of which he was accused, but innocently and without any guilty knowledge, or that he did not do it because no motive existed in him for the commission of such a crime, or that he did it by mistake.' . . . It is not with a view of proving guilt, but of proving the intention with which the act was done, that you anticipate it [by such evidence]"); *Cal.:* 1884, People *v.* Gray, 66 Cal. 271, 274 (embezzlement by a clerk of the Harbor Commissioners; the fact was admitted of other acts of embezzlement

6. Fraudulent Transfers.

§ 333. **Transfers in Fraud of Creditors.** Here the question is whether the transfer was made with intent to defraud the transferor's creditors by deceiving, delaying, or hindering them. The act of transfer is conceded; no specific question as to Knowledge (except of insolvency) usually arises (*ante*, § 301); and the inquiry is simply as to the Intent accompanying the act. On the Intent theory (*ante*, § 302), other transfers of property may have some bearing on this question by tending to negative the probability of good faith. They will have such a probative value whenever they are made under such circumstances that they cannot be naturally accounted for by the ordinary course of business in which such transfers occur from time to time with good faith. The difficulty is to determine what circumstances are essential to produce this improbability that the transfer was in that ordinary course of business which involves good faith. (1) The *quantity* of property conveyed will have great weight — as where all the debtor's estate is conveyed; but this is not an essential. (2) The *persons* to whom the transfers are made will have weight; because ordinary transfers are naturally made to various persons, and a multiplicity of transfers to the same person is hardly to be accounted for by good faith. Moreover, the family or friendly relationship of the transferee may strengthen the improbability. But it is not essential that the transferee should be the same person in each case or should be intimately related.[1] (3) The *time* of the other transfers has much weight; for in the ordinary course of business a large proportion of the entire property may be

while in that office, to negative ignorance or mistake); 1894, People *v.* Bidleman, 104 id. 609, 613, 38 Pac. 502 (embezzlement; the receipt, etc., of other sums than those charged, admissible as "tending to show a system" to conceal the takings and "the intent" of the taking); *Fla.*: 1896, Thalheim *v.* State, 38 Fla. 169, 20 So. 938 (a preceding embezzlement admitted); *Ill.*: 1876, Krilo *v.* People, 82 Ill. 425 (embezzlement; fraudulent collection "of money belonging to other parties," excluded); *Ky.*: 1897, Shipp *v.* Com., 101 Ky. 518, 41 S. W. 856, (falsifying account-books; other false entries admitted to show a common purpose to deceive the bank-officers); *Mass.*: 1857, Com. *v.* Tuckerman, 10 Gray 173, 179, 197 (embezzlement by taking and using his employer's money; the fact was admitted of other embezzlements from the same employer having as transactions "a peculiar and intimate, if not also an inseparable, connection with" the transaction charged; "not for the purpose of proving or as having a tendency to prove that the defendant took the money charged in the indictment, but for the purpose of showing that if he took it, it was done with the fraudulent intent to convert it"); 1861, Com. *v.* Shepard, 1 All. 575, 581 (embezzlement; the fact received of another act of embezzlement in the same week and out of the same books, to show intent); 1902, Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72 (embezzlement of "other articles at about the same time, from the same owner and under the same general circumstances," admissible to show intent); *Mich.*: 1895, People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736 ("previous acts of embezzlement," admitted "to prove intent"); *Minn.*: 1896, State *v.* Holmes, 65 Minn. 230, 68 N. W. 11 (prior takings admitted); *Or.*: 1895, State *v.* Reinhart, 26 Or. 446, 38 Pac. 822 ("a series of connected transactions," covering "many acts done in a series of years," admitted); *U. S.*: 1890, American Surety Co. *v.* Pauly, 18 C. C. A. 644, 72 Fed. 470 (embezzlement by a bank cashier by falsification of the books; to negative "mere oversight or negligence," similar acts of fraud and dishonesty, prior to the date of his surety bond, were admitted); 1900, Dorsey *v.* U. S., 41 id. 652, 101 Fed. 746 (making false entries, etc., in national bank; other false dealings with same bank admitted, Sanborn, J., diss.); 1900, Wolfson *v.* U. S. 41 id. 442, 101 Fed. 430, 102 id. 131 (misapplication of national bank funds; instances of similar misapplication for three years previous, admitted to show intent; Boarman, J., diss., in an opinion full of misconceptions and singularly illiberal views); *Wyo.*: 1894, Edelhoff *v.* State, 5 Wyo. 19, 27, 36 Pac. 627 (embezzlement of rents; other similar takings, admitted to negative mistake). Compare the related precedents cited *ante*, § 321.

[1] Howe *v.* Reed, Me.

casually sold from time to time, but not repeatedly within a short time. But the time is chiefly important so far as the other transfers occur during the period when the transferor is insolvent; because the singularity of such transfers at that time is less accountable by the ordinary course of business than at any other time. It is usually said that the other transfers offered must have occurred about the same time or recently;[2] and perhaps they must have occurred during a time of insolvency, actual or impending, but this should hardly be required as a rule. Subsequent as well as prior transfers equally avail to negative good faith.[3] (4) The *consideration* is material; for a voluntary transfer at such a time is singularly inconsistent with the probability of good faith. On the whole, then, while several sorts of circumstances are significant, their weight may vary in each case, and no one of them is essential, except that of time, and here no fixed rule can be laid down.

But it is not necessary that the rigorous test of the System rule (*ante*, § 304) should be applied, *i. e.* that the other transfers should be so connected as to disclose a *general scheme* (though one or two Courts do go to this extent);[4] it is enough that the other transfers occurred under such circumstances as to tend to negative good faith in the transfer charged. Nor is it necessary to show the other transfers *fraudulent;* it is enough that they were made under some of the above circumstances; for it is the mere recurrence of the similar transactions which by the strange coincidence raises the improbability of good faith (*ante*, § 302); to require a showing of fraud in each of the evidential instances is both unnecessary in principle and impracticable in application.[5]

§ 334. **State of the Law in the Various Jurisdictions.** The precedents in the various jurisdictions illustrate the development of the foregoing principles with more or less consistency.[1]

[2] Nelms *v.* Steiner, Ala.; Piedmont Bank *v.* Hatcher, Va.; for examples of exclusion, see Hardy *v.* Moore, Ia.; Flagg *v.* Willington, Me.

[3] Lynde *v.* McGregor, Mass. For a discrimination on this point, see § 335.

[4] *E. g.* Massachusetts.

[5] In some opinions the language intimates such a requirement, *e. g.* Whittier *v.* Varney, N. H.; but it is usually not called for; see, in particular, Bottomley *v.* U. S., U. S.; M'Elwee *v.* Sutton, S. C.

[1] *Ala.:* 1843, Cummings *v.* McCullough, 5 Ala. 321, 332 (another deed, two days before, while insolvent, to the same person, admitted to show a scheme to defraud); 1852, Dent *v.* Portwood, 21 id. 589 (a deed for land on the same day to the same person, admitted to show the intent of a deed of slaves); 1853, Benning *v.* Nelson, 23 id. 801, 804 (another deed on the same day, admitted); 1897, Nelms *v.* Steiner, 113 id. 562, 22 So. 435 (admitting "other transactions which are fraudulent and which are in point of time contemporaneous or nearly so"); 1898, Davidson *v.* Kahn, 119 id. 361, 24 So. 583 (other transfers about the same time to other persons, admitted); *Ia.:* 1883, Hardy *v.* Moore, 62 Ia. 65, 70, 17 N. W. 200 (conveyances to the same person and others, nearly two years before, excluded as evincing no common purpose); 1902, Kelliher *v.* Sutton, 115 id. 632, 89 N. W. 26 (fraudulent mortgage; "other acts of a similar character, about the same time," admitted to show a connected scheme; *La.:* 1851, Lockhart *v.* Harrell, 6 La. An. 530, 532 (other transactions between the same parties, admitted); *Me.:* 1830, Flagg *v.* Willington, 6 Greenl. 386 (similar sale to another person five years before, not admitted to show present dishonest motives); 1834, Blake *v.* Howard, 11 Fairf. 202 (similar sale to another person eight months before, excluded; *semble* not admissible at all, even though known to the present grantee; weak opinion); 1835, Howe *v.* Reed, 12 id. 515 (in effect overruling the preceding; admitting fraudulent conveyances to other persons about the same time, to show the grantor's intent; the present grantee's knowledge of that intent being a separate fact, to be proved by separate evidence); *Mass.:* 1831, Foster *v.* Hall, 12 Pick. 99 (conveyance alleged to be in fraud of creditors; other fraudulent conveyances to the demandant, at the same time and previously,

§ 335. **Same: Other Kinds of Evidence.** The fraudulent intent of the transferor may be indicated by other circumstances not of the above sort, — such as the debtor's remaining in possession after the mortgage or sale,[1] the pendency of suits at the time of the sale,[2] and other circumstances[3] suggesting their own significance and not raising any difficulty of principle.

admitted); 1852, Long *v.* Lamkin, 9 Cush. 361 (prior sales, excluded because no question of fraudulent transfer was involved); 1853, Cook *v.* Moore, 11 Cush. 213, 216 (similar facts to Foster *v.* Hall; prior fraudulent conveyance, admitted); 1860, Williams *v.* Robbins, 5 Gray 590 (bill to set aside a transfer in fraud of creditors; the fact of two other fraudulent transfers, excluded, because belonging to "a distinct, separate, and independent negotiation, and one had therefore no tendency to characterize or to evince the purpose or design of the parties in the other"; such transactions "must be shown to be so connected with it as to make it apparent that the parties had a common purpose in both"); 1861, Taylor *v.* Robinson, 2 All. 562 (other fraudulent conveyances to other persons, made on the same day, admitted to show fraudulent intent; subsequent ones *semble* excluded, on an erroneous application of the principle that admissions after title divested do not bind); 1866, Lynde *v.* McGregor, 13 id. 172, 174 (similar facts; subsequent fraudulent conveyances, admitted to show a fraudulent purpose); 1867 Winchester *v.* Charter, 97 Mass. 143 (similar to Taylor *v.* Robinson); 1872, Jordan *v.* Osgood, 109 id. 457 (adopts the rule of Williams *v.* Robbins as to showing System; quoted *ante*, § 321); 1899, Brownell *v.* Briggs, 173 id. 529, 54 N. E. 251 (deed alleged to be void against the grantor's wife, as made with intent to defraud her of rights at his decease; similar transfers of personalty to relatives and friends, admitted to show a general plan to defeat the wife's interest); *Mich.:* 1888, Ganong *v.* Green, 71 Mich. 1, 9, 38 N. W. 661 (fraudulent mortgage; other conduct, such as releases of other mortgages, admitted on cross-examination); *Minn.:* 1895, Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. 108 (that notes had been improperly turned over by an insolvent about the same time to other creditors, to show a fraudulent plan to evade creditors, admitted); *Miss.:* 1895, Uhler *v.* Adams, 73 Miss. 332, 18 So. 367, 654 (conveyances of lands between the same parties in other States, to show fraud against creditors in this conveyance; excluded on the facts); *N. H.:* 1820, Lovell *v.* Briggs, 2 N. H. 223 ("it is established practice to admit evidence concerning different sales of a debtor's estate, made at or about the same time, to show a fraudulent intent in the debtor to injure his creditors"); 1839, Whittier *v.* Varney, 10 id. 291, 294 (writ of entry by an attaching creditor to recover land transferred in alleged fraud of creditors; the fact admitted of other transfers of land by the debtor to the defendant about the same time and while insolvent; the other transfers must be shown fraudulent); 1852, Angier *v.* Ash, 26 id. 109 (affirming the doctrine); 1856, State *v.* Johnson, 33 id. 441, 456 (indictment for concealing the property of a debtor with intent to prevent its being taken by process; "evidence of other sales and dispositions of his property by the debtor to defraud his creditors, so connected in time and circumstances as to constitute parts of a general scheme of fraud," held admissible); *N. Y.:* 1833, Benham *v.* Cary, 11 Wend. 83 (like the next case); 1834, Jackson *v.* Timmerman, 12 id. 299 (transfer of land alleged to be in fraud of creditors; other contemporaneous transfers admitted to show intent); *N. C.:* 1855, Holmesly *v.* Hogue, 2 Jones L. 391 (fraudulent transfer of a slave; the fact of a sale by the debtor, six months before, of land which he did not own, rejected, as totally unconnected); 1895, State *v.* Jeffries, 117 N. C. 727, 23 S. E. 163 (transfer of a bicycle in fraud of creditors; pledge of a wagon, covered by the same mortgage, to another person five months later, held too remote in time); *Pa.:* 1851, Zerbe *v.* Miller, 16 Pa. 488, 495 (ejectment, the title depending on whether a conveyance by a father to his son was in fraud of creditors; other deeds and confessions of judgment by the father about the same time, admitted to show intent); 1869, Heath *v.* Page, 63 id. 108, 125 (another deed, made five days before, admitted); *S. C.:* 1831, M'Elwee *v.* Sutton, 2 Bail. 128, 130 (trover; gifts about the same time to each of his other children, six or seven in number, admitted); 1831, Lowry *v.* Pinson, ib. 321, 328 (trespass to try title; another voluntary bill of sale about the same time, admitted); *U. S.:* 1840 Story, J., in Bottomley *v.* U. S., 1 Story 145 (describes the question as "whether a particular voluntary conveyance was made in fraud of creditors," and would admit "like [*i. e.* voluntary] conveyances to other persons who are mere volunteers, made about the same time"); 1893, Kellogg *v.* Clyne, 4 C. C. A. 554, 54 Fed. 696, 12 U. S. App. 174, 183 (fraudulent mortgage; other transfers by debtor about the same time, admitted); *Va.:* 1897, Piedmont Bank *v.* Hatcher, 94 Va. 229, 26 S. E. 505 ("other frauds of like character at or near the same time," admissible); *Wis.:* 1894, Kanfer *v.* Walsh, 88 Wis. 63, 68, 59 N. W. 460 (purchase in fraud of creditors; other transactions of the sort by the buyer with other persons than this debtor, excluded).

[1] 1846, Abney *v.* Kingsland, 10 Ala. 361 (with qualifications); 1831, Smith *v.* Henry, 2 Bail. 118, 123; 1833, s. c. 1 Hill S. C. 24; 1837, Reinhard *v.* Keenbartz, 6 Watts 94. This is the subject of a *presumption* (*post*, § 2515).

[2] 1831, Smith *v.* Henry, 2 Bail. 118, 123.

[3] 1864, Gray *v.* St. John, 35 Ill. 222 ("the manner in which he had recently obtained goods from his creditors," admitted)

§ 336. **Same: Other Principles, discriminated.** The doctrine about Admissions, when made by a predecessor in title, as to the nature of his ownership or possession, has the effect, in an action against a transferee claiming *bona fide* acquisition of property from a debtor, of excluding the *admissions of the debtor* made *subsequent to the transfer*. This rule was in some early cases thought to exclude evidence of subsequent transfers as bearing on the debtor's intent.[1] But it is clear that these are not used in any sense as admissions of his intent, either then or at the time charged; they are used simply as circumstances negativing his former innocent intent at the time charged, and are not justly obnoxious to the above doctrine.[2] The various uses of a debtor's declarations, both as verbal acts and as admissions, in connection with fraudulent transfers, are dealt with elsewhere (*post*, §§ 1082–1086, 1727–1729, 1779–1780).

§ 337. **Fraudulent Purchase with Intent not to Pay.** The invalidity of a purchase made with intent not to pay rests on the falsity of the implied representation of an intent to pay; the transaction is so treated by the Courts, and the rulings are accordingly collected under that head (*ante*, § 321).

§ 338. **Other Fraudulent Transfers.** The principles of Knowledge and Intent (*ante*, §§ 301–304) may occasionally be applied to other kinds of transfers in which fraudulent intent is material.[1]

7. Sundry Frauds; and Fraud in General.

§ 340. **False Claim of a Cause of Action; Fraudulent Insurance.** The bearing of former false claims of a similar sort may often be weighty. The exact principle of evidence applicable is perhaps not beyond doubt. The case is not the same as that of Extortion (*post*, § 352), because there the intent to be proved is not merely the intent to make a false claim, but to obtain money by making a false claim. Here the evidence seems to be sometimes in the nature of conduct exhibiting Guilty Consciousness (*ante*, § 280), or of an Admission (*post*, § 1060) or of the Self Contradiction of a witness (*post*,

[1] In Foster *v.* Hall and Taylor *v.* Robinson, Mass., *ante*, § 334, believing the Admission doctrine, as laid down in Bridge *v.* Eggleston, 14 Mass. 249, to be applicable; traces of the same notion are also seen in the early Maine cases.

[2] As illustrated in Lynde *v.* McGregor, Mass., *ante*, § 334.

[1] 1820, Somes *v.* Skinner, 16 Mass. 348, 358 (conveyance alleged to have been obtained by undue influence; a series of former similar transactions between the same parties, rejected for showing a plan or bad character; but admitted for showing the grantor's susceptibility to the grantee's influence); 1882, Porter *v.* Throop, 47 Mich. 313, 320, 11 N. W. 174 (that G. P.'s will was made by undue influence of A. P., not admissible to show the same for the will of G. P.'s mother, to whom G. P. had bequeathed his property; on this and the preceding case, compare the citations under § 1738, *post*); 1818, Farrington *v.* Sinclair, 15 Johns. 428 (to show a prior levy of execution to be collusive and fraudulent, the officer having given the debtor permission to use the article, the fact was received that similar permission was given for other articles levied on at the same time); 1820, Lovell *v.* Briggs, 2 N. H. 218, 223 (fraudulent purchase by an administrator from the heirs; the facts about other purchases from the other heirs, admitted to show improper dealing, since "the whole intestate estate was probably managed with similar views"); 1859, Castle *v.* Bullard, 23 How. 172 (fraudulent sale by an agent to an insolvent; other fraudulent sales to him before and after time in question, admitted to show intent; also other false representations by the defendant to other persons, about the same time, as to the solvency of the buyer).

§ 1040); yet the former false claims are hardly admissions of the falsity of the present claim. The truth seems to be that the recurrence of false claims of a similar sort tends to negative good faith in the present claim, and thus to show an intent to make a false claim; and it is this intent which is itself an Admission of the party inconsistent with the claim on the pleadings; if the Intent were declared in express words, this would be clear. In short, the former acts are not in themselves admissions, but are evidence of a lack of good faith which is equivalent to an admission.

Of the two possible rules to be applied, that of Intent and that of System (*ante*, §§ 302, 304), it seems clear that the former suffices; the issue concerns the intent accompanying the claim, and the purpose is to negative good faith; the other incorrect claims must be so similar as not to be consistent with casual error; but they need not be so connected as to indicate a system.[1]

§ 341. **Sundry Frauds (Taxes, Mails, Measures, etc.).** The principles of Intent and of System (*ante*, §§ 302–304) are illustrated in many other situations in which a fraudulent intent is in issue, and other similar acts may be received to evidence it, — for example, in the *importation of goods* with intent to defraud the Government, by undervaluation or otherwise;[1] in the

[1] Besides the following cases, reference may be made to the cases under Extortion (*post*, § 352) and to some of those under False Pretences (*ante*, § 321), especially Rafferty *v.* State, Tenn.: 1895, Hood *v.* R. Co., 95 Ia. 331, 64 N. W. 261 (the plaintiff's claim for an injured eye was alleged to be fraudulent; fraud in making a claim upon an insurance company for other injuries was excluded); 1831, Bradford *v.* Ins. Co., 11 Pick. 161 (to prove that damaged blankets received were not damaged by sea-water in transit, but by wetting in the consignor's factory to increase the weight fraudulently, the fact was offered of the receipt of many similar goods, by other consignees in the same year from the same consignor but in different vessels, the damage being similar and of a kind indicating a wetting at the factory; admitted as indicating merely that the damage probably did not arise from sea-water, but not as showing a general plan of the consignor to export wetted blankets); 1893, Miller *v.* Curtis, 158 Mass. 127, 131, 32 N. E. 1039 (charge of indecent assault; other instances, many years before, of the plaintiff making similar false charges against other men, held competent, if they showed "a purpose to obtain money" in that way; but here held not open to that construction); 1890, Smith *v.* Nat'l Ben. Soc'y, 123 N. Y. 85, 25 N. E. 197 (applications to thirty-six different insurance companies, and other acts, admitted to show a general scheme to defraud by insuring and committing suicide); 1897, Young *v.* Doherty, 183 Pa. 142, 38 Atl. 587 (action on a note, said by defendant to be forged; evidence of the plaintiff's habit "of endeavoring to enforce unjust claims," excluded); 1902, Jack *v.* Mutual R. F. Life Ass'n, 51 C. C. A. 36, 113 Fed. 49 (fraudulent insurance; conduct showing a fraudulent scheme of insurance, admitted); 1883, Lewis *v.* Barker, 53 Vt. 23 (the plaintiff claimed that the defendant had caused his goods to be largely over-insured and then burned them; attempts to defraud the insurance companies by making claims for goods not destroyed were admitted, though made after the fire; "the attempt to defraud the company into paying him for the oil, and the owners of the oil into not collecting it of him, was so connected with the main transaction as to make any part of the attempt admissible whether made before or after the fire; it was evidence relative to the scheme, etc.").

Compare the citations *post*, §§ 956–964 (impeaching a witness by showing corruption).

[1] 1840, Bottomley *v.* U. S., 1 Story 135 (importation of goods under fraudulently false invoices; the goods in question were seized in May, 1838; and evidence was received of twenty-three false entries between Aug. 5, 1837, and March 15, 1838, the goods being "broadcloths of a similar character and description" to those seized, and shipped from the same port and persons, and that after the seizure, but before news could have reached England, four other importations of "broadcloths of the same character, cost, and value" as those seized, shipped from the same port and persons, and contained in cases marked like those seized and in numerical sequence, arrived and were stored, and were afterwards entered at a much higher valuation than those seized and under a consignor's oath taken not at the time of shipment, but long after the seizure in question; quoted *ante*, § 302); 1842, Wood *v.* U. S., 16 Pet. 342, 346, 356, 360 (fraudulent undervaluation of imported goods; the defendant had entered twenty-nine importations, of which the four charged were a part, during the years 1839–40, of which fifteen were before and ten after the four charged; all of these invoices were over-

falsification of documents or books, with intent to conceal or misuse;[2] in the substitution of *false articles or measures*, with the intent of cheating;[3] and in sundry modes of chicanery not coming under any general class.[4]

§ 342. **Perjury.** On the analogy of the principles for False Representations (*ante*, § 319), a prior misstatement in the nature of perjury may have value as negativing mistake or *bona fides* on the occasion charged.[1]

§ 343. **Bribery.** On a charge of bribery, any of the three general principles (*ante*, §§ 301–304) — Knowledge, Intent, and Design — may come into play. To show Knowledge of the nature of the transaction, a former transaction of the sort may serve, as indicating an understanding of the particular transaction.[1] To show Intent, another transaction of the sort may serve to

valued, and all asserted an exporter's disconnt which was not given; these were admitted on the same principle as in Bottomley *v.* U. S., Story, J., delivering the opinion, and admitting "other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act").

[2] 1833, Thompson *v.* Mosely, 5 C. & P. 501, Lyndhurst, L. C. B. (alteration of a bill; the fact excluded of alterations in ten other unspecified bills; "it is trying other issues, which the opposite party are not prepared to meet"; here the System rule was applicable); 1857, Gardner *v.* Way, 8 Gray 189 (party's book of accounts offered to show a debt; to impeach its correctness, the fact that some years before this the plaintiff had kept two books of original entries so as to falsify his accounts, was excluded, because the former transactions were "remote and different").

Compare the precedents under Embezzlement (*ante*, § 331) and Forgery (*ante*, § 318), crimes often committed by alteration of books or documents.

[3] 1900, State *v.* Jamison, 110 Ia. 337, 81 N. W. 594 (using false weights; falsity of weights "at other times," admitted to show knowledge); 1882, Dibble *v.* Nash, 47 Mich. 589, 11 N. W. 399 (fraudulent substitution of other land; the defendant's offer to sell the original land to a third person, admitted to negative mistake); 1887, Reid *v.* Ladne, 66 Mich. 22, 25, 32 N. W. 916 (two or three false weighings in 1885, in a general course of dealing, held not sufficient to establish fraudulent weighing in 1877); 1876, Bainbridge *v.* State, 30 Oh. St. 264, 274 (knowingly delivering skimmed milk to a factory for cheese, with intent to defraud; repeated deliveries to the same factory about the same time, admitted); 1832, Townsend *v.* Graves, 3 Paige Ch. 453 (fraudulent drawing of a lottery; the defendant's fraudulent alteration of his account-book in a lodge a year before, excluded).

Compare the precedents under False Pretences (*ante*, § 321).

[4] Can. Crim. Code 1892, § 693 (advertising counterfeit money; any letter etc. concerning "any similar scheme or device to defraud the public" is *prima facie* evidence of the "fraudulent character of such scheme or device"); 1892, Continental Ins. Co. *v.* Ins. Co., 2 C. C. A. 535, 51 Fed. 884 (action to recover reinsurance-moneys paid out by the plaintiff to third persons, a common agent of plaintiff and defendant having apportioned the reinsurance not according to good judgment or chance, as authorized, but through a fraudulent scheme in general to relieve the defendant from loss and throw it upon others; evidence of similar shiftings of loss by the agent upon other companies, admitted to show this scheme); 1901, Packer *v.* U. S., 46 C. C. A. 85, 106 Fed. 906 (using the mails to defraud by investment-circulars; other solicitations of a similar sort, admitted).

[1] 1903, Stone *v.* State, — Ga. —, 45 S. E. 630 (subornation of perjury; other preparatory efforts to coach the false witnesses, admitted); 1866, State *v.* Raymond, 20 Ia. 582, 588 (another perjury "relating to the same oath and subject-matter," allowed to evidence intent); 1898, People *v.* Van Tassel, 156 N. Y. 561, 51 N. E. 274 (subornation of perjury; attempts to suborn for the same trial other persons not called as witnesses, admitted); 1902, People *v.* Doody, 172 id. 165, 64 N. E. 807 (perjury in falsely testifying that he did not remember certain criminal acts; his prior testimony asserting and admitting those acts, here received to show that he did know and remember them); 1840, U. S. *v.* Wood, 14 Pet. 430, 432, 437, 443 (perjury by falsely valuing imported goods; thirty-five letters indicating a general design of the sort, covering more than three years, admitted as showing a false swearing with intent to defraud). Compare the cases cited *post*, § 963 (impeachment of a witness by other perjuries or admissions of perjury).

[1] 1838, Webb *v.* Smith, 4 Bing. N. C. 373, 379 (bribery; the defendant stood in the front room of the house receiving voters, and gave a card to many; those receiving cards went to an adjoining room and received from another person £10 for each card; to show the defendant's knowledge of this handling of the money, the fact was received of his giving cards to other voters than the three charged, and of their receiving the money; Bosanquet, J.: "To show that he knew such cards would produce money, it was very important to prove that on the same day and in the same place he was cognizant of what passed in the inner room").

negative good faith.[2] To show a general Design, a former attempt towards the same general end may be significant.[3]

§ 344. **Fraud in General; Latitude of Investigation.** It is often said that, in evidencing fraud, a broad scope of investigation must be allowed,[1] and, in particular, that the range of cross-examination of the party charged must be liberal.[2] It is not easy to understand the exact significance of such statements. Apart from a ruling upon a concrete piece of evidence, they cannot mean much. If they mean that the principles of evidence are to be relaxed or abandoned, they are unsound. If they mean that evidence of System or of Intent is to take a wide range, they are useless except so far as they are reducible to some definite principle, such as are here involved (§§ 301–304, *ante*). Perhaps they are usually intended to suggest that many apparently innocent parts of a fraudulent scheme must be evidenced before the fraudulent significance of the whole can appear.[3] As to any particular liberty on cross-examination, nothing can be claimed for that situation beyond the general principle applicable to all witnesses (*post*, § 946).

8. Larceny and Kidnapping.

§ 346. **Larceny; General Principle.** (1) The *Knowledge* principle (*ante*, § 301) may occasionally come into application, where the purpose is to show specifically that the defendant was aware that the property was not his

[2] 1899, People *v.* Hurley, 126 Cal. 351, 58 Pac. 814 (offering to accept a bribe, the defendant being a delegate to a nominating convention; similar solicitations to another candidate for the same office about the same time, excluded; a ruling that wrongs the law and protects a rank crime); 1901, Higgins *v.* State, 157 Ind. 57, 60 N. E. 685 (common councilman soliciting a bribe for the passing of an ordinance; solicitation about the same time of a bribe for another pending ordinance, admitted); 1898, State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127 (demanding a bribe by a city councillor; similar demand of another member of the same firm about the same subject, admissible); 1903, State *v.* Fitchette, — id. —, 92 N. W. 527 (taking money for appointment to office; similar transaction six months before, excluded; the opinion is over-scrupulous, and is of the sort that helps to create immunity for rascals); 1903, State *v.* Ames, — id. —, 96 N. W. 330 (bribery; payment to defendant's agent by other persons, admitted on the facts; State *v.* Fitchette distinguished).

[3] 1896, State *v.* Williams, 136 Mo. 293, 38 S. W. 75 (embracery; attempts to corrupt other jurors on the same panel about the same case, admitted to show intent); 1887, People *v.* Sharp, 107 N. Y. 427, 456, 470, 14 N. E. 319 (indictment for offering a bribe in 1886 to a member of the Common Council of the City of New York, to influence his consent to a franchise for a surface-railway on Broadway; the fact of the offer of a bribe in 1883 to the engrossing-clerk of the State Assembly to alter a bill so as to allow the construction of the same railway was rejected; the present principle and precedents were not considered, except by Peckham, J.,; there is nothing to be said in support of this ruling; it is of the kind that breeds defiance of the law and encourages criminals in gambling on the result of judicial quibbles). Compare the cases *post*, §§ 956–964 (impeaching a witness by showing bribery).

[1] 1897, Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; 1870, Comstock *v.* Smith, 20 Mich. 345; 1860, Filley *v.* Register, 4 Minn. 391, 405 (grant in fraud of creditors); 1865, Smalley *v.* Hale, 37 Mo. 103 ("to disclose its [the transaction's] true character, explain the acts of the parties, and throw light on their objects and intentions"); 1880, Massey *v.* Young, 73 id. 260, 273; 1898, Armagost *v.* Rising, 54 Nebr. 763, 75 N. W. 534; 1847, Kauffman *v.* Swars, 5 Pa. St. 31 ("No case of this sort could be made out if it were necessary to dissect the evidence, and show that every part of it was immediately connected with the party to be affected by it"); 1895, Leedom *v.* E. F. & C. Co., 12 Utah 172, 42 Pac. 208.

[2] 1876, Jacobsen *v.* Metzger, 35 Mich. 103; 1896, Cohen *v.* Goldberg, 65 Minn. 473, 67 N. W. 1149; 1897, Pincus *v.* Reynolds, 19 Mont. 564, 49 Pac. 145; 1897, Bennett *v.* McDonald, 52 Nebr. 278, 72 N. W. 268.

[3] 1861, Woodward, J., in Stauffer *v.* Young, 39 Pa. 455, 460, suggests that the ordinary doctrines of relevancy are not intended to be varied by such statements.

own, by showing former acts which must naturally have led to a warning.[1] (2) The *Intent* principle (*ante*, § 302) is the one of most frequent application; for the recurrence of similar takings may serve to negative mistake, inadvertence, or good faith at the time charged, because this recurrence cannot be accounted for by the ordinary chances of innocent taking.[2] In this view the other instances offered may be subsequent as well as prior to the time charged.[3] They must occur under circumstances more or less similar, that is, so similar that the chance of innocent recurrence in the same way is lessened.[4] It is in such a case assumed that the act of taking is otherwise proved, and that the Intent is alone aimed at by such evidence. The theory of Anonymous Intent (*ante*, § 303) is also occasionally applicable; for mistake may be negatived by other instances of the same sort, even though the other instances cannot be connected with the defendant.[5] (3) The *System* principle (*ante*, § 304) is applicable where the act of taking is to be proved, and a general system leading up to the act is offered as the basis of inference; [illegible] the other acts should be so connected by common features as to indicate a general plan. Such requisites are seldom fulfilled; and in most of the rulings the prior similar acts are excluded because their sole purpose is to show the doing of the act, and yet they do not fulfil the requirements of the System principle.[6] So far, however, as the object is merely to negative the innocent intent accompanying a proved act, the question should be governed by the Intent principle.

§ 347. **Same: State of the Law in the Various Jurisdictions.** The precedents in the various jurisdictions illustrate the development of the foregoing principles with more or less consistency.[1]

[1] R. *v.* Bleasdale, Eng.

[2] Compare the quotations *ante*, § 302.

[3] R. *v.* May, Eng.

[4] R. *v.* Ellis, Eng., Dove *v.* State, Ark., People *v.* Cunningham, People *v.* Robles, People *v.* Lopez, Cal., Williams *v.* People, Ill., Barton *v.* People, Oh.

[5] State *v.* Van Winkle, Ia.

[6] Lewis *v.* State, Kan., Shears *v.* State, Ind., Peopla *v.* Schweitzer, Mich., Stata *v.* Goetz, Stata *v.* Reavis, Mo., Cheny *v.* Stata, Oh., Walker's Case, Va., Schaser *v.* State, Wis.

[1] *Eng.:* 1826, R. *v.* Ellis, 6 B. & C. 145 (larceny by a clerk; marked shillings were put into the till; the fact of several successive takings from the till on the sama day was admitted "to show the character" of the act); 1845, R. *v.* May, 1 Cox Cr. 236 (larceny of money on the 9th by a servant in a shop; a larceny from tha sama till on tha 13th was admitted, apparently to negative the idea of the money being placed on tha defendant's person by others); 1848, R. *v.* Bleasdale, 2 C. & K. 765 (larceny of coal by cutting beyond the boundary-line beneath the surface; to show that tha trespass was knowing, the fact was received of similar cuttings into tha land of 30 other proprietors); 1858, R. *v.* Southwood, 1 F. & F. 356 (to show the stealing of three books of account, the fact of the destruction of another was held not "material", "It would be merely bad conduct in one instance inducing a probability of bad conduct in another"); 1864, R. *v.* Reardon, 4 F. & F. 79 (other larcenies, admitted to negative mistake); *Can.:* 1897, R. *v.* McBerny, 29 N. Sc. 327, 328 (larceny by trick; other simllar acts, admitted); *Ala.:* 1839, State *v.* Wisdom, 8 Port. 511, 516 (negro-stealing; that the defendant was seen talking with other slaves shortly before, excluded); *Ark.:* 1881, Dove *v.* State, 37 Ark. 261, 263 (larceny of a horse by a boy, who claimed that he had merely jumped on tha horsa and run away to escape a whipping from his father; evidenca that the defeudant had taken a bridla from another person, at an unspecified time and place, excluded); 1881, Endaily *v.* State, 39 id. 278, 280 (larceny of horses; larcany at the same tima of a saddla and a bridle, taken from other persons and put on the horses, not admitted to show intent); *Cal.:* 1868, People *v.* Robles, 34 Cal. 591, 593 (larceny of sheep of R.; the fact of tha theft of W.'s sheep, which were herded with R.'s, driven off and sold by the same persons, admitted as indicating intent); 1881, People *v.* Lopez, 59 id. 362 (finding of other horses, disappearing at the same time, in the defandant's possessiou, admitted); 1885, People *v.* Cunningham, 66 id. 668, 4 Pac. 1144, 6 Pac. 700, 846

§ 348. **Same: Sundry Limitations.** (1) Throughout the preceding topics it has been seen that under the Intent theory the purpose was to negative

(larceny of cattle; the defence being innocent purchase from a third person, the fact was admitted in rebuttal that cattle of another person were stolen from the same premises at the same time and found in the defendant's possession; Thornton, J., diss.); 1894, People *v.* Fehrenbach, 102 id. 394, 36 Pac. 678 (taking money deposited with a confederate; defendant's attempts to induce another to deposit in the same way, admitted); *Colo.:* 1897, Housh *v.* People, 24 Colo. 262, 50 Pac. 1036 (larceny of sheep by fraud; similar transaction with another person at the same time, admitted to show intent); *Fla.:* 1903, Baldwin *v.* State, — Fla. —, 35 So. 220 (larceny of grain; other acts forming part of a plan, admitted); *Ill.:* 1897, Williams *v.* People, 166 Ill. 132, 46 N. E. 749 (assault with intent to steal; previous larcenies about the same place and time, admitted to show a general plan of picking pockets during the presence of a circus); 1902, Bishop *v.* People, 194 id. 365, 62 N. E. 785 (larceny of wire; defendant's stealing of another lot of wire, shortly before, excluded); *Ind.:* 1871, Bonsall *v.* State, 35 Ind. 461 (larceny; robbery of the same person on the next day, excluded); 1897, Shears *v.* State, 147 id. 51, 46 N. E. 331 (other larcenies, not admissible to show the fact of commission of the larceny charged; nor even to show intent where as here "proof of the commission as charged carries with it the evident implication of a criminal intent"; wrong on both points, and of no value); *Ia.:* 1890, State *v.* Van Winkle, 80 Ia. 15, 18, 45 N. W. 388 (larceny of cattle; the stealing of other cattle from the owner in question at the same time, admitted as indicating that the cattle charged to have been stolen had not strayed but had been stolen); 1902, State *v.* Wackernagel, — Ia. —, 91 N. W. 761 (larceny of hogs; larceny of harness, excluded on the facts); *Kan.:* 1868, Lewis *v.* State, 4 Kan. 306 (larceny; the fact admitted of the careful arrangement of the premises for concealing goods, the finding of many stolen articles secreted, etc., as showing "a combination between the appellent and the others to carry on a general stealing business"); 1883, State *v.* Thurtell, 29 id. 148 (larceny; the defendant's belonging to a gang of horse-thieves, excluded, because shown by reputation only, but also — this seems incorrect — irrespective of the mode of proof); *La.:* 1894, State *v.* Bates, 46 La. An. 849, 15 So. 204 (another larceny at a different time and place, excluded); 1898, State *v.* Marceaux, 50 id. 1137, 24 So. 611 (defendant's admissions of former similar larcenies and of a plan to continue them, admitted); *Me.:* 1855, Pike *v.* Crehore, 40 Me. 503, 511 (to disprove the receipt of money sent by mail in September, 1834, the fact was offered of the finding in 1836, in the house inhabited in September, 1834, by the letter-carrier delivering letters at the alleged payee's town, of secreted letters, dated 1834, directed to persons in that town, and opened; excluded); *Mich.:* 1871, People *v.* Schweitzer, 23 Mich. 301 (prior larceny of other articles from the same person, excluded); 1894, People *v.* Machen, 101 id. 401, 404, 59 N. W. 664 (pocket-larceny; that the defendant shortly before was seen feeling in other persons' pockets, admitted to show intent); *Mo.:* 1863, State *v.* Goetz, 34 Mo. 85, 90 (larceny; other larcenies on the same day, about the same hour, and in stores near by, excluded, no connection being shown between the different felonies); 1880, State *v.* Reavis, 71 id. 421 (larceny of cattle; other larcenies of cattle excluded); *Nebr.:* 1898, Davis *v.* State, 54 Nebr. 177, 74 N. W. 599 (larceny by bailee; fraudulent borrowing from a third person while using the horse taken, not received to show intent); *Oh.:* 1833, Cheny *v.* State, 7 Oh., Pt. 1, 222 (larceny of a horse; subsequent engagement of the defendant with others "in one line as horse-thieves," excluded); 1849, Barton *v.* State, 18 id. 221 (a larceny of money from E., on the night before the alleged stealing of a horse from T., not admitted to show intent); *Okl.:* 1899, Beberstein *v.* Terr., 8 Okl. 467, 58 Pac. 641 (larceny; other larcenies forming part of a general plan, admitted); *Or.:* 1888, State *v.* Harding, 16 Or. 493 (larceny; that the defendant, while going to the place, assaulted a co-conspirator, admitted); 1900, State *v.* Savage, 36 id. 191, 60 Pac. 610 (larceny from an express company; instances of a former plan to rob an express car of the same company, admitted); *Tenn.:* 1884, Links *v.* State, 9 Lea 701, 712 (larceny by substituting a cheap ring for a valuable one in a jeweller's tray, while the jeweller was attending to another matter, the defendant having at the time purchased another cheap ring and left it for engraving; the fact of two similar acts in other stores, one in another State, admitted to negative mistake; compare State *v.* Defreese, *ante*, § 321); *Tex.:* 1874, Gilbraith *v.* State, 41 Tex. 567 (larceny of a bull; larceny of a steer belonging to another person, excluded, chiefly because the record showed the conditions and purpose of its use too imperfectly); 1892, Nixon *v.* State, 31 Tex. Cr. 205, 208, 20 S. W. 364 (larceny of a horse; prior possession and sale of other horses stolen from another place, excluded); 1898, Unsell *v.* State, 39 id. 330, 45 S. W. 1022 (theft of cattle; prior thefts of cattle, excluded on the facts); 1898, Holt *v.* State, ib. 282, 46 S. W. 829 (larceny; another larceny admitted on the facts); *Vt.:* 1892, State *v.* Kelley, 65 Vt. 531, 27 Atl. 203 (larceny; other stealings on the same trip of a wagon, admitted); *Va.:* 1829, Walker's Case, 1 Leigh 574 (larceny of a watch, chain, and key from T.'s house; the fact of the defendant's stealing on the same day a cloak from T.'s house, rejected); *Wash.:* 1901, State *v.* Gottfreedson, 24 Wash. 398, 64 Pac. 523 (larceny of a horse; defendant's larceny of another horse turned on the range with the former, excluded; unsound); *Wis.:* 1874, Schaser *v.* State, 36 Wis. 429 (a former larceny from another person, excluded).

For other instances, compare the citations of

innocent intent; if the jury find the act proved, they are to use the evidence in question to determine the Intent. It is immaterial that mistake or inadvertence has not been expressly set up by the defendant; for the prosecution is bound as a part of its case to prove the criminal intent and therefore to negative innocent intent; for example, if the jury on retiring agreed that the taking had been proved, and then proceeded to determine the intent, they might find themselves without sufficient evidence, if these former acts were not before them as a part of the evidence. It is therefore a radical error to suppose that the evidence under the Intent principle is only available after the defendant has expressly suggested mistake or inadvertence as his exoneration.[1]

(2) The defendant may equally resort to former acts as indicating a general honest purpose, provided there is similarity enough in the occasions to make the former acts relevant by the general principle.[2]

§ 349. **Kidnapping and Enticement.** On a charge of *kidnapping, enticement to escape*, or the like, the analogies of proof of larceny are often applicable.[1]

9. Robbery, Burglary, and Extortion.

§ 351. **Robbery and Burglary; General Principle.** (1) No opportunity seems here to arise for the application of the *Knowledge* principle (*ante*, § 301). (2) The *Intent* principle (*ante*, § 302) allows the use of another similar act wherever, assuming the act to be otherwise proved and the intent to be in issue, the recurrence of the act negatives the possibility of mistake or good faith.[1] (3) The *System* principle (*ante*, § 304) assumes that the act itself is to be proved and proposes to infer its probability from the existence of a general design or system; the other acts offered to show this should be so connected as to indicate a common design; but this requirement is often not met.[2]

larceny by trick, under false pretences (*ante*, § 321), of larcenies forming inseparable parts of an act (*ante*, § 218), and of larcenies identifying the goods taken (*post*, § 415).

[1] 1894, People *v.* Tucker, 104 Cal. 440, 38 Pac. 195 (larceny of money from L. on Jan. 18; another larceny of money from L. on Jan. 17, offered to negative a defence that the taking on Jan. 18 was done to preserve L.'s money as a friend; excluded because no such defence was made).

[2] 1897, Hendry *v.* State, 39 Fla. 235, 22 So. 647 (larceny of cattle; a custom of cattle-owners to drive off and sell friends' cattle with their own, not admitted, where the defendant was not a friend of the owner of the cattle taken); 1869, Foster *v.* People, 18 Mich. 266, 271 (larceny of a horse; an attempt by the defendant, within six months before, to purchase a horse, not admitted to show honest intent, the defence being that the horse was purchased, not stolen).

[1] 1849, Taylor *v.* Horsey, 5 Harringt. 131 (business as a negro trader, admitted to show the intent of purchase, under a statute forbidding purchase with intent to export); 1841, Com. *v.* Turner, 3 Metc. 19 (kidnapping with intent to transport, the taking of the child not being disputed; the fact of the defendant's attempt on the previous day to get possession of another child, admitted to show his intent); 1839, State *v.* Ford, 3 Strobh. 517 (indictment for stealing slaves; the fact received of an unsuccessful solicitation by the defendant to the witness, two years before, to undertake such work; O'Neall, J.: "Remoteness of time, where the party made declarations pointing to this corrupt intention, cannot render the evidence incompetent. . . . If it could be shown that he had thrown out dark hints to others who had declined, might it not be considered as the natural consequence that his solicitations would be followed up until he found his man?"); 1848, Cole *v.* Com., 5 Gratt. 696 (advising slaves belonging to E. L. to escape; evidence of a similar advising of slaves belonging to other persons, excluded).

For *enticement to prostitution*, see *post*, §§ 357, 401.

[1] Kidd's Trial. R. *v.* Briggs, Eng., People *v.* McGilver, Cal., State *v.* Cowell, Nev., State *v.* Desroches, La.

[2] Mason *v.* State, Ala., Ford *v.* State, Ark., Com. *v.* Scott, Mass., Lightfoot *v.* People, Mich., State *v.* Greenwade, Mo., Swan *v.* Com., Pa.

(4) The principle of Inseparableness (*ante*, § 218) will sometimes admit evidence of other offences inseparable from the narrative of the substantive act charged.[3] In general the considerations applicable to the preceding topic (Larceny) are also here applicable.[4]

[3] 1849, Com. *v.* Williams, 2 Cush. 584 (burglary; the possession of a large number of burglar's tools was shown, but some of them were not fitted to the commission of the particular offence; admitted, because they were part of the mass or parcel, "without sanctioning the admission of evidence merely tending to show that the defendant had in his possession instruments adapted to the commission of other crimes").

[4] *Eng.:* 1696, Captain Vaughan's Trial, 13 How. St. Tr. 499 (treason by cruising under the French flag in the "Loyal Clencarty," with intent to capture English subjects and vessels; after proving the cruising in that vessel, the prosecution offered to show "that during this war, before and after the treason laid in the indictment, he was a cruiser upon and taker of the king's ships, and this fortifies the direct proof given of the intention; . . . we would produce collateral evidence, to induce a firmer belief of that special overt act, by showing you that he hath made it his practice during the war to aid and assist the king's enemies"; L. C. J. Holt: "I cannot agree to that . . . ; because a man has a design to commit depredation on the king's subjects in one ship, does that prove that he had an intention to do it in another?"; this ruling is clearly wrong, and is entirely inconsistent with the next one); 1701, Captain Kidd's Trial, 14 id. 154, 182 (piracy; the defendant was commissioned by the king in 1696 to destroy the pirates in the Indian seas, but was now charged with piracy in those regions; he admitted the capture of the ship as charged, but pleaded that it was done under his commission; to disprove this lawful intent, evidence was given of a series of previous and subsequent marauding on the same voyage; L. C. B. Ward: "The seeming justification he depends on is his commissions. Now it must be observed how he acted with relation to them, and what irregularities he went by; . . . what he did before shows his mind and intention not to act by his commissions, which warrant no such things. . . . Now no man knows the mind and intention of another but as it may be discovered by his actions"); 1796, R. *v.* Vandercomb, 2 Leach 4th ed. 708 (burglary; a previous larceny from the same house, rejected); 1839, R. *v.* Briggs, 2 Moo. & Rob. 199, Alderson, B. (robbery; the fact received of the robbery by the defendant of another person at the same place a short time in hours before); *Ala.:* 1868, Mason *v.* State, 42 Ala. 532 (the fact admitted of a series of other burglaries by the defendant and others under similar conditions, during the same week, and in the same region); *Ark.:* 1879, Ford *v.* State, 34 Ark. 649 (murder committed during a robbery of B.; the fact received of a general plan to rob the stores of B., C., and J.); *Cal.:* 1874, People *v.* Dubois, 48 Cal. 551 (burglary; another burglary of the same room on the night before, excluded); 1885, People *v.* McGilver, 67 id. 55, 56, 7 Pac. 49 (burglary; that the defendant was arrested while breaking into another store and that burglar's tools were found upon him, admitted); *Ind.:* 1893, Frazier *v.* State, 135 Ind. 38, 41, 34 N. E. 817 (other burglaries by the defendant on the same night, admitted to show that he "was out on a mission of burglary"); *Ia.:* 1903, State *v.* Berger, — Ia. —, 96 N. W. 1094 (burglary of a railroad car; sundry prior misdoings, excluded); *La.:* 1896, State *v.* Desroches, 48 La. An. 428, 19 So. 250 (breaking and entering with intent to rob; a shooting at the same time, admitted to show intent); *Mass.:* 1877, Com. *v.* Scott, 123 Mass. 225, 234 (robbery of the Northampton Bank; the fact received of various criminal doings showing a general plan to rob banks, and in particular the one in question); *Mich.:* 1868, Lightfoot *v.* People, 16 Mich. 507, 510 (burglary; a former burglary of the same house within a year, excluded); 1901, People *v.* Henry, 129 id. 100, 88 N. W. 77 (breaking and entering; convictions of larceny on two former unconnected occasions, excluded); *Miss.:* 1898, McGee *v.* State, — Miss. —, 22 So. 890 (robbery; independent assault committed at the same time and place by the defendant's employer upon another person, excluded); *Mo.:* 1880, State *v.* Greenwade, 72 Mo. 300 (the robbery of H. was planned, and L. being mistaken for H. was first robbed; the fact of the plan and the robbery of H., admitted on the charge of robbing L.); 1903, State *v.* Spray, — id. —, 74 S. W. 846 (robbery; another robbery nearby and about the same time of night, excluded); *Nev.:* 1877, State *v.* Cowell, 12 Nev. 337 (burglary of A.'s house; the fact admitted, to show intent, that a few days beforehand the defendant had planned with others to rob A. on the street and desisted only because they learned that he had no money about him); *N. J.:* 1898, Leonard *v.* State, 60 N. J. L. 8, 41 Atl. 561 (possession of burglar's tools; conviction of larceny, and suspicious conduct near a dwelling, excluded); *N. Y.:* 1880, Hope *v.* People, 83 N. Y. 419, 423, 428 (robbery of the key of a bank; evidence admitted of two prior unsuccessful attempts by the defendant to rob the same bank, as indicating with other facts a general plan with other persons to rob the bank, the latter robbery being shown to have been committed by the key-robbers); *Oh.:* 1876, Coble *v.* State, 31 Oh. St. 100 (assault with intent to rob; an assault upon another person in the same vicinity about five minutes later, not admitted to show intent); *Pa.:* 1883, Swan *v.* Com., 104 Pa. 218 (robbery of a store of B. on the night of September 13; the fact of the defendant's complicity in a robbery of the house of R., "about the same time," in the same township, rejected, because there was no "system established between the offence on trial and that

§ 352. **Extortion and Blackmail (Robbery by Threatening Demands).** The principles that here apply are those of Knowledge and of Intent. (1) It may be argued that the successful obtaining of money on a former occasion by similar means tends to show the acquisition of knowledge that money can be obtained in this way (*ante*, § 301). This argument, however, as here applied,[1] seems somewhat forced; such knowledge being a matter of common understanding and not needing to be proved. (2) It is clear, however, that the Intent argument is entirely applicable, *i. e.* the doing of similar acts at other times tends to negative the supposition that the demand on the occasion charged was made in good faith (for example, with a genuine desire to obtain compensation for supposed injuries). This use of such evidence is generally sanctioned.[2]

10. Arson.

§ 354. **General Principle; State of the Law in the Various Jurisdictions.** (1) The *Knowledge* principle (*ante*, § 301) has here usually no scope for

introduced, to connect it with the defendant"); *Tex.*: 1894, Dawson *v.* State, 32 Tex. Cr. 535, 552, 25 S. W. 21 (prior and subsequent burglaries, admitted on the facts); 1898, Long *v.* State, — id. —, 47 S. W. 363 (other burglaries in the neighborhood about the same time, excluded); 1903, Glenn *v.* State, — id. —, 76 S. W. 757 (burglary; other anonymous burglaries of the same house, excluded); *Wash.*: 1902, State *v.* Norris, 27 Wash. 453, 67 Par. 983 (burglary of an adjacent house on the same night, admitted); *Wis.*: 1881, Neubrandt *v.* State, 53 Wis. 89, 91, 9 N. W. 824 (breaking with intent to steal B.'s goods; the taking of goods of other persons from the same house at the same time, admitted to show the intent).

[1] In R. *v.* Cooper, Eng., *infra*; quoted *ante*, § 301.

[2] 1758, Barnard's Trial, 19 How. St. Tr. 825 (charge of sending threatening letters; a series of them offered; objection, not passed on, that "one felony, whoever it may affect, cannot be evidence of another felony"); 1830, R. *v.* Winkworth, 4 C. & P. 444, Parke, J. (robbery by demanding money under threats of violence; the accused, one of a mob in front of the prosecutor's house, came up and civilly advised him to give them money to get rid of them; to show that this was not *bona fide* advice, the fact was received of similar demands made at other houses on the same day by the same mob when the defendant was with it); 1819, R. *v.* Egerton, R. & R. 375, by all the Judges (robbery by threats of charging the prosecutor with sodomy; the fact of another attempt by the same threats on the next evening to rob the prosecutor was admitted "as confirmatory of the truth of the prosecutor's evidence, as to the transaction of the former day and as to the nature of those transactions"); 1849, R. *v.* Cooper, 3 Cox Cr. 547, Cresswell, J. (charge of feloniously accusing a person of an unnatural crime with intent to extort money; the fact offered of former obtaining of money by similar methods, as told by the accused to a comrade; admitted, to show knowledge of the likelihood of money being offered); 1850, R. *v.* McDonnell, 5 Id. 153, Erle, J. (excluding a former instance of a similar charge because the intent was clear here, if the prosecutor was to be believed at all); 1898, People *v.* Lambert, 120 Cal. 170, 52 Pac. 307 (prosecutrix for rape by her father, allowed to be asked whether she had not planned to "put up jobs" on him to get him into prison and thus be free from control); 1899, Wallace *v.* State, 41 Fla. 547, 26 So. 713 (blackmail by threatening to accuse A. of keeping a bawdy-house; similar threats to other similar women, admitted to show intent); 1903, Glover *v.* People, — Ill. —, 68 N. E. 464 (maliciously threatening to kill, with intent to extort money; defendant's prior arrest etc. of the person threatened, and his demand for money, admitted, as showing the parties' "previous relations"); 1895, State *v.* Lewis, 96 Ia. 286, 65 N. W. 295 (extortion of money by a newspaper publisher; previous instances of extortion from other persons, admitted merely to show guilty intent); 1893, Com. *v.* Saulsbury, 152 Pa. 554, 558, 25 Atl. 610 (extortion by a constable; similar obtaining of money from another person, excluded; clearly erroneous); 1848, Britt *v.* State, 9 Humph. 31 (the prosecutor was a stranger and the defendant was charged with obtaining money from him by false pretences that the prosecutor had passed counterfeit money and false pretences of having a warrant against him; to negative good faith, the fact was received of the defendant's having followed the prosecutor the next day into the adjoining county and extorted other money, etc., by falsely claiming that the latter had stolen his overcoat; citing R. *v.* Winkworth and R. *v.* Egerton).

For some analogous cases, see the citations under False Claims, *ante*, § 340, and Impeachment of Witnesses, *post*, § 963.

application.[1] (2) The *Intent* principle (*ante*, § 302) is constantly applied. Where the act itself is conceded or otherwise proved, and the object is to negative inadvertence or accident, the recurrence of similar acts of firing by the defendant tends to diminish the possibility of an innocent explanation.[2] Moreover, the principle of *Anonymous Intent* (*ante*, § 303) is recognized as being here occasionally of peculiar utility; *i. e.* the recurrence of a similar fire may tend decidedly to negative innocent intent, even though the author of the other fires is not shown; thus, the prosecution having negatived innocent intent in the present fire by whomsoever set, the defendant may be shown to have kindled it.[3] (3) The *System* principle (*ante*, § 304) supposes the act itself of setting the fire to be desired to be proved, and accepts former acts of the kind as admissible to show a design or system from which the setting of the fire charged may be inferred, provided the other acts have common features indicating a common plan.[4] For this purpose, however (*ante*, § 304), the defendant's connection with the previous fires must be shown.[5] The disinclination of the Courts to resort to this System principle, and their aptness, when using its rigorous test, to misapply it to evidence of mere Intent, have been already spoken of (*ante*, § 304), and are to be disapproved.[6]

[1] It may have, where knowledge of the nature of combustible materials is to be shown.

[2] R. *v.* Dosset, Eng., Com. *v.* McCarthy, Com. *v.* Bradford, Mass.

[3] R. *v.* Bailey, R. *v.* Gray, R. *v.* Nattrass, Eng., Fancett *v.* Nicholls, People *v.* Murphy, N. Y., State *v.* Thompson, N. C.

[4] R. *v.* Taylor, Eng., Martin *v.* State, Ala., State *v.* Raymond, N. J., Kramer *v.* Com., Pa., State *v.* Ward, Vt., State *v.* Miller, Wis.

[5] R. *v.* Reagan, Eng., People *v.* Kennedy, N. Y., State *v.* Freeman, N. C.

[6] The precedents are as follows: *Eng.*: 1839, R. *v.* Howell, 3 State Tr. N. S. 1087, 1098 (felonious burning at a riot; preceding burning of another house, admitted as evidence of a riot but not of design to burn the house charged); 1846, R. *v.* Dosset, 2 Cox Cr. 243, 2 C. & K. 306 (a hayrick had been fired by the discharge of a gun in the prisoner's hand; the facts of the rick having been fired the day before and the prisoner being seen near it with a gun were admitted; Maule, J.: "It is only by the conduct of the prisoner that a judgment can be formed whether the act was accidental or intentional"); 1850, R. *v.* Regan, 4 id. 335 (the fact that the accused had given notice of other fires and claimed the rewards in the present case was apparently rejected as not strong enough); 1851, R. *v.* Taylor, 5 id. 138 (evidence tending to show the accused's share in other rick-fires of the same night, excluded, except as bearing on his conduct as to the fire in question; the ruling seems erroneous, for part of the evidence was a threat "to light B. from end to end," and thus a general connection between the fires was supplied); 1866, R. *v.* Gray, 4 F. & F. 1102 (indictment for setting fire to the defendant's own house, with intent to obtain insurance-money; the fact was received, to negative accident, of the occurrence of fires in two of the defendant's former houses and of his claiming and receiving the insurance-money on both, though no evidence of the cause of these fires or of the defendant's connection with them was offered); 1882, R. *v.* Nattrass, 15 Cox Cr. 73 (charge of attempt to burn the house by setting fire to articles so that the house would catch fire; the fact was received that on the same day articles were found on fire at four different times in different parts of the house; *Ala.*: 1855, Brock *v.* State, 26 Ala. 104 (a subsequent firing of the same person's property, excluded; the point not raised); 1856, Martin *v.* State, 28 id. 71, 82 (arson with intent to defraud; a previous attempt to hire some one to burn the same house, admitted); 1900, Merricourt *v.* Norwalk F. Ins. Co., 13 Haw. 218, 224 (arson of one's own house in fraud of insurance; questions as to prior fire-losses of the plaintiff, excluded; no rule defined); *Mass.*: 1876, Com. *v.* McCarthy, 119 Mass. 355 (arson on Sept. 10; to show intent only, the fact was admitted of a setting fire by the defendant on Aug. 24 and Sept. 6 to a shed ten feet distant from but connected with the building in question); 1878, Com. *v.* Bradford, 126 id. 42 (arson; the fact of the defendant's setting fire to the same mill a few nights before, admitted to show wilfulness and to negative accident or negligence; the Court apparently had in mind the stricter System rule, however, for they say that the evidence indicated "that the defendant then had a settled purpose in regard to it," and that such evidence must be near enough to "afford a presumption" that the design continues; compare this Massachusetts peculiarity, *ante*, § 321); *Mo.*: 1903, State *v.* Jones, 171 Mo. 401, 71 S. W. 680 (burning of another house, and stealing of a horse, on the same night,

11. Rape, Abortion, and other Sexual Offences.

§ 357. Rape; General Principle. (1) Here the *Knowledge* principle (*ante*, § 301) has no opportunity for application. (2) The *Intent* principle (*ante*, § 302) clearly applies where the act is assumed as otherwise proved and the intent is in issue; *i.e.* in such cases, former acts of the kind are relevant to negative the intent as being of any other kind than to commit rape. (*a*) Where the charge is of *assault with intent*, the propriety of such evidence cannot be doubted. There should be some limitation of time, but merely to avoid the objection of unfair surprise (*ante*, § 194). There need be no limitation as to the person assaulted, because the only purpose is to negative any other than the rape-intent, and a previous rape-assault on another woman has equal probative value for that purpose, for it is the general desire to satisfy lust that is involved in this crime, and no particular woman is essential for this. Accordingly, where the charge is assault with intent, former acts of the sort should be received without any limitation except as to time;

admitted); *Nebr.*: 1899, Knights v. State, 58 Nebr. 225, 78 N. W. 508 (arson; defendant's setting of other fires in adjacent buildings on the same night, admitted); *N. J.*: 1891, State v. Raymond, 53 N. J. L. 260, 264, 21 Atl. 328 (arson in 1888 with intent to defraud; the occurrence of six fires between 1877 and 1883, in buildings in which the defendant was interested, excluded, even as negativing accident, because there was "not the slightest connection between it and them"; wrong application of the System theory); *N. Y.*: 1865, People v. Kennedy, 32 N. Y. 141 (burning of a barn; the defendant was a discharged employee living near by; the fact of an attempt by him to burn the employer's house about the same time was rejected, partly because the defendant was not sufficiently connected with it, partly because "we cannot presume that he burned the barn because we presume that he attempted to burn the house"; no authorities cited); 1876, Faucett v. Nichols, 64 Id. 377 (action against an innkeeper for goods lost negligently by fire; defence, that the fire was set by a third person wilfully; to negative the theory of carelessness in the defendant's household and show deliberateness by some one else, the fact was held admissible that on the same night an attempt was made to fire another building, near by, with kerosene, etc., as in the case of the defendant's building; but the Court say, *obiter*, without citing authorities, that such evidence could not have been admitted in a criminal charge against the defendant); 1892, People v. Murphy, 135 id. 450, 456, 32 N. E. 138 (arson of a barn; the poisoning of the owner's horses, and the mutilation of his carriages, on the same night, where another's were untouched, admitted to show a general though anonymous scheme of destruction, including the barn); 1898, People v. Fitzgerald, 156 id. 253, 50 N. E. 846 (defendant, a trustee of corporate property, was charged with arson of it; the burning of other corporate property and the defendant's private property, more than two years before, not shown to be incendiary, excluded); *N. C.*: 1856, State v. Freeman, 4 Jones L. 5 (two former attempts by the same servant, within a month or so, by setting fire to the same premises, here rejected, because the defendant was not connected with them); 1887, State v. Thompson, 97 N. C. 496, 1 S. E. 921 (arson of an outhouse; attempted burning of the dwelling itself at the same time, admitted as showing that the same person had fired both); 1897, State v. Graham, 121 Id. 623, 28 S. E. 409 (burning of a landlord's dwelling; the defendant's burning of his former landlord's dwelling, ten months before, excluded); 1902, State v. McCall, 131 Id. 798, 42 S. E. 894 (arson of a church; arson of a mill shortly before, excluded); *Pa.*: 1878, Kramer v. Com., 87 Pa. 299 (setting fire to a hotel on May 23; the fires were put out; the fact admitted that on the 25th, the defendant, who was a resident of the hotel at both times, attempted to set fire to the hotel; "the purpose of the first attempt . . . was not complete, for that was to consume the building entirely; being saved, it was clearly the subject of a renewed purpose; and the evidence of this renewed purpose tended strongly to show that the person was the same who had made both attempts"); *Vt.*: 1878, State v. Smalley, 50 Vt. 738, 750 (other burnings, not passed upon); 1888, State v. Ward, 61 Id. 181, 17 Atl. 483 (an attempt by the defendant, four weeks previous, to burn the same barn, admitted); 1898, State v. Hallock, 70 Id. 159, 40 Atl. 51 (arson of L.'s barn by defendant's procurement; an incendiary firing of L.'s dwelling-house six weeks before, admitted, to negative accident, and also to show, with other evidence, the defendant's plan to burn L.'s buildings); *Wis.*: 1879, State v. Miller, 47 Wis. 530, 3 N. W. 31 (forgery and larceny, not admitted on the facts as so intimately connected with the arson charged as to indicate a common purpose in all).

though the Courts can hardly be said to have accepted this result fully. (*b*) Where the charge is of *rape*, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but practically, if the act is proved, there can be no real question as to intent; and therefore the Intent principle has no necessary application. The former acts, if available at all, must be available under the Design principle. (3) The *Design* or *Plan* principle (*ante*, § 304) requires that the former act or acts should indicate, by common features, a plan or design which tends to show that it was carried out by doing the act charged. Here it is obvious that there is much room for difference of opinion in a given case. The committing of a single previous rape, or rape-attempt, upon another woman may not in itself indicate such a design, — a view carefully examined in the following leading case:

1876, *State* v. *Lapage*, 57 N. H. 289, 295, 299, 303; *Cushing*, C. J.: "I think we may state the law in the following propositions: (1) It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character. (2) It is not permitted to show the defendant's bad character by showing particular acts. (3) It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged. (4) It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions. . . . It should also be remarked that this being a matter of judgment, it is quite likely that Courts would not always agree, and that some Courts might see a logical connection where others could not. But however extreme the case may be, I think it will be found that the Courts have always professed to put the admission of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other. In the case under consideration, I cannot see any such logical connection, between the commission of the rape upon Julienne Rousse and the murder of Josephine Langmaid, as the law requires. I am unable to see any connection by which from the first crime can be inferred that the respondent was attempting the commission of a rape when he committed the murder, if he did it, other than such inference as I understand the law expressly to exclude." *Smith*, J.: "Proof that he committed a rape in Canada, four years previously, upon Julienne Rousse, shows what? Not that he then had any design or intent to perpetrate a rape four years afterwards upon another woman whom he had never seen or heard of, or in a place two hundred miles distant where he had never been; not that he had then formed a design to rape and murder women whenever he might have opportunity; not that he had ever before or since committed that crime, — but that the defendant had a disposition to commit the crime of rape four years previously. No one will pretend that evidence that the prisoner had committed another murder, in Canada, or Texas, or Europe, could be shown on this trial. One cannot be convicted of murder, by showing that he has at some time and somewhere else committed another murder; or of larceny, by showing that he has committed the crime before, and therefore has an evil disposition inclining him towards that particular crime."

Nevertheless, a single previous act, even upon another woman, *may*, with other circumstances, give strong indication of a design (not a disposition) to rape; and a previous act of the sort upon the same woman ought in itself

usually to be regarded as indicating such a design. Courts have shown altogether too much hesitation in receiving such evidence. Even when rigorously excluded from any bearing it may have upon character (*ante*, § 194), it may carry with it great significance as to a specific design or plan of rape. There is no reason why it should not be received when it does convey to the mind, according to the ordinary logical instincts, a clear indication of such a design. There is room for much more common sense than appears in the majority of the rulings.[1]

[1] *Assault with Intent:* 1875, People *v.* Bowan, 49 Cal. 654 (assault with intent to rape a child under ten; intercourse with other children under ten, excluded); 1877, State *v.* Walters, 45 Ia. 389 (assault with intent to rape; other similar assaults upon the same person admitted, but not other similar assaults upon another person); 1899, State *v.* Desmond, 109 Id. 72, 80 N. W. 214 (assault with intent to rape; defendant, giving a stage-entertainment, invited the complaining witness and other young girls separately behind the curtain; the facts of rape and other indecencies upon the others at that time, admitted to show intent); 1880, State *v.* Boyland and McCurty, 24 Kan. 186 (assault on B. with intent to rape, by B.'s husband and a friend M., the husband helping M. violate A.; conduct and expressions of the husband, a few days later, in the presence of B. and M., rejected, though the Court conceded that it showed "a willingness on the part of the husband that the wife might be debauched by the other defendant"; an example of gross failure of justice through misapplication of the legal principles in favor of crime); 1896, State *v.* Stevens, 56 Id. 720, 44 Pac. 992 (attempt to rape; evidence of an indecent assault upon the same person two years later, excluded); 1901, McAllister *v.* State, 112 Wis. 496, 88 N. W. 212 (assault with intent to rape; similar assault on another woman living three blocks away, one hour before, excluded; unsound); 1903, Barton *v.* Brnlay, — Id. —, 96 N. W. 815 (indecent assault; defendant's prior similar misconduct, excluded).

Rape: 1836, R. *v.* Lloyd, 7 C. & P. 318 (liberties taken by the defendant with the prosecutrix, not admitted to show lustful intent); 1848, R. *v.* Chambers, 3 Cox Cr. 92 (former rape upon the prosecutrix, his granddaughter; here admitted to explain the child's condition); 1864, R. *v.* Reardon, 4 F. & F. 76 (carnal knowledge of a female child, the defendant lodging in the same house; the fact admitted of subsequent perpetrations of the same act two and four days later; Willes, J.: 'I shall allow all the matters to be proved, in order to show the real nature of the case. . . . It has repeatedly appeared to me in cases of this sort that the man by a threat of violence deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions; and this seems to me to give a continuity to the transaction which makes such evidence properly admissible"); 1895, People *v.* Fultz, 109 Cal. 258, 41 Pac. 1040 (on a charge of rape of his daughter, other rapes upon her by the defendant were admitted to explain the absence of signs of rape); 1902, Bigcraft *v.* People, — Colo. —, 70 Pac. 417 (rape upon defendant's daughter; other acts of intercourse excluded because not expressly offered in corroboration only); 1890, Parkinson *v.* People, 135 Ill. 401, 25 N. E. 764 (a preceding rape on the prosecutrix, held inadmissible; here, however, admitted as necessarily mentioned in describing the offence charged); 1896, Jäuzen *v.* People, 159 Id. 440, 42 N. E. 862 (rape on May 1 on defendant's daughter M.; a rape on May 15 on another daughter Y., excluded); 1901, Addison *v.* People, 193 Id. 405, 62 N. E. 235 (rape; defendant's conduct that day in becoming intoxicated and in treating a boy to beer, excluded); 1892, State *v.* Bonsor, 49 Kan. 758, 31 Pac. 736 (rape in July; the fact of previous intercourse by the defendant in June, and of efforts to conceal its resulting pregnancy, rejected; clearly unsound); 1898, Legore *v.* State, 87 Md. 735, 41 Atl. 60 (rape; prior indecent proposal of defendant to prosecutrix, excluded; no authority cited); 1895, People *v.* Burwell, 106 Mich. 27, 63 N. W. 986 (where the woman's consent was alleged to have been forced, the fact that the defendant "had abused and beaten her [his daughter] before," and that he "was abusive to his wife and other children," was admitted); 1903, Dabney *v.* State, — Miss. —, 33 So. 973 (rape; larceny in an adjoining room the same night, excluded); 1903, State *v.* Scott, 172 Mo. 536, 72 S. W. 897 (prior attempts to rape the same woman, admitted); 1901, Reinoehl *v.* State, 62 Nebr. 619, 87 N. W. 355 (prior indecent language to the complainant, admissible); 1859, Conkey *v.* People, 5 Park. Cr. 32, 35 (rape; violent conduct in the room by the defendant about the same time, in overturning the stove, throwing things out of the window, etc., admitted as indicating a purpose to alarm and coerce the woman); 1887, People *v.* O'Sullivan, 104 N. Y. 483, 10 N. E. 880 (rape by a Catholic priest upon his servant; the fact was received of an unsuccessful attempt, four days before, to ravish her; "It is always competent to show, upon the question of his guilt, that he has made an attempt at some prior time, not too distant, to commit the same offence"); 1877, State *v.* Laxton, 76 N. C. 216 (that the defendant "was running after one certain bad white woman," excluded); 1848, Williams *v.* State, 8 Hnmph. 585, 590, 594 (rape upon the defendant's daughter; the fact was admitted of a series of requests, threats, and attempts at the rape, extending about four

§ 358. **Same: Other Principles discriminated.** (1) Occasionally the former act will be receivable for *other purposes* independently of the present principles, — as, in explanation of certain physical appearances,[1] or under the doctrine of Inseparableness (*ante*, § 218).[2] (2) The use of former *voluntary intercourse* of the *same complainant* with the defendant, as indicating her general sentiments toward him and therefore the probability of her consent on this occasion, involves a question of Emotion or Motive, dealt with elsewhere (*post*, § 402). The logical principles are distinct, but their application cannot always be discriminated. In the one class of cases the evidence is appropriate for the prosecution; in the other, for the defence.

§ 359. **Abortion.** (1) The *Knowledge* principle (*ante*, § 301) has here no application in practice; though it is available to show a knowledge of the nature and effect of the instruments or drugs used, if that should be disputed.[1] (2) The *Intent* principle (*ante*, § 302) is available; other occasions of using such instruments or drugs, whether prior or subsequent,[2] tend to negative an innocent intent.[3] (3) The *Design* principle (*ante*, § 304), where the act itself is to be proved, would allow resort to former acts showing by common features a general design indicating that it was carried out by doing the act charged.[4] The precedents in the various jurisdictions illustrate these principles with more or less consistency.[5]

months back, and beginning about eight months after the mother's death; Green, J.: "When a party for a series of months, by every persuasive, by importunity, by threats, and by force, seeks to gratify his lust for sexual intercourse with a particular woman, certainly every mind must perceive the force and relevancy of those facts to explain the intent with which he made an assault subsequently on the same woman"); 1896, State *v.* Thompson, 14 Wash. 285, 44 Pac. 533 (rape; a former "trouble" of a similar sort, excluded); 1893, Proper *v.* State, 85 Wis. 615, 628, 55 N. W. 1035 (rape; the prosecutrix and a girl E. slept together in the defendant's house; evidence of the defendant's previous indecent assaults and rape on E. while so living, admitted).

Rape under Age of Consent: this is practically the offence of fornication, consent being immaterial, and hence is dealt with under § 402, *post*.

[1] R. *v.* Chambers, Eng., People *v.* Fultz, Cal.

[2] Parkinson *v.* People, Ill.

[1] See the quotation, *ante*, § 301, from R. *v.* Cooper.

[2] R. *v.* Perry, Eng., Lamb *v.* State, Md.

[3] Com. *v.* Corkin, Mass., People *v.* Seaman, Mich.

[4] Baker *v.* People, Ill., People *v.* Sessions, Mich.

[5] 1847, R. *v.* Perry, 2 Cox Cr. 223, Wilde, C. J. (administering a drug with intent to produce a miscarriage; subsequent administrations of other drugs admitted to show intent); 1883, Baker *v.* People, 105 Ill. 452, 456 (abortion; the fact of another attempt to cause an abortion in the course of the same pregnancy, excluded; clearly wrong); 1899, State *v.* Moothart, 109 Ia. 130, 80 N. W. 301 (giving a drug with intent to cause miscarriage; subsequent use of an instrument on the same person for the same miscarriage, admitted); 1903, State *v.* Crofford, — id. —, 96 N. W. 889 (murder by abortion; abortions by the defendant upon other women, excluded); 1901, Clark *v.* Com., — Ky. —, 63 S. W. 740 (abortion; other perpetrations of abortion admissible to prove intent, where the act in question is conceded but justified on the ground of necessity, but, by a majority of the Court, not admissible to prove a plan to do the act, its commission being denied); 1884, Com. *v.* Corkin, 136 Mass. 429 (the use of instruments with intent to produce a miscarriage; the use of them on the same woman a few days before, admitted to show the intent); 1886, Lamb *v.* State, 66 Md. 285, 7 Atl. 399 (attempt to procure abortion by drugs; a "subsequent attempt to accomplish the same purpose by a different means [viz., an operation] is admissible to show with what purpose and intent" he acted); 1886, People *v.* Sessions, 58 Mich. 594, 600, 26 N. W. 291 (murder by abortion; the facts admitted of the frequent and habitual use of instruments by the defendant in other cases to produce abortion, and of the repeated proffer of services for that purpose); 1895, People *v.* Seaman, 107 id. 348, 65 N. W. 203 (abortion; the fact that the defendant's house was a place of resort for such practices, and that he had frequently performed such criminal operations, admitted to show a guilty intent; the defendant conceding that he had attended the case as a medical man); 1898, People *v.* Abbott, 116 id. 263, 74 N. W. 529 (a

§ 360. **Indecent Exposure, Sodomy, Bigamy, Incest, Seduction, Adultery, etc.** The same principles are occasionally applicable on charges of indecent exposure,[1] sodomy,[2] bigamy,[3] or enticement for prostitution.[4] But for the offences of adultery, seduction, rape under age of consent, incest, and certain others, there is commonly no question of intent, and the significance of prior conduct of the defendant with the woman is usually to show, not Intent, but an Emotion of lust. This is perhaps not always to be distinguished from evidence of Design; but it is best examined under the principles applicable to evidence of Emotion (*post*, §§ 398–402).

12. Homicide and Homicidal Assault.

§ 363. **Homicide, including Murder by Poison.** (1) The *Knowledge* principle (*ante*, § 301) has practically little application here; though it would be available to show a knowledge of the nature and injurious effects of a lethal weapon.[1]

(2) The *Intent* principle (*ante*, § 302) receives constant application; for the intent to kill is in homicide practically always in issue, and is to be proved by the prosecution, and the recurrence of other acts of the sort tends to negative inadvertence, defensive purpose, or any other form of innocent intent. For this purpose, therefore, the evidence is receivable irrespective of whether the act charged is itself conceded or not. Where (as usually) it is not conceded, the evidence of intent goes to the jury to be used by them only on the assumption that they find the act to have been done by the accused; it is then to be employed by them in determining the intent. This use of such evidence is universally recognized.[2] As to the *similarity* of the other acts, no fixed rule can be formulated. They certainly need not have been done to the same person;[3] they need not have accompanied more or less immediately the act charged,[4] and they may have

habit of performing abortions, receivable to show the intent of an operation).

[1] 1893, State *v.* Stice, 88 Ia. 27, 55 N. W. 17 (indecent exposure; prior and subsequent instances, admitted to show intent).

[2] 1893, State *v.* Place, 5 Wash. 773, 774, 32 Pac. 736 (assault with intent of sodomy; conduct about an hour before on the same train but in another State, admitted).

[3] 1901, State *v.* Graham, 23 Utah 278, 64 Pac. 557 (cohabitation with several women at a prior time, admissible to show intent during the time charged).

[4] 1898, People *v.* Elliott, 119 Cal. 593, 51 Pac. 955 (enticement for prostitution; that the defendant had attempted to entice other young girls into the same house for the same purpose, excluded; but it should have been received to show intent).

[1] See the quotation from R. *v.* Cooper, *ante*, § 301.

[2] R. *v.* Mobbs, R. *v.* Roden, Makin *v.* Att'y-Gen'l, Eng., Smith *v.* State, Ala., Austin *v.* State, Melton *v.* State, Ark., People *v.* Walters, People *v.* Craig, Cal., Killins *v.* State, Oliver *v.* State, Fla., Reese *v.* State, Shaw *v.* State, Ga., State *v.* Fontenot, La., State *v.* Pike, Me., Com. *v.* Campbell, Mass., People *v.* Knapp, People *v.* Marble, Mich., State *v.* Testerman, State *v.* Martin, State *v.* Sanders, Mo., Walters *v.* People, N. Y., State *v.* Mace, N. C., People *v.* Coughlin, Utah, Poindexter's Case, Va., Albricht *v.* State, Wis. *Poisoning cases:* R. *v.* Mogg, R. *v.* Calder, R. *v.* Geering, R. *v.* Winslow, R. *v.* Garner, R. *v.* Flannagan, Eng., Johnson *v.* State, Ala., People *v.* Thacker, Mich., Goersen *v.* Com., Pa.

[3] R. *v.* Roden, Makin *v.* A.-G., Eng., Smith *v.* State, Ala., People *v.* Walters, People *v.* Craig, Cal., Killins *v.* State, Oliver *v.* State, Fla., Reese *v.* State, Ga., State *v.* Fontenot, La., People *v.* Marble, Mich., State *v.* Testerman, State *v.* Sanders, Mo., People *v.* Coughlin, Utah; so also in almost all the poisoning cases.

[4] R. *v.* Roden, Makin *v.* A.-G., Eng., Austin *v.* State, Ark., Shaw *v.* State, Ga., Poindexter's Case, Va.; so also in almost all the poisoning cases.

been done even at a subsequent time.[5] The precedents show every variety of circumstances, and a correct application of the principle would receive any evidence of the sort which conveys any real probative indication of the defendant's intent.

(2 *a*) The principle of *Anonymous Intent* (*ante*, § 303) finds occasional application, particularly in poisoning cases. Other instances of death by poison under somewhat similar circumstances serve to negative the supposition of inadvertent taking or of mistaken administration, even though the person responsible for the other poisonings is not identified; and thus, a criminal intent having been shown for the act charged, by whomsoever done, the defendant may be then shown to be its doer.[6]

(3) The principle of *Design* or *System* (*ante*, § 304) finds here frequent application. It supposes that a design or plan in the defendant is to be shown, as making it probable that the defendant carried out the design or plan and committed the act; and it receives former similar acts so far as through common features they naturally indicate the existence of such a plan, design, or system, of which they are the partial fulfilment or means. This principle is fully recognized in the precedents.[7] There has been occasional hesitation in applying it in poisoning cases;[8] but this hesitation is wholly unfounded, and numerous instances illustrate its equal applicability to such cases.[9]

The precedents in the various jurisdictions illustrate the development of the foregoing principles with more or less consistency.[10]

[5] Smith *v.* State, Ala., People *v.* Walters, People *v.* Craig, Cal., Killins *v.* State, Fla., People *v.* Marble, Mich., State *v.* Sanders, Mo., State *v.* Mace, N. C. *Poisoning cases:* R. *v.* Geering, R. *v.* Heesom, Eng.

[6] R. *v.* Geering, R. *v.* Flannagan, R. *v.* Bailey, Eng.

[7] Melton *v.* State, Ark., State *v.* Smith, Ia., State *v.* Vaughan, Nev., Stephens *v.* People, People *v.* Shea, N. Y., Snyder *v.* Com., Com. *v.* Mudgett, Pa., Heath *v.* Com., Nicholas *v.* Com., Va. In Makin *v.* Att'y-Gen'l, Eng., it should have been applied, but the opinion is not clear on this point.

[8] R. *v.* Flannagan, Eng., People *v.* Thacker, Mich.

[9] R. *v.* Cotton (*semble*), R. *v.* Heesom (*semble*), Eng., Com. *v.* Robinson, Mass. (leading case), People *v.* Wood, N. Y., Farrer *v.* State (*semble*), Brown *v.* State, Oh., Shaffner *v.* Com. (leading case), Goersen *v.* Com., Pa.

[10] For convenience of reference the *poisoning cases* have been arranged separately in a second list, *infra*. *Eng.:* 1853, R. *v.* Mobbs, 6 Cox Cr. 223 (murder of wife; things done to her by the defendant ten days before, not admitted to show intent; Coleridge, J.: "It is very difficult to draw the line in these cases"); 1864, R. *v.* Reardon, 4 F. & F. 79, Willes, J., *semble* (other killings, admissible to show intent); 1874, R. *v.* Roden, 12 Cox Cr. 630, Lush, J. (murder by suffocating her infant while in bed; the fact that the defendant had "had four other children who had also died in infancy at early ages," was admitted, on the authority of R. *v.* Cotton, *infra*); 1889, R. *v.* Crickmer, 16 id. 701, Charles, J. (murder by stabbing; the fact of another stabbing by the defendant an hour before, admitted); 1893, Makin *v.* Att'y-Gen'l of N. S. Wales, 17 id. 704, Privy Council (murder of an illegitimate infant intrusted for keeping by its mother to the defendant and found buried on the defendant's premises; the fact was admitted of the finding, in the various premises where the defendant had lived about the time in question, of the buried bodies of other infants, respectively four, six, and two at each place, no deaths having been registered from those addresses, and of several other infants having been received on similar arrangements to the one in question; received, per L. C. Herschell, following R. *v.* Geering, *infra*, as "bearing upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused"); *Ala.:* 1887, Lawrence *v.* State, 84 Ala. 424, 5 So. 33 (previous "difficulty," admissible to show "malice, or a motive"; but not "the particulars or merits" of the "difficulty"; 1889, Smith *v.* State, 88 id. 76, 7 So. 52 (quarrel with deceased and S.; the defendant's following up S. and shooting at him after shooting at the deceased, admitted); 1901, Miller *v.* State, 130 id. 1, 30 So. 379 (murder of a police-officer; conspiracy between the defendants to kill another officer at the same time, admitted); *Ark.:* 1812, Baker *v.* State, 4 Ark. 56, 61 (general principle

§ 364. Assault with Intent; Other Crimes of Personal Violence. The principle of Intent (*ante*, § 302) here admits other acts of the defendant

stated, that other acts of violence are admissible to show intent); 1854, Austin *v.* State, 14 Id. 555, 558 (murder by a slave to show intent, "former grudges, former threats, previous lying in wait," etc., admissible; here, the slave's declarations that he would resist capture); 1884, Melton *v.* State, 43 id. 367, 371 (murder alleged to have been done in pursuance of a plan by the Ku-Klux Society to dispose of the deceased for having opposed the Society; the fact received that the defendant with others had on a former occasion gone masked to the deceased's house and flogged him as a part of the plan to stop his opposition); *Cal.*: 1893, People *v.* Walters, 98 Cal. 138, 141, 32 Pac. 864 (murder of a son; the killing of the mother immediately afterwards by an associate of the defendant, with the fact of a long-standing feud between the two parties, admitted to show intent); 1895, People *v.* Smith, 106 id. 73, 82, 39 Pac. 40 (murder of D.; the killing of C. in the same house at the same time, admitted to show that C. could not have killed D.); 1896, People *v.* Craig, 111 id. 460, 467, 44 Pac. 186 (wife-murder; after evidence of ill-feeling by the defendant against his wife's family generally, the fact that he shot the wife's brother at the same time as the shooting of the wife and then went immediately to her father and mother and shot them was admitted as showing that the shooting of the wife was not accidental); 1898, People *v.* Miller, 121 id. 343, 53 Pac. 816 (M. killed C. when C. stopped M.'s pursuit of a woman N.; the intent of the pursuit admitted, to show the intent against C.); *Fla.*: 1891, Killins *v.* State, 28 Fla. 313, 333, 9 So. 711 (killing of the deceased's mother immediately afterwards, admitted to show intent); 1896, Oliver *v.* State, 38 id. 46, 20 So. 803 (shooting of another person at the same time and in the same affray, admitted); 1898, Milton *v.* State, 40 Id. 251, 24 So. 60 (murder; shooting another at the same time, as negativing self-defence, admitted); 1900, West *v.* State, 42 id. 244, 28 So. 430 (murder; the killing of the only other man in the vicinity, just beforehand, robbery of a house being the motive, admitted to show intent); *Ga.*: 1849, Reese *v.* State, 7 Ga. 373 (assault upon the deceased's father just before the murder; such evidence limited to "the time of the transaction"); 1878, Shaw *v.* State, 60 id. 246, 250 (wife-murder by beating; the fact of a similar beating four years before, admitted); *Ida.*: 1900, State *v.* Taylor, — Ida. —, 61 Pac. 288 (manslaughter; the defendant's shooting at a witness shortly afterwards while escaping, excluded); *Ky.*: 1895, Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390 (murder; questions as to the killing of two other persons "at the same place and immediately afterwards," excluded: erroneous); 1896, Green *v.* Com., — id. —, 33 S. W. 100 (a nearly simultaneous killing; obscure); 1901, Bishop *v.* Com., — id. —, 58 S. W. 817, 60 S. W. 190 (murder of an officer; that the defendant had just killed another man and was fleeing from arrest, admitted as evidencing motive); 1903, O'Brien *v.* Com., — Id. —, 74 S. W. 666 (murder during a burglary; burglary of neighboring houses on the same night, admitted); *La.*: 1896, State *v.* Fontenot, 48 La. 305, 19 So. 111 (attacks by the defendant on a third person just before killing the deceased, admitted); *Me.*: 1876, State *v.* Pike, 65 Me. 111, 113 (manslaughter of wife by cruel abuse; other acts of violence on the same evening, admissible, but not "another distinct assault"); *Mass.*: 1863, Com. *v.* Campbell, 7 All. 541 (murder at 7 P. M. by one of a mob during the Draft Riots; riotous acts by the defendant at [illegible] of the same day, admitted to show the subsequent guilty intent, provided there was a general resistance and disturbance of the public peace such that the earlier and the later acts formed "a part of one transaction"); *Mich.*: 1872, People *v.* Knapp, 26 Mich. 112, 116 (murder; the preceding affray, alleged to have involved a rape on the deceased, admitted); 1878, People *v.* Marble, 38 id. 117, 123 (murder of A.; three persons attacked at once; A. was killed outright M. was pursued, and all fired at, within two minutes; the shooting and pursuit of M., admitted as "coloring" the act of attacking A.); 1901, People *v.* Dowd, 127 id. 140, 86 N. W. 546 (certain "acts of violence" to other persons, excluded); *Miss.*: 1846, Dowling *v.* State, 5 Sm. & M. 664, 666, 686 (murder of a slave by an overseer, by beating; the fact excluded that the defendant's usual manner of punishing the slaves was by a thick wooden paddle); 1898, Herman *v.* State, 75 Miss. 340, 22 So. 873 (murder; defendant's assault on the deceased with a knife, about a year before, excluded); *Mo.*: 1878, State *v.* Testerman, 68 Mo. 408, 415 (murder; the cutting of another person by the defendant in the same affray, admitted); 1881, State *v.* Martin, 74 id. 547 (murder; two other indictments for felonious assault, excluded); 1882, State *v.* Sanders, 76 Id. 35, 36 (a stroke at a bystander, who had seized the defendant after the killing and as he was escaping, admitted); 1882, State *v.* Emery, ib. 349 (previous assault to show intent to kill; obscure); 1900, State *v.* Tettaton, 159 id. 354, 60 S. W. 743 (murder; the killing of other members of the family at the same time, and the burning of the house, admitted); *Mont.*: 1901, State *v.* Shafer, 26 Mont. 11, 66 Pac. 463 (conflict between the same parties a few hours before, admitted); *Nebr.*: 1903, Jahnke *v.* State, — Nebr. —, 94 N. W. 158 (prior attempts by other means to take the deceased's life, admitted); *Nev.*: 1895, State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733 (whether or not the deceased had been the aggressor; former attempt by the deceased to shoot the defendant's brothers, excluded); *N. M.*: 1893, Roper *v.* Terr., 7 N. M. 255, 265, 33 Pac. 1014 (murder; previous attempt at robbery of another, not admitted on the facts to show intent to rob the deceased); *N. Y.*: 1859, Stephens *v.* People, 4 Park. Cr. 396, 511, 19 N. Y. 571 (wife-murder; to show a general design to get rid of all obstacles to marry a woman

tending to negative innocent intent and thus to establish the criminal intent charged (to kill, to wound, to resist an officer, and the like). No fixed

B., of which the wife-murder was to be one part, tha fact was received of an attempt by the defendant to drive away B.'s suitor C., by sending him after the wife's death an anonymous letter reflecting on B.'s character); 1864, Walters *v.* People, 6 Park. Cr. 15 (murder by stabbing; acts of violence to tha deceased on the day before, admitted to show deliberation of intent); 1893, People *v.* Laruhia, 140 N. Y. 87, 35 N. E. 412 (murder; violence on behalf of the same paramour, four months before, excluded); 1895, People *v.* Shea, 147 id. 78, 41 N. E. 508 (admitting, in a trial for homicide at the polls, the fact of a general plan to repeat votes and to intimidate by violence those who opposed, and of instances of this conduct); 1899, People *v.* Place, 157 id. 584, 52 N. E. 576 (homicide of a stepdaughter; assault by defendant on her husband after tha daughter's death and on his return, admitted to show intent); *N. C.:* 1873, State *v.* Shuford, 69 N. C. 486, 492 (murder of a new-born child; the defendant's admission that she had "had a child this way before, and put it away," excluded; tha evidence here left it uncertain whether the child was killed by an accident); 1896, State *v.* Mace, 118 id. 1244 24 S. E. 798 (an assault, a quarter of an hour aftar a killing, upon an eye-witness who was going away to tell the news, admitted to show intent); *Pa.:* 1877, Snydar *v.* Com., 85 Pa. 519, 521 (murder of the illegitimate infant of the defendant's daughter; the fact of an incestuous rape upon har, excluded); 1896, Com. *v.* Mudgett, alias Holmes, 174 id. 211, 34 Atl. 588 (the killing of three children of tha deceased so as to prevaut tha deceased's wife from learning of his death, admissible); 1898, Com. *v.* Wilson, 186 id. 1, 40 Atl. 283 (murder; attempt to rob another person at another time, and other unconnected crimes, excluded); 1901, Com. *v.* Major, 198 id. 290, 47 Atl. 741 (murder; prior burglary at another place tha sama evening, admitted as showing intent); 1901, Com. *v.* Biddle, 200 id. 647, 50 Atl. 264 (murder; casual mention of other crimes by an accomplice relating his intimacy, held not improperly admitted); *R. I.:* 1833, Avery's Trial, Newport, Hildreth's Rep. 41 (murder; anonymous letter making an appointment with the deceased, admitted "to rebut the presumption of suicide"; Eddy, C. J., Brayton and Durfee, JJ., sitting); *Tenn.:* 1843, Stone *v.* State, 4 Humph. 27, 35 (murder; the fact that the defendant had shortly before set fire to the deceased's house, rejected, because proof of a separate felony could not be received; erroneous reason); *Tex.:* 1899, Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 69 (murder; a single accidental prior killing, excluded); *Utah:* 1896, People *v.* Coughlin, 13 Utah 58, 44 Pac. 94 (killing of another person in the sama affray, to show intent, admitted); *Vt.:* 1902, State *v.* Eastwood, 73 Vt. 205, 50 Atl. 1077 (murder of a wife's sister's husband at M.; defendant's shooting of his wife's sister at the same time, and of his wife and her mother immediately before, five miles away at East M., where he said "I have come to break up tha family," held admissible to show "purpose, preparation, and intent"); *Va.:* 1842, Heath *v.* Com., 1 Rob. 735, 738, 743 (murder of a woman by stabbing; the fact admitted of the shooting of her companion by the defendant just previously on the same night under circumstances indicating a design to do away with both); 1880, Poindexter's Case, 33 Gratt. 766, 788 (murder; a prior attack on the deceased by the defendant on the same morning, admitted); 1895, Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364 (the defendant's giving strychnine to a wife and telling her to administer it in milk or coffee to the deceased, admitted; here the deceased in fact was drowned in a boat, which the defendant was charged with sinking); *Wis.:* 1857, Albricht *v.* State, 6 Wis. 74 (manslaughter of his son by striking with a chisel; evidence of former strikings of the boy with an axe-helve and otherwise, not admitted even to show intent; clearly wrong); 1903, Paulson *v.* State, — id. — , 94 N. W. 771 (murder; larcenies several years before, excluded); 1903, Horn *v.* State, — Wyo. — , 73 Pac. 705 (defendant's assault, shortly before, on tha deceased's father, admitted to show motive and identity).

Additional instances, analogous to tha foregoing cases, are cited under §§ 396, 397, *post*, dealing with acts of prior hostility as evidence of motive.

Poisoning Cases: *Eng.:* 1830, R. *v.* Mogg, 4 C. & P. 335 (mixing poison with a horse's feed; the administration to the other horses in the sama stable, admitted to show intent); 1844, R. *v.* Calder, 2 Cox Cr. 348 (administration of similar drugs on subsequent days, admitted to show intent on the day in question); 1847, Pollock, C. B., in R. *v.* Bailey, ib. 312 (declaring evidence admissible, on a charge of poisoning, that the prisoner had attempted to drown the deceased by sawing nearly in two tha limb of a tree on which the deceased was accustomed to sit when fishing); 1849, R. *v.* Geering, 18 L. J. M. C. 215 (murder of husband by arsenic-poisoning; evidence was offered of the death by arsenic, within six months later, of two sons of the defendant, and of tha arsenical illness of a third son, to show (1) "that the deceased had in fact died of poison administered by some party," and (2) "to prove that the death of the deceased husband was not accidental"; objected to because the death and illness occurred after the death in issue; Pollock, C. B., Alderson, B., and Talfourd, J., approving, admitted it, "to determine whether such taking was accidental or not"; the prosecution also connected the defendant with the plan or system by showing that she generally cooked the meals for all four persons); 1860, R. *v.* Winslow, 8 Cox Cr. 397, Martin, B. (murder by antimony-poisoning; evidence that within six months three other persons in the same family, the prisoner being employed there, had died from antimony-poisoning, was offered

rule can be formulated as to the similarity which the other act must bear;

chiefly "to exclude the supposition of an accidental poisoning in present case," but was excluded; no reason given); 1863, R. *v.* Garner and wife, 3 F. & F. 681, 4 id. 346 (murder by arsenic-poisoning; the deceased was the mother of the male defendant; the latter sold arsenic for agricultural purposes; the fact that one of his own horses and some of his milk-customers, against whom he apparently had no feeling, had suffered from arsenic, had been received to show accidental administration; and the fact of the death of his former wife was then received to negative accident); 1864, R. *v.* Harris, 4 id. 342, Willes, J. (general principle of R. *v.* Geering approved); 1873, R. *v.* Cotton, 12 Cox Cr. 400, Archibald, J., Lush, J., and Pollock, B. (murder of the defendant's stepchild by arsenic-poisoning in July; the fact was received of the death of the defendant's two sons in the preceding November and March, and of one M., lodging in the house, in the preceding April; all were supplied with food by the defendant and all showed arsenic-traces; the evidence was received on the authority of Geering's and Garner's Cases); 1878, R. *v.* Heesom, 14 id. 40, Lush, J. (murder of her child by arsenic-poisoning in October, 1877; evidence having been received of the death of another child of the defendant in March, 1876, and of the defendant's mother in November, 1877, by the same poison, both being in the same household, the fact was also received that the lives of all three had been insured a short time before by the defendant, and that on the death of the other two she had collected the insurance; following Geering's Case); 1884, R. *v.* Flannagan, 15 id. 403 (two sisters, charged with the murder by arsenic of the husband of the second; evidence was offered of the deaths by arsenic-poisoning, within three years, of three other persons in the same household; Butt, J.: "I think, where the authorities are at all in conflict, the safest rule to be guided by is one's common sense, and I cannot conceive that on a charge of this nature it is consistent with common sense to exclude such evidence. It has been decided . . . in the case of poisoning by arsenic, that evidence of the deaths of people other than the deceased, whose death was the subject-matter of the particular inquiry might be given, with a view to showing not that the prisoner had poisoned the deceased, but that the deceased had in fact died by poison administered by some one; that is the extent to which that authority went, and that is the extent to which, I have no hesitation in saying, I shall admit evidence as to the other deaths in this case"); *Ala.:* 1850, Johnson *v.* State, 17 Ala. 618, 622 (wife-murder by poison; a former attempt by the defendant to poison her, admissible to negative mistake); *Ia.:* 1897, State *v.* Smith, 102 Ia. 656, 82 N. W. 279 (the deceased was insured in the defendant's favor, and had died of poison; one year before, he had been shot in the head, but had only lost sight thereby; the complicity of the defendant, his wife, in the shooting, admitted); 1899, State *v.* Lightfoot, 107 Id. 344, 78 N. W. 41 (poisoning a horse by strychnine; the presence of strychnine in other horse-boxes in the same barn, and the poisoning of other horses in other barns of the same owner, on the same night, admitted); *Mass.:* 1888, Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452 (murder by poisoning a brother-in-law, the obtaining of an insurance-benefit being the alleged motive; the prosecution, to show that the defendant had formed a general design to obtain the money by killing him, was allowed to give in evidence that her sister, the original beneficiary, and then a child of her sister, had died by poisoning within the previous five months while under the defendant's care, and that the brother-in-law had then appointed the defendant the beneficiary; *ante*, § 304); 1897, Com. *v.* Kennedy, 170 id. 18, 48 N. E. 770 (poisoning, by putting poison in a tea cup; the finding of the same poison in the same cup at other times, admitted to show an anonymous scheme); *Mich.:* 1870, People *v.* Lansing, 21 Mich. 221, 226 (poisoning a grandmother by putting arsenic into wine; a similar attempt, a few days before, by putting arsenic into her food, admitted for another purpose, and the present question left undecided); 1896, People *v.* Thacker, 108 id. 652, 66 N. W. 562 (wife-poisoning; attempts to poison the wife's sister, living in the same household, held admissible to show intent and negative accident, but not to show the act itself of administering); 1903, People *v.* Quimby, — id. —, 96 N. W. 1061 (poisoning of another child in the same way at the same time, admitted); *N. Y.:* 1858, People *v.* Wood, 3 Park. Cr. 685 (murder of a sister-in-law by poison; the fact was admitted, to show a general purpose to get the brother's estate for himself, of the prior poisoning of the brother, the contemporaneous attempt at poisoning of his two children, the procuring himself appointed as their guardian, and the forging of claims against the estate; all these being "parts of a single transaction, influenced by a single motive, and designed to accomplish a single object"); 1901, People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286 (murder of A. by poison sent to C. and taken by him and also by A.; the defendant's murder of B. by similar poison, more than a month previously, the only other common circumstances being that B. and C. were members of the same club as the defendant and that the defendant had conducted false correspondence with other persons in the names of B. and of C., held inadmissible, as not relevant to prove motive, intent, common plan, or any other evidential element; three judges dissenting); *N. C.:* 1892, State *v.* Best, 111 N. C. 638, 640, 15 S. E. 930 (wife-murder by poisoning; the presence of uneaten poisoned food in the house, admitted); *Oh.:* 1853, Farrer *v.* State, 2 Oh. St. 54, 61, 67 (murder by arsenic of a child in the family, by the defendant, the nurse, in October, 1851; the fact admitted of deaths of other members of the same family in the same way about the same time;

it may be done to another person;[1] it may not accompany immediately the act charged;[2] and it may occur at a time subsequent.[3] The precedents illustrate these various aspects of the principle.[4]

but the fact rejected of the death of I., a former mistress of the defendant, in the same way, in the preceding August, before the defendant came to F.'s house; Bartley, C. J., diss.); 1875, Brown *v.* State, 26 id. 176, 180 (poisoning horses; the fact admitted of the poisoning of other horses about the same time in the same village, to indicate that the defendant had inflicted the injuries and had given out that a general epidemic prevailed, with the design of profiting by treating the horses professionally for cure); *Pa.*: 1872, Shaffner *v.* Com., 72 Pa. 60 (wife-murder by poison; the defendant had ... criminally intimate with Susan C. for many years, during the life of his first wife, and married the deceased, his second, while Susan C. was still unmarried; the criminal relation continued, C. was married to S., and both lived in the defendant's house; S.'s life was insured for his wife in November, 1870; he died in February, 1871, and the defendant collected the insurance; then the defendant's wife died in June, 1871; an offer by the prosecution to show that the cause and circumstances of the two deaths were similar, and that the defendant attended both, was rejected, because the other facts did not show that the death of S. and the wife could have been "contemplated as parts of one plan in his mind in which the taking of S.'s life was part of his purpose of taking the life of his wife"; the opinion works out the application of the principle carefully and instructively, and is worth study as a useful illustration of method; though the conclusion reached is perhaps a strained one); 1882, Goersen *v.* Com., 99 id. 388, 390, 398 (wife-murder by arsenic-poison; the fact that the wife's mother, living in the same house and attended by the defendant, had died a few days before in the same way and that her daughter succeeded to her property in remainder after her life-estate, was received "to show his purpose and intent, and the system by which that purpose was to be accomplished, and to connect the death of both women with that purpose and intent"; also "to rebut the theory that the death of Mrs. G. was the result of accident or suicide, or of the negligent or ignorant use or administering of arsenic by either his wife or by him"); *Wis.*: 1892, Zoldoske *v.* State, 82 Wis. 580, 599, 52 N. W. 778 (poisoning of E., the supposed intended wife of M.; the death of M.'s wife by poison, admitted to negative the accidental nature of E.'s death, E. and M.'s wife being obstacles in the way of defendant's marriage to M.).

[1] People *v.* Wilson, Cal.; though this is not frequent, and its propriety is sometimes, though erroneously, denied: People *v.* Gibbs, N. Y.

[2] Ross *v.* State, Ala., State *v.* Merkley, Ia. State *v.* Patza, La., People *v.* Jones, N. Y.

[3] R. *v.* Voke, Eng.; in People *v.* Hopson, N. Y., a subsequent act was excluded.

[4] 1823, R. *v.* Voke, R. & R. 531 (by all the Judges; assault with intent to kill; defence, accident; the fact of the accused having run away after the firing and concealed himself beside the road ahead, and then fired again at the same person, was received to prove the intent); 1877, Hickey *v.* Fitzgerald, 41 U. C. Q. B. 303 (assault; question to the plaintiff as to prior fights, excluded); 1878, Ross *v.* State, 62 Ala. 224 (assault with intent to commit murder; previous assaults upon the same person on the same evening, admitted to show intent); 1893, Horn *v.* State, 102 id. 144, 151, 279, 15 So. 278 (assault with intent to kill; an attempt to shoot the wife and the clerk immediately after, admitted; Freeman, J., diss.); 1898, Gaston *v.* State, 117 id. 162, 23 So. 682 (shooting a gun across a public road; defence, accidental discharge; declarations just before of an intent to shoot at Mr. Bryan's picture, admitted); 1899, Ellis *v.* State, 120 id. 333, 25 So. 1 (assault with intent to kill; previous "difficulty" between the parties, admitted); 1897, People *v.* Wilson, 117 Cal. 688, 49 Pac. 1054 (shooting an officer; a shooting of others just preceding the arrest, admitted to show intent); 1899, People *v.* Teixeira, 123 id. 297, 55 Pac. 988 (assault with intent; another assault about the same time upon the injured person's companion, admitted); 1888, State *v.* Merkley, 74 Ia. 695, 39 N. W. 111 (burning an adopted child with a hot iron, with intent to kill; other similar burnings of the child admitted to show intent); 1848, State *v.* Patza, 3 La. An. 512 (stabbing with intent to kill; a former attempt to poison the same person by putting laudanum in her wine, admitted); 1900, State *v.* Cavanaugh, 52 id. 1251, 27 So. 704 (assault with intent to kill; assault on the same person the previous night, excluded); 1897, State *v.* Raper, 141 Mo. 327, 42 S. W. 935 (defendant's riotous misconduct before an assault, admitted to show intent); 1845, People *v.* Hopson, 1 Den. 574 (assault and battery on a constable and resisting him in performing his duty; an assault on him ten days later while the same proceedings of execution were being carried out, excluded); 1875, Kerrains *v.* People, 60 N. Y. 228 (the purpose of taking up a weapon, shortly before assaulting with it, admitted to show the purpose at the time of the assault); 1883, People *v.* Gibbs, 93 id. 470 (assault with intent to kill M.; the defendant had entered M.'s house, claiming the right to it, and about 8 o'clock shot at M.; then about half-past 9 J. came, and took M.'s part, who was absent, and the defendant attempted to shoot him; excluded, as throwing no light on the intent in assaulting M., and also because "the principle upon which evidence is admitted ... other offences to show the intent ... has no application to a case of this kind"; no cases cited; clearly wrong); 1885, People *v.* Jones, 99 id. 667, 2 N. E. 49 (wife-murder, by shooting; as indicating whether he fired in anger to

§ 365. **Other Principles, discriminated.** (1) According to the principle of § 218, *ante*, another act may be evidenced so far as it is an *inseparable part* of the whole act charged. This is simply because in narrating the one it is impracticable to avoid describing the other, and not because the other has any evidential purpose. The phrase *res gestæ* is sometimes used to sanction the admission of such acts, but it merely serves to obscure thought and to confuse principle. Either the act is an inseparable part of the main act or *res gestæ*, in which case it has no evidential function; or it serves to evidence intent or the like, in which case it must be tested by the foregoing principles. This latter purpose is often the one really in mind when this phrase is used, — as where the other act is said to "color" or "characterize" the main act charged;[1] obviously this is an evidential use, throwing light on the intent, and the phrase *res gestæ* not only has no real application but introduces a loose and unworkable test.

(2) Another act of violence may need to be offered so as to assist in *identifying* the defendant, — as where it is shown that the same person did both acts, and then that the defendant did the other (*post*, § 413).

(3) Prior acts of violence by the defendant against the same person, besides evidencing intent, may also evidence *emotion or motive, i. e.* a hostility showing him likely to do further violence; this principle is elsewhere dealt with (*post*, § 396). The practical difference is that in the latter use the acts may range over a wider period of time (as indicating an enduring emotion) than in the present use, where they must be fairly near in time in order to throw light on the design or intent of the act charged.

(4) *Threats* of violence are in themselves expressions of a design to injure, and are accordingly dealt with elsewhere (*ante*, §§ 105–109).

13. Miscellaneous Offences.

§ 367. **Treason, Sedition, Riot, Trespass, Gaming, Liquor-Selling, Electoral Offences, etc.** The foregoing principles apply to this class of evidence in any offence where knowledge, intent, or design is to be proved. What is to be kept in mind is that the Intent principle (*ante*, § 302) is available wherever the intent accompanying an act is to be shown, the other acts being so far similar as to negative by their recurrence that innocent intent which might be conceded for one occasion but becomes less supposable with every repetition; and that the Design or System principle (*ante*, § 304) has application wherever the doing of the act itself is to be proved, and the design or system pointing towards it is to be inferred from other acts indicating by their common features its existence. These principles may thus have application

frighten her, or fired intending to kill, the fact was admitted of two prior shootings at his wife during the preceding twelve months; no cases cited); 1892, Moore *v.* State, 31 Tex. Cr. 234, 236, 20 S. W. 563 (assault with intent to kill; indecent language to the assaulted, just before, admitted); 1900, Hamilton *v.* State, 41 id. 644, 56 S. W. 927 (assault with intent to kill; prior assaults on the same person during a year or more, admitted); 1866, Devine *v.* Rand, 38 Vt. 621, 627 (trespass for beating, kicking, throwing into the snow, placing on a hot stove, etc.; the various acts of cruelty admitted to show the intent, exemplary damages being allowable for wilful trespass).

[1] *E. g.*, People *v.* Marble, Mich., *ante*, § 363.

on a charge of *rioting* or the like,[1] keeping a *disorderly house*,[2] *gambling*, or keeping a *lottery*,[3] committing a wilful *trespass to property*,[4] uttering a criminal libel,[5] refusing a *vote*,[6] or casting a vote,[7] *packing a jury*,[8] and sundry other offences.[9]

[1] 1820, R. *v.* Hunt, 3 B. & Ald. 566, 569, 573 (mob-meeting; acts of various parts of the mob admitted to show its intent as a whole); 1876, R. *v.* Mailloux, 16 N. Br. 499, 507, 512, 516 (indictment for a riot; evidence to explain away conduct previous to the day alleged was rejected, because it did not call for explanation); 1844, State *v.* Renton, 15 N. H. 169, 170, 174 (riot on the 4th of July, 1842; the fact that the celebrations on that anniversary in 1839, 1840, and 1841 were riotous, and that the defendant took part in them, excluded). The various other questions of evidence that become material in proving mob violence are analyzed, with cross-references, *post*, § 1790.

[2] 1896, Roop *v.* State, 58 N. J. L. 479, 34 Atl. 749 (former keeping of a disorderly house, that being the offence charged, excluded); 1897, Parks *v.* State, 59 id. 573, 36 Atl. 935 (keeping a disorderly house; matters connected with a similar offence in another State, excluded). For other acts as showing the inmates' *character*, see *ante*, § 204.

[3] 1898, Toll *v.* State, 40 Fla. 169, 23 So. 943 (keeping a gaming room; where acts within the period charged are shown, acts prior and subsequent are admissible to illustrate); 1866, Dunn *v.* People, 40 Ill. 469 (lottery; the defendant called it a "gift-sale"; and other envelopes and advertisements were admitted to show its real nature); 1871, Thomas *v.* People, 59 id. 160, 162 (lottery; other tickets, bills, and advertisements, connected with the same enterprise, admitted to show intent); 1878, Miller *v.* Com., 13 Bush 737 (maintaining a lottery; the fact admitted of its regular maintenance for several years preceding the time alleged); 1888, Com. *v.* Ferry, 146 Mass. 209, 15 N. E. 484 (pool-selling in rooms kept for the unlawful purpose of so selling, etc.; the carrying on of such transactions shortly before, admitted); 1885, Clark *v.* State, 47 N. J. L. 556, 4 Atl. 327 (sale of lottery tickets; the sale of a ticket to another person, not admitted "for the purpose of showing that the defendant would be likely to commit the crime charged").

[4] 1897, Louisville & N. R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163 (in proving, to recover a penalty, that a trespass was wilful and knowing, under the statute, the breaking down of the fence at the same time may be shown); 1903, State *v.* Roscum, — Ia. —, 93 N. W. 293 (malicious mischief; larceny of similar articles two years before, excluded); 1895, Mayer *v.* R. Co., 90 Wis. 522, 63 Mo. 1048 (to show that the defendant had piled snow at a certain crossing, the fact that it had piled snow at other adjacent points was admitted).

[5] 1791, R. *v.* Pearce, Peake 75 (several other paragraphs about the plaintiff by the defendant were admitted in corroboration, to prove him the author).

[6] 1870, Friend *v.* Hamill, 34 Md. 298, 305 (action by a Democrat for malicious and corrupt refusal of an election officer to allow him to vote; the fact was received of the defendant's prior declaration that the plaintiff and certain others should not vote, the fact that these persons were not allowed to vote, and the fact that they were all Democrats while the defendant was a Republican). Compare the jury cases *infra*.

The following case illustrates a similar application: 1899, People *v.* Alton, 179 Ill. 615, 54 N. E. 421 (mandamus to compel the allowance of the relator's negro children to attend the public schools; an ordinance authorized the superintendent or the board committee to assign pupils to specific schools; the relator's children were alleged to have been excluded from schools containing white children only and sent to schools containing negro children only; to prove that the exclusion was made with sole intent to discriminate on grounds of race, the treatment of other negro children by the defendant was admitted).

[7] 1895, People *v.* Shee, 147 N. Y. 78, 41 N. E. 508 (admitting evidence of previous repeating, to show a general design of fraudulent voting).

[8] 1848, R. *v.* Mitchel, 6 State Tr. N. s. 599, 630 (challenge to the array because not impartially selected by the sheriff; the fact that among the qualified persons the Catholics and the Protestants were as two to one, but on the panel were as one to five, held admissible as tending to show an unfair intent in the sheriff; quoted *ante*, § 302); 1848, R. *v.* O'Doherty, ib. 831, 881, 888 (same); 1848, R. *v.* O'Brien, 7 id. 1, 28, 30 (similar); 1848, R. *v.* Duffy, ib. 795, 859, 870 (similar facts allowed, but the ruling is obscure, apparently from a failure to distinguish between religious disproportion as a ground of challenge and the same as evidence of corrupt selection); 1903, Binyon *v.* U. S., — Ind. T. —, 76 S. W. 265 (grand jurors discriminated against, in selection, on account of race; evidence held insufficient on the facts); 1903, Carter *v.* State, — Tex. Cr. —, 76 S. W. 437 (similar question; evidence held insufficient).

[9] 1890, Dodd *v.* State, 92 Ala. 61, 9 So. 467 (carrying a concealed pistol; the fact of the use of a pistol shortly before, excluded); 1855, Thomas *v.* State, 103 Ind. 419, 431, 434, 2 N. E. 808 (knowingly sending a lewd letter; another letter to the same person, admitted); 1896, Meyer *v.* State, 59 N. J. L. 310, 36 Atl. 483 (knowingly and unlawfully prescribing medicine to C. without a license; the fact excluded of similar unlawful prescriptions to others; the Court treat it as character-evidence, and ignore its use as indicating intent or scheme); 1866, The Springbok, 5 Wall. 1, 7, 25, 27 (confiscation of goods of a neutral, captured between England and Nassau, and consigned to Nassau, a block-

The violation of the laws in regard to *intoxicating liquors* involves constantly the use of evidence under the present principles. There are four chief varieties of offences under these laws: selling, being a common seller, keeping with intent to sell, and keeping a place for the purpose of sale. (1) The first may raise the question how far an intent may be evidenced by other instances, and how far a design or plan, as showing probably an actual sale, may be evidenced by former acts of the sort.[10] (2) The second involves the principle of separate instances to show a character or habit (*ante*, § 203).[11] (3) The third may raise the question how far other acts of keeping or selling may be received to show the intent;[12] (4) and the fourth may raise the same question.[13] The answers are not difficult, so far as they depend on the application of the foregoing principles. But in order to discriminate properly the various other questions of substantive law and criminal pleading which occasionally bear a superficial resemblance to the evidential questions, it would become necessary to consider a great variety of local statutory material and a mass of decisions having no bearing on the law of evidence. Nothing short of a treatise on the law of intoxicating liquors could do justice to the subject,[14] so that it seems better on the whole to omit any treatment of it here.

ade of Confederate ports then prevailing; issue, whether the cargo was destined by the shippers for transshipment at Nassau to a Confederate port; to evidence the intention, the facts were admitted that two other vessels, the Gertrude and the Hart, recently captured on their way to blockaded ports, had a cargo consigned by the same shippers, of the same classes of goods marked in the same way, and that many consecutively numbered bales, missing in the other two vessels, were found on the Springbok); 1898, Safter *v.* U. S., 31 C. C. A. 1, 87 Fed. 329 (mailing lewd letters; subsequent adultery of the defendant with the addressee, held irrelevant).

[10] 1898, Chipman *v.* People, 24 Colo. 520, 52 Pac. 677 (sale of liquor said to have been in good faith for medicinal purposes; the sale being denied and the medicinal use being immaterial, evidence of other sales to disprove good faith was held improperly admitted); 1877, State *v.* Shaw, 58 N. H. 73 (illegal liquor-selling; sales during the same month, admitted as showing a plan or course of business); 1895, Fosdahl *v.* State, 89 Wis. 482, 62 N. W. 185 (illegal selling of whiskey on Oct. 29, 1892; illegal selling of beer and whiskey during the summer of 1892, excluded; but illegal possession during October, 1892, admissible, apparently to show the selling charged).

[11] 1890, People *v.* Haas, 79 Mich. 457, 461, 44 N. W. 923 (illegal sales shortly before the date charged, admitted); and instances cited *ante*, § 203.

[12] 1876, State *v.* Plunkett, 64 Me. 534 (keeping with intent; former sales admitted; here a conviction for illegal selling); 1885, Com. *v.* Cotton, 138 Mass. 501 (keeping liquor with intent to sell unlawfully; the defendant was the driver of a wagon sent out from the city, where sales were lawful, to a suburb where they were unlawful; the fact of deliveries in the same suburb three and four months before was admitted to show intent); 1895, Com. *v.* Vincent, 165 id. 18, 42 N. E. 332 (keeping liquor illegally; to show intent, the fact was admitted of intoxicated men leaving the place some weeks before; that "the same condition of things existed both before and after the day named" was admissible "for the purpose of showing the intent with which the liquors were kept on the day set forth"); 1897, Hans *v.* State, 50 Nebr. 150, 69 Mo. 838 (sales shortly before, admitted to show the intent of keeping); 1898, State *v.* White, 70 Vt. 225, 39 Atl. 1085 (keeping with intent to sell on June 18; keeping with intent to sell on Sept. 14 of same year, admitted to show intent). Another principle to be distinguished is that which, while allowing a range between certain dates for the offence proved at the trial, forbids the attempt to prove more than one as the basis of the charge, on the ground that each juror might regard a different one as proved, *e. g.* Boldt *v.* State, 72 Wis. 14, 38 N. W. 177.

[13] 1860, Com. *v.* Edds, 14 Gray 406, 408 (keeping a tenement used for illegal sales of liquor; after evidence of the keeping of the tenement, the fact of sales by others in the absence of the defendants was received); 1871, Sherman *v.* Wilder, 106 Mass. 537, 540 (the intent charged being to give a lease knowingly to one selling liquor illegally, the intent at another time was admitted); 1896, People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213 (former sales, admitted to show a general plan).

[14] Consult Black, Intoxicating Liquors, §§ 499–527, *et passim*. Compare the cases cited *post*, § 382.

In *treason*, the period of the Restoration saw a general improvement in the definition of the crime as well as in its procedure and rules of evidence (*post*, § 2036), — an improvement which was permanently established by the practice under Lord Holt after the Revolution and the accession of William and Mary. As a part of this advance there came in the doctrines of criminal law and pleading that treason must consist in an overt act (which was in truth a revival of an ancient limitation), and that no overt act other than such as is charged in the indictment can be proved as constituting the offence.[15] But this latter doctrine was one of pleading only; and it did not prohibit the use of other overt acts as evidential of intent under the present principle;[16] and this result has been accepted in applying our own constitutional enactment of the same rule.[17]

In *sedition* (including seditious riot and seditious libel), other acts and utterances are receivable, under the present principles, to evidence seditious intent.[18] In the same way, the accused may offer his other utterances and acts to evidence his loyal (*i. e.* non-seditious) intent,[19] — an application of the rule which became well enough established as law, but was no doubt hampered by its apparent relation to other rules which might have prohibited it, such as the character-rule (*ante*, § 195) and the rule for innocent conduct (*ante*, § 293).[20]

14. Civil Cases.

§ 370. **In general.** The foregoing principles are equally as applicable to civil cases as to criminal cases, and to the use of other torts, sales, forgeries, or the like, in evidencing similar issues in civil cases. The peculiarity of the question involved is merely whether and under what conditions other similar acts are receivable to show Knowledge, Intent, or Design as to the act charged. This question is of much less frequent occurrence in civil

[15] 1696, R. *v.* Vaughan, Salk. 634 ("a distinct overt act cannot be given in evidence unless it relate to that which is alleged or conduces to the proof of it. But if it conduce to prove an overt act alleged, it is good evidence"). For the history of the rule, see the following authorities: 1660, Regicides' Trials, 5 How. St. Tr. 947, 976; 1762, Foster, Crown Law, 245; 1803, East, Pleas of the Crown, I, 130.

[16] R. *v.* Vaughan, *supra*.

[17] 1799, U. S. *v.* Fries, Whart. St. Tr. 482, 585, 594 ("evidence may be given of other circumstances or even of other overt acts, connected with that on which the indictment is grounded, and occurring or committed in any other part of the district than the place mentioned, . . . to show the *quo animo*, the intent, with which the act laid was committed"); 1807, Burr's Trial, Robertson's Rep. I, 472 (acts of treason elsewhere than as charged, admissible, since they, "by showing a general evil intention, render it more probable that the intention in the particular case was evil").

[18] 1820, R. *v.* Hunt, 1 State Tr. N. S. 171, 476, 486, 491 (seditious meetings; resolutions at a similar meeting shortly before, admitted to show intent and design); 1821, Redford *v.* Birley, Ib. 1071, 1237 (seditious mob; antecedent doings of the same persons, admitted); 1848, R. *v.* O'Brien, 7 Id. 1, 75 (sedition; other speeches than those charged, six months before, admitted to show intent).

[19] 1683, Lord Russell's Trial, 9 How. St. Tr. 577, 622; 1684, Rosewel's Trial, 10 Id. 147, 197, 206, 212; 1691, Grahme's Trial, 12 Id. 645, 794; 1831, R. *v.* Cobbett, 2 State Tr. N. S. 789, 877 (seditious libel; the defendant's publications nine years before, received to negative wrongful motive or intent); 1839, R. *v.* Frost, 4 Id. 85, 380 (treason; former anti-seditious conduct described); 1843, R. *v.* O'Connor, ib. 935, 1162 (sedition; acts of good conduct testified to); 1843, R. *v.* O'Connell, 5 Id. 1, 537 (sedition; defendant's speeches in 1841, read to negative seditious intention); 1848, R. *v.* O'Brien, 7 Id. 1, 260, 266 (sedition; past expressions of loyalty received); 1848, R. *v.* Rankin, ib. 711, 747 (seditious riot; former assistance to police in quelling riots, received).

[20] Compare also the principles of §§ 461, 1731, 1732, *post*, which may be thought to have a bearing.

cases than in criminal cases, mainly because the issues of intent and the like are less commonly open in civil cases. But wherever Knowledge or Intent or Design is relevant in a civil case the foregoing principles are equally applicable. Thus, where the act of forgery is in issue, there may be a criminal prosecution for the forgery or there may be a civil action based on the forged document, and the same evidence may be applicable in both. So, where a false representation is charged, it not only may be but usually is a civil case in which the issue arises and the foregoing principles become applicable. In almost every one of the foregoing classes of cases there are instances of the application of the principles in civil litigation. The salient feature is the nature of the issue and the kind of evidence offered, not the penal or the civil form of the proceeding. There are, however, a few classes of cases to be noticed in which the present principles may be applied and yet the opportunity occurs practically in civil litigation only.

§ 371. **Copyright Infringement.** The infringement of copyright may be evidenced by the aid of the present principle, in connection with another one, actually different, but seldom distinguished in practice. (1) Where B's book is published subsequently to A's, and in B's is found a passage, similar to a passage in A's, but purporting to be composed by B, the reappearance of the same passage points back to A's book as the source of its borrowing, — on the principle of Traces (examined *ante*, §§ 148, 152). But B may explain away this indication, in showing that there were other sources from which the passage could equally well have been composed, — as, in a directory, from a canvass of the same persons, or, in a guide-book, from observation of the same places; the similarity in reproduction being thus more or less unavoidable. It is only in the rare case when A is the sole source of the information, or when the passages are peculiar in tenor and also identical in wording, that the inference from similarity is a necessary one. But this hypothesis of other sources is not available as an explanation where the same errors — either of fact or of printing — occur in B's passage as well as in A's; and accordingly the recurrence of such errors is a well-established mode of evidencing, to a high degree of probability, the copying of such a specific passage by B from A:

1858, *Wood*, V. C., in *Spiers* v. *Brown*, 31 L. T. 16: "The difficulty that arises in this class of cases [dictionaries] is that they only relate to a subject common to all mankind, and that the mode of expression and language is necessarily so common that two persons may to a very great extent express themselves in identical terms in conveying the instruction or information to society which they are anxious to communicate. The most obvious case is that of figures, such as a table of logarithms, where the calculations are so nicely performed that the result and the expression of the result must be identical; neither is it very easy to vary the order. The same may be said of directories, calendars, court guides, and works of that description. Those are cases in which the only mode of arriving at the amount of labor bestowed is by the common test resorted to of discovering the copy of errors and misprints, indicating a servile copying."

1852, *Kindersley*, V. C., in *Murray* v. *Bogue*, 1 Drewry 353, 360: "Now the use of showing the same errors in both is that . . . if the evidence is unsatisfactory on the ques-

tion whether the defendant did use the plaintiff's work or not, to show the same errors in the subsequent work that are contained in the original is a strong argument to show copying; . . . which is the ordinary and familiar mode of trying the fact whether the defendant has used the plaintiff's book."

(2) But, assuming that in this way there is shown the probability of the copying of specific passages, it remains to invoke the present principles (of Intent and Design), and to argue that the copying of a number of such passages indicates a more extensive copying of other passages not otherwise shown to have been copied. This argument is always open, and its use has constantly been sanctioned; there can merely be a question of its weight in a given instance.[1] Just what its nature is, however, is not entirely clear. (a) It seems at first sight to be an argument from the System or Design principle (*ante*, § 304); *i.e.* because B in various instances copied from A's book, therefore he probably had a general plan to copy, which he carried out in other instances. (b) It is doubtful, however, whether a Court would give much weight to this argument as showing a copying of passages which are merely more or less similar. Practically, the argument is resorted to only where there is a certain similarity in specific passages, and this similarity is attempted to be explained as due to the use of common sources necessarily resulting in similar language or thought; this explanation may suffice to leave the Court in a state of doubt; but if it can be shown that there was copying in other passages also this doubt may dis-

[1] 1809, Longman *v.* Winchester, 16 Ves. Jr. 269 (Royal Calendar, etc.; the "identity of the inaccuracies" taken as proof of "a vast proportion of the work" being mere copying); 1826, Mawman *v.* Tegg, 2 Russ. 385, 394 (Eldon, L.C.: "When a considerable number of passages are proved to have been copied, by the copying of blunders in them, other passages, which are the same with passages in the original book, must be presumed *prima facie* to be likewise copied, though no blunders occur in them"; 1839, Lewis *v.* Fullarton, 2 Beav. 6, 13 (copying of parts taken as justifying an inference of further copying); 1900, Cadieux *v.* Beauchemin, 31 Can. Sup. 370; 1847, Webb *v.* Powers, 2 Woodb. & M. 497, 513 (coincidences in descriptions used to determine whether there was a systematic copying); 1869, Lawrence *v.* Dana, 4 Cliff. 1, 74 ("When a considerable number of passages are proved to have been copied by the copying of the blunders in them, other passages which are the same with the passages in the original book must be presumed, *prima facie*, to be likewise copied, though no blunders appear in them"; "coincidence of citations" and "identity in the plan and arrangement of the notes" were also treated as evidential); 1887, Publishing Co. *v.* Keller, 14 C. C. A. 213, 30 Fed. 772 (alleged infringement of a directory; the fact that in 2,800 names and addresses paralleled in the defendant's book 39 material errors were also reproduced, was taken as evidence of a general piracy; "in a case like this, when a close resemblance is the necessary consequence of the use of common materials, the existence of the same errors in the two publications affords one of the surest tests of copying; the improbability that both compilers would have made the same mistakes, if both had derived their information from independent sources, suggests such a cogent presumption of copying by the latter compiler from the first that it can be overcome only by clear evidence to the contrary"); 1888, Callaghan *v.* Myers, 128 U. S. 617, 660, 9 Sup. 177 (the improper use of the plaintiff's headnotes, etc., in some instances in every one of many volumes, taken by the Court as indicating similar use in a "large portion of the work"); 1895, Chicago D. D. Co. *v.* Chic. D. Co., 13 C. C. A. 8, 66 Fed. 977 (the defendant's directory contained about 60,000 names; 67 errors in the plaintiff's directory were shown to be repeated in the defendant's; no ruling as to evidence, except to admit the above and similar facts indicating system); 1897, West Pub. Co. *v.* Lawyers' Co-op. Pub. Co., 25 C. C. A. 648, 79 Fed. 756 (the defendant having made a digest of some 38,000 paragraphs, the piracy of a limited number (such as 303 out of 548 examined by the master) was held evidence of a systematic use of the plaintiff's material, indicating piracy in other portions not expressly pointed out; the opportunity and temptation to pirate being similar in the other portions).

appear and the Court become willing to believe that the similarity in question is not entitled to an innocent explanation. In short, the effect is precisely analogous to that of the Intent principle (*ante*, § 302), where the conceivable innocent explanation of the intent of an ambiguous act is negatived by other instances of the sort. So that perhaps the Intent principle is in essence the one here involved.

§ 372. **Contracts (Sale, Agency, Lease, etc.).** There is a large class of civil issues in which at least one of the foregoing principles may receive frequent application, — the issue whether a specific contract was made; the fact being offered to be proved by other instances of the making of similar contracts. The argument here is that the other instances indicate a general plan, system, or habit of making such contracts, which was probably carried out in the specific instance, — as where a factory-hand, to show the agreed amount of his wages, offers instances of the same amount being paid to others in the same factory doing the same kind of work. This question theoretically has a place here. But it also verges on and often really is the question of proof of Habit. It is perhaps in most cases merely a matter of words whether these other instances be offered as evidencing a Plan, System, or Design, or be offered as evidencing a Habit or Course of Business. For this reason, and also because there are many instances which strictly involve only the question of Habit, and because the principle is in such cases practically the same for proving both Habit and System, the rulings on such evidence are collected under one head (§§ 376, 377, *post*).

Sub-title II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION.

Topic VIII: EVIDENCE TO PROVE HABIT, STATUS, COURSE OF BUSINESS, OR CUSTOM.

CHAPTER XIII.

§ 375. **General Principle.** That a habit, course of business, or custom is relevant to show the doing of an act, has already been seen (*ante*, §§ 92–98). Evidence of Habit or Custom may of course be furnished testimonially, by a witness who asserts its existence in the form: "A has a habit of riding to the city"; "There is a custom of granting a discount." But the question is now of circumstantial evidence only. Of the three modes of evidencing circumstantially a human quality or condition (*ante*, § 190), two only are practically here available, namely, specific instances of conduct exhibiting the habit or custom, and the prior or subsequent existence of it. And first, of the former.

At the outset may be distinguished two kinds of things that come to be proved (1) Habit proper, *i. e.* a course of conduct by an individual; and (2) Custom, or usage, *i. e.* a course of conduct by a community or other body of individuals.

(1) In evidencing the Habit of an individual, it is impossible to group the precedents with entire exactness, because a Court occasionally excludes the evidence without making it clear whether its objection is to Habit as itself irrelevant to something else, or merely to the evidence of Habit. In general, wherever the evidence excluded is of individual instances, the precedent is considered here. Another obstacle arises through the occasional difficulty of distiuguishing between Habit and other qualities. Where Habit and Disposition (or Character) may both be fairly applicable terms to describe a condition or quality — *i. e.* that of intemperance —, specific acts would be in most cases inadmissible from the latter point of view (*ante*, §§ 194, 199, 203), but admissible from the present point of view. Where Habit and Design or System are both conceivably applicable terms, the instances of specific conduct could equally well be treated from the latter point of view (*ante*, § 372). There must therefore be numerous instances in which the precedents could be as well considered under one principle as under another; and this difficulty is insuperable, until Courts become more exact in indicating the precise effect of their rulings on these points. It is worth while, then, to keep in mind the possible bearings of other principles; for example, the relevancy of Habit,

as indicating the doing of an act (*ante*, §§ 92–98), and of Character or of Capacity, for the same purpose (*ante*, §§ 65, 85); so also the relevancy of specific conduct as indicating Character (*ante*, §§ 198–203), or Capacity (*ante*, §§ 219–225).

(2) In evidencing Custom or Usage of the community or of a trade, the foregoing difficulties do not arise.

§ 376. **Individual Habit; Miscellaneous Examples.** In general, where a habit of conduct is to be evidenced by specific instances, there is no reason why they should not be resorted to for that purpose. The only conditions (*ante*, § 32), are (*a*) that they should be numerous enough to base an inference of systematic conduct, and (*b*) that they should have occurred under substantially similar circumstances, so as to be naturally accountable for by a system only, and not as casual recurrences. As to the first condition, convenience requires that the discretion of the trial Court should control, in order to avoid the objections of unfair surprise and confusion of issues (*ante*, §§ 42, 194, *post*, §§ 1849, 1904). The following passage illustrates this consideration:

1883, *Morton*, C. J., in *Com.* v. *Ryan*, 134 Mass. 223 (murder; the debauched habits of the deceased were alleged by the defendant to have been the cause of her death, and he offered testimony directly to her intoxicated habits; but the facts of particular instances of intoxication were held admissible only in the discretion of the trial judge): "The question is whether . . . the defendant had the right to go into any number of individual instances of intoxication throughout her life, unrestrained by the discretion of the Court. We do not understand that the law gives him such a right. . . . It must be in the power of the Court to limit the amount of the testimony where it may be extended indefinitely, — as in cases of usage, or character, or genuineness of handwriting. Confirmed habits of drunkenness can usually be easily proved without going into the investigation of particular instances; while such investigations, if unlimited, would tend to raise a multiplicity of issues, and to distract and confuse the minds of the jury and to divert them from the real issues of the case. . . . It was within the discretion of the presiding justices to admit or reject the evidence offered of particular acts of drunkenness."

As to the second condition, it may be said that the Courts are apt to require too much, ruling often as if it were their function to require incontrovertible demonstration from each piece of evidence instead of merely to declare it relevant to be considered by the jury. The following passage illustrates the proper treatment:

1835, *Shaw*, C. J., in *Howe* v. *Thayer*, 17 Pick. 91, 96 (the defendant had given a general notice of dissolution of partnership to all creditors; the terms of the notice received by the plaintiff being in question, the terms of the notice to another creditor were admitted): "A man goes forth to a class of persons, all standing in the same relation, to give them a notice affecting their interests alike; if there are ten, and he gives a particular notice to nine, it leads to a probable inference that he gave a like notice to the tenth, where he states that he intended to make no distinction and believes that he notified all alike."[1]

[1] The following is an example of improper and pedantic treatment: 1837, Watts v. Fraser, 7 A. & E. 223, 232 (answering in the negative, "whether or not, in the absence of direct proof, it can be inferred from the printing of one newspaper [or book] which was not circulated, that another exactly corresponding with it was printed" and published in the usual way and quantity).

That a *negative habit* may be shown, and not merely an affirmative one, seems unquestionable, *i.e.* that a person systematically omits to do a certain thing; separate instances suffice to persuade us on such matters in everyday life, and they should be received as probative in courts of justice. The only conditions are as before, namely, that the instances be sufficiently numerous, and that they occur under such circumstances as to indicate a general course of behavior under like circumstances.[2]

Subject to the foregoing considerations, and to the distinctions noted in § 375, the proof of habit by specific repeated instances of conduct is allowed in all varieties of situations.[3]

§ 377. **Same: in Contracts (Sale, Lease, Loan, Agency, Hiring, etc.).** It has already been pointed out (*ante*, § 372) that it is often difficult to say whether the idea of Habit or that of Plan or System is the more appropriate in evidencing a course of conduct in making contracts. This, however, is after all chiefly a question of words, for the underlying notion and the applicable principle are the same in each case. That principle is (*ante*, §§ 32, 33) (*a*) that the instances must be numerous enough, and (*b*) that they must have occurred under conditions so similar as to indicate a system, plan, or habit of doing that particular thing under similar circumstances. This principle has, however, found slow acceptance in application. The reason seems to have been chiefly a notion that because such evidence would in some cases clearly be improper (even under the above principle), therefore it must be in all cases improper, — an over-cautious attitude founded on a fallacy. Many precedents, however, do distinctly recognize the principle.

[2] 1873, State *v.* M. & L. Railroad, 52 N. H. 528, 532, 549 (to show a habit of omitting the ringing of the bell and the blowing of the whistle at a particular crossing by a particular fireman and engineer, the fact was received of such omissions by them at that place during the preceding year); 1878, State *v.* B. & M. Railroad, 58 id. 410 (same; compare the citations *ante*, § 93); 1877, Adams *v.* Ins. Co., 70 N. Y. 169 (whether a condition of an insurance policy had in fact been waived; the fact held inadmissible that he had never waived such a condition before in other policies, or that he had constantly waived it; the ruling is confused, however, by raising the question of corroborating an impeached witness); 1897, Lake Erie & W. R. Co. *v.* Craig, 25 C. C. A. 585, 80 Fed. 488 (to show an abandonment of an employer's rule by the habitual sanction of its disobedience, instances of such sanction under circumstances not entirely similar are admissible; here, a rule forbidding train hands to go between cars in uncoupling).

[3] 1898, Ferner *v.* State, 151 Ind. 247, 51 N. E. 360 (whether a person was "engaged in the practice of dentistry"; specific instances received); 1899, Eagon *v.* Eagon, 60 Kan. 97, 57 Pac. 942 (alienation of husband's affections by father; after evidence of defendant's solicitations of the son to abandon the plaintiff, defendant's evidence of a series of acts and solicitations of an opposite tenor were excluded; incorrectly, because they tended to show an habitual course of conduct, and thus to disprove the acts alleged by the plaintiff; Smith, J., diss.); 1861, Gahagan *v.* R. Co., 1 All. 187 (an issue was whether the defendant's cars were unreasonably standing across the highway; the fact of an unreasonable use of the highway for switching, etc., at times past, excluded; compare the citations *ante*, § 199); 1878, State *v.* Shaw, 58 N. H. 73 (illegal sale of liquor; sales at former times, admitted to show "a course of business according to which it would naturally be done"; compare § 367, *ante*); 1884, Davis *v.* Lyon, 91 N. C. 444 (libel on a justice of the peace charging him with "habitual abuse of his authority for private gain" by receiving money; evidence received of other cases of his corrupt receipt of money as justice; compare the citations *ante*, § 203); 1900, Wade *v.* R. Co., 36 Or. 311, 59 Pac. 875 (particular instances of high speed on former occasions, not admissible to prove speed on the present occasion; compare the citations *ante*, § 93); 1903, Louisville & N. R. Co. *v.* Summers, — C. C. A. —, 125 Fed. 719, 723 (that the plaintiff on prior occasions on the same day had stopped, looked, and listened, before crossing the track, held inadmissible); 1900, Clark *v.* Smith, 72 Vt. 138, 47 Atl. 391 (injury by negligent jerking of the car; that "the train was jerked violently at other stations," excluded; compare the citations *ante*, § 199).

It is impossible to reconcile all the conflicting precedents; but it is possible to explain most of them. The solution of any given case can easily be reached if it is remembered that no technical rule or general policy obstructs such evidence; that the only question can be whether the instances produced do have any real probative value to show a system or plan or habit; that in commercial affairs it is sometimes very unlikely, and sometimes very likely, that a particular contract or term of a contract will be habitually made; and that it is frequently possible to differ in opinion over the solution in a given case, while there may be no difference of opinion as to the principle applicable. The cases may be grouped under three heads: (1) the Authorization of an agent; (2) the making of some other Contract, evidenced (*a*) by other contracts with the same person, (*b*) by other contracts with other persons.

(1) *Authorization of an agent.* Here the use of such evidence has always been sanctioned. Where a general authority to do an act is alleged, and the plaintiff relies on the defendant's having held out the third person as his agent, other instances of the plaintiff's having treated the person as agent for such an act are receivable to show a general holding-out of that person as agent.[1] This principle applies as well to a criminal agency as to a civil agency;[2] for though the facts making a person liable criminally for an agent's act may be different from those involving civil liability, the mode of evidencing a general authority is the same for both.[3]

(2) (*a*) *Contract* evidenced by *other contracts with the same person.* Here

[1] 1794, Gibson *v.* Hunter, 2 H. Bl. 288 (H. drew a bill on G., payable to F., a fictitious person, or order, and indorsed it in F.'s name; the plaintiff, a *bona fide* holder for value, in order to show in H. a general authority from G. to draw such bills, offered the fact of many other bills of the sort being drawn and accepted by H. with apparent consent of H.; the objection raised conceded that "a general authority to do such acts . . . can only be inferred by showing an acquiescence of the person supposed to have given such authority in other acts done with his privity or consent," and rested on the failure to show such actual privity to the former drawings; the evidence was held admissible, the grounds not appearing); 1800, Barber *v.* Gingell, 3 Esp. 61, Kenyon, L. C. J. (to show that the defendant had given authority to T. to accept the bill for him, the drawee, the fact was received of the defendant's having paid several bills drawn like the present by T., a general authority being thus inferrible); 1830, Cash *v.* Taylor, Ll. & W. C. C. 178, K. B. (similar facts); 1845, Llewellyn *v.* Winkworth, 13 M. & W. 599 (authorizing the acceptance of another bill is evidence of a general authority to accept bills and therefore to accept the bill in question); 1869, Morris *v.* Bethell, L. R. 4 C. P. 765 (the fact of a single such former payment as in Barber *v.* Gingell was held not improperly rejected, no general authority being set up); 1899, Lytle *v.* Bank, 121 Ala. 215, 26 So. 6 (the giving of other notes by an alleged agent, and their ratification, admitted); 1885, Snn Mut. Ins. Co. *v.* Barrel Co., 114 Ill. 99, 29 N. E. 477 (previous relations of a broker and an insurance company, admitted to show that the former was authorized to receive the plaintiff's premium); 1854, Lee *v.* Tinges, 7 Md. 215, 235, 237 (to show ratification of certain settlements by an employer, the ratification of other such settlements by him during the same week was excluded, because made "under circumstances very different from those existing at the time of the occurrence of the principal matter"); 1851, Trull *v.* True, 33 Me. 367 (whether H. had given S. the authority to sign a note; their business relations admitted); 1824, Irvine *v.* Buckloe, 13 S. & R. 35 (agency one or two years later, admitted); 1862, Stevenson *v.* Hoy, 43 Pa. 191, 196 (authority to give a written guaranty; similar guaranties by the same person previously recognized by the defendant, admissible).

[2] *Contra:* 1896, People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017 (the fact of B. having acted as agent for the defendant in other cases of corrupt official conduct, not admitted to show that B., the actor in the present misconduct, was the defendant's agent then: "It is true that in civil actions upon contract the course of dealing between parties may be proved to establish a general agency, but that principle has no place in criminal jurisprudence").

[3] Cases cited *ante*, § 4, especially Lord Melville's Trial.

the making of other contracts with the same person should be received to show either the making in general or the specific terms of the contract in question, provided the other instances were so connected as to indicate a general plan or habit of which they were merely parts or illustrations:

1878, *Peters*, J., in *Eaton* v. *Telegraph Co.*, 68 Me. 63, 67 (whether A had sold to B, or was merely holding for B, certain certificates of stock in the former's possession; the certificates were in A's name and bore assignments to B; the fact of A's possession as custodian of other certificates of the same stock made out in B's name was received): "The difficulty is to decide what is and what is not relevant evidence. The best authorities clearly sustain the doctrine that 'the fact of a person having once or many times in his life done a particular act in a particular way does not prove that he has done the same thing in the same way upon another and different occasion.' It is sometimes permissible to show, however, what men generally have done under certain circumstances and conditions, as showing how a particular man might act under the same surroundings. . . . Here the dealing inquired about was between the same persons at the same time and related to the same kind of property. The reason of the rule which excludes irrelevant testimony admits such as this." [4]

[4] 1844, Bourne v. Gatliff, 11 Cl. & F. 45, 49, 70 (the defendant, a sea-carrier, claimed the right to deliver goods immediately on the wharf without further responsibility; the fact was received, from the consignor, of former bills of freight and of lading, and of the mode of other deliveries, in consignments between the same parties between the same countries; L. C. Lyndhurst: "That evidence was offered . . . to explain the meaning of the contract by showing what had been the meaning of the parties. It is said that the evidence offered was that of instances of individual contracts. Be it so; that does not render the evidence the less admissible; it may be open to observation on that ground, but it is not inadmissible"); 1895, Bank of Nova Scotia v. Robinson, 33 N. Br. 326, 334 (false representations as to negotiable paper; certain similar prior transactions between the parties, admitted, but on varying grounds); 1903, Zane v. Onativis, 139 Cal. 328, 73 Pac. 856 (whether a sum advanced by plaintiff was a loan to defendant or a deposit for plaintiff's expenses to be paid by defendant; the parties' prior relations as friends, admitted to show the probable intent); 1897, Gardner v. Meeker, 169 Ill. 40, 48 N. E. 307 (whether a note was given for a gaming transaction; the prior and subsequent dealings of the parties, admissible, for a time within the trial Court's discretion); 1899, Mabry v. Cheadle, — Ia. —, 80 N. W. 312 (action for attorney's services; on a plea denying a contract, a prior employment "as leading up to the second employment," allowed to be shown); 1903, Livingston v. Stevens, — id. —, 94 N. W. 925 (previous dealings between the parties showing a "system of dealings" in waiving a mortgage lien, admitted); 1890, Nickerson v. Gould, 82 id. 512, 20 Atl. 86 (whether a note was a forgery; other pecuniary transactions between the parties, admitted); 1898, Wood v. Finson, 91 id. 280, 39 Atl. 1007 (whether the contract for sale of oil to the defendant by a salesman E. involved also an agreement to insure the oil: terms of former similar sales between the same parties, through a salesman C., admitted to show the "probability or improbability of the contract being as claimed by the plaintiff"); 1837, Tibbetts v. Sumner, 19 Pick. 166 (prior and usual course of dealings between the parties, admitted to show whether a particular sale was upon credit); 1859, Farnum v. Farnum, 13 Gray 508 (several prior dealings of lease and loan between the parties, rejected on the facts); 1875, Huntsman v. Nichols, 116 Mass. 521 (promissory note, made by F., alleged to have been indorsed by the defendant, who denied the indorsement; to show the likelihood of the indorsement, F. testified to several such transactions and indorsements about the same time); 1875, Schwerin v. De Graff, 21 Minn. 354 (excavation-contract; the amount excavated in December, under similar conditions as to number of men, etc., admitted to show the probable amount in January and February); 1876, Iron Mountain Bank v. Murdock, 62 Mo. 70, 74 (whether a bookkeeper had inserted an interest-clause in a promissory note without authority after indorsement; the fact that the maker had indorsed four other notes with a clause of that tenor, excluded as irrelevant); 1851, Swamscot M. Co. v. Walker, 22 N. H. 457, 467 (whether the plaintiff's contract was made with the defendant or with W. and F.; the fact that the plaintiff had formerly refused to trust W. and T. for other articles, not admitted to show that they had not here contracted with W. & T.); 1892, Holmes v. Goldsmith, 147 U. S. 150, 162, 13 Sup. 288 (whether the payee of a note was in fact an accommodation maker; the "relations," not specified, between the defendant and the payee, admitted); 1896, Welch v. Ricker, 69 Vt. 239, 39 Atl. 200 (to show no agreement to pay for goods furnished to I., the fact that the defendant had paid for goods thus furnished on another such agreement was excluded, as not relevant); 1898, Limerick Nat'l Bank v. Adams, 70 id. 132, 40 Atl. 166 (plaintiff claimed as *bona fide* purchaser of notes;

(3) *Contract* evidenced by *other contracts with other persons.* Here, obviously, though the principle remains the same, the other instances must be more marked in their similarity in order to be admissible to evidence a general plan or habit, because the element of a different personality is so important in affecting the making or the terms of a contract that the likelihood of making a similar contract with different persons is relatively much smaller. It thus happens that the Courts are generally inclined to exclude such evidence, and, in the majority of instances, properly. In the much-cited case of Hollingham *v.* Head, there has sometimes been discovered an intimation that such evidence as a class is inadmissible; but the later ruling of Woodward *v.* Buchanan, and in our own country numerous rulings, show that this is an error. There is merely a question in each instance of the probative value of the particular facts offered:

1858, *Willes*, J., in *Hollingham* v. *Head*, 4 C. B. N. S. 388 (to show a warranty, by a travelling agent of a manure-company, that the guano should be equal to Peruvian guano, evidence that other contracts of his contained such a guaranty was rejected): "I am of opinion that the evidence was properly disallowed as not being relevant to the issue. It is not easy in all cases to draw the line and to define with accuracy where probability ceases and speculation begins; but we are bound to lay down the rule to the best of our ability. . . . Now it appears to me that the evidence proposed to be given in this case, if admitted, would not have shown that it was more probable that the contract was subject to the condition insisted upon by the defendant. The question may be put thus: Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would I think be fraught with great danger. . . . If such evidence were held admissible it would be difficult to say that the defendant might not, in any case where the question was whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual and therefore that it was highly probable that the particular charge of assault was well-founded. The extent to which this sort of thing might be carried is inconceivable." [5]

other purchases of similar notes from the same person, not received to show a *bona fide* purchase in this instance); 1899, Koehler *v.* Koehler, 104 Wis. 260, 80 N. W. 449 (alleged contract with a daughter for services; the fact of a similar contract three years before, excluded). Compare the citations *ante*, § 94, and *post*, § 462.

Distinguish the use of other transactions of the parties to *interpret the meaning* of a contract whose words are not disputed (*post*, § 2465).

[5] 1792, Carter *v.* Pryke, Peake 95 (whether rent was payable quarterly or half-yearly; that the plaintiff's other tenants of the same description paid quarterly, excluded); 1806, Spenceley *v.* Wilmot, 7 East 108 (*Qui tam* for usury; the fact that the borrower, alleging usury, had on the same and other days received sums for investment as agent, and not as loans, from third persons who belonged to the same circle of intimates as the borrower and the defendant, was rejected; since "whatever contracts the witness might have entered into with other persons for other loans, they could not be evidence of the contract made with the defendant, unless the witness had first said that he had made the same contract with the defendant as he had made with those persons; which he had not said"); 1833, Smith *v.* Wilkins, 6 C. & P. 180, Tindal, C. J. (assumpsit for goods sold to a wife; defence, that the credit was given to the defendant's father-in-law; the fact that other tradesmen had given her father credit when she bought, rejected); 1836, Borden *v.* Keverberg, 2 M. & W. 61 (the defendant having pleaded, in assumpsit, that credit had been given to her husband, the plaintiff, after proving her husband to be an absent alien, offered the facts that in her dealings with other tradesmen she had not disclosed her marriage, in order to prove that she had in the contracts with him represented herself as a *feme sole;* the evidence was rejected, because her failure to disclose was not equivalent

§ 378. **Same: in Prescriptive Possession; Surveys and Boundaries evidenced by other Lines.** A mode of argument which seems to belong here

to an affirmative representation); 1870, Woodward *v.* Buchanan, L. R. 5 Q. B. 285 (action for plumbing work and materials on a house, the defendant being mortgagee, and the issue of fact being whether he or a contractor had hired the plaintiff; the fact was received that in building the same house and at the same time others of the contracts had been made by the defendant, as showing that he was systematically taking the responsibility; Mellor, J.: "Had the evidence applied to other houses, the authorities might be in point against the admissibility of the evidence"); 1873, Stolp *v.* Blair, 68 Ill. 541 (assumpsit for $500 loaned for six months, without a note; the fact that the plaintiff had formerly loaned various persons such sums without notes, admitted as rebutting the inference that might be drawn from the failure to take a note); 1892, Schmidt *v.* Packard, 132 Ind. 398, 402, 31 N. E. 944 (indorsement of a note as transferring ownership; similar indorsements by him on the same day, held admissible to negative intent to transfer); 1893, Roberts *v.* Dixon, 50 Kan. 436, 31 Pac. 1083 (money loaned on cattle-investments; the terms of defendant's contracts with other investors in the same business, held not admissible to show the terms of plaintiff's investment); 1898, Lexington & E. R. Co. *v.* Lyons, 104 Ky. 23, 46 S. W. 209 (whether representations as to a ticket were made; similar representations to another person about similar tickets, admitted); 1903, Gill *v.* Staylor, — Md. —, 55 Atl. 398 (wages of another hand in the same employ, not admitted to show the terms of the plaintiff's contract); 1893, Davis *v.* Kneale, 97 Mich. 72, 76, 56 N. W. 220 (whether a contract by a subscriber to a factory was made conditionally by C.; the terms of the contract with another subscriber, excluded); 1880, Roles *v.* Mintzer, 27 Minn. 31, 6 N. W. 378 (to prove that the plaintiff's wages were agreed to be his board only, and not $20 and board and washing, the defendant offered to show that about the same time the plaintiff offered to work for W. for board only; excluded, because "there is no presumption that a person will work for one man on certain terms from the fact that he is willing to work for some other man on those terms"); 1897, Murphy *v.* Backer, 67 Id. 510, 70 N. W. 799 (defence of usury; question to the plaintiff whether he "had not made certain other usurious loans to other persons at other times," allowed in discretion), 1853, True *v.* Sanborn, 27 N. H. 383 (selling diseased beef: a sale of unwholesome beef by the defendant several years before, excluded, as not having "such an intimate connection . . . as to lead naturally to the conclusion" alleged); 1827, Jackson *v.* Smith, 7 Cow. 717 (loans of money on land at an alleged usurious rate, the bond being dated Dec. 22; another usurious bond dated Dec. 21 was offered, and also the fact of two other persons who on applying for loans had been offered the same usurious terms; treated as showing "that N. was in the habit of loaning money at usurious interest," but excluded because it involved "his general character or habit as a usurer"; this is unsound; compare § 216, *ante*); 1893, McLoghlin *v.* Bank, 139 N. Y. 514, 522, 34 N. E. 1095 (whether a deposit bore interest; that the depositor had interest-bearing deposits at other banks, excluded); 1900, Lowenstein *v.* Lombard, 164 Id. 324, 58 N. E. 44 (to show the terms of a contract for carriage by sea, the fact was admitted of contracts by the same agent of the defendant with other parties about the same time, "for the purpose of defining the contract that was actually made"); 1902, Thompson *v.* Exum, 131 N. C. 111, 42 S. E. 543 (rent-contract of one tenant, not admitted to show the terms of another's); 1876, Coxe *v.* Deringer, 82 Pa. 236, 258 (payment of taxes in 1832–33; the fact received of the owner's continuous payments on all five tracts in January of biennial periods from 1826 to 1844, then 1849 to 1868; "it was a very natural conclusion that a man who always paid his taxes promptly in biennial periods previous to the time of the sale [1834] would have paid them in time in 1832 and 1833"); 1899, Cravens *v.* Carter-Crume Co., 34 C. C. A. 479, 92 Fed. 479 (plaintiff agreed to sell his factory products to defendant only, and to close his factory, in consideration of certain shares in the defendant company and a guaranteed dividend; in an action to obtain the dividend, the defence being that the contract was unlawful as having for its object the restraint of trade, similar contracts of other manufacturers with the defendant were admitted); 1858, Phelps *v.* Conant, 30 Vt. 277, 282 (action on a promise to pay for goods furnished to W.; the fact that the defendant promised to pay another person for other goods furnished to W. was rejected; "nor is there any legal probability that he would pay one because he agreed to pay the other; . . . to have one fact prove another, there must be a necessary or probable connection between the two"); 1886, Aiken *v.* Kennison, 58 id. 665, 5 Atl. 757 (trover; defence, a contract of purchase different from that asserted by the plaintiff; the question whether the plaintiff had had "other transactions of a similar nature with other people dealing with him" was excluded, since the fact would not amount to "any such course of office or business as would suffice"); 1896, Jones *v.* Ellis, 68 id. 544, 35 Atl. 488 (to show that stock sold had been warranted, the fact of a warranty in sales of the same stock to another person was not admitted); 1897, Pictorial League *v.* Nelson, 69 id. 162, 37 Atl. 247 (representations to other persons in the same city in making similar contracts, excluded); 1901, Repass *v.* Richmond, 99 Va. 508, 39 S. E. 160 (action on a deputy-treasurer's bond; mode of execution of the other deputies' bonds, not admitted); 1893, Hartman *v.* Evans, 38 W. Va. 669, 673, 18 S. E. 810 (usury; that loans to others by the same person were usurious, excluded); 1884, Kellay *v.* Schupp, 60 Wis. 76, 18 N. W. 725 (services in

is that by which possession of a whole tract of land is sought to be inferred from specific instances of possession of parts of it. The inference seems to be genuinely one of the present sort, rather than one of mere prior or subsequent possession as a condition or state (*post*, § 382), because it involves the thought that the separate instances of conduct in relation to the land indicate a larger and habitual course of conduct. The conditions of admissibility are that the various acts should be so connected with each other, as to the topography of the place where they are done, that they suggest a system or course of conduct with reference to other parts of the adjacent land; *i. e.* that the various places where the acts are shown should be parts of one estate, manor, way, range, section, survey, or other entity, so that acts done upon these would naturally be done only as a part of a system to do them upon the other parts of the same entity. The doctrine has been fully developed in England:

1811, *Ellenborough*, L. C. J., in *Stanley* v. *White*, 14 East 332 (trespass for cutting trees; the title being in dispute, after evidence had been offered that the plaintiff's manor was surrounded on all sides by a belt of land extending fifteen feet beyond a circular hedge, the fact was offered by him of acts of ownership — involving prescriptive title — at parts of this belt other than that where the cutting had occurred; objection, that there was no connection proved between the titles of the several owners around the belt, without which no inference could be drawn in prejudice of one from acts of ownership exercised by the Stanley family against others): "The same law may be shown by general evidence to govern one entire district, though it may affect the rights of different persons in different parts. It is then one entire thing, *quoad* that district; as in the case of the Border-law. In this case the eye may see that there is one continuity of belt; and the witnesses' proving that the Stanley family have asserted the same right from time to time against different owners in different parts of the belt is evidence of their general right."

1837, *Parke*, B., in *Jones* v. *Williams*, 2 M. & W. 326 (issue between opposite owners as to the title to the bed of a stream, whether the plaintiff owned the whole or only up to the middle; the fact was received that, further down, where the plaintiff's riparian estate was opposite X's land, the former was owner of the whole bed and had done acts of repairing, by taking stones and the like): "[Acts of enjoyment, when used to prove extended possession, need not be precisely on the same spot,] provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did"; so that the plaintiff was "entitled to show the taking of stones not only at the spot in question but all along the bed of the river."[1]

cutting logs, etc.; the defendant's promise to pay "one similarly situated," not admitted to show a promise to the plaintiff); 1893, Brunnell *v.* H. S. M. Co., 86 id. 587, 57 N. W. 364 (trimmer hired at a saw-mill; the contracts of service of other trimmers as to a drawback, excluded); 1897, Oliver *v.* Morawetz, 95 id. 1, 69 N. W. 977 (to show the price at which a real-estate agent was authorized to sell, the fact of the price so authorized for another agent for the same piece at the same time was not admitted).

Compare the citations *ante*, § 94, concerning *habit* as evidence, and also the citations of civil cases *ante*, §§ 300–370, concerning former instances of forgery, false representations, and the like, to evidence *intent* or *design*, and the citations *post*, § 379, concerning evidence of trade *custom* or usage. For *market-value*, as evidencing the probable price *of a sale*, see *post*, § 392. Compare also the citations *p. t.*, § 462 (business patronage as evidence of another article's quality).

[1] 1811, Stanley *v.* White (quoted *supra*); 1813, Barnes *v.* Mawson, 1 M. & S. 85 (Ellenborough, L. C. J.: "In the case of an encroachment on a waste, it might not be proved that any acts of ownership had been exercised by the lord upon the very spot; but showing acts of ownership upon other parts within the general ambit of the waste has always been deemed sufficient"); 1831, Doe *v.* Kemp, 7 Bing. 332 (issue as to the title to a slip of waste alongside

Where the possession of the part is under a *deed* which covers a larger tract, the principle is the same,[2] but here the inference is stronger, because the deed, by marking the singleness of the entire tract, supplies the place of other evidence of unity of character.

The same principle seems to operate where, from the condition or bearing of a *boundary* or *survey* at one point, its condition or bearing at another point may be inferred, provided there is a unity between the two in the sense that the former is a part of the same general line or system of lines (township, range, section, or the like) as the latter is.[3]

§ 379. **Custom or Usage, in Trade and Commerce.** In evidencing a custom or usage (*i.e.* the habit of a body of persons) by specific instances, the same general principle as before is applicable; that is, the instances offered (*a*) should be sufficiently numerous to indicate a fairly regular course of business, and (*b*) should occur under conditions substantially similar to that in question.

a road; evidence offered for the defendant, as lord of the manor, of acts of ownership upon similar slips further along for several hundred yards, to a bridge, and again beyond it to a common; rejected, as to parts beyond the bridge, since the defendant, though owning enclosed lands adjacent to the slips of waste up to the bridge, owned none beyond it; Bosanquet, J.: "Where evidence is offered of acts done in other places than the place in dispute, it is for the judge to decide, in the first instance, whether there is such a unity of character in the different parts as to render evidence affecting a part not in dispute admissible with reference to the part in dispute"); 1837, Jones *v.* Williams (quoted *supra*); 1844, Doe *v.* Roberts, 13 M. & W. 520, 530 (Parke, B.: "How can you show a title to the whole estate except by acts of ownership in different parts?" Counsel: "That would be only where there is some evidence of a general right." Parke, B.: "There is such evidence here"); 1878, Lord Blackburn, in Bristow *v.* Cormican, L. R. 3 App. Cas. 641, 670 ("Acts of ownership on parts of a tract are evidence to prove ownership on the whole [quoting Parke, B., in Jones *v.* Williams]. This, which I think is the right rule, makes the weight of the evidence depend on the nature of the locality and of the acts, and on what it is reasonable for a jury to infer"); 1882, Neill *v.* Devonshire, L. R. 8 App. Cas. 135, 151, 166 (acts of fishery in several other parts of a river, admitted, there being evidence that the whole region was treated "as *unum quid*"); 1902, South *v.* Deaton, — Ky. —, 68 S. W. 137 (possession of part of a tract, treated as evidence of possession of the whole); 1847, Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633, 746 (a series of acts of possession over a large district were apparently used on the present principle); 1867, Abeel *v.* Van Gelder, 36 N. Y. 513, 515 ("The defendants offered to show that for a great number of years they had cut wood and timber yearly on the premises adjoining the *locus in quo* and up to and along the line thereof, for the use of their adjoining premises. . . . Where the *locus in quo* and the territory on which the acts indicating ownership were done are similarly situated as regards inclosures and other circumstances, such acts may be proved with a view to show occupation of the land in dispute and an intention to maintain and assert their right of ownership").

The principle is equally applicable to the possession of *personalty:* 1827, Moon *v.* Hawks, 2 Aik. 390 (issue as to the title to a mare possessed by R., and claimed by him to be a gift from the plaintiff; R.'s possession and claim being *prima facie* sufficient to show title, his possession and claim of another mare, delivered to him at the same time by the plaintiff in payment of a legacy, were admitted; "any act of ownership over either . . . would be evidence as it respects the other").

[2] *E.g.*, 1884, Lancey *v.* Brock, 110 Ill. 609, 612. But this use is seldom judicially distinguished from the rule of substantive law by which possession of a part, under a deed, is deemed legally *equivalent* to possession of the whole, *i.e.* a constructive possession; 1866, Bowman *v.* Wettig, 39 Ill. 416, 426 (possession of part under a deed to the whole is possession of the whole, and thus *prima facie* evidence of title to whole, as against a mere trespasser showing no paper title). Here the deed is used, as a *verbal act*, to color the possession, under the principle of § 1778, *post;* see Sedgwick and Wait, Trial of Title to Land, §§ 761–781.

[3] 1898, Olsen *v.* Rogers, 121 Cal. 225, 52 Pac. 486 (boundary line making uniform subdivisions; survey of one lot received to indicate the lines of an adjacent one); 1893, Goldsborough *v.* Pidduck, 87 Ia. 599, 601, 54 N. W. 431 (adjacent lines, etc., used to determine lines of connected blocks); 1844, Overton's Heirs *v.* Davisson, 1 Gratt. 211, 227 (the description of another survey of a coterminous tract, admissible to show the boundary); 1856, Clements *v.* Kyles, 13 id. 468, 479 (same); 1895, Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347 (same).

(*a*) Under the first head, no difficulty seems to arise; the discretion of the trial Court should control.[1]

(*b*) Under the second head, it is obvious that there must be such a similarity or unity of conditions that what is done by one or more persons or sets of persons may be taken as indicating the probable general habit of the class of persons under similar circumstances. Here there is much opportunity for difference of opinion in given cases. The precedents illustrate all sorts of trades and usages, and no detailed generalization seems feasible. It is enough to point out (1) that no particular circumstance is conclusive either *pro* or *con*; (2) that instances from another trade or another region are not necessarily without probative value, while instances from the same trade and the same locality are not necessarily admissible; and (3) that the question is not whether the offered instances fully prove the custom alleged, but merely whether they are receivable as having probative value:

1780, *Noble* v. *Kennoway*, 2 Doug. 510, the plaintiff's vessel, bound to Labrador, delayed landing her cargo and was captured; to show that the delay was reasonable and customary, and thus could not forfeit the insurance, the custom was offered in the Newfoundland trade to keep their goods on board several months; it was objected that "Newfoundland and Labrador are distant and discontiguous, and although the object of the voyages to both may be the fishery, yet the fishing trade is conducted very differently at different places; would the practice at Greenland, Nova Zembla, on the coast of Scotland, or in the new whale fishery in the Mediterranean, be evidence in this case?" Lord *Mansfield*, C. J.: "The trade of fishing on the coast of Newfoundland, especially from the west of England, has been known and practised for many years. Since the treaty of Paris, a new trade has been opened to Labrador. . . . It is well known that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at Newfoundland. I still think the evidence was properly admitted to show the nature of the trade"; *Buller*, J.: "If it can be shown that the time [of delay] would have been reasonable in one place, that is a degree of evidence to prove that it was so in another; the effect of such evidence may be taken off by proof of a difference of circumstances"

1867, *Pigot*, C. B., in *M'Fadden* v. *Murdock*, 1 Ir. C. L. 218 (the question being as to proof from other trades of the fact and amount of loss in handling particular goods by retail): "It was argued that Mr. C. ought not to have been allowed to give evidence of what occurred in his own trade, or of the losses which he himself had sustained in the course of his own experience. If he founded his judgment on facts not similar to those which were proved in the present case, the argument would be most cogent. But if he stated (as I think he did) what occurred in his own trade in matters similar to those which, on the very point of controversy, were proved to have existed in the trade of the defendant, then the evidence would appear to be admissible."

1895, *Gaines*, C. J., in *Texas & P. R. Co.* v. *Reed*, 88 Tex. 439, 31 S. W. 1058 (excluding evidence of the custom on other railroads as to a foreman's authority over railroad hands): "Did the fact that other railroad companies gave that authority to such servants tend to throw light upon the question? We think not. It is a matter of policy in the management of internal affairs upon which one manager would have one opinion, while

[1] Of course individual instances, offered one at a time, are receivable; the practical question is commonly whether enough have been offered to suffice to go to the jury (*post*, § 2494). But even a single one may suffice for this purpose: 1770, Doe *v.* Mason, 3 Wils. 63 (custom of descent); 1813, Roe *v.* Jeffery, 2 M. & S. 92 (custom to bar entails; Ellenborough, L. C. J.: "It is true that one act undisturbed does not make a custom; but it will be evidence of a custom"). There was an old French law maxim, "*une fois n'est pas coutume*" (Glasson, Hist. du droit, etc. de la Fr., vi, 546).

For the different question whether *one witness' testimony* may suffice to establish a custom, see *post*, § 2053.

another or all others might pursue a different course. One owner of a plantation might intrust his superintendent with power to employ and discharge hands; another might reserve that right to himself, or commit it to another agent. . . . [As to excluding evidence of the custom on the same road at large stations, while admitting the custom at small stations like the one in question,] the conditions at large stations, where much freight and many cars were to be handled, are so different from those at small places that we are of opinion that the practice at the latter raises no presumption that the same practice existed at the former." [2]

[2] 1842, Millward *v.* Hibbert, 3 Q. B. 120, 139 (to prove a custom of London as to the stowage of goods in regard to general average, a similar custom in other English ports was received); 1863, Falkner *v.* Earle, 3 B. & S. 360 (to prove a custom of trade between Liverpool and California, after incorporation with the United States, as to discounts on freight, a similar custom as to trade with Texas after incorporation and as to other ports of British North America, etc., was received); 1866, Place *v.* Allcock, 4 F. & F. 1074 (usage as to a bleaching-lien in Nottingham; usage at Loughborough admitted, by reason of "the vicinity of the places and the interchange of trade"); 1871, Fleet *v.* Murton, L. R. 7 Q. B. 126, 130, 134, 41 L. J. Q. B. N. S. 49 (action for the price of fruit on a sold-note signed by the brokers only, the dispute being whether in that trade brokers were liable on such notes for the default of principals; the custom of the trade being held to be involved in the contract, evidence was received, with some hesitation, of the custom on the point in the colonial market; Blackburn, J.: "It seemed to be conceded at the trial that the two trades were so far allied to each other that the same usages would be likely to prevail in both, and I thought that upon the question of the liability of a broker, evidence of his liability in a similar trade might be received"); 1863, Barnes *v.* Ingalls, 39 Ala. 201 (because "there are so many points in common between such an establishment [ambrotype and photograph gallery] and those in which the ordinary mechanic arts are pursued," a custom as to working hours in the latter was admitted to show the same in the former); 1874, Sullivan *v.* Hense, 2 Colo. 424, 433 (number of feet in a mining claim; length of other claims in the district controlled by similar customs, admitted); 1878, Denver & R. G. R. Co. *v.* Glasscott, 4 Colo. 270 (action to recover the salary of a railroad-conductor; set-off for money collected on the trains from passengers without tickets and never delivered over; the fact that on trains making the same number of trips with substantially the same number of cars at the same rates of fare over the same route the receipts of the sort by another conductor had been much higher, was rejected; because, whether or not the habit of passengers in entering trains in forgetfulness of the prior purchase of tickets was subject to unvarying principles, yet the conditions were too complicated for investigation; this is unsound); 1882, Sexton *v.* Lamb, 27 Kan. 429 (the fact admitted of the average waste of ice in handling, to show an original stock of ice as calculated from the part sold); 1896, Todd *v.* Keene, 167 Mass. 157, 45 N. E. 81 (damages from failing to perform a contract to give a theatrical performance of a Shakspearean tragedy, in the profits of which the plaintiff was to share; the cash receipts of similar plays at the same theatre in the same town under the same auspices, rejected, because "there are too many elements of uncertainty and conjecture to make it safe to rely upon" such evidence; unsound); 1877, Reynolds *v.* Ins. Co., 36 Mich. 131, 142 (to show the extent of the authority of an agent of an insurance company, the extent of authority given by other insurance companies on the same point, was excluded); 1861, Walker *v.* Barron, 6 Minn. 508 (a custom elsewhere as to a discount in boarding stage-employees, excluded, because not defined as to place or time); 1872, Jones *v.* Ins. Co., 36 N. J. L. 29, 43 (like Ins. Co. *v.* Weide, *infra*; excluded, because the circumstances were not similar); 1834, Phœnix Ins. Co. *v.* Philip, 13 Wend. 81 (to show that the plaintiff's stock probably did not amount to the value claimed, the value of the largest stock in that business in the city was offered; excluded, as being a mere surmise; unsound); 1847, Howard *v.* Ins. Co., 4 Den. 507 (similar evidence was rejected on the principle of excluding opinions); 1895, Weatherford M. W. & N. R. Co. *v.* Duncan, 88 Tex. 611, 32 S. W. 878 (here the manner, not the fact, of the act was in issue, and hence the custom of railroads elsewhere was immaterial); 1870, Insurance Co. *v.* Weide, 11 Wall. 438 (to show that the value of the stock of goods burned could not have reached the amount claimed, viz. half the value of the annual sales, the fact was received from the defendant that persons in the same city and in the same business had on hand a stock only one fifth the amount of their annual sales; Davis, J.: "It would establish a fact connected with this kind of business, to wit, the uniform relation between the stock on hand and the annual sales"; adding, "it is true there are no reported cases on the subject"); 1894, Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, 148, 14 Sup. 295 (profits of infringement; the profits made by other users of a patent, excluded); 1897, Anderson *v.* Mining Co., 16 Utah 28, 50 Pac. 815 (to show the practice of employees in a certain mine, the general custom among miners of the camp under similar circumstances was admitted); 1868, Hine *v.* Pomeroy, 30 Vt. 103, 104, 106 (whether an attorney had directed a process-server to take receiptors; the practice of other attorneys in the same city, excluded, because "there was no such relation of lawyers to each other, in respect to habits and modes and practice, in the details

§ 380. **Same: Customary Rights in Land.** The use of other instances to prove a custom of descent or of other right affecting land has not been and is not likely to become common in this country, because here such usages are rare. But this sort of evidence has had frequent use in England, and the precedents on this point well illustrate the general principle. Instances occurring within the *same manor*, it is clear, will be received, because the original unity of the holding allows each instance to appear as merely one illustration of a general system working uniformly;[1] and the same principle may apply where a *township*, or other unity likely to involve community of conduct in the matter in question, is a common feature in all the instances.[2] On the same principle, however (though the matter was not clearly settled until Rowe *v.* Brenton), instances from *other manors* may be received, provided that, behind their apparent difference of conditions, a unity of some sort can be shown which makes instances from the one equally illustrative of a general system including and operating in the other.[3] The precedents on

of professional service in matters of this kind, as to make what is true of some the ground of inference as to what is true of another"). Compare the cases *post*, § 461, concerning the custom of other railroads, factories, or the like, as indicating the *danger* of certain apparatus or the *reasonableness* of certain precautions.

[1] 1810, Doe *v.* Sisson, 12 East 62 (to prove a custom of descent in the female line, particular instances were received of such descent in other estates of the manor, as well as of a general reputation as to such custom of descent in the manor; the particular instances being, per Lord Ellenborough, C. J., "only so many branches derived from the same root").

[2] 1813, Blundell *v.* Howard, 1 M. & S. 292 (custom as to tithes; payments by other holdings in the same township, admitted to show its general character); 1842, Jewison *v.* Dyson, 9 M. & W. 540, 556 (custom of appointing coroners; the appointment of coroners in other places within the same grant, admissible); 1879, Lendrum *v.* Deazley, 4 L. R. Ire. 635, 639, 645 (usage as to tenant-right in another part of the same estate, the usage on all parts of the estate being the same, admitted).

[3] 1637, Moulin *v.* Dallison, Cro. Car. 484 (whether an estate descended by custom to the eldest daughter in the manor of S.; after showing that S. was a part of a manor O., and thus establishing a unity of custom, the fact was received of the rule of descent in O.); 1672, Champion *v.* Atkinson, 3 Keb. 90 (whether in a copyhold estate a fine was due on the death of the lord in certain circumstances; the fact was received of the existence of such a custom in the copyhold estates of adjoining manors; no reason being given); 1725, Somerset *v.* France, 1 Stra. 654 (whether the tenant for life could collect by custom a fine from the customary tenants of the manor upon the death of the last admitting lord; the fact was received of a similar custom for other tenants of the plaintiff himself in other manors, no reason being given; but the fact of a similar payment by other tenants to other lords of manors was objected to because "each manor hath its particular customs, and they have no relation to one another but by accident"; Fortescue, J., was for admitting, because "it is very proper to enquire what are the qualities which attend other estates which are held by the same tenure"; Raymond, C. J., was opposed, because "I should readily admit that this evidence might be allowed if the customs of tenant-right estates were the same in all manors; but it is plain that the customs of these estates are different in different manors"; yet he yielded to supposed authority); 1778, Furneaux *v.* Hutchins, 2 Cowp. 807 (action for not carrying off tithes; plea, that they were not properly set out; the fact was rejected of a custom in the adjacent parishes to set them out as the plaintiff had done; Lord Mansfield, C. J.: "Proof of the custom in other parishes is no evidence to affect the parish in question, unless the custom had been laid as a general custom of the whole country"); 1793, Beebee *v.* Parker, 5 T. R. 26, 31 (descent-custom; Kenyon, L. C. J., speaking *obiter*, of outside instances: "and the latter has gone so far that the custom of one manor has been given in evidence to show the custom of another, where they are both governed by the Border-law"); 1813, R. *v.* Ellis, 1 M. & S. 652, 661 (whether a fishery was so connected with land as to be subject to a poor rate; Ellenborough, L. C. J., speaking of Somerset's Case, *supra*: "I have always thought that . . . this evidence is to be considered rather as evidence of a custom pervading one common district of manors, than as the custom of one manor to show the custom of another"); 1828, Rowe *v.* Brenton, 8 B. & C. 737, 758 (issue as to the ownership of copper-mines, and the rights of a plaintiff who was a "conventionary lessee" in the copper on his land; there were 17 manors in the duchy, and some of the above tenancies, renewable every 7 years, existed in each manor; evidence was received as to the terms of the customary right of such a tenant in these other manors; Tenterden, L. C. J.: "The same

this point are full of instruction upon the class of evidence dealt with in the preceding topics. It can be only seldom that the proper conditions for the admissibility of such evidence would exist in this country.[4]

§ 381. **Same: Other Principles discriminated.** Certain aspects, in which the question arises whether the usage of others may be resorted to, are to be distinguished from the foregoing subject.

(1) When the nature of an external object is to be determined, its *effect upon others* may throw light upon its qualities. Thus, in a railroad accident, the conduct of other persons may show whether the situation was a terrifying and dangerous one; in a plea of breach of quality of an article sold, the patronage of other persons may throw light on its quality; in an issue as to the dangerousness of machinery, the conduct of others in taking precautions may throw light on its dangerous quality. In all these cases, the conduct of others is not offered as instances showing a general custom or habit; such a general custom would be irrelevant; it is offered as showing the effects produced on ordinary persons by the nature of the article, place, or machinery in question (*post*, § 461).

(2) Where a *term of a contract* is sought to be imported into it on the score of usage or custom, this usage or custom must be shown to have been known to and impliedly accepted by the party. As a principle of contracts this is clear; and accordingly a Court is occasionally found saying that such a custom must be a local one, — meaning merely that it must be brought home to the knowledge of the opponent. But, this being conceded, it still remains to prove the custom, and for this purpose instances in other districts may be received, as above seen. This evidential use is always allowable, the assumption throughout being that the principle of substantive law, sooner or later, in some way or other, will be satisfied and knowledge of the custom be brought home to the opponent. The local custom, *i. e.* the custom as

character, whatever that may be, belongs to them all. . . . It certainly belongs to all those called 'free conventionaries' in this district. . . . Must we not, then, in fairness, in order to ascertain what are the relative rights of the lord and these tenants in one part of this district, enquire what are their rights in another?"; Bayley, J.: "I am of opinion that the usage which has prevailed in one part . . . is evidence to explain a grant expressed in similar terms as to any other part of the district"); 1842, Anglesey *v.* Hatherton, 10 M. & W. 218 (trover for coals, limestone, and ironstone, taken from the manors of C. and R.; issue as to the right of copyholders to take minerals; the fact was offered by the defendant of the custom in the adjoining manor of W., after first offering evidence that W. was only a subinfeudation of C. and hence the customs would presumably be the same; excluded; Abinger, C. B.: "It should be established clearly and beyond all controversy that the two manors originally formed one manor. . . . [As to the cases *supra* of 'border-law'] there prevails throughout those manors a particular species of tenure, called 'tenant-right'; . . . since in those manors *all* the tenants hold under the same right, if it should happen that in one particular manor no example can be adduced of what is the custom in any particular case, . . . in order to explain the nature of tenure, which is not confined to one manor but prevails in a great number, you may show what is the general usage with respect to that tenure"; and he then approves also of Rowe *v.* Brenton; Alderson, B.: "If indeed there be some general connecting link between them — as, for instance, if the customs in question be a particular incident of the general tenure which is common to the two manors, then you have a right to show what the custom of one manor is as to that tenure, for the purpose of showing what the custom of the other manor is as to that tenure; but you must begin by showing that there is a general tenure common to them both; that fact fails here").

[4] 1869, Gilman *v.* Riopelle, 18 Mich. 145, 165 (other instances of a practice among French settlers of giving a possessory right to the eldest son, excluded, in the absence of direct testimony in the case in question).

known to the opponent, is required by the substantive law, but it may be evidenced by instances from other districts, on the principle of § 379, *ante*.

(3) Whether a custom or usage may thus be imported as a term of a *written contract*, or may be used to interpret a written contract, concerns the parol-evidence rule (*post*, §§ 2440, 2464).

(4) Whether testimony to a custom violates the opinion rule (*post*, § 1955), and whether one witness alone suffices to prove a custom (*post*, § 2053), are also different questions.

§ 382. **Prior or Subsequent Status (Business, Possession, Ownership, Solvency, Coverture, etc.).** It has already been seen (*ante*, § 190) that the prior or the subsequent existence of a quality or condition is evidential of its existence at a given time. This principle is equally applicable in evidencing a habit or cause of conduct. Its use is most frequent for facts which can at first sight hardly be ranked here in any natural classification, — facts roughly to be described as involving a human status or relation to external affairs; for example, possession, ownership, solvency, and the like. The possession or ownership of property, the incumbency of an office, the existence of a debt, of coverture, and such relations, in truth involve a human course of conduct or a human attitude or position regarded as voluntarily and habitually maintained towards outward things and events; and this seems their most appropriate place in any classification of propositions to be proved.

The prior or the subsequent existence of such a fact is always evidential to show its existence at a time in issue, upon the general experience that such facts involve a human attitude more or less continuous and permanent. The probability of continuance depends much, of course, on the nature of the specific fact and the circumstances of each case; and therefore, in setting a limit of time for the range of the evidence, the discretion of the trial Court should control. The principle is illustrated by many sorts of facts. Such evidence is receivable to show the *mode of conducting a business*,[1] the *keeping of liquors illegally*,[2] the *possession of goods, land*, or *money*,[3] the *ownership of*

[1] 1792, R. *v.* Neville, Peake N. P. 91 (nuisance in carrying on the business of a melter of grease; an admission, made at a former place, that the business there was a nuisance, received, to "weigh more or less against him as it shall appear more or less like that where he before resided"); 1857, R. *v.* Falrie, 8 E. & B. 486 (nuisance; a conviction for a similar nuisance in the preceding year was offered, because the same thing was done in 1856 that was done in 1855, and if that was so, it is important to show that what was done in 1855 was an offence"; excinded, because, per Campbell, L. C. J., "a collateral issue is raised" on the question whether the places were alike; repudiating R. *v.* Neville; Coleridge, J., accord; Williams, J., uncertain).

[2] 1889, Com. *v.* Finnerty, 148 Mass. 162, 19 N. E. 215 (Knowlton, J.: "The illegal keeping of intoxicating liquor with intent to sell it, like keeping a nuisance, is a continuing offence, which may extend over a long or a short period of time. If attention is directed to any point of time during the keeping, there is a probability, from the very fact of keeping then, that the same condition has existed from some previous time, and will continue for some time into the future. And so, as to offences which are in their nature continuing, evidence has often been received of a condition a little before or a little after the time within which the offence must be proved"). *Accord:* 1871, Com. *v.* Carney, 108 Mass. 417; 1872, Com. *v.* Berry, 109 id. 366; 1873, State *v.* Colston, 53 N. H. 483 (keeping liquor illegally for sale on Dec. 6; the keeping liquor for sale in the same house — a hotel — a short time before, admitted, because "a state of things once shown to exist is presumed to continue until something is shown to rebut the presumption"). Compare the cases cited *ante*, § 367.

[3] 1817, R. *v.* Watson, 2 Stark. 116, 137 (treason; the finding of pikes in the defendants' house three months after their arrest, objected to because they might have been placed there by others, admitted; papers, etc., found similarly

property,[4] the *existence of a debt*,[5] the *condition of solvency*,[6] the *condition of coverture*,[7] the *condition of residence*,[8] the *incumbency of office*,[9] and so on.[10] The occasional repudiation of such evidence in some of the above precedents is not to be taken as a negation of the general principle, but only as a determination that in the case in hand the contingencies of change were too many to allow the prior or the subsequent condition of things to be of probative value.

§ 383. **Style of Handwriting or Spelling, as evidenced by Specimens.** It has been noted already (*ante*, § 90) that, in proving a document to have been written by A, two distinct modes offer themselves, — first, testimony by a person who saw A write it, and, secondly, testimony of some other sort. The first mode is not concerned in any way with the character or style of A's

In a room that had been locked by the defendant and not opened in the interval, also admitted; compare the citations *ante*, § 149); 1898, Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035 (possession six months before, allowed); 1845, Wells *v.* Burbank, 17 N. H. 409 (possession of a tax-warrant by the deputy Secretary of State on June 1, admitted evidence of its possession by him on Sept. 1); 1847, Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633, 744 (the general principle of the continuance of a state of things once shown, applied to infer a subsequent from an earlier possession of land); 1868, Kennedy *v.* People, 39 N. Y. 245, 254 (possession of money, and sales of goods, six weeks and six months before, admitted; whether the time is too remote must "depend very much on the circumstances of each case"); 1870, Wilkins *v.* Earle, 44 N. Y. 172 (bailment of money to an Innkeeper; the bailor's prior possession of such sums of money, admitted).

For the possession of a *document*, as indicating *prior possession*, see *ante*, § 157.

For the use of *subsequent possession of money* as indicating a prior act of *larceny*, etc., see *ante*, § 154.

For the *possession* or *lack of money* as involving *incapacity to lend* and therefore probable non-lending, see *ante*, § 224.

For the *possession or lack of money* as indicating a *motive* to do or not to do something, see *post*, § 392.

For the *possession of goods*, etc., as showing a prior *larceny or other crime*, see *ante*, §§ 149–153.

[4] 1855, Montgomery & W. P. R. Co. *v.* Webb, 27 Ala. 618 (ownership of corporation-stock in 1850, held admissible to show ownership in 1853); 1882, Donahue *v.* Coleman, 49 Conn. 464, 466 (freeholder as eligible to be appraiser; ownership six months before, admitted; the presumption to be "merely one of fact"); 1872, Com. *v.* Dearborn, 109 Mass. 370 (proprietorship of a shop in July, admitted to show proprietorship in December); 1878, Hanson *v.* Chiatovich, 13 Nev. 395 (recovery of personalty of a testator; ownership at death, inferred from prior ownership).

[5] 1809, Jackson *v.* Irvin, 2 Camp. 50 (bankruptcy; a creditor's claim having been proved to exist several months before the bankruptcy, its continuance to the latter date was presumed); 1867, O'Neil *v.* Mining Co., 3 Nev. 141 (a debt due and unpaid, on Oct. 5, inferred to remain unpaid on Oct. 16); 1860, Eames *v.* Eames, 41 N. H. 177 (assumpsit for two weeks' board; the parties' relations for the previous year, admitted); 1854, Bell *v.* Young, 1 Pa. 175 (the existence of a note at testator's death, inferrible from its prior existence).

[6] 1873, Body *v.* Jewson, 33 Wis. 402, 411 (insolvency at time of action, inferred from prior insolvency); 1884, Cozzens *v.* Holt, 136 Mass. 237 (insolvency a short time before, admitted); 1891, Dunnigue *v.* Daniels, 154 Ill. 483, 485, 28 N. E. 900 (insolvent's deed; lack of property "at some previous time," admissible "if there was nothing to show a change in this respect"; "his condition as to property at a subsequent time," also, if "not too remote"; the trial Court's discretion to contro' as to time).

For *insolvency* as involving *inability to lend* and probable non-lending, see *ante*, § 224.

[7] 1881, Murdock *v.* State, 68 Ala. 567 (marriage-relation at the time of a trial for burglary, not evidence of the same relation at the time of the burglary; unsound); 1861, Erskine *v.* Davis, 25 Ill. 251, 256 (the single state indicates subsequent singleness; coverture indicates subsequent but not prior coverture; unsound).

[8] 1875, Daniels *v.* Hamilton, 52 Ala. 105 (former residence in a State, as making amenable to process, admitted); 1842, Prather *v.* Palmer, 4 Ark. 456 (residence as affecting bond for costs; residence 17 years before, admitted); 1854, Swift *v.* Swift, 9 La. An. 117 (absence from the State during five years after a party's death, inferrible from absence after that period). Compare the citations *post*, § 1312.

[9] 1849, Barelli *v.* Lytle, 4 La. An. 557 (office as justice on June 29, 1848; inference of prior incumbency on June 5, 1848, held not allowable).

[10] 1886 Louisville & N. R. Co. *v.* Jones, 108 Ind. 565, 9 N. E. 476 (speed of a train at one place, admitted to show the speed at a place just beyond); 1895, Brown *v.* Wren, 2 Q. B. 391 (partnership in April, 1892, evidence of its continuance in June, 1893, and Feb., 1894).

handwriting; the witness testifies merely to seeing the act done, just as he would testify to seeing a blow struck or hearing a remark made. By the second mode there is merely a resort to A's type or character or habit of handwriting, and an inference from the type to the genuineness of the disputed writing. This evidential fact, the type of the handwriting, involves an inference from a kind of habit or skill (of handwriting) to an act done (the specific writing), and the nature of that inference has been already explained (*ante*, § 99). But this skill or style or habit of handwriting has in its turn to be evidenced. This may be done by either testimonial or circumstantial evidence; *i. e.* by the direct testimony of one who is familiar with A's style of writing, or by separate instances of his writing used circumstantially to show the general type. The former mode concerns the Qualifications of Witnesses to Handwriting (dealt with *post*, §§ 569, 693). The latter mode is here involved; the general process being the same as that of evidencing any human quality or trait by specific instances of its exhibition.

What are the necessary requirements of relevancy in evidencing a style of handwriting by specific instances?

(1) The first requirement is, of course, that the specimens should be those of the person whose handwriting-style is to be proved, *i. e.* that they should be *genuine*. This is rather a necessary preliminary assumption than a principle of relevancy; just as, to prove A's character, it is obviously only A's and not B's conduct that can have any bearing. But it is precisely this preliminary assumption that has vitally affected the history of the law on this subject; for when specimens of handwriting are offered as A's, since they must thus first be shown to be A's, this may introduce new issues which will complicate and prolong the trial, and perhaps thus involve an incidental burden which will cost more than the evidence is worth. These considerations of Auxiliary Policy (§ 43), which are independent of the principle of Relevancy, thus become of radical importance.

(2) The requirement of the principle of relevancy is that the specimens offered shall be such as are capable of affording an inference of the normal and general type or style of the writing. Various considerations might be thought of as affecting this capability. (*a*) The *ex parte selection* of the specimens may be improper, as possibly resulting in only one aspect of the style. This suggestion has never found any acceptance; for while the variations of a person's style may be numerous, they are usually not; the difficulty of collecting misleading ones is great; any serious false impression could be easily exposed; and, finally, our whole system of proof is that of an *ex parte* selection and offering of evidence. (*b*) The specimens may have been written at a time when there was a clear inducement to deceive, *e. g.* at the trial. This consideration is usually given much weight, and may suffice to exclude specimens so written. (*c*) The specimens may have been written so long ago that they do not represent the person's present style. This argument has never been considered as important; for, if the person's present style is different, it can easily be shown. (*d*) The specimens offered may not be numerous

enough to illustrate the average or normal type. But one specimen usually does represent the type with sufficient accuracy; and, if it does not, the opponent may easily show this by counter-specimens. This objection has never prevailed.

Such are the considerations involved in the principle of relevancy. If this alone were involved, there would have been no obstacle to the free use of this mode of proof, and no other limitations than the few simple ones above mentioned. But the considerations of auxiliary policy already specified, as well as others (in particular, the Opinion rule), the survival of certain earlier limitations arising at a time when proof by type of handwriting was looked on with suspicion, and the confusion of usage as to certain ancient and modern terms, all combined to introduce additional restrictions, more or less arbitrary in themselves, and not connected with any principle of relevancy. It would be impossible to understand or to expound the law of to-day without having in mind this historical development and these additional principles. Accordingly, the state of the law as affected by all of them can best be examined in one place, under the Opinion rule (*post*, §§ 1991–2027).

The collateral considerations above mentioned were seldom thought to apply to such traits as a person's mode of *spelling*, grammatical use of words, and the like; and not only could such a usage be freely used to show the authorship of a document, but the usage in its turn could be proved by specimens, without the above limitations historically peculiar to specimens of handwriting. For convenience, the precedents are dealt with at the same place with proof of handwriting by specimens (*post*, § 2024).

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION.

TOPIC IX: EVIDENCE TO PROVE EMOTION (MOTIVE, FEELING, PASSION).

CHAPTER XIV.

§ 385. **Theory of Motive.** It has been already observed (*ante*, § 117) that the term "motive," as commonly used, does not serve to discriminate the two different processes to which it may be applied. (1) It may be attempted, first, to infer, from the existence in A of a desire or inclination to do act X, that this desire, urging him on, probably resulted in the doing of the act; as when it is argued that, because A desired and wished to get rid of B, he probably did do something towards getting rid of B. (2) Secondly, in proceeding in turn to evidence this desire or other emotion, certain circumstances may be offered as tending to show its existence; as when the argument is to the existence of this desire in A (*a*) from an injury which B has done to A, or (*b*) from A's outward conduct expressing such a desire, or (*c*) from the prior or subsequent existence of such a desire. The former process involves the evidencing of a Human Act, and has already been dealt with (*ante*, §§ 117–119). The latter process involves the evidencing of a Human Quality or Condition, and is the present subject. Under the former head, questions of evidence are rare; the rulings upon evidence are concerned usually with the latter process.

§ 386. **Discriminations between Motive and Intent or Design or Character.** Whatever the psychological distinctions may be, the discriminations between Emotion and other human attributes or conditions are not always accurately observed practically in judicial language, nor are they easy to observe. At one point the line is not easy to draw between Emotion and Design

(*ante*, § 237), at another point between Emotion and Disposition (*ante*, § 192), at another between Emotion and Intent or Belief (*ante*, §§ 245, 300). Hence, in classifying the precedents it cannot be supposed that they will always be found just where they would be expected; the absence of an accepted terminology, and the difficulties in the application of any terminology, necessarily leave a margin of uncertainty.

§ 387. **Kinds of Inference.** The modes of inference circumstantially to a human quality or condition, as already pointed out (*ante*, § 190), may be of three kinds, all of which come into use in the present subject: (*a*) From circumstances tending to excite, stimulate, or bring into play the emotion in question; (*b*) From outward conduct expressing and resulting from the emotion in question; (*c*) From the prior or the subsequent existence of the emotion in question, as indicating its existence at the time in issue. The first of this is a Prospectant indication (*ante*, § 43); the second is a Retrospectant indication; the third is of both sorts. Each sort of inference has its own dangers and difficulties.

a. Circumstances tending to excite an Emotion.

§ 389. **General Principle; Knowledge of the Circumstances.** It must be remembered that this mode of argumen' .s equally available in civil as well as in criminal cases. One is perhaps apt to think of "motive" as a matter involved in criminal cases only. But a recollection of the process involved — that of inferring the existence of some emotion, from which in turn the doing of an act is to be inferred — shows that this process may be equally a feature of proof in civil cases, though not as frequently as in criminal cases.

The general inquiry is, What circumstances tend probably to excite a given emotion? Obviously, the whole range of human affairs is here involved. It would be idle to attempt to catalogue the various facts of human life with reference to their potency in exciting a given emotion. Such an attempt would exhibit two defects. It would be pedantic, because it is impossible to suppose that the operation of human emotions can be reduced to fixed rules, and that a given fact can have an unvarying quantity of emotional potency. It would be useless, because the emotional effect of any fact must depend so often on the surrounding circumstances that no general formula could provide for the infinite combinations of circumstances. Courts have therefore always been agreed that in general no fixed negative rules can be made; that no circumstance can be said beforehand to be without the power of exciting a given emotion; and that, in general, any fact may be offered which by possibility can be conceived as tending with others towards the emotion in question:

1850, *Parsons, J.*, in *Johnson* v. *State*, 17 Ala. 627: "[The commission of the murder by some one having been established,] every ground from which a motive could arise may be proved against him [the defendant.] . . . With regard to the grounds from which a motive may be inferred, we may remark that the law has never limited them and never can limit them in number or kind."

1868, *Sanderson, J.*, in *Lyon* v. *Hancock*, 35 Cal. 376: "Malice, like fraud, is generally to be inferred from facts and circumstances. Hence the plaintiff [in this case] is entitled to prove any facts or circumstances which tend, even in the slightest degree, to show malice on the part of the defendant. For the same reason, the defendant is entitled to prove any facts and circumstances which tend, in the slightest degree, to show a contrary motive. No fact or circumstance can therefore be properly excluded from the jury unless the Court is satisfied to a moral certainty that the jury can draw no rational presumption from it."

1854, *Parker*, J., in *Hendrickson* v. *People*, 10 N. Y. 13, 31: "Considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offence; for human minds would differ in their ideas of adequacy according to their own estimate of the enormity of the crime; and a virtuous mind would find no motive sufficient to justify the felonious taking of human life."[1]

There is but one limitation that can be thought of as necessary and universal, namely, the *circumstance* said to have excited the emotion *must be shown* to have probably *become known* to the person; because otherwise it could not have affected his emotions:

1897, *Dale*, C. J., in *Son* v. *Terr.*, 5 Okl. 526, 49 Pac. 923: "A motive cannot operate to influence until the facts which create the motive exist. The facts upon which a motive is based cannot operate upon the mind until they are known by the party against whom the motive is assigned. If one person should contemplate and undertake a great wrong against another, — such a wrong as would induce in the mind of the person against whom it was directed a motive to kill, — and yet such contemplated wrong was unknown to the party, it cannot be justly said that a motive to kill could exist, because the party wronged had no knowledge of the facts which would be necessary to create the motive."[2]

Nevertheless, Courts are often called upon to rule upon the admissibility of various circumstances. It is to their reproach that they heed the majority of these calls. There is in most of the rulings no reason for the slightest doubt of the propriety of the evidence. The extreme vagaries and the desperate pugnacity of many of those who take on themselves the defence of criminals have raised questions which ought to have been silently ignored by the Courts, — a treatment which would tend much to the discouragement of crime and the lightening of the profession's burden of precedents.[3] The criminality of the circumstances involved in proof of the motive has no doubt often been the ground of objection, the character-rule (*ante*, § 194) being invoked in exclusion. But it has already been seen (*ante*, § 216) that

[1] *Accord:* 1893, Moore v. U. S., 150 U. S. 57, 61, 14 Sup. 26 (approved in the following case); 1895, Goldsby v. U. S., 160 id. 70, 16 Sup. 216 (a watch-charm taken from the robbed person by a companion of the accused).

[2] 1871, Cheek v. State, 35 Ind. 492, 494 (the deceased's plan to help a third person to elope with the defendant's wife, admissible, if known to the defendant, to show hot blood); 1884, State v. Shelton, 64 Ia. 333, 338, 20 N. W. 459 (murder; intimacy between the defendant's paramour and the deceased; knowledge by the defendant required); 1899, Pence v. Com., — Ky. —, 51 S. W. 801; 1900, People v. Morgan, 124 Mich. 527, 83 N. W. 275 (deceased's right to a life-insurance policy; but here the ruling is erroneous on the facts, as Montgomery, C. J., diss., points out); 1873, Stokes v. People, 53 N. Y. 176 (murder; an indictment for blackmailing procured by the deceased against the defendant, held inadmissible to show hostility, as the defendant had not known of it); 1898, People v. Fitzgerald, 156 id. 253, 50 N. E. 846; 1899, Barkman v. State, 41 Tex. Cr. 105, 52 S. W. 73.

[3] As already commented on *ante*, §§ 8, 21.

the fact that the circumstance offered involves also *another crime* by the defendant charged is in itself no objection, if the circumstance is relevant for the present purpose.

A natural arrangement of the precedents would be according either to the various circumstances offerable or to the various emotions to be proved. Practically, however, it is not possible to attempt a consistent grouping on either principle; the precedents are therefore arranged in part on each principle.

§ 390. **Motives for Murder.** The circumstances which might excite a desire to kill are innumerable. It must be understood that the rulings of the Courts cover only those circumstances which counsel have cared to question, and that nowadays the fact that counsel care and dare to question a circumstance is not necessarily an indication that there is the slightest rationality in the question. The annals of trials illustrate many other circumstances judicially recognized as capable of becoming motives; and the absence of a ruling by a Supreme Court upon a particular circumstance casts no doubt upon its propriety. Among the instances most commonly offered for adjudication, the following may be noted:

Circumstances involving the *sexual passion*, in one aspect or another, and usually operating through the emotion of jealousy, may lead to a desire to kill:

1894, *State* v. *Reed*, 53 Kan. 767, 774, 37 Pac. 1[illegible] (disproving the language of counsel): "It has been universally conceded since David wi[illegible] Joab, 'Set ye Uriah in the forefront of the hottest battle, and retire ye from him, [illegible] he may be smitten and die,' that the man who covets his neighbor's wife has a motive for desiring the death of his neighbor."

1863, *Thompson*, J., in *Com.* v. *Ferrigan*, 44 Pa. 386 (murder of a paramo[illegible] husband): "I agree that a solitary instance of illicit intercourse, especially if at a con[illegible]derable distance in time from the period of the homicide, . . . if received at all, should only be so with great caution, and where a probability existed that it would throw light on the motive of the prisoner. Something must be necessarily left to the discretion of the judge in such a case. But a different case is presented when it is proposed to prove a continuous illegal intercourse down to the death of the slain. . . . He is a poor judge of human motives and impulses who cannot see, in such a relation as is proposed to be proved here between the deceased's wife and the prisoner, that it might lead to the perpetration of the crime charged, or who would deny that it would probably shed light on the motive. History is full of such examples.[1]

[1] *Ala.*: 1850, Johnson v. State, 17 Ala. 625 (wife-murder; the fact admitted that in the preceding year he had attempted to carry on a liaison with an unmarried woman near by); 1899, Gafford v. State, 122 id. 54, 25 So. 10 (deceased's adulterous relations with the defendant's sister, admitted to show the deceased's probable aggression; Tyson and Haralson, JJ., diss.); 1903, Caddell v. State, — id. —, 34 So. 183 (wife-murder; defendant's relations with a paramour, admitted); *Ark.*: 1879, Edmonds v. State, 34 Ark. 720, 730 (murder of a paramour; violence of the defendant, a few days before, to their child in the deceased's presence, admitted to show his feelings towards the deceased); *Cal.*: 1895, People v. Gress, 107 Cal. 461, 40 Pac. 752 (the defendant's efforts to induce the deceased's wife to leave the deceased, excluded, because the killing was admitted and self-defence was the issue; this seems erroneous, because on the question whether the defendant was the aggressor, his prior motive to kill the deceased would be useful); 1900, People v. Brown, 130 id. 591, 62 Pac. 1072 (defendant's relations with the deceased's wife, admitted); *Conn.*: 1831, State v. Watkins, 9 Conn. 47, 52 (wife-murder; the relation of husband naturally suggests an inference of a desire to preserve, not destroy, the wife; to

The expediency of preventing the *discovery* of a *former crime*, or of *evading an arrest* or a prosecution for it, may lead to the desire to kill:

rebut this, the fact is admissible that the husband has been living in adulterous intercourse with another; Hosmer, C. J.: "Love extinguished by adultery gives way to hatred, and a desire to be free from the burden of a wife who is no longer the object of regard"); 1868, State *v.* Green, 35 id. 203 (wife-murder; the fact was admitted, to rebut the inference of affection, that the defendant was before married to another woman still living, and was therefore not the lawful husband of the deceased; following State *v.* Watkins); *Ga.:* 1897, Shaw *v.* State, 102 Ga. 660, 29 S. E. 477 (train-wrecking; the defendant's illicit overtures to another woman, admitted to show a motive for wrecking the train, on which his wife was); 1901, Robinson *v.* State, 114 id. 56, 39 S. E. 862 (raped condition of the deceased, admitted); *Ill.:* 1889, Farris *v.* State, 129 Ill. 521, 526, 21 N. E. 821 (subsequent rape of a wife, as indicating a motive for killing her husband half an hour before, not admitted; clearly wrong); 1894, Simons *v.* People, 150 id. 66, 75, 36 N. E. 1019 (murder of paramour; the relations between them, as shown by the defendant's letters, admitted); *Ind.:* 1877, Binns *v.* State, 57 Ind. 46, 52 (pendency of a suit for divorce admitted to show a motive in the husband for wife-murder; but the merits of the dispute, as shown in the decree of divorce, excluded); 1893, Pettit *v.* State, 135 id. 393, 415, 34 N. E. 1113 (wife-murder: the wife's affection, relevant to show his state of mind); 1897, Hinshaw *v.* State, 147 id. 334, 47 N. E. 158 (wife-murder; the defendant's improper relations with another woman, admitted); *Ia.:* 1858, State *v.* Hinkle, 6 Ia. 380, 384 (wife-poisoning; the defendant's illicit relations with another woman, before the wife's death, admitted as indicating that "he would be more likely to desire her death"); 1880, State *v.* Kline, 54 id. 183, 6 N. W. 184 (assault with intent to kill; the fact admitted that the defendant had seduced the assaulted woman and had solicited her to procure an abortion); *Kan.:* 1894, State *v.* Reed, 53 Kan. 767, 774, 37 Pac. 174 (quoted *supra*); *Ky.:* 1896, Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422 (murder of a paramour; the presence of an advanced fœtus, admitted as indicating a motive); *La.:* 1898, State *v.* Reed, 50 La. An. 990, 24 So. 131 (the keeping of a paramour, as a source of quarrel with the deceased, admitted); 1904, State *v.* Brown, 111 La. —, 35 So. 818 (murder; deceased's admissions of adultery with defendant's wife, not admitted, on the facts, to show the deceased's motive for aggression, on a plea of self-defence); *Mass.:* 1869, Com. *v.* Madan, 102 Mass. 1, 4 (similar to Binns *v.* State, *supra*); *Mich.:* 1873, Templeton *v.* People, 27 Mich. 502 (attempt at wife-murder; improper relations between the defendant and another married woman, admitted); *Minn.:* 1881, State *v.* Lawlor, 28 Minn. 216, 219, 9 N. W. 698 (an altercation at a drinking-saloon in which the deceased threw beer upon a woman L., and the accused then shot the deceased; the fact that L. was the defendant's paramour, admitted to show a motive for resenting her treatment); *Miss.:* 1896, Webb *v.* State, 73 Miss. 456, 19 So. 238 (seduction of the deceased admitted to show a motive for murder); 1901, Ouldas *v.* State, 78 id. 622, 29 So. 525 (illicit relations with the deceased's wife, admitted); *Mo.:* 1897, State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554 (wife-murder; the defendant's possession of a paramour, admitted); 1900, State *v.* Callaway, 154 id. 91, 55 S. W. 444 (similar); *Nebr.:* 1879, St. Louis *v.* State, 8 Nebr. 405, 411, 1 N. W. 371 (wife-murder; criminal intimacy with another woman, before and after the wife's death, admitted); 1896, Dixon *v.* State, 46 id. 298, 64 N. W. 962 (abortion; the defendant's recent intercourse with the woman admitted, as showing an intimacy rendering the deed more probable); *Nev.:* 1876, State *v.* Larkin, 11 Nev. 314, 328 (murder; the relations of the deceased to a certain woman, admitted to show motive); *N. J.:* 1900, State *v.* Abatto, 64 N. J. L. 658, 47 Atl. 10 (illicit relations with the deceased's wife, admitted); *N. Y.:* 1858, People *v.* Stout, 4 Park. Cr. 71, 115, 128 (murder; the defendant's criminal connection with the deceased's wife, admitted, though she was the defendant's sister and could never marry him; "in case the deceased was effectually disposed of and silenced, their fears of exposure and detection would naturally be lessened"); 1880, Pierson *v.* People, 79 N. Y. 424, 435 (defendant's marriage to the widow of the murdered man, admitted, as showing the desire to possess her as a motive for the killing); 1893, People *v.* Harris, 136 id. 423, 437, 449, 33 N. E. 65 (wife-murder; defendant's admission of two former secret marriages, contracted to overcome the scruples of his victims, admitted as showing his motive to conceal the secret marriage with the deceased; adulterous intercourse of the defendant and a plan with his paramour to murder her future husband, admitted to show a motive); 1893, People *v.* Osmond, 138 id. 80, 86, 33 N. E. 739 (wife-murder; illicit relations of the defendant's wife and her paramour, unknown to defendant, not admitted); 1895, People *v.* Buchanan, 145 id. 1, 39 N. E. 846 (illicit relations of the defendant with the deceased, admitted); 1897, People *v.* Scott, 153 id. 40, 46 N. E. 1028 (wife-murder; relations of the defendant with a paramour, admitted); 1897, People *v.* Sutherland, 154 id. 345, 48 N. E. 518 (murder of a paramour; her letters, received by him, showing her view of their relations, receivable to indicate his motive; Bartlett and Martin, JJ., diss.; the ruling is of course correct, and the dissent is inexplicable); 1899, People *v.* Benham, 160 id. 402, 55 N. E. 11 (wife-murder; illicit relations with another woman, admitted); 1903, People *v.* Montgomery, — id. —, 68 N. E. 258 (wife-murder by one having a paramour; the paramour's character for unchastity, excluded; erroneous, because, under the principle of § 68, *ante*, her character

1896, *Bartholomew*, J., in *State* v. *Kent*, 5 N. D. 516, 67 N. W. 1052 (wife-murder; the alleged motive was a fear that the wife was about to discover the facts of his murder of his first wife 20 years before, his robbing of a bank, and the falsity of his present name and pretensions; proof of these past misdoings was received): "Obviously, this theory of the motive would be greatly strengthened by proof that he had committed the specified crimes in Ohio. While it is true that, in the cases where proof of a collateral crime has been admitted for the purpose of showing motive, the relation between the two crimes was usually such as to indicate that the latter was committed in order to prevent an investigation into and an exposure of the former crime, that it was feared would be followed by prosecution and punished, yet we can discover no reason in principle for the limitation of the rule to that class of cases strictly. Any strong incentive must furnish an equally cogent reason for the admission of such testimony. . . . Whoever reads the record in this case, and particularly Kent's letters, will be irresistibly impressed with the thought that Kent at all times assumed high moral grounds, with an exalted standard of personal purity. There is evidence tending to show that he claimed for himself a higher social position than he was willing to concede to his wife. Under these circumstances, it would be intolerably galling to him to have his wife learn that he was in fact a felon, that he had married her under an assumed name, and that during all these years he had led a life of duplicity and hypocrisy. . . . Nor can we sanction the views of the learned counsel that these collateral crimes were too remote in time to furnish any motive for the commission of the crime here charged. Motive may or may not be affected by the lapse of time. Ordinarily, a man who had committed a murder 20 years in the past would be just as much concerned to prevent exposure and punishment for that crime as though it were but one year in the past. And in this case, if the discovery by Mrs. Kent, at the time of her death, of these dark and criminal spots in her husband's life, would have been just as galling and humiliating to him as if discovered the first year of their married life, then his motive to prevent such discovery would be just as strong at the former time as at the latter."[2]

made more probable her adultery with the defendant); *Pa.*: 1833, Com. v. Ferrigan, 44 Pa. 386 (quoted *supra*): 1878, Turner v. Com., 86 id. 54, 70 (adultery by the defendant with the deceased, admitted); *Vt.*: 1896, State v. Chase, 68 Vt. 405, 35 Atl. 336 (the defendant's adultery with the deceased's wife, admitted); *Wis.*: 1879, Mack v. State, 48 Wis. 271, 276, 4 N. W. 449 (husband-murder; criminal intimacy with a discharged employee, admitted to show motive). Compare the citations *post*, § 398.

[2] 1830, R. v. Clewes, 4 C. & P. 222 (the fact was received of the murder of a third person by the deceased and of the defendant's ill-will to the third person, and his hiring the deceased to do the act, as furnishing a motive for destroying the deceased); 1881, Marler v. State, 68 Ala. 580, 584 (the deceased's importance as a witness against the defendant in a pending divorce suit, admitted to show a motive for murder); s. c. 67 id. 55 (admitting also his desire to get rid of his wife by divorce); 1839, Dunn v. State, 2 Ark. 229 (the previous killing of E., whose murderers W. had attempted to discover and bring to justice, admitted as indicating a motive for the killing of W.); 1899, People v. Valliere, 123 Cal. 576, 56 Pac. 433 (that defendant, at the time of the alleged assault upon a jailer, was in jail under conviction, admitted to show motive); 1895, State v. Seymore, 94 Ia. 699, 63 N. W. 661 (that defendant had reason to fear that the deceased, a partner in crime, would inform on him, admitted); 1898, Riggs v. Com., 103 Ky. 610, 45 S. W. 866 (that the deceased had made an accusation against the defendant, admitted; but not the truth of the accusation; this seems unsound); 1861, State v. Mulholland, 16 La. An. 376 (that the deceased was killed while arresting the accused for another killing, admitted); 1896, State v. Fontenot, 48 id. 305, 19 So. 111 (that a person suspected the accused of stealing his wood and had engaged the deceased to watch it, admitted); 1899, State v. Geddes, 22 Mont. 68, 55 Pac. 919 (the deceased's former complaint against defendant for assault, admitted; but not the facts of the assault); 1899, State v. Welch, 22 id. 92, 55 Pac. 927 (same principle applied to the same offence by another defendant); 1881, State v. Morris, 84 N. C. 756, 761 (murder; the fact that the defendant had been indicted for larceny, while the deceased, who was implicated, had been allowed to become State's evidence, admitted); 1897, Son v. Terr., 5 Okl. 526, 49 Pac. 923 (that the deceased was trying to implicate the defendant in certain robberies, admitted); 1899, Barkman v. State, 41 Tex. Cr. 105, 52 S. W. 73 (murder; that deceased had testified against the defendant at an inquest on another death, admitted); 1900, State v. Morgan, 22 Utah 162, 61 Pac. 527 (murder of one of a sheriff's posse; defendant's prior commission of robbery, for which the posse were pursuing him, admissible to show motive to resist).

So, also, and sometimes hardly to be discriminated, the conduct of the deceased in *opposing* or *injuring* or trying to injure the defendant, may furnish a motive.[3]

The defendant's *relations with a third person* having a desire to kill the deceased may induce him to coöperate, through the sympathy either of friendship or of domestic ties, or by reason of pecuniary hire or of fraternal pledges.

1868, *Sanderson*, J., in *Lyon* v. *Hancock*, 35 Cal. 372, 376 (the defendant had caused the arrest of the female plaintiff for throwing a brickbat at him from a window; to prove that she was the assailant, he offered the fact of the hostility of the plaintiff's husband and of herself against the defendant): "The presence of Mrs. Lyon in the street, and the absence of all other persons by whom the act might have been committed, were strong probabilities that the brickbat was cast by her. Taking in connection, does the fact, if such was the fact, that her husband entertained towards the defendant feelings of hostility, and had in her presence made threats against him, constitute another probability against her? Would she have been less likely to have cast the brickbat had the relationship between her husband and the defendant been friendly? . . . Suppose, upon coming to the street, the defendant had found two women, instead of one, of equal respectability and character, one of whom must have cast the brickbat, one the wife of his friend, the other of his enemy; would not the friendship of the one and the enmity of the other constitute probabilities to be taken into account in determining which perpetrated the act? Other probabilities being equal, as we have supposed, no one would hesitate to say that the act had been committed by the wife of the defendant's enemy and not by the wife of his friend."[4]

Finally, a most common circumstance is the deceased's *possession of money or property*, as leading to the accused's desire to kill.[5]

[3] 1877, Commander v. State, 60 Ala. 1, 7 (anticipated litigation as a motive for murder, admitted; but details as to the merits of the dispute, excluded); 1892, Martin v. Com., 93 Ky. 193, 19 S. W. 580 (murder; that the defendant had been indicted for robbery at the deceased's instance, admitted, but not the details of the fact); 1895, Com. v. Gray, — Ky. —, 30 S. W. 1015 (the facts as to a legal dispute existing between the defendant and the deceased, admitted); 1875, Murphy v. People, 63 N. Y. 591 (litigation pending between the defendant and G., and the purpose of it, admitted to show a motive for the murder of H., also concerned in the suit and present with G. at the time of the killing); 1843, Stone v. State, 4 Humph. 27, 35 (murder; the fact admitted that the defendant had maltreated his wife, and that she was harbored by the deceased). It will be noticed that the existence of a *previous prosecution* or *litigation* may appear, not merely as involving conduct of the opponent tending to excite the defendant's hostility, but also as involving conduct of the defendant expressing his hostility (*post*, § 395). Compare the similar principle applied to evidence of a witness' bias (*post*, §§ 949, 950, 967).

[4] 1883, Bell v. State, 74 Ala. 421 (that others of the defendant's family disliked the injured person, excluded; unsound); 1891, Story v. State, 68 Miss. 609, 629, 10 So. 47 (the defendant never having seen the deceased until the day before, the instigation of a third person was shown as the motive); 1877, Hester v. Com., 85 Pa. 139, 155 (the fact was admitted that the defendant and others concerned were members of the Ancient Order of Hibernians, otherwise there known as Molly Maguires, the order being a combination for the purpose of assisting each other in crimes, each member taking an oath to commit any offence ordered; the membership thus supplying a motive for crimes otherwise apparently motiveless; this great trial, published in pamphlet form, illustrates the wide ramifications of motive-evidence); 1879, McManus v. Com., 91 Id. 57, 66 (murder of a miner; the defendant's membership in the Molly Maguires and his subjection to the oath of the society, admitted to show a probable motive).

[5] 1884, R. v. Flannagan, 15 Cox Cr. 403, 411, Butt, J. (insurance-money); 1895, Byers v. State, 105 Ala. 31, 16 So. 716 (possession of money); 1893, Graves v. People, 18 Colo. 170, 32 Pac. 63 (the defendant being in charge of property of the deceased, the fact of his having duly accounted for it was held admissible in explanation); 1881, State v. Crowley, 33 La. An. 782, 785 (possession of money); 1854, Hendrickson v. People, 10 N. Y. 13, 31 (wife-murder; disappointment with the father-in-law's will, admitted); 1868, Kennedy v. People, 39 id. 245, 254 (possession of money "suggests a motive for

The usual employment of these and other circumstances (as above) is by *the prosecution*, as evidencing the defendant's probable desire to injure and thus his probable doing of the injury. But where *the defendant* admits the act, he may wish to offer on his own behalf some of the foregoing kinds of circumstances, as *tending to show hot blood*, and thus to mitigate the degree of the crime. Here, however, the number and kind of circumstances that might naturally excite hot blood are much more limited.[6] Distinguish from this the effort to show, on a plea of insanity, that the defendant was under an hallucination as to the deceased's conduct (*ante*, § 228). There, obviously, the argument involves proof that the conduct had no existence, and that no reason existed for the belief in it; here it must be shown, either that it existed and came to the defendant's knowledge, or that he had been told that it existed or otherwise obtained reason to believe in it. The present argument is identical with the one (*ante*, § 231), admitting circumstances which, when known to a person, tend to bring on insanity.

§ 391. **Motive for Other Deeds.** The circumstances that may serve as motives for other deeds are innumerable; and the rulings, though naturally few, can hardly be classified except according to the crimes involved.[1]

committing a robbery, and so a motive to take the life of the deceased if that would facilitate the theft or contribute to its concealment"); 1893, Moore *v.* U. S., 150 U. S. 57, 61, 14 Sup. 26 (murder; the deceased's possession of land claimed by the defendant's wife, admitted to show motive); 1901, State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; 1903, Keffer *v.* State, — Wyo. —, 73 Pac. 556.

Distinguish the mooted question of the *accused's lack of money* as indicating a motive (*post*, § 392).

[6] 1881, Combs *v.* State, 75 Ind. 215, 217 (information to the defendant about rumors as to the deceased's misconduct, excluded, because their tenor was not shown); 1862, Maher *v.* People, 10 Mich. 212, 217, 224 (to determine whether the killing was done in hot blood, the fact was admitted that the defendant was told, a few moments before, of his wife's adultery with the deceased); 1872, Hurd *v.* People, 25 id. 405, 412 (immediately precedent assaults by the deceased, admitted, as bearing on the defendant's provocation or fear of harm); 1860, Sanchez *v.* People, 22 N. Y. 117, 152 (information likely to result in passion reducing the degree of homicide, admitted); 1896, People *v.* Barberi, 149 id. 256, 43 N. E. 635 (the preceding relations between the deceased and his mistress the defendant, admitted as showing a state of mind on her part consistent with a lesser degree of homicide).

[1] *Arson* (compare also the citations *post*, § 392); 1876, Hinds *v.* State, 55 Ala. 145, 148 (lawsuit as a motive for arson, admitted); 1878, McAdory *v.* State, 62 id. 154, 158 (hostility to a bailor of property, admitted to show a motive for arson of the bailee's house); 1888, Long *v.* State, 86 Ala. 36, 38, 43, 5 So. 443 (that the defendant's divorced wife lived in the burned house and associated with its owner, admitted); 1896, Simpson *v.* State, 111 id. 6, 20 So. 572 (that the owner of the premises had recently refused to rent them to the defendant, excluded; unsound); 1900, State *v.* Battle, 126 N. C. 1036, 35 S. C. 624 (arson; ill-will towards owner's agent, not of itself admissible to show motive; Clark, J., diss., in a weighty opinion); 1881, State *v.* Hannett, 54 Vt. 83 (to show the alleged motive, hostility to the defendant's former wife, who had an interest in the building, the fact was rejected of the wife's petition for divorce on the ground of cruelty, and of other stages of the dispute; the fact of hostile feeling was held admissible, but not facts "calculated to inflame the minds of the jury against the respondent").

Suicide (compare also the citations *ante*, § 144): 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1187 (murder of a woman; to disprove the theory of suicide, the Court allowed the deceased's reputation to be considered, as indicating that she had no shameful reason for destroying herself); 1876, Continental Ins. Co. *v.* Delpeuch, 82 Pa. 234 (belief in spiritualism, not admitted to show the likelihood of suicide).

Sundry Crimes and Wrongs: 1895, McTeers *v.* Perkins, 106 Ala. 411, 17 So. 547 (near relationship, as bearing on the good faith of a conveyance, admitted); 1834, Austin *v.* Austin, 10 Conn. 221, 224 (divorce for adultery; defence, fraudulent connivance with the co-respondent; the husband's harsh feelings towards his wife, not admitted as tending to show the fact of connivance); 1851, Carter *v.* State, 2 Ind. 618 (on a charge of administering drugs with intent to produce abortion, the fact of the administration of ergot having been introduced, it was held admissible to show that the popular opinion was that ergot would pro-

§ 392. **Pecuniary Circumstances as creating a Motive; Poverty, to show a Crime, or negative a Loan; Market Value, to show a Sale-Price.** In several ways the pecuniary circumstances, of one or another person or thing, may tend to show the excitement of a motive in some person. It will be convenient to distinguish the situations according as the evidence deals with (1) the pecuniary condition of A as exciting a motive in B; (2) the pecuniary condition of A as exciting a motive in himself; (3) the pecuniary value of a thing as exciting a motive to contract with a person; (4) pecuniary conditions in sundry aspects.

(1) (*a*) The *possession of money* by A may tend to show that B desired to *rob* or to *kill* him (*ante*, § 390). (*b*) The *lack of money* by A may tend to show that B would be unwilling to trust his promises, and therefore probably did not trust him; in particular, that B would be unwilling to *lend* A *money*,[1] or to *sell goods* to A, or to sell to him as principal,[2] or to sell to him absolutely,[3] or to sell to him in good faith.[4]

(2) (*a*) The *lack of money* by A might be relevant enough to show the

duce abortion, as evidence of the probable purpose of its use); 1886, State *v.* Schaffer, 70 Ia. 372, 30 N. W. 639 (larceny; the search for and discovery of other stolen goods with the goods in question, admitted as showing the motive for making the search; the sheriff's possession of another warrant against the defendant, admitted as showing a motive for a thorough search for the defendant, the sheriff having testified that the defendant had absconded); 1895, Kennedy *v.* Hensley, 94 id. 598, 63 N. W. 341 (character of the wife, as indicating the husband's reason for cessation of the affection supposed to have been alienated); 1874, Hays *v.* State, 40 Md. 633, 650 (abortion; the reputation of the house where the parties went, as one of ill-fame, admissible as indicating the likelihood of such a place being chosen for such an act); 1879, Robinson *v.* State, 53 id. 151 (burglary of M.'s house; to show the defendant's real motive for presence there, the fact was admitted that M.'s wife was a lewd woman with whom he had formerly had intercourse); 1899, Bengiesdorf *v.* Hanaway, 90 id. 217, 44 Atl. 1011 (whether a certain statement had been made by plaintiff; that the facts were contrary to the alleged statement, not admissible as indicating that the statement was not made); 1854, York *v.* Pease, 2 Gray 282 (a quarrel between the defendant and the next friend of the plaintiff, in an action by an infant for slander, admitted); 1871, Strang *v.* People, 24 Mich. 1, 4, 10 (rape; defendant's statements to the complainant, admitted to show her fear); 1883, State *v.* Grant, 79 Mo. 113, 137 (murder; the defendant's theft of butter, admitted to show the officer's reason for arresting).

[1] 1860, Marcy *v.* Barnes, 16 Gray 161, 162 (whether the defendant's name was on a note before it came into the plaintiff's hands or was fraudulently put there afterwards; the fact of inquiries made by the plaintiff, before taking the note, as to the standing of the defendant and the other maker, and of his being informed that the defendant was responsible financially but the other maker worthless, admitted, as showing the improbability of the plaintiff's having taken the note without the defendant's name); 1896, Cochrane *v.* W. D. Co., 64 Minn. 369, 67 N. W. 206 (insolvency of the alleged borrower, admitted).

[2] 1896, Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 938 (here the person in question had already bought as agent in similar transactions, and the person's lack of assets was admitted as tending to show that a change in the course of dealings had not occurred); 1858, Lee *v.* Wheeler, 11 Gray 236, 239 (poverty and lack of credit of W., admitted to show that the defendant gave credit to the defendant, not to W.). *Contra:* 1821, Wheeler *v.* Packer, 4 Conn. 102, 106 (money paid on the credit of the defendants; to show that the money was paid, not on their credit but on the credit of the plaintiff's son, the defendants offered to show that the plaintiff's son had sufficient funds to be answerable, while the defendants were "entirely poor and unable to pay any part of it"; excluded, as "too vague" and "leading to interminable inquiries"; ruling unsound).

[3] 1887, Buswell T. Co. *v.* Case, 144 Mass. 350, 11 N. E. 549 (lack of credit of M., admitted to show that of two orders by him the plaintiff accepted that of a conditional and not an absolute sale).

[4] 1862, Cook *v.* Mason, 5 All. 212 (writ of entry for land conveyed to the defendant in fraud of creditors; the defendant's bad pecuniary credit at the time of the transfer, admitted to show that it would not "have enabled him to get credit . . . if the sale had been in good faith"); 1875, Sweetser *v.* Bates, 117 Mass. 466, 468 (same; admitted to show that the grantor would not have conveyed "in good faith in sole reliance upon her [the grantee's] future ability to pay").

probability of A's desiring to *commit* a *crime* in order to obtain money. But the practical result of such a doctrine would be to put a poor person under so much suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence:

1863, *Bigelow*, C. J., in *Com.* v. *Jeffries*, 7 All. 548, 559, 566 (false pretences by representing that the defendant had an order for goods from an undisclosed principal; the fact of the defendant's insolvency at the time, as known to him, was offered): "It is doubtless true that in a large class of cases the poverty or pecuniary embarassments of a party accused of crime cannot be shown as substantive evidence of his guilt. The reason for the exclusion of such evidence is that in those cases there is no certain or known connection between the facts offered to be proved and the conclusion which is sought to be established by it. It does not follow, because a man is destitute, that he will steal, or that when embarrassed with debt and incapable of meeting his engagements he will commit forgery. . . . Evidence of the pecuniary condition of the accused in such a case [as this] is not offered to show that he was under a peculiar temptation to commit the offence, or was more likely to cheat or defraud because he was in embarrassed circumstances, but for the purpose of showing the natural and necessary consequences of his act which the law presumes he intended. . . . If at the time of the transaction he was deeply insolvent, and was cognizant of his condition, the necessary consequence of his act was to deprive the vendor of his property without recompense or the chance of payment, and leads to the just and almost unavoidable inference that it was done with an intent to defraud."[5]

Nevertheless in cases of merely pecuniary crime (such as larceny or embezzlement), and in civil cases where the issue is whether the defendant borrowed money or not, the fact that he was in need of it at the time is decidedly relevant to show a probable desire to obtain it and therefore a probable borrowing or purloining; and there is here not the same objection from the standpoint of possible unfair prejudice:

1849, *Bell*, J., in *Stevenson* v. *Stewart*, 11 Pa. 309 (admitting, in rebuttal of a defence of forgery to a note, the fact that about the time of the alleged date the defendant was trying to borrow money): "Among the most common topics of inquiry is the pecuniary capacity of the supposed lender, and the necessitous condition of the alleged borrower; and these inquiries are legitimate. It is surely competent for the defendant to show . . . that the defendant was himself possessed of money and therefore not driven to the necessity of using his credit. If so, why should not the plaintiff be at liberty to prove that about the critical time the defendant was seeking to borrow? Standing unsupported, neither line of evidence would be sufficient to rebut the adverse allegation; but yet all must feel that in a doubtful case the facts I have supposed to be made out by the defendant would go far in his favor."[6]

[5] *Accord:* 1896, Reynolds v. State, 147 Ind. 3, 46 N. E. 31 (robbery); 1863, Com. v. Jeffries, 7 All. 548, 559, 566 (in general; quoted *supra*). *Contra:* 1845, Tawell's Trial, Eng., Woodall's Celebrated Trials, I, 188 (admitted; but the editor cites a contrary ruling at another trial shortly before). But when a defendant, under the principle of par. (*b*), *infra*, seeks to show that his possession of money deprived him of any motive for crime, the fact may of course be *disproved* by the prosecution; 1881, Fulmer v. Com., 97 Pa. 503 (larceny; the fact of lack of money, admitted for the prosecution to rebut the defendant's evidence that he had plenty of money).

[6] *Accord:* 1898, Bridges v. State, 103 Ga. 21, 29 S. E. 359 ("financial embarrassment" as tending to show a motive for embezzlement, admitted); 1877, Harvey v. Osborn, 55 Ind. 535, 545 (which of two persons, joint makers of a note, was the surety for the other; the debt of one to the other admitted as showing him to be

(*b*) On the other hand, the fact that a person was in *possession of money* tends to negative a desire to obtain it by crime or by borrowing, and is always admissible, the foregoing objection not being here applicable.[7]

Two inferences, involving other principles, must be here distinguished: (a) The inference that A probably did not lend money to B because A had no money to lend; this is inferring that A did not do an act because he had not the Means or Capacity to do it (*ante*, § 89); (b) the inference that A probably took money because after the time alleged he had large sums while before it he had little or none; this is inferring an act from the Traces of it (*ante*, § 154).

(3) The *market value* of an article bought may be received to show the *probable price agreed upon;* because the actual value would move the buyer to wish to obtain it for not more than that amount, and hence a serious difference between the actual value and the price alleged by the vendor would throw discredit on the latter's claim. In the same way, where the price is not in issue, but the *specific article* is, a serious difference between the value of the article in question and the concededly agreed price tends to support an allegation that the article in question is not the one agreed upon:

1841, *Putnam*, J., in *Bradbury* v. *Dwight*, 3 Metc. 31, 33: "The presumption which arises from the uniform conduct of men under a given state of facts enters essentially into almost every cause to be tried. Very few cases are established by positive proof. If the fact, alleged by one party and denied by the other, be unusual, unaccountable, and not warranted by the circumstances which attended the transaction, it will not be likely to obtain credit with the jury. If (to come home to the question) the wood, which was standing on the defendant's lot, was worth far more than $1.25 a cord — and we must now take the fact to be so —, is it reasonable to suppose and presume that he would have sold it at that reduced price? . . . The [below] rejected evidence would indeed only raise a presumption,[8] which might be rebutted by some particular circumstances that might have operated upon the defendant to sell for less than the known value. But this would not affect the admissibility of the evidence."

the principal); 1882, Costello v. Crowell, 133 Mass. 352, *semble* (financial embarrassment of the alleged maker of a note, admissible to show the likelihood of borrowing, the genuineness being disputed; on the other hand, to explain away financial embarrassment as a circumstance indicating a probable borrowing from the plaintiff, the fact of the defendant's ability to borrow at two banks was not received; the latter ruling seems erroneous); 1853, Covanhovan v. Hart, 21 Pa. 495, 502 (deed alleged to be in fraud of creditors; to show that the defendant had really made the advance for which the deed was said to be given in payment, the fact was admitted of the grantor's need of money at the time); 1872, Com. v. Yerkes, Phila. Com. Pleas, 29 Leg. Intell. 60, 12 Cox Cr. 208, 217, 225 (larceny and false pretences, by obtaining a check without consideration; the fact was admitted "that at the time he was sorely pressed for money and therefore had the strongest motive to commit the larceny"; Finletter, J., diss.); 1892, Befay v. Wheeler, 84 Wis. 135, 140, 53 N. W. 1121 (larceny of cash in bank by a bookkeeper; his default to the bank and falsified accounts just prior, admitted to show motive).

[7] 1865, R. v. Grant, 4 F. & F. 322 (indictment for burning the defendant's own house in order to obtain the insurance; the fact admitted, for the defence, of the defendant's easy circumstances, prompt payment of bills, etc.; Pollock, C. B.: "Surely it was material to show that her circumstances were such as not to raise any temptation to the act"); 1861, Stauffer v. Young, 39 Pa. 455, 461, 462 (little need of money, admitted to negative the borrowing of a large amount); 1898, Knopke v. Ins. Co., 99 Wis. 289, 74 N. W. 795 (evidence of a sum lost in a fire should be of a sum large enough to deter from arson to gain the insurance). *Contra:* 1897, Reynolds v. State, 147 Ind. 3, 46 N. E. 31 (robbery; the defendant's possession of money, excluded, practically overruling Cavender v. State, 126 id. 50, 25 N. E. 875).

[8] *I. e.* a mere inference.

It is usually said that this evidence is receivable where the price or the identity of the article is disputed, or where the other evidence is conflicting, or where there is no direct evidence. On the whole, however, this limitation seems unnecessary; for either it is superfluous, since the question never can arise unless there is a dispute, or else it is stating the result of other principles (*post*, § 2430) so far as it means that a written contract could not be varied by such parol evidence.[9]

[9] *Ala.*: 1901, Timothy *v.* State, 130 Ala. 68, 30 So. 339 (value of land, admitted to show the probable price agreed on); *Ia.*: 1877, Johnson *v.* Hardee, 45 Ia. 677, 679 (price of land sold; value admissible "where there is a conflict in the direct evidence"; it "should be admitted with great caution, and limited to its strictly legitimate province; the danger is that it will be used to affect the sympathy of the Court or jury to secure the release of an improvident party from the trade actually made"); *Mass.*: 1841, Bradbury *v.* Dwight, 3 Metc. 31 (the terms of a lost written contract for the sale of timber being in dispute, the value per cord was received to show the probable terms); 1862, Renneli *v.* Kimball, 5 All. 356, 365 (whether the vendor of a share in a ship had agreed to pay for repairs then making; the value of the vessel at the time, the condition of the repairs, etc., admitted "to show that the plaintiff [vendee] would not have been likely to give so high a price as he did unless the vessel were to be put in good repair without expense to him"); 1865, Parker *v.* Coburn, 10 id. 82, 84 (value of land sold; general principle affirmed); 1871, Upton *v.* Winchester, 106 Mass. 330 (same; value of oak plank sold); 1871, Brewer *v.* R. Co., 107 id. 277, 278 (dispute as to the kind and quality of wood bargained for; value of the kind of wood delivered, admitted to show, as compared with the price agreed on, that such a price would not have been promised for such wood); 1879, Norris *v.* Spofford, 127 id. 85 (same; dispute as to which of two horses was sold); 1900, Copeland *v.* R. Co., 177 id. 186, 58 N. E. 639 (principle applied); *Mich.*: 1875, Campau *v.* Moran, 31 Mich. 281 (contract to put in piling for $200; upon an issue as to the kind of work called for, evidence of the greater cost of the kind claimed by the defendant was held relevant for that purpose, but not to show that the work was properly done according to contract); 1892, Banghart *v.* Hyde, 94 id. 49, 51, 53 N. W. 915 (sale of chattels; excess of value over the alleged price, admitted); 1897, Raymond *v.* Day, 111 id. 443, 69 N. W. 832 (insurance commissions; other pecuniary arrangements between the parties, admitted to show the probable price); 1897, Shakespeare *v.* Banghman, 113 id. 551, 71 N. W. 875 (legal services; value not admitted on the facts to show the probable price; the rule is not confined to uncorroborated parties' testimony; prior rulings in this State examined); 1900, Stevens *v.* Beardsley, 122 id. 671, 81 N. W. 921 (rental agreement in dispute; the depreciation of rent of other business houses, admitted, but not the rent paid by another tenant of the same owner for another house); 1901, Grabowsky *v.* Banmgart, 128 id. 267, 87 N. W. 391 (contract to buy stock; value admitted as evidence of the price agreed on); *Minn.*: 1862, Knmler *v.* Ferguson, 7 Minn. 442, 445 (dispute as to the consideration for a conveyance; the value of the land at the time, received); 1875, Schwerin *v.* De Graff, 21 id. 354 (same principle; value of services in grading); 1875, Miller *v.* Lamb, 22 id. 43 (same principle; consideration of a conveyance); 1893, Saunders *v.* Gallagher, 53 id. 422, 55 N. W. 600 (same principle; services in sawing logs); 1894, Zeich *v.* Hirt, 59 id. 360, 362, 61 N. W. 20 (same principle; condition and value of a horse bought, to show the terms of payment); *Nebr.*: 1896, Blomgren *v.* Anderson, 43 Nebr. 240, 67 N. W. 186 (contract of hiring, the compensation alleged by the defendant to be board and lodging only; the fact admitted of the plaintiff's being offered $1.25 a day, as showing that he would not be likely to make such a contract as the former); *N. H.*: 1860, Swain *v.* Cheney, 41 N. H. 232, 234 (drawing lumber; "the common price for conveying that precise kind of lumber over the same road and at the same time," admitted); 1869, Moore *v.* Davis, 49 id. 45, 56 (preceding case approved); *N. Y.*: 1889, Weidner *v.* Phillips, 114 N. Y. 458, 461, 21 N. E. 1011 ("When the fact as to the [terms of the] agreement was in dispute, the real value was an element for the jury to consider in determining which version of the story was the correct one"; here, the sale of marble); 1889, Rubino *v.* Scott, 118 id. 662, 22 N. E. 1103 (same; value of services as broker); *N. C.*: 1897, Short *v.* Yelverton, 121 N. C. 95, 28 S. E. 138 (action for goods sold; denial of any purchase; defendant introduced the alleged real purchaser as witness who stated the alleged price; plaintiff offered to prove that he paid as much as that when buying the goods, as showing improbability of selling at the same price; excluded, Clark, J., diss.; the dissent being clearly correct); *Oh.*: 1871, Allison *v.* Horning, 22 Oh. St. 138, 142 (excess of value of work over the alleged price, admitted to show the probable price agreed on); *Pa.*: 1871, Rauch *v.* Scholl, 68 Pa. 234 ("it is not an unfair presumption that he was to receive no more than the market value of the stone under his contract"); *U. S.*: 1898, Jefferson *v.* Burhans, 29 C. C. A. 481, 85 Fed. 952 (agreement for commissions for services; question left undecided); *Vt.*: 1861, Kidder *v.* Smith, 34 Vt. 294 (market value of a mare, admitted to show the probable price); *Wash.*: 1901, Wheeler *v.* Buck, 23 Wash. 679, 63 Pac. 566 (whether a specific rate of commission for sales was agreed for;

(4) In *sundry* other ways, not calling for special doubt or discrimination, pecuniary circumstances may properly be admitted as evidencing a motive for some one's action.[10]

§ 393. **Legal Duty or Liability as creating a Motive.** The existence of a legal duty or liability is often of more or less probative value to show a fulfilment of it, because of the motive for action (or non-action) which it may inspire. But the variety of duties and of their surrounding circumstances is such that no specific rules can be laid down.[1] So far as any definite rule exists for a limited class of cases, it takes the shape of the presumption that official duties and legal proceedings were duly fulfilled (*post*, § 2534); but even this presumption is of uncertain and intermittent force.

b. CONDUCT EXHIBITING AN EMOTION.

§ 394. **General Principle.** Every one of the human qualities or conditions with which the foregoing chapters have been concerned may be evidenced by conduct exhibiting it (*ante*, § 190). The interpretation of that conduct proceeds always from experience as to the inferences to be drawn from particular kinds of conduct. Questions of evidence rarely arise over such inferences, so far as the evidence of Emotions is concerned, probably because these interpretations are fairly plain and indubitable. Courts have done little more than enunciate the general relevancy of Conduct to show Emotion:

1850, *Shaw*, C. J., in *Com.* v. *Webster*, 5 Cush. 295, 316: "The ordinary feelings, passions, and propensities under which parties act, are facts known by observation and experience; and they are so uniform in their operation that a conclusion may be safely

rate of commissions allowed by other merchants for similar goods to the same party, admitted); 1901, Dimmick *v.* Collins, 24 Id. 78, 63 Pac. 1101 (work on harvesting a crop; the value and condition of the crop, admitted to show the probable price; "the law assumes that men make fair bargains"; good opinion by Mount, J.); 1901, Coey *v.* Darknell, 25 id. 518, 65 Pac. 760 (following Dimmick *v.* Collins); *Wis.*: 1883, Kvammen *v.* Mill Co., 58 Wis. 399, 17 N. W. 222 (lath-sawing; evidence of the usual price of services of a different kind, excluded; the general question not decided); 1888, Valley L. Co. *v.* Smith, 71 id. 304, 305, 37 N. W. 412 (value admitted to show contract-price); 1888, Bell *v.* Radford, 72 id. 402, 39 N. W. 482 (price agreed for horses; value of the horses, received, there being a dispute as to the price); 1893, Mygatt *v.* Tarbell, 85 id. 457, 467, 55 N. W. 1031 (same principle; value of shares of stock sold).

For the admissibility of *specific sales* of other property, as evidence of the value of the property in question, see *post*, § 463.

[10] 1900, Tarbell *v.* Forbes, 177 Mass. 238, 58 N. E. 873 (whether a bequest to stepchildren was in a will as executed; the testatrix' inheritance of an estate from her father, not admitted to show the probability of her leaving it to brothers rather than stepchildren; chiefly because of multiplicity and confusion of issues); 1883, Bathrick *v.* Detroit Post, 50 Mich. 629, 633, 16 N. W. 172 (poverty of the woman as bearing on the probability of seduction, admitted); 1885, Gaston *v.* Merriam, 33 Minn. 271, 277, 22 N. W. 614 (whether a deed's record was correct; the fact that the grantor did not own the property described but did own other property noted in the "reception-book," admissible).

[1] 1898, Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272 (general rumor of C.'s pregnancy, admitted, to show probability of defendant's execution of a note said to have been given in compromise of an action for slander by C. against defendant for declaring her pregnant); 1849, Boston *v.* Weymouth, 4 Cush. 538, 541 (settlement of a pauper; the mere assessment of a tax upon him held no evidence that he paid the tax); 1894, Tremblay *v.* Harnden, 162 Mass. 383, 38 N. E. 972 (injury at a machine; that a defendant was insured against accidents, not admissible to show that he would be less careful; compare § 949, *post*); 1899, German-American Bank *v.* Stickle, 59 Nebr. 321, 80 N. W. 910 (genuineness of accommodation-note-signature disputed; the fact that the defendant had made a previous note, of which this was said to be a renewal, admitted as tending to show execution); 1896, Welch *v.* Ricker, 69 Vt. 239, 39 Atl. 200 (evidence that the defendant was jointly interested with I. in a farm, received to show the probability of an agreement to become jointly liable with I. for goods furnished the farm).

drawn that, if a party acts in a particular manner, he does so under the influence of a particular motive."

1854, *Scott*, J., in *Austin* v. *State*, 14 Ark. 560: "The jury were sitting in judgment upon an act which in point of law was to be essentially characterized by the motive of the heart which prompted it. These in the order of Providence are hidden and beyond the reach of human law, until developed by acts of commission or of omission which present them to its judgment in determining the quality of the act brought in question. Every act, then, of either class, which in the range of probability could cast a ray of light upon the motive which produced the homicide in question, was legitimately within the range of the investigation, although occurring at an antecedent time or at another place."

Occasionally, specific conduct is passed upon.[1] But the questions that arise in connection with conduct involve usually the principles of the ensuing topics; *i. e.* prior or subsequent conduct is offered as showing the emotion at that prior or subsequent time, and the then emotion is thus offered as showing emotion at the time in issue; the doubt or objection being not as to the first of the two inferences, but as to the second.

c. Prior and Subsequent Emotion.

§ 395. **General Principle.** Where an Emotion is offered as evidencing an Act (*ante*, § 117), it is offered as existing at the time of the act; *e. g.* that A killed B, is inferred as probable from A's desire at that time to kill B. Where A's emotion is in issue, as in the case of malice in defamation, it is also predicated as existing at a specific time; and this will usually be the case wherever Emotion enters, either evidentially or as in issue. Thus, the existence of the same Emotion at a prior or a subsequent time can enter only as evidential of its existence at the time in issue; and then is presented the question how far it is thus evidentially available. The nature of the inference, it will be seen, is distinct from those of the two preceding sorts (*i. e.* from extraneous circumstances tending to the excitement of the emotion, and from conduct exhibiting the inward inspiration for the conduct). Here the argument is from an emotional condition once existing to its subsequent or prior prolongation. The peculiar opportunity for error here is that the prior ex-

[1] 1846, R. *v.* Gandfield, 2 Cox Cr. 43 (to explain his conduct in not disclosing a burglary, the witness, claiming that he had been afraid, was allowed to state his directions to his wife not to tell; Erle, J.: "conversations that explain a man's conduct are admissible"); 1890, Wims *v.* State, 90 Ala. 623, 8 So. 566 (calling a vile name, admitted); 1858, Dunham's Appeal, 27 Conn. 192, 196 (the feelings between testatrix and her sisters being material, a declaration of a sister as to the testatrix, "She is too ugly to die yet," was admitted to show the sister's feelings); 1895, State *v.* Seymore, 94 Ia. 699, 63 N. W. 661 (that deceased and defendant were not on speaking terms, admitted); 1895, State *v.* Hutchison, 95 id. 566, 64 N. W. 612 (that defendant, charged with a rape assault, made faces at the child during the trial, admitted); 1886, State *v.* Baldwin, 36 Kan. 10, 12 Pac. 318 (a state of despondency or cheerfulness as bearing on the probability of suicide, admitted); 1885, State *v.* Goodwin, 37 La. An. 713 (maliciously sending a threatening letter; conduct showing a *bona fide* desire to give the receiver an opportunity to clear himself of the charge threatened to be made, admitted); 1869, Blake *v.* Damon, 103 Mass. 209 (the defendant's state of mind towards the plaintiff being material, the fact of insulting remarks to the plaintiff was admitted to show the defendant's state of mind); 1872, Blackburn *v.* State, 23 Oh. St. 146, 149, 165 (a melancholy disposition more than six years before, admitted to show suicide).

For a *testator's conduct and expressions*, as evidencing his state of affections and of susceptibility to influence, see *post*, § 1738.

For a *witness' conduct and expressions*, as evidencing his bias, see *post*, §§ 950–952.

isting emotion may have been brought to an end before the time in issue, and that the subsequent existing emotion may have been first produced since the time in issue.

Practically this inference is of course usually associated with two others in a way which may obscure the real evidential question. For example, to show that A struck his wife, the fact is offered that he beat her five years before; here three steps of inference are involved: (1) the beating five years before evidences a then violent emotion towards her; (2) the violent emotion five years ago evidences a continuance of the emotion to the time in issue; (3) the violent emotion at the time in issue evidences the realization of the emotion in the act of striking as charged. Now as to the first and the third of these inferences (*i. e.* the inferences dealt with *ante*, § 394, and *ante*, § 117) there is and can be no question; it is as to the second that a question may arise; and it is with that question that we are here concerned. The superficial circumstance that the inference is presented along with others should not prevent us from perceiving its nature however obscured.

§ 396. **Hostility in general; Feeling at other Times.** Where an emotion of hostility at a specific time is to be shown, the existence in the same person of the same emotion at another time is in general plainly admissible.[1] What that *limit of time* should be must depend largely on the circumstances of each case, and ought always to be left to the discretion of the trial Court:

1871, *Lochrane*, C. J., in *Pound* v. *State*, 43 Ga. 88, 133: "No general rule can be distinctly traced over this disputed ground of judicial controversy. All we may assert, within the principle recognized, is that there must be some link of association, something which draws together the preceding and subsequent acts, something which presents cause and effect in the transaction. . . . As if A, jealous of his wife, finds B with her, and forbids him speaking to her, and afterwards meets B and her together, though weeks and even months have elapsed, the previous difficulty, though slight, would be proper evidence to go to the jury in case of homicide. But if A afterwards met B, and upon a new cause of quarrel, distinctly separate from the first, the difficulty sprang up, the acts relative to the first ought to be excluded as not throwing light upon the homicide, and the fact of unfriendly feelings existing is all which would be permitted."

Subsequent hostility is equally receivable;[2] that it arose only subsequently is matter for explanation by the opponent. The *details* of the conduct evidencing the hostility of a defendant should not ordinarily be gone into; they are irrelevant, even if they show that the hostility was justifiable, and they may, if offered against a defendant, cause unfair prejudice.[3] A *friendly feeling* at another time is equally receivable.[4] No further generalization of rules seems feasible.[5] Distinguish here certain other uses of similar evidence; in

[1] See the cases cited at the end of this section.

[2] Ala., Conn., Or.

[3] Ala., Mass.; but Ky. and La. are *contra*. Compare the citations *post*, §§ 951, 952 (details of a quarrel, in impeaching a witness).

[4] Ill., Ia.

[5] The cases are as follows: *Ala.*: 1860, McManus *v.* State, 36 Ala. 285, 292 (expressions of hostility against the deceased, half an hour after the fatal blow, admitted to negative sudden passion); 1877, Faire *v.* State, 58 id. 74, 79 (murder; previous malice admissible); 1877, Commander *v.* State, 60 id. 1, 7 (murder; previous litigation between the parties, admitted); 1878, Hudson *v.* State, 61 id.

particular, (1) *former threats* of a *defendant* as involving a Design to injure (*ante*, § 105); (2) *former threats* of a *deceased* as involving a Design to injure (*ante*, § 110) or as creating a Belief in probable aggression (*ante*, § 247); and (3) *previous prosecution* or *litigation* as creating a Motive for injury (*ante*, § 390).

§ 397. **Same: Hostility to Wife or Paramour.** The precedents dealing with

333, 337 (arson of a mill; previous quarrels and lawsuits about it, admitted to show motive); 1879, Gray *v.* State, 63 id. 66, 73 ("previous threats, previous altercations, or prior combats," between the parties, admitted to show ill-will at the time of the killing; but the fact only, not the details of the dispute); 1883, McAnally *v.* State, 74 id. 17 ("the fact of such difficulty, and its gravity on the contrary," admissible; its merits or the particulars, not; "the tendency would be to divert the minds of the jury . . . to the merits of the former quarrel"); 1884, Tesney *v.* State, 77 id. 33, 38 (the defendant's prior unwillingness to go to the place where the deceased was later met and killed, admitted); 1904, Spraggins *v.* State, — id. —, 35 So. 1000 (prior declarations of the defendant, that he would not fight fair, admitted); *Ark.:* 1855, Atkins *v.* State, 16 Ark. 568, 581 (prior expressions of malice against the deceased, admitted); 1889, Billings *v.* State, 52 id. 303, 306, 310, 12 S. W. 574 (a casual altercation with the deceased some years before, excluded as not connected); *Conn.:* 1862, State *v.* Alford, 31 Conn. 40, 43 (assault and battery; defence, that the collision was accidental; to disprove this, the fact was admitted that the defendant and her family, though living in the same apartment-house, did not afterwards visit or inquire after the assaulted person, who was confined to her bed); 1878, State *v.* Riggs, 39 id. 498, 501 (a hostile feeling on the part of the defendant, not admitted as showing that he was "more likely to be the author of the libel in question"); *Fla.:* 1898, Rawlina *v.* State, 40 Fla. 155, 24 So. 65 (threats "within a period not too remote," admissible); 1903, Sylvester *v.* State, — id. —, 35 So. 142 (merits of a quarrel between deceased and defendant, excluded); *Ga.:* 1871, Pound *v.* State, 43 Ga. 88, 123, 133 (murder; the fact that the defendant once refused to speak to the deceased a few months before, excluded); 1897, Daniel *v.* State, 103 id. 202, 29 S. E. 767 (deceased's hostility at a remote time, not shown continuous, excluded); 1900, Horton *v.* State, 110 id. 739, 35 S. E. 659 (isolated quarrel about six years before, excluded); *Ill.:* 1880, Tracy *v.* People, 97 Ill. 104 (to show that a person's entry into premises was not to avenge an insult, the fact admitted of his friendly presence there shortly before); *Ia.:* 1878, State *v.* Westfall, 49 Ia. 328 (murder; the issue being who was the aggressor, the fact that one party had often tried to avoid quarrelling was admitted); 1880, State *v.* Moelchen, 53 id. 310, 314, 5 N. W. 186 (homicide; a quarrel received); *Ku.:* 1895, Com. *v.* Gray, — Ky. —, 30 S. W. 1015 (murder; the deceased and the defendant had compromised a quarrel, and then the quarrel had broken out again; the details of the compromise received to see "which party was in the right and which in the wrong" in the quarrel; unsound); 1896, Tuttle *v.* Com., — id. —, 33 S. W. 823 (expressions of ill-will to the deceased seven months before; admitted); *La.:* 1854, State *v.* D'Angelo, 9 La. An. 46 (murder; former quarrels received); 1856, State *v.* Jackson, 12 id. 679 (same); 1880, State *v.* Cooper, 32 id. 1084 (same; particulars may be shown to explain away malice); 1882, State *v.* McNeely, 34 id. 1022 (same; but here previous threats and the dangerous character of the deceased were admitted); 1884, State *v.* Birdwell, 36 id. 859, 861 (same); *Mass.:* 1852, Com. *v.* Vaughan, 9 Cush. 594 (to show a motive for burning a barn, the fact was received that the same person had before begun a criminal prosecution against the owner; but no counter-explanation of probable cause was allowed, since the fact of ill-will, and not its propriety, was alone involved); 1892, Com. *v.* Holmes, 157 Mass. 240, 32 N. E. 6 (hatred towards a murdered person; time of the former hatred to be in the discretion of the trial Court); 1901, Com. *v.* Storti, 177 id. 339, 58 N. E. 1021 (quarrel two years before in Italy, admitted on the facts); *Mich.:* 1871, Josselyn *v.* McAllister, 22 Mich. 300, 304 (malicious prosecution; anger of the defendant when arrested in the present suit, not admitted to show malice in the former suit by him); 1871, Druce *v.* Wheeler, ib. 439, 444 (trespass; other conduct showing malice, admissible as affecting damages); 1896, Tyler *v.* Nelson, 109 id. 37, 66 N. W. 671 (ill-feeling by defendant, as showing whether his collision with plaintiff was negligent or not; admitted); *Mo.:* 1899, State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483 (murder; p[illegible] of self-defence; defendant's efforts to secure a peaceable settlement of the quarrel, excluded); *Or.:* 1874, State *v.* Garland, 5 Or. 216 (defendant's threats to shoot a witness, just after the affray, for inquiring what was the matter, admitted to show malice); *Tenn.:* 1899, Fitts *v.* State, 102 Tenn. 141, 50 S. W. 756 (accused's expressions after the killing, admitted); *Tex.:* 1898, Holley *v.* State, 39 Tex. Cr. 301, 46 S. W. 39 (former animosity, admissible, and the language expressing it, but not details of quarrels); *W. Va.:* 1901, State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676 (defendant's expression of feelings towards deceased, after arrest, held admissible).

For the application of the Hearsay rule to an *accused's expressions of regret or explanation*, see *post*, § 1732. For the use of *prior assaults* to show *intent*, see *ante*, §§ 363, 364.

instances of hostility to a wife or a paramour form a numerous group by themselves, though the principle and its application are precisely the same as in the foregoing general instances. The *limit of time* over which the evidence may range depends much on the circumstances of each case, and no fixed rule can be laid down:

1851, *Nash*, J., in *State* v. *Rash*, 12 Ired. 382, 384 (wife-murder): "On behalf of the prisoner it is said that the State was permitted to go too far back for its facts, and by that means the general character of the prisoner was brought before the jury to speak against him. Not so. In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful they are to show the state of the feelings. A single expression and a single act of violence are most frequently the result of temporary passion, as evanescent as the cause producing them. But a long-continued course of brutal conduct shows a settled state of feeling inimical to the object."

1881, *Colt*, J., in *Com.* v. *Abbott*, 130 Mass. 472 (the fact of a husband's bad treatment of his wife and quarrels with her from 1873 to 1877, to show a motive for killing her in 1880, the two having lived together in the meantime, was excluded): "It is difficult, in dealing with this description of evidence, to define as matter of law, the precise limits which must practically control its admission. . . . [It was proper] to prove such a state of ill-feeling on the part of the husband, existing at the time of the homicide, as would furnish him with a motive for the commission of the crime. But the difficulty is that the ill-feeling here offered to be shown was not of such a character as to afford a reasonable ground for the inference that it existed at the time of the murder. . . . The whole evidence fails to show such deeply seated and enduring hostility on the part of the husband as to lead to the presumption that without further manifestation and under the concealment of kindly relations, it continued to exist and so increase in power as to furnish a motive for the commission of the crime."

Here also, subsequent as well as prior emotion is receivable;[6] and the evidence has application occasionally in civil as well as in criminal cases.[7] No more detailed generalizations present themselves.[8]

[6] Conn., Nev.

[7] Ia., Nev.

[8] The cases are as follows: 1850, Baalam v. State, 17 Ala. 451, 453 (wife-murder; that the deceased and the defendant had quarrelled and separated about a year before, admitted); 1850, Johnson v. State, ib. 626 (wife-murder; cruelty to her by the defendant for a time previous, admitted); 1882, People v. Kern, 61 Cal. 244 (violent domestic conduct a month before, admitted); 1898, People v. Barthleman, 120 id. 7, 52 Pac. 112 (defendant's hostile expressions, received); 1898, People v. Chaves, 122 id. 134, 54 Pac. 596 (prior violence, admitted); 1834, Austin v. Austin, 10 Conn. 221 (divorce for adultery; defence, a luring and connivance by her husband; his relation to her being in itself some evidence against this, the wife offered evidence of his repeated unkindness to her; rejected, as not relevant); 1868, State v. Green, 35 id. 203, 208 (wife-murder; the defendant's marrying again within five weeks after the death, admitted as showing his feelings toward the deceased at the time of her death); 1878, Shaw v. State, 60 Ga. 246, 250 (wife-murder; former quarrels between the parties, admitted); 1893, Painter v. People, 147 Ill. 463, 35 N. E. 64 (murder of a paramour; former quarrels admitted); 1883, Doolittle v. State, 93 Ind. 272, 274 (assault and battery on a wife; previous ill-feeling between them, admitted); 1884, Koerner v. State, 98 Id. 7, 10, 24 (same; previous quarrels, beatings, and threats during several years, admitted to show malice); 1895, Kennedy v. Henaley, 94 Ia. 598, 63 N. W. 341 (prior quarrels, between husband and wife, admitted, to diminish damages in an action for alienation of affections); 1881, Com. v. Abbott, 130 Mass. 472 (quoted *supra*); 1892, Com. v. Holmes, 157 id. 233, 239, 32 N. E. 6 (wife-murder; a course of violent conduct at various times during eight or nine years, admitted; an interval of cessation, or even of reconciliation, does not necessarily exclude the preceding conduct); 1902, Raines v. State, 81 Miss. 489, 33 So. 19 (acts and words of violence, extending over the previous ten years, excluded; grossly erroneous); 1879, State v. Nugent, 71 Mo. 136, 140 (maltreatment of the wife, for the preceding two months, by cutting, shooting, and threatening her, admitted to show deliberateness and malice); 1900,

§ 398. **Sexual Passion at other Times.** The prior or subsequent existence of a sexual passion in A for B is relevant, on the same principle and to the same extent as in the foregoing topics, to show its existence at the time in issue. The circumstance that the prior or subsequent conduct exhibiting the passion is criminal does not alter the case nor affect the admissibility of the evidence (*ante*, § 216). But the different ways in which this evidence may be employed need to be discriminated, so that the present principle in its operation may not be confounded with others having different limitations. The precedents may be divided into three groups: (1) cases involving adultery, fornication, criminal conversation, and incest; (2) cases involving seduction, bastardy, and breach of promise of marriage; (3) cases involving rape.[1]

State *v.* Callaway, 154 Mo. 91, 55 S. W. 444 (murder; former violence, admitted); 1896, Gardner *v.* Gardner, 23 Nev. 207, 45 Pac. 189 (divorce; husband's cruelty after suit begun, admitted to throw light on his previous acts); 1899, People *v.* Benham, 160 N. Y. 402, 55 N. E. 11 (wife-murder; quarrels two years before, admitted); 1853, State *v.* Langford, Busbee 436, 442 (domestic quarrels, admitted); 1851, State *v.* Rash, 12 Ired. 382 (wife-murder; a long course of ill-treatment, admitted to show hostile feeling); 1879, Sayres *v.* Com., 88 Pa. 291, 292, 303, 309 (wife-murder by shooting; to show ill-feeling and malice, evidence admitted that the defendant had thrown her down stairs two years before); 1900, Com. *v.* Birriols, 197 Pa. 371, 47 Atl. 355 (former violence, admitted); 1895, Thiede *v.* Utah, 159 U. S. 510, 16 Sup. 62 (wife-murder; the fact admitted of the wife having been seen at various times with black eyes, bruises, tears, etc.); 1901, O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121 (murder of a paramour; defendant's violence to her in the preceding year, admitted); 1884, Boyle *v.* State, 61 Wis. 440, 444, 21 N. W. 289 (wife-murder; previous acts of abuse admitted, to "show that his disposition carried him at times to . . . personal violence upon her").

For the use of *prior assaults* to show intent, see *ante*, §§ 363, 364.

[1] The precedents are as follows, and will be dealt with in detail in the ensuing sections: *Adultery, Bigamy, Criminal Conversation, Fornication, and Incest* (the issue is adultery, where not otherwise stated): *Eng.:* 1692, Duke of Norfolk *v.* Germaine, 12 How. St. Tr. 943 (crim. con.; at the end of the plaintiff's evidence, L. C. J. Holt: "Do you observe what you have proved? . . . You have not proved any lascivious conversation within these six years." Sol.-Gen.: "Pray, my lord, if your lordship pleases, this is the use we make in giving in evidence some things before, — to show the fact within the six years, their frequent meeting in a lascivious manner; and we make use of that before the sixth year to explain what use we make of it in matters done within the six years." L. C. J.: "For my part, I must declare, that these matters may be given in evidence to explain, but they are not to be given in evidence to any other purpose [*i. e.* damages]"); 1861, Boddy *v.* Boddy, 30 L. J. P. M. A. 23 (subsequent living together as showing previous adulterous inclination, admitted); 1900, Wales *v.* Wales, Prob. 63 (divorce for adultery; cohabitation subsequent to the date of the petition, admitted); *Ala.:* 1848, State *v.* Crowley, 13 Ala. 172 (intercourse 18 months afterwards, excluded, as not fairly indicating prior relations; "what are such circumstances [of inference] cannot be laid down universally"); 1852, Lawson *v.* Swinney, 20 id. 65, 75 (intercourse before the statutory bar and after the date of the indictment, admitted as on the facts sufficiently connected in time); 1860, McLeod *v.* State, 35 id. 395, 397 (familiarities before the statutory period, admitted); 1875, Alsabrooks *v.* State, 52 id. 24 (familiarities since the indictment; admissible, after other evidence offered as to the time charged); 1903, Hill *v.* State, — id. —, 34 So. 406 (adultery; other intercourse before and after, admitted, if an act is otherwise evidenced within the period charged); 1903, Bickley *v.* Bickley, — id. —, 34 So. 946 (divorce for adultery; illicit relations not long before marriage, admitted); *Cal.:* 1894, People *v.* Patterson, 102 Cal. 289, 244, 36 Pac. 436 (incest; prior intercourse for several years, admissible); *Fla.:* 1886, Brevaldo *v.* State, 21 Fla. 789, 795 (prior adultery admissible, provided some other evidence of adultery within the time charged is first offered); *Ga.:* 1897, Bass *v.* State, 103 Ga. 227, 29 S. E. 966 (fornication; former lascivious familiarities, within "a comparatively recent period," admitted); 1900, Taylor *v.* State, 110 id. 150, 35 S. E. 161 (incest; intercourse previous to the statutory period, admissible); *Haw.:* 1896, Republic *v.* Wsipa, 10 Haw. 442, 445 (adultery; act of intercourse before the date charged, admitted to show their relations); *Ill.:* 1897, Crane *v.* People, 168 Ill. 395, 48 N. E. 54 (adultery; prior and subsequent acts of improper familiarity and adultery, in another county, receivable, even before evidence of the substantive act is offered); *Ind.:* 1859, Lovell *v.* State, 12 Ind. 18 (incest; subsequent intercourse, excluded as irrelevant); 1884, State *v.* Markins, 95 id. 464 (incest; prior intercourse, as well as lascivious behavior, admitted, distinguishing the preceding case as

§ 399. Same: General Principles. The process of argument here involves (*ante*, § 395) three steps, namely, (*a*) from the Emotion to the Act charged,

involving merely subsequent conduct, and yet approving Thayer *v.* Thayer, Mass., which admits both), 1891, Lefforge *v.* State, 129 Id. 551, 29 N. E. 34 (incest; prior acts of familiarity, admitted); *Ia.:* 1886, State *v.* Briggs, 68 Ia. 416, 423, 27 N. W. 358 ("the fact that the parties had the disposition, and on previous occasions had been guilty of acts of intercourse, was of the highest importance in determining whether they did indulge at that time [charged]"); 1897, State *v.* Hurd, 101 Ia. 391, 70 N. W. 613 (incest; former acts of intercourse admitted); 1901, State *v.* More, 115 id. 178, 88 N. W. 322 (adultery; subsequent undue familiarities, admitted); *Ky.:* 1901, Smith *v.* Com., — Ky. —, 60 S. W. 531 (incest; similar act within a few months, admitted); *La.:* 1903, State *v.* DeHart, 109 La. —, 33 So. 605 (incest; prior acts admitted); *Me.:* 1881, State *v.* Witham, 72 Me. 531, 534 (adulterous intercourse before and after the time charged; admitted in discretion); *Md.:* 1898, Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416 (prior undue intimacy, received); *Mass.:* 1833, Com. *v.* Merriam, 14 Pick. 518 (former improper relations with the defendant, admitted; "a woman who would so conduct herself would be more likely to commit the fact alleged against her than if her deportment had been modest and discreet"); 1854, Com. *v.* Horton, 2 Gray 355 (subsequent adultery with the same person in another county, excluded; no clear reason given); 1858, Com. *v.* Thrasher, 11 id. 450 (adultery; prior acts of adultery and improper familiarity, admitted, "with the purpose of showing a disposition in the parties to commit such a crime and as bearing on the probability of its commission on the occasions alleged"; but subsequent acts rejected on the authority of Com. *v.* Horton); 1858, Com. *v.* Pierce, ib. 447 (like Com. *v.* Thrasher); 1859, Com. *v.* Lahey, 14 id. 92 (attempting to distinguish Com. *v.* Horton, 2 id. 354, and following Com. *v.* Merriam); 1867, Com. *v.* Curtis, 97 Mass. 574 (prior and subsequent acts of sexual intimacy admitted, to show the adultery); 1869, Thayer *v.* Thayer, 101 id. 111 (divorce for adultery; adultery between the parties since the date of the libel, admitted; overruling Com. *v.* Thrasher and Com. *v.* Horton on this point; quoted *post*); 1873, Com. *v.* Nichols, 114 id. 288 (adultery in another county, admitted); 1888, Brooks *v.* Brooks, 145 id. 574, 14 N. E. 777 (divorce for adultery; indecent familiarities and sexual intercourse with the third person before marriage, admitted as "tending to prove sexual intimacy with the same person" after marriage); *Mich.:* 1858, People *v.* Jenness, 5 Mich. 305, 319 (incest; other acts of sexual intercourse and of familiarity, for five years preceding, admitted); 1881, People *v.* Carrier, 46 id. 442, 446, 9 N. W. 487 (enticement of a minor for prostitution, etc.; former illicit relations of the defendant with her, admitted); 1893, People *v.* Skutt, 96 id. 449, 450, 56 N. W. 11 (incest; prior intercourse during eight years, admitted); 1900, Matthews *v.* Detroit J. Co., 128 id. 608, 82 N. W. 243 (improper conduct three months later, excluded); *Nebr.:* 1877, State *v.* Way, 5 Nebr. 283 (improper familiarities before and after the time charged, admissible); *N. H.:* 1838, State *v.* Wallace, 9 N. H. 515 (previous improper conduct admitted, but treated rather as indicating a design); 1857, State *v.* Marvin, 35 id. 22, 28 (same); 1899, Burns *v.* Burns, 68 Id. 33, 44 Atl. 75 (prior acts of familiarity, etc., admitted); *N. J.:* 1899, State *v.* Snover, 64 N. J. L. 65, 44 Atl. 850 (adultery in another county, admitted); 1900, State *v.* Jackson, 65 Id. 62, 46 Atl. 767 (other acts of adultery, admitted); 1900, State *v.* Snover, ib. 289, 47 Atl. 583 (prior adultery in another county, admitted); *N. M.:* 1902, U. S. *v.* Griego, — N. M. —, 72 Pac. 20 (adultery; conduct four years before, admitted); *N. Y.:* 1845, Lockyer *v.* Lockyer, 1 Edm. Sel. C. 108 (other improprieties admitted); 1859, Stephens *v.* People, 19 N. Y. 549, 571 (wife-murder; the defendant's improper attachment to a third person being alleged as a motive, evidence of his feelings towards her nearly a year after the wife's death, admitted; "love and jealousy are generally conceded to be enduring passions"); *N. C.:* 1882, State *v.* Kemp, 87 N. C. 538 (habitual illicit relations of the same persons more than two years before, admitted, as "shedding light upon the present relations if kept up"); 1883, State *v.* Pippin, 88 Id. 616 (same); 1897, State *v.* Raby, 121 id. 682, 28 S. E. 490 ("facts that transpired since the finding of the indictment," admitted); 1899, State *v.* Beard, 124 id. 811, 32 S. E. 804 (fornication and adultery; other intercourse in another county, admitted); *Pa.:* 1799, Gardner *v.* Madeira, 2 Yeates 466 (crim. con.; admitting indecent conduct, etc., provided first some direct evidence is offered of the acts charged at the times specified); 1867, Sherwood *v.* Titman, 55 Pa. 77, 79 (crim. con.; improper intimacy between the defendant and the plaintiff's wife after the latter had left him, admitted, on the same principle as in Gardner *v.* Madeira); 1895, Com. *v.* Bell, 166 id. 405, 31 Atl. 123 (incestuous fornication; prior intercourse, barred by statute, admitted); *R. I.:* 1899, Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67 (alienation of wife's affections; intimacy of plaintiff's wife with defendant after separation, admitted as indicating prior state of feelings); *Tenn.:* 1873, Cole *v.* State, 6 Baxt. 242 (improper familiarities between the persons, before the statutory period and after prosecution begun, held admissible); *Tex.:* 1870, Richardson *v.* State, 34 Tex. 142 (cohabitation for a "series of months," admitted); 1893, Burnett *v.* State, 32 Tex. Cr. 86, 22 S. W. 47 (incest; prior and subsequent intercourse, admissible); 1893, Wood *v.* State, ib. 476, 478, 24 S. W. 284 (slander charging incest; incest a few months before, admitted); 1898, Duncan *v.* State, 40 id. 591, 51 S. W. 372 (fornication; acts more than two years previous, excluded, except "under peculiar circum-

(*b*) from a prior or subsequent Emotion to this Emotion at the time charged, and (*c*) from Conduct to the prior or subsequent Emotion. The evidence as

stances"; no authority cited): *Utah:* 1885, U. S. *v.* Musser, 4 Utah 153, 7 Pac. 889 (bigamous cohabitation; cohabitation with the same women before the date charged, admitted to show "his inclination and disposition to cohabit with the women"); 1886, U. S. *v.* Groesbeck, ib. 487, 11 Pac. 542 (similar); 1887, U. S. *v.* Peay, 5 id. 263, 14 Pac. 342 (similar); 1887, U. S. *v.* Smith, ib. 232, 14 Pac. 291 (similar); 1901, State *v.* Neel, 23 id. 541, 65 Pac. 494 (illicit intercourse; prior acts of familiarity, admitted in corroboration); *Vt.:* 1876, State *v.* Bridgman, 49 Vt. 202, 209 (adultery; "a great many acts of familiarity and several acts of adultery" within seven years, admitted; also other acts at a subsequent time); 1878, State *v.* Colby, 51 id. 291, 293, 296 (obscure); 1879, State *v.* Potter, 52 id. 33, 40 (adultery; acts seven years before, admitted); *Wis.:* 1858, Ketchingman *v.* State, 6 Wis. 426 (another adultery admitted, but under a second count); 1895, Porath *v.* State, 90 id. 527, 63 N. W. 1061 (familiarities, admitted).

Seduction and Bastardy: Eng.: 1877, Verdin *v.* Wray, 2 Q. B. D. 611 (bastardy; acts of familiarity, before the probable time of begetting, with the alleged father, admitted); *Ind.:* 1890, Ramey *v.* State, 127 Ind. 243, 26 N. E. 818 (bastardy; acts of intercourse prior to the alleged time of conception, admitted to show "the probability of intercourse having taken place at subsequent times"); *Ia.:* 1898, State *v.* Hughes, 106 Ia. 125, 76 N. W. 520 (defendant's statement, a week later, that he was going to the prosecutrix's house for intercourse, admitted); *Md.:* 1853, Keller *v.* Donnelly, 5 Md. 213, 219 (seduction; the defendant's relations with the daughter five years later, admitted as throwing light on their relations at the time alleged); *Mich.:* 1876, People *v.* Clark, 33 Mich. 112, 115 (seduction; previous acts of intercourse, but not subsequent ones, admitted); 1900, People *v.* Jamieson, 124 id. 164, 82 N. W. 835 ("acts of intercourse and undue familiarity" before and after the alleged time of conception, admissible); 1902, People *v.* Elco, — id. —, 91 N. W. 755 (seduction; intimate relations of the parties after pregnancy ascertained, admitted); *N. C.:* 1897, State *v.* Robertson, 121 N. C. 551, 28 S. E. 59 (seduction; later intercourse between the parties, admitted); *Vt.:* 1865, Thayer *v.* Davis, 38 Vt. 163 (bastardy; intercourse three years before, admitted, as showing a familiarity making the alleged intercourse more probable). Compare the additional cases cited *post*, § 401.

