A TREATISE

ON THE

ANGLO-AMERICAN SYSTEM OF

EVIDENCE

IN

TRIALS AT COMMON LAW

INCLUDING

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

BY

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IN FIVE VOLUMES

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THE following Tables show the dates of latest sources examined, and the editions of legislative sources used.

TABLE I

Table I shows in Col. 2 the code or compilation of legislation used.

Col. 3 shows the latest year-laws (session laws) examined.

Col. 4 shows the latest official report of judicial decisions cited. For *England* and *Ireland*, only the official reports were examined. For *Canada*, only the unofficial reports (Dominion Law Reports) were examined; as no table of parallel citations is available, the official reports are not cited in this book for cases reported since 1912 (the date of beginning of the D. L. R.); hence, the official report here shown in Col. 4 is merely the latest volume that had appeared at the time of going to press; indicating that the citations of cases in this work will include at least the cases down to those official numbers of volumes, as well as a few later ones. For the *United States*, only the unofficial reports (National Reporter System) were examined; except for Alaska, Hawaii, Philippine Islands, and Porto Rico, and for District of Columbia down to 1919, — these not being included in the National Reporter System. Parallel citations of the official reports are invariably given, so far as these had appeared at the date of going to press. The official report shown in Col. 4 is merely the latest volume cited; the cases examined come down to a later date in the unofficial citations (Table II).

Col. 5 shows, by jurisdictions, the latest unofficial report examined and cited, — for Canada, the Dominion Law Reports; for the United States, the National Reporter System.

The decisions of the Appellate (intermediate) Courts which exist in some States have been cited only on interesting matters for which there is scanty authority; partly because their rulings are not final (except in Texas and in Oklahoma, for criminal cases), and partly because in some jurisdictions they are expressly made not binding as precedents. The rulings of Federal District Courts have also been left unnoticed to a similar extent.

LIST OF LATEST SOURCES EXAMINED

TABLE I. JUDICIAL AND LEGISLATIVE SOURCES USED

Jurisdiction	Statutes		Reported Decisions	
	Revision or Code Edition Used	Latest Annual Laws Examined	Latest Official Report Cited	Latest Unofficial Report Examined
England:	Rules of Court, ed. 1922	1921	1922 K. B. 1 1922 Ch. 1 1922 P. to June 1 1922 A. C. to June 1	
Ireland:		1921	1921 L. R. Ire.	
Canada:				
Dominion	Revised Statutes of C. 1906	1921	62 Can. Sup.	65 D. L. R.
Alberta	[see Northwest Territories] Rules of Court 1914	1921	16 Alta.	65 D. L. R.
British Columbia	Revised Statutes 1911 Supreme Court Rules 1912	1921	28 B. C.	65 D. L. R.
Manitoba	Revised Statutes 1913 Rules of Court 1913	1921	30 Man.	65 D. L. R.
New Brunswick	Consolidated Statutes 1903 Rules of Court 1909	1921	47 N. B.	65 D. L. R.
Newfoundland	Consolidated Statutes 1916	1921	9 Newf.	
Northwest Terr.[1]	Consolidated Ordinances 1898	1904	7 N. W. Terr.	
Nova Scotia	Revised Statutes 1900 Rules of the Supreme Court 1919	1921	53 N. S.	65 D. L. R.
Ontario	Revised Statutes 1914 Rules of Practice and Procedure 1913	1921	49 Ont.	65 D. L. R.
Prince Edward Island[2]		1920	2 P. E. I.	65 D. L. R.
Saskatchewan	Revised Statutes 1920	1921–2	14 Sask.	65 D. L. R.
Yukon	Consolidated Ordinances 1914	1920		65 D. L. R.
United States:				
Federal	Revised Statutes 1878 U. S. Code 1919[3]	1922 to June 1	258 U. S.	42 Sup. 279 Fed. 10 Porto Rico Fed. 1 Emergency.
Alabama	Code 1907	1919	206 Ala. 17 Ala. App.	91 So. 91 So.

[1] The legislation and decisions of this region are now continued by those of Alberta, Saskatchewan, and Yukon.

[2] There being no Compilation here, and the Evidence Act of 1889 having codified most of the rules, no search was made for statutes prior to 1889, except that those of 1873 and 1867, dealing with Evidence, were collated.

[3] At the time of going to press, still pending in the Senate; passed in the House of Representatives, May 16, 1921.

LIST OF LATEST SOURCES EXAMINED

TABLE I. JUDICIAL AND LEGISLATIVE SOURCES USED—*Continued*

Jurisdiction	Statutes		Reported Decisions	
	Revision or Code Edition Used	Latest Annual Laws Examined	Latest Official Report Cited	Latest Unofficial Report Examined
Alaska	Compiled Laws 1913	1921	4 Alaska	279 Fed.
Arizona	Revised Statutes 1913	1921	22 Ariz.	206 Pac.
Arkansas	Digest of the Statutes 1919	1921	150 Ark.	240 S. W.
California	Codes 1872		187 Cal.	206 Pac.
	General Laws ed. 1915	1921	45 Cal. App.	206 Pac.
Colorado	Compiled Laws 1921	1921	70 Colo.	206 Pac.
Columbia (Dist.)	Code of Law 1919	1921	50 D. C. App.	279 Fed.
Connecticut	General Statutes, Revision of 1918	1921	96 Conn.	116 Atl.
Delaware	Revised Statutes 1915	1921	11 Del. Ch.	116 Atl.
			7 Boyce	116 Atl.
Florida	Revised General Statutes 1919	1921	82 Fla.	91 So.
Georgia	Code 1910	1921	152 Ga.	111 S. E.
	Park's Annotated Code ed. 1918		27 Ga. App.	111 S. E.
Hawaii	Revised Laws 1915	1921	25 Haw.	
Idaho	Compiled Statutes 1919	1921	34 Ida.	206 Pac.
Illinois	Revised Statutes 1874	1921	303 Ill.	135 N. E.
Indiana	Burns' Annotated Statutes 1914	1921	189 Ind.	135 N. E.
			125 Ind. App.	135 N. E.
Iowa	Code 1897	1921	192 Ia.	187 N. W.
	Compiled Code 1919			
Kansas	General Statutes 1915	1921	110 Kan.	206 Pac.
Kentucky	Civil and Criminal Codes, Carroll's 3d ed., 1900	1922	194 Ky.	240 S. W.
	Kentucky Statutes, Carroll's 5th ed., 1915, 1918			
Louisiana	Revised Civil Code, ed. Marr, 1920	1922	150 La.	91 So.
	Code of Practice, ed. Garland and Wolff, 1900			
	Annotated Revision of the Statutes, ed. Marr, 1915			
Maine	Revised Statutes 1916	1921	120 Me.	116 Atl.
Maryland	Annotated Code of Public Civil Laws, ed. Bagby, 1911, 1914	1922	139 Md.	116 Atl.
Massachusetts	General Laws 1921	1921	237 Mass.	135 N. E.
Michigan	Compiled Laws 1915	1921	216 Mich.	187 N. W.
Minnesota	General Statutes 1913	1921	150 Minn.	187 N. W.
Mississippi	Annotated Code 1906, ed. Hemingway, 1917	1920	126 Miss.	91 So.
Missouri	Revised Statutes 1919	1921	288 Mo.	240 S. W.
			207 Mo. App.	240 S. W.
Montana	Revised Codes 1921	1921	60 Mont.	206 Pac.
Nebraska	Revised Statutes 1921	1921	106 Nebr.	187 N. W.
Nevada	Revised Laws 1912	1921	44 Nev.	206 Pac.
New Hampshire	Public Statutes 1901	1921	79 N. H.	116 Atl.
New Jersey	Compiled Statutes 1910	1921	95 N. J. L.	116 Atl.
			92 N. J. Eq.	116 Atl.

TABLE I. JUDICIAL AND LEGISLATIVE SOURCES USED—*Continued*

Jurisdiction	Statutes		Reported Decisions	
	Revision or Code Edition Used	Latest Annual Laws Examined	Latest Official Report Cited	Latest Unofficial Report Examined
New Mexico	N. M. Statutes Annotated 1915	1921	26 N. M.	206 Pac.
New York	Consolidated Laws 1909	1922	233 N. Y.	135 N. E.
	Code of Criminal Procedure 1881		196 App. Div.	194 N. Y. Suppl.
	Civil Practice Act 1920			
	Surrogate Court Act 1920			
	Justice Court Act 1920			
	City Court Act 1920			
	Court of Claims Act 1920			
	N. Y. City Municipal Court Code 1920			
North Carolina	Consolidated Statutes 1919	1921	182 N. C.	111 S. E.
North Dakota	Compiled Laws 1913	1921	45 N. D.	187 N. W.
Ohio	General Code Annotated 1921	1921	100 Oh.	135 N. E.
Oklahoma	Compiled Statutes 1921	1921	82 Okl.	206 Pac.
			16 Okl. Cr.	206 Pac.
Oregon	Or. Laws 1920	1921	102 Or.	206 Pac.
Pennsylvania	Digest of Statute Law 1920	1921	272 Pa.	116 Atl.
Philippine Isl.	Code of Civil Procedure, ed. 1920	1920 to Apr. 6 No. 2931 vol. 15	40 P. I.	
	Administrative Code 1917			
	Civil Code, ed. 1918			
	Penal Code, Penal Laws, and General Order 58, ed. 1911			
Porto Rico	Revised Statutes and Codes 1911	1921	28 P. R.	
Rhode Island	General Laws, Revision of 1909	1921	43 R. I.	116 Atl.
South Carolina	Code of Laws 1922	1921	116 S. C.	111 S. E.
South Dakota	Revised Code 1919	1921	44 S. D.	187 N. W.
Tennessee	Shannon's Code 1917	1921	145 Tenn.	240 S. W.
Texas	Revised Civil Statutes 1911	1921	110 Tex.	240 S. W.
	Revised Criminal Statutes 1911, Vernon ed. 1919		90 Tex. Cr.	240 S. W.
Utah	Compiled Laws 1917	1921	57 Utah	206 Pac.
Vermont	General Laws 1917	1921	93 Vt.	116 Atl.
Virginia	Code 1919	1922	130 Va.	111 S. E.
Washington	Remington & Ballinger's Annotated Codes and Statutes 1909	1921	117 Wash.	206 Pac.
West Virginia	Hogg's W. Va. Code Annotated 1914	1921	89 W. Va.	111 S. E.
Wisconsin	Statutes 1919	1921	174 Wis.	187 N. W.
Wyoming	Compiled Statutes Annotated 1920	1921	27 Wyo.	206 Pac.

LIST OF LATEST SOURCES EXAMINED

TABLE II

The printing of this treatise began in August, 1922, and occupied many months; 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 examining later sources appearing since its publication. The point of stoppage taken was therefore that volume of the several National Reporters which ended nearest to July 1, 1922; this ranged (dating by the weekly issues) between May, 1922, and August, 1922. The latest volumes of Reporters consulted were as follows:

TABLE II. LATEST NATIONAL REPORTERS EXAMINED

	VOLUME
Atlantic Reporter	116
Federal Reporter	279
New York Supplement[1]	194
Northeastern Reporter	135
Northwestern Reporter	187
Pacific Reporter	206
Southern Reporter	91
Southeastern Reporter	111
Southwestern Reporter	240
Supreme Court Reporter	42

[1] This Series was not examined prior to Vol. 178.

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	Civil Practice Act 1920			
	Surrogate Court Act 1920			
	Justice Court Act 1920			
	City Court Act 1920			
	Court of Claims Act 1920			
	N. Y. City Municipal Court Code 1920			
North Carolina	Consolidated Statutes 1919	1921	182 N. C.	111 S. E.
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Philippine Isl.	Code of Civil Procedure, ed. 1920	1920 to Apr. 6 No. 2931 vol. 15	40 P. I.	
	Administrative Code 1917			
	Civil Code, ed. 1918			
	Penal Code, Penal Laws, and General Order 58, ed. 1911			
Porto Rico	Revised Statutes and Codes 1911	1921	28 P. R.	
Rhode Island	General Laws, Revision of 1909	1921	43 R. I.	116 Atl.
South Carolina	Code of Laws 1922	1921	116 S. C.	111 S. E.
South Dakota	Revised Code 1919	1921	44 S. D.	187 N. W.
Tennessee	Shannon's Code 1917	1921	145 Tenn.	240 S. W.
Texas	Revised Civil Statutes 1911	1921	110 Tex.	240 S. W.
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Virginia	Code 1919	1922	130 Va.	111 S. E.
Washington	Remington & Ballinger's Annotated Codes and Statutes 1909	1921	117 Wash.	206 Pac.
West Virginia	Hogg's W. Va. Code Annotated 1914	1921	89 W. Va.	111 S. E.
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Southwestern Reporter	240
Supreme Court Reporter	42

[1] This Series was not examined prior to Vol. 178.

LIST OF CHANGED SECTION NUMBERS IN THIS EDITION

(Where the number given for the Second Edition is the same as that for the First, but is followed by others or by italic letters, the material in the original section has been expanded into several sections.)

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TITLE III. PROPHYLACTIC RULES (§§ 1813–1863)

(I) *Oath*

(II) *Perjury Penalty*

(III) *Publicity*

(IV) *Sequestering Witnesses*

(V) *Discovery Before Trial*

* For Tabular analysis of Book I, Part I, see Tables 3, 4, prefixed to Vol. I.
For tabular analysis of Part II, remainder, and Part III, see Table 6, prefixed to Vols. IV and V.

EVIDENCE

IN

TRIALS AT COMMON LAW

BOOK I (*continued*): ADMISSIBILITY

PART I (*continued*): RELEVANCY

TITLE II (*continued*): TESTIMONIAL EVIDENCE

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS

TOPIC V: TESTIMONIAL RECOLLECTION

CHAPTER XXVI.

§ 725. **General Principle.** The second of the necessary elements (*ante*, § 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 of 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 (so far as can be expected) 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.[1]

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, depends on 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 correspond to Observation, so far as can be expected. 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.

§ 725. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 239–243.

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 any 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 long been satisfied that we are too hide-bound and restricted in our practice with regard to the admissibility of evidence. It is high time that the practice should be discouraged."

1857, LEGRAND, C. J., in *Wilson* v. *Carson*, 10 Md. 75: "Opinion is belief, and nothing 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 fact may mean personal knowledge of the fact as it rests in the memory, though the remembrance is so faint that it cannot be characterized as an undoubting recollection. . . . In this sense the impression of a witness is evidence, however indistinct and unreliable the recollection may be. No line can be drawn for the exclusion of any record left upon the memory as the impress of personal knowledge, because of the dimness of the inscription."

§ 727. Same: Quality of Observation, distinguished: "Impression", "Belief", 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", "belief", and the like, may mean, not a faintness of recollection, but a weakness in the original impressions of observation; for example, "I was some distance away, but the person *seemed* to me to be A."; "I am not certain, but I *thought*, *supposed*, *judged*, at the time, that the hour was about four o'clock." Such expressions indicate a deficiency in the quality of the Observation, not of the Recollection; and this sense of the phrases is equally common with the preceding one. It will not do to accept mere guesses as testimony. Nevertheless, it is clear that the law cannot and does not require absolute certainty of Observation. A mere deficiency in the quality of Observation is of itself no good reason for excluding whatever results the observer did actually obtain. Some men's doubts are better than other men's certainties; and there is here nothing to do but leave to the trial judge to determine when the "impression" is so trivial and faint as to be not worth receiving:

1824, Mr. *Thomas Starkie*, Evidence, 153: "It has been said that [1] a witness must not be examined in chief as to his 'belief' or 'persuasion', but only as to his knowledge of the fact, since judgment must be given 'secundum allegata et probata.' . . . As far as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation, this position is correct, — as where a man believes a fact to be true merely because he has heard it said to be so. But with respect to persuasion or belief as founded on facts within the actual knowledge of the witness, the position is not true. On questions of identity of persons and of handwriting, it is every day's practice for witnesses to swear that they 'believe' the person to be the same or the handwriting that of a particular individual although they will not swear positively."

§ 728. **Same: State of the Law in the Various Jurisdictions.** In examining the authorities, then, it must be remembered that the result depends on the sense of the words used. (1) So far as the terms "impression", "belief", and the like, signify a *total lack of original observation*, a mere conjecture based 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).[1] However, in

§ 727. [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 witness to say that he thinks or persuadeth himself; and that for two reasons: 1st, Because he is to give an absolute sentence, and therefore ought to have more sure ground than thinking").

§ 728. [1] In the following cases the testimony was *admitted*, except as otherwise noted:

ENGLAND: 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).

UNITED STATES: *Federal:* 1822, Bouldin *v.* Massie's Heirs, 7 Wheat. 153 ("appeared to be"); 1824, Riggs *v.* Tayloe, 9 Wheat. 483, 486 ("impression" as to destroying a document);
Alabama: 1846, Hill *v.* Hill's Adm'r, 9 Ala. 792 (belief); 1878, Turner *v.* McFee, 61 Ala. 470, *semble* (belief); 1886, Bass Furnace Co. *v.* Glasscock, 82 Ala. 456, 2 So. 315 ("best judgment"); 1893, Shrimpton *v.* Brice, 102 Ala. 655, 666, 15 So. 452 (that handwriting "resembled B.'s"); 1897, Thornton *v.* State, 113 Ala. 43, 21 So. 356 (identification "in his best opinion"); 1913, Trailer *v.* State, 8 Ala. App. 217, 63 So. 37 ("It seemed like a knife", allowed);
California: 1859, McGarrity *v.* Byington, 12 Cal. 426, 430 ("to the best of his recollection", by an attesting witness); 1882, People *v.* Rolfe, 61 Ala. 540 (identity); 1899, People *v.* Soap, 127 Ala. 408, 59 Pac. 771 ("presume", as a statement of best recollection);
Connecticut: 1831, Lyon *v.* Lyman, 9 Conn. 60 (certainty not required);
Florida: 1905, Jordan *v.* State, 50 Fla. 94, 39 So. 155 (identity of a person "to the best of my judgment");
Georgia: 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 Ga. 620 ("best of belief", admitted); 1890, Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 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 Ga. 272 (1866); but compare the same judge's exclusion of "I think" in Morris *v.* Stokes, 21 Ga. 570 (1857), and the similar case of Parker *v.* Chambers, 24 Ga. 524 (1858);
Illinois: 1840, Gorham *v.* Peyton, 3 Ill. 364 (that the assignor does not recollect making certain admissions); 1865, Fash *v.* Blake, 38 Ill. 364, 368 (belief as to handwriting); 1919, Abbott *v.* Church, 288 Ill. 91, 123 N. E. 306 ("when a witness prefaces his testimony with 'I think', he is to be taken as testifying to what he remembers");
Indiana: 1847, Rhode *v.* Louthain, 8 Blackf. 413 ("best of recollection");

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

Iowa: 1871, State *v.* Porter, 34 Ia. 133 ("suppose", "took it", "concluded", "inferred"); 1881, State *v.* Lucas, 57 Ia. 502, 10 N. W. 868 ("can't positively identify, but am satisfied in my own mind"): 1894, State *v.* Farrington, 90 Ia. 673, 677 (that handwriting "looked some like his"; undecided); 1895, State *v.* Seymore, 94 Ia. 699, 63 N. W. 663 ("I don't know positive, but am satisfied in my own mind"; "best judgment"); 1905, State *v.* Richards, 126 Ia. 497, 102 N. W. 439 (identity of a person): 1920, State *v.* Christ, 189 Ia. 474, 177 N. W. 54 (homicide; to a witness to identity of defendant, "You are not certain, are you? You only think so, isn't that it?" "Well, I don't remember, but I think it was": allowed);
Louisiana: 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);
Maine: 1840, Lewis *v.* Freeman, 17 Me. 260 (the witness "was confident", but "would not swear" that it was so); 1852, Hopkins *v.* Megquire, 35 Me. 80 ("strong impression", "could not swear"); 1864, Humphries *v.* Parker, 52 Me. 504 ("impression", "I think");
Maryland: 1856, Baltimore & O. R. Co. *v.* Thompson, 10 Md. 84 ("suppose"); 1862, Fulton *v.* McCracken, 18 Md. 542 ("think");
Massachusetts: 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);
Michigan: 1895, Johnston *v.* Ins. Co., 106 Mich. 96, 64 N. W. 5 (one who knew "very near" what the value was);
Missouri: 1880, Ferris *v.* Thaw, 72 Mo. 450 ("thought"); 1881, Greenwell *v.* Crow, 73 Mo. 640 (would not swear to it); 1882, State *v.* Bable, 76 Mo. 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 Mo. 288 ("looked like"); 1895, State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110 (handwriting; "opinion", enough); 1897, State *v.* Dale, 141 Mo. 284, 42 S. W. 722 (that goods said to be stolen "resembled" those stolen); 1899, State *v.* Guild, 149 Mo. 381, 50 S. W. 909 (that stolen goods "looked like" those found); 1900, State *v.* Weber, 156 Mo. 249, 56 S. W. 729 ("belief" as to identity of stolen mare); State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737 (same, as to identity of person);
Montana: 1910, State *v.* Vanella, 40 Mont. 326, 106 Pac. 364 (identity inferred from voice):
New Hampshire: 1858, Burnham *v.* Ayer, 36 N. H. 185 (belief sufficient; mere impression excluded); 1860, Nute *v.* Nute, 41 N. H. 68 ("I think");
New York: 1877, Carrington *v.* Ward, 71 N. Y. 364 ("impression"); 1878, Blake *v.* People, 73 N. Y. 586 ("think"; "best of my knowledge");
North Carolina: 1839, Beverly *v.* Williams, 4 Dev. & B. 237 (would not swear positively); 1851, McRae *v.* Morrison, 13 Ired. 48 ("impression"); 1906, Gilliland *v.* Board, 141 N. C. 482, 54 S. E. 413 ("I think he always voted", admitted);
Ohio: 1854, Crowell *v.* Bank, 3 Oh. St. 411 ("impression");
Oregon: 1889, State *v.* Chee Gong, 17 Or. 638, 21 Pac. 882, *semble* (belief);
Pennsylvania: 1820, Sigfried *v.* Levan, 6 S. & R. 313 ("will not swear, but it is like his writing"); 1823, Farmer's Bank *v.* Whitehill, 10 Pa. 112 (belief); 1854, 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 Pa. 59 ("impression"); 1868, Dodge *v.* Bache, 57 Pa. 424 ("belief"); 1886, Pittsburgh V. & C. R. Co. *v.* Vance, 115 Pa. 332, 8 Atl. 764 (less than a certainty in an opinion as to value);
Tennessee: 1874, Woodward *v.* State, 4 Baxt. 324 ("think");
Texas: 1866, Swinney *v.* Booth, 28 Tex. 116 ("impression"); 1913, Heflin *v.* Eastern R. Co., — Tex. Civ. App. —, 159 S. W. 499 ("impression" as to a man's conduct when hurt);
Vermont: 1888, State *v.* Ward, 61 Vt. 187, 17 Atl. 483 ("impression", "I think so"); 1895, State *v.* Bradley, 67 Vt. 465, 32 Atl. 240 ("thought"); 1910, Herrick *v.* Holland, 83 Vt. 502, 77 Atl. 6 ("judgment" and "idea" admitted);
Virginia: 1893, Combs *v.* Com., 90 Va. 88, 91, 17 S. E. 881 (identification of stolen corn by opinion and belief);
Washington: 1912, State *v.* Elliott, 68 Wash. 603, 123 Pac. 1089 (identity of a person; "best recollection", admitted);
Wisconsin: 1876, Erd *v.* R. Co., 41 Wis. 68 (opinion on value).

In the following cases the testimony was held *insufficient: Federal:* 1843, Wilcocks *v.* Phillips' Ex'rs, 1 Wall. Jr. 49, 53 ("so far as I know"); *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., 94 Ia. 423, 62 N. W. 851 (suppose); *Ky.* 1833,

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. All that can be done, therefore, is to note the different principles involved, and to leave the authorities to be interpreted in that light.

§ 729. **Same: Other Senses of " Impression", etc., to which Other Principles are Applicable.** Three distinct senses have now been noted in which the terms " impression ", " belief ", or the like, may call for the application of different principles of Testimonial Qualifications: (1) That the witness is merely conjecturing or *guessing*, never having had any real observation of the facts; this evidence being inadmissible; (2) That the witness, though once possessed of some acquaintance with the facts, is more or less uncertain, by reason of (*a*) weakness of the *original impression* of observation, or (*b*) faintness of the *present recollection;* this evidence being generally acceptable.

But there must also be noted at least three other senses, perhaps four, involving still other principles, two of them genuinely principles of evidence:

(3) In testifying to a *conversation* or to *prior testimony* of another witness, the witness may attempt to give, not the detailed words or phrases, but his " *understanding* " or " best of recollection " as to the general purport or effect of what was said. Here the Court may insist on applying the principle of 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

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.* Wilson, 33 Md. 144 ("impression"); *N. Y.* 1860, Sanchez *v.* People, 22 N. Y. 154 (an expert's "doubt"); *Pa.* 1839, Carmalt *v.* Post, 8 Watts 411 (impression excluded, with qualifications); 1897, Fullam *v.* Rose, 181 Pa. 138, 37 Atl. 197 (that a signature "looks like" O.'s excluded); *Vt.* 1873, Guyette *v.* Bolton, 46 Vt. 232 (insufficient recollection).

Add also the cases cited *ante*, § 658.

L. C. Eldon, that inveterate distinguisher of the undistinguishable, tried once (in 1803, Eagleton *v.* Kingston, 8 Ves. 475) to distinguish between "*think*" and "*believe*": "I doubt the authority of the case of Garrels *v.* Alexander [4 Esp. 37], where if a man will not take upon him to say he believes it to be the writing of a person, but says he thinks it like [the writing], Lord Kenyon is made to say that is evidence. I doubt that. Formerly that would not have been deemed evidence." But modern practice, as seen in the above citations, has accepted Lord Kenyon's opinion.

It was once argued (on the authority of Adams *v.* Canon, cited *supra*, § 727) that a "belief" could not be received because no indictment for *perjury* was possible on such a form of statement. The conclusion does not follow from the premises; but at any rate it was early settled that a false statement of the sort would constitute a perjury: 1773, Miller's Case, 3 Wils. 428, *semble;* 1782, Lord Mansfield in Folkes *v.* Chadd, 3 Doug. 159, *semble;* 1784, R. *v.* Pedley, 1 Leach Cr. C. 325; 1847, R. *v.* Schlesinger, 10 Q. B. 670. But even in modern times the heresy is still not unknown: 1871, Maulsby, J., in Hayes *v.* Wells, 34 Md. 518: "Liability of a witness to the penalties of perjury, if he corruptly misstate facts, is one of the securities for truth which ought not to be removed, unless on necessity; and in proportion as opinion is admitted, that liability is removed."

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]

II. Past Recollection Recorded

§ 734. **General Principle.** In dealing with the two sorts of Recollection, Past and Present, it is desirable to consider first the former.

The situation is one in which the witness is devoid of a present recollection, and therefore desires to use a past recollection. This he proposes to do by

§ 730. [1] The authorities are for convenience collected *ante*, §§ 665, 416.
[2] *Post*, §§ 942, 973, 994, 1259.

employing some record of this past recollection and adopting it as his present statement. Thus, he says: "I made a correct memorandum of this conversation while my recollection was fresh; I now remember nothing, but can offer my prior recollection as embodied in the memorandum"; or, "I remember nothing of sending the notice, but I know from this entry that I must have sent it." The chief difficulties here to be met have no direct dependence on the principles of Recollection. It must appear that the witness had a good recollection when it was recorded, but that is all that is required by the canons of Recollection. It is as to the nature of the record and the means of making it now available that certain restrictions must be applied, and this is a matter of the accuracy and identity of the record, *i.e.* on principle, of the Narration or Communication of his evidence. The cardinal principle of Narration (*post*, § 765) will be seen to be this, that it must correspond to the Recollection; the story told by the witness, whether orally or in writing, must represent his knowledge and recollection. Whether or not the record must be by the witness himself, whether it may be a copy of the original, whether when used it is itself evidence, and the like, — these seem in strictness to involve the element of Narration or Communication. Nevertheless, for convenience of exposition, the use of such records must be treated under a single outline, the detailed rules being examined in sequence; and it will be enough to remember that there are after all two underlying general principles involved.

Broadly, then, we have to provide, in using a record of past recollection, for certain practical tests of the *accuracy* and *identity* of the record; furthermore, we must require some guarantee that the past recollection thus recorded was a *satisfactory one*, *e.g.* that it was recorded at or about the time of the events. A question may also arise whether one sort of recollection is to be preferred to the other. It will also be found that historically there has been much confusion, great delay, and possibly an occasional refusal to allow the use of a past recollection at all. These topics may best be taken up in the reverse order, as follows: (*a*) History of the use of past recollection; (*b*) Preference for a present recollection; (*c*) Tests to secure the adequacy of the past recollection and the accuracy and identity of the record of it.

a. *History of the Use of Past Recollection Recorded.*

§ 735. **History in England and the United States.** The use of a paper or other memorandum as an aid to recollection was recognized at an early 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 favor, 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. 654; the witness had gone about with a rent-collector and made entries in a book; the original was not 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 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

§ 735. [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 How. St. Tr. 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, 6 How. St. Tr. 1501, 1504 (witness testifies to the defendant's remarks, from a paper in which he "writ them down presently"); 1679, Knox's Trial, 7 How. St. Tr. 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, 7 How. St. Tr. 1043, 1047 (similar); 1684, Lady Ivy's Trial, 10 How. St. Tr. 555, 582 (notes allowed to be used to refresh memory, but not otherwise); 1696, Friend's Trial, 13 How. St. Tr. 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").

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 revivification 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:

[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, 2 A. & E. 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.

In *Ontario*, the Supreme Court has had to correct a trial judge: 1911, Fleming *v.* Toronto R. Co., 25 Ont. L. R. 317.

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."[4]

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 *Shore* 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 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, SELDON, J., in *Halsey* v. *Sinsebaugh*, 15 N. Y. 485: "The efforts of memory are seldom equal to the task of recalling after any considerable laspe 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."

[4] Three other corroborative rulings were made at an early date: 1818, Columbia v. Harrison, 2 Mills Const. Ct. S. C. 213; 1823, Nicholson v. Withers, 2 McC. S. C. 429; 1834, Cleverly v. McCullough, 2 Hill S. C. 445.

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 a 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." [5]

1919, GAYNOR, J., in *State* v. *Easter*, 185 Ia. 476, 170 N. W. 748: "One called to testify as to the existence or nonexistence or a fact may be able to recall the fact by an effort of memory, and state the fact truthfully as of memory. He is then competent to testify as to what the fact actually is. He may be called as a witness to testify to a material fact, and, when called, may not be able to recall the fact; yet his memory may be refreshed by an examination of some instruments submitted to him. If then he is able to speak to the existence of the fact — independent of the memorandum — as of his own personal recollection, he is competent, and is permitted to testify. This is because his mind, by the refreshing influence of the memorandum, is able to recall its existence, and he then speaks to its existence as of his independent recollection, refreshed by the instruments. This does not make the instrument competent to speak, but, by its operation on the mind of the witness, the mind becomes repossessed of the fact, and the witness is able to speak to the fact through power of recollection.

"One may be called as a witness who cannot recall the matter about which he is called to testify. He may not be able to refresh his memory so that he is repossessed of the fact, but it may be made to appear that at some time in the past he had a personal knowledge of the fact, and made a record of it. If then he is able to say that he made the entry, or caused it to be made, and at the time it was his purpose or duty to record the fact as it then

[5] So also: 1906, Sanders, J., in State *v.* Legg, 59 W. Va. 315, 53 S. E. 545.

existed, the record becomes a competent witness, not because it is a record of an event, but because it speaks the past knowledge of a witness to a fact occurring within the knowledge of the witness, truthfully recorded."

§ 736. **History and Local Anomalies in Particular Jurisdictions.** It cannot be doubted that the use of a recorded 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 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*, modern rulings show that 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,

§ 736. [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 1 Binn. 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 S. & R. 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 S. & R. 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 S. & R. 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 S. & R. 409 (counsel's notes admitted, following Cornell *v.* Green); 1829, Farmers' & M. Bank *v.* Boracf, 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 Pa. 308 (memorandum; how treated does not clearly appear); 1888, Long *v.* Regen, 119 Pa. 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 Pa. 7, 6 Atl. 366 (bank-book entries allowed to be used for the purpose of "fixing dates with accuracy"; no precedents referred to); 1905, Clark *v.* Union Traction Co., 210 Pa. 636, 60 Atl. 302 (obscure); 1922, Christian Moerlein Brewing Co. *v.* Rusch, 272 Pa. 181, 116 Atl. 145 (reports of an agent; general principle approved).

[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 Johns. 174 (past recollection rejected); 1829, Hart *v.* Wilson, 2 Wend. 515 (like Miller *v.* Hackley); 1830, Lawrence *v.* Barker, 5 Wend. 301 (memorandum excluded, except so far as it actually revived memory); 1833, Feeter *v.* Heath, 11 Wend. 486 (similar ruling); 1836, Clark *v.* Vorce, 15 Wend. 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 Wend. 595 (entries of work, held admissible if "attested by the

refusing the use of past recollection until the lack of present recollection is made to appear (*post*, § 738).

(3) In *Massachusetts*, after some early fluctuation, the use of past recollection has been placed beyond doubt;[3] yet it is 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 be sanctioned; but much confusion once existed as to the scope and grounds of the rule.[4]

(5) In the remaining jurisdictions, the precedents are fewer, but a general recognition is accorded and no special anomalies have developed.[5]

man who makes them", "though he remember nothing of the facts which they record"); 1837, Clute *v.* Small, 17 Wend. 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 N. Y. 96 (bank-teller's entries used; no actual recollection; the Merrill case followed); 1857, Halsey *v.* Sinsebaugh, 15 N. Y. 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 N. Y. 134; 1860, Guy *v.* Mead, 22 N. Y. 462; 1864, Marcly *v.* Shults, 29 N. Y. 346; 1871, Downs *v.* R. Co., 47 N. Y. 87; 1872, McCormick *v.* R. Co., 49 N. Y. 303; 1875, Gilchrist *v.* Assoc., 59 N. Y. 499; 1875, Squires *v.* Abbott, 61 N. Y. 535; 1876, Flood *v.* Mitchell, 68 N. Y. 509; 1876, Mandeville *v.* Reynolds, 68 N. Y. 528, 537; 1879, Howard *v.* McDonough, 77 N. Y. 592; 1886, Mayor *v.* R. Co., 102 N. Y. 572, 7 N. E. 905; 1889, National Ulster Co. Bank *v.* Madden, 114 N. Y. 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.* Conn, 8 Pick. 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 Pick. 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 Gray 452 (same); 1858, Perkins *v.* Ins. Co., 10 Gray 323 (certificate of marine surveyor); 1860, Briggs *v.* Rafferty, 14 Gray 525; 1860, Parsons *v.* Ins. Co., 16 Gray 463; 1866, Dugan *v.* Mahoney, 11 All. 572; 1867, Morrison *v.* Chapin, 97 Mass. 72; 1869, Adams *v.* Coulliard, 102 Mass. 173; 1872, Cobb *v.* Boston, 109 Mass. 444; 1882, Costello *v.* Crowell, 133 Mass. 352; 1891, Com. *v.* Clancy, 154 Mass. 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 Ill. 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 Ill. 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 Ill. 434 (sales-book entries; use of past recollection sanctioned); 1875, Brown *v.* Luehrs, 79 Ill. 575 (stenographer's notes, verified as correct, admitted; whether past or present recollection does not appear); 1884, Clifford *v.* Drake, 110 Ill. 135 (reporter using newspaper copy; admitted); 1887, Bonnet *v.* Glatfeldt, 120 Ill. 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 on the preceding rulings?).

If Courts would rigorously consult their own precedents, the state of doctrine might sometimes be better ascertainable; in the second, fourth, fifth, sixth, seventh, and eighth of the above cases, none of those preceding were referred to.

[5] The following list is intended to include only the salient cases leading to the establishment of the general doctrine:
Federal: 1869, Insurance Co. *v.* Weide, 9 Wall. 681 (admitted); 1871, Insurance Co. *v.* Weides, 14 9 Wall. 379 (admitted); 187 3, Ruch *v.* Rock Island, 97 U. S. 695 (notes of

testimony used); 1884, Maxwell *v.* Wilkinson, 113 U. S. 658, 5 Sup. 691 (sanctioned); 1886, Vicksburg R. Co. *v.* O'Brien, 119 U. S. 99, 7 Sup. 118 (sanctioned); 1893, Bates *v.* Preble, 151 U. S. 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);

Alabama: In Vastbinder *v.* Metcalf, 3 Ala. 101 (1841), a past recollection was not recognized; but this was set right, on the authority of Professor Greenleaf, in Bondurant *v.* Bank, 7 Ala. 830 (1845), since followed frequently;

Alaska: Comp. L. 1913, § 1497 (like Or. Laws 1920, § 859);

Arkansas: 1895, Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102 (admitted);

California: 1854, Treadwell *v.* Wells, 4 Cal. 263 (apparently employed); 1859, People *v.* Elyea, 14 Cal. 144 (apparently sanctioned); C. C. P. 1872, § 2047 (admissible if made "at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing . . . : so also a witness may testify from such a writing, though he retain no recollection of the particular facts: but such evidence must be received with caution"); 1894, Burbank *v.* Dennis, 101 Cal. 90, 35 Pac. 444 (shorthand-reporter; verified notes read as evidence); 1897, People *v.* Ammerman, 118 Cal. 23, 50 Pac. 15 (shorthand transcript admitted); 1897, People *v.* Mayne, 118 Cal. 516, 50 Pac. 654 (a mother identified an entry in a family Bible as hers, but the entry was excluded, with singular failure to notice the application of the present principle); 1919, Moore's Estate, 180 Cal. 570, 182 Pac. 285 (rejecting the unfounded contention that C. C. P. § 2047 expressly left the use of such a memorandum — here, a record of former testimony — optional with the trial court);

Connecticut: 1842, New Haven Bank *v.* Mitchell, 15 Conn. 224 (admitted);

Delaware: Declared admissible in Redden *v.* Spruce, 4 Harringt. 265 (1845); practically overruling Fitzgibbon's Adm'r *v.* Kinney, 3 Harringt. 319 (1841);

Georgia: 1849, Williams *v.* Kelsey, 6 Ga. 373 (sanctioned); Code 1910, § 5873, P. C. 1910, § 1046 ("A witness may refresh and assist his memory by the use of any written instrument or memorandum, provided he finally speaks from his recollection thus refreshed, or is willing to swear positively from the paper"); 1900, Atkins *v.* R. & B. Co., 111 Ga. 815, 35 S. E. 671;

Idaho: Comp. St. 1919, § 8033 (like Cal. C. C. P. § 2047);

Indiana: 1853, Clark *v.* State, 4 Ind. 156 (rejected); 1866, Prather *v.* Pritchard, 26 Ind. 67 (accepted, not mentioning Clark's case); 1888, Johnson *v.* Culver, 116 Ind. 290, 19 N. E. 129 (sanctioned, with the qualification, "he cannot testify entirely from the writing, . . . but for . . . giving accuracy to his statements he may refer to it"); 1893, Bass *v.* State, 136 Ind. 165, 168, 36 N. E. 124 (stenographer may read his notes aloud, though not able to recollect without them); 1901, Higgins *v.* People, 157 Ind. 57, 60 N. E. 685 (shorthand notes of testimony used by the taker); 1905, Southern R. Co. *v.* State, 165 Ind. 613, 75 N. E. 272 (Johnson *v.* Culver approved; this is a virtual repudiation of the general doctrine, and is unsound);

Iowa: 1864, Morris *v.* Sargent, 18 Ia. 95 (sanctioned); 1870, McKivitt *v.* Cone, 30 Ia. 457; 1871, Borland *v.* Walrath, 33 Ia. 132; 1874, Moore *v.* Moore, 39 Ia. 461, 463 (stenographer referring to notes; obscure); 1875, Adae *v.* Zangs, 41 Ia. 536; 1896, State *v.* Smith, 99 Ia. 26, 68 N. W. 428 (shorthand notes, used by the maker); 1897, State Bank *v.* Brewer, 100 Ia. 576, 69 N. W. 1011 (apparently held improper to testify without actual refreshment; no authorities cited); 1897, O'Brien *v.* Stambach, 101 Ia. 40, 69 N. W. 1133 (a referee'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 Kan. 15, 12 Pac. 318 (sanctioned); 1897, Wright *v.* Wright, 58 Kan. 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 Me. 465 (admitted; apparently past recollection);

Maryland: 1831, Flack *v.* Green, 3 G. & J. 474 (admitted); 1833, Owings *v.* Low, 5 G. & J. 134 (admitted); 1837, Pocock *v.* Hendricks, 8 G. & J. 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 Mich. 126, 11 N. W. 413, 837 (sanctioned); 1895, Hooker, J., in People *v.* Considine, 105 Mich. 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, — Minn. —, 70 N. W. 984 (record of passing trains; allowed);

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 Mo.

§ 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 first seen and is still most commonly exemplified. But the scope of the present principle, in its relation to them, must be distinguished from other principles.

(1) When a stenographer's *notes of former testimony* are used, the present principle is simple. The stenographer cannot commonly revive an actual recollection, and will therefore read his notes as a memorandum of past recollection (*ante*, § 736); the only usual questions under the present principle will be whether the stenographic original must be used (*post*, § 749), and whether the witness himself, not the stenographer, may use it (*post*, §§ 748, 760). But other distinct principles may come into play. If the stenographer

525, 6 S. W. 253 (past recollection sanctioned);
Mississippi: 1881, Cooper *v.* State, 59 Miss. 267 (admitting the use of a memorandum where a part only was actually recollected);
Montana: Rev. C. 1921, § 10664 (like Cal. C. C. P. § 2047);
Nebraska: 1886, Lipscomb *v.* Lyon, 19 Nebr. 522, 27 N. W. 731 (sanctioned); 1897, Davis *v.* State, 51 Nebr. 301, 70 N. W. 984 (same); 1901, Johnson *v.* Spaulding, — Nebr. —, 95 N. W. 808 (same);
Nevada: 1877, McCausland *v.* Ralston, 12 Nev. 217 (admitted); 1883, Pinschower *v.* Hanks, 18 Nev. 104, 1 Pac. 454 (sanctioned, *semble*);
New Hampshire: 1840, Haven *v.* Wendell, 11 N. H. 112 (sanctioned); 1846, Hall *v.* Ray, 18 N. H. 126 (cashier's entries); 1849, Seavy *v.* Dearborn, 19 N. H. 357 (notary's record of protest); 1855, Webster *v.* Clark, 30 N. H. 253 (admitted);
New Jersey: 1795, Ryerson *v.* Grover, 1 N. J. L. 459 (sanctioned); 1899, Myers *v.* Weger, 62 N. J. L. 432, 42 Atl. 280 (same); 1920, State *v.* Martin, 94 N. J. L. 139, 109 Atl. 350 (witness reading transcript of testimony at a former trial; Myers *v.* Weger, approved);
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 Jones L. 300 (same); 1883, State *v.* Lyon, 89 N. C. 568 (reference to a newspaper copy of a libel, admitted); 1884, State *v.* Pierce, 91 N. C. 606 (notes of testimony, admitted); 1886, Bryan *v.* Moring, 94 N. C. 687 (same);
Ohio: 1869, Mead. *v.* McGraw, 19 Oh. St. 55 (sanctioned, *semble*); 1871, Moots *v.* State, 21 Oh. St. 653 (admitted, but possibly on hearsay-exception principles);
Oregon: Laws 1920, § 859 (like Cal. C. C. P. § 2047); 1892, Friendly *v.* Lee, 20 Or. 202, 25 Pac. 396 (sanctioned, under the Code);
Philippine Isl.: C. C. P. 1901, § 338 (like Cal. C. C. P. § 2047);
Porto Rico: Rev. St. & C. 1911, § 1522 (like Cal. C. C. P. § 2047);
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 S. C. 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 Tex. 342 (admitted); 1885, Davie *v.* Terrill, 63 Tex. 106 (admitted);
Vermont: 1833, Glass *v.* Beach, 5 Vt. 175 (notes of testimony, admitted; the witness must "swear to their accuracy"); 1844, Mattocks *v.* Lyman, 16 Vt. 113 (admitted, but "a general recollection of the transaction" is required); 1849, Marsh *v.* Jones, 21 Vt. 378 (like the Mattocks case); 1852, Downer *v.* Rowell, 24 Vt. 243 (same); 1915, Taplin & Rowell *v.* Clark, 126 Vt. 569, 95 Atl. 491 (sale of cattle);
Virginia: 1854, Harrison *v.* Middleton, 11 Gratt. 546 (surveyor's notes, admitted);
West Virginia: 1883, Vinal *v.* Gilman, 21 W. Va. 309 (sanctioned);
Washington: 1903, State *v.* Douette, 31 Wash. 6, 71 Pac. 556 (hotel register; principle recognized);
Wisconsin: 1883, Rounds *v.* State, 57 Wis. 52, 14 N. W. 865 (sanctioned); 1905, Manning *v.* School District, 124 Wis. 84, 102 N. W. 356 (sanctioned).

is not called to the stand, the question occurs whether the notes can none the less be read as a correct report, under an exception to the Hearsay rule (*post*, § 1669). Moreover, the witness whose testimony it is must be accounted for as deceased or otherwise unavailable (*post*, §§ 1401–1413); the parties and issues must be the same (*post*, §§ 1386–1388); and in criminal cases a special question of constitutionality arises (*post*, § 1398). Through the failure to note which of these principles is involved, many rulings are obscure and useless.

(2) When the memorandum is one of a series of *regular entries in the course of business*, it would be admissible without calling the entrant, if he were deceased or otherwise unavailable, under a settled exception to the Hearsay rule (*post*, §§ 1517–1561). But when the entrant himself comes with the entry to the stand, then the present principle alone (or that of present recollection) is involved. In this aspect, it is wholly immaterial that the entry was one of a regular series (*post*, § 747); neither that nor any other of the limitations to the Hearsay exception has here any application. Yet the tendency to confuse the two is inveterate.

(3) A *notary's certificate* may be admissible, without calling the notary to the stand, under an exception to the Hearsay rule (*post*, § 1675). But when the notary testifies in person, he uses his certificate under the principles of past or present recollection. Here the peculiar service of this class of memoranda has been to show that the habit of being consciously accurate is of itself a sufficient foundation for the witness' verification of his memorandum (*post*, § 747).

(4) An *attesting witness* commonly verifies his signature just as a notary does, *i.e.* from his confidence that he would not have signed if he had not verily seen what he attests (*post*, § 747). If the witness is not available in person, then his signature is proved, and his attestation becomes virtually a hearsay statement, admissible by a settled exception (*post*, § 1505).

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 satisfactory 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 was for a time established in New York. It was 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 and unapproved by good sense.

§ 739. **Written Copies, as preferred to Oral Recollection.** Parallel with the doctrine of the New York Court (*ante*, § 738), that a present recollection

§ 738. [1] So also: 1864, Marcly *v.* Shults, 29 N. Y. 346; 1875, Squires *v.* Abbott, 61 N. Y. 535; 1876, Flood *v.* Mitchell, 68 N. Y. 509; 1889, National Ulster Co. Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408; 1896, People *v.* McLaughlin, 150 N. Y. 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 Barb. 65; 1877, Kennedy *v.* R. Co., 67 Barb. 182. *Contra*, 1868, Townsend Mfg. Co. *v.* Foster, 51 Barb. 346; 1878, Morrow *v.* Ostrander, 13 Hun 219, *semble*.

[2] *Fed.* 1886, Vicksburg R. Co. *v.* O'Brien, 119 U. S. 99, 7 Sup. 118; 1909, Bacon *v.* Conroy, 2d C. C. A., 172 Fed. 532 (it is said that the "better practice" requires the entries to be offered where the witness has no present recollection, and for this is cited National Ulster Co. Bank *v.* Madden, *supra*, *n.* 1); 1919, Stockyards Loan Co. *v.* Nichols, 8th C. C. A., 260 Fed. 393; *D. C.* 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. 1098, 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); 1913, Salo *v.* Duluth & I. R. Co., 121 Minn. 78, 140 N. W. 188 (telegram reciting facts known to the witness, and already testified to by him, excluded, where his only failure of memory was as to the date of the event, and he needed to refer to the telegram for this purpose only; no precedents are cited; the opinion is apparently unaware that it is following the peculiar and unsound New York doctrine, and does not consider the two prior conflicting rulings in Minnesota above cited; it refers to the "confusion and disagreement in the authorities", without realizing that there is no "confusion" on this point, and that the issue is the simple one whether one or another plain rule will be adopted; it loftily premises, "We are content to leave the general discussion of these questions to the text-writers and encyclopedists", but then proceeds to spend two pages on a "general discussion" which is profitless in view of its complete ignoring of the prior state of the controversy); 1890, Friendly *v.* Lee, 20 Or. 205, 25 Pac. 396; 1900, Susewind *v.* Lever, 37 Or. 365, 61 Pac. 644; 1901, Coxe *v.* Milbrath, 110 Wis. 499, 86 N. W. 174 (New York doctrine adopted; no precedents cited).

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 contrast 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).

§ 740. **Reading a Prepared Report.** The New York doctrine, *i.e.* of not permitting the use of a memorandum of past recollection until the lack of any present recollection was shown, would forbid the practice of permitting an *expert witness* to read, as the basis of his testimony, a *report prepared beforehand*, representing the results of an analysis or other investigation. Such a practice, however, is often highly desirable; to forbid it merely shows the misguided nature of the principle of § 738, *ante*.

That such a prepared report is a proper mode of narration is noticed more fully *post*, § 785.

c. *Rules to secure Adequacy of Past Recollection and Correctness 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 postulate.[1]

§ 744. [1] 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 an utterance, 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: *Accord:* 1778, Captain Baillie's Base, 21 How. St. Tr. 319 ("I desire to know whether you heard any such words as those come out of 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"); 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: 1915, Mallinger *v.* Sarbach, 94 Kan. 504, 146 Pac. 1148 (whether S. gave an authority to sign; M.'s testimony that if he told N. at a certain date that S. had given

§ 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 positive, — 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:[1]

1795, L. J. CLERK (for the minority) in *Kinlock'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 here, 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."

(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

such an authority, the statement was correct, but that he could not remember the conversation, and N.'s testimony that M. did so state to him, held not admissible).

Compare the doctrine of *corroboration by similar statements* (*post*, § 1130), which might sometimes be availed of in such a situation. Compare also § 751, *post*.

§ 745. [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"); 1906, Murray & Peppers *v.* Dickens, 149 Ala. 240, 42 So. 1031 ("No precise time is fixed by law"); 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"); 1903, Volusia Co. Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704 ("at or about the time . . . so that it may be safely assumed that the recollection was then sufficiently fresh to correctly express it"). P. I. C. C. P. 1901, § 338 (like Cal. C. C. P. § 2047); P. R. Rev. St. & C. 1911, § 1522 (like Cal. C. C. P. § 2047); 1920, State *v.* Williams, — Vt. —, 111 Atl. 701 (expert's summary of accounts); see also the Codes cited *ante*, § 736.

phrasing has been generally used, even where it was not required for the decision of the case.[2] Two things must be noted, however, about this rule: (*a*) The recollection must in fact have been fresh (*i.e.* adequate), even though noted "near the time";[3] (*b*) the phrases "near the time" or "shortly afterwards" really furnish no accurate test, and in their application the probable freshness of the recollection must after all be the ultimate test. It may be added that in some rulings the language mentions both the first and the second tests in the alternative.[4] In most rulings, the decision turns upon the circumstances of the particular case.[5]

§ 746. (2) **Correctness of Record; General Principle.** It has already been noted (*ante*, § 734) that, so far as adequacy of Recollection is concerned, it is enough to require that at the time of making the record the Recollection should have been fresh, *i.e.* the event recent. But, having gained this assurance that the Recollection was adequate, it remains still for the law to make fairly sure of certain other things, which (in strictness) depend on the element of correct Narration or Communication (*post*, § 766). In the first place, it must make sure that this *Recollection* was *correctly represented* in the record or memorandum then made; here several situations present themselves for solution. Next, it must make sure that the *statement now offered* as testimony by the witness is in fact *identical in tenor* with the record or memoran-

[2] 1825, Jones *v.* Stroud, 2 C. & P. 196 ("near the time"); 1879, Acklen'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. Mass. 72 ("contemporaneously"); 1849, Seavy *v.* Dearborn, 19 N. H. 357 ("at the time"); 1855, Webster *v.* Clark, 30 N. H. 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. N. Y. 595 ("immediately after they were set down"); 1857, Halsey *v.* Sinsebaugh, 15 N. Y. 485 ("at the time or almost immediately afterwards"); 1858, Russell *v.* R. Co., 17 N. Y. 134 ("at or about the time"); 1879, Howard *v.* McDonough, 77 N. Y. 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. 658, 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. C. 213 ("at the time of the transaction, or shortly afterwards, when the facts were fresh in his recollection"). In Chamberlain *v.* Sands, 27 Me. 465 (1847) the broad test was used, "facts as known to him at the time."

[5] *England:* 1839, Horne *v.* Mackenzie, 6 Cl. & F. 628 (recorded two days before trial, admitted); 1851, R. *v.* Philpotts, 5 Cox Cr. 329 (recorded "almost immediately", admitted); 1852, Anderson *v.* Whalley, 3 C. & K. 54, Talfourd, J. (a log-entry, a week after the events, while they were fresh in his mind, admitted); *Canada:* 1864, Fraser *v.* Fraser, 14 U. C. C. P. 70 (made the same day, admitted); *United States:* 1893, Bates *v.* Preble, 151 U. S. 154, 14 Sup. 277 (rejecting memoranda made at a time unknown); 1921, McEwen *v.* New York Life Ins. Co., 187 Cal. 144, 201 Pac. 577 (fraud by an insured; the medical examiner's memorandum of answers, not made until 9 years later, not allowed to be used); 1857, Auld *v.* Walton, 12 La. An. 137 (made by election officers the day after the election, admitted); 1859, Spring Garden Mut. Ins. Co. *v.* Riley, 15 Md. 54 (made 5 months after, excluded); 1882, Swartz *v.* Chickering, 58 Md. 290 (made 16 months after, excluded); 1851, Watson *v.* Walker, 23 N. H. 496 (made 3 years after, excluded); 1896, Jones *v.* State, 54 Oh. 1, 42 N. E. 699 (made a few months before the trial and many years after the event, excluded); 1845, O'Neale *v.* Walton, 1 Rich. S. C. 234 (excluded); 1852, Ballard *v.* Ballard, 5 Rich. 495 (made 2 weeks later, excluded); 1869, Pinney *v.* Andrus, 41 Vt. 648 (made just before trial, admitted).

dum formerly made; here, again, several different situations arise. Finally, it has to consider the *testimonial status of the record* when thus used.

For the first of these steps — that of making sure that the record or memorandum, 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 assert that the record correctly represented his knowledge and recollection at the time of making. (*b*) But, this testimonial guarantee of correctness 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 Correctness.** The witness must be able now to assert 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 correctness. 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

§ 747. [1] *Federal:* 1871, Insurance Co. *v.* Weides, 14 Wall. 379 ("at the time knew it was correct"); 1919, Stockyards Loan Co. *v.* Nichols, 8th C. C. A., 260 Fed. 393 (certain checks excluded, for lack of this verification); *Alabama:* 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; 1921, Wright *v.* State, 17 Ala. App. 621, 88 So. 185 (larceny of flour: witness relying upon a waybill which he did not make nor know anything about, excluded); *Illinois:* 1907, Diamond Glue Co. *v.* Wietzychowski, 227 Ill. 338, 81 N. E. 392; 1908, Dorrance *v.* Dearborn Power Co., 233 Ill. 354, 84 N. E. 269; *Maryland:* 1860, Green *v.* Caulk, 16 Md. 572; *Michigan:* 1880, Misner *v.* Darling, 44 Mich. 439, 7 N. W. 77; 1911, Koehler *v.* Abey, 168 Mich. 113, 133 N. W. 923 (left to the trial Court); *New Jersey:* 1903, Titus *v.* Gunn, 69 N. J. L. 410, 55 Atl. 735; *New Mexico:* 1910, Terro *v.* Harwood, 15 N. Mex. 424, 110 Pac. 556; *New York:* 1858, Russell *v.* R. Co., 17 N. Y. 134 ("knew it to be correct when it was made"); 1875, Gilchrist *v.* Assoc., 59 N. Y. 499; 1879, Howard *v.* McDonough, 77 N. Y. 592 ("which he intended to make correctly and which he believes to be correct"); *North Dakota:* 1915, Eaton Chemical Co. *v.* Doherty, 31 N. D. 636, 153 N. W. 966 (testimony to books not personally known to be correct, excluded); *Oregon:* 1913, Marron *v.* Great Northern R. Co., — Or. —, 129 Pac. 1055 (under Rev. C. § 8020); *Utah:* 1914, Shepherd *v.* Denver & R. G. R. Co., 45 Utah 295, 145 Pac. 296 (to identify the day of an accident, a witness L. stated that next day he delivered a load of lumber to H.; the books of H., verified by H. and by his bookkeeper, showing no credit entry to L. on that day, were excluded; apparently the ground of exclusion is the lack of a formal verification of the books; but the ruling, on the circumstances disclosed, presents the law of Evidence as a quibbling farce, and the majority opinion is not marked by an understanding of the principles involved; McCarty, C. J., diss.); *Vermont:* 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 *infra*, note 5.

The witness must of course have had personal knowledge of the facts: *infra*, note 8.

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] Other peculiar circumstances, such as *handwriting*, specially intended or calculated to indicate correctness, may be satisfactory.[4] Is it enough that the witness (as is usual with *attesting witnesses* to a *document*) merely recognizes his handwriting and knows that he would not have written or signed without believing the record to be correct? Here the witness is really calling to his

[2] Except, perhaps, in Massachusetts and Delaware; see note 6, *post*.

[3] *Eng.* 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"); *U. S. Ala.* 1879, Acklen *v.* Hickman, 63 Ala. 494; 1886, Hancock *v.* Kelly, 81 Ala. 378, 2 So. 281; *Ark.* 1906, St. Louis S. W. R. Co. *v.* White S. M. Co., 78 Ark. 1, 93 S. W. 58 (telegrapher's service-marks); *D. C.* 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); *Ga.* 1849, Williams *v.* Kelsey, 6 Ga. 374 ("uniform practice to make the entries truly . . . and further that he has no doubt from such practice that the entry is correct"); 1895, Leonard *v.* Mixon, 96 Ga. 239, 23 S. E. 80 (habit of a collector in notifying of claims); *Mich.* 1911, Koehler *v.* Abey, 168 Mich. 113, 133 N. W. 923 (routine duties of an inspector of machinery); 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 Ia. 95; 1871, Borland *v.* Walrath, 33 Ia. 132; 1849, Seavy *v.* Dearborn, 19 N. H. 357; 1855, Webster *v* Clark, 30 N. H. 253; 1810, Miller *v.* Hackley, 5 Johns. N. Y. 375; 1829, Hart *v.* Wilson, 2 Wend. 515; 1854, Cole *v.* Jessup, 10 N. Y. 96; 1846, Bank *v.* Cowan, 7 Humph. Tenn. 70; and cases *passim infra*.

Compare the following statute: N. J. Comp. L. 1910, Neg. Instr. § 207 (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 Md. 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 G. & J. 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] 1919, State *v.* Easter, 185 Ia. 476, 170 N. W. 748 (good theoretical opinion, but the doctrine is wofully misapplied); 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. 106 (sundry circumstances).

aid, not his specific business custom, but his general moral attitude; but, as a rule, the indication should be and is treated as sufficient.[5]

It is possibly the rule in Massachusetts that only *regular entries*, not mere casual memoranda, can be used, — apparently on the notion that this regularity is the only satisfactory guarantee of correctness.[6] But this limitation is absolutely without ground, either of principle or of policy,[7] and is of course due to some confusion of thought about the Regular Entries exception to the Hearsay rule (*post*, § 1517).

It may be added that the witness must of course have had *personal knowledge* of the facts recorded (*ante*, § 657) in the first instance; he cannot guar-

[5] 1817, Pearson *v.* Wightman, 1 Mills Const. Ct. 344 ("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 recognize 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").

Recognition of the *handwriting* and consequent certainty of accuracy was so treated as follows: *Eng.* 1828, Maugham *v.* Hubbard, 2 M. & Ryl. 5; 1834, R. *v.* St. Martin's, 2 A. & E. 210; *Ire.* 1864, Lord Talbot *v.* Cusack, 17 Ir. C. L. 213, per Hayes, J.; *U. S. Ala.* 1845, Graham *v.* Lockhart, 8 Ala. 9, 22; *Ky.* 1815, Allen *v.* Trimble, 4 Bibb 21; 1824, Brown *v.* Anderson, 1 T. B. M. 198; *Md.* 1859, Martin *v.* Good, 14 Md. 398; *Mass.* 1857, Crittenden *v.* Rogers, 8 Gray 452; *N. H.* 1840, Haven *v.* Wendell, 11 N. H. 112; *N. Y.* 1837, Clute *v.* Small, 17 Wend. 237, *semble; N. C.* 1904, Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435 (a certain signed letter, excluded; the opinion confuses this principle and that of § 2099, *post*); *Pa.* 1808, Pigott *v.* Holloway, 1 Binn. 436, 442 (certainty of correctness of attestation held sufficient on the facts); *S. C.* 1831, Collins *v.* Lemasters, 2 Bail. 141, 144; 1855, Verdier *v.* Verdier, 8 Rich. 135, 141 (that he would not have signed the will without a request, sufficient); 1906, Franklin *v.* Atlanta & C. A. L. R. Co., 74 S. C. 332, 54 S. E. 578 (hospital record; the opinion is not very clear).

Contra, 1860, Parsons *v.* Ins. Co., 16 Gray 463; but this is perhaps a result of the Massachusetts doctrine noticed *infra*.

For the doctrine that proof of an *absent witness' signature* is evidence of all the *requisites of execution*, see *post*, § 1511.

[6] The question was expressly reserved in Shove *v.* Wiley, 18 Pick. 558 (1836). It is sufficient to notice that this regularity was apparently treated as requisite in some cases: 1858, Perkins *v.* Ins. Co., 10 Gray 323; 1882, Costello *v.* Crowell, 133 Mass. 352; but in others as not requisite: 1838, Alvord *v.* Collin, 20 Pick. 418, 430; 1885, Smith *v.* Johns, 3 Gray 517; 1857, Crittenden *v.* Rogers, 8 Gray 452; 1860, Parsons *v.* Ins. Co., 16 Gray 463; 1866, Dugan *v.* Mahoney, 11 All. Mass. 572; 1869, Adams *v.* Conilliard, 102 Mass. 173; 1872, Cobb *v.* Boston, 109 Mass. 444; 1906, Holden *v.* Prudential L. Ins. Co., 191 Mass. 153, 77 N. E. 309 (here a medical man's writing of the answers to an insurance application was allowed to be used).

In *Delaware* a somewhat similar principle was laid down in Redden *v.* Spruce, 4 Harringt. 215 (1845), admitting the use of "inventories and schedules, precise dates, particular words, and other matters", but not beyond this.

[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 (see the history *ante*, § 736). 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 Masters *v.* Marsh, 19 Nebr. 458, 466, 27 N. W. 438 (1886; bastardy; to prove the date of delivery of wheat, a bookkeeper 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), and in First Nat'l Bank *v.* Yeoman, 14 Okl. 626, 78 Pac. 388 (1904), there is language looking towards the limitation in question as proper.

The following cases negative this heresy: 1899, Dunlap *v.* Hopkins, 37 C. C. A. 52, 95 Fed. 231 (letter to a friend); 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).

antee 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 correctness 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. 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:[1]

[8] *Federal:* 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); 1905, Rosenthal *v.* McGraw, 138 Fed. 721, 724, C. C. A. (a witness who did not make the entries and did not know that they were correct, excluded); 1906, Grunberg *v.* U. S., 145 Fed. 81, 92, C. C. A. (invoices, etc.); *Alabama:* 1892, Bolling *v.* Fannin, 97 Ala. 619, 621 (cashier's entry usuable by him only to prove cash received, not facts of a sale by B. producing the cash); 1906, Jones *v.* State, 147 Ala. 701, 41 So. 299 (account books); *California:* 1903, Peterson *v.* Mineral K. F. Co., 140 Cal. 624, 74 Pac. 162 (memorandum held not sufficiently verified); *Connecticut:* 1896, Norwalk *v.* Ireland, 68 Conn. 1, 35 Atl. 807 (the witness must have had personal knowledge); 1919, Burn *v.* Metropolitan Lumber Co., 94 Conn. 1, 107 Atl. 609 (damages for non-delivery of lumber; a salesman who knew nothing about values except the sales-price-list used by him, not allowed to use it as a memorandum); *Georgia:* 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 Ga. 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, 118 Ga. 427, 45 S. E. 317 ("he should at some time have had personal knowledge of the correctness of the memoranda"); *Kansas:* 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); *Maryland:* 1905, Dryden *v.* Barnes, 101 Md. 346, 61 Atl. 342 (a list testified to by plaintiff, but made up from prior lists by H. and by B., the plaintiff having no personal knowledge, excluded); 1905, Hoogewerff *v.* Flack, 101 Md. 371, 61 Atl. 184 (books offered through a clerk who did not keep them nor know of the facts, excluded); 1906, State *v.* Trimble, 104 Md. 317, 64 Atl. 1026 (certain hospital records, proved by a physician who did not make the entries, etc., excluded); *Massachusetts:* 1905, Allwright *v.* Skillings, 188 Mass. 538, 74 N. E. 944, *semble* (stock-exchange transactions); *Minnesota:* 1913, Salo *v.* Duluth & I. R. Co., 121 Minn. 78, 140 N. W. 188 (telegram); *Missouri:* 1908, Eberson *v.* Continental Ins. Co., 130 Mo. App. 296, 109 S. W. 62 (appraisal of stock of goods); *Utah:* 1916, Baird *v.* Denver & R. G. R. Co., 49 Utah 58, 162 Pac. 79 (delay in shipment of livestock; C.'s account rendered of the stock, not verified by any one having knowledge, excluded); *Vermont:* 1896, Pingree *v.* Johnson, 69 Vt. 225, 39 Atl. 202 (memorandum by witness' wife, not known by him as correct, excluded); *Wisconsin:* 1904, Hart *v.* Godkin, 122 Wis. 646, 100 N. W. 1057 (rule applied).

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.

In Conover *v.* Neher R. Co., 38 Wash. 172, 80 Pac. 281 (1905), a party's time-book was excluded on the ground that the parties (corporate officers) themselves had testified and "their knowledge was the primary evidence", citing no authority but a cyclopedia article; the ruling could not have been justified had the Court explicitly invoked the theory of § 1560, *post;* but, as it stands, it merely confuses the law; and the case of Mathes *v.* Robinson, later cited in the opinion on another point, is *contra* on this point.

§ 748. [1] *Accord:* ENGLAND: 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

1809, ELLENBOROUGH, L. C. J., in *Burrough* v. *Martin*, 2 Camp. 112 (the witness used 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."

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.* Walley, 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).

UNITED STATES: *Federal:* 1899, Pacific Coast S. Co. *v.* Bancroft-Whitney Co., 36 C. C. A. 135, 94 Fed. 180; 1915, The J. S. Warden, 3d C. C. A., 219 Fed. 517 (entries made by a ship captain's direction and afterwards inspected and verified by him, held admissible to "refresh memory");

Alabama: 1892, Thompson *v.* State, 99 Ala. 173, 175, 13 So. 753 (testimony before a grand jury); 1897, Torrey *v.* Burney, 113 Ala. 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 Ala. 272, 25 So. 748 (memorandum of entries made by several persons, and known by each to be correct, used by each); 1917, Floyd *v.* Pugh, 201 Ala. 29, 77 So. 323 (copy of a contract);

California: 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 Cal. 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, — Cal. —, 52 Pac. 1074, *semble* (entries made under the witness' direction by his son, used); 1906, People *v.* Brown, 3 Cal. App. 178, 84 Pac. 670;

Connecticut: 1895, Curtis *v.* Bradley, 65 Conn. 99, 31 Atl. 591; 1906, Wood *v.* Holah, 79 Conn. 215, 64 Atl. 220 (Curtis *v.* Bradley applied; here excluding the memorandum);

Idaho: Comp. St. 1919, § 8033 (like Cal. C. C. P. § 2047);

Kansas: 1885, Solomon R. Co. *v.* Jones, 34 Kan. 444, 8 Pac. 730; 1888, Phenix Ins. Co. *v.* Sullivan, 39 Kan. 451, 18 Pac. 528 (an attorney who heard the deceased witness' testimony and assisted in preparing the bill of exceptions, which embodied it);

Maine: 1847, Chamberlain *v.* Sands, 27 Me. 458, 465 (a paper drawn up by another person more than 20 days after the events, but then recognized by the witness, having a fresh recollection of the events, to be correct);

Maryland: 1860, Green *v.* Caulk, 16 Md. 556 (in effect overruling Lewis *v.* Kramer, 3 id. 287); 1887, Owens *v.* State, 67 Md. 307, 10 Atl. 210, 302 (C. kept the poll-book at an election, and checked off all voters; during his absence, F. and H. kept the book, H. checking and F. watching the process; C. and F., without H., were allowed to testify by the book); 1893, Billingslea *v.* Smith, 77 Md. 504, 514, 26 Atl. 1077; 1921, Myers *v.* State, 137 Md. 496, 113 Atl. 92 (larceny of an automobile; receipt for the car, signed by A., and compared by M. as to motor-number with the motor-number on the car, admitted as a part of M.'s testimony);

Michigan: 1899, Union Cent. L. I. Co. *v.* Smith, 119 Mich. 171, 77 N. W. 706 (insurance books);

Montana: Rev. C. 1921, § 10664 (like Cal. C. C. P. § 2047);

Nebraska: 1896, Kearney *v.* Themanson, 48 Nebr. 74, 66 N. W. 996 (articles destroyed by a flood; the paper known at the time to be correct, though made by another);

New Hampshire: 1855, Webster *v.* Clark, 30 N. H. 254; 1856, Pillsbury *v.* Locke, 33 N. H. 96 (the witness noted amounts on a slate, and his wife or his daughter copied these into a book, which the witness examined and verified);

New York: 1837, Merrill *v.* R. Co., 16 Wend. 595, *semble;* 1900, Clark *v.* Bank, 164 N. Y. 498, 58 N. E. 659 (entries made by bookkeeper of items furnished by the witness, and seen two days later by the witness and then known to be correct, admitted); 1905, McCarthy *v.* Meaney, 183 N. Y. 190, 76 N. E. 36 (certain memoranda not made nor verified by T., not allowed to be received as his testimony);

North Carolina: 1883, State *v.* Lyon, 89 N. C. 568 (a newspaper copy of a libel);

Oregon: Laws 1920, § 859 (like Cal. C. C. P. § 2047); 1899, Oyler *v.* Dantoff, 36 Or. 357, 59

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 memoranda made by the witness himself] has been extended to the case of entries which, though not in the witness' handwriting, were either made in his presence and read by him at the time of the transaction, or were read and examined by him shortly afterwards when the facts were fresh in his recollection and when he was enabled to ascertain that the facts stated in the entry were true."

1860, LE GRAND, C. J., in *Green* v. *Caulk*, 16 Md. 573: "What was supposed to be the ancient rule has been relaxed by more recent decisions; and now it is held not 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 he is still convinced at the time of the trial, he may be examined in regard to it."

Nevertheless, 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:[2]

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

Pac. 474 (typewritten memorandum, known correct by the witness);
Philippine Islands: C. C. P. 1901, § 338 (like Cal. C. C. P. § 2047);
Porto Rico: Rev. St. & C. 1911, § 1522 (like Cal. C. C. P. § 2047);
Vermont: 1884, Davis *v.* Field, 56 Vt. 426 (assessors here used tax-lists not made in their own handwriting);
Virginia: 1853, Wormeley's Case, 10 Gratt. 665, 689, *semble* (a deposition read over to, corrected and signed by the witness); 1854, Harrison *v.* Middleton, 11 Va. 546 (a diagram of courses and distances, made by the plaintiff, but used by the witness and verified while making the survey);
Wisconsin: 1869, Riggs *v.* Weise, 24 Wis. 545 (made by the wife); 1896, Hazer *v.* Streich, 92 Wis. 505, 66 N. W. 720 (made by a clerk in his presence); 1901, Bourda *v.* Jones, 110 Wis. 52, 85 N. W. 671 (inventory of personalty);
Wyoming: 1913, Jenkins *v.* State, 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749 (stenographic notes made by another person, but seen and verified by the witness freshly after the event; use allowed).

See also the case under § 750, *post*, in which newspaper copies were used.

Contra: The requirement that the memorandum shall be made by the witness himself is usually 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 Ga. 241, 22 S. E. 938 (where the book was made up by H. from memoranda of L., the witness, who had afterwards checked off the entries as correct); 1898, Evans *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 the 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 by another, and not known to witness to be correct, excluded); 1892, Hematite M. Co. *v.* R. Co., 92 Ga. 268, 272, 18 S. E. 24 (memoranda of shipment made partly by another person and not known to witness to be true, excluded; and because the several entries were indistinguishable, all excluded); 1921, Hall *v.* Brown, 102 Or. 389, 202 Pac. 719 (loss of crops; memorandum of crops threshed, made by a person who threshed grain for the witness, and not verified by him, excluded); 1852, Ballard *v.* Ballard, 5 Rich. L. S. C. 495.

Compare also the cases cited *ante*, § 747, where personal knowledge was lacking.

at the time they are occurring, by a witness acting under the self-direction of his own mind and 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."

§ 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 embodiment of his past recollection. While the witness' guarantee of its correctness 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 principle of § 1179, *post*) is almost universally recognized; and, of course (as a part of the rule), if the original is lost or otherwise unavailable, a copy may then be used.[1] It is

§ 749. [1] According to the ordinary rules of § 1179, *post*, a copy may be used where the original 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:

ENGLAND: 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 consisting of complicated calculations); 1844, Topham *v.* McGregor, 1 C. & K. 320 (the original was not produced because lost).

IRELAND: 1864, Lord Talbot *v.* Cusack, 17 Ir. C. L. 213.

CANADA: 1891, Taylor *v.* Massey, 20 Ont. 429, 437; 1917, Matheson *v.* Canadian Pacific R. Co., 35 D. L. R. 514, Sask. (the original being destroyed, the witness was allowed to use a copy, checked with the original, but containing only net weight figures, omitting gross weights);

UNITED STATES: *Federal:* 1869, Insurance Co. *v.* Weide, 9 Wall. 677 (an abstract of destroyed inventories); 1922, Caudle *v.* U. S., 8th C. C. A., 278 Fed. 710 (burglary of a freight car: to evidence the defendant's presence on a train, the train auditor's record, made up from temporary memoranda, was admitted); *Connecticut:* 1899, Clark *v.* Holmes, 71 Conn. 749, 43 Atl. 194 (stenographer's use of transcript of notes of testimony, excluded, the original not being accounted for); *Columbia (Dist.):* 1906, O'Brien *v.* U. S., 27 D. C. App. 263, 272 (bookkeeper's memorandum of total sums represented in a document given to the defendant, admitted); *Florida:* 1896, Adams *v.* Board, 37 Fla. 266, 20 So. 266; 1903, Volusia Co. Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704; 1904, Davis *v.* State, 47 Fla. 26, 36 So. 170 (approving Volusia Co. Bank *v.* Bigelow); 1904, Eatman *v.* State, 48 Fla. 21, 37 So. 576 (memorandum taken from a ledger, excluded): *Illinois:* 1884, Clifford *v.* Drake, 110 Ill. 135 (reporter, using the printed copy of his notes); 1887, Bonnet *v.* Glatfeldt, 120 Ill. 166, 11 N. E. 250 (copy from account-books); 1901, Chicago & A. R. Co. *v.* American Strawboard Co., 190 Ill. 268, 60 N. E. 518 (certain "stack-sheets" made from temporary memoranda, admitted as originals); 1904, Chicago & E. I. R. Co. *v.* Zepp, 209 Ill. 339, 70 N. E. 623 (a Chicago weather-record made by forming a book from letterpress copies of original sheets sent to Washington, admitted as an original; the opinion ignores the further ground of admissibility, that the original sheets, being in another jurisdiction, were unobtainable by subpœna, under the rule of § 1213, *post*); *Iowa:* 1876, State *v.* Maloy, 44 Ia. 115, *semble* (stenographic notes; original required); 1880, Case *v.* Burrows, 54 Ia. 682, 7 N. W. 130 (same; undecided); 1917, State *v.* Powers, 181 Ia. 452, 164 N. W. 856 (shorthand notes of testimony; ruling obscure, but wrong anyhow); *Kansas:* 1903, Smith *v.* Scully, 66 Kan. 139, 71 Pac. 249 (official stenographer's report of testimony; stenographic original not required); *Kentucky:* 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); *Maine:* 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); *Maryland:* 1860, Green *v.* Caulk, 16 Md. 572 (also excludes absolutely a copy of a copy); 1869, Thomas *v.* Price, 30 Md. 484;

true that the use of a copy lacks certain advantages; but this defect is no greater than in the ordinary instance of a contract or a deed which cannot be produced; nor is the importance of using the original here any greater.

§ 750. **Same: Copy made and Verified by Another Person.** It is obvious that the process of guaranteeing the correctness of the record (*ante*, § 746) and that of identifying and producing the record are separable. Since in commercial practice there is constantly such a separation of these functions among different persons, there seems to be no reason why the law should not accept and sanction it. Thus, when a witness makes a memorandum and then guarantees on the stand that it was correct, the process of proving its terms by making and producing a copy of it may often be feasible only with the aid of another person, — as where the original is lost and the only copy was made, not by the original writer, but by another person. What difference 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:[1]

Massachusetts: 1836, Shove *v.* Wiley, 18 Pick. 563; 1881, Com. *v.* Ford, 130 Mass. 66, *semble; Minnesota:* 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); *Missouri:* 1897, Banking House *v.* Darr, 139 Mo. 660, 41 S. W. 227 (entries excluded because not produced in court); *Montana:* 1920, State *v.* Smith, — Mont. —, 190 Pac. 36 (stenographer's use of transcript of notes); *Nebraska:* 1904, Donner *v.* State, 72 Nebr. 263, 100 N. W. 305 (stockyards-book, not the original, excluded); *New Hampshire:* 1851, Watson *v.* Walker, 23 N. H. 477, 496, *semble; New Jersey:* 1795, Ryerson *v.* Grover, 1 N. J. L. 459; 1915, State *v.* Dougherty, 86 N. J. L. 525, 93 Atl. 98 (but the opinion does not exhibit entire understanding of the principles involved, and its citation of the present work is perhaps misleading, for the passage cited deals with another point); *New York:* 1857, Halsey *v.* Sinsebaugh, 15 N. Y. 485; 1864, Marcly *v.* Shults, 29 N. Y. 346 (copy of a copy); 1871, Downs *v.* R. Co., 47 N. Y. 87; 1872, McCormick *v.* R. Co., 49 N. Y. 303 (doubtful language); *North Carolina:* 1883, State *v.* Lyon, 89 N. C. 568 (newspaper copy of a libel which the witness had seen); *Ohio:* 1869, Mead *v.* McGraw, 19 Oh. St. 55; *Oklahoma:* 1921, Cowley *v.* State, — Okl. Cr. —, 194 Pac. 284 (stenographer's carbon copy of notes of testimony, allowed to be used, the original being lost); *Oregon:* 1905, Manchester Assur. Co. *v.* Oregon R. & N. Co., 46 Or. 162, 79 Pac. 60 (engine inspection-book); *Pennsylvania:* 1902, Edwards *v.* Gimbel, 202 Pa. 30, 51 Atl. 357 (typewritten copy of a memorandum, allowed to be used); *South Carolina:* 1880, Bank *v.* Zorn, 14 S. C. 444; *Vermont:* 1884, Davis *v.* Field, 56 Vt. 420; *Virginia:* 1854, Harrison *v.* Middleton, 11 Gratt. 547; 1871, Pidgeon *v.* Williams, 21 Gratt. 251, 261 (a bank-book seen by the witness at a previous occasion but not brought into court); *Tennessee:* 1823, Rogers *v.* Burton, Peck 108; 1838, Beets *v.* State, Meigs 106 (notes of a dying declaration); *Wisconsin:* 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); 1916, Campbell *v.* Germania Fire Ins. Co., 163 Wis. 329, 158 N. W. 63 (copy of list of articles destroyed by fire);

Notwithstanding the rulings cited above, a copy was held receivable without accounting for the original in the following cases: *Can.* 1914, Daynes *v.* British Col. El. R. Co., 19 D. L. R. 266, Can. Sup. (a witness held entitled to use a copy "made by himself from the original which was a transcript of his stenographic report of the interview"); *U. S.* 1899, Anderson *v.* English, 121 Ala. 272, 25 So. 748; 1870, Chicago R. Co. *v.* Adler, 56 Ill. 344; 1875, Brown *v.* Luehrs, 79 Ill. 575.

§ 750. [1] *Accord: Federal:* 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 C. C. A. 553, 68 Fed. 509 (foremen and bookkeeper); *Alabama:* 1892, Birmingham *v.* McPoland, 96 Ala. 363, 11 So. 427 (copy by third person; usable if verified by him, or if known by the

1866, *State* v. *Shinborn*, 46 N. H. 503: A hired man, as well as M. and his son, let 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 transfered to the book, the entry stands substantially as if all was done by the same person."

§ 751. **Same: Double Testimony: 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 has long been generally accepted:[1]

user to be a correct copy); *Illinois:* 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 A. S. L. & B. Ass'n, 204 Ill. 616, 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); *Louisiana:* 1857, White *v.* Wilkinson, 12 La. An. 360 (purchasing-clerks and bookkeeper); *Massachusetts:* 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, 12 Pick. 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 Cush. 218 (party's books; slate entries by one partner, copied by the other); *Missouri:* 1902, Stephan *v.* Metzger, 95 Mo. App. 609, 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).

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).

§ 751. [1] *Accord: Federal:* 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; 1913, The City of St. Joseph, 8th C. C. A., 205 Fed. 284 (foremen making entries on slates or memoranda, and bookkeepers transcribing them; both sets of men testifying, the accounts were admitted); *Alabama:* 1906, Murray & Peppers *v.* Dickens, 149 Ala. 240, 42 So. 1031 ("It would seem, on reason, that if one party testifies that he knew of the correctness of the item and gave it correctly to the other, and the other testifies that he entered it as it was given to him, that that would amount to the same thing as if the party who made the entry should swear that he knew of the correctness of the item"; applied to a time-book; the opinion cites an encyclopedia of law, but does not notice the prior ruling in this Court to the contrary, Snow H. Co. *v.* Loveman, *infra*); 1919, Moundville Lumber Co. *v.* Warren, 203 Ala. 488, 83 So. 479 (delivery of lumber; entries made by plaintiff, on reports by an employee checking deliveries, both testifying, admitted); *Illinois:* 1881, Stettauer *v.* White, 98 Ill.

1857, DEWEY, J., in *Harwood* v. *Mudry*, 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): "Business could not be carried on and accounts kept, in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. . . . If the witnesses are to be believed, there can be but little moral doubt that the book is a true record of the actual fact."

§ 752. **Same: Salesman Deceased or otherwise Unavailable.** A common situation is that in which the original observer who made the oral or written statement — salesman, timekeeper, driver — is, by reason of death or ab-

77 (shipper and entry-clerk); *Iowa:* 1907, Furlong & Meloy *v.* North British & M. Ins. Co., 136 Ia. 468, 113 N. W. 1084 (inventory of burnt stock, made by two persons testifying); *Louisiana:* 1857, White *v.* Wilkinson, 12 La. An. 360, *semble* (bookkeeper and salesman); *Maryland:* 1909, Buck *v.* Brady, 110 Md. 568, 73 Atl. 277 (memorandum of a rabies investigation made in part by each of three doctors, used on their joint testimony); 1921, Corbin *v.* Staton, 139 Md. 150, 115 Atl. 23 (barrels delivered; entries by clerk and bookkeeper, admitted; theory obscure); *Massachusetts:* 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); 1906, Pettey *v.* Benoit, 193 Mass. 233, 79 N. E. 245 (books of account verified by the plaintiff and his clerks, admitted; citing Kent *v.* Garvin, *supra*); *New Jersey:* 1919, Rathbun *v.* Brancatella, 93 N. J. L. 222, 107 Atl. 279 (issue as to the number of an automobile; M. a bystander called out the number as observed by him to S., who made a memorandum, but first repeated the number to G., who reported it to police headquarters where it was identified by X in the motor vehicle register; S. meantime destroyed her memorandum; the combined testimony of M. S. G. and X, admitted); *New York:* 1877, Shear *v.* Van Dyke, 10 Hun 529 (one 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); *Oklahoma:* 1914, State *v.* Rule, 11 Okl. Cr. 237, 144 Pac. 807 (larceny by false warrants; certain account books of the W. P. Co., verified by all persons concerned in making them, admitted; the opinion is not clear as to the principle); *Pennsylvania:* 1823, Ingraham *v.* Beckins, 9 S. & R. 285 (delivery-clerk and bookkeeper); 1834, Jones *v.* Long, 3 Watts 326, *semble* (same); *South Carolina:* 1831, Clough *v.* Little, 3 Rich. 353 (same); 1850, Thomas *v.* Porter, 4 Strob. Eq. 65 (same); *Washington:* 1912, Lawn *v.* Prager, 67 Wash. 568, 121 Pac. 466 (building contractor's time-books, proved by the foreman who made the slips and the defendant who copied them, admitted).

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 is presented where an *interpreter's* rendering of a *deceased witness' testimony* is presented by a *stenographer's minutes*. If both take the stand, the minutes should be received. This seems to be sanctioned in the following cases: 1871, Schearer *v.* Harbor, 36 Ind. 541; 1880, People *v.* Lee Fat, 54 Cal. 529; 1880, People *v.* Ah Yute, 56 Cal. 120.

So, too, for any *report of words uttered:* 1834, Green *v.* Cawthorn, 4 Dev. L. 409 (the issue being whether offensive words of the plaintiff had been communicated to the defendant, E. testified that he had told them to the defendant as reported to him by M. but now forgot the words, and M. testified what the words were as he heard them from the plaintiff and reported them to M.); 1903, People *v.* McFarlane, 138 Cal. 481, 71 Pac. 568 (witness at a former trial permitted to testify by reference to and reliance upon the official transcript of his testimony verified by the reporter).

Compare the cases cited *ante*, § 744 (oral identification of utterances).

sence, unattainable as a witness. In that case, may the person who copied the statement — the bookkeeper or shipping-clerk — by his testimony alone make the use of the record possible? Here it is clear that the original statement of the absent person comes as hearsay — *i.e.* untested by the production of the witness in court for cross-examination, and is therefore 'prima facie' unreceivable. It must come in, if at all, under the hearsay exception for Regular Entries. The rules for this situation are therefore best examined elsewhere (*post*, §§ 1530, 1555).

§ 753. (4) **Record must be Shown to Opponent on Demand, for Inspection and Cross-examination.** The fundamental purpose of the rule requiring the use of the original is to protect against error and to give the opponent an opportunity to verify the exact nature of the document and to ascertain its value (*post*, § 1179). Even where a copy is permitted, there is still a need in fairness for the opponent to see the document, in order to prepare to test the witness upon its contents (on the principle of § 1861, *post*). Thus it is a necessary implication that the document used, whether an original or a copy, when produced in court, shall be *shown to the opponent, on his request*, to inspect and to use in cross-examination:[1]

> 1834, PATTESON, J., in *R.* v. *St. Martin's*, 2 A. & E. 210: "If he could not recollect the facts independently of the writing, the original writing ought to have been in court in order that the other party might cross-examine; not that such writing is to be made evidence itself, but that the other party is to have the benefit of the witness refreshing his memory in every part."
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> 1870, MULLIN, J., in *Tibbets* v. *Sterberg*, 66 Barb. 201: "If the witness cannot be compelled to produce it, he might use documents made for him by the party calling him, of the accuracy of which he knows nothing. . . . The right of a party to protection against the introduction against him of false, forged, or manufactured evidence, which he is not permitted to inspect, must not be invaded a hair's breadth."

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

§ 753. [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, 45 Fla. 638, 33 So. 704; 1870, McKivitt *v.* Cone, 30 Ia. 457; 1875, Adae *v.* Zangs, 41 Ia. 536; 1836, Shove *v.* Wiley, 18 Pick. Mass. 563; 1875, Raynor *v.* Norton, 31 Mich. 209; 1922, People *v.* Schepps, — Mich. —, 186 N. W. 508 (robbery); 1872, Chute *v.* State, 19 Minn. 277; 1846, Hall *v.* Ray, 18 N. H. 126; 1884, Peck *v.* Valentine, 94 N. Y. 569; P. R. Rev. St. & C. 1911, § 1522 (like Cal. C. C. P., § 2047); 1823, Nicholson *v.* Withers, 2 McCord S. C. 429; 1823, Rogers *v.* Burton, Peck Tenn. 108; 1838, Beets *v.* State, Meigs Tenn. 106; 1884, Davis *v.* Field, 56 Vt. 426; 1854, Harrison *v.* Middleton, 11 Gratt. Va. 547.

The limits to the inspection by the opponent of 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).

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." 2. "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."

§ 754. (5) **Record goes as Testimony to the Jury.** If by verifying and adopting the record of past recollection the witness makes it usable testimonially, 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]

§ 754. [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, except as otherwise noted:

ENGLAND: 1801, Jacob *v.* Lindsay, 1 East 460; 1826, Loyd *v.* Freshfield, 2 C. & P. 332; 1896, Birchall *v.* Bullough, 1 Q. B. 325 (a note used as a record of past recollection as to borrowing money; allowable, although itself inadmissible because unstamped).

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."

UNITED STATES: *Federal:* Here the course of rulings has been disturbed by the unfortunate opinion in Bates *v.* Preble, Fed., which should be expunged from memory: 1869, Insurance Co. *v.* Weide, 9 Wall. 677 ("not evidence *per se*", but satisfactory when verified); 1871, Insurance Co. *v.* Weides, 14 Wall. 379; 1878, Ruch *v.* Rock Island, 97 U. S. 695 ("put in evidence"); 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); 1899, Dunlap *v.* Hopkins, 37 C. C. A. 52, 95 Fed. 231; 1906, Grunberg *v.* U. S., 145 Fed. 81, 96 (again the subject is confused by ignoring the two kinds of memoranda); 1914, The J. S. Warden, 3d C. C. A., 219 Fed. 517 (witness allowed to "read into the evidence" a memorandum of past recollection; here, an inspector of engineering); 1920, Schoberg *v.* U. S., 6th C. C. A., 264 Fed. 1, 9 (dictagraph operator's notes); *Alabama:* 1860, Mims *v.* Sturtevant, 36 Ala. 630 ("a part of his evidence"); 1879, Acklen's Ex'r *v.* Hickman, 63 Ala. 498; 1905, Alabama G. S. R. Co. *v.* Clarke, 145 Ala. 459, 39 So. 816; 1910, Birmingham R. L. & P. Co. *v.* Seaborn, 168 Ala. 658, 53 So. 241 ("The true rule . . . is laid down in the case of Acklen *v.* Hickman"); *Arkansas:* 1896, Phœnix Ins. Co. *v.* Amusement Co., 63 Ark. 187, 37 S. W. 959 (must be read, and not put in as evidence); *California:* 1857, People *v.* Elyea, 14 Cal. 144 (the memorandum cannot be "given in evidence"); *Columbia* (Dist.): 1908, Sechrist *v.* Atkinson, 31 D. C. App. 1 (not decided); *Connecticut:* the sound rule 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.; *Hawaii:* 1897, Republic *v.* Toyotaro, 11 Haw. 195 (the memorandum cannot be "read in evidence"); *Illinois:* 1859, Mineral Point R. Co. *v.* Keep, 22 Ill. 20; *Iowa:* 1875, Adae *v.* Zangs, 41 Ia. 536; 1897, Tyler *v.* R. Co., 102 Ia. 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 Ia. 435, doubted); 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); 1904, State *v.* McGruder, 125 Ia. 741, 101 N. W. 646; *Kansas:* 1885, Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730; 1897, Wright *v.* Wright, 58 Kan. 525, 50 Pac. 444 ("The two [witness and memorandum] are the equivalent of a present positive statement of the witness affirming the truth of the contents of the memorandum"); 1900, Garden City *v.* Heller, 61 Kan. 767, 60 Pac. 1060; *Maine:* 1885, State *v.* Lynde, 77 Me. 561, 1 Atl. 687 (an examined or sworn copy becomes evidence); *Massachusetts:* both theory and practice have been unsettled: 1857, Crittenden *v.* Rogers, 8 Gray 452; 1866, Dugan *v.* Mahoney, 11 All. 572; 1869, Adams *v.* Coulliard, 102 Mass. 173; 1872, Cobb *v.* Boston, 109 Mass. 444 (to be read in the discretion of the Court; not "of itself evidence"); 1875, Field *v.* Thompson, 119 Mass. 151; 1882, Costello *v.* Crowell, 133 Mass. 352; 1906, Holden *v.* Prudential L. Ins. Co., 191 Mass. 153, 77 N. E. 309 (here the Court is still unappreciative of the true nature of the process; the memorandum is said to be "plainly inadmissible", but the witness may "use it to aid him in testifying"); 1908, Atherton *v.* Emerson, 199 Mass. 199, 85 N. E. 530 (doctrine applied); 1908, Cumberland G. M. Co. *v.* Atteaux, 199 Mass. 426, 85 N. E. 536, *semble*; *Michigan:* 1882, Mason *v.* Phelps, 48 Mich. 126, 11 N. W. 413, 837; 1909, Farrell *v.* Haze, 157 Mich. 374, 122 N. W. 197 (not decided); 1911, Koehler *v.* Abey, 168 Mich. 113, 133 N. W. 923; 1912, John-

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 supported 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" or "given in evidence." But these must be regarded as unsound in principle.

§ 755. **Judicial Discretion in applying the Foregoing Rules.** It must be conceded that the foregoing detailed rules under the general principle have been too reverently regarded as inflexible dogmas. They have now, in their technical development, overshot their purpose. That purpose was to secure the best available memory of the witness, while guarding against imposition by false use of purporting memoranda. But when the logical details of the general principle are made ends in themselves, they tend to become vain quibbles, having no relation to probative value.

The truth is that these two grand rules — for memoranda of Past and of Present Recollection — being the only rules of the Law of Evidence on the subject — have assumed a size which is out of all proportion to the real risks

son *v.* Union Carbide Co., 169 Mich. 651, 134 N. W. 1079; *Minnesota:* 1883, Hoffman *v.* R. Co., 40 Minn. 60, 41 N. W. 301 (memorandum cannot be "given in evidence"); *Mississippi:* 1902, Alabama & V. R. Co. *v.* Sol Fried Co., 81 Miss. 314, 33 So. 74; *New Hampshire:* 1840, Haven *v.* Wendell, 11 N. H. 112; 1869, Kelsea *v.* Fletcher, 48 N. H. 282 ("evidence to go to the jury"); 1874, Watts *v.* Sawyer, 55 N. H. 40; 1883, Pinkham *v.* Benton, 62 N. H. 687; *New Mexico:* 1910, Terr. *v.* Harwood, 15 N. Mex. 424, 110 Pac. 556 (whether it may be handed to the jury, or simply read, not decided); *New York:* 1857, Halsey *v.* Sinsebaugh, 15 N. Y. 485 ("read to the jury in connection with the oral testimony"); 1858, Russell *v.* R. Co., 17 N. Y. 134 ("in connection with and auxiliary to the oral testimony"); 1864, Marcly *v.* Shults, 29 N. Y. 346 ("evidence of the fact"); 1872, McCormick *v.* R. Co., 49 id. 303; 1876, Flood *v.* Mitchell, 68 N. Y. 509; 1879, Howard *v.* McDonough, 77 N. Y. 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 N. Y. 569 ("read in evidence in connection with and as auxiliary to his testimony"); 1889, National Ulster Co. Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408 ("read in evidence"); *North Carolina:* 1886, Bryan *v.* Moring, 94 N. C. 687; *Oklahoma:* 1904, First Nat'l Bank *v.* Yeoman, 14 Okl. 626, 78 Pac. 388; *Pennsylvania:* 1829, Farmers' M. Bank *v.* Boraef, 1 Rawle 152; 1866, Selover *v.* Rexford, 52 Pa. 308; *South Carolina:* 1817, Haig *v.* Newton, 1 Mills Const. 423; 1818, Columbia *v.* Harrison, 2 S. C. 212; *South Dakota:* 1898, Mt. Terry M. Co. *v.* White, 10 S. D. 620, 74 N. W. 1060 (opponent allowed to put it in on cross-examination); 1917, Maupin *v.* Mobridge State Bank, 38 S. D. 331, 161 N. W. 332 (memorandum of contents of certificate of deposit); *Vermont:* 1862, Lapham *v.* Kelly, 35 Vt. 198; 1884, Davis *v.* Field, 56 Vt. 426; 1892, Bates *v.* Sabin, 64 Vt. 511, 520, 24 Atl. 1013; 1892, Williams *v.* Wager, 64 Vt. 326, 328, 336, 24 Atl. 765 (same; but not as "independent evidence"); *Virginia:* 1854, Harrison *v.* Middleton, 11 Gratt. 547 ("being a part of the evidence"); *Wisconsin:* 1883, Rounds *v.* State, 57 Wis. 52, 14 N. W. 865 (may not be "read in evidence"); 1905, Manning *v.* School District, 124 Wis. 84, 102 N. W. 356 ("may be put in evidence").

[2] 1834, R. *v.* St. Martin's, 2 A. & E. 210; 1893, Bates *v.* Preble, 151 U. S. 154, 14 Sup. 297; 1900, Baird Lumber Co. *v.* Devlin, 124 Ala. 245, 27 So. 425; 1886, Lipscomb *v.* Lyon,

and defects of testimonial memory. Modern psychology [1] exhibits the memory processes as highly complex and varied; its vagaries and tendencies are so intricate and so obscure that no one or two rules of precaution can secure testimonial trustworthiness. A rigid veneration for these two groups of rules, and these only, as the dependable safeguards of the law, is pedantic, in view of their limited scope and of the extensive field left untouched by them. They are wise enough in themselves, as rules of thumb based on the usual situations presented at trials. But they are mere provisional crudities, in the light of the complex actual processes of memory.

Courts should cease to treat them as anything but provisional and crude aids to truth. The trial Court's discretion should be allowed to control. There should be liberal interpretation and liberal exemption. And no ruling of admission should ever be deemed an error worth noticing on appeal.

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 capable of misuse 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 prevent this misuse of expedients legitimate enough in themselves that some restriction may be necessary:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. III, c. XI (Bowring's ed., vol. VI, p. 446): "If on the part of the witness the testimony be the product of the imagination, instead of the memory, — incorrectness is, in so far, the quality given to it. If, for want of such helps which on the particular occasion may happen to be necessary, recollection fail to bring to view any such real facts as with these helps might and would have been brought to view, — incompleteness in the mass of the evidence is the result. But, by the same suggestions by which, in case of veracity, memory alone would be assisted and fertilized, it may also happen that *invention* (which, where testimony is in question, is synonymous with mendacity) shall also be set to work, and rendered productive. To administer assistance to recollection, to veracity — to administer, not assistance, but obstruction, to invention, to mendacity, — in these we see two opposite, and, to a first view, irreconcilable, pursuits. How then to reconcile them? or, at any rate, to do

19 Nebr. 521, 27 N. W. 731; 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; 1914, Du Perow *v.* Groomes, 42 D. C. App. 287 (excluded because not used to refresh memory); 1896, Imhoff *v.* Richards, 48 Nebr. 590, 67 N. W. 483 (excluded because not offered as a part of any one's testimony).

§ **755.** [1] See the materials collected in the present writer's "Principles of Judicial Proof", cited *ante*, § 725.

§ **758.** [1] Compare the other rules directed to the same end, against other false aids than writing (*post*, §§ 769, 786).

what is possible to be done towards it? In this question may be seen a problem, the solution of which is no less conspicuous for its difficulty than for its importance. The first point to be considered is the natural opposition between the two ends. In the instance of any arrangement by which recollection is assisted, how natural, if not necessary and unavoidable, it is, that mendacious invention should receive assistance likewise? In the instance of any arrangement by which mendacious invention is obstructed, how natural, if not necessary, it is, that recollection should be subjected to interruption likewise?" [2]

The purpose being to allow the legitimate use of written aids, while preventing their misuse, it would seem that no hard-and-fast rules can be laid down for invariable application. That which is suspicious and reprehensible in one instance may be entirely trustworthy in the next. No unerring marks of impropriety can be named absolutely.

It follows, therefore, that *any writing whatever is eligible for use*, while, on the other hand, *any writing whatever may, in the circumstances, become improper*.[3] This has been well put in the following passage:

1835, Sir *G. A. Lewin*, Note to *Lawes* v. *Reed*, 2 Lew. Cr. C. 152: "Where the object is to revive in the mind of the witness the recollection of the facts of which he once had knowledge, it is difficult to understand why any means should be excepted to whereby that object may be obtained. Whether in any particular case the witness' memory has been refreshed by the document referred to, or he speaks from what the document tells him, is a question of fact open to observation, more or less according to the circumstances. If in truth the memory has been refreshed, and he is enabled in consequence to speak to facts with which he was once familiar, but which afterwards escaped him, it cannot signify, in effect, in what manner or by what means these facts were recalled to his recollection. Common experience tells every man that a very slight circumstance, and one not in point to the existing inquiry, will sometimes revive the history of a transaction made up of many circumstances. . . . Why, then, if a man may refresh his memory by such means out of court, should he be precluded from doing so when he is under examination in court?"

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 misguided rulings.

§ 759. **Writing not made by Witness himself.** That the paper was not written by the witness himself is therefore no fault in it. The witness may or may not, in a given instance, with propriety make use of it; but the aid

[2] Compare also Bentham's other passage: ib. b. III, c. II (Bowring's ed., vol. VI, p. 386).

[3] *Accord: Eng.* 1810, Henry v. Lee, 2 Chitty 124 ("any document"); *U. S.* 1916, Turner v. Turner, 90 Conn. 676, 98 Atl. 324 (approving the text above); 1921, Neff v. Neff, 96 Conn. 273, 114 Atl. 126 (approving the text above); 1843, Dunlop v. Berry, 3 Scam. Ill. 327 ("this or any other paper"); 1866, Miner v. Phillips, 42 Ill. 131 ("the witness had the right to refresh his memory by referring to this or any other paper"); 1893, McNeely v. Duff, 50 Kan. 488, 492, 31 Pac. 1061 (by "any book or memoranda", whether admissible or not in themselves); 1804, Livingston, J., in Steinbach v. Ins. Co., 2 Caines N. Y. 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); 1906, Horton v. Robert, 11 P. R. 168, 185; 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.

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] Occasionally, the paper has been required at least to have been written *under the witness' direction*, or to be known by him to be correct;[2] but this is generally due to a confusion of this subject with the subject of past recollection (*ante*, § 748).

§ 759. [1] *Accord:* ENGLAND: 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);

UNITED STATES: *Federal:* 1901, Breese *v.* U. S., 45 C. C. A. 535, 106 Fed. 680 (bankbooks); 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 Wis. 602; *Alabama:* 1914, Riley *v.* Fletcher, 185 Ala. 570, 64 So. 85 (bill of exceptions from former trial); *Connecticut:* 1921, Neff *v.* Neff, 96 Conn. 273, 114 Atl. 126 (cited *post*, § 761); *Georgia:* 1905, Shrouder *v.* State, 121 Ga. 615, 49 S. E. 702 (record of mortgages); *Illinois:* 1843, Dunlop *v.* Berry, 4 Scam. 327 (a pleading); 1866, Miner *v.* Phillips, 42 Ill. 131 (a newspaper); 1916, Scovill Mfg. Co. *v.* Cassidy, 275 Ill. 462, 114 N. E. 181 (order book); 1922, Walsh *v.* Chicago R. Co., 303 Ill. 339, 135 N. E. 709 (physician's testimony to an examination of an insured); *Indiana:* 1911, Federal U. Surety Co. *v.* Indiana L. & M. Co., 176 Ind. 328, 95 N. E. 1104 (lumber hauler allowed to refresh from a delivery-slip not made out by him); *Maine:* 1854, State *v.* Lull, 37 Me. 246 (made by witness' clerk); *Massachusetts:* 1903, Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419 (telegram); 1906, Fay *v.* Walsh, 190 Mass. 374, 77 N. E. 44; *Michigan:* 1878, Cameron *v.* Blackman, 39 Mich. 108 (entries copied by others); *Minnesota:* 1893, Culver *v.* Lumber Co., 53 Minn. 360, 365, 55 N. W. 552; *New Jersey:* 1920, State *v.* Gruich, 95 N. J. L. 263, 112 Atl. 594 (paper written by H., prepared in presence of L., allowed to be shown to L. to refresh his memory); *New York:* 1852, Huff *v.* Bennett, 6 N. Y. 337 (newspaper report); 1872, McCormick *v.* R. Co., 49 N. Y. 303 ("made by himself or by any other person"); 1883, Bigelow *v.* Hall, 91 N. Y. 145 ("whether made by himself or another"); 1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (R. allowed to testify from a memorandum made by R.'s bookkeeper), *South Carolina:* 1845, O'Neale *v.* Walton, 1 Rich. 234; 1857, Berry *v.* Jourdan, 11 S. C. 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 S. C. 373 ("not material that the witness did not himself make the record"); *Vermont:* 1916, Nelson & Wallace *v.* Gibson, 90 Vt. 423, 98 Atl. 1006 (books not personally known to be correct, used to refresh recollection "as corroborative"); *West Virginia:* 1922, Browning *v.* Hoffman, — W. Va. —, 111 S. E. 492 (nurse's bedside chart).