Rape (the evidence offered is, where not otherwise mentioned, of former intercourse between the parties, to show the woman's probable consent): *Eng.:* 1870, R. *v.* Cockcroft, 11 Cox Cr. 410, Willes, J.; 1871, R. *v.* Holmes, 12 id. 141 (indecent conduct admitted; but not passed upon); 1887, R. *v.* Riley, 16 id. 191 (Coleridge, L. C. J.: "It renders it more likely that she would or would not have consented"); and cases cited *ante*, § 200; *Ala.:* 1887, McQuirk *v.* State, 84 Ala. 435, 438 (admitted); 1889, Barnes *v.* State, 88 id. 204, 207, 7 So. 88 (rape; "prior acts of undue intimacy," received to show the complainant's probable consent); *Ark.:* 1855, Pleasant *v.* State, 15 Ark. 624, 643 (admitted); *Cal.:* 1896, People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071 (question reserved); *Ill.:* 1873, Shirwin *v.* People, 69 Ill. 56, 59, *semble* (admissible); *Ind.:* 1880, Eyler *v.* State, 74 Ind. 49, 51 (admissible); 1888, Bedgood *v.* State, 115 id. 275, 278, 17 N. E. 621 (same); *Mich.:* 1882, Hall *v.* People, 47 Mich. 636, 11 N. W. 414 (friendly relations of the parties, not improper, admitted to show that the defendant would probably seek to obtain intercourse by persuasion, not by force); 1888, People *v.* McLean, 71 id. 310, 38 N. W. 871 (admissible); *Mont.:* 1898, State *v.* Bowser, 21 Mont. 133, 53 Pac. 179 (rape; the relationship between defendant and prosecutrix, admitted, to indicate that the latter resisted as much as could be expected); *N. H.:* 1861, State *v.* Forschner, 43 N. H. 89 (admissible; put on the ground of character); 1863, State *v.* Knapp, 45 id. 151, 156 (rape; the defendant's indecent solicitations of the prosecutrix six months before, admitted as involving "a motive or passion that would render the commission of the act charged more probable"); *N. Y.:* 1838, People *v.* Abbot, 18 Wend. 194 (admissible); 1857, People *v.* Jackson, 3 Park. Cr. 398 (same); 1874, Woods *v.* People, 55 N. Y. 516 (same); *N. C.:* 1846, State *v.* Jefferson, 6 Ired. 305 (that she had been his concubine, or had suffered him to take indecent liberties, admitted); *Oh.:* 1858, McCombs *v.* State, 8 Oh. St. 643, 646, *semble* (admissible); 1862, McDermott *v.* State, 13 id. 331, *semble* (same); *Vt.:* 1894, State *v.* Hollenbeck, 67 Vt. 84, 30 Atl. 696 (the complainant's friendliness beforehand, admitted); *Wis.:* 1893, Proper *v.* State, 85 Wis. 615, 628, 55 N. W. 1035 (rape; previous indecent assaults upon the complainant, admitted to show a desire to gratify his passions with her); 1902, Banneu *v.* State, 115 id. 317, 91 N. W. 964 (rape; prior relations of the parties, admitted to show probable consent).

Rape under Age of Consent: 1903, People *v.* Edwards, — Cal. —, 73 Pac. 416 (rape under age; prior intercourse, and prior and subsequent improper familiarity, between the two, admitted "to prove the adulterous disposition of the defendant"); 1902, State *v.* King, 117 Ia. 484, 91 N. W. 768 (another act of intercourse a week or so later, admitted); 1893, People *v.* Abbott, 97 id. 484, 486, 56 N. W. 862 (admitted, to show their "relations" and "opportunity"); 1903, State *v.* Peres, 27 Mont. 358, 71 Pac. 162 (other intercourse with the prosecutrix, admitted); 1900, People *v.* Flaherty, 162 N. Y. 532, 57 N. E. 73 (intercourse under age of consent; other intercourse admissible only in corroboration, when other evidence of act charged is in the case); 1897, State *v.* Robinson, 32 Or. 43, 48 Pac. 357 (other intercourse with the prosecutrix, admitted); 1899, Rogers *v.* State, 40 Tex.

offered takes the reverse order; it consists in conduct, and from this the first inference is to the then emotion, from this next to the emotion at the time charged, and from this to the act charged. All these steps are implied in the offer of such evidence, and questions may arise as to any one of the steps; and, though the second is the only legitimate subject of the present treatment (the first and the third involving respectively the principles of § 117 and § 394, *ante*), it is convenient to deal with them all in this place.

(*a*) That a sexual desire of A for B is relevant to show the probability of A's doing that which will realize that desire cannot be and is not questioned; and no evidential difficulties arise at this point:

1869, *Colt*, J., in *Thayer* v. *Thayer*, 101 Mass. 113: "The evidence by which the act of adultery is proved is seldom direct. . . . When adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place."

1876, *Wheeler*, J., in *State* v. *Bridgman*, 49 Vt. 210: "The offence charged in this case cannot ordinarily be committed till the restraints of natural modesty and the safeguards of common deportment and conventionality have been overcome by gradual approaches, and the relations of the parties have been changed from those usually existing between the sexes to the most intimate. . . . Thus it appears that the true relation of the parties to each other in this respect is very material and proper to be shown."

1884, *Elliott*, C. J., in *State* v. *Markins*, 95 Ind. 465: "It is a rule of elementary logic, as well as of rudimentary law, that evidence which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force. It is more probable that lucestuous intercourse will take place between persons who have conducted themselves with indecent familiarity than between those whose behavior has been modest and discreet."

(*b*) That this desire at a prior or subsequent time is relevant to show the probable existence of the same desire at the time in issue is equally clear:

1799, *Hume*, B., in *Brown* v. *Smith*, Hume (Sc.) 32 (action for fillation of an illegitimate child, the time of intercourse being in doubt): "It is reasonable for the judge to consider the situation and circumstances of the parties at a later period; . . . and if these are still such as to afford them the like temptations and opportunities of meeting, . . . it is natural to presume that such an intercourse once commenced does not cease while those opportunities continue."

1852, *Goldthwaite*, J., in *Lawson* v. *Swinney*, 20 Ala. 76: "The fact to be established by the evidence is that the parties lived together in a certain condition; and if this particular condition of life was proved to exist, both anterior and subsequent to the time alleged in or covered by the indictment, an inference might often be correctly drawn as to the existence of this condition during the intermediate period."

Cr. 355, 50 S. W. 338 (other acts of intercourse between the parties, admissible to show the probability of the offence); 1903, Smith *v.* State, — id. —, 73 S. W. 401 (subsequent intercourse with the same woman, excluded; repudiating prior contrary rulings; Henderson, J., *semble*, diss.); 1903, Smith *v.* State, — Tex. Cr. —, 74 S. W. 556 (rape under age; prior intercourse in another county, excluded); 1900, State *v.* Hilberg, 22 Utah 27, 61 Pac. 215 (subsequent acts are inadmissible; Bartch, C. J., diss. on this point, and properly): 1903, State *v.* Carpenter, — Wash. —, 73 Pac. 357 (rape on a daughter under age; that the defendant had on several occasions attempted to induce another daughter to have intercourse with him, excluded; unsound; no authorities cited); 1902, Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128 (rape under the age of consent, the girl being in fact willing; other intercourse admitted).

1869, *Colt*, J., in *Thayer* v. *Thayer*, 101 Mass. 113: "It is true, that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it. . . . When once an adulterous disposition in two persons towards each other is shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence at any particular point of time from facts illustrating the preceding or subsequent relations of the parties. . . . The limit, practically, to the evidence under consideration is that it must be sufficiently significant in character and sufficiently near in point of time, to have a tendency 'to lead the guarded discretion of a reasonable and just man' to a belief in the existence of this important fact to be proved. If too remote or insignificant, it will be rejected, in the discretion of the judge who tries the case."

The *limits of time* over which the evidence may range must depend largely on the circumstances of each case,[1] and should be left to the discretion of the trial Court.[2] A *subsequent* existence of the desire is equally relevant with a prior one. It is true that the contingencies of error are different; *i. e.* in the former case, the desire may have been first induced by intervening circumstances, in the latter it may have been ended by them; but the strength of these contingencies is no greater in one instance than in the other. If for example the parties have been intimate during the entire year 1890, and an act of adultery is charged on July 1, an adulterous desire on Dec. 31 carries no less persuasive weight than an adulterous desire on Jan. 1. That there is any distinction is generally repudiated.[3]

(*c*) The conduct receivable to prove this desire at such prior or subsequent time is whatever would naturally be interpretable as the expression of sexual desire:

1899, *Garrison*, J., in *State* v. *Snover*, 64 N. J. L. 65, 44 Atl. 850: "Adultery, from its inherent stealth, is seldom provable apart from circumstances by which the disposition of the parties towards each other may be judged. This disposition develops gradually, and has a duration and progress that generally, if not always, antedate opportunity. Hence the total proof of adultery is not to be circumscribed by the time and space of a single act, but rather is to be extended as widely as the demonstration of the moral qualities involved may require. The discreet limit of such proof is the character of the conduct sought to be shown, — a point of which time, rather than geography, is apt to be the significant feature."

Sexual intercourse is the typical sort of such conduct, but indecent or otherwise *improper familiarities* are equally significant.[4] That the intercourse is also itself criminal is no objection.[5]

[1] See instances in Eng., Mass., N. Y., N. C., Tex., Vt.; and the evidence may antedate the statutory period of limitation, as in Eng., Ala., Pa., Tenn.

[2] Mass., quoted *supra*; Me.

[3] Ala., Me., Md. (seduction), Mass., Nebr. (seduction), N. Y., Pa., Tenn., Vt. *Contra*, Ind., Mich. (seduction).

[4] As in Eng., Ala., Ind,, Mass., Mich., Nebr., N. H., N. Y., Pa., Vt., Wis.

[5] Colt, J., in Thayer v. Thayer, 101 Mass. 113: "[If it were an objection,] evidence tending to establish an independent crime is to be rejected, although all acts which are only acts of improper familiarity are to be admitted in proof. There is no sound distinction to be thus drawn. There is no difference between acts of familiarity and actual adultery committed, when offered for the purpose indicated, except in the additional weight and significance of the latter

§ 400. **Same: Discriminations in regard to Adultery and Incest.** The foregoing principles apply equally to the sexual desire in all aspects. But for each sort of acts in which it becomes relevant, certain discriminations need to be made.

Where *adultery* (civil or criminal) or *incest* is charged, the use of the evidence in question is to show a desire at the time charged, as indicating an act of intercourse, and thus the evidence is predicated of *the one charged* with that act. This distinction might become important where the sexual desire was evidenced, not by actual intercourse, but by solicitation or familiarities, which might be predicable of one only of the parties.[1]

§ 401. **Same: Discriminations in regard to Seduction, Bastardy, and Breach of Promise.** Ordinarily, in seduction (whether an action by the parent or a criminal prosecution) and in bastardy, the act of intercourse being in dispute, the sexual desire at other times is offered as showing the probability of that act, and is predicated *of the man* charged with it; *i. e.* the use is the same as in the preceding subject, and is resorted to by the plaintiff or prosecutor. But in the statutory action (by the woman) or the criminal prosecution for seduction under promise of marriage, the prior willingness of the *woman* to have intercourse, as shown by acts, may be relevant *for the accused* to show the probability that she consented, on the occasion charged, without regard to any promise of marriage as an inducement.[1] The prior unchastity of the woman *with other persons*, as affecting her character and the parent's damages, raises a different question (dealt with *ante*, §§ 205, 210). So, too, the intercourse of the woman with third persons, in bastardy actions, as showing *another paternity* (*ante*, § 133), or as impeaching her *testimonial credit* (*post*, § 987).

In actions for *breach of promise of marriage*, the present principle is more or less frequently involved, in inferring from the state of affections at one time to its state at another.[2] From this distinguish the question (*post*, § 1770) whether the woman's expressions and conduct of assent, occurring subsequently to the time of the man's alleged offer, are admissible under the verbal-act rule.

fact. . . . There is no one act by which the moral status of the parties is more clearly defined"; see also the full discussion *ante*, § 216.

[1] For other adulteries of the wife to *mitigate damages* in *crim. con.*, see *ante*, § 211.

[1] 1876, People *v.* Clark, 33 Mich. 112, 116 (Marston, J.: "Where parties thus indulge their criminal desires, it shows a willingness upon her part that a person of chaste character could not be guilty of, and although a promise of marriage may have been made at each time as an inducement, it would be but a mere matter of form, and could not alone safely be relied upon to establish the fact that she would not have yielded had such a promise not been made"); 1876, Bowers *v.* State, 29 Oh. St. 542, 546 (same). But it seems also to admit occasionally of an opposite inference: 1897, Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386 (relations of the parties before the alleged promise, while the plaintiff was married to another, admitted, to show the probability of a promise).

[2] 1831, Honyman *v.* Campbell, 2 Dow. Ch. 265, 282 (conduct of courtship is some evidence of marriage); 1901, Hahn *v.* Bettingen, 84 Minn. 512, 88 N. W. 10 (prior attentions are admissible even while the defendant was married to another woman); 1840, Carskadden *v.* Poorman, 10 Watts 82, 85 (penalty for marrying a minor without the parent's assent; preceding favorable attitude of the father to the match, admitted to show probable consent); 1896, Osmun *v.* Winters, 30 Or. 177, 46 Pac. 780 (breach of promise; malicious letters after suit begun, admitted to show malice in breaking the promise).

§ 402. **Same: Discriminations in regard to Rape.** (1) (a) Ordinarily, the evidence offered is of the *woman's prior improper conduct* with the defendant, as showing an inclination on her part to consent to his embraces, and thus negativing an essential element in the crime charged. For this purpose, her submission to improper familiarities may be as significant as her allowance of actual intercourse.[1] (b) From this is to be distinguished the use of the *woman's prior friendly feelings* toward the defendant, as showing that he would more probably have attempted to obtain his purpose by persuasion than by force;[2] the inference here is really of a different sort (*ante*, § 389). (c) The fact of the woman's *friendly feelings after* the supposed rape is conduct in the nature of an inconsistency, and so far as it impeaches her testimony, is admissible (*post*, §§ 1040, 1134). (d) The woman's prior *intercourse with a third person* involves the question of character, and has been examined from that point of view (*ante*, § 200); over such evidence of character there has been more or less controversy; but over the evidence in (a), *supra*, there has been none.[3]

(2) (a) Former conduct *predicated of the man* may serve to show a passion, inclining him to attempt further gratification of his passion for this woman; though this use is seldom emphasized, where the conduct consists in voluntary intercourse, the use in (1) (a), *supra*, being the more important. But upon the same principle, former *indecent solicitations* by the man, or other conduct short of actual intercourse with the woman, tend similarly to show such a passion, and are receivable;[4] though they would not have been, from the point of view of (1) (a), *supra*. (b) The defendant's former *rape* or *attempt at rape* of the *same woman* may, like the voluntary intercourse in (2) (a), equally indicate a desire for this woman. But it may also be treated as evidencing a *plan* or *design* to obtain intercourse with her, or to throw light on the *intent* of a proved assault upon her (*ante*, § 357). (c) The defendant's former *rape* or attempt at rape of a *third person* cannot be treated as indicating a passion or desire for the woman in issue, *i. e.* cannot legitimately involve the present principle; either it indicates a lustful character generally and is thus inadmissible (*ante*, § 194), or it indicates a plan or intent to rape (*ante*, § 357).

(3) In *rape under the age of consent*, the woman's consent is immaterial; the charge is therefore practically one of fornication. The evidence may be dealt with from the point of view of adultery and fornication (*ante*, § 400), where the intercourse was in fact voluntary; or it may be dealt with from the point of view of rape, where it was in fact forcible.

[1] *E. g.*, Eng., Ala., N. C.

[2] *E. g.*, Mich., Vt.

[3] The following passage shows how the latter may be received, but not the former: 1876, Wheeler, J., in State *v.* Bridgman, 49 Vt. 212: "Evidence of like intercourse between them is admissible on an indictment [of him] for rape, and evidence of like acts of intercourse between her and other men is not, . . . not because it is in any wise more lawful for a man to commit rape upon a woman with whom he has had such intercourse, but because from the relations between them it is less likely that the intercourse was forcible."

[4] *E. g.*, N. H., Or., Wis.

§ 403. **Defamation: Other Utterances as evidencing Malice.** The state of feelings, with reference to malice, of one who has uttered a defamatory statement, may become important, under the substantive law, in two ways: (1) as involving an excess of a privilege otherwise existing; (2) as affording ground for aggravation of damages.[1] The early notion that malice was also important in a third way, namely, as an essential element for the plaintiff's cause of action, is now generally repudiated.

For the purpose of showing this malice at the time of uttering the defamation charged, other utterances of the defendant may be offered; and the question arises whether and on what terms they are admissible. The *nisi prius* rulings on this subject in England up to the middle of the 1800s fluctuated widely; and though the law was there clearly settled in 1851 by the House of Lords, the varieties of ruling in the previous period furnished no uniform guide for the earlier rulings in this country; so that the numerous different distinctions for which there had been in England some authority were all reproduced here and there with new detailed varieties, in one or another jurisdiction in this country. All these variations rested upon some supposed reason; and it is essential to examine these reasons, as affording the key to the wide difference of rules which is still found in our different jurisdictions, and even in the precedents of a single jurisdiction. There are thus to be considered, first, the considerations of Relevancy, and, secondly, the considerations of Auxiliary Policy (*ante*, § 43).[2]

§ 404. **Same: Principle of Relevancy.** The probative value of other utterances as showing malice at the time charged rests on a double argument: (*a*) that the other utterance indicates malice at that time of utterance; and (*b*) that malice then indicates malice at the time charged.

(*a*) That the other utterance may indicate malice at that time is clear, on the general principle (*ante*, § 394) that all conduct, including language, is one of the legitimate sources of inference to the feeling that inspires it:

1863, *Sanford*, J., in *Swift* v. *Dickerman*, 31 Conn. 285, 291: "It conduced to prove a fact from which a legitimate inference regarding the defendant's feelings and motives when he spoke the words now sued for might be fairly deduced. Every uncalled for utterance of a defamatory charge is more or less indicative of the speaker's malice at the time of speaking. . . . His malice *then* was probable in this suit only for the sake of the inference which it authorized regarding his mental feelings when he spoke the words now declared on."

What are the limitations, if any, that result from this principle?[1]

(1) *Expressions of hatred*, ill-will, anger, and the like, not in themselves defamatory, are plainly receivable, as all concede.[2]

(2) An utterance *in itself defamatory* may (not necessarily does) also evidence such feelings, as is generally conceded. The suggestion that such an utterance *when privileged* is not thus evidential[3] has not been generally accepted, and seems unsound.

[1] But this way is not recognized in New York.
[2] The precedents are collected *post*, § 406.
[1] The precedents are collected *post*, § 406.
[3] Parke, B., in Wright *v.* Woodgate, Eng., Denman, L. C. J., in Simpson *v.* Robinson, Eng.
[2] N. J.

(3) Whether an *unproved plea of justification* (*i. e.* of truth) has such evidential force is questionable. It is certainly a repetition of the defamatory utterance; and, though a *bona fide* attempt to prove it would dispose of any notion of its malice, yet a total failure to attempt to prove it, coupled with the deliberate retention of it upon the record, may well be taken as at least evidence of malice. The English law came finally to receive for this purpose an unproved and unwithdrawn plea;[4] but perhaps it is wiser to require some additional circumstance strengthening the indication of malice.[5]

(4) The *subject-matter* of the other utterances is in England not considered to be material;[6] for clearly a defamatory charge of a different tenor may equally evidence a feeling of ill-will or malice. In this country it is generally laid down (with varying phrases) that the other utterance must be upon the same subject.[7] Certainly it must be directed against the plaintiff,[8] or at least against a class of persons including him. But the limitations in the United States may be perhaps based on the doctrine of unfair surprise, to be referred to later.

(*b*) The second branch of the inference, that malice *then* indicates malice *at the time charged*, is merely another and legitimate application of the general principle already dealt with (*ante*, § 395). There can be and is no question as to the propriety of the argument:

1851, *Parke*, B., in *Barrett* v. *Long*, 3 H. L. C. 395, 414: "We are all of opinion that under such a plea the publication of previous libels on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question, merely affects the weight, not the admissibility, of the evidence."

1879, *Folger*, J., in *Daly* v. *Byrne*, 77 N. Y. 187: "It would tend to show malice to prove that libellous publications of the same nature were repeated from time to time after the first libel. Such articles, published after the commencement of the action, were not incompetent because of their essential nature, but because of a factitious and incidental consequence that might flow from the reception of them in evidence, to wit, that they might aggravate the damages, etc."

1885, *Berry*, J., *Gribble* v. *Press Co.*, 34 Minn. 345, 25 N. W. 710: "We take the rule to be so maintained, not arbitrarily or as a mere matter of precedent, but because it rests upon a common-sense judgment of human nature and a practical knowledge of its motives and its ways. The fact that a given libel has been preceded and followed by others of like tenor from the same source is one from which, as men are constituted, a legitimate inference may be drawn as to the *animus*, the spirit, with which the given libel was published. It has a fair tendency to show that the given libel was not published by acci-

[4] Simpson *v.* Robinson, Eng. *Accord:* Me., Md., Mass., N. Y. Rejected: Mich.

[5] As in Conn. and in the opinion of Mather, Sen., in King *v.* Root, N. Y.

[6] Wright *v.* Woodgate, Barrett *v.* Long, Hemmings *v.* Gasson, and others *passim*; *contra*, Finnerty *v.* Tipper, which would not be law.

[7] Cal., Conn., Mass., Minn., N. H., N. J., N. Y., Pa. (perhaps), S. C. (qualified), U. S., Vt., Va.

[8] Del., Mass.

dent or mistake, or even under a sudden impulse, or heedlessly, but by design and with a deliberate purpose to injure and persecute the person libelled."

(1) The *length of time* elapsing between the evidential utterance and that charged may of course affect the strength of the inference. The English Courts treat the lapse of time as never affecting the admissibility of the utterances;[9] but in this country a few Courts have sought to put some rational limitation to it.[10] The matter ought to be left entirely in the hands of the trial Court.

(2) That the evidential utterances occurred *subsequent* to that charged, and, in particular, after action or trial begun, is equally immaterial, from the point of view of probative value; but a limitation is here suggested by the ensuing considerations of Auxiliary Policy.

Thus the limitations that result from the point of view of Relevancy are merely: That (perhaps) an unproved and unwithdrawn plea of truth is not receivable; that (in this country) the subject of the other utterances must be the same; and that (in this country, perhaps) the evidential utterance must not be too remote in time.

§ 405. **Same: Principle of Auxiliary Policy.** The real and substantial support of the attempt to exclude the present class of evidence has always been found in certain considerations of Auxiliary Policy (*ante*, § 43). These considerations have apparently at no time succeeded in effecting a total exclusion of the evidence; for it has in no jurisdiction and by no judge been excluded (it would seem) absolutely. But they have resulted in various proposed limitations upon its use, — limitations intended to obviate the supposed evil of one or the other of these objections. The amusing yet confusing feature of their application has been that exactly opposite conclusions have been occasionally deduced from the same reason, so that if all the deductions were sound, the law would be in a paradoxical and unmanageable state. It will be necessary to note the various distinctions, and also to attempt to indicate the condition of the law in each jurisdiction upon each point; the latter effort necessarily assuming (what experience sadly teaches us is not always the fact) that the latest ruling represents the law of to-day.

(*a*) The first and chief argument is that other utterances, if allowed to go to the jury to show malice, will probably be used by them *improperly for awarding additional damages;* so that the plaintiff will obtain double damages, either for utterances already outlawed or already recovered for, or for utterances for which he may still sue and be paid as independent causes of action:[1]

1844, *Bronson*, J., in *Root* v. *Lowndes*, 6 Hill 518, 519: "The plaintiff will be allowed to recover damages for an injury when the recovery will not be a bar to another action for the same cause. I know it is said that the judge must tell the jury not to give damages for the words which are not laid in the declaration. But suppose he does give that instruction; everybody knows that it will have little or no effect. However honestly the

[9] Barrett v. Long, Eng.

[10] Mass., N. H. (the better phrasing).

[1] See this argument also in Defries v. Davis, Symmons v. Blake, Eng.

jury may intend to follow the guidance of the Court, it requires but a moderate acquaintance with the operations of the human mind to see that they will be misled by the introduction of such evidence. If, after proving the words laid imputing larceny, the plaintiff is allowed to prove other words imputing robbery or murder, it is past doubt that the latter words, whatever the judge may say to the contrary, will influence the jury in fixing the quantum of damage. . . . To tell the jury at one moment that the evidence is proper, and at the next that they must disregard it, involves a contradiction; and if the jury is composed of sensible men, they will either think lightly of the law or of those who administer it. But whatever they may think, they will give damages for the words not laid; and thus the defendant may suffer a double punishment for the same fault."

The answer to this argument is, first, that the jury can be cautioned not to apply the evidence improperly, a well-settled mode (*ante*, § 13) of dealing with evidence under the principle of multiple admissibility, and no more dangerous in this instance than in any other; and, secondly, that any attempt to carry out this objection logically will result either in a hopeless confusion of rules, or in mere unpractical refinements, or in the entire exclusion of useful and just evidence. The objection has been totally repudiated in England.[2]

(*b*) The other argument is that of *Unfair Surprise* and *Confusion of Issues* (*ante*, § 194; *post*, §§ 1849, 1904), which would exclude all utterances not charged in the declaration:

1844, *Bronson*, J., in *Root* v. *Lowndes*, 6 Hill 518: "When the plaintiff does not go beyond the words laid in the declaration, I see no reason why he may not show that those words have been spoken on a dozen different occasions [because the judgment bars all the instances of utterance and there is no surprise]. . . . But very different considerations arise when we come to actionable words which are not laid in the declaration. To admit the proof of such words must be a surprise upon the defendant. It cannot be supposed that he will be prepared to try a matter of which the plaintiff has not complained. That is not all. If the plaintiff may prove the words, the defendant may justify as to those words, and thus the Court and jury will be led off from the point in controversy as presented by the pleadings, into the trial of an indefinite number of collateral issues." [3]

The answer to this argument is that it does not apply to matters evidential of a state of mind of the defendant relevant to the issue (*ante*, § 305); that it applies in strictness to character evidence and a few other well-known types; and that otherwise it would exclude any piece of evidence of which an opponent had not been specifically warned. It was early discountenanced in England,[4] and seems to have received little support in this country. The limitations, where they exist, are deduced usually from the preceding objection. What then are these proposed and competing limitations?

(1) It has been suggested that other *actionable* utterances be excluded,[5] to obviate the first objection above. The answer is that if the jury is bent on disregarding the instructions of the judge, they are just as likely to add

[2] Plunkett v. Cobbett, Rustell v. McQuister, Barwell v. Adkins, Pearsoff v. Lemaitre, Barrett v. Long, pointing out the warning to the jury as the sufficient answer to the objection.

[3] See this argument also in Finnerty v. Tipper, Eng., Shock v. M'Chesney, Pa.

[4] Mead v. Daubigny.

[5] Cook v. Field, Mead v. Daubigny, Defries v. Davis, Eng.; perhaps also in U. S. Fed.

to the damages for a non-defamatory utterance of hatred as for a defamatory one. The distinction has long been discarded in England,[6] and has been expressly repudiated in many jurisdictions here.[7]

(2) It has been suggested that at least other *actionable* utterances *not already recovered for* be excluded.[8] The answer is the same, that a jury that will disregard the instructions for the one class of words will do so equally for the other. The distinction did not become law in England,[9] and has not been accepted anywhere in this country.

(3) It has been suggested that just the contrary distinction be adopted, *i. e.* by excluding other *actionable* utterances *already recovered for*.[10] This is equally logical with the preceding one, though absolutely inconsistent with it; it is no less unpractical, and has been nowhere accepted.

(4) It has been suggested, from the same point of view as in (2) above, that *actionable* utterances *not barred by limitation* (and thus still available for other actions) be excluded.[11] The answer is still the same, that a jury is just as likely or unlikely to reckon improper damages for outlawed utterances as for others; and the distinction has generally been repudiated.[12]

(5) It has been suggested that just the contrary distinction be adopted, namely, by excluding other *actionable* utterances *barred by limitation*.[13] The answer is the same; and such a limitation is generally repudiated.[14]

(6) It has been suggested that *subsequent* utterances — meaning, usually, utterances after *action* or *trial begun* — be excluded, chiefly for the first reason above, that they might be reckoned in the damages, although still available for another action;[15] the distinction being suggested by a confused notion that prior utterances would be barred by the present judgment. The latter notion is of course incorrect, for the judgment would bar only repetitions of the identical charge, if not only those set out in the declaration; and the former notion is unfounded, for the same reason as above, that a jury is just as likely to disregard instructions in the one case as in the other. The distinction seems to obtain in a few jurisdictions,[16] but has been generally repudiated.[17]

(7) It has been suggested that other *actionable* utterances be excluded

[6] Buller, Scott *v.* Lord Oxford, Delegall *v.* Highley, Pearson *v.* Lemaitre, Barrett *v.* Long.

[7] Ala., Ind., Ia., Ky., N. H., N. J., N. C., Oh., Pa.; and of course where the broader limitations next mentioned are accepted, the present distinction is by implication abandoned.

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

[9] Barrett *v.* Long, and other cases *supra*.

[10] *I. e.* because they have been once paid for; advanced but repudiated in Conn.

[11] N. Y.

[12] Ala., Me., N. H., N. J., Oh., Pa., S. C., Va.

[13] Apparently no ruling has accepted this distinction.

[14] Barrett *v.* Long, Eng.; in this country, Ala., Ind., Me., N. H., N. J., N. Y., Oh., Pa., S. C., Va.

[15] Finnerty *v.* Tipper, Stuart *v.* Lovell, Pearce *v.* Ornsby, Eng.

[16] In this country, in Conn., N. Y., Tenn.; Folger, J., in Daly *v.* Byrne, 77 N. Y. 187: "[Libellous articles] published after the commencement of the action . . . [are excluded] because they might aggravate the damages found by the jury in this action while they also in themselves gave to the plaintiff the right to another action in which he might get damages again by reason of the publication of them."

[17] Rust[illegible] *v.* McQuister, McLeod *v.* Wakley, Chubb *v.* [illegible]estley, Defries *v.* Davis, Boyd *v.* Douglas, Barwell *v.* Adkins, Hemmings *v.* Gasson (qualified), Eng.; in this country, Ala., Ind., Ia., Ky., Me., Mass., Mich., N. H., N. J., N. C., Oh., Pa., S. C., Vt., Va., Wis.

entirely, *except* where the utterance charged is *equivocal* as to the feeling inspiring it,[18] — the apparent reason involving both of the above arguments, regarded as demanding exclusion except where there is absolute necessity. The distinction is plausible, but in practice would seldom exclude anything; and it is rarely advanced.[19]

The net result, then, of the arguments based on auxiliary policy is that on principle no limitations can be deduced from them, and that, except here and there, the various jurisdictions concur in repudiating all the suggested limitations.

§ 406. **Same: State of the Law in the Various Jurisdictions.** The precedents exhibit a variety of rules, involving the preceding distinctions, in the different jurisdictions. Few Courts have passed upon all of the suggested points.[1]

[18] Stuart *v.* Lovell, Pearce *v.* Ornsby, Eng.; in this country, Ind., N. Y.

[19] Barrett *v.* Long, Eng., practically repudiates it; so also Oh., after originally accepting it.

[1] *England:* 1767, Buller, Nisi Prius, 7 ("After he has proved the words as laid, he may give evidence of other expressions made use of by the defendant, as proof of his ill-will towards him. . . . After verdict for the plaintiff and damages intire, where some of the words are not actionable, . . . if the words be in one count, the Court will intend that such as are not actionable were added only to show the malice of the party and that the damages were given for what were actionable"); 1785, Cook *v.* Field, 3 Esp. 133, Kenyon, L. C. J. (other utterances admitted, so far as not actionable in themselves, to show malice); 1791, Charlton *v.* Barret, Peake N. P. 22, Kenyon, L. C. J. (the same words at different times, admitted to show malice); 1792, Mead *v.* Daubigny, ib. 125 (other words admitted; objected to because of the surprise to the defendant; objection overruled, per Kenyon, L. C. J., because "the plaintiff may give evidence of *any* words used by the defendant, to show the spirit and temper by which he was actuated"; yet the evidence was limited to non-actionable words); 1793, Lee *v.* Huson, ib. 166, Kenyon, L. C. J. (other libellous writings admitted; objected to on the damages-ground); 1804, Plunkett *v.* Cobbett, 5 Esp. 136, Ellenborough, L. C. J. (another sale of the same libel to show absence of mistake; the jury being told not to reckon it in the damages); 1807, Rustell *v.* Macquister, 1 Camp. 49, Ellenborough, L. C. J. (other slanders spoken afterwards; objected to because the jury might consider them in the damages; objection overruled, because the jury could be instructed not to do so); 1808, Scott *v.* Lord Oxford, Peake N. P. 127, note, Lawrence, J. (other actionable words, admitted to increase damages); 1808, Tate *v.* Humphrey, 1 Camp. 73, note, Graham, B. (action for perjury; the false charge in another form, admitted to show malice; affirmed by the Judges); 1809, Finnerty *v.* Tipper, ib. 72, Mansfield, C. J. (other libels from subsequent numbers of the same journal, rejected; partly because of surprise, partly because they did not "so far refer to the subject of the declaration" as to be useful; yet the former precedents, so far as cited, were approved); 1817, Stuart *v.* Lovell, 2 Stark. 93, Ellenborough, L. C. J. (subsequent libels, held inadmissible, because the *animus* was not equivocal and they would merely serve to enhance the damages); 1828, Macleod *v.* Wakley, 3 C. & P. 311 (another libel only two days before the trial, admitted; Tenterden, L. C. J.: "However late anything takes place, it may be evidence of a previous intention as to a previous fact"); 1834, Chubb *v.* Westley, 6 id. 436, Park, J. (subsequent articles attacking the plaintiff, admitted to show the *animus*); 1835, Defries *v.* Davis, 7 id. 112, Tindal, C. J. (subsequent utterances of the same slander, but not of any other actionable words, admitted; "it has been a very usual course of late to restrict the evidence in that way; and there is good sense in so doing, as the jury ought not to mix up the words in question with other words in considering the amount of damages"); 1835, Pearce *v.* Ornsby, 1 Moo. & Rob. 455 (repetition of the slander after action begun; rejected by Abinger, L. C. B., because improperly tending to aggravate the damages, and because no equivocal phrase needed explanation); 1835, Symmons *v.* Blake, ib. 477 (other slanders to the same effect, rejected by Patteson, J., on the same grounds; "the damages in this cause may be increased by those words, and yet this record be no evidence in a subsequent action which may be founded upon them"; hence, other slanders are admissible for which damages have already been recovered); 1835, Wright *v.* Woodgate, 2 C. M. & R. 578, Parke, B. ("conduct or expressions of the defendant showing that he was actuated by a motive of personal ill-will are admissible"); 1836, Bond *v.* Douglas, 7 C. & P. 627, Abinger, L. C. B. (other libels published of the plaintiff on the same subject within a few days afterwards, admitted, "to show the animus"); 1836, Tarpley *v.* Blabey, 2 Bing. N. C. 437 (preceding libels on the plaintiff admitted to show animus); 1837, Delegall *v.* Highley, 8 C. & P. 444, 449, Tindal, C. J. (procuring another publication of the libel, admitted to show malice, though in itself action-

able); 1838, Park, J., in Webb *v.* Smith, 4 Bing. N. C. 379 (admitting "other libels and slanders proceeding from the same defendant"); 1840, Barwell *v.* Adkins, 1 M. & Gr. 807, C. P. (a subsequent repetition of the charge, admitted to show malice in the original charge; the judge's instructions being sufficient to guard against giving damages for the repetition); 1843, Pearson *v.* Lemaitre, 5 id. 700, 719, C. P. (repetitions of the libel admitted; Tindal, C. J., noting that "it may be difficult to reconcile all the *nisi prius* cases": "This appears to be the correct rule, viz., that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it; . . . and that evidence tending to prove it cannot be excluded simply because it may disclose another and a different cause of action"); 1848, Simpson *v.* Robinson, 12 Q. B. 511 (Denman, L. C. J.: "Acts although subsequent might indicate the existence of motives at a former time; . . . and every other part of his conduct showing the same disposition may equally be laid before the jury, — refusing to make reparation for unjustifiable slander may have that effect"; here the act was the "putting a justification on record which he does not attempt to prove and will not abandon"; approving of Warwick *v.* Foulkes, 12 M. & W. 507 (1848), where a plea repeating the charge in justification was not attempted to be proved, and where Parke, B., said, "Surely the plaintiff has a right to give evidence to show that the charge was not one lightly made and soon abandoned, but that it was seriously made, and persevered in to the last moment"; but disapproving that case so far as it seemed to allow the repetition to be used for increasing damages or for anything but inferring malice; also in effect overruling Wilson *v.* Robinson, 7 Q. B. 68 (1845), where the repetition was in an abandoned plea, so far as the Court there, including Lord Denman himself, while repudiating the use of the evidence merely to increase damages, seemed to ignore its use to show malice); 1845, Long *v.* Barrett, 7 Ir. L. R. 439 (other libels published in the same newspaper, more than six years before, received to show malice, the jury being warned to consider them for that purpose only); 1851, Barrett *v.* Long, 3 H. L. C. 395, 401, 407, 414 (statutory plea denying actual malice; previous publications by the defendant of the plaintiff, in the same journal, extending over 10 years, admitted; quoted *supra*); 1852, Camfield *v.* Bird, 3 C. & K. 56, Jervis, C. J. (other slanderous words, at a time not specified, admitted to show animus); 1858, Hemmings *v.* Gasson, E. B. & E. 346 (the fact that the defendant, six months after the utterance of a libel, charging a breaking and entering, had publicly charged the plaintiff with dishonoring bills and had called him a rascal, was offered to show malice, but rejected; Campbell, L. C. J.: "We do not say the evidence was inadmissible. . . . But we think that the learned judge should have pointed out more distinctly to the jury the length of time between the writing of the letter charged in the declaration and the subsequent expressions sought to be put in evidence"); *Can.:* 1838, Rankine *v.* Clarke, Ber. N. Br. 303 (affidavit in a criminal case still pending, excluded); 1859, Tobin *v.* Shea, 3 Morris Newf. 257 (subsequent libels, admitted); *Ala.:* 1845, Teague *v.* Williams, 7 Ala. 844 (repetition admissible, whether actionable or not, whether barred by statute or after suit begun; the jury not to consider it in giving damages); 1849, Scott *v.* McKinnish, 15 id. 666 (same); 1873, Sonneborn *v.* Bernstein, 49 id. 168, 170 (repetition after suit begun, admitted; no precedents cited); 1902, Riley *v.* State, 132 Id. 13, 31 So. 731 (repetition subsequent to the time of the indictment, held admissible); *Cal.:* 1875, Chamberlin *v.* Vance, 51 Cal. 75, 84 (similar utterances after action begun, admitted); 1888, Stern *v.* Loewenthal, 77 id. 340, 19 Pac. 579 (statements "at a different time," uttering a charge "of a different nature," excluded); 1892, Harris *v.* Zanone, 93 id. 59, 28 Pac. 845 ("other utterances of words of similar import," admissible); 1898, Westerfield *v.* Scripps, 119 id. 607, 51 Pac. 958 (repetition, or charge of similar import, receivable; plea of truth, without attempt to establish it, receivable); 1898, Hearne *v.* De Young, ih. 670, 52 Pac. 150 (repetition after suit begun, admissible); *Conn.:* 1786, Holmes *v.* Brown, Kirby 151 (other utterances after suit begun, excluded); 1837, Mix *v.* Woodward, 12 Conn. 262, 287, 292 (other utterances, but only of the same libel, admissible, the jury not to give damages for them; the dissent of Waite, J., at 288, did not affect this point); 1839, Flint *v.* Clark, 13 id. 361, 366 (same point); 1847, Williams *v.* Miner, 18 id. 464, 472 (same); 1863, Swift *v.* Dickerman, 31 id. 285, 290 (same; admissible though already recovered for); 1872, State *v.* Riggs, 39 id. 498, 501 (same as Williams *v.* Miner); 1879, Ward *v.* Dick, 47 id. 300, 304 (same; unproved plea of truth not admissible unless maliciously pleaded); *Del.:* 1854, State *v.* Jeambell, 5 Harringt. 475, 479 (other defamatory utterances, against the same person, prior to the one charged, admitted, but no others); *Ga.:* 1857, Adkins *v.* Williams, 23 Ga. 222 (prior utterances, admitted); 1897, Craven *v.* Walker, 101 Id. 845, 29 S. E. 152 (repetition after suit brought, admissible); *Ill.:* 1854, Sloan *v.* Petrie, 15 Ill. 425 (like the next case); 1866, Harrison *v.* Shook, 41 id. 141 (plea of justification not filed in good faith may evidence malice; the jury to decide upon good faith); Rev. St. 1874, c. 126, § 3 ("An unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury on the whole case find that such defence was made with malicious intent"); 1875, Hawver *v.* Hawver, 78 Ill. 412 (statute applied, construing an instruction); *Ind.:* 1831, Scott *v.* Mortsinger, 2 Blackf. 454, 457 (other words admitted, whether actionable or not, and whether after suit begun or not, under the general issue); 1834, M'Glemery *v.* Keller, 3 id. 489 (same; the sole use being to show malice); 1836,

Throgmorton *v.* Davis, 4 Id. 176 (words barred by statute, admissible); 1842, Burke *v.* Miller, 6 id. 155 (admissibility of other words implied); 1843, McIntire *v.* Young, ib. 498 (words since action begun, admitted; but admissibility said to be limited to cases where the malicious intent of the defendant is in doubt); 1844, Schoonover *v.* Rowa, 7 id. 202 (admissible to show malice only); 1846, Forbes *v.* Myers, 8 id. 74 (same); 1846, Teagle *v.* Deboy, ib. 136 (like Burka *v.* Miller); 1847, Lauter *v.* McEwen, ib. 496 (admissible, if the intent is equivocal, to show malice only); 1848, Burson *v.* Edwards, 1 Ind. 164 (like Forbes *v.* Myers); 1852, Hesler *v.* Degant, 3 id. 504 (words since suit begun, admitted to show malice only); 1854, Vincent *v.* Dixon, 5 Id. 270 (rejected, because used in aggravation of damages); 1873, Meyar *v.* Bohlfing, 44 id. 239 (same); 1876, Downey *v.* Dillon, 52 id. 442, 450 (admitting defendant's former good feelings, but not for an unreasonable time previous; here conduct "always" exhibited was rejected); *Ia.:* 1864, Beardsley *v.* Bridgman, 17 Ia. 292 (words uttered after suit begun, admissible to show malice, subject to a caution to the jury); 1868, Schrimper *v.* Heilman, 24 id. 505, *semble* (words uttered after suit begun, admitted); 1874, Ellis *v.* Lindley, 38 id. 461 (repetition admissible to show malice only); 1877, Prime *v.* Eastwood, 45 id. 640, 642 (repetition admitted); 1887, Hannars *v.* McClelland, 74 id. 320, 87 N. W. 389 (obscure); Code 1897, § 3593 ("an unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury on the whole case finds that such defence was made with malicious intent"); 1902, Zurawski *v.* Reichmann, 116 Ia. 388, 90 N. W. 69 (assault by defendant on plaintiff, shortly afterwards, held admissible); 1902, Cushing *v.* Hederman, 117 id. 637, 91 N. W. 940 (utterance of similar words to another person, admitted); *Ky.:* 1822, Eccles *v.* Shackelford, 1 Litt. 36 (*semble*, only words not actionable are admissible); 1837, Allensworth *v.* Coleman, 5 Dana 315 (obscure); 1859, Letton *v.* Young, 2 Metc. 561 (admitting any language showing ill-will, actionable or not, after suit begun or not; the jury to be cautioned against including them in the damages); 1880, Campbell *v.* Bannister, 79 Ky. 208 (preceding case approved); 1901, Alcorn *v.* Powell, 22 id. 1353, 60 S. W. 520 (other similar utterances admitted); *La.:* 1828, Kendrick *v.* Kemp, 6 Mart. N. S. La. 500 (other words uttered within one year before suit begun, admitted); *Me.:* 1839, Smith *v.* Wyman, 16 Me. 13 (repetition admitted, though after action begun; unproved plea of truth, admissible); 1851, White *v.* Sayward, 33 id. 322 (subsequent utterances admitted); 1853, True *v.* Plumley, 36 id. 466, 478 (repetitions since suit begun, admitted); 1878, Harmon *v.* Harmon, 61 id. 233 (utterance of the same charge at a time barred by statute, admitted); 1893, Conant *v.* Leslie, 85 id. 257, 27 Atl. 147 (utterance of the same charge, before or after, but not of a different charge, admissible); *Md.:* 1827, Duvall *v.* Griffith, 2 H. & G. 30 (another slander, admissible); 1834, Rigden *v.* Wolcott, 6 G. & J. 413, 419, *semble* (unproved plea of truth, admissible); 1902, Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500 (other words actionable and forming the subject of a pending action, excluded); *Mass.:* 1818, Jackson *v.* Stetson, 15 Mass. 48 (unproved plea of truth, admissible); 1825, Bodwell *v.* Swan, 3 Pick. 376 (other utterances admissible, provided they involve the same charge; utterances since action begun, admissible); St. 1826, c. 107, § 2 (plea of justification if unproved shall not "of itself be proof of the malice," but the jury "shall decide upon the whole case" whether it was pleaded with malicious intent); 1827, Hix *v.* Drury, 5 Pick. 296, 302 (the statute refers only to a plea of truth pleaded with a general issue as permitted by the statute; and not to a sole plea of truth); Mass. Rev. St. 1836, c. 100, § 19, Pub. St. 1882, c. 167, § 79 (plea of truth, "though not maintained by the evidence," is not "of itself" to be proof of malice); 1846, Goodrich *v.* Stone, 11 Pick. 486, 491 (repetition after action begun, admissible); 1848, Watson *v.* Moore, 2 Cush. 137 (other utterances admissible, if involving the same charge; the mere filing of a complaint in Court, no avidence); 1856, Baldwin *v.* Sonle, 6 Gray 321 (repetition of the charge, admissible); 1866, Markham *v.* Russell, 12 All. 574 (prior and subsequent utterances of the same charge, admissible, though no damages could be awarded for them); 1869, Robbins *v.* Fletcher, 101 Mass. 116 (feeling of the defendant against a third person included in the alleged slander, admitted, as tending to prove its utterance; repetition of the slander, admissible to show malice); 1875, Clark *v.* Brown, 116 id. 508 (repetition admissible, but the jury should be cautioned not to increase the damages therefor); 1884, Com. *v.* Damon, 136 id. 449 (other utterances admissible if "of such a nature as to indicate a persistent disposition of hatred or ill-will towards him, or if they appear to be a part of a settled purpose to bring him into public hatred, contempt, or ridicule, and are sufficiently near in time to afford a natural inference that the same state of mind existed when the publication complained of was made"); 1888, Sullivan *v.* O'Leary, 146 id. 322, 15 N. E. 775 (that the defendant had slandered other persons a few years before, excluded); *Mich.:* Comp. L. 1857, § 4548, Comp. L. 1897, § 10415 ("If the defendant in any action for slander or for publishing a libel shall give notice in his justification that the words spoken or published were true, such notice, though not maintained by the evidence, shall not in any case be of itself proof of the malice charged in the declaration"); 1868, Detroit Post Co. *v.* McArthur, 16 Mich. 446, 454 ("frequent recurrence of similar libels," admissible to show "recklessness" supporting exemplary damages); 1877, Scripps *v.* Reilly, 35 id. 371, 384, 393 ("the recurrence of similar libels," apparently held admissible to show such reckless conduct of the defendant's newspaper as would justify punitory damages); s. c. 38 id. 10 (similar evidence held inadmissible; these two opinions are not clear, except in that they take a too liberal attitude towards the publishers of libel); 1877, Proctor *v.* Houghtaling, 37 id. 41, 45 (failure to prove a plea of truth, not admissible);

1893, Randall *v.* News Ass'n, 97 id. 136, 145, 56 N. W. 361 (another charge of same sort, admitted); 1894, Thibault *v.* Sessions, 101 id. 279, 286, 59 N. W. 624 (subsequent publications on the same subject, after suit begun, admitted); 1896, Botsford *v.* Chase, 108 id. 432, 66 N. W. 325 (former utterances, admissible); 1899, Jastrzemboki *v.* Marxhousen, 120 id. 677, 79 N. W. 935 (under the statute, an unsustained plea may still be considered as evidence of malice, though not alone sufficient); *Minn.:* 1885, Reitan *v.* Goebel, 33 Minn. 151, 22 N. W. 291 ("other slanderous words of similar import, and so connected with them as to amount to a continuance of the same slander," at least if before suit begun, admissible); 1885, Gribble *v.* Press Co., 34 id. 342, 25 N. W. 710 ("other publications . . . containing substantially the same imputation as that sued upon, whether made before or after the latter, or after suit brought," admissible only to show malice, and thus give ground for exemplary damages; here an utterance six years before was admitted); 1886, Larrabee *v.* Tribune Co., 36 id. 141, 142, 30 N. W. 462 (approving the preceding case; the utterances need not be repetitions, if they "refer to the same matter and make substantially the same imputation"); 1895, Frederickson *v.* Johnson, 60 id. 337, 62 N. W. 388 (prior utterances of the same import, admissible); 1902, Jacobs *v.* Cater, 87 id. 448, 92 N. W. 397 (words not actionable *per se* nor imputing the same charge, held inadmissible); *Nebr.:* 1903, Bee Pub. Co. *v.* Shields, — Nebr. —, 94 N. W. 1029 (subsequent similar utterances, admitted); *N. H.:* 1827, Mason *v.* Mason, 4 N. H. 114, *semble* (repetition admissible); 1839, Chesley *v.* Chesley, 10 id. 337 (repetition admissible, even of actionable utterances); 1855, Symonds *v.* Carter, 32 id. 458 ((1) the other words may have been spoken at any time, "provided they were spoken so near the time of the actionable words or were otherwise so connected with them as to have a legitimate bearing upon the disposition of the defendant's mind at the time of uttering the slander complained of"; (2) they may be actionable words, though *semble* the judge should instruct the jury not to give damages for them; but (3), *semble*, they must be concerned with the same subject-matter); *N. J.:* 1836, Bartow *v.* Brands, 15 N. J. L. 248 (other words admissible to show malice); 1838, Dayton, J., in State *v.* Robinson, 16 id. 514 (other defamatory words, "if referring to those charged," admissible); 1843, Schenck *v.* Schenck, 20 id. 208 (other libels admitted, so far as they relate to the same charge, and even though uttered after suit begun); 1882, Evening Journal Ass'n *v.* McDermott, 44 id. 430 (previous or subsequent libels admissible, whether barred by limitation or not; the jury to be cautioned against giving damages for them; but a privileged repetition is inadmissible); 1888, Fahr *v.* Hayes, 50 id. 275, 281, 13 Atl. 261 (approving the preceding case); *N. Y.:* 1810, Thomas *v.* Croswell, 7 Johns. 264, 270 (utterances, not libellous, against the plaintiff since action begun, admitted; *semble*, that libellous utterances would not be admissible, because the damages might be improperly increased); 1826, Matson *v.* Buck, 5 Cow. 499 (like the next case); 1827, Root *v.* King, 7 id. 613, 633 (an unproved plea, not withdrawn by an affidavit of falsity, admissible); 1828, King *v.* Root, 4 Wend. 140 (same case on appeal; doctrine below approved; but Mather, Sen., dissented at 150, with the distinction that the defendant must have so pleaded "knowing it to be false, or from a reckless disregard of consequences without having reasonable cause to suppose he could substantiate it"); 1832, Inman *v.* Foster, 8 id. 602 (solving the apparent doubt in Thomas *v.* Croswell, and holding that prior actionable utterances, but only those barred by limitation, could be used); 1838, Kennedy *v.* Gifford, 19 id. 297, 300 (confining the utterances to the subject of the original charge, and admitting a repetition after suit begun); 1844, Root *v.* Lowndes, 6 Hill 518 (the use of other utterances limited to the extent indicated by Thomas *v.* Croswell and Inman *v.* Foster, with regret that even that much had been conceded; see quotation *ante*, § 405; the whole use limited to proving malice in excess of privilege); 1846, Keenholts *v.* Becker, 3 Den. 346 (other utterances, not slanderous, before and after action brought, not admitted to show malice); C. C. P. 1848, § 165 ("whether he prove the justification or not, he may give in evidence the mitigating circumstances"); C. C. P. 1877, § 535 (substantially similar); 1849, Campbell *v.* Butts, 3 N. Y. 173, *semble* (action brought for words already used in a former action to show malice, but not then declared on; the practice in the former case impliedly approved); 1850, Fero *v.* Roscoe, 4 id. 165 (not treating it as a question of malice, but of damages, and admitting an unproved plea of truth, even if *bona fide* made); 1850, Howard *v.* Sexton, ib. 157, 161 (slander for charge of perjury; (1) charge at another time, of robbery, excluded; the other utterance must be of the same charge, since the malice to be proved is "not mere general ill-will, but malice in the special case set forth in the pleadings"; (2) such repetition allowed only to show malice in excess of privilege, following Root *v.* Lowndes, or to explain an ambiguous utterance); 1854, Bush *v.* Prosser, 11 id. 347, 356, 366 (statute noticed as changing the law for pleas of truth); 1863, Fry *v.* Bennett, 28 id. 324, 327 (affirming the first point of the preceding case, but apparently violating it in admitting different libels; *semble*, *contra* to the preceding case on the second point); 1870, Thorn *v.* Knapp, 42 id. 474 (repetition after trial begun, admissible; failure to prove plea of truth, admissible); 1870, Titus *v.* Sumner, 44 id. 266 (prior utterances of the same slander admissible, if barred by the statute; following Inman *v.* Fowler; *semble*, *contra* to Howard *v.* Sexton on the second point); 1872, Bassell *v.* Elmore, 48 id. 563, 566 (repetition of the same charge to time of trial, held admissible, without mentioning the limitations of the preceding and the following case); 1875, Frazier *v.* McCloskey, 60 id. 337 (repetition of the slander after action begun, excluded, because where the words may be the subject of another action, damages might thus be given twice for them); 1877, Distin *v.*

Rose, 69 id. 122, 127 (total failure to prove a plea of truth may be considered, if the plea was inserted wantonly or maliciously; but need not be so considered; "the Code has made this change in the law, . . . because it seems inconsruous to say that a failure to establish a justification may enhance the damages, and yet the facts proved under it may mitigate them"); 1879, Daly *v.* Byrne, 77 id. 187 (repetition after action begun, excluded; see quotation *ante*, § 404); 1892, Enos *v.* Enos, 135 Id. 609, 32 N. E. 123 (repetition of the same charge in other words, admitted); *N. C.:* 1829, Brittain *v.* Allen, 2 Dev. 120, 125 (repetition admissible, even after action begun; whether to be only repetitions, is not considered; the judge to instruct the jury not to give damages for them; "no regard ought to be paid to the old rule, that these words must be such as were not actionable, that rule having yielded to common sense"); 1831, s. c. 3 id. 167; 1859, Lucas *v.* Nichols, 7 Jones L. 32, *semble* (utterances after action begun, admissible, but damages not to be given for them); *Ohio:* 1832, Carter *v.* McDowell, Wright 100 (words since suit begun, not admissible, except to show the sense of the words charged); 1884, Seely *v.* Cole, ib. 681 (repetition admissible, *semble*); 1834, Flamingham *v.* Boucher, ib. 746 (words barred by the statute, admitted, but the jury cautioned to use them only to find malice); 1846, Fisher *v.* Patterson, 14 Oh. 418, 424 (other libels admissible only where the intent is doubtful); 1848, Stearns *v.* Cox, 17 id. 590 (preceding restrictions as to doubtfulness of intent and as to ambiguities, repudiated; other libels, after suit begun, or before the statute bar, actionable or not, held admissible, subject to a caution to the jury); 1855, Van Derveer *v.* Sutphin, 5 Oh. St. 293, 295 (same); 1871, Alpin *v.* Morton, 21 id. 536, 544 (approving the preceding cases); *Or.:* 1893, Upton *v.* Hume, 24 Or. 420, 436, 33 Pac. 81 (plea of truth, unproved, to be evidence of malice only when the circumstances indicate it; utterance of a distinct charge, not admissible); *Pa.:* 1799, Shock *v.* M'Cbesney, 2 Yeates 473 (charge of forgery; only "expressions of the same nature as those complained of" are admissible; "distinct slanders, charging the plaintiff with other distinct offences, should not be received in evidence, because the defendant cannot be prepared to meet them, and they form the subjects of other actions"); 1811, Wallis *v.* Mease, 3 Binn. 546, 550 (other and different words charging the plaintiff, admissible, whether actionable or not actionable, before or after suit begun, barred by the statute or not; but the jury are to be instructed not to give damages for them); 1816, Kean *v.* M'Laughlin, 2 S. & R. 469 (admitting the same words spoken since action begun; approving Wallis *v.* Mease); 1826, M'Almont *v.* M'Clelland, 14 id. 359, 361 (repetition after suit begun, admitted, because "not a new charge for which a new action could be brought"); 1857, Elliott *v.* Boyles, 31 Pa. 65, 68 (words showing malice, but not actionable, were admitted; no rule given nor authority cited); 1878, Barr *v.* Moore, 87 id. 385, 394 ("other articles of the same tenor and character," admitted); 1893, Com. *v.* Place, 153 Pa. 814, 318, 26 Atl. 620 (other libellous articles on the same subject, admitted to show malice); 1895, Selp *v.* Deshler, 170 id. 334, 32 Atl. 1032 (subsequent letters, admitted); 1899, Thompson *v.* M'Cready, 191 Pa. 82, 45 Atl. 78 ("testimony honestly given in a judicial proceeding of the circumstances connected with the utterances of slanderous words tending to mitigation" is not evidence of malice); *S. C.:* 1822, Miller *v.* Kerr, 2 McC. 286 (repetition after action begun, admitted; here malice is "the gist of the action," not merely affecting privileges or damages); 1836, Randall *v.* Holsenbake, 3 Hill S. C. 175 (repetition so long ago as to be barred, and previous to the words laid; the rule held to admit words not actionable, and other actionable words "relating to the same species of crime" either after action begun or previous to the period of limitations; to any broader rule they decline to "yield an unqualified assent"; 1846, Morgan *v.* Livingston, 2 Rich. 573, 585 ("anterior publications [outlawed by statute], as well as publications after suit brought" of the same charge, admissible); *Tenn.:* 1812, Howell *v.* Cheatham, Cooke 247 (repetition admissible, but not after action brought); 1847, Witherspoon *v.* Richmond, 8 Humph. 475 (repetition since suit begun, admitted as explaining the meaning of the original charge); 1871, Saunders *v.* Baxter, 6 Heisk. 369, 387 (prior expressions of hatred or ill-will, held admissible, but not subsequent ones, unless as explanatory of the former charge or containing an express admission of malicious intent at the former time); 1899, Russell *v.* Farrell, 102 Tenn. 248, 52 S. W. 147 (subsequent utterance excluded, unless it involves an explanation or an admission of the former one or of malice in the former one); *U. S.:* 1836, U. S. *v.* Crandell, 4 Cr. C. C. 683, 689, 692 (other uttered papers, admitted, "having relation to the libels charged" and not in themselves "substantive ground of prosecution"); 1901, Kansas City Star Co. *v.* Carlisle, 47 C. C. A. 884, 108 Fed. 344, 356, 362 (plea of justification, admissible if not made in good faith; Sanborn, J., diss. on the ground that the issue of good faith is an improper one); *Vt.:* 1870, Cavanaugh *v.* Noble, 42 Vt. 576 (utterances "of a similar character" admissible; here made just before suit begun); 1883, Knapp *v.* Fuller, 55 id. 311 (subsequent hostile utterance, admitted); *Va.:* 1839, Lincoln *v.* Chrisman, 8 Leigh 338, 342, 345 ("slanderous words of the same and like character," though barred by the statute, admitted); 1874, Hansbrough *v.* Stinnett, 25 Gratt. 495 ("like words antecedent or subsequent," admissible); *W. Va.:* 1902, Swindell *v.* Harper, 51 W. Va. 381, 41 S. E. 117 (similar utterances, before and after the utterance in issue, held admissible, if made before action begun); *Wis.:* 1886, Bradley *v.* Cramer, 66 Wis. 297, 302, 28 N. W. 372, *semble* (subsequent utterances, admissible; no rule laid down); 1898, Born *v.* Rosenow, 84 id. 620, 622, 54 N. W. 1089 (utterances over three years before, admitted).

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION.

TOPIC X: EVIDENCE TO PROVE IDENTITY.

CHAPTER XV.

§ 410. **Other Principles discriminated.** In evidencing that proposition commonly spoken of as Identity, there is apt to be a confusion in thought with two other processes which are really not germane.

(1) It is perhaps natural to apply the notion of Identity or Identification to the general process of proving an accused person guilty. He is said to be "identified" as the murderer or the thief; *i. e.* the whole process of proof and the whole mass of evidence is thought of as involving the "identity" of the accused and the guilty person. From this point of view, all distinctions between the various sorts of evidence heretofore analyzed are merged and become useless. That the accused planned the act, had a motive for the act, bore traces of the act, and so forth, are all merely "identifying" facts; because the real guilty person also must have planned, had a motive, bore traces, and the like. Such an indiscriminate confusion and merger of all sorts of probative elements would render close analysis impossible, and naturally excites suspicion of the propriety of the term "identification" as thus applied. In truth, there is no propriety in it. The very looseness of the term shows that, since the various sorts of evidence thus covered by it may be further analyzed and separated, there would remain no specific need for the term "identity" and no specific class of evidence to which it was distinctively appropriate. If this were the true meaning of the term, it might be discarded altogether as superfluous. The term does have a distinctive application; but this loose and indefinite usage just referred to may be once for all discarded as useless and misleading.

(2) In arguing from subsequent traces of an act to the doing of an act, the argument of Identity sometimes is necessarily involved and needs to be distinguished. Suppose, for example, to prove a murder, evidence is offered that a gun found three days later in the defendant's possession is exactly fitted by a bullet found in the body of the deceased. Here there are two inferences involved: (a) "Because the defendant possessed the gun when found later, therefore he probably possessed it at the time"; this inference is always open to doubt, since the defendant may have borrowed the gun since the killing,

or some third person may have surreptitiously placed the gun on his premises; (b) "Because the gun, thus possessed by the defendant at the time of the killing, fitted the bullet found in the body, therefore the defendant's gun must be the one that shot the deceased"; here the inference is open to doubt because the bullet may fit other guns, *i. e.* the fitting of the bullet is not a necessary mark of the identity of the gun that shot it. Now the first inference is an inference from subsequent traces to the former act of possession or use of the gun; no question of identity is involved. It is the second inference that involves the element of the identity. This is why much of the evidence herein termed Traces, as pointing back to an Act (*ante*, §§ 148–177), may incidentally involve a question of Identity. The distinction has been already explained (*ante*, § 151); and the precedents on that subject are not here to be dealt with.

§ 411. **General Principle of Identity-Evidence.** Identity may be thought of as a quality of a person or thing, — the quality of sameness with another person or thing. The essential assumption is that two persons or things are thought of as existing, and that the one is alleged, because of common features, to be the same as the other. The process of inference thus has two necessary elements: (1) it is a Concomitant one, in its logical scheme (*ante*, § 130); and (2) it operates by comparing common marks, found to exist in the two supposed separate objects of thought, with reference to the possibility of their being the same. It follows that its force depends on the *necessariness of the association between the mark and a single object.* Where a certain circumstance, feature, or mark, may commonly be found associated with a large number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity, because, on the general principle of Relevancy (*ante*, § 31), the other conceivable hypotheses are so numerous, *i. e.* the objects that possess that mark are numerous and therefore two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are *nil* or are comparatively small. Hence, in the process of identification of two supposed objects, by a common mark, the force of the inference depends on the *degree of necessariness of association of that mark with a single object.*

For simplicity's sake, the evidential circumstance may thus be spoken of as "*a* mark." But in practice it rarely occurs that the evidential mark is a *single* circumstance. The evidencing feature is usually a group of circumstances, which as a whole constitute a feature capable of being associated with a single object. Rarely can one circumstance alone be so inherently peculiar to a single object. It is by adding circumstance to circumstance that we obtain a composite feature or mark which as a whole cannot be supposed to be associated with more than a single object. The process of constructing an inference of identification thus consists usually in adding together a number of circumstances, each of which by itself might be a feature of many objects, but all of which together can conceivably coexist in a single

object only. Each additional circumstance reduces the chances of there being more than one object so associated. The process thus corresponds accurately to the general principle of Relevancy (described *ante*, §§ 31–33). It may be illustrated by the ordinary case of identification by name. Suppose there existed a parent named John Smith, whose heirs are sought; and there is also a claimant whose parent's name was John Smith. The name John Smith is associated with so many persons that the chances of two supposed persons of that name being different are too numerous to allow us to consider the common mark as having appreciable probative value. But these chances may be diminished by adding other common circumstances going to form the common mark. Add, for instance, another name-circumstance, — as that the name of each supposed person was John Barebones Bonaparte Smith; here the chances of there being two persons of that name, in any district however large, are instantly reduced to a minimum. Or, add a circumstance of locality, — for example, that each of the supposed persons lived in a particular village, or in a particular block of a certain street, or in a particular house; here, again, the chances are reduced in varying degrees in each instance. Or, add a circumstance of family, — for example, that each of the persons had seven sons and five daughters, or that each had a wife named Mary Elizabeth and three daughters named Flora, Delia, and Stella; here the chances are again reduced, in varying degrees, in proportion to the probable number of persons who would possess this composite mark. In every instance, the process depends upon the same principle, — the extent to which the common mark is capable of being associated, in human experience, with more than one object.

§ 412. **Test of Admissibility.** The only matter that is here of concern is the *admissibility* of circumstantial evidence of identification; and it will easily be seen that very few questions can arise from this point of view. The usual matter of dispute, when such evidence is offered, is whether it is sufficient to found a *presumption*, or, as a mass of evidence, to support a verdict; and in this aspect it raises an entirely different question (*post*, §§ 2490, 2494). So far as there can be any general principle of admissibility, it is perhaps to be stated as follows: A mark common to two supposed objects is receivable to show them to be identical whenever the mark does not in human experience occur with so many objects that the chances of the two supposed objects are too small to be appreciable. But it must be understood that this test applies to the total combination of circumstances offered as a mark, and not to any one circumstance going with others to make it up. The offer must be understood as embracing all the elements combined. On the whole, and in practice, it is seldom practicable and seldom attempted to pass upon the admissibility of identifying circumstances; it is better to wait until all the circumstances have been offered, and then to pass upon them from the point of view of a presumption or the sufficiency of evidence (*post*, § 2494). If the circumstance has no real probative value, no harm will be done; while if it has such value in combination with other facts, good evidence may be

excluded by passing upon it piecemeal; for it usually happens that the whole group of identifying circumstances cannot be put before the Court for a ruling at one point of time. It may be noted that in accordance with the general principle of *Explanation* (*ante*, § 34), the party denying the identity may show that there are numerous objects equally possessing the evidential mark offered, so as to show that the chances of the two supposed objects being the same are very small.[1] It may also be noted that a mark of identity may be *negative* as well as affirmative; *i.e.* where a certain circumstance would be necessarily associated with an object in issue, the lack of that feature in a particular object offered tends to show that it cannot be the object in issue,[2] — in analogy with the argument from essential inconsistency (*ante*, §§ 135, 158).

§ 413. **Circumstances Identifying a Person.** Rulings upon admissibility are for the foregoing reasons comparatively rare.[1] In the reports of celebrated trials are to be found innumerable instances of such evidence;[2] but it is not necessary here either to attempt to analyze the various types of facts or to collate the recorded instances in such trials. Common experience is a usually sufficient test of relevancy in cases of this sort. The precedents in which an express ruling has been called for have dealt with corporal marks,[3] voice,[4] mental peculiarities,[5] clothing,[6] weapons,[7] name,[8] residence, and other circumstances of personal history.[9] The usual question, however, has been

[1] 1859, Cooper *v.* Stete, 23 Tex. 343 (three sizes of shot being found both in the deceased's body and the defendant's gun, it was shown in explanation that mixed shot was in common use in the neighborhood).

[2] 1895, People *v.* Thiede, 11 Utah 241, 39 Pac. 837 (where the other man, alleged to have been the real murderer, must have been covered with blood, but was found not to be).

[1] For instances of identifying by Traces circumstantially, see *ante*, §§ 148–177, and by skill or capacity, *ante*, §§ 83, 220.

[2] For copious illustrations of the varied circumstances that may be employed to indicate identity, see Hubback, Evidence of Succession, Pt. II, ch. V. (reprinted in the "Law Library," Johnson, Phila., 1845).

[3] 1874, R. *v.* Castro (Tichborne Case), charge of Cockburn, C. J., II, 1 ff., 307 ff.; I, 670 ff., 718 ff. (tattoo-marks, etc.; but there were no express rulings); 1875, Com. *v.* Sturtivant, 117 Mass. 131, 139 (a blow having been inflicted by the left hand, the fact that the defendant is left handed is admissible).

[4] 1903, Patton *v.* State, — Ga. —, 43 S. E. 533; 1870, Com. *v.* Williams, 105 Mass. 67; 1866, State *v.* Shinborn, 46 N. H. 502. Compare the cases cited *ante*, § 222.

[5] 1850, Webster's Trial, Bemis' Rep. 89 (knowledge of anatomy, as shown in the mode of dissecting the deceased's body, admitted to identify the accused, a medical professor).

[6] 1881, Murdock *v.* State, 68 Ala. 569, 574 (correspondence of footprints, admitted); 1879, Jones *v.* State, 63 Ga. 395, 398, 401 (boot-tracks, etc., admitted); 1884 Story *v.* State, 99 Ind. 413 (clothing of the deceased).

[7] 1895, People *v.* Yee Fook Din, 106 Cal. 163, 39 Pac. 530 (possession of a weapon excluded, because the weapon was not shown to have been the one used); 1852, People *v.* Larned, 7 N. Y. 445 (that tools with which a bank was broken had come originally from the defendant's premises, 200 miles away, admitted); 1879, Dean's Case, 32 Gratt. 912, 923 (murder with a gun; "it was proved that upon the examination of a large number of guns within a radius of eight miles of the scene of the murder, none were found of the same bore or which would carry precisely the same ball [as that found in the deceased's body]; two or three only . . . [might have carried it,] but these two or three were accounted for and proved to be where it was impossible the murderer of Fugate could have used them").

[8] Cases cited *post*, § 2529.

[9] 1885 Lovat Peerage Case, L. R. 10 App. Cas. 763, 775 (statement of deceased members of a family, having no personal knowledge, as to a manslaughter by one of the ancestors, admitted as an identifying tradition, "a story adhering to that Alexander, but not as any evidence of the fact that a fiddler was ever killed by him or by anybody else"); 1876, Com. *v.* Costello, 120 Mass. 358, 369 (fictitious signature to an appeal bond; name, residence, etc., of the real signer admitted to indicate the fictitious nature of the signer); 1871, Ruloff *v.* People, 45 N. Y. 224 (that X was known to be with Y and that Y was in a certain place, relevant to show X there); 1875, American Life Ins. & T. Co. *v.* Rosenagle, 77 Pa. 515 (to show that the person whose birth-date was testified to by two persons was the same person referred to by each, the

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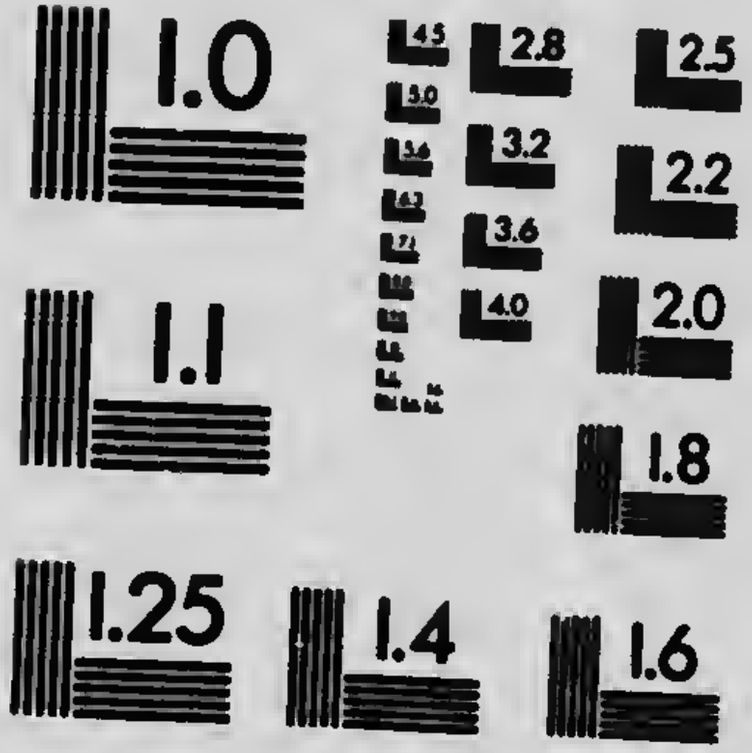

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whether some combination of these circumstances is sufficient to support a verdict or raise a presumption (*post*, § 2529). Additional illustrations may be found in rulings dealing primarily with other principles, — for example, with a person's subsequent belief or conduct as evidence of his past career (*ante*, § 270), with statements about facts of family history, as an exception to the hearsay rule (*post*, §§ 1487, 1488, 1501, 1791), and with specimens of spelling as indicating a person's authorship of a writing (*post*, § 2024). Distinguish the questions whether the opinion rule applies to testimony of identity (*post*, § 1977), whether a voice may be evidenced by instances of its utterance (*ante*, § 222), or identified by one who has heard it (*post*, § 660), and whether a person's identity is sufficiently evidenced by the witness' "belief" or "impression" (*post*, § 728).

§ 414. **Same: Criminality of Act, Immaterial.** It has already been seen (*ante*, § 218) that, where a circumstance is relevant for some purpose, the incidental revelation, in offering it, of other criminal conduct by a defendant is immaterial, and does not stand in the way of receiving the evidence. The principle finds application here as elsewhere.[1]

dates of birth of the five other children of the same parents were admitted; here the similarity of circumstances showed that the person referred to was a member of the family in question); 1896, Bryant's Estate, 176 id. 309 35 Atl. 571 (five different sets of claimants asserted the intestate to have been a member of their family, and the identity was ascertained by a careful collation of the facts true of the intestate and the various ancestors alleged).

[1] 1833, R. *v.* Fursey, 6 C. & P. 83, 3 St. Tr. N. s. 543, 551 (the kind of wound given to a third person by the accused, admitted to identify the weapon); 1836, R. *v.* Rooney, 7 C. & P. 517 (robbery of W., who was riding with U.; evidence of the finding of U.'s watch on the defendant admitted as identifying him as one of those taking part; "it makes no difference that Mr. U.'s watch is the subject of the next indictment"); 1868, Yarborough *v.* State, 41 Ala. 405, 407, (disputed identity; the theft of other property, admitted to identify); 1857, People *v.* Butler, 8 Cal. 435, 439 (a question as to the defendant's business, answered by a statement that he was a gambler, held proper, since it might be relevant to identify the defendant or to test the witness' knowledge of him); 1897, People *v.* Ebanks, 117 id. 652, 49 Pac. 1049 (murder on Sept. 10; doings of the defendant a few days before, with a pistol and a sack admitted to identify him); 1902, People *v.* Taylor, 136 id. 19, 69 Pac. 292 (a larceny, admitted to identify); 1874, State *v.* Folwell, 14 Kan. 105, 109 (larceny of a horse; to identify the defendants, one who saw the wagon-tracks was allowed to say that he knew them because the wagon was his); 1867, State *v.* Bartlett, 55 Me. 200, 214 (to show a witness' acquaintance with the defendant and ability to identify him, the witness was allowed to say that he was an officer in a State prison; whether he might properly have said that he saw the defendant there was not decided); 1875, Com. *v.* Sturtivant, 117 Mass. 123 (three persons found murdered in or about the same house; the fact was admitted that all were killed with the same weapon, at the same time); 1875, Foster *v.* State, 63 N. Y. 619 (burglary; the taking of another article at the same time, admitted to identify the source of goods found in the defendant's possession); 1880, Hope *v.* People, 83 id. 419, 423, 427 (robbery of the key of a bank from the cashier; at the time of the robbery of the key, all of the gang of robbers were masked; but upon a showing that the same gang subsequently robbed the bank, the fact was admitted of the defendant's participation in the latter robbery, to identify him); 1881, State *v.* Wintzingerode, 9 Or. 153, 157 (the identification of a gun used in the murder, and found in the defendant's possession, as one stolen from the deceased, admitted); 1900, State *v.* O'Donnell, 36 id. 222, 61 Pac. 892 (larceny; possession of other stolen property, not admitted on the facts); 1874, Brown *v.* Com., 76 Pa. 319, 321, 337 (murder of Annetta K., at her house; the fact was offered of the murder of her husband, Daniel K., at the same time, near the house, with the same weapon, and of the possession of money in the house by the husband and of other circumstances showing that the two murders were committed by the same person; admitted, because "when two persons are murdered at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or *res gestæ*, and tend to throw light on the motive and manner of the murder for which the prisoner is indicted," the second murder is admissible); 1881, Moyer *v.* Com., 98 id. 338, 349 (similar facts). See additional related instances cited *ante*, § 218 (inseparable acts).

§ 415. **Circumstances identifying a Chattel, Document, or other External Object.** The principle applies as well to objects of external nature (a place, book, document, or house) as to human beings. There is no room for the operation of the human will as affecting the validity of the inference, and hence there happens here to be no occasion for the discrimination, otherwise useful, between the second and third sub-titles of the present Title, *i. e.* evidence to prove a Human Quality or Condition, and evidence to prove a fact of External Nature. The recorded rulings deal with chattels of various sorts,[1] and with documents, written or printed.[2]

§ 416. **Utterances used to Identify Time or Place.** It often happens that a place or a time is marked significantly by an utterance there or then occurring, so that the identification of it may alone be made, or best be made, by permitting the various witnesses to mention the utterance as an identifying mark. The utterance, not being used as an assertion to prove any fact asserted therein, is not obnoxious to the Hearsay rule (as explained *post*, § 1791), and may therefore be proved like any other identifying mark:

1865, *Colt*, J., in *Earle* v. *Earle*, 11 All. 1 (the libellant in divorce had called Ellen G. whose testimony tended if unexplained to show that she saw Mrs. E. sitting in the lap of Mr. R. in Mrs. E.'s bedroom; Mr. R. testified that while Mrs. E. was ill in bed in her house Mr. R. on one occasion, at Mrs. R.'s request, took Mrs. E. in his lap to enable Mrs. R. to make the bed, and when Mrs. R. returned after a moment's absence he

[1] 1896, Buchanan *v.* State, 109 Ala. 7, 19 So. 410 (defendant was charged with larceny from S. of a mixed lot of furnishing goods, ranging from shoe-tacks to shirts; S. had bought from G., who carried a large stock; comparison by the jury of the goods found in defendant's house and the original stock was held improper; no reason given; an absurd ruling); 1896, Crane *v.* State, 111 Ala. 45, 20 So. 590 (similar to the preceding); 1872, Com. *v.* Brooks, 109 Mass. 354 (the finding of a watch-ring at a certain place, admitted as evidence that a watch-robbery had taken place there); 1883, Com. *v.* Collier, 134 id. 203, 205 (to identify a barrel of beer as coming from S., the label of S. on the barrel was admitted; compare § 150, *ante*); 1888, Com. *v.* Kendrick, 147 id. 444, 18 N. E. 230 (identity of sampled beer with that possessed by the defendant; evidence "fairly establishing" it in the trial Court's opinion, held sufficient); 1875, DeArmond *v.* Neasmith, 32 Mich. 232 (gentleness of a heifer); 1882, Keith *v.* Tilford, 12 Nebr. 276 (11 N. W. 315 (herd of cattle).

For other cases illustrating the principle for *stolen goods*, compare the citations *ante*, §§ 148–152, 218.

[2] 1684, Lady Ivy's Trial, 10 How. St. Tr. 555, 617, 640 (defendant's title-deed shown to be forged because it read, in the recital of date, "the 13th day of November, in the 2d and 3d years of the reigns of our sovereign lord and lady Philip and Mary by the grace of God king and queen of England, *Spain*, France, both Sicilies, Jerusalem, and Ireland, etc.," although the style of deeds until the next summer, when Philip acceded to the kingdom of Spain, was "king and queen of England, France, Naples, Jerusalem and Ireland, *princes of Spain and Sicily*"; this the Court calls "a natural, legal evidence, and a proper evidence in things of this nature to detect a forgery"); 1835, Johnson *v.* Morgan, 7 A. & E. 233 (libel by a song; to prove the contents of the particular song charged, the paper being lost, it was held sufficient evidence that 1,000 copies of a song had been printed by M., 300 of them put for sale with H., that the song charged had been bought of H., and that it corresponded with one produced which he longed to the 1,000 copies; Coleridge, J.: "There is no rule, respecting the proof of identity, peculiar to the case of a printed paper; the evidence may depend upon correspondence in size, appearance, and other circumstances"); 1900, Carte *v.* Dennis, 5 N. W. Terr. 32, 45 (infringement of copyright of an opera; a printed copy produced held sufficiently identified); 1849, Com. *v.* Miller, 3 Cush. 243, 251 (to show that three certain notes were forgeries, thirty others were admitted, as indicating by the identity of marks that they were formed from one pattern by tracing); 1881, Shelden *v.* Warner, 45 id. 640, 8 N. W. 529 (three similar kinds of ink in each of two documents, used to show an identity of source); 1813, Southwick *v.* Stevens, 10 John. 443, 446 (the source of a newspaper evidenced by the features of the type).

For other illustrations, see the rulings dealing with opinion testimony to the *ink*, *paper*, and other marks of documents (*post*, §§ 2024–2027), with the *production of the original* of a *newspaper* (*post*, §§ 1234, 1237), and the *authentication* of *printed matter* (*post*, §§ 440, 2150).

said to her that "Ellen had been in"; Mrs. R. testified to a similar effect; to the admission of the statement by Mr. R. to his wife an objection was made): "It was important, as the case stood, for the libellee to satisfy the jury that Mr. and Mrs. R. were testifying to the same occasion. . . . Any circumstance or act occurring at that transaction and remembered by both witnesses would show that they were testifying to the same occasion and would be clearly competent. So we are of opinion that the conversation of the parties or any declarations made at the time are to be regarded as of the nature of verbal acts, and admissible for the purpose of identifying the occasion of which the witnesses speak. Statements used for this limited purpose are admitted without regard to the truth of the fact stated. . . . There is no violation of the rule against hearsay evidence."

This principle is generally accepted; but it is to be understood that the utterance cannot be used as having any assertive value; and some Courts occasionally refuse to allow the specific tenor of the utterance to be stated, where a special danger exists of giving improper credit to it as a hearsay assertion.[1] From this use of identifying utterances by several witnesses testifying to a common time or place, distinguish the following superficially similar uses: (1) mentioning a third person's utterance as a reason for observing a particular fact (*post*, § 655); (2) mentioning it as a reason for recollecting a particular fact (*post*, § 730); (3) using one's own prior utterance of a fact to corroborate one's present testimony and repel the suggestion of recent contrivance (*post*, § 1130).

[1] The principle is illustrated in the following cases: 1846, R. *v.* Richardson, 2 Cox Cr. 361; Denman, L. C. J., and Alderson, B. (to show the date when a conversation with the accused about poison occurred, the witness was allowed to state a remark which he shortly afterwards made to C. about it, so that by calling C. the time could be fixed; but "of course it could only be used to fix the time of the prisoner's conduct"); 1887, Barrowe *v.* State, 80 Ga. 194, 5 S. E. 64 (a remark of D. served to mark the time after which a witness obtained certain knowledge); 1899, State *v.* Dunn, 109 Ia. 750, 80 N. W. 1068 (conversation admitted to fix a date); 1900, Stewart *v.* Anderson, 111 id. 229, 82 N. W. 770 (similar; left to the trial Court's discretion); 1865, Earle *v.* Earle, 11 All. 1 (see quotation *supra*); 1876, Com. *v.* Piper, 120 Mass. 187; 1877, Com. *v.* Sullivan, 123 id. 221 (to fix the time of a sale, the fact was admitted of A's testimony to it having been given at a certain time before a magistrate); 1878, Whitney *v.* Houghton, 125 id. 452 (the time of a sale was in issue; testimony as to the date of a conversation by the defendant in which he mentioned the sale was rejected; if the sale was proved, this seems unsound); 1883, People *v.* Mead, 50 Mich. 229, 15 N. W. 95 (note that in this Court some of the precedents in §§ 655, 730, *post*, where utterances fixing one's recollection or attention are held admissible, are used as though they fell under the present head); 1899, Agulino *v.* R. Co., 21 R. I. 263, 43 Atl. 63 (the fact of A calling B's attention to a circumstance, admitted to corroborate); 1861, Hill *v.* North, 34 Vt. 616 (time fixed by a remark); 1881, Weeks *v.* Lyndon, 54 Vt. 640, 647 (similar); 1895, State *v.* Young, 67 id. 450, 32 Atl. 252 (similar); 1898, Wilkins *v.* Metcalf, 71 id. 103, 41 Atl. 1035 (similar).

Sub-title III: EVIDENCE TO PROVE FACTS OF EXTERNAL INANIMATE NATURE (EVENTS, CONDITIONS, TENDENCIES, CAUSES, QUALITIES, AND EFFECTS, OF THINGS AND PLACES).

CHAPTER XVI.

INTRODUCTORY.

§ 430. **Distinction between this and the preceding Subjects.** In the classification of circumstantial evidence, as already observed (*ante*, § 43), there can be, at certain points, no sharp distinction between a Human Act, a Human Quality or Condition, and a Fact of External Inanimate Nature, with reference to evidencing them as propositions to be proved. Some matters, such as death, may sometimes be viewed in either the first or the second aspect; for other matters, such as the possession of land, it may not be easy to distinguish between the second and the third. The propositions which come to be proved before tribunals of justice embrace every sort of fact in life, and no classification not purely arbitrary can divide them for practical purposes into classes always absolutely distinct. All that can be done is to separate by themselves such *facta probanda* as are more or less related with reference to the mode of evidencing them and the considerations of probative value affecting the evidentiary facts. The grouping already set forth (*ante*, § 43) seems to find justifications in such natural considerations. That at the point where the lines of grouping are drawn some obscurity exists is a necessary defect of all such classifications, and does not affect their general validity. The inter-relation of the matters grouped under the first sub-title (evidence to prove a Human Act) has already been seen. Certain sorts of evidentiary facts — Character, Design, Habit, Motive — are specially appropriate and common in proving such matters, and the peculiar restrictions of our law upon the use of character have there constantly to be distinguished from the use of other sorts of related evidence, and make a combined consideration indispensable. The matters in the second sub-title (evidence to prove a Human Quality or Condition) are related with equal closeness. The use of specific instances of conduct, with its appurtenant dangers of unfair surprise, undue prejudice, and confusion of issues, is common to all. The prohibition of character-conduct has constantly to be distinguished from the use of other conduct; and the considerations of probative value and of auxiliary policy which are there applicable must be studied in comparison in order to appreciate their proper significance.

Coming now to the third and present group, we find its distinguishing feature to be the absence of the element of a human will and of the human emotion, reason, and character as affecting conduct. The evidencing of a human act from antecedent or subsequent human attributes, and the evidencing of a human quality or condition from human conduct, involve a class of experience as to the meaning of human attributes and human conduct which is peculiar and distinct. Where the thing to be proved and the evidence to prove it does not contain those elements, the considerations of Relevancy, affecting the inferences to be drawn, are necessarily different, and suggest naturally a distinct grouping for practical purposes. The considerations of Auxiliary Policy, where these human elements are lacking, have also a different force and bearing. Thus, for practical purposes, the

third grouping is broadly marked out by considerations essentially connected with the propositions to be proved and the evidence to prove them. While there may easily be doubt and difference of opinion as to the appropriate group for a few topics, the validity of the grouping as a whole is not thereby affected.

The warning must here be repeated (*ante*, § 43) that for the classification of any evidential question, as well as for the working out of its solution, the only safe and scientific and practical way is to ask perpetually two questions: 1. What is the exact proposition to be proved? 2. What is the evidentiary fact from which the inference is desired to be drawn? With these two data in hand — the abscissa and the coördinate, so to speak, of the problem — most places in the topography of the law of evidence ought easily to be found.

§ 431. **General Principles of Relevancy.** The general principles of Relevancy, or Probative Value, as already examined, here receive constant and copious illustration. Their application is in some ways more normal and more instructive, because less complicated by the varying considerations of Auxiliary Probative Policy (*ante*, § 42) which come into play where human conduct is concerned. The exposition of principles (*ante*, §§ 30–36) will serve as an introduction to the treatment of the ensuing precedents; but specific reference to the various principles is also made, as occasion requires, at the appropriate places.

§ 432. **Division of Topics.** The kinds of *facta probanda* may be subdivided, having regard to those propositions evidenced by more or less associated facts and inferences, into four categories or groups:

I. Identity (for example, whether a machine delivered was the same as the one agreed to be delivered);

II. Occurrence of an Event (for example, whether a tree fell, or whether lightning struck a house);

III. Existence, or Persistence, in Time (for example, whether a defect in a street or a house was in existence at the time in issue);

IV. Tendency, Capacity, Quality, Cause, or Effect (for example, whether a place in a sidewalk was dangerous, or whether a gunshot could carry a certain distance).

Here, again, no specific single terms can accurately distinguish the different groups, nor is it possible always to draw the lines sharply between the various groups. The practical justification for the grouping will be best appreciated in consulting the precedents. Under one or another of these heads seem to come all the evidential questions that concern external inanimate nature.

It has already been seen (*ante*, § 43) that, for the purpose of grouping evidential facts involving similar inferences, it is usually convenient to arrange them according as the inference is Prospectant, Concomitant, or Retrospectant, *i. e.* according as a view is taken forward in time from the evidentiary fact to the *factum probandum*, or concurrently at the two, or backward from the former to the latter. This distinction, which has been seen to be practically

useful in both the preceding groups of evidential material, is here equally useful in most of the topics.

§ 433. **Combination of Different Inferences.** A given evidentiary fact may and usually does involve (as already observable in dealing with the other materials) more than one of these processes of inference. For example, in proving a sidewalk-hole to be unsafe, the evidence may be that A fell there two weeks ago; this involves, first, an inference in the fourth group, namely, that the place was then unsafe, and, secondly, an inference in the third group, namely, that its unsafeness two weeks before evidences its unsafeness at the time in issue; and either of these inferences may be rejected as unsound, while the other remains sound. Again, to prove the identity of a bale of goods delivered, its features six months before may be offered; and this involves the soundness of two inferences, one of the first and one of the third sort. Again, the question being whether a tree was lying across a street on January 1, the evidentiary fact that the tree was struck by lightning on July 1 preceding involves two inferences, namely, that the tree fell when struck, and that its fallen condition continued till the time in question, *i. e.* an inference of the second and one of the third sorts. Again, to show that a dust-explosion occurred in a certain room, the evidentiary fact that a dust-explosion previously occurred in the same room involves two and perhaps three inferences, — first, that there is a tendency in a room thus circumstanced for the dust to explode spontaneously, secondly, that as a result of this tendency an explosion did occur, and perhaps (intervening between these two), thirdly, that the condition at the previous time continued up to the time in question, — inferences, respectively, of the fourth, the second, and the third sorts.

In spite, however, of this incidental resort to two or more of the kinds of inference in one piece of evidence, the kinds of inference, as types, remain distinct. They are governed by distinct considerations and must be studied separately. Without analyzing them and studying them separately, nothing but confusion results. It has already been seen, for instance (*ante*, § 192), that in offering to prove an immoral act for the purpose of showing the same person to have done an act charged, we cannot neglect to separate the process of thought into its two elements of inference, *i. e.* (1) A's immoral act indicates probably an immoral trait; (2) this trait indicates the doing of the act in question; for while in general both of these forms of argument are forbidden, yet the prohibition is a limited one only and rests on distinct grounds for each, and thus it may happen that the immoral act offered in the particular case does not come within the prohibition of (1), nor does the immoral trait evidenced by it come within the prohibition of (2) — as, where the intercourse of a rape-complainant with a third person is offered to show the probability of her consent. The same analysis and caution is here necessary in order to avoid being misled by the superficial nature of an evidentiary fact. It is easy to misuse a rule by ignoring the reasons for it.

Topic I: Identity.

§ 434. **Identity of one Object with Another.** The mode of inference used in proving identity is precisely the same for objects of inanimate nature and for human beings. The principle has been already examined (*ante*, §§ 411–416), and the precedents upon the present subject have been there considered; so that no further notice of the subject is necessary.

Topic II: Occurrence of an Event.

§ 435. **Scope of the Subject.** This term (the Occurrence of an Event) may serve as a generalization to cover all cases where a thing is thought of as coming into being or of producing a result, and includes therefore theoretically matters which might perhaps be conceived of also under the category of Existence. For example, if the *factum probandum* be the destruction of a house, it might ordinarily be conceived of either as an event — the momentary fact of destruction, — or as a condition of existence — the state of being destroyed.[1] For practical evidential purposes, however, the choice of terms is here not important. The distinction between the second and the third groups is the distinction between the mere fact of occurrence or existence as such, and the fact of occurrence or existence with reference to time. In the present group it is asked how to prove the fact of destruction or non-destruction; and, with reference to the evidentiary matters pointing forward as causes of its probable destruction or pointing backwards as effects or traces of its destruction, it is immaterial whether we regard "event" or "condition," "occurrence" or "existence," as the more appropriate term for this category. In the mass of instances the notion of the occurrence of an event is the more appropriate term; and that term (subject to an exception pointed out *post*, § 437) will be employed as the general one.

§ 436. **Occurrence of an Event, as evidenced from Cause or Effect.** An event may be evidenced circumstantially by a cause or by an effect. This mode of inference is available in the three forms already mentioned (*ante*, § 432), — Prospectant, Retrospectant, and Concomitant. For example, the sinking of a ship is evidenced prospectantly by the presence of a storm in the vicinity; the occurrence of a fire is evidenced retrospectantly by the blackened ruins left as its traces; the revolution of car-wheels is evidenced concomitantly, by the motion of the car, to the person riding in it. This type of inference, though perhaps in practice the commonest of all, gives rise, nevertheless, to practically no judicial rulings. One reason for their rarity is that, for the occurrences of external or inanimate nature, testimonial evidence is commonly abundant. Another reason is that, where circumstantial

[1] "When successive phenomena are in question, these abstracted portions [*factum probandum* and evidentiary fact] may always themselves be viewed as events, even where so uneventful as hardly to deserve the name in popular language. Thus, where any quality of any thing changes ever so slightly — say, when a thermometer rises one degree —, we have what is here considered an 'event.' . . . It may seem [in these examples] strange to call a large river or a large town 'events,' but here the names are only used elliptically, for the growth of the town and the continued existence of the river." (Sidgwick, Fallacies, 333, 338.)

evidence is resorted to, the instinctive logic which suggests the offer of evidence will also suffice to convince the tribunal and the opponent of its propriety; nobody, for instance, would object to the offer of certain blackened and charred wood as evidencing a fire. Still another reason is that, where the desired inference transcends the scope of ordinary instinct and experience, it is offered as the subject of a testimonial knowledge or opinion by an expert witness,— as where a physician testifies that froth in the lungs of a corpse evidences a certain kind of death. Another reason is that most events of external nature are associated with some human act, and hence the proof involves evidence of the act.[1] But a reason the most important for present purposes is that an inference of this type, though in form the first one to be put forward as the main inference, frequently — if not usually — resolves itself into another of a different type, and the evidential question comes to turn upon the other. This feature it is necessary to explain more fully. The process may be examined for each of the three modes of inference in turn,— prospectant (inference from a prior or causal fact), retrospectant (inference from an effect), and concomitant:

(1) *Prior Cause, as the basis of inference.* That a corporal injury will cause a permanent disability to work; that noxious fumes will cause the destruction of herbage; — these are examples of this sort of inference. The evidential offer may be put in this way: The fact of injury is offered as evidence that at a future time there will ensue an inability to work; the fact of noxious fumes is offered as evidence that at a future time there will ensue no herbage. Such evidential offers would unquestionably be recognized as proper. But in practice these offers involving an argument from cause to effect do not raise any evidential questions in the above form, but resolve themselves into others; and this in two chief ways: (*a*) Where the desired inference is to an unknown or future *effect* or state of things which it is said the evidential fact will probably cause, the inference rests on an important assumption which in its turn becomes the subject of a new evidential question. To take the second illustration above, and state it more accurately: The fact of these fumes having a tendency to destroy herbage evidences that in future they will probably result in destroying the herbage in question. Now the evidential offer is in this shape unquestionably sound; but this form of statement — while accurately illustrating the present type of argument — brings out the necessity of proving, in its turn, a fact of a new and different category, viz. this assumed *tendency of the fumes to destroy herbage;* and this fact of *tendency* (or capacity) is seen to be in reality the probable point of controversy. It is in attempting to evidence this alleged tendency that the troublesome evidential questions arise; and these questions, so numerous in practice, involve a different sort of inference and different considerations both of probative value and of collateral inconvenience (herein dealt with *post*, §§ 441–464). (*b*) Where the desired inference is as to the

[1] See examples under §§ 148–160, *ante*, which otherwise might be appropriately dealt with here.

cause of a concededly existing state of things or occurred event, the same situation is usually reproduced. Thus, in the above illustration, where herbage is conceded to have been destroyed, and the dispute is whether the fumes in question were the cause of the destruction, the evidential suggestion that something harmful to herbage was the cause which would probably effect the destruction of the herbage would plainly be proper; its relevancy is apparent. But the real point of controversy here, as in the preceding class of cases, now comes to be this supposed tendency of these particular fumes to destroy herbage; and it is in the process of evidencing this tendency that the evidential difficulties arise; and these, as just noted, involve different principles.

(2) *Subsequent Effect, as the basis of inference.* That the falling barometer indicates the existence of an atmospheric disturbance; that the derailed car indicates the prior occurrence of a collision or other destructive event; — these are instances of inferences from effect back to the existence of a cause. Such inferences, however, rarely raise evidential questions in practice, for reasons the same as those just explained. Thus, in the illustration above used, the destruction of the herbage is evidently relevant, without question, as indicating the same destructive influence of atmosphere, soil, or the like; but in the further process of fixing on the fumes in question as the precise cause, either we proceed to offer that specific inference through an expert witness, who asserts as a matter of professional experience that the appearance of the herbage indicates specific fumes as the source (in which case no questions of circumstantial relevancy arises), or, in attempting otherwise to fix upon the fumes as one of the probable destructive influences, it must first be shown that they have this tendency to destroy herbage; so that in evidencing this tendency, the argument sets up new auxiliary inferences, and has travelled into the scope of a new category of fact. Thus, in general, the inference from an effect to the existence or operation of a cause is usually so proper as to be unquestionable, or else leads to a new controversy as to whether the supposed cause has any causing tendency of the alleged sort, and this new controversy involves a different sort of inference.

(3) *Concomitant Events, as the basis of inference.* An event cannot be inferred from its concomitant event except on the assumption that they have a common cause, or unless the inference is really not one of concomitancy but of cause and effect. An example of the latter sort is the inference of fire from smoke, *i. e.* it is really the inference of fire as a cause from smoke as the effect. An example of the former sort is the inference of revolving wheels from the motion of the car, *i. e.* there is really an inference, first from the motion to the motive power as a cause, and next, from the motive power to the revolution of the wheels as a common effect of the same cause. In some instances, however, for practical purposes, this latter analysis may be neglected and the inference treated as a single one; these instances are dealt with in the next sections. Otherwise, no separate problem is involved in this form of argument.

Topic III: EXISTENCE (OR, PERSISTENCE) IN TIME.

There is, in strictness, no place for a separate category of mere Existence, as distinguished from Occurrence; for, as already suggested (*ante*, § 435), the notion of a thing's either coming into being or of its having been in being is an inclusive and single notion, with reference to which inferences from cause or from effect may equally be made. Thus in inferring future disability from corporal injury, it is immaterial whether the former be termed the occurrence of an event or the existence of a condition; the inquiry is merely how far we may infer towards it from something else as its cause or its effect; and the term Occurrence has therefore been employed (*ante*, § 435) as the one most generally applicable to the *factum probandum*. Nevertheless, it is convenient to separate, for some purposes, a category of Existence in Time as the *factum probandum*, *i. e.* those instances in which the Existence in Time of an object, condition, or quality is to be evidenced by a prior, subsequent, or concomitant existence. The inference may, as usual, be of one of these three general types; but the first two are not dissimilar in their operation, and may be considered together.

§ 437. (1) **Existence, from Prior or Subsequent Existence; General Principle, applied in Sundry Instances (Highways, Machines, Buildings, Railway Tracks, etc.).** When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistence or continuance at a later period. The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap-bubble was in existence half-an-hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is strong evidence that it exists yet; whether the fact of a tree's existence a year ago will indicate its continued existence to-day will vary according to the nature of the tree and the conditions of life in the region. So far, then, as the *interval of time* is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control.

Similar considerations affect the use of *subsequent existence* as evidence of existence at the time in issue. Here the disturbing contingency is that some circumstance operating in the interval may have been the source of the subsequent existence, and the propriety of the inference will depend on the likelihood of such intervening circumstances having occurred and been the true origin. On landing at New York it can hardly be inferred that the steamer at the next dock has been there for a week; but it may usually be inferred that the dock has been there for some years; while the particular circumstances of appearance and the like will in the last instance affect the length of time to which the inference could be carried

back. Here, as with prior indications, the *interval of time* to which any inference will be allowable must depend upon the nature of the thing and the circumstances of the particular case.

The opponent, on the principle of *Explanation* (*ante*, § 34), may always attempt to explain away the effect of the evidence by showing that in the meantime other circumstances have occurred to raise a probability of change instead of continuance.

This general principle that a *prior* or *subsequent* existence is evidential of a later or earlier one has been repeatedly laid down, and has even been spoken of as a Presumption (*post*, § 2530):

1820, *Best*, J., in *R.* v. *Burdett*, 4 B. & Ald. 124: "I am to presume a thing always [to have been] in the state in which it is found, unless I have evidence that at some previous time it was in a different state."

1847, *Sandford*, V. C., in *Bogardus* v. *Trinity Church*, 4 Sandf. Ch. 744: "It is a rule of evidence, founded on the experience of human affairs, that where a state of things is once established by proof, the law presumes that such a state of things continues until the contrary is shown or a different presumption is raised from the nature of the subject in question."

1867, *Bigelow*, C. J., in *Com.* v. *Billings*, 97 Mass. 405: "Facts and circumstances in their nature continuous may always be shown to exist anterior to the precise period when it is necessary to show their existence, unless the interval is too great to afford a reasonable inference that the same state or condition of things has remained unchanged."

1869, *Colt*, J., in *Thayer* v. *Thayer*, 101 id. 113: "The rule is that a condition once proved is presumed to have been produced by causes operating in the usual way, and to have continuance till the contrary be shown."[1]

That no fixed rule can be prescribed as to the time or the conditions within which a prior or subsequent existence is evidential, is sufficiently illustrated by the precedents, from which it is impossible (and rightly so) to draw a general rule. They may be roughly grouped into two classes, — those in which the evidence has been received without any preliminary showing as to the influential circumstances remaining the same in the interval (thus leaving it to the opponent to prove their change by way of explanation in rebuttal), and those in which such a preliminary showing is required. Whether it should be required must depend entirely on the case in hand, and it is useless to look or to wish for any detailed rules. The precedents show the principle applied to all manner of subjects, — to the condition of a highway,[2] or

[1] The contrary statement, as to subsequent existence, by Gray, C. J., in Chandler v. Aqueduct Co., 122 Mass. 307 (1877), is wholly unsound; and has been repudiated by the next remark in Laplante v. Mills, Mass., *infra*: "It is said that presumptions do not run backward; but that depends on the case."

[2] 1900, Dean v. Sharon, 72 Conn. 667, 45 Atl. 963 (the sameness of a highway's condition being shown, its condition after the accident was admitted); 1895, Hunt v. Dubuque, 96 Ia. 314, 65 N. W. 319 (condition of a sidewalk a year before, admissible, if substantially unchanged); 1899, Bailey v. Centreville, 108 id. 20, 78 N. W. 831 (subsequent condition, unchanged, of a sidewalk, admitted); 1881, Barrenberg v. Boston, 137 Mass. 231 (condition of a sidewalk as to ice, before and after the time in issue, admitted); 1902, Tobin v. Brimfield, 182 id. 117, 65 N. E. 28 (condition of a highway four or five days after an accident, held not improperly excluded in the trial Court's discretion); 1892, Fuller v. Jackson, 92 Mich. 197, 203, 52 N. W. 1075 (condition of a sidewalk-plank the next morning, admitted); 1898, Hall v. Austin, 73 Minn. 134, 75 N. W. 1121 (rotten condition of planking a week later, admitted); 1895, Link v. R. Co., 165 Pa. 75, 30 Atl. 820, 822 (condition of a sidewalk two days later, admitted); 1898, Potter v. Natural Gas Co., 183 id. 575, 39 Atl. 7

of a bridge[3] or of a railway track, station, or roadbed,[4] or of a stream,[5] or of premises, without[6] or within,[7] or of machinery and apparatus,[8] or of a stock of goods,[9] or of sundry articles,[10] or of the condition of a human

(similar condition of pipe in a road up to a few weeks previous, admitted); 1897, Rosenbaum *v.* Shoffner, 98 Tenn. 624, 40 S. W. 1086 (condition of the place of an accident next day, admitted); 1902, Bell *v.* Spokane, 30 Wash. 508, 71 Pac. 31 (subsequent condition of a sidewalk, admitted); 1893, Schwenke *v.* Pine River, 84 Wis. 668, 677, 51 N. W. 1007 (condition of a highway at a later time, admitted). See also, for this inference in combination with others, the cases cited *post*, Bailey *v.* Trumbull, Conn., § 458; Hudson *v.* R. Co., Ia., § 458; Stone *v.* Ins. Co., Mich., § 460; Quinlan *v.* Utica, Gillrie *v.* Lockport, N. Y., § 458.

[3] 1894, Jessup *v.* Osceola Co., 92 Ia. 178, 60 N. W. 485 (condition of bridge-planking, etc., a few days afterwards, admitted); 1894, Washington C. & A. T. *v.* Case, 80 Md. 36, 30 Atl. 571 (decayed condition of a bridge nearly a year after an accident, admitted; but the fact of subsequent need of repairs fourteen months after the accident was excluded).

[4] 1890, Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 136, 9 So. 525 (injury at a railroad track; its condition from one to five months thereafter, admitted, where coupled with evidence that its condition had remained unchanged); 1889, Dyson *v.* R. Co., 57 Conn. 24, 17 Atl. 137 (the condition of a railroad crossing in winter was shown, the accident having taken place in summer when the trees were in leaf); 1899, Cunningham *v.* R. Co., 72 id. 244, 43 Atl. 1047 (prior condition of a rail as to elevation above highway, admitted); 1882, Pennsylvania Co. *v.* Boylan, 104 Ill. 595, 599 (defective planks in a culvert; the lasting capacity of repairs made nine months before, admitted to show whether there was need for repairs at the time); 1885, Hipsley *v.* R. Co., 88 Mo. 348, 354 (injury by derailment; condition of the roadbed other than at time of accident, excluded); 1887, Stoker *v.* R. Co., 91 id. 509, 516, 4 S. W. 389 (condition of a culvert, as to overflowing, from one to three years before or after, excluded; but such condition is admissible "within such reasonable time as will from the nature and circumstances of the case induce or justify a reasonable presumption or inference that the condition is the same and unchanged"); 1899, Agulino *v.* R. Co., 21 R. I. 263, 43 Atl. 63 (lighting of a station; its condition at prior and subsequent times, excluded on the facts as too remote); 1897, Hampton *v.* R. Co., 120 N. C. 534, 27 S. E. 96 (appearance of the place of an accident more than two years later, after changes had occurred, excluded).

[5] 1873, Lewin *v.* Simpson, 38 Md. 468, 483 (the overflow of back-water since suit begun, admitted to show the overflow before that time, in connection with a showing that the grade, etc., remained the same); 1873, Brooke *v.* Winters, 39 Md. 509 (the flow of a mill-stream after suit begun, admitted to show its flow before that time; but subject to the opponent's explanation as to the recent operation of other causes); 1861, Dewey *v.* Williams, 43 N. H. 384, 387 (diversion of a mill-stream; measurements of water-heights while the conditions "remained substantially unchanged," admitted).

[6] 1894, Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40 (subsequent condition admitted, where the premises taken by eminent domain had changed somewhat between the taking and the trial); 1878, Ulrich *v.* People, 39 Mich. 245 (rape; condition of the field, where it was said to have occurred, more than a month later, as showing no traces of a struggle, excluded); 1898, Beardslee *v.* Columbia Tp., 188 Pa. 496, 41 Atl. 618 (place of accident; subsequent condition admissible, if substantial identity is not changed, and changes are pointed out; the trial Court's discretion to control).

[7] 1895, Colorado M. & I. Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42 (previous open condition of an elevator-door, admitted, to show the defective absence of a lock); 1898, Sievers *v.* P. B. & L. Co., 151 Ind. 642, 50 N. E. 877 (condition of an elevator after an injury, admitted); 1896, Marston *v.* Dingley, 88 Me. 546, 34 Atl. 414 (subsequent condition of a habitation, admitted); 1877, Com. *v.* Powers, 123 Mass. 244 (keeping liquor with intent to sell; the condition of the room on the next day, as to fixtures, etc., admitted); 1900, Barker *v.* Mfg. Co., 176 id. 203, 57 N. E. 366 (subsequent condition as to the amount of steam in a room, admitted); 1901, Toland *v.* Paine F. Co., 179 id. 501, 61 N. E. 52 (condition of stairs four hours later, admitted); 1893, Leidlein *v.* Meyer, 95 Mich. 586, 591, 55 N. W. 367 (condition of premises injured by water, a year later, excluded).

[8] 1898, Rockford C. R. Co. *v.* Blake, 74 Ill. App. 175, 173 Ill. 354, 50 N. E. 1070 (prior condition of car-brakes, received); 1900, Powers *v.* R. Co., 175 Mass. 466, 56 N. E. 710 (condition of a locomotive step, some time before and after, lack of change of condition not being shown, held not improperly excluded); 1903, Boucher *v.* Robeson Mills, 182 id. 500, 65 N. E. 819 (condition of defective machine-belt at time of trial, admitted, though altered by repair); 1903, Hannum *v.* Hill, 52 W. Va. 166, 43 S. E. 223 (condition of a broken telephone wire some months before and after the time in issue, excluded).

[9] 1896, Scottish U. & N. I. Co. *v.* Stubbs, 98 Ga. 754, 27 S. E. 180 (an inventory of a stock of goods, made shortly before the fire and while another owned them, admitted).

[10] 1885, Mulliner *v.* Bronson, 114 Ill. 510, 513, 2 N. E. 671 (timber warranted of a certain quality when delivered; its quality after sawing and while being shipped, admitted; the opponent to show if possible that damage had occurred on the way); 1896, Laplante *v.* Mills, 165 Mass. 487, 43 N. E. 294 (the condition of a ladder two

body [11] or of an animal.[12] The matter should be left entirely to the trial Court's discretion. That the opponent may explain away the inference by other circumstances (as already noted) is also illustrated by the precedents.[13]

These applications of the principle are analogous to the use of the same inference in evidencing, from prior or subsequent condition, a human quality, — habit, possession, ownership, partnership, and solvency (*ante*, § 382), emotion (*ante*, §§ 395–406), physical capacity (*ante*, § 225), insanity (*ante*, § 233), and character (*post*, §§ 1617, 1618). In the proof of a place or person by photographs (*post*, § 792), the principle is frequently applied. Distinguish, however, the prohibition against using the *subsequent repaired condition* of a place or a machine as an *admission of negligence* (*ante*, § 283), and the propriety of using a *prior dangerous condition* as evidence of *notice* (*ante*, § 252).

§ 438. (2) **Existence, from Concurrent Existence; the Whole evidenced by the Parts, etc. (Highways, Railway Tracks, Premises, etc.).** The process of thought by which one thing *concurrently* indicates another rests on the assumption that in human experience the one is likely to be found associated with the other. This assumption, then, in one form or another, must underlie any attempt to evidence the latter by showing the concurrent existence of the former. For practical purposes the situations may be grouped under three heads.

(*a*) *Miscellaneous Instances.* That the presence of smoke indicates the concurrent presence of combustion; that in coming upon sea-water in its natural place we are likely to come upon fish; that on apple-trees fruit is likely to be found in season, — these are illustrations of the form which this inference most usually takes. This form, however, is but superficially a concurrent indication; almost every apparent inference is in reality a prospectant one, *i. e.* from cause to effect. That apple-trees are likely to pro-

years after the accident, admitted, as involving the permanent and therefore unchanged structure of the ladder; "it is said that presumptions do not run backward; but that depends on the case"); 1865, Yates *v.* People, 32 N. Y. 512 (the question was whether the street-light would have shown the accused that his pursuer was an officer, and evidence of the light's power just before the trial was excluded); 1875, Linsday *v.* People, 63 id. 143, 147, 156 (blood-spots on a board; see *post*, § 451); 1878, King *v.* R. Co., 72 id. 608 (subsequent condition of a piece of iron, admitted, the circumstances remaining the same); 1894, Foote *v.* Woodworth, 66 Vt. 216, 220, 28 Atl. 1034 (issue as to the soiled state of jars; test with a piece of paper, excluded, the conditions at the time in issue not being shown the same).

[11] 1893, People *v.* Hawes, 98 Cal. 648, 652, 33 Pac. 791 (murder; vest taken from deceased's body after burial, admitted, after evidence that condition remained the same); 1897, West Chicago St. R. Co. *v.* Kennedy Cahill, 165 Ill. 496, 46 N. E. 368 (appearance of a person before and after an injury, admitted to show the source of illness); 1885, Williams *v.* State, 64 Md. 390, 1 Atl. 887 (condition of a human body some time after burial, admitted); 1892, French *v.* Wilkinson, 93 Mich. 322, 324, 53 N. W. 530 (injury by bite of dog; state of the limb three years later, excluded). Compare the cases cited *ante*, § 225.

[12] 1874, Kansas S. Y. Co. *v.* Couch, 12 Kan. 612, 614 (to show the condition of cattle in Kansas in November, the fact of the condition of the cattle in Cherokee in October was rejected; "the fact that a thing is in a certain condition at one time is some proof that it is in the same condition at some subsequent time; but proof of this kind is usually confined to such things as are not liable to change suddenly or rapidly, and it is generally admissible only where better evidence cannot be obtained"); 1875, Freyman *v.* Knecht, 78 Pa. 141, 143 (a mare with diseased eyes; condition a year after the sale, admitted if the condition in the meantime was also shown).

[13] *E. g.*, Dyson *v.* R. Co., Conn.; Brooke *v.* Winters, Md., *supra*.

duce apples; that fire is likely to produce smoke, — such are the true forms of these arguments upon analysis. There are few, if any, genuine instances of concurrent argument of this sort;[1] and no rules of evidence have had occasion to be laid down. The inference in its true form has already been examined (*ante*, § 436, par. 3).

(*b*) *Existence of the Whole inferred from a Part, or of one Part from Another.* To argue to the whole from a part, or to one part from another, is also, in the last analysis, an argument from one effect of a common cause to another effect. But for practical purposes it is sufficient to treat the inference as an immediate one. The condition of the inference's propriety is that in human experience the whole has been found probably to exist with certain related parts; it is then admissible to use the existence of one of the parts as evidence from which to infer the presence of the whole or of one of the associated parts, — as where, observing a floating iceberg, it is inferred that beneath the water's surface is a larger mass of ice in the proportion usually found associated with such a mass above water; or where on observing, from one side of a locomotive, two driving-wheels, we infer that on the other side there are two similar ones. This sort of inference is common enough in trials, but does not seem to have raised any difficulties requiring rulings.

(*c*) *Condition or Quality in one Place, from Condition or Quality in Another.* Logically of the same nature as the preceding, but in practice having a slightly different aspect, is the inference frequently desired to be made from the nature of a condition or quality in one place to the condition or quality at another place, usually in the vicinity. The logical assumption is that by a common cause or causes uniform effects have been produced over a given area, which is thenceforth related to the evidential place as a homogeneous whole to its parts. In practical application, therefore, the requirement is that the two places should be so related that they probably form parts of a homogeneous area including them both; and in such case the condition or quality of the one place is relevant to show the condition or quality of the other. This principle receives frequent application, — to highways,[2]

[1] See Sidgwick, Fallacies, 333, for an exposition of this.

[2] 1875, Taylor *v.* Monroe, 43 Conn. 42 (rejecting the fact of the safe condition of a place as shown by tests made at a different part where the conditions were different); 1899, Cunningham *v.* R. Co., 72 id. 244, 43 Atl. 1047 (condition of rail as to elevation above highway at other parts of a street, excluded); 1888, Hoyt *v.* Des Moines, 76 Ia. 430, 41 N. E. 63 (cited *post*, § 458); 1891, Riley *v.* Iowa Falls, 83 id. 761, 50 N. W. 33 (the condition of other planks "along the place of that accident," admitted); 1897, Faulk *v.* Iowa Co., 103 id. 442, 72 N. W. 757 (defect in a railing at or near the place in question, admitted); 1899, Bailey *v.* Centreville, 108 id. 20, 78 N. W. 831 (condition of sidewalk 200 feet away, admitted); 1875, Brooks *v.* Acton, 117 Mass. 204 (injury at a ridge of ice and snow across the highway; to show its height, which was disputed, the fact of the depth of the snow in the adjoining woods was excluded, because the conditions were dissimilar); 1890, Campbell *v.* Kalamazoo, 80 Mich. 655, 660, 45 N. W. 652, *semble* (condition of other parts of the sidewalk fronting the same lot, admitted); 1894, Edwards *v.* Three Rivers, 102 id. 153, 60 N. W. 451 (injury at a sidewalk; "condition of the walk in the vicinity," admitted); 1896, Wiel *v.* Mendon, 108 id. 251, 66 N. W. 58 (condition of the sidewalk several rods away, admitted); 1897, Canfield *v.* Jackson, 112 id. 120, 70 N. W. 444 (condition of the sidewalk in the vicinity of the accident, admitted); 1897, Haynes *v.* Hillsdale, 113 id. 44, 71 N. W. 466 (defects in other parts of the sidewalk built at the same time, admitted); 1902, Styles *v.* Decatur, — id. —, 91 N. W. 622 ("general char-

to railway tracks, stations, and roadbeds,[3] to machines, buildings, and other structures,[4] to natural growths and formations, weather conditions, and the like.[5] It would be a mistake to attempt to ereet these specific rulings into hard-and-fast precedents; the law should do no more than recognize the general prineiple, leaving it entirely to the trial Court to apply it to each ease. The steam-hammer of the Supreme Court is not needed to erack such nuts.

§ 439. **Same: Samples as Evidence of an Entire Lot.** It is on the present prineiple that a sample is receivable in evidenee to show the quality or

acter and condition of that walk," admitted; 1881, Kelly *v.* R. Co., 28 Minn. 98, 100, 9 N. W. 588 (cited *post*, § 458); 1899, Lyons *v.* Red Wing, 76 id. 20, 78 N. W. 868 (condition of the adjacent sidewalk, admitted); 1894, Emerson *v.* Lebanon, 67 N. H. 579, 39 Atl. 466 (condition of a highway-railing four years before, excluded on the facts); 1886, Osborne *v.* Detroit, 36 Fed. 36, 38 (injury at a defective sidewalk; condition at another place near by, admitted, but on the theory that it would have led to notice of the defect in question); 1899, Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456 (highway injury; general bad condition of the road in the vicinity two days before, admitted); 1901, Vieliesse *v.* Green Bay, 110 id. 160, 85 N. W. 665 (sidewalk-condition "as far as the walk runs lengthwise," admitted); 1903, Hoffmann *v.* North Milwaukee, — id. —, 95 N. W. 274 (bad condition of a sidewalk across the street, admitted, not to show the condition at the place in issue, but to negative the plaintiff's negligence in going on the latter part).

For the use of such facts to evidence *notice*, see *ante*, § 252.

[3] 1885, Cleveland C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 267, 3 N. E. 836 (injury by derailment through a broken rail; the breaking of another rail at the same place on the same morning, admitted); 1875, Louisville & N. R. Co. *v.* Fox, 11 Bush 505 (injury by a defective railroad track; the defective condition of other portinns of the same section, excluded as too remote); 1898, Louisville & N. R. Co. *v.* Henry, — Ky. —, 44 S. W. 428 (other holes in a station-platform, excluded; the present principle not noticed); 1893, Turner *v.* R. Co., 158 Mass. 266, 33 N. E. 520 (to prove that a frog became unblocked, not a short time before the accident, but long before, the fact of others being unblocked in the same vicinity was used, on the ground that they would probably not all have come unblocked at once); 1878, Grand R. & I. R. Co. *v.* Huntley, 38 Mich. 537, 540 (injury by derailment; defects in the track "where it was injured or displaced," admissible, but not "away from the scene of the injury"); 1883, Morse *v.* R. Co., 30 Minn. 465, 16 N. W. 358 (injury to an engineer, alleged to have happened through a broken rail and a defective switch; the fact was rejected of other defects in the same yard, because they were not shown to be the apparent result of the same causes); 1885, Hipsley *v.* R. Co., 88 Mo. 348, 354 (injury by derailment; condition of the roadbed other than "at ... place of and the immediate vicinity of" ...cident, excluded); 1887, Sidekum *v.* R. Co., ... Mo. 400, 405, 4 S. W. 701 (derailment; the preceding case approved); 1871, Reed *v.* R. Co., 45 N. Y. 574, 576, 580, *semble* (defective ties, etc.; defective condition of the road half a mile away, excluded).

[4] 1886, Fort Wayne *v.* Coombs, 107 Ind. 87, 7 N. E. 743 (a neighboring break in a sewer, admitted to show that the materials were defective); 1897, Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475 (decayed condition of timber in other parts of the same bridge, admitted); 1899, Rose *v.* St. Louis, 152 Mo. 602, 54 S. W. 440 (injury from the falling of a cornice-stone alleged to be rotten; condition of other stones in the cornice allowed to be shown); 1879, Plummer *v.* Ossipee, 59 N. H. 57 (Allen, J.: "The accident happened by the carriage running upon the log at its west end. The east end of the log was admitted to be in the highway. . . . Evidence of wheel marks upon the east end of the log was evidence of an obstruction at that place; and whether it was evidence of an obstruction at the place of the accident depended upon the similarity in size, form, and position, with reference to the travel upon the highway, of the west end of the log with the east end"); 1882, Randall *v.* Tel. Co., 54 Wis. 140, 11 N. W. 419 (injury by a fallen telegraph line; the fallen condition of the line at other near places and times, admitted to show the defective and negligent nature of the construction and maintenance); 1899, Baxter *v.* R. Co., 104 id. 307, 80 N. W. 644 (explosion of a boiler; defective part of a flue, admitted; Bardeen, J., diss.).

[5] 1892, Central R. Co. *v.* Ingram, 98 Ala. 395, 397, 12 So. 801 (absence of fog at an adjacent place where conditions were more favorable for it, admitted, in negative the existence of fog on the track); 1872, Cleland *v.* Thornton, 43 Cal. 437 (nature of timber burned; "character of the timber for milling purposes in that immediate neighborhood," admitted); 1894, Hart *v.* Walker, 100 Mich. 406, 410, 59 N. W. 174 (the fact of hot weather in a place 12 miles away from that in issue, admitted); 1873, Stanbaugh *v.* Smith, 23 Oh. 594 (the existence of coal seams of certain thicknesses and quality upon other lands in a neighborhood, admitted to show the existence, quantity, and quality of coal on the premises in question).

condition of the entire lot or mass from which it is taken.[1] The requirement is merely that the mass should be substantially uniform with reference to the quality in question, and that the sample portion should be of such a nature as to be fairly representative.[2] When the sample is not taken from the very substance or article in issue, but from another one, the only difference in the argument is that another inference is introduced, *i. e.* the inference of Identity (*ante*, § 411). It must first be evidenced that substance A is in nature identical, for the purpose in hand, with substance B, and then a sample from B, working through a double inference, evidences the nature of substance A.[3]

§ 440. **Same: Sample Copies of Printed Matter.** An *impression from type* (usually known by the unfortunate because ambiguous term *copy*) is evidence of the *contents* of another impression from the same type, the required assumption being merely that both were produced by the same type.[1] The easier mode of proof is usually by a witness who offers one impression as representing his recollection of the other (*post*, § 748). The present principle, however, is to be distinguished from that which is involved when it is attempted from one type-impression to show the *authorship*, or publication, of another and similar one. Two cases may arise. (*a*) Where the fact of the person's having printed or published an entire mass or series of impressions is otherwise proved, then his publication of each and every one is shown by necessary implication. But this is the rare case. (*b*) Where the authorship (or publication) of a single impression is shown, the authorship of another impression exactly similar is not necessarily proved, although it ought at least to be regarded as evidenced, because the printing of one evidences in ordinary experience the probable printing of all others of the same content and appearance (*ante*, § 376). That question, however, does not involve the present principle, *i. e.* the nature of the article, but involves the doing of an act, *i. e.* of authorship or publication.[2]

[1] 1885, Epps *v.* State, 102 Ind. 539, 1 N. E. 491 (absence of arsenic in another sample from the same package, admitted to show the absence of arsenic); 1888, Com. *v.* Schaffner, 146 Mass. 512, 514, 16 N. E. 280 (another sample taken by the inspector from the defendant's milk-wagon, on same day, at substantially the same time, admitted to show the bad quality of the milk); 1888, Com. *v.* Kendrick, 147 id. 444, 18 N. E. 230 (quality of liquor shown by samples); 1899, McConnell *v.* Lewis, 58 Nebr. 188, 78 N. W. 518 (samples of leather, exhibited); 1895, Vietti *v.* Nesbitt, 22 Nev. 390, 41 Pac. 151 (the quality of ore shown by assays of ore "from the same ore body and near where the ore in question came from but in adjoining mine"). Compare the cases cited *post*, § 457.

[2] 1895, Fox *v.* Mining Co., 108 Cal. 369, 41 Pac. 308 (question discussed as to whether "battery-samples" are and "car-samples" are not the better index of ore-values); 1871, Brown *v.* Leach, 107 Mass. 367 (before testing by sample, the sample must be shown a fair one).

[3] 1864, Jupitz *v.* People, 34 Ill. 520 (larceny of brass couplings; samples of couplings testified to be similar, admitted); 1867, Com. *v.* Goodman, 97 Mass. 117 (to show a liquor to have been intoxicating, samples were admitted of liquor taken from one P., contained in barrels having a similar mark, and being also similar in color, flavor, and strength; careful opinion by Bigelow, C. J.); 1899, Golden Reward M. Co. *v.* Buxton M. Co., 38 C. C. A. 228, 97 Fed. 413 (samples of ore from an ore body of the same general character and forming a continuation of the same ore body, admitted).

For *statutory provisions* allowing *samples* to be used, see *post*, § 445. Compare also § 457.

[1] 1837, R. *v.* Murphy, 8 C. & P. 308 (contents of a handbill, evidenced by other bills said to be similar). Compare the cases cited under the principle of identity (*ante*, § 415) and the principle of producing the original (*post*, §§ 1234, 1237).

[2] Compare the other principles as to authentication of printed matter (*post*, § 2150).

Topic IV: Tendency, Capacity, Quality, Cause, or Effect.

1. General Principles.

§ 441. **Scope of the Subject.** It has already been noted (*ante*, § 436) how, in so many instances of other classes of cases, that which is the main or first apparent inference offered is upon analysis to be resolved into an inference of the present sort, *i. e.* in which the proposition to be evidenced is a tendency, capacity, or the like. It is thus easy to see why the great majority of the rulings are concerned with this specific sort of inference. Yet it is not to be supposed that the ensuing number of precedents indicates the relative actual frequency of the present sort of inference in trials. It is merely that the evidential difficulties of the subject occur chiefly in connection with the present type of inference, and thus lead naturally to a multiplication of rulings disproportionate to the actual frequency of the part played by this mode of inference.

What, then, is the mode of evidencing circumstantially a tendency, capacity, or quality of external inanimate nature? In general, the inference is from specific instances of *observed effects, exhibitions, or illustrations, to the supposed tendency, capacity, or quality producing them.* This inference from effects to capacity or tendency to produce those effects furnishes the general form to which all such processes are reducible. For example, the question at issue may be whether the vibrations of factory-machinery have caused a conceded injury in an adjacent house. The main controversy is whether the former is the cause of the latter; but, in searching among the probable causes, the argument is obviously confined to those things which have a tendency or capacity to produce such effects, and thus the real proposition of the proponent now becomes this, namely, that the factory-apparatus has a tendency or capacity to produce such effects. Thus, while one of the ultimate issues for the jury still remains the question whether the factory caused the injury, yet the subsidiary proposition to which the evidence has to be directed is whether the factory has such a tendency or capacity. In short, when it is desired to show broadly the occurrence of an event, or the cause of it, the process of thought usually resolves itself into two inferences, — first, that the capacity or tendency of something to cause the event is evidence that the event did so result therefrom; and, secondly, that something else is evidence of such a capacity or tendency; and it is the second of these inferences which in practice raises evidential questions.[1] The existence of a tendency, capacity, or quality may of course also come into issue independently of any question as to its being a cause, — for example, where the maintaining of a dangerous place is itself an offence. But, however it comes into issue, it is evidenced by using its observed effects.

§ 442. **Principle of Probative Value (Relevancy).** The requirements for this process of inference are indicated by the logical principles already examined

[1] For the inference of *defective* or *negligent construction* from the single fact of the *injury* *in issue*, see *post*, § 2509 (presumption of negligence from accident).

at the outset (*ante*, §§ 30–36), and a brief re-statement will be sufficient. There is presented, as the *factum probandum*, a capacity or tendency in X to produce the specific effect B. This means that in the presence of a certain complex of circumstances the introduction of X will result in the occurrence of B; *i. e.* this alleged tendency or capacity in X is not an abstract and absolute one, but a limited and specific one, namely, a capacity, under the circumstances in which B occurred, to be followed by B. What X's capacity or tendency under other circumstances might be, is immaterial; the single question is whether there was such a capacity or tendency under the circumstances in hand. In looking elsewhere, therefore, to evidence this specific capacity or tendency by observing the same effect elsewhere, the requirement is that the circumstances elsewhere are the same as in the case in hand. Thus, if elsewhere are found similar results, B′ and B″, accompanying X, it cannot be inferred that they are the result of the alleged tendency of X, unless the other circumstances in those cases were similar to that in issue; because otherwise it cannot be known that some other circumstance, Y or Z, was not the cause of B′ or B″. In other words, unless the circumstances are the same, the door is open for other hypotheses that might account for the effects B′ and B″, as well as for B. Thus, if the proposition is that X factory's vibrations have a tendency to injure an adjacent building B, the falling of timbers in other adjacent houses B′ and B″ might not evidence such a tendency if B′ were an old house and B″ were a wooden house, while B was a new brick house; the case B′ would at most indicate a tendency in X to injure an old house, not a new house B; and the case B″ would at most indicate a tendency in X to injure a wooden house, not a brick house B. Or, again, if in a third house B‴, lying on the other side of X factory and next to Y factory also, there is a similar injury, it cannot be inferred that it is the result of a tendency in X to produce such an injury to B, because the factory Y may have caused, partly or solely, the injury to B‴. The general logical requirement is, then, that when a thing's capacity or tendency to produce an effect of a given sort is to be evidenced by instances of the same effect found attending the same thing elsewhere, these other instances have probative value — *i. e.* are relevant — to show such a tendency or capacity *only if the conditions or circumstances in the other instances are similar to those in the case in hand.*[1]

But this similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question. For instance, in the case put above, the circumstance that house B′ was of wood while house B was of brick would conceivably affect the ease and likelihood of injury by vibration; but the circumstance that the inner walls in B′ were papered while those in B were kalsomined, or that the house B′ was painted red while the house B

[1] In the foregoing analysis the inference from other instances only is considered. The inference from the instance in issue (*i. e.* of negligent construction from the mere fact of the plaintiff's injury in an accident) is recognized as a presumption, and is dealt with *post*, § 2509.

was painted green, or that the occupant of house B′ was a Presbyterian while the house B was occupied by a Methodist, — such a circumstance, though perhaps material in other aspects, could not have any bearing upon the likelihood of injury by vibration. A similarity between the two cases in respect to such circumstances, therefore, would not be required. The similarity that is required is, in short, a similarity in essential circumstances, or, as it is usually expressed, a *substantial similarity, i.e.* a similarity in *such circumstances or conditions as might supposably affect the result in question.*

The logical foundation of this principle has been already set forth in another place (§§ 30–33). As applied to the present sort of inference it has constantly received the sanction of the Courts; and whatever are the inconsistencies of its applications, there is substantial unanimity in the general reasoning:

1892, *Miller*, J., in *Lake Erie & W. R. Co.* v. *Mugg*, 132 Ind. 168, 31 N. E. 565 (excluding experiments as to the freezing of a boot to a rail on a cold day, the experiments being made on the day of the injury in question): "Unless the experiments are shown to have been made under essentially the same conditions that existed in the case on trial, the tendency is to confuse and mislead rather than enlighten the jury. . . . The appellant did not show that the experiment was made under the same conditions that existed when the injury took place. The time of day was different, and the conditions as to warmth and moisture of the boot exposed may not have been, probably were not, the same."

1892, *Miller*, C. J., in *Chicago, St. L. & P. R. Co.* v. *Champion*, — Ind. —, 32 N. E. 874: "During the trial the appellant placed a witness upon the stand, and proposed to show that shortly before the trial a test was made upon the siding on which the accident took place, and at about the same place, by letting a gondola car of the same kind as the one in use at the time of the injury down upon the siding. . . . Evidence of this kind should be received with caution, and only be admitted where it is obvious to the Court from the nature of the experiments that the jury will be enlightened rather than confused. In many instances a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence and make it harmful rather than helpful. In other cases a principle may be established by experiments made under circumstances quite different from the one under investigation, that will have an important and beneficial effect upon the investigation. . . . In our opinion the circumstances under which the experiment was made were sufficiently similar to the facts surrounding the happening of the accident to make it admissible in evidence for what it was worth." *McBride*, J., dissenting: "It cannot be certain that the circumstances and conditions were in each case precisely the same."

1862, *Merrick*, J., in *Emerson* v. *Lowell Gaslight Co.*, 3 All. 410, 417 (the question here being whether the illness of the plaintiffs was caused by gas leaking from the defendant's pipes): "The evidence offered by the plaintiffs to show that, wherever the gas which escaped from the fracture in the defendant's pipe entered any dwelling-house in the neighborhood of the plaintiffs, sickness followed, was properly excluded. . . . The attending circumstances may be so different that the occurrence of sickness in one house would have no tendency to show the cause of illness in the occupants of another."

1864, *Chapman*, J., in *Hunt* v. *Lowell Gaslight Co.*, 8 All. 169, 171 (the issue being the same as in the preceding case): "The plaintiffs . . . were permitted to offer evidence that A. H. and his family had been in perfect health up to the time when the gas began to escape into their house, and that, immediately or soon after, every member of the family became seriously ill. . . . The sickness of these persons . . . is admissible merely for the purpose of showing the nature of the gas which came into the house, to the influ-

ence of which all the inmates were subjected alike. Evidence that inmates of another house were made sick in consequence of inhaling the gas . . . has been held to be inadmissible. The evidence should be limited to the effect of the gas upon those who have in common and under similar circumstances inhaled it."

1880, *Gardner*, J., in *Baxter* v. *Doe*, 142 Mass. 558, 561, 8 N. E. 415 (to show that the plaintiff's illness on board the defendant's vessel was due to the defendant's failure to supply anti-scorbutic food and medicine, the fact was offered of a similar sickness of others of the crew, on board the ship, about the same time): "It is difficult to find a case where all the conditions and circumstances affecting all the crew were so similar. As suggested by the plaintiffs in their argument, the crew lived together in the same quarters, on the same vessel, for the same length of time, worked in the same employment, were subjected to the same climatic influences, hardships, deprivations, and manner of life, partook of the same food at substantially the same time; and of the crew of twelve, eight were affected at about the same time with about the same symptoms of disease. This evidence . . . tended directly to prove that the provisions served to the crew were unsuitable and insufficient, and that the sickness was occasioned by the want of anti-scorbutics."

1887, *Holmes*, J., in *Reeve* v. *Dennett*, 145 Mass. 28, 11 N. E. 938 (a stockholder alleged that the invention "naboli," for the manufacture of which the corporation was formed, was worthless to effect its represented object, the painless extraction of teeth; the inventor's patients were allowed to testify that it practically prevented pain, where similar operations had formerly been painful): "The objections made to it are . . . that the fact may admit of being explained by other causes than the conclusion sought to be established. In some cases, at least, it would seem that the painful fillings were performed by other dentists, so that it might be argued that the evidence was only a testimony to the skilfulness of the defendant's hand. But . . . when the fact sought to be proved is very unlikely to have any other explanation than the fact in issue, and may be proved or disproved without unreasonably protracting the trial, there is no objection to going into it. If a dozen patients should testify that when the defendant used his naboli, he filled their teeth without hurting them, and that he hurt them a good deal when he did not use it, supposing the testimony to be believed and not to be explained by fancy and a general disposition on the part of witnesses to think well of new nostrums, it would go far towards proving that naboli had some tendency to deaden pain."

1883, *Lord*, J., in *State* v. *Justus*, 11 Or. 182, 8 Pac. 337: "The object of the experiments made on the pasteboard targets which were offered in evidence was to prove by inference that the deceased came to his death by a near gunshot wound at the hands of the defendant . . . [After describing the characteristics of 'near' wounds,] Now it must be manifest that there are here noted so many marked characteristics of near gunshot wounds which could by no possibility be reproduced or represented by experiments upon pasteboard, yet upon which the fact of a near wound is made to depend and often to be determined, that it would be utterly unsafe to apply the inferences sought to be deduced from such experiments to the facts in dispute, unless there can be found, in such experiments and in the subject-matter which it is their object to explain or illustrate, some point of similitude or ground of common resemblance, always present, as a result induced by a similarity of conditions or circumstances. . . . When it is considered how important it is that experiments should be based on conditions and circumstances as nearly as possible like the matter they are intended to illustrate, to avoid the liability of misconception or error from some supposed agreement or resemblance, we should certainly hesitate to admit such experiments," *i. e.* when made, as here, by non-professional witnesses not skilled in determining the essential appearances of such wounds.

1892, *Lord*, J., in *Leonard* v. *So. Pac. Co.*, 21 Or. 555, 559, 28 Pac. 887 (admitting experiments as to whether a rail could have injured a wheel-flange): "There seems to be some hesitation in receiving evidence of experiments or demonstrations, and from the liability to misconception and error there can be no doubt that the experiments or demon-

strations should be made under similar conditions and like circumstances. In all cases of this sort very much must be left to the discretion of the trial Court. But when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case in issue, its discretion ought not to be interfered with. In the present case the things used for the purpose of demonstration were similar in size, material, and position, and were operated under conditions similar to the thing sought to be demonstrated."

There is also available here, but not so commonly, the subordinate form of argument known as the *method of difference* (*ante*, § 33). In ascertaining whether X is the cause of B, an examination may be made of sundry instances B′, B″, C, D, similar to each other in all other conditions except that X is present or absent; if it is found that wherever X is present, the effect B, B′, B″, is found, and that as soon as X ceases to be present a different effect, C or D, is found, it may be inferred that the difference of effect is produced by the difference in the absence or presence of X; because that is the only causative circumstance which is different in the different instances. The requirement is that the other instances, *i. e.* of B, B′, B″ not being found, should be similar in all substantial conditions except the absence of X. This mode of evidencing is in judicial investigations not so frequently available, because it is not usually feasible to find instances which fulfil these requirements; but so far as the issue admits of experiments in which the conditions can be thus artificially manipulated, the mode is equally feasible. Occasional instances are found in the precedents, usually in the form of proof of the absence of the harm in question before the alleged harmful act and then the supervening presence of the harm immediately after.[1]

§ 443. **Principle of Auxiliary Policy.** It has already been pointed out (*ante*, § 42) that, in ascertaining the principles of circumstantial evidence, the rulings of Courts are found to be much obscured, and the difficulty of clear treatment greatly increased, by the concurrent application of certain principles resting on notions of Auxiliary Probative Policy. The result of their concurrent application is the frequent exclusion of facts that are entirely relevant and would have been admitted if the principles of Relevancy alone were to be applied. It is important to distinguish the rule and the effect due to a principle of Relevancy from the rule and the effect due to a principle of Auxiliary Policy. The fact may be generally relevant, yet in a particular instance obnoxious to some rule of Auxiliary Policy; and if so, it may become proper to use it on some occasion to which the latter rule does not apply. Or the fact may be obnoxious to no rule of Auxiliary Policy, but merely irrelevant; and if so, it is impossible to use it at all, unless the offer can be so changed as to meet the requirements of Relevancy. It is therefore important, when a class of facts is found excluded, to ascertain whether the reason of exclusion is a reason of Relevancy or a reason of Auxiliary Policy. In practice, the Courts almost invariably indicate the reason for exclusion;

[1] Folkes *v.* Chadd, 3 Doug. 157, § 451, *post;* Kramer *v.* Messner, 101 Ia. 88, 69 N. W. 1142, § 451; Standish *v.* Washburn, 21 Pick. 237, § 451.

and the material is plentiful for a correct understanding of the principles intended to be laid down by them.

Of the various considerations of Auxiliary Probative Policy recognized in the law, only two have any application to the present sort of evidence. (1) The reason of *Unfair Surprise*.[1] The notion here is that the production of various instances to evidence a tendency, capacity, or quality finds the opponent unprepared to answer such evidence, — unprepared to dispute the occurrence of the various instances, unprepared to test or to rebut or to explain away the varied facts thus perhaps for the first time brought to his attention; and that therefore, on account of the danger of relying on evidence thus not open to exposure by rebuttal, it should be excluded. (2) The reason of *Confusion of Issues*.[2] The notion here is that, in attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy. These reasons, as applied to the present sort of evidence, have been frequently invoked in judicial opinion:

1882, *Lord O'Hagan*, in *Metropolitan Asylum District* v. *Hill*, 47 L. T. R. N. S. 29 (speaking for the rejection of evidence of the effects of other hospitals in spreading contagion, offered to show the noxious quality of the one in question): "Without proof as to the state and management of the other hospitals, so as to establish a substantive similarity, any inference drawn from a comparison of their operation with that of the H. asylum might have been quite fallacious and deceptive. But, even without regard to this, . . . it would have involved the jury in a multitude of collateral inquiries, calculated to confuse and embarrass them, and it might have been endlessly prolonged by an indefinite multiplication of objects of comparison. To keep such investigations within reasonable limits, and secure promptitude, precision, and satisfaction in the demonstration of justice, it seems to me that Courts should be very jealous of the admission of such proof."

1877, *Ashburn*, J., in *Insurance Co.* v. *Tobin*, 32 Oh. St. 90 (excluding previous instances of steamboat disasters occurring through snags, etc., and yet without any shock or other coincident warning): "It was calculated to create as many collateral issues as special cases of such loss introduced. In this case the witness [to the former instance] says, 'No one knew anything about it at the time.' . . . This would probably become a disputed question, calling for the testimony of all the persons on the 'Sherman' at the time of the [prior] accident to settle the question of fact as to her case. Here would be a vexed but valueless collateral issue. . . . Very many cases [of similar accidents] were introduced in testimony on the part of the plaintiff. . . . This class of testimony was incompetent because calculated to surprise and take undue advantage of defendant at the trial. Ordinarily he could not be prepared to meet and contest the merits of each particular case of loss from unknown cause introduced. To deprive him of this privilege would be the denial of a legal right, and to admit them would overwhelm the case with collateral issues of fact, distract judicial investigation, leading to no valuable legal result."

1879, *Doe*, C. J., in *Amoskeag Co.* v. *Head*, 59 N. H. 332, 337 (excluding evidence of

[1] This principle, in its other aspects, is dealt with *post*, §§ 1849 ff.

[2] This principle, in its other aspects, is dealt with *post*, §§ 1863, 1904 ff.

sums paid for thirty-two other rights of flowage, as indicating value): "How far a trial can justly and reasonably go upon such [additional] issues is often a question of fact. The trial to which parties are entitled is not an endless one, nor one unreasonably protracted and exhausting. There may be a vast amount of evidence, relevant in a certain legal sense, but so unimportant, when compared with an abundance of better evidence easily available, as to be properly excluded. The parties being allowed upon collateral issues an equal range amply sufficient for the purposes of justice under the circumstances of the particular case, they are not necessarily entitled as a matter of law to go further in that direction."

1881, *Barrows*, J., in *Mayhew* v. *Mining Co.*, 76 Me. 113: "One substantial ground for excluding evidence of collateral facts is that it is seldom that such identity in all essentials is found that a legitimate inference respecting the one case can be drawn from the other, and a host of collateral issues are brought in to distract the attention of the jury from the real point. The fear of this has sometimes, perhaps, produced decisions excluding evidence which might throw light upon the issue."

1887, *Cole*, C. J., in *Phillips* v. *Willow*, 70 Wis. 9, 34 N. W. 731 (excluding the fact that two other persons had collided with the stone by which the plaintiff's sleigh had been overturned): "[Courts have excluded this evidence] because such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and, moreover, because the adverse party, having had no notice of such a course of examination, is not presumably prepared to meet it. . . . It is apparent that if this testimony was relevant to prove a defect . . ., it would have been competent [in answer] to show that these persons were not driving carefully, or had skittish teams; also that hundreds had passed over this highway in safety with carriages, notwithstanding the alleged defect. So issue after issue would be raised, and facts collateral to the main issue made by the pleadings would multiply; the main issue forming new ones, and the suit itself expanding like the banyan tree of India, whose branches drop shoots to the ground which take root and form new stocks till the tree itself covers great space by its circumference."

The answers to these arguments of policy, however, are not difficult: (1) As to the argument from Unfair Surprise. In the first place, the inconvenience here urged is found in trying almost every issue whatever; for the evidence of an opponent is always to some extent unforeseen, and this is, in general, no valid objection (*post*, § 1845). In the next place, the risk does not usually exist to any serious extent in the present sort of issue, for the nature of the controversy readily suggests the sort of evidence that will be resorted to. Furthermore, the argument is rarely allowed elsewhere to prevail except to prevent certain modes of impeachment of character (*ante*, § 194; *post*, § 979), where otherwise the evidence might range over a whole lifetime; and it is not a serious objection in cases where the unexpected evidence bears directly upon the issue and but covers a small range both of time and of material. Lastly, the evil of shutting out that which is frequently the sole accessible or reliable evidence is much greater than the occasional disadvantage of surprise. The argument of surprise, it should be added, is very rarely pressed in this connection. (2) As to the argument from Confusion of Issues. In the first place, it must be noted that it is by no means universally, perhaps not usually, forceful; for the other instances offered of the tendency or quality are seldom numerous and are not commonly disputed. In the next place, the multiplicity and confusion is usually no greater than that which occurs in the trial of other matters with their

numerous minor issues; and it would seem, having regard to the direct bearing of the present sort of evidence on that which is usually a main issue, that the disadvantage cannot be avoided without too great a sacrifice of useful evidence. Finally, and most important, wherever upon minor issues this disadvantage becomes a real and marked one, without compensating advantage from useful evidence, it is unnecessary to take the radical step of excluding such evidence in all cases by a universal rule; because a simple expedient is at hand, by which the evil can be stopped in such cases while the advantage of the evidence is retained for other cases, — namely, the expedient of leaving it to the discretion of the trial Court to draw a line of exclusion wherever the evil of confusion of issues impends. The whole objection in question is mainly (as Mr. Justice Holmes has neatly put it[3]) "a purely practical one, a concession to the shortness of life"; and it would be unworthy of the genius of our law if Courts should feel obliged to lay down a hard-and-fast rule of exclusion when such a simple expedient was at hand for preventing the supposed disadvantages.

§ 444. **Discretion of the Trial Court.** The true solution of the conflicting considerations, then, is that evidence of the sort, when relevant, should be admitted, unless in the discretion of the trial Court it seems to involve a serious inconvenience by way of unfair surprise or confusion of issues. Such is the solution clearly pointed out by many Courts:

1872, *Doe*, J., in *Darling* v. *Westmoreland*, 52 N. H. 401, 408: "Another cause of confusion [in the rulings] is the mixture of law and fact, and the lack of a distinction, lucidly and emphatically expressed, between what is matter of strict law and what is matter of judicial discretion. Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the Court; and a close attention to the difference between fact and law, and the difference between an exercise of judicial discretion (unfortunately so called) and a decision of a question of law, will remove much of the obscurity in which the subject of the relevancy of evidence has been involved. . . . [In the Knapp case,[1] where, to show the defendant's extraordinary strength, various instances of his feats of strength were received,] the judge in the exercise of what is called judicial discretion, allowed the parties to go back fifteen years; and if he had allowed them to go back sixteen years, or only fourteen years, no question of law would have arisen as to the proper length of time. . . . The general relevancy of that class of evidence was matter of law. But how far back in the history of his life it was advisable to go for experimental knowledge of his strength was a question of fact, to be determined upon a variety of considerations, some of which are erroneously given in the books as reasons for the exclusion of irrelevant or collateral evidence as a matter of law. The decision of this question of fact was, in the peculiar and technical language of the law, an exercise of judicial discretion. . . . As to the number of experiments or experiences on many points, collateral in a certain sense, but relevant in a legal sense, it is impossible in the nature of the case for a limit to be fixed as a matter of law. But it does not follow that the law excludes all evidence of which it cannot measure a reasonable quantity."

1894, *Knowlton*, J., in *Bemis* v. *Temple*, 162 Mass. 342, 344, 38 N. E. 970 (admitting evidence of the frightening effect of a flag upon other horses): "The only objection to testimony of the last kind in such a case is that in testing it collateral issues may be raised. Such an objection in many cases is a sufficient reason for excluding the testi-

[3] In Reeve v. Dennett, 145 Mass. 28, 11 N. E. 938.
[1] 45 N. H. 148, 149, 151; *ante*, § 219.

mony. Whenever a line of inquiry will give rise to collateral issues of such number and difficulty that they will be likely to confuse and distract the jury and unreasonably protract the trial, it should not be permitted. But the mere fact that a collateral issue may be raised is not of itself enough to justify the exclusion of evidence which bears upon the issue on trial. Most circumstantial evidence introduces collateral issues, and ordinarily it is a practical question, depending upon its relations to the other facts and circumstances in the case, whether it should be received. It may be remote from the real issue or closely connected with it, and in many cases its competency depends upon the decision of questions of fact, affecting the practical administration of justice in the particular case, such that a Court of law will refuse to revise the ruling of the presiding judge, but will treat his ruling as a matter of discretion."

This sensible solution has not yet been generally accepted by the Courts, at least in express language. Where the question of Auxiliary Policy has been considered, the evidence has more often been either rejected or accepted as if by a fixed rule, although the natural result has been a lack of uniformity in the rulings of such Courts. It is much wiser and more practical to leave the possible inconvenience to be determined by the tribunal best fitted to determine it, the trial Court, and to sanction the reception of all such relevant evidence subject to this exclusionary discretion based on inconvenience. This attitude is more and more frequently taken by the Courts, and will probably receive general approval as the true mode of dealing with such evidence.

§ 445. **Distinction between Experiment and Observation.** There are two ways in which the data may be obtained for evidencing tendency, capacity, or quality, on the principle under consideration. One is by using such instances as may be found ready at hand, — instances which have already occurred in the ordinary course of events and happen to be suitable for the purpose. The other is to reproduce artificially and expressly the appropriate conditions and then observe the data obtained by this effort and prearrangement. The former process is the simple one of Observation; the latter is that of Experiment. The former is, in general scientific acceptance, distinctly inferior for most purposes to the latter; because, in taking data just as they come, it is not usually feasible to secure precisely the proper conditions required for the validity or certainty of our inference; while in the latter the conditions may usually be prearranged precisely as they are needed in order to make a sound inference. Indeed, the former source of data, in the modern scientific world, is looked upon as concededly so inferior in probative value, as not to be resorted to except in such situations (for example, geological formations and human diseases) as do not usually admit of artificial prearrangement and control.

But this attitude of modern scientific thought is quite other than that which has been exhibited by many members of the bar and bench. There is a certain mental state which may in lenient moments be termed conservatism, but perhaps deserves to be called juristic narrowmindedness. It is often due to nothing more incurable than an ignorance of precedents and a bigoted fear of everything not technical. This attitude has shown itself, in

many quarters, in the form of an alarm at experimental evidence, a disinclination to accept what does not come in the accustomed shapes of certified copies, sealed instruments, and sworn depositions. It is the same spirit that was so reluctant, at the beginning of the 1800s, to resort to expert evidence. It is the same spirit that is willing to doubt the propriety of showing to the jury the very thing whose existence is in controversy, and prefers that the regular and cumbrous indirections should instead be followed (*post*, § 1151). This spirit has led occasionally to a rejection of experiments offered under the present principle as evidence of a tendency, capacity, or quality. These rulings of rejection are usually to be compared to the shying of a horse,—an instance of instinctive but unreasoning repulsion.

Occasionally there is, to be sure, some independent and plausible reason for questioning the evidence; for example, experiments made in a court-room in the presence of the tribunal may be inconvenient and impracticable (*post*, § 1160); experiments have also (but improperly) been objected to because they are hearsay or *ex parte* only (*post*, § 1385); experiments of some kinds may be objectionable because they violate the privilege against self-crimination (*post*, § 2265). So far as these considerations apply to experiments, they apply to them in common with other forms of evidence, and may be dealt under the other principles of evidence just indicated. But the present question is the simple one whether data whose relevancy is not questioned are objectionable or inferior because they have been obtained, not by observing merely such casual material as Nature has provided for us, but by carefully arranging the conditions so as to obtain by experiment more trustworthy results. That there should be such a distinction between Observation and Experiment would be unworthy of our law. That there is none has been made clear once for all in a classical passage by one of the greatest of American judges:

1872, *Doe*, J., in *Darling* v. *Westmoreland*, 52 N. H. 401: "Was the fright of Fletcher's horse competent evidence on the question whether the lumber was likely to frighten horses? . . . On the independent and general question of the horse-frightening capacity of a certain pile of lumber, what rule of law considers the fright of [the plaintiff's] horse as important and disregards the fright of Mr. Fletcher's horse as of no consequence at all? . . . If the question were, whether the lumber was capable of floating in water, or making a good fire, or being sawed or cut or planed in a specific manner, or supporting horses and wagons passing over a bridge, there could be no legal objection to the trial of an appropriate experiment upon it in the presence of the jury, or to the evidence of experiments that had been tried elsewhere. And there is no reason, outside of the technical rules of law, why its ability to frighten horses should not be tested out of court, and proved in court in the same manner. When we want to know whether a certain horse is skittish or is capable of a certain speed, whether a certain substance is poisonous and destructive of animal or vegetable life, whether certain materials are of a certain strength, whether a certain field or a certain kind of soil is likely to produce a certain kind or amount of crop, whether a certain man or brute or machine is likely to perform a certain kind or amount of work, or whether anything can be done or is likely to be done, one way is to speculate about it, and another way is to try it. The law is a practical science, and when it is appealed to to direct what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if any one asserts that, on this subject, the law prefers speculation to experience, abhors actual experiment and delights in guesswork,

the person advancing such a proposition takes upon himself the task of maintaining it upon some legal rule, distinctly stated by him and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that can be justly called a principle. By what technical rule, at war with reason and principle, is it supported? . . . The experience of other persons, equally relevant on that point, has seemed [to some judges] to have an objectionable appearance, because it did not come into the case in the same unobjectionable way as that by which the plaintiff's experience was introduced. . . . The tendency to error has been aggravated by an exception (which is a peculiarity of precedents of English origin) excluding relevant evidence of a defendant's general and notorious disposition to commit such crimes or torts as that with which he is charged, and his habitual commission of crimes or torts of a like kind as proof of such disposition. . . . However much reverence may remain for ancient innovations in behalf of human life under circumstances no longer existing, and however strong may be the inclination derived from that reverence and from habit to adhere to the practice of excluding evidence of human character furnished by experience, the extension of that practice to the rejection of experimental knowledge of the character of inanimate matter ought to stop. . . . It is evident that the exception [of the character-rule, above referred to], not being sufficiently emphasized as an exception and a very peculiar one, has produced much confusion by seeming to countenance the idea that the law has an antipathy against experimental knowledge in general."

There is an increasing judicial tendency to treat evidence of experiments in the spirit of Mr. Justice Doe's utterance; and it can hardly be supposed that the casual erroneous precedents would be regarded as a hindrance. How much more in harmony with the pristine practice of our law is Mr. Justice Doe's attitude, than that of the modern rulings which he justly criticises, may be seen in the following record of one of Sir Matthew Hale's trials, more than two centuries ago:

1665, *Witches' Trial*, 6 How. St. Tr. 647, 697; the children claiming to be bewitched would go into fits, clenching their fists, and then opening them with a shriek when the supposed witch touched them, "which accident would not happen by the touch of any other person." It was suggested that the children "might counterfeit this distemper"; so the judge, Sir Matthew Hale, desired that several gentlemen would test one of the children with Amy Duny, a defendant, in another part of the Court. "They put an apron before her [the child's] eyes, and then one other person touched her hand, which produced the same effect as the touch of the witch did in the Court. Whereupon the gentlemen returned, openly protesting that they did believe the whole transaction of the business was a mere imposture. This put the Court and all persons into a stand."[1]

[1] In the following list are given numerous examples of the different kinds of rulings upon experiments as such; the list includes merely typical cases, and many others may be found in the citations of the ensuing sections. The rulings may be grouped as follows, all the cases named being cited more at length in the ensuing sections: (1) Admitting the experiments offered; (2) Excluding them, but only because the tests of relevancy were not fulfilled in the case in hand, and not because they were experimenta instead of observed data; (3) Excluding them for no appreciable reason; (4) Excluding them because made before the jury (under § 1160, *post*); (5) Excluding them because *ex parte* (under § 1385, *post*); (6) Excluded for sundry peculiar reasons; (7) Left to the trial Court's discretion.

(1) Under this head fall the following cases: Witches' Trial, cited *supra;* Cowper's Trial, *post*, §§ 457, 460; R. *v.* Palmer, § 457; R. *v.* Heseltine, § 451; Broder *v.* Saillard, § 451; People *v.* Hope, § 451; People *v.* Durrant, § 451; Chicago, St. L. & P. R. Co. *v.* Champion, § 451; Brooke *v.* R. Co., § 458; State *v.* Cater, § 457; Mo. P. R. Co. *v.* Moffatt, § 460; State *v.* Asbell, § 457; Champ *v.* Com., § 457; Swett *v.* Shumway, § 451; Eidt *v.* Cutter, § 451; People *v.* Morrigan, § 460; Stone *v.* Ins. Co., § 460; Becket *v.* Aid Assoc., § 457; Vaughan *v.* State, § 457; Dillard *v.* State, § 457; Berckmans *v.* Berckmans, § 460; Lind-

§ 446. **Distinction between Possibility, Capacity, Tendency, and Cause, as the object of Evidence; Evidencing a Possibility.** The notion of Causation is by no means easy to analyze correctly; but it is enough to point out here that certain superficially different terms represent essentially the same evidential process. When it is asked, for example, whether certain factory-vapors were the cause of a destruction of herbage, the notion of "cause," simple as it seems, becomes upon analysis somewhat complex and at the same time indefinite. Stated in its broadest form, the notion of cause and effect is merely that of invariable sequence. It is only rarely, however, if at all, that such an abstract assertion can be made in universal terms that will stand examination. Thus, that a bullet shot from a pistol into the heart "causes" — *i. e.* will invariably be followed by — death, is a seemingly impregnable assertion; and yet not only may it not be true [illegible] bullets of every size, but it may not be true, even with ordinarily la[illegible] ullets, in instances recorded here and there; and, in the future, surgical skill may show that the instances of non-sequence of death might be made even more numerous. The assertion may then be amended by adding limiting conditions, so as to say that, provided this and that and the other be so, a bullet through the heart causes death. In short, instead of an absolute certainty or invariability of sequence, the assertion will be only of a very high probability of sequence. In most instances no one thinks of making an assertion in absolute form, and it is easy to see that an assertion of causation means usually only an assertion of high probability or strong tendency. Thus, the planting of seed in good soil at the right time of the year will probably result in a harvest in due season; but the result is not invariably certain, because no rain may fall or the land may be built upon or other influences may intervene. Though we should feel justified in speaking of the seed as the cause of the harvest, yet it would not be intended to assert anything more than that the seed has a tendency to produce the harvest. Coming now to an example of still weaker probability, suppose it to be asserted that gunpowder may spontaneously — *i. e.* without human meddling — explode, this is not saying that it will probably so explode, but merely

say *v.* People, § 451; Smith *v.* State, § 460; Leonard *v.* R. Co., § 451; Sullivan *v.* Com., § 457; Boyd *v.* State, § 457; Byers *v.* R. Co., § 460; Moore *v.* State, § 457; Osborne *v.* Detroit, § 457; State *v.* Flint, § 460; State *v.* Ward, § 451.

(2) Under this head fall the following cases: Lou. & N. R. Co. *v.* Hill, *post*, § 460; Jones *v.* State, § 460; Lake E. & W. R. Co. *v.* Mugg, § 451; Libby *v.* Scherman, § 458; Painter *v.* People, § 460; McMurrin *v.* Rigby, § 460; Com. *v.* Piper, § 451; Ulrich *v.* People, § 460; Klanowski *v.* R. Co., § 460; Justice *v.* State, § 457; West Pub. Co. *v.* Coop. Pub. Co., § 460.

(3) Under this head falls the following case: Evans *v.* State, *post*, § 457.

(4) Under this head fall the following cases: R. *v.* Palmer, *post*, § 457; Jumpertz *v.* People, § 460.

(5) Under this head belong the cases collected *post*, § 1385; no such principle of exclusion is recognized.

(6) Under this head fall the following cases: Wynne *v.* State, § 457; Polin *v.* State, § 451.

(7) Under this head fall the following cases: State *v.* Smith, § 451; Ball *v.* U. S., § 457.

The following English and Canadian statutory rules, quoted *post*, § 1151, expressly authorize the judge to authorize "experiments or observations" to be made and samples to be taken: Eng. Rules of Court, 1883; Man. Rev. St. 1902, c. 40, Rule 894; N. Sc. Rules of Court 1900, Ord. 37, R. 6; Ont. Rules of Court 1897, § 1096.

that under a rare combination of circumstances it will do so, *i. e.* it has a capacity to do so. Capacity, then, is a quality representing the same process of thought as tendency; *i. e.* it represents the possibility of a result as compared with the probability of a result, and above them both is a notion of a still higher degree, rarely realized in experience, — that of absolute certainty of result. All these are in the same category; the difference is that in the highest degree we think of the sequence as occurring under any and every combination of other circumstances, but in the middle degrees under the ordinary combinations only. and in the lowest degrees under rare combinations only. The notion of causation is perhaps most commonly associated with the middle and highest degrees only; *i. e.* one would naturally enough say, "A bullet through the heart will cause death," and "Sowing seed will cause a harvest"; while in the lowest degree one would either not speak at all of cause or would qualify the statement, for example, by saying, "Gunpowder may cause spontaneously an explosion." The essential thing to note is that *all these terms express* only *varying degrees of certainty or probability* or *possibility;* and that they all belong to the same logical category of thought:

Professor *Alfred Sidgwick*, Fallacies, 81, 285: "Abstract assertions of succession are commonly made with a large margin for the incalculable. We feel fairly contented in obtaining any hint of 'law,' — any knowledge, that is, which may form a basis for even imperfectly secure inference and proof. The only alternative to 'Chance' is often 'Tendency,' and our gladness to escape from Chance we dignify this as 'Law.' . . . Between mere guesses, hypotheses, theories, empirical laws, and 'laws of Nature,' there are only continuous differences of degree in certainty, according to the nature and number of the tests they have stood and the duration of their past invulnerability. . . . The resemblance in uncertainty between a fanciful guess and a proved law may be less important than the difference in the degree of certainty; but the fact cannot be safely hidden that the resemblance exists. . . . The method of proving laws is one and the same, whether they be the merest wildest supposition or the soundest explanation of the facts of Nature."

In the precedents upon the present subject, then, there is *no difference in logic or in legal principle* between evidencing a capacity, a tendency, or a certainty of operation or causation. The only difference is as to the practical need or utility of one or the other degree of likelihood in the case in hand. Thus, if the issue is as to a spontaneous explosion of gunpowder, we may appreciably advance our proof by showing merely a capacity, *i. e.* possibility, of such a result.[1] But, if the issue is as to the destruction of herbage by vapors, the capacity of the vapors to do this would probably be conceded, and the only useful way of advancing the proof will be to show, not merely a capacity, but a strong tendency to produce this effect.[2] Again,

[1] Of this sort are some of the precedents in § 460, *post*, in which the question is whether a person could be distinguished or whether work could be done; and also in § 457, *post*, in which the question is whether *e. g.* a pistol could carry from a certain distance.

[2] Of this sort are most of the precedents in § 458, *post*, where the question is whether a place in a highway was dangerous, *i. e.* likely to cause injury to passers-by.

if the issue is as to the injury to an adjacent house by factory-vibrations, their tendency to produce some injury would perhaps be easily enough shown or conceded, and the desirable thing would be, in offering evidence of effects elsewhere, to show by them that a fair certainty of injury actually attended the vibrations.[3] Incidentally, however, these differences may bear on the question of admissibility, so far as the evidence is required to have an appreciable value for the particular issue at bar.

§ 447. **Number of Instances required.** It follows, from what has just been said, that the number of instances offered is immaterial, so far as the logical principle is concerned. The only difference will be as to the practical utility, for the case in hand, of the inference to be drawn. One instance may indicate a capacity to produce the result; but so feeble and indefinite a possibility may practically not advance the cause beyond what would be already conceded or easily accepted. So, too, a limited number of instances might show a tendency or common probability, and yet this tendency might be already beyond dispute and unnecessary to prove, and nothing short of an approach to certainty or universality of operation would advance the cause of the proof. Thus, an offer of one or two instances only might properly be rejected by a Court, if it would tend to show merely a capacity which was already beyond dispute. The jury might be inclined to give too great effect to a single instance; and if the claim of the proponent required for its proper evidencing the existence of a strong tendency or of an approximate certainty of result, the Court might be justified in rejecting an offer of such scanty scope as not to evidence anything more than a capacity or possibility. No Court seems to have rejected evidence on these specific grounds, though they would serve as justifying the rulings in several cases where the rejection of a single instance has been put upon other and insufficient grounds.[1] But usually, where the evidence is regarded by the Court as otherwise admissible, it is received without any criticism as to number of instances.[2] Where the purpose is to show the existence of a mere capacity, so as to negative the impossibility of a thing's occurrence, here a single instance is always admissible.[3]

§ 448. **Negative and Affirmative Instances; Evidencing an Impossibility.** Whether an instance is to be regarded as affirmative or negative in form depends much on the issue as made by the parties. For example, if it were desired to prove performance of a warranty that a certain substance is calculated to deaden pain in dental operations,[1] instances of the substance having made operations painless are affirmative of the quality alleged by the warranty; but if a patient were suing the dentist for careless use of a substance

[3] This degree of strength of evidence seems never to have been required by Courts.

[1] *E. g.* Hoyt *v.* Des Moines, § 458; Hudson *v.* R. Co., § 458.

[2] *E. g.* Bailey *v.* Trumbull, § 458; Tomlinson *v.* Derby, § 458; Gilmer *v.* Atlanta, § 458; Darling *v.* Westmoreland, § 460; Pomfrey *v.* Saratoga Springs, § 458; State *v.* Isaacson, § 457.

[3] *E. g.* Broder *v.* Saillard, § 451; R. *v.* Heseltine, § 451; Augusta S. R. Co. *v.* Dorsey, § 460; State *v.* Delaney, § 451; Davis *v.* State, § 460.

[1] Compare Reeve *v.* Dennett, 145 Mass. 28, *post*, § 457.

calculated to produce pain, the offer of the same instances by the dentist would in form negative the alleged quality, *i. e.* they would be instances in which pain was not produced.

Assuming, then, that the issue is such that the instances are thus genuinely negative in purpose and form, is there any difference to be noted as to the conditions of their use, as distinguished from affirmative instances? Keeping in mind the principle just examined (*ante*, § 446), it will be seen that there is no difference of logical principle, though there is practically a difference in availability, according to the object of the evidence:

(1) Suppose that the proponent in the issue is (correctly) offering only to show a *capacity* — *i. e.* an occasional possibility — of producing the effect. Obviously, it is here logically of no avail to produce against him instances in which the effect was not produced. They do not meet his point; for it is quite consistent with the capacity or possibility of producing the effect that there should be many instances in which the effect was not produced; for example, if the proponent has evidenced by one or two instances the capacity of a pistol to carry two hundred yards, it is logically of no avail for the opponent to answer with a negative instance (or instances) in which it has not carried thus far. Logically nothing short of a universal negative will suffice.

Nevertheless, even a single negative may on certain conditions be receivable, and in the following way: If the proponent's witnesses to the capacity (or to the instances of capacity) are not to be believed, the opponent's negative instances are logically no answer; but it is impossible to say beforehand whether the jury will believe the proponent's witnesses. Assuming, then, that they do not believe them, and therefore that there is no affirmative instance of the alleged capacity in the field, even a single negative instance may suffice to show the non-capacity or impossibility on one condition, namely, that it is made equivalent to a universal negative. The only way to do this is to take an instance which by allowing for all possible counteracting causes shows that, even where they could not have operated, nevertheless the effect was not produced, *i. e.* there was an incapacity to produce it. For example, one instance of a pistol's not carrying 200 yards is simply a negative instance showing that it does not always carry that distance; but if we show that the greatest possible charge of powder was put in, the smallest possible bullet was used, and the most skilful marksman possible aimed it, and still it did not carry 200 yards, we have gone far to show that it is utterly incapable of carrying that distance, *i. e.* to prove a universal negative from a single instance. Where the precautions are thus sufficient to exclude the operation of possible counteracting influences, a single instance may be more trustworthy than a thousand of another kind, because it yields the assurance that if there were under any circumstances a possibility of producing the alleged effect, it would have been here produced. This is an example of the Method of Difference applied to show a negative.[2]

[2] Sidgwick, Fallacies, 275, 282, 339.

In practice, the proponent seldom has occasion to allege merely a capacity, and that case may be neglected. But the opponent may meet the situation by denying even such a capacity, and then the above principles apply on the issue thus formed. So that the opponent may properly, in evidencing an impossibility, offer either (a) a universal negative, *i. e.* that no instances of such a capacity have occurred; or (a′) one or more instances attended by such precautions or conditions as practically amount to a universal negative. As to (a), note that evidence merely of instances not having been heard of is not sufficient, unless they would have been heard of if they had occurred.[3] As to (a′), note that for purposes of mere admissibility (*i. e.* not demonstration), only a moderate degree of such precautions could be required.

(2) Suppose, however, that the proponent is aiming to show something stronger than a mere capacity, *i. e.* a *general or usual tendency*, and has evidenced this by a few instances; here, obviously, an equal or greater or less number of negative instances or perhaps even a single instance would help to show that no usual or general tendency could be predicated, and thus would be practically available to answer the showing made by the proponent.

(3) But suppose, finally, that the proponent is interested in showing a fair *certainty or inevitableness* of effect; here even a single negative instance would suffice to dispose of his contention. The proponent cannot claim that an effect is invariably found, if an instance is shown in which the effect is not found; for example, where it is claimed that a near gunshot wound always leaves powder-stains, a single instance will overturn this claim.

In practice, however, there is little discrimination to be made between the use of the negative instances in these three situations. If the distinction between these three possible attitudes of the proponent were sharply marked by the pleadings, then the foregoing discriminations would apply, and the opponent would have to regulate the use of his negative instances accordingly. But there is usually no such sharp demarcation; the proponent alleges the qualities of a certain object as the cause of the alleged effect, but he seldom is restricted to one of the above three purposes; *i. e.* he will hope to prove a universal or invariable production of the effect, but he will probably be satisfied if he can prove only a general tendency, and he may end by not evidencing any more than a mere capacity. At one and the same time he is making an attempt at all three; and therefore the opponent is entitled to offer whatever would be relevant against any one of the three, and cannot be criticised if his offer would be insufficient against some one, if it is sufficient against another.

To sum up, then:

(1) Where the proponent offers to show merely a capacity, or where the opponent invites the issue by proposing to show a non-capacity or impossibility, the latter's evidence may properly be of either of two sorts: (*a*) He

[3] Compare § 671, *post*.

may show that in all experience with the thing in question, no such effect had ever occurred; (*b*) He may show one or more instances attended by such conditions as make it probable that no such effect could possibly occur.

(2) Under the second head above, one or more negative instances are always receivable; but more may be required.

(3) Under the third head, a single negative instance is always receivable.

In general, the rulings are based upon the above principles; though occasionally an unwarranted distrust of negative instance is shown.[4]

§ 449. **Explaining away the Proponent's Instances.** An opponent who is not supporting his case by bringing in new data of his own, but confines himself to destroying the proponent's data, finds three ways at hand for diminishing their effect. The three ways have been examined already in dealing with Relevancy in general (*ante*, §§ 34, 35); and a brief notice of their application to the present sort of evidence will here suffice.

(1) The opponent may produce contradictory, or *negative, instances;* that is to say, the proponent's instances being offered to show a tendency or capacity to produce an effect, the opponent answers by producing other instances in which the effect did not appear, arguing from this that the tendency must be only a limited one and does not produce its effects with any probability. The principles governing this use of negative instances have been considered in the preceding section.

(2) The opponent may show that, while the proponent's instances occurred *prima facie* under similar conditions, yet there was for one or more of them some attendant condition which was really important and was likely to have been the true source of the effect observed, so that the proponent's instance may or must be attributed to that other and not to the alleged tendency or cause in question. Thus he *explains away* the proponent's instance by showing that it does not mean what it seemed to mean.[1] Such explana-

[4] The chief cases may be grouped as follows:

I. *Negative instances rejected:*

1. Because of auxiliary policy, dissimilarity of conditions, or some other independent reason, and not because they were negative.

2. Because they were negative: (1) *a*. Improperly rejected under (1) *a*, *supra*; *a'*. Properly rejected under the same; *b*. Improperly rejected under (1) *a'*, *supra*; *b'*. Properly rejected under the same; (2) Improperly rejected under (2) *supra*; (3) Improperly rejected under (3) *supra*.

II. *Negative instances received:* (1) *a*. In the situation of (1) *a*, *supra*; *b*. In the situation of (1), *b*, *supra*; (2) In the situation of (2) *supra*; (3) In the situation of (3) *supra*.

Not all of the above sorts are represented in the rulings, but all are capable of occurring.

I, 1: Bauer *v.* Indianapolis, § 458; Branch *v.* Libbey, § 458; Balt. & Y. T. R. *v.* Leonhardt, § 458; Balt. & Y. T. R. *v.* State, § 458; Aldrich *v.* Pelham, § 458; Lewis *v.* Smith, § 458; Peverly *v.* Boston, § 458; Ulrich *v.* People, § 460; Temp. Hall Assoc. *v.* Giles, § 458; Polin *v.* State, § 451; Bloar *v.* Delafield, § 460.

2, (1) *a:* Hodges *v.* Bearse, § 458; (1) *a':* Balt. & Y. T. R. *v.* State, § 458; (1) *b*: no instances; (1) *b'*: Libby *v.* Scherman, § 458; Ulrich *v.* People, § 460.

I, 2, (2): Nave *v.* Flack, § 458 (express repudiation of this class of evidence); Bauer *v.* Indianapolis, § 458.

I, (3): no instances.

II, (1), *a:* Crofter *v.* R. Co., § 458; Tremblay *v.* Harnden, § 451; Doyle *v.* R. Co., § 458 (an express sanction of such evidence); Dougan *v.* Champlain Co., § 458; Baird *v.* Daly, § 458; Sinton *v.* Butler, § 458.

II, (1) *b:* Epps *v.* State, § 457; Champ *v.* Com., § 457; Vaughan *v.* State, § 457; Smith *v.* State, § 460; Leonard *v.* State, § 451; Sullivan *v.* Com., § 457, Boyd *v.* State, § 457; Byers *v.* R. Co., § 460; Osborne *v.* Detroit, § 457.

II, (2): Calkins *v.* Hartford, § 458; Wilson *v.* Granby, § 458; Hill *v.* R. Co., § 460; Salem D. R. Co. *v.* Adams, § 460; McCool *v.* Grand Rapids, § 458; Lester *v.* Pittsford, § 458.

II, (3): Cowper's Trial, § 457.

[1] In § 35, par. 2, *ante*, this form of argument has been sufficiently illustrated.

tory circumstances are always receivable in evidence.[2] The only limitation is the policy of preventing confusion of issues (*ante*, § 443),—the fear of which indeed finds its chief justification, so far as it has any, in the necessary propriety of allowing this mode of explanation, when once the proponent is allowed to open the way with particular instances.

(3) The third method takes away the force of the proponent's instance by offering *other instances* in which the same effect is found, but *without the presence of the alleged cause*. The absence, in these additional instances, of the thing alleged to have the causing tendency, forces us to look upon its presence in the proponent's instance as merely accidental, and explains that instance away as due not to the alleged tendency but to something else. Thus, to show that an illness following Monday's dinner was not due to the ham eaten, an instance of the same illness following Tuesday's dinner, at which the dishes were the same except that no ham was eaten, indicates that some other dish was probably the common cause on both occasions. The limitations on the use of this form of disproof are that the conditions (otherwise than as to the alleged cause, *e. g.* the ham) were substantially the same on both occasions; for, unless this is ensured, it might be supposed that the alleged cause — *e. g.* the ham — might have operated in the one case and some other cause in the other case. It is only by confining the difference of the two instances to the single circumstance in question that the argument is effective to eliminate it as the cause.[3]

(4) The use of the Method of Difference (*ante*, § 442, at the end) is not to be confounded with the preceding modes of argument. It has in appearance a negative character, and may be resorted to in Disproof; but it does not operate by explaining away the proponent's evidence; it begins a new line of evidence, although that evidence may be directed to proving a negative proposition, *i. e.* that a certain thing was not a cause.

2. Precedents arranged by Subjects.

§ 450. **Principle of Classification.** For the practical purposes of study and reference, it is better to consider the precedents in such an order that the rulings upon a given sort of tendency, capacity, or quality, can be found in one place. Each of these tendencies or qualities exemplifies in the rulings more than one of the preceding modes of argument, and in the foregoing examination of the principles the specific typical precedents have been noted in illustration. But it is chiefly desirable to be able to note the state of the law on a given sort of evidence in each jurisdiction. Moreover, other questions, requiring special consideration, incidentally arise under certain subjects, and can only be treated under the particular head of evidence involved.

[2] The process is common, though the precedents are few: Abend *v.* Mueller, § 451; Pettibone *v.* Smith, § 451.

[3] The following precedents illustrate it: Standish *v.* Washburn, § 451; Eidt *v.* Cutter, § 451; Pinney *v.* Cahill, § 457; Hoyt *v.* R. Co., § 458; Haynes *v.* Burlington, § 451. This form of argument has been examined in § 35, par. 3, *ante*.

How shall the various precedents be arranged most usefully for the present purpose? The principle involved is the evidencing of a tendency (capacity, or quality) by its effects. The precedents may therefore best be grouped according to the various kinds of tendencies (capacities, or qualities) and the various kinds of effects. A preliminary grouping may be: A. *Material effects* (for example, marks left by a pistol shot, damage done to houses by smoke, fire set by locomotive-sparks); B. *Corporal effects*, including animal and human effects (for example, wounds produced by shots, disease produced by poison, injuries by dangerous highways); C. *Mental and Moral Effects, i.e.* on *human conduct* (for example, efforts to escape the danger of a railroad collision, time required by a workman for work, precautions required for a dangerous machine). This classification is to some extent arbitrary, as all must be, in the sense that some cases might equally well go in one group or another. But the general lines of division are marked; and the grouping is the most useful, because it enables us to compare the employment of analogous kinds of effects, and to see how far the uses of related kinds of effects throw evidential light on each other.

A. Instances of Material Effects, as Evidence.

§ 451. **Miscellaneous Instances (Factories, Railroads, Floods, Gases, Land, Machinery, Tools, Apparatus, Weapons, etc.).** The tendency, capacity, or quality, so far as it exists, may show itself through its material effects. Instances of its apparent operation under substantially similar circumstances will serve to evidence it, subject to the foregoing limitations of principle. In this way may be evidenced the existence (or not) of sundry *nuisances*, by the presence (or absence) of certain effects under similar circumstances (for example, of similar damage by other factories, streams, hospitals, sewers, operating under analogous conditions);[1]

[1] 1839, Tennant *v.* Hamilton, 5 Cl. & F. 122 (nuisance in injuring the plaintiff's premises by smoke, etc.; evidence on both sides as to the condition of "land similarly circumstanced to those of the party complaining," admitted, per L. C. Cottenham, "for ascertaining what the effect was of the smoke and vapor emitted by this manufactory"); 1857, R. *v.* Fairie, 8 E. & B. 486, 488 (Coleridge, J., cited a former case in which, on a charge of nuisance, he admitted evidence of the similar effects of the defendant's manufacture carried on at another place, to show "the tendency of the manufacture to produce such effects"; Lord Campbell, C. J., agreed); 1876, Broder *v.* Saillard, 2 Ch. D. 692 (Jessel, M. R., in an action to restrain a noise-nuisance, admitted "a practical experiment performed by Mr. I'Anson, who actually only put in the stable a piece of wood with a horse's shoe attached, and when that was struck upon the ground he heard it on the second floor front [of the next house]; showing that it is distinctly heard . . ."); 1882, Metropolitan Asylum Dist. *v.* Hill, 47 L. T. R. N. S. 29 (whether a small-pox hospital was a nuisance in infecting a neighborhood; per Lord Selborne, L. C., evidence was admissible of "any similar or other facts from which the effect, or absence of effect, of other hospitals, and particularly of those at H. and S., on the surrounding neighborhoods, could either positively or approximately be ascertained"; *accord*, Lord Watson; *contra*, Lord O'Hagan; quoted *ante*, § 443); 1899, Hoadley *v.* Seward & S. Co., 71 Conn. 640, 42 Atl. 997 (nuisance by a factory; effect of defendant's business upon other persons situated substantially the same as the plaintiff, admitted); 1871, Cooper *v.* Randall, 59 Ill. 320 (Walker, J., for the majority, admitting evidence in a nuisance case that the defendant's mill threw dust, smut, etc., on other houses: "It tended to show that the mill was capable of inflicting the injury complained of by appellant. If the deposit was general in the immediate neighborhood, and large quantities were deposited on other buildings similarly situated, it would be a just inference that the same was true of appellant's house"); 1900, Bradley *v.* R. Co., 111 Ia. 562, 82 N. W. 996

of the nuisance-nature of a *railroad*, by its injurious effects upon similar adjacent property, in respect to smoke, noise, vibration, and the like;[2] of the tendency of *water*, in various forms, by its effect under similar circumstances (for example, in the flowage of streams, the silting of harbors, the breaking of dams, the destruction of bridges);[3] of the tendency of *gases*, by their injurious effects, on other houses, trees, or water-supplies;[4] of other injurious operations

(condition of grass-roots in adjoining meadow under similar conditions, admitted); 1900, Hughes *v.* General Electric L. & P. Co., — Ky. —, 54 S. W. 722 (nuisance of smoke, etc.; effect on other dwellings in vicinity, excluded; no authority cited); 1864, Lincoln *v.* Mfg. Co., 9 All. 181 (alleged poisoning of a stream by copper acids, destroying meadow-crops; that similar effects were produced upon other meadows along the river, excluded, for reasons of confusion of issues and because of the slight probative value; Standish *v.* Washburn, *post*, doubted).

[2] 1896, Metropolitan W. S. E. R. Co. *v.* Dickinson, 161 Ill. 22, 24, 43 N. E. 706 ("physical effects upon adjoining property of an elevated railroad of the same general character as this one in the way of noise, smoke, gases, etc.," not admissible; except that witnesses to value may be asked whether they are qualified by knowing it); 1851, Concord R. Co. *v.* Greely, 23 N. H. 237, 243 (inconveniences of a railroad on adjoining land, not allowed to be shown by the experience on adjacent lands, because of the collateral issues involved); 1891, Doyle *v.* R. Co., 128 N. Y. 488, 495, 28 N. E. 495 (damage by the operation of an elevated railroad; evidence received of the effect upon the premises similarly situated and "not too distant"; "the Court may undoubtedly in such case, in the exercise of its discretion, limit the number of witnesses to be called, and may confine the examination of the witnesses to premises in the vicinity, giving a reasonable range"); 1896, Hine *v.* R. Co., 149 id. 154, 43 N. E. 414 (to show the effect of an elevated railroad upon the light coming to abutting premises, the effect upon premises across the street was admitted).

[3] 1782, Folkes *v.* Chadd, 3 Doug. 157, Lord Mansfield, C. J. (admitted evidence of the state of other harbors along the same coast where no embankment existed, to show that no such change had occurred as at the harbor in question, where an embankment existed); 1903, Louisville Water Co. *v.* Weis, — Ky. —, 76 S. W. 356 (flooding of a cellar from a leaking meter; the flooding of other cellars, offered to show that other causes had operated, held properly excluded in the trial Court's discretion); 1860, Clark *v.* Water Power Co., 52 Me. 75 (in an action for diverting a stream, injuries to another mill-owner were rejected on the facts, because "there were no elements of comparison offered which could afford any safe or reliable data for the judgment of a jury," and still other evidence, because the conditions "did not present such points of similarity to the plaintiff's mill and privilege as to afford any reliable data for comparison"); 1838, Standish *v.* Washburn, 21 Pick. 237 (the extent of flowage of meadows; the plaintiff offered to show a change in the quality and quantity of his land-production in the previous ten years as compared with the anterior period; then the defendant offered to show like changes in other lands not flowed; the latter was rejected, so far as the other meadows were distant and presumably not under the same influences); 1872, Hawks *v.* Charlemont, 110 Mass. 112 (the occurrence of washouts at a previous occasion and a different place by a removal of stones in the same way as alleged against the defendant; the trial Court ruled that "if the plaintiff could show that the localities and all the elements entering into the occurrences taking place at each locality were alike," the evidence might be given; and this ruling was sustained); 1889, Verran *v.* Baird, 150 Id. 142, 22 N. E. 630 (to show the effect of the breaking of the plaintiff's dam, the fact was offered of the appearance of a gully halfway between the dam and the plaintiff's property; but the other facts "necessary to make the gorge a measure of the volume and force of the water" were wanting, and the evidence was rejected); 1877, Pettibone *v.* Smith, 37 Mich. 580 (the low water in a stream was explained as the result of a succession of dry seasons, not of the defendant's diversion of water); 1867, Dorman *v.* Ames, 12 Minn. 451, 456 (overflow caused by a dam; that certain changes observable in the land were also observed in other land, not admitted for defendant); 1903, Roberts *v.* Dover, — N. H. —, 55 Atl. 895 (back-flow of sewage; that the sewer had at other times flowed back into cellars on an adjacent street, admitted to show the adequacy of the sewer's capacity); 1903, Bullock *v.* Lake Drummond C. & W. Co., — N. C. —, 43 S. E. 593 (effect of a canal in damaging adjacent property, excluded); 1839, Reed *v.* Dick, 8 Watts 480, 481 (admitting evidence of the behavior and condition of other vessels, to show the violence of a storm); 1891, Hoffman *v.* R. Co., 143 Pa. 503, 22 Atl. 823 (illustrating the force of discharge of water by experiment in Court, allowed); 1865, Haynes *v.* Burlington, 38 Vt. 350, 363 (to show that the setting back of water was not the cause of injury to a building, etc., similar injuries to another building not touched by the water were rejected, because the other conditions did not appear to be "so similar that one would be any fair test for the other").

[4] 1864, Ottawa G. & C. Co. *v.* Graham, 35 Ill. 348 (Walker, C. J.: "One of the questions controverted before the jury was whether the gas could pass through the earth the distance the well was situated from the tank, so as to affect the water. If it could be shown that it had so affected the water in other wells at the same or greater distance from the tank,

and structures affecting the condition of *land* or *buildings* by vibration, burning, or otherwise;[5] of the tendency or quality of *tools, weapons, vehicles, acids*, and other materials, as indicated in their effects upon similar substances under similar conditions;[6] and of the tendency of a *machine* or apparatus, as shown

such evidence" would be admissible); 1879, Eldt *v.* Cutter, 127 Mass. 522 (whether the gases from the defendant's copperas works had caused the discoloration of the paint on the plaintiff's house; the defendant alleged that the discoloration was due to sewer gas; experiments made with painted boards, etc., were admitted for the plaintiff as showing that under circumstances substantially similar, except that the sewer gas was wanting, the same results were produced; but the matter was admitted as being the grounds of experts' opinions); 1900, Koplan *v.* Gaslight Co., 177 Mass. 15, 58 N. E. 183 (whether a leak in the defendant's pipes had caused an explosion; testimony to "a smell of gas near the place of the accident at different times within three months previously," admitted); 1895, Evans *v.* Gas Co., 148 N. Y. 112, 42 N. E. 513 (to show that plaintiff's trees were injured by escaping gas, the fact was admitted of trees in the neighborhood being similarly affected at the time); 1902, Kilbride *v.* Carbon D. & M. Co., 201 Pa. 552, 51 Atl. 347 (explosion of a gas cylinder: the fact that the defendant had sold 150,000 gas cylinders, only one of which had ever exploded, treated as evidence to show their safety); 1899, Barrickman *v.* Marion Oil Co., 42 W. Va. 634, 32 S. E. 327 (fire caused by negligent supply of natural gas to plaintiff's house; condition and pressure of gas in neighboring houses governed by same regulator, admitted).

[5] 1868, Clark *v.* Willett, 35 Cal. 544 (the effect of the tunnelling of the defendant, as detrimental to adjacent premises other than the plaintiff's, offered to show that the defendant caused the land to crack and settle; excluded on the ground of surprise and confusion of issues); 1882, Abend *v.* Mueller, 11 Ill. App. 256 (action for injuries to soil and buildings caused by vibrations of the east end of the St. Louis Bridge; (1) evidence was admitted that at the west end the vibrations were more severe and that yet buildings were not injured; "Differences arising from diversity of soil or geological formation, if any, or otherwise, could readily have been ascertained on cross-examination or by the introduction of rebutting testimony"; (2) evidence of cracks, etc., caused in other buildings had been admitted; it was held then proper to show that these injuries were caused by vibrations of an adjacent Belt Railway and not by travel over the bridge); 1898, Sugar C. C. M. Co. *v.* Peterson, 177 Ill. 324, 52 N. E. 474 (falling of mine-roof in another place, not admitted); 1902, Fitzsimons & Connell Co. *v.* Braun, 199 id. 390, 65 N. E. 249 (injury to a building by dynamite blasts near by; the fact that adjacent buildings were or were not injured by the same blasting, excluded on the facts); 1900, Seibert *v.* McManus, 104 La. ..., 29 So. 108 (experiments as to fire-construction, admissible when made under identical conditions).

[6] 1873, R. *v.* Heseltine, 12 Cox Cr. 404 (arson; to show that the fire could have been set as claimed, experiments made with candles of different lengths, similar to those found in the débris of the fire, were admitted); 1901, Decatur C. W. & M. Co. *v.* Mehaffey, 128 Ala. 212, 29 So. 646 (experiments two years before, not under substantially the same conditions, to show the swinging of a scaffold, excluded; 1901, Timothy *v.* State, 130 Id. 68, 30 So. 339 (experiments as to the distance at which powder-marks will be left, held inadmissible); 1874, People *v.* Brotherton, 47 Cal. 402 (that a powder possessed by the defendant had destroyed ink-traces in another check written with the same ink as the one alleged to have been altered by the defendant, admitted); 1882, People *v.* Hope, 62 id. 291, 295 (experiments in Court with burglar's tools, allowed, for an unspecified purpose); 1897, People *v.* Durrant, 116 id. 179, 48 Pac. 75 (fitting a chisel into marks on a door, allowed, the door, etc., being in the same condition); 1881, State *v.* Smith, 49 Conn. 381 (experiments with pistols by an expert, to see from which one a bullet had been discharged; the trial Court's discretion in refusing, held conclusive); 1884, Tomlinson *v.* Earnshaw, 112 Ill. 313 (to show that a sandstone having certain iron-spots in it was nevertheless of first quality, testimony was received that all such stones, even of first quality, had such spots); 1902, Jewell Filter Co. *v.* Kirk, 200 id. 382, 65 N. E. 698 (satisfactory operation of other filters of the same vendor, excluded, the similarity of circumstances not being shown); 1892, Lake Erie & W. R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 465 (experiments as to the freezing of a boot to the rail on a cold day, made on the day of the injury, excluded, because the conditions were not similar; see quotation *ante*, § 442); 1862, Chicago, St. L. & P. R. Co. *v.* Champion, — Id. —, 32 N. E. 874 (experiments in letting a gondola-car down upon a siding under similar conditions, admitted; see quotation *ante*, § 442); 1899, Thrawley *v.* State, 153 id. 375, 55 N. E. 95 (experiments with similar pistol and cartridges to determine carrying distance, allowed); 1900, Bach *v.* R. Co., 112 Ia. 241, 83 N. W. 959 (defective guard-rail; subsequent derailment under different conditions, excluded); 1869, Swett *v.* Shumway, 102 Mass. 368 (experiments by a witness as to the strength of similar horn and hoof rings when put together, admitted); 1876, Com. *v.* Piper, 120 id. 190 (murder by clubbing; experiments on a dynamometer with a bat of substantially the same form and weight as that alleged to have been used were rejected; Morton, J.: "Experiments of this character would tend to confuse and mislead rather than to assist the jury, unless they were shown to have been made under conditions the same as those existing in the case on trial. It was not shown in this case that there was a

by other instances of its operation under similar circumstances, to operate defectively or otherwise (for example, in actions for breach of warranty or personal injury);[7] here the *workings of other similar machinery* (tools or apparatus) would equally be receivable, provided the conditions were similar and a confusion of issues was not involved; but, in the first place, it should be understood that the other instances are merely evidential of the way the one in question probably worked, and should not be taken as a legal standard of adequate operation (*post*, § 461); and, in the second place, the issue in the case may be such that the other instances are less likely to be relevant (as where a different contract of operation was made), or that an instance of a special kind only is material (as where one machine is taken as the sample of sale).[8]

similarity in the conditions of the two events, and the Court might properly in its discretion reject the testimony"); 1902, Kingman *v.* Lynn & B. R. Co., 181 Id. 387, 64 N. E. 79 (dangerous operation of a ring in a car at other times on the same day, admitted); 1901, Thiel *v.* Kennedy, 82 Minn. 142, 84 N. W. 657 (experiments with a wringer under similar conditions, rejected in discretion as involving confusion of issues); 1883, Polin *v.* State, 14 Nebr. 540, 16 N. W. 898 (whether a revolver would go off at half-cock; an experiment by the sheriff, with the remaining cartridges, under order of the Court, not allowed at the defendant's request, because the Court could not order the sheriff, and because the experiment could have been tried equally well with the empty chambers); 1899, Little *v.* Head & D. Co., 69 N. H. 494, 43 Atl. 619 (tests of strength of a hook, held not improperly excluded in discretion); 1875, Linsday *v.* People, 63 N. Y. 143, 147, 156 (tests of blood spots on boards long after the murder, admitted, on evidence that their condition was the same); 1854, Otey *v.* Hoyt, 2 Jones L. 72 (to show that a will was forged, by chemically removing the ink and writing in its place, a witness testified that "he had just seen an experiment performed whereby legible writing with ordinary ink had been erased and extracted from a piece of paper," which he then held in his hand, by the application of certain chemicals; excluded); 1892, Leonard *v.* R. Co., 21 Or. 555, 28 N. W. 887 (a scar on the outside of the bottom flange of a rail was alleged to have been made by the wheel of an engine on a rail crossing the first; experiments were received of the rolling of a similar wheel on a similar rail crossing, showing the impossibility of such a result; the experimental wheel was slightly smaller, but an increase of size would only have increased the impossibility; see quotation *ante*, § 442); 1888, State *v.* Ward, 61 Vt. 153, 17 Atl. 483 (experiments as to the similarity of sleigh-tracks, received); 1900, Hardwick S. B. & T. Co. *v.* Dreman, 72 id. 438, 48 Atl. 645 (experiments as to adhesiveness of gummed paper, not admitted where similarity of conditions did not appear).

For evidence from the effects of gunshots, drugs, etc., on human bodies, see § 457, *post*.

[7] 1891, Phillips, J., in Bloomington *v.* Legg, 151 Ill. 9, 13, 37 N. E. 696 ("Where an issue is made as to the safety of any machinery or work of man's construction which is for practical use, the manner in which it has served that purpose, when put to that use, would be a matter material to the issue"); 1876, Baber *v.* Rickart, 52 Ind. 594, 597 (whether a ditching machine would work as warranted; its manner of working at another place, admitted); 1894, State *v.* Delaney, 92 Ia. 467, 61 N. W. 1040 (arson; to show that the fire might have been caused by a leaky gasoline stove, the fact was admitted of a former fire in the same house from the stove); 1880, Brierly *v.* Davol Mills, 128 Mass. 291 (whether a loom attachment was capable of successful working; its working upon another loom of substantially the same construction and operation, admitted); 1894, Tremblay *v.* Harnden, 162 Id. 383, 38 N. E. 972 (injury by a machine; that it "worked perfectly before the accident and had worked perfectly ever since," admitted); 1896, Flaherty *v.* Powers, 167 Id. 61, 44 N. E. 1074 (habit of a machine to spatter, admitted, to show its behavior at the time of the accident); 1897, Roskee *v.* Pulp Co., 169 id. 528, 48 N. E. 766 (experiments with machinery to test its working, received); 1890, McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812 (injury at a machine; prior misworking of the same machine in the same way, admitted, to show "the condition of the machine"); 1893, Findlay Brewing Co. *v.* Bauer, 50 Oh. 560, 35 N. E. 55 (admitting instances of the previous workings of a machine under another person, to show its defective character); 1896, Baker *v.* Hagey, 177 Pa. 128, 35 Atl. 704 (other instances of defective working of a plant for breaking steel, admitted to show its defective condition at the time in question); 1898, Taylor *v.* U. S., 32 C. C. A. 449, 89 Fed. 954 (counterfeiting; whether a machine could do certain work; allowed to be operated before the jury); 1900, Konold *v.* R. Co., 21 Utah 379, 60 Pac. 1021 (experiments as to cause of explosion, held not improperly excluded in trial Court's discretion); 1898, Perry *v.* Machine Co., 70 Vt. 276, 40 Atl. 731 (condition of a machine, as to operating, on the day of trial, admitted).

[8] 1880, Blackman *v.* Collier, 65 Ala. 312 (admitting the operations of similar machinery,

The evidencing of a tendency — *e. g.* of a machine — by its material effects is to be distinguished from two other matters, one of them involving a wholly different principle: (1) The evidencing of a defective or dangerous machine or highway by the occurrence of previous personal injuries has a special line of other precedents (dealt with *post*, § 458). (2) The inference to one human act of negligence from another similar act (in using, for example, the same machine or in driving the same street-car) is governed by different principles, and is dealt with under the character-rule (*ante*, § 199). This distinction is pointed out in the following passage:

1894, *Putnam*, J., in *Central Vt. R. Co.* v. *Soper*, 8 C. C. A. 341, 59 Fed. 870, 890 (in an action for damage caused by spontaneous ignition of dust by heated pulley-bearings, admitting evidence that similar ignition at those bearings had occurred before): "[The facts objected to] relate entirely to the tendency of things, inanimate things, being in this case machinery. The plaintiff in error argued as though they related to the peculiar habits of certain specified human beings. The distinction is a broad one; and, if it is kept in mind, the evidence was clearly admissible for the purpose, not of showing that the employees of the defendant below were negligent, but of showing . . . that it is the tendency of certain parts of rapidly-running machinery to get heated, and of dust in mills where grain is ground or stored to be of a highly inflammable character, . . . both for the purpose of showing a point where the fire might have originated and also of showing the necessity of care to guard that point."

to determine capacity); 1898, Stockton C. H. & A. W. v. Ins. Co., 121 Cal. 167, 53 Pac. 565 (machines destroyed by fire; to show that they were worthless, evidence by the defendant how other similar machines of the plaintiff had worked, excluded); 1884, McCormick H. M. Co. v. Gray, 100 Ind. 285, 292 (sale of a harvester; defence, that it did not work well; that it ran harder than other machines, excluded, as "a comparison with standards not admitted to be true standards of excellence"); 1885, Nat'l B. & L. Co. v. Dunn, 106 Id. 110, 115, 6 N. E. 131 (sale of a threshing engine; defence, that it was defective; the quantity of work of another engine of the same make and rated power, admitted, as merely showing "the possibilities" of such an engine, and not setting up a standard of quality); 1887, Osborn v. Simerson, 73 Ia. 509, 512, 35 N. W. 615 (sale of a harvesting-machine; issue, its failure to work as represented; the way in which other similar machines worked, excluded, because it would be essential that the other machines should be similar and tried under similar circumstances, and this would introduce too many collateral and unforeseen issues); 1890, Davis' Sons v. Sweeney, 80 Id. 393, 45 N. W. 1040 (showing that a machine was defective by telling what other similar machines would do, allowed); 1897, Kramer v. Messner, 101 Id. 88, 69 N. W. 1142 (to show that a heating-apparatus did not fail because of defects in the building, the fact was admitted of favorable results obtained from another apparatus in the same house under severer conditions); 1831, Bradford v. Ins. Co., 11 Pick. 161 (to prove that damaged blankets were not damaged by sea-water in transit but by wetting in the consignor's factory to increase the weight, the fact was admitted of the receipt by other consignees, in the same year, from the same consignor, by different vessels, of many similar goods damaged in a similar manner); 1886, Gege v. Meyers, 59 Mich. 300, 306, 26 N. W. 522 (contract to sell cutler-woods; the workmanship and materials of others of the same lot shipped to other persons, not received; no authority); 1886, Osborne v. Bell, 62 Id. 214, 218, 28 N. W. 841 (harvesting-machine, alleged to operate defectively; that all the others of 100 sold the same year worked well, excluded, as not tending to show "that the operation of the one in question was in accordance with the promise of the plaintiff"); 1898, Avery v. Burrall, 118 Mich. 672, 77 N. W. 272 (guaranty of boilers' working; working of other similar boilers under similar circumstances, admitted to show that under proper management the boilers would work well); 1899, People v. Thompson, 122 Id. 411, 81 N. W. 344 (explosion of boiler; experiments as to time of raising steam under similar conditions, admissible); 1898, Shute v. Mfg. Co., 69 N. H. 210, 40 Atl. 391 (cause of breaking of a pulley; breaking of another similar pulley, admitted); 1870, Tilton v. Miller, 66 Pa. 388 (refusal to accept gas-burners purchased by sample, because they were not made according to sample; held, that while the maker did not guarantee a particular result or quality of work, and therefore evidence that they did not work well was immaterial, yet to determine whether they were made according to sample, the workings of the sample and the workings of the goods offered might be received for comparison); 1885, Carpenter v. Corinth, 58 Vt. 216, *semble* (breaking of other horse-bits under similar conditions, admissible).

§ 452. **Sparks and Fires, as evidencing the Cause of a Fire; General Principle.** There has been some confusion of precedents over the evidencing of the source of a fire (usually, a fire attributed to a railroad locomotive engine) by the fact of the emission of sparks or the setting of fires at other times by the same or other apparatus. The solution of the problem seems not to be difficult if the different issues involved are discriminated. Two issues may come for investigation. (1) The effort may be to prove the *cause* of the fire in question. The locomotive, or other apparatus (factory or mine chimney), is alleged as the cause; and this is sought to be evidenced by the fact that at other times there were emissions of sparks (*i. e.* flaming coals) from (*a*) the same engine or (*b*) other engines of the same owner. (*a*) The proposed inference, in the first case, is from the former spark-emissions to the existence of a capacity or tendency to such emissions by that specific engine, and thus to the possibility or probability of such an emission having occurred at the time in question and so having set the fire in question. (*b*) The proposed inference, in the second case, is to such a capacity or tendency in the class of engines passing over that line, and therefore to its probable existence in a particular engine passing by at the time in question, and thus to the same conclusion as before. (2) In the preceding issue, the effort was merely to show that the defendant's engine caused the fire. But this alone will usually not suffice under the law;[1] it will be necessary further to show some kind of *negligence;* and this will commonly resolve itself into showing the maintenance of an engine so constructed as to be dangerously likely to emit sparks. This requires much more than a showing of mere capacity for emission. In the former issue the inquiry was merely whether the locomotive *did once emit* a spark and thus cause the specific fire, and the fact of capacity to do so was merely subsidiary and evidentiary to that; in the present issue the plaintiff proceeds directly to show *habitual emission, i. e.* a dangerous tendency, as a main element entering into legal negligence; and the showing must be not merely of a capacity to emit sparks, but of a tendency so strong that it may be regarded as negligence to maintain an engine so equipped. Such are the two issues; and the rulings upon the evidence for each may conceivably be different.

§ 453. **Same: Discriminations.** Before proceeding to examine the application of the present principles to the above issues, it is desirable to discriminate certain other evidential questions which often arise in such litigation but do not involve the present principles. (1) In showing that a particular locomotive set a fire or emitted sparks, evidence is receivable that, shortly after it passed the place in question, stubble along the track was found on fire or *live coals were found* near the track. Here the inference is from the traces of fire to the origin of fire, — an argument of another kind (*ante*, §§ 148, 149), and not affected by the present principle. (2) The question whether the mere fact of the setting of the fire in question, if brought home

[1] It might, in a jurisdiction where the railroad owner is by statute liable without negligence for the setting of fire by sparks.

to the defendant, raises a *presumption of negligence* is a question of Presumptions (*post*, § 2509). (3) The setting of fires by the same or other engines of the defendant at other times may be admissible to show *notice of the defect, if there was one*; here is involved the general principle of evidencing notice or knowledge circumstantially (*ante*, § 252). Practically, there may be a serious difference in this use; since only *prior fires* could be relevant as indicating this fact of notice. (4) In order to show that a certain kind of spark-arrester or other piece of apparatus is such as a prudent person would use, the *usage* of other persons as to spark-arresters or like precautions may be offered; this raises a different question (*post*, § 461).

Returning to the two issues stated in the preceding section, the situations thus presented are the following: (1) To show that a given locomotive *caused* the fire, by having the capacity to emit sparks, evidence is offered of spark-emissions at other times (*a*) by the *same* locomotive, or (*b*) by *other* locomotives on the same line; (2) To show a dangerously defective (and therefore *negligent*) *construction* in the locomotive, evidence is offered of spark-emissions at other times by the same locomotive or by others on the same line.

§ 454. **Same: (1) Cause of the Fire, as evidenced by other Spark-emissions (*a*) by the same Locomotive.** Here no difficulty seems to have arisen. The emission of sparks by a locomotive at various times will naturally indicate a capacity to emit such sparks; the capacity rising into a tendency (*i. e.* the possibility rising towards a probability), in a given case, with the number or character of the instances (*ante*, § 446). Where the time of the other instances is somewhat removed, it is sometimes thought wise to require a preliminary showing that the condition of the engine had not changed in the meantime (*ante*, § 437); but the difficulty of such a showing by the plaintiff, and the ease for the defendant of showing such a change if it had occurred, make it much preferable to ignore this requirement and to leave it to the defendant, on the principle of Explanation (*ante*, § 449) to show such a change if he can. The other instances, moreover, may have occurred either before or after the time in question, for in either case they show the condition of the engine.[1]

[1] To the following precedents may be added those receiving the evidence under (1 *b*) and (2), *post*; for the present point, though passed upon in comparatively few jurisdictions, would be regarded as involved in an affirmative ruling on those points: *Ala.*: 1903, Alabama G. S. R. Co. v. Clark, — Ala. —, 34 So. 917 (other emissions at or about the time, received); *Col.*: 1875, Henry v. R. Co., 50 Cal. 176, 183 (to show that the engine was the cause, other fires set by it are admissible); 1899, Liverpool, L. & G. Ins. Co. v. Southern Pac. Co., 125 id. 434, 58 Pac. 55 (previous emission of sparks by the same engine, admitted to show probable setting of a fire); *Ill.*: 1898, Baltimore & O. S. W. R. Co. v. Tripp, 175 Ill. 251, 51 N. E. 833 (emission within ten days afterwards, admitted); *Ky.*: 1901, Carpenter v. Laswell, — Ky., —, 63 S. W. 609 (setting of prior fires from defendant's smokestack, admitted); *Mass.*: 1863, Ross v. R. Co. 6 All. 87 (sparks by the same engine under similar conditions, admitted to disprove the defendant's proposition that no sparks could reach the plaintiff's building, and thus to show "the physical possibility that fire could be so communicated"); 1881, Loring v. R. Co., 131 Mass. 469 (same); *Mich.*: 1874, Hoyt v. Jeffers, 30 Mich. 181, 189 (mill-chimney; that it "had been in the habit of throwing sparks and setting fire to buildings, etc., for several years previous," the conditions of use, wind, etc., being the same, admitted to show that the chimney had caused this fire); *N. H.*: 1888, Haseltine v. R. Co., 64 N. H. 545 (other fires set by the same engine a week later, admitted to show it to be the cause of the fire in question); *N. Y.*: 1862, Hinds

§ 455. **Same: (1) Cause of the Fire, as evidenced by other Spark-emissions (*b*) by other Locomotives.** Here there has been some difference of opinion, which can only be solved by an examination of the principles involved:

(1) *Relevancy;* (a) *in General.* The proposed inference, as already noted (*ante*, § 452), is to the defendant's engine as the possible *cause* of the fire, *i. e.* as having the capacity to cause it by emitting burning material. In evidencing that capacity by instances of it, one way — just examined — is to take instances of the specific engine's operation. But another and equally satisfactory way is to take instances of the operation of the class of engines of which it is a member; for what exists in the class is presumably to be found also in the individual, and to evidence such a capacity in the class is to evidence it in any one of the class. The argument up to this point has never been objected to, except in the following passage:

1883, *Orton*, J., in *Gibbons* v. *R. Co.*, 58 Wis. 335, 17 N. W. 132: "Evidence that other fires had been set by the fire machinery managed by the company, before or after or about the time of the fire in question, is confined to the same machinery which caused such fire, and which may bear upon the question of the sufficiency of such machinery or its management. . . . [It is said that] such evidence might tend to prove the possibility and consequent probability that some locomotive of the company caused the fire. . . . But it is submitted that a possibility can never establish a probability of a fact required to be proved in order to make a railroad company, or any party, liable in any action whatever; and the proposition is no sounder in logic than in law."

In answer to this argument, two things may be said. First, a given instance or two may show only a possibility; but this is reason only for excluding such slight evidence in that case, and not for excluding all such evidence without regard to the number or significance of such instances. Secondly, even a possibility or capacity is properly relevant (*ante*, §§ 446, 448). The object is to narrow down the conceivable range of causes by finding out what things were capable of producing the fire, and by then cumulating other evidence upon one of them. If mice had set a fire in the house, but once only, by getting at matches, this would be relevant as showing a possible cause. The statement in the above passage that no one can be made liable upon a mere possibility is of course beside the point; because the possibility is not offered as constituting *per se* a test of liability, but merely as evidence admissible towards accumulating a preponderance of evidence. The sound

v. Barton, 25 N. Y. 544 (former emission of sparks, admitted to show "the capacity of this particular engine to emit igneous matter a greater distance than that intervening between it and the building" in question); 1888, Collins v. R. Co., 109 id. 243, 249, 16 N. E. 50 (emission six months later; admitted only on a showing that the engine was permanently so constructed as to emit sparks or that it was in the same state of repair as before; no precedents cited; the ruling seems finical and unsound); *Pa.:* 1876, Philadelphia & R. R. Co. v. Hendrickson, 80 Pa. 182, 189 (sparks and fires by the same engine, just before and after, admitted to show the cause); 1875, Pennsylvania Co. v. Watson, 81 id. 293, 296 (sparks and fires by the same engine, just before and after, admitted); 1891, Henderson v. R. Co., 144 id. 461, 477, 22 Atl. 851 (same; the time limit to be a reasonable one); *Va.:* 1897, Patteson v. R. Co., 94 Va. 16, 26 S. E. 393 (other sparks by the same engine, admitted); *Wis.:* 1882, Brusberg v. R. Co., 55 Wis. 106, 12 N. W. 416 (fires on the same trip of the same engine, close by, admitted to show it to be the cause of the fire).

principle, as applied to the present sort of evidence, is expounded in the following passage:

1846, *Piggot* v. *R. Co.*, 3 C. B. 229 (admitting evidence of sparks on other occasions from the defendant's locomotives); *Tindal*, C. J. "[The evidence was admissible] to ascertain whether or not sparks such as those described *could* be emitted, from the engines used by the company, to the distance represented"; *Maule*, *J.*: "The evidence objected to was that other engines used on the defendant's line, of the same description as that which was said to have caused the injury here, had on various other occasions been seen to throw particles of ignited matter to a distance from the line as great or greater than the spot in question. The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine, and involved in that issue was the question whether or not the fire *could* have been so caused. The evidence was offered for the purpose of showing that it could; and for that purpose it was clearly material and admissible."

1897, *Savage*, J., in *Dunning* v. *R. Co.*, 91 Me. 87, 39 Atl. 352: "It is admissible as 'tending to prove the possibility, and a consequent probability, that some locomotive caused the fire,' — language from *Railway Co.* v. *Richardson*,[1] which has often been cited with approval. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same track, at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals, so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. The testimony is illustrative of the character of a locomotive, as such, with respect to the emission of sparks or the dropping of coals. If the possibility be proved, other facts and circumstances may lead to a probability, and then to satisfactory proof."

(1) (b) *Similarity of Construction.* But the foregoing inference is based on the assumption that the engine in question is one of a class, and what is true of the class is true of the individual engine upon this assumption only. Not all engines are of the same construction or in the same condition with reference to a capacity to emit sparks, and therefore the instancing of such a capacity in some of them does not evidence such a capacity in another unless they belong to the same class with reference to construction, etc.; in short, unless the principle of substantial similarity of conditions (*ante*, § 442) is fulfilled. Upon this all agree; but the question arises whether the detailed showing of similarity of construction should be required in advance from the plaintiff, or whether the similarity should be assumed in certain cases, leaving it to the defendant, on the principle of Explanation (*ante*, § 449), to show, if he can, that the construction or condition was not similar. It seems wiser, where the other engines belong to the *same owner* or run over the *same line*, to assume this similarity, — first, because it is a probable one, and, next, because it is comparatively difficult for a plaintiff, though comparatively easy for a defendant, to produce the proper evidence. This was long ago pointed out in one of the earlier cases:

1856, *Denio*, C. J., in *Sheldon* v. *R. Co.*, 14 N. Y. 220: "It is argued [that the evidence] . . . did not refer to any particular engine, and that it may be that the one which ran past the premises just before the discovery of the fire was quite a different one [from

[1] 91 U. S. 464.

the others. . . . But] it would be practically quite impossible by any inquiries to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad presupposes a unity of management and a general similarity in the fashion of the engines and the character of the operations. . . . it is presumed to be in the power of the company, which has intimate relations with all its engineers and conductors, to controvert the fact sworn to, if it is untrue, or, if true in a particular instance, that it was not so in respect to the engines which passed the place at a proper time before the occurrence of the fire. The effect of the evidence would only be to shift the *onus probandi* upon the company. . . . [It was in their power] to show that the special facts applicable directly to the occurrence of the fire were such as to overcome the general inference from the plaintiff's evidence."[2]

Where the other engines belong to *another road*, this assumption cannot be made; but upon a showing of such similarity, it would seem that instances of their operation would be receivable.[3]

(1) (c) *Time of other instances.* The other instances may be either before or after the time in question; though if the time was remote, a preliminary showing that no change had been made in construction would perhaps be proper.

(1) (d) *Nature of Sparks.* The setting of a fire is plainly an effect indicating a capacity to set fire. But the emission of burning coals of any sort is always regarded as sufficient, because it is clear that such a substance is always capable of setting fire.[4]

(2) *Auxiliary Policy.* The principle of auxiliary policy (*ante*, § 443), involving the considerations of unfair surprise and confusion of issues, has never been thought to exclude this sort of evidence;[5] for not only is the evidence of special importance, but it seldom involves any substantial risk of either of those sorts.

(3) *Known engine.* In Pennsylvania, the notion was early promulgated that the evidence of sparks from other engines is not receivable if the engine that passed at the time and must have been the one (if any) to set the fire is *specifically known and identified*.[6] It is not easy to see the precise reason for this limitation. The thought perhaps is that when the specific engine is known, there is no need of resorting to instances of the operation of other engines. But in reality the need may be and usually will be just as great; for it does not follow that, because it was known on this occasion, it was therefore known on the other occasions; and it may well be impossible to obtain instances of this particular engine's operation on other occasions. The principle that the operation of a specific machine may be learned from the operations of its class is just as valid in the one case as in the other. A doctrine that proper evidence is always to be rejected because it is sometimes possible to get other and perhaps better evidence is certainty a novelty. This

[2] *Accord:* Eng., Mo., Nev., N. Y., Or., U. S., Vt. *Contra:* Ill. (?), N. H. (undecided).

[3] Mass.

[4] Except that in Pennsylvania it is required that the evidence show repeated emission of sparks of *unusual size*.

[5] It was expressly repudiated in the following cases: 1875, Henry *v.* R. Co., 50 Cal. 176, 184 (at least for the case in hand); 1874, Hoyt *v.* Jeffers, 30 Mich. 181, 190.

[6] The earlier cases are cited *post*, § 456.

limitation about identified engines, which began as a local aberration, has threatened to spread into other jurisdictions, through their apparent ignorance of its purely local character.[7]

Subject to the occasional prevalence of the last limitation, this class of evidence for this purpose is accepted as admissible in almost all jurisdictions.[8]

[7] *E. g.* Ill., Mo., N. C., S. C., U. S. C. C. A., Wis. (*post*, § 456).

[8] *Eng.:* 1846, Piggot *v.* R. Co., 3 C. B. 229 (the fact of sparks on other occasions from the defendant's engines was offered; it was objected that "it was not competent to the plaintiff in this case to prove the emission of sparks or ignited matter from other engines, passing the spot on other occasions, without showing them to have been under the care of the same driver, driven at the same speed, with the same number of carriages and passengers, and of the same construction as the engine in use at the time of the accident"; admitted in spite of this objection); *Ala.:* 1901, Alabama G. S. R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771 (habitual emission of sparks by defendant's engines, admitted; the qualification about identified engines, not decided); *Ark.:* 1894, Railway Co. *v.* Jones, 59 Ark. 105, 111, 26 S. W. 595 (other fires by the same railroad's engines, perhaps admissible); *Cal.:* 1885, Butcher *v.* R. Co., 67 Cal. 518, 8 Pac. 174 (fires from other engines of the defendant, before and after, admissible "to show the cause of the injury"; two judges dissenting); *Ga.:* 1897, Brown *v.* Benson, 101 Ga. 753, 29 S. E. 215 (fires set "at various times before the fire occurred," by engines of the defendant, admissible; if remote in time, the conditions of repair must be shown the same); *Ill.:* 1866, Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355 (sparks and fires by the defendant's engines, admitted to show that sparks could be thrown one hundred feet, all the engines being similar); *Ind. T.:* 1903, St. Louis I. M. & S. R. Co. *v.* Lawrence, — Ind. T. —, 76 S. W. 254 (admissible, where the engine in question is not identified); *Ia.:* 1882, Babcock *v.* R. Co., 62 Ia. 593, 597, 13 N. W. 740, 17 N. W. 909 (another fire set by the defendant's engine in the right of way, not admitted to show that this one also caught there); 1884, Bell *v.* R. Co., 64 id. 321, 325 (other fires set by the defendant's engines in that region, excluded); *Ky.:* 1883, Kentucky C. R. Co. *v.* Barrow, 89 Ky. 643, 20 S. W. 165 ("in the absence of direct evidence as to the condition of that particular locomotive," former fires by other engines were held admissible); 1900, Louisville & N. R. Co. *v.* Samuels, — id. —, 57 S. W. 235 (R. Co. *v.* Barrow approved); *Me.:* 1893, Thatcher *v.* R. Co., 85 Me. 502, 509, 27 Atl. 519 (fires set by the defendant's other locomotives about the same time and in the same vicinity, admitted); 1897, Dunning *v.* R. Co., 91 id. 87, 39 Atl. 352 (other fires by other locomotives about the same time and in the same vicinity, admitted; the Pennsylvania rule about identity of engine rejected; see quotation *supra*); *Md.:* 1873, Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115, 134 (sparks and fires by other engines of the defendant, shortly before, admitted to show the capacity to cause the fire); *Mass.:* 1881, Ross *v.* R. Co., 6 All. 87 (sparks and fires by engines of a similar sort on other roads, admitted to show "the physical possibility that fire could be so communicated," which the defendant had denied); 1900, McGinn *v.* Platt, 177 Mass. 125, 58 N. E. 175 (emission by other engines on the same road in the vicinity, received); 1901, Bowen *v.* R. Co., 179 id. 524, 61 N. E. 141 (emission of sparks by engines similarly equipped, received); *Miss.:* 1903, Alabama & V. R. Co. *v.* Ins. Co., — Miss. —, 35 So. 304 (emission of sparks by other engines, just before and after, admitted); *Mo.:* 1893, Campbell *v.* R. Co., 121 Mo. 340, 349, 25 S. W. 396 (fires by other engines of the defendant, before and after, at different places on the line, admissible); 1897, Matthews *v.* R. Co., 142 id. 645, 44 S. W. 802 (sparks from another engine of the defendant, admitted; no previous showing of similarity of kind or condition required); *Nev.:* 1874, Longabaugh *v.* R. Co., 9 Nev. 271, 284, 288 (sparks and fires from the defendant's engines, within a few weeks, admissible, to show that an engine of the defendant caused the fire; similarity of construction need not first be shown); *N. H.:* 1860, Boyce *v.* R. Co., 42 N. H. 97, 100 (sparks and fires by other engines, admitted, to show capacity for setting fire, provided they are all of similar construction, repair, and management); 1862, Boyce *v.* R. Co., 45 id. 627 (similar evidence admissible; but the above proviso held to be a point undecided); 1884, Smith *v.* R. Co., 63 id. 25, 29 (fires by the defendant's engines, all of similar construction, admitted "to show that this fire could have been and probably was set in the same manner"); 1903, Gerrish *v.* Whitfield, — id. —, 55 Atl. 551, *semble* (that "such a mill as W.'s" had thrown live sparks as far as in the present case, admissible); *N. Y.:* 1856, Sheldon *v.* R. Co., 14 N. Y. 218, 220 (sparks from other engines of the defendant on the same track, admitted, "after refuting every other probable cause of the fire," to show that the engines "were so managed as to be likely to set on fire objects not more remote than the property burned"; similiarity of engine-construction need not be first shown; see quotation *supra*); 1862, Hinds *v.* Barton, 25 id. 544, 546, *semble* (approving the preceding case); 1866, Field *v.* R. Co., 32 id. 338, 346, 348 (live coals dropped at other times from the fire-pan; foregoing cases approved); *Or.:* 1890, Koontz *v.* O. R. & N. Co., 20 Or. 3, 23 Pac. 820 (sparks and fire by other engines of the defendant, before and after, admissible, without showing similarity of make); *Pa.:* 1875, Pennsylvania R. Co. *v.* Stranahan, 79 Pa. 405 (the emission of sparks in unusual quantities by other engines of

§ 456. **Same: (2) Defective Construction, as an element of Negligence, evidenced by other Spark-emissions.** Here, as already noted (§ 452), the inference is in its nature broadly the same as in the preceding cases, *i. e.* from the observed operations of the engines to a construction or condition which, under the law of torts and aided by other evidence, may be an element of negligence. But though the process of inference is the same, the present purpose is distinct from and additional to the preceding; and either one may be available without the other, — for example, where a statute makes the setting of fire by a locomotive negligence *per se*, in which case only the preceding use is required; or where the setting of the fire is conceded, in which case the present use alone is available. The principle is expounded in the following passages:

1858, *Bramwell*, B., in *Vaughan* v. *R. Co.*, 3 H. & N. 743, 745, 750 (fires by the defendant's engines at other times were admitted without objection): "It was admitted that, with these precautions, the locomotive was the cause of setting fire to the defendant's banks, not daily but occasionally; so that . . . its use was dangerous, and what had happened on this particular occasion — that is, setting fire to the defendant's grass — was not a particular accident, but one of the habitual incidents to the use of the locomotive."

1891, *Clark*, J., in *Henderson* v. *R. Co.*, 144 Pa. 488: "If many of the company's engines, at or about the time, are without sufficient spark-arresters, and frequent fires are kindled in consequence, it may well be inferred, in view of the effectual character of mechanical inventions of this kind, not only that the fire in question originated from this cause, but that it occurred from the habitual negligence of the company in failing to provide sufficient spark-arresters."

1869, *Barrett*, J., in *Clearelands* v. *R. Co.*, 42 Vt. 457: "The argument is this: The evidence tended to show, and the fact was not denied, that the fire was set from an engine of the defendants; . . . other evidence tended to show that about the time, and on the day of the fire, and before it occurred, the defendants were running engines by the place in question that did scatter fire to such an extent that fires were set by it. The inference is that, of the defendants' engines, the one by which the fire was set was one

the defendant, admitted to show the cause of the fire); 1891, Henderson *v.* R. Co., 144 id. 461, 487, 22 Atl. 851 (repeated sparks and fires about the same time, set by other engines of the defendant, admitted to show the cause of the fire, provided the engine is not identifiable; otherwise, the evidence of other fires and sparks must be restricted to it); *R. I.*: 1871, Smith *v.* R. Co., 10 R. I. 24, 27 (other fires set by the defendant's engines, admissible "to show the possibility of communicating fire by sparks from a locomotive"); *U. S.*: 1875, Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 458, 470 (sparks by the defendant's engines, during the same summer, admitted to show that an engine of the defendant caused the fire; similarity of construction, etc., need not first be shown); 1892, Chicago S. P. M. & O. R. Co. *v.* Gilbert, 3 C. C. A. 264, 52 Fed. 711, 10 U. S. App. 375, 378 (emission of fire for several weeks previous in the same vicinity, admitted); 1893, Gulf C. & S. F. R. Co. *v.* Johnson, 4 C. C. A. 447, 54 Fed. 474, 10 U. S. App. 629, 631 (similar); 1902, Lesser Cotton Co. *v.* R. Co., 52 C. C. A. 95, 114 Fed. 138 (the engine being identified, and its spark-arrester being produced, the fact of emission of sparks by other engines of the defendant was held inadmissible, unless it appeared that they were constructed and operated similarly; the opinion does not clearly comprehend the principle); 1902, Texas & P. R. Co. *v.* Watson, — U. S. —, 23 Sup. 681 (Grand T. R. Co. *v.* Richardson followed); *Vt.*: 1894, Hoskison *v.* R. Co., 66 Vt. 618, 30 Atl. 24 (sparks and fires by other engines of the defendant, admitted to show the capacity of the engines to set fire; the particular engine not being identifiable; similarity of construction need not first be shown); *Va.*: 1897, Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207 (sparks by other engines of the defendant near the time, admitted); *Wash.*: 1902, Abrams *v.* R. Co., 27 Wash. 507, 68 Pac. 78 (other fires, admitted); 1903, Noland *v.* R. Co., 31 id. 430, 71 Pac. 1098 (admissible, if the specific engine is not identified); *Wis.*: 1883, Gibbons *v.* R. Co., 58 Wis. 335, 17 N. W. 132 (fires set by the defendant's engines at other times, not admissible to show that the engine of the defendant's caused the fire, the engine being identified; where not identified, *semble*, the same result)

that scattered fire. But it is already in evidence that an engine that will do that to such an extent is not of proper construction and suitable repair. The reasoning is direct to the condition of the defendants' engine by which the fire was set."

The general nature of the inference being the same as in the preceding cases, the incidental questions that arise are analogous. (1) It might be supposed, since here the purpose is to show a tendency and not a mere capacity to emit sparks, that a *stronger quality of evidence* would have been required. This seems not to have been done anywhere;[1] and for these presumable reasons, namely, that even a capacity to emit sparks may in a given case become an element of negligence, and that in any case the distinction (*ante*, § 446) between a capacity and a tendency (possibility and probability) is impracticable with the object of requiring a higher quality for evidence of the latter. These reasons justify the failure to make such a distinction. (2) The other instances may be received from the *same engine* or from *other engines* of the same line; discrimination between the two seems rarely to have been attempted, — a just result, as already noted (*ante*, § 455). But any Court that might require similarity of construction to be shown in advance[2] would apply the requirement equally in the preceding class of cases and the present. (3) The *time* of the other instances may be either before or after the time in question; if the time was remote, a preliminary showing that no change of condition had occurred might be required. (4) Where the *specific engine* is *known*, the evidence as to other engines is excluded in a few jurisdictions;[3] the impropriety of this limitation has been already considered (*ante*, § 455).

The *state of the law* in the various jurisdictions is not as harmonious as upon the foregoing class of evidence. But in no jurisdiction, apparently, is the evidence excluded absolutely; in a few only it is excluded conditionally.[4]

[1] Except that Pa. requires the repeated setting of fires by sparks of unusual size; but this is required equally for the preceding case; see Ia. also.

[2] See note 2 in § 455.

[3] Ga., Ill., Mich., N. C., Pa., Wis., and perhaps others.

[4] The phrase used in some of the ensuing precedents, that the evidence indicates a "negligent habit" is hardly correct; the evidence indicates defective construction of the engine, which may be equivalent to negligence; but that it can be used to indicate a habit or character of the defendant's agents is perhaps doubtful, for the learned Courts using this language would hardly mean to involve the principles of the character-rule (*ante*, § 199). The precedents are as follows: *Eng.*: 1841, Aldridge *v.* R. Co., 3 M. & Gr. 515, 522 (Tindal, C. J.: "If the plaintiff had proved that the engines had frequently set fire to stacks, that would have shown negligence"; but whether by indicating defective condition of the engine, or merely by tending to show a notice of such condition, does not appear); 1858, Vaughan *v.* R. Co., 3 H. & N. 743, 745, 750 (fires by the defendant's engines at other times, admitted to show the dangerousness of the construction; see quotation *supra*; the ruling on appeal, in 5 H. & N. 679, 688, probably did not mean to deny this); *N. Br.*: 1883, Robinson *v.* N. B. R. Co., 23 N. Br. 323, 332 (that fires frequently occurred along the right of way after the passing of trains, admitted); *Ont.*: 1883, Canada C. R. Co. *v.* McLaren, 8 Ont. App. 564, 571 (prior emission of sparks by defendant's engine, admitted to show defective construction, by two judges); 1900, Peacock *v.* Cooper, 27 id. 128 (prior and subsequent emission of sparks by a steamboat, held admissible to show defective construction; but here the evidence was not sufficient under the rule); *Ala.*: 1896, Louisville & N. R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989 (the mere fact of adjacent fires long before, excluded); 1896, Louisville & N. R. Co. *v.* Malone, ib. 509, 20 So. 33 (that other fires had been set in the neighborhood by the defendant's engines, not admissible if "similar conditions did not exist"); *Ark.*: 1894, Railway Co. *v.* Jones, 59 Ark. 105, 111, 26 S. W. 595 (other fires, as evidence of defective condition, must have been set by the same engine); *Cal.*:

B. INSTANCES OF CORPORAL EFFECTS, AS EVIDENCE.

§ 457. Corporal Effects and Symptoms; Miscellaneous Instances (Proximity, Calibre, or Direction of a Weapon inflicting a Wound; Operation of a Drug, Liquor, Poison, Food, or Disease, on Human Beings or on Animals). So far as legal principle is concerned, no different one is here involved from

1875, Henry *v.* R. Co., 50 Cal. 176, 183 (other fires by the same engine, admitted to show that its construction was defective); 1885, Butcher *v.* R. Co. 67 id. 518, 8 Pac. 174 (fires from other engines of the defendant, before and after, admissible to show "negligence in the construction or working" of the engines; two judges dissenting); *Fla.:* 1891, Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co., 27 Fla. 1, 9 So. 661 ("former fires by the same engine," but not by others, admissible to show "defective condition or construction or improper management"); *Ga.:* 1892, East Tennessee V. & G. R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828 (in rebuttal of defendant's evidence of the proper condition of engines, the emission of sparks by other engines is receivable); 1900, Akins *v.* R. & B. Co., 111 id. 815, 35 S. E. 67 (emission by a locomotive not run on the day in issue, excluded); 1901, Central of Ga. R. Co. *v.* Trammell, 114 id. 312, 40 S. E. 259 (operation of other engines, not to be considered, if the engine setting the fire was identified); *Ill.:* 1866, Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355, *semble* (fires by the defendant's engines, admitted, perhaps to show negligent construction); 1894, Lake Erie & W. R. Co. *v.* Middlecoff, 150 Id. 27, 39, 37 N. E. 660 (setting of other fires by the same engine on the same day, admitted, to show negligence); 1898, First Nat'l Bank of Hoopeston *v.* R. Co., 174 id. 36, 50 N. E. 1023 (other fires by other engines of the defendant, not admissible, where the engine causing the fire is identified; erroneously assuming the Pa. and Wis. rule to represent the weight of authority); *Ind.:* 1872, Gagg *v.* Vetter, 41 Ind. 228, 257 (fire attributed to sparks from the defendant's brewery-chimney; evidence that sparks had been seen coming from the chimney at other times, admitted to show that it was not well-constructed); 1900, Pittsburg C. C. & St. L. R. Co. *v.* Indiana H. Co., 154 id. 322, 56 N. E. 766 (setting of other fires, admitted to show negligence in the condition of the roadway); *Ia.:* 1870, Gaudy *v.* R. Co., 30 Ia. 420 ("the repeated or unusual dropping of coals or excessive and continued emission of sparks, etc.," admissible to show "the fact of negligence"); 1882, Slossen *v.* R. Co., 60 id. 215, 14 N. W. 244 (other fires set on the same trip of the same engine, admitted to show that it "was not properly constructed or was out of repair"); 1886, Lanning *v.* R. Co., 68 id. 502, 505, 27 N. W. 478 (same, admitted as evidence of "defects in its construction, or that it was not in proper repair, or was negligently handled"); *Kan.:* 1873, St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47, 49, 54 (fires set by the defendant's engines within a few weeks, admitted to show "either that they were not properly constructed or that they were out of repair," the conditions in all the engines being similar); 1876, Atchison T. & S. F. R. Co. *v.* Campbell, 16 id. 200, 204 (previous fires by the same engine on the same day, with absence of fires from other engines, admitted to show that the former "was badly constructed and managed"); 1897, Atchison T. & S. F. R. Co. *v.* Osborn, 58 id. 768, 51 Pac. 286 (fires by other engines, excluded; no authorities cited); *Ky.:* 1897, Taylor *v.* R. Co., — Ky. —, 41 S. W. 551 (previous emission of sparks from the same engine, admitted to show negligence); *Md.:* 1873, Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115, 134 (sparks and fires by other engines of the defendant, shortly before, admissible to show negligence "in the construction and management of its engines," though the particular engine was identified; distinguishing Baltimore & S. R. Co. *v.* Woodruff, 4 id. 242, 254, 1854, where weaker evidence of the sort was excluded); *Mich.:* 1890, Ireland *v.* R. Co., 79 Mich. 163, 165, 44 N. W. 426 (fire by another engine of the company, not admissible to show defective construction, because the engine was identified; but other fires by the same engine are admissible); *Minn.:* 1885, Davidson *v.* R. Co., 34 Minn. 51, 24 N. W. 324 (sparks by the defendant's engines, "at or about the date" in question, admitted to show a "negligent habit"; but treated as "a matter not altogether free from doubt"; here the exceptions were the plaintiff's, and were based on the limit of time set, and the question of admissibility was thus not passed upon); *Miss.:* 1893, Trilette *v.* R. Co., 71 Miss. 212, 233, 13 So. 899 (emission of sparks by other engines of the defendant, excluded); 1903, Alabama & V. R. Co. *v.* Ins. Co., — id. —, 35 So. 304 (fires by other engines, admitted, to show a "negligent habit" of the defendant); *Mo.:* 1870, Fitch *v.* R. Co., 45 Mo. 322, 324, 327 (frequent fires by one of the defendant's engines, admitted to show defective construction); 1893, Campbell *v.* R. Co., 121 id. 340, 350, 25 S. W. 936 (fires by other engines inadmissible, where the engine is identified); *Nev.:* 1874, Longabaugh *v.* R. Co., 9 Nev. 271, 284, 289 (fires and sparks by the defendant's engines, a few weeks before and after, admitted to show negligent management and construction); *N. Y.:* 1866, Field *v.* R. Co., 32 N. Y. 338, 346, 349 (after evidence that it is feasible to construct and manage engines so as to avoid scattering fire, the scattering of fire by other engines on former occasions is evidential that such engines are "out of order or improperly constructed," and thus are negligently managed); 1872, Webb *v.* R. Co., 49 id. 420, 422, 424 (the dropping of live coals by the same engine for a month or two before, in the

t at illustrated in the preceding general group of cases. But it is convenient to consider together the precedents in which the inference is made from the

neighborhood, admitted to show defective construction); 1888, Collins *v.* R. Co., 109 Id. 243, 249, 16 N. E. 50 (the emission of large sparks by the same engine six months later, admitted only after a showing that its permanent mode of construction allowed such emissions or that its condition of repair was the same at the time in question; no authority cited); 1894, Flinn *v.* R. Co., 142 Id. 11, 19, 36 N. E. 1046 (constant emission of sparks by the defendant's engines, considered, but held not to amount to negligence, but to show that upon the upgrade in question such emission was inevitable; the latter proposition seems to give the locomotive-owner the right to burn houses *ad lib.*); *N. C.:* 1900, Hygienic P. L. M. Co. *v.* R. Co., 126 N. C. 797, 36 S. E. 279 (the Henderson case, in Pennsylvania, followed in the limitation as to identified engines; Douglas, J., diss.); *Or.:* 1890, Koontz *v.* O. R. & N. Co., 20 Or. 3, 23 Pac. 820, *semble* (sparks and fires by other engines of the defendant, before and after, admissible to show "habitual negligence"); *Pa.:* This inexcusable tangle of rulings is supposed to be unravelled by the Henderson case: 1848, R. Co. *v.* Yeiser, 8 Pa. 366, 371, 376 (the Court instructed that the fact of other fires by the defendant's engines was "of itself evidence of negligence"; this was disapproved on appeal; "It may be very true that there may be some difficulty in the proof, . . . but there is no reason that every principle of law should be uprooted by requiring no proof of negligence whatever"; thus treating the question as if it were whether the other fires amounted to negligence *per se*, and not whether they were merely evidence of negligence); 1854, Hayett *v.* R. Co., 23 id. 374 (distinctly ruling that the setting of other fires by the defendant's engines was some evidence of negligence, and thus removing the obscurity of the preceding case); 1875, Erie R. Co. *v.* Decker, 78 id. 293 (where the engine causing the fire is identified, the defects of other engines of the defendant are irrelevant); 1875, Pennsylvania Co. *v.* Watson, 81 Pa. 293, 296 (sparks and fires by the same engine, admitted as "evidence from which the jury may infer an imperfect and inferior spark-catcher, and from this fact negligence"); 1879, Lehigh V. R. Co. *v.* McKeen, 90 id. 122, 123, 130 (sparks of unusual size, and fires, by the same engine at other times, admitted as evidence of negligence in the apparatus); 1880, Jennings *v.* R. Co., 93 id. 337, 340 ("evidence to prove defects in other engines of the company was irrelevant," citing R. Co. *v.* Yerger, 73 id. 121, which does not discuss that question at all; here the evidence was of unusually large sparks; also like the Latshaw case, *infra*); Philadelphia & R. R. Co. *v.* Schultz, ib. 341 (like the McKeen case, *supra*); Reading & C. R. Co. *v.* Latshaw, ib. 449 ("the bare fact" of fires after the passing of the engine "was neither negligence, nor evidence from which a jury would be justified in finding negligence"); 1881, Albert *v.* R. Co., 98 Id. 316, 321 (like the Decker case, *supra*, excluding sparks by other engines); 1886, Gowen *v.* Glaser, 3 Centr. Rep. 108 (sparks and fires by other engines, before and after, admitted (1) "to show that they have many engines with insufficient spark-arresters," and thus (2) "to lay the ground for an inference that it was one of these engines with insufficient spark-arresters which did this"); 1888, Pennsylvania R. Co. *v.* Page, 21 W. N. 52 (emission of sparks by engines just before the fire, no evidence of negligence); 1891, Henderson *v.* R. Co., 144 Pa. 461, 476 (*a:* the mere fact of fire caused by the defendant's engine is no evidence of negligence, approving the Jennings and Latshawa rulings; the feature of this doctrine is that this Court is constantly confusing three distinct things, namely, (1) evidence admissible, (2) evidence sufficient to go to the jury, (3) facts amounting to negligence *per se* and thus as matter of law taking the case from the jury; *b:* the emission of sparks of unusual size and the setting of numerous fires by the defendant's engines may be evidence for the jury; *c:* where the engine is identifiable, such evidence of the defective action of other engines is irrelevant; otherwise it is admissible, but should be confined to a reasonable time before and after. This case is intended to clear up the conflict of rulings and settle the law); 1897, Thomas *v.* R. Co., 182 id. 538, 38 Atl. 413 (other fires by the same engine on the same day, near by, admitted); *U. S.:* 1875, Grand T. R. Co. *v.* Richardson, 91 U. S. 454, 458, 470 (sparks by the defendent's engines, during the same summer, admitted to show "a negligent habit of the officers and agents"; similarity of construction, etc., need not first be shown); 1892, Northern P. R. Co. *v.* Lewis, 2 C. C. A. 446, 51 Fed. 658, 7 U. S. App. 254, 272 (fires by other locomotives, admitted); 1902, Texas & P. R. Co. *v.* Watson, — U. S. —, 23 Sup. 681 (Grand T. R. Co. *v.* Richardson followed); *Va.:* 1881, Brighthope R. Co. *v.* Rogers, 76 Va. 443, 448 (sparks and fires of the same engine, admitted to show "negligence on the part of the defendant's employees, or, it may be defects" in the engine); 1896, New York P. & N. R. Co. *v.* Thomas, 92 id. 606, 24 S. E. 264 (fires by the defendent's engines, before and after the time in question, admitted to show "negligence on the part of the defendent's employees, or defects in the defendant's engine, and also for the purpose of showing a negligent habit" of the defendant's agents); 1897, Kimball *v.* Borden, 95 id. 203, 28 S. E. 207 (sparks by other engines of the defendent near the time, admitted to show "a negligent habit"); *Vt.:* 1869, Cleavelands *v.* R. Co., 42 Vt. 449, 456 (sparks and fires by other engines of the defendant, in the same season, admitted to show defective condition); *Wis.:* 1882, Brusberg *v.* R. Co., 55 Wis. 106, 12 N. W. 416 (fires on the same trip of the same engine, close by, admitted to show defective construction or management); 1883, Gibbons *v.* R. Co., 58 id. 335, 17

effects produced on the body, human or animal, to the tendency of a given thing. Thus, the capacity or tendency of a *weapon* (gun or pistol) may be indicated by the appearance of other wounds, with reference to size of bullet, proximity of weapon, nature of powder, or direction of the shot;[1] the specific tendency of a *drug, poison, disease, food*, or other substance, by the corporal symptoms or effects in other like situations, either on animals or on human beings;[2] in particular, the *intoxicating* tendency of a *liquor*, by its effects

N. W. 132 (fires set by the defendant's engines at other times; "such evidence might have weight in showing the negligence of the company," where the cause is shown to have been some engine of the defendant, but unidentified); 1888, Allard *v.* R. Co., 73 Id. 165, 40 N. W. 685 (the engine being identified, and its construction as to a screen being shown similar to the others of the defendant, fires set by the defendant's engines generally were not admitted to show defective construction); 1895, Menominee R. S. & D. Co. *v.* R. Co., 91 Id. 447, 65 N. W. 176 (other fires by the same engine, identified, during preceding months, excluded, because the engine had been repaired in the meantime; other fires by it after the time in question, absolutely excluded; other fires by it during the same month, excluded, because not shown to be from sparks of unusual size or thrown to unusual distance, and therefore not indicating any want of repair or improper management).

[1] 1896, Evans *v.* State, 109 Ala. 11, 19 So. 535 (experiments with a pistol to ascertain the relative size of the hole and the ball, excluded; no reason given); 1876, Wynne *v.* State, 56 Ga. 113, 118 (murder; experiments in firing the pistol found on the defendant, not allowed, because they might change the condition of the pistol); 1897, State *v.* Cater, 100 Ia. 501, 69 N. W. 880 (to show the marks of shooting near at hand, experiments with a revolver of the same calibre were admitted); 1896, State *v.* Asbell, 57 Kan. 398, 46 Pac. 770 (the effect of a pistol shot fired at human hair from a distance; experiments admitted); 1897, Becket *v.* Aid Assoc., 67 Minn. 298, 69 N. W. 923 (experiments made with a revolver and similar cartridges, admitted to show the effects of shooting near at hand); 1844, Vaughan *v.* State, 3 Sm. & M. 555 (evidence considered of experiments to show that the discharge of a gun at the same distance and with the same kind of shot was incapable of taking life); 1880, Dillard *v.* State, 58 Miss. 386 (to learn whether a wound could have been inflicted from a certain position, experiments were received); 1883, State *v.* Justus, 11 Or. 182, 8 Pac. 337 (to show that the marks of wounds on the deceased were those of near gun-shot wounds, experiments on pasteboard targets were not received, because the conditions could not be made similar enough; see quotation *ante*, § 442); 1893, State *v.* Fletcher, 24 id. 295, 298, 33 Pac. 575 (experiments as to the force of a bullet, with cartridges and pistol found on defendant, excluded because conditions were not shown similar); 1880, Sullivan *v.* Com. 93 Pa. 288, 296 (experiments were allowed to be described by which the effect, in blackening and tattooing the flesh, of a shot fired at short range, was demonstrated to be such that in the case at bar the deceased could not have committed suicide); 1903, State *v.* Nagle, — R. I. —, 54 Atl. 1063 (experiments with a pistol, to show the effect on a flesh-wound, admitted); 1884, Boyd *v.* State, 14 Lea 161, 171 (the allegation being that the deceased had committed suicide with a pistol, the Court admitted experiments made with pistols under similar conditions to show that the results would not be the same as those found upon the body of the deceased); 1896, Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046 (an experiment, based on the appearances of a wound, to ascertain the relative positions of deceased and defendant, admitted); 1896, Ball *v.* U. S., 163 U. S. 662, 16 Sup. 1192 (a refusal to allow an experimental firing with the defendant's gun, held within the discretion of the trial Court).

For cases dealing with *non-corporal effects* of weapons, see *ante*, § 451.

[2] 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1162 (murder; the body of the deceased was found in the river; the question was whether she had committed suicide or had been killed and thrown into the water; the prosecution advanced the proposition that the absence of water in the stomach showed that the person was dead before entering the water; the defence was allowed to testify to experiments, made by doctors, upon dogs, to show that a drowning person does not necessarily take water into the stomach); 1834, R. *v.* Webb, 1 Moo. & Rob. 405, 412 (manslaughter by administering noxious pills; to disprove the noxious quality, the fact was admitted of the cure of various diseases by them); 1836, R. *v.* Salmon, before Patteson, J., Pelham's Chronicles of Crime, ed. 1891, II, 417 (manslaughter by administering noxious pills; on behalf of the defendant, a medicine-vender, "a great many persons were called from all parts of the kingdom, who stated that they had taken large quantities of these pills, with the very best results, as a means of cure for almost every species of malady to which the human frame is subject; one person stated that he had taken no fewer than twenty thousand of them in two years, and that he had found infinite relief from swallowing them in very large doses"); 1856, R. *v.* Palmer, Annual Register 1856, pp. 403, 422, 473, 475, 509 (to determine the tendency of strychnia to produce certain symptoms, experiments upon dogs and rabbits were described, and the observed symp-

upon others partaking it.[3] In all these precedents, it is to be remembered,

toms in human beings; but the Court refused to allow dogs to be brought into the courtyard and killed by strychnia before the jury); 1854, Bush *v.* Jackson, 24 Ala. 274, *semble* (in a suit on a warranty of a slave, alleged to be subject to chronic pneumonia, the use of evidence of symptoms of other supposed cases of pneumonia was held inadmissible, unless somehow connected); 1893, Alabama G. S. R. Co. *v.* Collier, 112 id. 681, 14 So. 327 (injury to passenger by breaking of fire-extinguisher bottle; experiments in court to test the liquid, rejected on the facts); 1893, Remy *v.* Olds, — Cal. — , 34 Pac. 216 (whether vines died for lack of water; that others similarly situated died though plentiful'y supplied with water, admitted); 1863, Wallace *v.* Wren, 32 Ill. 150 (for the purpose of showing that a warranted horse had the glanders, the court permitted the plaintiff to show that a mule which worked with the horse took the disease and died; Caton, C. J.: "There was proof that glanders is contagious, and if that be so, then the proof was undoubtedly pertinent"); 1900, Grand Lodge *v.* Randolph, 186 Ill. 89, 57 N. E. 882 (injury to ankle; experience of H., similarly injured, as to time of healing, and the exhibition of his ankle to the jury, excluded as confusing the issues); 1885, Epps *v.* State, 102 Ind. 549, 1 N. E. 491 (absence of injurious effect from the same kind of substance when administered to another person, admitted to show absence of arsenic); 1899, Ware Cattle Co. *v.* Anderson, 107 Ia. 231, 77 N. W. 1026 (whether cattle failed to fatten because of poor pasture; gain of other cattle in similar pastures, admitted); 1859, Champ *v.* Com., 2 Metc. Ky. 17, 26 (rape while unconscious from a supposed violent chloroforming; experiments showing unconsciousness to be an impossible result under the supposed circumstances, admitted); 1864, Hunt *v.* Lowell Gaslight Co., 1 All. 343, 345, 350; s. c. 8 All. 169, 171 (to show the noxious effects of the gas escaping into the house where the plaintiffs were visitors and became ill, the similar illness of all the other inmates of the house at the same time was received; the extent to which the particulars of the illness should be inquired into being left to the trial Court's discretion); 1862, Emerson *v.* Lowell Gaslight Co., 3 id. 410, 417 (see quotation *ante*, § 442); 1886, Baxter *v.* Doe, 142 Mass. 558, 561, 8 N. E. 415 (action for sickness incurred through failure of ship-owners to provide the sailors with proper food and anti-scorbutics; evidence of the similar sickness of others of the crew on board the ship about the same time that the plaintiffs were sick, admitted; see quotation *ante*, § 442); 1887, Reeve *v.* Denuett, 145 id. 23, 11 N. E. 938 (whether a substance "naboli" was calculated to ensure painless extraction of teeth; the experience in that respect of various persons who had used it, admitted; see quotation *ante*, § 442); 1894, Shea *v.* Glendale E. F. Co., 162 id. 463, 38 N. E. 1123 (whether the plaintiff had been poisoned by white lead in the defendant's factory; the similar illnesses of other employees under similar conditions, admitted); 1897, Com. *v.* Kennedy, 170 id. 18, 48 N. E. 770 (tea drunk by several persons together; effects upon some of them, admitted, to show that it was poisoned); 1882, Tinney *v.* Cahill, 48 Mich. 586, 12 N. W. 862 (to show that a horse had died not from the defendant's driving but from disease, two previous instances when the horse fell ill while driven by other persons were received); 1897, People *v.* Holmes, 111 id. 364, 69 N. W. 501 (other cases in which a similar injury caused insanity, not admitted to show a defendant's insanity); 1899, People *v.* Thompson, 122 id. 411, 81 N. W. 344 (boiler-explosion; charge of manslaughter; the killing and injuring of other persons, admitted, to show the effects; but not their stay at hospitals, etc.); 1899, Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183 (injury to cattle by unlawful driving; comparative increase of plaintiff's cattle in former years, and average increase of other cattle in the same year, admitted); 1895, State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430 (whether a horse was poisoned; the immediate death of a hen to whom the contents of the horse's stomach were experimentally fed, *semble*, admissible); 1886, Osborne *v.* Detroit, 32 Fed. 36 (the plaintiff claimed to have been paralyzed by a fall; to demonstrate this, a pin was allowed to be thrust into her face, arm, and leg, in the presence of the jury); 1897, The T. F. Oakes, 82 Fed. 759 (common symptoms in a crew of sailors during a long voyage, admitted to show lack of proper food as the cause); 1898, U. S. *v.* Reed, 86 Fed. 308, 311 (master of a vessel withholding suitable food; that every person on board not eating in the cabin had scurvy, admitted); 1881, Weeks *v.* Lyndon, 54 Vt. 645 (that other persons had cured themselves of hernia, excluded); 1897, Willett *v.* St. Albans, 69 id. 330, 38 Atl. 72 (illness attributed to sewer-gas; the illness, from sewer-gas, of others living near by, excluded, because of irrelevancy, surprise, and confusion of issues); 1898, Bateman *v.* Rutland, 70 id. 500, 41 Atl. 500 (illness attributed to sewer-gas; that others living in adjacent houses were not so affected, excluded).

[3] 1885, Knowles *v.* State, 80 Ala. 9 (Somerville, J.: "The most available mode of testing the nature and properties of a fluid or drug, next to that of chemical analysis, is by its effect on the human system; that a liquor when taken in certain quantities intoxicated or failed to intoxicate the person taking it is as competent to prove or disprove its intoxicating qualities as it would be to prove the poisonous nature of a drug by the effect following its administration"); 1891, Brantly *v.* State, 91 id. 47, 8 So. 816 (selling spirituous, etc., liquors; the effect of the liquors upon the purchasers, admitted); 1893, State *v.* Lindoen, 87 Ia. 702, 704, 54 N. W. 1075 (mixing ingredients of a drink before the jury, excluded as not bearing on its intoxicating quality; compare §§ 1159, 1160, *post*); 1886, State *v.* Pfefferle, 36 Kan. 90, 91, 12 Pac. 406 (whether a beverage "phœnix" was intoxicating; its

any and all of the principles and limitations already examined (§§ 441–449) may be involved; and further reference to them here is unnecessary.

§ 458. **Similar Injuries to Other Persons at the same Machine, Highway, Railroad, or Building.** If a white powder's tendency to produce illness may be evidenced by the symptoms following its administration, then in the same way the tendency of a projecting spike in a gate to catch and tear the garment of a passer-by may be evidenced by instances of such tearings, and the tendency of a part of a highway to make the feet trip upon it may be shown by instances of trippings. The mass of precedents dealing with the use of other injuries (or "accidents") as evidencing the dangerousness of a place or a machine are concerned with an inference of precisely this form, *i. e.* an inference as to the *harmful tendency or capacity* of the machine, highway, building, or track, as indicated by the occurrence of such harm to human beings in other instances.

There is thus no objection from the standpoint of the *character* rule (*ante*, § 199); for the object of the inference is not to show previous acts of negligence, nor even (directly and necessarily) a present negligence. The purpose is merely to show the nature of the machine or the place, as having a tendency to produce such human injuries; just as copper acids may have a tendency to destroy herbage or strychnia a tendency to produce convulsions. If it can be shown what that tendency is, it may then be possible to show that the maintenance of a place or machine of that tendency — *i. e.* likely to cause such harm — is negligence. But this additional conclusion is not necessarily involved in the evidential purpose, which seeks simply the illustration of the nature of the thing or the place by its observed effects. Nor is there any virtue in the suggestion, occasionally heard, that "the jury are trying the merits of this particular accident and none other." This is true enough, but it is beside the point. Just because the "merits of this particular accident" have to be investigated, it becomes necessary to learn the nature of the machine or place involved; and in learning its nature, the evidential view cannot be confined to the precise moment of the accident in question. That nature, being more or less continuous, has exhibited itself at other times and in other instances; and it is both rational and practical to look at other instances from which that nature is to be ascertained. The only principles that can affect the exclusion of such instances are those of Relevancy and of Auxiliary Policy. What is their bearing?

(1) The principle of *Relevancy*, as already noted (*ante*, § 442), requires that the other instances of injuries received should have occurred under substantially similar circumstances. The application of this principle has already been sufficiently illustrated. Note, however, that a *double inference*

effect in stimulating and intoxicating various persons, admitted); 1890, State *v.* Adams, 44 id. 135, 24 Pac. 71 (whether a beverage "cider" was intoxicating; its effect in intoxicating those who drank it, admitted); 1885, Fairly *v.* State, 63 Miss. 333 (that a person was made drunk by certain bitters, admitted to show that they were spirituous); 1889, Com. *v.* Reyburg, 122 Pa. 299, 305, 16 Atl. 351 (the effect felt by persons drinking a liquor, admissible to show whether it was spirituous).

usually is necessary, *i. e.* from the other instances to the tendency or condition at the time of their occurrence, and then from the tendency or condition at that time to its persistence at the time in question. The principle governing the latter inference has also been examined (*ante*, § 437). But often this double inference is treated by the Court as a single one, and an instance occurring at a remote time is disposed of as not occurring under similar circumstances. Yet there is in reality a second inference involved —, as may be seen where a prior tendency or condition is shown by direct testimony (*ante*, § 437) and not by instances of its effect, and then the inference is made from the prior to the later condition. It is enough to point out that there do come into play these two inferences, and that hence an instance may be excluded either because the circumstances were not similar or because the time was too remote.

(2) The principle of Auxiliary Policy, as already noted (*ante*, § 443), requires the exclusion of such instances wherever, by the introduction of many new controversial points, there would result a confusion of issues and an expense of time disproportionate to the usefulness of the evidence. Occasionally a Court is found excluding such evidence absolutely and invariably because of this general possibility of confusion of issues, and without regard to its actual operation in the case in hand. Such a treatment is unnecessary and finical. The rational and practical way is to exclude such evidence when it does in the case in hand clearly involve such consequences, but not otherwise; and to leave its treatment to the discretion of the trial Court, guided by this principle (*ante*, § 444).

There would probably have been little difference of practice in the use of this class of evidence, if there had not been a series of precedents in Massachusetts, beginning with Collins *v.* Dorchester, which attempted to cast discredit on the use of this evidence, and laid down an absolute rule of exclusion. That ruling proceeded from the point of view both of relevancy and of auxiliary policy, though without any full consideration of either reason; and, coming at a comparatively early date, served for a long time as a stumbling-block to many Courts whose instinct would have led them to receive such evidence. Its fallacies, from both points of view, were first clearly exposed by Mr. Justice Doe, in his classical opinion in Darling *v.* Westmoreland;[1] and from that time the tide of rulings began to turn. The ensuing cases show how an absolute rule of exclusion, like that of Collins *v.* Dorchester, is nowadays rarely attempted; and the two principles of relevancy and auxiliary policy are usually applied anew to each instance, as they ought to be. Strictly as a precedent, Collins *v.* Dorchester applied only to injuries in a highway, but its influence was to be seen in opinions upon evidence involving other sorts of injuries, and even, to some extent, over this whole group of evidential material. But Mr. Justice Doe's opinion utterly discredited it as an obstacle to the investigation of truth, and even in its own

[1] 52 N. H. 401, quoted *ante*, §§ 444, 445.

jurisdiction it was gradually narrowed in its effect, until the doubt may now be maintained, whether it would there be followed, even upon its precise state of facts. The precedents, however, in the various jurisdictions still show traces of its misleading influence.[3]

[3] All the foregoing principles of §§ 442–449 are here illustrated; in particular, the principle for negative instances (§ 448) is important; *Eng.:* 1866, Crofter *v.* R. Co., L. R. 1, C. P. 300 (injury on a defective staircase; evidence from the defendant was admitted without question, that about 43,000 persons had passed over it without injury during the previous year, in which alone it had been used); *Ala.:* 1872, Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15, 32, *semble* (that the trains had run off the track seven or eight times in the previous month, admitted, to show its condition); 1891, Birmingham Union R. Co. *v.* Alexander, 93 id. 133, 9 So. 525 (injury by a wagon striking a car-rail; the fact admitted for the plaintiff that other similar injuries had been thus received, and for the defendant that the rail was constantly crossed in safety; "a knowledge of the experience of others . . . may enable the jury to weigh all the evidence before them in the light of the rule that like causes operating under like conditions produce like results"); 1893, Schlaff *v.* R. Co., 100 id. 377, 378, 388, 14 So. 105 (former injuries of other persons at a bridge, excluded); 1896, Birmingham *v.* Starr, 112 id. 98, 20 So. 424 (similar falls at the same place about the same time, *e.g.* a month before or after, admitted; but not of falls at other times or at times unspecified); 1897, Mayer *v.* Building Co., 116 id. 634, 22 So. 859 (defective cornice; evidence that one or more persons had stood safely upon another cornice of the same building similarly constructed, excluded); 1899, Southern R. Co. *v.* Posey, 124 id. 486, 26 So. 914 (another's experience at same guard-rail three weeks before, admitted); *Cal.:* 1869, Martinez *v.* Planel, 36 Cal. 578 (fall of another person at the same passageway six weeks before, excluded; following Collins *v.* Dorchester, Mass.); 1903, Dyas *v.* Southern P. Co., — id. — , 73 Pac. 972 (prior fall of a derrick, admitted, to show its defectiveness); *Conn.:* 1863, Bailey *v.* Trumbull, 31 Conn. 581 (omnibus upset into a ditch by an alleged highway defect; the fact received that on the next morning, before any change in the place, a loaded cart also upset at a place 15 or 20 feet distant, the distance not being such as to destroy the substantial similarity of conditions); 1865, Calkins *v.* Hartford, 33 id. 57 (injury by a fall on an icy sidewalk; that many persons had passed at the time without inconvenience, admitted; "if the plaintiff had offered evidence to show that a number of people had actually slipped upon it, this would have been strong proof that it was in a slippery and dangerous condition. . . . Men always act on such evidence in deciding whether they will risk their limbs or not. Why then should not proof that a number of persons passed over it and did not slip be admitted as tending to show that it was not in a slippery condition?"); 1875, Taylor *v.* Monroe, 43 id. 42 (see citation *ante*, § 439); 1876, Tomlinson *v.* Derby, 43 id. 562 (that other wagons ran into the same hole in the road, admitted); 1879, Wilson *v.* Granby, 47 id. 75 (previous similar loads carried over other bridges, admitted to show whether or not they were beyond the capacity of the bridge); *Ga.:* 1878, Augusta *v.* Hafers, 61 Ga. 48 (injury by falling into a cellar-door opening on the street; two instances within five or six years of children falling into other such cellars, admitted, as "bearing remotely" on the question); 1886, Gilmer *v.* Atlanta, 77 id. 688 (injury by tripping over roots of a tree projecting across a sidewalk; the fact of another person having tripped at the same place some days before, admitted); *Ill.:* 1882, Anrora *v.* Brown, 12 Ill. App. 131 (Lacey, J.: "The defect claimed in the walk was that it was so smooth that it was dangerous to travel on account of travellers slipping down upon it. How could it be told whether men's feet would slip while passing over it unless by experiment or trial, or to what extent or how badly they would slide? . . . Where it is attempted to be shown what has happened to others simply to illustrate a physical fact before or after the occurrence being investigated, if the conditions are the same, we can see no objection"); 1889, Hodges *v.* Bearse, 129 Ill. 89, 21 N. E. 613 (that no accident had happened during the 4½ years of an elevator's use, rejected, apparently because the evidence of negligence was strong); 1893, Libby *v.* Scherman, 146 id. 540, 34 N. E. 801 (whether the taking out of a barrel from a pile of barrels could be done without causing the pile to fall; experiment with similar barrels similarly arranged, in which they did not fall, excluded, partly because it was impossible to secure identical conditions, and because a confusion of issues would occur, partly because the question was not whether the pile would necessarily fall, but whether it was dangerously likely to fall if the single barrel were taken out); 1894, Bloomington *v.* Legg, 151 id. 9, 13, 37 N. E. 696 (injury at a drinking-fountain; similar injuries admitted to show dangerousness of the place; quoted *ante*, § 451); 1897, West Chicago St. R. Co. *v.* Kennelly, 170 id. 508, 48 N. E. 996 (that in a car-accident, others were thrown down in the same car, admitted); 1899, Illinois C. R. Co. *v.* Treat, 179 id. 576, 54 N. E. 290 (injury at railroad platform; prior injury to another at same place, admitted, after defendant's evidence that no other such injuries had been received); 1902, Taylorville *v.* Stafford, 196 id. 288, 63 N.E. 824 (that others had stumbled over the same place, admitted, as showing "that the common cause of the accidents is a dangerous and unsafe thing"); *Ind.:* 1881, Delphi *v.* Lowery, 74 Ind. 520, 525 (former injuries to other persons at the same bridge, ad-

Distinguish here (1) the use of other injuries to show *notice of a defective or dangerous place* (*ante*, § 252); in some of the rulings, both points are

mitted; following Darling *v.* Westmoreland and repudiating Collins *v.* Dorchester, but not distinguishing between the present principle and that of showing notice to the city, *ante*, § 252); 1883, Nave *v.* Flack, 90 id. 205, 209, 214 (injury at the drive-way of grain-scales; the fact that others had passed in safety, excluded, because "men may and do use unsafe places without receiving injury, but this does not show that a place proved to be really dangerous is not so"; but evidence of other injuries there was received to show knowledge; compare § 448, *ante*); 1884, Bauer *v.* Indianapolis, 99 id. 56, 60 (injury at a sidewalk; that others had passed the same place in safety, excluded; first, because of the collateral issues involved, following Kidder *v.* Dunstable, Mass., *infra*; and, secondly, because the evidence proved nothing, as in Nave *v.* Flack, *supra*); 1888, Louisville N. A. & C. R. Co. *v.* Wright, 115 id. 378, 393, 16 N. E. 145, 17 N. E. 584 (injury at a low bridge on a railway; the former occurrence of three similar accidents at the same place, admitted); 1894, Salem S. & L. Co. *v.* Griffin, 139 id. 141, 38 N. E. 411 (injury at a mill-tramway, by being caught between a window and a car; another's prior injury in the same way, admitted); *Ia.*: in this jurisdiction the principle of notice (*ante*, § 252) is frequently not distinguished from the present principle; 1882, Hudson *v.* R. Co., 59 Ia. 581, 13 N. W. 735 (a horse caught his foot between rail and plank at a crossing; a similar injury at the same place to another person's horse six months before, excluded, for reasons of auxiliary policy); 1888, Hoyt *v.* Des Moines, 76 id. 430, 41 N. W. 63 (injury at a sidewalk; the fall of another person on the same sidewalk, excluded, because it did not appear that it occurred at the same place); 1890, Matthews *v.* Cedar Rapids, 80 id. 459, 45 N. W. 894 (states that the preceding ruling would be doubtful, if the question were an open one); 1890, Brooke *v.* R. Co., 81 id. 511, 47 N. W. 74 (Granger, J.: "It is also urged that the testimony of K. as to the experiments in placing his foot between the rails, showing where the foot would be caught, and where not, were erroneously admitted. We regard it as clearly competent. A very important fact to be known was whether, with the situation of the rails, a foot could or would be likely to be caught. We can hardly imagine testimony that would better show the fact than such experiments. The shoe that Brooke wore was before the jury, and the witness who made the experiments was there, and the relative size of the shoes worn by each could be known"); 1895, Hunt *v.* Dubuque, 96 id. 314, 65 N. W. 319 (that other people had stumbled at the part of the sidewalk in question, admitted); 1897, Bryce *v.* R. Co., 103 id. 665, 72 N. W. 780 (that no accident had occurred at a bridge during its nine years' use, excluded); 1901, Bailey *v.* Centerville, 115 id. 271, 88 N. W. 379 (sidewalk; that other persons had fallen at the same place, admitted, "for the purpose of calling the witness' attention to the walk"; compare § 655, *post*); *Kan.*: 1880, Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933 (injury by tripping against a projecting plank in December, by tilting it up in passing; the fact received of constant tiltings of this sort from March to December, and of four other falls, three before and one after the fall in question, at the same place but not on the same plank; "the plaintiff must prove that it was unsafe to walk over . . .; the simple fact that there were frequent accidents on this part of the sidewalk would tend to show that it was unsafe; . . . . this walk had been tested by actual use, and this evidence tended to show that it was dangerous and unsafe"; the argument of surprise rejected, for the question was as to the condition of the sidewalk, and the defendant ought to be prepared); *Me.*: 1855, Hubbard *v.* R. Co., 39 Me. 506 (injury at a place where the highway was dug away; previous upsettings of carriages at that place, excluded, for the reasons of auxiliary policy and because there were other ways of ascertaining the nature of the place); 1879, Parker *v.* Publishing Co., 69 id. 173 (fall at an elevator-well; former injuries at the place, excluded, for reasons of auxiliary policy and on the authority of Collins *v.* Dorchester, Mass.); 1886, Branch *v.* Libbey, 78 id. 321, 5 Atl. 71 (injury in the highway; that others had driven safely over the same place, excluded, for reasons of surprise and confusion of issues); *Md.*: 1886, Baltimore & Y. T. R. *v.* Leonhardt, 66 Md. 70, 78, 5 Atl. 346 (injury on a horse-car; whether an accident had ever before happened in that way, excluded; "the jury was trying the merits of this particular accident and none other"); 1889, Baltimore & Y. T. R. *v.* State, 71 id. 573, 575, 584, 18 Atl. 884 (injury at a dangerous place in a road; whether during 32 years past there had been any complaint of the dangerousness of this place, excluded, because "it was no answer" if the place was unsafe; no authorities cited and no understanding of the question shown, in either of these two cases); 1892, Wise *v.* Ackerman, 76 id. 375, 390, 25 Atl. 424 (elevator-injury; similar injury to another employee at a like elevator in the same building, excluded); *Mass.*: 1850, Collins *v.* Dorchester, 6 Cush. 396 (injury on a highway, through a supposed failure of a railing; that another person, riding there under similar circumstances, had suffered a similar accident, excluded below, as "a collateral issue," which would "result in testing one point in dispute by another"; this ruling was affirmed; Metcalf, J.: "It was testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet"; citing Standish *v.* Washburn, *ante*, § 451); 1854, Aldrich *v.* Pelham, 1 Gray 510 (want of a railing as a defect in a highway, when two teams passed each other; the defendant offered to show that various other persons had passed each other at

decided; in others, the present principle is ignored; (2) the inference of a defect from the very *fact of the injury in issue* (*ante*, § 442), and the related

that place in the same way without injury; held, improperly admitted, because "each of these cases would present a distinct issue with all its attendant circumstances, and involve the consequences contemplated in Collins *v.* Dorchester"); 1858, Kidder *v.* Dunstable, 11 id. 342 (issue as to the condition of a snowy road; that others had passed in safety, excluded); 1871, Lewis *v.* Smith, 107 Mass. 334 (action for mules lost by insufficient arrangements on the ferry-boat transporting them; that such a boat had been run for thirty years previously without such an injury, excluded); 1872, Schoonmaker *v.* Wilbraham, 110 id. 134 (following Collins *v.* Dorchester, Aldrich *v.* Pelham); 1884, Peverly *v.* Boston, 136 id. 366 (injury on a ferryboat through catching the hand in a gate raised by an unauthorized person; issue as to the necessity of protecting the gate; that no accident had ever before happened at the gate, excluded); 1893, Marvin *v.* New Bedford, 158 id. 464, 466, 33 N. E. 605 (that no injury had ever occurred there before, excluded); 1894, Knowlton, J., in Bemis *v.* Temple, 162 id. 342, 345, 38 N. E. 970 (referring to these cases as decided on the ground of surprise and confusion of issues, he remarks that "in most of these cases" the applications of the principle to the facts "are generally deemed satisfactory," while "in others . . . apart from authority, it may be" that the fact offered "as a simple experiment might well have been proved"; the majority approve this opinion; see quotation *ante*, § 444); 1896, Flaherty *v.* Powers, 167 id. 61, 44 N. E. 1074 (injury at a machine; "the habit of the machine to spatter, down to just before the accident," admitted to show the "behavior of the machine"); 1898, Spaulding *v.* Lithograph M. Co., 171 id. 271, 50 N. E. 543 (injury by the seat of machinery tipping up; that it had tipped up before, admitted, as "instructive as to what happened to the plaintiff"); *Mich.*: 1885, McCool *v.* Grand Rapids, 58 Mich. 41, 46, 24 N. W. 631 (that another person had constantly driven over the same part of the highway without injury, admitted); 1889, Dundas *v.* Lansing, 75 id. 499, 508, 42 N. W. 1011 (other accidents to other people at the particular place, admissible to show that the place "was not reasonably safe and fit for travel"); 1891, Lombar *v.* East Tawas, 86 id. 14, 48 N. W. 947 (injury at a hole in a plank in the walk; that others had before fallen into the same hole, admitted, to show the existence and nature of the defect); 1892, Retan *v.* R. Co., 94 id. 146, 53 N. W. 1094 (injury in a sidewalk-hole; that others had caught their feet in the hole, admitted); 1893, Corcoran *v.* Detroit, 95 id. 84, 54 N. W. 692 (highway defect; that another person "broke his buggy" at the same place about the same time, excluded; no authorities cited); *Minn.*: 1877, Phelps *v.* Mankato, 23 Minn. 276, 279) injury at a post in the street; that "other teams had run into it," admitted to show its "dangerous character"); 1881, Kelly *v.* R. Co., 28 id. 98, 100, 9 N. W. 568 (injury at a crossing; that "similar accidents occurred by reason of the same defect, as tending to show that the absence of the plank rendered the crossing unsafe," admissible; but an accident at a different place and in a different mode was excluded); 1887, Phelps *v.* R. Co., 37 id. 487, 35 N. W. 273 (difficulties experienced by other travellers in crossing a place alleged to be unsafe were admitted; Mitchell, J.: "There was evidence tending to show that the highway was in substantially the same condition during this time as on the day of the accident, except that the obstruction was increased. . . . As to the materiality and competence of this evidence there is no room for doubt. . . . It is the practical test of common experience, often the most satisfactory evidence"); 1889, Doyle *v.* R. Co., 42 id. 79, 82, 43 N. W. 787 (whether a rail was dangerous by being worn out and splintered; that a witness had in 23 years' experience never heard of an injury from a rail so splintered, admitted; "if such evidence [of former injuries] is admissible to show that what is complained of was of a dangerous character, it must be that evidence would be admissible on the other side to show that in a long and constant use of such instrumentalities accidents had been unknown; that would be a proper means of showing that a thing which was not obviously dangerous was not in fact so"); 1895, Burrows *v.* Lake Crystal, 61 id. 357, 63 N. W. 745 (similar accidents to other pedestrians at the same place in a walk; question reserved; why it should be, if to this Court the principle *stare decisis* is a consideration of any consequence, is not clear); *Mo.*: 1885, Hipsley *v.* R. Co., 88 Mo. 348, 354 (injury by derailment; "other accidents on other parts" of the road, excluded); 1897, Graney *v.* R. Co., 140 id. 89, 41 S. W. 246 (a boy thrown down by the alleged suction of air from a passing train; the effect of air upon mail sacks thrown from moving trains, excluded as not analogous in conditions); *N. H.*: 1877, Griffin *v.* Auburn, 58 N. H. 121 (whether a tree was dangerously near the highway; collisions of other persons with the tree, admitted, in the trial Court's discretion); 1895, Dow *v.* Weare, 68 id. 345, 44 Atl. 489 (highway injury; similar accident to another person at that place several days before, held admissible in the trial Court's discretion); 1900, Whitcher *v.* R. Co., 70 id. 242, 46 Atl. 740 (experiments made since the accident, in stepping from cars, admitted); *N. J.*: 1869, Temperance Hall Ass'n *v.* Giles, 33 N. J. L. 260 (injury by falling into an area by the sidewalk; testimony of a witness that there had been no such injury there before, though 10,000 persons had passed there yearly, excluded, partly because similarity of conditions was not shown, partly because of surprise and confusion of issues; the opinion, which is not consistent in its language, is often understood by other Courts to go further than it

presumption of negligence from the *mere fact of injury* (*post*, § 2509); (3) the *fixing of the memory* of a highway defect by the occurrence of a *prior accident*

does, and next to Collins *v.* Dorchester it has done most to influence erroneous rulings); *N. Y.:* 1873, Dougan *v.* Champlain Co., 56 N. Y. 7 (dangerousness of a place on a steamboat deck; *semble*, that others had fallen overboard there, or that no accident had before occurred there, admissible); 1877, Baird *v.* Daly, 68 id. 550 (that a scow, alleged to be unseaworthy, had or had not experienced similar accidents on previous similar occasions, admitted); 1877, Quinlan *v.* Utica, 74 id. 603, affirming 11 Hun 217 (injury by slipping on a sidewalk; the slipping and falling of others upon it while it was in the same condition, admitted); 1887, Pomfrey *v.* Saratoga Springs, 104 id. 459, 469, 11 N. E. 43 (injury by slipping on snow and ice; that another person had fallen in the same place, admitted); 1890, Hoyt *v.* R. Co., 118 id. 399, 23 N. E. 565 (a wagon getting into a hole in the street; to show that the wagon was defective, a similar happening to it the next day in another place was received, as showing "that such defect tended in theory and operated in practice to overturn the wagon, and thus put this case in line with that numerous class of cases holding that, where a defect is shown to exist, that fact may be legitimately strengthened by proof of other and similar effects, both before and after the effects were produced which form the subject of the trial"); 1890, Gillrie *v.* Lockport, 122 id. 403, 25 N. E. 357 (injury in the highway; the fall of another person two years before at the same place, excluded; previous injuries declared generally admissible to show that the place as tested by use is unsafe; but here the time was too remote; see *ante*, § 437); 1899, Fordham *v.* Gouverneur, 160 id. 541, 55 N. E. 290 (injury on sidewalk; stumbling of others on the same evening on the same plank, admitted); *N. C.:* 1900, Raper *v.* R. Co., 126 N. C. 563, 36 S. E. 115 (accidents at other crossings similarly constructed, admitted); *Oh.:* 1877, Insurance Co. *v.* Tobin, 32 Oh. St. 90 (previous instances of steamboat disasters occurring through snags, etc., and yet without any shock or other coincident indication, excluded, on account of surprise and confusion of issues); 1883, Sinton *v.* Butler, 40 id. 158, 168 (falling of an elevator; that it was "in constant use for well nigh five years without accident," admitted); *Pa.:* 1879, Mansfield C. & C. Co. *v.* McEnery, 91 Pa. 185, 192 (defective bridge; experience of others in passing over it, admitted to show its condition); *R. I.:* 1898, Anderson *v.* Taft, 20 R. I. 362, 39 Atl. 191 (injury in a highway; that no such accident had happened there for 20 years, excluded; following Temp. Assoc. *v.* Giles, N. J.; ignoring Darling *v.* Westmoreland); 1899, State *v.* Mowry, 21 id. 376, 43 Atl. 871 (injury by diversion of uninsulated current; shocks received subsequently by others at the same place, admitted to show the condition as to insulation); *S. C.:* 1887, Bridger *v.* R. Co., 27 S. C. 456, 3 S. E. 860 (injury at a turntable; former injuries of others there, excluded, unless brought to defendant's knowledge; no authorities cited, and no appreciation of the nature of the question); 1898, Pearson *v.* Spartanburg Co., 51 id. 480, 29 S. E. 193 (bridge collapsing under a road-engine; cracking of the bridge at the former passing of such an engine, admitted); *U. S.:* 1882, District of Columbia *v.* Armes, 107 U. S. 519, 524, 2 Sup. 840 (injury on a sidewalk; that other persons had fallen at the same place, admitted; the objection of confusion of issues held not applicable where the evidence was not disputed; a much cited case, and a good opinion); 1886, Osborne *v.* Detroit, 32 Fed. 36 (injury at a defective sidewalk; a former injury of the same sort at the "same neighborhood" to two other persons, admitted, both to show the defective condition and to show notice to the defendant); 1896, Scott *v.* New Orleans, 21 C. C. A. 402, 75 F. 373 (injury on a sidewalk; other previous accidents at the same place, admitted); 1897, Patton *v.* R. Co., 27 C. C. A. 287, 82 Fed. 979 (previous derailments at the same place, received); *Utah:* 1892, Hurd *v.* R. Co., 8 Utah 241, 243, 244, 30 Pac. 982 (whether an engine started of itself; similar startings of other engines, excluded, but of the same engine, admitted); 1898, Snowden *v.* Coal Co., 16 id. 366, 52 Pac. 599 (injury in a mine by the falling of a "clod"; that others had been injured by the falling of this "clod," rejected, on the theory that it was an attempt to use other negligent acts, under § 199, *ante;* no notice taken of the present principle); *Vt.:* 1835, Lester *v.* Pittsford, 7 Vt. 158 (admitting a previous passing over the same road with safety; no question raised); 1860, Kent *v.* Lincoln, 32 id. 591 (injury by being thrown from a wagon while crossing a water-bar; that others were thrown or jolted at the same place, admitted; such effects would be "in the nature of experiments to show the actual condition of the road"); 1867, Walker *v.* Westfield, 39 id. 247 (injury by being thrown out of a wagon which got into a mudhole; C.'s similar experience a day or two later, received, as no more irrelevant than "if the witness had testified that he went there the next day and with a measuring rule found the ditch to be three feet wide and two feet deep"); 1900, Sullivan *v.* D. & H. Canal Co., 72 id. 353, 47 Atl. 1084 (absence of accidents at railroad platform for 30 years, excluded, because the conditions were not shown the same); 1901, Lynds *v.* Plymouth, 73 id. 216, 50 Atl. 1083 (prior injuries to other persons at the same bridge, admitted); *Wash.:* 1897, Elster *v.* Seattle, 18 Wash. 304, 51 Pac. 394 (injuries at the same place in the sidewalk to other persons a week or ten days before, admitted); *Wis.:* 1887, Phillips *v.* Willow, 70 Wis. 6, 34 N. W. 731 (a stone obstructing the highway and overturning a sleigh; that others about the same time had collided with the stone, excluded; see quotation *ante*, § 443); 1894, Barrett *v.* Hammond, 87 id. 654, 657, 58

(*post*, §§ 655, 730); and (4) the inference of an admission of negligence from *subsequent repairs* (*ante*, § 283).