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.

[2] *Eng.* 1827, Meagoe *v.* Simmons, 3 C. & P. 75; *U. S. Ala.* 1879, Acklen'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; *Ida.* Comp. St. 1919, § 8033 (like Cal. C. C. P. § 2047); 1921, State *v.* Ramirez, 33 Ida. 803, 199 Pac. 376 (sheriff's use of notes of a conversation with accused, made by the district attorney, held improper; the Court admits the sound principle, but holds that Comp. St. § 8033 is controlling; yet a better solution would have been to hold that the Code provision applied only to records of past recollection); *Mass.* 1853, Coffin *v.* Vincent, 12 Cush. 98; 1857, Davis *v.* Allen, 9 Gray 322; *Mo.* 1914, State *v.* Patton, 255 Mo. 245, 164 S. W. 223 ("the Missouri rule is . . . against the rule urged by Wigmore's Greenleaf, 16th ed., § 439*c*; where it is said that the memory of the witness may be refreshed by any paper, *whether the same is known by the witness to be correct or not;* this view of Mr. W. has been followed by our St. Louis Court of Appeals, Ebersol *v.* Investment Co., 130 Mo. App. 308; we do not find this statement of the learned author and of the Court of Appeals to be borne out either by the cases which he cites to support it, or by the great weight of the authorities which we have examined"; the fact

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.[3] 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."

§ 760. **Writing not Original, but a Copy.** That the paper is a copy, not an original, is also no essential fault. The only question is whether in fact it is genuinely calculated to revive the witness' recollection; and for this purpose a copy may conceivably be entirely satisfactory.[1] The radical difference of

is, however, that no authorities are cited in the Greenleaf passage *in support* of the above phrased statement; the passage reads: "That the paper was not *written by the witness himself* is no objection", and then a Note 1 cites twenty-one authorities in support of that statement; these authorities do support it, except that one is not verifiable, being miscited by volume or page, and is therefore out of question, and one is capable of being misunderstood; then the text continues, "and it is *therefore incorrect* (confusing this with the preceding subject) *to require* that the paper be one written by the witness or under his direction or *known by him to be correct*", and then a Note 2 cites four authorities as examples of a requirement indeed so made, but *incorrectly* so made; it is likely that a hasty perusal imagined that these authorities were cited as supporting the doctrine approved in the text); *Mont.* Rev. C. 1921, § 10664 (like Cal. C. C. P. § 2047); *N. J.* 1907, Hill *v.* Adams Express Co., 74 N. J. L. 338, 68 Atl. 94 (distinction of two kinds of refreshing, ignored); *Or.* Laws 192, § 859 (like Cal. C. C. P. § 2047); *P. I.* C. C. P. 1901, § 338 (like Cal. C. C. P. § 2047); *P. R.* Rev. St. & C. § 1522 (like Cal. C. C. P. § 2047); *S. C.* 1878, State *v.* Cardoza, 11 S. C. 238; *Tex.* 1899, Burks *v.* State, 40 Tex. Cr. 167, 49 S. W. 389, *semble*.

[3] *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"); 1905, State *v.* Teachey, 138 N. C. 587, 50 S. E. 232 (dying declarant's affidavit, used by an auditor).

Add the citations *post*, §§ 786–788, which rest upon the same principle.

§ 760. [1] *Accord:* ENGLAND: 1756, Tanner *v.* Taylor, in 3 T. R. 754 (copy of account-book entry); 1776, Duchess of Kingston's Case, 20 How. St. Tr. 619; 1790, Doe *v.* Perkins, 20 How. St. Tr. 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).

UNITED STATES: *Colorado:* 1881, Lawson *v.* Glass, 6 Colo. 134; *Connecticut:* 1885, Erie Preserving Co. *v.* Miller, 52 Conn. 444 (copies of way-bills); *Florida:* 1904, Davis *v.* State, 47 Fla. 26, 36 So. 170 (witness allowed to refer to a copy of stenographic notes, made after adjournment; approving Volusia Co. Bank *v.* Bigelow, cited *ante*, § 749, n. 1); *Georgia:* 1891, Finch *v.* Barclay, 87 Ga. 393, 13 S. E. 566 (copy from account-books); *Illinois:* 1855, Iglehart *v.* Jernegan, 16 Ill. 513 (extract from copy of testimony in bill of exceptions); 1870, Chicago R. Co. *v.* Adler, 56 Ill. 345; *Maine:* 1878, Davie *v.* Jones, 68 Me. 393 (copy of account-book entry); 1900, Pierce *v.* R. Co., 94 Me. 171, 47 Atl. 144; *Maryland:* 1875, Bullock *v.* Hunter, 44 Md. 425; *Massachusetts:* 1853, Coffin *v.* Vincent, 12 Cush. 98 (copy of printed form); 1903, Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419 (telegram); *Michigan:* 1878, Cameron *v.* Blackman, 39 Mich. 108; 1883, Hudnutt *v.* Comstock, 50 Mich. 596, 16 N. W. 157 (copy of account-book entry); *Nebraska:* 1878, Clough *v.* State, 7 Nebr. 336 (extracts from witness' official records); 1912, Erdman *v.* State, 90 Nebr. 642, 134 N. W. 258 (newspaper); *New York:* 1852, Huff *v.* Bennett, 6 N. Y. 337 (newspaper copy); 1864, Marcly *v.* Shults, 29 id. 346; 1872, McCormick *v.* R. Co., 49 N. Y. 303; 1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (R. allowed to testify from memoranda made by his bookkeeper from books made up from data furnished by R.'s foreman); *Oregon:* 1901, Haines *v.* Cadwell, 40 Or. 229,

principle between this use and that of a copied record of past recollection (*ante*, § 749) is plain; there is here no necessity of accounting for the original in any way:

1843, SHIELDS, J., in *Dunlop* v. *Berry*, 5 Ill. 327 (the witness refreshed his memory as to the contents of a return by looking at the copy of it in the declaration): "It was competent for him to use the declaration or any other paper for the purpose of refreshing his memory upon the subject."

1852, JEWETT, J., in *Huff* v. *Bennet*, 6 N. Y. 337 (the witness used a newspaper report): "It is well settled that he is permitted to assist his memory by the use of any written instrument; and it is not necessary that such writing should have been made by himself, or that it should be an original writing, providing after inspecting it he can speak to the facts from his own recollection."

1877, COLE, J., in *Folsom* v. *Log-driving Co.*, 41 Wis. 602 (the witness, testifying to the amount of damage, used a copy made recently by K. from a copy of original contemporary memoranda; the other papers having become defaced): "This kind of evidence is open to more or less suspicion, because . . . it may lead him to suppose he recalls facts when he really does not. But this affects the credibility rather than the competency of the testimony."

§ 761. **Writing not made at the Time of the Event; Depositions and Former Testimony.** That the paper was not drawn up about the time of the events is not a fault. The recollection may be equally refreshed by a recent note as by some contemporaneous record. It might, in fact, be argued that there was less danger of reliance upon the record itself and more probability of actual refreshment where the paper was one confessedly having no value as a contemporaneous record of past recollection.

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

66 Pac. 910; *Rhode Island:* 1902, Welch and Co. *v.* Greene, 24 R. I. 515, 54 Atl. 54; *South Carolina:* 1857, Berry *v.* Jourdan, 11 Rich. 67, 78 (witness to lost deed, allowed to use a copy); 1899, Sloan *v.* Pelzer, 54 S. C. 314, 32 S. E. 431; *Texas:* Houston & T. C. R. Co. *v.* Burke, 55 Tex. 342; 1891, Watson *v.* Miller, 82 Tex. 285, 17 S. W. 1053; *Utah:* 1917, Sagers *v.* International Smelting Co., 50 Utah 423, 168 Pac. 105 (damage to crops); *Vermont:* 1883, State *v.* Hopkins, 56 Vt. 258; *Virginia:* 1854, Harrison *v.* Middleton, 11 Gratt. 530, 547 (copy of field notes).

Contra: 1896, Hopper *v.* Beck, 83 Md. 647, 34 Atl. 474 (a ledger copied from a day-book copied from another book, rejected).

In a few cases the writing was apparently treated and used as a record of past recollection, and hence the question of originality was material: 1884, Clifford *v.* Drake, 110 Ill. 135; 1887, Bonnet *v.* Glatfeldt, 120 Ill. 166, 11 N. W. 250; 1881, Com. *v.* Ford, 130 Mass. 66.

§ 761. [1] 1921, Neff *v.* Neff, 96 Conn. 273, 114 Atl. 126 (detective allowed to refresh her memory by reference to the stenographer's transcript of notes taken from witness' dictation); 1880, Bank *v.* Zorn, 14 S. C. 444 ("without regard to when or by whom made"); 1917, Sagers *v.* International Smelting Co., 50 Utah 423, 168 Pac. 105; 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.

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.[3] 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

[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, Maxwell's Ex'rs v. Wilkinson, 113 U. S. 657, 5 Sup. 691; 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; and the other Codes cited *ante*, § 736.

[4] ENGLAND: 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. 184 (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).

UNITED STATES: *Ark.* 1855, Atkins v. State, 16 Ark. 568, 589 (refreshing by a deposition); *Cal.* 1903, People v. McFarlane, 138 Cal. 481, 71 Pac. 568 (refreshing by a copy of former testimony); *Ill.* 1855, Iglehart v. Jernegan, 16 Ill. 513 (refreshment from certified copies of bill of exceptions containing testimony at another trial); *Ind.* 1872, Harvey v. State, 40 Ind. 519 (reading aloud her former testimony to one who could not read); 1884, Johnson v. Gwinn, 100 Ind. 466, 474 (reading over the witness' preceding testimony on the subject at his request); 1887, Stanley v. Stanley, 112 Ind. 145, 13 N. E. 261 (calling attention of witness to his former testimony); *Iowa:* 1880, State v. Kremling, 53 Ia. 209 (witness looked at the minutes of his testimony before the grand jury); *La.* 1904, State v. Aspara, 113 La. 940, 37 So. 883 (stenographic report of former testimony); *Md.* 1921, Mercantile Trust & D. Co. v. Rhode, 137 Md. 362, 112 Atl. 574 (party's reference to his stenographer's note-book to show error of transcription of letter, not allowed; the ruling is incorrect, because here the witness was merely trying to explain the incorrectness of transcription); *Mich.* 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"); *Mo.* 1919, Vest v. Kresge Co., — Mo. App. —, 213 S. W. 165 (distinguishing the use of a deposition to impeach one's own witness); *N. Car.* 1894, State v. Staton, 114 N. C. 813,

been influenced more or less by the apprehension that thereby the counsel, when a cross-examiner, might evade the rule (*post*, § 1018) which forbids the witness' prior contradictory statements to be introduced as independent testimony, or that the counsel on a direct examination might evade the rule (*post*, § 902) against impeaching one's own witness by his contradictory statements.[5] But neither of these rules in themselves interpose any obstacle. If an evasion of them is really being attempted, with the refreshment of recollection as a mere pretext, then the judge may interpose. But it is a singular proposal to forbid a legitimate proceeding by a uniform rule, merely because of a possible evasion, which can be dealt with adequately whenever it is attempted.

§ 762. **Writing must be Shown to the Opponent, on Demand, for Inspection and Cross-Examination; Memoranda used before Trial.** On a general principle (*post*, § 1861), having in view the risk of imposition and false aids, against which the opponent is entitled to the means of protection, the writing must be shown to him on request. Furthermore, as by this opportunity of *inspection* the opponent is guarded against imposition clearly apparent, so by *cross-examination* based on the paper he may further detect circumstances not appearing on the surface, and may expose all that detracts from the weight of testimony:[1]

815, 19 S. E. 96 (by memorandum of former testimony); 1896, State *v.* Finley, 118 N. C. 1161, 24 S. E. 495 (using a deposition); *Oh.* 1889, Williams, J., in Hurley *v.* State, 46 Ohio 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); *Va.* 1904, Portsmouth St. R. Co. *v.* Peed's Adm'r, 102 Va. 662, 47 S. E. 850.

Compare § 764, *post*.

[5] *Eng.* 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); *U. S.* 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 recur in their own minds to their testimony before the grand jury, and then state when and how often" they had bought liquor; this was held improper; Shaw, C. J.: "To ask what he testified to before the grand jury has no tendency to refresh his memory"); 1892, U. S. *v.* Cross, 20 D. C. 377 (a witness' memory cannot be refreshed by re-stating his former oral testimony).

The Federal Supreme Court has unfortunately, in Putnam *v.* U. S. 687, 16 Sup. 923 (1896), complicated a very simple question and added the weight of its authority to the side that is wrong both in history and in principle, by ruling that this refreshment by such a reference to former testimony cannot be made, since the reference is based on a non-contemporaneous record. It ought to have been obvious that even if there were a rule against refreshing by non-contemporaneous papers, that rule could not apply where the refreshment was by oral questions of the counsel, and not by the witness' use of a paper. But the opinion in Putnam *v.* U. S. also proceeds on a radical misunderstanding of Melhuish *v.* Collier, *post*, § 902 (impeachment of one's own witness).

§ 762. [1] *Accord: Eng.* 1824, Sinclair *v.* Stevenson, 1 C. & P. 582; 1833, Gregory *v.* Taverner, 6 C. & P. 281; 1858, Palmer *v.* McLear, 1 Sw. & Tr. 149; *Can.* 1916, McLean *v.* Merchants' Bank, 27 D. L. R. 156, Alta. (title to an automobile; the witness having used a paper of items to refresh her memory on cross-examination, counsel cross-examining was held entitled to look at the paper); *U. S.* 1907, Morris *v.* U. S., 80 C. C. A. 112, 149 Fed. 123; 1879, Acklen's Ex'r *v.* Hickman, 63 Ala. 498; 1916, Capital Traction Co. *v.* Hoover, 45 D. C. App. 247 ("any paper shown to and read by a witness while upon the stand", though not a paper merely shown for identification); 1908, Harman *v.* Illinois & E. Coal Co., 237 Ill. 36, 86 N. E. 625; 1870, McKivitt *v.* Cone, 30 Ia. 455; 1856, Com. *v.* Fox, 7 Gray 585; 1866, Com. *v.* Haley, 13 All. Mass. 587; 1866, Com. *v.* Lanman, 13 All. 563 (discretion of Court); 1882, Com. *v.* Jeffs, 132 Mass. 5;

1794, EYRE, L. C. J., in *Hardy's Trial*, 24 How. St. Tr. 824: "It is always usual and very reasonable, when a witness speaks from memorandums, that the counsel should have an opportunity of looking at those memorandums, when he is cross-examining that witness."

1827, *R.* v. *Ramsden*, 2 C. & P. 603; the witness gave a date as six months before; when the counsel put a paper in his hand, he then named the date as nine months before; the opposing counsel demanded to see it; Witness' counsel: "I submit my friend has no right to see it, unless he will read it in evidence." TENTERDEN, L. C. J.: "You put the 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 referred 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. *Seely*, 34 Mich. 369: "The other party had a right to know what the memorandum was on which he relied, and whether it [2] 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 memorandum 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."

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 distinction 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

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. N. Y. 134; 1870, Tibbetts *v.* Sterberg, 66 Barb. N. Y. 201; 1917, State *v.* Deslovers, 40 R. I. 89, 100 Atl. 64; 1878, State *v.* Cardoza, 11 S. C. 238.

[2] Misprinted as "he" in the original.

[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. N. C. 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. Mass. 587; 1882, People *v.* Lyons, 49 Mich. 78, 13 N. W. 365.

Compare the rules of §§ 2116, 2125, *post*.

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.

§ 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 strict 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 the *opponent* 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. *Tavernor*, 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

[5] *Accord:* 1900, People v. Vann, 129 Cal. 118, 61 Pac. 776, *semble;* 1906, Lowrie v. Taylor, 27 D. C. App. 522, 526, *semble* (here the production of the book was not demanded); 1869, White v. Allen, 3 Or. 103, 110; 1855, Hamilton v. Rice, 15 Tex. 382, 386. *Contra:* 1912, State v. Kwiatkowski, 83 N. J. L. 650, 85 Atl. 209 (here the precise point was not raised); 1899, State v. Magers, 36 Or. 38, 58 Pac. 892 (but otherwise for a record of past recollection); 1915, State v. Hammond, 46 Utah 249, 148 Pac. 420 (doctor's record of birth); 1903, Loose v. State, 120 Wis. 115, 97 N. W. 526 (but the Court may require production).

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. [1] *Eng.* 1803, Hedges' Trial, 28 How. St. Tr. 1367; 1858, Payne v. Ibbotson, 27 L. J. Ex. 341; *U. S. Ala.* 1879, Acklen's Ex'rs v. Hickman, 63 Ala. 498; 1910, Pace v. Louisville & N. R. Co., 166 Ala. 519, 52 So. 52; 1914, Riley v. Fletcher, 185 Ala. 570, 64 So. 85 (affirming Acklen v. Hickman); *Col.* (Dist.): 1898, McCormick v. Cleal, 12 D. C. App. 335, 338 (need not be offered in evidence); 1908, Sechrist v. Atkinson, 31 D. C. App. 1; *Conn.* 1895, Curtis v. Bradley, 65 Conn. 99, 31 Atl. 591; 1900, Palmer v. Hartford D. Co., 73 Conn. 182, 47 Atl. 125; *Ill.* 1920, Davis v. Michigan Central R. Co., 294 Ill. 355, 128 N. E. 539 (car-inspector's book); *Ind.* 1885, Elmore v. Overton, 104 Ind. 548, 555, 4 N. E. 197; *Ky.* 1899, Western Assur. Co. v. Ray, 105 Ky. 523, 49 S. W. 326; 1900, Wilson v. Com., — Ky. —, 54 S. W. 947; *Mass.* 1856, Com. v. Fox, 7 Gray 585; 1881, Com. v. Ford, 130 Mass. 66; 1921, Capodilupo v. Stock, 237 Mass. 550, 130 N. E. 65; 1921, Dorr v. Mass. Title Co., — Mass. —, 131 N. E. 191 (order blank); *Mo.* 1920, Willitts v. Chicago B. & Q. R. Co., — Mo. —, 221 S. W. 65 (physician's memoranda); 1922, Littig v. Urbaner-Atwood H. Co., — Mo. —, 237 S. W. 779 (reading it to the jury); *Mont.* 1901, Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884; *N. H.* 1874, Watts v. Sawyer, 55 N. H. 40; *N. Y.* 1879, Howard v. McDonough, 77 N. Y. 592; 1911, Mattison v. Mattison, 203 N. Y. 79,

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 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).

§ 765. **Judicial Discretion in applying the Foregoing Rules.** The foregoing rules should not be treated as dogmas of inherent efficiency. They are merely crude rules-of-thumb, worthy of adoption for the general purpose. What is said in § 755, *ante*, as to over-strict enforcement of the other rules, applies equally to these. The trial Court's discretion should control.

96 N. E. 359 (hotel register, not admitted); *Or.* 1890, Friendly *v.* Lee, 20 Or. 202, 25 Pac. 396; *S. C.* 1901, Hicks *v.* R. Co., — S. C. —, 38 S. E. 725, *semble*; *Va.* 1867, Fant *v.* Miller, 17 Gratt. 187, 224; *W. Va.* 1906, State *v.* Legg, 59 W. Va. 315, 53 S. E. 545 (reading aloud to a witness his former testimony: this seems strained, for the reading aloud was merely a mode of questioning him to stimulate recollection, and not an offering of the paper in evidence).

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; 1913, Bruder *v.* State, 110 Ark. 402, 161 S. W. 1067 (trial Court's refusal to submit to the jury, held here not improper); 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"); 1905, Logan *v.* Freerks, 14 N. D. 127, 103 N. W. 426.

§ 764. [1] 1838, Chapin *v.* Lapham, 20 Pick. Mass. 472.

[2] *England:* 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, he 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"); *Massachusetts:* 1914, Hutchinson *v.* Plant, 218 Mass. 148, 105 N. E. 1017 (not decided).

Compare the principles of §§ 780, 1861, *post*, § 761, *ante*.

SUB-TITLE I (*continued*): TESTIMONIAL QUALIFICATIONS

TOPIC VI: TESTIMONIAL NARRATION OR COMMUNICATION

CHAPTER XXVII.

§ 766. **General Principle.** The third element forming an essential part of all testimony (*ante*, § 478) is the process of laying before the tribunal the witness' results of his Observation (*ante*, § 650) and his Recollection (*ante*, § 725), *i.e.* the process of Narration or Communication. In this element, as 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 *correctly reproducing and intelligibly 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. 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 of law arise.[2]

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. 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:

§ 766. [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").

[2] The rules of Evidence on this subject are not many. But they are only crude in comparison to the complex considerations which psychologically lurk beneath the process of Communication. From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility) see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 244–276.

(1) furnished upon systematic *interrogations*, and not as a continuous 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.

A. INTERROGATED TESTIMONY

§ 767. **Continuous Narration without Questions. Deposition Interrogatories.** May not the witness narrate his knowledge in *continuous speech* 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.

1880. Mr. *Richard Harris*, Hints on Advocacy (Amer. ed. 1892, p. 29): "One of the most important branches of advocacy is the examination of a witness *in chief*. . . . One fact should be remembered to start with, and it is this: the witness whom he has to examine has probably a plain, straightforward story to tell, and that upon the telling it depends the belief or disbelief of the jury, and their consequent verdict. If it were to be told amid a social circle of friends, it would be narrated with more or less circumlocution and considerable exactness. But *all the facts would come out;* and that is the first thing to insure, if the case be, as I must all along assume it to be, an honest one. I have often known half a story told, and that the worst half, too, the rest having to be got out by the leader in reëxamination if he have the opportunity. If the story were being told as I have suggested, in private, all the company would understand it, and if the narrator were known as a man of truth, all would believe him. It would require no advocate to elicit the facts or to confuse the dates; the events would flow pretty much in their natural order. Now change the audience; let the same man attempt to tell the same story in a court of justice. His first feeling is that he must not tell it in his own way. He is going to be *examined* upon it; he is to have it dragged out of him piecemeal, disjointedly, by a series of questions — in fact, he is to be interrupted at every point in a worse manner than if everybody in the room, one after another, had questioned him about what he was going to tell, instead of waiting till he had told it. It is not unlike a post mortem; only the witness is alive, and keenly sensitive to the painful operation. He knows that every word will be disputed, if not flatly contradicted. He has never had his veracity questioned, perhaps, but now it is very likely to be suggested that he is committing rank perjury. . . .

"Now the best thing the advocate can do under these circumstances is to remember, that the witness has something to tell, and that but for him, the advocate, would probably tell it very well, 'in his own way.' *The fewer interruptions, therefore, the better; and the fewer questions, the less questions will be needed.* Watching should be the chief work; specially to see that the story be not confused with extraneous and irrelevant matter."

1906, Mr. *G. F. Arnold*, Psychology of Legal Evidence, 105: "It has no doubt been frequently noticed that it is easier to recall events in the order in which they occurred, and that witnesses, if left to themselves, habitually narrate occurrences in chronological order. It has always struck the writer that the method usually adopted by public prosecutors of

asking questions, though it may be useful in excluding irrelevant matter, *is certainly calculated to hinder memory*."

1910, Mr. *G. M. Whipple*, Manual of Mental and Physical Tests, p. 404: "*Dependence on form of Report.* All authorities agree that the use of the interrogatory, whether the complete or incomplete form, increases the range and decreases the accuracy of the report. Thus, in comparison with the narrative, the range of the interrogatory may be 50 per cent greater, while the inaccuracy (of the incomplete interrogatory) may be as much as 550 per cent greater. In general terms we may say that about one tenth of the narrative is inexact, but about one quarter of the interrogatory."[1]

On the other hand, continuous narration has the disadvantage of risking the witness' interjection of irrelevant and inadmissible matter (chiefly hearsay) without any opportunity for the opponent to know beforehand in time to object and to prevent it. The latter reason has prevailed, increasingly during the past century in the United States; so that the general if not the universal practice is for the witness to narrate, on the direct examination, only by *giving answers to questions framed by counsel*.

This practice is due largely to the increase of technicality in rulings of inadmissibility on the pettiest details of testimony. There is in the minds of courts and practitioners an obsession that the natural way of giving testimony is the dangerous way. The practice now goes to absurd excesses. A healthy view of the subject would banish the obsession, and would restore the natural method as the usual one, thus obtaining more reliable testimony and a notable economy of time in trials.

In point of law, 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:[2]

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."

§ 767. [1] Compare the other passages quoted in the present author's "Principles of Judicial Proof", §§ 244–276, cited *ante*, § 766. So far as the mode of narration is a question of tact and judgment for the examining counsel, it lies without the present purview.

[2] 1892, Northern P. R. Co. *v.* Charless, 2 C. C. A. 380, 51 Fed. 562 (trial Court's discretion controls); 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); 1905, Horton *v.* State, 123 Ga. 145, 51 S. E. 287 ("The practice [of continuous narrative] is to be commended rather than condemned"); 1907, Hendricks *v.* St. Louis Transit Co., 124 Mo. App. 157, 101 S. W. 675; 1909, Pumphrey *v.* State, 84 Nebr. 636, 122 N. W. 19 (trial Court's discretion).

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."

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 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."

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).

§ 768. **Direct and Cross Examination, distinguished.** When a witness' testimony is obtained by requiring answers after questions, instead of by permitting a continuous uninterrupted narrative, certain special opportunities for abuse may arise from adopting the former method of extraction. Some of these opportunities are peculiar to the direct examination (by the party calling the witness) and some to the cross-examination (by the opponent). What is to be noted at the outset is that we are concerned here only with the rules of law which aim to avoid the *dangers 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 no concern with the present inquiry, namely, the defects and dangers peculiar 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.);

[3] *E.g.*, Cal. C. C. P. 1872, § 2006 ("Depositions must be taken in the form of question and answer"). 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.

(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 cross-examination mak. 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 or more.[1] But the rules of law, and not the art of applying them, must here set the limits of investigation.

§ 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

§ 768. [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 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; and other passages quoted in the present author's "Principles of Judicial Proof, etc." (1913), §§ 244–276.

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 frequent 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 instructs 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."

§ 769. [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); and especially the passages quoted from psychologists and practitioners in the present author's "Principles of Judicial Proof, etc." (1913), §§ 244–276.

1904, Sir HENRY HAWKINS, Baron BRAMPTON, Reminiscences, I, 30: "I went to the Old Bailey, a den of infamy in those times not conceivable now, and I verily believe that no future time will produce its like — at least, I hope not. . . . In all cases of gravity three judges sat together. . . . They sat till five o'clock right through, and then went to a sumptuous dinner provided by the Lord Mayor and Aldermen. They drank everybody's health but their own, thoroughly relieved their minds from the horrors of the court, and, having indulged in much festive wit, sometimes at the alderman's expense, and often at their own, returned into court in solemn procession, their gravity undisturbed by anything that had previously taken place, and looking the picture of contentment and virtue. Another dinner was provided by the Sheriffs. . . . The first thing that struck me in the after-dinner trials was the extreme rapidity with which the proceedings were conducted. As judges and counsel were exhilarated, the business was proportionately accelerated. But of all the men I had the pleasure of meeting on these occasions, the one who gave me the best idea of rapidity in an after-dinner case was Muirhouse. Let me illustrate it by a trial which I heard: Jones was the name of the prisoner. His offence was that of picking pockets, entailing of course, a punishment corresponding in severity with the barbarity of the times. It was not a plea of 'Guilty', when, perhaps, a little more inquiry might have been necessary; it was a case in which the prisoner solemnly declared he was 'Not Guilty', and therefore had a right to be tried. The accused having 'held up his hand', and the jury having solemnly sworn to hearken to the evidence, and 'to well and truly try, and true deliverance make', etc., the witness for the prosecution climbs into the box, which was like a pulpit, and before he has time to look round and see where the voice comes from, he is examined as follows by the prosecuting counsel:

"'I think you were walking up Ludgate Hill on Thursday 25th, about half-past two in the afternoon and suddenly felt a tug at your pocket and missed your handkerchief, which the constable now produces. Is that it?' 'Yes, sir.' 'I suppose you have nothing to ask him?' says the judge. 'Next witness.' Constable stands up. 'Were you following the prosecutor on the occasion when he was robbed on Ludgate Hill, and did you see the prisoner put his hand into the prosecutor's pocket and take this handkerchief out of it?' 'Yes, sir.' Judge to prisoner: 'Nothing to say, I suppose?' Then to the jury: 'Gentlemen, I suppose you have no doubt? I have none.' Jury: 'Guilty, my lord', as though to oblige his lordship. Judge to prisoner: 'Jones, we have met before — we shall not meet again for some time — seven years' transportation — next case.' Time: two minutes, fifty-three seconds.

"Perhaps this case was a high example of expedition, because it was not always that a learned counsel could put his questions so neatly; but it may be taken that these after-dinner trials did not occupy on the average more than four minutes each. — Of course, in those days there *were* judges of the utmost strictness as there are now, who insisted that the rules of evidence should be rigidly adhered to."

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,

[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.

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 continuously, it has been declared that the application of the principle is to be left to the *discretion of the trial Court.*[2] In

§ 770. [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] ENGLAND: 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).

UNITED STATES: *Federal:* 1893, St. Clair *v.* U. S., 154 U. S. 134, 150, 14 Sup. 1002; 1894, Northern P. R. Co. *v.* Urlin, 158 U. S. 273, 15 Sup. 840; 1899, Peters *v.* U. S., 36 C. C. A. 105, 94 Fed. 127; 1903, Rainey *v.* Potter, 57 C. C. A. 113, 120 Fed. 651; 1918, Linn *v.* U. S., 2d C. C. A., 251 Fed. 476, 482 (approving the text above);

Alabama: Code 1907, § 4018 ("Leading questions are generally allowed in cross-examinations, and only in these; but the court may exercise a discretion in granting the right to the party calling the witness, and in refusing it to the opposite party, when, from the conduct of the witness, or other reason, justice requires it"); 1841, Towns *v.* Alford, 2 Ala. 380; 1845, Blevins *v.* Pope, 7 Ala. 374 (trial judge need not state his reasons); 1847, Watson *v.* Anderson, 11 Ala. 43, 45; 1848, Donnell *v.* Jones, 13 Ala. 507; 1850, Johnson *v.* State, 17 Ala. 618, 626; 1859, Sayre *v.* Durwood, 35 Ala. 247, 252; 1875, Gassenheimer *v.* State, 52 Ala. 313, 317; 1892, Birmingham *v.* McPoland, 96 Ala. 363, 11 So. 427; 1898, McDonald *v.* State, 118 Ala. 672, 23 So. 637;

Alaska: Comp. L. 1913 (like Or. Laws 1920, § 858);

Arkansas: Dig. 1919, § 4185 (allowable "under special circumstances, making it appear that the interests of justice require it"); 1907, Midland V. R. Co. *v.* Hamilton, 84 Ark. 81, 104 S. W. 540;

California: C. C. P. 1872, § 2046 ("A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On direct examination leading questions are not allowed, except in the sound discretion of the Court, under special circumstances, making it appear that the interests of justice require it"); 1883, People *v.* Ah Fook, 64 Cal. 381, 382; 1 Pac. 347; 1888, People *v.* Goldenson, 76 Cal. 349, 19 Pac. 161; 1890, White *v.* White, 82 Cal. 427, 23 Pac. 276; 1899, Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264; 1901, People *v.* Harlan, 133 Cal. 16, 65 Pac. 9;

Florida: 1878, Coker *v.* Hayes, 16 Fla. 368; 1901, Myers *v.* State, 43 Fla. 500, 31 So. 275; 1903, Sylvester *v.* State, 46 Fla. 166, 35 So. 142; 1904, Schley *v.* State, 48 Fla. 53, 37 So. 518; 1905, Reyes *v.* State, 49 Fla. 17, 38 So. 257;

Georgia: Rev. C. 1910, § 5872, P. C. 1910, § 1045; 1856, Heisler *v.* State, 20 Ga. 153, 155; 1871, Statham *v.* State, 41 Ga. 507, 509; 1874, Ewing *v.* Moses, 51 Ga. 410, 419; 1876, Burrus *v.* Kyle, 56 Ga. 24, 27; 1884, Cade *v.* Hatcher, 72 Ga. 359, 363; 1884, Farkas *v.* Stewart, 73 Ga. 90; 1889, Parker *v.* G. P. R. Co., 83 Ga. 539, 546; 1890, Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 794; 1892, Howard *v.* Johnson, 91 Ga. 319, 322, 18 S. E. 132; 1895, Welch *v.* Stipe, 95 Ga. 337, 22 S. E. 681; 1898, Keller *v.* State, 102 Ga. 506, 31 S. E. 92; 1901, Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; 1903, Rusk *v.* Hill, 117 Ga. 722, 45 S. E. 42; 1904, O'Dell *v.* State, 120 Ga. 152, 47 S. E. 577; 1904, Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934; 1905, Phinazee *v.* Bunn, 123 Ga. 230, 51 S. E. 60; 1908, Moore *v.* State, 130 Ga. 322, 60 S. E. 544;

Idaho: Comp. St. 1919, § 8032 (like Cal. C. C. P. § 2046); 1902, McLean *v.* Lewiston, 8 Ida. 427, 69 Pac. 478; 1906, State *v.* Simes, 12 Ida. 310, 85 Pac. 914; 1919, Pedersen *v.* Moore, 32 Ida. 420, 184 Pac. 475;

Illinois: 1875, Doran *v.* Mullen, 78 Ill. 145; 1881, Coon *v.* People, 99 Ill. 369; 1895, Cassem *v.* Galvin, 158 Ill. 30, 41 N. E. 1087; 1901, Daugherty *v.* Heckard, 189 Ill. 239, 59 N. E. 569; 1909, Peebles *v.* O'Gara Coal Co., 239 Ill. 370, 88 N. E. 166;

Indiana: 1880, Shockey *v.* Mills, 71 Ind. 291; 1881, Blizzard *v.* Applegate, 77 Ind. 516, 529; 1908, Knickerbocker Ice Co. *v.* Gray, 171 Ind. 395, 84 N. E. 341;

Iowa: 1875, Lowe *v.* Lowe, 40 Ia. 223; 1879, Reddin *v.* Gates, 52 Ia. 214, 2 N. W. 1079; 1895, State *v.* Bauerkemper, 95 Ia. 562, 64 N. W. 609; 1899, Gross *v.* Feehan, 110 Ia. 163, 81 N. W. 235; 1900, State *v.* Petersen,

different jurisdictions this rule is enforced with differing vigor; 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.

110 Ia. 647, 82 N. W. 329; 1903, State *v.* Burns, 119 Ia. 663, 94 N. W. 238; 1904, State *v.* Robinson, 126 Ia. 69, 101 N. W. 634; 1905, State *v.* Drake, 128 Ia. 539, 105 N. W. 54;
Kansas: 1874, Gannon *v.* Stevens, 13 Kan. 457 (unless gross abuse); 1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51;
Kentucky: 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;
Maine: 1831, Woodman *v.* Coolbroth, 7 Greenl. 181; 1854, State *v.* Lull, 37 Me. 249; 1854, Parsons *v.* Huff, 38 Me. 143; 1859, Bliss *v.* Shuman, 47 Me. 253; 1874, State *v.* Benner, 64 Me. 280;
Maryland: 1908, Baltimore & O. R. Co. *v.* State, 107 Md. 642, 69 Atl. 439;
Massachusetts: 1835, Moody *v.* Rowell, 17 Pick. 498; 1854, York *v.* Pease, 2 Gray 284; 1858, Com. *v.* Thrasher, 11 Gray 59; 1862, Green *v.* Gould, 3 All. 466; 1888, Com. *v.* Chaney, 148 Mass. 8, 18 N. E. 572; 1890, Francis *v.* Rosa, 151 Mass. 534, 24 N. E. 1024; 1896, Smith *v.* Smith, 167 Mass. 87, 45 N. E. 52; 1906, Gray *v.* Kelley, 190 Mass. 184, 76 N. E. 724; 1914, Com. *v.* Dorr, 216 Mass. 314, 103 N. E. 902;
Michigan: 1897, Fowler *v.* Fowler, 111 Mich. 676, 70 N. W. 336; 1898, People *v.* Roat, 117 Mich. 578, 76 N. W. 91; 1899, Webb *v.* Feathers' Est., 119 Mich. 473, 78 N. W. 550;
Minnesota: 1896, Couch *v.* Steele, 63 Minn. 504, 65 N. W. 946;
Mississippi: 1847, Turney *v.* State, 8 Sm. & M. 110 (in narrow limits); 1853, Stringfellow *v.* State, 26 Miss. 160;
Missouri: 1860, Smith *v.* Hutchings, 30 Mo. 384; 1869, Meyer *v.* People's Railway Co., 43 Mo. 523, 526; 1872, King *v.* Mittalberger, 50 Mo. 182, 184; 1874, St. Louis & I. M. R. Co. *v.* Silver, 56 Mo. 265; 1897, State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; 1899, State *v.* Whalen, 148 Mo. 286, 49 S. W. 989; 1899, Coats *v.* Lynch, 152 Mo. 161, 53 S. W. 895;
Montana: C. C. P. Rev. C. 1921, § 10663 (like Cal. C. C. P. § 2046);
Nebraska: 1889, Obernalte *v.* Edgar, 28 Nebr. 70, 44 N. W. 82; 1892, Insurance Co. *v.* Gotthelf, 35 Nebr. 357, 53 N. W. 137; 1896, Baum Iron Co. *v.* Berg, 47 Nebr. 21, 66 N. W. 8; 1897, Perry *v.* Bank, 53 Nebr. 89, 73 N. W. 538; 1898, Harvard *v.* Stiles, 54 Nebr. 26, 74 N. W. 399; 1900, Welch *v.* State, 60 Nebr. 101, 82 N. W. 368; 1901, Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445; 1901, Hiersche *v.* Scott, — Nebr. —, 95 N. W. 494; 1903, Hackney *v.* Raymond B. C. Co., 68 Nebr. 624, 94 N. W. 822, 99 N. W. 675; 1904, Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114;
New Hampshire: 1855, Huckins *v.* Ins. Co., 31 N. H. 247; 1855, Severance *v.* Carr, 43 N. H. 67; 1863, Steer *v.* Little, 44 N. H. 615 (naming certain limits); 1869, Wells *v.* Iron Co., 48 N. H. 540; 1884, Gerrish *v.* Gerrish, 63 N. H. 128;
New Jersey: 1849, Chambers *v.* Hunt, 22 N. J. L. 552, 562; 1897, Trenton R. Co. *v.* Cooper, 60 N. J. L. 219, 37 Atl. 730; 1906, Luckenback *v.* Sciple, 72 N. J. L. 476, 63 Atl. 244; 1920, Leonard *v.* Standard Aero Co., 95 N. J. L. 235, 112 Atl. 252;
New York: 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 N. Y. 655, 8 N. E. 733;
North Carolina: 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, 130 N. C. 479, 41 S. E. 876;
North Dakota: 1905, State *v.* Hazlett, 14 N. D. 490, 105 N. W. 617; 1910, State *v.* Fujita, 20 N. D. 555, 129 N. W. 360;
Oklahoma: 1896, Ellison *v.* Bennabia, 4 Okl. 347, 46 Pac. 477;
Oregon: Laws 1920, § 858 (like Cal. C. C. P. § 2046); 1889, State *v.* Chee Gong, 17 Or. 639, 21 Pac. 882; 1901, State *v.* Ogden, 39 Or. 195, 65 Pac. 449;
Philippine Isl. C. C. P. 1901, § 337 (like Cal. C. C. P. § 2046);
Porto Rico: Rev. St. & C. 1911, § 1521 (like Cal. C. C. P. § 2046); 1913, Camacho *v.* Balasquide, 19 P. R. 564, 577; 1916, People *v.* Garcia, 24 P. R. 123;
South Carolina: 1895, State *v.* Johnson, 43 S. C. 123, 20 S. E. 988; 1897, State *v.* Green, 48 S. C. 136, 26 S. E. 234; 1898, Spencer O. M. Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392; 1901, Latimer *v.* Sovereign Camp, 62 S. C. 145, 40 S. E. 155; 1901, State *v.* Marchbanks, 61 S. C. 17, 39 S. E. 187; 1904, Koon *v.* Southern Ry., 69 S. C. 101, 48 S. E. 86;
South Dakota: 1905, State *v.* Cambron, 20 S. D. 282, 105 N. W. 241;
Texas: 1899, International & G. N. R. Co. *v.* Dalwigh, 92 Tex. 655, 51 S. W. 500;
Utah: 1902, Rio Grande W. R. Co. *v.* Utah N. Co., 25 Utah 187, 70 Pac. 859;
Vermont: 1840, Hopkinson *v.* Steel, 12 Vt. 584; 1909, Berry *v.* Doolittle, 82 Vt. 471, 74 Atl. 97;
Virginia: 1904, Lane *v.* Bauserman, 103 Va. 146, 48 S. E. 857;

The entire regulation of the procedure, furthermore, is attended by no fixed rules. For example, when an improperly suggestive question has been put but ruled out, it may be allowed to be phrased in proper form and put again,[3] although presumably the harm has been irretrievably done; or, the witness in such a case may be prevented from answering at all on the subject of the question.[4] The proper consequence to be applied is peculiarly a matter for the trial Court's discretion.[5]

Nevertheless, there are certain canons of guidance which may be formulated for the trial Court as the general foundation for its discretionary rulings. They are none the less rules of law, even though their application may not be the subject of an appeal. They are of two sorts, answering the two questions, (a) When must questions be forbidden because of the danger of improper suggestion? and (b) When, though such danger exists, may the questions nevertheless be permitted by way of exception? This distinction is sometimes ignored; but it is a real one. When it 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 is that there is no danger of false suggestion, *i.e.* that the question is not leading 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 of exception. There is a distinction, then, between holding a question to be allowable *because* it is *not* suggestive and holding it to be allowable *though* it *is* suggestive.

§ 771. **Same: (2) Kinds of Leading Questions; Assuming a Controverted Fact.** A question which in part *assumes the truth* of a controverted fact, and inserts the assumption as a part of a question on another fact, may lead a

Wisconsin: 1860, Carlyle *v.* Plumer, 11 Wis. 96, 109; 1863, Barton *v.* Kane, 17 Wis. 37, 42, *semble;* 1875, McPherson *v.* Rockwell, 37 Wis. 162; 1883, Rounds *v.* State, 57 Wis. 53, 14 N. W. 865; 1884, Wright *v.* Fort Howard, 60 Wis. 121, 18 N. W. 750; 1886, Coggswell *v.* Davis, 65 Wis. 191, 203, 26 N. W. 557; 1893, Proper *v.* State, 85 Wis. 626, 55 N. W. 1035; 1895, Porath *v.* State, 90 Wis. 527, 63 N. W. 1061; 1897, McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375; 1898, Kohler *v.* R. Co., 99 Wis. 33, 74 N. W. 568; 1902, Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170; 1902, Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965; 1904, Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

In the following rulings certain questions were ruled upon according to the circumstances, but the rulings are of no service as precedents: 1898, Parker *v.* Brown, 29 C. C. A. 357, 85 Fed. 595; 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 Ga. 667, 42 S. E. 151; 1895, Springfield C. 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, 37 N. H. 31; 1896, People *v.* Nino, 149 N. Y. 317, 43 N. E. 853; 1814, Snyder *v.* Snyder, 6 Binn. Pa. 490; 1824, Wogan *v.* Small, 11 S. & R. Pa. 143; 1912, U. S. *v.* Dula, 23 P. I. 132; 1867, Trammell *v.* McDade, 29 Tex. 361; 1849, Hopper *v.* Com., 6 Gratt. Va. 686.

[3] *E.g.:* 1900, Allen *v.* Ins. Co., 72 Conn. 693, 45 Atl. 955.

[4] *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").

[5] For the general doctrine of *judicial discretion*, see *ante*, § 16.

For leading questions *by the judge*, see *post*, § 784.

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:[1]

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, BECKLEY, C. J., in *Traveler's Ins. Co.* v. *Sheppard*, 85 Ga. 751, 794 (the issue being whether the insured was really deceased or had fradulently pretended to be drowned, questions of the following sort were held improper: 'State what was the nature of the 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."

§ 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, so rigid a rule is unsound. Obviously such a question depends for 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:[3]

§ 771. [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.* Gress Lumber Co., 111 Ga. 87, 36 S. E. 314; 1858, Carpenter *v.* Ambroson, 20 Ill. 172; 1879, Hewitt *v.* Clark, 91 Ill. 608; 1847, Turney *v.* State, 8 Sm. & M. Miss. 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.

§ 772. [1] 1815, Nicholls *v.* Dowding, 1 Stark. 81, and cases in notes *infra;* 1907, Walker *v.* Baldwin, 106 Md. 619, 68 Atl. 25; 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 present 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.'"

[3] 1916, DeWitt *v.* Skinner, 8th C. C. A., 232 Fed. 443; 1920, Audibert *v.* Michaud, 119 Me. 295, 111 Atl. 305 (quoted *supra*); 1913, Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383 (approving the above rule).

1920, CORNISH, C. J., in *Audibert* v. *Michaud*, 119 Me. 295, 111 Atl. 305: "A question is not necessarily leading because it can be answered by 'yes' or 'no.' The presiding justice, who has an unprejudiced view of the entire situation, is allowed a wide discretion in this respect. The legitimate object of all examination of witnesses is the eliciting of the truth; and the danger which arises from so-called leading questions is not that the truth may thereby be extracted in an untechnical manner, but that the untrue may be stated by a witness, who is either indifferent to his oath or overzealous in the cause and eager to adopt any suggestion made by the attorney although not in accordance with the fact. It is not the mere leading, but the leading into temptation, that is to be deprecated and avoided."

(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. 292, 299, 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 had 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 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;[4] (*b*) a few Courts seem to treat it as always proper;[5] (*c*) while a few seem to treat it as necessarily improper.[6]

[4] 1897, Coagler *v.* Rhodes, 38 Fla. 240, 21 So. 109; 1906, Hix *v.* Gulley, 124 Ga. 547, 52 S. E. 890 (good example); 1909, Peebles *v.* O'Gara Coal Co., 239 Ill. 370, 88 N. E. 166; 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 N. H. 26; 1860, Page *v.* Parker, 40 N. H. 63; 1863, Steer *v.* Little, 44 N. H. 616; 1862, Tinsley *v.* Carey, 26 Tex. 350, 352; 1891, Lott *v.* King, 79 Tex. 292, 299, 15 S. W. 231 (see quotation *supra*); 1920, Williams *v.* State, 88 Tex. Cr. 214, 225 S. W. 173 ("Did he or did he not", held not necessarily leading); 1905, State *v.* Taylor, 57 W. Va. 228, 50 S. E. 247.

[5] 1867, Adams *v.* Harrold, 29 Ind. 200; 1859, Pelamourges *v.* Clark, 9 Ia. 18.

[6] 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"); 1877, State *v.* Johnson, 29 La. An. 718; 1830, Marcy, J., in People *v.* Mather, 4 Wend. N. Y. 248.

The following passage exhibits a singular notion of a leading question: 1911, Steenie Morrison's Trial, p. 54 (Notable English Trials Series, 1922): Mr. Muir (re-examining to the story of a night's wanderings); "Did you have any conversation with any woman that night?" Mr. Abinger: "I object to that question; it is a leading question." Mr. J. Darling: "Yes, so it is. I do not think you should ask that, Mr. Muir."

§ 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:[1]

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."

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 arises 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, how-

§ 773. [1] *Eng.* 1836, Parkin *v.* Moon, 7 C. & P. 409; *U. S.* 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"); 1918, Marsh *v.* State, 16 Ala. App. 597, 80 So. 171; Alaska Comp. L. 1913, § 1498; Ark. Dig. 1919, § 4185; Cal. C. C. P. 1872, § 2048; Ga. Civ. C. 1910, § 5872, P. C. § 1045 (leading questions are "generally allowed in cross-examinations", but the Court in discretion may forbid them); 1884, Cade *v.* Hatcher, 72 Ga. 359, 363; 1906, Lauchheimer *v.* Jacobs, 126 Ga. 261, 55 S. E. 55 (in discretion); Ida. Comp. St. 1919, § 8034; 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. Mass. 498; Or. Laws 1920, § 860; P. I. C. C. P. 1901, § 339; P. R. Rev. St. & C. 1911, § 1521; 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 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. Mass. 498.

In State *v.* Peirce, 178 Ia. 417 (1916), 159 N. W. 1050, the ruling is obscure and futile.

ever, 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 danger 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 averse 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, by their sympathies with the opponent's ca[illegible] but also of witnesses

[3] For the related question as to using an *opponent's deposition*, as affected by the present rule, see *post*, § 912.

§ 774. [1] ENGLAND: 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.;

UNITED STATES: *Fed.* 1893, St. Clair *v.* U. S., 154 U. S. 150, 14 Sup. 1002; 1896, Putnam *v.* U. S., 162 U. S. 687, 16 Sup. 923; *Ala.* Towns *v.* Alford, 2 Ala. 380; 1841, Blevins *v.* Pope, 7 id. 374; *Conn.* 1832, Stratford *v.* Sanford, 9 Conn. 283; *Ia.* 1892, Rosenthal *v.* Bilger, 86 Ia. 246, 247, 53 N. W. 255; 1907, State *v.* Walker, 133 Ia. 489, 110 N. W. 925; *Me.* 1854, Parsons *v.* Huff, 38 Me. 142; 1874, State *v.* Benner, 64 id. 279 (see quotation *supra*); *Mass.* 1835, Moody *v.* Rowell, 17 Pick. 498; *Mich.* 1886, McBride *v.* Wallace, 62 Mich. 453, 29 N. W. 75; 1897, People *v.* Gillespie, 111 Mich. 241, 69 N. W. 490; *N. Y.* 1830, People *v.* Mather, 4 Wend. 247; 1907, People *v.* Sexton, 187 N. Y. 495, 80 N. E. 396 (the opponent's wife and daughter); *Wyo.* 1912, Hollywood *v.* State, 19 Wyo. 493, 120 Pac. 471.

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.

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:[1]

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."

§ 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 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 —

(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.; 1840, U. S. *v.* Dickinson, 2 McLean 331; 1841, Towns *v.* Alford, 2 Ala. 380; 1845, Blevins *v.* Pope, 7 Ala. 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.

§ 775. [1] *Accord:* 1874, Gannon *v.* Stevens, 13 Kan. 457; 1864, Hall *v.* Taylor, 45 N. H. 407; Or. Laws 1920, C. C. P. § 858 ("unless merely formal or preliminary" questions); 1889, Hausenfluck *v.* Com., 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.

§ 776. [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.

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.[1]

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 contemporaneous events, with a view to stimulate or fix his recollection."

§ 778. **Same: Witness not Understanding; Children, Invalids, Illiterates, etc.** 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

§ 777. [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. Del. 475, 478 (see quotation *supra*); 1854, Parsons *v.* Huff, 38 Me. 142; 1835, Moody *v.* Rowell, 17 Pick. Mass. 498; 1855, Huckins *v.* Ins. Co., 31 N. H. 247; 1861, Severance *v.* Carr, 43 N. H. 67; 1879, O'Hagan *v.* Dillon, 76 N. Y. 173; 1885, Toomey *v.* Kay, 62 Wis. 107, *semble*, 22 N. W. 286.

§ 778. [1] *Eng.* 1815, Nicholls *v.* Dowding, 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"); *Can.* 1913, Maves *v.* Grand Trunk P. R. Co., Alta. S. C., 14 D. L. R. 70 (elaborate opinion by Beck, J.); *U. S.* 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. 307; 1852, Long *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. Mass. 498.

[3] 1906, State *v.* Simes, 12 Ida. 310, 85 Pac. 914 (simple-minded woman, in rape); 1875, Doran *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; 1903, Campion *v.* Lattimer, 70 Nebr. 245, 97 N. W. 290 (a person ignorant and dull).

So also the reticence of *shame* or *modesty*: 1910, State *v.* Dudley, 147 Ia. 645, 126 N. W. 812 (rape).

[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.

must be substantially the same as that upon which the other witness has already 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. Conversely, 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

§ **779.** [1] *Eng.* 1807, Courteen *v.* Touse, 1 Camp. 43; 1820, Edmonds *v.* Walter, 3 Stark. 8; *U. S.* 1896, Union P. R. Co. *v.* O'Brien, 161 U. S. 451, 16 Sup. 618; 1884, Phœnix Ins. Co. *v.* Meog, 78 Ala. 310; 1882, People *v.* Ah Yute, 60 Cal. 95; 1910, Sheridan Coal Co. *v.* Hull Co., 87 Nebr. 117, 127 N. W. 218; 1857, Gunter *v.* Watson, 4 Jones L. N. C. 457; 1878, Farmers' M. F. Ins. Co. *v.* Eair, 87 Pa. 128; 1895, Norton *v.* Parsons, 67 Vt. 526, 32 Atl. 481; 1857, Ketchingman *v.* State, 6 Wis. 426; 1883, Rounds *v.* State, 57 Wis. 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 N. Y. 647, 21 N. E. 122.

§ **780.** [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).

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 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 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.'" [2]

(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 for fraudulent insinuations of misdeeds which the counsel has in reality no reason to suppose were ever committed.

Distinguish (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

[2] *Accord:* 1918, Marsh *v.* State, 16 Ala. App. 597, 80 So. 171; 1900, Hand *v.* Soodeletti, 128 Cal. 674, 61 Pac. 372; 1905, Briggs *v.* People, 219 Ill. 330, 76 N. E. 499 (rule illustrated); 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. 205, 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"); 1905, State *v.* Boice, 114 La. 856, 38 So. 584.

(*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 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 embarrassment, 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

§ 781. [1] The name "Stareleigh", given by the novelist to this judge, is supposed to have signified Mr. J. Gaselee.

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?' '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 didn'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 sacrificed, 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 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:[4]

[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).

[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 Ballantine's Experiences of a Barrister's Life, 105).

The following remarks were addressed to Dr. Mitchill, a celebrated and opinionated scientist, by Mr. William Sampson, New York's most learned and witty advocate in the early days, at the opening of his cross-examination of Dr. Mitchill, on the trial of Alex. Whistelo for bastardy (1808; 11 Amer. St. Tr. 528, 575); the scientist and the lawyer had already met in forensic skirmishes:

"Doctor, since your opinions were likely to be unfavorable to the side I am to advocate, I must avail myself of the privilege of cross-examination. It would be unnecessary with so learned a witness to say, that the adverb 'cross' was not to be taken in the vulgar acceptation. 'Cross' was in contra-distinction to 'direct'; and 'cross-examination' meant only an indirect examination. The ignorant, who take things in the wrong sense, often show ill-humor, and put themselves in an attitude to be cross, because they are to be cross-examined. With the candid and enlightened, it proves often an agreeable mode of discussion, and is particularly so to our profession, when it gives us occasion to extract from those of superior learning, knowledge which we might not otherwise have the means of acquiring."

[4] The principle, in one or another form, is recognized in the following statutes and cases; *Ala.* Code 1907, § 4016 ("It is the right of a witness to be protected from improper questions and from harsh or insulting demeanor"); *Alaska:* Comp. L. 1913, §§ 1494, 1508 (like Cal. C. C. P. § 2044); *Ark.* Dig. 1919, § 4183, like Cal. C. C. P. § 2044); *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); *Ky.* C. C. P. 1895, § 593 (like Cal.

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 unfavorably 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 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 dis-

C. C. P. § 2044); *Mo.* 1901, State *v.* Prendible, 165 Mo. 329, 65 S. W. 559 (a merely abusive cross-examination, held improper); *Mont.* Rev. C. 1921, §§ 10661, 10675 (like Cal. C. C. P. §§ 2044, 2066); *N. H.* 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"); *Oh.* 1904, Cleveland, P. & E. R. Co *v.* Pritschau, 69 Oh. 438, 69 N. E. 662; *Or.* Laws 1920, §§ 856, 870 (like Cal. C. C. P. §§ 2044, 2066); *P. I.* C. C. P. 1901, § 381 (quoted *post*, § 1890); *P. R.* Rev. St. & C. 1911, § 1519 (like Cal. C. C. P. § 2044); § 1533 (like Cal. C. C. P. § 2066); *Utah:* Comp. L. 1917, § 7142 (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.

advantage, 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 advocates, 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 dispcsed 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."

The following instance illustrates for orthodox practice the dividing line between propriety and impropriety:

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 becomes desirable (on the principle of § 995, *post*) in order to test the witness' capacity to recollect what he has just stated and to ascertain whether he falls easily into inconsistencies and thus betrays falsification. In spite of its frequent tedium and unskilful handling, this process often proves useful; and the discretion of the trial Court must suffice to fix its limits:[4]

[illegible] CHRISTIANCY, C. J., in *O'Donnell* v. *Segar*, 25 Mich. 367, 371: "The defendants had a right, on cross-examination of this witness, to put any question calculated, not only to test his credibility and the extent and means of his knowledge, but to draw out any fact which might tend either to contradict, weaken, or explain any one of the particular statements made by the witness or to weaken any inference from the whole or any part of his testimony in chief in support of either of the main facts essential to the plaintiff's case. And since, if a question on cross-examination relates to the subject to which the direct examination related, . . . the Court cannot usually say, before the question is answered, whether the answer will elicit anything tending to contradict, weaken, or explain any of the facts or the inference from any of the facts stated in the direct examination, or to test the credibility or the extent or means of knowledge of the witness, the only safe general rule upon cross-examination is to allow the party cross-examining to go over the whole subject or subjects to which the direct examination related, and to give him the chance to draw out as far as he may be able any fact which (within the principles and for the purposes above explained) he has the right to elicit on cross-examination. . . . Cross-

§ 782. [1] 1893, Jones *v.* Stevens, 36 Nebr. 849, 852, 55 N. W. 251 (repeating after objection sustained; excluded in discretion); 1918, State *v.* Felch, 92 Vt. 477, 105 Atl. 23.

[2] 1905, Braham *v.* State, 143 Ala. 28, 38, So. 819; 1904, Thomas *v.* State, 47 Fla. 99, 36 So. 161 (excluded); 1900, Singer & T. S. Co. *v.* Hutchinson, 184 Ill. 169, 56 N. E. 353 (excluded on the facts); 1878, Ulrich *v.* People, 39 Mich. 245, 251; 1885, Simon *v.* Home Ins. Co., 58 Mich. 278, 25 N. W. 190; 1911, Smith *v.* Boston Elevated R. Co., 208 Mass. 186, 94 N. E. 315.

[3] For *recalling a witness to make a correction*, see also *post*, § 786.

[4] 1902, People *v.* Rader, 136 Cal. 253, 68 Pac. 706; 1903, Mathis *v.* State, 45 Fla. 46, 34 So. 287; 1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; 1921, Bassett *v.* State, — Ind. —, 130 N. E. 118 (forgery of a check); 1883, Winklemans *v.* R. Co., 62 Ia. 11, 17; 1850, Odiorne *v.* Bacon, 5 Cush. Mass. 185, 191 (allowable in discretion; here by asking the witness to re-state his knowledge on a certain point); 1912, People *v.* Lustig, 206 N. Y. 162, 99 N. E. 183 (above passage quoted and applied).

For other instances of *testing the recollection* on cross-examination, see *post*, §§ 994, 1006.

So, too, the cross-examination questions may, in discretion, be repeated on *re-direct examination:* 1904, Caven *v.* Bodwell G. Co., 99 Me. 278, 59 Atl. 285; and cases cited *post*, § 1896.

examination is the great test of the knowledge as well as of the veracity of witnesses. The right to pursue it may sometimes be abused; and when it is sought to be abused, as when the counsel insists upon going over the same ground again and again, or when it is apparent that the witness has already fully answered without any appearance of evasion, and it is evident that the counsel is merely pushing the witness for sake of annoyance or for any illegitimate purpose, it is competent for the Court in its discretion to put an end to it. But we see no evidence of an attempt at such abuse in this case."

1891, CHAMPLIN, C. J., in *Zucker* v. *Karpeles*, 88 Mich. 424, 50 N. W. 373: "We know of no rule of practice that prohibits an attorney from requesting a witness to repeat what he has testified to upon a particular point in his direct examination. He has a right to have it repeated, for the purpose not only of testing the recollection of the witness, but of ascertaining whether he makes a statement at variance with what he testified to in chief. Of course it would not be permissible for an attorney to pass through the whole of the direct examination and ask the witness to repeat it; and such was not the case here. The attorney had not abused his privilege, nor, as it appears from the record, unnecessarily consumed the time of the court in a fruitless attempt at cross-examination."

(4) Repeating precisely the *same allowable question on cross-examination*, in order by sheer moral force to compel a witness to admit the truth, after an *original false answer* or *refusal to answer*, is a process which not only savors 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 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

[5] 1897, Middlesex B. Co. *v.* Smith, 27 C. C. A. 485, 83 Fed. 133 (exclusion of third or fourth repetition, held proper); 1875, Wesley *v.* State, 52 Ala. 182, 188; 1916, People *v.* Lim-Foon, 29 Cal. App. 270, 155 Pac. 477 (murder; frequent repetition of the same question may be stopped by the trial Court); 1909, Math *v.* Chicago City R. Co., 243 Ill. 114, 90 N. E. 235 (a misapplication of this rule with several others); 1869, Schwartze *v.* Yearly, 31 Md. 270, 276; 1890, Brown *v.* State, 72 Md. 468, 475, 20 Atl. 186; 1874, Demerritt *v.* Randall, 116 Mass. 331 ("how many times the same question should be repeated on cross-examination [when the witness declines to express an opinion in answer] and how far the witness should be compelled to answer, were matters within the discretion of the presiding judge"); 1888, Gutsch *v.* McIlhargey, 69 Mich. 377, 37 N. W. 303; 1898, Stern *v.* Stanton, 184 Pa. 468, 39 Atl. 404; 1918, People *v.* Aponte, 26 P. R. 537 (principle applied); 1888, Railway *v.* Pool, 70 Tex. 715; 1893, Shaw *v.* State, 32 Tex. Cr. 155, 169, 22 N. W. 588; 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).

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 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 Proceedings*, 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 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*

[6] See another good example, ib. I, 48, 115.

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. 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 was 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 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 sub-

[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).

§ 783. [1] *England:* 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"); *Canada:* 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); *United States:* Ala. Code 1907, § 4017 ("The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him. If several parties to the same case have distinct interests, each may exercise this right"); 1915, Smith v. Bachus, 195 Ala. 8, 70 So. 261 (applying Circuit Court Rule 18); 1900, Kason'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 1910, § 6318 ("In all cases in which

ject 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 (*post*, § 1845) 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, 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

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 1919, § 7495; 1906, State *v.* Nugent, 116 La. 99, 40 So. 581 (two defendants and three counsel; only one allowed to examine the same witness); N. Mex. Ann. St. 1915, § 4464 ("But one counsel on each side shall examine the same witness").

[2] 1809, Doe *v.* Roe, 2 Camp. 280 (see quotation *supra*); 1908, Jackson *v.* Tribble, 156 Ala. 480, 47 So. 310; 1902, Citizens' Bank *v.* Fromholz, 64 Nebr. 284, 89 N. W. 775 (trial Court's discretion controls); 1875, Tilton *v.* Beecher, N. Y., Abbott's Rep. 1, 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).

[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); 1906, Barnes *v.* Squier, — Mass. —, 78 N. E. 731 (similar to Munro *v.* Stowe); 1919, Com. *v.* Russ, 232 Mass. 58, 122 N. E. 176 (cross-examination of a defendant lasting three hours, not improper); 1914, People *v.* Becker, 210 N. Y. 274, 104 N. E. 396 (murder; the principal witness for the prosecution was examined in chief from 10 A.M. till 2.30 P.M., the lunch period intervening, and was then cross-examined until 8.50 P.M., the day being Saturday of a week's trial; a refusal to adjourn the further cross-examination until Monday was held error on the facts, though later in the next week the cross-examiner declined further cross-examination of the witness when tendered for the purpose; this seems unsound; Werner, J., diss.). For the limitation of the *number of witnesses*, see *post*, § 1907.

For the length of a *hypothetical question*, see *ante*, § 685.

For valuable comments on the practice in the *Federal Courts*, under the 1912 Equity Rules, as to improvement in the restriction of lengthy examinations of expert witnesses, see Mr. Wallace R. Lane's article, "Federal Equity Rules", Harvard L. Rev., XXXV, 276.

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 (*post*, § 2551) against comments by the judge upon the evidence in his charge to the jury.

(1) 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 (*post*, § 2484), and could seek evidence to inform himself judicially (*post*, § 2569); 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.[1] It has, however, been necessary

§ 784. [1] The questioning was held proper, except as otherwise noted; in many of the recent utterances the abject surrender of the trial judge's function, as commanded by the Supreme Court, is repulsive in its misguided supineness; ENGLAND: 1894, Coulson *v.* Disborough, 2 Q. B. 316;

UNITED STATES: *Federal:* 1916, Lepper *v.* U. S., 4th C. C. A., 233 Fed. 227 (a singular ruling; the judge's question to the accused, whether he had written letters admitting guilt, was held improper); 1921, Johnson *v.* U. S., 2d C. C. A., 270 Fed. 168 (judge's cross-questions censured; Hough, J., dies.: "I feel obliged to dissent from that method of disciplining the judiciary"); *Alabama:* 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, — Ala. —, 35 So. 58; *Arkansas:* 1888, Sharp *v.* State, 51 Ark. 147, 154, 10 S. W. 228 ("The judge has the right in a criminal prosecution to interrogate the witnesses; but he has no right to usurp the place of the State's attorney"); 1905, Arkansas C. R. Co. *v.* Craig, 76 Ark. 258, 88 S. W. 878 (quoting the above passage); *California:* 1917, Bell *v.* Maloney, 175 Cal. 366, 165 Pac. 917 ("It is the right and the bounden duty of a judge of a trial Court to take part in the examination of a witness whenever he believes that he may aid in bringing out the truth or in preventing a misunderstanding"); *Colorado:* 1874, Kansas P. R. Co. *v.* Miller, 2 Colo. 442, 452, 470; 1919, Laycock *v.* People, 66 Colo. 441, 182 Pac. 880 (questions held improper, on the facts); *Connecticut:* 1901, Barlow B. Co. *v.* Parsons, 73 Conn. 696, 49 Atl. 205 (held improper on the facts; unsound opinion); *Georgia:* 1855, Epps *v.* State, 19 Ga. 111 (see quotation *supra*); 1856, Kelly *v.* State, 19 Ga. 425; 1860, McGinnis *v.* State, 31 Ga. 236, 261; 1885, Varnedoe *v.* State, 75 Ga. 181, 186; 1895, Bowden *v.* Achor, 95 id. 243, 22 S. E. 271; 1897, Kearney *v.* State, 101 Ga. 803, 29 S. E. 127; 1898, Gordan *v.* Irvine, 105 Ga. 144, 31 S. E. 151 (judge may interrogate, but not so as to cast discredit upon the witness); 1905, Grant *v.* State, 122 Ga. 740, 50 S. E. 946; *Hawaii:* 1915, Terr. *v.* McGregor, 22 Haw. 786; 1918, Terr. *v.* Kekipi, 24 Haw. 500; 1919, Kamahala *v.* Coelho, 24 Haw. 689; *Illinois:* 1902, Featherstone *v.* People, 194 Ill. 325, 62 N. E. 685; 1905, O'Shea *v.* People, 218 Ill. 352, 75 N. E. 981 (the proper course for a judge in cross-examining witnesses, defined); 1898, Dunn *v.* People, 172 Ill. 582, 50 N. E. 137 (but giving feeble sanction to such questions by the judge); 1921, People *v.* Cardinelli, 297 Ill. 116, 130 N. E. 355 (judge calling and examining a witness whom neither party had cared to call); 1921, People *v.* Schultz, 300 Ill. 601, 133 N. E. 379 (burglary; judge's questions to the accused, held not prejudicial error; "we do not approve of the trial judge examining the witnesses", on the automaton theory); *Indiana:* 1876, Ferguson *v.* Hirsch, 54 Ind. 337; 1881, Lefever *v.* Johnson, 79 Ind. 554, 556; 1882, Huffman *v.* Cauble, 86 Ind. 591, 596; *Iowa:* 1897, State *v.* Spiers, 103 Ia. 711, 73 N. W. 336; *Kansas:* 1911, State *v.* Keehn, 85 Kan. 765, 118 Pac. 851; *Maryland:* 1916, Rickards *v.* State, 129 Md. 184, 98 Atl. 525 (manslaughter; judge's interrogation held not improper on the facts); *Massachusetts:* 1852, Palmer *v.* White, 10 Cush. 321, *semble; Missouri:* 1902, State *v.* Lockett, 168 Mo. 480, 68 S. W. 563 (but "provided this were done within such bounds as control attorneys in similar interrogations", which seems an unsound restriction); *Nebraska:*

more frequently to maintain and vindicate it and to resist encroachment upon it. The vicious effect of the rule (*post*, § 2551) against judicial comments upon the evidence has so undermined the healthy tradition of the common law that many Supreme Courts are found virtually forbidding the trial judge to put questions, unless in exceptional cases. And even in those Supreme Courts which maintain the trial judge's orthodox right, a note of faintheartedness can be heard in their defensive utterances of modern times:

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

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 Nebr. 371, 87 N. W. 158; 1903, South Omaha *v.* Fennell, — Nebr. —, 94 N. W. 632; *New Mexico:* 1907, Terr. *v.* Meredith, 14 N. M. 288, 91 Pac. 731; *North Carolina:* 1879, State *v.* Lee, 80 N. C. 483, 485; 1904, Eckhout *v.* Cole, 135 N. C. 583, 47 S. E. 655 (good opinion, by Connor, J.); 1921, Morris *v.* Kramer Bros. Co., 182 N. C. 87, 108 S. E. 381 (personal injury; questions to an attorney testifying as to a release, held improper; the opinion illustrates the deplorable extent to which Supreme Courts profess this doctrine and willingly exercise their powers to gag the trial judge); *North Dakota:* 1905, State *v.* Hazlett, 14 N. D. 490, 105 N. W. 617; *Oklahoma:* 1895, DeFord *v.* Painter, 3 Okl. 80, 41 Pac. 96; 1905, Howard *v.* Terr., 15 Okl. 199, 79 Pac. 773 (good opinion, by Burwell, J.; DeFord *v.* Painter, not cited); 1914, Harrison *v.* State, 11 Okl. Cr. 14, 141 Pac. 236 (the trial Court's examination was here held unwarranted; to the layman it looked very sensible); 1921, Douglas *v.* State, — Okl. Cr. —, 199 Pac. 927 (judge's questions held improper on the facts); 1921, Jones *v.* State, — Okl. Cr. —, 202 Pac. 187 (murder; "it is the right of a trial judge to interrogate witnesses when essential to the administration of justice; but the practice of so doing, except when absolutely necessary, should be discouraged"; this misguided attitude is lamentable in a modern court); *Philippine Isl.* 1914, U. S. *v.* Hudieres, 27 P. I. 45; *Porto Rico:* 1908, People *v.* Morales, 14 P. R. 227, 240; *South Carolina:* 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); *Tennessee:* 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 Tenn. 673, 692, 18 S. W. 272; 1900, State *v.* Hargroves, 104 Tenn. 112, 56 S. W. 857; *Texas:* C. Cr. P. 1911, § 792 (the Court may interrogate to ascertain the competency of an offered witness); *Vermont:* 1898, State *v.* Noakes, 70 Vt. 247, 40 Atl. 249 (trial Court in discretion may ask questions or suggest them to counsel); 1916, State *v.* Roberts, 91 Wash. 560, 158 Pac. 101 (a "rigid and extended cross-examination" of defendant's witness, held not improper on the facts); *Wisconsin:* 1903, Lowe *v.* State, 118 Wis. 641, 96 N. W. 417 (allowable "when necessary to elicit the truth"); 1906, Komp *v.* State, 129 Wis. 20, 108 N. W. 46.

Mr. (Assistant District Attorney) Arthur Train, in his book "The Prisoner at the Bar" (1906), pp. 181, 182, has some valuable comments.

Often 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); 1917, People *v.* Lurie, 276 Ill. 630, 115 N. E. 130 (a good illustration of the pernicious effect of the doctrine in gagging the trial judge); 1909, Flint *v.* Stockdale's Estate, 157 Mich. 593, 122 N. W. 279 (an example of improper treatment of the trial judge); 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).

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 or screen the guilty, 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 undoubtedly 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."

To restore the pristine principle to full acceptance would be the best single measure that can save trial by jury from permanent inefficiency. Fortunately there are still some States in which Supreme Courts give ample support to the trial Court's exercise of power. The following passage of sturdy eloquence should serve as a lesson in many quarters:

1911, BURCH, J., in *State* v. *Keehn*, 85 Kan. 765, 784, 118 Pac. 851 (murder; on a motion for a new trial a witness for defendant made affidavit that the Court interposed and asked questions and assisted in conducting his cross-examination, until, in his confusion, he failed to apprehend the nature of the questions propounded by the court and the counsel for the state; . . . and that by reason of such examination of the court and counsel he was so confused, frightened, embarrassed, and intimidated that he failed to state all of the facts that were within his knowledge as he understood them; that his mind became a blank, and he became so bewildered he must have given the jury the impression that his testimony was not worthy of belief. . . .):

"As a matter of fact the witness was in deep water before the Court intervened at all in his cross-examination. He had contradicted previous statements he had made in the course of the same examination, and had contradicted the testimony he gave at the preliminary examination. After that the Court did make what appears from the record to be a patient and sincere effort to find out what contribution the witness could make to the truth of the matter under investigation. Many of the questions were obviously framed to give the witness poise before answering, and, if he were scared, embarrassed, and bewildered, and if

the jury were not impressed by his testimony, the fault lay with him, and not with the court. There is no justification for inserting the word 'intimidated' in Hackenberger's affidavit.

"A very common notion of the function of a trial judge in respect to the examination of witnesses in a criminal case is expressed in the opinion in the case of *Dunn* v. *People*, 172 Ill. 582, 595: It is within the power of the court to propound pertinent and properly framed questions to a witness. The exercise of the power, if the questions propounded by the court are directed to crucial points of the case, is most likely to arouse the serious apprehension of the one or the other of the parties, and certainly places counsel in a situation of great embarrassment if they conceive a question asked by the court as leading and suggestive in form or improper for any cause. . . It is believed the instances are rare and the conditions exceptional in a high degree which will justify the presiding judge in entering upon and conducting an extended examination of a witness, and that the exercise of a sound discretion will seldom deem such action necessary or advisible.'

"From this it would appear that, while the judge has ample authority, it is seldom safe for him to undertake to exercise it. This Court entertains a different view. The purpose of a criminal trial is to ascertain the truth about the matters charged in the indictment or information, and it is part of the business of the judge to see that this end is attained. He is not a dumb and mask-faced moderator over a contest between sensitive and apprehensive, or perhaps wily and ingenious, counsel. He is a vital and integral factor in the discovery and elucidation of the facts. He must have a full and accurate comprehension of each and all of the facts in order to instruct the jury, to present the facts to the jury if he should choose to do so (Code Cr. Proc. § 236; Gen. Stat. 1909, § 6815), and to determine, finally, upon a motion for a new trial, whether justice has been done. Therefore, on his own account, he is not obliged to rest content with the modicum of evidence which counsel may dole out, or to accept as final their showing of knowledge, means of knowledge, and credibility on the part of witnesses. But beyond this it is the function of the judge to aid the jury in obtaining a comprehension of the facts equal to his own, in order that a just verdict may be reached. Therefore, whenever in his judgment the proceeding is not being conducted in a way to accomplish the purpose for which alone it is instituted, the full development of the truth, or whenever he can effect a better accomplishment of that purpose, he not only has the right, but it is his duty, to take part. Limitations upon this power appear from the statement of the purpose to be subserved, and are merely those which good sense and propriety suggest. The judge should not place himself in the attitude of helping or hurting either side, but, whenever it appears to him proper, he should fearlessly endeavor to develop the truth with all possible clearness and certainty, whichever side the truth may help or hurt. The judge will always have a personality of his own which he cannot disguise or conceal. But the only tact he need display is sincerity, and, so long as he is sincere, he need feel no timidity in the discharge of his public duty because of the possible tone or inflection of his voice or the play of his features. 'The presumption that this liberty will not be honorably and impartially exercised is not to be tolerated for a moment. Counsel in their zeal to acquit their clients seem to take it for granted that the only object of courts is to convict. Until called upon to discharge the solemn and responsible functions of a judge, they never can fully appreciate the high sense of obligation under which they act, to God and their fellow citizens. . . . Counsel seek only for their client's success; but the judge must watch that justice triumphs.' *Epps* v. *State*, 19 Ga. 102, 118, 119. It is natural that able and masterful attorneys should be intolerant and resentful of any participation by the judge in the examination and cross-examination of witnesses. Should the judge exercise his right, professional bias and zeal will always be able to make a strong showing of prejudice on appeal. The result is that too often in this country the lawyers have had their own way, and judges have been reduced to the level of impotent spectators of trials before them, much to the detriment of our criminal jurisprudence. There is nothing in the Constitution or statutes of this State which fetters the efficiency of trial judges as a part of

the legal machinery for developing and establishing the facts in criminal cases, and in this case the trial judge did not abuse his power."

(2) 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:[2]

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 questions? 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."

§ 785. **Non-Responsive Answers.** 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:[1]

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

[2] 1855, Epps *v.* State, 19 Ga. 111 ("any legal question he pleases"); 1876, White *v.* State, 56 Ga. 385; 1878, Harris *v.* State, 61 Ga. 359 (but a question intimating an opinion as to guilt was held erroneous); 1918, Terr. *v.* Kekipi, 74 Haw. 500; 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).

§ 785. [1] 1917, John's Will, 184 Ia. 416, 165 N. W. 1021; 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 N. H. 485, 489; 1870, Bundy *v.* Hyde, 50 N. H. 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 N. H. 55, 57; 1900, Glauber Mfg. Co. *v.* Voter, 70 N. H. 332, 47 Atl. 612; 1920, Dyer *v.* Lalor, 94 Vt. 103, 109 Atl. 30.

Contra, for a party answering interrogatories: 1909, Carwille *v.* Franklin, 164 Ala. 543, 51 So. 396.

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 to 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."

1920, POWERS, J., in *Underwood* v. *Cray*, *Cray* v. *Underwood*, — Vt. —, 108 Atl. 513:

"It is not every irresponsive answer given by a party that will support an exception; not only must such an answer be *improper in substance*, but it must be apparent that the party intends to go beyond the question and to gain an advantage."

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). Courts ought to cease repeating the novel and unwholesome assertion [2] that "where an answer is not responsive to the question put, it is the duty of the Court to strike it out, on motion."

This topic of responsiveness has somehow become in modern times beset with crude misunderstandings, that tend to suppress truth and turn the inquiry into a logomachy:

(1) Sometimes it is said that the *party questioning* may object on this ground, but not the opposing party.[3] But there should be no such distinction; if the answer gives an admissible fact, it is receivable, whether the question covered it or not. No party is owner of facts in his private right. No party can impose silence on the witness called by Justice.

(2) That a party *waives objection* to a responsive answer, by the very asking of the question, is noticed *ante*, § 18.

(3) That an opponent is entitled to the *striking out* of an answer which is non-responsive *and inadmissible*, is noticed *ante*, § 18; but this is merely a rule excusing him from not having objected before the answer.

§ 786. **Improper Suggestion otherwise 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.

[2] 1909, Math *v.* Chicago C. R. Co., 253 Ill. 114, 90 N. E. 235.
[3] 1906, Dunahaugh's Will, 130 Ia. 692, 107 N. W. 925.
§ 786. [1] 1629, Coke, Fourth Institute 279.

(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]

(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.[6] Nevertheless, no rule has ever required this, —

[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] 1906, State *v.* Goodson, 116 La. 388, 40 So. 771 (co-defendants not allowed as of right to consult a co-indictee in jail and about to be used as a witness for the State); 1867, New Jersey Express Co. *v.* Nichols, 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 interfering, "to suggest or dictate the answers which the witnesses should give"; excluded); 1906, State *v.* Barker, 43 Wash. 69, 86 Pac. 387 (exchange of signals between witness and attorney, held improper); 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 Wis. 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 the person meant and de-

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.

§ 787. **Same: Prepared Deposition; Expert Reading a Prepared Report.** (5) Since the witness' statement must correspond spontaneously to his actual recollection, it is plain that to permit him, as a practice, to *commit to writing beforehand* certain statements and then to read them or hand them in as his testimony would be to risk fabrication and coached 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 equally of course to oral testimony as well as 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 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: [1]

scribed by the witness"); 1910, Dickman's Case, 5 Cr. App. 135 ("If we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction that followed"); 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.

§ 787. [1] ENGLAND: 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 a 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).

UNITED STATES: *Federal:* 1898, Emerson Co. *v.* Nimocks, 88 Fed. 280 (patent-expert

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."

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); *Alabama:* 1898, Dreyspring *v.* Loeb, 119 Ala. 282, 24 So. 734 (answers to depositions prepared beforehand and repeated orally by deponent, suppressed); *Connecticut:* 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); *Delaware:* 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"); *Massachusetts:* 1809, Amory *v.* Fellowes, 5 Mass. 219, 227 ("the appellee prepared and wrote the depositions in the absence of the commissioners"; excluded); *New York:* 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); *Pennsylvania:* 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, Carmalt *v.* Post, 8 Watts 406 (similar); 1839, Grayson *v.* Bannon, 8 Watts 524, 529 (deposition written by party's agent and afterwards sworn to, excluded); *Texas:* 1892, Greening *v.* Keel, 84 Tex. 326, 328, 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 excluded); 1894, Blum *v.* Jones, 86 Tex. 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).

For the impropriety of the *officer* who takes the deposition being an *agent or kinsman* of the party, see *post*, § 803.

Distinguish also the ordinary use of *memoranda* of a past recollection, *ante*, § 745, under which would come most memoranda by experts.

But the foregoing principles should be left flexible, to fit the facts of testimonial psychology. Sometimes a prepared statement has advantages, without risk of fabrication. In many cases, especially where an *expert witness* upon a subject of scientific knowledge has made an investigation or analysis and is called to testify, it makes for his own lucidity and accuracy, and for better comprehension and valuation of his testimony, if he first reads his written report stating in precise terms his observations and inferences. This practice should be freely permitted. It goes slightly beyond the technical rule for the use of memoranda of past recollection (*ante*, § 740); but that rule is a mere precautionary one. Here the policy of seeking the greatest light on the subject requires flexible liberty to use this method.[2]

§ 787*a*. **Answer by Reference.** (6) An analogous mode of narration, in which opportunity is furnished for fabrication by adopting a prior statement without resort to actual recollection of details, consists in *questioning by reference* to another person's statement and seeking what may be termed an "indorsing" answer verifying the other statement by adoption. Such a question is ordinarily to be disapproved;[1] for the answer may be merely a mechanical one:

1811, WASHINGTON, J., in *Richardson* v. *Golden*, 3 Wash. C. C. 109 (witnesses were asked if an 'ex parte' certificate of facts prepared by some of them "contained the truth"): "The mode pursued in this case is calculated to produce perjury. It is worse than leading questions, or telling the witness what to say, because he is here reminded of the necessity 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 been merely asked at the trial whether he agreed with or differed from the testimony of D. as to a transaction): "The credit of the witness before the jury, and the greater or less confidence he secures with them, often depend very much on the manner in which he relates the details of the transactions about which he testifies, the intelligence with which he groups the various circumstances surrounding them, the general capacity and information he exhibits in relation to the subject-matter of his testimony, and the accuracy with which he is able to remember and state minute and apparently trivial and unimportant incidents therewith. . . . If either party insists upon it, he is entitled to have the witness state fully all details of his testimony upon the stand."

On cross-examination, however, there being no danger of suggestion or mechanical indorsement, this form of question is allowable;[2] at least, the objection to it rests upon a totally different ground, namely, the Opinion rule;

[2] The authorities are noted *post*, § 1385 (right of cross-examination). The practice is also material in the reformed method of securing expert testimony (*ante*, § 563).

§ 787*a*. [1] Nevertheless, on direct examination, when the witness has *once answered* a question in detail, he may for a subsequent question covering the same ground refer back to his first answer: 1861, Black *v.* Black, 38 Ala. 112 (deposition); on cross-examination, however, the cross-examiner may oblige him to repeat his direct testimony in detail: *supra*, § 782, par. 3.

[2] 1888, Parnell Commission's Proceedings, 24th day, Times' Rep. pt. 7, p. 76 (asking A whether, if X has said so-and-so, it is incorrect, allowed; *contra*, *semble*, 31st day, pt. 8, p. 199): 1900, State *v.* Taylor, 56 S. C. 360, 34 S. E. 939 (witnesses may be told, "either correctly or incorrectly, what another witness on the same side has testified to, with a view to test the correctness of the memory or the honesty of the witness"; here the question was allowed, "If your husband says . . . is he telling the truth or a falsehood?").

for while this question may properly serve to emphasize a contradiction on a specific point between witnesses on the same side (*post*, § 1838) or to exhibit the witness' vacillation or uncertainty, it should not be used as a mode of improperly extracting one witness' opinion on the general credibility of another (*post*, §§ 1964, 1985).

§ 788. **Same: Prior Conference with Attorney; Knowledge of Questions.** (7) How far any attempt can be made judicially to prevent improper suggestion *furnished out of court* by mere conference with the attorney or by 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 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.[1] The judicial attitude towards this problem may be gathered from the following passages:

1637, 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."

§ 788. [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"); 1911, State *v.* Papa, 32 R. I. 453, 80 Atl. 12 (the defendant's counsel has a right to interview witnesses already summoned by the State).

The following ruling is unsound: 1909, Eads *v.* State, 17 Wyo. 490, 101 Pac. 946 (questions seeking to clear away an inference of counsel's suggestion in conference with a witness, excluded).

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.

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. 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 still, it is absolutely necessary, in certain cases where a witness is to be examined in reference to a transaction which was the subject of correspondence, or which involved numerous items or dates, that he should be informed beforehand of the nature and scope of the questions he will be called upon to answer, in order that he may be prepared for the examination; for it is obvious that without some previous preparation to refresh his memory in such cases, his testimony would be nearly or quite valueless. We think, therefore, to lay down a rule that it is sufficient ground for suppressing a deposition, if it appear that the witness was allowed to read and examine the direct and cross interrogatories before he gave his evidence, would be inconvenient and dangerous as a rule of practice."

B. NON-VERBAL[1] TESTIMONY

§ 789. **Dramatic Communication (Gesture, Dumb-show, etc.).** Man does not communicate by words alone; and it may occur that words become inferior to action as a mode of communicating a correct impression of a scene observed. Certainly, in an appropriate case, it is proper and customary for the trial Court in its discretion to sanction a departure from the ordinary or verbal medium and permit the witness to make clearer his own observed data by representing them in gesture, dumb-show, or other dramatic mode.[2] Whether it is

§ 789. [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 Cal. 175, 48 Pac. 75 (murder; draping the clothing of the murdered woman upon a dress-frame, for better identification, allowed); 1888, Tudor Iron Works *v.* Weber, 31 Ill. App. 312 (wearing

more useful to do so must depend much on the circumstances of the case. The only general and disfavoring consideration to be noted is that the witness' dramatic expression may be calculated to give unfair emphasis and create improper emotional effects;[3] but this can rarely occur.

§ 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. No 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

clothes as worn at the time of an accident, allowed); 1905, Turner *v.* Com., — Ky. —, 89 S. W. 482 (putting on a vest worn by one of the parties, to illustrate an affray); 1912, Hutchinson *v.* Richmond S. G. Co., 247 Mo. 71, 152 S. W. 52 ("Look out, below!" repeated by witness with loudness, to show the nature of a warning given); 1904, Clark *v.* Brooklyn H. R. Co., 177 N. Y. 357, 69 N. E. 647 (plaintiff-witness' illustration of his nervous affection caused by the injury, held doubtful, as being "under the sole control of the witness himself"; here not improper in discretion); 1892, State *v.* Ellwood, 17 R. I. 763, 769, 24 Atl. 782 (burglar's mask, etc., used to describe appearance of burglar); 1898, Louisville & N. R. Co. *v.* Ray, 101 Tenn. 1, 46 S. W. 554 (articles placed in court-room to illustrate testimony).

In the trial of O'Connell, 5 St. Tr. N. S. 1, 248 (1843), is an amusing cross-examination of a witness who endeavored to represent the treasonable significance of one of the great orator's — pauses! There is certainly one great historical pause which could never again be reproduced in its effect: "Caesar had his Brutus — Charles the First, his Cromwell — and George the 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 to distinguish from those falling under the present head. For additional and interesting instances of the present sort, occurring at 'nisi prius', see a series of articles by Mr. Irving Browne, in 5 Green Bag, *passim*.

The following statutes belong here: Can. Dom. R. S. 1906, c. 145, § 6 (quoted *post*, 811, n. 3); Alta. St. 1910, 2d sess., Evidence Act, c. 3, § 18 (quoted *post*, § 811, n. 3); Sask. R. S. 1920, c. 44, 538 (quoted *post*, § 811, n. 3).

[3] 1905, Birmingham R. L. & P. Co. *v.* Rutledge, 142 Ala. 195, 39 So. 338 (personal injury; the plaintiff allowed to "walk the best he could before the jury"); 1904, Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845 (rape under age; the prosecutrix testifying with the babe in her lap, held not erroneous); 1862, People *v.* Graham, 21 Cal. 261, 266 (the child, the alleged subject of a rape, burst into tears when testifying; "unless we can trust to the intelligence and integrity of juries to withstand such influences, we must dispense with the use of juries as a part of the machinery for the administration of justice"); 1904, Blanchard *v.* Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94 (a motion to permit the plaintiff in a personal injury suit to testify while reclining on a stretcher, held not improperly denied on the facts, in the trial Court's discretion); 1906, State *v.* Barrick, 60 W. Va. 576, 55 S. E. 652 (rape; that the prosecutrix testified while lying ill on a cot, held not improper); 1898, Selleck *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 proference*, or "real evidence" (*post*, §§ 1157, 1158; exhibition of injured limbs, etc.), and the principle forbidding *indecent testimony* (*post*, § 2180).

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 rigorously 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 nonenity. 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.[1] 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.[2] But whenever such a document is offered as proving *a thing 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 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 simply 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."

§ 790. [1] Quoted with approval in Northern Pacific R. Co. *v.* Alderson, C. C. A., 199 Fed. 735 (1912).

[2] 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); 1884, People *v.* Muller, 32 Hun 210 (charge of selling or showing indecent photographs).

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 be so 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 minutiae 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 Maps, Models, and Diagrams.** The use of maps, models, and diagrams, as modes of conveying a witness' knowledge, is illustrated in manifold rulings, as well as in the daily practice of trials.[1]

§ 791. [1] **Maps, drawings, diagrams:** ENGLAND: 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 then to Mr. Wetherell).

UNITED STATES: *Federal:* 1897, Bunker Hill Co. *v.* Schmelling, 24 C. C. A. 564, 79 Fed. 263 (diagram of a mine); 1899, Western Gas C. Co. *v.* Danner, 38 C. C. A. 528, 97 Fed. 882 (diagram); 1900, Southern Pacific Co. *v.* Hall, 41 C. C. A. 50, 100 Fed. 760 (place of railroad accident); 1902, Chicago *v.* Le Moyne, 56 C. C. A. 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); *Alabama:* 1852, Nolin *v.* Parmer, 21 Ala. 71 (diagram); 1853, Campbell *v.* State, 23 Ala. 83 (map); 1882, Humes *v.* Bernstein, 72 Ala. 546, 553 (map); 1889, East Tennessee V. & G. R. Co. *v.* Watson, 90 Ala. 41, 45, 7 So. 813 ("it might properly be considered by implica-

A few discriminations only need to be noted. (1) The map or diagram, as testimony, must come in on the credit of some witness (*post*, § 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.).

tion as a part of the witness' testimony, and therefore as in evidence"); 1894, Burton *v.* State, 107 Ala. 108, 127, 18 So. 284 (map of place of homicide); 1895, Wilkinson *v.* State, 106 Ala. 23, 17 So. 457 (diagram); 1897, Burton *v.* State, 115 Ala. 1, 22 So. 585 (map of locality of a murder); *Florida:* 1898, Rawlins *v.* State, 40 Fla. 155, 24 So. 65 (map verified by surveyor and used by witnesses); 1906, Hisler *v.* State, 52 Fla. 30, 42 So. 692 (map of location of homicide); *Georgia:* 1882, Moon *v.* State, 68 Ga. 695 (diagram); 1896, Western & A. R. Co. *v.* Stafford, 99 Ga. 187, 25 S. E. 656 (diagram of place of a railroad accident); *Illinois:* 1890, Kankakee & S. R. Co. *v.* Horan, 131 Ill. 303, 23 N. E. 621 (map); 1903, Lake St. Elev. R. Co. *v.* Burgess, 200 Ill. 628, 66 N. E. 215 (sketch of a railroad car); 1913, Reinke *v.* Sanitary District, 260 Ill. 380, 103 N. E. 236 (graphic summaries of statistics); *Iowa:* 1893, Goldsborough *v.* Pidduck, 87 Ia. 599, 601, 54 N. W. 431 (surveyor's map illustrating his testimony); 1917, Baker *v.* Zimmerman, 179 Ia. 272, 161 N. W. 479 (plat of location of collision); *Kansas:* 1904, State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114 (handwriting; cited *post*, § 797, n. 4); *Maine:* 1857, State *v.* Knight, 43 Me. 130 (chart of human skeleton; see quotation *supra*); *Maryland:* 1898, County Com'rs *v.* Wise, 71 Md. 54, 18 Atl. 31 (river-bank after flood); *Massachusetts:* 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"); 1879, Clapp *v.* Norton, 106 Mass. 33 (plan); 1871, Com. *v.* Holliston, 107 Mass. 233 (plan); 1871, Paine *v.* Woods, 108 Mass. 168 (plan); 1885, Barrett *v.* Murphy, 140 Mass. 143 (plan); *Minnesota:* 1888, Bennison *v.* Walbank, 38 Minn. 313, 37 N. W. 447 (diagram of accident); 1910, Strasser *v.* Stabeck, 112 Minn. 90, 127 N. W. 384 (plat of the place of a collision); *Mississippi:* 1914, Le Barron *v.* State, 107 Miss. 663, 65 So. 648 (house where a witness to a murder was staying; admitted); *Missouri:* 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"); *Montana:* 1905, Carman *v.* Montana C. R. Co., 32 Mont. 137, 79 Pac. 690; *Nebraska:* 1898, Chicago R. I. & P. R. Co. *v.* Buel, 56 Nebr. 205, 76 N. W. 571 (map); *New Hampshire:* 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"); *New York:* 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 N. Y. 350, 354, 35 N. E. 604 (murder; sketches of premises, blood-stains, etc.); 1908, People *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690 (knife used as a model); *North Carolina:* 1887, State *v.* Whiteacre, 98 N. C. 753, 3 S. E. 488 (diagram); 1888, Dobson *v.* Whisenhaut, 101 N. C. 647, 8 S. E. 126; 1889, Burwell *v.* Sneed, 104 N. C. 120, 10 S. E. 152; 1895, Riddle *v.* Germanton, 117 N. C. 387, 389, 23 S. E. 332 (map); 1895, Tankard *v.* Railroad, 117 N. C. 558, 565, 23 S. E. 46 (diagram of railroad crossing); 1900, Arrowood *v.* R. Co., 126 N. C. 629, 36 S. E. 151; 1903, State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625 (surroundings of a homicide); 1906, Bullard *v.* Hollingsworth, 140 N. C. 634, 53 S. E. 441 (map and plat of boundaries); 1918, State *v.* Spencer, 176 N. C. 709, 97 S. E. 155 (murder; map of premises used); *North Dakota:* 1908, Higgs *v.* Minneapolis, St. P. & S. S. M. R. Co., 16 N. D. 446, 114 N. W. 722 (hay and grass burnt); *Pennsylvania:* 1890, Com. *v.* Switzer, 134 Pa. 388, 19 Atl. 681 (map); 1901, Hagan *v.* Carr, 198 Pa. 606, 48 Atl. 688 (diagram of theory of handwriting); 1903, Geist *v.* Rapp, 206 Pa. 411, 55 Atl. 1063 (model of a scaffold); *South Carolina:* 1893, Rapely *v.* Klugh, 40 S. C. 134, 146, 18 S. E. 680 (map); *Tennessee:* 1912, Hughes *v.* State, 126 Tenn. 40, 148 S. W. 543 (room of a homicide, rearranged to show the scene); *Texas:* 1888, Griffith *v.* Rive, 72 Tex. 187, 12 S. W. 168 (map); *Washington:* 1898, State *v.* Hunter, 18 Wash. 670, 52 Pac. 247 (map of premises of rape-assault); 1918, Deitchler *v.* Ball, 99 Wash. 483, 170 Pac. 123 (automobile injury; diagram of location, etc., admitted); *West Virginia:* 1893, State *v.* Harr, 38 W. Va. 58, 63, 17 S. E. 794 (diagram of distance); 1893, Poling *v.* R. Co., 38 W. Va. 645, 657, 18 S. E. 782 (scene of injury by railway mail-crane); 1899, King *v.* Jordon, 46 W. Va. 106, 32 S. E. 1022; *Wisconsin:* 1857, Vilas *v.* Reynolds, Wis. 214, 224 (plat).

(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.

(4) A map, model, or diagram, though *made out of court*, is nevertheless subject to cross-examination through the witness who verifies and uses it. Hence the objection based on the Hearsay rule, that it is prepared 'ex parte', is groundless (*post*, § 1385).

§ 792. **Same: Instances of Photographs.** A photograph, like a map or diagram, is 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]

Models: 1895, Davis *v.* Power Co., 107 Cal. 563, 40 Pac. 953; 1898, People *v.* Searcy, 121 Cal. 1, 53 Pac. 359 (showing the jury boot-tracks artificially made in a box of sand, allowed); 1906, People *v.* Maughs, 149 Cal. 253, 86 Pac. 187 (murder; model of the part of the house, admitted); 1895, Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938; 1905, Chicago & A. R. Co. *v.* Walker, 217 Ill. 605, 75 N. E. 520 (skeleton of a foot, used to explain an injury); 1916, Logan *v.* Empire D. El. Co., 99 Kan. 381, 161 Pac. 659 (injury by electric wires; model of poles and wires, admitted); 1895, Louisville & N. R. Co. *v.* Berry, 96 Ky. 604, 29 S. W. 449; 1887, Earl *v.* Lafler, 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).

[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.

So also: 1911, Napier *v.* Little, 137 Ga. 242, 73 S. E. 3: "The map of a county surveyor, while not evidence, under the circumstances of this case, is admissible to go to the jury as a mere diagram to illustrate other testimony." Under this convenient but insidious term "illustrate", it is easy to re-classify almost any kind of evidence. Courts often fail to perceive that a diagram, map, or photograph is *always somebody's say-so*, and that therefore some explanation is always due of why that somebody is not in court to verify his graphic statement.

§ 792. [1] In the following cases photographs were declared admissible, except where otherwise noted: ENGLAND: 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).