C. INSTANCES OF MENTAL AND MORAL EFFECTS, AS EVIDENCE.

§ 459. **General Principle.** There is no reason why the tendency or quality of an object of external nature should not sometimes be as easily ascertainable from its mental or moral (psychological) effects as from its corporal or its material effects. Where the issue is as to the existence of a tendency to produce psychological effects, the tendency can usually best be proved by adducing instances of such effects, if they have attended the use or operation of the thing in question. For example, if on looking out of the window of a comfortable home the persons on the highway are observed to be shuddering and turning up their ulster-collars, a natural inference is that the temperature without is extremely cold. Or, if on looking some distance ahead, as one drives through a street, all the vehicles are observed to be turning aside at a certain apparently vacant spot in the road, a natural inference is made that some obstruction exists, such as a pavement-hole or a broken electric wire. This sort of inference from human or animal conduct is of constant service in daily life, and claims also an important part in the realm of evidence for litigated issues. It is of especial importance and utility, because of the absurd and fantastical extent to which the prohibitions of the Opinion-rule (*post*, § 1917) are pushed; for if no direct testimony is to be permitted, by persons who can say (for example) whether a place was dangerous or safe, it becomes all the more necessary to grant the largest possible scope to circumstantial evidence by specific instances of the effects produced on human or animal conduct by the use or operation of the thing in question.

A possible objection is found in the *Hearsay rule*; *i. e.* in looking to a person's conduct as evidencing the material cause of the conduct, are we not virtually receiving the person's hearsay assertion as to the cause? The Hearsay rule excludes extra-judicial assertions only, *i. e.* deliberate utterances in terms affirming a fact (*post*, § 1362); and, although in effect an inference from conduct may be the same in result as an inference from assertion, nevertheless the two are distinct. Nor does the policy or spirit of the Hearsay rule apply; for that policy is to test the assertions of persons regarded as witnesses, by learning the source of their knowledge and by exposing its elements of weakness and error, if possible; and where the evidence is not dealing with a person's assertion as deriving force from his personal character, knowledge, or experience, it is not within the scope of the policy of the Hearsay rule. No doubt the line is sometimes hard to draw between conduct used as circumstantial evidence and assertion used testimonially.[1] Nevertheless

N. W. 1053 (prior injuries at the same place, excluded); 1901, Kreider *v.* Wisconsin R. P. & P. Co., 110 id. 645, 86 N. W. 662 (prior injuries at a machine, excluded).

[1] One of the difficult cases where the line has to be drawn — the use of Conduct as evidencing Consciousness — has been fully discussed (*ante*, § 265), and reference may be made to that exposition for a more extended examination of the question, as also to the discussion *post*, §§ 1362, 1788, under the Hearsay rule.

the difference is a real one; and the preceding topics illustrate amply the acknowledged propriety of using conduct circumstantially.

Another objection that may occur is that the conduct of another person is not to be taken as a *standard determining legal duty.* This is undoubtedly true; but it is easy to distinguish between the conduct of another person as a standard of duty and the same conduct merely as evidence of the nature of the thing which is the subject of the duty. The importance and sufficiency of this distinction is dealt with elsewhere (*post*, § 461).[2]

In general, then, the *phenomena of others' sensations and conduct* — effects psychological, or mental and moral (for the term is immaterial, and no one word expresses the entire notion) — *may serve to evidence the tendency, capacity, or quality of a material object of external nature*, precisely as corporal or material phenomena may evidence it. The principles of Relevancy and of Auxiliary Policy, as already examined (*ante*, §§ 442, 443), will determine the admissibility of a given piece of evidence. In general, the former requires that the circumstances under which the other conduct occurs should be substantially similar; the latter allows the exclusion of relevant evidence wherever it would, in the case in hand, involve an unfair surprise or a disproportionate confusion of issues and waste of time.

§ 460. **Measures of Time, Space, Light, Sound, Difficulty, or Capacity, as evidenced by Human Sensations or Conduct (Noises heard, Objects seen, Distances walked, Trains stopped, Work performed, etc.).** All those material conditions and qualities of material objects in external nature which become effective with reference to the ordinary sense-perceptions and muscular activities of human beings or animals may be evidenced by specific instances of such effects, — used subject to the limitations of the general principles already noticed. Thus, a condition of *light* may be evidenced by instances of other persons' experience in *seeing* or *identifying* under similar circumstances;[1] and this application of the principle includes broadly all cases of

[2] It is here impossible to collect all the cases defining this standard of care; yet many of them indirectly lead to an evidential rule.

[1] 1897, Louisville & N. R. Co. *v.* Hill, 114 Ala. 587, 22 So. 169 (whether children could be recognized on a trestle at a certain distance; witnesses placed similar children on the trestle and then observed them from various distances; excluded because the conditions were "too variant"); 1903, Sherrill *v.* State, — id. —, 35 So. 129 (experiments, as to the possibility of seeing an affray, made afterwards, under conditions not shown to be the same, excluded); 1898, People *v.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833 (experiments three months later as to the possibility of distinguishing persons from a certain point, not improperly rejected in discretion, the conditions not being similar); 1846, Sealy *v.* State, 1 Kelly 220 (whether an object could be distinguished at night at a certain distance; evidence of one who had experimented, in company with another, "between the same hours of a similar star-light night," was rejected, because "the difference in men's visions and the uncertainty as to the exact quantity of light on both nights would render the proof too uncertain"); 1893, Painter *v.* People, 147 Ill. 444, 459, 35 N. E. 64 (whether from a certain position a person below in the house could be recognized; experiments tried by both sides, "if competent at all," held of little weight, owing to the difficulty of testing the substantial similarity of conditions as to light, etc.); 1880, Jones *v.* State, 70 Ind. 83, 84 (murder; experiments by sitting at night near the window in a room with a fire and a lamp to see whether a person without could be recognized, rejected; Worden, J.: "The experiments were not made at the house where Pigg was shot, but elsewhere; it would probably be difficult, if not impossible, to make an experiment elsewhere under just the circumstances that existed at the time Pigg was shot, including the extent and situation of the lights in the room, the extent of light or darkness outside, the quality of the window glass, etc."); 1894, Burg *v.* R. Co., 90 Ia. 106, 116, 57 N. W.

the possibility of *mistaken identity*, as shown by other instances of mistaken recognition.[2]

A condition of *sound* may be evidenced by instances of other persons' experience in hearing under similar conditions.[3] The *time* required for walking or riding a certain *distance*,[4] or for stopping a train within a certain dis-

680 (tests under similar conditions, to determine whether a person could be seen on a track, admitted); 1899, Richardson v. State, 90 Md. 109, 44 Atl. 999 (experiments in identifying other persons by the light of the same street-lamp under similar conditions, admissible); 1888, Stone v. Ins. Co., 71 Mich. 81, 38 N. W. 710 (death by slipping into an excavation in the sidewalk; the impression received by one approaching it on the next night under the same circumstances, admitted); 1863, Berckmans v. Berckmans, 16 N. J. Eq. 127 (admitting experiments as to the possibility of seeing a certain event testified to); 1900, Cox v. R. Co., 126 N. C. 103, 35 S. E. 237 (experiments as to how far a man could be seen, admitted); 1853, Smith v. State, 2 Oh. St. 517 (the injured person asserted that he had recognized the accused in the dark by the flash of the pistol as it was discharged outside his window at him; evidence of experiments under similar conditions showing the impossibility of such a recognition was declared admissible; Thurman, J.: "It was certainly lawful to disprove this statement by showing the impossibility or natural improbability of its being true. This is not denied, but it is said it could not be done by proof of experiments. If not, how could the proof be made? . . . Again, it is urged that the experiments in question were not made by looking through the same window pane that H. looked through. But does that deprive them of all value? Is there such a difference in common window-glass that the judgment could not in any degree be aided by an experiment made with another pane!"); 1899, Schweinfurth v. R. Co., 60 id. 215, 54 N. E. 89 (experiments with men in a buggy, and an engine and train, made under circumstances similar to those of an injury sued for, and on the spot in the jury's presence, admitted); 1898, Baltimore & O. R. Co. v. Hellenthal, 31 C. C. A. 414, 88 Fed. 116 (whether a child could be seen on the track; experiments assumed admissible, but whether the similarity of conditions was for judge or jury, left undecided; it need not have been; of course it is for the judge); 1897, Young v. Clark, 16 Utah 42, 50 Pac. 832 (experiments as to the possibility of seeing a child on a railroad bridge, received); 1899, Bias v. R. Co., 46 W. Va. 349, 33 S. E. 240 (experiments made on the railroad-track, in the jury's presence, to show how far a person could be seen, allowed); 1899, Emery v. State, 101 Wis. 627, 78 N. W. 145 (experiments as to time of disappearance of daylight, not admitted, because not under sufficiently similar conditions).

[2] 1824, R. v. Robinson, Annual Register, 1824, App. 33 (larceny, evidenced by a witness to the act; the defendant, to show mistaken identity, called a witness who "had seen two persons in custody very much resembling the prisoner"; "about six weeks ago he met a young man so much like the prisoner that he was quite surprised at the resemblance"); 1882, White v. Com., 80 Ky. 483 (the witness met the accused's double and was so strongly impressed by the identity that he twice approached him to speak to him as the defendant); 1850, Com. v. Webster, Bemis' Rep. 281, 5 Cush. 295, 302 (murder; after testimony that the deceased had been seen alive on the streets since the time alleged, evidence in rebuttal was offered that other persons had mistaken a certain man for the deceased, the fact indicating the existence of a similar person; excluded, unless the person himself was produced; un-sound).

[3] 1899, People v. Phelan, 123 Cal. 551, 56 Pac. 424 (experiments as to hearing of sounds, made under conditions substantially similar, admitted); 1899, Sonoma Co. v. Stofen, 125 id. 32, 57 Pac. 681 (experiments as to the sound produced by kicking a safe-door, admitted, as made under substantially similar conditions); 1900, Starr v. People, 28 Colo. 184, 63 Pac. 299 (whether a conversation could be heard at a certain point; experiments under essentially the same conditions, held admissible); 1896, Missouri P. R. Co. v. Moffatt, 56 Kan. 667, 44 Pac. 607 (railway killing at a crossing; to show whether the sound-signals could have been heard, evidence was held admissible from persons who had stood at the spot and listened, "if the test is made at the place and under substantially similar circumstances"); 1902, Gambrill v. Schooley, 95 Md. 260, 52 Atl. 500 (experiments as to the range of hearing of a voice, held admissible); 1899, State v. Smith, 78 Minn. 362, 81 N. W. 17 (whether a voice could be heard, etc., at a certain point; results of experiments, admitted). Compare § 222, *ante*.

[4] 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1162, 1178 (evidence received of experiments made in walking to the river, to show that it was impossible for the defendant to go and return within a certain time); 1887, Klanowski v. R. Co., 64 id. 279, 286, 31 N. W. 275 (experiments made by proceeding along the same road as the plaintiff just before the same train approached the crossing, to determine whether it could be safely made, excluded, because the distances and other conditions were not shown to be similar; Morse, J., diss.); 1900, People v. Gotshall, 123 Mich. 474, 82 N. W. 274 (time of going a distance; time taken by certain young men experimentally, not admitted to show time taken by an old man who was ill); 1888, State v. Flint, 60 Vt. 304, 308, 317, 14 Atl. 178 (time required to walk a certain distance; experiments in walking it, admitted in spite of partial dissimilarity of conditions).

tance,[5] may be evidenced by other instances under similar conditions. The *height* of a *cattle-guard*, with reference to the possibility of cattle leaping it, may be evidenced by instances of what cattle have done with similar fences; or the amount of animal *feed*, by the quantity consumed by others.[6] In general, when a question arises whether at a certain machine, house, field, mine, or other thing, a certain act can be done, under given conditions of time, strength, skill, or achievement, "one way to do," in the language of Mr. Justice Doe,[7] "is to speculate about it; and another way is to try it"; and it is a crude error to suppose that the law of evidence here "prefers speculation to experience, abhors actual experiment, and delights in guesswork." There is therefore no reason why other instances of observation and experiment should not be received, subject to the foregoing limitations of principle.[8]

[5] 1881, Augusta & S. R. Co. *v.* Dorsey, 68 Ga. 235 (to show whether an engine could have been stopped in time, the engineer related another instance in which he had done it under similar circumstances); 1895, Byers *v.* R. Co., 94 Tenn. 345, 29 S. W. 129 (an experiment evidenced that it was impossible to stop a train under the conditions in which the defendant failed to stop the train); 1903, Richmond P. & F. Co. *v.* Racks, — Va. — , 44 S. E. 709 (time required for stopping cars of a substantially different construction, excluded).

[6] 1886, Chicago & N. W. R. Co. *v.* Hart, 22 Ill. App. 209 (on the question whether a cattle-guard was of such a construction that domestic animals could readily step over, evidence was offered that cows, heifers, steers, and horses had repeatedly been seen passing over; Baker, P. J.: "A fact that illustrates by experiment the condition of the subject-matter of the issue in controversy is not collateral to that issue, but is direct evidence bearing on it"); 1871, Carlton *v.* Hescox, 107 Mass. 410 (price of hay fed to the defendant's horse; the quantity fed being in issue, evidence of "how much hay an ordinary horse will eat or consume in a week," excluded, since the horse was with the defendant to be doctored, and therefore not in ordinary condition); 1895, Harwood's Adm'x *v.* R. Co., 67 Vt. 664, 32 Atl. 720, *semble* (that other cattle-guards, similarly circumstanced, and of like pattern, had sufficiently restrained cattle, received to show that the one in question was adequate).

[7] Quoted *ante*, § 445.

[8] 1899, People *v.* Hill, 123 Cal. 571, 56 Pac. 443 (experiment as to getting over a fence, improper because not shown to be under similar conditions); 1859, Jumpertz *v.* People, 21 Ill. 408 (the defence having alleged that the deceased committed suicide, experiments were made before the jury with screws, ropes, hooks, etc., to test the possibility of the deceased having hung himself in the manner alleged by the accused; the objection was made, among others, that the conditions were not the same. The majority of the Court held that the verdict would not have been reversed for this alone, but declared that such experiments "should be permitted by the Court with great caution"); 1890, McMurrin *v.* Rigby, 80 Ia. 325, 45 N. W. 877 (experiments as to the possibility of a rape on a stairway as described by the plaintiff; rejected, because "the experiments were not made under such conditions as to size of persons as that the results would prove or disprove the claim of the plaintiff"); 1898, Baltimore C. P. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859 (to show whether a person could ride on a street-car in a certain way, the fact that persons had ridden or could ride on similar cars of the same line was excluded); 1839, Salem I. R. Co. *v.* Adams, 23 Pick. 256, 258, 264 (deceit in the sale of shoes; the plaintiff claimed that they were so packed in boxes, and the boxes so arranged, as to induce deception; to disprove this, their apparent condition, etc., as examined about the same time and under the same circumstances by another person, was admitted); 1874, People *v.* Morrigan, 29 Mich. 5 (a pocketbook had been stolen from a coat-pocket while on the wearer; the fact was admitted of experiments made at a tailor's to determine the possibility of the theft, the coat being then "in the same condition in which it had been at the alleged robbery"); 1878, Ulrich *v.* People, 39 id. 245 (rape; experiments made in lifting girls over a fence as alleged by the complainant, to show the impossibility of this, excluded, because of liability to unfairness and because the lifting was not material); 1897, Davis *v.* State, 51 Neb. 301, 70 N. W. 984 (train-wrecking; to answer testimony that it was impossible with a monkey-wrench to remove certain nuts, testimony was admitted of one who had so removed similar nuts, the conditions being similar); 1897, West Pub. Co. *v.* Lawyers' Coöp. P. Co., 25 C. C. A. 648, 79 Fed. 756 (the issue being whether the headnotes made by the defendant's editors from the plaintiff's reports were merely copied from the plaintiff's headnotes to these reports or were made by original labor and study of the reports, the plaintiff argued that the period of time between the publication of these reports and that of the defendant's headnotes made original study impossible; the defendant's offer to have his editors show their capacity for speed in the master's presence

Compare here (1) the use of other instances of a *particular person's strength* or *skill*, to show his individual strength or skill (*ante*, §§ 220–223); and (2) the propriety, in the present class of cases, of performing the experiments *before the jury*, instead of proving them by witnesses (*post*, §§ 1150–1161).

§ 461. **Measure of Negligence, Danger, Insufficiency, Unreasonableness, Cruelty, Unskilfulness, or their opposites, as evidenced by Similar Conduct or Habits of other Persons or Animals (Horses' Fright, Passengers' Behavior, Safeguards for Railroads, Highways, and Machines, Commercial Customs, Malpractice, Libel, etc.).** If a person is in the house and wishes to know whether he needs to take out his umbrella with him, and the condition of the atmosphere makes it difficult to see whether it is raining, he may look at the passers-by, and observe whether their umbrellas are lifted. If he wished to ascertain whether a hill was too steep to descend in a wagon without a brake, he would learn something by observing whether the brake was applied to others' wagons in descending. If he observed the workmen in a powder-factory wearing felt shoes, he might infer that the tendency of the powder was to explode from the concussion or friction of ordinary shoes, and that felt shoes were necessary with reference to obviating this tendency. In all these cases, he is judging of the nature or tendency of a material object from its effects on the conduct of others. This tendency of the material object is usually not shown (as in the preceding classes of cases) by its direct effects upon senses or muscles — as where a person uses his vision in sighting an object or feels pain upon eating a substance —, but by its indirect effects, *i. e.* usually, by voluntary conduct, exhibited in avoiding the supposed tendency of the object. Thus, the wearing of the felt shoes is that sort of conduct which the person is forced into in order to avoid the consequences otherwise to be expected; the raising by the traveller of the protective umbrella is what he is put to in order to escape a drenching; and the use of the brake is resorted to for avoiding the danger of slipping down the hill. Nevertheless, the conduct is equally cogent evidentially as indicating the tendency of the material object. The only difference is that it approaches a degree nearer to the line between testimonial and circumstantial evidence, and thus raises more distinctly the question of the Hearsay rule. This possible application of the Hearsay rule was the reason for the exclusion of such evidence in Wright *v.* Tatham, *infra*; but this question has already been referred to (*ante*, § 459), and it is enough to say that the rule has never been thought applicable except in Wright *v.* Tatham.

was held not improperly rejected in the trial Court's discretion, in view of the conditions being there much more favorable to high speed than at the time of the making of the headnotes in question); 1899, Golden Reward M. Co. *v.* Buxton M. Co., 38 C. C. A. 228, 97 Fed. 413 (trespass by mining a quantity of ore on the plaintiff's premises; to prove the total amount taken, the defendant offered to prove that the rate of output in its various slopes was the same, and that the total output divided by the total number of workmen, and multiplied by the number of men working in the slopes on the plaintiff's premises, would give the total tons of ore wrongfully taken; excluded, because on the facts confusing, unfair, and unnecessary); 1898, Hayes *v.* R. Co., 17 Utah 99, 53 Pac. 1001 (whether an engine could pass a shed safely; experiment with another engine under similar conditions, allowed).

The chief difficulty here is of another sort. It arises from the necessity of distinguishing between the use of such facts *evidentially* and their use as involving a *standard of conduct* in substantive law. The distinction is in itself a simple one. (1) The conduct of others evidences the tendency of the thing in question; and such conduct — *e. g.* in using brakes on a hill, felt shoes in a powder-factory, railings around a machine, or in not using them — is receivable with other evidence showing the tendency of the thing as dangerous, defective, or the reverse. But this is only evidence. The jury may find from other evidence that the thing was in fact dangerous, defective, or the reverse, and that its maintenance was or was not negligence, in spite of the above evidence. (2) Meanwhile, the substantive law tells them what the standard of conduct for negligence is; and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law.[1]

This distinction is patent enough, but it is sometimes judicially ignored. Such evidence is sometimes improperly excluded on the erroneous supposition that the mere reception of it implies that it is to serve as a legal standard of conduct. The proper method is to receive it, with an express caution that it is merely evidential and is not to serve as a legal standard. The correct treatment of it is well illustrated in the following two cases from the same jurisdiction:

1867, *Colt*, J., in *Cass* v. *R. Co.*, 14 All. 448 (issue as to the care due from a bailee for hire): "What constituted such care [due and ordinary care] was a question of fact to be judged of with reference to all the circumstances, and especially with reference to the degree of care which other persons engaged in similar business in the vicinity were in the habit of bestowing on property similarly situated."

1868, *Wells*, J., in *Maynard* v. *Buck*, 100 Mass. 40 (issue as to the negligence of a drover in losing cattle; an instruction was refused, that "if the defendant did the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable"): "This is not the legitimate application of evidence admitted to show the usual practice in similar cases. . . . What had been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed; it is not to control the judgment of the jury, if they see that in the case under consideration it is not such conduct as a prudent man would adopt in his own affairs. . . . It is evidence of what is proper and reasonable to be done, from which, together with all the other facts and circumstances of the case, the jury are to determine whether the conduct in question in the case before them was proper and justifiable."

It is to be remembered that the principles of Relevancy and of Auxiliary Policy (*ante*, §§ 442–444) apply with the same limitations as in the preceding

[1] For a further consideration of the distinction between evidence of negligence and the legal standard of negligence, see *post*, § 2552.

topics; *i.e.* (1) the conduct of others must have occurred under circumstances substantially similar, and (2) there may be an exclusion of relevant evidence where in the case in hand it would, in the trial Court's opinion, involve a confusion of issues and undue waste of time.

In the application of this principle, then, the dangerous tendency of an object to *frighten horses* may be evidenced by instances of other horses being frightened by it under similar circumstances.[2] So, too, the tendency of an extraordinary situation to *frighten human beings* (as when in a collision the reasonableness of a person's conduct in jumping or rushing out is in issue) may be evidenced by the conduct of other persons similarly situated.[3]

[2] 1889, Brown *v.* R. Co., 22 Q. B. D. 391 (a heap of refuse and earth in a highway; to show its tendency to frighten horses, the fact was received of the shying of various other horses than the plaintiff's in passing the heap); 1858, House *v.* Metcalf, 27 Conn. 631 (fright at a mill-wheel; to show that the wheel in motion was calculated to frighten horses, other instances of such fright were received); 1871, Knight *v.* Goodyear Mfg. Co., 38 id. 438, 412 (fright of other horses of ordinary gentleness by the same whistle at the same place, admitted to show the whistle's horse-frightening capacity); 1876, Tomlinson *v.* Derby, 43 id. 562 (that another horse was frightened by a highway-defect, admitted); 1888, Cleveland R. Co. *v.* Wynant, 111 Ind. 525, 17 N. E. 118 (injury through fright of a horse at a box-car; previous fright of other horses at it, excluded; "it is not a subject to be pleaded or proved, whether a box-car or any other particular object is naturally calculated to frighten horses; this is to be determined by the Court and the jury, as applied to all the facts of the particular case before them"; the mere statement of such a reason is its own refutation); 1897, Topeka Water Co. *v.* Whiting, 58 Kan. 639, 50 Pac. 877 (fright of other horses at an open hydrant, received); 1867, Hill *v.* R. Co., 55 Me. 438 (horse's fright at a whistle; fright of other horses at the same whistle, admitted, to show "the usual effect of this whistle on horses of ordinary character"; the defendant might have shown that "no horse had ever been alarmed by it"); 1881, Crocker *v.* McGregor, 76 id. 282 (whether escaping steam was likely to frighten horses; the fright of other horses, well-broken and ordinarily safe, admitted; "it tends to show the capacity of the inanimate thing to do the mischief complained of"); 1891, Bemis *v.* Temple, 162 Mass. 312, 38 N. E. 970 (whether a campaign-flag overhanging a street was calculated to frighten horses; the effect of the flag under the same conditions upon other ordinary horses, admitted by the majority; Knowlton, J.: "The inquiry was in regard to the effect of an inanimate object upon an animal acting from instinct; the only way in which knowledge on this subject could be acquired is by observation of the effect of the object or of similar objects upon the animal. . . . The only possible difference in the results of different observations would arise from the difference in the horses," but this possible difference is not substantial); 1886, Smith *v.* Sherwood, 62 Mich. 159, 28 N. W. 806 (fright of a horse at a hole in a bridge; the shying of other horses at the same hole, admitted); 1903, Nye *v.* Dibley, — Minn. —, 93 N. W. 524 (fright of other horses of ordinary gentleness, at a pile of stone, admitted); 1872, Darling *v.* Westmoreland, 52 N. H. 40 (injury by the fright of a horse at a pile of lumber; previous fright of another horse, admitted; see quotations, *ante*, §§ 413. 444, 445); 1878, Gordon *v.* R. Co., 58 id. 396 (whether the noise of steam escaping from a locomotive was likely to frighten horses; the fright of other horses passing under like circumstances, admitted); 1896, Folsom *v.* R. Co., 68 id. 454, 38 Atl. 209 (fright of other horses "in the same or similar situation," admitted); 1897, Valley *v.* R. Co., ib. 546, 38 Atl. 383 (conduct of the same horse in passing the same pile of lumber at other times on the same day, admissible); 1898, Potter *v.* Natural Gas Co., 183 Pa. 575, 39 Atl. 7 (previous fright of another horse at the same noise, admitted); 1899, Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643 (horse frightened by a heap of sand; non-occurrence of fright by other horses at such heaps, excluded because too remote and because the conditions were not the same); 1891, Thomas *v.* Springville, 9 Utah 426, 430, 35 Pac. 503 (shying of other horses at a hole, admissible); 1887, Bloor *v.* Town of Delafield, 56 Wis. 273, 34 N. W. 115 (fright of a horse at a box-car; that numerous other horses had been driven past without fright, excluded, on grounds of auxiliary policy; no authorities cited).

[3] 1872, Mobile & M. R. Co. *v.* Ashcroft, 48 Ala. 31 (conduct of others in jumping from the train, admitted); 1890, Mitchell *v.* R. Co., 87 Cal. 62, 25 Pac. 245 (conduct of other passengers, admitted to "show what they, being in the same dangerous situation, deemed prudent conduct"); 1899, Atlanta C. S. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191 (screams of other people in a car just before a collision, admitted to show plaintiff's state of mind before jumping); 1855, Galena & C. U. R. Co. *v.* Fay, 16 Ill. 558, 568 (conduct of other passengers, admitted "as tending to show how the circumstances of apparent danger impressed every one, and . . . vindicate it [the plaintiff's conduct] from rashness and imprudence from undue alarm"); 1899, Leary *v.* R. Co., 173 Mass. 373, 53 N. E. 817 (that other passengers were frequently confused and got out

Where the ordinary operation of (for example) a railroad car is in issue, with reference to the care to be used by *passengers*, *employees*, or *highway travellers*, or the possibility of *safely riding*, *standing*, *passing*, *coupling*, or *climbing* in a certain manner, the same principle applies, though the risk is greater of the jury's improperly confusing the evidential effect with the legal standard of care.[4] Where the care required of the *owner of a railroad* is in issue, this sort of evidence may serve in a variety of ways, — to indicate, for example, the adequate construction or operation of tracks, platforms, bridges, cars, turntables, spark-arresters, switches, or any object whose qualities are exhibited by the specific conduct or habitual practice of other persons or *other railroads* in using it.[5] Thus also may be evidenced the condition of

on the wrong side of the train, left to trial Court's discretion); 1897, Holman *v.* R. Co., 114 Mich. 208, 72 N. W. 202 (conduct of other passengers in the same car at the time of a collision, admitted as indicating the existence of danger); 1877, Twomley *v.* R. Co., 69 N. Y. 161 (the issue being the danger of a particular situation and therefore the reasonableness of the plaintiff's conduct in jumping from a train, the action of other passengers was received, "as evidence of what was deemed prudent by those in the same situation, having an interest to take the least and avoid the greater hazard"); 1886, Hallahan *v.* R. Co., 102 id. 199, 6 N. E. 287 (the plaintiff was injured by a collision between the car and a mail-crane; he was allowed "to show that others in the car heard the noise of the collision of the crane with the car, the confusion being the result of the collision and showing the nature thereof"); 1899, Agulino *v.* R. Co., 21 R. I. 263, 43 Atl. 63 (whether a plaintiff was negligent in believing that a train had come to a full stop; experience of others on the same train at other times, excluded).

[4] For this reason, and also because the evidence is frequently offered from the wrong point of view, most of the rulings exclude such evidence: *Ala.*: 1891, Warden *v.* R. Co., 94 Ala. 277, 285, 10 So. 276 (brakeman riding on the cross-beam in front of the engine; a custom so to ride, held admissible usually as throwing light on the propriety of conduct, but not admissible where the act was *per se* negligent, as here); 1892, Kansas C. M. & B. R. Co. *v.* Burton, 97 id. 240, 251, 12 So. 88 (car left near the main line; similar principle laid down); 1892, Andrews *v.* R. Co., 99 id. 439, 12 So. 432 (similar facts and ruling as in Warden *v.* R. Co.); 1893, Hill *v.* R. Co., 100 id. 447, 451, 14 So. 201 (stepping from one street-car to another by the foot-boards, the cars being in motion; a custom of others excluded, for the above reason); 1896, George *v.* R. Co., 109 id. 245, 19 So. 785 (going between engine and car, while in motion, to uncouple them; same ruling); *Ga.*: 1893, Metropolitan S. R. Co. *v.* Johnson, 91 Ga. 466, 470, 18 S. E. 816 (crossing the street in front of a car; "usual custom" of pedestrians, excluded, as "no measure of diligence" for plaintiff); *Ill.*: 1883, Chicago R. I. & P. R. Co. *v.* Clark, 108 Ill. 118 (usual mode of coupling cars, excluded; the Court not noticing the evidential use of the fact); 1900, North Chicago S. R. Co. *v.* Knapers, 186 id. 246, 57 N. E. 849 (that other passengers were accustomed to jump on a car in motion, not admitted "for the purpose of establishing a standard of ordinary care"; correct distinction not noticed); *Kan.*: 1890, Southern K. R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113 (climbing the ladder of a box-car; the practice of others, excluded as creating collateral issues); *Mass.*: 1867, Hickey *v.* R. Co., 14 All. 429 (riding upon a car-platform; a custom of others, excluded as "not tending to show that it was safe"); 1867, Caswell *v.* R. Co., 98 Mass. 194, 200 (whether the plaintiff was careless in going out on the platform from the waiting-room before the train arrived; the custom of passengers to do this, admissible as evidence); *Mich.*: 1890, Glover *v.* Scotten, 82 Mich. 369, 46 N. W. 936 (switchmen riding upon cow-catchers; a custom of others held not to be considered, the act being negligent *per se*); 1903, De Cair *v.* Mualstee & G. R. R. Co., — Id. —, 95 N. W. 726 (custom of employees to go in front of moving cars when coupling, admitted to show the plaintiff's care; Hooker, C. J., and Grant, J., diss., on the ground that such a fact is admissible only to show a waiver by the defendant of a rule forbidding such conduct); *Tex.*: 1882, Houston & T. C. R. Co. *v.* Cowser, 57 Tex. 293, 303 (the usual mode of switching by prudent railroad men under similar circumstances, admitted); *Ut.*: 1898, Nelson *v.* South. P. Co., 18 Utah 244 55 Pac. 364 (contributory negligence in passing over the roof of a car; custom for persons to do so under such circumstances, admitted); *W. Va.*: 1889, Humphreys *v.* N. N. & M. V. Co., 33 W. Va. 135, 10 S. E. 39 (a locomotive fireman standing out on the tank-spout while watering the engine; a custom of others held not to prevent the act from being negligent *per se*); *Wis.*: 1894, Colf *v.* R. Co., 87 Wis. 273, 276, 58 N. W. 408 (switchman jumping off a moving engine; the practice of employees, excluded, as involving confusion of issues; only one precedent cited, and that erroneously); 1897, Andrews *v.* R. Co., 96 id. 348, 71 N. W. 372 (custom as to other employees' mode of coupling, admitted, on the issue of contributory negligence).

[5] *Can.*: 1883, Robinson *v.* N. B. R. Co., 23

a *factory*, *mine*, *house*, *vessel*, *machine*, boiler, or other apparatus, with refer-

N. Br. 323 (railway fire set by sparks; the kind of fuel used on other railways, admitted); *D. C.*: 1894, Weaver *v.* R. Co., 3 D. C. App. 436, 448 (injury at a bridge; width of bridges on one other railroad, excluded; general principle undecided); *Ill.*: 1893, Cleveland C. C. & St. L. R. Co. *v.* Walter, 147 Ill. 60, 64, 35 N. E. 529 (injury at a low bridge; usual height of bridges on other roads, excluded; yet conceding that it "might tend to prove" negligence); 1897, Chicago City R. Co. *v.* Taylor, 170 Id. 49, 48 N. E. 831 (collision between horse-car and cable-car; the custom as to priority of passage at the time and place, received, but not the custom in another city); *Ind.*: 1886, Louisville N. A. & C. R. Co. *v.* Pedigo, 108 Ind. 481, 484, 8 N. E. 627 (injury at a bridge; the use of tools and methods similar to those ordinarily so used, excluded as immaterial); 1888, Louisville N. A. & C. R. Co. *v.* Wright, 115 Id. 378, 389, 390, 16 N. E. 145, 17 N. E. 584 (injury of a brakeman at a low bridge on a railway; that on other railways were maintained many bridges equally low, excluded; but *semble* that a general custom not to exceed that height might have been received); 1892, Lake Erie & W. R. Co. *v.* Mugg, 132 Id. 168, 175, 31 N. E. 564 (condition of a track; custom of others to maintain a track in the same condition, excluded); *Ia.*: 1872, Hamilton *v.* R. Co., 36 Ia. 31, 37 (freight-car loaded with timber; that a mode of loading as "usually and commonly loaded and carried over defendants' and all other railroads" would not be negligent, was denied by the Court); 1888, Hosic *v.* R. Co., 75 Id. 683, 685, 37 N. W. 693 (absence of a footboard on a freight-car peculiarly loaded; a customary omission of footboards, held not to negative negligence); 1888, Metzgar *v.* R. Co., 76 Id. 387, 389, 41 N. W. 49 (fire set by a locomotive; evidence that a similar style of smokestack was used on four other railroads, excluded as neither negativing negligence, nor tending "to establish any fact material"); 1894, Miller *v.* R. Co., 89 Id. 567, 570, 57 N. W. 418 (fireman falling into a tender-manhole; usual construction of a manhole, excluded, because the good construction was conceded; custom of firemen to act as plaintiff did, admitted to show care); 1899, Kelst *v.* R. Co., 110 Id. 32, 81 N. W. 181 (construction of stock chutes; usual custom on other roads, excluded); *Ky.*: 1898, Berberich *v.* Bridge Co., — Ky. —, 46 S. W. 691 (custom of other railroads to give notice to carpenters working on a bridge, admissible); *Mass.*: 1871, Bailey *v.* N. H. & N. Co., 107 Id. 497 (absence of a flagman at a railroad crossing, excluded as evidence because the circumstances of other crossings would not be exactly similar and because collateral issues would be raised as to each crossing); *Mich.*: 1874, Hoyt *v.* Jeffers, 30 Mich. 181, 191 (negligent mill-chimney; the use of spark-arresters elsewhere for locomotives, steamboats, saw-mills, etc., admissible as showing that there was an effective remedy available; not admissible to show negligence or care, except under similar circumstances; and, *semble*, not affording a test of legal duty in any event; leading case); *Minn.*: 1881, Kelly *v.* R. Co., 28 Minn. 98, 99, 9 N. W. 588 (defective planking at a crossing; the usual mode of planking, admitted, because the care required was "that which men of prudence would usually exercise under like circumstances"); 1884, Kolstl *v.* R. Co., 32 Id. 133, 134, 19 N. W. 655 (injury at a turntable; similarity of method of securing other turntables, admitted, because "the test is the amount of care ordinarily used by men in general in similar circumstances"; this is clearly wrong in the substantive law, but not the preceding case); 1889, Doyle *v.* R. Co., 42 Id. 79, 43 N. W. 787 (condition of tracks; the use of old rails being shown, a general custom to do so was admitted as evidence of "care such as ordinary prudent men are accustomed" to use); 1900, Moldenhour *v.* R. Co., 80 Id. 700, 83 N. W. 881 (condition of headlights on other cars of defendant, under dissimilar circumstances, excluded); *Miss.*: 1902, Southern R. Co. *v.* McLellan, 80 Miss. 700, 32 So. 283 (that "other responsible railway companies used slag to ballast their roads," admitted on the issue of negligence); *Mo.*: 1877, Koons *v.* R. Co., 65 Mo. 592, 597 (turntable injury; the custom of other railroads to leave turntables locked, excluded, the conduct of others being "no defence"); *N. J.*: 1899, Exton *v.* R. Co., 62 N. J. L. 7, 42 Atl. 486 (injury to a passenger by scuffling of two hackmen standing on carrier's premises; former repeated similar conduct of these and other hackmen, admitted "to show the dangers connected with the use of this way to the baggage-room"); *N. Y.*: 1841, Wilds *v.* R. Co., 29 N. Y. 315, 326 (injury by a railroad train; that the speed of the train in the city was not negligently fast, was held to be clear, if it was "not greater than that which had been usually practised for a considerable period, with the tacit consent of the community, and without accident"); *N. C.*: 1900, Raper *v.* R. Co., 126 N. C. 563, 36 S. E. 115 (mode of construction of other crossings of defendant, not admitted to show a standard of defectiveness); *Pa.*: 1867, Frankford & B. T. Co. *v.* R. Co., 54 Pa. 345, 351 (use of similar spark-arresters on other lines, admissible "not as a rule of decision, but as a matter of evidence assisting the jury to judge what sort is ordinarily safe"); *R. I.*: 1901, Benson *v.* R. Co., 23 R. I. 147, 49 Atl. 689 (that cars were of a sort in common use on other railroads, allowed); *S. C.*: 1887, Bridger *v.* R. Co., 27 S. C. 456, 3 S. E. 860 (injury at a turntable; the practice of other railroads as to locking and guarding, admitted as evidence, but not as constituting a standard of care); *Tex.*: 1884, Gulf C. & S. F. R. Co. *v.* Evansich, 61 Tex. 3, 5 (the custom of other railroads not to lock turntables, held no standard of the defendant's care; also, *semble*, not admissible because the conditions of other turntables may be entirely dissimilar); 1890, Gulf C. & S. F. R. Co. *v.* Compton, 75 Id. 667, 671, 13 S. W. 667 (custom of other railroads as to number of hands for a train, admissible, but not to constitute a standard of care);

ence to the propriety of certain precautions in construction and operation;[5] or of a pavement, ditch, or other part of the *highway*,[6] with reference to its

1891, Gulf C. & S. F. R. Co. *v.* Harriett, 80 Id. 73, 81, 15 S. W. 556 (similar evidence; "the custom of other railroads was legal evidence to go to the jury upon the question of negligence in sending out the train, but it was not conclusive upon the question"); 1894, Gulf C. & S. F. R. Co. *v.* Smith, 87 Id. 348, 357, 28 S. W. 520 (custom of other railroads as to flying switches, not to be made "the absolute standard of judgment"); *U. S.*: 1875, Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 458, 469 (fire set by locomotives; the defendant's negligence in not having the track properly watched was an issue; that "it was not the usual practice among railroads in that section of the country to employ a man," etc., excluded, because "the standard by which the defendant's conduct was to be measured was not the conduct of other railroad companies in the vicinity"); 1897, Henion *v.* R. Co., 23 C. C. A. 223, 79 Fed. 903 (injury at a platform by an approaching train; mode of construction of other platforms, excluded, because the platform could show for itself its safety or danger; *semble*, modes of approach of trains in other companies "possibly" pertinent ordinarily); *Vt.*: 1884, Bryant *v.* R. Co., 56 Id. 710, 712 (cutting away brushwood by a railway track; practice of others not allowable as a legal standard, but the Court does not clearly express the principle); 1895, Rainey *v.* R. Co., 67 Id. 594, 32 Atl. 810 (that the station and track arrangements at other places were the same as at the place alleged to be dangerous, excluded, partly because substantial similarity was not shown); *Va.*: 1900, Southern R. Co. *v.* Manzy, 98 Va. 692, 37 S. E. 285 (usual practice of loading among railroads in general, admitted, but not the mode used by a single other road).

[5] 1858, Hilders *v.* McCartney, 31 Ala. 501 (fire set by a torch on a steamer; custom of other steamers to carry such a torch, held not a justification); 1893, Jones *v.* Lumber Co., 58 Ark. 125, 128, 23 S. W. 679 (whether a boiler was properly tested; usual tests used in the region, admitted, but not the conduct of one other owner); 1893, Burns *v.* Sennett, 99 Cal. 363, 373, 33 Pac. 916 (hoisting strap; usual mode of construction, admitted, not as a conclusive test, but as evidence of care); 1903, Arrington *v.* Fleming, — Ga. —, 43 S. E. 691 (agistment; custom of other agisters as to fencing, admitted); 1898, Hartford Deposit Co. *v.* Sollitt, 172 Ill. 222, 50 N. E. 178 (negligence with an elevator; operating mode of other elevators, excluded; no authority cited); 1899, Taylor *v.* Star Coal Co., 110 Ia. 40, 81 N. W. 249 (admissible "in certain cases to prove what is negligence," though not "for the purpose of excusing negligence"; here, a custom as to mine-roofing, admitted); 1903, Hamilton *v.* Mendota C. & M. Co. — Id. —, 94 N. W. 282 (custom of other mines as to entries admitted); 1884, Mayhew *v.* Mining Co., 76 Me. 100, 111 (that a railing around a ladder-hole in a mine was not customary in other mines, excluded, because custom was no excuse for negligence); 1875, Hill Mfg. Co. *v.* P. & N. Y. R. Co., 125 Mass. 292, 298, 303 (careless construction of a New York pier with reference to fire; the mode of construction of similar piers in Boston under similar circumstances of risk, held not improperly excluded in the trial Court's discretion as involving collateral issues); 1894, Rooney *v.* R. & D. R. Co., 161 Id. 153, 161, 36 N. E. 789 (employee injured at machinery; custom of guarding in other factories, excluded, because plaintiff assumed the risk of danger here); 1897, French *v.* Spinning, 169 Id. 531, 48 N. E. 269 (running-board near shafting; that other mills were differently arranged, excluded, apparently because the plaintiff had assumed the risk); 1899, McMahon *v.* McHale, 174 Id. 320, 54 N. E. 854 (usual play of part of derrick as elsewhere used, etc., admissible in trial Court's discretion); 1896, Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863 (negligent running of a grindstone; the rate of speed in other similar factories, excluded, because it "was immaterial, and furnished no defence to the action"; 1898, Belleville Stone Co. *v.* Condon, 61 N. J. L. 353, 39 Atl. 641 (methods of other quarries as to the use of hanging ropes, admitted as evidence of negligence); 1894, Reese *v.* Hershey, 163 Pa. 253, 257, 29 Atl. 907 (general mode of use of machine in the trade, admissible); 1901, McGar *v.* Worsted Mills, 22 R. I. 317, 47 Atl. 1092 (mode of lacing belts in other mills, admitted to show lack of safety); 1903, Fritz *v.* Tel. Co., 25 Utah 263, 71 Pac. 209 (usual method of providing insulators, stringing wires, etc., admitted); 1894, Congdon *v.* Scale Co., 66 Vt. 255, 29 Atl. 253 (whether a wheel was properly guarded; the absence of guards on similar wheels in other factories, excluded, because the conditions of use were not similar); 1897, Richmond L. & M. W. *v.* Ford, 94 Va. 627, 27 S. E. 509 (injury in wheel-moving; the general practice of other such shops, but not of a single other, admissible); 1893, Faerber *v.* Lumber Co., 86 Wis. 226, 234, 56 N. W. 745 (use of similar burners elsewhere, excluded on the issue).

[6] 1893, Bassett *v.* Shares, 63 Conn. 39, 43, 27 Atl. 421 (team left unhitched; ordinary practice, excluded; no precedents cited); 1869, Champaign *v.* Patterson, 50 Ill. 61, 65 (manner of constructing sidewalks, etc., in other cities and towns of similar size, excluded, on the theory that this would be no justification); 1841, Barataria & S. C. Co. *v.* Field, 17 La. 422 (that many persons had been obliged to quit their houses on account of an overflow, admitted to show its nature); 1868, Maynard *v.* Buck, 100 Mass. 40 (see quotation *supra*); 1871, Judd *v.* Fargo, 107 Id. 264, 268 (the plaintiff's horse was frightened by the defendant's maple-sugar apparatus in the highway; that other persons in the vicinity were accustomed to use the highway in the same manner, excluded); 1893, Marvin *v.* New Bedford, 158 Id. 464, 466, 33 N. E. 605 (that similar depressions in the side-

proper mode of use; or of *money* or *chattels*,[7] with reference to the proper method of loading, warehousing, using, mending, or otherwise handling; and, in particular, of a *business*, or a *stock of goods*, with reference to the prudence of carrying it.[8] Whether in *medical matters* a certain kind of remedy, skill, or treatment is necessary or sufficient, may often be evidenced in this manner.[9] Even in matters more nearly involving moral standards, some light may properly thus be obtained from the conduct of other persons, — as when the propriety of a *schoolmaster's* or *ship-captain's* discipline or treatment is evidenced by the practice of others;[10] or when the *cruelty* of treatment to animals is evidenced by other persons' like methods;[11] or when the propriety

walk were common in other cities, excluded as irrelevant and confusing); 1901, Laporte *v.* Cook, 22 R. I. 554, 48 Atl. 798 (custom of shoring up ditches of like character under similar circumstances, admitted); 1896, Jenkins *v.* Irrigation Co., 13 Utah 100, 44 Pac. 829 (to show negligence in cleaning out ditches, the practice of other irrigators in the same region was excluded).

[7] 1818, Hatchett *v.* Gibson, 13 Ala. 587, 598 (like the next case); 1854, Gibson *v.* Hatchett, 24 id. 201 (whether a warehouse was negligently destroyed by fire; the precautions taken and efforts made for another warehouse, saved from burning, admissible, *semble*, if the conditions were the same); 1900, Arnold *v.* Fruit Co., 128 Cal. 637, 61 Pac. 283 (under a contract to handle fruit "in the most approved manner," the methods of the majority of fruit-handlers were allowed to be proved; the issue not being whether these were the best methods); 1885, McPherrin *v.* Jennings, 66 Ia. 625, 24 N. W. 212 (that no other person in that business had similar arrangements, excluded); 1884, Mayhew *v.* Mining Co., 76 Me. 112 ("Defendant's counsel argue that . . . 'if one conforms to custom he is so far exercising average ordinary care.' The argument proceeds upon an erroneous idea of what constitutes ordinary care. 'Custom' and 'average' have no proper place in its definition"); 1867, Cass *v.* R. Co., 14 All. 448 (see quotation *supra*); 1878, Eastham *v.* Riedell, 125 Mass. 586, *semble* (what other persons in the same business do, admitted to evidence care); 1897, Hendrick *v.* R. Co., 170 id. 44, 48 N. E. 835 (general course of business of defendant in shipping cattle, admissible on the question of negligence); 1891, Isham *v.* Post, 141 N. Y. 100, 110, 35 N. E. 1084 (action for negligence in lending the plaintiff's money on poor security; custom of other bankers and of the defendant to lend money on similar security, admitted); 1902, Benedict *v.* Union Agricultural Soc'y, 71 Vt. 91, 52 Atl. 110 (custom of wheelmen as to the manner of riding in a race, admitted on an issue of contributory negligence); 1901, Chase *v.* Blodgett Milling Co., 111 Wis. 655, 87 N. W. 826 (negligence in shelling popcorn delivered to defendant; to show the fitness of the corn, the fact was admitted that corn of identical quality had been successfully shelled by other persons with similar machines).

[8] 1972, Jones *v.* Ins. Co., 36 N. J. L. 29, 43 (to throw light on the amount of stock in a store in M. when burned, evidence of a resident of N. as to the prudent proportion of stock to sales in the same business was rejected; the principle of Ins. Co. *v.* Weide, *infra*, being conceded, but here, the towns being of very different size, etc., the difference of conditions was so great that "such testimony does not afford any reasonable inference" on the subject).

Distinguish the principle of § 379, *ante*, where the question is only of the fact, not of its prudence; the following case illustrates the difference: 1870, Ins. Co. *v.* Weide, 11 Wall. 438 (usual proportion of stock to sales, kept by persons in the same business and same city, received; here the evidence was really used to show a custom or habit, and was properly admissible from that point of view; in Jones *v.* Ins. Co., N. J., *supra*, the ostensible purpose of the evidence was to show the "prudent" proportion of stock).

[9] 1857, Wilkinson *v.* Moseley, 30 Ala. 571 (what prudent planters do in caring for sick slaves, admitted); 1902, Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323 (malpractice; instances of defendant's successful treatment of other persons for the same ailment, excluded on the facts; the ruling appears unsound); 1881, DeMay *v.* Roberts, 46 Mich. 160, 163, 9 N. W. 146 (action against a physician for wrongfully bringing a lay assistant; custom of physicians as to calling such assistance, admitted); 1901, Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260 (malpractice; the treatment of similar cases by other physicians, as offered to be proved by nurses, held properly excluded on the facts). Compare the cases cited *ante*, § 457.

[10] 1858, Hall *v.* Goodson, 32 Ala. 287 (whether a whipping was such as masters generally give, allowed); 1824, Boldron *v.* Widdows, 1 C. & P. 65 (action for slander charging that the boys in the plaintiff's school were ill-fed, etc.; the quality of the provisions in another school, excluded, apparently because this was not the proper test); 1859, Lander *v.* Goodenough, 32 Vt. 114, 119, 125 (beating given by a schoolmaster; to show whether a rawhide was an instrument unreasonably severe, the fact was admitted that it was used in other schools in the vicinity).

[11] 1877, Murphy *v.* Manning, L. R. 2 Ex. D. 307, (whether the cutting of combs of fighting-cocks was a cruel ill-treatment under the statute; the custom as to such cutting, received without

of a *seditious* or *libellous utterance*,[12] with reference to its keeping within the bounds of fair criticism as demanded by the exigency, is evidenced by a comparison with other persons' utterances whose propriety is conceded.

From the foregoing applications of the present principle, distinguish three questions commonly associated in litigation: (1) Whether (for example) a railroad or a factory is bound to provide the *best available appliance*, or appliances as good as those used by any one else in the same occupation, or whether a physician is bound to possess the *skill* commonly possessed in his locality or in the entire profession. These questions arise under the general principle of substantive law already noted (*ante*, § 459), and relate to the legal standard of duty for the case in hand. There are scores of precedents on this subject, but they have been noted here only so far as they tend to illustrate the distinction between the rule of substantive law and the rule of evidence. Facts rejected under the former may nevertheless be admissible under the latter. (2) The *Opinion* rule may forbid direct testimony by a witness upon care, prudence, reasonableness, safety, or skill of the conduct or the place or machine in issue (*post*, §§ 1949–1951); but that rule does not affect the present use of specific instances of conduct as circumstantial evidence. Much may depend, in a given ruling, on the form in which the witness' knowledge is asked for. (3) In actions for personal injury, the known custom of other persons (for example, to trespass on a railroad track) may in substantive law amount to a *license* or *waiver*, so as to exonerate the plaintiff from the rule of contributory negligence or assumption of risk. This is distinct from the present rule of evidence.

objection, but treated as not legalizing the operation or showing it a necessary one); 1884, Brady *v.* McArdle, 15 Cox Cr. 516, 523 (cruelty in dishorning cattle; the practice of so doing, *semble*, held no excuse); 1885, Callaghan *v.* S. P. C. A., 16 id. 101, 101 (same charge; extent of the practice and its results, considered, upon the question whether it was a reasonable and necessary one); 1887, Lewis *v.* Fermor, L. R. 18 Q. B. D. 532 (prosecution for cruelly treating sows; that the treatment was a surgical operation, supposed to increase weight, and practised extensively, was considered, as affecting good faith); 1889, Ford *v.* Wiley, L. R. 23 id. 203, 221 (prosecution for cruelly dishorning cattle; that cattle were not dishorned in most cattle-districts, considered, as showing by the results that the operation was not necessary for fattening, etc.).

[12] With the following cases compare those cited *ante*, § 367, concerning sedition and libel: 1817, Hone's Trial (Pamph.) (the defendant, charged with seditious libel, read various publications by eminent men, including the father of Chief Justice Ellenborough, the presiding judge at the trial, to show that utterances of a similar sort were compatible with unquestioned loyalty and propriety of conduct; the defendant's acquittal on three successive trials was the immediate occasion of Lord Ellenborough's retirement from the Bench); 1843, R. *v.* O'Connell, 5 State Tr. N. s. 1, 533 (sedition by bringing Courts into contempt by encouraging resort to arbitration; rules of the Society of Friends, requiring resort to arbitration, admitted to show "that a vast number of the respectable portion of the community have done the same thing and have universally been considered as acting legally"); 1848, R. *v.* O'Brien, 7 id. 1, 275 (seditious utterances; former similar utterances of persons of high station and unquestioned loyalty, offered as "acts done by public men on particular subjects"; rejected); 1848, R. *v.* Duffy, ib. 795, 915 (seditious utterances; other speeches, by persons since in high office, offered to show that defendant "did not go beyond the latitude allowed to political writers"; received on account of the former practice, but not approved on principle).

For examples of the comparison of other utterances by distinguished men, as showing that the defendant's utterance could not be a *libel* if the others were unaccused, see striking instances in Brougham's Speeches, Works, vol. IX, p. 18 (trial of Hunt), p. 230 (trial of Williams). Compare also the admission of *literary usage*, to show a standard of meaning, *post*, § 1699.

The following ruling belongs here: 1904, State *v.* Ulsemer, 24 Wash. 657, 64 Pac. 800 (circulating obscene pictures; "use of similar pictures in commerce," excluded).

§ 462. **Business Patronage, as evidencing the Quality of a Place or Article.** Where persons are found avoiding a particular region or repudiating a particular article, their conduct serves to evidence for us some defective or annoying or dangerous or other quality in it. The *patronage* given to an *article* (as observed in the number of customers or amount of sales) may thus be resorted to for evidencing its quality;[1] or the *patronage* given to a *place* or *house* may indicate its discomforts.[2] The offer is usually of the difference of patronage before and after the alleged disturbing cause, *i.e.* a resort to the logical method of differences (*ante*, § 442). But upon the same principle, a decrease in *rental value*, as involving a decrease in the patronage of lessees, will also serve to indicate the existence of a defective quality from some disturbing cause.[3] The difference between these and the ensuing cases is merely that here the patronage, as expressed in sales or customers numbered, indicates some particular defect, discomfort, or other quality likely to affect patronage; in the other cases, the money-terms (price or value) indicate the net total effect or sum of all the qualities of the article, for purposes of transfer on the market. The propriety or impropriety of the evidence is the same in both cases; if it is received or rejected in the one, it should be received or rejected in the other.[4]

§ 463. **Same: Value or Sales of Similar Land, Chattels, or Services.** When the conduct of others indicating the nature of a salable article consists in offering this or that sum of money, it creates the phenomena of value, so-called. For evidential purposes, Sale-Value is nothing more than the nature or quality of the article as measured by the money which others are willing to lay out in purchasing it. Their offers of money not merely indicate the value; they *are* the value; *i.e.* value being merely a standard or measure in figures, those sums are that standard. But the evidential question is not concerned with the many subsidiary principles of the law of Damages, or *standard of value*, that come into play. Whether an unaccepted

[1] The rulings are not all as liberal as they might be: 1810, Holcombe *v.* Hewson, 2 Camp. 391 (assumpsit by a brewer against a publican for beer contracted to be bought; defence, that the beer was not of a fair merchantable quality; "the defendant afterwards proved that the beer supplied to him by the plaintiff was very bad, and that he had lost almost the whole of his customers before he began to deal with another brewer, since which he has carried on a thriving trade"; the plaintiff was not allowed to show that other purchasers of his beer were satisfied, since "the plaintiff might deal well with one and not with the others," *i.e.* the article sold might not be the same); 1884, Cunningham *v.* Stein, 109 Ill. 377 (the difference in sales of beer before and after the opening of the defendant's factory, alleged to have polluted the beer, admitted; "it was not conclusive; it was open to proof that other causes, and what causes, affected the sale of the beer"); 1863, Barton *v.* Kane, 17 Wis. 37, 43 (contract for cigars; issue as to their quality; "that the plaintiff about the same time forwarded to other purchasers cigars the same in kind as those furnished the defendant, and that those purchasers made no complaint that the cigars received by them were damp, unseasoned, or unfit for use," excluded).

[2] 1887, Drucker *v.* R. Co., 106 N. Y. 157, 164, 12 N. E. 568 (falling off of customers on account of smoke, noise, etc., of a railway, admitted); 1891, Doyle *v.* R. Co., 128 id. 488, 497, 28 N. E. 495 (same).

[3] 1891, Kane *v.* R. Co., 125 N. Y. 164, 187, 26 N. E. 278, *semble* (to show that the real cause of a decrease of rental value was not the defendant's act, such a decrease in neighboring property not affected by the defendant's act was held admissible); 1894, Cook *v.* R. Co., 144 id. 115, 118, 39 N. E. 2 (rental values of "similar properties on the same street," used to show the defendant's act to be the cause of decrease; like the Kane case, *supra*).

[4] Yet in New York a distinction seems to be taken, as noted in the next section.

offer of purchase at a certain figure may be looked to as determining value, or whether the price of a sale or the cost of making may be looked to, — these are questions which arise because value is a test formed by averaging results and because it is necessary to define the range over which the true idea of value permits the estimate to go. That is not an evidential process, but a process of average calculation. So, too, the question whether the value of the article at another time or another place may be resorted to depends on whether, in defining the range of data, it is fair for the purposes in hand to allow marketability at another place or time to be considered; there the process is still one of defining the range of the value-idea. It is true that there may occur here some applications of the principles already considered (*ante*, §§ 437, 438) for inferring the existence of a thing at one *time* or *place* from its existence at another time or place. But these applications of the principles of evidence are in the rulings so bound up with the substantive principles of the standard of value that it would be impracticable to consider them here.[1]

There is, however, one question indirectly involving a rule of evidence, — the question whether the value of *another article* is receivable in order to show the value of the article in issue. As the price at a sale is, by the law of Damages, conceded to be an element in the test of value (except perhaps in forced sales), this question is usually presented in the form, whether a *sale of other property* is admissible as evidence of the value of the property in question. In answering this question, it is found that the two leading principles already expounded come into joint application, — the principle of Relevancy and the principle of Auxiliary Policy (*ante*, §§ 442–444). According to the former, the value or sale-price of the other property is irrelevant unless the property is *substantially similar in conditions;* according to the second, it may also be excluded, though relevant, if it involves in the case in hand a disproportionate *confusion of issues* and loss of time. The latter consideration has weighed so much with a few Courts that they have treated it as requiring the absolute and invariable exclusion of such evidence. This view is represented in the following passages:

[1] Examples of these principles are found in the following cases: Whether value at a particular *time* may be evidenced by value at a *prior* or *subsequent time:* 1858, McLaren *v.* Birdsong, 24 Ga. 265, 270 (stock of goods attached; value some eight months previous, excluded); 1895, Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 271; 1886, Denton *v.* Smith, 61 Mich. 431, 433, 28 N. W. 160 (value of a cow a year beforehand, admitted); 1887, French *v.* Fitch, 67 id. 492, 495, 35 N. W. 258 (sale-price of corporation stock three years subsequently, when business had been abandoned, excluded); 1890, Showman *v.* Lee, 79 Id. 653, 661 (sale-price of a stock of goods eight months subsequently, excluded); 1895, Johnston *v.* Ins. Co., 106 id. 96, 64 N. W. 5 (value some years before, admitted, the property having no settled market value); 1869, Kelsea *v.* Fletcher, 48 N. H. 282 (price of a cow three years later, admitted); 1854, Dana *v.* Fiedler, 12 N. Y. 40, 43; 1895, Nelson *v.* Bank, 16 C. C. A. 425, 69 Fed. 805 (sale by court of an insolvent's assets three years seven months after the transaction; the Court pointing out that where assets are in court custody a sale after a considerable period may well be satisfactory evidence). Whether value at a particular *place* may be evidenced by value at an *adjacent place:* 1894, Hudson *v.* R. Co., 92 Ia. 231, 60 N. W. 608 (beef-cattle; price at South Omaha and Chicago, admitted to show the value at Sioux City); 1871, Gilbert *v.* Kennedy, 22 Mich. 117, 137 (value elsewhere, admissible so far as it tends to regulate or control the home value); 1895, Blumenthal *v.* Meat Co., 12 Wash. 331, 41 Pac. 47; 1876, Siegbert *v.* Stiles, 39 Wis. 533, 536 (hogs; the price in McGregor, admitted to show value in Prairie du Chien).

1861, *Thompson, J.*, in *East Pennsylvania R. Co.* v. *Hiester*, 40 Pa. 55: "If allowed, each special instance adduced on the one side must be permitted to be assailed and its merits investigated on the other; and thus there would be as many branching issues as instances, which if numerous would prolong the contest interminably. But even this is not the most serious objection. Such testimony does not disclose the public and general estimate, which in such cases we have seen is a test of value. It would be as liable to be the result of fancy, caprice, or folly, as of sound judgment in regard to the intrinsic worth of the subject-matter of it, and consequently would prove nothing on the point to be investigated. The fact as to what one man may have sold or received for his property is certainly a collateral fact to an issue involving what another should receive, and, if in no way connected with it, proves nothing. It is therefore irrelevant, improper, and dangerous."

1891, *Parker*, J., in *Matter of Thompson*, 127 N. Y. 468, 28 N. E. 389: "[If such sales are some evidence of value], then *prima facie* a case may be made out — so far as the question of damages is concerned — by proof of a single sale —, and thus the agreement of the parties, which may have been the result of necessity or caprice, would be evidence of the market value of land similarly situated, and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show, first, the dissimilarity of the two parcels of land; and, second, the circumstances surrounding the parties which induced the conveyance, — such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his property is in the market, or, on the other hand, that the price paid was excessive and occasioned by the fact that the grantee was not a resident of the locality nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus, each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the subject of as vigorous contention as the main issue, and, if the transactions were numerous, it would result in unduly prolonging the trial and unnecessarily confusing the issues; with the added disadvantage of rendering preparation for trial difficult."

It is enough to note (1) in answer to the argument from Relevancy, that since value is a money-estimate of a marketable article possessing certain definable qualities, the value of other marketable articles possessing substantially similar qualities is strongly evidential and is so treated in commercial life; all the argument and protestation conceivable cannot alter the fact that the commercial world perceives and acts on this relevancy; (2) in answer to the argument from Auxiliary Policy, it may be noted that this objection may or may not exist in a given instance, and that the rational and practical way of meeting it is to allow the trial Court in its discretion to exclude such evidence when it does involve a confusion of issues, but otherwise to receive it, — a solution already considered in its general application to the present subject (*ante*, § 444).

Except in a few jurisdictions, this class of evidence is received.[2] In Massa-

[2] *Ala.*: 1899, Ladd v. Ladd, 121 Ala. 583, 25 So. 627 (sales of other lands in the same locality about the same time, admissible, "at least on cross-examination"); *Ark.*: 1887, Little Rock J. R. Co. v. Woodruff, 49 Ark. 381, 391, 5 S. W. 792, *semble* (sales of other lands, admissible, in trial Court's discretion); *Cal.*: 1868, Central P. R. Co. v. Pearson, 35 Cal. 247, 262 (sales of "adjoining lands," excluded, on the principle of confusion of issues; but cross-examination to test a value-witness may employ such material); 1899, Crusoe v. Clark, 127 id. 341, 59 Pac. 700 (value of similar services in the neighborhood, admitted); *Colo.*: 1903, Loloff v. Sterling, — Colo. —, 71 Pac. 1113 (Massachusetts doctrine approved); *Ga.*: 1898, Western & A. R. Co. v. Calhoun, 104 Ga. 384, 30 S. E. 868 (value of a mare; sales of other horses

chusetts and in New Hampshire the principle of leaving the matter to the trial Court's discretion to determine both the substantial similarity of conditions

and of mules, excluded on the facts); *Ill.*: 1869, White *v.* Hermann, 51 Ill. 243, 246 (land; value of "other property of equal quality lying near to and similarly situated to this, at or near the date," admissible, or even "property of different quality in its immediate vicinity"); 1871, Cook *v.* Com'rs, 61 id. 115, 124 (value of adjacent lands, here excluded because too different in situation); 1876, St. Louis V. & T. H. R. Co. *v.* Hallar, 82 id. 208, 211, *semble* (other sales allowable); 1880, Chicago & W. I. R. Co. *v.* Maronsy, 95 id. 179, 182, *semble* (land; sale of an adjoining tract, admissible); 1883, Haish *v.* Payson, 107 id. 365, 371 (legal services; less beneficial results of similar services by others, in settling infringement claims under the same patent, excluded); 1884, Colbertson & B. P. & P. Co. *v.* Chicago, 111 id. 651, 654 (land; sales of "property in the vicinity and near the time," admitted); 1889, Sherlock *v.* R. Co., 130 id. 403, 22 N. E. 844 (excluding mere offers of other property); 1891, Louisville N. A. & C. R. Co. *v.* Wallace, 136 id. 87, 26 N. E. 493 (usual charge for similar legal services, admitted); 1893, Peoria G. & C. Co. *v.* R. Co., 146 id. 372, 374, 34 N. E. 550 (sales of "other similar property, made at or about the same time," admissible); 1896, Metropolitan W. S. E. R. Co. *v.* Dickinson, 161 id. 22, 24, 43 N. E. 706 (effect of a similar railroad on values of other property, not admissible; except that witnesses to value may qualify by showing that they know it); 1896, Metropolitan R. Co. *v.* White, 166 id. 375, 46 N. E. 978 (specific nature of injury to rental values of other property, excluded, except as brought out in showing the source of the witness' qualifications); 1897, Nathan *v.* Brand, 167 id. 607, 47 N. E. 771 (attorney's services; others' usual charges, admitted as evidence of reasonableness); 1897, Boecker *v.* Naperville, — id. —, 48 N. E. 1058 (sales of similar property receivable as affecting the value of the witness' testimony); 1900, Chicago Terminal T. R. Co. *v.* Bugbee, 184 id. 353, 56 N. E. 386 (effect of another railroad on a piece of land four miles away eight years before, excluded); 1902, Chicago *v.* Jackson, 196 id. 496, 63 N. E. 1013 (value of benefit to other properties by track elevations and depressions, excluded); 1902, Lanquist *v.* Chicago, 200 id. 69, 65 N. E. 681 (sales of similar property, admitted); *Ia.*: 1872, King *v.* R. Co., 34 Ia. 458, 461 (price of a similar right of way through an adjoining tract, excluded; such evidence "is admissible only where it appears that there is a uniformity in the character of the lands thus brought in question with those made a criterion of their value"); 1879, Cherokee *v.* Land Co., 52 id. 279, 3 N. W. 42, (prices of other lots in the neighborhood, admitted, although not precisely similar in all respects); 1884, Cummins *v.* R. Co., 63 id. 397, 404, 19 N. W. 268 (prices of other lots in the vicinity, excluded, because "it was not shown . . . that there was any similarity between the lots in question" and the others); 1901, Soper *v.* McClout, — id. —, 87 N. W. 724 (rental value of other similar farms, excluded); *Kan.*: 1878, Atchison & N. R. Co. *v.* Harper, 19 Kan. 529, 534 (colts killed; value of other colts of like appearance and qualities, excluded, as affording an opening for too much uncertainty and as tending to confuse the issues); 1890, Kansas C. & T. R. Co. *v.* Splitlog, 45 id. 68, 25 Pac. 202 (unoccupied land; value of land in a settled neighborhood, excluded; but a general rule also intimated that, where expert testimony can be obtained, the values of other land should not be considered as evidence); 1891, Kansas C. & T. R. Co. *v.* Vickroy, 46 id. 248, 250, 26 Pac. 698 (the preceding case approved; but testing on cross-examination allowed, as in the following case); 1892, Chicago K. & N. R. Co. *v.* Stewart, 47 id. 703, 706, 28 Pac. 1017 (land; values of adjoining land allowed to be asked about to test value-witnesses on cross-examination; the present question left undecided); *Ky.*: 1901, Paducah *v.* Allen, — Ky. —, 63 S. W. 981 (sales of similar adjoining property, admissible); *Me.*: 1842, Warren *v.* Wheeler, 21 Me. 484, 486, 491 (land; the prices of land "lying in the neighborhood" and also "more remote" in the same town, admitted); 1842, Fogg *v.* Hill, ib. 529, 532 (tenancy; the rents of "similar tenements in the same neighborhood at and about the same time," admitted); 1882, Norton *v.* Willis, 73 id. 580 (value of three horses; price paid for six horses, including these three, admitted); *Md.*: 1854, Moale *v.* Baltimore, 5 Md. 314, 324 ("the neighboring and contiguous lots may be looked to"); *Mass.*: 1847, Wyman *v.* R. Co., 13 Metc. 316, 326 ("other sales between other parties of adjacent lots," admissible; though not compulsory sales nor jury-verdict valuations nor mere opinion-valuations); 1853, Davis *v.* R. Co., 11 Cush. 506, 509 (actual sales of other land, admissible); 1861, Boston & W. R. Co. *v.* O. C. & F. R. Co., 3 All. 142, 146 (the preceding cases approved); 1862, Paine *v.* Boston, 4 id. 168 ("actual sales of lots of land on the same street," admitted; no specific distance is too remote as a matter of law; "it was the province of the judge to determine whether the lots . . . were so similar in their situation, relative position, and other circumstances bearing on their value, as to make a sale of them evidence"; leading case); 1863, Shattuck *v.* R. Co., 6 id. 115, 117 (other land sales admitted; the trial judge to have discretion as to time and place); 1868, Ham *v.* Salem, 100 Mass. 350, 352 (rejection of values of other land in trial judge's discretion, approved); 1869, Benham *v.* Dunbar, 103 id. 365 (other land sales, held not improperly admitted in discretion); Presbrey *v.* R. Co., ib. 1, 8 (another sale of land condemned for a railroad, held improperly admitted under the circumstances, as including extra damages in the price); 1871, Lawton *v.* Chase, 108 id. 238, 241 (other sales of similar fallen timber, held not improperly rejected in

and the confusion of issues is well carried out. In some jurisdictions its use is limited to the testing of value-witnesses on cross-examination. Even in the

discretion); 1873, Green *v.* Fall River, 113 Id. 262, 263 (other land sales, held not improperly rejected in discretion as too far anterior in time); 1877, Chandler *v.* Aqueduct, 122 id. 305 (another land sale in a different town and three years later, held improperly rejected in the trial Court's discretion); 1879, Gardner *v.* Brookline, 127 id. 358, 363 (another sale of land of a peculiar kind in an adjoining town, held not improperly admitted in discretion); 1887, Sawyer *v.* Boston, 144 id. 470, 11 N. E. 711 (sales of other lots, much smaller, held not improperly admitted in discretion); 1888, Patch *v.* Boston, 146 id. 52, 57, 14 N. E. 770, 772 (sales a few months later and of improved lots, held not improperly admitted in discretion); 1888, Lowell *v.* Com'rs, 146 id. 403, 16 N. E. 8 (value of mill water-power in Lawrence, admitted to show value in Lowell, the conditions being the same); 1889, Thompson *v.* Boston, 148 id. 387, 19 N. E. 406 (the general principle affirmed; but a mere opinion of the value of another lot, excluded, as in Shattuck *v.* R. Co.); 1895, Amory *v.* Melrose, 162 id. 556, 558, 39 N. E. 276 (another sale in the same street and vicinity, held not improperly admitted in discretion); Lyman *v.* Boston, 164 id. 99, 41 N. E. 127 (other land sales admissible in discretion); Bowditch *v.* Boston, ib. 112, 41 N. E. 131 (same); Pierce *v.* Boston, ib. 92, 41 N. E. 229 (same); Teele *v.* Boston, 165 id. 88, 42 N. E. 507 (same; a mere difference in size is not conclusive); 1896, Buck *v.* Boston, ib. 509, 43 N. E. 496 (the usual principle); Beale *v.* Boston, 166 id. 53, 43 N. E. 1029 (like Thompson *v.* Boston); 1899, Manning *v.* R. Co., 173 id. 100, 53 N. E. 160 (similar); 1900, Old Colony R. Co. *v.* Robinson Co., 176 id. 387, 57 N. E. 670 (similar; but excluding the opinion of experts as to the conditions of these other pieces of property used in comparison); 1903, Sirk *v.* Emery, — id. —, 67 N. E. 668 (like the preceding case); *Mich.:* 1870, Comstock *v.* Smith, 20 Mich. 338, 346 (the value of one of several wells considered); 1877, Eggleston *v.* Boardman, 37 id. 14, 18 (amount paid to one lawyer, not admitted to show the value of another's services to the other parties in the same case; intimating that ordinarily such evidence as to "certain commodities" is admissible); *Minn.:* 1873, Lehmicke *v.* R. Co., 19 Minn. 464, 483 (sales of adjacent land, admissible); 1880, Stinson *v.* R. Co., 27 Id. 284, 289, 6 N. W. 784 (sales of other lands, excluded, "unless perhaps in an exceptional case, in which no other evidence can be had"); 1884, Senrer *v.* Horst, 31 id. 479, 480, 18 N. W. 283 (services; wage-rate of another employee of the defendant, excluded); *Miss.:* 1899, Board *v.* Dillard, 76 Miss. 641, 25 So. 292 (experts to value may be cross-examined as to other sales of like land about the same time); 1903, Board *v.* Nelms, — id. —, 34 So. 149 (admissible, "in weakening opinion values"); *Mo.:* 1861, Lexington *v.* Long, 31 Mo. 369, 374 (benefit by betterment to opposite owners, excluded); 1878, Springfield *v.* Schnook, 68 Id. 394 (damages allowed for other expropriated lands, excluded, because of confusion of issues and uncertainty of the inference); 1893, St. Louis K. & N. W. R. Co. *v.* Clark, 121 Id. 169, 185, 25 S. W. 192 (land; sales of "similar property made in the neighborhood about the same time," admitted; distinguishing the preceding case); 1895, Forsyth Boulevard *v.* Forsyth, 127 Id. 417, 30 S. W. 188 (value of similar pieces of land in the neighborhood, received); 1898, St. Louis O. H. & C. R. Co. *v.* Fowler, 142 id. 670, 44 S. W. 771 (sales must be of similar property); 1902, State *v.* Meysenburg, 171 id. 1, 71 S. W. 229 (shares of stock; sales of similar shares, admitted); *Nebr.:* 1894, Kirkendall *v.* Omaha, 39 Nebr. 1, 6, 57 N. W. 752 (excluding, on the facts, sales of other land); 1897, Thompson *v.* Gaffey, 52 id. 317, 72 N. W. 314 (reasonable plumbing charges; charges by other plumbers in the same city, excluded); *N. H.:* 1849, March *v.* P. & C. R. Co., 19 N. H. 372, 376 (not clear); 1851, Concord R. *v.* Greely, 23 id. 237, 242 ("sales of other lands, similarly situated, in the vicinity of that in question," and made about the same time, admissible); 1855, White *v.* Concord R., 30 id. 188, 191, 208 (colt killed; sale of another colt of the same age, sire, etc., admitted; the case of Whipple *v.* Walpole, 10 id. 131, treated as a precedent, seems hardly to be one); 1858, Ferguson *v.* Clifford, 37 id. 86, 105 (sales of property "in the vicinity and about the same time, similar" to that in question, admissible); 1860, Carr *v.* Moore, 41 id. 131, 133 (price of horses of similar age and description, a year later, admitted; "it has been the uniform practice . . . to receive evidence of the price at which other property of like character and condition was actually sold in the vicinity at or about the same time"); 1860, Swain *v.* Cheney, ib. 232, 234 (services in hauling lumber; prices paid for similar services elsewhere in the neighborhood, admissible according to circumstances); 1861, Dewey *v.* Williams, 43 id. 384, 387 (prices at "times more or less remote and places more or less distant according to circumstances," admissible); Cross *v.* Wilkins, ib. 332, 334 (board at a hotel; price at a similar hotel in an adjacent town, admitted; the trial judge's discretion to control); 1862, French *v.* Piper, ib. 439 (leather; value in Boston, where approximate prices ruled, admitted); 1864, Kingsbury *v.* Moses, 45 id. 222, 223 (services as carpenter; price paid to the employer-defendant by the customer for the plaintiff's services, admitted; whether the time of such other sales is before or after suit brought does not affect their admissibility); 1869, Kelsea *v.* Fletcher, 48 id. 282 (that a controversy is pending at the time of such sales does not exclude them); 1872, Haines *v.* Ins. Co., 52 id. 467, 468 (house and farm; value of another farm, admitted, the question of remoteness in time and place being for the discretion of the trial Judge); 1876, Hoit *v.* Russell, 56 id. 559, 563 (land; rule affirmed); 1879, Amoskeag Co.

jurisdictions where it is rejected, its force is so far recognized that numerous absurd quibbles become necessary in order to distinguish between that which

v. Head, 59 Id. 332, 337 (flowage; the sums paid to thirty-two other persons for their rights of flowage, excluded, because not important enough to justify confusing the issues and protracting the trial; see quotation *ante*, § 443); *N. J.*: 1873, Montclair R. Co. *v.* Benson, 36 N. J. L. 557 (value of adjoining lots a year later, excluded, on the ground of confusion of issues; but the trial Court's discretion is apparently allowed some influence); 1892, Laing *v.* R. & C. Co., 54 Id. 576, 25 Atl. 409 (sales of other land substantially similar, admissible, the trial judge's discretion to control); *N. Y.*: 1873, Gouge *v.* Roberts, 53 N. Y. 619 (the cost of another ice-house, excluded, "as it raised a collateral issue leading to a comparison between the different structures, and could not legitimately aid" upon the issue); 1874, Blanchard *v.* Steamboat Co., 59 id. 292, 294, 300 (sunken vessel; value of other vessels excluded; no reason given); 1886, People *v.* McCarthy, 102 id. 630, 639, 8 N. E. 85 (prices named as consideration in various deeds, not received to show value of lands); 1889, McGean *v.* R. Co., 117 id. 219, 224, 22 N. E. 957 (land rentals; rental values of "similar property in the same street," allowed to be compared); 1890, Huntington *v.* Attrill, 118 id. 365, 378, 23 N. E. 544 (values of other seaside property, rejected because of confusion of issues); 1891, Matter of Thompson, 127 id. 463, 470, 28 N. E. 389 (water-power; amounts paid for adjacent water-powers, excluded; see quotation *supra*); 1891, Roberts *v.* R. Co., 128 id. 455, 473, 28 N. E. 486 (*obiter*, proof of "the rental and fee value" of "buildings somewhat similar to plaintiff's" may be used); 1892, People *v.* Myers, 133 id. 627, 631, 636, 30 N. E. 1150 ("the ordinary rule" excludes "sales of other real property in the same vicinity," first, because of confusion of issues, and, secondly, because of unfair surprise; here, such sales were admitted because no other evidence was attainable, and because on the facts of the case the above objections were obviated); 1895, Jamieson *v.* R. Co., 147 id. 322, 325, 41 N. E. 693 (rental value "in the vicinity," excluded); 1896, Witmark's Case, 149 id. 393, 44 N. E. 78 (affirming the preceding case: "There is no general or well-defined principle of the law of evidence that enables a party to establish the value of some particular or specific thing by proof of the value of another thing of the same class or general character. . . . Cases may doubtless be found where, in other jurisdictions, and in special statutory proceedings for determining the value of real property, more or less support is given to the contention of the plaintiffs' counsel. But in most, if not all, of them, it will be found that the inquiry was not governed by the rules of evidence that prevail at common law. . . . It will be found, we think, upon careful examination, that in most of these [older] cases the Court simply recognized a situation which the parties themselves had created by the general course of the trial, or by consent or acquiescence, and hence they are in no way in conflict with the decision "in the Jamieson case; this suggestion, that the rule in other jurisdictions has anything to do with a statute, and is not based on a common-law principle, is without foundation); 1901, Lævin *v.* El. R. Co., 165 Id. 572, 59 N. E. 261 (cross-examination to the value of similar premises, allowed; direct examination to "the general course of values" in the vicinity, allowed); 1901, Shepard *v.* R. Co., 169 id. 160, 62 N. E. 151 (Jamieson *v.* R. Co. followed); 1903, Robinson *v.* N. Y. El. R. Co., 175 id. 219, 67 N. E. 431 (Jamieson's case approved; but, cross-examination to specific instances of sales being allowed, the re-direct examination may take up the instances thus brought out); *Pa.*: 1859, Searle *v.* R. Co., 33 Pa. 57, 63 ("the market value is measured by the price usually given for such land in that neighborhood, making due allowance for differences of position, soil, and improvement; . . . [the French law] directs the market value to be ascertained by reference to recent actual sales in the neighborhood"); 1861, East Pa. R. Co. *v.* Hiester, 40 id. 53, 55 (the Searle case approved as allowing reference to "the selling price of land in the neighborhood"; "there certainly can be no objection to this test"; but it is then said to be available only as forming the basis of the witness' knowledge, and not admissible as an independent fact; see quotation *supra*; but it may be used on cross-examination to test a witness' qualifications); 1873, Pittsburg V. & C. R. Co. *v.* Rose, 74 id. 362, 369 (land; particular sales inadmissible, *semble*); 1873, Hays *v.* Briggs, ib. 373, 386 (the Hiester case approved); 1883, Vanderslice *v.* Philadelphia, 103 id. 102, 109 (value of another lot excluded); 1884, Pittsburg & W. R. Co. *v.* Patterson, 107 id. 461, 464 ("particular sales of alleged similar property under special circumstances," inadmissible; the reasoning of the Hiester case adopted); 1886, Pittsburg R. Co. *v.* Vance, 115 id. 325, 331, 8 Atl. 764 (same); 1890, Curtin *v.* R. Co., 135 id. 20, 30, 19 Atl. 740 (same); 1896, Becker *v.* R. Co., 177 id. 252, 35 Atl. 617 (same); *R. I.*: 1893, Daigneault *v.* Woonsocket, 18 R. I. 378, 28 Atl. 346 (value of other remote and dissimilar land, excluded); *Tenn.*: 1901, Whorley *v.* Tennessee C. Expos. Co., — Tenn. —, 62 S. W. 346 (sales of similar articles at other places, admitted to show the amount of loss of business); *U. S.*: 1876, Stanton *v.* Embery, 93 U. S. 548, 557 ("price usually charged and received for similar services by other persons of the same profession [of the law] practising in the same Court," admissible); 1885, Kerr *v.* Com'rs, 117 id. 379, 385, 387, 6 Sup. 801 ("Sales of property of like character and quality, similarly situated and affected by the same causes, made under circumstances likely to produce competition among bidders, are sometimes resorted to," but the sales here offered were of land "relatively so different" as not to be evidential; this instruction and ruling were approved); 1886, Lehigh

is rejected and that of which common sense compels a hearing. The doctrine of admission, moreover, is sometimes recognized for evidencing the value of services or chattels, when not recognized for land-value.

After instances of such similar sales have been received, it is proper, on the principle of Explanation (*ante*, § 449), to diminish the force of the evidence by showing the conditions to have been dissimilar in some important points.[8]

§ 464. **Same: Other Principles discriminated.** (1) For the purpose of *testing the opinion of a value-witness*, by bringing out facts contradictory of his conclusion, it may be proper for the opponent to ask him on *cross-examination* about the sale-price of adjacent pieces of property; thus, one who places the value of the lot in question at $5,000 may admit that a similar lot adjoining was sold for $3,000 or for $7,000. The effect of this is to exhibit an apparent error of judgment, for if the lots are really similar, their value should be about the same. This mode of impeachment rests on another principle (*post*, § 1004). It is conceded in some jurisdictions where the independent use of such similar instances to show value is forbidden.[1] It is occasionally forbidden, apparently on the theory that it involves a contradiction on a collateral point (*post*, § 1004); but that principle does not properly apply to any inquiry confining itself to cross-examination.[2]

(2) In order that a value-witness may qualify as to *knowledge*, he must

V. C. Co. v. Chicago, 26 Fed. 415, 419 (land; "sales of similar property in the vicinity," admitted); 1896, Schradsky v. Stimson, 22 C. C. A. 515, 76 Fed. 730 (rentals of other stores, not shown to have similar conditions, excluded); *Vt.*: 1849, Vilas v. Downer, 21 Vt. 419, 424 ("usual prices charged and received for similar services . . . by other men of the same profession with the plaintiff in the same vicinity and in the same County," admissible); 1897, Davis v. Cotey, 70 id. 120, 39 Atl. 628 (price paid for timber in the vicinity, receivable); *Wash.*: 1892, Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738 (price of similar land about same time, admissible); *Wis.*: 1882, West v. R. Co., 56 Wis. 318, 321, 14 N. W. 292 (sale of adjoining land, admitted); 1883, Watson v. R. Co., 57 id. 332, 349, 15 N. W. 468 (sales of lots "in the vicinity," some of them several years before, admitted, the trial judge's discretion controlling; but the use to test on cross-examination was the one here concerned); 1884, Washburn v. R. Co., 59 id. 364, 377, 18 N. W. 328 (same; such evidence admitted generally, "to test the accuracy of estimates thereof made by the witnesses"; but the other lands must be "similar in character, location, and value [*!*]," and the sales "not too remote in time"); 1896, Atkinson v. R. Co., 93 id. 362, 67 N. W. 703 (preceding case approved; but mere offers excluded); 1898, Stolze v. Term. Co., 100 id. 208, 75 N. W. 987 (other sales admissible, in the trial Court's discretion, if similar).

[8] 1847, Wyman v. R. Co., 13 Metc. 316, 326 ("open of course to any evidence explanatory of the circumstances attending such sale," and indicating the price as an unfair basis); 1896, Buck v. Boston, 165 Mass. 512, 43 N. E. 496 (witness to the value of land who had spoken to the value of adjacent farms; questions bringing out undesirable elements in the location, admitted).

[1] As in Cal., Kan., *supra*; so also the following: 1896, Silverstein v. O'Brien, 165 Mass. 512, 43 N. E. 497 (a witness who has valued stock as worthless; question as to his having heard of orders for goods which would make it valuable, admitted).

[2] 1839, Tennant v. Hamilton, 5 Cl. & F. 122 (a witness for defendant, in an action for nuisance by smoke, had testified that adjacent premises A, B, etc., were not injured; on cross-examination he was asked whether G, a place, was injured; having answered "No," he was then asked if he knew that defendant had paid anything to the owner of G as compensation for alleged damage; held, that (1) the answer could not serve to test the correctness of his direct testimony, because he had not testified as to G, and (2) it could not be used to test his credit generally, because the inquiry was "perfectly collateral," and involved "a matter which was not relevant to the subject matter in dispute"; hence, even the question was rejected, because (it would seem) its purpose was to lay the foundation for a contradiction); 1889, Thompson v. Boston, 148 Mass. 387, 389, 19 N. E. 406 (a question as to his former estimate of adjacent land, held not improperly excluded in discretion).

appear to know the value of the article in question (*post*, § 713); he may therefore be asked on *direct examination* whether he knows the value of adjacent lands, without naming specific instances;[8] in such a case the present principle is not involved.

(3) Whether an *opinion* as to value is obnoxious to the Opinion rule involves the general principle elsewhere treated (*post*, §§ 1940–1944).

(4) The effect of a *railroad* in injuring the material condition of land, as evidenced by the material condition of adjacent land, depends upon the principle already dealt with (*ante*, § 451).

[8] *E. g.* as in Ill. and Pa., *supra*. Compare the cases cited *post*, §§ 562, 655.

TITLE II: TESTIMONIAL EVIDENCE.

INTRODUCTORY: GENERAL THEORY OF TESTIMONIAL EVIDENCE.

CHAPTER XVII.

§ 475. **In Theory a question of Relevancy is involved.** The necessity for a distinction between Testimonial or Direct and Circumstantial or Indirect evidence has already been considered (*ante*, § 25). It was there noticed that a large class of evidence is differentiated from all others as governed by a set of rules of admission peculiar to itself, — a class including human assertions taken as the basis of an inference to the truth of the fact asserted. The process of all evidence is an inference from one fact to the existence of another, — from Evidence to Proposition (*ante*, § 2); and in the present class of evidence the uniform feature is that the inference is to be made from the fact of an assertion having been made to the truth of the matter asserted. How this inference is in practice constantly combined with the inference from circumstantial evidence, and how nevertheless the detailed principles applicable to each remain distinct and independent in application, has been already suggested (*ante*, § 25). The rules governing the use of this sort of evidence — testimonial evidence — include mainly the rules prescribing the qualifications of witnesses, together with sundry rules for evidence used to explain away and diminish or to strengthen and restore the effect of testimonial evidence. Is it proper to regard such topics as topics of Relevancy? On principle, it is. The question whether A's assertion (or testimony) that B forged a note can be received to show that B forged is as much a question of relevancy as the question whether the discovery of forgers' tools in B's room, or the flight of B from the city, can be received for the same purpose. Suppose a person to come upon the stand and, without a preliminary question, to assert that B forged the note. The mere fact that some casual person opens his mouth and utters these words has in itself little or no weight whatever; for there is as yet no substantial reason why one should pay any attention to his statements. But the fact that a witness A, being of sound mind and sufficient experience, having had opportunity to see what B did, and well recollecting the circumstances, is willing to assert that B forged the note, is a fact which we shall readily listen to as evidence. Some unknown

person's assertion may be worthless; but a specific person's assertion, under certain conditions, acquires sufficient probative value to be at least considered. Any one of several circumstances being definitely lacking, it may have no probative value. If A is insane, for example, his assertion is mere chatter; if A is too young to understand what he is speaking of, his assertion is only an infantile repetition of what his elders have said in his hearing; if A cannot write, he cannot form any opinion as to what B wrote; if A was in St. Louis when B is said to have forged the note in New York, his assertion is idle gossip. In short, it is not every human assertion, as such, that is worth considering as the basis of an inference to the truth of the thing asserted; but only assertions made under certain conditions,— these usually consisting in the presence of certain personal qualities or circumstances in A,— *i. e.* his testimonial qualifications. Now these conditions and the mental process which induces us to recognize them are the same in essence as in the case of circumstantial evidence. A fact must rise to a certain degree of probative value before it can be considered at all (*ante*, §§ 32, 38), — that is the root notion of relevancy, as thus far examined; and the same notion is here involved. If it is desired to express the doctrine of testimonial qualifications in terms of relevancy, it may be thus stated: The fact that an assertion is made by a person who is sane, of age, experienced in the subject-matter, acquainted with the circumstances, and so forth, is relevant to show the truth of the fact asserted. The rules of relevancy here, as with circumstantial evidence, will consist in a statement of these conditions under which the fact of the assertion will be received as having probative value. It is true, however, that in stating these conditions the phraseology of relevancy is not commonly employed; nor is there a need that they should be. It is sufficient to deal with the general question in its common form, Under what conditions may Testimonial Evidence be received? — or, as covering most of the same scope, What are the qualifications of witnesses? It is only necessary to appreciate that scientifically the present subject is equally a part of the general topic of Relevancy.

§ 476. **Method of Argument; Inductive or Deductive.** What has already been noted as to the form of the inference (*ante*, § 30) applies equally to the present class of evidence. The rules which prescribe the relevancy of a class of evidence are here, as with circumstantial evidence, always in inductive form. It is only in the use of these rules that we find employed chiefly the deductive form. When the Court is asked to agree that testimony of a certain sort is relevant and admissible, it is asked to lay down the rule of law as a proposition reached inductively on the basis of experience. But when the Court has sanctioned this proposition, the counsel's argument then takes the deductive form; *i. e.* "Testimony of a specific class is by a certain rule admissible; the present testimony offered is of that class; therefore it is admissible."

§ 477. **Three General Groups of Rules; Testimonial Qualifications. Impeachment, and Rehabilitation.** It follows that the ordinary processes of inductive

argument are here appropriate. Practically those which call for use are reduced to three:

First, in offering testimonial assertions and asking the Court to agree that assertions of that class are admissible, the simple question is whether other hypotheses affecting the credibility of the assertion are sufficiently negatived (*ante*, § 32). When the Court declares that the statement is under the conditions named admissible, it declares by implication that the sanity, the experience, the knowledge, and so forth, of the witness are such that the hypotheses of the assertion being idle chatter, ignorant gossip, or otherwise untrustworthy, are sufficiently negatived *prima facie*, and that the assertion is *prima facie* worth listening to. Thus the other forms or requirements — substantial similarity of conditions, sufficient number of instances, and the like (*ante*, § 31) — do not arise for application at all, as they do in using circumstantial evidence; the simple reason being that the basis of inference here is a single homogeneous variety of evidence (human assertions), and not the myriad varied sorts of facts roughly grouped together under the term "circumstantial evidence." In offering testimonial evidence, then, the judge merely inquires whether experience and precedent have sanctioned certain conditions which must accompany the statement.

Secondly, just as in the use of circumstantial evidence it was observed that there are for the opponent certain ways of diminishing the force of the evidence after it was admitted (*ante*, § 34), namely, by showing that other hypotheses exist which are equally or more probable, or by adducing contrary instances of the same sort, — so here there is found a group of rules pointing to the analogous ways by which an opponent may diminish the force of testimonial evidence; and here, as there, these ways consist mainly either in explaining away the testimonial statement (as, by showing the witness' bad character for veracity, his inadequate experience or knowledge, his poor recollection, and so on), or in adducing contrary instances of the same sort (in the shape of previous contradictory statements, and the like).

Thirdly, since the new facts offered by way of discrediting the witness may themselves in turn be open to explanation taking away their apparent force of inference, so once more the original proponent of the witness may offer evidence, this time for such explanatory or rehabilitating purpose. In practice the process usually ends here; although in theory it might continue longer.

There are thus three general groups of rules to be considered, which correspond to these three general processes of argument:

I. Admissibility of Testimonial Assertions, *i. e.* Witness-Qualifications:

II. Impeachment of Testimonial Assertions;

III. Rehabilitation of Testimonial Assertions.

§ 478. **Analysis of Elements of a Testimonial Assertion: Observation, Recollection, Narration.** Before proceeding to the consideration of these rules, an analysis is desirable of the elements of a piece of testimonial evidence; for upon this analysis will depend the grouping of topics, and from it may be surmised something of the necessary requirements of such evidence.

1. When a witness' statement is offered as the basis of an evidential inference to the truth of his statement — for example, the statement of A that B struck X —, it is plain that at least three distinct elements are present: or, put in another way, that there are three processes, in the absence of any one of which we cannot conceive of testimony. *First*, the witness must know something, *i. e.* must have observed the affray and received some impression on the question whether B struck X; to this element may be given the generic term Observation. *Secondly*, the witness must have a recollection of these impressions, the result of his Observation; this may be termed Recollection. *Thirdly*, he must communicate this recollection to the tribunal; that is, there must be Communication, or Narration, or Relation (there is no single term entirely appropriate). Now the very notion in using a human utterance as the basis of belief in the truth of the fact asserted impliedly attributes these three processes to the witness, — Observation, Recollection, Communication.[1] Whatever rules, therefore, limit the acceptance of testimonial assertions must have reference to some one or more of these elements.

Moreover, in the function fulfilled by each of the three elements or processes are to be found in general form the fundamental canons of which the various detailed rules will be the applications and from which they are sometimes direct deductions. Thus, the notion of Observation is that the external event has in some way or other impressed itself on the witness' senses, to be now reproduced to us in court. This impression of the witness, then (knowledge, observation, or whatever it be called), should adequately represent or correspond to the fact itself as it really existed or exists; and the practical rules under this head will be found to have, for their common purpose, the object of ensuring the probability of a fairly accurate knowledge on the part of the witness. Again, the function of Recollection is to recall or reproduce the original impressions of observation; and such rules as the law has laid down under this head are usually therefore merely applications of this fundamental notion that Recollection must fairly correspond with or reproduce the original Knowledge or Observation. Finally, the function of Narration or Communication is to reproduce for the apprehension of the tribunal the Recollected results — themselves already reproduced from Observation —; and the common purpose of the varied rules under this head is to ensure that the story as told shall represent with fair accuracy what the witness once observed and now recollects.

2. The rules, thus analyzed, would however deal with the simple question, Does this witness actually know, recollect, communicate with sufficient accuracy? — a question requiring in each instance anew an investigation, and a decision based on the facts discovered. But experience has carved

[1] 1806, Evans, Notes to Pothier, II, 202: "All regard to testimony supposes the general proposition that witnesses, not having any motives for asserting what is false or suppressing what is true, having had an adequate opportunity of observing the subject to which they depose, having actually observed it with adequate attention, and having a distinct and perfect memory with respect to it, relate what they have seen or heard with accuracy and fidelity."

out certain rough rules of convenience which, if applied at the outset, may save the necessity of a detailed investigation as to the sufficiency of *actual* knowledge, recollection, and communication; for it is obvious that if we find the witness *incapable* — *i. e.* lacking in the very power — of acquiring adequate knowledge or of sufficiently recollecting or of properly telling, then further inquiry whether he did in fact know or does in fact recollect or well relate, is useless and may be omitted. For instance, if A is put on the stand to testify to the color of a horse, it will be unnecessary to inquire whether and where and when he saw the horse, if it appears at the outset that he has been blind from birth. So, too, it would be unnecessary to ask B, who is put forward to testify to the results of a post-mortem examination, whether he was present and took part, if it appears at the outset that he knows nothing of medicine or of surgery. When the witness is found to lack the proper capacity or power, it becomes not only unnecessary but improper to consider whether he actually knows, for it is impossible for him to know; we do not trust his statement that he does know. Thus, in addition to the rules defining the requirements as to actual knowledge, recollection, and communication, there arise other rules defining the kinds of incapacity (to know, recollect, and communicate) which exclude the witness at the outset without further inquiry.

Of this incapacity there are three distinct sorts: *First*, there is an incapacity affecting the general mental or moral powers, — of which insanity, infancy, dumbness, and the like, are instances. This sort of incapacity may affect the witness' power of knowing or of recollecting or of communicating or of doing all three, and must be examined with reference to each. *Secondly*, there is an incapacity involving a lack of power to judge rightly on particular subjects, and arising from lack of experience or training. This incapacity extends to particular topics only, not necessarily to the whole subject of litigation. *Thirdly*, there is an incapacity arising from an emotional relation to the controversy, *e. g.* from marital relationship or from pecuniary interest in the subject of the suit. This incapacity — nowadays recognized to a limited extent only — is supposed to involve an inability to give any credible testimony on the subject of the particular cause, and, when it exists, affects all three elements alike. As for the names to be applied to these three sorts of incapacity, there are none of general acceptance, nor is it easy to select proper ones. The first may be termed Organic, as affecting mental and moral functions or powers; the second Experiential, as involving a lack of sufficient experience or training; the third Emotional, as involving the dominance of untrustworthy motives.

§ 479. **Any Assertion, whether in court or not, may be Testimonial Evidence.** The use of the phrase "testimonial" evidence must not be understood as applicable exclusively to assertions made on the witness-stand. Any assertion, taken as the basis of an inference to the existence of the matter asserted, is testimony, whether made in court or not (*ante*, § 25). Thus, all the statements received under the exceptions to the hearsay rule are

genuinely testimony (*post*, § 1361). Assertions made on the witness-stand are merely the commonest class of testimonial evidence. It follows that the qualifications of a witness are equally essential in the use of extra-judicial assertions. In practice the Court does not always insist on proof of these qualifications beforehand; but many of the rules established for the hearsay exceptions (*post*, § 1424) are nothing more than applications of the rules of testimonial qualifications to extra-judicial assertions.

§ 480. **Order of Topics.** In accordance with the preceding analysis, the order of topics under the general title of Testimonial Evidence becomes:

Sub-title I: Qualifications of Witnesses.
  Topic I: Organic Capacity; including
    Sub-topic A: Mental Derangement (Insanity, Disease, Idiocy);
    Sub-topic B: Mental Immaturity (Infancy);
    Sub-topic C: Moral Depravity (Sex, Religion, Race, Infamy).
  Topic II: Experiential Capacity.
  Topic III: Emotional Capacity:
    Sub-topic A: Pecuniary Interest;
    Sub-topic B: Domestic Relationship.
  Topic IV: Observation, or Knowledge.
  Topic V: Recollection.
  Topic VI: Narration, or Communication.
Sub-title II: Impeachment of Witnesses; with further subdivisions (noted *post*, § 881).
Sub-title III: Rehabilitation of Witnesses; with further subdivisions (noted *post*, § 1101).

SUB-TITLE I: TESTIMONIAL QUALIFICATIONS.

INTRODUCTORY: GENERAL RULES AFFECTING TESTIMONIAL QUALIFICATIONS.

CHAPTER XVIII.

§ 483. **Time of Qualifications.** The time of utterance of the testimony is the time when the qualifications must exist, because it is at that time that they are needed. Certain consequences follow from this axiom:

(1) In the case of *insanity*, an insanity prior to the time of trial is immaterial, unless it affected the person's power of correct observation at the time of the fact testified to.[1] On the other hand, prior insanity may suffice as evidence of the continuing existence of it at the time of observation or of delivering testimony.

(2) In the case of *infamy*, the disqualifying conviction has of course occurred before the trial; but it is supposed to demonstrate a moral depravity continuing up to the trial. A pardon operates to remove the disqualification;[2] but this, though justifiable only on the ground that the depravity had ceased, is a conclusion that does violence to the general principle. In such an irrational doctrine, however, as that of disqualification by infamy (now almost obsolete) it is unnecessary to look for consistency.

(3) In the case of a *deposition*, the qualifications are required at the time of its taking; hence, the condition of the deponent at the time of its offering in court is immaterial; his intervening death or disqualification could not affect the trustworthiness of his statement when made. On this point, however, the judicial rulings sometimes have ignored sound principle.[3]

§ 484. **Burden of Proof of Qualifications.** The preëxistence, in the witness, of the requisite elements of capacity already enumerated (*ante*, § 478) is in theory required. In the practical enforcement of these requirements, however, it would be pedantic to require that their existence be expressly shown in every respect before the witness is permitted to testify. Experience has led to an arrangement by which the existence of the proper qualifications may in some classes of cases be assumed, until the opposing party proves or the witness betrays their absence; while in certain other classes of cases the qualifications are not assumed to exist, but must first be proved to exist by the party offering the witness. Under the former head fall, in

[1] *Post*, §§ 493, 497. [2] *Post*, § 523. [3] *Post*, §§ 1408, 1409.

general, the elements affecting Organic and Emotional Capacity; under the latter head, those affecting Experiential Capacity, as well as the qualification of Observation (or Knowledge); for the elements of Recollection and Narration, there is no uniform doctrine. The detailed rules carrying out this general principle can better be examined under the respective qualifications; it is enough to note here that the lack of capacity by insanity or idiocy must be shown as a disqualification by the opposing party;[1] that lack of capacity by infancy must in theory also be shown by him, though the witness' age and appearance usually serve to change the burden;[2] and that interest and relationship must be shown, as disqualifications, by the opposing party;[3] while the witness' experience[4] and observation (or knowledge)[5] must be shown, as qualifications, by the offering party.

§ 485. **Mode of Proof of Qualifications.** Four ways are distinguishable for ascertaining the qualifications or lack of qualifications of a witness.

(1) The *behavior* of a witness, in court during trial, or after being called to the stand but before being sworn or formally questioned, may reveal his incapacity. This, however, would in practice be an available source for the cases only of idiocy, insanity, intoxication, or extreme infaucy.[1]

(2) Before the witness is sworn as such, but after he is called and presented, a *preliminary questioning* of himself may be had, in order to ascertain by his own answers his condition as to qualifications. This questioning (known as *voir dire*, when applied to ascertain disqualification by interest) formed originally a distinct stage of the proceeding; and it was perhaps properly so, because the answers of a (supposedly) unqualified person could not form testimony, and because it is convenient to mark definitely the time when the stage of testimony proper begins. But in modern practice (especially under the custom of administering the oath beforehand to the witnesses in mass[2] the separation of the two stages is usually ignored. Moreover, in proving the qualifications of experience and knowledge, it was never practised.[3] The detailed rules in regard to the mode of conducting this provisional examination are noticed later under the respective heads.[4]

(3) Before the witness is sworn as such, but after he is called and presented, *other witnesses* may be used to evidence the facts of his incapacity. This, the commonest mode of proof, is ordinarily available as complementary to the foregoing two;[5] but, for incapacity by interest, it was allowed only on condition of not using the *voir dire*,[6] — the exception being due merely to the disfavor which the Courts finally came to show towards that ground of disqualification.

(4) After the witness has been sworn, the *progress of his direct examination* or *cross-examination* may disclose his incapacity, and then he may be

[1] *Post*, § 497.
[2] *Post*, § 508.
[3] *Post*, § 584.
[4] *Post*, § 572.
[5] *Post*, § 654.
[1] *Post*, §§ 497, 508.
[2] *Post*, § 1819.
[3] *Post*, §§ 560, 654.
[4] Insanity, § 497; infancy, § 508; infamy, § 523; interest, § 583.
[5] *Post*, §§ 497, 508, 562.
[6] *Post*, § 585.

stopped and his preceding testimony ordered expunged; or, if merely grounds of doubt are disclosed, a questioning on *voir dire*, or other persons' testimony, may be resorted to. But at this stage, after the oath's administration, his incapacity will not be examined into in case the opponent has by the delay lost the right to make objection;[7] and this loss of the right might occur at different times for different incapacities.[8]

§ 486. **Time of Objecting to Qualifications.** Wherever a plain separation is preserved between the preliminary examination or *voir dire* and the testimony proper, the rule can be strictly enforced that capacity is not to be questioned after the person is once *sworn* as a witness, except where the opposing party had *no prior notice* of the disqualifying fact, or where, having notice, he has made due objection but has been unable to prove the fact.[1] But in a court where the witnesses are customarily sworn as such before any opportunity for questioning is given, this rule cannot be applied. Yet its principle may be carried out by requiring the opponent to make objection and offer proof before the testimony of the witness is begun, — so far at least as the opponent then is aware of any specific ground of objection.[2]

When the testimony is offered in the form of a *deposition*, the same general principle is applied, *i. e.* the objection, if the facts were known, must have been made at the time of the taking of the deposition, if it could then have been of any avail. Nevertheless, since the officer taking it has no authority to exclude testimony, in some classes of evidence the objection would be at that time without practical consequences, and hence there is no harm in permitting certain questions to be raised at the trial for the first time, provided the party offering the deposition has not been put in an inconvenient position for lack of the prior objection. The specific rules on this point have already been considered (*ante*, § 18).

§ 487. **Judge, not Jury, to determine Qualifications.** The orthodox division of function between judge and jury allots, without question, to the judge the determination of all matters of fact on which the admissibility of evidence depends (*post*, § 2550), and therefore of the facts of a witness' capacity to testify. In this inquiry, on the one hand, the judge is not bound by the ordinary rules of evidence applicable to evidence offered to the jury;[1] and, in particular, he need not permit cross-examination of witnesses called to prove or disprove another's qualifications.[2] On the other hand, when the judge has once determined the admissibility of a witness, by applying the rules of law to the facts found by himself, the witness stands before the jury for them to judge of his credit as they see fit, untrammelled by the rules of law as to his qualifications;[3] it would follow that if they reject his testimony, it should be merely because, all things considered, they do not believe

[7] *Post*, §§ 486, 586.

[8] The rules about *capacity to take the oath* do not involve testimonial qualification as such, and are elsewhere examined (*post*, §§ 1816–1823).

[1] Interest, *post*, § 586. For the *general principle* as to the time of making objections to evidence, see *ante*, § 18.

[2] Interest, *post*, § 586; insanity, *post*, § 497.

[1] See instances cited *post*, § 2550; and under *Interest*, § 587.

[2] See the cases collected *post*, § 1385.

[3] See instances cited *post*, § 861, 1451, 2550.

him, and not because they find him lacking by force of some legal definition of competency;[4] with such definitions the jury have nothing to do.

§ 488. **Statutes affecting Qualifications.** The rules of the common law respecting the qualifications of witnesses were highly restrictive. In the progress of thought, these restrictions came in many instances to be recognized as illiberal and unnecessary; and legislation has in several important respects abolished them either wholly or in part. The statutes affecting these changes have often embodied in the same enactment the change of diverse rules. In order to have before us in practicable form all the statutory data affecting a given rule, it is necessary to set out in one place the series of enactments or statutory sections dealing with the general subject, and then from time to time in the course of discussion refer to this single collection of data. Accordingly, it is most convenient to set out here in mass, for subsequent reference in detail, the statutes affecting organic and emotional capacity, *i. e. insanity, infancy, infamy, interest*, and *marital relationship*, reserving for other places the statutes, easily separable, which affect other rules of testimonial evidence.[1]

[4] An application of this will be fonnd *post*, § 497.

[1] The editions of collected statutes here referred to will be found enumerated in the Preface:

I. ENGLAND: 1814, St. 54 Geo. III, c. 170 (rated inhabitants of parish, etc., to be competent in certain cases); 1833, St. 3 & 4 Wm. IV, c. 42 (removes "disqualification by reason of verdict being usable for or against the witness); 1840, St. 3 & 4 Vict. c. 26 (similar to St. 1814); 1843, St. 6 & 7 Vict. c. 85, Lord Denman's Act ("Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony, Now therefore be it enacted, That no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence," provided that this shall not render competent "any party to any suit," "or the husband or wife of such persons"); 1846, St. 9 & 10 Vict. c. 95 (in suits in the county courts, "the parties thereto, their wives and all other persons" may be examined); 1851, St. 14 & 15 Vict. c 99, § 1 (St 6 & 7 Vict. repealed as to the proviso about parties); § 2 (parties, and persons on whose behalf a suit is brought or defended, are to be competent and compellable); § 3 (person charged with offence indictable or punishable with summary conviction, not to be affected by statute; neither husband nor wife to be "competent or compellable to give evidence for or against" the other in criminal proceedings); § 4 (action for breach of promise of marriage or in consequence of adultery, not to be affected); 1853, St. 16 & 17 Vict. c. 83, § 1 ("husbands and wives of the parties" shall be competent and compellable to testify "on behalf of either or any of the parties"); § 2 (but nothing shall render husband or wife competent or compellable to testify for or against the other "in any criminal proceeding or in any proceeding instituted in consequence of adultery"); § 3 ("no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage"); 1859, St. 22 & 23 Vict. c. 61, § 6 (on wife's petition for divorce founded on adultery, coupled with cruelty or desertion, both husband and wife are competent and compellable as to the cruelty or desertion); 1869, St. 32 & 33 Vict. c. 68 ("Whereas the discovery of truth in courts of justice has been signally promoted by the removal of the restrictions on the admissibility of witnesses and it is expedient to amend the law of evidence with the object of still further promoting such discovery"); § 2 (parties to an action for breach of marriage promise, competent); § 3 (parties to any proceeding in consequence of adultery, and their husbands and wives, to be competent; but no answer as to a witness' own adultery to be compellable, unless the witness has already testified in disproof thereof); 1877, St. 40 & 41 Vict. c. 14 (on indictment or proceeding to try or enforce a civil right only, the defendant, and the defendant's wife or husband, to be competent and compellable); 1885, St. 48 & 49 Vict. c. 69, § 4 (in prosecutions for rape under age, where the girl in question "or any other child of tender years" does not in the Court's opinion understand the nature of an oath, the child's evidence may be given, without oath, if in the Court's opinion the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth"; with a proviso requiring corroboration, for which see *post*, § 2061); 1889, St. 52 & 53 Vict. c. 44, § 8 (similar), 1898, St. 61 & 62

Vict. c. 36, § 1 ("every person charged with an offence, and the wife or husband, as the case may be, of the person charged, shall be a competent witness for the defence at every stage of the proceedings"; the accused thus testifying, "shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted or been charged with any offence other than that wherewith he is then charged").

II. CANADA. DOMINION OF CANADA: Rev. St. 1886, c. 106, § 114 (in trials under the Temperance Act, the wife or husband of the accused is compellable and competent); Crim. Code 1892, § 685 (rape under age, and indecent assault; like Eng. St. 1885, c. 69, § 4); St. 1893, c. 31, § 3 ("A person shall not be incompetent to give evidence by reason of interest or crime"); § 4 ("Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage. 2. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury"); § 6 ("A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible"); § 25 ("in any legal proceeding" the rule of Eng. St. 1885, c. 69, § 4, is adopted).

BRITISH COLUMBIA: Rev. St. 1897, c. 71, §§ 4, 5 (like Can. St. 1893, c. 31, §§ 3, 4, omitting par. 2 of § 4 and the last clause of par. 1); § 7 (like ib. § 6); § 29 (testimony of certain natives not understanding an oath may be received); c. 62, § 27 (in divorce, the Court may order the examination or cross-examination of the petitioner, who shall however not be bound to answer any question tending to show him guilty of adultery); St. 1900, c. 9, § 3 (repeals R. S. 1897, c. 71, § 24, and substitutes: "[In civil proceedings, the parties] and their wives and husbands shall, except as hereinafter excepted, be competent as witnesses and compellable" as if not parties, etc.; provided that the plaintiff's testimony, in breach of promise of marriage, must be corroborated); § 4 (adds the following section, 50, to R. S. 1897, c. 71: "No husband shall be compellable to disclose any communication made to him by his wife during the marriage," and no wife similarly).

MANITOBA: Rev. St. 1902, c. 57, §§ 3, 4, 6 (like Can. St. 1893, c. 31, §§ 3, 4, 6); § 39 (like ib. § 25); c. 62, § 72 (in offences under the Factory Act, the accused shall be competent and compellable); c. 116, § 786 (in offences under the Municipal Act, the accused, and wife or husband, shall be competent and compellable).

NEWFOUNDLAND: Consol. St. 1892, c. 57, § 13 (no person "shall be excluded by reason of incapacity from crime from giving evidence"); § 1 (the parties and their beneficiaries, "and the husbands and wives of the parties" and of the beneficiaries, shall be "competent and compellable," except as otherwise declared; provided that "the party so called to testify may be cross-examined by the opposite party under the rules applicable to the cross-examination of witnesses"); § 2 (no person "charged with the commission of any indictable offence" shall be "competent and compellable to give evidence for or against himself or herself," nor shall any person be "compellable to answer any question tending to criminate himself or herself," nor shall any husband "in any such criminal proceeding" be "competent or compellable to give evidence for or against his wife," nor any wife similarly; but nothing here "shall preclude a defendant or the husband or wife of the defendant from becoming a witness, should he or she think fit, in any summary proceeding of a criminal or other nature"; and "no witness in any proceeding instituted in consequence of adultery, whether a party to the suit or not, or the husband or wife of such party, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery"); § 3 (marital communications; like Eng. St. 1853, c. 83, § 3); § 4 (breach of promise; like Ont. Rev. St. 1897, c. 73, § 6).

NEW BRUNSWICK: Consol. St. 1877, c. 46, § 2 (no person shall be excluded "by reason of incapacity from crime or interest"; the parties and beneficiaries "and the husbands and wives of the parties thereto" shall be "competent and compellable," except as hereafter stated); § 3 (a person charged with "any offence punishable on summary conviction" shall not be "competent or compellable to give evidence for or against himself," nor any person "compellable to answer any question intended to criminate himself"; nor "any husband competent or compellable to give evidence for or against his wife, nor any wife competent or compellable to give evidence for or against her husband, in any proceeding upon summary conviction, or in any civil proceeding instituted in consequence of adultery"); § 4 (marital communications; like Eng. St. 1853, c. 83, § 3); § 5 (the foregoing sections shall not apply to any proceeding in a court of common law or matrimonial Court "instituted in consequence of adultery"); St. 1878, c. 27, §§ 1, 2 (in prosecutions for "any fine, penalty, or imprisonment, it shall be competent for the person against whom the proceedings are taken to testify in his own defence"; but he shall not be compellable); § 3 (the foregoing shall "apply to the husband or wife" of the person); St. 1897, c. 29 ("the disability of any husband or wife to give evidence for or against each other in any civil proceeding instituted in consequence of adultery" is abolished; they shall be competent and compellable); St. 1898, c. 22, § 2 ("the person charged and the wife or husband as the case may be of such person" shall be competent, whether charged solely or jointly; but "no husband shall be competent to disclose any communication made to him by his wife during their marriage," and no wife similarly); St. 1902, c. 19,

§ 11 (In divorce, the judge may permit the plaintiff's examination or cross examination; see also § 2252, *post*).

Northwest Territories: St. 1901, c. 10, § 1 (rules of the Canada Evidence Act 1893, as now or hereafter amended, made applicable in this jurisdiction; compare *ante*, § 6).

Nova Scotia: Rev. St. 1900, c. 163, § 34 (no person shall be incompetent "by reason of incapacity from crime or from interest"); § 35 (the parties and beneficiaries and their husbands and wives shall be competent and compellable; provided that no "opposite or interested party" shall obtain a judgment, in any action against "the heirs, executors, administrators, or assigns of a deceased person," "on his own testimony, or that of his wife, or both of them, in respect to any dealing, transaction, or agreement with the deceased, or in respect to any act, statement, acknowledgment, or admission of the deceased, unless such testimony is corroborated by other material evidence", compare the statutes *post*, § 2065); § 36 (the preceding shall not apply to any proceeding "instituted by the husband or wife in consequence of adultery"); § 37 (nothing herein shall render any person compellable "to answer any question tending to subject him to criminal proceedings or to prosecution for any penalty"; nor render any person charged in any criminal proceeding with "any offence under the statutes of the province, or the wife or husband of the person so charged, compellable to give evidence against the person so charged"); § 38 (marital communications; like Eng. St. 1853, c. 83, § 3); c. 100, § 164 (in offences concerning the sale of intoxicating liquors, "the person charged or the husband of such person shall be competent and compellable," saving the privilege against self-crimination); St. 1866, c. 13, § 11, in Rev. St 1900, vol. II, p. 864 (in proceedings for divorce by the wife for adultery coupled with cruelty, husband and wife are "competent and compellable to give evidence of or relating to such cruelty").

Ontario: Rev. St. 1897, c. 73, §§ 2, 3 (neither interest nor conviction of crime is to disqualify, and every person shall be admitted notwithstanding interest or conviction); § 4 (parties and beneficiaries shall be competent and compellable, and also their husbands and wives, except as otherwise declared); § 6 (parties to an action for breach of promise of marriage; like Eng. St. 1869, c. 68, § 2); § 7 (proceedings in consequence of adultery; parties and their husbands and wives shall be competent; "provided that in such case the husband or wife, if competent only under and by virtue of this Act, shall not be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same proceeding in disproof of his or her alleged adultery"); § 8 (marital communications; like Eng. St 1853, c. 83, § 3, omitting "to him" in the first clause); § 9 (in trials under any Ontario statute or on the trial of "any such proceeding" before any justice of the peace, mayor, or police magistrate, "the party opposing or defending, or the wife or husband of the person opposing or defending, shall be competent and compellable to give evidence therein"); St. 1903, c. 19, § 711 (in prosecution under the Municipal Act or by-laws of a council or board of police, "the defendant and the wife or husband of such persons opposing or defending shall also be competent witnesses; and all the said persons shall be compellable to give evidence."

Prince Edward Island: St. 1889, c. 9, §§ 3, 4 (incapacity by crime or interest; like Eng. St. 1843, c. 85, without the provisos); § 5 (parties and beneficiaries, and their husbands and wives, are "competent and compellable," except as otherwise declared); § 6 (privilege against self-crimination reserved for all persons); § 7 (breach of promise; like Eng. St. 1869, c. 68, § 2); § 8 (adultery; like ib. § 3, except that the proviso is made applicable only to "the husband or wife if competent only under and by virtue of this Act"); § 9 (marital communications; like Eng. St. 1853, c. 83, § 3); § 10 (the "party opposing or defending, or the wife or husband of such party, shall be competent and compellable" in any proceeding under an act of this Legislature or before a justice of the peace or stipendiary magistrate when the matter is not a crime).

III. United States. Alabama: *Code* 1897, § 1794 ("In civil suits and proceedings, there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that no person having a pecuniary interest in the result of the suit or the proceeding shall be allowed to testify against the party to whom his interest is opposed, as to any transaction with or statement by the deceased person whose estate is interested in the result of the suit or proceeding, or when such deceased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the party to whom such interest is opposed, or unless the testimony of such deceased person in relation to such transaction or statement is introduced in evidence by the party whose interest is opposed to that of the witness, or has been taken and is on file in the cause. No person who is an incompetent witness under this section shall make himself competent by transferring his interest to another"); § 1795 ("No objection must be allowed to the competency of a witness because of his conviction for any crime, except perjury or subornation of perjury; but if he has been convicted of other infamous crime, the objection goes to his credibility"); § 5297 ("On the trial of all indictments, complaints, or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him, nor be the subject of comment by counsel"); § 5298 ("There shall be no exclusion of a witness in a criminal case, because, on conviction of the defendant, he may be entitled to a reward, or to a restoration of property, or to the whole or any part of the fine or penalty inflicted; such objection is addressed to the credibility, not to the competency, of the witness"); § 5301 ("When

two or more defendants are jointly indicted, the Court may, at any time before the evidence for the defence has commenced, order any defendant to be discharged from the indictment, in order that he may be a witness for the prosecution; and such order operates as an acquittal of such defendant, provided he does testify"); § 5302 ("When two or more defendants are jointly indicted, the Court may direct a verdict of acquittal to be entered in favor of any one of them, against whom there is not, in the opinion of the Court, evidence sufficient to put him on his defence; and being acquitted, he may be a witness").

ALASKA: *C. Cr. P.* 1900, §§ 145, 146 (like Or. Annot. C. 1892, §§ 1361, 1362); § 149 (like ib. § 1365, omitting the last words, following "a right to cross-examination"); § 150 (like ib. § 1366); *C. C. P.* 1900, § 1033 (like Or. Annot. C. 1892, § 710, omitting the first sentence); § 1034 (like ib. § 711, inserting in the first clause, "the transaction and of"); 1900, § 1035 (like ib. § 712, par. 1).

ARIZONA: *Revised Statutes*, 1887, § 1863 ("No person shall be incompetent to testify on account of color, nor because he is a party to a suit or proceeding or interested in the issue tried, nor because he has been indicted, accused, or convicted of a crime"); § 1864 ("The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications between such husband and wife, but neither can be examined for or against the other without the consent of the other, but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); § 1865 ("In actions by or against executors, administrators, or guardians, in which judgment may be rendered, for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the Court; and the provisions of this section shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent"); § 2037 ("All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding, are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief: although in every case the credibility of the witness may be drawn in question"); § 2038 ("The following persons cannot be witnesses in a criminal action: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"); § 2039 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a criminal action or proceeding, for a crime committed by one against the other"); § 2040 ("A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the Territory as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding"); § 2113 ("either party may be a witness" in divorce proceedings); §§ 1648, 1649 (on joint indictment, the Court may, on prosecuting attorney's application, at any time before defendant has gone into his defence, discharge defendant to testify for prosecution; and when the Court believes that there is not sufficient evidence as to one to put him on his defence, it shall order his discharge, before evidence closed, to be witness for co-defendant).

ARKANSAS: *Statutes*, 1894, § 2908 ("No person shall be rendered incompetent to testify in criminal cases by reason of being the person injured or defrauded, or intended to be injured or defrauded, or because he would be entitled to satisfaction for the injury, or may be liable to pay the costs of prosecution"); § 2909 ("In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offence"); § 2910 ("On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him"); § 2911 ("When two or more persons are indicted in the same indictment, either may testify in behalf of or against the other defendant or defendants"); § 2912 ("All persons now convicted and sentenced, or who may hereafter be convicted and sentenced to the penitentiary of the State of Arkansas, shall be competent witnesses during and after their term of imprisonment, to testify in all prosecutions, suits, or investigations touching the ill treatment of persons convicted of felony and the unsanitary condition of the penitentiary and camps in which said convicts have been or may hereafter be confined, and of the kind and quality of food furnished such convicts"); § 2913 ("The competency of such convicts to testify shall be limited to the matters set out in the preceding

section, unless such convicts are pardoned by the governor of the State"); § 2914 ("In civil actions, no witness shall be excluded because he is a party to a suit or interested in the issue to be tried; Provided, in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statements of the testator, intestate, or ward, unless called to testify thereto by the opposite party; Provided further, this section may be amended or repealed by the General Assembly"); § 2915 ("All persons except those enumerated in the next section shall be competent to testify in a civil action"); § 2916 ("The following persons shall be incompetent to testify: First: Persons convicted of a capital offence, or of perjury, subornation of perjury, burglary, robbery, larceny, receiving stolen goods, forgery, or counterfeiting, except by consent of the parties; Second: Infants under the age of ten years, and over that age if incapable of understanding the obligation of an oath; Third: Persons who are of unsound mind at the time of being produced as witnesses; Fourth: Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent"); § 2917 ("All other objections to witnesses shall go to their credit alone, and be weighed by the jury or tribunal to which their evidence is offered").

CALIFORNIA: *Codes* 1872, as amended to 1901 inclusive:[1] *Code of Civil Procedure*, § 1879: "All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as provided in section 1847"); § 1880 ("The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. 3. Parties or assignors of parties to an action or proceeding, or persons on behalf of whom an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person"; the foregoing sub-sect. 3 was replaced in 1901 by the following Commissioners' amendment: "Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such party or interested person derives his interest or title, by assignment or otherwise, or the husband or wife of any such party or person, must not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, or in behalf of his or her husband or wife, against the executor, administrator, or survivor of a deceased person, or the guardian of an incompetent person, or a person deriving his title or interest from, through, or under a deceased or incompetent person by assignment or otherwise, as to any matter of fact occurring during the lifetime of such deceased person, or occurring while such incompetent person was competent"); § 1881 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"; for amendments to § 1881, added by the Commissioners in 1901, see *post*, under the respective privileges involved, as follows: par. 2, attorney and client, *post*, § 2292; par. 3, priest and penitent, *post*, § 2394; par. 4, physician and patient, *post*, § 2380); § 1882 (added by amendment in 1901, deals with implied waiver of privilege; see quotation *post*, § 2292); *Penal Code*, § 675 (imprisonment affecting civil rights does not create incompetency as witness in a criminal case); § 1099 ("When two or more persons are included in the same charge, the Court may, at any time before the defendants have gone into their defence, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the People"); § 1100 ("When two or more persons are included in the same indictment or information, and the Court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant"); § 1102 ("The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code"); § 1322 ("Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties"); § 1323 (if the accused "offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters

[1] All the Code Commissioners' amendments of 1901 were held *unconstitutional and void* (on formal grounds affecting the mode of enactment), in Lewis *v.* Dunne, 134 Cal. 291, 66 Pac. 478; but they have been left here, because they may later be validly enacted.

about which he was examined in chief"; "his neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding").

COLORADO: *Annotated Statutes*, 1891, § 185 (insolvent assignments; debtor's wife may be compelled to testify); § 1168 ("an accessory during the fact shall be a competent witness," unless otherwise disqualified); § 1170 ("The party or parties injured shall in all cases be competent witnesses, unless he, she, or they shall be rendered incompetent by reason of his, her, or their infamy or other legal incompetency other than that of interest. The credibility of all such witnesses shall be left to the jury as in other cases"); § 1171 ("Hereafter in all criminal cases tried in any court of this State, the accused, if he so desire, shall be sworn as a witness in the case, and the jury shall give his testimony such weight as they think it deserves; but in no case shall a neglect or refusal of the accused to testify be taken or considered any evidence of his guilt or innocence"); § 1172 ("Approvers shall not be allowed to give testimony"); § 1173 ("The solemn affirmation of witnesses shall be deemed sufficient"); § 2780 (on preliminary examination, the accused may make statement, under oath or otherwise, "after all witnesses have been heard"); § 3382 (married woman becoming special partner in limited firm "shall be a competent witness for or against her husband, the same as though a *femme sole*" in all proceedings arising out of partnership); § 4785 ("no person making a claim against the estate of any testator or intestate shall be permitted to prove the same by his or her own oath," except as in § 4782, for uncontested claims); § 4816 ("That no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section [now § 4822] when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic, or distracted person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending; and also, except in the following cases, namely: First: In any such action, suit, or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person; Second: When in such action, suit, or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between the agent and the opposite party or parties in interest, such party or parties in interest may testify concerning the same conversation or transaction; Third: When in any such action, suit, or proceeding, any such party suing or defending as aforesaid, or any person having a direct interest in the event of such action, suit, or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or parties in interest, then such opposite party in interest shall also be permitted to testify as to the same conversation or transaction; Fourth: When in any such action, suit, or proceeding, any witness not a party to the record, or not a party in interest, or not an agent of such deceased person, shall in behalf of any party to such action, suit, or proceeding, testify to any conversation or admission by any adverse party or parties in interest, occurring before the death and in the absence of such deceased person, such adverse party or parties in interest may also testify to the same admission or conversation; Fifth: When in any such action, suit, or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or parties in interest may testify as to all matters and things testified to in such deposition by such deceased person and not excluded for irrelevancy or incompetency"); § 4818 ("That in any action, suit, or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party or person adversely interested in the event thereof, shall, by virtue of section one of this act, be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation"); § 4819 (an assignment or release "made for the purpose of allowing such person to testify" does not make him competent under §§ 4816, 4818); § 4820 (statute is not to affect the law in regard to the settlement of estates of deceased persons, etc., or to the acknowledgment or proof of deeds, or to the attestation of instruments required to be attested); § 4822 ("All persons, without exception, other than those specified in the next three sections, and in the second, third, fourth, seventh, and eighth sections of chapter one hundred and four of the general laws [*supra*], may be witnesses. Neither parties nor other persons who have an interest in the event or proceeding shall be excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as now provided by law; but the conviction of any person for any crime may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proved like any other fact not of record, either by the witness himself (who shall be compelled to testify thereto), or by any other person cognizant of such conviction, as impeaching testimony or by any other competent testimony"); § 4823 ("The following persons shall not be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly"); § 4824 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person shall not be examined as a witness in the following cases: 1. A husband

shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor shall either during the marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other during marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); § 4825 ("If a person offer himself as a witness, that is to be deemed a consent to the examination; also the offer of a wife, husband, attorney, clergyman, physician, or surgeon, as a witness, shall be deemed a consent to the examination within the meaning of the first four subdivisions of the last section"); St. 1893, p. 127, § 3 (in prosecution for failure to support, the wife is competent against the husband without his consent).

COLUMBIA (DISTRICT): *Compiled Statutes*, 1894, c. 16, § 38 (no person convicted of perjury or subornation of perjury, to be received as witness, unless judgment be reversed); c. 71, § 1 ("The parties thereto, and the persons in whose behalf any such action or proceeding may be brought or defended, and all persons interested in the same, shall, except as provided in the following section, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of any of the parties to the action or other proceedings"); § 2 ("Nothing in the preceding section shall render any person who is charged with an offence in any criminal proceeding competent or compellable to give evidence for or against himself; or render any person compellable to answer any question tending to criminate himself; or render a husband competent or compellable to give evidence for or against his wife, or a wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery; nor shall a husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage"); § 5 ("In the Courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: Provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by opposite party, or required to testify thereto by the Court"); § 7 ("In all judicial proceedings in the District there shall be no exclusion of any witness on account of color"); § 8 ("In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him"). The ensuing Code of the District repeals so much of prior statutes as may be inconsistent with it: *Code* 1901, § 1063 ("Except as herein elsewhere provided, no person shall be incompetent to testify in any civil action or proceeding by reason of his being a party thereto or interested in the result thereof; but if otherwise competent to testify, he shall be competent to give evidence in his own behalf and competent and compellable to give evidence on behalf of any other party to such action or proceeding"); § 1064 ("If one of the original parties to a transaction or contract has since the date thereof died or become insane or otherwise incapable of testifying in relation thereto, the other party thereto shall not be allowed to testify as to any transaction or declaration or admission of the said deceased or otherwise incapable party in any action between said other party, or any person claiming under him, and the executors, administrators, trustees, heirs, devisees, assignees, committee, or other person legally representing the deceased or otherwise incapable party, unless he be first called upon to testify in relation to said transaction or declaration or admission by the other party, or the opposite party first testify in relation to the same, or unless the transaction or contract was made or had with an agent of the said deceased or otherwise incapable party, and the said agent testifies in relation thereto, or unless called to testify thereto by the Court"); § 1066 ("Where any of the original parties to a transaction or contract which is the subject of investigation are partners or other joint contractors, or jointly entitled or liable, and some of them have died, or otherwise become incapable of testifying, any others with whom the contract or transaction was personally made or had, or in whose presence or with whose privity it was made or had, or admissions in relation to the same were made, shall not, nor shall the adverse party, be incompetent to testify because some of the parties or joint contractors, or those jointly entitled or liable, have died or otherwise become incapable of testifying"); § 1067 ("No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime other than perjury, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence *aliunde*; and the party cross examining him shall not be concluded by his answers as to such matters. In order to prove such conviction of crime 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"); § 1068 ("In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other"); § 1069 ("In neither civil nor criminal proceedings shall a husband or wife be competent to testify as to any confidential communications made by one to the other during the marriage").

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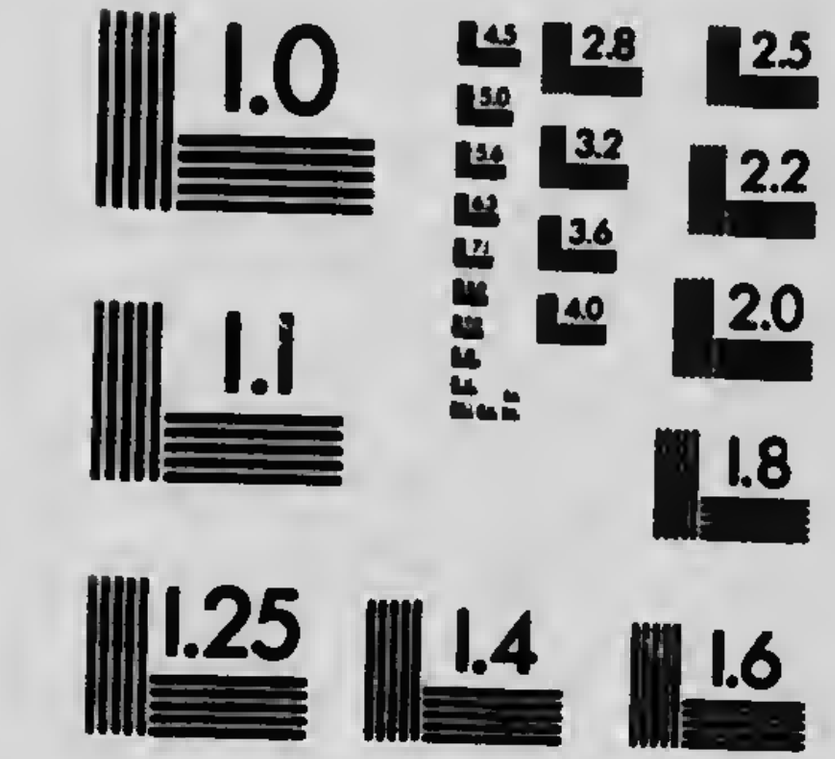

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CONNECTICUT: *General Statutes*, 1887, § 1094 ("In actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased, relevant to the matter in issue, may be received as evidence; and in actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of said trustee or receiver, shall be received in evidence"); § 1097 ("A wife shall be a competent witness against her husband in any action brought against him for necessaries furnished her while living apart from him"); § 1098 ("No person shall be disqualified as a witness in any action by reason of his interest in the event of the same as a party or otherwise, or of his disbelief in the existence of a Supreme Being, or of his conviction of crime; but such interest or conviction may be shown for the purpose of affecting his credit"); § 1099 (Any party to a civil action may compel any adverse party or "any person for whose immediate and adverse benefit" the action was begun, etc., to testify; but not compel both discovery and testimony from the same party); § 1623 ("Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify, upon such trial, and if such person has a husband or wife, he or she shall be a competent witness, but may elect or refuse to testify for or against the accused, except that a wife when she has received personal violence from her husband, may, upon his trial therefor, be compelled to testify in the same manner as any other witness. The neglect, or refusal, of an accused party to testify shall not be commented upon to the Court or jury").

DELAWARE: *Revised Statutes*, 1893, c. 107, § 4 ("In criminal prosecutions, a free negro or free mulatto, if otherwise competent, may testify, if it shall appear to the Court that no competent white witness was present at the time the fact charged is alleged to have been committed; or that a white witness, being so present, has since died or is absent from the State and cannot be produced; provided that no free negro or free mulatto shall be admitted as witness to charge a white man with being the father of a bastard child"); Laws (vol. 11), 1859, c. 598, § 1 ("A party to the record in any action or judicial proceeding, or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross examination, at the instance of the adverse party, or any of them, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness to testify; but the party calling for such examination shall not be excluded [concluded?] thereby, but may rebut his testimony by other evidence"); § 2 ("A party proposing to examine a party adverse in interest may have the same process and means of compelling attendance and response as the law provides in the case of ordinary witnesses"); § 3 ("No person shall be excluded from testifying as a witness by reason of his having been convicted of a felony, but evidence of the fact may be given to affect his credibility"); Laws 1873, c. 550, § 10 ("It shall and may be lawful for husband and wife to testify in all civil actions in which either or both are or may be parties to the suit"); Laws (vol. 16), 1881, c. 537, § 1 ("No person shall be incompetent to testify in any civil action or proceeding whether at law or in equity, because he is a party to the record or interested in the event of the suit or matter to be determined; provided that in actions or proceedings by or against executors, administrators, or guardians, in which judgment or decree may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party"); Laws (vol. 19), 1893, c. 777, § 1 ("Each and every person accused, or who shall be accused, of any felony, misdemeanor, or offence whatsoever, punishable by the laws of this State, now or hereafter in force, shall, upon his or her trial before any tribunal established by the Constitution or laws of this State, have the right to testify in his or her own behalf, and shall also have the right to testify for or against any other person or persons jointly tried with him or her; provided, however, that a refusal to testify shall not be construed or commented upon as an indication of guilt").

FLORIDA: *Revised Statutes*, 1892, § 1095 ("No person, in any Court or before any officer acting judicially, shall be excluded from testifying as a witness, by reason of his interest in the event of the action or proceeding, or because he is a party thereto; provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom, any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence"); § 1096 ("Persons who have been convicted in any Court in this State of murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy, or buggery, shall not be competent witnesses. Even a pardon of a person convicted of perjury shall not render him competent. Such conviction may be proved by questioning the proposed witness, or if he deny it, by producing a record of his conviction"; see St. 1901, *infra*); § 1097 ("Testimony as to the general character, and an admission of proof, as provided in § 1096, of the conviction of any witness who shall have been convicted in this State of any crime other than those mentioned in said section, or who shall have been convicted of any crime in any other State, may be given in evidence to affect

his credibility"); § 1808 (executor's oath not admitted to prove will, if he is "interested in the estate therein bequeathed, or any part thereof"); §§ 2321, 2322 (disputed ownership of live stock in certain cases, must be proved "by disinterested testimony"); § 2863 ("The provisions of law relative to the competency of witnesses in civil cases shall obtain also in criminal cases"); § 2905 ("Approvers shall not be admitted in any case whatever"); § 2908 ("In all criminal prosecutions the accused shall have the right of making a statement to the jury, under oath, of the matter of his defence or her defence"; see St. 1895, *infra*); St. 1891, c. 4029 ("In the trial of civil actions in this State, neither the husband nor the wife shall be excluded as witnesses, where either the said husband or wife is an interested party to the suit pending"); St. 1895, c. 4400 ("In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses"); St. 1901, c. 4966 ("No person shall be disqualified to testify . . . by reason of conviction of any crime except perjury").

GEORGIA: *Code*, 1895, § 5198 (1) ("Communications between husband and wife," excluded); § 5268 ("Religious belief goes only to the credit"); § 5269 ("No person offered as a witness shall be excluded, by reason of incapacity for crime or interest, or from being a party, from giving evidence, either in person or by deposition [in any court or proceeding] . . .; but every person so offered shall be competent and compellable to give evidence on behalf of either or any of the parties to the said suit, action, or other proceeding, except as follows: 1. Where any suit is instituted or defended by a person insane at the time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person 2. Where any suit is instituted or defended by partners, persons jointly liable, or interested, the opposite party shall not be admitted to testify in his own favor as to transactions or communications solely with an insane or deceased partner, or person jointly liable or interested. 3. Where any suit is instituted or defended by a corporation, the opposite party shall not be admitted to testify in his own behalf to transactions or communications solely with a deceased or insane officer or agent of the corporation. 4. Where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if, as a party to the cause, he would for any cause be incompetent. 5. No agent or attorney-at-law of the surviving or sane party, at the time of the transaction testified about, shall be allowed to testify in favor of a surviving or sane party, under circumstances where the principal, a party to the cause, could not testify; nor can a surviving party or agent testify in his own favor, or in favor of a surviving or sane party, as to transactions or communications with a deceased or insane agent, under circumstances where such witness would be incompetent if deceased agent had been principal. 6. In all cases where the personal representative of the deceased or insane party has introduced a witness interested in the event of a suit, who has testified as to transactions or communications on the part of the surviving agent or party with a deceased or insane party or agent, the surviving party or his agent may be examined in reference to such facts testified to by said witness"; amended by Acts 1900, p. 57, Van Epps' Suppl. § 6200, by adding: "whether such transactions or communications were had by such insane or deceased person with the party testifying or with any other person"); Acts 1897, p. 53, Van Epps' Suppl. § 6222: ("When suit is instituted against joint defendants, one of whom is the representative of an insane or deceased person, the sane or living party defendant shall not be admitted to testify as to any transaction or communication with the insane or deceased party, when his evidence would tend to relieve or modify the liability of the party offered as a witness and tend to make the estate of said insane or deceased party primarily liable for the debt or default"); Code 1895, § 5270 ("There shall be no other exceptions allowed under the foregoing paragraphs"); § 5272 ("Nothing contained in section 5269 shall apply to any action, suit, or proceeding in any Court, instituted in consequence of adultery, or to any action for breach of promise of marriage"); § 5273 ("Persons who have not the use of reason, as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses"); § 5274 ("Drunkenness, which dethrones reason and memory, incapacitates during its continuance"); § 5275 ("No physical defects in any of the senses incapacitates a witness. An interpreter may explain his evidence"); § 5276 ("The Court must, by examination, decide upon the capacity of one alleged to be incompetent from idiocy, lunacy, or insanity, or drunkenness, or childhood"); *Criminal Code*, 1895, §§ 1010, 1011 ("In all criminal trials the prisoner shall have the right to make to the Court and jury such statement in the case as he may deem proper in his defence. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the cause"; but in so making a statement, he is not compellable "to answer any questions on cross-examination, should he think proper to decline to answer"; "no person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, is competent or compellable to give evidence for or against himself"); § 1011 (4) ("Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that the wife shall be competent, but not compellable, to testify against her husband, upon his trial for any criminal offence committed, or attempted to have been committed, upon her person. She is also a competent witness to testify for or against her husband, in cases of abandonment of his child, as provided for in § 114 of this Code");

§ 114 (as above); § 104 (wife to be a "competent witness," when husband is tried for maltreatment of wife); § 910 (accused's statement before a magistrate, regulated).

Hawaii: *Civil Laws*, 1897, § 1412 ("No person offered as a witness shall hereafter be excluded by reason of incapacity from crime (perjury or subornation of perjury only excepted) or interest, from giving evidence. . . . But every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence except as aforesaid"); § 1413 (". . . It shall be lawful for such Court or person to receive the evidence of any minor, notwithstanding he may be destitute of the knowledge of God and of any belief in religion or in a future state of rewards and punishments. Provided always, that the evidence of such minor shall be given upon his affirmation or declaration to tell the truth, the whole truth, and nothing but the truth, or in such other form as may be approved of and allowed by such Court or person as first aforesaid, and after he shall have been cautioned by such Court or person that he will incur and be liable to punishment if he do not tell the truth. Provided also, that no such evidence shall in any case be received unless it shall be proved to the satisfaction of such Court or such person, that such minor perfectly understands the nature and object of such declaration or affirmation as aforesaid, and the purpose for which his testimony is required"); § 1414 (". . . Parties thereto, and the party on whose behalf any such action, suit, or proceeding may be brought or defended, and the husbands and wives of such parties and persons respectively shall (except as hereinafter excepted) be competent and compellable to give evidence, either in person or by deposition, according to the practice of the Court, on behalf of either or any of the [parties to the (?)] said suit, action or proceeding"); § 1415 ("The defendant in any criminal proceeding may give evidence on his own behalf, and thereupon be subject to cross-examination in like manner as any other witness, but in case any such person shall neglect or decline to offer himself as a witness, no inference shall be drawn prejudicial to such accused by reason of such neglect or refusal, nor shall any argument be permitted tending to injure the defence of such accused person on account of such failure to offer himself as witness"); § 1416 ("Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, compellable to give evidence for or against himself; or (except as hereinafter mentioned) shall render any person compellable to answer any question tending to criminate himself, or shall in any criminal proceeding render any husband competent or compellable to give evidence against his wife, or any wife competent or compellable to give evidence against her husband, except in such cases where such evidence may now be given; provided also that in all criminal proceedings the husband or wife of the party accused shall be a competent witness for the defence"); § 1417 ("No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage"); § 1955 (in divorce, the Court may in discretion "examine either or both of the parties upon oath, in order to prevent collusion").

Idaho: *Revised Statutes*, 1887, § 5956 ("All persons without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility"); § 5957 ("The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person"); § 5958 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other"); §§ 7861, 7862 (like Cal. P. C. §§ 1099, 1100); § 8141 ("The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code"); § 8142 ("Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other in a criminal action or proceeding to which one or both are parties"); § 8143 ("A defendant in a criminal

action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding").

ILLINOIS: *Revised Statutes*, 1874, c. 17, § 6, as amended (in bastardy trials, "the mother and defendant" are competent); c. 38, § 35 (when a witness is released by Court order from liability to prosecution, and compelled to testify, "the defendant shall also at his own request be deemed a competent witness"; but no inference shall be drawn, as in ib. § 426); c. 38, § 426 ("No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the Court permit any reference or comment to be made to or upon such neglect"); c. 38, § 491, St. 1893, June 17 (the wife to be competent in any case against the husband under the statute punishing abandonment of family, "as to any and all matters relevant thereto, including the fact of such marriage and the parentage of such children"); St. 1901, May 11, § 3 (in prosecutions for abandonment of wife or child, "such husband or wife shall be a competent witness to testify in any case brought against the one or the other under this act, and to any and all matters relevant thereto, including the facts of such marriage and the parentage of such child or children"); Rev. St. c. 51, § 1 ("No person shall be disqualified as a witness in any civil action, suit, or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence"); § 2 ("No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely: — First. In any such action, suit, or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the wards, heir, legatee, or devisee shall have attained his or her majority. Second. When, in such action, suit, or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction. Third. Where, in any such action, suit, or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action suit, or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction. Fourth. Where, in any such action, suit, or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit, or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation. Fifth. Where, in any such action, suit, or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency"); § 4 ("In any action, suit, or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party, or party adversely interested in the event thereof, shall, by virtue of section 1 of this Act, be rendered a competent witness, to testify to any admission or conversation, by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action, suit, or proceeding, a party to the same, who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness, as to any conversation or transaction between himself and such agent, except where the conditions are such, that under the provisions of sections 2 and 3 of this Act, he would have been permitted to testify, if the deceased person had been a principal and not an agent"; amended by St. 1899, April 24, by inserting after "such agent," the words, "unless such admission or conversation with the said deceased agent was had or made in the presence of a surviving agent or agents of such adverse party, and then only"); § 5 ("No husband or wife shall, by virtue of section 1 of this Act, be rendered competent to testify for or against each other as to any transaction or conversation, occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where

the cause of action grows out of a personal wrong or injury done by one to the other or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act. Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife"); § 6 ("Any party to any civil action, suit, or proceeding, may compel any adverse party or person for whose benefit such action, suit, or proceeding is brought, instituted, prosecuted, or defended, to testify as a witness at the trial, or by deposition, taken as other depositions are by law required, in the same manner, and subject to the same rules, as other witnesses"); § 7 ("In any civil action, suit, or proceeding, no person who would, if a party thereto, be incompetent to testify therein, under the provisions of sections 2 or 3, shall become competent by reason of any assignment or release of his claim, made for the purpose of allowing such person to testify"); § 8 (nothing in this act is to affect the law as to the settlement of the estates of deceased persons, incapables, etc., or the proof of conveyances for record, or the attestation of instruments required to be attested).

INDIANA: *Revised Statutes*, 1897, § 507 (6) ("Husband and wife, as to communications made to each other," shall not be competent); § 509 ("All persons, whether parties to or interested in the suit, shall be competent witnesses in a civil action or proceeding, except as herein otherwise provided"); § 510 ("The following persons shall not be competent witnesses: First: Persons insane at the time they are offered as witnesses, whether they have been so adjudged or not; Second: Children under ten years of age, unless it appears that they understand the nature and obligation of an oath); § 511 ("In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate: Provided, however, that in cases where a deposition of such decedent has been taken, or he has previously testified as to the matter, and his testimony or deposition can be used as evidence for such executor or administrator, such adverse party shall be a competent witness for himself, but only as to any matters embraced in such deposition or testimony"); § 512 ("In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or obtain possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor"); § 513 ("When in any case an agent of a decedent shall testify on behalf of an executor, administrator, or heirs, concerning any transaction, as having been had by him, as such agent, with a party to the suit, his assignor or grantor, and in the absence of the decedent; or if any witness shall, on behalf of the executor, administrator, or heirs, testify to any conversation or admission of a party to the suit, his assignor or grantor, as having been had or made in the absence of the deceased; then the party against whom such evidence is adduced, his assignor or grantor, shall be competent to testify concerning the same matter. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit upon or involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives or heirs of the decedent, unless he shall be called by such heirs or legal representatives. And in such case he shall be a competent witness only as to matters concerning which he is interrogated by such heirs or representatives. When, in any case, a person shall be charged with unlawfully taking or detaining personal property, or having done damage thereto, and such person by his pleading shall defend on the ground that he is executor, administrator, guardian, or heir, and as such has taken or detains the property, or has done the acts charged, then no person shall be competent to testify who would not be competent if the person so defending were the complainant; but when the person complaining cannot testify, then the party so defending shall also be excluded"); § 514 ("When the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded; except that the husband shall be a competent witness in a suit for the seduction of his wife, but she shall not be competent"); § 515 ("In all cases in which executors, administrators, heirs, or devisees are parties, and one of the parties to the suit shall be incompetent, as hereinbefore provided, to testify against them, then the assignor or grantor of a party making such assignment or grant voluntarily shall be deemed a party adverse to the executor or administrator, heir, or devisee, as the case may be; Provided, however, that in all cases referred to in sections 276, 277, 278, and 279 of said act — said sections being numbered in the Revised Statutes of 1881, 498, 499, 500, and 501 — any party to such suit shall have the right to call and examine any party adverse to him as a witness, or the Court may, in its discretion, require any party to a

sult, or nther person, tn testify, and any abuse of sueh discretion shall be renewnble (reviewable!) on appeal"); § 516 ("In all actions by an executor or administrator on contracts assigned to the decedent, when the assignor is alive and a competent witness in the cnuse, the executor or administrator and the defendant or defendnnts shall be compe'ent witnesses as to all matters which occurred between the assignor and the defendant or defendnnts, prior to notice of such assignment. In all questions nffecting the credibility of a witness, his general moral character may be given in evidence"); [Criminal cases:] § 1889 ("The following persons nre competent witnesses: First. All persons who are competent to testify in civil actions. Second. The party injured by the offence committed. Third. Accomplices, when they consent to testify. Fourth. The defendant, to testify in his own behalf. But if the defendant do not testify, his failnre to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the dnty of the Court, in snch case, in its charge, to instruct the jury as to their duty under the provisions of this section"); § 1895 ("When two or more persons are inclnded in one prosecntion, the Court may, at any time before the defendnnt has gone into his defence, direct any defendant to be discharged, that he may be a witness for the State. A defendant may also, when there is not sufficient evidence to put him on his defence, at any time before the evidence is closed, be discharged by the Court fnr the purpose of giving testimony for n co defendnnt"); St. 1903, c. 39 ("in nl. suits by or against any person adjudged to be a person of unsonnd mind and under guardianship, or against his guardian, founded upon any contract with or demand against said ward, or in any suit to obtain possession of the real or personal property of said ward, or to affect the same in any manner, neither party to said transaction shall be a competent witness to any matter which occnrred prior to the appointment of said guardian; provided however that if the party to said transaction nnder guardianship should be adjudged by the Court competent to testify, then the other party to said suit shall not be excluded; provided further that the provisions of this act shall not apply to any ense where a person has been adjudged to be of unsonnd mind before the taking effect of this act, nor to any contract made or transaction had before the taking effect of this act; also provided that in all cases contemplated by this act either party to such suit shall have the right to call and examine any party adverse to him as a witness, or the Court may in its discretion require any party to sueh suit or other person to testify, and any abuse of sneh discretion shall be reviewable on appeal").

Indian Territory: the statutes of Arkansas, as specified, are declnred to be here in force, by U. S. St. 1890, May 2, 26 Stat. L. 94, § 31.

Iowa: *Constitution*, 1857, Art. I, § 4 ("Any party to any judicial proceeding shall have the right to nse as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact mnterinl to the case; and parties to suits may be witnesses, as provided by law"); *Annotated Code*, 1897, § 4601 ("Every human being of sufficient capncity to nnderstand the obligation of an oath is a competent witness in nll cases, both civil nnd criminal, except as herein otherwise declared"); § 4602 ("Facts which have heretofnre caused the exclnsion of testimony may still be shown for the pnrpose of lessening its credibility"); § 4603 ("No person offered as n witness in any netion or proceeding in any Court, or before any officer acting judicinlly, shall be excluded by reason of his interest in the event nf the action or proceeding, or becnuse he is a party thereto, except as provided in this chapter"); § 4604 ("No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or nnder whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such exnmination, deceased, insane, or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of sneh deceased person, or the nssignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or guardinn shall be examined in his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence"); § 4606 ("Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecntion for a crime committed by one against the other, or in a civil action or proceeding one against the other, or in a civil action by one agnir a third party for alienating the affections of the other; bnt they may in all civil and criminal cases be witnesses for each other"); amended by St. 1898, 27th Gen. Ass., c. 108, § 1 (by inserting after "affections of the other," the words "or in any civil action brought by a judgment creditor against either the husband or the wife, to set aside a conveyance of property from one to the other on the ground of want of consideration or fraud, and to subject the same to the payment of his judgment"); § 4607 ("Neither husband nor wife can be examined in any case as to any communication made to the one by the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any sneh communication made while the marriage snbsisted"); § 5484 ("Defendants in all criminal proceedings shall be competent witnesses in their own behalf, bnt cannot be called as witnesses by the State; and shonld a defendant not elect to become a witness, this fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the State, during the trial, refer to the fact that the defendnnt did not testify in his own behalf; and should they do so, sueh attorney or attorneys

will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial"); § 5485 (defendant taking the stand "shall be subject to cross-examination as an ordinary witness, but the State shall be strictly confined therein to the matters testified to in the examination in chief").

KANSAS: *General Statutes*, 1897, c. 95, § 330 ("No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility"); § 331 ("Nothing in the preceding section contained shall in any manner affect the laws now existing relating to the settlement of estates of deceased persons, infants, idiots, or luantics, or the attestation of the execution of last wills and testaments, or of conveyances of real estate, or of any other instrument required by law to be attested"); § 333 ("No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir-at-law, next of kin, surviving partner, or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterward die, and the testimony so taken shall be used after his death in behalf of his executors, administrators, heirs-at-law, next of kin, assignee, surviving partner, or joint contractor, the other party or the assignor shall be competent to testify as to any and all matters to which the testimony so taken relates"); § 334 ("The following persons shall be incompetent to testify: First, persons who are of unsound mind at the time of their production for examination; second, children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; third, husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted or afterward; and provided that in all actions for divorce hereafter to be tried, the parties thereto, or either of them, shall be competent to testify upon all material matters involved in the controversy to the same extent as other witnesses might do"); c. 96, § 59 (parties to be competent in divorce cases like other witnesses); c. 102, § 217 ("No person shall be rendered incompetent to testify in criminal causes by reason of his being the person injured or defrauded, or intended to be injured or defrauded, or that would be entitled to satisfaction for the injury or is liable to pay the costs of the prosecution; or by reason of his being the person on trial or examination; or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting his or her credibility; provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify except as a witness on behalf of the person on trial or examination"); § 218 ("The neglect or refusal of the person on trial to testify, or of a wife to testify on behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the Court or jury before whom the trial takes place"); § 264 (prosecution of two or more; Court may order any defendant discharged to be a witness for the State, at any time before "the defendant" has gone into his defence; when there is not sufficient evidence to put him on his defence, he may be discharged to testify for co-defendant, at any time before close of evidence); St. 1903, cc. 387, 388 (in divorce and alimony, "the parties thereto, or either of them, shall be competent to testify upon all material matters involved in the controversy to the same extent as other witnesses might do"; St. 1897, c. 125, is repealed; the above is substituted for C. C. P. § 651*a* and Gen. St. 1901, § 547).

KENTUCKY: *Statutes*, 1899, § 1180 (conviction for false swearing or subornation of perjury, or for falsely making certain affidavits and reports, disqualifies "from giving evidence in any judicial proceeding or from being a witness in any case whatever"); § 1645 ("In all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this Commonwealth, the defendant on trial, on his own request, shall be allowed to testify in his own behalf, but the failure to do so shall not be commented on or be allowed to create any presumption against him"); § 1646 ("The defendant requesting that he be allowed to testify shall not be allowed to testify in chief, after any other witness has testified for the defence"); § 1648 ("If a conspiracy is charged in the indictment and proven to the satisfaction of the Court, then each defendant named in the indictment may testify on his own behalf as above provided"); § 1973 (the person against whom a witness testifies in gaming prosecutions is not competent to prove prior gaming against the witness); § 4838 (no executor to be as such incompetent for or against a will); *Civil Code of Practice*, 1895, § 605 ("Subject to the exceptions and modifications contained in section six hundred and six, every person is competent to testify for himself or another, unless he be found by the Court incapable of understanding the facts concerning which his testimony is offered"); § 606 ("(1) Neither a husband nor his wife shall testify, even after the cessation of their marriage, con-

cerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an innkeeper, or a wrongdoer, and in such action either or both of them may testify; and except in actions which might have been brought by or against the wife, if she had been unmarried, and in such actions either but not both of them may testify; (2) Subject to the provisions of sub-section seven of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when above fourteen years of age and of sound mind heard such statement, or was present when such transaction took place, or when such act was done or omitted, unless (*a*) the infant or his guardian shall have testified against such person with reference to such statement, transaction, or act; or (*b*) the person of unsound mind shall, when of sound mind, have testified against such person with reference thereto; or (*c*) the decedent, or a representative of or some one interested in his estate, shall have testified against such person, with reference thereto; or (*d*) an agent of the decedent or person of unsound mind, with reference to such act or transaction, shall have testified against such person with reference thereto, or be living when such person offers to testify with reference thereto. (3) No person shall testify for himself against a party who is not before the Court otherwise than by constructive service of a summons. (4) No person shall testify for himself in chief in an ordinary action, after introducing other evidence for himself in chief; nor in an equitable action after taking other testimony for himself in chief; . . . (6) If the right of a person to testify for himself be founded upon the fact that one who is dead or of unsound mind has testified against him, the testimony of such person shall be confined to the facts or transactions to which the adverse testimony related. (7) A person may testify for himself as to the correctness of original entries made by him against persons who are under no disability — other than coverture, or infancy and coverture combined — in an account-book according to the usual course of business, though the person against whom they were made may have died or become of unsound mind; but no person shall testify for himself concerning entries in a book, or the contents or purport of any writing, under the control of himself, or of himself and others jointly, if he refuse or fail to produce such book or writing and to make it subject to the order of the Court for the purposes of the action, if required to do so by the party against whom he offers to testify. (8) No prisoner in a penitentiary of this State or of any other country shall testify; nor shall any person testify for himself against such prisoner. (9) The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another. (10) A party may compel an adverse party to testify as any other witness. (11) None of the preceding provisions of this section apply to affidavits for provisional remedies, or to affidavits of claimants against the estates of deceased or insolvent persons, or affect the competency of attesting witnesses of instruments which are required by law to be attested"); foregoing § 606 amended by St. 1898, c. 1, as follows: par. 1, (by substituting " while the marriage exists or afterwards," for "even after the cessation of their marriage"; and by adding at the end, "and except that when a husband or wife is acting as agent for his or her consort either of them may testify as to any matter connected with such agency"); par. 3 (omitted); par. 7 (by substituting for " infancy," the words "coverture, or infancy and coverture combined," and for "account-book," the word "accounting"); par. 8 (omitted); par. 10 (replaced by the following: "A party may be examined as if under cross-examination at the instance of the adverse party, either orally or by deposition as any other witness; but the party calling for such examination shall not be concluded thereby, but may rebut it by countertestimony"); § 607 ("All other objections to witnesses shall go to their credit alone, and be weighed by the jury or tribunal to which their evidence is offered"); §§ 608, 609 (admits party's testimony in rebuttal of new testimony by opponent since deceased or become unsound in mind).

LOUISIANA: *Revised Laws*, 1897, § 1191 ("No witness in a suit for divorce shall be declared incompetent on account of his being allied or related to either the plaintiff or defendant"); § 1438 ("testimony of convicts for or against each other," admissible); St. 1886, No. 29, § 1 ("The competent witness in all criminal matters shall be a person of proper understanding; provided that the husband cannot be a witness for or against his wife, nor the wife for or against her husband, except in such case as is now provided by law"); § 2 ("The circumstance of the witness being a party accused shall in no wise disqualify him from testifying, provided that no one shall be compelled to give evidence against himself; and provided that if the person accused avails himself of this privilege, he shall be subject to all the rules that apply to other witnesses, and may be cross-examined as to all matters concerning which he gives his testimony; and provided further that his failure to testify shall not be construed for or against him; but all testimony shall be weighed and considered according to the general rules of evidence; and the trial judge shall so charge the jury"; amended by St. 1902, no. 185, by inserting in § 2, after "party accused," the words "or being jointly indicted"); § 2282 ("The circumstances of the witness being a relation, a party to the cause, interested in the result of the suit, or in the actual service or salary of one of the parties, is not a sufficient cause to consider the witness as incompetent"); *Code of Practice*, 1894, § 482 ("If the witness be objected to on the ground of his having a direct or indirect interest in the event of the suit, the party making the objections may examine such witness on oath as to the existence of such interest,

and the witness must be sworn to answer the truth on the questions which shall be put to him on that head; provided, that the competent witness of any covenant or fact, whatever it may be, in civil matters, is a person of proper understanding; provided further, that the husband cannot be a witness for or against his wife, nor the wife for or against her husband, but that in any case where the husband and wife may be joined as plaintiffs or defendants and have a separate interest, they shall be competent witnesses for or against their separate interest therein"); St. 1888, no. 59 ("In all cases where either spouse has acted as agent for the other spouse, such spouse so acting as agent shall be a competent witness as to all transactions arising from, involved in, or connected with such agency. No statement or statements of either party in suits for separation in property and separation from bed and board or divorce shall be received in evidence"); *Revised Civil Code*, § 2281 ("The competent witness of any covenant or fact, whatever it may be, in civil matters, is a person of proper understanding. The husband [etc. as in Code Pr. § 482]"; amended by St. 1898, no. 190, by adding: "and provided further that in all civil suits for damages instituted by the husband for or on account of personal injuries sustained or suffered by his wife, the wife shall be a competent witness; provided further that in all cases where either spouse has acted as the agent of the other spouse, such spouse so acting as agent shall be a competent witness as to all transactions arising from, involved in, or connected with such agency; but no statement or statements of either party in suits for separation of property or separation from bed and board or divorce shall be received in evidence").

MAINE: *Public Statutes*, 1883, c. 60, § 2 (in divorce, "either party may be a witness"); c. 82, § 93 ("No person is excused or excluded from testifying in any civil suit or proceeding at law or in equity, by reason of his interest in the event thereof as a party or otherwise, except as hereinafter provided, but such interest may be shown to affect his credibility; and the husband or wife of either party may be a witness"); § 94 ("No defendant shall be compelled to testify in any suit when the cause of action implies an offence against the criminal law on his part. If he offers himself as a witness, he waives his privilege of not criminating himself, but his testimony shall not be used against him in any criminal prosecution involving the same subject-matter"); § 98 ("The five preceding sections do not apply to cases where at the time of taking testimony or at the time of trial the party prosecuting or the party defending or any one of them is an executor or an administrator or is made a party as heir of a deceased party; except in the following cases: 1. The deposition of a party or his testimony given at a former trial may be used at any trial after his death, if the opposite party is then alive, and in that case the latter may also testify. 2. In all cases in which an executor, administrator, or other legal representative of a deceased person is a party, such party may testify to any facts admissible upon the rules of evidence, happening before the death of such person; and when such person so testifies, the adverse party is neither excluded nor excused from testifying in reference to such facts, and any such representative party or heir of a deceased party may testify to any fact admissible upon general rules of evidence, happening after the decease of the testator, intestate, or ancestor; and in reference to such matters the adverse party may testify. 3. If the representative party is nominal only, both parties may be witnesses; if the adverse party is nominal only, and had parted with his interest, if any, during the lifetime of the representative party's testator or intestate, he is not excluded from testifying, if called by either party; and in an action against an executor or administrator, if the plaintiff is nominal only, or, having had an interest, disposed of it in the lifetime of the defendant's testator or intestate, neither party to the record is excused or excluded from testifying. 4. In an action by or against an executor, administrator, or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto. 5. In actions where an executor, administrator, or other legal representative is a party, and the opposite party is an heir of the deceased, said heir may testify when any other heir of the deceased testifies at the instance of such executor, administrator, or other legal representative"); § 99 ("The rules of evidence which apply to actions by or against executors or administrators apply in actions where a person shown to the Court to be insane is solely interested as a party"); § 105 ("No person is incompetent to testify in any Court or legal proceeding in consequence of having been convicted of an offence; but such conviction may be shown to affect his credibility"); c. 87, § 10 (on suggestion of death of a party, in an action that survives, the survivors if any on both sides may testify); c. 134, § 19 ("In all criminal trials the accused shall, at his own request, but not otherwise, be a competent witness. He shall not be compelled to testify on cross-examination to facts that would convict or furnish evidence to convict him of any other crime than that for which he is on trial; and the fact that he does not testify in his own behalf shall not be taken as evidence of his guilt. The husband or wife of the accused is a competent witness").

MARYLAND: *Public General Laws*, 1888, Art. 35, § 1 ("No person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the Courts, in the trial of any issue joined or hereafter to be joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any judge, jury, justice of the peace, or other person having, by law or by consent of the parties, authority to hear, receive, and examine evidence; but every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a

witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; but no person who has been convicted of the crime of perjury shall be admitted to testify in any case or proceeding whatever; and the parties litigant, and all persons in whose behalf any suit, action, or other proceeding may be brought or defended, themselves, and their wives and husbands, shall be competent and compellable to give evidence in the same manner as other witnesses, except as hereinafter excepted"); § 2 ("When an original party to a contract or cause of action is dead or shown to be a lunatic or insane, or when an executor or administrator is a party to the suit, action, or other proceedings, either party may be called as a witness by his opponent; but shall not be admitted to testify on his own offer, or upon the call of his co-plaintiff or co-defendant, otherwise than now by law allowed, unless a nominal party merely, except in case where the party to such suit, action, or other proceeding has died, or become lunatic or insane, after having testified in his own behalf, then the opposite party shall be a competent witness on his own behalf in such case, notwithstanding the executor or administrator of such deceased person, or committee of such lunatic or insane person, has become a party to such suit, action, or other proceeding, but shall only testify as to matters upon which such deceased, lunatic, or insane person was examined and testified to; provided, that when an executor, administrator, guardian, or committee of a lunatic or insane person is a party to the suit, action, or proceeding, when the cause of action has arisen on a contract made with such executor, administrator, guardian, or committee, or out of transactions between such executor, administrator, guardian, or committee and the other party, or when the executor, administrator, guardian, or committee testifies as to any conversation had with the other party, either party may be examined as a witness as provided for in the other sections of this article; and provided further, that it shall not be competent for any party to the cause, who has been examined therein as a witness, to corroborate his testimony when impeached by proof of his own declaration or statement made to third persons out of the presence and hearing of the adverse party; and provided further, that whenever the contract or cause of action in issue and on trial was made or contracted with an agent, the death or insanity of his principal shall not prevent any party to the suit or proceeding from being a witness in the case; provided such agent shall be living and competent to testify"); § 3 ("In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes and offences, and in all proceedings in the nature of criminal proceedings in any court of this State, and before a justice of the peace or other person acting judicially, the person so charged shall at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him. In all criminal proceedings the husband or wife of the accused party shall be competent to testify; but in no case, civil or criminal, shall any husband or wife be competent to disclose any confidential communication made by the one to the other during the marriage; and in suits, actions, bills, or other proceedings instituted in consequence of adultery, or for the purpose of obtaining a divorce, or for damages for breach of promise of marriage, no verdict shall be permitted to be recovered, nor shall any judgment or decree be rendered, upon the testimony of the plaintiff alone; but in all such cases testimony in corroboration of that of the plaintiff shall be necessary"); St. 1902, c. 495, amending and replacing Pub. G. L. Art. 35, § 2 ("In actions or proceedings by or against executors or administrators, in which judgments or decrees may be rendered for or against them, and in proceedings by or against persons incompetent to testify by reason of mental disability, no party to the cause shall be allowed to testify as to any transaction had with or statement made by the testator, intestate, or party so incompetent to testify, either personally or through an agent since dead, lunatic, or insane, unless called to testify thereto by the opposite party, or unless the testimony of such testator, intestate, or party incompetent to testify shall have been already given in evidence concerning the same transaction or statement, in the same cause, on his or her own behalf or on behalf of his or her representative in interest; nor shall it be competent for any party to the cause, who has been examined therein as a witness, to corroborate his testimony when impeached by proof of his own declaration or statement made to third persons out of the presence and hearing of the adverse party").

MASSACHUSETTS: *Revised Laws*, 1902, c. 175, § 20, Pub. St. 1882, c. 169, § 18 ("No person of sufficient understanding, whether a party or otherwise, shall be excluded from giving evidence in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, except in the following cases: First, neither husband nor wife shall be allowed to testify as to private conversations with each other; Second, neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding against the other; Third, in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him"); R. L. ib. § 21, P. S. ib. § 19 ("The conviction of a witness of crime may be shown to affect his credibility").

MICHIGAN: *Compiled Laws*, 1897, c. 282, § 99 ("No person shall be excluded from giving evidence in any matter, civil or criminal, by reason of crime, or for any interest of such person in the matter, suit, or proceeding in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime may be shown for the purpose of drawing in question the credibility of such witness, except as is hereafter provided");

§ 100 ("On the trial of any issue joined, or in any matter, suit, or proceeding, in any court, or before any officer or person having, by law or by consent of parties, authority to hear, receive, and examine evidence, the parties to any such suit or proceeding named in the record, and persons for whose benefit such suit is prosecuted or defended, may be witnesses therein, in their own behalf or otherwise, in the same manner as otherwise, except as hereinafter otherwise provided; and the deposition of any such party or person may be taken and used in evidence under the rules and statutes governing depositions, and any such party or person may be proceeded against, and compelled to attend and testify, as provided by law for other witnesses. No person shall be disqualified in any criminal case or proceeding, by reason of his interest in the event of the same as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not raise any presumption against him, nor shall the Court permit any reference or comment to be made to or upon such neglect"); § 101 ("That when a suit or proceeding is prosecuted or defended by the heirs, assignees, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person; and when any suit or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of the deceased partner and not within the knowledge of any one of the surviving partners. And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation and not within the knowledge of any surviving officer or agent of the corporation, nor when any suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person against a corporation, shall any person who is or has been an officer or agent of any such corporation be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person; provided, that whenever the words 'the opposite party' occur in this section, it shall be deemed to include the assignors or assignees of the claim or any part thereof in controversy"; amended by St. 1901, no. 239, by inserting after "surviving partners," the following: "No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died shall be a competent witness, in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representatives or heirs of such decedent, unless he shall be called by such heirs or legal representatives"); § 102 ("A husband shall not be examined as a witness, for or against his wife, without her consent; nor a wife, for or against her husband, without his consent, except in cases where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support within the meaning of Act No. 136 of the Session Laws of 1883, and except in cases where the husband or wife shall be a party to the record in a suit, action, or proceeding where the title to the separate property of the husband or wife so called or offered as a witness, or where the title to property derived from, through, or under the husband or wife so called or offered as a witness, shall be the subject-matter in controversy or litigation in such suit, action, or proceeding, in opposition to the claims or interest of the other of said married persons who is a party to the record in such suit, action, or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto, without the consent of said husband or wife, who is a party to the record in such suit, action, or proceeding, as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage; but in any action or proceeding instituted by the husband or wife in consequence of adultery the husband and wife shall not be competent to testify"); Acts 1887, no. 82 ("Whenever a child under the age of ten years is produced as a witness the Court shall by an examination, made by itself, publicly, or separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify; and in such case such testimony may be given on a promise to tell the truth instead of upon oath or statutory affirmation, and shall be given such credit as to the Court or jury, if there be a jury, it may appear to deserve"); Acts 1897, no. 212 ("A husband may testify for or against his wife without her consent, and a wife may testify for or against her husband without his consent, in all criminal prosecutions for bigamy; provided, however, that nothing herein contained shall be so construed as to permit a husband or wife to testify against the other without the consent of both concerning any communications made by one to the other during the marriage"); § 8652, Howell's ed. (in divorce proceedings, either party may elect to testify, but "such testimony shall not be received in support or in defence of a charge of adultery").

MINNESOTA: *General Statutes*, 1894, §§ 642,

1191 (inhabitants in city or county, not to be disqualified as such); § 2007 (Indians to be competent in prosecution for unlawful sale, etc., of liquor to Indian); § 2561 (in actions by husband against savings bank for wife's money, wife may be examined as if unmarried); § 5658 ("All persons, except as hereinafter provided, having the power and faculty to perceive and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief; although in every case the credibility of the witnesses may be drawn in question. And on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the Court"); § 5659 ("A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, or managing agents of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter-testimony"); § 5660 ("It shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of and concerning any conversation with or admission of a deceased or insane party or person, relative to any matter at issue between the parties"; amended by St. 1895, c. 27, by adding: "provided that where the testimony of the party or person since deceased or insane shall have been taken, prior to death or disability, either in form of a deposition or by court stenographer in court, and can be had and read as the testimony of such witness, wherein such party or person shall have testified concerning any conversation with the opposite party or person or concerning admissions made to such party, upon a trial of the issues after the death or disability of such party or person as contemplated in this section, the opposite party may testify fully in reference to conversations and admissions to which the aforesaid deposition or evidence shall relate"); § 5661 ("The following persons are not competent to testify in any action or proceeding: First, those who are of unsound mind or intoxicated at the time of their production for examination; Second, children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly"); § 5662 ("There are particular relations in which it is the policy of the law to encourage confidence, and preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: First. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to proceedings supplementary to execution"; amended by St. 1903, c. 227, omitting the last clause, and substituting "nor to an action or proceeding for abandonment and neglect of the wife or children by the husband"); § 6811 ("A person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness in any case or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question"); § 2216 ("Whenever in any action in any court the defendant shall plead or answer the defence of usury, either party to the action may be a witness on his own behalf on the trial, except in actions in which the opposite party sues or defends as administrator or personal representative of a deceased person; except, also, actions in which the opposite party claims as assignee and the original assignor is deceased"); § 7324 (a co-indictee may be discharged to be a witness for the State, at any time before the defendant has gone into his defence); § 7325 (a co-indictee must be discharged, before the evidence is closed, to be witness for defendant, if the Court is of opinion that there is not sufficient evidence to put him on his defence).

MISSISSIPPI: *General Statute Laws*, 1892, § 1571 (in divorce suits, "the parties shall be competent witnesses for or against each other"); § 1738 ("Every person, whether a party to the suit or not, shall be competent to give evidence in any suit at law or in equity, and shall not be incompetent by reason of any interest in the result thereof, or in the record as an instrument of evidence in other suits; and such weight shall be given to the evidence of parties and interested witnesses as, in view of the situation of the witnesses and other circumstances, it may fairly be entitled to. Any party may, by subpœna, as in other cases, compel any other party to the suit to appear and give evidence"); § 1739 ("Husband and wife may be introduced by each other as witnesses in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them"); § 1740 ("A person shall not testify as a witness to establish his own claim or defence against the estate of a deceased person which originated during the lifetime of such deceased person, or any claim

he has transferred since the death of such decedent. But such person shall be permitted to give evidence in support of his claim or defence against the estate of a deceased person which originated after the death of such deceased person in the course of administering his estate"; see St. 1896, *infra*); § 1741 ("The accused shall be a competent witness for himself in any prosecution for crime against him; but the failure of the accused in any case to testify shall not operate to his prejudice or be commented on by counsel"); § 1743 ("A conviction of a person for any offence, except perjury and subornation of perjury, shall not disqualify such person as a witness, but such conviction may be given in evidence to impeach his credibility. A person convicted of perjury or subornation of perjury shall not afterwards be a competent witness in any case, although pardoned or punished for the same"); St. 1896, c. 99 ("A person shall not testify as a witness to establish his own or assigned claim or defence against the estate of a person of unsound mind, which originated before the ward became a *non compos mentis*; but this shall not apply to claims or defences which arose in the course of the administration of the estate of such person").

MISSOURI: *Revised Statutes*, 1899, § 2635 ("No person shall be rendered incompetent to testify in criminal causes by reason of his being the person injured or defrauded or intended to be injured or defrauded, or that would be entitled to satisfaction for the injury, or is liable to pay the costs of the prosecution"); § 2636 ("When two or more persons shall be jointly indicted or prosecuted, the Court may, at any time before the defendants have gone into their defence, direct any defendant to be discharged, that he may be a witness for the State. A defendant shall also, when there is not sufficient evidence to put him on his defence, at any time before the evidence is closed, be discharged by the Court for the purpose of giving his testimony for a co-defendant"); § 2637 ("No person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting the credibility of such witness; provided that no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant, and shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case; provided that in no case shall husband or wife, when testifying under the provisions of this section for a defendant, be permitted to disclose confidential communications had or made between them in the relation of such husband and wife"); § 2638 (the accused's failure to testify "shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the Court or jury before whom the trial takes place"); § 4652 ("No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility; provided that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the Court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defence is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided; and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator; provided, further, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are, and when made, and no farther"); § 4654 ("Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted, or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; provided that the party so called may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses"); § 4655 (foregoing sections not to affect the law of attestation of instruments required to be attested); § 4656 ("No married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in the following cases, to wit: First, in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed; second, in actions against carriers, so far as relates to the loss of the property and the amount and value thereof; third, in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband; and no married man shall be disqualified in any such civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her or not as a party, when such suit or proceeding is based upon, grows out of, or is connected with any matter of business or business transaction where the transaction or business was had with or was conducted by such married man as the agent of his wife; provided that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists or subsequently, to testify to

any admission or conversation of her husband, whether made to herself or to third parties"); § 4659 ("The following persons shall be incompetent to testify: First, a person of unsound mind at the time of his production for examination; second, a child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"); § 4680, Laws 1895, p. 284 ("Any person who has been convicted of a crime is notwithstanding a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer").

MONTANA: *Codes and Statutes*, 1895; *C. C. P.* § 3160 ("A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit"); § 3161 ("All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in § 3123"); § 3162 ("The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"; amended by St. 1897, p. 245, Feb. 19, by adding: "3. Parties or assignees of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person"); § 3163 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); *P. C.* § 1242 (a person "convicted of any offence" is competent); §§ 2075, 2076 (like Cal. P. C. §§ 1099, 1100); § 2440 ("The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code"); § 2441 ("Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties"); § 2442 ("A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but he may be sworn, and may testify in his own behalf, and the jury, in judging of his credibility and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. If the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice, and the attorney prosecuting must not comment to the Court or jury on the same"); § 2443 ("When two or more persons are jointly or otherwise concerned in the commission of an offence, any one of such persons may testify for or against the other in relation to the offence committed, but the testimony of such witness must not be used against him in any criminal action or proceeding").

NEBRASKA: *Compiled Statutes*, 1897, § 2866 ("either party [to a divorce suit] may be a witness as in other civil cases"); § 5902 ("Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: First, persons of unsound mind at the time of their production; second, Indians and negroes who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them intelligently and truly; third, husband and wife, concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward"); § 5903 ("No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation"); § 5905 ("The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other"); § 5906 ("Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal, in testimony, any such communication

made while the marriage subsisted"); § 5908 ("The prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted waives the rights thereby conferred"); § 7199 ("No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal"); § 7200 ("When two or more persons shall be indicted together, the Court may, at any time before the defendant has gone into his defence, direct any one of the defendants to be discharged, that he may be a witness for the State"; the accused "may also, when there is not sufficient evidence to put him upon his defence, be discharged by the Court," or may demand a verdict, to give evidence "for others" accused with him").

NEVADA: *General Statutes*, 1885, § 3398 ("All persons, without exception, otherwise than as specified in this chapter, who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses in any action or proceeding in any Court of the State. Facts which by the common law would cause the exclusion of witnesses may still be shown for the purpose of affecting their credibility"); § 3399 ("No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his conviction of felony, but such conviction may be shown for the purpose of affecting his credibility, and the jury is to be the exclusive judges of his credibility, or by reason of his interest in the event of the action or proceeding as a party thereto or otherwise, but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and be compellable to give evidence, either *viva voce* or by deposition or upon a commission, in the same manner and be subject to the same rules of examination as other witnesses on behalf of himself or either or any of the parties to the action or proceeding"); § 3401 ("No person shall be allowed to testify under the provisions of § 377 [3399] when the other party to the transaction is dead, or when the opposite party to the action or the person for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person; provided that when such deceased person was represented in the transaction in question by any agent who is living, and who testifies as a witness in favor of the representative of such deceased person, in such case the other party may also testify in relation to such transaction, and nothing contained in such section shall affect the laws in relation to any instrument required to be attested; provided, further, that when husband or wife is insane and has been so declared by a commission of lunacy, or in due form of law, the other shall be a competent witness to testify as to any fact which transpired before or during such insanity, but the privilege of so testifying shall cease on the restoration to soundness of the insane husband or wife, unless upon the consent of both, in which case they shall be competent witnesses"); § 3402 ("The following persons cannot be witnesses: First, those who are of unsound mind at the time of their production for examination; second, children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"); § 3403 ("A husband cannot be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. But this exception shall not apply to an action or proceeding by one against the other"); §§ 4241, 4242 (joint indictees; like Cal. P. C. §§ 1099, 1100); § 4562 ("In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the Court"); § 4563 ("Nothing herein contained shall be construed as compelling any such person to testify; and in all cases wherein the defendant to a criminal action declines to testify, the Court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause"); § 4576, as amended by St. 1881, c. 83 ("The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided for in this Act. The party or parties injured shall in all cases be competent witnesses; the credibility of such witnesses shall be left to the jury, as in other cases. In all cases when two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness against another, in relation to such crime or misdemeanor; but the testimony given by such witnesses shall in no instance be used against himself in any criminal prosecution, and any person may be compelled to testify as provided in this section"); § 4577, as amended by St. 1865, c. 403, St. 1881, c. 84 ("Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties"); § 4734 (in prosecutions for selling liquor to Indians, Indians are to be "competent wit-

nesses" against Chinese, and their testimony "may be taken by the Court or jury for what it may be deemed worth" against white persons).

NEW HAMPSHIRE: *Public Statutes*, 1891, c. 224, § 13 ("No person shall be excused or excluded from testifying or giving his deposition in any civil cause by reason of his interest therein, as a party or otherwise"); § 16 ("When one party to a cause is an executor, administrator, or the guardian of an insane person, neither party shall testify in respect to facts which occurred in the lifetime of the deceased or prior to the ward's insanity, unless the executor, administrator, or guardian elects so to testify, except as provided in the following section"); § 17 ("When it clearly appears to the Court that injustice may be done without the testimony of the party in such case, he may be allowed to testify: and the ruling of the Court, admitting or r[illegible] his testimony, may be excepted to and [illegible]ed"); § 18 ("When either party of record is [illegible]t the party in interest, and the party whose interest is represented by the party of record is an executor, administrator, or insane, the adverse party shall not testify, unless the executor, administrator, or [illegible]ardian of the insane person elects to testify himself, or to offer the testimony of such party of record"); § 19 ("In an action brought by an indorsee or assignee of a bill of exchange, promissory note, or mortgage against an original party thereto, the defendant shall not testify in his own behalf if either of the original parties to the bill, note, or mortgage is dead or insane, unless the plaintiff elects to testify himself or to offer the testimony of an original party thereto"); § 20 ("Husband and wife are competent witnesses for or against each other in all cases civil and criminal, except that neither shall be allowed to testify as to any statement, conversation, letter, or other communication made to the other or to another person, nor as to any matter which in the opinion of the Court would lead to a violation of marital confidence"; amended by St. 1899, c. 41, by inserting "against the other" after "testify," and by inserting "shall either be allowed in any case to testify" after "nor"); § 24 ("In the trial of indictments, complaints, and other proceedings against persons charged with the commission of crimes and offences, the person so charged shall, at his own request, but not otherwise, be a competent witness"); § 25 ("Nothing herein contained shall be construed as compelling any such person to testify, nor shall any inference of his guilt result if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify"); § 26 ("No person shall be incompetent to testify on account of his having been convicted of an infamous crime, but the record of such conviction may be used to affect his credit as a witness").

NEW JERSEY: *General Statutes*, 1896, "Disorderly Persons," § 18 (wife may be witness in trial of husband deserting family); "Evidence," § 1 ("No person offered as a witness in any action or proceeding of a civil or criminal nature shall be excluded by reason of his having been convicted of crime, but such conviction may be shown on cross-examination of the witness, or, by the production of the record thereof, for the purpose of affecting his credit"); § 2 ("In all civil actions in any Court of record in this State the parties thereto shall be admitted to be sworn and give evidence therein, when called as witnesses by the adverse party in such action; and when any party is called as a witness by the opposite party, he shall be subject to the same rules as to examination and cross-examination as other witnesses; provided, that no party to a suit shall be compelled to be sworn or give evidence in any action brought to recover a penalty or to enforce a forfeiture; and provided, also, that this section shall not apply to suits for divorce"); § 3 ("No person shall be disqualified as a witness in any suit or proceedings at law or in equity by reason of his or her interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his or her credit; provided, nevertheless, that no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties in a cause sue or are sued in a representative capacity, except as hereinafter provided"); § 4 ("A party to a suit in a representative capacity may be admitted, as a witness therein, and if called as a witness in his own behalf, and admitted, the opposite party may in like manner be admitted as a witness"); § 5 ("In any trial or inquiry in any suit, action, or proceeding in any Court, or before any person having by law or consent of parties authority to examine witnesses or hear evidence, the husband or wife of any person interested therein as a party or otherwise, shall be competent and compellable to give evidence the same as other witnesses, on behalf of any party to such suit, action, or proceeding; provided, that nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding, or in any action or proceeding for divorce on account of adultery, except to prove the fact of marriage, or in any action for criminal conversation; nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during the marriage"); § 6 ("The complainant or petitioner in any action, or proceeding of an equitable nature in any Court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition, and any defendant in any such action or proceeding shall be a competent witness for or against any other defendant not jointly interested with him in the matter in controversy"); § 7 ("Upon the trial of any indictment for falsely making, altering, forging, or counterfeiting, or for uttering or publishing as true, any record, deed, or other instrument or writing, no person named in such record, deed, or other instrument or writing, or whose name or any part of whose name is or purports to be written or signed therein or thereto, shall on that account be deemed and taken to be an incompetent witness"); § 8 ("Upon the trial of any indictment, alle-

gation, or accusation of any person charged with crime, the person indicted or accused shall be admitted to testify as a witness upon such trial, if he shall offer himself as a witness therein in his own behalf"); § 12 (surviving party is competent in new trial of action revived after other party's death); St. 1900, c. 150, § 1 (same as Gen. St. Evid. § 1); § 2 (same as ib. § 2); § 3 (same as ib. § 3, omitting the clauses after "sworn as a witness"); § 4 ("In all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness on his own behalf and testifies to any transaction with or statement by his testator or intestate, in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator or intestate which are pertinent to the issue"; the former § 4 is here repealed); § 5 (like the former § 5, except that the proviso, down to the last clause, is thus re-phrased: "Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action for criminal conversation, except to prove the fact of marriage, or to render any husband or wife competent or compellable to give evidence against the other in any criminal action or proceeding, except to prove the fact of marriage, and except as now otherwise provided by statute, or compellable in any action or proceeding for divorce on account of adultery to give evidence for the other, except to prove the fact of marriage"); § 6 (like former § 6); § 7 (like former § 9; former §§ 7 and 8 are repealed); § 8 (like former § 10); § 10 (like former § 12); St. 1903, c. 216 (in prosecutions for desertion, the accused's wife is admissible against him); Gen. St., "Evidence," § 51 (§ 5, *supra*, declared to "authorize husband or wife in any criminal action against either, to give evidence to prove the fact of marriage"); § 53 ("In all civil actions in any Court of law or equity of this State, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action"); § 54 ("Upon any trial hereafter had, of any indictment of any person charged with the crime of murder or manslaughter, the husband or wife of the person so charged shall be admitted to testify as a witness upon such trial, if he or she offer himself or herself as a witness therein on behalf of the person so charged"); § 57 ("Upon the trial of any indictment, allegation, or accusation of any person charged with crime, the wife or husband of the person indicted or accused shall be admitted to testify as a witness in behalf of such person upon such trial, if he or she shall be offered and produced as a witness therein by the person so indicted or accused"); § 73 ("Any husband or wife may give evidence on their own behalf, or for or against each other, in any proceedings in this State for divorce on account of adultery, any law of this State to the contrary notwithstanding"); St. 1898, c. 237, § 57 ("Upon the trial of any indictment, the defendant shall be admitted to testify, if he shall offer himself as a witness; and upon any such trial, the wife or the husband of the defendant, as the case may be, shall be admitted to testify on behalf of the defendant, if he or she shall offer himself or herself as a witness; and upon any such trial, a married woman shall be admitted to testify against her husband when she is the complainant against him, if she shall offer herself as a witness"); 1903, State *v.* Zdanowicz, — N. J. L. —, 55 Atl. 743 (the accused is competent for himself under the Crim. Proced. St. 1898, June 14, c. 237, § 57, though the Evidence Revision Statute of 1900, March 23, c. 150, repeals the former § 8, and contains no clause of like effect).

NEW MEXICO: *Compiled Laws*, 1897, § 3014 ("No person offered as a witness shall hereinafter be excluded by reason of any alleged incapacity from interest, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter in question or on any inquiry arising in any civil suit, action, or proceeding in any court, or before any judge, coroner, justice of the peace, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence in this Territory"); § 3015 ("Every person so offered shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable; notwithstanding that such person has an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness"); § 3016 ("Hereafter, in the courts of this Territory no person offered as a witness shall be disqualified to give evidence on account of any disqualification known to the common law, but all such common-law disqualifications may be shown for the purpose of affecting the credibility of any such witness and for no other purpose; provided, however, that the presiding judge, in his discretion, may refuse to permit a child of tender years to be sworn, if, in the opinion of the judge, such child has not sufficient mental capacity to understand the nature and obligation of an oath"; amended by St. 1901, c. 58, by inserting: "provided that no person offered as a witness shall be competent to give testimony in any case who shall have been convicted and sentenced for the commission of any felony or infamous crime, unless he shall have first been pardoned and restored to full rights of citizenship"); § 3017 ("On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any civil suit, action, or other proceeding in any court of law or equity in this Territory, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence, the parties to such proceedings, and the persons in whose behalf any such suit, action, or other proceeding is brought or instituted, or op-

posed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of themselves or of either of the parties to the suit, action, or proceeding, and the husbands and wives of such parties and persons shall, except as hereinafter excepted, be competent to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or proceeding"); § 3019 ("Nothing herein contained shall apply to the trial, in any action, suit, or other civil proceeding, of the question of the adultery of any party, or the husband or wife of any party to such action, suit, or proceeding"); § 3020 ("No husband shall be compelled to disclose any communication made by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage"); § 3201 ("In a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect to any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence"); § 3431 ("In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors in the courts of this Territory, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him"); § 3432 ("Hereafter the husband or wife of any defendant in any trial on a prosecution for crime before any Court or officer authorized to hear or try said prosecution shall be a competent witness to testify in favor of, but not against, such defendant; provided, that such husband or wife shall be a competent witness to testify against any such defendant where the prosecution is for any unlawful assault or violence forcibly committed by the defendant on the person of such witness").

NEW YORK: *Constitution*, 1895, Art. XIII, § 4 ("Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor"); *Code of Civil Procedure*, 1877, § 828 ("Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, opposed, prosecuted, or defended"); § 829 ("Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the proceeding or interested in the result thereof"); § 831 ("A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. A husband or wife shall not be compelled, or, without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff"); § 832 ("A person, who has been convicted of a crime or misdemeanor, is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not included by that inquiry"); § 850 ("The Court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him as a witness, to ascertain his capacity and the extent of his knowledge"); *Penal Code*, 1881 § 714 (substantially like § 832, C. C. P.); § 715 ("The husband or wife of a person [illegible] or accused of a crime is in all cases a [illegible]tent witness, on the examination or trial of [illegible] person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during marriage"); *Code of Criminal Procedure*, 1881, § 10 ("No person can be compelled in a criminal action to be a witness against himself"); § 392 (in criminal cases, the testimony of a child apparently under 12 not understanding an oath may be received if it is "of sufficient intelligence"); § 393 ("The defendant in all [criminal] cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him"); Laws 1876, c. 182, § 1 ("All persons jointly indicted shall, upon the trial of either, be competent witnesses for each other the same as if not included in the indictment"), Laws 1892, c. 689, § 115 (wife

may testify in action by husband against savings bank to recover money deposited by wife as hers).

North Carolina: *Code* 1883, § 1288 (In divorce cases, neither party is competent to prove adultery of the other, nor shall either's admissions be received for that purpose; but in divorce for pregnancy at marriage, either may testify to material facts); §§ 585–587 (these sections, removing in part only the disqualification of parties, are presumably superseded by §§ 1350, 1351, *infra*); § 588 ("In any trial or inquiry in any suit, action, or proceeding in any court or before any person having by law or by consent of parties authority to examine witnesses or to hear evidence, the husband or wife of any party thereto, or any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as hereinafter stated, be competent and compellable to give evidence as any other witness on behalf of any party to such suit, action, or proceeding. Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage"); § 589 (abolishes interest as a disqualification; see ib. § 1350, *infra*); § 590 ("Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication"); § 1192 ("No person shall be deemed to be an incompetent witness by reason of any interest which a person may have, or be supposed to have, in respect to any deed, writing, instrument, or other matter whatsoever, in support of any prosecution, wherein shall be questioned the fact of forging such deed, writing, instrument, or other matter whatsoever, or the fact of uttering, showing forth in evidence, or disposing thereof, knowing the same to be forged"); § 1350 ("No person offered as a witness shall be excluded by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury, or other person having, by law, authority to hear, receive, and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills"); § 1351 ("On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit, or other proceeding in court, or before any judge, justice, jury, or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as hereinafter provided, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, in behalf of either or any of the parties to said action, suit, or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation"); § 1353 ("In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, the person so charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him. The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defence. But every such person examined as a witness shall be subject to be cross-examined as are other witnesses"); § 1354 ("Nothing in this chapter, except as provided in the preceding section, shall render any person, who in any criminal proceeding is charged with the commission of a criminal offence, competent or compellable to give evidence against himself, nor shall render any person compellable to answer any question tending to criminate himself, nor shall in any criminal proceeding render any husband competent or compellable to give evidence against himself, nor any wife competent or compellable to give evidence against her husband; provided that in all criminal prosecutions of a husband for an assault and battery upon the person of his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the State against her husband"); St. 1889, p. 422 (divorce for refusal of intercourse; either party may testify).

North Dakota: *Revised Codes*, 1895, § 5653 ("No person offered as a witness in any action or proceeding in any court, or before any officer or person having authority to examine witnesses or hear evidence, shall be excluded or excused by reason of such person's interest in the event

of the action or proceeding; or because such person is a party thereto, or because such person is the husband or wife of a party thereto, or of any person in whose behalf such action or proceeding is commenced, prosecuted, opposed, or defended, except as hereinafter provided: 1. A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. 2. In civil actions or proceedings by or against executors, administrators, heirs at-law, or next of kin, in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party. But if the testimony of a party to the action or proceeding has been taken and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs-at-law, or next of kin, then the other party shall be a competent witness as to any and all matters to which the testimony so taken relates"); § 6977 (conviction of perjury or subornation disqualifies the person as a witness in any proceeding "upon his own behalf," and in any proceeding "between adverse parties," against objection, until judgment of perjury, etc., is reversed; but no rights innocently acquired by a person claiming under such proceedings shall be prejudiced by illegal admission of an infamous person); § 8188 ("When two or more persons are included in the same information or indictment, the Court may, at any time before the defendants have gone into their defence, on the application of the State's attorney, direct any defendant to be discharged from the information or indictment, that he may be a witness for the State"); § 8189 ("When two or more persons are included in the same information or indictment, and the Court is of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant"); § 8190 ("In the trial of a criminal action or proceeding before any Court or magistrate of this State, whether prosecuted by information, indictment, complaint, or otherwise, the defendant shall, at his own request and not otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create or raise any presumption of guilt against him; nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the Court or jury before whom the trial takes place").

Ohio: *Annotated Revised Statutes*, 1898, § 5240 ("All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly"); § 5241 ("The following persons shall not testify in certain respects: 3. Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and the rule shall be the same if the marital relation has ceased to exist. 4. A person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify. 5. A person who, if a party, would be restricted in his evidence under § 5242, shall, where the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, be restricted in the same manner in any action or proceeding concerning such property or thing"); § 5242 ("A party shall not testify where the adverse party is a guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person, except — 1. To facts which occurred subsequent to the appointment of the guardian or trustee of an insane person, and, in the other cases, subsequent to the time the decedent, grantor, assignor, or testator died. 2. When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject. 3. If a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify as to the same transactions or conversations. 4. If a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions. 5. In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with or admissions by a partner or joint contractor since deceased, unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued. 6. If the claim or defence is founded on a book account, a party may testify that the book is his account-book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person, non-resident of the county; whereupon the book shall be competent evidence; and such book may be admitted in evidence, in any case, without regard to the parties, upon like proof by any competent witness. 7. If a party, after testifying orally, die, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matters. 8. If a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein. Nothing in this section contained shall apply to actions for causing death, or actions or proceed-

lngs involving the validity of a deed, will, nr codicil; and when a case is plainly within the reason aud spirit of the last three sections, though not within the strict letter, their principles shall be applied"); § 5697 (parties in divorce and alimony cases are to be competent like any other witness); § 7284 ("No person shall be disqualified as a witness ln any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime; and husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions; bnt snch interest, conviction, or relationship may be shown for the purpose of affecting his or her credibility. But husband or wife shall not testify concerning any communication made by one to the other, or act done by either in the presence of each other during covertnre, nnless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or nnless in case of personal injury by either the husband and [or ?] wife to the other, or in case of neglect or cruelty of either to their minor children nnder ten years of age. And the rule shall be the same if the marital relation has ceased to exist; provided, that the presence or whereabouts of the husband or wife shall not be construed to be an act under this section"); § 7285 ("On the trial of all indictments, complaints, and other proceedings, against a person charged with the commission of an offence, the person so charged shall, at his own reqnest, bnt not otherwise, be a competent witness; but his neglect or refusal to testify shall not create any presnmption against him, nor shall any reference be made to, nor any comment be made npon, snch neglect or refusal").

OKLAHOMA: *Statutes* 1893, § 2002 (infamy; like N. D. Rev. C. § 6977); § 4209 ("No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, nr by reason of his conviction of a crime; bnt snch interest or conviction may be shown for the purpose of affecting his credibility"); § 4210 (nothing in the preceding section is to affect the law as to the settlement of estates of decedents, etc., or as to the attestation of wills, etc.); § 4211 ("Any party to a civil action or proceeding may compel any adverse party or person for whose benefit snch action is institnted, prosecnted, or defended, at the trial or by deposition, to testify as a witness in the same manner and snbject to the same rules as other witnesses"); § 4212 ("No party shall be ellowed to testify in his own behalf, in respect to any transaction or communication had personally by snch party with a deceased person, when the adverse party is the execntor, administrator, heir-at-law, next of kin, surviving partner, or assignee of snch deccased person, where they heve acqnired title to the cause of action immediately from snch deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of snch party concerning any transaction or communication had personally by snch assignor with a deceased person in any snch case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his snrviving partner or joint contractor, when snch surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterwards die, and the testimnny so taken shall be nsed after his death, ln behalf of executors, administrators, heirs-at-law, next of kin, assignee, snrviving partner, or joint contractor, the other party or the assignor shall be competent to testify as to any and ell matters to which the testimony so taken relates"); § 4213 ("The following persons shall be incompetent to testify: First, persons who are of nnsound mind at the time of their production for examination. Second, children nnder ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Third, husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; bnt in no case shall either be permitted to testify concerning any communication made by one to the other during marriage, whether called while that relation subsisted or afterwards"); § 5204 ("When two or more persons are included in the indictment, the Court may, at any time before the defendants have gone into their defence, on the application of the district attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the Territory"); § 5205 ("When two or more persons are inclnded in the same indictment, and the Court is of opinion that in regard to a particnlar defendant there is not sufficient evidence to put him on his defence, it must, before the evidence is closed, in order that he may be a witness for his co-defendant, snbmit its said opinion to the jnry, who, if they so find, may acquit the particnlar defendant for the purpose aforesaid"); § 5206 ("On the trial of all indictments, informntions, complaints, and other proceedings against persons charged with the commission of a crime, offences, and misdemeanors before any Conrt or committing magistrate in this Territory, the person charged shall nt his own reqnest, bnt not otherwise, be a competent witness, and his failure to make such reqnest shall not create any presnmption against him, nor be mentioned on the trial; if commented upon by connsel, it shall be ground for a new trial"); § 5207 ("The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this chapter"); St. 1895, c. 41, § 29 ("neither husband nor wife shall in any case be a witness against the other, except in a criminal prosecntion for a crime committed one against the otiier, bnt they may in all cases be witnesses for each other, and shall be subject to cross-examination as other witnessee, and shall in no event on a criminal trial be permitted to disclose commnnications made by one to the other, except on a trial of an offence committed by one against the otiier").

OREGON: *Codes and General Laws*, 1892, § 710 ("All persons without exception, except

as otherwise provided in this title, who, having organs of sense can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore neither parties nor other persons who have an interest in the event of an action, suit, or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case, except the latter, the credibility of the witness may be drawn in question, as provided in § 683"); § 711 ("The following persons are not admissible: 1. Those of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"; amended by St. 1893, p. 134, by permitting a deceased opponent's hearsay statements to be received; see quotation *post*, § 1576); § 712 ("There are particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: 1. A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But the exception does not apply to a civil action, suit, or proceeding, by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); § 713 ("If a party to the suit, action, or proceeding offer himself as a witness, that is to be deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician, or surgeon on the same subject, within the meaning of subdivisions 1, 2, 3, and 4 of the last section"); § 1361 ("When two or more persons are charged in the same indictment, the Court may, at any time before the defendant has gone into his defence, on the application of the district attorney, direct any defendant to be discharged from the indictment, so that he may be a witness for the State"); § 1362 ("When two or more persons are charged in the same indictment, and the Court is of opinion that, in regard to a particular defendant, there is not sufficient evidence to put him on his defence, it must, if requested by another defendant then on trial, order him to be discharged from the indictment, before the evidence is closed, that he may be a witness for his co-defendant"); § 1364 ("The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in this Code"); § 1365 ("On the trial of or examination upon all indictments, complaints, information, and other proceedings before any Court, magistrate, jury, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offences, the person so charged or accused shall, at his own request but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court, or to the discrimination of the magistrate, grand jury, or other tribunal before which such testimony may be given; provided, his waiver of such right shall not create any presumption against him; that such defendant or accused, when offering his testimony as a witness in his own behalf, shall be deemed to have given to the prosecution a right to cross-examination upon all facts to which he has testified, tending to his conviction or acquittal"); § 1366 ("In all criminal actions, where the husband is the party accused, the wife shall be a competent witness, and when the wife is the party accused, the husband shall be a competent witness; but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such case unless by consent of both of them; provided, that in all cases of personal violence upon either by the other, the injured party, husband or wife, shall be allowed to testify against the other").

PENNSYLVANIA: *Digest of Laws*, 1896 (Pepper & Lewis), "Witnesses," § 1 ("Except upon a preliminary hearing before a magistrate for the purpose of determining whether a person charged with a criminal offence triable in the Court of Oyer and Terminer ought to be committed for trial, and except also upon a hearing under *habeas corpus* for the purpose of determining whether bail ought to be taken upon a commitment for murder in the first degree, or for the purpose of determining in any case how much bail ought to be required, or for the purpose of determining in any case whether a person committed for trial ought to be further held, and except, also, upon hearings before a grand jury, in none of which cases shall evidence for the defendant be heard, and except, also, as provided in § 2 of this act, all persons shall be fully competent witnesses in any criminal proceeding before any tribunal"); § 2 ("In such criminal proceedings, a person who has been convicted in a court of this Commonwealth of perjury, which term is hereby declared to include subornation of perjury, shall not be a competent witness for any purpose, although his sentence may have been fully complied with, unless the judgment or conviction be judicially set aside or reserved [reversed?], or unless the proceeding be one to punish or prevent injury or violence attempted, done, or threatened to his person or property, in which cases he shall be competent to testify"); § 3 ("Nor shall husband and wife be competent or permitted to testify against each other, or in support of a criminal charge of adultery alleged to have been committed by or with the other, except that, in proceedings for desertion and maintenance, and in any criminal proceeding against either for bodily injury or violence attempted, done, or threatened upon the other, each shall be a competent witness against the other, and except, also, that either shall be competent merely to prove the fact of marriage in support of a criminal charge of adultery alleged to have been committed by or with the other"; see St. 1899, *infra*); § 4 ("Nor shall either husband or wife be competent or permitted to testify to confidential communications made by one to the other, unless this privilege be waived upon the trial"); § 8 ("In any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or

direction, no liability merely for costs nor the right to compensation possessed by an executor, administrator, or other trustee, nor any interest merely in the question on trial, nor any other interest or policy of law, except as is provided in § 5 [11] of this act, shall make any person incompetent as a witness"); § 9 (provisions of § 2, *supra*, applied to civil proceedings); § 10 (provisions of § 4, *supra*, applied to civil proceedings); § 11 ("Nor shall husband or wife be competent or permitted to testify against each other, except in those proceedings for divorce in which personal service of the subpœna or of a rule to take depositions has been made upon the opposite party, or in which the opposite party appears and defends, in which case either party may testify fully against the other, and except also that in any proceeding for divorce either party may be called merely to prove the fact of marriage"); § 12 ("In any proceedings brought by either under the provisions of section three [*aliubi*] to protect or recover the separate property of either, both shall be fully competent witnesses, except that neither may testify to confidential communications made by one to the other, unless this privilege be waived upon the trial"); § 14 ("Nor, where any party to a thing or contract in action is dead, or has been adjudged a lunatic, and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy; unless the proceeding is by or against the surviving or remaining partners, joint promisors, or joint promisees, of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors, or joint promisees and the other party on the record, or between such surviving or remaining partners, promisors, or promisees and the person having an interest adverse to them, in which case any person may testify to such matters; or, unless the action be ejectment against several defendants, and one or more of said defendants disclaims of record any title to the premises in controversy at the time the suit was brought and also pays into Court the costs accrued at the time of his disclaimer, or gives security therefor as the Court in its discretion may direct, in which case such disclaiming defendant shall be a fully competent witness; or, unless the issue or inquiry be *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses"); § 15 ("But no person who is incompetent under clauses (*a*), (*b*), (*c*), and (*d*) [§§ 9, 10, 11, 13, *supra*; § 13 deals with attorneys' privileged communications] of this section shall become competent by the general language of clause (*e*) [§ 14, *supra*]"); § 16 ("Any person, who is incompetent under clause (*e*) [§ 14, *supra*] of section five by reason of interest, may, nevertheless, be called to testify against his interest, and in that event he shall become a fully competent witness for either party; and such person shall also become fully competent for either party by a release or extinguishment in good faith of his interest, upon which good faith the trial judge shall decide as a preliminary question"); § 18 ("Hereafter, in any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or direction, although a party to the thing or contract in action may be dead or may have been adjudged a lunatic, and his right thereto or therein may have passed, either by his own act or by the act of the law, to a party on a record who [re]presents his interest in the subject in controversy, nevertheless, any surviving or remaining party to such thing or contract or any other person whose interest is adverse to the said right of such deceased or lunatic party, shall be a competent witness to any relevant matter, although it may have occurred before the death of said party or the adjudication of his lunacy; if and only if such relevant matter occurred between himself and another person who may be living at the time of the trial and may be competent to testify, and who does so testify upon the trial, against such surviving or remaining party or against the person whose interest may be thus adverse, or if such relevant matter occurred in the presence or hearing of such other living or competent person"); § 21 ("In any civil proceeding, whether or not it be brought or defended by a person representing the interests of a deceased or lunatic assignor of any thing or contract in action, a party to the record or a person for whose immediate benefit such proceeding is prosecuted or defended, or any other person whose interest is adverse to the party calling him as a witness, may be compelled by the adverse party to testify as if under cross-examination, subject to the rules of evidence applicable to witnesses under cross-examination, and the adverse party calling such witnesses shall not be concluded by his testimony; but such person so cross-examined shall become thereby a fully competent witness for the other party as to all relevant matters, whether or not these matters were touched upon in his cross-examination; and also where one of several plaintiffs or defendants, or the person for whose immediate benefit such proceeding is prosecuted or defended, or such other person having an adverse interest, is cross-examined under this section, his co-plaintiffs or co-defendants shall thereby become fully competent witnesses on their own behalf as to all relevant matters, whether or not these matters were touched upon in such cross-examination"); § 22 ("Except defendants actually upon trial in a criminal court, any competent witness may be compelled to testify in any proceeding, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to criminate him; nor may the neglect or refusal of any defendant, actually upon trial in a criminal court, to offer himself as a witness be treated as creating any presumption against him, or be adversely referred to by Court or counsel during the trial"); "Desertion," § 3 (action for main-

tenance against deserting husband; wife to be competent for Commonwealth, and husband to be competent); St. 1899, April 11, Pub. L. 41 (preamble states purpose to remove existing disadvantages of the wife); § 1 ("In any civil action brought against the husband to recover necessaries furnished to the wife, if the husband makes defence at the trial upon the ground that the wife had left him without justification or excuse before the necessaries were furnished, or upon any other ground which attacks the wife's character or conduct, she shall be a competent witness in rebuttal for the plaintiff"); § 2 ("In any criminal proceeding brought against the husband, if he makes defence at the trial upon any ground which attacks the wife's character or conduct, she shall be a competent witness in rebuttal for the Commonwealth"); St. 1903, no. 32 (In a prosecution for a husband's failure to support, "the wife shall be a competent witness").

Rhode Island: *General Laws*, 1896, c. 244, § 35 ("No person shall be disqualified from testifying in any action at law, suit in equity, or other proceeding at law or in equity, by reason of his being interested therein or being a party thereto"); § 37 ("In the trial of every civil cause, the husband or wife of either party shall be deemed a competent witness; provided, that neither shall be permitted to give any testimony tending to criminate the other or to disclose any communication made to him or her by the other, during their marriage, except on trials of petitions for divorce between them"); § 40 ("No person shall be deemed an incompetent witness because of his conviction of any crime, or sentence to imprisonment therefor; but shall be admitted to testify like any other witness, except that conviction or sentence for any crime or misdemeanor may be shown to affect his credibility"); § 41 ("No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent; and neglect or refusal so to testify shall create no presumption nor be used in argument against him"); § 42 ("The husband or wife of any respondent in a criminal prosecution, offering himself or herself as a witness, shall not be excluded from testifying therein because he or she is the husband or wife of such respondent"); St. 1903, c. 1110 (amending Gen. L. c. 244, § 37, by adding: "and trials between them involving their property rights").

South Carolina: *Constitution*, 1882, Art. I, § 12 ("No person shall be disqualified as a witness . . . or be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances"; this does not appear in the Constitution of 1895); *Code of Crim. Pr.* 1893, § 63, Cr. C. 1902, § 64 ("In the trial of all criminal cases, the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case"); *Code of Civil Procedure*, 1893, and *Civil Code*, 1902, under the same numbers; § 391 ("A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission"); § 397 ("A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner and subject to the same rules of examination as if he were named as a party"); § 399 ("No person offered as a witness shall be excluded by reason of his interest in the event of the action"); § 400 ("A party to an action or special proceeding in any and all courts, and before any and all officers and persons acting judicially, may be examined as a witness in his own behalf, or in behalf of any other party, conditionally, on commission, and upon the trial or hearing in the case, in the same manner and subject to the same rules of examination as any other witness; provided, however, that no party to the action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event of the action or proceeding, nor any person who previous to such examination has had such an interest, however the same may have been transferred to or come to the party to the action or proceeding, nor any assignor of anything in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when such examination, or any judgment or determination in such action or proceeding, can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf in regard to such transaction or communication, or the testimony of such deceased or insane person or lunatic, in regard to such transaction or communication (however the same may have been perpetuated or made competent), shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee, then all persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing. Nothing contained in section 8 of this Code of Procedure shall be held or construed to affect or restrain the operation of this section. 1. In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law, or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as hereinafter stated, be competent and compellable to give evidence,

the same as any other witness, on behalf of any party to such suit, action, or proceeding. 2. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during marriage"); §§ 396, 398 (old provisions dealing with parties' testimony; on the present subject they are practically supplanted by §§ 391, 400, *supra*).

SOUTH DAKOTA: *Statutes*, 1899, § 6491 (like N. Dak. Rev. Code 1895, § 5653; amended by St. 1901, c. 105, by inserting in par. 2, after "neither party," the words "nor his assignor, nor any person who has or ever had any interest in the subject of the action adverse to the other party or to his testator or intestate"); § 7624 (like N. D. Rev. Code, § 6977); § 8648 (like N. D. Rev. C. § 8188); § 8649 (like N. D. Rev. C. § 8189, except that the Court must submit its opinion to the jury, who may then acquit the person for the purpose); § 8650 (in all proceedings against persons charged with crimes, "the person charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him"); St. 1903, c. 122, amending P. C. 1903, § 803 ("any person who is serving a term in any penitentiary shall be a competent witness," unless he has been "convicted and be serving a sentence for the crime of perjury or of subornation of perjury").

TENNESSEE: *Annotated Code*, 1896, § 5592 ("Every person of sufficient capacity to understand the obligation of an oath is competent to be a witness"); § 5595 ("Persons are rendered incompetent by conviction and sentence for the following crimes, unless they have been restored to full citizenship, under the law provided for that purpose, viz.: abuse of female child, arson and felonious burning, bigamy, burglary, felonious breaking and entering mansion house, bribery, buggery, counterfeiting, or violating any of the provisions to suppress the same, destroying will, forgery, housebreaking, incest, larceny, perjury, robbery, receiving stolen property, rape, sodomy, stealing bills of exchange or other valuable papers, subornation of perjury"); § 5596 ("In all civil actions in the Courts of this State, no person shall be incompetent to testify because he or she is a party to or interested in the issue tried, or because of the disabilities of coverture, but all persons, including husband and wife, shall be competent witnesses, though neither husband nor wife shall testify to any matter that occurred between them by virtue of or in consequence of the marital relation"); § 5597 ("It shall not be lawful for any party to any action, suit, or proceeding in any court of this State to testify as to any transaction or conversation with or statement by any opposite party in interest, if such opposite [party] is incapacitated or disqualified to testify thereto, by reason of idiocy, lunacy, or insanity, unless called by the opposite side, and then [only] in the discretion of the Court"); § 5598 ("In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party"); § 5600 ("In the trial of all indictments, presentments, and other criminal proceedings, in any of the courts of this State, the party defendant thereto may, at his own request but not otherwise, be a competent witness to testify therein"); § 5601 ("The failure of the party defendant to make such request and to testify in his own behalf shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defence is heard by the Court trying the case"); § 6665 ("in person verbally challenged" to a duel is competent to prove "the fact of such verbal challenge"); § 6859 (when a witness without his contrivance is examined by grand jury as to election offences, "no person against whom his evidence is given" is competent against him for an election offence committed prior to examination); § 7581 (convicts are competent against each other in prosecutions for prison offences).

TEXAS: *Revised Civil Statutes*, 1895, § 2300 ("No person shall be incompetent to testify on account of color, nor because he is a party to the suit or proceeding or interested in the issue tried"); § 2301 ("The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications between such husband and wife"); § 2302 ("In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent"); § 2303 ("No person shall be incompetent to testify on account of his religious opinions or for want of any religious belief"); St. 1897, c. 49 (Rev. Civ. St. 1895, § 2979, amended by adding: "In all such suits and proceedings [for divorce from the bonds of matrimony] the husband and wife shall be competent witnesses for and against each other, but neither party shall be compelled to testify as to any matter that will criminate himself or herself"); *Penal Code*, 1895, § 91 ("Persons charged as principals, accomplices or accessories, whether in the same indictment or by different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and if any one or more be acquitted they may testify in behalf of the others"); *Code of Criminal Procedure*, 1895, § 710 (on a prosecution of joint defendants, "when it is apparent that there is no evidence" against one, the jury may be directed to find a verdict as to him, "and if they acquit, he may be introduced as a witness in the case"); § 709 (State attorney may dismiss prosecution as to a defendant jointly indicted, "and the person so discharged may be introduced as a witness by either party"); § 768 ("All persons are competent to testify in

criminal actions except the following: 1. Insane persons, who are in an insane condition of mind at the time when they are offered as witnesses, or who were in that condition when the events happened of which they are called to testify. 2. Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath. 3. All persons who have been or may be convicted of felony in this State, or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted. But no person who has been convicted of the crime of perjury, or false swearing, and whose conviction has not been legally set aside, shall have his competency as a witness restored by a pardon, unless such pardon by its terms specifically restore his competency to testify in a court of justice"); § 770 ("Any defendant in a criminal action shall be permitted to testify in his own behalf therein; but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause; provided, that where there are two or more persons jointly charged or indicted, and a severance is had, the privilege of testifying shall be extended only to the person on trial"); § 771 ("Persons charged as principals, accomplices, or accessories, whether in the same indictment or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others"); § 773 ("All other persons except those enumerated in articles 768 and 775, whatever may be the relationship between the defendant and witness, are competent to testify"); § 774 ("Neither husband nor wife shall in any case testify as to communications made by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offence, and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to extenuate or justify an offence for which either is on trial"); § 775 ("The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offence committed by one against the other"); § 777 ("A defendant jointly indicted with others, and who has been tried and convicted, and whose punishment was fine only, may testify for the other defendant after he has paid the fine and costs"); § 782 ("In trials for forgery, the person whose name is alleged to have been forged is a competent witness, and in all cases not otherwise specially provided for, the person injured or attempted to be injured is a competent witness").

UNITED STATES: *Revised Statutes*, 1878, and *Supplements*; § 858 ("In the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court. In all other respects, the laws of the State in which the Court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty"); § 1078 ("No witness shall be excluded in any suit in the Court of Claims on account of color"); § 1079 ("No claimant, nor any person from or through whom any such claimant derives his alleged title, claim, or right against the United States, nor any person interested in any such title, claim, or right, shall be a competent witness in the Court of Claims in supporting the same, and no testimony given by such claimant or person shall be used except as provided in the next section [*i. e.* when taken and offered by the government attorney]"; repealed by St. 1883, *infra*); § 1977 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . give evidence . . . as is enjoyed by white citizens"); § 2140 ("Indians shall be competent witnesses" in all cases concerning illegal sale of liquor to Indians); § 5392 (every person guilty of perjury or subornation of perjury shall "be incapable of giving testimony" until judgment is reversed); St. 1874, June 22, c. 391, § 8 ("No officer, or other person entitled to or claiming compensation under any provision of this act [against evading customs laws] shall be thereby disqualified from becoming a witness in any action, suit, or proceeding for the recovery, mitigation, or remission thereof . . . [and the defendant may testify]"); St. 1878, March 16, c. 37 ("In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him"); St. 1883, March 3, c. 116, § 6 (in cases in the Court of Claims, no person is to be excluded "because he or she is a party to or interested in the same"); St. 1887, March 3, c. 359, § 8 (similar; adding, "any plaintiff or party in interest may be examined as a witness on the part of the government"; § 1079 of Rev. St. 1878, repealed); St. 1887, March 3, c. 397, § 1 ("In any proceeding or examination before a grand jury, a judge, justice or a United States commissioner, or a Court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the accused shall be a competent witness,

and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution, without the consent of the husband or wife, as the case may be. And such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law"); St. 1892 (for this and other statutes affecting the Chinese, see *post*, § 516, Incapacity by race); St. 1903, c. 487, § 7, Feb. 5, 32 Stat. L. 798 (Bankruptcy Act, 1898, § 21, subd. *a*, amended so as to permit the Court "to require any designated person, including the bankrupt and his wife," to appear for examination "concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act; provided that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt").

UTAH: *Constitution*, 1895, Art. I, § 12 ("In criminal prosecutions, the accused shall have the right . . . to testify in his own behalf; . . . a wife shall not be compelled to testify against her husband, nor a husband against his wife"); *Revised Statutes*, 1898; *Code of Civil Procedure*, § 3412 ("All persons without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility"); § 3413 ("The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination; 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. 3. A party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit, or proceeding, claims or opposes, sues or defends, as guardian of any insane or incompetent person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian, or assignee, or grantee, directly or remotely, of such heir, legatee, or devisee, as to any statement by or transaction with such deceased, insane, or incompetent person, or matter of fact, whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent, or deceased person, unless such witness be called to testify thereto by such adverse party, so claiming or opposing, suing or defending, in such action, suit, or proceeding"); § 3414 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by or against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); *Code of Criminal Procedure*, § 5011 ("The rules for determining the competency of witnesses in civil actions shall be applicable also to criminal actions and proceedings except as otherwise provided in this Code"); § 4515 ("The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife"); § 5014 ("Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife shall be a competent witness for or against the other in a criminal action or proceeding to which one or both shall be parties"); § 5015 ("If the defendant offers himself as a witness he may be cross-examined by the counsel for the State the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him, nor be used against him on the trial or proceeding"); § 5016 ("When two or more persons are jointly or otherwise concerned in the commission of an offence, any one of such persons may testify for or against the other in relation to the offence committed, but the testimony of such witness must not be used against him in any criminal action or proceeding"); § 4851 ("When two or more persons shall be included in the same charge, the Court may, at any time before the defendants have gone into their defence, on the application of the county attorney, or other counsel for the State, direct any defendant to be discharged, that he may be a witness for the State"); § 4852 ("When two or more persons shall be included in the same charge, and the Court shall be of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant").

VERMONT: *Statutes*, 1894, § 1236 ("No person shall be disqualified as a witness in a civil suit or proceeding, at law or in equity, by reason of his interest in the event of the same, as a party or otherwise; but such interest may be shown for the purpose of affecting his credit"); § 1237 ("In actions, except actions of book account, where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the Court to be insane, the other party shall not be admitted to testify in his own favor, except to meet or explain the testimony of living witnesses produced against

him as to facts or circumstances taking place after the death or insanity of the other party; or upon a question upon which the testimony of the party afterward deceased or insane has been taken in writing or by a stenographer in open court, to be used in such action, and is used thereiu"); § 1238 ("When an executor or administrator is a party, the other party shall not be permitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to acts and contracts done or made since the probate of the will or the appointment of the administrator, and to meet or explain the testimony of living witnesses produced against him, as to facts or circumstances taking place after the death of the other party"); § 1239 ("In actions of book account, and when the matter in issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are and when made, and no further, except to meet or explain the testimony of living witnesses produced against him as to facts or circumstances taking place after the death of the other party"); § 1240 ("No married woman shall be disqualified as a witness in a civil suit or proceeding at law or in equity, prosecuted in the name of or against her husband, whether joined or not with her husband as a party; in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed; in actions against carriers, so far as relates to the loss of the property, and the amount and value thereof, and to personal injury alleged to have been sustained by the wife in consequence of the wrongful act or neglect of such carriers; in a suit brought against the husband for the maintenance of the wife; Nothing in this section shall authorize or permit a married woman to testify to admissions or conversations of her husband whether made to herself or to third persons"; see St. 1902, *infra*); § 1241 ("In actions where the husband and wife are properly joined, either as plaintiffs or as defendants, or where either has acted as the agent of the other in business transactions, they shall be competent witnesses, except that neither shall be permitted to testify as to conversations or admissions of the other"); § 1242 ("A married man shall not be disqualified as a witness in a civil suit or proceeding at law or in equity, brought by his wife upon a policy of insurance of property so far as relates to the amount and value of property alleged to be injured or destroyed"); § 1243 ("The libellant and libellee shall be competent witnesses in divorce cases"); § 1245 ("No person shall be incompetent as a witness in any court, matter, or proceeding, by reason of his conviction of a crime other than perjury, subornation of perjury, or endeavoring to incite or procure another to commit the crime of perjury; but the conviction of a crime involving moral turpitude may be given in evidence to affect the credibility of a witness"); § 1246 ("A party to a civil action or proceeding at law or in equity may compel an adverse party, or person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted, or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses. But the party so called to testify may be examined by the opposite party under the rules applicable to the cross-examination of witnesses"); § 1915 ("In the trial of complaints, informations, indictments, and other proceedings against persons charged with crimes or offences, the person so charged shall, at his own request and not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court; but the refusal of such person to testify shall not be considered by the jury as evidence against him"); § 4089 ("In actions against a savings bank, savings institution, or trust company, by a husband to recover for moneys deposited by his wife in her name or as her money, the wife may be a witness as if she were an unmarried woman"); § 4510 ("[In actions for injury caused by the sale of liquor] . . . nor shall a person be disqualified as a witness therein by reason of the marriage relation"); St. 1902, no. 123 ("a married woman shall be a competent witness against her husband in prosecutions under this section," making criminal the failure to support a family).

VIRGINIA: *Code* 1887, and *Supplement of* 1898; § 3345 ("No person shall be incompetent to testify because of interest; or because of his being a party to any action, suit, or proceeding of a civil nature; but he shall, if otherwise competent to testify, and subject to the rules of evidence and practice applicable to other witnesses, be competent to give evidence in his own behalf and be competent and compellable to attend and give evidence on behalf of any other party to such action, suit, or proceeding; but in any case at law, the Court, for good cause shown, may require any such person to attend and testify *ore tenus*, and, upon his failure to so attend and testify, may exclude his deposition"); § 3346 ("The preceding section is subject to the following qualifications: The competency of husband and wife as witnesses for or against each other during the coverture or after its termination, and the competency of attesting witnesses to wills, deeds, and other instruments, shall be determined by the law in force the day before this Code takes effect [see amendment *infra*]. Where one of the original parties to the contract or other transaction, which is the subject of investigation, is incapable of testifying by reason of death, insanity, infancy, or other legal cause, the other party to such contract or transaction shall not be admitted to testify in his own favor or in favor of any other person whose interest is adverse to that of the party so incapable of testifying, unless he be first called to testify in behalf of such last mentioned party, or unless some person, having an interest in or under such contract or transaction, derived from the party so incapable of testifying, has testified in behalf of the latter or of himself to such contract or transaction; or unless the said contract or transaction was personally made or had with an agent of the party so incapable of testifying and such agent is alive and capable of testifying"); § 3347

(" But where any of the original parties to the contract or other transaction which is the subject of investigation are partners or other joint contractors, or jointly entitled or liable, and some of them have died or otherwise become incapable of testifying, the others, or such of them as there may be, with whom the contract or transaction was personally had or made, or in whose presence and with whose privity it was made or had, shall not, nor shall the adverse party, be incompetent to testify because some of the partners or joint contractors, or of those jointly entitled or liable, have died or otherwise become incapable of testifying "); § 3348 (" And where such contract or transaction was personally and solely made with an agent of one of the parties thereto, and such agent is dead or otherwise incapable of testifying, the other party shall not be admitted to testify in his own favor or in favor of a person claiming an interest adverse to that of the principal or such agent, unless he be first called to testify on behalf of said principal or some person claiming under him, or the testimony of such agent be first read or given in evidence by his principal or other person claiming under him, or unless the said principal has first testified "); § 3349 (" If an original party to such contract or transaction, with whom it was personally and solely made or had, or his agent, be examined as a witness orally or in writing, at a time when he is competent to testify, and he afterwards die or become otherwise legally incapable of testifying, his testimony may be proved or read in evidence, and in such case the adverse party may testify as to the same matters "); § 3742 (" [A person convicted of perjury or subornation of perjury shall] . . . be forever adjudged incapable . . . of giving evidence as a witness "); § 3896 (" Approvers shall not be admitted in any case "); § 3897 (" In any case of felony or misdemeanor, the accused may be sworn and examined in his own behalf, and be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the Court or jury by the prosecuting attorney "); § 3898 (" Except where it is otherwise expressly provided, a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor, and a person convicted of perjury shall not be a witness, although pardoned or punished "); § 3899 (" No person prosecuted for unlawful gaming shall be competent to testify against a witness for the Commonwealth in such prosecution, touching any unlawful gaming committed by him prior to the commencement of such prosecution "); § 3900 (" No person who is not jointly tried with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof "); § 4187 (" In any such prosecution [against a convict], any convict in the penitentiary shall be a competent witness for or against the accused "); § 3346 *a*, St. 1897–8, p. 753, § 1 (" Husband and wife shall be competent to testify for or against each other in all civil cases except as is hereinafter provided: First, neither husband nor wife shall be competent to testify for or against each other in any proceeding by a creditor to avoid or impeach any conveyance, gift, or sale from the one to the other on the ground of fraud or want of consideration, but as to said transaction the existing rules of evidence shall remain unchanged; second, where one of the original parties to a contract, matter, or other transaction which is the subject of investigation, is incapable of testifying by reason of death, insanity, infancy, or other legal cause, and the other party to such contract, matter, or transaction is made incompetent to testify by sub-section 2 of section 3346 of the Code of Virginia, then in such case the consort of either party shall be incompetent to testify in relation to such contract, matter, or transaction; and provided, further, that nothing herein contained shall be deemed or construed to alter the existing rules of evidence as to proceedings for divorce "); ib., § 2 (" In criminal cases husband and wife shall be allowed to testify on behalf of each other; but neither shall be compelled to testify against the other. If either, however, be examined in any case as a witness in behalf of the other, the one so examined shall be deemed competent to testify in such case as well as against as in behalf of such other, but the failure of either husband or wife to testify shall create no presumption against the accused nor be the subject of any comment before the Court or jury by the prosecuting attorney "); ib., § 3 (" Neither husband nor wife shall without the consent of the other be examined in any case as to any communication made by one to the other while married, nor shall either of them be permitted without such consent to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted; provided, that this exclusion shall not apply to a criminal proceeding for a criminal offence committed by one against the other, but as to such proceeding the existing rules of evidence shall remain unchanged "); St. 1901–2, p. 799, § 1 (amending St. 1897–8, by adding at the end of § 1: " except in cases where the suit for divorce is brought on the ground of cruelty or desertion, in which cases the husband or wife may testify "); ib., § 2 (amending § 2 so as to read: " In criminal cases, husband and wife shall be allowed, and subject to the same rules of evidence governing other witnesses, may be compelled to testify in behalf of each other; but neither shall be compelled, nor, without the consent of the other, allowed to testify against the other, provided, however, if either be called and examined in any case as a witness in behalf of the other, the one so examined shall be deemed competent, and, subject to the rules of evidence governing other witnesses, may be compelled to testify against the other; the failure," etc., as in St. 1897–8).

WASHINGTON: *Constitution*, 1889, § 22 (" In criminal prosecutions, the accused shall have the right . . . to testify in his own behalf "); *Annotated Code and Statutes*, 1897, § 5990 (" Every person of sound mind and suitable age and discretion, except as hereinafter provided, may be a witness in any action or proceeding "); § 5991 (" No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the ac-

tion, as a party thereto or otherwise, but such interest may be shown to affect his credibility; provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person or by any such minor under the age of fourteen years; provided, further, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity and who have no other or further interest in the action"); § 5992 ("No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility; provided, that any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon"); § 5993 ("The following person[s] shall not be competent to testify: 1. Those who are of unsound mind, or intoxicated at the time of their production for examination. 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"); § 5994 ("The following persons shall not be examined as witnesses: 1. A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); § 6748 (before a justice of the peace, "a party examined by an adverse party may be examined in his own behalf," but if he testify to new matter, the adverse party may be a witness); § 6940 ("Witnesses competent to testify in civil cases shall be competent in criminal prosecutions; . . . Indians shall be competent as hereinbefore provided [?], or in any prosecutions in which an Indian may be a defendant"); § 6941 ("Any person accused of any crime in this State by indictment, information, or otherwise, may, in the examination or trial of the cause, offer himself or herself as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when the accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examinations of other witnesses; provided, that nothing in this Code shall be construed to compel such accused persons to offer himself or herself as a witness in such case; and provided, further, that it shall be the duty of the Court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf"); § 6950 (joint indictees; substantially like Cal. P. C. §§ 1099, 1100, with "may" for "must" in the latter); § 7316 (on a prosecution for sale of liquor to Indians, Indians are to be competent).

WEST VIRGINIA: *Code, Third Edition*, 1891, c. 130, § 22 ("In any civil action, suit, or proceeding, the husband or wife of any party thereto, or of any person in whose behalf any such action, suit, or proceeding is brought, prosecuted, opposed, or defended, shall be competent to give evidence the same as any other witness on behalf of any party to such action, suit, or proceeding, except that no husband or wife shall disclose any confidential communication made by one to the other during their marriage"); § 23 ("No person offered as a witness in any civil action, suit, or proceeding shall be excluded by reason of his interest in the event of the action, suit, or proceeding, or because he is a party thereto, except as follows: No party to any action, suit, or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of examination deceased, insane, or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence"; amended by St. 1897, c. 44, by adding at the end: "provided, however, that where an action is brought for causing the death of any person by wrongful act, neglect, or default under c. 130 of the Code, the physician sued shall have the right to give evidence in any case in which he is sued; but in this event he can only give evidence as to the medicine or treatment given to the deceased, or operation performed, but he cannot give evidence of any conversation had with the deceased"); § 24 ("No person shall be incompetent as a witness on account of race or color"); c. 152, § 17 ("Except where it is otherwise expressly provided, a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor, but a person convicted of felony and sentenced therefor, except it be for perjury, may by leave of Court be examined as a witness in any criminal prosecution, though he has not been pardoned or punished therefor, but a person convicted of perjury shall not be a witness in any case, although he may have been pardoned or punished"); § 18 (analogous to § 3899, Virginia Code, but covering a number of offences); § 19 ("In any trial or examination in or before any Court or officer for a felony or misdemeanor, the accused shall, at his or her own request, but not otherwise, be a

competent witness on such trial and examination. The wife or husband of the accused shall also, at the request of the accused, but not otherwise, be a competent witness on such trial and examination. But a failure to make such request shall not create any presumption against him or her, nor shall any reference be made to or comment upon such failure by any one during the progress of the trial in the hearing of the jury"); c. 50, § 108 (special rules of competency before justices of the peace); St. 1901, c. 93, § 8 (in gaming offences, "no person against whom such witness shall testify shall be competent as a witness for the State in the prosecution against such witness for the same offence or matter as to which such witness so testified, or to any like offence committed by such witness before the commencement of the prosecution in which he was examined as such witness").

WISCONSIN: *Statutes*, 1898, § 4068 ("No person shall be disqualified in any action or proceeding, civil or criminal, by reason of his interest in the event of the same, as a party or otherwise; and every party shall be in every such case a competent witness except as otherwise provided in this chapter. But such interest or connection may be shown to affect the credibility of the witness. Any party to the record in any civil action or proceeding, or any person for whose immediate benefit any such action or proceeding is prosecuted or defended, or the president, secretary, or other principal officer or general managing agent of any corporation which is such a party or for whose benefit the action or proceeding is prosecuted or defended, may be examined upon the trial of any such action or proceeding as if under cross-examination, at the instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify; but the party calling for such examination shall not be concluded thereby, and may rebut the evidence given thereon by counter or impeaching testimony"); § 4069 ("No party, and no person from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person or with a person then insane, in any civil action or proceeding in which the opposite party derives his title or sustains his liability to the cause of action from, through, or under such deceased person or such insane person, or in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first be examined or examine some other witness in his behalf to such transaction or communication between the deceased or insane and such party or person, or unless the testimony of such deceased person given in his lifetime or of such insane person be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates"; amended by St. 1901, c. 181, by adding the word "party," in the first line, the words "in his own behalf or interest"); § 4070 ("No party, and no person from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with an agent of the adverse party or an agent of the person from, through, or under whom such adverse party derives his interest or title, when such agent is dead or insane or otherwise legally incompetent as a witness, unless the opposite party shall first be examined or examine some other witness in his behalf in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates"); § 4071 ("In all criminal actions and proceedings the party charged shall, at his own request, but not otherwise, be a competent witness, and his refusal or omission to testify shall create no presumption against him or any other party thereto"); § 4072 ("A husband or wife shall not be allowed to disclose a confidential communication made by one to the other during their marriage, without the consent of the other. In an action for criminal conversation the plaintiff's wife is a competent witness for the defendant as to any matter in controversy except as aforesaid"); § 4073 ("A person who has been convicted of a criminal offence is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer"); § 4085 ("The Court before whom an infant or person apparently of weak intellect shall be produced as a witness may examine such person to ascertain his capacity and whether he understands the nature and obligations of an oath").

WYOMING: *Revised Statutes*, 1887 (Civil Procedure), § 2588 ("All persons are competent witnesses, except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly"); § 2589 ("The following persons shall not testify in certain respects: . . . Third, husband or wife, concerning any communication made by one to the other during coverture, unless the communication was made in the known presence or hearing of a third person competent to be a witness; and the rule shall be the same if the marital relation has ceased to exist. Fourth, a person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify. Fifth, a person who, if a party, would be restricted in his evidence under § 2590, shall, where the property or thing is sold or transferred by an executor, administrator, guardian or trustee, heir, devisee, or legatee, be restricted in the same manner in any action or proceeding concerning such property or thing"); § 2590 ("A party shall not testify where the

adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person; except, First, to facts which occurred subsequent to the appointment of the guardian or trustee of an insane person, and, in other cases, subsequent to the time the decedent, grantor, assignor, or testator died; Second, when the action or proceeding relates to a contract made through an agent, by a person since deceased, and the agent testifies, a party may testify on the same subject; Third, if a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify to the same transactions or conversations; Fourth, if a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions; Fifth, in an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with or admissions by a partner or joint contractor since deceased, unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued; Sixth, if the claim or defence is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person non-resident of the county; whereupon the book shall be competent evidence; and such book may be admitted in evidence in any case, without regard to the parties, upon like proof by any competent witness; Seventh, if a party, after testifying orally, die, the evidence may be proved by either party, on a further trial of the case, whereupon the opposite party may testify as to the same matters; Eighth, if a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein; Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied"); § 2591 ("A party may compel the adverse party to testify orally or by deposition, as any other witness may be thus compelled"); (Criminal Procedure) § 3288 ("The defendant in all criminal cases, in all the courts in this Territory, may be sworn and examined as a witness, if he so elect, but shall not be required to testify in any case. If the defendant so elect, he may make a statement to the jury without being sworn, but the neglect or refusal to make a statement shall not create any presumption against him, nor shall any reference be made to nor shall any comment be made upon such neglect or refusal"); § 3295 ("When two or more persons shall be indicted together the Court may, at any time before the defendant has gone into his defence, direct any one of the defendants to be discharged, that he may be a witness for the Territory. An accused party may, also, when there is not sufficient evidence to put him upon his defence, be discharged by the Court, or, if not discharged by the Court, shall be entitled to the immediate verdict of the jury, for the purpose of giving evidence for others accused with him"); St. 1899, c. 81 ("In no case shall the husband or wife be a witness against the other, except in criminal proceedings for a crime committed by one against the other, or in a civil action or proceeding by one against the other, or an action brought by the husband for criminal conversation with or seduction of his wife, or in an action brought by either husband or wife for the alienation of each other's affections; but they may in all civil and criminal cases be witnesses for each other the same as though the marital relation did not exist").

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS.

TOPIC I: ORGANIC CAPACITY.

SUB-TOPIC A: MENTAL DERANGEMENT (INSANITY, IDIOCY, DISEASE, INTOXICATION).

CHAPTER XIX.

§ 492. **General Principle of Capacity.** There was a period (and it has not long passed away) when the lunatic and the idiot, in the superstitious belief of the times, which regarded madness as an infliction sent from Heaven, were treated as incapable of being witnesses at all:

1628, *Coke upon Littleton*, 246 b: "*Non compos mentis* is of four sorts: 1. An idiot, which from his nativity, by a perpetual infirmity, is *non compos mentis*. 2. He that by sickness, grief, or accident, wholly loses his memory and understanding. 3. A lunatic that hath sometime his understanding and sometime not, '*aliquando gaudet lucidis intervallis*,' and therefore he is called '*non compos mentis*' so long as he hath not understanding. 4. Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken."

1842, Professor *Simon Greenleaf*, Evidence, § 365: "It makes no difference from which cause this defect of understanding may have arisen; nor whether it be temporary and curable, or permanent; whether the party be hopelessly an idiot or maniac, or only occasionally insane, as a lunatic; or be intoxicated; or whether the defect arises from mere immaturity of intellect, as in the case of children. While the deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness."[1]

But this indiscriminate rule of exclusion, since the progress of our intelligence respecting mental derangement, has been modified and rationalized. While it is still attempted to draw a line which prevents certain classes of persons from being listened to at all — a doubtful policy in any case (*post*, § 501) —, the law endeavors to make its tests fit the purpose. The question being whether the person is trustworthy as a witness, the law now asks whether in each case the derangement or imbecility is such as to make the person untrustworthy as a witness. It no longer excludes absolutely whenever some degree of derangement or imbecility exists; it asks whether the aberration is in the instance in hand sufficient to negative trustworthiness:

[1] *Accord*: Co. Litt. 6 b; Com. Dig., "Testmoigne," A. 1; 1786, White's Case, 2 Leach Cr. C., 3d ed., 482; 1813, Livingston *v.* Kiersted, 10 Johns. 362. The only relaxation of this rule was permitted where the proposed witness was, at the time of offering, enjoying a lucid interval.

1851, *R.* v. *Hill*, 2 Den. & P. C. C. 254;[2] the proposed witness said: "I am fully aware that I have a spirit, and 20,000 of them; they are not all mine; I must inquire — I can, where I am; I know which are mine. Those ascend from my stomach to my head, and also those in my ears. . . . They speak to me constantly; they are now speaking to me. . . . I know what it is to take an oath; my catechism taught me from my infancy when it is lawful to swear"; he was then sworn, and gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed; he was in some doubt as to the day of the week on which it took place, and said: "These creatures insist upon it it was Tuesday night, and I think it was Monday. . . . The spirits assist me in speaking of the date; I thought it was Monday, and they told me it was Christmas Eve, — Tuesday; but I was an eye-witness"; the defence contended that the witness was *non compos mentis*, and that as soon as any unsoundness of mind is manifested in a witness, he ought to be rejected as incompetent; the Court of Criminal Appeal negatived this; *Campbell*, L. C. J.: "It has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases in proof either of guilt or innocence; it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the judge must, in all such cases, determine the competency and the jury the credibility. . . . The rule which has been contended for would exclude the testimony of Socrates, for he had one spirit always prompting him"; *Talfourd*, J.: "It would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions."

1865, *Chapman*, J., in *Kendall* v. *May*, 10 All. 64: "This is the only rational and just rule that can be adopted. Insanity exists in various degrees. . . . Persons who are affected to such an extent that it is expedient to place them in insane hospitals or under guardianship often possess sufficient knowledge . . . of events that took place in their presence to make them useful and trustworthy as witnesses. A rigid rule that would exclude the testimony of all such persons as untrustworthy witnesses would not be conformable to facts and therefore would not be founded in good sense."

1892, *Walker*, J., in *Worthington* v. *Mencer*, 96 Ala. 310, 11 So. 72: "One's infirmity may be such as to render it expedient to place him under guardianship, and even to subject him to personal restraints, and yet he may be fully competent to understand the nature of an oath, to observe facts correctly, and to relate them intelligently and truly. A sweeping rule of disqualification which excludes such a person as a witness would be arbitrary and unsupported by sound reason. The true reason for not admitting the testimony of a person *non compos mentis* in any case is because his malady involves such a want or impairment of faculty that events are not correctly impressed on his mind, or are not retained in his memory, or that he does not understand his responsibility as a witness. When the reason for the exclusion of the witness does not exist, he should be permitted to testify."

This broad and rational principle — that the derangement, in order to disqualify, must be such as substantially negatives trustworthiness upon the subject of the testimony — is now practically everywhere accepted.[3] In

[2] Also reported in 5 Cox Cr. C. 259; 15 Jur. 470; 5 Eng. L. & Eq. 547; 6 Moore P. C. 341.

[3] 1877, Allen *v.* State, 60 Ala. 19, *semble;* 1892, Worthington *v.* Mencer, 96 id. 310, 11 So. 72 (quoted *supra*); 1892, Walker *v.* State, 97 id. 85, 12 So. 83; 1893, Clements *v.* McGinn, — Cal. —, 33 Pac. 920; 1865, Kendall *v.* May, 10 All. 64 (quoted *supra*); 1881, Cannady *v.* Lynch, 27 Minn. 436, 8 N. W. 164; 1898, Guthrie *v.* Shaffer, 7 Okl. 459, 54 Pac. 698; 1893, State *v.* Weldon, 39 S. C. 318, 17 S. E. 689; 1822, Evans *v.* Hettich, 7 Wheat. 470; 1882, District of Columbia *v.* Armes, 107 U. S. 521; 1897, Wright *v.* Express Co., 80 Fed. 85; 1897, Pittsburg & W. R. Co. *v.* Thompson, 27 C. C. A. 333, 82 Fed. 720 (principle of the Armes case applied; the mere fact of being a committed lunatic is not decisive, though it raises a presumption; the Ohio statute excluding persons of "unsound mind" does not change this principle); 1894, Coleman *v.* Com., 25 Gratt.

three particular respects this rationalization of the rule affects its present content; in two of them the field of competency becomes broader, in one of them narrower. *First*, the mere fact of derangement does not in itself exclude the witness; the various forms of monomania are no longer treated as equivalent to complete lunacy. *Secondly*, the inquiry is always as to the relation of the derangement to the subject to be testified about. If on this subject no derangement appears, the person is acceptable, however untrustworthy on other subjects. *Thirdly*, the mere fact of sanity at the time of trial is no longer sufficient; for derangement at the time of the events to be testified to may make the person untrustworthy. The inquiry looks to the capacity to observe as well as to the other elements, the capacity to recollect and to narrate.

§ 493. **Capacity of Observation.** If the inquiry is to deal with the relation of the derangement of each person to his actual trustworthiness, it seems clear that each of the three elements (*ante*, § 478) must be considered. Therefore, in the first place, an incapacity to *observe intelligently* at the time of the events to be observed would suffice to exclude the person:

1859, *Waldo*, J., in *Holcomb* v. *Holcomb*, 28 Conn. 179: "The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly as upon his disposition to describe them honestly, and if the mind of the witness is in such a condition that it cannot accurately observe passing events, . . . the story will make but a feeble impression upon the hearer."[1]

But this necessary conclusion does not seem to have been yet generally accepted; the usual attitude is to consider as immaterial a derangement occurring before the time of testifying:

1878, *Horton*, C. J., in *Sarbach* v. *Jones*, 20 Kan. 500: "The existence of such delusions on his part at the time of the occurrences which he is called upon to relate goes to his credit and not to his competency, when he is of sound mind at the time he is called upon to testify. As there can be neither perfect sanity nor perfect insanity, so no witness, not incompetent within the statute, is to be absolutely excluded because he has been insane and is called upon to narrate matters some of which occurred while he is alleged to have been unconscious."[2]

If this absence of limitation can be regarded as a deliberate step towards the doctrine of the future (*post*, § 501) that all attempts at exclusion for mental or moral incapacity be abandoned and that each witness' testimony be taken for what it seems to be worth, after testing by cross-examination and impeaching by other evidence, then this step to that end is to be welcomed. But the apparent effect of these decisions seems, in some instances at least, to

873; 1902, Czareckl v. R. & N. Co., 30 Wash. 288, 70 Pac. 750; and the cases cited in the ensuing notes. Compare the statutes quoted *ante*, § 488; their precise wording is not usually of importance, as applied in the decisions.

[1] *Accord:* 1882, District of Columbia v. Armes, 107 U. S. 521; 1892, Worthington v. Mencer, 96 Ala. 310, 11 So. 72; 1897, Wright v. Express Co., 80 Fed. 85, *semble*.

[2] *Accord:* 1853, Campbell v. State, 23 Ala. 74; 1893, Clements v. McGinn, — Cal. —, 33 Pac. 920 (former commitment for insanity of a person since discharged does not render incompetent): 1859, Carlton v. Carlton, 40 N. H. 20, *semble*; 1822, Evans v. Hettich, 7 Wheat. 470. The statutes (*ante*, § 488) founded on the California Code are responsible chiefly for this result.

be an inadvertent one. The Courts have been desirous to point out that the fact of insanity is in itself no bar, and have thus declared broadly that any past insanity, merely as such, is no hindrance, if the witness is sane when testifying.

§ 494. **Capacity of Recollection.** The capacity to recollect is an essential part of the idea of testimonial qualification (*ante*, § 478), and is often noted by the Courts in their definitions.[1] But it seldom occurs as the subject of a specific form of disqualifying aberration.

§ 495. **Capacity of Communication.** The capacity of communication is the third essential requirement (*ante*, § 478), and is the one most commonly in controversy. It has two aspects. (1) First, it involves a capacity *mentally to understand* the nature of questions put and to form and communicate intelligent answers.[1] (2) Secondly, does it involve a sense of *moral responsibility*, of the duty to make the narration correspond to the recollection and knowledge, *i. e.* to speak the truth as he sees it? It would seem that the clear absence of such a sense would disqualify the witness. The question is complicated by the necessity, in the earlier cases, of inquiring after that religious sense of the oath-obligation which was in former times paramount, and by the difficulty of determining whether the language of the judges was directed to that subject or to the present one. It is important to know whether, since the oath has been abolished or made optional, an independent testimonial requirement exists, in the shape of a sense of moral responsibility to speak the truth. On principle, it seems to exist; and it has often been pointed out as essential with reference to mental derangement.[2]

§ 496. **Standard of Intelligence is in Trial Court's Discretion.** If it is asked further what shall be the standard by which this capacity to observe, recollect, and communicate is to be judged, the law is found very properly declining to lay down any more detailed rules. The trial Court must determine this capacity.[1] Any more restricted rule, however ingenious, would fail of

[1] 1892, Worthington *v.* Mencer, 96 Ala. 310, 11 So. 72; 1810, Swift, Evidence, Conn., 46 ("sufficient memory to retain facts"); 1894, Bowdle *v.* R. Co., 103 Mich. 292, 61 N. W. 529; 1881, Cannady *v.* Lynch, 27 Minn. 436, 8 N. W. 164 (assimilating statute to common law); 1822, Hartford *v.* Palmer, 16 Johns. 143 (understanding sufficient to "retain in their memory the events"); 1876, People *v.* Hospital, 3 Abb. N. C. 251, Ordronaux, C.; 1882, District of Columbia *v.* Armes, 107 U. S. 521; 1874, Coleman's Case, 25 Gratt. 876 (sufficient "to retain in memory the events").

[1] 1892, Walker *v.* State, 97 Ala. 85, 12 So. 83 ("narrate the transaction in what appears to be an intelligent, rational manner"); 1810, Swift, Evidence, 46, Conn. ("sufficient understanding to relate facts"); 1894, Bowdle *v.* R. Co., 103 Mich. 292, 61 N. W. 529; 1882, District of Columbia *v.* Armes, 107 U. S. 521; 1874, Coleman's Case, 25 Gratt. 876. The following ruling seems erroneous: 1879, State *v.* Feltes, 51 Ia. 496, 1 N. W. 755 (insanity at the time of a confession, held not to exclude it).

[2] 1851, R. *v.* Hill, 2 Den. & P. C. C. 254, 5 Cox Cr. C. 259, *semble;* 1892, Worthington *v.* Mencer, 96 Ala. 310, 11 So. 72 ("understand his responsibility as a witness"); 1810, Swift, Evidence, 46, Conn. ("sense of right and wrong"; where "utterly incapable of any sense of truth," they are excluded); 1865, Kendall *v.* May, 10 All. 63 ("sufficient knowledge of the nature of an oath"; at this time religious tests had been abolished); 1881, Cannady *v.* Lynch, 27 Minn. 437, 8 N. W. 164 ("possess the ability and appreciate the duty to relate events truly"); 1822, Hartford *v.* Palmer, 16 Johns. 142; 1874, Coleman's Case, 25 Gratt. 876 ("a sufficient share of understanding to appreciate the nature and obligation of an oath, to distinguish between right and wrong"); 1882, District *v.* Armes, 107 U. S. 521, *semble*. Compare the cases cited *post*, § 1822 (oath-capacity).

[1] 1840, R. *v.* Hill, 2 Den. & P. C. C. 254, *semble;* 1841, Armstrong's Lessees *v.* Timmons, 3 Harringt. 345; 1819, Den *v.* Vancleve 2 South. N. J. 653; 1865, Kendall *v.* May, 10 All. 63; 1881, Cannady *v.* Lynch, 27 Minn. 436, 8

its purpose, and would hamper rather than assist the process of procuring trustworthy testimony.

§ 497. Capacity presumed; Methods of Ascertainment; Judge and Jury. (*a*) The general rule here applies (*ante*, § 484) that the capacity of the person offered as a witness is presumed; *i. e.* to exclude a witness on the ground of mental or moral incapacity the existence of the incapacity must be made to appear.[1] What is sufficient in order that the offering party may be put to the necessity of adducing evidence of capacity, and the judge to the necessity of determining the existence of capacity, has not been made entirely clear by decisions. It may be supposed that a mere objection raised and a claim to have a *voir dire* examination would suffice. Moreover, the offering of any extrinsic evidence whatever would suffice to make it necessary for the judge to record a similar finding; though an upper Court should pay no attention to the lack of such a finding unless the nature of the evidence appeared. But it is generally accepted that the fact that the witness is, at the time of testifying, or was shortly beforehand, a lawful inmate of a lunatic asylum, or an adjudged lunatic, makes it necessary that his capacity should be examined into and an express finding appear.[2] (*b*) The ways in which the insanity may appear are four: (1) The general behavior of the person, while in court and before taking the stand, may be such as to exhibit the derangement to the judge; (2) The person may be questioned on the *voir dire*, so that his condition appears at once;[3] (3) Other witnesses to the derangement may be ered before the person's testimony is begun;[4] (4) The examination or cr s-examination may disclose clearly the incapacity, in which case the preceding part of testimony may be struck out; or may disclose grounds of doubt, in which case a *voir dire* or other witnesses may be resorted to.[5] (*c*) The pre-

N. W. 164; 1891, Davis *v.* State, 31 Nebr. 248, 47 N. W. 851; 1895, State *v.* Meyers, 46 Id. 152, 64 N. W. 697; 1882, District of Columbia *v.* Armes, 107 U. S. 521.

For the degree of mental derangement that *impeaches credibility*, see *post*, § 932.

[1] 1856, Formby *v.* Wood, 19 Ga. 581 (a lunatic's affidavit); 1888, Mayor *v.* Caldwell, 81 id. 78, 7 S. E. 99 (here the deposition of one afterwards adjudged a lunatic, examined by commission and certified to have been duly sworn, was assumed as competent); 1881, Cannady *v.* Lynch, 27 Minn. 437, 8 N. W. 164.

[2] 1834, *Ex parte* ——, 3 Dowl. Pr. 161, *semble* (habeas corpus ad test.); 1871, Spittle *v.* Walton, L. R. 11 Eq. 420 (in taking an affidavit from an inmate of an asylum, the preliminary inquiry into capacity must appear); 1835, *Re* Christie, 5 Paige Ch. 241 (petition by adjudged lunatic; officer certifying it must state that capacity has been examined); 1876, Ordronaux, C., in People *v.* Hospital, 3 Abb. N. C. 252 (witness formerly in asylum); 1897, Pittsburg & W. R. Co. *v.* Thompson, 27 C. C. A. 333, 82 Fed. 720 (cited *ante*, § 492). In Mayor *v.* Caldwell, 81 Ga. 78, 7 S. E. 99 (1888), the decision held merely that the trial Court was not wrong in assuming the competency of the insane deponent and in leaving the jury to give the deposition what credit they pleased; there is no attempt to lay down the doctrine that the testimony of a conceded lunatic, if attacked, shall go to the jury without preliminary inquiry as to competency. The apparent doctrine of Clements *v.* McGlun, — Cal. —, 33 Pac. 920 (1893), that a discharge from a State asylum is *prima facie* evidence of competency, seems proper, and would render a preliminary examination in such case not indispensable.

[3] 1847, Attorney-General *v.* Hitchcock, 1 Exch. 95, per Parke, B.; 1876, White *v.* State, 52 Miss. 216, 223 (defendant may examine as to sanity of prosecution's witness, even though the judge had before trial determined it to his own satisfaction); 1882, District of Columbia *v.* Armes, 107 U. S. 521 (the Court may examine).

[4] 1847, Attorney-General *v.* Hitchcock, *supra*. *Contra*, but unsound: 1844, Robinson *v.* Dana, 16 Vt. 474. In Mayor *v.* Caldwell, 81 Ga. 78, 7 S. E. 99 (1888), a lunatic's deposition being offered, though the trial Court was held right in refusing to hear impeaching evidence and to determine for itself and in sending all the evidence to the jury to consider, the general doctrine of considering extrinsic evidence was not denied.

[5] 1866, R. *v.* Whitehead, L. R. 1 C. C. R. 33. Compare the cases cited *post*, § 1820 (oath).

liminary determination of capacity is for the judge, not the jury (*ante*, § 487, *post*, § 2550); and it is therefore an improper practice for the judge to leave the testimony provisionally to the jury, to be rejected by them if found ineligible according to legal standards;[6] the jury have nothing to do with preliminary questions of admissibility. But, after the Court has passed on the witness' capacity, it is still open to the jury to conclude that the witness is not credible and to reject the testimony entirely; and the Court's decision does not necessarily affect the estimate which the jury must make.[7]

§ 498. **Deaf-and-Dumb Persons not Idiots.** At the time when unscientific ideas prevailed concerning mental derangement, the deaf-and-dumb were so far treated as idiots that they were presumed to be incapable of testifying, until the contrary was shown.[1] To-day this presumption has disappeared:

1845, *Jewett*, J., in *People* v. *McGee*, 1 Den. 21: "[The woman] was of sense sufficient to have intelligence conveyed to her and to communicate intelligence to T. by signs and motions. . . . If she had sufficient reason to have intelligence conveyed to her by T. and to communicate facts to the understanding of T., although she was not able to talk or write, she could have been sworn and testified through him by signs."[2]

No doubt it may sometimes be wise to examine into the capacity of such persons; but ordinarily the only question will be as to the possibility of communicating with them by some certain system of signs.[3] So far as such persons are shown to be weak-minded, the principles applicable to lunatics will govern.[4]

§ 499. **Intoxication.** It follows from the modern theory of mental derangement (*ante*, § 492) that intoxication, even habitual, does not in itself incapacitate a person offered as a witness. The question is, in each instance, whether the witness was so bereft of his powers of observation, recollection, or narration, that he is thoroughly untrustworthy as a witness on the subject in hand:

1794, *Walker's Trial*, 23 How. St. Tr. 1153; re-examination of Thomas Dunn, an informer: *Dunn* [answering a question, to explain his past behavior]: "I went there when I was intoxicated, the same as I am now." Mr. Justice *Heath*: "How long have you been intoxicated?" "Not very long; I have my recollection about me, though it may seem to the Court that I may be ill or may not." "Were you intoxicated when you gave your evidence just now?" "I was not. . . . Drunk or sober, I will speak the

[6] *Contra*: 1894, Mead *v.* Harris, 101 Mich. 585, 60 N. W. 284, *semble*. In Mayor *v.* Caldwell, 81 Ga. 78, 7 S. E. 99 (1888), the decision was merely that the trial Court was not wrong on the facts in declining to withdraw the evidence (a deposition) from the jury.

[7] 1895, Bowdie *v.* R. Co., 103 Mich. 292, 61 N. W. 529 (McGrath, J., diss., construing Mead *v.* Harris, *supra*).

[1] 1680, Hale, Pl. Cr. I, 34; 1786, R. *v.* Rnston, 1 Leach Cr. L., 4th ed., 408; 1827, Morrison *v.* Lennard, 3 C. & P. 127; 1769, Bl. Com. IV, 303; 1842, Greenl. Evid. § 366.

[2] *Accord*: 1896, Ritchey *v.* Peopie, 23 Colo. 314, 47 Pac. 272 (a deaf-mute, admitted, in spite of difficulty in conducting the examination); 1893, State *v.* Howard, 118 Mo. 127, 143, 24 S. W. 41 (deaf-mute not assumed mentally incompetent); 1893, State *v.* Weldon, 39 S. C. 318, 17 S. E. 689; 1882, Quinn *v.* Halbert, 55 Vt. 228 (admitting the testimony of one who "was bereft of the power of speech, and could not explain any proposition, but only assent or dissent in answer to a direct question by a nod or shake of the head").

[3] For the method of deaf-and-dumb testimony by signs, see *post*, § 811.

[4] The following decision commits an atrocity in the name of the law: 1901, Lee *v.* State, 43 Tex. Cr. 285, 64 S. W. 1047 (rape by intercourse with a woman mentally incapable; the incapacity which is essential to the crime, held also to make the woman incompetent to testify).

truth"; Mr. Justice *Heath*: "I do not know that we can examine a man that is drunk"; the counsel for the prosecution, Mr. Law, proceeded to ask further questions; Mr. Justice *Heath*: "How can you, Mr. Law, examine him after he has told you he is intoxicated? He has made himself so exceedingly drunk, it is impossible to examine him"; but the cross-examiner, Mr. Erskine, was allowed to proceed.

1854, *Chilton*, C. J., in *Eskridge* v. *State*, 25 Ala. 33: "It does not follow necessarily that, because the party was much intoxicated, his reason was so far dethroned as to disable him from comprehending the effect of his admissions or from giving a true account of the occurrence to which they had reference."

First, then, the *capacity of observation* (*ante*, § 478) at the time of the events to be testified to, may be such as should exclude the witness as untrustworthy.[2] Yet here is found a tendency, already noted (*ante*, § 493), to forget this requisite, and to declare that the time of taking the stand is that which alone is to be considered:

1824, *Duncan*, J., in *Gebhart* v. *Shindle*, 15 S. & R. 238: "The point of inquiry is the moment of examination; is the witness then offered so besotted in his understanding as to be deprived of his intelligence? If he is exclude him; if he be a hard drinker, an habitual drunkard, yet if at that time he is sober and possessed of a sound mind, he is to be received."[3]

Secondly, the *capacity of recollection* may appear to be so affected that the witness is untrustworthy:

1819, *Hartford* v. *Palmer*, 16 Johns. 143: "It is a temporary derangement of the mind; and it is impossible for such men to have such a memory of events of which they may have had a knowledge as to be able to present them fairly and faithfully."

Finally, the *capacity of intelligent and truthful narration* may appear to be destroyed temporarily. Here regard is to be had only to the time when the person is put on the stand to testify:

1819, *Hartford* v. *Palmer*, 16 Johns. 143: "A present and existing intoxication to a considerable degree utterly disqualifies the person so affected to narrate facts and events in a way at all to be relied on. It would, we think, be profaning the sanctity of an oath to tender it to a man who had no present sense of the obligations it imposed."

1845, *Rogers*, J., in *Gould* v. *Crawford*, 2 Pa. St. 90, Rogers, J.: "The Court will not suffer a person to be examined as a witness who is in such a state that he cannot understand the obligation of an oath. . . . Yet such cases must depend on the sound discretion of the Court that hears the cause. There are degrees of intoxication; of which the Court alone can judge."[4]

A *confession* must be judged with reference to the time of its utterance; but the mere fact of intoxication at the time does not of itself exclude the confession.[5]

[1] *Accord:* 1880, People v. Ramirez, 56 Cal. 536.

[2] 1883, State v. Costello, 62 Ia. 407, 17 N. W. 605, *semble*.

[3] *Accord:* 1874, Coleman v. Com., 25 Gratt. 865.

[4] *Accord:* 1883, State v. Costello, 62 Ia. 407, *semble;* 1824, Gebhart v. Shindle, 15 S. & R. 238.

For drunkenness as *impeaching credibility*, see *post*, § 933.

[5] 1696, Vaughan's Trial, 13 How. St. Tr. 507 ff.; 1835, R. v. Spilsbury, 7 C. & P. 187; 1878, Lester v. State, 32 Ark. 730; 1879, State v. Feltes, 51 Ia. 496, 1 N. W. 755; 1898, State v. Berry, 50 La. An. 1309, 24 So. 329; 1857, Com. v. Howe, 9 Gray 112, *semble;* 1899, Com. v. Chance, 174 Mass. 245, 54 N. E. 551 (recent recovery from delirium tremens); 1881, State v. Grear, 28 Minn. 426, 10 N. W. 472; 1862, Jefferds v. People, 5 Park. Cr. 547; 1898, State v.

§ 500. **Disease, Blindness, etc.** The *capacity of observation* may be otherwise so lacking, particularly through blindness, that the witness may be incompetent to testify on the specific subject to which the incapacity relates. The *capacity of recollection* or *of communication* may also be so affected by disease or otherwise as to lead to the same result.[1] The discretion of the Court must control.[2]

§ 501. **Policy of Abolishing Disqualification through Mental Derangement.** The tendency of modern times is to abandon all attempts to distinguish between incapacity which affects only the degree of credibility and incapacity which excludes the witness entirely. The whole question is one of degree only, and the attempt to measure degrees and to define that point at which total incredibility ceases and credibility begins is an attempt to discover the intangible. The subject is not one which deserves to be brought within the realm of legal principle, and it is profitless to pretend to make it so. Here is a person on the stand; perhaps he is a total imbecile, in manner, but perhaps, also, there will be a gleam of sense here and there in his story. The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear. There is usually abundant evidence ready at hand to impeach him when he is truly an imbecile or suffers under a dangerous delusion. It is simpler and safer to let the jury perform the process of measuring the impeached testimony and of sifting out whatever traces of truth may seem to be contained in it. The step was long ago advocated by the English commission of judges, in their proposals of reform,[1] and has been approved by two such distinguished writers on the law of Evidence as Mr. Best[2] and Mr. Justice Taylor.[3]

Cannon, 52 S. C. 452, 30 S. E. 589 (confession under the influence of morphine); 1883, Williams *v.* State, 12 Lea 212; 1897, Leach *v.* State, 99 Tenn. 584, 42 S. W. 195 (slight intoxication); 1894, White *v.* State, 32 Tex. Cr. 625, 636, 25 S. W. 784. Drunkenness *induced for the purpose of securing a confession* should exclude it: Ga. Code 1895, § 5194 (admissions obtained by "drunkenness induced for the purpose" are not receivable); 1903, McNutt *v.* State, — Nebr. —, 94 N. W. 143 (liquor given by the sheriff, who then questioned the accused; held inadmissible); 1886, McCabe *v.* Com., — Pa. —, 8 Atl. 54, *semble* (a confession made under the influence of liquor given by an officer to make the accused talk).

[1] 1876, Isler *v.* Dewey, 75 N. C. 466; 1885, Hoard *v.* State, 15 Lea 321, *semble* (wound in head).

[2] 1861, People *v.* Robinson, 19 Cal. 40 (confession in sleep); 1893, Dickson *v.* Waldron, 135 Ind. 507, 35 N. E. 1 (person injured by a wound). It has been ruled that the use of opium, as affecting the powers of observation and recollection, cannot suffice to exclude the user: 1895, State *v.* White, 10 Wash. 611, 39 Pac. 160.

[1] 1853, Common Law Practice Commissioners (Jervis, Cockburn, Martin, Bramwell, Willes, and Walton, all afterwards Judges, except the last), Second Report, p. 10: "Plain sense and reason would obviously suggest that any living witness who could throw light upon a fact in issue should be heard to state what he knows, subject always to such observations as may arise as to his means of knowledge or his disposition to tell the truth."

[2] Evidence, §§ 62, 144.

[3] Evidence, § 1210. It was originally proposed by Bentham: Rationale of Jud. Evid. b. IX, pt. III, c. VI (Works, VII, 427).

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS.

TOPIC I (*continued*): ORGANIC CAPACITY.

SUB-TOPIC B: MENTAL IMMATURITY (INFANCY).

CHAPTER XX.

§ 505. **General Principle.** That with reference to the general capacity to observe, recollect, and narrate, the same principles apply to mental immaturity that are applied to mental derangement, seems undoubted. The question, however, of paramount importance in the earlier common law precedents has been the eligibility of children to take the oath; and the religious sense required for this has usually been the sole subject of argument, to the neglect of the question whether, independently of the oath, any particular degree of intelligence is necessary as a purely testimonial element. It is not always possible to determine whether the language of the Courts is used in view of the oath-test or of an independent testimonial requirement. But this much may be taken as settled, that no rule defines *any particular age* as conclusive of incapacity; in each instance the capacity of the particular child is to be investigated.[1]

§ 506. **Capacity of Observation, Recollection, and Communication.** (1) The capacity of *observation* (*ante*, § 478) is the first of the essential requirements, and has been occasionally so noted by the Courts.[1] (2) The capacity of *recollection* is also an essential requirement;[2] though little likely to be called into question, and probably often intended to be covered by the expressions defiuing the next requirement. (3) For the capacity of *communication*,

[1] 1779, R. *v.* Brasier, 1 Leach Cr. L. 199 ("There is no precise or fixed rnle as to the time within which infants are excluded from giving evidence; but their admissibility . . . is to be collected from their answers to questions propounded to them by the Court"; said primarily of the oath test); 1902, State *v.* King, 117 Ia. 484, 91 N. W. 768 ("All modern decisions seem to declare intelligence, and not age, the proper test"). *Accord:* 1889, McGuff *v.* State, 88 Ala. 147, 7 So. 35; 1873, Draper *v.* Draper, 68 Ill. 17; 1866, State *v.* Ross, 18 La. An 342; 1867, State *v.* Denis, 19 id. 119; 1903, State *v.* Williams, 111 La. —, 35 So. 505; 1813, Com. *v.* Hntchinson, 10 Mass. 225; 1887, Hughes *v.* R. Co., 65 Mich. 10, 31 N. W. 605; 1819, Den *v.* Vancleve, 2 Sonth. N. J 653; 1895, Terr. *v.* DeGutman, 8 N. M. 92, 42 Pac. 68.

The statntory definitions of infants' capacity are collected *ante*, § 488.

[1] 1874, Wade *v.* State, 50 Ala. 164 ("intelligent enough to observe"); 1883, Kelly *v.* State, 73 id. 22 ("of snfficient years and discretion to know what occnrs"); 1867, Flanagin *v.* State, 25 Ark. 96; 1858, People *v.* Bernal, 10 Cal. 66 ("sufficient intelligence to receive just impressions of the facts"; compare the phrasing of the California and related codes); 1890, Ridenhour *v.* R. Co. 102 Mo. 288, 13 S. W. 889 (applying the statntory definition); 1881, State *v.* Johnson, 9 Or. 459.

[2] 1876, Stephen, Dig. Evid., Art. 107; 1883, Kelly *v.* State, 75 Ala. 22 ("of sufficient years and discretion . . . to remember what occurs"); 1867, Flanagin *v.* State, 25 Ark. 96.

as in the case of mental derangement (*ante*, § 495), there are two elements to be taken into consideration: (*a*) There must be a capacity to *understand* questions put, and to frame and express intelligent answers.[3] (*b*) There must be a sense of *moral responsibility*, — a consciousness of the duty to speak the truth. Here it is that the difficulty chiefly comes in determining whether the Courts intend to establish a testimonial requirement independent of the oath. It would seem that they do.[4]

§ 507. **Standard of Intelligence; Discretion of Trial Court.** Agreeably to sound policy, and to the analogy of principle in cases of mental derangement, the trial Court must be the one to determine finally, upon all the circumstances, whether the child has sufficient intelligence according to the foregoing requirements:

1895, *Brewer*, J., in *Wheeler* v. *U. S.*, 159 U. S. 523, 16 Sup. 93: "The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous."[1]

[3] 1680, Hale, Pl. Cr., I, 302 ("of a competent discretion"); 1876, Stephen, Dig. Evid., Art. 107 ("understanding the questions put to him, giving rational answers to those questions"); 1874, Wade v. State, 50 Ala. 164 ("intelligence enough to narrate"); 1883, Kelly v. State, 75 Ala. 22 ("of sufficient intelligence to narrate what occurs"); 1858, People v. Hernal, 10 Cal. 66 ("sufficient capacity to relate facts correctly"); 1894, State v. Douglas, 53 Kan. 669, 671, 37 Pac. 172; 1894, White v. Com., — Ky. —, 28 S. W. 348 ("sufficient intelligence to truthfully narrate facts to which its attention is directed"); 1861, Com. v. Mullins, 2 All. 296 ("the possession of sufficient intelligence to testify in the case"); 1896, Com v. Robinson, 165 Mass. 426, 43 N. E. 121 ("sufficient intelligence"); 1895, Territory v. De Gutman, 8 N. M. 92, 42 Pac. 68 ("sufficient discretion and understanding," "sufficient natural intelligence"); 1881, State v. Jackson, 9 Or. 459.

[4] 1779, R. v. Brasier, 1 Leach Cr. L. 199 ("the sense and reason they entertain of the danger and impiety of falsehood"); 1876, Stephen, Evid., Art. 107, and App. Note XL ("knowing that he ought to speak the truth"); 1810, Swift, Evidence, 45 ("their sense of the obligation to speak the truth, . . . understand the distinction between right and wrong"); 1889, McGuff v. State, 88 Ala. 150, 7 So. 35, *semble* ("sense and reason they entertain of the danger and impiety of falsehood"); 1878, Johnson v. State, 61 Ga 36 ("the capacity to understand the nature of an oath, — which means, perhaps, the degree of intelligence the child shows, so as to satisfy the Court that she is impressed that she ought to tell the truth on such a solemn occasion rather than a lie"); 1869, Simpson v. State, 31 Ind. 90; 1842, State v. Whittier, 21 Me. 347, *semble* ("a sense of accountability for moral conduct"); 1813, Com. v. Hutchinson, 10 Mass. 225 ("a sufficient sense of the wickedness and danger of false swearing"); 1896, Com. v. Robinson, 165 id. 426, 43 N. E. 121 ("sufficient sense of the duty of telling the truth"); 1862, Washburn v. People, 10 Mich. 374, 386, *semble*; 1880, McGuire v. People, 44 id. 287, 6 N. W. 669, *semble*; 1887, Hughes v. R. Co., 65 id. 10, 31 N. W. 605 ("A child cannot testify unless capable of appreciating the obligation of his oath, if he takes an oath, or his affirmation if that is substituted. . . . He must be able to comprehend it; . . . disposed to tell the truth under some sense of obligation"); 1876, State v. Levy, 23 Minn 108; 1881, State v. Jackson, 9 Or. 459; 1895, State v. Reddington, 7 S. D. 368, 68 N. W. 170; 1895, Wheeler v. U. S., 159 U. S. 523, 16 Sup. 93 ("appreciation of the difference between truth and falsehood, as well as of his duty to tell the former"); 1893, State v. Michael, 37 W. Va. 568, 16 S. E. 803, *semble*. Compare the precedents cited *post*, § 1821 (oath). It would seem that, irrespective of theology, the child could be instructed in moral duties, for the purpose of testifying: 1902, State v. King, 117 Ia. 484, 91 N. W. 768.

[1] *Accord:* 1896, People v. Craig, 111 Cal. 469, 44 Pac. 186; 1897, People v. Baldwin, 117 id. 244, 49 Pac. 186; 1901, People v. Daily, 135 id. 104, 67 Pac. 16; 1902, People v. Swist, 136 id. 520, 69 Pac. 223; 1894, Williams v. U. S., 3 D. C. App. 335, 339; 1873, Peterson v. State, 47 Ga. 527; 1896, Minton v. State, 99 id. 254, 25 S. E. 626; 1902, State v. King, 117 Ia. 484, 91 N. W. 768; 1895, Freeny v. Freeny, 80 Md. 406, 31 Atl 304; 1861, Com. v. Mullins, 2 All. 296; 1896, Com v. Robinson, 165 Mass. 426, 43 N. E. 121; 1897, People v. Walker, 113 Mich. 367, 71 N. W. 641; 1876, State v. Levy, 23 Minn. 108; 1890, Ridenhour v. R. Co., 102 Mo. 288, 13 S. W. 889; 1896, State v. Nelson, 132 id. 184, 33 S. W. 809; 1896, State v. Prather, 136 id. 20, 37 S. W. 805; 1895, State v. Sawtelle, 66 N. H. 488, 32

Nevertheless, the Supreme Courts, instead of enforcing this principle rigidly, continue to revise rulings upon the competency of children whom they have never seen or heard.[2] Time should not be wasted on such a task.

§ 508. **Capacity Presumed; Method of Ascertainment.** In the precedents dealing with the oath-test, the fact of capacity is *not presumed* but must be shown, where the child is under fourteen years of age,[1] or certainly where it is under seven years of age[2]; and the same rules are commonly applied under the present principle.[3] The *methods of ascertainment* of children's testimonial capacity are the same as those employed for the oath, and the subject can best be examined under that head (*post*, § 1820).

§ 509. **Policy of Abolishing Disqualification by Infancy.** A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure *a priori* the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable. The desirability of abandoning this attempt and abolishing all grounds of mental or moral incapacity has already been noted, in dealing with mental derangement (*ante*, § 501). The reasons apply with equal or greater force to the testimony of children. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth. To this result legislation must come.[1] To be genuinely strict in applying the existing re-

Atl. 831; 1900, State *v.* Cracker, 65 N. J. L. 410, 47 Atl. 643; 1881, State *v.* Jackson, 9 Or. 459; 1813, State *v.* Leblanc, 1 Tread. Const. (S. C.) 357; 1900, Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855; 1899, State *v.* Blythe, 20 Utah 378, 58 Pac. 1108; 1903, State *v.* Bailey, — Wash. —, 71 Pac. 715; 1901, Uthermohlen *v.* Boggs R. M. & M. Co., 50 W. Va. 457, 40 S. E. 410 (good opinion by Brannon, P.); 1894, State *v.* Juneau, 88 Wis. 180, 59 N. W. 580.

[2] 1902, Walker *v.* State, 134 Ala. 86, 32 So. 703 (child of 10 years, held qualified); 1903, Castleberry *v.* State, 135 id. 24, 33 So. 424 (rape; the child, 8 years old, held competent); 1898, St. Louis I. M. & S. R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222 (statute applied); 1902, People *v.* Swist, 136 Cal. 520, 69 Pac. 223 (boy 6 years of age, held competent); 1894, Williams *v.* U. S., 3 D. C. App. 335, 340 (admitting a child of 7½ years as competent); 1896, Gaines *v.* State, 99 Ga. 703, 26 S. E. 760 (excluded on the facts); 1896, Republic *v.* Ah Wong, 10 Haw. 524, 528 (child of 5, excluded on the facts; Judd, C. J., diss.); 1902, State *v.* Wilson, 109 La. 74, 33 So. 85 (rape, the little girl, between 3 and 4 years old, held not sufficiently intelligent); 1901, Com *v.* Ramage, 177 Mass. 349, 58 N. E. 1078 (child 6 years old, admitted); 1902, People *v.* Beech, 129 Mich. 622, 89 N. W. 363 (child of 6, held incompetent); 1903, Trim *v.* State, — Miss. —, 33 So. 718 (child 5 years of age, held competent); 1896, State *v.* Nelson, 132 Mo. 184, 33 S. W. 809 (child 9 years old, admitted); 1895, Wheeler *v.* U. S., 159 U. S. 523, 16 Sup. 93 (child 5½ years old, admitted); 1899, State *v.* Blythe, 20 Utah 378, 58 Pac. 1108 (child 6 years old, admitted). Compare the statutes cited *ante*, § 488, and the cases cited *post*, § 1821 (oath).

[1] 1680, Hale, Pl. Cr., I, 302.

[2] 1779, R. *v.* Brasier, 1 Leach Cr. L. 199; *post*, § 1821.

[3] 1902, State *v.* King, 117 Ia. 484, 91 N. W. 768 (child under 14, presumed incompetent); 1903, State *v.* Frazier, 109 La. 458, 33 So. 561 (a child of 10, whose dying declarations were admitted, presumed incompetent); 1887, Hughes *v.* R. Co., 65 Mich. 10, 31 N. W. 605, *semble* (here the child was under 7, and the failure of the trial judge to examine and expressly find sufficient understanding was held erroneous); 1895, Terr. *v.* De Gutman, 8 N. M. 92, 42 Pac. 68 (child under 14, presumed incompetent); 1893, State *v.* Michael, 37 W. Va 568, 16 S. E. 803 (stating confusedly that under 14 there is no presumption of competency, and under 6 there is a presumption of incompetency; the effect being that below 14 the offeror must show the child's capacity).

[1] See the Canadian statutes cited *ante*, § 488.

quirement is either impossible or unjust; for our demands are contrary to the facts of child-nature:

1887, *Campbell*, C. J., in *Hughes* v. *R. Co.*, 65 Mich. 10, 31 N. W. 605: "We are compelled to apply the law as we find it, until changed by legislation. But we are greatly impressed with the practical imperfection of the present rules. In France, and probably elsewhere, the Courts refuse to administer an oath to children of tender years, and allow them to be examined without anything more than suitable cautions, leaving their statements on direct and cross-examination to be taken for what they are worth. This seems to be a sensible proceeding, and is probably quite as efficacious as our present system and less likely to abuse. . . . It would be better, we think, to put their testimony on the more rational ground that it is calculated to be of some value, and capable under a proper examination of being reasonably well weighed for what it is worth."

1881, *Robert Louis Stevenson*, Child's Play (in "Virginibus Puerisque"): "It is when we make castles in the air and personate the leading character in our own romances that we return to the spirit of our first years. In all the child's world of dim sensations, play is all in all. 'Making believe' is the gist of his whole life, and he cannot so much as take a walk except in character. . . . One thing, at least, comes very clearly out of all these considerations, that whatever we are to expect at the hands of children, it should not be any peddling exactitude about matters of fact. They walk in a vain show, and among mists and rainbows; they are passionate after dreams and unconcerned about realities; speech is a difficult art not wholly learned; and there is nothing in their own tastes or purposes to teach them what we mean by abstract truthfulness. . . . Show us a miserable unbreeched human entity, whose whole profession it is to take a tub for a fortified town and a shaving-brush for the deadly stiletto, and who passes three fourths of his time in a dream and the rest in open self-deception, and we expect him to be as nice upon a matter of fact as a scientific expert bearing evidence. Upon my heart, I think it less than decent."

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS.

TOPIC I (*continued*): ORGANIC CAPACITY.

SUB-TOPIC C: MORAL DEPRAVITY.

CHAPTER XXI.

§ 515. **General Principle.** A quality which affects only the element of Communication (*ante*, § 478) is Moral Depravity. One who is wholly capable of correct Observation and of accurate Recollection may still be so lacking in the sense of moral responsibility as to be likely to tell his story with entire indifference as to its correspondence with the facts observed and recollected by him. The question is whether any person should upon such grounds be deemed to lack the fundamental capacity of a witness.

There are two objections to any attempt to establish such an incapacity. The first is that in rational experience no class of persons can safely be asserted to be so thoroughly lacking in the sense of moral responsibility or so callous to the ordinary motives of veracity as not to tell the truth (as they see it) in a large or the larger proportion of instances; or, in more accurate analysis, no such defect, if it exists, can be so well ascertainable as to justify us in predicating it for the purpose of exclusion.[1] The second reason is that, even if such a defect existed and were ascertainable, its operation is so uncertain and elusive that any general rule of exclusion would be as likely in a given instance to exclude the truth as to exclude falsities. It is therefore not a proper foundation for a rule of exclusion.

Nevertheless, this conclusion of rational experience is of comparatively modern acceptance. Tradition has handed down to us a number of instances in which certain classes of persons were either excluded or attempted to be excluded on the ground of moral irresponsibility or depravity. In times of more primitive development, such an attitude was not inconsistent with the

[1] The exposition of this has been made by Mr. Bentham, in a passage quoted for another purpose, *post*, § 519.

prevailing social and moral notions;[2] and the abandonment of that attitude has been due to a change in those notions. Some of them never found positive recognition in judicial rulings; they remained merely as unsuccessful attempts. In other instances a definite recognition was given; and the abandonment has come either through judicial disowning or through legislative abolition. The circumstances which were thus once conceived to involve a disqualification may be grouped as five in number: (1) Race or color; (2) sex; (3) religion; (4) infamy (conviction of crime); (5) turpitude of sundry sorts.

§ 516. (1) **Alienage, Race, or Color.** It is everywhere a deep-rooted instinct to distrust the alien of another nation, — much more the alien of another theology or race or color. The progressive diminution of the strength of this instinct, from the days of primitive commercial interchange between neighboring tribes to the modern solidarity of international commerce, has been almost imperceptibly slow; the last hundred years have probably seen more rapid progress, in European and American spheres, than all the preceding centuries. It is a part of this primitive instinct to distrust the good faith and honesty of the alien. It was a much-mooted question in Christendom, down into the 1600s, whether faith should be pledged or need be kept with infidels, or alien infidels, or alien enemies.[1] The singular inconsistency of such a maxim, in furnishing to the alien equal grounds for charging ourselves with the very fault which forms our pretext for condemning him, both typifies the hypocritical basis of all such rules, wherever persisting, and explains the slowness with which progress is made towards better mutual understanding between alien peoples. They are hypocritical, because they assume a superiority which does not in substance exist; and they obstruct progress, because they perpetuate our blindness to the degree of our own faults and of the alien's virtues.

It is no doubt true that certain races are less strongly moved to constant truth-speaking than are others; and the causes, sociological and physiological, are sometimes not difficult to analyze.[2] But it is by no means certain that the English-speaking peoples are the most veracious; it is probable (according to travellers' reports) that some others excel them; so that the difference becomes merely a question of degree. Moreover, the quality of truth-speaking is only one part of the larger trait of honesty and loyalty in general; and, among the other qualities which go to make up that larger

[2] Compare the history of the rules of number of witnesses, *post*, § 2032.

[1] Grotius, De Jure Belli et Pacis, b. II, c. 15, § 8; Phillimore, International Law, 3d ed., vol. II, p. 74; Hallam, Literature of Europe, II, 163, 176, 179; Lecky, Rationalism in Europe, II, 111; Hinschius, Kirchenrecht, VI, pt. 1, p. 99, § 364; Coke, in Calvin's Case, 7 Rep. 2 *a*, 17 *a* ("All infidels are in law *perpetui inimici*, . . . for between them, as with the devils whose subjects they be, and the Christian, there is perpetual hostility and can be no peace"). Chief Justice Willes, in 1745, in that great landmark of enlightened legal opinion, the case of Omichund *v.* Barker (1 Atk. 21), commenting on this doctrine of Coke's as contrary to "common humanity," declared that "the devils, to whom he [Coke] has delivered them [the Pagans], could not have suggested anything worse."

[2] Some of them have been noted by the present writer in an article in the American Law Register, N. s., 1897, pp. 437, 445, entitled "The Administration of Justice in Japan."

trait, there are certainly some in which the Occidental peoples are not much, if at all, superior to some of the Oriental peoples. Again, whatever comparison can be made at all between Occidental and Asiatic or African peoples, as to their standards of veraciousness, ought to be based on the respective practice of each people among its own members, *i.e.* the Chinese dealing with the Chinese, the German with the German, and so on; because there has everywhere and always been a tendency (rooted in human nature), as between aliens, to abandon reciprocally their own native standards, which they would have observed towards their own people; and thus such dealings afford no criterion for judging the normal standard of their people. Add to this, finally, that the classes of native persons with whom the resident alien comes into contact are usually the less scrupulous and honorable; and it will be understood that such observers have merely the less trustworthy sources for forming a judgment upon the people as a whole, and that thus the reports which they send home are by no means a sound basis for public opinion and legislative enactment.[2] Taking all these considerations together, it may be concluded that any judgment of condemnation for the testimony of aliens in general, or of particular races or peoples, is likely to be, in the first place, absolutely incorrect, as not founded on facts; in the second place, relatively unjust, as assuming a superiority of honesty which can only be hypothetical; in the third place, unwise, as tending merely to perpetuate ill-feeling and misunderstanding; and, finally, unsound in principle, as excluding indiscriminately a mass of testimony which ought rather to be weighed and credited in each individual instance for what it may seem to be worth.[4] Such exclusion of testimony, nevertheless, has existed, at one time or another, in four forms:

(*a*) *Aliens*, in general. It would seem that at one time in our history, for some purposes at least, a ban had prevailed against aliens as witnesses.[5]

[2] To offer here the authorities for the above generalizations would be to go too far astray. But the extent of material to support them would probably be surprising to most persons; the following may serve as a single illustration: Hon. C. W. Bradley, LL.D., in a report in H. Ex. Doc. 29, p. 176, 40th Cong., 3d sess.: "It is a mortifying fact that, were a balance to be struck between the aggregate losses suffered by Americans from Chinese pirates, Chinese thieves and debtors, on the one hand, and, on the other, the injuries inflicted on Chinese merchants, tradesmen, compradors, and citizens in the non-payment of debts honestly due them by American merchants, agents, shipmasters, mariners, etc., we should find that balance to our debt in a ratio of full 90 per cent. I speak advisedly. On the score, too, of official fidelity and punctuality in fairly carrying out their treaty obligations as against their own countrymen, I apprehend that the consular officers of America and Europe have been guilty of as many and as serious laches as can be produced against the native magistracy of China in their official shortcomings towards foreigners."

[4] Compare what is said *post*, § 936, as to the discrediting of a witness by reason of race.

[5] 1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, 1002 (Duke: "Is the Bishop of Ross a sufficient witness against me? There be points enough in the law to prove him no sufficient witness. He is a stranger and a Scot; a stranger can be no sufficient witness much less a Scot; . . . If a Scot come into England without a passport, he may be a lawful prisoner. . . . [Bractou saith] they must be *legales*, lawful men, and so cannot strangers be, as the bishops of Ross and Rodolph"; L. C. J. Catlin: "Bracton indeed is an old writer of our law, and by Bracton indeed I do may be a witness; a stranger, a bondman, may be a witness. Ask you all the Judges here." And the Judges affirmed that he may. . . . Attorney Wilbraham: "This were a strange device, that Scots might not be witnesses; for so, if a man would commit treason, and make none privy but Scots, the treason were unpunishable, and so were a kind of men found out with whom a man might freely conspire treason").

But this primitive notion has long since ceased to have any recognition;[6] except, to be sure, in our Federal naturalization statute.[7]

(*b*) *Negroes.* By the laws of the Southern States, before the Civil War, persons of the negro race were disqualified from testifying, either absolutely or only in proceedings against white persons; and even in some of the Northern and Western States the same rule obtained.[8] It does not seem to have been regarded as abrogated by implication through the Fourteenth Amendment to the Federal Constitution;[9] and such laws existed in at least one Southern State as late as 1876.[10] They now remain no longer in any jurisdiction, except Delaware,[11] and perhaps Nebraska.[12]

(*c*) *Indians.* In the course of our "benevolent assimilation" of the Indian race — that process which with all its moral problems need at least not have been shadowed by excessive assumptions of virtuous superiority[13] — there were a number of regions in which testimonial incapacity was by law predicated of the Indian.[14] These have now almost all disappeared in the course of enlightened progress.[15] The traces that remain will probably persist so long as, in any part of the community, that public opinion is recognized which regards the Indian chiefly as an object of selfish exploitation and unscrupulous plunder; for this brutal spirit is likely enough to combine with greed for the Indian's land a distrust of his testimony.

(*d*) *Chinese.*[16] No statutory exclusion of the Chinese race as witnesses seems ever to have obtained in any State law except that of California; and this has there disappeared since the Code of 1872. The condition of public feeling in that community against the economic encroachments of Chinese laborers explains and extenuates (while it may not excuse) this blunder in

[6] 1631, Lord Audley's Trial, 3 How. St. Tr. 401, 411 (a person who had not taken the oath of allegiance, held competent); 1634, Coke, Fourth Institute, 279 (says that Bracton's statement "is to be understood of an alien infidell").

[7] U. S. Rev. St. 1878, § 2165, cl. 6, being St. 1816, March 22, c. 32, § 2 (aliens applying for naturalization must prove their five years' residence "by the oath or affirmation of citizens of the United States"); 1892, Fong Yue Ting *v.* U. S., 149 U. S. 698, 730, 13 Sup. 1016 (statute noted as valid).

[8] In Iowa as late as the Code of 1855, § 2388. These statutes are collected in Appleton, Evidence, App. pp. 271–278.

[9] No authorities on the precise point have been found.

[10] Ala. Code 1876.

[11] Del. Rev. St. c. 107, § 4; quoted *ante*, § 488.

[12] Nebr. Comp. St. § 5902; quoted *ante*, § 488. Probably these laws are inoperative in Federal courts under the U. S. Rev. St. § 1977. There is an express prohibition against such exclusion in the following jurisdictions: Ariz. Rev. St. § 1863; D. C. Comp. St. c. 71, §§ 5, 7; Tex. Rev. Civ. St § 2300; U. S. Rev. St. §§ 858, 1078, 1977; W. Va. Code, c. 130, § 24. These statutes are set out *ante*, § 488.

[13] Here, again, it would be impracticable to cite authorities upon the relative merits of Indian character; the following will indicate how incorrect some of the ordinary notions are: Professor Shaler, "Kentucky," 109: "In the early days, the Indian warfare was singularly humane; they never outraged their women prisoners; and rarely butchered their captives. They had now learned a more brutal warfare from the whites. There can be no question that the Indian customs of war were debased by the example of their enemies."

[14] An early exception may be found in the Massachusetts Colonial Laws (Thayer, in "A Chapter of History," Harvard Law Review, IX, 1).

[15] There apparently remains some sort of disqualification in the following statutes: Nebr. Comp St. §§ 4734, 5902; Minn. G. St. § 2007; U. S. Rev. St. § 5392; Wash. Annot. C. & St. §§ 6940, 7316. But these are probably annulled for Federal courts by U. S. Rev. St. § 1977. Discrimination by reason of race is expressly prohibited in W. Va. Code, c. 130, § 24. These statutes are set out *ante*, § 488.

[16] Compare the authorities *post*, § 2054, as to requiring *corroboration* for Chinese testimony; and *post*, § 936, with reference to *discrediting* a witness by reason of his race.

the policy of the testimonial law. But the just and eloquent denunciation which that law once received from a Federal judge[17] seems to have been forgotten; for a similar law, though more restricted in scope, has since made its appearance in a place where it was less to be expected, namely, in the Federal statute-book.[18] Of these statutes it can only be said that they do not come consistently from a Legislature which in this series of enactments was itself breaking solemn treaty-faith with the very nation whose members it thus condemned as oath-breakers; and that the supposed special danger of perjury by Chinese attempting to evade those statutes of exile was precisely what might be expected from the people of any country when an unjust measure is attempted to be enforced by the harshest means.[19]

§ 517. (2) **Sex.** In spite of the example of some of the surrounding peoples, notably of Scotland,[1] there seems never to have been in the law of England any general testimonial disability based on sex.[2] This failure to discriminate against women is perhaps another illustration of what has been sometimes forgotten, that the oppressive disabilities, so often inveighed against, of women in England, had regard solely to the married state, and not to sex itself.

§ 518. (3) **Religion.** The religious belief of a witness was of consequence, at common law, chiefly with reference to his ability or willingness to submit to the test of the oath, — a test wholly independent (as pointed out *post*, § 1823) of his testimonial capacity.[1] But there is an aspect in which the witness' religion may be considered as affecting his testimonial capacity, namely, when the religion sanctions false testimony. Does the belief in such a religion — termed by Bentham "cacotheism"[2] — make its adherent so untrustworthy that he ought not to be listened to at all? Upon the considera-

[17] 1867, Sawyer, J., in People *v.* Jones, 31 Cal. 573 (where the accused, robbing a Chinaman, had said that it did not matter whether the latter recognized him, since a Chinaman could not testify against him).

[18] U. S. St. 1892, May 5, c. 60, § 6, 27 Stat. L. 25 (Chinese claiming to remain in U. S. must prove the fact of residence prior to passage of the act "by at least one credible white witness"); 1892, Fong Yue Ting *v.* U. S., 149 U. S. 698, 726, 730, 742, 759, 13 Sup. 1016 (statute held constitutional; three judges dissenting); U. S. St. 1893, Nov. 3, c. 14, § 2, 28 Stat. L. 7, amending § 6 of St. 1892 (a Chinese re-entering as a merchant formerly residing here must prove his mercantile character by "two credible witnesses other than Chinese"); 1900, Li Sing *v.* U. S., 180 U. S. 486, 21 Sup. 449 (statute applied).

[19] Of the "grievous wrong" of this statute of 1892, Mr. Justice Brewer, himself the son of a missionary, has said judicially (Fong Yue Ting *v.* U. S., 149 U. S. 698, 744, 13 Sup. 1016): "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius ask, 'Why do they send missionaries here?'"

[1] 1705, Captain Green's Trial, 14 How. St. Tr. 1199, 1292 (Scotland; "in crimes atrocious, occult, and excepted, a woman is never refused").

[2] It is true that, as late as 1627, Coke in the Commentary on Littleton (6 *b*; see also 29 *b*, 158 *b*) says that "in some cases women are by law wholly excluded to bear testimony, as to prove a man to be a villein" (1285, 13 Edw. I, Brooke's Abridgment, De Nativo Habendo). But this likely refers to the even then obsolete process of "trial by witnesses," and not to the witnesses in the modern sense, who had only come into general use a century before Coke's time (*post*, § 575). The passage from Coke, quoted *post*, § 575, naming all the grounds of incompetency, does not name sex. For an interesting summary of the disqualifications by sex in the Roman and other foreign systems of law, see Best, Evidence, § 64; Hinschius, Kirchenrecht, VI, pt. 1, p. 98, n. 2, § 364.

[1] The authorities upon *capacity to take the oath* are collected *post*, §§ 1815–1829.

[2] Rationale of Judicial Evidence, b. IX, pt. III, c. V, § 2 (Bowring's ed., vol. VII, p. 423); b. I, c. XI, § 7 (vol. VI, p. 271); Introductory View of the same, c. XXI, § 3 (vol. VI, p. 106).

tions already noticed under the foregoing topics,[3] it would seem that even in this extreme case it is impolitic to exclude the witness; because he may perhaps tell the truth, and because the ordinary tests of untruth are sufficient to justify us in taking the risk of at least listening. The question is hardly likely to occur in practice; and yet, if the Jesuit, or the Roman Catholic in general, entertained this belief (as was sometimes formerly charged), that the Church in certain situations sanctioned false testimony, the very case would seem to be presented. Nevertheless, at the time when that charge against Papists and Jesuits was generally believed in Protestant England, the Courts steadily refused to make it a ground of exclusion;[4] though it was conceded to discredit the witness.[5] The conclusion is, then, that no rule of exclusion for "cacotheists" (as distinct from theological incapacity to take the oath) has ever been recognized in our law.[6]

§ 519. (4) **Infamy, by Conviction of Crime; History and General Policy.** The disqualification of a person who has been convicted of crime seems not to have been fully established in our law until well on into the 1600s; although the readiness of the Crown lawyers in treason trials to favor all testimony for the prosecution, however tainted, may serve to explain the earlier instances of its admission in criminal cases as exceptions to a general rule. It is firmly enough established, and some learning about it already exists (though not without marks of novelty), by the end of the 1600s.[1]

The thought underlying this exclusion is nowadays plain enough; the man who has been guilty of a heinous crime cannot be trusted in any respect, therefore cannot be trusted in his testimony. This thought is one which might be supposed peculiar to the social stratification of England, where class degradation was of itself a serious source of untrustworthiness,[2] and where a judicial accusation of crime was in fact a perquisite chiefly of the "lower classes."[3] But the early prevalence of the same notion of incompetency in other systems of law, and its persistence in many of the Southern communities of our own modern democracy, indicate that there is something generic and universal in its origin. At the same time, it may be suggested that this generic feature was confined to the effect of infamy as a punishment for

[3] See also the passage from Bentham, quoted *post*, § 519.

[4] 1679, Whitehread's Trial, 7 How. St. Tr. 311, 361, 379 (Witness: "I hope a Roman Catholic may be a lawful witness"; L. C. J. Scroggs: "Yes, I deny it not"); 1685, Oates' Trial, 10 id. 1079, 1192.

[5] *Post*, § 935.

[6] The only contrary expression was probably used of oath-capacity; 1833, O'Neall, J., in Anon., 1 Hill S. C. 258 ("the belief of a witness that he was not bound on oath to tell the truth would, if coming from his own lips, render him incompetent to be sworn").

[1] 1613, Browne v. Crashaw, 2 Bulstr. 154 (two persons attainted of felony were excluded; for, per Coke, C. J., "he is not a fit person to serve of a jury, nor yet to be an indifferent witness; and by the same reason the testimony of such a one for a witness in all cases is to be rejected"); 1616, Earl of Somerset's Trial, 2 How. St. Tr. 965, 985 (illustrating the practice of using the sworn testimony of a convicted accomplice); 1637, Bishop of Lincoln's Trial, 3 id. 804, 807, 812 (an objection that a witness had been "sentenced in the Star Chamber," was overruled, since it was not "for any matter of perjury, or crime that should take away his testimony").

[2] *Post*, § 575. Compare our traditional phrase, "of poor but honest parents."

[3] "Most accused persons are poor, stupid, and helpless" (Stephen, History of the Criminal Law, I, 442).

crime, while its moral significance as a source of distrust in testimony was peculiarly marked in English conditions. At any rate, in one respect at least, English social facts affected its scope; for one of its irrational and inconsistent limitations, namely, that the judgment of conviction, and not the actual guilt, caused the disqualification, may be accounted for by remembering the English tendency (noted in other connections also, *post*, § 982) to ignore social offences so long as they do not bring the offender to the formal ignominy of legal condemnation, *i. e.* to accept an external, not an internal, standard of guilt. No doubt, this same limitation rested to some extent on the notion of disqualification as a part of the punishment for the crime, *i. e.* that the degradation, which by these social standards must follow immediately upon public judgment of guilt, should naturally involve an exclusion from equal status in the witness-box. Nevertheless, in whatever degree the disqualification may have been thought of as a part of the punishment of the offender himself, it was obvious that this theory could not of itself justify the incidental punishment of innocent persons who might need the convict's testimony; and hence the justification had ultimately to be founded on some more acceptable reason. Hence, as soon as the rule begins to be reasoned about, we find it placed upon the more plausible theory of actual moral turpitude, *i. e.* the person is to be excluded because from such a moral nature it is useless to expect the truth, — a notion which at least avoided the fallacy of the punishment-theory, and came finally to be put forward as the orthodox one of the common law:

Ante 1727, Chief Baron *Gilbert*, Evidence, 139: "The second sort of persons excluded from testimony for want of integrity are such as are stigmatized. Now there are several crimes that so blemish that the party is ever afterwards unfit to be a witness, . . . and the reason is very plain, because every plain and honest man affirming the truth of any matter under the sanction and solemnity of an oath is entitled to faith and credit, . . . but where a man is convicted of falsehood and other crimes against the common principles of honesty and humanity, his oath is of no weight, because he hath not the credit of a witness, . . . and he is rather to be intended as a man profligate and abandoned than one under the sentiments and convictions of those principles that teach probity and veracity."

1824, Mr. *Thomas Starkie*, Evidence, 83: "Since the object of the oath is to bind the conscience of the witness, . . . it follows also that the testimony of a person who by the turpitude of his conduct has shown that he is regardless of all laws both human and divine ought not to be received, for it cannot reasonably be expected that such a person would regard the obligation of an oath."

1810, Chief Justice *Swift*, Evidence, 52: "Persons convicted of crimes evincive of a want of regard for those moral and religious principles that constitute the obligation of an oath are excluded from testifying."

This theory, plausible enough at first sight, and calculated to persist until general social conditions permitted a different sort of reasoning to obtain recognition, sufficed to maintain the common-law doctrine in full force until the time of Bentham. His lucid exposition of its shortcomings and his determined attack upon its fallacies proved irresistible. The almost complete disappearance of this disqualification from Anglo-American law in the last

half-century has been due to those arguments, first promulgated by him, of which the following are salient passages:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. III, c. III (Bowring's ed. vol. VII, pp. 406 ff.): "Improbity, in whatever shape or degree, is still farther [than interest] from being a proper ground of exclusion. . . . Let us begin with perjury. In perjury may be seen by far the strongest case: the case in which the pretence for exclusion on the score of security against deception wears the fairest outside. . . . Perjury, in addition to the prevalence of the ordinary motives on some individual occasion or occasions, indicates the particular species of delinquency into which the individual has thus been impelled; viz. mendacity: the very species by which the most plausible of all pretences for exclusion on the ground of improbity is afforded. In any other case, the argument for the exclusion is no more than this: He has violated the obligations of morality in some sorts of ways; therefore it is more or less probable that he will, upon occasion, violate them in this sort of way. In the case of mendacity it runs thus: He has violated the obligations of morality not only in other sorts of ways, but in this very sort of way, on former occasions; therefore it is more or less probable that so he will on the occasion now in hand. For suspicion, a most perfectly proper ground; for rejection, none whatever. Reasons: those already mentioned [for interest and the like]; to which may be added those which follow. 1. In this line of delinquency, beyond most, if not all others, the scale is lengthy, the degrees are numerous. . . . To all these different levels the eye of judicial suspicion has the power of adjusting itself. Exclusion knows no gradations: blind and brainless, it has but one alternative; — shut or open, like a valve; up or down, like a steam-engine. . . . 2. When the door of the witness-box is shut against a proposed witness on this score, it is generally on the ground of some single transgression of this sort. But a single transgression of this sort, — what does it prove? . . . That on one assignable occasion the convict has been known to fall into that sort of transgression, which every human adult must also have fallen into, more times than one, on occasions assignable or unassignable. 'I said,' says the Psalmist, 'I said in my wrath, all men are liars.' It was in his wrath that the observation came from him; but he need not have wished to retract it in his coolest moments. From a single lie told in the course of ever so long a life, a man may, without any grammatical impropriety, be denominated a liar. . . . Upon the whole, he who considers how few in comparison are the occasions in which any advantage (howsoever impure, and overbalanced by ultimate disadvantage) is to be gained by falsehood, will, I imagine, join with me in the opinion, that, from the mouth of the most egregious liar that ever existed, truth must have issued at least a hundred times, for once that falsehood, wilful falsehood, has taken its place. . . . What I am contending against (let it never be out of sight) is absolute rejection: rejection in all cases: — not suspicion and distrust. [3.] The very repugnance, with which it is but natural the reader should have received the proposition of opening the door of justice to testimony of this tainted kind, is a sort of proof and earnest of the safety of the measure. . . . So broad, so prominent is the stigma — so conspicuous and impressive the warning which it gives, — the danger is, not that the man thus distinguished should gain too much credence, but that he should not gain enough. *Fœnum habet in cornu.* [4.] Suppose an inexorable door shut against him; or, although open, suppose an inexorably deaf ear turned to him; and observe the consequence: — that crimes, all imaginable crimes, may be committed with impunity, with sure impunity, on his person and in his presence. . . . [5.] Infamy, and (as a visible sign of infamy) exclusion from the sanctuary of justice, . . . one of the instances, which, in but too great number, may be found in the English as well as other established systems, of the sort of punishment which has been called *mis-seated* punishment: punishment *in alienam personam:* a sort of punishment which, in this particular application of it, may be styled *chance-medley* punishment. The punishment does not fall upon the witness who is disqualified, but upon all persons who may have need of his evidence. A certain person has offended, and, to add a sting to his punishment, an

unoffending crowd is collected below, and a pailful of punishment is thrown down upon their heads out of a window. An innocent stranger is laid hold of, and a sword run through his body, that with the point of it a useless scratch may be given to the caitiff who has provoked all this vengeance. . . . [6.] If from that modification of improbity which consists in a breach of veracity on the very sort of occasion . question (viz. judicial testimony), no sufficient ground for exclusion can be deduced, — much less (it is evident) can it, from improbity manifesting itself in any other shape. . . . A sample or two must serve instead of a complete list. To judge of offences by punishments, the most detestable of mankind should be found in the class of traitors. . . . During the warfare between the Two Roses, — that is, from generation to g eration, — the good people of England, good and bad together, were alternately loyalists and traitors: consequently, if the men of law were fit to be believed, in all that time scarce a man in the country that was fit to be believed. Look back, as above, to a few hundred years' distance in the track of time, you see a whole nation composed of traitors. Look on to few hundred degrees' distance in the track of space, you may see a whole colony composed of felons: and felons not *in posse* merely, like the traitors, but *in esse*, duly converted into that state in due form of law. Upon the evidence of this or that one of those felons, this or that other of them has from time to time suffered death: murdered, thereby, or not murdered, is a question I leave undiscussed for the amusement of those who sent them there. . . . Take homicide in the way of duelling. Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear — and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it, — has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie, — and the inference of the law is, that he cannot open his mouth but lies will issue from it. Such are the inconsistencies which are unavoidable in the application of any rule which takes improbity for a ground of exclusion. Take it for a ground of suspicion only, all these absurdities are avoided. . . . If the legislator had his choice of witnesses upon every occasion, and witnesses of all sorts in his pocket, he would do well not to produce any, upon any occasion, but such over whose conduct the tutelary motives exercised despotic sway; in a word, to admit no other men for witnesses than perfect men. But perfect men do not exist: and if the earth were covered with them, delinquents would not send for them to be witnesses to their delinquency. In such a state of things, then, the legislator has this option, and no other: to open the door to all witnesses, or to give license to all crimes. For all purposes, he must take men as he finds them: and, for the purpose of testimony, he must take such men as happen to have been in the way to see, or to say they have been in the way to see, what, had it depended upon the actors, would have been seen by nobody."[4]

There can be, then, no justification for the disqualification of a person by reason of conviction of crime; and legislation has now in most jurisdictions recognized this, with more or less thoroughness, by abolishing the common law rule. In a few jurisdictions, nevertheless, it remains in full scope (though defined by statute), and in many others it is retained for the crime of perjury.[5] These anachronisms ought not to be longer countenanced:

1902, *Riddick, J.*, in *Vance* v. *State*, 70 Ark. 272, 68 S. W. 37: "We take this occasion, also, to call attention to the backward state of the law in this State in reference to the

[4] These arguments will be found epitomized in the treatise of Chief Justice Appleton of Maine, on Evidence (1860), c. III. Similar ones were published (*circa* 1823) by Mr. Justice Edward Livingston of Louisiana, in his Introductory Report to the Code of Evidence (Works ed. 1872, I. 468).

[5] The statutes are collected *ante*, § 488.

competency of witnesses convicted of felony. The statutes which render such witnesses incompetent belong to a class of antiquated laws which suppress evidence, and which the wisdom of modern ages has discredited and shown to be unreasonable and injurious. They are of the same class as the laws which formerly forbade the parties to the suit from testifying, and closed the mouth of the defendant on trial for his life, and should be repealed, as these laws have been repealed, for such matters should go only to the credit or impeachment of the witness, not to the exclusion of his testimony. There is no valid reason why a person who knows anything material to the decision of a case on trial should not be permitted to tell it, whatever may be his character, the jury being allowed to weigh his testimony in connection with his character and antecedents. These statutes not only suppress evidence, but the application of them often presents difficult and doubtful questions, which, being decided in the hurry of trial, frequently result on appeal in reversals, and in this way justice is often thwarted. There are very few States that now retain such laws, and we think our legislators might well consider whether they should not be repealed in this State also."

§ 520. Same: Kind of Crime that Disqualifies.

1842, Professor *Simon Greenleaf*, Evidence, § 373:[1] "It is a point of no small difficulty to determine precisely the crimes which render the perpetrator thus infamous. The rule is justly stated to require, that 'the *publicum judicium* must be upon an offence, implying such a derelletion of moral principle, as carries with it a conclusion of a total disregard to the obligation of an oath.'[2] But the difficulty lies in the specification of those offences. The usual and more general enumeration is, *treason*, *felony*, and the *crimen falsi*.[3] In regard to the two former, as all treasons, and almost all felonies were punishable with death, it was very natural that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a Court of Justice. But the extent and meaning of the term, *crimen falsi*, in our law, is nowhere laid down with precision. In the Roman Law, from which we have borrowed the term, it included not only forgery, but every species of fraud and deceit.[4] If the offence did not fall under any other head, it was called *stellionatus*,[5] which included 'all kinds of cozenage and knavish practice in bargaining.' But it is clear, that the Common Law has not employed the term in this extensive sense, when applying it to the disqualification of witnesses; because convictions for many offences, clearly belonging to the *crimen falsi* of the civilians, have not this effect. Of this sort are deceits in the quality of provisions, deceits by false weights and measures, conspiracy to defraud by spreading

[1] This topic, being practically almost obsolete, and destined soon to become entirely so, may be here sufficiently expounded by quoting the words of Professor Greenleaf, which have served to guide our Courts in their rulings since 1842. Those passages, including such notes as are here reproduced, are placed in quotation marks; the scanty modern rulings are added without such marks.

[2] "2 Dods. R. 186, per Sir Wm. Scott."

[3] "Phil. & Am. on Evid. p. 17; 6 Com. Dig. 353, *Testmoigne*, A. 4, 5; Co. Lit. 6, b.; 2 Hale, P. C. 277; 1 Stark. Evid. 94, 95. A conviction for petty larceny disqualifies, as well as for grand larceny: Pendock *v.* Macklnder, Willes, R. 665"; *accord*, for grand larceny, 1899, State *v.* Clark, 60 Kan. 450, 56 Pac. 767.

[4] "Cod. Lib. 9, tit. 22, ad legem Corneliam de falsis. Cujac. Opera, Tom. lx. In locum. (Ed. Prati, A. D. 1839, 4to, p. 2191–2200); 1 Brown's Civ. & Adm. Law, p. 425; Dig. lib. 48, tit. 10; Heinec. in Pand. Pars vii. § 214–218. The *crimen falsi*, as recognized in the Roman Law, might be committed, 1. by words, as in perjury; 2. by writing, as in forgery; 3. by act, or deed; namely, in counterfeiting or adulterating the public money, — in fraudulently substituting one child for another, or n suppositious birth, — or in fraudulently personating another, — in using false weights or measures, — in selling or mortgaging the same thing to two several persons in two several contracts, — and in officiously supporting the suit of another by money, &c., answering to the common law crime of maintenance. Wood, Instit. Civil Law, p. 282, 283; Halifax, Analysis Rom. Law, p. 134."

[5] "Dig. lib. 47, tit. 20, l. 3, Cujac. (In locum.) Opera, tom. ix. (Ed. supra) p. 2224. Stellionatus nomine significatur omne crimen, quod nomen proprium non habet, omnis fraus, quæ nomine proprio vacat. Translatum autem esse nomen stellionatus, nemo est qui nesciat, ab animali ad hominem vafrum, et decipiendi peritum: Ib. Heinec. ad Pand. Pars vii. § 147, 148; 1 Brown's Civ. & Adm. Law, p. 426."

false news,[6] and several others. On the other hand, it has been adjudged, that persons are rendered infamous, and therefore incompetent to testify, by having been convicted of forgery,[7] perjury, subornation of perjury,[8] suppression of testimony by bribery, or conspiracy to procure the absence of a witness,[9] or other conspiracy, to accuse one of a crime,[10] and barratry.[11] And from these decisions it may be deduced, that the *crimen falsi* of the Common Law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. At least it may be said, in the language of Sir William Scott,[12] 'so far the law has gone, affirmatively; and it is not for me to say where it should stop, negatively.'"

§ 521. Same: Judgment, not Guilt, Disqualifies.

1842, Professor *Simon Greenleaf*, Evidence, § 375:[1] "We have already remarked, that no person is deemed infamous in law, until he has been legally found guilty of an infamous crime. But the mere verdict of the Jury is not sufficient for this purpose; for it may be set aside, or the judgment may be arrested, on motion for that purpose. It is *the judgment*, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify.[2] And it must appear that the judgment was rendered by a Court of competent jurisdiction.[3] Judgment of outlawry for treason or felony will have the same effect;[4] for the party, in submitting to an outlawry, virtually confesses his guilt; and so the record is equivalent to a judgment upon confession. If the guilt of the party should be shown by oral evidence, and even by his own admission (though in neither of these modes can it be proved, if the evidence be objected to), or, by his plea of guilty, which has not been followed by a judg-

[6] "The Ville de Varsovie, 2 Dods. R. 174; but see Crowther *v.* Hopwood, 3 Stark. R. 21." The following crimes have been held insufficient to disqualify: maliciously obstructing railroad cars: Com. *v.* Dame, 8 Cush. 384; fraudulently disposing of a crop subject to lien: 1897, State *v.* Green, 48 S. C. 136, 26 S. E. 234.

[7] "R. *v.* Davis, 5 Mod. 74."

[8] "Co. Lit. 6, b.; 6 Com. Dig. 353, *Testm.* A. 5."

[9] "Clancey's case, Fortesc. R. 208; Bushell *v.* Barrett, Ry. & M. 434."

[10] "2 Hale, P. C. 277; Hawk. P. C. b. 2, c. 46, § 101; Co. Lit. 6, b.; R. *v.* Priddle, 2 Leach, Cr. Cas. 496; Crowther *v.* Hopwood, 3 Stark. R. 21, arg.; 1 Stark. Evid. 95; 2 Dods. R. 191."

[11] "R. *v.* Ford, 2 Salk. 690; Bull. N. P. 292. The receiver of stolen goods is incompetent as a witness; see the trial of Abner Rogers, p. 136, 137. If a statute declare the perpetrator of a crime 'infamous,' this, it seems, will render him incompetent to testify: Phil. & Am. on Evid. p. 18; 1 Phil. Evid. p. 18; 1 Gilb. Evid. by Lofft, p. 256, 257."

[12] "2 Dods. R. 191. See also 2 Russ. on Crimes, 592, 593." Compare the same question as it arises for the use of conviction of crime to impeach a witness, *post*, § 980: the definition may in that case be somewhat different.

[1] See note 1, § 520, *ante*.

[2] "6 Com. Dig. 354, *Testm.* A. 5; R. *v.* Castel Careinion, 8 East, 77; Lee *v.* Gansell, Cowp. 3; Bull. N. P. 292; Fitch *v.* Smalbrook, T. Ray. 32; People *v.* Whipple, 9 Cow. 707; People *v.* Herrick, 13 Johns. 82; Cushman *v.* Loker, 2 Mass. 108; Castellano *v.* l'eillon, 2 Mart, N. S. 466"; 1901, Yates *v.* State, — Fla. —, 29 So. 965 (there must be a "judgment or sentence"); 1851, Smith *v.* Brown, 2 Mich. 161, 163 (verdict of perjury offered against B. to overthrow his answer in equity on the matter for which he was found guilty of perjury; excluded, because pending a motion in arrest of judgment B. had died; cases cited additionally to those above); 1888, Arcia *v.* State, 26 Tex. App. 193, 9 S. W. 685 (judgment on the verdict, not followed by sentence, held insufficient under local statutory provisions); 1888, Woods *v.* State, ib. 490, 508, 10 S. W. 108 (contrary result reached, where sentence was lacking, for an offence punishable only by fine); 1893, Jones *v.* State, 32 Tex. Cr. 135, 22 S. W. 404 (following Arcia *v.* State); 1896, Evans *v.* State, 35 id. 485, 34 S. W. 285 (same); 1900, Flournoy *v.* State, — Tex. Cr. —, 59 S. W. 902 (same). It would follow that, if judgment appears to have been rendered, the party offering the witness must show that it has been reversed or the offence pardoned: 1878, State *v.* Howard, 19 Kan. 507, 509; 1899, State *v.* Clark, 60 id. 450, 56 Pac. 767. But a mere showing that an appeal has been taken should not suffice: 1900, Best *v.* Best, 22 Wash. 695, 60 Pac. 58 (conviction suffices, though a pending appeal results later in reversal of judgment; yet in such case continuance should be allowed); *contra:* 1898, Stanley *v.* State, 39 Tex. Cr. 482, 46 S. W. 645 (disqualified only after sentence accepted or judgment affirmed); 1898, Foster *v.* State, 39 id. 399, 46 S. W. 231 (not disqualified pending appeal taken; the objector to show that the appeal had been dismissed).

[3] "Cooke *v.* Maxwell, 3 Stark. R. 183."

[4] "Co. Lit. 6, b.; Hawk. P. C. b. 2, c. 46, § 22; 3 Inst. 212; 6 Com. Dig. 354, *Testm.* A. 5; 1 Stark. Evid. 95. 96. In Scotland it is otherwise: Tait's Evid. p. 347."

ment,[8] the proof does not go to the competency of the witness, however it may affect his credibility." [8]

§ 522. Same: Conviction in Another Jurisdiction.

1842, Professor *Simon Greenleaf*, Evidence, § 376:[1] "Whether judgment of an infamous crime, passed by a foreign tribunal, ought to be allowed to affect the competency of the party as a witness, in the Courts of this country, is a question upon which jurists are not entirely agreed. But the weight of modern opinion seems to be that personal disqualifications not arising from the law of nature but from the positive law of the country, and especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originate.[2] Accordingly it has been held, upon great consideration, that a conviction and sentence for a felony in one of the United States, did not render the party incompetent as a witness, in the Courts of another State; though it might be shown in diminution of the credit due to his testimony." [3]

§ 523. Same: Disqualification removed by (1) Reversal of Judgment; (2) Pardon; (3) Serving of Sentence.

1842, Professor *Simon Greenleaf*, Evidence, §§ 377, 378: "The disability thus arising from infamy may, in general, be removed in two modes; (1) by reversal of the judgment; (2) by a pardon; [and (3) by serving the sentence].

(1) The *reversal of the judgment* must be shown in the same manner that the judgment itself must have been proved, namely, by production of the record of reversal, or, in proper cases, by a duly authenticated exemplification of it.[1]

(2) The *pardon* must be proved by production of the charter of pardon under the great seal; and though it were granted after the prisoner had suffered the entire punishment awarded against him, yet it has been held sufficient to restore the competency of the witness; though he would, in such case, be entitled to very little credit." [2] The rule, that a

[8] "R. *v.* Hinks, 1 Den. Cr. Cas. 84," 2 C. & K. 462.

[6] "R. *v.* Castel Careinion, 8 East, 77; Wicks *v.* Smalbroke, 1 Sid. 51; T. Ray. 32, s. c.; People *v.* Herrick, 13 Johns. 82." Compare the same question in relation to the impeachment of a witness, *post*, § 980.

Whether the judgment may be proved by *asking the witness on cross-examination*, *i.e* otherwise than by a certified copy of the record, depends upon a different principle, examined *post*, § 1270.

Whether the conviction prevents the use of a *deposition taken* before conviction or the proof of an *attesting signature* affixed to a will or deed before conviction, involves other principles, examined *post*, §§ 1409, 1506.

[1] See note 1, *ante*, § 520.

[2] "Story on Confl. of Laws, § 91, 92, 104, 620–625; Martens's Law of Nations, B. 3, c. 3, § 24, 25."

[3] "Com. *v.* Green, 17 Mass. 515, 539–549"; proceeding upon (1) the difficulty of raising an issue as to the record, (2) the diversity of ideas as to criminal conduct in different countries, (3) the hardship of disqualifying by old and forgotten offences in other lands, (4) the principle that penal laws have no effect beyond the jurisdiction, (5) the fact that infamy is a punishment as well as a stigma on character. *Accord:* 1878, Sims *v.* Sims, 75 N. Y. 466, 468; 1879, National Trust Co. *v.* Gleason, 77 id. 400, 410; 1891, Logan *v.* U. S., 144 U. S. 303, 12 Sup. 617. *Contra:* 1824, State *v.* Chandler, 3 Hawks 307 (Taylor, C. J.: "As truth and justice are not confined by geographical limits but are coextensive with the concerns and relations of civilized communities, the crime which in reason renders a witness incompetent in one country must do so in all"); 1838, Chase *v.* Blodgett, 10 N. H. 30; 1880, State *v.* Foley, 15 Nev. 72. "In the cases of State *v.* Ridgely, 2 Har. & McHen. 120; Clark's lessee *v.* Hall, ib. 378; and Cole's lessee *v.* Cole, 1 Har. & Johns. 572; which are sometimes cited in the negative, this point was not raised nor considered; they being cases of persons sentenced in England for felony, and transported to Maryland, under the sentence, prior to the Revolution."

[1] See note 2, *ante*, § 521.

[2] "U. S. *v.* Jones, 2 Wheeler Cr. C. 451."

The rule that a pardon removes the disqualification has been recognized from the beginning, though in the earlier practice there was some difference of opinion whether the burning in the hand was also essential; 1673, Toug's Case, Kelyng 18; 1679, Reading's Trial, 7 How. St. Tr. 259, 296; 1680, Castlemaine's Trial, ib. 1067, 1083, 1089 (by the K. B. and C. P.; mere pardon for felony does not make competent, unless there was a burning in the hand); 1685, Fernley's Trial, 11 id. 381, 426; 1695, Crosby's Trial, 12 id. 1291, 1296; 1696, Rookwood's Trial, 13 id. 183, 185 (pardoned, but not burnt in the hand; admitted); Earl of Warwick's Trial, ib. 1011–1019 (given benefit of clergy, but the burning in the hand resplted; excluded); 1870, Curtis *v.* Cochran, 50 N. H. 242; 1880, State

pardon restores the competency and completely rehabilitates the party, is limited to cases where the disability is a consequence of the judgment, according to the principles of the Common Law.[3] But where the disability is annexed to the conviction of a crime by the express words of a statute, it is generally agreed that the pardon will not, in such a case, restore the competency of the offender; the prerogative of the sovereign being controlled by the authority of the express law. Thus, if a man be adjudged guilty on an indictment for perjury, at Common Law, a pardon will restore his competency; but if the indictment be founded on the statute of 5 Eliz. c. 9, which declares, that no person convicted and attainted of perjury, or subornation of perjury, shall be from thenceforth received as a witness in any Court of record, he will not be rendered competent by a pardon."[4]

1680, *Scroggs*, C. J., in *Castlemaine's Trial*, 7 How. St. Tr. 1067, 1083: "In this I am clear: If a man were convicted of perjury, that no pardon will make him a witness, because it is to do the subject wrong. A pardon does not make a man an honest man; it takes off reproaches; . . . it is only to prevent upbraiding language, which tends to the breach of the peace. . . . [But otherwise for other felonies]; this I make more doubtful than the other, for a man, maybe, that hath committed a robbery would be afraid to forswear himself; for though one is a great, the other is a greater sin, and that in the subject matter."

(3) Professor *Greenleaf, ubi supra:* [A] "By Stat. 9 Geo. 4, c. 32, § 3, *enduring the punishment* to which an offender has been sentenced for any felony not punishable with death, has the same effect as a pardon under the great seal, for the same offence; and of course it removes the disqualification to testify; and the same effect is given by § 4, of the same statute, to the endurance of the punishment awarded for any misdemeanor, except perjury and subornation of perjury.[5] But whether these enactments have proceeded on the ground, that the incompetency is in the nature of punishment, or, that the offender is reformed by the salutary discipline he has undergone, does not clearly appear."

§ 524. **Same: Statutory Changes.** Acting upon the reasons already set forth (*ante*, § 519), the Legislatures of almost every jurisdiction have long ago either entirely abolished or narrowly restricted the disqualification by conviction of crime. The earliest statute seems to have been that of England, in 1843. The statutes in the United States, when not providing for entire abolition, usually retain the common law rule for perjury only (including subornation); while a few retain it in its original scope as to kinds of crimes, but apply it in criminal trials only; neither of these limitations has any justification in logic or policy.[1]

v. Foley, 15 Nev. 67, and cases cited; 1891, Boyd *v.* U. S., 142 U. S. 450, 12 Sup. 292; 1891, Logan *v.* U. S., 144 id. 303, 12 Sup. 617.

[3] "If the pardon of one sentenced to the penitentiary for life, contains a proviso, that nothing therein contained shall be construed, so as to relieve the party from the legal disabilities consequent upon his sentence, other than the imprisonment, the proviso is void, and the party is fully rehabilitated: People *v.* Pease, 3 Johns. Cas. 333."

[4] R. *v.* Ford, 2 Salk. 689; Dover *v.* Maestaer, 5 Esp. 92, 94; 2 Russ. on Crimes, 595, 596; R. *v.* Greepe, 2 Salk. 513, 514; Bull. N. P. 292; Phil. & Am. on Evid. 21, 22." *Contra:* 1895, Diehl *v.* Rogers, 169 Pa. 316, 32 Atl. 424. "See also Mr. Hargrave's Juridical Arguments, Vol. 2, p. 221, *et seq.*, where this topic is treated with great ability. Whether the disability is, or is not, made a part of the judgment, and entered as such on the record, does not seem to be of any importance. The form in which this distinction is taken in the earlier cases, evidently shows that its force was understood to consist in this, that in the former case the disability was declared by the statute, and in the latter, that it stood at Common Law."

For the same question, arising in relation to the *impeachment* of a witness, see *post*, § 980.

[5] "See also 1 W. 4, c. 37, to the same effect."

[1] The statutes have been already set out, *ante*, § 488; in the following list a rough summary is given, with the local rulings construing the effect of the statutes: *Eng.* 1843 (abolished); *Can.* (abolished); 1867, R. *v.* Webb, 11 Cox Cr. 133, Lush, J. (convict under death-sentence, disqualified, because "under the old law a person attainted and sentenced to death was deemed

§ 525. (5) "**Allegans turpitudinem suam**"; **General Principle.** During the 1600s and 1700s there appeared in several quarters of the law of evidence a tendency to recognize as a general principle of disqualification the maxim *nemo turpitudinem suam allegans audiendus est.* The notion underlying the maxim is that a person who comes upon the stand to testify that he has at a former time spoken falsely or acted corruptly is by his very confession a liar or a villain, and therefore untrustworthy as a witness. Before examining the validity of the principle as a whole for our law of evidence, it will be desirable to notice the specific situations in which it has been invoked. There are five of these, each dealt with in a group of precedents independent of the other and only loosely connected by the general notion of the above maxim.

§ 526. **Same: Accomplice, as disqualified by his Guilt.** It was frequently urged against an accomplice, during the 1600s and 1700s, that since by his own confession he was guilty of crime, this turpitude thus acknowledged made him as incompetent as if it were proved by conviction for the crime. This argument is only broadly related to the above maxim, and yet this relation is frequently noticed in the opinions dealing with the other instances. It must be distinguished from the argument of disqualification as a co-indictee (*post*, § 580) and of disqualification by reason of a promise of pardon (*post*, § 576). The argument, however, was judicially repudiated from the very beginning, — partly on the ground of necessity, partly on the ground that turpitude, though self-confessed, was no hindrance unless there had been a conviction of crime:

civilly dead"); *Ala.* (abolished, except for perjury or subornation of it); *Ariz.* (abolished); *Ark.* (abolished only as to treatment of convicts, unless when pardoned; incompetency retained in civil cases, when convicted of specified offences); *Cal.* (abolished); *Colo.* (abolished, in civil cases; *semble*, retained, in criminal cases); *Columbia* (abolished, *semble*, except for perjury); *Conn.* (abolished); *Del.* (abolished); *Fla.* abolished, except for perjury); *Ga.* (abolished); *Haw.* (abolished, except for perjury); *Ida.* (abolished); *Ill.* (abolished); *Ind.* (*semble*, abolished); *Ia.* (*semble*, abolished); *Kan.* (disqualification abolished for civil cases); *Ky.* (no person convicted of perjury or equivalent offences is to be competent; no prisoner in a penitentiary is competent; all persons are made competent except those expressly disqualified by statute); 1886, Com. *v.* McGuire, 84 Ky. 57 (disqualification no longer exists except for perjury, etc., under Stats. § 1180); 1890, Com. *v.* Minor, 89 id. 555, 13 S. W. 5 (same; but the rule is limited to criminal cases, since § 606, Civ. Code, disqualifies convicts in civil cases); 1896, Hancock *v.* Parker, 100 id. 143, 37 S. W. 594 (admitting in a criminal case a convict in penitentiary for obtaining money by false pretences); *La.* (abolished for civil cases; convicts' testimony admissible for or against each other); 1889, State *v.* Mack, 41 La. An. 1079, 1082, 6 So. 808 (held to be in criminal cases abolished); 1890, State *v.* McManus, 42 id. 1194, 8 So. 305 (same); 1903, State *v.* Williams, 111 La. —, 35 So. 505; (State *v.* McManus approved); *Me.* (abolished); *Md.* (abolished, except for perjury); *Mass.* (abolished); *Mich.* (abolished); *Minn.* (abolished); *Miss.* (abolished, except for perjury and subornation of perjury); *Mo* (abolished); *Mont.* (abolished); *Nebr.* (abolished); *Nev.* (abolished); *N. H.* (abolished); *N. J.* (abolished); *N. M.* (abolished); *N. Y.* (abolished); *N. C.* (abolished); *N. D.* (abolished, *semble*, except for perjury or subornation, conditionally); *Oh.* (abolished); *Okl.* (abolished, except for perjury and subornation of perjury, conditionally); *Or.* (abolished); *Pa.* (abolished, except in part for perjury); 1899, Com. *v.* Clemmer, 190 Pa. 202, 42 Atl. 675 (one under sentence of death, admitted); *R. I.* (abolished); *S. D.* (like N. D.); *Tenn.* (retained for a long list of crimes specified; convicts competent against each other for prison offences); 1887, Morgan *v.* State, 86 Tenn. 472 (statutory competency as defendant overrides disqualification by former conviction); *Tex.* (retained, with regulations); *U. S.* (local law to apply; but perjury or subornation is to disqualify); *Utah* (abolished); *Vt.* (abolished, except for perjury or subornation or attempted subornation of perjury); *Va.* (retained, with modifications); *Wash.* (abolished, except for perjury); *W. Va.* (retained, except for other than forgery-convictions in criminal cases by leave of Court); *Wis.* (abolished); *Wyo.* (abolished, for civil cases).

1663, *Tong's Case*, Kelyng 18: "It was resolved that some of those persons who were equally culpable with the rest may be made use of as witnesses against their fellows; . . . and the law alloweth every one to be a witness who is not convicted or made infamous for some crime; and if it were not so, all treasons would be safe, and it would be impossible for any one who conspires with never so many others to make a discovery to any purpose."

1696, *Charnock's Trial*, 12 How. St. Tr. 1377, 1403; *Defendant* (objecting to the witness to treason): "He makes himself a criminal by his own confession, and that of a very heinous crime, and it is equal . . . as if he had confessed it upon an indictment, and then the law can take no notice of him as a good witness"; L. C. J. *Holt* (charging the jury): "Now, as to that objection, I must tell you, . . . you may consider that traitorous conspiracies are deeds of darkness as well as wickedness, the discovery whereof can properly come only from the conspirators themselves. . . . And though men have been guilty of such heinous offences in being partakers or promoters in such designs, yet if they come in and repent and give testimonies thereof by discovering the truth, great credit ought to be given to them, for such evidence was ever accounted good."

1827, *Abbott*, C. J., in *Thistlewood's Trial* (Cato Street Conspirators), 33 How. St. Tr. 681, 921, as reported in Campbell's Lives, IV, 312: "Dark and deep designs are seldom fully developed except to those who consent to become participators in them, and can therefore be seldom exposed and brought to light by the testimony of untainted witnesses. Such testimony is to be received on all occasions with great caution; it is to be carefully watched, deliberately weighed, and anxiously considered. He who acknowledges himself to have become a party to a guilty purpose does by that very acknowledgment depreciate his own personal character and credit. If, however, it should ever be laid down as a practical rule in the administration of justice that the testimony of accomplices should be rejected as incredible, the most mischievous consequences must necessarily ensue; because it must not only happen that many heinous crimes must pass unpunished, but great encouragement will be given to bad men by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt; and thereby universal confidence will be substituted for that distrust of each other which naturally possesses men engaged in wicked projects and which often operates as a restraint against the perpetration of offences to which the coöperation of a multitude is required."[1]

§ 527. **Same: Witness retracting Former Perjured Testimony.** The argument was often urged, during the 1600s and 1700s, and appears to have been generally accepted by the judges, that one who came to the stand to testify that upon a former oath he had sworn falsely was as a self-confessed perjurer incapable of trust:

[1] *Accord:* 1774, Clarke *v.* Shee, Cowp. 197 (action for money paid by the plaintiff's clerk from the plaintiff's funds to the defendant for a lottery chance; against the clerk's testifying for the plaintiff, Mr. Bulier, afterwards Judge, argued that the clerk "is a *particeps criminis*, and therefore clearly incompetent, for no man shall be admitted to prove his own turpitude, as perjury or the like; this man was called to prove himself guilty of a breach of trust in embezzling his master's money and also of a breach of the Act of Parliament; therefore his evidence was inadmissible"; Mr. Davenport, for the defendant, argued that "here the plaintiff is an innocent person, and therefore had a right to call him"; Lord Mansfield, C. J., said that "there can be no doubt but that W. was an admissible witness"; citing the case of a man who had "taken the bribery oath" being called to prove himself bribed); 1775, Shaftesbury Case, 2 Doug. El. C. 2d ed. 303, 308, 315 (voter's confessions of bribery, objected to as not admissible "to invalidate what he had solemnly sworn" by the purging oath at the polls, a ruling of the House to this effect in 1696 being cited; objection repudiated; the reporter cites another House ruling, of 1715, in accord); 1833, Southampton Case, Per. & Kn. El. C. 213, 226 (repudiated). In the United States an early trace of the doctrine appears: 1789, State *v.* Annice, N. Chipm. 9 (indictment for adultery with E.; E. not admitted "in this case" to prove her own turpitude); 1878, State *v.* Colby, 51 Vt. 291, 295 (preceding case repudiated).

1685, *Oates' Trial*, 10 How. St. Tr. 1079, 1185; *Attorney-General:* "Pray acquaint my lord and the jury how you came to swear at the former trial, by whom you were persuaded, and how you varied from the truth"; L. C. J. *Jeffreys:* "I tell you truly, Mr. Attorney, it looks rank and fulsome. If he did forswear himself, why should he ever be a witness again?" *Attorney-General:* "'Tis not the first time by twenty that such evidences have been given"; L. C. J. *Jeffreys:* I hate such precedents in all times, let it be done never so often. Shall I believe a villain one word he says, when he owns that he forswore himself? . . . What good will the admitting him to be a witness do? For either what he swore then or what he swears now is false; and if he once swears false, can you say he is to be believed? . . . We are all of another opinion, that it is not evidence fit to be given." [1]

It is noticeable that this same argument of L. C. J. Jeffreys appears again in another doctrine (*post*, § 530). But there, as here, it is unsound; the witness *may* be telling the truth now; whether he is doing so can best be left to the jury to consider under all the circumstance. affecting his credit. To exclude one who now admits a former perjury, much more to exclude one who merely contradicts his former oath, is to shut out a possible source of truth; and to admit him can hardly serve to mislead, since the testimony is of itself open to suspicion. The doctrine by the 1800s came to be entirely repudiated:

1809, *Ellenborough*, L. C. J., in *R.* v. *Teal*, 9 East 307: "Though a person may be proved on his own showing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath; though that may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the judge; it only goes to the credit of the witness, on which the jury are to decide."

1847, *Shepley*, J., in *Aiken* v. *Kearne*, 14 Shepl. 252, 261: "In the course of judicial investigations, witnesses are found to testify differently on different occasions and at different times; sometimes [it is] because they have ascertained that they had made a mistake in their former testimony; at other times they exhibit a disposition to suit their testimony to the exigencies of the case; and on other occasions they acknowledge that they were induced to testify falsely at a former time. In no such case can the question of the competency of the witness to testify properly arise, for it cannot be judicially known how far his testimony may conform to or differ from his former testimony. If it could be known, so that the objection to his competency could be presented, it must be overruled, for it is the peculiar province of the jury in an action at law to decide whether the testimony of a witness should be entitled to any and if so to what credit under the circumstances in which it is presented to them." [2]

[1] *Accord:* 1754, Canning's Trial, 19 How. St. Tr. 283, 450, 609, 632 (one Virtue Hall, who had recanted her testimony given at the trial of the supposed abductor Squires, was not now called on Canning's trial for perjury at the first trial, because the defendant's counsel, on the authority of Oates' Trial, thought her incompetent, and the trial judges agreed to this; Legge, B.: "I will never admit or suffer a person that will say they have been perjured in another affair"; but he conceded that the custom was contrary in trials for perjury-subornation).

[2] *Accord:* 1809, R. *v.* Teal, 9 East 307, 309 (conspiracy to make a false charge of paternity of a bastard; objected against the mother's testimony that she had before sworn to the prosecutor as father, but now was swearing the contrary, and "consequently she was to prove herself forsworn," so that "not only was she incompetent to contradict the fact she had before sworn to," but "she was an incompetent witness for any purpose, on the ground of her acknowledged perjury and infamy" and that "it made no difference whether the infamy were found by verdict, or by the confession of the party tendered as a witness"; objection overruled; see quotation *supra*); 1816, Rands *v.* Thomas, 5

§ 528. **Same: Attesting Witness contradicting his Attestation.** The general notion that a person cannot be heard to repudiate his own formal assertion made on a former occasion was responsible for the attempt, often made during the 1600s and 1700s, to forbid an attesting witness to repudiate his attestation by swearing that, though he did attest the execution, yet in fact he attested falsely. But this doctrine, though repeatedly urged by counsel and though apparently in harmony with popular notions of the time, was as constantly repudiated by the judges.[1] That the propounder of the will may, in spite of the attesting witnesses' denials, prove otherwise the genuineness of execution, involves a different principle, elsewhere considered (*post*, § 1302).

§ 529. **Same: Invalidating one's Own Instrument; Rule in Walton *v.* Shelly.** Closely related to the attesting-witness notion, and almost including it, is the thought that one who by his signature as party has acknowledged an instrument to be valid should not be heard to testify to facts destroying its validity. This notion, involving in part some idea of estoppel as applied to a witness, seems first to have been advanced against the obligor of an usurious bond attempting to prove the usury;[1] though here the controlling

M. & S. 244 (assumpsit for goods furnished to a ship; defendant claimed not to have been owner, and called C. as the real owner to testify that C. had inserted the defendant's name on the register as part owner without the defendant's consent; objected that C. could not "contradict the oath which he had taken at the time of the registry"; held, that C. was competent, following R. *v.* Teal; repudiating the *nisi prius* ruling on the same facts in Nickerson *v.* Thomas, 1 Stark. 85); 1903, Stone *v.* State, — Ga. —, 45 S. E. 630 (subornation of perjury; the perjurers' admission that they had committed perjury does not disqualify them); 1847, Aiken *v.* Kilburne, 14 Shepl. 252, 261 (a debtor who had on oath in a petition of bankruptcy averred the contrary, admitted; see quotation *supra*); 1809, Amory *v.* Fellows, 5 Mass. 219, 228 (modern principle applied to will-witnesses; their false attestation does not make them not "credible"); 1875, Fitzcox *v.* State, 52 Miss. 923, 930 (maxim repudiated); 1864, Dunn *v.* People, 29 N. Y. 523, 529 (abortion; the principal witness, the woman, admitted that she had sworn falsely before the magistrates; held that an instruction to disregard her testimony entirely was not proper; explaining Dunlop *v.* Patterson, 5 Cow. 243); 1878, Deering *v.* Metcalf, 74 Id. 501, 504 (preceding case approved); 1888, People *v.* O'Neil, 109 id. 251, 266, 16 N. E. 68 (same); 1879, Mack *v.* State, 48 Wis. 271, 286, 4 N. W. 449 (rule repudiated).

Distinguish the doctrine of *impeachment*, "*falsus in uno, falsus in omnibus*" (*post*, § 1008).

Distinguish the following, resting on the principle of *judicial admissions* (*post*, § 2593): 1896, Marvin *v.* Sager, 145 Ind. 261, 44 N. E. 310 (agreement to use a deposition and not call the witness; the witness cannot be called after using the deposition).

[1] 1683, Hudson's Case, Skinner 79 (two of the three swore that the testator was incapable and that his hand had been guided); 1694, Dayrell *v.* Glascock, ib. 413 (one of them would not testify that he saw the testator execute); 1696, Blurton *v.* Toon, ib. 639 (one of the witnesses denied seeing the execution, though admitting his hand; proof by the other's signature was opposed, but allowed); 1700 (?), Austin *v.* Willes, Buller N. P. 264 ("notwithstanding the three witnesses all swore to its not being duly executed, the devisee obtained a verdict"); 1762, Lowe *v.* Jolliffe, 2 W. Bl. 365 ("the three subscribing witnesses to the testator's will, and the two surviving ones to a codicil made four years subsequent . . . all unanimously swore him to be utterly incapable of making a will," etc); 1768, Goodtitle *v.* Clayton, 4 Burr. 2224 (a new trial was granted, because the witnesses had "been admitted to give evidence against their own attestation"; Yates, J., thought this erroneous; Lord Mansfield, C. J., thought that "it is of terrible consequence that witnesses to wills should be tampered with to deny their own attestation"; but it does not appear that such evidence was understood to be prohibited, but merely untrustworthy); 1798, Lord Kenyon, C. J., in Jordaine *v.* Lashbrook, 7 T. R. 599, 604 (approving Lowe *v.* Jolliffe); 1812, Howard *v.* Braithwaite, 1 Ves. & B. 202, 208 (Lord Eldon, L. C.: "their testimony is to be received with all the jealousy necessarily for the safety of mankind attaching to a man who upon his oath asserts that to be false which he has by his solemn act attested as true"); 1895, Johnson *v.* Johnson, 44 S. C. 364, 22 S. E. 423 (witness who attests delivery, etc., may testify to the contrary); 1903, Ward *v.* Brown, — W. Va. —, 44 S. E. 488. *Contra:* 1795, Currie *v.* Donald, 2 Wash. Va. 58 (attesting witness to a deed cannot contradict its delivery).

[1] 1628, Coke upon Littleton, 6 *b* ("It was

objection was afterwards accepted to be the doctrine of disqualification by interest (*post*, § 575), and from this point of view the propriety of such testimony was finally established.[2] The general maxim, however, had long before been given currency by that prolific maker of maxims, Lord Coke;[3] and in the first half of the 1700s there are other indications of a tendency to concede the impropriety of allowing a man to swear against his own deed;[4] the instances being complicated, however, like that of the usurious contract, by the rule as to disqualification by interest. But, finally, the doctrine appeared in a quarter where no objection based on interest could prevail; and the general principle was advanced (in one of those rulings in which Lord Mansfield exhibited his great power of persuading his colleagues into novelties) that a person should not be allowed by his testimony to invalidate any instrument to which he had given credit by his signature as a party:

1786, *Walton* v. *Shelly*, 1 T. R. 296; the objection was, when an indorser of notes was offered in defence to prove the usurious consideration of the notes, and thus of a bond given for them, "that he was called to invalidate a security which he had given, and that an indorser of a note, independently of any question of interest," could not do this; *Mansfield*, L. C. J.: "In this case, it seems to me that the witness had no interest in the present question, for either way he is discharged; . . . therefore, in point of interest, I think there is no objection to his competency. But what strikes me is the rule of law founded on public policy, which I take to be this: That no party who has signed a paper or a deed shall ever be permitted to give testimony to invalidate that instrument which he hath so signed. And there is a sound reason for it; because every man who is a party to an instrument gives a credit to it. It is of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it. . . . The civil law says, *Nemo allegans suam turpitudinem est audiendus*. Now apply this general maxim to the present case. . . . The obligee of this bond trusted to the notes; he gave them up as a consideration for the bond; he trusted to the name of the indorser, and that he knew of no objection to the notes; and yet this same person was afterwards called to say that they were given for an usurious and illegal consideration; therefore, on that ground, I am of opinion that he was an incompetent witness"; *Willes*, J.: "The present question falls within the general rule that no man shall be permitted to allege his own turpitude in having given credit to a false and illegal security"; *Buller*, J.: "I have always understood it to be a settled principle that no man shall be permitted to invalidate his own act."

The immense influence of Lord Mansfield's name may be seen from the

also agreed by the whole Court [citing Smith's Case] that in an information upon the statute of usury, the partie to the usurious contract shall not be admitted to be a witnesse against the usurer, for in effect he should be *testis in propria causa* and should avoid his owne bonds and assurances and discharge himself of the money borrowed; and though he commonly raise up an informer to exhibit the information, yet *in rei veritate* he is the partie"); 1670, Lassels v. Chatterton, T. Raym. 190, per Twisden, J. (to the same effect); 1702, R. *v.* Sewel, 7 Mod. 118 (obligor may testify to a fact "to invalidate or set aside" an obligation obtained by duress, "where the nature of the thing allows him no other evidence").

[2] 1768, Abrahams *v.* Bunn, 4 Burr. 2251.

[3] 1634, Coke, Fourth Institute, 279 (maxim cited). Coke, in Professor Thayer's epigram, "seems to have spawned Latin maxims freely."

[4] 1704, Title *v.* Grevett, 2 Ld. Raym. 1008 ("a man that conveys lands may be a witness to prove he had no title, because that is swearing against himself"); 1741, L. C. Hardwicke, in Man *v.* Ward, 2 Atk. 228 (the deposition of a grantor, covenanting against incumbrances, was offered against the grantee to prove that the grantor had fraudulently pretended a title; it was admitted, though regarded inadmissible "by the strict rules of law").

vogue which was thus given in this country to the doctrine of Walton *v.* Shelly;[5] for in almost every American jurisdiction, and for the ensuing fifty years, this doctrine became the subject of repeated judicial discussion and was by many Courts accepted, — although it had been in England doubted and limited almost as soon as it was published[6] and was within a short dozen years completely repudiated. This came about in 1798:

Kenyon, L. C. J., in *Jordaine* v. *Lashbrook*, 7 T. R. 603: "The proposition attempted to be established by the plaintiff is this, that for some technical reason, or for some reason of policy, a court of justice must shut its eyes and not suffer facts to be disclosed which may be laid before them by a witness who is not infamous in his character and who has no interest in the cause. If the law be so, there is some novelty in it. . . . The rule contended for by the plaintiff is this, that 'however infamously you (the defendant) have been used, whatever fraud may have been committed on you, whatever may be the rights of others, if I (the plaintiff) the party to the fraud can get on the instrument the name of the person who may be the only witness to the transaction, I will stand entrenched within the forms of law, and impose silence on that only witness, though he be a person of unimpeachable character and not interested in the cause.' But I cannot conceive on what ground such a proposition can be established. It is contradicted by every hour's experience. It would tend to show that a party to an instrument shall not be permitted to contest the validity of it in a court of law, not only by his own evidence, but by any evidence whatever. . . . [It was contended] that policy required that the evidence offered by the defendant should be excluded; but it appears to me that there is at least as much policy in admitting it; for the consequence of admitting such evidence may be only to disappoint a remedy in a civil action, while the consequence of excluding it will be to encourage fraud and to authorize the person who has committed it to rely on his own fraud in a court of justice"; *Grose*, J.: "Before the case of Walton *v.* Shelly I never read of this ground of incompetency. The ground is that a man shall not disclose any fact that may invalidate an instrument which he has signed. And why may he not disclose a fact which, if true, it is his duty to the public to disclose? Because, it is said, he has given currency to the bill by putting his name upon it; and he shall not be permitted to impeach his own title. If he has done so, he has done a very illegal and improper act, and committed a fraud upon the public; [yet] if by his assistance the law has been violated and the revenue defrauded, he owes to the public, by way of retribution, a disclosure of the circumstances and the parties, that the scheme to rob the revenue may be frustrated. . . . But it is said: *Homo allegans turpitudinem suam non est audiendus*. This, as a maxim applied to parties in a cause, may in some cases be true; but there, if both are *participes criminis*, the rule applies, *Potior est conditio defendentis*. A man shall not sustain an action upon a ground which proves him guilty of a breach of the law; so a man shall not recover money due upon an illegal consideration, such as usury, gaming, smuggling, or the like. But this rule does not extend to shut the mouths of witnesses guilty of criminal actions; if it did, witnesses daily received in courts of

[5] Compare the effect of his influence in fathering the unsound rules about parents "bastardizing their children" (*post*, § 2063), jurors impeaching their verdict (*post*, § 2352), and proof of "marriage in fact" (*post*, § 2085).

[6] 1789, Bent *v.* Baker, 3 T. R. 27 (assumpsit on a policy of insurance; for the defendant was called, to disprove liability, a broker who had been employed by the plaintiff to get the policy and had also underwritten it himself after the defendant had underwritten it; besides the objection of interest, it was urged against him that "a party shall not be permitted to give testimony to avoid an instrument which he himself has executed," citing Walton *v.* Shelly; Lord Kenyon, C. J., noticed this as follows: "Then it has been said that a person cannot be permitted to give evidence to invalidate an instrument which he himself has executed; but I cannot assent to that as a general proposition," citing Lowe *v.* Jolliffe, *supra*, § 527; Buller, J., noticing the same objection, said: "The ground of that objection is that it is holding out false credit to the world, and must be confined to negotiable instruments"; to which Lord Kenyon agreed).

justice, and whom the policy of the law invites to come forward, must be rejected, — such as accomplices, and others concerned in illegal transactions. This class of men, as I said before, the policy of the law invites to disclose all they know, leaving their credit to the wisdom and discretion of the jury."[7]

This ended the suggested doctrine in England. Perhaps its end would not have been so speedy had not Lord Mansfield's successor been a man determined to overthrow the (to him) pernicious innovations of his great predecessor and intellectual antipathist.[8] But in this country Lord Mansfield's rule obtained for a time considerable vogue. Several Courts retracted, after its utter repudiation in England was pressed upon their notice; and even those retaining it were content to confine it to persons appearing as indorsers (or the like) of negotiable instruments, and to decline applying it to obligors of other contracts or grantors of deeds.[9] Almost nothing has been heard of

[7] 1798, Jordaine *v.* Lashbrooke, 7 T. R. 599 (indorsee of a bill against the acceptor; the latter allowed to call the payee to prove that the bill, though dated at Hamburg, was in fact drawn in London, and therefore inadmissible for lack of a stamp); 1812, Jones *v.* Brooke, 4 Taunt. 464 (preceding case accepted as law).

[8] For another instance (there less creditable) of the influence upon the law of Lord Kenyon's succession to Lord Mansfield's place, see *post*, § 1858.

[9] The rulings in the various American jurisdictions are as follows: *Ala.:* 1827, Todd *v.* Stafford, 1 Stew. 199 (payee competent to impeach note's consideration; Walton *v.* Shelly repudiated; White, J., diss.); *Ark.:* 1847, Tucker *v.* Wilamonicz, 8 Ark. 157, *semble* (Walton *v.* Shelly not accepted); 1852, Caldwell *v.* McVicar, 12 id. 746, 750, *semble* (same); 1856, Arnold *v.* McNeil, 17 id. 179, 187 (grantor of deed of trust, admissible to disprove execution; rule of Walton *v.* Shelly repudiated); *Conn.:* 1802, Allen *v.* Hollkins, 1 Day 17 (defendant, a subsequent lessee, offered the lessor to prove plaintiff's prior lease void; excluded, on the authority of Walton *v.* Shelly, because "no man should be admitted to swear against his own deed") 1804, Webb *v.* Danforth, ib. 301 (point argued, but not decided); 1814, Townsend *v.* Bush, 1 Conn. 260 (drawer of usurious bill competent in action by payee, who has paid indorsee, against acceptor; Walton *v.* Shelly repudiated; the opinion of Swift, J., is the best of all the learned and sensible opinions on this subject with reference to the application of the doctrine to negotiable instruments); 1839, Jackson *v.* Packer, 13 id. 342, 359 (preceding case approved); *Ga.:* 1832, Slack *v.* Moss, Dudley 161 (payee of first note competent to prove, in action on renewal note, that consideration of first note was gaming; Walton *v.* Shelly repudiated in an excellent opinion); 1881, McBride *v.* Bryan, 67 Ga. 584 (attorney confessing a judgment without authority for his client, held "incompetent to invalidate it," because "he committed a crime as a lawyer"); *Ill.:* 1840, Webster *v.* Vickers, 3 Ill. 295 (payee-indorser of note competent to prove breach of warranty of goods paid by note); 1841, Bradley *v.* Morris, 4 id. 182 (indorser of note competent to prove discharge, "although it had been held" that he would be incompetent to prove it void *ab initio*, except where he indorses without recourse); *Ia.:* 1840, Strang *v.* Wilson, 1 Morris 84 (indorser of note competent to prove holder's purchase for value, but, *semble*, not to "invalidate the instrument"); *Ky.:* 1823, Gorham *v.* Carroll, 3 Litt. 221 (payee of note assigning without recourse competent to prove usury); *La.:* 1821, Shamburgh *v.* Commagere, 10 Mart. 18 (indorser admissible to prove alteration after indorsement, but, *semble*, not to invalidate by prior facts) 1826, Cox *v.* Williams, 5 id. N. S. 139 (rule referred to as "not yet perfectly settled"); *Me.:* 1826, Deering *v.* Sawtel, 4 Greenl. 191 (mortgagor not admitted to prove note's usurious consideration, in writ of entry by mortgagee's assignee against mortgagor's grantee; Walton *v.* Shelly approved; rule confined to negotiable instruments); 1828, Chandler *v.* Moulton, 5 id. 374 (maker of accommodation note for defendant's benefit, not admitted to prove usury in action by indorsee); 1837, Puck *v.* Appleton, 2 Shepl. 284 (indorser of note admissible to prove that waiver of notice was written on note after defendant's indorsement, a fact not affecting the note's validity at inception), 1841, Abbott *v.* Mitchell, 6 id. 354 (indorser without recourse admissible to prove alteration before delivery); 1856, Lincoln *v.* Fitch, 42 Me. 456, 466 (indorser of acceptance, held not admissible to prove fraud in its inception); *Md.:* 1810, Ringgold *v.* Tyson, 3 H. & J. 172 (indorser of note competent to prove payment, in action by indorsee against maker; Walton *v.* Shelly repudiated; see quotation *post*, § 531; Earle and Gantt, JJ., diss.); *Mass.:* 1795, Parker *v.* Lovejoy, 3 Mass. 565 (payee of note not admitted to prove usury, in action by indorsee against maker; approving Walton *v.* Shelly); 1807, Warren *v.* Merry, ib. 27 (indorsee of note against indorser; maker admitted to prove payment, but Walton *v.* Shelly approved); 1808, Churchill *v.* Suter, 4 id. 156 (like Parker *v.* Lovejoy; rule reaffirmed as good policy), 1813, Manning *v.* Wheatland, 10 id. 502 (rule reapproved); 1814, Stowell *v.* Flagg, 11 id. 368, 375 (like the next case); 1814, Loker *v.* Haynes, ib. 498 (grantor of deed admitted to prove fraud

the doctrine in the last fifty years, even in those jurisdictions where it was preserved as law. This, however, seems to be due to the belief that the

In deed, in action by grantor's creditor; rule confined "to negotiable instruments alone"); 1819, Fox *v.* Whitney, 16 Id. 118 (rule not applicable to non-negotiable or non-negotiated paper); 1821, Hartford Bank *v.* Barry, 17 id. 94 (maker of note not admitted to prove usury in action by indorsee against indorser); 1821, Packard *v.* Richardson, ib. 122, 127 (rule applied to one signing as agent for maker); 1834, Hudson *v.* Hulbert, 15 Pick. 423, 426 (like Loker *v.* Haynes); 1840, Thayer *v.* Crossman, 1 Metc. 416 ("supposing the rule settled," it does not affect testimony to prove payment of a note indorsed after maturity); 1845, Dickinson *v.* Dickinson, 9 Id. 471 (rule not applicable to vendor of colt warranting title, in action by true owner against vendee); *Mich.:* 1846, Orr *v.* Lacey, 2 Dong. 230, 238 (indorsee against indorser; accommodation acceptor admitted to prove bill void; Walton *v.* Shelly repudiated in an excellent opinion by Whipple, J.); *Miss.:* 1832, Drake *v.* Henly, Walk. 541 (first indorsee admitted to prove facts occurring after indorsement); 1842, Ronth *v.* Helm, 6 How. 127 (undecided; but rule held not applicable to a maker called for an indorser to prove payment); 1848, Williams *v.* Miller, 10 Sm. & M. 139 (same; rule not applicable to payee called for maker to prove payment); 1852, Watts *v.* Smith, 24 Miss. 77, 79 (same; payee suing as nominal plaintiff admitted to prove a note void on behalf of the maker, the title being still legally in the payee); 1870, Partee *v.* Silliman, 44 Id. 272, 280 (undecided; but rule not applicable to an indorser not impeaching the paper "in its origin or at the time it was indorsed"); *Mo.:* 1841, Bank *v.* Hull, 7 Mo. 273, 276 (indorsee against indorser; maker competent; Walton *v.* Shelly repudiated); 1853, St. John *v.* McConnell, 19 Id. 38 (Walton *v.* Shelly repudiated); *N. H.:* 1817, Houghton *v.* Page, 1 N. H. 60 (co-maker of note not admitted to prove usury in action by indorsee against maker); 1820, Bryant *v.* Ritterbush, 2 Id. 212 (indorser admitted to prove payment before indorsement; rule confined to defences which affect purchasers for value without notice); 1830, Haddock *v.* Wilmarth, 5 id. 181, 187 (grantor admitted against grantee to prove deed void; rule confined to "negotiable securities"); 1840, Haines *v.* Dennett, 11 id. 180 (indorsee of note against surety; maker admissible to prove alteration after execution and without defendant's knowledge; Walton *v.* Shelly and Houghton *v.* Page repudiated, in the best opinion on the subject, next to Mr. J. Swift's); *N. J.:* 1811, Rosevelt *v.* Gardner, Penningt. 791 (Walton *v.* Shelly discussed; no decision); 1818, Ferris *v.* Saxton, 1 South. 1, 14 (Walton *v.* Shelly assumed to be law); 1839, Freeman *v.* Brittin, 2 Harrison 191, 194, 219, 229, 235, 238 (indorser of note, admitted to prove usury in action of indorsee against maker; Walton *v.* Shelly repudiated, by three judges against two; Ford, J., diss., says the most that has ever been said for the rule); *N. Y.:* 1802, Winton *v.* Saldler, 3 Johns. Cas. 185 (payee of note not admissible to prove usury in action by one indorsee against another; by three judges against two including Kent, J.); 1807, Coleman *v.* Wise, 2 Johns. 165 (Walton *v.* Shelly approved, following Winton *v.* Saldler); 1813, Woodhull *v.* Holmes, 10 Id. 231 (rule not applicable to proof of facts subsequent to execution); 1818, Skidding *v.* Warren, 15 Id. 270 (preceding case followed); 1819, Powell *v.* Waters, 17 Id. 176 (same); 1822, Tuthill *v.* Davis, 20 Id. 285 (Winton *v.* Saldler doubted); 1825, Stafford *v.* Rice, 5 Cow. 23 ("Winton *v.* Saldler is not law"); 1825, Bank of Utica *v.* Hillard, Ib. 153, 159 (Winton *v.* Saldler deliberately overruled); 1829, Williams *v.* Walbridge, 3 Wend. 415 (same); *N. C.:* 1819, Guy *v.* Hall, 3 Murph. 150 (Walton *v.* Shelly repudiated); *Oh.:* 1833, Stone *v.* Vance, 6 Oh. 246, 248 (payee admitted to prove facts of assignment, in action between assignee and maker); 1846, Treon *v.* Brown, 14 Id. 483 (indorser not admitted to prove note void, in action between indorsee and maker; Walton *v.* Shelly followed); 1849, Rohrer *v.* Morningstar, 18 Id. 579, 587 (rule not applied in action by indorsee taking after maturity); *Pa.:* 1791, Clyde *v.* Clyde, 1 Yeates 92 (contract to divide land bought; one of the parties not allowed to "invalidate or disaffirm his own contract"); 1792, Stille *v.* Lynch, 2 Dall. 194 (payee excluded, in action between indorsee and maker; Walton *v.* Shelly cited); 1793, Pleasants *v.* Pemberton, ib. 196 (rule confined to negotiable instruments; not applied to a receipt); 1802, Balliot *v.* Bowman, 2 Binn. 162 (Jordaine *v.* Lashbrooke cited with approval); 1809, Baring *v.* Shippen, ib. 154, 165 (assignor of bond admitted to prove it fraudulently obtained; Pleasants *v.* Pemberton approved); 1818, Baird *v.* Cochran, 4 S. & R. 397 (rule not applied in action by indorsee taking after maturity); 1820, Hepburn *v.* Cassel, 6 Id. 113 (rule not applied to non-negotiable paper or paper not negotiated in regular course); 1839, Harrisburg Bank *v.* Forster, 8 Watts 304, 309 (rule recognized; intervening decisions cited); 1842, Davenport *v.* Freeman, 3 W. & S. 557 (maker inadmissible in action between indorsee and indorser); 1842, Parke *v.* Smith, 4 Id. 287 (like Baird *v.* Cochran); 1879, State Bank *v.* Rhoads, 89 Pa. 353, 357 (rule of Walton *v.* Shelly, the ground of which was "policy of law, not interest," held to have been abolished by St. 1869, *ante*, § 488, that "no interest nor policy of law" shall exclude a witness); *S. C.:* 1796, Payne *v.* Trezevant, 2 Bay 23, 33 (payee of note allowed to prove usury, in action by indorsee against maker; Walton *v.* Shelly cited in argument); 1797, Canty *v.* Sumter, ib. 93 (obligee of bond not admitted to impeach it in action by assignee; Walton *v.* Shelly cited); 1811, Croft *v.* Arthur, 3 Desauss. 223 (vendee of chattels admitted to invalidate the sale; Walton *v.* Shelly, if law, confined to negotiable instruments); 1817, Haig *v.* Newton, 1 McCord 423, 429, 433 (Walton *v.* Shelly treated as law; Cheves, J., diss.); 1825, Knight *v.* Packard, 3 Id. 72 (Walton *v.*

general statutory abolition of disqualification by interest (*post*, § 576), which went on from 1850 to 1870, carried away with it the rule of Walton *v.* Shelly.[10] But this supposition is certainly erroneous; and Lord Mansfield himself (as seen above) expressly pointed out that the interest-objection was not involved. It is proper that a Court in which the rule once prevailed should expressly disown it, first, because the maxim *allegans turpitudinem suam*, on which it rests, has no place in our law,[11] and, secondly, because, so far as the policy of the law of negotiable instruments is involved, that policy makes decidedly against the rule and not for it.[12] It may safely be assumed that the rule of Walton *v.* Shelly would not to-day be sustained in any jurisdiction.

§ 530. **Same: Contradicting one's Own Official Certificate.** A notion almost identical with that underlying the rule of Walton *v.* Shelly has led to the argument that an official who has certified to a specific fact as known to him to have occurred will not be allowed to testify, in contradiction to the certificate, that the facts were otherwise than as certified:

1839, *Bullard*, J., in *Briggs* v. *Stafford*, 14 La. o. s. 381: "A public officer who has given a solemn certificate in his official character and under his seal cannot be listened to as a witness to prove it false. There is a degree of turpitude in certifying as to what the officer does not know to be true, as well as in certifying what he knows to be false. In either case, whatever may be the palliating circumstances *in foro conscientiæ*, we think the falsity of the certificate ought not to be shown by the testimony of the officer himself. *Allegans turpitudinem suam non audiendus.*"

The notion has no better grounds for support here than elsewhere. If the certificate is not absolutely conclusive (*post*, §§ 1345–1352) and may be otherwise shown to be incorrect, then the official should be equally competent. The official doubtless should be punished, but not the party needing

Shelly definitely repudiated as not law); 1828, Simmons *v.* Parsons, 1 Bail. 62, 64 (Walton *v.* Shelly is "entirely exploded"); 1891, Reeves *v.* Brayton, 36 S. C. 384, 394, 401, 15 S. E. 658 (grantor of deed, not a party, allowed to prove defective execution); *Tenn.*: 1821, Stamp *v.* Napier, 2 Yerg. 35 (Walton *v.* Shelly, and the whole principle of *nemo allegans*, etc., repudiated; excellent opinion by Whyte, J.); 1853, Smithwick *v.* Anderson, 2 Swan 573, 577 (Walton *v.* Shelly treated as law; but not applicable to paper negotiated after maturity); *Tex.*: 1849, Parsons *v.* Phipps, 4 Tex. 341, 350 (Walton *v.* Shelly repudiated); *U. S.*: 1832, Bank of U. S. *v.* Dunn, 6 Pet. 51, 57 (Walton *v.* Shelly approved; intermediate indorser not admitted to prove a note given "under any circumstances which would destroy its validity"); 1834, Bank of the Metropolis *v.* Jones, 8 id. 12, 16 (drawer not admitted to prove fraud discharging indorser); 1835, Taylor *v.* Luther, 2 Sumn. 228, 235, per Story, J. (rule held not applicable to deeds); 1837, U. S. *v.* Leffler, 11 Pet. 86, 94 (rule not applicable to exclude official from proving his surety's bond to have been delivered in escrow); 1838, Scott *v.* Lloyd, 12 id. 145, 149 (rule assumed to be in force); 1845, Henderson *v.* Anderson, 3 How. 73, 80 (rule adhered to); 1851, Saltmarsh *v.* Tuthill, 13 id. 229 (same); 1876, Davis *v.* Brown, 94 U. S. 423 (action by second indorsee against first indorsees; one of the latter admitted to prove agreement with plaintiff not to hold defendants liable; Walton *v.* Shelly discredited; Bank *v.* Dunn qualified to the above extent); 1901, Metropolitan Nat'l Bank *v.* Jansen, 47 C. C. A. 497, 108 Fed. 572 (Davis *v.* Brown followed); *Vt.*: 1826, Nichols *v.* Holgate, 2 Aik. 138 (Walton *v.* Shelly repudiated); 1829, Chandler *v.* Mason, 2 Vt. 193, 197 (Walton *v.* Shelly approved, but the preceding case held to be a precedent); 1852, Pecker *v.* Sawyer, 24 id. 459, 462 (Nichols *v.* Holgate approved; Walton *v.* Shelly definitely repudiated); *Va.*: 1825, Taylor *v.* Beck, 3 Rand. 316, 317, 340, 346 (Walton *v.* Shelly repudiated in excellent opinions by Carr, Green, and Coalter, JJ.).

[10] It was partly on this ground that it was abandoned in Pennsylvania.

[11] See § 532, *post*.

[12] For masterly expositions of this policy, see the opinions of Swift, J., in Townsend *v.* Bush, 1 Conn. 260; Gilchrist, J., in Haines *v.* Dennett, 11 N. H. 180; and Carr and Green, JJ., in Taylor *v.* Beck, 3 Rand. 316.

his testimony. The official is clearly capable of falsification, but the value of his testimony should be left to the jury:

1862, *Peck*, C. J., in *Truman* v. *Lore*, 14 Oh. St. 144, 151: "[The counsel admits that the certificate may be shown to state the facts incorrectly, because it was not made as a judicial act after a judicial investigation], but insists that public policy prohibits a magistrate from disproving a fact to which he has certified. But the argument loses much if not all of its force, when we consider he is not required to certify to any such thing or empowered to make any such investigation. The reasons which would close the lips of the magistrate also apply to the subscribing witnesses. . . . If all were excluded, public policy would be violated rather than promoted by the exclusion."

That such testimony is properly admissible ought not to be doubted, in view of the general denial in modern times of the analogous doctrines already examined, and of the total repudiation in our law of the maxim *allegans suam turpitudinem* (as noted in § 531, *post*). Yet the contrary view finds occasional support.[1] The question whether such an official certificate can be *contradicted by any evidence whatever* is a different one, involving the principle of conclusive testimony (*post*, § 1352).

§ 531. **Same: Allegans suam turpitudinem, as a general Maxim.** It is thus apparent that, of the specific instances in which the supposed doctrine of *allegans suam turpitudinem* has been put forward or for a time accepted, none (except the last) have to-day any recognition as valid doctrines of the law of evidence. The truth is that the whole notion underlying that maxim is unsuited to support rules of evidence.[1] That so many Courts have in so many distinct lines of precedents repulsed the attempts to establish it in one form or another has been due to a general perception that the entire notion

[1] The cases on both sides are as follows: 1902, Parlin & Orendorff Co. *v.* Hatson, — Ill. —, 65 N. E. 93 (notary may impeach his certificate of acknowledgment); 1858, Wright *v.* Lundy, 11 Ind. 398, 406 (that a notary may impeach his own certificate, apparently assumed); 1839, Briggs *v.* Stafford, 14 La. o. s. 381 (notary not admitted to prove that the acts certified in protest were done by his clerk; see quotation *supra*); 1841, Oakey *v.* Bank, 17 id. 386 (notary not admitted to "contradict or strengthen" certificate of protest); 1843, Mathews *v.* Holand, 5 Rob. La. 200 (same); 1844, Peet *v.* Dougherty, 7 Id. 85 (notary not allowed to testify in contradiction of express statement in certificate of protest); 1845, Follain *v.* Dupré, 11 Id. 154 (principle conceded; but notary allowed to prove orally facts not provable by defective certificate); 1862, Central Bank *v.* Copeland, 18 Md. 305 (magistrate not allowed to impeach his own certificate; citing Harkins *v.* Forsyth, *infra*); 1863, Matthews *v.* Dare, 20 id. 270 (a justice of the peace taking a married woman's acknowledgment of a deed, which recited that he had "fully explained" it to her, was not allowed to show by any evidence that he had not read it over to her; but in this case he was a party and his knowledge of the contents of the deed was material); 1903, Nicholson *v.* Snyder, — Id. —, 55 Atl. 484 (notary not allowed to impeach his certificate of a bankrupt's oath); 1843, Wood *v.* Trust Co., 7 How. Miss. 609, 632 (justice certifying a notarial act may not "falsify his own certificate," but may testify to facts rendering it illegal); 1862, Truman *v.* Lore, 14 Oh. St. 144, 151 (certificate of acknowledgment by justice of the peace; the magistrate's testimony to the acknowledger's feeble state of mind, admitted; see quotation *supra*); 1821, Stewart *v.* Allison, 6 S. & R. 321 (notary may impeach his certificate of acknowledgment); 1898, Davis *v.* Monroe, 187 Pa. 212, 41 Atl. 44 (justice of the peace allowed to impeach his certificate of acknowledgment); 1843, Carpenter *v.* Sawyer, 17 Vt. 121, 123 (town-clerk allowed to show that a record of advertisements by him was not properly made); 1806, Haring *v.* Reeder, 1 Hen. & M. 154, 166, 175 (maxim repudiated by one judge, approved by another); 1840, Harkins *v* Forsyth, 11 Leigh 294, 308 (justice or clerk cannot deny facts certified by "testifying to their own official perfidy"; but here no testimony at all was admissible); 1861, Adams *v.* Wright, 14 Wis 408, 413 (notary may impeach his certificate).

[1] For a discussion of the maxim in its proper application to *estoppels* in substantive law, see Baker *v.* Preston, Gilmer 235 (1821); Laurenson *v.* State, 7 H. & J. 339 (1826).

has no place in our system. That this is the fundamental reason for the failure of those attempts, and that it is not a question of the unsoundness of a particular set of precedents but of the fallacy of the whole idea, may be seen from the following passages, in which by the most weighty judicial names the maxim is broadly repudiated from the domain of evidence:

1802, *Kent*, J., in *Winton* v. *Saidler*, 3 Johns. Cas. 185, 192: "The maxim *nemo allegans*, etc., is applicable to parties rather than to witnesses, and it goes no more to the exclusion of witnesses in civil than in criminal cases."

1810, *Chase*, C. J., in *Ringgold* v. *Tyson*, 3 H. & J. 172, 176: "[The rule of Walton v. Shelly] is acknowledged to be a rule of policy, and adopted by the Court in that case in conformity to a maxim of the civil law, *Nemo allegans suam turpitudinem est audiendus*. This as a rule of evidence was unknown in the common-law Courts in England prior to that case. . . . Unquestionably the rule in Walton v. Shelly cannot prevail as a general rule, because, in the cases of wills, deeds, and bonds, the witnesses to them may be examined to impeach their validity, — in the first case, to prove the insanity of the testator; in the second case, to prove the deed was not sealed or delivered; and in the third case, to prove the bond was given on an usurious consideration, or that the obligor was unlettered and that the bond was not read or was misread to him. The witnesses in these cases by their attestations held out there was no legal objection to them and that they will prove those requisites which are essential to their validity. . . . An accomplice is a legal and competent witness against the principal, and in giving testimony must declare his own turpitude and participation in the crime, which is a circumstance that [only] impeaches his credit. The maxim of the civil law, when considered with reference to the common law, may be understood as affecting the credit of the witness and declaring that he stands in that predicament which renders his testimony suspicious and that he ought to be heard with caution."

1814, *Trumbull*, J., in *Townsend* v. *Bush*, 1 Conn. 260, 267: "The maxim of the civil law that no man is to be heard who alleges his own turpitude or crime was never by any Court or judge before Lord Mansfield applied to the inadmissibility of a witness, but only to the rights of the parties in a suit or action. No suitor can support a claim in which the ground or consideration is an unlawful act of his own, nor can any defendant be heard on a defence grounded on his own unlawful act. But an accomplice in a crime, fraud, or any illegal transaction was always an admissible witness, unless immediately interested in the suit;" *Swift*, J.: "Lord Mansfield, who had borrowed many valuable principles from the civil law and incorporated them with the common law, attempts to support his decision by what he says is a maxim of the civil law, *Nemo allegans suam turpitudinem est audiendus*. But there is no such rule to be found in the civil law as applicable to witnesses; and it is the daily practice in the common law courts to admit witnesses to testify to facts which show they have been parties to trespasses, frauds, and crimes."

1817, *Nott*, J., in *Knight* v. *Packard*, 3 McCord 71, 77: "The great objection that a person shall not be allowed to develope his own shame appears to me to be founded on mistaken principles. It is not a question whether a party shall be permitted to take advantage of his own wrong, but whether a witness may not be required or permitted to disclose a fraud although he may have been a party to it. How far such a circumstance may go to affect the credit of the witness is a distinct question. I am not aware of any rule or law which renders a witness incompetent on account of his having committed a fraud, unless he has been convicted in a court of justice of perjury or some infamous crime."

1823, *Green*, J., in *Taylor* v. *Beck*, 3 Rand. 316, 341, 344: "The meaning of the maxim is that a man alledging his own turpitude impairs his own credit more or less, according to the degree and nature of the turpitude; and in this sense it is universally true, as a sensible rule for testing the degree of credit to which a witness is entitled; but has no

application to the question of competency or incompetency. . . . The rule as to exclusion for infamy never, until the case of Walton *v.* Shelly, varied or was doubted. It was confined to cases of conviction for an infamous crime. Before that case, a witness was not rendered incompetent in any case, civil or criminal, by giving evidence of his own fraud, embezziement, perjury, or felony."

1876, *Field*, J., in *Davis* v. *Brown*, 94 U. S. 423: "The maxim was plainly misapplied here by the great Chief Justice [Mansfield]; for it is not a rule of evidence, but a rule applicable to parties seeking to enforce rights founded upon illegal or criminal considerations. The meaning of the maxim is that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a claim or right; it does not import that a man shall not be heard who testifies to his own turpitude or criminality, however much his testimony may be discredited by his character."

Sub-title I (*continued*): TESTIMONIAL QUALIFICATIONS.

Topic II: EXPERIENTIAL CAPACITY.

CHAPTER XXII.

1. General Principles.

§ 555. **General Theory of Experiential Capacity; Expertness is Relative to the Particular Topic.** That sort of capacity which involves, not the organic powers, moral and mental, requisite for all testimony, nor yet the emotional power of unbiassed observation and statement, the skill to acquire accurate knowledge, may be termed Experiential Capacity. The person possessing it is commonly termed an Expert. Since upon some matters accurate understanding can never be attained without special preparation or familiarity, the rules of evidence must recognize this, and must see to it that the testimonial statements offered as representing knowledge are not offered by persons who on the subject in hand are not fitted to acquire knowledge. Such fitness or skill to acquire accurate impressions comes from circumstances which may broadly be summed up in the term "experience." If, at the one extreme, be imagined the babe in arms, practically lacking in any such skill or fitness, and, at the other extreme, the trained professional student of a department of science, in whom the fitness exists in the highest degree, it is seen that this attribution of the source of the fitness to "experience" is sufficiently accurate for purposes of nomenclature. In experience, then, are included all the processes — the continual use of the faculties, the habit and practice of an occupation, special study, professional training, and the rest — which contribute to produce a fitness to acquire accurate knowledge upon a given subject.

Three fundamental principles, involved in the very nature of this sort of capacity, are to be noted:

(1) The capacity is *in every case a relative one, i. e.* relative *to the topic about which the person is asked to make his statement.* The object is to be sure that the question to the witness will be answered by a person who is fitted to answer it. His fitness, then, is a fitness to answer on that point. He may be fitted to answer about countless other matters, but that does not justify accepting his views on the matter in hand. Conversely, if he is skilled enough to acquire knowledge on the matters in hand, it is immaterial that he is not skilled upon any or every other matter.

(2) It follows that *there are no fixed classes of expert persons,* in which a witness finds himself and remains permanently. A person may be sufficiently skilled upon one question, and totally unskilled upon the next. He may be competent to say whether the deceased had gray hair, and incompetent to say what killed the deceased; competent to say whether the deceased was asphyxiated by gas, and incompetent to distinguish between coal-gas and water-gas; competent to say whether a hatchet was sharp, and incompetent to say whether a stain upon it was human blood. Since experiential capacity is always relative to the matter in hand, the witness may from question to question, enter or leave the class of persons fitted to answer, and the distinction depends on the kind of subject primarily, not on the kind of person. It is thus, furthermore, a mistake to think of experiential qualifications as sharply marked off into defined classes. Since the change of a trifling feature in the general fact asked about may render the competent witness now incompetent, it is obvious that an accurate classification of topics with reference to experiential qualifications would involve divisions and subdivisions too numerous to conceive, and not of practical use.

(3) Again, it is *a mistake to think of some witnesses as experts and others as non-experts.* In a strict sense, every witness whosoever is an expert. In other words, the very fact that he is allowed to speak at all assumes that he is fitted to have knowledge on the subject; though in the vast majority of matters no demonstration of his fitness is needed. It is common and not unnatural to confine the term "experts" to witnesses whose fitness, by reason of the subject-matter, needs to be first shown; but while there is, as will be seen, a practical distinction between the instances in which the fitness must be expressly shown and the instances in which it need not be, that is no reason for ignoring the fundamental principle that every witness whosoever is and must be, by hypothesis, fitted or "expert" in the matter about which he is allowed to give his supposed knowledge. In particular, it is a mistake to suppose that an "expert" must be a person professionally occupied upon the matter to be testified to. This is a mistake having its special origin in the doctrine of Opinion evidence, and can there better be considered.[1] It is sufficient here to note that the only requirement is that the witness must be

[1] *Post*, § 1923.

fitted to acquire knowledge on the matter he speaks about; and, if he is thus fitted, that it is entirely immaterial whether he acquired his fitness by being professionally concerned in such matters.

§ 556. **Different Kinds of Expert Capacity.** Although (as just noted) there is no difference in principle between what may be termed the highest and the lowest expert, and though the single and uniform principle is that every witness must be sufficiently experienced for the matter in hand, yet it is possible and necessary to distinguish two broad groups of matters with reference to experiential capacity. Between these two the distinction constantly becomes a question of law, because of reasons of practical convenience.

First, there is that class of matters as to which a sufficient experience is possessed by *every person of ordinary fortunes in life*, — the kind of skill in the ordinary use of the senses which is developed necessarily, in the course of the daily doings, for every mature member of society. To every one who is intelligent enough to take the witness stand at all is attributed a sufficient kind and degree of skill upon these matters. Hence, as the important practical consequence, *no express preliminary evidence of the possession of skill* in these matters is necessary. The opponent may by cross-examination expose its meagre quantity or poor quality; but that it exists in a sufficient degree in every one upon such matters is taken for granted.

Secondly, there is that class of matters as to which it is only by means of some *special and peculiar experience*, more than is the common possession, that a person becomes competent to acquire knowledge. Hence, the possession of this cannot be assumed, for an individual witness, but *must be expressly shown beforehand*. This special and peculiar experience may have been attained, so far as legal rules go, in any way whatever; all the law requires is that it should have been attained. Yet it is possible here to group roughly two classes of experience which are usually, though not necessarily, found separately. (*a*) There is, first, the so-called "practical" experience, — the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood. From the advertising-agent to the woodchopper there is a long list of occupations in any one of which, and perhaps in that alone, the fitness will be obtained to acquire knowledge on a particular topic. (*b*) There is, secondly, a systematic training, directed deliberately to the acquisition of fitness and involving the study of a body of knowledge forming a branch of some science or art. This may be termed "scientific" experience. Now the line, if any can be drawn, between these two has no general legal significance. In truth no accurate line can be drawn. Each shades into the other imperceptibly. In some instances the witness will need both; in some instances he may have both, though he does not need both. Neither is generally favored above the other by the Courts. The question in each instance is whether the particular witness is fitted as to the matter in hand. On many points the nature of the subject is such that a scientific training is indispensable; but rulings requiring it made no general discrimination between the two sources of fitness; they

simply apply the general principle and require the particular sort of experience which fits the witness to acquire knowledge on the particular matter:

1888, *Campbell*, J., in *Kelley* v. *Richardson*, 69 Mich. 436, 37 N. W. 514: "The phrase 'expert testimony' is not entirely fortunate as designed to cover all cases where a witness may give his opiuions. . . . [First, as to impressions of cold or heat, and the like,] any person can give such impressions without special experience or special intelligence. Beyond these every-day matters, known to all men, are things which most, if not all persons can become qualified to judge by more or less opportunities of observation, local or habitual, but which require no peculiar intelligence. [Secondly,] then, there are branches of business or occupations where some intelligence is requisite for judgment, but opportunities and habits of observation must be combined with some practical experience. This seems to be the beginning or lower grade of what may properly be termed 'experts,' — a word meaning only the acquisition of certain habits of judgment, based on experience or special observation. And the scale rises as the qualifications become nicer and require greater capacity or knowledge and experience, until it reaches scientific observers and practitioners in arts and sciences requiring peculiar and thorough special training."

The fundamental principle, that every witness whatsoever must be expert in the matter he speaks about, is not violated by the recognition of these two broad classes above. That principle is invariable. But the distinction between the two classes stands upon the practical consideration that, in matters of the first class, the skill or capacity, being that which the ordinary course of life furnishes, may be assumed to be possessed by every person offered as a witness and need not be shown beforehand; while in matters of the second class, the skill or capacity required being attainable only by an experience special, peculiar, and out of the ordinary, the possession of that experience by any person who is to speak on that point must first be expressly shown. The distinction is entirely practical, and is in principle sound and simple.

It thus comes about that the rulings of Courts applying the requirements of experiential capacity are broadly of two general sorts, answering the questions:

1. *On what matters* is that *general experience*, common to every member of the community, a sufficient qualification?

2. When something more than this general experience is necessary, what shall the requirements be, as to such *special experience*, for the particular matter to be testified to?

More briefly put: 1. *On a particular topic, is general experience sufficient?* 2. *If not, what sort of special experience is necessary?*

The rules of law under these two topics form the legitimate subject of the present principle. But before examining these rules, it is desirable to discriminate two other principles which have no bearing on the present subject, but are apt to be improperly associated with it.

§ 557. **Opinion Rule, distinguished.** There is a rule of evidence (*post*, § 1918) which excludes, on the ground of superfluity, testimony which speaks to the jury on matters for which all the materials for judgment are already before the jury. This testimony is excluded simply because, being useless, it involves an unnecessary consumption of time and a cumbersome addition to

the mass of testimony. In the majority of instances the testimony thus excluded will consist of an "opinion" by the witness, *i. e.* a judgment or inference from other facts as premises, and it will be excluded because the other facts are already or may be brought sufficiently before the tribunal. If they are not or cannot be, then the witness' judgment or inference will be listened to. Thus, it will often depend on the special qualifications of the witness whether he can add anything valuable which the jury have not already for themselves. When, for example, the size and appearance of a skull-fracture has been testified to, the witness, if he is a person of only ordinary experience, cannot tell any better than the jury can whether the fracture is such as to have necessarily caused death; while, if he is a medical man, he is capable of adding considerably to the jury's information on that point. In the former case, his judgment, or "opinion," would be excluded; in the latter case, it would be listened to. Thus, in applying this rule about the superfluity of opinions, the experiential qualifications of the witness will be material; and it is because for that rule of law as well as for the present one the question of experiential qualifications is important, that there has often been a confusion of the two subjects. That there are two distinct subjects involved is not always seen. That they are distinct is certain. It is easy to see how in practice the result of the ruling upon the evidence may be very different according to the principle which is being applied. For example, suppose it is desired to show that certain stains on a garment are blood-stains. In applyiug the principle of testimonial expert qualifications, all that is asked is whether the witness, as a person of general experience only, is competent to distinguish blood-stains from other marks. Assume it to be decided that he is; then there comes to be applied the other principle as to the superfluity of opinions which the jury themselves have the material for forming. Here, if the garment is before the jury, the witness' opinion, as a layman, is superfluous (unless perhaps he saw it when the stains were fresher) and will be excluded. Yet, if the witness is specially experienced in such matters, he may be able to add something to the jury's information, even with the garment before their eyes; and he will therefore be listened to. Again, suppose it is a question whether the distance between two points is a rod or a mile. If the jury have seen the place, no help from any one, however expert a surveyor, is needed; and if they have not seen it and cannot, a person of ordinary experience is as useful as a surveyor. But if the issue is whether the distance is eighty rods or seventy-nine rods, then even if the jury cannot see it, and help is needed, the principle of experiential qualifications would perhaps make it necessary to call a surveyor.

Thus, it is essential that the doctrine of experiential qualifications should not be confounded with the doctrine of superfluous opinion-evidence. Each has its legitimate rules, and both often may come into doubt with reference to the same piece of evidence; but they must be kept separate. The whole law of "opinion evidence," so-called, may be and might well be modified or abolished; but that would not affect in the slightest the sound doctrine of

experiential qualifications. Practically, the best plan for the advocate is to test each piece of evidence (if it seems to involve these doctrines) by asking himself the two distinct questions: first, Is this a matter upon which this witness is sufficiently qualified by experience? and, if it is, next, Is this a matter upon which the jury are or may be so well furnished with information that this witness cannot help them appreciably?

§ 558. **Experience, and Observation or Knowledge, distinguished.** It has been seen (*ante*, § 478), that Observation, or Knowledge, of the matter to be testified to is one of the essential elements of testimonial qualifications; its rules are examined elsewhere in detail (*post*, § 650). Here it is to be noted that, in practice, the line between experience and observation may sometimes be indistinguishable. It is not that there is any doubt about either being indispensable; that cannot be. It is merely that the circumstances which supply the one often supply the other also; and so the rule which requires or permits a witness of a certain sort to be accepted cannot in such a case be classified as belonging exclusively or certainly under the one or the other principle. This situation arises often with reference to value-witnesses. A ruling, for instance, that knowledge of sales in the vicinity is sufficient to qualify a value-witness, — is it a ruling as to experience or as to knowledge? The uncertainty arises from the fact that observation or knowledge of a thing involves, in these instances, two elements: acquaintance with the object or article itself, and acquaintance with the class of things into which it is desired to put the object. For example, knowledge of the value of a horse involves, first, a knowledge of the values of the different grades of horses, and, secondly, knowledge of the appearance and qualities of the particular horse, and the operation of estimating its value consists in comparing it with the several possible classes or grades and then placing it in one of them. It follows that the observation or knowledge necessary in such cases is twofold, — knowledge of values generally or the conditions affecting values, and knowledge of the thing to be valued. The same twofold process is necessary also in witnesses to identity or resemblance; for the witness must be acquainted with both the thing to be identified and the thing with which the identification is to be made or denied.

Now in this twofold qualification as to knowledge there is in itself involved nothing as to experiential qualifications. But the question may arise whether or not special experiential qualifications are not necessary for acquiring this knowledge of a class of things; and it is here that the practical difficulty of treatment begins. Suppose, for example, a witness is called to the identification of handwriting. Here, as has been already noted (*ante*, § 99), the process consists in first determining the generic features of a given person's handwriting and then affirming or denying that the piece of writing in issue belongs within that type of writing. Now suppose that testimony to the genuineness of bank-notes is offered on this point from a bank-cashier and a merchant. It will certainly be necessary to show the witness' knowledge of the class, *i. e.* the genuine notes, by evidence that he has handled and

is familiar with the genuine notes; this is purely a question of his opportunities for knowledge of the class. But the further question may arise whether, in spite of such frequent opportunities by handling the notes, the merchant has sufficient skill to form a trustworthy opinion about the genuineness of notes as a class; and here a Court might insist on the witness possessing the peculiar skill which, for example, a cashier would have. Again, suppose a ruling that in order to testify to the value of real property it is or is not necessary that the witness should be a dealer in real estate; is this a ruling as to experiential capacity? It may be looked upon in that way, as holding that special experience is or is not necessary in order to be capable of acquiring intelligent knowledge about such values. On the other hand, it may be looked upon merely as determining that a full and accurate knowledge of such values (*i.e.* the classes or grades into one of which the property is to be placed) can or cannot be obtained exclusively by one whose occupation gives him a full survey of the field. In the former view, we are establishing a special experiential capacity as necessary; in the latter view, we require no special capacity, but insist on full opportunities for observing the class of things in question. Now the Court may in its opinion reveal which of these views it had in mind; but so seldom is this done and so commonly does the decision furnish merely the rule of thumb, without the principle, that it is practically out of the question to distinguish the two topics in the rulings. So, too, the rulings that (for example) a merchant who has handled genuine bank-notes may be a witness to genuineness are so closely connected in their practical bearings with the rulings about experts' qualifications that it is difficult to treat them separately. In dealing, then, with the subject of expert qualifications as to values, and a few other topics, it will be desirable to examine all the rulings under the head of Knowledge or Observation (*post*, §§ 687–722), without attempting to distinguish sharply between principles which have not been expressly discriminated by the Courts.

§ 559. **First Question: Is General or Ordinary Experience sufficient?** The first of the two questions (*ante*, § 556) to be asked in applying the present principle is, whether, for a particular subject of testimony, the *general or ordinary experience* of a layman is sufficient. Here a warning needs to be sounded, at the outset, against the too noticeable tendency to be over-strict, and to insist upon special accomplishments, where justice would be better served by a laxer attitude. The witness is not the juror. He does not decide the issue; he merely furnishes a small contribution to the material for decision. He should not be required to qualify as if he were a final arbiter of facts. A stand must be taken, sooner or later, against the undue extension of the topics upon which special experience is to be required for testifying:

1866, *Porter*, J., in *People* v. *Gonzalez*, 35 N. Y. 62: "The affairs of life are too pressing and manifold to have everything reduced to absolute certainty, even in the administration of justice. Some reliance must be placed in the intelligence and good faith of

witnesses and the judgment and discrimination of jurors. Microscopes, chemists, and men of science are not always at hand; and criminals are neither anxious to court observation nor careful to preserve the evidences of their guilt."

Can any general canon be employed, in determining whether the topic is one upon which special experience shall be required? The following may be suggested: No special experience shall be required unless the matter to be testified to is one upon which it would clearly be presumptuous, under the circumstances of the case, for a person of only ordinary experience to assume to trust his senses, for the purposes of his own action in the ordinary serious affairs of life.[1]

§ 560. **Second Question: What Special Experience is Necessary? (1) Qualification must be Expressly Shown.** If for a particular topic the foregoing question is answered in the negative, and special experience is held to be necessary, the second question then presents itself: What sort of special experience is necessary? This will sometimes permit of a general rule, — as when it is laid down that a medical practitioner need not be a specialist in insanity to form an opinion on that subject. Whatever general rules of this sort have been vouchsafed are dealt with under the various topics of testimony (*post*, §§ 534–571). But commonly there can be no such general propositions for the topic at large. The decision must be a concrete one, *i. e.* upon the fitness of the individual witness, as shown by the circumstances of his experience. Here two rules of method come into application: (1) The *possession of the required qualifications* by a particular person offered as a witness, *must be expressly shown by the party offering him.* This follows from the nature of the situation (*ante*, § 556), and is universally conceded.[1] It marks a contrast between this and the foregoing sorts of testimonial capacity (*ante*, § 484).

§ 561. **Same: (2) Discretion of the Trial Court.** (2) Secondly, and emphatically, the *trial Court must be left to determine*, absolutely and without review, the fact of possession of the required qualification by a particular witness. In most jurisdictions it is repeatedly declared that the decision upon the experiential qualifications of witnesses should be left to the determination of the trial Court.[1]

[1] Compare the following: 1875, Endicott, J., in Com. *v.* Sturtivant, 117 Mass. 122: "[The condition is that] the facts upon which the witness is called on to express his opinion are such as men in general are capable of comprehending and understanding."

[1] It is therefore seldom expressly ruled upon: 1879, State *v.* Secrest, 80 N. C. 450, 457; 1867, State *v.* Ward, 39 Vt. 225, 236. This was not allowed to be insisted on in Bishop Atterbury's Trial, 16 How. St. Tr. 494 (1723), but merely because the interest of the State demanded the preservation of the secrecy of such methods (*post*, § 2367).

[1] *Can.:* 1888, Preeper *v.* R., 15 Can. Sup. 401, 408, 410; *Ala.:* 1900, Louisville & N. R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40; 1902, White *v.* State, 133 id. 122, 32 So. 139; *Ark.:* 1882, Hunnicutt *v.* Kirkpatrick, 39 Ark. 172; *Cal.:* 1880, Sowden *v.* Quartz Mining Co., 55 Cal. 451; *Conn.:* 1897, State *v.* Main, 69 id. 123, 37 Atl. 80; 1898, Hygeia D. W. Co. *v.* Hygeia I. Co., 70 id. 516, 40 Atl. 534; 1900, Barber *v.* Manchester, 72 id. 675, 45 Atl. 1014; *D. C.:* 1895, Lansburgh *v.* Wimsett, 7 D. C. App. 271, 274; *Fla.:* 1902, Davis *v.* State, — Fla. —, 32 So. 822; *Ind.:* 1886, Fort Wayne *v.* Coombs, 107 Ind. 85, 7 N. E. 743 (conclusive, unless there is no evidence at all of qualifications, or a palpable abuse of discretion); 1895, Jenney Electric Co. *v.* Branham, 145 id. 314, 41 N. E. 448; *Me.:* 1883, Higgins *v.* Higgins, 75 Me. 346; 1885, Fayette *v.* Chesterville, 77 id. 33 ("in extreme cases, where a serious mistake

Just how far this extends in each jurisdiction is difficult to say. In some, the ruling is not reviewable at all; in others, it is reviewable on certain conditions; in others, the matter is left "largely" to the trial Court's discretion. But the language of the principle varies in different opinions; and, in practice, the rulings below are constantly reconsidered above, under the guise of ascertaining whether the "discretion" has been "abused."[2] But the reform of the future will find in this principle the nucleus for a beneficent extension of the doctrine of judicial discretion. Looking at the complication of facts often entering into a witness' competency and best understood by the trial judge alone, — looking at the comparatively trifling character (in relation to all the issues of a trial) of the topics over which controversy arises, — looking at the ample and sure safeguard of cross-examination to reveal the witness' real qualifications, — looking at the injustice of requir-

has been committed through some accident, inadvertence, or misconception, his action may be reviewed"); 1888, State *v.* Thompson, 80 Id. 200, 13 Atl. 892; 1896, Marston *v.* Dingley, 88 Id. 546, 34 Atl. 414 ("unless it is made clearly to appear from the evidence that it was not justified or that it was based upon some error in law"); *Mass.:* 1850, Lincoln *v.* Barre, 5 Cush. 591; 1858, Quinsigamond Bank *v.* Hobbs, 11 Gray, 257; 1860, Marcy *v.* Barnes, 16 Id. 164; 1869, Swan *v.* Middlesex, 101 Mass. 177; 1869, Gossler *v.* Refinery, 103 Id. 335; 1870, Com. *v.* Williams, 105 Id. 68; 1874, Tucker *v.* Railroad, 118 Id. 548; 1875, Lawrence *v.* Boston, 119 Id. 132; 1882, Perkins *v.* Stickney, 132 Id. 217 ("conclusive, unless it appears upon the evidence to be erroneous or to have been founded upon some error in law"); 1883, Com. *v.* Nefus, 135 Id. 554; 1885, Campbell *v.* Russell, 139 Id. 279, 1 N. E. 345; 1887, Warren *v.* Water Co., 143 Id. 164, 9 N. E. 527; 1880, Hill *v.* Home Ins. Co., 129 Id. 349; 1888, Lowell *v.* Com'rs, 146 Id. 412, 16 N. E. 8; 1895, Amory *v.* Melrose, 162 Id. 556, 39 N. E. 276; 1895, Com. *v.* Hall, 164 Id. 152, 41 N. E. 133; 1901, Toland *v.* Paine F. Co., 179 Id. 501, 61 N. E. 52; 1901, Bowen *v.* R. Co., Ib. 524, 61 N. E. 141; 1903, White *v.* McPherson, — Id. —, 67 N. E. 643; *Mich.:* 1879, McEwen *v.* Bigelow, 40 Mich. 217; 1883, Ives *v.* Leonard, 50 Id. 299, 15 N. W. 463, *semble*; *Minn.:* 1896, Blondel *v.* R. Co., 66 Minn. 284, 66 N. W. 1079; 1897, Beckett *v.* Aid Assoc., 67 Id. 298, 69 N. W. 923; 1900, Backus *v.* Ames, 79 Id. 145, 81 N. W. 766; 1901, Yorks *v.* Mooberg, 84 Id. 502, 87 N. W. 115; *Mo.:* 1896, Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863; *Nebr.:* 1900, Missouri P. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744; 1901, Omaha L. & T. Co. *v.* Douglas Co., 62 Id. 1, 86 N. W. 936; 1903, Schmuck *v.* Hill, — Id. —, 96 N. W. 158; *N. H.:* 1860, Jones *v.* Tucker, 41 N. H. 549 (Doe, J.: "whether a witness has a special and peculiar knowledge is as much a question of fact as the question whether a search is diligent and thorough"); 1870, Dole *v.* Johnson, 50 Id. 459; 1872, Ellingwood *v.* Bragg, 52 Id. 490; 1881, Goodwin *v.* Scott, 61 Id. 114; 1888, Carpenter *v.* Hatch, 64 Id. 576, 15 Atl. 219; *N. J.:* 1896, New Jersey Z. & I. Co. *v.* L. Z. & I. Co., 59 N. J. L. 189, 35 Atl. 915; *N. Y.:* 1877, Nelson *v.* Ins. Co., 71 N. Y. 460, *semble*; 1888, Slocovich *v.* Ins. Co., 108 Id. 62, 14 N. E. 802; *N. C.:* 1879, Flynt *v.* Bodenhamer, 80 N. C. 205; 1886, State *v.* Cole, 94 Id. 964 (explaining State *v.* Parish, Busbee 239; State *v.* Secrest, 80 N. C. 450); 1895, Bline *v.* R. Co., 117 Id. 644, 23 S. E. 275 (collecting previous rulings); 1900, Geer *v.* Durham W. Co., 127 Id. 439, 37 S. E. 474; 1903, State *v.* Wilcox, — Id. —, 44 S. E. 625; *Or.:* 1900, Farmers' & T. N. Bank *v.* Woodell, 38 Or. 294, 61 Pac. 837; 1902, Ruckman *v.* Lumber Co., 42 Id. 231, 70 Pac. 811; *Pa.:* 1869, Ardesco Oil Co. *v.* Gilson, 63 Pa. 152; Sorg *v.* Congregation, Ib. 161; 1871, Delaware & C. Towboat Co. *v.* Starrs, 69 Id. 41; 1884, First Nat'l Bank *v.* Wirebach's Ex'r, 106 Id. 44; 1902, Stevenson *v.* Ebervale Coal Co., 203 Id. 316, 52 Atl. 201; *R. I.:* 1860, Howard *v.* Providence, 6 R. I. 514; 1863, Sarle *v.* Arnold, 7 Id. 586; 1903, Ennis *v.* Little, — Id. —, 55 Atl. 884; *Tenn.:* 1891, Powers *v.* McKenzie, 90 Tenn. 181, 16 S. W. 559; 1897, Bruce *v.* Beall, 99 Id. 303, 41 S. W. 445; *U. S.:* 1888, Stillwell Mfg. Co. *v.* Phelps, 130 U. S. 527, 9 Sup. 601; 1894, Union P. R. Co. *v.* Novak, 15 U. S. App. 400, 414, 9 C. C. A. 629, 61 Fed. 573; 1902, Bradford Glycerine Co. *v.* Kizer, 51 C. C. A. 524, 113 Fed. 895; *Ut.:* 1897, Wright *v.* S. P. Co., 15 Utah, 421, 49 Pac. 309; 1899, State *v.* Webb, 18 Id. 441, 56 Pac. 159; 1901, Budd *v.* R. Co., 23 Id. 515, 65 Pac. 486; 1902, Garr *v.* Craney, 25 Id. 193, 70 Pac. 853; *Vt.:* 1874, Wright *v.* Williams' Estate, 47 Vt. 232 ("so long as the evidence or facts do not constitute or conclusively show skill, and such skill is matter of fact to be inferred from such evidence or facts, the finding of the Court is not revisable in that respect as being error in law"); 1885, Lamoille Valley R. Co. *v.* Bixby, 57 Id. 563; Carpenter *v.* Corinth, 58 Id. 216, 2 Atl. 170; 1886, Bemis *v.* R. Co., 58 Id. 641, 3 Atl. 531; 1901, Watriss *v.* Trendall, 74 Id. 54, 52 Atl. 118; *Va.:* 1897, Richmond L. & M. W. *v.* Ford, 94 Va. 616, 27 S. E. 509; *Wash.:* 1902, Czarecki *v.* R. & N. Co., 30 Wash. 288, 70 Pac. 750.

[2] For the misuse of the term "discretion" in this sense, see *ante*, § 16.

ing the busy judges of the Supreme Courts to investigate such trifles, — in view of all these considerations, it cannot be doubted that the rule of the future ought to be: *The experiential qualifications of a particular witness are invariably determined by the trial judge, and will not be reviewed on appeal.*

§ 562. **Sundry Principles: (1) Expert Witness Stating his Grounds of Opinion; (2) One Expert testifying to Another's Competency; (3) Method of Securing Unbiassed Experts.** (1) An expert witness, like any other witness, may be asked on the direct examination, or may be required, to state the *grounds of his opinion, i. e.* the general data which form the basis of his judgment upon the specific data observed by him. This is merely an application of the general principle of the knowledge-qualification (*post*, § 655). Distinguish from this the questions whether a *hypothetical question* may or must be employed (*post*, § 672); whether an expert witness may be *cross-examined* or *contradicted* as to the grounds of his opinion (*post*, §§ 938, 972, 992); and whether the statements of a *patient* to a *physician* may be offered in evidence under the exception to the Hearsay rule (*post*, §§ 1720).

(2) The *experiential qualifications* of a witness are usually established by his own testimony reciting the facts of his career and special experience. But in impeachment of his qualifications (*post*, § 938), or in support of them when impeached (*post*, § 1104), the general character of the witness as to experiential competency may be testified to. Here the proof may be made by means of reputation (*post*, § 1621) or by means of another expert witness' personal opinion (*post*, § 1984), — methods which raise the distinct questions of the Hearsay rule and the Opinion rule.

(3) Much has been declaimed about the *partisanship* and consequent untrustworthiness of the usual professional man as an expert witness. But it does not appear that the professional man is more biassed or more corrupt than the ordinary lay witness. It is merely that his bias or pecuniary subserviency, when it is discovered, is in a more marked and unpleasant contrast with that ideal of impartiality and trustworthiness which is naturally associated with abstract scientific truth. So, too, the frequent inconclusiveness, uncertainty, and contradiction of expert testimony are not more radical than the same baffling features in testimony founded on ordinary observation by the layman's senses. They merely disappoint more sharply our usual conceptions of the accuracy of scientific knowledge. It is a question whether either of these popular (and natural) ideals is attainable at all. But if they may be, in any degree, it certainly is an important question whether they are attainable, in any greater degree than at present, by any other method of using expert testimony than that of calling expert witnesses like any others. There are serious difficulties to be met with by any other method, — in particular, the expense, the impracticability of classifying experts, the impropriety of interfering with the parties' voluntary choice, and the difficulty of adopting a fixed rule for all classes of cases and all communities. Hitherto

no one plan seems to have received any general support either in professional or in public opinion.[1]

2. Rules for Particular Subjects of Experience.

§ 564. Foreign Law. In answering the first question (*ante*, § 559), as applied to this topic, the main controversy is whether a witness to foreign law must be by profession an advocate, attorney, or judge, or whether a layman, if he claims the knowledge, may be trusted to speak as to the state of the law. The earlier practice in England seems to have been often very liberal,[1] though Lord Ellenborough is reported as having insisted on the necessity of a professional character in the witness.[2] But in the leading cases of Vander Donckt *v.* Thelusson and the Sussex Peerage it was settled that, besides professional persons, those whose occupation makes it necessary for them to give special attention to legal topics may be listened to upon those topics; the application of this test being left for decision to individual cases:

1844, Lord *Langdale*, in *Sussex Peerage Case*, 11 Cl. & F. 117–134 (a Roman Catholic bishop, exercising certain judicial functions over marriages, was permitted to testify to the Catholic law of marriage): "The witness is in a situation of importance; he is engaged in the performance of important and responsible public duties; and, connected with them and in order to discharge them properly, he is bound to make himself acquainted with this subject of the law of marriage. That being so, his evidence is of the nature of that of a judge."

1849, *Maule, J.*, in *Vander Donckt* v. *Thelusson*, 8 C. B. 812, 824 (a witness to prove Belgian law had been a merchant and a commissioner in stocks and bills of exchange in Brussels, but was now an hotel-keeper in London; the question being as to the legal place of presentation of a note): "The question is whether he is a person having special and peculiar means of knowledge of the law of Belgium with regard to bills of exchange and promissory notes, one whose business it was to attend to and make himself acquainted with the subject. I think that, inasmuch as he had been carrying on a business which made it his interest to take cognizance of the foreign law, he does fall within the description of an expert. Applying one's common sense to the matter, why should not persons who may be reasonably supposed to be acquainted with the subject — though they have not filled any official appointment, such as judge or advocate or solicitor — be deemed competent to speak upon it? . . . All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as experts are required."

As to *English* law, then, these limits will not be transcended, *i. e.* there must be an occupation, making necessary a familiarity with law.[3] In the *United*

[1] For some of the proposed expedients, see the following articles: J. F. Stephen, Esq., in 11 Jur. Soc. Pap. 236; Hon. Willard Bartlett, in 34 Am. L. Rev. 1; Hon. G. A. Endlich, in 32 id. 851; Hon. W. L. Foster, in 11 Harv. L. Rev. 169; Mr. Learned Hand, in 15 id. 53. Compare the English and Canadian Rules of Court as to the use of experts' certificates (*post*, § 1674).

[1] Cases cited *infra*.

[2] 1807, Richardson *v.* Anderson, 1 Camp. 66 ("there ought strictly to be some witness professionally acquainted with it").

[3] 1844, Sussex Peerage Case, 11 Cl. & F. 134 (repudiating the ruling of Wightman, J., in R. *v.* Dent, 1 C. & K. 97 (1843); followed with some hesitation in (1849) Vander Donckt *v.* Thelusson, 8 C. B. 824); 1903, Wilson *v.* Wilson, P. 157 (law of Malta proved by a doctor of civil law who had never practised there, but who had made professional researches into that law).

Compare the following early cases: 1795, Lindo *v.* Belisario, 1 Hagg. Cons. 216 (Hebrew witnesses to the Hebrew marriage law were freely consulted who did not appear to fulfil the above limitations); 1791, Ganer *v.* Lady Lanes-

States no such special limitation has been laid down; an even more liberal policy has generally been followed. In some Courts it has been distinctly said that the experiential competence is independent of the witness' profession and will depend upon the circumstances of each case.[4] In other Courts special circumstances have led to special rules admitting particular classes of laymen.[5] Further than this, generalization seems impracticable.

(2) In answering the second question (*ante*, § 560), a number of rulings have passed upon the qualifications of particular witnesses; but they have little or no value as precedents.[6]

§ 565. **Same: Custom as equivalent to Law.** It has sometimes been necessary to point out that a custom of merchants, or the like, may in effect raise a question of law, and that therefore the witness' qualifications must be examined from that specific point of view.[1] Distinguish, however, the question whether usage may be evidenced by specific instances in *other trades or places* (*ante*, § 379); whether a *single witness* suffices to prove a usage (*post*, § 2053); and whether such testimony is obnoxious to the *Opinion rule* (*post*, § 1955).

§ 566. **Same: Other Principles, distinguished.** In the proof of foreign law, certain other principles, usually involved in practice, are here to be dis-

borough, Peake N. P. 18 (admitting a Jewess, as to the divorce custom of Hebrews on the continent). By St. 1859, 22–3 Vict., c. 63, § 1, an opinion may be obtained from another British court in a region where a diffarent law prevails, and by St. 1861, 24–5 Vict., c. 11, § 1, from any foreign court of a country with which a convention has been made for the purpose; see *post*, 1675.

[4] 1852, Pickard *v.* Bailey, 26 N. H. 170 (a lawyer is not necessary, if the necessary experience otherwise appears); 1806, Kenny *v.* Clarkson, 1 Johns. 394 (some intelligent person of the country in question suffices); 1829, Chanoine *v.* Fowler, 3 Wend. 177; 1875, American Life Ins. & Trust Co. *v.* Rosenagle, 77 Pa. 515 (any one "who is or has been in a position to render it probable that he would make himself acquainted with it"; here a Catholic dean in Germany, who had the legal custody of the local marriage records, testified as to the law about them); 1871, Bird's Case, 21 Gratt, 801, 808 (a priest or minister may testify to marriage law); W. Va. Code 1891, c. 13, § 4 (a judge may "consider any testimony, information, or argument that is offered on the subject").

[5] 1877, Wottrich *v.* Freeman, 71 N. Y. 601 ("all residents of a country, of a marriageable age and ordinary understanding, are familiar with the usual and customary forms of marriage"; here it was apparently enough if the customary form was followed); 1840, Phillips *v.* Gregg, 10 Watts 161, 170 (here the difficulty of obtaining lawyers acquainted with the early Louisiana Territory laws, and the general notoriety of marriage laws, was regarded as allowing a relaxation); 1877, State *v.* Cneflar, 47 Tex. 304 ("the practice has long prevailed in our courts of receiving the evidence of intelligent Mexicans who were not lawyers, in reference to the laws of Spain and Mexico, in litigation pertaining to lands").

[6] 1867, McKenzie *v.* Gordon, 7 N. Sc. 151 (American consul, held not qualified to testify to "a validity of a note without a revenue sta p); 1849, Layton *v.* Chaylon, 43 La. An. [illegible], 1695, Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317; 1856, People *v.* Lambert, 5 Mich. 349, 362 (excluding a constable, who had had some litigation involving the law in question); 1834, Marguerite *v.* Chonteau, 3 Mo. 540, 562 (early Spanish military official's opinion as to law of slavery of Indians, rejected); 1898, State *v.* Davis, 69 N. H. 350, 41 Atl. 267 (what "R. L. D." on the U. S. internal revenue office records meant; one who had consulted a circular of the Department held not incompetent); 1870, Barrows *v.* Downs, 9 R. I. 453; 1870, Armstrong *v.* U. S., 6 Ct. Cl. 226; Molina *v.* U. S., lb. 272.

[1] But in most of the rulings the custom does not involve any matter of law. 1878, Third National Bank *v.* Cosby, 43 U. C. Q. B. 58 (American bank president admitted to testify to the legal currency of the U. S.; "any person, be he a practising lawyer or not, who comes within the description of a person *peritus virtute officii*" is admissible); 1875, Wilson *v.* Bauman, 80 Ill. 493 (custom of employing an architect to superintend construction; "anybody who had any experience in the matter was competent"; here, building contractors); 1863, Kermott *v.* Ayer, 11 Mich. 181 (coinage; admitted); 1866, Phelps *v.* Town, 14 id. 379 (similar; excluded); 1870, Comstock *v.* Smith, 20 id. 342 (similar; admitted); 1859, Evans *v.* Ins. Co., 6 R. I. 47, 53 (meaning of "bar-iron"; "any person connected with the trade" so as "reasonably to be presumed to know the meaning," admissible).

tinguished. (1) Whether the professional witness may have acquired his knowledge by reading only, *without practice*, and whether he must be a resident of the country whose law is in issue, are questions of the adequacy of his knowledge, rather than of his skilled capacity (*post*, § 690). (2) Whether, when statutory law is involved, the law may be testified to by an expert witness, instead of by the *production of the text*, is a question of the rule for producing originals (*post*, § 1271). (3) Whether the Opinion rule affects the testimony of a witness is still another important question (*post*, § 1953). (4) Whether the foreign law may be evidenced by certified or printed *copies of the statutes*, or by *legal treatises* or by *printed reports* of decisions, depends upon various exceptions to the Hearsay rule (*post*, §§ 1684, 1697, 1703).

§ 567. **Value.** It has been already noted (*ante*, § 558) that, since knowledge of the value of a thing involves knowledge also of the classes of value to which the thing may belong, it is impracticable to distinguish invariably the rulings upon experiential qualification from the rulings upon knowledge; and it is therefore more convenient to examine the law of the subject under the latter head (*post*, §§ 711-722).

§ 568. **Medical and Chemical Matters (Health, Sanity, Poison, Blood, etc.); (1) Whether a Lay Witness suffices.** Following the double division already noted (*ante*, § 559), it may be first inquired what topics there are upon which laymen in their ordinary experience are incapable of acquiring knowledge and forming opinions; and, next, what special training is required or is sufficient for the particular professional witness. (1) *When does ordinary experience suffice?* The key to the various questions that here arise seems to be this: While on matters strictly involving medical science, as such, some special skill is needed, yet there are numerous matters, involving health and bodily soundness, upon which the ordinary experience of everyday life is entirely sufficient. The line may sometimes be difficult to draw; but there can be no difficulty in determining that a layman may be received to state (for example) that a person was or was not apparently ill. Great liberality should be shown by the Courts in applying this principle, so that the cause of justice may not be obstructed by narrow and finical rulings. The correct doctrine has nowhere been better set forth than in the following passage:

1858, *Campbell*, J., in *Evans* v. *People*, 12 Mich. 36: "The greatest difficulty encountered, in determining questions of competency of testimony on subjects connected more or less with medical science, is in ascertaining how far it is safe to suppose unprofessional observers are able to form a reliable judgment. There are some simple disorders which all persons are familiar with. Others require the very highest degree of medical skill to distinguish them from disorders having some resembling appearances or symptoms. . . . In the view of evidence now entertained by the best authorities, it is settled that a jury should be allowed to have placed before them all the means of knowledge which can be had without involving the danger of leading them to form conclusions not based on solid truth and not reliable as reasonably certain. . . . Circumstances may make whole communities familiar with diseases not known elsewhere, . . . and it often happens that persons having no general skill become very familiar with particular subjects. It would be very unwise to exclude such evidence merely because the range of the witness' knowledge is limited. There are as many grades of knowledge and ignorance in the professions

as out of them. The only safe rule in any of these cases is to ascertain the extent of the witness' qualifications, and within their range to permit him to speak. Cross-examination and the testimony of others will here, as in all other cases, furnish the best means of testing his value."

To the modern reluctance of the English bar to dispute over trifling points of evidence must be attributed the absence of English rulings on this doctrine. In our own country, on the whole, narrow objections, though constantly made, are discountenanced, and a policy of considerable liberality is enforced.[1]

[1] *Laymen held admissible: Ala.:* 1847, Milton *v.* Rowland, 11 Ala. 737 (the fact of disease, as externally apparent); 1855, Bennett *v.* Fall, 26 id. 610 (that a person was sick); 1857, Wilkinson *v.* Moseley, 30 Id. 562 (same); 1859, Blackman *v.* Johnson, 35 Id. 255 (same); 1859, Barker *v.* Coleman, ih. 225 (same); 1861, Fountain *v.* Brown, 38 id. 75 (same); 1861, Stone *v.* Watson, 37 id. 288 ("looked sick"); 1900, Dominick *v.* Randolph, 124 Id. 557, 27 So. 481 (that a person is sick, allowable, but not that he has paralysis); *Cal.:* 1882, People *v.* Hong ah Duck, 61 Cal. 390 (kind of wound inflicted); 1895, People *v.* Gibson, 106 id. 458, 39 Pac. 864 (same); 1894, Robinson *v.* Fire Co., 103 Id. 1, 4, 36 Pac. 955 (a person's healthy appearance); 1896, People *v.* Barney, 114 id. 554, 47 Pac. 41 (whether there was a hymen; a woman admitted); *D. C.:* 1894, District of Col. *v.* Haller, 4 D. C. App. 405, 411 (that the plaintiff was a "strong, able-bodied man" before the injury); *Fla.:* 1898, Edwards *v.* State, 39 Fla. 753, 23 So. 537 (where medical experts are not accessible, a layman may testify what would probably cause death); *Ill.:* 1876, Shawneetown *v.* Mason, 82 Ill. 339 (whether a juror was sick); 1892, Chicago C. R. Co. *v.* Van Vleck, 143 id. 480, 485, 32 N. E. 262 (ability to work; state of health); *Ind.:* 1897, Cleveland C. C. & St. L. R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675 (a wife, as to the condition of her husband's health); *Ia.:* 1901, Suddith *v.* Boone, — Ia. —, 96 N. W. 853 (that the smell of certain gas made him sick); *Md.:* 1886, Baltimore & L. T. Co. *v.* Cassell, 66 Md. 432, 7 Atl. 805 (general healthy appearance); *Mass.:* 1869, Com. *v.* Dorsey, 103 Mass. 413, 419 (whether hairs were human, and whose they were); 1896, Com. *v.* Flynn, 165 id. 153, 42 N. E. 562 (apparent physical condition of a person robbed); *Mich.:* 1863, Evans *v.* People, 12 Mich. 33 (excluded as to whether a particular epidemic disease prevailed; but admitted as to whether sickness, in general, prevailed); 1874, People *v.* Olmstead, 30 Id. 433 (cause of an illness); 1884, Peer *v.* Ryan, 54 Id. 224, 19 N. W. 961 (veterinary surgery); 1889, Harris *v.* R. Co., 76 id. 229, 42 N. W. 1111 (ability of sick person to work and to use limbs); *N. Y.:* 1875, Linsday *v.* People, 63 N. Y. 152 (freshness of a wound); *Pa.:* 1881, Allen's Appeal, 99 Pa. 198 (a woman who had borne four children was allowed to testify that a child at its birth was fully developed); 1888, United B. Mut. Aid Soc. *v.* O'Hara, 120 Id. 265, 13 Atl. 932 (that a person had shortness of breath, allowed, but not that he had asthma); *Tex.:* 1874, Wilson *v.* State, 41 Tex. 321 (sex of a skeleton); *U. S.:* 1893, Baltimore & O. R. Co. *v.* Rambo, 16 U. S. App. 277, 280, 8 C. C. A. 6, 59 Fed. 75 (appearance of suffering); 1896, Grayson *v.* Lynch, 163 U. S. 468, 16 Sup. 1064 (whether cattle had symptoms of a disease commonly called Texas fever); 1885, Knight *v.* Smythe, 57 Vt. 530 (general health appearance); *W. Va.:* 1892, Lawson *v.* Conaway, 37 W. Va. 159, 162, 16 S. E. 564 (physical ability); *Wis.:* 1874, Montgomery *v.* Scott, 34 Wis. 343 (whether a leg was broken); 1884, Wright *v.* Howard, 60 Id. 122, 18 N. W. 750 (nature of present suffering; asked of the injured person on the stand); 1885, Baker *v.* Madison, 62 id. 143, 22 N. W. 141, 583 (capacity to work, etc.); 1887, Smalley *v.* Appleton, 70 Id. 344, 35 N. W. 729 (general health); 1888, Bridge *v.* Oshkosh, 71 Id. 365, 37 N. W. 409 (physical and mental condition as outwardly apparent).

Laymen held inadmissible: Ala.: 1849, McLean *v.* State, 16 Ala. 679 (nature of a disease consisting in "fits"); 1903, White *v.* State, — id. —, 34 So. 178 (how long a man had been dead when his body was seen); *Ark.:* 1860, Tatum *v.* Mohr, 21 Ark. 354, *semble* (nature of disease); 1861, Thompson *v.* Bertraud, 23 id. 733 (same); 1897, Redd *v.* State, 63 id. 457, 40 S. W. 374 (relaxation of muscles after death); *Ga.:* 1895, Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48 (by the plaintiff, that his injury would be permanent); 1899, Atlanta C. S. R. Co. *v.* Bagwell, 107 id. 157, 33 S. E. 191 (whether dancing would injure a woman having "female trouble"); *Ky.:* 1896, American Accident Co. *v.* Fidler, — Ky. —, 35 S. W. 905, 36 Id. 528 (whether the deceased had typhoid fever; amputation of limb); *Me.:* 1835, Boles *v.* McAllister, 12 Me. 308 (existence of pregnancy); *Mass.:* 1868, Ashland *v.* Marlborough, 99 Mass. 47 (disease); 1894, Zimin *v.* Rice, 161 Mass. 571, 576, 37 N. E. 747 (by a plaintiff, that his pneumonia was due to taking a journey in consequence of an attachment); *Mich.:* 1896, Lewis *v.* Bell, 109 Mich. 189, 66 N. W. 1091 (disease of horses; one employed in a stable, excluded); *N. Y.:* 1903, Gray *v.* Brooklyn H. R. Co., 175 N. Y. 448, 67 N. E. 899 (by women, that their miscarriages were like the plaintiff's, excluded); *Pa.:* 1889, Lombard R. Co. *v.* Christian, 124 Pa. 123, 16 Atl. 628 (various answers permitted and excluded); *U. S.:* 1886, Dushane *v.* Benedict, 120 U. S. 647, 7 Sup. 696 (infected rags as a cause of illness); *Utah:* 1898, Murray *v.* R. Co., 16 Utah 356, 52 Pac. 596 (whether a jolt of a car would hurt a pregnant woman).

On all the foregoing topics of testimony, compare the application of the *Opinion rule* (*post*, §§ 1974–1976).

Of the particular topics most frequently arising for decision, it has been generally held that special qualification is not required upon the question whether a stain is of *blood*.[2] Whether a lay witness may testify to *sanity* is a question which always occurs in conjunction with the question whether the rule against Opinion evidence should exclude such testimony, and the former question has played but a small part in the settlement of the rule of law in the different jurisdictions. It is conceivable that a Court might regard such testimony as proper under the former principle but improper under the latter. In fact, however, if a Court has excluded it on the former ground it has also excluded it on the latter, putting the chief emphasis on the latter, and if it has received it, has done so on both grounds; so that practically the rule of law stands or falls according to the determination of the latter question. The state of the law on that point is examined under the Opinion rule (*post*, §§ 1933–1938). The incompetency of the layman to form an opinion has nevertheless entered in part into the grounds of decision for the few jurisdictions which reject such testimony:

1879, *Colt*, J., in *May* v. *Bradlee*, 127 Mass. 421: "That question [of testamentary capacity], as it arises in the courts, is not often presented in a form in which it can be wisely determined by the opinions of unskilled observers, however numerous. There are forms of partial delusion, the influence of which can be detected only by persons of uncommon skill and experience, which defeat a will executed as the result of such a delusion. All forms of sanity and insanity, whether partial or general, are mental conditions which run into each other by insensible gradations, not easily separated and defined. The Courts do not deal with the plain cases only; those which come near the line, or where the disease is partial and limited, are those which most commonly occupy attention and require the application of skill and science."

But the propriety of accepting lay opinions, for what they may be worth, has been defended in the following sensible opinion, which represents the doctrine in all but a few jurisdictions:

1884, *Harlan*, J., in *Connecticut M. Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 4 Sup. 533: "This position [that an ordinary observer may not state his judgment as to the sanity of one he knows] cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many, if not in every, case, civil and criminal, which involves the question of insanity. Whether an individual is insane is not always best solved by abstruse metaphysical speculations expressed in the technical language of medical science. The common sense and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation, — matters about which they may and do form opinions sufficiently satisfactory to constitute the basis of action. While the mere opinion of a non-professional witness predicated upon facts detailed by others is incompetent as evidence upon an issue of insanity, his judgment based upon personal knowledge of the cir-

[2] 1898, Gantling v. State, 40 Fla. 237, 23 So. 857 (that stains of a certain color were found); 1901, State v. Rice, 7 Ida. 762, 66 Pac. 87; 1875, Com. v. Sturtivant, 117 Mass. 122 (direction of a stain); 1880, Dillard v. State, 58 Miss. 368; 1893, State v. Robinson, 117 Mo. 649, 663, 23 S. W. 769 (that stains looked like blood); 1866, People v. Gonzalez, 35 N. Y. 62; 1881, Greenfield v. People, 85 id. 83; 1888, People v. Deacons, 109 id. 382, 16 N. E. 676; 1897, People v. Burgess, 153 id. 561, 47 N. E. 889; 1885, People v. Thiede, 11 Utah 241, 39 Pac. 837; 1902, State v. Henry, 51 W. Va. 283, 41 S. E. 439.

cnmstances involved in such an inqniry certainly is of valne; because the natural and ordinary operations of the human intellect, and the appearance and condnct of insane persons, as contrasted with the appearance and conduct of persons of sonnd mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the Court or jury must depend upon the intelligence of the witness as manifested by his examination, and upon his opportunities to ascertain all the circumstances that shonld properly affect any conclusion reached."[8]

§ 569. **Same: (2) What Special Experience is Necessary.** (2) When on a medical topic ordinary experience does not suffice, *what are to be the requirements of special experience?* The chief question that here occurs is whether a *general practitioner* may testify on matters of a particular department of the science wherein specialists may presumably be had. Here the Courts seem not to have taken a sufficiently firm stand against the narrow objections frequently raised. It is not that the rulings themselves are illiberal, but that narrow doctrines are not repudiated with sufficient positiveness. The liberal doctrine should be insisted on that the law does not require the best possible kind of a witness, but only persons of such qualifications as the community daily and reasonably relies upon in seeking medical advice. Specialists are in most communities few and far between; the ordinary medical practitioner should be received on all matters as to which a regular medical training necessarily involves some general knowledge. This rule has been applied for sundry subjects, chiefly that of poisons,[1] and also for *in-*

[8] Compare with the following cases, which agree with the opinion qnoted, the citations under § 689, *post* (qualificatlons as to *Knowledge of the person* said to be insane) and § 1938, *post*, (application of the *Opinion rule* to sanlty), all the admitting cases on the latter point being also anthorities for admission on the present point: 1882, Smith *v.* Hickenbottom, 57 Ia. 737, 11 N. W. 664; 1871, State *v.* Reddick, 7 Kan. 149; 1881, Wood *v.* State, 58 Miss. 742; 1845, Clark *v.* State, 12 Oh. 487; 1897, Kanfman *v.* Caughman, 49 S. C. 159, 27 S. E. 16; 1901, Johnson *v.* State, 42 Tex. Cr. 618, 62 S. W. 756; 1896, Mntual Life Ins. Co. *v.* Lenbrie, 18 C. C. A. 332, 71 Fed. 843.

The only rulings taking the contrary view on this point have apparently been the following, with May *v.* Bradlee, *supra:* 1853, Dewitt *v.* Barley, 9 N. Y. 384; 1858, U. S. *v.* Holmes, 1 Cliff. 104, 106 (yet the court allowed it at p. 114).

The following ruling falls nuder the principle of § 505, *ante:* 1902, Collins *v.* People, 194 Ill. 506, 62 N. E. 902 (child of 13, held incompetent on the facts to testify to her father's mental condition).

[1] *Admitting a general practitioner:* 1897, Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488 (toxicologist-physician, who had no personal experience with cases of cyanide of potassium poisoning): 1888, Siebert *v.* People, 143 Ill. 579, 32 N. E. 431 (arsenic-poisoning; though the witness never had a case of it); 1858, State *v.* Hinkle, 6 Ia. 385 (chemical analysis); 1883, State *v.* Cole, 63 Ia. 698, 17 N. W. 183 (post-mortem examination for poison); 1869, Young *v.* Makepeace, 103 Mass. 53 (child-birth); 1894, Hardiman *v.* Brown, 162 Id. 585, 39 N. E. 192 (brain-tumor as a sonrce of disease; witness not familiar with such tumors in practice); 1896, People *v.* Thacker, 108 Mich. 652, 66 N. W. 562 (a physician having a medical degree and a general practice, held competent to speak of symptoms of arsenic-poisoning in a patient treated by him, though he had had no personal experience in such cases, hnt has studied the subject); 1895, Seckinger *v.* Mfg. Co., 129 Mo. 590, 31 S. W. 957 (need not be a specialist); 1891, People *v.* Benham, 160 N. Y. 402, 55 N. E. 11 (poison, murder; general practitioner need not be a specialist in toxicology); 1870, Horton *v.* Green, 64 N. C. 67 (glanders, and animal diseases generally); 1859, State *v.* Terrell, 12 Rich. L. 327 (strychnia-poisoning); 1885, Kelly *v.* U. S., 27 Fed. 618 (need not be a specialist); 1875, Hathaway's Adm'r *v.* Ins. Co., 48 Vt. 351 (need not be a specialist). *Rejecting a general practitioner:* 1863, Emerson Gaslight Co., 6 All. 146 (effects of gas on health); 1901, State *v.* Simouis, 39 Or. 111, 65 Pac. 595 (licensed physician, not allowed to testify to symptoms of arsenions poisoning). A person expert in some other special department only was held incompetent in Fairchild *v.* Bascomb, 35 Vt. 409 (1862). Compare the cases clted under § 687, *post* (medical knowledge founded on reading, without practice).

sanity.[2] In various rulings, also, the qualifications of particular physicians are determined, but without laying down general rules.[3] The common law, it may be added, does not require that the expert witness on a medical subject shall be a person *duly licensed to practise medicine;*[4] but in at least one jurisdiction this requirement has been introduced by statute.[5] Except as an indirect stimulus to obtain a license, such a rule is ill-advised, first, because the line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses, and, secondly, because some of the most capable investigators have probably not needed or cared to obtain a license to practise medicine.

§ 570. **Handwriting and Paper Money.** For the reasons already noted (*ante*, § 558), it is not always possible to distinguish the application of the

[2] 1880, Estate of Toomes, 54 Cal. 515 (specialist not necessary); 1871, Davis *v.* State, 35 Ind. 497 (ordinary practice, plus some reading on insanity, sufficient); 1895, Phelps *v.* Com., — Ky. —, 32 S. W. 470 (not making a specialty of insanity, but having had cases of it); 1900, Abbott *v.* Com., — id. —, 55 S. W. 196 (specialist not necessary). *Contra:* 1884, Reed *v.* State, 62 Miss. 409 (special study or practice necessary). In Massachusetts the odd rule obtains that a general practitioner may testify if his opinion is based on personal observation, but not if it is based on a hypothetical question: 1856, Baxter *v.* Abbott, 7 Gray 78; 1859, Com. *v.* Rich, 14 id. 336; 1868, Hastings *v.* Rider, 99 Mass. 624. Compare the citations under § 687, *post*.

[3] 1847, Tullis *v.* Kidd, 12 Ala. 648 (admitting a witness who had received a license as a physician, practised one year, then became a lawyer, and for sixteen years had not practised medicine but continued to keep up his medical reading); 1877, Mitchell *v.* State, 58 id. 419; 1878, Rash *v.* State, 61 id. 92, 95 (wounds); 1898, Green *v.* State, 64 Ark. 523, 43 S. W. 973 (physician, as to insanity; one admitted, another rejected); 1881, Noblesville E. G. R. Co. *v.* Ganse, 76 Ind. 144; 1901, Isenhour *v.* State, 157 id. 517, 62 N. E. 40 (adulteration of milk); 1877, State *v.* Cook, 17 Kan. 395 (poison); 1887, Broquet *v.* Tripp, 36 id. 704, 14 Pac. 227 (sheep disease); 1888, Missouri Pac. R. Co. *v.* Finley, 38 Kan. 560, 16 Pac. 951 (cattle disease); 1897, Dugan *v.* Com., 102 Ky. 241, 43 S. W. 418 (reduction of weight of fired bullet); 1896, Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094 (a professional nurse, who had nursed in 20 or 30 cases of bone felon, but not a student of surgery, not allowed to speak as to whether a felon was cut to the bone; a good example of petty and unfruitful interference with the discretion of a trial Court); 1880, People *v.* Niles, 44 Mich. 609, 7 N. W. 192 (wound of a horse); 1859, New Orleans J. & G. N. R. Co. *v.* Allbritton, 38 Miss. 246, 273; 1897, People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; 1883, State *v.* Sheets, 89 N. C. 549 (poisoning of an animal); 1882, Olmsted *v.* Gere, 100 Pa. 131); 1898, Com. *v.* Farrell, 187 id. 408, 41 Atl. 382 (when rigor mortis sets in); 1855, Allen *v.* Hunter, 6 McL. 307 (chemical subject); 1872, Masons *v.* Fuller, 45 Vt. 31 (whether a birth was premature; a professional nurse was allowed to testify); 1828, Meudum *v.* Com., 6 Rand. 709, 721; 1884, Yates *v.* Cornelius, 59 Wis. 617, 18 N. W. 474 (diseases of horses); 1902, Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924 (whether a trained nurse is qualified to speak as to the dangerous significance of a certain temperature, not decided; yet it is difficult to see why such a question should cause protracted doubt).

[4] 1897, Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379; 1899, People *v.* Rice, 159 N. Y. 400, 54 N. E. 48 (admissible if expert, though not licensed to practise or actually not practising); 1886, State *v* Speaks, 94 N. C. 874 (the State Board examination required before practising is not necessary for testifying).

[5] Wis. Stats. 1898, § 1436 (no person practising physic or surgery shall have the right "to testify in a professional capacity" unless he had "a diploma from some incorporated medical society or college," or since that date received a license from the State medical examiners; but in a criminal case the Court may dispense with proof of incorporation); 1874, Montgomery *v.* Scott, 34 Wis. 339, 343 (the plaintiff was taken to the house of H., after her injury, and the fracture reduced and dressed; held, that H. might testify whether the leg was broken, though he possessed no diploma; "the question whether a leg is broken is one of fact"); 1890, McDonald *v.* Ashland, 78 id. 25, 47 N. W. 434 (the diploma and the incorporation of the college may be proved orally by the witness himself, without producing the diploma or a copy of the charter); 1901, McCann *v.* Ullman, 109 id. 574, 85 N. W. 493 (under St. 1899, c. 82, providing that no person shall be "competent to testify as an expert witness" upon animal diseases unless registered as a veterinary surgeon, an unregistered person was excluded); 1902, Allen *v.* Voje, 114 id. 1, 89 N. W. 924 (whether the prohibition of the statute applies to those only who require a license for practice, or to all persons called as medical experts, for example a trained nurse, not decided); 1903, Lowe *v.* State, — id. —, 96 N. W. 417 (Rev. St. 1898, § 585, does not affect the testimonial qualifications of physicians).

present principle from that of the principle of Knowledge (*post*, § 693). Nevertheless the present one has a real place among the qualifications of a witness to handwriting.

(1) For *handwriting* in manuscript, the fundamental proposition of our law is that the general experience of the ordinary person is sufficient; in other words, *any person able to read and write is competent to form and to express a judgment as to the genuineness of handwriting.*[1] So often does the subject of expert qualifications in handwriting come before the Courts that this subject is ordinarily thought of as exclusively one for experts. But a little reflection on every day's practice will demonstrate this error of thought. Where the witness is sufficiently qualified as to knowledge, *i. e.* where he has seen the person write or the like (*post*, § 693), no dispute is ever raised as to his experiential competency. Proper familiarity with the standard of comparison is all that is asked for, and no special skill in judging of writings is required. It is accepted law that the general experience of the ordinary person is sufficient, so far as experiential competency goes. Why, then, does the question of expert qualifications in handwriting ever arise? Because, when the specimens to be used are themselves before the jury, they may examine them to form an opinion as to the standard or type of writing, and hence the opinion of a person of ordinary experience only, based upon these specimens, being no better than that of the jury themselves, is not needed, and is excluded by the Opinion rule; and hence the only persons whose aid need be asked in studying these standards are those who have some special experience over and above that of the jury. Thus, under the Opinion rule, the question arises whether the person whose aid is offered is such a one as can contribute some skill not possessed by the jury. This is a different question from the present one of the Experiential Qualifications to be required of all witnesses; and is peculiar to the Opiuion rule (*post*, § 2012). The only questions that can here arise concern the skill required for something other than the identity of mere handwriting, for example, the kind of *paper* or *ink*, or the feasibility of an *alteration*; and here it may be proper to require special experience.[2]

(2) *Bank-notes and Paper Money.* Where the genuineness of a bank-note or other paper money involves not merely a signature's identity, but the texture, design, and general appearance of the document, as the basis of an opiuion, may any person, having the proper familiarity with the class of notes in question, form and express an opinion as to its genuineness?

[1] 1893, Salazar *v.* Taylor, 18 Colo. 538, 544, 33 Pac. 369. Whether the witness need even be able to read and write is perhaps doubtful; for many illiterate persons can distinguish signatures and hands without being able to decipher them in detail. Such a witness was rejected in Russell *v.* Brosseau, 65 Cal. 607 (1884). Where, however, the handwriting is of a *special style*, special experience in reading it would be necessary; 1845, Crawford and Lindsay Peerage Cases, 2 H. L. C. 545 (where only a clerk who was familiar with mediæval Latin handwriting was permitted to testify by a copy to the tenor of an old document).

[2] 1854, Otey *v.* Hoyt, 2 Jones L. 70 (the removal of inks from paper; witness excluded); 1897, Birmingham Nat'l Bank *v.* Bradley, 115 Ala. 142, 23 So. 53 (whether a check could be chemically altered without leaving traces; expert knowledge required).

This question has been little mooted since the issuing of bank-notes has come into the sole control of the Federal Government. An early line of decisions reached the sensible conclusion that a *merchant*, not being specially expert as to detecting counterfeits, could testify about the genuineness of a bank-note, provided he had the requisite familiarity with the class of notes in question.[3] Other Courts have since held that a *bank-officer* may testify to the genuineness of notes,[4] or of coin,[5] or to the fact of an erasure in a note.[6] The principle of Knowledge (*post*, § 705) is here not always easy to distinguish in its application.

§ 571. **Miscellaneous Instances (Interpretation, Speed of a Train, Strength of a Structure, etc., etc., etc.).** (1) In answer to the first of the two usual questions (*ante*, § 559) under this principle, there are a variety of rulings on miscellaneous topics, holding that a lay witness suffices;[1] the topics that seem to have called for frequent decision being those of the *speed of a train*,[2] and the existence of a condition of *intoxication*.[3]

(2) In answer to the second of the two usual questions (*ante*, § 560), there are a variety of rulings determining the qualifications of an individual witness on a particular topic. That of most frequent occurrence is the *interpretation* of a foreigner's or mute's mode of speech.[4] None of the remaining

[3] *Ky.*: 1841, Watson *v.* Cresap, 1 B. Monr. 196; *N. C.*: 1805, U. S. *v.* Holtsclaw, 2 Hayw. 379, *semble*; 1824, State *v.* Candler, 3 Hawks 398, *semble*; 1844, State *v.* Harris, 5 Ired. 291, *semble*; 1851, State *v.* Check, 13 id. 120 ("who habitually receive and pass the notes of a bank for a long course of time, so as to become thoroughly acquainted with them"); 1877, Yates *v.* Yates, 76 N. C. 149.

[4] 1896, Keating *v.* People, 160 Ill. 480, 43 N. E. 724 (treasury notes, national bank bills, and greenbacks; a paying-teller admitted to speak to their genuineness); 1873, Atwood *v.* Cornwall, 28 Mich. 339.

[5] 1860, May *v.* Dorsett, 30 Ga. 118.

[6] 1864, Dubois *v.* Baker, 30 N. Y. 361.

[1] 1863, Barnes *v.* Ingalls, 39 Ala. 200 (admitting members of a family, as able to speak of the likeness of a portrait, but not of its quality of execution); 1897, McDonald *v.* Wood, 118 id. 589, 22 So. 489, 24 So. 86 (the location of a survey-line, by the owner of the land); 1903, Rardon *v.* Cunningham, — id. —, 34 So. 26 (whether a mule is blind; expert not needed); 1845, Porter *v.* Mfg. Co., 17 Conn. 255 (sufficiency of a dam); 1856, Frink *v.* Potter, 17 Ill. 408 (safety of a road); 1875, Clagett *v.* Easterday, 42 Md. 629 (existence of a mill-site); 1886, Baltimore & L. T. Co. *v.* Cassell, 66 id. 430, 7 Atl. 805 (whether a road was safe); 1888, McPherson *v.* R. Co., 97 Mo. 256, 10 S. W. 846 (draining capacity of culvert); 1896, State *v.* Punshon, 133 id. 44, 34 S. W. 25 (experiments with a pistol); 1880, State *v.* Reitz, 83 N. C. 635 (identity of foot-prints); 1881, State *v.* Morris, 84 id. 761 (same); 1894, Vermillion Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802 (height of a stream of water observed to be thrown from a water-main); 1898, Ochsenreiter *v.* Elev. Co., 11 id. 91, 75 N. W. 822 (condition of crop; layman in grain-growing country, competent).

[2] 1896, Highland Ave. & B. R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566; 1901, Louisville & N. R. Co. *v.* Stewart, 128 id. 313, 29 So. 562; 1896, St. Louis & S. F. R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225 (how far a train had gone when it stopped); 1895, Howland *v.* R. Co., 110 Cal. 513, 42 Pac. 983 (whether a car could have been stopped); 1900, Johnsen *v.* Oakland S. L. & H. E. R. Co., 127 Cal. 608, 60 Pac. 170 (regular passengers allowed to testify to speed of cars); 1884, Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 628 (undecided); 1868, Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99 (but not the speed, in slowing up, necessary to bring to a stop at a given point); 1887, Guggenheim *v.* R. Co., 66 id. 154, 33 N. W. 161 ("any intelligent man who had been accustomed to observe moving objects"); 1899, Mott *v.* R. Co., 120 id. 127, 79 N. W. 3; 1881, Nutter *v.* Railroad, 60 N. H. 485; 1895, Chipman *v.* R. Co., 12 Utah 68, 41 Pac. 562; 1859, McVey *v.* R. Co., 46 W. Va. 111, 32 S. E. 1012; 1884, Hoppe *v.* R. Co., 61 Wis. 369, 21 N. W. 227.

[3] 1887, People *v.* Monteith, 73 Cal. 8; 14 Pac. 373; 1876, Dimick *v.* Downs, 82 Ill. 570; 1887, Gallagher *v.* People, 120 id. 182, 11 N. E. 335; 1870, State *v.* Pike, 49 N. H. 407; 1868, Castner *v.* Sliker, 33 N. J. L. 97.

[4] 1900, Central of G. R. Co. *v.* Joseph, 125 Ala. 313, 28 So. 35 (interpreter speaking both languages, but not reading English writing, held competent); 1870, People *v.* Gelabert, 39 Cal. 664 (interpreter must understand the languages); 1874, People *v.* Ah Wee, 48 id. 238 (same); 1886, Skaggs *v.* State, 108 Ind. 56, 8 N. E. 695 (fair knowledge suffices); 1897,

miscellaneous rulings have any real value as precedents.[5] They were a waste of time for the Supreme Courts, and should have been disposed of under the doctrine of the trial Court's discretion (*ante*, § 561). The application of the Opinion rule (*post*, §§ 1949–1978) should be compared, upon all these topics.

People *v.* Constantino, 153 N. Y. 24, 47 N. E. 37 (interpreter held competent); 1893, State *v.* Weldon, 39 S. C. 318, 17 S. E. 688 (any person able to communicate by signs with a mute is competent); 1867, Kuhlman *v.* Medlinka, 29 Tex. 392 (interpreter must understand both languages).

For the question when an interpreter *may* or *must* be called, *see post*, § 811. For the question whether an interpreter must be *sworn* and *cross-examined*, *see post*, §§ 1810, 1824.

[5] *N. Sc.:* 1887, Cain *v.* Uhlman, 20 N. Sc. 151 (one who was a mill-builder, and was used to taking levels but did not understand how to do so with a theodolite, was allowed to testify); *Ala.:* 1863, Barnes *v.* Ingalls, 39 Ala. 198 (the execution of photographic paintings); 1877, Campbell *v.* Gilbert, 57 Id. 568 (qualities and use of a guano); 1877, Mobile & M. R. Co. *v.* Blakely, 59 id. 473, 481 (condition of a train, as to means of stopping it); 1878, Nelson *v.* Wood, 62 id. 175 (tanning); 1900, Louisville & N. R. Co. *v.* Sandlin, 126 id. 585, 28 So. 40 (track construction); 1900, Birmingham N. Bank *v.* Bradley, — id. —, 30 So. 546 (effects of Enreka acid on paper); *Cal.:* 1866, Blood *v.* Light, 31 Cal. 115 (dam); *Colo.:* 1897, Denver T. & F. W. R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681 (condition of a freight-car); *Conn.:* 1897, State *v.* Main, 69 Conn. 123, 37 Atl. 80 (destruction of trees affected by a contagious disease; the capacity of a deputy charged with the duty of investigating, assumed, *semble*, as indicated by his office); *Ill.:* 1897, Webster Mfg. Co. *v.* Mulvanny, 168 Ill. 311, 48 N. E. 168 (cause of an explosion); 1898, St. Louis & S. W. R. Co. *v.* Elgin C. M. Co., 175 id. 557, 51 N. E. 911 (transportation of condensed milk); *Ind.:* 1837, House *v.* Fort, 4 Blackf. 295 (defects of a horse); 1877, Hinds *v.* Harbon, 58 Ind. 123 (sewers); 1880, Indianapolis *v.* Scott, 72 id. 203 (soundness of timber); 1886, Fort Wayne *v.* Coombs, 107 id. 86, 7 N. E. 743 (sewers); 1887, Terre Haute *v.* Hudnut, 112 id. 549, 13 N. E. 686 (injury to a building); *Ia.:* 1874, Kilbourne *v.* Jennings, 38 Ia. 537 (construction of a house); 1875, Shulte *v.* Hennessey, 40 id. 356 (measurement of masonry); 1878, Sheldon *v.* Booth, 50 id. 210 (machinery); 1895, Kerns *v.* R. Co., 94 id. 121, 62 N. W. 692 (mode of coupling cars); 1899, Stomne *v.* Hanford P. Co., 108 id. 137, 78 N. W. 841 (fitness of elevator cable); *Kan.:* 1882, Sexton *v.* Lamb, 27 Kan. 429 (ice-handling); 1884, Sandwich Mfg. Co. *v.* Nicholson, 32 id. 666, 5 Pac. 164 (machinery); 1885, Missouri Pac. R. Co. *v.* Mackey, 33 Kan. 303, 6 Pac. 291 (duties of a fireman); 1898, Missouri P. R. Co. *v.* Johnson, 59 id. 776, 53 Pac. 129 (manner of inspecting car-timbers); *Ky.:* 1897, U. S. Mail Line Co. *v.* Mfg. Co., 101 Ky. 658, 42 S. W. 342 (manner of breaking of glass); 1898, Williams *v.* R. Co., 103 id. 298, 45 S. W. 71 (locomotive's effect in starting train); *Me.:* 1856, Hammond *v.* Woodman, 41 Me. 207 (milling); *Md.:* 1856, Baltimore & O. R. Co. *v.* Thompson, 10 Md. 85 (disturbance of cattle by railroads, and the effects on their health); 1886, Baltimore Elev. Co. *v.* Neal, 65 id. 451, 5 Atl. 338 (handling a tug); *Mass.:* 1847, Vandine *v.* Burpee, 13 Met. 288 (gardens); 1853, Carpenter *v.* Wait, 11 Cush. 257 (cattle-weight); 1870, Moulton *v.* McOwen, 103 Mass. 597 (damage to a building); 1895, Davis *v.* Mills, 163 id. 481, 40 N. E. 852 (qualities of flour); 1899, Childs *v.* O'Leary, 174 id. 111, 54 N. E. 490 (blasting); *Mich.:* 1866, Sisson *v.* R. Co., 14 Mich. 497 (machinery); 1896, Woods *v.* R. Co., 108 id. 396, 66 N. W. 328 (machinery); *Minn.:* 1871, Clague *v.* Hodgson, 16 Minn. 339 (age of sheep, judged by the teeth); 1884, Koisti *v.* R. Co., 32 id. 134, 19 N. W. 655 (turntables); 1885, Davidson *v.* R. Co., 34 id. 54, 24 N. W. 324 (sparks from locomotives); 1890, Armstrong *v.* R. Co, 45 id. 87, 47 N. W. 459 (care of horses); 1875, Blomquist *v.* R. Co., 60 id. 426, 62 N. W. 818 (construction of a derrick); 1899, Aultman Co. *v.* Mosloski, 77 id. 27, 79 N. W. 593 (defects in a threshing-machine); *Mo.:* 1896, Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863 (strength and safety-speed of grindstones); *Mont.:* 1897, Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390 (horse); *Nebr.:* 1884, Sioux City & P. R. Co. *v.* Finlayson, 16 Nebr. 587, 20 N. W. 860 (engine-boilers); 1887, Connelly *v.* Edgerton, 22 id. 87, 34 N. W. 76 (saloon-fixtures); 1845, Woods *v.* Allen, 18 N. H. 31 (ice-block at a mill); 1846, Wallace *v.* Goodall, 18 id. 452 (age of marks on trees); 1859, Page *v.* Parker, 40 id. 59 (soapstone-quarry); 1860, Blodgett Paper Co. *v.* Farmer, 41 id. 404 (machinery); *N. Y.:* 1854, Bearss *v.* Copley, 10 N. Y. 95 (one whose occupation had changed from a tanner to a lawyer, admitted to speak about tanning); 1874, Hoyt *v.* R. Co., 57 id. 678 (cause of railroad accident); 1881, Ward *v.* Kilpatrick, 85 id. 415 (workmanship of furniture); 1886, People *v.* Buddensieck, 103 id. 500, 9 N. E. 44 (photographs); *N. C.:* 1849, Sikes *v.* Paine, 10 Ired. 280 (ship-repairs); 1859, State *v.* Jacobs, 6 Jones L. 286 (negro descent); *Or.:* 1902, Duntley *v.* Inman, 42 Or. 334, 70 Pac. 529 (cause of a pulley's breakage); 1900, Farmers' & T. N. Bank *v.* Woodell, 38 id. 294, 61 Pac. 837 (cultivation of beets); *Pa.:* 1845, Pittsburgh *v.* O'Neill, 1 Pa. St. 342 (mode of summary reckoning in bricklaying); 1849, Detweiler *v.* Groff, 10 Id. 376 (working a mill with a certain height of water); 1869, Ardesco Oil Co. *v.* Gilson, 63 id. 151 (strength of iron); 1889, Shaw *v.* Boom Co., 125 id. 327, 17 Atl. 426 (cause of ice-jam); 1895, Fraim *v.* Ins. Co., 170 id. 151, 32 Atl. 613 (effect of gasoline in cleans-

ing in silver-plating); 1899, Haley *v.* Flaccus, 193 id. 521, 44 Atl. 666 (novelty in a glass-press patent); *R. I.:* 1858, Buffum *v.* Harris, 5 R. I. 250 (sufficiency of a drain); 1859, Evans *v.* Ins. Co., 6 id. 54 (meaning of trade terms); *U. S.:* 1881, Pope *v.* Filley, 3 Fed. 69 (meaning of trade terms); 1894, Missouri Pac. R. Co. *v.* Hall, 14 C. C. A. 153, 66 Fed. 868 (shrinkage of cattle); *Vt.:* 1674, James *v.* Hodsden, 47 Vt. 136 (knitting-machines); 1897, Conway *v.* Fitzgerald, 70 id. 103, 39 Atl. 634 (capacity of cars for carrying logs); *Wis.:* 1899, Baxter *v.* R. Co., 104 Wis. 307, 80 N. W. 644 (tendency of iron to crystallise).

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS.

TOPIC III: EMOTIONAL CAPACITY.

SUB-TOPIC A: INTEREST AS A TESTIMONIAL DISQUALIFICATION.

CHAPTER XXIII.

§ 575. **History of the Rules.** The disqualification of parties and interested persons as witnesses on their own behalf is now practically obsolete throughout our law, except for a single situation. That the history of its origin is obscure and not precisely ascertained is therefore not a matter of such serious consequence to our understanding of the law of to-day. Nevertheless, its origin is so connected with other important traits in the history of the law of evidence that a survey is desirable of so much as is known or can be conjectured. The main elements in the development are, first, that this disqualification does not appear for any of the ancient kinds of witnesses under the older modes of trial; secondly, that it did not exist for the modern witness, when that type of person began to be important (in the 1400s); and thirdly, that the disqualification does plainly appear, in the stage of incipiency, in the early 1600s; the problem being, therefore, to account for its introduction during the 1500s. In tracing these stages, we may distinguish, for convenience, the progress of the rule in civil trials at common law, in chancery practice, and in criminal trials.

1. *Civil Trials at Common Law.* (1) For the first period, it is to be remembered that under the older modes of trial, forerunning trial by jury and surviving for a time alongside of it, the persons who could be thought of as perhaps liable to disqualification after the manner of modern witnesses were of three chief classes, namely, the complaint-witnesses or *secta*, the compurgators or oath-helpers, who swore in aid of the party's oath or wager of law, and the transaction-witnesses and deed-witnesses, whose oath in certain classes of cases formed a mode of decision. Now for none of these classes does any disqualification appear by reason of partisan interest, dependency, or relationship. On the contrary, these persons were originally and usually

taken from none other than the very clansmen, dependents, and other partisans of the plaintiff or defendant. For the *secta*, it is clear that "they might be relatives or dependents of the party for whom they appeared."[1] For the oath-helpers, it is equally clear that they not only might be, but originally (in some tribes) must be, of the party's clansmen.[2] For the transaction-witnesses and deed-witnesses it can hardly be less doubted that partisanship, in any of its forms, was not recognized as a disqualification;[3] in fact, we are told by the judges of the time, more broadly still, that "witnesses cannot be challenged."[4] When jury trial develops and enlarges in scope, and comes down into the 1400s as the dominant mode of trial, this last sort of "witnesses" — those who were sworn to attest the transactions done or deeds executed in their presence — come to play a frequent part in jury-trial itself;[5] that is, their oath ceases (to that extent) to form a distinct sort of trial. Thus the spectacle is presented of a body of jurors, with whom (yet more or less discriminated) are acting this special class of witnesses. As yet there are no other witnesses (in the modern sense) in jury trials. Thus the most important thing to note, in this stage, is that the only class (substantially) of persons, whose required qualities could have served as a type for the modern witness when he came in, were plainly understood to be not challengeable on any ground of partisanship, and perhaps not at all.

(2) The modern witness — *i. e.* any person who happens to know something about the facts in dispute and is summoned to inform the jury, and not as one of the jury — begins to be frequent in the middle of the 1400s; but not until another century does he furnish a substantial or major part of the information on which the jury act;[6] up to this time the jury's own knowledge and extra-judicial inquiries have taken the place of our modern witness. Now as to this new sort of witness also, it is also plain that during the 1400s there was as yet no disqualification on the ground of partisanship,[7] and that,

[1] Thayer, Preliminary Treatise on Evidence, 12.

[2] Brunner, Deutsche Rechtsgeschichte, II, 379; Thayer, *ubi supra*, 25; Pollock and Maitland, History of English Law, II, 598. It is true that, by the custom of London, a non-partisan character came later to be required of these oath-helpers, in trial by wager of law; "they were not to be chosen by the accused himself, nor to be his kinsmen or bound to him by the tie of marriage or any other": Thayer, *ubi supra*, 27; Pollock and Maitland, *ubi supra*, II, 633. This possibly came about through the pressure of competition of jury-trial and was added to make the wager of law seem a little less one-sided in favor of defendants. It may also later have contributed a suggestion to the modern doctrine, as noted later.

[3] It is not mentioned in Brunner's list, *ubi supra*, II, 396, so also not in Thayer, *ubi supra*, 17–24. Professor Glasson has pointed out (Histoire du droit et des institutions de la France, VI, 547, 1895) that under the earlier feudal system of proof the opponent's right to dispute a witness by judicial combat served as a guaranty against false witnesses, and that only when judicial combat was abolished in 1260, and as a part of the reform of the proof-system, "the challenging of witnesses was replaced by the theory of disqualifications borrowed from the canon law."

[4] Thayer, *ubi supra*, 100, 103; 1339, Anon., 12 Lib. Ass. pl. 11, 12 (one of the witnesses to a deed was challenged because he was named as disseisor in the brief; but the challenge was not allowed, and "the court said that it had never seen witnesses challenged"); 1349, Anon., Lib. Ass. 110, cited in Thayer's Cases on Evidence, 2d ed., 306 (to prove a release, the witnesses named in it were joined to the jury; "one of the witnesses was challenged as being a relative of the plaintiff; but the challenge was not allowed, for witnesses are not challengeable, because the verdict will not be received from them, but from the jury").

[5] Thayer, Preliminary Treatise, 97–104.

[6] Thayer, *ubi supra*, 120–134.

[7] Fortescue, De Laudibus Legum Angliæ, c. 26 (writing about 1470), makes no note of any limitations; parties may produce "all such

on the contrary, the non-partisan witness was a rare figure and was, in the conception of the time, an unnatural one. This appears most plainly in the discouragements to which such a non-partisan person was subjected by the law of maintenance.[8] That law made it a matter of much risk for a truly indifferent person to give testimony to the jury; for unless he had been requested by the Court or jury (a request by the party only was of doubtful effect), he was liable to a charge of maintenance:

Professor *James Bradley Thayer*, Preliminary Treatise, 126: "A writ of maintenance was brought [in 1433] in the King's Bench against one B, charging that in an assize of rent between the plaintiff and C the defendant had 'maintained' C. B answered that long before C had anything in the said rent he himself owned it; and he had granted it to C. When the said assize was brought against C, the latter came to B, the present defendant, and asked him to come to the assizes with him and bring his evidences relating to the rent; and accordingly B came with these and delivered to C certain ancient evidences to plead in bar against the plaintiff in his discharge of his warranty of the rent; this was all the maintenance. In discussing whether this really constituted maintenance, and if so whether it was justifiable, it was insisted that the defendant should not have come voluntarily, but only by way of voucher to warranty. . . . *Hals*, J., said: 'In a tort of maintenance, it is a good plea to say that he who is charged came and prayed us, since we were an old man of the region and had knowledge of the title of the land of which he was impleaded, that we would be with him to inform the jury about the title; and so we did, etc. So here it is good.' *Cheyne*, [C. J.]: 'It will be adjudged a maintenance in your cases, because he has no cause or privity for maintaining the controversy more than the merest stranger in the world, unless the other had cause of warranty against him. . . . And as to what you say of its being a good plea in maintenance that he is an old man of the region and having better knowledge of the right and title of this rent, and his coming with the defendant to declare his right in the said rent, etc., I say that this is a real maintenance; for on such a ground everybody could justify a maintenance, and that would be against reason. But if he had shown a ground of maintenance on which the law presumes him bound to be with the party, then this would not be adjudged a maintenance, — as, if he were with his relation, or came with one because he was his servant or his tenant; he is bound to be with his servant or tenant; but it is not so in other cases.'"[9]

The underlying conception of the law, then, at this time of the 1400s, was something as follows: "Here are the jurors, indifferent persons, who know already more or less about this case; their oaths are to determine the issue; they are the selected ones for the purpose; no other man's oath is wanted; unless the jurors think that they need it, or the Court calls for it, any other man's oath is merely a meddlesome intrusion upon the carefully selected body of triers. To be sure, the party or his attorney may argue and labor with the jury and produce documents, and so also may his privies in title,

witnesses as they please or can get to appear on their behalf").

[8] Thayer, Preliminary Treatise, 122–134.

[9] This is from Y. B. 11 H. VI, 43, 36. Add the following, which carries the idea down a century later: 1535, Y. B. 27 H. VIII, f. 2, pl. 6 (a seneschal of a manor, who showed the jury certain leet-court records, held exonerated of conspiracy, *i. e.* maintenance, because the judges ordered the showing; Englefield, J.: "If a man be present in court, and the justices command him, because he has good knowledge of the jury, to give evidence to the jury, by reason of which he does give evidence to the jury, he is not punishable for conspiracy"; Bromley, of counsel opposing, argued that it was otherwise if he were not sworn; Englefield, J.: "It is all one").

vouchers and the like, or his dependents, stewards, tenants, and such other persons as share his interest in the issue. But beyond this no other person has any call to interfere." In short, so far as ordinary witnesses were coming to be used, they were presumably interested partisans. So far from interest being a disqualification, it was rather the disinterested persons who were likely to be treated as improper witnesses. Such is the state of the law as we emerge into the 1500s, with the modern witness becoming a more and more important functionary of jury trial.

(3) Passing over for the moment the dubitable time of the 1500s, and coming to Coke's time, the early 1600s, we find that, in some way or other, ideas have plainly changed in the interval. Interest is now unquestionably recognized as a disqualification. The modern witness is now the chief source of information to the jury;[10] there is a sharp discrimination between witness and jury; the deed-witness, who was formerly nearer to being a juror, is now almost assimilated to the ordinary witness; and for both sorts, without apparent distinction, rules of disqualification are now beginning to be laid down:

1627, *Coke upon Littleton*, 6 *a*: "[As to witnesses to a deed] sometimes, though rarely [objections were allowed], which being found true, they were not to be sworne at all, neither to be joined to the jury nor as witnesses; as, if the witness were infamous, . . . or if the witnesse be an infidell, or of non-sane memory, or not of discretion, or a partie interested, or the like. But oftentimes a man may be challenged to be of a jury that cannot be challenged to be a witnesse; and therefore, though the witnesse be of the neerest alliance, or kindred, or of counsell, or tenant, or servant to either partie, or any other exception that maketh him not infamous or to want understanding or discretion or partie in interest, though it be proved true, shall not exclude the witnesse to be sworne, but he shall be sworne and his credit upon the exceptions taken against him left to those of the jury, who are tryers of the fact. . . . And the Courts in some books have said that they have not seene witnesses challenged, which is regularly to be understood with the limitations abovesaid."

Thereafter, from the middle of the 1600s, the rules about interest appear firmly established and begin to develop in fulness. What was the process of thought by which this doctrine was introduced? How comes it to be absent, and even repugnant, in 1500, and yet present and favored in 1650? Such is the problem.

For one thing, the explanation seems not to lie in any process of adaptation or imitation of the rules for jurors. Those persons were, in fundamental principle, indifferent between the parties; while witnesses proper were originally (as above noted) conceived of as naturally partisans. The juror's disqualification had existed from the beginning, and yet for at least one hundred years (in the 1400s) the two classes had gone side by side without any borrowing; so that it is hardly natural that a direct borrowing should take place in such tardy fashion. It is true that after jurors had come to depend for information chiefly on the witnesses in court (say, by 1600), it would be desirable to seek for unprejudiced persons as witnesses; and this

[10] Coke, 3 Inst. 26: "Most commonly juries are led by deposition of witnesses."

later change in the jury's nature must have helped towards the new rule.[11] But that rule could hardly have obtained its beginning in that mode. Moreover, the traditional rules of qualification for jurors were numerous, and it is not easy to suppose that this particular one was picked out for imitation, while others equally appropriate were omitted.[12] For another thing, the explanation seems not to be that the rules of the ecclesiastical law were adopted or imitated. It is true that this particular disqualification is found long established, by adoption from the Roman law,[13] in the ecclesiastical rules as practised in England.[14] It is true also that the epoch in question was one in which great advances towards domination were being made by the ecclesiastical courts and their system, and that in other respects its rules were sought to be introduced into the common law.[15] Nevertheless, the same objections here occur that have been noted for the jurors' rules. Moreover, the sharp conflict between the two jurisdictions, reaching its height in Coke's time, would tend strongly against any such conscious adoption. Finally, there appear in the precedents no allusions to an express borrowing.

What, then, is there to fall back upon as the explanation of the change? Here must be distinguished the two branches of the disqualification, namely, of parties and of other interested persons. The two are no doubt united in principle in the later law; but they seem to have come into being at different epochs.

(*a*) The exclusion of interested persons not parties does not appear to have begun until after the time of Coke's commentary upon Littleton. This was written by 1627, but was not printed until 1642. From the time of his utterance (above-quoted) there are cases enough, in the reigns of Charles II and James II (1649–1688); but before that time, the Abridgments appear

[11] The juror's disqualification by infamy was, for example, appealed to in this way by Coke as sanctioning such a rule for witnesses; *ante*, § 519.

[12] Britton, f. 134 (convicts of perjury cannot be jurors; nor "those who have suffered judgment of life and limb or punishment of pillory or tumbrell, nor those who want discretion, nor excommunicated persons, nor lepers removed from society, nor priests or clerks within holy orders, nor women, nor such as dwell away from the neighborhood, nor those who are above 70 years of age, nor allies in blood, nor such as claim any right in the tenement, nor villains, nor persons indicted or appealed of felony, nor those of the household of any of the parties, nor those who are liable to be distrained by either of the parties, nor their lords or counsellors or accountants"); Fortescue, De Laudibus, c. 25 (juror may be challenged "by alleging that the person so impanelled is of kin, either by blood or affinity, to the other party, or in some such particular interest as he can not be deemed an indifferent person to pass between the parties"). The disqualification by affinity or by household dependency never obtained for witnesses (*post*, § 600); if there was any direct imitation, this would almost certainly have been included.

[13] Digest XXII, 5; Codex IV, 20; Heineccius, Elementa Pandectarum, p. IV, c. 140 ("Quum vero censeatur testis idoneus esse in causa ubi interest ejus alterutrum vincere, consequens est ut nemo admittendus est in causa vel propria vel socii. Ut merito repellantur pater in causa filii, filius in causa patris, aliique potestati vel imperio alterius subjective vel domestici; ut patroni tutores, curatores in causa clientis, pupilli, minorisve sui testimonium dicere non possunt; ut suspecti etiam sint amici et inimici, nec non qui jam ante in eum reum dixerunt testimonium").

[14] Corp. Jur. Eccl., Decr. P. II, Causa III, Qu. V, Causa IV, Qu. II, c. III, § 36 (servants and relations); Decret. Sec. Pars, Causa III, Qu. V ("testes de domo accusatorum prodncendi non sint," including "consanguinei vel familiares"); Decretal. II, 20, *de testibus*, c. 24; 1726, Ayliffe, Parergon, tit. "Witnesses"; 1738, Oughton, Ordo Judiciorum, c. 99 (the list includes "amici intimi partis producentis, ac inimici capitales partis contra quem producuntur, affectionati, partiales, ac minus indifferentes; infames, criminosi, pauperes, egeni; ac consanguinei, et affines, ac famuli domestici, et de roba ac stipendio partis prodncentis").

[15] *Post*, § 2032.

to note none.[16] Coke himself concedes that "the Courts in some books have said that they have not seen witnesses challenged." Moreover, as recently as 1613, a deed-witness, palpably interested in the issue, had been deliberately held competent;[17] and as recently as 1606 a statute had apparently been regarded as indispensable to prescribe non-partisanship for witnesses in trials on the Scotch border.[18] The reports of the State trials do not note a disqualification on this ground before 1640.[19] In civil cases, the only precedents of disqualification before Coke's time, if we rely on the industry of the Abridgment-makers, are confined to the parties themselves.[20] Thus everything tends to indicate that the disqualification of interested persons not parties did not appear until the time when Coke wrote; and even then it had not been fully established.

(*b*) On the other hand, the disqualification of parties themselves seems clearly to have come in long before, that is, at least by the time of Elizabeth, as early as 1582, and to have been at that time a thing well understood and accepted.[21] The succeeding rulings between that time and 1650 seem all to have been instances of the parties themselves being offered as witnesses.[22]

[16] The only case before 1642 appears to be the following: 1630, Mericke *v.* King, Hetley 137 ("In evidence to the jury, he who had purchased the land in question (it was said by the Court) he shall not be a witness if he claim under the same title"); this is perhaps equivalent to the case of a party. The hitherto existing freedom is shown in the following case: 1535, Y. B. 27 H. VIII, f. 20, pl. 10 (replevin; defendant made connsance as bailiff of Lord Cobham for rent in arrear, and alleged a rent due to the lord; Lord Cobham then "passed out, and gave evidence" as to his seisin of the rent; and no objection to his competency was raised; yet he was an interested person).

[17] 1613, Anon., 1 Bulstr. 202 (witness to a deed of feoffment by livery of seisin, excepted to because afterwards he received an estate at will in the land, "and so by his oath was to make his own estate good"; exception "disallowed by the whole Court, and that he might well be sworn as a lawful witness to prove the executing of a feoffment by livery and seisin, this being in affirmance of the feoffment").

[18] St. 4 James I, c. 1, § 16 (the juries in trials of Englishmen for offences committed in Scotland are authorized "to receive and admit only such good and sufficient lawful witnesses upon their oaths, either for or against the party arraigned, as shall not appear to them or the greater part of them to be unfit and unworthy to be witnesses in that case, either in regard of their hatred or malice, or their favor and affection, either to the party prosecuting or the party arraigned, or of their former evil life and conversation"). On the other hand, seventy years before, in 1535, Parliament had recited, as one of the causes for transferring jurisdiction of piracy from the Admiralty to the common-law courts, the unsatisfactory mode of trial by the civil law in the former court, which required the offence to be either confessed or "directly proved by witnesses indifferent, such as saw their offences committed, which cannot be gotten but by chance at few times." It would seem that a change, or the beginning of it, was marked by the later statute.

[19] *Infra*, note 38.

[20] *Infra*, note 22.

[21] 1582, Dymoke's Case, Savile 34, pl. 81 (joint defendants joined "by covin to take away their testimony"; if this appears on the evidence, "the justices may and must receive their testimony").

[22] 1611 (?), Smith's Case, 12 Co. 69 (resolved, by Coke, C. J., that "the parties to the supposed usurious contract shall not be admitted witnesses, for this, that upon the matter they were *testes in propria causa*, and by their oath shall avoid their bond, etc."); 1617, Howard *v.* Bell, Hob. 91 (persons claiming tenant-right against the lord of the manor, allowed to join in defence, "by my lord Coke and myself," in the Star Chamber, "and the reason was that since the title was one against all, it was in effect but one's defence, . . . and therefore the courts of justice do every day deny them to be witnesses one for another in such general cases; . . . now as they are acknowledged parties to their prejudice in defence, so it is in reason that they be in like manner allowed for their advantage"; but the Lord Chancellor differed, *i. e.* from the conclusion); 1624, Anon., Godb. 326 (one of joint defendants against whom plaintiff discontinued, admitted); 1636, Creswick's Case, Clayt. pl. 64 (joint defendant, against whom no proof was made, admitted).

The Star Chamber followed rules of a hybrid sort, chiefly ecclesiastical in procedure; but where their rule is not from the latter law, it

The result, then, on these data, is that the disqualification of parties is recognized at least as early as Elizabeth's time, while that of interested persons at large does not appear till near 1650. From these facts and from Coke's own language (in the passage above quoted), it may be inferred that the latter form of the disqualification came as a development and an expansion of the former. There is little difficulty in accepting this origin of the latter form as the natural and sufficient one. The changed nature of the jury's function, and the contemporary examples, already set, of disqualification by infamy (*ante*, § 519) and by marital relationship (*post*, § 600) might have served to aid the result, but the principle of parties' disqualification would have been the direct root of the disqualification by interest in general. In final corroboration of this, it may be suggested that the imitation of any other of the existing bodies of rules against partisanship — namely, those for jurors and those for ecclesiastical witnesses — would necessarily have included the prohibition of family members as witnesses; whereas the common law from the outset repudiated such a doctrine. Now it would be consistent with the gradual development of the party's disqualification to extend it to persons interested in the issue, *i. e. quasi*-parties, but to fail to extend it to family relationship, which otherwise stood upon the same general principle and was always so treated in other systems. In short, the development indicated by the course of the precedents is precisely that which *a priori* would have been most natural.[23] Only upon that hypothesis can we plausibly account for the singularity of English law in admitting freely the plainest of partisan witnesses, namely, family members and servants.

There remains, then, but one element to account for, — the parties' disqualification itself, as apparently coming into existence during the 1500s. The explanation of this seems to be near at hand; it is a fruitful one for the rules of evidence, namely, the history of jury-trial as an institution competing with and gradually displacing the other modes of trial. Turning back to the 1400s, we find at that epoch but one of the older modes surviving in any vigor; this was wager of law, the then name for the primitive process of compurgation by the party's oath with oath-helpers. All through the 1400s, and with only gradually decreasing vogue during the 1500s, the defendant could still refuse to be tried by a jury, and demand a decision by his own wager of law, in actions (mainly) of detinue and debt,[24] — almost the com-

may be supposed to represent the common law; on the qualification of witnesses in the present respect they clearly had not adopted the church-law (they admitted a son for a father, for example); so that we may assume their rule to represent the contemporary one of the common law; it plainly excluded parties: *infra*, note 23.

[23] The following passages show how the rule would amplify: 1612, Dr. Manning's Case, 2 Brownl. 151 (Star-Chamber; bill for extortion; "if a man which is not party grieved exhibits bill for offence made to another person as against whom the offence was committed, he [the latter] shall not be allowed as witness, insomuch as he is party grieved, and by that he should be a witness in his own cause"); *ante* 1635, Hudson, Treatise of the Star Chamber, pt. III, § 21, in Hargr. Collect. Jurid. 205, 203 ("First of all, it is clear that a party can be no witness; . . . but the Court hath lately taken an honorable order to allow the answer and examining of any persons named defendants against whom there is no proof, but only their names put in to take away their testimonies, which is grown exceedingly common"; nothing is said of interested persons not parties).

[24] Thayer, Preliminary Treatise, 29–31.

monest of the original civil actions; in London, this privilege of its freemen extended even to charges of felony.[25] For the maintenance of this privilege defendants struggled long and hard; in 1403, for example,[26] a special statute came to their aid and protected them against evasions of their right by plaintiffs who framed their action fictitiously in account and then appealed to a prejudiced jury and thus cut off the defendant from exonerating himself by oath alone.[27] What is the significance of this long struggle, successful for two centuries at least? It seems to be this, that in wager of law alone, and not in jury-trial, could the party have the benefit of his own oath.[28] Before a jury the parties do not swear. They plead orally, or argue, or allege things "in evidence," — either by themselves or by their counsel;[29] but they do not take an oath. The oath is in that epoch a solemn and determinative proceeding, — a mode of trying and deciding; the oath of jurors is that of triers of the fact; so also the oath of compurgators; so also, originally, that of deed-witnesses and transaction-witnesses, and even in later times (as late as Coke's day) these might go out with the jurors and help to decide by their oaths. The hesitancy in admitting ordinary witnesses to testify was probably due in part to a sense of the incongruity of an oath which had in it no flavor of decisiveness. Hence can be conceived the unnaturalness of admitting the party to his oath before a jury. *That* would have been another mode of "trial," not to be mixed with trial by jury. A verdict was one kind of "proof"; deed-witnesses might be another kind; and the party's oath was still a different kind; there could not be two kinds of "proof" together, *i. e.* two ways of testing and settling the truth. The party's oath, then, had no place in trial by jury; its appropriate place was in a distinct mode of trial, wager of law. It can hardly be anything but this contrast which explains the determined struggle to retain the privilege of wager of law; it was the sole proceeding in which a party could have the benefit of his own oath, *i. e.* virtually, as a modern witness.[30]

If this be so, it is easy to see that, from the very beginning of modern witnesses, the party was incapable of being one. When ordinary witnesses began, in the 1400s, to be called with only slowly increasing frequency, the matter would be of little consequence. But in the 1500s, as witnesses came to be more and more the reliance of the jury and the parties for evidence, the conceded incapacity of the party to take the witness' oath would be more and more noticeable. It would be more worth while for the opponent to

[25] Thayer, *ubi supra*, 27; Pollock & Maitland, Hist. Eng. Law, II, 632.

[26] St. 5 H. IV, c. 8.

[27] It is not improbable that the contracts found frequently in the 1500s and 1600s, by which the obligor promises to pay if the obligee will make oath that a specific sum is due (Knight *v.* Rushwood, Cro. Eliz. 469; Bretton *v.* Prettiman, T. Raym. 153, and many others), came into vogue as a method of ensuring the availability of the obligee's oath, at a time when jury-trial was defeating him of that right.

[28] In 1561, Harwood *v.* Lee, Dyer 196 *b*, it is noted as the special custom of London that "the defendant should be affirmed by the oath of the party."

[29] Thayer, *ubi supra*, 112, 120, 122.

[30] This seems to have been first suggested by Chief Justice Cushing of New Hampshire, in 1876 (King *v.* Hopkins, 57 N. H. 334, 367: "the fact of the history of jury trial, that one great purpose of its introduction was the exclusion of the parties as witnesses").

appeal to this rule; and thus it would naturally tend to happen (as we find it happening in fact) that the opponent would seek to disqualify witnesses by joining them as parties. This would not naturally be found, *a priori*, until some time in the 1500s; and it is in the late 1500s[31] that we find apparently the first reported case.

The result, then, may be summed up in this way: That the party's oath was necessarily excluded in jury trial; that, when modern witnesses came into vogue in the 1400s and 1500s, the party was naturally deemed incapable of being such a witness; that otherwise no rule of disqualification for interested persons was recognized in the earlier days of witnesses; and that finally, after Coke's time and probably under the influence of his utterances, the rule for a party was extended by analogy to interested persons in general.

2. *Chancery Practice.* In Chancery practice, the problem would seem at first sight to have been a simpler one; for the Chancellor modelled his procedure after the canon (or ecclesiastical) law, and would in all probability have followed those rules substantially, not only in the mode of examination of witnesses (as is well established) but also in the rules of incompetency.[32] Nevertheless, by the end of the 1600s, Chancery is found enforcing the common-law rules of competency, just as through all its later history it professed to follow in general the common-law rules of evidence.[33] There must, then, have been, at some stage, a departure from the canon-law rules for witnesses, and the puzzling thing is that this stage appears to have been at least as early as those common-law rules themselves. In the first place, the disqualification of parties is seen already in the time of Elizabeth;[34] this, however, was consistent enough with the canon law. But, secondly, in the Chancery reporters of the 1500s (chiefly Cary and Tothill) there appear no precedents for the exclusion of interested persons other than parties; this harmonizes with the common-law history, but departs from the canon law. Thirdly, the Chancellors, who sat with other judges in the Star Chamber and presided, did not there fix into its practice the canon-law rules of disqualification by family-relationship.[35] Finally, the Chancery practice is found preserving, from the very beginning of the reports, the canon-law rule for the compulsory examination of parties at the opponent's instance, *i.e.* negativing any privilege for the party,[36] — a rule in direct discord with the common law; and it is a singularity that the Chancellor, while thus proceeding consistently to adopt the canon-law rules in a matter so radical, should nevertheless have ignored them in other respects in which their difference

[31] *Supra*, note 21. See also Hudson's Star-Chamber Treatise, quoted in note 23.

[32] A token of the influence is found, for example, in the fact that at common law, up to the 1600s, an objection to a witness was called a "challenge," while in Chancery the canon-law term "exception" was used.

[33] *Ante*, § 4.

[34] 1580, Hollingworth *v.* Lucy, Cary 129 (defendant, moving for a commission, alleges that the plaintiff had notified only Smith, another of the defendants, "who is little interested in the cause, but made a party, as the defendant's counsel supposes, to take away his testimony from the other defendants"); and the citations *supra*, note 22.

[35] *Post*, § 600.

[36] *Post*, § 2218.

from the common law was equally radical. The details of the origin of the Chancery rules, and the motives leading to its peculiar combination of methods, remain still to be learned with accuracy.

3. *Criminal Trials.* It remains to notice the progress of the rule in criminal cases. (1) So far as concerns the prosecution's witnesses, it would seem that no exclusion by reason of interest was attempted before very near the time of Coke's book;[37] and even after that time, little recognition is given to that rule.[38] There was, however, in crown cases in this epoch, especially in the trials for treason, which form most of those that have come down to us, no disposition to concede objections to the crown's testimony;[39] and this sufficiently explains the tardiness in the adoption of the rules in criminal trials; indeed, at no time later was the rule of interest as strictly construed as in civil cases.

(2) The accused himself, like the parties in civil cases, had always, under jury-trial, been allowed to plead his cause orally in person. This in civil cases naturally came to be done usually by the counsel. But, since in criminal causes, the accused was not allowed to have counsel in felony cases (until statute conceded this, for treason in 1695, and for felony in 1836),[40] his statements covered without distinction whatever he had to say of law, of evidence, and of argument. In effect, he furnished evidence, *i. e.* material which affected the jury's belief; but he was not sworn, he had no standing as a witness, and in theory of the law he therefore gave no evidence. During the period of recorded trials down to the second half of the 1500s this theory appears not to have been emphasized; the accused made an address at the proper stage, and, as witnesses came on, he spoke and was questioned freely, as if his statements counted for something, though he was not sworn.[41] But by the time of James II, just before the Revolution, the Court is found

[37] No mention is made of any rule of exclusion as late as 1557, in Staunford's Pleas of the Crown, b. 3, c. 8, and 1565, in Smith's Commonwealth of England, b. 2, c. 26.

[38] 1640, Lord Strafford's Trial, 3 How. St. Tr. 1381, 1434 (a copy of an alleged illegal warrant, testified to by the serjeant claiming to act under the defendant's command, was objected to by the defendant, since "what he swears to my prejudice is to his own advantage; nor can a man, by any equity in the world, be admitted to testify against another *in suam justificationem*"; and the copy was excluded); 1643, Col. Ficnnes' Trial, 4 id. 185, 212 (court-martial; argued for the prosecution that defendant's father was "but *testes domesticus* at the best"); 238 (argued for the prosecution that "many of them [defendant's witnesses] are *testes domestici*, as his brother, kinsmen, servants, footboys; most of the rest his officers and soldiers, against whom we excepted as incompetent"; the Court here went in part on civil law rules of procedure); 1644, Archbishop Laud's Trial, ib. 315, 383, 389, 402 (argued as an objection by the defendant that a witness testified "in his own cause"); 1649, Duke of Hamilton's Trial, ib. 1155 (defendant objected unsuccessfully against a witness' testimony, "he being a party, and now in hazard"); 1649, Lilburne's Trial, ib. 1269, 1342 (similar); 1660, St. 12 Car. II, c. 32 (seizures of goods illegally executed; the person seizing "shall not be admitted or allowed to give in evidence upon his or their oath or oaths"); *ante* 1680, Hale, Pleas of the Crown, I, 302 ("A man concerned in point of interest is not a lawful accuser or witness in many cases").

[39] Compare the history of the rule for infamy, *ante*, § 519.

[40] 7 & 8 W. III, c. 3; 6 & 7 W. IV, c. 114.

[41] The following trials illustrate this: 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 873; 1571, Duke of Norfolk's Trial, ib. 958, 979; 1588, Knightley's Trial, ib. 1263, 1267; 1603, Raleigh's Trial, 2 id. 1, 11; 1615, Weston's Trial, ib. 911, 928; 1649, Duke of Hamilton's Trial, 4 id. 1155, 1161; 1661, James' Trial, 6 id. 67, 79; 1662, Tonge's Trial, ib. 225, 256; 1663, Moders' Trial, ib. 273, 278; 1664, Turner's Trial, ib. 565, 595. Compare Mr. J. Stephen's account of this: Hist. Crim. Law, I, 325, 377, 440.

expressly repudiating the notion that the accused's statements are to be taken as testimony.[42] This, it may be supposed, was in part due to the then recently established principle in civil cases of disqualification by interest.

(3) The accused was at common law not allowed to have any witnesses on his behalf. This (to our eyes) barbarous rule was perhaps not unnatural in the earlier days, when the jurors had so much knowledge of their own. At any rate, as late as the 1400s, it was not an extraordinary thing, seeing that the practice of calling witnesses in the modern sense was only just beginning in civil cases. But, in the next century, when their use in civil cases was common enough, they were still not admitted in criminal trials;[43] not on any theory of disqualification (it was still too early for that), but on the pretext that they were not needed, — the same pretext that forbade the employment of counsel.[44] No doubt also a general disinclination prevailed to concede anything that would weaken the hands of the prosecution. There seems to have been some general support for this rule in the notions of the time, for not until the middle of the 1600s is there any relaxation.[45] Then, first, the accused is gradually allowed to produce witnesses, who speak, however, without oath;[46] next, he is given compulsory process for them;[47] and, finally, by statutes in 1695[48] and 1701[49] he is allowed to have them sworn in treason and in felony. From that time on, the ordinary principle of disqualification by interest, already established for civil cases, is enforced wherever it is applicable to a defendant's witnesses.

§ 576. **Interest-Disqualification in general; Policy of the Rule; Statutory Abolition.** The theory of disqualification by interest was merely one variety

[42] 1678, Coleman's Trial, 7 How. St. Tr. 1, 65 (Coleman: "I came home the last day of August"; L. C. J. Scroggs: "Have you any witness to prove that?"; Coleman: "I cannot say I have a witness"; L. C. J.: "Then you say nothing"); 1681, Colledge's Trial, 8 id. 549, 681.

[43] 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 885; 1590, Udall's Trial, ib. 1271, 1280, 1304.

[44] 1678, L. H. Steward Finch, in Lord Cornwallis' Trial, 7 How. St. Tr. 143, 149: "The fouler the crime is, the clearer and the plainer ought the proof of it to be. There is no other good reason can be given why the law refuseth to allow the prisoner at the bar counsel in matter of fact when his life is concerned, but only this, because the evidence by which he is condemned ought to be so very evident and so plain that all the counsel in the world should not be able to answer upon it."

[45] There had been two statutes, of very limited extent, allowing witnesses to the accused, in 1589 (St. 31 Eliz. c. 4) and 1606 (St. 4 Ja. I, c. 1, § 16).

[46] 1645, Lord Macguire's Trial, 4 How. St. Tr. 653, 666 (Macguire: "I was told, when I came into the kingdom [from Ireland], that I might have witnesses"; Judge: "If you had witnesses here, we would hear them; but . . . we cannot protract time [to wait for them]. . . . If you will ask them [the king's witnesses] any questions for your defence, you shall"); 1649, Duke of Hamilton's Trial, ib. 1155, 1157, 1160 (defendant allowed to use some witnesses, but not granted a warrant for others); 1653, Faulconer's Trial, 5 id. 323, 357 (witnesses freely examined for the defendant; here under the Commonwealth); 1660, Hulet's Trial, ib. 1179, 1191 (under the Restoration; witnesses allowed, "but they are not to be admitted upon oath against the king"); 1661, James' Trial, 6 id. 67, 79; 1669, Hawkins' Trial, ib. 921, 933; 1678, Stayley's Trial, ib. 1501, 1508.

[47] Note that this reform comes in under the Restoration and before the Revolution: 1663, Twyn's Trial; 6 How. St. Tr. 513, 516 (L. C. J. Hyde: "Let's know their names, we will take care they shall come in"); 1664, Turner's Trial, ib. 565, 570 (L. C. J. Hyde: "The law will not admit us to summon any witnesses"); 1679, Reading's Trial, 7 id. 259, 278 (L. C. J. North: "There was never any subpœnas denied you; but you might have had them at any time"; and at pp. 288, 289, two witnesses were sworn). Compare the history of compulsory process in general, *post*, § 2190.

[48] St. 7 Wm. III, c. 3, § 1; St. 1 Anne, c. 9, § 3. Compare the detailed history of the old rule in Thayer, Preliminary Treatise, 157, note, and the shorter account in Stephen, History of the Criminal Law, I, 350–354, 416.

of the general theory which underlay the extensive rules of incompetency at common law. It was reducible in its essence to a syllogism, both premises of which, though they may now seem fallacious enough, were in the 1700s accepted as axioms of truth: Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; Persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; Therefore such persons should be totally excluded. This theory may be perceived running through all the authoritative expositions of the doctrine:

1727, Chief Baron *Gilbert*, Evidence, 110; Lofft's ed. 223: "For where a man, who is interested in the matter in question, would also prove it, it rather is a ground for distrust, than any just cause of belief; for men are generally so short-sighted, as to look to their own private benefit, which is near them, rather than to the good of the world, which, though on the sum of things really best for the individual, is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it. It is also easy for persons, who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence; and therefore the law removes them from testimony, to prevent their sliding into perjury; and it can be no injury to truth to remove those from the jury, whose testimony may hurt themselves, and can never induce any rational belief. If it be objected, that interest in the matter in dispute might, from the bias it creates, be an exception to the credit, but that it ought not to be absolutely so to the competency, any more than the friendship or enmity of a party, whose evidence is offered, towards either of the parties in the cause, or many other considerations hereafter to be intimated; the general answer may be this, that in point of authority no distinction is more absolutely settled; and in point of theory, the existence of a direct interest is capable of being precisely proved; but its influence on the mind is of a nature not to discover itself to the jury; whence it hath been held expedient to adopt a general exception, by which witnesses so circumstanced are free from temptation, and the cause not exposed to the hazard of the very doubtful estimate, what quantity of interest in the question, in proportion to the character of the witness, in any instance, leaves his testimony entitled to belief. Some, indeed, are incapable of being biased even latently by the greatest interest; many would betray the most solemn obligation and public confidence for an interest very inconsiderable. An universal exclusion, where no line short of this could have been drawn, preserves infirmity from a snare, and integrity from suspicion; and keeps the current of evidence, thus far at least, clear and uninfected."

1824, Mr. *Starkie*, Evidence, 83: "The law will not receive the evidence of any person, even under the sanction of an oath, who has an interest in giving the proposed evidence, and consequently whose interest conflicts with his duty. This rule of exclusion, considered in its principle, requires little explanation. It is founded on the known infirmities of human nature, which is too weak to be generally restrained by religious or moral obligations, when tempted and solicited in a contrary direction by temporal interests. There are, no doubt, many whom no interests could seduce from a sense of duty, and their exclusion by the operation of this rule may in particular cases shut out the truth. But the law must prescribe general rules; and experience proves that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion."

The answer to this syllogism is merely that both its premises are unsound, —that pecuniary interest does not raise any large probability of falsehood, and that, even if it did, the risks of false decision are not best avoided by

excluding such testimony. The classical expositions of these fallacies are found in the following passages:[1]

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. III, c. III (Bowring's ed., vol. VII, pp. 393 ff.): "Ignoramus has for the purpose of this topic composed his system of psychology. What is it? A counterpart to the learned Plowden's system of mineralogical chemistry: equal as touching its simplicity — equal as touching its truth. Two parent metals, sulphur and mercury: the mother, sulphur; the father, mercury. Are they in good health? they beget the noble metals: are they in bad health? they beget the base. . . . In the view taken of the subject by the man of law, — to judge of trustworthiness, or at least, of fitness to be heard, *interest* or *no interest* is (flagrant and stigmatized improbity apart) the only question. . . . Between two opposite propositions, both of them absurd in theory, because both of them notoriously false in fact, the choice is not an easy one. But if a choice were unavoidable, the absurdity would be less gross to say, 'No man who is exposed to the action of interest will speak false,' than to say, 'No man who is exposed to the action of interest will speak true.' Of a man's, of every man's, being subject to the action of divers mendacity-restraining motives, you may be always sure: of his being subjected to the action of any mendacity-promoting motives, you cannot be always sure. But suppose you were sure. Does it follow, because there is a motive of some sort prompting a man to lie, that for that reason he will lie? That there is danger in such a case, is not to be disputed: but does the danger approach to certainty? This will not be contended. If if did, instead of shutting the door against some witnesses, you ought not to open it to any. An interest of a certain kind acts upon a man in a direction opposite to the path of duty: but will he obey the impulse? That will depend upon the forces tending to confine him to that path — upon the prevalence of the one set of opposite forces or the other. All bodies on or about the earth tend to the centre of the earth; yet all bodies are not there. All mountains have a tendency to fall into a level with the plains; yet, notwithstanding, there are mountains. All waters seek a level; yet, notwithstanding, there are waves. . . . Any interest, interest of any sort and quantity, sufficient to produce mendacity? As rational would it be to say, any horse, or dog, or flea, put to a waggon, is sufficient to move it: to move it, and set it a-running at the pace of a mail-coach. . . . Take what everybody understands, money: for precision's sake, take at once £10; the £10 of the day, whatever be the ratio of it to the £10 of yesterday: to the present purpose, depreciation will not affect it. This £10, will its action be the same in the bosom of Crœsus as of Irus? in the bosom of Diogenes, as in that of Catiline? No man will fancy any such thing for a moment: no man, unless, peradventure, it may have happened to him to have been stultified by legal science. . . . In the eyes of the English lawyer, one thing, and one thing only, has a value: that thing is money. On the will of man, if you believe the English lawyer, one thing, and one thing only, has influence: that thing is money. Such is his system of psychological dynamics. If you will believe the man of law, there is no such thing as the fear of God; no such thing as regard for reputation; no such thing as fear of legal punishment; no such thing as ambition; no such thing as the love of power; no such thing as filial, no such thing as parental, affection; no such thing as party attachment; no such thing as

[1] Mr. Bentham's was of course the first and greatest; the above quotation includes merely a few of the most typical and forcible passages from his argument. The other two quotations represent those which in the history of the law were next most potent in their practical consequences, namely, the utterances of the Commissions in England and America, whose proposals led directly to legislative reform. There were, of course, other admirable expositions, notably Lord Brougham's, in his speeches in Parliament, and Lord Denman's, between 1824 and 1854, in his speeches, pamphlets, and articles. Both of these were Bentham's admirers. Perhaps the most comprehensive and concise, and the most profitable for perusal, next to Mr. Bentham's, are those of Chief Justice Appleton of Maine (a disciple of Bentham's) in his treatise (1860) on Evidence, chaps. I, IV, and Mr. Justice Edward Livingston (*circa* 1823), in his Introductory Report to the Code of Evidence (Works, ed. 1872, I, 424, 438 ff.); Livingston had read Bentham, probably in Dumont's earlier abridged edition.

party enmity; no such thing as public spirit, patriotism, or general benevolence; no such thing as compassion; no such thing as gratitude; no such thing as revenge. Or (what comes to the same thing) weighed against the interest produced by the value of a farthing, the utmost mass of interest deducible from the action of all those affections put together, vanishes in the scale. . . . For a farthing — for the chance of gaining the incommensurable fraction of a farthing, no man upon earth, no Englishman at least, that would not perjure himself. This in Westminster Hall is science, this in Westminster Hall is law. According to the prints of the day, £180,000 was the value of the property left by the late Duke of Bridgewater. For a fraction of a farthing, Aristides, with the duke's property in his pocket, would have perjured himself. One decision I meet with, that would be amusing enough, if to a lover of mankind there could be anything amusing in injustice. A man is turned out of court for a liar, not for any interest that he has, but for one which he supposed himself to have, the case being otherwise. Instead of turning the man out of court, might not the judge have contented himself with setting him right? Would not the judge's opinion have done as well as a release? The pleasant part of the story is that the fact on which the exclusion is grounded could not have been true. For, before the witness could be turned out of court for supposing himself to have an interest, he must have been informed of his having none: consequently, at the time when he was turned out, he must have ceased to suppose that he had any. Another offence, for which I find a man pronounced a liar, seems to make no bad match with the foregoing: it was for being a man of honour. 'Oh ho! you are a man of honour, are you? Out with you, then — you have no business here.' Being asked whether he did not look upon himself as bound in honour to pay costs for the party who called him, supposing him to lose the cause, and whether such was not his intention, — his answer was in the affirmative, and he was rejected. It was taken for granted that he would be a liar. Why? Because he had shown he would not be one. . . . Exceptions, self-contradictions, spring up everywhere under their feet: exceptions, and, as far as they extend, all reasonable. Reasonable, and why? Because, the rule itself being fundamentally absurd, everything must be reasonable which goes to narrow its extent. . . . V. Exception the fifth: — . . . Question: A man who at the time of his examination has an interest in the cause, — is he an admissible witness, he having had no interest at the time of the supposed fact? Decision in the affirmative. Because he was under no temptation when he had not to speak, therefore, when he is to speak, knowing him to be under temptation, you are to suppose him not to be so. Just as if a pilot were to say in a storm, the vessel among the breakers, Sit still, there is no danger. Why so? Because yesterday it was a dead calm. VI. Exception the sixth: *Voire dire*. Truth expected, in spite of interest. . . . When a witness produced against you has an interest in the business (meaning always a pecuniary interest), and you cannot get other evidence of it, or do not care to be at the expense, you address yourself to the witness himself, and ask him whether he has or no: if he speaks truth, he is turned out; if he perjures himself, he is heard. This operation is called examining a witness upon the *voire dire*. *Voire dire* is, in law French, to tell the truth. A man might look a good while, even in the vocabulary of English law, before he would find so silly a one. 'Come, my honest friend, I am going to put some questions to you. To the first of them, the court expects you to speak truth: to the others, as you please.' "

1853,[2] *English Common Law Practice Commissioners*, Second Report, p. 10: "Plain sense and reason would obviously suggest that any living witness who could throw light upon a fact in issue should be heard to state what he knows, subject always to such observations

[2] This Report was ten years subsequent to the abolition of the interest-disqualification; but the passage was useful as confirming by experience the wisdom of the steps so recently taken, and thus made it possible to obtain support for the further reform of abolishing marital incompetency, — a measure which followed immediately in 1854. It was in consequence of the First Report of this same Commission that the incompetency of civil parties had been abolished in 1851.

as may arise as to his means of knowledge or his disposition to the truth. The law o England, however, at least until a recent period, proceeded on a very different principle Acting apparently on a distrust both of the integrity of witnesses and of the discernmen of the tribunals, it sought to protect the latter from the possibility of being misled, by carefully excluding from giving testimony not only the parties to the cause, but any one who had any, even the most minute, interest in the result. Every person so circumstanced, however small and insignificant the amount of his interest, was presumed to be incapable of resisting the temptation to perjury; and every judge and juryman was presumed to be incapable of discerning perjury under circumstances peculiarly calculated to excite suspicion and watchfulness. It is painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law, not only in cases actually brought into court and there wrongly decided in consequence of the exclusion of evidence, but in numberless cases in which the parties silently submitted to wrongs from inability to avail themselves of proof which, though morally conclusive was in law inadmissible. From the time, however, when the late Mr. Bentham first turned the attention of the public to the defects of the English law of evidence, the system of exclusion has been crumbling away before the power of discussion and improved legislation. . . . [After noting the three general statutes between 1843 and 1851, which had by successive steps removed incompetency for interest,] Such is the gradual progress of opinion and intelligence. A quarter of a century ago such a measure if proposed, would doubtless have been treated as a wild and dangerous innovation altogether unfit to be entertained by the Legislature. The new law has now been in practical operation for eighteen months; and according to the concurrent testimony of the bench, the profession, and the public, is found to work admirably and to contribute in an eminent degree to the administration of justice."

1848, *New York Commissioners on Practice and Pleadings*,[3] First Report, p. 246: "The rule appears to us to rest upon a principle altogether unsound; that is, that the situation of the witness will tempt him to perjury. The reason strikes at the foundation of human testimony. The only just inquiry is this; whether the chances of obtaining the truth are greater from the admission or the exclusion of the witness. Who that has any respect for the society in which he lives can doubt, that, upon this principle, the witness should be admitted? The contrary rule implies, that, in the majority of instances, men are so corrupted by their interest, that they will perjure themselves for it, and that besides being corrupt, they will be so adroit, as to deceive courts and juries. This is contrary to all experience. In the great majority of instances the witnesses are honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected, and deceives none. Absolutely to exclude an interested witness, is therefore as unsound in theory, as it is inconsistent in practice. It is inconsistent, because the law admits witnesses far more likely to be biased in favor of the party, than he who has merely a pecuniary interest. A father may testify for his son; a child living with his father and dependent upon his bounty, may appear as his witness, nay, as his only witness, without question. Is the immediate gain of a dollar, by the result of a cause, so potent to outweigh integrity, while affection, consanguinity, dependence, are put down as dust in the balance? There is not another rule in the law of evidence so prolific of disputes, uncertainties, and delays, as that we are considering. Not a circuit is held, but question after question is raised upon it; nor a term where exceptions growing out of it are not debated. . . . England has outstripped us in this most necessary reform. Five years ago, an act of Parliament obliterated the rule from the laws of that country. . . . Lord

[3] This Commission, appointed through efforts led by Mr. David Dudley Field, consisted of Messrs. Nicholas Hill, David Graham, and Arphaxad Loomis; but, before its labors began, Mr. Hill resigned and was replaced by Mr. Field. Compare with the above Report the Complete Report of 1850, p. 715, note to § 1708; this section, making "all persons without exception" competent, except specified classes, has served as the type for the legislation of a majority of our jurisdictions.

Brougham has spoken of it, in the following language: 'This is certainly the greatest measure that has been carried under the head of judicial procedure, since the statute of frauds, that is, since the Restoration. It places the law of evidence at length upon a rational footing, and makes its provisions consistent with themselves. It protects judges and juries and parties, from the miscarriages, heretofore constantly produced, by the exclusion of important testimony; wisely opening the door to the witness, but reserving the estimate of his credit and the value of his evidence, to those who are to judge the cause. It also sweeps away the numberless nice and subtle distinctions in which the profession was wont to luxuriate; disencumbers our jurisprudence of a heavy load of useless decisions, resting upon refinements and not principles, and abridges the trial of causes, by shutting out those debates that used daily to arise upon the admission of proofs, which the common sense of mankind at once pronounced should be received, and which the law itself did receive in other instances, not distinguishable by the naked eye of plain reason. There have been few greater improvements in our judicial system, than those which are effected by this valuable statute.'"

It is not easy nowadays to appreciate why these plain objections remained so long without recognition. (1) One reason, certainly, is found in the much stronger influence, up to the 1800s, of the emotional element in all human conduct. The belief that a partisan would likely falsify, or at least distort unconsciously the truth, was then much closer than now to the facts of life; because partisanship did then have an influence which has now largely given place to cooler and more rational motives of action. This may be gathered from various features of life in those days. Partisanship then colored the whole existence and committed one to set views and courses of conduct which had no relation to a discriminating choice. Speech and action were more passionate and violent; witness Burke's speeches against Warren Hastings, and the enormous excess of libel actions over their present number, as well as the extremities of abuse which were indulged in between gentlemen; compare the almost incredible vituperation employed against such majestic characters as Washington and Jefferson with the decline of political personalities in the last few decades. Motives then rested more on sentiment; witness the rise of Romanticism in literature and politics, the careers of Byron and Shelley, the vogue of "Paul and Virginia" and "Thaddeus of Warsaw." Note, too, that these features are still found surviving in the traditions of precisely that portion of our community — the South — where we may see with our own eyes that the emotional element — both in its highest and its lowest forms — predominates in the character. During the 1800s this predominance was gradually disappearing; the influence of scientific research and of industrial invention and organization made for a more rational and less emotional life. That influence, no doubt, has in part had its degrading effect in strengthening the calculative, sordid, and commercial standards of action; but it has also had the effect of establishing, in general, cool reason as the orthodox test of conduct. Thus, with the diminution of the control of mere emotion and partisanship over conduct and opinion, the rules of law which were natural enough while that domination existed, ceased gradually to correspond to the facts of life and survived as anachronisms. It became possible to see their fallacies as soon as

their moral basis disappeared, but not till then. In short, not before the second half of the 1800s could it have been fairly expected that public opinion would demand or even support the abolition of disqualification by interest; nor yet, perhaps, does that abolition, in a few communities (chiefly in the South[4]), correspond to the facts of life and public opinion, as it certainly does in most.

(2) A second reason perhaps is to be found in that "dead weight of an oath" (in Mr. Justice Stephen's phrase), which in popular probative notions prevailed from primitive times and still is so difficult in some communities to make way against. As long as juries were inclined to give a numerical value to witnesses, to believe that ten witnesses were ten times as probative as one witness, and to treat a sworn assertion on the stand as being good for so much testimony, irrespective of the witness' personal credit, so long might the Legislature well hesitate to admit to the stand persons who in their credit would certainly be weaker than the normal witness and would yet be indiscriminately counted as good witnesses by the jury. In other words, the tribunal's opportunity for a careful weighing of a witness' measure of credit, and the means afforded for doing so by cross-examination and the like, form the safeguards which induce us to take the risk of admitting interested witnesses; we rely on being able to make the proper allowance for the danger; if, then, the tribunal is apt to ignore those safeguards, the reason for admission is much weaker. Some such thought must have operated to prolong the delay in abolishing disqualification by interest.[5] Perhaps the two foregoing considerations sufficiently explain why the reforming legislation dates no earlier than the second half of the 1800s.

In England, the publication (in 1827) of Bentham's great treatise first furnished the arsenal of arguments for transforming public opinion. The weapons were wielded and the forces marshalled by Mr. (afterwards L. C. J.) Denman and Mr. (afterwards L. C.) Brougham).[6] Mr. Denman had indeed, as early as 1824, in reviewing the French edition of Bentham's work,[7] given voice to the new views; he had always been, and never ceased to be, far in advance of public opinion in his measures of reform. By 1843 the result was finally achieved, in the statute 6 & 7 Victoria, chapter 85, known ever since as Lord Denman's Act.[8]

[4] In 1898, Mr. N. J. Hammond, an accomplished and thoughtful member of the bar of Georgia, at one time Attorney-General, said to the writer that the abolition of parties' incompetency had in his opinion been a mistake. Perhaps there exist other doubters still; see Jenkins, J., diss. in Harman v. Harman, 1895, 17 C. C. A. 479, 70 Fed. 926, and *ante*, § 289.

[5] This consideration is noted, in dealing with the history of the rules of number, *post*, § 2032.

[6] The campaign of reform in the political field was signalized, within a year after the publication of Bentham's book, by Mr. Brougham's great speech, of Feb. 7, 1828, on the reform of procedure, in which occurred the oft-quoted peroration: "It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler shall be the sovereign's boast, when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, — left it a living letter; found it the patrimony of the rich, — left it the inheritance of the poor; found it the two-edged sword of craft and oppression, — left it the staff of honesty and the shield of innocence!" (Hans. Parl. Deb., 2d ser., vol. 18, p. 247.)

[7] Edinburgh Review, March, 1824, vol. 40, p. 176. This French translation appeared before the English edition of the original.

[8] For Lord Denman's speech (then Chief Justice and a peer) in moving the second reading of this bill, see Hansard, Parl. Deb., 3d ser.,

In the United States, the English statutes served as an example, and it was soon followed. The earliest enactment abolishing interest as a disqualification seems to have been that of Michigan.[9] But the broad movement of reform in New York, led by Mr. David Dudley Field, brought results which attracted more general attention; and the legislation of that State, in 1848, was the direct means by which the reform of testimonial rules spread, within the next decade, to most of the other States.[10] The details of the old rule, in its application to the numerous circumstances of pecuniary interest, may therefore be ignored as having no longer any importance.[11] In every jurisdiction under our law interest as a disqualification is expressly abolished.[12]

§ 577. **Civil Parties' Disqualification; Statutory Abolition.** The notion of interest at common law applied of course to the parties to the suit, for their interest in the event of the litigation was obviously the most marked. That this general principle of disqualifying interest was the real ground of their exclusion from testifying in their own favor is clear; and certain details of the rule rested directly on this theory, — for example, the consequence that a mere titular or nominal party was admissible, or a party against whom judgment had gone by default. The hardship and the anomaly, however, of this ground for exclusion were even more emphatic and apparent than in the case of ordinary interested persons.[1] To this branch of the rule also Mr. Bentham paid special attention in his seathing denunciations:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. V, c. I (Bowring's ed. vol. VII, pp. 487, 507): "The reason which forbids the admission of the testimony is weaker in this case than in the case of an interested extraneous witness. The real magnitude of the interest being the same in both cases, — in the case of a party the interest is more palpable: the objection created by it is likely to act with greater force upon the judicial faculties of the magistrate: his mind is more surely open to it: the danger of deception is therefore less. If, in so far as it operates in his own favor, the testimony of the party is liable to be drawn aside from the line of truth by the action of this force, which is so obvious even to the most unobservant eye, — in so far as it operates in his disfavor, it possesses, in a degree superior to all other testimony, a claim to confidence. That, in this case, the error, if any there be in the testimony, is not a wilful one — is not accompanied, at the same time, with a knowledge of the falsity of the information, and of the tendency it has to operate to the deponent's prejudice — is a proposition, the truth of which is far more certain in this instance, than it can be in any other. Accordingly, as often as the testimony of a party is received — so sure as it enters into the mind of any one who has to judge of it — so sure is it to be analyzed, and, as it were, divided

vol. 61, p. 208. March 8, 1842. In 1833, a statute of 3 & 4 W. IV. c. 42, had removed this disqualification so far as it depended on the verdict being usable for or against the witness in other litigation; all these statutes are noted *ante*, § 488. It would seem also that the Admiralty Courts had for some time before these statutes ceased to regard interest as a disqualification: Dr. Lushington, in The Peerless, 1 Lush. 30, 41.

[9] Michigan, Rev. St. 1846, c. 102, § 99.

[10] See note 3, *supra*.

[11] Except for the rule (*post*, § 578) excluding survivors from testifying against a decedent. The scope for the application of the old rules is even there, however, so narrow that it will be sufficient to refer the reader to Professor Greenleaf's exposition of them, in his Treatise, §§ 329–430.

[12] The statutes are set forth *ante*, § 488. In general, the legislation was later in the Southern States than elsewhere.

[1] "When as a boy I read the Pickwick Papers, I was always puzzled to know why Mr. Pickwick did not go into the witness-box, and say that he never promised to marry Mrs. Bardell, and explain how the good lady came to make such a mistake" (W. Blake Odgers, Esq., A Century of Law Reform, 1901, p. 217).

into two parts. To the part which is regarded as operating in the deponent's own favor, the incredulous, the diffident part of the judge's mind, applies itself of course: while the part regarded as operating in his disfavor, commands, on the part of the judge, an almost unlimited share of confidence: in a word, what portion of the mass is understood as belonging to this division, is, by the common sense and consent of mankind, universally regarded as the best evidence. Such is the evidence, of which, on the ideal supposition of extraordinary vexation, the rashness of a certain class of jurists has not hesitated to rob the treasury of justice. A party is not suffered to be examined on his own behalf. Observe the consequence; he is delivered without mercy into the hands of a mendacious witness on the other side. Your adversary, to make evidence for a suit he means to bring against you, sends an emissary to you to engage you in a conversation, that, when called upon as a witness, he may impute confessions to you such as you never made. When the evidence comes to be given at the trial, the witness tells what story he pleases: as for you, you must not open your mouth to contradict him, although, were you admitted to state what passed, it might be in your power to satisfy the judge, that the account given of the conversation by the witness could not possibly have been true. . . . Parties, how numerous soever, being excluded, while, in the character of an extraneous witness, the testimony of a single deponent is sufficient to warrant, and (if clear of contradiction, as well from within as without,) in a manner to command, decision; — a single tongue obtains thus a certain victory over a thousand, that would have sounded in contradiction to it, had they been suffered to be heard. Every defendant is, *par etat*, by his station in the cause, a liar: a man who, if suffered to speak, would be sure to speak false, and equally sure to be believed. Every defendant is a liar. But every human being may, at the pleasure of every other, be converted into a defendant. Therefore, and by that means, every human being may, at the pleasure of every other, be converted into a liar, and, in that character, his capacity of giving admissible testimony annihilated. The *jus nocendi*, the power of imposing unlimited burthens by calumnies not suffered to be contradicted, is thus offered constantly upon sale, to every man who will pay the price for it. . . . In principle there is but one mode of searching out the truth: and (bating the corruptions introduced by superstition, or fraud, or folly, under the mask of science) this mode, in so far as truth has been searched out and brought to light, is, and ever has been, and ever will be, the same, in all times, and in all places, in all cottages and in all palaces — in every family, and in every court of justice: Be the dispute what it may, see everything that is to be seen; hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it — the parties."[2]

Mr. Bentham had rightly perceived that the incompetency of parties could be treated as a different question from that of interested persons not parties; for, while the impropriety of their exclusion was more marked in rational policy, yet the common-law theory of interest was in their case most strongly applicable and the instinct against altering it would therefore offer more obstinate resistance. And so it did. In England, this stage of reform was not reached until 1851, eight years after the first great step had been taken;[3] and in most of the United States such an interval between the two steps similarly appears.[4]

[2] Compare the arguments of Livingston and Appleton, in the citations *ante*, § 576, note 1.

[3] St. 14 & 15 Vict. c. 99, excepting actions for adultery and breach of marriage-promise; this exception was removed in 1869, St. 32 & 33 Vict. c. 68. In 1846, St. 9 & 10 Vict. c. 95, an experiment had already been tried, by admitting parties in the county courts.

[4] The earliest statute seems to have been that of Connecticut, in 1849, prior to the English Act. In Alabama, the disqualification by interest generally was removed in 1852, but that of parties not until 1867. But in some jurisdictions, at much earlier dates, statutes had made partial exceptions to the general disqualifications, *e. g.* in bastardy cases and in actions on book-accounts, suits involving municipal corporations, and suits before justices of the peace. Some of these statutes making parties competent provided, as a condition, that he should

To-day the disqualification has everywhere disappeared,[5] and its details are no longer of any consequence.[6]

§ 578. **Survivor's Disqualification against Opponent Deceased, or Incapable.** In almost every jurisdiction in the United States, by statutes enacted in connection with or shortly after the statute removing the general disqualification by interest, an exception was carved out of the old disqualification and was allowed to perpetuate within a limited scope the principle of the discarded rule. It does not appear that there was any precedent which could have served as an example;[1] and the almost universal vogue of this modern fragment of the old anomaly is therefore the more remarkable. The scope of this modern rule excludes the testimony of the survivor of a transaction with a decedent, when offered against the latter's estate. The defenders of this rule are usually content to invoke some vague metaphor in place of a reason, but occasionally there is found an attempt at a rational justification:

1873, *Brickell*, J., in *Louis* v. *Easton*, 50 Ala. 471: "This right and privilege [of testifying] must be mutual. It cannot exist in the case of one party and not in the other. If death has closed the lips of the one party, the policy of the law is to close the lips of the other."

1878, *Haymond*, J., in *Owens* v. *Owens*, 14 W. Va. 88, 95: "The law in the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omission, mistakes, or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great to allow the surviving party to testify in his own behalf. Any other view of this subject, I think, would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous."

The argument of the latter passage, that a contrary rule "would place in great peril the estates of the dead" sufficiently typifies the superficial reasoning on which the rule rests. Are not the estates of the living endangered daily by the present rule, which bars from proof so many honest claims? Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof? The truth is that the present rule is open, in almost equal degree, to every one of the objections which were successfully urged nearly a century ago against the interest-rule in general. Those objections may be reduced to four heads: (1) That the supposed danger of interested persons testifying falsely exists to a limited extent only; (2) That, even so, yet, so far as they testify truly, the exclusion is an intolerable injustice; (3) That no exclusion can be so defined as to be rational, consistent, and workable; (4) That in any case the test of cross-examination and the other safeguards for truth are a sufficient guaranty

testify first of the witnesses on his side; see *post*, § 1869. The old rules may be found in Greenleaf, Evidence, §§ 329–331.

[5] The statutes are set forth *ante*, § 488.

[6] Except under the statutory rule of § 578, *post*. For the effect of one of the exceptions to the old rule, namely, that parties might make affidavits to the *loss of a document*, see *post*, §§ 1196, 1225.

[1] Except the analogy of some earlier chancery rulings, which however merely required corroboration and did not exclude the witness (*post*, § 2065). But the expedient was an old one; it is found in several mediæval codes, *e. g.*, "*Nulla probatio testimonii de mutuo vel deposito valeat contra defunctos*" (Pertile, Storia del diritto italiano, 2d ed., 1900, vol. VI, pt. 1, p. 400).

against frequent false decision. Every one of the first three objections applies to the present rule as amply as to the old and broader rule. The fourth applies with less apparent force, because the opponent's testimony is lacking in contradiction. And yet, upon what inconsistencies is based even this support for the rule! For its defenders in effect declare the lack of this opposing testimony to be the sole ground for an exceptional rule adapted to that particular situation; and yet, since the deceased opponent is a party, he would have been by hypothesis a potential liar equally with the disqualified survivor; so that the rule rests on the supposed lack of a questionable species of testimony equally weak with that which is excluded. There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound. Add to this, the labyrinthine distinctions created in the application of the complicated statutes defining this rule; and the result is a mass of vain quiddities which have not the slightest relation to the testimonial trustworthiness of the witness:

1895, *Corliss*, J., in *St. John* v. *Lofland*, 5 N. D. 140, 64 N. W. 930: "Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them, by destroying the evidence to prove such claim, than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find is difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods, — the sword of cross-examination. For these reasons, which lie on the very surface of this question of policy, we regard it as a sound rule to be applied in the construction of statutes of the character of the one whose interpretation is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses."

As a matter of policy, this survival of a part of the now discarded interest-qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words.[1] If any concession at all is to be made to the considerations of caution underlying the rule, there are two simple ways available, each of them in actual and tried operation, and

[1] The statutes are set forth *ante*, § 488; the only jurisdictions not recognizing this disqualification are apparently Connecticut, Massachusetts, New Mexico, and Oregon. The interpreting decisions will not be given here, for three reasons; first, they depend largely on the wording of the local statute; secondly, they are extremely numerous, and usually cannot be correctly summarized without a voluminous statement of the circumstances of the case and a comparison with the various parts of the statute, for which the present space does not suffice; thirdly, they are usually accessible to every practitioner in the form of annotations to the statute. This conclusion has been reached only after a full examination of all the rulings in one of the States, and a collection of the current rulings in all the jurisdictions for a period of several years.

each of them able to accomplish the purpose without following the crude, technical, and unjust method of disqualifying surviving witnesses. One of these, adopted in New Mexico and Canada, is to allow no recovery in such cases on the party's sole testimony, without corroboration of some sort.[2] The other, followed in Connecticut and Oregon, is to admit, as well as the surviving party, any extant writings or declarations of the deceased party on the subject in issue.[3]

§ 579. **Accused in Criminal Cases; Statutory Abolition.** The disqualification of the accused in criminal cases to testify for himself seems not to have been questioned in policy until Bentham's time.[1] But his arguments in this respect took longer for their fruition in legislation than any other of his proposals for abolishing witnesses' incapacities. The order of their abolition almost everywhere was the same; first, that of interested persons, next and in short space, that of civil parties, and then after a long interval, that of accused persons; that of husband and wife came about at varying times in the third interval, and in many communities remains still unachieved. The competency of accused persons was first declared in Maine, in 1864,[2] and was not finally reached in England until 1898;[3] it now remains unaccomplished in Georgia only. It came later, in general, in the Southern States; and it was sometimes there accompanied by the proviso that the accused should testify, if at all, first in order of the witnesses on his own side.[4]

The reason for the general slow arrival at this measure did not apparently lie entirely in a failure to perceive the fairness of giving the accused an opportunity to tell his story in exculpation. This must have been appreciated as soon as any perception was reached of the impropriety of excluding parties and other interested persons. Indeed, before that time, it had become customary in England to allow the accused to make a "statement" to the jury, *i. e.* to tell his story, not on oath and not as a witness, but in the guise of an address or argument on the testimony and the whole case.[5] A similar practice grew up or was introduced by statute in some of our own jurisdictions,[6] and still obtains in Georgia.[7] That the formal grant of competency,

[2] *Post*, § 2065.

[3] *Post*, § 1576.

[1] See the quotations *ante*, § 577, and *post*, § 2250. Bentham's arguments are summarized in (1860) Appleton, Evidence, c. VII.

[2] Me. St. 1864, c. 280; said by Professor Thayer (Cases on Evidence, 2d ed., p. 1117) to be "the earliest statute permitting the defendant in a criminal case to testify. In Massachusetts it was allowed in 1866, in Connecticut in 1867, in New York and New Hampshire in 1869, in New Jersey in 1871."

[3] *Ante*, § 488, where the statutes of the various jurisdictions are collected. There had been several statutes in England before 1898, qualifying the accused in particular issues; they are collected in Best, Evidence, 8th ed., § 622 A; they begin in 1872.

[4] *Post*, § 1869.

[5] 1838, R. *v.* Malings, 8 C. & P. 242; 1838, R. *v.* Walkling, ib. 243; 1844, R. *v.* Dyer, 1 Cox Cr. 113; 1846, R. *v.* Williams, ib. 363; 1882, R. *v.* Shimmin, 15 id. 122 (with a note referring to preceding inconsistent rulings now repudiated); 1885, R. *v.* Millhouse, ib. 622 (limited to cases where defendant calls no witnesses). The following are good examples of such "statements": 1827, Corder's Trial, Pelham's Chronicles of Crime, ed. 1891, II, 151; 1831, Taylor's Trial, ib. 233.

For this practice, see also the following: 1883, Stephen, Hist. Crim. Law, I, 440; 1893, Lely, editor, in Best on Evidence, 8th ed., § 635 (explaining the construction put on the Prisoners' Counsel Act, 1836, St. 6 & 7 Wm. IV, c. 114).

[6] *E. g.*, 1861, People *v.* Thomas, 9 Mich. 314.

[7] 1895, Boston *v.* State, 94 Ga. 590, 20 S. E.

then, was so long withheld was due rather to a hesitation founded on the supposed interest of the accused himself, — partly because his failure to use the right of testifying and his exercise of the privilege of remaining silent would (it was believed) damage his cause more seriously than if he were able to claim that his silence was enforced by law; and partly also, and chiefly, because his exercise of the right to testify would (it was believed), in subjecting him to the ordeal of cross-examination, place him in a situation in which even an innocent man would show at a disadvantage and would injure more than assist his own cause:

1868, *Steele, J.*, in *State* v. *Cameron*, 40 Vt. 555, 565: "In the great body of cases, no wise practitioner would permit his client, whether he believed him guilty or innocent, to testify when upon trial on a criminal charge. The very fact that he testifies as if with a halter about his neck, that he is under such inducement to make a fair story for himself, his character and his liberty if not his fortune and his life being at stake, is enough to usually deprive his testimony of all weight in his favor, whether it be true or false. This is the case even when his manner upon the stand is unexceptionable, while his critical condition often creates such apprehension and excitement that his manner is open to great criticism, and if he does make a mis-step after voluntarily assuming the responsibility of testifying, it will naturally be construed strongly against him. In short, his testimony is far more likely to injure him seriously than to help him a little. It is true that a clear intellect and perfect self-possession may enable an unscrupulous rogue to run the gauntlet of a cross-examination and make something out of this privilege; and the same qualities will be still more likely to help an innocent man to some advantage from it; but the true application of the statute [qualifying him] is only to those rare cases, when a word from the prisoner, and him only, will manifestly dispose of what otherwise seems conclusive against him."

1869, *Sawyer*, C. J., in *People* v. *Tyler*, 36 Cal. 522, 528: "The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection that has been urged against it, is, that it places a party charged with crime in an embarrassing position; that, even when innocent, a party upon trial upon a charge for some grave offence may not be in a fit state of mind to testify advantageously to the truth even, and yet if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the common law, to furnish evidence against himself, negatively at least, by his silence, or take the risk, under the excitement incident to his position, of doing worse, by going upon the stand and giving positive testimony."

These apprehensions, as experience has shown, were unfounded, — at any rate, the second of them (the disadvantage of taking the stand); while the first (the disadvantage of claiming silence), protected as it is by the strict law forbidding any inferences to be drawn from such silence,[8] gives at least as much benefit as in common sense can be afforded to the accused who takes the unnatural and suspicious course of declining to testify for himself. That an accused ought to be competent to testify can no longer be questioned.[9]

98, 21 S. E. 603; 1897, Hackney *v.* State, 101 id. 512, 519, 28 S. E. 1007; 1900, Tiger *v.* State, 110 id. 244, 34 S. E. 1023; 1900, Sharp *v.* State, 111 id. 176, 36 S. E. 633; 1900, Knox *v.* State, 112 id. 373, 37 S. E. 416; 1901, Cochran *v.* State, 113 id. 736, 39 S. E. 337; 1901, Peavy *v.* State, 114 id. 260, 40 S. E. 234; 1903, Dunwoody *v.* State, — id. — , 45 S. E. 412.

For the question whether an accused making such a statement can be *impeached*, see *post*, § 892.

[8] *Post*, § 2272.

[9] For the history of the efforts at reform in England, and specimens of the arguments *pro* and *con*, see 99 Law Times, 103; 100 id. 412; 101 id. 582; 103 id. 297; 104 id. 415; 32 Law

The following passage illustrates what can be said for that proposition from the standpoint of judicial experience:

1883, Sir *James Stephen*, History of the Criminal Law, I, 442: "I am convinced by much experience that questioning [the accused], or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. It must be remembered that most people accused of crime are poor, stupid, and helpless. They are often defended by solicitors who confine their exertions to getting a copy of the depositions and endorsing it with the name of some counsel to whom they pay a very small fee, so that even when prisoners are defended by counsel the defence is often extremely imperfect, and consists rather of what occurs at the moment to the solicitor and counsel than of what the man himself would say if he knew how to say it. When a prisoner is undefended his position is often pitiable, even if he has a good case. An ignorant, uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged. He is utterly unaccustomed to sustained attention or systematic thought, and it often appears to me as if the proceedings on a trial, which to an experienced person appear plain and simple, must pass before the eyes and mind of the prisoner like a dream which he cannot grasp. I will give an illustration of what I mean. . . . A man was indicted at a Court of Quarter Sessions for stealing a spade. The evidence was that the spade was safe overnight and was found in his possession next day, and that he gave no account of it. He made no defence whatever, and was immediately convicted. When called upon to say why sentence should not be passed upon him, he replied in a stupid way, 'Well, it is hard I should be sent to gaol for this spade, when the man I bought it of is standing there in court.' The chairman caused the man referred to to be called and sworn; the jury, after hearing him, recalled the verdict they had given, and the man was acquitted at once. . . . The propriety of making the parties competent witnesses in civil cases is no longer disputed. It is difficult to say why the same rule should not apply to criminal cases also. One objection to the admission of such evidence rests upon the false supposition that a witness is to be believed because he is sworn to speak the truth. The proper ground for admitting evidence is not that people are reluctant to lie, but that it is extremely difficult to lie minutely and circumstantially without being found out."

§ 580. **Same: Co-indictees and Co-defendants.** There remains to-day, in spite of the statutory abolition of the accused's incapacity, a group of questions inherited from the common-law rule, and liable still to arise because of the incomplete and careless formulation of the statutes in some jurisdictions. At common law, when two or more persons were tried upon the same charge, each and all were naturally disqualified;[1] only by ceasing to be a party in the cause could one of them become a witness, for or against his co-defendants; and there were precedents concerning the manner in which a defendant could be deemed thus to have ceased to be a party. Now, when legislation came to remove the disqualification of the accused, the statutory phrase ran frequently that he should be receivable "in his own behalf,"— thus omitting in terms to provide for competency on behalf of or against another defendant. However, before this legislation had made the change,

Journal, 210; ib. 362; 30 id. 218, 277, 288, 378; 31 id. 140, 151, 189; 1893, Mr. J. M. Lely, editor, in Best on Evidence, 8th ed., § 622 A.

[1] For the question whether the *confession* of one defendant can be used as an admission against the other, see *post*, §§ 1076, 1079. For the *right to cross-examine* a co-defendant who takes the stand in his own behalf, see *post*, § 2276.

statutes had been passed, in many jurisdictions, declaratory of the common-law rules as to the mode of making a co-defendant competent by removing him from the record, or settling some of the details left doubtful in that respect by judicial precedent; and these statutes, appropriate enough while the accused's disqualification continued, were often left upon the statute-book, in spite of successive revisions, after the general statute abolishing the disqualification had been enacted; so that it became necessary to reconcile the latter statute with the former. The result has been some confusion and uncertainty in the state of the law after the statutes' enactment, — an uncertainty wholly unnecessary if proper caution had been taken in framing them. To ascertain the present law, it is therefore necessary to consider what the rule of the common law was, and then to observe the effect of the statutory modification.

A. *Common Law.* (1) It is plain that a person *not of record a party to the same charge* would not be disqualified to testify, either for or against the accused. Hence, in the first place, a person who is merely an *unindicted accomplice* is as such not disqualified;[2] nor yet a person charged in *another indictment*.[3] Whether a person charged in another indictment *for the same crime*, as principal or as accessory, would be disqualified, was left doubtful,[4] though upon principle he was properly not to be treated as a party to the charge.

(2) Furthermore, a person who had been *charged in the same indictment*, but had *ceased to be a party* to the charge, by the time his testimony was offered, would cease to be disqualified. This principle was not disputed; the differences of opinion grew out of the question whether the cessation of his party-character should be tested by the technical state of the record or merely by his substantial lack of further interest in the result. In strictness, the former test might be more consistent with the settled doctrine already noted under (1) *supra;* but, in an enlightened view of the object of the disqualifying rules, the other test was preferable. Accordingly, there was good authority for the rules that a person jointly indicted would be admissible if he had ceased to have an interest in the result by virtue of an

[2] This was hardly even doubted; compare the cases cited *post*, § 2056. The only question ever seriously made was whether a *promise of pardon* disqualified the accomplice; and this was universally decided in the negative: 1662, Tonge's Trial, 6 How. St. Tr. 226, Kelyng 16 (Hale, C. J., and Brown, J., diss.); 1696, Charnock's Trial, 12 How. St. Tr. 1404, 1454; 1722, Layer's Trial, 16 id. 160 (Solicitor-General: "Suppose, then, for argument sake, that there was a promise of pardon made to a man upon condition that he should give evidence; I apprehend that would not disable him from being a witness"); 1784, Com. *v.* Fairfield, Mass., Dane's Abr., c. 84, art. 2, § 3; 1898, State *v.* Reed, 50 La. An. 990, 24 So. 131; 1897, State *v.* Riney, 137 Mo. 102, 38 S. W. 718; 1897, State *v.* Magone, 32 Or. 206, 51 Pac. 452. In a few jurisdictions, the trial Court's discretion was said to control: 1827, People *v.* Whipple, 7 Cow. 708, 713; 1875, Lindsay *v.* People, 63 N. Y. 143, 153; 1877, Wight *v.* Rindskopf, 43 Wis. 344, 348. For a promise of pardon as *impeaching the credit* of an accomplice, see *post*, § 967.

[3] 1867, McKenzie *v.* State, 24 Ark. 636; 1886, Ex parte Stice, 70 Cal. 51, 56, 11 Pac. 459; 1888, State *v.* Walker, 98 Mo. 95, 102, 9 S. W. 646, 11 S. W. 1133.

[4] 1840, R. *v.* Lyons, 9 C. & P. 555 (one indicted separately as principal; not decided); 1873, Davis *v.* State, 38 Md. 15, 47 (one indicted separately as accomplice, excluded); 1898, State *v.* Stewart, 142 Mo. 412, 44 S. W. 240 (one indicted separately as accomplice, admitted); 1898, State *v.* Black, 143 id. 166, 44 S. W. 341 (same).

entry of nolle prosequi,[5] or of a formal *acquittal* or *discharge*,[6] or of a judgment of *conviction on the verdict*,[7] or of a judgment of *conviction on default*,[8] or of a *plea of guilty*, with or without the passing of sentence or judgment thereon.[9]

(3) Does a *severance of trials* of persons jointly charged in a single indictment have the same effect in qualifying them as a discharge from the record? In form, it does not; they remain named together as parties. But in substance, it does; for they are tried by different juries, and nothing said by one to the other's jury can either help or hurt his own cause:

1884, *Peters*, C. J., in *State* v. *Barrows*, 76 Me. 401, 408: "The argument against the admission of such evidence does not strike us with much force. It is almost universally admitted that an accomplice separately indicted may be a witness for the State, and any distinction arising between trials on a joint indictment and trials on separate indictments is not readily appreciated. The crime is supposed to be jointly committed in either case; . . . the interest and motives of the witness must be the same whether he is to be afterwards tried under the same or another indictment. As said by *Beasley*, J., in *State* v. *Brien*, [*infra*] 'The only reason for the rejection of such a witness is that his own accusation of crime is written on the same piece of paper with the charge against the culprit whose trial is in progress.' . . . Stringent as the rule [of interest] was, it did not apply to indictments to its full extent. . . . Courts seemed inclined to regard a co-defendant in a criminal case as not a party unless a party to the issue on trial. . . . To be incompetent to testify, the defendants must be in charge of the same jury."

The better opinion, then, was that an indictee for whom a severance had been granted was receivable, not only for the *prosecution*,[10] but also on behalf

[5] 1741, L. C. Hardwicke, in Man v. Ward, 2 Atk. 228; 1896, Love v. People, 160 Ill. 501, 43 N. E. 710; 1891, State v. Steifel, 106 Mo. 129, 133, 17 S. W. 227; 1875, Lindsay v. People, 63 N. Y. 143, 153.

[6] 1893, State v. Minor, 117 Mo. 302, 305, 22 S. W. 1085; 1877, Kehoe v. Com., 85 Pa. 127, 137 (excluded, because no judgment was passed).

[7] 1736, R. v. Sherman, Lee cas. t. Hardwicke 303 (discharge, after plea in abatement); 1826, R. v. Rowland, Ry. & Mo. 401; 1857, R. v. O'Donnell, 7 Cox Cr. 337.

[8] *Contra:* 1804, R. v. Lafone, 5 Esp. 154, Lord Ellenborough, C. J. (for the special case of a joint offence); this case, though often cited, seems to stand alone.

[9] The English rulings agreed to this, equally whether the witness was called for or against the co-defendant; 1738, R. v. Fletcher, 1 Stra. 633 (here after fine paid); 1840, R. v. Lyons, 9 C. & P. 555, 558 (here before sentence served); 1841, R. v. George, Car. & M. 111 (here before sentence passed); 1847, R. v. Hinks, 1 Den. Cr. C. 84, 2 C. & K. 462, 465, by all the judges (here before sentence passed); 1849, R. v. Arundel, 4 Cox Cr. 260 (here before sentence passed); 1875, R. v. Gallagher, 12 id. 61 (same). *Contra:* 1855, R. v. Jackson, 6 Cox Cr. 525 (here allowed only after sentence passed). In the United States, it seems conceded that he may be called *for the prosecution:* 1847, Com. v. Smith, 12 Metc. 238 (here before sentence); 1891, State v. Jackson, 106 Mo. 174, 177, 17 S. W. 301 (here before sentence); 1900, State v. Young, 153 id. 445, 55 S. W. 82; 1897, State v. Magone, 32 Or. 206, 51 Pac. 452; 1900, State v. Savage, 36 id. 191, 60 Pac. 610. He ought to be equally admissible *for the defendant:* 1863, State v. Jones, 51 Me. 125 (either before or after sentence); 1875, Lee v. State, 51 Miss. 566, 568, 574. *Contra*, unless sentence is passed: 1881, Henderson v. State, 70 Ala. 23, 24 (there must be "some order which amounts to an acquittal or a severance"; following R. v. Lafone, *supra*, note, and ignoring the other precedents); 1859, State v. Young, 39 N. H. 283, 284 (plea of *nolo contendere*, not sufficient without judgment; the rule being equally applicable to the plea of not guilty); 1871, State v. Bruner, 65 N. C. 499 (*nolo contendere*); 1877, Kehoe v. Com., 85 Pa. 127, 137.

[10] 1865, R. v. Winsor, 10 Cox Cr. 276, 300, 314, 320, 323, 326 (by all the judges); 1866, Winsor v. Regina, L. R. 1 Q. B. 289, 311, 320, 324, 327, 390, 396; 1891, Adams v. State, 28 Fla. 511, 533, 10 So. 106; 1873, State v. Prudhomme, 25 La. An. 522; 1886, State v. Mason, 38 id. 476; 1884, State v. Barrows, 76 Me. 401, 408 (see quotation *supra*); 1883, Evans v. State, 61 Miss. 157; 1876, Carroll v. State, 5 Nebr. 31, 35; 1868, State v. Brien, 32 N. J. L. 414; 1879, Noyes v. State, 41 id. 418, 429; 1859, Allen v. State, 10 Oh. St. 287, 303; 1869, Brown v. State, 18 id. 496, 509. *Contra:* 1887, State v. Chyo Chiagk, 92 Mo. 395, 401, 4 S. W.

of the *co-indictee* himself; yet on the latter point, by some obscure reasoning the majority of Courts were opposed.[11]

B. *Statutes.* Let us now suppose that a statute has given to the accused person the right to testify, *i. e.* has removed his disqualification as a party. Such a statute exists, in one form or another, in every jurisdiction but one. This statute is now to be applied to the law as it stood, and the question is, what effect it has had upon the situations in which at common law a co-indictee was disqualified. Those cases were substantially two, (1) a co-indictee, after a severance of trial, called on the defendant's behalf (here by the great majority of Courts excluded), (2) a co-defendant, tried at the same time, called either for or against the defendant (here by all Courts excluded).

(1) *Separate trial.* The plain object of the statute was to remove the disqualification of the accused as a party; his common-law incompetency as co-indictee was due solely to his being a party in interest; therefore any and every such disqualification has disappeared. This is impregnable logic, if the premises be conceded:

1881, *Scholfield*, J., in *Collins* v. *People*, 98 Ill. 584, 587: "We do not deem it necessary to inquire what was the common law in this respect, since we are of opinion that the question is conclusively settled against plaintiff in error by our statute. It provides 'No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness. . . . If at common law Lacomb would have been an incompetent witness, it must have been because he was interested in the event of the suit, and under the above language it is wholly unimportant whether that interest arose from his being a party or otherwise, for in either event he is rendered competent. The proviso adds force to this view; it shows that it was intended that *all* defendants should be *allowed* to testify, for otherwise the proviso was wholly unnecessary. Under that section a defendant is unquestionably entitled to have the benefit, for what it is worth, of the evidence of a co-defendant; and the same right is equally clearly given to the State. The infamy arising from convicted guilt, and the interest resulting from being a party to the same case or proceeding, may now be considered for the purpose of determining what credence should be given to the testimony of the witness, but they no longer furnish any ground for excluding his testimony."

1884, *Peters*, C. J., in *State* v. *Barrows*, 76 Me. 401, 410: "[Our statutory enactments] have weakened, if not abrogated, the argument of public policy. It was, no doubt, the design of the Legislature that the objection to the competency of parties as witnesses should be removed both in civil and criminal cases. In criminal cases the provision is

704; 1901, State v. Weaver, 165 Id. 1, 65 S. W. 308.

[11] *Pro:* 1872, R. v. Payne, 12 Cox Cr. 118, *semble;* 1881, Henderson v. State, 70 Ala. 23, 25; 1846, Jones v. State, 1 Ga. 610, 617; 1859, Allen v. State, 10 Oh. St. 287, 303. *Contra:* 1856, Moss v. State, 17 Ark. 327, 330; 1891, Adams v. State, 28 Fla. 511, 534, 10 So. 106; 1859, State v. Nash, 10 Ia. 81, 85; 1856, Adwell v. Com., 17 B. Monr. 310, 318; 1873, Davis v. State, 38 Md. 15, 47 (for accessories); 1830, Com. v. Marsh, 10 Pick. 57; 1860, State v. Dumphey, 4 Minn. 438, 449; 1851, State v. Roberts, 15 Mo. 28, 59; 1887, State v. Chyo Chiagk, 92 id. 395, 401; 1813, People v. Bill, 10 Johns. 95; 1838, People v. Williams, 19 Wend. 377; 1877, Kehoe v. Com., 85 Pa. 127, 137; 1853, Lazier v. Com., 10 Gratt. 708, 716 (changed here by express statute, as applied in 1894, Smith v. Com., 90 Va. 759, 19 S. E. 843).

this: 'In all criminal trials the accused shall at his own request, but not otherwise, be a competent witness.' . . . If the argument for the defendant is sound, then the common-law rule has become reversed; defendants can testify against each other when tried together, and cannot so testify when tried apart. . . . It would present a singular inconsistency in criminal procedure if . . . a co-defendant on trial may be called from the dock to the witness-stand, but a companion in guilt, included in the same indictment, not on trial, be excluded therefrom."

This is plain enough, when the witness is called for the *prosecution*, because at least that much was already conceded at common law;[12] but the reasoning applies equally to the witness called for his *co-defendant*, so that the common-law rule (as it had been applied by most Courts) must be deemed changed in that respect, by implication of the statute.[13]

(2) *Same trial.* The reasoning has precisely the same effect in its application to the case of the disqualification (unanimously conceded) at common law, namely, testimony of a co-defendant being tried at the same time. The statute has removed all his incapacity as a party, both in its direct effect upon himself and in its indirect effect upon others:

1900, *Shelby*, J., in *Wolfson* v. *U. S.*, 41 C. C. A. 422, 101 Fed. 430, 436: "When any defendant chooses to testify, the statute permits him to do so. It does not matter whether his testimony is for or against himself, or for or against his co-defendant. The only limitation in the statute is that he shall not be made a witness except on his own request. Being sworn as a witness at his own request, he is amenable, generally, to the rules governing other witnesses. He could testify against or for his co-defendant on trial with him, because the only reason why he could not do so at common law was that he was a party to the record and interested in the case. In other words, the only common-law reason for his exclusion was that he was a defendant also on trial. The statute clearly removes that objection. The fact that two defendants were on trial does not prevent the statute applying. There is nothing in it to confine its operation to cases where but a single defendant is named in the indictment."

This result is generally accepted, at least for a co-defendant called for the *prosecution*.[14] The reasoning applies with equal force to a co-defendant called for the accused,[15] though a few Courts, having perhaps in mind the common-

[12] 1881, Casey v. State, 37 Ark. 67, 83, *semble;* 1899, Bishop v. State, 41 Fla. 522, 26 So. 703 (pleading guilty but not sentenced); 1900, Williams v. State, 42 id. 205, 27 So. 998; 1881, Collins v. People, 98 Ill. 584, 587 (see quotation *supra*); 1898, State v. Asbury, 49 La. An. 1741, 23 So. 322; 1901, State v. Slutz, 106 La. 637, 31 So. 179; 1899, Munyon v. State, 62 N. J. L. 1, 42 Atl. 577; 1903, People v. Van Wormer, 175 N. Y. 188, 67 N. E. 299; 1892, Benson v. U. S., 146 U. S. 325, 333, 13 Sup. 60 (explaining U. S. v. Reid, 12 How. 361); 1894, Smith v. Com., 90 Va. 759, 19 S. E. 843; 1891, Edwards v. State, 2 Wash. 291.