UNITED STATES: *Federal:* 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.,

Certain discriminations, however, which may affect its admissibility from other points of view, need to be made:

50 U. S. 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 U. S. 366, 118 Fed. 412 (train-wreck); 1905, Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 66, 69 C. C. A. 28 (plaintiff's injured leg); 1906, Porter *v.* Buckley, 147 Fed. 140, C. C. A. (automobile accident; photographs of the locality, taken more than a year afterwards, excluded); 1915, Coronas *v.* American R. Co., 7 P. R. Fed. 429; 1916, De Diego *v.* Rovira, 9 P. R. Fed. 17 (location of a dam);
Alabama: 1875, Luke *v.* Calhoun Co., 52 Ala. 118 (personal features); 1889, Kansas City M. & B. R. Co. *v.* Smith, 90 Ala. 27, 8 So. 43 (train-wreck); 1905, Russell *v.* State, — Ala. —, 38 So. 291 (person of the defendants);
Arkansas: 1906, Kansas C. S. R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363 (railroad injury); 1920, Young *v.* State, 144 Ark. 71, 221 S. W. 478 (carnal abuse of female under 16; the female being in court, a photograph taken some years before was excluded as needless);
California: 1889, Re Jessup, 81 Cal. 418, 21 Pac. 976, 22 Pac. 742 (personal features); 1897, People *v.* Durrant, 116 Cal. 179, 48 Pac. 75 (deceased while alive); 1899, People *v.* Phelan, 123 Cal. 551, 56 Pac. 424 (place of homicide); 1899, People *v.* Crandall, 125 Cal. 129, 57 Pac. 785 (scene of a crime); 1907, People *v.* Grill, 151 Cal. 592, 91 Pac. 515 (place of homicide); 1905, People *v.* Mahatch, 148 Cal. 200, 82 Pac. 779 (locality of homicide, showing the position of body, knife, hat, etc., as re-arranged by a witness who testified to the correct placing); 1906, People *v.* Maughs, 149 Cal. 253, 86 Pac. 187 (murder; photograph of a person in the supposed position of the deceased, excluded); 1920, People *v.* Northcott, — Cal. App. —, 189 Pac. 704 (murder by abortion, photograph of place of finding body, admitted);
Columbia (Dist.): 1904, Shaffer *v.* U. S., 24 D. C. App. 417, 424 (accused);
Connecticut: 1889, Dyson *v.* R. Co., 57 Conn. 24, 17 Atl. 137 (railroad-crossing); 1899, McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000 (premises); 1899, Cunningham *v.* R. Co., 72 Conn. 244, 43 Atl. 1047 (condition of rails; photograph not testified to as correct, excluded); 1900, Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672 (highway and premises; held not improperly rejected in discretion); 1901, Wetherell *v.* Hollister, 73 Conn. 622, 48 Atl. 826 (weight of photographs as to correctness is for the jury); 1902, State *v.* Cook, 75 Conn. 267, 53 Atl. 589 (condition of horses as to flesh; admissible in discretion); 1913, Moffitt *v.* Connecticut Co., 86 Conn. 527, 86 Atl. 16 (street-car injury);
Delaware: 1904, MacFeat *v.* Phila. W. & B. R. Co., 5 Pen. Del. 52, 62 Atl. 898 (scene of a railroad accident); 1905, State *v.* Powell, 5 Pen. Del. 24, 61 Atl. 966 (wounds on the deceased);
Florida: 1891, Adams *v.* State, 28 Fla. 511, 538, 10 So. 106 (in general); 1892, Ortiz *v.* State, 30 Fla. 256, 265, 11 So. 611 (a hotel and a tree near by, excluded because misleading as to material matters of distance, etc.);
Georgia: 1882, Franklin *v.* State, 69 Ga. 42 (wound); 1889, Shaw *v.* State, 83 Ga. 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 Ga. 790, 12 S. E. 18 (personal features);
Illinois: 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 Ill. 89, 59 N. E. 573 (railroad-track); 1901, Iroquois F. Co. *v.* McCrea, 191 Ill. 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 Ill. 98, 64 N. E. 739 (photograph of the place of an accident, taken nine months later, when the surroundings had changed, excluded); 1905, Chicago & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865 (railroad accident at a crossing; photographs taken twelve months afterward, excluded); 1906, Chicago & S. L. R. Co. *v.* Kline, 220 Ill. 334, 77 N. E. 229 (eminent domain; photographs of adjoining estates, excluded, as offered merely in evasion of the rule of proof of value);
Indiana: 1877, Beavers *v.* State, 58 Ind. 530, 535 (deceased's personal features); 1889, Keyes *v.* State, 122 Ind. 529, 23 N. E. 1097 (premises); 1891, Miller *v.* R. Co., 128 Ind. 97, 27 N. E. 339 (railroad crossing);
Iowa: 1877, Locke *v.* R. Co., 46 Ia. 110 (train-wreck); 1879, Reddin *v.* Gates, 52 Ia. 213, 2 N. W. 1079; 1883, German Theol. School *v.* Dubuque, 64 Ia. 737, 17 N. W. 153 (flooded premises); 1885, Barker *v.* Perry, 67 Ia. 148, 25 N. W. 100; 1895, State *v.* Windahl, 95 Ia. 470, 64 N. W. 420 (deceased after he was shot); 1902, State *v.* Hossack, 116 Ia. 194, 89 N. W. 1077 (body of deceased); 1905, Considine *v.* Dubuque, 126 Ia. 283, 102 N. W. 102 (footpath);
Kansas: 1895, Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337 (personal features); 1905, Ottawa *v.* Green, 72 Kan. 214, 83 Pac. 616 (sidewalk);
Kentucky: 1908, Louisville & N. R. Co. *v.* Brown, 127 Ky. 732, 106 S. W. 795 (railway

(1) There may be an objection, not to the photographic testimony as such, but to the *relevancy of the fact testified to;* if the fact to be evidenced by the

wreckage); 1911, Bowling Green G. Co. *v.* Dean's Ex'x, 142 Ky. 678, 134 S. W. 1115 (photograph of a lineman on a telegraph pole, the scene being reproduced by other persons, and duly verified, admitted); 1916, McCandless *v.* Com., 170 Ky. 301, 185 S. W. 1100 (corpse of victim of homicide);
Maine: 1897, State *v.* Hersom, 90 Me. 273, 38 Atl. 160 (room); 1904, Stone *v.* L. B. & B. St. R. Co., 99 Me. 243, 59 Atl. 56 (photograph of the scene of a railroad injury, excluded in discretion); 1904, Babb *v.* Oxford P. Co., 99 Me. 298, 59 Atl. 290 (photograph of a coal conveyer, held not improperly excluded in the trial Court's discretion);
Maryland: 1880, People's P. R. Co. *v.* Green, 56 Md. 93, *semble* (railroad car); 1896, Dorsey *v.* Habersack, 84 Md. 117, 35 Atl. 96 (building); 1904, Martin *v.* Moore, 99 Md. 41, 57 Atl. 671 (battery; photograph of the plaintiff on the day of the battery, excluded for lack of verification); 1912, Maryland El. R. Co. *v.* Beasley, 117 Md. 270, 83 Atl. 157 (place of an accident; photographs in winter, the accident occurring in June, held not improperly admitted in discretion);
Massachusetts: 1864, Hollenbeck *v.* Rowley, 8 All. 475 (premises); 1875, Blair *v.* Pelham, 118 Mass. 421 (place of highway injury); 1882, Randall *v.* Chase, 133 Mass. 213; 1889, Verran *v.* Baird, 150 Mass. 142, 22 N. E. 630 (place of flood); 1892, Com. *v.* Campbell, 155 Mass. 537, 30 N. E. 72 (personal features as to wearing of whiskers); 1893, Turner *v.* R. Co., 158 Mass. 261, 265, 33 N. E. 520 (railroad tracks, to show the absence of blocks in the frogs); 1893, Com. *v.* Morgan, 159 Mass. 375, 377, 34 N. E. 458 (personal features as to wearing of whiskers); 1894, Farrell *v.* Weitz, 160 Mass. 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 Mass. 403, 36 N. E. 60 (questionable, in showing condition of physical health and the like); 1894, Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25 (premises); 1898, Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042 (sidewalk; rejectible in trial Court's discretion as not instructive); 1898, Carey *v.* Hubbardston, 172 Mass. 106, 51 N. E. 521 (highway; trial Court's discretion to determine as to exclusion because uninstructive); 1899, Wilcox *v.* Forbes, 173 Mass. 63, 53 N. E. 146 (alleged insane person; trial Court's discretion allowed to exclude); 1899, Dolan *v.* M. R. F. Life Ass'n, 173 Mass. 197, 53 N. E. 398 (insured person; admissible in trial Court's discretion); 1904, Com. *v.* Fielding, 184 Mass. 484, 69 N. E. 216 (arson); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (murder, photograph of the deceased's corsets, taken six months before trial, held properly admitted in the trial Court's discretion, though the corsets were in court; photograph of pieces of a knife-blade, admitted, to aid testimony, though the pieces were in court); 1908, Com. *v.* Johnson, 199 Mass. 55, 85 N. E. 188 (photograph of defendant, from the rogues' gallery and indorsed with his police history, admitted on the facts); 1916, Lynch *v.* Larivee Lumber Co., 223 Mass. 335, 111 N. E. 861 (photographs of a lumber-pile, not verified, and not showing conditions at the time of the injury, excluded); 1916, Smith *v.* Gammino, 225 Mass. 285, 114 N. E. 205 (pump); 1919, Morrissey *v.* Connecticut Valley St. R. Co., 233 Mass. 554, 124 N. E. 435 (place of collision of street-car and automobile; admitted);
Michigan: 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, 134 id. 22, 95 N. W. 986 (place of an injury); 1905, Ness *v.* Escanaba, 142 Mich. 404, 105 N. W. 879 (sidewalk; excluded on the facts); 1907, Davis *v.* Adrian, 147 Mich. 300, 110 N. W. 1084 (personal injury); 1909, Harrison *v.* Green, 157 Mich. 690, 122 N. W. 205 (photograph of machinery with persons placed as at the time of the injury, admitted);
Minnesota: 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 Minn. 379, 383, 56 N. W. 42 (the plaintiff as injured and suffering); 1899, Stewart *v.* R. Co., 78 Minn. 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 Minn. 142, 88 N. W. 436 (photograph of a mill yard, taken seven months after an accident, held not improperly received, on the facts); 1915, O'Neil *v.* Potts, 130 Minn. 353, 153 N. W. 856 (location of a motor car collision; admitted);
Mississippi: 1908, Brett *v.* State, 94 Miss. 669, 47 So. 781 (photograph of the scene of a murder reproduced by posing the parties; excluded, because misleading);
Missouri: 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 Mo. 317, 53 S. W. 921 (sidewalk); 1909, Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969,

photograph is itself not admissible, obviously it cannot be proved by photograph or otherwise. This objection of irrelevancy is commonly either that

(position of plaintiff when run over; photographs of an artificially re-constructed scene, excluded because the similarity of conditions was not sufficiently shown); 1914, Lauff *v.* Kennard & S. C. Co., 186 Mo. App. 123, 171 S. W. 986 (photograph of a freight platform and wagons, admitted, approving the above passage in par. 3);
Montana: 1921, State *v.* Byrne, 60 Mont. 317, 199 Pac. 262 (murder; maps and photographs of the place, admissible);
Nebraska: 1886, Marion *v.* State, 20 Nebr. 240, 29 N. W. 911 (deceased's corpse); 1893, Omaha S. R. Co. *v.* Beeson, 36 Nebr. 361, 364, 54 N. W. 557 (land taken by railroad); 1903, Lamb *v.* State, 69 Nebr. 212, 95 N. W. 1050 (murdered man);
Nevada: 1905, State *v.* Roberts, 28 Nev. 350, 82 Pac. 100 (of a deceased, showing his wounds);
New Hampshire: 1898, Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188 (testator and his wife); 1910, Turner *v.* Cocheco Mfg. Co., 75 N. H. 521, 77 Atl. 999 (mill; discretion of trial Court);
New Jersey: 1897, Goldsboro *v.* R. Co., 60 N. J. L. 49, 37 Atl. 433; 1913, State *v.* Strong, 83 N. J. L. 177, 83 Atl. 506 (photograph of the place of a murder, taken later, without specifying the changes that had taken place, excluded);
New York: 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 N. Y. 477 (personal features; see quotation *supra*); 1886, People *v.* Buddensieck, 103 N. Y. 487, 500, 9 N. E. 44 (premises); 1887, Archer *v.* R. Co., 106 N. Y. 598, 603, 13 N. E. 318 (premises); 1888, People *v.* Jackson, 111 N. Y. 370, 19 N. E. 54 (place of homicide; here received by consent); 1889, Alberti *v.* R. Co., 118 N. Y. 77, 88, 23 N. E. 35 (injured limbs); 1890, People *v.* Smith, 121 N. Y. 581, 24 N. E. 852 (personal features); 1891, People *v.* Fish, 125 N. Y. 147, 26 N. E. 319 (premises and corpse-wounds); 1893, People *v.* Webster, 139 N. Y. 73, 83, 34 N. E. 730 (deceased, to show his appearance to the defendant when acting in self-defence); 1896, People *v.* Pustolka, 149 N. Y. 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 Hun 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); 1904, Smith *v.* Lehigh Valley R. Co., 177 N. Y. 379, 69 N. E. 729 (action for death; photograph of deceased excluded, her appearance being immaterial);
North Carolina: 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.); 1904, Davis *v.* Seaboard A. L. Ry., 136 N. C. 115, 48 S. E. 591 (injured person); 1910, Pickett *v.* Atlantic C. L. R. Co., 153 N. C. 148, 69 S. E. 8 (land flooded);
North Dakota: 1912, Sherlock *v.* Minneapolis, St. P. & S. S. M. R. Co., 24 N. D. 40, 138 N. W. 976 (railway track); 1915, Wyldes *v.* Patterson, 31 N. D. 282, 153 N. W. 630 (photographs of a man standing on a roof as in the manner of the accident sued for, excluded on the facts);
Ohio: 1912, Cincinnati, H. & D. R. Co. *v.* De Onzo, 87 Oh. 109, 100 N. E. 320 (legs of a plaintiff before injury; photographs received);
Oklahoma: 1902, Smith *v.* Terr., 11 Okl. 669, 69 Pac. 805 (body of deceased, and its wounds);
Oregon: 1903, State *v.* Miller, 43 Or. 325, 74 Pac. 658 (of deceased, showing wounds, excluded, on the principle of § 1158, *post*); 1904, Maynard *v.* Oregon R. & N. Co., 46 Or. 15, 78 Pac. 983 (railway wreck); 1909, State *v.* Finch, 54 Or. 482, 103 Pac. 505 (of deceased, admitted); 1921, State *v.* Clark, 99 Or. 629, 196 Pac. 360, 370 (murder; photographs of the body as found);
Pennsylvania: 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 Pa. 147, 151, 27 Atl. 366 (accomplice in a robbery); 1898, Beardslee *v.* Columbia Tp., 188 Pa. 496, 41 Atl. 617 (place of accident); 1899, Com. *v.* Keller, 191 Pa. 122, 43 Atl. 198 (size of deceased); 1909, Buck *v.* McKeesport, 223 Pa. 211, 72 Atl. 514 (photograph of a highway, held misleading on the facts);
Philippine Islands: 1908, Manila *v.* Cabangis, 10 P. I. 151 (title to waterway);
Rhode Island: 1892, State *v.* Ellwood, 17 R. I. 763, 771, 24 Atl. 782 (accused shortly after arrest, to identify him); 1911, Curtis *v.* N. Y. N. H. & H. R. Co., 32 R. I. 542, 80 Atl. 127 (place of railroad accident);
South Carolina: 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 question);
Tennessee: 1900, Livermore F. & M. Co. *v.* Union S. & C. Co., 105 Tenn. 187, 58 S. W. 270 (machinery);
Texas: 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 Tex. 642, 32 S. W. 868 (per-

the condition of a place or person at the time of taking the photograph is not evidence of the condition at the time in issue (*ante*, § 438);[2] or that the outward appearance of a person is not evidential of his inward condition (*ante*, §§ 226, 228, 229);[3] or that the features of a child are not evidence, by resemblance, of a particular person's paternity (*ante*, § 166).[4] These objections are seldom favorably considered by the Courts; but it is obvious that the decision in any case rests on principles of relevancy of the fact pictured, and does not affect the propriety of evidencing a relevant fact by a photograph.

(2) There may be an objection, not to the photographic testimony as such, but to the reproduction of a corporal injury or other object calculated *unduly to excite sympathy* for one party and *unfair prejudice* against the other;[5] this objection is identical with that considered (*post*, §§ 1157, 1158) for autoptic proference (or, real evidence), and a similar application of principle would be made.

(3) The objection that a photograph *may* be so made as to *misrepresent the object* is genuinely directed against its testimonial soundness; but it is of no validity. It is true that a photograph can be deliberately so taken as to convey the most false impression of the object.[6] But so also can any witness 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 the objection

sonal appearance two years before death); 1906, Newcomb *v.* State, 49 Tex. Cr. 550, 95 S. W. 1048 (room of a homicide; excluded, because the position of furniture was not the same);
Utah: 1896, Dederichs *v.* Salt Lake, 14 Utah 137, 46 Pac. 656 (locality of a railroad accident); 1897, State *v.* McCoy, 15 Utah 136, 49 Pac. 420 (deceased person);
Vermont: 1907, Foss *v.* Smith, 79 Vt. 434, 65 Atl. 553 (exchange of furniture for tools, etc.; a photograph of the furniture held not improperly excluded, the appearance not being important in evidencing value); 1922, Dent *v.* Bellows Falls & S. R. St. R. Co., — Vt. —, 115 Atl. 83 (bridge and railroad track; question as to conditions being the same);
Virginia: 1914, Spencer *v.* Looney, 116 Va. 767, 82 S. E. 745 (photographs of the plaintiff's grandfather, etc., admitted, on an issue of negro ancestry);
Wisconsin: 1872, Church *v.* Milwaukee, 31 Wis. 512, 519 (premises); 1899, Baxter *v.* R. Co., 104 Wis. 307, 80 N. W. 644 (plaintiff's injured appearance; admissible in discretion); 1899, Selleck *v.* Janesville, 104 Wis. 307, 80 N. W. 944 (injured foot, excluded as unnecessary and prejudicial, on the principle of § 1158, *post*); 1902, Hupfer *v.* Distilling Co., 114 Wis. 279, 90 N. W. 191 (vat-hoops; Marshall, J. diss., on the ground that photographs were insufficient without other evidence when available); 1903, Paulson *v.* State, 118 Wis. 89, 94 N. W. 771 (premises); 1906, Hupfer *v.* National Dist. Co., 127 Wis. 306, 106 N. W. 831 (vat-hoops).

Distinguish the question of the *sufficiency* of 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 suffice, 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 parties to an affray, and of the features 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.* Janesville, Wis., *supra*.

[6] Striking illustrations of this may be found in an article by Mr. Fitzgerald, "Some Curiosities of Modern Photography", in the "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; also in a quotation from the London "Tidbits", in an article by Mr. Irving Browne, 5 Green Bag 62; and in the magazines of photography since that date.

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 express his observation and recollection (*ante*, § 766). Here, then, is a form of expression ready prepared pictorially; he must supply the missing elements;

[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.

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 latter element may be implied from his very oath;[1] the former must appear from his preliminary statements.

The deductions from this general principle may now be examined.

§ 794. **Same: Anonymous Pictures; Personal Knowledge; Calling the Maker; Official Maps.** (1) A map or photograph cannot be received *anonymously;* it must be "*verified*" *by some witness.*[1] So also specific additional marks or legends, borne on the document but not verified in particular, must similarly be sponsored.[2] Where the map is offered as an official one, without calling the officer (*post*, § 1665), the official authentication of it amounts of course to a verification.

(2) The witness thus standing sponsor must be *qualified by observation* (*ante*, §§ 650, 657) to speak of the matters represented in the picture.[3] Whether this requirement is properly fulfilled should be left to the determination of the trial Court.[4]

§ 793. [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."

§ 794. [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 marks "I. 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, *England:* 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); *United States:* 1882, Humes *v.* Bernstein, 72 Ala. 546, 553 (map prepared from insufficient data); 1909, Sellers *v.* State, 91 Ark. 175, 120 S. W. 840 (murder; photograph of a reproduction of the actors, excluded, because not verified as to the positions, etc.); 1899, People *v.* Hill, 123 Cal. 571, 56 Pac. 443 (diagram verified by witness who knew of the place only by hearsay, excluded); 1905, People *v.* Mahatch, 148 Cal. 200, 82 Pac. 779 (cited *ante*, § 792, n. 1); 1892, Cleveland C. C. & St. L. R. Co. *v.* Monaghan, 140 Ill. 483, 30 N. E. 869 (see citation *supra*, § 792); 1912, State *v.* Baker, 157 Ia. 126, 135 N. W. 1097; 138 N. W. 841 (pointing out that the photographer may identify places in the picture by referring to the alleged facts); 1909, Consolidated G. E. L. & P. Co. *v.* State, 109 Md. 186, 72 Atl. 651; 1918, Mayor etc. of Baltimore *v.* State, 132 Md. 113, 103 Atl. 426 (photographic copy of insured's application, testified to by examining physician, who identified his handwriting photographed, but could not verify the photograph, held inadmissible; finical); 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); 1909, Morris *v.* Terr., 1 Okl. Cr. 617, 99 Pac. 760 (premises of a homicide); 1918, Caffery *v.* Philadelphia & R. R. Co., 261 Pa. 251, 104 Atl. 569 (photographer's joint record, excluded on the principle of § 1530, *post*).

[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. W. 783; 1898, Carey *v.* Hubbardstown, 172 Mass. 106, 51 N. E. 521, and other cases in this jurisdiction cited *supra*, § 792; 1898, Pritchard *v.* Austin, 69 N. H. 387, 46 Atl. 188; 1909, Hassam *v.* Safford L. Co., 82 Vt. 444, 74 Atl. 197 ("the sufficiency of the verification . . . is ordinarily not reviewable"); 1903, Hupfer *v.* National Distilling Co., 119 Wis. 417, 96

(3) The witness thus using the map or photograph as representing his knowledge *need not be the maker* of it.[5] He affirms it to represent his observation; 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. More-

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); 1911, Napier *v.* Little, 137 Ga. 242, 73 S. E. 3 (map); 1903, State *v.* Forbes, 111 La. 473, 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); 1907, State *v.* Remington, 50 Or. 99, 91 Pac. 473 (map made by county surveyor, with a legend, verified by one who had visited the spot); 1904, Koon *v.* Southern Ry., 69 S. C. 101, 48 S. E. 86 (drawing of a pile-driver); 1863, Wood *v.* Willard, 36 Vt. 82 (map); 1876, Hale *v.* Rich, 48 Vt. 224 (map); 1900, Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790 (map, made 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: *Federal:* 1901, New York S. & W. R. Co. *v.* Moore, 45 C. C. A. 21, 105 Fed. 725; *Alabama:* 1875, Luke *v.* Calhoun Co., 52 Ala. 118 (the photograph of a man L. was identified by the plaintiff as that of her husband); *Connecticut:* 1899, McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000; *Iowa:* 1877, Locke *v.* R. Co., 46 Ia. 110 (the witness was shown a photograph taken by another, and declared it to be correct); *Massachusetts:* 1907, McKarren *v.* Boston & N. St. R. Co., 194 Mass. 179, 80 N. E. 477 (plaintiff's spinal vertebræ; verification by the physician present and directing the photographer, held sufficient); *Minnesota:* 1890, State *v.* Holden, 42 Minn. 354, 44 N. W. 123 (showing a likeness and identifying it); *Montana:* 1914, State *v.* Jones, 48 Mont. 505, 139 Pac. 441 (identification of a person); *New York:* 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 N. Y. 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 N. Y. Suppl. 52, 75 Hun 255 (same); *Pennsylvania:* 1893, Com. *v.* Connors, 156 Pa. 147, 151, 27 Atl. 366 (showing a photograph to one who has seen the person); *Tennessee:* 1912, Hughes *v.* State, 126 Tenn. 40, 148 S. W. 543; *Vermont:* 1902, McGovern *v.* Smith, 75 Vt. 104, 53 Atl. 326 (the photograph-taker, if he can identify the place, need not be an expert photographer); *Wisconsin:* 1904, Hebbe *v.* Maple Creek, 121 Wis. 668, 99 N. W. 442 (witness need not have been present at the photographing); 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, 31 Colo. 351, 72 Pac. 1069.

[6] 1894, Turner *v.* U. S., 13 C. C. A. 436, 66 Fed. 280; 1876, Bridges *v.* McClendon, 56 Ala. 327, 335; 1879, Clements *v.* Pearce, 63 Ala. 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 N. C. 666, 30 S. E. 19 (used for cross-examination); 1899, King *v.* Jordan, 46 W. Va. 106, 32 S. E. 1022.

over, 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, X-rays; etc.** 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 seem plain, however, that the situation is the same as if our senses had been abnormally enlarged in scope or capacity, and that we may here also claim to have knowledge, in the ordinary sense, *provided only that the instrument or process is known to be a trustworthy one*. That trustworthiness may be based upon general experience as to the class of instrument in question, together with a knowledge of the mechanism of the particular instrument as one constructed according to the trustworthy type.

What is needed, then, in order to justify testimony based on such instruments, is merely preliminary professional testimony to the trustworthiness of the process or instrument in general (when not otherwise settled by judicial notice), and to the correctness of the particular instrument; such testimony being usually available from one and the same person. Any process or instrument, furnishing abnormal aid to the senses, may thus be employed as a source of testimonial knowledge.

It will be seen that, after all, the real question is one of the proper sources of a witness' Knowledge (under the principle of §§ 657, 665, *ante*), and not of his mode of communicating it, under the present principle; because, if the source of knowledge is a proper one, the mode of communicating it is the usual one of words. It is true that in a single instance — namely, that of the vacuum or X-rays — the process of observation may be united with the process of communication, *i.e.* the rays may at the same time make visible the otherwise invisible and also by photograph register the impression. But this is not an essential union, — any more than the astronomer's automatic photography by telescope is necessarily united with the process of telescopic observation; in either case a special additional apparatus of photography is used, and in either case the situation is virtually as if the observer had first looked through the telescope or the vacuum-machine, had seen the details with his own eyes, and then had verified the photograph as representing what

he had seen with this artificial assistance. 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 recognition, 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 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*, *radiograph*, *skiagraph*) is also an available process; and its general trustworthiness ought to be judicially noticed.[4]

[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: 1912, Alexander *v.* Blackburn, 178 Ind. 66, 98 N. E. 711 (magnifying glass for signatures); 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. N. Y. 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. Tenn. 232 (microscope used by jury).

See additional instances under § 797, *post* (photographs of magnified handwriting).

For the use of other *scientific* or *professional* instruments of *calculation*, *registration*, etc. see *ante*, § 665.

[3] It was used, for example, in the Luetgert trial, Chicago, 1897.

[4] *Arkansas:* 1904, Miller *v.* Minturn, 73 Ark. 183, 83 S. W. 918 (malpractice; radiograph of the injured ankle, taken by an expert, admitted); 1914, Prescott & N. W. R. Co. *v.* Franks, 111 Ark. 83, 163 S. W. 180 (bodily wound; admitted); *California:* 1911, Kimball *v.* Northern Electric Co., 159 Cal. 225, 113 Pac. 154 (knee); *Illinois:* 1904, Chicago & J. El. Co. *v.* Spence, 213 Ill. 220, 72 N. E. 796 (X-ray skiograph of the plaintiff's body received, after preliminary evidence of correctness of method); 1907, Chicago City R. Co. *v.* Smith, 226 Ill. 178, 80 Ne. 716 (personal injury; certain X-ray photographs held properly introduced); 1912, Colesar *v.* Star Coal Co., 255 Ill. 532, 99 N. D. 709 (X-ray photograph of stone in kidney, held on the facts inadmissible because "unintelligible to the jury"); *Iowa:* 1905, State *v.* Matheson, 130 Ia. 440, 103 N. W. 137 (X-ray radiograph of a bullet, taken by an expert and verified by him, admitted); 1907, Elzig *v.* Bales, 135 Ia. 208, 112 N. W. 540 (a doctor's testimony based on an unauthenticated X-ray photograph, excluded); 1919, Lang *v.* Marshalltown L. P. & R. Co., 185 Ia. 940, 170 N. W. 463 (expert testimony interpreting skiographs, allowed; how could Courts ever dignify by attention such an absurd objection?); *Maine:* 1899, Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299 (vacuum-ray photograph; admissible in trial Court's discretion); *Massachusetts:* 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

(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 heard and understood from a distance whence they would ordinarily be inaudible. The *phonograph*[5] and the "*dictagraph*" fall under the principle of the *telephone*. No question is ever made on this ground, and the difficulties arise from other principles (examined *ante*, § 669, *post*, § 2155).

(6) If science should ever establish 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.[6]

be admitted if properly taken"); 1915, Doyle *v.* Singer S. M. Co., 220 Mass. 327, 107 N. E. 949 (radiographs of the plaintiff's head, admitted); *Missouri:* 1910, Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953 (X-ray photographs of a bone, admitted); *Nebraska:* 1902, Geneva *v.* Vurnett, 65 Nebr. 464, 91 N. W. 275 (X-ray photographs of an injured foot, verified by the physicians taking them, admitted); 1902, Carlson *v.* Benton, 66 Nebr. 486, 92 N. W. 600 (X-ray photograph held admissible, upon due verification of the process by a competent taker); *New York:* 1915, Marion *v.* Coon Construction Co., 216 N. Y. 178, 110 N. E. 444 (physician's testimony to results of X-ray plates; whether the plates themselves must be produced; certain discriminations laid down); *North Carolina:* 1915, Lupton *v.* Southern Express Co., 169 N. C. 671, 86 S. E. 614 (personal injury; X-ray plates admitted); *Oklahoma:* 1916, Bartlesville Zinc Co. *v.* Fisher, 60 Okl. 139, 159 Pac. 476 (personal-injury; X-ray plates not identified by the maker, nor verified as to the process, etc., excluded); *Oregon:* 1921, Yarbrough *v.* Carlson, 102 Or. 422, 202 Pac. 739 (X-ray photographs of corporal condition, made six months after the injury, admitted on the facts); *Tennessee:* 1897, Bruce *v.* Beall, 99 Tenn. 303, 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; "New 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"); *Utah:* 1918, Russell *v.* Borden's C. Milk Co., 53 Utah 457, 174 Pac. 633 (personal injury; radiographs used with medical testimony); *Vermont:* 1901, Sias *v.* Consol. Lighting Co., 73 Vt. 35, 50 Atl. 554 (X-ray photograph admitted; the ruling sanctions a pretty quibbling objection to one part of the testimony of the expert); 1907, Sheldon *v.* Wright, 80 Vt. 298, 67 Atl. 807 (X-ray picture of an injured leg, admitted); 1916, Davis *v.* Dunn, 90 Vt. 284, 98 Atl. 80 (malpractice; plaintiff not allowed to cross-examine defendant to an X-ray photograph not yet verified as that of the plaintiff's hand; but, after verification plaintiff was allowed to compare several other X-ray photographs of plaintiff's hands as identifying the first one); *Virginia:* 1916, Virginian R. Co. *v.* Bell, 118 Va. 570, 87 S. E. 570 (personal injury; X-ray picture of a normal neck, admitted); *Washington:* 1901, Miller *v.* Dumon, 24 Wash. 648, 64 Pac. 804 (use of X-ray photograph in testimony by the physician taking it, allowable); *West Virginia:* 1915, Griffith *v.* American Coal Co., 75 W. Va. 686, 84 S. E. 621 (radiograph of plaintiff's body, admitted); 1920, Quinn *v.* Flesher, 85 W. Va. 451, 102 S. E. 300 (action for injury to a bone); *Wisconsin:* 1901, Manch *v.* Hartford, 112 Wis. 40, 87 N. W. 168 (X-ray photographs taken by an expert and verified by him, received).

See also an article by Mr. L. P. Wilson, "The X-Ray in Court" (Cornell L. Quart., 1922, VII, 202).

[5] 1905, Loring *v.* Boston Elev. R. Co., Superior Court of Suffolk Co., Mass., Boston Transcript, Dec. 12 (damage by noise; Wait, J., allowed the use of phonograph records, to show the noise made by the defendant's trains); 1906, Boyne C. G. & A. R. Co. *v.* Anderson, 146 Mich. 328, 109 N. W. 429 (eminent domain; "a phonograph was permitted to be operated in presence of the jury to reproduce sounds claimed to have been made by the operation of trains in proximity to respondent's hotel").

[6] *Not decided:* 1906, Boles *v.* People, 37

§ 796. **Producing the Original of a Photograph; in General.** By the general principle elsewhere examined (*post*, § 1177), the original of a thing must be produced 'in specie' to the tribunal, instead of receiving testimonial evidence about it. But this rule is usually regarded (*post*, §§ 1181–1183) as not applicable to any objects but writings or at least to chattels not bearing a written inscription. So far, then, as concerns objects not writings, a photographic representation could be used without accounting for the original.[1] Nevertheless, where the object photographed is some place of land, a view might be had (*post*, § 1162), and Courts have occasionally intimated that a view ought to be had in preference to testimony by photograph;[2] yet there seems no reason why such a rule, if valid at all, would not be equally proper for testimony in words.

§ 797. **Same: Handwriting.** Whether a photograph of handwriting may be used depends chiefly upon the principle requiring production of the original of a writing (*post*, § 1177); but it is more convenient to consider together the practical effect of that principle and the present one.[1]

(*a*) In the first place, the question arises whether, for the purpose of studying and identifying handwriting, *photographic copies may be used at all.* 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 by placing the original to be copied obliquely to the sensitive plate, the portion nearest to the plate may be distorted by being enlarged, and that the portion furthest from the plate must be correspondingly decreased, while the slightest bulging of the paper upon which the signature is printed may make a part blurred and not sharply defined, we can form some idea of the fallacies to which this subject is liable. . . . The refractive power of the lens, the angle at which the original to be copied was inclined to the sensitive plate, the accuracy of the focussing, and the skill of the operator, would have to be investigated to insure the evidence as certain. The Court would be obliged to suspend its examination as to the question of the genuineness of the signature . . . and in fact to inquire into the whole science of photography."

1880, FOLGER, C. J., in *Hynes* v. *McDermott*, 82 N. Y. 51: "Somewhat, for exact likeness, will depend upon the adjustment of the machinery, upon the atmospheric conditions, and the skill of the manipulator. And in so delicate a matter as the reaching of judicial results by the comparison of writings through the testimony of experts, it ought to be required that the witness should exercise his acumen upon the thing itself which is to be the basis of his judgment. . . . The certainty of expert testimony in these cases

Colo. 41, 86 Pac. 1030 (spiritualistic communication as to a murderer).

§ 796. [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 N. Y. 210); though this result would be still open to doubt on the principle of § 1181, *post*, cited above.

[2] 1894, Bedell *v.* Berkey, 76 Mich. 440, 43 N. W. 308 (suggesting that a view may often be better, where premises are concerned); 1893, Omaha R. Co. *v.* Beeson, 36 Nebr. 364, 54 N. W. 557 (photograph of premises, admissible where a view of them would be impracticable).

§ 797. [1] The rules in general as to the use of *specimens* to evidence the type of handwriting (*post*, §§ 2003 ff.) and of testimonial qualifications for handwriting (*ante*, §§ 569, 693 ff.) have of course equal application here.

On this whole subject, consult here as always the elaborate and scientific treatment in Mr. Albert S. Osborn's Questioned Documents (1910), and The Problem of Proof (1922).

is not so well assured that we can afford to let in the hazard of errors or differences in copying, though it be done by howsoever a scientific process."

But this argument is nothing more than which may be urged (as already noted in § 792, par. 3) against photographs in general, namely, their capability of falsifying; and the answer to it is the same, namely, that a photograph 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 modern photographic art has long outlawed the judicial doubts above quoted. 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 is 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 rule for all documents (*post*, §§ 1152 ff.). In the present application a liberal construction is commonly given to them; especially in the principal instance, viz. on the *probate of a will*, the testimony of a *subscribing witness out of the*

[2] *Accord:* 1860, Marcy *v.* Barnes, 16 Gray Mass. 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"); 1920, Leland *v.* Leonard, — Vt. —, 112 Atl. 198 (signatures; poor workmanship of photographs, held not to exclude them); 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.

jurisdiction, to whom a photographic copy can be submitted for authenticating the signatures.[4]

(3) When the original is *produced*, but it is desired also conveniently to collate specimens by *photographic groupings* (as by placing many specimens in juxtaposition on a single sheet), the original is not literally unavailable

[4] ENGLAND: 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); 1910, Estate of Vines, Prob. 147 (will in India proved by a photograph of the will, with affidavit of the attesting witness).

IRELAND: 1908, M'Cullough *v.* Munn, 2 Ir. R. 194 (photograph of a lost libelous letter alleged to have been written by defendant but denied by him; whether the photograph could be compared with admitted specimens, not decided; a doubt which was perversely unnecessary).

UNITED STATES: *Federal:* 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); *Arizona:* Rev. St. 1913, Civ. C. § 746 (if a subscribing witness to a will, being out of the county, can give his deposition, the Court may authorize a photographic copy of the will to be made and shown to him on his examination); *California:* C. C. P. 1872, § 1310 (where the will of a deceased resident is detained outside the State, "the Court may authorize a photographic copy of the will to be presented to the subscribing witness", either on his examination or by deposition, and the witness may be questioned "as if the original will were present"); § 1308 (similar, where a subscribing witness testifies by deposition to a will in court; quoted *post*, § 1310); *Colorado*: 1913, Hayes' Estate, 55 Colo. 340, 135 Pac. 449 (testimony by deposition to a will's hand-writing, based on photographic copies duly verified, held admissible); *Illinois:* 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); *Michigan:* 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); *Rhode Island:* Rev. Gen. L. 1909, C. 310, § 15 (original will sent out of jurisdiction and lost; on proof and decree, photographic copy filed in records may be used as original); *South Dakota:* Rev. C. 1919, § 3211 (uncontested will; photographic copy may be sent out of county for taking deposition of non-resident witness); 1906, McClellan's Estate, 20 S. D. 498, 107 N. W. 681 (inheritance; photographic reproductions of enlistment papers on record at barracks in Ireland, admitted; here the custodian's certified copies were also in evidence); 1915, Peters *v.* Lohr, 35 S. D. 372, 152 N. W. 504 (validity of an assessment; the assessor's deposition being taken in another county, a photographic copy of his return and oath was annexed, but the original book was in court and was not before the deponent; the photograph and deposition held admissible, the main issue being the oral oath and the signed jurat being collateral only); *Texas:* 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 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 Tex. 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 Tex. 171, 12 S. W. 525 (originals out of the jurisdiction and contained in public or other archives; photographs received); 1890, Ayers *v.* Harris, 77 Tex. 113, 114, 115, 13 S. W. 768 (here archives, not able to be produced, were photographed); 1890, Buzard *v.* McAnulty, 77 Tex. 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).

As to the *necessity* of having the original placed before an *absent witness deposing to execution*, see *post*, § 1185.

(*post*, § 1192), in the sense of being tangibly beyond procurement. Nevertheless, there are still lacking and unproduced to instantaneous perception the minute resemblances and differences which appear upon close juxtaposition and fade from memory in the operation of passing from one document to the others. Hence, the photographic juxtaposition does, in strict sense, "produce" these otherwise unavailable minutiæ, and such a grouping is therefore allowable without even any deviation from technical principle.[5]

(4) So also, the original being *produced*, or accounted for, a *photographic enlargement*, through a magnifying lens, may properly be employed.[6] The minute features of the writing — particularly those which indicate an erasure or a tracing — are in their fullest detail invisible to the naked eye, and hence are unavailable in the liberal sense of the term; the case is in effect the same as that of an illegible document, which it is conceded (*post*, § 1229) may be proved by copy.[7]

§ 798. **Photographs of Artificial Settings; Moving-Pictures.** Conceding the verisimilitude of any particular photograph's reproduction of the object photographed, there remains always the assumption that the object photographed is identical with the object in issue. This assumption underlies, of course, all use of photographs, as it does that of all other forms of testimony. It represents the element elsewhere referred to as involving the principle of Authentication, applied to chattels (*post*, § 2130).

[5] 1859, Luco *v.* U. S., 23 How. 531 (genuine and false signatures and seals were allowed to be conveniently grouped on a single photographic sheet, the originals being also at hand); 1893, Crane *v.* Horton, 5 Wash. 481, 32 Pac. 223 (the disputed signature was at hand, and no special need of the photographic grouping offered seemed in this case to exist; rejected).

So also for photographs of *finger-prints:* 1911, People *v.* Jennings, 252 Ill. 534, 56 N. E. 1077; 1921, Moon *v.* State, 22 Ariz. 418, 198 Pac. 288; and cases cited *ante*, § 151*a*.

[6] *Fed.* 1899, U. S. *v.* Ortiz, 176 U. S. 422, 20 Sup. 466 (enlarged photographs of standard and disputed writing, admitted with the originals); *Cal.* 1901, People *v.* Mooney, 132 Cal. 13, 63 Pac. 1070 (photographs, of an unspecified sort, held admissible); *Ill.* 1892, Riggs *v.* Powell, 142 Ill. 453, 456, 32 N. E. 482 (enlarged photographic copy of disputed writing used); 1901, Howard *v.* Illinois T. & S. Bank, 189 Ill. 568, 59 N. E. 1106 (duplicate photographs of an original produced, excluded as superfluous; but photographic enlargements admitted as useful); *Ky.* 1901, First National Bank *v.* Wisdom's Ex'rs, 111 Ky. 135, 63 S. W. 461 (enlarged photographs admitted); *Mass.* 1860, Marcy *v.* Barnes, 16 Gray 163 (similar); *Mich.* 1876, Foster's Will, 34 Mich. 23, *semble* (allowable for the disputed writing; left to the Court's discretion); *N. J.* 1908, State *v.* Skillman, 76 N. J. L. 474, 70 Atl. 83 (photographic enlargements, admitted); *N. Y.* 1880, Hynes *v.* McDermott, 82 N. Y. 51 (excluding photographs when alone; but implying that as enlargements accompanying the disputed writing they would be acceptable); *N. C.* 1915, Fourth National Bank *v.* McArthur, 168 N. C. 48, 84 S. E. 39 (certain photographic enlargements, excluded, because not verified by the photographer); *Vt.* 1887, Rowell *v.* Fuller, 59 Vt. 695, 10 Atl. 853 (allowing it for disputed writing and standards); *Va.* 1904, Johnson *v.* Com., 102 Va. 927, 46 S. E. 789 (enlarged photographs of specimens, admitted); *Wash.* 1893, Crane *v.* Horton, 5 Wash. 131, *semble* (allowable).

Contra: 1871, Taylor Will Case, 10 Abb. Pr. N. S. 318 (see quotation *supra*).

For the use of *letter-press* copies of handwriting, as the basis of comparison, see *post*, §§ 2010, 2019.

So, too, enlarged drawings or *diagrams* are allowable: 1904, State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114 (blackboard illustrations of handwriting by an expert, allowed); 1890, McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711 (cited *ante*, § 791, n. 1); 1904, Groff *v.* Groff, 209 Pa. 603, 59 Atl. 65 (blackboard reproductions of the disputed signatures, held not improperly excluded in the trial Court's discretion).

[7] This expedient has sometimes been brought into service by writers of fiction, as in Mr. J. G. Holland's "Sevenoaks."

(*a*) Now ordinarily the evidence to support this assumption will be supplied incidentally and as a matter of course; *e.g.* the witness will say, "The front gate represented in this photograph, taken by me, is the same front gate referred to by Witness X as the place where the wagon drove in" (or, "the survey line started").

But it will often be desirable to establish 'prima facie' this assumption by more explicit or more ample evidence. This will be so where the original conditions have concededly changed or disappeared and where there has been an *attempted reconstruction* of them, by artificial means, for the purposes of the photograph.

Common examples of this are found in still photographs purporting to represent the relative location of freight cars, gates, and vehicles, at the place of a crossing collision; or of the alignment of machines, windows, materials, and operatives in a factory-room at the time of an injury. In such a case, there is always the possibility that the bias of the party or agent preparing the scene and taking the photograph has given to the reconstructed scene a misleading alteration, or has been content with a reconstruction which was only as close as is feasible to the original scene, but is put forward by him as actually identical with it.[1] Here the trial judge may require sufficient evidence of a substantial identity of conditions before admitting the photograph. But instead, if any serious doubt exists on this point, the judge may well cause additional photographs to be taken of a scene reconstructed as the opponent's testimony alleges, if that is feasible.

The foregoing element of weakness may reach its maximum in a *moving-picture*. In so far as such a picture has any value beyond a still picture, this value depends on the correctness of the artificial reconstruction of a complex series of movements and erections, usually involving several actors, each of them the paid agent of the party and acting under his direction. Hence its reliability, as identical with the original scene, is decreased and may be minimized to the point of worthlessness.

Where this possibility is serious, what should be done? Theoretically, of course, the moving-picture can never be assumed to represent the actual occurrence; what is seen in it is merely what certain witnesses say was the thing that happened. And, moreover, the party's hired agents may so construct it as to go considerably further in his favor than the witnesses' testimony has gone. And yet, any moving-picture is apt to cause forgetfulness of this and to impress the jury with the convincing impartiality of Nature herself. In view of these inherent risks of misleading, the trial judge may well deem a picture unsafe and inadmissible when the introductory evidence has not convinced him that the risk is negligible.[2]

No general rule can be laid down as to the kinds of occurrences, artificially

§ 798. [1] A few rulings of this sort will be found in the citations *ante*, § 792, n. 1.

[2] 1920, People *v.* —, Calif., Colusa Co. Superior Court (reported in Moving Picture World, as quoted in N. Y. Times, Feb. 22, 1920, homicide; Weyand, J., excluded a moving-picture of a reconstructed scene of the parties' conduct).

reconstructed, in which the moving-picture would have a special risk of misleading.

(*b*) But where the moving-picture is taken *without artificial reconstruction*, *i.e.* at the time and place of the original event (a possibility not infrequent), it lacks the above element of weakness and is entitled to be admitted on the same principles as still photographs. The only circumstance then to be considered is that in a few matters, such as speed and direction of human movement, or relative size in the focus, the multiple nature of the films requires special allowances of error to be made; but these allowances are no different in kind from the elements of error inherent under certain conditions in still photographs.[3]

C. Written Testimony

§ 799. **Oral and Written Testimony, in general.** In the common-law court the traditional method of delivering testimony is to utter it orally, not in 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. 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:

1922, Mr. *Wallace R. Lane*, "The Federal Equity Rules, 1912" (Harvard Law Rev. XXXV, 278): "The [new] rule requiring equity causes to be tried in 'open court' and requiring the Court to pass upon the admissibility of all evidence (Rule 46) is generally conceded to be most beneficial, and seems to meet with wide approval by the Courts. Presiding Circuit Judge Baker in a recent unreported decision (*Computing Scale Co.* v. *Toledo Computing Scale Co.*) involving a patent on computing scales, speaking for the Court of Appeals of the Seventh Circuit, expresses in a striking way his approval of the trial of equity cases in open court, which summarizes and epitomizes the statements of many judges concerning the practice, and emphasizes the importance of the change from deposition proofs to the open court trials. 'Under the old rules, the Court in reaching the permanent injunc-

[3] 1920, Algeri *v.* Cleveland R. Co., Cleveland Common Pleas (as reported in Cleveland Plaindealer, May 13, 1920; personal injury; to disprove plaintiff's alleged incapacity, a moving-picture of the plaintiff at work as a bricklayer since the date of the injury was received, by Hay, J.).

tion was helpless to control the proofs. Depositions were loaded with hearsay, with immeasurable masses of irrelevant matter, with controversies of counsel, with counsel's directions to witnesses not to answer, with experts' analyses of hundreds of prior patents when six would have been more than enough, with experts' interlarding of their opinions of facts with their opinions of the law of the case, etc., etc. We conjecture that in our clerk's vaults there are tons of paper which were pure waste. We leave it at conjecture because we have no computing scales on which to weigh the more important matters, the clients' exhaustion of patience and resources, the lawyers' mutual infliction of unnecessary labors, and the efforts of the courts to find the three grains of wheat in the bushel of chaff. But those evils are gone. Under the new rules, when the Chancellor hears a patent suit as he does other injunction suits in open court, he can and does control the proofs, exclude hearsay and irrelevancies, restrain counsel, compel witnesses to answer proper questions, limit the number of prior patents, and bridle the experts. Records on appeals now show the gratifying difference.'"[1]

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.[2] 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

§ 799. [1] See also an article expressing similar views: Geo. P. Dike, "The Trial of Patent Accountings in Open Court" (Harvard L. Rev. XXXVI, 33; 1922).

The Continental lawyers concede the inferiority of their traditional practice of taking testimony, in civil cases, in writing by a referee-judge before trial: De la Grasserie, "De la preuve au civil et au criminel" (1912), vol. II, pp. 494–497.

[2] 1915, Martin's Estate, 170 Cal. 657, 151 Pac. 138; 1851, Withers, J., in Kuhlman *v.* Brown, 4 Rich. L. S. C. 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. N. Y. 222, 226 (a witness producing a document may be compelled to read it aloud; good opinion).

by the revived recollection is alone the testimony; the writing becomes no part of the testimony and therefore cannot be put in or read as such (*ante*, § 763), though the opponent or the jury may obtain inspection of it as a safeguard against fabrication (*ante*, § 762).

§ 801. **Copies of Writings.** So far as recollection is concerned, a copy is in effect the commonest variety of a record of past recollection (*ante*, § 745); so far as mode of communication is concerned, it is a merely anonymous piece of paper until it has been adopted and verified by some qualified witness, precisely as a map or photograph must be (*ante*, §§ 790, 793). The application of these principles to copies is however more conveniently treated in connection with the rule requiring Production of the Original Writing, and the rules are there examined (*post*, §§ 1277–1281).

There are also certain rules of Preference applicable to the choice of one kind of copy rather than another, and these are considered in the same place (*post*, §§ 1264 ff.). The principle of Completeness also prescribes rules, applicable to written copies, for the degree of fulness with which the original must be reproduced (*post*, §§ 2094 ff.). Copies authorized to be made by public officers may be used without calling the copyist to the stand; but this involves an exception to the Hearsay rule (*post*, §§ 1677 ff.).

§ 802. **Depositions, in general.** The term "deposition", which formerly was applied to include testimony orally delivered, is now confined in meaning exclusively to testimony delivered in writing, *i.e.* testimony which in legal contemplation does not exist apart from a writing made or adopted by the witness. It is virtually of two sorts, namely, testimony which is never of any legal significance until it is completed in writing — as, the ordinary deposition 'de bene' taken by a commissioner, — and (in occasional use of the term) testimony which may first sufficiently exist orally, but upon being reduced to writing is regarded as exclusively or 'prima facie' contained in the writing, — as, the oral examination taken before a magistrate on a preliminary criminal trial. What difference there is in the legal conclusiveness of the writing is noticed later (*post*, § 805).

So far as the present principle is concerned, the question is, *What special rules arise for securing accuracy of narration because of the departure from the oral form* and the reduction into writing? If the witness himself wrote out the statement entire, no special question would arise. But in practice he usually does not, since the written form is that peculiar to testimony delivered out of court before a commissioner authorized by the court to receive and transmit it, and this commissioner is legally authorized to act and usually does act as the transcriber of the oral utterance; so that it is an intermediary who makes the writing which becomes the testimony, and thus it becomes specially necessary to secure that this writing shall represent precisely the statement for which the witness stands sponsor.[1]

§ 802. [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 language": 1768, Blackstone, Comm. III, 373.

The special elements of the situation which may thus be a source of error and must be guarded by special rules are three, namely, the *personality of the official writer*, the *verbal accuracy of his transcription* 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; the parties are often not present by attorney, to watch for errors; 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 elects 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 anticipated. The opposing party, not unreasonably distrustful of the magistrate selected by his antagonist, is often dissatisfied with the course of the examination; and the instances are numerous, where, rather than submit to the injustice of hearing what he believes a partial statement of facts read to the jury, he incurs the expense of summoning the witness to attend the trial, that the deposition may not be used. . . . Now to hold that a magistrate, invested with such varied powers, and whose improper conduct may lead to such evil results, should not be as impartial as the lot of humanity will admit, is to apply to him a rule which never obtains in any other case, where men are appointed to decide upon the rights of others."

This general rule, more or less indefinite in its application, originated in early chancery practice,[1] but has also been adopted, in one form or another, in most of the statutes authorizing depositions to be taken by courts of common law.[2] It does not, of course, prevent the officer from having the manual act

§ 803. [1] *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, Fortescue & 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 Beav. 135 (nephew and agent of plaintiff, held improper).

[2] ENGLAND: 1682, Newton *v.* Foot. Dick. 793 (deposition suppressed, because "the clerk of the plaintiff's solicitor sat as clerk to the commissioners"); 1819, Cooke *v.* Wilson, 4 Madd. 380 (solicitor's clerk).

CANADA: *Ontario:* Rules of Court 1913, No. 285 (depositions may be taken in shorthand by the commissioner or a shorthand writer).

UNITED STATES: *Federal:* Rev. St. 1878, § 863, Code 1919, § 1364 (officer not to be "of counsel or attorney to either of the parties, nor interested in the event of the cause"); Code § 1365 (deposition must be written by the officer, or "by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person"); 1868, Ship Norway, 2 Ben. 121 (witness' wife, appointed on the facts for a deposition in the East Indies); *Alabama:* Code 1907, §§ 4039, 4040 (deposition must be written by the commissioner or the witness or some impartial person, the commissioner not being "of counsel or of kin" to the parties nor interested in the cause); 1848, Scott *v.* Baber, 13 Ala. 182, 189 (commissioners being nephews of both parties, held not improper); 1849, Bryant *v.* Ingraham, 16 Ala. 116, 119 (brother-in-law of party, held improper); 1850, Jordan *v.* Jordan, 17 Ala. 466, 469 (kinsman held improper); 1906, Bledsoe *v.* Jones, 145 Ala. 685, 40 So. 111 (counsel); *Alaska:* Comp L. 1913, § 1485 (must be written by the officer or the witness or some disinterested person); *Arizona:* 1906, Southern P. Co. *v.* Wilson, 10 Ariz. 162, 85 Pac. 401 (deposition in a foreign country, not excluded merely because the solicitor of the witness, a party interested, read to him the interrogatories in the commissioner's presence); *Arkansas:* Dig. 1919, § 4233 (deposition must be written by the witness or by the officer or by any one designated by the officer); *California:* C. C. P. 1872, § 2006 (deposition must be written down by the officer or "by some disinterested person appointed by him"); *Columbia* (Dist.): Code 1919, § 1058 (deposition may be taken down by the officer "or a competent and disinterested stenographer engaged by him"); *Connecticut:* Gen. St. 1918, § 5709 (deposition "written, drawn up, or dictated" by party, attorney, or person interested, not admissible); *Florida:* Rev. G. S. 1919, § 2751 (commissioner is not to be "of kin to, nor the attorney nor the agent of either party, nor interested in the result"); *Georgia:* Rev. C. 1910, § 5893 (deposition on commission 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); § 5908 (deposition without commission, to be written by the officer or the witness himself or a "disinterested stenographer"); 1848, Tillinghast *v.*

Walton, 5 Ga. 335, 339 (clerk of party's counsel, held improper; good opinion); 1861, Williams *v.* Rawlins, 33 Ga. 117, 121 (attorney not in the cause, held proper); 1848, Glanton *v.* Griggs, 5 Ga. 424, 426, 433 (a student of defendant's counsel acting as commissioner); *Hawaii:* Rev. L. 1915, § 2579 (deposition to be written by the officer "or by some impartial person by him appointed"); *Idaho:* Comp. St. 1919, § 8012 (deposition shall be written by the officer, the deponent, or some disinterested person); *Illinois:* 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"); *Indiana:* Burns' Ann. St. 1914, § 445 (deposition must be written by officer, or deponent, or "some disinterested person"); 1904, Knickerbocker Ice Co. *v.* Gray, 165 Ind. 140, 72 N. E. 869 (deposition written by the office-clerk and stenographer of one of the attorneys, excluded, because not by a "disinterested person"; good opinion by Dowling, C. J.); *Iowa:* Code 1919, § 7408 (deposition must be written by officer or by a disinterested person named therein, under his direction and in his presence); *Kansas:* Gen. St. 1915, § 7245 (officer taking deposition "must not be a relative or attorney of either party, or otherwise interested in the event or clerk or stenographer of party or attorney"); § 7256 (deposition must be written by "the officer, the witness, or some disinterested third person"); *Louisiana:* 1913, Segura's Succession, 134 La. 84, 63 So. 640 (counsel for a party, disqualified); *Maine:* Rev. St. 1916, c. 112, § 13 (deposition must be written by the officer, the deponent, or some disinterested person); 1824, Smith *v.* Smith, 2 Greenl. 408 (magistrate who had formerly during the same cause acted as party's attorney, held improper); *Massachusetts:* Gen. L. 1920, c. 233, § 32 (deposition shall be written "by the justice, commissioner, deponent, or by a disinterested person in the presence and under the direction of the justice or commissioner"); 1832, Wood *v.* Cole, 13 Pick. 279 (one temporarily attorney in a former stage of the cause, and again retained after the deposition taken, held not improper); 1833, Coffin *v.* Jones, 13 Pick. 441, 445 (friend assisting the party or other depositions, held not incompetent on the facts); 1833, Chandler *v.* Brainard, 14 Pick. 285, 287 (party's son-in-law, held not incompetent, the statute not expressly prohibiting kinsmen); *Michigan:* Comp. L. 1915, § 12494 (commission not to be "of counsel or attorney for either of the parties, nor interested in the event of the cause"); *Minnesota:* Gen. St. 1913, § 8387 (deposition must be written "by the officer or by some disinterested person"); *Mississippi:* Code 1906, § 1931, Hem. 1591 (deposition to be written by commissioner, or witness, or "some disinterested person"); 1880, Groves *v.* Groves, 57 Miss. 658, 660 (party's uncle, held improper); *Nebraska:* Rev. St. 1922, § 8884 (officer taking deposition "must not be a relative or attorney of either party, or otherwise interested in the event of the proceeding"); *New Hampshire:* Pub. St. 1891, c. 225, § 7 (no person to write the deposition who would be disqualified as juror except by exemption); 1829, Bean *v.* Quimby, 5 N. H. 94 (party's uncle, improper); 1840, Whicher *v.* Whicher, 11 N. H. 348, 351 (one acting as attorney to question deponent at a prior stage, incompetent; though the statute made no express prohibition of any one; see quotation *supra*); *New Jersey:* Comp. St. 1910, Evidence, §§ 33, 45 (depositions to be written "only by the officer" or by the deponent; § 48 (may be taken by sworn stenographer); *North Carolina:* Con. St. 1919, § 1809 (commissioner taking deposition, to be "of kin to neither party"); *North Dakota:* Comp. L. 1913, §§ 7893, 7899 (like Okl. Comp. St. 1921, §§ 616, 620); *Ohio:* Gen. Code Ann. 1921, §§ 11532, 11537 (like Okl. Comp. St. 1921, §§ 616, 620); *Oklahoma:* Comp. St. 1921, § 616 (officer "must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding"); § 620 (deposition must be written "either by the officer, the witness, or some disinterested person"); *Oregon:* Laws 1920, § 847 (deposition in the State and upon oral interrogatories out of the State must be written by officer or witness "or some disinterested person"); *Philippine Islands:* C. C. P. 1901, § 363 (deposition must be written by the officer taking it or some disinterested person in his presence and under his direction); *Porto Rico:* Rev. St. & C. 1911, § 1495; *South Dakota:* Rev. C. 1919, §§ 2760, 2764 (like N. D. Comp. L. 1913, §§ 7893, 7899); *Tennessee:* 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); §§ 5659 *a* 1–4 (deposition may be taken by disinterested stenographer, or with opponent's consent by stenographer employed by party or attorney); *Texas:* Rev. Civ. St. 1911, § 3671 (deposition must be reduced to writing by the officer or some person under his personal supervision or by the deponent); 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); *Utah:* Comp. L. 1917, § 7172 (deposition out of the State on oral interrogatories must be written "by the officer, the witness, or some disinterested person"); *Vermont:* 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

of writing done under his direction by an assistant;[3] but this assistant, acting for the officer, must equally be a person free from any connection of bias or interest of the above sort.[4]

§ 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, and too often is, the expression of that person's erroneous inference as to the meaning of the language used by the witness himself; and, however carefully the affidavit may be read over to the witness, he may not understand what is said in language so different from that which he is accustomed to use. . . . [Thus] testimony not intended by him is brought into the Court as his."

persons "interested in the cause"; Tyler, J., diss.): *Washington:* R. & B. Code 1909, § 1242 (must be written by the officer, the witness, "or some disinterested person"): *Wisconsin:* Stats. 1919, § 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"); *Wyoming:* Comp. St. 1920, §§ 5837, 5841 (like Oh. Ann. Code §§ 11532, 11537).

Compare also the citations in the next note but one.

For *affidavits*, the officer taking the acknowledgment is subject to the same rule: 1907, Malcom Sav. Bank *v.* Cronin, 80 Nebr. 228, 114 N. W. 158 (noting the effect of statutes).

[3] Can. St. 1913, 3–4 Geo. V, c. 13, § 25 (provision for stenographic transcripts of depositions without witness' signing or reading; amending § 683, Crim. Code 1906); Man. 1911, R. *v.* Bond, 21 Man. 366; W. Va. St. 1909, c. 44, p. 382, Code 1914, § 4890 (provision for stenographer's transcription and for certification of the transcript without signature of witness); and other statutes cited *supra*, n. 2.

The following statute seems hardly necessary: N. Y. St. 1912, c. 390, p. 746 (inserting § 222 *b* in C. Cr. P.; examination before magistrate may be taken by stenographer and certified by magistrate).

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.

[4] 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*: *England:* 1687, Newton *v.* Foot, 2 Dick. 793 (clerk of party's solicitor, held improper); 1819, Cooke *v.* Wilson, 4 Madd. 380 (same); *United States:* 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.* Steele, 3 Bibb Ky. 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

The solution reached by the Courts seems to be, properly enough, that the deposition will not be rejected on this ground unless on its face (and perhaps together with circumstances otherwise shown) it appears clearly to be in language which the witness could not have used.[1] It is on this principle that a *prepared deposition* is rejected (*ante*, § 787).

The act of writing should of course be done *immediately*, not afterwards from recollection.[2] The use of stenography in taking depositions, the translation being made afterwards, removes the substance of this danger; but it would seem that the translation into longhand ought to be made before the consummation of the taking, since otherwise there would be no check upon possible errors.[3]

§ 805. **Same: Reading Over and Signing.** (1) Since the writing is to stand as the witness' own words, and since there is always an indefinable coefficient of error in transcription, there should be given a final opportunity for correction by the *reading over* to or by the witness, of the writing as completed. It has been customary in statutes to make special provisions for this.[1]

(2) The witness' *signature* may be regarded either as necessary to constitute the writing his by adoption, or as symbolically equivalent to a knowing assent to its tenor (thus dispensing with the reading over), or as an additional means of identifying the person of the witness. Whatever the legal theory, it is usually treated as a technical requirement indispensable under the statutes.

writing the deposition, allowable when consented to); 1853, Wertz *v.* May, 21 Pa. 274, 279 (deposition taken down by the defendant's counsel, the plaintiff's counsel present and consenting, admitted).

§ 804. [1] The following rulings deal with affidavits, but the principle is the same: 1811, Fowler *v.* State, 5 Day Conn. 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).

§ 805. [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 upon them, depending on local wordings, cannot profitably be examined here; the following cases illustrate their method: 1893, Moller *v.* U. S., 13 U. S. App. 472, 479, 6 C. C. A. 459, 57 Fed. 490 (same); 1902, Louisville & N. R. Co. *v.* Carter, — Ky. —, 66 S. W. 508 (press-copy of unsigned deposition taken in another case, verified by the notary, excluded: here improperly, because the deposition was offered only as an admission, under the principle of § 1075, *post*); 1836, People *v.* Moore, 15 Wend. N. Y. 419, 421 (the statute does not require a reading over to a witness, because it must be signed by him, and hence the failure to read over merely discredits, and does not exclude such a deposition; but the statute requires a reading over to an accused, because it need not be signed by him, and hence a reading over must be shown); 1921, McNally, Inc. *v.* Chapin, Sup. App. Div., 189 N. Y. Suppl. 441 (deposition not read over or subscribed, inadmissible); 1898, Zehner *v.* Lehigh C. & N. Co., 187 Pa. 487, 490, 41 Atl. 464 (longhand translation must be read over and signed by the witness); 1908, Slaughter Co. *v.* King Lumber Co., 79 S. C. 338, 60 S. E. 705 (deposition taken directly by typewriting, without shorthand transcription, need not be read over, under 23 Stats. at L. p. 1072); 1899, Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879 (similar).

(3) Supposing that the technical requirements of a reading over and signing are not fulfilled, a difference then arises between a *deposition* in the strict sense (*i.e.* testimony taken 'de bene' before a mere commissioner for later use 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 admission may be either that the alleged testimony is true, or merely that it would have been delivered as alleged; the statutes differing in their provisions. The alleged testimony, forming the subject of the Admission, is of course usually presented in written form, either as an affidavit of the witness himself or as a stipulation agreed to by counsel. It appears in the cause solely by virtue of the opponent's judicial admission; no question of the present principle therefore arises; and the subject is dealt with under the head of Judicial Admissions (*post*, § 2595).

§ 808. **Official Statements and Private Writings, under Hearsay Exceptions; Opponent's Admissions.** Under the various *Exceptions to the Hearsay rule*, statements in writing are often admissible. So far as any questions under the present principle arise, they can be more conveniently examined under the respective Exceptions to that rule (*post*, §§ 1420–1797).

An opponent's *extrajudicial admissions* are frequently in written form; such questions as arise for them under the present principle are dealt with under Admissions (*post*, §§ 1070–1075).

D. INTERPRETED TESTIMONY

§ 811. **Deaf-mutes, Aliens, Inaudible Witnesses; Interpreters and Translations.** The mode of communication will usually be in words or other symbols directly intelligible to the tribunal. If the witness cannot employ a mode thus directly intelligible, some intermediary may and must be sought who can interpret the witness' mode into the ordinary one:

1851, WITHERS, J., in *Kuhlman* v. *Brown*, 4 Rich. L. 479, 485 (admitting a translated deposition): "Upon general principles it is contended that our law exacts the English tongue as its only language. This is true as to the pleadings, and it is also true that it speaks that language to the jury. But is it true that it hears no other? Every day experience testifies the contrary. Any language is heard in court where a foreign witness must be used there. And what is the office that the law performs? It requires that means shall be furnished by the actor on that occasion, or in some manner provided, to convert the testimony, clothed and adduced in a foreign tongue, into that which the jury who are to estimate it comprehend. . . . It is enough to remark that every expedient should be favorably regarded, and that most favorably, the tendency of which gives the strongest promise of an intelligible transmission of the evidence to the jury through a medium capable, unbiassed, faithful."

It is clear that testimony must not be allowed to fail if some process of interpretation is available. The conditions under which it is to be resorted to are the simple dictates of cautious common sense:

(1) Interpretation is proper to be resorted to *whenever a necessity exists*, but not till then:[1]

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."

1908, Mr. *Arthur Train*, The Prisoner at the Bar, 239: "Where the witness speaks a foreign language, the task of discovering exactly what he knows, or even what he actually says, is herculean. In the first place, interpreters, as a rule, give the substance — as they understand it — of the witness' testimony rather than his exact words. It is also practically impossible to cross-examine through an interpreter, for the whole psychological significance of the answer is destroyed, ample opportunity being given for the witness to collect his wits and carefully to frame his reply. One could cross-examine a deaf-mute by means of the finger alphabet about as effectively as an Italian through a court interpreter, who probably speaks (defectively) seventeen languages."

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]

§ 811. [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 antiquity, but above all other reasons, that he could better escape cross-examination by it), and wishing to appear mean and poor and therefore a mere 'Irish', he was observed on coming into court to take the buckles [tongues] cunningly out of his shoes. The reason of this was asked by counsel, and one of the country people, his 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] ENGLAND: 1858, R. *v.* Burke, 8 Cox Cr. 45, 55, 56, 60, 61, 64.

CANADA: 1916, Donkin *v.* The Chicago Marn, 28 D. L. R. 804, Can.

UNITED STATES: *Alabama:* Code 1907, § 4010 ("Interpreters may be sworn to interpret truly, when necessary"); *Alaska:* Comp. L. 1913, § 1493 (like Cal. C. C. P. § 1884, first part); *Arizona:* Rev. St. 1913, Civ. C. § 1687 ("The Court may when necessary appoint interpreters"); *Arkansas:* 1906, Dobbins *v.* Little Rock R. & E. Co., 79 Ark. 85, 95 S. W. 794 (deaf-mute); *California:* C. C. P. 1872, § 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 Cal. 626, 72 Pac. 166; 1906, People *v.* Salas, 2 Cal. App. 537, 84 Pac. 295 (trial Court's discretion controls); *Georgia:* 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); Rev. C. 1910, § 5864 (when a "physical defect in any of the senses" affects a witness, "an interpreter may explain his evidence"); *Idaho:* Comp. St. 1919, § 7399 (like Cal. C. C. P. § 1884); *Illinois:* 1912, People *v.* Rardin, 255 Ill. 9, 99 N. E. 59 (competency determined by the trial Court; here a distant relative of the prosecutrix); *Indiana:* Burns' Ann. St. 1914, § 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); *Iowa:* 1889, State *v.* Severson, 78 Ia. 653, 43 N. W. 533 (interpreter allowable in trial Court's discretion); *Kansas:* Gen. St. 1915, § 7249 (an interpreter may be sworn "whenever necessary"); 1920, Beall *v.* Spear, 106 Kan. 690, 189 Pac. 938 (statute applied; interpreter here refused, the judge believing that witness could understand English); *Kentucky:* Stats. 1915, § 181 (provision for interpreter for mother in bastardy proceedings); § 1020 (official interpreter in general); *Mississippi:* Code 1906, § 792, Hem. § 576 (interpreters may be used "when necessary"); *Missouri:* Rev. St. 1919, § 2343 (Courts may appoint interpreters, to interpret testimony, and to translate "any writing necessary to be translated"); *Montana:* Rev. C. 1921, § 10538

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

(like Cal. C. C. P. § 1884); 1918, State *v.* Inich, 55 Mont. 1, 173 Pac. 230 (applying Rev. C. § 7894); *Nevada:* Rev. L. 1912, § 5430 (like Cal. C. C. P. § 884); *New Mexico:* here the bi-lingual population emphasizes the problem, and interpretation is as a right protected by constitution: Const. 1911, Art. II, § 14 ("In all criminal prosecutions the accused shall have the right . . . to have the charge and testimony interpreted to him in a language that he understands"); Annot. St. 1915, § 1378 ("Whenever necessary, an interpreter shall be appointed by the Court"); § 3199 (justice of the peace, in "any cause in which he may deem it necessary", may employ an interpreter); *Oregon:* Laws 1920, § 855 ("When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret"); *Pennsylvania:* St. 1919, May 8, Dig. 1920, § 12499 (Court of common pleas may employ interpreters as necessary); *Philippine Islands:* C. C. P. 1901, § 12 ("Any party or his counsel may examine witnesses and make oral argument in English or Spanish, which shall then and there be interpreted into other language by a court interpreter whenever the other party or his counsel does not understand the language in which the examination or argument is made, and so requests, and may submit any petition, motion, pleading, brief, document or evidence either in English or Spanish without an accompanying translation into the other language: provided, however, that in cases in which all the parties or counsel stipulate in writing, or the accused in a criminal action requests the language used in the record shall be in accordance with such stipulation or request; and that proceedings in justice of the peace courts shall be in the Spanish language unless the justice speaks English and there is an official interpreter or all the parties or their counsel speak English"); *Porto Rico:* Rev. St. & C. 1911, § 1411 (like Cal. C. C. P. § 1883, adding the Spanish language in the alternative); *Texas:* Rev. Civ. Stats. 1911, § 3661 (commissioner taking deposition, "when he shall deem it expedient", may have an interpreter "to facilitate the taking"); § 3648 ("The court may when necessary appoint interpreters"); Rev. C. Cr. P. 1911, § 816 ("When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him"); *Virginia:* Code 1919, § 6223 (interpreters shall be sworn "when necessary"); *West Virginia:* Code 1914, c. 130, § 30 ("Interpreters may be sworn truly to interpret, when necessary").

[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: England: 1786, Ruston's Case, 1 Leach Cr. L., 4th ed., 408; 1827, Morrison *v.* Lennard, 3 C. & P. 127, Best, C. J.; *Canada:* Dom. R. S. 1906, c. 145, Evid. Act, § 6 (quoted *ante*, § 488), Alta. St. 1910, 2d sess., Evidence Act, c. 3, § 18 ("A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible"); Sask. Rev. St. 1920, c. 44, § 38 (like Alta. St. 1910, c. 3, § 18), and the other Canadian statutes quoted *ante*, § 488; *United States:* 1906, Dobbins *v.* Little Rock R. & E. Co., 79 Ark. 85, 95 S. W. 794 (deaf-mute's testimony taken by a sign-interpreter, instead of through written questions and answers); 1830, State *v.* DeWolf, 8 Conn. 98; 1840, Snyder *v.* Nations, 5 Blackf. Ind. 295; 1817, Com. *v.* Hill, 14 Mass. 207; Minn. Gen. St. 1913, § 7469 (a deaf or dumb person charged with insanity is entitled to an interpreter "as a matter of absolute right"); 1893, State *v.* Howard, 118 Mo. 127, 144, 24 S. W. 41; 1845, People *v.* McGee, 1 Denio N. Y. 21; Wis. Stats. 1919, § 4205*m* (interpreter shall be used for deaf-mute, as accused or witness).

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 is 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

diffidence or illness, to *speak loud enough* for the tribunal to hear distinctly.[5]

(2) If interpretation is necessary, and *no adequate means* of securing it is practicable, the testimony is lost, for without adequate communication (*ante*, § 766) there can be no testimony.[6]

(3) What *sort of a person* is a proper one to be *interpreter*, is a question depending much on the circumstances,[7] and should be determined by the trial judge.

linguæ', it would seem that a necessity 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; 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 Wintoun's Trial, 15 How. St. Tr. 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 (1886), 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] ENGLAND: 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 do not understand English; but on further objection an interpreter was used).

UNITED STATES: *California:* C. C. P. 1872, § 1884 ("any person, a resident of the proper county", may be used); *Illinois:* 1890, Chicago & Alton R. Co. *v.* Shenk, 131 Ill. 283, 23 N. E. 436 (damage to property; a person who had testified for defendant, allowed to be used as interpreter for another witness of defendant); 1908, People *v.* Weston, 236 Ill. 104, 86 N. E. 188 (deaf-mute; the judge may cause the witness and the proposed interpreter to be questioned for ascertaining the feasibility of interpretation, but on demand the jury should be removed during this stage); 1912, People *v.* Radin, 255 Ill. 9, 99 N. E. 59 (rape; an Assyrian whose great-great-grandfather was the same as the prosecutrix' ancestor, allowed to interpret for the prosecutrix); 1916, People *v.* Murphy, 276 Ill. 304, 114 N. E. 609 (murder of a police-officer; another police-officer, held not disqualified as an interpreter); *Indiana:* 1920, Bielich *v.* State, 189 Ind. 127, 126 N. E. 220 (a police-officer who arrested or detained the accused should not be assigned as his interpreter on the trial); *Iowa:* 1899, State *v.* Burns, — Ia. —, 78 N. W. 681 (friend allowed to act as deaf-mute's interpreter); *Massachusetts:* 1911, Com. *v.* Shooshanian, 210 Mass. 123, 96 N. E. 70 (a witness who understands both languages may give a translation of a conversation heard by him, without calling an interpreter); *Missouri:* 1907, State *v.* Smith, 203 Mo. 695, 102 S. W. 526 (like State *v.* Burns, Ia.); *Pennsylvania:* 1920, Com. *v.* Pava, 268 Pa. 520, 112 Atl. 103 (interpreter may also be a witness to other matters); *Porto Rico:* Rev. St. & C. 1911, § 1411 (the court interpreter officiates; but the parties may sub-

Courts in the metropolitan cities do not exercise sufficient care to provide a staff of honest and competent interpreters. They become callous to the grist of petty criminal cases; and they tend to forget that one of the cruelest injustices is to place at the bar a person of alien tongue and then fail to provide him with the means of defending himself by intelligible testimony. Many Courts are open here to severest censure.

(4) The *form* of interpretation will ordinarily be *oral*. Even for letters or other documents offered to the jury, it may be oral,[8] on the principle of § 799, *ante;* though a written translation is customarily employed.

For *depositions*, however, which in the modern legal theory exist only in writing (*ante*, § 802), the translation must equally be in writing; and statutes sometimes prescribe this. The *time* of translation must for ordinary oral testimony to the jury be immediate; but for depositions it would seem that this is not essential, at least where (as is usual) the Commissioner taking it understands the witness' language and the translation is needed only for the trial-tribunal.[9]

§ 812. **Same: Other Principles discriminated.** (1) By the Hearsay rule, every witness must be subject to the opportunity of cross-examination; an 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).

stitute a person selected by themselves); made six weeks later, and annexed to them, was received; yet the commissioners may require translation at the time); *U. S.* 1916, Arizona Eastern R. Co. *v.* Bryan, 18 Ariz. 106, 157 Pac. 376 (deposition by one not speaking English need not show who was interpreter or whether sworn); 1851, Kuhlman *v.* Brown, 4 Rich. L. S. C. 479, 485 (deposition need not be translated by interpreter before the commission nor accompanied by a translation: but may be orally translated when used; best opinion); 1870, Cavasos *v.* Gonzales, 33 Tex. 133 (deposition need not be written in their domestic language, but may be translated on offering it). Rules are sometimes prescribed by statute; *e.g.* Ont. Rules of Court 1913 § 283.

The following ruling is sound: 1898, Meyer *v.* Rothe, 13 D. C. App. 97, 102 (a notary taking down a deposition, and skilled enough in the witness' language to translate as he writes down, need not be sworn as an interpreter; good opinion by Morris, J.).

Texas: 1900, Jacobs *v.* State, 42 Tex. Cr. 353, 59 S. W. 1111 (witness sequestrated may be brought in as interpreter); *Utah:* 1895, People *v.* Thiede, 11 Utah 241, 39 Pac. 837 (a juror may be an interpreter); *Vermont:* 1915, State *v.* Gomez, 89 Vt. 490, 96 Atl. 190 (assault with intent to kill; an acceptable interpreter having been appointed for the accused, his objection to the State's interpreter as incompetent and unfriendly, was held not tenable); *Washington:* 1896, State *v.* Thompson, 14 Wash. 285, 44 Pac. 533 (a person who was a witness and related to the prosecutrix, held not proper to be an interpreter).

For the qualifications of an interpreter with reference to *skill in the alien language*, see *ante*, § 571.

[8] 1867, Kuhlman *v.* Medlinka, 29 Tex. 392.

[9] *Eng.* 1821, Atkins *v.* Palmer, 4 B. & Ald. 377 (depositions need not be "translated at the time they are taken"; here the sworn interpreter's translation of Italian depositions

(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).

(5) An interpreter must take an *oath* to interpret truly (*post*, § 1824).

TOPIC VI (*continued*): TESTIMONIAL COMMUNICATION

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 some valuable advantage (as compared with his remaining without this advantage), 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 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.

(1) 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, but may always be explained away and discredited by their maker as due to his inadvertence or mistake (*post*, § 1085), there is no necessity for an exclusionary rule based on theory of duress. All analogies suggest that the party's admission be received, subject to his proof of the threats or other circumstances of duress which may have extorted it. It would follow, then, that in a civil case the admissions of an opponent, when offered, are not to be tested or excluded by any rules of confession applicable to the accused in a criminal case.

(2) For *duress of a witness*, not being a party, the same considerations would prescribe that there be no exclusion on the ground of *extrajudicial threats* or other form of coercion; and this is in practice universally assumed to be the law;[2] for, in the first place, the facts could be brought out on examination (*post*, § 949) and given due weight; in the next place, the judicial power must be assumed sufficient to protect the witness from any serious apprehension of physical harm; and, finally, the existence of any rule of exclusion on this ground would conflict with the laudable tendency of the past two generations to admit testimony as freely as possible and trust to the examination to disclose its weaknesses. As for that form of duress which arises from the *intimidating manner* and words of the *examining counsel*, its effective prohibition is within the control of the judge; and it is of course more properly dealt with by the prevention of the act of coercion when it

§ 815. [1] The authority, oddly enough, is scanty: *England:* 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); 1917, Hurst *v.* Evans, 1 K. B. 352, 358 (Lush, J.: "A confession to a police officer is always excluded if the confession was induced by a promise or threat; but in a civil case, if a witness had made a statement to the police implicating himself, it would be impossible to exclude it"); *United States:* 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 Mass. 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, McCahan *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); 1916, Campbell *v.* Germania Fire Ins. Co., 163 Wis. 329, 158 N. W. 63 (arson, as a defence to a claim on an insurance policy; the plaintiff's confession admitted, *semble* without imposing the rule for criminal cases).

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 principle 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 1910, § 5781 (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; 1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1 (a confession of an accomplice having been obtained by officers through fear, but not being admitted, the jury were allowed, in weighing the accomplice's testimony on the stand, to consider evidence that he had been put in fear "and still labored under this fear"); 1854, Newhall *v.* Jenkins, 2 Gray Mass. 562 (cited *supra*); 1899, State *v.* Geddes, 22 Mont. 68, 55 Pac. 919 (threats to accomplice, no ground for excluding his testimony for the State); 1912, State *v.* Miller, 68 Wash. 239, 122 Pac. 1066 (accomplice; the opinion collects recent precedents).

is attempted (*ante*, § 781) than by any general rule of exclusion for the testimony.

§ 816. **Admissions, Confessions, and Hearsay Statements against Interest, distinguished.** Confessions are merely one species of admissions, namely, that species which consists in a direct acknowledgment of guilt in a criminal charge (*post*, § 821). For that particular sort the danger of untrustworthiness exists, and a special rule, based on the general testimonial principle of trustworthiness of narration (*ante*, § 766), becomes applicable. That rule satisfied, the confession occupies the status of an ordinary admission; its relation to other rules of Evidence is therefore determined by its quality as an admission. For example, as an extrajudicial statement, it would ordinarily be obnoxious to the Hearsay rule; but admissions are either not within the prohibition of that rule, or are an exception to it; this being the ground for receiving admissions in general (*post*, § 1048), it suffices also for confessions.[1] Again, vicarious admissions, *i.e.* those of agents and 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

§ 816. [1] It is true that confessions could also have entered under the Hearsay exception for statements of facts against interest (*post*, § 1457), the accused not being a qualified witness, and could to-day be so regarded, where the accused, not being compellable, fails to take the stand. 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).

For confessions used as *self-contradictions* to impeach on accused taking the stand, see *post*, § 821, n. 2.

In the early days of American jurisdiction in Porto Rico, the Supreme Court found it difficult to convince the lawyers, newly introduced to American common law rules of Evidence, that "confessions are not hearsay": cases cited *post*, § 1049.

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 is a doctrine 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 is to describe first these two doctrines, and then to indicate the absence of any other and exclusionary rule.

(1) "*Confession*" *as a plea of guilty.* The technical sense of "confession", then, in the earlier usage, is a plea of guilty. It was affected by a rule of practice of not receiving or recording such a plea under certain circumstances; but it was not understood as including extrajudicial narrative avowals of guilt offered as evidence, and the rule about it did not affect such statements; in short, it dealt with a matter of criminal pleading, not a matter of evidence. This will be plain enough from the following passages in the earliest treatises on criminal law:

1607, *Staundford*, Pleas of the Crown, b. 2, c. 51: "If one is indicted or appealed of felony, and on his arraignment he confesses it, this is the best and surest answer that can be in our law for quieting the conscience of the judge and for making it a good and firm condemnation; provided, however, that the said confession did not proceed from fear, menace, or duress; which if it was the case, and the judge has become aware of it, he ought not to receive or record this confession, but cause him to plead not guilty and take an inquest to try the matter."

1680, *Hale*, Pleas of the Crown, Emlyn's ed., 225: "Concerning the plea of the prisoner upon his arraignment, and first of his confession of the fact charged and approving others. When the prisoner is arraigned, and demanded what he saith to the arraignment, either he confesseth the indictment, or pleads to it, or stands mute and will not answer. The confession is either simple, or relative in order to the attainment of some other advantage. That which I call a simple confession is where the defendant, upon hearing of his indictment, without any other respect confesseth it; this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon

his trial, and not presently to record his confession but to admit him to plead. If it be but an extrajudicial confession, tho' it be in Court — as where the prisoner freely tells the fact and demands the opinion of the Court whether it be a felony, — tho' upon the fact thus shown it appear to be felony, the Court will not record his confession but admit him to plead to the felony 'not guilty.' A confession in order to some other advantage is either where the prisoner confesseth the felony in order to his clergy, or where he confesseth the offence and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon if he convict them." [1]

Notice here, first, that a "confession" in the language of Lord Hale, "is a conviction", or, in Serjeant Hawkins' phrase, "the highest conviction that can be made." There is no question of evidence; it is matter of recording a man as guilty, because he has pleaded it, and no resort to evidence (no "trial") is needed. Notice, next, that the unwillingness to make the record of such a plea is a general and indiscriminate one, according to Hale ("it is usual for the Court"); but according to the others, the circumstance causing hesitation is that accused is overpowered by "fear, menace, or duress", or by "fear, menace, or duress, or from weakness or ignorance." This test is one wholly appropriate to the situation, and not at all coincident with the modern one; and yet these authorities have undoubtedly served in part for precedents in the later stages.

(2) *"Confession" as dispensing with the two overt-act witnesses in treason.* 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 (*post*, § 2036) 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

§ 818. [1] So also (1716) Hawkins, Pl. Cr., b. II, c. 31, §§ 1–3.

[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.

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 judge 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 gave it such an effect seems to have been that such a confession was itself an overt act, and therefore was enough if proved by two witnesses. The doubts were still unsettled in 1793; and the following passage shows how distinct the question was from that of the mere admissibility of confessions:

1793, *Anon.*, Discourse on High Treason, 145 (printed in Kelyng's Rep., ed. 1874): "As to the confession, there have been doubts whether the statute requires a confession upon the arraignment of the party, or a confession taken out of court by a person authorized to take such examination. Evidence of a confession proved upon the trial by two witnesses has been held insufficient to convict without farther proof of the overt acts (MS. 1746). This point is, however, not clearly settled. But such confession out of court is evidence admissible, proper to be left to a jury, and will go in corroboration of other evidence to the overt acts." [5]

(3) *Confessions in general as admissible.* These, then, were the only doctrines about "confessions" up to the middle of the 1700s. They both involved the notion of "confession" as a plea of guilty and therefore as dispensing with the necessity of evidence; and they dealt with the conditions under which the effect of immediate conviction was to follow such a confession.

That, apart from these doctrines, there were no others as to confessions, appears not merely from the general lack of record of such doctrines, but

[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.

[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.

from several other circumstances. In the first place, the reports of trials, down to the middle of the 1600s at least, show the tribunal questioning the accused, and proceeding, without let or hindrance, upon whatever they could get from him by way of confession.[6] In the next place, we find that, up to the middle of the 1600s at least, the use of torture to extract confessions was common, and that confessions so obtained were employed evidentially without scruple;[7] and it is clear that such a practice is inconsistent with the slightest recognition of the modern doctrine about the admissibility of confessions. In the third place, the doctrine of receiving approvers' confessions against themselves was nominally in full force during all this period, and was not in effect abolished until Rudd's Case,[8] in 1775. This doctrine, too, could not possibly co-exist with any semblance of the modern doctrine 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

[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 The Athenian Mercury, a periodical printed between 1690 and 1697 (edited in selections as "The Athenian Oracle", by J. Underhill, Camelot Series, 1892), a correspondent asks whether torture to a suspected criminal is unlawful, and the editor replies (p. 196) that "'tis neither political nor reasonable; but were it both of these, we very much doubt the lawfulness of it; Christianity and the laws of nature seem to forbid it"; thus the law of the land had as yet not shown a plain attitude to the editor.

In Scotland, it was applied even much later: 1676, Mitchel's Trial, 6 How. St. Tr. 1207, 1232; 1680, Gordon's Trial, 11 How. St. Tr. 51; 1684, Semple's Trial, 11 How. St. Tr. 985; 1684, Carstair's Trial, 10 How. St. Tr. 687; 1688, Standsfield's Trial, 11 How. St. Tr. 1371, 1387; 1689, Renwick's Trial, 12 How. St. Tr. 569, 576; 1690, Paine's Trial, 10 How. St. Tr. 754. Sir Walter Scott, in "Old Mortality" describing, as of 1679, the examination of torture of the Cameronian preacher Macbriar (ch. 38), confessedly relies in part for his authority on this very trial of Mitchel, *supra*.

In the Colonies, it was known at as late a time as Mr Jardine mentions: 1642, Bradford's History of Plymouth Plantation, 473; 1641 and 1660, Mass. Body of Liberties, c. 45 (quoted *post*, § 2280).

For the history of the abolition of torture in modern times on the Continent, see Pertile, Storia del diritto italiano, 2d ed., 1900, vol. VI, pt. 1, p. 449; Esmein, History of Continental Criminal Procedure (Simpson's transl., Continental Legal History Series), 1913, Part I, tit. II, ch. II, § 4, p. 107, and Part III, tit. II, ch. II, §§ 1–6, p. 351.

[8] *Post*, § 819.

[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

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]

§ 819. **Confessions in the Second Half of the 1700s.** During the time after the Restoration of 1660, and in the course of the gradual, though slow and timid, improvement in the methods of criminal trials, there must have been some extension, in the minds of bar and bench, to the usage for extrajudicial confessions, of the phrases and notions originally peculiar to confessions at bar upon arraignment.[1]

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 justiæ.'"

[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 How. St. Tr. 62; Layer's Trial, 16 How. St. Tr. 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, of 1810, for example, p. 132), and 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.

§ 819. [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,

It has left few direct traces in the reports;[2] but by 1775–1785 we find its results coming to the surface. In 1775 in Rudd's Case,[3] where the accused has applied for release in consequence of having confessed under an assurance of pardon to be received as an accomplice testifying for the Crown, Lord Mansfield, in discussing the practice of using approver's confessions, seemed to see nothing unlawful in it. But at the same time he made the first judicial utterance limiting the admissibility of ordinary confessions: "The instance has frequently happened of persons having made confessions under threats or promises; the consequence as frequently has been that such examinations and confessions *have not been made use of* against them on their trial." He was here, clearly, thinking only of persons "being drawn by promises and assurances to answer to an examination and to swear to it on oath", and not of confessions in general; moreover he does not intimate that anything more than a common practice (not a rule) existed. But in 1783, in Warickshall's Case,[4] before Nares, J., and Eyre, B., the modern rule received a full and clear expression, and confessions not entitled to credit because of the promises or the threats by which they had been obtained were declared inadmissible in evidence. From this time on, the history of the doctrine is merely a matter of the narrowness or broadness of the exclusionary rule.

At this stage, then, the doctrine is a perfectly rational one. Confessions apparently untrustworthy as affirmation of guilt are excluded. Under this principle very few were in fact excluded. Doubts about situations which subsequently become questionable were never heard of. Confessions were thought of in general as "the highest evidence of guilt"; and there was no general sentiment against them,—no 'prima facie' doubt of their propriety.

§ 820. **Confessions in the 1800s.** By the beginning of the 1800s, the whole attitude of the judges had changed, through influences which we may attempt later to estimate (*post*, § 865). There was 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

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 earliest direct indication of such a doctrine: 1741, White's Trial, 17 How. St. Tr. 1085 (the accused's examination before a magistrate being offered, the clerk was asked whether it was voluntarily given; Mr. Recorder, presiding: "That is an improper question; unless the prisoner had insisted and made it part of his case that his confession was extorted by threats or drawn from him by promises; in that case, indeed, it would have been proper for us to inquire by what means the confession was procured"). In this case and Goodere's Trial, ib. 1054, it appears to have become the custom to entitle the report of the accused's examination as "the voluntary examination of A. B."

[3] 1 Leach Cr. C. 135.

[4] Ib. 293.

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 expr[illegible]ds, by the accused in a criminal case, of the truth of the guilty fact [illegible] or of some essential part of it. It is to this class of statements on[illegible] 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 verbal utterances 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:[1]

§ 821. [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 Tex. App. 508, 5 S. W. 128 (refusal to tell his name); 1890, Fulcher v. State, 28 Tex. App. 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 made to include conduct and utterances used as evidence on the issue of *sanity:* 1895, Adams v. State, 34 Tex. Cr. 470, 31 S. W. 372; 1897, Hurst v. State, — Tex. Cr. —, 40 S. W. 264 (but otherwise if the words are in form a direct confession); 1897, Burt v. State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344; 1898, Barth v. State, 39 Tex. Cr. 381, 46 S. W. 228. Compare the Texas citations under par. (2), *infra*. Compelling an accused, out of court, to submit to a measurement of his foot, is not a confession, within the Texas statute: 1903, Thompson v. State, 45 Tex. Cr. 190, 74 S. W. 914.

1895, BEAN, J., in *State* v. *Reinhart*, 26 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 his employment, such entries are extrajudicial statements in the nature of a confession, and not sufficient to convict him unless corroborated by other evidence. But we cannot concur in this position. A 'confession' in a legal sense is restricted to an acknowledgment of guilt made by a person after an offence has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred. The entries of the defendant in the books of account which he was required to keep are not confessions or admissions of guilt, but are perfectly innocent in themselves; and it is only because they are shown to be false and fraudulent that the inference is irresistible, from the manner in which they were made, that they were intended to cover up his misappropriation."

(2) *Exculpatory statements*, denying guilt, cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed:

1846, RUFFIN, C. J., in *State* v. *Broughton*, 7 Ired. 101: "It is altogether a mistake to call this 'evidence of a confession by a prisoner.' It has nothing of that character. It was not an admission of his own guilt, but on the contrary an accusation of another person. That it was preferred on oath in no way detracts from the inference that may be drawn from it unfavorably to the prisoner, as being a false accusation against another 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 persons are not necessarily confessions, but generally, on the other hand, they are denials of guilt, and consist in attempts to explain circumstances calculated to excite suspicion."

1895, DEWITT, J., in *State* v. *Cadotte*, 17 Mont. 315, 42 Pac. 857 (the accused took the stand to explain how in self-defence he killed the deceased; the State offered various previous explanations of his, showing self-contradictions): "The other objection was that a portion of this testimony was a confession by the defendant, and it was not shown that such confession was made freely. . . . We are satisfied that the statements of the defendant sought to be proved were not confessions at all. Instead of being confessions of guilt, they were statements of his self-defence, statements in which he admitted the killing, and endeavored to show that he was obliged to kill to save his own life. They were admissions, to be sure, of the killing, but self-defending statements as to the same. And this was precisely the position he occupied upon the trial. He relying on self-defence for acquittal, it was competent to attack his credibility by proving statements made out of court as to the self-defence, contrary to those which he made as a witness on the trial."

1899, GRANGER, J., in *State* v. *Novak*, 109 Ia. 717, 79 N. W. 465: "Inaccurate use of such words as 'confessions', 'admissions', and 'declarations' has led to some confusion in the cases; but, on authority and reason, there is a clear distinction between a confession 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 cases noted in the ensuing sections no attention was paid to this limitation.

[2] CANADA: 1913, R. *v.* Hurd, 10 D. L. R. 475 Alta. (larceny); 1920, R. *v.* Hughes, 55 D. L. R. 697, Alta. (denial of guilt).

UNITED STATES: *Federal:* Here this doctrine has been 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). But later cases, cited *post, passim*, have discredited the Bram Case in general.

Alabama: 1895, Pentecost *v.* State, 107 Ala. 81, 18 So. 146 (statements denying guilt, admitted as contradictions); 1903, Meadows *v.* State, 136 Ala. 67, 34 So. 183; 1905, Carwile *v.* State, 148 Ala. 576, 39 So. 220; 1906, Neville *v.* State, 148 Ala. 681, 41 So. 1011 (larceny); 1909, Kelly *v.* State, 160 Ala. 48, 49 So. 535;

California: 1896, People *v.* Hickman, 113 Cal. 80, 45 Pac. 175; 1897, People *v.* Ammermann, 118 Cal. 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, 118 Cal. 508, 50 Pac. 681 (burglary; declarations admitting possession of the goods, but explaining it; rule not applicable); 1904, People *v.* Jan John, 144 Cal. 284, 77 Pac. 950 (People *v.* Ammermann followed); 1905, People *v.* Kelly, 146 Cal. 119, 79 Pac. 846; 1906, People *v.* Weber, 149 Cal. 325, 86 Pac. 671 (statements showing an alibi); 1918, People *v.* Fowler, 178 Cal. 657, 174 Pac. 892 (an assertion that the killing was in self-defence is not a confession within the rule); 1921, People *v.* Peete, — Cal. App. —, 202 Pac. 51, 61 (murder);

Colorado: 1893, Mora *v.* People, 19 Colo. 255, 262, 35 Pac. 179 (denial of guilt and exculpatory story, held not a confession); but see Tuttle *v.* People, 1905, 33 Colo. 243, 79 Pac. 1035, *contra*, ignoring Mora *v.* People;

Connecticut: 1810, Swift, Evidence, Conn., 133;

Florida: 1915, Crawford *v.* State, 70 Fla. 323, 70 So. 374;

Georgia: 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 Ga. 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 folllowing case: 1906, Fuller *v.* State, 109 Ga. 809, 35 S. E. 29; exculpatory statements; left undecided);

Illinois: 1921, People *v.* Stapleton, 300 Ill. 471, 133 N. E. 224 (murder; a statement admitting the shooting but asserting self-defence, held not a confession; here, with the singular effect that an instruction upon the sufficiency of a confession without corroboration was held "most serious and prejudicial error");

Iowa: 1906, State *v.* Thomas, 135 Ia. 717, 109 N. W. 900;

Kansas: 1910, State *v.* Turner, 82 Kan. 787, 109 Pac. 654;

Louisiana: 1900, State *v.* Spillers, 105 La. 163, 29 So. 480 (denial, held not a confession); 1904, State *v.* Aspara, 113 La. 940, 37 So. 883; 1904, State *v.* Gianfala, 113 La. 463, 37 So. 30 (a ridiculou. example of an accused's exculpatory statement excluded because the Court thought that "he may well have been in fear and may well have hoped to mitigate his act", *i.e.* being probably a false exculpation, therefore it should be rejected; this is the rule of law gone mad);

Nebraska: 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);

New York: 1819, People *v.* Reilly, 224 N. Y. 90, 120 N. E. 113 (murder);

North Carolina: 1901, State *v.* McDowell, 129 N. C. 523, 39 S. E. 840 (denial, held not a confession);

Oklahoma: 1919, Wilson *v.* State, — Okl. Cr. —, 183 Pac. 613 (here applied to a statement admitting the killing but alleging self-defence);

Rhode Island: 1914, State *v.* Mariano, 37 R. I. 168, 91 Atl. 21 (murder);

South Carolina: 1852, State *v.* Vaigneur, 5 Rich. L. 400, 402 (the accused's statement about his doings, in trying to exculpate himself, proved false; admitted);

Texas: Here 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 Tex. App. 93, 100, 19 S. W. 901 (larceny; exculpatory statement that he bought the horse from F.,

A due enforcement of it would help materially to remove some of the absurdities in the present practice, especially in the treatment of confessions made under oath (*post*, §§ 842–852).

It will be noticed that the exculpatory statements thus admitted are 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.[3]

(3) An acknowledgment of a *subordinate fact, not directly involving guilt*, or, in other words, not essential to the crime charged, is not a confession; because the supposed ground of untrustworthiness of confessions (*post*, § 822) is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment; and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of

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); 1904, Parks *v.* State, 46 Tex. Cr. 100, 79 S. W. 301 (Bailey *v.* State followed; the Quintana and Ferguson cases apparently repudiated, where the statement is not used to impeach the defendant as a witness; Brooks, J., diss.); 1917, Dover *v.* State, 81 Tex. Cr. 545, 197 S. W. 192 (larceny);

Washington: 1905, State *v.* Royce, 38 Wash. 111, 80 Pac. 268;

Wisconsin: 1902, Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170 (statements in denial or exculpation are not confessions).

[3] 1909, Harrold *v.* Terr., 8th C. C. A., 169 Fed. 47 (where a defendant by taking the stand, waives his privilege and may be cross-examined to his admissions in general, a confession not admissible under the present rules may not be introduced by first asking him if he made it, and then, on his denial, by evidencing it with other testimony; *i.e.* the rules limiting the admissibility of a confession apply no matter how it be evidenced); 1920, Pearrow *v.* State, 146 Ark. 201, 225 S. W. 308 (confessions of other larcenies); 1916, People *v.* Buckminster, 274 Ill. 435, 113 N. E. 713 (whether an accused who voluntarily takes the stand can be impeached by an inadmissible confession; not decided); 1898, Butler *v.* State, — Miss. —, 24 So. 316; 1914, Jones *v.* State, 97 Nebr. 151, 149 N. W. 327; 1920, Taylor *v.* State, 87 Tex. Cr. 330, 221 S. W. 611 (but here admitted, because the defendant had referred to the matter in voluntary testimony at a former trial); 1921, Brent *v.* State, 89 Tex. Cr. 544, 232 S. W. 845; 1894, Shepard *v.* State, Wis. 185, 186, 59 N. W. 449.

Contra: 1903, Smith *v.* State, 137 Ala. 28, 34 So. 396; 1903, Angling *v.* State, 137 id. 17, 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; 1911, People *v.* Brown, 203 N. Y. 44, 96 N. E. 367 (the rule for confessions does not apply when the accused, taking the stand, is asked as to his former statements as a witness before the coroner).

guilt are without the scope of the peculiar rules affecting the use of confessions: [4]

1796, EYRE, L. C. J., charging the jury, in *Crossfield's Trial*, 26 How. St. Tr. 215: "Gentlemen, those declarations [relating to the invention of a deadly weapon and uttered before

[4] *Accord: Federal:* 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");
Alabama: 1921, Cook *v.* State, 17 Ala. App. 611, 88 So. 58 (larceny); but *contra:* 1911, McGehee *v.* State, 171 Ala. 19, 55 So. 159 ("inculpatory admissions in the nature of a confession", that is, directly relating to the fact or circumstances of the crime and connecting the defendant therewith, "are subject to the rules for confessions");
California: 1866, People *v.* Strong, 30 Cal. 151, 157 (admissions as to an appointment with the deceased, etc., held not confessions; see quotation *supra*); 1898, People *v.* Miller, 122 Cal. 84, 54 Pac. 523 (libel; admission of newspaper's ownership, not a confession); 1910, People *v.* Wilkins, 158 Cal. 130, 111 Pac. 612;
Georgia: 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 Ga. 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 Ga. 468, 471, 17 S. E. 100; 1897, Lee *v.* State, 102 Ga. 221, 225, 29 S. E. 264 (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 Ga. 407, 37 S. E. 747; 1904, Owens *v.* State, 120 Ga. 296, 48 S. E. 21 (an absurd ruling; the Court incidentally makes the remarkable pronouncement that "a confession is rather a fact to be proved by evidence than evidence to prove a fact"; Lamar and Candler, JJ., diss.); 1916, Lucas *v.* State, 146 Ga. 315, 91 S. E. 72 (murder);
Illinois: 1902, Johnson *v.* People, 197 Ill. 48, 64 N. E. 286; 1904, Michaels *v.* People, 208 Ill. 603, 70 N. E. 747 (defendant on being arrested and charged with forgery, said, "Can't this thing be fixed up?"; held, not a confession);
Iowa: 1871, State *v.* Jones, 33 Ia. 9, 11 (statements in regard to escaping); 1878, State *v.* Knowles, 48 Ia. 598 ("A confession implies that the matter confessed is a crime"); 1879, State *v.* Glynden, 51 Ia. 463, 465, 1 N. W. 750 (admissions of presence at the time and place, held not confessions); 1879, State *v.* Feltes, 51 Ia. 495, 498, 1 N. W. 755; 1880, State *v.* Red, 53 Ia. 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"); 1920, State *v.* Cook, 188 Ia. 655, 176 N. W. 674 (a confession "That is the house; I tried to get in, but was frightened away by the woman's screams", held not a confession of attempt to break and enter with intent to commit larceny, under the rule of § 2070, *post*, as to the sufficiency of a confession; a perusal of the facts of the case, as set forth in the opinion, reveals how this fantastic perversion of natural word-meanings helps to bring the law into contempt);
Kansas: 1906, State *v.* Campbell, 73 Kan. 688, 85 Pac. 784 (statement of the receipt of money lawfully);
Minnesota: 1879, State *v.* Mims, 26 Minn. 183, 186, 2 N. W. 494, 683 (embezzlement; admissions of the receipt of the money, held not confessions);
Mississippi: 1915, Pringle *v.* State, 108 Miss. 802, 67 So. 455;
Montana: 1919, State *v.* Guie, 56 Mont. 485, 186 Pac. 329 (burglary; statement as to certain events, held not a confession); 1921, State *v.* Stevens, 60 Mont. 390, 199 Pac. 256 (larceny; defendant's false statements as to details, held not confessions);
New Mexico: 1921, State *v.* Lindsey, 26 N. M. 526, 194 Pac. 877 (bigamy; admission of the first marriage, held not a confession);
Oklahoma: 1920, McGarrah *v.* State, — Okl. Cr. App. —, 187 Pac. 505 (larceny);
Oregon: 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); 1909, State *v.* Brinkley, 55 Or. 134, 105 Pac. 708; 1921, State *v.* Won Wen Tueng, 99 Or. 95, 195 Pac. 349 (statement as to time of arriving in the city, held not a confession); 1921, State *v.* Howard, 102 Or. 431, 203 Pac. 311; 1921, State *v.* Weston, 102 Or. 102, 201 Pac. 1083 (murder);
Philippine Isl. 1912, U. S. *v.* Lio Team, 23 P. I. 64 (opium-smoking); 1918, U. S. *v.* Ragon, 37 P. I. 856 (sale by mortgagor);
South Carolina: 1898, State *v.* Taylor, 54 S. C. 174, 32 S. E. 149 (ambiguous language);
Texas: 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 Tex. App. 126, 130, 9 S. W. 358 (larceny of a cow; defendant's promise to pay for the cow, held not a confession); *contra:* 1920, Willoughby *v.* State, 87 Tex. Cr. 40, 219 S. W. 468 (ignoring the foregoing cases, but citing some others;

the deed charged] have been as it seems to me improperly called 'confessions'; they are not properly 'confessions', which import a particular change first made and an acknowledgment of that charge. . . . According to the rules of evidence, what a prisoner has said respecting a particular fact is admissible evidence, not in the nature of a confession, but as evidence of the particular fact."

1866, CURREY, C. J., in *People* v. *Strong*, 30 Cal. 157: "The word 'confessions' is not the mere equivalent of the words 'statement' or 'declarations.' The defendant made statements to several of the witnesses, as they testified, respecting the departure of Holmes [the murdered man] for San Francisco, and of their appointment to meet at that place, etc.; but it is nowhere to be found in the testimony of the witnesses that he admitted or confessed to any participation in the homicide."

1897, WOLVERTON, J., in *State* v. *Porter*, 32 Or. 135, 49 Pac. 964: "We take it that the admission of a fact, or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and these import guilt, or, as put by Mr. Wharton, '"I am guilty of this"; and this imports the admission of all the acts constituting guilt.' It is necessary, however, that the accused should speak with an 'animus confitendi', or an intention to speak the truth touching the specific charge of guilt; and when he, with such intention, narrates facts constituting a crime, the guilt becomes matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the commission of a crime, or in themselves constitute a crime, then the facts admitted import guilt, and such admissions may properly be denominated confessions."

1919, HOLLOWAY, J., in *State* v. *Guie*, 56 Mont. 485, 186 Pac. 329: "The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement, but based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgment of guilt on the part of the accused, and, by the very force of the definition, excludes an admission, which, of itself, as applied in criminal law, is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorize a conviction."

(4) Of course the present rules of exclusion have no application to a confession *made in open court* before judge and jury on the trial of the issue.[5]

§ 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

here, "that suitcase is my property", was held a confession, on a trial for burglary);
Utah: 1909, State v. Moore, 36 Utah 521, 105 Pac. 293 (adultery by the defendant, being wife of C. H. M., with A. J. M.; the sheriff, on receiving her in custody made the usual inquiries required by law as to her name, age, etc., and asked her, "Are you the wife of C. H. M.?"; her answer held not a confession);
Washington: 1893, State v. Munson, 7 Wash. 239, 240, 34 Pac. 932, *semble;*
Wyoming: 1916, Mortimer v. State, 24 Wyo. 452, 161 Pac. 766 (homicide).

[5] In Garner v. State, 97 Ark. 63, 1910, 132 S. W. 1010, is an extraordinary instance of the improper exclusion of such a confession, on the ground that defendant's counsel was not present.

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, especially one of defective mentality or peculiar temperament, 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? The law cannot attempt to weigh testimony before even listening to it. But it can take note of certain objective circumstances as leading with high probability to falsities. The circumstances which thus call for the rejection of a confession 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 the contingencies of a confession more desirable than the certain consequences of silence.

The principle, then, upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy*. What circumstances may make it so, and what degree of untrustworthiness is sufficient, are further questions; but the essential feature is that the principle of exclusion is a testimonial one, analogous to the other principles which exclude narrations as untrustworthy (*ante*, §§ 768–788). This theory, while developing different and inconsistent practical tests at the hands of various Courts, seems to have been generally accepted as the underlying and fundamental principle since the first introduction of any doctrine about the inadmissibility of confessions:

Ante 1726, Chief Baron 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."

1783, NARES, J., and EYRE, B., in *Warickshall's Case*, 1 Leach Cr. C., 3d ed., 298: "It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith. No

§ 822. [1] Instances are cited *post*, § 866.

such rule ever prevailed. . . . Confessions are received in evidence or rejected as inadmissible under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers. But a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape when it is to be considered as evidence 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 all this class of cases is founded is that by an inducement being held out to the prisoner, he may be led to suppose that he will be more mercifully dealt with if he confesses, and that he may therefore be induced to confess himself guilty of an offence he never committed (of which instances we believe have occurred)."

1856, CAMPBELL, L. C. J., in *Scott's Case*, 1 D. & B. 58: "It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say that which is not true, and the supposed confession cannot be safely acted on."

1881, WILLIAMS, J., in *R.* v. *Mansfield*, 14 Cox Cr. 639: "It is not because the law is afraid of having truth elicited that these confessions are excluded, but because the law is jealous of not having the truth."

1886, WILSON, C. J., in *R.* v. *Doyle*, 12 Ont. 354: "The reason the confession in such a case is not admissible is that in law it cannot be depended upon as true; for one in such a case may say, and is likely to say, that which is not the truth if he thinks it to his advantage to do so."

1792, MCKEAN, C. J., in *Com.* v. *Dillon*, 4 Dall. 116: "If such declarations are voluntarily made, all the world will agree that they furnish the strongest evidence of imputed guilt. . . . The true point of consideration, therefore, is whether the prisoner has falsely declared himself guilty of a capital offence."

1852, WITHERS, J., in *State* v. *Vaigneur*, 5 Rich. L. 400: "The foundation of all rules upon this subject rests upon an anxiety to exclude confessions that are probably not true; and therefore to exclude those that are not voluntary because such are probably untrue."

1854, 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."

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."

1899, GRANGER, J., in *State* v. *Norak*, 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

[2] See another report of this leading opinion in Sel. Crim. Trials at Old Bailey, I, App. 23, 24.

the confessions are made the conditions as to hope or fear are such as to make then unsafe as evidence."

1917, GEORGE, J., in *Wilson* v. *State*, 19 Ga. App. 759, 92 S. E. 309: "Practically all the authorities agree that the only proper question is whether the inducement held out to the prisoner tended to make his confession an untrue one. The exclusion of confession evidence rests on the connection with the inducement; the inducement and the confession stand to each other in the relation of cause and effect. The object of every legal investigation is to ascertain the truth. Testimonial worthlessness is the underlying and fundamental principle on which confession evidence is, under certain circumstances, rejected. If the court could know in a given case that a confession was true, it is clear that the evidence thereof should not be rejected. The wrong done, however reprehensible, in inducing the accused to make a confession, could never, rightly considered, require a rejection of the confession if the court could know as a fact that the confession was the truth of the case. The underlying principle is that the only confession that can be excluded is the false confession."

1922, LATTIMORE, J., in *Barker* v. *State*, — Tex. Cr. —, 238 S. W. 943: "It is needless to discuss confessions. They are held to be statements of the accused in criminal cases hostile to his own interests, but which must be shown to have been made in accordance with certain precautionary rules, before they will be held admissible. These rules are deemed wise and needful in order to prevent the use against the accused of his statements made under duress, fear, intimidation, coercion, or hope of favor, etc. The rules are based on the general hypothesis that the truth of statements made under the circumstances referred to is too often questionable. The only object sought in the entire matter is truth."[3]

§ 823. **Other Theories not sanctioned; Self-Crimination Privilege, distinguished.** This principle of testimonial untrustworthiness being the foundation of exclusion, it follows that the exclusion is not rightly rested on certain other possible and occasionally plausible theories.

(*a*) A confession is not excluded because of any *breach of confidence* or of good faith which may thereby be involved. This has been accepted from the beginning:

1783, *Warickshall's Case*, 1 Leach Cr. L., 3d ed., 298; a confession was obtained by a promise of favor; "it was contended by her counsel that as the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected; for otherwise the faith which the prosecutor had pledged could be violated, and the prisoner made the deluded instrument of her own conviction." NARES, J., and EYRE, B.: "It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith; no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit."

1842, Mr. *Joy*, Confessions, 50: "This does not make the confession admissible [*i.e.* an oath or promise of secrecy], although a confidence is thus created in the mind of the prisoner and he is thrown off his guard. The true question seems to be, Does such confi-

[3] 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; 1911, People *v.* Flores, 17 P. R. 166, 176. So, too, the following writers: 1824, Starkie, Evidence, I, 52; 1842, Joy, Confessions, 51; 1860, Appleton, Evidence, c. XI, p. 174.

dence render it probable that the prisoner should be thus induced *untruly* to confess himself guilty of a crime of which he was innocent?"

Thus, so far as a promise, whether of secrecy, of favor, or of other action, or a misrepresentation of facts, has been the means of obtaining the confession, the exclusion that might ensue would in no way rest on the mere fact that a promise has been broken, a confidence violated, or a deception deliberately planned and carried out.[1]

(*b*) A confession is not excluded because of any *illegality* in the method of obtaining it or in the speaker's situation at the time of making it.[2] The general principle — that the illegality of the source of evidence is no bar to its reception — is well established (*post*, § 2183), and it is not for any such reason that confessions are rejected.[3] Occasion seldom arises, however, for the illustration of the principle as applied to confessions.

(*c*) Finally, a confession is not rejected because of any connection with the *privilege against self-crimination*. The circumstances that this privilege protects against a disclosure which is compulsory, and that one of the tests for a confession is whether it is voluntary or not, have naturally led to the occasional use of both arguments at once by counsel in opposing the use of such a confession; but the Courts have properly kept the two principles distinctly apart. Thus, where a compulsory disclosure is offered, it may be 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

§ 823. [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, Selden, J., in People v. McMahon, 15 N. Y. 386 ("It is because it [a sort of confession] is in its nature unreliable, and not on account of any impropriety in the manner of obtaining it, that the evidence is excluded"); 1880, Andrews, J., in Balbo v. People, 80 N. Y. 499 ("The fact that the arrest was illegal has no relevancy, if the confession was voluntary").

[4] *E.g.* R. v. Sloggett, *post*, § 850.

[5] *E.g.* R. v. Garbett, *post*, § 850.

[6] *Post*, § 2270.

[7] *Post*, § 2270.

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 Confession 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 considered that test which is orthodox in the sense that it is correct on principle, 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 arises when the person is placed in such a situation that an untrue confession of guilt (more correctly, a confession of guilt irrespective of its truth or falsity) has become the more desirable of two alternatives between which the person was obliged to choose. Thus, the essential features of the situation are, first, the fact that the alternative is presented between present silence (or assertion of innocence) and some other prospect held out by and associated indispensably with the confession of guilt; and, secondly, the relative advantage of this confession, with its consequences certain or contingent, over silence, with its consequences certain or contingent. The exact situation is perhaps apt to be obscured by the ordinary phrase designating "a promise of benefit or a threat of harm" as the circumstances availing to exclude. The truth is that this duplicate form of statement is not essential; it indicates merely superficial features; and the situation is always reducible to the single form above stated. Thus, where a promise (for example, of pardon) is the inducement for a confession, its effect is to make the certain freedom which will accom-

[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 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*.

pany false confession more attractive at the moment than the mere possibilities of freedom, coupled with temporary restraint, which attend silence. Again, where a mob's threat of hanging has induced a confession, the alternative of present certain and future possible safety proves naturally more attractive than present certain death. Thus in both cases — a promise and a threat — the confession is untrustworthy because it has been associated with an attraction too strong to resist. The form of statement "a promise or a threat" is misleading because the two terms are not really correlative; *i.e.* a promise is always attached to the confession-alternative, while a threat is always attached to the silence-alternative; thus in the one case the person is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantage of the present satisfactory situation, minus the general undesirability of confession, against the threatened harm. The measurements and the balances may be very different in the two instances, and the coupling of the terms "a promise or a threat" is thus improper in the same way that it would be improper to compare the opposite terms of two equations. Modern usage therefore generalizes by employing the term "inducement" to cover all modes of influence.

The term "a promise or a threat", as well as the term "voluntary", are also misleading in another way; for they obscure the fact that (even when threats 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 between the rack and a false confession, the latter would usually be considered the less disagreeable; but it is none the less voluntarily chosen. The term "voluntary", then, as describing the absence of the vicious element which excludes a confession, is, in ultimate exactness, unsound. All conscious verbal utterances 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 circumstances as to induce the prisoner to make a confession of guilt whether such confession were true or no."

1847, WITHERS, J., in *State* v. *Kirby*, 1 Strobh. 387: "[It is erroneous] to construe the rule to be irrespective of the reason upon which all rules upon this whole subject are based. . . . The object of the rule is to exclude any admission that may have been procured by the prisoner's being led to suppose that it would be better for him to confess himself guilty of an offence of which he is innocent, — whether the inducement held out 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 the decisions on this branch of the law; and the reason seems to be that reporters and elementary law writers do not always bear in mind the true test on which the admission or exclusion of such evidence depends. In 1792, when Chief Justice McKean was presiding, the Supreme Court of this State declared that 'the true point for consideration is whether the prisoner has falsely declared himself guilty of a capital crime.' In deciding this point, the chief question is whether the inducement held out was calculated to make the confession an untrue one."

1881, HAMMOND, J., in *U. S.* v. *Stone*, 8 Fed. R. 232, 241, 256: "The real question is whether there has been any threat or promise of such a nature that the prisoner would be 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 controlling inquiry is whether there had been any threat of such a nature that from fear of it the prisoner

was likely to have told an untruth. If so, the confession should not be admitted. Its exclusion rests on its connection with the inducement; they stand to each other in the relation of cause and effect. If it is apparent that no such connection exists, there is no reason for the exclusion of the evidence." [1]

§ 825. **Same: (*b*) Was the Confession induced by a Threat or a Promise, by Fear or Hope?** Not all questions involving confessions would necessarily bring into prominence the accurate test just described; and naturally enough many Courts fell into the habit of describing the excluding circumstance more briefly, though less accurately, as "a threat or a promise", or (the same thing in effect) as "fear or hope." In this form the test lacks any modification as to the measure of the force which the threat or the promise, the fear or the hope, might have in causing falsity of confession. It is based, to be sure, upon the general principle, already examined (§ 822), that confessions are excluded when untrustworthy; but it is not an accurate deduction therefrom. Nevertheless, it is constantly employed as a rule of thumb, without 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

§ **824**. [1] The same principle has been more or less definitely expressed in the following rulings: 1878, U. S. *v.* Graff, 14 Blatch. 387; 1883, Hopt *v.* Utah, 110 U. S. 585, 4 Sup. 202; 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, Young *v.* State, 68 Ala. 575; 1897, Williams *v.* State, 63 Ark. 527, 39 S. W. 709 ("whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from the fear of the threat or hope of profit from the promise"); 1810, Swift, Evidence, Conn., 131; 1920, State *v.* Bailey, 146 La. 624, 83 So. 854; 1830, Com. *v.* Knapp, 9 Pick. Mass. 503; 1857, Com. *v.* Tuckerman, 10 Gray Mass. 191; 1871, Com. *v.* Cuffee, 108 Mass. 288; 1869, State *v.* Staley, 14 Minn. 113; 1861, Frank *v.* State, 39 Miss. 711; 1919, State *v.* Guie, 56 Mont. 485, 186 Pac. 329 (approving the test as stated in the above text); 1881, State *v.* Patterson, 73 Mo. 706; 1881, State *v.* Phelps, 74 Mo. 136 (quoting Keating, J., in R. *v.* Reason, *supra*); 1888, State *v.* Anderson, 96 Mo. 249, 9 S. W. 636; 1881, State *v.* Carrick, 16 Nev. 128; 1883, People *v.* McGloin, 91 N. Y. 246; 1868, State *v.* Mitchell, Phillips L. N. C. 449; 1868, Price *v.* State, 18 Oh. St. 419; 1854, State *v.* Motley, 7 Rich. L. S. C. 337; 1853, Deathridge *v.* State, 1 Sneed 79; 1861, State *v.* Walker, 34 Vt. 302; 1853, Smith's Case, 10 Gratt. Va. 737; 1858, Shiffiet's Case, 14 Gratt. 661, 665.

§ **825**. [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).

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 were 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]

§ 826. **Same: (*c*) Was the Confession Voluntary?** Probably as early in historical usage and more common in modern judicial opinions, is the phrase "voluntary", as indicating that quality in a confession which sanctions its reception.[1] Here, again, though the test rests ultimately for its validity upon the fundamental principle already examined (*ante*, § 822), yet it has come to be employed in judicial parlance as sufficient in itself, independent of the living principle beneath it. But, unlike the preceding test, it is not so serviceable as a rule of thumb, for its significance is so indefinite and loose that it does not of itself supply a solution for the various situations with their

[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.* Mill, 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, Patterson, 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"); 1905, R. *v.* Ryan, 9 Ont. L. R. 137 (confession of a letter-carrier to a post-office inspector, admitted on the facts; R. *v.* Thompson followed); 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. [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.

graduated differences; hence it is often, perhaps usually, found in combination with the preceding test in one form or another, the latter serving to explain and make it more specific; thus:

1801, Mr. *Peake*, Evidence, 14: "The confession of a felon voluntarily made is evidence against him on his trial; but if any threats or promises have been made to 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 confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

1893, CAVE, J., in *R.* v. *Thompson*, 2 Q. B. 17: "A simple test, . . . Is it proved affirmatively that the confession was free and voluntary; that is, Was it preceded by any 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 — oftener than the preceding one — in a purely subsidiary way, *i.e.* as merely a rough test for determining the trustworthiness of the confession; the living principle being oftener kept in mind; thus:

1874, PEARSON, C. J., in *State* v. *Whitfield*, 70 N. C. 356: "No confession of guilt shall be heard in evidence unless made voluntarily; for if made under the influence of either hope or fear, there is no test of its truthfulness." [3]

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 ac-

[2] Examples of this test in American opinions are as follows: (1) Using "threat or promise" as the secondary test: 1839, U. S. *v.* Nott, 1 McL. 501; 1873, Nicholson *v.* State, 38 Md. 153; 1874, State *v.* Jones, 54 Mo. 479; 1871, Barnes *v.* State, 36 Tex. 362; 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. N. C. 259; 1874, Rufer *v.* State, 25 Oh. St. 469.

Other sundry examples of this test are the following: 1896, Wilson *v.* U. S., 162 U. S. 613, 16 Sup. 895 (Fuller, C. J.: "the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort"); 1900, Jackson *v.* U. S., 42 C. C. A. 452, 102 Fed. 473; 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 Fla. 237, 23 So. 857; 1898, Hecox *v.* State, 105 Ga. 625, 31 S. E. 592; 1900, Fuller *v.* State, 109 Ga. 809, 35 S. E. 298 (to sheriff); 1900, State *v.* Vicknair, 52 La. An. 1921, 28 So. 273; 1895, Com. *v.* Sheehan, 163 Mass. 170, 39 N. E. 791; 1892, People *v.* Taylor, 93 Mich. 638, 641, 53 N. W. 777; 1895, People *v.* Parsons, 105 Mich. 177, 63 N. W. 69; 1897, Hunter *v.* State, 74 Miss. 515, 21 So. 305; 1902, Blalack *v.* State, 79 Miss. 517, 31 So. 105; 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; 1898, Snider *v.* State, 56 Nebr. 309, 76 N. W. 574; 1900, State *v.* Abatto, 64 N. J. L. 658, 47 Atl. 10; 1900, State *v.* Baker, 58 S. C. 111, 36 S. E. 501.

[3] Other examples of this sort are as follows: 1875, Sampson *v.* State, 54 Ala. 243; 1875, Levison *v.* State, 54 Ala. 524; 1877, Johnson *v.* State, 59 Ala. 39; 1881, Young *v.* State, 68 Ala. 575; 1881, Redd *v.* State, 69 Ala. 259; 1846, State *v.* Potter, 18 Conn. 177; 1871, Young *v.* Com., 8 Bush 370; 1857, Com. *v.* Tuckerman, 10 Gray Mass. 190; 1856, Brown *v.* State, 32 Miss. 450; 1847, State *v.* Cowan, 7 Ired. N. C. 244.

cording 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 view was that the inducement, to exclude,

§ 828. [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.

§ 829. [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); 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.* Pountney, 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-

must have been held out by a person having a legal interest or authority in the arrest and prosecution;[2] but the view also obtained currency that an inducement by any person whatever would exclude.[3] The case of an inducement by a master or a mistress to a servant was the troublesome one, for there no legal interest in the prosecution might exist, and yet the relation involved in one sense an "authority", *i.e.* an actual control which might affect by its pressure the mind of the servant. Finally, in 1852, the earlier view was confirmed, and the existence of a legal interest in the prosecution was taken as the test, -- not the mere existence of actual control or influence growing out of the social or commercial relations of the persons:

1852, *R.* v. *Moore*, 2 Den. Cr. C. 522; Mr. *Creasy*, for the accused: "We must not look at the case as lawyers, but consider what would be the natural result of an inducement by such a person. The test is not, it is submitted, Who is the party to set justice in motion? but, Who is most likely to have influence? Who is most natural that the prisoner should look to?" PARKE, B., for the eight judges: "Perhaps it would have been better to have held (when it was determined that the judge was to decide whether the confession was voluntary) that in all cases he was to decide that point upon his own view of *all* the circumstances, including the nature of the threat or inducement, and the character of the person holding it out, together; not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down in different precedents by which we are bound, and that is, 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. And the prosecutor, magistrate, or constable, is such a person; and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. . . . But it is only where the offence concerns the master or mistress that their holding out the threat or the promise renders the confession inadmissible. . . . In the present case, the offence of the prisoner, in killing her child or concealing its dead body, was in no way an offence against the mistress of the house; she was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence."

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

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, "because the advice to confess was not given or sanctioned by any person who had any concern in the business"); 1836, R. *v.* Gibbons, 1 C. & P. 97, Park, J., and Hullock, B. ("any person having any office or authority, as the prosecutor, constable, etc."); 1839, R. *v.* Taylor, 8 C. & P. 734, Patteson, J., speaking of his opinion as representing the judges; 1839, Lewin, note to 2 Lew. Cr. C. 125 ("The cases seem to establish the principle that where a confession is obtained through the medium of a suggestion made by a person from whom the prisoner can have nothing to hope or to fear, it ought to be received").

[3] 1831, R. *v.* Dunn, R. *v.* Slaughter, 4 C. & P. 543, Bosanquet, J. ("any person telling a prisoner that it will be better for him to confess will always exclude any confession made to that person"; here a fellow-workman, and a person to whom the stolen article was offered for sale); 1837, R. *v.* Spencer, 7 C. & P. 776, Parke, B. (held doubtful, because the judges were divided in opinion).

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 the decision in R. *v.* Moore (above quoted), 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, at common law 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 or a palpable

[4] Subsequent rulings in England and Canada are as follows: *England:* 1853, R. *v.* Luckhurst, 6 Cox Cr. 243 (one who puts questions in the prosecutor's presence; excluded); 1853, R. *v.* Sleeman, 6 Cox Cr. 245 (a married daughter of the accused's master, not in his household; admitted); 1861, R. *v.* Parker, 8 Cox Cr. 465 (a fellow-prisoner in the presence of prosecutor and constable; admitted); 1872, R. *v.* Vernon, 12 Cox Cr. 153 (a woman deputed by the constable to guard the accused temporarily; admitted); 1911, Godinho's Case, 7 Cr. App. 12 (a hope of pardon originating in the accused's own mind, and not due to the statement of any person in authority, does not exclude); *Canada:* 1901, R. *v.* Todd, 13 Man. 364 (detectives obtaining a confession by trick, held not persons in authority); 1905, R. *v.* Ryan, 9 Ont. L. R. 137 (a post-office inspector questioning a letter-carrier; not decided); 1914, R. *v.* Anderson, 16 D. L. R. 203, Alta. (a doctor examining for mental condition, held not a person in authority); 1915, R. *v.* De Mesquito, 26 D. L. R. 464, B. C. (master with a police constable in attendance held a person in authority); 1920, R. *v.* Trenholme, 61 D. L. R. 316, Que. (charge against a medical man of "defiling a young girl by false pretences"; the father of the girl, held a person in authority).

[5] 1852, R. *v.* Moore, 2 Den. Cr. C. 526; and cases cited *supra*, *passim*.

§ 830. [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").

But since the institution in England of a Director of Public Prosecutions, the common law status of the injured party has of course changed. On the new prosecuting method, see the Report of Edwin R. Keedy and John D. Lawson to the American Institute of Criminal Law and Criminology (Journal of the Institute, 1911, vol. I, pp. 595, 748).

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 (*i.e.* in the United States the prosecuting witness merely) is to be deemed a "person in authority", has occasionally been recognized.[3]

(2) The opposite extreme — ignoring the inducements of all persons except those having official authority — has also received sanction:

1881, HAMMOND, J., in *U. S.* v. *Stone*, 8 Fed. 260 (admitting a confession to a private detective employed by the owner of stolen goods): "At common law, some person, generally the party injured, though it might be another person, must be named as prosecutor, except in special cases; and without this there could be no prosecution. . . . It is through this semi-official relation to the prosecution that a private prosecutor becomes a person in authority in this matter of evidence of confessions. But under our federal practice from the earliest times, and by force of the statute, the district attorney is the only prosecutor known to our law, and as a matter of fact, in this court at least, no private prosecutor has ever been recognized. . . . It is impossible therefore for any one to occupy the place of a private prosecutor in this court, or make any promises of immunity that will avail the accused in that capacity. It was otherwise at common law; for generally if the party injured refused to prosecute, there could be no prosecution. With us the district attorney alone can give such assurances. . . . [Thus], the determination of the question of authority depends upon the relation of the person to the criminal prosecution for the act done by the accused. . . . The person must have some authority over the prosecution of that particular offence, whether he be an officer of the law or not. The mere fact that he is an officer does not answer the purpose; he must be connected with the prosecution and have authority through that connection over the prisoner."

(3) A middle way is that which most Courts seem to have adopted. The injured person, or the master of a servant, is not regarded as necessarily having a control sufficient to vitiate confessions made by his inducement; nor is he regarded as entirely incapable of holding them out. Each case is decided upon its own circumstances, and the actual state of the relation between him and the confessor is inquired into with reference to the probable strength of the inducement. This seems the wisest rule, and it is in accordance with the recommendation of Professor Greenleaf, often quoted by the judges:

1842, Professor *Simon Greenleaf*, Evidence, § 224: "Promises and threats by private persons, not being found so uniform in their operation [as those by persons in official authority] perhaps may with more propriety be treated as mixed questions of law and fact; the principle of law that the confessions must be voluntary being strictly adhered to, and the question whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left to the discretion of the judge under all the circumstances of the case."

1854, SHAW, C. J., in *Com.* v. *Morey*, 1 Gray 463: "Of course such inducement must be held out to the accused by some one who has, or is supposed by the accused to have, some power or authority to assure to him the promised good or cause or influence the threatened injury."

[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.

1879, BRICKELL, C. J., in *Murphy* v. *State*, 63 Ala. 3: "[The improper inducement may come from] any one connected with the accused who may, considering his relations and condition, be fairly supposed by him to have the power to secure him what ever of benefit is promised or to influence the threatened injury."

The precedents illustrate the flexibility (or perhaps the looseness) of this rule.[4] It may be added that some of them seem to indicate that a modification 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

[4] *Cal.* 1909, People v. Piner, 11 Cal. App. 542, 105 Pac. 780 (the injured person may be a person in authority); 1910, People v. Luis, 158 Cal. 285, 110 Pac. 580 (a bystander, not a person in authority); *Conn.* 1846, State v. Potter, 18 Conn. 178 (a friend; admitted); *Del.* 1870, State v. Darnell, 1 Houst. Cr. C. 322 (a bystander; admitted); *Ga.* 1895, Freeman v. Brewster, 94 Ga. 1, 21 S. E. 128 (a fellow-prisoner; excluded); *Haw.* 1871, R. v. Kamakana, 3 Haw. 313, 315 (an officer not connected with the prosecution, held a person in authority); *Ky.* 1871, Young v. Com., 8 Bush 370 (one in whose house the accused, fleeing from pursuit, was sleeping; admitted); *La.* 1896, State v. Griffin, 48 La. 1409, 20 So. 905 (requested by a reporter; admitted); 1898, State v. Caldwell, 50 La. An. 666, 23 So. 896 (encouragement by a friend of the accused, that the prosecutor would help; admitted); *Me.* 1842, State v. Grant, 22 Me. 171 (a friend urging the accused to save his brother, jointly accused; admitted); *Mich.* 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 Mich. 614, 17 N. W. 78 (persons visiting the prisoner in jail with implied official authority; excluded); *Miss.* 1895, State v. Smith, 72 Miss. 420, 18 So. 482 (an employer whose factory had been burned; excluded); 1900, Hamilton v. State, 77 Miss. 675, 27 So. 606 (accused's employer, held on the facts a person in authority); *Mo.* 1900, State v. Bradford, 156 Mo. 91, 56 S. W. 898 (a prison guard; admitted); 1915, State v. Keller, 263 Mo. 539, 174 S. W. 67 (to a private detective; admitted); *Nebr.* 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); *Nev.* 1881, State v. Carrick, 16 Nev. 128 (the bondsmen of defendant urging him to say whether he had defaulted; admitted); *N. M.* 1919, State v. Foster, — N. M. —, 183 Pac. 397 (larceny of cattle; a State cattle-inspector, held a person in authority); *Pa.* 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); *Tenn.* 1875, Beggarly v. State, 8 Baxt. 526 (following Greenleaf); *Va.* 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 Gratt. 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); 1915, Jackson v. Com., 116 Va. 1015, 81 S. E. 192 (an employer who had been active in the prosecution; excluded).

§ 831. [1] 73 Mo. 705.

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 earlier 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-

[2] *Colorado:* Comp. L. 1921, § 6787 (various forms of physical coercion of arrested persons by a public officer to induce a confession are penalized); § 6788 (nothing herein shall "alter or affect in any manner whatever the rules of evidence", or prevent interrogation by officers); *Georgia:* P. C. 1910, § 1032 ("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"); § 1033 ("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"); *Hawaii:* Rev. L. 1915, § 2624 ("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); *Indiana:* Burns Ann. St. 1914, § 2115 ("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 or by intimidation or undue influences"); *Kentucky:* State. 1915, § 1649 *b* (confessions to police; quoted *post*, § 851); *Louisiana:* Const. 1921, Art. I, § 11 ("No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel confession of crime; nor shall any confession be used against any person accused of crime unless freely and voluntarily made"); *Minnesota:* Gen. St. 1913, § 8462 ("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"); *New York:* 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"); 1908, People *v.* Rogers, 192 N. Y. 331, 85 N. E. 165 (Code Cr. P., 1881, § 395; the words "private person" include a police officer or any other person not conducting a judicial proceeding); the New York Code's rule seems nowadays to be applied with more care, *i.e.* so as to render inapplicable all the quibbles dealt with in the ensuing sections; *Oregon:* Laws 1920, § 1537 ("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"); *Philippine Islands:* Act 619, §§ 2, 3 (Insular police force; physical violence or torture by a member to extort a confession is made a penal offence); § 4 ("no confession of any person charged with crime shall be received as evidence against him in any court of justice unless it be first shown to the satisfaction of the Court that it was freely and voluntarily made and not the result of violence, intimidation, threat, menace, or of promises or offers of rewards or leniency"); *Texas:* Rev. C. Cr. P. 1911, § 809 ("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"); § 810 ("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 made in the voluntary statement of the accused, taken before an examining court in accordance with law, or made in writing and

mon-law rule, and cannot be said on the whole to have effected any change, much less any improvement; except that in Hawaii, Indiana, and Washington the radical step of desirable reform (*post*, § 867) has been taken, and the traditional rules are practically abolished; and that in Texas the rule of exclusion is made even stricter than before.

§ 832. **Advice that "It would be better to tell the truth", or its equivalent.** On principle, the advice by any person whatever that it would be better to tell *the truth* cannot possibly vitiate the confession, since by hypothesis the worst that it can evoke is the truth, and there is thus no risk of accepting a false confession (*ante*, § 822). The confessor is not obliged to choose between silence and a false confession having powerful advantages; the advantages are attached to the utterance of the truth; and, however tempting we may suppose them to be, there is nothing in the nature of the temptation to make the statement untrustworthy; for if it has availed at all, it has availed to bring out the truth.

Nevertheless, judges have been found with such extraordinary scrupulosity as to exclude confessions following such advice.[1] The practical result under

signed by him, which written statement shall show that he was warned by the person to whom the same is made, first, that he does not have to make any statement at all, second, that any statement made may be used in evidence against him on his trial for the offence", etc.; "or unless in connection with such confession he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property or instrument with which he states the offence was committed; provided that where the defendant is unable to write his name and sign[s?] the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness"); the last clause, and the clause "or be made in writing" etc. were inserted by St. 1907, c. 118); *Washington:* R. & B. Code 1909, § 2151 ("The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats"); 1895, State *v.* Hopkins, 13 Wash. 5, 42 Pac. 627 ("the former rule as to excluding confessions made under inducement does not obtain in this State, in consequence of this statute").

§ 832. [1] In the following cases the confession was excluded:

ENGLAND: 1833, R. *v.* Enoch, 5 C. & P. 539, Parke, J. (by a constable, "she had better tell the truth or it would lie upon her"); 1841, R. *v.* Hearn, C. & M. 109 ("if she did not tell the truth, he would send for a constable to take her"); 1846, R. *v.* Laugher, 2 C. & K. 225 (by the accused's husband in the presence of the arresting constable; told "to tell the truth"; excluded on mixed grounds); 1848, R. *v.* Garner, 1 Den. Cr. C. 329, Maule and Patteson, JJ.; 1852, Pollock, C. B., in R. *v.* Baldry, 2 Den. Cr. C. 441; 1861, R. *v.* Parker, Leigh & C. 42; 1871, R. *v.* Bate, 11 Cox Cr. 686, Smith, J.; 1874, R. *v.* Dogherty, 13 Cox Cr. 23 (Ire.), Whiteside, C. J.; 1881, R. *v.* Fennell, 7 Q. B. D. 147; 1893, R. *v.* Thompson, 2 Q. B. 16, 18, Cave, J., *semble*. Pollock, C. B. in R. *v.* Baldry, *supra*, distinguished between "tell the truth", and "you had better tell the truth"; but this quiddity seems not to be elsewhere advanced.

CANADA: 1889, R. *v.* Romp, 17 Ont. 567 ("The truth would go better than a lie"; excluded).

UNITED STATES: *Federal:* 1897, Bram *v.* U. S. 168 U. S. 532, 18 Sup. 182 (the defendant was under arrest and was called in to 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

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]

ship think, that Brown is the murderer; but I don't know anything about it" ' "; in a labored opinion, 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"); 1919, Purpura *v.* U. S., 4th C. C. A., 262 Fed. 473 (larceny by a postoffice employee; "the case of Bram *v.* U. S. . . . is practically on all fours with the case at bar"; it was then nearly twenty-five years since the Bram decision; how much longer will that misguided and unrepudiated opinion continue to cloud the reputation of the Federal Supreme Court?); *Arkansas:* 1898, Hardin *v.* State, 66 Ark. 53, 48 S. W. 904 (by the sheriff, that to tell the truth would save the defendant from the death-penalty); 1904, Brewer *v.* State, 72 Ark. 145, 78 S. W. 773 (Hardin *v.* State approved); *California:* 1874, People *v.* Barrie, 49 Cal. 345; 1890, People *v.* Thompson, 84 Cal. 605, 24 Pac. 384; 1902, People *v.* Gonzales, 136 Cal. 666, 69 Pac. 487; *Columbia* (Dist.): 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); *Illinois:* 1922, People *v.* Heide, 302 Ill. 624, 135 N. E. 77 (but the opinion apparently looks upon Baldry's Case as representing modern English law, citing it to support the statement that "it has long been held . . . in England"; had the learned Court no access to the rulings of the English Court of Criminal Appeal, two generations later than Baldry's Case?); *Louisiana:* 1898, State *v.* Auguste, 50 La. An. 488, 23 So. 612 ("You must tell the truth"; excluded on the facts); *Massachusetts:* 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"); *Mississippi:* 1897, Ford *v.* State, 75 Miss. 101, 21 So. 524 (by a police officer); 1900, Hamilton *v.* State, 77 Miss. 675, 27 So. 606; *Missouri:* 1901, State *v.* Hagan, 164 Mo. 654, 65 S. W. 249 (that it "would be better" for him to make a "statement"); 1915, State *v.* Keller, 263 Mo. 539, 174 S. W. 67 (here the incorrect statement in the Court's opinion, that "the authorities practically agree", was unfortunately based on two anonymous compilations, which no judge can afford to substitute for personal perusal of the authorities); *New Hampshire:* 1858, State *v.* York, 37 N. H. 175 ("if she had set the building on fire, she had better own it"); *North Carolina:* 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"); *Pennsylvania:* 1846, Com. *v.* Harman, 4 Pa. St. 269 ("if you do not tell the truth, I will commit you"); *Rhode Island:* 1903, State *v.* Nagle, 25 R. I. 105, 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"); *South Carolina:* 1847, State *v.* Kirby, 1 Strobh. 378 (complicated facts).

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 Cox Cr. 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); 1911, Stanton's Case, 6 Cr. App. 198.

UNITED STATES: *Federal:* 1919, Fitter *v.* U. S., 2d C. C. A., 258 Fed. 567, 577 ("the best thing you can do is to tell the truth", admitted); *Alabama:* 1861, Aaron *v.* State, 37 Ala. 106 (Stone, J., writing an effective opinion); 1876, Meinaka *v.* State, 55 Ala. 47; 1881, Redd *v.* State, 69 Ala. 259, *semble;* 1901, Huffman *v.* State, 130 Ala. 89, 30 So. 394; Ala. *Arizona:* 1921, Roman *v.* State, — Ariz. —, 201 Pac. 551 ("If you are the men that done the robbery and murder at T., you better say so, because you will save some innocent man suffering", admitted); *Colorado:* 1911, Reagan *v.* People, 49 Colo. 316, 112 Pac. 785 ("I want the straight facts", admitted); *Columbia* (Dist.): 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); *Connecticut:* 1846, State *v.* Potter, 18 Conn. 178, *semble; Delaware:* 1842, State *v.* Harman, 3 Harringt. 567, *semble; Georgia:* 1852, Stephen *v.* State, 11 Ga. 234 ("tell the truth if you say anything"); 1856, Rafe *v.* State, 20 Ga. 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 Ga. 472, 479 (by the prosecutor, "it would be better to tell the truth if he was going to tell anything"); 1896, Minton *v.* State, 99 Ga. 254, 25 S. E. 626 (here the defendant himself first made the inquiry of the other person); 1917, Wilson *v.* State, 19 Ga. App. 759, 92 S. E. 309 (enlightened opinion by George, J.); *Iowa:* 1905, State *v.* Wescott, 130 Ia. 1, 104 N. W. 341; 1921, State *v.* Townsend, 191 Ia. 362, 182 N. W. 392 (by a chief of police, "You know that you have not told me the truth"; admitted); *Kansas:* 1900, State *v.* Kornstett, 62 Kan. 221, 61 Pac. 805; *Maine:* 1918, State *v.* Priest, 117 Me. 223, 103 Atl. 359 ("We want the truth", admitted); *Maryland:* 1873, Nicholson *v.* State, 38 Md. 153 ("I want you to tell me the truth and make a clean breast of it"); 1916, Deems *v.* State, 127 Md. 624, 96, Atl. 878 (murder; "the truth would hurt no one", etc.); *Massachusetts:* 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 Gray 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 Mass. 307 ("tell the whole truth"); 1883, Com. *v.* Nott, 135 Mass. 269, *semble;* 1904, Com. *v.* Hudson, 185 Mass. 402, 70 N. E. 436, *semble; Michigan:* 1920, People *v.* Foster, 211 Mich. 486, 179 N. W. 295; *Minnesota:* 1869, State *v.* Staley, 14 Minn. 111; *Missouri:* 1841, Hawkins *v.* State, 7 Mo. 192, *semble;* 1881, State *v.* Patterson, 73 id. 69; 1888, State *v.* Anderson, 96 Mo. 249, 9 S. W. 636; 1893, State *v.* Robinson, 117 Mo. 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"; 901, State *v.* Lipscomb, 160 Mo. 125, 60 S. W. 1081 (by the mayor, "better tell the straight truth"); 1902, State *v.* Armstrong, — Mo. —, 66 S. W. 961; *Nevada:* 1906, State *v.* Johnny, 29 Nev. 203, 87 Pac. 3 (by a sheriff, "You might as well tell the truth"); *New York:* 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"); 1910, People *v.* Chapman, 224 N. Y. 463, 121 N. E. 381 (murder; best to "tell the truth", admitted); *North Carolina:* 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); 1921, State *v.* Danelly, — N. C. —, 107 S. E. 149; *Ohio:* 1857, Fonts *v.* State, 8 Oh. St. 107; *Oklahoma:* 1921, Mays *v.* State, — Okl. Cr. —, 197 Pac. 1065; *Oregon:* 1912, State *v.* Humphrey, 63 Or. 540, 128 Pac. 824; *Philippine Islands:* 1913, U. S. *v.* Evangelist 24 P. I. 453, 460; *South Carolina:* 1856, State *v.* Gossett, 9 Rich. L. 428 ("it is a bad scrape you have got into; you had better tell the truth"); 1846, State *v.* Kirby, 1 Strobh. 155 ("if you confess you may be pardoned, but do not confess if you are innocent"); *South Dakota:* 1910, State *v.* Allison, 24 S. D. 622, 124 N. W. 747; *Texas:* 1902, Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583 ("the best you can do is to tell the truth", by a magistrate); 1921, Pierce *v.* State, 90 Tex. Cr. 302, 234 S. W. 537 (by the justice, "it would be best to go ahead and make the statement"; left to the jury); 1922, Smith *v.* State, — Tex. Cr. —, 237 S. W. 265 (better to "tell all about it"); *Vermont:* 1864, State *v.* Carr, 37 Vt. 192, 195, *semble* ("if you are going to tell anything, tell the truth, tell it just as it was"); *Wisconsin:* 1905, Hintz *v.* State, 125 Wis. 405, 104 N. W. 110; Roszczyniala *v.* State, ib. 414, 104 N. W. 113.

Compare the citations *post*, § 838 ("You had better confess").

The advice "you had better tell the truth" may under the circumstances be interpreted as advice to avow guilt, and in such a case the confession should be excluded, *if* in that jurisdiction the advice "you had better confess" (*post*, § 838) is regarded as vitiating the confession. This has been pointed out by Pierpoint, J., in State *v.* Walker, 34 Vt. 302: "But it is said that these were only inducements to *tell the truth*, and had no tendency to induce a confes-

In coming now to the inducements which may on principle be properly repudiated, it is best to take them up approximately in the order of their strength;[4] and first, therefore, of a

§ 833. **Threat of Corporal Violence (Rack, Whip, Lynching, "Sweat-box").** A threat of corporal violence is the clearest case of an inducement that excludes the confession. To escape the disagreeable consequences of silence — whip, gallows, or rack — the threatened person naturally prefers to utter what his tormentors desire to hear, — a confession. He trusts to chance to enable him to repudiate his untrue avowal and vindicate his innocence; or perhaps, under the violent pain of the rack, he thinks of nothing but the present relief from agony which his confession will gain him. Not every threat of violence, to be sure, is necessarily sufficient to cause distrust of the confession which follows it; "I shall put you out of my house unless you confess yourself guilty of this murder" has obviously no tendency to cause a false confession. But the typical cases of such violence in legal annals — the rack of the inquisitor, the whip of the slave-owner, and the slip-noose of the jail-breaking mob — serve as the clearest and least questionable instances of an inducement which vitiates a confession for evidential purposes.

That a confession obtained by the *rack*, or a threat of the rack, is inadmissible was apparently never judicially decided;[1] that it would be inadmissible is of course unquestioned to-day. Confessions obtained from slaves under the *whip*, or a threat of the whip, have usually been excluded, upon the circumstances 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]

sion that was not true. This is true to the ear of the respondent, but it is not so to his understanding. . . . The prisoner understands that, whether he is innocent or not, it will in some way better his condition to tell a different story." Many of the excluding decisions above noted are perhaps to be explained on this theory.

[4] Mr. Best's classification (Evidence, §§ 561–572) is based on the kind of the motive; but this is more useful psychologically than legally; the probable strength of the inducement is the important element.

§ 833. [1] *Ante*, § 818.

[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 Ala. 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 Ala. 12 (intimation to a slave by a master that a confession of guilt would make the matter better); 1855, Brister *v.* State, 26 Ala. 107, 129 (whipping of a slave to make him confess); 1863, Joe *v.* State, 38 Ala. 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 Miss. 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; *Alabama:* 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 Ala. 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 Ala. 1, 33 So. 329 (an officer's promise to protect the accused from the violence of persons desiring revenge, held not an improper inducement);

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 necessarily exclude a confession.[5] So far as the term has acquired a secondary meaning of *continuous interrogation* by the police of an accused under arrest (also termed

Arkansas: 1904, Edmonson *v.* State, 72 Ark. 585, 82 S. W. 203 (threat of hanging, excluded); *Illinois:* 1866, Miller *v.* People, 39 Ill. 457 (a mob hung the accused repeatedly, to make him confess); *Indiana:* 1907, Thurman *v.* State, 169 Ind. 240, 82 N. E. 64 (admitted on the facts); *Kentucky:* 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 Ky. 241, 43 S. W. 418 (confession during public excitement, admitted on the facts); *Louisiana:* 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 La. An. 478, 27 So. 50 (confession to private captors, with a rope around his neck, and in danger of lynching); 1904, State *v.* Gianfala, 113 La. 463, 37 So. 30 (excluded; poor ruling); *Mississippi:* 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, Mackmasters *v.* State, 82 Miss. 459, 34 So. 156 (confession in jail, under fear of a mob, and a promise to "help you out"); *Missouri:* 1901, State *v.* Moore, 160 Mo. 443, 61 S. W. 199 (threat of mob violence); *Montana:* 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); *North Carolina:* 1875, State *v.* Dildy, 72 N. C. 327 (violence used); 1880, State *v.* Drake, 82 N. C. 593 (same; a poor decision); *Tennessee:* 1853, Deathridge *v.* State, 1 Sneed 76 (threats to take life); *Texas:* 1867, Warren *v.* State, 29 Tex. 369 (threats to hang if confession was not made); 1871, Barnes *v.* State, 36 Tex. 356 (the accused was taken from the jail at night by persons in disguise and threatened with hanging); *Virginia:* 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, 1 Mood. Cr. C. 452 (same); 1893, Beckham *v.* State, 100 Ala. 15, 17, 14 So. 859 (threat construed as implying violence and inducing fear; excluded); 1922, State *v.* Rini, 151 La. —, 91 So. 664 ("the mere fact that officers have mistreated a prisoner" does not exclude a confession); 1922, White *v.* State, — Miss. —, 91 So. 903 (murder; confession by an ignorant negro boy, made after the "water-cure" had been done to him by a vigilance committee, excluded); 1822, State *v.* Hart, — Mo. —, 237 S. W. 473 (reply to an officer arresting the accused, "Don't kill me, I was there", admitted; "the weapon was not leveled at the defendant to induce him to confess, but to compel surrender"); 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); 1902, U. S. *v.* Balayut, 1 P. I. 451 (confession excluded on the facts); 1904, U. S. Lozada, 4 P. I. 226 (confession obtained in violation of Act 619, § 3, quoted *ante*, § 831, excluded); 1904, State *v.* Middleton, 69 S. C. 72, 48 S. E. 35 (confession obtained by threats of whipping, etc., excluded); 1906, Jackson *v.* State, 50 Tex. Cr. 302, 97 S. W. 312 (confession obtained by hanging and burning, 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 La. An. 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); 1917, Miller *v.* State, 13 Okl. Cr. 176, 163 Pac. 131 (confession made to a police-officer, who called defendant a vile name and caught him by the arm and "gave him a half nelson", excluded); 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.

For the use of *police-officers' questions to one under arrest*, and the statutes and decisions concerning the "sweat-box" or "third degree" in this sense, see *post*, § 851.

"third degree"), it does not fall under the present principle, and is considered *post*, § 851.

§ 834. **Promise of Pardon.** A promise of pardon is usually made directly conditional upon the furnishing of evidence for the Crown or the State. Whether the confessing person fulfils his engagement or not, it is obvious that such a confession, made as it is on the faith of a complete immunity from everything but the moral and social consequences of acknowledged guilt, may well be treated as untrustworthy. The stronger the apparent case against the accused, the greater the temptation, even to the innocent, to accept a sure legal immunity (weighted though it may be with unpleasant consequences of an indefinite sort), in order to escape probable legal condemnation.

Yet it was only by the 1800s that the doctrine can be said to have been fully established. It has already been seen [1] that the doctrine of using approvers' confessions against themselves was sanctioned as late as Lord Mansfield's time; and in Francia's Trial, in 1716,[2] a confession obtained apparently by a direct promise of favor was allowed to be used, the accused having failed, it was said, to disclose all that he promised. Moreover in Rudd's Case, in 1775,[3] although Lord Mansfield declared that the confession even of an accomplice who had not revealed the whole truth would "be of no prejudice to her on the trial", and although there are two other reported instances in the same century of the exclusion of accomplices' confessions thus induced,[4] this doctrine does not seem to have become established for some time —, at least, for accomplices who broke their faith by failing to furnish the promised disclosures; for Mr. Starkie, on the authority of a case otherwise unreported [5] was able to state the practice of 1824 as receiving such a confession.[6] Undoubtedly, however, though no subsequent English decision exists, any confession obtained by a promise of pardon would there to-day be excluded; and the principle has been well expounded in an Irish decision:

1866, O'Hagan, J., in *R.* v. *Gillis*, 11 Cox Cr. 69: "I think the question must be put thus: Was the prisoner induced by a person in authority to make the informations criminating himself by the hope of obtaining the immunity of an approver? I think he was. . . . He became a Crown witness in the reasonable expectation that he would escape punishment as a return for his accepted services in bringing other offenders to justice." [7]

§ 834. [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, I, 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 and convicted upon his confession").

[7] Three of the nine judges here dissented on the facts of the case; Burley's Case was treated as not involving this point. There is another Irish ruling: 1841, Berigan's Case, 1 Ir. Circ. R. 177 (the accused had been confined with another, who had turned Queen's evidence, and the accused, in confessing, had this in mind, but was cautioned against hoping; Crampton, J., admitted the confession, because, whatever the expectations might have been, they had not been induced by any one in authority).

In the United States such promises have always been regarded as vitiating the confession.[8] But it must be remembered that neither this nor any other 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 testimony 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

[8] 1830, Com. v. Knapp, 9 Pick. Mass. 499 (a case of peculiar circumstances); 1878, State v. Johnson, 30 La. An. 881; 1849, Conley v. State, 12 Mo. 470, *semble;* 1918, People v. Reilly, 224 N. Y. 90, 120 N. E. 113 (confession made to the district attorney under stipulation not to use it against him, not allowed to be used to contradict him on the trial, under the circumstances); 1875, Beggarly v. State, 8 Baxt. Tenn. 520, 526; 1864, State v. Carr, 37 Vt. 191.

[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).

§ 835. [1] *Excluded*, except where otherwise noted: 1906, Sorenson v. U. S., 143 Fed. 820, C. C. A.; 1871, People v. Johnson, 41 Cal. 453 (that there was enough evidence to convict, and a confession would make the punishment lighter); 1906, Smith v. State, 125 Ga. 252, 54 S. E. 190 ("it would be lighter on him"); 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 Ia. 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, — Miss. —, 20 So. 837 ("might go easier"); 1906, Maxwell v. State, — Miss. —, 40 So. 615; 1906, Johnson v. State, 89 Miss. 773, 42 So. 606 (promise to intercede with the judge, etc.; excluded); 1893, State v. Drake, 113 N. C. 624, 626, 18 S. E. 166 (by an officer, "It might be easier for you"); 1906, People v. Kent, 10 P. R. 325, 347 (promise not found on the facts).

[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,

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 confession of such offences for such a purpose have occurred. But that is no reason for assuming that ordinarily, or in even an appreciable proportion of cases, there is such force in the offer of a loaf of bread or of a sum of money as to cause us to distrust and to reject absolutely a confession so induced. Where the circumstances of a case show that a false confession was probably thus induced, let it be excluded. But to erect a fixed and unvarying rule on the basis of so unusual a contingency is to eliminate rationality from the law of Evidence.

§ 836. **Promises of other Favorable Legal Action (Cessation of Prosecution, Release from Arrest, Abstention from Arrest).** Coming under the same principle as the preceding class are those promises of other favorable legal action which stop short of promising complete immunity in the shape of pardon, but offer hopes or assurances, definite or indefinite, implying a cessation of prosecution, a recommendation to mercy, or the like.

(1) A promise in any way implying a *cessation of prosecution* or a *release from arrest* has usually been held to exclude the confession thus induced.[1]

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 Cox Cr. 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).

§ 836. [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 Mode 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 C. & P. 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"); 1881, R. *v.* Mansfield, 14 Cox Cr. 639, Williams, J. (an implied promise of forgiveness by the prosecutrix); 1910, Boughton's Case, 6 Cr. App. 8 ("It has been conclusively established" that a promise that "there will be no prosecution" excludes the confession); 1911, Stanton's Case, 6 Cr. App. 198 ("If you will give me back my rings, I will forgive you"; this "would be a grave question").

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.); 1918, Gravel *v.* The King; 50 D. L. R. 648, Que. (embezzlement by a postal clerk; statement made to his superior, who had said he "would try to assist him as much as possible" admitted).

UNITED STATES: *Ala.* 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 Ala. 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 Ala. 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 Ala. 44, 17 So. 321 (promise to end the prosecution); *Ark.* 1901, White *v.* State, 70 Ark. 24, 65 S. W.

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]

937 (by the injured person, "If you will tell me, I won't bother you"); *Cal.* 1867, People *v.* Hoy Yen, 34 Cal. 176 (promise to set free); *Del.* 1845, State *v.* Bostwick, 4 Harr. 563 (by a mistress, "I do not expect to do anything with you"); *Ill.* 1869, Austine *v.* People, 51 Ill. 238 (the accused signed an agreement to confess and to have the charge dropped); *Ind.* 1858, Smith *v.* State, 10 Ind. 106 (promise to try and stay prosecution); *La.* 1878, State *v.* Von Sachs, 30 La. An. 942 (promise to release from jail, if the stolen property was returned); *Mass.* 1804, Com. *v.* Chabbock, 1 Mass. 144 (promise of favor by the prosecutor); 1850, Com. *v.* Taylor, 5 Cush. 610 (promise by officers to use influence in his favor); *Mich.* 1883, People *v.* Wolcott, 51 Mich. 614, 17 N. W. 78 (assurance that he would "get off easier"); *Miss.* 1874, Garrard *v.* State, 50 Miss. 150 (by a magistrate, "I suspect you and you had better tell all about it if you want to get off"); 1899, Draughn *v.* State, 76 Miss. 574, 25 So. 153 (promise not to prosecute); *Mo.* 1849, Conley *v.* State, 12 Mo. 470, *semble* (promise by an important witness not to appear); 1873, State *v.* Hagan, 54 Mo. 192 (promise to set free); 1881, State *v.* Brown, 73 Mo. 632 (promise not to prosecute); 1904, State *v.* Hunter, 181 Mo. 316, 80 S. W. 955 (promise not to prosecute); *Nebr.* 1903, State *v.* Force, 69 Nebr. 162, 95 N. W. 42 ("If you tell all about the killing, you will get clear", excluded); *N. J.* 1828, State *v.* Guild, 10 N. J. L. 178 (the evidence is not entirely clear as to the offers made; they implied a setting free); *N. C.* 1872, State *v.* Lowhorne, 66 N. C. 638 (abandonment of prosecution); *P. I.* 1905, U. S. *v.* Caballeros, 4 P. I. 350 (promise that "nothing would be done to them"; excluded); 1907, U. S. *v.* Alameda, 8 P. I. 266 (promise not to prosecute); *Tenn.* 1840, Boyd *v.* State, 2 Humph. 40 (promise to try and have prosecution dropped, if accused would confess that he did the alleged malicious mischief in frolic only); 1871, Rice *v.* State, 3 Heisk. 217, 223 (promise not to prosecute); *Vt.* 1839, State *v.* Phelps, 11 Vt. 121 (favor to be shown); 1861, State *v.* Brierly, 34 Vt. 302 ("if B. [an accomplice] should get the start of you [in confessing], it may go hard with you").

In the above citations, some of the inducements are perhaps specific enough to bring the cases under one of the two foregoing sections. But no hard-and-fast classifications can be made; for the situations and the inducements shade too closely into one another. Nor would it be of service. The chief things to be noted are (1) that the clear tendency of the Courts is to assimilate 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] 1783, Thompson's Case, 1 Leach Cr. L., 3d ed., 325, Hotham, B. (by the injured person,

§ 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.

(2) The same earlier tendency to excessive caution had produced a ruling (based on the Drew case) that even "what you say will be used *against* you" would exclude the confession;[3] but this remarkable result was also overturned by the Baldry decision.[4]

"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); 1853, 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); 1915, R. *v.* DeMesquito, 26 D. L. R. 464, B. C. ("You will be arrested if you do not say where the goods are"; excluded); 1873, Beery *v.* U. S., 2 Colo. 189, 203 (a threat to arrest unless he confessed, and promise to release if he confessed).

§ 837. [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 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, 1 Cox Cr. 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, "be 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. Tenn. 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, 117 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); 1915, State *v.* Murphy, 87 N. J. L. 515, 94 Atl. 640 (Roesel *v.* State followed).

§ 838. **Assurance that "You had better confess."** Is it conceivable that the indefinite and elusive assurance of advantage contained in the phrase "you had better confess" is in any degree calculated to induce a false confession? What tangible attraction is there in it? It is an exhortation, to be sure, which might turn the balance, in the breast of a guilty person, between silence and confession; but, with an innocent man, that is too extraordinary a supposition to justify any evidentiary rule of exclusion. Nevertheless, this has always been held (under circumstances of greater or less unreason) to be a vitiating inducement [1] — upon the rule, of course (*ante*, § 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.

§ 838. [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 Littledale, JJ. (by a surgeon attending deceased); 1833, R. *v.* Walkley, 6 id. 175, Gurney, B. (by a person not specified); 1834, R. *v.* Simpson, 1 Moody Cr. C. 410 ("it will be better for you if you tell and worse for you if you do not"; but also, apparently, "you will go free if you confess"); 1834, R. *v.* Thomas, 6 C. & P. 353, Patteson, J. (by a person not specified, "you had better split, and not suffer for all of them"); 1836, R. *v.* Shepherd, 7 C. & P. 579, Gaselee, J. (by a constable, "you had better not add a lie to the crime of theft"); 1841, R. *v.* Moody, 2 Cr. & D. 347, Torrens, J. ("If any other person had to do in the case, it is better you should tell"; this perhaps falls under the class of § 832, *ante*); 1846, R. *v.* Croydon, 2 Cox Cr. 67 Platt, B. ("you may as well tell me"); 1848, R. *v.* Collier, 3 Cox Cr. 57, Williams, J. ("because it would save him the shame of a search-warrant"); 1851, R. *v.* Warringham, 2 Den. Cr. C. 447, Parke, B. ("it would be best for him if he would tell how it was transacted"); 1862, R. *v.* Cheverton, 2 F. & F. 833, Erle, C. J.; 1868, R. *v.* Coley, 10 Cox Cr. 536, Mellor and Williams, JJ. (by a constable, "if you do not tell, it will be the worse for you"); 1893, R. *v.* Thompson, 2 Q. B. 12, 18 (by the prosecutor, "It will be the right thing for M. to make a clean breast of it").

UNITED STATES: *Ala.* 1887, Banks *v.* State, 84 Ala. 430, 4 So. 382 (by an officer, "it would be best for him to tell all about it"); *Ga.* 1891, Green *v.* State, 88 Ga. 516, 15 S. E. 10 (by a sheriff, "if you know anything, it may be best for you to tell it", and with the accused's repeated professions that his story was voluntary); 1901, Dixon *v.* State, 113 Ga. 1039, 39 S. E. 846 (confession upon an officer's advice that "if she knew anything she had better tell it", these two rulings perhaps should be classed under § 832, *ante*); *La.* 1848, State *v.* Nelson, 3 La. An. 499 ("it would be better to tell what he had done"); 1903, State *v.* Alexander, 109 La. 557, 33 So. 600 (by a police officer, "If you have got anything to say, you had better say it now"); *Mass.* 1883, Com. *v.* Nott, 135 Mass. 269 (by an officer); 1879, Flagg *v.* People, 40 Mich. 706 (the urging was repeated and the prisoner was in irons and was furnished with liquor, and an intention to force a confession had been expressed by the officer); *Miss.* 1898, Mitchell *v.* State, — Miss. —, 24 So. 312; 1914, Johnson *v.* State, 107 Miss. 196, 65 So. 218 (Smith, C. J., diss.); *Mo.* 1870, State *v.* Brockman, 46 Mo. 569 ("it would be better for him to own up", with an express refusal to promise immunity); *N. Y.* 1836, People *v.* Ward, 15 Wend. 231; *N. C.* State *v.* Winston, 116 N. C. 990, 21 S. E. 37 ("best to tell"); 1899, State *v.* Davis, 125 N. C. 612, 34 S. E. 198 (by an arresting officer, "he had as well tell all about it"); *Va.* 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 Mass. 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 and 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.

§ 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. **Influence 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 use of exhortations invoking the terrors of punishment predicated by theological beliefs could be regarded as vitiating a confession. It is obvious that, in their ordinary aspect, the influence of religious considerations makes en-

§ 839. [1] 1872, R. *v.* Vernon, 12 Cox Cr. 153 ("How came you to do it?"); 1853, Carroll *v.* State, 23 Ala. 38; 1911, State *v.* Lee, 127 La. 1077, 54 So. 356 ("If I was in your place and you was the right man, I would try and effect a compromise"; excluded); 1867, People *v.* Wentz, 37 N. Y. 307; 1883, People *v.* McGloin, 91 N. Y. 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, Cain'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: England: 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).

Canada: 1884, Re Stambro, 1 Manit. 263, 268 (certain inducements as to resuming employment, held not to exclude); 1917, R. *v.* Benjamin, 41 D. L. R. 388, Que. (by a justice of the peace, at the request of the high constable, to "try to make him tell where he put the shirt"; excluded).

United States: 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); 1912, State *v.* Kwiatkowski, 83 N. J. L. 650, 85 Atl. 209 (by an interpreter, that he would help him if he could; admitted); 1868, State *v.* Mitchell, Phillips N. C. 448 (confession made in asking advice of a fellow-prisoner; admitted); 1920, People *v.* Rodriguez, 28 P. R. 464 (violation of excise law).

§ 840. [1] R. *v.* Radford, 1 Mood. Cr. C. 197 (where 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 then and is still a mooted point; *post*, § 2394) entered into the result.

tirely for truth in a confession, and not against it. Mr. Joy's exposition of this point cannot be improved upon:

1842, Mr. *Joy*, Confessions, 51: "It seems difficult to imagine that a man under spiritual convictions and the influence of religious impressions would therefore confess himself guilty of a crime of which he was *not* guilty; or that a man under a strong sense of his spiritual relations with God could hope to please God by a falsehood; that a 'confidence created' between him and his pastor, or the 'being thrown off his guard' by this confidence, should induce him, not to confess (*that* it might naturally do if he were guilty), but induce him to confess *falsely*. Such spiritual convictions, or spiritual exhortations, seem from the nature of religion, the most likely of all motives to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth, because it is likely to lead to falsehood. If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead to nothing but truth."

A case might be presented, however, in which the use of such exhortations approached so near the line of intimidation that some plausibility might be given to the argument that the confession was not voluntary. Such was *R. v.* Gilham, in which as strong a case as possible for such an argument 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; Mr. *Moody*, for the accused: "The case states a continuous series of religious terrors impressed on the prisoner's mind, with a view to obtain a confession —, in the first instance by the gaoler, in placing before him religious books with that subject put prominently before him; and in the second instance by the chaplain, whose whole language and exhortation unceasingly dwelt on the duty of confession as a condition of forgiveness with God, and accompanied with the terrors of God's vengeance put forward, not only with the force expressed in the commination service, but with all the additional effect which the personal authority and manner of the chaplain would of necessity produce. . . . Looking therefore to the whole tenor of the chaplain's conversation, and to the state of mind produced, the necessary conclusion is that this confession was made under duress." Mr. *Follett*, for the Crown: "Unless it is believed that a confession given under religious impressions is not entitled to credit, but springs from motives that are likely to lead to falsehood, these confessions were properly received. But who can possibly suppose that a man under the influence of a deep sense of religion, as it is admitted the prisoner was, would confess an atrocious murder of which he was not guilty, and that he could hope to please God by a falsehood?" "The judges present were unanimously of opinion that the confessions were properly received."

No exhortations, then, of a moral or a spiritual nature, have ever (since R. *v.* Radford) been regarded as vitiating a confession,[2] — a result commended alike by principle and by common sense.

[2] ENGLAND: 1822, R. *v.* Gibney, Jebb Cr. C. 15, by all the Irish Judges (where the constable and others said "What a terrible thing to murder your own child!"; admitted, on the principle that "the fear to be produced must be of a temporal nature, 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 Mood. 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 ob-

§ 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.[1] 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.

tained"); 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").

UNITED STATES: *Colo.* 1913, Mitsunaga *v.* People, 54 Colo. 102, 129 Pac. 241; *Ga.* P. C. 1910, § 1033 ("spiritual exhortation" does not exclude); *Mass.* 1808, Com. *v.* Drake, 15 Mass. 161 (penitential confession to fellow-members of the church); *N. Y.* 1824, Johnson's Trial, N. Y., 1 Amer. St. Tr. 512, 525 (murder; the accused was taken, when arrested, to the hospital and "was required to touch the dead body"; he afterwards confessed at the police office; Edwards, J., admitted the confession).

Contra, semble: 1914, Johnson *v.* State, 107 Miss. 196, 65 So. 218 (Smith, C. J., diss.).

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. Va. 665 (confessing to save a mother from the charge of complicity).

Compare the instances of such self-sacrifice cited *post*, § 867.

§ 841. [1] ENGLAND: 1826, R. *v.* Derrington, 2 C. & P 418 (letter handed to the turnkey, who *violated* his promise to post it); 1917, R. *v.* Robinson, 2 K. B. 108 (letter written after conviction, mailed to a woman, but copied by the prison authorities before mailing, admitted, by copy, the original being destroyed).

CANADA: 1904, R. *v.* Todd, 13 Man. 364 (detectives pretended to be a gang of criminals, and obtained a confession from the accused as qualifying him to join their gang; admitted); 1908, R. *v.* White, 18 Ont. L. R. 640 (confession induced by a police officer's false statement as to an accomplice confessing, admitted).

UNITED STATES: *Federal:* 1900, Jackson *v.* U. S., 42 C. C. A. 452, 102 Fed. 473, 483 (approving Com. *v.* Cressinger, Pa.); *Alabama:* 1867, King *v.* State, 40 Ala. 319 (by letting the accused think that a supposed accomplice had been shot); 1895, Stone *v.* State, 105 Ala. 60, 17 So. 114 (by pretending to be an accomplice); 1895, Burton *v.* State, 107 Ala. 108, 18 So. 284 (by a detective pretending to be a fellow-prisoner); *Delaware:* 1870, State *v.* Darnell, 1 Houst. Cr. C. 322 (made in confidence); *Georgia:* 1892, Cornwall *v.* State, 91 Ga. 277, 282, 18 S. E. 154 (to an officer who pretended to help his escape); P. C. 1910, § 1033 ("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); *Illinois:* 1853, Gates *v.* People, 14 Ill. 436 (by deception a letter was obtained); *Massachusetts:* 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); *Michigan:* 1910, People *v.* Dunnigan, 163 Mich. 349, 128 N. W. 180 (repudiating the contrary intimation in People *v.* McCullough, 81 Mich. 25, 45 N. W. 515); 1921, People *v.* Utter, — Mich. —, 185 N. W. 830 (murder; confession made to a detective impersonating a fellow-prisoner in the jail, held admissible); *Missouri:* 1874, State *v.* Jones, 54 Mo. 481 (a trick); 1881, State *v.* Phelps, 74 Mo. 136 (showing to the accused his engagement ring and telling him that the woman had "gone back on him"); 1887, State *v.* Brooks, 92 Mo. 542, 576, 5 S. W. 257, 330, 13 Amer. St. Tr. 702, 728 (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); *Nebraska:* 1886, Heldt *v.* State, 20 Nebr. 492, 30 N. W. 626 (detective pretending to be a fellow-prisoner); *New York:* 1903, People *v.* White, 176 N. Y. 331, 68 N. E. (pretences to be accused's friend); 1907, People *v.* Furlong, 187 N. Y. 198, 79 N. E. 978 (People *v.* White, *supra*, followed); 1909, People *v.* Scott, 195 N. Y. 224, 88 N. E. 35 (confession induced by a trick purporting to give the defendant a chance to escape, admitted, under C. Cr. P., § 395); 1915, People *v.* Buffum, 214 N. Y. 53, 108 N. E. 184 (woman's confession of murder obtained by unspecified artifices); *Ohio:* 1868, Price *v.* State, 18 Oh. St. 418 (a false statement

(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]

5. Nature of the Inducement (continued): Confessions on Examination before a Magistrate or in other Legal Proceedings

§ 842. **Orthodox Principle.** The question is here presented: Is there anything in the fact of arrest, as such, or in the fact of presence before a magistrate, as such, or of examination on oath, as such, which tends to produce an untrue confession of guilt?

We now assume the absence of any of the other kinds of inducements anywhere deemed fatal; we assume that no threats, promises, assurances, urgings, or other inducements sufficient in themselves to exclude, have been held out; we are to consider merely the effect of the above facts in themselves. Remembering this, and applying the test already indicated as the orthodox one (*ante*, §§ 822, 824), "Was the inducement such that there was any fair risk of a false confession?" there can be on principle but one answer, namely, no such risk exists, and the confession is admissible. For the circumstances of arrest and of presence before a magistrate, no argument can be necessary; and even for the extreme case of an answer under oath, it must be obvious that so far as any answer at all is thereby compellable, it is, according to the terms of the oath, to be a true answer; that is all that is demanded or compelled.[1] There is on principle not the vestige of an argument for excluding a confession merely because of such a circumstance; and, as a matter of history, such an exclusion was not thought of until the novel judicial attitude of the 1800s gave it a partial sanction and opened the way for that misuse

that an alleged accomplice had confessed); *Pennsylvania:* 1857, Fife *v.* Com., 29 Pa. 435 (the accused was falsely told that accomplices had confessed); 1898, Com. *v.* Goodwin, 186 Pa. 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 Pa. 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"); *Porto Rico:* 1912, People *v.* Almestico, 18 P. R. 314 (confession obtained by false statements, admissible).

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*).

Distinguish the following: 1908, R. *v.* Choney, 17 Man. 467 (a purporting agent of defendant's attorney falsely told the defendant while in jail that the attorney had telephoned him "to tell him everything about the case"; excluded).

[2] So, too, of a confession made during *sleep* or during *hypnotic influence* (*ante*, § 500), or during *insanity* (*ante*, §§ 493-495).

§ 842. [1] 1838, Morton, J., in Faunce *v.* Gray, 21 Pick. Mass. 245 ("The fact that it was made under oath cannot diminish its force or render its competency questionable. If it contain a true narrative of facts, justice requires that they should be admitted. And no man will be likely to make *false* admissions against himself, because he has been sworn to tell the truth"); Smith, C. J., in Wood *v.* Weld, Smith N. H. 367, referring to a similar examination on oath ("What hardship is it to be obliged to tell the truth? No means [were] used to produce anything but the truth"); and see R. *v.* Scott, *post*, § 843; and U. S. *v.* Kirkwood, Utah, *post*, § 852.

of precedents by which extreme results have been reached in a few jurisdictions.

But we find also in use, and competing for recognition, certain other tests, which are all derived from the phrase "voluntary", but as applied and worked out for the situations now in hand have a meaning and effect very different from the ordinary one as already expounded (*ante*, § 826).

§ 843. **Principle of Voluntariness: (1) Common Form.** The common form, in the present application, consists in taking the phrase "voluntary", considering it without any reference to promises or threats, and erecting it into an absolute and final test, — in short, in translating it as "spontaneous." The notion is a broad one, and is in effect: Was the situation such that the person *had* to speak, felt obliged to speak, or was it a matter of pure choice with him to speak or not?

The radical difference here, it will be observed, is that we no longer care whether his speaking involves a false avowal of guilt; the thing is that a speaking not voluntary cannot be received, and hence the speaking is excluded irrespective of the danger of falsity. If, then, we take the phrase "voluntary" and treat it as the final and self-sufficient test, and if thus we discard the fundamental theory of confessions (*ante*, § 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 com-

mon 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 not felt or supposed herself to be a prisoner, and not appearing to have been obtained by any threat or promise or other undue or unfair means, was properly receivable in evidence. But on the other hand, I am of opinion that if the defendant had at the time of that conversation felt herself to be in custody on the criminal charge, then her statements in answer to the questions would not have been receivable, unless prefaced by a caution."

1862, RICE, J., in *State* v. *Gilman*, 51 Me. 223: "Does it follow that because a statement is made upon oath in a proceeding where the circumstances of the commission of the crime are being investigated, and the person making such statements is a suspected or accused person, that it must necessarily be involuntarily made? . . . The argument is that the impressiveness of obligation and the solemnity of the occasion would have a tendency to wring from the party thus situated facts and circumstances which he is not bound to disclose, and therefore can in no just sense be said to be voluntary. As a general proposition this may be true, especially if the party is uninformed with regard to his rights. But when he is fully apprised of his rights and informed that he is under no legal obligation to disclose any facts prejudicial to himself, or to give evidence against himself, and then deliberately makes statements under oath, no good reason is perceived why such statements should not be given in evidence against him. . . . If it be said that, though a party in such a situation may be under no legal constraint, he may nevertheless feel under a degree of moral compulsion, and from that cause feel impelled to make self-incriminative statements, the answer is that this moral pressure bears with no greater force upon him when on the stand voluntarily than in other situations. A party who finds himself surrounded with circumstances calculated to cast 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 at.[2] (3) There is, however, a third way of dealing with this doctrine; and that is to accept its principle — *i.e.* that a statement not voluntary is to be excluded, irrespective of its truth or falsity, — but to deny that there can be any compulsion in the mere facts of custody or of examination upon oath, because the person is always at liberty to refuse to speak. This answer may still leave open to dispute the question whether at least a "caution" (or notification to the person of his privilege) is not essential; but the theory that the person must be supposed to know that he need not answer (as applied in State *v.* Vaigneur, *infra*) would practically repudiate such a requirement.[3]

§ 844. **Same: (2) Modern English Form.** In the last half of the 1800s there appeared 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

§ 843. [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 Faunce *v.* Gray, and Smith, C. J., in Wood *v.* Weld, quoted *ante*, § 842.

[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. S. C. 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."

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:

1885, A. L. SMITH, J., in *R.* v. *Gavin*, 15 Cox Cr. C. 656: "When a prisoner is in custody, the police have no right to ask him questions. Reading a statement over, and then saying to him, 'What have you to say?' is cross-examining the prisoner, and therefore I shut it out. A prisoner's mouth is closed after he is once given in charge, and he ought not to be asked anything."

1864, 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 was doubtlessly partly due to an impression that the statute of 1850 (considered later) should be treated as in spirit excluding all evidence from accused persons in custody not obtained by the statute-sanctioned method. Partly, also, it was due, as the preceding form is, to a confusion of confession-law with the privilege against self-crimination; the privilege, of course, does not affect statements not made on the stand but made while in custody (*post*, § 2263); and in applying the law of confessions to the latter situation, the judges have modified it by an infusion of the spirit of the above privilege; so that we find presented under the head of confession-law a notion excluding statements made merely in answer to questions by a custodian,[1] — a result which would be natural enough as an extension of the privilege against self-crimination, but is quite anomalous in the law of confessions.

§ 845. **Same: (3) Selden's Principle of Mental Agitation.** Another form of test derived from the phrase "voluntary" is still broader in its excluding effect, and differs radically in one point from the preceding two. Like them, (1) it takes "voluntariness" as a final standard; but (2) it does not discard, but retains, the fundamental notion of confession-law that a probable untruth is that which we are seeking to reject; and furthermore (3) it includes, as the second does, under "confession" anything and everything said by the person, whether an avowal of guilt or an assertion intended to exculpate and to demonstrate innocence.[1]

Its peculiar different result arises from applying the idea (2) to the statements included in (3). Thus, it argues: Persons suspected wrongly of a

§ 844. [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"; an utter confusion of two things distinct in history and in principle).

§ 845. [1] A notion whose fallacy has already been examined (*ante*, § 821).

crime, especially when officially charged with it and questioned about it, are apt, particularly when the circumstances are strongly inculpatory and demand explanation, to make the first explanation that occurs to them, to deny incriminating facts, and, in short, to assert and try to prove their innocence by inventing false stories, which if true would show their innocence; hence, statements so made cannot fairly be trusted, and should be rejected. The chief representative statements of this theory are found in the following passages:

1854, SELDEN, J., dissenting, in *Hendrickson* v. *People*, 10 N. Y. 33: "The mental disturbance produced by a direct accusation, or even a consciousness of being suspected of crime, is always great, and in many cases incalculable. The foundation of all reliance upon human testimony is that moral sentiment which universally leads men, when not under some strong counteracting influence, to tell the truth. This sentiment is sufficiently powerful to resist a trifling motive, but will not withstand the fear of conviction for crime. Hence, the moment that fear seizes the mind, the basis of all reliance upon its manifestations is gone. . . . The mind, confused and agitated by the apprehension of danger, cannot reason with coolness, and it resorts to falsehood when truth would be safer, and is hurried into acknowledgments which the facts do not warrant. Neither false statements nor confessions, therefore, afford any certain evidence of guilt when made under the excitement of an impending prosecution for crime."

1864, PIGOT, C. B., dissenting, with LEFROY, C. J., and O'BRIEN, J., in *R.* v. *Johnston*, 15 Ir. C. L. 60, 121: "It must be shown to the satisfaction of the judge that the statements have been purely *voluntary* statements of the prisoner. . . . The danger to be guarded against is not, in the far greatest 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."

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 principle has any validity even for the class of statements, namely, assertions of facts showing innocence, as to which it is worked out. In that department of Evidence such a principle is without precedent, and is in conflict with all analogies. The conduct of a suspected person, in concealing or destroying incriminating evidence or in fleeing from justice, has always been admitted, subject to any innocent explanation that can be made (*ante*, §§ 273–276), and his false assertions of an *alibi* and other false explanations of conduct have always been admitted (*ante*, §§ 277–278); yet if the above principle were good, it would necessarily exclude all conduct and statements while under suspicion, and not merely while in custody or on the stand. Thus the principle is without precedent or analogy, and is unworkable in practice.[4]

§ 846. **Present Status of the above Principles.** The first of the above three principles is less recognized to-day.

The second is that which prevails in most jurisdictions, though it is not uniformly nor consistently applied.

The third can hardly be said to prevail completely in any jurisdiction, its chief function having been to throw precedents and principles into confusion,

[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?"

[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 of circumstances may lead the innocent man to resort to this as a measure of safety. This is quite as true as that suspicion will lead a man to false statements for the same purpose. There must be some limit to the rule excluding declarations, short of the test that they be made when he is under no consciousness that he is under suspicion: else the whole conduct of the party, from the moment he is apprised that he is suspected, must be declared to be too unreliable to be made the subject of any inference whatever").

to unsettle the course of decision, and to suggest confusing arguments while not commanding complete adherence. It was first judicially advanced by the eminent Mr. J. Selden,[1] in 1854, in the Teachout Case in New York, at nearly the same time that it was being repudiated by the English judges, in 1856, in Scott's Case; it was subsequently championed by the dissenting judges in the Irish case of R. *v.* Johnston, in 1864; but it did not obtain any further footing in England or Ireland; and it had vogue as a determining doctrine in only a few American jurisdictions. Apart from its lack of precedent, the false basis of supposed principle by which it is reached, and its conflict with analogies, it is workable simply and consistently up to a certain point only, *i.e.* quite as far as Mr. J. Selden and the Irish judges wished to carry it. But this is radically different from and opposed to the other principles; and the unfortunate thing has been, for many Courts, that they have not seen this. They have thought to recognize it partially, but not wholly and in connection with other principles, — an unfortunate thing, because this test is not reconcilable in any degree with either of the other tests (except in part the last preceding one) and cannot coexist with them in the same body of law. 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; Police Interrogations.** It was for a long time the clear and unquestioned law in England that the mere circumstance of *arrest*, even when combined with the cir-

§ 846. [1] It had already been advanced, however, by counsel, Mr. Dundas, in 1838, in Wheater's Case, *post;* and Mr. J. Selden probably found it there. But a spurious passage, much quoted, in Gilbert's Evidence and Hawkins' Pleas of the Crown also served as a source; this passage is examined *ante*, § 818.

cumstance 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]

"It may be proper that the police authorities should forbid the practice of questioning a prisoner by a constable, and it might reasonably induce caution, and perhaps suspicion, and a scrutinizing jealousy in jurors, in investigating the credit of a witness who obtains a confession through such means. But the cases before the twelve judges, both in England and Ireland, already cited, seem to establish that statements made in answer to questions put, without any caution and by a person who has no authority to question the prisoner, are admissible in evidence. . . . Such confession, if voluntary and free, is admissible, although it appears that he was not cautioned."

It is to be noticed (1) that from the point of view of the "threat or promise" test (*ante*, § 825) the result was a necessary one, because by hypothesis no threat or promise was employed; (2) that in the absence of a threat or a promise, the test of "voluntariness" was regarded as satisfied; (3) that no caution was required; and (4) that the rule was repeatedly affirmed 'in banc.'

In the meantime, in Ireland, the same result had been reached in Gibney's Case, by all the judges.[6] But some twenty years afterwards came a series of Irish rulings by individual judges excluding such confessions;[7] the reasons

§ 847. [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 C. & P. 318, Bosanquet, J. (to a constable, in custody on the way to jail); 1833, R. *v.* Long, 6 C. & P. 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.

[6] 1822, R. *v.* Gibney, Jebb Cr. C. 15, by all the Irish judges (statements in answer to questions by a constable, while under arrest on the way to jail, with a crowd about him asking questions; no caution given; "they held the rule to be well established that a voluntary confession shall be received in evidence, but if hope has been excited, or threats or intimidation held out, it shall not", and admitted it here). This was followed in 1842: R. *v.* Hughes, quoted in Joy, Confessions, 39 (a statement had been made while in custody, in answer to a constable's questions; Crompton, J., "had frequently had occasion to decide this question, and all these [cases cited] had been before him. The confession of a man, to be admitted, is not to be extorted by fear nor educed by flattery; but where a prisoner voluntarily gives it, it may be received, whether the questions be put to him by an authorized or unauthorized person. Wherever the declaration is voluntary, he would receive it, and the doctrine in Wild's Case was the true one").

[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, 1 Cr. & D. 396, Bushe, C. J. (a constable visiting the accused in jail, and questioning her, after a caution); 1841, R. *v.* Devlin, 2 Cr. & D. 151, Bur-

being variously given. The uncertainty of practice thus introduced was finally settled in 1864 by the great case of R. *v.* Johnston,[8] wherein the original and orthodox view was maintained by the majority, that confessions made under such circumstances were not in themselves inadmissible, and were to be tested, like other confessions, according to the presence or absence of some other and specific inducement in the way of a threat or a promise.

Meantime, in 1849, 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. 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 rule (described *ante*, § 844), made its appearance in England; *i.e.* any *answers obtained by questions put by an officer to a person in custody* were excluded; this rule was by most judges enforced from that time onwards.[10]

ton, J., and Brady, C. B. (a police-inspector questioning the accused in jail; excluded); 1856, R. *v.* Toole, 7 Cox Cr. C. 244; Pigot, C. B., and Richards, B. (statement in answer to a police-inspector while under arrest, after caution; excluded, the current difference of opinion among the judges being noted); 1861, R. *v.* Hassett, 8 Cox Cr. 511, Christian, J. (similar facts; evidence requested to be withdrawn as doubtful); 1863, R. *v.* Bodkin, 8 Ir. Jur. N. s. 340, Pigot, C. B. (statement in answer to a question by a constable while under arrest, after caution; excluded, because constables "ought to abstain from asking questions").

[8] 1864, R. *v.* Johnston, 15 Ir. C. L. 60, before eleven Irish judges (the accused made statements in answer to the police, just after notice of the charge, but before arrest, no caution being given; Deasy, B., with whom concurred Hughes and Fitzgerald, BB., Monahan, C. J., and Fitzgerald, Ball, and Keogh, JJ., held the statement admissible because of the absence of threat or inducement; Ball, J. (109): "the general result of the foregoing cases appears to be that from the year 1822 down to the present time — that is, for a period of upwards of forty years — it has been recognized as the law of the land, both in England and Ireland, that admissions or statements obtained from prisoners through the instrumentality of questions from police constables, without any previous caution, are admissible in evidence against them; provided that such admissions or statements be the voluntary acts of the prisoners, not induced by either hope or threat operating upon their minds"). The views of Hayes, J., and Lefroy, C. J., dissenting, represented the test of § 844, *ante;* the view of Pigot, C. B., and O'Brien, J., dissenting, represented the test of § 845, *ante;* see the quotations in those sections.

[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] *England:* 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.

Subsequent rulings were as follows: 1893, R. *v.* Male & Cooper, 17 Cox Cr. 689 ("The prisoner should be previously cautioned"); 1895, R. *v.* Miller, 18 Cox Cr. 54 (answers to questions by an inspector without caution, admitted; "it is impossible to discover the facts of a crime without asking questions"); 1898, Rogers *v.* Hawken, 19 Cox Cr. 122 (R. *v.* Male & Cooper not followed; there is "no such rule" that a statement made in answer to an officer's question, without caution but without inducement, is inadmissible; good opinion by Russell, L. C. J.); 1898, R. *v.* Histen, 19 Cox Cr. 16 ("When a prisoner is once taken into custody, a policeman should ask no questions at all without administering the usual caution"); 1905, R. *v.* Knight & Thayre, 20 Cox Cr. 711 ("When a police-officer has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. . . . I am not aware of any distinct rule of evidence that if such improper questions are asked the answers to them are inadmissible, but . . . in my

These rulings, and the statute, resulted in a change of police tradition, or at any rate, in the dominance of a tendency, long undercurrent, to apply to this situation the dictates of that sporting instinct (*post*, §§ 1845, 2251, *ante*, § 194) which has done so much in other parts of English law to establish the principles of fair and considerate treatment of the accused.

The modern spirit of the English practice is well portrayed in the following passage: [11]

1916, Mr. *Frank Froest*. The Maelstrom, c. XXXIV (the man Ling, strongly suspected of the cruel assassination of an old man, has been arrested. He is a known professional criminal. Conversation then ensues between Heldon Foyle, superintendent of the Criminal Investigation Department, New Scotland Yard, and Weir Menzies, chief detective inspector of the same):

"It happened after you had gone and they 've just had me on the 'phone. You know they put a constable in the cell with him? Ling offered the man one hundred pounds to smuggle him out."

"That 's interesting. Looks as if he does n't fancy his chance overmuch." The detail did not appear to greatly stir Menzies.

"Yes, but listen to this. The blame fool constable, after refusing it, seems to have got him into conversation with Ling and asked him if he really did shoot Greye-Stratton."

Some sign of consternation flickered over Menzies' face. "You don't say," he exclaimed. "The cabbage-headed idiot! . . ." Words failed him.

There is one unforgivable blunder in the Metropolitan Police, the hideousness of which no layman can adequately plumb. To question a prisoner, to coax or bully him into an admission of guilt is one of those things that no zeal, no temptation can excuse. It is not merely that it is against the law. It is not playing the game. The slightest suggestion that such a course has been pursued has before now secured a guilty man's acquittal.

opinion that is the right course to pursue"); 1909, James' Case, 2 Cr. App. 319 (to a police-officer, while under arrest; he said, "You must tell me. . . . Any statement will be given in evidence against you at your trial"; no caution; admitted, citing R. *v.* Thomas and R. *v.* Reason); 1909, Best's Case, 1 K. B. 692 (answers given to a constable's questions after a caution, admitted; L. C. J. Alverstone: "In our opinion R. *v.* Gavin, 15 Cox Cr. C. 656, is not a good decision; . . . it is too wide and requires qualification"); 1910, Unsworth's Case, 4 Cr. App. 1 (confession while in jail to a constable; no warning, no inducement; admitted).

Canada: 1904, R. *v.* Kay, 11 Br. C. 157 (answers to police officer, without a caution, and under arrest, excluded; "the arrest and charge are in themselves a challenge to the accused to speak, — an inducement within the rule"; a caution of the purpose and consequences must be given); 1913, U. S. *v.* Wrenn, N. Sc., 10 D. L. R. 452 ("the practice of detectives interrogating a prisoner when in jail, and when no one else is present at the interview, should be discouraged"); 1890, R. *v.* Day, 20 Ont. 209 ("Although we reprehend the practice of questioning prisoners, we cannot come to the conclusion that evidence obtained by such questioning is inadmissible"); 1899, R. *v.* Elliott, 31 Ont. 14 ("R. *v.* Day is the case settling the law in this Province"); 1909, R. *v.* Steffoff, 20 Ont. L. R. 103 (made to the police under arrest after caution, admitted); 1912, R. *v.* Cummings, 5 D. L. R. 86, Que. (confession to an officer after caution, admitted); 1912, The King *v.* Hoo Sam, 1 D. L. R. 569, Sask. (if the officer puts questions, there must be a caution; prior cases examined); 1917, R. *v.* Spain, 36 D. L. R. 522, Man (murder; statements made to a police-officer while under arrest, admitted; per Perdue, J. A., "Every case as to the admissibility of a statement made by an accused person while under arrest must be decided according to its own circumstances"); 1918, R. *v.* Rodney, 43 D. L. R. 404, Ont. (larceny; statements when being searched by detectives, while under detention but not formal arrest, without caution, admitted); 1921, R. *v.* Read, 62 D. L. R. 363, Alta. ("every officer . . . should be familiar with the principles clearly enunciated in The Queen *v.* Thompson, 1893, 2 Q. B. 12").

[11] Apparently the modern Canadian practice with arrested persons is even more cautious than the English practice: 1910, Crippen's Trial (ed. Filson Young, 1920, Notable English Trials Series, p. 92).

Foyle kicked the coals again, and the action seemed to afford him some relief. "And Ling admitted it! The constable chap was so proud of what he 'd done that he took a note of the conversation."

"I don't see what we can do," said Menzies slowly. "We can't put the constable in the box. The only thing to do is to let it slide. If we don't use it, the defence won't make a point of it."

"What I 'm wondering about," said the superintendent, "is if your evidence is water-tight as it stands. You see, even if Ling should make a voluntary admission now, it 's tainted. He 's been seeing that shyster Lexton, and I would n't wonder if all this was n't a carefully put-up trap."

Weir Menzies drew his brows together and began eating his moustache. "There might be something in that," he agreed. "Lexton 's a good lawyer, and it 's like him."

"See." Foyle demonstrated with a forefinger. "If we could be tempted into putting an officer in the box to say that Ling had confessed, he 'd have us by the short hair. We 'd have to admit that at least one of our men had questioned him and" — he snapped his fingers — "there you are! The whole police evidence tainted. We 're so anxious for a conviction that we 've applied third-degree methods in England. Why, he 'd be acquitted if he 'd committed as many murders as Herod."

"I quite understand, sir." Menzies was a little peevish at having the i's dotted. "If he makes a thousand confessions, we won't use them."

"I only wanted to put you wise," said Foyle, almost apologetically. "You 've got to rely on a straightforward case. Got it mapped out?"

"I think so. . . ."

§ 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 the United States) 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

§ 848. [1] 1741, White's Trial, 17 How. St. Tr. 1085; Goodere's Trial, ib. 1054; and other cases in § 2250, *post*.

signing, he said: "It is all true enough," but would not sign it. Whether it was admissible apart from the statute, was the first question. GROSE, J., for the twelve judges: "The general rule respecting this species of testimony is that a free and voluntary confession, made by a person accused of an offence, is receivable in evidence against him, whether such confession be made at the moment he is apprehended, while those who have him in custody are conducting him to the magistrate's, or even after he has entered the house of the magistrate for the purpose of undergoing his examination. But in the present case the confession of the prisoner was made not only in the presence of the magistrate, but while he was undergoing a judicial examination. . . . First, then, to consider this question as it is governed by the rules and principles of the common law. Confessions of guilt made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime and previous to his examination before the magistrate, are at common law received in evidence as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true. It may, however, be said [in opposition] that this rule only applies to confessions by parol, and not to confession (as in the present case) reduced into writing and afterwards admitted by parol to be true. But surely if what a man says, though not reduced into writing, may be given in evidence against him, 'a fortiori' what he says when reduced into writing is admissible, for the fact confessed being rendered less doubtful by being reduced into writing, it is of course entitled to greater credit, and it would be absurd to say that an instrument is invalidated by a circumstance from which it derives additional strength and authenticity. And for this reason it is clear that the present confession having been taken by a magistrate under a judicial examination can be no objection to receiving it in evidence, for it gains still greater credit in proportion to the solemnity under which it was made. . . . [He then points out that the statute methods were not intended to replace all others by exclusion, but merely to add a new and acceptable form, thus leaving all other proper ones still admissible, even though the statutory form could not be availed of.] [The examination] is more authentic on account of the deliberate manner in which it is taken, and, when it contains a confession, is admitted, not by force of the statutes, but by the common law, as strong evidence of that fact; . . . and it is clear that what a prisoner confessed before a justice of the peace, previous to the reign of Philip and Mary, if not induced by hope or extorted by fear, whether reduced into writing or not, or if reduced into writing, whether signed or not, if admitted by the prisoner to be true, was and is as good evidence as if made in the adjoining room previous to his having been carried into the presence of the justice, or after he had left him, or in the same room before the magistrate comes, or after he quits it."

This ruling was emphasized in an opinion delivered a few years later:

1794, *R.* v. *Thomas*, 2 Leach Cr. L., 3d ed., 727; GROSE, J. (the facts being similar to those of Lambe's Case, *supra*): "There can be no doubt but that these minutes may be read in evidence. . . . In Lambe's Case, which in its circumstances was precisely like the present, the judges were of opinion that if such written examination were to be adjudged not admissible, this monstrous proposition would follow, that whatever a prisoner says when not before a magistrate would be admissible, though depending on the faculty of memory; but that the moment a prisoner gets before a magistrate it would not be admissible, though taken down in writing under circumstances of the greatest solemnity."

It will thus be seen that confessions so made were declared to be equally admissible (1) at common law, (2) under the statute, and (3) when intended to be taken under the statute, but not successfully so taken. Furthermore, it will be observed, there is no intimation that it is of any consequence (a) whether

the accused was cautioned or not, or (b) whether his statements were made spontaneously, or in answer to a general inquiry as to what he had to say, or in answer to repeated specific questions. Finally, it is clear that confessions made in such a situation were treated on exactly the same footing as any others, *i.e.* the only question would be as to the influence of some positive threat or promise; the mere situation did not affect the result or constitute an inducement.

The admissibility of such a confession was subsequently 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, however, came to the surface once again in 1850.[5] But in the preceding year a statute had entirely revised the method of con-

[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 C. & P. 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, 5 C. & P. 312, Gurney, B. (statements as accused before a magistrate, after a caution); 1836, R. *v.* Court, 7 C. & P. 486, Littledale, J. (statement as accused before magistrate in answer to question); 1836, R. *v.* Rees, 7 C. & P. 569, Lord Denman, C. J. (statement as accused before magistrate in answer to questions); 1837, R. *v.* Bartlett, 7 C. & P. 832, Bolland, B. (same); 1838, R. *v.* Arnold, 8 C. & P. 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 C. & P. 177, Park, J., *semble;* 1838, R. *v.* Wheeley, 8 C. & P. 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.* Bennett, 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").

ducting 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 which have arisen in applying this statute,[8] three only need here concern us. (1) Did it exclude a confession before admissible at common law? That it does not, has been decided in England;[9] and very properly, since in the face of the language of its last clause any other interpretation would have left it impossible to believe that words can mean anything. (2) Was a caution necessary at common law? This also has been settled in the negative, and the orthodox doctrine already described has been affirmed and perpetuated.[10] (3) Finally, does it matter that the statement was called forth by specific questions put by the magistrate about the offence? This has not been authoritatively answered since the passing of the statute. It had already been settled at common law, as we have seen, that the

[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, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favor and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecution in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time, which by law would be admissible as evidence against such person").

Canada: Crim. Code 1892, §§ 591, 689, R. S. 1906, c. 146, §§ 684, 1001 (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 Just. P. 606. A similar opinion was expressed by a majority in the Irish case of 1864, R. *v.* Johnston, 15 Ir. C. L. 82, 89, per Deasy, Hughes, Fitzgerald, BB., Fitzgerald and Keogh, JJ., against Hayes, O'Brien, and Ball, JJ.

[10] The question arises, it will be seen, when the statutory caution has been omitted, and thus the confession is not receivable under the statute; this was the case in R. *v.* Sansome, *supra*, the decision being as above; the same opinion was expressed by the majority in R. *v.* Johnston, *supra;* a subsequent English ruling confirms the result; 1865, R. *v.* Stripp, 7 Cox Cr. 97 (interpolated remarks, made before evidence ended).

It may be added that *under the statute* it has been held that the omission of the *second* caution does not exclude the confession: Eng. 1850, R. *v.* Sansome, 4 Cox Cr. 207; 1850, R. *v.* Bond, 4 Cox Cr. 231, 241, Alderson, B.; *Can.* 1867, R. *v.* Kalabeen, 1 Br. C. pt. I, 1; 1878, R. *v.* Souci, 17 N. Br. 611 (statement before the magistrate, admitted, though no caution was given; R. *v.* Sansome followed).

putting of questions was immaterial; but some individual rulings since the statute [11] excluded statements so obtained, on the principle already described (in § 844, *ante*), that the very putting of questions is improper and involves a compulsion. It is apparent how little this view is sanctioned by precedent; and it is difficult to see how the argument of Lefroy, C. J., that "questioning is not allowed, except in the way prescribed by the statute", can be accepted, unless we believe (as he does) that the statute introduces an exclusive method; but this view is expressly repudiated, as we have seen, by the Sansome decision; and the deduction of such a view from the mere spirit of the statute amounts to nothing less than an overturning of the common law without any express authority.

§ 849. **English Practice: (3) Confessions as Accused, under Oath, on Examination before a Magistrate.** Under the statutory provisions of the 1500s, the examinations of the witnesses, 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

[11] 1854, R. *v.* Berriman, 6 Cox Cr. 388, Erle, J.; 1863, R. *v.* Mick, 3 F. & R. 822, Mellor, J., *semble*. In the Irish case this view was repudiated by the majority: 1864, R. *v.* Johnston, 15 Ir. C. L. 82, per Deasy, Hughes, and Fitzgerald, BB., and Fitzgerald and Keogh, JJ., against Lefroy, C. J., Pigot, C. B., O'Brien and Ball, JJ.

§ 849. [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] *England:* 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, 4 C. & P. 564, Garrow, B. (examination on oath as accused before magistrate, excluded); 1833, R. *v.* Tubby, 5 C. & P. 530, Vaughan, B. (same); 1833, R. *v.* Lewis, 6 C. & P. 162, Gurney, B., *semble* (same); 1835, R. *v.* Rivers, 7 C. & P. 177, Park, J. (same); 1838, R. *v.* Wheeler, 8 C. & P. 250, Alderson, B. (same); 1838, R. *v.* Wheater, 2 Moody Cr. C. 45, 2 Lew. Cr. C. 157, *semble* (same); 1842, Joy, Confessions, 62; *Canada:* 1921, R. *v.* Sileski, 63 D. L. R. 146, Que. (statements on oath under arrest to a magistrate without warning, excluded; inadequate opinion). 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:

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 case presents the most difficult situation of the four, because it involves not only the effect of the oath as involving compulsion, but also the necessity of distinguishing the different bearings of compulsion as disapproved by confession-law and of compulsion as opprobrious to the privilege against self-crimination. That conflicting and confused views were from time to time put forth is not unnatural.

Remembering the results already reached — that, at common law (practically unquestioned until the 1800s and repeatedly maintained during the first half of the 1800s), neither the fact of custody nor the fact of magisterial examination in custody and without caution excluded a confession, and that the exclusion of a sworn examination was due solely to the statutory prohibition, — it is natural enough to find the judges, at the opening of this century, treating the confessions of a witness upon oath as not in themselves objectionable. Down to 1816 we find no exclusion. Between that time and 1840 occurs a long and tangled series of rulings, representing conflicting views and furnishing a fruitful source of later misunderstanding.[1] Certain things,

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."

§ 850. [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 Camp. 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

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;

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 Blank, J. (examination on oath as witness before magistrate: rejected because on oath); 1818, R. *v.* Merceron, 2 Stark. N. P. 366, Abbott, J. (examination as witness before Commons Committee; objected to as therefore not voluntary, but admitted; afterwards said by Abbott, J., in 1 Moo. Cr. C. 203, not to have been taken on oath, and to have been admitted for that reason only; the Commons afterward disapproved of the ruling in a Resolution quoted in 2 C. & K. 483, note); 1828, Tucker *v.* Barrow, 7 B. & C. 624, Littledale, J. (examination as witness before bankruptcy commissioners; "I am disposed to say that an admission obtained under compulsory examination is not evidence of an account stated"); 1828, Robson *v.* Alexander, 1 Moo. & P. 448, Common Pleas (examination as witness before bankruptcy commissioners, without caution; claimed to have been taken in excess of authority; admitted; Lord Ellenborough's language in Stockfleth *v.* De Tastet, adopted); 1830, R. *v.* Haworth, 4 C. & P. 255, Parke, J. (examination as witness for prosecution before magistrate; admitted; "he might as a witness have objected to answer any questions which might have a tendency to expose him to a criminal charge, and not having done so, his deposition is evidence against him"); *ante* 1830, Anon., *ex rel.* reporter, ib., note, Parke, J. (examination as witness, before suspicion, by coroner; rejected); 1833, R. *v.* Tubby, 5 C. & P. 530, Vaughan, B. (statement upon oath as witness, not suspected; admitted, "as no suspicion attached to the party at the time; the question is, Is it the statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when he made it"); 1833, R. *v.* Lewis, 6 C. & P. 161, Gurney, B. (examination as witness by magistrate, before suspicion, but witness committed at end of examination; Tubby's Case approved, but, this being taken "at the same time as all the other depositions on which she was committed, and on the very same day on which she was committed, I think it is not receivable; I do not think this examination was perfectly voluntary"); 1833, R. *v.* Davis, 6 C. & P. 178, Gurney, B. (examination as witness before magistrate; excluded; "if, after having been a witness, you make her a prisoner, nothing of what was then said can be admitted as evidence"); 1833, R. *v.* Britton, 1 Moo. & R. 297, Patteson and Alderson, JJ. (balance-sheet of bankrupt in civil proceedings offered to prove the petitioning creditor's debt on an indictment for concealing effects, etc.; objected to as having been made on oath; excluded for other reasons, Patteson, J., explaining in 1 Moo. Cr. C. 51, that the above objection was not approved by him); 1838, R. *v.* Wheeley, 8 C. & P. 250, Alderson, B. (examination before coroner, as a witness, but under arrest; excluded); 1839, R. *v.* Owen, 9 C. & P. 84, Williams, J. (examination as witness before coroner, but under arrest; on Wheeley's Case being cited, "since that, there has been a reaction in opinion, if I may be allowed the expression"; admitted); 1840, same case, postponed, 9 C. & P. 238, before Gurney, B. ("I am not aware of any instance in which an examination on oath before a coroner or a magistrate has been admitted as evidence by the person making it; I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected';' after the 'nisi prius' ruling in Wheater's Case, *post*, he admitted its conflict, but still excluded the evidence).

[2] Such is the explanation of the following cases: Lewis', Davis', Wheeley's, and perhaps Owen's before Gurney, B. In Tubby's Case and Owen's Case before Williams, J., the admission amounted to saying that the prohibition applied strictly to persons then charged as accused, and to no others.

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; but this theory, the mere fact of the administration of the oath, in spite of the giving of a caution, excludes his statements.[3] But (*b*) in this form it was disowned by the greater number of judges in these rulings;[4] for, as was pointed out, the witness had a choice between disclosing and keeping silent; in the words of Parke, J., "he might as a witness have objected to answer any questions which might have a tendency to expose him to a criminal charge; and not having done so", there was no compulsion. But the significance of this answer (*b*) is that it accepts the principle of (*a*), but denies the propriety of its application; *i.e.* it concedes that an answer actually compelled from the witness would be inadmissible, but it denies that there is in truth any compulsion in such cases.

Thus, of course, this theory (more liberal though it is than the first) contains within itself the germ of a further difference of opinion; *i.e.* (*b'*) one attitude prefers, as the test of compulsion, to ask whether there was 'de facto' in the specific case a feeling of compulsion, — in other words, to take the subjective standard 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

[3] Such seems to be the notion in the following cases of the preceding list: Smith's (introducing the doctrine), Mercerон'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.

[5] This again offers further opportunity for distinctions; for some Courts are satisfied with nothing short of a caution from the judge.

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.* Hawarth 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 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

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."

[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.

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 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

[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.").

[10] 1847, R. *v.* Garbett, 2 C. & K. 474, 1 Den. Cr. C. 262, 2 Cox Cr. 448, before the fifteen judges (examination as witness in a civil suit, the Court having told him, after his declining to answer, that he must answer: Chambers, for the defence, argued that "in the present case, the impression on the mind of the witness was that he must answer, and that after trying to evade the questions and to ex-

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. 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]

ert 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 the answers were obtained by a violation of the privilege. On the other question, his well-known views leave us no reason to doubt that he agreed with his colleagues.

[14] The case is strengthened by the circumstance (above noted) that the magistrate had threatened to commit the witness (as he might lawfully) if he persisted in his refusal; this was properly explained by Lord Campbell as "merely an explanation of the enactment of the legislature upon the subject."

[15] Quoted more fully *ante*, § 843.

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 and in Canada.[17]

[16] *E.g.*, *ante*, § 344.

[17] *England:* 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); 1898, R. *v.* Bird, 19 Cox Cr. 180 (the accused testified before the magistrate and signed the written report; then, on being asked whether he had anything to say in answer to the charge, replied, "What I have already said is true"; the Court of Crown Cases Reserved held (1) that this answer made the written report admissible, (2) that, even without the answer, the written report was admissible, following R. *v.* Erdheim); 1902, R. *v.* Pike, 1 K. B. 553, 18 Cox Cr. 35 (bankrupt's compulsory "statement of affairs" on oath, held admissible in a prosecution for unlawful appropriation); 1916, R. *v.* Colpus and Boorman, 1 K. B. 575 (conspiracy to defraud military authorities; at a military court of inquiry, the accused were invited to attend and make statements, which they did, without other inducement and voluntarily; the statements held admissible).

The indications of its sanction in *Ireland* are doubtful; 1857, R. *v.* McHugh, 7 Cox Cr. 483 (information on oath as witness, while under arrest as a joint accused; the magistrate thought that the informant was to turn Crown witness; excluded, partly because the informant was not cautioned as an accused); 1866, R. *v.* Gillis, 11 Cox Cr. 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 information inadmissible, provided they were made voluntarily and spontaneously").

In *Canada*, the following authorities are found: Dom. St. 1893, c. 31, § 5, R. S. 1906, c. 145, § 5 (quoted *post*, § 2252); 1896, R. *v.* Douglas, 11 Manit. 401 (deposition of the ac-

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 which 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; Continuous Interrogation by Police ("Sweat-Box", "Third Degree").** (*a*) In the United States, the orthodox English doctrine, declining to consider the mere fact of *arrest* as sufficient to exclude a confession, has been universally accepted; except in Texas, where by statute a caution must be given in such circumstances.[1]

cused 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); 1904, R. *v.* Golden, 11 Br. C. 349 (forgery; after the statutory caution, the accused declined to say anything, but on request of the magistrate signed his name to the written statement; the signature was admitted to compare with the alleged forgery); 1906, R. *v.* Van Metre, 7 N. W. Terr. 297 (statements on oath, made in a deposition taken on examination for discovery in aid of execution, held admissible, the answers being voluntary); 1915, R. *v.* Graham, 21 D. L. R. 513, Alta. (obtaining credit by false pretences; the prosecution offered an assignment in insolvency and the accused's examination on oath taken pursuant thereto; held, admissible, the accused not having claimed privilege when examined); 1920, R. *v.* Peel, No. 1, 60 D. L. R. 469, 481, N. Sc. (accused's testimony before the coroner, under arrest, admitted).