[13] 1881, Collins v. State, 98 Ill. 584, 587; 1893, State v. Bogue, 52 Kan. 79, 84, 34 Pac. 410; 1892, Benson v. U. S., 146 U. S. 325, 337, 13 Sup. 60, *semble;* 1898, McGinnis v. State, 4 Wyo. 115, 53 Pac. 492. *Contra:* 1885, Foster v. State, 45 Ark. 328.

[14] 1898, People v. Plyler, 121 Cal. 160, 53 Pac. 553; 1888, Conway v. State, 118 Ind. 482, 484, 21 N. E. 285; 1878, State v. Hudson, 50 Ia. 157, 161, *semble;* 1899, Gilbert v. Com., 21 Ky. 544, 51 S. W. 804; 1882, State v. Smith, 86 N. C. 705; 1896, State v. Smith, 8 S. D. 547, 67 N. W. 619 (co-defendant may testify without limitation; Compiled Laws, § 7381, prevailing over §§ 7379, 7380, which prevailed over § 5260); 1900, Wolfson v. U. S., 41 C. C. A. 422, 101 Fed. 430, 102 id. 134 (Boarman, J., diss.); 1900, State v. Hyde, 22 Wash. 551, 61 Pac. 718.

[15] 1881, Collins v. State, 98 Ill. 584, 587, *semble;* 1867, State v. Gigher, 23 Ia. 318; 1879, State v. Stewart, 51 Id. 312, 1 N. W. 646; 1896, State v. Smith, 8 S. D. 547, 67 N. W. 619; 1892, Richards v. State, 91 Tenn. 723, 20 S. W. 533; 1900, Wolfson v. U. S., 41 C. C. A. 422, 101 Fed. 430, 436; 1893, McGinnis v. State, 4 Wyo. 115, 53 Pac. 492. Formerly, in Kentucky, a statute (Cr. Code, § 234, as

law distinction, or going upon the special words of a statute, have declined to take this last step.[16] There ought to-day to be no further question in any jurisdiction (except Georgia) that there is no limitation whatever on the qualification of a co-indictee or co-defendant to testify either for or against the accused.

§ 581. **Testifying to One's Own Intent.** Under the influence of some obscure suggestion, not easily traceable, the view has been often urged upon Courts that a person — especially a party — should be disqualified from testifying to his own intent or motive, even where that intent or motive is material to be investigated. The argument is (so far as any has been vouchsafed) that such testimony may be falsified without the possibility of detection, and that therefore it is dangerous to permit an interested person to allege, in effect, whatever he pleases as to his own state of mind.[1] The answers to this argument are various and sufficient. In the first place, there is no precedent for it in the inherited common law; it is an attempt to create a rule without an analogy in the accepted doctrines of the judicial rulings. In the next place, it assumes that there is no counter-evidence available, and yet asks that the only evidence which it assumes to be available shall be excluded, — in other words, asks that a concededly proper issue be submitted to the jury with no evidence at all. In the third place, its assumption is incorrect in fact, namely, that there is no other available and sufficient evidence of intent or motive by which the person's own testimony can be tested and checked; for the evidence from conduct and circumstances and from others' testimony is not only a permissible but a potent source of belief,[2] and is amply sufficient to guard against falsification. Finally, the argument is at least of no higher value than the argument in favor of the unsatisfactory statutory rule against survivors' testimony (*ante*, § 578), and is merely of a piece with all crude attempts to disqualify a witness by reason of interest, — attempts which to-day must stand discredited by the general repudiation of that species of disqualification (*ante*, § 576). Some of these answers to the argument are represented in the following judicial utterances disapproving it, — a disapproval which is to-day practically unanimous:

1827, *Savage*, C. J., in *People* v. *Ferguson*, 8 Cow. 107: "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

amended by St. May 1, 1886) prohibited co-defendants from testifying on each other's behalf in cases of conspiracy; this was abolished by St. March 23, 1894, applied as follows: 1894, Thompson *v.* Com., — Ky. —, 26 S. W. 1100; 1895, Kidwell *v.* Com., 97 Id. 538, 31 S. W. 131; 1902, Williams *v.* Com., — Ky. —, 68 S. W. 7 (following Kidwell *v.* Com.).

[16] 1893, Ballard *v.* State, 31 Fla. 266, 284 (§§ 1095, 2363, 2908, do not abolish the common-law rule); 1899, State *v.* Angel, 52 La. An. 485, 27 So. 214; 1901, State *v.* Breaux, 104 La. 540, 29 So. 222; 1898, State *v.* Franks, 51 S. C. 259, 28 S. E. 908 (C. Cr. P. § 63, does not make a defendant competent for a co-defendant). But the co-defendant is of course competent *on his own behalf*: 1901, State *v.* Sims, 106 La. 453, 31 So. 71.

For an exclusion under a special English statute, see the following: 1872, R. *v.* Payn, 12 Cox Cr. 118 (the reason being that his cross-examination might make him testify against himself).

[1] The argument is set forth in extracts from Alabama opinions quoted *post*, § 1966.

[2] *Ante*, §§ 237–242, 300–371, 385–406, *post*, §§ 661, 1963 ff.

be convicted of perjury? I know of no such rule of evidence. If this principle is to be engrafted upon the law of evidence, we must always inquire, before a witness is sworn, whether he can be convicted of perjury if he swears falsely, and if not, he must be rejected."

1864, *Hogeboom*, J., in *McKown* v. *Hunter*, 30 N. Y. 625: "[The cases] go very far to establish the general principle that where the motive of a witness in performing a particular act or making a particular declaration becomes a material issue in a cause or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness."

1865, *Poland*, C. J., in *Hulett* v. *Hulett*, 37 Vt. 586: "This was objected to on the ground that a party should not be allowed to swear to his intent or mental purpose, because it is not in the power of the other party to contradict him by similar evidence. Of course . . . he can be contradicted only by his acts and conduct or declarations. But where a party swears to his intent, if his acts and conduct are shown to be wholly at variance and inconsistent with the intent he swears to, his own testimony in his own favor would ordinarily obtain very little credit with the jury; and but little danger need be apprehended from such testimony unless his acts and conduct are consistent with it."

1867, *Sanderson*, J., in *People* v. *Farrell*, 31 Cal. 576, 582: "If under the new rule [of competency] parties are to be kept in harness and not allowed to explain their actions and words, when they admit of explanation and when explanation is needed in order to exhibit the whole truth, but half the evil which was felt under the old rule has been removed. It is no answer to say that this enables a party to substitute a false motive for the true one or to convert words spoken in one sense into another. If the argument proves anything it proves too much, and shows that the radical change which has been made is in all respects founded in folly rather than in wisdom. For the truthfulness of the parties when upon the witness stand we must depend, as in the case of other witnesses, upon the obligations of their oath and their reputation for truth and veracity. If these can be relied upon for the truth of statements made in reference to acts and words of which the eye and ear may take notice, they may for the same reason be accepted as guarantees for the truth of statements made in respect to motives and intents of which the mind or inner man alone can take cognizance. Nor is there, in our judgment, any well-grounded reason for apprehending that this rule will obstruct rather than advance the ends of justice. There is no more danger of imposing upon the jury falsehood or pretence in respect of motives and intents than there is of doing the like in respect to visible or external circumstances. The jury can as readily distinguish between the false and the true in respect to the former as to the latter. If the motive or intent assigned is inconsistent with the external circumstances, it must be discarded as false. If on the contrary they are consistent, there is no reason why they may not be true."

1876, *Niblack*, J., in *White* v. *State*, 53 Ind. 596: "Because the intent is a fact which cannot in the nature of things be positively known to others, and is hence a matter about which other witnesses cannot directly testify, does not in our opinion affect the rule." [3]

[3] In all the following cases the testimony was held receivable; *Eng.*: 1721, Answer of the Judges concerning Fox's Libel Act, 22 How. St. Tr. 296, 300, *semble* (quoted *post*, §§ 661, 1962); 1897, R. v. King, 1 Q. B. 214 (false pretences; by the prosecuting witness, as to his belief upon the representation); *Cal.*: 1899, Kyle v. Craig, 125 Cal. 107, 57 Pac. 791 (intent in executing a deed *mortis causa*; grantor's testimony to his intent); *D. C.*: 1902, Bass v. U. S., 20 D. C. App. 232, 242 (by one charged with false representation, as to his motive and belief); *Fla.*: 1902, Lane v. State, — Fla. —, 32 So. 896 (accused's belief as to danger calling for self-defence); *Ga.*: 1902, Acme Brewing Co. v. Central R. & B. Co., 115 Ga. 494, 42 S. E. 8 (by a purchaser, as to his good faith in paying); 1903, Alexander v. State, — id. —, 44 S. E. 851 (murder; by a co-indictee, that he did not intend violence); *Ill.*: 1866, Miner v. Phillips, 42 Ill. 131 (by a debtor, as to his good faith in making a sale alleged to be fraudulent); 1894, Wohlford v. People, 148 id. 296, 298, 36 N. E. 107 (assault; by defendant, whether he intended to act in self-defence); 1894, Pope v. Hanke, 155 id. 617, 40 N. E. 839, *semble* (by

It is to be regretted, however, that, by a misunderstanding of the history of the rule, an unnecessary concession has sometimes been made, by a few

one buying or selling stocks on a margin, as to his intent to take or give delivery); *Ind.*: 1864, Zimmerman *v.* Marchland, 23 Ind. 474 (grantee's intent, properly immaterial, but testimony excluded improperly on the present ground; practically repudiated in the ensuing cases); 1876, Greer *v.* State, 53 Ind. 420 (by one indicted for assault with intent to rape, as to his intention); 1876, White *v.* State, ib. 595 (by one indicted for larceny, as to his intention at the time of taking); 1880, Shockey *v.* Mills, 71 id. 288 (by a debtor, as to his intent in selling property alleged to have been transferred in fraud of creditors); 1881, Bidinger *v.* Bishop, 76 id. 244, 255 (by the alleged dedicator of a street, as to his intention); 1883, Parrish *v.* Thurston, 87 id. 440 (by a purchaser, as to his belief in the representations of the seller); 1883, Sedgwick *v.* Tucker, 90 id. 271, 281 (by a debtor, as to his intent in an alleged fraudulent conveyance); 1885, Over *v.* Schiffling, 102 id. 193, 26 N. E. 91 (the precise kind of intent does not appear); 1885, Heap *v.* Parrish, 104 id. 36, 39, 3 N. E. 549 (by the defendant in an action for malicious prosecution, as to his motive in prosecuting); 1888, Ross *v.* State, 116 Id. 497, 19 N. E. 451 (by one accused of selling liquor unlawfully to a minor, as to his good faith); 1883, Sedgwick *v.* Tucker, 90 id. 281 (by a debtor, as to his intent in a transfer alleged to be fraudulent); *Ia.*: 1865, Watson *v.* Cheshire, 18 Ia. 202, 211 (by an indorser, as to his belief in the truth of his representations); 1878, Selz *v.* Belden, 48 id. 451 (by a debtor, as to his intent in an alleged fraudulent conveyance, if relevant); 1885, Frost *v.* Rosecrans, 66 id. 405, 23 N. W. 895 (mortgagee, as to his knowledge of debtor's intent to defraud); 1886, Browne *v.* Hickle, 68 id. 330, 333, 27 N. W. 276 (general principle; see quotation *infra*); 1897, Zimmerman *v.* Brannon, 103 id. 144, 72 N. W. 439 (admissible where intent is relevant; but intent of a promisor in a guaranty is not); 1897, Counselman *v.* Reichart, ib. 430, 72 N. W. 490 (intent not to make actual purchases, as constituting a gambling contract); 1899, Kruse *v.* S. & W. Lumber Co., 108 id. 352, 79 N. W. 116 (by a creditor, that he did not accept a note in payment of a claim against the defendant); 1899, Chew *v.* O'Hara, 110 id. 81, 81 N. W. 157 (extortion; defendant's belief in the charges); 1900, Bartlett *v.* Falk, ib. 346, 81 N. W. 602 (by a person deceived, as to his reliance upon the false representations); 1902, Flam *v.* Lee, 116 id. 289, 90 N. W. 71 (by one imprisoned, as to his mental suffering); 1902, McDermott *v.* Mahoney, 119 id. 470, 93 N. W. 499 (by an intending purchaser, in an action by the broker against his employer for services, whether the witness was ready and willing to buy); *Kan.*: 1890, Gardom *v.* Woodward, 44 Kan. 758, 761, 25 Pac. 199 (by a debtor, as to the intent of an alleged fraudulent conveyance; good opinion, by Valentine, J.); 1901, State *v.* Kirby, 62 id. 436, 63 Pac. 752 (by a defendant, as to the meaning of his remark); *La.*: 1888, State *v.* Wright, 40 La. An. 589, 592, 4 So. 486 (accused's intent just before the affray); 1896, State *v.* Dillon, 48 id. 1365, 20 So. 913 (by a defendant in larceny, as to his intent in taking the goods); *Me.*: 1836, Corinna *v.* Exeter, 13 Me. 328 (by an officer, whether an act was done in good faith); 1857, Edwards *v.* Currier, 43 id. 484 (by a purchaser, as to his motives in a purchase alleged to be in fraud of creditors); 1857, Wheelden *v.* Wilson, 44 id. 18 (same); 1897, Cushing *v.* Friendship, 89 id. 523, 36 Atl. 1001 (one's intent in removing, as affecting domicil); *Md.*: 1875, Roddy *v.* Finnegan, 43 Md. 490, 501 (by one arrested, as to his intention in the act charged as illegal and as justifying the arrest); 1884, Fenwick *v.* State, 63 id. 239 (by a defendant, as to his purpose in getting the weapon in question; good opinion, by Yellott, J.); 1902, Gambrill *v.* Schooley, 95 id. 260, 52 Atl. 500 (intent to resume distilling); *Mass.*: 1857, Fisk *v.* Chester, 8 Gray 508 (intent of residence of one whose domicil is in question); 1863, Thacher *v.* Phinney, 7 All. 149 (by a debtor, as to the intent of a transfer); 1863, Lombard *v.* Oliver, ib. 157 (intent as to residence); 1870, Reeder *v.* Holcomb, 105 Mass. 94 (same); 1874, Snow *v.* Paine, 114 id. 526 (fraudulent transfer); 1876, Safford *v.* Grant, 120 id. 20, 21, 26 (by a creditor, as to his reliance upon false representations); 1890, Stevens *v.* Stevens, 150 id. 557, 559, 23 N. E. 378 (by the maker of a deed, as to its delivery with intent to pass title); 1895, Crandell *v.* White, 164 id. 54, 41 N. E. 204 (by one selling stocks on margin, that he had no intention to take delivery, under a statute making this material); 1900, Pollock *v.* Morrison, 172 id. 83, 57 N. E. 326 (intent to build a permanent fence); 1900, Faxon *v.* Jones, 176 id. 206, 57 N. E. 359 (malice as affecting damages); *Mich.*: 1869, Watkins *v.* Wallace, 19 Mich. 75 (intent of a debtor as to an assignment alleged to be fraudulent); 1883, People *v.* Quick, 51 id. 547, 18 N. W. 375 (by a defendant in larceny, as to his intent in touching the owner of the goods); 1885, Spalding *v.* Love, 56 id. 366, 374, 23 N. W. 46 (by the defendant, as to his own belief and motive, in an action for malicious prosecution); *Minn.*: 1872, Hathaway *v.* Brown, 18 Minn. 423 (fraudulent transfer; the Court doubted as to the propriety of receiving the debtor's testimony as to his own intention; but the question was not involved); 1875, Berkey *v.* Judd, 22 id. 287, 297 (purchase on the faith of false representations; the purchaser, as to his own belief and reliance, admitted; repudiating the doubt in Hathaway *v.* Brown); 1877, Garrett *v.* Mannheimer, 24 id. 193 (by a defendant in malicious prosecution, whether he believed his claim valid; approving Berkey *v.* Judd); 1898, Albion *v.* Maple Lake, 71 id. 503, 74 N. W. 282 (pauper's intent in residence); 1903, State *v.* Ames, — id. —, 96 N. W. 830 (receipt of bribe; by the person bribing, as to her purpose in paying money, admitted); *Miss.*: 1894, Ferguson *v.* State, 71

judges, to the argument in its favor. This concession is that there once was some sort of a rule by which "the intent must be inferred from the acts and

Miss. 805, 813, 15 So. 66 (by a seduced woman, that she yielded in reliance on a promise of marriage); *Mo.:* 1878, Van Sickle *v.* Brown, 68 Mo. 627, 634 (by the defendant in malicious prosecution, as to his good faith and lack of malice in the prosecution); 1881, State *v.* Banks, 73 Mo. 592, 595 ("*A fortiori* the rule ought to apply in criminal causes also, where the intent which prompts an act is always vitally important"); *Mont.:* 1896, Gassert *v.* Noyes, 18 Mont. 216, 44 Pac. 959 (intention as to non-abandonment of user of a water-right); *Nebr.:* 1903, Hackney *v.* Raymond B. C. Co., — Nebr. —, 94 N. W. 1822 (by a creditor, as to his intent in a transfer); 1903, McCormick Harv. M. Co. *v.* Hiatt, — id. —, 95 N. W. 627 (waiver of breach of warranty; the plaintiff's testimony to his motive in conduct apparently a waiver); *Nev.:* 1877, State *v.* Harrington, 12 Nev. 135 (by a defendant, on a trial for murder, as to whether he believed he was in danger); *N. H.:* 1860, Gale *v.* Ins. Co., 41 N. H. 175 (general statement); 1860, Blodgett Paper Co. *v.* Farmer, ib. 402 (intent, as to title and as to good faith to creditors, of parties to a sale); 1861, Severance *v.* Carr, 43 id. 67 (intent with which property, alleged to have been stolen, was taken); 1864, Graves *v.* Graves, 45 id. 323 (by a debtor, as to his motive in a transfer alleged to be in fraud of creditors); 1864, Hale *v.* Taylor, ib. 406 (intent of a buyer in taking away goods which he subsequently refused to accept in satisfaction of the contract of sale); 1868, Delano *v.* Goodwin, 48 id. 205 (in general); 1880, Homans *v.* Corning, 60 id. 419 (intent of a corporation officer as to the liability for improvements charged by him on the corporation); 1884, Downes *v.* Society, 63 id. 152 (intent in a gift); *N. J.:* 1871, Mulford *v.* Tennis, 35 N. J. L. 256, 260 (intent as to transfer attacked by creditors); *N. Y.:* 1827, People *v.* Ferguson, 8 Cow. 107 (voter's intent; see quotation *supra*); 1833, Cunningham *v.* Freeborn, 11 Wend. 244, *semble* (by a debtor, as to his motive in making a transfer alleged to be in fraud of creditors); 1856, Seymour *v.* Wilson, 14 N. Y. 567 (same); 1860, Griffin *v.* Marquardt, 21 id. 122 (same); 1862, Forbes *v.* Waller, 25 id. 439 (same); 1864, McKown *v.* Hunter, 30 id. 625 (by a defendant, in an action for malicious prosecution for perjury, as to his belief in the materiality of the testimony said to involve perjury; see quotation *supra*); 1866, Bedell *v.* Chase, 34 id. 388 (by a purchaser, as to his motive in a sale alleged to be in fraud of creditors); 1867, Osborn *v.* Robbins, 36 id. 375 (whether a note was intended to be given to procure release from unlawful imprisonment); 1868, Thurston *v.* Cornell, 38 id. 287 (a lender, as to whether the charge for the loan was intended as usurious compensation); 1870, Dillon *v.* Anderson, 43 id. 236 (approving the preceding instances); 1870, Cortland Co. *v.* Herkimer Co., 44 id. 22 (the motive in removing a pauper, by one who took part in doing so; removal with intent, etc., being penalized); 1872, Fiedler *v.* Darrin, 50 id. 443 (usury); 1875, Kerrains *v.* People, 60 id. 228 (defendant, in a prosecution for assault with intent to kill, as to his purpose in taking up the weapon); 1876, Turner *v.* Keller, 66 id. 66 (one's knowledge of his authority as an agent being relevant, his statement as to his belief that he had it was received); 1880, Bayliss *v.* Cockcroft, 81 id. 363, 371 (usury); 1882, Starin *v.* Kelly, 88 id. 420 (the general doctrine as to intent affirmed; a purchaser from a debtor allowed to answer as to his intention to defraud creditors, although notice of the debtor's fraud was alone legally necessary, so far as the purchaser was concerned, to avoid the transfer); 1884, People *v.* Baker, 96 id. 340, 349 (by a defendant, as to his intent, on a charge of obtaining money fraudulently); 1887, Crook *v.* Rindskopf, 105 id. 482, 12 N. E. 174 (fraudulent transfer); 1890, Hard *v.* Ashley, 117 id. 617, 23 N. E. 177 (whether a party to a compromise relied on the other's representations); 1899, Davis *v.* Marvine, 160 id. 269, 54 N. E. 704 (intent as to purpose of an alleged usurious loan); *N. C.:* 1882, State *v.* King, 86 N. C. 603, 606 (general principle, applied to accused persons); 1888, Phifer *v.* Erwin, 100 id. 59, 63, 6 S. E. 672 (by a debtor, as to his intent in an alleged fraudulent mortgage); 1890, Nixon *v.* McKinney, 105 id. 23, 28, 11 S. E. 154 (similar); 1900, Autry *v.* Floyd, 127 id. 186, 37 S. E. 208 (by a defendant, as to his lack of malice in prosecuting plaintiff); 1903, Bright *v.* Tel. Co., — id. —, 43 S. E. 841 (by the addressee of a telegram, that he would have done certain things had he received the message in ample time); 1903, State *v.* Hall, — id. —, 44 S. E. 553 (by a defendant, as to his purpose in going to the place of the homicide); *N. D.:* 1903, State *v.* Tough, — N. D. —, 96 N. W. 1025 (by a defendant, as to his belief of ownership in entering a railroad car having coal of another person); *Oh.:* 1866, White *v.* Tueker, 16 Oh. St. 468, 470 (by the defendant in malicious prosecution, as to his belief in the charge made against the plaintiff; good opinion by Day, J.); 1896, Grever *v.* Taylor, 53 id. 621, 42 N. E. 829 (goods fraudulently bought; by the vendor, as to whether he relied on the false representations); *Pa.:* 1883, Juniata Bldg. Ass'n *v.* Hertzel, 103 Pa. 507, 511 (admissible "wherever the character of the transaction depends on the intent of the party"); 1896, Com. *v.* Julius, 173 id. 322, 34 Atl. 21 (whether a release was signed on the faith of representations); 1896, Weaver *v.* Cone, 174 id. 104, 34 Atl. 551 ("What induced you to sell for $80?"); *R. I.:* 1902, Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208 (by one suing for deceit, as to his reliance on the representations); *S. C.:* 1900, McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529 (deed in fraud of creditors); *Tex.:* 1886, Hamburg *v.* Wood, 66 Tex. 176, 18 S. W. 623 (transfer in fraud of creditors; by the transferee, as to his motive in accepting the property transferred); *U. S.:* 1872, Bank

words of the party," and that its cessation is due to the fact that it is now by implication "removed by the abrogation of the rule which created it," namely, of the party's disqualification.[4] The truth is, however, that even while parties were entirely disqualified the question was presented, in the shape of testimony to his own intent by a third person, not a party, whose intent was material under the issue, — for example, a voter or a debtor, — and that, in that shape, the question was answered plainly in the negative by several Courts.[5] There was, then, already established a doctrine that a person might properly testify to his own intent, whenever it was material. There was, also, no rule that parties in particular might not testify to their own intent, but merely a general rule disqualifying parties altogether; and thus, when the latter rule was abolished altogether, parties became qualified to testify to whatever other persons had been qualified to testify to, including the fact of their own intent. Thus the statutory changes had nothing to do with the validity or origin of the present rule; they simply made it possible to raise, against parties, a question which had no occasion to be raised against them before that time. It had been raised for other persons, and settled; and it now remained merely to raise it and settle it in a particular new application. The statutory abolition of parties' disqualification is not the source of validity for the present rule, but merely explains the subsequent frequency of a ruling which in that application was before that time unnecessary.

In only one jurisdiction has any clear sanction been given to a rule that

v. Kennedy, 17 Wall. 20, 26 (purpose of an advance of money); 1896, Wallace *v.* U. S., 162 U. S. 466, 16 Sup. 859 (the defendant's belief that the deceased was about to assault the defendant); *Utah:* 1875, Conway *v.* Clinton, 1 Utah 215, 221 (by one charged with malicious destruction of property, as to his motive); 1895, People *v.* Hughes, 11 id. 100, 39 Pac. 492 (accused's intent); *Vt.:* 1865, Hulett *v.* Hulett, 37 Vt. 581 (by one whose domicil was in question; see quotation *supra*); 1886, Stearns *v.* Gosselin, 58 id. 38, 3 Atl. 193 (by a debtor, as to his intent in an alleged fraudulent transfer); *Va.:* 1898, Jackson *v.* Com., 96 Va. 107, 30 S. E. 452 (by a trespasser, as to his malice); 1903, Litton *v.* Com., — id. —, 44 S. E. 923 (murder; by the accused, as to his intent to shoot, allowed); *W. Va.:* 1889, State *v.* Evans, 33 W. Va. 417, 424, 425, 10 S. E. 792 (by the accused, as to his belief of the necessity of shooting, and his malice); *Wis.:* 1874, Wilson *v.* Noonan, 35 Wis. 321, 355, 363 (libel; malice or intent being material on the question of damages, the defendant may testify on the subject, "wherever the act complained of is not clearly and necessarily inconsistent with the supposition that such bad intent or malice did not or may not have existed"; *quære* as to this limitation, which ought to apply, if at all, equally to other sorts of evidence); 1881, Sherburne *v.* Rodman, 51 id. 474, 478, 8 N. W. 414 (by a defendant in malicious prosecution, as to his belief and good faith in his claim); 1885, Plank *v.* Grimm, 62 id. 251, 22 N. W. 470 (by one sued for assault, as to intent in approaching the plaintiff); 1885, Arnold *v.* White, ib. 401 (by a debtor, as to the alleged fraudulent intent in contracting); 1894, Commercial Bank *v.* Ins. Co., 87 id. 297, 303, 58 N. W. 391 (by an insured, as to his intent to defraud in altering books); 1896, Emery *v.* State, 92 id. 146, 65 N. W. 848 (by a defendant, as to his intent in making a threat); 1898, Fischer *v.* State, 101 id. 23, 76 N. W. 594 (intent of defendant as to intimidating another person); 1901, Yerkes *v.* Northern Pacific R. Co., 112 Wis. 184, 88 N. W. 33 (that the plaintiff relied on the defendant's promise to repair machinery, allowed; but that he would not have continued at work except for the promise, excluded on the theory of the opinion rule, — a vain and quibbling distinction). The admission of *hearsay declarations of intention* (*post*, §§ 1725 ff.) is another application of the foregoing principle.

In the following rulings, the testimony was excluded, on perhaps the present grounds, but the rulings may be otherwise supported: 1896, Harris *v.* Lumber Co., 97 Ga. 465, 25 S. E. 519 (by an alleged promisor, as to his own intent to buy); 1892, Vawter *v.* Hultz, 112 Mo. 633, 640, 20 S. W. 689 (by a defendant, that he shot to protect his life).

[4] *E. g.* by Sanderson, J., in People *v.* Farrell, 31 Cal. 576, quoted *supra*.

[5] As in People *v.* Ferguson, N. Y., quoted *supra*, and in other cases cited *supra*.

parties or other persons are disqualified to testify to their own intent or motive.[6] In all others where the question has been raised there is a general repudiation of that notion in all its aspects.

It remains to be noted that this sort of testimony, or any other whatever, to the fact of a person's intent or motive, is of course receivable only on the assumption that *the intent or motive is a fact permissible to be proved under the substantive law* involved in the case. This assumption conditions the admissibility of all evidence (*ante*, § 2) and of this sort in particular. Hence, if for any reason of substantive law the person's intent or motive is not provable at all, it is not provable by such testimony. But rulings of that tenor are not rulings upon a question of evidence:

1886, *Reed*, J., in *Browne* v. *Hickle*, 68 Ia. 330, 333, 27 N. W. 276: "When it is material to determine the motive or intention with which an act was done, the testimony of the one doing the act, as to his motive or intention, is competent evidence. But . . . the questions to be determined [in this case] were whether the parties entered into a contract for the termination of the lease, and, if so, what were the terms and conditions of their agreement. These questions must be determined from the conduct and language of the parties during the agreement. If an agreement was entered into by the parties, the undertaking of plaintiff therein must be determined aloue from what was said and done by him at the time. His secret motives or intentions are entirely immaterial. We think, therefore, that the Court properly excluded the evidence."[7]

From the present question of evidence are also to be distinguished two other questions of evidence: (1) whether a person may testify to *another person's intent* or state of mind in general; this involves the principle of adequacy of sources of knowledge, examined elsewhere (*post*, § 691); (2) whether a person's testimony to *another's intent* or meaning or state of mind in general is excluded by reason of the *Opinion rule;* this is a question of complicated bearings, and is dealt with under the Opinion rule (*post*, §§ 1962).

[6] This is in Alabama. The rulings are collected *post*, § 1966, in order to distinguish them from others concerning *testimony to a third person's intent*, and the like; the rulings in that jurisdiction on these topics are in hopeless confusion and exhibit an unprecedented narrow artificiality.

[7] The following cases will serve as examples of the various ways in which a rule of substantive law may affect the solution: 1871, Columbus *v.* Dehn, 36 Ind. 334 (rejecting testimony by the alleged dedicator of a street as to his intention); 1888, Ross *v.* State, 116 id. 497, 19 N. E. 451 (rejecting testimony as to one's intent to violete the law); 1902, Donovan *v.* Driscoll, 116 Ie. 339, 90 N. W. 60 (by a son working for his father, as to his own expectation of pey, excluded); 1859, Quimby *v.* Morrill, 47 Me. 470 (the intention of a promisor to be bound was ellowed to be asked about by the opponent); 1844, Jones *v.* Howland, 8 Metc. 385 (whether in addition to the fact of knowledge of insolvency by the debtor, a distinct element, the intent to make a preference, need be shown); 1877, Perry *v.* Porter, 121 Mass. 523 (admitting evidence of a grantor's intent, the issue being whether she had been frandulently misled into signing); 1895, Nash *v.* Minn. T. I. & T. Co., 163 id. 574, 40 N. E. 1039 (whether one making false representations intended to state a falsity); 1844, Hibbard *v.* Russell, 16 N. H. 417 (excluding the secret intent of a person promising in words to pay a note); 1860, Gale *v.* Ins. Co., 41 id. 174 (en uncommunicated intent to choose between two policies covering the same risk, excluded); 1860, People *v.* Saxton, 22 N. Y. 309 (rejecting testimony, by one casting an ambiguous ballot, as to his intention); 1870, Dillon *v.* Anderson, 43 id. 236 (excluding en uncommunicated intent, with reference to a contract made). Add to these illustrations the cases which involve the question whether one charged with *slanderous or libellous utterances* may testify to his meaning intended: 1890, Townshend, Slander & Libel, 4th ed., § 139; 1881, Odgers, Libel & Slander, 1st Am. ed., p. 93; 1898, Newell, Libel & Slander, 2d ed., c. 15, § 22. Compare also the anslogous illustrations erising under the limitations of the *opinion* rule and the *parol evidence* rule, *post*, § 1971, and §§ 2400–2478.

§ 582. **Testamentary Attesting-Witness' Competency.** Whether the person attesting a will is eligible as such is purely a question of the substantive law applicable to the validity of wills. The object of the statute is not to determine the competency of persons called to testify to the will, but to secure the execution of the will under formalities of a specified sort.[1] The will is required to be contained in writing, to be signed by certain persons, and to be signed in the presence of certain persons; if these rules are followed, the will is valid in form, and no one of the rules is more a rule of evidence than another (*post*, § 2456).

Certain corollaries ensue from this principle and illustrate it. In the first place the rule of validity, requiring attestation by certain persons, remains to be satisfied, whether or not any one of those persons appears as a witness. For example, the rule that certain of these persons must be called in preference to others to testify (*post*, §§ 1290) is a rule of evidence independent of the rule of validity, and may be dispensed with while the latter remains in full force. Secondly, if one of them, appearing as a witness on the stand, is entirely qualified at the time of testifying, still his incompetency at the time of attesting renders the will invalid; though this part of the doctrine has been usually changed by statute.[2] Finally, if one of these persons, when called to testify, is incompetent to do so, but was competent under the statute at the time of attesting, the will is nevertheless valid;[3] the statute's object is satisfied when the execution takes places with the specified formalities; *i.e.* it prescribes a rule of substantive law, not of evidence. The consideration of these statutes, therefore, involving as they do the theory of the substantive law as to the validity of wills, would here be out of place.[4]

§ 583. **Voir Dire; Mode of Ascertaining Disqualification**: (1) **Time of Interest that Disqualifies.** The doctrine of disqualification by interest is now of little practical consequence. It is applicable solely, and that only in a modified degree, to the statutory class of persons disqualified as survivors to testify against an opponent deceased or incapable, and even then in some only of the jurisdictions (*ante*, § 578). So far as the details of the old rule are concerned, by which are determined the time when the disqualifying interest is to exist and the mode in which its existence is to be ascertained, it will therefore suffice, for to-day's purpose, to call attention to the principles already examined (*ante*, §§ 483–487) for testimonial qualifications in general, and to set forth summarily their application to the present subject by approved passages of exposition from the period when the rules of interest were in full force. And, first, of the

(1) *Time of Interest that Disqualifies.* Ordinarily, the time when the wit-

[1] This was amply established in an early period of the statute's application, in luminous and classical opinions: 1746, Wyndham *v.* Chetwynd, 1 Burr. 425; 1765, Doe *v.* Hindson (Eng.), 1 Day 41, note; 1845, Taylor *v.* Taylor 1 Rich. L. 531, 534.

[2] Sometimes, as in Arizona, this is done making a real rule of evidence, as by requiring corroboration: *post*, § 2066.

[3] 1865, Sparhawk *v.* Sparhawk, 10 All. 155.

[4] The statutes affecting the subject may be found by consulting the citations *post*, §§ 1290, 1310, 2049–2051. Consult the following opinion: 1903, O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788.

ness is called upon *to testify* is the time when his qualification must exist. But, in order to avoid the abuse of the rule against interested witnesses, exceptions to that principle were here recognized:

1842, Professor *Simon Greenleaf*, Evidence, § 418: "It has been laid down in general terms, that where one person becomes entitled to the testimony of another, the latter shall not be rendered incompetent to testify, by reason of any *interest subsequently acquired* in the event of the suit.[1] But though the doctrine is not now universally admitted to that extent, yet it is well settled and agreed, that in all cases where the interest has been subsequently created by the fraudulent act of the adverse party, for the purpose of taking off his testimony, or by any act of mere wantonness, and aside from the ordinary course of business, on the part of the witness, he is not thereby rendered incompetent. And where the person was the original witness of the transaction or agreement between the parties, in whose testimony they both had a common interest, it seems also agreed, that it shall not be in the power either of the witness, or of one of the parties, to deprive the other of his testimony, by reason of any interest subsequently acquired, even though it were acquired without any such intention on the part of the witness, or of the party.[2] . . . If the subsequent interest has been created by the agency of the party producing the witness, he is disqualified; the party having no right to complain of his own act."[3]

§ 584. **Same: (2) Burden of Proving Disqualification.** The burden of proving disqualification by interest is upon the party objecting to the witness. This was never doubted.[1] Although the state of the record might of itself serve to show the interest, still, so far as anything whatever needed to be done to make the interest apparent, it must be done by the objector.

§ 585. **Same: (3) Mode of Proving Disqualification.** So far as a mere reference to the record of the cause does not suffice, the objector finds two sources of evidence available, first, evidence of the ordinary sort (from other persons), and secondly, the witness' own answers, either on his general examination or on a special preliminary examination (*voir dire*) had for the purpose:

1746, L. C. *Hardwicke*, in *Lord Lovat's Trial*, 18 How. St. Tr. 585, 597, 730: "The party objecting may either put it to the oath of the witness produced or call witnesses to prove it. If he puts it to the oath of the witness produced, then he is concluded as to the point of competency by the answer he gives, unless the other side consents to waive that."

1801, Mr. *Peake*, Evidence, 186: "When a witness was liable to any objection on account of interest, etc., the old rule was to examine upon the *voire dire* as to his situation or call other witnesses to prove the fact which rendered him incompetent. The party against whom he was produced had his election which of these modes he would pursue; but he could not adopt both; and if the witness denied his interest, no other evidence could afterwards be produced to prove it, for the purpose of rendering him incompetent."

[1] "See Bent *v.* Baker, 3 T. R. 27, per Ld. Kenyon, and Ashhurst, J.; Barlow *v.* Vowell, Skin. 586, per Ld. Holt; Cowp. 736; Jackson *v.* Rumsey, 3 Johns. Cas. 234, 237."

For a *deposition*, the time of taking it is the material time, and subsequent interest acquired before trial does not exclude: 1862, Cameron *v.* Cameron, 15 Wis. 1, 5 (subsequent marriage to a party). Compare the cases cited *post*, § 1409 (deponent disqualified by interest).

[2] "Forrester *v.* Pigou, 3 Camph. 381; 1 Stark. Evid. 118; Long *v.* Bailie, 4 S. & R. 222; 14 Pick. 47; Phelps *v.* Riley, 3 Conn. 266, 272; R. *v.* Fox, 1 Stra. 652."

[3] "Hovill *v.* Stephenson, 5 Bing. 493."

[1] 1843, Densler *v.* Edwards, 5 Ala. 34 (citing cases); 1886, Hill *v.* Helton, 80 id. 532, 1 So. 340.

1842, Professor *Simon Greenleaf*, Evidence, §§ 424, 423: "A witness is said to i examined upon the *voir dire*, when he is sworn and examined as to the fact whether he not a party interested in the cause.[1] And though this term was formerly and mo strictly applied only to the case where the witness was sworn to make true answers such questions as the Court might put to him, and before he was sworn in chief, yet it now extended to the preliminary examination to his interest, whatever may have be the form of the oath under which the inquiry is made. . . . The mode of proving the i terest of a witness is either by his own examination, or by evidence *aliunde*. But wheth the election of one of these modes will preclude the party from afterwards resorting to t other, is not clearly settled by the authorities. If the evidence offered *aliunde* to pro the interest is rejected, as inadmissible, the witness may then be examined on the *v dire*.[2] And if the witness on the *voir dire* states that he does not know, or leaves doubtful whether he is interested or not, his interest may be shown by other evidence It has also been held, that a resort to one of these modes, to prove the interest of the wi ness on one ground, does not preclude a resort to the other mode, to prove the interest another ground.[4] And where the objection to the competency of the witness is founde upon the evidence already adduced by the party offering him, this has been adjudged n to be such an election of the mode of proof, as to preclude the objector from the right examine the witness on the *voir dire*.[5] But, subject to these modifications, the rule reco nized and adopted by the general current of authorities is, that where the objecting par has undertaken to prove the interest of the witness, by interrogating him upon the *v dire*, he shall not, upon failure of that mode, resort to the other to prove facts, the exis ence of which was known when the witness was interrogated.[6] The party, appealing the conscience of the witness, offers him to the Court as a credible witness; and it is co trary to the spirit of the law of evidence, to permit him afterwards to say, that the witn is not worthy to be believed. It would also violate another rule, by its tendency to rai collateral issues.[7] Nor is it deemed reasonable to permit a party to sport with the co science of a witness, when he has other proof of his interest. But if evidence of h interest has been given *aliunde*, it is not proper to examine the witness, in order to explai it away."[8]

[1] "Termes de la Ley, Verb. *Voyer dire*. And see Jacobs *v.* Laybourn, 11 M. & W. 685, where the nature and use of an examination upon the *voir dire* are stated and explained by Ld. Abinger, C. B."

[2] "Main *v.* Newson, Anthon's Cas. 13. But a witness cannot be excluded by proof of his own admission that he was interested in the suit: Bates *v.* Ryland, 6 Alabama R. 668; Pierce *v.* Chase, 8 Mass. 487, 488; Commonwealth *v.* Waite, 5 Mass. 261; George *v.* Stubbs, 13 Shepl. 243."

[3] "Shannon *v.* The Commonwealth, 8 S. & R. 444; Galbraith *v.* Galbraith, 6 Watts 112; Bank of Columbia *v.* Magruder, 6 Har. & J. 172." The Court may hear additional evidence; 1903, White Memorial Home *v.* Haeg, — Ill. —, 68 N. E. 568.

[4] "Stebbins *v.* Sackett, 5 Conn. 258."

[5] "Bridge *v.* Wellington, 1 Mass. 221, 222."

[6] "In the old books, including the earlier editions of Mr. Starkie's and Mr. Phillips's Treatises on Evidence, the rule is clearly laid down, that after an examination upon the *voir dire*, no other mode of proof can in any case be resorted to; excepting only the case, where the interest was developed in the course of trial of the issue. But in the last editions of those works it is said, that 'if the witness discharge himself on the *voir dire*, the party who objects, may still support his objection by evidence but no authority is cited for the position. Stark. Evid. 124; Phil. & Am. on Evid. 149 1 Phil. Evid. 154. Mr. Starkie had previousl added these words — 'as part of his own case (see 2 Stark. Evid. p. 756, 1st ed.); and wit this qualification the remark is supported b authority, and is correct in principle. Th American Courts have followed the old Englis rule, as stated in the text. Butler *v.* Butler, Day R. 214; Stebbins *v.* Sackett, 5 Conn. 25 261; Chance *v.* Hine, 6 Conn. 231; Welden Buck, Anthon's Cas. 9; Chatfield *v.* Lathrop 6 Pick. 418; Evans *v.* Eaton, 1 Peters C. C 322."

[7] "The question of competency is a collatera question; and the rule is, that when a witnes is asked a question upon a collateral point, hi answer is final, and cannot be contradicted that is, no collateral evidence is admissible fo that purpose. But if the evidence, subsequently given upon the matter in issue, should als prove the witness interested, his testimony ma well be stricken out, without violating an rule: Brockbank *v.* Anderson, 7 Man. & Gr 295, 313."

[8] "Mott *v.* Hicks, 1 Cowen 513; Evans Gray, 1 Martin N. S. 709"; 1902, Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266.

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§ 586. **Same**: (4) **Time of Making Objection.** The general principle (*ante*, §§ 18, 486) is that an opponent must object at the time of the offering of the witness, and that if he allows this time to go by, though aware of the ground for objection, he should be treated as waiving the objection. This principle, as applied to interested witnesses, seems to have been substantially repudiated in modern times in England, so that no limitation of time remains for the objection, so long at least as the witness is still on the stand. But the orthodox principle was preserved by the American Courts:

1801, Mr. *Peake*, Evidence, 186: "[The old rule was that] if he appeared to be incompetent, either by his own examination on the *voire dire* or by other evidence, the objection was immediately made; for if not taken before he was sworn in chief, it was considered as too late after he had been examined by the party calling him and cross-examined by the other side. But the modern practice is to swear the witness in chief in the first instance, and if at any time during the trial it be discovered that he is in a situation which renders him incompetent, it is then time to take the objection."

1843, L. C. B. *Abinger*, in *Jacobs* v. *Layborn*, 11 M. & W. 685, 692: "A counsel who knows of an objection to the competency of a witness may very fairly say, 'I will lie by, and see whether he will speak the truth; if he does not, I will exclude his evidence.' I see no hardship or injustice at all in that course. . . . In other words, an examination on the *voir dire* may be instituted at any period of the examination."

1842, Professor *Simon Greenleaf*, Evidence, § 421. "In regard to the time of taking the objection to the competency of a witness on the ground of interest, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the witness is examined in chief. If the party is aware of the existence of the interest, he will not be permitted to examine the witness, and afterwards to object to his competency, if he should dislike his testimony. He has his election, to admit an interested person to testify against him, or not; but in this, as in all other cases, the election must be made as soon as the opportunity to make it is presented; and, failing to make it at that time, he is presumed to have waived it forever.[1] But he is not prevented from taking the objection at any time during the trial, provided it is taken as soon as the interest is discovered.[2] Thus, if discovered during the examination in chief by the plaintiff, it is not too late for the defendant to take the objection.[3] But if it is not discovered until after the trial is concluded, a new trial will not, for that cause alone, be granted;[4] unless the interest was known and concealed by the party producing the witness.[5] The rule on this subject, in criminal and civil cases, is the same.[6] Formerly, it was deemed necessary to take the objection to the competency of a witness on the *voir dire;* and if once sworn in chief, he could not afterwards be objected to, on the ground of interest. But the strictness of this rule is relaxed; and the objection is now usually taken after he is sworn in chief, but previous to his direct examination. It is in the discretion of the Judge to per-

showing interest need not be produced on the *voir dire*, see *post*, § 1258.

[1] "Donelson *v.* Taylor, 8 Pick. 390, 392; Belcher *v.* Magnay, 1 New Pr. Cas. 110"; but see Jacobs *v.* Laybourn, *supra*, for the modern English rule *contra*. For modern American applications of the rule, see the following: 1863 Leslie *v.* Sims, 39 Ala. 161; 1882, Binford *v.* Dement, 72 id. 491; 1903, Slattery *v.* Slattery, — Ia. —, 95 N. W. 201; 1898, State *v.* Downs, 50 La. An. 694, 23 So. 456; 1903, Summerlin *v.* R. Co., — N. C. —, 45 S. E. 898; 1892, Benson *v.* U. S., 146 U. S. 325, 332; 1895, Pillow *v.* Impr. Co., 92 Va. 144, 23 S. E. 32; 1897, Spence *v.* Repass, 94 id. 716, 27 S. E. 583.

[2] "Stone *v.* Blackburn, 1 Esp. 37; 1 Stark. Evid. 124; Shurtleff *v.* Willard, 19 Pick. 202. Where a party has been fully apprised of the grounds of a witness's incompetency by the opening speech of counsel, or the examination in chief of the witness, doubts have been entertained at nisi prius, whether an objection to the competency of a witness can be postponed: 1 Phil. Evid. 154, note (3)."

[3] "Jacobs *v.* Laybourn, 11 M. & W. 685. And see Yardley *v.* Arnold, 10 M. & W. 141; 6 Jur. 718."

[4] "Turner *v.* Pearte, 1 T. R. 717; Jackson *v.* Jackson, 5 Cowen 173."

[5] "Niles *v.* Brackett, 15 Mass. 378."

[6] "Commonwealth *v.* Green, 17 Mass. 538; Roscoe's Crim. Evid. 124."

mit the adverse party to cross-examine the witness, as to his interest, after he has bee examined in chief; but the usual course is not to allow questions to be asked upon th cross-examination, which properly belong only to an examination upon the *voir dire*. But if, notwithstanding every ineffectual endeavor to exclude the witness on the groun of incompetency, it afterwards should appear incidentally, in the course of the trial, tha the witness is interested, his testimony will be stricken out, and the Jury will be instructe wholly to disregard it.[8] The rule in Equity is the same as at Law;[9] and the principl applies with equal force to testimony given in a deposition in writing, and to an ora examination in Court. In either case, the better opinion seems to be, that if the objec tion is taken as soon as may be after the interest is discovered, it will be heard; but afte the party is *in mora*, it comes too late.[10] One reason for requiring the objection to b made thus early is, that the other party may have opportunity to remove it by a release which is always allowed to be done, when the objection is taken at any time before th examination is completed.[11] It is also to be noted as a rule, applicable to all objection to the reception of evidence, that the ground of objection must be distinctly stated at th time, or it will be held vague and nugatory."[12]

1877, *Staples*, J., in *Hord* v. *Colbert*, 28 Gratt. 49, 54: "The authorities leave no roo for doubt; they hold that if the party be aware of the existence of the interest, he wi not be permitted to examine the witness and afterwards to object to his incompetency i he should dislike his testimony."

§ 587. **Same: (5) Judge, not Jury, to determine Disqualification.** Th following passage has no doubt often served to influence judicial rulings:

1812, Professor *Greenleaf*, Evidence, § 425: "The question of interest, though involv ing facts, is still a preliminary question, preceding, in its nature, the admission of th

[7] "Howell *v.* Lock, 2 Camp. 14; Odiorne *v.* Winkley, 2 Gallis. 51; Perigal *v.* Nicholson, 1 Wightw. 64. The objection that the witness is the real plaintiff, ought to be taken on the *voir dire*: Dewdney *v.* Palmer, 4 M. & W. 664; 7 Dowl. 177, s. c."

[8] "Davis *v.* Barr, 9 S. & R. 137; Schillenger *v.* McCann, 6 Greenl. 364; Fisher *v.* Willard, 13 Mass. 379; Evans *v.* Eaton, 1 Peters C. C. 338, 4 Fod. 559; Butler *v.* Tufts, 1 Shepl. 302; Stout *v.* Wood, 1 Blackf. 71; Mitchell *v.* Mitchell, 11 G. & J. 388. The same rule seems applicable to all the instruments of evidence, whether oral or written: Scribner *v.* M'Laughlin, 1 Allen 379; and see Swift *v.* Dean, 6 Johns. 523, 536; Perigal *v.* Nicholson, Wightw. 63; Howell *v.* Lock, 2 Campb. 64; Needham *v.* Smith, 2 Vern. 464. In one case, however, where the examination of a witness was concluded, and he was dismissed from the box, but was afterwards recalled by the Judge, for the purpose of asking him a question, it was ruled by Gibbs, C. J., that it was then too late to object to his competency: Beeching *v.* Gower, 1 Holt's Cas. 313; and see Heely *v.* Barnes, 4 Denio 73. And in Chancery it is held, that where a witness has been cross-examined by a party, with full knowledge of an objection to his competency, the Court will not allow the objection to be taken at the hearing: Flagg *v.* Mann, 2 Sumn. 487."

[9] "Swift *v.* Dean, 6 Johns. 523, 538; Needham *v.* Smith, 2 Vern. 463; Vaughan *v.* Worrall, 2 Swanst. 400. In this case, Lord Eldon said, that no attention could be given to the evidence, though the interest were not discovered until the last question, after he has been 'cross-examined to the bone.' See Gresley on Evid. 234–236; Rogers *v.* Dibble, 3 Paige 238; Town *v.* Needham, id. 545, 552; Harrison *v.* Courtauld, 1 Russ. & M. 428; Moorhouse *v.* L Passou, G Cooper, Ch. Cas. 300; 19 Ves. 433 s. c. See also Jacobs *v.* Laybourn, 7 Jur. 562 11 M. & W. 685."

[10] "Donelson *v.* Taylor, 8 Pick. 390. Whe the testimony is by deposition, the objection, the interest is known, ought regularly to b taken *in limine*; and the cross-examinatio should be made *de bene esse*, under protest, with an express reservation of the right of objec tion at the trial; unless the interest of the wit ness is developed incidentally, in his testimon to the merits. But the practice on this poin admits of considerable latitude, in the discr tio of the Judge: United States *v.* One Case of Ia Pencils, 1 Paine 400, 15 Fed. 924; Tel...t Clark, 8 Pick. 51; Smith *v.* Sparrow, 11 Ju 126; The Mohawk Bank *v.* Atwater, 2 Paig 54; Ogle *v.* Pelaski, 1 Holt's Cas. 485: 2 Tidd Pr. 812. As to the mode of taking the objectio in Chancery, see 1 Hoffm. Chan. 489; Gass Stinson, 3 Sumn. 605."

[11] "Tallman *v.* Dutcher, 7 Wend. 180; Dot *v.* Wilson, 14 Johns. 378; Wake *v.* Lock, 5 C & P. 454."

[12] "Camden *v.* Doremus, 3 Howard 515, 530 Elwood *v.* Deifendorf, 5 Barb. S. C. R. 398 Carr *v.* Gale, Daveis, R. 337, 2 Fed. 434."

For *depositions*, see the additional cases cite under the general principle *ante*, § 18.

testimony to the Jury. It is therefore to be determined by the Court alone, it being the province of the Judge, and not of the Jury, in the first instance, to pass upon its sufficiency.[1] . . . In determining the question of interest, where the evidence is derived *aliunde*, and it depends upon the decision of intricate questions of fact, the Judge may, in his discretion, take the opinion of the Jury upon them. And if a witness, being examined on the *voir dire*, testifies to facts tending to prove that he is not interested, and is thereupon admitted to testify; after which opposing evidence is introduced, to the same facts, which are thus left in doubt, and the facts are material to the issue; the evidence must be weighed by the Jury, and if they thereupon believe the witness to be interested, they must lay his testimony out of the case."[2]

But it is necessary to point out that the doctrine of the last sentence in this passage is unsound. When the judge has ruled upon admissibility, all question of a rule of law is at an end.[3] The jury cannot again apply the rule of admissibility. If they reject a witness' testimony, it is not because they find him to be ineligible by the technical rules of interest, but merely because on the whole they do not believe him. The fallacy of the above doctrine has been elsewhere sufficiently considered in other applications (*ante*, §§ 487, 497; *post*, §§ 861, 1451, 2550).

[1] "Harris *v.* Wilson, 7 Wend. 57."

[2] "Walker *v.* Sawyer, 13 N. H. 191"; 1902, Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266 (the trial judge on objection, should determine the facts by a preliminary examination, though he may in his discretion submit the question to the jury).

[3] 1843, L. C. B. Abinger, in Jacobs *v.* Layborn, 11 M. & W. 685, 691 ("When a man is examined on the *voir dire*, the examination is only to satisfy the conscience of the judge, the jury having nothing to do with it").

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS.

TOPIC III (*continued*): EMOTIONAL CAPACITY.

SUB-TOPIC B: MARITAL RELATIONSHIP AS A TESTIMONIAL DISQUALIFICATION.

CHAPTER XXIV.

1. In general.

§ 600. **History of the Rule; No other Family Relationship disqualifies.** The history of the disqualification by marital relationship can better be examined at the same time with the privilege based on the same relationship (*post*, § 2227). It suffices to notice here that the disqualification first comes into notice about or just before the recognition of interest in general as a disqualification, — that is, the time of Sir Edward Coke's First Institute, 1628. It is easy to see that whatever considerations were then moving to create the one disqualification might coöperate to cause the other, — although no directly common origin or association appears in the precedents. But the singularity is that other grounds of disqualification which would naturally be linked with the present one, and were recognized as unquestionably united with it in the two other legal systems of the time, — the Roman civil and the ecclesiastical law[1] —, failed wholly of recognition in any respect in our own law, namely, the ground of filial or paternal relationship and of domestic dependency. That servant and master were admissible for each other was always the law.[2] That father and son, as well as other family relations, were admissible for each other was never doubtful, though the objection was in the beginning frequently raised, upon the analogy (probably) of the civil and the

[1] For these rules, see the quotations *ante*, § 575, n. They obtained in Louisiana, as a follower of the civil law, under the original code of that State (§ 2260); but have since been abolished; Rev. Civ. C. § 2282, Rev. L. 1897, § 1191.

[2] Citations *ante*, § 575.

ecclesiastical rules.[3] This anomaly is difficult to explain. It may perhaps be attributable to nothing more than the scholastic reasoning, peculiar to the times, which sufficed for Coke's mind, namely, the legal identity of the two spouses (*post*, § 601). This theory, which of course did not apply to the parental relationship, assimilated the wife to the husband, and thus made her share the disqualification which he as a party (*ante*, § 575) already was recognized as suffering.

§ 601. **Policy of the Rule.** In considering the reasons upon which the rule rests and the policy of altering it, the distinction must be kept in mind between the incapacity of the one spouse to testify *for* the other and the privilege not to testify *against* the other. This distinction (more amply examined *post*, § 2228) warns us that we are here considering only the reasons for disqualifying them when voluntarily coming forward in favor of each other, — reasons quite independent of those affecting the privilege of not being compellable or allowable to testify against each other.

(1) The earliest reason to be met is a piece of metaphysical fiction, and calls for no attempt to answer it:

1628, Sir *Edward Coke*, Commentary upon Littleton, 6 *b*: "It hath been resolved by the justices that a wife cannot be produced either for or against her husband, *quia sunt duæ animæ in carne una*."

(2) A second reason, later advanced, was the marital identity of interest, *i. e.* the same reason that sufficed for interested persons in general:

Ante 1726, Chief Baron *Gilbert*, Evidence, 133: "The second corollary to this general rule [of exclusion from interest] is that husband and wife cannot be admitted to be witnesses for or against each other; for if they swear for the benefit of each other, they are not to be believed, because their interests are absolutely the same, and therefore they can gain no more credit when they attest for each other than when any man attests for himself."

This reason is a plausible one, and serves well enough for most situations at common law, where the wife's property interests in her husband's estate would place her equally under the disqualification of an interested person, and *vice versa*. But the theory fails when pushed to extremities; for the disqualification prevailed, by general acceptance, even where their property interests were wholly independent (*post*, § 603).

(3) There must be, then, some other or further reason; and this, naturally, is the supposed bias of affection, — that partisanship which may ordinarily be assumed from the very existence of the marital relation:

[3] 1630, Moor's Case, Hetley 137 ("Hutton said, there can be no exception to the witness who is cozen to the party, to hinder his evidence in our law; to which all agreed"); *Ante* 1635, Hudson, Treatise of the Star Chamber, pt. III, § 21, in Hargr. Collect. Jurid. 205 ("The son may be a witness for the father"); *Ante* 1726, Gilbert, Evidence, 133 ("But no other relation is excluded, because no other relation is absolutely the same as interest. But by the civil law, servants and children were excluded because the parents and masters had absolute power over them, and therefore under that law they swore with manifest interest to themselves"); 1727, Dalton, The Country Justice, 2d ed., c. 164; 1752, R. *v.* Oakhampton, 1 Wilson 332, Sayer 45, McNally, Evidence, 182 ("Mere relationship, how near soever the relation may be, does not go to the competency of a witness").

1854, *Samuels*, J., in *Johnston* v. *Slater*, 11 Gratt. 321, 323: "From the intimate relation between husband and wife, and from the strong bias of feeling towards each other, the law has provided that neither shall be a witness in regard to any subject in which the other is interested."

(4) But still a fourth reason — fantastic enough — has been advanced, analogous to that which has been advanced for the privilege (*post*, § 2228) and yet different in its origin, namely, the danger of the disturbance of marital peace which might occur if the wife, being available for the husband, should be expected by him to come forward and perjure herself:

1860, *Sargent*, J., in *Kelley* v. *Proctor*, 41 N. H. 139, 142: "We believe that the true reason why a wife should not be allowed to testify either for or against her husband at common law has always been a sort of compound reason, founded partly in interest, to be sure, and the identity of the persons, but partly also upon conditions of public policy. . . . We think that considerations of public policy — the fear of sowing dissensions between man and wife, and of occasioning perjury . . . — are equally satisfactory reasons why they should not be allowed to testify in each other's favor. It is to be feared that in some instances, if not in many, if it were understood that a wife could testify for her husband but not against him, where the husband has the misfortune to be litigious and the still greater misfortune to be unprincipled, that the wife would find herself called upon too often to choose between her duty to her God and the requirements of (not to say her duty to) her husband, — between violating the obligations of her oath and incurring the displeasure of him whom she has promised to love, honor, and obey."

(5) And, finally, since a wife, if called by her husband, must be subjected to a cross-examination which might call for truths unfavorable to his cause, the same danger (whatever it amounts to) here recurs again, with such added and similar dangers (from telling the truth against him) as the privilege (*post*, § 2228) is designed to forefend.

What, then, of these various reasons? Is there any soundness in them?

As to the first, no one has ever thought it worth either defending or answering. The second does not even adequately explain the law; but, so far as it does, it stands or falls by its prototypes, the reasons for disqualification by interest in general, which are now universally repudiated (*ante*, § 576). The third reason is nothing more than the second in another variety — *i. e.* the supposed danger of falsification by a witness subject to the bias of marital affection, instead of the bias of pecuniary interest; and it can hardly be contended that the danger in this form is different enough in degree to override the arguments applicable in opposition to the other form (*ante*, § 576). In short, the possibility of falsification by wife or husband is no more a reason for exclusion than the same possibility by a person pecuniarily interested; and the objectionable inconsistencies and irrational quibbles which disfigure the rule are as much apparent in the one form as in the other. The fourth argument, based on the ground of possible dissension, is open to the objections, first, that it is a mere apprehension, not worthy of consideration as appreciable; secondly, that it deprives honest causes of upright testimony for the sake of preventing dishonest causes from using false testimony; thirdly, that it attempts to distort the natural rules of testimony for the sake

of preventing marital infelicities which either ought to be otherwise and more directly remedied, or else rest upon such deep-seated causes that it is useless to expect to remedy them by legal interference. In other words, where the husband of the supposed unprincipled sort exists, the attempt to regulate his daily domestic tyranny by the casual application of a rule of evidence is ridiculous; and, beyond this, to build up, for all families not so afflicted, a rule of universal deprivation having this abnormal type of masculine Borgia for its basis, is to go to fantastic extremes of caution. Finally, the possibility of adverse testimony on cross-examination is an objection which need not be entertained on behalf of one who has himself — by hypothesis — called his wife in his favor; he desires to use her testimony, and may be therefore supposed to accept the risk of unwelcome results on cross-examination. The law cannot properly refuse him the right to her testimony on account of a risk which he himself is willing to assume. Add to all this, that the rule is equally open to all those general objections which weigh against the rule of disqualification by interest (*ante*, § 576). In the following passages are expounded the chief of the foregoing objections, in varying phrase:

1852, *Erle*, J., in *Stapleton* v. *Crofts*, 18 Q. B. 367, 377: "If the question may be considered with reference to the interest of truth, it is clear the exclusion of essential information as a means for finding truth is absurd. It is not doubted that wives often possess essential information as to matters within the usual province of a wife, and as to those conducted by her as agent for her husband, and as to those which she happened to witness. If essential witnesses are excluded, there is the certain evil of deciding without knowledge, and there is the probable evil of shaking confidence in the law. . . . The idea that husbands would generally suborn their wives to perjury, and persecute them if they spoke truth, is to my mind unworthy of the time. There is no reason to suppose that wives, if admitted, would be worse treated in respect of their testimony than in respect of any other part of their conduct, or be more prone to untruth than any other class of witnesses; and if, by reason of the exclusion of the wife, the husband has to suffer an adverse judgment contrary to the truth, and [therefore to suffer] the consequent loss, he would dissent with much reason from the zealous declarations that such a mean for protecting the peace of his family and the sanctity of his marriage was better than administering the law according to truth."

1853, *English Common Law Practice Commission*, Second Report, 11: "The highly satisfactory result of these more enlarged views [represented by the abolition of disqualification by interest in general] induces us to consider whether an exception preserved by the late statute, namely, the exclusion of husband and wife as witnesses for or against each other, may not be abolished. . . . The incompetency of husband and wife to be witnesses for one another is said to rest on three grounds: 1st, Identity of interest; 2d, the consequent danger of perjury; 3d, the policy of the law, which, as it is said, 'deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice,' and which rejects such evidence, because its admission would lead to domestic disunion and unhappiness. The first two grounds are manifestly no longer tenable, since the parties to suits have been themselves made competent to give evidence. It remains to be considered how far the third ground should be allowed to exclude testimony which may be essential to justice. In the first place, it seems clear that no disturbance of domestic happiness need be apprehended from permitting husband and wife to call one another as witnesses. The evidence may in many cases be indispensable. A wife often keeps her husband's books, conducts his business in his absence, pays

or receives money for him. Even in matters in which she may take a less active part, her testimony may be the only one to prove facts essential to the vindication of her husband's rights, or it may be valuable as confirmatory of the evidence of other witnesses: so, the testimony of the husband may be material to the wife in matters relating to her separate estate, to the proof of her coverture, if sued as a feme sole, and the like. It seems difficult to assign any reason why the law should be more tender of the domestic happiness of married persons than they are themselves disposed to be; the only danger that can be suggested is, that evidence might be extracted from the witness, by the adverse party, prejudicial to the interest of the married plaintiff or defendant, and that some bitterness of feeling might arise in consequence; but of the probability of such a result the married couple are themselves the best judges. Should any fact be thus brought to light which would otherwise have remained unproved, the interests of truth will be thereby promoted, and any transient interruption of conjugal harmony from such a circumstance, or from disappointment occasioned by the evidence falling short of what was expected, would be a trifling evil compared to the mischief which must result from the exclusion of testimony essential to the ends of justice and truth."[4]

§ 602. **Same: Statutory Alterations.** The validity of this misguided rule of the common law could not long have remained unquestioned, as soon as any discussion was raised regarding the propriety of the general rules for competency of witnesses. In England, Bentham launched against the rule his well-merited invectives, and in this country they were presented in the treatises of Livingston and of Appleton. The first step was taken in England as early as 1846, when husband and wife were made admissible in the County Courts.[1] Then in 1853, after parties and interested persons had been made competent,[2] husbands and wives were made admissible in civil cases, except for proceedings founded on adultery;[3] this exception in civil cases was removed in 1869;[4] and finally, the incompetency in criminal cases was abolished in 1898.[5] In the United States, the progress has been, in most jurisdictions, equally slow, and in some even slower. Furthermore, it has been made in very similar stages, — that is, the marital disqualification has usually not been recognized as outgrown until after the disqualification of parties and interested persons had been removed, and the recognition has been given force in civil cases earlier than in criminal cases. These distinctions seem to be somewhere obscurely rooted in the subject, so that the instant apprehension of the unsoundness of all of these limitations has seldom been found. Some jurisdictions, however, have served as notable exceptions, and in them no vestige of these outworn rules now remains. In possibly less than a third of the jurisdictions this is substantially the case. In more than another third, the marital disqualification is still preserved, with large classes of statutory exceptions; and in the remainder, the common law rule is still sanctioned by statute.[6]

[4] The arguments are more fully presented in the following works: 1828, Bentham, Rationale of Judicial Evidence, book IX, pt. IV, ch. V, § 4 (Works, Bowring's ed., vol. VII, p. 480); *Circa* 1823, Livingston, Introductory Report to the Code of Evidence (Works, ed. 1872, I, 452 ff.); 1860, Appleton, Evidence, c. IX.

[1] St. 9 & 10 Vict. c. 95.

[2] The statute of 1851, 14 & 15 Vict. c. 99, §§ 2, 3, had been held not to remove by implication the marital incompetency.

[3] St. 16 & 17 Vict. c. 83, § 1.

[4] St. 32 & 33 Vict. c. 68, § 3.

[5] St. 61 & 62 Vict. c. 36, § 1. All these statutes are set forth *ante*, § 488.

[6] These statutes are set out *ante*, § 488.

It is therefore necessary to consider, under each part of the subject, first, the scope of the rule at common law and, secondly, the effect of statutory alterations.

§ 603. **Theory of the Common-Law Rule; Relationship, not Property Interest, excludes.** The fundamental theory of the common-law rule was that the relationship, not the pecuniary interest, caused the disqualification; hence, the rule applied even where the witness offered had no interest in the estate of the spouse who was a party to the suit:

1855, *Lee*, J., in *William & Mary College* v. *Powell*, 12 Gratt. 372, 383: "Thomas J. Powell is offered as a witness [for his wife's estate] in support of the settlement made by him upon his wife, [which is now sought to be set aside as void against creditors, the husband being insolvent]. For this purpose he was clearly incompetent. . . . That he was not himself personally interested because he was bound for the college debt in any case, or that his interest was the same either way, does not vary the case. The authorities cited show that his incompetency does not rest upon the narrow ground of a personal and direct interest, but upon other and different principles. Indeed, the incompetency has been maintained even where the husband's interest was the other way. Thus, in an action by the trustee for a wife against the sheriff for taking goods which were her separate property, under an execution against the husband, the husband was held to be an incompetent witness for the plaintiff (the wife being regarded as the real plaintiff), although he had an interest on the other side, in having his debt satisfied by the levy of the execution."

This theory was maintained, without dissent, whenever occasion arose.[1] Nevertheless, it was not always consistently carried out to its complete extent. Furthermore, it was applied, not in spirit, but only in technical strictness, *i. e.* the fact of bias was not looked for anew in each case and the rule applied wherever such bias was to be presumed; but the principle, though placed upon the above ground, was once for all reduced to a rule, framed for the specific and limited case of a wife or husband testifying for the other's interest, and was then enforced on those technical lines. Thus it often admitted persons in situations where such a bias would in fact be equally likely, and excluded them in situations where such a bias would be by no means likely. These peculiarities may be further noticed in dealing with the details.

The classes of questions that arise fall naturally under four heads: Who is excluded as being a spouse? On whose behalf is a spouse excluded?

[1] 1792, Davis *v.* Dinwoody, 4 T. R. 678 (action for value of goods, seized on execution against L., by executrix of trustee under a marriage-settlement on L.'s wife; L. not admitted for the plaintiff, although he would be liable if his wife's goods were not); 1830, Terry *v.* Belcher, 1 Bail. 568, 571 ("in law they are identical, notwithstanding any contract that may exist between them"); 1844, Osborn *v.* Black, Speers Eq. 431, 435; 1860, McDuffie *v.* Greenway, 24 Tex. 625, 629; 1855, William & Mary College *v.* Powell, 12 Gratt. 372, 382 (see quotation *supra*); 1873, Murphy *v.* Carter, 23 id. 477, 488; 1881, Fink *v.* Deany, 75 Va. 663, 669; 1886, Mills *v.* Spencer, 81 id. 751, 755. In particular, the husband was disqualified even in suits concerning the wife's *separate estate:* 1838, Trenton B. Co. *v.* Woodruff, 2 N. J. Eq. 117, 131; 1835, Warner *v.* Dyett, 2 Edw. Ch. 497; 1840, Hosack *v.* Rogers, 8 Paige 229, 242; 1845, Burrell *v.* Bull, 3 Sandf. Ch. 15, 24. The rule has been applied in other than the ordinary tribunals: 1898, Seaton *v.* Kendall, 171 Ill. 410, 49 N. E. 561 (wife incompetent, in arbitration proceedings between husband and third person).

What exceptions exist, at common law or by statute? How far have statutes abolished the general rule?

§ 604. **Waiver; Sundry Principles discriminated.** (1) The doctrine of *waiver* applies exclusively to Privilege (*post*, § 2242); a disability cannot be waived. One spouse, therefore, cannot by any attempted waiver be enabled to call for the favoring testimony of the other.[1]

(2) The question of pleading in chancery, whether the *answer* of wife or husband can be used for the other as co-party, rests on other principles than the present rule of evidence.[2]

(3) The use of *hearsay statements* of a wife or husband, admissible under recognized exceptions to the Hearsay rule, seems never to have been regarded as limited by the present disqualification.[3]

(4) Whether one may testify to his *own marriage* involves usually no other question than perhaps the interest-disqualification, and, when that prevailed, was answered in the affirmative.[4]

2. Who is excluded as being a Spouse?[1]

§ 605. **Mistress; Bigamous Marriage.** The rule excluded such a person only as fulfilled the technical definition of lawful husband or wife. No doubt this was an absurd limitation; because, on the orthodox theory of marital bias (*ante*, § 603), the existence or absence of the bias would probably not depend on the technical validity of the relation. Nevertheless, it is needless to complain of a minor absurdity in a rule which had its very foundation upon a fallacious notion of testimonial principles.

It followed that a *mistress* or concubine, being not a legal wife, was admissible.[2] It followed also that, if there had been a bigamy, the first spouse

[1] There cannot be the slightest doubt upon principle, but the few rulings are not satisfactory, partly owing to the usual statutory regulation, in the same section (*e. g.* Cal. C. C. P. § 1881) of both the disqualification and the privilege, the language of the one being in truth inappropriate for the other: 1852, Barbat *v.* Allen, 7 Exch. 609 (waiver not allowed, because the consent was not given till after the judge's ruling of exclusion; whether it could have sufficed, if made before, was the subject of difference of opinion); 1898, Falk *v.* Witham, 120 Cal. 479, 52 Pac. 707 (incapacity of the other spouse to consent does not allow an examination); 1862, Russ *v.* Steamboat War Eagle, 14 Ia. 363, 375 (waiver allowable under a statute expressly sanctioning a waiver; the rule being applicable in practice to the case of a husband objecting to his co-party calling the wife); 1865, Blake *v.* Graves, 18 id. 312, 318 (same; by a majority); 1901, Murphy *v.* Ganey, 23 Utah 633, 66 Pac. 190 (an implied consent suffices, under Rev. St. § 3412). Supposing, however, that by statute the disqualification is removed, the question may arise whether the spouse has *waived the right* to call the other: 1890, Wolford *v.* Farnham, 44 Minn. 159, 46 N. W. 295 (wife's objection to husband's being called against her is not a waiver preventing her from calling him later in her behalf).

[2] See Frank *v.* Lilienfeld, 1880, 33 Gratt. 377, 380.

[3] Examples may be found *post*, in §§ 1718, 1730 (wife's declarations of affection, etc.), 1747, 1772 ff.

[4] 1736, Stapleton *v.* Stapleton, Lee temp. Hardwicke 277. For cases where the present principle is genuinely involved, see *post*, § 607.

[1] The word "spouse" will here be employed, to avoid the cumbrousness, not to say confusion, which the use of "husband and wife" involves. We need such a single word for purposes of scientific legal discussion. It exists in the Continental law and in our own Louisiana law.

[2] 1889, R. *v.* Nan-e-quis-a-ka, 1 N. W. Terr. 211 (an Indian marriage, held sufficient on the facts); 1867, Flanagin *v.* State, 25 Ark. 92; 1876, Rickerstricker *v.* State, 31 id. 207; 1871, Hill *v.* State, 41 Ga. 484, 496, 503; 1811, Meunier *v.* Conet, 2 Mart. La. 56; 1854, Johnson *v.* Melville, 9 La. An. 308, *semble*; 1870, Dennis *v.* Crittenden, 42 N. Y. 542, 546; 1872, Birdsall *v.* Patterson, 51 id. 43, 47.

alone, being the only lawful one, was inadmissible;[3] though here some uncertainty existed as to the extent to which the proof of the first marriage must go in order to qualify the later spouse or disqualify the prior one.[4]

3. On whose behalf is a Spouse excluded?

§ 606. **General Principle.** Husband or wife is excluded from testifying for the other. What is it, then, to testify *for* the other? Is it merely to speak favorably for the other in any sense, — for example, by speaking to the other's credit as a witness, or by corroborating his testimony, or by contributing any fact whatever which palpably redounds to the advantage of the other in any respect whatever? If the theory of marital bias (*ante*, § 603) were to be carried out in the fullest intent, such would be the effect of the principle; for the supposed marital bias would affect any and every topic of testimony. But that theory is not logically carried out. It is limited (as already noted in § 603) by a strictly technical definition of advantage or profit. To speak *for* another is understood in the narrow sense of speaking *for his legal interest in the cause in hand.* No other advantage or profit or credit which may be favored by the testimony is regarded as requiring this prohibition. The other person must have an interest in the event of the cause, in order that the sponse's testimony be inadmissible. This limitation was formed in analogy to the general rule disqualifying interested persons (*ante*, § 576), and it was convenient enough as a test; although a little reflection shows that the adoption of it in the present connection was by no means a necessary logical consequence. In other words, the common law made two distinct assumptions, first, that a specific kind and quantity of interest would probably induce a person to falsify, and, secondly, that precisely the same kind and quantity of interest, no more and no less, must be at stake for that person in order that the person's husband or wife should probably be induced to falsify.

The principle finds application in several aspects:

§ 607. **Interest in the Cause; Nominal Party.** On the one hand, the fact that the one spouse is *interested in the event* of the cause, even though not as a party to the record, serves to exclude the testimony of the other spouse.[1]

[3] 1702, Broughton *v.* Harpur, 2 Ld. Raym. 752 (ejectment; first wife not admitted for defendant to prove a marriage prior to that under which the plaintiff claimed); 1842, State *v.* Patterson, 2 Ired. 346, 354 (second wife admitted).

[4] 1898, Lowery *v.* People, 172 Ill. 466, 50 N. E. 165 (if a first marriage is in controversy, a second alleged wife is incompetent); 1899, Clark *v.* People, 178 id. 37, 52 N. E. 857 (forgery; alleged second wife admissible, on a showing that the first wife was living and undivorced at the time of the second marriage). On these points, consult also the precedents *post*, § 2230, under Privilege, where the same question arises and the rulings are more numerous.

[1] In the following cases this rule was applied to *exclude* the witness: 1701, Tiley *v.* Cowling, 1 Ld. Raym. 744 (carrier's action for trover against person wrongfully taking goods consigned; consignor's wife, not admitted for plaintiff, because the judgment and testimony could be used by the consignor in suing the carrier); 1826, Cornish *v.* Pugh, 8 Dowl. & R. 65 (wife of defendant's bail, excluded); 1824, Corse *v.* Patterson, 6 H. & J. 153 (wife not admitted for husband's mortgagee sued in replevin by another person); 1824, Griffin *v.* Brown, 2 Pick. 303, 308 (action against the sheriff for a debtor's escape; debtor's wife not admitted for the defendant to prove the debtor's insolvency, because the judgment would be conclusive as to damages in the sheriff's action against the debtor); 1866, Young *v.* Gilman, 46 N. H. 484, 486; 1829, Leggett *v.* Boyd, 3 Wend. 376 (wife of a special bail, ex-

On the other hand, the fact of the one spouse being a *nominal party* to the record, without real interest in the issue, does not exclude the other spouse.[2]

§ 608. **Same: Effect of Statutes qualifying Parties and Interested Persons.** Suppose, now, that by a statute, which does not expressly affect the disqualification of the spouse offered as a witness,[1] the disqualification of parties and interested persons is abolished; what test remains for determining the matters examined in the foregoing section? The test whether one was attempting to testify *for* the other was there seen to be whether the other was legally interested in the cause and thus himself was disqualified; since that interest no longer disqualifies the other, and its definition for that purpose is no longer important, shall it nevertheless remain as the test for the present purpose? To preserve it would seem to be anomalous; and yet to invent any other would be hazardous. There is a singular dearth of authority; in one jurisdiction the old test of *interest* has been preserved — for example, a wife may not testify for a husband who is interested and yet is himself com-

cluded); 1814, Snyder *v.* Snyder, 6 Binn. 483, 487, 492 (against plaintiff heirs, defendant claimed title by administrator's sale; the husband of one who would obtain dower if the sale was set aside, not admitted for plaintiff; but this was put partly on the ground that the verdict would be used in the probate court in distribution proceedings; Yates, J., diss., because her interest was contingent only); 1819, McComb *v.* Dillo, 5 S. & R. 305, 307 (wife excluded, under analogous circumstances); 1868, Pringle *v.* Pringle, 59 Pa. 281, 288 (administrator's suit; husband of daughter of intestate, not admitted for plaintiff, her interest not being contingent); 1871, Carpenter *v.* Moore, 43 Vt. 392 (wife of heir is inadmissible in a will contest); 1874, Wheeler *v.* Wheeler's Estate, 47 id. 637, 646 (an heir in a suit to charge an advancement is a party, though not of record); 1882, Labaree *v.* Wood, 54 id. 452 (test is whether the judgment can be used for or against the husband; if so, his wife is incompetent; here, the wife of a grantor was excluded in a suit between his creditor and a grantee); 1873, Murphy *v.* Carter, 23 Gratt. 477, 488; 1878, Warwick *v.* Warwick, 31 id. 70, 76; 1886, Lindsay *v.* McCormick, 82 Va. 479, 481, 5 S. E. 534.

In the following cases this rule was applied to *admit* the witness: 1670, R. *v.* Parris, 1 Sid. 431 (information against P. for obtaining a judgment against the wife of L. before her marriage, the execution having been extended upon the husband's estate; the Court set aside the judgment, "and principally on the wife's evidence, *quod nota*"; probably because the document on which the judgment was based was obtained from her in private at a tavern by P.); 1788, R. *v.* Claviger, 2 T. R. 263 (pauper settlement; to prove that M. was not J.'s wife, E. was offered as his first wife to prove the marriage; her interest in charging him with her support, held no objection; in effect discrediting R. *v.* Reading, 1734, Lee cas. temp. Hardw. 79, on this point; compare the rule as to wife's testimony to non-access, *post*, § 2063); 1870, Parsons *v.* People, 21 Mich. 509, 513 (adultery with S.; S. admissible for prosecution, though her husband was by statute the necessary complainant); 1830, Richardson *v.* Learned, 10 id. 261, 268 (trustee for wife's separate property suing for it; husband admitted for the plaintiff, his interest being contingent only); 1833, Coffin *v.* Jones, 13 id. 441, 445 (action against a deceased administrator's surety; administrator's wife admitted for defendant); 1860, State *v.* Borden, 6 R. I. 495 (assault and battery on the wife by a third person, the husband being liable for costs as prosecutor; wife admissible for the prosecution); 1857, Rutland & B. R. Co. *v.* Lincoln, 29 Vt. 206, 209 (admitting the wife of a husband merely liable on a bond for costs); 1806, Baring *v.* Reeder, 1 Hen. & M. 154, 157, 164, 171, 172 (wife admissible where her husband, though interested, is not a party nor bound by the result; two judges dissenting).

[2] The principle was applied in the following cases: 1738, Cotton *v.* Luttrell, 1 Atk. 451 (husband of a wife made party-defendant without being interested in the event, admitted for her co-parties); 1840, Young *v.* Richards, 2 Curt. Eccl. 371, 374 (wife of an executor, excluded, in probating a will); 1884 Ross *v.* Ross, Can. Sup., Cassels' Dig. 1893, p. 306 (husband of executrix, in a suit for her removal, not admitted); 1888, Beale *v.* Brown, 17 D. C. 574, 576 (wife admitted to testify for herself where the husband was joined as a formal party only); 1872, Ruth *v.* Ford, 9 Kan. 17, 29); 1897, Collins *v.* Wilson, — Ky. —, 39 S. W. 33 (wife admitted where the husband was only next friend suing for a child); 1861, Donnelly *v.* Smith, 7 R. I. 12 (husband and wife suing for wages earned by her before marriage; wife not admitted); 1864, Bonet *v.* Stowell, 37 Vt. 258 (wife of a *prochein ami*, admitted).

[1] This aspect of these statutes is discussed *post*, § 619.

petent by statute;[2] in another jurisdiction, the husband must be a *party*, in order that the wife may be disqualified.[3] On one point, however, all are properly agreed, namely, that so far as interest has been preserved as a disqualification by statute, *i. e.* in the case of a *survivor against a decedent* (*ante*, § 578), there the survivor's spouse is of course disqualified, in direct obedience to the common-law analogy.[4]

§ 609. **Co-defendants.** Where a person is co-defendant and desires to call for himself the spouse of another defendant, the question arises whether the sponse can be said to be testifying for the other defendant. The latter is a party to the record, and thus ordinarily any testimony given in the cause would be testimony for him. Nevertheless, ways were found at common law for withdrawing him from the record or otherwise removing his actual interest in the issue; and a special group of rules were developed for this situation, where one defendant was desired to be called for a co-defendant. On the general prineiple already examined (*ante*, § 606), whatever rule defined the other defendant's interest as a disqualifying one would also define the spouse's disqualificaton. The rules for a co-defendant called on behalf of a defendant have been already examined in detail (*ante*, § 580); it is therefore enough here to note that those rules served equally to determine the admissibility of the spouse.[1]

[2] 1890, Craig *v.* Miller, 133 Ill. 300, 307, 24 N. E. 431; repudiating the following case: 1882, Lincoln Ave. & N. C. G. R. Co. *v.* Madaus, 102 id. 417, 419.

[3] 1877, Higbee *v.* McMillan, 18 Kan. 133.

[4] 1886, Treleaven *v.* Dixon, 119 Ill. 548, 553, 9 N. E. 189 (explaining prior cases); 1888, Way *v.* Harriman, 126 id. 132, 137; 1889, Shaw *v.* Schoonover, 130 id. 448, 455; 1894, Bevelot *v.* Lestrade, 153 id. 625, 631, 38 N. E. 1056; 1895, Pyle *v.* Pyle, 158 id. 289, 41 N. E. 999; 1895, Stodder *v.* Hoffman, ib. 486, 41 N. E. 1082; 1889, Bitner *v.* Boone, 128 Pa. 567, 18 Atl. 404; 1900, Myers *v.* Litts, 195 id. 595, 46 Atl. 131; 1886, Kilgore *v.* Hanley, 27 W. Va. 451, 454; 1896, Valentine's Will, 93 Wis. 45, 67 N. W. 12.

These rulings would depend somewhat upon the terms of the survivor-statutes (*ante*, § 578); and for the reasons there stated, no attempt is here made to collect them fully.

[1] The rules were applied in the following cases; compare with them the precedents *post*, § 2236, under Privilege, as to calling the sponse *against* a co-defendant: 1739, R. *v.* Frederick, 2 Stra. 1095 (co-defendant's wife excluded, "it being a joint trespass and impossible to separate the cases of the two defendants in the account to be given of the transaction"); 1804, R. *v.* Locker, 5 Esp. 107 (conspiracy for procuring a ward to marry one of the defendants; the defendant-husband's wife, the ward, not admitted to exonerate the other defendants); 1826, R. *v.* Smith, Mood. Cr. C. 289 (burglary); 1830, R. *v.* Hood, ib. 281, 289 (assault); 1843, Hawkesworth *v.* Showler, 12 M. & W. 45 (joint trespass against S. and B.; the trespass by S. being clearly proved, S.'s wife was not allowed to exonerate B.; "where a person who is the defendant upon the record is entirely removed from it, whether by a judgment by default, or by a verdict pronounced in his favor, or by the jury not being charged with his interest at all at the time, in those cases, and in those only, his wife can be examined as a witness"); 1844, R. *v.* Bartlett, 1 Cox Cr. 105 (larceny; co-defendant's wife admitted, with hesitation, where "the defence of each is distinct"); 1847, R. *v.* Denslow, 2 id. 230 (horse-stealing; co-defendant's wife not admitted to prove alibi, because this would benefit the husband by impeaching the prosecutor); 1872, R. *v.* Thompson, 12 id. 202 (larceny; joint indictment and trial; wife of one excluded); 1895, Holley *v.* State, 105 Ala. 100, 17 So. 102; 1859, Collier *v.* State, 20 Ark. 36, 46; 1881, Casey *v.* State, 37 id. 67, 85; 1883, People *v.* Langtree, 64 Cal. 256, 30 Pac. 813; 1885, Trowbridge *v.* State, 74 Ga. 431, 434; 1898, Stephens *v.* State, 106 Ga. 116, 32 S. E. 13; 1898, Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250 (co-defendants jointly tried; wife of one, incompetent, unless the grounds of defence are distinct); 1888, Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65 (defendant's wife not admitted for co-defendant where defence was joint); 1858, Thompson *v.* Com., 1 Metc. Ky. 13, 15 (wife of co-indictee not on trial, admissible); 1861, Cornelius *v.* Com., 3 id. 481, 483 (same); 1849, State *v.* Worthing, 31 Me. 62 (wife of a co-indictee, not on trial, and defaulted, admitted); 1804, Com. *v.* Easland, 1 Mass. 15 (assault and battery; wife of co-indictee tried jointly, excluded); 1854, Com. *v.* Robinson, 1 Gray 555 (burglary; similar ruling); 1843, Pullen *v.* People, 1 Doug. Mich. 48 (wife of

§ 610. **Death and Divorce.** (1) If the one spouse is *deceased*, the other spouse is qualified to testify on behalf of the estate, the heirs, or any other person succeeding to the deceased's interests; because there is no living person interested to whom the witness bears the relation of spouse. The reason is thus not that "those feelings and influences, supposed to exist during the conjugal estate, have ceased,"[1] for they are quite as likely to remain; but merely that the rule of thumb founded on that supposed bias (*ante*, § 603) has ceased to be applicable:

1846, *Rogers*, J., in *Cornell* v. *Vanartsdalen*, 4 Pa. St. 364, 374: "It is somewhat difficult to understand how the point can arise, when her testimony is offered in favor either of the former husband or of his estate after his death. She may have a strong bias, it is true, but that goes to her credit and not to her competency. But in what respect public policy arising from the domestic relation forbids her to testify is not apparent to my mind."[2]

(2) For the same reason, one whose marital relation has been ended by *divorce* may be called on behalf of the divorcee.[3]

co-indictee tried separately, inadmissible); 1863, Morrissey *v.* People, 11 Mich. 327, 331, 341 (*contra*, for co-indictee tried jointly, under the statute of 1861; Manning, J., diss.); 1833, Com. *v.* Manson, Ashm. Pa. 32, 39 (wife of a co-defendant separately tried, admissible); 1821, State *v.* Anthony, 1 McC. S. C. 285 (wife of co-indictee, not on trial, admitted for the defendant); 1855, State *v.* Bradley, 9 Rich. 168, 171 (similar; but testimony that would criminate her husband was excluded); 1866, State *v.* McGrew, 13 id. 316; 1866, State *v.* Drawdy, 14 id. 87, 89 (like State *v.* Anthony); 1881, State *v.* Workman, 15 S. C. 540, 546 (wife of co-defendant on trial, not admitted); 1881, State *v.* Dodson, 16 id. 451, 460 (same); 1840, Moffit *v.* State, 2 Humph. 99 (wife of a co-indictee separately tried, held admissible); 1868, U. S. *v.* Addatte, 6 Blatchf. 76 ("when trials are separate, the wife may testify in favor of or against any one other than her husband, except in cases where the acquittal of one defendant works the acquittal of the rest, as in cases of conspiracy and the like"); 1854, Schoeffler *v.* State, 3 Wis. 823 (husband not admitted for wife's co-defendant jointly tried); 1874, Heath *v.* Keyes, 35 id. 668, 672 (wife of a nominal co-defendant; undecided); 1877, Stewart *v.* Stewart, 41 id. 624, 626 (wife of co-defendant, excluded unless the wife is otherwise competent for the husband specifically); 1896, Bartlett *v.* Clough, 94 id. 196, 201, 68 N. W. 875 (mechanic's lien; wife of co-defendant having same defence, excluded).

[1] 1876, Taliaferro, J., in Reilly *v.* Reilly's Succession, 28 La. An. 669, 670.

[2] *Accord:* 1808, Stanton *v.* Willson, 3 Day 37, 39, 55 (widow allowed to testify in suit by administratrix for services rendered by deceased husband); 1873, Deniston *v.* Hongland, 67 Ill. 265, 268 (widow allowed to testify for the heirs in a bill for specific performance of a contract to sell land to her deceased husband); 1858, Carpenter *v.* Dame, 10 Ind. 125, 128 (wife of deceased obligee in a bond, admitted for the heirs against the maker); 1876, Reil *v.* Reilly's Succession, 28 La. An. 669 (widow testifying against a claim of defendant against husband's estate); 1878, Leyman *v.* Levy, id. 745, 749 (husband testifying to decease wife's claim against himself); 1878, State Ryan, ib. 1176 (widow testifying against charged with murdering her husband); 186 Robinson *v.* Talmadge, 97 Mass. 171 (similar the next case); 1869, Litchfield *v.* Merritt, 1 id. 520, 524 (widow admitted for the husband executor suing on a debt to the husband 1872, Spradling *v.* Conway, 51 Mo. 51, (admitting a widow, in a proceeding for distribution of husband's estate); 1809, Jackson Bard, 4 John. 230, 233 (widow admitted suit to recover lands claimed through her husband); 1809, Jackson *v.* Van Dusen, 5 id. 1 158 (same); 1821, Harrison *v.* Burgess, 1 Hun 385, 393 ("after his death, she is as competent as any one"); 1833, Hester *v.* Hester, 4 D 228, 229; 1855, Stober *v.* McCarter, 4 Oh. S 513, 516 (widow may testify for husband's administrator as to the estate); 1846, Cornell Vanartsdalen, 4 Pa. St. 364, 373 (widow admitted for executor in action against him testator's debt); 1833, Capehart *v.* Huey, 1 H S. C. 407, *semble* (widow competent on a against husband's administrators); 1863, Mat e on *v.* Sergeant's Est., 36 Vt. 142, 1 *semble*; 1878, White *v.* Perry, 14 W. Va. 78 (widow admitted to prove *bona fides* husband's grant). *Contra:* 1871, Reeves Herr, 59 Ill. 81 (wife testifying for husband executor; but this ruling receives countenan from the careless wording of the statute); 18 William & Mary College *v.* Powell, 12 Gra 373, 382; 1882, Smith *v.* Bradford, 76 Va. 7 765; 1886, Mills *v.* Spencer, 81 id. 751, 755.

[3] 1850, Diekerman *v.* Graves, 6 Cush. 3 1838, Ratcliff *v.* Wales, 1 Hill N. Y. 63; 18 Wottrich *v.* Freeman, 71 N. Y. 601.

4. Exceptions to the Rule.

§ 612. **Necessity, as creating Exceptions at Common Law (Injuries to the Wife, Bailments, Account-books, etc.).** The rules of interest-disqualification always recognized certain exceptions founded on a supposed necessity (*ante*, § 576), *i.e.* the presumed impossibility, in specifically defined situations, of obtaining other witnesses; and this analogy was followed in recognizing certain exceptions to the marital disqualification.

(1) There was an exception of indefinite extent, chiefly confined to actions by the husband for *injury to the wife*.[1]

(2) There was, in a few jurisdictions, an exception for all cases in which the one spouse could have been admitted, by the necessity-exception to the Privilege rule, to testify *against the other*, *i.e.* the exceptions to the two rules were made identical.[2] As the two rules — that of disqualification and that of privilege — were utterly distinct both in reason and in scope, this attempt to assimilate the exceptions by a reversible rule of thumb was purely arbitrary and irrational, and received little recognition.

(3) Wherever the interest-disqualification suffered an exception on the ground of necessity, it would seem that the spouse of the interested person thus admitted became also admissible, — for example, to prove account-books by *suppletory oath*[3] or to prove the contents of *packages bailed and lost*.[4] This exception is hardly to be reconciled with the doctrine (*ante*, § 608) that the removal by statute of the interest-disqualification does not remove the marital disqualification; but consistency in the application of an artificial rule is hardly to be expected.

[1] Compare with these precedents the analogous exception to the Privilege rule, *post*, § 2239: 1694, Thompson *v.* Trevanion, Skinner 402 (wife's statements immediately upon an injury, receivable on the principle of the Hearsay exception, § 1718, *post*; here admitted for the husband suing in trespass for the battery); 1710, Anon., 11 Mod. 224 (husband's action for battery of wife; wife admitted); 1734, R. *v.* Reading, Lee cas. temp. Hardwicke 79 (filiation order charging defendant with a married woman's bastard; the woman held a sufficient sole witness to prove intercourse with defendant, "which is usually carried on with such secrecy that it will admit of no other evidence," but not to prove her husband's absence and non-access, "whereas this might be made to appear by other witnesses," and "there is no necessity that can justify her being an evidence"); 1752, R. *v.* Rook, 1 Wilson 340 (same); 1807, R. *v.* Luffe, 8 T. R. 193, 202 (same); as to this last series of precedents, compare the modern rule as to wife's testimony to *non-access*, *post*, § 2063. 1900, Cramer *v.* Hurt, 154 Mo. 112, 55 S. W. 258 (wife allowed to testify for husband in action for loss of services by defendant's malpractice, where the defendant took the stand); 1903, Turner *v.* Overall, — id. —, 72 S. W. 644 (fraud in securing a trust deed from the wife; husband admitted).

[2] Compare the corresponding necessity-exception under the Privilege rule, *post*, § 2239: 1844, State *v.* Neill, 6 Ala. 685 (wife admitted for the husband, on a charge of assaulting and beating her); 1882, Tucker *v.* State, 71 id. 342 (same); 1862, Com. *v.* Murphy, 4 All. 491 (similar); 1857, People *v.* Fitzpatrick, 5 Park. Cr. C. 26 (similar).

[3] 1845, Littlefield *v.* Rice, 10 Metc. 287, 290 (wife allowed to make suppletory oath to her husband's account-books kept in part by her).

[4] 1860, Illinois C. R. Co. *v.* Taylor, 24 Ill. 323 (here, to prove the contents of a lost trunk); 1871, Freeman *v.* Freeman, 62 id. 189, 191; 1876, Crane *v.* Crane, 81 id. 165, 171; 1877, Galbraith *v.* McLain, 84 id. 379, 383; 1846, McGill *v.* Rowand, 3 Pa. St. 451 (loss of goods by a carrier; plaintiff's wife's testimony to the contents, admitted; "the principle of necessity which alone enables a party under certain circumstances to prove the contents of a box or trunk applies with as much if not greater force to the wife as to the husband; the wife usually packs her husband's trunk and always her own"; no precedent cited).

For another similar exception, in one jurisdiction, on the ground of *agency*, see *post*, § 616.

§ 613. **Statutory Exceptions**: (1) **Joint Parties; Effect of Statute making Party Competent.** The exceptions carved out of the rule by statute are numerous, and vary markedly in the different jurisdictions. Certain exceptions, however, are common to several jurisdictions, and the judicial interpretation of them may be of service reciprocally.

(1) (*a*) Suppose the spouse offered as a witness to be *also a party*, and suppose a statute to have made parties competent, while leaving married persons incompetent or omitting to provide for them; which of these statutory provisions is to override the other? In most jurisdictions, it has been held, without further discrimination, that the statutory qualification of parties was absolute, and by implication made the spouse competent whenever entitled as a party to testify.[1] In some jurisdictions, a more narrow construction has been adopted, and the mere fact of being a nominal party not interested (otherwise if a real party in interest) was held not sufficient to qualify a spouse, on the ground that the interest-statute had not changed the position of such persons.[2] In a few other jurisdictions, a still narrower construction has been followed, by holding in effect that the statute qualifying parties did not entitle a spouse who was a party to testify at all; *i. e.* if both M and N were real parties in interest, neither could testify; but if M was a nominal party only, M could testify, because at common law (*ante*, § 607) M was competent; while N could not testify, because M, the other spouse, was a party in interest.[3] Thus is practised the sublimation of repu

[1] For all the statutes here involved, see *ante*, § 488; *Ark.*: 1881, Klenk *v.* Knoble, 37 Ark. 298, 302 (if also a party, the wife "*quoad hoc* might testify for herself"); 1891, R. Co. *v.* Amos, 54 id. 159, 163, 15 S. W. 362 (joint action for personal injuries; each competent for self alone); *Ill.*: 1892, Kusch *v.* Kusch, 143 Ill. 353, 357, 32 N. E. 267 (consequently, if a bill is dismissed against the wife, during the hearing, when the wife is called, she is incompetent); *Ind.*: 1872, Beunifield *v.* Hypres, 38 Ind. 498 (action by husband and wife against husband and wife for slander of the plaintiff wife; each wife allowed to testify as a party in interest; reviewing the prior differences of opinion in Carnie *v.* Murphy, 28 id. 88; Albaugh *v.* James, 29 id. 398; Crane *v.* Buchanan, ib. 570; Ward *v.* Colyhan, 30 id. 395; Mousler *v.* Harding, 33 id. 176; Newhouse *v.* Miller, 35 id. 463); 1874, Rogers *v.* Rogers, 46 id. 1, 4; 1876, McConnell *v.* Martin, 52 id. 434, 436; 1880, Clouse *v.* Elliott, 71 id. 302, 304; 1883, Sedgwick *v* Tucker, 90 id. 271, 279; *Vt.*: 1903, Hathaway's Will, — Vt. —, 53 Atl. 996 (the wife of the proponent of a will, held disqualified in probate proceedings; but not the wife of a legatee, who is herself as legatee joined as a party); *Wis.*: 1862, Barnes *v.* Martin, 15 Wis. 240, 246 (husband admitted, in action for wife's injuries); 1863, Hackett *v.* Bonnell, 16 id. 417, 476 (wife's separate property; husband admitted); 1866, Farrell *v.* Ledwell, 21 id. 182; 1877, Holmes *v.* Fond du Lac, 42 id. 282, 285; 1877, Getzlaff *v.* Seliger, 43 id. 297, 302; 1880, Kaime *v.* Omro, 49 id. 371, 372, 5 N. W. 838; 1882, Snell *v.* Bray, 56 id. 156, 160, 14 N. W. 14 (even where nominal party only); 1884, Hoverson *v.* Nok 60 id. 511, 514, 19 N. W. 382; 1885, Strong Stevens Point, 62 id. 255, 261, 22 N. W. 425

The same result was sometimes reached wh the witness was merely interested and thus to t extent qualified by statute: 1885, Strong Stevens Point, 62 Wis. 255, 262, 22 N. W. (admitting a wife for the husband suing as administrator for death of a child, the two be jointly interested, though she was not a part

[2] *Mo.*: 1872, Tingley *v.* Cowgill, 48 291, 296; 1872, Fugate *v.* Pierce, 49 id. 444; 1873, Buck *v.* Aahbrook, 51 id. 539; 18 Owen *v.* Brockschmidt, 54 id. 285, 288; 18 Charles *v.* R. Co., 58 id. 458, 461; 1874. Ha man *v.* Stowe, 59 id. 93, 95; 1875, Evers *v.* Ass'n, 59 id. 429, 433; 1875, Cooper *v.* Ord, id. 420, 430; 1877, Haerle *v.* Kreihn, 65 202, 206; 1879, Steffen *v.* Bauer, 70 id. 3 404 (nor is the witness confined to mat affecting his own interest); 1880, Joice *v.* Br son, 73 id. 28; 1882, Wood *v.* Broadley, 7 23, 34; 1885, Bell *v.* R. Co., 86 id. 599, (Steffen *v.* Bauer approved); 1889, Harring *v.* Sedalia, 98 id. 583, 589, 12 S. W. 342; 1 Layson *v.* Cooper, — id. —, 73 S. W. 472 mitting a wife as real party in interest, but merely as owner of property in controver *N. J.*: 1867, Metler's Adm'r *v.* Metler, 18 N Eq. 270, 276; *N. Y.*: 1867, Maverick *v.* R. 36 N. Y. 378, 380.

[3] *Va.*: 1874, Statham *v.* Ferguson, 25 Gr

sive quibbling, over a series of combinations which have no real relation to the witness' truth-telling probabilities in any of the situations.

(*b*) In a number of jurisdictions, the matter is made plain by expressly providing that husband and wife shall be competent "where they are *joint parties* and have a joint interest," or (sometimes) "a separate interest."[4] But this merely perpetuates the spirit of the vain distinctions of the common law.

§ 614. **Same: (2) Separate Estate.** It is sometimes provided that the one spouse shall be admissible for the other in trials "concerning the *separate estate* of the wife."[1] The common-law rule in this respect (*ante*, § 603) is thus directly abrogated.

§ 615. **Same: (3) Wife as if Unmarried.** It is often provided that the disqualification shall cease in cases where "the wife would *if unmarried* be plaintiff or defendant,"[1] — a clause which perhaps was intended to cover chiefly actions for injuries to or by the wife, but is in fact to-day of the large scope, if it is liberally interpreted.

§ 616. **Same: (4) Agents.** A very common exception is that which qualifies husband and wife wherever the transaction in issue was alleged to have been conducted by the wife as *agent* for the husband, or (sometimes) by either as agent for the other.[1] Under this clause, it seems to be proper

28, 34; 1882, Hayes *v.* Mutual Prot. Ass'n, 76 Va. 225, 227 (insurance policy); 1884, Burton *v.* Mills, 78 Va. 468, 470; 1886, Farley *v.* Tillar, 81 id. 275, 279 (sole trader); 1886, Perry *v.* Ruby, ib. 317, 323; 1886, Norfolk & W. R. Co. *v.* Prindle, 82 id. 122, 126 (personal injury); 1886, Lindsay *v.* McCormick, ib. 479, 481, 5 S. E. 534; 1887, Nicholas *v.* Austin, ib. 817, 825, 1 S. E. 132; 1888, Jones *v.* Degge, 84 id. 685, 688, 5 S. E. 799; 1890, Crabtree *v.* Dunn, 86 id. 953, 959, 11 S. E. 1053; 1891, Defarges *v.* Ryland, 87 id. 404, 406, 12 S. E. 805; 1891, Thomas *v.* Sellman, ib. 683, 687, 13 S. E. 146.

In *West Virginia* the same result was reached under a statute expressly preserving the marital disqualification: 1872, Wheeling *v.* Trowbridge, 5 W. Va. 353; 1877, Hill *v.* Proctor, 10 id. 59, 83; 1877, Rose *v.* Brown, 11 id. 122, 133; 1878, Campbell *v.* White, 14 id. 122, 148; 1880, Lawrence *v.* Dubois, 16 id. 443, 457; 1881, Zane *v.* Fink, 18 id. 693, 742; 1883, Anderson *v.* Snyder, 21 id. 632, 644. But in West Virginia this is now changed by St. 1882, c. 130, § 22.

[4] Compare also the analogous rulings under the Privilege rule, *post*, § 2235: *Kan.:* 1881, Jenkins *v.* Lewis, 25 Kan. 479, 481; 1889, Chicago K. & W. R. Co. *v.* Anderson, 42 id. 297, 21 Pac. 1059; *La.:* 1871, Keller *v.* Vernon, 23 La. An. 164; 1878, Willis *v.* Ward, 30 id. 1282; 1882, Shantz *v.* Stoll, 34 id. 1237; 1886, Beltran *v.* Gautbreaux, 38 id. 106, 111; 1888, Johnson *v.* Boice, 40 id. 273, 275; 4 So. 168; 1899, Watson *v.* Lyons, 51 id. 1697, 26 So. 440 (action by father for loss of services of child and on behalf of the child for latter's personal illness; wife held incompetent on the former issue alone; following Lapleine *v.* R. Co., 40 id. 661, 4 So. 875).

[1] The statute was applied in the following cases: *Ill.:* 1871, Northern Line P. Co. *v.* Shearer, 61 Ill. 263; 1872, Biggins *v.* Brockman, 63 id. 316, 320; 1873, McNail *v.* Ziegler, 68 id. 224; 1874, Anderson *v.* Friend, 71 id. 475; 1875, Hawver *v.* Hawver, 78 id. 412, 414; 1876, Davenport *v.* Ryan, 81 id. 218, 219; 1879, Pyle *v.* Ouatatt, 92 id. 209, 216; 1879, Funk *v.* Eggleston, ib. 515, 532; 1879, Mueller *v.* Rebhan, 94 id. 142, 148; 1882, Otis *v.* Spencer, 102 id. 622, 626; 1899, Pain *v.* Farsou, 179 id. 185, 53 N. E. 579; 1903, Cassem *v.* Heustis, 201 id. 208, 66 N. E. 283.

[1] The statute was applied in the following cases: *Ill.:* 1872, Mitchell *v.* McDougall, 62 Ill. 498, 506; 1872, Krebaum *v.* Cordell, 63 id. 23, 25; 1874, Anderson *v.* Friend, 71 id. 475, 477; 1875, Hawver *v.* Hawver, 78 id. 412, 414; 1878, Pigg *v.* Carroll, 89 id. 205; 1878, Marshall *v.* Peck, 91 id. 187, 190; 1879, Mueller *v.* Rebhan, 94 id. 142, 148; 1882, Otis *v.* Spencer, 102 id. 622, 626; 1883, Smith *v.* Long, 106 id. 485, 488; 1893, Francis *v.* Roadea, 146 id. 635, 642, 35 N. E. 232; *Ky.:* 1883, Wise *v.* Foote, 81 Ky. 10, 13; 1888, Howard *v.* Tenney, 87 id. 52, 55, 7 S. W. 547; 1892, Covington *v.* Geyler, 93 id. 275, 283, 19 S. W. 741; 1901, Smith *v.* Doherty, — id. —, 60 S. W. 380; 1902, Board *v.* Moore, — id. —, 66 S. W. 417.

[1] *Ark.:* 1899, American Expr. Co. *v.* Lankford, 35 C. C. A. 353, 93 Fed. 380 (interpreting the Arkansas statute); 1900, Gunter *v.* Earnest, 68 Ark. 180, 56 S. W. 876; *Ill.:* 1875, Trepp *v.* Barker, 78 Ill. 146; 1875, Hayes *v.* Parmalee, 79 id. 563; 1876, Robertson *v.* Brost, 83 id.

enough to hold that the person offered under it may also be the one to prove the agency which thus qualifies the witness.[2] This exception was instituted on the general principle of necessity (*ante*, § 612); and hence, in at least one jurisdiction, it is found developed as an original part of the common law.[3]

§ 617. Same: (5) Sundry Statutory Provisions. The further local variations of statute would be here unprofitable to examine in detail. The tenor of the statutes (*ante*, § 488) is usually sufficiently clear, and judicial interpretation seems to be needed in only casual instances.[1]

5. Statutory Abolition.

§ 619. Statutory Abolition of Interest-Disqualification does not include Disqualification of Spouse. Since the principle of the common law had fo

116, 118; 1884, Powell *v.* Powell, 114 Id. 329, 2 N. E. 162; *Ind. T.:* 1897, American Express Co. *v.* Lankford, 1 Ind. T. 233, 39 S. W. 817; *Kan.:* 1878, Fisher *v.* Conway, 21 Kan. 18, 23; 1887, Wichita & W. R. Co. *v.* Kuhn, 38 id. 104, 106; 16 Pac. 75; 1888, Pfefferle *v.* State, 39 id. 128, 130, 17 Pac. 828; 1888, Paulsen *v.* Hall, ib. 365, 369, 18 Pac. 225; *Mo.:* 1878, Williams *v.* Williams, 67 Mo. 661, 663; *Vt.:* 1861, Eastabrooks *v.* Prentiss, 34 Vt. 457; 1865, Orcutt *v.* Cook, 37 id. 515; 1868, Lunay *v.* Vantyne, 40 id. 501, 503; 1874, Bates *v.* Cliley, 47 id. 1, 7; 1888, Martin *v.* Hurlburt, 60 id. 364, 367, 14 Atl. 649; 1891, Pierce *v.* Bradford, 61 id. 219, 23 Atl. 637; 1892, Bates *v.* Sabin, ib. 511, 517, 24 Atl. 1013; 1896, Pingree *v.* Johnson, 69 id. 225, 39 Atl. 202; 1901, Farr *v.* Bell, 73 id. 342, 50 Atl. 1107.

[2] *Contra: Vt.:* 1897, Jenne *v.* Piper, 69 Vt. 497, 38 Atl. 147 (agency must first appear otherwise); *Mo.:* 1878, Williams *v.* Williams, 67 Mo. 661, 663; 1882, Wheeler & W. Mfg. Co. *v.* Tinsley, 75 id. 458, 459 (like Williams *v.* Williams). *Accord: Mo.:* 1893, Leete *v.* State Bank, 115 Mo. 184, 204, 21 S. W. 788 (repudiating Williams *v.* Williams, *supra*); 1899, Long *v.* Martin, 152 id. 668, 54 S. W. 473; 1901, Reed *v.* Peck, 163 id. 333, 63 S. W. 734 (approving Leete *v.* Bank and Long *v.* Martin).

[3] *Wis.:* 1862, Birdsall *v.* Dunn, 16 Wis. 235, 239 (on the analogy of the similar exception to the general rule of disqualification by interest); 1863, Hobby *v.* Wisconsin Bank, 17 id. 167, 169 (husband admissible to prove "the contract made by him as the agent of the wife, the receipt or payment of money, or other acts done by him within the scope of his agency"); 1865, Meek *v.* Pierce, 19 Id. 300, 302; 1867, Mountain *v.* Fisher, 22 id. 93, 97; 1872, Butts *v.* Newton, 29 id. 632, 640; 1872, O'Conner *v.* Ins. Co., 31 Id. 160, 167; 1874, Ainsworth *v.* Barry, 35 id. 134, 141; 1876, Menk *v.* Steinfort, 39 id. 370, 375; 1876, Hale *v.* Danforth, 40 id. 382; 1878, Chunot *v.* Larson, 43 id. 536, 538; 1878, Marsh *v.* Pugh, ib. 597, 600 ("probably she is a competent witness to prove the agency"); 1885, Meade *v.* Gilfoyle, 64 id. 18, 26, 24 N. W. 413; 1896, Hager *v.* Streich, 92 id. 505, 509, 66 N. W. 720; 1898, Goesel *v.* Davis, 100 id. 678, 76 N. W. 768.

[1] *Can.:* 1889, McFarlane *v.* R., 16 Can. Sup. 393 (assault on a peace officer; defendant's wife excluded); *Ill.:* 1895, Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 750 (admitting the husband for the wife, where she sues, after the statutory period of six months, for the penalty payable by one who wins in gambling, to any person suing); *Ky.:* 1899, Bright's Ex'rs *v.* Swinebroad, — Ky. —, 51 S. W. 578 (Civ. C. § 606 construed, as to one or the other, but not both, being admitted); 1903, s. c., 73 S. W. 1031; 1903, Williams *v.* Williams, — Ky. —, 71 S. W. 505 (under Civ. C. § 606, a husband is not admissible for the contestants of a will where his wife has already testified in her own interest on the same side); *N. H.:* 1899, Chase *v.* Pitman, 69 N. H. 423, 43 Atl. 617 (statute applied); *Vt.:* 1895, Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35 (wife admitted, where the husband was not a party); *Va.:* 1899, Ilsley *v.* Turner, 96 Va. 624, 32 S. E. 291 (statute applied); 1899, Crowder *v.* Garber, 97 id. 565, 34 S. E. 470 (statute 1897–8, applied); 1901, First National Bank *v.* Holland, 99 id. 495, 39 S. E. 126 (under St. 1897–8, deceased husband's declarations, made when free from debt, are admissible to prove gift to wife); *Wash.:* 1899, Speck *v.* Gray, 14 Wash. 589, 45 Pac. 143 (wife not admissible in crim. con. actions by husband); *Wis.:* 1900, Miller *v.* State, 106 Wis. 156, 81 N. W. 1020 (murder; defendant's wife excluded); 1903, Krainer *v.* State, — id. —, 93 N. W. 1097 (assault on I.; defendant's wife excluded). Under the *Michigan* clause as to "actions instituted in consequence of *adultery*," the following rulings have been made: 1870, Parsons *v.* People, 21 Mich. 509, 515 (statute does not exclude the wife in a criminal prosecution for adultery with her); 1880, Egbert *v.* Greenwalt, 44 id. 245, 247, 6 N. W. 654 (wife admitted for her husband in crim. con.; no question raised); 1882, Mathews *v.* Yerex, 48 id. 36, 12 N. W. 489 (wife not admissible for the husband in action for crim. con.); 1883, People *v.* Lovejoy, 49 id. 529, 531, 14 N. W. 485, *semble* (admissible in an action for enticement); 1884, Gleason *v.* Knapp, 56 id. 291, 294, 22 N. W. 8 (husband not admissible in his action for crim. con.); 1890, Carter *v.* Hill, 81 id. 275, 279, 45 N. W. 988 (same).

its basis the marital bias, and not the bias of interest in the event (*ante*, § 603), it followed that a statute making interested persons competent could not be construed to make married persons competent by implication. Ultimately, the ground of exclusion was the same, namely, the supposed danger of falsification; but, as specific rules, they rested on distinct sources of such danger, and hence their abolition would be required to be effected by distinct provisions. Such was the result reached by almost every Court before whom the question was raised.[1]

§ 620. **Statutory Express Abolition.** The statutes expressly abolishing the common-law marital disqualification speak usually for themselves with sufficient plainness; they have been already set forth in full (*ante*, § 488). From time to time, judicial declarations of their effect have been given, but, owing to the gradual changes of statute in each jurisdiction, these must be weighed in connection with the tenor of the contemporary statute.[1]

[1] *Eng.:* 1852, Barbat *v.* Allen, 7 Exch. 609; 1852, Stapleton *v.* Crofts, 18 Q. B. 367 (Erle, J., diss.); *Ark.:* 1877, Collins *v.* Mack, 31 Ark. 684, 688 (repudiating the *obiter dictum* in Magness *v.* Walker, 26 id. 470); *D. C.:* 1886, Holtzman *v.* Wagner, 16 D. C. 15; 1896, Foertsch *v.* Germuller, 9 D. C. App. 351, 356; *Ill.:* 1871, Mitchinson *v.* Cross, 58 Ill. 366, 368; 1882, Lincoln Ave. & N. C. G. R. Co. *v.* Madaus, 102 id. 417, 422; *Mass.:* 1857, Barber *v.* Goddard, 9 Gray 71; *Miss.:* 1859, Dunlap *v.* Hearn, 37 Miss. 471, 474 (overruling Lockhart *v.* Luker, 36 id. 68); *N. H.:* 1860, Kelley *v.* Proctor, 41 N. H. 139, 141; 1862, Smith *v.* R. Co., 44 id. 325, 334; *N. J.:* 1862, Handlong *v.* Barnes, 30 N. J. L. 69; 1862, Bird *v.* Davis, 14 N. J. Eq. 467, 478; 1865, Marshman *v.* Conklin, 17 id. 282, 288; 1865, Staats *v.* Bergen, ib. 293, 303; 1866, Cramer *v.* Reford, ib. 367, 383; 1868, Yetman *v.* Dey, 33 N. J. L. 32; *N. Y.:* 1853, Hasbrouck *v.* Vandervoort, 9 N. Y. 153, 161; 1868, Hicks *v.* Bradner, 2 Abb. App. Cas. 362; *N. C.:* 1869, Rice *v.* Keith, 63 N. C. 319; *Oh.:* 1859, Bird *v.* Hueston, 10 Oh. St. 418, 429; *S. C.:* 1881, State *v.* Workman, 15 S. C. 540, 546; *Tenn.:* 1871, Goodwin *v.* Nicklin, 6 Heisk. 257; *U. S.:* 1873, Lucas *v.* Brooks, 18 Wall. 436, 453; *Vt.:* 1832, Carr *v.* Cornell, 4 Vt. 116; 1852, Manchester *v.* Manchester, 24 id. 649; 1860, Cram *v.* Cram, 33 id. 15, 20; *Wis.:* 1866, Farrell *v.* Ledwell, 21 Wis. 182. *Contra: Ala.:* 1870, Robison *v.* Robison, 44 Ala. 227, 233; 1871, Miller *v.* State, 45 id. 24, 26; 1872, Johnson *v.* State, 47 id. 7, 33; 1872, Lang *v.* Waters, 47 id. 624, 636; 1873, Rowland *v.* Plummer, 50 id. 182, 193; 1874, Sumner *v.* Cooke, 51 id. 521; 1877, Chapman *v.* Holding, 60 id. 522, 533; 1888, Hussey *v.* State, 77 id. 121, 135; *Conn.:* 1850, Merriam *v.* R. Co., 20 Conn. 354, 363; 1854, Lucas *v.* State, 23 id. 18, 20; *Ind.:* 1879, Hutchason *v.* State, 67 Ind. 449; *Pa.:* 1870, Yeager *v.* Weaver, 64 Pa. 425, 427 (turning on the statute's peculiar wording).

[1] *Ark.:* Disqualification not abolished: 1877, Collins *v.* Mack, 31 Ark. 684, 688; 1878, Phipps *v.* Martin, 33 id. 207, 210; 1878, Berlin *v.* Cantrell, ib. 611, 621; *Conn.:* Disqualification not abolished in criminal cases: 1854, Lucas *v.* State, 23 Conn. 18, 20; *Fla.:* Disqualification abolished in criminal cases: 1894, Walker *v.* State, 34 Fla. 167, 169, 16 So. 80; *Ind.:* Disqualification entirely abolished: 1875, Brown *v.* Norton, 67 Ind. 424; 1879, Hutchason *v.* State, ib. 449; 1881, Robert: *v.* Porter, 78 id. 130, 133; *La.:* 1896, State *v.* Pain, 48 La. An. 311, 19 So. 138 (wife is inadmissible in criminal suits generally); *Miss.:* Disqualification entirely abolished: 1876, Rushing *v.* Rushing, 52 Miss. 329; 1876, Barry *v.* Sturdivant, 53 id. 490, 493; 1886, Ellis *v.* Alford, 64 id. 8, 12, 1 So. 155; 1894, Saffold *v.* Horne, 72 id. 470, 482, 18 So. 433 (giving a history of the legislation); *Nebr.:* Disqualification abolished: 1897, Smith *v.* Meyers, 52 Nebr., 70, 71 N. W. 1006; *Oh.:* Disqualification abolished for civil cases: 1881, Howard *v.* Brower, 37 Oh. St. 402, 404, 409; *Okl.:* Disqualification not abolished for civil cases: 1897, Nix *v.* Gilmer, 5 Okl. 740, 50 Pac. 131; *Pa.:* Disqualification abolished for civil cases: 1870, Yeager *v.* Weaver, 64 Pa. 425, 427; 1874, Ballentine *v.* White, 77 id. 20, 26; 1893, Evans *v.* Evans, 155 id. 572, 576, 26 Atl. 755; *W. Va.:* Disqualification abolished, except for spouse of disqualified survivor: 1889, Kilgore *v.* Hanley, 27 W. Va. 451, 454.

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS.

TOPIC IV: TESTIMONIAL KNOWLEDGE.

CHAPTER XXV.

A. GENERAL PRINCIPLES OF KNOWLEDGE.

1. Preliminary Distinctions.

§ 650. Observation, Opportunity to Observe, and Knowledge; their difference, and their practical sameness.

§ 651. Distinction between Experience and Knowledge.

§ 652. Knowledge may rest upon a Hypothetical Basis.

§ 653. Knowledge often a double element, including (1) a class of things, and (2) the thing to be classed.

§ 654. Burden of Proof of Knowledge Qualification.

§ 655. Same: Witness asked to specify the Grounds of his Knowledge.

2. Degree, Quality, and Sources of Knowledge.

§ 656. Judicial Phrasings of the Principle of Knowledge.

§ 657. (*a*) Knowledge must be founded on Personal Observation by the Senses, not on Hearsay.

§ 658. (*b*) Knowledge need not be Positive or Absolute; Admissibility of a "Belief," "Impression," "Opinion," or the like.

§ 659. (*c*) Knowledge must involve Rational Inferences from Adequate Data.

§ 660. Same: Inference of Identity of Person by Voice or Appearance; of Age from Appearance; of Chattels from their Qualities; Miscellaneous Instances of Inadequate Knowledge.

§ 661. Same: Testimony to another Person's State of Mind.

§ 662. Same: Improbabilities in Scientific Testimony.

§ 663. Same: Speculative Testimony to Personal Injuries and to Values.

§ 664. Negative Knowledge; Testimony that a Fact would have been Seen or Heard, had it occurred.

3. Hearsay Knowledge exceptionally admitted.

§ 665. (1) Official Records; (2) Scientific Instruments and Tables (Vacuum Rays, etc.); (3) Expert Learning founded on Books.

§ 666. (4) Execution and Contents of Documents not personally observed.

§ 667. (5) Testifying to one's Own Age; or (6) to Another Person's Name.

§ 668. (7) Conversations through an Interpreter.

§ 669. (8) Information received by Telephone.

§ 670. (9) Testimony of Deceased or Absent Persons under the Hearsay Exceptions.

4. Hypothetical Questions.

§ 672. General Theory.

§ 673. False Theory: "Usurping the Province of the Jury."

§ 674. Actual Observation not necessary; Hypothetical Presentation may be sufficient.

§ 675. Where Personal Observation is had, Hypothetical Presentation is Unnecessary.

§ 676. Where Personal Observation is lacking, Hypothetical Presentation must be used.

§ 677. Personal Observation is not necessary, when Hypothetical Presentation is used.

§ 678. The same Skilled Witness may testify from both Personal Observation and Hypothetical Presentation.

§ 679. Only Skilled Witnesses may be asked Hypothetical Questions.

§ 680. If the Premises fail, the Conclusion must be disregarded.

§ 681. Form and Scope of the Question; (1) Particularization of the Premises to be used; Questions based on Testimony in the Case.

§ 682. Same: (2) Kind of Data that may be assumed in the Question; not All the Facts, but Any Facts of which there is Evidence.

§ 683. Same: (3) Form of Question must be expressly Hypothetical.

§ 684. Hypothetical Questions on Cross-examination.

B. KNOWLEDGE REQUIRED FOR SPECIAL SUBJECTS.

1. Medical Matters.

§ 687. Physician's General Knowledge based on the Study of Books.

§ 688. Physician's Knowledge of Symptoms based on Hearsay of Patients and Others.

§ 689. Layman's or Physician's Acquaintance with a Person Insane or Diseased.

2. Foreign Law.

§ 690. Knowledge of Foreign Law as based on Study alone.

3. Reputation (of Character).

§ 691. Witness must expressly appear Qualified.

§ 692. Knowledge must be based on Residence in the Place of Repute, not on mere Inquiry.

A. General Principles of Knowledge.

1. Preliminary Distinctions.

§ 650. **Observation, Opportunity to Observe, and Knowledge; their difference, and their practical sameness.** It is obviously impossible to speak with accuracy of a witness' "knowledge" as that which the principles of testimony require. If the law received as absolute knowledge what he had to offer, then only one witness would be needed on any one matter; for the fact asserted would be demonstrated. When a thing is *known* to be, it *is*; and that would be the end of inquiry. A witness cannot be assumed beforehand, by the law, to know things; the most it can assume is that he thinks he knows. The law assumes that the matter is in truth of some particular complexion, but also realizes that to determine what its real complexion is the tribunal may have to listen to various persons; the statements of some of these it will reject, and of others it will accept. But from the persons to whom the tribunal will listen the law will attempt to require some qualification which will make them worth listening to. It will not presume to determine beforehand which witness is correct — *i. e.* which one really *knows* —, but it will ask that each one offered shall be one *prima facie* likely to know, — in short, shall have had *an opportunity of observing* what was or what happened and shall have *directed his attention* or observation to the matter. This is as far as the law can go. Accordingly, the rules upon the subject in hand are all concerned, not strictly with the witness' knowledge, but with his *opportunities of observing* and his *actual observation*. For example, if it is a

question of the aggressor in an affray, what the tribunal will ask for is, no persons who really *know* who the aggressor was, but persons who have bee so situated that they had an opportunity of observing and did observe th affair.

The practical tests, then, and the detailed rules, are in strictness concerne with observation and not with knowledge; they are satisfied by a likelihoo of the witness' having knowledge, and do not require a prior demonstratio of his actual knowledge. Nevertheless, as the ultimate aim often give name to the method, it may be said, roughly but sufficiently, that the qual fication here involved is Knowledge, — at least as distinguished from Exper ence, Sanity, and the other qualifications of capacity to know. Remembering then, that Observation is, accurately speaking, the required element, it wil be convenient to employ the commoner term Knowledge, as equivalent to i for purposes of discussion.

§ 651. **Distinction between Experience and Knowledge.** Observation o the matters to be testified to is an essential conception in the qualification of every witness without exception (*ante*, § 478). By Observation is mean that direction of attention which is the source of impressions, and thus o knowledge. The distinction between Experience (*ante*, § 558) and Observa tion is that the former concerns the mental power or capacity to acquir knowledge on the subject of testimony, while the latter concerns the actua exercise of the faculties upon the subject of testimony. Competency as a witness is inconceivable without the presence of both these elements. Th law of evidence must lay down some rules for the purpose of ensuring a actual observation of and knowledge about the matter in hand.

It is true that the distinction between Experience and Observation is some times lost sight of in the practical tests applicable to certain subjects of tes timony. For example, when a Court adopts the rule of thumb that farmer in the vicinity of a certain piece of land may testify to its value, it is ruling upon both these subjects; it is ruling that farmers are persons of sufficien experiential qualifications, and it is also ruling that persons in the vicinity have sufficient observation or knowledge of the general class of values in question and of the piece of land in question. Again, when a Court rules that a bank-cashier who has handled the kind of notes alleged to be counter feit may testify to the genuineness of the one in question, it is ruling that bank-cashiers are experientially qualified to form an opinion on the matter and it is also ruling that the handling of the notes sufficiently ensures obser vation or knowledge of the general type of note in question. In these in stances, as well as in others, the rule of thumb does not distinguish the two principles. But the practical convenience of such rules need not prevent us from recognizing that two distinct principles are involved, or that the two elements must always exist however obscured.[1]

[1] The following case illustrates the combination of the two: 1871, Clague *v.* Hodgson, 16 Minn. 339 (where questions were raised both as to the experiential qualifications of the witness and as to the fact of his examination of the sheep whose age was in controversy.

§ 652. **Knowledge may rest upon a Hypothetical Basis.** The direction of attention which constitutes the source of the knowledge will usually be made upon matters as they present themselves to the senses out of court. But the observation may also be directed to the same matter hypothetically placed before the witness in court. Thus, a physician may examine a patient at his home and observe certain symptoms, whence he reaches the conclusion that a fever exists; but the same symptoms may be stated to him by counsel in court, and he may then reach the same conclusion, and it will be receivable, except that it will rest upon the hypothesis that the symptoms stated to him actually existed. Here the direction of attention to the symptoms is that observation which the law requires before receiving his conclusion as to the nature of the disease; but in the one case the alleged symptoms are learned by his own senses and rest on his own testimonial credit, while in the other case they rest on the hypothesis that other persons will testify them to be true. In §§ 672–684, the theory of the hypothetical question and its detailed rules are examined in full.

§ 653. **Knowledge often a double element, including (1) a class of things, and (2) the thing to be classed.** In certain subjects the observation must be of a double sort. For example, a witness to the value of a horse must be acquainted with the value-standards for different classes of horses, and must also be acquainted with the particular horse to be valued. A witness to the genuineness of handwriting must be acquainted with the type or standard of the handwriting of the alleged writer, and must also see the disputed writing which he is to say does or does not belong to that type. A witness to the identity of a person, a voice, or anything else, must be familiar with the person or voice or other thing as to which the identity is asserted, and must also see or hear or otherwise perceive the thing to be identified with it. In short, wherever the subject of the testimony consists in classifying or identifying or testing or authenticating, the witness' observation necessarily involves two elements, (1) an observation of the class, type, or standard, and (2) an observation of the thing to be classified or identified. Both elements must be supplied in his testimony. Under the particular topics of testimony, the rules applying this principle may be examined.

It may be noted that here it is not uncommon to supply the second element by hypothetical presentation (*post*, § 672). Thus, in valuing the cost of a house's construction, the witness may have actual observation of only the value-standards of different sorts of houses, and then the features of the particular house to be valued may be placed before him by hypothetical description. So a witness to the identity of a murdered person with one J. S. may have had actual observation of J. S. but not of the body of the murdered man, and the latter element may be supplied by showing him a photograph assumed to be that of the deceased, and then verifying the photograph as that of the deceased.

§ 654. **Burden of Proof of Knowledge Qualification.** It has already been noted (*ante*, §§ 484, 497, 508, 560, 584), that in adults the general Mental

Capacity to testify is assumed, and need not be shown beforehand; and that the same is true of that capacity whose absence is indicated by the term Interest; while Experiential Capacity is not assumed, if the subject calls for special experience, and the possession of it must be made to appear beforehand. These differeuces are based on practical convenience and probabilities, for the probability is that the average witness will be sane (and thus sanity may be assumed), and the probability is that the average witness will not have special experience (and thus it cannot be assumed). Analogy would indicate, then, that since the probabilities are all against a particular person, out of all persons, having been one to observe the particular matter in hand, it cannot be assumed that he is one of the few admissible persons, and his qualifications as to observation, or knowledge, must be made to appear beforehand. Such is the generally accepted rule. The witness before he refers to the matter in hand, *must make it appear that he had the requisite opportunities to obtain correct impressions* on the subject, and the first questions put to him should be and usually are directed to laying this foundation:[1]

1870, *Morton*, J., in *Wetherbee* v. *Norris*, 103 Mass. 564, 566 (approving a ruling, in the trial Court's discretion, that a witness to reputation must be asked beforehand whether he knows the reputation): "The same principle is applicable to the examination of witnesses upon other subjects. It often occurs, in the trial of cases, that the judge is called upon to inquire of a witness whether he has knowledge of the matter of which he is called to testify. If it appears to be doubtful whether the witness understands and appreciates his duty to testify only to what he knows of his own knowledge, or if for any reason there is danger that he may testify to hearsay, it is the right and it may be the duty of the presiding judge to inquire of him if he has knowledge of the matter as to which he is asked to testify. . . . Whether the circumstances of this case required the preliminary question to be put was a matter within the judicial discretion of the presiding judge."

Where this preliminary inquiry is omitted, the opposing counsel cannot afterwards object to it as a technical violation of rules; this is usually placed on the theory that the knowledge may be presumed,[2] but it is more correct to place it upon the rule (*ante*, § 18) that a failure to make objection at the proper time is a waiver of the objection. Yet where the subsequent course of the examination develops a total lack of opportunity of knowledge, no doubt the testimony may be struck out, on the ground that the waiver was merely of the requirement of the preliminary burden of proof, and not of the substantial qualifications of the witness.

The importance of enforcing this general rule is illustrated in the fol-

[1] 1900, Cleveland T. & V. R. Co. *v.* Marsh, 63 Oh. 236, 58 N. E. 821 (whether a person was a trainman); 1899, Gorkow's Estate, 20 Wash. 563, 56 Pac. 385 (prior statement of qualifications may be required, in trial Court's discretion).

[2] 1874, Pearson *v.* Wheeler, 55 N. H. 41 ("Where nothing appears to the contrary it is to be presumed that what the witness stated was within his knowledge, and that his knowledge was derived from proper sources"); 1867, Field *v.* Tenney, 47 id. 513, 522; 1900, Glauber Mfg. Co. *v.* Voter, 70 id. 332, 47 Atl. 612; 1874, Fassin *v.* Hubbard, 55 N. Y. 471 (deposition; if knowledge would at least have been possible, from what appears, it may be presumed).

lowing passage, where the unsuccessful counsel was, in strictness, in the right:

1888, *Parnell Commission's Proceedings*, 36th day, Times' Rep. pt. 10, p. 18; the Irish Land League and its leaders being charged with complicity in certain crimes, particularly in the Phœnix Park assassination of 1882, certain of the known criminals testified that their body, the Invincibles, had received assistance-money from the League; it had turned out, on cross-examining one of them, that his testimony to the receipt of this money from the League officers was not based on his own knowledge at all, but merely on what he had heard from others; another of these persons was now asked on direct examination as follows: Sir *H. James:* "Tell me of your own knowledge whether you know of his receiving any money from the Land League"; Sir *C. Russell:* "My Lords, I would ask my learned friend to be particular as to that question 'of his own knowledge' after the experience we had of Delaney's evidence. 'Did he see any one pay him?' is the proper form of question"; Sir *H. James:* "I think not"; Sir *C. Russell:* "With great deference, my Lords, it is. We had a deliberate statement the other day in answer to a similar question put to a witness, 'Did you know this?' and 'Did you know that?' and, afterwards in cross-examination, it turned out that he did not know it of his own knowledge, but it was what had been told him. I want to guard against a repetition of that. The proper form of question as I submit is, 'Did he see any money paid?'" Sir *H. James* (to the witness): "You understand what I mean — do you know this of your own knowledge?" Sir *C. Russell:* "I am objecting to the form of the question"; President *Hannen:* "It is a very usual form of question." Sir *C. Russell:* "I respectfully say, in view of the reasons I have given, that the proper question is, 'Did he see any money paid?'" President *Hannen:* "I shall not interfere with the discretion of counsel in asking a question in a manner which is quite usual." Sir *C. Russell:* "I have pointed out the danger — the great danger — of putting the question in the form in which my learned friend is putting it." President *Hannen:* "Precisely so; and you have also shown where the safeguard lies, namely, in cross-examination."

§ 655. **Same: Witness specifying the Grounds of his Knowledge.** The party offering a witness may desire to make plain the strength of the witness' grounds of knowledge and the reasons for trustiug his belief. This is a legitimate purpose. But, in pursuing it, the witness often will naturally state circumstances which may give indirectly some unfavorable impressions against the opposite party, — as where the witness is asked, "What made you notice the defendant's features?" and replies, "Because he was the same man who stole my wagon last year." Or he may relate other persons' utterances which would be inadmissible as hearsay, but for their present utility. Nevertheless, on the principle of multiple admissibility (*ante*, § 13), the general rule is that the witness may on the direct examination state the particular circumstances which legitimately affected his knowledge or recollection, even though the fact would otherwise be inadmissible; the judge's instruction to the jury must be relied upon for preventing their improper use of the fact:

1856, *Green*, C. J., in *State* v. *Fox*, 25 N. J. L. 575, 602 (in fixing the recollection of a time, the remark of a neighbor was used; "she said, 'Perhaps the man I met on Thursday morning might have had something to do with it'"): "The evidence was not offered or admitted to prove the truth of the facts stated to the witness, but merely to show what it was that called the attention of the witness to a fact stated by her or that fixed the fact in her recollection. Whether the statement of the third person was true or false was

perfectly immaterial. The fact that the communication was made, and not its truth
falsity, was the only material point. The conversations were not hearsay, within t
proper meaning of the term."

1864, *Christiancy*, J., in *Angell* v. *Rosenbury*, 12 Mich. 241, 257: "It was very impo
tant, in determining the credit to be given to the witness' recollection, to know whet
any or what reason existed at the time to induce the witness to give particular attentio
to the appearance of the notes [then shown to him]. The value of his recollection wou
depend entirely upon the degree of attention with which he observed the facts and t
reasons which operated upon his mind to excite that attention and to fix the facts in h
memory. He should therefore have been allowed to state any facts which had that effec
whether relevant to the issue or not." [1]

2. Degree, Quality, and Sources of Knowledge.

§ 656. **Judicial Phrasings of the Principle of Knowledge.** Courts hav
often uttered in broad terms the general principle of the necessity of Ob
servation as a source of Knowledge. The following passages illustrate the
attitude:

1824, Mr. *Thomas Starkie*, Evidence, 79, 127: "To render the communication of fac
perfect, the witnesses must be both able and willing to speak or to write the truth. It
necessary that they should possess, in the first place, the means and opportunity
acquiring a knowledge of the facts. . . . A witness who states facts ought to state tho
only of which he has personal knowledge; and such knowledge is supposed, if n
expressly stated, upon the examination in chief; and upon cross-examination his mea
of knowledge may be fully investigated, and if he has not sufficient and adequate mea
of knowledge, his evidence will be struck out."

1820, *Henderson*, J., in *State* v. *Allen*, 1 Hawks 9: "The law requires that he wi
deposes to a fact should have the means of knowing it."

[1] *Accord:* 1895, Dickson *v.* Bamberger, 107 Ala. 293, 18 So. 290 (general principle, but too narrowly stated); 1876, Tomlinson *v.* Derby, 43 Conn. 562 (reasons for knowing that a highway-defect existed); 1895, Kendall's Ex'rs *v.* Collier, 97 Ky. 446, 30 S. W. 1002 (reasons for knowing handwriting); 1859, Dickenson *v.* Fitchburg, 13 Gray 556 (expert; general principle); 1864, Lincoln *v.* Mfg. Co., 9 All. 192 (same); 1878, Williams *v.* Taunton, 125 Mass. 40 (same); 1890, Hunt *v.* Boston, 152 id. 169, 25 N. E. 82 (same); 1896, Com. *v.* Bishop, 165 id. 148, 42 N. E. 560 (tha witness' reason for identifying defendant was that tha latter had come to him to be treated for a certain disease); 1897, Com. *v.* Kennedy, 170 id. 18, 48 N. E. 770 (identity of purchaser of poison); 1899, Leslie *v.* R. Co., 172 id. 468, 52 N. E. 542 (expert; general principle); 1902, O'Malley *v.* Com., 182 id. 196, 65 N. E. 30 (expert not allowed to state that his opinion was based on a consideration of sales not otherwise evidenced, without specifying them); 1864, Angell *v.* Rosenbury, 12 Mich. 241, 257 (whether notes produced were tha same as those shown to witness by plaintiff; reasons for noticing them particularly, allowed to be stated; quoted *supra*); 1868, Detroit & M. R. Co. *v.* Van Steinburg, 17 id. 99, 107 (to indicate the fixing of a witness' attention on the fact of a locomotive bell having been rung or not, the witness was allowed to say that it had been then talked of, but not to state that "people said that the bell was not rung"); 1895, Cole *v.* R. Co., 105 id. 549, 6 N. W. 647 (words uttered, admitted to show how a thing was remembered); 1900, Grenell R. Co., 124 id. 141, 82 N. W. 843 (similar); 1879, O'Hagan *v.* Dillon, 76 N. Y. 170, 17 (a witness testifying to the hanging of a lam at the place where an injury occurred, allowed t be asked: "Is your recollection refreshed, o your attention called to that from any circum stance, any accident that happened there?") 1865, Howser *v.* Com., 51 Pa. 341 (that th witness on arriving home had told to her par ents what she had heard and seen, and tha they replied, allowed); 1903, State *v.* Nagle — R. I. — , 54 Atl. 1063 ("Whenever th opinion of a person is deemed to be relevant, the grounds on which such opinion is based ar also deemed to be relevant"; here, of experi ments with a pistol as to the appearances o wounds).

Compare a similar use of hearsay utterance to *identify a time, place,* or *person* (*ante,* § 416), to *corroborate a witness* (*post,* § 1129), and t exhibit the grounds of a *physician's opinion* (*post,* § 1720), or other *experts' opinions* (*ante,* § 562). The theory of the Hearsay rule on this point is dealt with *post,* § 1791. For *cross-examination to impeach the witness'* sources of knowledge, see *post,* §§ 991–995, *ante,* § 463.

1863, 1875, *Campbell*, J., in *Evans* v. *People*, 12 Mich. 35, and *Elliott* v. *Van Buren*, 33 id. 52: "The primary rule concerning all evidence is that personal knowledge of such facts as a Court or jury may be called upon to consider should be required of all witnesses, where it is attainable. . . . No one can be allowed to prove what he has never learned, whether it be ordinary or scientific facts."

1870, *Doe*, J., in *State* v. *Pike*, 49 N. H. 413: "A witness cannot testify that in his opinion the defendant was sick, or well, without first showing that he had an opportunity of forming an opinion from facts observed by himself."

§ 657. (*a*) **Knowledge must be founded on Personal Observation by the Senses, not on Hearsay.** The first corollary from the general principle of Knowledge is that what the witness represents as his knowledge must be an impression derived from the *exercise of his own senses*, not from the reports of others, — in other words, must be founded on personal observation. This general rule, to which contrary instances can be only casual exceptions, has long been recognized as fundamental:

1359, *Thorpe*, C. J., in Y. B. 23 Ass. pl. 11: "Witnesses must testify to nothing except what they are certain of, that is, what they have seen or heard."

1441-2, *Newton*, C. J., in Y. B. 20 H. VI., 20, 16 (the essoiner was sworn to say whether his principal was in the service of the king, and he said that he was so informed, but he did not dare to say expressly that he was in the king's service): "The essoiner is sworn, and he is not willing to say that the principal is in the service of the king. The statute runs that the essoiner *testetur in curia*; but this is not testifying."

1656, *Bushnell's Trial*, 5 [illegible]t. Tr. 633, 641; *Bushnell*, arguing: "William Pinchin acknowledges himself to be present, and yet he swears [to my unlawful act at Box] as if he had been at Box. I am not so much a lawyer as to know how far forth an oath will extend, or to what it will amount, if a man depose nothing but what he hath received by hearsay. . . . 'He is a false witness, not only he who tells a lie, but also he who testifies a truth whereof he hath not a certain and undoubted knowledge, — that is, if he testify that which he hath neither seen nor heard nor [illegible]th had any experience of.' Which I speak . . . only to evidence thus much unto thee, that, be it true or be it false, yet William Pinchin could be no competent witness of it, because by his own confession he was at the same time at another place about four or five miles off."

1670, *Vaughan*, C. J., in *Bushel's Case*, 6 id. 999, 1003, Vaughan 135 (noting the difference between a juryman and a witness): "A witness swears but to what he hath heard or seen, — generally or more largely, to what hath fallen under his senses."

1696, *Holt*, L. C. J., in *Charnock's Trial*, 12 id. 1454 (to the jury): "But then, gentlemen, as to what they [the accused] say, that the witnesses do testify by hearsay, — that is not evidence, but what they know themselves, or heard from the prisoners. . . . But whatsoever evidence has been given of any fact done within the witness' own knowledge, . . . that you are to take notice of as good evidence and consider of it."

Ante 1726, Chief Baron *Gilbert*, Evidence, 152: "The attestation of the witness must be to what he knows, and not to that only which he hath heard, for a mere hearsay is no evidence; for it is his knowledge that must direct the Court and jury in the judgment of the fact, and not his mere credulity, which is very uncertain and various in several persons; for testimony being but an appeal to the knowledge of another, if indeed he doth not know he can be no evidence."

1726, *Ayliffe*, Parergon, p. 540: "Testimony or evidence ought first of all to be given and founded on some principal corporeal sense of their own, according to the nature and quality of the fact, as on their sight, hearing, touching, tasting, or smelling; and not on the corporeal sense of another person. . . . And thus witnesses ought to depose appositely *de proprio suo sensu*, and not *de sensu alieno*."

Upon this principle, the testimony of one claiming to have knowled has constantly been rejected, when it appeared that he had lacked pe sonal observation.[1]

This objection to testimony, however, must be distinguished from the o jection based on the so-called Hearsay rule. Under the present principl the law declines to accept a witness X's statement (for example) that h knows A struck B, because it appears that X had no personal observatio but received his impressions from others' information. But if X were testify, "Y told me that A struck B first,' then he would appear to kno sufficiently the fact of Y's making the assertion, and the question then b comes whether Y's assertion, thus proved, is admissible. Then it is that th Hearsay rule rejects the proof of X's assertion as a statement untested b oath and cross-examination. In other words, so long as it is attempted t argue directly from the witness X's statement to the striking of B by A, th question is one of the sufficiency of X's knowledge; it is only when th assertion of Y, a person not in court, is put forward testimonially that w are concerned with the Hearsay rule in the strict sense. The distinction i more fully examined elsewhere (*post*, § 1361).

The exceptional cases, under the present principle, when knowledge founde on hearsay may suffice, are later considered (*post*, §§ 664–670).

[1] 1543, Rolfe *v.* Hampden, Dyer 53, *b* (two of the witnesses to a will "deposed upon the report of others," "but the jury paid little attention to the testimony aforesaid"; but this was merely an instance of the old practice for attesting witnesses, noted in Thayer, Prelim. Treat. on Evid. 97); 1881, R. *v.* Budge, 20 N. Br. 531 (surveyor's measurement of a street, between places pointed out to him by B., who was not called, excluded); 1849, Scales *v.* Desha, 16 Ala. 317 (purpose of discounting a note); 1901, Central Coal & Coke Co. *v.* Henry Shoe Co., 69 Ark. 302, 63 S. W. 50 (witness to the amount of timber cut); 1902, Trulock *v.* State, 70 id. 558, 69 S. W. 677 (testimony to the authenticity of a cartridge, based on what somebody told the witness excluded); Cal. C. C. P. 1872, § 1845 ("A witness can testify of those facts only which he knows of his knowledge, that is, which are derived from his own perceptions"); 1881, People *v.* Wreden, 59 Cal. 394; 1874, Selma, R. & D. R. Co. *v.* Keith, 53 Ga. 181 (calculations of another person); 1874, Southern Life Ins. Co. *v.* Wilkinson, ib. 546; 1892, Lamar *v.* Pearre, 90 id. 377, 17 S. E. 92 (the witness testified that she knew where the money for a purchase came from, yet admitted that at the time of the purchase she was too young to know this); 1884, Perry *v.* Burton, 111 Ill. 143 (knowledge from orders to an agent); 1852, Brooks *v.* Hazen, 3 G. Greene, 554; 1858, Williams *v.* Soutter, 7 Ia. 444; 1898, Lacy *v.* Kossuth Co., 106 id. 16, 75 N. W. 689 (whether a person was able to pay a bill; testimony by persons who had "made investigations and inquiries," admitted); 1879, Conely *v.* McDonald, 40 Mich. 152; 1889, Hoffman *v.* R. Co., 40 Minn. 60, 41 N. W. 301; 1866, Sherwood *v.* Houston, 41 Miss. 63 (knowledge by hearsay that M. was indebted to the heirs of P.); 1883, Chicago R. Co. *v.* Provine 61 id. 292 (book-entries); 1844, Chouteau *v.* Searcy, 8 Mo. 736; Mont. C. C. P. 1895, § 312 (like Cal. C. C. P. § 1845); 1903, Quimby *v.* Ayers, — Nebr. —, 95 N. W. 464 (witness who had merely examined the probate records, held not qualified to testify to the insolvency of a decedent's estate); 1903, Donner *v.* State, — id. —, 95 N. W. 40 (identifying a shipment of cattle received as from a certain consignor; a weighmaster in the receiving yard, not allowed to testify to the consignor's identity from merely seeing the car-number entry in certain books kept by others); 1860, Rich *v.* Eldredge, 42 N. H. 158 (book entries); Or. C. C. P. 1892, § 682 (like Cal. C. C. P. § 1846); 1867, Wood *v.* Sawyer, Phillips 276; 1874, Woodward *v.* State, 4 Baxt. 324 (the witness heard a shot and saw a man running, and when he learned that W. had made threats against the deceased he thought the man running must be W.; excluded); 1881, Houston & T. C. R. Co. *v.* Burke, 55 Tex. 339; 1888, Gilbert *v.* Odum, 69 id. 673, 7 S. W. 510; 1895, Texas & P. R. Co. *v.* Reed, 88 id. 439, 31 S. W. 1058 (witnesses testifying without knowledge as to a foreman's authority over railroad hands). The following ruling is peculiar, and rests on the principle of § 654, *ante:* 1857, Willey *v.* Portsmouth, 35 N. H. 308 (the witness said that the place at which W. fell was within the highway; but he was not present when W. fell; held, that as he might have learned of the place's identity by admissions of the party's or otherwise in an adequate way, the answer was proper).

§ 658. (*b*) **Knowledge need not be Positive or Absolute; Admissibility of a "Belief," "Impression," "Opinion," or the like.** The second corollary of the general principle of knowledge is that the result of the witness' observation *need not be positive or absolute knowledge.* Such a degree of certainty cannot be demanded, even in theory (*ante*, § 650); it suffices if he had an opportunity of personal observation and did get some impressions from this observation. But in the attempt to name this quality of knowledge which suffices, the terms available are so loose and indefinite that other principles come naturally to introduce confusion. If positive knowledge is not required, does an "impression" or "belief" or "opinion" suffice? Here the operation of four different principles must be distinguished, because such terms may be criticised from the point of view of all four:

(1) "Belief" or "impression" may signify merely the *degree of positiveness of his original observation* of the facts. The witness may have had actual observation of the matter in hand, but the result may have been a not very definite or positive impression; for example, he saw a man and "thought" that it was the accused. In such cases there is no legal objection whatever to receiving such impression as the witness gained from his observation. In other words, the degree or quality of his knowledge, so far as there was actual personal observation by him, is no ground of objection.[1]

(2) "Belief" or "impression" may signify the *degree of positiveness of the witness' recollection; i. e.* may signify that he obtained entirely clear and positive impressions at the time, but that since then his memory has faded, and his recollection to-day is so weak that he is not able to call it more than an "impression" or to say more than "I think." The deficiency comes merely in the quality of his recollection. Here again, the law makes no objection on such grounds. It welcomes whatever quality of recollection he is able to bring. In general, then, where there has been actual observation, the quality of the impression received at the time and the quality of persistence of that impression are no grounds of objection; for the simple reason that Courts must accept the facts of human nature and must not insist on what they cannot fairly expect.

(3) "Belief" or "impression" may signify a *lack of actual personal observation;* when this is the case, the main principle (§§ 656, 657, *ante*) excludes such testimony. The shades of meaning in such expressions are often elusive; but if the present meaning appears, there is no question of the judicial attitude against admission:

1820, *R.* v. *Dewhurst*, 1 State Tr. N. s. 529, 590; Mr. *Raines* (cross-examining): "Upon your oath, did you not see something very like that which I have read to you?"; *Witness:* "I cannot recollect"; Mr. *Raines:* "Will you swear you do not believe what I have read to you?"; *Bayley*, J.: "It must be belief from recollection"; Mr. *Raines:* "I should

[1] The authorities on this point are examined in dealing with Recollection (*post*, § 728); because, though the principles are well settled, the rulings do not always distinguish the exact objection involved, and must therefore be marshalled in one place. The rulings in the ensuing note of the present section are only those in which it is clear that the objection was based on a lack of actual personal observation.

have thought it was a legitimate question capable of being answered"; *Bayley, J.*: "it admits of a legitimate answer. It may not; because he might say 'I believe it, becau I have heard people say so.'"

1810, Chief Justice *Swift*, Evidence, 111: "A witness must swear to facts within knowledge and recollection, and cannot swear to mere matters of belief."

1820, *Henderson, J.*, in *State* v. *Allen*, 1 Hawks 9: "The law requires that he w deposes to a fact should have the means of knowing it. Grounds of conjecture a opinions are not sufficient."

1839, *Weston, C. J.*, in *Clark* v. *Bigelow*, 16 Me. 247: "'Impression,' though it m convey the idea of a certain degree of recollection, is an equivocal term. It may ha been derived from the information of others, or from some unwarrantable deduction the mind from premises not well established, . . . [in which case] it cannot in our jud ment be safely or legally received."

1856, *Goodenow, J.*, in *Lewis* v. *Brown*, 41 Me. 451: "In general, the opinion of a w ness is not evidence; he must speak of facts. It may have been derived from so unwarrantable deduction of the mind, from premises not well established."

1859, *Sawyer, J.*, in *State* v. *Flanders*, 38 N. H. 332: "An impression may mean understanding or belief of the fact as derived from some other source than personal o servation, — as the information of others"; and this would be not admissible.

1877, *Brickell, C. J.*, in *Wood* v. *Brewer*, 57 Ala. 517: "A witness generally must dep to facts within his knowledge, and cannot be permitted to testify upon mere conjectu or belief."

What the Courts repudiate, then, is a mere guess, an exercise of the imagi tion, a suspicion, a conjecture, offered in place of the result of actual perso observation; it is from this point of view only that a "belief" or "opinio or "impression" is not to be received.[2]

(4) A "belief" or "impression" or "opinion" may, though otherwise a

[2] In the following rulings the testimony was excluded, except where otherwise stated: 1821, Redford *v.* Birley, 1 State Tr. N. s. 1071, 1171 (battery in dispersing a mob; Evans: "Do you believe there was [anybody cut]?"; disallowed; Holroyd, J.: "You must get that fact from a witness who saw the wound inflicted"); 1882, McDonald *v.* Jacobs, 77 Ala. 525, 527 ("reasons for belief" not amounting to personal knowledge); 1850, Jordan *v.* Foster, 11 Ark. 142 ("opinion" as a mere guess): 1886, Tait *v.* Hall, 71 Cal. 152, 12 Pac. 391 ("impression" of conduct, based on a guess from other acts); 1831, Bank *v.* Brown, Dudley Ga. 62, 65 ("The belief or persuasion of a witness cannot be received as evidence, unless it rests upon a sufficient legal foundation"); 1868, Macon & W. R. Co. *v.* Johnson, 38 Ga. 436 ("opinion," here based on inference, not sight; but admitted upon the facts); 1891, Terr. *v.* McKern, 2 Ida. 759, 26 Pac. 123 ("thought" the defendant received an object from another person, but didn't see it); 1834, Jones *v.* Chiles, 33 Ky. 33 (the witness "understood" that a certain possession existed); 1893, Lovejoy *v.* Howe, 55 Minn. 353, 354, 57 N. W. 57 (impression based on something heard, not on knowledge); 1846, Tibbetts *v.* Flanders, 18 N. H. 292 (understood); 1864, Kingsbury *v.* Moses, 45 id. 225 (impression); 1873, Higbie *v.* Ins. Co., 53 N. Y. 604 (by a physician, "an impression sufficient to satisfy his own mind, but not enough to h a medical opinion upon"); 1895, State *v.* Ly 117 N. C. 799, 23 S. E. 476 ("I met a l chunky man; it was dark; he had his back me; I took him to be L.," held admissible; only judged it was L. from the fact that I l heard he had gone up the road that day," h inadmissible); 1898, Farmers' Bank *v.* Sali 33 Or. 394, 54 Pac. 190 (one who had means observation allowed to state his "understa ing" as to the membership of a firm; " understanding was not based upon hearsay e dence"); 1839, Carmalt *v.* Post, 8 Watts (impression); 1860, Duvall's Ex'r *v.* Darby, Pa. 59 (same); 1900, Endowment Rank *v.* All — Tenn —, 58 S. W. 241 (physician's te mony that "he thought" deceased took overdose of medicine, excluded as "a mere c jecture"); 1879, Atchison R. Co. *v.* U. S., Ct. Cl. 141; Patten *v.* U. S., ib. 290 (the e mates of experts, roughly fixing a percentage gross cost or earnings as representing a cert element of the total, were rejected and the ite were carefully reckoned); 1896, Crane Co. Columbus Const. Co., 20 C. C. A. 233, 73 F 984 (an estimate of the cost of pipe-layi "mere guesses, prepared without perso knowledge of the facts," excluded). Comp the cases cited *post*, § 728, admitting testimo of "impressions."

missible, be obnoxious to the Opinion rule, because all the data on which it is founded may be capable of being stated fully by the witness to the jury, and thus his inferences from them become superfluous. The operation of this rule is examined in detail elsewhere (*post*, §§ 1962, 1969).

§ 659. (*c*) **Knowledge must involve Rational Inferences from Adequate Data.** The third corollary of the general principle of Knowledge (*ante*, § 656) is that the witness' knowledge (assuming it to be based on personal observation) must not appear to *lack adequate data as its basis of inference*. For example, when Sherlock Holmes tells his companion that the neatly dressed person who is seen passing on the street is a banker, the father of six children, and a German by birth, the ordinary intelligence will not credit a statement based on such apparently invisible data (or would not credit it from any one but the celebrated detective). Yet if a man passed by in working clothes daubed with lime and brickdust, the ordinary intelligence would admit that any observer had the right to assert positively that the man was a bricklayer. Thus it is that the law may reject testimony which appears to be founded on data so scanty that the witness' alleged inference from them may at once be pronounced absurd or extreme. The law denies to the witness the right, on such data, to assert that he knows.

This principle, however, sound as it is in theory, can seldom have frequent application. When the source of knowledge is so insufficient, Courts will rarely need to pronounce the formal exclusion of the testimony. Its weakness is self-exhibited. The risk of excluding a useful though small item of testimony is greater than the risk of admitting testimony capable of exaggeration. Cross-examination will usually furnish the exposure.

§ 660. **Same: Inference of Identity of a Person by Voice or Appearance; of Age from Appearance; of Chattels from their Qualities; Miscellaneous Instances of Inadequate Knowledge.** In the application of the foregoing principle, Courts have shown no tendency to follow a narrow policy of exclusion. In most of the instances it needs no argument to perceive that the testimony was at least worth receiving. It has been properly held, for example, that a witness may testify to a person's *identity* from his *voice* alone,[1] or from observing his *stature, complexion, clothing*, or other marks,[2] or

[1] 1660, Hulet's Trial, 5 How. St. Tr. 1185, 1187 (Counsel: "Did you mark the proportion of his body, or his habit, what disguise he was in?"; Witness: "He had a pair of freeze trunk breeches, and a vizor, with a grey beard"; Defendant: "I desire to know of him how he comes to know that I was there at that time?"; Witness: "By your voice"); 1692, Harrison's Trial, 12 id. 846, 850, 861, 862; 1806, The Threshers' Trial, 30 id. 197, 198, 204, 222; 1805, Picton's Trial, ib. 245; 1874, R. v. Castro (Tichborne Case), Charge of Cockburn, C. J., 4 *ff.*; 1895, Fussell v. State, 93 Ga. 450, 21 S. E. 97 (a voice heard in the darkness); 1903, Patton v. State, 117 id. 230, 43 S. E. 533 (witness to a voice, held not well qualified on the facts); 1895, Deal v. State, 140 Ind. 354, 39 N. E. 930; 1890, Ogden v. Illinois, 134 Ill. 599, 25 N. E. 755; 1901, State v. Herbert, 63 Kan. 516, 66 Pac. 235; 1870, Com. v. Williams, 105 Mass. 67 (hearing the voice only once before); 1884, State v. Hopkirk, 84 Mo. 288 (voice and motion); 1874, Brown v. Com., 76 Pa. 319, 328, 338 (one who carries on a conversation through the soil-pipe of a prison or through a speaking-tube may form an opinion as to the identity of the person speaking with him; here the witness was familiar with the speaker's voice).

For the cases admitting the sound of a *voice as circumstantial evidence*, see *ante*, § 222.

For identification by voice on the *telephone*, see *post*, § 669.

[2] 1830, R. v. Shaw, 1 Lew. Cr. C. 116 (mur-

from the sight of the person's photograph;[3] and that a witness may testi to a person's *age*[4] or *intoxication*[5] merely from his appearance. So, t *chattels* may be *identified* by their appearance and other qualities.[6] In su dry other instances the principle may need to be applied.[7] It may noted that of course the law does not refuse testimony based on *artifici experimentation*, merely as such.[8]

§ 661. **Same: Testimony to Another Person's State of Mind.** The arg ment has been made that, because we cannot directly see, hear, or feel t state of another person's mind, therefore testimony to another person's sta of mind is based on merely conjectural and therefore inadequate data. Th

der; "a witness was called to prove comparison of shoes and shoe-marks; Parke, J., asked him if he had looked at the soles of the shoes and examined them with the footmarks *before* he put the shoe in the mark; the witness answered in the negative. Parke, J., desired the jury to reject the whole inquiry relating to the identification by shoe-marks"); 1882, Beale v. Posey, 72 Ala. 332 (mode of walking); 1902, Trulock v. State, 70 Ark. 558, 69 S. W. 677 (mode of walking); 1881, State v. Lucas, 57 Ia. 502, 10 N. W. 868 (a peculiar shrugging of the shoulders); 1872, State v. Woodruff, 67 N. C. 91 ("The law allows persons to testify to such identity or to such resemblance who have had an opportunity of seeing such persons, if but for an instant"); 1895, State v. Lytle, 117 N. C. 799, 23 N. E. 476 ("I judged it to be L. from his chunky build," held admissible); 1885, Lipes v. State, 15 Lea 125 (any person who had seen the defendant's feet, allowed to testify to their peculiarities).

For *identification in general*, see *ante*, § 413.

For the *opinion rule*, as applied to identity, see *post*, § 1977.

For the privilege against *self-crimination*, as applied to *compulsory identification* by voice or foot-measure, see *post*, § 2265.

[3] 1883, Brooke v. Brooke, 60 Md. 529, 533; 1886, Marion v. State, 20 Nebr. 240, 29 N. W. 911.

For the use of *photographs to identify*, see also *post*, § 792.

[4] 1875, Benson v. McFadden, 50 Ind. 433; 1896, State v. Bernstein, 99 Ia. 5, 68 N. W. 442 (selling liquor to a minor).

For the inference to *age from appearance* as circumstantial evidence, see *ante*, § 222.

For inference from a child's *resemblance* to its *paternity*, see *ante*, § 166.

For the *exhibition* of a person *to the jury*, as evidencing his *age* or *paternity*, see *post*, § 1154.

[5] 1878, Aurora v. Hillman, 90 Ill. 61.

For other ways of evidencing *intoxication*, see *ante*, § 235.

[6] 1887, State v. Rainsberger, 74 Ia. 204, 37 N. W. 153 (identification of a buggy by its rattle, allowed); 1873, Com. v. Aaron, 114 Mass. 255 (seeing sales of liquor which the witness supposes was whiskey and ale; admitted); Com. v. Dowdican, ib. 257 (seeing liquor which "looked like" whiskey, admitted); 1902, Ainsworth v. Lakin, 180 Id. 397, 62 N. E. 7 (identification of a wagon by its rattle, allowe

[7] 1852, Nolin v. Parmer, 21 Ala. 71 (a s veyor's knowledge of land); 1895, People Chin Hane, 108 Cal. 597, 41 Pac. 697 (t a pistol-shot sounded as though fired insi a building, admitted); 1859, Babcock v. Ban 28 Conn. 306 (knowledge of another's pecunia condition); 1894, Carter v. Carter, 152 Ill. 4 28 N. E. 948, 38 N. E. 669 (testimony to unseen adultery, from sounds heard in an a joining room, admitted); 1864, Messer v. Regi niter, 32 Ia. 313 (surveyor's knowledge of lan 1852, Rich v. Jones, 9 Cush. 337 (goods e amined by an expert had not been identified the plaintiff's); 1866, Hamilton v. Nickerso 13 All. 352 (usage of trade; "such knowled of the practice and course of business as create the belief or conviction of its existence "witnesses who had active and constant e perience of the manner in which the tra was conducted in relation to the matter controversy"); 1872, Com. v. Pease, 1 Mass. 412 (knowledge of the mode of maki an established article several years before 1891, Lynch v. Moore, 154 id. 335 (habits of horse); 1880, State v. Reitz, 83 N. C. 635 (t defendant had lived with the witness three four weeks and had worn an old pair of boots his, twisting them out of shape in using them knowledge of the type of footprints held su cient); 1835, Burns v. Welch, 8 Yerg. 1 (capacity of a saw-mill); 1874, Albright v. C ley, 40 Tex. 113 (basis for estimating the nu ber of cattle in a range); 1898, Northern P. Co. v. Hayes, 30 C. C. A. 576, 87 Fed. 1 (how fast a train was going, by one who w struck by it from behind but did not see it; e cluded); 1849, Hopper v. Com., 6 Gratt. 6 (identity of a garment). The application of t principle should be left to the *determination the trial Court*: 1888, Stillwell Mfg. Co. Phelps, 130 U. S. 527, 9 Sup. 601; 1890, Mo tana R. Co. v. Warren, 137 id. 353, 11 Sup. 9

[8] 1886, Citizens' Gaslight Co. v. O'Brien, 1 Ill. 180, 8 N. E. 310; 1869, Swett v. Shumwa 102 Mass. 366; 1878, Williams v. Taunton, 1 Mass. 40; 1879, Eidt v. Cutter, 127 id. 524.

For the admissibility of experiments as *cumstantial evidence*, see *ante*, § 445. For t propriety of performing experiments *before jury*, see *post*, § 1161.

argument is finical enough; and it proves too much, for if valid it would forbid the jury to find a verdict upon the supposed state of a person's mind. If they are required and allowed to find such a fact, it is not too much to hear such testimony from a witness who has observed the person exhibiting in his conduct the operations of his mind:

1791, *Answer of the Judges* to the House of Lords, concerning Fox's Libel Act, 31 Geo. III, c. 60, 22 How. St. Tr. 300: "Your lordships' fourth question is, 'Is a witness produced before a jury in a trial as above, by the plaintiff, for the purpose of proving the criminal intentions of the writer, or by the defendant, to rebut the imputation, admissible to be heard as a competent witness in such trial before the jury?' . . . [Assuming that the criminal intent is material and allowable to be proved or denied at all, then] cases may be put where a witness is competent and admissible to prove the criminal intention, on the part of the prosecutor; and it may be stated as a general rule, that in all cases where a witness is competent and admissible to prove the criminal intention, a witness will also be competent to rebut the imputation."

1882, *Bowen*, L. J., in *Edgington* v. *Fitzmaurice*, L. R. 29 Ch. D. 459: "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is; but if it can be ascertained, it is as much a fact as anything else."

1818, *Tilghman*, C. J., in *Delancy* v. *Little*, 4 S. & R. 503 (admitting testimony by Z. of what C. M. intended in locating a tract): "It has been argued that the intention of Charles McCormick, being confined to his own breast, was not a fact to which the witness could swear. This is a very subtle argument; but I cannot say that I feel the force of it. A man's intentions may be manifested by his words or his actions, and, when known, may be sworn to with as much certainty as any other fact. When a witness undertakes to swear to a thing of that kind, the jury who hear the oath will value it at what it is worth."[1]

From the foregoing question, distinguish the questions (1) whether the *Opinion rule* affects testimony to another person's state of mind (*post*, § 1962), and (2) whether the *Interest rule* prevents a witness from testifying to his *own state of mind* (*ante*, § 581).

[1] *Accord:* 1902, Spencer v. Peterson, 41 Or. 257, 68 Pac. 519 (intent as to dedication of a way); 1840, Devling v. Williamson, 9 Watts 311, 316 (a witness to an interview; that "the contract was considered at an end by all parties," admitted); 1885, Plank v. Grimm, 62 Wis. 251, 253, 22 N. W. 470 (by a defendant in assault, as to his belief in the plaintiff's intention in wielding a weapon). *Contra*, but only more or less unsound: 1903, Durrence v. Northern Nat'l Bank, 117 Ga. 385, 43 S. E. 726 (by B., that D. bought land in good faith and without notice, excluded); 1857, Edwards v. Currier, 43 Me. 484 ("one not a party to the sale could not know the motives of those who were parties"); 1869, Gilman v. Riopelle, 18 Mich. 162 (excluded, "unless the motive was expressed"); 1866, State v. Garvey, 11 Minn. 163 (whether an assailant in firing intended to shoot the witness); 1901, State v. Pierce, 85 Id. 112, 88 N. W. 417 (abortion; the defendant claimed that he was merely treating the woman for a vaginal disease; the woman's testimony as to his purpose in the operation, excluded; such a ruling affronts common sense); 1901, Peterson v. State, 63 Nebr. 251, 88 N. W. 550 (whether the accused believed certain liquor to be intoxicating, excluded); 1897, Rucker v. Bolles, 25 C. C. A. 600, 80 Fed. 504 (whether a person intended to remain a resident of New York; an acquaintance allowed to testify to his conduct only, not his intention); 1897, State v. Carrington, 15 Utah 480, 50 Pac. 526 ("no witness can state with what purpose another performed an act"); 1898, State v. Kilburn, 16 id. 187, 52 Pac. 277 (whether the defendant meant, by certain expressions, that he was going to steal, excluded, from a hearer); 1898, Reese v. Min. Co., 17 id. 489, 54 Pac. 759 (that the deceased knew the facts affecting his danger, excluded).

The Alabama rulings are also *contra*, and seem to have been the origin of this heresy; but they are so mixed with the application of the Opinion rule that they are placed under that head with the other Alabama rulings (*post*, § 1966).

§ 662. **Same: Improbabilities in Scientific Testimony.** The inexpedien of applying the present principle (*ante*, § 659) in any but rare instances the more apparent when a Court assumes to intrude into the techni domain of the engineer, the physician, and other scientific professional m and to deny the possibilities of knowledge therein, by refusing to listen that which appears, to the lay understanding of the tribunal, as an incredi assertion or an unlikely inference. Sometimes the exclusion has rested, wholly on the impossibility of knowing the matter, nor yet wholly on insufficiency of the particular witness' data of inference, but on mix grounds, amounting to this, that the subject is one in which certain a accurate results are difficult to reach and upon which most persons' opinio will be merely notional and conjectural, so that it is not worth while listen to testimony at all. In other words, the Court claims for the jury exclusive privilege of guessing.[1] The whole theory is of the past, unpracti and ill-founded, and is obnoxious to the modern principle of receiving wh ever light can be thrown upon the issue by competent persons and t leaving their credit to the jury:

1851, *Ruffin*, C. J., in *State* v. *Clark*, 12 Ired. 154: "When professors of the scie swear they can thus distinguish, it would be taking too much on themselves, for pers who like Judges, are not adepts, to say the witness cannot thus distinguish, and on t ground refuse to hear his opinions at all. By such a course the judge would undert of his own sufficiency to determine how far a particular science, not possessed by h can carry human knowledge, and to determine it in opposition to the professors in t science."[2]

§ 663. **Same: Speculative Testimony to Personal Injuries and to Valu** (1) In comparatively recent years, a few Courts, led by that of New Yo have refused to accept, in personal injury trials, testimony as to the *poss time of persistence of the injury* or the *possible development* of certain con quences. As to this, first, the same answer may be made as to the gene attitude already considered. If physicians are willing to estimate cert consequences as probable or possible, it is hardly proper for judges to affi the untrustworthiness of these conclusions. The worthlessness, in cas

[1] The following rulings illustrate various aspects of the tendency: 1857, State v. Knight, 43 Me. 133 (that no such a difference exists between the appearances of the blood of a man and of a sheep as will permit the identification of the former, excluded); 1859, Anon., 37 Miss. 58 (in a bastardy case, testimony that pregnancy from a first coition was highly improbable was rejected by the Court as "too uncertain, indefinite, and hypothetical," "mere speculative opinion"); 1900, Smitson v. S. P. Co., 37 Or. 74, 60 Pac. 907 (Moore, J.: "There may be certain physical facts the proof of the existence of which must necessarily overcome, as a matter of law, all testimony to the contrary. The present is not an age of miracles, and, if testimony be introduced at a trial which transcends the ordinary laws of the universe, the Court, being obliged to take judicial notice of such laws, would probably be compelled to reject such testimony"; appli it to testimony about a railroad accident); 1 McLain v. Com., 99 Pa. 99 (the result of sc tific investigation, that human blood canno distinguished from that of some animals, was sanctioned as binding). Compare the *Opi rule*, as applied to testimony to *possibility probability* (*post*, § 1976).

Distinguish those cases in which a *mere sibility* is not relevant in the cause: 1873, D v. State, 38 Md. 35 ("a mere possibility, n rational probability"; here the question "what kind of an instrument could have flicted the wounds?", and it was allowed u the circumstances).

[2] *Accord:* 1870, Horton v. Green, 64 N 67; compare the criticisms of Bentham, tionale of Judicial Evidence, b. V, c. XVI, (Bowring's ed. vol. VII, p. 87).

instances, of the testimony of hired and unscrupulous physicians is no more a reason for rejecting all such testimony indiscriminately than the constant abuse of expert testimony generally is a reason for excluding all expert testimony without distinction. Next, it must be said that the Courts have in many of these rulings proceeded upon a confused apprehension of a legitimate doctrine of the law of Torts, namely, that recovery may be had for such injurious consequences only as are fairly certain or probable, not for merely possible harm. That is, a Court, in holding that the physician may not testify to possible harmful consequences, is not always ruling that testimony to possible consequences is evidentially improper, but is meaning to rule that such possible consequences are as a matter of substantive law not entitled to consideration at all. This is often the real explanation for such rulings.[1] But the evidential doctrine in question has little standing elsewhere,[2] and should not be extended. (2) At one time it was advanced as a reason for rejecting *opinions as to value* that they dealt with a matter essentially uncertain, speculative, and incapable of definite ascertainment, and hence should not be the subject of testimony at all. The ground of the opponents of value-testimony was soon shifted to the Opinion rule, and the contest has since been settled in that field (*post*, § 1940); but the present reason, though of little consequence in the law of to-day, was advanced by eminent judges in leading opinions:

1840, *Nelson*, C. J., in *Lincoln* v. *R. Co.*, 23 Wend. 434 (rejecting testimony to the probable loss of profits in business): "There may be a tolerable conjecture of the amount of damage, . . . but their opinions can rise no higher than mere conjecture. In the nature of the case no set or series of facts exists to which the application of their peculiar knowledge would naturally lead with anything like mathematical certainty. . . . Assume the whole [of the grounds] to be true, and loss does not follow with anything like the exactness that exists in matters of science and skill, more especially to any given amount. Even with the jury the damage, beyond the actual expenses out, can at best rise but little above conjecture."[3]

§ 664. **Negative Knowledge; Testimony that a Fact would have been Seen or Heard had it occurred.** In applying the foregoing principle requiring that

[1] Compare especially the second and sixth cases cited: 1872, Filer v. R. Co., 49 N. Y. 45 (whether an inflammation would probably recur, admitted); 1884, Strohm v. R. Co., 96 id. 306; 1888, Turner v. Newburgh, 109 id. 308, 16 N. E. 344 (whether injury caused disease, admitted); 1889, Griswold v. R. Co., 115 id. 63, 21 N. E. 726 (distinguishing future recovery from present harm from the access of a new disease); 1889, McClain v. R. Co., 116 id. 467, 22 N. E. 1062 (same); 1891, Wallace v. Oil Co., 128 id. 580, 27 N. E. 956. Compare the citations under the Opinion rule (*post*, § 1976).

[2] 1889, Louisville N. A. & C. R. Co. v. Lucas, 119 Ind. 592, 21 N. E. 968 (probable result of an injury, admitted); 1850, Dupré v. Desmaret, 5 La. An. 591; Dupré v. Prescott, ib. 592; 1860, Paty v. Martin, 15 id. 620 (in these cases the testimony was not rejected; it was merely declared insufficient); 1888, Peterson v. R. Co., 38 Minn. 515, 39 N. W. 485 (probability of recovery, admitted).

[3] *Accord:* 1837, Norman v. Wells, 17 Wend. 162, Cowen, J.; 1847, Fish v. Dodge, 4 Denio 318. It must be noted that the present reason, though no longer advanced, was quite different from that based on the Opinion rule; and thus it was possible for the same Court to reject value-testimony on the present ground (Lincoln v. R. Co., 23 Wend. 43 [value of business profits) and to admit it when the present objection did not exist (Briil v. Flagler, ib. 356). Moreover, traces of this notion still survive at the present day in some courts and classes of cases, — as where a Court rejects an estimate of what the value of land would have been if a railroad had not passed by (*post*, § 1943).

the witness' inferences be based on adequate data (*ante*, § 659), Courts ha often been asked to exclude testimony based on what may be called *negati knowledge*, *i. e.* testimony that a fact did not occur, founded on the witness' fa ure to hear or see a fact which he would supposedly have heard or seen if it h occurred. But there is no inherent weakness in this kind of knowledge. rests on the same data of the senses. It may even sometimes be strong than affirmative impressions. The only requirement is that the witne should have been so situated that in the ordinary course of events would have heard or seen the fact had it occurred:

1850, *Chilton*, J., in *Thomas* v. *Degraffenreid*, 17 Ala. 607 (the issue being the title slaves): "The witness C. states his intimacy with the family of A. T. [the alleged owne . . . If his relation to the family was such as he would in all probability have known the existence of a fact ostensible and notorious in its character had it existed, his wa of all knowledge on the subject may be received as some evidence of its non-existence."

1876, *Cooley*, C. J., in *Chambers* v. *Hill*, 34 Mich. 524 (excluding the testimony of neighbor, who had formerly lived a short time in the family, as to conversations in t family about a son's absence): "Had the witness lived in the family at the time, t proposed evidence might have had some value, especially as the subject was one of hi importance to the parties concerned and, if spoken of at all, would have been likely to discussed more or less by all the family. But the fact that a matter of family concern not talked about before the neighbors is no evidence that it is not talked about at all."

1880, *Stone*, J., in *Killen* v. *Lide*, 65 Ala. 508: "Want of knowledge of things open the senses, in a person who had the opportunity of knowing such fact if it existed, is so evidence, though slight, that the thing did not exist."

This sort of testimony, on the conditions above stated, is constantly receive — particularly in proof of the failure to give railroad signals, the loss of chattel, the absence of a witness, the non-existence of a fictitious person, t non-payment of money, and other negative facts.[1] The analogies of th

[1] In the following rulings the testimony was received, except where otherwise noted: *Eng.*: 1780, Maskall's Trial, 21 How. St. Tr. 681 (a person at a riot, not seeing the accused among the active part of the mob); 1832, R. v. King, 5 C. & P. 123 (fictitious character of a name forged; testimony by a person who was otherwise unacquainted with the locality, but had made special inquiries, was admitted); 1834, R. v. Brannan, 6 id. 326 (clerk in one department of a large commercial house, admitted to prove that no customer of a certain name was known to it); *Ala.*: 1850, Thomas v. Degraffenreid, 17 Ala. 607 (one who had lived 25 years in the family, who never knew or heard of a certain member being given and having certain slaves); 1853, Gilbert v. Gilbert, 22 id. 533 (relatives of the deceased, living in the neighborhood, who never heard of a will being made, excluded); 1853, Nelson v. Iverson, 24 id. 17 (an intimate friend who lived near by, who never knew of a transfer of a slave); 1857, Pool v. Devers, 30 id. 675 (did not see money given); 1858, Ward v. Reynolds, 32 id. 389, *semble* (a neighbor of old standing, who never knew or heard of a slave being unsound); 1859, Blakey's Heirs v. Blakey's Ex'x, 33 id. 614, 618 (one who had often boarded with the testator, and had never known of a "serious difficulty" between his wife and hi sell); 1875, Bennett v. State, 52 id. 370, *semb* (did not see or hear a person leave the room 1880, Killen v. Lide, 65 id. 508 (excluding tes mony that the witness would have known if h friend L. had any money, but believed he ha none); 1884, Tesney v. State, 77 id. 33, 37 (tes mony of a bystander, in a position to hear, th he did not hear the defendant curse); 1897, Ba ton v. State, 115 id. 1, 22 So. 585 (not finding revolver, after searching in the likeliest plac admitted); 1900, Tennessee C. I. & R. Co. Hunsford, 125 id. 349, 28 So. 45 (if in a positio to observe, allowable; here as to the ringing an engine-bell, etc.); *Cal.*: 1894, People Eppinger, 105 Cal. 36, 38 Pac. 518 (police-off cer's search, held sufficient); 1896, People Sanders, 114 id. 216, 46 Pac. 153 (that a sheri who had searched the whole region had not bee able to find a trace of one J. K., admitted, t show that no such person existed); *D. C.* 1895, Le Cointe v. U. S., 7 D. C. App. 16 (l a person present, that he heard no loud tones etc.); *Conn.*: 1849, Abel v. Fitch, 20 Conn. 9 (arbitrators, testifying that they did not see a interlineation in the submission, and did no

principle are seen in the rules admitting testimony of *inability to find a document*, to prove its loss (*post*, §§ 1196, 1678), or to find an *attesting witness*, to prove his absence (*post*, § 1312); of the *absence of an entry in a public record* (*post*, § 1633) or in an *account-book* (*post*, §§ 1531, 1556), to prove that no such transaction took place; of the absence of repute in a *family* (*post*, § 1495), to prove that the event of family history did not occur; and of the *lack of traces or news* of a person or thing (*ante*, §§ 158–160) to show circumstantially that the person or thing is deceased, or non-existent, or is absent.

3. Hearsay Knowledge exceptionally admitted.

§ 665. (1) **Official Records**; (2) **Scientific Instruments and Tables (Vacuum Rays, etc.)**; (3) **Expert Learning founded on Books.** Under the general principle of Knowledge (*ante*, §§ 656, 657), testimony founded not on personal observation, but on the information of others, is inadmissible. But this cannot be enforced as a rule of unbending rigidity. There must be exceptions; for the affairs of life often recognize a practical trustworthiness in beliefs not founded altogether on personal observation. The law of evi-

hear the subject of it argued); *Fla.*: 1900, Gray v. State, 42 Fla. 174, 28 So. 53 (failure of neighbors to see a person about his home); *Ga.*: 1848, Matthews v. Poythress, 4 Ga. 287, 295 (by a third person, that the plaintiff had never received value for a note); 1853, Johnson v. State, 14 id. 63 (a person working on a road, that he saw no one pass during a given time); 1881, McConnell v. State, 67 id. 635 (in general); 1896, Killian v. R. Co., 97 id. 727, 25 S. E. 384, *semble* (in general); *Ill.*: 1857, Coughlin v. People, 18 Ill. 267 (by a bystander, that the defendant did not strike the blow); 1861, Great Western R. Co. v. Hanks, 25 id. 242 (by an agent, that he did not make a purchase alleged); 1865, Rockwood v. Poundstone, 38 id. 201 (by a witness to boundaries, that he did not see a landmark); 1866, Frizell v. Cole, 42 id. 363 (by a bystander, that certain words were not spoken); 1882, Pennsylvania Co. v. Boylan, 104 id. 595, 599 (testimony by a track-workman, as to defective planks, that he did not know of any and would have known of them if there); *Ind.*: 1882, Burchfield v. State, 82 Ind. 584 (by a bystander, that he did not hear a shot from a certain place); *Ia.*: 1898, Trimble v. Tantlinger, 104 Ia. 665, 74 N. W. 25 (non-hearing of certain words in a conversation, inadmissible); *Mass.*: 1824, Com. v. Hershell, Thacher Cr. C. 70, 74 (to disprove that the defendant had sent goods to Charleston, testimony was received of the carter usually employed by him in shipping, that he had carried no such goods for the defendant); 1856, Com. v. Cooley, 6 Gray 352, 354 (by a bystander, that he did not hear anything said); 1898, Walsh v. R. Co., 171 Mass. 52, 50 N. E. 453 (that a passer-by did not hear the locomotive-bell rung); 1899, McMahon v. McHale, 174 id. 320, 54 N. E. 854 (that employees saw no one inspect a derrick); *Mich.*: 1874, People v. Marion, 29 Mich. 31, 38 (that no such officer existed in the county, the witness having been personally acquainted with all); 1876, Chambers v. Hill, 34 id. 524 (quoted *supra*); 1882, Marcott v. R. Co., 49 id. 101, 13 N. W. 374 (the question "Could the whistle have blown anywhere near C. station and you not have heard it?" was excluded, because the witness might have been otherwise occupied so as not to notice the bell; this is erroneous); 1884, People v. Sharp, 53 id. 523, 525, 19 N. W. 168 (sheriff's failure to find an alleged subscribing witness, admitted to prove the name to be fictitious); 1894, Edwards v. Three Rivers, 102 id. 153, 60 N. W. 454 (whether a person had been lame, had varicose veins, etc.; that intimate acquaintances had never known of it, admitted); *N. H.*: 1844, Lyford v. Thurston, 16 N. H. 399, 407 (by a deed's subscribing witness, that he did not see any consideration paid); *N. Y.*: 1838, People v. Abbot, 19 Wend. 192, 194 (rape; an occasional resident in a family, not allowed to testify to not seeing any improper liberties said by the prosecutrix to have been taken with her secretly by the defendant); *N. C.*: Purnell v. R. Co., 122 N. C. 832, 29 S. E. 953 (by persons near cars, that they saw no flagman's light); *Or.*: 1900, State v. Mims, 36 Or. 315, 61 Pac. 888 (carrying weapons); *U. S.*: 1897, Rhodes v. U. S., 25 C. C. A. 186, 79 Fed. 740 (whether a person had sore eyes; relatives and fellow-soldiers allowed to testify that they did not see the disease); 1902, Texas & P. R. Co. v. Watson, — U. S. —, 23 Sup. 681 (setting fire to cotton); *Vt.*: 1875, State v. Phair, 48 Vt. 377 (by a passenger in a midnight train, that he did not see A. on it); *Wash.*: 1898, State v. Lattin, 19 Wash. 57, 52 Pac. 314 (by one living with the deceased, that he had never seen the latter with a pistol); *Wis.*: 1873, Ralph v. R. Co., 32 Wis. 181 (that a person did or did not receive an order from the other).

dence must follow the facts of life as closely as is consistent with caution In a number of instances it has recognized exceptions to the rule.

(1) The *records of a public office* are not personally known by the officia successors to be authentic. But their place of custody is of itself sufficien circumstantial evidence of genuineness (*post*, § 2158); and for much th same reason the belief of the succeeding incumbents is recognized as com petent knowledge. In this and a few related ways, the testimony of a publi officer, and even of private persons having to do with a mass of records, may be received.[1] So, too, a public officer's certificate or entry of a transactio actually performed by his subordinates, not by himself, may be received. But this is not conceded for the account-books of a private person.[2]

(2) The use of *scientific instruments, apparatus, and calculating-tables* involves to some extent a dependence on the statements of other persons even of anonymous observers. Yet, on the one hand, it is not feasible fo the scientific man to test every instrument himself; while, on the othe hand, he finds that practically the standard methods are sufficiently to b trusted. Thus, the use of a vacuum-ray machine may give correct knowl edge, though the user may neither have seen the object with his own eye nor have made the calculations and adjustments on which the machine' trustworthiness depends. The adequacy of knowledge thus gained is recog nized for a variety of standard instruments.[4] In some instances the calcu lating tables or statistical results are admitted directly, under an exceptio to the Hearsay rule.[5]

(3) The data of every science are enormous in scope and variety. No on professional man can know from personal observation more than a minut fraction of the data which he must every day treat as working truths Hence a reliance on the *reported data of fellow-scientists*, learned by perusing

[1] Ala. Code 1897, § 1798 (usury; representative of deceased borrower, on ten days' notice, may testify "by swearing that he believes the contract to be usurious," if plaintiff was lender, unless plaintiff on oath in court denies the facts proposed to be sworn to); 1894, Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 418, 39 N. E. 33 (personal knowledge of existence of abstracts, etc., made before the fire of 1871, not required); 1886, Worcester *v.* Northborough, 140 Mass. 397, 402, 5 N. E. 491 (clerk of adjutant-general's office, of over twenty years' service, allowed to testify to custom of office prior to his incumbency); 1897, Westfield Cigar Co. *v.* Ins. Co., 169 id. 382, 47 N. E. 1026 (a city engineer, as to the official actions of his office, though really performed by a predecessor, admitted); 1884, Anderson *v.* Volmer, 83 Mo. 403, 407 (bill of goods sold; witness knowing nothing of it except from his books, excluded); 1897, Southern I. C. Line *v.* R. Co., — Tenn. —, 42 S. W. 529 (statements as to car mileage, etc., made by the general manager of the plaintiff, admitted, though not based in every detail on his own observation); 1890, Hill *v.* Kerr, 78 Tex. 217, 14 S. W. 566 (knowledge of the filing and date of filing of surveyor's notes, based in part on their mere presence in the office admitted).

[2] *Post*, § 1635.

[3] *Post*, §§ 1530, 1555.

[4] The cases on *vacuum rays*, which dea chiefly with photographs, are placed *post*, § 795 other examples are as follows: 1898, More' Estate, 121 Cal. 608, 54 Pac. 97 (counting shee by a registering-machine, verified by the witnes as accurate in its operation, allowed); 1897 Hatcher *v.* Dunn, 102 Ia. 411, 71 N. W. 34 (a thermometer used in making tests, the varia tions indicated by a certificate of test made a Yale College and attached to the instrument admitted); Oh. Rev. St. 1898, § 1058 (surveyo not to testify to land-survey until he has sworn if required, that his chain or measure was o legal standard); 1901, State *v.* McDaniel, 39 Or 161, 65 Pac. 520 (fire department secretary allowed to testify from an automatic indicato that no alarm had sounded); 1896, Grayson *v* Lynch, 163 U. S. 468, 16 Sup. 1064 (veterinar surgeons in the Department of Agriculture allowed to testify to the districts particularly infected with Texas cattle-fever, though they ha not personally been there).

[5] *Post*, § 1706.

their reports in books and journals. The law must and does accept this kind of knowledge from scientific men. On the one hand, a mere layman, who comes to court and alleges a fact which he has learned only by reading a medical or a mathematical book, cannot be heard. But, on the other hand, to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on finical and impossible standards. Yet it is not easy to express in usable form that element of professional competency which distinguishes the latter case from the former. In general, the considerations which define the latter are (a) a professional experience, giving the witness a knowledge of the trustworthy authorities and the proper source of information, (b) an extent of personal observation in the general subject, enabling him to estimate the general plausibility, or probability of soundness, of the views expressed, (c) the impossibility of obtaining information on the particular technical detail except through reported data in part or entirely. The true solution must be to trust the discretion of the trial judge, exercised in the light of the nature of the subject and of the witness' equipments. The decisions show in general a liberal attitude in receiving technical testimony based on professional reading.[6]

§ 666. (4) **Execution and Contents of Documents, not personally observed.** (a) A witness who testifies to the *execution* of a document, not merely to the handwriting,[1] will usually have seen the very act of affixing the signature.[2] Nevertheless, he may have observed circumstances which will suffice in place of this. The sufficiency of such circumstantial evidence is dealt with under the subject of Authentication of Documents (*post*, §§ 2131, 2148–2154). Moreover, he may have seen and heard the maker's subsequent acknowledgment of the document's genuineness. Such an acknowledgment would, as against the maker himself, be sufficient as an admission (*post*, §§ 1300, 2131); but, apart from that, it is an act of adoption of the document, equivalent to a reëxecution, and hence is now universally conceded to be a sufficient basis of testimony (*post*, § 1648). In the case of wills, the execution has been by statute everywhere made a formal act, in which the attesting witness' presence is technically necessary (*post*, § 2456), so that the ordinary principle

[6] 1879, Central R. Co. *v.* Mitchell, 63 Ga. 176, 180 (based partly on book-learning; admitted); 1901, New York P. & N. R. Co. *v.* Jones, 94 Md. 24, 50 Atl. 423 (a private surveyor not allowed to testify that certain marks of the U. S. survey signified the altitude; a singular ruling); 1872, Howard *v.* Gt. Western Co., 109 Mass. 385 (a witness who had made a study of coals, etc., yet not dealt in them, and testified to a fuel's composition, admitted); 1888, Slocovich *v.* Ins. Co., 108 N. Y. 62, 14 N. E. 802 (shipping-expert; knowledge founded on Lloyd's books, etc., admitted); 1903, Scott *v.* R. Co., — Or. —, 72 Pac. 594 (an engineer, not experienced in railroad building, but acquainted with the scientific literature, and otherwise experienced, allowed to testify to the approved slope of a railroad embankment).

For the cases concerning such testimony to *medical matters*, *foreign law*, and *values* or *prices*, see *post*, §§ 687, 690, 719.

For a *physician's* testimony based on the *patient's statement of symptoms*, see *post*, § 688.

[1] For handwriting, see *post*, § 693.

[2] 1869, Filley *v.* Angell, 102 Mass. 68 (excluded, where the attesting witness was not present at a note's execution). On this point, compare the ancient practice (*post*, § 1510; Thayer, Prelim. Treat. Evid. 97).

of testimonial knowledge has ceased to operate, and the requirements of the statute are the sole tests.

(b) A witness to the *contents* of a document may sometimes lack personal observation; but this rule is best examined in dealing with the subject of copies in general (*post*, § 1277).

§ 667. (5) **Testifying to One's Own Age**; or (6) **to Another Person's Name.** (5) Strictly speaking, one cannot know his exact age except upon hearsay information; for he is not capable of knowing this, or anything, until an appreciable time after birth. But practically a person's belief on this point has a satisfactory basis. Courts have commonly preferred to accept this practical certainty rather than to insist on academic nicety.[1] But in any case one may know whether at a particular time he was of one age or another, if the difference is as much as the time that must have brought him to the age of observation.[2] Moreover, a person who does not know the date of another's birth or of his own may know, by the association of events, whether he or the other was over or under a certain age at a certain time.[3] Even if, from the present point of view, testimony to one's own age is not to be received, yet it may be regarded as asserting the family reputation on the subject, and the latter may thus be received under the exception to the Hearsay rule (*post*, § 1493).

(6) A person's *name* is the title by which habitually he calls himself and others call him. To know a person's name, therefore, is to have heard him so called by himself and by others. In strictness, such an utterance is not hearsay (*post*, § 1772), except where it is made as an assertion of fact. But, though it may be hearsay, as a source of information, yet it is universally relied upon as a source of knowledge. Courts have commonly accepted the testimony founded upon it.[4]

[1] 1896, People *v.* Ratz, 115 Cal. 132, 46 Pac. 915; 1901, Chicago & A. R. Co. *v.* Lewondowski, 190 Ill. 301, 60 N. E. 497; 1892, State *v.* McClain, 49 Kan. 730, 734, 31 Pac. 790 (seduction; prosecutrix' testimony to her age, admitted, her parents being dead); 1886, Com. *v.* Stevenson, 142 Mass. 468, 8 N. E. 341, *semble;* 1898, Com. *v.* Hollis, 170 id. 433, 49 N. E. 632; 1895, Com. *v.* Phillips, 162 id. 504, 39 N. E. 109 (rape-prosecutrix under age of consent); 1876, Cheever *v.* Congdon, 34 Mich. 295; 1892, Houlton *v.* Manteuffel, 51 Minn. 185, 187, 53 N. W. 541 (action on a note); 1898, State *v.* Bowser, 21 Mont. 133, 53 Pac. 179 (rape-prosecutrix under age of consent); 1896, State *v.* Marshall, 137 Mo. 463, 36 S. W. 619 (admitting it; but still intimating that where the witness appears on cross-examination to be speaking from mere hearsay the statement will be excluded; yet all testimony as to one's own age is founded on hearsay); 1897, State *v.* Marshall, ib. 463, 39 S. W. 63, *semble;* 1903, Hancock *v.* Supreme Council, — N. J. Eq. — 55 Atl. 246 (a witness allowed to testify to his own and his elder brother's approximate age; good opinion by Dixon, J.); 1895, Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621 (knowledge of sonship, based in part upon the mother calling him her son); 1876, State *v.* Cain, 9 W. Va. 569; 1898, Dodge *v.* State, 100 Wis. 294, 75 N. W. 954. *Contra:* 1846, Doe *v.* Ford, 3 U. C. Q. B. 353.

[2] 1879, Hill *v.* Eldredge, 126 Mass. 234 (whether he was 16 or 21 years old at a certain time).

[3] 1870, Foltz *v.* State, 33 Ind. 217 (whether another was over 14).

[4] 1744, Heath's Trial, 18 How. St. Tr. 152 (Mr. Harward, objecting to a statement that the witness saw Lady Altham at Wexford: "This evidence is founded upon a supposition that the lady he saw at Wexford was the lady Altham; he says he was only told it was she, and cannot say it was of his own knowledge"; Witness: "I am pretty certain the lady I saw was lady Altham. I am told, sir, that you are counsellor Harward; am not I to believe you are? I am told that gentleman is counsellor Daly; I am morally assured of it, and I believe it"); 1857, R. *v.* Toole, 7 Cox Cr. 266 (one who merely saw X sign his name, admitted to prove the name).

Compare the cases cited *ante*, §§ 270, 413, *post*, § 2156, some of which apply this principle. Compare also the following: 1848, R. *v.*

§ 668. (7) **Conversations through an Interpreter.** When A speaks with B through an interpreter, because of ignorance of B's language, A cannot of his own hearing know what B said; he depends on the interpreter's report. Here no exception has been recognized to the general rule (though it might well have been). The witness A is allowed to testify only to what he heard from the interpreter, and the interpreter must be called to testify to what B said to him.[1] If, however, B is a *party*, whose *admissions* can be used, then the interpreter is to be regarded as B's agent, and the agent's statements on B's behalf (being in a language understood by the witness) are usable as B's admissions.[2]

§ 669. (8) **Information received by Telephone.** When a witness testifies to a conversation heard by him over the telephone, two kinds of questions arise, in which the present principle is involved.

(1) The question of the *identity* or personality of the antiphonal speaker may arise. How can A know that the person speaking to him was really B? Here the principle of Authentication, with its related applications to letters and telegrams, is involved, and the precedents can best be considered in comparison (*post*, § 2155).

(2) The question of the *tenor* of the utterance may arise. Assuming that B was really the speaker, how can A know that B did utter the words? When A and B converse directly at the instrument, A's knowledge is based directly on his sense of hearing, aided by a scientific instrument of accepted correctness, and hence is receivable (on the principle of § 665, *ante*). But if A, instead of speaking directly, converses with a clerk or operator, and the latter reports B's utterances to A, then A is no longer a witness having personal knowledge. Here three solutions present themselves. (*a*) The *strict rule* of personal knowledge (*ante*, § 657) may be applied, and A's testimony be excluded.[1] (*b*) Or, an *exception to that rule* may be recognized, on the analogy of the foregoing exceptions, and of the exceptions to the Hearsay rule for regular entries in the course of business (*post*, § 1517) and of commercial reports (*post*, § 1702). (*c*) In any case, the doctrine of *admissions* may be invoked, where one of the speakers is a party to the cause, just as it may be for interpreters (*ante*, § 668). If B had sent his clerk to A to report orally B's orders or agreements, the clerk's statements would unquestionably be used as B's admissions. In the same way, the clerk's or the operator's report may be used against B, on the theory that the latter has

O'Doherty, 6 State Tr. N. s. 831, 884 (challenge to array; to prove the religion of a qualified juror, one who had not inquired of the juror himself but spoke from unspecified hearsay, excluded).

[1] The cases are collected under § 1810, *post* (Hearsay rule). For other principles applicable to *interpreters* and *translators*, see *post*, §§ 811, 1672.

[2] 1773, Fabrigas *v.* Mostyn, 20 How. St. Tr. 123, Gould, J.; 1903, Meacham *v.* State, — Fla. —, 33 So. 983 (embezzlement from G.; conversation between G. and defendant, interpreted by W., allowed to be proved against G. by L., a bystander, who heard W., but did not understand Spanish, the language of G.); 1885, Sullivan *v.* Kuykendall, 82 Ky. 489; 1865, Camerlin *v.* Palmer Co., 10 All. 541; 1892, Com. *v.* Vose, 157 Mass. 393, 32 N. E. 355 (abortion; defendant spoke English, deceased French, witness French; testimony to the conversation between defendant and deceased through witness, received).

[1] 1888, Wilson *v.* Coleman, 81 Ga. 299, 6 S. E. 693 (where the plaintiff was informed by his clerk of the answer).

made the former his agent for the purpose of communication. This theory has thus far sufficed for the Courts.[2]

§ 670. (9) **Testimony of Deceased or Absent Persons, under the Hearsay Exceptions.** Under the exceptions to the Hearsay rule the testimony of the witness deceased or absent must equally be based on personal observation. The testimony is admitted in spite of its not having been given on the stand subject to the test of cross-examination; but still it is testimony, and the person making the statements must have the means of knowledge expected normally of every witness. Nevertheless, there as here, exceptions to this requirement are recognized; for example, in statements of Family History, the person's knowledge is usually based on the family-reputation on the subject (*post*, § 1486); in Official Documents, the entry of an assessor or the certificate of a recorder of deeds is sometimes based on hearsay (*post*, § 1635). These exceptions, being peculiar to the kind of statement offered, are better dealt with under the respective subjects of the Hearsay rule.

4. Hypothetical Questions.

§ 672. **General Theory.** Suppose the facts of an affray are in issue, and it is disputed whether A or B was the aggressor. A witness is asked, "Did you have an opportunity to observe the situation?" He answers, "I did; I was at the place at the time, and saw the affray." Then, "Is it your belief that A or B struck first?" and he expresses his belief. Suppose, again, the issue is as to the mode of a death, and certain indicia are in question. A physician is asked, "Have you considered the matter of a congestion of the windpipe with reference to the cause of death?" Answer, "I have." Then "What mode of death, if any, does it indicate as probable?" Answer, "Death by strangulation." Now in order that this latter answer may be further considered by the tribunal for the case in hand, it is obvious that the circumstance on which it rests, namely, the congestion of the windpipe, must be supplied, as a fact in the case, by testimony. This may be done in one of two ways, — either (1) by the testimony of the physician himself, based on a personal examination of the body, that the windpipe was congested, or (2) by the testimony of some one else who has made such a personal examination. But if the latter method is chosen — and this is the important circumstance — the fact to be considered by the physician must be placed before him hypothetically; it may be assumed for the time being, but must afterwards be supplied by the testimony of another person. If this were not

[2] 1885, Sullivan *v.* Kuykendall, 82 Ky. 487 (to show the plaintiff's admissions, the defendant testified to a conversation over the telephone which an operator received and reported at the time to the defendant; the defendant's statements of what he was told were received; the operator was treated as the agent of the plaintiff to communicate, on the analogy of an interpreter); 1892, Oskamp *v.* Gladsden, 35 Nebr. 7, 52 N. W. 718 (here the witness received the message from an operator at a way station F., who repeated the message of the plaintiff at O., and served as intermediary; admitted).

Distinguish the following case: 1897, German Bank *v.* Citizens' Bank, 101 Ia. 530, 70 N. W. 769 (the hearer at a telephone, testifying to what he heard, not allowed to tell what he repeated to a bystander as the tenor of the message; this was of course inadmissible under the principle of § 1124, *post*).

done, and if the single question were asked, "What in your opinion was the mode of this man's death?", it would be impossible for the tribunal to tell whether to accept the witness' conclusion or not; since, if the tribunal were to find that there had been no congestion of the windpipe, it would be unable to know whether the physician's conclusion had been based on a consideration of that circumstance alone or on a consideration of some other circumstance alone or of both. In other words, the hypothetical question to the physician, as to the data for inference, takes the place of the question to the bystander whether he was in a position to observe the affray.

The reasoning may be explained in the following propositions: 1. Testimony in the shape of inferences or conclusions *rests always on certain premises of fact.* That which has been called Observation, serving as the basis of belief in matters directly cognizable by the senses — as, the facts of an affray, a conversation, a trespass, and the like — is here replaced by what may be called a Consideration of the Premises. Just as observation of the situation or affair or surroundings is in the one case essential to the formation of a witness' belief based on his senses, so a consideration of specific data is essential to the formation of an inference or conclusion or opinion. If the witness has not considered or had in mind these premises, his inference or opinion is good for nothing. 2. *These premises,* a consideration of which is essential to the formation of the conclusion or opinion, *must somehow be supplied by testimony.* The same witness may supply both premises or conclusion; or one witness may supply the premises and another the conclusion. The two are not necessarily connected. 3. If the latter method is chosen, and a witness is put forward to testify to the conclusion, *the premises considered by him must be expressly stated, as the basis of his conclusion;* otherwise, since his conclusion rests for its validity upon a consideration of the premises, and since the tribunal may later decide that certain premises are not proved and may thus reject them, it must, before accepting his conclusion, have the means of knowing whether it is based on a consideration of premises accepted as true by the tribunal. If those premises are not made to accompany the conclusion, the tribunal might be accepting a conclusion for which the witness had considered premises found by the tribunal not to be true. 4. Hence, the *premises must be stated hypothetically in connection with the conclusion;* then, by other testimony, the material for determining the truth of the assumed premises may be furnished to the tribunal.

The key to the situation, in short, is that there may be two distinct subjects of testimony, — premises, and inferences or conclusions; that the latter involves necessarily a consideration of the former; and that the tribunal must be furnished with the means of rejecting the latter if upon consultation they determine to reject the former, *i. e.* of distinguishing conclusions properly founded from conclusions improperly founded. That this is the orthodox and accepted theory of the hypothetical question in our law may be gathered from the following passages, in which practically the principle is indicated in one or another aspect:

1806, *Erskine*, L. C., in *Lord Melville's Trial*, 29 How. St. Tr. 1065 (admitting the results of a calculation by the witness as to the profit made by the defendant from the sums alleged to have been received by him): "If you take away the foundation upon which it is made, which is matter for the Court afterwards, there is an end to the superstructure. All the witness has done is to establish by calculation that such a stock from such a time will produce so much. He does not himself prove any fact, and the calculations he has made must therefore depend upon the facts which are proved by others." *A Lord:* "The data and facts stand as they did; it is a mere hypothetical question to the witness: *If* the fact stands so and so, what is the arithmetical result?"

1843, *Maule*, J., in *M'Naghten's Case*, 10 Cl. & F. 207 (Question for the Judges: "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, etc.?"): "In principle it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what these conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry."

1851, *Curtis*, J., in *U. S.* v. *McGlue*, 1 Curtis C. C. 1 (to the jury): "[The expert physicians] were, as you observed, not allowed to give their opinions upon the case; because the case, in point of fact, on which any one might give his opinion, might not be the case which you upon the evidence would find; and there would be no certain means of knowing whether it was so or not."

1854, *Dean*, J., in *Lake* v. *People*, 1 Park. Cr. C. 557: "A question in physical science will afford an illustration. A motion which is the result of a combination of different forces invariably changes its direction if but one of the moving powers is withdrawn. Take away half of them, it would be reversed in its course. Experts might be called to prove any given motion; they might also be asked what would be the effect of certain combined forces; but in either case it is manifest that to have the opinion correct, *all* of the motive powers must be given. . . . To allow [medical testimony to be given on merely such part of the evidence as they heard] would be as dangerous a principle as to permit a juror to sit during a part of the trial and then unite with the rest in rendering a verdict."

1856, *Woodbury* v. *Obear*, 7 Gray 468; from the instruction: "The answer of the witness, if given in reply to the proposed interrogatory, might mislead; since it might, unknown to the jury, be founded upon some proposition or statement of facts differing in material particulars from that which appeared to them to be satisfactorily established."

1859, *Shaw*, C. J., in *Dickenson* v. *Fitchburg*, 13 Gray 556: "This objection [of counsel] assumes that the facts will be taken to be true because the witness has stated that he founds his opinion on them. But this is quite a mistake. . . . The question is put to him hypothetically, whether *if* certain facts testified to are true, he can form an opinion and what that opinion is. The jury will then be instructed, if the truth of any such fact is contested, first to consider whether the fact on which such opinion rests is proved to their satisfaction; if it is, then to give such weight to the opinion resting on it as it deserves; but if the fact is not proved by the evidence, then to give the opinion no weight."

1865, *Steele*, J., in *Wetherbee's Ex'rs* v. *Wetherbee's Heirs*, 38 Vt. 460: "In any case the jury ought to know upon what basis of facts the opinion is founded, for its pertinence depends upon whether they find the facts upon which it rests."

1870, *Christiancy*, J., in *Kempsey* v. *McGinniss*, 21 Mich. 139: "As a collection or state of facts assumed, whether few or many, constitute in the aggregate the basis on which the opinion is asked, if it does not appear that the opinion would be the same with any of those facts omitted, it necessarily follows that if the jury should negative or fail to find any one of the assumed facts, the opinion expressed cannot be treated as evidence, but must be rejected by the jury. From these considerations it necessarily follows that the

jury should know just what facts are assumed and enter into the collection or state of facts upon which the witnesses' opinions are based. Otherwise they cannot know whether they ought to treat the opinions as evidence at all, since they can form no opinion whether such assumed facts, or the opinions based upon them, are true or false. . . . If the witness be asked his opinion of a case assuming the testimony of certain specified witnesses to be true, and it appears that he did not hear the whole of their testimony, and it does not definitely appear what facts stated by them he has heard, and what he did not hear, the jury cannot know upon what state of facts he forms his opinion, nor whether the facts he has assumed are true, nor whether his opinion would have been the same if he had heard the whole."[1]

1872, *Kingman*, C. J., in *State* v. *Medlicott*, 9 Kan. 288: "It does not appear anywhere what part of the medical testimony [the expert] had heard. . . . [Thus] neither the court, nor the jury, nor counsel, knew on what part of the medical testimony the opinion of the witnesses was founded; therefore the answer formed no criterion of the intelligence of the witness or his capacity to form a correct judgment. . . . It would be as sensible to test a person's knowledge of mathematics by asking him the sum of two and an unknown quantity, at most known only to himself."

1882, *Morris*, C., in *Burns* v. *Barenfield*, 84 Ind. 48 (a medical witness was asked what he thought of a certain kind of treatment, after examining a case): "The answer of the witness was not based upon facts stated by him. What he knew about the case might and doubtless did embrace much more than he had stated to the jury; how much or what he knew about the case was in a great measure unknown to the Court and the jury. It is the clear right and duty of the jury to judge of the truth of the facts upon which the opinion of the expert is based. If his opinion is based upon what he may suppose he knows about the case — upon facts, it may be, although irrelevant and unknown to the jury —, it would be impossible for them to pass upon the truth of the facts upon which the opinion may be based, or to apply the opinion of the expert to the facts. . . . The expert's memory might be deficient in recollecting all the facts testified to; he might have a different understanding of or place a different construction upon the language used by the witness or witnesses upon whose testimony he based his opinion from what the jury would have or place if they were informed upon what facts testified to the opinion was based."

1886, *Forsyth* v. *Doolittle*, 120 U. S. 77, 7 Sup. 408 (approving the following charge): "You must readily see that the value of the answers to these questions depends largely, if not wholly, upon the fact whether the statements made in these questions are sustained by the proof. If the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight because based upon false assumptions or statements of facts."

1890, *Ruger*, C. J., in *People* v. *McElvaine*, 121 N. Y. 250, 24 N. E. 465: "It would be impossible for the jury [when the opinion is based on 'all the evidence in the case'] to determine the facts upon which the witness bases his opinion, and whether such facts were proved or not. Suppose the jury concluded that certain facts are not proved, how are they in such an event to determine whether the opinion is not to a certain degree based upon such facts? When specific facts, either proved or assumed to have been proved, are embraced in the question, the jury are enabled to determine whether the answer to such question is based upon facts which have been proved in the case or not, and whether other facts bearing upon the correctness and force of the answer are contained therein or have been omitted from it; but in the absence of such a question the evidence must always be to a certain extent uncertain, unintelligible, and perhaps misleading."

1898, *McGill*, Ch., in *Malynak* v. *State*, 61 N. J. L. 562, 40 Atl. 572: "It is plain that the method [of not asking hypothetically] would be valueless in a case where the testimony is conflicting, or is of such character as to be susceptible of more than one interpretation, and hence affords room for different deductions of fact, and where the expert does

[1] See a similar exposition by Campbell, C. J., in 58 Mich. 607 (1886).

not make known his findings of fact, because it would be impossible for the jury to gi weight to the opinion, for they could not know whether or not it would be applicable the facts as they find them. In such case the juror of thoughtful mind would reject t opinion as valueless."[2]

§ 673. **False Theory: "Usurping the Province of the Jury."** This being th plain, logical, and necessary reason for the use of the hypothetical questio it will easily be seen that it is not resorted to from any fear that the witne will "usurp the function of the jury."[1] This bugbear, vigorously denounce with sentimental appeals to the value of jury trial, has been made to ser again and again as the dreadful source of those evils which the hypothetic question enables us to avoid. But the expert is not trying to usurp th function, and could not if he would. He is not trying to usurp it, becau his error, if any, is merely the common one of witnesses, that of presentit as knowledge what is really not knowledge; and he could not usurp it if h would, because the jury may still reject his testimony and accept his opp nent's, and no legal power, not even the judge's order, can compel them accept the witness' statement against their will. That there is no hidde danger to the jury system, and no need of invoking rhetoric in its aid, wi be seen when it is remembered that the necessity for hypothetical questio is exactly the same for a judge sitting without a jury. Whatever the tr bunal, it must separate premises from conclusions, and it must wait till th end of the trial and all the evidence on both sides is in, before it determin what premises are proved and therefore which opinions have a proper basi The usurpation theory has done much to befog bench and bar, and to assi in producing some of the confusion which attends the precedents.

§ 674. **Actual Observation not necessary; Hypothetical Presentation ma be sufficient.** The first corollary of the theory of hypothetical questio then, is that actual personal observation, hitherto (*ante*, § 657) assumed as i general necessary for a witness, is not needed where the testimony consis in conclusions drawn from premises, but is replaced by the consideration

[2] The earliest English and American rulings seem to be the following: 1760, Earl Ferrers' Trial, 19 How. St. Tr. 943 ("Please to inform their Lordships whether any and which of the circumstances which have been proved by the witnesses are symptoms of lunacy." . . . Earl of Hardwicke: "My Lords, this question is too general, tending to ask the doctor's opinion upon the result of the evidence; . . . if the noble Lord at the bar will divide the question and ask whether this or that particular fact is a symptom of lunacy, I daresay they will not object to it"); 1807, Beckwith *v.* Sydebotham, 1 Camp. 116 (a witness was called to say whether a ship having on Oct. 12 the defects already testified to could have been seaworthy on Sept. 2 preceding; Garrow pointed out the prejudice that might arise from asking the opinion of a witness on a statement which might be false, and was here *ex parte* (in a deposition); Lord Ellenborough "held that this was like examining a physician or surgeon to say whether upon such and such symptoms a person whose life was insured cou at the time of insurance have been in a go state of health. . . . As the truth of the fa stated to them was not certainly known, th opinion might not go for much; but still it w admissible evidence. The prejudice alluded might be removed by asking them in cross-e amination what they should think upon t statement of facts contended for on the oth side"); 1824, State *v.* Powell, 7 N. J. L. 2 (objection overruled that the physician had n made a "personal examination" but was speal ing upon a "mere suppositious case").

[1] 1890, Ruger, C. J., in People *v.* McElvain 121 N. Y. 250, 24 N. E. 465: "It cann be questioned but that the witness was by t question put in the place of the jury, and w allowed to determine upon his own judgme what their verdict ought to be in the case. . . It substantially allowed him to usurp the fun tions of the jury in deciding the questions fact."

examination of those premises; and this consideration of the premises may be afforded by presenting them hypothetically to the person who is to draw conclusions from them. In other words, the same person need not testify to both premises and conclusion. This general principle is now universally accepted; but it is worth while to mark it at the outset.

§ 675. **Where Personal Observation is had, Hypothetical Presentation is Unnecessary.** Secondly, since it is the essential nature of conclusions that they are always relative to and dependent upon the premises, is not every offered opinion or conclusion hypothetical in its nature, whether the witness himself supplies the testimony to the premises or whether they are assumed in the question and then supplied by other testimony? This is certainly so. Even though the physician testifies himself to seeing the congestion of the windpipe, and then infers from these premises a death by strangulation, the jury may later decide that there was no congestion, and thus the opinion based on this premise fails also. Thus all opinions or conclusions are in a sense hypothetical. But does it follow that, when the opinion comes from *the same witness* who has learned the premises by actual observation, those premises must be stated beforehand, hypothetically or otherwise, by him or to him? For example, the physician is asked, "Did you examine the body?"; "Yes"; "State your opinion of the cause of death." Is it here necessary that he should first state in detail the facts of his personal observation, as premises, before he can give his opinion? In academic nicety, yes; practically, no; and for the simple reason that on cross-examination each and every detail of the appearances he observed will be brought out and thus associated with his general conclusion as the grounds for it, and the tribunal will understand that the rejection of these data will destroy the validity of his opinion. In the opposite case, where the witness has not had personal observation of the premises, they are not to be got from him on cross-examination, because he had no data of personal observation; and that is precisely the reason why they must be indicated and set out in the question to him, for thus only can the premises be clearly associated with the conclusion based upon them.

Through failure to perceive this limitation, Courts have sometimes sanctioned the requirement of an advance hypothetical statement even where the expert witness speaks from personal observation:

1878, *Marston*, J., in *Hitchcock* v. *Burgett*, 38 Mich. 507: "Even in cases where experts are called upon to give an opinion based upon their own personal observation or examination, the facts upon which the opinion is founded must all be stated [beforehand]; otherwise the witness might be giving an opinion which would have great weight with the jury, upon a state of facts very different from those found by them in the case on trial."[1]

[1] *Accord:* 1898, Flannagan v. State, 106 Ga. 109, 32 S. E. 80 (facts observed by a medical man testifying to insanity must be specified); 1885, Louisville N. A. & C. R. Co. v. Falvey, 104 Ind. 418, 3 N. E. 389, 4 Id. 908, *semble;* 1887, L. N. A. & C. R. Co. v. Wood, 113 id. 553, *semble;* 1895, McDonald v. McDonald, 142 id. 55, 41 N. E. 346, *semble;* 1879, Van Densen v. Newcomer, 40 Mich. 119 (excluding "From what you found at the time in examining the patient, from your knowledge of her during the years previous, . . . what produced the condition she was in?"); 1874, Haggerty v. R. Co., 61 N. Y. 624, *semble;* 1901, State v. Simonis, 39 Or. 111, 65 Pac. 595; 1901, Easler v. R. Co., 59 S. C. 311, 37 S. E. 938 (physician, who had examined the plaintiff, not allowed to testify positively to the cause of her injury); 1898, Foster v. F. & C.

But this fallacy of being too logical in forcing the theory is generally
properly repudiated:

1860, *Brinkerhoff*, J., in *Bellefontaine & I. R. Co.* v. *Bailey*, 11 Oh. St. 337 (admitt
a question, to an engineer who saw the injury, as to the possibility of avoiding it): "
doubtedly, if the witness had been a stranger to the actual facts, it would then have b
necessary to assume a state of facts as the foundation of any opinion he might give;
no such assumption, it seems to us, is necessary when the witness is or is properly
sumed to be himself personally acquainted with the material facts of the case. . . . If
expert may give his opinion on facts testified to by others, we see no reason why he
not do so on facts presumably within his own personal knowledge; and if his knowle
of any material fact be wanting or defective, the parties have ample opportunity to s
it by cross-examination and by testimony *aliunde*."

1868, *Dillon*, C. J., in *State* v. *Felter*, 25 Ia. 75: "If a physician visits a person
from actual examination or observation becomes acquainted with his mental conditi
he may give an opinion respecting such mental condition at that time. . . . There is
more reason why he may not do this than why he might not testify that he saw a cert
person at a certain time and that he was then laboring under an epileptic fit or under
attack of typhus fever, or had been stricken down and rendered unconscious by
apoplectic stroke." [2]

§ 676. **Where Personal Observation is lacking, Hypothetical Presentat
must be used.** Thirdly, though hypothetical presentation is thus not univ
sally necessary, it is certainly necessary (for the reason just noted) where
premises are not supplied by the witness himself. The premises must
brought out in some way. If the witness cannot himself supply them
details of his own observation, they must be presented hypothetically.[1]

§ 677. **Personal Observation is not Necessary, when Hypothetical Pres
tation is used.** Fourthly, though the premises must be supplied in one fo
or the other, it is not necessary that both be available. If the witnes
skilled enough (*post*, § 679), his opinion may be adequately obtained u
hypothetical data alone; and it is immaterial whether he has ever seen
person, place, or thing in question:

1873, *Gray*, C. J., in *Miller* v. *Smith*, 112 Mass. 475: "A witness having the requi
knowledge and experience may always be examined by hypothetical questions, even if

Co., 99 Wis. 447, 75 N. W. 69 (attending physician; question as to cause of death "from all the evidence you had before you there at that time," excluded); 1898, Green v. Water Co., 101 id. 258, 77 N. W. 722 (expert testifying partly from personal examination as to cause of typhoid fever; hypothetical form required).

[2] *Accord:* 1855, Bennett v. Fail, 26 Ala. 610 (a trial court was criticised for ignoring this); 1884, Louisville N. A. & C. K. Co. v. Shires, 108 Ill. 631; 1868, State v. Felter, 25 Ia. 75 (quoted *supra*); 1871, State v. Reddick, 7 Kan. 149; 1896, McCarthy v. Boston Duck Co., 165 Mass. 165, 42 N. E. 568 (the trial Court's discretion controls); 1879, Brown v. Hnffard, 69 Mo. 305 (value of services); 1896, People v. Youngs, 151 N. Y. 210, 45 N. E. 460; 1896, Tullis v. Rankin, 6 N. D. 44, 68 N. W. 187; 1900, State v. Foote, 58 S. C. 218, 36 S. E. 551; 1850, Jones v. White, 11 Humph. 268; 1875, Pigg v. State, 43 Tex. 111; 1897, New York El. Eq. Co Blair, 25 C. C. A. 216, 79 Fed. 896; 1 Wells v. Davis, 22 Utah 322, 62 Pac. 3.

[1] 1891, Southern Bell Teleph. Co. v. Jor 87 Ga. 72, 13 S. E. 202; 1903, Western T. Co. v. Morris, — Kan. —, 73 Pac. 1 1876, State v. Pike, 65 Me. 111 (rejecti question as to how long a post-mortem exam tion should have taken, no premises being sented: "It does not appear that the wit was present at the post-mortem examination the deceased, or that he had any knowledg the case or the kind or extent of the exam tion needed. . . . [The answer] would h been no more than the opinion of one who far as appeared, had no knowledge on which base it"); 1896, Flaherty v. Powers, 167 M 61, 44 N. E. 1074; 1867, Moore v. State, Oh. St. 525.

has not seen the particular subject to which the trial relates and has not heard all the other evidence given in the case."[1]

§ 678. The same Skilled Witness may testify from both Personal Observation and Hypothetical Presentation. On the other hand, no harm is done if the skilled witness has had personal observation. His testimony may be based upon both forms of data. It will not always happen that persons having special skill will be totally devoid of actual observation of the matter in hand; they may have partially observed it, and their opinion may be desired upon premises partly furnished by personal observation, partly remaining to be supplied by hypothetical presentation. That this is permissible follows from the preceding principle.[1]

§ 679. Only Skilled Witnesses may be asked Hypothetical Questions. Fifthly, since hypothetical presentation is proper and necessary only where the witness has not had actual observation, does it follow that to any one whatever, who has not had actual observation, the premises may be presented hypothetically and his conclusion asked upon them? They might, so far as the present principle is concerned, which requires only that the premises must be supplied in at least one form or the other. But by the Opinion rule (*post*, § 1918) the tribunal will not listen to conclusions or opinions from persons who possess no more skill than the tribunal itself in drawing inferences from the premises, *i.e.* persons of only ordinary skill. The hypothetical form of presentation is therefore proper for those witnesses only who bring to the consideration of the particular premises in hand a more than ordinary skill. The detailed tests which define an expert witness are a part of the Opinion rule (*post*, §§ 1923, 1924). It is sufficient to note here the effect of that rule on the use of hypothetical questions.[1]

[1] 1888, Central City Ins. Co. *v.* Oates, 86 Ala. 558, 6 So. 83 (value of a burned house); 1879, Cook *v.* Fuson, 66 Ind. 530 (the issue arose on a warranty as to a cellar's dryness, and the witness had never been in the cellar or had any personal knowledge of it, but had lived in a house near by where the cellar had been wet; his testimony that the cellar in question could not be kept dry was rejected); 1875, Lawrence *v.* Boston, 119 Mass. 130, 132 (land value); 1895, Pierce *v.* Boston, 164 id. 92, 41 N. E. 229 (land value); 1888, Slocovich *v.* Ins. Co., 108 N. Y. 64, 14 N. E. 802 (value of a ship); 1859, Mish *v.* Wood, 34 Pa. 452 (value testimony, based on a description of goods lost); 1894, Missouri Pac. R. Co. *v.* Hall, 14 C. C. A. 153, 66 Fed. 868 (shrinkage of cattle). *Contra:* 1892, State *v.* Maier, 36 W. Va. 757, 761, 15 S. E. 991 ("Are not love and jealousy causes of insanity?", excluded; erroneous); 1896, Schneider Br. Co. *v.* A. I. M. Co., 23 C. C. A. 89, 77 Fed. 138, *semble* (opinion on the net value of a machine, the price being fixed and the only material question being the value of the defects, excluded). It has been said that an object that can be produced must be produced, and not described hypothetically; but this seems unnecessary: 1859, Beecher *v.* Denniston, 13 Gray 355, *semble;* compare § 1181, *post*.

[1] 1895, Mullin's Estate, 110 Cal. 252, 42 Pac. 646 (a physician as to his patient's sanity); 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 418, 3 N. E. 389, 4 id. 908; 1887, L. N. A. & C. R. Co. *v.* Wood, 113 id. 553, 14 N. E. 572, 16 id. 197; 1903, Skelton *v.* R. Co., — Minn. —, 92 N. W. 960; 1896, State *v.* Wright, 134 Mo. 404, 35 S. W. 1145 (a case hypothetically stated, together with the data of a personal examination, held proper for a physician giving an opinion on sanity); 1878, Pannell *v.* Com., 86 Pa. 269; 1881, State *v.* Clark, 15 S. C. 407 (a physician testified partly upon his own *post-mortem* examination and partly on other testimony); 1865, Wetherbee's Ex'rs *v.* Wetherbee's Heirs, 38 Vt. 454; 1895, Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045; 1898, Selleck *v.* Janesville, 100 id. 157, 75 N. W. 975. *Contra*, 1893, State *v.* Welsor, 117 Mo. 570, 581, 21 S. W. 443 (physician's statement, based in part on personal examination and in part on hypothetical data, excluded).

[1] 1900, Ragland *v.* State, 125 Ala. 12, 27 So. 983; 1858, Dunham's Appeal, 27 Conn. 197.

§ 680. **If the Premises fail, the Conclusion must be disregarded.** Sixth
It follows as a necessary part of the theory, that if the premises are ul
mately rejected by the jury as untrue, the testimonial conclusion based
them must also be disregarded. This is plain enough where a witness
claimed to have personal observation and is disbelieved. It is only wh
his testimony is based on hypothetical data that the same result needs to
emphasized.[1] But the failure which justifies rejection must be a failure
some one or more important data, not merely in a trifling respect.[2]

§ 681. **Form and Scope of Question; (1) Particularization of the Premis
to be used.** The question of greatest practical difficulty and of most freque
occurrence concerns the form and the scope of the hypothetical question. T
detailed rules rest on simple considerations, partly of principle, partly
practical expediency. The difficulty lies in securing the best results in th
application. The fundamental purpose of hypothetical presentation — fu
nishing the tribunal with the means of knowing just what premises t
conclusion is based upon — requires that *the data to serve as premises shou
be particularized with sufficient distinctness.* Various situations raise que
tions under this head:

(*a*) May the witness be asked, "Upon *all the testimony in the case*, wh
is your opinion on a given point?" The objection to this form of question
stated in the following passage:

1890, *Ruger*, C. J., in *People* v. *McElvaine*, 121 N. Y. 250, 24 N. E. 465: "It would th
be impossible for the jury to determine the facts upon which the witness bases his opini
whether such facts were proved or not. . . . When specific facts either proved or assum
to have been proved, are embraced in the question, the jury are enabled to determi
whether the answer to such question is based upon facts which have been proved in t
case or not."

Accordingly, it is generally accepted that such a question is improper.[1] Y
many Courts, having regard to the reason of the rule, are willing to perm

[1] 1861, Com. *v.* Mullins, 2 All. 296; 1903, Kersher *v.* Kersher, — Ia. —, 94 N. W. 346; 1886, People *v.* Sessions, 58 Mich. 599, 26 N. W. 291; 1884, Loucks *v.* R. Co., 31 Minn. 534, 18 N. W. 651; 1895, Delaware L. & W. R. Co. *v.* Roalefs, 16 C. C. A. 607, 70 Fed. 23 ("the opinion of the doctor is indivisible; it must be accepted or rejected as a whole; there is nothing to indicate how much it rests on the declarations [of the patient] and how much on personal observation").

[2] Compare the foregoing cases and the following: 1877, Eggers *v.* Eggers, 57 Ind. 461; 1885, Epps *v.* State, 102 id. 554, 1 N. E. 491; 1863, Hovey *v.* Chase, 52 Me. 313; 1866, Boardman *v.* Woodman, 47 N. H. 135 ("so proved as to resemble as near as may be the case under consideration; the jury can judge whether the case supposed is so far like the one they are considering as that the opinion of the expert on the supposed case is any guide to them"); 1886, Forsyth *v.* Doolittle, 120 U. S. 76, 7 Sup. 408.

[1] *Eng.:* 1760, Earl Ferrers' Trial, 19 How. St. Tr. 943; 1821, R. *v.* Wright, R. & R. 4 (uncertain); 1827, R. *v.* Wright, R. & R. 45 1831, R. *v.* Searle, 1 Moo. & Rob. 75 (unce tain); 1840, Sills *v.* Brown, 9 C. & P. 60 1840, R. *v.* Oxford, 4 State Tr. N. s. 497, 53 *Can.:* 1870, Key *v.* Thomson, 13 N. Br. 22 1882, Diffin *v.* Dow, 22 id. 108; *Ala.:* 190 Porter *v.* State, 135 Ala. 51, 33 So. 694; *Cal.* 1880, People *v.* Goldenson, 76 Cal. 350, 19 Pa 161; *Ind.:* 1871, Rush *v.* Magee, 36 Ind. 7 Bishop *v* Spining, 38 id. 144; *Ia.:* 1868, Stat *v.* Felter, 25 Ia. 74; 1876, Buller *v.* Ins. Co. 45 id. 98; 1882, Smith *v.* Hickenbollon, 57 i 738, 11 N. W. 664; *Mass.:* 1856, Woodbury Obear, 7 Gray 471; *N. H.:* 1858, Spear Richardson, 37 N. H. 34, *semble; N. Y.:* 185 People *v.* Lake, 12 N. Y. 362; 1890, People McElvaine, 121 id. 250, 24 N. E. 465; *S. D.* 1896, Aultman Co. *v.* Ferguson, 8 S. D. 458, 6 N. W. 1801; *U. S.:* 1855, The Clement, 2 Curt C. C. 369; *Wis.:* 1883, Bennett *v.* State, 5 Wis. 86, 14 N. W. 912, *semble;* 1885, Quinn Higgins, 63 id. 669, 24 N. W. 482, *semble.*

such a question where that reason does not exist, *i.e.* where the testimony is *not conflicting* and hence the witness may assume it all as true and is not obliged to choose (unknown to the jury) between conflicting witnesses.[2] The matter should be left to the discretion of the trial Court.[3] It may be noted, that whenever this form of question is to be allowed, it must appear that the witness has in fact heard all the testimony.

(*b*) The same objections apply to the question, "On *what you have heard of the testimony* in this case, what is your opinion?"; with the additional objection that it is here still more difficult to understand the premises actually in the witness' mind, since no one else knows exactly how much he has heard.[4]

(*c*) The question, "Assuming the truth of the *testimony for the plaintiff* (or for the defendant), what is your opinion?" is not seriously affected by the reason of the uncertainty of the data; although the witnesses on the same side do not always agree entirely. But the further reason remains, that it is difficult to fix in the mind (whether of witness or of jury) all the facts testified to by a number of witnesses and to associate them with this particular opinion as its premises. There are opposing rulings upon this form of question.[5] The only proper solution is to leave it to the discretion of the trial judge to accept the question when it does fair justice.[6] In any case, the witness must have heard all the testimony he is asked about.

[2] The Courts put this rule in different ways. Some declare admissible a question based on all the testimony, unless it is conflicting; others declare such a question inadmissible, unless the facts testified to are undisputed by the opposite witnesses. There seems to be no practical difference, except that it would be easier to justify the question in the former case: *Ala.:* 1878, Page *v.* State, 61 Ala. 18; *Ill.:* 1895, Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999; *Kan.:* 1870, Tefft *v.* Wilcox, 6 Kan. 58; *Md.:* 1856, Baltimore & O. R. Co. *v.* Thompson, 10 Md. 84; 1865, Walker *v.* Rogers, 24 id. 243; *Mass.:* 1895, Chalmers *v.* Mfg. Co., 164 Mass. 532, 42 N. E. 98; 1898, Oliver *v.* R. Co., 170 id. 222, 49 N. E. 117; *Mich.:* 1870, Kempsey *v.* McGinness, 21 Mich. 138; *Minn.:* 1875, Getchell *v.* Hill, 19 Minn. 472; 1876, State *v.* Lautenschlager, 22 id. 521; 1881, Storer's Will, 28 id. 11; *Oh.:* 1851, Cincinnati Mut. Ins. Co. *v.* May, 20 Oh. 211, 223; *Pa.:* 1882, Olmsted *v.* Gere, 100 Pa. 131, *semble*; *Tex.:* 1887, Armendaiz *v.* Stillman, 67 Tex. 462, 3 S. W. 678; *Vt.:* 1862, Fairchild *v.* Bascomb, 35 Vt. 398, *semble*; 1878, Gilman *v.* Strafford, 50 id. 725; State *v.* Hayden, 51 id. 304; *Wis.:* 1849, Luning *v.* State, 1 Chand. 184; 1883, Bennett *v.* State, 57 Wis. 81, 14 N. W. 912 (modifying Luning *v.* State; advising hypothetical questions as a rule; and if the testimony of one or all the witnesses is allowed to be taken, in case of conflict or doubt, the witness should state beforehand his understanding of the testimony he is speaking of); 1886, Gatea *v.* Fleischer, 67 id. 508, 30 N. W. 674 (applying this liberally); 1888, Krenziger *v.* R. Co., 73 id. 163, 40 N. W. 657.

[3] 1875, Getchell *v.* Hill, 19 Minn. 472; 1876, State *v.* Lautenschlager, 21 id. 521; 1881, Storer's Will, 28 id. 11, 8 N. W. 827.

[4] 1859, Champ *v.* Com., 2 Metc. Ky. 27; 1896, Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344; 1898, Malynak *v.* State, 61 N. J. L. 562, 40 Atl. 572; 1854, Lake *v.* People, 1 Park. Cr. C. 557; 1860, Sanchez *v.* People, 22 N. Y. 154. *Contra:* 1897, Swanson *v.* Mellen, 66 Minn. 486, 69 N. W. 620 (a part of the testimony only was heard, but as it related to services of a common and uniform kind, an opinion of value based on it was admitted); 1903, State *v.* Privitt, — Mo. —, 75 S. W. 457 (opinion based on the testimony as he heard it, with a recital of the testimony of the only witness he had not heard, allowed); 1878, State *v.* Hayden, 51 Vt. 299, 306.

[5] *Admitted:* 1880, Polk *v.* State, 36 Ark. 123; 1887, Schneider *v.* Manning, 121 Ill. 387, 12 N. E. 267; 1895, Pyle *v.* Pyle, 158 id. 289, 41 N. E. 999. *Excluded:* 1882, Diffin *v.* Daw, 22 N. Br. 107 ("Is the statement of the medical case, as given by the defendant in evidence, reconcilable with the facts, assuming them to be true, as given by the other witnesses?" excluded); 1890, People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465.

[6] For instance, where the opinion, when expressed, favors the opponent, and could not more favor him upon any supposition, there is no reason for him to object to the scope of the question: 1872, Dexter *v.* Hall, 15 Wall. 26.

(*d*) A question assuming the truth of the testimony of *several specific witnesses* may very well suffice, if the facts they testify to are likely to b definitely in the minds of the witness and the jury. This must depend o the circumstances of the case. There should be no fixed rule excluding suc a question; and in the precedents it can hardly be said that a fixed rule i intended to be laid down.[7]

(*e*) A question assuming the truth of a *single witness' testimony* will usuall be proper. Yet here, too, the scope of the testimony may be so extended o so confused that the assumed premises are not clear, and an express rehearsa of the assumed facts should be made.[8] As before, it should rest in th discretion of the trial judge.

(*f*) Questions in any other way covering a scope which is not clea may always be excluded; much depending on the discretion of the tria judge.[9] From this point of view it may sometimes be necessary to state hypothetically the data gained from the witness' personal observation although in the ordinary case of that sort (*ante*, § 675) hypothetical pres entation is not necessary.

§ 682. **Same: (2) Kind of Data that may be assumed in the Question; not All the Facts, but Any Facts of which there is Evidence.** (*a*) Since the data to be assumed are those which it is expected or claimed by the party the jury will subsequently adopt as true, it is obvious that it is both wasteful

[7] 1870, Key *v.* Thomson, 2 Han. N. Br. 224, 228 (testimony based on the evidence of other witnesses, excluded); 1857, Wilkinson *v.* Moseley, 30 Ala. 573 (two witnesses; excluded); 1900, Baltimore City P. R. Co. *v.* Tanner, 90 Md. 315, 45 Atl. 188 (several witnesses' testimony to undisputed facts; allowed); 1876, Reynolds *v.* Robinson, 64 N. Y. 595 (the value of services in nursing a cancer patient was in issue, and the witness' opinion was based on hearing the testimony of three witnesses of the plaintiff as to the nature of the services; excluded); 1880, Guiterman *v.* Steamship Co., 83 id. 366 (several witnesses to a collision; excluded); 1893, Snelling's Will, 136 id. 515, 518, 32 N. E. 1006 (two witnesses; excluded); 1899, Cornell *v.* State, 104 Wis. 527, 80 N. W. 745 (allowable, for the testimony of a few conflicting witnesses, but not for voluminous and conflicting testimony; the matter to be in the trial Court's discretion). A question involving reference to former testimony was excluded in McMechen *v.* McMechen, 17 W. Va. 692 (1881), where the testimony of two witnesses was named; it does not appear whether the Court intended to prohibit all reference to even one witness' testimony; but in Kerr *v.* Lunsford, 31 id. 672, 8 S. E. 493 (1888), it was said that "the opinion of medical experts founded on testimony already in the case can be given only on a hypothetical case"; in 1891, however, it was expressly held, ignoring Kerr *v.* Lunsford, in Bowen *v.* Huntington, 35 id. 694, 14 S. E. 217, for a question based on a reference to three witnesses' testimony, that this form was proper.

[8] *Admitted: La.:* 1874, State *v.* Baptiste, 26 La. An. 137; *Mass.:* 1853, Twombly *v.* Leach, 11 Cush. 402, 405; 1864, Hunt *v.* Lowell Gaslight Co., 8 All. 170; *N. Y.:* 1875, McCollum *v.* Seward, 62 N. Y. 318; 1879, Seymour *v.* Fellows, 77 id. 180; *Vt.:* 1878, Gilman *v.* Stratford, 50 Vt. 725; State *v.* Hayden, 51 id. 305; *Wis.:* 1867, Wright *v.* Hardy, 22 Wis. 353; 1883, Bennett *v.* State, 57 id. 81, 14 N. W. 912; 1897, McKeon *v.* R. Co., 94 id. 477, 69 N. W. 175 (part being heard, the rest read from a stenographic report); 1899, Cornell *v.* State, 104 id. 527, 80 N. W. 745. *Excluded: Conn.:* 1893, Barber's Estate, 63 Conn. 393, 408, 27 Atl. 973 (testimony of another witness, with additional data; improper on the facts); *Ill.:* 1898, Chicago & A. R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896; *Ind.:* 1883, Elliott *v.* Russell, 92 Ind. 530 (an opinion as to the results of a hanging "for the time and in the manner plaintiff said he was hung"); 1884, Craig *v.* R. Co., 98 Ind. 112; *Mass.:* 1893, Stoddard *v.* Winchester, 157 Mass. 567, 575, 32 N. E. 918; *Mich.:* 1899, Detzur *v.* Brewing Co., 119 Mich. 282, 77 N. W. 948; *N. Y.:* 1892, Link *v.* Sheldon, 136 N. Y. 1, 9, 32 N. E. 696; *U. S.:* 1893, Manuf. A. I. Co. *v.* Dorgan, 16 U. S. App. 290, 299, 7 C. C. A. 581, 58 Fed. 945.

[9] 1884, Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 630 (excluding an opinion based on the testimony of witness T. and also a private conversation with him); 1891, Wallace *v.* Oil Co., 128 N. Y. 580, 27 N. E. 956 ("judging from the whole history of his case and what you have learned of it in all other ways;" excluded).

and misleading to ask a witness to consider *data which there is not a fair possibility of the jury accepting*. It is wasteful, because the process takes up valuable time without being of any service. It is misleading, because the jury may often, forgetting the data of an opinion, accept the opinion itself when in fact its data are not accepted, and the opinion is therefore really irrelevant. Various practical tests have been proposed for indicating the minimum quality of possibility which the data must possess in order to be taken as the premises of an opinion. No one of them seems preëminently the best; they express the various predilections and experience of different judges as to the safe limits to be set. Sometimes different tests occur in the same opinion; occasionally an extreme strictness or looseness is found, palpably in excess of the general practice.[1]

[1] For *cross-examination*, see *post*, § 684; in the cases not especially so noted, no particular rule is laid down: *Colo.*: 1876, Gottlieb *v.* Hartman, 3 Colo. 62 ("evidence tending to prove"); 1895, Jackson *v.* Burnham, 20 id. 532, 39 Pac. 577 ("within the possible or probable range of the evidence"); 1896, Courvoisier *v.* Raymond, 23 id. 113, 47 Pac. 284 (same); *Conn.*: 1893, Barber's Estate, 63 Conn. 393, 409, 27 Atl. 973 ("such only as counsel may fairly claim that the evidence tends to justify"); 1898, Porter *v.* Ritch, 70 id. 235, 39 Atl. 169; *Ida.*: 1897, Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45 (founded on facts which the evidence "tends to prove," not on "conjecture"); *Ill.*: 1872, Decatur *v.* Fisher, 63 Ill. 241; 1897, Grand Lodge *v.* Wieting, 168 id. 408, 48 N. E. 59 (may range "within reasonable limits"; here held not to violate this rule); 1900, Howard *v.* People, 185 id. 552, 57 N. E. 441 ("evidence tending to prove"); 1902, Economy L. & P. Co. *v.* Sheridan, 200 id. 439, 65 N. E. 1070 (facts "within the scope or range of the evidence"); *Ind.*: 1879, Guetig *v.* State, 66 Ind. 104 ("must be supported by some evidence"); 1880, Nave *v.* Tucker, 70 id. 18 ("evidence tending to prove"); 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 id. 420, 3 N. E. 389, 4 N. E. 908 (excluding "where there is no evidence at all in support of the facts assumed, or where the question is strictly irrelevant, or where it is merely speculative"); 1888, Conway *v.* State, 118 id. 490, 21 N. E. 285 (must be "within the range of the evidence"); *Ia.*: 1878, Hurst *v.* R. Co., 49 Ia. 78 ("evidence tending to establish"); 1879, *Re* Ames' Will, 51 id. 603, 2 N. W. 408 (same); 1881, Bomgardner *v.* Andrews, 55 id. 638, 8 N. W. 48 (same); 1888, Meeker *v.* Meeker, 74 id. 355, 37 N. W. 973 ("based on evidence"); 1898, Manatt *v.* Scott, 106 id. 203, 76 N. W. 717; 1901, Pierson *v.* R. Co., 116 id. 601, 88 N. W. 363; *Kan.*: 1898, Davis *v.* Ins. Co., 59 Kan. 74, 52 Pac. 67; 1899, Medill *v.* Snyder, 61 id. 15, 58 Pac. 962 ("some evidence"); 1900, Roark *v.* Greeno, 61 id. 299, 59 Pac. 655; *Ky.*: 1898, Baxter *v.* Knox, 19 Ky. 1973, 44 S. W. 972 (question held proper on the testimony); *Md.*: 1901, Safe Deposit & T. Co. *v.* Berry, 93 Md. 560, 49 Atl. 401 (certain questions held improper on the facts); *Me.*: 1885, Powers *v.* Mitchell, 77 Me. 369 ("evidence tending to prove"); *Mass.*: 1898, Oliver *v.* R. Co., 170 Mass. 222, 49 N. E. 117 ("something must be left to the presiding judge"); 1900, Anderson *v.* Albertetamm, 176 id. 87, 57 N. E. 215 (trial judge "in many cases must rely to a great extent upon the good faith of counsel in their statements as to what they expect the evidence will be"); *Mich.*: 1882, People *v.* Hall, 48 Mich. 489, 12 N. W. 665 (must not be "contrary to positive and uncontradicted facts"); 1886, People *v.* Sessions, 58 id. 598, 26 N. W. 291 ("evidence tending to establish"); 1886, Mayo *v.* Wright, 63 id. 43, 29 N. W. 832 (some testimony must have been offered); 1887, People *v.* Foley, 64 id. 153, 31 N. W. 94; 1896, Rivard *v.* Rivard, 109 id. 98, 66 N. W. 681; 1897, Holman *v.* R. Co., 114 id. 208, 72 N. W. 202; 1898, People *v.* Foglesong, 116 id. 556, 74 N. W. 730 ("any evidence tending to prove"); *Minn.*: 1886, State *v.* Hanley, 34 Minn. 433, 26 N. W. 397 (excluded if it covers a single material fact not evidenced); 1888, Peterson *v.* R. Co., 38 id. 515, 39 N. W. 485 ("any evidence tending to prove"); 1899, Wittenberg *v.* Onsgard, 78 id. 342, 81 N. W. 14 (facts which "might legitimately be found by the jury from the evidence"); *Miss.*: 1887, Woolner *v.* Spalding, 65 Miss. 211, 3 So. 583; 1890, Kearney *v.* State, 58 id. 238; *Mo.*: 1871, Tingley *v.* Cowgill, 48 Mo. 297; 1889, State *v.* Meyers, 99 id. 121; 1892, Russ *v.* R. Co., 112 id. 45, 48, 20 S. W. 472 (there must be evidence for all the facts assumed); 1898, Fullerton *v.* Fordyce, 144 id. 519, 44 S. W. 1053 ("tends to prove"); *Mont.*: 1899, State *v.* Peel, 23 Mont. 358, 59 Pac. 169 ("evidence tending to support"); *Nebr.*: 1883, O'Hara *v.* Wells, 14 Nebr. 408, 15 N. W. 722; 1886, Morrill *v.* Tegarden, 19 id. 536, 26 N. W. 202 ("so framed as to fairly reflect facts either admitted or proved by other witnesses"); 1886, Bellard *v.* State, ib. 613, 28 N. W. 271; *N. H.*: 1858, Spear *v.* Richardson, 37 N. H. 34; 1862, Perkins *v.* Railroad, 44 id. 225; *N. J.*: 1898, Lindenthal *v.* Hatch, 61 N. J. 29, 39 Atl. 662 (question on data involving "mere guesswork," excluded); *N. Y.*: 1876, Harnett *v.* Garvey, 66 N. Y. 641 ("within the possible or probable range of the evidence");

(*b*) The question, on principle, need not include any particular number facts; *i. e.* it may assume any one or more facts whatever, and *need not cov all the facts which the questioner alleges* in his case. The questioner is e titled to the witness' opinion on any combination of facts that he ma choose. It is often convenient and even necessary to obtain that opinio upon a state of facts falling short of what he or his opponent expects prove, because the questioner cannot tell how much of the testimony th jury will accept; and if proof of the whole should fail, still proof of son essential part might be made and an opinion based on that part is entitled be provided for the jury. For reasons of principle, then, and to some exte of policy, the natural conclusion would be that the questioner need not cov in his hypothesis the entire body of testimony put forward on that point b him or by the opponent, but may take as limited a selection as he pleas and obtain an opinion on that basis. Such is the orthodox doctrine as applie by most Courts.[2]

But there are opposing considerations of policy. The jury are apt, esp cially where there are many expert witnesses and the evidence is voluminou to remember and accept merely the net opinion of a witness, with little or n reference to the special premises on which it was based. Thus, if a couns were to select from the testimony the evidential circumstances most favo able to his party, or those least favorable to the opponent, and obtain a opinion thereon, it is obvious that if the jury forgets the partial nature of th opinion's premises, the opinion may count with them, when perhaps it ough

1882, Stearns *v.* Field, 90 Id. 641 ("any state of facts which the evidence fairly tends to justify"); 1884, People *v.* Angsbury, 97 id. 504 ("facts admitted or established by the evidence, or which, if controverted, the jury might legitimately find on weighing the evidence"); 1891, People *v.* Smiler, 125 id. 717, 26 N. E. 312; 1899, Cole *v.* Fall Brook C. Co., 159 id. 59, 53 N. E. 670 (excluded if "there is proof sustaining" the data); *N. C.:* 1897, Burnett *v.* R. Co., 120 N. C. 517, 26 S. E. 819 (excluded, because no evidence on the point was offered); *Oh.:* 1876, Williams *v.* Brown, 28 Oh. St. 552; *Or.:* 1882, State *v.* Anderson, 10 Or. 455; *Pa.:* 1884, First Nat'l Bank *v.* Wirebach's Ex'r, 106 Pa. 44; 1887, Reber *v.* Herring, 115 id. 608, 8 Atl. 830 (fluctuates, in excluding, between "facts not supported" and "facts not proved" by the testimony); *S. D.:* 1894, Vermillion Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802; *U. S.:* 1895, North American Acc. Ass'n *v.* Woodson, 12 C. C. A. 392, 64 Fed. 689 (facts of which some evidence has been offered); 1900, Denver & R. G. R. Co. *v.* Roller, 41 C. C. A. 22, 100 Fed. 738 ("any state of facts which the evidence directly, fairly, and reasonably tends to establish or justify"); *Utah:* 1902, Nichols *v.* R. Co., 25 Utah 240, 70 Pac. 996 (a question assuming facts which "indisputably had neither been proven nor in truth existed," held improper); *Vt.:* 1875, Hathaway's Adm'r *v.* Ins. Co., 48 Vt. 351 ("evidence tending to prove"); *W. Va.:* 1888, Kerr *v.* Lunsford, 31 W. Va. 672, 8 S. E. 493 ("evidence tending t prove"); *Wis.:* 1885, Quinn *v.* Higgins, 6 Wis. 670, 24 N. W. 482 ("evidence tending t prove"); 1895, Tebo *v.* Augusta, 90 id. 405, 6 N. W. 1045 ("sufficient evidence on which t base an assumption"); 1900, Werner *v.* R. Co. 105 Id. 300, 81 N. W. 416 ("tended to prove")

[2] *Cal.:* 1897, People *v.* Durrant, 116 Ca 179, 48 Pac. 75; 1897, People *v.* Hill, ib. 562 48 Pac. 711; *D. C.:* 1899, Horton *v.* U. S., 1 D. C. App. 310, 324; *Fla.:* 1903, Williams State, — Fla. —, 34 So. 279; *Ill.:* 1903 Chicago & E. I. R. Co. *v.* Wallace, 202 Ill. 129 66 N. E. 1096; *Ind.:* 1871, Davis *v.* State, 3 Ind. 497; 1879, Guetig *v.* State, 66 id. 101 1884, Goodwin *v.* State, 95 id. 554; 1887, Louis ville N. A. & C. R. Co. *v.* Wood, 113 id. 554, 1 N. E. 572, 16 N. E. 197; *Mich.:* 1888, Turn bull *v.* Richardson, 69 Mich. 413, 37 N. W. 499 *Mont.:* 1897, Morrill *v.* Hershfield, 19 Mont 245, 47 Pac. 997; *N. Y.:* 1882, Stearns *v.* Field 90 N. Y. 640; *Pa.:* 1884, First Nat'l Bank *v.* Wirebach's Ex'r, 106 Pa. 44 (this opinion contains a good exposition); *Tex.:* 1890, Gulf C. & S. F. R. Co. *v.* Compton, 75 Tex. 673, 13 S. W. 667; 1902, Fretwell *v.* State, 43 Tex. Cr. 501, 67 S. W. 1021 (unless it appears that an opportunity on cross-examination to add the remaining material facts was denied); *U. S.:* 1902, Swengen *v.* Bender, 51 C. C. A. 627, 114 Fed. 1; *Vt.:* 1900, State *v.* Doherty, 72 Vt. 381, 48 Atl. 658; 1902, McKinstry *v.* Collins, 74 id. 147, 52 Atl. 438.

not to count at all. Now the law and the judge cannot, of course, be expected to reject legitimate offers of evidence simply because the jury may occasionally fail to perform its duty intelligently. But the Court may well interfere to prevent questions which are under the circumstances practically valueless, and are either intended or fairly likely to mislead the jury. Some Courts, looking at the not uncommon abuse of the hypothetical question, have properly attempted to forbid the putting of questions whenever the abuse of this sort is probable. There are two slightly different forms of the abuse. (1) One consists in asking an opinion as to the effect of facts testified to by a given witness, his testimony being culled and partially stated, so that while in form the opinion deals with a part only, in effect the whole of that witness' testimony is either discredited or approved, as the case may be. The remedy for this is to require a statement of all the material facts testified to by the witness.[3] (2) The other method does not specially mention particular witnesses, but culls certain facts having a bearing particularly favorable for the questioner's side or particularly unfavorable to the opponent's, and then the opinion obtained will, it is hoped, be remembered as absolutely (not conditionally) favorable or unfavorable respectively:

1888, *Morse, J.*, in *People* v. *Vanderhoof*, 71 Mich. 176, 39 N. W. 28: "I believe that even in a civil case all the undisputed facts of a case must be included in a hypothetical question, both as a matter of sound principle, and of reason and justice. . . . To permit, as was done in this case, a culling of facts to suit the purposes of conviction, to be propounded in hypothesis to the experts, and then to instruct the jury that the only way to contradict the opinion of the experts is by the opinion of other experts, is to deny a fair trial."[4]

But though any efforts to repress the abuses of the hypothetical question at the hands of unscrupulous tricksters should meet with approval, it is improper and unnecessary to lay down any general rule. The trial judge should be given discretion to determine how far the counsel can and must properly limit his questions, and how far the jury may be trusted, with the aid of argument, to discover the conditional nature of the opinion.

(*c*) There could be no reason in confining the hypothetical question to the *undisputed facts*, or to the facts "proved." The former expedient is at least conceivably possible; though the latter is not. Both are without the slightest ground of logic or policy. It is singular that Courts have consented to discuss such propositions; but they have several times thought it necessary to negative them.[5]

[3] 1873, Davis *v.* State, 38 Md. 40, 44; 1879, Hand *v.* Brookline, 126 Mass. 326. The same situation is also presented where a written contract is to be interpreted; the question must assume terms similar to the contract, and no less or different: 1883, Jewett *v.* Brooks, 134 Mass. 505.

[4] *Accord:* 1876, Gottlieb *v.* Hartmann, 3 Colo. 61 (must cover all the evidence; this goes too far); 1893, Barber's Estate, 63 Conn. 393, 409, 27 Atl. 975 (the omitted data must not leave the others in a false relation); 1888, Petersou *v.* R. Co., 38 Minn. 515, 39 N. W. 485 (must cover all the material parts); 1901, Schulz *v.* Modisett, — Nebr. —, 96 N. W. 338 ("All the undisputed pertinent facts"); 1902, Nichols *v.* R. Co., 25 Utah 240, 70 Pac. 996 (a question omitting material undisputed facts is unfair); 1865, Thayer *v.* Davis, 38 Vt. 163 (based on notes of counsel; excluded); 1899, Schaidler *v.* R. Co., 102 Wis. 564, 78 N. W. 732 (a material fact must be included).

[5] 1895, Jackson *v.* Burnham, 20 Colo. 532, 39 Pac. 577 (not confined to undisputed facts);

(*d*) On principle, the questioner is entitled (as already noted) to obtain an opinion upon any combination of facts, however few or however numerous. Hence, the mere *length* of a question of itself is no objection.[6] But, for the same reasons of policy as before, the Court may exclude a question which by its length tends to confuse or mislead the jury without being of appreciable service.[7] This discretion of the trial judge ought to be absolute, and might be exercised much more frequently than it is in excluding tedious and useless questions.

§ 683. **Same: (3) Form of Question must be expressly Hypothetical.** Policy, as well as principle, require that the form of the question be expressly hypothetical;[1] because otherwise the jury, and perhaps the witness, may be misled by the statement, as a proved or admitted fact, of that which is as yet only an assertion of counsel or of witnesses.[2] But this requirement is capable of being insisted upon with finical and injurious exactness. The harm from its violation can seldom be serious, and Courts should not find fault with omissions to use a formal hypothetical statement where the jury could not have been misled. The question need be only substantially, not in exact form, hypothetical.[3]

For the *mode of stating* the assumed premises, there is no fixed rule. Where the facts have not yet been testified to at all, there is only one way, — the oral statement of the premises by counsel. But where testimony already offered is taken as the basis, either the testimony of a given witness may be read aloud, an assumption of its truth being then made, or an oral statement by counsel, in impersonal form, of such assumed premises may be used; the judge's discretion determining the choice.[4] Whether a uniform question asked of all the experts need be repeated for each witness, if the witness has already heard it read, will also rest in the discretion of the judge.[5]

§ 684. **Hypothetical Questions on Cross-examination.** Just as the cross-examination of an ordinary witness may involve questions which test his memory, observation, and bias, so in cross-examining one who takes the

1880, Nave *v.* Tucker, 70 Ind. 18 (objection that "the hypothesis was not proved," overruled); 1880, Cowley *v.* People, 83 N. Y. 470 (question need not state "facts as they exist"); 1882, Stearns *v.* Field, 90 Id. 640 (objection that it "assumed what was not proved," overruled); 1891, Bowen *v.* Huntington, 35 W. Va. 686, 14 S. E. 217 (basis need not be facts exactly as they are).

[6] 1865, Mary Harris' Trial, (D. C.) Clephane's Rep. 100 (question of some 3,800 words, allowed to be put); 1881, Guiteau's Trial, (D. C.) II, 1251, 1322, 1720 (question of more than 3,400 words, allowed to be asked); 1886, Mayo *v.* Wright, 63 Mich. 43, 29 N. W. 832 (mere length is no objection).

[7] 1898, Davis *v.* Ins. Co., 59 Kan. 74, 52 Pac. 67 (lengthy question held perhaps improper); 1896, Howes *v.* Colburn, 165 Mass. 385, 43 N. E. 125 ("It might be wiser to exclude such questions altogether, when they are very complicated or involve much detail"); 1886, Forsyth *v.* Doolittle, 120 U. S. 78, 7 Sup. 408 (trial Court in discretion may exclude).

[1] A classical form is this: 1856, Shaw, C. J., in Woodbury *v.* Obear, 7 Gray 471: "If certain facts, assumed by the question to be established by the evidence, should be found true by the jury, what would be his opinion, upon the facts thus found true, on the question at issue?"

[2] 1895, Chalmers *v.* Mfg. Co., 164 Mass. 532, 42 N. E. 98; 1890, Jones *v.* R. Co., 43 Minn. 281, 45 N. W. 444; 1884, Reed *v.* State, 62 Miss. 409, *semble;* 1878, State *v.* Bowman, 78 N. C. 511, *semble;* 1886, State *v.* Cole, 94 Id. 964; 1888, State *v.* Keene, 100 Id. 511, 6 S. E. 91; 1878, Gilman *v.* Strafford, 50 Vt. 725.

[3] 1870, Christiancy, J., in Kempsey *v.* McGinniss, 21 Mich. 139; 1875, McCollum *v.* Seward, 62 N. Y. 318.

[4] 1860, Choice *v.* State, 31 Ga. 468.

[5] 1886, Gates *v.* Fleischer, 67 Wis. 509, 30 N. W. 674.

stand as a skilled witness, his judgment upon germane matters may be tested by assuming premises and asking his conclusions.[1] The modes and purposes are substantially the same as in testing ordinary witnesses (*post*, §§ 994, 1000, 1018, 1362).

B. Knowledge required for Special Subjects.

1. Medical Matters.

§ 687. **Physician's General Knowledge based on the Study of Books.** The general principle has already been considered (*ante*, § 657) that a witness' knowledge must be based upon personal observation of his own senses. It has also been noted that exceptions to this rule are conceded, — in particular, for professional men testifying to a matter of general scientific truth (*ante*, § 665). It remains to consider the application of the principle to the testimony of *physicians* concerning *truths of medical science*. Here it is necessary to distinguish two considerations. Are we objecting to the bookish source of their knowledge (1) because it implies a lack of skill and experience as affecting their expert capacity for judgment, or (2) because it involves accepting, as a knower of a given fact, one who has not really observed for himself but is trusting to others? In other words, is the objection directed against the quality of the witness' Experience or the quality of his Knowledge?

(1) From the former point of view, the result would not be uncertain if we were asking whether a layman who has merely read medical books may express an opinion upon the nature of a particular person's disease; for here the mere perusal of books by a layman would clearly not be a sufficient cultivator of the judgment for diagnosis of symptoms or prescription of remedies. But if, as is usual, the objection is directed against a professional man, because he has merely graduated from a medical school and has never practised, then ordinarily it should not be difficult to negative the objection. According to the older methods, by which a medical training was gained mainly from actual practice under an apprenticeship, an active apprenticeship in practice for a considerable period might be essential. But the modern training of a medical school does not involve merely the perusal of books; it embraces a personal observation of disease and its remedies. The cultivation of judgment which may be attained in such a school ought to qualify without any requirement of a term of subsequent practice. There is little definite authority on the subject; but the matter should rest in the trial judge's discretion.[1]

[1] 1887, People *v.* Sutton, 73 Cal. 246, 15 Pac. 86; 1897, West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447 (on cross-examination, "any fact which, in the sound discretion of the Court, is pertinent to the inquiry, whether testified to or not," is usable in testing the expert); 1871, Davis *v.* State, 35 Ind. 498; 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 id. 415, 3 N. E. 389, 4 N. E. 908; 1885, Geisendorff *v.* Eagles, 106 id. 41, 5 N. E. 743; 1888, Grubb *v.* State, 117 id. 284, 20 N. E. 257, 725; 1899, Taylor *v.* Star Coal Co., 110 Ia. 40, 81 N. W. 249 ("almost any state of facts" may be assumed).

[1] 1850, Pollock, C. B., in Bristow *v.* Sequeville, 5 Exch. 277 ("In a case depending on medical testimony, would the evidence of a person be admissible who had studied medicine at

(2) The objection from the second point of view is easily answered. T deny the competency of a physician who does not know his facts fro personal observation alone is to reject medical testimony almost in its en tirety. To allow any physician to testify who claims to know solely b personal experience is to appropriate the witness-stand to impostors. Med cal science is a mass of transmitted data; the generalizations are rare whic are the result of one man's personal observation exclusively; and the la cannot expect its petitioners to obtain these rare persons. The law mus recognize the methods of medical science. It cannot stultify itself by estab lishing, for legal remedies, a rule never considered necessary by the medica profession itself. It is enough for a physician, testifying to a medical fac that he is by training and occupation a physician; whether his source o information for that particular fact is in part or entirely the hearsay of hi fellow-practitioners and investigators, is immaterial:

1893, *Holmes*, J., in *Finnegan* v. *Gas Works Co.*, 159 Mass. 312, 34 N. E. 523 (receiv ing testimony that after asphyxiation there is a period of conscious suffering befor death, the physician having had no cases of the kind): "Although it might not be ad missible merely to repeat what a witness had read in a book not itself admissible, still when one who is competent on the general subject accepts from his reading as probabl true a matter of detail which he has not verified, the fact receives an authority which i would not have had from the printed page alone, and, subject perhaps to the exercise o some discretion, may be admitted."[2]

§ 688. **Physician's Knowledge of Symptoms based on Hearsay of Patients and Others.** Here, again, the law cannot afford to stultify itself by refusing to recognize, in testimonial rules, the safe and accepted practices of medical science. When a physician examines a patient to ascertain his ailment and

one of the universities but had never practised it?", intimating the negative); 1847, Tullis v. Kidd, 12 Ala. 650 (actual practice is not necessary); 1895, State v. Dixon, 47 La. An. 1, 16 So. 589 (admitting a medical student who had treated similar diseases). The retirement from active practice involves no disqualification: 1874, Roberts v. Johnson, 58 N. Y. 617. A similar question arises sometimes under another principle, *i. e.* whether a physician of *general practice*, whose knowledge on a *special topic* (such as poisoning) is gained by reading only, is of sufficient experience or judgment to testify on that topic (*ante*, § 569). The rulings do not always distinguish the two points of view, but the result in both classes should be substantially the same.

[2] *Admitted:* 1888, Preeper v. R., 15 Can. Sup. 401, 404, 408, 410, 416 (medical witness to the *indicia* of distance in shot-marks on a body, speaking "not from personal experience, but from books," admitted; two judges diss.); 1894, Jackson v. Boone, 93 Ga. 662, 20 S. E. 46; 1901, Boswell v. State, 114 id. 40, 39 S. E. 897 (physicians allowed to testify to the poisonous nature of bluestone, though deriving their knowledge solely from books); 1851, Carter v. State, 2 Ind. 619 (poison; knowledge based on reading); 1901, Isenhour v. State, 157 Ind. 517, 62 N. E. 40 (chemist's knowledge, acquired "wholly from reading, study, and conversations with other physicians"); 1886, State v. Baldwin, 36 Kan. 16, 12 Pac. 318 (knowledge partly founded on books); 1894, Hardiman v. Brown, 162 Mass. 585, 39 N. E. 192 (reading is sufficient, at least for specialties); 1883, Marshall v. Brown, 50 Mich. 148, 15 N. W. 55 (the effect of a substance on the human system; knowledge based chiefly on books); 1869, Taylor v. Railway, 48 N. H. 306 (founded on study alone); 1873, State v. Wood, 53 id. 495 (same); 1859, State v. Terrell, 12 Rich. L. 327 (strychnia-poisoning; knowledge acquired from "books, lectures, and oral instruction").

Excluded: 1898, Erb v. Popritz, 59 Kan. 264, 52 Pac. 871 (statements as to probable duration of life, by one speaking solely from acquaintance with mortality tables); 1870, Dole v. Johnson, 50 N. H. 452, 459 (one who proposed to testify as to the contagiousness of foot-rot in sheep, after having "as editor of a stock-journal read extensively on the subject"); 1888, Soquet v. State, 72 Wis. 666, 40 N. W. 391 (arsenic; testimony based solely on books).

For the right to *cross-examine a medical man* upon the scope of his reading, see *post*, § 1700.

to prescribe for it, a portion of his reasons for action must be the patient's own statements. To exclude testimony not wholly independent of this foundation for opinion is, in strictness, to exclude almost always medical testimony based on a personal examination.[1] Yet there are distinctions to be taken. The hearsay source of information may be that of the patient as to (1) present symptoms, (2) past symptoms, (3) cause of the injury or illness, (4) or that of a nurse or other third person.

(1) A diagnosis based *in part* on hearsay from the *patient* himself stating *present symptoms* is generally and properly considered receivable.[2] That it would not be when this was the *exclusive* source may sometimes be conceded, though such a case can rarely be presented.[3]

(2) As to hearsay from the *patient* detailing *past symptoms*, no line can well be drawn between this and the preceding source; the policy of the case is the same for both.[4] Courts seem usually not to take any distinction; but occasionally the principle is expressly spoken of as covering the present case.[5]

[1] It is said that Prince von Bismarck was once ruffled by the number of questions put to him by his medical attendant, an eminent physician of no less individuality and self-possession than the Chancellor. The latter intimated that the physician could do his duty without putting so many intrusive questions. "Very well, Highness," said the other; "but if you wish to be cured without questions asked, you had better send for a veterinary surgeon." Those who object to testimony of the sort here considered must expect to surrender the medical witness-stand to veterinary surgeons exclusively.

[2] *Accord*, except as otherwise noted: *Ala.:* 1855, Eckles *v.* Bates, 26 Ala. 659; *Ga.:* 1896, Western & A. R. Co. *v.* Stafford, 99 Ga. 187, 25 S. E. 656, *semble; Ill.:* 1867, Illinois C. R. Co. *v.* Sutton, 42 Ill. 440; 1884, Chicago B. & Q. R. Co. *v.* Martin, 112 id. 17; *Ind.:* 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 419, 3 N. E. 389, 4 N. E. 908; 1887, Louisville N. A. & C. R. Co. *v.* Wood, 113 Id. 548, 14 N. E. 572, 16 N. E. 197; 1888, Louisville N. A. & C. R. Co. *v.* Snyder, 117 id. 436, 20 N. E. 284; 1892, Chicago, St. L. & P. R. Co. *v.* Spilker, 134 id. 380, 392, 33 N. E. 280, 34 N. E. 218; 1893, Ohio & M. R. Co. *v.* Heaton, 137 Id. 1, 35 N. E. 687; *Mass.:* 1865, Barber *v.* Merriam, 11 All. 324 (perhaps overruling Rowell *v.* Lowell, 11 Gray 420, 1858); *Minn.:* 1891, Johnson *v.* R. Co., 47 Minn. 430, 50 N. W. 473 ("an opinion based in part upon statements" by the patient as to his present condition, admissible); *N. J.:* 1896, Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100; 1897, Traction Co. *v.* Lambertson, 60 id. 452, 38 Atl. 683 (physician's opinion, founded "wholly or in part" on inadmissible declarations of patient, admissible where there was other evidence of facts so declared); *N. Y.:* 1866, Matteson *v.* R. Co., 35 N. Y. 491; *S. C.:* 1895, State *v.* Chiles, 44 S. C. 338, 22 S. E. 340; *U. S.:* 1894, Union P. R. Co. *v.* Novak, 15 U. S. App. 400, 414, 9 C. C. A. 629, 61 Fed. 573; *Wis.:* 1879, Quaife *v.* R. Co., 48 Wis. 521, 4 N. W. 658; 1895, Block *v.* R. Co., 89 Id. 371, 61 N. W. 1102. *Contra:* 1895, Van Winkle *v.* R. Co., 93 Ia. 509, 61 N. W. 929; 1886, People *v.* Murphy, 101 N. Y. 130, 4 N. E. 326, *semble;* 1892, Davidson *v.* Cornell, 132 id. 236, 30 N. E. 573, *semble:* 1895, Delaware, L. & W. R. Co. *v.* Roalefs, 70 Fed. 23, 16 C. C. A. 601, *semble* (where possibly the Court would have admitted the opinion on the hypothesis of the truth of the statements); 1893, Abbot *v.* Heath, 84 Wis. 318, 54 N. W. 574 (distinguishing Quaife *v.* R. Co., *supra*, partly because that opinion was excluded partly because the statements of the alleged insane person were made too long after the alleged insane act; but the Court confused the present rule, which does not apply to an alleged insane person's conversation (for that is not hearsay, *ante*, § 227), with the doctrine that insane conduct long after the alleged insane act is not relevant (*ante*, § 233), which was here the true reason for exclusion). But the following ruling is sound: 1897, People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049 (excluding a hypnotist, who based his testimony solely on the defendant's protestation of innocence).

[3] The following rulings are erroneous, for the reasons noted: 1899, State *v.* Soper, 148 Mo. 217, 49 S. W. 1007 (physician's testimony to defendant's insanity, founded on defendant's own statements, excluded); 1895, People *v.* Strait, 148 N. Y. 566, 42 N. E. 1045, *semble* (where the opinion was excluded partly because the statements of the alleged insane person were made too long after the alleged insane act; but the Court confused the present rule, which does not apply to an alleged insane person's conversation (for that is not hearsay, *ante*, § 227), with the doctrine that insane conduct long after the alleged insane act is not relevant (*ante*, § 233), which was here the true reason for exclusion). But the following ruling is sound: 1897, People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049 (excluding a hypnotist, who based his testimony solely on the defendant's protestation of innocence).

[4] Though statements of past symptoms may not be independently admissible under the Hearsay exception (*post*, § 1718).

[5] *Accord:* Eckles *v.* Bates, Barber *v.* Merriam, in note 2, *supra*. *Contra*, R. Co. *v.* Frazier, in the following note. The following ruling seems doubtful: 1825, Gardner Peerage Case, Le Marchant's Rep. 77, 170, 174 (the issue involving the *ultimum tempus* of gestation, and a physician being called to testify to specific instances of a period exceeding nine calendar months from conception, the physician's state-

(3) As to hearsay from the *patient* as to the *cause* of the injury or illn no such necessity exists for accepting the testimony. In the preceding stances, certain data were necessary for the forming of an opinion as to nature of the ailment. Here the physician, in testifying to the cause of would merely repeat what the patient said; but this may be shown by ot evidence. Moreover, the physician's estimate of the cause may be m independently of these statements, and, so far as it is based on them, it i mere repetition carrying no weight of its own. There seems no reason demand the reception of this testimony.[6]

(4) As to hearsay symptoms told by *third persons*, a diagnosis based sundry information from third persons in general has no claims for adm sion.[7] But where the information is that of an attending nurse or phy cian having personal observation and an interest in learning and describi accurately, there seems every reason for admitting testimony based in p on this. Every physician relies upon it, and there are periods of sleep other unconsciousness or mental incapacity which make it impossible resort to the patient for information. It should be immaterial whether t informant is a professional person, or is the wife or other member of t household, so long as the information is based on attendance and perso observation.[8] The rulings have thus far seldom accepted this view; yet t language of some of their opinions may well seem to a physician a pedan enforcement of legal nicety inconsistent with the needs of practical life.

(5) Distinguish here (1) the inquiry as to the *grounds of a physicia knowledge* and the admissibility of his answers (*ante*, § 655); (2) the admi sion of the *patient's statements themselves* as testimony under the Hears exceptions (*post*, § 1918); though Courts do not always distinguish the tw

§ 689. **Layman's or Physician's Acquaintance with the Person Insane Diseased.** According to the principle already examined (*ante*, § 659), o element of a sufficient means of knowledge is the adequacy of the extent scope of observation. In medical matters (speaking broadly) may be co sidered under this head (1) sundry instances in which health, injury,

ment of the date of conversion, based wholly on the woman's statement to him, was excluded; otherwise, of his opinion in general as to the length of the *ultimum tempus* in general).

[6] *Accord:* 1867, Illinois C. R. Co. *v.* Sutton, 42 Ill. 440: 1882, Atchison T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463; 1872, Morrissey *v.* Ingham, 111 Mass. 65. *Contra:* 1865, Barber *v.* Merriam, 11 All. 324.

[7] *Excluded:* 1898, Flannagan *v.* State, 106 Ga. 109, 32 S. E. 80 (medical man's opinion of insanity, based in part upon what he had heard); 1887, Brown *v.* Ins. Co., 65 Mich. 315, 32 N. W. 610; 1899, State *v.* Peel, 23 Mont. 358, 59 Pac. 169 (opinion based in part on hearsay in regard to the crime); 1895, People *v.* Strait, 148 N. Y. 566, 42 N. E. 1045 (like Flannagan *v.* State, *supra*); 1868, Rouch *v.* Zehring, 59 Pa. 78 (opinion of insanity, founded partly on hearsay); 1888, U. S. *v.* Faulkner, 35 Fed. 732 (same); 1890, Voshurg *v.* Putney, 78 Wis. 8 47 N. W. 99 (knowledge of the cause of a wound predicated upon indefinite hearsay).

[8] *Accord:* 1896, Southern K. R. Co. Michaels, 57 Kan. 474, 46 Pac. 938 (history a case given by other physicians to one who wa called in; his testimony, founded on this an on personal examination, not excluded). *Contra* 1882, Atchison T. & S. F. R. Co. *v.* Frazier, 2 Kan. 463; 1858, Heald *v.* Thing, 45 Me. 39 ("The declarations of the nurse, wife, an attending physician are all clearly inadmissible," and therefore also "the information obtaine from those sources"); 1895, Miller *v.* R. Co. 62 Minn. 216, 64 N. W. 554 (opinion as to caus of symptoms, based in part on another physi clan's "history of the case," given at the tim of consultation, excluded); 1865, Wetherbee' Ex'rs *v.* Wetherbee's Heirs, 38 Vt. 454.

disease, are concerned, (2) the condition of sanity or insanity, in which the question may arise as to the extent of the witness' observation, whether a medical man or a layman.