§ 851. [1] *Federal:* 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 U. S. 355, 16 Sup. 321; 1896, Wilson *v.* U. S., 162 U. S. 613, 16 Sup. 895; 1919, Pass *v.* U. S., 9th C. C. A., 256 Fed. 731;
Alabama: 1856, Franklin *v.* State, 28 Ala. 9; 1875, Sampson *v.* State, 54 Ala. 343; 1881, Redd *v.* State, 68 Ala. 498; 1881, Spicer *v.* State, 69 Ala. 163; 1892, Goodwin *v.* State, 102 Ala. 87, 98, 15 So. 571; 1895, Burton *v.* State, 107 Ala. 108, 18 So. 284 (a boy of fourteen arrested, kept in jail without counsel; no threats or promises; admitted); 1898, Fuller *v.* State, 117 Ala. 26, 23 So. 688; 1902, White *v.* State, 133 Ala. 122, 32 So. 139; 1903, Stevens *v.* State, 138 Ala. 71, 35 So. 122; 1905, Braham *v.* State, 143 Ala. 28, 38 So. 919; 1907, Heningburg *v.* State, 153 Ala. 13, 45 So. 246; 1920, Carr *v.* State, 17 Ala. App. 539, 85 So. 852 (excluded on the facts);
Arizona: 1907, Terr. *v.* Emilio, — Ariz. —, 89 Pac. 239; 1921, Roman *v.* State, — Ariz. —, 201 Pac. 551 (confession made to an officer when under arrest);
Arkansas: 1913, Greenwood *v.* State, 107 Ark. 568, 156 S. W. 427 (even when questions are put); 1921, Logan *v.* State, 150 Ark. 486, 234 S. W. 493 (to an officer);
California: 1880, People *v.* Ramirez, 56 Cal. 536 (with or without warrant); 1901, People *v.* Miller, 135 Cal. 69, 67 Pac. 12; 1903, People *v.* Walker, 140 Cal. 153, 73 Pac. 831; 1908, People *v.* Siemsen, 153 Cal. 387, 95 Pac. 863;
Colorado: 1911, Byram *v.* People, 49 Colo. 533, 113 Pac. 528;
Connecticut: 1917, State *v.* Castelli, 92 Conn. 58, 101 Atl. 476 (alleged starvation methods; confession admitted);
Delaware: 1898, State *v.* Trusty, 1 Pen. 319, 40 Atl. 766;
Florida: 1898, Green *v.* State, 40 Fla. 191, 23 So. 851 (in prison and to an officer); 1904, McNish *v.* State, 47 Fla. 69, 36 So. 176 (the accused under arrest in chains, alone with the officer; admitted); 1904, Williams *v.* State, 48 Fla. 65, 37 So. 521; 1909, Daniels *v.* State, 57 Fla. 1, 48 So. 747 (see the authorities under § 861, *post*); 1910, Sims *v.* State, 59 Fla. 38, 52 So. 198;
Georgia: 1896, Nobles *v.* State, 98 Ga. 73,

It is to be noted that of course this result could not be reached under a strict logical application of the Selden theory of mental agitation (and such confessions were therefore expressly declared inadmissible by him in the New York McMahon Case, *post*, and by the dissenting Irish judges in Johnston's

26 S. E. 64; 1902, Price *v.* State, 114 Ga. 855, 40 S. E. 1015; 1905, Folds *v.* State, 123 Ga. 167, 51 S. E. 305; 1914, Wilburn *v.* State, 141 Ga. 510, 81 S. E. 444;
Hawaii: 1912, Terr. *v.* Chung Ning, 21 Haw. 214, 220 (statements made in answer to police questions, after a caution, admitted);
Idaho: 1898, State *v.* Davis, 6 Ida. 159, 53 Pac. 678;
Illinois: 1905, Hoch *v.* People, 219 Ill. 265, 76 N. E. 356; 1916, People *v.* Buckminster, 274 Ill. 435, 113 N. E. 713 (confession made to the State's attorney, excluded without pointing out any specific defect);
Indiana: 1876, Harding *v.* State, 54 Ind. 366; 1893, Walker *v.* State, 136 Ind. 663, 668, 36 N. E. 356; 1908, State *v.* Laughlin, 171 Ind. 66, 84 N. E. 756 (under St. 1905, c. 168, § 239);
Iowa: 1876, State *v.* Fortner, 43 Ia. 495 (in jail); 1900, State *v.* Petersen, 110 Ia. 647, 82 N. W. 329; 1900, State *v.* Penney, 113 Ia. 691, 84 N. W. 509; 1901, State *v.* Storms, 113 Ia. 385, 85 N. W. 610; 1904, State *v.* Icenbice, 126 Ia. 16, 101 N. W. 273; 1910, State *v.* Neubauer, 145 Ia. 337, 124 N. W. 312; 1913, State *v.* Kilduff, 160 Ia. 388, 141 N. W. 962;
Kansas: 1905, State *v.* Inman, 70 Kan. 894, 79 Pac. 162;
Kentucky: 1904, Hathaway *v.* Com.,— Ky. —, 82 S. W. 400; 1915, Clary *v.* Com., 163 Ky. 48, 173 S. W. 171 (embezzlement);
Louisiana: 1848, State *v.* Nelson, 3 La. An. 499; 1893, State *v.* Nash, 45 La. An. 974, 13 So. 265; 1893, State *v.* Chambers, 45 La. An. 36, 37, 11 So. 944 (statements in prison to trial judge, after warning, admitted); 1895, State *v.* Johnson, 47 La. An. 1225, 17 So. 789; 1895, State *v.* Jones, 47 La. An. 1524, 18 So. 515 (to a jailer); 1898, State *v.* Berry, 50 La. An. 1309, 24 So. 329; 1902, State *v.* Edwards, 106 La. 674, 31 So. 308; 1903, State *v.* Robertson, 111 La. 35, 35 So. 375; 1904, State *v.* Lewis, 112 La. 872, 36 So. 788; 1904, State *v.* Lyons, 113 La. 959, 37 So. 890; 1906, State *v.* Hogan, 117 La. 863, 42 So. 353; 1907, State *v.* Williams, 120 La. 175, 45 So. 94; 1908, State *v.* Pamelia, 122 La. 207, 47 So. 508; 1920, State *v.* Doyle, 146 La. 973, 84 So. 315; 1920, State *v.* Bailey, 146 La. 624, 83 So. 854;
Maryland: 1899, Rogers *v.* State, 89 Md. 424, 43 Atl. 922; 1900, Young *v.* State, 90 Md. 579, 45 Atl. 531; 1906, Birkenfeld *v.* State, 104 Md. 53, 65 Atl. 1; 1914, McCleary *v.* State, — Md. —, 89 Atl. 1100;
Massachusetts: 1871, Com. *v.* Cuffee, 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 Mass. 432; 1876, Com. *v.* Smith, 119 Mass. 311; 1895, Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494 (young boys); 1896, Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121 (and that no caution was given is immaterial); 1897, Com. *v.* Bond, 170 Mass. 41, 48 N. E. 756 (confession to a fire-marshal when under arrest, held voluntary on the facts); 1898, Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035; 1902, Com. *v.* Devaney, 182 Mass. 33, 64 N. E. 402;
Michigan: 1895, People *v.* Warner, 104 Mich. 337, 62 N. W. 405; 1908, People *v.* Owen, 154 Mich. 571, 118 N. W. 590;
Missouri: 1874, State *v.* Carlisle, 57 Mo. 104; 1893, State *v.* Moore, 117 Mo. 395, 399, 402, 22 S. W. 1086; 1895, State *v.* Murray, 126 Mo. 611, 29 S. W. 700; 1897, State *v.* McClain, 137 Mo. 307, 38 S. W. 906; 1899, State *v.* Sheckelford, 148 Mo. 493, 50 S. W. 105; 1903, State *v.* Jones, 171 Mo. 401, 71 S. W. 680; 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235; 1906, State *v.* Church, 199 Mo. 605, 98 S. W. 16; 1906, State *v.* Spaugh, 199 Mo. 147, 98 S. W. 55; 1909, State *v.* Brooks, 220 Mo. 74, 119 S. W. 353; 1910, State *v.* Green, 229 Mo. 642, 129 S. W. 700 (by questioning of officers);
Nebraska: 1901, George *v.* State, 61 Nebr. 669, 85 N. W. 840; 1901, Reinoehl *v.* State, 62 Nebr. 619, 87 N. W. 355; 1902, Meyers *v.* Menter, 63 Nebr. 427, 88 N. W. 662 (to a penitentiary warden);
New Jersey: 1901, State *v.* Hill, 65 N. J. L. 626, 47 Atl. 814; 1902, State *v.* Young, 67 N. J. L. 223, 51 Atl. 939; 1902, State *v.* Hernia, 68 N. J. L. 299, 53 Atl. 85;
New Mexico: 1892, Faulkner *v.* Terr., 6 N. M. 464, 30 Pac. 905;
New York: 1858, People *v.* Rogers, 18 N. Y. 13; 1875, Murphy *v.* People, 63 N. Y. 597 (to an officer while in custody, upon questions asked); 1880, Balbo *v.* People, 80 N. Y. 496 (even an unlawful arrest; here an arrest made in another State without a warrant); 1880, Cox *v.* People, 80 N. Y. 515 (to a police-officer, while in custody); 1883, People *v.* McGloin, 91 N. Y. 242, 245; 1899, People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51; 1900, People *v.* Meyer, 162 N. Y. 357, 56 N. E. 758; 1903, People *v.* Egnor, 175 N. Y. 419, 67 N. E. 906; 1908, People *v.* Rogers, 192 N. Y. 331, 85 N. E. 135; 1909, People *v.* Randazzio, 194 N. Y. 147, 87 N. E. 112 (statutory rule applied); 1910, People *v.* Hill, 198 N. Y. 64, 91 N. E. 272; 1912, People *v.* Garfalo, 207 N. Y. 141, 100 N. E. 698 (arrested and in the presence of the victim);
North Carolina: 1902, State *v.* Flemming,

Case, *ante*); but to-day that theory is nowhere allowed to have this natural and consistent effect.

(b) But does it make any difference that the confession was made *in answer to interrogatories* put by a police officer to the person under arrest? No,

130 N. C. 688, 41 S. E. 549; 1905, State *v.* Smith, 138 N. C. 700, 50 S. E. 859; 1905, State *v.* Horner, 139 N. C. 603, 52 S. E. 136; 1907, State *v.* Jones, 145 N. C. 466, 59 S. E. 353; 1915, State *v.* Lowry, 170 N. C. 730, 87 S. E. 62; 1919, State *v.* Bridges, 178 N. C. 733, 101 S. E. 29;

Oregon: 1901, State *v.* McDaniel, 39 Or. 161, 65 Pac. 520; 1920, State *v.* Stevenson, 98 Or. 285, 193 Pac. 1030;

Pennsylvania: 1846, Com. *v.* Mosler, 4 Pa. St. 264; 1899, Com. *v.* Eagan, 190 Pa. 10, 42 Atl. 374 (to a district-attorney); 1899, Com. *v.* Shew, 190 Pa. 23, 42 Atl. 377 (same); 1910, Com. *v.* Aston, 227 Pa. 112, 75 Atl. 1019;

Porto Rico: 1908, People *v.* Morales, 14 P. R. 227, 239;

Rhode Island: 1903, State *v.* Nagle, 25 R. I. 105, 54 Atl. 1063; 1921, State *v.* Gancarelli, 43 R. I. 374, 113 Atl. 5 (no previous warning necessary);

South Carolina: State *v.* Cook, 15 Rich. L. 29; 1900, McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529; 1906, State *v.* Henderson, 74 S. C. 477, 55 S. E. 117;

South Dakota: 1908, State *v.* Landers, 21 S. D. 606, 114 N. W. 717; 1908, State *v.* Vey, 21 S. D. 612, 114 N. W. 719;

Texas: Here an exceptional rule, by statute, requires a caution to be given: C. Cr. P. 1911, § 810 (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, 39 Tex. Cr. 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 Tex. Cr. 296, 50 S. W. 388; 1899, Pryor *v.* State, 40 Tex. Cr. 643, 51 S. W. 375; 1902, McColloh *v.* State, 44 Tex. Cr. 152, 69 S. W. 141 (rule applied to letters of the accused); 1903, Connell *v.* State, 45 Tex. Cr. 142, 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, — Tex. Cr. —, 76 S. W. 465 (that the statements would be used "for or against him", held not a sufficient warning); 1904, Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008 (this decision finally reads all life out of the statute, by excluding the defendant's answers to the county attorney's questions, after due warning, under arrest, at the inquest; the ground is that testimony given under a severe cross-examination is not voluntary; this kind of judicial vapidity certainly makes the way smooth for the accused and hard for the prosecution); 1910, Jenkins *v.* State, 60 Tex. Cr. 236, 131 S. W. 542 (amendment of 1907, quoted *ante*, § 831, construed; the confession must contain a recital of the caution and of its being given by the person to whom the confession is made; Ramsey, J., diss., prior cases considered); 1920, Kyle *v.* State, 86 Tex. Cr. App. 471, 217 S. W. 943 (the statutory rule does not apply "where property is found in pursuance to a confession"); 1920, Phillips *v.* State, 86 Tex. Cr. App. 624, 219 S. W. 454 (person suspected, not arrested); 1920, Mayzone *v.* State, 88 Tex. Cr. 98, 225 S. W. 55 (under arrest and before the grand jury; excluded because no caution given and not written and signed; no preceding rulings cited); 1920, Williams *v.* State, 88 Tex. Cr. 87, 225 S. W. 177 (testimony before the grand jury, not in writing and signed, while under arrest, excluded, under St. 1907, p. 219, amending C. C. P. § 810; precedents collected); 1920, Moore *v.* State, 87 Tex. Cr. 569, 226 S. W. 415 (statute held not applicable to footprints made by defendant after arrest); 1921, Buddy *v.* State, 88 Tex. Cr. 403, 227 S. W. 323; 1921, Dodson *v.* State, 89 Tex. Cr. 541, 232 S. W. 836 (C. Cr. P. § 810 applied to a confession made to a justice of the peace; distinguishing ib. §§ 295, 976);

Vermont: 1895, State *v.* Gorham, 67 Vt. 365, 31 Atl. 845 (under arrest, without counsel, admitted); 1895, State *v.* Bradley, 67 Vt. 465, 32 Atl. 238; 1904, State *v.* Blay, 77 Vt. 56, 58 Atl. 794; 1922, State *v.* Long, — Vt. —, 115 Atl. 734 (murder);

Virginia: 1878, Wolf's Case, 30 Gratt. 836, *semble*; 1912, Mullins *v.* Com., 113 Va. 787, 75 S. E. 193 (accused's examination at the inquest, excluded under Code § 3901);

Washington: 1893, State *v.* Munson, 7 Wash. 239, 240, 34 Pac. 932; 1906, State *v.* Poole, 42 Wash. 192, 84 Pac. 727 (this opinion devotes a page to this point, and cites authorities from other jurisdictions, apparently forgetting that the local statute, cited *ante*, § 831, has replaced the common law rule and made a new and unique one; this Court should be urged to recall its words in State *v.* Hopkins, quoted *ante*, § 831, that "the former rule does not obtain", and to look only at the statutory question of "fear produced by threats", instead of keeping alive all the old controversies and quibbles and thus losing the benefit of the statutory reform);

Wisconsin: 1897, Connors *v.* State, 95 Wis. 77, 69 N. W. 981; 1905, Hintz *v.* State, 125 Wis. 405, 104 N. W. 110; Roszczyniala *v.* State, ib. 414, 104 N. W. 113; 1911, Tarasinski *v.* State, 146 Wis. 508, 131 N. W. 889.

on the once settled principles of the authorities above cited. Yet recent years have seen signs of backsliding in some Courts.

This new phase of reaction is due to the misguided application of the terms "*sweat-box*" and "*third degree*" to such a process. Those terms originally and properly signified the use of some form of violence; in that sense, a confession so obtained was and is inadmissible (*ante*, § 833). But journalistic exaggeration has in common usage misapplied the terms to any process of simple interrogation of the arrested person, while in seclusion, by an official other than the judge.

The question of fact should therefore first be cleared up. If physical violence is used, the principle of § 833, *ante*, applies, and the confession is plainly inadmissible. But if no physical violence, or threat of it, is used, both the moral and the legal question become quite different. What is the actual practice of the police, at a given place and time, as between these two meanings of the term "third degree", is a question of fact. But here, at the outset, it should be understood that the present question concerns only the situation where, without violence, a *continuous interrogation by the police* was employed to obtain the confession; and that this meaning of the term probably represents in fact the general usage, to which the instances of actual violence are exceptions.[2]

The following comments from experienced observers are worth keeping in mind at this point:

1910, *International Association of Chiefs of Police*, 17th Annual Meeting, Proceedings, p. 54; Major *Sylvester*, of Washington (President of the Association): "We have heard of the other vulgarity, 'Third Degree.' Some of us have taken the genuine article. In police and criminal procedure and practice the officer of the law administers the 'First Degree', so called, when he makes the arrest. When taken to the place of confinement, there is the 'Second Degree.' When the prisoner is taken into private quarters and there interrogated as to his goings and comings, or asked to explain what he may be doing with Mr. Brown's broken and dismantled jewelry in his possession, to take off a rubber-heeled shoe he may be wearing in order to compare it with a footprint in a burglarized premises, or even to explain the blood stains on his hands and clothing, that, hypothetically, illustrates what would be called the 'Third Degree.' The prisoner is cautioned by the reputable officer to-day that he need not incriminate himself, and, in some places, the authorities have blank forms in use stipulating that what a prisoner states is of his own volition and without coercion. In the pursuit of their investigations, there is no law to prevent the officers of the law questioning any person who, in their opinion, may be able to give information which may enable them to discover the perpetrator of a crime. It becomes the bounden duty of the police to locate the violator. There is no justification for personal violence, inhuman or unfair conduct, in order to extort confessions. The officer who understands his position will offer admissions obtained from prisoners in no other manner than that which is sanctioned by the

[2] The "sweat-box" and "third degree" practices, in their legitimate scope, are well explained by Mr. Thomas Byrnes, former chief of detectives in New York City, in the Sunday Magazine, Oct. 9, 1905; with which is to be compared the long-established and highly-developed French method, as illustrated in the citations of § 2251, n. 12, *post* (notably Gaboriau's novel, Monsieur Lecocq). Further accounts by experienced persons are the following: Allan Pinkerton, Bank Robbers and Detectives (1882), p. 231; International Association of Chiefs of Police, Proceedings, *passim;* Arthur Train, Courts, Criminals and the Camorra (quoted *supra*).

law. If a confession, preceded by the customary caution, obtained through remorse or a desire to make reparation for a crime, is advanced by a prisoner, it surely should not be regarded as unfair. . . . Volunteer confessions and admissions made after a prisoner has been cautioned that what he states may be used against him, are all there is to the so-called 'Third Degree.'" . . . .

Chief *Corriston*, of Minneapolis. . . . "The 'third degree' as understood by the public is a very different thing from the 'third degree' as known by a police official. . . . This body of men should by every means in their power refute the sensational idea the public has of the so-called 'third degree.' . . . In making an investigation as to who is responsible for committing an offence, it is often necessary to have several talks with the persons suspected, and their statements as to their whereabouts and conduct at the time in question are important links in unraveling a mystery. These investigations by the police have no doubt cleared the record of many an innocent suspect. The object is to ascertain the truth, not, as the public seem to think, fasten the commission of a crime upon some one — whether guilty or innocent. . . . There may have been individual cases where police officials have used improper and unfair methods to obtain results, but the 'Third Degree' is and always should be simply a battle of wits, the only object being to get at the truth. There can be no set rules for gaining information from a person suspected, but brute force to accomplish the result should never be resorted to, and any police official should be promptly dismissed who employs harsh measures to obtain statements. The methods of acquiring information depend upon the circumstances of each case and the disposition and mental faculties of the person under suspicion. . . . A crime has been committed. It is reported to the police; facts may come slowly or quickly. On the spur of the moment the head of the detective bureau must evolve a theory — what was the motive for the crime — who may have had an object in committing it? Some one is suspected, brought in and questioned. The one object is to get the truth. A searching examination is made, call it the 'third degree' or whatever you may; a great deal depends upon it. It may send out from police headquarters a suspect with his reputation good before the world; it may be the means of bringing a felon to justice. If the suspect is innocent, his story can generally be quickly checked up and proved, and the 'third degree' is then the means of working to the advantage of the suspect and society."

1912, Mr. *Arthur Train* (former Assistant District Attorney in New York City), Courts, Criminals, and the Camorra, p. 21: "When it comes to the more important cases, the accused is usually put through some sort of an inquisitorial process by the captain at the station-house. If he is not very successful at getting anything out of the prisoner, the latter is turned over to the sergeant and a couple of officers who can use methods of a more urgent character. If the prisoner is arrested by headquarters detectives, various efficient devices to compel him to 'give up what he knows' may be used — such as depriving him of food and sleep, placing him in a cell with a 'stool-pigeon' who will try to worm a confession out of him, and the usual moral suasion of a heart-to-heart (!) talk in the back room with the inspector.

"This is the darker side of the picture of practical government. It is needless to say that the police do not usually suggest the various safeguards and privileges which the law accords to defendants thus arrested. But the writer is free to confess that, save in exceptional cases, he believes the rigors of the so-called third degree to be greatly exaggerated. Frequently, in dealing with rough men, rough methods are used. But considering the multitude of offenders, and the thousands of police officers, none of whom have been trained in a school of gentleness, it is surprising that severer treatment is not met with on the part of those who run foul of the criminal law. The ordinary 'cop' tries to do his duty as effectively as he can. With the average citizen gruffness and roughness go a long way in the assertion of authority. Policemen cannot have the manners of dancing-masters. The writer is not quarrelling with the conduct of police officers. On the contrary, the point he is trying to make is that in the task of policing a big city, the rights of the individual

must indubitably suffer to a certain extent if the rights of the multitude are to be properly protected. We can make too much of small injustices and petty incivilities. Police business is not gentle business. The officers are trying to prevent you and me from being knocked on the head some dark night or from being chloroformed in our beds. Ten thousand men are trying to do a thirty-thousand-man job."

Miscalling a thing by a bad name does not make it any worse than it is. Let us therefore ask whether there is any reason why the traditional process of lengthy continuous interrogations in seclusion, immediately after arrest, calls for exclusion of a confession thus made.

(1) In the first place, an innocent person is always helped by an early opportunity to tell his whole story; hundreds of suspected persons every day are set free because their story thus told bears the marks of truth. Moreover, and more important, every guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested. This psychological truth, well known to all criminal trial judges, seems to be ignored by some Supreme Courts. The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction.[3] At that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment — the best one. And this expedient, if sanctioned, saves the State a delay and expense in convicting him after he has reacted from his first sensations, has yielded to his friends' solicitations, and comes under the sway of the natural human instinct to struggle to save himself by the aid of all technicalities.

(2) In the case of professional criminals, who usually work in groups, there is often no hope of getting at the group until one of them has "peached", and given the clues to the police. The police know this, and have known it for generations in every country. The only ones who apparently do not know it are some of the Supreme Court judges. A thorough questioning of the first suspected person who is caught makes possible the pursuit of the right trail for the others. To forbid this is to tie the hands of the police. The attitude of some judges towards these necessary police methods is lamentable; one would think that the police, not the criminals, were the enemies of society. To disable the detective police from the very function they are

[3] Read Balzac's description of this in "Lucien de Rubempré", c. XV, and "The Last Incarnation of Vautrin", c. II; also Daniel Webster's speech at the Knapp-Crowninshield Trial (quoted in full in the present writer's Principles of Judicial Proof, § 393). Psychologists report that their studies have not yet taken up this phenomenon. But so well established a fact should be supplied with its scientific explanation. That explanation seems to be that the long-continued nervous inhibition of all utterance, in fear of revealing clues to guilt, imposes a terrific strain, like that of a tightened steel spring; that the arrest shows the guilty person that this strain of repression is futile and is no longer needed; and that hence, in the sudden release of the inhibition, it is a genuine relief to be able to tell freely the whole story. After this sense of nervous relief has passed, the inclination to tell disappears; and most confessions are in fact made within a short time after arrest.

set to fulfil is no less than absurd. Let the judges who sit in judgment on crime look a little into the facts. Let them not sit up aloft and dictate a rule which ignores the well-known facts of criminal life and hampers the needful methods of justice.

But, it is argued, there are abuses by the police. Very true, — here and there, at least. It does not follow, however, that a stricter rule of exclusion for confessions is the proper remedy. It is still a misguided remedy. The true one is to provide a means of speedy confession which shall be less susceptible to abuses, while still taking advantage of the inherent psychological situation. In short, let an *authorized skilled magistrate* take the confession. Let every accused person be required to be taken before a magistrate within a day after arrest, for private examination; let the magistrate warn him of his right to keep silence; and then let his statement be taken if he is willing to make one.

Such is the expedient employed in other civilized countries. Such is the method long ago adopted in England.[4] We need not go so far as to introduce the French "juge d'instruction" into our system; but we may at least accept English experience of two generations. The examination before a magistrate meets a real need of the situation, both psychologic and detective. To attempt to get along without it is virtually to force the police to practice its equivalent. For the pursuit of crime needs and justifies it; and as long as our legislators and judges are shortsighted enough to fail to provide it with proper safeguards, it must and will be practised without them.

From what is above said, it follows that the attempts, legislative and judicial, to exclude confessions obtained by police-questioning of persons arrested and in seclusion represent simply a misguided solution of the problem.[5]

[4] St. 1849, quoted *ante*, § 848, n. 7.

[5] Besides the following cases, consult those cited in note 1, *supra*, which often involve this situation: *Federal:* 1916, U. S. *v.* Rivera, 8 P. R. Fed. 401 (statements to postal superior, without warning, but not under arrest, excluded); *Arkansas:* 1914, Strong *v.* State, 114 Ark. 574, 169 S. W. 1189 ("where a confession is obtained from a defendant by persistent questioning by officers, but without deception, threat, hope of reward, or inducement of any kind", it is admissible); *California:* 1910, People *v.* Loper, 159 Cal. 6, 112 Pac. 720 (the "sweating process"; confession excluded; but what does the opinion mean by exhuming the historical errors of the majority opinion in Bram *v.* U. S., and offering them as law? That case should be forgotten); 1911, People *v.* Borello, 161 Cal. 367, 119 Pac. 500 (an ordinary confession obtained by interrogation, peculiar only in the amount of profanity used by the sheriff; excluded); *Illinois:* 1920, People *v.* Vinci, 295 Ill. 419, 129 N. E. 193 (answers made in response to continuous questioning in the State's attorney's office, excluded on the facts); *Kentucky:* St. 1912, Mar. 19, *c.* 135, p. 542, now Stats. 1915, § 1649 *b* (1. Sweating is defined to be "the questioning of a person in custody charged with crime in an attempt to obtain information from him concerning his connection with the crime or knowledge thereof", "by plying him with questions or by threats or other wrongful means, extorting from him information to be used against him", etc.; 2. Such questioning is forbidden to a police or similar officer while in charge; 3. A confession thus obtained is inadmissible. 4. Penalty for offence above defined. The legislative phraseology is crude); 1913, Com. *v.* McClanahan, 153 Ky. 417, 155 S. W. 1131 (St. 1912, applied, to exclude a confession obtained by a police officer's continued questioning, without threats; the opinion shows no appreciation of the misguided nature of the legislation); 1914, Helm *v.* Com., 156 Ky. 751, 162 S. W. 94 (a statement made without being questioned by the officer, admitted, is not within the prohibition of St. 1912); 1914, Deaton *v.* Com., 157 Ky. 308, 163 S. W. 204 (St. 1912, held not applicable, where the accused went voluntarily to the prosecuting attorney and made

§ 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 the United States represent any marked attitude.[1] On the whole, they are liberal in spirit; and the occasional legislation has also been liberal.

their confessions); 1916, Com. *v.* Long, 171 Ky. 132, 188 S. W. 334 (Stats. § 1649 *b* applied and no "sweating" found); 1921, Lowery *v.* Com., 191 Ky. 657, 231 S. W. 234 (confession held not in fact to violate Stats. § 1649 *b*); *Louisiana:* St. 1908, No. 109, p. 166, July 1 (officers in custody of accused "who shall frighten by threats or who shall torture or shall resort to any means of an inhuman nature whatever to secure a confession" are punishable); Const. 1921, Art. I., § 11 (quoted *ante*, § 831); 1920, State *v.* Doyle, 146 La. 973, 84 So. 315 (continuous questioning of the accused for nearly two days, while under arrest, without bullying or physical discomfort, with supplies of food, drink, and tobacco, and in the presence of reporters, held admissible on the facts; Bram *v.* U. S. said to be "an unsafe guide"); *Massachusetts:* 1920, Com. *v.* Szczepanek, 235 Mass. 411, 126 N. E. 847 (arrest, and questions by officers, without warning, do not per se exclude a confession); *Michigan:* 1917, People *v.* Brockett, 195 Mich. 169, 161 N. W. 991 (confession made after lengthy interrogation and while detained two nights in a cell without a bed, excluded); *Missouri:* 1905, State *v.* Stebbins, 188 Mo. 387, 87 S. W. 460 (here the Court improperly rebukes the prosecuting attorney for questioning the accused in his office; the confession in writing here stated that it was made "of my own free will and accord", and that the prosecuting attorney had informed him that it "will be used against me," yet the Court speaks about his being "compelled to testify against himself"); 1913, State *v.* Thomas, 250 Mo. 189, 157 S. W. 330 (the fact that a confession was obtained "by almost continuous interrogatories during 24 hours was almost sufficient to justify a court in rejecting the statement and admissions as involuntary"); 1915, State *v.* Robinson, 263 Mo. 318, 172 S. W. 598 (interrogation by prosecuting attorney; admitted); 1915, State *v.* Powell, — Mo. —, 180 S. W. 851 (murder; a confession excluded where "nine officers, for the most part police, collectively or individually, in pairs or in trios, 'sweated' defendant continuously" from 2 P.M. to 1 A.M); 1922, State *v.* Meyer, — Mo. —, 238 S. W. 457 ("there was no impropriety in the officers interrogating appellant"); *Oregon:* 1917, State *v.* Morris, 83 Or. 429, 163 Pac. 567 (murder; confession obtained by interrogation, admitted on the facts); 1921, State *v.* Howard, 102 Or. 431, 203 Pac. 311 (murder; confession admitted); *Texas:* St. 1907 (quoted *ante*, § 831); *Wyoming:* 1916, Mortimer *v.* State, 24 Wyo. 452, 161 Pac. 766 (admitted on the facts).

§ 852. [1] In these citations, 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;

Federal: 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 or 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 U. S. 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); 1904, Burrell *v.* Montana, 194 U. S. 572, 24 Sup. 787 (answers made by a bankrupt on citation be-

fore a referee, not being in custody nor charged with a criminal offence, held admissible); St. 1910, May 7, c. 216, No. 168, 61st Cong. p. 352 (Rev. St. § 860, repealed): 1912, Powers *v.* U. S., 223 U. S. 303, 32 Sup. 281 (offense against the revenue laws; defendant's testimony before the U. S. commissioner, voluntarily taking the stand but without warning of his privilege, admitted; following Wilson *v.* U. S.); 1915, U. S. *v.* Oppenheim, D. C. N. D. N. Y., 228 Fed. 220, 232 (the now accused had gone voluntarily before a grand jury, expressly waived his privilege, and testified; afterwards he was by another grand jury indicted with others, and testified for himself and the others; held, that his original testimony before the grand jury could be used in impeachment).

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 Ala. 241, 243 (statement as accused on examination before magistrate, admitted); 1882, Kelly *v.* State, 72 Ala. 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 Ala. 1, 20 So. 415 (sworn as witness before a coroner, not charged or arrested, but suspected; excluded, apparently on the theory that the oath involved compulsion); 1899, Jones *v.* State, 120 Ala. 303, 25 So. 204 (testimony as witness before the coroner, not under arrest or suspicion, admitted); 1903, Jones *v.* State, 137 Ala. 12, 34 So. 681 (an admission of an accused made "on the preliminary trial", received); 1903, Angling *v.* State, 137 Ala. 17, 34 So. 846 (testimony on the preliminary trial, admitted, as a "judicial confession"); 1906, Peck *v.* State, 147 Ala. 100, 41 So. 759 (an entrapping interrogation by the magistrate just before the preliminary hearing of the accused; excluded); 1916, Coplon *v.* State, 15 Ala. App. 331, 73 So. 225 (testimony before grand jury as a witness on oath, not arrested or accused, though perhaps suspected, held admissible "under the holding of the Supreme Court in the majority opinion in Wilson *v.* State", *supra*).

Alaska: Comp. L. 1913, § 2421 (like Or. Annot. C. 1892, § 1599);

Arkansas: 1920, Ellis *v.* State, 144 Ark. 504, 222 S. W. 1058 (statements voluntarily made as a witness to examining magistrate, admitted).

California: 1873, People *v.* Kelley, 47 Cal. 125 (examination under oath before magistrate as accused; admitted, as voluntary; distinguishing People *v.* Gibbons, 43 Cal. 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 Cal. 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 Cal. 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 Cal. 37, 64 Pac. 107 (accused's testimony as witness before grand jury, admitted; but here not a confession); 1901, People *v.* Chrisman, 135 Cal. 282, 67 Pac. 136 (defendant's testimony at the preliminary examination, admitted); 1913, People *v.* O'Bryan, 165 Cal. 55, 130 Pac. 1042 (under arrest, on oath, before the grand jury, without warning, held inadmissible, following People *v.* Molineux, N. Y.; but the opinion sanctions the exploded error that such an examination violated the privilege against self-crimination; of course, as noted *ante*, § 850, par. (3), there is no compulsion in such cases, hence no violation of that privilege).

Colorado: 1894, Torris *v.* People, 19 Colo. 438, 36 Pac. 153 (affidavits to procure witnesses, voluntarily made by defendant, received); 1905, Tuttle *v.* People, 33 Colo. 243, 79 Pac. 1035 (testimony on oath as witness subpœnaed before the coroner, knowing that he was under suspicion, and without warning, excluded; the Court thus takes this opportunity to ally itself with the old-fashioned and absurd quibbles, which, in a State not hampered with a past record on this subject, an enlightened judiciary could have afforded to repudiate; the ruling is the more inexcusable in that the statements offered were conceded to be not confessions in the proper sense — *ante*, § 821 — but statements of "their whereabouts"; the Court in a defensive manner remarks that "Crime should be punished", etc., but fails to explain how it can be punished so long as Courts maintain an obstructive anachronistic attitude on such questions); 1911, Reagan *v.* People, 49 Colo. 316, 112 Pac. 785 (on oath, under arrest, before the coroner, after a warning, admitted).

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 Fla. 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 Fla. 474, 24 So. 537 (plea of guilty before magistrate, after warning, admitted); 1903, McNish *v.* State, 45 Fla. 83, 34 So. 219 (plea of guilty before the committing magistrate, without caution, excluded); 1903, Ferrell *v.* State,

45 Fla. 26, 34 So. 220 (bigamy; defendant's sworn testimony in a suit by him against the first wife for divorce, admitted); 1909, Daniels *v.* State, 57 Fla. 1, 48 So. 747 (statements made under arrest before the coroner, even though not strictly confessions, are not admissible unless the person is "fully advised of his rights" and then voluntarily makes the statement); 1915, Crawford *v.* State, 70 Fla. 323, 70 So. 374 (murder; statement made under arrest and upon oath before coroner held inadmissible for lack of warning).

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 Ga. 564, 8 S. E. 724 (under arrest as accused before the coroner, but without oath; admitted); 1895, Henderson *v.* State, 95 Ga. 326, 22 S. E. 537 (testimony given as a witness without compulsion is admissible); 1905, Davis *v.* State, 122 Ga. 564, 50 S. E. 376 (statements to the grand jury as witness, after a caution, admitted; no authority cited); 1905, Green *v.* State, 124 Ga. 343, 52 S. E. 431 (defendant's testimony, under arrest, at the coroner's inquest, admitted); 1907, Adams *v.* State, 129 Ga. 248, 58 S. E. 822 (examination on oath before the coroner, under arrest, and without warning; excluded); 1919, Standifer *v.* State, 24 Ga. App. 329, 100 S. E. 775 (accused's testimony as witness before the coroner, on oath but not warned, excluded).

Hawaii: Rev. Laws 1915, § 2624 ("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 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 Ind. 254, 260, 34 N. E. 972 (statements "voluntarily" made and assigned at inquest as witness, admitted); 1903, Ginn *v.* State, 161 Ind. 292, 68 N. E. 294 (confession, when taken before a justice, to one not in authority, admitted); 1920, Batchelor *v.* State, 189 Ind. 69, 125 N. E. 773 (accused's answers to judge's interrogatories, after plea of guilty and before sentence imposed, and without counsel (excluded under the circumstances).

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 Ia. 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 Ia. 6, 72 N. W. 497 (voluntary appearance at the inquest, admitted).

Kansas: 1893, State *v.* Sortor, 52 Kan. 531, 539, 34 Pac. 1036 (preliminary examination as defendant on oath, received); 1887, State *v.* Taylor, 36 Kan. 329, 13 Pac. 550 (testimony at the inquest, without subpœna or questioning, admitted); 1905, State *v.* Finch, 71 Kan. 793, 81 Pac. 494 (testimony as witness subpœnaed at the inquest, not in custody nor under suspicion, admitted); 1918, State *v.* King, 102 Kan. 155, 169 Pac. 557 (robbery; defendant's testimony at the former trial, admitted against him).

Kentucky: C. Cr. P. 1895, § 64 (witness' statement before committing magistrate not "of itself" to be "evidence for any purpose"); 1903, Tines *v.* Com., — Ky. —, 77 S. W. 363 (affidavit made to the district attorney, excluded; no precedents cited); 1904, Seaborn *v.* Com., — Ky. —, 80 S. W. 233 ("voluntary testimony" before committing magistrate, admitted); 1904, Bess *v.* Com., 118 Ky. 858, 82 S. W. 576 (defendant's voluntary testimony on his former trial, admitted); 1920, Riley *v.* Wallace, 188 Ky. 471, 222 S. W. 1085 (trial Judge held not entitled to take judicial notice of the falsity of certain testimony so as to punish the witnesses for contempt in testifying falsely).

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 La. An. 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, 61 Me. 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 Gray 503 (examination as witness at fire inquest; no caution; admitted: whether caution was essential, was expressly not decided); 1866, Com. *v.* Lannan, 13 All. 563, 569

(special plea in bar, held bad by the Court below; not admitted, chiefly because drawn by the attorney, and thus inadmissible by statute); 1877, Com. *v.* Reynolds, 122 Mass. 455, 458 (examination as defendant at a former trial of the same charge; admitted, because "they were voluntary . . . and it is immaterial when or where they were made"); 1896, Com. *v.* Wesley, 140 Mass. 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 an inducement"); 1897, Com. *v.* Hunton, 168 Mass. 130, 46 N. E. 404 (testimony before an investigating committee at the City Hall, admitted); 1912, Com. *v.* Mackenzie, 211 Mass. 578, 98 N. E. 598 (on oath before the grand jury, voluntarily and after warning, admissible).

Michigan: 1890, People *v.* Lauder, 82 Mich. 109, 46 N. W. 956 (testimony on oath before a grand jury cannot be afterwards used); 1908, People *v.* Owen, 154 Mich. 571, 118 N. W. 590 (on oath under arrest, before a chief detective and a notary; admitted); 1919, People *v.* Maloy, 204 Mich. 524, 170 N. W. 690 (co-respondent in a divorce case, testifying under subpœna and oath, without claim or privilege, excluded on his own trial for adultery, because it was not shown "that he was advised of what his constitutional rights were or that he had knowledge of what they were"; absurd); 1920, People *v.* Sharac, 209 Mich. 249, 176 N. W. 431 (statement before a justice, while under arrest, voluntarily but without warning, admitted).

Mississippi: 1860, Josephine *v.* State, 39 Miss. 626, 650 (examination as witness on the trial of another person for the same charge; excluded); 1879, Jackson *v.* State, 56 Miss. 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 Miss. 847 (on oath as a witness before the coroner, but under arrest on suspicion; excluded); 1897, Ford *v.* State, 75 Miss. 101, 21 So. 524 (a thirteen-year old negro boy, sworn as defendant on a preliminary examination, without caution; excluded); 1898, Powell *v.* State, — Miss. —, 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 Miss. 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, Mackmasters *v.* State, 83 Miss. 1, 35 So. 302 (voluntary testimony as accused at the first trial, admitted); 1906, Cooper *v.* State, 89 Miss. 429, 42 So. 601 (testimony under oath before the grand jury, while in custody as accused, excluded; Steele *v.* State distinguished).

Missouri: 1859, State *v.* Lamb, 28 Mo. 218, 228 (examination as accused before magistrate, after caution; admitted); 1893, State *v.* Young, 119 Mo. 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, 119 Mo. 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 Mo. 380, 33 S. W. 28 (the witness attended the inquest voluntarily and testified without subpœna; admitted); 1896, State *v.* Punshon, 133 Mo. 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 Mo. 654, 65 S. W. 249 (testimony before a coroner as witness, apparently held inadmissible); 1903, State *v.* Jones, 171 Mo. 401, 71 S. W. 680 (confession under oath at the preliminary trial of another person jointly charged, after warning, admitted); 1890, State *v.* Mullins, 101 Mo. 514, 14 S. W. 625 (murder; voluntary testimony at the inquest, admitted, the accused being "well known" to be the killer); 1904, State *v.* Woodward, 182 Mo. 391, 81 S. W. 857 (statement to a judge in chambers, not on oath and voluntary, admitted; not one of the foregoing cases, except State *v.* Mullins, is cited); 1911, State *v.* Marion, 235 Mo. 359, 138 S. W. 491 (deposition of a party in a civil suit, admitted); 1920, State *v.* Smith, — Mo. —, 222 S. W. 455 (statement on oath, while in custody, at the inquest, excluded); 1921, State *v.* Allen, — Mo. —, 234 S. W. 837 (statement of wife made voluntarily on examination by coroner on oath, after caution, admissible, here as self-contradiction).

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 Jersey: 1906, State *v.* Banusik, — N. J. L. —, 64 Atl. 994 (confession not under

oath, to a police magistrate, in jail, after warning, admitted).

New Mexico: 1916, State v. Ascarate, 21 N. M. 191, 153 Pac. 1036 (murder; accused's statements on oath under arrest before the coroner, admitted; careful opinion by Hanna, J.).

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 N.Y. 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 the effect [of preventing free and voluntary mental action], and hence the exclusion. . . . [Hence, such an examination under oath is not to be rejected] unless that oath was administered in the course of some judicial inquiry in regard to the crime itself for which the prisoner is on trial: . . . [while it is also necessarily admissible] if at the time it was made the prisoner was not himself resting under any charge or suspicion of having committed the crime"; as for examinations of accused persons on oath, Selden, J., for the Court, adopts the theory "that the evidence is too uncertain to be safely relied upon", and rejects the theory that "a mere arbitrary rule, which prohibits magistrates from taking the examination of prisoners charged with crime upon oath, has been violated"); 1869, Teachout *v.* People, 41 N. Y. 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 N. Y. 602 (schedules put in by the debtor in bankruptcy proceedings; admitted); C. Cr. P. 1881, § 395 (quoted *ante*, § 831); 1883, People *v.* McGloin, 9 N. Y. 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 therefore", the confession was equally admissible); 1886, People *v.* Mondon, 103 N. Y. 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 N. Y. 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 (!), and the examination admitted as being "in all respects and however viewed, the voluntary and uninfluenced statements of the individual"; no solution of the difficulties being offered, except, perhaps, that the voluntariness of the confession, in view of "their nature and the circumstances under which made", is to be the final test in each case); 1892, People *v.* Wright, 136 N. Y. 625, 632, 32 N. E. 629 (examination before coroner, received; following the Chapleau Case); 1901, People *v.* Molineux, 168 N. Y. 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 was clearly recognized in all the cases except McMahon's; (2) that apart from this nothing was 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 naturally interpreted) accepts fully the orthodox principle of Scott's Case in England; (4) that the Court changed its principles often, and in the later cases ignored the irreconcilable conflict in the precedents and treated them as harmonious. After the Molineux Case a new phase is entered:

1915, People *v.* Ferola, 215 N. Y. 285, 109 N. E. 500 (the accused, in custody on a charge of homicide, testified on oath before the coroner, who warned her of her privilege, though not exactly as prescribed by the statute; "she frankly admitted that she committed the homicide"; held a violation of her "constitutional rights", per Miller, J., using this phrase improperly to designate the judicial law in the confession cases; but whether under C. Cr. P. § 395 "her statements were voluntary and admissible . . . or it was an error of law to admit her subsequent statement in evidence, is a different question: . . . a majority of us are of the opinion that if error was committed it was harmless"; per Seabury, J., that "we should declare the McMahon and Mondon decisions overruled, and accept . . . the principle asserted in the Hendrickson, Teachout, McGloin and Chapleau cases", approving the above text; per Collin, J., held inadmissible; to the simple-minded reader, the odd thing is the entire futility of the legislator's effort to make law in C. Cr. P. § 395; listen to these words: "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"); 1915, People *v.* Roach, 215 N. Y. 592, 599, 109 N. E. 618 (confession on oath before the coroner, after stating that he was willing to confess, admitted, following People *v.* Ferola).

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 statute 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, 7 Ired. 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 N. C. 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 N. C. 688, 693, 18 S. E. 507 (accused on oath before magistrate, after warning, admitted); 1897, State *v.* Melton, 120 N. C. 591, 26 S. E. 933 (accused at preliminary examination, after asking to testify and being cautioned; admitted); 1903, State *v.* Parker, 132 N. C. 1014, 43 S. E. 830 (examination as accused before the magistrate, under oath contrary to the statute, excluded); 1903, State *v.* Simpson, 133 N. C. 676, 45 S. E. 567 (examination of a prosecutor on oath as a witness in another trial, after a 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, 39 (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: Laws 1920, § 1786 (the statement of a defendant before a committing magistrate, made according to statute after caution, etc., "is competent testimony to be laid before the grand jury, and may be given in evidence against the defendant on the trial"); 1896, State *v.* Hatcher, 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

Or. 43, 48 Pac. 357 (before the grand jury, in what capacity not stated, but voluntary; admitted); 1899, State *v.* Andrews, 35 Or. 388, 58 Pac. 765 (statements by an Indian at examination as accused before magistrate without caution, excluded); 1912, State *v.* Humphrey, 63 Or. 540, 128 Pac. 824 (on examination before a grand jury, after warning, admitted).

Pennsylvania: 1846, Com. *v.* Harman, 4 Pa. St. 269 (examination upon oath as accused before magistrate, without caution, and under threats and promises; excluded, as "a gross outrage upon the accused"); 1857, Williams *v.* Com., 29 Pa. 102, 105 (examination as witness before coroner, not suspected nor charged; admitted, because "he might have declined to testify", and it thus "was a voluntary statement"); 1890, Com. *v.* Clark, 130 Pa. 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).

Philippine Islands: 1912, U. S. *v.* Ching Po, 23 P. I. 578 (opium offence; defendant's former voluntary testimony at the trial of another charge based on the same transaction, admitted); 1919, U. S. *v.* Agatea, 40 P. I. 596 (confession on oath before a justice, without warning, held admissible).

Porto Rico: 1909, People *v.* Martinez, 15 P. R. 725 (confessions made under oath to a magistrate, without warning, said *obiter* to be inadmissible).

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 S. C. 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 S. C. 38, 12 S. E. 619, *semble* (preceding case approved); 1911, State *v.* Barwick, 89 S. C. 153, 71 S. E. 838 (defendant allowed to be cross-examined to statements made by him under oath in the mayor's court; State *v.* Senn distinguished); 1916, State *v.* Tapp, 104 S. C. 576, 89 S. E. 394 (witness sworn at a coroner's inquest, though not charged or suspected; excluded); 1916, State *v.* Perry, 106 S. C. 289, 91 S. E. 300 (following State *v.* Tapp, *supra*).

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. 1911, § 810 (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; 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 Tex. Cr. 579, 61 S. W. 926 ("before the grand jury, after being warned"; admitted; Henderson, J., diss. on another ground); 1902, Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583 (testimony before the grand jury, while under arrest, held admissible, following Wisdom *v.* State); 1903, Twiggs *v.* State, — Tex. Cr. —, 75 S. W. 531 (rule of warning, applied); 1906, Miller *v.* State, — Tex. Cr. —, 91 S. W. 582 (testimony as witness before the examining magistrate, admitted); 1913, Rogers *v.* State, 71 Tex. Cr. 149, 159 S. W. 40 (testimony before grand jury before arrest, reduced to writing and sworn to, admitted, as not being within the statute).

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); 1904, State *v.* Blay, 77 Vt. 56, 58 Atl. 794 (larceny; plea of guilty before a justice of the peace, without counsel or warning, admitted).

Virginia: 1830, Moore *v.* Com., 2 Leigh 702, 704 (examination as accused before magistrate; admitted, because no threats or promises were made); Code 1919, § 4781 (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. 89 (voluntary statement to justice, admitted); 1916, Hansel *v.* Com., 118 Va. 803, 88 S. E. 166 (forgery; former testimony of H. in a suit by R. against G. where H. had a joint interest with R., admitted under Code § 3901); 1922, Thaniel *v.* Com., — Va. —, 111 S. E. 259 (accused's testimony as a witness before the coroner, not charged nor under arrest, held not a "witness in his own behalf", under Code 1919, § 4781; following Mullins *v.* Com., 113 Va. 787, and distinguishing Kirby *v.* Com., 77 Va. 681; but here admitting the statement on the principle of § 2276, *post*).

Washington: 1895, State *v.* Hopkins, 13 Wash. 5, 42 Pac. 627 (testimony at a civil trial as then defendant, admitted); 1903, State *v.* Carpenter, 32 Wash. 254, 73 Pac. 357 (statements at the close of the preliminary examina-

No attempt 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 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).

The rulings in New York are of first importance, because the comparatively early promulgation there of the Selden theory in the Hendrickson and McMahon Cases, and its repudiation in the Teachout Case, greatly influenced the discussion in the other jurisdictions, in most of which the controversy is comparatively recent, — a further testimony, perhaps, to the unnaturalness and heterodoxy (shown also by the early English practice) of any controversy at all.

6. Existence of the Inducement (Subsequent Ending, etc.)

§ 853. **General Principle.** 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 question 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. 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 influenced by it.*

tion as accused, admitted); 1904, State *v.* Washing, 38 Wash. 465, 78 Pac. 1019 (statement of defendant, an Indian, made before a magistrate on arraignment, without oath but without warning, admitted; compare the statute in this State, quoted *ante*, § 831; it does not seem to have produced its intended effect, in preventing further discussion of questions like the present one; this is seen also in the cases cited *ante*, § 851).

West Virginia: Code 1914, 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 swearing witnesses, admitted); 1907, State *v.* May, 62 W. Va. 129, 57 S. E. 366 (under Code 1906, c. 152, § 20, a statement under oath made at a preliminary examination by a person charged but not under arrest is not admissible); 1911, State *v.* Cook, 69 W. Va. 717, 72 S. E. 1025 (Code 1906, c. 152, § 20, forbidding the use of an accused's statement made under examination, does not forbid cross-examination to such self-contradictory former statement of an accused taking the stand).

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 Wis. 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 Wis. 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.); 1907, Anderson *v.* State, 133 Wis. 601, 114 N. W. 112 (on oath and under arrest before the coroner, without specific warning as to his privilege, admitted).

Wyoming: 1911, Maki *v.* State, 18 Wyo. 481, 112 Pac. 334 (under arrest on oath before the coroner, without warning, excluded).

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 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]

§ 854. [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.

§ 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]

§ 855. [1] The following cases include those under all five heads. 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 has 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 C. & P. 223 (caution by a coroner after hopes held out by a magistrate; admitted); 1832, R. *v.* Richards, 5 C. & P. 318 (a promise not to arrest; after arrest, the inducement held to have been destroyed by necessary implication; admitted); 1833, R. *v.* Cooper, 5 C. & P. 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 C. & P. 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 Cox Cr. 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: R. *v.* Sansome, 4 Cox Cr. 206, Alderson, B.; 1850, R. *v.* Bond, 4 Cox Cr. 235, 238, Alderson, B.; 1871, R. *v.* Bate, 11 Cox Cr. 686, Smith, J.

CANADA: 1901, R. *v.* Lai Ping, 11 Br. C. 102 (confession in jail; the caution by the magistrate, held to remove a prior inducement); 1905, R. *v.* Young, 38 N. Sc. 427 (elaborate opinions, analyzing the precedents).

UNITED STATES: *Alabama:* 1854, Wyatt *v.* State, 25 Ala. 12 (slave); 1858, Bole *v.* State, 32 Ala. 566 (slave); 1850, Mose *v.* State, 36 Ala. 311, 226 (slave); 1875, Levison *v.* State, 54 Ala. 525; 1876, Porter *v.* State, 55 Ala. 101; 1881, Redd *v.* State, 69 Ala. 260; 1920, Kinsey *v.* State, 204 Ala. 180, 85 So. 519 (confession excluded, where a threat of violence by S. applied at the time of confessing to R.); 1920, Andrews *v.* State, 17 Ala. App. 456, 85 So. 840 (inducements here done away with); 1920, Carr *v.* State, 17 Ala. App. 539, 85 So. 852 (subsequent proof of corpus delicti here curing the error); *Arkansas:* 1901, Williams *v.* State, 69 Ark. 599, 65 S. W. 103; *Colorado:* 1873, Beery *v.* U. S., 2 Colo. 203; 1905, Andrews *v.* People, 33 Colo. 193, 79 Pac. 1031 (Beery *v.* U. S. not cited); *Connecticut:* 1846, State *v.* Potter, 18 Conn. 177; 1898, State *v.* Willis, 71 Conn. 293, 41 Atl. 820 (confession to second officer unconditionally, after inducement by first, admitted); *Georgia:* 1905, Griner *v.* State, 121 Ga. 614, 49 S. E. 700; 1905, Milner *v.* State, 124 Ga. 86, 52 S. E. 302; *Illinois:* 1895, Dunne *v.* Park Com'rs, 159 Ill. 60, 42 N. E. 375 (a written confession of the district attorney under promise of release was not satisfactory to him, and the accused subsequently made another oral one to him; excluded); *Iowa:* 1907, State *v.*

(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 shows 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 circumstances 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.

Foster, 136 Ia. 527, 114 N. W. 36; *Kansas:* 1910, State *v.* Turner, 82 Kan. 787, 109 Pac. 654 (revolver delivered up by defendant after threats by the sheriff); *Kentucky:* 1896, Laughlin *v.* Com., — Ky. —, 37 S. W. 590: 1903, Whitney *v.* Com. — Ky. —, 74 S. W. 257; 1094, Green *v.* Com., — Ky. —, 83 S. W. 638 (confession of a private person, the next day after an inducement by an officer and an inadmissible confession to him, received); *Louisiana:* 1906, State *v.* Rugero, 117 La. 1040, 42 So. 495; *Massachusetts:* 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 Mass. 437 (similar); 1894, Com. *v.* Myers, 160 Mass. 530, 533, 36 N. E. 481 (that the confession is to the same person is not fatal); *Mississippi:* 1844, Peter *v.* State, 4 Sm. & M. 36; 1900, Whitley *v.* State, 78 Miss. 255, 28 So. 852; 1903, Mackmasters *v.* State, 82 Miss. 459, 34 So. 156; 1922, White *v.* State, — Miss. —, 91 So. 903 (a second confession, made after a first one obtained by torture, excluded); *Missouri:* 1874, State *v.* Jones, 54 Mo. 479; *Nebraska:* 1903, State *v.* Force, 69 Nebr. 162, 95 N. W. 42; *New Jersey:* 1828, State *v.* Guild, 10 N. J. L. 163, 179; Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62 (total removal of the inducement must be shown); *North Carolina:* 1858, State *v.* Gregory, 5 Jones L. 315; 1858, State *v.* Scates, 5 Jones L. 420; 1872, State *v.* Lowhorne, 66 N. C. 638; 1880, State *v.* Drake, 82 N. C. 596; 1893, State *v.* Drake, 113 N. C. 624, 628, 18 S. E. 166; *Ohio:* 1883, Jackson *v.* State, 39 Oh. St. 37, 40; *Pennsylvania:* 1900, Com. *v.* Sheets, 197 Pa. 69, 46 Atl. 753; 1909, Com. *v.* Snyder, 224 Pa. 526, 73 Atl. 910; *South Carolina:* 1904, State *v.* Middleton, 69 S. C. 72, 48 S. E. 35 (discretion of the trial Court); *Tennessee:* 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 Baxt. 520; *Texas:* 1871, Barnes *v.* State, 36 Tex. 356; 1920, Williams *v.* State, 88 Tex. Cr. 87, 225 S. W. 177 (inducement held not negatived); *Vermont:* 1864, State *v.* Carr, 37 Vt. 191; *Virginia:* 1858, Shifflet's Case, 14 Gratt. 665; 1870, Thompson's Case, 20 Gratt. 731; 1890, Early's Case, 86 Va. 927, 11 S. E. 795; *Washington:* 1912, State *v.* Miller, 68 Wash. 239, 122 Pac. 1066.

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.[1]

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."

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."

1847, *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."

§ 856. [1] A subsequent confirmation by the *accused's own acknowledgment* of the correctness of the confession should also relieve from any inquiry into the influence of the inducement, or into the voluntariness in general of the confession: 1906, State *v.* Johnny, 29 Nev. 203, 87 Pac. 3; 1922, Parker *v.* State, —Tex. Cr. —, 238 S. W. 943 (citing the above text with approval, per Lattimore, J.).

§ 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 something 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

§ 857. [1] *Ala.* 1855, Brister *v.* State, 26 Ala. 128; *Del.* 1835, State *v.* Brick, 2 Harringt. 530; *Ky.* 1903, Whitney *v.* Com., — Ky. —, 74 S. W. 257; *Tex.* 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; subsequent exhumation showed this to be true; confession admitted); 1899, Winfield *v.* State, — Tex. Cr. —, 54 S. W. 584; 1900, Campbell *v.* State, 42 Tex. Cr. 27, 57 S. W. 288; 1902, Johnson *v.* State, 44 Tex. Cr. 332, 71 S. W. 25 (confession admissible when thus tested, even though the statutory warning was omitted); 1920, Singleton *v.* State, 87 Tex. Cr. 302, 221, S. W. 610; 1921, Garcia *v.* State, 88 Tex. Cr. 605, 228 S. W. 938 (larceny; defendant and accomplice each confessed; officer took accomplice to the place and found goods; defendant's confession received, under C. Cr. P. § 810); 1922, Smith *v.* State, — Tex. Cr. —, 237 S. W. 287 (burglary; prior cases reviewed).

[2] *Ala.* 1879, Murphy *v.* State, 63 Ala. 4; 1887, Banks *v.* State, 84 Ala. 431, 4 So. 382; 1889, Lowe *v.* State, 88 Ala. 8, 7 So. 97; 1895, Gregg *v.* State, 106 Ala. 44, 17 So. 321 (finding the body of a child confessed to have been killed); 1896, Pressley *v.* State, 106 Ala. 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. Car.* 1880, State *v.* Drake, 82 N. C. 596 (stolen goods); 1895, State *v.* Winston, 116 N. C. 990, 21 S. E. 37 (stolen goods); 1921, State *v.* Danelly, — N. C. —, 107 S. E. 149 (burglary); *Pa.* 1877, Laros *v.* Com., 84 Pa. 209 (concealment of money); *S. Car.* 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, Frederick *v.* State, 3 W. Va. 697 (stolen goods).

§ 858. [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.

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]

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

[2] ENGLAND: 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 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).

CANADA: 1886, R. *v.* McCafferty, 25 N. Br. 396, 398 (two judges diss.); 1886, R. *v.* Doyle, 12 Ont. 350, *semble*.

UNITED STATES: *Ga.* P. C. 1910, § 1034 ("any material facts discovered by a confession" are provable, "and the fact of its discovery by reason of such information"); *Ky.* 1904, Com. *v.* Phillips, — Ky. —, 82 S. W. 286 (the fact of finding, "together with the statement of the accused as to their location", admitted); *Miss.* 1858, Belote *v.* State, 26 Miss. 96, 116 (the Court reserved the question of admitting the words of the confession); 1874, Garrard *v.* State, 50 Miss. 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; 1906, Com. *v.* Johnson, 213 Pa. 432, 62 Atl. 1064 (Laros *v.* Com. approved); *S. C.* 1854, State *v.* Motley, 7 Rich. L. 337; 1904, State *v.* Middleton, 69 S. C. 72, 48 S. E. 35; *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, 3 Heisk. 341.

[3] As in R. *v.* Berriman, *supra*. The American cases cited in the preceding note seem to take this form.

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 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:[1]

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

[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.* Moy Yen, 34 Cal. 176; 1873, Peery *v.* U. S., 2 Colo. 203; 1906, State *v.* Moran, 131 Ia. 645, 109 N. W. 187 ("such facts, and so much of the confession as distinctly relates thereto"); 1878, State *v.* Mortimer, 20 Kan. 97; 1876, State *v.* Garvey, 28 La. An. 925.

§ 859. [1] *Accord:* 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. 646, *semble;* 1915, State *v.* Lowry, 170 N. C. 730, 87 S. E. 62; 1839, U. S. *v.* Nott, 1 McL. U. S. 502.

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."

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. 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]

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§ 860. [1] ENGLAND: 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;

CANADA: 1921, R. *v.* Read, 62 D. L. R. 363, Alta; 1921, R. *v.* Jones, 62 D. L. R. 413, Alta.

UNITED STATES: *Federal:* 1883, Hopt *v.* Utah, 110 U. S. 587, 4 Sup., Harlan, J.; *Alabama:* 1866, Miller *v.* State, 40 Ala. 58; 1876, Bonner *v.* State, 55 Ala. 245; 1898, McAlpine *v.* State, 117 Ala. 93, 23 So. 130; 1899, Curry *v.* State, 120 Ala. 366, 25 So. 237 (but a confession not made while under a charge need not be first shown voluntary); 1905, State *v.* Stallings, 142 Ala. 112, 38 So. 261 (an unsound decision); 1910, Green *v.* State, 168 Ala. 90, 53 So. 286; *California:* 1899, People *v.* Castro, 125 Cal. 521, 58 Pac. 133 (to a sheriff); *Florida:* 1909, Daniels *v.* State, 57 Fla. 1, 48 So. 747 (for statements made under arrest, it must first clearly appear that the party was advised of his rights and spoke voluntarily); *Georgia:* 1873, Eberhart *v.* State, 40 Ga. 608 (holding that the State must first show the attendant circumstances, but the statement is admissible *unless* it appears to be not voluntary); *Idaho:* 1917, State *v.* Nolan, 31 Ida. 71, 169 Pac. 295 (undecided); *Louisiana:* 1878, State *v.* Johnson, 30 La. An. 881; 1882, State *v.* Davis, 34 La. An. 352 (holding that an objection not made at the time is ineffective); *Maryland:* 1904, Watts *v.* State, 99 Md. 30, 57 Atl. 542; *Missouri:* 1913, State *v.* Thomas, 250 Mo. 189, 157 S. W. 330 (for a confession taken in writing and signed while under arrest); *Nebraska:* 1914, Jones *v.* State, 97 Nebr. 151, 149 N. W. 327; *Philippine Islands:* 1903, U. S. *v.* Pascual, 2 P. I. 457 (applying Act 619); 1905, U. S. *v.* Ramos, 4 P. I. 389 (similar); 1905, U. S. *v.* De La Cruz, 5 P. I. 24 (similar); 1907, U. S. *v.* Gorospe, 9 P. I. 394 (similar); 1906, U. S. *v.* Mercado, 6 P. I. 332 (similar); *contra*, but *obiter:* 1913, U. S. *v.* De los Santos, 24 P. I. 329, 358; *accord:* 1914, U. S. *v.* De Leon, 27 P. I. 506, 511; *Texas:* 1857, Cain *v.* State, 18 Tex. 390; *Virginia:* 1870, Thompson's Case, 20 Gratt. 731.

But in any case the trial Court may properly be presumed to have found the necessary preliminary facts until the opposite is shown *in the record:* 1905, Whatley *v.* State, 144 Ala. 68, 39 So. 1014.

(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 the 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.—Of course, he should be admitted to testify to this question of fact preliminary to the Court's ruling, without waiving his privilege.

(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*, on 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 law, the judge trying the facts as in other cases of mixed questions of law or fact; but either being answered in the negative, the evidence goes to the jury, and thereupon they try this as they do all the other facts of the case, giving such weight to the confession as

[2] 1840, R. v. Courtenay, 2 Cr. & D. 62 (under arrest, after a constable, who was not produced, had been with the accused; held doubtful); 1831, R. v. Swatkins, 4 C. & P. 549 (confession to one constable just after an interview with another); 1873, State v. Garvey, 25 La. An. 193, *semble*.

Contra: 1883, Hopt v. Utah, 110 U. S. 585, 4 Sup. 202; 1904, Jenkins v. State, 119 Ga. 431, 46 S. E. 628.

[3] 1876, State v. Garvey, 28 La. An. 925 (that the prosecution must negative compulsion, not only of B., but of any one else).

[4] *Ala.* 1920, Carr v. State, 17 Ala. App. 539, 85 So. 852 (reversing the original rule of this State); *Haw.* 1867, R. v. Paakaula, 3 Haw. 30, 34; *Ind.* 1897, Hauk 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), 1907, Thurman v. State, 169 Ind. 240, 82 N. E. 64; 1908, State v. Laughlin, 171 Ind. 66, 84 N. E. 756 (under St. 1905, c. 168, § 239); *Ia.* 1904, State v. Icenbice, 126 Ia. 16, 101 N. W. 273, *semble; Me.* 1902, State v. Grover, 96 Me. 363, 52 Atl. 757; *Mass.* 1878, Com. v. Sego, 125 Mass. 213; 1879, Com. v. Culver, 126 id. 464; *Mo.* 1922, State v. Reich, — Mo. —, 239 S. W. 835; *N. Y.* 1908, People v. Rogers, 192 N. Y. 331, 85 N. E. 135 (approving the above text); *Oh.* 1874, Rufer v. State, 25 Oh. St. 469; *Okl.* 1921, Mays v. State, — Okl. Cr. —, 197 Pac. 1065; *P. R.* 1904, People v. Rivera, 7 P. R. 325, 333; 1905, People v. Dones, 9 P. R. 423, 428; 1909, People v. Martinez, 15 P. R. 725; 1912, People v. Almestico, 18 P. R. 314, 324.

[5] R. v. Thompson, 1893, 2 Q. B. 12, 18, Cave, J. ("in case of doubt"); 1920, R. v. Trenholme, 61 D. L. R. 316, Que.

§ 861. [1] *Ante*, § 12 (admissibility and weight); § 487 (determination of testimonial admissibility); *post*, § 2550 (judge and jury).

they see fit. All evidence of confessions does not pass through this ordeal of trial by the 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 voluntarily made or not, we hold, is a question of law, to be determined by the Court from the facts, as a condition precedent to their admission. Having been declared competent and admissible, they are before the jury for consideration. The jury have no authority to reject them as incompetent. But the jury are the sole judges of the truth and weight to be given confessions, as they are of any other fact. In weighing the confessions, the jury must take into consideration all the circumstances surrounding them, and under which they were made, including those under which the Court declared, as matter of law, they were voluntary. In weighing confessions, the jury necessarily consider those facts upon which their admissibility, as having been voluntarily made, depends. While there is no power in the jury to reject the confessions, as being incompetent, there is no power in the Court to control the jury in the weight to be given to facts. The jury may, therefore, in the exercise of their authority, and within their province, determine that the confessions are untrue, or not entitled to any weight, upon the grounds that they were not voluntarily made. The Court passes upon the facts merely for the purpose of determining their competency and admissibility. The jury pass upon the same facts, and in connection with other facts, if there are other facts, in determining whether the confessions are true, and entitled to any, and how much weight. The Court and jury each have a well-defined and separate province. It follows that, although the jury may come to the conclusion that the confessions were not voluntary, yet if, from extrinsic evidence, or from their character and the circumstances, the jury are satisfied that they are true, the jury should act upon them. The statement in the opinion of the case of *Goodwin* v. *State*, that it is the 'duty' of the jury to discard and reject the confessions altogether, if they are of opinion that the confessions were not voluntarily made, although they may believe them to be true, is herein modified in so far as it conflicts with the opinion in the present case. Charge 67 requested by defendant is not full enough. The jury consider whether confessions were voluntary, in passing upon their weight, but the jury is not authorized to determine their admissibility. The charge was calculated to mislead. Charge 68 was properly refused, as invading the province of the jury. It required the jury to reject the confessions absolutely, if, in their opinion, they were not voluntarily made. It was their duty to consider them, and their province to give them such weight as they saw proper."

This orthodox principle is well recognized in the majority of jurisdictions.[2]

[2] *Alabama:* 1876, Bonner v. State, 55 Ala. 246; 1881, Young v. State, 68 Ala. 578; 1881, Redd v. State, 69 Ala. 260; 1895, Stone v. State, 105 Ala. 60, 17 So. 114; 1895, Burton v. State, 107 Ala. 108, 18 So. 285 (quoted *supra*); 1900, Brown v. State, 124 Ala. 76, 27 So. 250; 1901, Huffman v State, 130 Ala. 89, 30 So. 394; 1902, McKinney v. State, 134 Ala. 134, 32 So. 726; *Colorado:* 1913, Harris v. People, 55 Colo. 407, 135 Pac. 785; *Florida:* 1897, Holland v. State, 39 Fla. 178, 22 So. 298; 1920, Bates v. State, 78 Fla. 672, 84 So. 373; *Iowa:* 1905, State v. Willing, 129 Ia. 72, 105 N. W. 355, *semble; Kentucky:* 1897, Dugan v. Com., 102 Ky. 241, 43 S. W. 418; 1906, Howard v. Com., 28 Ky. 737, 90 S W. 578; 1906, Pearsall v. Com., 29 Ky. 222, 92 S. W. 589; *Massachusetts:* 1830, Com. v. Knapp, 9 Pick. 495; 1879, Com. v. Culver, 126 Mass. 464 (good opinion by Lord, J.); *Missouri:* 1841, Hawkins v. State, 7 Mo. 192; 1876, State v. Duncan, 64 Mo. 265, 1898, State v. McKenzie, 144 Mo. 40, 45 S. W. 1117; 1919, Com. v. Russ, 232 Mass. 58, 122 N. E. 176 (wife-murder); *Nevada:* 1909, State v. Williams, 31 Nev. 360, 102 Pac. 974, *semble; New Jersey:* 1906, State v. Monich, 74 N. J. L. 522, 64 Atl. 1016 (good opinion by Pitney, J.; quoted *ante*, § 1451, n. 1; Bullock v. State, *infra*, n. 3, repudiated; settling the doubt in State v. Young, *infra*, n. 3): 1912, State v. Kwaitkowski, 83 N. J. L. 650, 85 Atl. 209 (following State v. Monich); 1914, State v. Dolan, 86 N. J. L. 192, 90 Atl. 1034 (the finding of fact is not reviewable, if there is any legal evidence to support it); *Ohio:* 1874, Rufer v. State, 25 Oh. St. 469; *Pennsylvania:* 1857, Fife v. Com., 29 Pa. 437; *South Carolina:* 1852, State v. Vaigneur, 5 Rich. L. 400; 1856, State v. Gossett, 9 Rich. L. 435; *South Dakota:* 1908, State v. Landers, 21 S. D. 606, 114 N. W. 717; *Texas:* 1857, Cain v. State, 18 Tex. 390; *Virginia:* 1853, Smith's Case, 10 Gratt. 737; *Wisconsin:* 1905, Hintz v. State, 125 Wis.

But in comparatively recent times the heresy of leaving the question to the jury has made rapid strides. To say that it is a question for the jury may mean one of two things. It may mean that the confession goes in any case to the jury to accept or to reject or to give such weight as the jury chooses; this practically abolishes all the foregoing limitations, and would be in this aspect a desirable rule. But it may and commonly does mean 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 makes abject surrender of the fixed principle (*ante*, § 12, *post*, §§ 487, 2550) 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 heresy fails to ap-

405, 104 N. W. 110; Roszczyniala *v.* State, ib. 414, 104 N. W. 113; *Wyoming:* 1906, Clay *v.* State, 15 Wyo. 42, 86 Pac. 17, 544, *semble*.

[3] *Federal:* 1896, Wilson *v.* U. S., 162 U. S. 613, 16 Sup. 895; *Columbia* (Dist.): 1904, Shaffer *v.* U. S., 24 D. C. App. 337, 385; *Georgia:* 1902, Price *v.* State, 114 Ga. 855, 40 S. E. 1015; 1905, Griner *v.* State, 121 Ga. 614, 49 S. E. 700; 1920, Thomas *v.* State, 150 Ga. 269, 103 S. E. 244; *Iowa:* 1901, State *v.* Storms, 113 Ia. 385, 85 N. W. 610 (if the Court is in doubt); 1905, State *v.* Westcott, 130 Ia. 1, 104 N. W. 341 (State *v.* Storms followed); 1907, State *v.* Von Kutzleben, 136 Ia. 89, 113 N. W. 484; 1907, State *v.* Foster, 136 Ia. 527, 114 N. W. 36; 1909, State *v.* Bennett, 143 Ia. 214, 121 N. W. 1021; *Maryland:* 1910, Toomer *v.* State, 112 Md. 285, 76 Atl. 118; *Massachusetts:* 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 Mass. 41, 48 N. E. 756; 1903, Com. *v.* Antaya, 184 Mass. 326, 68 N. E. 331 (and they may be left to decide what part, if any, was made after the improper inducement); 1885, Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494 ("the humane practice" is for the judge, if he admits the confession, after a conflict of evidence, to tell the jury that "they should exclude the confession, if upon the whole evidence in the case they are satisfied that it was not the voluntary act of the defendant"); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (Com. *v.* Preece approved); 1919, Com. *v.* Sherman, 234 Mass. 7, 124 N. E. 423; *Michigan:* 1906, People *v.* Maxfield, 146 Mich. 103, 108 N. W. 1087; 1919, People *v.* Biossat, 206 Mich. 334, 172 N. W. 933; 1916, People *v.* McClintic, 193 Mich. 589, 160 N. W. 461; 1921, People *v.* Johnson, 215 Mich. 221, 183 N. W. 920; *Mississippi:* 1874, Garrard *v.* State, 50 Miss. 152; *Missouri:* 1903, State *v.* Jones, 171 Mo. 401, 71 S. W. 680 (confession held to be properly submitted to the jury to find); 1905, State *v.* Stebbins, 188 Mo. 387, 87 S. W. 460 (this opinion faces both ways); *Montana:* 1903, State *v.* Tighe, 27 Mont. 327, 71 Pac. 3; *Nebraska:* 1909, Heddendorf *v.* State, 85 Nebr. 747, 124 N. W. 150; *New Jersey:* 1900, Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62; *New Mexico:* 1921, State *v.* McDaniels, — N. M. —, 196 Pac. 146; *New York:* 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, 162 N. Y. 357, 56 N. E. 758; 1903, People *v.* White, 176 N. Y. 331, 68 N. E. 630; 1909, People *v.* Randazzio, 194 N. Y. 147, 87 N. E. 112 (a singular ruling); *North Carolina:* 1921, State *v.* Dannelly, — N. C. —, 107 S. E. 149 (in trial Court's discretion); *Ohio:* 1896, Burdge *v.* State, 53 Oh. 512, 42 N. E. 594 (if the Court is in doubt); *Oklahoma:* 1912, Gonzalus *v.* State, 7 Okl. Cr. 444, 123 Pac. 705; 1921, Mays *v.* State, — Okl. Cr. —, 197 Pac. 1065; *Pennsylvania:* 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); 1910, Com. *v.* Aston, 227 Pa. 112, 75 Atl. 1019; *Porto Rico:* 1906, People *v.* Kent, 10 P. R. 325, 362; *South Dakota:* 1902, State *v.* Vincent, 16 S. D. 62,

preciate the elementary canon of admissibility, and in that aspect its judicial extension has been 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]

91 N. W. 347; 1910, State *v.* Allison, 24 S. D. 622, 124 N. W. 747 (if the evidence is conflicting); 1910, State *v.* Montgomery, 26 S. D. 539, 128 N. W. 718; *Texas:* 1898, Hamlin *v.* State, 39 Tex. Cr. 579, 47 S. W. 656; *Utah:* 1909, State *v.* Wells, 35 Utah 400, 100 Pac. 681; *Washington:* 1904, State *v.* Washing, 38 Wash. 465, 78 Pac. 1019; 1912, State *v.* Wilson, 68 Wash. 464, 123 Pac. 795; 1917, State *v.* Kelch, 95 Wash. 277, 163 Pac. 757.

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] 1920, People *v.* Columbus, — Cal. App. —, 194 Pac. 288; 1920, Bates *v.* State, 78 Fla. 672, 84 So. 373 (and if by later evidence the confession appears inadmissible, it should be struck out); 1904, Zuckerman *v.* People, 213 Ill. 114, 72 N. E. 741 (embezzlement; the judge may hear both sides); 1922, People *v.* Knox, 302 Ill. 471, 134 N. E. 923; 1879, Com. *v.* Culver, 136 Mass. 464; 1913, State *v.* Thomas, 250 Mo. 189, 157 S. W. 336; 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); 1908, People *v.* Rogers, 192 N. Y. 331, 85 N. E. 135 (but there must be a proper offer of such evidence); 1922, People *v.* Nunziato, 233 N. Y. 394, 135 N. E. 827 (the trial Court must receive all evidence properly tendered by defendant, and cannot draw the line at a certain point; unsound); 1910, Berry *v.* State, 4 Okl. Cr. 202, 111 Pac. 676 (approving the text above).

[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); 1909, State *v.* Wells, 35 Utah 400, 100 Pac. 681 (the defendant is entitled to cross-examine, but not to offer other evidence, before the ruling; the opinion, though citing some 25 cases from other jurisdictions, does not cite its own decision in State *v.* Haworth).

[6] 1905, Griner *v.* State, 121 Ga. 614, 49 S. E. 700 (not error not to withdraw); 1905, State *v.* Stebbins, 188 Mo. 387, 87 S. W. 460; 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); 1907, Harrold *v.* Terr., 18 Okl. 395, 89 Pac. 202 (Kirk *v.* Terr. followed); 1910, State *v.* Barker, 56 Wash. 510, 106 Pac. 133 (but not necessarily).

[7] 1881, Young *v.* State, 68 Ala. 578; 1881, Redd *v.* State, 69 id. 260; 1909, State *v.* Williams, 31 Nev. 360, 102 Pac. 974; 1916, People *v.* Taranto, 217 N. Y. 199, 111 N. E. 753 (the defendant was allowed to explain that "I heard anybody [taken to the sheriff's office] got a good licking, and I was afraid I might get a licking myself"); 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"); 1910, State *v.* Barker, 56 Wash. 510, 106 Pac. 133.

The following ruling takes account of the principles of modern psychology mentioned *post*, § 935: 1922, People *v.* Joyce, 233 N. Y. 61, 134 N. E. 836 (murder; the defendant held entitled, when claiming that a confession made to the police was untrue, to show by experts that his mental capacity was that of a child and that he was susceptible to pressure).

§ 862. **Discretion of the Trial Judge.** No plain tendency has appeared, in this department of the law, to leave anything to the final determination of the trial judge (*ante*, § 16). Although that policy is worthy to be favored, in a few instances only have the Courts of appeal really carried out their nominal adherence to it by refusing to review the trial Court's determination.[1]

§ 863. **Other Principles applicable to Confessions (Proving all the Parts, 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 the general principle of Testimonial Qualifications as applicable to confessions. But, as with all evidential material, other principles not peculiar to confessions occasionally come into play:

(1) How far *all parts of the confession* may be 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

§ 862. [1] *Canada:* 1915, R. v. De Mesquito, 26 D. L. R. 464, B. C. (trial judge's ruling reversed, the facts not being conflicting); *United States:* 1921, Morton v. State, — Ala. —, 89 So. 655; 1873, Runnells v. State, 28 Ark. 121; 1897, Williams v. State, 63 Ark. 527, 39 S. W. 709; 1915, People v. Burns, 27 Cal. App. 227, 149 Pac. 605; 1899, Fincher v. People, 26 Colo. 169, 56 Pac. 902 ("to some extent"); 1922, O'Donnell v. People, — Colo. —, 204 Pac. 330; 1893, Hardy v. U. S., 3 D. C. App. 35, 46; 1895, Travers v. U. S., 6 D. C. App. 450, 459; 1898, State v. Willis, 71 Conn. 293, 41 Atl. 820; 1900, State v. Cross, 72 Conn. 722, 46 Atl. 148 (the trial Court's determination is final as to the facts, and perhaps also to a further extent); 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); 1895, Bartley v. People, 156 Ill. 234, 40 N. E. 831; 1907, Thurman v. State, 169 Ind. 240, 82 N. E. 64; 1901, State v. Storms, 113 Ia. 385, 85 N. W. 610; 1902, State v. Edwards, 106 La. 674, 31 So. 308; 1902, State v. Grover, 96 Me. 363, 52 Atl. 757; 1909, State v. Berberick, 38 Mont. 423, 100 Pac. 209; 1898, Roesel v. State, 62 N. J. L. 216, 41 Atl. 408; 1906, State v. Monich, 74 N. J. L. 522, 64 Atl. 1016 (the only question on review is whether there was evidence to support the trial judge's finding of admissibility); 1909, State v. Zeller, 77 N. J. L. 619, 73 Atl. 498; 1869, State v. Davis, 63 N. C. 580; 1880, State v. Vann, 82 N. C. 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 N. C. 512, 37 S. E. 66; 1857, Fife v. Com., 29 Pa. 437 (trial Court's discretion will be reviewed only in an extreme case); 1904, State v. Rogoway, 45 Or. 601, 78 Pac. 987, 81 Pac. 234; 1912, State v. Humphrey, 63 Or. 540, 128 Pac. 824; 1913, State v. Spanos, 66 Or. 118, 134 Pac. 6; 1895, State v. Derrick, 44 S. C. 344, 22 S. E. 338; 1897, State v. Cannon, 49 S. C. 550, 27 S. E. 526; 1895, State v. Gorham, 67 Vt. 365, 31 Atl. 845 (trial Court's ruling is final, if evidence is conflicting); 1897, Connors v. State, 95 Wis. 77, 69 N. W. 981; 1905, Hintz v. State, 125 Wis. 405, 104 N. W. 110 (as to the existence of the inducement); Roszczyniala v. State, 125 Wis. 414, 104 N. W. 113.

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, 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 un-

§ 865. [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; 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; Wells, J., in Beery *v.* U. S., 2 Colo. 211, 213; Lee, J., in Smith's Case, 10 Gratt. Va. 739; Moncure, J., in Shifflet's Case, 14 Gratt. 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 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). See the quotation and the rulings *ante*, § 847.

[4] Paxson, C. J., in Com. *v.* Clark, 130 Pa. 650, 18 Atl. 988 (1890), uttering a rebuke similar to that of Gurney, B.

fortunate 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 cleavage is also accompanied, in all countries, with a subordination, a submission, half-respectful and half-stupid, on the part of the "lower classes" towards those in authority, — an attitude especially marked, though not solely found, among the peasantry and towards the squires and other landed superiors on whose will hangs the tenant's fortune. The situation of such a peasant charged by his landlord with poaching and urged to confess, the situation of the maid urged and threatened by her mistress to confess a petty theft, involves a mental condition to which we may well hesitate to apply the test of a rational principle. We may believe that rationally a false confession is not to be apprehended from the normal person under certain paltry inducements or meaningless threats; but we have here perhaps a person not to be tested by a normal or rational standard.[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 consideration. 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 be felt), 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 superiors.

This, then, was certainly one of the reasons why, in one way or another, on principle or without principle, many judges came to set themselves against the use of confessions, and to exclude them on pretexts which were in themselves trifling and irrational but in fact represented a fixed judicial sentiment. It is not easy for us, to-day, and in most parts of this country, to realize this attitude; but it had a very real influence.

(2) Another reason is found in the absence at that time of the right of appeal in criminal cases, and the practical creation of the law of confessions

[5] "Most persons accused of crime are poor, stupid, and helpless" (Stephen, History of the Criminal Law, I, 442).

by isolated judges at Nisi Prius without consultation and on independent responsibility. In order to solve any doubts which might arise in his mind, the Nisi Prius judge was obliged to consult casually-accessible colleagues or to reserve the question for a meeting of all the judges; and the natural disinclination to such a delay, to becoming the source of trouble to his professional associates, and to bringing perhaps upon himself the reflection of having had unnecessary doubts, made this course always a disagreeable one and a last resort.[6] The result was that the judges commonly preferred to eliminate the questionable evidence altogether, to try the case on whatever other evidence could be mustered, and to solve all questions that were even arguable (whether the judge himself had doubts or not) in favor of the accused.[7] As the exact distinction was not always preserved between rejecting 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

[6] There are twenty reported Nisi Prius rulings on confessions for every full-bench decision. Nor did the creation of the Court for Crown Cases (in 1865) much improve matters, for it contained less than half (five) of all the judges (so that its authority was not representative), and the reservations of questions for it do not seem to have been more frequent.

[7] Said Baron Parke, in 1852, commenting 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.

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 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 community 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, 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 today of the Nisi Prius doctrines of the first part of the

[11] Compare § 579, *ante*.

1800s is now nothing but sentimentalism, a false tenderness to guilty ones, and an unnecessary deviation from principle.[12]

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 confessions 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]

[12] The most notable example, of course, of this unreasonable perpetuation, in modern times of these inappropriate doctrines, is the Federal case of Bram *v.* U. S., 168 U. S. 532, 18 Sup. 183.

§ 866. [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 2 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, Harlan, J., in Hopt *v.* Utah, 110 U. S. 584, 4 Sup. 202; Putnam, J., in 9 Pick. Mass. 507; Rothrock, C. J., in 48 Ia. 384.

[4] In Johnson *v.* People, 197 Ill. 48, 64 N. E. 286 (1902), is an example of the confusion which arises from an indiscriminate mingling of these two generalities in instructions to a jury.

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. Much depends upon the mental and emotional traits of the accused; and the many grades of defectiveness would bear upon the confessions value. 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 persuasion 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 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;

[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."

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.[6] Mr. J. Erle touched the kernel of the subject when he said:[7] "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 inclined 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.[8]

§ 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 — is of a slender character, and the cases of that sort are of the rarest occurrence. No trustworthy figures of authenticated

[6] The above text cited with approval by Teller, J., in Damas *v.* People (1917), 62 Colo. 418, 163 Pac. 289.

[7] 1852, R. *v.* Baldry, 2 Den. Cr. C. 446.

[8] Whether an *instruction should be given* on the value of confessions is considered in the following cases: 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169; 1905, Griner *v.* State, 121 Ga. 614, 49 S. E. 700; 1903, Burnett *v.* People, 204 Ill. 208, 68 N. E. 505; 1905, State *v.* Willing, 129 Ia. 72, 105 N. W. 355; 1903, Horn *v.* State, 12 Wyo. 80, 73 Pac. 705.

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, as it is impossible to determine beforehand the real weight of any confession, 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 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

§ 867. [1] The following are the most notable in English and American annals:

England: 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, ed. 1840, II, 188, 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).

United States: 1819, Boorn's Case, Vt., Greenleaf, Evid., 15th ed., § 214 note, 10 North Amer. Review 418, 12 Amer. Crim. Rep. 221, and 15 id. 223, 6 Amer. St. Tr. 73 (confession of murder, made at the advice of friends, in the face of damaging evidence, and in the hope of a recommendation to mercy); 1846, Trailor's Case, 4 West. L. J. 25, Chicago, Daily Law Bull. Dec. 14, 1904; 1909, State *v.* Fanning, Shawnee Co., Kansas, Topeka "Capital", Nov. 16, 1909 (death of Mrs. Short by supposed poisoning; one Fanning confessed repeatedly to having poisoned her by arsenic, but the medical and chemical testimony showed this to be impossible, and indicated heart disease as the cause of death); 1914, Shellenberger *v.* State, 97 Nebr. 498, 150 N. W. 643 (a mania to confess heinous crimes).

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). Mr. J. F. Geeting has a note carefully collating the cases in his edition of American Criminal Reports, vol. 12, p. 213. Professor Hans Gross has a valuable chapter in his Criminal Psychology, § 8, p. 31 (transl. Kallen, in the Modern Criminal Science Series). Mr. W. M. Best's chapter, in his Principles of the Law of Evidence, §§ 560–573 (3d Amer. ed.), collects interesting data. The following titles also give purporting instances: E. B. Delabarre, "Retroactive Amnesia and Confessions of Self-Robbery" (Case & Comment, 1913, XIX, 839); Anon, "Untrue Confessions" (Case & Comment, 1913, XIX, 841). See also the materials collected in the present writer's "Principles of Judicial Proof" (1913), §§ 277–279.

[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 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

Chief Justice Paxson already quoted, an exhibition of sentimentalism toward the guilty.

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 innocent.

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]

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; and *ante*, § 851.

[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.

TITLE II (*continued*): TESTIMONIAL EVIDENCE

SUB-TITLE II: TESTIMONIAL IMPEACHMENT

CHAPTER XXIX.

A. GENERAL THEORY OF IMPEACHMENT

B. PERSONS IMPEACHABLE

1. Impeachment of Hearsay Testimony

2. Impeachment of Defendant as Witness

3. Impeachment of an Impeaching Witness

4. Impeachment of One's Own Witness

A. General Theory of Impeachment

§ 874. **Analysis of the Process of Impeachment.** A testimonial assertion comes, as evidence, in the same logical form as a circumstantial evidential fact (*ante*, § 475); *i.e.*, the form of proposed inference is: A asserts the existence of fact X; therefore, fact X exists. Hence, the problem of the cogency of this inference involves (as all other judicial inferences do) the question how many and what other hypotheses there are which explain away the evidential fact of A's assertion as due to some other cause than the existence of fact X (*ante*, No. 2). The evidential fact is simply that A makes the assertion; the problem is, Can it be explained away, so that we need not accept fact X as the conclusion? In short, the whole process of Impeachment or Discrediting of a witness, as known to practitioners, is nothing but the *general logical process of Explanation* (*ante*, § 34). So, too, the process of corroboration or support of a witness is the logical process of closing up the possible avenues of Explanation, and thus making the proposed inference more and more necessary and unavoidable.

What, then, is the distinction, if any, between Explanation for Circumstantial evidence and Explanation for Testimonial evidence? Practically the distinction is a real one, — is in fact the chief basis for the time-honored division of all evidence into these two classes. Circumstantial evidence is heterogeneous and multifarious in its varieties; testimonial evidence is homogeneous. Circumstantial evidence has no single common feature, and few features partly in common; testimonial evidence has one great feature in common, and numerous large classes having common features. *E.g.* the finding of an old coat in an empty baker's wagon on a back lot in Halsted street, Cook county, — the presence of a broken oil can in a grain car on a sidetrack near Onondaga, New York, — the lack of one ten-dollar bill in a roll of ten-dollar bills in a Louisville bank on Monday, January 4, — these are unique, isolated facts which have never happened before in precisely the same way; hence there are no generic truths or laws involved in our inference from them; it is purely empiric. But A's assertion that a street lamp was lighted at a given time or place is generically of a piece with hundreds of thousands of former evidential data, viz. it is a human assertion, resting for credit on human qualities. The human element in this testimony is an element in common, running through the vast mass of prior human testimonies. And even though human beings differ, yet their differences also are generic, each on a vast scale. Moral character, bias, experience, powers of perception in light and dark, powers of memory after a lapse of time, susceptibility to falsify under torture, — these and other qualities

have been under observation in so many thousands of instances under varying conditions that we have built up generalizations (more or less correct or uniform), which pass for general truths (or at least, as working guides) on those subjects. In short, we *possess a fund of general principles*, applicable to specific instances of this class of evidence, and almost totally lacking for specific circumstantial evidence. It does not here matter whether those general principles are all sound or not; the point is that we believe them to be, and that we are always disposed to use them in our reasoning upon the probative value of specific human assertions.

How does this bear upon the process of Impeachment or Explanation? In this way: Through this more or less explicit appeal to such general principles, *most of our reasoning upon the credit of witnesses is put into the Deductive form;* in which form these general principles or truths come out into the open as the avowed basis of our inference (*ante*, § 30). Thus they can and must be tested for their validity; and thus, if well founded, they may serve as aids to the valuing of other testimony. These aids are generally lacking for circumstantial evidence; their possession is a great advantage in valuing testimonial evidence, and is its prime feature for practical purposes.

1. *Classification of Impeaching Evidence.* Since, then, the process of Impeachment or Explanation (*i.e.* the valuation of the discount to be made from the credit of a testimonial assertion) rests usually on a more or less explicit deduction from some generalized truth, and since the force of the Explanation will depend much on the number, nature, and correctness of the general principles thus involved, it would seem that the classification of the data should attempt an answer to these questions: What data are virtually Deductive? What data are virtually Empiric? Under the former head, we should further classify according to the number of general principles or deductions involved. Under the latter head, we should endeavor to analyze the possible general principles latent, and thus to learn the force of the explanations.

a. Deductive Impeachment. The generic human qualities affecting testimony, and the state of knowledge on the subject, have already been considered (*ante*, § 478). The tripartite elements of the testimonial process — perception, memory, narration — have also been examined (*ante*, § 478). But the latter do not form separate steps in the inference; they are merely modes in which the deduction operates; hence they do not need to figure separately in the inference. *E.g.* in estimating the witnesses' credit for an assertion as to a midnight explosion, the facts are offered that one witness has no special experience in explosion sounds, and that another is afflicted with insane delusions; the forms of the inferences are: (1) Persons not experienced in explosion sounds are apt to obtain erroneous impressions of direction and intensity; this witness lacks such experience; therefore he is possibly in error as to the fact perceived; (2) Persons of insane delusions are apt to imagine non-existent facts; this witness is insane on a certain

subject; therefore he is likely to be in error either by his original perception or by the subsequent operation of his memory. Now the former discrediting fact affects only the element of perception, in the testimonial process; the latter affects either or both perception and recollection. Whichever of such elements may be the one affected, it enters as a term of the truth used deductively, and not as a separate step of deduction. Hence, we may ignore those three elements in classifying the separate steps.

Proceeding to the impeaching facts, then, we premise further that they may be first grouped (merely for convenience) as comprising external and internal conditions. *External* conditions include general truths as to the effect of light, distance, temperature, position, time, etc., on the functions of perception, memory, and narration. *E.g.* that an object in a strong light may give misleading impressions as to color; that events observed ten years ago cannot be as well remembered as more recent ones; that a threat of violence usually deters from telling the exact truth, — these (if there are such truths) may roughly be grouped as external conditions. *Internal* conditions include general truths as to moral disposition, emotions, sex, experience, etc.; *e.g.* that a strong emotion disturbs the powers of correct perception and correct memory; that moral unscrupulousness makes correct narration less likely, and so on.

All the foregoing generalities form the first class of data, *i.e.* data of *Immediate* deduction. There is a single step of inference from them to the supposed discrediting conclusion. The formal statement would be: Persons affected by a strong emotion of revenge are apt to distort the facts; this witness has such an emotion; hence, his assertion may not represent the facts as they are. Notice that here we have but one (supposed) general truth to deal with, — the major premise; the minor premise is a concrete fact, viz. this man's specific emotion.

The next class is formed by the data of *Mediate* deduction. Here the above minor premise comes under analysis. Do we get it from a simple concrete fact, interpreted empirically, or do we get it by the aid of another general truth coupled with another concrete fact as a minor premise? If by the latter way, we must note and test that second general truth also. In this particular instance, either way may be available. *E.g.* the witness's language of hostility, on or off the stand, may be the simple concrete fact from which the emotion may be inferred; or, the witness may be an accomplice or a policeman (concrete fact), to which we may couple some supposed general truth about accomplices or policemen having generically an emotion of hostility. In the latter case, we thus have a second general truth, upon whose correctness or force our ultimate conclusion will depend. There are scores of such supposed general truths current in the books and in tradition. They are drawn from the more or less extensive experience of life, accumulated and compared and condensed. Sometimes these partial experiences are puzzlingly contradictory, *e.g.* the views as to the bias of experts and of

policemen. Sometimes they are relics of former experience now practically discarded, *e.g.* the rooted distrust of a convict's testimony.

It is at this point that we meet most of the doubtful general truths affecting testimonial evidence. The data of immediate deduction are seldom formulated; their generality is obviously so broad and loose (at least, for what are above called internal conditions) that they seldom do harm by receiving an exact phrasing; and so far as they have fallen within the range of the scientific psychologist (*e.g.* the effect of light on color) there are as yet established few general laws having any exact tenor. But the supposed general truths falling within the mediate class, which have mostly grown up empirically in judicial practice, are apt to need special caution, by reason of their plausible verities.

By insisting on the foregoing two processes — those of stating explicitly the immediate data and the mediate data, with one or both of their general truths — we shall have forced out into the open the real basis of our proposed inference. We may verify our concrete fact or facts (*i.e.* we may settle whether this man *is* a policeman or an accomplice or a convict or has uttered hostile language, by asking him or by calling another witness); and we may then lay aside our general truth or truths for reflection and testing. This process we could seldom use for circumstantial evidence; but we can and must use it most of the time for testimonial evidence.

Such is the practical application of the logical process of Explanation in making use of the data for the valuation of testimonial evidence. Thus, when the process of analysis has been completed for a given witness, we shall have passed in review all the possible immediate data affecting the topics of his testimony, noting the supposed general truths, if any, on which they rest, — all the concrete mediate data which complement the former as minor premises, — all the further general truths therein involved, — and all the further concrete data which complete the supposed inference. After the appropriate rejections and acceptances, we are ready to estimate the probability that the witness's assertion is due rather to some other cause than to the actuality of the fact asserted by him.

b. Empiric Impeachment. The common varieties of empiric impeachment are few. Most of them are illustrated *post*, §§ 977, 1000, 1017, — specific circumstances forming a defect in basis of perception, specific instances of lack of recollection, specific errors involved in contradiction and self-contradiction, usually in some detail "collateral" to the main issue. Now the ordinary use of these data is purely empiric or inductive in form; *e.g.* "A erroneously asserted that the defendant wore a black hat, instead of a light one; therefore A's main assertion that the defendant struck first is erroneous." Occasionally, when the arguer is questioned as to the soundness of the inference (for, as Professor Sidgwick says, "the whole cogency of inductive proof depends upon the extent to which the principle, hitherto out of sight, is rendered definite"), he will offer some general truth which

fortifies the inference by giving it a deductive form, *e.g.* "falsus in uno, falsus in omnibus." But such general truths, when then examined, usually are found to be either inapplicable or too loose to be forceful. Hence, until we arrive at a more accurate knowledge of the general truths applicable in this field, we must class these inferences as essentially empiric.

This is not saying that they are not strong. At times, none can be stronger. Indeed, in the ordinary course of trials none are more sought after or more relied upon than this class of data; which at least shows how highly their force is valued by practitioners. All we are concerned for here is that their distinct nature shall be understood, and that their weaknesses shall not be ignored.

So far as they are sometimes intangible and sometimes supportable by various general truths, these proposed inferences are sufficiently analyzed under the various rules involved. In charting them for a given witness, it is prudent to assume some undetermined general truth or quality as the immediate datum, add the specific instance, etc., as the mediate datum, and then, after reflection, fill in tentatively the description of the immediate datum.

2. *Corroborating Evidence.* Corroborating evidence has several aspects. Some data usually spoken of as corroborating are not such, in a strict sense. Corroboration, applied to testimonial evidence, is merely the complement of Explanation (Impeachment). The logical process of accepting an inference as to a fact in issue has only two results, — belief (in some degree) or non-belief. Non-belief consists in regarding some other hypothesis (than the fact alleged) as equally or more probable; the process of showing those other hypotheses and their probability, and thus of preventing belief, is that of Explanation (*ante*, § 34). This the opposing party will usually undertake to do. But even if he does not, the tribunal may see for itself that some such other hypotheses are possible. Hence the first party (whether or not the opponent suggests these explanatory hypotheses) may well strengthen his case by certain data which demonstrate those hypotheses to be not available. Thus he stops up possible exits for non-belief, and makes it more unavoidable to believe his own alleged conclusion. And this process of stopping up exits is Corroboration.

As applied to testimonial evidence, Corroboration consists in establishing data which refute possible discrediting circumstances. And (as above noted) this may properly be done even though the opponent has made no attempt to establish any of the impeaching hypotheses; for the mere possibility of them may cause the tribunal to hesitate, and the Corroboration will remove these grounds of hesitation. The mere fact of the witness's making an assertion does not require us to believe the matter asserted; our knowledge of human nature forbids this. Hence the tribunal, in view of possible discrediting hypotheses, may cautiously be disinclined to believe until those hypotheses have been shown groundless. For example, a witness Smith, whose name and face signify nothing to the tribunal and whose moral char-

acter may or may not be trustworthy, may receive instantly more credit when it appears that he is the well-known citizen Smith. This class of data may appear on the 'voir dire' of the direct examination, quite as well as on the case in rebuttal after an attempted impeachment, and on the witness's own examination as well as from the testimony of others. Thus the rule of practice which forbids most sorts of so-called corroboration until after an attempted impeachment is a rule of orderly convenience only, and its distinction has no correspondence to any logical feature of Corroboration.

Every fact, then, which closes up an exit of *possible* distrust of the testimony, *i.e.* which prevents or refutes a possible discrediting hypothesis, is a Corroborative fact. Hence the varieties of corroboration are as numerous as the varieties of impeachment.

There is, however, little occasion for the use of new or different general truths by way of deduction. The general truths, so far as used, would be the same as those used in impeachment, with a reverse application. *E.g.* in a street-car collision, the testimony of a bystander waiting on the corner is strengthened by the fact that he was a cool spectator; *i.e.* the general truth that persons excited by a catastrophe are not likely to observe correctly is negatived as a possible impeachment of him, and thus one possible source of distrust is removed.

As to empiric data, only a very few types are common. The prior consistent narration of a witness's story is one of these. For such data the same cautions apply as for empiric impeaching data.

§ 875. **Distinction between Scientific Analysis of Testimony and Controversial Procedure in Judicial Trials.** The feature of bi-partisan presentation of evidence in a judicial trial, as traditionally handed down to us, has radically affected the law of Evidence in many aspects (*post*, § 2483).

(1) Notably here, it gives rise to the antiphonal division of the procedure of analyzing a witness' credit into *three stages*, viz. Examination in Chief, Impeachment, and Rehabilitation (or, Corroboration). The scientist would in one continuous process analyze and weigh all the elements affecting the credit of a specific testimonial assertion. But in a judicial trial, the allotment of the task of producing evidence to the contending parties results in the division of the evidential material into three groups, corresponding to the above three stages; the first group falling to the share of the proponent of the witness, the second to the opponent, and the third to the proponent again.

Hence, the share of evidential material allotted to the opponent is affected by a special group of rules, applicable peculiarly to this process of Impeachment. The probative value of the evidence would be the same, whether for the scientist or the advocate. But these rules limit the processes of the advocate. Hence in this field the processes of science and of judicial inquiry part from each other. We cannot expect that the inferences of the man of science can expect to be given the same free scope of consideration in judicial trials.

(2) Nevertheless, within the limitations of these special judicial rules, judicial practice is entitled and bound to resort to all *truths of human nature established by science*, and to employ *all methods recognized by scientists* for applying those truths in the analysis of testimonial credit. Already, in long tradition, judicial practice is based on the implicit recognition (*ante*, § 874) of a number of principles of testimonial psychology, empirically discovered and accepted. In so far as science from time to time revises them, or adds new ones, the law can and should recognize them. Indeed, it may be asserted that the Courts are ready to learn and to use, whenever the psychologists produce it, any method which the latter themselves are agreed is sound, accurate, and practical. If there is any reproach, it does not belong to the Courts or the law. A legal practice which has admitted the evidential use of the telephone, the phonograph, the dictograph, and the vacuum-ray, within the past decades, cannot be charged with lagging behind science. But where *are* these practical psychological tests, which will detect specifically the memory-failure and the lie on the witness-stand? There must first be proof of general scientific recognition that they are valid and feasible. The vacuum-ray photographic method, for example, was accepted by scientists the world over, within a few months after its promulgation. If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it. Both law and practice permit the calling of any expert scientist whose method is acknowledged in his science to be a sound and trustworthy one. Whenever the Psychologist is really ready for the Courts, the Courts are ready for him.[1]

§ 875. [1] In a series of articles by Professor Hugo Münsterberg, Professor of Psychology in Harvard University, in the Times Magazine (N. Y.) for January and March, 1907, the assertion was made (p. 427) that within the past few years "a new special science has grown up", by means of which a witness could be accurately tested directly "with regard to his memory and his power of perception, his attention and his [mental] associations, his volition and his suggestibility, with methods which are in accord with the exact work of experimental psychology"; and the reproach was made that Courts are "still unaware" of this; that they "proceed as if experimental psychology, with its efforts to analyze the mental faculties, still stood where it stood two thousand years ago"; that Courts are "completely satisfied with the most unscientific and haphazard methods of common prejudice and ignorance when a mental product, especially the memory report of a witness, is to be examined"; and that "the Courts will have to learn sooner or later" that these tests should be employed. Professor Münsterberg's claims were further expounded by him in a volume entitled "On the Witness Stand" in 1908. The controversy was taken up by Mr. C. C. Moore in Law Notes, and articles by him and Professor Münsterberg appeared in the numbers for October and November, 1907, and January, 1908. Another article by the learned psychologist appeared in McClure's Magazine for October, 1907 (XXIX, 614).

The voluminous Continental literature on the subject was carefully examined by the present writer, and a bibliography of it was published by him in the Illinois Law Review for February, 1909 (III, 399), with a summary of the criticisms tenable against the proposed methods. The general conclusion was that they were as yet of no practical service in the judicial investigation of facts. Passages from that article and from Professor Münsterberg's book are reprinted in the present writer's Principles of Judicial Proof, as given in Logic, Psychology, and General Experience, and illustrated in Judicial Trials (Boston, 1913).

But the scientific study of testimonial psychology is undoubtedly much needed by lawyers and judges, and the "Principles etc.", above cited, attempts to serve this need. The legal profession should be grateful to Professor Münsterberg for having stimulated popular interest in the subject.

The Journal of Criminal Law and Criminology (Northwestern University) contains notes and articles from time to time on this subject;

Modern psychology has already made progress in various directions towards adding to our available knowledge in this field. Its possibilities are noted under the several impeachment processes involved (*post*, §§ 995 *et passim*).

§ 876. **Distinction between proving Incorrectness of Testimony from Defective Qualifications, and proving the Defective Qualifications by other Circumstances.** (1) It has been seen, in dealing with Testimonial Evidence, that an assertion may be admitted as the basis of inference only when it is attended by certain minimum qualifications in the person making it, *i.e.* first, the Capacity to Observe, Recollect, and Narrate — either Organic, Experiential, or Emotional — and, secondly, Actual Observation, Recollection, and Relation (*ante*, §§ 475–478). Now, although the witness whose assertion has been thus admitted may possess in the minimum requisite degree these qualifications, nevertheless above this minimum degree there is a countless variety in the possible extent and strength of these qualifications, and the greater or less extent of them may throw light on the probability of his assertion's correctness. Thus, he may possess the minimum degree of Sanity required to make the assertion admissible, or the minimum degree of Opportunity of Observation; and yet he may fall so far short of possessing such sanity or such opportunity of observation as he might well have had, and this fact, if shown, will detract from the probability of his assertion's correctness.

In the first place, then, wherever a quality or condition is so important that its possession in a minimum degree is essential to the use of his assertion at all, it is obvious that its possession in a degree somewhat greater, but still less than perfect, may be used to argue against the probable correctness of his assertion; and thus a *defect in any of the above testimonial qualifications may be employed in discrediting*.

But, in the second place, there are a few other qualities which, though *not required as essential prerequisites* to the use of the assertion at all, nevertheless may be used to cast doubt on its correctness when admitted. These are two, Moral Character and Emotional Prejudice. These, at a former stage of the law, were indeed in some respects regarded as prerequisites; *i.e.* a person totally lacking in moral character (as indicated by Infamy, or conviction of a crime), and a person not in an emotional attitude of non-partisanship (as indicated by Interest in the cause), was excluded abso-

and a bibliography of the articles in foreign languages, on the psychology of testimony, from time to time has appeared in the Psychological Bulletin and in the Journal of Experimental Psychology.

The methods of Dr. Wm. M. Marston, of the American University, Washington, D. C., which are promising, can be studied in the following articles: *Marston:* Journal of Exp. Psych., II, 117 (April, 1917); ib. III, 72 (Feb. 1920); Journal of Abnormal Psychology, XV, 319 (1921); Journal of Criminal Law & Criminology, XI, 551 (Feb. 1921); *Larson:* Journal of Crim. L., etc. XII, 390 (Nov. 1921).

Other works and articles are as follows: Wm. and Mary T. Healy, Pathological Lying, Accusation and Swindling (Boston, 1915; Criminal Science Monograph Series, No. 1); Bernard Glueck, Studies in Forensic Psychiatry (Chap. III, "The Forensic Phase of Litigious Paranoia"; Chap. IV, "The Malingerer"; 1916); Collie, Malingering and Feigned Sickness, 1917, 2d ed., *passim*.

lutely (*ante*, §§ 519, 576). To-day the lack of these qualities is not regarded of such consequence as to exclude the assertion; but they still are regarded as having probative force against the correctness of the assertion. Thus, in discrediting an assertion, we may appeal, in searching for a basis of inference, not only to defects in specified qualities whose minimum existence is required for admitting the assertion, but also to the qualities of moral character and of emotional prejudice.

(2) These, then, are the starting-points of inference. We may argue that the witness' assertion may not be correct because the assertor has some defect either in Capacity — Organic or Experiential — to observe, recollect, or narrate, or in Opportunity of Actual Observation, Recollection, or Narration; and, additionally, we may argue from his moral character — a species of Organic Incapacity — and from his Emotional Incapacity. Now if we could adequately present these defects, or defective qualities, to the tribunal directly and abstractly, nothing further would be done or needed; we should ask the tribunal to infer from these defective qualities the probability of the assertion's incorrectness, and the only questions that would arise would involve the conditions under which this single inference would be allowed in the case of each quality. But it is obvious that in most cases it will be either impossible, or difficult, or insufficient, to present this defective quality to the tribunal directly or abstractly. In other words, the *defective quality may in its turn need to be evidenced by other circumstances*. Thus, instead of a single inference — from the defective quality to the assertion's incorrectness — we shall resort to two inferences (*ante*, § 874), *i.e.* from some other circumstance to the existence of the defective quality, and from that to our original objective, the assertion's incorrectness. For example, if it is desired to argue from the witness' emotional prejudice or hostility to the opponent, it will rarely be possible to present that quality abstractly and directly; we must resort to another inference in order to evidence that very hostility; for example, it will be shown that a pecuniary loss to the witness will attend the victory of the opponent, or that he has quarrelled with the opponent, or that he is nearly related to the party he testifies for. Again, while it is commonly possible to present his defective moral character to the tribunal directly and abstractly — *i.e.* by reputation of that character, or by personal knowledge —, yet this is not the only or the sufficient way of getting at the character; a resort to a circumstantial inference may be desirable, — for example, the inference from his specific misconduct to his bad character; and then a second inference is required from the character to the assertion's incorrectness.

Now the practical basis of these two classes of inferences is wholly distinct, as it has already been seen to be (*ante*, § 53) in dealing with Character as evidence of an Act done, and Conduct as evidence of the Character. The questions of Relevancy — *i.e.* the propriety of the inference — being here different, the rules prescribing the admission of the two sorts of inference

must be separately treated. This is one of the fundamental distinctions affecting the arrangement of the subject, and is observed in the separation of Topics II and III (§§ 945–994, *post*) from Topic I (§§ 920–942).

§ 877. **Distinction between Relevancy and Auxiliary Policy.** It has already been seen (*ante*, § 42), that the exclusion of circumstantial evidence may be expressed by a single rule of thumb, and yet the rule may rest, not merely on some principle of Relevancy (of Probative Value), but also or solely on some principle other than Relevancy, *i.e.* on Auxiliary Policy. Thus, the occurrence of a similar injury to another person may be excluded because it does not satisfy a principle of Relevancy, *i.e.* the conditions of the injury are not substantially similar; while, again, the same evidence, though satisfying this principle of Relevancy, may still be excluded on the ground of surprise and confusion of issues, *i.e.* Auxiliary Policy (*ante*, § 443). Again, a person's bad character is concededly admissible, so far as Relevancy is concerned, to indicate his probable doing of a bad act, and yet, where the person is a defendant in a criminal case, an auxiliary policy of avoiding undue prejudice prevents the prosecution from resorting to it except in rebuttal; while, where this policy does not apply — as in the case of the prosecutrix on a rape charge, or of a deceased person alleged to be the aggressor in an affray — the evidence is admitted when it satisfies the requirements of Relevancy alone (*ante*, §§ 55–68). In short, while the principles of Relevancy form a homogeneous and independent body of doctrine, and the principles of Auxiliary Policy form a wholly separate body of doctrine (*post*, §§ 1845, 1863), they may still have to be applied to the same piece of evidence in such a way that a single rule of thumb is often created as the net resultant of both principles; in the exposition of the subject it is practically impossible to separate the treatment of the double principle lying behind the concrete rule. But this practical necessity, arising from convenience of treatment, need not mislead us to forget the distinctness of the two sets of principles; for, without a full understanding of the principles, the rules themselves can never be understood.

In the present subject, then, there occurs this same doubleness of principle. Each bit of circumstantial evidence offered to discredit a witness must first pass the gauntlet of the Relevancy principles; but it may also be obnoxious to some principle of Auxiliary Policy which may after all exclude it. In dealing with a given sort of discrediting evidence, the principle of its Relevancy has always first to be considered; and then the bearing must be examined of any principle of Auxiliary Policy which may apply. The evidence may satisfy the test of the first, but not of the second; or it may satisfy both; or there may be none of the second sort that is applicable.

A few instances will serve to illustrate concretely in advance the workings of the two sorts of doctrines. (1) The witness' Character, as indicating incorrectness of assertion, is relevant (on the general principle of § 59, *ante*), when it involves the trait connected with the sort of act to be proved;

a question of Relevancy here, then, is whether character for truthfulness only, or general character, may be used. This being determined, the matter of Auxiliary Policy presents itself; and the judges are found pointing out that the reason of this sort that effects exclusion of character as against a defendant in a criminal case does not apply here at all, *i.e.* the reason of unfair prejudice, because the witness is not on trial and cannot be condemned; while on the other hand a new principle of Auxiliary Policy here comes into play, *i.e.* the principle that one cannot attack the character of his own witness. (2) Again, in attempting to evidence this Character by circumstantial evidence, it has already been seen (*ante*, § 194), that evidence of specific acts of misconduct, while it is relevant enough, is excluded as against a defendant in a criminal case because of two reasons, — first, the undue prejudice which might condemn him for past acts though innocent of the one charged; secondly, the unfair surprise and the impossibility of being prepared to disprove the misconduct alleged. Now, for witnesses, the first of these has no application, because the witness is not on trial; the second does apply, yet it may be obviated if we merely forbid the use of extrinsic testimony and confine the opponent to proving it by evidence extracted from the witness himself, *i.e.* by cross-examination. This being settled, certain questions of Relevancy still remain open for evidence thus extracted; for example, whether the mere arrest of a witness on a specific charge is relevant to show bad character. This, the net result of the rules for showing bad character by particular acts of misconduct depends on the combined influence of certain principles of Relevancy and certain principles of Auxiliary Policy taken together. (3) Again, to show the witness' Capacity for Mistake we may offer as relevant a prior contradictory statement of his. If it is really contradictory it is relevant. But it must also pass the tests of Auxiliary Policy; in the first place, to avoid multiplicity of issues, such evidence must be excluded if it deals with a collateral matter; in the next place, to avoid surprise and furnish a fair opportunity for explanation or denial, the witness must first be asked whether he made such a statement. These tests being satisfied and the relevancy appearing, the evidence may be used. (4) Again, to show Bias, we offer the expressions of the witness indicating a hostile feeling; by the Relevancy principle of Counter-explanation (*ante*, § 34), he may offer facts which explain away his expression and destroy its force as indicating hostility; here a question of relevancy may arise, — for example, whether the justness of his cause of anger is in any sense an explanation, as of course it may not be; or a question of Auxiliary Policy may arise, — for example, whether it is profitable to take up much time by such explanations, or whether the details of the quarrel, though truly explanatory, may not cause unfair prejudice to the opposing side.

Thus, throughout the whole subject, here as well as for Circumstantial Evidence at large (Title I), the principles of Relevancy and the principles of Auxiliary Policy, while wholly distinct in their nature, are yet so inextrica-

bly united in the concrete rules of exclusion that they must be expounded together in connection with each sort of evidence.

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

Two things must be kept in mind about such rules. (1) The question of Relevancy is not touched by them. The restriction is based wholly on some doctrine of Auxiliary Policy. It prescribes that such-and-such evidence, *if relevant*, is to come only from a specific source. Its relevancy is still open to question. For example, in evidencing bad character, we may not call a new witness to impeach the former one by testifying to some misconduct of his; we are restricted to the questioning of the original witness; but, while conducting such questionings, we are still confined to facts which are relevant for the purpose, and we may at any moment be told that a given fact about which we are cross-examining — for example, former arrest on some heinous charge — is not relevant.

(2) Thus there is *no virtue in the cross-examination as such* with reference to the admissibility of the alleged fact. The notion is not that because we are cross-examining, therefore we may get admission for this or that fact; for the fact cannot go in if it is not relevant; but the notion is that because we are *not* using extrinsic testimony, the fact if relevant may go in.

It is important to observe this, because the ordinary discussion of the rule of thumb leads often to a notion (for which the judges indeed are not responsi-

ble) that cross-examination has some mysterious virtue of its own which imparts merit to facts otherwise worthless. A loose belief doubtless obtains in some minds that almost anything may go in on cross-examination (saving the discretion of the Court). Conceptions of this sort should be radically abandoned. Cross-examination is no universal solvent for reducing everything to admissibility. The notion is not only unsound, but misleading; for several sorts of evidence — for example, facts evidencing Bias — are equally presentable through extrinsic testimony and through cross-examination, and a given fact may thus be in either way admissible.

The real significance of the rules that involve a distinction between cross-examination and extrinsic testimony is seen if we note that the rules come about, not by enlarging the use of the former, but by *cutting off the use of the latter*. It is not that the law of impeachment loves cross-examination more; but that it loves extrinsic testimony less. Conceive the relevant facts as carried before the tribunal like chattels, in two kinds of vehicles, and understand the law to forbid the use of one of the kinds of vehicles for certain sorts of facts; the result being that the other kind of vehicle has thereby a far greater vogue, but simply because the use of the first kind is forbidden; and the tenor of the prohibition does not tell us what classes of facts may be carried at all, but merely what kinds of vehicles may not be used for carrying certain classes of facts.

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

§ 879. **Distinction between Circumstances having Definite Relevancy and Circumstances having Indefinite Relevancy.** The preceding distinction between the limited use of extrinsic testimony and the free use of cross-examination is intimately connected in application with another distinction involving the probative effect of circumstances offered in evidence. For instance, we find that circumstances of relationship, quarrels, or pecuniary interest, may be offered equally by extrinsic testimony as by cross-examination (*post*, § 948); yet the discrediting circumstance of an erroneous assertion or a lie may be offered through extrinsic testimony on one condition only, namely, that the subject of the error or the lie be material to the case, and not "collateral" (*post*, §§ 1001–1003).

That the principle of Auxiliary Policy excludes extrinsic testimony in the latter case and not in the former seems to depend partly on a difference in

the probative nature of the evidence. In the former case, the probative force is definite and specific; in the latter case it is indefinite and ambiguous, although positive. In the former case, from the circumstance of (for example) relationship to a party, the inference is, definitely and solely, that a hostile feeling exists towards the opponent. In the latter case, the inference is that in some way or other the witness possesses a capacity or an inclination to an incorrect assertion. Yet, while the plain effect of the evidence is to indicate a defective testimonial quality of some sort, there is no definite indication of the specific quality that is defective. The mind recognizes and accepts the force of the inference that, because he was mistaken on one point, he may be mistaken on another; but it does not definitely infer a specific defective quality.

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

The result of this rough distinction between circumstances having a definite and strong probative meaning, and circumstances having an indefinite or a weak probative meaning, is that, when we are attempting to prove these defective qualities by circumstantial evidence, we find again the convenience of the grouping already noticed, namely, on the one hand, evidence that can be offered equally through extrinsic testimony and through cross-examination, and, on the other hand, evidence that cannot be offered at all through extrinsic testimony or can be offered only to a limited extent, according to the applicability of the above reasons. Such a grouping would be based on the essential features of the evidence and the policy applicable to it, and is represented by the separation of Topics IV and V (*post*, §§ 1000–1046) from the preceding Topics I and II.

§ 880. **Distinction between Impeaching Evidence and Rehabilitating or Supporting Evidence.** It has already been seen (*ante*, § 874) that, in the very nature of the process of Inductive reasoning, while the proponent of evidence offers it as leading to a desired conclusion, it is always open to the opponent to show that the inference desired to be drawn is not the correct or more probable one, and that some other inference than the one desired is equally or more probable, *i.e.* to show that some other explanation exists and thus to explain away the force of the evidential circumstance. This counter-process of Explanation, inherent in the very nature of reasonings, is equally applicable, so far as Relevancy is concerned, in explaining away circumstantial evidence

offered to discredit a witness. Thus, in jurisdictions which allow general bad moral character to be used to indicate the probability of the witness' speaking untruthfully, the party offering the witness is usually allowed, on cross-examining the impeaching witness, to show that the other has kept his character for truth-telling, *i.e.* to explain away the desired inference. Again, in the single case in which by extrinsic testimony particular misconduct may be offered to show bad character, namely, conviction of a crime, the question arises whether it may be shown in explanation that the witness was really innocent; though here the resulting rule will be affected by the principle of Auxiliary Policy directed at preventing multiplicity of issues. Again, when a prior contradictory statement is offered to discredit, an explanation may be attempted by showing that the witness has at other times made statements precisely similar to that made on the stand, and the interesting question arises whether such evidence is relevant as affording any real explanation or destroying the force of the impeaching evidence; the generally accepted solution in modern times being that such similar statements do not accomplish any real explaining-away of a prior contradictory statement, but that they do on certain conditions help to explain away any evidence tending to show corruption, bias, or interest.

Under each class of discrediting evidence, then, there may be available ways of explaining away by other evidence the force of the discrediting circumstance. But for convenience' sake these various methods of Rehabilitation must be considered together (*post*, §§ 1100–1144).

§ 881. **Order of Topics.** The foregoing considerations necessarily affect the order of topics; for the rules must be so treated as best to distinguish the principles behind them. Few of the rules are difficult to comprehend or obscure in their bearing; but much latitude of opinion is possible as to the most satisfactory order of treatment. The following order is most practicable:[1]

First, as preliminary to the whole subject of impeachment, must be considered What Persons as witnesses are to be Impeachable. In the process of discrediting a witness, the first inference (*ante*, § 876) must always be from some defective testimonial quality to the assertion's incorrectness; the different possible testimonial qualities are thus to be passed in review (Topic I), — Moral Character, Mental Capacity (Insanity, Intoxication), Emotional Capacity (Bias, Interest, Corruption), and Experiential Capacity. These discrediting deficiencies become in their turn the object of circumstantial proof, — first (Topic II), such sorts of evidence as are not forbidden to be offered by extrinsic testimony, *i.e.* circumstances indicating Interest, Bias, and Corruption; following these, all such evidence as is more or less liable

§ 881. [1] Compare the following summary of topics: Cal. C. C. P. 1872, § 1847 ("A witness is presumed to speak the truth. This presumption, however, may be repelled 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").

to the rule excluding extrinsic testimony — (Topic III) Particular Instances of Conduct to show Character — the principles here involved having an influence over the whole group; next, similar facts to show Experiential Defects and the like; then (Topic IV) Specific Errors of assertion, used indefinitely to show some general capacity for mistake or misstatement; (Topic V) Prior Self-Contradictions, used indefinitely for a similar purpose; and, finally, (Topic VI) Admissions, *i.e.* prior self-contradictions of parties.

B. PERSONS IMPEACHABLE

1. Impeachment of Hearsay Testimony

§ 884. **General Principle.** When the statement of a person not in court is offered as evidence of the fact stated, the real ground of objection is that it has not been subjected to the test of trustworthiness which the law regards as desirable before listening to any testimonial evidence, namely, the test of cross-examination. This is the Hearsay rule (*post*, § 1362). Yet under certain conditions such statements may exceptionally be received. Now the statement, if thus received, stands testimonially as the equivalent of a statement made on the stand and subject to cross-examination; *i.e.* in both cases there is received the statement (for example) of A that B struck him with a knife, — in the one case, A being on the stand and untested when the statement is made, and in the other case, A being not on the stand and not tested when the statement is made. In both cases the statement is nothing more nor less than testimonial evidence, the two being precisely equivalent in respect to their nature as testimony. This being so, the untested statement — *i.e.* the hearsay statement — must come from a person qualified to speak on the matter in question, precisely as ordinary testimony must; the rules of Testimonial Qualifications (as noted *post*, § 1424) have constant application to such testimonial statements admitted under the Hearsay exceptions.

Now, in the same way, the statements being testimonial in their nature, it is right to subject them, when admitted, to *impeachment in the appropriate ways*, as it was to require the usual testimonial qualifications in advance; and that is what we find the law doing. For reasons of convenience in exposition, however, the rules of testimonial qualifications and of testimonial impeachment are better considered in connection with the various kinds of hearsay statements admitted under the exceptions to the Hearsay rule. It is enough here to note the general features of the process.

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

§ 886. **Attesting Will-Witness.** The proof of an attesting will-witness' signature involves virtually the use of his testimony according to the tenor of the attestation-clause (*post*, § 1505); and the modern tendency to ignore this truth has led sometimes to an ignoring of its corollary, namely, that a deceased attesting will-witness is open to impeachment like any other hearsay witness. The application of the impeachment rules to this sort of testimony is dealt with under that exception, (*post*, § 1514).[1]

Whether an attesting witness who is *one's own witness* may be impeached is dealt with *post*, § 908.

§ 887. **Statements of Facts against Interest, and other Hearsay Statements.** The other kinds of statements admissible under exceptions to the Hearsay rule are less commonly subjected to impeachment, but the principle is recognized as equally applicable. Accordingly, it is permissible to impeach statements of *facts against interest* (*post*, § 1471), statements of *facts of family history* (*post*, § 1496), *regular entries in the course of business* (*post*, § 1554), and other kinds of statements; though the attempt thus to apply the principle is rarely made.[1]

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

2. Impeachment of Defendant as Witness

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

§ 886. [1] In a practice where an auditor's or master's report of findings of fact is admitted to be read to the jury, no impeachment of the character of a witness who testified to the auditor but not the trial jury is allowable: 1917, Jackson & N. Co. *v.* Fuller, 226 Mass. 441, 115 N. E. 766.

§ 887. [1] 1921, State *v.* Segar, 96 Conn. 428, 114 Atl. 389 (forgery of check in C.'s name; a written statement by C. denying authority to sign his name was already in evidence without objection, but C. himself had not testified; C.'s extra-judicial statements to S. that he had given authority to defendant, admitted, on the present principle).

(1) Is his position as a witness so distinct from his position as defendant that that which would be usable to impeach him as a witness, but not usable against him as a defendant, may now be used? In particular, may his *bad moral character* be shown, — may this character be evidenced *by particular acts*, — may his testimony be tested by the sundry other methods applicable to witnesses?

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

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

There is, however, one circumstance, superficial only, which has tended to loose thinking on the subject, namely, the circumstance that much of the evidence of both sorts (*i.e.* to impeach credibility and to show guilt) is asked for on cross-examination; and thus we sometimes find the question "May a defendant on the witness-stand be cross-examined like any other witness?" put and discussed as though only one question, instead of two wholly distinct ones, were involved. No correct solution can ever be reached in that way.

Whether facts impeaching credibility may be offered, either extrinsically or through cross-examination, is one question; whether a criminating fact, otherwise privileged, may be asked and compelled from the defendant himself, is the other and wholly distinct question. In the first case, the sole object is to impeach credibility, and the incidental effect on the defendant's position as such is undesired and forbidden; in the second case, the sole object is usually to prove guilt, and to affect the defendant as such. The answer to either question might be in the affirmative or in the negative without affecting the answer to the other.

The first question alone concerns us here. The second is dealt with under the subject of Privilege (*post*, § 2276).

§ 890. **Defendant impeachable as an Ordinary Witness.** Of the arguments on the first question, there is no hesitation in accepting those of the affirmative. The law is that a defendant taking the stand as a witness may as a witness be impeached precisely like any other witness.[1]

The rule is enunciated more or less broadly, and with more or less variation of phrasing, in the different jurisdictions; but the principle is universally conceded:

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

1874, BUSKIRK, C. J., in *Fletcher* v. *State*, 49 Ind. 130: "A defendant who elects to testify occupies the position of both defendant and witness, and thus he combines in his person the rights and privileges of both. But while this is true, we do not think it should result in any change in the law or rules of practice. In his capacity as a witness he is entitled to the same rights, and is subject to the same rules, as any other witness. In his character of defendant, he has the same rights, and is entitled to the same protection as were possessed and enjoyed by defendants before the passage of the act in question [enabling defendants to testify]. When we are considering the rights of the appellant in his character of defendant, we lose sight of the fact that he has the right to testify as a witness; and when his privileges as a witness are called in question, they should be decided without reference to the fact that he is a defendant also."

1893, BREAUX, J., in *State* v. *Murphy*, 45 La. An. 958, 959, 13 So. 229: "The defendant, in availing himself of the privilege of testifying in his own behalf, was subject to all the rules that apply to other witnesses. The accused was not compelled to testify; the statute declares that the failure to testify shall not create a presumption against a defendant. Having offered himself as a witness, and having testified, he was called upon to submit to the same tests which are legally applied to other witnesses. The witness can decline to answer any question which may tend to charge him as criminal; moreover, the Court has the power to protect him against unreasonable or oppressive cross-examination. These modes of guarding against the abuse possible under the statute are not in question. . . . The defendant appeared before the Court in the dual capacity of an accused and that of a witness. As an accused, his character was not subject to attack

§ 890. [1] This doctrine is universally conceded. The authorities will be found in the places cited in the next section.

unless he opened the question. As a witness, his position was different; his credibility was subject to attack. . . . As a defendant, his character could not be impeached, that issue not having been opened by him. As a witness, it could be impeached, as the character of any witness may be subjected to that test. In other words, he may be unworthy of belief, but this unworthiness is not to be considered in determining whether or not he is guilty; while the attack upon the character of an accused is for the purpose of establishing that his plea is not supported by his attempt at proving character and that he is guilty."

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

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

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

(3) In evidencing the accused's bad moral character as a witness, the usual kinds of evidence are equally available, — *conviction of crime, specific instances of misconduct* (on cross-examination), and the like. But when these involve a crime and are attempted to be proved on cross-examination, the question arises whether the accused is compellable to answer, *i.e.* whether he has *waived his privilege against self-crimination*.[3] Furthermore, it may be noted, the doctrine has been advanced, in New York and elsewhere, that, while a defendant as a witness is in general impeachable as a witness, yet, in offering *through cross-examination* to impeach his credibility by specific acts of misconduct, the prosecution would have too wide a latitude in employing these discreditable facts unless some limits were set in order to prevent unfair prejudice to the defendant as such; and hence the scope of that particular sort of evidence should be narrower for a defendant-witness than for others. Such a doctrine, however, would involve no abandonment of the general principle that the defendant as a witness may be impeached as such in the other

§ 891. [1] The authorities are collected *post*, § 924.

Since the defendant would never take the stand till after the prosecution had closed its case in chief, the prosecution would never be authorized to offer his character of either sort until rebuttal; it is therefore never a question of the *time* of the prosecution's offer, but of the *kind* of character offered.

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

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

usual ways. Nevertheless, the limitation laid down by these New York rulings is not to be commended; it has been several times refused approval in other jurisdictions having these rulings before them.[4]

§ 892. **Defendant not Testifying, but making a "Statement."** In the course of the transition from the unenlightened common-law disqualification of an accused person to his complete eligibility as a witness, several jurisdictions took a half-way step (*ante*, § 579) of allowing the accused person to make a "statement" — a grudging concession to the demands of justice. Being in itself anomalous, it raised several anomalous questions. One of these was whether this "statement" rendered its maker open to impeachment like an ordinary witness. But this question is no longer of consequence.[1]

3. Impeachment of an Impeaching Witness

§ 894. **Limitation in the Trial Court's Discretion.** No question arises here except as to the use of character-evidence. When B is brought forward to impeach A, and C to impeach B, it is obvious that not only might there be no end to this process, but the real issues of the case might be wholly lost sight of in a mass of testimony amounting to not much more than mutual vilification. The general rule as to limiting the number of witnesses upon a given point (*post*, § 1907) does not in strictness apply.

Three courses are open to pursue: first, to exclude absolutely the impeachment of the character of an impeaching witness; [1] secondly, to admit the impeachment of an impeaching witness, but no more; [2] thirdly, to admit it only

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

§ 892. [1] Except in Georgia and Wyoming; some authorities are cited *ante*, § 579.

§ 894. [1] *Contra:* 1869, State *v.* Cherry, 63 N. C. 495 (Pearson, C. J.: "We are told that this supposed rule of law is acted upon in that circuit, and is based on the ground of avoiding the inconvenience of an endless process. If the impeaching witness can be impeached, the last witness may also be impeached and so on 'ad infinitum.' This inconvenience cannot occur very often or be very serious, for the general practice is to call only the most respectable men in the community as to character, and the instance of calling a witness of doubtful character to prove character is exceptional. Let it be understood that an impeaching witness cannot be impeached, and the exception will soon be the general rule. But be this as it may, truth should not be excluded to avoid inconvenience"); 1846, Rector *v.* Rector, 8 Ill. 105, 117 (generally not allowable, but here treated as proper).

[2] 1851, Wayne, J. (the others not touching the point), in Gaines *v.* Relf, 12 How. 555. This was the rule of the civil and the canon law of the Continent: Corp. Jur. Canon., Decretal. II, 20, de testibus, c. 49; 1738, Oughton, Ordo Judiciorum, tit. 102, § VI ("In testem testes, et in hos, sed non datur ultra"); and this was followed in Chancery: 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1484 (Sir W. Jones, for the prosecution: "If his new witnesses are only to the reputation of our witnesses, then perhaps one must have some other witnesses brought to discredit his; and we, not knowing who these new witnesses of his would be, may need perhaps another day to bring testimony against them; so that I know not when the matter can have an end"; L. H. S. Finch: "It is true, in the practice of Chancery we do examine to the credit of witnesses, and to *their* credit, but no more; but what my lords will do in this case I know not till they are withdrawn"; and the matter went off by consent).

In the following jurisdictions the rule has been allowed to go this far, without saying that it shall go no farther: 1862, State *v.* Brant, 14 Ia. 182 (left undecided); 1868, State *v.* Moore, 25 Ia. 137 (not excluded here; but no general rule laid down); 1905, Dunn *v.* Com., 119 Ky. 457, 84 S. W. 321; 1914, Gabbard *v.* Com., 159 Ky. 624, 167 S. W. 942 (rule of Dunn *v.* Com., 119 Ky. 461, of the second sort above, cited without express approval); 1847, Starks *v.* People, 5 Den. N. Y. 106, 109; 1903, Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148.

to such an extent as the discretion of the trial Court deems best. The first two of these rules are represented in different jurisdictions. In such a case, however, any mere rule of thumb is undesirable; the preferable rule is the third.

4. Impeachment of One's Own Witness

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

In the present topic, the rule has been long established, and is in its general validity never to-day questioned, that the party on whose behalf a witness appears *cannot himself impeach that witness in certain ways*.

The history of it is singularly obscure, considering its practical frequency and importance. But the following stages of its development are fairly clear:

(1) In the primitive modes of trial, persons who attended on behalf of the parties were not witnesses, in the modern sense of the word. They were "oath-helpers", by whose mere oath, taken by the prescribed number of persons and in the proper form, the issue of the cause was determined. They were chosen, naturally and usually, from among the relatives and adherents of either party. They went up to the court literally to "swear him off", and the two sets of oath-takers were marshalled in opposing bands. This traditional notion of a witness, that of a person 'ex officio' a partisan pure and simple, persisted as a tradition long past the time when their function had ceased to be that of a mere oath-taker and had become that of a testifier to facts. So long as such a notion persisted, it was inconceivable that a party should gainsay his own witness; he had been told to bring a certain number of persons to swear for him; if one or more did not do so, that was merely his loss; he should have chosen better ones for his purpose. This notion that a party must stand or fall by what his partisan affirms was long in disappearing.[1] It was a natural consequence of this notion that the party should not be allowed to dispute what his own chosen witness says. Such (presumably) was the instinctive thought all through the earlier periods of our recorded trials, and long after the time when witnesses in the modern sense had taken the place of compurgators. But for a considerable period there is no trace of a positive rule upon the subject. There must have been the feeling; perhaps no opposition to it was attempted.

(2) Meanwhile, in the civil and the canon law the rule was well known that one who used a witness for himself could not afterwards object to his

§ 896. [1] Compare the history of the rule about required numbers of witnesses (*post*, § 2032).

incompetency (by interest or otherwise) when called by the opponent.[2] This rested on the general and natural notion of a waiver of the objection (*ante*, § 18), and was apparently a rule of equally unquestioned acceptance in our own law.[3]

(3) But the further conception, that a party calling a witness must not even discredit him, was not enforced as a rule of law until a comparatively late period. Its beginnings are seen at the end of the 1600s, in criminal trials. Until that time, the accused had no legal right to summon witnesses (*ante*, § 575), and apparently the prosecution was not before then hampered by any rule against impeachment. In that period a rule begins to be hinted at, as against the accused's witnesses, though the prosecution is still exempt.[4]

(4) By the beginnings of the 1700s a general rule makes a casual appearance, and is applied in civil cases equally.[5] But it had not yet received common acceptance; for it is not mentioned in any of the early editions of the treatises on trial practice.

(5) By the end of the 1700s, however, it is notorious and unquestioned. Its enforcement in the trial of Warren Hastings, in 1788,[6] seems to have been the immediate cause of its general currency; for thereafter it receives mention in the treatises.[7] Whatever its merits, then, its prestige is comparatively modern.

[2] Codex IV, 20, 17 ("Si quis testibus usus fuerit, iidemque testes adversus eum in alia lite producantur, non licebit ei personas eorum excipere, nisi ostenderit inimicitias inter se et illos *postea* emersisse, ex quibus testes repelli leges præcipiunt; non adimenda scilicet ei licentia, ex ipsis depositionibus testimonium eorum arguere. Sed si liquidis probationibus datione vel promissione pecuniarum eos corruptos esse ostenderit, etiam eam allegationem integram ei servari præcipimus"; A. D. 528); *ante* 1635, Hudson, Treatise of the Court of Star Chamber, 201 ("but this is a firm and constant rule as well in this court as in all laws, that no man shall be received to except against a witness as incompetent, if he examine him also himself").

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

[4] 1681, Fitzharris' Trial, 8 How. St. Tr. 223, 369, 373 (on the defendant's pressing an unwilling witness, called by him, with self-contradiction on cross-examination, L. C. J. Pemberton: "Mr. Fitzharris, do you design to detect Mrs. Wall of falsehood? She is your own witness; you consider not you can get nothing by that"; . . . Defendant, to another witness called by him: "You dare not speak the truth"; Mr. J. Dolben: "you disparage your own witnesses"); 1681, Plunket's Trial, 8 How. St. Tr. 447, 496 (a witness called for the prosecution exonerates the defendant; the Attorney-General then explains that he swore the contrary before the jury, and had said the same the night before, and ends by censuring him and having him committed); 1681, Colledge's Trial, 8 How. St. Tr. 549, 636 (defendant calls a witness to impeach another, and then, on his refusal, tries by a cross-examination to show him biassed; L. C. J. North: "Look you, Mr. Colledge, I will tell you something for law and to set you right. Whatsoever witnesses you call, you call them as witnesses to testify the truth for you; and if you ask them any questions, you must take what they have said as truth: . . . let him answer you if he will, but you must not afterwards go to disprove him"); 1691, Lord Mohun's Trial, 12 How. St. Tr. 1007 (self-contradiction of a witness, permitted to the prosecution).

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

[6] Cited *post*, § 905.

[7] 1793, Buller, Trials at Nisi Prius, 297, 6th ed. (at the end of the "fourth general rule"); 1795, Hawkins, Pleas of the Crown, II, c. 46, § 208, 7th ed.; both of these citing only Hastings' Trial and neither of them mentioning it in prior editions; 1796, Crossfield's Trial, 26 How. St. Tr. 1, 37 (L. C. J. Eyre referring apparently to Hastings' Trial as his authority). In 1803 the practice under the rule appears to be still uncertain: Furcell *v.* M'Namara, 8 Ves. Jr. 327, L. C. Eldon.

The learned opinion of Mr. J. Blume, in Crags *v.* State (1922), — Wyo. —, 202 Pac. 1099, summarizes the history of the rule.

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

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

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

1831, TINDAL, C. J., in *Bradley* v. *Ricardo*, 8 Bing. 58: "The object of all the laws of evidence is to bring the whole truth of a case before the jury; . . . [but if this contradicting evidence were excluded] that would no longer be the just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables and to be bound by the statements of a witness whom he might call without knowing he was adverse, who might labor under a defect of memory, or be otherwise unable to make a statement on which complete reliance might be placed."

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

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

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

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

1866, Professor *Simon Greenleaf*, Evidence, § 442: "When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief; he is presumed to know the character of the witnesses he adduces; and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth."

One answer to this argument would be that the supposed guarantee ought not in fairness to be allowed to burden a party when he has discovered the witness' untrustworthiness after putting him on the stand. Another and more satisfactory answer would be that the ends of truth are not to be subserved by binding the parties with guarantees and vouchings, and that it is the business of a court of justice, in mere self-respect, to seek all sources of correct information, whatever foolish guarantees a party may or may not have chosen to make.

But there are three other answers, not merely in the nature of counter-arguments, that effectually dispose of the above reason: (1) The first is that, in point of fact, looking at the actual conduct of trials, neither party does know, and much less does he guarantee, the character and trustworthiness of the witnesses called by him:

1876, MAY, C. J., in "Some Rules of Evidence", 11 American Law Review 264: "But does common experience show that, from the given fact that a witness is brought into court by a party, it is to be inferred that he not only knows his character, but also that that character is such that 'in general' he is worthy of belief? . . . Witnesses are not made to order, — at least, not by honest people. The only witnesses who can properly be called are those who happen to have knowledge of relevant facts; and who these may be is predetermined by the history and course of the events which are to come under examination. . . . The witnesses to the material facts in dispute are such persons as happen to have been cognizant of the facts, and are not such as the parties have selected at their pleasure. In point of fact, it is substantially true that parties call particular persons as witnesses simply because they are obliged to and can call no others. If a lawsuit was a manufacture, and the party bringing it could select his materials — facts and witnesses —, there might be some propriety in holding him responsible for the character of these materials; but, as both are beyond his control, his responsibility for their character is out of the question. He comes into the court with the best materials he can get to make out his case."

(2) The second answer is that this theory of guaranteeing credibility is not true in law, *i.e.* is not practically enforced by any Court, and therefore is a mere empty phrase;[1] for the permission to-day universally accorded (*post*, § 907) to discredit one's witness by showing the facts to be contrary to his assertion, is wholly inconsistent with any guarantee of credibility. If there were such a guarantee, the party could not fly in the face of it by proving that his witness is not to be believed on that point. A Court which allows

§ 898. [1] 1906, Lasher v. Colton, 225 Ill. 234, 80 N. E. 122 (calling the opponent as witness). It is disappointing to find a modern opinion repeating this cant formula, "The party who calls a witness certifies his credibility" (1907, People v. Sexton, 187 N. Y. 495, 80 N. E. 396).

the party to disprove what his witness has said, and at the same time speaks of a guarantee of credibility as the reason for some other part of the rule, refutes itself, and the phrase about a guarantee of credibility becomes devoid of reality.

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

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. III, c. IV (Bowring's ed., vol. VI, p. 401): "Two arguments, in some measure distinct, may be collected from the books: . . . 1. By calling for his testimony, you have admitted him to be a person of credit, acknowledged his trustworthiness; to seek to discredit him would be an inconsistency; and the success of your endeavours would be fatal to your cause; for, if his testimony be not to be believed, and you have none but his, then is your side of the cause without evidence. . . . [This argument rests upon] a false axiom of psychology. . . . The false axiom is this:—'All men belong to one or other of two classes—the trustworthy and the untrustworthy. The trustworthy never say anything but what is true: by them you never can be deceived. The untrustworthy never say anything but what is false: so sure as you believe them, so sure are you deceived.' . . . No man is so habitually mendacious as not to speak true a hundred times, for once that he speaks false; no man speaks falsehood for its own sake; no man departs from simple verity without a motive. . . . Exhibit in the strongest possible colours the untrustworthiness of your witness—his partiality to your adversary's side, and his improbity of character—, you discredit so much of his testimony as makes in favour of your adversary, but in the very same proportion you increase the trustworthiness of all that portion which makes in favour of yourself. . . . Among the means which the nature of things affords you for extracting the truth from this or any other unwilling bosom, is interrogation,—counter-interrogation, it may in one sense be called, in respect of its contrariety to the current of his wishes. 'No,' says one of the rules, 'this shall not be permitted to you.' 'Why?' says justice. 'Because,' adds the rule, 'this witness, this enemy of yours, is *your* witness.' . . . In the grammatical expression, '*your witness*', howsoever applicable to him, what is there that should prevent your having permission to paint his disposition, any more than the disposition of any other person, in its real colours? . . . The tendency of this your counter-evidence is to place the value of your witness's testimony in its true light. 'No,' say the lawyers: 'we will not have it placed in its true light: the situation, the moral situation, in which the witness is placed—the sinister interests to the action of which he is exposed—shall not be presented to view.' 'Oh, but what you contend for is an inconsistency: you want the same man to be regarded as credible and incredible—as speaking true, and speaking false.' Not the smallest inconsistency: what we want to have thought true of this man, is no more than what is true of every man."

§ 899. **Third Reason: The Party ought not to have the means to Coerce his Witness.** The truth is that the Courts affecting the foregoing reasons have sought too much in the realm of objective arguments. They have thought of visiting punishment on the head of offending parties, or of leaving them to suffer the consequences of their mistakes. This is not a high-minded nor a practical attitude for a tribunal seeking truth, nor is it in harmony with the policy of other rules of Evidence. This whole attitude must be abandoned. What we are to ask is, Is there anything in the process of impeaching one's own witness which tends to restrict or impair the sources of evidence, to make competent evidence less plentiful or less trustworthy?

We should ask, not what the conduct of the party is, but what the effect is upon the witness.

Taking this subjective point of view, we find that there is something of a reason, — a reason easy to grasp, founded on reality, not on cant, legitimate in its policy, orthodox in its history, though narrow in its scope, — the reason that *the party ought not to have the means to coerce his witnesses.* It was laid down by Mr. Justice Buller, a century and a half ago, in terms which have been frequently quoted — more often quoted than acknowledged (as Serjeant Evans once said of his own writings):[1]

Ante 1767, BULLER, J., Trials at Nisi Prius, 297: "A party never shall be permitted to produce general evidence to discredit his own witness, for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him."

1834, PUTNAM, J., in *Whitaker* v. *Salisbury*, 15 Pick. 545: "If this were not so, it would be in the power of any party merely by putting a witness upon the stand, to blacken and defame his general character for truth whenever the evidence should fall short of what was wanted."

The true foundation of policy (so far as there is any) is here manifest. If it were permissible, and therefore common, to impeach the character of one's witness whose testimony had been disappointing, no witness would care to risk the abuse of his character which might then be launched at him by the disappointed party. This fear of the possible consequences would operate subjectively to prevent a repentant witness from recanting a previously falsified story, and would more or less affect every witness who knew that the party calling him expected him to tell a particular story. Of this sort of abuse from the opposite side the witness is even now sufficiently afraid; were he liable to it from either side indiscriminately, the terrors of the witness-box would be doubled. Speculative as this danger may be, it furnishes the only shred of reason on which the rule may be supported. Moreover, it is the only reason which allows the details of the rule to be worked out consistently. What is this fear which we desire to save the witness? It must be a fear that would operate upon the ordinary witness honestly inclined. The fear that his character will be abused, — this is certainly a tangible and sufficient consideration. On the other hand, the fear that he will be shown to be affected by bias or interest, — this involves nothing disgraceful or derogatory to character, and is hardly worth considering. Thus this reason tests efficiently the various details of the rule.

But, after all, it is a reason of trifling practical weight. It cannot appreciably affect an honest and reputable witness. The only person whom it could really concern is the disreputable and shifty witness; and what good reason is there why he should not be exposed? That he would adhere to

§ 899. [1] Approved in the following: 1834, Lord Denman, C. J., and Bolland, B., in Wright *v.* Beckett, 1 M. & Rob. 417, 432; 1801, Peake, Evidence, 89; 1814, Phillipps, Evidence, 308 (5th Amer. ed.); 1824, Starkie, Evidence, 216.

false testimony solely for fear of exposure by the party calling him is unlikely; because his reputation would in that case equally be used against him by the opponent. It therefore becomes merely a question which of the two parties may properly expose him. Is there any reason of moral fairness which forbids this to the party calling him? The rational answer must be in the negative. There is no substantial reason for preserving this rule, — the remnant of a primitive notion:

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

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

§ 900. **Bad Character.** It has never been doubted that one effect of the rule is to exclude evidence of the witness' moral character; this much is clearly forbidden, whatever policy we accept as the support of the rule.[1] Upon the

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

§ 900. [1] Apart from the following cases, this interpretation of the rule is repeated in almost every case upon the present topic, so that no other citations are necessary.

ENGLAND: St. 1854, c. 125, § 22 (quoted *post*, § 905); 1858, Greenough *v.* Eccles, 5 C. B. N. S. 786, 28 L. J. C. P. 160 (speaking of the law before 1854 as "clear").

CANADA: *Dom.* R. S. 1906, c. 145, Evid. Act § 9 (like Eng. St. 1854, c. 125, § 22); as also the following Provincial statutes; *Alta.* St. 1910, 2d sess. c. 3, Evid. Act, § 3; *B. C.* Rev. St. 1911, c. 78, § 19; *Newf.* Cons. St. 1916, c. 91, § 7; *N. Br.* Cons. St. 1903, c. 127, § 15; *N. Sc.* Rev. St. 1900, c. 163, § 42; *Ont.* Rev. St. 1914, c. 76, § 20; 1853, Mair *v.* Culy, 10 U. C. Q. B. 321, 325, per Burns, J.; *P. E. I.* St. 1889, c. 9, § 15; *Sask.* R. S. 1920, c. 44, § 32; *Yukon:* Consol. Ord. 1914, c. 30, § 40.

UNITED STATES: *Cal.* C. C. P. 1872, § 2049 ("by evidence of bad character"); 1897, Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310; *Conn.* 1864, Olmstead *v.* Winsted Bank, 32 Conn. 278, 287; 1901, Waterbury *v.* Waterbury T. Co., 74 Conn. 152, 50 Atl. 3; *Col.* 1919, Graff *v.* People, 65 Colo. 489, 177 Pac. 962; *Fla.* Rev. G. S. 1919, § 2710; *Haw.* Rev. L. 1915, § 2618 ("general evidence of bad character" forbidden); *Ida.* Comp. St. 1919, § 8036; *Ind.* Burns Ann. St. 1914, § 531 (impeachment by "bad character", not allowable "unless it was indispensable that the party

true policy of the rule, it ought to make no difference whether the party knew the character or not before offering the witness' testimony; but upon the conventional theory (*ante*, § 898), that the rule is intended to punish unfair conduct, it is difficult to avoid the conclusion that, if he did not know it, the prohibition does not apply.[2] Moreover, it ought not to apply to other qualities than moral character — that is, not to insanity.[3]

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

should produce him, or in case of manifest surprise"); *La.* 1905, State *v.* Gallo, 115 La. 746, 39 So. 1001 (but here the offer was to show the witness to be an accomplice and hence fell rather under the principle of § 901, *post*); *Mass.* Gen. L. 1920, c. 233, § 23; *Mont.* Rev., c. 1921, § 10666; *N. J.* 1826, Skellinger *v.* Howell, 3 Halst. N. J. 310; *N. M.* Annot. St. 1915, § 2180; *N. Y.* 1830, Lawrence *v.* Barker, 5 Wend. 301, 305; 1834, Jackson *v.* Leek, 12 Wend. 105, 108; 1847, People *v.* Safford, 5 Den. 112, 117; 1860, Sanchez *v.* People, 22 N. Y. 147, 153; 1873, Bullard *v.* Pearsall, 53 N. Y. 230; 1919, People *v.* Minsky, 227 N. Y. 94, 124 N. E. 126 (questions by the prosecution, as *to* bad moral character of a woman witness whose testimony was disappointing, held improper; the prosecution may at the outset make clear the disreputable record of its witness, but may not reserve such questions until after testimony given); *Or.* Laws 1920, § 861 (like Cal. C. C. P. § 2049); *P. I.* C. C. P. 1901, § 340 (like Cal. C. C. P. § 2049); *P. R.* Rev. St. & C. 1911, §§ 1524, 2675 (like Cal. C. C. P. § 2049); *Tex.* C. Cr. P. 1911, § 815 ("The rule that a party introducing a witness shall not attack his testimony is so far modified that any party, when facts stated by a witness are injurious to his cause, may attack his testimony in any other manner, except by proving the bad character of the witness"); *Va.* Code 1919, § 6215 ("general evidence of bad character" forbidden); *Wyo.* Comp. St. 1920, § 5809 ("bad character" excluded).

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

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

§ **901.** [1] *Interest;* this has usually been excluded: 1802, Fenton *v.* Hughes, 7 Ves. Jr. 287, 290, Lord Eldon, L. C. (speaking of it as "settled upon by a conference by all the Judges"; excluded); 1829, Winston *v.* Moseley, 2 Stew. Ala. 138 (excluded); 1846, Stewart *v.* Hood, 10 Ala. 600, 607 (excluded); 1859, Fairly *v.* Fairly, 38 Miss. 280, 289 (excluded); 1827, Jackson *v.* Varick, 5 Cow. N. Y. 239, 242 (a subscribing witness was allowed, after being called on one side, to be examined on the other, an objection on the score of interest not being available to the former; "they could not afterwards question either his competency or credibility"; affirmed in Varick *v.* Jackson, 2 Wend. N. Y. 166, 200); 1829, Fulton Bank *v.* Stafford, 2 Wend. 483, 485 (same).

Corruption; the practice has differed: 1838, Dunn *v.* Aslett, 2 M. & Rob. 122, Lord Denman, D. J. ("a party calling a witness may examine him as to any fact tending to show he has been induced to betray that party"; here, a recent intimacy with the opponent); 1905, State *v.* Moon, 71 Kan. 349, 80 Pac. 597 (a witness had before trial told the prosecution of the defendant's conversations planning the larceny; on the stand, the witness denied all these things; on cross-examination, the prosecution was allowed to ask about them; after adjournment, he was arrested for perjury; he then sent for the prosecuting attorney, and retracted, and next day on the stand retold his story with all details as to the defendant's subornation; held proper, in a good opinion by Burch, J.; this opinion is a brilliant example of what a Court can and should do in repudiating the artificial trammels of the present rule); 1874, State *v.* Shonhausen, 26 La. An. 421, 423 (excluding questions as to attempts to suborn witnesses).

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

Upon the second theory (*ante*, § 898), the cant theory, this evidence should logically be forbidden. If the party is to be taken as guaranteeing the witness' credibility, clearly he is prohibited from exposing, by any means whatever, an error of that witness, and especially an error which carries with it an implication of other errors, from whatever source.

But the correct theory of the rule (*ante*, § 899) by no means prevents an exposure of error through the present means. The policy of protecting the witness, subjectively, against the fear of being abused and held up to disgrace, in case he should disappoint the expectations of the party calling him, obviously cannot regard the exposure of a self-contradiction as a legitimate reason for such apprehension on the part of the witness. There is no necessary implication of bad character, no smirching of reputation, no exposure of misdeeds on cross-examination, nothing that could fairly operate to coerce either an honest or a dishonest witness to persist in an incorrect story through fear of the party calling him. An honest witness could readily explain how he came to make the former statement; a dishonest one would not be deterred from returning to truth by such a trifling obstacle. On correct principles,

Bias and Hostility; this has been allowed to be shown: 1899, Consol. Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. 733 (cross-examination of a hostile witness to discredit memory, allowed); 1910, People *v.* Jacobs, 243 Ill. 580, 90 N. E. 1092 (cross-examination of a physician as to a letter by grand jurors criticizing him, held improper); 1918, Avery *v.* Howell, 102 Kan. 527, 171 Pac. 628, *semble* (left to the trial Court's discretion); 1921, State *v.* Sanborn, — Me. —, 113 Atl. 54 (the State, on a charge of assault, called J. to the stand, "without previous interview"; held, that the State could by another witness show that Jones "by bias or by interest . . . was partial to the respondent's side"; the above text approved); 1860, Carr *v.* Moore, 41 N. H. 131, 134 (allowed after cross-examination by the opponent).

Contra: 1919, McLaughlin *v.* Los Angeles R. Co., 180 Cal. 527, 182 Pac. 44 (cross-examination of one's own expert witness "merely for the purpose of showing bias" in favor of the opponent, held improper; this prohibitive rule obstructs the truth, and is really only a rule making the game more complex and therefore more difficult to play correctly, therefore one in which success depends not so much on the party's facts and merits as on his ability to select a skilful trial lawyer; we should not permit ourselves any longer to maintain rules of that kind).

then, the use of self-contradictory statements is not forbidden. But the case is even stronger; for the indirect effect of a self-contradiction, as reflecting on general credibility (*post*, § 1018), is not resorted to when such statements are used against one's own witness; for the effort is merely to nullify and remove the adverse and unexpected assertion, and the party neither expects nor wishes to discredit the remainder of the testimony, which satisfies him well enough.

Thus, on the theory that the rule merely forbids an attack on general credibility, there is no breach of the rule in using evidence of self-contradictions. It may be said, therefore, that even upon the common theory — at least, its looser form (*ante*, § 898) — the use of self-contradictions is in truth not improper.

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

1834, DENMAN, L. C. J., in *Wright* v. *Beckett*, 1 Moo. & Rob. 418, 425: "The word 'credit' appears to me manifestly to be employed in the sense of 'general character': and, thus understood, the rule and the reason go well together, and are perfectly consonant to common sense; 'You shall not prove that man to be infamous whom you endeavored to pass off to the jury as respectable.' But how can this prevent me from showing that he states an untruth on a particular subject by producing the contrary statement previously made by him, which gave me just cause to expect the repetition of it now? If his character is injured, it is not directly but consequentially. But perhaps no injury may arise; there may be a defect of memory; there may be means of perfect explanation. If not, if the witness professing to be mine has been bribed by my adversary to deceive me, if, having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon me with a newly invented falsehood, which defeats my just right and throws discredit on all my other witnesses, must I be prevented [from] showing the jury facts like these? . . . Can any reason, then, be assigned why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from showing the contradiction into which (from whatever motive) he had fallen? It is clear that in civil cases the exclusion might produce great injustice, and in criminal cases improper acquittals and fraudulent convictions. . . . Indeed, the case of *Ewer* v. *Ambrose* presents a 'reductio ad absurdum' which can hardly be surpassed; for if the answer could not have been received at all, the same man might defeat on the same day a suit in Chancery and an action at law by swearing in the former to the affirmative and in the latter to the negative of the same proposition. . . . The inconvenience of procluding the proof tendered strikes my mind as infinitely greater than that of admitting it. For it is impossible to conceive a more frightful iniquity than the triumph of falsehood and treachery in a witness who pledges himself to depose the truth when brought into Court, and in the meantime is persuaded to swear, when he appears, to a completely inconsistent story. The dangers on the other hand, though doubtless very fit subjects of precaution in the progress of a trial, exist at present in equal degree with reference to modes of proceeding which have never yet been questioned. The most obvious and striking danger is that of collusion. An attorney may induce a man to make a false statement without oath for the mere purpose of contradicting by that state-

ment the truth, which when sworn as a witness he must reveal. The two parties concerned in this imagined collusion must be utterly lost to every sense of shame as well as honesty; but there is another mode by which their wicked conspiracy could be just as easily effected. The statement might be made and then the witness might tender himself to the opposite party, for whom he might be set up, and afterwards prostrated by his former statement; this far more effectual stratagem could be prevented by no rule of law. The other danger is that the statement, which is admissible only to contradict the witness, may be taken as substantive proof in the cause. But this danger arises equally from the contradiction of an adverse witness; it is met by the Judge pointing out the distinction to the jury and warning them not to be misled; it is not so abstruse but that Judges may explain it and juries perceive its reasonableness; and it is probable that they most commonly discard entirely the evidence of him, who has stated falsehoods, whether sworn or unsworn."

1824, Mr. *Thomas Starkie*, Evidence, 217: "The resolution of this doubt depends, as it seems, on the considerations [1] whether in the abstract such evidence is essential to justice; and if so, then whether the party is to be excluded from such evidence either by reason of [2] any objection in the nature of an estoppel, or [3] of any collateral inconvenience which might result. [1] As a general proposition, it is essential to justice that in a case where the testimony of two witnesses upon a question of fact is contradictory, every aid should be afforded to enable the jury to decide which of them is better entitled to credit. . . . [2] If, as an abstract position, it be essential to the end of truth that such evidence should be submitted to a jury, it remains to consider in the first place whether the party having called the witness is, as it were, to be estopped from afterwards so impeaching his credit. It is difficult to come to this conclusion. A party who is prepared with general evidence to show that a witness whom he calls is wholly incompetent acts unfairly and inconsistently; for, knowing his witness to be undeserving of credit, he offers him to the jury as the witness of truth, and attempts to take an unfair advantage by concealing or disclosing the real character of his witness as best suits his purpose; but a party may impeach his own business in the mode without incurring any such blame; he may have been purposely deceived by the witness, or, though not under a legal necessity to call him, may be constrained by paucity of evidence under the particular circumstances. . . . [3] Considering the admission of such evidence in its tendency to occasion collateral inconvenience, the argument that a party ought not to be allowed to discredit his own witness by general evidence seems to have little weight; the contradiction proposed being plainly distinguishable. . . . A party may with perfect propriety and consistency insist on the general competency of his witness, although he alleges that his testimony as to one particular fact is erroneous."

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

But it is evident that this does not apply to the case where a party, having given credit to a witness, is deceived by him and first discovers the deceit at the trial of the cause. To reject the proposed evidence in such a case, and repress the truth, would be to allow the witness to deceive both jury and party."

1870, Mr. J. H. BENTON, Jr., 'arguendo', in *Hurlbert* v. *Bellows*, 50 N. H. 112: "We submit that a party does not, by calling a witness, upon one point, vouch for him as entitled to credit upon every point to which he may be called in the case by anybody. He may know very little of the witness. He may even believe his character to be doubtful, and still properly believe that his statements upon the point to which he calls him are true. In such a case there is no reason for saying that the party or his attorney are practising a fraud upon the Court, or asking the jury to give the witness any more credit than he is entitled to. The party calls the witness in good faith, relying upon his previous statements, believing that he will state the truth, and asking for his testimony the exact credit to which it is entitled. Now if the witness has deceived him, and testifies contrary to those statements, ought not the party to be allowed to show the deception, that the contradiction may be made manifest and the testimony weighed in the scales of truth? Suppose the contradiction does discredit the witness; if his testimony is unworthy of belief, ought not the jury to know it? . . . [By the opposite rule] a party who has been entrapped and deceived by a dishonest and lying witness is compelled to practice an unwilling, but none the less dangerous fraud upon the Court; and thus, not only his interests, but what is of infinitely more importance than the interests of any party, the cause of justice itself, is sacrificed to an unreasonable construction of the law."

1922, BLUME, J., in *Crago* v. *State*, — Wyo. —, 202 Pac. 1099: "The legal situation on this subject in the courts of the United States about the middle of the last century was that no party was permitted to discredit his own witness by showing that the latter had made statements out of court inconsistent with the statements made at the trial, unless the witness was one whom the party was compelled to call, as, for instance, a witness to a will; but a party was, in some instances, permitted to examine his witnesses in regard to such inconsistent statements for the purpose of refreshing his recollection. Further than that the courts would not go. Then came the era of legislation, where laws were enacted in some of the states similar to § 5809 of our statute; and, perhaps mainly under the influence of such legislation, Courts came to modify their views, permitting generally examination of the witness for the purpose of refreshing his recollection, and also permitting, under certain conditions and with certain limitations, proof or previous statements made out of court. We have twice held that a party's own witness could be examined, calling his attention to former statements made, for the purpose of refreshing his recollection: but we have not heretofore been called upon to decide whether the additional step could be taken of proving such former statements by other evidence. That is the question in this case. To this we now turn our attention.

"The purpose of impeaching one's own witness is to neutralize his testimony on the witness stand. But neither Courts nor Legislatures have permitted this to be done by attacking the general character of a witness. This character is, generally at least, known to a party just as well before as during a trial, and courts will not tolerate that he, vouching for the good character of a witness when producing him, should play fast and loose, get the advantage of the testimony if favorable, but repudiate it if unfavorable. Section 5809 of our statute recognizes this principle. But there are times when a party may be imposed upon; he may be deceived and surprised by a witness; the witness may be allured away from him, and from the path of truth. It would be harsh and unjust that a party should be put at the mercy of such witness or of an unscrupulous adversary tampering with him. But the Courts prior to the second half of the last century did not deem these facts of sufficient importance so as to lay aside the old established rule; and to meet this situation, and remedy the evils pointed out, the character of legislation mentioned was passed."

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

§ 904. **Same: (3) Various Forms of Rule adopted by Different Courts.** The rulings, however, exhibit more than two attitudes taken towards the use of this evidence. There are, of course,

(1) Courts which *admit* the evidence freely in any shape; [1] and

(2) Courts which *reject* the evidence absolutely in every shape.[2] But there are also several attitudes of compromise and modification, the theories which need to be examined before noting the rulings.

(3) There is the view which admits the evidence after a showing that the party has been *surprised* (or "entrapped", "misled") by his witness, or, as it is sometimes put, that the witness unexpectedly proves adverse:[3]

1909, FURMAN, P. J., in *Sturgis v. State*, 2 Okl. Cr. 362, 102 Pac. 57: "The great weight of modern authority is that a party, upon grounds of surprise at and injury from the testimony so given may, in the discretion of the trial Court, offer in evidence previous statements of such witness which contradict the injurious portion of his testimony. This rule is necessary for the protection of litigants against the contrivance of artful and designing witnesses. If a witness had deceived the party calling him (to the injury of such party), it would be manifestly unjust to hold the party to be bound by such deception and to prevent him from relieving himself of such injury. This is the philosophy of the law, upon which parties are permitted to offer contradictory statements made by their witnesses, for the purpose of impeaching them. But this rule is subject to certain conditions: First, The party must be surprised at the testimony of the witness sought to be so impeached, and this surprise must exist as a matter of fact; that is, it must be based upon such facts as would give the party reasonable ground to believe that the witness would testify favorably to such party. If the facts were such that the party had no reasonable ground to believe, when he placed such witness on the stand, that the witness would so testify, then no surprise could exist

§ 904. [1] *E.g.* in most of the statutes, *post*. In England by statute the discretion of the trial judge controls; in Kansas, the Court has followed this form.

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

The learned opinion of Mr. J. Blume in Crago *v.* State (1922), — Wyo. —, 202 Pac. 1099, summarizes the early history of the rule in the several State Courts.

[3] *E.g.* in Missouri, Dunn *v.* Dunnaker (if "entrapped"); in New Hampshire, Hurlburt *v.* Bellows (in case of surprise by an adverse witness, provided the party acts in good faith); in Mississippi, Dunlap *v.* Richardson ("deceived or misled", etc.); and in probably the majority of jurisdictions. Some Courts carelessly speak of the evidence as admissible "to show surprise." But the surprise is not the thing to be shown *by* the evidence; it is the surprise that allows the evidence to be received.

at the failure of the witness to give such testimony, and statements previously made by the witness, contradicting the testimony given, would not be admissible. Second, It is not enough that the witness failed to testify favorably to the party calling him, in order that previous contradictory statements made by such witness may be introduced in evidence, but the witness must have testified to facts injurious to the party calling him before he can be so impeached. . . .

"The restrictions, above stated, upon the right of a party to impeach his own witness by showing contradictory statements made by such witness, are supported by the soundest reasons, and are based upon the highest considerations of public policy. If the State has the right, upon the plea of impeaching its own witness, to introduce statements made by such witness contradictory of his testimony given in court, and thus get hearsay before the jury, as original substantive evidence against a defendant, then in all fairness and justice we would be compelled to hold that the defendant had the same right. The far-reaching and ruinous consequences of such a rule are manifest. A defendant could place a witness upon the stand and, after asking him a few general questions, could then ask the witness if he had not made a statement (giving the statement in full) to the defendant, and other persons, which would constitute a complete defense. Upon the denial of the witness that he had made such a statement, the defendant could then place the parties named upon the witness stand and prove that the first witness had made such statements. If a defendant could do as was permitted to be done by the State in this case, it would be impossible to secure a single conviction, and no one would be subject to the pains and penalties of perjury. There are already too many loopholes for the escape of the guilty. This Court will not add to or enlarge these avenues of escape; on the contrary, it is our purpose to close them up as far as possible."

This rule does not practically often exclude, since the party is in most cases the victim of such a surprise. But there are two objections to this limitation: (*a*) Even if the party does know beforehand (by a letter from the witness, for example), that the witness will not adhere to his original story, there is no harm done by allowing him, if he sees fit to call a witness against himself, to show the contradiction; for that is exactly what he could have done if he had left it to the other party to call the witness; he has in fact on the whole profited less than if the latter course had been pursued. (*b*) In most cases, the contradiction will deal with only one item in the whole story of the witness; and there is no reason why the party should not get the benefit of the witness' testimony on the remaining points and yet show him mistaken in this one item; such a course is in no way dishonest, and to forbid it is to impose a captious and purposeless restriction and to suppress a portion of the truth.

(4) Another typical attitude is to exclude the self-contradiction if offered by *extrinsic testimony*, but to allow it if brought out by a question to the witness himself.[4] This compromise course, too, has nothing in its favor. If a contradiction may be shown, there is no good reason why the party should be restricted to a particular method of showing it. The doctrine of confusion of issues by outside testimony (*post*, § 1019) cannot apply, for it ex-

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

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

cludes only contradictions on collateral points; these could not be used even against an opponent's witness, and it may be conceded that the offered contradiction must deal with a material point.

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

1850, COLERIDGE, J., in *Melhuish* v. *Collier*, 19 L. J. Q. B. 493: "A witness from flurry or forgetfulness may omit facts, and on being reminded may carry his recollection back so as to be able to give his evidence fully and correctly, and a question for that purpose may properly be put. . . . It is objected that the object of the question put here was to contradict and not to remind the witness, and that therefore it could not be put. It is certainly very difficult to draw the line in practice, and I am not now disposed to do it."

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

This form of the rule has the merit of being consistent with itself, and of recognizing that, however improper it may be thought to be to impeach by self-contradictions, nevertheless this doctrine should in no way prevent the always legitimate effort of the party to stimulate his witness' memory and obviate the effect of temporary forgetfulness.[5] Some Courts allow the question only on condition that the witness is hostile, — a limitation without precedent or justification.[6] One or two Courts refuse to allow at all this method of refreshing recollection; but this involves the question what methods of refreshing recollection are legitimate, and has already been dealt with (*ante*, § 761).

(6) Another attitude is a kind of compromise between the last two; excluding outside evidence, it allows only the question to be put, primarily

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

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

to *stimulate recollection*, but does not object to the incidental discrediting which may ensue:[7]

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

1895, CORLISS, J., in *George* v. *Triplett*, 5 N. D. 50, 63 N. W. 891: "This may be done . . . for the purpose of refreshing the recollections of the witness. . . . If the witness is in fact testifying falsely, it may bring him to the truth to probe his conscience, or to call to his mind the danger of punishment for perjury, in view of the fact that he has, by statements out of court inconsistent with his testimony, furnished evidence for his conviction. Moreover, a lawyer of strong personality, burning with indignation at the witness' deceit, may cow and break down a corrupt witness who has told him or his client a different story."

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

(8) Besides these various forms of the rule, there is found, among many of the Courts that freely admit the self-contradictory statements, a doctrine which excludes a certain class of such statements because they are *not in any true sense contradictory*, and merely serve to introduce flagrant hearsay. Thus, if A testifies that he knows nothing of the affray in question, this doctrine would forbid the admission of his former statement describing the affair in detail. Now the theory that this is not a self-contradiction[9] seems unsound; for he is clearly false in one or the other of his statements, since one of them in effect asserts that he knows about the affair and the other asserts that he does not. But the additional argument[10] that the admission of such statements would practically allow a party to re-enforce by pure hearsay statements the gaps in his witness' statement is a more plausible reason for the prohibition; for it appeals to the well-established though un-

[7] Other examples may be found in Alabama, Hemingway *v.* Garth; in Wyoming, Arnold *v.* State, with a peculiar limitation.

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

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

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

sound rule (*post*, §§ 1018, 1043) that a prior self-contradictory statement is obnoxious to the Hearsay rule, and assumes that this illegitimate effect of the statement would practically usurp entirely its function as a mere contradiction. It may be noted that the Courts enforcing this doctrine differ as to details. Some seem to exclude such statements in whatever form offered;[11] others allow them to be brought out by question to the witness.[12] Moreover, some Courts, instead of holding that the defect of the evidence consists in a lack of self-contradiction, phrase it that the witness is not "adverse", meaning that he has merely failed to help the party offering him.[13]

§ 905. **Same: (4) State of the Law in the Various Jurisdictions.** The foregoing forms of the rule have not always been consistently enforced even within the same jurisdiction.

In *England*, in particular, the rule has had a checkered course. Up to the middle of the 1800s the admissibility of this sort of evidence had not been generally conceded, and there were rulings looking in various directions.[1]

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

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

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

§ 905. [1] 1788, Warren Hastings' Trial, Lords' Journal, Feb. 9, April 10, 31 Parl. Hist. 369 (a question being asked as to former contradictory testimony, it was disallowed by the Judges, apparently on the principle of § 1043, *post*, and not as generally incompetent; such questions seem often to have been allowed elsewhere on this trial, *e.g.* 1788, May 7 and 28; part of the ruling is quoted in Starkie, Evidence, 220, and in Phillipps, Evidence, 5th Amer. ed., 310); 1803, R. *v.* Oldroyd, R. & R. 88 (the judge ordered a person named as witness for the prosecution to be examined, though the prosecutor strongly suspected her to be an accomplice and did not wish to examine her; her testimony favored the accused; and the judge ordered her deposition before the coroner to be read to show material discrepancies; held proper by all the Judges, as having been ordered by the judge; and Ellenborough, L. C. J., and Mansfield, C. J., also thought that the prosecutor could do the same); 1823, R. *v.* Boyle, cited in 1 Moo. & Rob. 422, Bayley, J. (admitted); 1825, Ewer *v.* Ambrose, 3 B. & C. 746 (a contradictory statement was held improperly used as evidence of the fact alleged in it; but as to its use merely to discredit by inconsistency, Bayley, J., inclined to forbid it; Holroyd, J., and Littledale, J., thought it unnecessary to decide the question); 1833, Bernasconi *v.* Fairbrother, cited in 1 Moo & Rob. 427, Denman, L. C. J. (admitted); 1834, Wright *v.* Beckett, 1 Moo. & Rob. 428 (Denman, L. C. J.: "The only proper way of conducting it [the cross-examination] is by proving the witness' former statement in the most distinct and authentic manner"; 1834, Bolland, B. ("I think great weight is due to the argument founded on the danger of collusion; it is, indeed, in my mind, the main objection to the reception of the evidence"); 1838, Dunn *v.* Aslett, 2 Moo. & Rob. 122, Denman, L. C. J. (admitted); 1838, Holdsworth *v.* Mayor, 2 Moo. & Rob. 153, Parke, B. (excluded, even though the hostile testimony came out on cross-examination; "it goes to his general credit to show that he has given a different account of the matter before"); 1839, R. *v.* Ball, 8 C. & P. 745, Erskine, J. (excluding extrinsic testimony, but apparently allowing the question on cross-examination); R. *v.* Farr, ib. 768, Patteson, J. (excluding it from both sources); 1841, Winter *v.* Butt, 2 Moo. & Rob. 357, Erskine, J. (excluded; citing another ruling by himself and Patteson, J., and the approval of "several of the other Judges"); Allay *v.* Hutchings, ib., Wightman, J. (excluded); 1850, Melhuish *v.* Collier, 19 L. J. Q. B. 493 (admissible, by question to witness, per Patteson and Erle, JJ.; Coleridge, J., allowing it for refreshing recollection, and refusing to distinguish the two purposes in practice; outside testimony excluded, per Patteson and Coleridge, J.J., but *semble*, *contra*, per Erle, J., who said: "It is not necessary to decide the point whether the attorney could be called to contradict [the witness who denied having told him the same story she told on the stand]. The majority of the Judges are of opinion that such a course ought not to be allowed; but some judges have continued until the end of their career to think that justice required that such evidence should be admitted"); 1850, The Lochlibo, 14 Jur. 792, Dr. Lushington (not deciding, but expressing a preference for the

At this time, as a result of the recommendation of the Commission on Procedure (quoted *ante*, § 903), a statute was enacted:

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

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

opinion of Bolland, B.; treating prior self-contradictions as a means "absolutely to discredit the witness", and indirectly equivalent to discrediting him by "general evidence"; also making the argument of policy, that "I have yet to learn that a witness is to be tied and pruned down by his signature before: I think it is for the interests of justice, and the only way to get at the truth, that a witness should go before the examiner to give his evidence not tied down or coerced by any statement previously made to any solicitor or proctor in the cause"; the learned Judge was probably moved by Scotch traditions); 1853, R. *v.* Williams, 8 Cox Cr. 343, Williams, J. (allowing a witness who has given an unexpected answer to be shown his deposition and then asked once more, and afterwards to be questioned in leading form from the deposition).

[2] The principal question of interpretation in the ensuing rulings is as to the meaning of "adverse": ENGLAND: 1858, Greenough *v.* Eccles, 5 C. B. N. S. 786, 28 L. J. C. P. 160 ("adverse" is interpreted as "hostile", in distinction from merely "unfavorable"; so that the conditions for use are (1) that the judge shall consider him hostile, and (2) that the judge shall also give leave, which he need not do even though the witness is hostile; Cockburn, C. J., not "altogether assenting"); 1858, Reed *v.* King, 30 L. T. R. 190 (a prior conversation with the offering party's attorney; excluded on obscure grounds); 1858, Faulkner *v.* Brine, 1 F. & F. 254, Lord Campbell, C. J. (permitting the question, but not clearly specifying the conditions); 1859, Dear *v.* Knight, 1 F. & F. 433, Erle, J. (same); Martin *v.* Ins. Co., 1 F. & F. 505, Wrightman, J. (same); but the practice in all three cases seems to be to treat any unfavorable statement on a material point as "adverse", thus negativing the interpretation of "hostile" accepted in Greenough *v.* Eccles; 1861, Jackson *v.* Thomason, 1 B. & S. 745 (allowing the use of a series of letters; Cockburn, C. J., intimating that a compulsory witness may still be attacked as at common law); 1863, Ryberg *v.* Smith, 32 L. J. P. M. & A. 112 (a useless precedent, since the Judge Ordinary excluded the evidence in entire forgetfulness of § 22); 1864, Cresswell *v.* Jackson, 4 F. & F. 3, Cockburn, C. J.; 1865, Pound *v.* Wilson, 4 F. & F. 301, Erle, C. J. (both apparently construing "adverse" as merely "different and unfavorable"); 1866, Coles *v.* Brown, L. R. 1 P. & D. 70, Sir J. P. Wilde, *semble* (adopting the distinction of Greenough *v.* Eccles); 1867, Amstell *v.* Alexander, 16 L. T. R. N. S. 830, Bramwell, B. (referring to the interpretation in Greenough *v.* Eccles, but apparently disapproving it and treating "adverse" as meaning "unfavorable"); 1883, R. *v.* Little, 15 Cox Cr. 319, Day, J. (the witness for the prosecution in rape appearing adverse; here the Stat. 28 & 29 Vict. c. 18, § 3, extending the preceding one to criminal cases, was applied); 1886, Rice *v.* Howard, L. R. 16 Q. B. D. 681, Grove and Stephen, JJ. (treating "adverse" as equivalent to "hostile", and leaving the determination of the fact wholly with the trial Judge); 1888, Parnell Commission's Proceedings, 11th, 21st, 27th days, Times Rep. pt. 3, pp. 140, 146, pt. 6, p. 94, pt. 7, pp. 181 ff., 212 (the statute does not seem to have been referred

In the *United States*, fortunately, only a few jurisdictions have repeated the English statute.[3] But the variety of attitude in the different jurisdic-

to at all; here extrinsic testimony was received to show surprise, but not to discredit); 1909, Smith's Case, 2 Cr. App. 86, 106 (rape; whether a boy whose testimony varied from a written statement made by him to the police could be cross-examined to the statement and the variance; not decided); 1913, Williams' Case, 8 Cr. App. 133 (cross-examination to prior statements, allowed).

CANADA: *Dom.* R. S. 1906, c. 145, Evid. Act. § 9 (like Eng. St. 1854, c. 125, § 22); *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 23 (substantially like Eng. St. 1854, c. 125, § 22, with the correction as made in P. E. I. St. 1889, c. 9, § 15); *B. C.* Rev. St. 1911, c. 78, § 19; 1915, R. *v.* May, 21 D. L. R. 728, B. C. (the trial judge must find the witness to be "adverse", before admitting the self-contradiction; applying Can. Evid. Act § 9; and in so finding he cannot consider as evidence the self-contradictory statement itself; Irving, J. A., diss.); (like Eng. St. 1854, c. 125, § 22); *N. Br.* Cons. St. 1903, c. 127, § 15 (like Eng. St. 1854, c. 125, § 22); 1862, Davidson *v.* Arseneau, 5 All. N. Br. 289, *semble* (Melhuish *v.* Collier approved); *Newf.* Cons. St. 1916, c. 91, § 7 (like Eng. St. 1854, c. 125, § 22); *N. Sc.* Rev. St. 1900, c. 163, § 43 (like Eng. St. 1854, c. 125, § 22); *Ont.* Rev. St. 1897, c. 73, § 20 (like Eng. St. 1854, c. 125, § 22); 1881, Dunbar *v.* Meek, 32 U. C. Q. B. 195, 213 (statute applied); St. 1909, c. 43, § 20, R. S. 1914, c. 76, § 20 (like R. S. 1897, c. 73, § 20, but correcting the phrasing as in P. E. I. St. 1889, c. 9); *P. E. I.* St. 1889, c. 9, § 15 ("he may contradict him by other evidence, or, by leave of the judge in case the witness shall in the opinion of the judge prove adverse, prove that he has made at other times", etc., as in Eng. St. 1854, c. 125, § 22; this corrects the anomalous wording of the English statute); *Sask.* R. S. 1920, c. 44, Evidence Act, § 27 (like Eng. St. 1854, c. 125, § 22); *Yukon:* Consol. Ord. 1914, c. 30, § 40 (like Eng. St. 1854, c. 125, § 22).

[3] The citations *ante*, § 761 (refreshing recollection by asking about prior testimony), should be compared with the following:

Federal: 1884, The Charles Morgan, 115 U. S. 69, 77, 5 Sup. 1172; 1893, Hickory *v.* U. S., 151 U. S. 303, 309, 14 Sup. 334 (questioning allowed to refresh recollection and induce a correction; outside evidence intimated to be allowable in the discretion of the trial Court where the witness unexpectedly proves hostile; for other Federal decisions see *ante*, § 761); 1893, St. Clair *v.* U. S., 154 U. S. 134, 150, 14 Sup. 1002 ("The rule is correctly indicated by Greenleaf, when he says [§ 444], . . . [The party may] show that the evidence has taken him by surprise and is contrary to the examination of the witness preparatory to the trial"); 1899, Swift *v.* Short, 34 C. C. A. 545, 92 Fed. 567 ("under some circumstances . . . the party so deceived may impeach the witness to the extent of showing" prior contradictory statements); 1900, Clary *v.* Hardeeville Brick Co., 100 Fed. 915 (allowed, where the opponent's witness has not been allowed in chief to be cross-examined to self-contradictory statements under the rule of § 1885, *post*, and therefore is allowed to be recalled by the cross-examiner during his own case for that purpose); 1900, Hays *v.* Tacoma R. & P. Co., 106 Fed. 48 (allowed, in case of surprise); 1901, Tacoma R. & P. Co. *v.* Hays, 49 C. C. A. 115, 110 Fed. 496 (trial Court's discretion conceded; following Hickory *v.* U. S.); 1896, Putnam *v.* U. S., 162 U. S. 687, 16 Sup. 923 (cited *ante*, § 761, n. 5; this case confuses several principles, and should have no weight); 1918, Rosenthal *v.* U. S., 8th C. C. A., 248 Fed. 684 (reading of the whole of prior testimony, held improper on the facts);

Alabama: 1829, Winston *v.* Moseley, 2 Stew. 137, *semble* (excluded); 1853, Campbell *v.* State, 23 Ala. 44, 76 (after examining the authorities, admits the question to the witness, to discredit; but leaves undecided the admissibility of outside evidence); 1874, Hemingway *v.* Garth, 51 Ala. 530 ("It is not an objection to such evidence that it has a tendency to impeach the witness"; admitting a question to the witness); 1892, Thompson *v.* State, 99 Ala. 173, 175, 13 So. 753 (refreshing memory by calling attention to report of former testimony, allowed); 1892, Louisville & N. R. Co. *v.* Hurt, 101 Ala. 34, 43, 13 So. 130 (questions as to former testimony, allowed to refresh memory); 1896, Feibelman *v.* Assur. Co., 108 Ala. 180, 19 So. 540 (admitting the question to stimulate recollection, after unfavorable testimony); 1898, Thomas *v.* State, 117 Ala. 178, 23 So. 665 (allowed on cross-examination "to show surprise", in spite of incidental discrediting; Coleman, J., diss.); 1900, Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687 (allowable in case of surprise or to refresh memory); 1921, Thomas *v.* State, 206 Ala. 416, 90 So. 295 (homicide; self-contradiction, admitted);

Alaska: Comp. L. 1913, § 1499 (like Or. Laws 1921, § 861);

Arkansas: Dig. 1919, § 4186 (may show "that he has made statements different from his present testimony"); 1884, Ward *v.* Young, 42 Ark. 543, 553 (statute applied); 1914, Jonesboro L. C. & E. R. Co. *v.* Gainer, 112 Ark. 477, 481, 166 S. W. 571 (contradiction, proved by other witnesses, allowable "where a party is taken by surprise"); 1914, Williams *v.* Cantwell, 114 Ark. 542, 170 S. W. 250 (similar ruling; foregoing case not cited); 1915, Shands *v.* State, 118 Ark. 458, 177 S. W. 18 (similar

ruling, citing Williams *v.* Cantwell); 1920, Doran *v.* State, 141 Ark. 442, 217 S. W. 485 (self-contradiction as to defendant's admission, not allowed, no surprise being shown; this Court has now virtually read away the express provisions of the statute); 1921, Garrison *v.* State, 148 Ark. 370, 230 S. W. 4 (cross-examination to contrary statement, allowed in case of surprise);

California: C. C. P. 1872, § 2049 ("The party producing a witness . . . may also show that he has made at other times statements inconsistent with his present testimony"); 1874, People *v.* Jacobs, 49 Cal. 384 (the testimony not being hostile, but merely falling short of what was expected, questions as to former statements were allowed, but outside evidence was excluded; intimating that for a witness unexpectedly hostile the evidence would be received); 1889, People *v.* Bushton, 80 Cal. 161, 22 Pac. 127, 549 (former testimony at a coroner's inquest read over to the witness, and then, on his denial, allowed to be proved; no cases cited); 1891, People *v.* Wallace, 89 Cal. 158, 163, 26 Pac. 650 (same as People *v.* Jacobs in facts; outside evidence of prior declarations excluded, since they would "enable the party to get the naked declarations of the witness before the jury as independent evidence"); 1892, People *v.* Mitchell, 94 Cal. 550, 556, 29 Pac. 1106 (same as People *v.* Jacobs, in facts; but even the question was not allowed, by a misunderstanding of the Jacobs ruling); 1893, People *v.* Kruger, 100 Cal. 523, 35 Pac. 88 (rule of surprise applied); 1894, Re Kennedy, 104 Cal. 429, 431, 38 Pac. 93 (like People *v.* Wallace); 1895, Hyde *v.* Buckner, 108 Cal. 522, 41 Pac. 416 (admitting outside testimony in case of surprise); 1896, People *v.* Crespi, 115 Cal. 50, 46 Pac. 863 (excluded, because offered as a substitute for testimony and not merely to show surprise); 1897, People *v.* Durrant, 116 Cal. 179, 48 Pac. 75 (reading from former testimony, allowed); 1897, Thiele *v.* Newman, 116 Cal. 571, 48 Pac. 713 (outside testimony, allowed, in case of surprise); 1904, People *v.* Creeks, 141 Cal. 532, 75 Pac. 101 (like People *v.* Crespi, *supra*); 1905, People *v.* Cook, 148 Cal. 334, 83 Pac. 43 (cross-examination by the prosecution to several contrary statements, allowed on the facts); 1908, Zipperlen *v.* Southern Pac. Co., 7 Cal. App. 206, 93 Pac. 1049 (allowable in case of adverse testimony surprising the attorney); 1908, Dolbeer's Estate, 153 Cal. 652, 96 Pac. 266 (declarations excluded, where there was no surprise);

Colorado: 1889, Babcock *v.* People, 13 Colo. 519, 22 Pac. 813 (excluding outside testimony, but admitting the question to stimulate recollection; see quotation *ante*, § 904);

Columbia (Dist.): Code 1901, § 1073 *a* (when a party producing a witness has been "taken by surprise by the testimony of such witness", the Court may in discretion allow the party to prove "for the purpose only of affecting the credibility of the witness, that the witness has made to such party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause", upon due warning as to the "circumstances of the supposed statement" and an opportunity to explain); 1894, Weaver *v.* B. & O. R. Co., 3 D. C. App. 436, 448 (prior testimony, not allowed to be asked for on cross-examination; partly on the ground of the trial Court's discretion, partly on other mixed grounds; general principle of surprise conceded, at least so as to permit cross-examination to such matters); 1895, Stearman *v.* R. Co., 6 D. C. App. 46, 51 (refreshing his recollection by reading aloud to him, in the jury's presence, his former affidavit, held properly refused);

Connecticut: 1896, Wheeler *v.* Thomas, 67, Conn. 577, 35 Atl. 499 (excluded); 1902, Carpenter's Appeal, 74 Conn. 431, 51 Atl. 126 (allowable in the discretion of the trial Court, where the party is surprised);

Delaware: 1899, State *v.* Wright, 2 Pen. 228, 45 Atl. 395 (may "contradict his own witness when taken by surprise"); 1899, State *v.* Quinn, 2 Pen. 339, 45 Atl. 544 (admissible where surprise is suggested);

Florida: Rev. G. S. 1919, § 2710 (a party "may, in case the witness prove adverse, contradict him by other evidence, or prove that he has made at other times a statement inconsistent with his present testimony"); 1899, Mercer *v.* State, 41 Fla. 279, 26 So. 317 (witness to immaterial matter cannot be "adverse"); 1903, Bryan *v.* State, 45 Fla. 8, 34 So. 243 (statute applied; whether a witness is "adverse", is much in the trial Court's discretion); 1903, Sylvester *v.* State, 46 Fla. 166, 35 So. 142 (prior statements of a witness not appearing hostile, not admitted to impeach; *semble*, admissible to refresh memory);

Georgia: Rev. C. 1910, § 5879, P. C. § 1050 (impeachment, in general, allowable "where he can show to the Court that he has been entrapped by the witness by a previous contradictory statement"); statute applied in the following rulings: 1874, McDaniel *v.* State, 53 Ga. 253; 1878, Garrett *v.* Sparks, 60 Ga. 582, 586; 1881, Cox *v.* Prater, 67 Ga. 588, 593; 1891, Dixon *v.* State, 86 Ga. 754, 13 S. E. 87; 1919, Booth *v.* State, 24 Ga. App. 275, 100 S. E. 723 (self-contradictions, not allowed, unless the witness has entrapped the party by previous statements);

Hawaii: Rev. L. 1915, § 2618 ("in case the witness shall in the opinion of the Court . . . prove adverse", the party producing him "may by leave of such Court or person prove that he has made at other times a statement inconsistent with his present testimony"); 1898, Kwong Lee Wai *v.* Ching Sai, 11 Haw. 444, 448 (in case of surprise, the witness may be asked about a prior inconsistent statement, and extrinsic proof of it may be made);

Idaho: Comp. St. 1919, § 8036 (like Cal. C. C.

P. § 2049); 1900, State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034 (statute applied); 1910, State *v.* Marren, 17 Ida. 766, 107 Pac. 993 (witness allowed to refresh his memory from report of his former testimony);

Illinois: 1906, Chicago C. R. Co. *v.* Gregory, 221 Ill. 591, 77 N. E. 1112 (contradiction of a medical witness by his memorandum given beforehand to the party, not allowed, for impeaching him); 1909, People *v.* Lukoszno, 242 Ill. 101, 89 N. E. 749 (cross-examination allowed: "he had a right either to refresh the memory of the witness if he was forgetful, or to probe his conscience and move him to relent and speak the truth if he was wilfully erring"); 1911, People *v.* Cotton, 250 Ill. 338, 95 N. E. 283 (allowing refreshment of recollection, for a forgetful witness, by reference to his former testimony; here the forgetfulness was "intentional"); 1915, People *v.* O'Gara, 271 Ill. 138, 110 N. E. 828 (rule applied); 1921, People *v.* Scott, 296 Ill. 268, 129 N. E. 798 (former testimony at the inquest identifying the defendant, not allowed to be used except to refresh memory and impeach credibility);

Indiana: Burns' Ann. St. 1914, § 531 (party may "in all cases contradict him . . . by showing that he has made statements different from his present testimony"); the original Civil Code section contained a similar provision: 1861, Judy *v.* Johnson, 16 Ind. 371; 1862, Hill *v.* Goode, 18 Ind. 207, 209; but the Criminal Code at that time lacked such a provision: 1860, Quinn *v.* State, 14 Ind. 589 (applying the rule of exclusion to criminal cases); 1870, Howard *v.* State, 32 Ind. 478 (cross-examination only, allowed, to "refresh the memory of the witness and give him the opportunity to set the matter right"); this lack, in criminal cases, was supplied by Rev. St. 1881, § 1796; and the statutory rule has since been applied as follows: 1883, Hull *v.* State, 98 Ind. 128, 132 (excluded, where the witness simply fails to make the desired assertion); 1888, Conway *v.* State, 118 Ind. 482, 488, 21 N. E. 285 ("the only limitation is that . . . he has given testimony prejudicial to the party"); 1890, Miller *v.* Cook, 124 Ind. 101, 104, 24 N. E. 577 (like Hull *v.* State); 1889, Crocker *v.* Agenbroad, 122 Ind. 585, 24 N. E. 169; 1895, Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70 (like Hull *v.* State); 1901, Adams *v.* State, 156 Ind. 596, 59 N. E. 24; (statute applied); 1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 604 (statute applied, in a bastardy case, to impeach the third person called by the defendant and said to be the father of the child);

Iowa. 1886, Humble *v.* Shoemaker, 70 Ia. 223, 226, 30 N. W. 492 (question allowed, to refresh recollection and induce correction); 1888, State *v.* Cummins, 76 Ia. 133, 135, 40 N. W. 124 (question allowed, to refresh recollection); 1892, Hall *v.* R. Co., 84 Ia. 311, 315, 51 N. W. 150 (question allowed, to refresh his recollection, to allow him to make a correction, and "to show that it has surprised the party who called him"; but no outside testimony allowable); 1896, Spaulding *v.* R. Co., 98 Ia. 205, 67 N. W. 227 (question as to testimony at a former trial, admitted "to test and quicken his recollection, and give him an opportunity to correct his testimony"); 1896, Hall *v.* Manson, 99 Ia. 698, 68 N. W. 922 (apparently allowing the witness to be questioned, but rejecting outside testimony); 1894, Smith *v.* Dawley, 92 Ia. 312, 60 N. W. 625 (excluding outside testimony);

Kansas: 1882, Johnson *v.* Leggett, 28 Kan. 590, 605 (the trial Court "may, when it thinks the interests of justice require, permit a party to show that he is unexpectedly mistaken in the testimony of any witness, that he had good reason to expect other testimony, and what such other testimony would be"); 1886, St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 431 (admitted, in discretion, by outside testimony); 1892, State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036 (admitted); 1894, State *v.* Keefe, 54 Kan. 197, 201, 38 Pac. 302 (Johnson *v.* Leggett followed); 1905, State *v.* Moon, 71 Kan. 349, 80 Pac. 597 (Johnson *v.* Leggett followed; see the citation *ante*, § 901); 1916, Nuzum *v.* Springer, 97 Kan. 744, 156 Pac. 704 (bank-transaction; an inconsistent affidavit, held usable in the trial Court's discretion); 1916, State *v.* Terry, 98 Kan. 796; 161 Pac. 905 (rape under age; the female allowed to be examined by the prosecution as to her change of testimony);

Kentucky: C. C. P. 1895, § 596 (allowed unconditionally); applied in the following cases. 1859, Champ *v.* Com., 2 Metc. 17, 23 (here the statement was excluded, because the witness had simply failed to allude to the matter on the stand); 1876, Blackburn *v.* Com., 12 Bush 181, 184; 1892, Wren *v.* R. Co., — Ky. —, 20 S. W. 215 (admitted); 1896, Pittsburg C. C. & St. L. R. Co. *v.* Lewis, — Ky. —, 38 S. W. 482, *semble* (admitted, to refresh recollection); 1901, Feltner *v.* Com., — Ky. —, 64 S. W. 959 (prior statements excluded; opinion obscure); 1903, Mosley *v.* Com., — Ky. —, 72 S. W. 344 (prior statements held admissible, under C. C. P. § 596, but not as substantive evidence); 1904, Com. *v.* Bavarian B. Co., — Ky. —, 80 S. W. 772 (use of former testimony as evidence under the guise of refreshing memory is not allowable); 1906, Garrison *v.* Com., 122 Ky. 882, 93 S. W. 594 (prosecution allowed to prove by other witnesses the witness' contrary assertions); 1907, Dukes *v.* Davis, 125 Ky. 313, 101 S. W. 390 (rule of C. C. P. § 596 applied); 1914, Rutland *v.* Com., 160 Ky. 77, 169 S. W. 584 (rule of C. C. P. § 596 applied);

Louisiana: 1876, State *v.* Thomas, 28 La. An. 827 (excluded); 1885, State *v.* Simon, 37 La. An. 569 (admitted, where it was incidental and the party was taken by surprise); 1886, State *v.* Boyd, 38 La. An. 105 (admissible, where the witness is unwilling, *semble:* none of the three cases consider the rule carefully); 1895, State

v. Johnson, 47 La. An. 1225, 17 So. 789 (admissible, in case of surprise); 1895, State v. Vickers, 47 La. An. 1574, 18 So. 639 (cross-question only admissible, in case of surprise and to stimulate recollection); 1900, State v. Robinson, 52 La. An. 616, 27 So. 124 (question as to former testimony, excluded on the facts; principle obscure); 1903, State v. Williams, 111 La. 179, 35 So. 505 (cross-examination allowed, in case of surprise, to stimulate recollection); 1906, State v. Stephens, 116 La. 36, 40 So. 523 (witness for the State; cross-examination allowable if the purpose is to stimulate recollection, but not "if the sole purpose . . . is to discredit him, . . . unless the party offering it has been entrapped into the calling a hostile witness", and even then only when the witness affirmatively testifies against him); 1913, State v. Robertson, 133 La. 806, 63 So. 363 (re-examination to a self-contradiction, held not improper on the facts; following State v. Williams); 1914, State v. Garner, 135 La. 746, 66 So. 181 (following State v. Williams); 1919, State v. Walters, 145 La. 209, 82 So. 197 (reading over former testimony to a witness now professing to have been drunk at the time of the homicide and to remember nothing, not allowed);

Maine: 1840, Dennett v. Dow, 17 Me. 19, 22 (excluded); 1847, Chamberlain v. Sands, 27 Me. 458, 466 (same);

Maryland: 1807, De Sobry v. De Laistre, 2 H. & J. 219 (a deposition abroad 'de bene' taken by defendant, allowed to be contradicted by defendant by letters to him from the opponent); 1821, Queen v. State, 5 H. & J. 232 (admitted); 1839, Franklin Bank v. Navig. Co., 11 G. & J. 36 (excluded); 1877, Sewell v. Gardner, 48 Md. 178, 183 (where the party was misled, he may "contradict the witness' statement by his own or other testimony"; here he was not misled);

Massachusetts: The common-law rulings were here inclined to a radical exclusion: 1852, Com. v. Starkweather, 10 Cush. 59 (exclusion of both question and outside evidence); 1855, Com. v. Welsh, 4 Gray 535, *semble* (same); 1858, Com. v. Hudson, 11 Gray 64 (same, even where the question was asked on cross-examination after the opponent had made the witness his own); 1867, Adams v. Wheeler, 13 Gray 67 (excluding statements which "can have no effect but to impair the credit of the witness with the jury"; reversing the question of admissibility to refresh recollection or in case of surprise by a hostile witness). But in 1869, by statute (Gen. L. 1920, c. 233, § 23 like Cal. C. C. P. § 2049, using "prove" instead of "show"), the use of the evidence was freely permitted; applied in the following rulings: 1869, Ryerson v. Abington, 102 Mass. 531; 1873, Brannon v. Hursell, 112 Mass. 63, 70; 1875, Day v. Cooley, 118 Mass. 524, 526; 1877, Force v. Martin, 122 Mass. 5; 1877, Brooks v. Weeks, 121 Mass. 433 (pointing out that the party need not show surprise); 1882, Com. v. Donahoe, 133 Mass. 407; 1899, Knight v. Rothschild, 172 Mass. 546, 52 N. E. 1062; 1916, Conklin v. John Howard Industrial Home, 224 Mass. 222, 112 N. E. 606 ("cross-examination", whatever that may mean, said to be in discretion of trial Court unless bias or prejudice is shown);

Michigan: 1895, People v. Case, 105 Mich. 92, 62 N. W. 1017 (opinion obscure; cross-examination to contrary statements in a deposition read to the witness, allowed); 1895, People v. O'Neill, 107 Mich. 556, 65 N. W. 540 (calling the attention of hostile witnesses to their testimony before the grand jury to refresh their memories, allowed); 1896, Dillon v. Pinch, 110 Mich. 149, 67 N. W. 1113 (the question may be put, in the trial Court's discretion); 1897, People v. Gillespie, 111 Mich. 241, 69 N. W. 490 (question as to a former contradictory affidavit allowed, to "induce the witness to state what she knew"); 1898, Gilbert v. R. Co., 116 Mich. 610, 74 N. W. 1010 (in discretion, the question may be put to refresh recollection); 1899, McGee v. Baumgartner, 121 Mich. 287, 80 N. W. 21 (inconsistent affidavit admitted, and witness' explanation that it was obtained by threats contradicted by the testimony of the drawer of the affidavit); 1902, People v. Payne, 131 Mich. 474, 91 N. W. 739 (cross-examination to the contrary statement, allowed, "not as substantive proof, but as explaining why he had called him"); 1903, Westphal v. R. Co., 134 Mich. 239, 96 N. W. 19 ("a party will not be permitted to impeach his own witness by showing contradictory statements"; none of the foregoing cases cited);

Minnesota: 1867, State v. Johnson, 12 Minn. 476, 486 (question allowable "either to lead the witness to correct her testimony, or to save the party calling her from being sacrificed by the witness"); 1890, State v. Tall, 43 Minn. 273, 275, 45 N. W. 449 (question admissible "not for the purpose of discrediting the witness, but as a proper means of inducing him to tell the truth", provided he is hostile); 1893, Selover v. Bryant, 54 Minn. 434, 56 N. W. 58 (prior self-contradiction, admissible, in case of surprise, in the trial Court's discretion; Gilfillan, C. J., diss.); 1906, Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958 (proof of former self-contradiction, by extrinsic testimony, admitted in the trial Court's discretion, in a case of surprise); 1906, State v. Sederstrom, 99 Minn. 234, 109 N. W. 113 (prior inconsistent statements of the witness to the State's attorney, allowed to be shown); 1922, State v. Jensen, — Minn. —, 186 N. W. 581 (carnal knowledge under age; contradictory statements by the girl, not admitted on the facts);

Mississippi: 1881, Moore v. R. Co., 59 Miss. 243, 248 (admissible, where it appears that the party was surprised; here the record indicated the contrary, and nothing was shown to remove this indication); 1886, Dunlap v.

Richardson, 63 Miss. 447, 449 (admissible where "deceived or misled by fraud or artifice practised on him by the witness"); 1893, Chism *v.* State, 70 Miss. 742, 12 So. 852 (approving the preceding two); 1898, Bacot *v.* Lumber Co., — Miss. —, 23 So. 481 (allowed, where there was hostility on cross-examination and also surprise); nevertheless, under the doctrine of (8), § 904, *ante*, these statements may be excluded: 1881, Moore *v.* R. Co., 59 Miss. 243, 248 (failure to testify to certain injuries; former assertions of the injuries excluded, as there was nothing to impeach; whether such assertions could be referred to to refresh the memory, undecided); 1893, Chism *v.* State, 70 Miss. 742, 12 So. 852 (the witness professed to know nothing of the killing; former assertions about it excluded, because "the first and essential thing is that the testimony of the witness must be adverse"); 1904, Dunk *v.* State, 84 Miss. 454, 36 So. 609 (self-contradiction of a witness for the prosecution, where the State's attorney had been "neither misled nor entrapped by the witness", excluded; but the ruling is erroneously put also on the ground of the immateriality of the assertion, misunderstanding Williams *v.* State, *post*, § 1038); 1906, Dodd *v.* State, 88 Miss. 50, 40 So. 545 (Dunk *v.* State followed; rule of discretion applied);

Missouri: 1885, Dunn *v.* Dunnaker, 87 Mo. 597, 600 (admissible only where "the party is entrapped" into offering a witness who disappoints him); 1896, State *v.* Burks, 132 Mo. 363, 34 S. W. 48 (not admissible "unless the party is entrapped into offering" a witness who proves faithless; shortly termed, "a surprise"); 1899, Feary *v.* O'Neill, 149 Mo. 467, 50 S. W. 918 (not allowed where there was no surprise or misleading); 1903, State *v.* Coats, 174, Mo. 396, 74 S. W. 864 (defendant's witness' memory allowed to be refreshed by reading her prior contradictory testimony); 1905, Clancy *v.* St. Louis T. Co., 192 Mo. 615, 91 S. W. 509 (rule of State *v.* Burks, *supra*, applied); 1906, Beier *v.* St. Louis T. Co., 197 Mo. 215, 94 S. W. 876 (a witness who had been subpœnaed by both parties, but introduced by the defendant only, and whose memory failed on various points covered by a written statement made by him two years before; the written statement not allowed to be put in evidence, no entrapment being shown); 1914, State *v.* Patton, 255 Mo. 245, 164 S. W. 223 (method of refreshment of memory of State's witness as to his own former testimony, where the prosecutor is now surprised, carefully prescribed, so as to prevent a substitution of the former testimony instead of a mere refreshment); 1917, Bingaman *v.* Hannah, 270 Mo. 611, 194 S. W. 276 (will contest; self-contradictions of unwilling attesting-witnesses, admitted; the opinion seems to ignore the present point); 1921, State *v.* Depriest, 288 Mo. 459, 232 S. W. 83 (prosecution's witness; memory refreshed from his testimony before grand jury);

Montana: Rev. C. 1921, § 10666 (like Cal. C. C. P. § 2049); 1898, State *v.* Bloor, 20 Mont. 574, 52 Pac. 611 (statute applied; the suggestion of the defendant's counsel that the statute violated the constitutional guarantee of due process of law was of course repudiated);

Nebraska: 1908, First National Bank *v.* State, 80 Nebr. 597, 114 N. W. 772 (allowable to "elicit the truth from a confused or unwilling witness"); 1910, Masourides *v.* State, 86 Nebr. 105, 125 N. W. 132 (allowing the whole former statement to be read to the jury, held improper);

New Hampshire: 1870, Hurlburt *v.* Bellows, 50 N. H. 105, 116 (admissible in case of surprise and absence of collusion or bad faith, if the witness is adverse); 1885, Whitman *v.* Morey, 63 N. H. 448, 456, 2 Atl. 899 (same);

New Jersey: 1840, Brewer *v.* Porch, 17 N. J. L. 377, 379 (excluded); 1897, Kohl *v.* State, 59 N. J. L. 445, 36 Atl. 931, 37 Atl. 73 (excluded); 1913, State *v.* D'Ahame, 84 N. J. L. 386, 86 Atl. 414 ("where the specific testimony comes as a surprise, such an attack is admissible"); 1913, State *v.* Kysilka, 84 N. J. L. 6, 87 Atl. 79 (similar); 1906, State *v.* Johnson, 73 N. J. L. 199, 63 Atl. 12 (prior self-contradiction, allowed to be shown on cross-examination, on the ground of surprise; 1914, State *v.* MacRoric, 86 N. J. L. 401, 92 Atl. 578 (rule of surprise, applied, with certain attenuated and futile distinctions);

New Mexico: Ann. St. 1915, § 2180 ("In case the witness, in the opinion of the judge, proves adverse, such party may prove that the witness made at other times a statement inconsistent with his present testimony"); 1906, Terr. *v.* Livingston, 13 N. M. 318, 84 Pac. 1021 (rule in Hickory *v.* U. S.; why did not the Court cite and follow the rule of its own statute, which is broader?);

New York: 1830, Lawrence *v.* Barker, 5 Wend. 301, 305 (Savage, C. J., allowing "great latitude of examination" in certain cases, but not specifying the use of self-contradictory statements); 1847, People *v.* Safford, 5 Den. 112, 116 (excluded, on the theory that to contradict by showing error "does by no means involve the witness in the crime of perjury, but may be reconcilable with the most perfect integrity and good faith", while a prior self-contradiction necessarily involves an "impeachment"); 1850, Thompson *v.* Blanchard, 4 N. Y. 303, 311 (excluded); 1873, Bullard *v.* Pearsall, 53 N. Y. 230 (excluded, "when the sole object of such proof is to discredit the witness"; thus extrinsic proof is absolutely excluded, while cross-examination is possible for the purpose of refreshing recollection and obtaining explanation or correction; allowable, therefore, on cross-examination only; but the ruling on the facts is confused: the form of question intended to be sanctioned being apparently, "whether

he had not made a prior statement to such-and-such an effect"); 1874, Coulter *v.* Express Co., 56 N. Y. 585, 588 (excluded, "when it is only material as it bears upon credibility"; but conceding an exception "on the ground of surprise, as contrary to" just expectations, or of deceit of the opponent; citing Melhuish *v.* Collier, but misunderstanding it); 1887, Becker *v.* Koch, 104 N. Y. 394, 402, 10 N. E. 701 (prior self-contradictory statements absolutely inadmissible to impeach; as matter of law, "not open to discussion"; though, as a policy, apparently questioned; yet, in this very case, curiously enough, the witness' self-contradictory statements on the direct examination were allowed to be employed, and the right conceded "to show that a portion of the evidence of your own witness is untrue, by comparing it with another portion of the evidence of the same witness and with the other facts in the case"); 1888, Cross *v.* Cross, 108 N. Y. 628, 15 N. E. 333 (following Becker *v.* Koch, and allowing a husband, called by the wife in a suit for divorce based on abandonment, to be discredited, as to his denials of intent to abandon, by "the facts and circumstances of his conduct, his letters and declarations", *i.e.* allowing freely the use of prior self-contradictions, but putting it on the ground of the witness being really hostile and interested; erroneously fathering this view upon the case of Becker *v.* Koch); 1889, People *v.* Kelly, 113 N. Y. 647, 651, 21 N. E. 122 (former testimony; Bullard *v.* Pearsall approved; yet here the former statement was not contradictory, but merely supplied an omission); 1890, De Meli *v.* De Meli, 120 N. Y. 485, 490, 24 N. E. 996 (approving Becker *v.* Koch); 1897, People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889, *semble* (excluded); 1914, People *v.* De Martini, 213 N. Y. 203, 107 N. E. 501 (identification of the accused; witnesses L. C. and others, for the prosecution, having "refused to identify the defendant at all, or retracted his identification after it was made", the prosecuting attorney called R. to testify to these witnesses having identified the defendant at the police station upon his arrest; held inadmissible; "there is much to be said in support of Prof. W.'s argument [that the rule is no longer to be tolerated as an impediment to truth], but the case at bar is not one in which we should make a new departure, for a human life is at stake"; of course this case illustrates the lack of rationality in the rule); 1920, Miller *v.* Greenwald Petticoat Co., Sup. App. Div., 183 N. Y. Suppl. 97 (goods sold; plaintiffs called and examined R., their agent, who had been discharged; a self-contradicting affidavit of R., not admitted for plaintiff to impeach R.; unsound);

North Carolina: 1796, State *v.* Norris, 1 Hayw. 429, 437 (excluding the evidence in civil cases, but admitting it in criminal cases, because of the possibility of imposing on the State's attorney); 1806, Sawrey *v.* Murrell, 2 Hayw. 397, *semble* (same); 1849, Neil *v.* Childs, 10 Ired. 195, 197, *semble, contra* (left undecided); 1851, Hice *v.* Cox, 12 Ired. 315, *semble* (same); 1883, State *v.* Taylor, 88 N. C. 696 (outside testimony excluded);

North Dakota: 1895, George *v.* Triplett, 5 N. D. 50, 63 N. W. 891 (question allowable, where surprised by a hostile witness; as to outside testimony, point reserved);

Oklahoma: 1900, Drury *v.* Terr., 9 Okl. 398, 60 Pac. 101, *semble* (inadmissible); 1909, Sturgis *v.* State, 2 Okl. Cr. App. 362, 102 Pac. 57 (prosecution is allowed to cross-examine the witness and to prove by others the self-contradictions, where the witness had surprised the attorney by altering his expected testimony; but here surprise was negatived; leading opinion by Furman, P. J.);

Ohio: 1889, Hurley *v.* State, 46 Oh. 320, 322, 21 N. E. 645 (admissible only on cross-examination; not "merely to impeach the witness" but "for the purpose of refreshing his recollection and inducing him to correct his testimony or explain his apparent inconsistency", provided the party is surprised by "unexpected adverse testimony"; the precedents are carefully examined);

Oregon: Laws 1920, § 861 (like Cal. C. C. P. § 2049); 1890, Langford *v.* Jones, 18 Or. 307, 325, 22 Pac. 1064 (the witness professed ignorance of the subject; former assertions excluded, when offered by outside evidence, because there was no testimony to contradict; but the witness may be asked about such statements, to refresh his memory); 1896, State *v.* Steeves, 29 Or. 85, 43 Pac. 947, *semble* (here the witness merely failed to prove what was expected; opinion obscure); 1898, State *v.* Bartmess, 33 Or. 110, 54 Pac. 167 (witness hostile; self-contradictions allowed to be shown by others; in any case, refreshment of memory by cross-examination after unexpected testimony is allowed); 1901, State *v.* McDaniel, 39 Or. 161, 65 Pac. 520 (admissible under C. § 838); 1906, State *v.* Jennings, 48 Or. 483, 87 Pac. 524 (proof by other testimony, allowed); 1918, State *v.* Mello, 92 Or. 678, 173 Pac. 317 (murder; Lord's Or. L. § 864 applied to allow refreshment of recollection as to prior statements of a witness for the State); 1918; Weygandt *v.* Bartle, 88 Or. 310, 171 Pac. 5873 1919, State *v.* Merlo, 92 Or. 678, 182 Pac. 151 (careful opinion, by Harris, J., analyzing the law in this State; statements here excluded because the original testimony was not "affirmatively prejudicial to the State", but merely "not as strong as was expected");

Pennsylvania: 1781, Rapp *v.* Le Blanc, 1 Dall. 63, *semble* (excluded); 1825, Cowden *v.* Reynolds, 12 S. & R. 281, 283 (admitted); 1835, Craig *v.* Craig, 5 Rawle 91, 95, *semble* (same); 1838, Stockton *v.* Demuth, 7 Watts 39, 41 (excluded, not citing this case); 1838, Smith *v.* Price, 8 Watts 447 (same); 1843, Bank of N. Liberties *v.* Davis, 6 W. & S.