(1) *Health, Injuries.* Here all that needs to be said is that the witness must appear to have had adequate opportunities of observation of the person, and, if the matter calls for it, to have directed his attention particularly to the particular ailment. The discretion of the trial judge should govern.[1]

(2) *Sanity and Insanity.* It may here be assumed that laymen, as well as others, may, under the Opinion rule, express opinions as to sanity and insanity (*post*, § 1933). The inquiry will still remain (since each and every witness must fulfil the requirement of Knowledge) whether the particular person put forward to express the opinion has had an opportunity, by observation of the conduct of the one whose mental condition is in issue, to learn something upon the subject and to form a belief worth listening to. That such an opportunity is necessary, no one has doubted. The doubt comes only as to the exact phrasing of the test to be applied. A precise definition, which shall be at once both flexible enough to meet various situations and exact enough to be a rule at all, is difficult, if not impossible. It has at any rate not been devised to the satisfaction of all the Courts. The truth is that the test should be left in the hands of the trial judge. Neither its exact phrasing, nor its application in a given instance, should be made to occupy the time of the highest Courts. The attempt to invent an all-sufficient form of words is as inexpedient as it is vain:

1841, *Gaston, J.*, in *Clary* v. *Clary*, 2 Ired. 85: "Unquestionably, before a witness can be received to testify as to the fact of capacity, it must appear that he had an adequate opportunity of observing and judging of capacity. But so different are the powers and habits of observation in different persons that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than that it has in fact enabled the observer to form a belief or judgment thereupon. . . . It is admissible whether the opportunity for observation has been frequent or rare, . . . the weight of which must depend upon a consideration of all the circumstances under which it was formed."

1854, *Goldthwaite, J.*, in *Powell* v. *State*, 25 Ala. 27: "In every case where this question arises, the character of the insanity is a matter of no small importance in determining correctly as to the admissibility of the opinions of witnesses. If the evidence tended to establish that the prisoner, from mental imbecility, was incapable of distinguishing between right and wrong, or that his case was one of general insanity, by which we mean madness on all subjects, it is obvious that it would not require the same degree of observation to discover the existence of the disease under such circumstances as in cases of monomania or partial derangement, where the particular delusion might frequently escape the attention of the most acute observer or the most intimate association. . . . It is impossible to lay down any precise rule as to the length or character of acquaintance which

[1] *Examples:* (1) *Health and Illness:* 1885, Carthage Turnpike Co. *v.* Andrews, 102 Ind. 143, 1 N. E. 364; 1874, People *v.* Olmstead, 30 Mich. 433; (2) *Injuries requiring special examination:* 1879, Eboe *v.* State, 34 Ark. 522 (that a head-wound was the cause of death by concussion, though the witness had not opened the skull in his examination; admitted); 1884, Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 627 (personal injuries; physician-witness who had known the plaintiff before the injury and examined him afterwards, admitted); 1878, Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 542 (excluded on the facts).

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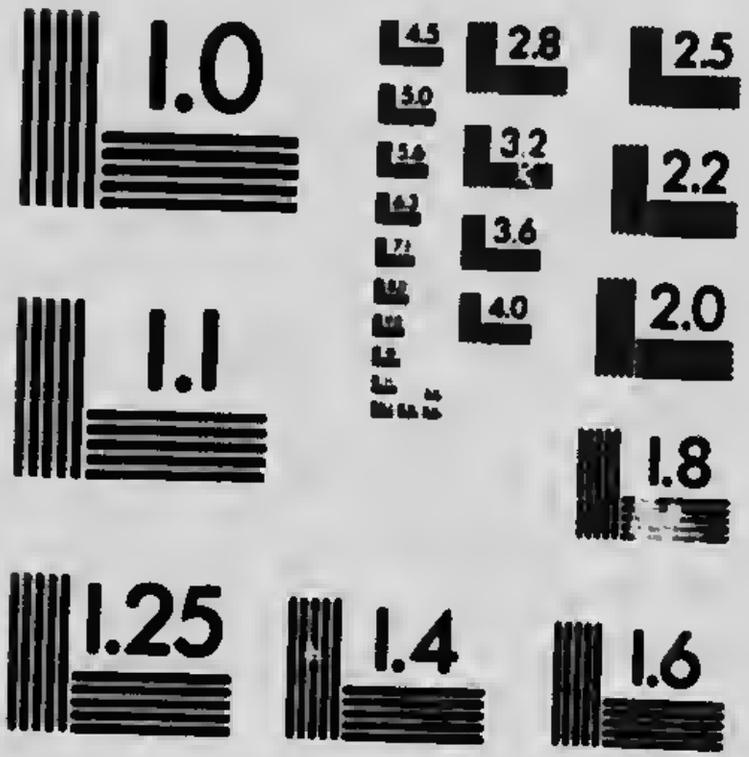

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would render the opinion of a witness admissible on this question. All we can say is that the circumstances must be such as to have afforded the opportunity to form an accurate judgment as to the existence or the non-existence of the disease considered with reference to the character or degree in which it is alleged to exist."

1860, *Lumpkin*, J., in *Choice* v. *State*, 31 Ga. 467: "It has been truly remarked that so different are the powers and habits of observation in different persons that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than that in fact it has enabled the observer to form a belief or judgment thereon."

1864, *Campbell*, J., in *Beaubien* v. *Cicotte*, 12 Mich. 503: "From the nature of things no rule can be laid down declaring what amount of acquaintance or what opportunities are necessary to enable an observer to become a witness. There are cases of insanity open to the slightest scrutiny, while others defy the keenest search. But no testimony can be of any real value unless it appears the witness had adequate means and opportunities for forming some conclusion."

1892, *Temple*, C., in *Carpenter's Estate*, 94 Cal. 414, 29 Pac. 1101 (commenting on the Code restriction to "intimate acquaintances"): "The witnesses are [at common law] only required to have had sufficient opportunity to observe the person whose sanity is in question. Different rulings have been made as to what shall be considered a sufficient showing of opportunity of observation to enable a witness to form an opinion which can be received as evidence; or, expressed in the language of our Code, what degree of intimacy there must be. In general, the idea seems to be that no rule can be prescribed on this subject. . . . Now, when we take into consideration the rule as it exists in most jurisdictions where the common law prevails, we must conclude that our Code has attempted what has been said to be impracticable, — to establish a rule as to what opportunities of observation shall entitle a witness to speak. . . . Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is and must remain more or less indefinite. A very large discretion must be conceded to the trial court."

1895, *Boyd*, J., in *Crockett* v. *Davis*, 81 Md. 134, 31 Atl. 710: "If, for example, a physician were to testify that, in his opinion, a testator was not of sound and disposing mind, capable of executing a valid deed or contract, and would in his further examination say that the only reason he had for such opinion was that the testator used patent medicines, or was a member of some religious or political faith other than his own, such opinion would be based on a foundation so clearly repugnant to right reason that a Court would not hesitate to instruct the jury that it was not sufficient to support a verdict."[2]

[2] In spite of the sensible utterances above quoted, the reports are still cumbered with rulings which should have been left to the trial Court. In this note are given the forms of the various tests proposed; where no quotation follows, the ruling merely illustrates the application of the general principle to a particular witness, with or without the enunciation of some general test; for additional minor rulings in some of the jurisdictions, see *post*, § 1938, where the Opinion rule is discussed with reference to lay testimony to sanity; *Eng.:* 1865, R. v. Southey, 4 F. & F. 884; *Ala.:* 1845, Bowling v. Bowling, 8 Ala. 541; 1849, Norris v. State, 16 id. 778 ("such as from long intimacy or familiar and frequent intercourse, with the party alleged to be insane, are peculiarly fitted to judge"); 1854, Florey v. Florey, 24 id. 247("whose acquaintance with the party has been such as to enable him to form a correct opinion as to his mental condition"); 1854, Powell v. State, quoted *supra;* 1860, Re Carmichael, 36 id. 514 ("of an intimate character, such as, etc."; a disposition here to lay down a strict test, limiting the trial Court's discretion, and thus departing from Powell v. State, *supra*); 1868, Stuckey v. Bellah, 41 id. 707; 1882, Ford v. State, 71 id. 397 (going back to the rule of Powell v. State); 1895, Murphree v. Sam, 107 id. 424, 18 So. 264; 1900, Dominick v. Randolph, 124 id. 557, 27 So. 481 (witness here held not to have a sufficiently "long and intimate knowledge"); *Ark.:* 1855, Kelly's Heirs v. McGuire, 15 Ark. 600; 1860, Beller v. Jones, 22 id. 95 ("those who, from habits of daily or common intercourse with or observation of appellee, could make an intelligent comparison of his mental manifestations with his conduct when he was admitted to enjoy the full use of his natural faculties"); 1895, Shaeffer v. State, 61 id. 241, 32 S. W. 679; *Cal.:* C. C. P. § 1870 (10) (opinion of "an intimate acquaintance," admissible); this is applied in the trial Court's discretion, according to the following cases: 1882, People v. Pico, 62 Cal. 53; 1887, People v. Levy, 71 id. 623, 12 Pac. 791; 1888, People v. Fine, 77 id. 149, 19 Pac. 269; 1892, Carpenter's Estate, 94 id. 414,

There is one class of witnesses who, by long tradition, have been received to testify to mental capacity and may speak without being qualified in the

29 Pac. 1101; 1893, Wheelock *v.* Godfrey, 100 id. 584, 35 Pac. 317; 1895, People *v.* Schmitt, 106 id. 48, 39 Pac. 204; 1895, Re Wax's Estate, ib. 343, 39 Pac. 624; 1894, Holland *v.* Zollner, 102 id. 633, 640, 36 Pac. 930 (one who is not an "intimate acquaintance" may testify to rationality of appearance at the time of acts observed, though not to sanity in general); 1896, People *v.* McCarthy, 115 id. 258, 46 Pac. 1073 (Code rule does not apply to "rational" appearance at a given time; discretion of trial Court here applied to admit a jailer having the defendant for months in his charge); 1897, People *v.* Hill, 116 id. 562, 48 Pac. 711; 1898, People *v.* Barthleman, 120 id. 7, 52 Pac. 112; 1901, Keithley's Estate, 134 id. 9, 66 Pac. 5; *D. C.:* 1895, Taylor *v.* U. S., 7 D. C. App. 27, 34 (witness excluded for lack of "adequate opportunity to observe the conduct and appearance of the party"); *Conn.:* 1831, Kinne *v.* Kinne, 9 Conn. 103; *Ida.:* 1895, State *v.* Hurst, 4 Ida. 345, 39 Pac. 554; 1897, State *v.* Larkins, 5 id. 200, 47 Pac. 945; 1897, Kelly *v.* Perrault, 5 id. 221, 48 Pac. 45 (attesting witness to a deed); 1903, State *v* Shuff, — id. —, 72 Pac. 664; *Ill.:* 1897, Grand Lodge *v.* Wieting, 168 Ill. 408, 48 N. E. 59 (one who had a "passing acquaintance" only, held properly excluded); *Ind.:* 1854, Kenworthy *v.* Williams, 5 Ind. 379 ("long acquaintance"); 1877, Sutherland *v.* Williams, 55 id. 349; 1881, Colee *v.* State, 75 id. 514 ("some knowledge of the acts and conduct of the person"); 1883, Sage *v.* State, 91 id. 143 ("an acquaintance with the person, or conversations, business dealings, or social intercourse with him"); 1884, Goodwin *v.* State, 95 id. 558 ("if the witness shows an acquaintance with the accused, if he has had conversation with him, or has had business dealings or social intercourse with him"); 1888, Johnson *v.* Culver, 116 id. 289, 19 N. E. 129 (need not be "extensive or intimate"; enough if it be "such as to enable the witnesses to form an opinion"); 1888, Gruhb *v.* State, 117 id. 282, 20 N. E. 257, 725 (admitted, where witness talked 10 or 15 minutes with the defendant); *Ia.:* 1875, State *v.* Stickley, 41 Ia. 237 (knowledge long previous; excluded); 1875, State *v.* Geddis, 42 id. 268; 1887, Re Norman's Will, 72 id. 86, 33 N. W. 374; 1888, Blake *v.* Rourke, 74 id. 523, 38 N. W. 392 (distinguishing knowledge long before from past knowledge at a past time in issue); 1896, Fenton's Will, 97 id. 192, 66 N. W. 99 (a stenographer who had taken the testator's deposition, occupying two hours, admitted); 1902, Hull's Will, 117 id. 738, 89 N. W. 979; *Kan.:* 1898, State *v.* Beuerman, 59 Kan. 586, 53 Pac. 874 ("a fair basis for an opinion"); *Me.:* 1885, Fayette *v.* Chesterville, 77 Me. 33 (an expert examining once *ex parte*, rejected); 1895, Hall *v.* Perry, 87 id. 567, 33 Atl. 160; *Md.:* 1848, Brooke *v.* Townshend, 7 Gill 29; 1852, Stewart *v.* Redditt, 3 Md. 78 ("facts of such a nature as will enable him to form a knowledge of the party's intellect"); 1872, Waters *v.* Waters, 35 id. 542 ("an opportunity of forming a rational opinion"); 1895, Crockett *v.* Davis, 81 id. 134, 31 Atl. 710; *Mass.* (owing to the exclusion of lay opinions, *post*, § 1938, the question is rarely presented in this State); *Mich.:* 1893, O'Connor *v.* Madison, 98 Mich. 183, 188, 57 N. W. 105 (must have "the means of observation"); *Miss.:* 1876, Russell *v.* State, 53 Miss. 379; 1881, Wood *v.* State, 58 id. 743 ("such acquaintance or such opportunities of observation as are likely to make his opinion valuable"); 1884, Reed *v.* State, 62 id. 408 ("who has had opportunities of knowing and observing the conversation, conduct, and manners of the person"); *Mo.:* 1862, Farrell's Adm'r *v.* Brennan's Adm'x, 32 Mo. 334 ("opportunities for knowing and observing the conversation, conduct, and manners of the person"); 1870, State *v.* Klinger, 46 id. 227; 1877, Moore *v.* Moore, 67 id. 195 ("adequate opportunity of observing and judging of his capacity"); 1882, Appleby *v.* Brock, 76 id. 318 ("adequate opportunity of observing and judging"); 1891, State *v.* Williamson, 106 id. 171, 17 S. W. 172; *Mont.:* C. C. P. 1895, § 3146 (10) (like Cal. C. C. P. § 1870); 1888, Terr. *v.* Hart, 7 Mont. 498 ("acquainted with the defendant and have observed his actions and manner of life"); 1889, Terr. *v.* Roberts, 9 id. 15, 22 Pac. 132; 1899, State *v.* Peel, 23 id. 358, 59 Pac. 169 (opinion must relate to time of witness' observation, not time of trial); *Nebr.:* 1893, Shults *v.* State, 37 Nebr. 481, 496, 55 N. W. 1080 (must be "of an intimate character and his associations of sufficient duration to justify him in forming a correct judgment"); 1895, Pflueger *v.* State, 46 id. 493, 64 N. W. 1094; 1902, Clarke *v.* Irwin, 63 id. 529, 88 N. W. 783; *Nev.:* 1889, State *v.* Lewis, 20 Nev. 347, 22 Pac. 241 (largely in discretion of trial judge); *N. H.* (see the citations under § 1938, *post*; they are complicated by the peculiar history of the Opinion rule in this State); *N. Y.:* 1901, People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057 (physician allowed to state his opinion as based on defendant's acts at the very time of the homicide); in this State the question rarely arises, owing to the exclusion of lay opinions (*post*, § 1938); *N. C.:* 1863, McDougald *v.* McLean, Wiust. 120 ("opportunities of knowing and observing"); and other cases under § 1938, *post*; *Or.:* C. C. P. § 706 (10) (like Cal. C. C. P. § 1870); 1897, State *v.* Feister, 32 Or. 254, 50 Pac. 561 (a deputy sheriff who had the defendant in charge four months, admitted); *Pa.:* 1861, Bricker *v.* Lightner's Ex'r, 40 Pa. 205 ("opportunities for observing the conduct of the party and the developments of the intellectual faculties"); 1893, Com. *v.* Buccieri, 153 id. 535, 549, 26 Atl. 228 (one who had seen insane indications months before, but had not seen the defendant for some time, not allowed to speak as to his condition at the time charged); 1899, Com. *v.* Brown, 193 id. 507, 44 Atl. 497; *Tex.:* 1874, Thomas *v.* State, 48 Tex. 65 (acquaintance enabling witness "to form correct opinions of his mental condition"); Holcomb *v.* State, 41 id. 125 ("good opportu-

foregoing manner, namely, *persons attesting a will as witnesses.* Long before any tests for the general subject were devised, these persons were received, and the tradition seems everywhere to have kept its place, in spite of the change of theory of attestation and of the probable incompetency of a will-witness under modern tests:

1794, *Heyward* v. *Hazard*, Bay 349; *Per Curiam:* "The third requisite is the attestation. The true construction of the law under this head has always been that the act called the attention of the witnesses to the situation of the testator himself, and this particularly relates to his sanity. . . . The business, then, of the persons required by statute to be present at executing a will is not barely to attest the corporal act of signing, but to try, judge, and determine whether the testator is *compos* to sign."[6]

2. Foreign Law.

§ 690. **Knowledge of Foreign Law as based on Study alone.** It ought not to be doubted to-day that, so far as a knowledge of our *domestic system of law* is concerned, it may be adequately gained from a study of the printed sources alone, without any practice whatever in the conduct of litigation. "Two things are established," says Professor Langdell, in a passage of classical value,[1] "first, that the law is a science; secondly, that all the available materials of that science are contained in printed books." From the point of view, then, either of that skill which is required to make an estimate of the state of the law, or of that observation of data which is the necessary foundation of knowledge, practice at the forum is not indispensable:

1844, *Coleridge*, J., in *Baron de Bode's Case*, 8 Q. B. 263: "I take it nobody can doubt that a lawyer who, without ever having held a brief or practised out of his chambers, had acquired all his knowledge by readiug, would be as competent to give evidence

nities of forming an opiuion"); *U. S.:* 1815, Lessee of Hoge *v.* Fisher, 1 Pet. 164; 1903, Queenan *v.* Oklahoma, — U. S. —, 23 Sup. 762 (a lay witness who had known the accused "for some years," not allowed to say whether "since the killing he had formed an opinion as to the prisoner's mental condition at the time," on the ground that the opinion might, without further specification of its reasons, have been based on improper data); *Wis.:* 1875, Boorman *v.* Relief Ass., 90 Wis. 144, 62 N. W. 924 (excluded, where the witness' only grounds were that the person had once become angry with him for supposed misconduct).

[5] 1683, Hudson's Case, Skinner 79; 1848, McCurry *v.* Hooper, 12 Ala. 827; 1849, Potts *v.* House, 6 Ga. 335; 1897, Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45; 1854, Kenworthy *v.* Williams, 5 Ind. 379, *semble;* 1843, Hunt's Heirs *v.* Hunt, 3 B. Monr. 577, *semble;* 1831, Ware *v.* Ware, 8 Me. 55; 1852, Cilley *v.* Cilley, 34 id. 163 (when the facta observed are also given); 1890, Williams *v.* Spencer, 150 Mass. 349, 23 N. E. 105 (but relates to time of attestation only); 1864, Beaubien *v.* Cicotte, 12 Mich. 495, per Campbell, J.; 1859, Carlton *v.* Carlton, 40 N. H. 17, *semble;* 1866, Boardman *v.* Woodman, 47 id. 134; 1853, DeWitt *v.* Barley, 9 N. Y. 381, per Mason, J.; 1863, McDougald *v.* McLean, Winst. 120; 1884, Barker *v.* Pope, 91 N. C. 168; 1835, Gibson *v.* Gibson, 9 Yerg. 331; 1877, Garrison *v.* Blanton, 48 Tex. 303; 1877, Jarrett *v.* Jarrett, 11 W. Va. 584, 626; 1882, Nicholas *v.* Kershner, 20 Id. 255; 1888, Kerr *v.* Lunsford, 31 id. 680, 8 S. E. 493. Compare also the cases cited *post*, § 1511 (attestation as implying a statement of sanity).

See further the citations under § 1936, *post*, dealing with that detail of the Opinion rule which in some jurisdictions receives the will-witness' opinion without calling for his reasons.

Note that a witness may not be qualified to express an opinion on general sanity; but may yet have observed *particular occasions or transactions*, and therefore may of course (if otherwise admitted under the Opinion rule) characterize them as rational or not: 1886, People *v.* Lavelle, 71 Cal. 352, 12 Pac. 226; 1892, Carpenter's Estate, 94 id. 414, 29 Pac. 1101.

[1] Proceedings at the 250th Anniversary of the Founding of Harvard University, 1886, p. 85. "To put an end to reports," said Edmund Burke, on a great occasion, "is to put an end to the law of England" (31 Parl. Hist. 311).

respecting the state of the English law as if he had been engaged in the most extensive practice. . . . It is, I think, conceded that though the witness should state that all his knowledge is derived from reading a particular book or a particular decision, he still might give us the result of all his knowledge of the state of the unwritten law."[2]

But the case may be different in testing one's acquaintance with a *foreign* law. From the point of view of the principle of Knowledge, to be sure, little difficulty arises; for the fact that a consideration of text-writers' hearsay enters in part into a study of legal sources is no objection to a knowledge thus founded, since these very opinions go in part to make up the general consensus of interpretation which constitutes a portion of all law. From the point of view of Expert Capacity, however (*ante*, § 564), it may well be argued that residence, and perhaps practice, in the foreign country is essential to an ability to discriminate between the values of different sources and the standing of different authorities. It may even be argued that a Knowledge of recent possible changes is not to be expected of those who do not by practice or residence have an interest or an opportunity to keep up regularly with such changes. These considerations would hardly apply to the law of a country where the foreign system was germane in its general features to the domestic one — as that of England is to that of the United States —, where skill in the domestic forum would equally equip for an examination of the foreign sources. But for a system foreign in essence as well as in name some such requirements as the above might fairly be demanded as a rule; much being left to the discretion of the trial judge. The decisions reflect, in their conflict, the necessity for some such latitude of rule. On the whole, the English courts have been more strict in this respect than the courts of this country:

1850, *Bristow* v. *Sequeville*, 5 Exch. 275; the witness to the law of Cologne, in Prussia, had studied law at the University of Leipsic, in Saxony; *Counsel*: "Whether that knowledge was acquired by study or practice is only a ground for observation on the value of his evidence"; *Alderson*, B.: "If a man who has studied law in Saxony, and never practised in Prussia, is a competent witness to prove the law of Prussia, why may not a Frenchman, who has read books relating to Chinese law, prove what the law of China is? Would a person who had never been in England, but had studied the law of England at a foreign university, be competent to prove what the law of England is?"[3]

[3] *Contra*: 1831, Tindal, C. J., in Collier v. Simpson, 5 C. & P. 74, *semble*; 1845, Lord Langdale, M. R., in Nelson v. Bridport, 8 Beav. 539, *semble*.

[2] 1852, R. v. Povey, 6 Cox Cr. 83 (bigamy; to prove a valid first marriage, the woman's sister, who was present at the ceremony in Scotland, was offered to testify that "parties were always married in Scotland" in the form seen by her; excluded; "it may not be necessary in all cases to have a professional person to tell us what the foreign law is"; but "the witness does not profess to know the law"; this ruling well illustrates the distinction between the present principle and that of § 564, *ante*); 1875, *Re* Bonelli's Goods, L. R. 1 P. D. 69 (an English lawyer who had studied Italian law in England, rejected); 1878, Cartwright v. Cartwright, 26 W. R. 864, Hannen, P. (an English barrister practising before the Privy Council, held not a competent expert as to the law of those dependencies whence appeals are heard in the Council; this is unsound); 1880, Goods of Dost Aly Khan, L. R. 6 P. D. 6 (Persian minister plenipotentiary, admitted to testify to Persian law, having stated that "all persons in the diplomatic service of Persia are required to be thoroughly versed in the law, and that therefore he had studied and become acquainted with it"); 1901, Barber v. International Co., 73 Conn. 587, 48 Atl. 758 (American lawyer who had spent six months in England, held qualified on the facts); 1903, De Sonora v. Bankers' M. C. Co., — Ia. —, 95 N. W. 232 (an attorney

3. Reputation (of Character).

§ 691. **Witness must expressly appear Qualified.** When the character of a party or of a witness is to be evidenced by reputation (*post*, § 1608), the reputation must itself be proved by a witness qualified by an opportunity to obtain knowledge of it. The first rule here consists in an application of the general principle (*ante*, § 654) that a witness must *expressly appear to have had the means of knowledge*, before his testimony can proceed:

1870, *Morton*, J., in *Wetherbee* v. *Norris*, 103 Mass. 566: "The ruling of the presiding judge that each of the witnesses called to impeach the plaintiff should be first asked the question, 'Do you know the reputation of the plaintiff for truth and veracity?' is not the subject of exceptions. The practice upon this subject differs in different courts. In this State no practice is established as a rule of law; but it is within the discretion of the presiding judge to require the preliminary question above stated to be asked of each witness, if he shall deem that the interests of justice require it. The same principle is applicable to the examination of witnesses upon other subjects. . . . If the presiding judge sees that there is danger that the witness, in answer to the usual question, 'What is his general reputation for truth and veracity?', may give incompetent testimony," he may require the preliminary question; but this rests in his discretion.[1]

§ 692. **Knowledge must be based on Residence in the Place of Repute, not on mere Inquiry.** The admissible reputation is that which is built up in the neighborhood of a man's domicile or in the circle where his livelihood is followed (*post*, § 1615), and it is of slow formation. It is the sum of all that is said or not said for or against him. Consequently, its tenor can be adequately learned only by a residence in the place, not by a mere visit of inquiry, or by a casual sojourn, or by a conversation with a resident who reports the reputation:

held on the facts not qualified to testify to the law of Mexico); 1874, Consolidated Ins. Co. *v.* Cashow, 41 Md. 79 (a lawyer residing, but not shown to be practising, in the foreign State, held qualified); 1891, People *v.* McQuaid, 85 Mich. 123, 125, 48 N. W. 161 (to prove that a certain edition of Pennsylvania statutes was there commonly used as correct, a clergyman was admitted who had consulted the statutes of that State in performing his duty for marriage ceremonies and had observed the use of that edition in the courts); 1868, Hall *v.* Costello, 48 N. H. 179 (New Hampshire lawyers, who as counsel had had special interest and opportunity, admitted with reference to a topic of Canadian law).

Distinguish here certain other questions concerning foreign law: (1) Whether the witness is sufficiently *skilled as a lawyer* (*ante*, § 564); (2) where a foreign *statute* must be proved by *copy* (*post*, § 1271); (3) whether *printed copies* of a statute (*post*, § 1684), or *legal treatises* (*post*, § 1697), or *reports of decisions* (*post*, § 1703), may be used; and (4) whether the *Opinion rule* interposes any obstacle (*post*, § 1953).

[1] *Accord: Ala.:* 1898, McClellan *v.* State, 117 Ala. 140, 23 So. 653 ("ordinarily" the witness' means of knowledge will not be inquired into, if he says that he knows); *Ill.:* 1859, Crabtree *v.* Kile, 21 Ill. 183; 1861, Crahtree *v.* Hagenbaugh, 25 id. 233, 238; 1887, Spies *v.* People, 122 id. 1, 208, 12 N. E. 865; *Mass.:* 1883, Com. *v.* Rogers, 136 Mass. 158 (the judge may inquire whether the witness has any knowledge, but not into its means or extent); *Miss.:* 1884, Pickens *v.* State, 61 Miss. 563, 566; 1885, French *v.* Sale, 63 id. 386, 393 (in effect disposing of the contrary dictum in Powers *v.* Presgroves, 38 id. 227, 242); *N. Y.:* 1895, Carlson *v.* Winterson, 147 N. Y. 652, 42 N. E. 347; *N. C.:* 1829, State *v.* Boswell, 2 Dev. 210; 1843, State *v.* O'Neale, 4 Ired. 88 ("the regular mode is to inquire whether they have the means of knowing the general character"); 1843, State *v.* Parks, 3 Ired. 296 (the witness must profess to know the general reputation before testifying); 1873, State *v.* Speight, 69 N. C. 72, 75 ("whether he knew the general character of the witness, and the means by which he had acquired that knowledge," must be asked); 1894, State *v.* Coley, 114 N. C. 879, 883, 19 S. E. 705; *U. S.:* 1859, Teese *v.* Huntington, 23 How. 2, 13.

The following case is apparently no longer law: 1849, Bates *v.* Barber, 4 Cush. 107 (making the strange statement that "there is no question of competency for the Court to settle, in regard to the knowledge of witnesses . . . to reputation for truth and veracity").

1802, *Kenyon*, L. C. J., in *Mawson* v. *Hartsink*, 4 Esp. 102 (rejecting the question, "Whether the witness in consequence of a trial had made particular inquiries as to the witness' general character?"): "That cannot be evidence. . . . If this was allowed, when it was known that a witness was likely to be called, it would be possible for the opposite party to send round to persons who had prejudices against him and from thence to form an opinion, which was afterwards to be told in court to destroy his credit."

1829, *Marcy*, J., in *Douglass* v. *Tousey*, 2 Wend. 354: "As a general rule, there is much reason to fear that this method [of ascertaining reputation] would prove a very unsafe one. The general character is the estimation in which a person is held in the community where he has resided, and ordinarily the members of that community are the only proper witnesses to testify as to such character. It would be unsafe to depend upon the testimony of the defendant's agent sent into that community, an entire stranger, it may be, to collect information to subserve the defendant's views in the suit. Such witness would not speak of his knowledge of the plaintiff's character, or give his own opinion in relation thereto, but barely state his conclusion upon the information received from others."[1]

How long this residence must have been, or how near to the place of domicile or occupation, cannot be defined by fixed rule. The qualification has varied according to circumstances;[2] and it should be left entirely to the trial Court.

4. Handwriting.

§ 693. **General Question defined; Identifying an Illiterate's Mark.** The identification of handwriting as genuine involves the double testimonial knowledge already spoken of (*ante*, § 653), an acquaintance by the witness with the type of handwriting in question, and an observation of the disputed

[1] *Accord:* 1864, Reid v. Reid, 17 N. J. Eq. 101 (like the above cases); 1817, Kimmel v. Kimmel, 3 S. & R. 336 ("the witness shall not be permitted to say 'he was told' that the person had either a good or bad character in his own neighborhood; but that is a very different thing from knowledge of common report acquired, as in this case, from common report itself"). *Contra:* 1811, Foulkes v. Sellway, 2 Esp. 236 (where the witness went to the place where the person in question lived, to inquire into her reputation).

[2] *Ala.:* 1846, Sorrelle v. Craig, 9 Ala. 536, 540 (one who lived 20 miles away, and was ignorant of the other witness' neighborhood-reputation, excluded); 1848, Hadjo v. Gooden, 13 id. 720, 722 (one who lived 12 miles away, but claimed to know the opinion in the witness' neighborhood, admitted); 1853, Dove v. State, 22 id. 23, 39 (excluded, because knowledge not shown), 1854, Elam v. State, 25 id. 53 (knowledge may appear on examination, as well as beforehand); 1859, Dupree v. State, 33 Ala. 388 (persons living more than 20 miles away, admitted); 1889, Holmes v. State, 88 id. 29, 7 So. 193 (excluded, on the facts); 1896, Buchanan v. State, 109 id. 7, 19 So. 410 (witness living 25 miles away, excluded); *La.:* 1896, State v. Fontenot, 48 La. An. 305, 19 So. 111 (witnesses not residing in the neighborhood for 11 and for 7 years, rejected); *Mass.:* 1866, Com. v. Lawler, 12 All. 585 (after the impeaching witness had admitted that he had not, as to the other witness' reputation, "heard it talked of a great deal," further questions as to the reputation were excluded); *Mich.:* 1883, Bathrick v. Post & Tribune Co., 50 Mich. 642, 16 N. W. 172; *Mo.:* 1899, State v. McLaughlin, 149 Mo. 19, 50 S. W. 315 (resident of town 5 miles distant, admitted); 1900, State v. Hudspeth, 159 id. 178, 60 S. W. 136 (one not living in the neighborhood, nor having an opportunity to learn of the reputation there, excluded); 1901, State v. Hsines, 161 id. 555, 61 S. W. 621 (witness from another State, excluded on the facts); *N. H.:* 1860, Kelley v. Proctor, 41 N. H. 139 ("whether he is acquainted with the reputation of the former witness for truth, or has the means of knowing the former witness' general character for truth"); *S. C.:* 1892, State v. Turner, 36 S. C. 539, 15 S. E. 602; *Tex.:* 1879, Johnson v. Brown, 51 Tex. 65, 77; *Wis.:* 1879, Dufresne v. Weise, 46 Wis. 290, 297, 1 N. W. 59 (not clear); 1883, Wallis v. White, 58 id. 26, 29, 15 N. W. 767 (one residing in the same city, but not the same ward, admitted). But *personal acquaintance* with the one bearing the reputation is not necessary; 1817, Kimmel v. Kimmel, 3 S. & R. 336. Compare (1898) Peeples v. State, 103 Ga. 629, 29 S. E. 691 (inquiries as to the length of acquaintance with the person, etc., held proper). The question where the *reputation* itself must prevail is a different one (*post*, § 1615).

specimen, the witness comparing the two in his mind and stating whethe the latter is to be regarded as genuinely an instance of the type in questio How to evidence the type of handwriting circumstantially — *i. e.* by ind vidual specimens — is a different matter, dealt with elsewhere (*ante*, § 38 *post*, §§ 2001, 2016). The inquiry here concerns the mode of proving it b testimonial evidence, *i. e.* by a witness who declares that he is acquainte with the type of handwriting in question. To satisfy this situation the wi ness (1) must *observe the specimen in dispute;* this we may assume he wi do;[1] and (2) must bring to this examination a *knowledge of the type writing* with which it is desired to affirm or deny a connection. It is th adequacy of this knowledge which is here to be examined. When may th witness properly claim that his opportunities of observation have been suc as to give him a fair knowledge of the general type or character of th person's hand? That this is the question has always been clearly recogniz by the Courts:

1816, *Dallas*, J., in Holt N. P. 421: "What are the materials of judgment to which witness has recourse when he says that he believes a particular signature to be the han writing of a particular person? He has seen the person write, and he is presumed have formed a standard in his mind, and with that standard to compare the writing question. This standard will be more or less perfect according as the instances have be more or less frequent."

1839, *Bronson*, J., in *Cunningham* v. *Bank*, 21 Wend. 558: "A witness must in so way have acquired a knowledge of the general character of the party's handwriting befo he can be qualified to testify on that subject."

1840, *Gaston*, J., in *Pope* v. *Askew*, 1 Ired. 16, 20: "The testimony now received that of the belief of a witness as to the identity of character between the writing in qu tion and the exemplar of the party's handwriting in the mind of the witness, whi exemplar has been formed upon previous sufficient means of observation. The enqui is, What does the law hold to be those adequate and sufficient means of observation?"

What, then, are the various recognized modes of obtaining knowledg It must be understood that this does not involve the testimony of one wh saw the very disputed document being written. Such a witness mak no comparison; he saw the act of writing, as he might have seen the a of ploughing a field; and he needs no knowledge of the general charact

[1] For the authorities on the question whether a witness to handwriting may testify to a *lost disputed document* or whether a *deponent* must have the *document shown to him* at the time of taking the deposition, see *post*, § 1185.

[2] The following opinions also expound the principle: 1852, Brayton, J., in Kinney *v.* Flynn, 2 R. I. 319, 326; 1872, Boyden, J., in State *v.* Woodruff, 67 N. C. 90.

The question has occasionally been raised whether one can testify from this basis to the genuineness of a *marksman's mark* — *i. e.* whether there is any constancy of peculiarity in the mark of an illiterate which can serve as a type or standard. There should be no hard-and-fast rule; the discretion of the trial Court should control. Such testimony seems generally to have been treated as allowable; 1830, George *v.* Surrey, M. & M. 516 (here the mark was an habitu one, and had a certain peculiarity); 1848, Say *v.* Glossop, 12 Jur. 464; 1849, Pearcy *v.* Dick 13 id. 997; 1850, Strong *v.* Brewer, 17 A 706, 710 (good opinion by Dargan, C. J.); 18 Jackson *v.* Van Dusen, 5 Johns. 155 (here the were two initials as a mark); 1897, State Tice, 30 Or. 457, 48 Pac. 367; 1868, Carso Appeal, 59 Pa. 493, 498, 503 (will); 1842, Fo *v.* Dennis, 3 Humph. 47 *semble*. *Contra:* 182 Carrier *v.* Hampton, 11 Ired. 307, 311 ("Ge erally, a mark, a mere cross, cannot be ide tified"); 1807, Engles *v.* Bruington, 4 Yeat 345, 346, *obiter;* 1851, Shinkle *v.* Crock, 17 P 159, 161 (inadmissible, where the mark has peculiarity; yet here a witness who said that had was excluded).

of the writer's hand. Excluding this kind of testimony, then, the various possible modes are three: (*a*) Knowledge obtained by *seeing the person write* some *other documents or signatures*, — indicated by the phrase *ex visu scriptionis;* (*b*) Knowledge obtained by seeing *documents otherwise known to have been written* by the person in question, — indicated by the phrase *ex scriptis olim visis;* (*c*) Knowledge obtained by an *examination*, in or out of court, for the *express purpose of obtaining such knowledge*, of *documents said to have been written* by the person in question, — indicated by the phrase *ex comparatione scriptorum* or *ex scripto nunc viso*. Within one or the other of these modes must fall any source of knowledge. In each of these modes *two elements* are involved, giving rise to different difficulties and different rules. The witness who says that he has, in one way or another, learned the character of the person's writing by the observation of specimens of it necessarily predicates two things, — (1) first, that specimens of handwriting were considered by him, and (2) secondly, that they were genuinely written by the person in question. The second of these circumstances is as essential as the first; and, under each mode of knowledge, it is to be considered whether both are present.

Before taking up in order the three modes of acquiring knowledge, it may be noted that (on the principle of § 654, *ante*), the witness must, before proceeding with his testimony, *expressly appear to have had the means of knowledge;*[3] for the possession of it is not presumed beforehand.

a. Ex Visu Scriptionis (*Seeing the Person Write*).

§ 694. **Number of Times.** Whether one could obtain a sufficient notion of the general character of a person's hand by seeing him write once only might well have been doubted. Tradition, however, has handed down a fixed rule that *seeing the person write once only* is as a matter of law sufficient:

1803, *Eldon*, L. C., in *Eagleton* v. *Kingston*, 8 Ves. 473: "You called a witness, and asked whether he had ever seen the party write. If he said he had, whether more or less frequently, if ever, that was enough. . . . You might call one who had not seen him write for twenty years, and if he said he believed it was the writing of the person, that evidence might go to the jury."[1]

[3] 1893, Richardson *v.* Stringfellow, 100 Ala. 416, 419, 14 So. 283 (omission of preliminary question later cured); 1892, Riggs *v.* Powell, 142 Ill. 453, 456, 32 N. E. 482 (he need not say "in so many words" that he knows it, if he shows knowledge); 1893, State *v.* Minton, 116 Mo. 605, 614, 22 S. W. 808 (that he is acquainted with the hand is sufficient); 1895, State *v.* Harvey, 131 id. 339, 32 S. W. 1110. In Georgia, however, it would seem that the statute, literally construed, dispenses with any prior inquiry into the witness' means of knowledge: Ga. Code 1896, § 5246 ("any witness is competent to testify as to his belief who will swear that he knows or would recognize the handwriting. The source of his knowledge is a question for investigation, and goes entirely to the credit and weight of his evidence").

[1] *Accord: Eng.:* 1801, Garrells *v.* Alexander, 4 Esp. 37, Kenyon, L. C. J.; 1817, Powell *v.* Ford, 2 Stark. 164; 1838, Willman *v.* Worrell, 8 C. & P. 381; 1836, Williams, J., and Patteson, J., in Doe *v.* Suckermore, 5 A. & E. 719, 730; 1839, Warren *v.* Anderson, 8 Scott 384 (with other circumstances); 1806, Evans' Pothier, ii, 160 ("I have known the admission of this evidence carried so far as for an attorney, after the failure of other attempts, to stand up and swear to a knowledge of the writing of the opposite party from having once looked over his

It is true that one may even now be deemed incompetent if, though h saw the act of writing done, he in fact formed no idea of its character;[2] th a tendency is perhaps growing to leave the matter to the discretion of th trial court;[3] and that judges have sometimes expressed dissatisfaction wit a rule of such blind and unquestioning dogmatism. Nevertheless, the rul is a settled one.

§ 695. **Length of Time beforehand.** The accepted tradition is also that makes no difference how long it was beforehand that the act of writing wa observed:

1836, *Williams, J.*, in *Doe* v. *Suckermore*, 5 A. & E. 720: "Subject to the qualificatio of Lord Eldon [that there must have been formed some belief about the writing], whic seems to be the criterion and to decide the question in each case, I am aware of no rul attempting to prescribe the quantity of knowledge which is requisite to enable a witne to speak to his belief; what degree of freshness and recency in the correspondence t admit, or what antiquity to exclude, may (as the reason of the thing would induce on to expect) in vain be looked for. To the jury it must go, in the language of Lord Eldon from the highest to the lowest."[1]

Here again, modern policy is ignored in the rigidity of a rule which make no allowance for dimness of recollection; but it cannot be said that the judi cial discretion is allowed, as it ought to be, any limits.

§ 696. **Quantity of Writing seen.** The quantity of writing that was seen is wholly immaterial.[1] It has even been conceded that one who testifies t the genuineness of a signature need only have seen the surname written.[2] Bu

shoulder when writing a letter at an alehouse"); *Can.:* 1899, Marcy v. Pierce, 4 N. W. Terr. 246; *U. S.:* 1847, Woodford v. McClenahan, 9 Ill. 89, *semble;* 1873, Burdick v. Hunt, 43 Ind. 386, *semble;* 1885, State v. Goodwin, 37 La. An. 713, 715; 1849, Smith v. Walton, 8 Gill 82; Edelen v. Gough, ib. 91; 1850, Hoitt v. Moulton, 21 N. H. 590; 1852, Bowman v. Sanborn 25 id. 110, *semble;* 1858, Burnham v. Ayer, 36 id. 184, *semble;* 1873, Hammond v. Varian, 54 N. Y. 400; 1896, Diggins' Estate, 68 Vt. 198, 34 Atl. 696; 1872, Pepper v. Barnett, 22 Gratt. 406. The statement that seeing write once is sufficient has been repeated *obiter* again and again, and it would be unprofitable to record each time.

[2] 1781, De la Motte's Trial, 21 How. St. Tr. 810, Buller, J., *semble;* 1849, Hopper v. Ashley, 15 Ala. 462; 1856, McNair v. Com., 26 Pa. 390 (seeing once only suffices, if an impression of the character of the writing was gained). The following ruling goes rather on the principle of § 570, *ante*, that an illiterate is not expert enough to testify to handwriting at all: 1895, People v. Corey, 148 N. Y. 476, 42 N. E. 1066, by a divided court (an illiterate person who had seen the defendant write once and could practically neither read nor write; the testimony rejected, on the principle that "before a witness should be permitted to testify to the handwriting of another, . . . he should have an intelligent acquaintance with the handwriting of the party, so that he can determine with a reasonable degree of certainty whether the writing offered is his genuine handwriting").

[3] 1889, Wilson v. Van Leer, 127 Pa. 377, 17 Atl. 1097.

[1] *Accord:* 1803, Eagleton v. Kingston, 8 Ves. 475, Eldon L. C. (quoted *ante*, § 694); 1889, Wilson v. Van Leer, 127 Pa. 377, 17 Atl. 1097 (three times, very long before); 1901, Renshaw v. First National Bank, — Tenn. —, 63 S. W. 194 (one who saw the handwriting in 1857–60, admitted); 1896, Diggins' Estate, 68 Vt. 198, 34 Atl. 696 (once, 20 years before, admitted).

[1] 1891, Gibson v. Trowbridge, 96 Ala. 357, 361, 11 So. 365 (one who "saw considerable writing of E.," excluded); 1899, Marchall's Est., 126 Cal. 95, 58 Pac. 449 (knowledge of signature alone, enfficient); 1893, Salazar v. Taylor, 18 Colo. 538, 545, 33 Pac. 369 (bank clerk and attorney, who had often seen the party write his name, admitted); 1895, Kendall's Ex'r v. Collier, 97 Ky. 446, 30 S. W. 1002 (sufficient on the facts); 1895, Com. v. Hall, 164 Mass. 152, 41 N. E. 133 (sufficient on the facts); 1885, State v. Stair, 85 Mo. 273 (sufficient on the facts); 1902, State v. Hall, — S. D. —, 91 N. W. 325 (sufficient on the facts); 1896, Poncin v. Furth, 15 Wash. 201, 46 Pac. 241 (sufficient on the facts).

[2] 1827, Lewis v. Sapio, Moo. & M. 39, Abbott, C. J.; 1849, Smith v. Walton, 8 Gill 83. *Contra*, 1817, Powell v. Ford, 2 Stark. 164, Ellenborough, L. C. J.

it ought to be remembered, by those Courts which have not ruled on the foregoing topics, that the unwise liberality of these rules is explainable by the history of the law (*post*, § 1991). It was the product of a time when this mode of knowledge was the only orthodox one, when even the second mode (*ex scriptis olim visis*) was just obtaining acceptance, and when the third mode (*ex scripto nunc viso*) was not recognized at all; so that the paucity of recognized modes of proof upon a subject so common and so important forced the judges to concede a looseness in applying the primary and orthodox mode. This laxity the Courts of to-day would do well to abandon, now that the stress of necessity does not exist.

§ 697. **Writing post litem motam; After-acquired Knowledge.** It is obvious that one who denies the genuineness of a writing which an opponent affirms, or *vice versa*, will be tempted to form his writing to suit his claim if he writes *after controversy* for the purpose of showing the type of his writing. It is true that one cannot vary his handwriting entirely at his pleasure; but it is safe, as a rule, to accept no testimony founded on such specimens;[1] though the matter should be left to the trial Court's discretion.[2] But no such objection attaches to specimens thus written at the opponent's request, for here the opponent in effect takes the risk of the hand being feigned, and waives the objection.[3] There is, moreover, no objection to testimony based on an act of *writing subsequent to the date of the disputed writing* (if no controversy had arisen);[4] the type of writing is always assumed to have been substantially the same, — an assumption forced, but practically necessary.

§ 698. **Quality of Witness' Opinion.** The witness' belief as to the genuineness or non-genuineness of the disputed writing need not be a positive or unqualified one: it is enough if he "believes" or "thinks" it to be one or the other.[1] But his belief must be founded solely on the type of handwriting as known to him, — not on the person's moral character or other circumstances.[2]

[1] 1890, Dakota *v.* O'Hare, 1 N. D. 44, 44 N. W. 1003 (since trial begun); 1879, Reese *v.* Reese, 90 Pa. 93 (during trial).

[2] 1872, Thompson *v.* Bennett, 22 U. C. C. P. 393, 401 (testimony based on signatures written by the alleged makers in the witness' presence expressly to illustrate their handwriting, received, per Gwynne, J.); 1895, Tucker *v.* Hyatt, 148 Ind. 471, 42 N. E. 1047 (the mere fact not enough to exclude, if no abuse of Court's discretion appears).

[3] Compare the analogies of § 2009 and § 2018, *post*.

[4] 1852, Keith *v.* Lothrop, 10 Cush. 457; 1902, Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887 (one who knew the hand after 1873, allowed to testify to the genuineness of a document of 1869).

So, too, the knowledge may be acquired *after the witness saw the disputed writing*, — a question which becomes important when the original is lost: 1888, Vye *v.* Alexander, 28 N. Br. 89, 95, 117 (witness to the writing of a lost document may speak from knowledge of the type of handwriting acquired afterwards; "if he can carry down the mental impression . . . and apply it to the paper that is in question and then produced in court, why may he not reverse the process and apply his knowledge of a paper produced in court to the mental impression formed in his mind with regard to the first paper?"); 1889, Alexander *v.* Vye, 16 Can. Sup. 501 (foregoing case affirmed); 1850, Porter *v.* Wilson, 13 Pa. 646. That the genuineness of a *lost document*, not produced, may be proved by testimony to the handwriting, see *post*, § 1185.

[1] *Post*, §§ 72[illegible], 727.

[2] 1797, Dacosta *v.* Pym, Peake N. P. 144 (the witness said the writing "was like to but he did not think it was the plaintiff's handwriting, because he knew the plaintiff to be a man too well acquainted with the world to sign such an account"; Lord Kenyon ruled that the witness

b. Ex Scriptis olim Visis (Seeing known Genuine Documents).

§ 699. **General Principle.** The difficulties that arise for this mode of tes mony are precisely the opposite of those arising under the preceding mo There the second element of knowledge (*ante*, § 693) — namely, that t specimen seen was genuinely written by the person in question — gives difficulty, because the very act of writing it was seen, and therefore t witness must necessarily know who wrote the specimen from which knowledge of the type was gained. Here, on the other hand, the doc ment has come to the observation of the witness without his seeing the of writing it. Hence the main source of controversy is the sufficiency of grounds for believing that the person in question *was genuinely the writ* Taking up first, then, this element, of his grounds of knowledge of the ty the simple question is: Has the witness adequate grounds for believing th the writing he observed was that of the person in question? That this is t real inquiry, and that in this mode of testimony, as distinguished from t preceding one, it is the peculiarly necessary one, has been clearly expound in an early Virginian decision:

1829, *Coalter*, J., in *Rowt's Adm'x* v. *Kile's Adm'r*, 1 Leigh 225: "The reason wh witness must see another write in order to form an opinion of the character of his ha writing is not, I apprehend, because seeing the party write gives you a knowledge of character of his hand; he must see the handwriting itself, after the act of writing is p formed, in order to acquire that knowledge. But when he sees the manual operati himself, he knows that the handwriting which he at the same time or afterwards inspe is the handwriting of the party. He thus acquires a knowledge . . . of a handwriti which he knows to be that of a certain individual. . . . Being accustomed to see operation is only full evidence that the writing, which you have thus seen and the char ter of which is more or less distinctly impressed on your mind according to circu stances, is the character of the manual writing of that individual. [On the other ha in the course of business and correspondence you acquire an equally perfect knowledge the *handwriting* of the individual. . . . But this writing may have been performed by clerk of the person in whose name it is; and if so, you have no knowledge of the ha writing of *that person*, though you have of that of his clerk, . . . [and the relevancy such knowledge] would be intirely defeated by proof that the letters were written by clerk, and is weakened in proportion to any doubts that may exist whether the pa whose handwriting is to be proved wrote the letters or not."

This being the reason for the inquiry, there is no special virtue in any p ticular rule as to the nature of the correspondence — whether business otherwise —, or as to the consequences of the correspondence — whether was "acted upon" or not. Nor is it *a priori* essential that there sho be mutual correspondence at all. The inquiry concerns the sufficiency of t witness' grounds of belief that A was the writer of what the witness receiv under A's name; and this, that, or the other rule must ultimately be test by this general nature of the inquiry:

must consider "the character of the handwriting only").

But this is a different thing from testing them as to the *strength of their belief*: 1893, Holmes v. Goldsmith, 147 U. S. 150, 163, Sup. 288 (question to qualified witnesses handwriting, whether they would act on a n as genuine, allowed).

1839, *Bronson*, J., in *Cunningham* v. *Bank*, 21 Wend. 559: "The authenticity of the specimens may be established by presumptive as well as by direct evidence. . . . [After giving illustrations], other cases might be mentioned where the circumstances will well warrant the inference of authenticity, although there may be no direct evidence to that effect. But in some way the fact that the specimens are genuine must be satisfactorily proved. . . . Standing alone, the fact that the witness *has acted on the letters* has no tendency to prove them genuine. It only proves, and that merely by inference, that the witness believed the letters authentic. His belief is of no importance unless it is founded upon some good reason, — such a reason as will satisfy the Court and jury as well as the witness. Although the fact that the witness has acted on the letters is, when standing alone of no importance, it may be of great value in a chain of circumstantial evidence."

The use of this class of testimony is comparatively new; its orthodoxy was not established until the last century (*post*, § 1993). But in the early leading case, Lord Ferrers v. Shirley, decided before the doctrine had become entirely orthodox, the principle now to be examined — the necessity for adequate ground to believe the genuineness of the letters — were clearly brought out:

1731, *Lord Ferrers* v. *Shirley*, Fitzgibbons, 195: "Amongst other witnesses was called one *J. J.*, who would have swore to the hand-writing of one *J. Cottington*, whose name was to the deed [of *Robert* Earl *Ferrers*] as a witness, because he had seen several letters wrote by *J. Cottington*. Thereupon he was asked, whether he had ever seen the said *Cottington* write; to which he answered, that he never did, nor never saw the person that wrote the said letters; but that his master, to whom the said letters were wrote for the rent of a part of the estate of the late Earl *Robert Ferrers*, which his said master held, informed him, they were the letters of *J. Cottington*, the Lord *Ferrers's* steward, who was the person pretended to have attested the deed in question. Hereupon it was objected to his testimony, because he could not say with any certainty, whether or no the writer of the letters was the same person that attested the deed; for that the *J. Cottington*, that was supposed to write the letters, might get some other person to write those very letters for him; and the counsel insisted, that in all cases, where a witness would swear to the hand-writing, he must be able to say, that he saw such person write. The Court rejected the said *J. J.* because he could not ascertain the identity of the person. But my Lord RAYMOND said, that it is not necessary in all cases that the witness have seen the person write, to whose hand he swears; for where there has been a fixed correspondence by letters, and that it can be made out that the party writing such letters is the same man that attested a deed, that will entitle a witness to swear to that person's hand, tho' he never saw him write. PAGE, Justice, said, If a subscribing witness to a deed lives in the *West-Indies*, whose hand-writing is to be proved in *England*, a witness here may swear to his hand, by having seen the letters of such person wrote by him to his correspondent in *England*, because under the special circumstances of that case, there is no other way, or at least, the difficulty will be great, to prove the hand-writing of such subscribing witness. But my Lord RAYMOND differed, and said, that those special circumstances could not vary the reason of the thing."

The various circumstances that may be regarded as affording adequate ground for such a belief may be grouped under three heads: (1) *admissions expressly* made to the witness by the person in question; (2) *implied admissions*; (3) *other circumstances*.

§ 700. (1) **Express Admissions as the source of belief.** There can be no question that an express acknowledgment by the purporting writer affords

an adequate ground of belief in the authenticity of the writing received, and this is generally accepted.[1]

§ 701. (2) **Implied Admissions as the source of belief.** An implied admission is universally considered as equally satisfactory, — *i. e.* any conduct which amounts to a recognition by the person in question of the genuineness of the writing received. There is no fixed test; perhaps the most accurate and most flexible is given in the following passage:

1839, *Bronson*, J., in *Cunningham* v. *Bank*, 21 Wend. 560: "The acts done in pursuance of the letters may be followed by such acts of approval or acknowledgment on the part of the supposed author as can only be accounted for on the supposition that he was in truth the writer of the letters; and there can be no doubt that in this way, as well as by a direct admission, the fact of authenticity may be satisfactorily established." [1]

§ 702. (3) **Mere Exchange of Correspondence: is this sufficient or must it be "acted upon"?** As soon as those sources of belief are reached which

[1] *Examples:* 1898, Redd *v.* State, 65 Ark. 475, 47 S. W. 119; 1838, State *v.* Spence, 2 Harringt. 348; 1822, Hammond's Case, 2 Me. 33; 1860, Woodman *v.* Dana, 52 Id. 9; 1873, Hammond *v.* Varian, 54 N. Y. 400. Unnecessary discriminations have sometimes been made: 1880, Hynes *v.* McDermott, 82 N. Y. 52 (possible exclusion because the witness gets the admission expressly for the trial); 1840. Pope *v.* Askew, 1 Ired. 16 (exclusion because the admission was made to another than the witness).

[1] *Examples* of testimony *admitted:* 1832, Smith *v.* Sainsbury, 5 C. & P. 196 (where the witness had merely as counsel seen an affidavit used by the opponent); 1821, Johnson *v.* Daverne, 19 Johns. 136 (where the witness had received payment of notes purporting to be those of the signer of the disputed document); 1839, Cunningham *v.* Bank, 21 Wend. 559, *semble* (same); 1873, State *v.* Hastings, 53 N. H. 452 (a jailer who had read letters handed to him by the prisoner as hers and forwarded by him as such); 1849, Gordon *v.* Price, 10 Ired. 387 ("[notes] established in the mind of the witness to be genuine by the fact that they were so treated by the party from time to time, by paying them"); 1819, Com. *v.* Smith, 6 S. & R. 571 (where a cashier had habitually made payments and received receipts from another cashier purporting to be the person in question); 1876, Cody *v.* Conly, 27 Gratt. 323 (where the party had drawn orders on the witness which the latter paid and the former honored).

Examples of testimony *excluded:* 1828 Creaves *v.* Hunter, 2 C. & P. 477 (witness to the defendant's hand excluded, who had seen "other papers in the master's office, which were admitted to be of his handwriting by the defendant's attorney," and had acted on them); 1850, R. *v.* Crouch, 4 Cox Cr. 163 (policeman, who had paid money to the defendant and obtained a receipt, for the express purpose of informing himself, excluded; unsound); 1866, Putnam *v.* Wadley, 40 Ill. 346, 348 (witness excluded who had seen other documents purporting to be signed by defendant, but not shown to have been "recognized as signed" by the defendant); 1875, Board *v.* Misenheimer, 78 id. 22, 24 (witness to a surety's signature, who had merely "examined his signature to his reports as guardian" filed in the county clerk's office, and had done so for the express purpose of informing himself, excluded); 1888, Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187 (witness to a wife's signature, who had seen it only on one document bearing a notary's certificate of acknowledgment, excluded on the facts).

The following statutes aim to cover this general principle: Cal. C. C. P. 1872, § 1943 (any one who has "seen writings purporting to be his [the author's], upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting" is qualified); amended in 1901 (by substituting the following: "seen writing purporting to be his and upon which the supposed writer has acted or been charged, or which consists of letters received by the witness in due course of mail in response to letters duly addressed and mailed by him to the supposed writer and who has thus acquired a knowledge of the handwriting of such person"; for the validity of this amendment, see *ante*, § 485); Mont. C. C. P. 1895, § 3234 (like Cal. C. C. P. § 1943, unamended); Or. C. C. P. 1892, § 762 (like Cal. C. C. P. § 1943, unamended). In Louisiana, the Code provision for proof of handwriting has been held to exclude testimony founded on knowledge of the present sort: La. C. C. P. § 325, ed. 1901 ("If the defendant deny his signature [to a document in the pleading] in his answer, or contend that the same has been counterfeited, the plaintiff must prove the genuineness of such signature either by witnesses who have seen the defendant sign the act, or who declare that they know it to be his signature because they have frequently seen him write or sign his name"); 1812, Sauvé *v.* Dawson, 2 Mart. 202 (under the old Civil Code, testimony receivable only from one who saw the writing executed, or from experts appointed by the Court); 1869, Huddleston *v.* Coyle, 21 La. An. 148 (under C. C. P. § 325, witness speaking from knowledge acquired by paying drafts not disputed by the party, excluded); 1869, Leonard's Succession, ib. 523, *semble* (same).

do not consist in implied admissions, debatable ground appears. The first matter to be noticed is that source of belief which rests on the certainty of the course of the mails. If A receives a letter purporting to come from B, he cannot be allowed to presume, for testimonial purposes, that it was in fact written by B; this all concede.[1] But if he writes to B and receives a purporting answer from B, intelligently treating the matter and showing an acquaintance with facts such as only B could know, is not this sufficient? Here the controversy begins:

(*a*) A number of judges have been unwilling to accept this source of belief; they require something more, and that something is that A's belief shall have been further confirmed by circumstances ensuing upon the letter or by his having subsequently found B acting upon it. The language of the judges is not uniform nor definite; but they require at least *something more than a mere exchange of intelligent correspondence:*

1799, *Kenyon*, L. C. J., in *Batchelor* v. *Honeywood*, 2 Esp. 715: "If persons are in the habit of corresponding, and letters are received from one to the other, upon which any transaction takes place, that may enable the party to swear to his correspondent's handwriting."

1836, *Doe* v. *Suckermore*, 5 A. & E. 705: *Coleridge*, J.: "[The requirement is that] transactions have taken place between them upon the faith that letters purporting to have been written or signed by him have been so written or signed;" *Denman*, L. C. J.: "The letters forming one side of a correspondence do not prove the handwriting because addressed to a particular person; that person's evidence may be requisite to show that A had in some way recognized the letters bearing A's signature, and was therefore probably the individual who wrote them; but this is quite different from a knowledge of the handwriting, [*i. e.* the matter of knowing] whether they proceeded from A or any other."

1889, *Campbell*, J., in *Pinkham* v. *Cockell*, 77 Mich. 272, 43 N. W. 921: "The mere receipt of letters purporting to be from a person never seen, and with whom no subsequent relations existed which were based on them as genuine, has no value as means of knowledge. Where there is no direct knowledge of handwriting, there must be something which assures the recipient of the letters in a responsible way of their genuineness.[2]

Two things must be noted about this form of the rule. (1) In the first place, it is not clear whether the judges mean that the required transaction or act must involve an implied admission *known* to be B's or merely an

[1] Although that circumstance may be sufficient *circumstantial* evidence that the letter was at least sent by *B's authority: post*, § 2153.

[2] *Accord*, with minor variations: 1825, Thorpe v. Gisburne, 2 C. & P. 22 (witness to the defendant's hand who had "received letters from him, upon which he had acted," received); 1897, Hightower v. Ogletree, 114 Ala. 94, 21 So. 934 (one who merely received letters purporting to come from one who could not write, not competent to authenticate them); 1846, Pate v. People, 8 Ill. 664; 1847, Woodford v. McClenham, 9 id. 89; 1856, McClain v. Esham, 17 B. Mour. 146, 155 (one who had received a letter and answered but received no further letter, not competent); 1860, Chaffee v. Taylor, 3 All. 601, *semble;* 1873, Nunes v. Perry, 113 Mass. 275 (merely receiving a letter in care, excluded); 1894, Violet v. Rose, 39 Nebr. 660, 672, 58 N. W. 216 (one who had sent and received and acted upon letters, admitted); 1852, Bowman v. Sanborn, 25 N. H. 110, Eastman, J. ("having seen genuine signatures or writings of the person, either in transacting business with him so that the papers have been acted upon and recognized by him as genuine, or by an intimate acquaintance with signatures which have been adopted into the ordinary business transactions of life"); 1858, Burnham v. Ayer, 36 id. 185 (following the preceding case); 1854, Power v. Frick, 2 Grant 307 (not sufficient under the circumstances); 1900, State v. Hall, 14 S. D. 161, 84 N. W. 766 (one receiving a letter "in due course of mail," excluded); 1894, Flowers v. Fletcher, 40 W. Va. 103, 20 S. E. 871 (a correspondence of mere friendship, not involving business transactions acted upon, insufficient).

Compare the cases cited *post*, § 2153.

implied admission *inferred* to be his. Thus, if a letter purporting to be B orders a ton of coal and it is delivered and then B comes in person and pay for it, the implied admission is known to be B's. But suppose, instead, tha a check purporting to be B's comes by mail; or suppose that A receives a offer and orders a box of soap from B, and a box of soap then comes in wagon purporting to be B's; these are admissions or recognitions which onl purport to be B's, and personal observation by A is still lacking. Or suppos that A writes to a theatre-clerk inclosing the money for a ticket; the ticke is sent, with a letter of receipt, and A goes to the theatre and is given a se on the ticket; here is an act done by somebody which indicates the genuin ness of the letter, but the admission was not necessarily made by the ticke clerk. Looking at the judges' language, we find some prescribing merel "any transaction that takes place," or "something which assures the recip ent"; while others go further and require that B's letter should be "acte upon and recognized *by him*," or the transactions should have "taken pla *between them*," meaning apparently acts by the person known to A to be and not merely acts by a person probably B. It is impossible to say wh are the judicial requirements of this doctrine in that respect.

(2) It has sometimes been supposed (and the language of some judici opinions has naturally induced the error) that the "acting upon" which necessary may be or must be *on the part of the witness A*. This, however, will be seen, is impossible as a test; the "acting upon" which induces th faith must always ultimately be that of B, the person in question. Thus, a letter purporting to be B's invites an investment, A may "act upon" th by investing a thousand dollars in the offered enterprise; but the extent A's action, however great a faith it shows on A's part, affords no further re son to us for sanctioning the sources of his belief. If, however, interest the investment is regularly received from B's office — in other words, if himself appears to have "acted on" A's answer — then, but only then, have that sort of action which tends to show the genuineness of the origin letter purporting to be B's. It must be remembered, then, that the force subsequent transactions as a ground for belief lies not in A's part in the but in B's part in them. In short, it is B's "acting upon" the correspondenc which furnishes the real and ultimate source of belief.

(*b*) But the majority of Courts (and this is the orthodox doctrine) pref to be satisfied with something short of this test, and accept an *exchange correspondence alone* as sufficient to justify belief in genuineness. That when A writes to B and receives in due course an answer purporting to B's, intelligently dealing with the original letter, the composite data of t course of the mails, the accuracy of the directory, the likely conduct of t receiver of a letter, and the improbability of a forger being able to send intelligent answer or series of answers, avail for practical purposes as adequate source of belief. It is of course B's *answer* to A's letter, and merely a first letter of B (however intelligent), nor an answer by A to it, th can have this effect, — though this discrimination is not always made:

1797, *Kenyon*, L. C. J., in *Carey* v. *Pilt*, Peake Add. Cas. 130: "That evidence was admitted on sound principles; for if, when letters are sent directed to a particular person on particular business, an answer is received in due course, it is a fair presumption that the answer was written by the person whose handwriting it purported to be."

1814, *Eldon*, L. C., in *Wade* v. *Broughton*, 3 Ves. & B. 172: "Where there has been correspondence by letters the contents of which are such as to render it probable that they were received [by the genuine person], perhaps impossible to suppose the contrary, that course of correspondence will do; and that has grown up in modern times."

1836, *Doe* v. *Suckermore*, 5 A. & E. 727: *Williams*, J.: "I adverted to an expression in frequent use, and which indeed has almost grown into the currency of a proverb upon this subject, that the letter or letters '*must have been acted upon.*' If, however, by this expression, it be meant to imply that any business must be transacted, or, in any sense of the word, *act done*, the observation is without foundation, for nothing of the sort is necessary. . . . Anything, I presume, from which the knowledge of the writer is established may suffice." *Patteson*, J.: "The knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which in the ordinary course of the transactions of life induces a reasonable presumption that the letters or documents were the handwriting of the party."

1820, *Taylor*, C. J., in *State* v. *Allen*, 1 Hawks 8: "Thirdly, by a witness who has received letters from the supposed writer of such a nature as renders it probable that they were written by the person from whom they purport to come. Such evidence is only admissible where there is good reason to believe that the letters from which the witness has derived his knowledge were really written by the supposed writer of the paper in question." [3]

The truth is that this course of correspondence may vary in probative value according to circumstances, and hence probably the disinclination of the Courts first mentioned to be satisfied with that alone. The true solution is to leave the matter to the trial judge's determination. The necessity for this flexibility has been recognized by the Courts in the additional classes of cases which are now to be considered.

[3] *Accord*, with variations; 1645, Lord Macguire's Trial, 4 How. St. Tr. 653,685 ("he hath written to me many letters"); 1767, Buller, Nisi Prius, 236; 1763, Gould v. Jones, 1 W. Bl. 384, Lord Mansfield; 1797, Barnes v. Trompowsky, 7 T. R. 265, Kenyon, L. C. J., *semble*; 1845, Ovenston v. Wilson, 2 C. & K. 1, Pollock, C. B.; 1849, Murieta v. Wolfhazen, ib. 744, *semble*; 1887, Campbell v. Woodstock Iron Co., 83 Ala. 359, 3 So. 369 (witness admitted who had mailed one or more letters to C., directed to his known place of residence, and received replies purporting to come from that place and to be signed by him); 1874, Kansas Pac. R. Co. v. Miller, 2 Colo. 442, 452, 460 (one who had corresponded for 18 years with a person purporting to be a friend of his youth in Germany, admitted); 1878, Pearson v. McDaniel, 62 Ga. 100 (business correspondence, sufficient); 1860, Clark v. Wyatt, 15 Ind. 272 ("from authentic papers derived in the course of business"); 1885, Thomas v. State, 103 id. 429, 2 N. E. 808; 1895, Bullis v. Eaton, 96 Ia. 513, 65 N. W. 395; 1881, Empire Mfg. Co. v. Stuart, 46 Mich. 484, 9 N. W. 527 (where the answer "I have seen letters that came from their office; I have had correspondence with them so that I could know their signature," was held to show sufficient certainty); 1866, Southern Exp. Co. v. Thornton, 41 Miss. 221; 1839, Cunningham v. Bank, 21 Wend. 559, *semble*; 1820, State v. Allen, 1 Hawks 9 ("in the course of correspondence in which pertinent answers have been received"); 1854, Shitler v. Bremer, 23 Pa. 413, *semble* (a school teacher receiving and acting on written orders from a director); 1855, Clark v. Freeman, 25 id. 133; 1885, Ullman v. Babcock, 63 Tex. 71; 1897, Redding v. Redding's Est., 69 Vt. 500, 38 Atl. 230; 1829, Coalter, J., in Rowt's Adm'x v. Kile's Adm'r, 1 Leigh 226.

§ 703. **Clerks familiar with Accounts, Letters, etc.** In part involving the foregoing doctrine, and yet not made to depend upon it, is a line of precedents admitting as qualified a *clerk* through whose hands his *employer's business correspondence* or other documents have passed and who has thus become familiar with what purports to be the hand of a customer or of his employer.[1] There seems to be no requirement that an "acting upon" shall be expressly shown, but the doctrine really rests on the quite proper assumption that there must have been numerous and convincing acts of the customer or employer which have verified the genuineness of the documents. On this probability a rule of thumb is based, without requiring special inquiry in each instance. The rule is satisfactory enough; it goes to show that the discretion of the trial judge should be given great latitude.

§ 704. **Official Custodians of Predecessor's Records, Family Records.** Another class of persons seem properly to possess safe sources for estimating authenticity, though they have not received implied admissions from the supposed makers, namely, persons who, having the *custody of official records*, have thus become familiar with the official signature of a predecessor in the office, whether a superior or one of the same grade, or, having the custody of *family records*, thus obtain familiarity with the handwriting. The propriety of the place of custody and the general reliance upon the documents for legal, mercantile, and family purposes, are a sufficient ground for belief in authenticity:

1836, *Denman*, L. C. J., in *Doe* v. *Suckermore*, 5 A. & E. 740: "In ancient documents, knowledge of an officer's handwriting is frequently obtained by an observation of his signature to papers which he would be called upon officially to sign; and a witness speaking from that knowledge may give an opinion whether any particular writing was made by the same person."

1820, *Taylor*, C. J., in *State* v. *Allen*, 1 Hawks 9: "The only methods of proving the hand-writing of a person, sanctioned by law, are: . . . Fourthly, When a witness has become acquainted with his manner of signing his name by inspecting other ancient writings bearing the same signature and which have been regarded and preserved as authentic documents. This mode of proof is confined to ancient writings, and is admitted as being the best the nature of the case will allow."

1874, *McKinstry*, J., in *Sill* v. *Reese*, 47 Cal. 344 (the witness was custodian of the Mexican archives in California and had consulted several hundred documents bearing the signature of the person in question): "If it can be assumed that the Mexican archives in

[1] 1832, R. *v.* Slaney, 5 C. & P. 218, Tenterden, L. C. J. (putting the case of a merchant's clerk who has become acquainted with the handwriting of the merchant's correspondents); 1884, *Re* Stambro, 1 Manit. 263, 267 (one who had examined, as part of his duty, accounts sent in by an agent, held qualified); 1900, Tyler *v.* Mutual D. M. Co., 17 D. C. App. 85, 93 (the manager of a messenger office, who had seen telegrams and receipt tickets purporting to be signed by Mr. & Mrs. T. and had had correspondence with them, allowed to testify to their signatures); 1850, Com. *v.* Webster, 5 Cush. 300, Bemis' Rep. 197, 208 (a writing-master who as such had written diplomas was admitted to speak of the handwriting of the defendant, whose signature he had seen appended to the diplomas of the college in which the defendant was an instructor; Shaw, C. J., "papers have passed under his notice, in a business or official capacity which have given him a long and familiar acquaintance with the defendant's handwriting"); 1847, Reyburn *v.* Belotti, 10 Mo. 598 (a clerk through whose hands letters came); 1801, Titford *v.* Knott, 2 Johns. Cas. 214 (a clerk who had become familiar with the person's business correspondence with his employer); 1831, Hess *v.* State, 5 Oh. 7 (a teller in a bank, who had seen correspondence of the president and the cashier).

the Surveyor General's office are genuine, the man who has read these archives and familiarized himself with the official signatures, several hundred in number, of the person whose signature is the subject of inquiry, has certainly as much knowledge of that person's handwriting as one who has received letters or bills purporting to be in the handwriting of a party whom he has never seen. . . . These documents and records have remained continuously in official custody, and although it is not impossible that in some instances forged papers have been surreptitiously or corruptly placed among them, the presumption that officers have done their duty in preventing such frauds applies. . . . There can be little danger in assuming the genuineness of the signatures from which the witness acquired his knowledge for a collateral purpose like that under consideration." [1]

Upon two points under this principle the law can hardly be said to be settled: (1) whether the witness must be the *custodian* of the standard-

[1] The witness was admitted, except as otherwise noted: *Eng.*: 1767, Buller, Nisi Prius, 236; 1762, Gould *v.* Jones, 1 W. Bl. 384; 1818, Randolph *v.* Gordon, 5 Price 317 (where the witness was rejected because his right to assume the genuineness of the probated will, which he had taken as a standard, did not sufficiently appear); 1820, Taylor *v.* Cook, 8 id. 652 (where the old registers taken as the standard were presumably genuine); 1824, Doe *v.* Tarver, R. & Moo. 143, *semble*; 1843, Fitzwalter Peerage Case, 10 Cl. & F. 193 (a family solicitor who had gained his knowledge by repeated perusals of the family title-deeds, etc., kept by him and examined in the course of the business); 1844, R. *v.* Barber, 1 C. & K. 436 (possessor of old documents); 1847, Doe *v.* Davies, 10 Q. B. 324 (where a parish-clerk testified to a clergyman's marriage-certificate signature through having seen the same signature at various places in the marriage-register; it was assumed that a necessity must exist, such as the probable death of the curate). *U. S.*: 1896, White *v.* Tolliver, 110 Ala. 300, 20 So. 97 (one who had merely seen writing "purporting" to be A.'s, excluded); 1901, Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884 (surveyor, familiar by experience with all the maps in a town-clerk's office and with their premises, allowed to testify to the handwriting of one H., whose signature was on many of the maps); 1849, Smith *v.* Walton, 8 Gill 86; 1832, Jackson *v.* Brooks, 8 Wend. 431, 15 id. 113 (old deeds kept in the witness' custody); 1847, Willson *v.* Betts, 4 Denio 205, 214 (signature to court documents by judge and clerk deceased, the witness not being the custodian); 1820, Stats *v.* Allen, 1 Hawks 9, *semble* ("ancient authentic documents"); 1887, Tuttle *v.* Rainey, 98 N. C. 514, 4 S. E. 475 (where the witness had seen many letters from the writer, his uncle, to his father, dealing with private family matters and a photograph of the uncle, subscribed by him, had been publicly kept in the family; admitted); 1895, Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302 (seeing old documents in one's possession, apparently forgotten; excluded); 1826, Vickroy *v.* Skelley, 14 S. & R. 373 (a deputy county-surveyor, who had seen the writing of a former surveyor; this mode of knowledge was declared not admissible without corroboration, "except in case of public officers, who have been so long dead that better proof could not be expected," and here it was not shown that witnesses who had seen him write were not still alive); 1836, Goddard *v.* Groninger, 5 Watts 209, 218 (admitting a witness who as surveyor-general, had often acted upon documents purporting to be signed by the person in question as clerk in the receiver-general's office, but the transactions were ancient); 1848, Sweigart *v.* Richards, 8 Pa. 439 (accepting testimony of an official of the land-office, who had there seen surveys, etc., of a deceased official surveyor; also accepting a son who had seen his father's writing in the family Bible and in letters possessed by his mother; here the Court seems to make it a condition that living witnesses who have seen the person write cannot be had; and also applies to this sort of testimony the Pennsylvania rule of comparison of documents (*post*, § 2013) that the testimony must be of those who have seen the person write, or else evidence of equal authority); 1822, Cantey *v.* Platt, McCord 260 (instruments purporting to be signed by a deceased surveyor-general; the antiquity of the writing, and consequent lack of witnesses who had seen the person write, being the special condition of admission); 1870, Rogers *v.* Ritter, 12 Wall. 320 (a keeper of records); 1899, U. S. *v.* Ortiz, 176 U. S. 422, 20 Sup. 466 (one employed for many years as clerk, translator, and custodian of Spanish and Mexican archives, held sufficiently acquainted with the signatures of a Mexican Governor and Secretary of 1846 as occurring in those archives); 1892, Tucker *v.* Kellogg, 8 Utah 11, 12, 28 Pac. 870 (administrator held qualified by seeing signatures on paid checks by the intestate found among his papers after death).

Compare the cases cited *post*, § 2158 (official custody as circumstantial evidence of genuineness).

The following rulings on *signatures* used to *frank letters* must be considered from the point of view of the present principle: 1797, Carey *v.* Pitt, Peake Add. Cas. 130, Kenyon, L. C. J. (excluding a post-office inspector who had merely seen in his business franks purporting, but not proved, to be the defendant's); 1799, Butchelor *v.* Honeywood, 2 Esp. 715 (excluding a post-office inspector who had passed Lord T.'s franks but had never seen Lord T. write nor ever received any acknowledgment of their genuineness).

document; (2) whether the documents must be *ancient*. The rulings of th last century answered the former question usually in the negative, the latte in the affirmative. But there is good reason to-day to lay down precisely th opposite rule. (1) The witness has usually no good ground for believing i the authenticity of the documents unless he has in some way had charge o them and found them genuine by testing them — as, a surveyor in charg of his predecessors' surveys, or a family-solicitor in charge of the family title-deeds. In general, some kind of familiar use would at least be neces sary for the witness. (2) The traditional phrase is usually "ancient docu ments;" but it does not seem essential on principle that the document should have been of a past generation or their author be deceased. A suc cessor in public office or a member of a family may have the requisite know edge of genuineness without either of these facts appearing. They shoul be no more essential here than they are in the case of knowledge resting o correspondence (*ante*, § 702), for which it is no longer (though it was at firs considered necessary that the correspondent should be abroad or deceased The truth is that the limitation to ancient documents is a perpetuation of a historical anomaly.[2] It was an extension, based on necessity, of the origina class *ex visu scriptionis;* and it is to this that we owe the phrases in th judicial opinions allowing the testimony only from ancient documents. To day, when testimony *ex scriptis olim visis* stands on an equal footing wit testimony *ex visu scriptionis*, there is no propriety in keeping up the old lim itation to ancient writings or to writings of a deceased official or family member.

§ 705. **Bank Notes and other Paper Money.** The present principle i volves peculiar considerations when the issue concerns the genuineness of bank-note or other paper money. To qualify under the general princip (*ante*, § 693), the witness must be familiar with the genuine notes of th same type, so as to be able to judge of the one in issue. This familiarity claims because he has seen many of the genuine notes of that class. B how can he know that the notes he has seen were in fact genuine one There are several possible grounds on which he may base his confidenc (1) Some Courts have thought it sufficient if he has merely *received a passed away* the notes from time to time.[1] These Courts, however, seem be thinking only of his having seen enough specimens to gain a clear impre sion of the general style, and to be forgetting the necessity of his having h some indication of their genuineness. (2) Other Courts have been satisfi

[2] 1767, Buller, Nisi Prius, 236: "In general Cases, the Witness should have gained his knowledge from having seen the Party write; but under some Circumstances that is not necessary, . . . so where the Antiquity of the Writing makes it impossible for any living Witness to swear he ever saw the Party write"; so also in 1785, Willis *v.* Singer, Suppl. Viner's Abr. "Evid.," T, b, 48. The history is examined *post*, § 1993.

[1] 1823, Com. *v.* Carey, 2 Pick. 48 (officers of a bank who had received and paid out ba notes, to testify to signatures of president cashier on the notes of another bank); 18 State *v.* Cheek, 13 Ired. 120 (persons "w habitually receive and pass the notes of a ba for a long course of time, so as to beco thoroughly acquainted with them"); 18 Martin *v.* Com., 2 Leigh 745 (bank-notes pr able by "persons well acquainted with notes of the bank," not necessarily by an offi of the bank).

when it appeared further that the notes so dealt with had *passed current* and been *reputed as genuine*. This is a step towards recognizing that necessity, but it rests on no definite theory.[2] (3) The strictest requirement, and the only one which is justifiable in theory, is that *none of the notes* thus received and passed *should have been returned* to the witness as counterfeit. This does not necessarily imply an admission of genuineness by the alleged issuers (*ante*, § 701). It rests on the fact that until the note has gone back to its alleged issuer there can be no fair certainty of its genuineness, since other persons receiving it may be equally deceived with the witness. If, then, sufficient time has elapsed for a fair number of the notes to be re-presented at the alleged issuer's, and none have been returned to the witness, the great probability is that the alleged issuer has treated them as genuine; and anything short of this is insufficient:

1824, *Taylor*, C. J., in *State* v. *Candler*, 3 Hawks 393, 400: "It appears to me that the witness' knowledge of the handwriting, acquired in the way he describes, is as much to be relied upon as if derived from a correspondence, and approaches nearly to that obtained from having seen the party write. It is scarcely possible, in the nature of things, that if any of the notes received by the witness throughout so long a period had been counterfeit, they should not have been returned. Their not returning shows their genuineness."[3]

The witness' source of knowledge may also be (but need not be) an *admission*, express or implied (*ante*, §§ 700, 701), by the alleged issuer of the notes.[4] Moreover, one may acquire a knowledge of the type of note from the *material*, color, design, and the like, apart from the signature; hence testimony to genuineness may be founded on a knowledge of these indicia without reference to the character of the signature.[5] Such witnesses will, however, usually be experts in the narrow seuse, *i. e.* persons testifying *ex scripto nunc viso*. The requirement of expertness, as applied to the present subject, has already been considered (*ante*, § 570).

§ 706. **Relative Value of foregoing Kinds of Knowledge.** Since the enactment of modern statutes permitting testimony by experts *ex scripto nunc viso* ("comparison of hands," in the narrow sense), all the established common-

[2] 1822, Furber *v.* Hilliard, 2 N. H. 483 *semble* (but here the witnesses were also experts in paper money); 1831, State *v.* Carr, 5 id. 373.

[3] Approved: 1844, State *v.* Harris, 5 Ired 291; 1851, State *v.* Cheek, 13 id. 120 (which also laid down, without distinction, the less strict rule just preceding; see note 1, *supra*). The Candler case (quoted *supra*) practically overruled U. S. *v.* Holtsclaw, 2 Haywood 379 (1805), where the fact of frequent dealings with bank-bills was held sufficient for testifying to the genuineness of the signatures, and also practically overruled the Allen case (*infra*) so far as the latter intimated that nothing short of correspondence with the signers would suffice. A singular decision is the following: 1895, Kendall's Ex'r *v.* Collier, 97 Ky. 446, 30 S. W. 1002 (a bank officer, who had already examined and discounted as genuine a note whose genuineness was disputed, was not allowed to state these facts as bearing on the strength of his belief that the note was genuine; there is no good reason for this ruling; compare § 698, *ante*).

[4] 1859, Johnson *v.* State, 35 Ala. 378 (bank-bill credited by bank; here the witness was also somewhat expert as to detecting counterfeits); 1820, State *v.* Allen, 1 Hawks 6 (here it did not expressly appear, as in State *v.* Candler, that the notes had been passed and not returned); 1842, Allen *v.* State, 3 Humph. 367 (receiving from and paying to a bank its notes).

[5] 1851, Johnson *v.* State, 2 Ind. 654; 1859, Jones *v.* Finch, 137 Miss. 468; 1805, U. S. *v.* Holtsclaw, 2 Haywood 379, *semble* (on this point, this case is not to be regarded as having been overruled by State *v.* Candler, *supra*); 1842, Allen *v.* State, 3 Humph. 368.

law kinds of knowledge are of course still proper, when they are availabl
It has been suggested that where a lost instrument is to be authenticat
knowledge of one of the weaker sorts is not admissible;[2] but this seem
consideration which should affect only the weight of evidence required
final decision.[3]

§ 707. **Number of Specimens; Writings Post Litem Motam.** Little or
question ever arises as to the sufficiency of the specimens in themselv
to furnish an adequate knowledge of the type of writing, *i. e.* the *number*
specimens received, the distance of *time* when they were received, or t
quantity of the person's writing contained in them. The liberal rules
plied on these points under the foregoing mode of knowledge (*ante*, §§ 69
697) seem to have been accepted here without question.[1]

§ 708. **Other Principles affecting Handwriting, distinguished.** In thec
any person able to read and write is sufficiently qualified, as to *exp*
capacity, to form an opinion of handwriting (*ante*, § 570), though perh
special considerations apply to the proof of bank-notes and other pap
money (*ante*, § 570). The testimony of "experts" in the narrow sense
affected by the *Opinion rule;* and the question is a different one accordi
as their testimony goes to the comparison of handwriting (*post*, §§ 200
2015) or merely to the appearance of ink, paper, or other materials, w
regard to dates, erasures, alteration, and the like (*post*, §§ 2023–2027). T
use of specimens exhibited to the jury involves also the Opinion rule (*p*
§§ 2016–2021).

The expert, however, like other witnesses, must base his *knowledge* of
particular hand upon specimens observed by him; and the application of
present principle to that situation remains now to be noticed.

c. *Ex scripto nunc viso*, or *Ex comparatione scriptorum* (*Expert's Compari*
of Specimens).

§ 709. **General Principle.** (1) Where the witness does not testify fr
sight of the person writing (*ante*, § 694) or from writings received or p
sessed before the litigation and independently of it (*ante*, § 699), he may s

[1] 1890, McKay *v.* Lasher, 121 N. Y. 482, 24 N. E. 711.

[2] In Porter *v.* Wilson, 13 Pa. 646 (1850), the Court declined to hold that a knowledge acquired *after* seeing the lost instrument would be insufficient (*ante*, § 697); but did rule that the knowledge must be positive, "nothing short of actually seeing the party write or an acknowledgment distinctly and clearly made by the party himself"; but it is not clear how far the Court regarded this as limiting the ordinary qualification gained by correspondence.

[3] It was also at one time thought that the *person whose hand was alleged to be forged* must if available be first called, or may alone be called, and in particular, that the *officer of a bank*, if available, is alone competent to testify to the genuineness of his signature on its notes. But this notion soon disappeared, sometimes by express statute; persons having the knowle required in other cases are of course equ competent; 1830, State *v.* Hooper, Bailey and cases and statutes collected *post*, § 1 (preferred witnesses).

[1] A few casual rulings are to be found: 18 McKonkey *v.* Gaylord, 1 Jones L. 94 (kn edge of signature only, acquired by correspo ence, is sufficient for identifying a signatu this would seem to be a proper rule to fol to-day for correspondence done in typewrit with the autograph signature only); 1850, Po *v.* Wilson, 13 Pa. 646 (a correspondence a the date of the disputed document is sufficie As to correspondence *post litem motam*, it well be not an unfair specimen; this should entirely in the trial Court's discretion; comp §§ 2009, 2018, *post*.

acquire knowledge of the type of writing by a special examination of specimens expressly laid before him by others. Now the essence of the difference (so far as the present principle of Knowledge is concerned) between this and the other modes is simply a *difference in the grounds of belief in the genuineness* of the specimens. The witness who saw the act of writing has a sufficient ground of belief in his sight of the person in the act. The witness who received letters, or was custodian of records, had a sufficient ground in other circumstances, often consisting in admissions made to him by the person in question. But in this third mode, both of these grounds of belief are lacking. Yet they must be supplied in some way. An opinion of the type of writing cannot be worth listening to unless the specimens examined appear to have been, with fair probability at least, genuinely those of the person in question. How this may be done, and what difficulties thus arise, can be examined presently. The important truth is that, apart from this, the theory of all three modes is identical; *i. e.* the witness must have knowledge of the type of handwriting, this knowledge must come from an adequate consideration of specimens, and these specimens must appear to be genuinely those of the person to whom they are attributed. That the process is always the same, and that the theory of the witness' *knowledge of handwriting* is identical for all modes has often and clearly been pointed out by the Courts:

1822, Sir *J. Nicholl*, in *Saph* v. *Atkinson*, 1 Add. 122, 216: "All evidence as to the handwriting of any party is the mere statement of an opinion formed by the witness, on comparing a writing said to be his [the author's], with *some* standard."

1836, *Doe* v. *Suckermore*, 5 A. & E. 705; *Coleridge*, J.: "On either supposition [lay or expert], the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question by reference to a standard so formed in his mind." *Denman*, L. C. J.: "I must fairly say that I think the syllogism complete. Opinion is evidence of handwriting, where it is founded on knowledge obtained from inspection of documents proved to be written by the same party. The [expert] opinion tendered here was founded on such knowledge."

1842, *Green*, J., in *Allen* v. *State*, 3 Humph. 368: "All that the rule of law contended for requires is that a witness who is called to prove handwriting shall be able to show that he has had such means of knowledge as to furnish a reasonable presumption that he is qualified to form an opinion on the subject. And the opportunity of acquiring such knowledge, mentioned in the books on evidence — such as having seen the party write, having corresponded with him, or seen writings acknowledged by him to be genuine — are only illustrations of the principle, and are not to be understood as the only means whereby such knowledge can be acquired. If other means of knowledge, in the view of reason and common sense, will equally afford it, there can be no reason why the statement of such means of information shall not be held to be sufficient."

1860, *Rice*, J., in *Woodman* v. *Dana*, 52 Me. 13: "It is contended that all opinion based upon previous knowledge of or acquaintance with handwriting is in reality only the result of comparison, and of comparison made under much more unfavorable circumstances than when the admitted or proved specimens are brought in juxtaposition with that which is controverted; that in one case [of lay testimony] the image of the standard specimen, as it exists in the mind, is compared with the controverted specimen in

the hand of the witness; while in the other [of expert testimony] the standard is before the eye of the witness and placed side by side with that which is contested; that in the former the characteristics of the standard are necessarily indistinct, shadowy, and uncertain, while in the latter they show out in all the distinctness of visible characters. . . . In a certain sense the position of counsel for the plaintiff is undoubtedly correct. 'All evidence of handwriting,' says Mr. Greenleaf, in his work on Evidence, 'except where the witness saw the [disputed] document written, is in the nature of comparison. It is the belief which the witness entertains upon comparing the writing in question with its exemplar in the mind derived from some previous knowledge.'"

1872, *Valentine*, J., in *Macomber* v. *Scott*, 10 Kan. 341: "All evidence of handwriting, except where the witness himself has seen the writing done, is in its nature a comparison of hands. It is the belief which the witness entertains upon comparing the writing in question with the exemplar in his mind derived from some previous knowledge of the party's handwriting."

1874, *Moses*, C. J., in *Bennett* v. *Mathewes*, 5 S. C. 484: "They both depend on the same faculty, — that of bringing into actual application impressions made on the mind, in the one case weakened by time, and in the other more vivid and lively because of more recent existence. One [the lay witness] recollects because he has seen the admitted writing before and can therefore now speak of its similarity with the one in question; the other [the expert witness] because by examining the admitted writing he has a present impression which he at once makes the standard of his comparison." [1]

(2) So far, then, as concerns the theory of the testimonial knowledge, the only difference, for expert testimony, consists in the mode of supplying that certainty of genuineness of specimens which in the other two cases rests on the personal knowledge of the witness himself. How may this be done and what difficulties and rules arise in doing it?

(*a*) It is obvious, first, that as the expert witness does not and *cannot offer his own knowledge* of the genuineness of the specimens, this element must be made to appear by *other persons' evidence*. There are three conceivable ways: (1) By an *admission* in the pleadings or before the court; (2) By *testimony* directed *to the judge*, in the nature of ordinary proof preliminary to the admission of any piece of evidence and calling for the judge's decision only; (3) By *testimony* directed *to the jury*, like all ordinary evidence, — the jury, on retiring, to use the witness' opinion if the hypothesis of genuineness is proved, and to discard it, like other hypothetical testimony (*ante*, §§ 672, 680), if the hypothesis is not proved. Now under the second and the third modes, but particularly the third, the objection of multiplicity and confusion of issues immediately arises; and it is from that point of view mainly that the argument has been made against this kind of testimony to handwriting.

(*b*) There is, however, another consideration, also based on the present principle, *i. e.* that of the adequacy of the witness' sources of knowledge. The witness to the type of handwriting must have formed in his mind a standard based on the observation of specimens; and the inquiry must naturally be made (*ante*, §§ 694–698) whether the specimens he has seen have been sufficient in number and in quality. It has been seen that the first sort of

[1] So also the following opinions: 1830, State v. Hooper, Bailey 42; 1850, Hitchcock, C. J., in Hicks v. Person, 19 Oh. 441.

witness — *ex visu scriptionis* — is liberally treated as to the number of specimens seen, while specimens written after litigation begun are in general not acceptable as sources of his belief. It has been seen also (*ante*, § 707) that for the second sort of witness — *ex scriptis olim visis* — there is still no objection raised on the score of the number of specimens, while specimens written after litigation begun may equally be open to objection. Now the same questions must come for settlement in dealing with the third kind of witness, the expert. His sources of belief may be objected to (1) because the specimens laid before him are not sufficient in number, or (2) because they have been selected unfairly, for the purpose of aiding a particular view.

Thus the rules for expert testimony based on specimens are largely governed by the present principle of Knowledge. But the Opinion rule, excluding lay testimony under certain circumstances, also has a bearing; and the direct submission of specimens to the jury involves still other principles. The precedents and rules are thus so intertwined that it is impracticable to deal with them in this place; and they are most conveniently examined in detail under the Opinion rule (*post*, §§ 1991–2021).

5. Value.

§ 711. **General Principle.** The judicial rulings upon a witness' qualifications to testify to Value are difficult to classify, — because the Court is often called upon to decide at the same time three distinct questions, namely (1) the *experiential capacity* of the witness, (2) his *knowledge* of the *standard* of value, and (3) his *knowledge* of the *object* to be valued. The theory of the first of these has already been examined (*ante*, §§ 558, 567). The theory of the second and the third (explained *ante*, § 653) rests upon the peculiar nature of the idea of Value, which calls for two acquirements in every witness, namely, knowledge of the class or standard of values, and acquaintance with the object which is to be put into the class or tested by the standard. In a great many rulings no means is given us of knowing whether the Court, in accepting or rejecting the witness, is doing so on the principle of Experiential Qualifications or on the principle of Knowledge. To some extent, then, mere rules of thumb must suffice; but some effort must be made to examine the decisions according to the principles involved. They may be arranged in four groups: 1. Whether *special experience* is necessary in estimating values, or whether merely ordinary experience suffices; 2. What tests are proper for deciding whether an adequate *knowledge of the value-standard* exists; 3. How far *acquaintance with the object to be valued* is necessary; 4. Miscellaneous topics.

§ 712. (1) **Experiential Qualifications.** The question here is whether (on the principle of § 556, *ante*) the cultivation of the judgment by special experience is necessary before one can be permitted to form and express an opinion upon values. It is here assumed provisionally that the witness

possesses adequate knowledge or opportunity for knowledge of the f
the doubt is whether in addition a special cultivation of the judgme
necessary before attempting to interpret those facts. For example, a
chant has had constant occasion during many years to employ lawyers;
he, on that basis alone, attempt to draw conclusions as to the value of
services? A lawyer has for two years lived in a metropolitan suburb;
he, merely from knowing what he paid and what others have paid
land in the neighborhood, attempt to form estimates of land values i
suburb?

Two things are obvious: first, that the answer may be different for d
ent things to be valued; and, next, that the answer may depend large
the conditions by which the value is determined in commercial
Where the exchange of articles has reached such a degree of organiz
and control that at a particular place the rate is clearly settled by the
cesses of trade and clearly communicated by an accepted mode — as
stock or produce exchange —, it is easy to see that any person, by goi
the proper source and possessing himself of the facts, may acquire a
satisfactory estimate of value, without having had previous special tra
Where, on the other hand, circumstances of casual occurrence, of unc
influence, and of wide range, may importantly affect that economic at
of the community which we call value — as in medical and legal servic
it may be out of the question for any one to form an opinion who
qualified by special experience to interpret the facts he has observed.

The general tendency of the Courts, however, is towards a broad pri
that *no special training or occupation is necessary to enable one to es
values.* Perhaps no Court has attempted to enforce such a rule as u
ing; certainly no Court could wisely do so. Nevertheless, there are fre
utterances pointing to the broad principle that, in general, knowledge
is necessary.[1] The practical effect may be said to be that Courts will
to require no special training, except where it seems to be clearly esse

Even where concrete rules are laid down for various kinds of values,
is little or no distinction taken between the doctrine of Experiential Q
cations and the doctrine of Knowledge; *i.e.*, when a Court rules
witness to land values must be a dealer in real estate, the Court do
necessarily mean that a dealer's experience is necessary to give exper
qualifications; it may be required merely to give adequate knowledge
facts of value. All that is given us is a rule of thumb only. Henc
practically useless to attempt to distinguish the principles; and the
may best be placed together (in the following sections).

[1] Ga. Code 1895, § 5286 (need not be "an expert or dealer in the article"); 1885, Central R. Co. *v.* Wolff, 74 Ga. 666 (it suffices "if they have any knowledge of such values"); 1890, Central R. Co. *v.* Skellie, 86 id. 693, 12 S. E. 1017 ("any one possessing sufficient knowledge or information may express his opinion"); 1881, Bowen *v.* Bowen, 74 Ind. 474 (one who "shows himself acquainted with v
1877, Thompson *v.* Boyle, 85 Pa. 4
safest course is to permit the examinati
having experience in the thing valued
their authority to be tested on the
examination"); 1890, Montana R. Co.
ren, 137 U. S. 353, 11 Sup. 96.

§ 713. (2) **Knowledge of Value-Standard; what tests are proper?** A knowledge of the general value-standard of the class of things in question is of course essential (*ante*, § 653). The difficult question is to determine tests for the various grades and modes of knowledge. The most practical arrangement of the rulings is to consider them first as applied to the various kinds of things to be valued, and then to notice certain general questions arising for all kinds of values alike. It must be repeated that in any case we are here dealing mainly with mere rules of thumb.

§ 714. **Same: Land-value.** (1) Must the witness be by occupation a *dealer in land?* The Courts unanimously and sensibly answer this in the negative.[1]

(2) Must the witness himself have made a *purchase* or a *sale* of land, or a number of them? This is generally answered in the negative.[2] Yet certainly such a personal participation in sales would be a sufficient qualification.[3]

(3) Must the witness at least have had knowledge, not merely of general value-rumor or the like, but of *specific sales* made? This, too, is generally regarded as not essential.[4] But certainly such knowledge of specific sales in the neighborhood is a sufficient qualification.[5]

(4) Occasionally all specific limitations or tests are abandoned, and the broad test adopted that "any person having knowledge of" or "acquainted with" the values may testify; the determination of the qualification thus being left open for each case.[6] This is perhaps the most satisfactory and sensible test, provided the application of it is left entirely to the discretion of the trial judge.[7] But it is doubtful if any Court, in spite of its proclama-

[1] *Cal.:* 1888, San Diego Land Co. *v.* Neale, 78 Cal. 76, 20 Pac. 372; *Ill.:* 1884, Johnson *v.* R. Co., 111 Ill. 418; 1894, Snodgrass *v.* Chicago, 152 Id. 600, 38 N. E. 790; 1895, Pike *v.* Chicago, 155 Id. 656, 40 N. E. 567; *Kans.:* 1888, Lawrence & W. R. Co. *v.* Hawk, 39 Kan. 640, 18 Pac. 943; 1889, Kansas City & S. W. R. Co. *v.* Ehret, 41 Id. 26, 20 Pac. 538; Kansas City & S. W. R. Co. *v.* Baird, Ib. 69, 21 Pac. 227; *Mich.:* 1885, Huff *v.* Hall, 56 Mich. 458, 23 N. W. 88; *Miss.:* 1903, Beard *v.* Nelms, — Miss. —, 34 So. 149; *Nebr.:* 1875, Lincoln & B. H. R. Co. *v.* Sutherland, 44 Nebr. 526, 62 N. W. 859; 1902, Greeley Co. *v.* Gebhardt, — Id. —, 89 N. W. 753; *N. Y.:* 1866, Robertson *v.* Knapp, 35 N. Y. 92; *Pa.:* 1876, Philadelphia & N. Y. R. Co. *v.* Bunnell, 81 Pa. 426; 1877, Hanover Water Co. *v.* Iron Co., 84 Id. 281, 285. But compare the following: 1881, Green *v.* Chicago, 97 Ill. 372 ("whose business in life has afforded them opportunities of acquiring information and of judging accurately upon the question").

In addition to the express decisions above given, the same result is of course reached by implication in those rulings in the next notes which accept anything less in the way of a requirement.

[2] 1851, Walker *v.* Boston, 8 Cush. 279; 1855, Russell *v.* R. Co., 4 Gray 607; 1869, Swan *v.* Middlesex, 101 Mass. 177; 1888, Northeastern Nebr. R. Co. *v.* Frazier, 25 Nebr. 54, 40 N. W. 609. The rulings in the ensuing notes imply the same result.

[3] 1855, West Newbury *v.* Chase, 5 Gray 421; 1859, Brainard *v.* R. Co., 12 Id. 409; 1869, Swan *v.* Middlesex, 101 Mass. 177.

[4] 1886, Chicago & E. R. Co. *v.* Blake, 116 Ill. 166, 4 N. E. 488; 1888, Lawrence & W. R. Co. *v.* Hawk, 39 Kan. 640, 18 Pac. 943; 1889, Kansas City & S. W. R. Co. *v.* Ehret, 41 Id. 26, 20 Pac. 538; Kansas City & S. W. R. Co. *v.* Baird, Ib. 69, 21 Pac. 227. The rulings in the ensuing notes imply also the same result.

[5] 1879, Cherokee *v.* R. Co., 52 Ia. 281, 3 N. W. 42; 1872, Wallace *v.* Finch, 24 Mich. 255; 1880, Pittsburg & L. E. R. Co. *v.* Robinson, 95 Pa. 428, 432; and the Massachusetts cases in note 3, *supra*.

[6] *E. g.:* San Diego Land Co. *v.* Neale, *supra*, note 1; Pike *v.* Chicago, *supra*, note 1; 1870, Ferguson *v.* Stafford, 33 Ind. 165 ("the necessary knowledge and information to enable them to form a proper estimate of his value").

[7] The following Courts have professed to do this: 1899, Howland *v.* Westport, 172 Mass. 373, 52 N. E. 522; 1900, Fossum *v.* R. Co., 80 Minn. 9, 82 N. W. 979; 1897, Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72.

tion of this broad principle, would consistently enforce it by refusing t
multiply rulings based on particular circumstances.

(5) A sufficient qualification is usually declared to exist where the witne
is a resident, land-owner, or farmer, *in the neighborhood*. The phrase diffe
in different jurisdictions and in different rulings of the same Court; th
notion is that of a person who has both an interest and an opportunity
make himself acquainted with land values around him.[8]

(6) The knowledge and experience of a *public office* — a county commi
sioner, or an assessor —, in which it is a part of the duties to become famili
with land values, may also qualify the witness.[9]

(7) In numerous rulings the particular witness' qualifications are passe
upon, without enunciating any general rule. These can hardly serve
precedents.[10]

§ 715. **Same: Services-value.** The general test, to be gathered from th
rulings, is that *any one sufficiently familiar* with the commercial value
such services may testify. Yet, when the services are of the sort general
termed *professional*, it is probable that a member of the same professi
would invariably be insisted upon;[1] the practice in this respect is so settl

[8] 1882, Hunnicutt *v.* Kirkpatrick, 39 Ark. 172 (farmers of the vicinity); 1893, Orange Belt R. Co. *v.* Craver, 32 Fla. 28, 42, 13 So. 444 (resident); 1884, Bradshaw *v.* Atkins, 110 Ill. 332 (farmers of the same sort in the vicinity); 1895, Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489 (land-owner); 1874, Stone *v.* Covell, 29 id. 362 (farmers and land-owners); 1873, Lehnicke *v.* R. Co., 19 Minn. 481 (resident); 1868, Thomas *v.* Mallinckrodt, 43 Mo. 65 ("property-holders and residents of the neighborhood"); 1896, Union Elev. Co. *v.* R. Co., 135 id. 353, 36 S. W. 1071 (residents of the city and acquainted with the property); 1888, Northeastern Nebr. R. Co. *v.* Frazier, 25 Nebr. 54, 40 N. W. 609 (residents); 1898, Chicago R. I. & P. R. Co. *v.* Buel, 56 id. 205, 76 N. W. 571 (farmer familiar with realty-values in vicinity); 1876, Philadelphia & N. Y. R. Co. *v.* Bunnell, 81 Pa. 426 ("persons living in the neighborhood"); 1877, Hanover Water Co. *v.* Iron Co., 84 id. 281, 285 ("owned land in the neighborhood and was acquainted with its market value"); 1893, McElheny *v.* Bridge Co., 153 Pa. 108, 116, 25 Atl. 1021 (any one who knows); 1878, Brown *v.* R. Co., 12 R. I. 240 (a farmer may testify to farming value of land, but not to general value); 1898, Stolze *v.* Term. Co., 100 Wis. 208, 75 N. W. 987 (old resident, etc.).

[9] 1863, Fowler *v.* Middlesex, 6 All. 97; 1869, Swan *v.* Middlesex, 101 Mass. 177; 1878, Chandler *v.* J. P. Aqueduct, 125 id. 551.

[10] 1878, Hudson *v.* State, 61 Ala. 339 (mill); 1901, Norris *v.* Crandall, 133 Cal. 19, 65 Pac. 571 (land); 1891, Jacksonville T. K. & W. R. Co. *v.* P. L. T. & M. Co., 27 Fla. 157, 9 So. 661 (cost of a building); 1898, Sewell *v.* R. Co., 177 Ill. 93, 52 N. E. 302 (land); 1899, German-Amer. Ins. Co. *v.* Paul, 2 Ind. T. 625, 53 S. W. 442 (building); 1895, Atchison T. & S. F. R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 105[illegible] (barn 1897, Baillie *v.* Assur. Co., 49 La. An. 658, So. 736 (land); 1861, Boston & N. R. Co. O. C. & F. R. R. Co., 3 All. 14 (land); 18[illegible] Whitney *v.* Boston, 98 Mass. 315 (land); 18[illegible] Bristol Co. Bank *v.* Keavy, 128 id. 303 (land 1894, Amory *v.* Melrose, 162 id. 556, 39 N. 276 (land); 1895, Lyman *v.* Boston, 164 id. 41 N. E. 128 (land); 1895, Teele *v.* Boston, id. 88, 42 N. E. 506 (land); 1899, Manning Lowell, 173 id. 100, 53 N. E. 160; 1900, Co rane *v.* Com., 175 id. 299, 56 N. E. 610 (one perienced in business of a bleaching-mill, et allowed to testify to value of land as a site such a mill); 1896, Union Elev. Co. *v.* R. C 135 Mo. 353, 36 S. W. 1071 (land); 1900, Ste S. C. Co. *v.* Scott, 157 id. 520, 57 S. W. 1 (stone-quarry); 1896, Chicago B. & Q. R. Co. Shafer, 49 Nebr. 25, 68 N. W. 342 (land); 18 Elvins *v.* Delaware & A. T. & T. Co., 63 N. J. 243, 43 Atl. 903 (shade-trees); 1880, Woodruf ins. Co., 83 N. Y. 138 (construction of house Spring City G. Co. *v.* R. Co., 167 Pa. 6, 31 A 368 (land); 1895, Mewes *v.* Pipe-Line Co., id. 364, 32 Atl. 1082 (land); 1896, Struther R. Co., 174 id. 291, 34 Atl. 443 (land); 18 Howard *v.* Providence, 6 R. I. 514 (land); 19 Williams *v.* Hathaway, 21 id. 566, 45 Atl. (trees); 1902, Seattle & M. R. Co. *v.* Roeder, Wash. 244, 70 Pac. 498 (stone quarry).

[1] 1842, Mock *v.* Kelly, 3 Ala. 387 (med services); 1888, Turnbull *v.* Richardson, Mich. 406, 411, 37 N. W. 499 (legal service Kelley *v.* Richardson, ib. 432, 437, 37 N. 514 (how far an attorney is qualified to va the services of a legal adviser in managing estate); 1896, Howell *v.* Smith, 108 Mich. 3 66 N. W. 218 (a witness to the value of l services must be an attorney; here a person had employed many lawyers was excluded).

that the question has seldom been raised. For other kinds of services, there seem to be no specific tests; a familiarity with their kind and value is the standard to be applied.[2] Where the testimony is directed not so much to a class of services as to those of *a particular person* in view of his individual qualities, the testimony of a person who had employed that individual might be receivable, even though he had no general knowledge of such services as a class.[3] It would be a hard rule which would prevent a plaintiff from informing the jury of his own estimate of the value of his services; and the Courts seem inclined to impose no terms as to his general familiarity with the class of services; that he has rendered them justifies listening to his opinion.[4] There are, in addition, numerous rulings passing upon the qualifications of particular witnesses and declaring no general rules.[5]

§ 716. **Same: Personal-property value.** Here the general test, that *any one familiar* with the values in question may testify, is liberally applied, and with few attempts to lay down detailed minor tests.[1] The *owner of an*

[2] 1896, Chamness *v.* Chamness, 53 Ind. 304 (value of board; receiving one not a boarding-house keeper); 1895, Jenney Electric Co. *v.* Branham, 145 id. 314, 41 N. E. 448 (value of services in negotiating a sale; familiarity with the "extent and character of the particular service," required); 1885, Alt *v.* Fig Syrup Co., 19 Nev. 118, 7 Pac. 174 (non-expert received, where the services were rendered in a secret manufacturing process).

[3] 1858, Doster *v.* Brown, 25 Ga. 25 (a mill-owner who had such work done); 1877, Eagle & P. Mfg. Co. *v.* Browne, 58 Ga. 110 (employer or co-employee, upon the facts of the cases); 1889, Kennett *v.* Fickel, 41 Kan. 213, 21 Pac. 93 (one who had hired such work); 1865, Kendall *v.* May, 10 All. 61, 67 (one who had furnished board to the same person); 1864, Cornell *v.* Dean, 105 Mass. 435 (pasturing cattle; one who has paid for or rendered such services); 1882, Ritter *v.* Daniels, 47 Mich. 618, 11 N. W. 409 (previous hiring of the same person); 1881, McPeters *v.* Ray, 85 N. C. 464 (previous employer of the same person).

[4] 1880, Richardson *v.* McGoldrick, 43 Mich. 476, 5 N. W. 672; 1895, Foley *v.* Platt, 105 id. 635, 63 N. W. 520; 1898, Missouri P. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169 (services in nursing); 1901, McCormick H. M. Co. *v.* Davis, 61 id. 406, 85 N. W. 390 (boarding horses); 1876, Mercer *v.* Vose, 67 N. Y. 58. *Contra, semble*, that he must be otherwise expert: 1884, Loucks *v.* R. Co., 31 Minn. 534, 18 N. W. 651 (farm services). Of course, an objection assuming his expertness and directed against a plaintiff's testifying in his own cause, is merely an attempt to argue that interest as a party disqualifies; such an objection has to-day no standing (*ante*, § 577).

[5] 1896, American Oak Extr. Co. *v.* Ryan, 112 Ala. 337, 20 So. 644 (cost of cording wood); 1899, Cowdery *v.* McChesney, 125 Cal. 19, 58 Pac. 62 (services in personal attendance); 1892, Chicago & E. I. R. Co. *v.* Bivans, 142 Ill. 401 (services); 1895, Heffron *v.* Brown, 155 id. 322, 40 N. E. 583 (services); 1881, Board *v.* Chambers, 75 Ind. 410 (services); 1895, Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448 (services in negotiating a sale of machinery); 1898, Clark *v.* Ellsworth, 104 Ia. 442, 73 N. W. 1023 (customary charges of an attorney); 1899, Allison *v.* Parkinson, 108 id. 154, 78 N. W. 845 (services of a nurse); 1875, Ottawa Univ. *v.* Parkinson, 14 Kan. 163 (attorney's services); 1880, Central B. U. P. R. Co. *v.* Nichols, 24 Kan. 243 (services); 1870, Allis *v.* Day, 14 Minn. 518 (legal services); 1897, Towle *v.* Sherer, 70 id. 312, 73 N. W. 180 (cost of a house); 1900, Chapman *v.* Tiffany, 70 N. H. 249, 47 Atl. 603 (storage); 1898, McLamb *v.* R. Co., 122 N. C. 862, 29 S. E. 894 (services of a farmer); 1886, Stone *v.* Tupper, 58 Vt. 411, 5 Atl. 387 (services in a stable). The following case seems contrary to the principle of § 654, *ante:* 1901, Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406 (sources of knowledge of the value of services need not be stated beforehand).

[1] 1858, Ward *v.* Reynolds, 32 Ala. 389 (value of a slave; any person may testify); 1886, State *v.* Finch, 70 Ia. 317, 30 N. W. 578 (one who had never bought or sold a seal-skin overcoat, nor seen one bought or sold, was allowed to testify to the value of such a coat); 1902, Houghtaling *v.* R. Co., 117 Ia. 540, 91 N. W. 811 (clothing and furniture; "any one familiar with its nature and use" is qualified); 1864, Brady *v.* Brady, 8 All. 101 (one who had bought and sold horses and wagons was received); 1900, Munro *v.* Stowe, 175 Mass. 169, 55 N. E. 992 (witness allowed to testify to the value of a lot of household goods, though unable to state the value of each article); 1873, Continental Ins. Co. *v.* Horton, 28 Mich. 175 (one who buys or is present at buying, received); 1879, Printz *v.* People, 42 id. 145, 3 N. W. 306 (one who had worn furs and had priced others, received); 1899, Langdon *v.* Wintersteen, 58 Nebr. 278, 78 N. W. 501 (millinery goods; dealer not required); 1866,

article, whether he is generally familiar with such values or not, ought ce tainly to be allowed to estimate its worth; the weight of his testimo (which often would be trifling) may be left to the jury; and Courts ha usually made no objections to this policy.[2] In sundry rulings, the qualific tions of particular witnesses are passed upon, without affording preceden for general rules.[3]

§ 717. **Same: Witness must know the Market Value, if there is o** Value is, of course, the rate at which an exchange would in fact be made this moment by the purchasing and selling community; hence, a knowled of what an article *ought* to exchange for is not a knowledge ... lue, — least, in the sense in which Courts regard it. Nor is a know...ge of th various qualities and *uses* of an article sufficient, if it stops short of includi the exchangeable rate which these qualities actually give it. In short, whe there is a market value, the knowledge of the witness must be of this mark value:

1877, *Berry*, J., in *Berg* v. *Spink*, 24 Minn. 138: "Where the thing whose value is question is of a nature to possess a current price or market value, such current price market value is in law the true value. To entitle a witness to testify to the value of suc a thing, he must therefore be acquainted with the current or market value of things the class to which it belongs. This is a general rule, in the application of which muc must be left to the sound discretion of the trial judge."[1]

Hood v. Maxwell, 1 W. Va. 221, 238 (relation of flour-price to wheat-price; one not in the business was received).

[2] 1885, Tubbs v. Garrison, 68 Ia. 48, 25 N. W. 921 (plaintiff and his wife, owners of household goods); 1895, Thomason v. Insurance Co., 92 id. 72, 61 N. W. 843 (owner of household furniture); 1897, State v. Hathaway, 100 id. 225, 69 N. W. 449; 1895, Shea v. Hudson, 165 Mass. 43, 42 N. E. 114 (owner of a horse and buggy); Mich. Comp. L. 1897, § 10189 (in an action for baggage lost or detained, the owner may testify to its value; but no judgment on such testimony alone shall exceed $150); 1840, Clark v. Spence, 10 Watts 336 (owner of a trunk and contents); 1843, Bingham v. Rogers, 6 W. & S. 501; 1845, Whitesell v. Crane, 8 id. 371 (owner of clothes); 1846, McGill v. Rowland, 3 Pa. St. 452 (same); 1859, Mish v. Wood, 34 id. 452; 1874, Adams Express Co. v. Schlessinger, 75 id. 248, 256; 1900, Gorman v. Park, 40 U. S. App. 537, 100 Fed. 553 (restaurant-keeper allowed to testify to value of tables, etc., used in his occupation).

[3] *Ala.*: 1857, Winter v. Burt, 31 Ala. 37 (machinery); 1885, Winter v. Montgomery, 79 id. 490 (personalty); 1896, Louisville J. C. Co. v. Lischkoff, 109 id. 136, 19 So. 436 (stock of dry goods, etc.); *Cal.*: 1858, Polk v. Coffin, 9 Cal. 58 (cattle); *Ga.*: 1859, Walker v. Fields, 28 Ga. 237, *semble* (mill-machinery); *Ill.*: 1901, Chicago & N. W. R. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095 (horses); *Ind.*: 1881, Foster v. Ward, 75 Ind. 594 (hogsfeed); *Ia.*: 1879, Haight v. Kimbark, 51 Ia. 14, 50 N. W. 577 (mules); 1885, Gere v. Ins. Co., 67 Ia. 275, 23 N. W. 137 (stallion); 1896, Leek v. Chesle 98 id. 593, 67 N. W. 580 (horses); 1901, Cat cart v. Rogers, 115 id. 30, 87 N. W. 758 (cattle *Kan.*: 1886, Reed v. New, 35 Kan. 730, 12 Pa 139 (horses); *Mass.*: 1855, Haskins v. Ins. Co 5 Gray 432 (machinery); 1871, Lawton v. Chas 108 Mass. 241 (timber); 1899, Knight v. Roth child, 172 id. 546, 52 N. E. 1062 (fur garments 1899, Vandercook v. O'Connor, ib. 301, 52 N. 444 (bottlers' supplies); *Mich.*: 1875, Brown v. Moore, 32 Mich. 257 (horses); *Minn.*: 187 Burger v. R. Co., 22 Minn. 343 (hay); 190 Linde v. Gaffke, 81 id. 304, 84 N. W. 41 (wheat *Mo.*: 1878, Simmons v. Carrier, 68 Mo. 42 (lumber); 1896, Moffit v. Hereford, 132 id. 51 34 S. W. 252 (shares of stock); *Mont.*: 189 Emerson v. Bigler, 21 Mont. 200, 53 Pac. 62 (cattle); 1903, Porter v. Hawkins, 27 id. 486, 7 Pac. 664 (hay and barn); *Nebr.*: 1895, Smith Bank, 45 Nebr. 444, 63 N. W. 796 (dry goods) *N. H.*: 1839, Whipple v. Walpole, 10 N. H. 13 (horses); *N. D.*: 1901, Minneapolis Threshin M. Co. v. McDonald, 10 N. D. 408, 87 N. W 993 (threshing machinery); *Okl.*: 1896, Diebol S. & L. Co. v. Holt, 4 Okl. 479, 46 Pac. 51 (safes); 1903, Choctaw O. & G. R. Co. v. Depe rade, — id. —, 71 Pac. 629 (cattle); *Or.*: 189 Oregon Pottery Co. v. Kern, 30 Or. 328, 47 Pac 917 (acow); *R. I.*: 1856, Forbes v. Howard, R. I. 367 (cost of fitting up a theatre); *Wash.* 1902, Lines v. Alaska C. Co., 29 Wash. 133, 6 Pac. 642 (piano); *Wis.*: 1867, Noonan v. Ilsley, 22 Wis. 35 (shares of stock).

[1] 1871, Cooper v. Randall, 59 Ill. 320; 1885, Daly v. Kimball Co., 67 Ia. 135, 24 N. W. 756; 1854, Elfelt v. Smith, 1 Minn. 126; 1869,

But not always is there a market value for an article. In such a case the value is the probable exchangeable rate so far as one can estimate it from the various attendant circumstances and conditions which would affect the disposal of the article; and it is with these that a witness must in such a case be familiar.[2]

§ 718. **Same: Knowledge must be of Value in the vicinity.** Since value is the exchangeable rate accepted by the community, it is obvious that the rate may differ, in passing from one region to another, where different conditions prevail and a different judgment would be formed by the local community. Hence the question arises how far an acquaintance with value-standards in one place will suffice when the value in question is of a thing in another place. The witness' competency must here depend upon whether the conditions of value in the two places are sufficiently similar to render his knowledge of values in one place adequate for estimating them in the other. The application of this principle must depend on the circumstances of each case, and no further detailed rules can be laid down.[1] This question, however, must be distinguished from that of the competency of a witness who, though having his business-quarters in one place, is by reason of his occupation familiar with values of goods in another, — for example, an importer, who is also necessarily acquainted with the values of goods at the foreign port of export; in such a case, his knowledge is sufficient.[2]

§ 719. **Same: Knowledge of Value-Standards must generally be acquired by personal observation, not by mere hearsay.** Knowledge of value does not necessarily rest on hearsay. It might be supposed that to know value is merely to know what other people say the thing is worth, — merely to have heard them offering and accepting prices. But the answer is that these various instances of offers or acceptances of prices, averaged into a mean or probable figure, are what constitute value. The statements of persons declaring their estimates of the prices they would give or receive are not taken, on the credit of those persons, as trustworthy assertions of the fact of value, but merely as items of conduct which themselves make up that total fact of conduct which we call value. Thus, if A sits in a merchant's office

Brackett *v.* Edgerton, 14 id. 174; 1889, Russell *v.* Hayden, 40 id. 90, 41 N. W. 456; 1840, Beard *v.* Kirk, 11 N. H. 400.

[2] 1876, Burger *v.* R. Co., 22 Minn. 343.

[1] 1886, Raridan *v.* R. Co., 69 Ia. 531, 29 N. W. 599 ("the fact that the witness knew the value of stalks in his neighborhood, from six to nine miles from plaintiff's place, did not qualify him to testify to the value of stalks in plaintiff's neighborhood"; a narrow ruling); 1895, Stevens *v.* Ellsworth, 95 id. 231, 63 N. W. 683 (rejecting a witness not acquainted with attorney's services in that region); 1863, Nejac *v.* R. Co., 7 All. 328 (admitting one familiar with the use and value of an easement, though not of adjacent land); 1895, Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276 (knowledge in a metropolis, held sufficient for suburban values); 1895, Lyman *v.* Boston, 164 id. 99, 41 N. E. 128 (not necessary that knowledge should relate to the same place); 1873, Greeley *v.* Stilson, 27 Mich. 155 (knowledge of value elsewhere rejected); 1874, Stone *v.* Covell, 29 id. 362 (farmer may testify only for land in vicinity); 1881, Kent Co. *v.* Ransom, 46 id. 417, 9 N. W. 454, *semble* (knowledge of value of services elsewhere, here held inadmissible); 1882, Fairley *v.* Smith, 87 N. C. 367 (knowledge of values elsewhere may be sufficient).

[2] 1843, Alfonso *v.* U. S. 2 Story 426 (Boston merchants testifying to prices at foreign ports); 1891, Central R. Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017 (where a dealer residing in Georgia but receiving daily quotations from New York was held competent); 1894, Texas & P. R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10 (a Texas dealer receiving quotations from Chicago). Compare the cases in the next section.

and listens to the terms accepted and rejected for a dozen articles, he acquire a first-hand knowledge of value; but if he goes in and asks the merchan to tell him the value of a given article, his knowledge is based on a belie in the truth of the merchant's assertion. In the former case, his knowledg is not based on hearsay.[1] But in the latter case his knowledge is based o the hearsay assertion of another person, and therefore is inadmissible (unde the principle of § 657, *ante*). The distinction depends upon whether th utterances heard represent in themselves a series of individual offers o transactions, or are merely assertions of the net result of offers or transac tions already made. The distinction is no doubt often difficult to draw i practice; in a newspaper, for example, some of the price-quotations ma purport to represent actual individual transactions, or groups of transac tions, while others may represent merely the editor's report or estimate o the net result of value. A witness may be said to be qualified, or not according as the one or the other of these elements forms the chief source o his knowledge; and no more definite rule can be or ought to be laid down:

1814, *De Berenger's Trial*, Gurney's Rep. 188; in this celebrated trial for swindling De Berenger, Lord Cochrane, and others were charged with having falsely circulated report of the death of Napoleon in order temporarily to raise the price of stocks and sel on the risen market; it was proved that on the day of the rise the defendants had sol more than £1,600,000 of stocks, recently bought; to prove the prices on those days, witness was called who had been "employed by the House to take the prices of the da at the Stock Exchange." *Q.* "Where do you get those accounts from?" *A.* "I collec them from the Stock Exchange." *Q.* "Do you go about all day long taking the prices?" *A.* "I collect them at different times in the course of the day." *Q.* "You go about takin an account from all the persons who are there?" *A.* "I take them from different per sons who are in the market." On objection by Mr. Serj. *Best*, *Ellenborough*, L. C. J. replied: "It is all hearsay; but it is the only evidence we can have; it is the only evi dence we have of the price of sales of any description. I do not receive it as the precis thing, but as what is in the ordinary transactions of mankind received as proper infor mation; and I suppose there is hardly a gentleman living who would not act on this paper."

1873, *Rodman*, J., in *Smith* v. *R. Co.*, 68 N. C. 115: "The plaintiff in testifying said that he only knew the value in New York by accounts of sales received from his factors informing him of sums placed to his credit, being the proceeds of sales, by telegrams circulars, and correspondence. . . . The result of all the sales of a day, or of a period shortly before or after, embodied in a reputation among dealers in the article, is the best evidence which the nature of the case admits. The reputation thus formed and circulated by telegrams, commercial circulars, and the prices current in newspapers, is such evidence as is acted on without hesitation by all dealers in their most important transactions."

1875, *Wells*, J., in *Whitney* v. *Thacher*, 117 Mass. 53 (admitting value-testimony of New York prices from brokers in Boston whose knowledge was chiefly obtained from daily price-current lists and returns of sales daily furnished them in Boston from their New York houses): "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify."[2]

[1] 1843, Story, J., in Alfonso v. U. S., 2 Story 423; and the general principle of § 1772, *post*.

[2] The rulings show how much the result depends upon which source was the chief one for the

§ 720. (3) **Acquaintance with the specific object to be valued.** It has already been noticed (*ante*, § 653) that a person making an estimate as to identity, handwriting, or value, must possess a double knowledge, — (1) a knowledge of the classes into one of which the thing is to be put or the standard by which it is to be tested, and (2) a knowledge of the thing itself to be classed or measured or tested. The necessity of this double element of knowledge lies in the very nature of the mental process involved. The former element of knowledge — of the value-standard — has just been considered. The latter element — knowledge of the particular thing to be valued — is equally required by the rules of evidence, as Courts have often pointed out:

1[illegible] *Earl*, C., in *Bedell* v. *R. Co.*, 44 N. Y. 370: "There is no rule of law, and there can be none, defining how much a witness shall know of property before he can be permitted to give an opinion of its value. He must have some acquaintance with it sufficient to enable him to form some estimate of its value, and then it is for the jury to determine how much weight to attach to such estimate. Here the witnesses were carpenters and had a general acquaintance with the house; they knew its shape, location, external appearance, and, to some extent, its internal condition; and the Court did not err in allowing their opinions of its value to go to the jury for what they were worth."

1886, *Clark*, J., in *Pittsburg V. & C. R. Co.* v. *Vance*, 115 Pa. 332, 8 Atl. 764: "[A witness to the market value of land] should have some special opportunity for observation —, should, in a general way and to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made. If interrogated, he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in a position to know what he proposes to state and to enable the jury to judge of the probable

particular witness: 1896, Little Rock & F. S. R. Co. *v.* Aliater, 62 Ark. 1, 34 S. W. 82 (cost of excavation; knowledge based on hearsay, excluded); 1875, Thatcher *v.* Kautcher, 2 Colo. 700, 702 (admitting knowledge obtained by inquiring in the market); 1890, Central R. Co. *v.* Skellie, 86 Ga. 693, 12 S. E. 1017 (a fruit-dealer in Georgia, who in the fruit season received daily quotations from dealers in New York by telegrams and circulars, was allowed to testify to New York market value); 1900, Armour *v.* Ross, 110 id. 403, 35 S. E. 787 (testimony to market value from one who had received the price from dealers in the markets elsewhere, admitted); 1894, Hudson *v.* R. Co., 92 Ia. 231, 60 N. W. 608 (admitting knowledge based on reading market reports); 1898, Walker *v.* Stilson, 1 Ind. Terr. 688, 43 S. W. 959 (testimony as to a sale, etc., founded on hearsay, excluded); 1860, Green *v.* Caulk, 16 Md. 572 (excluding knowledge of prices obtained by mere inquiry); 1858, Lewis *v.* Ins. Co., 10 Gray 511 (excluding a knowledge of prices obtained by mere inquiry, not by dealing); 1866, Sissou *v.* Cleveland & T. R. Co., 14 Mich. 490 (admitting knowledge based on newspaper market reports, telegraphic reports, etc.); 1868, Cleveland & T. R. Co. *v.* Perkins, 17 id. 296, 301 (testimony to New York market prices of cattle, "derived from the newspapers," admitted); 1870, Comstock *v.* Smith, 20 id. 342, *semble* (same); 1872, Kost *v.* Bender, 25 Mich. 519 (excluding knowledge of price of oil-lands learned by inquiry); 1875, Sirrine *v.* Briggs, 31 id. 446 (admitting a clerk in the business, who knew the value of merchandise from price-lists); 1889, Hoxsie *v.* Lumber Co., 41 Minn. 548, 43 N. W. 476 (admitting knowledge based on commercial reports received in the course of business); 1830, Lush *v.* Druse, 4 Wend. 317 (admitting knowledge gained by inquiring at a merchant's office); 1878, Harrison *v.* Glover, 72 N. Y. 454 (admitting knowledge based on price-lists, and letters from dealers); 1882, Fairley *v.* Smith, 87 N. C. 367 (admitting knowledge based on newspapers; but not where a single newspaper at a remote point was the source), 1894, Texas & P. R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10 (a person in Texas, receiving daily reports from Chicago, allowed to testify to price of sheep in Chicago); 1865, Cliquot's Champagne, 3 Wall. 141 (admitting knowledge based on "price current" lists); 1885, Railroad Co. *v.* Bixby, 57 Vt. 564, *semble* (admitting knowledge based on inquiry of prices); 1899, Norfolk & W. R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606 (testimony to value of cattle, based solely on price-quotations in a newspaper and on one price-list, excluded); 1900, Wadley *v.* Com., 98 id. 803, 35 S. E. 452 (value of bonds; witness who had made inquiries for creditors, "a pretty searching investigation," excluded).

Distinguish the question whether the *price-lists* or *trade-journals themselves* are admissible under an exception to the Hearsay rule (*post*, § 1704).

proximate accuracy of his conclusions. . . . J. B. stated in the most unequivocal ner that he was not much acquainted with the land in question; that he had been lower part of it, but that he knew nothing at all about the upper part. . . . It cer does not require much argument to show that B. was an incompetent witness to t on this question; he had not sufficient knowledge of the requisite facts upon wh base an opinion."

This general requirement is constantly enforced.[1] The sufficiency of witness' acquaintance with the thing to be valued should depend the discretion of the trial judge.

As with other kinds of knowledge (*ante*, § 672), so with knowled values, the place of this element may be supplied by a *hypothetical que* Thus, where a witness is competent to speak of house-values but ha seen the house in question, the specifications and other particulars ma placed before him hypothetically for an opinion, and then his knowled the value-standard may become available; or, in some cases, his atte may be called to a thing assumed to be substantially similar to th question, and his judgment may be given on the hypothesis of this simil This hypothetical basis is legitimately and frequently employed as a stitute for actual observation.[2]

§ 721. **Other Principles, distinguished.** The subject of value involve rules of evidence in still other ways not here concerned. (1) Whethe *values* or *sale prices* of *other things of the same sort* are admissible to the value of the article in question, involves a question of circumsta relevancy (*ante*, § 463). (2) What are the general *factors of valu* already been briefly noticed (*ante*, § 463). (3) Whether an estimate of

[1] *Ala.*: 1858, Ward *v.* Reynolds, 32 Ala. 390; 1861, Spiva *v.* Stapleton, 38 id. 174 (land); *Cal.*: 1868, Central Pacific R. Co. *v.* Pearson, 35 Cal. 261 (land); *Ill.*: 1881, Green *v.* Chicago, 97 Ill. 372 ("familiar with the subject of inquiry"); 1900, Chicago Terminal T. R. Co. *v.* Bugbee, 184 id. 353, 56 N. E. 386 (land); *Ind.*: 1862, Crouse *v.* Holman, 19 Ind. 38 (land); 1870, Ferguson *v.* Stafford, 33 id. 165; *Ia.*: 1879, Cherokee *v.* R. Co., 52 Ia. 281, 3 N. W. 42 (land); 1888, Pingery *v.* R. Co., 78 id. 440, 43 N. W. 285 (land); *Kan.*: 1888, Lawrence & W. R. Co. *v.* Hawk, 39 Kan. 640, 18 Pac. 943 (land); 1889, Lawrence & W. R. Co. *v.* Ross, 40 id. 605, 20 Pac. 197 (land); Kansas City & S. W. R. Co. *v.* Ehret, 41 id. 26, 20 Pac. 538 (land); Kansas City & S. W. R. Co. *v.* Baird, ib. 69, 21 Pac. 227; Kennett *v.* Fickel, ib. 213, 21 Pac. 93; *Md.*: 1895, Wallace *v.* Schaub, 81 Md. 594, 32 Atl. 324 (a nurse's services); *Mass.*: 1851, Walker *v.* Boston, 8 Cush. 279 (land); 1854, Shaw *v.* Charlestown, 2 Gray 109 (land); 1855, Russell *v.* R. Co., 4 id. 607 (land); *Mich.*: 1881, Dyer *v.* Rosenthal, 45 Mich. 590, 8 N. W. 560 (one who had been within a store but had not inspected the goods whose value was in question, excluded); 1895, Metzger *v.* Assur. Co., 105 id. 549, 63 N. W. 647 (insufficient examination of a stock of goods); 1899, Michaud *v.* Grace H. L. Co., 122 id. 305, 81 N. W. 93, *semble* (ship); *Minn.*: Lehmicke *v.* R. Co., 19 Minn. 482 (land ing it, without actually going upon it, m fice); 1876, Burger *v.* R. Co., 22 id. 34 sonalty); 1883, Sherman *v.* R. Co., 30 i 15 N. W. 239 (land); 1884, Senrer *v.* 31 id. 480, 18 N. W. 283 (services); 1889 sell *v.* Hayden, 40 id. 90, 41 N. W. 45 sonalty); *Mo.*: 1860, Newmark *v.* Ins. C Mo. 165 (personalty); 1886, Springfield & Co. *v.* Calkins, 90 Mo. 543, 3 S. W. 82 quainted with the premises, location, an roundings"); *N. Y.*: 1888, Slocovich *v* Co., 108 N. Y. 61, 14 N. E. 802 (excludi who had not seen the ship for several *Oh.*: 1876, Williams *v.* Brown, 28 Oh. S (services); *Pa.*: 1895, Mewes *v.* Pipe-Lin 170 Pa. 364, 32 Atl. 1082 (land); 1903, S *v.* R. Co., — id. —, 55 Atl. 769 (land); 1903, Wilson *v.* Southern R. Co., 65 S. C 43 S. E. 964 (land); *U. S.*: 1869, C *v.* Greer, 9 Wall. 734; *Vt.*: 1858, Laur Vaughn, 30 Vt. 94 (personalty).

[2] 1894, State *v.* Tennebom, 92 Ia. 5 N. W. 193 (the value of a stock of g 1873, Miller *v.* Smith, 112 Mass. 475; Johnston Harvester Co. *v.* Clark, 31 Minn 17 N. W. 111; 1877, Thompson *v.* Boy Pa. 481.

is excluded by the *Opinion rule* is dealt with under that head (*post*, § 1940). (4) The old doctrine of Norman *v.* Wells, that an estimate of value is too speculative and uncertain to be listened to has already been noticed under the present principle (*ante*, § 663). (5) Whether *market reports* and *trade journals* are admissible to prove value involves an exception to the Hearsay rule (*post*, § 1704).

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS.

TOPIC V: TESTIMONIAL RECOLLECTION.

CHAPTER XXVI.

§ 725. **General Principle.** The second of the necessary elements (*a* § 478) in every properly qualified testimonial statement is Recollection, the adequate mental reproduction of the impressions obtained by Observation. The element of Recollection thus stands between the element Observation (or Knowledge) which it reproduces, and the element of Communication (or Narration), by which it is in turn reproduced and made apprehensible by others.

The general canon applicable to Recollection is simple: the Recollection should adequately correspond to and represent the impressions originally gained by Observation or Knowledge. Various situations are conceivable in which this essential quality of Recollection may be lacking; and various detailed requirements with reference to curing or avoiding these possible deficiencies are also conceivable. There are, however, in practice, only a few situations commonly calling for judicial rules.

At the outset an important distinction is met between that present actual recollection which a witness on the stand may ordinarily be expected to exhibit (called here Present Recollection), and that recollection which once existed, but now, having irrevocably vanished, requires artificial preservation (called here Past Recollection). The use of the latter sort was for a time little recognized, and is even now often confused with the use of a present recollection. It is convenient to deal with the subject under three heads: I. Recollection in general; II. Past Recollection Recorded; III. Present Recollection Revived.

I. Recollection in general.

§ 726. **Quality of Recollection; "Impression," "Belief," and the like.** The general principle is (as just noted) that Recollection should adequately correspond to Observation. It is in a qualitative way that the deficiency usually occurs. The witness, it may happen, cannot recollect positively, — is not sure, — "thinks" it was so, — has an "impression," — "believes," or the like. How far is such a degree of recollection satisfactory?

It is a commonplace of judicial experience that testimony most glibly delivered and most positively affirmed is not always the most trustworthy. The honest witness who will not exaggerate the strength of his recollection is well worth listening to because of this very caution. Moreover, to accept such "impressions" and "beliefs" is after all not dangerous, since they carry in themselves a warning of their evidential weakness. The best judicial opinion does not insist on a high degree of positiveness in the recollection, but accepts whatever the witness feels able to present. Much must here be left to the trial Court to determine:

1839, *Weston*, C. J., in *Clark* v. *Bigelow*, 16 Me. 247: "If we are to understand from this language [a 'strong impression'] that the fact is impressed with some strength upon his memory, but that it does not rise to positive assurance, it would be admissible. . . . If no other recollection than that of the most positive character is to be received in a court of justice, the difficulty of verifying facts resting in memory would be greatly increased."

1850, *Eastman*, J., in *Hoitt* v. *Moulton*, 21 N. H. 588: "Witnesses are not required to give their testimony with absolute positiveness. If the fact is impressed on the memory, but the recollection does not rise to positive assurance, it is still admissible to be weighed by the jury."

1852, *Lumpkin*, J., in *Franklin* v. *Mayor*, 14 Ga. 260: "Every witness must swear according to the impressions on his mind. They are the materials of his knowledge. It is usually only a more cautious mode of expressing their belief. . . . The impressions of

Mr. R., we think, were sufficiently certain and positive to be admissible. I have been satisfied that we are too hide-bound and restricted in our practice with regard to admissibility of evidence. It is high time that the practice should be discouraged."

1857, *Legrand*, C. J., in *Wilson* v. *Carson*, 10 Md. 751 "Opinion is belief, and not more; it is not absolute certainty, nor does the law require it to be so."

1859, *Sawyer*, J., in *State* v. *Flanders*, 38 N. H. 332: "An impression as to a past may mean personal knowledge of the fact as it rests in the memory, though the remembrance is so faint that it cannot be characterized as an undoubting recollection. . . this sense the impression of a witness is evidence, however indistinct and unreliable recollection may be. No line can be drawn for the exclusion of any record left the memory as the impress of personal knowledge, because of the dimness of inscription."

§ 727. **Same: Quality of Observation, distinguished; "Impression," "Bel and the like.** But it has already been noted (*ante*, § 658) that there is also and the Courts recognize it — a sense in which the terms "impression," "lief," and the like, may mean, not a faintness of recollection, but a weakn in the original impressions of observation; for example, "I was some tance away, but the person *seemed* to me to be A."; "I am not certain, bu *thought, supposed, judged*, at the time, that the hour was about four o'cloc Such expressions indicate a deficiency in the quality of the Observation, of the Recollection; and this sense of the phrases is equally common with preceding one. It will not do to accept mere guesses as testimony. Nev theless, it is clear that the law cannot and does not require absolute certai of observation. A mere deficiency in the quality of observation is of itself good reason for excluding whatever results the observer did actually obta Some men's doubts are better than other men's certainties; and there is h nothing to do but leave to the trial judge to determine when the "impressio is so trivial and faint as to be not worth receiving:

1824, Mr. *Thomas Starkie*, Evidence, 153: "It has been said that a witness must be examined in chief as to his 'belief' or 'persuasion,' but only as to his knowledge of fact, since judgment must be given *secundum allegata et probata*.[1] . . . As far as rega mere belief or persuasion which does not rest upon a sufficient and legal foundation, position is correct, — as where a man believes a fact to be true merely because he heard it said to be so. But with respect to persuasion or belief as founded on facts wit the actual knowledge of the witness, the position is not true. On questions of ident of persons and of handwriting, it is every day's practice for witnesses to swear that t 'believe' the person to be the same or the handwriting that of a particular individ although they will not swear positively."

§ 728. **Same: State of the Law in the Various Jurisdictions.** In examini the authorities, then, it must be remembered that the result depends on t sense of the words used. (1) So far as the terms "impression," "belief," a the like, signify a *total lack of original observation*, a mere conjecture bas

[1] The position which Mr. Starkie here repudiates was based upon an early and loosely phrased passage of Coke's authorship, which was for a time much relied on: 1621, Adams *v.* Canon, 1 Dyer 53 *b* ("In this case much was said about the depositions of witnesses. . . . Secondly, that it is not satisfactory for the w ness to say that he thinks or persuadeth hi self; and that for two reasons: 1st, Because is to give an absolute sentence, and therefo ought to have more sure ground than thin ing").

on rumors, intuitions, prejudices, or the like, such testimony is inadmissible; the authorities in which this sense is unmistakably the one intended by the Courts have already been examined (*ante*, § 658); (2) So far as these terms signify merely an *inferior quality* (*a*) in the *observation* or (*b*) in the *recollection* of the witness, such testimony is receivable, subject to the trial Court's discretion (as just noted in §§ 726, 727). However, in the great majority of rulings to this effect it is either difficult or impossible to learn which of these senses ((*a*) or (*b*)) the Court had in mind. Moreover, in rulings rejecting testimony couched in the above terms, it is sometimes impossible to know whether the Court is justly repudiating "impressions" in the sense (1) above, or, contrary to the best opinion and the great weight of authority, is rejecting "impressions" in either of the senses (2) above. The best that can be done, therefore, is to note the different principles involved, and to leave the authorities to be interpreted in that light.[1]

[1] In the following cases the testimony was *admitted*, except as otherwise noted: *Eng.*: 1773, Miller's Case, 3 Wils. 428 ("should rather believe"); 1794, Horne Tooke's Trial, 25 How. St. Tr. 71 (belief as to handwriting); 1801, Garrells v. Alexander, 4 Esp. 37 (handwriting "like" another); *Ala.*: 1846, Hill v. Hill's Adm'r, 9 Ala. 992 (belief); 1878, Turner v. McFee, 81 id. 0, *semble* (belief); 1888, Bass Furnace Co. v. [illegible]cock, 82 id. 456, 2 So. 315 ("best judgment"); 1893, Shrimpton v. Brice, 102 id. 655, 666, 15 So. 452 (that handwriting "resembled B.'s"); 1897, Thornton v. State, 113 id. 43, 21 So. 356 (identification "in his best opinion"); *Cal.*: 1859, McGerrity v. Byington, 12 Cal. 426, 430 ("to the best of his recollection," by an attesting witness); 1882, People v. Rolfe, 61 id. 540 (identity); 1899, People v. Soap, 127 id. 408, 59 Pac. 771 ("presume," as a statement of best recollection); *Conn.*: 1831, Lyon v. Lyman, 9 Conn. 60 (certainty not required); *Ga.*: 1855, Dawson v. Callaway, 18 Ga. 579 ("I do not know positively, but I think" was held properly rejected; but "I saw . . . as I supposed," improperly rejected; the difference being practically a quibble); 1856, Goodwyn v. Goodwyn, 20 id. 620 ("best of belief," admitted); 1890, Travelers' Ins. Co. v. Sheppard, 85 id. 751, 777, 12 S. E. 18 (that the witness "thought he glimpsed S. as he fell," admitted as signifying "a direct reference to an immediate perception of the senses"); that a comparatively fainter recollection should be accepted from hostile witnesses is laid down by Walker, J., in Huguley v. Holstein, 35 id. 272 (1866); but compare the same judge's exclusion of "I think" in Morris v. Stokes, 21 id. 570 (1857), and the similar case of Parker v. Chambers, 24 id. 524 (1858); *Ill.*: 1840, Gorhem v. Peyton, 3 Ill. 364 (that the assignor does not recollect making certain admissions); 1865, Fash v. Blake, 28 id. 364, 368 (belief as to handwriting); *Ind.*: 1847, Rose v. Louthain, 8 Blackf. 413 ("best of recollection"); *Ia.*: 1871, State v. Porter, 34 Ia. 133 ("suppose," "took it," "concluded," "inferred"); 1881, State v. Lucas, 57 id. 502, 10 N. W. 868 ("can't positively identify, but am satisfied in my own mind"); 1894, State v. Farrington, 90 id. 673, 677 (that handwriting "looked some like his"; undecided); 1895, State v. Seymore, 94 id. 699, 63 N. W. 663 ("I don't know positive, but am satisfied in my own mind"; "best judgment"); *La.*: 1846, Bradford v. Cooper, 1 La. An. 326 ("belief" as to handwriting); 1885, State v. Goodwin, 37 La. An. 713, 715 ("best of knowledge and belief," for a witness to handwriting); *Me.*: 1840, Lewis v. Freeman, 17 Me. 260 (the witness "was confident," but "would not swear" that it was so); 1852, Hopkins v. Megquire, 35 id. 80 ("strong impression," "could not swear"); 1884, Humphries v. Parker, 52 id. 504 ("impression," "I think"); *Md.*: 1856, Baltimore & O. R. Co. v. Thompson, 10 Md. 84 ("suppose"); 1862, Fulton v. McCracken, 18 id. 542 ("think"); *Mass.*: 1866, Hamilton v. Nickerson, 13 All. 352 ("belief" as to the existence of a trade usage); 1897, Com. v. Kennedy, 170 Mass. 18, 48 N. E. 770 ("best of his knowledge, belief, and recollection," as to a person's identity); *Mich.*: 1895, Johnston v. Ins. Co., 106 Mich. 98, 64 N. W. 5 (one who knew "very near" what the value was); *Mo.*: 1880, Ferris v. Thaw, 72 Mo. 450 ("thought"); 1881, Greenwell v. Crow, 73 id. 640 (would not swear to it); 1882, State v. Babie, 76 id. 504 (here it was suggested that a closeness of resemblance, something short of an apparently exact identity, would suffice as evidence); 1884, State v. Hopkirk, 84 id. 288 ("looked like"); 1895, State v. Harvey, 131 id. 339, 32 S. W. 1110 (handwriting; "opinion," enough); 1897, State v. Dale, 141 id. 284, 42 S. W. 722 (that goods said to be stolen "resembled" those stolen); 1899, State v. Guild, 149 id. 381, 50 S. W. 909 (that stolen goods "looked like" those found); 1900, State v. Weber, 156 id. 249, 56 S. W. 729 ("belief" as to identity of stolen mare); State v. Cushenberry, 157 id. 168, 56 S. W. 737 (same, as to identity of person); *N. H.*: 1858, Burnham v. Ayer, 36 N. H. 185

§ 720. Same: Other Senses of "Impression," etc., to which Other Pri ples are applicable. Three distinct senses have now been noted in which terms "impression," "belief," or the like, may call for the application of ferent principles of Testimonial Qualifications: (1) That the witnes merely conjecturing or *guessing*, never having had any real observation the facts; this evidence being inadmissible; (2) That the witness, tho once possessed of some acquaintance with the facts, is more or less uncert by reason of (*a*) weakness of the *original impression* of observation, (*b*) faintness of the *present recollection*; this evidence being generally acce able. But there must also be noted at least three other senses, perhaps f involving still other principles, two of them genuinely principles of eviden

(3) In testifying to a *conversation* or to *prior testimony* of another witn the witness may attempt to give, not the detailed words or phrases, but "*understanding*" or "best of recollection" as to the general purport or ef of what was said. Here the Court may insist on applying the principle

(belief sufficient; mere impression excluded) 1860, Nute *v.* Nute, 41 Id. 08 ("I think"); *N. Y.*: 1877, Carrington *v.* Ward, 71 N. Y. 361 ("impression"); 1878, Blake *v.* People, 73 Id. 586 ("think"; "best of my knowledge"); *N. C.*: 1839, Beverly *v.* Williams, 4 Dev. & B. 237 (would not swear positively); 1851, McRae *v.* Morrison, 13 Ired. 48 ("impression"); *Oh.*: 1851, Crowell *v.* Bank, 3 Oh. St. 411 ("impression"); *Or.*: 1889, State *v.* Chee Gong, 17 Or. 638, 21 Pac. 882, *semble* (belief); *Pa.*: 1820, Sigfried *v.* Levan, 6 S. & R. 313 ("will not swear, but it is like his writing"); 1823, Farmer's Bank *v.* Whitehill, 10 Id. 112 (belief); 1851, Shitler *v.* Bremer, 23 Pa. 413 (the handwriting "looks like it; can't say I believe it to be his writing"); 1860, Duvall's Ex'r *v.* Darby, 38 Id. 59 ("impression"); 1868, Dodge *v.* Bache, 57 Id. 424 ("belief"); 1886, Pittsburgh V. & C. R. Co. *v.* Vance, 115 Id. 332, 8 Atl. 764 (less than a certainty in an opinion as to value); *Tenn.*: 1874, Woodward *v.* State, 4 Baxt. 324 ("think"); *Tex.*: 1866, Swinney *v.* Booth, 28 Tex. 116 ("impression"); *U. S.*: 1822, Bouldin *v.* Massie's Heirs, 7 Wheat. 153 ("appeared to be"); 1821, Riggs *v.* Taylor, 9 Id. 483, 486 ("impression" as to destroying a document); *Vt.*: 1888, State *v.* Ward, 61 Vt. 187, 17 Atl. 483 ("impression," "I think so"); 1895, State *v.* Bradley, 67 Id. 465, 32 Atl. 240 ("thought"); *Va.*: 1893, Combs *v.* Com., 90 Va. 88, 91, 17 S. E. 881 (identification of stolen corn by opinion and belief); *Wis.*: 1876, Erd *v.* R. Co., 41 Wis. 68 (opinion on value).

In the following cases the testimony was held *insufficient*: *Ind.*: 1894, Ohio & M. R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246 ("think"); *Ia.*: 1878, Simonson *v.* R. Co., 49 Ia. 88, *semble* ("thought"); 1895, Orr *v.* R. Co., 91 Id. 423, 62 N. W. 851 (suppose); *Ky.*: 1833, Carrico *v.* Neal, 1 Dana 162 ("impression" of the sole will-witness, held insufficient as sole proof); *La.*: 1860, Paty *v.* Martin, 15 La. An. 620 ("conjecture" of medical men); *Me.*: 1860, Hovey *v.* Chase, 52 Me. 313 ("could not tell, but presumed"); *Md.*: 1870, Elbin *v.* Wil 33 Md. 144 ("impression"); *N. Y.*: 1 Sanchez *v.* People, 22 N. Y. 151 (an exp "doubt"); *Pa.*: 1839, Carmait *v.* Post Watts 411 (impression excluded, with qua cations); 1897, Fullam *v.* Rose, 181 Pa. 138 Atl. 197 (that a signature "looks like" excluded); *U. S.*: 1843, Wilcocks *v.* Phil Ex'rs, 1 Wall. Jr. 49, 53 ("so far as I kn *Vt.*: 1873, Guyette *v.* Bolton, 46 Vt. 232 sufficient recollection). Add also the cases c *ante*, § 658.

L. C. Eldon, that inveterate distinguishe the undistinguishable, tried once (in 1803, Es ton *v.* Kingston, 8 Ves. 475) to distinguish tween "*think*" and "*believe*"; "I doubt authority of the case of Garrels *v.* Alexande Esp. 37], where if a man will not take upon to say he believes it to be the writing of a son, but says he thinks it like [the writin Lord Kenyon is made to say that is eviden I doubt that. Formerly that would not h been deemed evidence." But modern practi as seen in the above citations, has accepted L Kenyon's opinion.

It was once argued (on the authority Adams *v.* Canon, cited *supra*, § 727) tha "belief" could not be received because no dictment for *perjury* was possible on such a fo of statement. The conclusion does not foll from the premises; but at any rate it was ea settled that a false statement of the sort wo constitute a perjury: 1773, Miller's Case, Wils. 428, *semble*; 1782, Lord Mansfield Folkes *v.* Chadd, 3 Doug. 159, *semble*: 17 R. *v.* Pedley, 1 Leach Cr. C. 325; 1847, R. Schlesinger, 10 Q. B. 670. But even in mode times the hereay is still not unknown: 18 Maulsby, J., in Hayes *v.* Wells, 34 Md. 51 "Liability of a witness to the penalties of p jury, if he corruptly misstate facts, is one of t securities for truth which ought not to be moved, unless on necessity; and in proportion opinion is admitted, that liability is removed.

Completeness (*post*, §§ 2097, 2098), *i.e.* the details, not the substance, must be given whenever utterances, spoken or written, are concerned. It is not really a question of deficient Observation or Recollection; for, though the witness may sometimes fail to give details because he did not hear all or does not recollect all, the principle would still, if applied, exclude his evidence if, though hearing all or recollecting all, he still did not narrate all on the stand; in other words, it is the principle of Completeness that excludes such evidence (if it is to be excluded), and the deficiency of Observation or Recollection is a mere casual incident which may or may not be present.

(4) There is a general principle excluding *opinion* testimony whenever the facts are before the tribunal and the witness' judgment or opinion is superfluous. This exclusion has nothing to do with "opinion" as involving the strength of the witness' impressions (the subject of the foregoing sections); it concerns the convenience of the tribunal, which cannot spend its time in listening to wholly superfluous evidence. So far as "opinions" are excluded on this ground, they are elsewhere dealt with (*post*, §§ 1917–1978). A witness' "opinion" or "understanding" of the effect of a conversation may in this aspect also be open to criticism (*post*, §§ 1969–1971).

(5) The witness' "understanding" or "supposition" as to the *terms* of a *contract*, made by conversation or by letter, will often be wholly immaterial, according to the principle of substantive law which usually determines the effect of legal acts by their outward effect, not by the secret or imperfectly expressed intention of the actor. When a witness "understood" the other party to a contract as saying a certain thing, the substantive law may or may not allow this "understanding" to be regarded. This question — one of a group commonly treated under the Parol Evidence Rule — is dealt with under that head (*post*, §§ 2413, 2465).

(6) In Alabama, in the course of a confused series of highly unsatisfactory precedents, a witness' statement as to *another person's intent* or motive (sometimes employing the phrase "understanding" or "belief") has been repudiated, on the ground that no man can say that he knew what another's intent or motive was, *i.e.* on grounds of the impossibility of knowledge (*ante*, § 661). This unsound doctrine is dealt with under the Opinion rule (*post*, § 1966).

§ 730. **Witness Specifying on Direct Examination his Grounds for Recollection; Cross-Examination to Impeach Recollection.** (1) On the *direct examination* a witness may properly be asked to specify the grounds for his recollection; because the circumstances which have contributed to fix or to strengthen it may show how the witness is justified in his confidence of assertion, and the party offering him is entitled to the benefit of this.[1]

(2) On *cross-examination*, the opponent is equally entitled to bring out such circumstances as exhibit the untrustworthiness of the witness' recollection. But here the general principles of Impeachment control this process.[2]

[1] The authorities are for convenience collected *ante*, §§ 655, 416.

[2] *Post*, §§ 942, 973, 994, 1259.

II. PAST RECOLLECTION RECORDED

§ 734. **General Principle.** In dealing with the two sorts of recollecti past and present, it is desirable to consider first the former. The situati is one in which the witness is devoid of a present recollection, and theref desires to use a past recollection. This he proposes to do by employing so record of this past recollection and adopting it as his present stateme Thus, he says: "I made a correct memorandum of this conversation wh my recollection was fresh; I now remember nothing, but can offer my pr recollection as embodied in the memorandum"; or, "I remember nothing sending the notice, but I know from this entry that I must have sent The chief difficulties here to be met have no direct dependence on the pr ciples of Recollection. It must appear that the witness had a good recoll tion when it was recorded, but that is all that is required by the canons Recollection. It is as to the nature of the record and the means of makiu now available that certain restrictions must be applied, and this is a mat of the accuracy and identity of the record, *i. e.* on principle, of the Narrat or Communication of his evidence. The cardinal principle of Narration (*p* § 765) will be seen to be this, that it must correspond to the Recollecti the story told by the witness, whether orally or in writing, must repres his knowledge and recollection. Whether or not the record must be by witness himself, whether it may be a copy of the original, whether w used it is itself evidence, and the like, — these seem in strictness to inv the element of Narration or Communication. Nevertheless, for convenie of exposition, the use of such records must be treated under a single outl the detailed rules being examined in sequence; and it will be enough remember that there are after all two underlying general principles invol

Broadly, then, we have to provide, in using a record of past recollection, certain practical tests of the accuracy and identity of the record; furtherm we must require some guarantee that the past recollection thus recorded a satisfactory one, *e. g.* that it was recorded at or about the time of the eve we may be asked to declare that in any case a present recollection is alw preferable to a past one, and that hence the lack of a present recollec must first be expressly ascertained; and it will also be found that historic there has been much confusion, great delay, and possibly an occasi refusal to allow the use of a past recollection at all. These topics may be taken up in the reverse order, as follows: (*a*) History of the use of recollection; (*b*) Preference for a present recollection; (*c*) Tests to se the adequacy of the past recollection and the accuracy and identity of record of it.

a. *History of the Use of Past Recollection Recorded.*

§ 735. **History in England and the United States.** The use of a p or other memorandum as an aid to recollection was recognized at an e

stage in the history of reported trials. But the distinction between a past and a present recollection seems hardly to have been appreciated at first:

1660, *Scroop's Trial*, 5 How. St. Tr. 1034, 1039; murder of King Charles I, the defendant being charged as one of the judges sitting to condemn him; *Carr:* "Amongst others that were judges of that Court, as was printed in a paper which I then had in my hand, I found the name of Mr. A. Scroop, who I saw did there sit and appear" (Mr. Carr looked in that paper when he gave his evidence); *Scroop:* "I hope you will not take any evidence from a printed list"; *Counsel:* "The manner of his evidence is, he saith, this: that he had this printed paper in his hand when the names of that Court were called, and marking the persons in that paper who were present, and that you were one of them who did appear"; *Scroop:* . . . By your favour, I do suppose there is no witness ought to use any paper or look upon any paper when he gives evidence"; *Sol. Gen.:* "Ask him the question without the paper; yet nothing is more usual than for a witness to make use of a paper to help his memory."

So far as any distinction was at this time observed, it was merely between referring to a paper from time to time and reading it outright;[1] and the refusal to permit the latter process was practically a repudiation of the use of past recollection. But by the middle of the 1700s the legitimacy of the latter process is found fully conceded; the only distinction being (*post*, § 749) that the original must be produced in Court:

1756, *Tanner* v. *Taylor*, quoted by *Buller*, J., in *Doe* v. *Perkins*, *infra:* The witness proved delivery of goods from an account which he had in his hand, a copy from his day-book which he left at home; it was objected that the original should be produced; *Legge*, B.: "If he would swear positively from [present] recollection, and the paper was only to refresh his memory, he might make use of it. But if he could not from recollection swear to the delivery any further than as finding them entered in his book [past recollection], then the original should have been produced."

1790, *Doe* v. *Perkins*, 3 T. R. 754; the witness had gone about with a rent-collector and made entries in a book; the book was in court, but the witness spoke from extracts made by himself, having "no memory of his own of those specific facts"; this was objected to on the ground of "the known distinction between cases [1] where the witness swears from his own [present] knowledge of the facts, though his memory may be assisted by memoranda, and [2] where he does not speak from any recollection which he has, but merely from such memoranda; in the latter case it has always been required that the

[1] 1660, Downes' Trial, 5 How. St. Tr. 1209, 1213 (Downes: "I have an unhappy memory; I have slipt many things; L. C. B. Bridgman; "Remember yourself by papers, if you have any; no man will hinder you"); 1662, Sir Henry Vane's Trial, 6 id. 119, 149 (an under-clerk used the Commons Journal to prove Vane's attendance, "and said, though he will not take upon himself to say when Sir Henry Vane was there and when he was absent, yet he said positively that, at what time soever he is set down in the Journal to have acted or reported anything, he was there"); 1678, Stayley's Trial, ib. 1501, 1504 (witness testifies to the defendant's remarks, from a paper in which he "writ them down presently"); 1679, Knox's Trial, 7 id. 763, 789 (a justice wished to read his examination of an informant; "because my memory is bad"; Recorder: "No, that can't be; you must not read them, but only refresh your memory by them"); 1680, Cellier's Trial, ib. 1043, 1047 (similar); 1684, Lady Ivy's Trial, 10 id. 555, 582 (notes allowed to be used to refresh memory, but not otherwise); 1696, Friend's Trial, 13 id. 1, 21 (Witness for prosecution; "All that I can say to this business is written in my paper, and I refer to my paper"; Att'y-Gen'l: "You must not refer to your paper, Sir, you must tell all what you know"; L. C. J. Holt: "He may look upon any paper to refresh his memory"); 1754, Canning's Trial, 19 id. 488 (witness allowed to use a memorandum which he would not have recorded unless correct); 1754, L. C. Hardwicke, in Anon., 1 Ambl. 252 ("There is no certain rule how far evidence may be admitted from notes; some judges had thought, and he was inclined the same way, that the witness might speak from notes which were taken at the time of the transaction in question, but not if they were wrote afterwards").

original minutes should be produced, because of the great door which might otherwise be opened to fraud and concealment"; and the Court approved the objection.

1824, Mr. *Thomas Starkie*, Evidence, 176: "The law goes further, and in some instances, permits a witness to give evidence as to a fact although he has no present recollection of the fact itself. This happens, in the first place, where the witness, having no longer any recollection of the fact itself, is yet enabled to state that at some former time, and whilst he had a perfect recollection of a fact, he committed it to writing. If the witness be correct in that which he positively states from a present recollection, viz. that at a prior time he had a perfect recollection and, having that recollection, truly stated it in the document produced, the writing, though its contents are thus but mediately proved, must be true."

The reports show a constant use of this past recollection in the English courts from that time until the present.[2] There was more or less delay and doubt in settling some of the conditions of its use; yet it does not appear that any of the judges ever had any doubts as to the radical question of using it all. It is true that the bar for a long time did not seem to grasp the distinction;[3] and as late as 1834 the Court was called upon to reaffirm the legitimacy of the use, against a strong argument which cannot be supposed to have been made (in England, and in those days) by a counsel who really knew better:

R. v. *St. Martin's*, 2 A. & E. 210; the witness looked at a memorandum of a lease; "he had no memory of these things but from the book, without which he should not of his own knowledge be able to speak to the fact; but on reading the entry he had no doubt the fact really happened"; *Counsel*, opposing this: "Even supposing this to be a mere memorandum such as the witness might refresh his memory from, still his evidence does not go far enough. He says, after looking at the memorandum, that he has no doubt, but that he has no memory of these things; so that his memory, after being refreshed, does not supply the proof"; *Taunton*, J.: "When a bond is put into the hands of an attesting witness, and he says that he does not recollect attesting, but that, from seeing his name there, he has no doubt that he did, is not that proof of his attestation?" *Counsel*, replying: "A naked fact may be so proved: but here the question was as to the proof of the contents of an instrument, or of particulars appearing from those contents only." But the Court unanimously rejected his claim.

That there should have been misunderstanding is not strange, in view of the loose use of the term "refreshing the memory" to cover both the revivi-

[2] The order of cases to 1850 is as follows: 1773, Miller's Case, 3 Wils. 420, 427; 1795, Digby *v.* Stedman, 1 Esp. 328; 1801, Jacobs *v.* Lindsay, 1 East 460; 1806, Lord Melville's Trial, 29 How. St. Tr. 916, 996; 1809, Burrough *v.* Martin, 2 Campb. 112; 1810, Mayor of Doncaster *v.* Day, 3 Taunt. 262; 1826, Loyd *v.* Freshfield, 2 C. & P. 332; 1828, Maugham *v.* Hubbard, 2 M. & Ryl. 5; 1834, R. *v.* St. Martin's, 2 A. & E. 210; 1834, Burton *v.* Plummer, ib. 341; 1836, Howard *v.* Canfield, 5 Dowl. 417; 1844, Topham *v.* McGregor, 1 C. & K. 320; 1848, Beech *v.* Jones, 5 C. B. 696. In Scotland, in 1795, the judges were still divided as to the propriety of using a past recollection: Kinloch's Case, 25 How. St. Tr. 934–938 (Lord Eskgrove: "If a man comes to this bar as a witness, he is to swear to what he now remembers, not to what he formerly remembered"; Lord Justice Clerk, *contra*: "If a witness does not recollect any circumstance, he has a right to look at his notes, and then if he says, upon the great oath which he has taken, that these are facts, they ought to be received in evidence"; a majority rejected the evidence).

[3] There are some instances in which, when actual recollection failed, no attempt was made to use past recollection: 1820, Catt *v.* Howard, 3 Stark. 3. There are others in which, though there was apparently no recollection, the memorandum was used but the point not noted: 1796, Vaughan *v.* Martin, 1 Esp. 440; 1803, Rambert *v.* Cohen, 3 id. 213.

fication of a present actual memory and the adoption of a past recorded memory. This unfortunate parsimony of phrase is mainly responsible for the conflict of views still often found in prescribing the conditions of using a present recollection. It was left for an Irish judge, at a comparatively late date, to point out this impropriety of language:

1864, *Hayes*, J., in *Lord Talbot* v. *Cusack*, 17 Ir. C. L. 213: "['To refresh the memory of the witness'], that is a very inaccurate expression; because in nine cases out of ten the witness' memory is not at all refreshed; he looks at it again and again, and he recollects nothing of the transaction; but, seeing that it is in his own handwriting, he gives credit to the truth and accuracy of his habits, and, though his memory is a perfect blank, he nevertheless undertakes to swear to the accuracy of his notes."

In the United States the legitimacy of employing a past recollection was early apprehended by the Supreme Court of South Carolina, and its views were carried into effect in a series of decisions which have ever since served as the leading precedents:

1817, *Cheves*, J., in *Pearson* v. *Wightman*, Mills' Const. Ct. 344 (the witness had no recollection of witnessing a will, but recognized his handwriting): "I hold it not to be necessary that a subscribing witness should recollect the time and occasion when he subscribed the instrument as a witness. It is enough if he recognizes his handwriting and is perfectly assured in his own mind that he never subscribed an instrument as a witness without having seen it executed or acknowledged as the nature of the act requires. . . . Such testimony was better evidence than an adventurous and unaided recollection."

1817, *Colcock*, J., in *Haig* v. *Newton*, ib. 423 (the clerk of a notary testified from a minute-book, having no actual recollection): "If a witness is not allowed to recur to a memorandum book of such transactions as these in a large and populous city, there would be many instances of a defect in testimony, even where notices had been duly given. . . . Can it be supposed that one engaged in such an infinite number of cases, all of the same nature, could retain in his memory an exact account of the day and place and manner of giving the notice?"

1820, *Nott*, J., in *State* v. *Rawls*, 2 N. & McC. 333 (the witness, having no positive recollection, referred to an affidavit of the facts): "The propriety of the rule . . . may be inferred from its necessity. And the occurrences of every day furnish abundant proof that the ordinary transactions of life could not be carried on upon any other principle."[1]

On many occasions since then, the Courts of this country have emphasized the distinction between the use of a present and the use of a past recollection, and have vindicated the legitimacy of the latter as well as the former:

1836, *Shaw*, C. J., in *Shove* v. *Wiley*, 18 Pick. 558 (the witness had used a book of notices to indorsers and makers of notes): "It is very obvious to remark that if such evidence is not sufficient, it would be extremely difficult to prove such acts done. . . . The witness may testify to other facts which with the aid of the memorandum will afford a very satisfactory inference that the act was done, — such as his usual practice and habit, his caution never to make such a memorandum unless the acts were done, and his consciousness of the importance and necessity of accuracy in this particular. In this respect it is like the testimony of an attesting witness to an instrument. He recognizes his handwriting, he knows he put his hand there, he testifies that he believes he would not have put

[1] Three other corroborative rulings were made at an early date: 1818, Columbia *v.* Harrison, 2 Mills Const. Ct. 213; 1823, Nicholson *v.* Withers, 2 McC. 429; 1834, Cleverly *v.* McCullough, 2 Hill 445.

it there if he had not seen the instrument executed ; but he has no present recollection of the fact other than that derived from the recognition of his handwriting."

1857, *Selden*, J., in *Halsey* v. *Sinsebaugh*, 15 N. Y. 485: "The efforts of memory are seldom equal to the task of recalling after any considerable lapse of time even the exact substance of words and phrases. . . . To exclude such a record, when honestly made, would be to reject the best and frequently the only means of arriving at the truth."

1859, *Tuck*, J., in *Martin* v. *Good*, 14 Md. 398 (the witness did not remember, but would not have signed a paper which did not contain the true account): "If more were required in such cases, memoranda to refresh the memory would be of little use, because few men could undertake to relate the particulars of such transactions independent of the paper, and the purposes of judicial tribunals, in promoting the ends of justice, would be defeated."

1871, *Strong*, J., in *Insurance Co.* v. *Weides*, 14 Wall. 379: "And why should they not be [received]? Quantities and values are retained in the memory with great difficulty. If at the time when an entry of aggregate quantities or values was made the witness knew it was correct, it is hard to see why it is not at least as reliable as is the memory of the witness."

1879, *Stone*, J., in *Acklen's Executors* v. *Hickman*, 63 Ala. 498: "The law recognizes the right of a witness to consult memoranda in aid of his recollection under two conditions: *First*, when after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, to facts pertinent to the issue. In cases of this class the witness testifies to what he asserts are facts within his own knowledge, and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that without such assistance his recollection of the transaction he testifies to had become more or less obscured. . . . In the *second* class are embraced cases in which the witness after examining the memorandum cannot testify to an existing knowledge of the fact, independent of the memorandum, — in other words, cases in which the memorandum fails to refresh and revive the recollection and thus constitute it present knowledge. . . . [If the witness] testify that at or about the time the memorandum was made he knew its contents and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum."

1880, *Simpson*, C. J., in *Bank* v. *Zorn*, 14 S. C. 444: "The rule upon this subject, in its broadest outline, embraces two classes of cases ; first, where the witness, after referring to the paper, speaks from his own memory and depends upon his own recollection as to the facts testified to; second, where he relies upon the paper and testifies only because he finds the facts contained therein."

1884, *Rowell*, J., in *Davis* v. *Field*, 56 Vt. 426: "Nor was it necessary that the witness should have had an independent recollection. . . . The old notion that the witness must be able to swear from memory is pretty much exploded. All that is required is that he be able to swear that the memorandum is correct. There seem to be two classes of cases on this subject: 1. Where the witness by referring to the memorandum has his memory quickened and refreshed thereby, so that he is enabled to swear to an actual recollection ; 2. Where the witness after referring to the memorandum undertakes to swear to the fact, yet not because he remembers it, but because of his confidence in the correctness of his memorandum. In both cases the oath of the witness is the primary, substantive evidence relied upon; in the former the oath being grounded on actual recollection, and in the latter on the faith reposed in the verity of the memorandum."

§ 736. **History and Local Anomalies in Particular Jurisdictions.** It cannot be doubted that the use of a past recollection (under the conditions to be

examined later) now occupies a firm and unassailable place in our practice and doctrine. This is none the less a fact because the Courts of a few jurisdictions may not have ruled upon the subject, or because in a few others its place, if it has one, is uncertain, or because in these, as well as in some jurisdictions where its use is now orthodox, the history of the earlier precedents is confused and perplexing. It is worth while, however, to notice briefly the course of precedents, and some of the local anomalies here and there appearing, in certain of the jurisdictions of the United States. (1) In *Pennsylvania*, it is difficult to say whether there is in this jurisdiction a definite and settled acceptance of past recollection, as distinguished from present recollection.[1] (2) In *New York* the use of memoranda of past recollection is now firmly established, after some early vicissitudes;[2] but a local limitation persists,

[1] 1808, Pigott *v.* Holloway, 1 Binn. 436 (attesting witness to a letter of attorney, who found his seal and signature there, and thence was convinced of the fact of execution; admitted); 1811, Miles *v.* O'Hara, 4 id. 108 (judge's notes of testimony; if the judge had appeared and sworn that they were correct, they would have been admissible); 1818, Lightner *v.* Wike, 4 S. & R. 203 (counsel's notes; he "believed he had taken down what E. had said, as it fell from him," but had no present recollection; excluded); 1819, Juniata Bank *v.* Brown, 5 id. 226 (entries in a day-book offered by one of the firm; excluded, but it does not appear that the present question was raised); 1823, Cornell *v.* Green, 10 id. 14 (counsel, after refreshing memory from notes, could not remember sufficiently; excluded, but "it seems, however, singular that instead of trusting to Mr. F.'s recollection, the plaintiff did not offer his [F.'s] notes in evidence, against which, when properly authenticated, there could be no sort of objection"); 1824, Smith *v.* Lane, 12 id. 80 (issue as to flour delivered to the plaintiff; the books of the mill where it was ground were offered, the bookkeeper swearing to their correctness; Tilghman, C. J., rejected them (1) because they recorded flour ground, not flour delivered, (2) because they were not always made up at the time; Duncan, J., rejected them on mixed grounds, partly because the bookkeeper's recollection was not really revived; Gibson, J., was for admitting them, because (1) the amount ground was a real issue, and (2) the bookkeeper's swearing to the entries' correctness would suffice; the rule about parties' and third persons' account-books was confused with the question of using past recollections; the opinions show singular unfamiliarity with the precedents; and the confused thinking in this case has done much harm); 1828, Chess *v.* Chess, 17 id. 409 (counsel's notes admitted, following Cornell *v.* Green); 1829, Farmers' & M. Bank *v.* Boraef, 1 Rawle 152 (bank-clerk's verification of an entry, admitted; he had no present recollection); 1865, King *v.* Faber, 51 Pa. 392 (memorandum, apparently of past recollection, allowed to be used); 1866, Selover *v.* Rexford's Ex'r, 52 id. 308 (memorandum; how treated does not clearly appear); 1888, Long *v.* Regen, 119 id. 403, 13 Atl. 442 (memorandum, apparently of past recollection, admitted as "a statement prepared by the witness fixing the several quantities delivered at the dates designated respectively"); 1886, First Nat'l Bank of D. *v.* First Nat'l Bank of W., 114 id. 7, 6 Atl. 366 (bank-book entries allowed to be used for the purpose of "fixing dates with accuracy"; no precedents referred to).

[2] 1810, Miller *v.* Hackley, 5 Johns. 375 (notary's testimony to his habit of giving notice and his certainty of belief; no actual recollection; admitted); 1822, Halliday *v.* Martinet, 20 id. 174 (past recollection rejected); 1829, Hart *v.* Wilson, 2 Wend. 515 (like Miller *v.* Hackley); 1830, Lawrence *v.* Barker, 5 id. 301 (memorandum excluded, except so far as it actually revived memory); 1833, Feeter *v.* Heath, 11 id. 486 (similar ruling); 1836, Clark *v.* Vorce, 15 id. 193 (witness allowed to use notes of the testimony of a deceased witness at a former trial, upon swearing to their accuracy; no actual recollection); 1837, Merrill *v.* R. Co., 16 id. 595 (entries of work, held admissible if "attested by the man who makes them," "though he remembered nothing of the facts which they record"); 1837, Clute *v.* Small, 17 id. 237 (witness to contents of a letter; "he could speak either from positive recollection, or from seeing the letter and knowing it to be his own statement"); 1852, Huff *v.* Bennett, 6 N. Y. 337 (use of past recollection apparently affirmed); 1854, Cole *v.* Jessup, 10 id. 96 (bank-teller's entries used; no actual recollection; the Merrill case followed); 1857, Halsey *v.* Sinsebaugh, 15 id. 485 (counsel's notes of testimony used; past recollection distinctly sanctioned); this and the Merrill case put the question beyond doubt in this jurisdiction; and the two opinions give a careful survey to the whole subject; the subsequent cases accept the general principle as settled); 1858, Russell *v.* R. Co., 17 id. 134; 1860, Guy *v.* Mead, 22 id. 462; 1864, Marcly *v.* Shults, 29 id. 346; 1871, Downs *v.* R. Co., 47 id. 87; 1872, McCormick *v.* R. Co., 49 id. 303; 1875, Gilchrist *v.* Assoc., 59 id. 499; 1875, Squires *v.* Abbott, 61 id. 535; 1876, Flood *v.* Mitchell, 68 id. 509; 1876, Mandeville *v.* Reynolds, 68 id. 528, 537; 1879, Howard *v.* Mc-

refusiug the use of past recollection until the lack of present recollection made to appear (*post*, § 738). (3) In *Massachusetts*, after some early flu tuation, the use of past recollection has been placed beyond doubt;[3] yet it apparently limited to regular entries in the course of business (*post*, § 747 (4) In *Illinois* the use of a past recollection is undoubtedly intended to sanctioned; but much confusion has existed as to the scope and grounds the rule.[4] (5) In the remaining jurisdictions, the precedents are fewer, b a general recognition is accorded and no special anomalies have developed.[5]

Donough, 77 id. 592; 1886, Mayor *v.* R. Co., 102 id. 572, 7 N. E. 905; 1889, National Ulster Co. Bank *v.* Madden, 114 id. 280, 21 N. E. 408.

[3] 1828, Glover *v.* Hunnewell, 6 Pick. 222 (witness had no present recollection, and was not allowed to use a schedule which he believed correct); 1829, Russell *v.* Coffin, 8 id. 143 (a subscribing witness identified his hand and the grantor's, but had no recollection; the proof of handwriting was deemed sufficient); 1836, Shove *v.* Wiley, 18 id. 558 (book of notices to indorsers; past recollection sanctioned); 1838, Alvord *v.* Collin, 20 Pick. 430 (certificate of notice of sale; past recollection sanctioned); 1844, Bunker *v.* Shed, 8 Metc. 153 (a lawyer's docket-entry, admitted). Subsequent cases (showing not always a true appreciation of the grounds of admission) are as follows: 1855, Smith *v.* Johns, 3 Gray 517 (certificate of taking possession); 1857, Crittenden *v.* Rogers, 8 id. 452 (same); 1858, Perkins *v.* Ins. Co., 10 id. 323 (certificate of marine surveyor); 1860, Briggs *v.* Rafferty, 14 id. 525; 1860, Parsons *v.* Ins. Co., 16 id. 463; 1866, Dugan *v.* Mahoney, 11 All. 572; 1867, Morrison *v.* Chapin, 97 Mass. 72; 1869, Adams *v.* Coulliard, 102 id. 173; 1872, Cobb *v.* Boston, 109 id. 444; 1882, Costello *v.* Crowell, 133 id. 352; 1891, Com. *v.* Clancy, 154 id. 128, 27 N. E. 1001.

[4] 1859, Mineral Point R. Co. *v.* Keep, 22 Ill. 20 (counsel's notes, verified by him as correct, accepted); 1867, Elston *v.* Kennicott, 46 id. 205 (tax-collector's entry of "paid"; no actual recollection; rejected); 1870, Chicago R. Co. *v.* Adler, 56 Ill. 345 (inconsistent language and nothing left certain; "the witness must be able to state that he remembers the facts" in their substance, *e. g.* that a bell was not rung, but he may refer for dates to his memorandum, provided he knows they were true and correctly entered at the time); 1873, Chicago & W. Coal Co. *v.* Liddell, 69 id. 639 (same fault; the witness, using a memorandum, "testified from his own memory," yet "he knows the items to be correct because they were true when made"); 1875, Wolcott *v.* Heath, 78 id. 434 (sales-book entries; use of past recollection sanctioned); 1875, Brown *v.* Luehrs, 79 id. 575 (stenographer's notes, verified as correct, admitted; whether past or present recollection does not appear); 1884, Clifford *v.* Drake, 110 id. 135 (reporter using newspaper copy; admitted); 1887, Bonnet *v.* Glatfeldt, 120 id. 166, 11 N. E. 250 (copy of book-entries, admitted); 1899, Overtoom *v.* R. Co., 181 Ill. 323, 54 N. E. 898 (stenographer using notes without actual refreshment; culpably left undecided; why throw additional doubt the preceding rulings?). If Courts would rig ously consult their own precedents, the state doctrine might sometimes be better ascerta able; in the second, fourth, fifth, sixth, seven and eighth of the preceding cases, none of th preceding were referred to.

[5] The following list is intended to include o the salient cases leading to the establishment the general doctrine: *Alabama:* In Vastbin *v.* Metcalf, 3 Ala. 101 (1841), a past recollect was not recognized; but this was set right, on authority of Professor Greenleaf, in Bonduran Bank, 7 id. 830 (1845), since followed frequent *Alaska:* C. C. P. 1900, § 665 (like Or. An C. 1892, § 836); *Arkansas:* 1895, Woolruff State, 61 Ark. 157, 32 S. W. 102 (admitte *California:* 1854, Treadwell *v.* Wells, 4 C 263 (apparently employed); 1859, People Elyea, 14 id. 144 (apparently sanctioned); C. P. 1872, § 2047 (admissible if made "at the ti when the fact occurred, or immediately th after, or at any other time when the fact fresh in his memory, and he knew that the st was correctly stated in the writing"); 18 Burbank *v.* Dennis, 101 Cal. 90, 35 Pac. (shorthand-reporter; verified notes read as dence); 1897, People *v.* Ammerman, 118 id. 50 Pac. 15 (shorthand transcript admitte 1897, People *v.* Mayne, ib. 516, 50 Pac. 654 mother identified an entry in a family Bibl hers, but the entry was excluded, with sing failure to notice the application of the pres principle); *Connecticut:* 1842, New Haven B *v.* Mitchell, 15 Conn. 224 (admitted); *D ware:* Declared admissible in Redden *v.* Spr 4 Harringt. 265 (1845); practically overrul Fitzgibbon's Adm'r *v.* Kinney, 3 id. 319 (184 *Georgia:* 1849, Williams *v.* Kelsey, 6 Ga. (sanctioned); Code 1895, § 5284 ("A wit may refresh and assist his memory by the us any written instrument or memorandum, vided he finally speaks from his recollection t refreshed, or is willing to swear positively f the paper"); 1900, Akins *v.* R. & B. Co., id. 815, 35 S. E. 671; *Idaho:* Rev. St. 1 § 6078 (like Cal. C. C. P. § 2047); *India* 1853, Clark. *v.* State, 4 Ind. 156 (reject 1866, Prather *v.* Pritchard, 26 id. 67 (accep not mentioning Clark's case); 1888, Johnso Culver, 116 id. 290, 19 N. E. 129 (sanctio with the qualification, "he cannot testify tirely from the writing, . . . but for . . . ing accuracy to his statements he may refe it"); 1893, Bass *v.* State, 136 id. 165, 168 N. E. 124 (stenographer may read his n

§ 737. Other Principles applicable to certain Kinds of Memoranda, distinguished: (1) Notes of Testimony; (2) Regular Entries in the Course of Business; (3) Notary's Certificate; (4) Will-Witness' Attestation. There are four sorts of memoranda in which the applicability of the present principle was

aloud, though not able to recollect without them); 1901, Higgins *v.* People, 157 Id. 57, 60 N. E. 685 (shorthand notes of testimony used by the taker); *Iowa:* 1864, Morris *v.* Sargent, 18 Ia. 95 (sanctioned); 1870, McKivitt *v.* Cone, 30 id. 457; 1871, Borland *v.* Walrath, 33 id. 132; 1874, Moore *v.* Moore, 39 id. 461, 463 (stenographer referring to notes; obscure); 1875, Adae *v.* Zangs, 41 id. 536; 1896, State *v.* Smith, 99 id. 26, 68 N. W. 428 (shorthand notes, used by the maker); 1897, State Bank *v.* Brewer, 100 id. 576, 69 N. W. 1011 (apparently held improper to testify without actual refreshment; no authorities cited); 1897, O'Brien *v.* Stamlach, 101 id. 40, 69 N. W. 1133 (n reference's notes of testimony taken before him); *Kansas:* 1885, Solomon R. Co. *v.* Jones, 34 Kan. 444, 8 Pac. 730 (admitted); 1886, State *v.* Baldwin, 36 id. 15, 12 Pac. 318 (sanctioned); 1897, Wright *v.* Wright, 58 Id. 525, 50 Pac. 444 (stenographic report of testimony); *Kentucky:* 1815, Allen *v.* Trimble, 4 Bibb 21 (accepted, from a subscribing witness); 1821, Calvert *v.* Fitzgerald, 1 Litt. Sel. Cas. 388 (rejected); *Louisiana:* 1826, Bullard *v.* Wilson, 5 Mart. N. S. 196 (admitting the past recollection of a notary, in a record of a protest-notice); *Maine:* 1835, Wheeler *v.* Hatch, 3 Fairf. 389 (subscribing witness, admitted); 1843, Welcome *v.* Batchelder, 23 Me. 85 (notes of testimony, admitted); 1847, Chamberlain *v.* Sands, 27 id. 465 (admitted; apparently past recollection); *Maryland:* 1831, Flack *v.* Green, 3 G. & J. 474 (admitted); 1833, Owings *v.* Low, 5 id. 134 (admitted); 1837, Pocock *v.* Hendricks, 8 id. 426 (admitted); 1848, Bell *v.* Bank, 7 Gill 226 (sanctioned); 1852, Lewis *v.* Kramer, 3 Md. 287 (admitted); *Michigan:* 1875, Raynor *v.* Norton, 31 Mich. 209 (admitted); 1882, Mason *v.* Phelps, 48 id. 126, 11 N. W. 413, 837 (sanctioned); 1895, Hooker, J., in People *v.* Considine, 105 id. 149, 63 N. W. 196 (minutes of former testimony); 1897, Lucker *v.* Liske, 111 Mich. 683, 70 N. W. 421 (similar); *Minnesota:* 1889, Hoffman *v.* R. Co., 40 Minn. 60, 41 N. W. 301 (sanctioned); 1897, Davis *v.* State, — id. —, 70 N. W. 984 (record of passing trains; allowed); *Mississippi:* 1881, Cooper *v.* State, 59 Miss. 267 (admitting the use of a memorandum where a part only was actually recollected); *Missouri:* 1874, Smith *v.* Beattie, 57 Mo. 281 (the hearsay exception for regular entries was apparently used to admit records of past recollection; 1887, Mathias *v.* O'Neill, 94 id. 525, 6 S. W. 253 (past recollection sanctioned); *Montana:* C. C. P. 1895, § 3375 (like Cal. C. C. P. § 2047); *Nebraska:* 1886, Lipscomb *v.* Lyon, 19 Nebr. 522, 27 N. W. 731 (sanctioned); 1897, Davis *v.* State, 51 id. 301, 70 N. W. 984 (same); 1901, Johnson *v.* Spaulding, — id. —, 95 N. W. 808 (same); *Nevada:* 1877, McCausland *v.* Ralston, 12 Nev. 217 (admitted); 1883, Pinschower *v.* Hanks, 18 id. 104, 1 Pac. 454 (sanctioned, *semble*); *New Hampshire:* 1840, Haven *v.* Wendell, 11 N. H. 112 (sanctioned); 1846, Hall *v.* Ray, 18 id. 126 (cashier's entries); 1849, Seavy *v.* Denrborn, 19 id. 357 (notary's record of protest); 1855, Webster *v.* Clark, 30 id. 253 (admitted); *New Jersey:* 1795, Ryerson *v.* Grover, 1 N. J. L. 459 (sanctioned); 1899, Myers *v.* Weger, 62 id. 432, 42 Atl. 280 (same); *North Carolina:* 1835, Kello *v.* Maget, 1 Dev. & B. 414, 423 (doctrine of past recollection denied, "if after this help he obtains no remembrance of the facts distinct from the memorandum"; except for a verified copy or abstract of another document); 1855, Jones *v.* Ward, 3 Jones L. 24, 26 (notes of former testimony received, though the witness had no present recollection); 1858, Ashe *v.* De Rossett, 5 id. 300 (same); 1883, State *v.* Lyon, 89 N. C. 568 (reference to a newspaper copy of a libel, admitted); 1884, State *v.* Pierce, 91 id. 606 (notes of testimony, admitted); 1886, Bryan *v.* Moring, 94 id. 687 (same); *Ohio:* 1869, Mead *v.* McGraw, 19 Oh. St. 55 (sanctioned, *semble*); 1871, Moots *v.* State, 21 id. 653 (admitted, but possibly on hearsay-exception principles); *Oregon:* Annot. Code 1892, C. C. P. § 836 (like Cal. C. C. P. § 2047); 1892, Friendly *v.* Lee, 20 Or. 202, 25 Pac. 396 (sanctioned, under the Code); *Rhode Island:* 1855, State *v.* Colwell, 3 R. I. 132 (admitted); *South Carolina:* cases cited *ante*, § 735, and the following: 1888, State *v.* Jones, 29 S. C. 226, 7 S. E. 296 (coroner's notes of testimony at an inquest, admitted; but the Court confuses the question with that of the exclusive use of the coroner's record, and that of the hearsay exception for official statements); 1896, Springs *v.* R. Co., 46 id. 104, 24 S. E. 166; *Tennessee:* 1823, Rogers *v.* Burton, Peck 108 (judge's notes, admitted); 1838, Beets *v.* State, Meigs 106 (same); 1846, Bank *v.* Cowan, 7 Humph. 70 (notary's entry, admitted); *Texas:* 1855, Hamilton *v.* Rice, 15 Tex. 384, *semble* (admitted); 1881, R. Co. *v.* Burke, 55 id. 342 (admitted); 1885, Davie *v.* Terrill, 63 id. 106 (admitted); *United States:* 1869, Insurance Co. *v.* Weide, 9 Wall. 681 (admitted); 1871, Insurance Co. *v.* Weides, 14 id. 379 (admitted); 1878, Ruch *v.* Rock Island, 97 U. S. 695 (notes of testimony used), 1884, Maxwell *v.* Wilkinson, 113 id. 656, 5 Sup. 691 (sanctioned); 1886, Vicksburg R. Co. *v.* O'Brien, 119 id. 99, 7 Sup. 118 (sanctioned); 1893, Bates *v.* Preble, 151 id. 149, 14 Sup. 277 (a confusing opinion, which has done much to unsettle the law in that jurisdiction; it lacks acquaintance with the nature of the problems involved, and should be avoided in any study of the subject); *Vermont:* 1833, Glass *v.* Beach, 5 Vt. 175 (notes of testimony, admitted; the witness must "swear to their accuracy"); 1844, Mattocks *v.* Lyman, 16 id. 113 (admitted, but "a general recollection of the transaction" is required); 1849, Marsh *v.* Jones, 21 id. 378 (like the Mat-

first seen and is still most commonly exemplified. But the scope of th present principle, in its relation to them, must be distinguished from oth principles.

(1) When a stenogra ˈher's *notes of former testimony* are used, the prese principle is simple. The stenographer cannot commonly revive an actu recollection, and will therefore read his notes as a memorandum of pa recollection;[1] the only usual questions under the present principle will whether the stenographic original must be used (*post*, § 749), and wheth the witness himself, not the stenographer, may use it (*post*, §§ 748, 76 But other distinct principles may come into play. If the stenographer not called to the stand, the question occurs whether the notes can none th less be read as a correct report, under an exception to the Hearsay ru (*post*, § 1669). Moreover, the witness whose testimony it is must be a counted for as deceased or otherwise unavailable (*post*, §§ 1401–1413); th parties and issues must be the same (*post*, §§ 1386–1388); and in crimin cases a special question of constitutionality arises (*post*, § 1398). Throug the failure to note which of these principles is involved, many rulings a obscure and useless.

(2) When the memorandum is one of a series of *regular entries in the cour of business*, it would be admissible without calling the entrant, if he we deceased or otherwise unavailable, under a settled exception to the Hearsa rule (*post*, §§ 1517–1561). But when the entrant himself comes with th entry to the stand, then the present principle alone (or that of present reco lection) is involved. In this aspect, it is wholly immaterial that the ent was one of a regular series (*post*, § 747); neither that nor any other of th limitations to the Hearsay exception has here any application. Yet the te dency to confuse the two is inveterate.

(3) A *notary's certificate* may be admissible, without calling the notary the stand, under an exception to the Hearsay rule (*post*, § 1675). But whe the notary testifies in person, he uses his certificate under the principles past or present recollection. Here the peculiar service of this class of mem randa has been to show that the habit of being consciously accurate is of itse a sufficient foundation for the witness' verification of his memorandum (*po* § 747).

(4) An *attesting witness* commonly verifies his signature just as a nota does, *i. e.* from his confidence that he would not have signed if he had n verily seen what he attests (*post*, § 747). If the witness is not available person, then his signature is proved, and his attestation becomes virtually hearsay statement, admissible by a settled exception (*post*, § 1505).

tocks case); 1852, Downer *v.* Rowell, 24 id. 243 (same); *Virginia:* 1854, Harrison *v.* Middleton, 11 Gratt. 546 (surveyor's notes, admitted); *West Virginia:* 1883, Vinal *v.* Gilman, 21 W. Va. 309 (sanctioned); *Wisconsin:* 1883, Rounds *v.* State, 57 Wis. 52, 14 N. W. 865 (sanctioned); *Washington:* 1903, State *v.* Douette, 31 Was 6, 71 Pac. 556 (hotel register; principle rec nized).

[1] A number of instances of this ordinary u are collected *ante*, § 736.

b. *Preference for a Present Recollection.*

§ 738. **New York Doctrine; Present Recollection must first appear to be Lacking.** The principle on which the use of a past recollection rests (as appears from the passages quoted *ante*, § 734) is clearly that of necessity. "To reject such a record would be to reject the best and frequently the only means of arriving at the truth"; such is the notion, in various phrasings, expressed in those opinions and in many others. But this necessity, on further analysis, is open to two interpretations, the less satisfactorily of which has been adopted and emphasized in the modern New York rulings. Is the use of past recollection necessary (1) because in the case in hand there is not available a present actual recollection in the specific witness, or (2) because in the usual case a faithful record of a past recollection, if it exists, is more trustworthy and desirable than a present recollection of greater or less vividness? The latter view, it would seem, is more in harmony with general experience, as well as with the attitude of the judges who early vindicated the use of past recollection. A faithful memorandum is acceptable, not conditionally on the total or partial absence of a present remnant of actual recollection in the particular witness, but unconditionally; because, for every moment of time which elapses between the act of recording and the occasion of testifying, the actual recollection must be inferior in vividness to the recollection perpetuated in the record.

Nevertheless, the first of these differing interpretations of the principle seems to have become established in New York. It is there required that the absence of a present recollection must first be expressly shown as a preliminary to the use of the past recollection. Whether this failure shall be total or partial, whether it shall affect merely the substance of the transaction or even details, — these are the additional questions which do not seem to have been settled, but they illustrate the practical unwieldiness and undue technicality of this doctrine:

1858, *Russell* v. *R. Co.*, 17 N. Y. 134: "It is an indispensable preliminary to the introduction of such memoranda in evidence . . . that the witness is unable with the aid of the memorandum to speak from [present] memory as to the facts." [1]

This exceptional doctrine has been followed in the Federal Courts [2] and in a few States.[3] But it must be regarded as an inferior and local qualification, unknown to the orthodox doctrine.

[1] So also: 1864, Marcly *v.* Shults, 29 N. Y. 346; 1875, Squires *v.* Abbott, 61 id. 535; 1876, Flood *v.* Mitchell, 68 id. 509; 1889, National Ulster Co. Bank *v.* Madden, 114 id. 280, 21 N. E. 408; 1896, People *v.* McLaughlin, 150 id. 365, 44 N. E. 1017 (on the facts this ruling is a mere quibble). *Accord*, in the Supreme Court: 1868, Philbin *v.* Patrick, 6 Abb. Pr. N. S. 284; 1868, Brown *v.* Jones, 46 Barb. 410; 1868, Meacham *v.* Pell, 51 id. 65; 1877, Kennedy *v.* R. Co., 67 id. 182. *Contra*, 1868, Townsend Mfg. Co. *v.* Foster, 51 id. 346; 1878, Morrow *v.* Ostrander, 13 Hun 219, *semble*.

[2] 1886, Vicksburg R. Co. *v.* O'Brien, 119 U. S. 99, 7 Sup. 118; 1900, Gurley *v.* MacLennan, 17 D. C. App. 170, 180.

[3] 1884, Jaques *v.* Horton, 76 Ala. 243; 1886, State *v.* Baldwin, 36 Kan. 15, 12 Pac. 318; 1903, State *v.* Menard, 110 La. — , 35 So. 360; 1887, Weaver *v.* Bromley, 65 Mich. 214, 31 N. W. 839; 1898, Stahl *v.* Duluth, 71 Minn. 341, 74 N. W. 143 (spoken of as "the general rule"; but no authority cited; and see *contra*, *semble*, 1872, Chute *v.* State, 19 Minn. 277); 1890, Friendly *v.* Lee, 20 Or. 205, 25 Pac. 396; 1900, Susewind *v.* Lever, 37 id. 365, 61 Pac. 644;

§ 739. **Written Copies, as preferred to Oral Recollection.** Parallel with the doctrine of the New York Court (*ante*, § 738), that a present recollection is preferred to a recorded past recollection, and yet looking in precisely the opposite direction, is a doctrine that for some purposes a recorded past recollection is preferred to a present recollection. This question is presented when a witness offers to testify orally to the contents of a document to be proved. Here his testimony is based solely on his present recollection of the document as he perused it at a prior time. But if, instead, he offers a copy examined by him with the original, he virtually offers a written record of his past recollection as it existed instantly upon the perusal of each word. The contract is thus between his past recorded and his present recollection.

There can be no doubt that the former is a more trustworthy source of testimony for the contents of documents whose original is lost or otherwise unavailable. But shall there be a rule of preference, *i. e.* a rule requiring a written copy to be used, if it can be procured? This question is, by some Courts and for some classes of documents, answered in the affirmative; but the details can best be examined in considering the other rules affecting the use of copies (*post*, §§ 1265–1275).

c. *Rules to secure Adequacy of Past Recollection and Accuracy and Identity of Record.*

§ 744. **Past Recollection must have been Written down; Exception for Former Oral Identification.** It is commonly assumed, as a fundamental condition of using a past recollection, that the thing recollected must have been written down as recollected. The ensuing rules are all corollaries of this assumed axiom.

Yet in theory this is not essential. The tenor of the fact recollected may conceivably be preserved without writing. In practice there is one situation which not only illustrates this theoretical possibility but also demonstrates the wisdom of recognizing it, as an exception to the general rule. That situation is the former oral identification of a person, name, place, or signature whose identity is now forgotten. The fact recollected being a simple one, it suffices if the witness now knows that he did once orally verify it, even if he did not then preserve in writing the circumstance. The typical illustration is that of the identification of an accused person at the time of arrest:

1847, *Lefroy*, B., in *R.* v. *Burke*, 2 Cox Cr. 295 (the witness could not certainly identify the accused as K., one of the robbers, but said that he had identified a man positively at the police-station, and "at the time he was sure it was the right man"; witnesses were then allowed to prove that the accused was the same person formerly identified by the witness): "I remember a case in England in which that kind of assistance was given; a man had shorn off his whiskers, and evidence was allowed to be given of his being the man whom the witness had identified. I acted in the same way in several cases three years ago at Nenagh, having first consulted with my brother judge upon the subject. It is simply an imperfect identification of the prisoner." [1]

1901, Coxe *v.* Milbrath, 110 Wis. 499, 86 N. W. 174 (New York doctrine adopted; no precedents cited).

[1] *Accord:* 1778, Captain Baillie's Case, 21 How. St. Tr. 319 ("I desire to know whether you heard any such words as those come out o

§ 745. (1) **Recollection must have been fairly Fresh when Recorded.** In order that the past recollection may be one worth trusting, it must have been sufficiently fresh and vivid to be probably accurate. When a present recollection is used, it may be sufficient (as noticed *ante*, § 726) to admit an "impression," or a "belief"; the witness tries to give "the best of his recollection," and the tribunal may well take what it can get, and not exclude it for want of more that is unattainable. But where the witness goes back to a past recollection, which can less easily be tested by cross-examination, he may properly be asked for something more decided, — something of a quality satisfactory in itself and not merely the best available. This quality the law has attempted to define, and even to test by an arbitrary rule. There is found, *first*, a general principle that the recollection, when recorded, should have been *fairly fresh*, — each instance being dealt with on its own circumstances; and, *secondly*, there is, more commonly, an arbitrary test defining the recollection as one recorded *at or near the time* of the events.

(1) That the first is the preferable form for the law need hardly be argued; it exemplifies the excellent policy of leaving the law flexible and rational and not chilling it into rules more or less arbitrary:

1795, L. J. Clerk (for the minority) in *Kinloch's Case*, 25 How. St. Tr. 937: "It is admitted . . . that a witness may make use of notes taken at the time the fact happened. Now where is the difference though they are *ex post facto*, if he is ready to swear that he took them down with a good recollection?"

1880, *Allen*, J., in *Chamberlin* v. *Ossipee*, 60 N. H. 212 (admitting a memorandum "made at a time when the facts written down were fresh in the mind of the witness and known by him to be as recorded"): "The question of the sufficient accuracy of the memorandum, depending upon its nearness or remoteness in time to the date of the facts written there, was one of fact for the referees."

1881, *Elbert*, J., in *Lawson* v. *Glass*, 6 Colo. 134: "Much must be left in such a case to the judgment of the *nisi prius* Court, who sees the witness and hears him testify; and the witness having testified that he remembered the items of labor when he wrote them down, the lapse of time was [in this case] not such, considering the nature of the account, as to forbid the Court in the exercise of its discretion allowing the witness to use the account to refresh his memory."[1]

(2) But the common, though less proper, rule is that the recollection recorded must have been "at or near the time" of the events in question. This phrasing has been generally used, even where it was not required for the deci-

my mouth? . . ." "I certainly did not; it is now a great while since, [so] that I should not depend upon my memory; but your lordship did call upon me at the next general court and then I said there were no such words"); 1853, R. *v.* Blackburn, 6 Cox Cr. 338, Talfourd, J. (like R. *v.* Burke, *supra*); 1826, Jackson *v.* Thompson, 6 Cow. 178, 179 (an aged will-witness, not able to see to read, could not identify the will in Court, but had formerly seen it elsewhere and "then read and recognized his signature as genuine"). *Contra:* 1903, State *v.* Houghton, — Or. —, 71 Pac. 983 (like R. *v.* Burke, excluded). Compare the doctrine of *corroboration by similar statements* (*post*, § 1130), which might sometimes be availed of in such a situation. Compare also § 751, *post*.

[1] *Accord:* 1834, Burton *v.* Plummer, 2 A. & E. 341 (L. C. J. Denman phrased the test, "when the transaction could not but be fresh in his memory, so that he must have been able to verify the correctness of his entry"); Cal. C. C. P. § 2047 ("at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory"); 1884, Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260 ("at any time when the fact was fresh in his memory"); so also the Codes cited *ante*, § 736.

sion of the case.[3] Two things must be noted, however, about this rule: (a) T recollection must in fact have been fresh (*i. e.* adequate), even though not "near the time";[3] (b) the phrases "near the time" or "shortly afterward really furnish no accurate test, and in their application the probable freshn of the recollection must after all be the ultimate test. It may be added th In some rulings the language mentions both the first and the second tests the alternative.[4] In most rulings, the decision turns upon the circumstan of the particular case.[5]

§ 746. (2) **Accuracy of Record; General Principle.** It has already be noted (*ante*, § 734) that, so far as adequacy of Recollection is concerned, is enough to require that at the time of making the record the Rec lection should have been fresh, *i. e.* the event recent. But, having gain this assurance that the Recollection was adequate, it remains still for t law to make sure of certain other things which (in strictness) depend the element of correct Narration or Communication (*post*, § 766). In t first place, it must make sure that this Recollection was accurately represent in the record or memorandum then made; here several situations prese themselves for solution. Next, it must make sure that the statement n offered as testimony by the witness is in fact identical in tenor with t record or memorandum formerly made; here, again, several different sit tions arise. Finally, it has to consider the testimonial status of the reco when thus used.

For the first of these steps — that of making sure that the record or men

[2] 1825, Jones *v.* Stroud, 2 C. & P. 196 ("near the time"); 1879, Achlen's Ex'r *v.* Hickman, 63 Ala. 498 ("at or about the time"); 1845, Williams *v.* Kelsey, 6 Ga. 374 ("at the time"); 1870, Chicago R. Co. *v.* Adler, 56 Ill. 344 ("noted at the time"); 1826, Bullard *v.* Wilson, 5 Mart. N. s. La. 196; 1886, Green *v.* Caulk, 16 Md. 556 ("at the time or about the time of the occurrence"); 1867, Morrison *v.* Chapin, 13 All. 72 ("contemporaneously"); 1849, Seavy *v.* Dearborn, 19 N. H. 357 ("at the time"); 1855, Webster *v.* Clark, 30 id. 253 ("at the time or immediately after the occurrence . . . if the witness . . . would have sworn to them from recollection a short time afterwards"); 1837, Merrill *v.* R. Co., 16 Wend. 595 ("immediately after they were set down"); 1857, Halsey *v.* Sinsebaugh, 15 N. Y. 485 ("at the time or almost immediately afterwards"); 1853, Russell *v.* R. Co., 17 id. 134 ("at or about the time"); 1879, Howard *v.* McDonough, 77 id. 592 ("at the time or soon after"); 1880, Bank *v.* Zorn, 14 S. C. 444 ("contemporary"); 1884, Davis *v.* Field, 56 Vt. 426 ("contemporary").

[3] So the following phrases: 1809, Burrough *v.* Martin, 2 Camp. 112 ("while the occurrences were recent, and fresh in his recollection"); 1884, Maxwell *v.* Wilkinson, 113 U. S. 653, 5 Sup. 691 ("at or shortly after the time of the transaction and while it must have been fresh in his memory").

[4] 1864, Lord Talbot *v.* Cusack, 17 Ir. L. 213 ("at the time of the transaction, or shor afterwards, when the facts were fresh in recollection"). In Chamberlain *v.* Sands, Me. 465 (1847) the broad test was used, "fa as known to him at the time."

[5] 1839, Horne *v.* Mackenzie, 6 Cl. & F. 6 (recorded two days before trial, admitted); 18 R. *v.* Philpotts, 5 Cox Cr. 329 (recorded "alm immediately," admitted); 1852, Anderson Whalley, 3 C. & K. 54, Talfourd, J. (a log-ent a week after the events, while they were fresh his mind, admitted); 1864, Fraser *v.* Fraser, U. C. C. P. 70 (made the same day, admitte 1857, Auld *v.* Walton, 12 La. An. 137 (made election officers the day after the election, mitted); 1859, Spring Garden Mut. Ins. Co. Riley, 15 Md. 54 (made 5 months after, cluded); 1882, Swartz *v.* Chickering, 58 290 (made 16 months after, excluded); 18 Watson *v.* Walker, 23 N. H. 496 (made 3 ye after, excluded); 1896, Jones *v.* State, 54 Oh. 42 N. E. 699 (made a few months before t trial and many years after the event, excluded 1815, O'Neale *v.* Walton, 1 Rich. 234 (cluded); 1852, Ballard *v.* Ballard, 5 bl. 4 (made 2 weeks later, excluded); 1893, Bates Preble, 151 U. S. 154, 14 Sup. 277 (rejecti memoranda made at a time unknown); 18 Pinney *v.* Andrus, 41 Vt. 648 (made just bef trial, admitted).

randum, when made, represented the Recollection of the time with fair accuracy —, the requirements of principle may be summed up thus: (*a*) The witness must be able now to guarantee that the record accurately represented his knowledge and recollection at the time of making. (*b*) But, this testimonial guarantee of accuracy being all that is needed, it will therefore be generally immaterial that the witness was not the person actually writing or printing the record, provided the witness can give this guarantee; (*c*) except that in particular instances the circumstance that another person had prepared the record may justify the Court in doubting the witness' guarantee and rejecting the record. These various details may now be examined.

§ 747. **Same: (*a*) Witness must Guarantee Accuracy.** The witness must be able now to guarantee that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time."[1] It is obvious that the witness' readiness to affirm this may rest on one of two reasons: (1) He may distinctly recollect his state of mind at the time of making or first seeing the record and may thus now remember that he then passed judgment upon and knew the record's accuracy. Or (2) he may now actually recollect nothing of the occasion of making the record and of his then state of mind; nevertheless he may know, from his general practice in making such records, or from other indications on the paper, that he *must have passed judgment upon and known* the correctness of the record; here he none the less knows that he did know the record to be correct, although he has no present recollection of the specific state of mind.

(1) As to the former of these two ways of verifying the record, no difficulty arises.[2] If the witness can say, "I distinctly remember that when I made or saw this memorandum, about the time of the events, I was then conscious of its correctness," his verification is satisfactory. (2) But if he relies, not on a present recollection of his past state of mind, but on other indications, such as a habit, a course of business, a check-mark on the margin, or merely the genuineness of his handwriting, then the certainty is of a lower quality, though still satisfactory for most practical purposes. In general, it is conceded that when the witness' certainty rests on his usual *habit* or *course of business* in making memoranda or records, it is sufficient.[3]

[1] 1879, Acklen's Ex'rs *v.* Hickman, 63 Ala. 499 ("knew its contents and knew them to be true"); 1896, Louisville & N. R. Co. *v.* Cassibery, 109 id. 697, 19 So. 900; Kling *v.* Tunstall, 109 id. 608, 19 So. 907; 1860, Green *v.* Caulk, 16 Md. 572; 1880, Misner *v.* Darling, 44 Mich. 439, 7 N. W. 77; 1903, Titus *v.* Gunn, — N. J. L. —, 55 Atl. 735; 1858, Russell *v.* R. Co., 17 N. Y. 134 ("knew it to be correct when it was made"); 1875, Gilchrist *v.* Assoc., 59 id. 499; 1879, Howard *v.* McDonough, 77 id. 592 ("which he intended to make correctly and which he believes to be correct"); 1871, Insurance Co. *v.* Weides, 14 Wall. 379 ("at the time knew it was correct"); 1884, Davis *v.* Field, 56 Vt. 426 ("able to swear that it is correct, . . . because of his confidence in the correctness of his memorandum"). These are merely illustrations of the differing phraseology; nearly every decision mentions the requirement. For English cases, see *post*, note 5.

The witness must of course have had personal knowledge of the facts: *post*, note 8.

[2] Except, perhaps, in Massachusetts and Delaware; see note 6, *post*.

[3] 1810, R. *v.* Benson, 2 Camp. 508 (a master in chancery testified to having sworn the defendant to an answer, not by actual recollection, but because "unless on very particular occasions, he is always present when answers are sworn"); 1879, Acklen *v.* Hick-

Other peculiar circumstances, specially intended or calculated to indica correctness, may be satisfactory.[4] Is it enough that the witness (as is usu with *attesting witnesses* to a *document*) merely recognizes his handwriting an knows that he would not have written or signed without believing the reco to be correct? Here the witness is really calling to his aid, not his specif business custom, but his general moral attitude; but, as a rule, the indicatio should be and is treated as sufficient.[5]

It is possibly the rule in Massachusetts that only *regular entries*, n mere casual memoranda, can be used, — apparently on the notion tha this regularity is the only satisfactory guarantee of correctness.[6] Bu

man, 63 Ala. 494; 1886, Hancock *v.* Kelly, 81 id. 378, 2 So. 281; 1897, Howard *v.* R. Co., 11 D. C. App. 300, 309 (passenger agent, allowed to testify to the contents of a lost round-trip ticket from a single-trip ticket of the same form-number, after testifying that the form was known by him to be identical); 1849, Williams *v.* Kelsey, 6 Ga. 374 ("uniform practice to make the entries truly . . . and farther that he has no doubt from such practice that the entry is correct"); 1895, Leonard *v.* Mixon, 96 id. 239, 23 S. E. 80 (habit of a collector in notifying of claims); and cases cited *infra*. A *notary's practice* in sending out only correct copies of *protested documents*, or in recording only the correct time, etc., of the protest, is always taken as sufficient: 1878, Arnett *v.* Griffin, 60 Ga. 348; 1864, Morris *v.* Sargent, 18 la. 95; 1871, Borland *v.* Walrath, 33 id. 132; 1849, Seavy *v.* Dearborn, 19 N. H. 357; 1855, Webster *v.* Clark, 30 id. 253; 1810, Miller *v.* Hackley, 5 Johns. 375; 1829, Hart *v.* Wilson, 2 Wend. 515; 1854, Cole *v.* Jessup, 10 N. Y. 96; 1846, Bank *v.* Cowan, 7 Humph. 70; and cases *passim infra*; compare the following statute: N. J. Gen. St. 1896, Prom. Notes, § 12 (notary or justice may refer to his record of protest "for his own satisfaction"). Similar customs in *banks* have been held sufficient: 1842, New Haven Bank *v.* Mitchell, 15 Conn. 224; 1848, Bell *v.* Hagerstown Bank, 7 Gill 226; 1887, Mathias *v.* O'Neill, 94 Mo. 525, 6 S. W. 253. Examples of this use of *stenographer's minutes* and of ordinary *account-books* will be found, *ante*, § 736, and *post*, *passim*. Compare also the admission of the notary's or clerk's *habit* or *practice* as independent circumstantial evidence (*ante*, § 93), and also of habit in general as circumstantial evidence (*ante*, §§ 94–99).

In Maryland the propriety of using this kind of knowledge has been denied in two cases: 1832, Flack *v.* Green, 3 G. & J. 474; 1837, Pocock *v.* Hendricks, 8 id. 426; but there are instances of its being sanctioned: 1848, Bell *v.* Bank, 7 Gill 226 (bank notices); 1833, Owings *v.* Low, 5 G. & J. 134 (sales-book). The similar denial in U. S. *v.* Watkins, 3 Cr. C. C. 441, 566 (1829), is equally unsound.

[4] 1835, Wheeler *v.* Hatch, 12 Me. 389 (sundry circumstances); 1887, Owens *v.* State, 67 Md. 307, 10 Atl. 210, 302 (a check placed at each item); 1885, Davie *v.* Terrill, 63 Tex. 1 (sundry circumstances).

[5] 1817, Pearson *v.* Wightman, 1 Mills Cons Ct. 344 ("I hold it not to be necessary that subscribing witness should recollect the tim and occasion when he subscribed the instrume as a witness. It is enough if he recognize hi handwriting and is perfectly assured in his ow mind that he never subscribed an instrument a a witness without having seen it executed o acknowledged as the nature of the act requires"). Recognition of the *handwriting* and consequen certainty of accuracy was so treated as follows 1828, Maugham *v.* Hubbard, 2 M. & Ryl. 5 1834, R. *v.* St. Martin's, 2 A. & E. 210; 1864 Lord Talbot *v.* Cusack, 17 Ir. C. L. 213, pe Hayes, J.; 1845, Graham *v.* Lockhart, 8 Ala. 9 22; 1815, Allen *v.* Trimble, 4 Bibb 21; 1824 Brown *v.* Anderson, 1 T. B. M. 198; 1859 Martin *v.* Good, 14 Md. 398; 1857, Crittende *v.* Rogers, 8 Gray 452; 1840, Haven *v.* Wen dell, 11 N. H. 112; 1837, Clute *v.* Small, 1 Wend. 237, *semble*; 1808, Pigott *v.* Holloway 1 Binn. 436, 442 (certainty of correctness of at testation held sufficient on the facts); 1831 Collins *v.* Lemasters, 2 Bail. 141, 144; 1855 Verdier *v.* Verdier, 8 Rich. 135, 141 (that h would not have signed the will without a re quest, sufficient). *Contra*, 1860, Parsons *v.* Ins Co., 16 Gray 463; but this is perhaps a resul of the Massachusetts doctrine noticed *infra*.

For the doctrine that proof of an *absent wit ness' signature* is evidence of all the *requisite of execution*, see *post*, § 1511.

[6] The question was expressly reserved i Shove *v.* Wiley, 18 Pick. 558 (1836). It i sufficient to notice that this regularity was ap parently treated as requisite in some cases 1858, Perkins *v.* Ins. Co., 10 Gray 323; 1882 Costello *v.* Crowell, 133 Mass. 352; but in other as not requisite: 1838, Alvord *v.* Collin, 20 Pick 418, 430; 1885, Smith *v.* Johns, 3 Gray 517 1857, Crittenden *v.* Rogers, 8 id. 452; 1860 Parsons *v.* Ins. Co., 16 id. 463; 1866, Dugar *v.* Mahoney, 11 All. 572; 1869, Adams *v.* Cou illiard, 102 Mass. 173; 1872, Cobb *v.* Boston 109 id. 444.

In *Delaware* a somewhat similar principl was laid down in Redden *v.* Spruce, 4 Harring 215 (1845), admitting the use of "inventorie and schedules, precise dates, particular words and other matters," but not beyond this.

this limitation is absolutely without ground, either of principle or of policy.[7]

It may be added that the witness must of course have had personal knowledge of the facts (*ante*, § 657) in the first instance; he cannot guarantee the correctness of the paper as a record of facts which he himself never observed.[8]

§ 748. **Same: (*b*) Witness need not himself be the Writer.** But, this testimonial guarantee of accuracy being all that is needed, it is generally immaterial whether the witness was or was not the person who actually wrote or printed the record. If the witness, having once seen it and found it to be correct, can thus guarantee the accuracy of the record, all that is essential is secured. It may have been manually prepared by another; but from the moment when the witness saw it and passed judgment upon its correctness, it became for him a correct record. As the mere fact of his writing it would count for nothing in itself, so the mere fact of his not having been the writer is immaterial:

1800, *Ellenborough*, L. C. J., in *Burrough* v. *Martin*, 2 Camp. 112 (the witness used a log-book; he had not made the entries himself, but he had examined them while the events were recent and had found them accurate): "If the witness looked at the log-book from time to time, while the occurrences mentioned were recent, and fresh in his memory, it is as good as if he had written the whole with his own hand."

1864, *O'Brien*, J., in *Lord Talbot* v. *Cusack*, 17 Ir. C. L. 213 (the witness was using a copy made by K., examined and found accurate by the witness): "[The use of memo-

[7] In Massachusetts the usage appeared historically as a development from the hearsay exception of regular entries (Shove *v.* Wiley, *supra*), — a peculiar local line of thought to which alone the above limitation, if it there exists, is due. The heresy was expressly repudiated in Guy *v.* Mead, 22 N. Y. 462 (1860), by Denio, J.; and it is unfortunate that in Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99, 7 Sup. 172 (1886), it should have been elevated to the dignity of a doubtful question; it has also been apparently followed in Master *v.* Marsh, 19 Nebr. 458, 466, 27 N. W. 438 (1886; bastardy; to prove the date of delivery of wheat, a book-keeper of V. was offered, who testified to an entry of a delivery as to which he had no present recollection; the testimony was excluded on the theory that party's account-books alone were admissible; no acquaintance with the present subject appears); and in Third Nat'l Bank *v.* Owen, 101 Mo. 585, 14 S. W. 632 (1890), there is language looking towards the limitation in question as proper. The following cases negative this heresy: Mandeville *v.* Reynolds, 68 N. Y. 528, 537 (letters of an attorney stating the contents of a lost judgment roll, and known by him at the time to be correct, admissible); 1899, Dunlap *v.* Hopkins, 37 C. C. A. 52, 95 Fed. 231 (letter to a friend).

[8] 1892, Bolling *v.* Fannin, 97 Ala. 619, 621 (cashier's entry usable by him only to prove cash received, not facts of a sale by B. producing the cash); 1896, Norwalk *v.* Ireland, 68 Conn. 1, 35 Atl. 807 (the witness must have had personal knowledge); 1895, Orr *v.* W. & C. Co., 97 Ga. 241, 22 S. E. 937 (the witness cannot adopt a book of entries of whose correctness he knew nothing); 1901, Phenix Ins. Co. *v.* Hart, 112 id. 765, 38 S. E. 67 (list of articles checked by H. and X., H. alone testifying but not being able to distinguish his marks from X., excluded); 1903, Lenney *v.* Finley, — id. —, 45 S. E. 317 ("he should at some time have had personal knowledge of the correctness of the memoranda"); 1897, Atchison T. & S. F. R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286 (a joint memorandum made by a number of persons who had investigated the destruction by a fire to crops; use of it held improper so far as any one of them adopted the matters known only to others); 1898, Stewart *v.* Morris, 32 C. C. A. 7, 88 Fed. 461 (merely finding the facts recorded on a memorandum, held insufficient, by the law of Illinois); 1896, Pingree *v.* Johnson, 69 Vt. 225, 39 Atl. 202 (memorandum by witness' wife, not known by him as correct, excluded). Compare the cases cited *post*, § 751. Of course where a *clerk of court* produces *depositions* which witnesses have signed before him, and he proceeds to read them, this is not a case of using his past recollection for the facts of the testimony; the paper is the witness' statement, not the clerk's, and the clerk has merely authenticated it; he reads it just as counsel would read it, *i. e.* as A's statement in writing, and not as an adopted memorandum of his own; this the Court had to point out in Stephens *v.* People, 19 N. Y. 573.

randa made by the witness himself] has been extended to the case of entries which, th not in the witness' handwriting, were either made in his presence and read by him a time of the transaction, or were read and examined by him shortly afterwards when facts were fresh in his recollection and when he was enabled to ascertain that the stated in the entry were true."

1860, *Le Grand*, C. J., in *Green* v. *Caulk*, 16 Md. 573: "What was supposed t the ancient rule has been relaxed by more recent decisions; and now it is held to be necessary that the memorandum should have been made by the witness, but the witness having then seen it and recognized it as containing the truth, of which still convinced at the time of the trial, he may be examined in regard to it."[1]

[1] *Accord: Eng.:* 1795, Digby *v.* Stedman, 1 Esp. 328 (if "the witness saw it soon after it was made, and the entry corresponded with what he had himself then observed, such was tantamount to an entry made by himself"); 1801, Jacob *v.* Lindsay, 1 East 460 (the plaintiffs had a book containing entries of sales to defendant; a clerk who had not made either the sales or the entries went to the defendant and got his admission for each sale entered; the clerk was then allowed to use the book, in spite of defendant's objection that "the entries were not made by the witness himself"); 1834, Burton *v.* Plummer, 2 A. & E. 341 (the witness was allowed to use a copy, made by the plaintiff, of entries in a book kept by the witness, the copying having been done in the presence of the latter, who checked off the items at the time as correctly copied); 1844, Topham *v.* McGregor, 1 C. & K. 320 (the witness used a newspaper article, the original of which he had written); 1851, R. *v.* Philpotts, 5 Cox Cr. 329 (a solicitor, giving a deceased witness' testimony, used notes made by his counsel as the witness stood by and read over by him soon afterwards); 1852, Anderson *v.* Whalley, 3 C. & K. 54 (like Burrough *v.* Martin, *supra*); 1876, R. *v.* Langton, L. R. 2 Q. B. D. 296 (the witness was pay-clerk and paid out wages according to days and amounts read off by L. from a book made up by a third person from L.'s report; the witness, having seen the entries at the time of L.'s reading off, was allowed to use them as representing the amounts paid out); *Ala.:* 1892, Thompson *v.* State, 99 Ala. 173, 175, 13 So. 753 (testimony before a grand jury); 1897, Torrey *v.* Burney, 113 id. 496, 21 So. 348 (a bill of exceptions, dictated partly by the witness, partly by his associate counsel, but all afterwards gone over by the witness, admitted); 1899, Anderson *v.* English, 121 id. 272, 25 So. 748 (memorandum of entries made by several persons, and known by each to be correct, used by each); *Cal.:* C. C. P. 1872, § 2047 ("written by himself or under his direction"; this is too narrow, and is not always observed in the rulings); 1884, Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260; 1896, McGowan *v.* McDonald, 111 id. 57, 43 Pac. 418 (a bank pass-book, with entries of deposits made by the teller and entries of drafts made by the bank bookkeeper; the customer allowed to use it because he had inspected the entries at the time and known that they were correct); 1898, Grant *v.* Dreyfus, — id. —, 52 Pac. 1074, *semble* (entries made under the witness' direction by his son, used); *Conn.:* 1895, Curtis *v.* Bradley, 65 Conn. 99, 31 591; *Kan.:* 1885, Solomon R. Co. *v.* Jone Kan. 444, 8 Pac. 730; 1888, Phenix Ins. *v.* Sullivan, 39 id. 451, 18 Pac. 528 (an ney who heard the deceased witness' testi and assisted in preparing the bill of e tions, which embodied it); *Me.:* 1847, C berlain *v.* Sands, 27 Me. 458, 465 (a drawn up by another person more than 20 after the events, but then recognized by witness, having a fresh recollection of the ev to be correct); *Md.:* 1860, Green *v.* Caull Md. 556 (in effect overruling Lewis *v.* Kra 3 id. 287); 1887, Owens *v.* State, 67 id. 10 Atl. 210, 302 (C. kept the poll-book election, and checked off all voters; during absence, F. and H. kept the book, H. chec and F. watching the process; C. and F., out H., were allowed to testify by the bo 1893, Billingslea *v.* Smith, 77 id. 504, 514 Atl. 1077; *Mich.:* 1899, Union Cent. L. I *v.* Smith, 119 Mich. 171, 77 N. W. 706 (i ance books); *Nebr.:* 1896, Kearney *v.* The son, 48 Nebr. 74, 66 N. W. 996 (ar destroyed by a flood; the paper known a time to be correct, though made by anot *N. H.:* 1855, Webster *v.* Clark, 30 N. H. 1856, Pillsbury *v.* Locke, 33 id. 96 (the wi noted amounts on a slate, and his wife o daughter copied these into a book, which witness examined and verified); *N. Y.:* Merrill *v.* R. Co., 16 Wend. 595, *semble;* Clark *v.* Bank, 164 N. Y. 498, 58 N. E. 659 tries made by bookkeeper of items furnishe the witness, and seen two days later by the wi and then known to be correct, admitted); *N* 1883, State *v.* Lyon, 89 N. C. 568 (a newsp copy of a libel); *Or.:* 1899, Oyler *v.* Da 36 Or. 357, 59 Pac. 474 (typewritten mem dum, known correct by the witness); *U* 1899, Pacific Coast S. Co. *v.* Bancroft-Wh Co., 36 C. C. A. 135, 94 Fed. 180; *Vt.:* Davis *v.* Field, 56 Vt. 426 (assessors here tax-lists not made in their own handwriti *Va.:* 1853, Wormeley's Case, 10 Gratt. 665, *semble* (a deposition read over to, corrected signed by the witness); 1854, Harrison *v.* dleton, 11 id. 546 (a diagram of courses distances, made by the plaintiff, but use the witness and verified while making the vey); *Wis.:* 1869, Riggs *v.* Weise, 24 Wis (made by the wife); 1896, Hazer *v.* Strele id. 505, 66 N. W. 720 (made by a clerk i presence); 1901, Bourda *v.* Jones, 110 id 85 N. W. 671 (inventory of personalty)

Nevertheless, that in particular instances the circumstance that another person had prepared the record may justify the Court in doubting the witness' guarantee and rejecting the record. The very object of the rules is to secure the record's accuracy, and if, though ordinary tests are fulfilled, the Court in the particular circumstances finds the record untrustworthy, the rule should bend to the case:

1845, *Butler*, J., in *O'Neale* v. *Walton*, 1 Rich. L. 234 (about two weeks after a conversation between plaintiff and defendant, plaintiff drew up a memorandum of its terms and had it signed by three persons who heard it; one of these, having forgotten the facts, proposed, but was not allowed, to read from the paper): "Here the memorandum was drawn up by one of the parties to the suit, and if not in view of *lis mota*, it was to perpetuate evidence obtained *ex parte* and for his own benefit. It was obtained by a prepared and leading examination, the statement of a suspected witness. . . . The facts must be noted at the time they are occurring, by a witness actiug under the self-direction of his own mind snd for the purpose of perpetuating evidence. . . . When third persons, and those who are interested, prepare the memorial, suspicion will assail and justice should repudiate it." [2]

§ 749. (3) **Original required, if Available.** It remains to make sure that the record which the witness now puts forward as a record of his prior knowledge is in fact the genuine embodimen' of his past recollection. While the witness' guarantee of its accuracy may be accepted, the law may well insist on the production of his guaranteed paper, not merely as verifying the fact of its existence, but also as insuring the correctness of his story, as throwing additional light on his veracity, as affording a means of testing him, and as the best proof of what was really recorded. In short, *the original record itself must be used in testifying, if it is procurable.* This rule (which merely applies the general priuciple of § 1179, *post*) is almost universally recognized. If the original is lost or otherwise unavailable, a copy may then be used.[1]

also the cases under § 750, *post*, in which newspaper copies were used.

Contra: The requirement that the memorandum shall be made hy tbe witness himself is nsnally a loose *obiter dictum:* 1900, Wellman *v.* Jones, 124 Ala. 580, 27 So. 416; 1879, Schmidt *v.* Wambacker, 62 Ga. 323; 1895, Orr *v.* F. A. W. & C. Co., 97 id. 241, 22 S. E. 937 (where the book was made up by H. from memoranda of L., the witness, who had afterwards checked off the entries as correct); 1898, Evaus *v.* Murphy, 87 Md. 498, 40 Atl. 109; 1867, Morrison *v.* Chapin, 97 Mass. 72; 1879, Howard *v.* McDonough, 77 N. Y. 592. The correct doctrine was stated in tbe following cases: 1853, Coffin *v.* Vincent, 12 Cush. 98; 1881, Com. *v.* Ford, 130 Mass. 66; but witnesses there actually refreshed recollection.

[2] Similar instances are: 1849, Alcock *v.* Royal Exchange Assurance, 13 Q. B. 292; 1898, Wager L. Co. *v.* Sullivan L. Co., 120 Ala. 558, 24 So. 949 (memorandum made hy another, and not known to wituess to be correct, excluded); 1892, Hematite M. Co. *v.* R. Co., 92 Ga. 268, 272, 18 S. E. 24 (memoranda of ahipment made partly by another person and not known to witness to be true, excluded; and because the several entries were indistinguishable, all excluded); 1852, Ballard *v.* Ballard, 5 Rich. L. 495. Compare also tbe casea cited *ante*, § 747, where personal knowledge was lacking.

[1] According to tbe ordinary rules of § 1179, *post*, a copy may be used where the origiual cannot be had · and this condition is usually understood as applying when the Courts demand an original. In the following citations the Courts either expressly affirm or imply this: *Eng.:* 1756, Tanner *v.* Taylor, 3 T. R. 754; 1790, Doe *v.* Perkins, ib. 754 (must be produced "because of the great door which might otherwise be opened to fraud and concealment"); 1825, Jones *v.* Stroud, 2 C. & P. 196; 1834, R. *v.* St. Martin's, 2 A. & E. 210; 1839, Horne *v.* Mackenzie, 6 Cl. & F. 628 (the original was not produced because consistiug of complicated calculations); 1844, Topham *v.* McGregor, 1 C. & K. 320 (the original was not produced because lost); 1864, Lord Talbot *v.* Cusack, 17 Ir. C. L. 213; *Can.:* 1891, Taylor *v.* Massey, 20 Ont. 429, 437; *Conn.:* 1899, Clark *v.* Holmes, 71 Conn. 749, 43 Atl. 194 (stenographer's nse of transcript of notes of testimony, excluded, the original not being accounted for); *Fla.:* 1896, Adams *v.* Board, 37 Fla. 266, 20

It is true that the use of a copy lacks certain advantages; but this defec is no greater than in the ordinary instance of a contract or a deed which can not be produced, nor is the importance of using the original here any greater

§ 750. **Same: Copy made and Verified by Another Person.** It is obviou that the process of guaranteeing the accuracy of the record (*ante*, § 746) an that of identifying and producing the record are separable. Since in com mercial practice there is constantly such a separation of these function among different persons, there seems to be no reason why the law should no accept and sanction it. Thus, when a witness makes a memorandum and the guarantees on the stand that it was accurate, the process of proving its term by making and producing a copy of it may often be feasible only with th aid of another person, — as where the original is lost and the only copy wa made, not by the original writer, but by another person. What differenc can it make, if a copy is allowable at all, whether it is verified on the stand by the original maker and witness or by another person? If both take the stand one guaranteeing the accuracy of the original, and the other verifying the correctness of the copy, this procedure seems entirely proper both on principle and of practical necessity. This result the Courts have generally accepted:

1866, *State* v. *Shinborn*, 46 N. H. 503: A hired man, as well as M. and his son, le horses and entered their doings on a slate; M. and the son then copied these into a book the book was produced and all three testified to the accuracy of their respective doings *Bellows*, J., admitting the book: "On proving it to be correctly transferred to the book, the entry stands substantially as if all was done by the same person." [1]

So. 266; 1903, Volusia Co. Bank *v.* Bigelow, — id. —, 33 So. 704; *Ill.:* 1884, Clifford *v.* Drake, 110 Ill. 135 (reporter, using the printed copy of his notes); 1887, Bonnet *v.* Glatfeldt, 120 id. 166, 11 N. E. 250 (copy from account-books); 1901, Chicago & A. R. Co. *v.* American Strawboard Co., 190 id. 268, 60 N. E. 518 (certain "stack-sheets" made from temporary memoranda, admitted as originals); *Ia.:* 1876, State *v.* Maloy, 44 Ia. 115, *semble* (stenographic notes; original required); 1880, Case *v.* Burrows, 54 id. 682, 7 N. W. 130 (same; undecided); *Kan.:* 1903, Smith *v.* Scully, 66 Kan. 132, 71 Pac. 249 (official stenographer's report of testimony; stenographic original not required); *Ky.:* 1899, Moore *v.* Beale, — Ky. —, 50 S. W. 850 (tally kept on piece of paper, thrown away when soiled, after copy taken; use of copy allowed); *Me.:* 1860, Stanwood *v.* McLellan, 48 Me. 475 (copy from account-books); 1900, Pierce *v.* R. Co., 94 Me. 171, 47 Atl. 144 (memorandum-book made up on the same afternoon from shingle-marks, held sufficient); *Md.:* 1860, Green *v.* Caulk, 16 Md. 572 (also excludes absolutely a copy of a copy); 1869, Thomas *v.* Price, 30 id. 484; *Mass.:* 1836, Shove *v.* Wiley, 18 Pick. 563; 1881, Com. *v.* Ford, 130 Mass. 66, *semble; Minn.:* 1899, Amor *v.* Stoeckele, 76 Minn. 180, 78 N. W. 1046 (stenographer's use of transcript of notes of testimony, excluded, the original not being accounted for); *Mo.:* 1897, Banking House *v.* Darr, 139 Mo. 660, 41 S. W. 227 (entries excluded because not produced in court); *N. H.:* 1851, Watson *v.* Walker, 23 N. H. 477, 496, *semble; N. J.:* 1795, Ryerson *v.* Grover, 1 N. J. L. 459; *N. Y.:* 1857, Halsey *v.* Sinsebaugh, 15 N. Y. 485; 1864, Marcly *v.* Shults, 29 id. 346 (copy of a copy); 1871, Downs *v.* R. Co., 47 id. 87; 1872, McCormick *v.* R. Co., 49 id. 303 (doubtful language); *Oh.:* 1869, Mead *v.* McGraw, 19 Oh. St. 55; *N. C.:* 1883, State *v.* Lyon, 89 N. C. 568 (newspaper copy of a libel which the witness had seen); *Pa.:* 1902, Edwards *v.* Gimbel, 202 Pa. 30, 51 Atl. 357 (typewritten copy of a memorandum, allowed to be used); *S. C.:* 1880, Bank *v.* Zorn, 14 S. C. 444; *Tenn.:* 1823, Rogers *v.* Burton, Peck 108; 1838, Beets *v.* State, Meigs 106 (notes of a dying declaration); *U. S.:* 1869, Insurance Co. *v.* Weide, 9 Wall. 677 (an abstract of destroyed inventories); *Vt.:* 1884, Davis *v.* Field, 56 Vt. 420; *Va.:* 1854, Harrison *v.* Middleton, 11 Gratt. 547; 1871, Pidgeon *v.* Williams, 21 id. 251, 261 (a bank-book seen by the witness at a previous occasion but not brought into court); *Wis.:* 1902, Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614 (copy by witness, made on a sheet, from separate slips now destroyed, received); compare also the cases cited in the ensuing notes.

Notwithstanding the rulings cited above, a copy was held receivable without accounting for the original in the following cases: 1899, Anderson *v.* English, 121 Ala. 272, 25 So. 748; 1870, Chicago R. Co. *v.* Adler, 56 Ill. 344; 1875, Brown *v.* Luehrs, 79 id. 575.

[1] *Accord:* 1892, Birmingham *v.* McPoland, 96 Ala. 363, 11 So. 427 (copy by third person;

§ 751. **Same: Bookkeeper's Entry of Salesman's Oral Statement; Stenographer's Report of Interpreted Testimony.** If a copy by another person of a statement originally written is receivable, why is not a copy receivable of a *statement originally oral?* The situation is the same as in the preceding instance, except that the salesman, workman, or foreman, instead of handing the bookkeeper or clerk a written statement of the transaction, makes an oral statement, which is then and there copied as before. Here the salesman will on the stand testify that the statement made by him was an accurate embodiment of his recollection; while the bookkeeper will verify the correctness of his entry, — which is none the less in fact a copy, though it reproduces an oral statement. To receive the memorandum supported by the joint testimony of the two is in perfect accord with legal principle, and is certainly demanded by all considerations of mercantile convenience. This result may now be regarded as generally accepted:

1857, *Dewey*, J., in *Harwood* v. *Mulry*, 8 Gray 250 (one person delivered the goods and reported it, and the other made the charge in the books): "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 be required to be proved by a single person."

1886, *Andrews*, J., in *Mayor* v. *Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905 (a foreman W. made entries of oral reports by a sub-foreman M. of merchandise delivered; W. and M. both testified):[1] "Business could not be carried on and accounts kept, in many cases, without great inconvenience, unless method of keeping and proving accounts is sanctioned. . . . If the witnesses are believed, there can be but little moral doubt that the book is a true record of the actual fact."[2]

usable if verified by him, or if known by the user to be a correct copy); 1901, Chicago & A. R. Co. *v.* American Strawboard Co., 190 Ill. 268, 60 N. E. 518 ("sheets" made from memoranda of weights of straw, admitted, the weighers verifying their memoranda and the transcribers of the memoranda verifying the correctness of their copying); 1903, Trainor *v.* German H. S. L. & B. Ass'n, — id. — , 68 N. E. 650 (books kept by M., from entries of payments received by S., held not sufficiently verified by M. and S. on the facts); 1857, White *v.* Wilkinson, 12 La. An. 360 (nurebssing-clerks and bookkeeper); 1831, Smith *v.* Sanford, 12 Pick. 140 (party's books; one partner made memoranda of sales, the other entered; both testified); 1831, Holmes *v.* Marsden, ib. 171, *semble* (party's books; copies made by a second person, who testified); 1849, Morris *v.* Briggs, 3 Cush. 343 (party's books; workmen made memoranda, plaintiff entered); 1852, Barker *v.* Haskell, 9 id. 218 (party's books; slate entries by one partner, copied by the other); 1902, Stephan *v.* Metzger, — Mo. App. — , 69 S. W. 625 (plaintiff read off an account, and her daughter wrote it down; the original being destroyed, the copy was allowed to be used upon verification by their joint testimony); 1894, Chicago Lumbering Co. *v.* Hewitt, 12 C. C. A. 129, 64 Fed. 314 (tallies of logs by F., book-entry copies by M.); 1895, The Norma, 55 id. 553, 68 Fed. 509 (foreman and bookkeeper). The contrary doctrine is enforced in Peck *v.* Valentine, 94 N. Y. 569 (1884), where L. made memoranda of sums received and the plaintiff copied them; the originals being lost, the joint testimony of L. and the plaintiff was rejected. It is a sufficient criticism of this opinion to say (1) that the fundamental error pervades it that *no copy at all* could be received, and (2) that the Court which could go as far as it did in Mayor *v.* Second Ave. R. Co. (*post*, § 751) could not consistently repeat the ruling in Peck *v.* Valentine.

The following ruling is correct: 1883, Chicago R. Co. *v.* Provine, 61 Miss. 288, 292 (entries made by bookkeepers from reports made by other persons not having personal knowledge of the transactions or a duty to do them, excluded).

[1] The Court here applied the further local restriction (*ante*, § 747) that the original reports must be in the regular course of business or duty.

[2] *Accord:* 1881, Stettauer *v.* White, 98 Ill. 77 (shipper and entry-clerk); 1857, White *v.* Wilkinson, 12 La. An. 360, *semble* (bookkeeper and salesman); 1845, Littlefield *v.* Rice, 10 Met. 289 (party's books; plaintiff worked, and his wife made entries as told by him); 1854, Kent *v.* Garvin, 1 Gray 150 (drayman read off memoranda and clerk entered them); 1887, Miller *v.* Shay, 145 Mass. 163, 13 N. E. 468 (driver of a cart marked on it the number of loads and afterwards reported it to plaintiff, who entered it); 1877, Shear *v.* Van Dyke, 10 Hun 529 (one

§ 752. **Same: Salesman Deceased or otherwise Unavailable.** The
iarly difficult situation is that in which the original observer who mad
oral or written statement — salesman, shipper, or drayman — is, by reas
death or absence, unattainable as a witness. In that case, may the p
who copied the statement — the bookkeeper or shipping-clerk — by his
mony alone make the use of the record possible? Here it is clear tha
original statement of the absent person comes as hearsay — *i. e.* untest
the production of the witness in court for cross-examination, and is the
prima facie unreceivable. It must come in, if at all, under the hearsa
ception for Regular Entries. The rules for this situation are therefore
examined elsewhere (*post*, §§ 1530, 1555).

§ 753. (4) **Record must be Shown to Opponent on Demand, for Inspe
and Cross-examination.** The fundamental purpose of the rule requiring
use of the original is to protect against fraud and to give the oppone
opportunity to verify the exact nature of the document and to ascertai
value (*post*, § 1179). Even where a copy is permitted, there is still a ne
fairness for the opponent to see the document, in order to prepare to tes
witness upon its contents (on the principle of § 1861, *post*). Thus it
necessary implication that the document used, whether an original or a
when produced in court, shall be shown to the opponent on his reque
inspect and to employ in cross-examination:

1834, *Patteson*, J., in *R.* v. *St. Martin's*, 2 A. & E. 210: "If he could not recolle
facts independently of the writing, the original writing ought to have been in co
order that the other party might cross-examine; not that such writing is to be mad
dence itself, but that the other party is to have the benefit of the witness refreshi
memory in every part."

1870, *Mullin*, J., in *Tibbetts* v. *Sterberg*, 66 Barb. 201: "If the witness cannot be
pelled to produce it, he might use documents made for him by the party calling hi
the accuracy of which he knows nothing. . . . The right of a party to protection a
the introduction against him of false, forged, or manufactured evidence, which he
permitted to inspect, must not be invaded a hair's breadth."

witness had told another person at the time how many loads of hay were taken in but could not now remember; and the other person then testified to the number thus reported); 1823, Ingraham *v.* Bockins, 9 S. & R. 285 (delivery-clerk and bookkeeper); 1834, Jones *v.* Long, 3 Watts 326, *semble* (same); 1831, Clough *v.* Little, 3 Rich. 353 (same); 1850, Thomas *v.* Porter, 4 Strob. Eq. 65 (same); 1894, Chicago Lumbering Co. *v.* Hewitt, 12 C. C. A. 129, 64 Fed. 314, *semble* (tallies of logs orally reported, and taken down by a bookkeeper); 1895, The Norma, 55 C. C. A. 553, 68 Fed. 509. *Contra:* 1901, Snow Hardware Co. *v.* Loveman, 131 Ala. 221, 31 So. 19 (memorandum by B., at L.'s dictation, of transaction by L., both testifying on the stand, excluded); 1892, Tupper *v.* International B. & T. Co., 24 N. Sc. 256 (book made by copying from tally boards of lumber delivered, one person making the former, and another the latter, excluded); 1852, Lewis *v.* Kramer, 3 Md. 286 (notary and clerk). The same situation sented where an *interpreter's* rendering *deceased witness' testimony* is presented by *ographer's minutes*. If both take the stan minutes should be received. This seems sanctioned in the following cases: 1871, Sc *v.* Harber, 36 Ind. 541; 1880, People *v.* L 54 Cal. 529; 1880, People *v.* Ah Yute, 56 i So, too, for any *report of words uttered*: Green *v.* Cawthorn, 4 Dev. L. 409 (the issue whether offensive words of the plaintiff ha communicated to the defendant, E. testifie he had told them to the defendant as re to him by M. but now forgot the words, a testified what the words were as he heard from the plaintiff and reported them to 1903, People *v.* McFarlane, 138 Cal. 4 Pac. 568 (witness at a former trial permit testify by reference to and reliance upo official transcript of his testimony verified reporter). Compare the cases cited *ante*, §

The importance of this expedient is well illustrated in the following episode from a celebrated trial:

1888, *Parnell Commission's Proceedings*, 12th day, Times' Rep. pt. 3, pp. 182–184; the Irish Land League being charged with complicity in outrages and agrarian crime, it became necessary to prove the connection of certain individuals with the League; and the testimony of the constables, bailiffs, etc., was often open to the suspicion of being partisan and even manufactured; among these, one Honan, a magistrates' clerk, had produced a list of names said to have been taken down by him at the time, and the untrustworthiness of his list was exposed in the following way; on direct examination he had been asked: Q. "Have you watched the persons going in to the committee meetings?" A. "Yes." Q. "Are these the names of the members of the committee you have seen?" (holding up a paper). A. "Yes." . . . The witness was then cross-examined by Mr. *Lockwood*. Q. "When did you take this list of names?" A. "In March, 1884, or April." Q. "But it is written on a piece of paper which contains a communication to you or some other officer, and has the date July, 1885. Does that enable you to fix the date more accurately?" A. "I took it from the names I took in 1884." Q. "I understood you to say you took them down on that piece of paper?" Witness took the paper, looked at it, and said, "It is all right." Mr. *Lockwood*. "That is satisfactory, no doubt; but it will not do for me." . . . President *Hannen*. "The paper bears the date July 6, 1885, and the words 'Prospect Hill.' That is in a different handwriting." Mr. *Lockwood*. "Did you or did you not write that down at the time you say you saw the persons attending the committee?" President *Hannen*. "On that paper — that very paper?" A. "Yes, my Lord." . . . Mr. *Lockwood*. "Did you see the words on that paper, 'Complied with July, 1885'? Whose writing is it?" A. "The head constable's." Q. "Do you suggest the head constable wrote that after you wrote the names on the other side in March, 1884?" A. "That is a copy of the names I took down in 1884." Q. "You had forgotten that, had n't you? Now, I am very anxious to see the original document. Where is it?" A. "I have not got it. I knew the names of the committee." Q. "You wrote from your memory?" A. "Yes, I knew the names." Q. "When did you write it, last week?" A. "Oh, no, Sir." Q. "The week before?" A. "No, Sir." Q. "When? Some time in 1885? Some time after July?" A. "Yes." Q. "From memory?" A. "No. When they were going in." Q. "Was the document written by you from memory in July, 1885?" A. "It was written at the time I saw them going in." . . . Q. "You swore to me distinctly that you wrote that in March or April, 1884?" A. "That is a mistake of mine." Q. "Did you write that document at the time you saw the men going into the committee-room?" A. "No; I wrote in pencil and then copied in ink." Q. "Did not you swear to me just now that you wrote it in the street in pen and ink?" A. "It was a mistake of mine." Q. "Another mistake! Have you made any more mistakes in your evidence?" A. "No." Q. "You are sure of that?" A. "Yes."[1]

§ 754. (5) **Record goes as Testimony to the Jury.** If by verifying and adopting the record of past recollection the witness makes it usable testi-

[1] In the following cases this requirement was recognized: 1794, Hardy's Trial, 24 How. St. Tr. 824 (allowing the witness to paste up the parts sworn to be irrelevant); 1836, Howard *v.* Canfield, 5 Dowl. Pr. 417; 1848, Beech *v.* Jones, 5 C. B. 696; Cal. C. C. P. § 2047; and other codes cited *ante*, § 736; 1903, Volusia Co. Bank *v.* Bigelow, — Fla. — , 33 So. 704; 1870, McKivitt *v.* Cone, 30 Ia. 457; 1875, Adae *v.* Zangs, 41 id. 536; 1836, Shove *v.* Wiley, 18 Pick. 563; 1875, Rayuor *v.* Norton, 31 Mich. 209; 1872, Chute *v.* State, 19 Minn. 277; 1846, Hall *v.* Ray, 18 N. H. 126; 1884, Peck *v.* Valentine, 94 N. Y. 569; 1823, Nicholson *v.* Withers, 2 McCord 429; 1823, Rogers *v.* Burton, Peck 108; 1838, Beeta *v.* State, Meigs 106; 1884, Davis *v.* Field, 56 Vt. 426; 1854, Harrison *v.* Middleton, 11 Gratt. 547.

The limits to the inspection by the opponent of a series of such entries and their use in cross-examination must depend on the facts of each case; in general the whole of the material portion can be used: 1826, Loyd *v.* Freshfield, 2 C. & P. 332; 1860, Green *v.* Caulk, 16 Md. 578; and cases cited *post*, § 2116.

Compare the general rule for showing to the opponent *any document* about to be offered (*post*, § 1861).

monially, and if by this verification alone can it become so usable, it follows that the record thus adopted becomes to that extent the embodiment of the witness' testimony. Thus, (*a*) *the record, verified and adopted, becomes a present evidentiary statement of the witness;* (*b*) *and as such it may be handed or shown to the jury by the party offering it.*

The first part of this proposition deals with the theoretical status of the memorandum; nevertheless, as the proper usage noted by the second part depends on the theory adopted, it is not a matter of mere words or phrases. The language of the Courts varies, but is clear as to the principle:[1]

1871, *Per Curiam*, in *Moots* v. *State*, 21 Oh. St. 653: "The entry in the book and the oath of the witness supplement each other. The book was really a part of the oath, and therefore admissible with it in evidence."

1879, *Earl*, J., in *Howard* v. *McDonough*, 77 N. Y. 592: "After the witness has testified, the memorandum which he has used may be put in evidence, — not as proving anything of itself, but as a detailed statement of the items testified to by the witness. The manner in which the memorandum in such a case may be used is very much in the discretion of the trial judge."

1882, *Cooley*, J., in *Mason* v. *Phelps*, 48 Mich. 126, 11 N. W. 413, 837: "After she had testified that she knew it to be correct, she might have read the entries or repeated them as her evidence. Showing the book was no more than this."

1886, *Smith*, C. J., in *Bryan* v. *Moring*, 94 N. C. 687: "The memorandum thus sup-

[1] In the following cases, some speak merely of the theoretical aspect; others expressly permit the handing to the jury; all accept in effect the general proposition above: *Eng.:* 1801, Jacob v. Lindsay, 1 East 46; 1826, Loyd v. Freshfield, 2 C. & P. 332; 1896, Birchall v. Bullongh, 1 Q. B. 325 (a note used as a record of past recollection as to borrowing money; allowable, although itself inadmissible because unstamped); *Ala.:* 1860, Mims v. Sturtevant, 36 Ala. 630 ("a part of his evidence"); 1879, Acklen's Ex'r v. Hickman, 63 id. 498; *Ill.:* 1859, Mineral Point R. Co. v. Keep, 22 Ill. 20; *Ia.:* 1897, State v. Brady, 95 Ia. 410, 69 N. W. 290 ("Such documents are admissible in evidence, and the Court will not go through the useless ceremony of having the witness read a document relating to a fact of which he had no present recollection, etc."; noting the conflict of earlier rulings); *Kan.:* 1885, Solomon R. Co. v. Jones, 34 Kan. 443, 8 Pac. 730; 1897, Wright v. Wright, 58 id. 525, 50 Pac. 444 ("The two [witness and memorandum] are the equivalent of a present positive statement on the witness affirming the truth of the contents of the memorandum"); 1900, Garden City v. Heller, 61 id. 767, 60 Pac. 1060; *Me.:* 1885, State v. Lynde, 77 Me. 561, 1 Atl. 687 (an examined or sworn copy becomes evidence); *Mass.:* 1872, Cobb v. Boston, 109 Mass. 444 (to be read in the discretion of the Court; not "of itself evidence"); *Mich.:* 1882, Mason v. Phelps, 48 Mich. 126, 11 N. W. 413, 837; *Miss.:* 1902, Alabama & V. R. Co. v. Sol Fried Co., 81 Miss. 314, 33 So. 74; *N. H.:* 1840, Haven v. Wendell, 11 N. H. 112; 1869, Kelsea v. Fletcher, 48 id. 282 ("evidence to go to the jury"); 1874, Watts v. Sawyer, 55 id. 40; 1883, Pinkham v. Benton, 62 id. 687; *N. Y.:* 1857, Halsey v. Sinsebaugh, 15 N. Y. 485 ("read to the jury in connection with the oral testimony"); 1858, Russell v. R. Co., 17 id. 134 ("in connection with and auxiliary to the oral testimony"); 1864, Marcly v. Shults, 29 id. 346 ("evidence of the fact"); 1872, McCormick v. R. Co., 49 id. 303; 1876, Flood v. Mitchell, 68 id. 509; 1879, Howard v. McDonough, 77 id. 592 ("may be put in evidence, not as proving anything of itself, but as a detailed statement of the items testified to by the witness"); 1884, Peck v. Valentine, 94 id. 569 ("read in evidence in connection with and as auxiliary to his testimony"); 1889, National Ulster Co. Bank v. Madden, 114 id. 280, 21 N. E. 408 ("read in evidence"); *N. C.:* 1886, Bryan v. Moring, 94 N. C. 687; *Pa.:* 1829, Farmers' M. Bank v. Bornef, 1 Rawle 152; *S. C.:* 1817, Haig v. Newton, 1 Milla Const. 423; 1818, Columbia v. Harrison, 2 id. 212; *S. D.* 1898, Mt. Terry M. Co. v. White, 10 S. D. 620, 74 N. W. 1060 (opponent allowed to put it in on cross-examination); *U. S.:* 1869, Insurance Co. v. Weide, 9 Wall. 677 ("not evidence *per se*," but satisfactory when verified); 1871, Insurance Co. v. Weides, 14 id. 379; 1878, Ruch v. Rock Island, 97 U. S. 695 ("put in evidence"); 1899, Dunlap v. Hopkins, 37 C. C. A. 52, 95 Fed. 231; *Vt.:* 1862, Lapham v. Kelly, 35 Vt. 198; 1884, Davis v. Field, 56 id. 426; 1892, Bates v. Sabin, 64 id. 511, 520, 24 Atl. 1013; 1892, Williams v. Wager, ib. 326, 328, 336, 24 Atl. 765 (same; but not as "independent evidence"); *Va.:* 1854, Harrison v. Middleton, 11 Gratt. 547 ("being a part of the evidence").

ported and identified becomes part of the testimony of the witness, just as if without it the witness had orally repeated the words from memory."

A few decisions declare that the writing is not "independent evidence" or "in itself evidence";[2] but this is to be construed as meaning merely — what no one could deny — that without being verified and adopted (*ante*, § 747) it is without standing. A few others expressly refuse to allow it to be "read in evidence"[3] or "given in evidence."[4] But these must be regarded as unsound in principle.[5]

III. Present Recollection Revived.

§ 758. **General Principle: Any Writing may be used to Stimulate and Revive a Recollection.** Since the Narration or Communication should represent actual Recollection (*post*, § 766), it becomes necessary to forbid the use of various artificial written aids which may be misused so as to put into the witness' mouth a story which is in effect fictitious and corresponds to no actual Recollection.[1] Under pretext of stimulating the witness' recollection, if an actual present recollection results, of the quality sufficient for testimony (*ante*, § 726), the process and the result are legitimate. But these expedients for stimulating recollection may be so misused that the witness puts before the Court what purports to be but is not in fact his recollection and knowledge. Such a result cannot be accepted as testimony; and it is to

[2] 1834, R. *v.* St. Martin's, 2 A. & E. 210; 1900, Baird Lumber Co. *v.* Devlin, 124 Ala. 215, 27 So. 425; 1886, Lipscomb *v.* Lyon, 19 Nebr. 521, 27 N. W. 731; 1893, Bates *v.* Preble, 151 U. S. 154, 14 Sup. 297; 1883, Vinal *v.* Gilman, 21 W. Va. 309. If such a verification is lacking, the paper of course cannot be handed in or used: 1893, Flint's Estate, 100 Cal. 391, 399, 34 Pac. 863; 1896, Imhoff *v.* Richards, 48 Nebr. 590, 67 N. W. 483 (excluded because not offered as a part of any one's testimony).

[3] 1897, Republic *v.* Toyotaro, 11 How. 195; 1883, Rounds *v.* State, 57 Wis. 52, 14 N. W. 865.

[4] 1857, People *v.* Elyea, 14 Cal. 144; 1889, Hoffman *v.* R. Co., 40 Minn. 60, 41 N. W. 301.

[5] In *Massachusetts* both theory and practice seem unsettled: 1857, Crittenden *v.* Rogers, 8 Gray 452; 1866, Dugan *v.* Mahoney, 11 All. 572; 1869, Adams *v.* Coulliard, 102 Mass. 173; 1875, Field *v.* Thompson, 119 id. 151; 1882, Costello *v.* Crowell, 133 id. 352. So too in *Iowa* and a few other jurisdictions: *Ia.*: 1875, Adae *v.* Zangs, 41 Ia. 536; 1897, State *v.* Brady, Ia., cited *supra*; 1897, Tyler *v.* R. Co., 102 id. 632, 71 N. W. 536 (an inspection-book of engines used by one of the entrants, as to his entries; but whether it could be "offered in evidence," not decided, apparently upon some confusion with the Hearsay exception, *post*, § 1517; Taylor *v.* R. Co., 80 id. 435, doubted); *Ark.*: 1896, Phœnix Ins. Co. *v.* Amusement Co., 63 Ark. 187, 37 S. W. 959 (must be read, and not put in as evidence); *Pa.*: 1866, Selover *v.* Rexford, 52 Pa. 308; *U. S.*: 1893, Bates *v.* Preble, 151 U. S. 149, 155, 14 Sup. 277 (witness verified her memorandum-book, but did not use it for actual refreshment, and it was laid before the jury; Brown, J., making no distinction between past and present recollection, concedes that a party's own account-books may be "admitted in evidence," but doubts whether "memoranda made by a witness contemporaneously" are admissible, "elementary writers and courts being about equally divided upon the subject"; and declines to decide the question; it may be said, that if this refers to the subsidiary question whether the memoranda are a part of the witness' testimony, and thus evidence, the whole discussion is misleading; while if it is meant to say that Courts are equally divided as to the propriety of the use of past recollection, this is an error; in general, the opinion fails to consider any of the usual distinctions of the subject, and is without weight); 1898, Stewart *v.* Morris, 32 C. C. A. 203, 89 Fed. 290 (obscure). In Payne *v.* Ibbotson, 27 L. J. Excb. 341 (1858), and Waters *v.* Waters, 35 Md. 539 (1872), the use of the writings in evidence was denied apparently for other reasons. In *Connecticut* the sound doctrine is accepted, but on the incorrect fiction that "the paper is the witness'": 1895, Curtis *v.* Bradley, 65 Conn. 99, 31 Atl. 591, Hamersley, J.

[1] Compare the other rules directed to the same end, against other false aids than writing (*post*, §§ 769, 786).

prevent this misuse of expedients legitimate enough in themselves that
restriction may be necessary:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. III, c. XI (Bow
ed., vol. VI, p. 446): "If on the part of the witness the testimony be the product
imagination, instead of the memory, — incorrectness is, in so far, the quality given
If, for want of such helps which on the particular occasion may happen to be
sary, recollection fail to bring to view any such real facts as with these helps migh
would have been brought to view, — incompleteness in the mass of the evidence
result. But, by the same suggestions by which, in case of veracity, memory alone
be assisted and fertilized, it may also happen that *invention* (which, where testim
in question, is synonymous with mendacity) shall also be set to work, and rendere
ductive. To administer assistance to recollection, to veracity — to administer, not
ance, but obstruction, to invention, to mendacity, — in these we see two opposite,
a first view, irreconcilable, pursuits. How then to reconcile them? or, at any rate,
what is possible to be done towards it? In this question may be seen a probie
solution of which is no less conspicuous for its difficulty than for its importance.
first point to be considered is the natural opposition between the two ends.
instance of any arrangement by which recollection is assisted, how natural, if not
sary and unavoidable, it is, that mendacious invention should receive assistance lik
In the instance of any arrangement by which mendacious invention is obstructe
natural, if not necessary, it is, that recollection should be subjected to interr
likewise?"[2]

The purpose being to allow the legitimate use of written aids, whil
venting their misuse, it would seem that no hard-and-fast rules can b
down for invariable application. That which is suspicious and reprehe
in one instance may be entirely trustworthy in the next. No un
marks of impropriety can be named absolutely. It follows, therefore
any writing whatever is eligible for use, while, on the other hand, *any
ing whatever may, in the circumstances, become improper*.[3] This has
well put in the following passage:

1835, Sir *G. A. Lewin*, Note to *Lawes* v. *Reed*, 2 Lew. Cr. C. 152: "Where the
is to revive in the mind of the witness the recollection of the facts of which he o
knowledge, it is difficult to understand why any means should be excepted to w
that object may be attained. Whether in any particular case the witness' mem
been refreshed by the document referred to, or he speaks from what the docume
him, is a question of fact open to observation, more or less according to the
stances. If in truth the memory has been refreshed, and he is enabled in consequ
speak to facts with which he was once familiar, but which afterwards escaped
cannot signify, in effect, in what manner or by what means these facts were rec
his recollection. Common experience tells every man that a very slight circum
and one not in point to the existing inquiry, will sometimes revive the history of
action made up of many circumstances. . . . Why, then, if a man may refresh hi
ory by such means out of court, should he be precluded from doing so when he
examination in court?"[4]

[2] Compare also Bentham's other passage: ib. b. III, c. II (Bowring's ed., vol. VI, p. 386).

[3] It is worth while, therefore, to note that none of the rules just examined for past recorded recollection have any bearing on the present subject. The confounding of the two has led to many erroneous rulings.

[4] *Accord:* 1810, Henry v. Lee, 2 Ch ("any document"); 1843, Dunlop v. Scam. 327 ("this or any other paper"); Miner v. Phillips, 42 Ill. 131 ("the wit the right to refresh his memory by ref this or any other paper"); 1893, Mc Duff, 50 Kan. 488, 492, 31 Pac. 1061 (

§ 759. Writing not made by Witness himself. That the paper was not written by the witness himself is therefore no essential fault in it. The witness may or may not, in a given instance, with propriety make use of it; but the aid may equally be a legitimate one even though another person prepared the writing:

1810, *Ellenborough*, L. C. J., in *Henry* v. *Lee*, 2 Chitty 124: "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness."

This concluding expression of Lord Ellenborough's concisely states the principle, and has become a classic phrase in judicial quotation [1]

But, though the witness' authorship is not essential to the use of the paper, it is obvious that papers prepared by others may, under circumstances specially dangerous, be excluded from use. This was the case in one of the oldest precedents:

1753, L. C. *Hardwicke*, in *Motion of Noel*, quoted in 3 T. R. 752 (the witness referred frequently to six sheets transcribed by her from a digest by her solicitor of notes furnished by her; the witness had made alterations in his manuscript, but its use was forbidden): "Whether there has been any tampering or not I know not; but I know there has been a great mistake. . . . Should the Court connive at such proceedings as these, depositions would really be no better than affidavits. . . . I might as well let the attorney draw an affidavit for her and use that instead of a deposition." [2]

book or memoranda," whether admissible or not in themselves); 1804, Livingston, J., in Steinbach v. ins. Co., 2 Caines 131 ("the papers to which he alluded, or any other"); 1852, Huff v. Bennett, 6 N. Y. 337 ("any written instrument"); 1880, Bank v. Zorn, 14 S. C. 444. In the following cases the writings were held to be properly used under the circumstances: 1872, Waters v. Waters, 35 Md. 539 (counsel consulting his notes); 1878, State v. Cardoza, 11 S. C. 238 (a diary in a shorthand known to the witness only); 1901, Smith v. Hawley, 14 S. D. 638, 86 N. W. 652 (an inadmissible document). Compare the citations *post*, §§ 786–788, which rest upon practically the same principle.

[1] *Accord:* 1776, Duchess of Kingston's Case, 20 How. St. Tr. 619; 1796, Vaughan v. Martin, 1 Esp. 440, *semble;* 1835, Lawes v. Reed, 2 Lew. Cr. C. 152 (witness used notes of counsel made at former trial); 1843, Dunlop v. Berry, 3 Scam. 327 (a pleading); 1866, Miner v. Phillips, 42 Ill. 131 (a newspaper); 1854, State v. Lull, 37 Me. 246 (made by witness' clerk); 1903, Com. v. Burton, 183 Mass. 461, 67 N. E. 419 (telegram); 1878, Cameron v. Blackman, 39 Mich. 108 (entries copied by others); 1893, Culver v. Lumber Co., 53 Minn. 360, 365, 55 N. W. 552; 1852, Huff v. Bennett, 6 N. Y. 337 (newspaper report); 1872, McCormick v. R. Co., 49 id. 303 ("made by himself or by any other person"); 1883, Bigelow v. Hall, 91 id. 145 ("whether made by himself or another"); 1845, O'Neale v. Walton, 1 Rich. 234; 1857, Berry v. Jourdan, 11 id. 67 (copy of deed, prepared by counsel); 1880, Bank v. Zorn, 14 S. C. 444 ("without regard to by whom made"); 1881, State v. Collins, 15 Id. 373 ("not material that the witness did not himself make the record"); 1901, Breese v. U. S., 45 C. C. A. 535, 106 Fed. 680 (bank-books); 1864, Hill v. State, 17 Wis. 675 ("it matters not whether the memorandum was made by the witness or another"); 1877, Folsom v. Log-driving Co., 41 id. 602. So also all the instances cited *post*, § 761, where a *deposition* or *former testimony* was used.

In many cases it is impossible to say whether the case was one of refreshing present recollection or of adopting past recollection.

In a few cases, the paper has been required at least to have been written under the witness' direction or known by him to be correct; but this is generally due to a confusion of this subject with the subject of past recollection (*ante*, § 748); 1827, Meagoe v. Simmons, 3 C. & P. 75; 1879, Ackien's Ex'r v. Hickman, 63 Ala. 498; 1898, Walker v. State, 117 Ala. 42, 23 So. 149 (memorandum not known to be correct, excluded); Cal. C. C. P. § 2047; 1853, Coffin v. Vincent, 12 Cush. 98; 1857, Davis v. Allen, 9 Gray 322; 1878, State v. Cardoza, 11 S. C. 238; 1899, Burks v. State, 40 Tex. Cr. 167, 49 S. W. 389, *semble*.

[2] *Accord:* 1842, Layer v. Wagstaff, 5 Beav. 462 ("I cannot consider it a right thing for any solicitor to prepare depositions for a witness before examination. . . . If he goes before him [the examiner] with the depositions already prepared, it is a reason for suppressing them"). Add the citations *post*, §§ 786–788, which rest upon the same principle.

§ 760. **Writing not Original, but a Copy.** That the paper is a copy, n original, is also no essential fault. The only question is whether in fact genuinely calculated to revive the witness' recollection; and for this pu a copy may conceivably be entirely satisfactory. The radical differen principle between this use and that of a copied record of past recolle (*ante*, § 749) is plain; there is here no necessity of accounting for the ori in any way:

1843, *Shields*, J., in *Dunlop* v. *Berry*, 5 Ill. 327 (the witness refreshed his mem to the contents of a return by looking at the copy of it in the declaration): "It wa petent for him to use the declaration or any other paper for the purpose of refreshi memory upon the subject."

1852, *Jewett*, J., in *Huff* v. *Bennett*, 6 N. Y. 337 (the witness used a newspaper re "It is well settled that he is permitted to assist his memory by the use of any w instrument; and it is not necessary that such writing should have been made by hi or that it should be an original writing, providing after inspecting it he can speak facts from his own recollection."

1877, *Cole*, J., in *Folsom* v. *Log-driving Co.*, 41 Wis. 602 (the witness, testifying amount of damage, used a copy made recently by K. from a copy of original conte rary memoranda; the other papers having become defaced): "This kind of evide open to more or less suspicion, because . . . it may lead him to suppose he recalls when he really does not. But this affects the credibility rather than the competen the testimony." [1]

§ 761. **Writing not made at the Time of the Event; Depositions Former Testimony.** That the paper was not drawn up about the time of events is not an essential fault. The recollection may be equally refres by a recent note as by some contemporaneous record. It might, in fact argued that there was less danger of reliance upon the record itself more probability of actual refreshment where the paper was one confesse having no value as a contemporaneous record of past recollection.

[1] *Accord:* 1756, Tanner v. Taylor, In 8 T. R. 754 (copy of account-book entry); 1776, Duchess of Kingston's Case, 20 How. St. Tr. 619; 1790, Doe v. Perkins, Ib. 749; 1821, R. v. Edmonds, 1 State Tr. N. s. 785, 827 (the original here being lost); 1825, Gardner Peerage Case, Le Marchant's Rep. 65; 1827, Anon., 1 Lew. Cr. C. 101 (copy of account-book entry); 1853, R. v. Williams, 6 Cox Cr. 343 (deposition); 1881, Lawson v. Gloss, 6 Colo. 134; 1885, Erie Preserving Co. v. Miller, 52 Conn. 444 (copies of way-bills); 1891, Finch v. Barclay, 87 Ga. 393, 13 S. E. 566 (copy from account-books); 1855, Iglehart v. Jernegan, 16 Ill. 513 (extract from copy of testimony in bill of exceptions); 1870, Chicago R. Co. v. Adler, 56 id. 345; 1878, Davie v. Jones, 68 Me. 393 (copy of account-book entry); 1900, Pierce v. R. Co., 94 Id. 171, 47 Atl. 144; 1875, Bullock v. Hunter, 44 Md. 425; 1853, Coffin v. Vincent, 12 Cush. 98 (copy of printed form); 1903, Com. v. Burton, 83 Mass. 461, 67 N. E. 419 (telegram); 1878, Cameron v. Blackman, 39 Mich. 108; 1883, Hudnutt v. Comstock, 50 Id. 596, 16 N. W. 157 (copy of account-book entry); 1878, Clough State, 7 Nebr. 336 (extracts from witness' of records); 1852, Huff v. Bennett, 6 N. Y. (newspaper copy); 1864, Marcly v. Shults Id. 346; 1872, McCormick v. R. Co., 49 303; 1901, Haines v. Cadwell, 40 Or. 229, Pac. 910; 1902, Welch v. Greene, — R. I. 54 Atl. 54; 1857, Berry v. Jourdan, 11 R 67, 78 (witness to lost deed, allowed to u copy); 1899, Sloan v. Pelzer, 54 S. C. 314, S. E. 431; Houston & T. C. R. Co. v. Bu 55 Tex. 342; 1891, Watson v. Miller, 82 285, 17 S. W. 1053; 1883, State v. Hopkins Vt. 258; 1854, Harrison v. Middleton, 11 Gr 530, 547 (copy of field notes). *Contra:* 1 Hopper v. Beck, 83 Md. 647, 34 Atl. 474 (a le copied from a daybook copied from another bo rejected). In a few cases the writing was ap ently treated and used as a record of past re lection, and hence the question of original was material: 1884, Clifford v. Drake, 110 135; 1887, Bonnet v. Glatfeldt, 120 id. 166, N. W. 250; 1881, Com. v. Ford, 130 Mass. 6

There is adequate authority for the result thus required by principle.[1] Yet the greater number of decisions, and most of the *obiter dicta*, announce as a requirement that the memorandum used must have been made "contemporaneously or nearly so" with the events, "at or near the time," with the same varying phrases used in the rule for Past Recollection (*ante*, § 745). These authorities fall into two groups. (1) A very few declare on principle that no real revival of recollection can be had from a paper not made at the time.[2] Their reason seems amply discredited by every-day experience. (2) The greater number simply adopt the rule established for Past Recollection (*ante*, § 745), without observing the radical difference between the purposes of the two sorts of papers. The confusing use of the phrase "refreshing the memory," for both classes of recollection, has contributed to this result; yet it is singular that the discrimination between the two should have been clearly perceived in the topics of the two preceding sections, and not in the present instance.[3]

The instance which is at once the plainest test of principle and the most common in practice is that of a *deposition* or report of *prior testimony*. Here the document was certainly not made at or near the time of the events observed; but orthodox practice has always conceded that the witness may refer to it to refresh his memory, either on direct examination or on cross-examination.[4] The rulings in which this has been refused have apparently

[1] 1880, Bank *v.* Zorn, 14 S. C. 444 ("without regard to when or by whom made"); 1877, Folsom *v.* Log-driving Co., 41 Wis. 602, and the authorities cited under the general principle (*ante*, § 758); also a number of cases referred to in the preceding sections, which, it will be seen, must have involved the use of papers made long after the event and sometimes just before the trial.

[2] 1878, State *v.* Cardoza, 11 S. C. 238 ("must be contemporary with the event noted, otherwise it would not necessarily be associated with the state of mind that existed when the impression on the memory was made"); 1869, Pinney *v.* Andrus, 41 Vt. 648 ("It is obvious that a memorandum made from recollection merely, and so long after the transaction to which it refers, would not be likely to aid the recollection of the witness").

[3] 1838, Steinkeller *v.* Newton, 9 C. & P. 313; 1849, Whitfield *v.* Aland, 2 C. & K. 1015; 1884, Paige *v.* Carter, 64 Cal. 489, Cal. C. C. P. § 2047; 1889, Sanders *v.* Wakefield, 41 Kan. 11, 20 Pac. 518; 1895, Johnston *v.* Ins. Co., 106 Mich. 96, 64 N. W. 5; 1883, Bigelow *v.* Hall, 91 N. Y. 145; 1884, Maxwell's Ex'rs *v.* Wilkinson, 113 U. S. 657, 5 Sup. 691.

[4] *Eng.:* 1682, Coningsmark's Trial, 9 How. St. Tr. 1, 32 (showing to the witness his examination before the magistrate); 1835, Lawes *v.* Reed, 2 Lew. Cr. C. 152 (refreshing from notes of counsel); 1837, R. *v.* Edwards, 8 C. & P. 26, 31 (the witness was shown the depositions and asked to refresh his memory from them; this was allowed without question; then when it appeared that he could not read script, an officer of the Court read it over to him); 1839, Smith *v.* Morgan, 2 Moo. & R. 257 (witness allowed to use his own deposition to a limited extent); 1848, Wightman, J., in R. *v.* Mullins, 3 Cox Cr. 526, 528; 1850, R. *v.* Barnet, 4 Cox Cr. 269; 1851, R. *v.* Watson, 3 C. & K. 111 (allowing any one who heard testimony to refresh from the written deposition); 1851, R. *v.* Ford, 5 Cox Cr. 181 (quoted *post*, § 764); 1853, R. *v.* Williams, 8 Cox Cr. 343 (on direct examination, the witness' deposition was allowed to be put into his hands, "on the ground of refreshing the memory of the witness"; on his answering the question still unfavorably, the counsel was allowed to put a leading question; Williams, J., observing that he had before ruled thus and been sustained by the Queen's Bench, and that it "was not new law"); 1863, R. *v.* Quin, 2 F. & F. 818 (calling his attention to his former deposition); 1867, R. *v.* Wiggins, 10 Cox Cr. 562 (similar); *U. S.:* 1855, Atkins *v.* State, 16 Ark. 568, 589 (refreshing by a deposition); 1903, People *v.* McFarlane, 138 Cal. 481, 7[illegible] Pac. 568 (refreshing by a copy of former testimony); 1855, Iglehart *v.* Jernegan, 16 Ill. 513 (refreshment from certified copies of bill of exceptions containing testimony at another trial); 1872, Harvey *v.* State, 40 Ind. 519 (reading aloud her former testimony to one who could not read); 1884, Johnson *v.* Gwinn, 100 id. 466, 474 (reading over the witness' preceding testimony on the subject at his request); 1887, Stanley *v.* Stanley, 112 id. 145, 13 N. E. 261 (calling attention of witness to his former testimony); 1880, State *v.* Kremling, 53 Ia. 209 (witness looked at the minutes of his testimony

been influenced more or less by the apprehension that thereby the couns when a cross-examiner, might evade the rule (*post*, § 1018) which forbi the witness' prior contradictory statements to be introduced as independe testimony, or that the counsel on a direct examination might evade the ru (*post*, § 902) against impeaching one's own witness by his contradictory sta ments.[5] But neither of these rules in themselves interpose any obstacle. an evasion of them is really being attempted, with the refreshment of rec lection as a mere pretext, then the judge may interpose. But it is a singul proposal to forbid a legitimate proceeding by a uniform rule, merely becau of a possible evasion, which can be dealt with adequately whenever it attempted.