285, 288 (admitted, citing the first case only); 1848, Harden *v.* Hays, 9 Pa. St. 151, 159 (admitted); 1866, Stearns *v.* Bank, 53 Pa. 490 (excluded, two judges dissenting); 1892, Fisher *v.* Hart, 149 Pa. 232, 24 Atl. 225 (cross-examination to prior contradictory statements, excluded, apparently because the witness had shown no hostile bias); 1892, McNerney *v.* Reading, 150 Pa. 611, 615, 25 Atl. 57 (the witness being unwilling and his testimony a surprise, cross-examination to contradictory statements was held allowable in discretion); 1898, Morris *v.* Guffey, 188 Pa. 534, 41 Atl. 731 (allowed, on the facts); 1908, Com. *v.* Deitrick, 221 Pa. 7, 70 Atl. 275 (admitted, without restriction); 1918, Com. *v.* Delfino, 259 Pa. 272, 102 Atl. 949 (murder; examination of prosecution's witness by the district attorney to prior variant statements "is a matter largely in the discretion of the trial judge");

Philippine Isl. C. C. P. 1901, § 340 ("the party producing a witness, . . . in the discretion of the Court, in order to show that the witness has misled him into calling him to the stand, may also show that he has made at other times statements inconsistent with his present testimony");

Porto Rico: Rev. St. & C. 1911, §§ 1524, 6275 (like Cal. C. C. P. § 2049); 1910, People *v.* Rojas, 16 P. R. 239 (rape; self-contradiction of the woman by the prosecution, not admissible where no surprise);

Rhode Island: 1913, Barker *v.* Rhode Island Co., 35 R. I. 406, 87 Atl. 174 (interrogation allowed in case of surprise; in the trial Court's discretion);

South Carolina: 1884, Bauskett *v.* Keith, 22 S. C. 187, 199 (excluded); 1895, State *v.* Johnson, 43 S. C. 123, 20 S. E. 988 (adhering to the precedent, but allowing the question to be asked to induce correction);

South Dakota: 1904, State *v.* Callahan, 18 S. D. 145, 99 N. W. 1099 (cross-examination to prior testimony, forbidden; rule obscure);

Tennessee: 1848, Story *v.* Saunders, 8 Humph. 663, 666 excluded);

Texas: Rev. C. Cr. P. 1911, § 815 (allowed; see quotation *ante*, § 900); 1894, Erwin *v.* State, 32 Tex. Cr. 519, 24 S. W. 904 (excluded, where on the stand the witness failed to affirm a decided fact); 1898, Ross *v.* State, — Tex. Cr. —, 45 S. W. 808 (prior self-contradiction apparently allowable in case of surprise); 1900, Spangler *v.* State, 41 Tex. Cr. 424, 55 S. W. 326 (former testimony containing a prior self-contradictory statement, held inadmissible, where it merely affirms what the witness has failed to testify to on the stand; but the witness may be shown the prior testimony so as to recall the fact to his mind, if possible); 1900, Brown *v.* State, 42 Tex. Cr. 176, 58 S. W. 131 (former testimony held to be improperly used on the facts; Spangler's Case approved); 1903, Barnard *v.* State, 45 Tex. Cr. 67, 73 S. W. 957 (statute applied; surprise is not required); 1905, Dallas C. E. St. R. Co. *v.* McAllister, 41 Tex. Civ. App. 131, 90 S. W. 933; 1907, Skeen *v.* State, 51 Tex. Cr. 39, 100 S. W. 770 (rape; after the prosecuting witness' denial of the intercourse charged, the prosecution was not allowed to prove her prior affirmation of it); 1918, Anderson *v.* State, 83 Tex. Cr. 261, 202 S. W. 944 (homicide; cross-examination by the prosecution of its own witness to a former statement, held improper on the facts);

Utah: 1914, State *v.* Inlow, 44 Utah 485, 141 Pac. 530 (in case of surprise, recollection may be refreshed); 1920, State *v.* Scott, 55 Utah 553, 188 Pac. 860 (not allowed, on the facts);

Vermont: 1862, Fairchild *v.* Bascomb, 35 Vt. 398, 405, 417 (excluded); 1883, Cox *v.* Eayres, 55 Vt. 24, 27, 35 (excluded; there being no discretion for the trial Court); rule changed by St. 1886, c. 49, now Stats. 1894, § 1247 (allowable "by leave of Court", "when in the opinion of the Court a witness produced by a party is adverse"); applied in the following cases: 1890, Hurlburt *v.* Hurlburt's Estate, 63 Vt. 667, 670, 22 Atl. 850; 1891, Good *v.* Knox, 64 Vt. 97, 99, 23 Atl. 520; 1897, State *v.* Slack, 69 Vt. 486, 38 Atl. 311; 1901, Davis *v.* Buchanan, 73 Vt. 67, 50 Atl. 545; (State *v.* Slack followed); 1901, McGovern *v.* Smith, 73 Vt. 52, 50 Atl. 549 (similar); 1916, Cross *v.* Passumpsic F. L. Co., 90 Vt. 397, 98 Atl. 1010 (statute applied);

Virginia: Code 1919, § 6215 (a party may "in case the witness shall in the opinion of the Court prove adverse, contradict him by other evidence, or by leave of the Court prove that he has made at other times a statement inconsistent with his present testimony. . . . In every such case the Court, if requested by either party, shall instruct the jury not to consider the evidence of such inconsistent statements, except for the purpose of contradicting the witness"); 1902, Gordon *v.* Funkhouser, 100 Va. 675, 42 S. E. 677 (statute applied); 1904, Portsmouth St. R. Co. *v.* Peed's Adm'r, 102 Va. 662, 47 S. E. 850 (allowable to refresh but not to contradict; statute not cited); 1905, McCue *v.* Com., 103 Va. 870, 49 S. E. 623 (statute held applicable to criminal cases);

Washington: 1909, State *v.* Montgomery, 56 Wash. 443, 105 Pac. 1035 (prosecuting attorney's treatment of a rape-witness who testified contrary to her original story to him, held improper on the facts); 1917, Blystone *v.* Walla Walla Valley R. Co., 97 Wash. 46, 165 Pac. 1049 (personal injury; rule applied); 1920, State *v.* Sills, 113 Wash. 497, 194 Pac. 580 (witness may be questioned to probe his recollection and permit explanations);

West Virginia: 1900, State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626 (admitted to show the good faith of the party offering);

Wisconsin: 1892, Richards *v.* State, 32 Wis. 172, 180, 51 N. W. 652 (excluded; "this rule is

tions and the indiscriminate citation of rulings from other Courts, together with the indecision of the earlier English precedents, has tended to produce confusion in our law, even within the rulings of the same jurisdiction. The sound and simple remedy would be by statute to abolish all limitation on this kind of evidence; and this step has in some States already been taken.

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

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

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

In England, that notion, as already observed (*ante*, § 896), is found surviving as late as the 1700s;[1] but by the end of that century the doctrine was

elementary"); 1898, Sutton *v.* R. Co., 98 Wis. 157, 73 N. W. 993, *semble* (allowable in discretion, for an adverse witness); 1898, Collins *v.* Hoehle, 99 Wis. 639, 75 N. W. 416 (self-contradictions excluded, both on cross-examination and by others);
Wyoming: 1895, Arnold *v.* State, 5 Wyo. 439, 40 Pac. 967 (question admissible, for a hostile witness, to stimulate recollection, even if discredit incidentally follows); Comp. St. 1920, § 5809 (a party may, as to his own witness, show "that he has made at other times statements inconsistent with his present testimony, and this rule should apply to both civil and criminal cases"); 1903, Horn *v.* State, 12 Wyo. 80, 73 Pac. 705 (statute applied); 1922, Crago *v.* State, — Wyo. —, 202 Pac. 1099 (general comments on Comp. St. 1920, § 5809, in a learned and enlightened opinion by Blume, J.).

Compare also the cases *post*, §§ 1020–1043 (*self-contradiction* in general).

§ 906. [1] *Post*, § 1028. The statutes cited *ante*, § 905, provide usually (but superfluously) for this.

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

[3] *Post*, § 916 and § 1057.

§ 907. [1] The earlier cases usually speak in general terms of a prohibition against discrediting one's own witness; but it seems likely that this included a prohibition even against proving his error by other witnesses: 1700, Adams *v.* Arnold, 12 Mod. 375 ("And here Holt [C. J.] would not suffer the plaintiff to discredit a witness of his own calling, he swearing against him"); 1722, Eyre, J., cited in Vin. Abr. XII, 48, tit. Evidence ("The party

clearly laid down that one's own witness could always be contradicted by others and his error shown;[2] and this became established law (though not without an occasional trace of the older notion [3]) by the first half of the 1800s.[4] In 1854, however, came the statute (quoted *ante*, § 905) in which the anomalous condition was inserted that the witness should be deemed adverse by the judge. The limitation thus blunderingly put upon the right to contradict has however been practically read out of the statute.[5]

who produceth a witness cannot examine to the discredit of such witness"); the turning-point seems to be the following case: 1738, Rice *v.* Oatfield, 2 Stra. 1095 ("It was argued on behalf of the defendant that the plaintiff could not be allowed to contradict his former evidence", but it was answered that "if there was any contradiction, it is no objection"; citing Pike *v.* Badmering, in L. C. J. Pratt's time, unreported; and the Court unanimously received the evidence).

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

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

[4] 1825, Ewer *v.* Ambrose, 3 B. & C. 746 ("the party is at liberty afterwards to make out his own case by other witnesses"); 1831, Bradley *v.* Ricardo, 8 Bing. 57; 1832, Friedlander *v.* Assur. Co., 4 B. & Ad. 193; 1834, Denman, L. C. J., in Wright *v.* Beckett, 1 Moo. & Rob. 420 ("The case of Lowe *v.* Jolliffe would have seemed to make an end of the antiquated notion that a party cannot contradict his own witness"); 1839, R. *v.* Ball, 8 C. & P. 745; 1850, Melhuish *v.* Collier, 19 L. J. Q. B. 493 (per Coleridge and Erle, JJ.); 1850, The Lochlibo, 14 Jur. 792, Dr. Lushington (referring to the common-law practice as "beyond all dispute, beyond all doubt"); 1858, Greenough *v.* Eccles, 5 C. B. N. S. 786, 28 L. J. C. P. 160 (speaking of the law before 1854 as "clear").

[5] 1858, Greenough *v.* Eccles, 5 C. B. N. S. 786; Cockburn, C. J., says: "Perhaps the better way is to consider the second branch of the section as altogether superfluous"; while the majority of the Court, Williams and Willes, JJ., seem to reach the same result by defining "adverse" as "hostile", in distinction from "unfavorable", and then treating it as not impliedly forbidding the greater by permitting the less, and thus allowing contradiction on relevant matters as something "he may still do, if the witness is unfavorable." The statute, however, seems later to have been not so clearly construed; 1866, Coles *v.* Brown, L. R. 1 P. & D. 70, Sir J. P. Wilde (an attesting witness was allowed to be contradicted merely on the theory that he was a compulsory witness); 1890, R. *v.* Dytche, 17 Cox Cr. 39, Hawkins, J. (four persons were convicted for felonious wounding; it was afterwards believed that these were innocent; on the present trial, the assaulted person having testified, on cross-examination, that the first four and not the present defendants were the persons attacking him, the prosecution was allowed to call those four to show their *alibi*).

In CANADA, the English statute is followed literally (except in Alberta, Ontario and Prince Edward Island), but has been construed as in England: *Dom.* R. S. 1906, c. 145, Evid. Act § 9; *Alta.* St. 1910, 2d sess., c. 3, Evid. Act § 23 (like P. E. I. St. 1889); 1916, Maruzeczka *v.* Charlesworth, 26 D. L. R. 553, Alta. (money advanced on a sale by three persons; one of the latter having testified to certain admissions; the other two allowed to deny this, without leave of the judge; following the correct wording of Evid. Act § 23); *B. C.* R. S. 1911, c. 78, § 19, 1904, R. *v.* Hutchinson, 11 Br. C. 24, 32; *Man.*, 1913, Schwartz *v.* Winnipeg E. R. Co., 9 D. L. R. 708, 717, per Haggart, J. A.; *N. Br.* Cons. St. 1903, c. 127, § 15; *Newf.* Cons. St. 1916, c. 91, § 17; *N. Sc.* Rev. St. 1900, c. 163, § 42; 1894, Almon *v.* Law, 26 N. Sc. 340, 348 (contradiction allowed; the confusion of the statute being noted; Greenough *v.* Eccles approved); *Ont.* Rev. St. 1897, c. 73, § 20; 1864, Robinson *v.* Reynolds, 23 U. C. Q. B. 560, 563 (applying the Ontario statute according to the opinion of Williams, J., in Greenough *v.* Eccles); 1900, Stanley P. Co. *v.* Thomson, 32 Ont. 341 (the witness may be contradicted by others, called not to discredit but to contradict, without leave of the judge; Greenough *v.* Eccles followed); R. S. 1914, c. 76, § 20 (correcting the terms of the statute as in P. E. I. St. 1889, *infra*); 1916, Hamm *v.* Bashford, 26 D. L. R. 573 (a party calling a witness may contradict him); *P. E. I.* St. 1889, c. 9, § 15 (quoted *ante*, § 905); *Sask.* R. S. 1920, c. 44, § 32; *Yukon:* Consol. Ord. 1914, c. 30, § 40.

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

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

[7] The following cases would undoubtedly be followed in all jurisdictions where there are no express utterances; some of the more recent opinions, uselessly repeating, for the benefit of careless brief-makers, the rule of prior decisions, have not been here inserted: *Federal:* 1893, Hickory *v.* U. S., 151 U. S. 303, 309, 14 Sup. 334; 1899, Swift *v.* Short, 34 C. C. A. 545, 92 Fed. 567; 1899, Peters *v.* U. S., 36 C. C. A. 105, 94 Fed. 127; 1906, Mississippi Glass Co. *v.* Franzen, 143 Fed. 501, C. C. A.; 1920, MacKnight *v.* U. S., 1st C. C. A., 263 Fed. 832 (false pretenses based on forged deeds caused to be recorded; the prosecutor's use of certified copies of the record of the deeds, held not to bar it from showing the forgery); *Alabama:* 1897, Jones *v.* State, 115 Ala. 67, 22 So. 566; 1897, Phœnix Assur. Co. *v.* McArthur, 116 Ala. 659, 22 So. 903; 1898, Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699; *Alaska:* Comp. L. 1913, § 1499; *Arkansas:* Dig. 1919, § 4186; *California:* C. C. P. 1872, § 2049; 1919, Greenleaf *v.* Pacific Tel. & Tel. Co., 43 Cal. App. 691, 185 Pac. 872 (of course the contradicting party is not limited by the rule about showing surprise, which limits the use of self-contradictions); *Colorado:* 1889, Babcock *v.* People, 13 Colo. 521, 22 Pac. 817; 1892, Moffatt *v.* Tenney, 17 Colo. 189, 195, 30 Pac. 348; 1897, Brown *v.* Tourtellotte, 24 Colo. 204, 50 Pac. 195; *Connecticut:* 1864, Olmstead *v.* Winsted Bank, 32 Conn. 278, 287; *Columbia* (Dist.): 1909, Dumas *v.* Clayton, 32 D. C. App. 566; *Georgia:* Rev. C. 1910, § 5880; 1849, Merchants' Bank *v.* Rawls, 7 Ga. 191, 198; 1855, Burkhalter *v.* Edwards, 16 Ga. 593, 596; 1877, Skipper *v.* State, 59 Ga. 63, 66; 1878, Garrett *v.* Sparks, 60 Ga. 582, 585; 1887, Hollingworth *v.* State, 79 Ga. 607, 4 S. E. 560; 1904, Moultrie Repair Co. *v.* Hill, 120 Ga. 730, 48 S. E. 143; *Hawaii:* Rev. L. 1915, § 2618; *Idaho:* Comp. St. 1919, § 8036; *Illinois:* 1865, Rockwood *v.* Poundstone, 38 Ill. 199; 1900, Highley *v.* Bank, 185 Ill. 565, 57 N. E. 436; 1903, U. S. Brewing Co. *v.* Ruddy, 203 Ill. 306, 67 N. E. 799 (contradicting the defendant's attorney, who on the call of the plaintiff had testified that he had not attempted to suborn witnesses); *Indiana:* Burns' Ann. St. 1914, § 531; 1889, Crocker *v.* Agenbroad, 122 Ind. 585, 24 N. E. 169; 1900, Hanes *v.* State, 155 Ind. 112, 57 N. E. 704; *Indian Terr.* 1901, Bradburn *v.* U. S., 3 Ind. T. 604, 64 S. W. 550; *Iowa:* 1866, Thorn *v.* Moore, 21 Ia. 285, 290; 1880, Clapp *v.* Peck, 55 Ia. 270, 272, 7 N. W. 587; 1888, Gardner *v.* Connelly, 75 Ia. 205, 39 N. W. 650; 1892, Smith *v.* Utesch, 85 Ia. 381, 386, 52 N. W. 343; 1913, Cochburn *v.* Hawkeye C. M. Ass'n, 163 Ia. 28, 143 N. W. 1006; *Kansas:* 1901, Deering *v.* Cunningham, 63 Kan. 174, 65 Pac. 263; 1919, Broquet *v.* Norton Inv. Co., 105 Kan. 632, 185 Pac. 726; *Kentucky:* C. C. P. 1895, § 596; 1859, Champ *v.* Com., 2 Metc. 17, 23; 1876; Blackburn *v.* Com., 12 Bush 181, 184; 1850, Young *v.* Wood, 11 B. Monr. 123, 134; *Maine:* 1887, State *v.* Knight, 43 Me. 11, 134; 1854, Hall *v.* Houghton, 37 Me. 411, 413; *Maryland:* 1839, Franklin Bank *v.* Navig. Co., 11 G. & J. 36; 1843, Wolfe *v.* Hauver, 1 Gill 91; *Massachusetts:* 1826, Brown *v.* Bellows, 4 Pick. 187, 194 (where a part of the case was to prove the witness' interest with the opponent, and his declarations to that effect were admitted); 1834, Whitaker *v.* Salisbury, 15 Pick. 534, 544; 1852, Com. *v.* Starkweather, 10 Cush. 59; 1859, Brolley *v.* Lapham, 13 Gray 292, 297; Gen. L. 1920, c. 233, § 23; *Michigan:* 1877, Snell *v.* Gregory, 37 Mich. 500; 1892, Pickard *v.* Bryant, 92 Mich. 430, 434, 52 N. W. 788; 1896, Darling *v.* Thompson, 108 Mich. 215, 65 N. W. 754; *Minnesota:* 1892, Schmidt *v.* Dunham, 50 Minn. 96, 52 N. W. 277; *Mississippi:* 1859, Fairly *v.* Fairly, 38 Miss. 280, 288; 1887, Madden *v.* State, 65 Miss. 176, 3 So. 328 (that no promises had been made to a State's witness, as he had testified, allowed); *Missouri:* 1854, Brown *v.* Wood, 19 Mo. 475; 1899, State *v.* Branch, 151 Mo. 622, 52 S. W. 390; *Montana:* Rev. C. 1921, § 10666; *New Hampshire:* 1849, Seavy *v.* Dearborn, 19 N. H. 355; *New Jersey:* 1826, Skellinger *v.* Howell, 3 Halst. 310; 1897, Thorp *v.* Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361 ("either by his own examination and the improbability of his own story" or by other evidence); 1901, Ingersoll *v.* English, 66 N. J. L. 463, 49 Atl. 737; *New York:* 1804, Steinbach *v.* Ins. Co., 2 Caines 129, 131; 1830, Lawrence *v.* Barker, 5 Wend. 301, 305 ("he may nevertheless prove the fact by another witness or may show that the account given by the first witness is incorrect"); 1834, Jackson *v.* Leek, 12 Wend. 105, 108; 1839, McArthur *v.* Sears, 21 Wend. 189, 192 (deposition); 1847, People *v.* Safford, 5 Den. 112, 117; 1850, Thompson *v.* Blanchard, 4 N. Y. 303, 311; 1873, Bullard *v.* Pearsall, 53 N. Y. 230; 1874, Coulter *v.* Express Co., 56 id. 585, 588; 1877, Pollock *v.* Pollock, 71 N. Y. 137, 152; 1887, Becker *v.* Koch, 104 N. Y. 394, 402, 10 N. E. 701 (see *post*,

§ 908. **Same: Contradiction as involving Impeachment.** It has been noted (*ante*, § 897) that a chief reason for the victory of the newer notion was the perception that without it one could not prove the facts of his case if the first witness called were to testify untruly. From this point of view the discrediting of the witness is regarded as incidental only (because inevitable) to this other and necessary right. Nevertheless, the discrediting of the witness is also a legitimate use to be made of the evidence, if desired. A demonstrated error on one point may be used to infer error by the same witness upon other points.[1] It follows, too, from the permission to discredit a witness by other witnesses, that counsel, with or without offering other witnesses, may argue that his own witness is in error.[2] It is occasionally said that he may not;[3] but it is obvious that such a doctrine would simply bring us back to the exploded notion that one is bound by the statements of his own witness.

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

It is to be noticed, first, that the test for this purpose has nothing neces-

§ 1003); 1890, DeMeli *v.* DeMeli, 120 N. Y. 485, 490, 24 N. E. 996; *North Carolina:* 1840, Spencer *v.* White, 1 Ired. 236, 239; 1845, Shelton *v.* Hampton, 6 Ired. 216; 1851, Hice *v.* Cox, 12 Ired. 315; 1873, Wilson *v.* Derr, 69 N. C. 137, 139; 1880, Strudwick *v.* Brodnax, 83 N. C. 401, 403; 1884, Gadsby *v.* Dyer, 91 N. C. 311, 314; 1886, M'Donald *v.* Carson, 94 N. C. 497, 503; 1892, Chester *v.* Wilhelm, 111 N. C. 314, 316, 16 S. E. 229; 1895, Kendrick *v.* Dellinger, 117 N. C. 491, 23 S. E. 438; 1896, State *v.* Mace, 118 N. C. 1244, 24 S. E. 798; *Ohio:* 1889, Hurley *v.* State, 46 Oh. 320, 322, 21 N. E. 645; *Oregon:* Laws 1920, § 861; 1900, State *v.* Mims, 36 Or. 315, 61 Pac. 888; *Philippine Isl.* C. C. P. 1901, § 340; *Porto Rico:* Rev. St. & C. 1911, §§ 1524, 627 (like Cal. C. C. P. § 2049); *Pennsylvania:* 1838, Stockton *v.* Demuth, 7 Watts 39, 41; 1843, Bank of N. Liberties *v.* Davis, 6 W. & S. 285, 287; 1866, Stearns *v.* Bank, 53 Pa. 490; *Rhode Island:* 1907, Taber *v.* New York P. & B. R. Co., 28 R. I. 287, 67 Atl. 8; *South Carolina:* 1887, Wagener *v.* Mars, 27 S. C. 97, 98, 102, 2 S. E. 844; *Vermont:* 1905, Jennet *v.* Patten, 78 Vt. 69, 62 Atl. 33; *West Virginia:* 1904, Stout *v.* Sands, 56 W. Va. 663, 49 W. Va. 428; *Wisconsin:* 1877, Smith *v.* Ehanert, 43 Wis. 181; 1879, Wisconsin River L. Co. *v.* Walker, 48 Wis. 617, 4 N. W. 803; 1909, Halwas *v.* American Granite Co., 141 Wis. 127, 123 N. W. 789; *Wyoming:* Comp. St. 1920, § 5809.

§ 908. [1] 1831, Bradley *v.* Ricardo, 8 Bing. 57 (Bosanquet, J.: "The discrepancy may afford a fair topic for counsel as to the degree of credit to which the witness is entitled"). *Contra:* 1897, Nathan *v.* Sands, 52 Nebr. 660, 72 N. W. 1030 (contradiction forbidden where the sole purpose was to discredit the witness); but this is anomalous, and may better be explained by the general rule against contradictions on collateral matters (*post*, § 1001).

[2] 1912, Midland Valley R. Co. *v.* LeMoyne, 104 Ark. 327, 148 S. W. 654; 1886, Mitchell *v.* Sawyer, 115 Ill. 650, 657, 5 N. E. 109; 1864, Roberts *v.* Miles, 12 Mich. 296, 305; 1890, Webber *v.* Jackson, 79 Mich. 175, 179, 44 N. W. 591; 1892, Gilfillan, C. J., in Schmidt *v.* Dunham, 50 Minn. 96, 52 N. W. 277 ("He may question the truth of his statements of fact either by independent opposing evidence or by inference or arguments drawn from the testimony"); 1887, McLean *v.* Clark, 31 Fed. 501, 504.

[3] 1892, Claflin *v.* Dodson, 111 Mo. 195, 201, 19 S. W. 711; 1889, Dravo *v.* Fabel, 132 U. S. 487, 490, 10 Sup. 170; 1880, Tarsney *v.* Turner, 48 Fed. 818; 1892, Graves *v.* Davenport, 50 Fed. 881, 884.

It is surprising to find in modern times such a remark as the following: "The defendant having been called by the plaintiff as an adverse witness under the statute, the plaintiff was not bound by his testimony, and so the jury could accept the facts testified to by him [the defendant] and disbelieve the explanations"; 1909, Anderson *v.* Middlebrook, 202 Mass. 506, 89 N. E. 157. Even if the witness had not been the adverse party, the plaintiff would not be "bound" by his testimony and the jury need not believe any more of it than they saw fit.

sarily in common with the test for the *prohibition of leading questions.* Occasionally a tendency is found to confuse the two tests. But the latter rests purely on the presumed mental condition of the witness. The object of the rule is to prevent the supplying of suggestions of false testimony to a witness who is disposed to take advantage of them (*ante,* § 769). He is assumed to be friendly to the party putting him on the stand; but this is only a provisional assumption; and, accordingly, if he turns out to be hostile to that party, the prohibition ceases (*ante,* § 774), and, conversely, if on cross-examination by the other party, to whom he has been assumed to be hostile, he turns out to be a friendly partisan, the prohibition applies equally on cross-examination (*ante,* § 773). Thus the test for the prohibition of leading questions is ultimately and essentially independent of the superficial circumstance whether originally one party or the other put him on the stand.

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

In attempting to apply it in the present connection, the test may be sought either in the superficial features of the rule or in the supposed underlying reason of it:

(*a*) Superficially, the rule applies to a witness who has been put forward by the party and used to supply testimony. By this test, if A calls the witness and obtains testimony, and B afterwards calls him, the rule applies alike to both, and both are therefore prevented from impeaching him in the forbidden ways.

(*b*) The conventional reason for the rule is that the calling party guarantees the witness' credibility (*ante,* § 898). Taking this as a test, it is clear that if A calls the witness, A cannot thereafter impeach him, even when B has subsequently called him. As to B, it would seem that from the outset he must be assumed as disputing A's whole case, and therefore, by implication, of denying the credibility of A's witnesses; hence, when he afterwards calls a witness of A, this denial can hardly be said to be abandoned, for B is still denying the facts testified to for A; thus, when B puts A's witness on the stand, he is merely availing himself hypothetically of A's guarantee, and says in effect, "A has guaranteed this man's credibility, and has thus claimed that what he will say is true; taking that claim for what it purports to be worth, A has thus virtually admitted in advance that what the witness is

now about to say in my favor is true, and I put forward the witness merely by virtue of A's admission; I claim nothing myself in that respect." This may be artificial reasoning, but the whole reason of the rule begins as artificial, and a just deduction from its fictitious premises seems to lead to the above conclusion.

It is true that A's original guarantee may be said (as some Courts prefer to say) to extend merely to the testimony which A will obtain in his own favor, and not to the testimony which B may later obtain, so that thus A would be prevented from impeaching as to the former statements (and those only), while B could not impeach as to the latter statements (and those only); the result thus coinciding in part with that of (*a*) *supra*. But this is fundamentally fallacious. The guarantee of credibility (if there is one at all) must relate to the witness' general personal trustworthiness of disposition and emotion, not to the correctness of specific statements of fact; since the latter, as is universally conceded (*ante*, § 907), may always be shown to be untrue. The guarantee is of the continuing, single quality of trustworthiness, and is therefore inseparable; it either is made or is not made, and it cannot be construed as existing for some statements and not for others. Hence, upon this theory, it should follow that the party first calling the witness cannot thereafter impeach him, while the other party, though afterwards calling him, may still impeach him. Besides, by any other solution, the practically absurd result is reached of allowing B, in his case in reply, first to impeach A's witness as a confirmed liar, and then to call the same witness under a supposed guarantee of credibility without withdrawing his impeachment. Finally, it may be said [1] that, under the orthodox rule for the order of evidence (*post*, § 1885), B might have obtained all the witness' knowledge as to his own case on cross-examination, so that by not doing so and by calling him later, he has waived his option to treat him throughout as A's witness, and thus has made him his own. It is true that there was such an option as to putting in his own case on cross-examination. But it does not follow that there was an option between treating him as A's witness throughout and treating him as his own by calling him later; for this begs the question by assuming it already determined that to call the witness later would be to make him his own; that, indeed, is the very question sought to be determined. Under the Federal rule, forbidding putting in one's own case on cross-examination (*post*, § 1885), even this argument disappears, for under that rule there is no semblance of such an option.

§ 909. [1] As in the following passage: 1824, Starkie, Evidence, 3d ed., 187: "It has been said that, where a witness has been examined by one party, he may afterwards be cross-examined as an adverse witness [by the adversary] when he is called by the adversary as one of his own witnesses. Yet, if a party omit from prudential motives to examine his adversary's witness, [when first called,] as to any branch of his own case, there seems to be no reason why, when he afterwards adopts him as his own witness, he should not be so considered to all purposes. . . . The same witness may know distinct parts of the transaction, one branch of which makes for the plaintiff and the other for the defendant; and if each party call him as his own witness, there seems to be no reason why each should not be in turn bound by the same principle."

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

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

§ 910. **Same: (1) A calls a Witness; may A impeach? Subpœna, Oath, and Interrogation.** At the outset it is necessary to determine at what point of time, in the simplest case, the witness becomes one's own. Where A makes a witness his own, and B later does the same, complicated questions arise as to the incidence of the rule. But in these it is always assumed that A had originally done something to make the witness his own, *i.e.* that there is some act — such as summoning by subpœna, administering the oath, or the like by which A had originally set the rule in operation. The question thus arises, What is this original act by which the rule is at least 'prima facie' set in operation against the party doing it? Or, in other words, what constitutes "calling" a witness, for the purposes of this rule? Is it the mere summoning into court by subpœna? Or is it the administration of an oath? Or is it nothing short of asking questions and obtaining answers?

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

which determines whether the opponent has the right to cross-examine to his own case.[1]

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

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

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

§ 911. **Same: (2) A calls a Witness, then B calls him; may B impeach? (*a*) 'viva voce' Testimony.** Where A first calls the witness, and then B calls him, it seems to follow (for the reasons noted in § 909, *ante*) that B may nevertheless impeach him, whether by questions in the nature of cross-examination or otherwise.[1] Some Courts, however, take the contrary view and forbid impeachment by B;[2] and this occasionally goes to the extent of forbidding even proof by contradiction,[3] an extreme error, because the rule itself (as universally conceded) does not prohibit this mode of impeachment (*ante*, § 907). But, even in such Courts, the case should be distinguished of impeachment on a *recall by B* for further cross-examination (allowable in the trial Court's discretion; *post*, § 1897), for this is merely a continuation of cross-examination and not a calling of the witness as B's own;[4] and the same distinction applies to a 'viva voce' cross-examination (substituted for the cross-interrogatories in writing) of a witness whose direct examination has been taken and used by deposition for the first party.[5]

§ 910. [1] *Post*, § 1893, where the authorities are collected.

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

[3] 1886, Selph *v.* State, 22 Fla. 537, 545; 1892, Hill *v.* Com., 88 Va. 633, 639, 14 S. E. 330; 1893, Clark *v.* Com., 90 id. 360, 368, 18 S. E. 440. *Contra:* 1894, Coulson *v.* Disborough, 2 Q. B. 316 (neither may cross-examine, except in judge's discretion). Compare the rule for compulsory witnesses, *post*, § 917.

§ 911. [1] 1801, Dickinson *v.* Shee, 4 Esp. 67 (Kenyon, L. C. J.: "The witness having been originally called by the plaintiff and examined as his witness, the privilege of the defendant to cross-examine remained in every stage of the cause and for every purpose"); 1887, Travers *v.* McMurray, 19 N. Sc. 509; 1806, Sawrey *v.* Murrell, 2 Hayw. N. C. 397 ("The question . . . is to be considered as an interrogatory as to a distinct fact upon the cross-examination of the witness, although it was put to her after her first examination was desisted from for some time").

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

Undecided: 1877, State *v.* Jones, 64 Mo. 391, 397.

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

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

[5] Miss. Code 1906, § 1933, Hem. § 1593

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

§ 913. **Same: (3) A calls a Witness, then B calls him; may A impeach? (*a*) 'viva voce' Testimony; (*b*) Depositions.** (*a*) Where A has first called the witness, and then B has called him, does the rule cease to operate as to A, so as to allow him to impeach the witness? For the reasons already noted (*ante*, § 909), it would seem that the rule still prohibits impeachment by A; and this result is accepted by the majority of Courts dealing with the question.[1]

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

§ 912. [1] 1846, Carville *v.* Stout, 10 Ala. 796, 802, *semble* (A takes successive depositions of the same witness, and uses the last only; B may use the prior ones to discredit the witness). *Contra:* 1848, Story *v.* Saunders, 8 Humph. 663, 666 (deposition used by both parties; neither may impeach); compare the cases cited *post*, § 1892.

[2] 1854, Jewell *v.* Center, 25 Ala. 498, 504 ("What are we to understand, in legal parlance, by testimony belonging to a suitor? Clearly, that it pertains to him who introduces it"); 1882, Herring *v.* Skaggs, 73 Ala. 446, 453 (deposition taken originally by co-opponent); 1876, Fountain's Adm'r *v.* Brown, 56 Ala. 558; Alaska Comp. L. 1913, § 1490 (like Cal. C. C. P. § 2022); Cal. C. C. P. 1872, § 2022, as amended by St. 1907 (deposition may be read by either party, "and is then deemed the evidence of the party reading it"); 1861, Musick *v.* Ray, 3 Metc. Ky. 427, 431; Nev. Rev. L. 1912, § 5457 (deposition shall "be deemed the evidence of the party reading it"); N. D. comp. L. 1913, § 7901 (same); Or. Laws 1920, § 862 (like Cal. C. C. P. § 2022); 1911, People's National Bank *v.* Hazard, 231 Pa. 552, 80 Atl. 1094; Utah Comp. L. 1917, § 7182 (like Cal. C. C. P. § 2022); P. R. Rev. St. & C. 1911, § 1504 (like Cal. C. C. P. § 2022); 1903, Von Tobel *v.* Stetson & P. M. Co., 32 Wash. 683, 73 Pac. 788.

Contra: 1804, Steinbach *v.* Ins. Co., 2 Caines N. Y. 129, 131, *semble* (deposition used by the cross-examiner only; witness not made his own).

§ 913. [1] *Indiana:* 1903, Young *v.* Montgomery, 161 Ind. 68, 67 N. E. 684, *semble; Kansas:* 1906, Johnston *v.* Marriage, 74 Kan. 208, 86 Pac. 461 (negligent setting of fire; an employee of defendant, called by the plaintiff, was afterwards called by the defendant on the same subject; the plaintiff's impeachment of him by self-contradictions was forbidden, there being "no special circumstances which would make the rule's application work an injustice"); 1913, State *v.* Alexander, 89 Kan. 422, 131 Pac. 139; *Maryland:* 1908, Baltimore & O. R. Co. *v.* State, 107 Md. 642, 69 Atl. 439; *Massachusetts:* 1858, Com. *v.* Hudson, 11 Cray 64, 66 (Shaw, C. J.: "[The opponent makes the witness his own] to some purposes; it would be very difficult to determine what. But the party who first called him cannot be

(*b*) In the case of a *deposition*, the same rule would apply where A, the taker, has used it, and then B, the opponent, also uses it.[2] But where A has not read it, and B first puts it in as testimony, it would seem that the deponent has never been made A's witness (for the reasons already noted in § 912), and therefore that the rule has never come into force against him and that he is at liberty to impeach the deponent.[3] This result is further corroborated by a group of early rulings (no longer of force since the abolition of disqualification by interest), in which it was held that A, the taker of a deposition not using it, could, as against B, the opponent desiring to use it, enforce the objection that the deponent was by interest disqualified as a witness for B.[4]

§ 914. **Same: (4) Making a Witness One's Own by Cross-examination; (*a*) Impeachment.** In many jurisdictions there obtains a rule (*post*, §§ 1885 ff.;

allowed to say or to show that he was unworthy of credit"); *New York:* 1827, Jackson *v.* Varick, 7 Cow. 238, 242, *semble* ("He was introduced and sworn generally by the defendants; . . . they could not afterwards question either his competency or credibility"); affirmed in 2 Wend. 166, 205; 1829, Fulton Bank *v.* Stafford, 2 Wend. 483; 1834, Bogert *v.* Bogert, 2 Edw. Ch. 399, 403; 1915, Carlisle *v.* Norris, 215 N. Y. 400, 109 N. E. 564 (the opinion discloses too much reverence for this artificial rule of the game); *Pennsylvania:* 1843, Floyd *v.* Bovard, 16 W. & S. 75 (obscure).

Contra: 1864, Stafford *v.* Fargo, 35 Ill. 481, 486, *semble;* 1896, Hall *v.* Manson, 99 Ia. 698, 68 N. W. 922; 1914, Long *v.* Sweeten, 123 Md. 88, 90 Atl. 782 (but here only because the witness was interested for the opponent, and the caller was held entitled to impeach the portions brought out on cross-examination); 1898, Morris *v.* Guffey, 188 Pa. 534, 41 Atl. 731.

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

[2] 1848, Story *v.* Saunders, 8 Humph. Tenn. 663, 666 (deposition taken and used by both parties; rule applicable to both).

[3] 1916, Murray *v.* Third National Bank, 6th C. C. A., 234 Fed. 481 (self-contradiction of adverse party not permitted); 1891, Bloomington *v.* Osterle, 139 Ill. 120, 123, 28 N. E. 1068; 1834, Crary *v.* Sprague, 12 Wend. N. Y. 41, 45 (holding the rule not applicable as against A where B used the testimony of a deceased witness called at the former trial by A); 1849, Neil *v.* Childs, 10 Ired. N. C. 195; 1880, Strudwick *v.* Brodnax, 83 N. C. 401, 404 (approving preceding case); 1837, Richmond *v.* Richmond, 10 Yerg. Tenn. 343, 345 (forbidding impeachment by general character) add the statutes cited *ante*, § 912, and the cases cited *post*, § 1893.

Contra: Fed. 1826, Phettiplace *v.* Sayles, 4 Mason 312, 320; *Ky.* 1850, Young *v.* Wood, 11 B. Monr. 123, 134 (taker may probably not impeach general character, but may disprove facts testified to).

The following ruling seems unsound: 1916, Nelson *v.* Imperial Waterproof Co., 224 Mass. 388, 112 N. E. 1025 (A calls the witness before a master; B then takes his deposition; at the trial, B uses the deposition; A may offer a self-contradiction contained in the testimony to the master).

[4] The following list is a partial one only; note also that the rule might be different for an attempt to disqualify entirely, for the reason given below: 1858, House *v.* Camp, 32 Ala. 541, 549 (deposition offered by defendant at trial below but suppressed; defendant allowed to object to deponent's incompetency for plaintiff); 1849, Elliot *v.* Shultz, 10 Humph. Tenn. 234 (objection on ground of hearsay, allowed).

Contra: 1846, Stewart *v.* Hood, 10 Ala. 600, 607 (deposition taken by defendants, allowed to be used by plaintiff, because defendant taking it could not object to deponent's interest in favor of cross-examiner; "there is certainly no good to result from a practice which will permit a party first to ascertain by actual examination what a witness will swear and then admit or exclude him, at pleasure"); 1869, Weil *v.* Silverstone, 6 Bush Ky. 698, 700; 1871, Sullivan *v.* Norris, 8 Bush Ky. 519 (but here the rule is held not to forbid an objection to inadmissible evidence). It may be noted that these rulings often dealt at the same time with the question of § 1892, *post*, namely, whether B could cross-examine on his own case; because B, in order to avoid the objection now involved, which would arise if he called the witness for himself, was thus driven to cross-examine upon his own case if allowable.

called there the Federal rule) that the opponent, upon cross-examination, may not apply his questions to the material of his own case-in-reply, but must confine the subject of his questions to the matter of the first party's case as presented through his witnesses; thus the opponent, in order to obtain from the witness such facts as he can contribute to the opponent's own case, must wait his turn and then call the witness on his own behalf. That rule concerns merely the Order of Evidence, and is supposed (though erroneously) to prevent confusion and obscurity. But it is sometimes wrested from its original purpose, and joined with the rule against impeaching one's own witness, so as to produce a singular effect. This effect is produced by declaring that if the cross-examining party does ask about his own case (in violation of the first rule), he *thereby makes the witness his own*, and is thus prohibited from impeaching the witness on the subject of such questions. This consequence is enforced in many of the Courts adopting the above Federal rule;[1] and even occasionally (but without the slightest justification) in Courts following the orthodox rule (*post*, § 1885), which does not prohibit asking about one's own case on cross-examination.[2] A further logical consequence of the doctrine is that the original party may impeach on the matters thus brought out on cross-examination.[3]

But this doctrine rests merely on a confusion of ideas, and has no legitimate foundation. The two rules, one concerning the order of evidence (*post*, § 1885), the other concerning the scope of impeachment (*ante*, § 896), have nothing to do with each other in policy or in principle. It is true that, as a mere accident, the application of one results in the other going into force, and the exemption from one would remit the other; so that, where the latter is burdensome, the opponent struggles to evade the former as a means of escaping the latter. For example, one might desire to sue a corporation in

§ 914. [1] Ark. Dig. 1919, § 4185 (in cross-examining "on new matters, such examination is subject to the same rules as the direct examination"); Cal. C. C. P. 1872, § 2048 (if the opposite party "examine him as to other matters [than those connected with the direct examination], such examination is to be subject to the same rules as a direct examination"); 1900, Hanes *v.* State, 155 Ind. 112, 57 N. E. 704; 1878, Clough *v.* State, 7 Nebr. 320, 341; 1897, Kohl *v.* State, 59 N. J. L. 445, 36 Atl. 931, 37 Atl. 73; Or. Laws 1920, § 860; 1892, § 837 (like Cal. C. C. P. § 2048); Philippine Isl. C. C. P. 1901, § 339 (like Cal. C. C. P. § 2048); 1903, Bailey *v.* Seattle & R. R. Co., 32 Wash. 640, 73 Pac. 679; 1909, Lambert *v.* Armentrout, 65 W. Va. 375, 64 S. E. 260 (opinion by Brannon, J., regretting that such is the rule); 1912, McGuire *v.* Norfolk & W. R. Co., 70 W. Va. 538, 74 S. E. 859; and the cases cited in the next note.

Contra: 1912, Renn *v.* State, 64 Tex. Cr. 639, 143 S. W. 167, *semble* (Davidson, P. J., diss.); 1917, Teter *v.* Moore, 80 W. Va. 443, 93 S. W. 342 (witness' self-contradiction admitted, for a cross-examiner when going into new matter).

[2] 1804, Jackson *v.* Son, 2 Caines N. Y. 178 (opponent not allowed to cross-examine to a will, without notice to produce, because, the will being a new issue, "he made the witness as much his own as if he had himself called him"; a correct enough ruling on the facts); 1836, People *v.* Moore, 15 Wend. N. Y. 419, 423 (preceding case approved on the present principle); 1860, Mattice *v.* Allen, 33 Barb. N. Y. 543, 546 (present principle repudiated, except to limit leading questions by the Court's discretion; ["if the witness] had given material testimony against him, although he had attempted to prove his own case of some part of it by him, still he did not thereby forfeit the right to impeach him by particular or general testimony"); 1873 Bassham *v.* State, 38 Tex. 622, 625.

[3] 1876, Artz *v.* R. Co., 44 Ia. 284, 286; 1874, Hatch *v.* Brown, 63 Me. 410, 416.

the Federal Court, and to this end might join the corporation and its negligent employee as joint tortfeasors of different jurisdictions, and thus the defendant would strive to oppose the application of the doctrine of joint tortfeasors; and yet the constitutional rule as to Federal jurisdiction and the common-law doctrine as to joint tortfeasors have nothing whatever in common as to origin or policy. In the present situation, then, *if* the opponent had called the witness as his own, the prohibition as to impeachment would have come into force; yet, for not doing so, the Court imposes a penalty (namely, the prohibition of impeachment) which has no connection with the rule violated (namely, as to order of evidence). The fact that such would have been a consequence, if he had called the witness, is a mere accident, and is not a necessary and appropriate penalty for failure to follow the rule about the order of evidence; as is easily apparent from the fact that under the orthodox rule (which allows cross-examining to one's own case) there is no prohibition against impeachment. In short, the prohibition against impeachment turns upon the *act of calling and thus indorsing the witness* (*ante*, § 909), and *not upon the topics of the questions* put to the witness.

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

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

§ 915. **Same: (*b*) Leading Questions.** The peculiar rule dealt with in the preceding section — *i.e.* that cross-examining on one's own case makes the

witness one's own — is also by some Courts applied for still another purpose, namely, to *forbid leading questions* as to such topics. The process of argument is that since the cross-examination to such topics makes the witness one's own, and since leading questions to one's own witness are forbidden, they are therefore on such topics improper on cross-examination:

1881, FINCH, J., in *People* v. *Court of Oyer & Terminer*, 83 N. Y. 436, 459 (forbidding leading questions on cross-examination "while seeking to elicit new matter constituting an element of the intended defence"): "A different rule would enable a party to develop his defence untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary; when it passes beyond that, it becomes the direct and affirmative evidence of the party, and should be subjected to appropriate restraints. There is no reason in the nature of the case why a direct examination should be guarded against the evil and danger resulting from leading questions, which does not apply to an effort upon cross-examination to introduce a new and affirmative defence."

1874, DUNNE, C. J., in *Rush* v. *French*, 1 Ariz. 99, 130, 25 Pac. 816: "There is a general impression that the right to cross-examine implies the right to put leading questions; but the very point of *Harrison* v. *Rowan* [cited *infra*] is that the judge there was of opinion that such is not always the case; that you may cross-examine and lead while you keep within the limits of the plaintiff's [opponent's] case; but that when you strike new matter, though you may still cross-examine, you must not in that part of the cross-examination put leading questions; and though this seems a fine distinction, it may often be broad enough to secure valuable results."[1]

That such reasoning could be advanced in support of such a result seems incredible; for it rests on a misconception of one of the simplest and most established doctrines of Evidence. (1) That doctrine is (*ante*, § 767) that the prohibition of leading questions rests upon the supposed partisan bias of the witness, rendering him willing to accept suggestions, that therefore (*ante*, § 774) a leading question is allowable even on a direct examination where the witness appears to be biassed against the examiner, and that (*ante*, § 773) it is always allowable on a cross-examination unless the witness appears biassed in favor of the cross-examiner. In other words, the policy of the prohibition turns solely upon the emotional attitude of the witness to the party in general, *i.e.* to one side or the other, regarded as antagonists, and has nothing to do with the subject of the specific questions. If a witness is biassed for A, the bias applies to all questions which B may ask on cross-examinations. To suppose the witness to be dominated in A's favor by partisan rancor and stubbornness when one question is asked, so as to justify B's leading question, but the next moment to be possessed of equal

§ 915. [1] *Accord: Fed.* 1820, Harrison *v.* Rowan, 3 Wash. C. C. 580, 582 ("If the cross-examination respects new matter, leading questions cannot be asked"); *N. Y.* 1881, People *v.* Court of Oyer & Terminer, 83 N. Y. 436, 459 (leading questions not allowed, in asking to one's own case on cross-examination; quoted *supra*); *Pa.* 1827, Ellmaker *v.* Buckley, 16 S. & R. 72, 77 ("no bias is to be presumed after the witness has been called by both parties"): 1843, Floyd *v.* Bovard, 16 W. & S. 75, *semble; Vt.* 1877, State *v.* Hopkins, 50 Vt. 316, 331.

It would follow that the *original calling party* may ask leading questions on the same

fervor against A and in favor of B, so as to forbid B's next question to be in leading form, and to fancy the strong tide of partisan emotion thus swinging back and forth in the witness' mind from question to question, is merely to contrive a fantastic fiction. (2) Furthermore, the doctrine of the present chapter — the rule against impeaching one's own witness — has no concern with the rule against leading questions. Leading questions do not impeach. The subject-matter may impeach; but the form of the question cannot convert a non-impeaching fact into an impeaching fact. Conceding, then, that a cross-examination to one's own case makes the witness one's own and forbids impeachment (as in the cases of the preceding section), still this does not forbid leading questions; for the fact asked in the leading questions may not impeach the witness at all, and indeed their subject is by hypothesis merely a substantive fact bearing on the cross-examiner's own case. So that the propriety of leading questions still remains to be determined by the principle appropriate to them, namely (as above explained) by the witness' partisan attitude towards the parties in general.

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

1835, SHAW, C. J., in *Moody* v. *Rowell*, 17 Pick. 490, 499: "The general rule admitted on all hands is that on a cross-examination leading questions may be put, and the Court are of opinion that it would not be useful to engraft upon it a distinction not in general necessary to attain the purposes of justice in the investigation of the truth of facts, that it would be often difficult of application, and that all the practical good expected from it may be as effectually attained by the exercise of the discretionary power of the Court."[2]

§ 916. **Same: (5) Calling the Other Party as a Witness; Co-defendants.** (1) If there is any situation in which any semblance of reason disappears for the application of the rule against impeaching one's own witness, it is when the *opposing party is himself called by the first party*, and is sought to be compelled to disclose under oath that truth which he knows but is naturally unwilling to make known. To say that the first party guarantees the opponent's credibility (*ante*, § 898) is to mock him with a false formula; he *hopes* that the opponent will speak truly, but he equally perceives the possibilities of the contrary, and he no more guarantees the other's credibility than

topics: 1877, State *v.* Hopkins, *supra* (subject to the trial Court's discretion).

Contra: 1913, Anderson *v.* Berram, 36 Nev. 463, 136 Pac. 973.

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

he guarantees the truth of the other's case and the falsity of his own. To say, furthermore, that the first party, if he could impeach at will, holds the means of improperly coercing the other (*ante*, § 899) is to proceed upon a singular interpretation of human nature and experience, and to attribute a power which the former may perhaps wish that he had but certainly cannot be clothed with by this or any other rule. There is therefore no reason why the rule should apply at all.[1]

The state of the law is confused.[2] In some jurisdictions by judicial deci-

§ 916. [1] One peculiar practical absurdity of the opposite result may be noted. Since impeachment by prior self-contradiction would be excluded, the opponent could tell his story as favorably for himself as he pleased, and no prior inconsistent statements could be used in impeachment; so that unless one took the risk of abiding by what the opponent should choose to say, it would be preferable not to call him at all; thus the main purpose of the enabling statute making him compellable is defeated or encumbered. The prior statements, to be sure, could sometimes be used as admissions, but even this was ignored in Strudwick *v.* Brodnax, *infra*.

[2] For the right to *cross-examine on one's own case*, dealt with in some of the statutes *infra*, see further §§ 1891, 1892, *post;* and for the right to cross-examine to character on interrogatories of *discovery before trial*, see *post*, § 1856.

The phrase "rule applicable" in the following notes means the rule against impeaching one's own witness:

England: 1878, Allhusen *v.* Labouchere, L. R. 3 Q. B. D. 654, 661 (on interrogatories of discovery, examination to character is not allowable).

Canada: *Manit.* St. 1906, 5 & 6 Edw. VII, c. 17, § 2, R. S. 1913, c. 46, Rule 474 (quoted *post*, § 1890); *N. Br.* 1862, Atkinson *v.* Atkinson, 5 All. 271 (whether the opponent is a hostile witness depends on his conduct on the stand, not on his position in the record); *Newf.* Cons. St. 1916, c. 91, § 1 (quoted *ante*, § 488); *Ont.* 1853, Mair *v.* Culy, 10 U. C. Q. B. 321, 325, Burns, J. (holding that the rule did not apply; but here the result was merely to admit a contradiction, which could have been admitted even against an ordinary witness); 1881, Dunbar *v.* Meek, 32 U. C. C. P. 195, 213 ("A party calling the opposite party as a witness makes him his witness to all intents and purposes").

United States: *Federal:* 1889, Dravo *v.* Fabel, 132 U. S. 487, 489, 10 Sup. 170 (taking the opposing party's deposition; rule applicable); 1904, Jacobs *v.* Van Sickel, 127 Fed. 62, 61 C. C. A. 598 (Dravo *v.* Fabel followed, in a chancery case); 1905, Davidson S. S. Co. *v.* U. S., 142 Fed. 315, C. C. A. (under Minn. Gen. St. 1894, § 5659, *supra*, the master of a vessel owned by a corporation is included); 1917, American Issue Pub. Co. *v.* Sloan, 6th C. C. A., 248 Fed. 251 (party-opponent may not be called for cross-examination); 1922, Standard Water Systems Co. *v.* Griscom-Russell Co., 3d C. C. A., 278 Fed. 703 (calling the opponents as witnesses in equity; the rule does not prevent disproving their statements; but here no sufficient contradiction was found);
Alabama: Code 1907, § 4056 (use of interrogatories of opponent does not preclude "from contradicting it"); 1874, Warren *v.* Gabriel, 51 Ala. 235 (examination of the opponent on interrogatories; rule applicable);
Arizona: Rev. St. 1913, §§ 1680, 1726 (examination of opponent to be conducted under the same rules applicable to other witnesses); § 1726 (leading interrogatories in deposition, allowable); § 1727 (taker "may contradict the answers [to interrogatories] by any other competent testimony, in the same manner as he might contradict the testimony of any other witness");
Arkansas: 1854, Drennen *v.* Lindsey, 15 Ark. 359, 361 (rule applicable);
Colorado: Comp. St. 1921, § 6570 (opposing party may be examined at the trial "as if under cross-examination"); 1908, Purse *v.* Purcell, 43 Colo. 50, 95 Pac. 291 (the permission by statute to call the opponent does not limit the scope of allowable cross-examination when the opponent is taking the stand for himself);
Columbia (Dist.): 1909, Dumas *v.* Clayton, 32 D. C. App. 566 ("may be treated as witnesses on cross-examination"); 1918, Bradley *v.* Davidson, 47 D. C. App. 266, 284;
Connecticut: Gen. St. 1918, § 5741 (opponent may be compelled to testify "in the same manner and subject to the same rules as other witnesses"); 1905, Carney *v.* Hennessey, 77 Conn. 577, 60 Atl. 128 (plaintiff called by defendant, allowed to be impeached by prior self-contradiction);
Delaware: Rev. St. 1915, § 4213 (a party "may be examined as if under cross-examination, at the instance of the adverse party or any of them, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify; but the party calling for such examination shall not be concluded

thereby, but may rebut his testimony by other evidence");
Georgia: Rev. C. 1910, § 5879 (may cross-examine and impeach opponent "as though the witness had testified in his own behalf"); 1878, Garrett *v.* Sparks, 60 Ga. 582, 586 (rule applicable);
Idaho: Comp. St. 1919, § 8035 (party or beneficiary, or agent etc. of corporate party, "may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses, and the testimony given by such witnesses may be rebutted by the party calling him for such examination by other evidence; such witness when so called may be examined by his own counsel, but only as to matters testified to on such examination"); 1913, Burrow *v.* Idaho & W. N. R. Co., 24 Ida. 652, 135 Pac. 838 (locomotive engineer of the defendant, held not within the statute); 1916, Boeck *v.* Boeck, 29 Ida. 639, 161 Pac. 576 (divorce; St. 1909, Mar. 13, held here to have been abused by the plaintiff so as to let the opponent's contention "be first inquired into"; but why not?);
Illinois: Rev. St. 1874, c. 51, § 6 (a party may be examined "in like manner and subject to the same rules as other witnesses"); St. 1905, May 18 (Municipal Court), § 33 (a party "may be examined upon the trial thereof as if under cross-examination" at the instance of the adversary, and is compellable, "in the same manner and subject to the same rules for examination as any other witness, to testify", but the calling party is not concluded but may rebut); 1918, Felsenthal Co. *v.* Northern Ass. Co., 284 Ill. 343, 120 N. E. 268 (cross-examination of a party in interest);
Indiana: Burns' Ann. St. 1914, § 536 ("may be rebutted by adverse testimony"); 1889, Croker *v.* Agenbroad, 122 Ind. 585, 24 N. E. 169 (using the opposite party's deposition; left undecided);
Iowa: 1863, Hunt *v.* Coe, 15 Ia. 197 (rule applicable); 1893, Thomas *v.* McDaneld, 88 Ia. 380, 55 N. W. 499 (rule not applicable);
Louisiana: St. 1908, No. 126, p. 185, July 2 (opponent may be examined "as under cross-examination", and the examiner "shall not be held as vouching to the Court for the credibility of the opponents so placed on the stand or as estopped from impeaching in any lawful way the testimony given");
Maryland: Ann. Code 1914, Art. 35, § 5 (opponent's testimony may be rebutted by adverse testimony and by admissions);
Massachusetts: Gen. L. 1920, c. 233, § 22 ("A party who calls the adverse party as a witness shall be allowed to cross-examine him"); 1904, Emerson *v.* Wark, 185 Mass. 427, 70 N. E. 482 (the proponent of a will was called by the contestant as a witness; held, that under Rev. L. c. 175, § 24, an instruction that "in putting him on, they put him before you as a person entitled to be believed" was erroneous); 1908, Reed *v.* Mattapan D. & T. Co., 198 Mass. 306, 84 N. E. 469 (an office of an opponent corporation is not a party, under this statute); 1909, Anderson *v.* Middlebrook, 202 Mass. 506, 89 N. E. 157 (see the comment *ante*, § 908, note 3); 1911, Cobb, B. & Y. Co. *v.* Hills, 208 Mass. 270, 94 N. E. 265 (statute applied);
Michigan: Comp. L. 1915, § 12554 (when the opposite party, his agent etc., is called, the calling party may "cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true"); 1900, Smith *v.* Smith, 125 Mich. 234, 84 N. W. 144 (director of an opponent corporation may not be impeached except as other witness are);
Minnesota: Gen. St. 1913, § 8377 (similar to N. D. Rev. C. § 7868; quoted *ante*, § 488); 1896, Suter *v.* Page, 64 Minn. 444, 67 N. W. 67 (opponent is not the first party's witness); 1896, Pfefferkorn *v.* Seefield, 66 Minn. 223, 68 N. W. 1072 (examiner is not restricted to the case of the opponent, but may cover the whole field as in the case of one of his own witnesses); 1900, Pipestone Co. Bank *v.* Ward, 81 Minn. 263, 83 N. W. 991 (statute applied); 1901, Kellogg Co. *v.* Holm, 82 Minn. 416, 85 N. W. 159 (statute applied); 1899, Bennett *v.* Lumber Co., 77 Minn. 198, 79 N. W. 682 (under the words of the statute, the "directors, officers, superintendents, or managing agents" of a corporation include the superintendent of a saw-mill); 1916, Snelling State Bank *v.* Clasen, 132 Minn. 404, 157 N. W. 643 (former corporation officer; statute applied); 1917, Bannon's Will, — Minn. —, 162 N. W. 515 (executor of a will, in a will contest; Gen. St. 1913, § 8377, applied);
Missouri: Rev. St. 1919, § 5412 (a party may compel an adverse party "to testify as a witness in his behalf in the same manner and subject to the same rules as other witnesses, provided that the party so called may be examined by the opposite party under the rules applicable to the cross-examination of witnesses"); 1872, Chandler *v.* Freeman, 50 Mo. 239 (rule applicable); 1898, Imhoff *v.* McArthur, 146 Mo. 371, 48 S. W. 456 (same);
Mississippi: Code 1906, § 1939, Hem. § 1539 (one who calls the adverse party "shall be at liberty to contradict the testimony of such party as he might do with an adverse witness")
New Hampshire: Pub. St. 1891, c. 224, § 15 (party may cross-examine, contradict, or impeach the testimony, offered by him, of a nominal or real adverse party);

New Jersey: Comp. St. 1910, Evidence, § 2 ("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"); Practice, § 146 (examination of opposing party by deposition may be rebutted);
New York: C. P. A. 1920, § 343 (opponent's testimony "may be rebutted by other evidence"); 1804, Jackson *v.* Son, 2 Caines 178 (opponent on cross-examination is one's own witness, for the purpose of proving a document's contents); 1906, Sharp *v.* Erie Co., 184 N. Y. 100, 76 N. E. 923 (plaintiff held not bound by the statements on cross-examination of an agent of defendant called by the plaintiff);
North Carolina: Con. St. 1919, § 904 (opponent's testimony may be "rebutted by adverse testimony"); § 900 (a party opponent may be compelled to testify "subject to the same rules of examination as any other witness"); 1880, Strudwick *v.* Brodnax, 83 N. C. 401, 403 (opponent's deposition not impeachable by prior inconsistent statements; clearly erroneous, because they were also admissions); 1885, Coates *v.* Wilkes, 92 N. C. 376, 385 (obscure, applying Code § 583); 1890, Helms *v.* Green, 105 N. C. 251, 262, 11 S. E. 470 (rule applicable);
North Dakota: Comp. L. 1913, § 7866 (examination of opponent "may be rebutted by adverse testimony"); § 7868 (one examined as an opponent "may be examined on his own behalf, subject to the same rules of examination as other witnesses"); § 7870 (a party, or beneficiary, or officers of a corporate party, may be examined "as if under cross-examination at the instance of the adverse party"; and the adverse party may "rebut it by counter-testimony");
Ohio: Gen. Code Ann. 1921, § 11497 (opponent may be examined "as if under cross-examination", and examiner "shall not be concluded thereby, but may rebut it by counter-evidence");
Pennsylvania: St. 1887, May 23, Dig. 192, § 21863 "Witnesses" (a party "may be compelled by the adverse party to testify as if under cross-examination, subject to the rules of evidence applicable to witnesses under cross-examination, and the adverse party calling such witness shall not be concluded by his testimony, but such person so cross-examined shall become thereby a fully competent witness for the other party as to all relevant matters, whether or not these matters were touched upon in his cross-examination", and where a co-party is thus cross-examined, "his co-plaintiffs or co-defendants shall thereby become fully competent witnesses on their own behalf as to all relevant matters, whether or not these matters were touched upon in cross-examination"); 1874, Brubaker *v.* Taylor, 76 Pa. 83, 87, *semble* (rule not applicable); 1898, Callary *v.* Transit Co., 185 Pa. 176, 39 Atl. 813 (injury by street-car; plaintiff cannot treat motorman as an opposing party); 1901, Gantt *v.* Cox, 199 Pa. 208, 48 Atl. 992 (officers of opponent corporation become one's own witnesses on calling; but a liberal discretion may make exceptions); 1916, Hess *v.* Vinton Colliery Co., 255 Pa. 78, 99 Atl. 218 (self-contradiction allowed against a co-defendant called by defendant as on cross-examination);
South Carolina: C. C. P. 1922, §§ 667–674 (similar to N. D. Comp. L. 1913, §§ 7866–7871; quoted *ante*, § 488);
South Dakota: Rev. C. 1919, §§ 2714, 2715, 2716 (like N. D. Rev. C. §§ 7866, 7868);
Texas: Rev. Civ. Stats. 1911, § 3680 (opponent's examination on interrogatories is to be conducted "in the same manner and according to the same rules which apply in the case of any other witness"); § 3684 (party taking may "contradict the answers by any other competent testimony in the same manner as he might contradict the testimony of any other witness");
Vermont: Gen. L. 1917, § 1898 (a party may compel an adverse party "to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; but the party so called to testify may be examined by the opposite party under the rules applicable to the cross-examination of witnesses"); 1891, Good *v.* Knox, 64 Vt. 97, 99, 23 Atl. 520 (opponent called to testify against a co-defendant; rule applicable);
Virginia: Code 1919, § 6214 (opponent examinable "according to the rules applicable to cross-examination");
Washington: R. & B. Code 1909, §§ 1225, 1903 (opponent compellable to testify "subject to the same rules of examination as any other witness"); §§ 1229, 1904 (opponent's testimony "may be rebutted by adverse testimony"); 1900, Reed *v.* Loney, 22 Wash. 433, 61 Pac. 41 (respondent's use of appellant's testimony at former proceedings, to impeach appellant's answer, held not to make him respondent's witness); 1908, Thomas *v.* Fos, 51 Wash. 250, 98 Pac. 663 (impeachment by self-contradiction, permitted);
Wisconsin: Stats. 1919, § 4068 (a party "may be examined upon the trial of any such action or proceeding as if under cross-examination, at the instance of the adverse party or parties or any of them"; remainder as in Delaware, the last clause being "and may rebut the evidence given thereon by counter or impeaching testimony"); § 4096 (examination by deposition "shall be subject to the same rules as that of any other witness"); § 4098 (the testimony "may be rebutted by other testimony as if taken in his own behalf"); 1901, Kreider *v.* Wisconsin R. P. & P. Co., 110 Wis. 645, 86 N. W. 662 (manager of a mill, held not a corporate officer to be examinable adversely, under § 4096, Rev. St. 1898, as amended by Laws 1899, c. 29);

sion the rule is held to be inapplicable; in others, to be applicable. In many jurisdictions the statutes making the opponent compellable to testify have attempted to declare something on the present point, but usually with the sole result of increasing the uncertainty and introducing arbitrary suggestions. Of these statutes the most that can be said (apart from express judicial interpretations) is, first, that a statute authorizing the opponent's examination subject to the "ordinary rules of cross-examination" must be supposed to imply a general exemption from the present rule of impeachment; secondly, that a statute making the opponent examinable "like any other witness" may be supposed to refer to all such rules as benefit the calling party and not necessarily to include, as binding him, the rule against impeaching one's own witness; and, thirdly, that statutes which declare the calling party "not concluded" by the testimony and allow him to rebut it "by adverse testimony" were apparently contrived in a singular legislative ignorance or forgetfulness of the common law, which for more than a century has clearly conceded that exception to the general rule (*ante*, § 907), so that the effect of these statutes (as ordinarily worded) on the general rule for other kinds of impeachment remains indeterminate.

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

(3) Where a *co-defendant in a criminal prosecution* testifies for himself, the other co-defendant may impeach him, because their interests, as between each other, are distinct, and because the witness has been called by himself and not by the impeacher; and the same consequence follows for witnesses called by one co-defendant.[4]

1910, Keena *v.* American Box Toe Co., 144 Wis. 231, 128 N. W. 858 (question raised whether the discrimination of the statute, applying to corporation employees only, is constitutional); 1911, Makar *v.* Montello G. Co., 146 Wis. 46, 130 N. W. 949 (similar); 1911, O'Day *v.* Meyers, 147 Wis. 549, 133 N. W. 605 (a nominal co-defendant may be examined as an adverse party by his co-defendant, under Stats. 1898, § 4068); 1921, Lamberson *v.* Lamberson, — Wis. —, 184 N. W. 708 (title to land; defendant's use on plaintiff's cross-examination of portion of plaintiff's deposition taken adversely, held to allow plaintiff to testify to remainder of transaction; the logical kinks and quibbles involved in the working out of this very subtle question in the Court's opinion reveal the extent of vain scholastic cobwebbery which still obscures our law in this region; the ruling one way or the other on the question of law as presented could not have had the slightest relation to the ascertainment of the truth of the case).

Whichever rule be adopted, it is at least clear that the *opponent thus called* could not be allowed to *impeach himself!*: 1853, Legg *v.* Drake, 1 Oh. St. 286, 289 (it "would be incompatible with his situation as both party and witness; for the reason that he could not allege his own want of credibility").

[3] Maine Rev. St. 1916, c. 87, § 116 (co-party may "contradict or discredit" a co-party called by the opponent); 1907, Sullivan *v.* Fugazzi, 193 Mass. 518, 79 N. E. 775 (consolidated actions by S. against F. and against R. Co.; rule for such a case examined).

[4] 1902, R. *v.* Hadwen, 20 Cox Cr. 206, 1 K. B. 882 (both at common law, and under the statute of 1898 making accused persons competent in their own behalf (*ante*, § 488), one jointly indicted may cross-examine a co-indictee's witness whose testimony criminates the former; and under the statute the same rule applies to permit the cross-examination of the co-indictee testifying on his own behalf); 1883, McGruder *v.* State, 71 Ga. 864 (here tried together, but under a consent that each might testify for the other; impeachment allowed); 1895, State *v.* Goff, 117 N. C. 755, 23 S. E. 355 (indictment for affray, G. and K. being one set of combatants, and G—s being of the opponents; the former were allowed to impeach the latter

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

(5) Where a party, called for himself, is *cross-examined by the opponent* to his own case, the opponent may impeach by self-contradictions, which are here the party's admissions.[5]

§ 917. **Same**: (6) **Necessary Witnesses**; (*a*) **Attesting Will-Witness.** On the correct theory (*ante*, § 899) there is no reason why the legal *necessity of calling a particular witness* should exempt from the rule the party calling him; for the subjective immunity of the witness from fear of character-abuse is just as important and just as liable to be induced in this kind of witness as in any other. Nevertheless, acting upon the cant theory of a party's guarantee of his witness' credibility (*ante*, § 898), and pressed by a desire to restrict the operations of so unruly and extensive a principle, the Courts have commonly refused to apply the rule to a necessary witness, *i.e.* one called by compulsion of law.[1]

(*a*) The *attesting witnesses to a will* are required by law to be produced or accounted for (*post*, § 1288); hence it has always been conceded that no rule prevents their impeachment by the proponent of the will.[2] The precedents deal usually with impeachment by contradiction or self-contradiction, and it would not be safe to assume that the same Courts would take the logical step of permitting impeachment of character.[3]

testifying for himself; "in such a case the witnesses for the one side stand, as to the parties on the other, in the relation of prosecuting witnesses and defendants"); 1915, Frazee *v.* State, 12 Okl. Cr. 134, 152 Pac. 462 (affray; impeachment allowed); 1897, State *v.* Adams, 49 S. C. 414, 27 S. E. 451, *semble*.

So, too, for *divorce* and *crim. con.*, where a co-respondent testifies: 1894, Allen *v.* Allen, Prob. 248, *semble* (divorce for adultery; the co-respondent and the respondent are entitled to cross-examine each other).

[5] 1909, Lambert *v.* Armentrout, 65 W. Va. 375, 64 S. E. 260.

§ **917.** [1] The general principle has been broadly sanctioned in the following statutes: *Ark.* Dig. 1919, § 4186 (allowable for a witness "in a case in which it was indispensable that the party should produce him"); *Ky.* C. C. P. 1895, § 596 (bad character excluded, "unless it was indispensable that the party should produce him").

The following situation is analogous: The Cardiff, [1909] Prob. 183 (collision, alleged by defendant vessel to be the fault of the pilot; neither side calling him, the pilot was offered the choice to give evidence, then both sides to cross-examine him).

[2] *Eng.* 1818, Richardson *v.* Allan, 2 Stark. 335, Ellenborough, L. C. J.: 1843, Bowman *v.* Bowman, 2 Moo. & Rob. 501, Cresswell, J.; 1861, Jackson *v.* Thomasson, 1 B. & S. 745, 747, Cockburn, C. J. ("I know of no authority that a party who claims under a will, and consequently is compelled to call the attesting witness to it, cannot, in the event of one of them disproving the will, give evidence to discredit him; as for instance by showing that he has been corrupted by the heir-at-law").

U. S. 1838, Rash *v.* Purnel, 2 Harringt. Del. 448, 454; 1898, Thompson *v.* Owen, 174 Ill. 229, 241, 51 N. E. 1046; 1840, Dennett *v.* Dow, 17 Me. 19, 22 (Shepley, J., dissented from the ruling as to self-contradictions); 1851, Shorey *v.* Hussey, 32 Me. 579, 581; 1900, Wilton *v.* Humphreys, 176 Mass. 253, 57 N. E. 374 (attesting witness, not called as such, but as scrivener, held not a necessary witness); 1885, Whitman *v.* Morey, 63 N. H. 448, 456, 2 Atl. 899; 1832, Crowell *v.* Kirk, 3 Dev. 357, per Ruffin, J.; 1846, Williams *v.* Walker, 2 Rich. Eq. S. C. 291 (subscribing witness to a mortgage to which the impeacher was not a party); 1869, Alexander *v.* Beadle, 7 Coldw. Tenn. 126, 128.

[3] The few precedents are not harmonious: 1892, Diffenderfer *v.* Scott, 5 Ind. App. 243, 32 N. E. 87 (witness required by law, which was here not the case; character may be impeached); 1840, Dennett *v.* Dow, 17 Me. 19, 22, *supra* (*semble*, *contra*); 1866, Thornton's Ex'rs *v.* Thornton's Heirs, 39 Vt. 122,

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

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

(1) If there is in the jurisdiction a rule of Evidence *requiring the State to produce all known eye-witnesses* of the crime, then such witnesses are compulsory witnesses, and on the principle just examined (*ante*, § 917) the prohibition against impeachment plainly does not apply. But such a rule of compulsion exists in one or two jurisdictions only, and is elsewhere repudiated (*post*, §§ 1339, 2079).

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

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

155 (impeachment allowable "to the extent of proving his former declarations on the subject"; whether character-impeachment could be used is left undecided).

If the attesting witness is called by the *contestant*, he is not the proponent's witness in any respect: 1834, Solly *v.* Hind, 6 C. & P. 316.

and when an instrumentality becomes an obstruction to the source of justice the State should be at liberty to remove it, and by trampling upon it if necessary."

Of such an exemption as this there are a few traces in the earlier English practice.[1] In the United States it is thus far little recognized outside of the jurisdictions which (under the principle of § 2079, *post*) acknowledge the compulsory rule for the State's witnesses.[2] It is worth noting, however, that by invoking the conceded exemption for witnesses called by the judge (*ante*, § 910), the same result may be effected.[3]

§ 918. [1] 1803, R. *v.* Oldroyd, R. & R. 88 (cited *ante*, § 905); 1833, R. *v.* Bodle, 6 C. & P. 186 (murder; where the prosecutor did not call the defendant's father, himself suspected of the crime, the Court called him for the defendant, but allowed him to be cross-examined to discredit him, yet would not allow him to be contradicted by other witnesses); 1838, R. *v.* Chapman, 8 C. & P. 558 (murder; the defendant's brother, an eye-witness; whichever side calls him "may cross-examine him"); 1844, R. *v.* Carpenter, 1 Cox Cr. 72 (prosecutor compelled to call an indorsed witness may impeach him by contradiction, but not by self-contradiction); 1845, R. *v.* Stroner, 1 C. & K. 650 (rape; witnesses not called by the prosecution were compelled to be called, but "every latitude in examining them" was allowed the prosecution); 1847, R. *v.* Woodhead, 2 C. & K. 520 (whoever calls the witness, even defendant, makes them his own witnesses); 1858, R. *v.* Cassidy, 1 F. & F. 79 (Parke, B., ruled that the defendant who called an indorsed witness made him his own, and the prosecution could cross-examine).

[2] *La.* 1905, State *v.* Gallo, 115 La. 746, 39 So. 1001 (rule held equally applicable to the State; *Mich.* 1874, Wellar *v.* People, 30 Mich. 16, 23 (prosecutor may "press them with searching questions"); 1895, People *v.* Case, 105 Mich. 92, 62 N. W. 1017 (witness, "whom the prosecutor was obliged by law to call", allowed to be cross-examined to contrary statements in a deposition); 1902, People *v.* Elco, 131 Mich. 519, 91 N. W. 755; 94 N. W. 1069 (point not decided; three judges for exclusion, ignoring the preceding case); *Pa.* 1908, Com. *v.* Deitrick, 221 Pa. 7, 70 Atl. 275 (not decided; but the doctrine favored); *Vt.* 1877, State *v.* Magoon, 50 Vt. 333, 340 (since the State is bound, under the principle of § 2079, *post*, to produce all material witnesses, "it is not to be prejudiced by the character of the witnesses it produces and uses"); 1894, State *v.* Harrison, 66 Vt. 523, 527, 29 Atl. 807 (preceding case applied to allow jury's rejection of part of such witness' testimony); 1897, State *v.* Slack, 69 Vt. 486, 38 Atl. 311 ("We think no distinction can logically be made [between character-evidence and any other]; for the same reason that makes the rule inapplicable to one mode of impeachment makes it equally inapplicable to all modes, as the different modes are but different ways of doing the same thing, namely, discrediting the witness, and they are equal in degree and alike in essence. The reason of the rule does not fail in part and stand in part, — fail as to one mode of impeachment, and stand as to another mode. It is indivisible, and stands or falls as a whole"); *Wash.:* 1920, State *v.* Sills, 113 Wash. 497, 194, Pac. 580 ("The State is not to be prejudiced by the character of the witnesses it calls").

[3] 1902, Carle *v.* People, 200 Ill. 494, 66 N. E. 32 (State's attorney allowed to state that he did not wish to call a certain eye-witness, and to request the Court to call him, and then to cross-examine him, the defendant also cross-examining); 1912, People *v.* Baskin, 254 Ill. 509, 98 N. E. 957 (rule in Carle *v.* People approved); 1912, People *v.* Rardin, 255 Ill. 9, 99 N. E. 59 (similar); 1921, People *v.* Cardinelli, 297 Ill. 116, 130 N. E. 355 (if State's attorney, doubting the veracity of a witness, fails to call him, "in such case the Court may call the witness and leave him open for cross-examination by either side"); 1921, Pendleton *v.* Com., — Va. —, 109 S. E. 201 (homicide for attentions paid to a woman; the woman "having refused to talk to any one before the trial", the prosecuting attorney requested the Court to summon her, and was then allowed to cross-examine her as hostile).

But even this expedient is subjected to too much restriction, as the cases there cited show. It is time that we abandoned the absurd rigor of the rule against impeachment.

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

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

CHAPTER XXX

A. MORAL CHARACTER

B. INSANITY, AND OTHER ORGANIC INCAPACITY

C. EXPERIENTIAL INCAPACITY

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

A. MORAL CHARACTER

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

resorted to at all for the purpose of discovering his bias, his knowledge, his recollection, and the like; and the fact that it *is* resorted to for ascertaining his moral disposition must not be allowed to obscure the important truth that the thing immediately and fundamentally important is the actual disposition, and not the reputation (*ante*, § 52, *post*, § 1608).

Reputation, then, is merely *evidence of* disposition or character, and, moreover, only one of three kinds of such evidence. First, there may be *particular instances of conduct*, good or bad, from which is inferrible the permanent disposition that has inspired them; questions of Circumstantial Evidence thus arise which are treated later (*post*, §§ 977–988). Secondly, there may be the *personal knowledge* of one who has observed the man, *i.e.* Testimonial Evidence, such as would be given of the qualities of a horse, the strength of an iron beam, or the circumstances of a death, by one who has personally observed the data; there ought in reason to be no evidential objection to this kind of testimony to character; yet the Opinion rule has here been invoked, and the admissibility of such testimony is generally denied (*post*, § 1980). Thirdly, there may be *reputation*, *i.e.* the net expression of a multitude of personal opinions of the preceding sort, based more or less on personal intercourse. This should at least stand on no better footing than the preceding class, though it does in fact; but it has to pass the gauntlet of the Hearsay rule, and its admissibility as an exception to that rule is there discussed (*post*, § 1608–1621).

All these three varieties are merely kinds of evidence for proving Character. But it is for the present purpose immaterial whether the intention is to evidence that Character by means of reputation or otherwise. What we are now concerned with is the inference from Character to Conduct, *i.e.* to the witness' act of speaking correctly or incorrectly when on the stand.

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

It is usually assumed that there are not. The reason for exclusion in the case of a criminal defendant is that he may be found guilty on the present charge, not because he is believed to be guilty, but because his bad character may be thought by the jury to deserve punishment or to deprive an erroneous verdict of its moral injustice. But this reason obviously is totally lacking in

the case of a witness, because he is not on trial and can be found guilty of nothing. The reason for exclusion in the case of civil parties is that, even where some moral turpitude is involved (and where character would therefore be relevant), the possibilities of protracting the trial, confusing the issues, and turning the proceeding into a contest of mere numbers of witnesses, are strong enough to outweigh the advantage of having evidence of such slight value; and these reasons and motives are again supposed to be inapplicable to evidence of witnesses' character. The law, then, as now universally accepted, attributes no controlling influence to any of these considerations, and therefore allows the character of witnesses to be offered freely in evidence; subject only, of course, to the general discretionary power of the trial Court to limit the number of witnesses on this as on any other point (*post*, § 1907).

But it is a proper assumption that none of the above considerations apply to the use of witness' character? It is true that the witness cannot be found guilty by the jury upon any charge; but the assaults upon his character may bring it to public notice in such a way that, without any charge and without any trial, he may be condemned by public opinion and disgraced before the community. While we may not choose to regard with compunction the mere feelings of the witness, we may well hesitate if we find that the prospect of this ordeal of public disgrace threatens to make the witness-box a place of dread to its innocent occupant, and to deprive justice of the fullest opportunity to obtain useful testimony. Again, the reasons applicable to the use of parties' character in civil cases do also unquestionably in some degree apply to the use of witness' character; for no long experience at trials is needed to convince one that the danger of the protraction of the proceedings, the confusion of the issues, and the degeneracy of the trial into a contest between neighborhood factions is equally attendant upon such evidence. Judges have often protested against the abuses of this kind of evidence (*post*, § 1610). They concede the comparative triviality of its value. The modern tendency is to abandon the old notion (a mark of a primitive stage of opinion) that a usually bad man will usually lie and a usually good man will usually tell the truth. It would seem desirable to consider the expediency of restricting the resort to this feeble and petty class of evidence. Another and more advanced generation will possibly persuade itself to this decision:

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

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

1900, Hon. J. F. DALY, in "The Brief", III, 15: "In my experience and that of many judges there has been no successful impeachment of a witness by proof of bad reputation. There is something distasteful to the average juryman in the 'swearing away a man's character'; and the general feeling in that regard is evidenced by the reluctance, on the one hand, of witnesses to come forward and testify that they would not believe a witness under oath, and the readiness, on the other hand, with which all a man's acquaintances hasten to his support. . . . The advice to clients should be: Do not attempt to impeach the character of an adversary or a witness unless you are absolutely certain there is no character to impeach." [1]

§ 922. **Kind of Character; Veracity as the Fundamental Quality.** From the point of view of modern psychology, the moral disposition which tends for or against falsehood is an elusive quality. Its intermittent operation in connection with other tendencies, and the difficulty of ascertaining its quality and force, make it by no means a feature peculiarly reliable in the diagnosis of testimonial credit.[1] Hence, to the psychologist, the common law's reliance on character as an index of falsehood is crude and childish.

Nevertheless, Psychology itself has thus far discovered no feasible substitute. The crude belief of the common law must therefore hold its place until science provides a better method.

In determining the relevancy of Character as affecting the credit to be given to a witness, the first question is, What kind of character is relevant? Since the argument is to be against or for the probability of his now telling the truth upon the stand, it is obvious that the quality or tendency which will here aid is his quality or tendency as to truth-telling in general, *i.e.* his *veracity*, or, as more commonly and more loosely put, his *character for truth*. This must be, and is universally conceded to be, the immediate basis of inference. Character for truth is always and everywhere admissible.

Moreover, any other trait or quality, or combination of them, is relevant only so far as involving, necessarily or probably, the presence or absence of this quality as to truth-telling. This leads us to the chief topic of contro-

§ 921. [1] 1893, Simkins, J., in Carroll *v.* State, 32 Tex. Cr. 431, 24 S. W. 100 ("Experience clearly demonstrates that, in most efforts to swear away the character of a witness, animosity or revenge is the incentive or cause of the most positive impeaching testimony").

§ 922. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 196–202, especially Duprat's essay on "The Lie." See also the essays on pathological lies, etc., cited *ante*, § 875.

versy in this department, namely, whether *bad moral character* in general, or some other *specific bad quality* in particular, is admissible.

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

1656, *Bushnell's Trial*, 5 How. St. Tr. 633, 701, *Bushnell*, arguing against a witness whose many infamies he had related: "But may some say 'that all this, however true, makes him no more than a thief or a robber of both God and man, or a plunderer, or a parricide, a profaner, or a drunkard, or the like; but now this doth not wholly disenable his testimony; but could I make it appear that he had formerly foresworn himself, then, I had something to the purpose.' To this I shall answer . . . that we cannot prove it that those who bore false witness against Naboth did ever bear false witness against any before, but this it was that rendered them suspicious (and with just judges should have been cause enough to abhor them), because they were sons of Belial, wicked, mischievous, lawless men, men of so much known infamy that they would not stick at anything which was put upon them, be it either to speak or to do, but in the general were ready for any wicked employment."

1829, TOOMER, J., in *State* v. *Boswell*, 2 Dev. 210: "Should a witness whose general character is proverbially bad as to licentiousness and lewdness, who is in his habits regardless of the precepts of religion and reckless of the consequences of vice be entitled to the same credit as another whose character is without stain, and whose whole life has been marked by piety, virtue, and truth? . . . An unprincipled man, although grovelling in other vices which he has long practised, may for selfish purposes artfully conceal the weakness of his character on the score of veracity. Should not such habits lessen the weight and impair the credit of a witness, although he may have established no general character bad as to truth?"

1837, MARCY, Sen., in *Bakeman* v. *Rose*, 18 Wend. 146, 151: "That the credibility of a witness should be sought through his general moral character I have no doubt. . . . If the inquiry be confined to the general reputation of the witness in point of truth among his neighbors, it will happen in some cases that a witness whose general moral character is deservedly infamous is allowed to impress his testimony on the jury with unqualified weight, simply because mendacity may have been relatively too insignificant an item, in the catalogue of his vices, to have attracted the attention or elicited the remark of his acquaintance. Or it may happen that, though generally of so depraved or corrupt a life that no one would doubt the facility with which he might be suborned to swear falsely, yet from caution or calculation he may have observed that general veracity in his common intercourse, or from taciturnity a 'wilful stillness entertained', which would render his reputation impregnable natural to this form of inquiry. . . . One of the great benefits of jury trial was supposed to exist in the circumstance that the jury, being from the vicinage of the parties and the witnesses, were better able to judge of their relative honesty and credibility. It would seem, therefore, in accordance with this principle, that under the modern forms of impanelling juries, which do not in many cases afford to jurors the means of judging, from personal knowledge of the character of witnesses, the measure of credit to be given to them, that as liberal a course for supplying this deficiency of knowledge should be allowed as would be compatible with the rights of the witnesses."

The arguments made in answer to this are chiefly three: (1) that, as a matter

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

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

1848, GREENE, J., in *Carter* v. *Carenaugh*, 1 Greene Ia. 173: "The method of questioning as to general character alone appears to us not only vague but subject to great abuse and injustice. Clannish witnesses, whose intercourse and business are always limited to a particular class of kindred spirits, who may constitute a majority of the neighborhood, often entertain peculiar and contracted views of general character, when applied to those who may not agree with them in social, religious, or political tenets. And thus, by a decided majority of one neighborhood, a man might be represented as possessing an excellent general character; while in an adjoining neighborhood, where he is equally well known, he might be described as a man of great moral turpitude. . . . The requisites of a good character, and the components of a bad one, are so variously viewed by different and even adjacent communities that they never can become a safe and uniform test of veracity, without confining the inquiry particularly to character for truth. In some communities an ultra-Mason, in others a proscriptive anti-Mason, in this neighborhood an abolitionist, in the adjoining one an anti-abolitionist, would be regarded and styled a bad character; and thus, in many communities, he who plays cards, or engages in horse-racing, or frequents groceries, or works on the Sabbath-day, is looked upon and called a bad character; and yet such men — either the advocates of unpopular sentiments, or those addicted to objectionable habits — may have a most commendable regard for veracity. . . . Thus, by opening this boundless field of inquiry as to 'bad character,' in its multitudinous phases, the most truth-abiding man might often be impeached."

1856, ELLSWORTH, J., in *State* v. *Randolph*, 24 Conn. 363, 367: "The more general enquiry in England is adopted to learn the witness' character for truth; ours is adopted for the same purpose, but is more simple and direct. In our courts the enquiry put is, 'Is the character for truth on a par with that of mankind in general?' The English rule has this advantage, that it brings the general character of the witness before the triers, which is important where the witness has not acquired a specific character on the subject of truth; and hence it is urged with some force that in such a case the general inquiry is essential, for no other will reach the case. . . . General bad character is undoubtedly a serious blemish in a witness, and might justly detract from the weight of his testimony,

and so might the character of a witness for the specific blemish of licentiousness, especially in the female sex. But where shall we stop the enquiries? Witnesses, who can have no opportunity to exculpate themselves or give explanations of their acts, ought not to be exposed to unjust obloquy, nor should the trial be complicated and prolonged by trying collateral issues. If it were wise and just to enquire for one's reputation for virtue, why not for gambling, horse-racing, drunkenness, sabbath-breaking, etc.?"

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

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

§ 923. **Same: the Rule in the various Jurisdictions.** Historically, the use of bad general character appears as originally allowable, — fitting, as it does, a more primitive notion of human nature. In England, it was used without question down to the latter part of the 1700s (whence its appearance by transplantation in some of our earliest Courts). But about that time, in some obscure way, an opposition set in, and the propriety of using character for truth only was advocated. By the first part of the 1800s, a compromise had been reached; and, while character for truth only was taken as the fundamental requirement, the estimate was allowed to be based on the witness' knowledge of the other's general character; so that the inquiry in form became a compromise (*post*, § 1982), *i.e.* "Knowing his general character, would you believe him on oath?" In England, then, and in those States which allow that form of question, a slight concession is made (*post*, §§ 1982, 1985) by allowing the witness, in giving his personal opinion as to veracity, to consider *in his own mind* the other's general qualities; but it is to be observed that the witness does not *state to the tribunal* what that general character is. In other words, for the purposes of proving by repute, general character is excluded, and character for veracity only is stated. This is the modern rule in England.

In the United States, only veracity-character is admissible, in the great majority of jurisdictions.[1] Here the use of the witness' personal belief as to the character of the other has always stood on a precarious footing (*post*, § 1985);

§ 923. [1] In the following citations are included, for convenience, those also which deal with the questions of § 924 and § 925, *post*: *Federal:* 1836, U. S. v. White 5 Cr. C. C. 43 (veracity only); 1840, U. S. v. Vansickle, 2 McLean 219 (same); U. S. v. Dickinson, 2 McLean 325, 329 (same); 1851, Wayne, J. (the others not touching the point), in Gaines v. Relf, 12 How. 555 (general moral character, admissible); 1859, Teese v. Huntington,

23 How. 2, 13 (expressly left undecided); *Alabama:* Here general character was held admissible, except as otherwise noted: 1839, McCutchen's Adm'rs *v.* McCutchen, 9 Port. 650, 655; 1846, Sorrelle *v.* Craig, 9 Ala. 540 (left undecided); 1850, Nugent *v.* State, 18 Ala. 526 (denied); 1856, Ward *v.* State, 28 Ala. 53, 60, 64 (affirmed by two to one); 1871, Boles *v.* State, 46 Ala. 206 (approving the preceding case); 1872, De Kalb Co. *v.* Smith, 47 Ala. 412 (same); 1875, Holland *v.* Barnes, 53 id. 86 (excluding a woman's chastity); 1885, Motes *v.* Bates, 80 Ala. 382, 385; 1888, Davenport *v.* State, 85 Ala. 336, 338, 5 So. 152 (excluding character for honesty); 1889, McInerny *v.* Irvin, 90 Ala. 275, 277, 7 So. 84 (excluding a woman's character for chastity); Birmingham U. R. Co. *v.* Hale, 90 Ala. 8, 11, 8 So. 142 (same); 1894, Rhea *v.* State, 100 Ala. 119, 14 So. 853 (same); 1891, Mitchell *v.* State, 94 Ala. 68, 73, 10 So. 518; 1895, Byers *v.* State, 105 Ala. 31, 16 So. 716; 1895, Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; 1896, McCutchen *v.* State, 109 Ala. 465, 19 So. 810 (same as Davenport *v.* State); 1896, Crawford *v.* State, 112 Ala. 1, 21 So. 214 (admitting bad general character, but not character for chastity); 1897, White *v.* State, 114 Ala. 10, 22 So. 111; 1904, Ross *v.* State, 139 Ala. 144, 36 So. 718 (general character, but not character for turbulence, allowed); 1917, Terry *v.* State, 15 Ala. App. 665, 74 So. 756 (moral character; the language of the opinion is obscure); 1919, Johnson *v.* State, 203 Ala. 30, 81 So. 820 (general bad character, admissible);

Alaska: Comp. L. 1913, § 1501 (like Or. Laws 1920, § 863);

Arkansas: 1855, Pleasant *v.* State, 15 Ark. 624, 651, *semble* (truth only); Code, § 654, now Dig. 1919, § 4187 ("A witness may be impeached . . . by evidence that his general reputation, for truth or morality, renders him unworthy of belief"); 1874, Majors *v.* State, 29 Ark. 112 (character for "immorality" admitted); 1890, Hollingsworth *v.* State, 53 Ark. 387, 394, 14 S. W. 41 (character for truth only, improper);

California: C. C. P. 1872, § 2051 ("general reputation for truth, honesty, or integrity", admissible); § 1847 ("evidence affecting his character for truth, honesty, or integrity" is admissible); 1865, People *v.* Yslas, 27 Cal. 630, 633 (excluding chastity-character; Currey, J., diss.); 1883, People *v.* Markham, 64 Cal. 157, 163, 30 Pac. 620 (pointing out that the last two qualities named in the Code are additions to the common-law rule of the State); 1895, People *v.* Johnson, 106 Cal. 289, 39 Pac. 622 (woman's character for chastity, excluded); 1895, People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (excluding character as a prostitute);

Connecticut: 1810, Swift, Evidence, 143 (character for truth only; quoted *post*, § 1985); 1877, State *v.* Shields, 45 Conn. 256, 257, 260, 263 (rape; former prostitution of the prosecutrix admitted, but the principle not specified); *Florida:* 1878, Robinson *v.* State, 16 Fla. 835, 839, *semble* (veracity only); Rev. G. S. 1919, § 2706 ("general reputation" allowed); 1898, Mercer *v.* State, 40 Fla. 216, 24 So. 154 (veracity only); 1906, Maloy *v.* State, 52 Fla. 101, 41 So. 791 (manslaughter; accused's character for veracity, admitted);

Georgia: Rev. C. 1910, § 5882, P. C. § 1053 ("general bad character", admissible); 1855, Stokes *v.* State, 18 Ga. 17, 37 (general character, followed by opinion as to belief on oath); 1858, Smithwick *v.* Evans, 24 Ga. 463 (general character); 1860, Weathers *v.* Barkdale, 30 id. 889 (same; the former of these two excludes, the latter admits, a woman's character for chastity); 1873, Wood *v.* State, 48 Ga. 192, 292, *semble* (excluding female character for chastity; here a habit of illegal intercourse with a particular person was considered);

Idaho: Comp. St. 1919, § 7935 ("truth, honesty, or integrity"); § 8038 (like Cal. C. C. P. § 2051);

Illinois: Here character for veracity only is admissible: 1849, Frye *v.* Bank, 11 Ill. 367, 378; 1859, Crabtree *v.* Kile, 21 Ill. 183 ("general character" spoken of, perhaps carelessly); 1860, Cook *v.* Hunt, 24 Ill. 535, 545, 550; 1876, Dimick *v.* Downs, 82 Ill. 570, 573; 1884, Tedens *v.* Schumers, 112 Ill. 263, 266; 1887, Spies *v.* People, 122 Ill. 1, 208, 12 N. E. 865, 17 N. E. 898;

Indiana: The Civil Code provided (R. S. 1838, p. 275; Civ. Code, § 242) that in civil cases general moral character should be admissible; and this has been construed as also admitting specific moral traits: 1841, Walker *v.* State, 6 Blackf. 3; 1873, Indianapolis P. & C. R. Co. *v.* Anthony, 43 Ind. 183, 193 (chastity of female witness, admitted); 1877, Rawles *v.* State, 56 Ind. 439 (bastardy proceedings; here the complainant's specific character for chastity was also received); 1879, Smock *v.* Pierson, 68 Ind. 405 (general moral character; bastardy proceedings). But this section was treated as not applicable in criminal cases: 1874, Fletcher *v.* State, 49 Ind. 131 (interpreting the common law; and therefore not extending to criminal cases the rule of Civ. C. § 242); 1877, Farley *v.* State, 57 Ind. 334; 1879, State *v.* Bloom, 68 Ind. 55; State *v.* Beal, 68 Ind. 346. In 1881, however (R. S. 1881, § 1803), the rule for civil cases was extended to criminal cases: 1884, Wachstetter *v.* State, 99 Ind. 298; 1885, Anderson *v.* State, 104 Ind. 471, 4 N. E. 363, 5 N. E. 711 (a woman's character for chastity, admitted); 1892, Randall *v.* State, 132 Ind. 543, 32 N. E. 305 (defendant's moral character); and the statute now reads: Burns' Ann. St. 1914, § 529, 2116 ("In all questions affecting the credibility of a witness, his general moral character may be given in evidence");

Iowa: at first character for truth only was admitted: 1848, Carter *v.* Cavenaugh, 1 Greene 171; 1859, State *v.* Sater, 8 Ia. 420, 424; then by statute (*infra*) general moral character was made admissible: 1867, Kilburn *v.* Mullen, 22 Ia. 502 (excluding character for chastity, *i.e.* "a specific vice"); 1868, State *v.* Vincent, 24 Ia. 570, 574; 1882, State *v.* Egan, 59 Ia. 637, 13 N. W. 730; 1884, State *v.* Kirkpatrick, 63 Ia. 559, 19 N. W. 660; Code 1897, § 4614, Comp. C. § 7321 ("general moral character", admissible); 1899, State *v.* Seevers, 108 Ia. 738, 78 N. W. 705; 1904, State *v.* Haupt, 126 Ia. 152, 101 N. W. 739 (prosecutrix in seduction); 1913, Hunt *v.* Waterloo C. F. & N. R. Co., 160 Ia. 722, 141 N. W. 334 (veracity-character admissible; Code §§ 4613, 4614, admitting general character, is not exclusive);

Kansas: 1866, Craft *v.* State, 3 Kan. 450, 480, *semble* (woman's character for chastity excluded); 1891, Coates *v.* Sulan, 21 Kan. 341 (no ruling; yet the practice seems to sanction character for truth only); 1920, State ex rel. Zawada *v.* Lyons, 107 Kan. 312, 191 Pac. 281 ("An early decision by this Court, frequently quoted in former years, was to the effect that loss of virtue does not imply lack of truthfulness"; such evidence here held not improperly rejected);

Kentucky: 1914, Noel *v.* Dickey, 3 Bibb 268, *semble* (truth only); 1819, Mobley *v.* Hamit, 1 A. K. Marsh 591 (general character admissible, if followed by the witness' inference as to credibility upon oath); 1821, Hume *v.* Scott, 3 A. K. Marsh 261 (general character admissible, without limitation; expressly overruling the preceding case); 1857, Thurman *v.* Virgin, 18 B. Monr. 792 (general character admissible); 1869, Young *v.* Com., 6 Bush 316, *semble;* 1895, Com. *v.* Wilson, — Ky. —, 32 S. W. 166 (either character for truth or general moral character); C. C. P. 1895, § 597 ("evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief", allowable); 1913, Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804 (same); 1904, Helm *v.* Com., — Ky. —, 81 S. W. 270 (general moral character, admitted); 1905, Newman *v.* Com., — Ky. —, 88 S. W. 1089 (character for peace and quiet of a defendant taking the stand, excluded; "his character for truthfulness, or his general moral character", might have been shown); 1917, Day *v.* Com., 173 Ky. 269, 191 S. W. 105 (husband-murder by poisoning; the accused's bad reputation for "morality and truthfulness", admitted against her as a witness but not a party; the trial Court need not instruct the jury on the difference, unless requested); 1921, Hill *v.* Com., 191 Ky. 477, 230 S. W. 910 (murder; defendant impeached by "general reputation for morality");

Louisiana: general character is admissible; the controversy is as to other specific qualities than veracity: 1852, State *v.* Parker, 7 La. An. 83, 87 (*semble*, "infamous" character admitted, but character for extortion, cheating, and dissoluteness, not admitted by the majority); 1892, State *v.* Jackson, 44 La. An. 160, 162, 10 So. 600 (general character "of that kind which will show such moral turpitude" as to make him incredible, admissible; *semble*, "infamous" character, admissible, for violence, inadmissible); 1893, State *v.* Taylor, 45 La. An. 605, 609, 12 So. 927 (character for honesty, as well as truth; here a defendant on trial for larceny); 1901, State *v.* Guy, 106 La. 8, 30 So. 268 (general moral character admissible, but not character for honesty or other specific traits than veracity; Breaux, J., diss.); 1906, State *v.* Baudoin, 115 La. 837, 40 So. 239 (assault with intent to kill; prosecuting witness' character for chastity, excluded); 1906, State *v.* Romero, 117 La. 1003, 42 So. 482 (a woman's character for unchastity, not admissible);

Maine: character for truth only is admissible: 1841, Phillips *v.* Kingfield, 19 Me. 375, 377; 1844, State *v.* Bruce, 24 id. 71 ("infamous" character, excluded); 1849, Thayer *v.* Boyle, 30 Me. 475, 481 (intemperate habits, excluded); 1856, Shaw *v.* Emery, 42 Me. 59, 64; 1875, Sidelinger *v.* Bucklin, 64 Me. 371 (bastardy; complainant's reputation as a prostitute, excluded); 1877, State *v.* Morse, 67 Me. 428 (prosecutrix in rape complaint);

Maryland: 1795, Hutchings *v.* Cavalier, 3 H. &. McH. 389 (general character, admissible); 1890, Brown *v.* State, 72 Md. 468, 475, 20 Atl. 186 (truth only; not a woman's chastity); Brown *v.* State, 72 Md. 477, 480, 20 Atl. 140 (not general bad character); 1901, Hoffman *v.* State, 93 Md. 388, 49 Atl. 658 (truth only);

Massachusetts: 1817, Com. *v.* Murphy, 14 Mass. 387 (*Per Curiam:* "A common prostitute must necessarily have greatly corrupted, if not totally lost, the moral principle, and of course her respect for truth and her regard for the sacredness of an oath"); 1846, Com. *v.* Churchill, 11 Metc. 539 (overruling the preceding case); 1858, Quinsigamond Bank *v.* Hobbs, 11 Gray 257 (veracity only; not integrity); 1859, Pierce *v.* Newton, 13 Gray 528 (veracity only; allowing other questions in order to make it plain that the veracity-reputation was not confined to a failure to pay debts);

Michigan: 1856, Webber *v.* Hanke, 4 Mich. 198, 203 (truth only); 1874, Hamilton *v.* People, 29 Mich. 173, 185 (same); 1899, Calkins *v.* Ann Arbor R. Co., 119 Mich. 312, 78 N. W. 129 (character for honesty, excluded); 1900, People *v.* O'Hare, 124 Mich. 515, 83 N. W. 279 (woman's character for chastity, excluded); 1893, People *v.* Mills, 94 Mich. 630, 54 N. W. 488 ("lack of chastity cannot be used to impeach the credibility of a female witness"), 1904, People *v.* Wilson, 136 Mich.