§ 762. **Writing must be Shown to the Opponent, on Demand, for Inspecti and Cross-Examination; Memoranda used before Trial.** On a general pri ciple (*post*, § 1861), having in view the risk of imposition and false ai against which the opponent is entitled to the means of protection, the writi must be shown to him on request. Furthermore, as by having an opp tunity of inspection the opponent is guarded against imposition clearly a parent, so by cross-examination based on the paper he may further det circumstances not appearing on the surface, and may expose all that detra from the weight of testimony:

1794, *Eyre*, L. C. J., in *Hardy's Trial*, 24 How. St. Tr. 824: "It is always usual a very reasonable, when a witness speaks from memorandums, that the counsel should h an opportunity of looking at those memorandums, when he is cross-examining t witness."

1827, *R.* v. *Ramsden*, 2 C. & P. 603; the witness gave a date as six months befo when the counsel put a paper in his hand, he then named the date as nine months befo the opposing counsel demanded to see it; Witness' counsel: "I submit my friend no right to see it, unless he will read it in evidence." *Tenterden*, L. C. J.: "You put

before the grand jury); 1864, Beaubien *v.* Cicotte, 12 Mich. 459, 485 (the counsel's minutes were allowed to be read to him; "the precise modes of recalling a witness' memory to facts which he has forgotten cannot be arbitrarily restricted; and if suspicious means should ever be used, the remedy is to be found in cross-examination and comment"); 1894, State *v.* Staton, 114 N. C. 813, 815, 19 S. E. 96 (by memorandum of former testimony); 1896, State *v.* Finley, 118 id. 1161, 24 S. E. 495 (using a deposition); 1889, Williams, J., in Hurley *v.* State, 46 Oh. St. 323, 21 N. E. 645 ("The repetition of the statement itself, referring to the circumstances of its utterance, would be the most likely means of awakening the recollection of the witness"; here using the witness' former testimony). Compare § 764, *post*.

[5] 1850, R. *v.* Stokes, 4 Cox Cr. 451, Williams, J. (witness not allowed to have memory refreshed on cross-examination, by a deposition, because not contemporaneous); 1859, Brown *v.* State, 28 Ga. 211, *semble* (reading former testimony on cross-examination, forbidden); 1858, Com. *v.* Phelps, 11 Gray 73 (the district-attorney had asked his witnesses "to recu their own minds to their testimony before grand jury, and then state when and how oft they had bought liquor; this was held proper; Shaw, C. J.: "To ask what he testi to before the grand jury has no tendency refresh his memory"); 1892, U. S. *v.* Cross, D. C. 377 (a witness' memory cannot be freshed by re-stating his former oral testimo The Federal Supreme Court has unfortunat in Putnam *v.* U. S., 162 U. S. 687, 16 Sup. (1896), complicated a very simple question added the weight of its authority to the that is wrong both in history and in princi by ruling that this refreshment by such a re ence to former testimony cannot be made, si the reference is based on a non-contemporane record. It ought to have been obvious even if there were a rule against refreshing non-contemporaneous papers, that rule could apply where the refreshment was by oral q tions of the counsel, and not by the witness of a paper. But the opinion in Putnam *v.* U also proceeds on a radical misunderstandin Melhuish *v.* Collier, *post*, § 902.

paper into the witness' hands to refresh his memory. It is very usual for the opposite counsel to see it and examine upon it, and I think he has a right to see it."

1854, *Kindersley*, V. C., in *Lord* v. *Colvin*, 2 Drewr. 205: "If a paper is put into the hands of a witness to refresh his memory, if after that nothing comes of it, if nothing more be done, then the other party has no right to look at it. But if anything further is done, if the witness is asked and answers questions about the document or the facts refered to in it, then at law the party on the other side has the right to see the document. . . . If I were to follow my own opinion as to what would be just and right, I should say every document whatever ought to be produced; . . . every document produced should, I think, be shown to both sides."

1876, *Cooley*, C. J., in *Duncan* v. *Seeley*, 34 Mich. 369: "The other party had a right to know what the memorandum was on which he relied, and whether it [1] had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here. . . . The defendant was entitled to see it at the time in order to test the candor and integrity of the witness." [2]

Clear as the justice of this would seem to be, there are Courts which deny it, and others which seem to.[3] They are led away, in most instances, by perceiving the general distiuction between a record of past recollection and a paper reviving present recollection, and by concluding that, because the rule about producing originals applies to the former (*ante*, § 749) but not to the latter (*ante*, § 760), therefore it is unnecessary to produce and show the paper to the opponent. These decisions, however, are in a small minority, and have no principle to support them. Just how much of the document may be examined by the opponent (for example, when it is a book of accounts) depends much on the circumstances of each case;[4] in general, the parts relative to the subject of testimony, not merely the parts used by the witness, may be seen.

The rule should apply, moreover, to a memorandum *consulted* for refreshment *before trial* and not brought by the witness into court; for, though there is no objection to a memory being thus stimulated, yet the risk of imposition and the need of safeguard is just as great.[5] It is simple and feasible enough for the Court to require that the paper be sent for and exhibited before the end of the trial.

[1] Misprinted as "he" in the original.

[2] *Accord:* 1824, Sinclair v. Stevenson, 1 C. & P. 582; 1833, Gregory v. Taverner, 6 id. 281; 1858, Palmer v. McLear, 1 Sw. & Tr. 149; 1879, Acklen's Ex'r v. Hickman, 63 Ala. 498; 1870, McKivitt v. Cone, 30 Ia. 455; 1856, Com. v. Fox, 7 Gray 585; 1866, Com. v. Haley, 13 All. 587; 1866, Com. v. Lanman, ib. 563 (discretion of Court); 1882, Com. v. Jeffs, 132 Mass. 5; 1873, Com. v. Burke, 114 Mass. 261 (allowable after, not before, direct examination); 1882, People v. Lyons, 49 Mich. 78, 13 N. W. 365; 1890, Manufacturing Co. v. Platt, 83 Mich. 419; 47 N. W. 330; 1846, Hall v. Ray, 18 N. H. 126; 1870, Peck v. Lake, 3 Lans. 134; 1870, Tibbetts v. Sterberg, 66 Barb. 201; 1878, State v. Cardoza, 11 S. C. 238.

[3] 1834, R. v. St. Martin's, 2 A. & E. 210, *semble;* 1854, Addington v. Wilson, 5 Ind. 133; 1851, State v. Cheek, 13 Ired. 114; 1886, Davenport v. McKee, 94 N. C. 330 (doubtful); 1886, First N. Bank of D. v. First N. Bank of W., 114 Pa. 8, 6 Atl. 366 (doubtful); 1881, State v. Collins, 15 S. C. 373.

[4] 1833, Gregory v. Taverner, 6 C. & P. 281; 1872, Burgess v. Bennett, 20 W. R. 720; 1866, Com. v. Haley, 13 All. 587; 1882, People v. Lyons, 49 Mich. 78, 13 N. W. 365. Compare the rules of §§ 2116, 2125, *post*.

[5] 1900, People v. Vann, 129 Cal. 118, 61 Pac. 776, *semble;* 1869, White v. Allen, 3 Or. 103, 110; 1855, Hamilton v. Rice, 15 Tex. 382, 386. *Contra:* 1899, State v. Magers, 36 Or. 38, 58 Pac. 892 (but otherwise for a record of past recollection). But where the testimony is wholly independent of such a memorandum, its production is not necessary: 1900, Nabors v. Goldforb, 77 Miss. 661, 27 So. 641.

§ 763. **Writing used to Revive Recollection is not part of Testimony; yet the Jury may see it, to determine the Propriety of its Use.** It follows from the nature of the purpose for which the paper is used (*ante*, § 758) that it is in no sense testimony. In this respect it differs from a record of past recollection, which is adopted by the witness as the embodiment of his testimony and, as thus adopted, becomes his present evidence and is presentable to the jury (*ante*, § 754). Nevertheless, though the witness' party may not present it as evidence, the same reason of precaution which allows the opponent to examine it (*ante*, § 762) allows him to call the jury's attention to its features, and also allows the jurymen, if they please, to examine it for the same end. In short, the opponent, but not the offering party, has a right to have the jury see it:

1810, *Ellenborough*, L. C. J., in *Henry* v. *Lee*, 2 Chitty 124: "It is not the memorandum that is the evidence, but the recollection of the witness."

1833, *Gurney*, B., in *Gregory* v. *Taverner*, 6 C. & P. 281: "The memorandum itself is not evidence, and particular entries only are used by the witness to refresh his memory. . . . The defendant's counsel may cross-examine on the entries already referred to, and the jury may also see those entries if they wish to do so."

1882, *Endicott*, J., in *Com.* v. *Jeffs*, 132 Mass. 5: "The opposite party is entitled to cross-examine the witness in regard to it; and it may be shown to the jury, not for the purpose of establishing the facts therein contained, but for the purpose of showing that it could not properly refresh the memory of the witness."

That the *offering party* has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established.[1] That the *opponent* may do this, or that the jury may of its own motion demand it, is equally conceded.[2]

§ 764. **Cross-Examiner's Use of Writing to Revive Recollection.** Where the effort to refresh the witness' memory comes originally from the cross-examining party, several distinct questions may arise. (1) *Must* the witness accede to the request and see if his memory is refreshed by the paper handed him? It seems entirely proper to require him, in the trial judge's discretion, to do this.[1] (2) When this is done, the paper so used must in fairness be

[1] 1803, Hedges' Trial, 28 How. St. Tr. 1367; 1858, Payne v. Ibbotson, 27 L. J. Ex. 341; 1879, Acklen's Ex'rs v. Hickman, 63 Ala. 498; 1895, Curtis v. Bradley, 65 Conn. 99, 31 Atl. 591; 1900, Palmer v. Hartford D. Co., 73 id. 182, 47 Atl. 125; 1898, McCormick v. Cleal, 12 D. C. App. 335, 338 (need not be offered in evidence); 1885, Elmore v. Overton, 104 Ind. 548, 555, 4 N. E. 197; 1899, Western Assur. Co. v. Ray, 105 Ky. 523, 49 S. W. 326; 1900, Wilson v. Com., — id. —, 54 S. W. 947; 1856, Com. v. Fox, 7 Gray 585; 1881, Com. v. Ford, 130 Mass. 66; 1901, Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884; 1874, Watts v. Sawyer, 55 N. H. 40; 1879, Howard v. McDonough, 77 N. Y. 592; 1890, Friendly v. Lee, 20 Or. 202, 25 Pac. 396; 1901, Hicks v. R. Co., — S. C. —, 38 S. E. 725, *semble*; 1867, Fant v. Miller, 17 Gratt. 187, 224. *Contra*: 1855, Iglehart v. Jernegan, 16 Ill. 513 (where the rule for a record of past recollection was applied). In Bigelow v. Hall, 91 N. Y. 145 (1883), in an obscure opinion, it was ruled that the paper might be read out, yet not treated as evidence. In Pease Piano Co. v. Cameron, 56 Nebr. 561, 76 N. W. 1053 (1898), the Court took the queer course of compelling books of accounts to be put in and then of refusing to let the witness refresh his memory from them because he would be giving "secondary evidence of the contents of the books."

[2] Acklen's Ex'rs v. Hickman, Com. v. Fox, cited *supra*; and cases quoted *supra* in the text; 1897, Smith v. Jackson, 113 Mich. 511, 71 N. W. 843 ("The right to cross-examination included a right to see and have the jury see it").

[1] 1838, Chapin v. Lapham, 20 Pick. 472.

read aloud or shown to the jury.[2] (3) A paper thus desired to be used will usually be one containing a prior *inconsistent statement* of the witness; in this case, the rules will apply that the inconsistent statement is not equivalent to independent testimony (*post*, § 1018), and that the paper containing it must (in the jurisdictions following The Queen's Case) first be shown to the witness before asking him upon its contents (*post*, § 1259). (4) The propriety of thus refreshing a hostile witness' recollection by his *deposition* or former testimony, not being a contemporaneous paper, has already been noticed (*ante*, § 761).

[2] 1851, R. *v.* Ford, 5 Cox Cr. 184 (the witness had formerly given a deposition; on the trial, after he had made a certain statement, was asked by the opponent to read the deposition and see whether he would then adhere to his statement; this was held improper; Campbell, L. C. J.: "The deposition should either be read to the witness at the time of the cross-examination and before the questions as to its contents are put, or should be given in evidence by the cross-examining counsel in the usual course as a part of his own case"; Alderson, B.: "If the deposition is not put in evidence, it is impossible to tell whether it contains the same or a different statement from that which the witness makes in court, and a false impression may be produced upon the jury by the cross-examination. The two statements may be precisely the same, and yet this line of cross-examination would lead the jury to suppose that they were different)." Compare the principles of §§ 780, 1861, *post*.

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS.

TOPIC VI: TESTIMONIAL NARRATION OR COMMUNICATION.

CHAPTER XXVII.

§ 766. **General Principle.** The third element forming an essential part o all testimony (*ante*, § 478) is the process of laying before the tribunal th witness' results of his Observation (*ante*, § 650) and his Recollection (*ant* § 725), *i. e.* the process of Narration or Communication. In this element, a

in the other two, there are many opportunities for defects fatal to testimonial trustworthiness. As with the elements of Observation and of Recollection, so here also, experience has shown that certain dangers are to be looked for, and that certain restrictions should be imposed in order to prevent them. What these dangers and defects are depends upon the specific virtue which this element of Narration or Communication ought to possess.

Its office is to make intelligible to the tribunal the knowledge and recollection of the witness, whatever that may amount to, affirmative or negative, useful or trivial. Its prime and essential virtue, then, consists in *accurately reproducing and expressing the actual and sincere Recollection.*[1] We may assume that the witness' Recollection fairly represents and corresponds to his Observation (*ante*, § 725); if, then, his Narration or Communication fairly represents and corresponds to his Recollection, and is intelligible by the tribunal, the indispensable elements of testimonal value are complete, and the statement presented to the tribunal is testimonially relevant; but not otherwise. When the statement is found plainly or probably lacking in either of these respects, namely, in correspondence to recollected knowledge or intelligibility, then it should be rejected. Most of the usual defects occur in the former respect, *i. e.* an absence, actual or probable, of this correspondence between the witness' uttered statement and his conscious recollection which he ought to be stating. In the other respect, *i. e.* intelligibility to the tribunal of the witness' utterance, comparatively few questions arise.

It is, however, practically not feasible to examine the various problems directly with reference to the above two canons to be fulfilled. To satisfy them is always the underlying purpose of the specific rules. But these rules are more easily grouped according to the superficial features with which they are associated, and they can best be studied in those associations. For the purpose of grouping these various rules, it may be remembered that the simplest form of testimonial statement (from which others may be conceived of as deviations) is an (1) uninterrupted narrative (2) expressed in words (3) uttered orally (4) and intelligible directly by the tribunal. In any one of these features, there may be a variation from this simple and natural type; the inquiry therefore concerns the rules which become necessary when there is such a variance in one or another of the four respects. That is to say, testimony may be (1) furnished upon systematic *interrogations*, and not as a spontaneous utterance; or (2) it may be non-verbal, *i. e.* expressed *dramatically*, in conduct or gestures; or (3) it may be furnished in *writing*, not orally; or, finally, (4) it may require *interpretation*, before it becomes intelligible to the tribunal. Various rules will arise according as the deviation lies in one or another of these four features; and these rules may now be taken up under those four heads.

[1] 1824, Starkie, Evidence, 79 ("To render the communication of facts perfect, the witnesses must be both able and willing to speak or to write the truth. It is necessary that they should possess . . . in the second place, the power and the inclination to transmit them [the facts] faithfully").

A. TESTIMONIAL INTERROGATION.

§ 768. **Direct and Cross Examination.** When a witness' testimony i obtained by requiring answers after questions, instead of by permitting continuous uninterrupted narrative, certain special opportunities for abus may arise from adopting the former method of extraction. Some of thes opportunities are peculiar to the direct examination (by the party calling th witness) and some to the cross-examination (by the opponent). What is t be noted at the outset is that we are concerned here only with the *danger of error that arise from the putting of questions*, as contrasted with the process of extraction without questions. There are several other principles which affect the use of both direct and cross examination, but they have n concern with the present inquiry, namely, the defects and dangers peculia to an interrogational method. These distinct principles are elsewhere considered in their proper place, and are as follows: (a) The *order* of direct and cross examination is a matter of the Order of Evidence in general (dealt with *post*, §§ 1882 ff.); (b) A cross-examination, being that of a *hostile* party, in marked contrast to the direct examination of the party calling the witness, has a special object and value; the *art* of cross-examination (*post*, § 1368) depends upon this object; the indispensable advantages of a cross-examination make it a matter of absolute right, and the *lack of cross-examination* may be ground for excluding the testimony, under the Hearsay rule (dealt with *post*, §§ 1367–1393); (c) The *kind of facts* that may be inquired into on cross-examination, though forbidden to be proved otherwise by the opponent, involves the admissibility of certain kinds of evidence, in particular, of *character-evidence* (dealt with *post*, §§ 878, 946, 977 ff.); (d) One's *own witness* may not be impeached, and hence the inquiry may arise whether *by cross-examining* a witness he is made one's own so as to *prevent impeachment* (dealt with *post*, §§ 911–918). All these are distinct principles, and have no concern with the present question, namely, the restrictions desirable for an interrogational system *per se*.

In this inquiry, moreover, only rules of law are here to be examined. The rules and suggestions of tact and skill, which serve to guide the judgment of the examiner in obtaining the desired information, are a subject of the greatest consequence, and their study and practice is that of a fascinating pursuit, — involving as it does one of the highest forms of dialectic art, which has been chronicled in the experience of the most celebrated forensic leaders for two thousand years. But the rules of law, and not the art of applying them, must here set the limits of investigation.[1]

[1] In the following authors will be found some of the most celebrated and most useful passages of advice upon the proper method of examining witnesses on the stand: Quintilian, De Institutione Oratoria, lib. V, c. VII; 1835, Joseph Chitty, General Practice (or, Practice of the Law), III, 844; David Paul Brown, Golden Rules (reprinted in Chamberlayne's Best on Evidence (1893), Appendix); 1852, Edward Cox, The Advocate, cc. 32–35; 1885, John C. Reed, Conduct of a Lawsuit, cc. 9–11 (this, it may be suggested, is the most sensible and systematic modern book of its kind, and should be read and re-read by every aspiring young lawyer); 1892, Richard Harris, Hints on Advocacy, 9th ed., cc. 2–7, 12; 1894, Byron K. and

§ 769. **Leading Questions**; (1) **General Principle.** On the direct examination, *i. e.* by the counsel of the party in whose favor the witness is called, the most important peculiarity of the interrogational system is that it may be misused to supply a false memory for the witness,—that is, to suggest desired answers not in truth based upon a real recollection. The problem is to discriminate between the forms of questions which will too probably have that effect and those which will not. Questions may legitimately suggest to the witness the *topic* of the answer; they may be necessary for this purpose where the witness is not aware of the next answering topic to be testified about, or where he is aware of it but its terms remain dormant in his memory until by the mention of some detail the associated details are revived and independently remembered. Questions, on the other hand, which so suggest the *specific tenor of the reply as desired by counsel* that such a reply is likely to be given irrespective of an actual memory, are illegitimate. The essential notion, then, of an improper (commonly called a leading [1]) question is that of a question which *suggests the specific answer desired.* It will be seen that a collusive or conscious intention of the witness to answer as desired is here not a necessary assumption. That is a usual danger, but not the only one; for the known principles of human nature tell us that a witness may also unconsciously accept the suggestion of a question. It is therefore not necessary to attribute a corrupt intention either to witness or to counsel; since the danger has larger aspects than that.[2]

The essential test of a leading question as an improperly suggestive one is plainly expounded in the following passages:

1813, *Ellenborough*, L. C. J., in 25 Hans. Parl. Deb. 207: "I have always understood, after some little experience, that the meaning of a leading question was this, and this only: That the judge restrains an advocate who produces a witness on one particular side of a question, and who may be supposed to have a leaning to that side of the question, from putting such interrogatories as may operate as an instruction to that witness how he is to reply to favor the party for whom he is adduced."

1835, Mr. *Joseph Chitty*, Practice of the Law, III, 892: "The assigned reason in support of the rule is that a witness usually has a strong feeling in favor of the party who has subpœnaed him, and is disposed to swear anything that he thinks will serve that party, and that a leading question in effect suggests to the witness the answer that he is desired to give and invites misrepresentation. This reason imputes to the counsel an unworthy motive, and to every witness a supposition that he would be guilty of perjury; but perhaps the better and more comprehensive reason is that many witnesses, either from complaisance or indolence, are too much disposed to assent to the proposition of the counsel and answer as he may suggest, instead of reflecting and answering after an exertion of their own memory."

1840, *McLean*, J., in *U. S.* v. *Dickinson*, 2 McLean 331: "A question shall not be so propounded to a witness as to indicate the answer desired."

1860, *Fowler*, J., in *Page* v. *Parker*, 40 N. H. 63: "A question is leading which in-

W. F. Elliott, General Practice, cc. 23–27; 1900, Joseph F. Daly, Preparation for Trial (in "The Brief," vol. III, pp. 1 ff.); 1903, Francis Wellman, The Art of Cross-Examination.

[1] This term goes far back in our annals: 1634, Coke, 4th Inst. 279 (interrogatories in depositions); 1684, Rosewell's Trial, 10 How. St. Tr. 147, 190.

[2] Compare the exposition of Bentham: 1827, Bentham, Rationale of Judicial Evidence, b. III, c. III (Bowring's ed. vol. VI, p. 392).

structs the witness how to answer on material points, or puts into his mouth words to be echoed back, as was here done, or plainly suggests the answer which the party wishes to get from him."

1897, *Liddon*, J., in *Coogler* v. *Rhodes*, 38 Fla. 240, 21 So. 109: "The proper signification of the expression is a suggestive question, — one which suggests or puts the desired answer into the mouth of the witness."

1860, Chief Justice *Appleton*, Evidence, 227: "The end proposed in extracting testimony is the obtaining the actual recollection of the witness, not the allegations of another person, suggested to and adopted by the witness and falsely delivered as his. . . . The real danger is that of collusion between the witness interrogated and the counsel interrogating, that the counsel will deliberately imply or suggest false facts with the expectation on his part and with an understanding on the part of the witness that he will assent to the truth of the false facts thus suggested."

This being the broad nature of the evil to be avoided, and the end to be secured, there can be no invariable test for the impropriety, merely so far as the form is concerned. Any question may be or may not be suggestive. The *form* is immaterial.[3]

§ 770. **Same: Discretion of the Trial Court.** It follows, from the broad and flexible character of the controlling principle, that its application must rest largely, if not entirely, in the hands of the trial Court. So much depends on the circumstances of each case, the demeanor of each witness, and the tenor of the preceding questions, that it would be unwise, if not impossible, to attempt in an appellate tribunal to consider each instance adequately. Furthermore, the harm in a single instance is inconsiderable and more or less speculative, and the counsel's repetition of an impropriety can be so easily controlled by the trial Court, that no favor is shown in the appellate tribunals to objections based merely on the form of the question.[1] From the beginning, and contiuuously, it has been declared that the application of the principle is to be left to the *discretion of the trial Court*.[2] In differeut jurisdictions this rule is enforced with differing vigor;

[3] 1863, Steer *v.* Little, 44 N. H. 616. ("There is no form of question which may not be leading, the Court being constantly compelled to look beyond the form to the substance and effect of the inquiry"); 1878, Farmers' Mut. F. Ins. Co. *v.* Bair, 87 Pa. 127.

[1] 1815, Nicholls *v.* Dowding, 1 Stark. 81. (Ellenborough, L. C. J.: "In general no objections are more frivolous than those which are made to questions as leading ones"); 1841, Towns *v.* Alford, 2 Ala. 381 (Collier, C. J.: "Objections to questions on the ground that they are leading are generally captious and not intended to subserve the ends of justice").

[2] *Eng.:* 1801, Peake, Evidence, 189; 1824, Clarke *v.* Saffery, Ry. & Moo. 126, Best, C. J.; 1837, R. *v.* Murphy, 8 C. & P. 306, Coleridge, J.; 1855, Lawder *v.* Lawder, 5 Ir. C. L. 38; 1874, Ohlsen *v.* Terrero, L. R. 10 Ch. App. 128, 129 (conceding to an examiner in Chancery the judicial discretion to treat a witness as hostile: repudiating Wright *v.* Wilkin, 4 Jur. N. S. 804, 1858); *Ala.:* 1841, Towns *v.* Alford, 2 Ala. 380; 1845, Blevins *v.* Pope, 7 id. 374 (trial judge need not state his reasons); 1847, Watson *v.* Anderson, 11 id. 43, 45; 1848, Donnell *v.* Jones, 13 id. 507; 1850, Johnson *v.* State, 17 id. 618, 626; 1859, Sevre *v.* Durwood, 35 id. 247, 252; 1875, Gassenheimer *v.* State, 52 id. 313, 317; 1892, Birmingham *v.* McPoland, 96 id. 363, 11 So. 427; 1898, McDonald *v.* State, 118 id. 672, 23 So. 637; *Alaska:* C. C. P. 1900, § 664 (like Or. Annot. C. 1892, § 835); *Ark.:* Stats. 1894, § 2957 (allowable "under special circumstances, making it appear that the interests of justice require it"); *Cal.:* C. C. P. 1872, § 2046; 1883, People *v.* Ah Fook, 64 Cal. 381, 382; 1 Pac. 347; 1888, People *v.* Goldenson, 76 id. 349, 19 Pac. 161; 1890, White *v.* White, 82 id. 427, 23 Pac. 276; 1899, Kyle *v.* Craig, 125 id. 107, 57 Pac. 791; Casey *v.* Leggett, ib. 664, 58 Pac. 264; 1901, People *v.* Harlan, 133 id. 16, 65 Pac. 9; *Fla.:* 1878, Coker *v.* Hayes, 16 Fla. 368; 1901, Myers *v.* State, — id. —, 31 So. 275; 1903, Sylvester *v.* State, — id. —, 35 So. 142; *Ga.:* Code 1895, § 5283, Cr. C. § 1019; 1856, Heisler *v.* State, 20 Ga. 153, 155; 1871, Statham *v.* State, 41 id. 507, 509; 1874, Ewing *v.* Moses, 51 id. 410, 419; 1876, Burrus *v.* Kyle, 56 id. 24, 27; 1884,

in some the discretionary ruling is sometimes revised in an extreme case, while in others the objection is not even entertained for consideration; but the principle is universally conceded.

Cade *v.* Hatcher, 72 Id. 359, 363; 1884, Farkas *v.* Stewart, 73 id, 90; 1889, Parker *v.* G. P. R. Co., 83 Id. 539, 546; 1890, Travelers' Ins. Co. *v.* Sheppard, 85 Id. 751, 794; 1892, Howard *v.* Johnson, 91 id. 319, 322, 18 S. E. 132; 1895, Welch *v.* Stipe, 95 id. 337, 22 S. E. 681; 1898, Keller *v.* State, 102 id. 506, 31 S. E. 92; 1901, Cochran *v.* State, 113 id. 736, 39 S. E. 337; 1903, Rusk *v.* Hill, — id. —, 45 S. E. 42; *Ida.:* Rev. St. 1887, § 6077 (like Cal. C. C. P. § 2046); 1902, McLean *v.* Lewiston, — Id. —, 69 Pac. 478; *Ill.:* 1875, Doran *v.* Mullen, 78 Ill. 145; 1881, Coon *v.* People, 99 id. 369; 1895, Cassem *v.* Galvin, 158 Id. 30, 41 N. E. 1087; 1901, Daugherty *v.* Heckard, 189 Id. 239, 59 N. E. 569; *Ind.:* 1880, Shockey *v.* Mills, 71 Ind. 291; 1881, Blizzard *v.* Applegate, 77 id. 516, 529; *Ia.:* 1875, Lowe *v.* Lowe, 40 Ia. 223; 1879, Reddin *v.* Gates, 52 Id. 214, 2 N. W. 1079; 1895, State *v.* Bauerkemper, 95 Id. 562, 64 N. W. 609; 1899, Gross *v.* Feehan, 110 Id. 163, 81 N. W. 235; 1900, State *v.* Petersen, 1b. 647, 82 N. W. 329; 1903, State *v.* Burns, — Ia. —, 94 N. W. 238; *Kan.:* 1874, Gannon *v.* Stevens, 13 Kan. 457 (unless gross abuse); *Ky.:* C. C. P. 1895, § 595 (allowable "under special circumstances making it appear that the interests of justice require it"); 1883, Wise *v.* Foote, 81 Ky. 13; *Me.:* 1831, Woodman *v.* Coolbroth, 7 Greenl. 181; 1854, State *v.* Lull, 37 Me. 249; 1854, Parsons *v.* Huff, 38 id. 143; 1859, Bliss *v.* Shuman, 47 id. 253; 1874, State *v.* Benner, 64 id. 280; *Mass.:* 1835, Moody *v.* Rowell, 17 Pick. 498; 1854, York *v.* Pease, 2 Gray 284; 1858, Com. *v.* Thrasher, 11 id. 59; 1862, Green *v.* Gould, 3 All. 466; 1888, Com. *v.* Chaney, 148 Mass. 8, 18 N. E. 572; 1890, Francis *v.* Rosa, 151 id. 534, 24 N. E. 1024; 1896, Smith *v.* Smith, 167 id. 87, 45 N. E. 52; *Mich.:* 1897, Fowler *v.* Fowler, 111 Mich. 676, 70 N. W. 336; 1898, People *v.* Root, 117 id. 578, 76 N. W. 91; 1899, Webb *v.* Feathers' Est., 119 id. 473, 78 N. W. 550; *Minn.:* 1896, Couch *v.* Steele, 63 Minn. 504, 65 N. W. 946; *Miss.:* 1847, Turney *v.* State, 8 Sm. & M. 110 (in narrow limits); 1853, Stringfellow *v.* State, 26 Miss. 160; *Mo.:* 1860, Smith *v.* Hutchings, 30 Mo. 384; 1869, Meyer *v.* People's Railway Co., 43 id. 523, 526; 1872, King *v.* Mittalberger, 50 id. 182, 184; 1874, St. Louis & I. M. R. Co. *v.* Silver, 56 id. 265; 1897, State *v.* Duestrow, 137 id. 44, 38 S. W. 554, 39 S. W. 266; 1899, State *v.* Whalen, 148 id. 286, 49 S. W. 980; 1899, Coats *v.* Lynch, 152 id. 161, 53 S. W. 895; *Mont.:* C. C. P. § 3374 (like Cal. C. C. P. § 2046); *Nebr.:* 1889, Obernalte *v.* Edgar, 28 Nebr. 70, 44 N. W. 82; 1892, Insurance Co. *v.* Gotthelf, 85 id. 357, 53 N. W. 137; 1896, Baum Iron Co. *v.* Berg, 47 id. 21, 66 N. W. 8; 1897, Perry *v.* Bank, 53 id. 89, 73 N. W. 538; 1898, Harvard *v.* Stiles, 54 id. 26, 74 N. W. 399; 1900, Welsh *v.* State, 60 id. 101, 82 N. W. 368; 1901, Dinsmore *v.* State, 61 id. 418, 85 N. W. 445; 1901, Hiersche *v.* Scott, — id. —, 95 N. W. 494; 1903, Hackney *v.* Raymond B. C. Co., — id. —, 94 N. W. 822; *N. H.:* 1855, Hucklns *v.* Ins. Co., 31 N. H. 247; 1855, Severance *v.* Carr, 43 id. 67; 1863, Steer *v.* Little, 44 id. 615 (naming certain limits); 1869, Wells *v.* Iron Co., 48 id. 540; 1884, Gerrish *v.* Gerrish, 63 Id. 128; *N. J.:* 1849, Chambers *v.* Hunt, 22 N. J. L. 552, 562; 1897, Trenton R. Co. *v.* Cooper, 60 id. 219, 37 Atl. 730; *N. Y.:* 1830, People *v.* Mather, 4 Wend. 247; 1841, Williams *v.* Eldridge, 1 Hill 255 (but not for depositions); 1859, Walker *v.* Dunspaugh, 20 N. Y. 171; 1886, People *v.* Druse, 103 id. 655, 8 N. E. 733; *N. C.:* 1857, Gunter *v.* Watson, 4 Jones L. 456; 1897, Crenshaw *v.* Johnson, 120 N. C, 270, 26 S. E. 810; 1902, State Bank *v.* Carr, — id. —, 41 S. E. 876; *Okl.:* 1896, Ellison *v.* Bennabia, 4 Okl. 347, 46 Pac. 477; *Or.:* C. C. P. 1892, § 835 (like Cal. C. C. P. § 2046); 1889, State *v.* Chee Gong, 17 Or. 639, 21 Pac. 882; 1901, State *v.* Ogden, — id. — , 65 Pac. 449; *S. C.:* 1895, State *v.* Johnson, 43 S. C. 123, 20 S. E. 988; 1897, State *v.* Green, 48 id. 136, 26 S. E. 234; 1898, Spencer O. M. Co. *v.* Johnson, 53 id. 533, 31 S. E. 392; 1901, Latimer *v.* Sovereign Camp, — id. —, 39 S. E. 155; 1901, State *v.* Marchbanks, — id. —, 39 S. E. 187; *Tex.:* 1899, International & G. N. R. Co. *v.* Dalwigh, 92 Tex. 655, 51 S. W. 500; *U. S.:* 1893, St. Clair *v.* U. S., 154 U. S. 134, 150, 14 Sup. 1002; 1894, Northern P. R. Co. *v.* Urlin, 158 id. 273, 15 Sup. 840; 1899, Peters *v.* U. S., 36 C. C. A. 105, 94 Fed. 127; 1903, Rainey *v.* Potter, — id. — , 120 Fed. 651; *Utah:* 1902, Rio Grande W. R. Co. *v.* Utah N. Co., — Utah — , 70 Pac. 859; *Vt.:* 1840, Hopkinson *v.* Steel, 12 Vt. 584; *Wis.:* 1860, Carlyle *v.* Plumer, 11 Wis. 96, 109; 1863, Barton *v.* Kane, 17 id. 37, 42, *semble;* 1875, McPherson *v.* Rockwell, 37 id. 162; 1883, Rounds *v.* State, 57 id. 53, 14 N. W. 865; 1884, Wright *v.* Fort Howard, 60 Id. 121, 18 N. W. 750; 1886, Coggswell *v.* Davis, 65 id, 191, 203, 26 N. W. 557; 1893, Proper *v.* State, 85 id. 626, 55 N. W. 1035; 1895, Porath *v.* State, 90 id. 527, 63 N. W. 1061; 1897, McDermott *v.* Jackson, 97 id. 64, 72 N. W. 375; 1898, Kohler *v.* R. Co., 99 id. 33, 74 N. W. 568; 1902, Goodwin *v.* State, 114 id. 318, 90 N. W. 170; 1902, Banneu *v.* State, 115 id. 317, 91 N. W. 107, 965.

In the following rulings certain questions were ruled upon according to the circumstances, but the rulings are of no service as precedents: 1896, Yoch *v.* Ins. Co., 111 Cal. 503, 44 Pac. 189; 1901, King *v.* Westbrooks, 114 Ga. 307, 40 S. E. 262; 1902, Sivell *v.* Hogan, 115 Id. 667, 42 S. E. 151; 1895, Springfield R. Co. *v.* Welsh, 155 Ill. 511, 40 N. E. 1034; 1896, State *v.* Fontenot, 48 La. An. 220, 19 So. 112; 1854, Lee *v.* Tinges, 7 Md. 233; 1896, Goeschel *v.* Fisher, 108 Mich. 212, 65 N. W. 965; 1858, Spear *v.* Richardson,

The entire regulation of the procedure, furthermore, is attended by n fixed rules. For example, when an improperly suggestive question has bee put but ruled out, it may be allowed to be phrased in proper form and pu again,[1] although presumably the harm has been irretrievably done; or, th witness in such a case may be prevented from answering at all on the subjec of the question.[2] The proper consequence to be applied is peculiarly a matte for the trial Court's discretion.[3] Nevertheless, there are certain canons o guidance which may be formulated for the trial Court as the general foundi tion for its discretionary rulings. They are none the less rules of law, eve though their application may not be the subject of an appeal. They are o two sorts, answering the two questions, (a) when must questions be forbidde because of the danger of improper suggestion? and (b) when, though suc danger exists, may the questions nevertheless be permitted by way of excep tion? This distinction is sometimes ignored; but it is a real one. When i is said, for example, that a hostile witness may be asked a leading question this form of stating the rule is erroneous, because the determination really i that there is no danger of false suggestion, *i. e.* that the question is not lead ing at all. On the other hand, when a witness' memory is exhausted and he is therefore allowed to be led, the leading question is allowed, but by way o exception. There is a distinction, then, between holding a question to be al lowable *because* it is *not* suggestive and holding it to be allowable *though* it *i* suggestive.

§ 771. **Same: (2) Kinds of Leading Questions; Assuming a Controverted Fact.** A question which in part assumes the truth of a controverted fact may lead a witness to reply without taking care to specify that his answer is based on that assumption, and may thus commit him to an assertion of the assumed fact, though in fact he may not desire or be able to do so. This is obviously a danger to be prevented:

1863, *Bell*, C. J., in *Steer* v. *Little*, 44 N. H. 616: "[A question is leading] where the question assumes any fact which is in controversy, so that the answer may really or apparently admit that fact. Such are the forked questions habitually put by some counsel if unchecked; as, What was the plaintiff doing when the defendant struck him? the controversy being whether the defendant did strike. A dull or a forward witness may answer the first part of the question and neglect the last."

1890, *Bleckley*, C. J., in *Travelers' Ins. Co.* v. *Sheppard*, 85 Ga. 751, 794 (the issue being whether the insured was really deceased or had fraudulently pretended to be drowned, questions of the following sort were held improper: 'State what was the nature of the

37 N. H. 31; 1896, People *v.* Nino, 149 N. Y. 317, 43 N. E. 853; 1814, Snyder *v.* Snyder, 6 Binn. 490; 1824, Wogan *v.* Small, 11 S. & R. 143; 1867, Trammell *v.* McDade, 29 Tex. 361; 1898, Parker *v.* Brown, 29 C. C. A. 357, 85 Fed. 595; 1849, Hopper *v.* Com., 6 Gratt. 686.

[1] *E. g.*: 1900, Allen *v.* Ins. Co., 72 Conn. 693, 45 Atl. 955.

[2] *E. g.*: 1898, Burks *v.* State, 120 Ala. 386, 24 So. 931; 1856, Heisler *v.* State, 20 Ga. 153, 155 (refusing to authorize the witness to be prevented from answering: "this remedy would be worse than the disease; it is one which so far as we know has never been applied in practice; if a remedy known to law, yet whether it shall be applied in any case is a matter which, like that as to the asking of leading questions, is for the discretion of the Court presiding; . . . a little wholesome punishment inflicted upon the counsel that indulge in such questions would no doubt soon stop the practice").

[3] For the general doctrine of *judicial discretion*, see *ante*, § 16.

For leading questions *by the judge*, see *post*, § 784.

current at the point where Sheppard fell in'): "This sort of assumption is one of the most pernicious forms in which the vice of leading questions can make its appearance, its tendency being to induce the witness to adopt the theory of the facts propounded by the examiner, and shape his testimony in a way to lend support to that theory. Even an honest and well-meaning witness may sometimes be drawn by this device into coloring the letter if not the spirit of his evidence more highly than the exact truth, so far as his knowledge of it extends, would warrant."[1]

§ 772. **Same: Calling for Answer 'Yes' or 'No'; Alternative Questions.** (1) A question *admitting of being answered by a simple 'yes' or 'no'* is regarded as generally a leading and improper one.[1] Nevertheless, it is obvious that such a question carries its suggestion more in the tone of voice than in the form of words. The particle 'not' (as in, "Did you not say that you refused the offer?") does indeed convey in itself the suggestion that an affirmative answer is desired; but the opposite form ("Did you say that you refused the offer?") by no means betrays in form such a suggestion, and depends almost wholly upon the intonation for suggestion;[2] in other words, it may or may not be leading. This is peculiarly a case for the principle (*ante*, § 770) that the trial Court's determination controls.

(2) The *alternative form* of question ("State whether or not you said that you refused," "Did you or did you not refuse?") is free from this defect of form, because both affirmative and negative answers are presented for the witness' choice. Nevertheless, such a question may become leading, in so far as it rehearses lengthy details which the witness might not otherwise have mentioned, and thus supplies him with full suggestions which he incorporates without any effort by the simple answer, "I did," or "I did not." Accordingly, the sound view is that such a question may or may not be improper, according to the amount of palpably suggestive detail which it embodies:

1891, *Gaines*, J., in *Lott* v. *King*, 79 Tex. 202, 209, 15 S. W. 231 (the question being 'state whether or not you ever sold and conveyed the headright certificate of John B. Bulrese for one league and one labor of land to said Barnes Parker'): "It does not properly admit of an answer 'yes' or 'no'. . . . Whether a question in that or a similar form be leading or not depends upon the determination of the inquiry whether it suggests any particular answer; and we think questions in that form which have been held leading are not such as inquire into a single fact, but such as enable the witness to state in two words, such as 'he did' or 'he did not' a series or group of facts. . . . As to the question now

[1] *Accord:* 1897, *Re* Hine, 68 Conn. 551, 37 Atl. 384; 1890, Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 794, 12 S. E. 18; 1900, Franks v. Gross Lumber Co., 111 Id. 87, 36 S. E. 314; 1858, Carpenter v. Ambroson, 20 Ill. 172; 1879, Hewitt v. Clark, 91 id. 608; 1847, Turney v. State, 8 Sm. & M. 110; 1879, Davis v. Cook, 14 Nev. 287; 1857, Willey v. Portsmouth, 35 N. H. 307.

Compare the analogous impropriety of *misleading questions on cross-examination*, *post*, § 780.

[1] 1815, Nicholls v. Dowding, 1 Stark. 81, and cases in notes *infra*; 1899, International & G. N. R. Co. v. Dalwigh, 92 Tex. 655, 51 S. W. 500. Doubted: 1856, Mathis v. Buford, 17 Tex. 155.

[2] In Latin, on the contrary, the particles 'nonne' and 'an' were both distinctively suggestive. An amusing illustration of the suggestive uses to which such questions in Latin could be put is related by Lord Brougham (12 Law Rev. 114, cited by the writer in a note in 1 Harv. Law Rev. 297): "When I was attending lectures on the civil law in Edinburgh, they were all in Latin. A set of Latin questions were proposed after the lecture to the students. Very difficult indeed, some of them might be to answer, if a proper answer were required; but all we had to do was, if the question commenced with 'nonne,' we said 'etiam,' and if with 'an,' we replied 'non.'"

under consideration, we think it would puzzle the astutest lawyer who is uninformed as to the issues in the case to determine from the question alone whether the examiner desired to prove that the witness had or had not transferred the certificate."

Three attitudes are represented among the Courts: (*a*) Most Courts treat such a question as depending upon the circumstances, in the manner above stated;[3] (*b*) a few Courts seem to treat it as always proper;[4] (*c*) while a few seem to treat it as necessarily improper.[5]

§ 773. **Same: Opponent's Witness under Cross-Examination.** The typical situation in which the witness' presumable bias removes all danger of improper suggestion is that of an opponent's witness under cross-examination. The purpose of the cross-examination is to sift his testimony and weaken its force, in short, to discredit the direct testimony; thus, not only the presumable bias of the witness for the opponent's cause, but also his sense of reluctance to become the instrument of his own discrediting, deprive him of any inclination to accept the cross-examiner's suggestions unless the truth forces him to. Accordingly, it is well settled that on cross-examination of an opponent's witness, ordinarily no question can be improper as leading:

1820, *Wilson's Trial*, 2 Green (Sc.) 119: Mr. *Murray*: "I am surely entitled to lead in cross-examination?"; Lord *President*: "No; I never heard that with us"; Mr. *Murray*: "I remember hearing a judge in England, upon that being stated to him, saying, 'Good God, what a country!'"

1874, *Appleton*, C. J., in *State* v. *Benner*, 64 Me. 279: "Cross-examination of an opponent's witness [in leading form] is allowable. Why? Because, being called by him [the opponent], it has been imagined that there was some tie of sympathy or interest which would induce partiality on the part of the witness in favor of the party who called him."[1]

[3] 1897, Coagler *v.* Rhodes, 38 Fla. 240, 21 So. 109; 1895, State *v.* Wickliff, 95 Ia. 386, 64 N. W. 283; 1879, McKeown *v.* Harvey, 40 Mich. 228; 1856, Bartlett *v.* Hoyt, 33 N. H. 165; 1858, Spear *v.* Richardson, 37 id. 26; 1860, Page *v.* Parker, 40 id. 63; 1863, Steer *v.* Little, 44 id. 616; 1862, Tinsley *v.* Carey, 26 Tex. 350, 352; 1891, Lott *v.* King, 79 id. 292, 299, 15 S. W. 231 (see quotation *supra*).

[4] 1867, Adams *v.* Harrold, 29 Ind. 200; 1859, Peiamourges *v.* Clark, 9 Ia. 18.

[5] 1877, State *v.* Johnson, 29 La. An. 718; 1830, Marcy, J., in People *v.* Mather, 4 Wend. 248; 1840, U. S. *v.* Dickinson, 2 McLean 331 ("the form laid down in some of the books, 'do you or do you not know, etc.,' is a leading question, and may be so emphasized as to indicate in the strongest terms the desired answer").

[1] 1836, Parkin *v.* Moon, 7 C. & P. 409; Alaska C. C. P. 1900, § 666; Ark. Stats. 1894, § 2957; Cal. C. C. P. 1872, § 2048; Ga. Civ. Code 1895, § 5283, Cr. C. § 1019 (leading questions are "generally allowed in cross-examinations," but the Court in discretion may forbid them); 1884, Cade *v.* Hatcher, 72 Ga. 359, 363; Ida. Rev. St. 1887, § 6079; Ky. C. C. P. 1895, § 595; 1888, Townsend's Succession, 40 La. An. 67, 73, 3 So. 488; 1874, State *v.* Benner, 64 Me. 279 (see quotation *supra*); 1835, Moody *v.* Rowell, 17 Pick. 498; Or. Annot. C. 1892, § 837; 1820, Harrison *v.* Rowan, 3 Wash. C. C. 582; 1840, U. S. *v.* Dickinson, 2 McLean 331 ("the witness having been called by one party, may not be equally willing to disclose all he knows that shall be favorable to the other"); 1901, Hempton *v.* State, 111 Wis. 127, 86 N. W. 596. Compare § 915, *post*.

Unnecessary doubt has sometimes been thrown on this subject by misunderstood passages. A cross-examination was objected to as using leading questions in the Seven Bishops' Trial, 12 How. St. Tr. 310 (1688), and the judge says: "You must answer any questions that are not ensnaring questions"; but the same objector afterwards gives as his reason that the questions were asked "only to enflame, and to possess people with foolish notions and strange conceits," *i. e.* the matter implied dishonorable conduct to the King and the prosecution wished to avoid the subject; but no further principle seems to have been brought out. The remarks in Hardy's Trial, 24 How. St. Tr. 659 (1794), in which Mr. Erskine was told by L. C. J. Eyre, "You are not to put the very words in his mouth, even on a cross-examination," were said of a witness manifestly favorable to the cross-examiner, and were not intended to be applied to the ordinary case of a hostile witness.

That leading questions are not *usually* to be asked on cross-examination is maintained by Mr. Joseph Chitty, in Practice of the Law, III, 892, because the reason above quoted from him

Yet, where the reason ceases, the rule ceases also; thus, when an opponent's witness proves to be in fact biassed in favor of the cross-examiner, the danger of leading questions arise and they may be forbidden.[2]

(*a*) Distinguish the question whether a counsel may ask about the facts of his *own case on cross-examination*. The majority of Courts in this country, departing from the orthodox rule, refuse to allow it; a few of them, however, allow it on the condition that leading questions be not asked. The two rules, however, have nothing in common, and ought not to be so connected; the distinction is dealt with elsewhere (*post*, §§ 915, 1891).[3]

(*b*) Distinguish also the *misleading* question on cross-examination (*post* § 780); the form of question is sometimes identical, but the purpose is opposite,—in the one instance, of colluding with a favorable witness, in the other, of tricking a hostile witness.

§ 774. **Same: Witness Hostile, Biassed, or Unwilling.** A similar situation arises where the witness, though called by the party examining, is in fact biassed against his cause and is thus indisposed to favor it by accepting suggestions of desired testimony. Here a question cannot be objectionable as leading:

1682, Mr. *Williams*, arguing, in *Coningsmark's Trial*, 9 How. St. Tr. 1, 37: "There is a great deal of difference, I find, where you examine a man with the hair and where you examine him against the hair. Where you find it difficult to make a man answer, you will pump him with questions and cross-interrogate him, to sift out the truth."

1806, Mr. *W. D. Evans*, Notes to *Pothier*, II, 228: "This unwillingness is commonly to be decided by the judge, according to his impression of the demeanour of the witness, upon the trial. The situation of the witness, and the inducements which he may have for withholding a fair account, are also very proper circumstances to be taken into account in forming this decision. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness; a servant will not, in an action against his master, be very ready to acknowledge the negligence committed by himself."

1874, *Appleton*, C. J., in *State* v. *Benner*, 64 Me. 279: "If the witness is from any cause adverse to the party calling him, the same reason which authorizes and sanctions cross-examination, more or less rigorous, equally requires it when the party finds that the witness whom the necessities of his case have compelled him to call is adverse in feeling, is reluctant to disclose what he knows, is evasive or false. Important as interrogation may be, if the witness is friendly, to remove uncertainty and indistinctness and to give fullness and clearness, doubly important is it, if the witness be dishonest and adverse, to extract from reluctant lips facts concealed from sympathy, secreted from interest, or withheld from dishonesty. Cross-examination may be as necessary to elicit the truth from one's own as from one's opponent's witness."

This situation includes not only the case of witnesses hostile, biassed, or interested, in their sympathies with the opponent's cause,[1] but also of wit-

In § 769 applied equally in this case; but he probably had in mind the sort of misleading questions noted *infra*, § 780.

[2] 1874, Rush *v.* French, 1 Ariz. 99, 140, 25 Pac. 816; 1335, Moody *v.* Rowell, 17 Pick. 498.

[3] For the related question as to using an *opponent's deposition*, as affected by the present rule, see *post*, § 912.

[1] 1824, Clarke *v.* Saffery, Ry. & Moo. 126, Best, C. J.; 1838, R. *v.* Chapman, 8 C. & P. 559, Abinger, C. B.; 1839, R. *v.* Ball, 8 C. & P. 745, Erskine, J.; 1874, Ohlsen *v.* Terrero, L. R. 10 Ch. 129, Lord Cairns, L. C.; 1841, Towns *v.* Alford, 2 Ala. 380; 1841, Blevins *v.* Pope, 7 id. 374; 1832, Stratford *v.* Sanford, 9 Conn. 283; 1892, Rosenthal *v.* Bilger, 86 Ia. 246, 247, 53 N. W. 255; 1854, Parsons *v.* Hull.

nesses unwilling for any other reason to tell all they may know;[2] though the two classes are not different in principle, nor always distinguished by the Courts.

§ 775. **Same: Preliminary Undisputed Matters.** When a witness is asked about matters preliminary to the main topics of controversy — matters essential to be brought out, and yet not themselves in controversy —, such as the witness' name, age, residence, relationship to the parties, and the like, it is obvious that there is usually no danger of improper suggestion, simply because there is no motive for it:

1806, Mr. *W. D. Evans*, Notes to *Pothier*, II, 226: "The good sense of the rule is perfectly manifest with respect to all cases where the question propounded involves an answer immediately bearing upon the merits of the cause, and indicating to the witness a representation which will best accord with the interests of the party. But where the questions are merely introductory, where the mere answer of yes or no will leave the point of the case precisely as it found it and can only be material as laying the foundation for a further inquiry, the reason of the objection does not occur, and the objection itself appears to be ill-founded; and the making it can only proceed from a captious and petulant disposition to interrupt the course of examination."

1830, *Marcy*, Sen., in *People* v. *Mather*, 4 Wend. 247: "If the question relate to introductory matter and be designed to lead the witness with more expedition to what is material to the issue, it is captious to object to it, even if it be leading."[1]

§ 776. **Same: (3) Exceptions allowed; Trial Court's Discretion.** In spite of the danger of suggestion by questions, there arise situations in which these dangerous questions become a necessity, — situations in which the risk of losing useful testimony outweighs the risk of false suggestion. Whether such an exceptional situation exists on the facts is a question for the determination of the trial Court.[1] Nevertheless, there are one or two common

38 Me. 142; 1874, State v. Benner, 64 id. 279 (see quotation *supra*); 1835, Moody v. Rowell, 17 Pick. 498; 1886, McBride v. Wallace, 62 Mich. 453, 29 N. W. 75; 1897, People v. Gillespie, 111 id. 241, 69 N. W. 490; 1830, People v. Mather, 4 Wend. 247; 1893, St. Clair v. U. S., 154 U. S. 150, 14 Sup. 1002; 1896, Putnam v. U. S., 162 id. 687, 16 Sup. 923. The bias of the witness may be presumed from his situation as to interest or relationship, before it is disclosed in his testimony; 1824, Clarke v. Saffery, Ry. & Moo. 126, Best, C. J. (one creditor of a bankrupt against another). In one ruling the doctrine as a whole has been denied: 1825, Anon., 1 Lew. Cr. C. 322 ("Bayley, J., refused to allow an adverse witness to be led, although, as he said, he was aware some Judges differed from him in opinion. His reason was that it afforded an opportunity for collusion between the parties and their witnesses, and that a witness might be instructed to give certain answers in order to make him an adverse witness and thereby enable his counsel to put leading questions to him)." This fantastic reasoning proposes to handicap all honest counsel because a few may practise dishonestly; moreover, if a witness were as cunning as the one imagined by the learned judge, he would certainly be cunning enough to fulfil his plot without the aid of leading questions.

[2] 1836, Parkin v. Moon, 7 C. & P. 409, Alderson, B.; 1837, R. v. Murphy, 8 id. 306, Coleridge, J.; 1841, Towns v. Alford, 2 Ala. 380; 1845, Blevins v. Pope, 7 id. 374; 1832, Stratford v. Sanford, 9 Conn. 283; 1882, Bradshaw v. Combs, 102 Ill. 434; 1895, People v. Caldwell, 107 Mich. 374, 65 N. W. 213; 1849, Walsh v. Agnew, 12 Mo. 525; 1840, U. S. v. Dickinson, 2 McLean 331.

[1] *Accord:* 1874, Gannon v. Stevens, 13 Kan. 457; 1864, Hall v. Taylor, 45 N. H. 407; Or. C. C. P. § 835 ("unless merely formal or preliminary" questions); 1889, Hausenfluck v. Coun., 85 Va. 707, 8 S. E. 683.

Nevertheless, in accordance with the general principle (*ante*, § 769), if such a matter — *e. g.* name or age — should be the subject of real controversy, a suggestive question would be improper.

[1] The cases on this point are collected *ante*, § 770. It is common to say judicially that "leading questions are allowable in the trial Court's discretion," and it is often impossible to say whether this applies to the definition of such a question or to the exceptional allowance of it.

classes of cases in which a canon of guidance (*ante*, § 770) has been laid down.

§ 777. **Same: Witness' Recollection Exhausted.** Where the witness is unable without extraneous aid to revive his memory on the desired point — *i. e.* where he understands what he is desired to speak about, but cannot recollect what he knows —, here his recollection, being exhausted, may be aided by a question suggesting the answer. The trial Court's discretion must be relied upon to prevent imposition:

1854, *Per Curiam*, in *State* v. *Jeandell*, 5 Harringt. 475, 478 (the witness being asked as to the time of a fact): "The rule is plain; its application is not always evident. You are first to test the witness' own knowledge or recollection of the time by questions necessary for that; if his memory is at fault, you may suggest cotemporaneous events, with a view to stimulate or fix his recollection."[1]

§ 778. **Same: Witness not Understanding; Children, Invalids, Illiterates, Decedents.** Where there is as yet no exhaustion of memory, but the witness merely does not appreciate the tenor of the desired details and thus is unable to say anything about it, a question calling attention specifically to the details may be allowable, when other means have failed.[1] It may not be necessary to name all of the details; the mention of one or more of them may suffice by association to stimulate the recollection of the remainder. The common situation of this sort, running perhaps throughout the person's entire testimony, is that of a *child*,[2] or of an *illiterate* or *alien adult*.[3] A related situation is that of a person too ill or too feeble of speech to be able to articulate sentences; here the sentences may be framed for him suggestively, leaving him as little as possible to articulate and yet avoiding the danger of a misunderstood signal of assent or dissent.[4]

§ 779. **Same: Proving a Contradiction.** Where a witness is called to prove the prior self-contradictory statement of another witness, the tenor of the words in question become important. Moreover, the utterance proved must be substantially the same as that upon which the other witness has already

[1] 1807, Courteen *v.* Touse, 1 Camp. 43, Ellenborough, L. C. J.; 1815, Acerro *v.* Petroni, 1 Stark. 100, Ellenborough, L. C. J.; 1882, Herring *v.* Skaggs, 73 Ala. 453; 1854, State *v.* Jeandell, 5 Harringt. 475, 478 (see quotation *supra*); 1854, Parsons *v.* Huff, 38 Me. 142; 1835, Moody *v.* Rowell, 17 Pick. 498; 1855, Huckins *v.* Ins. Co., 31 N. H. 247; 1861, Severance *v.* Carr, 43 id. 67; 1879, O'Hagan *v.* Dillon, 76 N. Y. 173; 1885, Toomey *v.* Kay, 62 Wis. 107, *semble*, 22 N. W. 286.

[1] 1815, Nicholls *v.* Dowling, 1 Stark. 81 (Ellenborough, L. C. J., "it is necessary to a certain extent to lead the mind of the witness to the subject of the inquiry"); 1881, De Haven *v.* De Haven, 77 Ind. 240; 1875, Lowe *v.* Lowe, 40 Ia. 223; 1872, Bullard *v.* Hascall, 25 Mich. 136; 1853, Stringfellow *v.* State, 26 Miss. 160; 1850, Stewart *v.* State, 19 Oh. 397; 1852, Loug *v.* Steiger, 8 Tex. 462.

[2] 1879, Coon *v.* People, 99 Ill. 369 (but pointing out that sometimes leading questions should specially be avoided with children); 1903, Johnson *v.* People, 202 Ill. 53, 66 N. E. 877 (similar); 1890, State *v.* Watson, 81 Ia. 380, 383, 46 N. W. 868 (youthful witness in a rape charge); 1835, Moody *v.* Rowell, 17 Pick. 498.

[3] 1875, Dorn *v.* Mullen, 78 Ill. 345 (ignorant person); 1899, Kruse *v.* S. & W. Lumber Co., 108 Ia. 352, 79 N. W. 118 (one not well understanding English); 1899, State *v.* Yellow Hair, 22 Mont. 33, 55 Pac. 1026 (witness illiterate and testifying by an interpreter); 1901, Carlson *v.* Holm, — Nebr. —, 95 N. W. 1125.

[4] 1899, State *v.* Burns, — Ia. —, 78 N. W. 681 (deaf-mute); 1893, Belknap *v.* Stewart, 38 Nebr. 304, 310, 56 N. W. 881 (one so affected by paralysis as to be able to utter only monosyllables).

The case of the *dying declarant* is the subject of some controversy, and is dealt with under that head, *post*, § 1445.

been questioned (*post*, § 1029). Hence, as it is often practically impossible to inform the witness of the subject of his testimony without suggesting the details of the statement, such a suggestion has been commonly allowed;[1] and so also for the impeached witness' explanation of his statements.[2]

§ 780. **Misleading Questions by Cross-examiner.** (a) A question which *assumes a fact* that may be in controversy is leading, when put on direct examination (as noted *ante*, § 771), because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect. Similarly, such a question may become improper on cross-examination, because it may by implication put into the mouth of an unwilling witness a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his:[1]

1835, Mr. *Joseph Chitty*, Practice of the Law, 2d ed., III, 901: "It is an established rule, as regards cross-examination, that a counsel has no right, even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had previously been proved when it had not. Indeed, if such attempts were tolerated, the English Bar would soon be debased below the most inferior of society."

1794, *Hardy's Trial*, 24 How. St. Tr. 754; Mr. *Erskine*, cross-examining a witness to the proceedings of an alleged seditious meeting: "Then you were never at any of those meetings but in the character of a spy?" — "As you call it so, I will take it so." — "If you were not there as a spy, take any title you choose for yourself, and I will give you that"; L. C. J. *Eyre*: "There should be no name given to a witness on his examination. He states what he went for, and in making observations on the evidence, you may give it any appellation you please." After a repetition of the practice, Mr. *Gibbs*: "I am sorry to interrupt you, but your questions ought not to be accompanied with those sort of comments; they are the proper subjects of observation when the defence is made. The business of a cross-examination is to ask to all sorts of acts, to probe a witness as closely as you can; but it is not the object of a cross-examination to introduce that kind of periphrasis as you have just done"; Mr. *Erskine*: "But, on a cross-examination, counsel are not called upon to be so exact as in an original examination; you are permitted to lead a witness"; L. C. J. *Eyre*: "I think it is so clear that the questions that are put are not to be loaded with all the observations that arise upon all the previous parts of the case; they tend so to distract the attention of everybody, they load us in point of time so much; and that that is not the time for observation upon the character and situation

[1] 1807, Courteen *v.* Touse, 1 Camp. 43; 1820, Edmonds *v.* Walter, 3 Stark. 8; 1884, Phœnix Ins. Co. *v.* Meog, 78 Ala. 310; 1882, People *v.* Ah Yute, 60 Cal. 95; 1857, Gunter *v.* Watson, 4 Jones L. 457; 1878, Farmers' M. F. Ins. Co. *v.* Bair, 87 Pa. 128; 1896, Union P. R. Co. *v.* O'Brien, 161 U. S. 451, 16 Sup. 618; 1895, Norton *v.* Parsons, 67 Vt. 526, 32 Atl. 431; 1857, Ketchingman *v.* State, 6 Wis. 426; 1883, Rounds *v.* State, 57 id. 53, 14 N. W. 865; compare the citations *ante*, § 761. *Contra*: 1839, Hallett *v.* Cousens, 2 Moo. & Rob. 238 (Erskine, J., would not let the counsel "read from his brief the very words which the [other] witness had so denied having used"; that method being allowable only when it was necessary to keep out "parts of the conversation which are not evidence").

[2] 1894, Farrell *v.* Boston, 161 Mass. 106, 36 N. E. 751 (to correct a mistake on cross-examination, reference was allowed to the supposed contrary occurrence); 1888, Stone *v.* Ins. Co., 71 Mich. 81; 1873, Bullard *v.* Pearsall, 53 N. Y. 230; 1889, People *v.* Kelly, 113 id. 647, 21 N. E. 122.

[1] The following anecdote neatly illustrates this trick of a "loaded" or "forked" question: "Sir Frank Lockwood was once engaged in a case in which Sir Charles Russell (the late Lord Chief Justice of England) was the opposing counsel. Sir Charles was trying to browbeat a witness into giving a direct answer. 'Yes,' or 'No.' 'You can answer *any* question yes or no,' declared Sir Charles. 'Oh, can you?' retorted Lockwood 'May I ask if you have left off beating your wife?'" (Green Bag, vol. XII, p. 671).

of a witness is so apparent that as a rule of evidence it ought never to be departed from."

1888, *Parnell Commission's Proceedings*, 19th day, Times' Rep. pt. 5, p. 221; the "Times" having charged the Irish Land League with complicity in crime and outrage, a constable testifying to outrages was cross-examined by the opponents as to his partisan employment by the "Times" in procuring its evidence; Mr. *Lockwood:* "How long have you been engaged in getting up the case for the 'Times'?" Sir *H. James:* "What I object to is that Mr. Lockwood, without having any foundation for it, should ask the witness 'How long have you been engaged in getting up the case for *The Times*?'" Mr. *Lockwood:* "I will not argue with my learned friend as to the exact form of the question, but I submit that it is perfectly proper and regular. If the man has not been engaged in getting up the case for *The Times* he can say so;" Sir *H. James:* "I submit that my learned friend has no right to put this question without foundation. Counsel has no right to say 'When did you murder A. B.?' unless there is some foundation for the question. In this same way he has no right to ask 'How long have you been engaged in getting up this case?' for it assumes the fact." . . . President *Hannen.* "I do not consider that Mr. Lockwood was entitled to put the question in that form and to assume that the witness has been employed by *The Times*." [1]

(b) Another improper way in which, by insinuation, testimony may be incorrectly attributed to a witness is that of asking him to *refresh his recollection* by a paper and then say whether he still persists in his first statement; this has been already noticed (*ante*, § 764). (c) So also the prohibition of *impeaching questions as to prior misconduct* is sometimes based (*post*, § 983) upon the opportunities which they offer to fraudulent insinuations of misdeeds which the counsel has in reality no reason to suppose were ever committed.

Distiuguish (1) the rule that a cross-examiner *need not state the purpose of his question* (*post*, § 1871); the objection in such a case is not that the witness is deceived as to the ultimate purpose of the question, for it is immaterial whether or not he understands that, and it is enough if he is not deceived as to its actual tenor; the objection to a cross-examiner's not disclosing his purpose is that the relevancy of the facts inquired about may otherwise not appear, and the rule permitting such concealment is merely a necessary exception to the general rule requiring relevancy to appear at the time of asking; (2) the rule that a counsel *may not state* as a fact a matter upon which *no evidence* has been offered, nor discuss offered evidence in the jury's presence (*post*, §§ 1806, 1808); this is merely an application of the general rule against hearsay; (3) the rule requiring a *writing*, proved merely as to its execution, to be *shown to the opponent* before the witness retires (*post*, § 1859) is a rule designed to prevent unfairness, but does not concern the present principle; (4) the rule that a cross-examination cannot go beyond the scope of the direct examination; this is sometimes trickily used by *confining the*

[1] *Accord:* 1900, Hand *v.* Soodeletti, 128 Cal. 674, 61 Pac. 372; 1885, State *v.* Labuzan, 37 La. An. 489, 491 (question assuming that the witness had testified as he had not in fact, excluded; "such questions have a tendency to irritate, confuse, and mislead the witness, the parties, and their counsel, the jury and the presiding judge, and they embarrass the administration of justice"); 1903, State *v.* Williams, 111 La. —, 35 So. 521 ("witnesses should not be cross-examined on the assumption that they have testified to facts touching which they have given no testimony").

direct examination to a few safe topics; the unsoundness of this rule (which involves a different principle) is considered elsewhere (*post*, § 1887).

§ 781. **Intimidating and Annoying Questions by Cross-examiner.** An intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also questions which in form or subject cause shame or anger in the witness may unfairly lead him to such demeanor and utterance that the impression produced by his statements does not do justice to his real testimonial value. These are two of the notorious abuses of cross-examination, and always have been, both in the early period when it was still chiefly used by judges only, and also since the time of its mature elaboration, more than a century ago, as the greatest weapon of truth ever forged. In the following noted passages of fiction its inveterate abuse has been satirized:

1837, Mr. *Charles Dickens*, The Pickwick Club, c. XXIV: "'Nathaniel Winkle!' said Mr. Skimpin. 'Here!' replied a feeble voice. Mr. Winkle entered the witness-box, and having been duly sworn, bowed to the judge with considerable deference. 'Don't look at me, sir,' said the judge,[1] sharply, in acknowledgment of the salute; 'look at the jury.' Mr. Winkle obeyed the mandate, and looked at the place where he thought it most probable the jury might be; for seeing anything in his then state of intellectual complication was wholly out of the question. Mr. Winkle was then examined by Mr. Skimpin, who, being a promising young man of two or three and forty, was of course anxious to confuse a witness who was notoriously predisposed in favor of the other side, as much as he could. 'Now, sir,' said Mr. Skimpin, 'have the goodness to let his Lordship and the jury know what your name is, will you?' And Mr. Skimpin inclined his head on one side to listen with great sharpness to the answer, and glanced at the jury meanwhile, as if to imply that he rather expected Mr. Winkle's natural taste for perjury would induce him to give some name which did not belong to him. 'Winkle,' replied the witness. 'What's your Christian name, sir?' angrily inquired the little judge. 'Nathaniel, sir.' 'Daniel, — any other name?' 'Nathaniel, sir — my Lord, I mean.' 'Nathaniel Daniel, or Daniel Nathaniel?' 'No, my Lord, only Nathaniel — not Daniel at all.' 'What did you tell me it was Daniel for then, sir?' inquired the judge. 'I did n't, my Lord,' replied Mr. Winkle. 'You did, sir,' replied the judge, with a severe frown. 'How could I have got Daniel on my notes, unless you told me so, sir?' This argument was, of course, unanswerable. 'Mr. Winkle has rather a short memory, my Lord,' interposed Mr. Skimpin, with another glance at the jury. 'We shall find means to refresh it before we have quite done with him, I dare say.' 'You had better be careful, sir,' said the little judge, with a sinister look at the witness. Poor Mr. Winkle bowed, and endeavored to feign an easiness of manner, which, in his then state of confusion, gave him rather the air of a disconcerted pickpocket. 'Now, Mr. Winkle,' said Mr. Skimpin, 'attend to me, if you please, sir; and let me recommend you, for your own sake to bear in mind his Lordship's injunctions to be careful. I believe you are a particular friend of Pickwick, the defendant, are you not?' 'I have known Mr. Pickwick now, as well as I recollect at this moment, nearly' — 'Pray, Mr. Winkle, do not evade the question. Are you, or are you not, a particular friend of the defendant's?' 'I was just about to say, that' — 'Will you, or will you not, answer my question, sir?' 'If you don't answer the question, you 'll be committed, sir,' interposed the little judge, looking over his note-book. 'Come, sir,' said Mr. Skimpin, 'yes or no, if you please.' 'Yes, I am.' 'Yes, you are. And why could n't you say that at once, sir? Perhaps you know the plaintiff too — eh, Mr. Winkle?'

[1] The name "Stareleigh," given by the novelist to this judge, is supposed to have signified Mr. J. Gaselee.

'I don't know her; I've seen her.' 'Oh, you don't know her, but you've seen her? Now, have the goodness to tell the gentlemen of the jury what you mean by *that*, Mr. Winkle.' 'I mean that I am not intimate with her, but that I have seen her when I went to call on Mr. Pickwick, in Goswell Street.' 'How often have you seen her, sir?' 'How often?' 'Yes, Mr. Winkle, how often? I'll repeat the question for you a dozen times, if you require it, sir.' And the learned gentleman, with a firm and steady frown, placed his hands on his hips, and smiled suspiciously at the jury. On this question there arose the edifying brow-beating, customary on such points. First of all, Mr. Winkle said it was quite impossible for him to say how many times he had seen Mrs. Bardell. Then he was asked if he had seen her twenty times, to which he replied, 'Certainly, — more than that.' Then he was asked whether he had n't seen her a hundred times — whether he could n't swear that he had seen her more than fifty times — whether he did n't know that he had seen her at least seventy-five times — and so forth; the satisfactory conclusion which was arrived at, at last, being, that he had better take care of himself, and mind what he was about. The witness having been by these means reduced to the requisite ebb of nervous perplexity, the examination was continued. . . . Tracy Tupman and Augustus Snodgrass were severally called into the box; both corroborated the testimony of their unhappy friend; and each was driven to the verge of desperation by excessive badgering."

1857, Mr. *Anthony Trollope*, The Three Clerks, c. XL: "Mr. Chaffanbrass was one of an order by no means yet extinct, but of whom it may be said that their peculiarities are somewhat less often seen than they were when Mr. Chaffanbrass was in his prime. . . . Those who most dreaded Mr. Chaffanbrass, and who had most occasion to do so, were the witnesses. A rival lawyer could find a protection on the bench when his powers of endurance were tried too far; but a witness in a court of law has no protection. He comes there unfeed, without hope of guerdon, to give such assistance to the State in repressing crime and assisting justice as his knowledge in the particular case may enable him to afford; and justice, in order to ascertain whether his testimony be true, finds it necessary to subject him to torture. One would naturally imagine that an undisturbed thread of clear evidence would be best obtained from a man whose position was made easy and whose mind was not harassed; but this is not the fact; to turn a witness to good account, he must be badgered this way and that till he is nearly mad; he must be made a laughing-stock for the court; his very truths must be turned into falsehoods, so that he may be falsely shamed; he must be accused of all manner of villany, threatened with all manner of punishment; he must be made to feel that he has no friend near him, that the world is all against him; he must be confounded till he forget his right hand from his left, till his mind be turned into chaos, and his heart into water; and then let him give his evidence. What will fall from his lips when in this wretched collapse must be of special value, for the best talents of practised forensic heroes are daily used to bring it about; and no member of the Humane Society interferes to protect the wretch. Some sorts of torture are as it were tacitly allowed even among humane people. Eels are skinned alive, and witnesses are scarified, and no one's blood curdles at the sight, no soft heart is sickened at the cruelty. To apply the thumbscrew, the boot, and the rack to the victim before him was the work of Mr. Chaffanbrass's life. . . . On the whole, Mr. Chaffanbrass is popular at the Old Bailey. Men congregate to hear him turn a witness inside out, and chuckle with an inward pleasure at the success of his cruelty."[2]

The remedy for such an abuse is in the hands of the judges. The disgrace of these occurrences is even more theirs than that of the offending counsel; for the former have not the temptation of partisanship to sway them, and

[2] Mr. E. Manson's "Cross-examination — a Socratic Dialogue" (8 Law Quart. Rev. 160), is a neat satire, after the manner of the Platonic dialogue, on the abuses of cross-examination. There is good reading in the letter of rebuke written by Smollett to a counsel who had wantonly abused him (Foss' Memories of Westminster Hall, I, 235).

their duty to interfere is easier to fulfil than the counsel's duty to refrain. The slack sense of duty thus so often exhibited becomes the more blamable in contrast with the scrupulous sentimentality which will be exhibited in insisting on the tender quiddities of the law that favor guilty persons, — such as the rules for confessions and the privilege against self-crimination. For the probably guilty, when brought to book, there is often an abundance of protection, while for the unimplicated and innocent witness, coming to serve justice and truth, there is scanty assistance. The sport is of more interest than the victim. Such judges, as well as counsel, were justly pilloried by the great novelist; and his pen expressed only the widespread feeling of dread and disgust among the laity for the abuses of the witness-box. Those abuses, it is true, are, as a whole, probably less to-day than they formerly were; but they are in many places still not uncommon. They are too frequent when they occur at all. The just denunciations of high-minded judges have sometimes stigmatized these practices as they deserve;[3] and there can be no doubt that the law sanctions the power and establishes the duty of the trial judge to use a proper discretion to prevent and rebuke them:

1806, Mr. *W. D. Evans*, in his Notes to Pothier, II, 229: "The abuses to which this procedure is liable are the subject of very frequent complaint, but it would be absolutely impossible, by any but general rules, to apply a preventive to these abuses without destroying the liberty upon which the benefits above adverted to essentially depend; and all that can be effected by the interposition of the Court is a discouragement of any virulence towards the witnesses which is not justified by the nature of the cause, and a sedulous attention to remove from the minds of the jury the impressions which are rather to be imputed to the vehemence of the advocate than to the prevarication of the witness. Whatever can elicit the actual dispositions of the witness with respect to the event, — whatever can detect the operation of a concerted plan of testimony, or bring into light the incidental facts and circumstances that the witness may be supposed to have suppressed, — in short, whatever may be expected fairly to promote the real manifestation of the merits of the cause, is not only justifiable but meritorious. But I conceive that a client has no right to expect from his counsel an endeavour to assist his cause, or what is a more frequent object, to gratify his passions, by unmerited abuse, by embarrassing or intimidating witnesses of whose veracity he has no real suspicion, or by conveying an impression of discredit which he does not actually feel; and that where such expectations are intimated, there is an imperious duty upon the advocate, who, while the protector of private right, is also the minister of public justice, which requires them to be repelled. Considering the subject merely as a matter of discretion, the adoption of an unfair conduct in cross-examination has often an effect repugnant to the interests which it professes to promote. . . . But however unfavourable an injudicious asperity of cross-examination may be to the advancement of a cause, it, for the most part, is congenial to the wishes of the party; the neglect of it is regarded as an indifference to his interests and a dereliction of duty; and the practice of it is one of the surest harbingers of professional success."

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. II, c. IX, b. III, c. V (Bowring's ed. vol. VI, pp. 338, 406): "Under the name of *brow-beating* (a mode of oppression of which witnesses in the station of respondents are the more immediate

[3] "Mr. Baron Alderson once remarked to a counsel of this type, 'Mr. ——, you seem to think that the art of cross-examination is to examine crossly'" (Serjeant's Ballantine's Experiences of a Barrister's Life, 105).

objects) a practice is designated, which has been the subject of a complaint too general to be likely to be altogether groundless. Oppression in this form has a particular propensity to alight upon those witnesses who have been called upon that side of the cause (whichever it may be) that has the right on its side; because the more clearly a side is in the right, the less need has it for any such assistance as it is in the nature of any such dishonest arts to administer to it. . . . Brow-beating is that sort of offence which never can be committed by any advocate who has not the judge for his accomplice. . . . Rule 1. Every expression of reproach, as if for established mendacity: every such manifestation, however expressed — by language, gesture, countenance, tone of voice (especially at the outset of the examination) — ought to be abstained from by the examining advocate. If the tendency of such style of address were to promote the extraction of material truth, at the same time that the action of it could not be supplied to equal effect by any other plan of examination, — the vexation thus produced (how sharp soever) not being of any considerable duration, the liberty might be allowed, with preponderant advantage for the furtherance of justice. But, on a close investigation, no advantage, but rather a disadvantage, even in respect of furtherance of justice, seems to be the natural result of an assumption of this kind. . . . By reproachful and terrifying demeanour on the part of a person invested with, and acting under, an authority thus formidable, it seems full as natural that an honest witness should be confounded, and thus deprived of recollection and due utterance, and even (through confusion of mind) betrayed into self-contradiction and involuntary falsehood, as that a dishonest witness should be detected and exposed. The quiet mode above described is not in any degree susceptible of this sort of abuse: the outrageous mode seems more likely to terminate in the abuse than in the use. . . . Rule 2. Such unwarranted manifestations, if not abstained from by the advocate, ought to be checked, with marks of disapprobation, by the judge. In the presence of the judge, any misbehaviour, which, being witnessed at the time by the judge, is regarded by him without censure, becomes in effect the act, the misbehaviour, of the judge. On him more particularly should the reproach of it lie; because, for the connivance (which is in effect the authorization) of it, he cannot ever possess any of those excuses, which may ever and anon present themselves on the part of the advocate. The demand for the honest vigilance and occasional interference of the judge will appear the stronger, when due consideration is had of the strength of the temptation, to which, on this occasion, the probity of the advocate is exposed. Sinister interests in considerable variety concur in instigating him to this improper practice. . . . Rule 3. When, on the false supposition of a disposition to mendacity, an honest witness has been treated accordingly by the cross-examining advocate (the judge having suffered the examination to be conducted in that manner, for the sake of truth) — at the close of which examination all doubts respecting the probity of the witness have been dispelled, — it is a moral duty on the part of the judge to do what depends on him towards soothing the irritation sustained by the witness's mind; to wit, by expressing his own satisfaction respecting the probity of the witness, and the sympathy and regret excited by the irritation he has undergone. . . . Under the spur of the provocation, I remember now and then to have observed the witness turn upon the advocate in the way of retaliation. On an occasion of this sort, I have also now and then observed the judge to interpose, for the purpose of applying a check to the petulance of the witness. For one occasion in which, under the spur of the injury, the injured witness has presented himself to my conception as overstepping the limits of a just defence, — ten, twenty, or twice twenty, have occurred, in which the witness has been suffering, without resistance and without remedy, as well as without just cause, under the torture inflicted on him by the oppression and insolence of an adverse advocate. Scarce ever, I think, had I the satisfaction of observing the judge interpose to afford his protection to the witness, either at the commencement of the persecution, for the purpose of staying or alleviating the injury, or at the conclusion, for the purpose of affording satisfaction for it, — such inadequate satisfaction as the nature of the case admits of."

1843, Lord *Langdale*, M. R., in *Johnston* v. *Todd*, 5 Beav. 601: "Witnesses, and particularly illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open Court. The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination, as it is too often conducted, may give rise to important errors and omissions."

1857, *Lowrie*, J., in *Eliott* v. *Boyles*, 31 Pa. 66: "It is entirely natural that in the public trial of causes the earnestness of counsel should often become unduly intense; and it is not possible to prevent this without such an attribution and exercise of power as would be entirely inconsistent with that freedom of thought that is necessary to all thorough investigation. The remedy for it is to be found in inner rather than in outer discipline. Those who are zealously seeking the truth cannot always be watchful to measure their demeanor and expressions in accordance with the feelings or even with the rights of others. This zeal, even when inordinate, must be excused, because it is necessary in the search of truth; and generally it is not possible to condemn it as misguided or excessive until its fault has been proved by the discovery of the truth in the opposite direction; and possibly its very excess may have contributed to the discovery. When the presiding judge is respected and prudent, a hint kindly given is generally all that is needed to restrain such ardor, when it does not arise in any degree from habitual want of respect for the rights of others and for the order of public business. Witnesses often suffer very unjustly from this undue earnestness of counsel, and they are entitled to the watchful protection of the Court. In the court they stand as strangers, surrounded with unfamiliar circumstances, giving rise to an embarrassment known only to themselves; and in mere generosity and common humanity they are entitled to be treated, by those accustomed to such scenes, with great consideration, — at least until it becomes manifest that they are disposed to be disingenuous. The heart of the Court and jury, and all disinterested manliness, spontaneously recoil at a harsh and unfair treatment of them, and the cause that adopts such treatment is very apt to suffer by it. It is only where weakness sits in judgment that it can benefit any cause. Add to this that a mind rudely assailed naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses."[4]

The following instance illustrates for orthodox practice the dividing line between propriety and impropriety:

[4] The principle, in one or another form, is recognized in the following statutes and cases: Alaska C. C. P. 1900, §§ 662, 676 (like Or. Annot. C. 1892, § 833, 848); Ark. Stats. 1894, § 2955 ("The Court shall exercise a reasonable control over the mode of interrogation, so as to make it rapid, distinct, as little annoying to the witness and as effective for the extraction of the truth as may be"); Cal. C. C. P. 1872, § 2044 ("The Court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of truth, as may be; but, subject to this rule, the parties may put such pertinent and legal questions as they see fit"); § 2066 ("It is the right of the witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor"); 1897, People *v.* Durrant, 116 Cal. 179, 48 Pac. 75 (after an answer, "Yes, I have seen him," the question, "That is, you imagine you have?" was held properly excluded); Conn. Gen. St. 1887, § 768 ("during the trial of a cause, witnesses shall not be interrupted except for the purpose of having notes of their testimony taken by the stenographer"); Ky. C. C. P. 1895, § 593 (Court is to exercise a "reasonable control" over interrogation, so as to make it "as little annoying to the witness and as effective for the extraction of the truth as may be"); 1901, State *v.* Prendible, 165 Mo. 329, 65 S. W. 559 (a merely abusive cross-examination, held improper); Mont. C. C. P. 1895, §§ 3372, 3402 (like Cal. C. C. P. §§ 2044, 2066); 1872, Haines *v.* Ins. Co., 52 N. H. 470 (questions intended to intimidate or embarrass the witness, held improper; questions asking explanations should be made "in mild and brief terms, and in a civil manner"); Or. C. C. P. 1892, §§ 833, 848 (like Cal. C. C. P. §§ 2044, 2066); Utah Rev. St. 1898, § 3432 (like Cal. C. C. P. § 2066).

For intimidation *by the opponent in the court-room*, see *post*, § 1399. For intimidation to obtain a *confession*, see *post*, §§ 831 ff.

1820, *Ings' Trial*, 33 How. St. Tr. 957, 999; Mr. *Adolphus*, cross-examining an alleged accomplice: "I think you told us some things then [Monday, at another trial for the same plot] that did not come to your recollection to-day?" A. "That may be. I will not pretend to say, that the next time I come up here I can communicate everything as I have done to-day." Q. Certainly not; there are people that proverbially ought to have a good memory?" A. "Yes, certainly." Q. "You make your evidence a little longer or shorter, according as the occasion suits?" A. "Yes, I mention the circumstances as they come to my recollection." . . . Mr. *Gurney*: "That is observation, and not question." Mr. *Adolphus*: "I am asking him a question." . . . L. C. J. *Dallas*: "You should not now observe on the evidence." Mr. *Adolphus*: "This about the digging entrenchments you did not state on Monday?" A. "No, I forgot that." Q. "The next time there will be a new story?" Mr. *Gurney*: "I must interpose, my lord." L. C. J. *Dallas*: "All these observations are certainly incorrect." Mr. *Adolphus*: "He has said it himself; 'when next I come into the box, I shall recollect other things,' and upon that I put the question, whether he would tell another story the next time he comes." L. C. J. *Dallas*: "Ask him the question if you wish it." Mr. *Adolphus*: "Shall you tell us a new story the next time?" A. "No. If anything new occurs to my mind when I come to stand here, I will state it."

Resting upon the same principle that forbids intimidating questions is the rule excluding *confessions* made under menaces (*post*, §§ 831 ff.); and it is in part for a similar reason that a rule is enforced, in most jurisdictions (*post*, § 983), against *cross-questioning* a witness to an unnecessary extent upon his *past misdeeds*.

§ 782. **Repetition of Questions.** The repetition of a question or a topic may or may not be objectionable, according to its purpose.

(1) Repeating an unanswered question *upon an inadmissible point, already ruled out by the Court*, is of course an impertinence to the Court; and, while it may sometimes become desirable and allowable to renew an offer of testimony in approximately the same form, in order to secure its admission after obviating its original defects (*ante*, § 17), this attempt, made in good faith, is to be distinguished from a merely persistent effort to elude the vigilance of opponent and judge by repeating precisely the same forbidden offer, for this is at once useless, wasteful, and disrespectful.[1]

(2) Repeating an *allowable question* already once *answered*, or *covering the same ground of facts* in other questions, on the *direct examination*, is ordinarily superfluous and therefore improper. Nevertheless, circumstances may arise which make it desirable to emphasize certain facts anew; and the trial Court's discretion should control.[2] This situation, however, so far as the questions are repeated on a re-direct examination, concerns rather the repetition of the evidential facts than of the mere questions about them, and hence is governed by the principles as to Order of Evidence (*post*, §§ 1883 ff.).[3]

(3) Repeating the same testimonial matter of the direct examination, by *questioning the witness anew on cross-examination*, is a process which often be-

[1] 1893, Jones *v.* Stevens, 36 Nebr. 849, 852, 55 N. W. 251 (repeating after objection sustained; excluded in discretion).

[2] 1900, Singer & T. S. Co. *v.* Hutchinson, 184 Ill. 169, 56 N. E. 353 (excluded on the facts); 1876, Ulrich *v.* People, 39 Mich. 245, 251; 1885, Simon *v.* Home Ins. Co. 58 id. 278, 25 N. W. 190.

[3] For *recalling a witness to make a correction*, see also *post*, § 786.

comes desirable (on the principle of § 995, *post*) in order to test the witnes capacity to recollect what he has just stated and to ascertain whether he fal easily into inconsistencies and thus betrays falsification. In spite of its fr quent tedium and unskilful handling, this process often proves useful; an the discretion of the trial Court must suffice to fix its limits:

1872, *Christiancy*, C. J., in *O'Donnell* v. *Segar*, 25 Mich. 367, 371: "The defendants h a clear right, on cross-examination of this witness, to put any question calculated, not on to test his credibility and the extent and means of his knowledge, but to draw out any fa which might tend either to contradict, weaken, or explain any one of the particular stat ments made by the witness or to weaken any inference from the whole or any part of h testimony in chief in support of either of the main facts essential to the plaintiff's cas And since, if a question on cross-examination relates to the subject to which the dire examination related, . . . the Court cannot usually say, before the question is answere whether the answer will elicit anything tending to contradict, weaken, or explain any the facts or the inference from any of the facts stated in the direct examination, or test the credibility or the extent or means of knowledge of the witness, the only safe ge eral rule upon cross-examination is to allow the party cross-examining to go over t whole subject or subjects to which the direct examination related, and to give him th chance to draw out as far as he may be able any fact which (within the principles and fo the purposes above explained) he has the right to elicit on cross-examination. . . Cross-examination is the great test of the knowledge as well as of the veracity of wi nesses. The right to pursue it may sometimes be abused; and when it is sought to b abused, as when the counsel insists upon going over the same ground again and agai or when it is apparent that the witness has already fully answered without any appea ance of evasion, and it is evident that the counsel is merely pushing the witness fo sake of annoyance or for any illegitimate purpose, it is competent for the Court in i discretion to put an end to it. But we see no evidence of an attempt at such abuse i this case."

1891, *Champlin*, C. J., in *Zucker* v. *Karpeles*, 88 Mich. 424, 50 N. W. 373: "We kno of no rule of practice that prohibits an attorney from requesting a witness to repeat wha he has testified to upon a particular point in his direct examination. He has a right t have it repeated, for the purpose not only of testing the recollection of the witness, bu of ascertaining whether he makes a statement at variance with what he testified to i chief. Of course it would not be permissible for an attorney to pass through the whole c the direct examination and ask the witness to repeat it; and such was not the case her The attorney had not abused his privilege, nor, as it appears from the record, unneces sarily consumed the time of the court in a fruitless attempt at cross-examination."[4]

(4) Repeating precisely the *same objectionable question on cross-examination*, i order by sheer moral force to compel a witness to admit the truth, after a *original false answer* or *refusal to answer*, is a process which not only savor of intimidation and browbeating, but also tends to waste time. Accordingly it is not doubtful that the trial Court has discretion to refuse or to allow this as seems best under the circumstances.[5] Nevertheless, when used sparingly

[4] 1902, People v. Rader, 136 Cal. 253, 68 Pac. 706; 1903, Mathis v. State, — Fla. —, 34 So. 287; 1883, Winklemans v. R. Co., 62 Ia. 11, 17; 1850, Odiorne v. Bacon, 5 Cush. 185, 191 (allowable in discretion; here by asking the witness to re-state his knowledge on a certain point).

For other instances of *testing the recollection* on cross-examination, see *post*, §§ 994, 1006.

[5] 1875, Wesley v. State, 52 Ala. 182, 188 1869, Schwartze v. Yearly, 31 Md. 270, 276 1890, Brown v. State, 72 id. 468, 475, 20 At 186; 1874, Demerritt v. Randall, 116 Mass. 33 ("how many times the same question should b repeated on cross-examination [when the witnes declines to express an opinion in answer], an how far the witness should be compelled t answer, were matters within the discretion o

and against a witness who in the cross-examiner's belief is falsifying, there ought to be no judicial interference; for there is perhaps none of the lesser expedients (that is, ranking after Cross-examination and Sequestration) which has so keen and striking an efficacy, when employed by skilful hands, in extracting the truth and exposing a lie. Simple as this expedient seems, it rests on a deep moral basis; and the annals of our trials demonstrate its power. In the following passages, ranging over three centuries, some of the most notable illustrations will be found:

1682, *Count Coningsmark's Trial*, 9 How. St. Tr. 1, 55 (the Count, charged with murder, was said to have absconded in disguise; and a Swedish fellow-countryman of his, at whose house he had changed his clothes, was called): Q. "Pray, what did the Count say to you about his coming in disguise to your house?" A. "He said nothing, but that he was desirous to go to Gravesend; . . . I helped him to a coat, stocking, and shoes." Q. "Then I ask you, what did he declare to you?" A. "Why, he did desire to have those clothes." Q. "You are an honest man, tell the truth." A. "He declared nothing to me." Q. "Did he desire you to let him have your clothes because he was in trouble?" A. "He desired a coat of me, and a pair of stockings to keep his legs warm." Q. "I do ask you, did he declare the reason why he would have those cloaths was because he would not be known?" A. "*He said he was afraid of coming into trouble.*" Q. "Why were you unwilling to tell this?"

1768, *Lord Baltimore's Trial*, Gurney's Rep. 77 (abduction and rape of Sarah Woodcock; the testimony showed plainly that the case was in truth one of willing seduction, although the complainant testified flatly to the use of force and coercion; her evidence was suspiciously inconsistent, and, on her cross-examination by the accused himself, the following answers were elicited): Q. "How old are you?" A. "I am twenty-seven." Q. "Will you swear you are no older?" A. "I will swear I am twenty-eight." Q.: "Will you swear you are no older?" A. "I will swear I am that." Q. "Will you swear you are no older?" A. "I do not know I need tell; I am twenty-nine, and that is my age; I cannot exactly tell." Q. "To the best of your belief, how old are you?" A. "*I believe I am thirty* next July; I cannot be sure of that, whether I am or no."

1784, *Horton's Trial*, Sel. Crim. Trials at Old Bailey, I, 456 (the accused, aged 11, was indicted for felonious larceny; and one Isaac Barney, a patrolman, swore to a confession by the boy when under arrest that he had watched while two men entered the house; the following comprised the entire cross-examination of this witness): *Counsel:* "You had frighted this poor child out of his senses?" *Witness:* "I do not think he was afraid." *Counsel:* "Do you know what reward there is for the conviction of this poor infant?" *Witness:* "Upon my oath I do not know." *Counsel:* "Do you mean to say that you, a patrol, do not know?" *Witness:* "I am sure it is a thing I never had." *Counsel:* "You shall not slip through my fingers so." *Witness:* "Upon my word and honor I do not know." *Counsel:* "Upon your oath, sir?" *Witness:* "I do not." *Counsel:* "Did you never hear that there was a reward of forty pounds upon the conviction of that child?" *Witness:* "I never knew any such thing." *Counsel:* "But you have *heard* it?" *Witness:* "I never heard any such thing." *Counsel:* "Come, come, sir, it is a fair question, and the jury see and hear you. Upon your oath, did you never hear that you would be

the presiding judge"); 1888, Gutsch *v.* McIlhargey, 69 Mich. 377, 37 N. W. 303; 1898, Stern *v.* Stanton, 184 Pa. 468, 39 Atl. 404; 1888, Railway *v.* Pool, 70 Tex. 715; 1893, Shaw *v.* State, 32 Tex. Cr. 155, 169, 22 N. W. 588; 1897, Middlesex B. Co. *v.* Smith, 27 C. C. A. 485, 83 Fed. 133 (exclusion of third or fourth repetition, held proper); 1897, McMahon *v.* Waterworks Co., 95 Wis. 640, 70 N. W. 829. The following case, so far as it denies a discretion, is clearly unsound: 1896, People *v.* Barberi, 149 N. Y. 256, 43 N. E. 635 ("we are wholly unable to perceive any such element of improbability in her direct narrative . . . as to warrant such a wide and unusual departure from the ordinary and usual methods"; here the accused was asked the same questions six or eight times in succession).

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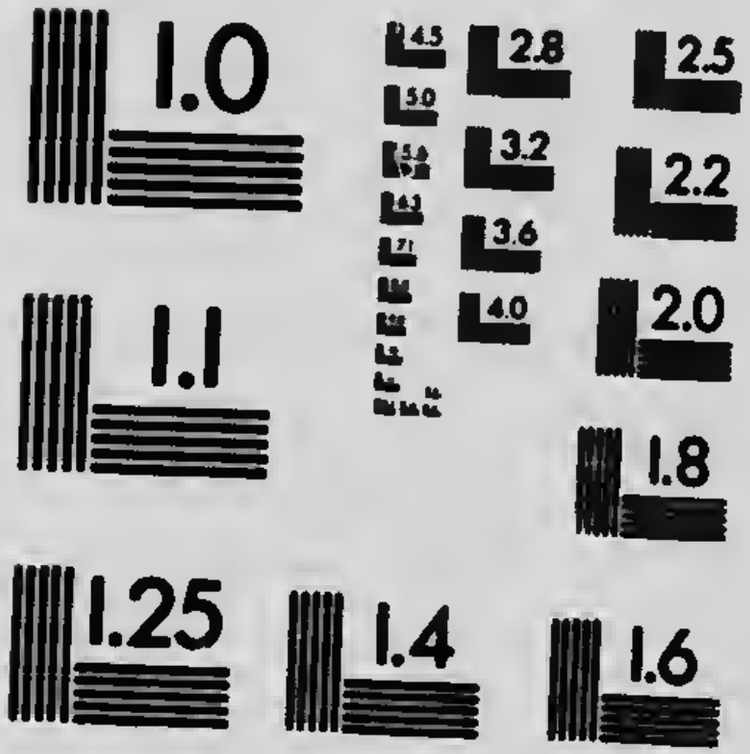

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entitled to forty pounds as the price of that poor infant's blood?" *Witness:* "Your honor, I cannot say." *Counsel:* "But you *shall* say before you leave that place." *Witness:* "*I have heard other people talking about such things.*" *Counsel:* "So I thought; and with that answer I leave your testimony with the jury."

1820, *Queen Caroline's Trial*, Linn's Ed., I, 48, 78; in attempting to prove an act of adultery at Naples, between the Queen and her servant Bergami, one of the material facts alleged by the prosecution was that the Queen's sleeping-room adjoined Bergami's, with only a corridor and a cabinet intervening, and that there was no access from the Queen's room to Bergami's except by that passage; to this the servant *Majocchi*, who for a time slept in the cabinet mentioned, testified as follows, on being asked by Mr. Solicitor-General *Copley* (afterwards L. C. Lyndhurst) whether there was no other intervening passage: "There was nothing else. One was obliged to pass through the corridor, from the corridor to the cabinet, and from the cabinet into the room of Bergami. There was nothing else." Then, on his cross-examination, Mr. *Brougham* asked as follows: "Will you swear there was no passage by which her Royal Highness could enter Bergami's room, when he was confined with his illness, except going through the room [*i. e.* cabinet] where you slept?" *Majocchi:* "I have seen that passage; other passages I have not seen." Mr. *Brougham:* "Will you swear there was no other passage?" *Majocchi:* "There was a great saloon, after which there came the room of her Royal Highness, after which there was a little corridor, and so you passed into the cabinet. I have seen no other passage." Mr. *Brougham:* "Will you swear there was no other passage?" *Majocchi:* "I can not swear; I have seen no other but this; and I cannot say there was any other but this." Mr. *Brougham:* "Will you swear that there was no other way by which any person going into Bergami's room could go, except by passing through the cabinet?" *Majocchi:* "I cannot swear that there is another; I have seen but that; there might have been, but I have not seen any, and I cannot assert but that alone." Mr. *Brougham:* "Will you swear that if a person wished to go from the Princess' [*i. e.* Queen's] room to Bergami's room, he or she could not go any other way than through the cabinet in which you slept?" "*Majocchi:* "*There was another passage to go into the room of Bergami.*" Mr. *Brougham:* "Without passing through the cabinet where you slept?" *Majocchi:* "*Yes.*"[6]

1880, *Parnell Commission's Proceeding*, 26th day, Times' Rep. pt. 7, pp. 137, 147; the Irish Land League was charged with complicity in crime and agrarian outrage; the fact of crime and outrage it admitted, but denied any complicity, and placed the responsibility on certain lawless secret societies of local origin; the issue turned largely on the identity of these societies with the League; many witnesses testified to meetings of lawless societies, and the inference, expressed or implied, was that these were Land League branches; the murder of Lord Mountmorres was under inquiry, and one Michael Burke, a shifty witness, having a bad record, testified to the concocting of the murder at such a meeting held in one Pat Kearney's house. "I know Pat Kearney; he keeps a public house at Clonbur; he was secretary to the Land League, I believe. The Land League meetings were held in his house sometimes." Q. "Before Lord Mountmorres was murdered, was there a meeting held at Pat Kearney's house?" A. "There was a kind of a meeting held, sir." Q. "Just tell us what the talk was?" A. "It was spoken of that he [Lord Mountmorres] should be done away with." This was direct enough that the local Land League branch had at a meeting plotted Lord Mountmorres' murder; but on cross-examination, Sir Charles *Russell*, after bringing out the witness' bad record and involving him in several shifty answers, finally returned to the meat of the testimony, namely, whether the meeting was a Land League meeting at all; after getting the witness to admit that he was not sure whether the meetings were League meetings, the cross-examiner continued: Q. "Now, tell me, will you swear there was a Land League at all at Clonbur in 1880?" A. "I will not swear whether there was or not, but I was told

[6] See another good example, ib. I, 48, 115.

there was by several people." Q. "Who told you?" A. "Several people." Q. "Who told you there was a Land League branch in Clonbur?" A. "I was told by several people, but I could not swear by whom." Q. "Will you swear there was any branch of the Land League at all in Clonbur before Lord Mountmorres' death?" A. "I was told there was." . . . Q. "Who told you there was a Land League in Clonbur?" A. "I can only —" Q. "Attend to me; who told you there was a Land League in Clonbur?" A. "Several people, Sir." Q. "Attend; who — if anybody — told you there was a Land League branch before Lord Mountmorres' murder?" A. "I can only —" Q. "Will you swear anybody told you?" A. "I could not swear what were the men's names, but I was told by several people." Q. "Attend to me; will you swear you were told by anyone before Lord Mountmorres was murdered that there was a Land League branch at Clonbur?" A. "There was some kind of branch; I could not swear what branch it was. I know there was a branch." Q. "Will you swear, on your oath, that anyone told you there was a branch of the Land League in Clonbur, before Lord Mountmorres was murdered?" A. "I was told, but I do not know the name of the man." . . . Q. "Attend to me, I will have an answer." A. "Not to that question, because I cannot answer it; I have said all I know." Q. "Attend to me." A. "I am attending as well as I can." Q. "Will you swear anyone told you before Lord Mountmorres was murdered that there was a *Land League* branch at Clonbur?" A. "I was told there was *a branch, but I could not say what it was; I could not say whether it was a Land League branch or not.*" Q. "Why did you not tell me so before?" [7]

§ 783. **Multiple Examiners; Length of Examination.** (1) It has long been a tradition that but *one counsel* should question during a single stage in the examination (direct or cross or re-direct) of a single witness; and this tradition rests on a wise policy of protecting the witness from undue and confusing interrogation, as well as of securing system and brevity by giving the control of the interrogation into a single hand:

1809, *Doe* v. *Roe*, 2 Camp. 280: "There were two counsel for the plaintiff; the junior having called a witness who seemed disposed to shuffle and prevaricate, the leader interposed, and was proceeding to examine him; the counsel on the opposite side contended that this was irregular, and that although, where there were several counsel on the same side, they might arrange among themselves by whom the witnesses should be examined, yet that when the examination of a witness was begun by one gentleman, the others had no right to put a question; they might privately suggest questions proper to be put, but could not address any directly to the witness; if this rule were not adhered to, a witness might be subject to the examination or cross-examination of as many barristers as were retained for the plaintiff or defendant, much time would be wasted, and great confusion would be introduced into proceedings at Nisi Prius. *Ellenborough*, L. C. J.: 'Convenience certainly requires that the examination of a witness should be carried on entirely by the gentleman who begins it; and several counsel clearly cannot be permitted to put questions to the same witness, one after another, in the manner apprehended. But I think the leading counsel has a right, in his discretion, to interpose, and to take the examination into his own hands. Very unpleasant consequences might follow if this were not allowed. If a gentleman, it being his first appearance in a court of justice, should be much embarrassed in the course of examining a witness, it would be hard if it were in the power of the opposite party to prevent his leader from stepping in to his relief. And other occasions may be imagined when it may be very important that the gentleman who

[7] Another example is found in the same trial, 61st day, Times' Report, pt. 15, p. 149. An instance of the same expedient by that great cross-examiner, Daniel O'Connell, occurs in Kennedy's Trial, p. 6 (Mongan's Celebrated Trials in Ireland). Still another good example is R. *v.* Bernard, 8 St. Tr. N. S. 887, 958 (1858).

conducts the cause should have the privilege of putting questions to a witness originally called by a co-adjutor. In the present state of the bar, there is no danger of this privilege being abused.'"

This rule has been recognized in judicial rulings generally, and also in a few statutes;[1] doubtless, also, in many local rules of court. It is of course subject to reasonable exceptions allowable in the trial Court's discretion;[2] moreover, it ought not to apply to the examination of another witness, nor of the same witness at another stage or by a separate party in the same stage,[3] nor to any process but that of putting the questions to the witness.[4]

(2) The *length of time* occupied in questioning may of course fitly be the subject of reasonable limits, fixed beforehand if possible;[5] and a mutual agreement as to time is often made.

§ 784. **Questions by the Judge.** The sporting theory of the common law,[1] in which litigation was a game of skill, to be conducted according to specific rules and to be decided by the combined effects of skill, strength, and luck, tended to place the judge primarily in the position of the umpire of a game, whose duty it was to interfere only so far as needed to decide whether the rules of the game had been violated. This tendency never dominated (so far as the judge's functions were concerned) in the orthodox English practice; the judge there has never ceased to perform an active and virile part as a director of the proceedings and as an administrator of justice. Nevertheless,

[1] 1815, Chippendale *v.* Masson, 4 Camp. 174 (two defendants, relying on the same defence; Gibbs, C. J., said, "The interests of the defendants being the same, I can only hear one counsel; . . . the witnesses are to be examined by the counsel successively, in the same manner as if the defence were joint and not separate"); 1835, Mason *v.* Ditchbourne, 1 Moo. & Rob. 460, 462 (same ruling by Lord Abinger, C. B., as to addressing the jury); 1836, Chitty, General Practice, 2d ed., III, 891 *a* ("After one counsel has brought his examination to a close, no other counsel on the same side can put a question to the same witness"); 1882, Walker *v.* McMillan, 21 N. Br. 31, 44, 6 Can. Sup. 241, 245 (two defendants, pleading the same defence by the same attorney and counsel, allowed to cross-examine by one counsel only); 1900, Kasson's Est., 127 Cal. 496, 59 Pac. 950 (right of cross-examination exists for each party appearing and making claim or answer; here, cross-examination by one claimant as heir allowed to cover the same ground as that covered by another claimant; the trial Court's discretion to prevent useless repetition); Ga. Code 1895, § 5691 ("In all cases in which more than one attorney is retained on either side, the examination and cross-examination shall be conducted by one of the counsel only; and at the opening of the case both parties shall state to the Court to which attorney the examination and cross-examination of witnesses is confined"); Ia. Code, 1897, § 3700; N. Mex. Comp. L. 1897, § 2990 ("But one counsel on each side shall examine the same witness").

[2] 1809, Doe *v.* Roe, 2 Camp. 290 (see quotation *supra*); 1875, Tilton *v.* Beecher, N. Y., Abbott's Rep. I, 552 (one of defendant's counsel, after cross-examining for two days the plaintiff's chief witness, fell ill, and under the circumstances the remainder, occupying five days, was allowed to be completed by another counsel); 1902, Citizens' Bank *v.* Fromholz, 64 Nebr. 284, 89 N. W. 775 (trial Court's discretion controls).

[3] 1834, Ridgway *v.* Philip, 1 C. M. & R. 415, 417 (cross-examinations by counsel for separate parties, allowable); 1874, State *v.* Bryant, 55 Mo. 75 (rule of Court forbidding more than one counsel on either side to examine; held ineffective to prevent counsel for one co-defendant from cross-examining in addition to counsel for the other co-defendant); 1881, Olive *v.* State, 11 Nebr. 1, 25, 7 N. W. 444 (the same attorney may be required to complete a single examination of the same witness, unless in exceptional cases; but no reasonable rule can require "the same attorney who took part in the examination in chief to conduct the cross-examination").

[4] 1887, Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888 (under a court rule that "one counsel only on each side shall examine and cross-examine witnesses," another counsel may "make objections and move to strike out testimony and argue his objections").

[5] 1900, Munro *v.* Stowe, 175 Mass. 169, 55 N. E. 992 (cross-examination of a single witness held limitable in discretion to three hours). For the limitation of the *number of witnesses*, see *post*, § 1907.

For the length of a *hypothetical question*, see *ante*, § 683.

[1] *Post*, § 1845.

in the United States the degenerate tendency has steadily been towards the domination of the function of umpire presiding over contestants in a game; not only has public opinion pressed towards this end, but the judiciary as a whole has often not resisted, but rather abdicated. Several reasons, unnecessary to analyze here, have contributed to this; chief among the illustrations of the tendency is, perhaps, the ill-advised yet almost universal legislative prohibition against comments by the judge upon the evidence in his charge to the jury.[2]

One of the natural parts of the judicial function, in its orthodox and sound recognition, is the judge's power and duty to put to the witnesses such additional questions as seem to him desirable to elicit the truth more fully. This just exercise of his function was never doubted at common law; the judge could even call a new witness of his own motion,[3] and could seek evidence to inform himself judicially;[4] much more could he ask additional questions of a witness already called but imperfectly examined. Fortunately, in spite of the strong but subtle tendency to force the purely judicial function into the background, the tradition of the common law has never been lost; the right of the judge to interrogate as he thinks best has always been preserved in theory. It has, however, been necessary more frequently to maintain and vindicate it and to resist encroachment upon it; although, in coming down to the present day, a note of faintheartedness can be heard in these defensive utterances:

1794, Mr. *Edmund Burke*, Report of Committee on Warren Hastings' Trial, 31 Parl. Hist. 348: "It is the duty of the Judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, should not bring it forward. A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them, and that duty is to investigate the truth. . . . If no prosecutor appears (and it has happened more than once), the Court is obliged, through its officer the clerk of the arraigns, to examine and cross-examine every witness who presents himself; and the judge is to see it done effectively, and to act his own part in it."

1855, *Lumpkin*, J., in *Epps* v. *State*, 19 Ga. 118; "We know of no limit to the right which belongs to the Court of interrogating witnesses, either in civil or criminal cases, especially the latter. The life or death of a man may hang upon a full development of the truth. The presumption that this liberty will not be honorably and impartially exercised is not to be tolerated for a moment. When they see, therefore, that a material fact has been omitted which ought to be brought out, it is not only the right but the duty of the presiding judge to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilt, but to administer the law correctly."

1882, *Bickwell*, C. C., in *Huffman* v. *Cauble*, 86 Ind. 591, 596: "A circuit judge presiding at a trial is not a mere moderator between contending parties; he is a sworn officer charged with grave public duties. In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice. . . . There is nothing wrong in the Court's asking the witness any question the answer to which would likely throw any light upon the testimony."

1898, *Harrison*, C. J., in *Bartley* v. *State*, 55 Nebr. 294, 75 N. W. 832: "It is un-

[2] *Post*, § 2551. Compare also the doctrine of new trials, *ante*, § 21.
[3] *Post*, § 2484.
[4] *Post*, § 2569.

doubtedly necessary that the judge who presided should acquire as full knowledge of the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and correctly, to the extent his duty demands, shape the determination of the litigated matters, that justice may not miscarry, but may prevail; and doubtless it is allowable at times, and under some circumstances, for the presiding judge to interrogate a witness. The exact extent or [times] when the exigencies may warrant an exercise of this right are matters which are not capable of very precise statement, but it may be said that the right here in question is one which should be very sparingly exercised, and, generally, counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause." [1]

It follows that a judge's questions may be *leading in form*, simply because the reason for the prohibition of leading questions (*ante*, § 769) has no application to the relation between judge and witness:

1813, *Ellenborough*, L. C. J., in 25 Hansard Parl. Deb. 207 (answering criticisms on the procedure of a Commission inquiring into the charges against the Princess of Wales): "Folly, my lords, has said that in examining the witnesses we put leading questions. The accusation is ridiculous; it is almost too absurd to deserve notice. In the first place, admitting the fact, can it be objected to a judge that he put leading questions? Can it be objected to persons in the situation of the Commissioners that they put leading ques-

[1] The questioning was held proper, except as otherwise noted: *Eng.:* 1894, Coulson *v.* Disborough, 2 Q. B. 316; *Ala.:* 1847, Milton *v.* Rowland, 11 Ala. 737; 1877, Sparks *v.* State, 59 id. 82, 87 ("It is also his duty to propound to the witnesses such questions as he may deem necessary to elicit any relevant and material evidence"); 1903, Real *v.* State, — id. —, 35 So. 58; *Colo.:* 1874, Kansas P. R. Co. *v.* Miller, 2 Colo. 442, 452, 470; *Conn.:* 1901, Barlow B. Co. *v.* Parsons, 73 Conn. 696, 49 Atl. 205 (held improper on the facts; unsound opinion); *Ga.:* 1855, Epps *v.* State, 19 Ga. 111 (see quotation *supra*); 1856, Kelly *v.* State, ib. 425; 1860, McGinnis *v.* State, 31 id. 236, 261; 1885, Varnedoe *v.* State, 75 id. 181, 186; 1895, Bowden *v.* Achor, 95 id. 243, 22 S. E. 271; 1897, Kearney *v.* State, 101 id. 803, 29 S. E. 127; 1898, Gordan *v.* Irvine, 105 id. 144, 31 S. E. 151 (judge may interrogate, but not so as to cast discredit upon the witness); *Ill.:* 1902, Featherstone *v.* People, 194 Ill. 325, 62 N. E. 685; *Ind.:* 1876, Ferguson *v.* Hirsch, 54 Ind. 337; 1881, Lefever *v.* Johnson, 79 id. 554, 556; 1882, Huffman *v.* Cauble, 86 id. 591, 596; *Ia.:* 1897, State *v.* Spiers, 103, Ia. 711, 73 N. W. 336; *Mass.:* 1852, Palmer *v.* White, 10 Cush. 321, *semble*; *Mo.:* 1902, State *v.* Lockett, 168 Mo. 480, 68 S. W. 563 (but "provided this were done within such bonnds as control attorneys in similar interrogations," which seems an unsound restriction); *Nebr.:* 1887, Fager *v.* State, 22 Nebr. 332, 338 (held improper, except in necessary cases of a witness being obtuse, etc.); 1901, Nightingale *v.* State, 62 id. 371, 87 N. W. 158, 1903, South Omaha *v.* Fennell, — id. —, 94 N. W. 632; *N. C.:* 1879, State *v.* Lee, 80 N. C. 483, 485; *Okl.:* 1895, DeFord *v.* Painter, 3 Okl. 80, 41 Pac. 96; *S. C.:* 1890, State *v.* Atkinson, 33 S. C. 100, 107, 11 S. E. 693 (judge's course in "taking the cross-examination of several of the witnesses out of the hands of the solicitor," held not error of law); *Tenn.:* 1849, Butler *v.* Boyles, 10 Humph. 155 (holding the same for an arbitrator); 1870, Sharp *v.* Treece, 1 Heisk. 446, 448 (judge's question as to defendant's irrelevant political acts, reproved); 1880, Hill *v.* State, 5 Lea 725, 731 ("a judge is not a mere figure-head"; pertinent questions held not improper); 1890, McDonald *v.* State, 89 Tenn. 161, 164, 14 S. W. 487; 1891, Graham *v.* McReynolds, 90 id. 673, 692, 18 S. W. 272; 1900, State *v.* Hargroves, 104 id. 112, 56 S. W. 857; *Tex.:* C. Cr. P. 1895, § 772 (the Court may interrogate to ascertain the competency of an offered witness); *Vt.:* 1898, State *v.* Noakes, 70 Vt. 247, 40 Atl. 249 (trial Court in discretion may ask questions or suggest them to counsel); *Wis.:* 1903, Lowe *v.* State, — Wis. —, 96 N. W. 417 (allowable "when necessary to elicit the truth").

Occasionally, the subject is expressly treated from the point of view of the statutory or constitutional provision (above noted) against charging the jury upon the effect of the evidence: 1889, People *v.* Bowers, 79 Cal. 415, 21 Pac. 752 (question held improper as expressing an opinion upon defendant's guilt); 1902, Leo *v.* State, 63 Nebr. 723, 89 N. W. 303 (similar); 1898, Wilson *v.* R. Co., 52 S. C. 537, 30 S. E. 406 (judge's interrogation is not a violation of the constitutional prohibition). Compare Bentham's comments: 1827, Bentham, Rationale of Judicial Evidence, b. II, c. IX (Bowring's ed. vol. VI, p. 343).

tions? I have always understood, after some little experience, that the meaning of a leading question was this, and this only: That the judge restrains an advocate who produces a witness on one particular side of a question, and who may be supposed to have a leaning to that side of the question, from putting such interrogatories as may operate as an instruction to that witness how he is to reply to favor the party for whom he is adduced. The counsel on the other side, however, may put what questions he pleases, and frame them as best suits his purpose, because then the rule is changed; for there is no danger that the witness will be too complying. But even in a case where evidence is brought forward to support a particular fact, if the witness is obviously adverse to the party calling him, then again the rule does not prevail, and the most leading interrogatories are allowed. But to say that the judge on the bench may not put what questions and in what form he pleases can only originate in that dullness and stupidity which is the curse of the age."[2]

§ 785. **Continuous Narration without Questions; Deposition-Interrogatories, and Responsive Answers.** (1) May not the witness narrate his knowledge in a continuous form and without the interruption of questions? It is obvious that this method, on the one hand, has often the advantage of preserving continuity and clearness of thought for the witness himself and of saving time for all parties concerned; and, on the other hand, has the disadvantage of risking the witness' interjection of irrelevant matter without any opportunity for the opponent to know beforehand in time to object and to prevent it. It would seem that, so far as any rule of evidence is concerned, the discretion of the trial Court should be left to direct the proper mode for each witness. So far as it is a question of fact and judgment, for the examining counsel, it is not within the present purview. The following passages illustrate the principles applicable:

1682, *Lord Grey's Trial*, 9 How. St. Tr. 127, 176; Lady Henrietta Berkeley, apparently because of the hectoring of coarse tyrannical parents, had run away from home and hidden herself and secretly married a Mr. Turner; and the father preferred an indictment for her seduction and debauchery against Lord Grey, his son-in-law and her brother-in-law, who had concerned himself on her behalf; Lady Henrietta, whose character her mother had already blackened, took the stand for the defendant, and testified that she had left home alone and voluntarily, and was then told by the Court to sit down; L. *Henrietta:* "Will you not give me leave to tell the reason why I left my father's house . . ' *Counsel* for defendant: "We do not think fit to ask her any such question; she acquits us and that is enough." L. *Henrietta:* "But I desire to tell it myself; . . . will you not give me leave to speak for myself?" Mr. J. *Dolben:* "My lord, let her speak what she has a mind to; the jury are gentlemen of discretion enough to regard it no more than they ought;" Mr. J. *Jones:* "You are, madam, to answer only such questions as are asked you pertinent to the issue that the jury are to try; and if the counsel will ask you no questions, you are not to tell any story of yourself."[1]

1835, Mr. *Joseph Chitty*, Practice of the Law, III, 894: "It is certainly the practice, when the time and place of the scene of action have once been fixed, to desire the witness

[2] 1855, Epps *v.* State, 19 Ga. 111 ("any legal question he pleases"); 1876, White *v.* State, 56 id. 385; 1878, Harris *v.* State, 61 id. 359 (but a question intimating an opinion as to guilt was held erroneous); 1898, Dunn *v.* People, 172 Ill. 582, 50 N. E. 137, *semble* (occasionally proper in discretion); 1882, Huffman *v.* Cauble, 86 Ind. 591, 596; 1852, Com. *v.* Galavan, 9 All. 272, 274; 1882, People *v.* Stevens, 47 Mich. 413, 418, 11 N. W. 220. *Contra:* 1900, State *v.* Crotts, 22 Wash. 245, 60 Pac. 403 (held improper on the facts).

[1] Whether here the facts desired to be given by the witness in *explanation* were relevant, is another question, depending partly upon the principles of §§ 1100 ff., *post*.

to give his own account of the matter, directing him, when not a professional person, to omit as he proceeds any account of what he has only heard from others and not seen or heard himself, and which he is too apt to suppose is quite as material as that which he himself has seen. . . . If his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the due order of time. In each particular case, however, it is in the discretion of the Court to regulate the mode in which a witness in chief shall be examined, in order best to answer a purpose of justice; and there is no fixed rule which binds counsel to a particular mode of examining him."[2]

In a *deposition* it has always been customary to elicit the testimony by questions, and this is usually prescribed in the statutes authorizing the taking of depositions.[3] Where the deposition is taken by commission, the commissioner conducting the examination, and the parties' attorneys not being present, it is obvious that specific interrogatories, written out beforehand, are indispensable, because otherwise the opponent could not know accurately upon what facts he should cross-examine, and his cross-examination, being necessarily prepared before the despatch of the commission, would otherwise be perhaps futile. The necessity for specific interrogatories thus rests here on the right of adequate cross-examination and the rules for securing it (*post*, § 1392).

(2) Where the witness, either in a deposition or on the stand, goes beyond the scope of the question, and makes an answer *not responsive*, there is here nothing *per se* wrong. If the answer includes irrelevant facts, they may be struck out, and the jury directed to ignore them (*ante*, § 18); if it furnishes relevant facts, then they are none the less admissible merely because they were not specifically asked for:

1612, *Peacock's Case*, 9 Co. Rep. 70 *b*; Peacock, being examined on commission "would have declared the whole truth, which J. H. being a commissioner chosen by the plaintiff would not suffer him to do, but held him strictly to the interrogatories, so that the truth could not appear"; held a great misdemeanor, by the Lord Chancellor, the two Chief Justices, Chief Baron, and the whole Court of the Star-Chamber, "for it is the murdering of truth and right"; commissioners "are not strictly tied to the words of the interrogatories, but to everything also which necessarily ariseth thereupon for the manifestation of the whole truth concerning the matter in question. . . . If the truth should be by such means suppressed, and falsely certified in the examinations, so the innocent would be oftentimes punished or the guilty escape punishment, and justice and right would be utterly subverted; for as is commonly said, the suppression of truth is the oppression of the innocent."[4]

[2] 1896, Thresher *v.* Bank, 68 Conn. 201, 36 Atl. 38 (interrogation not needed where the party-witness is his own counsel: in this case, he was also a member of the bar); 1892, Northern P. R. Co. *v.* Charless, 2 C. C. A. 380, 51 Fed. 562 (trial Court's discretion controls).

[3] These statutes may be found from the citations collected *post*, §§ 1380 ff. In a deposition taken by *oral interrogatories*, the witness may testify in narrative form; 1868, Pralus *v.* Pacific G. & S. M. Co., 35 Cal. 30.

[4] 1874, Hamilton *v.* People, 29 Mich. 173, 185; 1854, Streeter *v.* Sawyer, 28 N. H. 555, 559 ("The question is not so much how the evidence came there, as whether, being there, it is proper for consideration"); 1855, Willis *v.* Quimby, 31 id. 485, 489; 1870, Bundy *v.* Hyde, 50 id. 116, 121 ("It is well settled that such an objection will not be entertained at all, if the answers are competent and material; the object of evidence in the cause is to ascertain the whole truth material to the issue"); 1879, Plummer *v.* Ossipee, 59 id. 55, 57; 1900, Glauber Mfg. Co. *v.* Voter, — id. —, 47 Atl. 612.

The only ground of complaint for non-responsive answers is that, in the case of a deposition (for the reason above noted), such an answer may entitle the opponent to additional cross-examination on the new matter, — a rule dealt with elsewhere (*post*, § 1392).

§ 786. **Improper Suggestion other than by Questions.** Upon the general principle controlling Testimonial Narration or Communication (*ante*, § 766), it should represent so far as possible the sincere expression of his Recollection and Observation. Any and all forms of suggestion or instruction, therefore, which appear in fact to deprive his statement of this fundamental quality, may be forbidden. "A good witness should say from his heart, '*Non sum doctus nec instructus.*'"[1] The regulations which prevent an improper use of written *memoranda to aid recollection* (*ante*, §§ 734, 758) and of counsel's *leading questions* (*ante*, § 769), have already been examined. But there may be other ways in which the principle may be violated. Any method may be prevented, according as it does or does not, in the case in hand, seem to supply the witness with ready-made statements not being the genuine expression of his present belief.

(1) *Remaining in court* during the other witnesses' testimony may teach a witness how to shape his own testimony falsely to the best advantage of his own party's case; this may be prevented by *sequestering the witnesses*, — an expedient examined elsewhere (*post*, §§ 1837–1842). So, also, remaining in court during a *discussion of the admissibility* of the witness' intended evidence may be equally availed of improperly; this may be prevented by a similar expedient.[2]

(2) A witness may, after listening to other testimony, desire to take the stand again to *make a correction* of his former testimony. Whether this is a sincere effort on his part to tell the exact truth as he believes it, or a false effort to shape his testimony in consistency with what he has heard, is often difficult to determine; and this consideration must enter into the Court's decision. But in form the question is whether a witness may be *recalled after closing his testimony*, and this is dealt with (*post*, §§ 1896 ff.) in considering the order of Evidence.[3]

(3) The mere fact that a witness has become aware beforehand of *another witness' intended testimony* is, of itself and apart from the above situations and expedients, no objection to his testimony;[4] any attempt to control testimony in such respects would be futile. At the same time, any communication, made to the witness within the court, may in a given case be improper and be treated as such.[5]

[1] 1629, Coke, Fourth Institute 279.

[2] 1837, R. *v.* Murphy, 8 C. & P. 307 (Coleridge, J.: "It is almost a right for the opposite party to have a witness out of court while a discussion is going on as to his evidence"); 1839, R. *v.* Gaynor, 1 Cr. & D. 142, 145 (objection because the offered witness "was present in court when the questions were raised and partly discussed;" Torrens, J. "exercising a sound discretion" refused to allow his examination).

For the *exclusion of the jury* during such an argument, see *post*, § 1808.

[3] Compare also the principles affecting an impeached witness' *explanation* of a *prior inconsistent statement* (*post*, § 1044) or of an expression of *bias* (*post*, § 952), or of other impeaching facts (*post*, § 1112 ff.).

[4] 1833, R. *v.* Fursey, 3 State Tr. N. S. 543, 564; 1859, Horne *v.* Williams, 12 Ind. 326.

[5] 1867, New Jersey Express Co. *v.* Nichols,

(4) In *identifying persons or material objects*, it is of course more effective if the thing to be identified is so placed with others that the witness' selection appears to be unaided. Nevertheless, no rule has ever required this,— partly because of its frequent impracticability, partly because the lack of such a precaution plainly enough detracts from the value of the testimony, and partly because the witness has usually had so many prior opportunities of private verification that such a public test would often give a false appearance of spontaneous and unaided selection.[6]

§ 787. **Same: Prepared Deposition; Answer by Reference.** (5) Since the witness' statement must correspond spontaneously to his actual recollection, it is plain that to permit him to *commit to writing beforehand* certain statements and then to read them or hand them in as his testimony would be to abandon all safeguard against fabrication and to make possible any manner of pretended testimony. This mode of furnishing testimony is universally prohibited. It is of course to be distinguished from the use of writings which genuinely revive a present recollection (*ante*, § 758) or record a past recollection (*ante*, § 734). Indeed, the object of the restrictions placed upon those two uses of writing is chiefly to ensure that they are not writings of the prohibited and improper sort. The distinction is a clear one, namely, between writings which frankly purport to be used to aid memory (in which they are to be tested by the appropriate restrictions) and writings which do not purport to be so used; the latter falling within the present prohibition.

The present prohibition applies of course equally to oral testimony as well as to written depositions. Nevertheless, its application has been more usual in the case of depositions, because there the temptation to use written preparations is greater, and the impropriety is less glaring; for, when testimony is about to be immediately written down and the witness' demeanor as observable by a jury plays no part, there is a natural inclination to facilitate progress by having precise written answers ready, and the contrast between the writing thus prepared and the writing ensuing from the officer's hand is less

32 N. J. L. 166 (private interview between deponent and counsel during examination; testimony not excluded, because no inquiry was made by the opponent at the time as to the reason for conversing); 1861, Pratt *v.* Battles, 34 Vt. 391, 395, 401 (at the examination "great wrangling and confusion" occurred, the defendant's agent interfaring "to suggest or dictate the answers which the witnesses should give"; excluded); 1867, Nauman *v.* Zoehrlaut, 21 Wis. 466 (plaintiff sued for medical services, and, on cross-examination as to the nature of his treatment, declared that it was a secret; he was then allowed to consult with counsel as to answering the question, in order to determine whether to forego a demand for the special treatment instead of exposing his secret); 1883, Rounds *v.* State, 57 id. 50, 14 N. W. 865 (the district attorney privately spoke with a witness on the stand as to what he had already testified in the case; held improper).

For the propriety of counsel's consultation with a *witness sequestered from the court-room*, see *post*, § 1840. For intimidation by the opponent in the court-room, see *post*, § 1399.

[6] 1817, R. *v.* Watson, 2 Stark. 128 (in identifying prisoners, an objection that "the attention of the witness was too directly pointed at them" was overruled, since "the prosecution might ask in the most direct terms whether any of the prisoners was tha person meant and described by the witness"); 1898, Names *v.* Ins. Co., 104 Ia. 612, 74 N. W. 14 (schedule of proof of loss, identified in detail, receivable); 1854, State *v.* Lull, 37 Me. 248 (showing stolen goods and asking to identify, instead of requiring an unaided description, held not improper). Compare the use of unaided identification as a *corroborating circumstance*, *post*, § 1130, and *ante*, § 744.

apparent. Nevertheless, the opportunity and the danger of fabrication are none the less real; and Courts unite in emphasizing the importance of freeing a deposition from the vice of being a mere copy of a prior concocted statement:

1808, *Eldon*, L. C., in *Shaw* v. *Lindsey*, 15 Ves. Jr. 380, 381: "Upon general principles nothing is more clear than that a witness before commissioners cannot be examined in such a manner that the effect is, not his testimony given in answer to interrogatories, but (as it is termed) filing an affidavit. . . . All courts of justice are extremely anxious to secure the pure examination of witnesses by not permitting that mode of examination which could lead to infinite mischief. Many instances have occurred of a witness coming into court holding in his hand an answer which he has conscientiously framed as his answer to interrogatories, with the substance of which he may be acquainted, — the answer of an honest, conscientious man, and the value of his testimony perhaps not diminished by his anxiety to be correct. Yet courts of law and equity, with the view of excluding general mischief, concur in refusing to allow it. . . . The habitual practice of law, upon an examination *viva voce*, is not to permit any suggestion to the witness by the attorney, counsel, or any other person; the same strictness prevails in this court, where the extent of mischievous management that would ensue, if a witness should be permitted to go before commissioners with a prepared deposition, is obvious."

1817, *Kent*, C., in *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. 339, 346: "He went before the examiner with a prepared deposition. This is against the course and policy of the court, and it would lead to the most dangerous practices. The witness should go before the examiner, as Lord Coke observes, 'untaught and without instruction.' He should be free to answer the sifting interrogatories that are framed for the issue in that case, instead of merely filing an affidavit ready drawn."[7]

[7] 1740, Bland *v.* Armagh, 3 Brown P. C. 620, 626 (deposition made in terms of prior voluntary affidavits, not suppressed on the facts); 1754, Anon., 1 Ambl. 252 (deposition excluded because the attorney "had wrote down the whole in the exact form of the deposition before it was taken; . . . the attorney had methodised and worded it, and [it] is therefore no more than an affidavit"); 1808, Shaw *v.* Lindsey, 15 Ves. Jr. 380 (see quotation *supra*); 1839, Att'y-Gen'l *v.* Nethercote, 10 Sim. 311 (reading over a former deposition, altering the date, and re-signing it, held improper); 1849, Alcock *v.* Ass. Co., 13 Q. B. 292, 305 (the witness referred to an alleged copy of an alleged deposition, "which I now confirm"; this "swearing by reference" held improper); 1898, Dreyspring *v.* Loeb, 119 Ala. 282, 24 So. 734 (answers to depositions prepared beforehand and repeated orally by deponent, suppressed); 1809, U. S. *v.* Smith, 4 Day 121, 127 ("the substance of this deposition had been copied by the deponent from another paper which he had written at Suffield about 10 days before"; excluded); 1833, Randel *v.* Chesapeake & D. C. Co., 1 Harringt. 233, 285, 289 (the deponent, being ill with pulmonary consumption, and unable to speak much, wrote down his answers, and the writing was then read aloud to him; he assented and corrected them, and they were then taken down by the clerk; *Per Curiam*: "The general rule is that a witness shall not be permitted to bring his deposition ready prepared; like all general rules, it must have its exceptions . . . if ever there was a case in which a prepared deposition would be allowed, this is such a case"); 1809, Amory *v.* Fellowes, 5 Mass. 219, 227 ("the appellee prepared and wrote the depositions in the absence of the commissioners"; excluded); 1817, Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339, 346 (deponent "copying his deposition in the original cause," admitted exceptionally; see quotation *supra*); 1854, Commercial Bank *v.* Union Bank, 11 N. Y. 203, 210 ("one of the attorneys conversed with the witnesses prior to their examination, and at their request wrote down for them the substance of the facts' for several answers; held not fatal on the facts); 1818, Bovard *v.* Wallace, 4 S. & R. 499, 500 (the witness testifying in a second deposition, adopted the prior last one by copying it entire in the second one, without being questioned anew on it; excluded); 1825, Summers *v.* M'Kim, 12 S. & R. 405 (deposition drawn up by counsel, sent to the magistrate, and there sworn to; excluded); 1837, Armstrong *v.* Burrows, 6 Watts 266 (deposition written out beforehand, then sworn to; excluded); 1839, Carnalt *v.* Post, 8 id. 406 (similar); 1839, Grayson *v.* Bannon, ib. 524, 529 (deposition written by party's agent and afterwards sworn to, excluded); 1892, Greening *v.* Keel, 84 Tex. 326, [illegible]3, 19 S. W. 435 (deponent being aged and of infirm memory, the taker of the deposition had him answer privately certain questions, before the taking and unknown to the opponent; the interrogatories at the deposition asked the deponent to examine these private answers, and he testified that they were correct and annexed them; deposition ex-

(6) An analogous impropriety, in which opportunity is furnish fabrication by adopting a prior statement without resort to actual re tion of details, consists in *questioning by reference* to another person's ment and seeking what may be termed an "indorsing" answer verifyi other statement by adoption. Such a question is plainly to be disapp for such an answer may be merely a mechanical one:

1811, *Washington*, J., in *Richardson* v. *Golden*, 3 Wash. C. C. 109 (witness asked if an *ex parte* certificate of facts prepared by some of them "contained the t "The mode pursued in this case is calculated to produce perjury. It is worse than questions, or telling the witness what to say, because he is here reminded of the n of swearing to what he has before stated or of suffering in his credit."

1860, *Fowler*, J., in *Eames* v. *Eames*, 41 N. H. 177, 179 (the witness having merely asked at the trial whether he agreed with or differed from the testimony to a transaction): "The credit of the witness before the jury, and the greater confidence he secures with them, often depend very much on the manner in wh relates the details of the transactions about which he testifies, the intelligence with he groups the various circumstances surrounding them, the general capacity and in tion he exhibits in relation to the subject-matter of his testimony, and the accurac which he is able to remember and state minute and apparently trivial and unimp incidents connected therewith. . . . If either party insists upon it, he is entitled t the witness state fully all the details of his testimony upon the stand."[8]

On cross-examination, however, there being no danger of suggesti mechanical indorsement, this form of question is allowable;[9] at leas objection to it rests upon a totally different ground, namely, the Op rule; for while this question may properly serve to emphasize a cont tion on a specific point between witnesses on the same side,[10] or to e the witness' vacillation or uncertainty, it should not be used as a mo improperly extracting one witness' opinion on the general credibili another (*post*, §§ 1964, 1985).

§ 788. **Same: Prior Conference with Attorney; Knowledge of Ques** (7) How far any attempt can be made judicially to prevent improper gestion furnished out of court by mere conference with the attorney

cluded); 1894, Blum v. Jones, 86 Id. 492, 495, 25 S. W. 694 (cross-interrogatories as to the "manner in which his answers had been prepared and taken down," allowed); 1900, Rice v. Ward, 93 Tex. 532, 56 S. W. 747 (deposition excluded where the officer taking it used to some extent in framing the answers a memorandum of desired testimony furnished by one of the parties); 1898, Emerson Co. v. Nimocks, 88 Fed. 280 (patent-expert testifying from typewritten sheets prepared by counsel, not from witness' notes but revised and corrected by the witness; held improper, but not stricken out under the circumstances).

For the impropriety of the *officer* who takes the deposition being an *agent or kinsman* of the party, see *post*, § 803. See also the citations as to *prepared expert testimony*, etc., *post*, § 788. Distinguish also the ordinary use of *memoranda* of a past recollection, *ante*, § 745, under which would come most memoranda by experts.

[8] Nevertheless, on direct examination, the witness has *once answered* a question tail, he may for a subsequent question co the same ground refer back to his first a 1861, Black v. Black, 38 Ala. 112 (depos on cross-examination, however, the cr aminer may oblige him to repeat his testimony in detail: *supra*, § 782, par.

[9] 1888, Parnell Commission's Proce 21th day, Times' Rep. pt. 7, p. 76 (ask whether, if X has said so-and-so, it is inc allowed; *contra*, *semble*, 31st day, pt. 8, p. 1900, State v. Taylor, 56 S. C. 360, 34 939 (witnesses may be told, "either correc incorrectly, what another witness on the side has testified to, with a view to test th rectness of the memory or the honesty of th ness"; here the question was allowed, "If husband says . . . is he telling the truth falsehood?").

[10] *Post*, § 1838.

obtaining prior knowledge of the tenor of his questions, is a difficult problem, which has been solved by declining to lay down any rules. The absolute necessity of such a conference for legitimate purposes is conceded; no cautious attorney ought to put forward a witness whose testimony in at least its general tenor is unknown to him; and a personal conference is the best method of obtaining such information accurately. This right may be abused, and often is; but to prevent the abuse by any definite rule seems both undesirable and impracticable. It would seem, therefore, that nothing short of an actual fraudulent conference for concoction of testimony could properly be taken notice of; there is no specific rule of behavior capable of being substituted for the proof of such facts. The judicial attitude towards this problem may be gathered from the following passages:

1617, Lord Keeper *Coventry*, in *Bishop of Lincoln's Trial*, 3 How. St. Tr. 769, 802 (the Bishop being charged with tampering with witnesses): "Now it may be said, said he [the defendant], 'May not a man meddle nor question with a witness?' Yes; but with certain limitations, for else, if witnesses be made and corrupted, the jurors and judges both of them may be abused; and if that witnesses may be led and instructed by questions, or the like, it comes to all one as subornation. A solicitor may warn witnesses to come in, he may incite them, and enforce them, and one as well as the other. . . . But a solicitor must not instruct a witness, nor threaten him, nor carry letters to him, to induce him this way or that. Yet he may discourse with him, and ask him what he can say to this or that point, and so he may know whether he be fit to be used in the cause or no; by which means this Court is freed from the labor of asking many idle questions of the witnesses to no end, if they can say nothing to them and so spend good time to no end nor purpose. Yet he may not persuade him or threaten him to say more or less than he of himself was inclined unto and was by his conscience beforehand bound to deliver as truth."

1842, Lord *Langdale*, M. R., in *Sayer* v. *Wagstaff*, 5 Beav. 462, 467: "It is right for a solicitor to communicate with a witness to know what he can depose. That is a thing necessary to be done before the interrogatories can be prepared; and I do not mean to say that it is at all improper for a solicitor to take down from a witness what he can depose to, or that it is improper for both parties to see a witness to inquire what he can depose to. But what was done here? A witness had been examined and communicated with on behalf of the plaintiffs, not as to what he could say on the whole question, but as to what had been prepared for him to say on behalf of the plaintiffs; A. B., [nominated commissioner, but secretly also acting as defendant's solicitor,] goes to the solicitor of the plaintiffs, who shows him drafts of depositions ready for the witnesses to depose to. I think this was not a right thing to do."

1867, *Moncure*, J., in *Fant* v. *Miller*, 17 Gratt. 187, 223: "A witness ought not to write his deposition or his answers beforehand, nor ought they to be written for him beforehand by counsel or any other person; but he ought to answer the questions orally and from memory as they are propounded to him. Parties or their counsel may, orally or by writing, previous to his examination, direct his attention to the facts in regard to which he is intended to be examined, and he may refresh his memory in regard to such facts by examining books and papers, and make memoranda from them and otherwise, especially of dates and amounts."

1877, *Cole*, J., in *Allen* v. *Seyfried*, 43 Wis. 414, 418: "The practice of allowing a witness to read or to know, previous to examination, what questions will be asked him, is doubtless liable to abuse, and may sometimes almost destroy the value of a cross-examination. A hostile or dishonest witness, knowing in advance what questions were to be asked, would be put upon his guard, and might so prepare his answers as to suppress the

truth, conceal his bias, or avoid self-contradiction. This is all very evident. But sti it is absolutely necessary, in certain cases where a witness is to be examined in referen to a transaction which was the subject of correspondence, or which involved numero items or dates, that he should be informed beforehand of the nature and scope of t questions he will be called upon to answer, in order that he may be prepared for t examination; for it is obvious that without some previous preparation to refresh h memory in such cases, his testimony would be nearly or quite valueless. We think, ther fore, to lay down a rule that it is sufficient ground for suppressing a deposition, if appear that the witness was allowed to read and examine the direct and cross interro atories before he gave his evidence, would be inconvenient and dangerous as a rule practice."[1]

B. NON-VERBAL[1] TESTIMONY.

§ 789. **Dramatic Communication (Gesture, Dumb-show, etc.).** Man does n communicate by words alone; and it may occur that words become inferi to action as a mode of communicating a correct impression of a scene o served. Certainly, in an appropriate case, it is proper and customary for th trial Court in its discretion to sanction a departure from the ordinary or ve bal medium and permit the witness to make clearer his own observed da by representing them in gesture, dumb-show, or other dramatic mode Whether it is more useful to do so must depend much on the circumstance of the case. The only general and disfavoring consideration to be noted that the witness' dramatic expression may be calculated to give unfair em phasis and create improper emotional effects;[3] but this can rarely occur.

[1] *Accord:* 1835, Kelly *v.* French, Ll. & Goo. 166 (Ire.; L. C. Plunket; copies of interrogatories sent beforehand to deponent, who pencilled marginal notes as to his intended replies, not suppressed, because it was the solicitor's duty to ascertain beforehand from witnesses "the extent of their information"). Compare § 786, par. 3, 5, *ante*. The admissibility of *expert testimony* got by *ex parte* consultation and investigation is not to be doubted on the present ground; its admissibility from another point of view is dealt with *post*, § 1385.

For the admissibility of *statements of physical pain*, made to an expert when qualifying himself for testimony, see *post*, § 1721.

For suggestion in general as a reason for excluding Hearsay statements *post litem motam*, see the various Hearsay exceptions.

For *impeachment* on the ground of *bias* through money or other favors furnished before trial, see *post*, §§ 949, 961.

[1] "Verbal" is here used to signify "expressed in words"; "oral," to signify "spoken, not written."

[2] 1897, Linehan *v.* State, 113 Ala. 70, 21 So. 497 (held improper for counsel to walk across the room and ask the witness if the deceased walked as fast as that in advancing on the defendant; this is clearly unsound); 1895, People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (illustrating on a wall or door in the court-room the location of a bullet-mark; left to Court's discretion); 1897, People *v.* Durrant, 116 id. 175, 48 Pac. 75 (murder; draping the clothing of the murdered woman upon a dress-frame, for better identification, allowed); 1888, Tudor Iron Works Weber, 31 Ill. App. 312 (wearing clothes worn at the time of an accident, allowed); 189 State *v.* Ellwood, 17 R. I. 763, 769, 24 Atl. 78 (burglar's mask, etc., used to describe appearance of burglar); 1898, Louisville & N. R. C *v.* Ray, 101 Tenn. 1, 46 S. W. 554 (article placed in court-room to illustrate testimony In the trial of O'Connell, 5 St. Tr. N. S. 1, 24 (1843), is an amusing cross-examination of witness who endeavored to represent the treason able significance of one of the great orator's pauses! There is certainly one great historic pause which could never again be reproduced i its effect: "Caesar had his Brutus, — Charle the First, his Cromwell, — and George th Third — ['Treason,' cried the Speaker] — may profit by their example!"

The cases cited *post*, § 790 (models and diagrams), and *post*, § 1152 (autoptic proference or "real evidence"), are sometimes difficult t distinguish from those falling under the presen head. For additional and interesting instance of the present sort, occurring at *nisi prius*, se a series of articles by Mr. Irving Browne, i 5 Green Bag, *passim*.

[3] 1862, People *v.* Graham, 21 Cal. 261, 26 (the child, the alleged subject of a rape, burs into tears when testifying; "unless we ca trust to the intelligence and integrity of juries to withstand such influences, we must dispens with the use of juries as a part of the machinery for the administration of justice"); 1898, Sel

§ 790. **Models, Maps, Diagrams, Photographs; General Principle.** It would be folly to deny ourselves on the witness-stand those effective media of communication commonly employed at other times as a superior substitute for words. If a simple line-plan of a house is more satisfactory than a mass of alphabetical letters arranged in words, as a mode of communicating the relative position of the house-rooms as observed by us, then this method of communication is equally proper to be resorted to in a witness' communications to a jury. There can be no dispute upon this point; and no necessity for judicial elaboration of it would have been necessary, except for the peculiar danger and fallacy that lurks always in the use of writings and other materials of non-oral expression. This is considered more fully in another connection (*post*, § 2130); it is, briefly, that a material object, particularly a writing, when presented as purporting to be of a certain origin, always tends to impress the mind unconsciously, upon the bare sight of it, with the verity of its purport. Does it purport to be a contract signed by A and B? We immediately assume it to be such; though it may be the merest forgery. Does it purport to be a picture of the place of a murder? We look at it with an interest based on the unconscious assumption that it *is* that house. In short, we unwittingly give the document the credit of speaking for itself; though no human being has yet spoken for it. Now this tendency has to be sternly repressed; and as it is in the present relation that this tendency finds one of its most frequent manifestations, so it is here that the tendency has so frequently to be struck at by judicial rulings.

We are to remember, then, that a document purporting to be a map, picture, or diagram, is, for evidential purposes simply nothing, except so far as it has a human being's credit to support it. It is mere waste paper, — a testimonial nonentity. It speaks to us no more than a stock or a stone. It can of itself tell us no more as to the existence of the thing portrayed upon it than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is *somebody's testimony*, — or it is nothing. It may, sometimes, to be sure, not be offered as a source of evidence, but only as a document whose existence and tenor are material in the substantive law applicable to the case, — as where, on a prosecution for stealing a map or in ejectment for land conveyed by deed containing a map, the map is to be used irrespective of the correctness of the drawing; here we do not believe anything because the map represents it.[1] But whenever such a document is offered as proving things to be as therein represented, then it is offered testimonially, and it must be associated with a testifier.

Two consequences plainly follow. On the one hand, the mere picture or

leck *v.* Janesville, 100 Wis. 157, 75 N. W. 975 (plaintiff's testimony taken as she lay ill on a lounge; not improper).

Compare the application of the same consideration to *autoptic preference*, or "real evidence" (*post*, § 1157), and the principle forbidding *indecent testimony* (*post*, § 2180).

[1] 1884, People *v.* Muller, 32 Hun 210 (charge of selling or showing indecent photographs); 1893, U. S. *v.* Pagliano, 53 Fed. 1001 (charge of importation of women for prostitution; possession by defendant of photographs of the women imported, admissible).

map itself cannot be received except as a non-verbal expression of the testimony of some witness competent to speak to the facts represented. On the other hand, it is immaterial whose hand prepared the thing, provided it is presented to the tribunal by a competent witness as a representation of his knowledge. These consequences remain to be more fully considered. It is sufficient to note at this point that, by universal judicial concession, a map, model, diagram, or photograph, takes an evidential place only as a non-verbal mode of expressing a witness' testimony:

1864, *Willes*, J., in *R.* v. *Tolson*, 4 F. & F. 103 (admitting a photograph to prove identity of person): "The photograph was admissible because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents, and therefore is in reality only another species of the evidence which persons give of identity when they speak merely from memory."

1857, *Tenney*, C. J., in *State* v. *Knight*, 43 Me. 132: "It would be very difficult for an expert of the most accurate and extensive observation to exhibit in language with precision, so as to be understood, those delicate appearances which are appreciable only by the sense of vision. Nothing short of an exact representation to the sight can give with certainty a perfectly correct idea to the mind."

1873, *Peters*, C. J., in *Shook* v. *Pate*, 50 Ala. 92: "A diagram . . . is at best an approximation, and in this sense it is indifferent by whom it is made. . . . A witness may as well speak by a diagram and linear description, when the thing may so be described, as by words. . . . It is enough if it serves the purpose of the witness in the explanation of the lines and localities he is seeking to exhibit."

1881, *Folger*, C. J., in *Cowley* v. *People*, 83 N. Y. 478: "A witness who speaks to personal appearance or identity tells in more or less detail the minutia thereof as taken in by his eye. What he says is a description thereof by one mode of signs, by words orally uttered. If his testimony be written instead of spoken and is offered as a deposition, it is a description in another mode of signs, by words written; and the value of that mode, the deposition, depends upon the accuracy with which his words uttered are put into words written. Now if he has before him a portrait or photograph of the person, and it shows to him a correct copy of that person, if it produce to his view a correct description, which he testifies is a likeness, why may not that be given to the jury as a description of the person by the witness in another mode of signs?"

1897, *Clark*, J., in *Hampton* v. *R. Co.*, 120 N. C. 534, 27 S. E. 963: "A map not made under the order of the Court is really only the declaration, so to speak, of the party making it. Its reliability depends entirely upon his accuracy and conscientiousness, and is therefore only admissible as his evidence, and because it may convey to the eyes of the jury somewhat more accurately the description which the witness was endeavoring to convey to their ears by his oral testimony."

1899, *Valliant*, J., in *Baustian* v. *Young*, 152 Mo. 317, 53 S. W. 921: "[Photographs] are of the same character of evidence as diagrams and pictures drawn by hand; not necessarily carrying the same degree of probative force, but still of the same character; not in themselves evidence at all, but representing to the eye what the witness declares was the real appearance of the things at the times he saw it. Diagrams, drawings, and photographs are resorted to only because the witness cannot, with language, as clearly convey to the minds of the Court and jury the scene as the light printed it on the retina of his own eye at the time of which he is testifying."

§ 791. **Same; Instances of Models, Maps, and Diagrams.** The use of models, maps, and diagrams, as modes of conveying a witness' knowledge,

is illustrated in manifold rulings,[1] as well as in the daily practice of trials.

One or two discriminations only needed to be noted. (1) The map or diagram, as testimony, must come in on the credit of some witness (*post*,

[1] *Maps, drawings, diagrams: Eng.:* 1817, Watson's Trial, 32 How. St. Tr. 125 (Mr. Gurney: "I believe on the next day you made a sketch of the waggon [with the people standing in it]?" Mr. Wetherell: "I object to the description in writing; it is matter of verbal description"; Mr. Attorney-General: "My lord, I cannot conceive the objection"; Lord Ellenborough, to witness: "Go on, go on. Can there be any objection to the production of a drawing, or a model, as illustrative of evidence? Surely there is nothing in the objection"; the witness produced his drawing of the waggon, with a flag at each end and the banner in the centre; it was handed to the jury, and ther Mr. Wetherell); *Ala.:* 1852, Nolin *v.* Parm 21 Ala. 71 (diagram); 1853, Campbell *v.* State 23 id. 83 (map); 1882, Humea *v.* Bernstein, 74 id. 546, 553 (map); 1889, East Tennessee V. & G. R. Co. *v.* Watson, 90 id. 41, 45, 7 So. 813 ("it might properly be considered by implication as a part of the witness' testimony, and therefore aa in evidence"); 1894, Burton *v.* State, 107 id. 108, 127, 18 So. 284 (map of place of homicide); 1895, Wilkinson *v.* State, 106 id. 23, 17 So. 457 (diagram); 1897, Burton *v.* State, 115 id. 1, 22 So. 585 (map of locality of a murder); *Fla.:* 1898, Rawlins *v.* State, 40 Fla. 155, 24 So. 65 (map verified by aurveyor and used by witnessea); *Ga.:* 1882, Moon *v.* State, 68 Ga. 695 (diagram); 1896, Western & A. R. Co. *v.* Stafford, 99 id. 187, 25 S. E. 658 (diagram of place of a railroad accident); *Ill.:* 1890, Kankakee & S. R. Co. *v.* Horan, 131 Ill. 303, 23 N. E. 621 (map); 1903, Lake St. Elev. R. Co. *v.* Burgess, 200 id. 628, 66 N. E. 215 (sketch of a railroad car); *Ia.:* 1893, Goldsborough *v.* Piddnck, 87 Ia. 599, 601, 54 N. W. 431 (surveyor's map illustrating hia teatimony); *Me.:* 1857, State *v.* Knight, 43 [illegible] 130 (chart of human skeleton; see quotation *supra*); *Md.:* 1889, County Com'rs *v.* Wise, 71 Md. 54, 18 Atl. 31 (river-bank after flood); *Mass.:* 1833, Smith *v.* Strong, 14 Pick. 133 ("The copy of the plan annexed to the deposition . . . was in truth by reference made a part of the deposition"); 1870, Clapp *v.* Norton, 106 Mass. 33 (plan); 1871, Com. *v.* Holliston, 107 id. 233 (plan); 1871, Paine *v.* Woods, 108 id. 168 (plan); 1885, Barrett *v.* Murphy, 140 id. 143 (plan); *Minn.:* 1888, Bennison *v.* Walbank, 38 Minn. 313, 37 N. W. 447 (diagram of accident); *Mo.:* 1872, Williamson *v.* Fischer, 50 Mo. 198, 200 (map; "as a part of the testimony of Mr. C. it should have gone to the jury with his oath; its correctness, like his other testimony, being left to them"); *Nebr.:* 1898, Chicago R. I. & P. R. Co. *v.* Buel, 56 Nebr. 205, 76 N. W. 571 (map); *N. H.:* 1870, Ordway *v.* Haynes, 50 N. H. 159 ("any chalk, whether engraved or more roughly sketched, whether made with a pen, a pencil, a paint brush, a coal, or a piece of chalk"); *N. Y.:* 1890, McKay *v.* Lasher, 121 N. Y. 477, 483, 24 N. E. 711 (expert witness to handwriting may illustrate his testimony by the blackboard); 1893, People *v.* Johnson, 140 id. 350, 354, 35 N. E. 604 (murder; sketches of premises, blood-stains, etc.); *N. C.:* 1887, State *v.* Whiteacre, 98 N. C. 753, 3 S. E. 488 (diagram); 1888, Dobson *v.* Whisenhaut, 101 id. 647, 8 S. E. 126; 1889, Burwell *v.* Sneed, 104 id. 120, 10 S. E. 152; 1895, Riddle *v.* Germanton, 117 id. 387, 389, 23 S. E. 332 (map); 1895, Tankard *v.* Railroad, ib. 558, 565, 23 S. E. 46 (diagram of railroad crossing); 1900, Arrowood *v.* R. Co., 126 id. 629, 36 S. E. 151; 1903, State *v.* Wilcox, — N. C. —, 44 S. E. 625 (surroundings of a homicide); *Pa.:* 1890, Com. *v.* Switzer, 134 Pa. 388, 19 Atl. 681 (map); 1901, Hagan *v.* Carr, 198 id. 606, 48 Atl. 688 (diagram of theory of handwriting); 1903, Geis *v.* Rapp, — id. —, 55 Atl. 1063 (model of a scaffold); *S. C.:* 1893, Rapley *v.* Klugh, 40 S. C. 134, 146, 18 S. E. 680 (map); *Tex.:* 1888, Griffith *v.* Rive, 72 Tex. 187, 12 S. W. 168 (map); *U. S.:* 1897, Bunker Hill Co. *v.* Schmelling, 24 C. C. A. 564, 79 Fed. 283 (diagram of a mine); 1899, Western Gas C. Co. *v.* Danner, 38 id. 528, 97 Fed. 882 (diagram); 1900, Southern Pacific Co. *v.* Hall, 41 id. 50, 100 Fed. 760 (place of railroad accident); 1902, Chicago *v.* Le Moyne, 56 id. 278, 119 Fed. 662 (sketch of proposed buildings to show a method of avoiding damage by eminent domain appropriation, allowed to be excluded in discretion); *Wash.:* 1898, State *v.* Hunter, 18 Wash. 670, 52 Pac. 247 (map of premises of rape-assault); *W. Va.:* 1893, State *v.* Harr, 38 W. Va. 58, 63, 17 S. E. 794 (diagram of distance); 1893, Poling *v.* R. Co., ib. 645, 657, 18 S. E. 782 (scene of injury by railway mail-crane); 1899, King *v.* Jordan, 46 id. 106, 32 S. E. 1022; *Wis.:* 1857, Vilas *v.* Reynolds, 6 Wis. 214, 224 (plat).

Models: 1895, Davis *v.* Power Co., 107 Cal. 563, 40 Pac. 953; 1898, People *v.* Searcy, 121 id. 1, 53 Pac. 359 (showing the jury boot-tracks artificially made in a box of sand, allowed); 1895 Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938; 1895, Louisville & N. R. Co. *v.* Berry, 96 Ky. 604, 29 S. W. 449; 1887, Earl *v.* Lefler, 10 N. Y. St. Rep. 807 (impression of a horse's mouth, in wax or plaster); 1902, Moran Bros. Co. *v.* Snoqualmie F. P. Co., 29 Wash. 292, 69 Pac. 759 (model of a regulator-box for a power-plant).

Many additional instances, never reaching an appellate tribunal, might be collected, — such as the use of manikin bodies in the Borden trial (Mass. 1893), of a church-model in miniature, in the Durrant trial (Cal. 1897).

§ 793); yet this witness need not always be in court testifying; for, by exceptions to the Hearsay rule, a map of an *official surveyor* (*post*, § 1665) or of any *deceased person* made in the *regular course of business* (*post*, §§ 1523, 1570), may be received on certain conditions. In such a case the document must be *authenticated* as genuinely the work of the person purporting to make it (*post*, §§ 2129 ff.).

(2) The map or diagram may be offered as a part of a constitutive document — such as a *deed* or *contract*, and not as testimony; or a party's admission may make the map receivable; with such uses the present principle is not concerned.

(3) When the map or diagram comes in as a part of testimony, it *is evidence*, like any other part of the witness' utterance.[2] Whether it should *go to the jury-room* with other documents depends upon the general rule applicable to that question (*post*, § 1913); perhaps not all written testimony may be taken to the jury-room, but the map is none the less written testimony.

§ 792. **Same: Instances of Photographs.** A photograph, like a map or diagram, is merely a witness' pictured expression of the data observed by him and therein communicated to the tribunal more accurately than by words. Its use for this purpose is sanctioned beyond question.[1] Certain

[2] This is sufficiently illustrated by the remarks quoted in some of the citations in the preceding note. There has, however, been here and there a tendency to confuse the subject, as illustrated in the following passage: 1853, Chilton, C. J., in Campbell *v.* State, 23 Ala. 44, 83: "The rule is that a witness may use a plat, diagram, or map, made in any way, to explain or make himself intelligible to a jury, though it cannot go to them as evidence; it amounted to no more than if the witness had written down his testimony to aid his memory on the examination, and no one would contend that such memorandum as a matter of right could be taken by the jury [into the jury-room]." Here the fallacy consists in treating the question whether written testimony may be *taken to the jury-room* (a question of trial procedure) with the question whether a duly verified map *is written testimony*; and also in invoking the false analogy of a paper reviving recollection, which is of course (*ante*, § 763) not testimony.

[1] In the following cases photographs were declared admissible, except where otherwise noted: *Eng.:* 1862, R. *v.* United Kingdom El. T. Co., 3 F. & F. 73, 74 (electric-wire posts as highway-obstructions); 1864, R. *v.* Folson, 4 id. 103, 104 (personal features); 1874, R. *v.* Castro (Tichborne Case), charge of C. J. Cockburn, I, 640 (grotto), I, 672, II, 59 (personal features); 1876, Durst *v.* Masters, L. R. 1 P. D. 378 (premises); *Ala.:* 1875, Luke *v.* Calhoun Co., 52 Ala. 118 (personal features); 1889, Kansas City M. & B. R. Co. *v.* Smith, 90 id. 27, 8 So. 43 (train-wreck); *Cal.:* 1889, *Re* Jessup, 81 Cal. 418, 21 Pac. 976, 22 Pac. 742 (personal features); 1897, People *v.* Durrant, 116 id. 179, 48 Pac. 75 (deceased while alive); 1899, People *v.* Phelan, 123 id. 551, 56 Pac. 424 (place of homicide); 1899, People *v.* Crandall, 125 id. 129, 57 Pac. 785 (scene of a crime); *Conn.:* 1889, Dyson *v.* R. Co., 57 Conn. 24, 17 Atl. 137 (railroad-crossing); 1899, McGar *v.* Bristol, 71 id. 652, 42 Atl. 1000 (premises); 1899, Cunningham *v.* R. Co., 72 id. 244, 43 Atl. 1047 (condition of rails; photograph not testified to as correct, excluded); 1900, Harris *v.* Ansonia, 73 id. 359, 47 Atl. 672 (highway and premises; held not improperly rejected in discretion); 1901, Wetherell *v.* Hollister, ib. 622, 48 Atl. 826 (weight of photographs as to correctness is for the jury); 1902, State *v.* Cook, 75 id. 277, 53 Atl. 589 (condition of horses as to flesh; admissible in discretion); *Fla.:* 1891, Adams *v.* State, 28 Fla. 511, 538, 10 So. 106 (in general); 1892, Ortiz *v.* State, 30 id. 256, 265, 11 So. 611 (a hotel and a tree near by, excluded because misleading as to material matters of distance, etc.); *Ga.:* 1882, Franklin *v.* State, 69 Ga. 42 (wound); 1889, Shaw *v.* State, 83 id. 102, 9 S. E. 768 (representing persons in the situation of the defendant and the deceased at the time of the killing); 1890, Travelers' Ins. Co. *v.* Sheppard, 85 id. 790, 12 S. E. 18 (personal features); *Ill.:* 1881, Rockford *v.* Russell, 9 Ill. App. 233 (bridge); 1892, Cleveland C. C. & St. L. R. Co. *v.* Monaghan, 140 Ill. 483, 30 N. E. 869 (admissible in discretion of Court; here the inaccuracy arose from the picture having been taken two months after the injury, and the witness taking it and verifying it was not acquainted with the original features of the place); 1901, Lake Erie & W. R. Co. *v.* Wilson, 189 id. 89, 59 N. E. 573 (railroad-track); 1901, Iroquois F. Co. *v.* McCrea,

discriminations, however, which may affect its admissibility from other points of view, need to be made.

191 Id. 340, 61 N. E. 79 (photograph of a dump pile, excluded because not shown to represent the condition at the time in issue); 1902, Chicago & A. R. Co. *v.* Corson, 198 id. 98, 64 N. E. 739 (photograph of the place of an accident, taken nine months later, when the surroundings had changed, excluded); *Ind.*: 1877, Beavers *v.* State, 58 Ind. 530, 535 (deceased's personal features); 1889, Keyes *v.* State, 122 id. 529, 23 N. E. 1097 (premises); 1891, Miller *v.* R. Co., 128 Id. 97, 27 N. E. 339 (railroad crossing); *Ia.*: 1877, Locke *v.* R. Co., 46 Ia. 110 (trainwreck); 1879, Reddin *v.* Gates, 52 id. 213, 2 N. W. 1079; 1883, German Theol. School *v.* Dubuque, 64 id. 737, 17 N. W. 153 (flooded premises); 1885, Barker *v.* Perry, 67 id. 148, 25 N. W. 100; 1895, State *v.* Windahl, 95 id. 470, 64 N. W. 420 (deceased after he was shot); 1902, State *v.* Hossack, 116 id. 194, 89 N. W. 1077 (body of deceased); *Kan.*: 1895, Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337 (personal features); *Me.*: 1897, State *v.* Hersom, 90 Me. 273, 38 Atl. 160 (room); *Md.*: 1880, People's P. R. Co. *v.* Green, 56 Md. 93, *semble* (railroad car); 1896, Dorsey *v.* Habersack, 84 id. 117, 35 Atl. 96 (building); *Mass.*: 1864, Hollenbeck *v.* Rowley, 8 All. 475 (premises); 1875, Blair *v.* Pelham, 118 Mass. 421 (place of highway injury); 1882, Randall *v.* Chase, 133 id. 213; 1889, Verran *v.* Baird, 150 id. 142, 22 N. E. 630 (place of flood); 1892, Com. *v.* Campbell, 155 id. 537, 30 N. E. 72 (personal features as to wearing of whiskers); 1893, Turner *v.* R. Co., 158 id. 261, 265, 33 N. E. 520 (railroad tracks, to show the absence of blocks in the frogs); 1893, Com. *v.* Morgan, 159 id. 375, 377, 34 N. E. 458 (personal features as to wearing of whiskers); 1894, Farrell *v.* Weitz, 160 id. 288, 35 N. E. 783 (bastardy; likeness of alleged father, a third person, not allowed to be shown by photograph); 1894, Gilbert *v.* R. Co., 160 id. 403, 36 N. E. 60 (questionable, in showing condition of physical health and the like); 1894, Com. *v.* Robertson, 162 id. 90, 38 N. E. 25 (premises); 1898, Harris *v.* Quincy, 171 id. 472, 50 N. E. 1042 (sidewalk; rejectible in trial Court's discretion as not instructive); 1898, Carey *v.* Hubbardston, 172 id. 106, 51 N. E. 521 (highway; trial Court's discretion to determine as to exclusion because uninstructive); 1899, Wilcox *v.* Forbes, 173 id. 63, 53 N. E. 146 (alleged insane person; trial Court's discretion allowed to exclude); 1899, Dolan *v.* M. R. F. Life Ass'n, ib. 197, 53 N. E. 398 (insured person; admissible in trial Court's discretion); *Mich.*: 1887, Brown *v.* Ins. Co., 65 Mich. 315, 32 N. W. 610 (personal features); 1894, Bedell *v.* Berkey, 76 id. 440, 43 N. W. 308, *semble* (premises); 1893, Leidlein *v.* Meyer, 95 id. 586 591, 55 N. W. 367 (premises injured by water, a year before taking; excluded as of no assistance); 1901, People *v.* Carey, 125 id. 535, 84 N. W. 1087 (personal features); 1903, Sterling *v.* Detroit, — id. — , 95 N. W. 986 (place of an injury); *Minn.*: 1890, State *v.* Holden, 42 Minn. 354, 44 N. W. 123 (personal features; the prosecution offering one photograph of the deceased to show that a likeness of the deceased's brother, identified by a witness for the defence as like the deceased, was not in fact like him); 1893, Cooper *v.* R. Co. 54 id. 379, 383, 56 N. W. 42 (the plaintiff as injured and suffering); 1899, Stewart *v.* R. Co., 78 id. 85, 80 N. W. 855 (condition of track of railroad as reproduced by artificial arrangement of original conditions; held not improperly rejected); 1901, Attix *v.* Minnesota S. Co., 85 id. 142, 88 N. W. 436 (photograph of a mill yard, taken seven months after an accident, held not improperly received, on the facts); *Mo.*: 1895, State *v.* O'Reilly, 126 Mo. 597, 29 S. W. 577 (scene of a murder, the persons being replaced in their original positions); 1899, Baustian *v.* Young, 152 id. 317, 53 S. W. 921 (sidewalk); *Nebr.*: 1886, Marion *v.* State, 20 Nebr. 240, 29 N. W. 911 (deceased's corpse); 1893, Omaha S. R. Co. *v.* Beeson, 36 id. 361, 364, 54 N. W. 557 (land taken by railroad); 1903, Lamb *v.* State, — id. — , 95 N. W. 1050 (murdered man); *N. H.*: 1898, Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188 (testator and his wife); *N. J.*: 1897, Goldsboro *v.* R. Co., 60 N. J. L. 49, 37 Atl. 433; *N. Y.*: 1866, Cozzens *v.* Higgins, 1 Abb. App. Cas. 451, 33 How. Pr. 436 (premises); 1871, Ruloff *v.* People, 45 N. Y. 213, 224 (personal features); 1881, Cowley *v.* People, 83 id. 477 (personal features; see quotation *supra*); 1886, People *v.* Buddensieck, 103 id. 487, 500, 9 N. E. 44 (premises); 1887, Archer *v.* R. Co., 106 id. 598, 603, 13 N. E. 318 (premises); 1888, People *v.* Jackson, 111 id. 370, 19 N. E. 54 (place of homicide; here received by consent); 1889, Alberti *v.* People, 118 id. 77, 88, 23 N. E. 35 (injured limbs); 1890, People *v.* Smith, 121 id. 581, 24 N. E. 852 (personal features); 1891, People *v.* Fish, 125 id. 147, 26 N. E. 319 (premises and corpse-wounds); 1893, People *v.* Webster, 139 id. 73, 83, 34 N. E. 730 (deceased, to show his appearance to the defendant when acting in self-defence); 1896, People *v.* Pastolka, 149 id. 570, 43 N. E. 548 (place of a homicide); the following are some of the instances in the intermediate courts: 1887, Wilcox *v.* Wilcox, 46 Hun 38 (personal features); 1891, Glazier *v.* Hebron, 62 id. 144, 16 N. Y. Suppl. 503 (place of injury in road); 1892, Roosevelt Hospital *v.* R. Co., 21 N. Y. Suppl. 205, 66 Hun 633 (premises); 1893, People *v.* Webster, 68 Hun 17, 22 N. Y. Suppl. 634 (personal features); 1894, Nies *v.* Broadhead, 27 N. Y. Suppl. 52, 75 Hun 255 (premises); *N. C.*: 1897, Hampton *v.* R. Co., 120 N. C. 534, 27 S. E. 96 (photograph of the locality of an accident, excluded simply because the place had been altered at the time of taking; Clark, J., diss.); *Okl.*: 1902, Smith *v.* Terr., 11 Okl. 669, 69 Pac. 805 (body of deceased, and its wounds); *Pa.*: 1874, Udderzook *v.* Com., 76 Pa. 340, 352 (photograph of G. shown to a witness, who identified it as that of a man known to him as W.); 1893, Com. *v.* Connors, 156 id.

(1) There may be an objection, not to the photographic testimony as su
but to the *relevancy of the fact testified to;* if the fact to be evidenced by t
photograph is itself not admissible, obviously it cannot be proved by pho
graph or otherwise. This objection of irrelevancy is commonly either th
the condition of a place or person at the time of taking the photograph
not evidence of the condition at the time in issue (*ante*, § 438);[2] or that t
outward appearance of a person is not evidential of his inward conditi
(*ante*, §§ 226, 228, 229);[3] or that the features of a child are not evidence,
resemblance, of a particular person's paternity (*ante*, § 166).[4] These obje
tions are seldom favorably considered by the Courts; but it is obvious th
the decision in any case rests on principles of relevancy of the fact pi
tured, and does not affect the propriety of evidencing a relevant fact by
photograph.

(2) There may be an objection, not to the photographic testimony as suc
but to the reproduction of a corporal injury or other object calculated *undu
to excite sympathy* for one party and *unfair prejudice* against the other;[5] th
objection is identical with that considered (*post*, §§ 1157, 1158) for autop
tic proference (or, real evidence), and a similar application of principle woul
be made.

(3) The objection that a photograph *may* be so made as to *misrepresent th
object* is genuinely directed against its testimonial soundness; but it is of n
validity. It is true that a photograph can be deliberately so taken as to con
vey the most false impression of the object.[6] But so also can any witnes

147, 151, 27 Atl. 366 (accomplice in a robbery); 1898, Beardslee *v.* Columbia Tp., 188 id. 496, 41 Atl. 617 (place of accident); 1899, Com. *v.* Keller, 191 id. 122, 43 Atl. 198 (size of deceased); *R. I.:* 1892, State *v.* Ellwood, 17 R. I. 763, 771, 24 Atl. 782 (accused shortly after arrest, to identify him); *S. C.:* 1896, State *v.* Kelley, 46 S. C. 55, 24 S. E. 60 (a room and window where J. had been shot, J. occupying the same position as on the day in queation); *Tenn.:* 1900, Livermore F. & M. Co. *v.* Union S. & C. Co., 105 Tenn. 187, 58 S. W. 270 (machinery); *Tex.:* 1891, Missouri K. & T. R. Co. *v.* Moore, — Tex. —, 15 S. W. 714 (railroad crossing, showing the distance at which an approaching train could be seen); 1895, Taylor, B. & H. R. Co. *v.* Warner, 88 id. 642, 32 S. W. 868 (personal appearance two years before death); *U. S.:* 1896, Scott *v.* New Orleans, 21 C. C. A. 402, 75 Fed. 373 (a sidewalk-defect); 1896, Wilson *v.* U. S., 162 U. S. 613, 16 Sup. 895 (the deceased, on a charge of murder); 1900, Denver & R. G. R. Co. *v.* Roller, 41 C. C. A. 22, 100 Fed. 738 (railroad accident); 1901, Considine *v.* U. S., 50 id. 272, 112 Fed. 342 (photographs taken over four years before, identified as being good likenesses at the time of the burglary in question); 1902, Southern P. Co. *v.* Huntsman, 55 id. 366, 118 Fed. 412 (train-wreck); *Utah:* 1896, Dedericks *v.* Salt Lake, 14 Utah 137, 46 Pac. 656 (locality of a railroad accident); 1897, State *v.* McCoy, 15 id. 136, 49 Pac. 420 (deceased person); *Wis.:* 1872, Church *v.* Milwaukee, 31 Wis. 512, 519 (premises); 1899, Baxter *v.* R. Co., 104 id. 307, 80 N. W. 644 (plaintiff's injured appearance admissible in discretion); 1899, Selleck *v.* Janesville, 1b. 307, 80 N. W. 944 (injured foot, excluded as unnecessary and prejudicial, on the principle of § 1158, *post*); 1902, Hupfer *v.* Distilling Co., 114 id. 279, 90 N. W. 191 (vat hoops; Marshall, J. diss., on the ground that photographs were insufficient without other evidence when available); 1903, Panlson *v.* State — id. —, 94 N. W. 771 (premises).

Distinguish the question of the *sufficiency* o a photograph, as sole source of proof, from its mere admissibility: 1896, Frith *v.* Frith, Prob. 74 (in divorce causes, a photographic identification will not alone auffice, unless in special circumstances).

For *handwriting* photographs, see *post*, § 797.

For *cathode-ray* (X-ray, Roentgen-ray) photographs, see *post*, § 795.

[2] As in Verran *v.* Baird, Mass., Hampton *v.* R. Co., N. C., *supra*, and in other similar cases; as well as in the cases of a reproduced grouping of the partiea to an affray, and of the featurea of a person photographed long before his decease.

[3] As in Gilbert *v.* R. Co., Wilcox *v.* Forbes, Mass., Cooper *v.* R. Co., Minn., *supra*.

[4] As in Farrell *v.* Weitz, Mass., *supra*.

[5] As in Cooper *v.* R. Co., Minn., Selleck *v.* Janeaville, Wis., *supra*.

[6] The most striking illustrationa of this may be found in an article by Mr. Fitzgerald, "Some Curiosities of Modern Photography," in the

lie in his words. A photograph can falsify just as much and no more than the human being who takes it or verifies it. The fallacy of argument occurs in assuming that the photograph can come in testimonially without a competent person's oath to support it (*post*, § 793). If a qualified observer is found to say, "This photograph represents the fact as I saw it," there is no more reason to exclude it than if he had said, "The following words represent the fact as I saw it," which is always in effect the tenor of a witness' oath. If no witness has thus attached his credit to the photograph, then it should not come in at all, any more than an anonymous letter should be received as testimony. There can be no middle ground between these two consequences. Occasionally a Court is found excluding a photograph as being misleading;[7] but this is a begging of the very question which the jury have to decide; it would be as anomalous as if the judge were to order a witness from the stand because he was believed by the judge to be lying. Perjury cannot be thus determined in advance by the judge, — not more for photographic than for verbal testimony. There is a Massachusetts doctrine[8] that the trial Court may in its discretion reject a photograph as being under the circumstances not sufficiently "instructive"; in other words, the Court rules that cumulative testimony, by superfluously adding a pictured description to a verbal description, is on the facts not needed. Such a rule may be justified as an application of the general principle (*post*, § 1907) permitting the rejection of cumulative testimony; but not otherwise. The judge may properly warn the jury as to the peculiar deceptive possibilities of photographs, just as he may remind them of the possibilities of perjury for interested witnesses and others; but this is all; and this sufficiently protects the opponent, since he has an equal if not a greater opportunity of exposing photographic perjury than of exposing other sorts.[9]

§ 793. **Verification of Maps, Photographs, etc.; General Principle.** The use of maps, models, diagrams, and photographs as testimony to the objects represented rests fundamentally (as already noted in § 790) on the theory that they are the pictorial communications of a qualified witness who uses this method of communication instead of or in addition to some other method. It follows, then, that the map or photograph must first, to be admissible, be *made a part of some qualified person's testimony.* Some one must stand forth as its testimonial sponsor; in other words (as commonly said), it *must be verified.* There is nothing anomalous or exceptional in this requirement of verification; it is simply the exaction of those testimonial qualities which are required equally for all witnesses; the application merely takes a different form. A witness must have had observation of the data in question (*ante*, § 650), must recollect his observations (*ante*, § 725), and must correctly ex-

"Strand Magazine" for January and February, 1895, and in the "Curiosities" appendix and in the articles in the same magazine before and since that date; so also in a quotation from the London "Tidbits," in an article by Mr. Irving Browne, 5 Green Bag 62.

[7] As in Ortiz *v.* State, Fla., *supra*.

[8] See the cases collected *supra*.

[9] For the objection to *ex parte* photographs on the ground of lack of cross-examination, see *post*, § 1385.

press his observation and recollection (*ante*, § 766). Here, then, is a form expression ready prepared pictorially; he must supply the missing element in brief, it must appear that there is a witness who has competent knowledge, and that the picture is affirmed by him to represent it. The latt element may be implied from his very oath;[1] the former must appear fro his preliminary statements. The deductions from this general principle ma now be examined.

§ 794. **Same: Anonymous Pictures; Personal Knowledge; Calling th Maker; Official Maps.** (1) A map or photograph cannot be received *anony mously*; it must be "verified" by some witness.[1] So also specific additions marks or legends, borne on the document but not verified in particular, mus similarly be sponsored.[2] Where the map is offered as an official one, withou calling the officer (*post*, § 1665), the official authentication of it amounts c course to a verification.

(2) The witness thus standing sponsor must be *qualified by observatio* (*ante*, §§ 650, 657) to speak of the matters represented in the picture. Whether this requirement is properly fulfilled should be left to the deter mination of the trial Court.[4]

(3) The witness thus using the map or photograph as representing hi knowledge *need not be the maker* of it.[5] He affirms it to represent his obser

[1] The practical rule laid down in the following case ought to be extended to all these modes of testimony: 1856, Green, C. J., in State *v.* Fox, 25 N. J. L. 602: "A model is a copy or imitation of the thing intended to be represented; and when the witness states that he exhibits a model, it is to be inferred, in the absence of all proof to the contrary, that the model is [sworn to be] correct."

[1] This requirement is made, expressly or impliedly, in nearly every one of the rulings cited *ante*, §§ 791, 792, and no repetition of them is needed.

[2] For example: 1891, Adams *v.* State, 28 Fla. 511, 538, 10 So. 106 (a map bearing the ma. "1. S.'s route," etc., was handed in after I. S had testified, counsel having made the marks; this was declared improper). In a radical ruling in New Hampshire (Ordway *v.* Haynes, 50 N. H. 159) it was said that when an illustration is offered in a medical book, even through a witness on the stand, "that makes it at once improper as evidence, because that gives it an undue importance with the jury; the jury should not know that it was in a medical book or a law book, or what the book was that contained it." The notion here is that the chart really thus receives a testimonial verification from some one, the book-author, not on the stand. But this seems an over-cautious and unpractical ruling.

[3] 1852, R. *v.* Mitchell, 6 Cox Cr. 82 (excluding a map certified by a surveyor but also containing such inscriptions as "place where the can of milk was spilt," etc., as to which he was not a competent witness); 1882, Humes *v.* Bernstein, 72 Ala. 546, 553 (map prepared from insufficient data); 1899, People *v.* Hill, 123 Cal 571, 56 Pac. 443 (diagram verified by witness who knew of the place only by hearsay, excluded); 1892, Cleveland C. C. & St. L. R. Co. *v.* Monaghan, 140 Ill. 483, 30 N. E. 869 (see citation *supra*, § 792); 1876, Rippe *v.* R. Co., 23 Minn. 22 (map); 1903, State *v.* Smith, 68 N. J. L. 609, 54 Atl. 411 (furniture in a room at the time of a homicide).

[4] 1892, Ortiz *v.* State, 30 Fla. 256, 265, 11 So. 611 (see citation *supra*, § 792); 1892, Cleveland C. C. & St. L. R. Co. *v.* Monaghan, 140 Ill. 483, 30 N. E. 869 (see citation *supra*, § 792); 1894, Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783; 1893, Carey *v.* Hubbardstown, 172 id. 106, 51 N. E. 521; and other cases in this jurisdiction cited *supra*, § 792; 1898, Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188; 1903, Hupfer *v.* National Distilling Co., — Wis. —, 96 N. W. 809 (identity of the object photographed is largely for the trial Court's determination; here, certain vat-hoops).

[5] *Maps and Diagrams:* 1853, Campbell *v.* State, 23 Ala. 83 (map); 1898, Fuller *v.* State, 117 id. 36, 23 So. 688 (diagram); 1898, Jordan *v.* Duke, — Ariz. —, 53 Pac. 197 (map of land used by witness to illustrate his testimony, even though not otherwise proved correct); 1901, People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202 (diagram made by counsel and verified by witness, received); 1903, State *v.* Forbes, 111 La. —, 35 So. 710; 1899, Hall *v.* Ins. Co., 76 Minn. 401, 79 N. W. 497 (map); 1887, State *v.* Whiteacre, 98 N. C. 753, 3 S. E. 488 (diagram); 1863, Wood *v.* Willard, 36 Vt. 82 (map); 1876, Hale *v.* Rich, 48 id. 224 (map); 1900, Hyde *v.* Swanton, 72 id. 242, 47 Atl. 790 (map, made

vation; and this is the essential element. Even the maker could not use it without such a guarantee; and it may equally represent others' observation as well as his own. Indeed, if it is a correct representation, it will naturally be equally representative for all observers.

(4) A map or survey need not be an *official* one.[6] The hearsay statement of an officer is admissible only as an exception to the Hearsay rule (*post*, § 1665), and is therefore, if anything, the inferior sort of testimony. Moreover, there are in general no preferred classes of testimony (*post*, § 1286), and in particular there is no preference for official certificates or reports (*post*, § 1335); so that no principle can justify the demand for an official map or survey in preference to one verified by a qualified witness on the stand. It is only when a government map has by adoption in a deed become a constitutive document that it is required; and here the same result would ensue for any map so adopted.

§ 795. **Same: Personal Knowledge exceptionally dispensed with; Magnifying Lens; Vacuum-rays.** It is obvious that, in using certain mechanical instruments based upon the science of physics, we obtain a representation of things not perceivable by the ordinary senses; for example, in looking through a magnifying lens, we are presented with details which are invisible to the naked eye. Upon the principles, then, of testimonial Knowledge (*ante*, §§ 657, 665), can it be said that we have personal knowledge? Our impression is not received by the unaided senses, but depends for its verity upon the correctness of the intermediate instrument or process. It would

by engineer knowing nothing of the places with reference to the issue, but identified by other testimony, admitted). *Contra*, but unsound: 1898, Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166 (map used by a witness to illustrate the position of objects, excluded because not otherwise shown correct).

Photographs: 1875, Luke *v.* Calhoun Co., 52 Ala. 118 (the photograph of a man L. was identified by the plaintiff as that of her husband); 1899, McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000; 1877, Locke *v.* R. Co., 46 Ia. 110 (the witness was shown a photograph taken by another, and declared it to be correct); 1890, State *v.* Holden, 42 Minn. 354, 44 N. W. 123 (showing a likeness and identifying it); 1887, Archer *v.* R. Co., 106 N. Y. 598, 603, 13 N. E. 318 (the witness was asked whether a photograph offered him was a fair representation of the locality; he answered that it was, but it appeared that he had not taken the photograph and knew nothing of the mode of its taking; Danforth J.: "If a fair representation of the premises, it was admissible as an aid in the investigation, as much so as a map or other diagram, and served in like manner to explain or illustrate and apply testimony"); 1888, People *v.* Jackson, 111 id. 370, 19 N. E. 54 (the witness was present at the taking, and had placed certain persons in the position occupied by them at the time of the homicide, the witness having seen the homicide); 1887, Wilcox *v.* Wilcox, 46 Hun 438 (witness who knew the person identifying a photograph); 1892, Roosevelt Hospital *v.* R. Co., 21 N. Y. Suppl. 205, 66 Hun 633 (identification of photograph by witnesses familiar with the premises); 1894, Nies *v.* Broadhead, 27 id. 52, 75 Hun 255 (same); 1893, Com. *v.* Connors, 156 Pa. 147, 151, 27 Atl. 366 (showing a photograph to one who has seen the person); 1901, New York S. & W. R. Co. *v.* Moore, 45 C. C. A. 21, 105 Fed. 725; 1902, McGovern *v.* Smith, — Vt. —, 53 Atl. 326 (the photograph-taker, if he can identify the place, need not be an expert photographer); and a few other cases already cited *supra*, § 792. *Contra*, expressly or impliedly: Kansas C. M. & B. R. Co. *v.* Smith, Ala., Cleveland C. C. & St. L. R. Co. *v.* Monaghan, Ill., People's P. R. Co. *v.* Green, Dorsey *v.* Habersack, Md., Hollenbeck *v.* Rowley, Mass., cited *supra*, § 792; but these cases cannot be supported. A professional photographer is not needed: 1903, Mow *v.* People, — Colo. —, 72 Pac. 1069.

[6] 1876, Bridges *v.* McClendon, 56 Ala. 327, 335; 1879, Clements *v.* Pearce, 63 id. 284, 293; 1898, Justen *v.* Schaaf, 175 Ill. 45, 51 N. E. 695; 1872, Williamson *v.* Fischer, 50 Mo. 198, 200; 1886, Justice *v.* Luther, 94 N. C. 793, 795; 1898, Andrews *v.* Jones, 122 id. 666, 30 S. E. 19 (used for cross-examination); 1894, Turner *v.* U. S., 13 C. C. A. 436, 66 Fed. 280; 1899, King *v.* Jordan, 46 W. Va. 106, 32 S. E. 1022.

seem plain, however, that the situation is the same as if our senses had be abnormally enlarged in scope or capacity, and that we may here also clai to have knowledge, in the ordinary sense, *provided only that the instrume or process is known to be a trustworthy one.* That trustworthiness may b based upon gener[1] experience as to the class of instrument in questio together with a kn[illegible]edge of the mechanism of the particular instrument one constructed according to the trustworthy type. What is needed, the in order to justify testimony based on such instruments, is merely prelim nary professional testimony to the trustworthiness of the process or instru ment in general (when not otherwise settled by judicial notice[1]), and to th correctness of the particular instrument; such testimony being usuall available from one and the same person. Any process or instrument, fu nishing abnormal aid to the senses, may thus be employed as a source testimonial knowledge.

It will be seen that, after all, the real question is one of the proper source of a witness' knowledge (under the principle of §§ 657, 665, *ante*), and not o his mode of communicating it, under the present principle; because, if th source of knowledge is a proper one, the mode of communicating it is th usual one of words. It is true that in a single instance — namely, that o the vacuum or X rays — the process of observation may be united with th process of communication, *i. e.* the rays may at the same time make visibl the otherwise invisible and also by photograph register the impression. Bu this is not an essential union, — any more than the astronomer's automati photography by telescope is necessarily united with the process of telescopi observation; in either case a special additional apparatus of photography i used, and in either case the situation is virtually as if the observer had firs looked through the telescope or the vacuum-machine, had seen the detail with his own eyes, and then had verified the photograph as representing what he had seen with this artificial assistance. In practice, indeed, it is perhaps no more common to employ the photographic record in using vacuum-rays than in using the astronomical photograph for certain kinds of work. The process or instrument of observation, then, being duly testified to as trustworthy, it follows that a photograph of its images would always be receivable like any other photograph.

What kinds of abnormal processes or instruments are there, by which such artificial aids to the senses may be obtained and trusted? It may be premised that though, on the principle above noted, any such process or instrument must be preliminarily found to be a trustworthy one, yet if the appropriate science or art has advanced to a certain degree of general recog- nition, this trustworthiness may be judicially noticed (*post*, § 2581) as too notorious to need evidence. The various processes that have been from time to time employed and sanctioned are chiefly processes aiding the sense of vision:

(1) The *magnifying lens* (whether as microscope or telescope) is no doubt

[1] *Post*, § 2581.

an available instrument. Its general trustworthiness would be judicially noticed, though the quality and power of the particular instrument should in strictness be testified to.[2]

(2) The *refracting lens*, in the special form of the spectroscope, revealing chemical constituents by color-bands, should equally be sanctioned, and is in fact constantly used by professional investigators as the source of their testimony.[3]

(3) The *cathode-ray* (*vacuum-ray, X-ray, Roentgen-ray*) is also an available process; and it would seem that its general trustworthiness ought to be judicially noticed.[4]

(4) If scientific testimony should declare that the *retina of a dead person's eye* does (as the superstition now runs) preserve under certain circumstances a correct image of the object last seen by the deceased, then the use of this impression would be sanctioned by the present principle.

(5) The sense of hearing is enlarged by *telephony*, so that sounds electrically transmitted are known to have had existence at a distance whence they would ordinarily be inaudible. No question is ever made on this ground, and the difficulties arise from other principles (discussed *ante*, § 669, *post*, § 2155).

(6) If scientific testimony should ever declare that in a *telepathic condition* (hypnotism, mind-reading, and the like) the senses are trustworthily enlarged and made capable of precisely knowing things otherwise unknowable by that person at the time and place in question, then that source of knowledge should be accepted testimonially.

§ 796. **Producing the Original of a Photograph; in General.** By the gen-

[2] In only one instance (Frank *v.* Bank) does the present principle seem to have been carried out by a witness' use of the instrument; but the principle is not different where the tribunal itself uses the instrument; 1885, Barker *v.* Perry, 67 Ia. 148, 25 N. W. 100 (jury using magnifying glasses); 1857, State *v.* Knight, 43 Me. 131 (diagram used of blood as seen through microscope); 1879, Frank *v.* Bank, 13 Jones & Sp. 459 (an expert testified that a magnifying glass was correct and gave the multiple of its power, and the referee then examined the alleged erasures, etc., with it); 1872, Kannon *v.* Galloway, 2 Baxt. 232 (microscope used by jury). See additional instances under § 797, *post* (photographs of magnified handwriting).

[3] It was used, for example, in the Luetgert trial, Chicago, 1897.

[4] 1899, Jameson *v.* Weid, 93 Me. 345, 45 Atl. 299 (vacuum-ray photograph; admissible in trial Court's discretion); 1901, De Forge *v.* R. Co., 178 Mass. 59, 59 N. E. 669 (X-ray photographs of injured feet, taken by a medical expert in the process, admitted; "while a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted if properly taken"); 1902, Geneva *v.* Burnett, — Nebr. —, 91 N. W. 275 (X-ray photographs of an injured foot, verified by the physicians taking them, admitted); 1902, Carlson *v.* Benton, — id. —, 92 N. W. 600 (X-ray photograph held admissible, upon due verification of the process by a competent taker); 1897, Bruce *v.* Beall, 99 Tenn. 543, 41 S. W. 445 (vacuum-ray photograph, admissible; if offered by a person properly skilled; here it purported to show the overlapping bones of a broken leg; "Naw as this process is, experiments made by scientific men, as shown by this record, have demonstrated its power to reveal to the natural eye the entire structure of the human body, and that its various parts can be photographed as its exterior surface has been and now is. And no sound reason was assigned at the bar why a civil court should not avail itself of this invention, when it was apparent that it would serve to throw light on the matter in controversy"); 1901, Sias *v.* Consol. Lighting Co., 73 Vt. 35, 50 Atl. 554 (X-ray photograph admitted; the ruling sanctions a petty quibbling objection to one part of the testimony of the expert); 1901, Miller *v.* Dumon, 24 Wash. 648, 64 Pac. 804 (use of X-ray photograph in testimony by the physician taking it, allowable); 1901, Manch *v.* Hartford, 112 Wis. 40, 87 N. W. 816 (X-ray photographs taken by an expert and verified by him, received).

eral principle elsewhere examined (*post*, § 1177), the original of a thing m be produced *in specie* to the tribunal, instead of receiving testimonial e dence about it. But this rule is usually regarded (*post*, §§ 1181–1183) not applicable to any objects but writings or at least to chattels not bearin written inscription. So far, then, as concerns objects not writings, a pho graphic representation could be used without accounting for the origin Nevertheless, where the object photographed is some place of land, a vi might be had (*post*, § 1162), and Courts have occasionally intimated tha view ought to be had in preference to testimony by photograph;[3] yet th seems no reason why such a rule, if valid at all, would not be equally pro for testimony in words.

§ 797. **Same: Handwriting.** Whether a photograph of handwriting m be used depends chiefly upon the principle requiring production of the ori nal of a writing (*post*, §§ 1177 ff.); but it is more convenient to consid together the practical effect of that principle and the present one.[1]

(*a*) In the first place, the question arises whether, for the purpose studying and identifying handwriting, *photographic copies may be used at a* The argument against their use has been thus expressed:

1871, *Hutchings*, Sur., in *Taylor's Will*, 10 Abb. Pr. N. S. 318: "When we reflect that placing the original to be copied obliquely to the sensitive plate, the portion nearest the plate may be distorted by being enlarged, and that the portion furthest from t plate must be correspondingly decreased, while the slightest bulging of the paper up which the signature is printed may make a part blurred and not sharply defined, we c form some idea of the fallacies to which this subject is liable. . . . The refractive pow of the lens, the angle at which the original to be copied was inclined to the sensiti plate, the accuracy of the focussing, and the skill of the operator, would have to be inve tigated to insure the evidence as certain. The Court would be obliged to suspend examination as to the question of the genuineness of the signature . . . and in fact inquire into the whole science of photography."

1880, *Folger*, C. J., in *Hynes* v. *McDermott*, 82 N. Y. 51: "Somewhat, for exact lik ness, will depend upon the adjustment of the machinery, upon th atmospheric cond tions, and the skill of the manipulator. And in so delicate a matter as the reaching judicial results by the comparison of writings through the testimony of experts, it ough to be required that the witness should exercise his acumen upon the thing itself whic is to be the basis of his judgment. . . . The certainty of expert testimony in these cas is not so well assured that we can afford to let in the hazard of errors or differenc in copying, though it be done by howsoever a scientific process."

But this argument is nothing more than which may be urged (as alread noted in § 792, par. 3) against photographs in general, namely, their capa bility of falsifying; and the answer to it is the same, namely, that a photo

[1] But where the photograph is not used as testimony to an original but as the thing itself in issue (*ante*, § 790, note 1), the rule of production might apply to the photograph as itself the original (1884, People *v.* Muller, 32 Hun 210); though this result would be still open to doubt on the principle of § 1181, *post*, cited above.

[3] 1894, Bedell *v.* Berkey, 76 Mich. 440, 43 N. W. 308 (suggesting that a view may often be better, where premises are concerned); 189 Omaha R. Co. *v.* Beeson, 36 Nebr. 364, N. W. 557 (photograph of premises, admissibl where a view of them would be impracticable).

[1] The rules in general as to the use of *spec mens* to evidence the type of handwriting (*pos* §§ 2003 ff.) and of testimonial qualifications fo handwriting (*ante*, §§ 569, 693 ff.) have of cours equal application here.

graph represents what a witness affirms to be a correct reproduction, and therefore that provisional credit must be given to the witness' affirmation, unless we are prepared to go the length of maintaining that exact reproduction of handwriting in photography is in the nature of things impossible. No doubt especial care should be taken to secure positive testimony to the accuracy of reproduction; just as, upon another principle (*post*, § 2097), precise verbal accuracy is sometimes required for testimony to a person's words orally uttered. But this is no more than may be deduced from the general principle (*ante*, § 790), and falls far short of declaring such accuracy unattainable. The state of the photographic art does not admit of such an assertion; all that can be said is that a photograph of a writing may be made to falsify, like other photographs and like other kinds of testimony, and that a qualified witness' affirmation of its exactness suffices to remove this danger, —as much as any such testimonial danger can be removed. Accordingly, it seems generally conceded that a photographic copy of handwriting may be used instead of the original, so far as the accuracy of the medium is concerned.[2]

(*b*) Assuming, then, that testimony by photographic copy is in itself a proper mode, the application remains to be considered of the general principle (*post*, § 1177), requiring production of the original.

(1) If the original is *obtainable* but has not been produced, then the general rule applies and there is no excuse for resorting to copies of any sort; a photograph is therefore inadmissible.[3]

(2) If the original is *not obtainable*, then a copy may be used; hence, a photograph is admissible. Under what conditions the original may be said to be not obtainable depends upon the general principle and the specific rules for all documents (*post*, §§ 1192 ff.); in the present application a liberal construction is commonly given to them.[4]

[2] *Accord:* 1860, Marcy *v.* Barnes, 16 Gray 163 ("Under proper precautions in relation to preliminary proof as to the exactness and accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objection"); and all the cases in the ensuing notes. *Contra*, the two *obiter dicta* above quoted, and the following 1873, Tome *v.* R. Co., 39 Md. 93 (where the decision also excludes comparison of handwriting in any form). *Undecided:* 1896, Geer *v.* M. L. & M. Co., 134 Mo. 85, 34 S. W. 1099 (question reserved; but a verification of exact likeness held at least essential; here a custodian's certificate that it was a "true and literal exemplification" was held insufficient).

[3] 1883, Maclean *v.* Scripps, 52 Mich. 218, 17 N. W. 815, 18 N. W. 209, and the cases in the ensuing notes.

[4] 1874, *Re* Stephens, L. R. 9 C. P. 187 (it was intimated that photographic copies could be used in sending out of the jurisdiction a *de bene* commission, the originals not being allowed to leave the court; here the authenticity of the signature seems not to have been in question); Cal. C. C. P. 1872, §§ 1307, 1317, as amended in 1901 by the Commission (in probate of a will, the Court "may authorize a photographic copy of the will to be made and to be presented to such [absent attesting] witness on his examination," who may be examined on it as if it were the original; for the validity of these Commissioners' amendments, see *ante*, § 488); 1883, Duffin *v.* People, 107 Ill. 113, 119 (photographic copy of signature to note, admitted to show the words written, the original having faded and become illegible; whether a photograph could have been thus used to show the handwriting, not decided); 1876, Foster's Will, 34 Mich. 23, *semble* (see citation *infra*); 1883, Maclean *v.* Scripps, 52 Id. 218, 17 N. W. 815, 18 N. W. 209, *semble* (principle conceded); R. I. Gen. L. 1896, c. 210, § 14 (original will lost; on proof and decree, photographic copy filed in records may be used as original); 1877, Eborn *v.* Zimpelmann, 47 Tex. 519 (the general principle was recited that the copy may be used if the original signature is unavailable; but the fact that the witnesses to the signature were in another State and the original signature to be

(3) When the original is *produced*, but it is desired also conveniently collate specimens by *photographic groupings* (as by placing many specimen in juxtaposition on a single sheet), the original is not literally unavailab (*post*, § 1192), in the sense of being tangibly beyond procurement. Neve theless, there is still lacking and unproduced to instantaneous perception th minute resemblances and differences which appear upon close juxtapositio and fade from memory in the operation of passing from one document to th others. Hence, the photographic juxtaposition does, in strict sense, "produce these otherwise unavailable minutiæ, and such a grouping is therefore allow able without even any deviation from technical principle.[5]

(4) So also, the original being *produced*, a *photographic enlargemen* through a magnifying lens, may properly be employed.[6] The minute featur of the writing — particularly those which indicate an erasure or a tracing — are often in their full detail invisible to the naked eye, and hence are u available in the liberal sense of the term; the case is in effect the same that of an illegible document, which it is conceded (*post*, § 1229) may proved by copy.

C. WRITTEN TESTIMONY.

§ 799. **Oral and Written Testimony, in general.** In the common-law cou the traditional method of delivering testimony is to utter it orally, not

testified to was in the files of the Court did not constitute unavailability sufficiently to allow the use of a deposition taken in the other State and founded on photographic copies sent to the witness for examination); 1883, Houston *v.* Blythe, 60 id. 508, 509, 510 (photographs of archives not able to be produced were rejected, apparently unconditionally; yet claiming to follow Eborn *v.* Zimpelmann; here the signature to be used was a specimen only); 1889, Howard *v.* Russell, 75 id. 171, 12 S. W. 525 (originals out of the jurisdiction and contained in public or other archives; photographs received); 1890, Ayers *v.* Harris, 77 id. 113, 114, 115, 13 S. W. 768 (here archives, not able to be produced, were photographed); 1890, Buzard *v.* McAnulty, ib. 447, 14 S. W. 138 (general statement requiring a showing that it was "not in power of the plaintiffs to produce" the original, which was the disputed document); 1899, Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370 (forgery of deed; photographs of the deeds in the case, refused to be produced by defendant after notice, admitted); 1868, Daly *v.* Maguire, 6 Blatchf. 137 (an exhibit of printed slips from newspapers, needed for a commission *de bene*, was allowed to be sent away on condition of substituting photographic copies; here the authenticity of no signature was involved); 1875, Leathers *v.* Wrecking Co., 2 Wood 682 (photographs allowed of documents in the government archives); 1893, Owen *v.* Mining Co., 13 U. S. App. 248, 270, 9 C. C. A. 338, 61 Fed. 6 (photographic copies of printed Mexican archives, themselves unavailable, used by experts in determining genuineness).

As to the necessity of having the original placed before an *absent witnes* [illegible] *tion*, see *post*, § 1185.

[5] 1859, Luco *v.* U. S., 23 How. 531 (genui and false signatures and seals were allowed to conveniently grouped on a single photograph sheet, the originals being also at hand); 18 Crane *v.* Horton, 5 Wash. 481, 32 Pac. 223 (disputed signature was at hand, and no spec need of the photographic grouping offered seem in this case to exist; rejected).

[6] 1892, Riggs *v.* Powell, 142 Ill. 453, 4 32 N. E. 482 (enlarged photographic copy disputed writing used); 1901, Howard *v.* Illin T. & S. Bank, 189 id. 568, 59 N. E. 1106 (plicate photographs of an original produc excluded as superfluous; but photographic largements admitted as useful); 1860, Marcy Barnes, 16 Gray 163 (similar); 1876, Fost Will, 34 Mich. 23, *semble* (allowable for the puted writing; left to the Court's discretio 1880, Hynes *v.* McDermott, 82 N. Y. 51 (cluding photographs when alone; but imply that as enlargements accompanying the dispu writing they would be acceptable); 1899, U. *v.* Ortiz, 176 U. S. 422, 20 Sup. 466 (enlar photographs of standard and disputed writi admitted with the originals); 1887, Rowell Fuller, 59 Vt. 695, 10 Atl. 853 (allowing it disputed writing and standards); 1893, Cran Horton, 5 Wash. 131, *semble* (allowab *Contra:* 1871, Taylor Will Case, 10 Abb. N. S. 318 (see quotation *supra*).

This expedient has sometimes been brou into service by writers of fiction, as in Mr. J. Holland's "Sevenoaks." For the use of *let press* copies of handwriting, as the basis of c parison, see *post*, §§ 2010, 2019.

writing; in the chancery court, on the other hand, the traditional mode is the written one. There can hardly be any doubt as to the superiority of the former over the latter method, and for two reasons: first of all, the latter method leads naturally to the taking of testimony out of the presence of the tribunal of decision, and the whole benefit of the demeanor of the witness as affecting his credibility (*post*, §§ 947, 1395) is lost; secondly, the tedious process of recording the words as uttered tends to discourage full and thorough questioning and almost emasculates cross-examination; and the many failures of justice in courts-martial must be attributed in part to their adherence to the antiquated method of writing down the questions and answers in longhand. The oral method has no doubt some disadvantages, particularly in the facilities which it affords for intimidation by cross-examination (*ante*, § 781), as well as in the dependence of the tribunal upon mere recollection for a deliberate survey of all the testimony in a complicated case; but in the latter respect the modern practice of reporting the testimony in shorthand has partly eliminated this drawback. On the other hand, the rigor of the chancery rule has been almost everywhere modified by statutes permitting *viva voce* delivery of testimony in discretion.

So far as expediency and effectiveness are concerned, the modified practice of the common-law courts is to-day on the whole as satisfactory as can be in any system. Nevertheless, in theory the common-law principle remains, namely, that all testimony is delivered orally to the jury; so that, even where a part of the testimony is in fact contained in writing, it is formally put in by an oral reading aloud on the part of witness, clerk, or counsel.[1] This technicality, however, may be here disregarded, and, looking at the actual medium of the testimony, we may inquire what special rules arise in consequence of the testimony, or a part of it, being virtually in writing. For this purpose, the various uses of writing fall into four sorts, (1) records of a past recollection; (2) copies of writings; (3) depositions; (4) absent witnesses' testimony admitted *ad hoc*; (5) official certificates, reports, and registers, and private writings, received under exceptions to the Hearsay rule or as opponent's admissions.

§ 800. **Records of Past Recollection.** When a witness uses in his testimony a record or memorandum of his past recollection, he virtually adopts it as part of his present deliverance; it becomes a written statement of his present assertion, and as such it may be read and shown to the jury (*ante*, § 754). The requirements which must first exist for these memoranda have already been considered (*ante*, §§ 745 ff.). On the other hand, when a paper is used merely to revive a present recollection, the oral utterance prompted by the revived recollection is alone the testimony; the writing

[1] 1851, Withers, J., in Kuhlman *v.* Brown, 4 Rich. L. 479, 486 ("The idea that testimony by deposition is a written document, that should go before the jury as such, seems to present no difficulty; for in ordinary cases a deposition in English is read to the jury and reaches them through the ear only, as all evidence derived from the mouth of a witness does"); 1862, People *v.* Dyckman, 24 How. Pr. 222, 226 (a witness producing a document may be compelled to read it aloud; good opinion).

becomes no part of the testimony and therefore cannot be put in or read such (*ante*, § 763), though the opponent or the jury may obtain inspection it as a safeguard against fabrication (*ante*, § 762).

§ 801. **Copies of Writings.** So far as recollection is concerned, a copy in effect the commonest variety of a record of past recollection (*ante*, § 74 so far as mode of communication is concerned, it is a merely anonymo piece of paper until it has been adopted and verified by some qualified w ness, precisely as a map or photograph must be (*ante*, §§ 790, 793). T application of these principles to copies is however more conveniently treat in connection with the rule requiring Production of the Original Writi and the rules are there examined (*post*, §§ 1277–1281). There are al certain rules of Preference applicable to the choice of one kind of copy rath than another, and these are considered in the same (*post*, §§ 1264 f The principle of Completeness also prescribes rules, plicable to writt copies, for the degree of fulness with which the original must be reproduc (*post*, §§ 2094 ff.). Copies authorized to be made by public officers may used without calling the copyist to the stand; but this involves an exceptic to the Hearsay rule (*post*, §§ 1677 ff.).

§ 802. **Depositions, in general.** The term "deposition," which former was applied to include testimony orally delivered, is now confined in mea ing to testimony exclusively delivered in writing, *i. e.* testimony which legal contemplation does not exist apart from a writing made or adopted b the witness. It is virtually of two sorts, namely, testimony which is nev of any legal significance until it is completed in writing — as, the ordina deposition *de bene* taken by a commissioner, — and (in occasional use of t term) testimony which may first sufficiently exist orally, but upon bei reduced to writing is regarded as exclusively or *prima facie* contained in t writing, — as, the oral examination taken before a magistrate on a preli nary criminal trial. What difference there is in the legal conclusiveness the writing is noticed later (*post*, § 805). So far as the present principle concerned, the question is, *What special rules arise for securing accuracy narration because of the departure from the oral form* and the reduction in writing? If the witness himself wrote out the statement entire, no speci question would arise. But in practice he usually does not, since the writte form is that peculiar to testimony delivered out of court before a commi sioner authorized by the court to receive and transmit it, and this commi sioner is legally authorized to act and usually does act as the transcriber the oral utterance; so that it is an intermediary who makes the writi which becomes the testimony, and thus it becomes specially necessary t secure that this writing shall represent precisely the statement for which t witness stands sponsor.[1] The special elements of the situation which ma thus be a source of error and must be guarded by special rules are thre namely, the personality of the official writer, the verbal accuracy of his tra

[1] "An artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and la guage": 1768, Blackstone, Comm. III, 373.

scription of the witness' utterance, and the witness' deliberate and knowing indorsement of the transcription as completed. These three may be considered in order.

§ 803. **Same: Officer not to be Party's Agent or Kinsman.** The writing becomes the testimony; the writer is to be trusted to reproduce exactly the witness' oral utterances; and the opportunities for serious mispresentation, by deliberate fraud or unconscious effort, are too great to allow the writing to be made by a person open to plain suspicion of bias or interest for one or the other of the parties. Accordingly, it has always been the rule that the commissioner, or other officer taking the deposition, shall not be a person united to either party by near kinship or important pecuniary interest:

1824, *Hosmer*, C. J., in *Allen* v. *Rand*, 5 Conn. 322, 324: "The law will not trust an agent to draw up a deposition for his principal, as by the insertion of a word the meaning of which is not correctly understood, or by the omission of a fact that ought to be inserted, the testimony thus garbled and discolored will be false and deceptive. Nor is there a possible argument in favor of such a proceeding. The deponent may write the deposition, or procure it to be written by a disinterested person, or it may be drawn up by the magistrate who takes it, or the parties may agree on a fit person for this purpose. . . . As the witness ought to be disinterested, so must the evidence be impartial, comprising the whole truth and nothing but the truth; and this can never rationally be expected when a deposition is drawn up by an attorney or agent, or, what is little less exceptionable, by the party himself. Sickness constitutes no reason for the relaxation of this rule, as it produces no actual necessity; and if it did, it would make no difference, as no such exception to the general rule is admissible. It is much preferable that in particular instances the party should even be deprived of testimony than that a principle leading to widespread mischief should be adopted; as private disadvantage is a less evil than general inconvenience."

1825, *Tilghman*, C. J., in *Summers* v. *M'Kim*, 12 S. & R. 405, 410: "The counsel of the party producing the witness is the last person who should be permitted to draw the deposition, because he will naturally be disposed to favor his client; and it is very easy for an artful man to make use of such expressions as may give a turn to the testimony very different from what the witness intended. I know that depositions are sometimes taken in this manner by consent of parties; and when the counsel on both sides are present, the danger is not great; but in the present case there was no consent nor was the counsel of the plaintiffs present. The rule of court is that the deposition shall be taken 'before a justice.' It ought therefore to be reduced to writing from the mouth of the witness in the presence of the justice, though it need not be drawn by him; and in case of difference of opinion in taking down the words of the witness the justice should decide."

1840, *Gilchrist*, J., in *Whicher* v. *Whicher*, 11 N. H. 348, 353: "The duty of a magistrate in taking a deposition is essentially judicial in its character. He has other duties to perform than that of administering an oath to the deponent. He has a discretion to exercise in regard to the treatment of a witness, that he may not be induced by leading questions to state facts more broadly than the truth will warrant, and that he should not be brow-beaten nor terrified into the suppression of facts within his knowledge. . . . And he is to exercise such a general supervision over the examination, as will tend to elicit the truth, in a legal and proper manner, which, particularly in the case of timid or illiterate witnesses, is one of the most delicate and difficult parts of judicial duty. These duties are, in practice, too often overlooked by a careless or inefficient magistrate, or wilfully disregarded by a prejudiced one. A party selects his own magistrate, and, having this power of selection, he is naturally more anxious to seek a friendly, than a hostile, or even

an impartial tribunal. Under such auspices, the examination proceeds as might be ticipated. The opposing party, not unreasonably distrustful of the magistrate selected his antagonist, is often dissatisfied with the course of the examination; and the instan are numerous, where, rather than submit to the injustice of hearing what he believe partial statement of facts read to the jury, he incurs the expense of summoning the w ness to attend the trial, that the deposition may not be used. . . . Now to hold tha magistrate, invested with such varied powers, and whose improper conduct may lead such evil results, should not be as impartial as the lot of humanity will admit, is to ap to him a rule which never obtains in any other case, where men are appointed to dec upon the rights of others."

This general rule, more or less indefinite in its application, originated early chancery practice,[2] but has also been adopted, in one form or anoth in most of the statutes authorizing depositions to be taken by courts common law.[3] It does not, of course, prevent the officer from having t

[2] *Circa* 1600, Tothill's Reports, App. p. 21, Proceedings of the High Court of Chancery; 1612, Peacock's Case, 9 Co. Rep. 70, *b* ("Commissioners to examine ought to be indifferent"); 1613, Forteseue & Coake's Case, Godb. 193 ("one who had been a solicitor in the cause is not a fit person to be a commissioner in the same cause"); 1730, Fricker *v.* Moore, Bunb. 289 (deposition before party's solicitor, suppressed); 1779, Selwyn's Case, 2 Dick. 563 (same); 1818, Gordon *v.* Gordon, 1 Swanst. 166, 170 (commissioner a solicitor to a party in another cause between the same parties; not decided); 1842, Sayer *v.* Wagstaff, 5 Beav. 462, 464 (commissioner subsequently acting as party's solicitor, disqualified); 1843, Mostyn *v.* Spencer, 6 id. 135 (nephew and agent of plaintiff, held improper).

[3] *Ala.:* 1848, Scott *v.* Baber, 13 Ala. 182, 189 (commissioners being nephews of both parties, held not improper); 1849, Bryant *v.* Ingraham, 16 id. 116, 119 (brother-in-law of party, held improper); 1850, Jordan *v.* Jordan, 17 id. 466, 469 (kinsman held improper); *Alaska:* C. C. P. 1900, § 653 (must be written by the officer or the witness or some disinterested person); *Conn.:* Gen. St. 1887, § 1070 (deposition written, drawn up, or dictated by party, attorney, or person interested, not admissible); *Fla.:* Rev. St. 1892, § 1129 (commissioner is not to be "of kin to, nor the attorney nor the agent of either party, nor interested in the result"); *Ga.:* Code 1895, § 5303 (deposition not to be written by person "incompetent as a juror on account of relationship or as a witness on account of interest," nor by attorney or his clerk, or paid agent, of party); 1848, Tillinghast *v.* Walton, 5 Ga. 335, 339 (clerk of party's counsel, held improper; good opinion); 1861, Williams *v.* Rawlins, 33 id. 117, 121 (attorney not in the cause, held proper); *Ida.:* St. 1899, Feb. 10, § 12 (deposition shall be written by the officer, the deponent, or some disinterested person); *Ill.:* Rev. St. 1874, c. 51, § 33 ("The party, his attorney, or any person who shall in any wise be interested in the event of the suit, shall not be permitted to dictate, write, or draw up any deposition"); *Ind.:* Rev. St. 1897, § 438 (deposition must be written by officer, or deponent, or "some disinterested p son"); *Kan.:* G. S. 1897, c. 95, § 361 (offi taking deposition "must not be a relative attorney of either party, or otherwise interes in the event"); *Me.:* 1824, Smith *v.* Smi 2 Greenl. 408 (magistrate who had forme during the same cause acted as party's attorn held improper); *Mass.:* P. S. 1882, c. 169, § Rev. L. 1902, c. 175, § 33 (deposition shall written "by the justice, commissioner, dep ent, or by a disinterested person in the prese and under the direction of the justice or co missioner"); 1832, Wood *v.* Cole, 13 Pick. (one temporarily attorney in a former stage the cause, and again retained after the deposit taken, held not improper); 1833, Coffin *v.* Jon ib. 441, 445 (friend assisting the party at ot depositions, held not incompetent on the fact 1833, Chandler *v.* Brainard, 14 id. 285, (party's son-in-law, held not incompetent, statute not expressly prohibiting kinsme *Mich.:* Comp. L. 1897, § 10136 (commissio not to be "of counsel or attorney for either the parties, nor interested in the event of cause"); *Minn.:* Gen. St. 1894, § 5676 (like Mississippi statute); *Miss.:* Annot. Code 18 § 1754 (deposition to be written by commissio or witness, or "some disinterested person 1880, Groves *v.* Groves, 57 Miss. 658, 660 (p ty'a uncle, held improper); *Nebr.:* Comp. 1899, § 5950 (officer taking deposition "m not be a relative or attorney of either party, otherwise interested in the event of the proce ing"); *N. H.:* Pub. St. 1891, c. 225, § 7 person to write the deposition who would be d qualified as juror except by exemption); 18 Bean *v.* Quimby, 5 N. H. 94 (party's une improper); 1840, Whicher *v.* Whicher, 11 348, 351 (one acting as attorney to questi deponent at a prior atage, incompetent; thou the statute made no express prohibition of a one; see quotation *supra*); *N. J.:* Gen. 1896. Evidence, § 25 (depositions to be writt "only by the officer" or by the deponent; also ib. § 66); § 59 (may be taken by sworn ste ographer); *N. C.:* Code 1883, § 1357 (co missioner taking deposition, to be "of kin neither party"); *N. D.:* Rev. C. 1895, §§ 567

manual act of writing done under his direction by an assistant;[4] but this assistant, acting for the officer, must equally be a person free from any connection of bias or interest of the above sort.[5]

§ 804. **Same: Transcription in Witness' Words.** No Court seems ever to have insisted on a perfectly literal reproduction of the witness' very words. Perhaps no writer not a stenographer could give an exactly verbatim rendering, and the failure would be evidentially immaterial unless it were of serious extent. Nor can accuracy be regarded as a quality necessary to be expressly shown by other testimony, since the officer certifies that he has accurately transcribed, and faith must *prima facie* be given to his statement. Nevertheless the danger exists to be guarded against; there is ever an inherent possibility of error, no matter how impartial or careful the officer:

1843, Lord *Langdale*, M. R., in *Johnston* v. *Todd*, 5 Beav. 601: "When the witness is illiterate and ignorant, the language [of an affidavit] presented to the Court is not his; it is and must be the language of the person who prepares the affidavit; and it may be,

5680 (like Okl. Stats. §§ 4240, 4244); *Oh.*: Annot. Rev. St. 1898, §§ 5271, 5275 (like Okl. Stats. §§ 4240, 4244); *Okl.*: Stats. 1893, § 4240 (officer "must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding"); § 4244 (deposition must be written "either by the officer, the witness, or some disinterested person"); *Or.*: C. C. P. § 824 (deposition in the State and upon oral interrogatories out of the State must be written by officer or witness "or some disinterested person"); *S. D.*: Stats. 1899, §§ 6518, 6522 (like N. D. Rev. C. §§ 5675, 5680); *Tenn.*: Code 1896, §§ 5637, 5657 (person taking deposition not to be interested in the cause nor of counsel to either party nor of kin within the sixth degree as computed by the civil law); *Tex.*: 1866, Floyd v. Rice, 28 Tex. 341, 342 (surety on appellee's bond, held an improper person); 1894, Blum v. Jones, 86 Tex. 492, 495, 25 S. W. 694 (notary being "an employee in a mercantile establishment belonging to one of the parties," held an improper person); *U. S.*: Rev. St. 1878, § 863 (officer not to be "of counsel or attorney to either of the parties, nor interested in the event of the cause"); 1868, Ship Norway, 2 Ben. 121 (witness' wife, appointed on the facts for a deposition in the East Indies); *Vt.*: St. 1894, § 1271 (no agent, attorney, or person interested in a cause, to write a deposition); 1802, Heacock v. Stoddard, 1 Tyler 344 (party's son-in-law, held competent, under a statute forbidding persons "interested in the cause"; Tyler, J., diss.); *Wash.*: Code & Stats. 1897, § 6025 (must be written by the officer, the witness, "or some disinterested person"); *Wis.*: Stats. 1898, § 4089 (officer not eligible who "is the attorney or of counsel for any party or person interested, or is himself otherwise interested in the action," except by written consent); § 4105 (deposition to be written by officer or witness or "some disinterested person"); *Wyo.*: Rev. St. 1887, §§ 2619, 2623 (like Oh. Rev. St. §§ 5271, 5275). Compare also the citations in the next note but one.

[4] Whether such an officer may *delegate* his function of presiding at the taking is a different question — one of judicial powers — which is without the present purview.

[5] Some of the improprieties noted in the following cases are hardly to be distinguished from the impropriety of a *prepared deposition* (*ante*, § 787); the statutes on the present point have been placed in note 3, *supra*: 1687, Newton v. Foot, 2 Dick. 793 (clerk of party's solicitor, held improper); 1819, Cooke v. Wilson, 4 Madd. 380 (same); 1844, Steele v. Dart, 6 Ala. 798 (deposition in party's handwriting, rejected); 1849, Bryant v. Ingraham, 16 id. 116, 119 (deposition in party's brother's handwriting, suppressed); 1824, Allen v. Rand, 5 Conn. 322 (deponent being too ill to write, a person requested by the defendant wrote it out for her at her house and it was afterwards sworn to before the magistrate; excluded); 1875, Snyder v. Snyder, 50 Ind. 492, 493 (party's attorney may write questions, but not answers); 1866, Hurst v. Larpin, 21 Ia. 484 (party's attorney as scrivener, held improper); 1813, Logan v. Steeles, 3 Bibb 230 (deposition in the handwriting of a nephew of the party, written in the absence of the magistrate, excluded); 1831, Donoho v. Petit, Walker Miss. 440 (party's attorney as scrivener, not *ipso facto* improper); 1864, Cushman v. Wooster, 45 N. H. 410, 413 (under a statute requiring the magistrate to write the answers, an indifferent person may act as clerk under the magistrate's control; but the practice "should not be encouraged"); 1804, Mosely v. Mosely, N. C. Confer. 522 (deposition taken by plaintiff's attorney "under the view and control of the commissioner in the presence of the defendant," excluded); 1849, Farmers' & Mechanics' Bank v. Woods, 11 Pa. 99 (party's attorney writing the deposition, allowable when consented to); 1853, Wertz v. May, 21 id. 274, 279 (deposition taken down by the defendant's counsel, the plaintiff's counsel present and consenting, admitted).

and too often is, the expression of that person's erroneous inference as to the meanin
the language used by the witness himself; and, however carefully the affidavit ma
read over to the witness, he may not understand what is said in language so diffe
from that which he is accustomed to use. . . . [Thus] testimony not intended by hi
brought into the Court as his."

The solution reached by the Courts seems to be, properly enough, that
deposition will not be rejected on this ground unless on its face (and perh
together with circumstances otherwise shown) it appears clearly to be
language which the witness could not have used.[1]

The act of writing should of course be done *immediately*, not afterwa
from recollection.[2] The use of stenography in taking depositions, the tr
lation being made afterwards, removes the substance of this danger; but
would seem that the translation into longhand ought to be made before
consummation of the taking, since otherwise there would be no check u
possible errors.[3]

§ 805. **Same: Reading Over and Signing.** (1) Since the writing is to sta
as the witness' own words, and since there is always an indefinable coefficie
of error in transcription, there should be given a final opportunity for corr
tion by the *reading over* to or by the witness, of the writing as completed.
has been customary in statutes to make special provisions for this.[1]

(2) The witness' *signature* may be regarded either as necessary to constitu
the writing his by adoption, or as symbolically equivalent to a knowing asse
to its tenor (thus dispensing with the reading over), or as an additional mea
of identifying the person of the witness. Whatever the legal theory, it is us
ally treated as a technical requirement indispensable under the statutes.[2]

(3) Supposing that the technical requirements of reading over and signi
are not fulfilled, a difference then arises between a *deposition* in the str
sense (*i. e.* testimony taken *de bene* before a mere commissioner for later u

[1] The following rulings deal with affidavits, but the principle is the same: 1811, Fowler *v.* State, 5 Day 82 (a complaint, signed by the prosecuting witness, and praying for inquiry by the grand jury; excluded, because drawn up by a justice of the peace in legal language, and therefore not fairly representing the witness' own statements); 1877, State *v.* Elliott, 45 Ia. 486 (deponent made affidavit before a justice of the peace; but, as two-thirds of it appeared to be in the language of the justice and it was not read over to the deponent before he signed it, the Court rejected it).

[2] 1822, R. *v.* Sexton, Chetwynd's Suppl. to Burn's Justice, quoted in Joy, Confessions, 19 (confession not taken down by the officer from the lips of the accused, but written out afterwards from recollection; excluded).

[3] 1899, Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791 (notary's having the deposition taken in shorthand and then written out in longhand before signing, held proper).

[1] These statutes depend so much on detailed provisions that it is impracticable to reproduce them here; a guide to their place in the statute-books will be found in the citations *post*, §§ 1380–1383. For the same reason, the rulings up them, depending on local wordings, can profitably be examined here; the following ca illustrate their method: 1902, Louisville & R. Co. *v.* Carter, — Ky. —, 66 S. W. 5 (press-copy of unsigned deposition taken in other case, verified by the notary, excluded; h improperly, because the deposition was offe only as an admission, under the principle § 1075, *post*); 1836, People *v.* Moore, 15 We 419, 421 (the statute does not require a readi over to a witness, because it must be signed him, and hence the failure to read over mer discredits, and does not exclude such a depo tion; but the statute requires a reading over an accused, because it need not be signed him, and hence a reading over must be shown 1898, Zehner *v.* Lehigh C. & N. Co., 187 P 487, 490, 41 Atl. 464 (longhand translati must be read over and signed by the witness 1893, Moller *v.* U. S., 13 U. S. App. 472, 47 6 C. C. A. 459, 57 Fed. 490 (same); 189 Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. 879 (similar).

[2] See note 1, *supra*.

in a trial) and testimony before a *committing magistrate* in criminal cases. In the former instance the testimony is exclusively to be found in the writing, because a deposition is the creature of the statute or order granting the judicial officer's authority, and thus, if the writing fails in the above requirements, it never becomes testimony, and there is no testimony of that witness (*post*, § 1331). In the latter instance, on the other hand, the oral utterance was already testimony in that stage; it might become written testimony if a writing of the required sort was consummated; but, if not, then at least it remained oral testimony. Hence, it could be proved as such, by any ordinary and proper evidence. This might be done by calling a person who heard it (*post*, § 1330), or by accepting (under the exception to the Hearsay rule) the magistrate's official report of the testimony (*post*, §§ 1326 ff., § 1667), or by accepting the stenographer's testimony, either speaking on the stand with the notes as a record of recollection (*ante*, § 736) or certifying officially to it under an exception to the Hearsay rule (*post*, § 1669). Moreover, even a deposition, imperfectly taken as such, may by the party's adoption of it become his own admission (*post*, § 1075).

§ 806. **Same: Other Principles discriminated.** (1) For depositions, the rules as to *leading questions* are in general the same as for oral testimony (*ante*, §§ 769 ff.).

(2) Whether the interrogatories must be *specific* and the answers *responsive* involves the question of adequacy of opportunity for cross-examination (*post*, §§ 1393, 1394).

(3) The prohibition of a *prepared draft* of answers has been already considered in dealing with the general rule against improper suggestion (*ante*, § 787).

(4) The *authority of the officer* and the *technical formalities* of caption, certificate, and the like involve questions of procedure, beyond the present purview; they are briefly noted under the Hearsay rule (*post*, §§ 1376, 1676).

(5) The *authentication* of the deposition also involves statutory details of trial procedure not within the present purview; but so far as the evidential principle of authentication is concerned, its rules are dealt with elsewhere (*post*, §§ 2129 ff.).

(6) The requirement of *cross-examination*, or *notice* and opportunity thereof, as indispensable to the use of a deposition, is a question of the Hearsay rule (*post*, §§ 1377 ff.).

(7) The necessity of showing the deponent *deceased*, absent, or otherwise unavailable, in order to resort to his deposition, involves the rule of Confrontation (*post*, §§ 1401 ff.).

(8) The treatment of a deposition as an *admission by the party* using it at a former trial involves the doctrine of Admissions (*post*, § 1075).

(9) The *time of making objections* to testimony in a deposition depends upon the general rule for Objections (*ante*, § 18).

§ 807. **Absent Witness' Testimony admitted.** The testimony of an absent witness may be admitted by the opponent's consent in order to prevent a

postponement on behalf of the party desiring to call him. The admis may be either that the alleged testimony is true, or merely that it w have been delivered as alleged; the statutes differing in their provisi The alleged testimony, forming the subject of the Admission, is of co usually presented in written form, either as an affidavit of the witness l self or as a stipulation agreed to by counsel. It appears in the cause so by virtue of the opponent's judicial admission; no question of the pre principle therefore arises; and the subject is dealt with under the hea Judicial Admissions (*post*, § 2595).

§ 808. **Official Statements and Private Writings, under Hearsay Exceptio Opponent's Admissions.** Under the various *Exceptions to the Hearsay* statements in writing are often admissible. So far as any questions u the present principle arise, they can be more conveniently examined u the respective Exceptions to that rule (*post*, §§ 1420–1797).

An opponent's *extrajudicial admissions* are frequently in written fo such questions as arise for them under the present principle are dealt under Admissions (*post*, §§ 1070–1075).

D. INTERPRETED TESTIMONY.

§ 811. **Deaf-Mutes, Aliens, Inaudible Witnesses; Interpreters and Tra tions.** The mode of communication will usually be in words or other sym directly intelligible to the tribunal. If the witness cannot employ a m thus directly intelligible, some intermediary may and must be sought can interpret the witness' mode into the ordinary one:

1851, *Withers*, J., in *Kuhlman* v. *Brown*, 4 Rich. L. 479, 485 (admitting a trans deposition): "Upon general principles it is contended that our law exacts the En tongue as its only language. This is true as to the pleadings, and it is also true th speaks that language to the jury. But is it true that it hears no other? Every da perience testifies the contrary. Any language is heard in court where a foreign wi must be used there. And what is the office that the law performs? It requires means shall be furnished by the actor on that occasion, or in some manner provid convert the testimony, clothed and adduced in a foreign tongue, into that which jury who are to estimate it comprehend. . . . It is enough to remark that ever pedient should be favorably regarded, and that most favorably, the tendency of w gives the strongest promise of an intelligible transmission of the evidence to the through a medium capable, unbiassed, faithful."

It is clear that testimony will not be allowed to fail if some process o terpretation is available. The conditions under which it is to be resorte are the simple dictates of cautious common sense:

(1) Interpretation is proper to be resorted to *whenever a necessity exists* not till then:[1]

[1] The following anecdote illustrates the need of caution: O'Regan's Memoirs of John Philpott Curran, 29: "An Irish witness, Mr. Curran said, was called on the table to give evidence, and having a preference for his own language (first, as that in which he could best express himself, next, as being a poor Celt he loved it for its antiqnity, but above all other reasons, th could better escape cross-examination b and wishing to appear mean and poor and fore a mere 'Irish,' he was observed on c into court to take the buckles cunningly his shoes. The reason of this was ask counsel, and one of the country peopl

1858, *O'Brien*, J., in *R.* v. *Burke*, 8 Cox Cr. 45, 47: "The value of this test [cross-examination] is very much lessened in the case of a witness, having a sufficient knowledge of the English language to understand the questions put by counsel, pretending ignorance of it, and gaining time to consider his answers while the interpreter is going through the useless task of interpreting the question which the witness already understands."

Whenever the witness' natural and adequate mode of expression is not intelligible to the tribunal, interpretation is necessary. Whether the need exists is to be determined by the trial Court.[2] There are three general classes of persons for whom such a necessity may exist: (*a*) persons *organically unable* to use words, and obliged to communicate by ordinary gestures or by a systematic sign-language, *i. e.* most commonly, deaf-mutes;[3] (*b*) persons speaking exclusively or more naturally a *language alien* to that used by the tribunal;[4] (*c*) persons unable, through diffidence or illness, to *speak loud enough* for the tribunal to hear distinctly.[5]

opponent in the suit, cried out, 'The reason, my lord, is that the fellow does not like to appear to be master of two tongues!'"

[2] 1858, R. *v.* Burke, 8 Cox Cr. 45, 55, 56, 60, 61, 64; Cal. C. C. P. § 1884 ("When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him"; "any person a resident of the proper county" may be summoned by the judge to act); 1895, People *v.* Young, 108 Cal. 8, 41 Pac. 281 (applying the statute); 1903, People *v.* Morine, 138 Id. 626, 72 Pac. 166; 1871, City Fire Ins. Co. *v.* Carrugi, 41 Ga. 660, 665, 672, *semble* (interpreter is not needed for a deposition, if the commissioners understand both languages); Ind. Rev. St. 1897, § 508 ("interpreters may be sworn to interpret truly whenever necessary"); 1886, Skaggs *v.* State, 108 Ind. 57, 8 N. E. 695 (here in examining a deaf-and-dumb person it became desirable to appoint another deaf-and-dumb person as a second interpreter through whom the first communicated; held, that the number, etc., was in the trial Court's discretion, under the statute); 1889, State *v.* Severson, 78 Ia. 653, 43 N. W. 533 (interpreter allowable in trial Court's discretion); Tex. Rev. Civ. Stats. 1895, § 2285 (commissioner taking deposition, "when he shall deem it expedient," may have an interpreter "to facilitate the taking").

[3] 1881, Cowley *v.* People, 83 N. Y. 478 (Folger, C. J.: "A deaf-mute . . . is now taught to give ideas to his fellow-men by signs, and his deprivation of some of the common faculties of humanity does not exclude him from the witness-box. The signs he makes must be translated by an interpreter skilled and sworn"). *Accord:* 1786, Ruston's Case, 1 Leach Cr. L., 4th ed., 408; 1827, Morrison *v.* Lennard, 3 C. & P. 127, Best, C. J.; Can. St. 1893, c. 31 (quoted *ante*, § 488), and the other Canadian statutes there quoted; 1830, State *v.* DeWolf, 8 Conn. 98; 1840, Snyder *v.* Nations, 5 Blackf. 295; 1817, Com. *v.* Hill, 14 Mass. 207; 1893, State *v.* Howard, 118 Mo. 127, 144, 24 S. W. 41; 1845, People *v.* McGee, 1 Denio 21. So also for one made mute by *physical violence:* 1899, Roberson *v.* State, — Tex. Cr. —, 49 S. W. 398 (witness injured by violence, and able to testify only by nods or shakes of the head or by writing; allowed); and the cases cited *post*, § 1445, under *Dying Declarations*. The difference in these cases is that, while the witness uses an abnormal mode of communication, yet it does not need a special interpreter. It was said in Morrison *v.* Lennard, *supra*, that the deaf-mute, if he can, should by preference write, instead of using signs. This does not seem sound, and is denied in State *v.* DeWolf, State *v.* Howard, *supra;* he should be permitted the most fluent and natural mode. For the testimonial *capacity* of a deaf-mute, see *ante*, § 498.

[4] Whether the witness is sufficiently fluent in the language of the tribunal is a question for the trial Court: cases cited in note 2, *supra*.

For an anecdote of Lord Eldon's, illustrating the results that may befall from allowing question and answer in any but the orthodox language, see Twiss' Life of Eldon, I, 175.

When the jury is taken *de medietate linguæ*, it would seem that a necessity usually exists for interpreting all the testimony, because one or the other set of jurymen will not understand some of the witnesses. In Chief Justice Martin's History of Louisiana (p. 345) is described a situation, in early times in that State, which nearly amounted to a disregard of this principle, and illustrates the possibilities of novel questions in a region of mixed races. Courts of justice were furnished with interpreters versed in the French, Spanish, and English languages; and these translated the evidence and the Court's charge, but not the arguments of counsel. The case was often opened in the English language, and those of the jury not familiar with it were allowed to retire to the gallery. The defence being in French, a similar privilege was then allowed to those jurymen who did not understand that language. The jury then retired, and, each contending that the argument he had heard was conclusive, a verdict was finally reached as best they could.

[5] 1691, Lord Mohun's Trial, 12 How. St. Tr. 990 (a boy-witness could not speak loud enough;

(2) If interpretation is necessary, and *no adequate means* of securi is practicable, the testimony is lost, for without adequate communic (*ante*, § 766) there can be no testimony.[6]

(3) What sort of person is a proper one to be *interpreter*, is a que depending much on the circumstances,[7] and should be determined by trial judge.[8]

(4) The *form* of interpretation will ordinarily be oral; and ever letters or other documents offered to the jury, it may be oral,[9] on the ciple of § 799, *ante*; though a written translation is customarily empl For depositions, however, which in the modern legal theory exist onl writing (*ante*, § 802), the translation must equally be in writing; and utes sometimes prescribe this. The *time* of translation must for ordi oral testimony to the jury be immediate; but for depositions it would that this is not essential, at least where (as is usual) the Commissioner ing it understands the witness' language and the translation is needed for the trial-tribunal.[10]

§ 812. **Same: Other Principles discriminated.** (1) By the Hearsay every witness must be subject to the opportunity of cross-examination

and the defendant requested that "one of the officers of the court may come down to the bar, and repeat from his mouth to the Court what he saith," which was done); 1716, Earl of Wlutoun's Trial, 15 id. 804, 861 (the accused speaking very low and inaudibly, a person was sworn and stood by him repeating his words, but the accused was directed to speak loud enough for the prosecuting counsel to hear); 1857, Spollen's Trial, Ire., pamphl. p. 47 (similar, for a child speaking low); 1858, Conner *v.* State, 25 Ga. 521 (words of a witness too ill to speak above a whisper may be communicated to Court and jury by another person sworn for the purpose).

[6] 1660, Peters' Trial, 5 How. St. Tr. 1116, 1128 (Dr. Mortimer sworn: "Me Lar, me ha serd de king etc."; Court: "We cannot understand a word"; Counsel: "He is a Frenchman, my lord"; Court: "Pray let there be an interpreter"; one Mr. Young was sworn to interpret truly his evidence; but it being afterwards found difficult and troublesome, the counsel waived his evidence, and prayed another witness might be called; Dr. Mortimer: "Me Lar, me can peak Englis —"; Counsel: "No, no, pray sit down"). In R. *v.* Whitehead, L. R. 1 C. C. R. 33 (1866), is an example of failure of testimony mainly through inability to communicate. The traditional anecdote of the Irish judge addressing the inaudible witness ("Witness, for the sake of God and your expenses, speak up!") hints also that incomprehensibility is equivalent to incompetency.

For the exclusion of the direct examination, because *cross-examination has failed* through illness or contumacy, see *post*, § 1391.

[7] 1682, Coningsmark's Trial, 9 How. St. Tr. 1, 37 (witness speaking both English and French allowed to repeat his testimony in French to those of a jury *de medietate linguæ* who d understand English; but on further obj an interpreter was used); 1899, State *v.* — Ia. —, 78 N. W. 681 (friend allow act as deaf-mute's interpreter); 1900, Jac State, 42 Tex. Cr. 353, 59 S. W. 1111 (w sequestrated may be brought in as interpr 1895, People *v.* Thiede, 11 Utah 241, 39 837 (a juror may be an interpreter); 1896, *v.* Thompson, 14 Wash. 285, 44 Pac. 533 (son who was a witness and related to the cutrix, held not proper to be an interprete

For the qualifications of an interprete reference to *skill in the alien language*, see § 571.

[8] *Supra*, note 2.

[9] 1867, Kuhlman *v.* Medlinka, 29 Tex. [10] 1821, Atkins *v.* Palmer, 4 B. & Al (depositions need not be "translated at th they are taken"; here the sworn interp translation of Italian depositions made six later, and annexed to them, was received the commissioners may require translati the time); 1851, Kuhlman *v.* Brown, 4 L. 479, 485 (deposition need not be tran by interpreter before the commission, n companied by a translation; but may be translated when used; best opinion); Cavasos *v.* Gonzales, 33 Tex. 133 (depo need not be written in the domestic lan but may be translated on offering it). are sometimes prescribed by statute; *e. g.* Rules of Court 1897, § 507.

The following ruling is sound: 1898, *v.* Rothe, 13 D. C. App. 97, 102 (a notary down a deposition, and skilled enough witness' language to translate as he writes need not be sworn as an interpreter; good lon by Morris, J.).

interpreter is a witness to the other witness' words; hence, the interpreter's report of the other witness' testimony cannot be used at another trial without *calling or accounting for the interpreter* (*post*, § 1810). Whether a party is entitled to the interpretation of the *testimony against him* involves also the right of cross-examination (*post*, § 1393).

(2) By an exception to the Hearsay rule, official statements lawfully authorized may be used without calling the officer; under this principle, an *official interpreter's* translation may sometimes be used without calling him (*post*, § 1669).

(3) A person conversing with a third person through an interpreter is *not qualified* to testify to the other person's statements, because he knows them only through the hearsay of the interpreter. Ordinarily, therefore, the third person's words cannot be proved by any one except the interpreter himself (*ante*, § 668).

(4) A party may make an interpreter his agent to communicate; when this has been the case, the interpreter's statements are virtually the extra-judicial admissions of the *party's agent*, and thus are receivable, from any one who heard them, without calling the interpreter (*ante*, § 1078, *post*, § 1810).

TOPIC VI (*continued*): TESTIMONIAL NARRATION:

CONFESSIONS OF AN ACCUSED PERSON.

CHAPTER XXVIII.

§ 815. Rule applicable to Confessions of an Accused only, not of a Witness or a Civil Party. Among the circumstances that may be fatal to the trustworthiness of a testimonial narration is the fact that it is uttered under the direct and palpable pressure of an inducement to substitute something else than the truth. The statement thus presented may appear so likely to be the result of such an influence that it will be rejected as testimony (on the general principle of § 766, *ante*). The influence which might thus affect it would be some advantage directly conditional on the substitution of a fictitious for the truthful statement. This advantage will be, in general, either the definite acquisition by the witness of money or other valuable (as compared with his remaining without this acquisition), or his escape from a disadvantage now threatening; though these two (as will be seen) are in effect reducible to one. The situation of a person charged with crime is obviously peculiar with reference both to the circumstances under which these advantages will be presented, as well as to their nature and force; and thus, in history and in principle, statements in the nature of confessions of guilt by an accused person stand somewhat apart and call for a separate treatment in the law of evidence.

The development of the principle of confessions has been largely due (as may be later noticed) to the spirit of consideration for accused persons, which grew up during the latter half of the 1700s and the first part of the 1800s, and was generated as a natural reaction from the harshness and unjust severity prevailing in penal administration up to that time. We should consequently not expect to find the principle recognized outside the scope of criminal prosecutions. The policy and the history of the rule alike dictate its limitations; so that in *civil cases* no rule would be looked for which excluded the *opposing party's* acknowledgment of a debt or other claim because of its extortion by duress.[1] Since admissions are never conclusive,

[1] The authority, oddly enough, is scanty: 1814, Stockfleth *v.* De Tastet, 4 Camp. 10 (improper examination before bankrupt commissioners; held admissible, irrespective of the mode of obtaining it, though "he will not be bound by it" if obtained by duress or imposition); 1859, Fidler *v.* McKinley, 21 Ill. 308, 309, 316, 318 (breach of promise of marriage; the defendant's admissions of a promise of marriage, made while under arrest on a charge of bastardy, to the woman's father who was angry and held a weapon, admitted; Breese, J., diss.); 1854, Newhall *v.* Jenkins, 2 Gray 562 ("The rule excluding confessions made under undue influence applies only to the confessions of a person on trial in a criminal case"; here admitting testimony of convicts, given under inducements by the prison warden); 1896, McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123 (by consent in a deposition *de bene*, admissible; *semble*, also, even if under compulsion; McIver, C. J., diss.); 1855, Birchard *v.* Booth, 4 Wis. 67, 72 (plea of guilty in a criminal prosecution, admitted in a civil action for the same battery). *Contra:* 1898, Hamersley, J., in State *v.* Willis, 71 Conn. 293, 41 Atl. 820 ("The proposition that confessions obtained under compulsion are inadmissible expresses a well-established prin-

but may always be explained away and discredited by their maker as
to his inadvertence or mistake (*post*, § 1085), there is no necessity for
exclusionary rule based on theory of duress. All analogies suggest that
party's admission be received, subject to his proof of the threats or other
cumstances of duress which may have extorted it. It would follow, th
that in a civil case the admissions of an opponent, when offered, are not to
tested or excluded by any rules of confession applicable to the accused i
criminal case.

For *duress of a witness*, not being a party, the same considerations wo
prescribe that there be no exclusion on the ground of *extrajudicial thre*
or other form of coercion; and this is in practice universally assumed to
the law;[2] for, in the first place, the facts could be brought out on exa
nation (*post*, § 949) and given due weight; in the next place, the judic
power must be assumed sufficient to protect the witness from any serious
prehension of physical harm; and, finally, the existence of any rule of exc
sion on this ground would conflict with the laudable tendency of the p
two generations to admit testimony as freely as possible and trust to t
examination to disclose its weaknesses. As for that form of duress wh
arises from the *intimidating manner* and words of the *examining counsel*,
effective prohibition is within the control of the judge; and it is of cou
more properly dealt with by the prevention of the act of coercion when
is attempted (*ante*, § 781) than by any general rule of exclusion for t
testimony.

§ 816. **Admissions, Confessions, and Hearsay Statements against Intere
distinguished.** Confessions are merely one species of admissions, namely, th
species which consists in a direct acknowledgment of guilt in a crimin
charge (*post*, § 821). For that particular sort the danger of untrustworth
ness exists, and a special rule, based on the general testimonial principle
trustworthiness of narration (*ante*, § 766), becomes applicable. That ru
satisfied, the confession occupies the status of an ordinary admission; its
lation to other rules of evidence is therefore determined by its quality as
admission. For example, as an extrajudicial statement, it would ordinarily
obnoxious to the Hearsay rule; but admissions are not within the prohibiti
of that rule, because they are virtually the party's own statements inconsiste
with his present claim in his pleadings and evidence, and are therefore usab
against him like a witness' self-contradictions used in impeachment; th
being the ground for receiving admissions in general (*post*, § 1048), it suffic
also for confessions.[1] Again, vicarious admissions, *i. e.* those of agents a

ciple of evidence. It applies to admissions as well as to contracts, or to any act whose probative force depends on intent or assent"); Ga. Code 1895, § 5194 (admissions, if obtained "by constraint, or by fraud, or by drunkenness induced for the purpose," are inadmissible).

[2] The following rulings also bear on this question: 1854, Newhall *v.* Jenkins, 2 Gray 562 (cited *supra*); 1899, State *v.* Geddes, 22 Mont. 68, 55 Pac. 919 (threats to accomplic no ground for excluding his testimony for t State).

[1] It is true that confessions could also ha entered under the Hearsay exceptio for sta ments of facts against interest (*post*, § 145 the accused not being a qualified witness. could to-day be so regarded, where the accuse not being compellable, fails to take the stan

other persons, are often receivable (*post*, §§ 1069–1087); and here the principles which determine what persons' admissions are receivable — *e. g.* agents, co-conspirators, co-defendants, and the like — are equally applicable to confessions (*post*, §§ 1076-1079). Again, some sorts of admissions, being usually weak in probative value, are deemed to require corroboration before final acceptance by the jury; and hence certain rules of corroboration, applicable to a few other sorts of admissions as well as to confessions, are by some Courts recognized (*post*, §§ 2067, 2070, 2086).

What we are here concerned with, therefore, is a special and restrictive testimonial principle in its application to a particular species of admissions called confessions; in all other aspects, confessions are included under the generic title of admissions and the other principles applicable thereto. Those principles are dealt with under Admissions (*post*, §§ 1048–1087).

1. History of the Rule.

§ 817. **Different Stages of the Doctrine.** There may be noted four distinct stages in the history of the law's use of confessions. In the earliest stage (going for present purposes no further back than the times of the Tudors and the Stuarts) there is no restriction at all upon their reception. In the next stage, comprising the second half of the 1700s, the matter begins to be considered, and it is recognized that some confessions should be rejected as untrustworthy. In the third stage, comprising the 1800s, the principle of exclusion is developed, under certain influences, to an abnormal extent, and exclusion becomes the rule, admission the exception. In the last phase a reaction sets in here and there, but it represents a future rather than a present movement, and little is accomplished in the way of changing the law or the practice. The rulings of the courts of the United States reflect the last two stages only, and involve no special development. These several stages we may now notice; for here, as in other instances, some of the confusion and uncertainty has arisen from a failure to perceive the differing values which the historical perspective confers upon different precedents.

§ 818. **Confessions in the 1500s and 1600s.** What we notice in the first period is that there is no doctrine about excluding "confessions" in the modern sense; that is, all narratives avowing guilt are accepted in evidence without discrimination, and particularly without question as to their proceeding from hope of promises or from fear of threats, even of torture. It is true that the term "confession" appears, and that there are doctrines about it; but in the one case the term is used in a different sense, and in the other the doctrine relates to the conclusiveness, not the admissibility, of the evidence. Perhaps the simplest method of explaining the state of the law

But this theory is not necessary to lean upon, although it has in judicial thought often been suggested (*post*, § 866). Moreover, it failed to be applied when tested for *confessions of a third person*; for these, not being receivable as a party's admissions (*post*, § 1076), were also not received under the Hearsay exception (*post*, § 1476).

is to describe first these two doctrines, and then to indicate the ab
of any other and exclusionary rule.

(1) *"Confession" as a plea of guilty.* The technical sense of "confes
then, in the earlier usage, is a plea of guilty. It was affected by a r
practice of not receiving or recording such a plea under certain circumsta
but it was not understood as including extrajudicial narrative avowals of
offered as evidence, and the rule about it did not affect such statement
short, it dealt with a matter of criminal pleading, not a matter of evi
This will be plain enough from the following passages in the earliest tre
on criminal law:

1607, *Staundford*, Pleas of the Crown, b. 2, c. 51: "If one is indicted or appea
felony, and on his arraignment he confesses it, this is the best and surest answer th
be in our law for quieting the conscience of the judge and for making it a good an
condemnation; provided, however, that the said confession did not proceed from
menace, or duress; which if it was the case, and the judge has become aware of
ought not to receive or record this confession, but cause him to plead not guilty an
an inquest to try the matter."

1680, *Hale*, Pleas of the Crown, Emlyn's ed., 225: "Concerning the plea of the pr
upon his arraignment, and first of his confession of the fact charged and approving
When the prisoner is arraigned, and demanded what he saith to the arraignment,
he confesseth the indictment, or pleads to it, or stands mute and will not answer.
confession is either simple, or relative in order to the attainment of some other adva
That which I call a simple confession is where the defendant, upon hearing of his
ment, without any other respect confesseth it; this is a conviction; but it is usual
court, especially if it be out of clergy, to advise the party to plead and put himself
his trial, and not presently to record his confession but to admit him to plead. I
but an extrajudicial confession, tho' it be in court — as where the prisoner freel
the fact and demands the opinion of the Court whether it be a felony, — tho' up
fact thus shown it appear to be felony, the Court will not record his confession but
him to plead to the felony 'not guilty.' A confession in order to some other adv
is either where the prisoner confesseth the felony in order to his clergy, or where h
fesseth the offence and appealeth others thereof, thereby to become an approver, and
upon to obtain his pardon if he convict them."[1]

Notice here, first, that a "confession," in the language of Lord Hale,
conviction," or, in Serjeant Hawkins' phrase, "the highest conviction tha
be made." There is no question of evidence; it is matter of record
man as guilty, because he has pleaded it, and no resort to evidence (no "t
is needed. Notice, next, that the unwillingness to make the record of s
plea is a general and indiscriminate one, according to Hale ("it is usua
the Court"); but according to the others, the circumstance causing hesit
is that the accused is overpowered by "fear, menace, or duress," or by '
menace, or duress, or from weakness or ignorance." This test is one w
appropriate to the situation, and not at all coincident with the modern
and yet these authorities have undoubtedly served in part for preceder
the later stages.

(2) *"Confession" as dispensing with the two overt-act witnesses in tre*

[1] So also (1716) Hawkins, Pl. Cr., b. II, c. 31, §§ 1-3.

The same notion of "confession" as a plea of "guilty," and in itself a "conviction," reappears in the statutes of the 1500s and 1600s, requiring two witnesses to an overt act of treason. It is obvious that when a requirement was established as to the quantity of evidence (two witnesses), the requirement would naturally not apply in a case where no resort at all to evidence was needed, *i. e.* where the accused pleaded guilty, that is, "confessed." This was evidently the notion in the statutes of Edward VI, dispensing with the requirement in such a case:

1547, St. 1 Ed. VI, c. 12, s. 22: "No person . . . [shall be indicted or convicted of treason, unless he] be accused by two lawful and sufficient witnesses, or shall willingly and without violence confess the same."

1554, St. 5 & 6 Ed. VI, c. 11, s. 8: the same, "unless the said party arraigned shall willingly without violence confess the same."[2]

Now the statute was construed to give this dispensatory effect to confessions other than those made upon arraignment at bar. Thus:

1664, *Tong's Case*, Kelyng 18: "The judges all agreed that if a conspirator be examined before a privy counsellor or a justice of the peace, and upon his examination without torture confess the treason, if after at his trial he deny it, and two witnesses to prove that confession, are good evidence against him that made that confession at his examination aforesaid; and in that case there needs no witness to prove him guilty of the treason, for that confession puts it out of the statute, which requires two witnesses to prove the treason unless the party shall without torture confess the same; and the confession there spoken of is not meant a confession before the judges at his trial, but a confession upon his examination."[3]

It was apparently to remedy the effect of this forced construction and restore to the statute its intended restrictions that the act of 7 Wm. III changed the phraseology of the dispensing clause:

1695, St. 7 Wm. III, c. 3: No indictment or trial for high treason shall be had except on the testimony of two lawful witnesses, "unless the party indicted and arraigned or tried shall willingly without violence *in open court* confess the same, or shall stand mute, etc."

This phrasing, it would seem, should have settled the matter. But, such was the pressure to use summary methods towards treasonable efforts, that even this statute permitted a difference of opinion to arise as to the dispensatory effect of a confession made out of court.[4] The pretext of those who

[2] These statutes were, by some judges, believed or claimed to have been repealed, as to trials, by 1 & 2 P. & M. c. 10 (1554), which enacted that all trials of treason should from thenceforth be held "according to the due order and course of the common law"; see *e. g.* Tong's Case, Kelyng 18, 49 (1664); and this contention practically prevailed during the Stuart period (*post*, §§ 1364, 2036). But the question of its interpretation in the present connection was still a living one.

[3] Coke had advanced the same opinion a century before, in Ralston's Case, 3 Inst. 25; so, also, Anon., 2 Anderson 66.

[4] This broader effect was upheld in Francia's Case (1716), as reported in East Pl. Cr. I, 133, and Foster, Discourse on High Treason, c. III, § 8 (Foster Cr. C. 241); and in Berwick's Case (1746), Foster Cr. C. 10. On the other hand in Willis' Trial (1710), 15 How. St. Tr. 623, it was conceded that the confession, to be sufficient of itself, should be "in a court of record." Mr. J. Foster, in his Discourse (241), approved the latter doctrine, and thought that the former cases should not be extended beyond their facts, *i. e.* the case of an examination before a magistrate. Chief Baron Gilbert, in his Treatise on Evidence (p. 137; *ante* 1726) had taken the view of Willis' Case.

gave it such an effect seems to have been that such a confession was i
overt act, and therefore was enough if proved by two witnesses. The
were still unsettled in 1793; and the following passage shows how
the question was from that of the mere admissibility of confessions:

1793, *Anon.*, Discourse on High Treason, 145 (printed in Kelyng's Rep., ed. 187
to the confession, there have been doubts whether the statute requires a confess
the arraignment of the party, or a confession taken out of court by a person au
to take such examination. Evidence of a confession proved upon the trial by
nesses has been held sufficient to convict without farther proof of the overt a
1746). This point is, however, not clearly settled. But such confession out o
evidence admissible, proper to be left to a jury, and will go in corroboration
evidence to the overt acts."[5]

(3) *Confessions in general as admissible.* These, then, were th
doctrines about "confessions" up to the middle of the 1700s. The
involved the notion of "confession" as a plea of guilty and therefore
pensing with the necessity of evidence; and they dealt with the co
under which the effect of immediate conviction was to follow such a
sion. That, apart from these doctrines, there were no others as to
sions, appears not merely from the general lack of record of such do
but from several other circumstances. In the first place, the re
trials, down to the middle of the 1600s at least, show the tribunal q
ing the accused, and proceeding, without let or hindrance, upon w
they could get from him by way of confession.[6] In the next place,
that, up to the middle of the 1600s at least, the use of torture to extr
fessions was common, and that confessions so obtained were employ
dentially without scruple;[7] and it is clear that such a practice is inco
with the slightest recognition of the modern doctrine about the admi
of confessions. In the third place, the doctrine of receiving approve
fessions against themselves was nominally in full force during all this
and was not in effect abolished until Rudd's Case,[8] in 1775. This d
too, could not possibly co-exist with any semblance of the modern

[5] In 1803 we find Mr. East (Pl. Cr. I, 132) combating Mr. J. Foster's opinion, and agreeing with the view of the Francia case. Yet he seems at times to confuse the mere admission of a confession and its sufficiency to convict.

[6] Cases cited *post*, § 2250 (history of the privilege against self-crimination).

[7] 1836, Jardine, Use of Torture in the Criminal Law of England, 58 ff. Mr. Jardine says, further: "The last instance of torture in England, of which I can find any trace, occurred in the year 1640"; and this result seems to be adopted in the acute and interesting articles on the subject by Mr. A. Lawrence Lowell, "Judicial Use of Torture," 11 Harv. L. Rev. 293. Yet in 1664, in Tong's Trial, 6 How. St. Tr. 259, the defendant is found saying, "I confess I did confess it in the Tower, being threatened with the rack." In Scotland, it was applied even much later: 1676, Mitchel's Trial, 6 How. St. Tr. 1207, 1232; 1680, Gordon's Trial, 1684, Semple's Trial, ib. 985; 1684, Trial, 10 id. 687; 1688, Standsfield's id. 1371, 1387; 1689, Renwick's Tr 569, 576; 1690, Pain's Trial, 10 id. Walter Scott, in "Old Mortality," d as of 1679, the examination and tort Cameronian preacher Macbriar (ch. fessedly relies in part for his authorit very trial of Mitchel, *supra*. In the it was known at as late a time as M mentions: 1642, Bradford's History outh Plantation, 473; 1641 and 16 Body of Liberties, c. 45 (quoted *post* For the history of the abolition of modern times on the Continent, se Storia del diritto italiano, 2d ed., 190 pt. 1, p. 449.

[8] *Post*, § 819.

about confessions; for it used as evidence (and evidence sufficient in itself) a confession obtained by a promise of pardon, more or less contingent, to be sure, but still definite and probable enough to be fatal to the modern use of the confession.[9] In the fourth place there are many recorded trials in which such opportunities were offered that, if there had been any doctrine limiting the admissibility of confessions, it must have been mentioned by judges or by counsel; yet it was not.[10] Finally, in the treatises of Hale[11] and Buller,[12] where the doctrine would naturally be mentioned, there is in the original edition no such mention; while Hawkins[13] expressly declares the admissibility of confessions without limitation; and the passage of Gilbert,[14] which has a limitation, was apparently intended to apply only to "confessions" in the old pleading-sense already described.[15]

[9] The theory and process is clearly set forth by Lord Hale (1680), Pleas of the Crown, 225: "Before any man shall be admitted to be an approver, he must confess the indictment in open court, and pray a coroner to be assigned him. . . . Upon confessing the felony and praying a coroner to be assigned, the court doth these things: 1. They assign him a coroner to take his appeal; . . . 3. He shall be removed out of the strait custody, and make his appeal before the coroner, that he may not have any just pretence to say it was by duress or constraint, and, therefore, if upon the coming back of the approver into court he will waive his appeal, as being made by duress and against his will, the coroner shall be examined touching it upon oath, and if he affirm it was made *de bon grée*, the appeal shall stand, but the approver shall be hanged. . . . If the approver be vanquished and kild upon the place in the battle, or if the appellee be acquitted by verdict, yet a judgment must be entred upon his [the approver's] confession; for his bare confession of the felony is a conviction, it is true, but not an attainder til judgment given *quod suspendatur per collum*, which is not presently entred upon his becoming approver, but when either by trial or for any other cause before shewn, the court thinks not fit to spare his execution. . . . If the appellee be convict by verdict or battle, or slain upon the field, . . . in that case, altho' the life of the approver is saved, yet he shall be banished unless he obtain the king's pardon; lord Coke saith he shall have a pardon *ex debito justitiæ*."

[10] *E. g.*: 1664, Tong's Case, Kelyng 18 (the judges differed as to admitting against one defendant the testimony of another given under promise of pardon; "but they all *advised* that no such promise should be made, nor any threatenings used to them in case they did not give full evidence"); 1710, Willis' Trial, 15 How. St. Tr. 623 (a peculiar but absurd point was raised under the St. 7 Wm. III, *supra*, that it excluded all extrajudicial confessions, and during the discussion the judges made such remarks as the following: Tracy, J.: "I never knew it disputed but a man's confession might be given in evidence"; Lord Chief Baron: "To say it shall not be given in evidence, there is no ground for it"); 1716, Francia's Trial, ib. 920 (a promise by the Secretary of State not to use the confession was alleged to have been broken; no argument of the modern sort was advanced); 1722, Woodburne's Trial, 16 id. 62; Layer's Trial, ib. 21; 1736, Bacon, Abridgment, tit. "Evidence" (I), p. 313 ("The confession of the defendant himself, whether taken on examination . . . or spoken in private discourse, has always been allowed to be given in evidence against the party").

[11] *Ante* 1680.

[12] *Ante* 1767, Trials at Nisi Prius, 236; Buller's term "confessions," though used of an answer in chancery and of letters, evidently signifies admissions in civil causes.

[13] 1721, Pleas of the Crown, b. II, c. 46, § 3 ("It hath always been allowed to be given in evidence against the party confessing; but not against others").

[14] *Ante* 1726.

[15] Two instances will illustrate how the texts of the 1700s have by editorial interpolation been made to bear testimony in modern times to law which the authors would hardly have recognized. In Hawkins' Pleas of the Crown, b. II, c. 46, § 33, 8th ed., there is a passage: "A confession being the strongest proof of guilt, requires the highest authority"; this, in earlier editions, was a note, with the addition: "and this confession must be without menace or undue terror"; the passage did not appear at all in the original edition; and it applies merely to the old sense of confession, *i. e.* pleas of guilty. Again, the following sentimental rhetoric: "As the human mind under the pressure of calamity is easily seduced and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope or by the impressions of fear, however slightly the emotions may be implanted, is not admissible, for the law will not suffer a prisoner to be made the deluded instrument of his own conviction," after being interpolated by editors into Gilbert's and Hawkins' treatises, was widely copied (in Swift's treatise, for example, p. 132), and

§ 819. **Confessions in the Second Half of the 1700s.** During the time
the Restoration of 1660, and in the course of the gradual, though slow
timid improvement in the methods of criminal trials, there must have
some extension, in the minds of bar and bench, to the usage for extra
cial confessions, of the phrases and notions originally peculiar to confess
at bar upon arraignment.[1] It has left few direct traces in the reports;[2]
by 1775–1785 we find its results coming to the surface. In 1775 in R
Case,[3] where the accused had applied for release in consequence of ha
confessed under an assurance of pardon to be received as an accomplice t
fying for the Crown, Lord Mansfield, in discussing the practice of using
prover's confessions, seemed to see nothing unlawful in it; but at the s
time he made the first judicial utterance limiting the admissibility of ordi
confessions: "The instance has frequently happened of persons having m
confessions under threats or promises; the consequence as frequently
been that such examinations and confessions *have not been made us*
against them on their trial." He was here, clearly, thinking only of per
"being drawn by promises and assurances to answer to an examination
to swear to it on oath," and not of confessions in general; moreover he
not intimate that anything more than a common practice (not a rule)
isted. But in 1783, in Warickshall's Case,[4] before Nares, J., and Eyre
the modern rule received a full and clear expression, and confessions
entitled to credit because of the promises or the threats by which they
been obtained were declared inadmissible in evidence. From this time
the history of the doctrine is merely a matter of the narrowness or broad
of the exclusionary rule.

At this stage, then, the doctrine is a perfectly rational one. Confess
apparently untrustworthy as affirmations of guilt are excluded. Under
principle very few were in fact excluded. Doubts about situations wh
subsequently become questionable were never heard of. Confessions w
thought of in general as "the highest evidence of guilt"; and there was
general sentiment against them, — no *prima facie* doubt of their propriet

§ 820. **Confessions in the 1800s.** By the beginning of the 1800s,

has helped largely as an authority to support one of the modern heresies. Mr. Joy thinks it the work of Gilbert's editor, Lofft; but there are circumstances which point strongly to Leach, the reporter of Crown Cases, and a leading counsel in criminal practice in the late 1700s.

[1] It seems, however, to have been the custom, from the time of the trials of the 1500s, in offering the *depositions* of *accomplices* (and perhaps of accusers not strictly accomplices or co-principals), to state, in favor of their credit, that the deposition was given voluntarily without torture or compulsion: 1551, Duke of Somerset's Trial, 1 How. St. Tr. 515, 520; 1571, Duke of Norfolk's Trial, ib. 958, 978, 1009, 1020; 1586, Babington's Trial, ib. 1127, 1131; 1600, Blunt's Trial, ib. 1409, 1419 (of the accused); 1645, Lord Macguire's Trial, 4 id. 653, 675.

[2] The following case seems to have the liest direct indication of such a doctrine: 1 White's Trial, 17 How. St. Tr. 1085 (the cused's examination before a magistrate b offered, the clerk was asked whether it was untarily given; Mr. Recorder, presiding: "T is an improper question; unless the pris had insisted and made it part of his case his confession was extorted by threats or dr from him by promises; in that case, indeed would have been proper for us to inquire what means the confession was procured"). this case and Goodere's Trial, ib. 1054, it pears to have become the custom to entitle report of the accused's examination as "the untary examination of A. B."

[3] 1 Leach Cr. C. 135.

[4] Ib. 298.

whole attitude of the judges has changed, through influences which we may attempt later to estimate. There is a general suspicion of all confessions, a prejudice against them as such, and an inclination to repudiate them upon the slightest pretext. This attitude continued for half a century, when an effort to harmonize the accumulated and inconsistent precedents, and the improvements that had taken place in criminal procedure, brought clearly before the profession some of the absurdities of the results reached. That a confession should be excluded because it was made upon a promise to give a glass of gin; because the prosecutor said, "If the prisoner would only give him his money, he might go to the devil if he pleased"; because a handbill, offering a few pounds reward for evidence, was posted in the magistrate's office; because the prisoner was told that "what he said would be used *against* him"; — that such results, chronicled in the reports of the first half of the 1800s, could be reached in the name of the investigation of truth seems almost incredible, until we understand the explanatory circumstances. This explanation, lying as it does in collateral conditions indirectly affecting the attitude of the judges, may be here postponed (*post*, § 865). In the meantime, the foregoing history will enable us to examine the orthodox principle of exclusion and the details of the rules laid down in the precedents.

2. Principle of the Exclusion of Confessions.

§ 821. **What is a Confession? Denials, Guilty Conduct, and Self-Contradictions, distinguished.** A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it. It is to this class of statements only that the present principle of exclusion applies. In this sense, therefore, there are in particular three things which fall without the meaning of the term "confession," and are thus not affected in any way by the present rules, namely, (1) guilty conduct, (2) exculpatory statements, and (3) acknowledgments of subordinate facts colorless with reference to actual guilt.

(1) The *conduct* of an accused person falls clearly without the present principle, which rests on the theory that the trustworthiness of the accused's assertions is destroyed or weakened by circumstances supplying a motive for false assertion (*post*, § 822). That which is not an assertion, in some form or another, can therefore not be within the scope of such a principle; its probative use is not testimonial but circumstantial; and the frequency of its employment, free from the present rules, may be seen by perusing the numerous rules of circumstantial evidence (*ante*, §§ 272–284) which apply to such evidence. The accused's conduct, therefore, consisting in fleeing from arrest, concealing the traces of crime, fabricating evidence, suppressing testimony, and other behavior indicative of a guilty consciousness, falls without the present rules:

1895, *Bean*, J., in *State* v. *Reinhart*, 28 Or. 466, 38 Pac. 825: "The defendant contends that, inasmuch as the only evidence tending to show the embezzlement is

the false entries in the books of the firm kept by himself in the course of hi ployment, such entries are extrajudicial statements in the nature of a confession not sufficient to convict him unless corroborated by other evidence. But we c concur in this position. A 'confession' in a legal sense is restricted to an acknow ment of guilt made by a person after an offence has been committed, and does not to a mere statement or declaration of an independent fact from which such guilt m inferred. The entries of the defendant in the books of account which he was requi keep are not confessions or admissions of guilt, but are perfectly innocent in themse and it is only because they are shown to be false and fraudulent that the inferen irresistible, from the manner in which they were made, that they were intended to up his misappropriation." [1]

(2) *Exculpatory statements*, denying guilt, cannot be confessions. ought to be plain enough, if legal terms are to have any meaning and if spirit of the general principle is to be obeyed:

1846, *Ruffin*, C. J., in *State* v. *Broughton*, 7 Ired. 101: "It is altogether a mista call this 'evidence of a confession by a prisoner.' It has nothing of that character was not an admission of his own guilt, but on the contrary an accusation of an person. That it was preferred on oath in no way detracts from the inference that be drawn from it unfavorably to the prisoner, as being a false accusation against an and thus furnishing with other things an argument of his own guilt."

1862, *Rice*, J., in *State* v. *Gilman*, 51 Me. 225: "The declarations of accused pe are not necessarily confessions, but generally, on the other hand, they are denials of and consist in attempts to explain circumstances calculated to excite suspicion."

1895, *De Witt*, J., in *State* v. *Cadotte*, 17 Mont. 315, 42 Pac. 857 (the accused the stand to explain how in self-defence he killed the deceased; the State offered va previous explanations of his, showing self-contradictions): "The other objection that a portion of this testimony was a confession by the defendant, and it was not sh that such confession was made freely. . . . We are satisfied that the statements o defendant sought to be proved were not confessions at all. Instead of being confes of guilt, they were statements of his self-defence, statements in which he admitte killing, and endeavored to show that he was obliged to kill to save his own life. were admissions, to be sure, of the killing, but self-defending statements as to the s And this was precisely the position he occupied upon the trial. He relying on defence for acquittal, it was competent to attack his credibility by proving statem made out of court as to the self-defence, contrary to those which he made as a witne the trial."

1899, *Granger*, J., in *State* v. *Novak*, 109 Ia. 717, 79 N. W. 465: "Inaccurate u such words as 'confessions,' 'admissions,' and 'declarations' has led to some c sion in the cases; but, on authority and reason, there is a clear distinction between a

[1] The authorities dealing with this class of evidence (*ante*, §§ 272-284) sufficiently show that it is admitted without regard to the confession-rules. In the courts of *Texas* alone, it would seem, the heresy prevails that conduct may be treated as a confession (but note that in that State a peculiar statutory rule — *post*, § 831 — has affected the general doctrine): 1883, Nolen *v.* State, 14 Tex. App. 474, 479 (but here the gesture was virtually a statement in answer to a question); 1887, Carter *v.* State, 23 id. 508, 5 S. W. 128 (refusal to tell his name); 1890, Fulcher *v.* State, 28 id. 465, 472, 13 S. W. 750 (defendant's agitation and paleness when arrested; prior cases explained). Nevertheless, even this extension of the term is not ma include conduct and utterances used as evi on the issue of *sanity*: 1895, Adams *v.* Sta Tex. Cr. 470, 31 S. W. 372; 1897, Hurst *v.* — id. —, 40 S. W. 264 (but otherwise i words are in form a direct confession); Burt *v.* State, 38 id. 597, 40 S. W. 1000, 43 344; 1898, Barth *v.* State, 39 id. 381, 46 S 228. Compare the Texas citations under pa *infra*. Compelling an accused, out of cou submit to a measurement of his foot, is confession, within the Texas statute: Thompson *v.* State, — Tex. Cr. —, 74 S 914.

fession and an admission or declaration, unless the admission or declaration has within it the scope and purpose of a confession, in which its distinctive feature, as an admission or declaration, is lost in the broader term 'confession.' A confession is a voluntary admission or declaration by a person of his agency or participation in a crime. . . . To make an admission or declaration a confession, it must in some way be an acknowledgment of guilt. . . . The manifest purpose of [the defendant's] statements was to show himself innocent, and, if his statements are true, he is innocent of the crime charged; so that by no possibility could he have been induced, because of the promise of secrecy, to relate what was untrue, to his prejudice."

This necessary meaning for the term "confession" is generally conceded.[2] Nevertheless, it is in practice not always strictly obeyed; and in some of the

[1] 1895, Pentecost *v.* State, 107 Ala. 81, 18 So. 146 (statements denying guilt, admitted as contradictions); 1903, Meadows *v.* State, 136 id. 67, 34 So. 183; 1896, People *v.* Hickman, 113 Cal. 80, 45 Pac. 175; 1897, People *v.* Ammermann, 118 id. 23, 50 Pac. 15 (the confession-rule not applied to a statement denying the alleged larceny, but admitting the possession and accounting for it; "the term [confession] is restricted to acknowledgments of guilt"); 1897, People *v.* Ashmead, ib. 508, 50 Pac. 681 (burglary; declarations admitting possession of the goods, but explaining it; rule not applicable); 1893, Mora *v.* People, 19 Colo. 255, 262, 35 Pac. 179 (denial of guilt and exculpatory story, held not a confession); 1810, Swift, Evidence, Conn., 133; 1897, Powell *v.* State, 101 Ga. 9, 29 S. E. 309 (murder; killing admitted, self-defence set up; a statement that "his conscience did not bother him about killing R.," held not a confession of guilt); 1897, Shaw *v.* State, 102 id. 660, 29 S. E. 477 (statement disclaiming knowledge, but pointing out the place where the tools of the crime were hidden, held not a confession; yet these two rulings seem to have been ignored by the same Court in the following case: 1900, Fuller *v.* State, 109 id. 809, 35 S. E. 29; exculpatory statements; left undecided); 1900, State *v.* Spillers, 105 La. 163, 29 So. 480 (denial, held not a confession); 1893, Taylor *v.* State, 37 Nebr. 788, 56 N. W. 623 (statements not acknowledging guilt, held not confessions; here statements as to subsequent events, made to a sheriff in jail, admitted); 1901, State *v.* McDowell, 129 N. C. 523, 39 S. E. 840 (denial, held not a confession); 1852, State *v.* Vaigneur, 5 Rich. L. 400, 402 (the accused's statement about his doings, in trying to exculpate himself, proved false; admitted); 1902, Goodwin *v.* State, 114 Wis. 318, 90 N.W. 170 (statements in denial or exculpation are not confessions).

In the Federal Supreme Court this doctrine is ignored: 1896, Wilson *v.* U. S., 162 U. S. 613, 621, 16 Sup. 895 (here exculpatory assertions were admitted, yet after a discussion of the principles of confession): 1897, Bram *v.* U. S., 168 id. 532, 18 Sup. 183 (a statement in which the defendant exculpated himself by asserting that a witness B. could not have seen the defendant do the act, and that he thought the witness B. did it, excluded as a confession; this Bram case, in this as in other respects, reached the height of absurdity in misapplication of the law).

In Texas, the sound doctrine, originally accepted, seems to have been ignored later, under the influence of the peculiar local statute (quoted *post*, § 831): 1891, Quintana *v.* State, 29 Tex. App. 401, 407, 16 S. W. 258 (exculpatory explanation, held not a confession); 1892, Ferguson *v.* State, 31 id. 93, 100, 19 S. W. 901 (larceny; exculpatory statement that he bought the horse from F., offered to contradict his testimony that he bought it from K., held admissible; "instead of being an admission or confession of his guilt, it was intended as a denial of that fact"; Hurt, P. J., diss.); 1899, Bailey *v.* State, 40 Tex. Cr. 150, 49 S. W. 102 (prior statement that he knew nothing of the killing, offered as a contradiction to his testimony, excluded; the statute held to cover not merely "a technical confession," but any statement made while under arrest; Ferguson case ignored).

It will be noticed that the *exculpatory statements* thus admitted, in the above line of precedents, were employed usually either (by showing them to be fabricated) as circumstantial evidence of guilty consciousness (under the principle of § 278, *ante*) or as *self-contradictions impeaching the credit* of the accused as a witness when he took the stand (under the principle of § 1018, *post*). But when the accused's statement is *really a confession*, *i. e.* an acknowledgment of guilt, it cannot be used in the latter manner, if it is by the confession-rule inadmissible as such, for the confession-rule must always be applied to confessions, even when it is desired to use them merely in testimonial impeachment of the accused, and even though (*post* § 891) the accused as a witness may be impeached like other witnesses: 1898, Butler *v.* State, — Miss. —, 24 So. 316; 1894, Shepard *v.* State, 88 Wis. 185, 186, 59 N. W. 449. *Contra:* 1903, Smith *v.* State, — Ala. —, 34 So. 396; 1903, Angling *v.* State, — id. —, 34 So. 846; 1895, Logan *v.* Com., — Ky. —, 29 S. W. 632; 1876, Com. *v.* Tolliver, 119 Mass. 312, 315 (statements by a defendant "while unduly and improperly influenced by promises or threats made to him by officers and others," first excluded as confessions, but afterwards admitted to contradict the defendant's testimony on the stand); 1895, People *v.* Case, 105 Mich. 92, 62 N. W. 1017; 1903, State *v.* Broadbent, 27 Mont. 342, 71 Pac. 1.

cases noted in the ensuing sections no attention was paid to this limita
A due enforcement of it would help materially to remove some of the al
dities in the present practice, especially in the treatment of confessions
under oath (*post*, §§ 842–852).

(3) An acknowledgment of a *subordinate fact, not directly involving guil*
in other words, not essential to the crime charged, is not a confession; bec
the supposed ground of untrustworthiness of confessions (*post*, § 822) is
a strong motive impels the accused to expose and declare his guilt as
price of purchasing immunity from present pain or subsequent punishm
and thus, by hypothesis, there must be some quality of guilt in the
acknowledged. Confessions are thus only one species of admissions; and
other admissions than those which directly touch the fact of guilt are w
out the scope of the peculiar rules affecting the use of confessions:

1796, *Eyre*, L. C. J., charging the jury, in *Crossfield's Trial*, 26 How. St. Tr.
"Gentlemen, those declarations [relating to the invention of a deadly weapon and utt
before the deed charged] have been as it seems to me improperly called 'confessions';
are not properly 'confessions,' which import a particular charge first made and a
knowledgment of that charge. . . . According to the rules of evidence, what a pris
has said respecting a particular fact is admissible evidence, not in the nature of a co
sion, but as evidence of the particular fact."

1866, *Currey*, C. J., in *People v. Strong*, 30 Cal. 157: "The word 'confessions
not the mere equivalent of the words 'statement' or 'declarations.' The defen
made statements to several of the witnesses, as they testified, respecting the departur
Holmes [the murdered man] for San Francisco, and of their appointment to meet at
place, etc.; but it is nowhere to be found in the testimony of the witnesses that he
mitted or confessed to any participation in the homicide."

1875, *McKinstry*, J., in *People v. Parton*, 49 Cal. 637: "The statement of the def
ant [not admitting the offence charged] to K. did not constitute a 'confession,' ad
sible only after proof that it was made voluntarily. A confession is a person's declara
of his agency or participation in a crime. The term is restricted to acknowledgment
guilt. An admission of a fact not in itself involving criminal intent is not to be rejec
as evidence (without the preliminary proof) merely because it may, when connected
other facts, tend to establish guilt."

1897, *Wolverton*, J., in *State v. Porter*, 32 Or. 135, 49 Pac. 964: "We take it that
admission of a fact, or of a hundle of facts, from which guilt is directly deducible,
which within and of themselves import guilt, may be denominated a confession, but
so with the admission of a particular act or acts or circumstances which may or may
involve guilt, and which is dependent for such result upon other facts or circumstances to
established. It is not necessary that there be a declaration of an intent to admit gu
it is sufficient that the facts admitted involve a crime, and these import guilt, or, as
by Mr. Wharton, '"I am guilty of this"; and this imports the admission of all the
constituting guilt.' It is necessary, however, that the accused should speak with
animus confitendi, or an intention to speak the truth touching the specific charge of gu
and when he, with such intention, narrates facts constituting a crime, the guilt becon
matter of inference, a resultant feature of the narration without an explicit declarati
to that effect. So that we conclude that whenever the statements or declarations of
accused, voluntarily made, are of such facts as involve necessarily the commission o
crime, or in themselves constitute a crime, then the facts admitted import guilt, and su
admissions may properly be denominated confessions."[3]

[3] *Accord: Cal.:* 1866, People v. Strong, 30 Cal. 151, 157 (admissions as to an appointment with the deceased, etc., held not confessio see quotation *supra*); 1898, People v. Mill

§ 822. **Principle of Exclusion is the Untrustworthiness of the Testimony under certain conditions.** The principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony. The principle is the same as that upon which statements based on memoranda, or testimony given while intoxicated, or testimony given upon the suggestion of a leading question, are treated as dubitable and may under circumstances be excluded. In criminal charges, the higher degree of caution always exercised by the law in favor of the accused prompts to a greater strictness in excluding suspicious testimony, and the degree of likelihood of its incorrectness need be much less than in other instances; yet the principle is the same.

The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported;[1] but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence. What are the circumstances which may make such an acknowledgment preferable? They are usually described as involving either a promise or a threat. Thus a promise of certain pardon, when attached to a confession, may conceivably make a confession irrespective of its truth, seem more desirable than silence with its contingencies; or a threat of instant hanging by a mob, unless a confession is forthcoming, may conceivably make

122 id. 84, 54 Pac. 523 (libel; admission of newspaper's ownership, not a confession); *Ga.*: 1879, Dumas *v.* State, 63 Ga. 600 (an admission of presence at the place and time, held not a confession); 1887, Covington *v.* State, 79 id. 687, 690, 7 S. E. 153 ("When a person only admits certain facts from which the jury may or may not infer guilt, there is no confession"); 1892, Fletcher *v.* State, 90 id. 468, 471, 17 S. E. 100; 1897, Lee *v.* State, 102 id. 221, 225, 29 S. E. 261 (larceny; defendant's surrender of the goods and declaration that he wanted no trouble about them and would make them good, held not a confession); 1900, Suddeth *v.* State, 112 id. 407, 37 S. E. 747; 1902, Johnson *v.* People, 197 Ill. 48, 64 N. E. 286; *Ia.*: 1871, State *v.* Jones, 33 Ia. 9, 11 (statements in regard to escaping); 1878, State *v.* Knowles, 48 id. 598 ("A confession implies that the matter confessed is a crime"); 1879, State *v.* Glynden, 51 id. 463, 465, 1 N. W. 750 (admissions of presence at the time and place, held not confessions); 1879, State *v.* Feltes, ib. 495, 498, 1 N. W. 755; 1880, State *v.* Red, 53 id. 69, 74, 4 N. W. 831 ("A confession of guilt is an admission of the criminal act itself, not an admission of a fact or circumstance from which guilt may be inferred"); *Minn.*: 1879, State *v.* Mims, 26 Minn. 183, 186, 2 N. W. 491, 683 (embezzlement; admissions of the receipt of the money, held not confessions); *Or.*: 1897, State *v.* Porter, 32 Or. 135, 49 Pac. 964 ("the old man run towards him [defendant], and he [defendant] shot him"; held a confession); *S. C.*: 1898, State *v.* Taylor, 54 S. C. 174, 32 S. E. 149 (ambiguous language); *Tex.*: 1880, Eckert *v.* State, 9 Tex. App. 105 (assault; defendant's admission that he "shot after the man that rode his horse," held not a confession); 1888, Willard *v.* State, 26 id. 126, 130, 9 S. W. 358 (larceny of a cow; defendant's promise to pay for the cow, held not a confession); *U. S.*: 1895, Ballew *v.* U. S., 160 U. S. 187, 16 Sup. 263 ("We are unable to reach the conclusion that Ballew's mere statement to a witness that the pensioner had given his son the check was a confession, or in the nature of a confession. It had no tendency to establish his guilt, or to operate to his prejudice"); *Wash.*: 1893, State *v.* Munson, 7 Wash. 239, 240, 34 Pac. 932, *semble*.

[1] Instances are cited *post*, § 866.

the contingencies of a confession more desirable than the certain consequ of silence. It is in this way that a confession of guilt may become un worthy as testimony.

The principle, then, upon which a confession may be excluded is that under certain conditions, *testimonially untrustworthy*. What circumst may make it so, and what degree of untrustworthiness is sufficien further questions; but the essential feature is that the principle of excl is a testimonial one, analogous to the other principles which exclude n tions as untrustworthy (*ante*, §§ 768–788). This theory, while devel different and inconsistent practical tests at the hands of various Courts, s to have been generally accepted as the underlying and fundamental prin since the first introduction of any doctrine about the inadmissibili confessions:

Ante 1726, Chief Baron *Gilbert*, Evidence, 137: "This confession must be voi and without compulsion; . . . pain and force may compel men to confess what the truth of facts and consequently such extorted confessions are not to be dep on."

1783, *Nares*, J., and *Eyre*, B., in *Warickshall's Case*, 1 Leach Cr. C., 3d ed., "It is a mistaken notion that the evidence of confessions and facts which have obtained from prisoners by promises or threats is to be rejected from a regard to faith. No such rule ever prevailed. . . . Confessions are received in evidence or re as inadmissible under a consideration whether they are or are not intitled to credi free and voluntary confession is deserving of the highest credit, because it is presum flow from the strongest sense of guilt, and therefore it is admitted as proof of the to which it refers. But a confession forced from the mind by the flattery of hope the torture of fear comes in so questionable a shape when it is to be considered a dence of guilt that no credit ought to be given to it, and therefore it is rejected."[2]

1834, Editors' Note, 6 Carrington & Payne, 353: "The principle upon which al class of cases is founded is that by an inducement being held out to the prisoner, in be led to suppose that he will be more mercifully dealt with if he confesses, and th may therefore be induced to confess himself guilty of an offence he never committ which instances we believe have occurred)."

1856, *Campbell*, L. C. J., in *Scott's Case*, 1 D. & B. 58: "It is a trite maxim tha confession of a crime, to be admissible against the party confessing, must be volun but this only means that it shall not be induced by improper threats or promises, be under such circumstances the party may have been influenced to say that which true, and the supposed confession cannot be safely acted on."

1881, *Williams*, J., in *R.* v. *Mansfield*, 14 Cox Cr. 639: "It is not because the afraid of having truth elicited that these confessions are excluded, but because the jealous of not having . . truth."

1886, *Wilson*, C. J., in *R.* v. *Doyle*, 12 Ont. 351: "The reason the confession in a case is not admissible is that in law it cannot be depended upon as true; for one in a case may say, and is likely to say, that which is not the truth if he thinks it to h vantage to do so."

1792, *McKean*, C. J., in *Com.* v. *Dillon*, 4 Dall. 116: "If such declarations are tarily made, all the world will agree that they furnish the strongest evidence of im guilt. . . . The true point for consideration, therefore, is whether the prisoner has f declared himself guilty of a capital offence."

1852, *Withers*, J., in *State* v. *Vaigneur*, 5 Rich. L. 400: "The foundation of all

[2] See another report of this leading opinion in Sel. Crim. Trials at Old Bailey, I, App. 23

upon this subject rests upon an anxiety to exclude confessions that are probably not true; and therefore to exclude those that are not voluntary because such are probably untrue."

1851, *Shaw*, C. J., in *Com.* v. *Morey*, 1 Gray 462: "The ground on which confessions made by a party accused, under promises of favor or threats of injury, are excluded as incompetent is, not because any wrong is done to the accused in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him without regard to their truth, in order to obtain the promised relief or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted."

1855, *Dean*, J., in *People* v. *Thoms*, 3 Park. Cr. 268: "The foundation of this species of evidence is the innate selfishness of man's nature. Hence, all declarations made when the declarant is induced to speak from threats of punishment or offers of impunity are rejected, because it is known (so great is this desire of self-preservation) that men to secure it will often tell what is not true, even against their own innocence, if it but contributes to their safety."

1873, *Wells*, J., in *Beery* v. *U. S.*, 2 Colo. 210: "The reason uniformly assigned for the exclusion of confessions extorted by promises or threats is the unreliable character of confessions delivered under such influences. That the Courts pay no attention to the indecency of subjecting an unfortunate person accused of crime to flattery, torture, or artifice, in order to induce inculpatory statements is well established, — the rule resting solely upon the supposed probability of the untruth of the confessions."

1883, *Cooley*, J., in *People* v. *Wolcott*, 51 Mich. 615, 17 N. W. 78: "No reliance can be placed upon admissions of guilt so obtained [by promises of favor on confessing], for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them."

1893, *Morton*, J., in *Com.* v. *Myers*, 160 Mass. 530, 532, 36 N. E. 481: "Confessions are . . . [excluded] only where the circumstances are such, under which they are made, that a reasonable presumption arises that they may have been induced by a promise or threat from one in authority, and consequently are open to the objection that they may not be true."

1898, *Hamersley*, J., in *State* v. *Willis*, 71 Conn. 283, 41 Atl. 820: "[The conditions affecting the use of confessions] are the liability of accused persons, after their arrest, upon promise of favor from those having control of the prosecution, to untruly admit guilt, or misstate criminatory acts, for the purpose of securing immunity through the promised favor; and the liability of inferior police officers to report untruly or inaccurately the chance expressions or conversations of prisoners in their charge. . . . And the word 'voluntary' is used, not merely as contrasted with compulsory, but with a technical meaning, indicating certain surrounding circumstances. The question is, shall this evidence, admissible as relevant, be excluded because, in the opinion of the judge, the conditions of the declaration came within those conditions that make such an admission too unreliable to go to the jury?"

1899, *Granger*, J., in *State* v. *Novak*, 109 Ia. 717, 79 N. W. 465: "The reason for the rule excluding involuntary confession is not based on the thought that truth thus obtained would not be acceptable, but because confessions thus obtained are unreliable. The rule is in the interest of safe and reliable evidence. . . . The essence of the rule is that when the confessions are made the conditions as to hope or fear are such as to make them unsafe as evidence." [a]

[a] So, too, the following opinions, among others: 1852, R. *v.* Baldry, 2 Den. Cr. C. 432, 446; 1874, Peyton, C. J., in Garrard *v.* State, 50 Miss. 151; 1892, Bleckley, C. J., in Cornwall *v.* State, 91 Ga. 277, 283, 18 S. E. 154 ("The reason why confessions made under the influence of hope are excluded is the danger of their being false"); 1900, Depue, C. J., in Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62. So, too, the following writers: 1824, Starkie, Evidence, I, 52; 1842, Joy, Confessions, 51; 1860, Appleton, Evidence, c. XI, p. 174.

§ 823. **Other Theories not sanctioned; Self-Crimination Privilege, distinguished.** This principle of testimonial untrustworthiness being the foun tion of exclusion, it follows that the exclusion is not rightly rested on cer other possible and occasionally plausible theories.

(*a*) A confession is not excluded because of any *breach of confidence* o good faith which may thereby be involved. This has been accepted f the beginning:

1783, *Warickshall's Case*, 1 Leach Cr. L., 3d ed., 298; a confession was obtained promise of favor; "it was contended by her counsel that as the fact of finding the st property in her custody had been obtained through the means of an inadmissible co sion, the proof of that fact ought also to be rejected; for otherwise the faith which prosecutor had pledged could be violated, and the prisoner made the deluded instru of her own conviction"; *Nares*, J., and *Eyre*, B.: "It is a mistaken notion that the dence of confessions and facts which have been obtained from prisoners by prom or threats is to be rejected from a regard to public faith; no such rule ever prevai The idea is novel in theory, and would be as dangerous in practice as it is repugnan the general principles of criminal law. Confessions are received in evidence, or reje as inadmissible, under a consideration whether they are or are not entitled to credit."

1842, Mr. *Joy*, Confessions, 50: "This does not make the confession admissible (*i. e* oath or promise of secrecy], although a confidence is thus created in the mind of the p oner and he is thrown off his guard. The true question seems to be, Does such co dence render it probable that the prisoner should be thus induced *untruly* to con himself guilty of a crime of which he was innocent?"

Thus, so far as a promise, whether of secrecy, of favor, or of other acti or a misrepresentation of facts, has been the means of obtaining the conf sion, the exclusion that might ensue would in no way rest on the mere f that a promise has been broken, a confidence violated, or a deception delib ately planned and carried out.[1]

(*b*) A confession is not excluded because of any *illegality* in the method obtaining it or in the speaker's situation at the time of making it.[2] The g cral principle — that the illegality of the source of evidence is no bar to reception — is well established (*post*, § 2183), and it is not for any such r son that confessions are rejected.[3] Occasion seldom arises, however, for t illustration of the principle as applied to confessions.

(*c*) Finally, a confession is not rejected because of any connection wi the *privilege against self-crimination*. The circumstances that this privile protects against a disclosure which is compulsory, and that one of the te for a confession is whether it is voluntary or not, have naturally led to t occasional use of both arguments at once by counsel in opposing the use such a confession; but the Courts have properly kept the two principl distinctly apart. Thus, where a compulsory disclosure is offered, it may

[1] This has been emphasized in repeated decisions, cited *post*, § 841.

[2] A seeming exception is found in the exclusion of confessions by an accused *on oath* contrary to the statutes for the examination of accused persons; but this can be otherwise explained (*post*, § 849).

[3] 1857, Seiden, J., in People *v.* McMahon, 15 N. Y. 386 ("It is because it [a sort of conf sion] is in its nature unreliable, and not on count of any impropriety in the manner obtaining it, that the evidence is excluded 1880, Andrews, J., in Baiho *v.* People, 80 499 ("The fact that the arrest was illegal h no relevancy, if the confession was voluntary

admissible so far as the privilege against self-incrimination is concerned, and yet the question of its propriety as a confession may be raised;[4] while it may be inadmissible on both grounds.[5] Moreover, where the privilege has been violated, there is no need of resorting to confessional principles to exclude it, since the theory of the privilege itself suffices to prevent the use of evidence obtained in consequence of such a violation.[6] Finally, that the theory of confessions has no connection with the theory of this privilege is shown by the prevailing doctrine that testimony obtained by the violation of the privilege cannot be objected to as such unless it is being used against the person thus disclosing.[7] The sum and substance of the difference is that the confession-rule aims to exclude self-criminating statements which are *false*, while the privilege-rule gives the option of excluding those which are *true*. The two are complementary to each other, in that respect, and therefore cannot be coincident. Their separateness has more than once been judicially pointed out:

1854, *Selden*, J., in *Hendrickson* v. *People*, 10 N. Y. 33: "If by 'voluntary' is meant 'uninfluenced by the disturbing fear of punishment or by flattering hopes of favor' the expression may be accurate. But it is liable to mislead, because it suggests the idea that the rejection of what are termed involuntary confessions flows from that principle of the common law which is supposed mercifully to exempt persons from all obligations to criminate themselves, and which is expressed by the maxim *nemo tenetur prodere seipsum*. It might, I think, be shown . . . that the principle embodied in it has its foundation in the uncertain and dangerous nature of all evidence of guilt drawn from the statements of a party conscious of being suspected of crime. But, however this may be, it is certain that the statements of an accused person made under oath are never excluded on account of any supposed violation of the immunity of the party from self-crimination."[8]

§ 824. **Practical Tests resulting from the above Principle: (*a*) Was the Inducement sufficient, by possibility, to elicit an untrue Acknowledgment of Guilt?** While no one seems to have questioned the fundamental principle of the exclusion of confessions, there has been a decided difference of practice in the kind of test used in applying the principle. First may be consid-

[4] *E. g.* R. *v.* Sloggett, *post*, § 850.
[5] *E. g.* R. *v.* Garbett, *post*, § 850.
[6] *Post*, § 2270.
[7] *Post*, § 2270.
[8] So, also, the same judge's longer exposition in People *v.* McMahon (1857), 15 N. Y. 386; and that of Hamersley, J., in State *v.* Willis (1898), 71 Conn. 293, 41 Atl. 820. Compare Thompson *v.* State, Tex., cited *ante*, § 821, note 1. That the two rules should be supposed to have something of a common principle or spirit is a not unnatural error. But that history should be rashly tampered with by asserting any common origin is inexcusable. The following passage, by reason of its exalted source, must be specially repudiated: 1897, White, J., in Bram *v.* U. S., 168 U. S. 532, 18 Sup. 182: "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the Constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' . . . A brief consideration of the reasons which gave rise to the adoption of the fifth amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystallization of the doctrine as to confessions, well settled when the amendment was adopted." Of this it must suffice to say that no assertions could be more presumptuously unfounded. The history of the two rules, as set forth *ante*, § 818, *post*, § 2250, shows that there never was any connection or association between the constitutional clause and the confession-doctrine. As to the difference in principle and rule, it is further pointed out in § 2266, *post*.

ered that test which is orthodox in the sense that it is correct on princi
though not in the sense that it is adopted by the majority of Courts.

(1) It has been seen that the reason for distrusting a confession ari
when the person is placed in such a situation that an untrue confession
guilt (more correctly, a confession of guilt irrespective of its truth or falsi
has become the more desirable of two alternatives between which the per
was obliged to choose. Thus, the essential features of the situation are, fi
the fact that the alternative is presented between present silence (or ass
tion of innocence) and some other prospect held out by and associated ind
pensably with the confession of guilt; and, secondly, the relative advantage
this confession, with its consequences certain or contingent, over silence, w
its consequences certain or contingent. The exact situation is perhaps
to be obscured by the ordinary phrase designating "a promise of benefit o
threat of harm" as the circumstances availing to exclude. The truth is th
this duplicate form of statement is not essential; it indicates merely sup
ficial features; and the situation is always reducible to the single form abo
stated. Thus, where a promise (for example, of pardon) is the inducem
for a confession, its effect is to make the certain freedom which will acco
pany false confession more attractive at the moment than the mere pos
bilities of freedom, coupled with temporary restraint, which attend silen
Again, where a mob's threat of hanging has induced a confession, the alt
native of present certain and future possible safety proves naturally mo
attractive than present certain death. Thus in both cases — a promise a
a threat — the confession is untrustworthy because it has been associat
with an attraction too strong to resist. The form of statement "a prom
or a threat" is misleading because the two terms are not really correlativ
i. e. a promise is always attached to the confession-alternative, while
threat is always attached to the silence-alternative; thus in the one ca
the person is measuring the net advantage of the promise, minus the gene
undesirability of a false confession, as against the present unsatisfacto
situation; while in the other case he is measuring the net advantage of t
present satisfactory situation, minus the general undesirability of confessi
against the threatened harm. The measurements and the balances may
very different in the two instances, and the coupling of the terms "a promi
or a threat" is thus improper in the same way that it would be improp
to compare the opposite terms of two equations. Modern usage therefo
generalizes by employing the term "inducement" to cover all modes
influence.

The term "a promise or a threat," as well as the term "voluntary," are al
misleading in another way; for they obscure the fact that (even when threa
are used) the situation is always one of choice between two alternatives,
either one disagreeable, to be sure, but still subject to a choice. As betwe
the rack and a false confession, the latter would usually be considered th
less disagreeable; but it is none the less voluntarily chosen. The ter
"voluntary," then, as describing the absence of the vicious element whi

excludes a confession, is, in ultimate exactness, unsound. All confessions are and must be voluntary; and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of false confession is a natural one under the conditions. The choice of false confession is voluntary, but the false confession is associated with a prospect (namely, of escape from present harm) so tempting that it is not in human nature to resist it.

In general, then, the position of the confessing person which causes our distrust is that of being compelled to choose between two alternatives, one of which involves a confession of guilt irrespective of its truth or falsity. Each instance presented may be thus stated: What were the prospects attending confession (irrespective of its truth) to be weighed by him against the prospects of non-confession? The test of exclusion thus would be: Human nature being what it is, *were the prospects attending confession* (involving the equalization or averaging of the benefit of realizing the promise or the benefit of escaping from the threat, against the drawbacks moral and legal of furnishing damaging evidence), *as weighed at the time against the prospects attending non-confession* (involving a similar averaging), *such as to have created, in any considerable degree, a risk that a false confession would be made?* Putting it more briefly and roughly, Was the inducement such that there was any fair risk of a false confession?

It is this test which must be taken as on principle the orthodox one. It is not the test most commonly applied; but, in one phrasing or another, it has from time to time received the support of eminent judges so frequently that it may fairly be put forward as having claims as satisfactory on precedent as on principle:

1836, *Littledale*, J., in *R.* v. *Court*, 7 C. & P. 486: "The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed."

1836, *Coleridge*, J., in *R.* v. *Thomas*, 7 C. & P. 346: "The only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one."

1843, *R.* v. *Holmes*, 1 C. & K. 248; the magistrate told the accused to be sure and tell the truth, or it would be used against him; Mr. *Greaves*, for the prosecution: "The only proper question is, whether the words said to the prisoner had any tendency to induce him to make a false statement. . . . The case of *R.* v. *Court* is expressly in point"; *Rolfe*, B.: "I am glad to find that there is such an authority; there are some previous cases the other way."

1843, *Coleridge*, J., in *R.* v. *Hornbrook*, 1 Cox Cr. 54: "Before any such evidence is received, it must be seen that his mind is entirely free from every false hope or fear that would be likely to operate upon his mind and induce him to say that which is not true. That is the principle upon which all these cases are decided. Has anything been said to the party to induce him to state that which is not true, under a hope that he shall thereby benefit himself? . . . [Whatever is said must] leave his mind in an unprejudiced state to tell only the truth."

1848, *Erle*, J., in *R.* v. *Garner*, 1 Den. Cr. C. 331: "I think in every case it is for the Judge to decide whether the words were used in such a manner and under such cir-

cumstances as to induce the prisoner to make a confession of guilt whether such sion were true or no."

1872, *Keating*, J., In *R.* v. *Reason*, 12 Cox Cr. 229: "The real question is w there has been any threat or promise of such a nature that the prisoner would be to tell an untruth from fear of the threat or hope of profit from the promise."

1847, *Withers*, J., in *State* v. *Kirby*, 1 Strobh. 387: "[It is erroneous] to const rule to be irrespective of the reason upon which all rules upon this whole subj based. . . . The object of the rule is to exclude any admission that may have be cured by the prisoner's being led to suppose that it would be better for him to himself guilty of an offence of which he is innocent, — whether the inducement h to him be calculated to make his confession untrue."

1857, *Lewis*, C. J., in *Fife* v. *Com.*, 29 Pa. 437: "It is impossible to reconcile th sions on this branch of the law; and the reason seems to be that reporters and elem law writers do not always bear in mind the true test on which the admission or ex of such evidence depends. In 1792, when Chief Justice McKean was presidin Supreme Court of this State declared that 'the true point for consideration is w the prisoner has falsely declared himself guilty of a capital crime.' In decidi point, the chief question is whether the inducement held out was calculated to ma confession an untrue one."

1881, *Hammond*, J., in *U. S.* v. *Stone*, 8 Fed. R. 232, 241, 256: "The real ques whether there has been any threat or promise of such a nature that the prisoner wo likely to tell an untruth from fear of the threat or hope of profit from the promise."

1893, *Haralson*, J., in *Beckham* v. *State*, 100 Ala. 15, 17, 14 So. 859: "The cont inquiry is whether there had been any threat of such a nature that from fear of prisoner was likely to have told an untruth. If so, the confession should not be adm Its exclusion rests on its connection with the inducement; they stand to each ot the relation of cause and effect. If it is apparent that no such connection exists, t no reason for the exclusion of the evidence." [1]

§ 825. **Same: (*b*) Was the Confession induced by a Threat or a Pro by Fear or Hope?** Not all questions involving confessions would neces bring into prominence the accurate test just described; and naturally en many Courts fell into the habit of describing the excluding circums more briefly, though less accurately, as "a threat or a promise," or (the thing in effect) as "fear or hope." In this form the test lacks any mod tion as to the measure of the force which the threat or the promise, the or the hope, might have in causing falsity of confession. It is based, sure, upon the general principle, already examined (§ 822), that confes are excluded when untrustworthy; but it is not an accurate deduction t from. Nevertheless, it is constantly employed as a rule of thumb, wit

[1] The same principle has been more or less definitely expressed in the following rulings: 1852, R. *v.* Baldry, 2 Den. Cr. C. 430, 444, per Campbell, L. C. J. and Parke, B.; 1866, R. *v.* Gilles, 11 Cox Cr. 73, per Keogh, J.; 1853, Carroll *v.* State, 23 Ala. 38; 1881, Yonng *v.* State, 68 id. 575; 1897, Williams *v.* State, 63 Ark. 527, 39 S. W. 709 ("whether there has been any threat or promise of snch a nature that the prisoner would be likely to tell an nntrnth from the fear of the threat or hope of profit from the promise"); 1810, Swift, Evidence, Conn., 131; 1830, Com. *v.* Knapp, 9 Pick. 503; 1857, Com. *v.* Tuckerman, 10 Gray 191; 1871, Com. *v.* Cuffee, 108 Mass. 288; 1869, State *v.* Staley, 14 Minn. 113; 1861, Frank *v.* State, 39 Mis 1881, State *v.* Patterson, 73 Mo. 706; State *v.* Phelps, 74 id. 136 (quoting Keati in R. *v.* Reason, *supra*); 1888, State *v.* son, 96 id. 249, 9 S. W. 636; 1881, State rick, 16 Nev. 128; 1883, People *v.* McGl N. Y. 246; 1868, State *v.* Mitchell, Phili 449; 1868, Price *v.* State, 18 Oh. St. 419; State *v.* Motley, 7 Rich. L. 337; 1853, ridge *v.* State, 1 Sneed 79; 1878, U. S. *v.* 14 Blatch. 387; 1883, Hopt *v.* Utah, 110 585, 4 Snp. 202; 1853, Smith's Case, 10 737; 1858, Shifflet's Case, 14 id. 661, 665; State *v.* Walker, 34 Vt. 302.

referring back to the living principle on which it depends. By the middle of the 1800s the phrase had come to be regarded, by the greater number of judges, as in and for itself sufficient; and the rule was frequently laid down that *any* threat or promise, *any* fear or hope, would exclude a confession made in consequence of it, — that is, would exclude the confession irrespective of any attempt to measure its influence to cause a false confession:

1822, *R.* v. *Gibney*, Jebb Cr. C. 15, by all the Judges: "If hope has been excited or threats or intimidation held out, it shall not be received."

1824, Mr. *Thomas Starkie*, Evidence, II, 36: "A confession can never be received in evidence where the defendant has been influenced by *any* threat or promise."[1]

1852, *Parke*, B. (for eight Judges), in *R.* v. *Moore*, 2 Den. Cr. C. 525: "Perhaps it would have been better to have held that in all cases the Judge was to decide that point upon his view of all the circumstances, including the nature of the threat or inducement and the character of the person holding it out together. But a rule has been laid down in different precedents, by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement."

1797, *State* v. *Long*, Haywood 455: "Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats of severity or promises of favour, and of any influence, even the minutest."

1876, *Stone*, J., in *Bonner* v. *State*, 55 Ala. 245: "Any inducement of profit, benefit, or melioration held out; any threat of violence, injury, increased rigor of confinement; or any other menace which can inspire alarm, dread, or the slightest fear, is enough to exclude the confession as not voluntarily made."[2]

Another phrase generalized the above terms, and declares that "any inducement" is sufficient to exclude the confession.[3] Occasionally an effort was made to apply this test with reference to the living principle, — that is, to ask whether the fear or the hope, the threat or the promise, was strong enough to produce a false confession;[4] but these efforts are casual; and sometimes there appears deliberate breaking with the original and fundamental principle, and the rule of thumb is applied in plain disregard of the question whether the confession is possibly untrue.[5]

[1] So also: 1814, Phillipps, Evidence, 11. The broad statements of these treatise-writers helped greatly to popularize this form of the test, especially in the United States; but their statements exaggerate the extent to which it had at that time become accepted, and in that aspect were incorrect. Mr. Starkie's statement, for example, was made on the authority of Warickshall's Case (quoted *ante*, § 822), which, instead of sustaining it, is quite consistent with the orthodox test. The only early case taking his extreme view was apparently R. *v.* Cass, 1 Leach Cr. L., 4th ed., 293, note (1784).

[2] Other examples are: 1878, McAdory *v.* State, 62 Ala. 161; 1835, State *v.* Brick, 2 Harringt. 530; 1895, Bartley *v.* People, 156 Ill. 234, 40 N. E. 831; 1858, State *v.* York, 37 N. H. 183; 1902, State *v.* Bates, 25 Utah 1, 69 Pac. 70; 1895, State *v.* Coss, 12 Wash. 673, 42 Pac. 127.

[3] 1833, R. *v.* Enoch, 5 C. & P. 539, Parke, J. ("an inducement by one having in custody"); 1833, R. *v.* Mills, 6 C. & P. 146, Gurney, B. ("an inducement"); 1837, R. *v.* Drew, 8 C. & P. 140, Coleridge, J. ("an inducement"); 1839, R. *v.* Taylor, ib. 734, Patteson, J. ("some inducement"); 1856, R. *v.* Toole, 7 Cox Cr. 244, Pigot, C. B. ("some influence acting upon his mind").

[4] 1852, R. *v.* Moore, 2 Den. Cr. C. 525, Parke, B. ("One element in the consideration of this question as to their being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner"); 1870, Cady *v.* State, 44 Miss. 341.

[5] 1893, R. *v.* Thompson, 2 Q. B. 12, 17 ("A simple test, . . . Was it preceded by any inducement to make a statement, held out by a person in authority?"; that the inducements were "calculated to elicit the truth" is "entirely immaterial"); 1856, Jordan *v.* State, 32 Miss. 386 ("It is no answer to say that the confession was true; the question, and the only question, which can be considered is whether the confession was voluntary, extorted by threats or violence, or induced by the hope of reward or immunity from punishment").

§ 826. **Same: (c) Was the Confession Voluntary?** Probably as early historical usage,[1] and more common in modern judicial opinions, is the phr "voluntary," as indicating that quality in a confession which sanctions reception. Here, again, though the test rests ultimately for its validity u the fundamental principle already examined (*ante*, § 822), yet it has com be employed in judicial parlance as sufficient in itself, independent of living principle beneath it. But, unlike the preceding test, it is not serviceable as a rule of thumb, for its significance is so indefinite and l that it does not of itself supply a solution for the various situations v their graduated differences; hence it is often, perhaps usually, found in c bination with the preceding test in one form or another, the latter servin explain and make it more specific; thus:

1801, Mr. *Peake*, Evidence, 14: "The confession of a felon voluntarily mad evidence against him on his trial; but if any threats or promises have been mad induce him to confess, no evidence of such confession is admitted."

1881, *Coleridge*, L. C. J., in *R.* v. *Fennell*, L. R. 7 Q. B. D. 150: "A confessio order to be admissible, must be free and voluntary; that is, must not be extracted by sort of threats or violence, nor obtained by any direct or implied promises, however sl nor by the exertion of any improper influence."

1893, *Cave*, J., in *R.* v. *Thompson*, 2 Q. B. 17: "A simple test, . . . Is it pr affirmatively that the confession was free and voluntary, that is, Was it preceded by inducement to make a statement held out by a person in authority?"[2]

In the case of the present test, however, it is employed usually — oft than the preceding one — in a purely subsidiary way, *i. e.* as merely a re test for determining the trustworthiness of the confession; the living p ciple being oftener kept in mind; thus:

1874, *Pearson*, C. J., in *State* v. *Whitfield*, 70 N. C. 356: "No confession of guilt be heard in evidence unless made voluntarily; for if made under the influence of e hope or fear, there is no test of its truthfulness."[3]

[1] *Ante* 1726, Gilbert, Evidence, 137 ("This confession must be voluntary and without compulsion, . . . pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on"). It had been the custom, long before this, in offering the deposition of an accomplice or accuser, to state that it was "voluntary and without torture or compulsion": *ante*, § 818.

[2] Examples of this test in American opinions are as follows: (1) Using "threat or promise" as the secondary test: 1873, Nicholson *v.* State, 38 Md. 153; 1874, State *v.* Jones, 54 Mo. 479; 1871, Barnes *v.* State, 36 Tex. 362; 1839, U. S. *v.* Nott, 1 McL. 501; 1839, State *v.* Phelps, 11 Vt. 121. (2) Using "hope or fear" as the secondary test: 1870, State *v.* Brockman, 46 Mo. 568; 1827, State *v.* Roberts, 1 Dev. 259; 1874, Rufer *v.* State, 25 Oh. St. 469.

Other sundry examples of this test are the following: 1897, Newell *v.* State, 115 Ala. 54, 22 So. 572; 1897, Holland *v.* State, 39 Fla. 178, 22 So. 298; 1898, Gantling *v.* State, 40 id. 237, 23 So. 857; 1898, Hecox *v.* State, 105 Ga 31 S. E. 592; 1900, Fuller *v.* State, 109 id 35 S. E. 298 (to sheriff); 1900, State *v.* nair, 52 La. An. 1921, 28 So. 273; 1895, *v.* Sheehan, 163 Mass. 170, 39 N. E. 791; People *v.* Taylor, 93 Mich. 638, 641, 53 777; 1895, People *v.* Parsons, 105 id. 1 N. W. 69; 1897, Hunter *v.* State, 74 Mis 21 So. 305; 1902, Blalack *v.* State, 79 id 31 So. 105; 1895, Basye *v.* State, 45 Neb 63 N. W. 811; 1898, Snider *v.* State, 56 i 76 N. W. 574; 1900, State *v.* Abatto, 64 N 658, 47 Atl. 10; 1900, State *v.* Baker, 58 111, 36 S. E. 501; 1896, Wilson *v.* U. S U. S. 613, 16 Sup. 895 (Fuller, C. J.: "th test of admissibility is that the confess made freely, voluntarily, and without comp or inducement of any sort"); 1900, Jack U. S., 42 C. C. A. 452, 102 Fed. 473.

[3] Other examples of this sort are as fo 1875, Sampson *v.* State, 54 Ala. 243; Levison *v.* State, ib. 524; 1877, John State, 59 id. 39; 1881, Young *v.* State, 575; 1881, Redd *v.* State, 69 id. 259;

3. "Person in Authority."

§ 827. **Introductory.** After thus considering the various theories and tests by which confessions are governed, it is now feasible to examine the different specific situations and the state of the rulings thereon. Since the inadmissibility of a confession depends on the relative strength of the inducement to confess falsely, as measured against the prospects attached to non-confession, it is obvious that the various situations can best be grouped according to the *nature of the inducement*. But as the strength of the inducement must depend more or less upon the power of the person offering it, the rule of law must first specify the *kinds of persons* from whose mouths the inducements may be regarded as having any value. Most of the inducements being favors offered or disadvantages threatened in the way of legal proceedings, the question is usually one of the legal authority of the person promising the favor or threatening the harm. The general topic may properly be described by the phrase, "Person in Authority."

§ 828. **Threats or Promises in general.** Unless the person attempting to obtain a confession has the power (apparently to the confessor) to carry out the threat or the promise, there is no reason for treating the inducement as likely to produce an untrue confession. It is in such a case not due to the inducement, but to the confessor's own discretion; for he has no real alternative. The simple cases of this sort are those of threats of physical violence. Thus, a master threatening to beat or otherwise ill-treat a slave is clearly a person having such power; so, too, a mob having possession of the accused and threatening to hang or to beat him has such power.[1]

§ 829. **Threats or Promises connected with Legal Immunity or Relief.** Here there has been more or less uncertainty and difference of practice. The situation is that in which the confessor has been promised, if he confesses, a release from arrest, a cessation of prosecution, non-action towards prosecution, or the like. On principle, such a promise should be of no consequence unless the promisor was one having (apparently) the power to arrest or prosecute. But for some time in England there was more or less uncertainty in the practice at Nisi Prius. This came about, probably in part, because the class of persons commonly accused before the judges came largely from a population which was accustomed to comport itself with submission before those of a "superior" class, and was inapt to discriminate about the authority of such persons to employ threats or promises. Most of the exclusions can be supported upon even the narrowest definition of "person in authority"; but during the first half of the 1800s no agreement had been reached as to the propriety of that test.[1] The older and more usual

State *v.* Potter, 18 Conn. 177; 1871, Yonng *v.* Com., 8 Bush 370; 1857, Com. *v.* Tuckerman, 10 Gray 190; 1856, Brown *v.* State, 32 Miss. 450; 1847, State *v.* Cowan, 7 Ired. 244.

[1] No decisions expressly involving the question seem to have been made; but in the rulings in § 833, *post*, will be found situations illustrating the application of the principle.

[1] 1811, R. *v.* Hardwick, 1 C. & P. 98, *note* (the constable's wife; excluded); 1823, R *v.* Gibbons, ib. 97 (a bystander; admitted); 1823, R. *v.* Tyler, ib. 129 (a bystander; admitted);

view was that the inducement, to exclude, must have been held out person having a legal interest or authority in the arrest and prosecut but the view also obtained currency that an inducement by any p whatever would exclude.[3] The case of an inducement by a master mistress to a servant was the troublesome one, for there no legal inter the prosecution might exist, and yet the relation involved in one sen "authority," *i. e.* an actual control which might affect by its pressur mind of the servant. Finally, in 1852, the earlier view was confirmed the existence of a legal interest in the prosecution was taken as the te not the mere existence of actual control or influence growing out o social or commercial relations of the persons:

1852, *R.* v. *Moore*, 2 Den. Cr. C. 522; Mr. *Creasy*, for the accused: "We mu look at the case as lawyers, but consider what would be the natural result of an i ment by such a person. The test is not, it is submitted, Who is the party to set in motion? but, Who is most likely to have influence? Who is most natural th prisoner should look to?" *Parke*, B., for the eight judges: "Perhaps it would hav better to have held (when it was determined that the judge was to decide wheth confession was voluntary) that in all cases he was to decide that point upon his ow of *all* the circumstances, including the nature of the threat or inducement, and th acter of the person holding it out, together; not necessarily excluding the confess account of the character of the person holding out the inducement or threat. But has been laid down in different precedents by which we are bound, and that is, threat or inducement is held out, actually or constructively, by a person *in autho* cannot be received, however slight the threat or inducement. And the prosecutor, trate, or con ble, is such a person; and so the master or mistress may be. If n out by one in authority, they are clearly admissible. . . . But it is only whe offence concerns the master or mistress that their holding out the threat or the p renders the confession inadmissible. . . . In the present case, the offence of the pr in killing her child or concealing its dead body, was in no way an offence agai mistress of the house; she was not the prosecutrix then, and there was no probabi herself or the husband being the prosecutor of an indictment for that offence."

1834, R. v. Shaw, 6 id. 372 (a fellow-prisoner; admitted); 1834, R. v. Simpson, 1 Moody Cr. C. 410 (the mother of the prosecutor's wife, in the latter's presence; excluded); 1836, R. v. Upchurch, ib. 465, by ten Judges (the prosecutor's wife, who helped manage the business; excluded); 1836, R. v. Ponntney, 7 C. & P. 302, Alderson, B. (the landlord of the inn to which the accused was taken in custody, a constable being present; held doubtful); 1839, R. v. Taylor, 8 id. 734 (the wife of the prosecutor and mistress of the accused, held "a person in authority over the prisoner"); 1846, R. v. Croydon, 2 Cox Cr. C. 67 (an attorney endeavoring to find evidence for a prosecution; excluded); 1848, R. v. Garner, 1 Den. Cr. C. 331 (a medical man in the presence of prosecutrix and accused's husband; excluded); 1848, R. v. Millen, 3 Cox Cr. C. 507 (a fellow-prisoner in the presence of the arresting constable; excluded); 1851, R. v. Warringham, 2 Den. Cr. C. 447 (the wife of one of the prosecutors, concerned in the management of their business; excluded).

[2] 1809, R. v. Row, R. & R. 153, by nine Judges (advice by bystanders having nothing to do with the arrest; admitted, "becau advice to confess was not given or sanc by any person who had any concern business"); 1836, R. v. Gibbons, 1 C. & Park, J., and Hullock, B. (any person any office or authority, as the prosecutor, ble, etc."); 1839, R. v. Taylor, 8 C. & Patteson J., speaking of his opinion as senting the judges; 1839, Lewin, note to Cr. C. 125 ("The cases seem to establ principle that where a confession is o through the medium of a suggestion m a person from whom the prisoner ca nothing to hope or to fear, it ought received").

[3] 1831, R. v. Dunn, R. v. Slaughter, P. 543, Bosanquet, J. ("any person te prisoner that it will be better for him to will always exclude any confession m that person"; here a fellow-workman, person to whom the stolen article was for sale); 1837, R. v. Spencer, 7 id. 776, B. (held doubtful, because the judge divided in opinion).

Thus the prosecutor or the prosecutrix (or a person likely to be such), or a person so employed about such a one's affairs as to be able to exercise his authority for him, or a person acting under his express or implied sanction, would be one whose inducements involving benefits connected with the legal proceedings might exclude the confession; but no other person's inducements (of that character) could do so.[4] It must be added that a constable or other police officer, or a magistrate, has always been regarded as a person in authority with reference to inducements involving release from arrest or cessation of prosecution, irrespective of the technical limits of such a person's legal powers in the premises.[5]

§ 830. **Same: United States Doctrine.** The course of the law in the United States has tended towards the denial of the foregoing strict distinction, by reason of two circumstances. First, in the learned treatise of Professor Greenleaf, published several years before R. *v.* Moore (above quoted) was decided, it was intimated that the current of authority was against that doctrine, and his own weighty opinion favored that result;[1] and this opinion was widely circulated. Secondly, and chiefly, our system of public prosecution does not admit of such a sharp and easily handled distinction. In England, the person injured by the crime may and (at least in its primary stages) usually must himself institute and manage the prosecution.[2] But in the United States he has no such power; the official prosecutor alone has it. Confessions made to such officials are in this country the commoner class. At the same time, the injured person *may* practically be in a position (by a failure to testify) which gives him actual power to affect the result favorably to the accused. To draw the line absolutely, therefore, at those who alone had legal control over the prosecution would be to omit many who might conceivably under certain conditions hold out inducements of a palpable strength. It thus happens that three distinct rules are found applied in the jurisdictions of the United States:

(1) The English rule that the injured individual (with us, the prosecuting witness merely) is to be deemed a "person in authority" has occasionally been recognized.[3]

[4] Subsequent rulings in England are as follows: 1853, R. *v.* Luckhurst, 6 Cox Cr. 243 (one who put questions in the prosecutor's presence; excluded); 1853, R. *v.* Sleeman, Ib. 245 (a married daughter of the accused's master, not in his household; admitted); 1861, R. *v.* Parker, 8 id. 465 (a fellow-prisoner in the presence of prosecutor and constable; admitted); 1872, R. *v.* Vernon, 12 id. 153 (a woman deputed by the constable to guard the accused temporarily; admitted).

[5] 1852, R. *v.* Moore, 2 Den. Cr. C. 526; and cases cited *supra, passim*.

[1] 1842, Greenleaf, Evidence, § 223.

[2] 1883, Stephen, Hist. of Crim. Law, I, 493 ("In England, and, so far as I know, in England and some English colonies alone, the prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons. . . . [When there is a private prosecutor], he can and does manage the whole matter as he might manage any other action at law; he employs a solicitor, who may or may not instruct counsel, and who takes the proofs of witnesses, brings them before the committing magistrate and the grand jury, instructs counsel at the trial, and, in a word, manages the whole of the proceedings just as he would in a civil cause. . . . Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General or any one else").

[3] 1899, Sullivan *v.* State, 66 Ark. 506, 51 S. W. 828 (owner of stolen property, held a person in authority); 1870, State *v.* Brockman, 46 Mo. 570.

(2) The opposite extreme — ignoring the inducements of all persons ex those having official authority — has also received sanction:

1881, *Hammond*, J., in *U. S.* v. *Stone*, 8 Fed. 260 (admitting a confession to a pr detective employed by the owner of stolen goods): "At common law, some person erally the party injured, though it might be another person, must be named as prosec except in special cases; and without this there could be no prosecution. . . . It is thr this semi-official relation to the prosecution that a private prosecutor becomes a pers authority in this matter of evidence of confessions. But under our federal practice the earliest times, and by force of the statute, the district attorney is the only prose known to our law, and as a matter of fact, in this court at least, no private prosecuto ever been recognized. . . . It is impossible therefore for any one to occupy the place private prosecutor in this court, or make any promises of immunity that will avai accused in that capacity. It was otherwise at common law; for generally if the injured refused to prosecute, there could be no prosecution. With us the district atto alone can give such assurances. . . . [Thus,] the determination of the question of thority depends upon the relation of the person to the criminal prosecution for th done by the accused. . . . The person must have some authority over the prosecuti that particular offence, whether he be an officer of the law or not. The mere fact he is an officer does not answer the purpose; he must be connected with the prosecu and have authority through that connection over the prisoner."

(3) A middle way is that which most Courts seem to have adopted. injured person, or the master of a servant, is not regarded as necessa having a control sufficient to vitiate confessions made by his inducem nor is he regarded as entirely incapable of holding them out. Each cas decided upon its own circumstances, and the actual state of the relation tween him and the confessor is inquired into with reference to the prob strength of the inducement. This seems the wisest rule, and it is in acc ance with the recommendation of Professor Greenleaf, often quoted by judges:

1842, Professor *Simon Greenleaf*, Evidence, § 224: "Promises and threats by pri persons, not being found so uniform in their operation [as those by persons in of authority] perhaps may with more propriety be treated as mixed questions of law fact; the principle of law that the confessions must be voluntary being strictly adh to, and the question whether the promises or threats of the private individuals who ployed them were sufficient to overcome the mind of the prisoner, being left to the cretion of the judge under all the circumstances of the case."

1854, *Shaw*, C. J., in *Com.* v. *Morey*, 1 Gray 463: "Of course such inducement m be held out to the accused by some one who has, or is supposed by the accused to h some power or authority to assure to him the promised good or cause or influence threatened injury."

1879, *Brickell*, C. J., in *Murphy* v. *State*, 63 Ala. 3: "[The improper inducement come from] any one connected with the accused who may, considering his relations condition, be fairly supposed by him to have the power to secure him whatever of be is promised or to influence the threatened injury."

The precedents illustrate the flexibility (or perhaps the looseness) of t rule.[4] It may be added that some of them seem to indicate that a modificat

[4] 1846, State *v.* Potter, 18 Conn. 178 (a friend, admitted); 1870, State *v.* Darnell, 1 Houst. Cr. C. 322 (a bystander; admitted); 1895, Freeman *v.* Brewster, 94 Ga. 1, 21 S 128 (a fellow-prisoner; excluded); 1871, Kamakana, 3 Haw. 313, 315 (an officer not

has also been made in the English rule for police-officers; so that such a person would not necessarily be a "person in authority."

4. Nature of the Inducement.

§ 831. **Competing Rules; Statutory Definitions.** "There is no branch of the law of evidence," said Chief Justice Sherwood, a generation ago,[1] "in such inextricable confusion as that relative to confessions." This confusion is due chiefly to the competition of the different tests and the judicial fluctuations between them. The current rules or tests, for determining what kind of inducement suffices to exclude, are three (*ante*, §§ 824–826): (1) The first is, Was the inducement of a nature calculated under the circumstances to induce a confession irrespective of its truth or falsity? (2) Another is, Was there a threat or a promise, a fear or a hope? (3) The third test, Was the confession voluntary? is practically colorless and unserviceable when the nature of the inducement is in question, and is almost always translated secondarily, before application, into terms of one of the other two tests. It has been seen (*ante*, § 824) that the first test is, upon principle, the only rational and correct one. It will now be found that the varying and inconsistent results reached for similar situations are mainly explainable by the difference of the tests applied by the different Courts. It is particularly to be remembered that the hopeless inconsistency of the English rulings is due chiefly to the fact that the rulings were virtually in different jurisdictions, — that is, by single judges sitting in different circuits and living in different generations, and therefore not necessarily harmonious with the rulings of their colleagues or their predecessors.

In several American jurisdictions, the Legislature has dealt with the subject of confessions by adopting some definition of the inducement which is to exclude them;[2] but these statutes seldom do more than accept some com-

nected with the prosecution, held a person in authority); 1871, Young *v.* Com., 8 Bush 370 (one in whose house the accused, fleeing from pursuit, was sleeping; admitted); 1896, State *v.* Griffin, 48 La. An. 1409, 20 So. 905 (requested by a reporter; admitted); 1898, State *v.* Caldwell, 50 id. 666, 23 So. 869 (encouragement by a friend of the accused, that the prosecutor would help; admitted); 1842, State *v.* Grant, 22 Me. 171 (a friend urging the accused to save his brother, jointly accused; admitted); 1878, Ulrich *v.* People, 39 Mich. 249 (a friend of accused's father who rode to jail with the accused and the arresting officer; admitted); 1883, People *v.* Wolcott, 51 id. 614, 17 N. W. 78 (persons visiting the prisoner in jail with implied official authority; excluded); 1895, State *v.* Smith, 72 Miss. 420, 18 So. 482 (an employer whose factory had been burned; excluded); 1900, Hamilton *v.* State, 77 id. 675, 27 So. 606 (accused's employer, held on the facts a person in authority); 1900, State *v.* Bradford, 156 Mo. 91, 56 S. W. 898 (a prison guard; admitted); 1903, State *v.* Force, — Nebr. —, 95 N. W. 42 (a father urging a confession from a minor son, held a person in authority, on the facts); 1881, State *v.* Carrick, 16 Nev. 128 (the bondsmen of defendant urging him to say whether he had defaulted; admitted); 1898, Com. *v.* Wilson, 186 Pa. 1, 40 Atl. 283 (confession of crime made in order to procure admission to a supposed band of outlaws by proving his hardihood, etc., admissible); 1875, Beggarly *v.* State, 8 Baxt. 526 (following Greenleaf); 1853, Smith's Case, 10 Gratt. 737 (a master, but here the injured person was not the master; held not inadmissible merely because made to the master); 1858, Shifflet's Case, 14 Id. 657 (a member of the jailer's family and staff; admitted); 1890, Early's Case, 86 Va. 927, 11 S. E. 795 (a private detective who had secured evidence against the accused, admitted).

[1] 73 Mo. 705.

[2] *Ga.* Cr. Code 1895, § 1006 ("To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury"); § 1007 ("The fact that a confession is made under a spiritual exhortation, or a promise of secrecy, or a promise of a collateral benefit, shall not exclude it"); *Haw.*

mon-law rule, and cannot be said on the whole to have effected any ch
much less any improvement; except that in Hawaii, Indiana, and Was
ton the radical step of desirable reform (*post*, § 867) has been taken, an
traditional rules are practically abolished; and that in Texas the ru
exclusion is made even stricter than before.

§ 832. **Advice that "it would be better to tell the truth," or its equiv**
On principle, the advice by any person whatever that it would be bett
tell *the truth* cannot possibly vitiate the confession, since by hypothesi
worst that it can evoke is the truth, and there is thus no risk of acce
a false confession (*ante*, § 822). The confessor is not obliged to c
between silence and a false confession having powerful advantages
advantages are attached to the utterance of the truth; and, however te
ing we may suppose them to be, there is nothing in the nature of
temptation to make the statement untrustworthy; for if it has availe
all, it has availed to bring out the truth.

Nevertheless, judges have been found with such extraordinary scrupul
as to exclude confessions following such advice.[1] The practical result

Civil Laws 1897, § 1427 ("No confession which is tendered in evidence on any trial, shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the Judge or other presiding officer shall be of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made"); 1895, Republic *v.* Hang Cheong, 10 Haw. 94 (statute applied); *Ind.* Rev. St. 1897, § 1893 ("The confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear, produced by threats"); *Minn.* Gen. St. 1894, § 5766 ("A confession of a defendant, whether made in the course of judicial proceedings, or to a private person, cannot be given in evidence against him, when made under the influence of fear produced by threats"); *N. Y.* C. Cr. P. 1881, § 395 (confession, "whether in the course of judicial proceedings or to a private person," is admissible, "unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor"); *Or.* C. Cr. P. 1892, § 1368 ("A confession of a defendant, whether in the course of judicial proceedings or to a private person, cannot be given in evidence against him, when made under the influence of fear produced by threats"); *Tex.* C. Cr. P. 1895, § 789 ("The confession of a defendant may be used in evidence against him if it appear that the same was freely made without compulsion or persuasion, under the rules hereafter prescribed"); § 790 ("The confession shall not be used if at the time it was made the defendant was in jail or other place of confinement, nor while he is in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law, or be made voluntarily after having been first cautioned that it may be used against him, or unless in connection with such confession he statement of facts or of circumstances t found to be true, which conduce to establi guilt, such as the finding of secreted or property or instrument with which he sta offence was committed"); *Wash.* C. & 1897, § 6942 ("The confession of a def made under inducement, with all the c stances, may be given as evidence agains except when made under the influence produced by threats"); 1895, State *v.* H 13 Wash. 5, 42 Pac. 527 ("the former rul excluding confessions made under induc does not obtain in this State, in consequ this statute").

[1] In the following cases the confessi excluded: *England:* 1833, R. *v.* Enoch, 5 539, Parke, J. (by a constable, "she had tell the truth or it would lie upon her"); R. *v.* Hearn, C. & M. 109 ("if she did n the truth, he would send for a constable her"); 1846, R. *v.* Laugher, 2 C. & K. 2 the accused's husband in the presence arresting constable; told "to tell the t excluded on mixed grounds); 1848, Garner, 1 Den. Cr. C. 329, Maule and Pa JJ.; 1852, Pollock, C. B., in R. *v.* Baldry 441; 1861, R. *v.* Parker, Leigh & C. 42; R. *v.* Bate, 11 Cox Cr. 686, Smith, J.; R. *v.* Dogherty, 13 id. 23 (Ire.), Whi C. J.; 1881, R. *v.* Fennell, 7 Q. B. D 1893, R. *v.* Thompson, 2 Q. B. 16, 18, C *semble*. Pollock, C. B. in R. *v.* Baldry, distinguished between "tell the truth" "you had better tell the truth"; but thi dity seems not to be elsewhere advanced. *Can.:* 1889, R. *v.* Romp, 17 Ont. 567 truth would go better than a lie"; excl *United States:* 1898, Hurdin *v.* State, 6 53, 48 S. W. 904 (by the sheriff, that to t truth would save the defendant from the penalty); 1874, People *v.* Barrie, 49 Ca 1890, People *v.* Thompson, 84 Id. 605, 2

such rulings is a false and artificial interpretation, justly reproved by Mr. Justice Willes:[2] "It seems to have been supposed at one time that saying 'tell the truth' meant in effect 'tell a lie.'" Sound opinion refuses to exclude a confession induced by such exhortation; and the weight of authority in this country, though not in England, repudiates such an exclusion:

1836, *Littledale, J.*, in *R. v. Court*, 7 C. & P. 486 (the magistrate had told the prisoner to be sure to tell the truth): "It can hardly be said that telling a man to be sure to tell the truth is advising him to confess what he is really not guilty of."

1867, *Judge, J.*, in *King v. State*, 40 Ala. 321: "The admonition to say he was innocent, if such was the truth, was just as strong as to say he was guilty, if that was true. . . . Confessions, as already stated, which may have been procured by the prisoner's being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed, should be excluded. But it can hardly be said that telling a man to speak the truth is advising him to confess that of which he is not guilty."[3]

384; 1902, People *v.* Gonzales, 136 id. 666, 69 Pac. 487; 1902, West *v.* U. S., 20 D. C. App. 347, 351 ("You have been telling me a pack of lies; now you had better tell the truth"; excluded); 1898, State *v.* Auguste, 50 La. An. 488, 23 So. 612 ("You must tell the truth"; excluded on the facts); 1867, Com. *v.* Curtis, 97 Mass. 577 (by an officer, "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence"); 1897, Ford *v.* State, 73 Miss. 101, 21 So. 524 (by a police officer); 1900, Hamilton *v.* State, 77 id. 675, 27 So. 606; 1901, State *v.* Hagan, 164 Mo. 654, 65 S. W. 249 (that it "would be better" for him to make a "statement"); 1858, State *v.* York, 37 N. H. 175 ("if she had set the building on fire, she had better own it"); 1874, State *v.* Whitfield, 70 N. C. 356 (by a master to a slave, "I believe you are guilty; if you are you had better say so; if you are not you had better say that"); 1846, Com. *v.* Harman, 4 Pa. St. 269 ("If you do not tell the truth, I will commit you"); 1903, State *v.* Nagle, — R. I. —, 54 Atl. 1063 (that "the truth ought to be told"; excluded here, because the circumstances were such that "the prisoner might naturally have understood it as recommending a confession"); 1847, State *v.* Kirby, 1 Strobh. 378 (complicated facts); 1897, Bram *v.* U. S., 168 U. S. 532, 18 Sup. 182 (the defendant was under arrest and was called into the office of the chief of police; "'When Mr. Bram came into my office, I said to him: "Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder." He said: "He could not have seen me. Where was he?" I said: "He states he was at the wheel." "Well," he said, "he could not see me from there." I said: "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But," I said, "some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." He said: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it"'"; in a labored argument, this was held improperly admitted; it is enough to say that the ruling takes its place among those which have reached the highest pitch of irrationality in this subject, and have done most to reduce the law of evidence to a mass of mediæval scholasticism and to put it in a condition to favor criminals; Brewer, J., with Fuller, C. J., and Brown, J., dissent, saying "To support this contention involves a refinement of analysis which, while it may show marvellous metaphysical ability, is of little weight in practical affairs"). Compare the cases cited *post*, § 838 ("You had better confess").

[2] 1872, R. *v.* Reeve, L. R. 1 Cr. C. R. 363.

[3] In the following cases the confession was admitted: *England:* 1842, R. *v.* Hewett, Carr. & M. 534 (by the prosecutor, "she would forgive the accused if she told the truth"); 1852, Erle, J., in R. *v.* Moore, 2 Den. Cr. C. 523 ("As a universal rule, an exhortation to tell the truth ought not to exclude a confession"); 1867, R. *v.* Jarvis, 10 Cox Cr. 574, L. R. 1 C. C. R. 96 (by a prosecutor, advice to answer truthfully); 1872, R. *v.* Reeve, 12 id. 179, L. R. 1 C. C. R. 362 ("you had better as good boys tell the truth," by accused's mother in the constable's presence); *United States:* 1861, Aaron *v.* State, 37 Ala. 106 (Stone, J., writing an effective opinion); 1876, Meinaka *v.* State, 55 id. 47; 1881, Redd *v.* State, 69 id. 239, *semble;* 1901, Huffman *v.* State, 130 id. 89, 30 So. 394; 1846, State *v.* Potter, 18 Conn. 178, *semble;* 1842, State *v.* Harman, 3 Harringt. 567, *semble;* 1852, Stephen *v.* State, 11 Ga. 234 ("tell the truth if you say anything"); 1856, Rafe *v.* State, 20 id. 62, 68 (by a sheriff, "if he did do it, he had better acknowledge it; if not, not to acknowledge it"); 1886, Valentine *v.* State, 77 id. 472, 479 (by the prosecutor, "it would be better to tell the truth if he was g[illegible] to tell anything"); 1893, Hardy *v.* U. S., 3 D. C. App. 35, 39 (promise that if he had not done the act charged, they would do what they could for him; admitted, on the circumstances); 1896, Minton *v.* State, 99 id. 254, 25 S. E. 626 (here the defendant himself first made the inquiry of the other person); 1900, State *v.*

In coming now to the inducements which may on principle be prop repudiated, it is best to take them up approximately in the order of strength;[4] and first, therefore, of a

§ 833. **Threat of Corporal Violence (Rack, Whip, Lynching, "Sweat-bo** A threat of corporal violence is the clearest case of an inducement that vitiate the confession. To escape the disagreeable consequences of silenc whip, gallows, or rack —, the threatened person naturally prefers to s what his tormentors desire to hear, — a confession. He trusts to chanc enable him to repudiate his untrue avowal and vindicate his innocence; or haps, under the violent pain of the rack, he thinks of nothing but the pre relief from agony which his confession will gain him. Yet not every th of violence is necessarily sufficient to cause distrust of the confession wh follows it; "I shall put you out of my house unless you confess you guilty of this murder" has obviously no tendency to cause a false confess But the typical cases of such violence in legal annals — the rack of the quisitor, the whip of the slave-owner, and the slip-noose of the jail-bre ing mob — serve as the clearest and usually the least questionable insta of an inducement which vitiates a confession for evidential purposes.

That a confession obtained by the *rack*, or a threat of the rack, is inadm sible was apparently never judicially decided;[1] that it would be inadmiss is of course unquestioned to-day. Confessions obtained from slaves under *whip*, or a threat of the whip, have usually been excluded, upon the circu

Kornstett, 62 Kan. 221, 61 Pac. 805; 1873, Nicholson *v.* State, 38 Md. 153 ("I want you to tell me the truth and make a clean breast of it"); 1854, Com. *v.* Morey, 1 Gray 462 ("it was better for all concerned in all cases for the guilty party to confess"); 1857, Com. *v.* Tuckerman, 10 id. 191, *semble* (it was pointed out that the promises must be made to induce the accused to make a confession of guilt); 1875, Com. *v.* Mitchell, 117 Mass. 432 (by an officer, "the more lies told in such cases, the deeper one gets in the mud"); 1876, Com. *v.* Smith, 119 id. 307 ("tell the whole truth"); 1883, Com. *v.* Nott, 135 id. 269, *semble*; 1869, State *v.* Staley, 14 Minn. 111; 1841, Hawkins *v.* State, 7 Mo. 192, *semble*; 1891, State *v.* Patterson, 73 id. 69; 1888, State *v.* Anderson, 96 id. 249, 9 S. W. 636; 1893, State *v.* Robinson, 117 id. 649, 654, 660, 23 S. W. 1066 (by the sheriff after arrest, "It will be better to tell the truth about this matter"; "it will be a relief to you"; "whatever you say to me will probably be used against you"); 1901, State *v.* Lipscomb, 160 id. 125, 60 S. W. 1081 (by the mayor, "better tell the straight truth"); 1902, State *v.* Armstrong, — id. —, 66 S. W. 961; 1899, People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51 (by a police-sergeant, that "he could just as well tell him the truth, as it would save the former a lot of trouble"); 1827, State *v.* Cowan, 7 Ired. 243 ("unless you can account for your possession of the watch, I shall have to commit you for trial"; construed as not requiring a confession of guilt); 1857, Fouts *v.* State, 8 Oh. St. 107; 1856, State *v.* Gossett, 9 Rich. L. 428 ("it is a bad scrape have got into; you had better tell the truth 1846, State *v.* Kirby, 1 Strobh. 155 ("if confess you may be pardoned, but do not if you are innocent"); 1902, Grimsinge State, — Tex. Cr. —, 69 S. W. 583 ("the you can do is to tell the truth," by a m trate); 1864, State *v.* Carr, 37 Vt. 192, *semble* ("if you are going to tell anything, the truth, tell it just as it was"). Compare citations *post*, § 838 ("You had better confes

The advice "you had better tell the tru may under the circumstances be interprete advice to avow guilt, and in such a case confession should be excluded, *if* in that ju diction the advice "you had better confe (*post*, § 838) is regarded as vitiating the co sion. This has been pointed out by Pierpo J., in State *v.* Walker, 34 Vt. 302: "But i said that these were only inducements to *tel truth*, and had no tendency to induce a confes that was not true. This is true to the ear of respondent, but it is not so to his understand . . . The prisoner understands that, whether is innocent or not, it will in some way better condition to tell a different story." Many the excluding decisions above noted are perh to be explained on this theory.

[4] Mr. Best's classification (Evidence, §§ 5 572) is based on the kind of the motive; this is more useful psychologically than lega the probable strength of the inducement is important element.

[1] *Ante*, § 818.

stances of the case presented.[2] Confessions made in fear of a *mob* are usually made under circumstances calculated to educe a false confession; and in almost all the instances brought before the Courts they have been excluded, usually with propriety upon the facts of the case.[3] Other instances of violence or physical intimidation seem to be rare.[4] The "sweat-box" of the police, so far as it may signify direct physical intimidation, by starvation or otherwise, would invalidate a confession; but the term is often exaggeratedly applied to any form of solitary confinement and does not then signify such intimidation as would exclude a confession.[5]

§ 834. **Promise of Pardon.** A promise of pardon is usually made directly conditional upon the furnishing of evidence for the Crown or the State.

[2] In all the following cases, except as noted, the confession was excluded: 1847, State *v.* Clarissa, 11 Ala. 257 (under a whipping and threats of whipping, a slave was asked to confess guilt); 1850, Spence *v.* State, 17 Id. 197 (here a slave was merely tied; the usage of the master to tie before whipping might indicate the fear of whipping as the controlling influence); 1854, Wyatt *v.* State, 25 id. 12 (intimation to a slave by a master that a confession of guilt would make the matter better); 1855, Brister *v.* State, 26 id. 107, 129 (whipping of a slave to make him confess); 1863, Joe *v.* State, 38 id. 422 (intimation to a slave, by a master who had tied him to a log and was about to whip him, that his punishment would be lighter if he would confess); 1852, Van Buren *v.* State, 24 Miss. 512 (here after two whippings a slave finally confessed); 1861, Frank *v.* State, 39 id. 710 (here another slave was whipped, for some unspecified cause, near the accused at the time of confession; admitted); 1829, Hector *v.* State, 2 Mo. 166 (here a slave was lashed all night and then confessed in the morning).

[3] The confession was excluded, except as otherwise noted: 1881, Young *v.* State, 68 Ala. 576 (a crowd of men took the accused from the jail and to the scene of killing, where they confessed but not under any express threats); 1881, Redd *v.* State, 69 Id. 258 (the sheriff, after a mob coming to lynch the accused had been dispersed, told him that in such cases it was sometimes best to plead guilty, and he confessed); 1903, Hunt *v.* State, 135 Id. 1, 33 So. 329 (an officer's promise to protect the accused from the violence of persons desiring revenge, held not an improper inducement); 1866, Miller *v.* People, 39 Ill. 457 (a mob hung the accused repeatedly, to make him confess); 1897, Taylor *v.* Com., — Ky. —, 42 S. W. 1125 (confession made to deputy sheriff under promise to protect from impending mob violence, excluded); 1897, Dugan *v.* Com., 102 id. 241, 43 S. W. 418 (confession during public excitement, admitted on the facts); 1882, State *v.* Revells, 34 La. An. 384 (the accused was in the hands of an armed body, but they were merely taking him back after capture in fresh pursuit, made no threats, and expressly cautioned him that his statements would be used); 1899, State *v.* Young, 52 id. 478, 27 So. 50 (confession to private captors, with a rope around his neck, and in danger of lynching); 1844, Peter *v.* State, 4 Sm. & M. 36 (a mob threatening hanging); 1894, Williams *v.* State, 72 Miss. 117, 16 So. 296 (confession to a mob); 1903, McMaster *v.* State, — id. —, 34 So. 156 (confession in jail, under fear of a mob, and a promise to "help you out"); 1901, State *v.* Moore, 160 Mo. 443, 61 S. W. 199 (threat of mob violence); 1871, Terr. *v.* McClin, 1 Mont. 396 (the sheriff gave the advice to confess, and a mob at the time surrounded the jail threatening a hanging if a confession was not made); 1875, State *v.* Dibly, 72 N. C. 327 (violence used); 1880, State *v.* Drake, 82 id. 593 (same; a poor decision); 1853, Denthridge *v.* State, 1 Sneed 76 (threats to take life); 1867, Warren *v.* State, 29 Tex. 369 (threats to hang if confession was not made); 1871, Barnes *v.* State, 36 id. 356 (the accused was taken from the jail at night by persons in disguise and threatened with hanging); 1870, Thompson's Case, 20 Gratt. 731 (made under fear of a mob surrounding the accused).

[4] 1824, R. *v.* Thornton, 1 Mood. Cr. C. 27 (conduct held on the facts not to exclude, though intimidating in its nature); 1835, R. *v.* Wild, ib. 452 (same); 1893, Beckham *v.* State, 100 Ala. 15, 17, 14 So. 859 (threat construed as implying violence and inducing fear; excluded); 1895, State *v.* Brittain, 117 N. C. 783, 23 S. E. 433 (husband threatening to abandon wife, to make her confess incest with her father; excluded). Of course threats of violence made *after* the confession are of no consequence: 1803, State *v.* Jenkins, 5 Vt. 379.

[5] 1895, State *v.* Watt, 47 La. An. 630, 17 So. 164 (the mere fact that firearms were in the room for the use of defending the accused against release, held not to exclude); 1898, State *v.* Albert, 50 id. 481, 23 So. 609 (confession extorted by violence by sheriff, excluded); 1902, Ammons *v.* State, 80 Miss. 592, 32 So. 9 (confession made in a "sweat-box," six feet by eight, under exhortation that "It would be better to tell the truth," the custom being to let a prisoner out of the box when he confessed what the police "thought that he ought to," held inadmissible); 1897, State *v.* McCullum, 18 Wash. 394, 51 Pac. 1044 (the defendant was put in a dark cell in order to make him confess; excluded). That the mere state of being *arrested* or *confined in jail* does not exclude, see *post*, §§ 847, 851

Whether the confessing person fulfils his engagement or not, it is obv
that such a confession, made as it is on the faith of a complete immu
from everything but the moral and social consequences of acknowle
guilt, may well be treated as untrustworthy. The stronger the appa
case against the accused, the greater the temptation, even to the inno
to accept a sure legal immunity (weighted though it may be with unplea
consequences of an indefinite sort), in order to escape probable legal cond
nation. Yet it was only by the 1800s that the doctrine can be said to
been fully established. It has already been seen[1] that the doctrine of u
approvers' confessions against themselves was sanctioned as late as
Mansfield's time; and in Francia's Trial, in 1716,[2] a confession obta
apparently by a direct promise of favor was allowed to be used, the acc
having failed, it was said, to disclose all that he promised. Moreove
Rudd's Case, in 1775,[3] although Lord Mansfield declared that the confes
even of an accomplice who had not revealed the whole truth would "b
no prejudice to her on the trial," and although there are two other repo
instances in the same century of the exclusion of accomplices' confess
thus induced,[4] this doctrine does not seem to have become established
some time —, at least, for accomplices who broke their faith by failin
furnish the promised disclosures; for Mr. Starkie, on the authority of a
otherwise unreported[5] was able to state the practice of 1824 as recei
such a confession.[6] Undoubtedly, however, though no subsequent Eng
decision exists, any confession obtained by a promise of pardon would t
to-day be excluded; and the principle has been well expounded in an I
decision:

1866, *O'Hagan*, J., in *R.* v. *Gillis*, 11 Cox Cr. 69: "I think the question must be
thus: Was the prisoner induced by a person in authority to make the informa
criminating himself by the hope of obtaining the immunity of an approver? I t
he was. . . . He became a Crown witness in the reasonable expectation that he w
escape punishment as a return for his accepted services in bringing other offende
justice."[7]

In the United States such promises have always been regarded as vitia
the confession.[8] But it must be remembered that neither this nor any o

[1] *Ante*, § 818.
[2] 15 How. St. Tr. 920; *ante*, § 818.
[3] 1 Leach Cr. C., 3d ed., 135; *ante*, § 819.
[4] 1783, R. *v.* Warickshall, 1 Leach, 3d ed., 298 (an accessory's confession obtained "by promise of favor"; excluded); 1790, R. *v.* Hall, 2 id. 636, note (where the witness to the confession had been asked by the defendant to ask the justice to admit him as Crown's evidence).
[5] 1818, Burley's Case (where after confession the accused had declined to testify against the other person).
[6] 1824, Starkie, Evidence, II, 13 ("The admission of the party as a witness amounts to a promise of recommendation to mercy, upon condition of his making a full and fair disclosure of all the circumstances of the crime. . . . By a breach of the condition, the accomplice forfeits his claim to favor, and is liable to be tried convicted upon his confession").
[7] Three of the nine judges here dissente the facts of the case; Burley's Case was tre as not involving this point. There is an Irish ruling: 1841, Berigan's Case, 1 Ir. Cir 177 (the accused had been confined with ano who had turned Queen's evidence, and th cused, in confessing, had this in mind, but cautioned against hoping; Crampton. J., mitted the confession, because, whatever th pectations might have been, they had not induced by any one in authority).
[8] 1830, Com. *v.* Knapp, 9 Pick. 499 (a ca peculiar circumstances); 1878, State *v.* John 30 La. An. 881; 1849, Conley *v.* State, 12 470, *semble*: 1875, Beggarly *v.* State, 8 520, 526; 1864, State *v.* Carr, 37 Vt. 191.

inducement can on principle exclude a confession where the agreement is merely to tell the truth (and not necessarily to avow guilt).[9]

Here may be noted the absurd inconsistency of receiving against another person the story of an accomplice who on a promise of immunity turns State's evidence (*ante*, § 580) while rejecting the accomplice's confession when offered against himself. The promise of pardon is held to vitiate the story so far as it affects himself, but not so far as it affects others; although the natural instinct against false self-incrimination furnishes as good a guarantee of the truth of the former as the natural readiness to sacrifice others furnishes reason for distrusting the latter. That Courts accept the latter sort of testimony against the person charged demonstrates the hollowness of the sentimentalism on which the rejection of the former is based.

Leaving these genuinely untrustworthy inducements, we come now to a class of promises and threats which on principle can be supposed to vitiate a confession by only a severe stretch of the most sentimental imagination; and yet they are constantly treated by the Courts as effecting an exclusion of the confession; and first, of

§ 835. **Inducements involving a Lighter Punishment, Milder Treatment in Prison, or a Reward of Money.** It is scarcely conceivable (except in a case of extraordinary circumstances producing the blackest and most hopeless case against the accused) that an innocent man would confess falsely upon the inducement of a mere diminution of punishment, but a few Courts have reached that result, and it would in all probability everywhere be followed.[1] Equally inconceivable is it that a mere difference in treatment while confined could be an effective temptation to false confession.[2] Nor can we imagine that liberty or life would be voluntarily bartered by an innocent person for the money reward to be obtained by giving evidence; yet this result has sometimes been reached.[3] It is of course true that the lesser offences are often committed by persons lacking food and shelter, in order to be housed and fed for a time in the jail; and doubtless instances of the false

[9] On this principle the following ruling is correct: 1869, State *v.* Staley, 14 Minn. 112 ("the one of you that tells the straightest story shall have the privilege of turning State's evidence"; admitted).

[1] *Excluded*, except where otherwise noted: 1871, People *v.* Johnson, 41 Cal. 453 (that there was enough evidence to convict, and a confession would make the punishment lighter); 1893, State *v.* Jordan, 87 Ia. 86, 91, 54 N. W. 63 (defendant offered to "hand back the stuff," if the owner "made it easy for him"; admitted); 1902, State *v.* Jay, 116 id. 264, 89 N. W. 1070 (that "it would go easier for him if he would tell about it"); 1867, Com. *v.* Curtis, 97 Mass. 577 (hope of a lighter sentence); 1895, State *v.* Smith, 72 Miss. 420, 18 So. 482 (promising the use of influence to mitigate punishment); 1896, Harvey *v.* State, — id. —, 20 So. 837 ("might go easier"); 1893, State *v.* Drake, 113 N. C. 624, 626, 18 S. E. 166 (by an officer, "It might be easier for you").

[2] *Accord* (admitting the confession): 1834, R. *v.* Green, 6 C. & P. 655, Bosanquet and Talfourd, JJ., *semble* (when first apprehended, the accused said, "If the hand-cuffs are taken off, I will tell"); 1792, Com. *v.* Dillon, 4 Dall. 116 (various intimations of harsher treatment while confined for trial on a capital charge); 1878, State *v.* Tatro, 50 Vt. 490 (promise to take the accused from solitary confinement while waiting for trial).

[3] *Excluded:* 1846, R. *v.* Horner, 1 Cox Cr. 364, Tindal, C. J. (where a handbill offering a reward for accomplice's testimony was shown to the accused); 1853, R. *v.* Blackburn, 6 id. 337 (where the handbill offering a reward for evidence was hung up in the magistrate's office and its contents were known to the accused, who was desirous of giving evidence). *Admitted:* 1858, State *v.* Wentworth, 37 N. H. 219 (on the ground that the reward should at least appear directly to have influenced the confession.)

confession of such offences for such a purpose have occurred. But that reason for assuming that ordinarily, or in even an appreciable proporti cases, there is such force in the offer of a loaf of bread or of a sum of m as to cause us to distrust and to reject absolutely a confession so ind Where the circumstances of a case show that a false confession was pro thus induced, let it be excluded. But to erect a fixed and unvarying ru the basis of so unusual a contingency is to eliminate rationality from th of evidence.

§ 836. **Promises of other Favorable Legal Action (Cessation of Prosec Release from Arrest, Abstention from Arrest).** Coming under the same ciple as the preceding class are those promises of other favorable legal a which stop short of promising complete immunity in the shape of pa but offer hopes or assurances, definite or indefinite, implying a cessati prosecution, a recommendation to mercy, or the like.

(1) A promise in any way implying a *cessation of prosecution* or a *r from arrest* has usually been held to exclude the confession thus indu

[1] *England:* 1784, Cass' Case, 1 Leach Cr. L., 3d ed., 328, note (by the injured person to the accused in custody, "if you will tell me where my goods are, I will be favorable to you"; Gould, J.: "The slightest hopes of mercy . . . are sufficient to invalidate a confession"); 1809, R. *v.* Jones, R. & R. 152 (by the prosecutor, "If the prisoner only gave him his money, he might go to the devil if he pleased"); 1834, R. *v.* Simpson, 1 Mood Cr. C. 410 (the prisoner was told by one in authority that if she would confess to the crime she would have her liberty); 1833, R. *v.* Cooper, 5 C. & P. 535 (by a magistrate, a promise to do all he could); 1836, R. *v.* Partridge, 7 id. 552, Patteson, J. (by the prosecutor, "if you will not tell, we of course can do nothing [for you]"); 1836, R. *v.* Upchurch, 1 Moody Cr. C. 465, before ten judges ("if you are guilty, do confess; it will perhaps save your neck"); 1891, R *v.* Mansfield, 14 Cox Cr. 639, Williams, J. (an implied promise of forgiveness by the prosecutrix); *Canada:* 1886, R. *v.* McCafferty, 25 N. Br. 396 (the policeman thought that S. would not prosecute if he got his goods back, excluded; two judges diss.); *United States:* 1858, Bob *v.* State, 32 Ala. 566 (promise to a slave that he would be sold away and not hung); 1860, Mose *v.* State, 36 id. 211, 226 (promise by a master to get the slave out of the State if he confessed to a killing); 1876, Porter *v.* State, 55 id. 101 (the accused was told that there was proof enough to hang him anyhow, and he would be saved if he would confess the crime); 1873, Ward *v.* State, 50 Ala. 120 ("whether the confession was true or false, he was to be turned loose"); 1895, Gregg *v.* State, 106 id. 44, 17 So. 321 (promise to end the prosecution); 1901, White *v.* State, 70 Ark. 24, 65 S. W. 937 (by the injured person, "If you will tell me, I won't bother you"); 1867, People *v.* Hoy Yen, 34 Cal. 176 (promise to set free); 1845, State *v.* Bostwick, 4 Harr. 563 (by a mistress, "I do not expect to do anything with you"); 1858, Smith *v.* State, 10 Ind. 106 (promise to try and stay prosecution); 1869, A *v.* People, 51 Ill. 238 (the accused sig agreement to confess and to have the dropped); 1878, State *v.* Von Sachs, 30 1 942 (promise to release from jail, if the property was returned); 1804, Com. *v.* bock, 1 Mass. 144 (promise of favor prosecutor); 1850, Com. *v.* Taylor, 5 Cus (promise by officers to use influence favor); 1883, People *v.* Wolcott, 51 Mic 17 N. W. 78 (assurance that he would " easier"); 1874, Garrard *v.* State, 50 Mi (by a magistrate, "I suspect you and yo better tell all about it if you want to get 1899, Branghn *v.* State, 76 Id. 574, 25 S (promise not to prosecute); 1849, Cor State, 12 Mo. 470, *semble* (promise by portant witness not to appear); 1873, S Hagan, 54 id. 192 (promise to set free) State *v.* Brown, 73 id. 632 (promise not to cute); 1903, State *v.* Force, — Nebr. N. W. 42 ("If you tell all about the you will get clear," excluded); 1828, S Guild, 10 N. J. L. 163, 178 (the evidence entirely clear as to the offers made; they i a setting free); 1872, State *v.* Lowho N. C. 638 (abandonment of prosecution) Boyd *v.* State, 2 Humph. 40 (promise to have prosecution dropped, if accused wou fess that he did the alleged malicious in frolic only); 1871, Rice *v.* State, 3 217, 223 (promise not to prosecute); 183 *v.* Phelps, 11 Vt. 121 (favor to be shown) State *v.* Brierly, 34 id. 302 ("if B. [an plice] should get the start of you [in conf it may go hard with you").

In the above citations, some of the ments are perhaps specific enough to br cases under one of the two foregoing s But no hard-and-fast classification can be for the situations and the inducements sh closely into one another. Nor would i service. The chief things to be noted that the clear tendency of the Courts is

If many of these rulings do not commend themselves to common sense, it is not so much because the advantage held out may not conceivably be in a given case a sufficient temptation to false confession, as because the manner of offering it is so indefinite, the assurance so slight and halting, that it cannot be considered as exciting that certain faith in the confessing person which alone could induce him to violate natural instincts and incur sure risk in confessing that of which he is innocent. These are just the inducements which might educe an avowal from a guilty one, but they are too slight to overpower innocence, however weak and ignorant it may be. If, to be sure, the law adopts Mr. Justice Gould's test,[2] that "the slightest hopes of mercy" suffice to exclude, the result is unimpeachable. But that is not a rational nor a practical test.

(2) A *threat to arrest*, or a *promise not to arrest*, is perhaps sometimes equivalent to the promise of a general release from legal proceedings, *i. e.* practical immunity. Taken strictly, however, it could not be an inducement of any consequence; for the benefit of merely temporary liberty can hardly be so great as to induce a false confession with all its ultimate risks. Nevertheless such a threat or promise has usually been assimilated to the preceding more weighty ones, and has availed to exclude the confession.[3]

§ 837. **Assurance that "What you say will be used for you," or "used against you."** (1) The policy of wholesale exclusion, "however slight the inducement," had gone to such an extent in England, in the first half of the 1800s, that the advice of one in authority, promising that "what you say will be used *for* you" was regarded by a number of judges as excluding an ensuing confession.[1] But in 1852 the question was fully argued before the Court for Crown Cases, and these rulings were repudiated,[2] and some check was thus put to the extravagant policy of exclusion.

similate slight and indefinite inducements to strong and specific ones, and to exclude all alike; (2) that some of these rulings are less open to dispute than others.

Of course the *form* of the inducement is immaterial; *i. e.* whether the assurance is, "If you confess, you may get off more easily," or "if you do not confess, it may go hard with you"; for in each case the situation is that of an advantage being attached to confession.

A promise to set free if a certain crime is confessed would not exclude a confession of a *different crime*: 1876, State v. Fortner, 43 Ia. 495.

[2] Cass' Case, cited *supra*.

[3] 1763, Thompson's Case, 1 Leach Cr. L., 3d ed., 325, Hotham, B. (by the injured person, "unless you give me a more satisfactory account, I shall take you before a magistrate"); 1831, R. v. Parratt, 4 C. & P. 570 (by the master of ship, accused being a sailor); 1832, R. v. Richards, 5 id. 318 (by a mistress of the accused, her servant, charged with poisoning her); 1353, R. v. Luckhurst, 6 Cox Cr. 243 (that he would be given in charge if he did not tell what he was doing in a certain stable); 1873, Beery v. U. S., 2 Colo. 189, 203 (a threat to arrest unless he confessed, and promise to release if he confessed).

[1] 1837, R. v. Drew, 8 C. & P. 140 (Coleridge, J.: "I cannot conceive a more direct inducement to a man to make a confession than telling him that what he says may be used in his favour at the trial"); 1838, R. v. Arnold, ib. 622, Denman, L. C. J., *semble*; 1843, R. v. Morton, 2 Moo. & Rob. 514, also reported as R. v. Hornbrook, 1 Cox Cr. 55 (Coleridge, J.: "Upon reflection, I approve of my decision in Drew's Case. . . . [The principle is,] has anything been said to the party to induce him to state that which is not true, under a hope that he shall thereby benefit himself? . . . Now in Drew's case the man is told that what he says will be used for him; is this not raising a hope that if he told his story, whether true or false, it might benefit him?"); 1827, State v. Roberts, 1 Dev. 259 (statement that a confession could not be used against him; excluded).

[2] 1852, R. v. Baldry, 2 Den. Cr. C. 430 (Lord Campbell, C. J., Pollock, C. B., Parke, B., Erle and Williams, JJ., disapproving the Drew and Morton cases. Pollock, C. B., distinguished in one passage between "what you say" and "whatever you say"; but he subsequently

(2) The same earlier tendency to excessive caution had produced
(based on the Drew case) that even "what you say will be used
you" would exclude the confession;[3] but this remarkable result
overturned by the Baldry decision.[4]

§ 838. **Assurance that "You had better confess."** Is it conceiva
the indefinite and elusive assurance of advantage contained in the
"you had better confess" is in any degree calculated to induce a fa
fession? What tangible attraction is there in it? It is an exhort
be sure, which might turn the balance, in the breast of a guilty
between silence and confession; but, with an innocent man, tha
extraordinary a supposition to justify any evidentiary rule of ex
Nevertheless, this has always been held (under circumstances of gr
less unreason) to be a vitiating inducement,[1] — upon the rule, of cour

abandoned the distinction, and it has no significance whatever).

This decision has always been regarded as representing the sanest policy reached in treating confessions; and it contains some of the best utterances on the subject. But its significance is diminished by the fact that in the very same year the same Court, speaking through Parke, B., in R. *v.* Moore (quoted *ante*, § 829) maintained that "however slight the threat or inducement," it would exclude a confession. The vacillation and want of coherence that mark the rulings on this entire subject are nowhere better illustrated than by the inconsistency between this proposition and the ruling in R. *v.* Baldry, *supra*, that "what you say will be used *for* you" does not exclude a confession.

[3] 1843, R. *v.* Furley, 1 Cox Cr. 76, Maule, J. (where the caution was that what she said "would be used against her at the trial," and the curious result reached that this guaranteed the use of it, and therefore the use for as well as against the accused); 1844, R. *v.* Harris, ib. 106, Maule, J. (to the same effect).

[4] 1852, R. *v.* Baldry, 2 Den. Cr. C. 430 (Lord Campbell, C. J., Pollock, C. B., Parke, B., Erle and Williams, JJ., disapproving the Furley case). Single rulings to the same effect had preceded the Baldry decision: 1843, R. *v.* Holmes, 1 C. & K. 248 (by a magistrate, "he sure you say nothing but the truth, or it will be taken against you"); 1851, R. *v.* Attwood, 5 Cox Cr. 322, Erle, J. The Furley ruling has been once followed in this country: 1873, Self *v.* State, 6 Baxt. 249 (an extravagant decision, in which a defendant under arrest and confronted with proofs of guilt was told "nothing you can say will do you any good," and an ensuing confession was rejected). But the Baldry case would presumably be now accepted as sound: 1901, Com. *v.* Storti, 177 Mass. 339, 58 N. E. 102 (telling him that it will be used for him, if favorable, or against him, if unfavorable, does not exclude); 1898, Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408 ("whatever you say may be used for you or against you"; admitted).

[1] *England:* 1803, East, Pl. Cr. II, 659 ("it would be worse for him if he did not confess, or better for him if he did"); 1830, R. *v.* Kingston, 4 C. & P. 387, Parke and Littl
(by a surgeon attending deceased); 1
Walkley, 6 id. 175, Gurney, B. (by a
specified); 1834, R. *v.* Simpson, 1 M
C. 410 ("It will he better for you
and worse for you if you do not";
apparently, "you will go free if you c
1834, R. *v.* Thomas, 6 C. & P. 353, P
(by a person not specified, "you h
split, and not suffer for all of them
R. *v.* Shepherd, 7 id. 579, Gaselee, J.
stable, "you had better not add a
crime of theft"); 1841, R. *v.* Moody, 2
347, Torrens, J. ("If any other perso
do in the case, it is better you shou
this perhaps falls under the class of § 8
1846, R. *v.* Croydon, 2 Cox Cr. 67,
("you may as well tell me"); 18
Collier, 3 id. 57, Williams, J. ("becaus
save him the shame of a search-w
1851, R. *v.* Warringham, 2 Den. Cr
Parke, B. ("it would be best for h
would tell how it was transacted");
v. Cheverton, 2 F. & F. 833, Erle, C.
R. *v.* Coley, 10 Cox Cr. 536, Mellor
liams, JJ. (by a constable, "if you do
it will be the worse for you"); 185
Thompson, 2 Q. B. 12, 18 (by the p
"It will be the right thing for M. t
clean breast of it"); 1887, Banks *v.*
Ala. 430, 4 So. 382 (by an officer, "It
best for him to tell all about it"); 189
v. State, 88 Ga. 516, 15 S. E. 10 (by
"if you know anything, it may be bes
to tell it," and with the accused's
professions that his story was voluntar
Dixon *v.* State, 113 id. 1039, 39 S. E.
fession upon an officer's advice that
knew anything she had better tell it
two rulings perhaps should be classe
§ 832, *ante*); 1848, State *v.* Nelson, 3
499 ("It would be better to tell what
done"); 1903, State *v.* Alexander, 109
33 So. 600 (by a police officer, "If you
anything to say, you had better say it
1883, Com. *v.* Nott, 135 Mass. 269 (by an
1879, Flagg *v.* People, 40 Mich. 706 (th
was repeated and the prisoner was in i
was furnished with liquor, and an inte

§ 825), that "any inducement, however slight," is sufficient to exclude. In a given case the exclusion may occasionally not be improper under all the circumstances;[2] but that such a phrase, or its equivalent, should in itself and as a rule operate to vitiate the confession is wholly bad on principle and in common sense.

§ 839. **Sundry Phrases and Inducements.** A number of phrases and inducements, not falling into any of the foregoing commoner classes, have from time to time been judicially passed upon. It is settled that a question merely involving an *assumption of guilt* does not, as such, exclude the answer;[1] and the mere expression of a *wish*, by the prosecutor or any other person, has never been held to exclude.[2] Other rulings, of more or less propriety, upon sundry assurances or threats, give rise to no general rule.[3]

§ 840. **Influences of a Religious or a Moral Nature.** Owing to the ruling in R. *v.* Radford,[1] in 1823 the question was able to be raised whether the

force a confession had been expressed by the officer); 1898, Mitchell *v.* State, — Miss. —, 24 So. 312; 1870, State *v.* Brockman, 46 Mo. 569 ("it would be better for him to own up," with an express refusal to promise immunity); 1836, People *v.* Ward, 15 Wend. 231; 1895, State *v.* Winston, 116 N. C. 990, 21 S. E. 37 ("best to tell"); 1899, State *v.* Davis, 125 Id. 612, 34 S. E. 198 (by an arresting officer, "he had as well tell all about it"); 1867, Vaughan's Case, 17 Gratt. 580 ("you had better tell all about it"; the court erroneously taking Shifflet's Case, 14 Gratt. 661, as authority for exclusion). All the rulings (cited *ante*, § 832) excluding the inducement "you had better tell the truth" are also authorities for exclusion in the present instance.

The only rulings sanctioning a confession produced by the present sort of inducement seem to be the following: 1857, Com. *v.* Tuckerman, 10 Gray 192 (where such a phrase was shown not to involve any promise of favor); 1893, Willis *v.* State, 93 Ga. 208, 19 S. E. 43 (by an officer, that it was best for the accused to give himself up).

[2] In the foregoing note, R. *v.* Simpson and Flagg *v.* People are instances in which the accompanying circumstances give to such a result at least a plausibility. On the other hand, the rulings in R. *v.* Croydon and State *v.* Brockman expose the doctrine in all its naked absurdity.

[1] 1872, R. *v.* Vernon, 12 Cox Cr. 153 ("How came you to do it?"); 1853, Carroll *v.* State, 23 Ala. 38; 1867, People *v.* Wentz, 37 N. Y. 307; 1883, People *v.* McGloin, 91 id. 245; 1885, McClain *v.* Com., 110 Pa. 269, 1 Atl. 45 (unless it is calculated to entrap).

The following inconsistent rulings deal with a situation very similar to the foregoing: 1830, Wright's Case, 1 Lew. Cr. C. 48 (by a magistrate, that "his wife had already confessed, and there was quite case enough against him to send a bill before a grand jury"; admitted); 1833, R. *v.* Mill, 6 C. & P. 146, Gurney, B. (by a constable, "it is no use to deny it, for there are two who will swear they saw you do it"; excluded).

[2] 1834, R. *v.* Shaw, 6 C. & P. 372 (by a fellow prisoner, "I wish you would tell me"); 1878, Com. *v.* Sego, 125 Mass. 210 (by a prosecutor, "I should like to have you make a clean breast of this matter").

[3] *Threats:* 1839, Calu's Case, 1 Cr. & D. 37 (indictment for concealing the birth of a child; the medical witness threatened to examine the accused, if she did not answer, and she then confessed; admitted; the constable, upon the prisoner's denial at her house, said, "I shall search for the child, so you had better tell me where it is"; she then told; this confession was excluded); 1872, R. *v.* Reason, 12 Cox Cr. 228 (by a constable, "I must know more about it"; admitted); 1895, People *v.* Clarke, 105 Mich. 169, 62 N. W. 1117 (a threat that, unless a confession was made before twelve o'clock, it would not be received; excluded).

Promises: 1822, R. *v.* Sexton, in Chetwynd's Suppl. to Burn's Justice, quoted in Joy, Confessions, 17 (the accused said to the constable: "If you will give me a glass of gin, I will tell you all about it"; and he was given two; the confession was excluded; Mr. Joy's comment is: "It seems a violent presumption that two glasses of gin would induce a prisoner untruly to charge himself with a capital felony"); 1834, R. *v.* Lloyd, 6 C. & P. 393 ("if you will tell, you shall see your wife"; admitted); 1884, *Re* Stambro, 1 Manit. 263, 268 (certain inducements as to resuming employment, held not to exclude); 1903, Meadows *v.* State, 136 Ala. 67, 34 So. 183 (promise not to prosecute if he would pay for damage done; confession admitted); 1899, State *v.* Novak, 109 Ia. 717, 79 N. W. 465 (agreement by arresting officer not to disclose confession until a certain time; admitted); 1890, Com. *v.* Flood, 152 Mass. 529, 25 N. E. 971 (an offer by a physician to assist in procuring an abortion upon a woman with whom accused had lived in adultery, the offer conditioned on the latter's telling the facts; admitted); 1868, State *v.* Mitchell, Phillips, N. C. 448 (confession made in asking advice of a fellow-prisoner; admitted).

[1] R. *v.* Radford, 1 Mood. Cr. C. 197 (where

use of exhortations invoking the terrors of punishment predicated by t
logical beliefs could be regarded as vitiating a confession. It is obvious
in their ordinary aspect, the influence of religious considerations makes
tirely for truth in a confession, and not against it. Mr. Joy's expositio
this point can never be improved upon:

1842, Mr. *Joy*, Confessions, 51: "It seems difficult to imagine that a man
spiritual convictions and the influence of religious impressions would therefore co
himself guilty of a crime of which he was *not* guilty; or that a man under a strong
of his spiritual relations with God could hope to please God by a falsehood; that a
fidence created' between him and his pastor, or the 'being thrown off his guard' b
confidence, should induce him, not to confess (*that* it might naturally do if he
guilty), but induce him to confess *falsely*. Such spiritual convictions, or spiritual e
tations, seem from the nature of religion, the most likely of all motives to produce
They are therefore of a class entirely different from those that exclude confession
confession is excluded because the motive which induces it is calculated to produc
truth, because it is likely to lead to falsehood. If temporal hopes exist, they may
to falsehood. Spiritual hopes can lead to nothing but truth."

A case might be presented, however, in which the use of such exhorta
approached so near the line of intimidation that some plausibility migh
given to the argument that the confession was not voluntary. Such
R. *v.* Gilham, in which as strong a case as possible for such an argu
existed; but the argument was once and for all repudiated:

1828, *R.* v. *Gilham*, 1 Mood. Cr. C. 186, before all the judges except one absent
Moody, for the accused: "The case states a continuous series of religious terro
pressed on the prisoner's mind, with a view to obtain a confession —, in the first in
by the gaoler, in placing before him religious books with that subject put promi
before him; and in the second instance by the chaplain, whose whole languag
exhortation unceasingly dwelt on the duty of confession as a condition of forgi
with God, and accompanied with the terrors of God's vengeance put forward, not
with the force expressed in the commination service, but with all the additional
which the personal authority and manner of the chaplain would of necessity pro
. . . Looking therefore to the whole tenor of the chaplain's conversation, and
state of mind produced, the necessary conclusion is that this confession was made
duress"; Mr. *Follett*, for the Crown: "Unless it is believed that a confession given
religious impressions is not entitled to credit, but springs from motives that are lik
lead to falsehood, these confessions were properly received. But who can possibly
pose that a man under the influence of a deep sense of religion, as it is admitte
prisoner was, would confess an atrocious murder of which he was not guilty, and th
could hope to please God by a falsehood?" "The judges present were unanimou
opinion that the confessions were properly received."

No exhortations, then, of a moral or a spiritual nature, have ever (since
Radford) been regarded as vitiating a confession,[2] — a result comme
alike by principle and by common sense.

the clergyman had "dwelt on the heinousness of the crime charged and the denunciations of the Scripture against it," Best, C. J., thinking "it would be dangerous, after the confidence thus created, which would throw the prisoner off his guard, and the impression thus produced," to receive the confession). But it does not appear how far the argument of a clergyman's privilege (the existence of which was the is still a mooted point; *post*, § 2394) e into the result.

[2] 1822, R. *v.* Gibney, Jebb Cr. C. 15, the Irish Judges (where the constable and said "What a terrible thing to murder you child!"; admitted, on the principle that fear to be produced must be of a tempo

§ 841. **Confession induced by Trick or Fraud; Confession while Intoxicated.** (1) Since the exclusion of confessions is not due to any principle of public faith or of private pledge of secrecy (*ante*, § 823), it follows that the use of a *trick* or *fraud* (however reprehensible in itself) does not of itself exclude a confession induced by means of it. So far as the trick involved a promise which would tend to produce an untrue confession, it would operate to exclude, — not, however, because it was a trick (*i. e.* because the representations were false) but because even if true its tenor would have stimulated a confession irrespective of guilt. This principle is and always has been universally conceded.[1]

(2) A confession made while *intoxicated* is governed by the general principle of testimonial capacity, and is therefore usually held admissible (*ante*, § 499); it is only where the intoxication is produced by a person desirous of obtaining a confession that its trustworthiness becomes really doubtful.[2]

ture, and in this case there was no such threat or intimidation, nor any fear of a temporal nature produced; any terror that might have been excited was as to what might happen in the next world"); *Ante* 1828, R. *v.* Hodgson, cited in 1 Wood. Cr. C. 203 (by the accused's mistress, that the former "would never be easy in her mind till she had confessed"); 1835, R. *v.* Wild, 1 Mood. Cr. C. 452 (the accused was fourteen years old; a person in charge, "said 'Now you kneel down by the side of me and tell me the truth'; . . . I hoped he would tell me the truth in the presence of the Almighty"; the Judges (eight present) "were unanimous that the confession was strictly admissible, but they much disapproved of the mode in which it was obtained"); 1853, R. *v.* Sleeman, 6 Cox Cr. 245, by six Judges (an urging, "Don't run your soul into more sin, but tell the truth"); Ga. Cr. Code 1895, § 1007 ("spiritual exhortation" does not exclude); 1808, Com. *v.* Drake, 15 Mass. 161 (penitential confession to fellow-members of the church). There is one possible case in which a *moral consideration* might under circumstances properly vitiate a confession, namely, where it appears to have been made in the spirit of self-sacrifice for the purpose and with the certainty of shielding or saving one in whose life or liberty the confessor is deeply interested; but in the only ruling on the subject the confession was received: 1858, Shifflet's Case, 14 Gratt. 665 (confessing to save a mother from the charge of complicity). Compare the instances of such self-sacrifice cited *post*, § 867.

[1] 1826, R. *v.* Derrington, 2 C. & P. 418 (letter handed to the turnkey, who violated his promise to post it); 1867, King *v.* State, 40 Ala. 319 (by letting the accused think that a supposed accomplice had been shot); 1895, Stone *v.* State, 105 id. 60, 17 So. 114 (by pretending to be an accomplice); 1895, Burton *v.* State, 107 id. 108, 18 So. 284 (by a detective pretending to be a fellow-prisoner); 1870, State *v.* Darneil, 1 Honst. Cr. C. 322 (made in confidence); 1892, Cornwall *v.* State, 91 Ga. 277, 282, 18 S. E. 154 (to an officer who pretended to help his escape); Ga. Cr. Code 1895, § 1007 ("promise of secrecy" does not exclude); 1901, Sanders *v.* State, 113 Ga. 267, 38 S. E. 841 (sheriff's "bad faith," in opening a letter sent by accused from jail); 1853, Gates *v.* People, 14 Ill. 436 (by deception a letter was obtained); 1890, Com. *v.* Flood, 152 Mass. 529, 25 N. E. 971 (pretending to be ready to assist in a planned crime and having persons concealed hear the answer of the accused); 1874, State *v.* Jones, 54 Mo. 481 (a trick); 1881, State *v.* Phelps, 74 id. 136 (showing to the accused his engagement ring and telling him that the woman had "gone back on him"); 1887, State *v.* Brooks, 92 Id. 542, 576, 5 S. W. 257, 330 (murder of Preller in St. Louis by suffocating him in a trunk; a detective was by connivance of the prosecution arrested on a fictitious charge of forgery and imprisoned with the defendant and obtained a confession under pretence of friendly assistance); 1886, Heldt *v.* State, 20 Nebr. 492, 30 N. W. 626 (detective pretending to be a fellow-prisoner); 1903, People *v.* White, — N. Y. —, 68 N. E. 630 (pretences to be the accused's friend); 1868, Price *v.* State, 18 Oh. St. 418 (a false statement that an alleged accomplice had confessed); 1857, Fife *v.* Com., 29 Pa. 435 (the accused was falsely told that accomplices had confessed); 1898, Com. *v.* Goodwin, 186 id. 218, 40 Atl. 412 (confession to a woman, the interview being ostensibly in secret, according to the sheriff's promise, but eavesdroppers being stationed near by; letter given to the sheriff on a promise to deliver it, but retained by him; admitted); 1899, Com. *v.* Cressinger, 193 id. 326, 44 Atl. 433 (confession obtained by pretending that murderer's knife was discovered; "the object of evidence is to get at the truth, and a trick which has no tendency to produce a confession, except in accordance with the truth, is always admissible"); 1900, Jackson *v.* U. S., 42 C. C. A. 452, 102 Fed. 473, 483 (approving the preceding case).

Compare the cases cited *post*, § 2183 (*illegality* of means, as no ground of exclusion of evidence), § 2286 (*confidence* in general, as not privileged), and § 2302 (communications to a *pretended attorney*).

[2] So, too, of a confession made during *sleep* or during *hypnotic influence* (*ante*, § 500).

5. Nature of the Inducement (continued): Confessions on Examination b a Magistrate or in other Legal Proceedings.

§ 842. **Orthodox Principle.** The question is here presented: Is there thing in the fact of arrest, as such, or in the fact of presence before a m trate, as such, or of examination on oath, as such, which tends to produ untrue confession of guilt? We now assume the absence of any of the kinds of inducements anywhere deemed fatal; we assume that no thr promises, assurances, urgings, or other inducements sufficient in themselv exclude, have been held out; we are to consider merely the effect of the facts in themselves. Remembering this, and applying the test already cated as the othodox one (*ante*, §§ 822, 824), "Was the inducement such there was any fair risk of a false confession?" there can be on principle bu answer, namely, no such risk exists, and the confession is admissible. Fo circumstances of arrest and of presence before a magistrate, no argument be necessary; and even for the extreme case of an answer under oath, it be obvious that so far as any answer at all is thereby compellable, it is cording to the terms of the oath, to be a true answer; that is all th demanded or compelled.[1] There is on principle not the vestige of an ment for excluding a confession merely because of such a circumstance; as a matter of history, such an exclusion was not thought of until the judicial attitude of the present century gave it a partial sanction and op the way for that misuse of precedents by which extreme results have reached in a few jurisdictions.

But we find also in use, and competing for recognition, certain other t which are all derived from the phrase "voluntary," but as applied and wo out for the situations now in hand have a meaning and effect very diffe from the ordinary one as already expounded (*ante*, § 826).

§ 843. **Principle of Voluntariness: (1) Common Form.** The common f in the present application, consists in taking the phrase "voluntary," co ering it without any reference to promises or threats, and erectiug it int absolute and final test, — in short, in translating it as "spoutaneous." notion is a broad one, and is in effect: Was the situation such that the son *had* to speak, felt obliged to speak, or was it a matter of pure choice him to speak or not? The radical difference here, it will be observed, is we no longer care whether his speaking involves a false avowal of guilt; thing is that a speaking not voluntary cannot be received, and hence speaking is excluded irrespective of the danger of falsity. If, then, we the phrase "voluntary" and treat it as the final and self-sufficient test,

[1] 1838, Morton, J., in Fannce *v.* Gray, 21 Pick. 245 ("The fact that it was made under oath cannot diminish its force or render its competency questionable. If it contain a trne narrative of facts, justice requires that they should be admitted. And no man will be likely to make *false* admissions against himself, because he has been sworn to tell the truth"); S C. J., in Wood *v.* Weld, Smith N. H. 367, ring to a similar examination on oath ("V hardship is it to be obliged to tell the tr No means [were] used to produce anythin the truth"); and see R. *v.* Scott, *post*, § and U. S. *v.* Kirkwood, Utah, *post*, § 852.

if thus we discard the fundamental theory of confessions (*ante*, § 822) — that our object is to exclude those which may be false — and conceive our purpose as that of excluding confessions as such (even though true) unless they are "voluntary," we thus have good reason to consider how far under such a canon the fact of arrest or of presence before a magistrate or of examination on oath may prevent the confession from being in the above sense "voluntary"; for it may at least be argued that either of these circumstances may in a given case make the confession practically compulsory. Now this is the form of principle which was unsuccessfully championed by many English judges during the first half of the 1800s, and thus was introduced into our rulings; and it is under this form that the questions we are now to consider have been able to be raised. It is not the best principle; but it is at least superior to those we have later to examine, which to-day also compete for recognition. Different Courts apply the doctrine in differing spirits of strictness or liberality; the difference often practically shows itself in the circumstance whether the giving of a caution (or notice not to answer except voluntarily) is deemed to admit the answer; a Court of narrow tendencies will not even then admit it, since (it is said) the moral compulsion remains; but with most Courts a caution removes the reason for exclusion.

Types of the foregoing form of test and the arguments expounding it are found in the following passages:

1852, *Pollock*, C. B., in *R.* v. *Baldry*, 2 Den. Cr. C. 441: "The true distinction between the present case and a case of that kind ['you had better tell the truth'] is that [here] it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

1864, *Hayes*, J., dissenting, in *R.* v. *Johnston*, 15 Ir. C. L. 60, 83: "All that the common law requires is that the confession *in pais* [meaning other than in court or before a magistrate] be voluntary. Upon this principle it is that . . . a confession will be rejected if it appears to have been extracted by the presumed pressure and obligation of an oath, or by pestering interrogatories, or if it had been made by the party to rid himself of importunity, or if, by subtle and ensnaring questions, as those which are framed so as to conceal their drift or object, he has been taken at a disadvantage and thus entrapped into a statement which, if left to himself, and in the full freedom of volition he would not have made. . . . I am not aware of any law which declares, as an abstract proposition, that a confession is undeserving of that character [of voluntariness] if it has been made in answer to questions fairly put, while the party has been left at full liberty to answer or not, as he may think right. These principles will apply to the confession *in pais*, whether it has been made by a person at liberty or under arrest. But it is manifest to every one's experience that from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes much more accessible to every influence that addresses itself either to his hopes or fears. . . . [To counteract this influence a caution is customary; yet the presence or absence of a caution is not in itself decisive; it is merely a circumstance for the judge. But from the moment of *arrest*, the person must be assumed to be acting under pressure.] On the whole of the case now before us, I am of opinion that the statement to the constable, having been made at a time when the party neither was a prisoner nor felt or supposed herself to be a prisoner, and not appearing to have been obtained by any threat or promise or other undue or unfair means, was properly receivable in evidence. But on the other hand, I am of opinion that if the defendant had at the time of that conversation felt herself to be in cus-

tody on the criminal charge, then her statements in answer to the questions would not have been receivable, unless prefaced by a caution."

1862, *Rice*, J., in *State* v. *Gilman*, 51 Me. 223: "Does it follow that because a statement is made upon oath in a proceeding where the circumstances of the commission of the crime are being investigated, and the person making such statements is a suspected or accused person, that it must necessarily be involuntarily made? . . . The argument is that the impressiveness of obligation and the solemnity of the occasion would have a tendency to wring from the party thus situated facts and circumstances which he is not bound to disclose, and therefore can in no just sense be said to be voluntary. As a general proposition this may be true, especially if the party is uninformed with regard to his rights. But when he is fully apprised of his rights and informed that he is under no legal obligation to disclose any facts prejudicial to himself, or to give evidence against himself, and then deliberately makes statements under oath, no good reason is perceived why such statements should not be given in evidence against him. . . . If it be said that, though a party in such a situation may be under no legal constraint, he may nevertheless feel under a degree of moral compulsion, and from that cause feel impelled to make self-incriminative statements, the answer is that this moral pressure bears with no greater force upon him when on the stand voluntarily than in other situations. A party who finds himself surrounded with circumstances calculated to cast suspicion on him will undoubtedly feel the necessity of making explanations. But such considerations have never been deemed good cause for excluding declarations which he may choose voluntarily to make."

1879, *Chalmers*, J., in *Jackson* v. *State*, 59 Miss. 312, rejecting an examination as witness after a caution: "The principle is that no statement made upon oath in a judicial investigation of a crime can ever be used against the party making it, in a prosecution of himself for the same crime; because the fact that he is under oath of itself operates as a compulsion upon him to tell the truth and the whole truth, and his statement, therefore, cannot be regarded as free and voluntary."

The first answer to this test is of course (1) that the fundamental question for confessions is whether there is any danger that they may be untrue (*ante*, § 822) and that there is nothing in the mere circumstance of compulsion to speak in general, or of the use of oath-compulsion in particular, which creates any risk of untruth.[1] (2) Another answer is that the privilege against self-crimination assumes that if the person chooses to give such testimony on the stand or in custody, it will be received, and there would have been no need for such a privilege if this rule had existed for confessions; that privilege assumes in its very existence that statements made without using it are admissible, and answers all the purposes which the above doctrine is aiming

[1] This answer is well set forth in the opinion of Lord Campbell, C. J., for four judges (Coleridge, J., dissenting on another ground), in R. v. Scott, 1 D. & B. 47 (1856): "We will consider the several grounds on which the defendant's counsel has argued that it [the examination] is not admissible. The first is that the examination of the defendant was taken after making a declaration tantamount to an oath, and that if on oath it would have been inadmissible. But in the case referred to in support of this objection [R. v. Britton, *supra*], the oath had been improperly administered without authority; and if the examination is taken under an oath administered by proper authority, there is no reason for saying that it is less likely to be true than if it had been without an oath or any similar solemnity. The next objection is that the examination was compulsory. It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted on. Such an objection cannot apply to . . . a lawful examination in the course of a judicial proceeding." See also the epigrammatic passages from Morton, J., in Fannce v. Gray, and Smith, C. J., in Wood v. Weld, quoted *ante*, § 842.

at.[2] (3) There is, however, a third way of dealing with this doctrine; and that is to accept its principle — *i. e.* that a statement not voluntary is to be excluded, irrespective of its truth or falsity, — but to deny that there can be any compulsion in the mere facts of custody or of examination upon oath, because the person is always at liberty to refuse to speak. This answer may still leave open to dispute the question whether at least a "caution" (or notification to the person of his privilege) is not essential; but the theory that the person must be supposed to know that he need not answer (as argued in State *v.* Vaigneur, *infra*) would practically repudiate such a requirement.[3]

§ 844. **Same: (2) Modern English Form.** In the last half of the 18th century there appears a tendency on the part of English judges to revive this test in an altered form, for a certain class of cases at least. The notion is fundamentally the same, *i. e.* Was the situation such that the person had to speak? But it proceeds by a different test, namely, Was the speaking obtained by asking questions of a person while in custody? In other words, statements are deemed not voluntary and therefore inadmissible when they have been made in answer to questions put while in custody. Moreover, it thus becomes immaterial whether the answers amount to a confession or not. The attitude is illustrated by the following passages:

1883, *A. L. Smith*, J., in *R.* v. *Garin*, 15 Cox Cr. C. 656: "When a prisoner is in custody, the police have no right to ask him questions. Reading a statement over, and then saying to him, 'What have you to say?' is cross-examining the prisoner, and therefore I shut it out. A prisoner's mouth is closed after he is once given in charge, and he ought not to be asked anything."

1864, *Lefroy*, L. C. J., dissenting, in *R.* v. *Johnston*, 15 Ir. C. L. 66: "The law of England, since the time of Judge Jeffreys, is against any kind of extraction of evidence from a prisoner, not only by torture, but by anything that could be calculated to excite the prisoner to confess; any answer given under such circumstances is not admissible.... Ought we not to say that the law of England does not allow evidence to be obtained by questioning a prisoner, except in the particular way prescribed by the statute? ... There appears to have been a new current of opinion setting in after the passing of 14 & 15 Vict."

This attitude can by no means be taken as the prevailing one in modern English Courts; it is merely a tendency, though a marked one. It is doubtless partly due to a feeling (unfounded, as we shall see, in the law) that the statute of 1850 (considered later) should be treated as in spirit excluding all

[2] This argument is suggested in the following passage: 1878, Benedict, J., in U. S. *v.* Graff, 14 Blatchf. 386: "The reason why a sworn witness is permitted to decline answering is because his answers under oath can be used as evidence against him"; compare also § 823, *ante*, § 2266, *post*.

[3] 1852, Withers, J., in State *v.* Vaigneur, 5 Rich. L. 403 (after dealing with other objections): "There remains nothing but the supposed duress of an oath, administered by a power capable (as is said) of applying a sanction that shall exact an answer. Now in reality there is no power, in any tribunal known to the common law, to exact an answer that may implicate a witness in or tend to expose him to a criminal charge. ... Mr. Joy ... [assigns the reason] that one in his capacity of witness might refuse to answer a question that has a tendency to expose him to a criminal charge; hence an answer to such becomes a voluntary statement, since he might refuse to make any. This appears to be a sound legal theory. It cannot be met by the circumstance of a particular case that a witness may not know the extent of his personal security under the law, for ignorance of the law excuses no one").

evidence from accused persons in custody not obtained by the statute-sa tioned method. Partly, also, it is due, as the preceding form is, to a confus of confession-law with the privilege against self-crimination; the privile of course, does not affect statements not made on the stand but made wh in custody (*post*, § 2263); and in applying the law of confessions to the lat situation, the judges have modified it by an infusion of the spirit of the ab privilege; so that we find presented under the head of confession-law notion excluding statements made merely in answer to questions by a c todian,[1] — a result which would be natural enough as an extension of t privilege against self-crimination, but is quite anomalous in the law confessions.

§ 845. **Same**: (3) **Selden's Principle of Mental Agitation.** Another fo of test derived from the phrase "voluntary" is still broader in its excludi effect, and differs radically in one point from the preceding two. Like the (1) it takes "voluntariness" as a final standard; but (2) it does not disca but retains, the fundamental notion of confession-law that a probable untru is that which we are seeking to reject; and furthermore (3) it includes, the second does, under "confession" anything and everything said by t person, whether an avowal of guilt or an assertion intended to exculpate a to demonstrate innocence.[1] Its peculiar different result arises from applyi the idea (2) to the statements included in (3). Thus, it argues: Persons s pected wrongly of a crime, especially when officially charged with it a questioned about it, are apt, particularly when the circumstances are strong inculpatory and demand explanation, to make the first explanation th occurs to them, to deny incriminating facts, and, in short, to assert and t to prove their innocence by inventing false stories, which if true would sh their innocence; hence, statements so made cannot fairly be trusted, a should be rejected. The chief representative statements of this theory s found in the following passages:

1854, *Selden*, J., dissenting, in *Hendrickson* v. *People*, 10 N. Y. 33: "The mental d turbance produced by a direct accusation, or even a consciousness of being suspected cri. e, is always great, and in many cases incalculable. The foundation of all up human testimony is that moral sentiment which universally leads men, when not un some strong counteracting influence, to tell the truth. This sentiment is sufficien powerful to resist a trifling motive, but will not withstand the fear of conviction for cri Hence, the moment that fear seizes the mind, the basis of all reliance upon its manif tations is gone. . . . The mind, confused and agitated by the apprehension of dang cannot reason with coolness, and it resorts to falsehood when truth would be safer, and hurried into acknowledgments which the facts do not warrant. Neither false statemen nor confessions, therefore, afford any certain evidence of guilt when made under the citement of an impending prosecution for crime."

1864, *Pigot*, C. B., dissenting, with *Lefroy*, C. J., and *O'Brien*, J., in *R.* v. *Johnston*,

[1] 1867, Kelly, C. B., in 10 Cox Cr. C. 576 ("I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself, and that we ought to see that no one is induced either by a threat or a promise to say anything of a criminatory character against himself"; utter confusion of two things distinct in hist and in principle).

[1] A notion whose fallacy has already b examined (*ante*, § 821).

Ir. C. L. 60, 121: "It must be shown to the satisfaction of the judge that the statements have been purely *voluntary* statements of the prisoner. . . . The danger to be guarded against is not, in the far greatest number of cases, that an innocent man will fabricate a statement of his own guilt, although instances of this have occurred, too well attested to be doubted. The danger is that an innocent person, suddenly arrested, and questioned by one having the power to detain or set free, will (when subjected to interrogatories, which *may* be administered in the mildest or *may* be administered in the harshest way, and to persons of the strongest and boldest or of the most feeble and nervous natures) make statements not consistent with truth, in order to escape from the pressure of the moment. . . . The process of questioning impresses on the greater part of mankind the belief that silence will be taken as an assent to what the questions imply. The very necessity which that impression suggests, of answering the question in *some* way, deprives the prisoner of his free agency, and impels him to answer from the fear of the consequences of declining to do so. Daily experience shows that witnesses, having deposed the strict truth, become on a severe or artful cross-examination involved in contradictions and excuses destructive of their credit and of their direct testimony. A prisoner is still more liable to make statements of that character under the pressure of interrogatories urged by the person who holds him in custody; and thus truth, the object of the evidence of admissions so elicited, is defeated by the very method ostensibly used to attain it. This relative position of the parties does not, therefore, tend to truth as the result of the inquiry. It does tend in the strongest way to make the statement of the prisoner the reverse of voluntary. . . . In my judgment, the relative positions of the constable who has custody of the prisoner and of the prisoner who is in custody of the constable negative the fact that the prisoner is a free agent. It rebuts any presumption that the prisoner's statement is voluntary, and furnishes the strongest presumption that it is not."

Now, (*a*) conceding this argument to be good so far as it goes, what it shows is that statements professing *innocence*, and calculated to prove it, are not trustworthy; it does not show that a plain avowal of *guilt* is untrustworthy; on the contrary, the whole underlying notion is that an innocent person will lie to prove his innocence and explain away apparent guilt. Therefore, when we find him *confessing* guilt, it is obvious that it cannot be under the influence of any such motive as the above, and is totally inconsistent with the presence of that motive.[2] Thus, by the Courts adopting this principle, a reason which applies exclusively to assertions of innocence is made to support a rule excluding confessions of guilt. That is the first fallacy; and it must be clearly appreciated, because its insidious error is concealed in a triple process, namely, *first*, taking a principle fundamentally appropriate to the confession-rules (that they are excluded because of the risk of falsity), *secondly*, working out its reason for a totally different class of statements (assertions intended to show innocence),[3] and *thirdly*, going back to confessions, and testing them according to the rule thus borrowed.

(*b*) The further answer to this principle is found in the denial that the

[2] This answer is represented in the following passage: 1878, Benedict, J., in U. S. *v.* Graff, 14 Blatchf. 387 ("To say that the administering of an oath to one under suspicion of crime will of necessity cause a mental disturbance that must render unreliable the sworn admission of the crime and raise the legal presumption that the statement is untrue, is going further than I can go, unless compelled by authority. I know of no authority binding upon the Courts of the United States, which compels the holding that an arrest, or a charge of crime, or being sworn, or all three combined, are sufficient to exclude a confession that otherwise appears to have been freely made, without the influence of threat or promise").

[3] *Ante*, § 821, "What is a Confession."

principle has any validity even for the class of statements, namely, as
tions of facts showing innocence, as to which it is worked out. In t
department of evidence such a principle is without precedent, and is in c
flict with all analogies. The conduct of a suspected person, in concea
or destroying incriminating evidence or in fleeing from justice, has alw
been admitted, subject to any innocent explanation that can be made (*a*
§§ 273–276), and his false assertions of an *alibi* and other false explanat
of conduct have always been admitted (*ante*, §§ 277–278); yet if the al
principle were good, it would necessarily exclude all conduct and statem
while under suspicion, and not merely while in custody or on the st
Thus the principle is without precedent or analogy, and is unworkabl
practice [4]

§ 846. **Present Status of the above Principles.** The first of the above t
principles is less recognized to-day, though it gains ground steadily.
second is that which prevails in most jurisdictions, though it is not unifo
nor consistently applied, and it rather loses ground. The third can ha
be said to prevail completely in any jurisdiction, its chief function ha
been to throw precedents and principles into confusion, to unsettle the co
of decision, and to suggest confusing arguments while not commanding
plete adherence. It was first judicially advanced by the eminent Mr. J.
den,[1] in 1854, in the Teachout Case in New York, at nearly the same
that it was being repudiated by the English judges, in 1856, in Scott's C
it was subsequently championed by the dissenting judges in the Irish ca
R. *v.* Johnston, in 1864; but it has not obtained any further footing in
land or Ireland, and had vogue as a determining doctrine in only a
American jurisdictions. Apart from its lack of precedent, the false bas
supposed principle by which it is reached, and its conflict with analogi
is workable simply and consistently up to a certain point only, *i. e.* qui
far as Mr. J. Selden and the Irish judges wished to carry it. But it is
cally different from and opposed to the other principles; and the unfortu
thing has been, for many Courts, that they have not seen this, that they
thought to recognize it partially, but not wholly, and in connection

[4] This answer is represented in the following passage: 1869, Woodruff, J., in Teachout *v.* People, 41 N. Y. 11 ("If the declarations made under consciousness of suspicion are for that reason unreliable, they must be unreliable whenever and wherever made . . . and equally when the suspected party encounters that suspicion while fully at large among third parties, as when called as a witness to state if he sees fit what he knows of the cause of the death. And if consciousness of suspicion renders proof of his declarations unreliable, so also should it render proof of his acts unreliable, and they should be equally excluded. And yet it has not, I think, been doubted that proof of the acts of the party under the very pressure of suspicion is competent. . . . [Flight, concealment, etc.] may be proved as some indication of conscious guilt, and yet it is consistent with innocence, and may be the mere result of fear, and the pressure cumstances may lead the innocent man t to this as a measure of safety. This is q true as that suspicion will lead a man t statements for the same purpose. There be some limit to the rule excluding declar short of the test that they be made whe under no consciousness that he is und picion; else the whole conduct of the from the moment he is apprised that he pected, must be declared to be too unreli be made the subject of any inference whate

[1] It had already been advanced, howe counsel, Mr. Dundas, in 1838, in Wheater' *post*; and Mr. J. Selden probably found it But a spurious passage, much quoted, bert's Evidence and Hawkins' Pleas Crown also served as a source; this pas examined *ante*, § 818.

other principles, — an unfortunate thing, because this test is not reconcilable in any degree with either of the other tests (except in part the last preceding one) and cannot coexist with them in the same body of law, and because the result of this laudable endeavor to carry water on both shoulders is that neither vessel maintains its equilibrium, to the confusion of the Courts and the law. The best interests of the law of confessions would be served by a clear recognition on the part of the Courts that one of those three principles must be selected and logically carried out and the other two be repudiated; thus we should have at least consistency, instead of a tangle of rulings guided now by one principle, now by another, and leaving the law in a state of desperate uncertainty.

Owing to the state of the decisions, it is necessary to consider them by jurisdictions; for this alone will furnish an opportunity for examining the state of the law with reference to the various competing principles; and the English precedents, as furnishing the original distinctions and illustrating the history of the theories, must first be taken by themselves. In applying each of the principles, there are four kinds of situations, involving distinctions about which the controversy within each principle has chiefly turned. These four are: 1. Under arrest as accused; 2. Examined before a magistrate as accused, without oath; 3. Examined before a magistrate or on trial as accused, under oath; 4. Testifying on oath as a witness. Confessions made in these four different situations may be differently treated even under the same principle, and the course of the law must be examined separately for each.

§ 847. **English Practice: (1) Confessions while under Arrest.** It was for a long time the clear and unquestioned law in England that the mere circumstance of arrest, even when combined with the circumstance that the confession was made in answer to questions put by the custodian, did not exclude the confession. This was taken for granted and expressly asserted as unquestioned by Mr. J. Grose, in 1791, delivering the opinion of the twelve judges in Lambe's Case.[1] The next two landmarks of the rule are Thornton's[2] and Gilham's[3] Cases, also decisions *in banc*. These were followed, in the next ten years, by other rulings,[4] among which Wild's Case, a decision *in banc*, became the leading one. Such was the law at this period that Mr. Joy was able correctly to say, in 1842:[5]

[1] 1791, Lambe's Case, 2 Leach Cr. C., 3d ed., 625; see the quotation *post*, § 848. So also before that time: 1722, R. *v.* Woodburne, 16 How. St. Tr. 62 (to police-officer); 1746, Berwick's Case, Foster's Cr. C. 10 (officers of a rebel garrison after capture, giving their rank to the official inspectors while in prison).

[2] 1824, R. *v.* Thornton, 1 Moody Cr. C. 27, 1 Lew. Cr. C. 49, by seven judges against two (the accused, fourteen years old, was in custody and severely questioned by the police: held admissible, because "no threat or promise had been used").

[3] 1828, R. *v.* Gilham, 1 Mood Cr. C. 186, 191, before all the judges but one (in jail, to the jailer: admitted).

[4] 1831, R. *v.* Swatkins, 4 C. & P. 549, Patteson, J., *semble*; 1832, R. *v.* Richards, 5 id. 318, Bosanquet, J. (to a constable, in custody on the way to jail); 1833, R. *v.* Long, 6 id. 179, Gurney, B. (just after arrest, after hearing the charge); 1835, R. *v.* Wild, 1 Mood. Cr. C. 452 (in custody in an inn); 1837, R. *v.* Kerr 8 C. & P. 177, Park, J. (to a policeman, searching the accused's room, questioning her and about to arrest her).

[5] Confessions, 38, 46.

"It may be proper that the police authorities should forbid the practice of que
ing a prisoner by a constable, and it might reasonably induce caution, and perhap
picion, and a scrutinizing jealousy in jurors, in investigating the credit of a witne
obtains a confession through such means; but the cases before the twelve judges, b
England and Ireland, already cited, seem to establish that statements made in ans
questions put, without any caution and by a person who has no authority to questi
prisoner, are admissible in evidence. . . . Such confession, if voluntary and free,
missible, although it appears that he was not cautioned."

It is to be noticed (1) that from the point of view of the "threat or
ise" test (*ante*, § 825) the result was a necessary one, because by hypo
no threat or promise was employed; (2) that in the absence of a threa
promise, the test of "voluntariness" was regarded as satisfied; (3) th
caution was required; and (4) that the rule was repeatedly affirmed *in*

In the meantime, in Ireland, the same result had been reached in Gi
Case, by all the judges.[6] But some twenty years afterwards came a se
Irish rulings by individual judges excluding such confessions;[7] the r
being variously given. The uncertainty of practice thus introduce
finally settled in 1864 by the great case of R. *v.* Johnston,[8] and the o
and orthodox view was maintained by the majority, that confessions
under such circumstances were not in themselves inadmissible, and
be tested, like other confessions, according to the presence or absence o
other and specific inducement in the way of a threat or a promise.

[6] 1822, R. *v.* Gihuey, Jebb Cr. C. 15, by all the Irish judges (statements in answer to questions by a constable, while under arrest on the way to jail, with a crowd about him asking questions; no caution given; "they held the rule to be well established that a voluntary confession shall be received in evidence, but if hope has been excited, or threats or intimidation held out, it shall not," and admitted it here). This was followed in 1842: R. *v.* Hughes, quoted in Joy, Confessions, 39 (a statement had been made while in custody, in answer to a constable's questions; Crompton, J., "had frequently had occasion to decide this question, and all these [cases cited] had been before him. The confession of a man, to be admitted, is not to be extorted by fear nor educed by flattery; but where a prisoner voluntarily gives it, it may be received, whether the questions be put to him by an authorized or unauthorized person. Wherever the declaration is voluntary, he would receive it, and the doctrine in Wild's Case was the true one").

[7] 1839, R. *v.* Hughes, 1 Cr. & D. 13, Doherty, C. J. (an authorized person visiting the accused in jail, and questioning him; excluded, on the ground that no caution was given, and that on magistrates' examinations a caution is always given); 1840, R *v.* Doyle, ib. 396, Bushe, C. J. (a constable visiting the accused in jail, and questioning her, after a caution); 1841, R. *v.* Devlin, 2 id. 151, Burton, J., and Brady, C. B. (a police inspector questioning the accused in jail; excluded); 1856, R. *v.* Toole, 7 Cox Cr. C. 244; Pigot, C. B., and Richards, B. (statement in answer to a police-inspector while under arrest, after caution; excluded, the co
ference of opinion among the judg
noted); 1861, R. *v.* Hassett, 8 id. 51
tian, J. (similar facts; evidence reques
withdrawn as doubtful); 1863, R. *v.*
8 Ir. Jur. N. S. 340, Pigot, C. B. (sta
answer to a question by a constable wh
arrest, after caution; excluded, becau
bies "ought to abstain from asking qu

[8] 1864, R. *v.* Johnston, 15 Ir. C. L.
eleven Irish judges (the accused m
ments in answer to the police, just af
of the charge, but before arrest, no c
ing given; Deasy, B., with whom
Hughes and Fitzgerald, BB., Monal
and Fitzgerald, Ball, and Keogh, JJ.
statement admissible because of the
threat or inducement; Ball, J (10
general result of the foregoing cases
be that from the year 1822 down to t
time — that is, for a period of upwar
years — it has been recognized as the
land, both in England and Ireland, t
sions or statements obtained from
through the instrumentality of ques
police constables, without any previo
are admissible in evidence against
vided that such admissions or statem
voluntary acts of the prisoners, not
either hope or threat operating
minds"). The views of Hayes, J.,
C. J., dissenting, represented the te
ante, the view of Pigot, C. B., and
dissenting, represented the test of
see the quotations in those sections.

Meantime, in 1850, a statute (*post*, § 848) had prescribed a new method of examining accused persons for commitment, and in the opinion of Lefroy, C. J., its spirit had contributed to the opposing result reached by him in this case. But the supposed spirit of the statute had not affected the English judges, who continued to rule as before.[9] But about the same time as R. *v.* Johnston the other form of test (described *ante*, § 844), made its appearance in England;[10] *i. e.*, any answers obtained by questions put by an officer to a person in custody were excluded. It has not yet been given a standing by a Court of appeal, but it certainly is a candidate for supremacy.

§ 848. **English Practice: (2) Confessions as Accused without Oath on Examination before a Magistrate.** The examination of an accused person before a magistrate, for preliminary investigation and for commitment if necessary, was at common law taken without putting the accused upon oath, because as accused he was not competent to testify (*post*, § 2250, *ante*, § 575). Furthermore, the proceeding was for some three centuries regulated by a statute (widely copied in this country) the material provisions of which are as follows:

1554, St. 1 & 2 P. & M. c. 13, § 4: "Justices of the peace . . . shall before any bailment or mainprise take the examination of the said prisoner and the information of them that bring him, . . . and the same, or as much as may be material thereof to prove the felony, shall be put in writing before they make the bailment; which said examination, together with the said bailment, the said justices shall certify at the next general gaol-delivery. . . ." St. 2 & 3 P. & M. c. 10: "The said justice, or justices, before he or they shall commit or send such prisoner to ward, shall take the like examination of the prisoner and the information of those who bring him, and shall put the same in writing within two days after the said examination, and the same shall certify," etc.

Now the propriety of receiving confessions made at such a time, never questioned (from the present point of view) until the end of the 1700s,[1] was then settled, both as a common-law question and under the statute, in a decision so clear and emphatic that its exposition must be quoted:

1791, *Lambe's Case*, 2 Leach Cr. L., 3d ed., 625; the accused was arrested and examined before a magistrate, and on having the written examination read over to him for signing, he said: "It is all true enough," but would not sign it. Whether it was admissible apart from the statute, was the first question; *Grose*, J., for the twelve judges: "The general rule respecting this species of testimony is that a free and voluntary confession, made by a person accused of an offence, is receivable in evidence against him, whether such confession be made at the moment he is apprehended, while those who have him in custody are conducting him to the magistrate's, or even after he has entered the house of the magistrate for the purpose of undergoing his examination. But in the present case the confession of the prisoner was made not only in the presence of the

[9] 1853, R. *v.* Sleeman, 6 Cox Cr. 245 (in custody in a private house; admitted); 1862, R. *v.* Cheverton, 2 F. & F. 833, Erle, C. J., and Wightman, J. (statement to a police-superintendent, while under arrest, in answer to questions, without caution; admitted).

[10] 1863, R. *v.* Mick, 3 F. & F. 822, Mellor, J. (statements to the police, under arrest, answering a question, but after a caution; admitted, but the method disapproved); 1885, A. L. Smith, J., in R. *v.* Gavin, 15 Cox Cr. C. 656 (quoted *ante*, § 844). No doubt such a decision is apt to be reached through the influence of other considerations: as where Cave, J., in 1893, R. *v.* Thompson, 2 Q. B. 18, frankly expresses doubts as to the credibility of police-officers producing alleged confessions in doubtful cases.

[1] 1741, White's Trial, 17 How. St. Tr. 1085; Goodere's Trial, *ib.* 1054; and other cases in § 2250, *post*.

magistrate, bnt whiie he was nndergoing a judicial examination. . . . First, th
consider this question as it is governed by the ruies and principles of the commc
Confessions of guiit made by a prisoner, to any person, at any moment of time, and
place, subsequent to the perpetration of the crime and previous to his examination
the magistrate, are at common law received in evidence as the highest and most s
tory proof of guilt, because it is fairly presnmed that no mau would make such a
sion against himseif if the facts confessed were not trne. It may, however, be s
opposition] that this rule oniy applies to confessions by paroi, and not to con
(as in the present case) rednced into writing and afterwards admitted by parol
true. Bnt surely if what a man says, though not reduced into writing, may b
in evidence against him, *a fortiori* what he says when reduced into writing is
sibie, for the fact confessed being rendered iess doubtful by being reduced int
ing, it is of course entitled to greater credit, and it would be absurd to say t
instrument is invalidated by a circumstance from which it derives additionai streng
authenticity. And for this reason it is clear that the present confession havin
taken by a magistrate under a judiciai examination can be no objection to receivi
evidence, for it gains stiii greater credit in proportion to the solemnity under w
was made. . . . [He then points out that the statute methods were not intended
place all others by exciusion, but merely to add a new and acceptabie form, thus
aii other proper ones stiii admissible, even though the statutory form could not be
of.] "[The examination] is more authentic on account of the deliberate ma
which it is taken, and, when it contains a confession, is admitted, not by force
statutes, but by the common law, as strong evidence of that fact; . . . and it is ci
what a prisoner confessed before a justice of the peace, previous to the reign of Ph
Mary, if not induced by hope or extorted by fear, whether rednced into writing
or if reduced into writing, whether signed or not, if admitted by the prisoner to
was and is as good evidence as if made in the adjoining room previous to his havi
carried into the presence of the justice, or after he had ieft him, or in the sam
before the magistrate comes, or after he quits it."

This ruling was emphasized in an opinion delivered a few years late

1794, *R.* v. *Thomas*, 2 Leach Cr. L. (3d ed.) 727; *Grose*, J. (the facts being
to those of Lambe's Case, *supra*: "There can be no doubt but that these minutes
read in evidence. . . . In Lambe's Case, which in its circumstances was precisely
present, the judges were of opinion that if such written examination were to be a
not admissible, this monstrous proposition wouid foiiow, that whatever a priso
when not before a magistrate would be admissibie, though depending on the fa
memory; but that the moment a prisoner gets before a magistrate it wouid not b
sible, thongh taken down in writing under circnmstances of the greatest solemni

It will thus be seen that confessions so made were declared to be equ
missible (1) at common law, (2) under the statute, and (3) when intende
taken under the statute, but not successfully so taken. Furthermore
be observed, there is no intimation that it is of any consequence (a) w
the accused was cautioned or not, or (b) whether his statements wer
spontaneously, or in answer to a general inquiry as to what he had
or in answer to repeated specific questions. Finally, it is clear that
sions made in such a situation were treated on exactly the same foo
any others, *i. e.* the only question would be as to the influence of son
tive threat or promise; the mere situation did not affect the result
stitute an inducement.

The admissibility of such a confession was subsequently reiterated in a series of rulings extending through the next half-century ;[2] and Mr. Joy adds his authority as to the practice at the end of that time.[3] In the meantime, only one contrary ruling, R. *v.* Wilson, had appeared;[4] but it served to keep alive the possibility of controversy. It will be noted that, in the cases confirming the orthodox doctrine (of which R. *v.* Ellis and R. *v.* Gilham are most frequently cited), some of the confessions received were given under a caution and some were made without questions preceding; but neither of these circumstances seems to have been treated as essential to their reception. The doctrine of R. *v.* Wilson,[4] however, came to the surface once again in 1850.[5] But in the preceding year a statute had entirely revised the method of conducting such examinations;[6] the effect of which was to raise the question whether its methods were to exclude entirely and to forbid the common-law methods, and thus to leave an opportunity still to inquire judicially what methods were receivable at common law.[7] Of the various questions

[2] 1790, R. *v.* Hall, quoted in 2 Leach Cr. L., 3d ed., 635; 1799, R. *v.* Magill, McNally on Evid. 37, Chamberlain, J. (statement as accused before a magistrate; no caution); 1826, R. *v.* Ellis, Ry. & Moo. 432, Littledale, J. (a statement as accused on examination before a magistrate, without threat or promise, but upon questioning and after refusal to allow counsel; following an unreported ruling of Holroyd, J., and disapproving Wilson's Case of 1817, in the next note but one); 1828, R. *v.* Gilham, 1 Mood. Cr. C. 186, 191, before all the judges but one (on examination before a magistrate after a caution; admitted); 1830, Wright's Case, 1 Lew. Cr. C. 48 (on examination as accused before a magistrate; admitted); 1831, R. *v.* Fagg, 4 C. & P. 566, Garrow, B. (examination as accused before magistrate; disapproved because taken before all evidence for prosecution was in; but admitted); 1831, R. *v.* Bell, 5 id. 162, Gaselee, J., and Lord Tenterden, C. J. (statement as accused before magistrate, without questions; admitted, and Garrow, B.'s objection, *supra*, disapproved); 1831 (?), Anon., ib., note, Lord Lyndhurst, C. B. (same point); 1832, R. *v.* Green, ib. 312, Gurney, B. (statements as accused before a magistrate, after a caution); 1836, R. *v.* Court, 7 id. 486, Littledale, J. (statement as accused before magistrate in answer to question); 1836, R. *v.* Rees, ib. 569, Lord Denman, C. J. (statement as accused before magistrate in answer to questions); 1837, R. *v.* Bartlett, ib. 832, Bolland, B. (same); 1838, R. *v.* Arnold, 8 id. 622, Lord Denman, C. J. (advising a caution; but omitting to say whether it is essential). There were also other rulings indicating clearly, though indirectly, an acceptance of this practice: 1833, R. *v.* Tubby, 5 C. & P. 530, Vaughan, B., *semble*; 1835, R. *v.* Rivers, 7 id. 177, Park. J., *semble*; 1838, R. *v.* Wheeley, 8 id. 250, Alderson, B., *semble*.

[3] 1842, Joy, Confessions, 40.

[4] 1817, R. *v.* Wilson, Holt N. P. 597, Richards, C. B. (a statement as accused on examination before a magistrate, without threats or promises, but without caution and upon questions; "an examination of itself imposes an obligation to speak the truth; if a prisoner will confess, let him do so voluntarily"). There is another and earlier, sometimes quoted to the same effect; but it has no bearing: 1793, R. *v.* Bennet, 2 Leach Cr. L., 3d ed., 627 (where the accused had refused to sign the examination before the magistrate, though acknowledging his guilt; this acknowledgment the Court rejected, because the prisoner had the right "to retract what he had said, and to say that it was false"; yet here the accused did *not* say that it was false; he admitted his guilt).

[5] 1850, R. *v.* Pettit, 4 Cox Cr. 164, Wilde, C. J. (examination as accused before magistrates, upon questioning; excluded, the decision being independent of the statute: "I reject it upon the general ground that magistrates have no right to put [such] questions to a prisoner. . . . The law is so extremely cautious in guarding against anything like torture that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry; . . . the accused might think himself bound to answer for fear of being sent to gaol").

[6] 11 & 12 Vict. c. 42, § 18; enacted for Ireland in 12 & 13 Vict. c. 69, § 18, and again in 14 & 15 Vict. c. 93, § 14. The statute of Philip and Mary had already been revised without materially affecting the portions concerned with the present question, in 7 G. IV (1826), c. 64, §§ 2 and 3 (for Ireland in 9 G. IV, c. 54, §§ 2 and 3).

[7] The statute's peculiar features were: (1) It required two cautions to be given; and (2) it apparently sanctioned all confessions previously admissible: 1849, 11 & 12 Vict. c. 42, § 18 ("After the examination of all witnesses on the part of the prosecution, . . . the justice . . . shall say to the accused these words or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you upon your trial'; . . . Provided always, that the said justice or justices,

which have arisen in applying this statute,[8] three only need here concern u
(1) Did it exclude a confession before admissible at common law? That
does not, has been decided in England;[9] and very properly, since in the fa
of the language of its last clause any other interpretation would have left
impossible to believe that words can mean anything. (2) Was a cautio
necessary at common law? This also has been settled in the negative, ar
the orthodox doctrine already described has been affirmed and perpetuated
(3) Finally, does it matter that the statement was called forth by specif
questions put by the magistrate about the offence? This has not bee
authoritatively answered since the passing of the statute. It had alread
been settled at common law, as we have seen, that the putting of questio
was immaterial; but some individual rulings since the statute[11] have e
cluded statements so obtained, on the principle already described (in § 84
ante), that the very putting of questions is improper and involves a compu
sion. It is apparent how little this view is sanctioned by precedent; and
is difficult to see how the argument of Lefroy, C. J., that "questioning is no
allowed, except in the way prescribed by the statute," can be accepted, unles
we believe (as he does) that the statute introduces an exclusive method; bu
this view is expressly repudiated, as we have seen, by the Sansome decision
and the deduction of such a view from the mere spirit of the statute amount
to nothing less than an overturning of the common law without any expres
authority.

§ 849. **English Practice: (3) Confessions as Accused, under Oath, on Ex
amination before a Magistrate.** Under the statutory provisions of the 1500

before such accused person shall make any statement, shall state to him and give him clearly to understand that he h.. nothing to hope from any promise of favor and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecution in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time, which by law would be admissible as evidence against such person"); Can. Crim. Code 1892, §§ 591, 689 (the accused's statement made before the magistrate may "if necessary" be introduced against him).

[8] That the statute has presented some difficulties will hardly serve as a moral against statutory revision and codification; for, whether owing to the statute or to other reasons, it is certain that the proportion of rulings upon confession-law in that field after and before the statute is as one to ten.

[9] The statute is not exclusive; all confessions formerly admitted are still admissible: 1850, R. *v.* Sansome, 4 Cox Cr. 207, before five judges; disposing of the doubts of Coleridge and Cresswell, JJ., in R. *v.* Kimber, 3 Cox Cr. 223, and approving the ruling of Erle, J., in R. *v.* Steel, 13 Inst. P. 606. A similar opinio was expressed by a majority in the Irish case 1864, R. *v.* Johnston, 15 Ir. C. L. 82, 89, pe Deasy, Hughes, Fitzgerald, BB., Fitzgerald an Keogh, JJ., against Hayes, O'Brien, and Bal JJ.

[10] The question arises, it will be seen, whe the statutory caution has been omitted, and thu the confession is not receivable under the statute this was the case in R. *v.* Sansome, *supra*, th decision being as above; the same opinion wa expressed by the majority in R. *v.* Johnston *supra*; a subsequent English ruling confirm the result: 1856, R. *v.* Stripp, 7 Cox Cr. 9 (interpolated remarks, made before evidenc ended). It may be added that *under the statut* it has been held that the omission of the *secon* caution does not exclude the confession: 1850 R. *v.* Sansome, 4 Cox Cr. 207; 1850, R. *v* Bond, ib. 231, 241, Alderson, B.; 1867, R. *v* Kalabeen, 1 Br. C. pt. I, 1: 1878, R. *v.* Soncl 17 N. Br. 611 (statement before the magistrate admitted, though no caution was given; R. *v* Sansome followed).

[11] 1854, R. *v.* Berriman, 6 Cox Cr. 388 Erle, J.; 1863, R. *v.* Mick, 3 F. & F. 822, Mei lor, J., *semble*. In the Irish case this view wa repudiated by the majority: 1864, R. *v.* Johns ton, 15 Ir. C. L. 82, per Deasy, Hughes, and Fitzgerald, BB., and Fitzgerald and Keogh, JJ. against Lefroy, C. J., Pigot, C. B., O'Brien and Ball, JJ.

the examinations of the witnesses, but not of the accused, were to be upon oath. This was construed (and not improperly) as a practical prohibition against putting an oath to the accused.[1] It might well follow that, if an oath was put, his examination under it should not be received; and as a matter of practice such an examination was always rejected.[2] But the reason was, not that there was anything fatal in the oath as such (as will be seen in the next section), but simply that the statute forbade the administration of the oath, and by implication prevented the admission of statements obtained in the way thus specifically forbidden. It was thus not the oath, but the specific statutory illegality of its application, that prevented the admission; for there was no method of enforcing the prohibition except by rejecting the statement so obtained.[3] This it is essential to keep in mind; for in the controversy (dealt with in the next section) which arose as to the use of a mere witness' statements on oath, the fact that the statements of an accused person before a magistrate were admissible, if mere unsworn statements of the ordinary sort (as noted in § 848), but inadmissible if sworn, seemed to many to furnish a strong analogy, and led them to the deduction that it was the oath as such which produced the difference of results.[4] It was not, in truth; but this misleading circumstance undoubtedly helped to create the opinion (*i. e.* adverse to receiving witness' statements) which for a time threatened to prevail.

§ 850. **English Practice: (4) Confessions by a Witness upon Oath.** This

[1] 1767, Buller, Trials at Nisi Prius, 242: "But the examination of the prisoner shall be without oath, and of the others upon oath." This passage is often cited for the statement that an examination of the accused on oath is inadmissible; but that is not its purport.

[2] 1817, R. *v.* Wilson, Holt N. P. 597, Richards, C. B (statement on oath as accused before a magistrate); 1830, R. *v.* Haworth, 4 C. & P. 256, Parke, J., *semble* (examination on oath as accused before magistrate); 1831, R. *v.* Webb, Ib. 564, Garrow, B. (examination on oath as accused before magistrate, excluded); 1833, R. *v.* Tubby, 5 id. 530, Vaughan, B. (same); 1833, R. *v.* Lewis, 6 id. 162, Gurney, B., *semble* (same); 1835, R. *v.* Rivers, 7 id. 177, Park, J. (same); 1838, R. *v.* Wheeley, 8 id. 250, Alderson, B. (same); 1838, R. *v.* Wheater, 2 Moody Cr. C. 45, 2 Lew. Cr. C. 157, *semble* (same); 1842, Joy, Confessions, 62. There are few decisions, simply because the inadmissibility was conceded.

[3] That this was the reason is clearly shown by the language of Lord Campbell, C. J., delivering the judgment of the Court (Coleridge, J., dissenting on another ground) in R. *v.* Scott, 1 D. & B. 47 (1856): "The first [objection] is that the examination of the defendant was taken after making a declaration tantamount to an oath, and that if on oath it would have been inadmissible. But in the case referred to in support of this objection the oath had been improperly administered without authority; and if the examination is taken under an oath administered by proper authority, there is no reason for saying that it is less likely to be true than if it had been without an oath or any similar solemnity." This is the explanation accepted in the following ruling, and in other American cases *post*, § 852; 1878, Benedict, J., in U. S. *v.* Graff, 14 Blatchf. 387: "I am aware that statements taken under oath, by committing magistrates of this State, are not admitted in evidence. But the statute of the State forbids the taking of statements under oath by committing magistrates, and by implication the use of such illegal statements as evidence is forbidden." In Wheater's Case, Lord Abinger had gone even further, and thought even such a statement admissible on principle; but his language at least adds to the proof that it was the illegality, and not the oath, which excluded: 1838, R. *v.* Wheater, 2 Moody Cr. C. 45, 2 Lew. Cr. C. 157, before all the judges, except Park, J., and Gurney, B.; Mr. Starkie, for the prosecution, conceded that "a prisoner's examination taken on oath is inadmissible"; and Lord Abinger, C. B., said: "I understand, if a prisoner's examination be on oath it shall not be received in evidence, without reference to a duress or threat; I see no reason for it; in principle, the answer may be quite voluntary"; the other judges expressed no opinion.

[4] Mr. Starkie's language may serve as a specimen of the misunderstanding which grew up about this rule: 1824, Starkie, Evid. II, 38: "The prisoner is not to be examined upon oath, for this would be a species of duress, and a violation of the maxim that no one is bound to criminate himself."

case presents the most difficult situation of the four, because it inv
not only the effect of the oath as involving compulsion, but also the
sity of distinguishing the different bearings of compulsion as disapprov
confession-law and of compulsion as opprobrious to the privilege a
self-crimination. That conflicting and confused views were from ti
time put forth is not unnatural.

Remembering the results already reached — that, at common law (p
cally unquestioned until the 1800s and repeatedly maintained durin
first half of the 1800s), neither the fact of custody nor the fact of magis
examination in custody and without caution excluded a confession, and
the exclusion of a sworn examination was due solely to the statutory
bition, — it is natural enough to find the judges, at the opening o
century, treating the confessions of a witness upon oath as not in them
objectionable. Down to 1816 we find no exclusion. Between that tim
1840 occurs a long and tangled series of rulings, representing conf
views and furnishing a fruitful source of later misunderstanding.[1] C

[1] 1803, Collett *v.* Lord Keith, 4 Esp. 212, Le Blanc, J. (defendant a witness in a former cause; objected to as not voluntary; admitted); 1806, R. *v.* Walker, 6 C. & P. 162, Lord Ellenborough, C. J. (affidavit in Ecclesiastical Court; admitted); 1807, Smith *v.* Beadnall, 1 Camp. 30, Lord Ellenborough, C. J. (examination as witness before bankruptcy commissioners, upon questions, without caution or counsel, but without objection by him; admitted; he "is like any other witness called to give evidence by virtue of a subpœna; he speaks at the peril of the examination being turned against himself"); here the privilege of self-crimination did not exclude the use of the answer, because no claim was made for it); 1814, Stockfleth *v.* De Tastet, 4 id. 10, Lord Ellenborough, C. J. (examination as witness before bankruptcy commissioners; "if he was imposed upon when he signed it, or was under duress, he will not be bound by it," or if the examination was not lawful; but here it was assumed to be lawfully taken); 1816, R. *v.* Smith, 1 Stark. N. P. 242, Le Blanc, J. (examination on oath as witness before magistrate; rejected because on oath); 1818, R. *v.* Merceron, 2 id. 366, Abbott, J. (examination as witness before Commons Committee; objected to as therefore not voluntary, but admitted; afterwards said by Abbott, J., in 1 Moo. Cr. C. 203, not to have been taken on oath, and so have been admitted for that reason only; the Commons afterward disapproved of the ruling in a Resolution quoted in 2 C. & K. 483, note); 1828, Tucker *v.* Barrow, 7 B. & C. 624, Littledale, J. (examination as witness before bankruptcy commissioners; "I am disposed to say that an admission obtained under compulsory examination is not evidence of an account stated"); 1828, Robson *v.* Alexander, 1 Moo. & P. 448, Common Pleas (examination as witness before bankruptcy commissioners, without caution; claimed to have been taken in excess of authority; admitted; Lord Ellenborough's language in Stockfleth *v.* DeTastet adopted); 1830, R. *v.* Haworth, 4 C. & P. 255, Parke, J. (examination as witness for prosecution before magistrate; admitted; "he might as a witness have chosen to answer any questions which might have a tendency to expose him to a criminal charge, and not having done so, his deposition is evidence against him"); *ante* 1830, Anon., note to reporter, ib., note, Parke, J. (examination as witness, before suspicion, by coroner; rejected); 1833, R. *v.* Tubby, 5 id. 530, Vaughan, B. (statement upon oath as witness, not suspected, admitted, "as no suspicion attached to the witness at the time; the question is, Is it the statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when he made it"); 1833, R. *v.* Lewis, 6 id. 161, Gurney, B. (examination as witness by magistrate, not suspicion, but witness committed at end of examination; Tubby's Case approved, but being taken "at the same time as all the depositions on which she was committed, on the very same day on which she was committed, I think it is not receivable; I think this examination was perfectly voluntary"); 1833, R. *v.* Davis, ib. 178, Gurney, B. (examination as witness before magistrate concluded; "if, after having been a witness, make her a prisoner, nothing of what was said can be admitted as evidence"); 183 Britton, 1 Moo & R. 297, Patteson and son, JJ. (balance-sheet of bankrupt proceedings offered to prove the pet creditor's debt on an indictment for co effects, etc.; objected to as having bee on oath; excluded for other reasons, J., explaining in 1 Moo. Cr. C. 51, above objection was not approved b 1838, R. *v.* Wheeley, 8 C. & P. 250, A B (examination before coroner, as a but under arrest; excluded); 1839, R. 9 id. 84, Williams, J. (examination as before coroner, but under arrest; on W Case being cited, "since that, there ha reaction in opinion, if I may be allo

things, however, appear definitely enough, upon a careful examination in chronological order.

(1) In a great number of the excluding rulings, *i. e.* those cases where the witness had been examined before a coroner while in custody or under suspicion, the simple reason for the exclusion was that the witness' position was thought to be assimilated to that of an accused person, and thus the case came within the statutory prohibition (treated in the preceding section) against examinations of accused persons taken under oath.[2] It was not the oath, but the statutory prohibition, that excluded them. These rulings were the supposed foundation of the Selden theory of mental agitation (described *ante*, § 845); but it will easily be seen, in the light of the law of the times, how far these judges were from proceeding upon any such far-fetched and unprecedented theory. It has no foundation whatever in these rulings; and the circumstance of suspicion or of custody was material in their minds merely as bringing the person within the statutory prohibition, and not as producing mental disturbance; as is also seen from the fact that these same judges were accepting at the same time the confessions of persons in custody or on examination without oath before a magistrate (*ante*, §§ 847, 848). The Selden theory, then (the third of the spurious forms, described *ante*, § 845), has no support in the extremest rulings of this period.

(2) It is clear, secondly, that the second spurious form of theory (described *ante*, § 844) had not then appeared at all; it is distinctly a modern notion, and is applied peculiarly to the case of an accused person questioned in custody.

(3) It appears, thirdly, that the first spurious form of test (described *ante*, § 843, as the "common form") had made its appearance and gained some headway. The theory of this test — so far as any was offered — was that the oath involved a compulsion, and a compulsory disclosure was inadmissible. Now (*a*) this theory, in its broadest and most sweeping form, regards the oath as necessarily involving a compulsion, and ignores the choice which the witness has to use his privilege and decline to answer; by this theory, the mere fact of the administration of the oath, in spite of the giving of a caution, excludes his statements.[3] But (*b*) in this form it was disowned by the greater number of judges in these rulings;[4] for, as was pointed out, the witness had a choice between disclosing and keeping silent; in the words of

expression"; admitted); 1840, same case, postponed, ib. 238, before Gurney, B. ("I am not aware of any instance in which an examination on oath before a coroner or a magistrate has been admitted as evidence by the person making it; I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected"; after the *nisi prius* ruling in Wheater's Case, *post*, he admitted its conflict, but still excluded the evidence).

[2] Such is the explanation of the following cases: Lewis', Davis', Wheeley's, and perhaps Owen's before Gurney, B. In Tuhby's Case and Owen's Case before Williams, J., the admission amounted to saying that the prohibition applied strictly to persons then charged as accused, and to no others.

[3] Such seems to be the notion in the following cases of the preceding list: Smith's (introducing the doctrine), Mercerón's, Tucker *v.* Barrow, Anon., and perhaps Owen's before Gurney, B.; see its theory fully stated in the quotation from Jackson *v.* State, *ante*, § 843.

[4] Such were the following cases: Collett *v.* Keith, Walker's, Smith *v.* Beadnall, Stockfleth *v.* De Tastet, Robson *v.* Alexander, Haworth's, Tubby's, Britton's, and Owen's before Williams, J.

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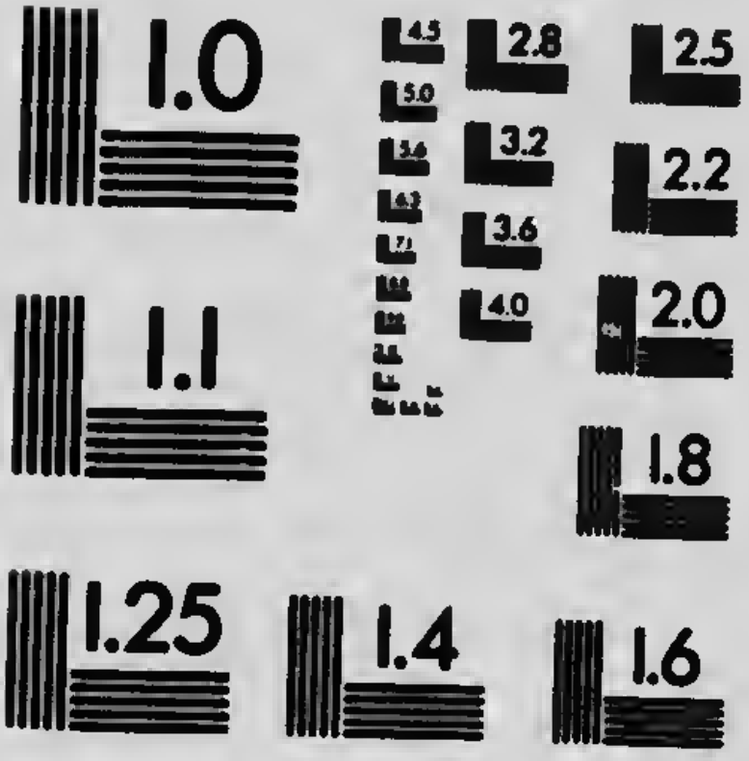

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Parke, J., "he might as a witness have objected to answer any questions which might have a tendency to expose him to a criminal charge; and not having done so," there was no compulsion. But the significance of this answer (*b*) is that it accepts the principle of (*a*), but denies the propriety of its application; *i. e.*, it concedes that an answer actually compelled from the witness would be inadmissible, but it denies that there is in truth any compulsion in such cases. Thus, of course, this theory (more liberal though it is than the first) contains within itself the germ of a further difference of opinion; *i. e.* (*b'*) one attitude prefers, as the test of compulsion, to ask whether there was *de facto* in the specific case a feeling of compulsion, — in other words, to take the subjective standard of the witness; while (*b''*) the other prefers, as its test, to ask whether the law actually used compulsion, — in other words, to take an objective or external standard. The practical effect of the former attitude is seen in rulings which hold that unless the witness appears clearly to have known of his privilege he must be supposed to have thought himself compelled to answer;[5] while the practical effect of the latter attitude is seen in rulings which hold that his answer will be supposed to be voluntary unless it clearly appears that he was compelled to answer after a refusal under claim of privilege.[6] Now, reverting to the English rulings of Parke, J., and others just mentioned, it is clear that, so far as any of them go upon this principle (*b*) at all, they adopt the more liberal form just described as (*b''*). Thus, in none of them does it appear that a caution was given or that the witness was otherwise informed of his rights, while in Smith *v.* Beadnall, Stockfleth *v.* De Tastet, and R. *v.* Haworth it clearly appears that the Court thought that he should have expressly claimed and been refused his right in order to make the answer really compulsory.[7]

(4) The majority of these rulings, then, in this period, at least repudiate the principle (*a*) and adopt the more liberal one (*b''*). But a little reflection will show that they were not impossibly proceeding upon a still more liberal principle, which may be designated as (*c*), — in short, the orthodox one, already described (*ante*, § 842). This principle is that a compelled confession is not necessarily and *ipso facto* a false one, and that therefore, in the absence of any threat or promise tending to produce an untruth, the mere fact that the answer was compelled — *i. e.* in spite of his express refusal and wish not to answer — does not exclude it. Now it is impossible to tell, in these cases just dealt with (Stockfleth *v.* De Tastet, Britton's, Haworth's, and the others

[5] This again offers further opportunity for distinctions; for some Courts are satisfied with nothing short of a caution from the judge, while others are satisfied if the witness was warned or presumably warned by counsel, — a distinction illustrated in the American cases *post*.

[6] In other words, the witness' ignorance of his choice either will not be assumed or will be treated as his own loss, — an attitude illustrated in State *v.* Vaigneur, quoted *ante*, § 843, note.

[7] This was treated by Mr. Joy as the better and prevailing principle of his time: 1842, Joy, Confessions, 62: "A statement, not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath. There are conflicting opinions of judges at *nisi prius* on this point, but the proposition appears to be established by high authority. The principle seems to be that the party in his capacity as witness might refuse to answer any question that has a tendency to expose him to a criminal charge; any statement, therefore, which he makes is a free and voluntary statement and is receivable in evidence."

in that list), whether they proceed on this principle (*c*) or on the preceding one (*b*″); and the reason for this ambiguity is an important one; it is that, though it was conceded that answers ordered in spite of a claim of privilege against self-crimination would have been inadmissible, the violation of the privilege would be a sufficient ground for their rejection. An answer ordered in spite of a legitimate claim of privilege is rejected because that is the significance of the privilege, which otherwise would amount to nothing;[8] and this would amply suffice to justify such an exclusion without any reference to the law about confessions. It is thus obvious that, when we are trying to discover the principle on which the judges acted in such cases, there is just one situation which will inevitably disclose it, — one situation in which no lawful privilege against self-crimination is violated, and in which, therefore, if a confession is ordered after an expressed desire not to answer, the exclusion of that answer must mean the adoption of the confession-principle (*b*) above, while the admission of the answer must mean the rejection of that confession-principle and the adoption of the principle (*c*). That situation occurs *when the privilege against self-crimination is abolished* by the Legislature (as it may be in England) for a certain class of cases, and a witness is thus no longer entitled to refuse to answer; if then he is ordered, after protest, to answer a question involving an avowal of guilt, and that answer is offered against him in a subsequent case, a question is squarely presented which necessarily involves the adoption of either one or the other of the above principles for such confessions. But that peculiar situation had not at this time presented itself; and that is the significance of this period and this series of rulings; some things had apparently been settled — for instance, that principle (*b*) would prevail against principle (*a*), — but the important question whether principle (*c*) — *i. e.* the orthodox theory of confessions — should prevail over both the others had not been answered.

Nor did a clear answer come for nearly twenty years. The first opportunity had presented itself in 1838, in Wheater's Case;[9] here the argument of counsel presented the question squarely enough; but, as no opinion was

[8] 1856, R. *v.* Scott, 1 D. & B. 47, before Campbell, L. C. J., and four others ("Where evidence is unlawfully obtained, and the witness objects, no doubt it cannot be admitted"); 1873, R. *v.* Coote, 12 Cox Cr. 557, 563 ("this exception depends upon the principle *nemo tenetur seipsum accusare*"); *post*, § 2270.

[9] 1838, R. *v.* Wheater, 2 Moo. Cr. C. 45, 2 Lew. Cr. C. 157, before all the judges except Park, J., and Gurney, B. (an examination before bankruptcy commissioners as to certain bills of exchange, after the committing magistrate had refused to hold him on a charge of forging them; the counsel had informed him of his privilege, and where he claimed it, an answer was not forced; other objections were overruled, and he was compelled to answer in those cases; Dundas, for the accused: "The evidence was inadmissible, inasmuch as it was a compulsory answer upon oath. . . . When therefore it is recollected that the prisoner himself considered that he was compelled to answer, and that his objections, however erroneous they might have been, had been overruled, can it be said that his examination was voluntary? It is submitted that he was under duress, his mind disturbed by the extraordinary situation in which he found himself placed, and called on in the midst of these trying circumstances to weigh and consider the nature of each question and the consequences of his answers; and if so, the law cannot estimate the exact degree of influence of the duress upon the human mind. . . . I submit, therefore, on these grounds, — first, that the examination was in its nature compulsory, and likely to operate so as to disturb the mind of the prisoner; and, secondly, that it was an examination upon oath, — that the evidence was inadmissible." "The judges present were all of opinion that the evidence was properly received, and the conviction was good, except Lord Abinger, C. B., and Littledale, J.").

published, the exact principle of the decision remained undisclosed. One thing is clear from it, that the Selden theory of mental agitation (*ante*, § 845; here advanced by the counsel Dundas) was again and permanently repudiated for England; but, though we may well infer that the principle (*c*), *supra*, was the controlling reason, yet principle (*b''*) would suffice on the facts to account for the admission, since the specific answers accepted had not been objected to on the score of privilege, *i. e.* as the witness had not chosen to refuse when he might have done so, the answers must be taken to have been voluntary. The next opportunity offered in 1847, in Garbett's Case;[10] but here the answer was obtained by an unlawful violation of privilege, and that alone would suffice to exclude it, and seems to have been the reason for exclusion; the only indication to the contrary being the use of the ambiguous word "compulsion" in the reporter's brief statement of the opinion. A third opportunity seemed to present itself in R. *v.* Sloggett, in 1856,[11] but here, too, the important question was not settled, since the witness (it was held) might have refused to answer, and, since he did not, was treated as acting voluntarily. But the ruling at least enforces the principle (*b''*) in its most liberal extent.

Meantime, in the same year, but by different judges (except one), the important question was being decided. In R. *v.* Scott[12] there was the fullest acceptance[13] of the principle (*c*) as the controlling and orthodox principle.

[10] 1847, R. *v.* Carbett, 2 C. & K. 474, 1 Den. Cr. C. 262, 2 Cox Cr. 448, before the fifteen judges (examination as witness in a civil suit, the Court having told him, after his declining to answer, that he must answer; Chambers, for the defence, argued that "in the present case, the impression on the mind of the witness was that he must answer, and that after trying to evade the questions and to exert his privilege, and finding both hopeless, he made the confession" under compulsion; Martin, for the prosecution, was asked by Parke, B.: "If a judge was clearly wrong, — as, if he said to a witness, 'Did you commit that murder?' and added, 'I will commit you if you do not answer,' and the witness then confessed it, — would that confession be afterwards receivable?" and answered: "I should say it would. . . . I submit that if the witness does answer, there is no rule to exclude what he says from being evidence afterwards"; nine of the judges were for excluding the evidence on the ground that, where a witness is obliged to answer, notwithstanding a lawful claim of privilege, "what he says must be considered to have been obtained by compulsion"; and six were for receiving it, on various grounds unspecified). Two other individual rulings had intervened between this and Wheater's Case; but these are explainable also on principle (*b''*) and are not conclusive for principle (*c*): 1841, R. *v.* Sandys, C. & Mar. 345, Erskine, J. (examination as witness before coroner; received, and question reserved, but never decided); 1844, R. *v.* Goldshede, 1 C. & K. 657, Lord Denman, C. J. (answer in Chancery on oath as defendant; objected to as compulsory and upon oath; both arguments rejected and the answer received).

[11] 1856, R. *v.* Sloggett, 7 Cox Cr. 139, before Jervis, C. J., Coleridge, J., Cresswell and Erle, JJ., and Martin, B. (examination as bankrupt on oath before bankruptcy commissioners, without claim of privilege against incrimination; at a certain stage he was told to consider himself in custody, and the examination up to that point was offered; whether the privilege was destroyed by the Bankruptcy Act, and compulsion to answer would therefore have been lawful in any case, was disputed by counsel; the judges unanimously held that the matters were covered by the privilege and hence his answers made without claim of privilege were voluntary and admissible; but whether, if the matters had not been privileged and he had been lawfully compelled after objection to answer, the answers would be inadmissible as not voluntary, was left undetermined, and was the question in the ensuing case of R. *v.* Scott).

[12] 1856, R. *v.* Scott, 1 D. & B. 47, before Lord Campbell, C. J., Alderson, Coleridge, Willes, and Bramwell, JJ. (examination as bankrupt before Bankruptcy Court; the magistrate secured answers by threatening to commit (as he had a right to do under the Bankruptcy Act) for failing to answer completely; but no claim of privilege was made; the Act had abrogated the privilege for bankrupt's examinations; admitted).

[13] It is true that Coleridge, J., dissented, but this was on the ground (denied by the others) that the Bankruptcy Act had *not* abrogated the privilege against self-incrimination, and hence

It is true that as no claim of privilege was in fact made by the witness, the decision might have been reached without this; but if we are looking for the reasons regarded by judges as indicating the law and actually controlling their rulings, a full and deliberate expression of those reasons must be the highest evidence, even though the ruling might by possibility be reached without such an expression.[14] The language is direct and clear:[15]

Campbell, L. C. J. (after declaring that, as for the oath in itself, "there is no reason for saying that it [the answer] is less likely to be true than if it had been without an oath or any similar solemnity"): "The next objection is that the examination was compulsory. It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted on. Such an objection cannot apply to . . . a lawful examination in the course of a judicial proceeding."

In short, mere compulsion in itself is nothing, so far as any confession-principle is concerned; for *that* is taken care of by the rule against being compelled to criminate one's self; an objection on that score alone must invoke that privilege, and the question then arises whether that privilege covers the case in hand, — a question which in the opinion above the judges next addressed themselves to, and which they treated as entirely distinct from any confession-question. For a correct understanding of the total separation between the two, and an antidote to the confusing expressions of a few modern English judges,[16] a perusal of this opinion may be recommended.

The result, then, of Scott's and Wheater's Cases in England was: (1) that the Dundas-Selden theory of mental agitation was entirely repudiated; (2) that as between the theories (*a*) and (*b*), *ante*, the former was equally repudiated, and the liberal form of (*b'*) was the only one that could by possibility be maintainable; (3) while by Scott's Case the orthodox theory (*c*) was given the deliberate sanction of at least one English Court. Since that time (1856) Scott's Case has been repeatedly treated as law in England.[17]

the answers were obtained by a violation of the privilege. On the other question, his well-known views leave us no reason to doubt that he agreed with his colleagues.

[15] The case is strengthened by the circumstance (above noted) that the magistrate had threatened to commit the witness (as he might lawfully) if he persisted in his refusal; this was properly explained by Lord Campbell as "merely an explanation of the enactment of the legislature upon the subject."

[16] Quoted more fully *ante*, § 843.

[16] *E.g.*, *ante*, § 844

[17] 1859, Skeen's Case, Bell Cr. C. 97, 127, 129 (R. *v.* Scott treated by the minority of the judges as perhaps not unimpeachable); 1867, R. *v.* Robinson, L. R. 1 C. C. R. 80, 10 Cox Cr. 467 (examination as witness before bankruptcy commissioners; no caution and no claim of privilege; the answers were compellable and without privilege; three judges declared R. *v.* Scott to be the law, and two decided upon other grounds); 1872, R. *v.* Widdup, L. R. 2 C. C. R. 3, 12 Cox Cr. 557 (same; R. *v.* Scott followed by all five judges, though the reasons of Kelly, C. B., were perhaps peculiar); 1873, R. *v.* Coote, 12 Cox Cr. 557 (Privy Council; answers as witness before fire-marshal without caution and without objection, admitted; R. *v.* Scott followed); 1896, R. *v.* Erdheim, 2 Q. B. 260, 267 (bankrupt's examination on oath, admissible; following R. *v.* Scott); 1902, R. *v.* Pike, 1 K. B. 553 (bankrupt's compulsory "statement of affairs" on oath, held admissible in a prosecution for unlawful appropriation). The indications of its sanction in Ireland are doubtful; 1857, R. *v.* McHugh, 7 Cox Cr. 483 (information on oath as witness, while under arrest as a joint accused; the magistrate thought that the informant was to turn Crown witness; excluded,

The lessons to be drawn as to our own use of the English precedents are three: (1) that it is impossible to use them indiscriminately and measure them by mere numbers; they mean little apart from the principle controlling the Court or the judge that makes them; (2) that whatever principle is selected should be logically and consistently carried out; and (3) that all the doubts and confusion are of comparatively recent creation, and that the orthodox and settled practice of the early 1800s entertained no doubts upon any of the four classes of situations we have been considering, and treated them as amenable to exactly the same tests as confessions of any other sort, except that a statement on oath as accused before a magistrate was excluded because of the implied statutory prohibition.

§ 851. **Rulings in the United States**: (1) **Confessions made under Arrest.** In this country, the orthodox English and Irish doctrine, declining to consider the mere fact of arrest as sufficient to exclude a confession, has been universally accepted.[1] It is to be noted that of course this result could not

partly because the informant was not cautioned as an accused); 1866, R. *v.* Gillis, 11 Id. 69 (statement as witness to magistrate; O'Hagan, J., all the judges agreeing or not dissenting: "I do not consider the fact of their being made on oath would render the informations inadmissible, provided they were made voluntarily and spontaneously").

In *Canada*, the following authorities are found: Dom. St. 1893, c. 31, § 5 (quoted *post*, § 2252); 1896, R. *v.* Douglas, 11 Manit. 401 (deposition of the accused taken as a witness in a civil case in Quebec, admitted); 1901, R. *v.* Clark, 3 Ont. L. R. 176, 179 (one answering on oath as a witness, without claim of privilege; his answers received; prior cases, before Can. St. 1893, c 31 as amended, now superseded); 1877, R. *v.* McLean, 17 N. Br. 377, 384 (statements of an insolvent on examination at a creditors' meeting, admitted).

[1] *Ala.*: 1856, Franklin *v.* State, 28 Ala. 9; 1875, Sampson *v.* State, 54 id. 343; 1881, Redd *v.* State, 68 id. 498; 1881, Spicer *v.* State, 69 id. 163; 1892, Goodwin *v.* State, 102 id. 87, 98, 15 So. 571; 1895, Burton *v.* State, 107 id. 108, 18 So. 284 (a boy of fourteen arrested, kept in jail without counsel; no threats or promises; admitted); 1898, Fuller *v.* State, 117 id. 36, 23 So. 688; 1902, White *v.* State, 133 id. 122, 32 So. 139; 1903, Stevens *v.* State, — id. —, 35 So. 122; *Cal.*: 1880, People *v.* Ramirez, 56 Cal. 536 (with or without warrant); 1901, People *v.* Miller, 135 id. 69, 67 Pac. 12; 1903, People *v.* Walker, — id. —, 73 Pac. 831; *Del.*: 1898, State *v.* Trusty, 1 Pen. 319, 40 Atl. 766; *Fla.*: 1898, Green *v.* State, 40 Fla. 191, 23 So. 851 (in prison and to an officer); *Ga.*: 1896, Nobles *v.* State, 98 Ga. 73, 26 S. E. 64; 1902, Price *v.* State, 114 id. 855, 40 S. E. 1015; *Ida.*: 1898, State *v.* Davis, 6 Ida. 159, 53 Pac. 678: *Ind.*: 1876, Harding *v.* State, 54 Ind. 366; 1893, Walker *v.* State, 136 id. 663, 668, 36 N. E. 356; *Ia.*: 1876, State *v.* Fortner, 43 Ia. 495 (in jail); 1900, State *v.* Petersen, 110 id. 647, 82 N. W. 329; 1900, State *v.* Penney, 113 Id. 691, 84 N. W. 509; 1901, State *v.* Storms, ib. 385, 85 N. W. 610; *La.*: State *v.* Nelson, 3 La. An. 499; 1893, State *v.* Nash, 45 Id. 974, 13 So. 265; 1893, State *v.* Chambers, ib. 36, 37, 11 So. 944 (statements in prison to trial judge, after warning, admitted); 1895, State *v.* Johnson, 47 Id. 1225, 17 So. 789; 1895, State *v.* Jones, Ib. 1524, 18 So. 515 (to a jailer); 1898, State *v.* Berry, 50 Id. 1309, 24 So. 329; 1902, State *v.* Edwards, 106 La. 674, 31 So. 308; 1903, State *v.* Robertson, 111 id. —, 35 So. 375; *Md.*: 1899, Rogers *v.* State, 89 Md. 424, 43 Atl. 922; 1900, Young *v.* State, 90 id. 579, 45 Atl. 531; *Mass.*: 1871, Com. *v.* Cnffee, 108 Mass. 287 (where officers examined the accused in prison at night for two hours, but no threatening language was used); 1875, Com. *v.* Mitchell, 117 id. 432; 1876, Com. *v.* Smith, 119 id. 311; 1895, Com. *v.* Preece, 140 id. 276, 5 N. E. 494 (young boys); 1896, Com. *v.* Robinson, 165 Id. 426, 43 N. E. 121 (and that no caution was given is immaterial); 1897, Com. *v.* Bond, 170 id. 41, 48 N. E. 756 (confession to a fire-marshal when under arrest, held voluntary on the facts); 1898, Com. *v.* Williams, 171 id. 461, 50 N. E. 1035; 1902, Com. *v.* Devaney, 182 id. 33, 64 N. E. 402; *Mich.*: 1895, People *v.* Warner, 104 Mich. 337, 62 N. W. 405; *Mo.*: 1874, State *v.* Carlisle, 57 Mo. 104; 1893, State *v.* Moore, 117 id. 395, 399, 402, 22 S. W. 1086; 1895, State *v.* Murray, 126 id. 611, 29 S. W. 700; 1897, State *v.* McClain, 137 id. 307, 38 S. W. 906; 1899, State *v.* Shackelford, 148 Id. 493, 50 S. W. 105; 1903, State *v.* Jones, 171 id. 401, 71 S. W. 680; *Nebr.*: 1901, George *v.* State, 62 Nebr. 669, 85 N. W. 840; 1901, Reinoehl *v.* State, 62 id. 619, 87 N. W. 355; 1902, Meyer *v.* Menter, 63 id. 427, 88 N. W. 662 (to a penitentiary warden); *N. J.*: 1901, State *v.* Hill, 67 N. J. L. 626, 47 Atl. 814; 1902, State *v.* Young, 67 id. 223, 51 Atl. 939; 1902, State *v.* Hernia, 68 Id. 299, 53 Atl. 85; *N. M.*: 1892, Faulkner *v.* Terr., 6 N. M. 464, 30 Pac. 905; *N. Y.*: 1857, People *v.* Rogers, 18 N. Y. 13; 1875, Murphy *v.* People, 63 id. 597 (to an officer while in custody, upon questions asked); 1880, Balbo, People, 80 Id. 496 (even an unlawful arrest here an arrest made in another State without

be reached under a strict and logical application of the Selden theory of mental agitation (and such confessions were therefore expressly declared inadmissible by him in the McMahon Case, *post*, and by the dissenting Irish judges in Johnston's Case, *ante*); but to-day that theory is nowhere allowed to have this natural and consistent effect.

§ 852. **Same: (2), (3), and (4); Confessions made as Accused before a Magistrate, with or without Oath, or as a Witness on the Stand.** Owing to the casual adoption of one and then another of the various competing principles, it cannot be said that the rulings in this country represent any marked attitude. On the whole, they are liberal in spirit; and the occasional legislation has also been liberal.[1] The rulings in New York are of

warrant); 1880, Cox *v.* People, ib. 515 (to a police-officer, while in custody); 1883, People *v.* McGlolu, 91 id. 242, 245; 1899, People *v.* Kennedy, 159 id. 346, 54 N. E. 51; 1900, People *v.* Meyer, 162 id. 357, 56 N. E. 758; 1903, People *v.* Egnor, 175 id. 419, 67 N. E. 906; *N. C.:* 1902, State *v.* Flemming, 130 N. C. 688, 41 S. E. 549; *Or.:* 1901, State *v.* McDaniel, 39 Or. 161, 65 Pac. 520; *Pa.:* 1846, Com. *v.* Mosler, 4 Pa. St. 264; 1899, Com. *v.* Eagan, 190 id. 10, 42 Atl. 374 (to a district-attorney); 1899, Com. *v.* Shew, ib. 23, 42 Atl. 377 (same); *R. I.:* 1903, State *v.* Nagle, — R. I. —, 54 Atl. 1063; *S. C.:* State *v.* Cook, 15 Rich. L. 29; 1900, McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529; *U. S.:* 1878, U. S. *v.* Graff, 14 Blatch. 386, Benedict, J.; 1895, Sparf *v.* U. S., 156 U. S. 51, 55, 15 Sup. 273 (in Irons); 1896, Pierce *v.* U. S., 160 id. 355, 16 Sup. 321; 1896, Wilson *v.* U. S., 162 id. 613, 16 Sup. 895; *Vt.:* 1895, State *v.* Gorham, 67 Vt. 365, 31 Atl. 845 (under arrest, without counsel, admitted); 1895 State *v.* Bradley, ib. 465, 32 Atl. 238; *Va.:* 1878, Wolf's Case, 30 Gratt. 836, *semble*; *Wash.:* 1893, State *v.* Munson, 7 Wash. 239, 240, 34 Pac. 932; *Wis.:* 1897, Connors *v.* State, 95 Wis. 77, 69 N. W. 981.

In *Texas*, an exceptional rule prevails that a caution must have been given: C. Cr. P. 1895, § 790 (quoted *ante*, § 831); 1898, Unsell *v.* State, 39 Tex. Cr. 330, 45 S. W. 1022 (admissible only if cautioned according to statute; warning that it could be used for him, improper); 1898, Barth *v.* State, ib. 381, 46 S. W. 228 (confession must be within such time after caution that confession was made under its recollection); 1899, Gallaher *v.* State, 40 id. 296, 50 S. W. 388; 1899, Pryor *v.* State, 40 id. 643, 51 S. W. 375; 1902, McColloh *v.* State, — id. —, 69 S. W. 141 (rule applied to letters of the accused); 1903, Connell *v.* State, — id. —, 75 S. W. 512 (the test of arrest is subjective; the confession of one who is actually detained, yet is not aware of it, is admissible); 1903, Glover *v.* State, — id. —, 76 S. W. 465 (that the statements would be used "for or against him," held not a sufficient warning).

[1] Where no oath is mentioned, it is understood that the statement was not on oath. The term "magistrate" means the committing judge, not including the coroner. Where "the statute" is mentioned, the reference is to the local statute regulating the mode of examining an accused person before the committing judge: the citations of these statutes *post*, § 1326, will usually suffice to find them: *New York:* 1854, Hendrickson *v.* People, 10 N. Y. 13 (examination as witness before coroner, not under suspicion or charge, but not cautioned; admitted; Parker, J.: "I do not see how, upon principle, the evidence of a witness, not in custody and not charged with crime, taken either on a coroner's inquest or before a committing magistrate, could be rejected. It ought not to be excluded on the ground that it was taken upon oath. The evidence is certainly none the less reliable because taken under the solemnity of an oath. . . . Nor can the exclusion of the evidence depend on the question whether there was any suspicion of the guilt of the witness lurking in the heart of any person at the time the testimony was taken; that would be the most dangerous of all tests, as well because of the readiness with which proof of such suspicion might be secured, as of the impossibility of refuting it. . . . The witness may refuse to answer, and his answers are to be deemed voluntary unless he is compelled to answer after having declined to do so; in the latter case only will they be deemed compulsory and excluded"; Selden, J. (language already quoted, *ante*, § 845) dissented solely on the ground that the testimony was given under suspicion; Gardiner, C. J., thought that on the facts the examination had been purely in the character of a witness, but would have excluded his oath as unlawful, had he been substantially an accused person; the majority conceded that an examination on oath as accused before a magistrate would have been inadmissible, because the putting an oath to the accused was forbidden by the statute); 1857, People *v.* McMahon, 15 id. 384 (the Court's membership having almost entirely changed; examination as witness before coroner, but in custody without warrant, charged as the offender, rejected; Selden, J.: "[The word 'voluntary' in judicial examinations means] proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any disturbing cause. . . . It is considered that a judicial oath, administered when the mind is disturbed and agitated by a criminal charge, may have that effect [of preventing free and voluntary mental action], and hence the exclusion. . . . [Hence, such an ex-

first importance, because the comparatively early promulgation there of the Selden theory in the Hendrickson and McMahon Cases, and its repudiation

amination under oath is not to be rejected] unless that oath was administered in the course of some judicial inquiry in regard to the crime itself for which the prisoner is on trial; . . . (while it is also necessarily admissible) if at the time it was made the prisoner was not himself resting under any charge or suspicion of having committed the crime"; as for examinations of accused persons on oath, Selden, J., for the Court, adopts the theory "that the evidence is too uncertain to be safely relied upon," and rejects the theory that "a mere arbitrary rule, which prohibits magistrates from taking the examination of prisoners charged with crime upon oath, has been violated"); 1869, Teachout *v.* People, 41 id. 7 (examination as witness before coroner, while under suspicion and after notice of probable arrest; a caution being given by the coroner, held by the majority, per Woodruff, J., that the single fact that the witness was under suspicion was not sufficient to exclude the testimony, expressly repudiating the reasoning of McMahon's Case and the dictum therein as to the effect of suspicion (language quoted *ante*, § 845), but holding that "declarations made under the influence of a charge of guilt, under actual arrest or under examination with such a charge impending, should be excluded, except where a careful obedience to the statutory precautions is observed"; thus adopting the English theory of statutory prohibition as the basis of that exclusion, though taking a liberal view of the cases coming within its application, like the rulings *ante* in § 850; Grover and Lott, JJ., dissenting, following McMahon's Case and its theory); 1878, Abbott *v.* People, 75 id. 602 (schedules put in by the debtor in bankruptcy proceedings; admitted); C. Cr. P. 1881, § 395 (quoted *ante*, § 831); 1883, People *v.* McGloin, 91 id. 242 (examination under oath before a coroner while under arrest charged with the crime in question, the coroner having been summoned to the police station and not acting officially; the conflicting theories of the preceding rulings were mentioned, and it was held (1) that the fact of the oath having been administered was not illegal so as to exclude, since only examinations taken under the statute could be so objected to, and this was not under it; and (2) that the examination was not compulsory, the theory of McMahon's Case being thus impliedly repudiated; (3) that under the Code of Criminal Procedure of 1881, § 395, "a confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor," the confession was equally admissible); 1886, People *v.* Mondon, 103 id. 213, 8 N. E. 496 (examination on oath before coroner, under arrest without a warrant, on suspicion of the crime in question, without counsel, not cautioned; excluded on the authority of McMahon's Case, and the Code provision *supra* held (overturning McGloin's Case) "not to apply to any but voluntary confessions, nor to change the statutory rules relating to the examination of prisoners charged with crime"; "the mere fact that at the time of his examination he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness," and his testimony may be used; but "if he is in custody as the supposed criminal, he is not regarded merely as a witness, but as a party accused," and the examination is excluded, unless in conformity with the statute as to preliminary examinations); 1890, People *v.* Chapleau, 121 id. 266, 24 N. E. 469 (examination at his own request, while in custody, before the coroner, after a caution; the preceding cases were reviewed and treated as harmonious (1), and the examination admitted as being "in all respects and however viewed, the voluntary and uninfluenced statements of the individual"; no solution of the difficulties being offered, except, perhaps, that the voluntariness of the confession, in view of "their nature and the circumstances under which made," is to be the final test in such case); 1892, People *v.* Wright, 136 id. 625, 632, 32 N. E. 629 (examination before coroner, received; following the Chapleau Case); 1901, People *v.* Molineux, 168 id. 264, 61 N. E. 286 (testimony given at an inquest as witness under subpœna, by one suspected but not arrested or charged, held admissible; People *v.* Chapleau approved). As a result of this series of decisions it may be said: (1) that the theory of statutory prohibition as the reason for excluding the examination of accused persons on oath has been clearly recognized in all the cases except McMahon's; (2) that apart from this nothing has been clearly settled; (3) that by the Mondon decision a coach and four was driven through the Penal Code, which had been intended to settle the controversy, and was so taken in the McGloin Case, and which (if properly and naturally interpreted) accepts fully the orthodox principle of Scott's Case in England; (4) that it is impossible to foretell the next decision, not merely because the Court has changed its principles so often, but (more than all) because in the later cases it ignores the irreconcilable conflict in the precedents and treats them as harmonious, — a complaisant attitude which is found in no other Court dealing with them; *Alabama:* 1852, Seaborn *v.* State, 20 Ala. 15, 17 (examination as accused before magistrate without caution; admitted, because voluntary upon the facts); 1875, Sampson *v.* State, 54 id. 241, 243 (statement as accused on examination before magistrate, admitted); 1882, Kelly *v.* State, 72 id. 244 (statement on examination before magistrate, after questioning; inadmissible "unless a prisoner comprehends his rights fully and is informed by the Court" that a refusal to answer is lawful and will not be taken against him; also partly because no questioning by the magistrate was expressly authorized by statute; preceding cases ignored); 1896, Wilson *v.* State, 110 id. 1, 20 So. 415 (sworn as witness before

in the Teachout Case, greatly influenced the discussion in the other jurisdictions, in most of which the controversy is comparatively recent, — a

coroner, not charged or arrested, but suspected; excluded, apparently on the theory that the oath involved compulsion); 1899, Jones *v.* State, 120 Id. 303, 25 So. 204 (testimony as witness before the coroner, not under arrest or suspicion, admitted); 1903, Jones *v.* State, — Id. —, 34 So. 681 (an admission of an accused made "on the preliminary trial," received); 1901, Angling *v.* State, — id. — , 34 So. 846 (testimony on the preliminary trial, admitted, as a "judicial confession"); *Alaska:* C. Cr. P. 1900, § 312 (like Or. Anuot. C. 1892, § 1599); *California:* 1873, People *v.* Kelley, 47 Cal. 125 (examination under oath before magistrate as accused; admitted, as voluntary; distinguishing People *v.* Gibbons, 43 Id. 551 (1872), because under the statute at that time (since changed) such examinations upon oath were unlawful; "if his voluntary, unsworn statement may be proved against him as a confession, his voluntary testimony under oath, given in a proceeding in which he elects and is authorized to testify, ought to stand upon at least as favorable a footing"); 1881, People *v.* Taylor, 59 id. 650 (examination as accused before coroner, apparently on oath; admitted, since "T. could not have been compelled to testify; . . . the statement having been voluntary, the evidence was admissible, whether made in a judicial proceeding or any other"); 1893, People *v.* Weiger, 100 id. 352, 357, 34 Pac. 826 (defendant's examination on oath, when cited in his own voluntary proceedings in insolvency, admitted); 1901, People *v.* Sexton, 132 Id. 37, 64 Pac. 107 (accused's testimony as witness before grand jury, admitted; but here not a confession); 1901, People *v.* Chrisman, 135 Id. 282, 67 Pac. 136 (defendant's testimony at the preliminary examination, admitted); *Colorado:* 1894, Torris *v.* People, 19 Colo. 438, 36 Pac. 153 (affidavits to procure witnesses, voluntarily made by defendant, received); *Columbia (District):* Comp. St. 1894, c. 20, § 29 (like U. S. Rev. St. § 860); *Florida:* 1892, Ortiz *v.* State, 30 Fla. 256, 283, 11 So. 611 (examination as accused on oath at trial by his own offer, admissible); 1895, Jenkins *v.* State, 35 id. 737, 18 So. 182 (before grand jury; the caution had been given as to his privilege, but he was told he was under suspicion; admitted); 1898, Green *v.* State, 40 id. 474, 24 So. 537 (plea of guilty before magistrate, after warning, admitted); 1903, McNish *v.* State, — id. — , 34 So. 219 (plea of guilty before the committing magistrate, without caution, excluded); 1903, Ferrell *v.* State, ib. — , 34 So. 220 (bigamy; defendant's sworn testimony in a suit by him against the first wife for divorce, admitted); *Georgia:* 1875, Cicero *v.* State, 54 Ga. 156 (examination as accused before magistrate; excluded, because the magistrate put questions to get contradictory statements); 1889, Woolfolk *v.* State, 81 id. 564, 8 S. E. 724 (under arrest as accused before the coroner, but without oath; admitted); 1895, Henderson *v.* State, 95 id. 326, 22 S. E. 537 (testimony given as a witness without compulsion is admissible); *Hawaii:* Civil Laws, 1897, § 1427 ("nor shall any confession which is tendered in evidence on any trial be rejected on the ground that it purports to have been made on oath, if proof can be given to the Judge or other presiding officer, that in fact it was not so made"); 1867, R. *v.* Paakaula, 3 Haw. 30, 37 (plea of guilty before the magistrate, admitted); *Illinois:* 1869, Austine *v.* People, 51 Ill. 236, 239 (admission made at the time of pleading as accused before a magistrate, excluded; but on the ground of being induced by a promise to drop the prosecution); *Indiana:* 1866, Anderson *v.* State, 26 Ind. 89 (examination as witness in another cause; admitted as voluntary); 1893, Davidson *v.* State, 135 Id. 254, 260, 34 N. E. 972 (statements "voluntarily" made and signed at inquest as witness, admitted); 1903, Ginn *v.* State, — id. — , 68 N. E. 294 (confession, when taken before a justice, to one not in authority, admitted); *Iowa:* 1886, State *v.* Briggs, 68 Ia. 416, 424, 27 N. W. 358 (plea of guilty on preliminary examination; admitted, even though not told by magistrate of his right to counsel); 1892, State *v.* Carroll, 85 Ia. 1, 51 N. W. 1159 (testifying before grand jury as witness, while under arrest on the charge; caution by foreman; admitted); 1892, State *v.* Clifford, 86 Id. 550, 553, 53 N. W. 209 (statute requiring disclosure of testimony before grand jury does not admit an otherwise inadmissible confession there made); 1897, State *v.* Van Tassel, 103 Id. 6, 72 N. W. 497 (voluntary appearance at the inquest, admitted); *Kansas:* 1893, State *v.* Sorton, 52 Kan. 531, 539, 34 Pac. 1036 (preliminary examination as defendant on oath, received); *Kentucky:* C. Cr. P. 1895, § 64 (witness' statement before committing magistrate not "of itself" to be "evidence for any purpose"); *Louisiana:* 1873, State *v.* Garvey, 25 La. An. 191 (examination as witness before coroner, while under arrest on a charge of the crime, but made at his own request; excluded, because made as an accused); 1900, State *v.* Robinson, 52 id. 616, 27 So. 124 (before coroner as witness; not decided); *Maine,* 1862, State *v.* Gilman, 51 Me. 206 (examination as witness on oath before coroner, after knowledge of suspicion, but a caution given; admitted, because the statements were voluntary, "the manifestation of his own free will"; quoted *ante,* § 843); 1873, State *v.* Bowe, 62 id. 174 (plea of guilty before the lower Court; admitted, as not appearing to have been obtained "by threats or promises"); *Massachusetts:* 1838, Faunce *v.* Gray, 21 Pick. 245 (admissions by an administrator in a civil examination on oath, admitted; the fact that it was made on oath, held immaterial; quoted *ante,* § 842); 1855, Judd *v.* Gibbs, 3 Gray 539, 543 (examination of an insolvent before commissioners, admitted; but his oath taken not as a part of the examination, excluded, apparently because it could not be used as against the present parties); 1857, Com. *v.* King, 8 id. 503 (examination as witness at fire inquest; no caution; admitted; whether caution was essential, was expressly not decided); 1866, Com. *v.* Lannan, 13 All. 563, 569 (special plea in bar,

further testimony, perhaps, to the unnaturalness and heterodoxy (shown also by the early English practice) of any controversy at all. No attempt

held bad by the Court below; not admitted, chiefly because drawn by the attorney, and thus inadmissible by statute)]; 1877, Com. *v.* Reynolds, 122 Mass. 455, 458 (examination as defendant at a former trial of the same charge; admitted, because "they were voluntary . . . and it is immaterial when or where they were made"); 1896, Com. *v.* Wesley, 140 id. 248, 252 (testimony of the defendant at an inquest, sworn, but not summoned, and warned; admitted, as "appearing to have been made voluntarily, and not under threat or duress or in consequence of any inducement"); 1897, Com. *v.* Hunton, 168 id. 130, 46 N. E. 404 (testimony before an investigating committee at the City Hall, admitted); *Michigan:* 1890, People *v.* Lander, 82 Mich. 109, 46 N. W. 956 (testimony on oath before a grand jury cannot be afterwards used); *Mississippi:* 1860, Josephine *v.* State, 39 Miss. 626, 650 (examination as witness on the trial of another person for the same charge; excluded); 1879, Jackson *v.* State, 56 id. 312 (examination as witness on the trial of another person jointly indicted for the same offence, after a caution; excluded, because the oath itself involves a compulsion); 1883, Farkas *v.* State, 60 id. 847 (on oath as a witness before the coroner, but under arrest on suspicion; excluded); 1897, Ford *v.* State, 75 id. 101, 21 So. 524 (a thirteen-year old negro boy, sworn as defendant on a preliminary examination, without caution; excluded); 1898, Powell *v.* State, — id. —, 23 So. 266 (testimony for the State on a prior trial of a co-defendant, excluded; but testimony on preliminary examination before the magistrate in the present proceedings, *semble*, admissible); 1899, Steele *v.* State, 76 id. 387, 24 So. 910 (one voluntarily offering himself as witness before the coroner and before a committing magistrate; his testimony admitted because given voluntarily; whether otherwise for one examined as an accused, not decided); 1903, McMasters *v.* State, — id. —, 35 So. 302 (voluntary testimony as accused at the first trial, admitted); *Missouri:* 1859, State *v.* Lamb, 28 Mo. 218, 228 (examination as accused before magistrate, after caution; admitted); 1893, State *v.* Young, 119 id. 495, 507, 517, 24 S. W. 1038 (ignorant German boy, under suspicion, summoned as witness before coroner, and examined on oath without warning; excluded); 1894, State *v.* Wisdom, ib. 539, 546, 551, 24 S. W. 1047 (accused under arrest, on oath, before the coroner, but of his own motion; admitted; the fact of oath is immaterial; the test is whether the statement was voluntary); 1895, State *v.* David, 131 id. 380, 33 S. W. 28 (the witness attended the inquest voluntarily and testified without subpœna; admitted); 1896, State *v.* Punshon, 133 id. 44, 34 S. W. 25 (accused before the coroner on oath, after caution, but under a promise that the statements would not be used against him; admitted); 1901, State *v.* Hagan, 164 id. 654, 65 S. W. 249 (testimony before a coroner as witness, apparently held inadmissible); 1903, State *v.* Jones, 171 id. 401, 71 S. W. 680 (confession under oath at the preliminary trial of another person jointly charged, after warning, admitted); *Montana:* 1896, State *v.* O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399 (testimony before coroner, in what capacity does not appear, but without caution; excluded); *Nebraska:* 1878, Clough *v.* State, 7 Nebr. 320, 340 (on oath as a witness before the coroner, and not accused; admitted); *New Hampshire:* 1814, Wood *v.* Weld, Smith N. H. 367 (answers on oath by the defendant to interrogatories put by an administrator in a Court of Probate on a complaint for concealing the intestate's goods, received in an action between the same parties for money had and received, covering the same concealment of goods; notes of Smith, C. J.: "What hardship is it to be obliged to tell the truth? No means used to produce anything but the truth"); 1863, Carr *v.* Griffin, 44 N. H. 510 (deposition irregularly taken; not inadmissible as involuntary); *New York:* see *supra*, at the beginning of the list; *North Carolina:* 1846, State *v.* Broughton, 7 Ired. 96 (examination as witness before grand jury; held inadmissible, if it had involved a confession, as within the spirit of the statutes against imposing oaths on accused persons, "because the statute intended to have the party free to admit or deny his guilt, and the oath deprives him of that freedom"); 1847, State *v.* Cowan, ib. 239 (examination as accused before a magistrate, without oath, after a caution; admitted, as "free and voluntary," though the magistrate warned him that he would be committed unless he accounted for his possession of the stolen property); 1873, State *v.* Patterson, 68 N. C. 292 (examination as accused before magistrate, without oath, but after caution, the caution not being as full as the statute prescribed; admitted); 1893, State *v.* Rogers, 112 id. 874, 876, 17 S. E. 297 (accused on oath at preliminary examination, after warning, admitted; warning need not be in words of statute; shackling of the accused not in itself fatal); 1893, State *v.* De Graff, 113 id. 688, 693, 18 S. E. 507 (accused on oath before magistrate, after warning, admitted); 1897, State *v.* Melton, 120 id. 591, 26 S. E. 933 (accused at preliminary examination, after asking to testify and being cautioned; admitted); 1903, State *v.* Parker, 132 id. 1014, 43 S. E. 830 (examination as accused before the magistrate, under oath contrary to the statute, excluded); 1903, State *v.* Simpson, — id. —, 45 S. E. 567 (examination of a prosecutor on oath as a witness in another trial, after caution, admitted; examination as accused having counsel, on his own behalf before the magistrate, after specific caution, admitted); *Ohio:* 1883, Jackson *v.* State, 39 Oh. St. 37, (as a witness for himself before the magistrate on the charge in question, after being cautioned but insisting on his right to testify; admitted); *Oregon:* Annot. C. 1892, § 1599 (the statement of a defendant before a committing magistrate made according to statute after caution, etc., competent testimony to be laid before the grand jury, and may be given in evidence against the defendant on the trial"); 1896, State *v.* Hatch

is worth while to label in detail the exact variety of principle which a given ruling represents, because a comparison of it with the preceding discussion

29 Or. 309, 44 Pac. 584 (defendant before magistrate, without caution; excluded, because by statute, § 1598, the caution is required); 1897, State *v.* Robinson, 32 id. 43, 48 Pac. 357 (before the grand jury, in what capacity not stated, but voluntary; admitted); 1899, State *v.* Andrews, 35 id. 388, 58 Pac. 765 (statements by an Indian at examination as accused before magistrate without caution, excluded); *Pennsylvania:* 1846, Com. *v.* Harman, 4 Pa. St. 269 (examination upon oath as accused before magistrate, without caution, and under threats and promises; excluded, as "a gross outrage upon the accused"); 1857, Williams *v.* Com., 29 Pa. 102, 105 (examination as witness before coroner, not suspected nor charged; admitted, because "he might have declined to testify," and it thus "was a voluntary statement"); 1890, Com. *v.* Clark, 130 Id. 641, 650, 18 Atl. 988 (examination on oath before magistrate, but not under the statute, after a caution, while under arrest on the charge; the accused said "he was making it of his own free will"; admitted, as a voluntary statement; the fact of the oath being improperly administered was held immaterial); *South Carolina:* 1852, State *v.* Vaigneur, 5 Rich. L. 395, 402 (examination as witness before coroner, not arrested nor suspected, and not cautioned, but arrested after his testimony; admitted, because he might have refused to answer; quoted *ante*, § 843); 1879, State *v.* Branham, 13 S. C. 389 (examination before magistrate as accused, without caution; admitted); 1890, State *v.* Senn, 32 id. 392, 11 S. E. 292 (on oath as a witness before the coroner, not charged with the crime; excluded by two judges to one); 1891, State *v.* Merriman, 34 id. 38, 12 S. E. 619, *semble* (preceding case approved); *Tennessee:* 1875, Beggarly *v.* State, 8 Baxt. 521, 525 (examination before magistrate, after caution; admitted, because he was "not so intimidated as to prevent his acting freely"); *Texas:* C. Cr. P. 1895, § 790 (see quotation *ante*, § 831); 1874, Alston *v.* State, 41 Tex. 40 (examination before magistrate on a charge against another person, not arrested and not cautioned, but knowing herself to be suspected; admitted, because voluntary upon the facts); 1894, Bell *v.* State, 33 Tex. Cr. 163 (former testimony in a civil case, admitted); 1901, Wisdom *v.* State, 42 Id. 579, 61 S. W. 926 ("before the grand jury, after being warned"; admitted; Henderson, J., diss. on another ground); 1902, Grimsinger *v.* State, — id. — , 69 S. W. 583 (testimony before the grand jury, while under arrest, held admissible, following Wisdom *v.* State); 1903, Twiggs *v.* State, — id. — , 75 S. W. 531 (rule of warning, applied); *United States:* 1799, U. S. *v.* Fries, Whart. St. Tr. 482, 535, 595 (accused's confession on examination before magistrate, after caution given, admitted; "whatever objections, then, there may be as to confession in general, it does not apply in this case, because it was voluntarily given"); Rev. St. 1878, § 860 ("No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate in any court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture"; except that this shall not exempt from prosecution for perjury therein); 1878, U. S. *v.* Graff, 14 Blatchf. 381, 385 (examination under oath before a special agent of the Treasury Department, the witness having been notified that he was suspected and having consented to be examined; admitted, on the grounds that (1) mere suspicion or charge of crime is not sufficient to exclude (repudiating McMahon's Case); (2) mere arrest is not sufficient; (3) mere administration of an oath is not sufficient; (4) all three together are not sufficient; quoted *ante*, §§ 843, 845, 847); 1896, Wilson *v.* U. S., 162 U. S. 613, 16 Sup. 895 (accused, without oath, but not warned nor furnished with counsel; admitted; the result being partly based on the distinction that the statements were not confessions of guilt, but exculpatory assertions); 1902, Hardy *v.* U. S., 186 id. 224, 22 Sup. 889 (statements made to a magistrate, before and after a preliminary examination, admitted on the facts); 1902, U. S. *v.* Kimball, C. C., 117 Fed. 156 (testimony of witnesses before a grand jury, the witnesses being "men of affairs," who had consulted counsel, held admissible on the facts); *Utah:* 1886, U. S. *v.* Kirkwood, 5 Utah 124, 127, 13 Pac. 234 (examination as witness before grand jury investigating the charge against him; his appearance was voluntary, and he was cautioned; admitted; "If of his own choice, after being warned, he takes an oath which the law provides that he may take, and makes a confession, we are unable to understand why such a confession is not as voluntary as if made not under oath; it certainly is as reliable, for the obligations of an oath are usually an incentive to speak the truth"); *Vermont:* 1840, Smith *v.* Crane, 12 Vt. 491, 493, per Redfield, J. (witness' statement under oath, admissible); *Virginia:* 1830, Moore *v.* Com., 2 Leigh 702, 704 (examination as accused before magistrate; admitted, because no threats or promises were made); Code 1887, § 3901 (in criminal prosecution, except for perjury or action on penal statute, a statement made "as witness upon a legal examination," unless made when examined as witness in his own behalf, is not admissible against the maker as accused); 1898, Hite *v.* Com., 96 Va. 489, 31 S. E. 895 (voluntary statement to justice, admitted); *Washington:* 1895, State *v.* Hopkins, 13 Wash. 5, 42 Pac. 627 (testimony at a civil trial as then defendant, admitted); 1903, State *v.* Carpenter, — id. — , 73 Pac. 357 (statements at the close of the preliminary examination as accused, admitted); *West Virginia:* Code 1891, c. 152, § 20 (in criminal prosecution, except for perjury, evidence shall not be given against accused of "any statement made by him as a witness upon a legal examination"); 1893, State *v.* Hobbs, 37 W. Va. 812, 818, 17 S. E. 380 (statements to coroner before

of the English cases will show where it stands, — so far as that may be ascertainable. It will be noticed that, through the influence of the Selden theory, mere exculpative statements are often improperly treated as confessions; this fallacy has been already examined (*ante*, § 821).

6. Existence of the Inducement (Subsequent Ending, etc.).

§ 853. **General Principle.** Where an inducement sufficient to exclude any confession obtained by it has been offered, the question often arises whether a confession subsequent in time to the inducement was in fact presumably influenced by it. The exclusion of a confession necessarily assumes (1) that the inducement, if it operated at all, was likely to produce a false confession, and (2) that it did in fact operate upon the mind of the person. The questions arising under the first of these elements — the *nature* of the inducement — having been examined, it remains to notice those arising under the second, — the *existence* and *operation* of the inducement.

It must be remembered that no attempt is ever made to investigate the actual motives of the person confessing, or the part played by the inducement among other motives. The whole theory of inducements rests on the probable effect, not the actual effect, upon the person. If while that inducement is held out a confession is made, no inquiry is ever made into the exact share of influence which the inducement had in evoking confession. Nevertheless, though there is no inquiry into the actuality of the operation of the inducement, and though it is assumed that if it was there it operated, we may often have to inquire whether in fact it was there at all, *i.e.* present to the mind of the person confessing. There are two kinds of cases in which the question may be raised. In the one kind, the inquiry is: Did the inducement, for the person in hand, ever come into existence at all? In the other kind, the inquiry is: Was the inducement, for the person in hand, brought to an end before the confession was made?

§ 854. **Did the Inducement come into Existence at all?** Very few cases of the first sort are presented for decision. The inducement is almost always addressed to the person in question, and thus becomes known to him as a promise or a threat directly bearing on his situation. It was intended to be accepted by him, and no doubt arises as to its existence for him as an inducement. But where the inducement was not directly addressed to the person, but mediately through another person, how are we to determine whether it

swearing witnesses, admitted); *Wisconsin:* 1854, Schoeffler *v.* State, 3 Wis. 823, 839 (examination before coroner as witness, while under suspicion, and without caution; admitted because voluntary; (1) the oath not excluding, (2) the suspicion not excluding, (3) the absence of a caution not excluding, because "ignorance of the law is no excuse"; (4) a possible exception reserved for a witness so circumstanced that his position was "equivalent to an actual arrest"; (5) examination on oath as accused before magistrate, conceded to be inadmissible); 1879, Dickerson *v.* State, 48 Id. 288, 4 N. W. 321 (examination as witness before magistrate on a charge against another person, but while under arrest on suspicion of complicity; admitted, as voluntary); 1880, State *v.* Glass, 50 Id. 218, 221, 6 N. W. 500 (voluntary examination on oath as accused before the magistrate; the privilege to refuse "removes from the testimony so given all element of compulsion"; good opinion by Lyon, J.). Compare the cases cited under the *privilege against self-crimination* (*post*, §§ 2266, 2276, 2281, 2282).

was in fact present as an inducement? This will of course be a pure question of fact for the judge, and no ruling can serve as a precedent; the conduct and language of the person will show whether he had the inducement in mind. The important thing to note, however, is that unless the inducement was held out, directly or indirectly, to the *person in question*, it cannot exclude the confession; in such a case that person has himself chosen to allow it to affect him, and to hope that it will be applied to him by the promisor, and thus he is himself responsible by free choice for its effect, and not the promising person, who cannot be said to have held out any inducement to him.[1]

§ 855. **Was the Inducement brought to an End?** Here five questions may arise. (1) *Must it be shown* clearly that an improper inducement, once offered, was brought to an end? (2) Are there any situations in which this showing will be regarded as impossible, and thus the *inducement, once made, vitiates any future confession* of that person? (3) Can the *same person* who has offered the inducement possibly put an end to it so as to make admissible a confession afterwards made to himself? (4) Are confessions made subsequently, but to a *person different* from the one offering the inducement, to be treated as not made under the inducement, or must it be shown to have been negatived by the second person? (5) *What suffices*, in general, to end an inducement?

(1) The first of these questions has always been answered affirmatively; the general principle is universally conceded that the subsequent ending of an improper inducement *must be shown; i.e.* it is assumed to have continued until the contrary is shown.

(2) There is nothing permanently *irrevocable* in an improper inducement; whether it has been brought to an end is, as all concede, always open to inquiry.

(3) Yet it seems never to have been decided specifically whether the *same person* may thus put an end to an inducement of his own creating. There is no reason why he cannot.

(4) There is on principle no reason for assuming that a promise or a threat made by one person will be treated by the accused as equally to be attributed to some *other person* who has had no share in the other's conduct and shown

[1] The case is that of a person who hears of a *fellow-prisoner* being offered an inducement and conceives the hope that it will be applied to him also; this would not exclude the confession: 1849, R. *v.* Jacobs, 4 Cox Cr. 54. So also a promise to set free if a certain crime is confessed would not exclude the ensuing confession of a *different crime:* 1876, State *v.* Fortner, 43 Ia. 495.

It is obvious that this is an artificial limitation, for if an inducement really calculated to educe a false confession had operated, the confession would be untrustworthy, and it would be unreasonable to trust it simply because the person was not justified in assuming that he would benefit by it. For example, in Shifflet's Case (*ante*, § 840), if the accused really thought to save his mother's life by a false confession, it ought to be immaterial whether the authorities promised it or whether he conceived the hope of his own motion. Nevertheless, so absurd are most of the rulings about improper inducements that any limitation, however artificial and unreasoning, is welcome. But the doctrine has never been applied to those inducements which employ threats of immediate violence to procure a confession, — as where a mob has hung a fellow-prisoner and the confession is made in the fear of similar treatment, or where a fellow-slave has been whipped, and similar treatment seems impending; see the cases *ante*, § 833.

no power or inclination to corroborate his promise or threat. Nevertheless, the inducement may on the facts prove to be in effect the second person's as much as the first one's. It should thus be a question to be determined in each case; no general rule can be laid down.

(5) The circumstauces which make it clear that the *inducement* had been *entirely negatived* must of course vary with the facts of each case. It is, in the words of an English judge, "merely a question of degree." It is impossible to lay down a general rule, and it is useless to employ individual rulings as precedents.[1]

[1] The way in which the circumstances of each case affect the answers to the last two questions is illustrated in the English rulings that follow. A brief outline of their facts has been given, as they are so frequently cited; but it would be unprofitable and it has not been attempted here even to summarize the facts in the American rulings; they illustrate chiefly the last two questions: *England:* 1797, Carty's Trial (Ire.), 26 How St. Tr. 889 (confession to one person after an inducement by another; held a question of fact, on the circumstances, whether it had operated); 1800, R. *v.* Bell, McNally, Evidence, 43 (made to one magistrate, after menaces and promises by another; excluded); 1823, R. *v.* Tyler, 1 C. & P. 129 (hopes by an unauthorized bystander; subsequent confession to a constable; admitted); 1830, R. *v.* Clewes, 4 id. 223 (caution by a coroner after hopes held out by a magistrate; admitted); 1832, R. *v.* Richards, 5 id. 318 (a promise not to arrest; after arrest, the inducement held to have been destroyed by necessary implication; admitted); 1833, R. *v.* Cooper, ib. 535 (a magistrate used improper inducements and next day a confession was made to the turnkey, who had given no caution; excluded); 1834, R. *v.* Howes, 6 id. 404 (a constable promised acquittal, but the magistrate afterwards warned him a confession would do him no good; admitted); 1834, R. *v.* Bryan, Jebb Cr. C. 157 (magistrate's caution sufficient on the facts); 1838, R. *v.* Sherrington, 2 Lew. Cr. C. 123 (inducement by master; constable's caution not sufficient on the facts); 1841, Berigan's Case, 1 Ir. Circ. R. 177, 182 (caution by magistrate deemed sufficient in fact to dispel previous hopes); 1842, R. *v.* Hewett, C. & M. 534 (inducement by prosecutrix, not removed by constable at interview two days later); 1843, R. *v.* Hornbrook, 1 Cox Cr. 54; 1846, R. *v.* Horner, ib. 364 (inducement by a constable, removed by magistrate's caution); 1848, R. *v.* Collier, 3 id. 57 (to the same person, but after a caution intervening; admitted); 1862, R. *v.* Cheverton, 2 F. & F. 833 (admitted on the facts; made to one police officer after improper inducement by another). It should be added that, under the statute of 11 & 12 Vict. (quoted *ante*, § 849), the second caution there provided for is properly treated as in itself and invariably sufficient to end any previous improper inducement and render it immaterial to affect the confession thereafter made to the magistrate: 1850, R. *v.* Sansome, 4 Cox Cr. 206, Alderson, B.; 1850, R. *v.* Bond, ib. 235, 238, Alderson, B.; 1871, R. *v.* Bate, 11 Id. 686, Smith, J. *United States: Ala.:* 1854, Wyatt *v.* State, 25 Ala. 12 (slave); 1858, Bole *v.* State, 32 id. 566 (slave); 1860, Mose *v.* State, 36 id. 211, 226 (slave); 1875, Levison *v.* State, 54 id. 525; 1876, Porter *v.* State, 55 id. 101; 1881, Redd *v.* State, 69 id. 260; *Ark.:* 1901, Williams *v.* State, 69 Ark. 599, 65 S. W. 103; *Colo.:* 1873, Beery *v.* U. S., 2 Colo. 203; *Conn.:* 1846, State *v.* Potter, 18 Conn. 177; 1898, State *v.* Willis, 71 Id. 293, 41 Atl. 820 (confession to second officer unconditionally, after inducement by first, admitted); *Ill.:* 1895, Dunne *v.* Park Com'rs, 159 Ill. 60, 42 N. E. 375 (a written confession to the district attorney under promise of release was not satisfactory to him, and the accused subsequently made another oral one to him; excluded); *Ky.:* 1896, Langhlin *v.* Com., — Ky. —, 37 S. W. 590; 1903, Whitney *v.* Com., — id. —, 74 S. W. 257; *Mass.:* 1871, Com. *v.* Cuffee, 108 Mass. 288 (statements to an officer different from the one making threats or promises are admissible, but the jury must be told to reject them if they think the improper influence had not ceased); 1872, Com. *v.* Cullen, 111 Id. 437 (similar); 1894, Com. *v.* Myers, 160 id. 530, 533, 36 N. E. 481 (that the confession is to the same person is not fatal); *Miss.:* 1844, Peter *v.* State, 4 Sm. & M. 36; 1900, Whitley *v.* State, 78 Miss. 255, 28 So. 852; 1903, McMaster *v.* State, — id. —, 34 So. 156; *Mo.:* 1874, State *v.* Jones, 54 Mo. 479; *Nebr.:* 1903, State *v.* Force, — Nebr. —, 95 N. W. 42; *N. J.:* 1828, State *v.* Guild, 10 N. J. L. 163, 179; 1900, Bullock *v.* State, 65 id. 557, 47 Atl. 62 (total removal of the inducement must be shown); *N. C.:* 1858, State *v.* Gregory, 5 Jones L. 315; 1858, State *v.* Scates, ib. 420; 1872, State *v.* Lowhorne, 66 N. C. 638; 1880, State *v.* Drake, 82 Id. 596; 1893, State *v.* Drake, 113 id. 624, 628, 18 S. E. 166; *Oh.:* 1883, Jackson *v.* State, 39 Oh. St. 37, 40; *Pa.:* 1900, Com. *v.* Sheets, 197 Pa. 69, 46 Atl. 753; *Tenn.:* 1865, McGlothlin *v.* State, 2 Coldw. 223; 1872, Maples *v.* State, 3 Heisk. 408; 1873, State *v.* Frazier, 6 Baxt 540; 1875, Beggarly *v.* State, 8 Id. 520; *Tex.:* 1871, Barnes *v.* State, 36 Tex. 356; *Va.:* 1858, Shiffiet's Case, 14 Gratt. 665; 1870, Thompson's Case, 20 id. 731; 1890, Early's Case, 86 Va. 927, 11 S. E. 795; *Vt.:* 1864, State *v.* Carr, 37 Vt. 191.

7. Confirmation by Subsequent Facts, as curing the Defect.

§ 856. **General Principle.** It has already been noticed (*ante*, § 822) that the fundamental theory upon which confessions become inadmissible is that when made under certain conditions they are untrustworthy as testimonial utterances. A very slight probability of untruth, to be sure, is sufficient to exclude (a probability much less than that which supports other testimonial exclusions), and the tests worked out are often more or less artificial; but this principle underlies the whole body of rules. If now a circumstance appears which indicates that the law's fear of untrustworthiness is unfounded, and counteracts the significance of the improper inducement by demonstrating that after all it exercised no sinister influence, the confession should be adopted. This is the theory of Confirmation by Subsequent Facts, which has been in vogue ever since there has been any doctrine about excluding confessions. That theory is that where, in consequence of a confession otherwise inadmissible, *search is made and facts are discovered which confirm it* in material points, the possible influence which through caution had been attributed to the improper inducement is seen to have been *nil*, and the confession may be accepted without hesitation.

This theory has always been accepted, at least in the abstract:

1780, Mr. *Leach*, Crown Law, 3d ed., I, 301, note: "But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true."[1]

1803, Serjeant *East*, Pleas of the Crown, II, 657: "This [finding of the stolen goods as described], it is said, does away the reason upon which the general rule that confessions so improperly obtained cannot be received in evidence is founded; because the reason being to guard against the possibility of an innocent person being from weakness seduced to accuse himself in hopes of obtaining thereby more favour or for fear of meeting with worse punishment, that reason is done away if such confession be substantiated by an actual finding of the goods accordingly in the place described, which could not probably be known to the party if he were not privy to the felony."

1817, *R.* v. *Garbett*, 2 C. & K. 490; Mr. *Martin*, for the prosecution: "Even in those cases [of improper confessions] the confession of a theft is received if the property be found in consequence"; *Denman*, L. C. J.: "Because it leads to the inference that the party was not accusing himself falsely."

1852, *Withers*, J., in *State* v. *Vaigneur*, 5 Rich. L. 404: "So much of such confession as relates strictly to the fact may be received in evidence, and this is on the principle that so much of the confession is established to be true; and the foundation of the whole doctrine is that the jury ought to hear whatever is true, and are entitled to look for truth through any and every medium that may be calculated to reveal it."

§ 857. **Admission of the Part Confirmed, or of the Whole?** It will be observed that, in Mr. Leach's phrase, "so much of the confession as relates strictly to the fact discovered by it" is to be received; in other words, the confirmation admits the *part confirmed, and that only.* Now this falls some-

[1] Citing R. v. Butcher, MS., 1798.

thing short of the logic of the case; for a confirmation on material points produces ample persuasion of the trustworthiness of the whole. It can hardly be supposed that at certain parts the possible fiction stopped and the truth began, and that by a marvellous coincidence the truthful parts are exactly those which a subsequent search (more or less controlled by chance) happened to confirm. Such a differentiation is purely artificial, and corresponds to no actual mental processes, either of the confessor or of the hearer. If we are to cease distrusting any part, we should cease distrusting all. This logical and common-sense result is accepted by a few Courts, though it is not clear how far they would carry it in a given case.[1] Other Courts follow Mr. Leach's limitation and admit that *part only* to which the confirming facts directly relate;[2] but as in most of these instances the inquiry relates to a larceny, there is little practical difference in the result, since the admission of that part relating to the stealing is the admission of the substantial part of the confession.

§ 858. **Prevailing Doctrine; No Part of the Confession received, but only the fact of Discovery in consequence of Accused's Information.** But the sound result more or less fully accepted by the foregoing Courts (representing a majority in this country) was not that of the English courts. The original practice (while able to produce such clear expositions of the theory as Mr. Leach's and Serjeant East's) stopped short of allowing any part of the confession, as such, to be received. The confession, *i. e.* the expressed avowal of the accused's acts, was entirely excluded;[1] and only this much effect was given indirectly to the underlying principle, namely, it could be shown that certain facts had been discovered by a search made *in consequence of a statement made* (or "something said" or "information given") by the accused. No principle appears ever to have been offered to justify or to explain this distinction; but it became the settled law of England, and was followed without question in some of our own jurisdictions.[2]

[1] 1855, Brister *v.* State, 26 Ala. 128; 1835, State *v.* Brick, 2 Harrlugt. 530; 1867, Warren *v.* State, 29 Tex. 369 (under the Code, quoted *ante*, § 831; but the facts must be relevant to the case in hand); 1867, Selvidge *v.* State, 30 id. 64; 1899, Parker *v.* State, 40 Tex. Cr. 119, 49 S. W. 80 (confession that the deceased was shot with slugs; subseqnent exhumation showed this to be true; confession admitted); 1899, Winfield *v.* State, — id. —, 54 S. W. 584; 1900, Campbell *v.* State, 42 id. 27, 57 S. W. 288; 1902, Johnson *v.* State, — id. —, 71 S. W. 25 (confession admissible when thus tested, even though the statutory warning was omitted); 1903, Whitney *v.* Com., — Ky. —, 74 S. W. 257.

[2] *Ala.:* 1879, Murphy *v.* State, 63 Ala. 4; 1887, Banks *v.* State, 84 id. 431, 4 So. 382; 1889, Lowe *v.* State, 88 id. 8, 7 So. 97; 1895, Gregg *v.* State, 106 id. 44, 17 So. 321 (finding the body of a child confessed to have been killed); 1896, Pressley *v.* State, 106 id. 44, 20 So. 647; *Ark.:* 1886, Yates *v.* State, 47 Ark. 174, 1 S. W. 65; *Ga.:* 1895, Hinkle *v.* State, 94 Ga. 595, 21 S. E. 595 (money); *N. C.:* 1880, State *v.* Drake, 82 N. C. 596 (stolen goods); 1895, State *v.* Winston, 116 id. 990, 21 S. E. 37 (stolen goods); *Pa.:* 1877, Laros *v.* Com., 84 Pa. 209 (concealment of money); *S. C.:* 1852, State *v.* Vaigneur, 5 Rich. L. 404, *semble*; *Tex.:* 1875, Strait *v.* State, 43 Tex. 488 (stolen goods); *Vt.:* 1803, State *v.* Jenkins, 5 Vt. 379 (stolen goods); *W. Va.:* 1869, Fredrick *v.* State, 3 W. Va. 697 (stolen goods).

[1] 1783, Warickshall's Case, 1 Leach, 3d ed., 300 (Nares, J., and Eyre, B); 1784, Mosey's Case, ib., note (all the Judges); 1803, East, Pl. Cr. II, 657; 1804, Peake, Evidence, 14.

[2] *Eng.:* 1784, R. *v.* Mosey, 1 Leach, 3d ed., 301, note (all the Judges); 1803, East, Pl. Cr. II, 657 (after the passage quoted *supra*, he admits that the more common practice is to receive "the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner's having stolen or put them there"); 1822, R. *v.* Jenkins, R. & R. 492 (the accused took the officer to a house as that of his confederate having the property stolen; the property was not found; the fact of

There is however apparently an explanation for it. In the case of a confession of stealing goods and their subsequent discovery as described (almost the only situation over which this question arises), there is just one hypothesis on which the jury may stop short of believing the confession after this confirmation, namely, the accused may know of the stealing and of the place of hiding, but he may still *not* be the thief. Now we may determine to ignore the improbability of the latter consequence, but we cannot ignore the former. That his confession of stealing is true may be hard to avoid, but that he knew where the stolen goods were (and must have been in some way "privy to the felony," in Serjeant East's phrase) is impossible to avoid. We shall admit, then, what as rational beings we are obliged to admit, but we shall stubbornly draw the line there; that seems to be the *rationale* of the above distinction. The result is, that so far as the discovery shows that the person knew where the stolen goods were, we are to hear about it; but we are to hear nothing more. Now, in thus accepting whatever bears on his knowledge, the line becomes hard to draw. There may be several places to draw it. (1) The law may admit merely the fact that the discovery was made, and that it was made in consequence of a statement by that person.[3] Or (2) it may go further and admit the details of the accused's conduct in that he went to the place and pointed out the goods, etc.[4] Or (3) it may go still further and admit the words of his statement describing the property and the place, exhibiting as they do a detailed knowledge on his part, and yet falling short of a confession of the stealing.[5] All these show knowledge and only knowledge. The distinction, then, while it is artificial and against common sense, has at least a certain intelligibility beneath it. But its weakness is well exposed in the following opinion:

1873, *Wells*, J., in *Beery* v. *U. S.*, 2 Colo. 211: "If the exclusion of the confession rests altogether upon the probability that the confession is untrue, as we have seen, then, if the prosecution produce evidence tending to show and sufficient to warrant the jury in finding that it is *true*, it ought to be received, for in such case the reason of the exclusion is done away. All the Courts recognize the propriety of this reasoning, but illogically decline to pursue it to its legitimate results. If one accused of larceny, being put to torture, confess the crime and produce the goods from his own possession or disclose the place

his having pointed out such a house was rejected, because there was in fact no corroboration); 1839, R. *v.* Cain, 1 Cr. & D. 37 (indictment for concealing a birth; the fact of searching for and finding the child, after information by the accused, was admitted); 1840, R. *v.* Gould, 9 C. & P. 364, Tindal, C. J., and Parke, B. (but here with the details of that statement); 1854, R. *v.* Berriman, 6 Cox Cr. 388, Erle, J. (without details); *Can.:* 1886, R. *v.* McCafferty, 25 N. Br. 396, 398 (two judges diss.); 1886, R. *v.* Doyle, 12 Ont. 350, *semble*; *Ga.:* Cr. Code 1895, § 1008 ("any material facts discovered by a confession" are provable, "and the fact of its discovery by reason of such information"); *Miss.:* 1858, Belote *v.* State, 36 Miss. 96, 116 (the Court reserved the question of admitting the words of the confession); 1874, Garrard *v.* State, 50 id. 151 (practically the same reservation); *Nev.:* 1900, State *v.* Simas, 25 Nev. 432, 62 Pac. 242; *Pa.:* 1877, Laros *v.* Com., 84 Pa. 202, 209; *S. C.:* 1854, State *v.* Motley, 7 Rich. L. 337; *Tenn.:* 1853, Deathridge *v.* State, 1 Sneed 80; 1879, Clemons *v.* State, 4 Lea 25; 1865, McGlothlin *v.* State, 2 Coldw. 230; 1871, Rice *v.* State, 3 Heisk. 223; 1872, White *v.* State, ib. 341.

[3] As in R. *v.* Berriman, *supra*. The American cases there cited in the preceding note seem to take this form.

[4] As in R. *v.* Jenkins, *supra*.

[5] As in R. *v.* Gould, *supra*. The following American rulings seem to use this form: 1886, Yates *v.* State, 47 Ark. 173, 1 S. W. 65; 1862, People *v.* Ah Ki, 20 Cal. 179; 1867, People *v.* Hoy Yen, 34 id. 176; 1873, Beery *v.* U. S., 2 Colo. 203; 1878, State *v.* Mortimer, 20 Kan. 97; 1876, State *v.* Garvey, 28 La. An. 925.

of their concealment, and they are afterward found in the place indicated, you may, it is agreed, give in evidence the fact of the finding of the goods conformably to information given by the prisoner; but you may not in the same case, according to the received doctrine, give in evidence the prisoner's statement that he deposited the goods in the place where they were found, or that he stole them. . . . But, I assert, in the case supposed the finding of the goods at the place indicated not only tends to corroborate the declaration of the prisoner that they will be found there, but also his declaration that he stole them and concealed them at that place, if he make this statement. . . . In other words, the received doctrine involves this absurdity, that while, in passing upon the primary question whether the evidence shall be received, the Court notwithstanding the corroborating circumstances shall find the confession probably untrue and therefore exclude it, the jury, considering the same evidence [that the place of concealment was disclosed by him], may find the very fact confessed to be absolutely true."

§ 859. **Discovered Facts themselves always admissible.** It was once contended that the impropriety of the inducement to the confession tainted the facts discovered in consequence of it, and that they also, as well as the confession, should remain inadmissible. Such a doctrine needs only to be stated to expose its equal lack of logic, principle, and expediency. It was fortunately repudiated at the outset in an opinion which leaves nothing to be said:

1783, *Warickshall's Case*, 1 Leach Cr. L., 3d ed., 298; a confession of stealing had been made, and in consequence of it the property was found concealed in the lodgings of the accused; but the confession itself was otherwise inadmissible; "it was contended by her counsel that as the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected," as obtained by a breach of faith; the Court, *Nares*, J., and *Eyre*, B. (after the passage quoted *ante*, § 823): "This principle respecting confessions has no application whatever as to the admission or rejection of *facts*, whether the knowledge of them be obtained in consequence of an extorted confession or whether it arises from any other source; for a *fact*, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be *in other respects* true or false. Facts thus obtained, however, must be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confession as a proof of the fact clearly shows that the fact may be admitted on other evidence; for as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not."[1]

8. Other Principles applied to Confessions.

§ 860. **Burden of Proof; Must the Prosecution show that no improper Inducement existed?** Looking at the general principles of admissibility (*ante*, § 484) and the comparative rarity of untrustworthy confessions, as well as the contingent nature of the dangers supposed to flow from improper inducements, the more practical rule would be to receive confessions without question, unless they are shown to have been improperly induced, — especially since a contrary rule may involve the difficulty of proving a negative.

[1] 1785, R. *v.* Lockhart, 1 Leach Cr. L., 3d ed., 430 (a witness obtained through the confession); 1784, Mosey's Case, ib. 301, note (all the Judges); 1863, Duffy *v.* People, 26 N. Y. 590; 1874, State *v.* Graham, 74 N. C. 648, *semble*; 1839, U. S. *v.* Nott, 1 McL. 502.

On this question five distinguishable attitudes are found represented in the rulings.

(1) The original English rule was that the *prosecution* (offering the confession) *must show* that it was made voluntarily, *i. e.* without any improper inducement from the person receiving the confession; and this rule is accepted in most American jurisdictions.[1]

(2) The English judges occasionally went still further, with a rule that where the accused had been in charge of a person in authority other than the one to whom the confession was made, the prosecution must show the absence of an inducement from the former as well as from the latter.[2]

(3) The view has also found representatives that the prosecution must, not merely in the above circumstances, but in all cases, show the absence of an inducement from any one else and *not merely from the person receiving the confession.*[3] This is an absurd extreme.

(4) A few jurisdictions regard confession as *prima facie admissible*, and require the defendant to show that the alleged improper inducement existed.[4] This is the practical and natural rule; for if there is any reason to object to the confession, no one can know it better than the defendant.

(5) A modern English ruling takes a middle path, and seems to receive the confession unless attacked by evidence of an improper inducement, and then in case of doubt leaves upon the prosecution the burden of convincing the Court of the admissibility.[5]

§ 861. **Judge and Jury; Whether the Confession is Voluntary, is a question for the Judge.** The admissibility of the confession, as affected by the foregoing rules, is a question for the judge, in accordance with the elementary principles defining the functions of judge and jury:[1]

1881, *Hammond*, J., in *U. S.* v. *Stone*, 8 Fed. R. 256 (naming, as the excluding facts, the nature of the threat or promise, and the authority of the person confessed to): "The elements entering into the preliminary inquiry by the judge are [the foregoing]. Both these questions being answered in the affirmative, the evidence is excluded as a matter of

[1] *Eng.:* 1783, Thompson's Case, 1 Leach Cr. L., 3d ed., 328, *semble*, Hotham, B.; 1851, R. *v.* Warringham, 2 Den. Cr. C. 447, Parke, B.; 1893, R. *v.* Thompson, 2 Q. B. 12, 18; *U. S.:* 1866, Miller *v.* State, 40 Ala. 58; 1876, Bonner *v.* State, 55 id. 245; 1898, McAlpine *v.* State, 117 id. 93, 23 So. 130; 1899, Curry *v.* State, 120 id. 366, 25 So. 237 (hnt a confession not made while nnder a charge need not be first shown volnntary); 1899, People *v.* Castro, 125 Cal. 521, 58 Pac. 133 (to a sheriff); 1873, Eberhart *v.* State, 40 Ga. 608 (holding that the State must first show the attendant circnmstances, bnt the statement is admissible *unless* it appears to be not voluntary); 1878, State *v.* Johnson, 30 La. An. 881; 1882, State *v.* Davis, 34 id. 352 (holding that an objection not made at the time is ineffective); 1857, Cain *v.* State, 18 Tex. 390; 1883, Hopt *v.* Utah, 110 U. S. 587, 4 Snp. 202, Harlan, J.; 1870, Thompson's Case, 20 Gratt. 731

[2] 1840, R. *v.* Conrtenay, 2 Cr. & D. 62 (under arrest, after a constable, who was not prodnced, had been with the accnsed; held donbtfnl); 1831, R. *v.* Swatkins, 4 C. & P. 549 (confession to one constable jus[illegible]er an interview with another); 1873, State [illegible]vey, 25 La. An. 193, *semble*. *Contra:* 188[illegible]t *v.* Utah, 110 U. S. 585, 4 Sup. 202.

[3] 1876, State *v.* Garvey, 28 La. An. 925 (that the prosecntion must negative compulsion, not only of B., but of any one else).

[4] 1867, R. *v.* Paakaula, 3 Haw. 30, 34; 1897, Hank *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465 (a written confession, stating it to be made freely, assumed to be voluntary); 1902, State *v.* Grover, 96 Me. 363, 52 Atl. 757; 1878, Com. *v.* Sego, 125 Mass. 213; 1879, Com. *v.* Culver, 126 id. 464; 1874, Rufer *v.* State, 25 Ob. St. 469.

[5] R. *v.* Thompson, 1893, 2 Q. B. 12, 18, Cave, J. ("in case of doubt").

[1] *Ante*, § 12 (admissibility and weight); § 487 (determination of testimonial admissibility); *post*, § 2550 (judge and jury).

law, the judge trying the facts as in other cases of mixed questions of law or
either being answered in the negative, the evidence goes to the jury, and there
try this as they do all the other facts of the case, giving such weight to the con
they see fit. All evidence of confessions does not pass through this ordeal of tri
judge, except to determine whether it belongs to the one class or the other."

1895, *Coleman*, J., in *Burton* v. *State*, 107 Ala. 108, 18 So. 285: "Whether vo
made or not, we hold, is a question of law, to be determined by the Court from
as a condition precedent to their admission. Having been declared competen
missible, they are before the jury for consideration. The jury have no authority
them as incompetent. But the jury are the sole judges of the truth and weig
given confessions, as they are of any other fact. In weighing the confessions,
must take into consideration all the circumstances surrounding them, and und
they were made, including those under which the Court declared, as matter of l
were voluntary. In weighing confessions, the jury necessarily consider those fa
which their admissibility, as having been voluntarily made, depends. While the
power in the jury to reject the confessions, as being incompetent, there is no pow
Court to control the jury in the weight to be given to facts. The jury may, ther
the exercise of their authority, and within their province, determine that the con
are untrue, or not entitled to any weight, upon the grounds that they were not
rily made. The Court passes upon the facts merely for the purpose of determini
competency and admissibility. The jury pass upon the same facts, and in con
with other facts, if there are other facts, in determining whether the confessions
and entitled to any, and how much, weight. The Court and jury each have a well
and separate province. It follows that, although the jury may come to the con
that the confessions were not voluntary, yet if, from extrinsic evidence, or fro
character and the circumstances, the jury are satisfied that they are true, the jury
not upon them. The statement in the opinion of the case of Goodwin v. State, th
the 'duty' of the jury to discard and reject the confessions altogether, if they are
ion that the confessions were not voluntarily made, although they may believe the
true, is herein modified in so far as it conflicts with the opinion in the presen
Charge 67 requested by defendant is not full enough. The jury consider whether
sions were voluntary, in passing upon their weight, but the jury is not authorized
termine their admissibility. The charge was calculated to mislead. Charge
properly refused, as invading the province of the jury. It required the jury to rej
confessions absolutely, if, in their opinion, they were not voluntarily made. It wa
duty to consider them, and their province to give them such weight as they saw pro

This orthodox principle is well recognized in the majority of jurisdict
But in comparatively recent times the heresy of leaving the question
jury has made rapid strides. To say that it is a question for the jury
mean one of two things. It may mean that the confession goes in
case to the jury to accept or to reject or to give such weight as the
chooses; this practically abolishes all the foregoing limitations, and
be in this aspect a desirable rule. But it may and commonly does

[2] *Ala.*: 1876, Bonner *v.* State, 55 Ala. 246; 1881, Young *v.* State, 68 id. 578; 1881, Redd *v.* State, 69 id. 260; 1895, Stone *v.* State, 105 id. 60, 17 So. 114; 1895, Burton *v.* State, 107 Ala. 108, 18 So. 285 (quoted *supra*); 1900, Brown *v.* State, 124 id 76, 27 So. 250; 1901, Huffman *v.* State, 130 id. 89, 30 So. 394; 1902, McKinney *v.* State, 134 id. 134, 32 So. 726; *Fla.*: 1897, Holland *v.* State, 39 Fla. 178, 22 So. 298; *Ky.*: 1897, Dugan *v.* Com., 102 Ky. 241, 43 S. W. 418; *Mass.*: 1830, Com. *v.* Knapp, 10 Pick. 495; Com. *v.* Culver, 126 Mass. 464; *Mo.*: Hawkins *v.* State, 7 Mo. 192; 1876, S Duncan, 64 id. 265; 1898, State *v.* McKenz id. 40, 45 S. W. 1117; *Oh.*: 1874, Rufer *v.* 25 Oh. St. 469; *Pa.*: 1857, Fife *v.* Com., 437; *S. C.*: 1852, State *v.* Vaigneur, 5 Ri 400; 1856, State *v.* Gossett, 9 id. 435; 1857, Cain *v.* State, 18 Tex. 390; *Va.*: Smith's Case, 10 Gratt. 737.

that the jury may be allowed to measure it by the foregoing legal tests, and to reject it as a judge would if the tests are not fulfilled. This is decidedly improper; first, because it violates the fixed principle (*ante*, §§ 12, 487) that all questions of admissibility are questions of law for the judge only; secondly, because, in particular, the confession-rules are artificial, based on average probabilities or possibilities only, and do not attempt to measure the ultimate value of a given confession, and the tribunal which is to weigh all evidence finally ought not to be artificially hampered by them; thirdly, because the jury is not familiar enough with them to attempt to employ them. Nevertheless, many Courts to-day hold that, after the judge has applied the rules and admitted the confession, the jury are to apply them again, and by that test may reject it.[3] This unpractical doctrine fails to appreciate the elementary canon of admissibility, and in that aspect its judicial extension is a discouraging circumstance.

In determining admissibility, (1) the *judge must hear the defendant's evidence* (including evidence from cross-examination of the prosecution's witnesses) upon the issue of voluntariness;[4] although under the heterodox rule this could logically be dispensed with;[5] (2) the *jury*, during the hearing of this evidence, *may be withdrawn*,[6] as is proper during all proof and arguments upon questions of admissibility (*post*, § 1808); (3) but, when a confession is ruled to be admissible, the same evidence and *all other circumstances affecting the weight of the confession* may be introduced for the jury's ultimate consideration.[7]

[3] *Ga.:* 1902, Price *v.* State, 114 Ga. 855, 40 S. E. 1015; *Ia.:* 1901, State *v.* Storms, 113 Ia. 385, 85 N. W. 610 (if the Court is in doubt); *Mass.:* 1894, Com. *v.* Burroughs, 162 Mass. 513, 39 N. E. 184 (where the judge upon a conflict of evidence feels unable to decide); 1897, Com. *v.* Bond, 170 id. 41, 48 N. E. 756; 1903, Com. *v.* Antaya, — id. —, 68 N. E. 331 (and they may be left to decide what part, if any, was made after the improper inducement); *Miss.:* 1874, Garrard *v.* State, 50 Miss. 152; *Mo.:* 1903, State *v.* Jones, 171 Mo. 401, 71 S. W. 680 (confession held to be properly submitted to the jury to find); *Mont.:* 1903, State *v.* Tighe, 27 Mont. 327, 71 Pac. 3; *Oh.:* 1896, Burdge *v.* State, 53 Oh. 512, 42 N. E. 594 (if the Court is in doubt); *N. J.:* 1900, Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62; *N. Y.:* 1900, People *v.* Zigouras, 163 N. Y. 250, 57 N. E. 465 ("It was the defendant's right to have it submitted to the jury whether the statement was a voluntary one"); 1900, People *v.* Meyer, — id. —, 56 N. E. 758; 1903, People *v.* White, — id. —, 68 N. E. 630; *Pa.:* 1899, Com. *v.* Epps, 193 Pa. 512, 44 Atl. 570 (after Court's ruling on admissibility, if there is a contradicting evidence, question of voluntariness is to be left to the jury, who are to reject if not voluntary); *S. D.:* 1902, State *v.* Vincent, — S. D. —, 91 N. W. 347; 1898, Hamlin *v.* State, 39 Tex. Cr. 579, 47 S. W. 656; 1896, Wilson *v.* U. S., 162 U. S. 613, 16 Sup. 895. *Undecided:* 1902, State *v.* Young, 67 N. J. L. 223, 51 Atl. 939 (question expressly left undecided, in spite of *obiter dicta* in prior rulings). Compare the similar heresy for *dying declarations* (*post*, § 1451).

[4] 1879, Com. *v.* Culver, 126 Mass. 464; 1890, People *v.* Fox, 121 N. Y. 449, 24 N. E. 923 (written confession; the judge's rejection of the defendant's evidence until the defendant's own case was introduced, under a promise to strike out the confession if then found to be inadmissible, held erroneous).

[5] 1893, Brady *v.* U. S., 1 D. C. App. 246, 248 (trial judge held to have had the discretion, after hearing evidence, to admit the confession without receiving the defendant's own testimony to prove the improper inducement); 1893, Hardy *v.* U. S., 3 id. 35 (preceding case approved; here the trial Court had refused to allow further questioning of a police-witness as involving confusion of issues); 1868, Com. *v.* Morrell, 99 Mass. 542; 1899, Com. *v.* Epps, 193 Pa. 512, 44 Atl. 570; 1902, State *v.* Haworth, 24 Utah 398, 68 Pac. 155 (defendant not allowed to cross-examine; but here the facts desired to be examined on would not of themselves have excluded the confession).

[6] 1902, State *v.* Gruff, 68 N. J. L. 287, 53 Atl. 88; 1900, Kirk *v.* Terr., 10 Okl. 46, 60 Pac. 797 (as a preferable practice).

[7] 1881, Young *v.* State, 68 Ala. 578; 1881, Redd *v.* State, 69 id. 260; 1900, Kirk *v.* Terr., 10 Okl. 46, 60 Pac. 797 (if held admissible, the jury may hear the circumstances of confession, "not for the purpose of passing on its competency, but in order to determine the weight and credibility").

§ 862. **Discretion of the Trial Judge.** No plain tendency has appeared, i this department of the law, to leave anything to the final determination c the trial judge (*ante*, § 16). This is a policy worthy to be favored, but in few instances only have the Courts of appeal really carried out their nomina adherence to it by refusing to review the trial Court's determination.[1]

§ 863. **Other Principles applicable to Confessions (Proving all the Part Reduction to Writing by a Magistrate, Confessions of Third Persons and Co Conspirators, Sufficiency for Conviction when Uncorroborated in Homicide Bigamy, and Divorce).** The foregoing rules are all that depend upon th general principle of Testimonial Qualifications as applicable to confessions But, as with all evidential material, other principles not peculiar to confession occasionally come into play. (1) How far *all parts of the confession* may b or must be used involves the general principle of Completeness (*post*, §§ 2097 2115). (2) How far *mere silence* when charged, or *other conduct not employing words*, amounts to a confession, involves a general principle of Admissions (*post*, § 1071). (3) When a confession is *reduced to writing before a magistrate*, the question arises whether the written report of the magistrate is to be the exclusive testimonial proof of the confession (*post*, §§ 1326, 1349). (4) In the same situation, the proof of the *execution of the writing* is often provided for by a statutory method, as in the case of many other writings, and involves the principles of Authentication (*post*, §§ 1667, 2164). (5) Why the *confession of a third person* is not admissible as a Declaration against Interest, under the exception to the Hearsay Rule, is discussed under the Hearsay Rule (*post*, § 1476). The *confession of a co-conspirator* or *co-defendant* is receivable, if at all, under the general principle of Admissions (*post*, §§ 1076, 1079). (6) Certain kinds of confessions are sometimes held not *sufficient for conviction without corroboration*, — in particular, in *criminal cases* generally (*post*, § 2070), in proof of the *corpus delicti* (*post*, § 2073), in *bigamy* (*post*, § 2086), and in *divorce for adultery* (*post*, § 2067).

9. Status of the Doctrine of Confessions.

§ 865. **Explanation of Sentimental Excesses in the Law of Confessions.** That absurdities have disfigured the law of the admissibility of confessions,

[1] *Ark.:* 1873, Runnells *v.* State, 28 Ark. 121; 1897, Williams *v.* State, 63 id. 527, 39 S. W. 709; *Colo.:* 1899, Fincher *v.* People, 26 Colo. 169, 56 Pac. 902 ("to some extent"); *Conn.:* 1898, State *v.* Willis, 71 Conn. 293, 41 Atl. 820; 1900, State *v.* Cross, 72 Id. 722, 46 Atl. 148 (the trial Court's determination is final as to the facts, and perhaps also to a further extent); *D. C.:* 1893, Hardy *v.* U. S., 3 D. C. App. 35, 46; 1895, Travers *v.* U. S., 6 id. 450, 459; *Fla.:* 1897, Holland *v.* State, 39 Fla. 178, 22 So. 298 (the trial Court's discretion controls in finding the facts, but not as to the rule applicable); *Ill.:* 1895, Bartley *v.* People, 156 Ill. 234, 40 N. E. 831; *Ia.:* 1901, State *v.* Storms, 113 Ia. 385, 85 N. W. 610; *La.:* 1902, State *v.* Edwards, 106 La. 674, 31 So. 308; *Me.:* 1902, State *v.* Grover, 96 Me. 363, 52 Atl. 757; *N. J.:* 1898, Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408; *N. C.:* 1869, State *v.* Davis, 63 N. C. 580; 1880, State *v.* Vann, 82 id. 632 (whether hope or fear existed is a question of fact for the trial court to decide; but what constitutes an excluding hope or fear is a question of law, on which the decision below is not final); 1900, State *v.* Page, 127 id. 512, 37 S. E. 66; *Pa.:* 1857, Fife *v.* Com., 29 Pa. 437 (trial Court's discretion will be reviewed only in an extreme case); *S. C.:* 1895, State *v.* Derrick, 44 S. C. 344, 22 S. E. 338; 1897, State *v.* Cannon, 49 id. 550, 27 S. E. 526; *Vt.:* 1895, State *v.* Gorham, 67 Vt. 365, 31 Atl. 845 (trial Court's ruling is final, if evidence is conflicting); *Wis.:* 1897, Connors *v.* State, 95 Wis. 77, 69 N. W. 981.

that the excessive caution in listening to them has given an appearance of sentimental irrationality to the law and has obstructed the administration of justice, cannot be denied, and has often been conceded by judges. "I confess," said Baron Parke,[1] "that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have been too frequently sacrificed at the shrine of mercy"; and Mr. J. Erle added: "I am much inclined to agree with Mr. Pitt Taylor; and, according to my judgment, in many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of guilt."

In the middle of the 1800s the perversion of normal reasoning had gone so far that counsel were able to advance seriously the argument that "the law assumes that a man may falsely accuse himself upon the slightest inducement."[2] No limits were fixed to the apparent influence of this attitude; and it even came to be urged that an accused person should be dissuaded from confessing, so that this notion had to be rebuked from the bench.[3] The spirit that thus tended to prevail in the law has been properly described "as a weak sentimentalism towards criminals,"[4] and it assuredly had unfortunate results. But no policy and no institution is without its reasons and its explanation; and before we can understand how to deal with this spirit in our law and what to expect of it in the future, we must ask what the explanation of its existence was.

(1) A first reason certainly was the character of person usually brought before the judges on charges of crime. In all countries having the social cleavages and the feudal survivals of England in the 1700s and early 1800s, the offenders against the criminal law come in the far greater proportion from what are known as the "lower classes." This was especially the case (down to the era of the Reform Bill, when nearly two hundred capital crimes were swept from the statute-book) at the time when the great multitude of grave offences involved merely those petty forms of property-crime which may be the natural result of only hopeless poverty and not necessarily of an abandoned life or a professional profligacy. Furthermore, the same social

[1] R. *v.* Baldry, 2 Den. Cr. C. 445; so also Kelly, C. B., in 12 Cox Cr. 180: "The cases including confessions on the ground of unlawful inducement have gone too far for the protection of guilt"; Hayes, J., in 15 Ir. C. L. 85: "an exhibition of morbid sensibility towards criminals." So also, Phillips, Evidence, 10th ed., 1852, p. 543; McLean, J., in U. S. *v.* Nott, 1 McLean 501; Wells, J., in Beery *v.* U. S., 2 Colo. 211, 213; Hammond, D. J., in U. S. *v.* Stone, 8 Fed. R. 255, 256, 262; Harlan, J., in Hopt *v.* Utah, 110 U. S. 584, 4 Sup. 202; Lee, J., in Smith's Case, 10 Gratt. 739; Moncure, J., in Shiflet's Case, 14 id. 659.

[2] Mr. Mills, *arguendo*, in R. *v.* Baldry, *supra*.

[3] Gurney, B., in R. *v.* Green, 5 C. & P. 312 (1832): "He ought not to be dissuaded from making a perfectly voluntary confession, because that is shutting up one of the sources of justice."

The absurd artificiality developed under this judicial attitude is illustrated by the instance of a British constable, who when asked at the trial whether the prisoner had not made a statement, replied, "No; he was beginning to do so; but *I knew my duty better*, and I prevented him" (Forsyth, Hortensius the Advocate, 3d ed., 292).

[4] Paxson, C. J., in Com. *v.* Clark, 130 Pa. 650, 18 Atl. 988 (1890), uttering a rebuke similar to that of Gurney, B.

cleavage is also accompanied, in all countries, with a subordination, a sub-
mission, half-respectful and half-stupid, on the part of the "lower classes"
towards those in authority, — an attitude especially marked, though not
solely found, among the peasantry and towards the squires and other landed
superiors on whose will hangs the tenant's fortune. The situation of such a
peasant charged by his landlord with poaching and urged to confess, the
situation of the maid urged and threatened by her mistress to confess a petty
theft, involves a mental condition to which we may well hesitate to apply
the test of a rational principle. We may believe that rationally a false con-
fession is not to be apprehended from the normal person under certain paltry
inducements or meaningless threats; but we have here perhaps a person not
to be tested by a normal or rational standard.[5] It is useless to attempt to
measure *a priori* what allowance should be made; and we do not find that
the law ever did make any exact allowance explicitly based on such a con-
sideration. But if we put ourselves in the place of those judges (at the end
of the 1700s, when a motive of decency and humanity in the criminal law
began to make itself effective), we may easily understand that, as they found
before them in the ordinary case persons of the above sort, one of the first
suggestions of these new notions would be to refuse great weight to the
utterances of such persons made under the influence of their social superior.
This, then, was certainly one of the reasons why, in one way or another, on
principle or without principle, many judges came to set themselves against
the use of confessions, and to exclude them on pretexts which were in them-
selves trifling and irrational but in fact represented a fixed judicial sen-
ment. It is not easy for us, to-day, and in most parts of this country,
realize this attitude; but it had a very real influence.

(2) Another reason is found in the absence at that time of the right
appeal in criminal cases, and the practical creation of the law of confessi
by isolated judges at Nisi Prius without consultation and on independ
responsibility. In order to solve any doubts which might arise in his m
the Nisi Prius judge was obliged to consult casually-accessible colleague
to reserve the question for a meeting of all the judges; and the natural
inclination to such a delay, to becoming the source of trouble to his pr
sional associates, and to bringing perhaps upon himself the reflectio
having had unnecessary doubts, made this course always a disagreeable
and a last resort.[6] The result was that the judges commonly preferre
eliminate the questionable evidence altogether, to try the case on wha
other evidence could be mustered, and to solve all questions that were
arguable (whether the judge himself had doubts or not) in favor o
accused.[7] As the exact distinction was not always preserved between

[5] "Most persons accused of crime are poor, stupid, and helpless" (Stephen, History of the Criminal Law, I, 442).

[6] There are twenty reported Nisi Prius rul-
ings on confessions for every full-bench deci-
sion. Nor did the creation of the Court for Crown Cases (in 1865) much improve
for it contained less than half (five) of
judges (so that its authority was not
sentative), and the reservations of quest
it do not seem to have been more freqn

[7] Said Baron Parke, in 1852, com

ing a confession because it was clearly inadmissible and rejecting it merely because a possible objection existed, the law of confessions came to be built up out of rulings which were strictly not precedents at all, but merely expressions of the cautious attitude of a careful Nisi Prius judge, and not fitted to be taken as precedents. That this was their true place may be seen by a comparison of the Nisi Prius rulings with the full-bench decisions; for the leading judgments of the full bench — in such cases as Gibney's, Moore's, Wheater's, Scott's, Baldry's — are precisely those in which rational principles are most clearly supported and the narrow hesitation of the Nisi Prius rulings repudiated and their tendency from time to time checked. To the natural influence, then, of the badly-constructed system of judicial organization we must attribute much of the apparent irrationality that disfigured the law of confessions.

(3) A third reason, and one amply sufficient in itself to account for the narrowness of confession rulings, and for much besides, was the extraordinary handicap placed upon the accused at common law in the shape of his inability either to testify for himself or to have counsel to defend him. The right to have the aid of counsel was not granted as a general one until 1836;[8] and although as early as 1750 it had become customary to allow counsel to cross-examine for the accused and to do everything but address the jury,[9] this custom was by no means unbroken and fell far short in efficiency of being equivalent to a right. The competency to testify on his own behalf was for long withheld from the accused person;[10] and the unsworn address to the jury, which he was allowed to make, was very different from the right to testify in his own behalf, and was probably not of great consequence as furnishing testimonial material.[11] In view of the apparent unfairness of a system which practically told the accused person, "You cannot be trusted to speak here or elsewhere in your own behalf, but we shall use against you whatever you may have said," it was entirely natural that the judges should employ the only makeweight which existed for mitigating this unfairness and restoring the balance, namely, the doctrine of confessions. They tried to restore the balance by excluding confessions upon every available pretext. There was a definite doctrine which legitimately applied to confessions and might rationally exclude them in certain rare cases, and on this doctrine the judges inclined to lay violent hands, and to use it as a weapon for that general exclusion which commended itself to their sense of fairness. In itself, however, it had very narrow limits, utterly insufficient to accomplish the purposes which fairness dictated; and the result was that, while the purpose was a good one, it overbore the principle, which was thus wrested beyond its legitimate use. Hence an irreconcilable conflict between the normal and

on the state of the law, in R. *v.* Baldry (2 Den. Cr. C. 436): "We all know how it occurred. Every judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner, and took the merciful view of it."

[8] 6 & 7 Wm. IV. c. 114, § 1.

[9] Stephen, History of the Criminal Law, I, 425.

[10] Until 1898, St. 61 & 62 Vict. c. 36.

[11] Compare § 579, *ante*.

accepted theory or principle for excluding confessions, and the abnormal use practically made of it for ulterior purposes. Damage was done to legal principle; but fortunately not damage so serious that it cannot be cured, now that the conditions leading to it have in part at least disappeared.

In view of these considerations, it is easy to see why the law of confessions came to develop what seem to us, in another country and in other times, absurd and dangerous sentimentalities, and why there is no necessity whatever for our retention of the distortions and irrational excrescences which, as handed down to us in the English rulings of the early 1800s, have served to obscure the correct and entirely rational principle of exclusion applicable to confessions. No one of these three considerations above pointed out applies to our conditions. The spirit of the community, whether we choose to call it by the name of liberty or by the name of anarchy (and it has certainly the evil as well as the good savor), is a spirit of fearlessness of superior social and political power; of restiveness and struggling against bonds, not of orderly submission; of bold (if superficial) readiness to claim "rights," not of ignorant surrender to demands; and, in general, of keen appreciation of the possibilities of evading justice, rather than of cowed obedience to any authority however oppressive. Furthermore, the power of revision of confession-law on appeal to the higher tribunal is universal. Finally, the accused person may everywhere testify for himself,[12] and has the fullest assistance of a bar not remarkable for its scrupulousness in criminal cases. All those circumstances are thus wanting which explain and excuse the unnatural development of the law of confessions in the hands of the English judges of a past generation. There is for us no such explanation and no such excuse. The perpetuation here of the Nisi Prius doctrines of the first part of the 1800s is now nothing but sentimentalism, a false tenderness to criminals, and an unnecessary deviation from principle.[13] The orthodox principle, that a confession may be excluded when the inducement was such as probably to produce an untrue confession, is amply fair and cautious, and should be applied in its original and pure form.

§ 866. **Value of Confessions; Explanation of Conflicting Opinions.** But, it may be asked, even after eliminating all these explanatory considerations of an extrinsic nature, are there not, after all, inherent weaknesses in confessions, even under the most favorable social and legal conditions, which should induce their exclusion on grounds of caution? If not, how do we account for the repeated utterances of the best authorities pointing out the dangerousness of accepting confessions and urging great caution? Does not this opinion count for something?

It is true that there exists a decided conflict of opinion, at first sight inexplicable, as to the evidential value of confessions. On the one hand, we find writers and judges of wide experience affirming the slender value of confes-

[12] Except in Georgia, where the accused makes a "statement."

[13] The most notable example, of course, of this unreasonable perpetuation, in present times of these inappropriate doctrines, is the Federal case of U. S. v. Bram, 168 U. S. 532, 18 Sup. 183.

sions and urging the greatest caution in their use;[1] some of these declarations, however, being merely the reproduction of a classical predecessor's language.[2] On the other hand, we find persons of equal authority offering, in equally positive and unqualified language, that confessions are the highest kind of evidence.[3] There must be some key to this conflict. How plausible each side of the controversy is, and how forcible the impression its influence may produce for the moment, appears when we see the same judge — Sir William Scott (Lord Stowell) — in almost the same year expressing opinions diametrically opposed.[4]

Of course a partial explanation is — as Mr. Joy has observed[5] — that confessions vary in value according to the circumstances in which they are made. Some are clearly trustworthy; others are worthless. This will account for the hasty indignation or the favorable comment which a judge might express in general terms when he had in mind only the concrete instance of weak or strong evidence that happened to be before him. But it hardly explains the constant use of general terms of satisfaction or disapproval by the representatives of both views.

The real explanation lies in the mixture of good and bad qualities likely to be present in all attempts to use confessions. We must separate (1) the confession as a proved fact, from (2) the process of proving an alleged confession. (1) Now, assuming the making of a confession to be a completely proved fact — its authenticity beyond question and conceded, — then it is certainly true that we have before us the highest sort of evidence. The confession of a crime is usually as much against a man's permanent interests as anything well can be; and, in Mr. Starkie's phrase, no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a per-

[1] *E. g.* Foster, High Treason, c. III. sect. 8 ("Hasty confessions, made to persons having no authority to examine, are the weakest and most suspicious of all evidence"); Burn, Justice of the Peace, I, 566, quoted in Joy, Confessions ("Magistrates cannot be too cautious in receiving confessions, as they very rarely flow from a conscientious desire to offer reparation for the injury committed, but are generally made either under an implied or express promise of favour, if not extorted by threat or through fear"; Chetwynd, Supplement to above: "This kind of evidence I have always found, in the words of that truly learned judge, Sir Michael Foster, to be the most suspicious of all testimony"); Sir William Scott, in Williams *v.* Williams, 1 Hagg. Cons. 304 ("The court must remember that confession is a species of evidence which, though not inadmissible, is regarded with great distrust. There is a canon particularly pointed against them, which says, *Nec partium confessioni fides habeatur*").

[2] Blackstone, Commentaries, IV, 357 ("The weakest and most suspicious of all testimony"); but here he is evidently copying Foster, *supra*.

[3] Grose, J., in Lambe's Case, 2 Leach, 3d ed., 629 ("the highest and most satisfactory proof of guilt"); Sir Wm. Scott, in 3 Hagg. Cons. 315 ("I need not observe that confession generally ranks high, or I should say, highest in the scale of evidence. *Habemus confitentem reum* is demonstration; unless indirect motives can be assigned to it"); Starkie, Evidence, I, 52 ("One of the surest proofs of guilt"); Nott, J., in Columbia *v.* Harrison, 2 Mills Const. 215 ("A voluntary confession is in most cases the highest evidence that can be given" Swift, Evidence, 133 ("the most conclusive evidence)"; so, also, Putnam, J., in 9 Wendell, 507; Rothrock, C. J., in 48 Ia. 384; Harlan, J., in Hopt *v.* Utah, 110 U. S. 584, 4 Sup. 202.

[4] In Johnson *v.* People, 197 Ill. 48, 64 N. E. 288 (1902), is an example of the confusion which arises from an indiscriminate mingling of these two generalities in instructions to a jury.

[5] Joy, Confessions, 109: "It appears inaccurate to give all kinds of confessions the same confidence or to treat them alike with distrust. Like all other kinds of admissions, they admit of all shades of certainty and probability, from a solemn estoppel by matter of record to the slightest presumption arising from the most casual, suspicious, or doubtful expressions."

suasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance. (2) But how do we get to believe in the fact of a confession having been made? Always and necessarily by somebody's testimony. And what is our experience of that sort of testimony on which we are asked to believe that a confession was made? A varying and sometimes discouraging experience. Paid informers, treacherous associates, angry victims, and overzealous officers of the law, — these are the persons through whom an alleged confession is often, perhaps oftenest, presented; and it is at this stage that our suspicions are aroused and our caution stimulated. Suppose a judge is offered from the lips of a single witness a detailed and complete avowal of guilt, attributed to the accused, and suppose the accused denies absolutely the fact of confession; suppose the judge now to think to himself, "Here is a confession which, if authentic, would make this man's guilt clear beyond doubt. But do you expect us to take it as authentic, against his denial, on the word of this man alone, who has such and such strong motives for inventing it or for misinterpreting what was said? Must we not listen to him with the greatest doubt and suspicion?" Then, would it not be natural for the judge, in commenting on such evidence to the jury, to say: "What you have heard here from this man about a supposed confession is to be taken with caution; for that is the weakest and most suspicious kind of evidence?" This is a natural and proper attitude, and it is precisely that of the authorities above quoted. They were thinking, not of the *confession as evidence* of the act, but of the *testimony to the alleged confession*. Take, for instance, the phrase above of Mr. Justice Foster's, which has been quoted again and again (with and without acknowledgment) in the records of the profession for a century and a half, in the mangled and misleading form that "confessions are the weakest and most suspicious of all evidence." Why did he so regard them? Not because of their own evidential weakness; but for the following reasons:

> "Proof may be too easily procured; words are often misreported — whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to misconstruction; and withal, this evidence is not in the ordinary course of things to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted."

In other words, the suspicion that he has found it necessary to entertain is directed entirely to the work of proving an alleged confession. This is the reason above suggested as the real cause of the distrust; we are ready enough to trust the confession *if there really was one*, but we are going to doubt and suspect for a long time before we accept it as a fact. Mr. J. Erle touched the kernel of the subject when he said:[6] "I am of opinion that *when a confession is well proved*, it is the best evidence that can be produced." Furthermore, it is precisely because the confession, if a fact, is so weighty and produces such a close approach to complete persuasion, that we are in-

[6] 1852, R. *v.* Baldry, 2 Den. Cr. C. 446.

clined to hesitate and demand the most satisfactory testimony before we accept that as a fact which, if believed, will practically render other evidence superfluous.

This seems to be the simple explanation of the apparently contradictory views; if we distinguish the confession as evidence from the evidence of the confession, we find that few have ever really doubted that the first is in itself of the highest value, while the second is always to be suspected. The moral is that the proper course lies, not in distorting the legitimate principles of confession law, but in exacting more, in the way of quantity and quality, of the testimony by which alleged confessions are presented.[7]

§ 867. **Future of the Doctrine.** In conclusion, two considerations not often kept in mind must be emphasized.

In the first place, the only real danger and weakness in a confession — the danger of a false statement induced by an important advantage — is of a slender character, and the cases of that sort are of the rarest occurrence. No trustworthy figures of authenticated instances exist; but they are concededly few.[1] Now if it were a question of receiving the confession as conclusive, *i. e.* as equivalent to a plea of guilty, we might well prefer to be extremely cautious (as under the early traditional practice already described), and let the trial take its ordinary course. But as it is a mere matter of giving or not giving one more piece of evidence to the jury, and as the accused has ample opportunity of offering any facts affecting the weight of the confession, it is entirely unnecessary to bar out all confessions whatever by broad and artificial tests, merely on account of this slender, impalpable, and rare risk of falsity. To employ an anomalous occurrence as the basis of indiscriminate exclusion is not reasonable.[2] It is simply, in the language of

[7] Whether an *instruction should be given* on the value of confessions is considered in the following cases: 1903, Burnett *v.* People, — Ill. —, 68 N. E. 505; 1903, Horn *v.* State, — Wyo. —, 73 Pac. 705.

[1] The following are the most notable in English and American annals: 1660, Perry's Case, 14 How. St. Tr. 1312 (one of two brothers confessed that he, his brother, and his mother had murdered his master; they were executed, but two years afterward, the master returned home, and explained that he had been kidnapped and sold to the Turks; it was never understood why Perry falsely confessed); 1666, Hubert's Trial, 6 How. St. Tr. 807, 821 (Hubert voluntarily confessed that he had set the great fire in London Sept. 2, 1666, "yet neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch weary of his life and chose to part with it in this way"); 1810 (?), Wood's Case, Life of Sir S. Romilly, 3d ed., II, 42 (court-martial for mutiny; here the accused "had applied to another man to write a defence for him, and he had read it, thinking it calculated to excite compassion"; the man was executed before the falsity was discovered); 1833, Sharpe's Case, Annual Register, Chronicle, p. 74 (murder in Chelsea; one Sharpe gave himself up for it, confessing his complicity; shortly afterwards he retracted it; "I made my confession through jealousy; some time ago three of my children died, and it preyed on my mind; and one night I gave myself up for murdering them, when it was all false; and on another occasion I gave myself up for a robbery"; this was confirmed; and as no other evidence of his connection with the murder was discovered, he was discharged from custody); 1819, Boorn's Case, Vt., Greenleaf, Evid., 15th ed., § 214 note, 10 North Amer. Review 418 (confession of murder, made at the advice of friends, in the face of damaging evidence, and in the hope of a recommendation to mercy). For additional instances, mostly from foreign annals, see the citations of the following writers: Chitty, Criminal Law, I, 85; Wharton, Criminal Law, 315; Best, Evidence, §§ 559–572; Monck, "Confessions of the Innocent" (not accessible at this writing). Compare also what is said *post*, § 2070, in examining the rule for corroboration.

[2] 1847, Ruffin, C. J., in State *v.* Cowan, 7 Ired. 246: "It is not sufficient to impugn the principle established by these cases that there have been instances in which men have charged themselves with offences which they did not commit or which had never been perpetrated; for that argument would destroy all confidence

Chief Justice Paxson already quoted, an exhibition of sentimentalism toward criminals.

Again, the notion that confessions should be guarded against and discouraged is not a benefit to the innocent, but a detriment. A full statement of the accused person's explanations, made at the earliest moment, is often the best means for him of securing a speedy vindication.[3] The circumstances of suspicion may often be disposed of by a simple explanation, so clear and convincing that immediate release follows as a matter of course; while the clues which the innocent accused may be able to furnish will be equally serviceable in securing that evidence against the real culprit which a delay may frequently render unavailable. When the officers of justice find confessions indiscriminately discouraged and rebuked by the judge, the effect of an enforced silence on the part of accused persons is likely on the whole to be to the disadvantage of the in[illegible].

The policy of the future, then, should be to receive all well-proved confessions in evidence, and to leave them to the jury, subject to all discrediting circumstances, to receive such weight as may seem proper. The advent of a fourth stage in the history of confession-law may be thought to be indicated in the repeated protests, already quoted, against the excesses of the bygone practice.[4] The tendency they represent shows as yet a promise, rather than an achievement, of reform. But it has helped to provide the opportunity, whenever the inclination shall come; for it has emphasized, particularly in some of the later American opinions, the correct theory of exclusion; and this orthodox theory, so much departed from in the last century, is amply sufficient to readjust beneficially, without any change of legal principles, the practice of the future.

in evidence, circumstantial or direct, since by each human tribunals have been or may be misled. But the administration of justice cannot depend upon such nice possibilities. It may safely, and indeed must necessarily, 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. Innocence or weakness is therefore sufficiently guarded by the rule which excludes a confession unduly obtained by hope or fear." So also Scott, J., in State *v.* Lamb, 28 Mo. 231; Story, J., in U. S. *v.* Gibert, 2 Sumn. 19, 28.

[3] Compare Pollock, C. B., and Erle, J., in R. *v.* Baldry, 2 Den. Cr. C. 443, 445.

[4] Lord Campbell, C. J., in R. *v.* Baldry, 2 Den. Cr. C. 457 (1852): "If the matter were *res integra*, I should perhaps have doubted whether it might not have been advisable to allow the confession [in general] to be given in evidence, and let the jury give what weight to it they pleased."

This attitude, based on the above considerations, has expressly been taken, since the above passage was first printed, by Emery, J., in State *v.* Grover (1902), 96 Me. 363, 52 Atl. 757.

END OF VOLUME I.