298, 99 N. W. 6 (bastardy; the woman's character for unchastity, excluded);
Minnesota: 1872, Rudsdill *v.* Slingerland, 18 Minn. 380 (truth only); 1876, Moreland *v.* Lawrence, 23 Minn. 84, 88 (same);
Mississippi: 1850, Newman *v.* Mackin, 13 Sm. & M. 383, 387 (truth only); 1870, Head *v.* State, 44 Miss. 731, 735, 751 (allowing proof of a female witness' prostitution); 1881, Smith *v.* State, 58 Miss. 867, 873 (veracity only; woman's character as a prostitute excluded; Head *v.* State repudiated); 1885, French *v.* Sale, 63 Miss. 386, 393 (truth only); 1896, Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955 ("probably unchaste character" of a woman, excluded; Whitfield, J., reserving his opinion); 1913, Alabama & V. R. Co. *v.* Thornhill, 106 Miss. 387, 63 So. 674 (Smith *v.* State followed);
Missouri: here it has always been conceded that *general moral character* is admissible: 1850, State *v.* Shields, 13 Mo. 236 ("bad moral character generally"); Day *v.* State, ib. 422, 426, *semble* ("general bad character"); 1874, State *v.* Hamilton, 55 Mo. 520, 522 ("moral character generally"); 1875, State *v.* Breeden, 58 Mo. 507 ("general moral character"); 1878, State *v.* Clinton, 67 Mo. 380, 390 ("general character" for "honesty and morality"); 1880, State *v.* Miller, 71 Mo. 591 ("general character for morality"); 1883, State *v.* Grant, 79 Mo. 133 (also, general reputation as a common drunkard, as showing a "deterioration of that general moral character"); 1886, State *v.* Rider, 90 Mo. 54, 63, 1 S. W. 825 ("morality"); 1888, s. c., 95 Mo. 474, 486, 8 S. W. 723 ("morality"); 1889, State *v.* Taylor, 98 Mo. 240, 245, 11 S. W. 570; 1891, State *v.* Shroyer, 104 Mo. 441, 446, 16 S. W. 286 (approving State *v.* Grant); 1894, State *v.* Smith, 125 Mo. 2, 6, 28 S. W. 181; 1896, State *v.* Weeden, 133 Mo. 70, 34 S. W. 473; 1897, State *v.* May, 142 Mo. 135, 43 S. W. 637; but an unedifying controversy (dealing much dole to the doctrine of 'stare decisis') long went on concerning the admissibility of a *man's character* for *unchastity;* it is perhaps not yet finally decided; 1850, State *v.* Shields, 13 Mo. 236 (woman; "general character for chastity" allowed, as "to some extent shaking the credibility"); 1878, State *v.* Clinton, 67 Mo. 380, 382, 390 (forgery; defendant as a witness; character for chastity admitted); 1883, State *v.* Grant, 79 Mo. 133 (admissible, for a female witness; *semble*, also, allowable to show that she was reputed a prostitute); 1886, State *v.* Rider, 90 Mo. 54, 63 (a man; chastity admitted); 1888, s. c., 95 Mo. 474, 486 (same); 1891, State *v.* Shroyer, 104 Mo. 441, 447, 16 S. W. 287 (rape; the defendant being a witness, his character for chastity was admitted); 1895, State *v.* Duffey, 128 Mo. 549, 31 S. W. 98 (chastity of a woman, admitted); 1895, State *v.* Sibley, 131 Mo. 519, 31 S. W. 1033 (by Div. 2; not admitting unchastity against male witnesses, especially against a defendant in a seduction charge, as here; going on the supposed authority of State *v.* Grant; Gantt, P. J., diss.); 1895, s. c., 132 Mo. 102, 33 S. W. 167 (by the Court in banc; affirming the preceding ruling; Brace, C. J., Macfarlane, Gantt, and Barclay, JJ., diss.); 1897, State *v.* Dyer, 139 Mo. 199, 40 S. W. 768 ("chastity and virtue", against a man, admitted; Burgess and Sherwood, JJ., undecided); 1898, State *v.* Summar, 143 Mo. 220, 45 S. W. 254 (woman's chastity, admitted); 1903, State *v.* Pollard, 174 Mo. 607, 74 S. W. 969 (rape: defendant's reputation for "chastity and morality", admitted to impeach him; Fox, J., writing the opinion, but in effect dissenting); 1900, State *v.* Evans, 158 Mo. 609, 59 S. W. 994 (defendant's general moral character, admissible); 1905, State *v.* Woodward, 191 Mo. 617, 90 S. W. (similar); 1906, State *v.* Beckner, 194 Mo. 281, 91 S. W. 893 (murder; defendant's character for violence, excluded; only general bad moral character can be used; prior decisions reviewed); 1906, State *v.* Richardson, 194 Mo. 326, 92 S. W. 649 (State *v.* Beckner followed; but the defendant's character for turbulence may be used, on the principle of § 58, *ante*, if he has first offered his character for peaceableness); 1906, York *v.* Everton, 121 Mo. App. 640, 97 S. W. 604 (reputation for unchastity, admitted; here, against a woman, though the rule is laid down for "both male and female witnesses"; but why should the Court rest this on State *v.* Sibley, *supra?*); 1908, State *v.* Oliphant, 128 Mo. App. 252, 107 S. W. 32 (illegal liquor sales; defendant's repute as a violator of the liquor law, admitted against him as a witness following State *v.* Beckner; Johnson, J., expressing dissatisfaction with the rule; but might not the learned judge push his skepticism a little further, and ask whether the character rule itself is so sacred? And should not an habitual offender's character always be admissible?); 1908, Imboden's Estate, 128 Mo. App. 555, 107 S. W. 400 (only character for truth and veracity admitted; purporting to follow State *v.* Pollard, and ignoring State *v.* Beckner); 1908, State *v.* Baker, 209 Mo. 444, 108 S. W. 6 ("truth and veracity as an average negro", held proper in subject but not in form, — whatever that may mean); 1908, State *v.* Priest, 215 Mo. 1, 114 S. W. 949 (general moral character, admissible); 1913, State *v.* Wellman, 253 Mo. 302, 161 S. W. 795 (crime against nature; that the defendant, who had testified, had the repute of committing crimes of the sort; excluded, distinguishing State *v.* Beckner and State *v.* Pollard); 1915, State *v.* Shuster, 263 Mo. 600, 173 S. W. 1049 (murder; prosecution's inquiries as to defendant's reputation as a peaceable law-abiding citizen, defendant having testified but offered no character-evidence, excluded, following State *v.* Beckner); 1920, State *v.* Edmundson, — Mo. —, 218 S. W. 864 (rape; defendant's

general bad reputation, admitted to impeach him as witness); 1921, State *v.* Baird, 288 Mo. 62, 231 S. W. 625 (murder; defendant's bad character for turbulence, not admissible to discredit him);
Montana: Rev. C. 1921, §§ 10508, 10668 (like Cal. C. C. P. §§ 1847, 2051);
Nevada: 1874, State *v.* Ferguson, 9 Nev. 106, 120 (truth only); 1876, State *v.* Larkin, 11 Nev. 314, 330 (truth only; "though there perhaps are exceptional cases" in which "utter depravity of moral character" might be shown; here excluding the unchastity of a woman);
New Hampshire: character for truth only is admissible; 1838, State *v.* Howard, 9 N. H. 486, *semble;* 1850, Hoitt *v.* Moulton, 21 N. H. 592; 1861, State *v.* Forschner, 43 id. 89;
New Jersey: 1795, State *v.* Mairs, 1 N. J. L. 456 (not allowed to prove quarrelsome character; "a man may be a boxer or a bully and yet speak the truth upon oath"); 1869, Atwood *v.* Impson, 20 N. J. Eq. 150, 157 (truth only); King *v.* Ruckman, 20 N. J. Eq. 316, 357 (truth only);
New Mexico: Annot. St. 1915, § 2180 ("general evidence of bad moral character not restricted to his reputation for truth and veracity", admissible); 1895, Territory *v.* De Guzman, 8 N. M. 92, 42 Pac. 68, *semble* (general immorality, admissible); 1915, State *v.* Perkins, 21 N. M. 135, 153 Pac. 258 (Code 1915, § 2180 applied); 1918, State *v.* Anderson, 24 N. M. 360, 174 Pac. 215 (woman's character for chastity; not decided);
New York: 1817, Jackson *v.* Lewis, 13 Johns. 505 (veracity only); 1818, Troup *v.* Sherwood, 3 Johns. Ch. 558, 566, Kent, C. (veracity-character assumed to be the only proper one); 1837, Bakeman *v.* Rose, 18 Wend. 146 (general character, admitted, but not specific traits such as unchastity; quoted *supra*); 1838, People *v.* Abbot, 19 Wend. 198 (general character; the opinion of Cowen, J., for the Supreme Court, so far as it may have allowed the specific trait of unchastity, was in effect overruled by the decision of the Court of Errors and Appeals in Bakeman *v.* Rose, *supra*, delivered shortly afterwards); 1838, People *v.* Rector, 19 Wend. 579, *semble* (general character, admitted; if not so intended, the language was no longer law after Bakeman *v.* Rose, *supra*); 1842, Johnson *v.* People, 3 Hill 178 (bad character); 1859, People *v.* Blakeley, 4 Park. Cr. 182 (same); 1895, Carlson *v.* Winterson, 147 N. Y. 652, 723, 42 N. E. 347, *semble* (bad general character);
North Carolina: 1804, State *v.* Stallings, 2 Hayw. 300 (admitting "bad moral character"); 1829, State *v.* Boswell, 2 Dev. 209 (same); 1843, State *v.* O'Neale, 4 Ired. 88 (same); 1849, State *v.* Dove, 10 Ired. 469, 473 (general character as to honesty and morals, admitted); 1872, State *v.* Perkins, 66 N. C. 127, *semble* (general bad character admissible, but not for a particular quality);
Ohio: 1834, Wilson *v.* Runyan, Wright 652 (truth only); 1851, Bucklin *v.* State, 20 Oh. 18 (obscure); 1853, French *v.* Millard, 2 Oh. St. 50 (left undecided); 1854, Craig *v.* State, 5 Oh. St. 607 (truth); only 1875, Hillis *v.* Wylie, 26 Oh. St. 576 (same);
Oregon: Laws 1920, § 863 ("that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief", may be shown);
Pennsylvania: 1835, Gilchrist *v.* M'Kee, 4 Watts 380 (veracity only; a woman's character for chastity, excluded); 1903, Com. *v.* Payne, 205 Pa. 161, 54 Atl. 489 (general reputation excluded, even when coupled with reputation for veracity); 1904, Com. *v.* Williams, 209 Pa. 529, 58 Atl. 922 (preceding cases approved);
Philippine Islands: C. C. P. 1901, § 342 (like Cal. C. C. P. § 2051);
Porto Rico: Rev. St. & C. 1911, § 1389 (like Cal. C. C. P. § 1847); 1913, Camacho *v.* Balasquide, 19 P. R. 564, 579 (character as a prostitute, excluded);
South Carolina: 1833, Anon., 1 Hill 258 (O'Neall, J: "If the witness assailed is of general bad moral character, his general character in legal contemplation is a bad one in all respects"); 1848, Clark *v.* Bailey, 2 Strobh. Eq. 143, 144 (to impeach the defendant's answer; general bad character excluded, "as unwarranted by the principles and practice of this court");
Tennessee: 1835, State *v.* Coatney, 8 Yerg. 1 (complainant in bastardy, allowed to be impeached by bad character); 1858, Gilliam *v.* State, 1 Head 38 (general bad character, admissible); 1897, Merriman *v.* State, 3 Lea 393, 394 ("the whole moral character", allowed, but, *semble*, not specific character for unchastity); 1906, Powers *v.* State, 117 Tenn. 363, 97 S. W. 815 (homicide; defendant's character for violence, not admitted to impeach him as a witness; purporting to follow State *v.* Beckner, Mo., *supra*, but obscure as to the precise rule laid down);
Texas: 1854, Jones *v.* Jones, 13 Tex. 168, 176 (unchastity, in either sex, admissible): in the ensuing cases, character for veracity only is admitted, except as otherwise noted: 1859, Boon *v.* Weathered, 23 Tex. 675, 678 (quoted *supra*); 1864, Ayres *v.* Duprey, 27 Tex. 593, 599; 1879, Johnson *v.* Brown, 51 Tex. 65, 77; 1886, Kennedy *v.* Upshaw, 66 Tex. 442, 452, 1 S. W. 308 ("honesty" excluded); 1893, Carroll *v.* State, 32 Tex. Cr. 431, 24 S. W. 100 (general character, admitted); 1902, Hall *v.* State, 43 Tex. 479, 66 S. W. 783 (chastity, excluded; except that on cross-examination the witness herself may be asked as to being a common prostitute); 1921, Hays *v.* State, 90 Tex. Cr. 355, 234 S. W. 898 (woman's repute for chastity, not admissible);
Utah: 1889, U. S. *v.* Breedmeyer, 6 Utah 143, 146, 22 Pac. 110 (adultery; the female paramour's "bad character" for chastity, admit-

the inquiry is commonly confined to reputation as the mode of proof, and the question is thus more directly and clearly phrased for the contrast between general character and veracity-character. The positive opinion in favor of the latter in Chief Justice Swift's treatise, in 1810, had wide currency; and in one way or another, the great majority of jurisdictions finally gave adherence to that opinion. Those that withstand it are chiefly in the South and the Southwest.

§ 924. **Same: Character as to Specific Traits (Chastity, etc.) other than Veracity.** Where the principle is strictly maintained that veracity only is to be the subject of inquiry, no question can arise as to admitting character for any other trait. But in jurisdictions where bad general character may be used, the question must also arise whether some other specific vice or group of vices is not as significant as bad general character in indicating a degeneration of the truth-telling capacity. One of the objections, indeed, urged against the use of bad general character[1] is that it necessarily brings in its train a number of consequential difficulties such as this. The better opinion, and the one usually reached, is that in spite of logic's demands, policy requires that the line be drawn at bad general character, and that *no specific quality other than that of veracity* be considered:

1837, WALWORTH, C., in *Bakeman* v. *Rose*, 18 Wend. 146: "It is perfectly well settled, both in this State and in England, that the general character of the witness alone can be inquired into for the purpose of impeaching his credibility; — that is, what is his general character for truth and veracity, or whether his general character is such that he is not entitled to credit. But you cannot prove . . . that he has the reputation of being guilty of any particular class of crimes. You cannot therefore inquire whether the witness has the general reputation of being a thief, prostitute, murderer, forger, adulterer, gambler, swindler, or the like; although each and every of such offences, to a greater or less degree, impairs the moral character of the witness and tends to impeach his or her veracity"; TRACY, Sen.: "It has been pressed upon us with earnestness and eloquence that the condition of a public prostitute, being the most debased and demoralized state of human being that can be imagined, necessarily presupposes the absence of all moral principle, and especially that of regard for truth; and it is therefore contended that a common reputa-

ted); 1898, State *v.* Marks, 16 Utah 204, 51 Pac. 1089 (truth and veracity only, not honesty and integrity; here applied to a defendant as witness); Comp. L. 1917, § 7122 (character for "truth, honesty, or integrity");
Vermont: 1832, Morse *v.* Pineo, 4 Vt. 281 (truth only; excluding character as prostitute); 1835, State *v.* Smith, 7 Vt. 141 (same); 1843, Spears *v.* Forrest, 15 Vt. 435 (same); 1846, Crane *v.* Thayer, 18 Vt. 168 (veracity only); 1896, State *v.* Fournier, 68 Vt. 262, 35 Atl. 178 (same); 1905, State *v.* Stimpson, 78 Vt. 124, 62 Atl. 14 (rape under age; the woman's character as a prostitute excluded);
Virginia: 1816, Ligon *v.* Ford, 5 Munf. 10, 16 (general bad character, admissible); 1849, Uhl *v.* Com., 6 Gratt. 706, 708 (truth only; yet the witness, in saying whether he would believe on oath, may "take into consideration the whole moral character");
Washington: 1915, State *v.* Jackson, 83 Wash. 514, 145 Pac. 470 (subornation; "general reputation for immorality" of a woman witness, held admissible; following State *v.* Coella) 3 Wash. 99);
West Virginia: 1870, Lemons *v.* State, 4 W. Va. 755, *semble* (veracity only);
Wisconsin: 1858, Ketchingman *v.* State, 6 Wis. 426, 431 (truth only "commonly"); 1906, State *v.* Detwiler, 60 W. Va. 583, 55 S. E. 654 (rape; prosecutrix' character for chastity, not admitted to impeach credibility).

For the use of the woman's *character for chastity*, in *rape* and *bastardy*, compare §§ 62, 68, *ante*, and § 987, *post*.

§ 924. [1] As urged by Ellsworth, J., in the passage quoted *ante*, § 922.

tion of public prostitution necessarily includes a common reputation for falsehood. . . . If Courts had the power [to change rules of evidence], it might not be a very discreet exercise of it to attempt to gauge crimes and graduate a standard of vices and immoralities. Loathsome, deplorable, and even detestable as is a condition of public prostitution, it is not the only vice of a great kindred; theft, forgery, swindling, drunkenness, gambling, adultery, are also well allied; and if we undertake to determine that the reputation of one vice necessarily includes the reputation of another, it would be difficult to say when or where we could stop. But . . . [after noting the rule of the Roman and other laws] the common law in this respect certainly is founded on juster notions of human nature; for while it so far recognizes the affinity of vice as not to regard the testimony of a witness of bad moral character as above all exception, it rejects the conclusion that a person guilty of one immoral habit is necessarily disposed to practise all others. And seeing that the absolute exclusion of an immoral witness may operate more to the prejudice than to the advancement of justice, it recognizes that dictate of common sense which no theory can refute, that the natural love of truth, when combined with the fear of temporal punishment, is some restraint, even upon the most depraved, against the commission of gratuitous falsehood."

But a few Courts, restrained by no such considerations of policy, allow the use, not only of bad general character, but also of bad character for a specific trait, such as chastity. One result of this is the recurrence of speculative discussions upon such questions as whether a man's, or only a woman's, character for unchastity is relevant.[2] Another is that an attack on the personal character of the witness is available as a mere instrument of revenge for his opposing attitude, or as a threat for coercing the suppression of important opposing testimony. The trial is thus given indirectly a flavor of filth and rancor which is at once unnecessary and harmful to justice.

Logically, almost any specific trait might be invoked for the purpose of this attack; practically, the usage is confined to a few of the more disagreeable ones.[3]

[2] 1895, State *v.* Sibley, 131 Mo. 519, 33 S. W. 167 (Burgess, J., *pro:* "It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of a man's, predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for truth of the other. Thus in Bank *v.* Stryker, 3 Wheeler Cr. Cas. 332, it is said: 'Adultery has been committed openly by distinguished and otherwise honorable members [of the bar] as well in Great Britain as in our own country, yet the offending party has not been supposed to destroy the force of the obligation which they feel from the oath of office.' Dr. Johnson said, in discussing the difference of turpitude between lewdness in a man and in a woman, 'that he would not receive back a daughter because her husband, in the mere wantonness of appetite, had gone into the servant girl.' And so Macaulay said, respecting the weakness of Lord Byron for sexual pleasure, 'that it was an infirmity he shared with many great and noble men, — Lord Somers, Charles James Fox, and others.'" Gantt, J., *contra:* "It is important to get at the reason underlying the decision, and the Massachusetts Court put it upon the ground of the loss of moral principle. This testimony is admitted upon the ground that the prostitute, by her life of vice, has so impaired her moral sense that the obligation to speak the truth is no longer binding, or has become more or less lax. If this be true of the female, why not true of her habitual companions, and why, though there be degrees in the vice, may not a man's disregard of the laws of chastity, which compel his association with the prostitute, be shown as tending to prove a disposition to lightly regard the obligations of his oath. The rule only admits the evidence when it has ripened into a general reputation for the vice. For my part, I think it rests upon the same foundation whether the witness be male or female").

[3] The rulings are collected, for convenience, *ante*, § 923.

§ 925. **Same: Accused's Bad Character as Witness and as Party, distinguished.** The prosecution in a criminal case may not use the accused's bad character as evidence that he probably did the act charged, if the accused has not himself first attempted to use his good character in his exoneration (*ante*, §§ 57, 58). Moreover, even when that condition is fulfilled, both the defence and the prosecution may use only the character for the trait appropriate to the crime charged (*ante*, § 59). On the other hand, if the accused has taken the stand as a witness, the prosecution may impeach him as a witness (*ante*, § 890).

From these principles it follows that the prosecution, when thus *impeaching the accused as a witness*, may introduce his character for *veracity only*, except in those jurisdictions where impeachment is allowed to include general bad character or a specific bad trait; but that it may do this regardless of whether the accused has attempted to use his good character as relevant to his innocence.[1]

This distinction also becomes important where the accused by taking the stand has waived his privilege (*post*, § 2277).

§ 926. **Same: Use of Prior Convictions and other Instances of Misconduct.** In those jurisdictions in which veracity-character alone is allowed to be used to impeach, it would logically follow that when particular instances of misconduct are allowed to be used as throwing light on credibility — that is to say, conviction of crime, when shown by extrinsic evidence, and other misconduct, when brought out on cross-examination (*post*, §§ 980, 981), — only such instances should be used as are *relevant to show a lack of truthfulness* of disposition, — for example, forgery, cheating, and the like.

§ 925. [1] *Ala.* 1886, Dolan *v.* State, 81 Ala. 11, 18, 1 So. 707 (general character admissible, but "only to the extent it affected his credibility", and thus not character for turbulence); 1891, Mitchell *v.* State, 94 Ala. 68, 73, 10 So. 518 ("inquiry into his general character", not restricted to veracity, is proper); 1891, Jones *v.* State, 96 Ala. 102, 105, 11 So. 399 (similar); *Ark.* 1913, Paxton *v.* State, 157 Ark. 396, 157 S. W. 396 ("general reputation" admitted); *Cal.* 1896, People *v.* Hickman, 113 Cal. 80, 45 Pac. 175 (allowing against a defendant an inquiry as to the statutory qualities); 1898, People *v.* Prather, 120 Cal. 660, 53 Pac. 259 (same); 1898, People *v.* Silva, 121 Cal. 668, 54 Pac. 146 (same); *Colo.* 1900, Herren *v.* People, 28 Colo. 23, 62 Pac. 833 (character as witness only, allowable); *Fla.* 1907, Clinton *v.* State, 53 Fla. 98, 43 So. 312; *Ind.* 1889, Keyes *v.* State, 122 Ind. 527, 531, 23 N. E. 1097 (general bad character allowed); *Ky.* 1888, Lockard *v.* Com., 87 Ky. 201, 204, 8 S. W. 266 (similar); 1895, Barton *v.* Com., — Ky. —, 32 S. W. 172 (similar); 1901, Calhoon *v.* Com., — Ky. —, 64 S. W. 965 (character as witness only, allowed; compare the Kentucky rule *ante*, § 923); *La.* 1903, State *v.* Casey, 110 La. 712, 34 So. 746; *Mich.* 1904, People *v.* Albers, 137 Mich. 678, 100 N. W. 908 (perjury, an offer of defendant's character for veracity, held improperly excluded, though the defendant had not taken the stand, because it was relevant to the charge of perjury; although the offering counsel did not specify that it was for the latter purpose); *N. Y.* 1908, People *v.* Hinksman, 192 N. Y. 421, 85 N. E. 676 (rule applied to exclude testimony of bad reputation in rebuttal, after the defendant had admitted a prior conviction and protested that he had "been a good boy ever since"); *N. C.* 1897, State *v.* Traylor, 121 N. C. 674, 28 S. E. 493 (general character, allowed); 1908, State *v.* Cloninger, 149 N. C. 567, 63 S. E. 154 (rule applied to specific acts brought out on cross-examination), 1921, State *v.* Pearson, 181 N. C. 588, 107 S. E. 305 (liquor offence; defendant having testified, witnesses to his character for truth and veracity were not admitted, the State not having impeached his character as a witness, explaining State *v.* Foster, 130 N. C. 675).

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

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

Entire consistency, however, is not shown in thus carrying out the strict principle. In the first place, conviction of crime is everywhere allowed to be used as affecting credibility of character, and while distinctions are sometimes made as to the grade of the crime, little effort is made to employ those crimes only which directly involve lack of honesty (*post*, § 980). In the second place, a few Courts, in dealing with the use of specific misconduct on cross-examination, permit the use of such misconduct only as directly bears on credibility, *i.e.* truthfulness; but most Courts make no attempt to do this, although logic and policy alike require such a restriction (*post*, § 982).

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

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

The logical analysis, then, is: (1) Present character, at the time of speaking, is evidence upon the probability of sincere speaking; and (2) character at some prior time, more or less distant, is evidence to prove the premise (*i.e.* present character) of the first inference. Thus the source of possible confusion appears. For if we were to insist upon a categorical answer to the question, "May character at a prior time be used to show that the witness is

probably not speaking the truth?", the answer must be a paradox. Prior character is *not* usable as showing directly that the witness is now speaking truthfully or the reverse; yet prior character *is* admissible to show present character, and the latter to show the proposition desired. Confronted by such a paradox, many Courts, not seeing the explanation, have thought themselves obliged to accept one or the other answer unqualifiedly; and the result has naturally been some confusion and error of principle.

§ 928. **Same: the Competing Rules as to Prior Character.** What, then, should be the rule as to the use of character at a prior time? Three different rules find vogue:[1]

§ 928. [1] The following citations include also the rulings upon an *accused's* prior character (*ante*, § 60), which rest upon precisely the same principle;
Federal: 1859, Teese *v.* Huntington, 23 How. 2, 14 (prior character admissible; but the time must not be "so remote from the transaction involved in the controversy as thereby to become entirely unsatisfactory and immaterial"); *Alabama:* 1854, Martin *v.* Martin, 25 Ala. 210 (in another place, whence the person had shortly before removed, admitted); 1878, Kelly *v.* State, 60 Ala. 19 (character in a different place, three years before, admitted); 1895, Yarborough *v.* State, 105 Ala. 43, 16 So. 758 (character years before, in a different town, admitted); 1895, Prater *v.* State, 107 Ala. 26, 18 So. 239 (character in a town six miles away where the witness formerly lived; admitted); 1919, Johnson *v.* State, 203 Ala. 30, 81 So. 820 (accused's general bad character may be shown up to the time of the alleged offence, but his veracity character up to the time of trial);
Arkansas: 1874, Snow *v.* Grace, 29 Ark. 131, 136 (within the discretion of the trial Court as to surprise and remoteness; here character seven years before in another place was received); 1877, Lawson *v.* State, 32 Ark. 220, 222 (same; character two years before in another place, held improperly rejected);
California: 1904, People *v.* Nunley, 142 Cal. 441, 76 Pac. 45 (reputation in a place twelve miles away, two years before, where he had lived, admitted in rebuttal); 1920, Akers' Guardianship, 184 Cal. 514, 194 Pac. 706 (reputation of the mother in another place and at a remote time, admissible in trial Court's discretion);
Connecticut: 1846, Caldwell *v.* State, 17 Conn. 467, 472 (bawdy-house; character at a prior time, admitted);
Florida: 1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (character some years before, admitted on the facts);
Georgia: 1888, Watkins *v.* State, 82 Ga. 231, 8 S. E. 875 (former character admissible subject to discretion; here a character eight years before in Georgia, the witness having been since absent, admitted);
Idaho: 1916, Boeck *v.* Boeck, 29 Ida. 639, 161 Pac. 576 (trial held in July 1914, and deposition of K. taken in February 1914; questions as to the reputation of H. for veracity, H. being a witness called later at the trial, excluded, as improperly "impeaching in anticipation"; the ruling is groundlessly wrong, and no authority is cited; an index of the weight of this ruling is seen in the opinion's naive statement that "the right to impeach a witness and the methods of impeachment are statutory"! Shades of Scarlett and O'Connell! who tanned the testimonial hides for a long lifetime without the aid of any statute);
Illinois: 1855, Holmes *v.* Stateler, 17 Ill. 453 (character in another State than his present residence, for a period of ten years, ending eight years before the trial, admitted; "if the witness did so reform, it was quite as easy for the plaintiff to prove that fact as for the defendant to prove that his character still continued bad"); 1877, Blackburn *v.* Mann, 85 Ill. 222 (preceding case approved); 1897, Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465 (reputation at a place left by the witness four years before, admissible); 1910, Kennedy *v.* Modern Woodmen, 243 Ill. 560, 90 N. E. 1084 (character ten years before the trial in another town, admitted);
Indiana: citations from this jurisdiction on this point may be ignored by other Courts; during more than sixty years the rulings vacillated: 1841, Walker *v.* State, 6 Blackf. 3 (at time of trial only); 1850, King *v.* Hersey, 2 Ind. 403 (good character before suit begun, proved in rebuttal of bad character after suit begun); 1851, Rucker *v.* Beaty, 3 Ind. 71 (former bad character not admissible, except to corroborate a bad one at time of trial); 1862, Rogers *v.* Lewis, 19 Ind. 405 (same as Walker's Case); 1863, Aurora *v.* Cobb, 21 Ind. 510 (same); 1866, Abshire *v.* Mather, 27 Ind. 381, 384 (at time of trial only, though there may be exceptions, the need of which the impeacher must show; here character five years before was excluded); 1870, Chance *v.* R. Co., 32 Ind. 475 (like Walker's Case); 1873, Indianapolis P. & C. R. Co. *v.* Anthony, 43 Ind. 192, *semble* (same); 1874, Stratton *v.* State, 45 Ind. 468, 472 ("it has never been held that the testimony must have reference

to that exact time [of his testimony]"; so that evidence is to be received "of his character within a reasonable time before the trial", as pointing forward to his character at the time of testifying, which is the objective point; here admitting character two years before in another region); 1877, Rawles *v.* State, 56 Ind. 439 (such evidence "should have reference to . . . the time he testified"; hence a question not so specifying the time was held improper); 1879, Louisville N. A. & C. R. Co. *v.* Richardson, 66 Ind. 50 (admitting character six weeks before the trial, the witness having then removed elsewhere); 1879, Smock *v.* Pierson, 68 Ind. 405 ("must relate to the time the witness is testifying"); 1882, Memphis & O. R. P. Co. *v.* McCool, 83 Ind. 392 (where bad reputation at the time of the trial in E. had been shown, further evidence of bad reputation two or three years before in another town was admitted; the preceding conflict in rulings being noted); 1888, Pape *v.* Wright, 116 Ind. 509, 19 N. E. 459 ("a time reasonably near the time of the examination"; here reputation two months before was admitted); 1890, Sage *v.* State, 127 Ind. 15, 27, 26 N. E. 667 (admitting character seven years before, the witness having been in the meantime in jail at another place; yet the general principle is treated as doubtful and unsettled); 1897, Hank *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465 (after evidencing present character, character at another place, fifteen months before, was admitted; the rule allowing character at the time of the trial "or somewhere reasonably near"); 1902, Lake Lighting Co. *v.* Lewis, 29 Ind. App. 164, 64 N. E. 35 (character "within a reasonable time before the trial" is admissible, the trial Court to determine); 1918, Bills *v.* State, 187 Ind. 721, 119 N. E. 465 (seduction; the woman's repute 12 years before trial, excluded);

Iowa: 1887, Hanners *v.* McClelland, 74 Ia. 318, 322, 37 N. W. 389 (reputation in another place a few miles away, before and after the time in question, admitted); 1889, State *v.* Potts, 78 Ia. 659, 43 N. W. 534 (reputation in another place five years before, excluded, the witness having resided continuously for that period at the place of trial, and his bad character there being also offered; *semble*, that character at a former time and other place is admissible only where the residence at the time of trial has been brief); 1898, Schoep *v.* Ins. Co., 104 Ia. 356, 73 N. W. 825 (in the absence of permanent residence, reputation at a place lived in a year before for eight months, received); 1900, McGuire *v.* Kenefick, 111 Ia. 147, 82 N. W. 485 (reputation in another town seven years before, not admitted; otherwise if he had only recently acquired residence at his present place); 1902, State *v.* Prins, 117 Ia. 505, 91 N. W. 758 (reputation in another city several years before, admitted on the facts); 1909, Brown's Will, 143 Ia. 649, 120 N. W. 667 (reputation in another town five years before admitted);

Kansas: 1878, Fisher *v.* Conway, 21 Kan. 18, 25, *semble* (character at the time of trial only); 1891, Coates *v.* Sulan, 46 Kan. 341, 343, 26 Pac. 720 (character at C., whence he had removed to his present place less than a year before, admitted; "there is no arbitrary iron-clad rule in relation to such evidence; sometimes it may be sought some distance away both in point of time and space"); 1906, State *v.* Simmons, 74 Kan. 799, 88 Pac. 57 ("No hard and fast rule" can be laid down);

Kentucky: 1869, Young *v.* Com., 6 Bush 317 (character six years before, in another county, excluded; the time of testifying being the true standpoint); 1874, Marion *v.* Lambert, 10 Bush 295 (no limitation to character at the time of the trial); 1879, Mitchell *v.* Com., 78 Ky. 219 (anterior bad character elsewhere, admitted only when present character at the place is unavailable or is 'prima facie' shown bad); 1895, Turner *v.* King, 98 Ky. 253, 32 S. W. 941 (must not be too long before; reputation for chastity sixteen years before, excluded); 1905, Craft *v.* Barron, 121 Ky. 129, 88 S. W. 1099 (character in Kentucky, ten years before, and in California at the time of trial, admitted in the Court's discretion); 1921, Steele *v.* Com., 192 Ky. 223, 232 S. W. 646 (homicide committed 14 years before; reputation 14 years before of certain women witnesses, also involved in defendant's conduct, held improperly admitted; unsound);

Louisiana: 1893, State *v.* Taylor, 45 La. An. 605, 609, 12 So. 927 (character twelve miles away, five years before, excluded);

Maine: 1912, State *v.* Albanes, 109 Me. 199, 83 Atl. 548 (accused's character in a town 10 years ago, held not improperly excluded in discretion, character in the town of residence for the 10 years preceding the homicide having been admitted);

Massachusetts: 1863, Parkhurst *v.* Ketchum, 6 All. 408 (general bad character, ten years before, admitted); 1867, Com. *v.* Billings, 97 Mass. 405 (admitting character a year and a half previous);

Michigan: 1856, Webber *v.* Hanke, 4 Mich. 198, 204 (usually character in his present residence must be asked; the discretion of the trial Court may relax this general rule; here the character five years before in Europe was held improperly received, the witness having lived continuously in this country since that time); 1874, Hamilton *v.* People, 29 Mich. 173, 188 (where domicil has changed, reputation in both places within a reasonable time is admissible; other possibilities obscurely mentioned); 1875, Keator *v.* People, 32 Mich. 485 (character at another place four years before the trial, admitted on the circumstances, the witness having led a roving life); 1907, People *v.* Mix, 149 Mich. 260, 112 N. W. 907 (reputation in two near-by towns for a period more than two years prior, admitted, approving the text above, and distinguishing Webber *v.* Hanke);

Minnesota: 1905, State v. Bryant, 97 Minn. 8, 105 N. W. 974 (reputation not allowed to be proved, in the trial Court's discretion, by one who had known the witness since youth, but had not heard his reputation mentioned for four years);
Mississippi: 1894, Norwood & B. Co. v. Andrews, 71 Miss. 641, 16 So. 262 (bad character in a neighborhood whence the witness had removed two years before, admitted; see quotation *supra*);
Missouri: 1881, Wood v. Matthews, 73 Mo. (character at the time of trial only; following the early Indiana rulings; here excluding character three years before); 1887, Waddingham v. Hulett, 92 Mo. 533, 5 S. W. 27, *semble* (same principle); 1893, State v. Pettit, 119 Mo. 410, 414 (character of the deceased more than ten years before, excluded); 1898, State v. Summar, 143 Mo. 220, 45 S. W. 254 (character at the time of trial is the material thing; though it may be stated as ranging back before that time; here, more than three years before was held too remote on the facts); 1900, State v. Miller, 156 Mo. 76, 56 S. W. 907 (not to be confined "to the immediate present"); 1905, State v. Shouse, 188 Mo. 473, 87 S. W. 480 (excluding the accused's character in Tennessee seven or eight years before); 1909, Lindsay v. Bates, 223 Mo. 294, 122 S. W. 682 (character in a place where witness had always lived up to three years before trial, admitted); 1920, Ulrich v. Chicago B. & Q. R. Co., 281 Mo. 697, 220 S. W. 682 (reputation in an adjacent place where witness formerly lived, admitted);
Nebraska: 1896, Davison v. Cruse, 47 Nebr. 829, 66 N. W. 823 (bastardy proceedings; chastity before probable period of gestation excluded); 1901, Faulkner v. Gilbert, 61 Nebr. 602, 85 N. W. 843 (reputation in another county several years before, excluded);
New Hampshire. 1861, State v. Forschner, 43 N. H. 89 (it was conceded that a witness' character before trial could be received as indicating character at the time of trial, since "a state of facts proved to have once existed is presumed to continue"; but the character for chastity of the prosecutrix in a rape charge must be her character at the time of the alleged rape, and not any later, since "the bad character a person may have now is not assumed to have always existed"; but it is not clear whether the Court, in promulgating this illogical doctrine, rest solely on the above principle; for they also invoke the doctrine that a reputation formed 'post litem motam' is untrustworthy; *post*, § 1618);
New Jersey: 1898, Shuster v. State, 62 N. J. L. 521, 41 Atl. 701 (reputation in another place eighteen years before; excluded in trial Court's discretion); 1914, State v. Quinlan, 86 N. J. L. 120, 91 Atl. 111 (accused's character in another city two to four years ago, held not improperly excluded);
New Mexico: 1915, State v. Perkins, 21 N. M. 135, 153 Pac. 258 (witness' character two years before in another place, admitted);
New York: 1838, People v. Abbot, 19 Wend. 200 (prior character admissible; see quotation *supra*); 1842, Losee v. Losee, 2 Hill 613 (merely holds that the time of testifying is to be the starting-point, and does not declare that the character at that time cannot be shown by the character at a former time); 1847, Sleeper v. Van Middlesworth, 4 Den. 429 (prior character admissible; see quotetion *supra*); 1865, Graham v. Chrystal, 2 Abb. App. 265 (admitting character eight or ten years before); 1907, People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718 (Sleeper v. Van Middlesworth, *supra*, followed);
North Carolina: 1878, State v. Lanier, 79 N. C. 622 (character two or three years before, in another town, admitted);
Ohio: 1877, Hamilton v. State, 34 Oh. St. 82 (character two years before, the witness having ever since been in prison, admitted);
Pennsylvania: 1850, Morss v. Palmer, 15 Pa. St. 51, 56 (character more than ten years before, in another county, admitted in rebuttal); 1897, Smith v. Hine, 179 Pa. 203, 36 Atl. 222, *semble* (character at the time of trial only, and not prior to that time); 1898, Miller v. Miller, 187 Pa. 572, 41 Atl. 277 (character four years before, excluded); 1916, Hopkins v. Tate, 255 Pa. 56, 99 Atl. 210 (libel on the character of an alleged political candidate; his bad repute for honesty in another place 11 years before, without evidence of his repute at the time of publication, excluded);
Rhode Island: 1896, Vaughn v. Clarkson, — R. I. —, 34 Atl. 989 (character five years before, in England, excluded);
Tennessee: 1896, Fry v. State, 96 Tenn. 467, 35 S. W. 883 (character in another State six years before, held not too remote, as tending to show character at the time of the alleged offence);
Texas: 1864, Ayres v. Duprey, 27 Tex. 593, 599 (left undecided); 1879, Johnson v. Brown, 51 Tex. 65, 75 (a charge referring the witness' credibility to the time of the act spoken of, not the time of trial, held properly refused); 1886, Mynatt v. Hudson, 66 Tex. 66, 17 S. W. 396 (admitting bad reputation in a different county four years before where he was a permanent resident); 1896, Brown v. Perez, 89 Tex. 282, 34 S. W. 725 (see quotation *supra*);
Vermont: 1858, Willard v. Goodenough, 30 Vt. 397 (see quotation *supra*); 1882, Amidon v. Hosley, 54 Vt. 25 (same rule);
Wisconsin: 1902, State v. Chittenden, — Wis. —, 88 N. W. 588 (under a statute providing for licenses to graduates of a "reputable" dental college, the reputation of a college one year before the applicant's graduation may be sufficient); 1903, State v. Knight, 118 Wis. 473, 95 N. W. 390 (reputation at another town two years before, admitted; good opinion by Dodge, J.).

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

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

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

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

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

1858, BARRETT, J., in *Willard* v. *Goodenough*, 30 Vt. 397: "It is well settled that the question should be 'What *is* the general character or reputation for truth?' . . . It may be proper under some circumstances — as in case an impeaching witness should answer the question thus put, that he does not know what the *present* character is, or that he has not heard it talked about *recently*, or in some other way implying his knowledge of former bad character — to inquire of him as to his knowledge of it at former periods. But we think this should be done only as following upon such a kind of answer to the questions above indicated. The *present* character is the point in issue. What the characters had formerly been is relevant only as it blends with the continuous web of life and tinges its present texture."

1896, BROWN, J., in *Brown* v. *Perez*, 89 Tex. 282, 34 S. W. 725 (leaving it largely to the discretion of the trial Court): "It may safely be said that where the evidence of a witness is such that it fairly raises the issue of his veracity, or where the testimony of other witnesses relating to his character at or near the time of the trial tends to impeach his character for truth and veracity, or in case the person whose character is in issue has removed beyond the jurisdiction of the court, or has been transient, so that he has no fixed and known residence for a time sufficient to make a reputation for truthfulness, resort may be had to evidence of the reputation of such witness at the place of his former residence, and at a time remote from the time of trial. No definite rule can be stated which will apply to all cases."

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

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

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

§ 929. **Same: Character 'post litem motam'; Effects of Hearsay Rule.** So far as the foregoing theory is concerned, it is immaterial whether the inference is from prior or subsequent character; that inference, like its general type, the argument from prior or subsequent condition (*ante*, §§ 225, 233, 241), stands on precisely the same footing in both cases. If character in 1875 indicates probatively the future character in 1877, then by the same token character in 1877 indicates the past character in 1875. Moreover, witness-character must always, except in one case, involve the argument from prior character exclusively, *i.e.* prior to the time of his testifying; the excepted case being that in which the impeaching witness predicates the character as subsequent to the moment of the other's testimony, and this practically can only be where the impeached testimony was given by deposition before trial begun. The fact that the character offered in evidence is in this single instance a subsequent character does not affect its relevancy at all. Thus,

the mere circumstance that the character offered is character after trial begun does not affect its admissibility; first, because it will usually still be prior character (*i.e.* prior to the time of testimony), and, next, because in the single case when it is really subsequent, its relevancy is the same.

But when the emphasis is upon the *modes of evidencing* character, a different question may arise. If reputation is the kind of evidence chosen, and if the reputation is offered as of a time after trial begun, this evidence must face the Hearsay rule and its cardinal principle that the hearsay offered must have been uttered under impartial conditions. Whether a reputation formed 'post litem motam' is trustworthy, from that point of view, may be a matter for hesitation; and we thus find some Courts declining to admit reputation-evidence of character when the reputation is stated as of a time after trial begun or controversy aroused. But this is distinctly and solely a question of the Hearsay rule, and has nothing to do with the present principle; it is treated *post*, § 1618, under that head. Nevertheless the two have sometimes been confused, and character after trial begun has been excluded as if a rule of Relevancy, and not of Hearsay, led to this.

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

Difference of place, however, does enter the question from two other points of view. (1) First, character in another place must of course always be character at another time; and hence, if at the present (and therefore primarily important) time he is at Millville, his character when he was at Sierra immediately raises the question whether *character at a prior time* is admissible. But it is here the priority of time, and not the difference of place, that raises the question of relevancy; the difference of place is merely an immaterial incident. Wherever prior character at another place is offered, the circumstance of priority of time is the material one; this has been examined *ante*, § 928. (2) From the point of view of the Hearsay rule and its exception for Reputation, the place becomes important. If A lives at Millville, and has never been in Sierra, one hundred miles away, it is difficult to see how a trustworthy reputation about his character can arise in the latter place; for *reputation must arise in the community of residence,* where he moves and exhibits his conduct. Hence, under the Hearsay exception for Reputation as to Character, various questions arise as to the place from which an admissible reputation must be offered (*post*, §§ 1615, 1616). These, however, have nothing to do with the present principle, namely, the conditions under which actual character is relevant to show the probability of truth-telling, but with an entirely different one, namely, in proving this actual character, by reputation, the conditions under which such hearsay will be admitted.

B. Insanity, and Other Organic Incapacity

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

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

Since the theory of this evidence is that any defect of capacity, insufficient to exclude, and yet involving less than the normal testimonial capacity, should legitimately discredit the witness, carrying whatever weight it may have in a given case, the only proper limit upon such evidence would seem to be as follows: Any trait importing in itself a defective power of observation (at the time of the matter testified to), or of recollection, or of communication, is admissible, provided the power is substantially defective as judged by the average standard of faculties.

What specific defects, then, may be shown for this purpose?[1] It must be remembered (as noted *ante*, § 478) that the faculties of Observation (Knowledge), Recollection, and Communication are all called into play in every piece of testimony; and hence a defect affecting any one of these three faculties at the time it is required would be relevant.

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

§ 933. **Intoxication.** Intoxication, if it is of such a degree as to deserve the name, involves a numbing of the faculties so as to affect the capacity to observe, to recollect, or to communicate; and is therefore admissible to impeach:[1]

§ 931. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 163–243.

§ 932. [1] *Eng.* The rulings are few, but the principle is unquestioned: 1692, Duke of Norfolk's Divorce, 12 How. St. Tr. 912 (insanity); 1775, Fowke's Trial, 20 How. St. Tr. 1175 ("he is not a sensible man, and yet not quite an ideot"); *U. S. Ala.* 1877, Allen *v.* State, 60 Ala. 19 (that a weak-witted negro-witness entertained certain superstitions was held not to bear on his powers of observation); *Ark.* 1918, Mell *v.* State, 133 Ark. 197, 202 S. W. 33 (assault with intent to rape; the woman's insane delusions, admissible); *Conn.* 1805, Tuttle *v.* Russell, 2 Day 202 (insanity at time of event); 1859, Holcomb *v.* Holcomb, 28 Conn. 179 (insanity); *Minn.* 1895, State *v.* Hayward, 62 Minn. 474, 65 N. W. 63 (this evidence is not merely for the judge on the preliminary question of competency, but goes to the jury to affect credibility); *N. H.* 1879, Free *v.* Buckingham, 59 N. H. 219, 225 (cross-examination of the plaintiff as to whether the spirit of Daniel Webster was present aiding him in the trial, held allowable or not, in discretion); *N. Y.* 1921, Ellarson *v.* Ellarson, Sup. App. Div., 190 N. Y. Suppl. 6 (questions as to being in an insane hospital, etc., allowed); 1921, Jamison *v.* Corn Exchange Bank, Sup. App. T., 191 N. Y. Suppl. 297 (action for a balance of $227, in a savings account, defendant disputing the amount only; to discredit the plaintiff's testimony, defendant read the record of her commitment to the Manhattan State Hospital for the insane, containing the following sentence: "The form of insanity from which she suffered is one from which recovery of the individual may be expected, but it is impossible to prevent recurrence of the disease. The disease occurs in those who are unstable mentally, and one typical attack like this woman had indicates that others are to be repeated in the future under stress or strain, but even without any apparent reason another attack may be brought about"; held, improper; the ruling is unsound); *Vt.* 1862, Fairchild *v.* Bascomb, 35 Vt. 417 (a disease of the brain some time before the trial, affecting Observation and Recollection).

Contra: 1912, People *v.* Enright, 256 Ill. 221, 99 N. E. 936 (an astonishing decision).

Ancestral or collateral insanity is admissible only on the conditions noted *ante*, § 232: 1896, State *v.* Hayward, 62 Minn. 474, 65 N. W. 63 (ancestors' insanity, plus evidence of temporary and different prior illusions, was held, even taken together, to be inadmissible to impeach a witness unless direct testimony of his own insanity nearer the time of the events was offered).

For the *mode of evidencing insanity*, see *ante*, §§ 227–233, *post*, §§ 993, 1671.

§ 933. [1] *Eng.* 1794, Walker's Trial, 23 How. St. Tr. 1157 ("You do not know how much liquor he had drunk?" "No, I do not." "Do you know whether he had drunk any?" "He had had a little, but he was quite sensible; he knew what he was saying and doing." "Just as much as he knows now?" "He was not half so much in liquor then as he is now");
U. S. Ala. 1905, Morris *v.* State, — Ala. —, 39 So. 608 (at the time of the affray); *Ark.* 1878, Lester *v.* State, 32 Ark. 730 (a confession); *Cal.* 1913, People *v.* Salladay, 22 Cal. App. 552, 135 Pac. 508 (intoxication for a period of 16 days, including the day in controversy, admissible); *Conn.* 1805, Tuttle *v.* Russell, 2 Day 202; *Ga.* 1905, Sharpton *v.* Augusta & A. R. Co., — Ga. —, 51 S. E. 553 (intoxication at the time of the injury,

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

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

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

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

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

Accordingly, the *morphine* or other *drug habit,* in that it may have had such

admitted); *Ida.* 1915, State *v.* Tilden, 27 Ida. 262, 147 Pac. 1056 (on cross-examination); *Ill.* 1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (intoxication at the time of testifying may be shown); *Ind.* 1908, Pittsburgh C. C. & St. L. R. Co. *v.* O'Conner, 171 Ind. 686, 85 N. E. 969; *Iowa:* 1879, State *v.* Feltes, 51 Ia. 496, 1 N. W. 755; 1883, State *v.* Costello, 62 Ia. 407, 17 N. W. 605; 1894, State *v.* Nolan, 92 Ia. 491, 61 N. W. 181; *Mass.* 1857, Com. *v.* Howe, 9 Gray 112; 1861, Com. *v.* Fitzgerald, 2 All. 297; *Mich.* 1871, Strang *v.* People, 24 Mich. 1, 7; *Minn.* 1881, State *v.* Grear, 28 Minn. 426; *Mont.* 1918, Herzig *v.* Sandberg, 54 Mont. 538, 172 Pac. 132' (plaintiff-witness injured by defendant's automobile; the witness' intoxication at the time of the injury, admitted); *Nebr.* 1894, Willis *v.* State, 43 Nebr. 102, 61 N. W. 254; *N. Y.* 1862, Jefferds *v.* People, 5 Park. Cr. C. 547; *N. C.* 1893, State *v.* Rollins, 113 N. C. 722, 732, 18 S. E. 394; *Pa.* S. 1823, Brindle *v.* M'Ilvaine, 10 S. & R. 282, 285, *semble; S. C.* 1895, State *v.* Rhodes, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306; *Tenn.* 1845, Fleming *v.* State, 5 Humph. 564; *Tex.* 1890, International & G. N. R. Co. *v.* Dyer, 76 Tex. 159, 13 S. W. 377 (asked on cross-examination); *Wis.* 1895, Mace *v.* Reed, 89 Wis. 440, 62 N. W. 186.

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

[2] 1846, Rector *v.* Rector, 8 Ill. 105, 117 (intemperance, admitted); 1904, Woods *v.* Dailey, 211 Ill. 495, 71 N. E. 1068 (cumulative evidence of intemperate habits, here excluded); 1849, Thayer *v.* Boyle, 30 Me. 475 (here treated as a question of character, veracity-character alone being admissible); 1903, State *v.* Castle, 133 N. C. 769, 46 S. E. 1 (that the accused, who testified, "drank liquor", excluded, the proof not relating to the time of the homicide or of testifying); 1850, Hoitt *v.* Moulton, 21 N. H. 586, 591 (intemperate habits, excluded, as veracity-character alone is admissible); 1898, Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165 (habitual intoxication during a given month, admitted to show intoxication on a certain day of that month).

an effect, should be received.[1] An *illness* at the time of observing or narrating may also be significant,[2] as well as the condition of a *dying declarant*.[3] A *defect of speech* may detract from the weight of testimony communicated under that disadvantage.[4]

An impairment of *memory* caused by *disease* or by *old age* or *idiocy* stands on the same footing, and should be admissible.[5] So also a subjection to *hypnotism*, at the time of observing or of narrating, or in the interval.[6]

§ 934. [1] The Courts have not yet all gone so far: 1914, Wilson, alias Willard, *v.* U. S., 232 U. S. 563, 34 Sup. 347 (use of morphine in general and during the trial, admitted); *Ga.* 1858, McDowell *v.* Preston, 26 Ga. 535 (evidence of general mental impairment or of temporary mental affection by laudanum, admissible); *Ida.* 1916, State *v.* Fong Loon, 29 Ida. 248, 158 Pac. 233 (whether a Chinese witness was an "habitual user of opium", allowed; Budge, J.: "habitual users of opium, or other like narcotics, become notorious liars", quoting a treatise on medical jurisprudence; "the capacity of a witness to observe and to receive accurate impressions, and to correctly relate them, also his power and inclination to be truthful, are all subjects which go to the credibility of a witness"; citing the above text with approval); *Ind. Terr.* 1904, Williams *v.* U. S., 6 Ind. Terr. 1, 88 S. W. 334 (use of cocaine; excluded, unless the witness is under its influence when examined, or is expressly shown to be affected in his faculties); *Ia.* 1898, Botkin *v.* Cassady, 106 Ia. 334, 76 N. W. 723 (taking morphine habitually, excluded); *Minn.* 1903, State *v.* King, 88 Minn. 175, 92 N. W. 965 (that a witness was a confirmed opium-eater, and that the use of opium "renders the user unreliable", excluded); *Mont.* 1895, State *v.* Gleim, 17 Mont. 17, 41 Pac. 998 (excluded, unless the witness was under its influence at the time of the events or of the testimony or unless it impaired her recollection); *N. Y.* 1893, People *v.* Webster, 139 N. Y. 73, 86, 34 N. E. 730 (that the witness was an habitual opium-eater at the time of the events, admitted); *Okl.* 1909, Cannon *v.* Terr., 1 Okl. Cr. 600, 99 Pac. 622 (that the witness was a "dope fiend"; ruling not clear); *Tenn.* 1890, Franklin *v.* Franklin, 90 Tenn. 49, 16 S. W. 557 (that the witness "had carried the use of morphine and whiskey to such excess as to impair his mind and affect his moral character"); *Wash.* 1895, State *v.* Robinson, 12 Wash. 491, 41 Pac. 884 (a question as to the effect upon the mental faculties was regarded as proper, but not a question as to the effect upon the witness' veracity); 1915, State *v.* Schuman, 89 Wash. 9, 153 Pac. 1084 (policeman levying tribute on prostitute; that complaining witness used cocaine, etc., excluded, with expert testimony that a cocaine user "loses the power to distinguish truth from falsehood"; unsound; the opinion shows no appreciation of modern science); 1918, State *v.* Smith, 103 Wash. 267, 174 Pac. 9 (illegal sale of morphine; medical testimony as to the effect of morphine upon the mental condition of an addict testifying for the prosecution, admissible).

[2] 1878, State *v.* Brown, 48 Ia. 384 (illness at the time of confession); 1905, Mathison *v.* State, 87 Miss. 739, 40 So. 801 (near-sightedness of an eye-witness to a homicide); 1872, State *v.* Matthews, 66 N. C. 113 (a woman had made a confession shortly after a childbirth).

[3] 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; and cases cited *post*, §§ 1446, 1451.

[4] 1882, Quinn *v.* Halbert, 55 Vt. 228 (the witness could merely nod the head).

[5] 1833, People *v.* Genung, 11 Wend. 18 (that the witness was "an old man, intemperate, and his mind and memory very much impaired"); 1876, Isler *v.* Dewey, 75 N. C. 466 ("that his memory is weak naturally or has been impaired by disease or age"); 1878, Lord *v.* Beard, 79 N. C. 12 (old-age paralysis); 1920, Bouldin *v.* State, 87 Tex. Cr. 419, 222 S. W. 555 (robbery; the defendant, on the theory that the prosecuting witness' story was the result of a disordered mind, was allowed to introduce evidence that he was feeble-minded, and that his mother was an idiot).

Contra: 1858, Merritt *v.* Merritt, 20 Ill. 65, 80 (that a witness' memory was impaired by illness, excluded); 1921, State *v.* Driver, 88 W. Va. 479, 107 S. E. 189 (rape under age on A. B.; to show A. G. to be a female pervert with a tendency to lie about sexual attempts, defendant moved before trial for a medical commission, and also on the trial offered the opinion of two psychological experts who had heard the testimony of A. G. and the other witnesses; both motion and offer were rejected; the experts were however allowed to describe the traits of a defective and female sexual liar; the opinion is of the ultra-conservative sort, which believes that the traditional methods contain all wisdom).

Not decided: 1858, Carpenter *v.* Dame, 10 Ind. 125, 130 (that a deponent was "not of sound memory", spoken of by the Court as "a weakness in a given faculty"; left undecided).

[6] 1905, State *v.* Exum, 138 N. C. 599, 50

§ 935. **Individual Grades of Capacity to Observe or Remember, as discoverable by Psychologic Science.** Ordinary experience in human nature has not furnished us hitherto with generalizations upon any of these features of testimonial capacity except the abnormal ones. The variations in normal persons have not been detectible by ordinary methods of observation available to the lay witness. The fact, for example, that a person testifying is endowed with a less retentive memory than other persons falls within that range of average variations which constitutes normality. Its presence has been left to the cross-examiner to detect, in judicial practice hitherto. No doubt the line may be sometimes hard to draw, but the distinction of principle is clear between that general variation of all powers which would be found in any given number of healthy persons, and that specific impairment which, when associated with disease or with other extensive mental derangement, marks the person as abnormal:[1]

1864, DAY, J., in *Bell* v. *Rinner*, 16 Oh. St. 46: "The question presented by the record is whether the credibility of a competent witness may be impeached by general evidence that the witness is not possessed of ordinary intelligence or powers of mind. It would not only be novel in practice, but would be entirely impracticable, to permit the parties on the trial of a case to go into general proof as to the strength of the mental capacity of the several witnesses. It might lead to as many collateral issues as there are witnesses, and thus divert the minds of the triers from the substantial issues of the case. Moreover, if it be conceded that the credibility of a witness is to be graded in proportion to his strength of intellect, the tribunal before which he testifies can better estimate his capacity and the weight to which his testimony is entitled by his manner and by his statements on cross-examination, than can ordinarily be done by the testimony and conflicting opinions of other witnesses as to the extent of his mental powers or the degree of his intelligence. . . . The degree of credit to which he is entitled in the testimony given cannot be practically better ascertained than by the usual tests, without resort to other proof of his capacity."

But this reluctance in judicial practice hitherto has been due merely to the lack of accredited knowledge and skill to detect with precision such types of mental variation. Modern psychology is steadily progressing towards definite generalizations in that field, and towards practical skill in applying precise tests. Whenever such principles and tests can be shown to be accepted in the field of science, expert testimony should and will be freely admitted to demonstrate and apply them.[2]

S. E. 283, *semble* (that defendant had occasionally hypnotized his wife, now testifying for him, allowed on cross-examination).

§ 935. [1] 1896, Ah Tong v. Fruit Co., 112 Bal. 679, 45 Pac. 7 (weakness of memory, excluded, unless involving mental derangement); 1856, Goodwyn v. Goodwyn, 20 Ga. 620 (Lumpkin, J.: "It would be attended with great inconvenience and hinder and delay the progress of business, by turning aside to form these collateral issues"); 1879, Alleman v. Stepp, 52 Ia. 627, 3 N. W. 636 (quoted *ante*, § 934); 1922, People v. Joyce, 233 N. Y. 61, 134 N. E. 836 (confession by an alleged moron; cited more fully *ante*, § 861);

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

[2] From the point of view of psychology as applicable to argument before the jury

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

1679, L. C. J. SCROGGS, in *Langhorn's Trial*, 7 How. St. Tr. 481 (to the jury, commenting on the testimony of certain young Roman Catholic students who came over from Flanders to testify for the defendant): "They came here to defend all the Roman Catholics, whom we would hang here for a plot. . . . Did not the principles of their religion so teach and make us to know that they will not stick at any wickedness to propagate it? Did not the best and chiefest of the doctors of their church preach and print it? Did not they teach and practise all sorts of equivocations, and that a lie does good service, if it be for the propagation of the faith? . . . The way they take to come off from all vows, oaths, and sacraments, by dispensations beforehand or indulgence and pardons afterwards, is a thing still so much worse that they are really unfit for human society. . . . [These doctrines are] such that it does take away a great part of the faith that should be given to these witnesses. Nevertheless, we must be fair and should hear them, if we could not answer what they allege by evidence to the contrary." [2]

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

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

(not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 290–294; and the essays cited *ante*, § 875; also the following: R. S. Woodworth, "The Preponderance of Evidence" (Case & Comment, 1913, XIX, 827).

§ 936. [1] *Ante*, § 518.

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

[3] 1856, Darby *v.* Ouseley, 1 H. & N. 6, 10 (where the question excluded concerned the belief of the witness in certain alleged doctrines of the Roman Catholic church justifying the breaking of faith with heretics); 1834, Com. *v.* Buzzell, 16 Pick. 156 (it was argued that as confession and absolution were parts of the Roman Catholic faith, there was a possibility of false swearing in the expectation of absolution; per Curiam: "Such a course of argument cannot be permitted. You might as well argue upon the effect of any other particular doctrine, for instance, if the witness belongs to a sect which holds that the duration or extent of future punishment will be less than it will be according to the tenets of a different sect").

[4] The statutes cited below are quoted in full *ante*, § 488, and *post*, § 1828; *Ariz.* Const. 1910, I, § 12, and the other Constitutions quoted *post*, § 1828; Rev. St. 1913, P. C. § 1226, *semble*; *Colo.* Comp. St. 1921, § 6555, *semble*; *Ga.* Rev. C. 1910, § 5857; *Ind.* Burns' Ann. St. 1914, § 529; *Ia.* 1877, State *v.* Elliott, 45 Ia. 486; 1881, Searcy *v.* Miller, 57 Ia. 613, 10 N. W. 912 (under a statute providing that all facts formerly disqualifying may now be used in discredit; erroneous); *Me.* Rev. St. 1916, c. 87, § 111; *Mass.* Gen. L. 1920, c. 233, § 19;

and Constitutions justly reject even this much use of theologic heterodoxy.[5]

§ 937. **Race.** The racial disqualifications (of the Negro and of the Chinese) that once existed in some States have been abolished (*ante*, § 516); and it may be assumed as law that, where no express enactment provides, nativity in a specific race is in no way to be treated as involving a general tendency to avoid the truth.[1] A broader acquaintance with the various types of human nature in the world is beginning to convince us that the virtues and the failings are found in all, and with little racial difference. Any attempt to attribute a rooted lack of veracity to any one branch of the human family is based on a self-conceited assumption or a narrow experience:

1902, RAY, J., in *U. S.* v. *Lee Huen*, 118 Fed. 442, 463: "This Court cannot assent to the proposition that in one of these [deportation] cases a witness for the person sought to be deported is interested merely because he is a Chinese person. . . . There is no rule of law that justifies the assumption that a Chinese person is more interested in his countrymen than is a person of some other nationality in his. A Yankee may testify for a Yankee, but he is not therefore interested. An Irishman may testify for an Irishman, an Englishman for an Englishman, a German for a German; but such witnesses are not, in the eye of the law, interested. No discredit can legally attach to the testimony of a person because he gives his evidence in behalf of a party belonging to his own nationality. A Chinese witness in one of these cases, if engaged in securing the entrance of Chinese persons into the United States, is open to suspicion; and if he is engaged in aiding the entrance of such a person, and gives evidence in that behalf, he is interested, and such fact legitimately tends to discredit his testimony. We are all brothers in the family of Adam, — all brothers in the national family to which by birth or adoption we belong; but these ties of race or color do not make us interested witnesses when we testify in court, within

1860, Com. *v.* Burke, 16 Mass. 33 (holding that G. S. c. 131, § 12, allowing religious belief to be used to discredit, did not alter the law as to the mode of proof); *Minn.* Gen. St. § 5658, *semble*; *N. M.* Annot. St. 1915, § 2165; *N. Y.* 1891, People *v.* Most, 128 N. Y. 108, 27 N. E. 970 (belief in a Supreme Being); 1903, Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148 (similar; two judges dissenting; good opinion by Cullen, J., diss.); *Pa.* St. 1909, Apr. 23, Dig. 1920, § 21833, Witnesses (quoted *post*, § 1828); *S. C.* 1892, State *v.* Turner, 36 S. C. 534, 543, 15 S. E. 602 (on cross-examination here); *Tenn.* Shannon's Code 1916, § 5593; 1871, Odell *v.* Koppee, 5 Heisk. Tenn. 91.

[4] 1887, People *v.* Copsey, 71 Cal. 548, 550, 12 Pac. 721 (that he was a person "who entertained no religious belief", excluded); 1882, Bush *v.* Com., 80 Ky. 244 (the Constitutional provision "was intended to prevent any inquiry into that belief" as affecting credibility); 1904, Louisville & N. R. Co. *v.* Mayes, — Ky. —, 80 S. W. 1096 (foregoing case followed); 1858, People *v.* Jenness, 5 Mich. 305, 319 (under statute; excluding both questions to the witness and outside testimony); 1879, Free *v.* Buckingham, 59 N. H. 219, 225 (it is "not customary"); Vt. Stats. 1894, § 1244.

For the propriety of ascertaining the most *binding form of oath*, see *post*, § 1818.

For the *privilege* against disclosing religious belief, see *post*, § 2214.

For religious belief as *disqualifying*, see *ante*, § 518.

For willingness to lie, see *post*, § 957.

§ 937. [1] *Accord:* 1897, Shelp *v.* U. S., 26 C. C. A. 570, 81 Fed. 694 (an Indian is not as such to be discredited); 1902, U. S. *v.* Lee Huen (quoted *supra*); 1915, Campbell *v.* U. S., 9th C. C. A., 221 Fed. 186 (Indians); 1919, Skuy *v.* U. S., 8th C. C. A., 261 Fed. 316 (a Jew is not as such to be discredited); 1917, Yee Chung *v.* U. S., 9th C. C. A., 243 Fed. 126 (Chinese); 1896, People *v.* Foo, 112 Cal. 17, 44 Pac. 453 (Chinese); 1910, State *v.* Lem Woon, 57 Or. 482, 107 Pac. 974 (revengeful trait of Chinese in a factional feud, not admitted; approving the text above at § 516).

Compare the Federal rule requiring *corroboration* for a Chinese witness (*post*, § 2066).

From the point of view of psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology and General Experience, and illustrated in Judicial Trials" (1913), §§ 164–171.

the rule that permits interest to be used as a discrediting circumstance. If it affirmatively appears that a witness has a bias in favor of persons of his own nationality, in whose behalf he is testifying, or against the other party to the litigation, or a bias in favor of persons of his own nationality generally, or against those of another nationality, such fact may be used to discredit his testimony."

§ 938. **Age and Sex in General.** Age and Sex do not constitute defects or abnormalities, but merely varieties in the normal mental organization. Nevertheless, those variations undoubtedly have some bearing on testimonial tendencies. If those specific tendencies could be known with any definiteness, and used with fair accuracy in concrete diagnosis, there is no reason why judicial practice should not make use of that knowledge and skill.

Modern psychology pursues gradually the path of revelation in this field. Already something is known, though it is scarcely usable in judicial practice.[1] The progress of science will in time enlarge the methods available for judicial trials.

C. EXPERIENTIAL INCAPACITY

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

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

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

§ 938. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 172–178 (age), §§ 179–190 (sex).

§ 939. [1] 1844, Washington *v.* Cole, 6 Ala. 214 (that a pretended medical witness was not a physician, allowed).

From the point of view of psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 220–231.

[2] As with Character, so here, a question has been raised under the Opinion rule whether one person may testify directly to another's lack of Experiential Capacity; the authorities are dealt with *post*, § 1984.

Compare also §§ 67, 87, 208, *ante*.

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

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

§ 940. [1] As with Character and Experiential Capacity, the Opinion rule has here also been rashly invoked to exclude such testimony, the absurdity of the suggestion being here more pronounced; the rulings are collected *post*, § 1963.

The modern emasculation in this country of the judicial function has raised some questions entirely novel in the history of the common law. The principle that the *judge is not to charge the jury upon matters of fact*, as distinguished from matters of law, has led, among other things, to doubting whether the judge may tell the jury that bias or interest affects the weight of testimony. This doubt, however (an instance of which may be found in Hess *v.* Lowrey, 122 Ind. 234, and People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315), has nothing to do with our present subject; compare § 968, *post*.

From the point of view of psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 203–216.

[2] *Post*, § 950.

[3] 1892. Consaul *v.* Sheldon, 35 Nebr. 254, 52 N. W. 1104.

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

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

CHAPTER XXXI

INTRODUCTORY

§ 943. **General Principle; No Prohibition against Extrinsic Testimony.** The various qualities available for impeachment having been surveyed, and their limitations marked out (Topic I), the next topic (*ante*, § 876) concerns the allowable *modes of evidencing those qualities*.

These sources of evidence will be chiefly either the *conduct of the witness* or *external circumstances*. The evidence will thus consist most commonly of particular acts of behavior or particular events. Thus the distinction already noted (*ante*, § 878), between extracting the impeaching facts on cross-examination and presenting them by other witnesses, becomes now of vital importance. It is convenient to notice first (Topic II) those qualities for the evidencing of which this prohibition of extrinsic testimony does not apply, namely, the qualities of Bias, Corruption, and Interest, — all being merely

varieties of the single quality of emotional partiality (*ante*, § 940). Cross-examination will here be an important but not the exclusive mode of presentation; the chief inquiries will concern the relevancy of the various kinds of conduct and circumstances, and the occasional bearing of considerations of auxiliary policy (*ante*, § 42). Under Topic III may afterwards be considered the evidencing of Moral Character and other qualities, to which the prohibition of proof by extrinsic testimony commonly applies.

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

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

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

(1) Throughout all the ensuing sorts of evidence, then, there is to be understood a general canon that on cross-examination the *range* of evidence that may be elicited for any purpose of discrediting is to be *very liberal:*[1]

§ 944. [1] It is unnecessary here to collect all the cases in which this doctrine has been uttered, first, because it is an unquestioned truism, and secondly, because like most commonplaces it is too indefinite to be of service as a rule, for it always yields when it comes in conflict with any definite rule; some of the more definite rules that are applicable to cross-examination will be found *ante*, §§ 768–785 (leading questions, etc.), *post*, §§ 981–983 (conduct affecting character), §§ 992–994 (testing the memory, etc.), §§ 1004, 1022 (collateral contradiction, etc.), and §§ 1871, 1885 (disclosing the purpose, order of putting in the case).

In the following cases two things are usually emphasized, first, that this broad scope of the examination is especially allowable in issues involving *fraud*, and secondly, that its limits are left to the *determination of the trial Court: Fed.* 1861, Johnston *v.* Jones, 1 Black 216, 226; 1873, Rea *v.* Missouri, 17 Wall. 542; 1876, Storm *v.* U. S., 94 U. S. 84 (further declining to interfere with that discretion simply because the answer might have furnished other witnesses who could have disproved the opponent's case); 1892, Eames *v.* Kaiser, 142 U. S. 488, 12 Sup. 302; 1894, Blitz *v.* U. S., 153 U. S. 308, 312; 1899, Davis *v.* Coblens, 174 U. S. 719, 19 Sup. 832; *Ala.* 1857, Stoudenmeier *v.* Wilson, 29 Ala. 564; 1859, Seale *v.* Chambliss, 35 Ala. 21; 1895, Long *v.* Booe, 106 Ala. 570, 17 So. 716; 1896, Rhodes Furn. Cl. *v.* Weedon, 108 Ala. 252, 19 So. 319; 1897, Nelms *v.*

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

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

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

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

It may be doubted whether in practical effect this canon enlarges the rules of relevancy. Probably it merely leaves the trial Court to pass upon the matter of relevancy without revision from above. Moreover, in many sorts of evidence even this effect is not given, for strict rules of relevancy are re-

Steiner, 113 Ala. 562, 22 So. 435; 1902, Southern R. Co. *v.* Brantley, 132 Ala. 655, 32 So. 300; 1905, Birmingham R. & E. Co. *v.* Mason, 144 Ala. 387, 39 So. 590; *Cal.* C. C. P. 1872, § 1868 (in trial Court's discretion, collateral facts may be inquired into, "when it affects the credibility of a witness"); 1895, Sandell *v.* Sherman, 107 Cal. 391, 40 Pac. 493; 1899, People *v.* Westlake, 124 Cal. 452, 57 Pac. 465; *Colo.* 1903, Porter *v.* People, 31 Colo. 508, 74 Pac. 879; *Col.* (D.) 1898, Davis *v.* Coblens, 12 D. C. App. 51, 53; 1899, Horton *v.* U. S., 15 D. C. App. 310, 324; *Conn.* 1846, Steene *v.* Aylesworth, 18 Conn. 244, 254; 1868, Kelsey *v.* Ins. Co., 35 Conn. 225, 233; 1889, State *v.* Duffy, 57 Conn. 528, 18 Atl. 791; *Fla.* 1903, Volusia Co. Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704; *Haw.* 1900, Merricourt *v.* Norwalk F. I. Co., 13 Haw. 218, 226; *Ill.* 1889, Tudor Iron Works *v.* Weber, 129 Ill. 535, 21 N. E. 1078; *Ind.* 1891, Pennsylvania Co. *v.* Newmeyer, 129 Ind. 405, 28 N. E. 860; 1895, McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 342; 1905, Smith *v.* State, 165 Ind. 180, 74 N. E. 983; *Kan.* 1902, Bassett *v.* Glass, 65 Kan. 500, 70 Pac. 336; *Ky.* C. C. P. 1895, § 593 (quoted *ante*, § 981, n. 4); 1904, Fuqua *v.* Com., 118 Ky. 578, 81 S. W. 923; *La.* 1852, State *v.* Benjamin, 7 La. An. 47, 49; 1896, State *v.* Southern, 48 La. An. 628, 19 So. 668; *Me.* 1874, Sturgis *v.* Robbins, 62 Me. 289, 292; *Mass.* 1873, Miller *v.* Smith, 112 Mass. 470 ("to test the truthfulness, judgment, and credibility"); 1903, Jennings *v.* Rooney, 183 Mass. 577, 67 N. E. 665; 1906, Greer *v.* Union St. R. Co., 193 Mass. 246, 79 N. E. 267; 1921, Freeman *v.* Freeman, — Mass. —, 130 N. E. 220 (divorce); *Mich.* 1899, Bennett *v.* Eddy, 120 Mich. 300, 79 N. W. 481; *Mo.* 1906, State *v.* Standard Oil Co., — Mo. —, 91 S. W. 1062; *Nebr.* 1894, Omaha Nat'l Bank *v.* Thompson, 39 Nebr. 269, 275, 282, 57 N. W. 997; 1897, Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; *N. H.*: 1849, Seavy *v.* Dearborn, 19 N. H. 355 ("a great deal of latitude is allowed for the purpose of testing the memory, the capacity, or the honesty of the person under examination"); 1879, Free *v.* Buckingham, 59 N. H. 219, 226; *N. J.* 1872, Jones *v.* Ins. Co., 36 N. J. L. 29, 42; *N. M.* 1896, Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349; 1900, Orange Co. F. E. *v.* Hubbell, 10 N. M. 47, 61 Pac. 121; *N. D.* 1905, State *v.* Foster, 14 N. D. 561, 105 N. W. 938; *Oh.* 1877, Martin *v.* Elden, 32 Oh. St. 282, 287; *Okl.* 1905, Guthrie *v.* Carey, 15 Okl. 276, 81 Pac. 431; 1921, Mathews *v.* State, — Okl. Cr. —, 198 Pac. 112 (conspiracy to defraud); *Or.* 1895, Maxwell *v.* Bolles, 28 Or. 1, 41 Pac. 661; *Pa.* 1893, Myerstown Bank *v.* Roessler, 156 Pa. 431, 40 Atl. 963; *S. C.* 1905, State *v.* Sauls, 70 S. C. 393, 50 S. E. 17; *Utah:* 1895, People *v.* Thiede, 11 Utah 241, 39 Pac. 837; 1899, Cahoon *v.* West, 20 id. 73, 57 Pac. 715; *Vt.* 1902, State *v.* Bean, 74 Vt. 111, 52 Atl. 269; 1913, Miller *v.* Pearce, 86 Vt. 322, 85 Atl. 588; *Va.* 1905, Worrell *v.* Kinnear, 103 Va. 719, 49 S. E. 988; *Wis.* 1922, Fernhaber *v.* Cream City Cartage Co., — Wis. —, 186 N. W. 175 (transfer in fraud of creditors).

quired to be followed. While it must be kept in mind, then, as representing a broad underlying tendency, it can hardly be trusted as a general guide and never as overriding any other concrete rule.

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

Topic II: Bias, Interest, and Corruption, evidenced by Conduct and Circumstances

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

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

§ 946. **Same: Demeanor of the Witness, as evidence.** The conduct of the witness is formally offered in evidence, when it has occurred outside of the court-room. But it is no less admissible when exhibited in the court-room and on the stand, even though no formal offer of it is then required. The *demeanor of the witness on the stand* may always be considered by the jury in their estimation of his credibility.[1]

§ 946. [1] 1901, Blair *v.* State, 69 Ark. 558, 64 S. W. 948; 1860, Evans *v.* Lipscomb, 31 Ga. 107; 1897, Georgia H. I. Co. *v.* Campbell, 102 Ga. 106, 29 S. E. 148 ("personal appearance" thought not to be properly considered); Ga. Rev. C. 1910, § 5732; Ida. Comp. St. 1919, § 7935; 1892, Purdy *v.* People, 140 Ill. 46, 50, 29 N. E. 700; Siebert *v.* People, 143 Ill. 571, 593, 32 N. E. 431; 1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416; 1868, Callanan *v.* Shaw, 24 Ia. 447; 1885, Jennings *v.* Machine Co., 138 Mass. 594, 598; 1899, Kirchner *v.* Collins, 152 Mo. 394, 53 S. W. 1081; P. I. C. C. P. 1901, § 273.

Compare the rule for an *accused's* demeanor during trial (*ante*, § 274).

So important has this form of evidence been deemed in our system of procedure that by a fixed rule of Confrontation (*post*, § 1395) the witness is required to be present before the tribunal while delivering his testimony. The main feature of contrast between the civil-law and the common-law systems of taking evidence was the difference between 'viva voce' testimony and written depositions. Only when the former cannot be procured is the latter allowed to be employed. The witness' demeanor, then, without any definite rules as to its significance, is always assumed to be in evidence.[2]

A. BIAS

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

Distinguish here the application of the Opinion rule, to exclude testimony to *another person's state of mind* (*post*, § 1962).

§ 949. **Relationship and other External Facts as Evidence of Bias.** The range of external circumstances (*ante*, § 945) from which probably bias may be inferred is infinite. Too much refinement in analyzing their probable effect is out of place. Accurate concrete rules are almost impossible to formulate, and where possible are usually undesirable. In general, these circumstances should have some clearly apparent force, as tested by experi-

[2] See *post*, § 1395, for passages expounding the value of an opportunity to observe the witness' demeanor.

§ 948. [1] This has seldom been even questioned: 1858, McHugh *v.* State, 31 Ala. 320 (quoted, *ante*, § 943); 1917, Eppison *v.* State, 82 Tex. Cr. 364, 198 S. W. 948 (pandering); 1833, Rixey *v.* Bayse, 4 Leigh 331.

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

[3] It has been said that where the witness in general *admits the existence of bias*, no further inquiry into circumstances will be allowed, either on cross-examination or otherwise; the notion being that it is a waste of time to allow a further attempt to prove a thing already conceded: 1879, State *v.* Glynn, 51 Vt. 580 ("the witness in this case admitted that she had unfriendly feelings against the prisoner, and such inquiry is so collateral to the issue that a court will never permit detail, but only the general inquiry whether the witness is friendly or otherwise"; here the question asked was, "Have you ever told S. that you would get the old man [the defendant] into State prison if you could?"). But this view is unsound; because a general admission of the existence of bias can never be so vivid and forceful as the inference from his situation or his utterances. The doctrine has no support elsewhere; 1869, Blake *v.* Damon, 103 Mass. 207, 209 (repudiating the argument that "the witness should first be asked if he has bias, and to what extent; if he concedes bias, then it is wholly collateral to inquire into the circumstances showing it"); and cases cited *ante*, § 940.

ence of human nature, or, as it is usually put, they should not be too remote.[1]

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

§ 949. [1] 1869, State *v.* Dee, 14 Minn. 35; 1882, Langhorne *v.* Com., 76 Va. 1016 (limiting this mode of showing bias to circumstances strongly significant). Whether, without resorting to this evidence, the witness may be *asked directly* whether he is biassed, has been already considered *ante*, §§ 940, 948.

[2] In the following rulings the circumstance was admitted, except where otherwise noted: ENGLAND: 1836, Thomas *v.* David, 7 C. & P. 350 (mistress of the plaintiff); CANADA: 1906, R. *v.* Finnessey, 11 Ont. L. R. 338 (similar to Thomas *v.* David, *supra;* cited more fully *post*, § 986, n. 11); UNITED STATES: *Federal:* 1888, U. S. *v.* Davis, 33 Fed. 865 (near relatives); *Alabama:* 1900, Martin *v.* State, 125 Ala. 64, 28 So. 92; 1905, Funderburk *v.* State, 145 Ala. 661, 39 So. 672 (rape; marital separation of the woman's brother-in-law, testifying for the defendant, allowed to be shown for the State); *California:* 1868, Lyon *v.* Hancock, 35 Cal. 377 (wife); *Georgia:* Code 1910, § 5878, P. C. § 1049 (feelings and relationship to parties, admissible); 1886, Simpson *v.* State, 78 Ga. 97 (relationship); 1901, Cochran *v.* State, 113 Ga. 726, 39 S. E. 333 (brothers, and others); 1906, Perdue *v.* State, 126 Ga. 112, 54 S. E. 820 (paramour of the defendant); 1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1 (hostility between the families of deceased and accused); *Idaho:* 1904, State *v.* Harness, 10 Ida. 18, 76 Pac. 788 (rape: illicit relations of the woman's sister with a third person, admitted to show the sister's motives for her testimony); *Indiana:* 1896, Smith *v.* State, 143 Ind. 685, 42 N. E. 913 (assault with intent to kill; the prosecuting witness' sister having testified for the defendant, her relations with him were admitted to show bias); 1900, Keesier *v.* State, 154 Ind. 242, 56 N. E. 232 ("near relatives"); *Iowa:* in the following three cases a wife's testimony was held not to be discredited by her relationship: 1859, State *v.* Rankin, 8 Ia. 355 (Wright, C. J., diss.); 1865, State *v.* Collins, 20 Ia. 85, 92; 1876, State *v.* Bernard, 45 Ia. 234; *contra:* 1859, State *v.* Nash, 10 Ia. 81, 89; *Kentucky:* 1895, Preston *v.* Dills, — Ky. —, 32 S. W. 945 (relationship should not "discredit" (*i.e.* reject?) the testimony); 1896, Holly *v.* Com., — Ky. —, 36 S. W. 532 (that a female witness for the defendant had lived with him without being married); 1898, Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986 (killing of a woman said to have been seduced; that a witness for the prosecution was the real seducer, admissible); *Louisiana:* 1881, State *v.* Willingham, 33 La. An. 537 (relationship); 1896, State *v.* Johnson, 48 La. An. 437, 19 So. 476 (defendant's mistress); *Missouri:* 1901, State *v.* Fisher, 162 Mo. 169, 62 S. W. 690 (relationship); 1919, State *v.* Cole, — Mo. —, 213 S. W. 110 (murder; to show bias of a woman witness for the prosecution, cross-examination to illicit acts with defendant was allowed, but not proof of such acts by other witnesses); *North Carolina:* 1846, State *v.* Ellington, 7 Ired. 66 (parental and fraternal relations); 1847, State *v.* Nash, 8 Ired. 36 (same); 1858, State *v.* Nat, 6 Jones L. 117 (fellow-slaves); 1897, State *v.* Apple, 121 N. C. 584, 28 S. E. 469 (father and mother); 1897, State *v.* Lee, 121 N. C. 544, 28 S. E. 552 (defendant's wife); *Philippine Isl.* 1913, U. S. *v.* Estrada, 24 P. S. 401, 410 (mother of accused); *South Dakota:* 1896, State *v.* Smith, 8 S. D. 547, 67 N. W. 619 (relationship); *Wisconsin:* 1895, Porath *v.* State, 90 Wis. 527, 63 S. W. 1061 (illicit relations: excluded, wrongly).

It should be understood that relationship is merely a circumstance which *may be invoked by counsel* as discrediting the witness; but it does not follow that the jury *must* so use it. The confusion of the first with the second result serves in part to explain the conflict of rulings.

[3] Here the circumstance has usually been excluded; but the rulings are too finical; a complete exposure of the relations is better: *Ala.* 1899, Lodge *v.* State, 122 Ala. 97, 26 So. 210 (that the father of a child-witness was hostile to the opponent, admitted); 1903, Stall *v.* State, — Ala. —, 34 So. 680 (that the witness was the husband of the deceased's washerwoman, excluded); *Cal.* 1875, People *v.* Parton, 49 Cal. 637 (mere marital relationship of witnesses to person claimed to have conspired to prosecute falsely the defendant, excluded); *Fla.* 1904, Adkinson *v.* State, 48 Fla. 1, 37 So. 522 (questions as to the witness' daughter's illicit relations with the defendant's brother, excluded); *Ill.* 1911, People *v.* Goodrich, 251 Ill. 558, 96 N. E. 542 (embezzlement of Mrs. M.'s money; cross-examination of Mrs. M. by defendant's counsel as to her past improper relations with defendant, excluded, though the Court would have held it admissible had Mrs. M. been called for the defendant; erroneous, and queer in its notion of human nature); *Minn.* 1859, State *v.* Bilansky, 3 Minn. 246, 249, 260 (criminal intimacy of a female witness for the prosecution with a man with whom the female defendant was also

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

intimate, rejected as too remote to show probable jealousy and bias); *Mo.* 1859, State *v.* Montgomery, 28 Mo. 594 (bias to third persons, excluded, "no matter in what relation, however else they may stand to the party"; here bias against the defendant's husband); *N. D.* 1904, Hogen *v.* Klabo, 13 N. D. 319, 100 N. W. 847 (pecuniary relations of plaintiff and his principal witness, admitted); *N. M.* 1919, Henderson *v.* Dreyfus, — N. M. —, 184 Pac. 819 (libel of a political opponent; witnesses' political affiliations, admitted); *Okl.* 1911, Henry *v.* State, 6 Okl. Cr. 430, 119 Pac. 278, (murder; that the witness for the State, wife of defendant, was living apart from him, as paramour of the deceased, admitted); 1920, Felice *v.* State, — Okl. Cr. —, 190 Pac. 898 (membership in the same fraternal organization as the defendant; allowed); *Or.* 1898, State *v.* Welch, 33 Or. 33, 54 Pac. 213 (whether he had any trouble with the defendant's brother or mother, not proper); 1901, State *v.* Ogden, 39 Or. 195, 65 Pac. 449 (witness' sons' quarrel with defendant, excluded); *W. Va.* 1880, State *v.* Conkle, 16 W. Va. 736, 742, 757, 764 (attempt to kill; a witness for the State lived in the house with the defendant and his wife; a question as to his intercourse with the latter was excluded, in an obscure opinion).

[4] It is obvious that where the employment is a *present* one, the effect is to suggest an interest (under § 969, *post*) rather than a personal bias; but the rulings can most conveniently be collected here in one place: *Federal:* 1898, Tennessee C. I. & R. Co. *v.* Haley, 29 C. C. A. 328, 85 Fed. 534 (wages of employee-witness, as affecting credit, admissible); 1903, Wabash S. D. Co. *v.* Black, 126 Fed. 721, 726, 61 C. C. A. 639 (physician); *Alabama:* 1895, Long *v.* Booe, 106 Ala. 570, 17 So. 716 (former employment of witness' father by the party, admitted); 1897, Postal Tel. Cable Co. *v.* Hulsey, 115 Ala. 193, 22 So. 854 (whether a witness' employment depended on the issue of his employer's case, and why the witness was interested, allowed); 1899, Preferred Acc. Ins. Co. *v.* Gray, 123 Ala. 482, 26 So. 517 (that the physician-witness was employed by the corporation insured by the defendant, allowed); 1900, Louisville & N. R. Co. *v.* Tegnor, 125 Ala. 593, 28 So. 510 (that a witness was a large shipper over defendant's road, allowed; Tyson, J., diss.); 1901, Alabama G. S. R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771 (that the witness had free transportation on defendant's road, admissible); 1919, Jones *v.* Tennessee Coal, Iron, & R. Co., 202 Ala. 381, 80 So. 463 (pollution of a stream; to an expert, "if you have not been a witness and in every case used on the question of a nuisance in this creek for the last 3 years for the T. Co.?", allowed); *California:* 1905, People *v.* Cowan, 1 Cal. App. 411, 82 Pac. 339 (membership in the same miners' union); 1920, People *v.* Burch, — Cal. App. —, 189 Pac. 716 (injunction under the red-light abatement law; amount and contingency of compensation due to witnesses who were agents of a law enforcement league, admitted); *Illinois:* 1898, Donley *v.* Dougherty, 174 Ill. 582, 51 N. E. 714 (employment by a party, admissible); 1903, Chicago C. R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087 (similar); 1909, McMahon *v.* Chicago City R. Co., 239 Ill. 334, 88 N. E. 223 (how many times the appellant defendant's medical expert had testified for "the street car lines of Chicago", held too broad, since the question should have been limited to the "number of times the witness had testified for the [illegible]"; unsound); *Indiana:* 1900, Chicago & Erie R. Co. *v.* Thomas, — Ind. —, 55 N. E. 8[illegible] whether the witness believed that he would be discharged if he testified to his own negli[illegible] allowed); *Kentucky:* 1920, Stephens *v.* C[illegible] 188 Ky. 824, 224 S. W. 364 (larceny of railroad property; whether the witness had not testified for defendant in a number of cases, allowed); *Massachusetts:* 1875, Wallace *v.* R. Co., 119 Mass. 93 (that a witness for defendant corporation was also employed by another corporation among whose stockholders were officers of the former, excluded in discretion); 1900, Koplan *v.* Gaslight Co., 177 Mass. 15, 58 N. E. 183 ("the fact that one has been discharged 'for cause' from the service of another against whom he testifies would not ordinarily be an independent ground of impeachment, but here allowed in discretion); *Michigan:* 1904, Gregory *v.* Detroit U. R. Co., 138 Mich. 369, 101 N. W. 546 (here the Court commits the error of ruling that "there must be something in the testimony itself or in the manner of the witness to justify the conclusion" of bias; yet the Court has no right to control the jury's inferences of bias by some rule of law; the simple fact that the witness is the father or husband or society or employee of a party may be given just as much or as little weight as the jury please in affecting their trust of the testimony; this opinion exhibits a radical misapprehension of the common-law theory of testimony on a jury-trial; instructions of any sort to the jury on such subjects are out of place); *Montana:* 1895, Wastl *v.* R. Co., 17 Mont. 213, 42 Pac. 772 (that a witness against a railroad company is an employee of one; an obscure and illogical treatment of the subject, apparently forbidding the consideration of such a fact); *Missouri:* 1903, Koenig *v.* Union D. R. Co., 173 Mo. 698, 73 S. W. 637 (that he was an attorney testifying for his client, allowed); *New Hampshire:* 1910, Genest *v.* Odell Mfg. Co., 74 N. H. 509, 77 Alt. 77 (that a physician-witness was employed by the insurer of the defendant, ad-

The *pendency of civil litigation* between the witness and the opponent is usually relevant, not only as a circumstance tending to create feeling,[5] but also as involving conduct expressive of feeling (*post*, § 950); and while the mere fact of litigation upon a disconnected matter may not necessarily show bias, still it is useless to attempt to distinguish and refine for the purpose of exclusion.[6]

That the witness is or has been *under indictment* may have several bearings; (1) if the indictment, present or past, was had by the opponent's procurement or for an injury to him, it is relevant as having tended to excite in the witness a hostile feeling to him;[7] (2) if the indictment was procured by the opponent against another party to the cause, it is relevant as an expression

mitted); *New Jersey:* 1900, Haver *v.* R. Co., 64 N. J. L. 312, 45 Atl. 593 (whether the defendant's employee charged as culpable was not afraid of losing his position if the verdict was against the defendant, allowed); *North Carolina:* 1913, Johnson *v.* Seaboard A. L. R. Co., 163 N. C. 431, 79 S. E. 690 (that the witness, an employee of defendant, had come to trial on a free pass given by the defendant, allowed); *Oregon:* 1915, Walling *v.* Portland G. & C. Co., 75 Or. 495, 147 Pac. 399 (that the physician-witness for the defendant was employed by the company insuring the defendant, admitted); *South Dakota:* 1902, Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31 (that the witness was agent of the company insuring the defendant, admitted); *Texas:* 1899, Missouri K. & T. R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666 (that a witness was the opponent's discharged employee, excluded); *Vermont:* 1916, Raymond *v.* Rutland R. L. & P. Co., 90 Vt. 373, 98 Atl. 909 (defendant's liability insurance, admitted on the facts, as affecting the credibility of an attorney testifying); *Wisconsin:* 1897, Klatt *v.* Lumber Co., 97 Wis. 641, 73 N. W. 563 (employment by a party, admissible).

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

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

[6] 1906, Glass *v.* State, 147 Ala. 50, 41 So. 727 (quarrel over a former indictment, admitted); 1888, Hitchcock *v.* Moore, 70 Mich. 115, 37 N. W. 914 (that the plaintiff in an action for slander against his wife's father had been compelled in a divorce suit to pay out money to his wife; admitted); 1881, Olive *v.* State, 11 Nebr. 1, 23, 7 N. W. 444 (that he was an attorney for the prosecution, that he was interested in a suit against the defendant, admitted on cross-examination); 1897, Lane *v.* Harlan Co., 51 Nebr. 641, 71 N. W. 302 (damages for the taking of land by a county; a county-supervisor who had helped fix the line and estimate the damages; these facts considered as affecting bias); 1837, Pierce *v.* Gilson, 9 Vt. 222 ("that a lawsuit has existed, calculated to excite personal dislike", admitted); 1882, Langhorne *v.* Com., 76 Va. 1024 (excluding the fact that a bill charging the State's witness with infamous conduct had been filed by the accused, because knowledge of the charge had not come to the witness before testifying; and also holding that the mere fact of litigation on a disconnected matter is not admissible).

Compare the doctrine of § 951, *post*.

[7] 1904, Smith *v.* State, 48 Fla. 307, 37 So. 573 (murder; indictment against defendant for stealing the deceased's cattle, admitted); 1903, Purdee *v.* State, 118 Ga. 798, 45 S. E. 606 (indictments for offences by the witness against the defendant, admitted); 1869, R. *v.* Brown, 3 Haw. 114, 116 (defendant's testimony before the magistrate, charging B., an accomplice, admitted, to show B.'s motive and credibility in incriminating the defendant by his testimony); 1909, Dotterer *v.* State, 172 Ind. 357, 88 N. E. 689 (assault and battery; an alleged accomplice was allowed to be impeached as to bias by a judgment of conviction for his part in the battery, and to discredit his denial that he was not present at the battery); 1921, Sparks *v.* Com., 193 Ky. 180, 235 S. W. 767 (cited more fully *post*, § 987); 1885, State *v.* Henderson, 29 W. Va. 147, 159, 1 S. E. 225 (that certain witnesses for the prosecution were indebted to the prosecuting witness, not allowed even on cross-examination; unsound).

Contra: 1875, Tilton *v.* Beecher, Abbott's Rep. I, 517 (that the principal witness for the plaintiff, Mr. Moulton, had been indicted for libel on Mr. Beecher's complaint, excluded; Mr. Evarts, for defendant: "Does your Honor say that to show that the party against whom he is testifying here has pursued him is not evidence that he does not stand impartial?"; Judge Neilson: "It is very clear that if A claims an immense estate against B, and B can pursue the principal witness and indict him in many indictments, that he don't ruin the witness whose testimony may be brought in support of the case against him").

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

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

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

[8] 1922, Fuller *v.* State, — Ariz. —, 205 Pac. 324 (family pressure upon rape-prosecutrix to make complaint); 1892, Fox *v.* Lead Works, 92 Mich. 249, 52 N. W. 623 (that a person was a total abstainer, who testified to the plaintiff's discharge for drunkenness, excluded); 1877, Gutterson *v.* Morse, 58 N. H. 165 (taking part as a grantee from the defendant in a conveyance fraudulently made to defeat the collection of the claim in suit, admitted); 1920, Henderson *v.* Dreyfus, 26 N. M. 262, 541, 191 Pac. 442, 453 (libel for stating that the plaintiff, a political henchman of one B., spat upon the American flag; the political affiliations of witnesses, admitted); 1896, State *v.* Mace, 118 N. C. 1244, 24 S. E. 798 (murder; that the witness for the prosecution had "been drunk with the deceased many times", excluded); 1895, Fenstermaker *v.* Pub. Co., 12 Utah 439, 43 Pac. 112 (plaintiff had been charged, with others of his family, with cruelty to a child; questions to his wife as to her cruelty to others of the children were held inadmissible to show bias); 1921, State *v.* Smith, 115 Wash. 405, 197 Pac. 770 (that a witness for the prosecution had been "acting under fear produced by threats" when making two confessions not offered in evidence, excluded on the facts).

§ 950. [1] A direct assertion, "I am biassed", or "I am ready to lie against him", is seldom made; in such an instance we are of course strictly not dealing with a circumstantial inference (*ante*, § 394), but with a hearsay assertion, admissible under the Exception for Declarations of a Mental Condition (*post*, § 1730). But in practice no such distinction is drawn, and all is treated as circumstantial evidence. For the admissibility of such a general answer *on the stand*, see *ante*, §§ 940, 948.

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

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

[4] *England:* 1679, Lewis' Trial, 7 How. St. Tr. 249, 254 (Defendant: "Dorothy James' . . . evidence is grounded upon plain malice"; Witness: "Dorothy James said to several persons . . . that she would wash her hands in Mr. Lewis' blood, and that she would have his head to make pottage of as of a sheep's head"). 1681, Colledge's Trial, 8 How. St. Tr. 549, 640 (Oates testifies that Smith, the informer, a chief witness, had said of the defendant: "God damn that Colledge, I will have his blood", and on Oates reproving him that "these words do not become a minister of the Gospel", Smith replied, "God damn the Gospel"); 1752, Blandy's Trial, 18 How. St. Tr. 1164 (the defendant was charged with poisoning her father; her female servant, who had been discharged, had been the chief witness against

conduct indicating a partisan feeling either in the present or in other legal proceedings.[5]

No generalization of the different sorts of evidence is of any utility; there is merely a greater or less degree of significance according to the circumstances and the personality of the witness.[6]

her; testimony as to the servant's bias: "I have heard her curse Miss Blandy, and damn her for a bitch, and said she would not stay. Since this affair happened I heard her say, 'Damn her for a black bitch, I shall be glad to see her go up the ladder and swing' "); 1888, R. v. Shaw, 16 Cox Cr. 503 (a statement two years before, after a quarrel: "It is in my power to do him a good one, and when I do it, it will be a good one").

United States: 1894, People v. Anderson, 105 Cal. 32, 38 Pac. 513 (that she would hang the defendant if her evidence would do so), 1889, State v. McFarlain, 41 La. An. 687, 6 So. 728 (that the witness had proposed, just after the shooting, to lynch the accused); 1892, Consaul v. Sheldon, 35 Nebr. 253, 52 N. W. 1104 ("There goes a man I will do up, by God"); 1853, Drew v. Wood, 26 N. H. 363 ("If the D. family come over that hill, they shall not go home alive"); 1896, State v. Ellsworth, 30 Or. 145, 47 Pac. 199 (that the defendant ought to be hung).

[5] The following rulings admitted the evidence, except where otherwise noted: *Ala.* 1889, Burger v. State, 83 Ala. 38 (concealing knowledge from an officer, to show bias for the accused); 1897, Scott v. State, 113 id. 64, 21 So. 425 (keeping a witness away); 1909, Grayson v. State, 162 Ala. 83, 50 So. 349 (carrying concealed weapon; that the prosecuting witness had once before caused the defendant to be searched for a weapon, admitted); *Cal.* 1885, People v. Lee Ah Chuck, 66 Cal. 667, 6 Pac. 859 (that the prosecuting witness had already caused the defendant's arrest for the same matter on another charge); 1899, People v. Bird, 124 Cal. 32, 56 Pac. 639 (trying to persuade defendant's bail-bondsman to withdraw); *Fla.* 1894, Jacksonville T. & K. W. R. Co. v. Lockwood, 33 Fla. 573, 578, 15 So. 327 (whether he has not testified against the same opponent in a dozen suits in fifteen months, excluded); *Ind.* 1881, Johnson v. Wiley, 74 Ind. 238 (the witness testified she had been threatened with suit on a note by heirs unless she testified against the will); 1884, Stone v. Huffine, 97 Ind. 346, *semble* (in an action to require a bond to keep the peace, that the relator had instituted a prosecution for attempt to provoke an assault); *Mass.* 1859, Com. v. Byron, 14 Gray 31 (activity in procuring an indictment, *semble*, admissible); *Mich.* 1860, Crippen v. People, 8 Mich. 128 (that the witness had with others arranged to procure the indictment as a speedy way of attaining the end for which they had brought civil suits); 1915, Foster v. Krause, 187 Mich. 630, 153 N. W. 1066 (battery; that the defendant had said that a co-defendant had "offered to pay his fine if he would help lick the plaintiff", admitted); *N. Y.* 1848, Lohman v. People, 1 N. Y. 386 (taking part in instigating a prosecution); 1868, Nation v. People, 6 Park. Cr. C. 259 (declaration that the witness would withhold his evidence if the defendant would restore the money lost; excluded); *Pa.* 1865, Gaines v. Com., 50 Pa. 328 (a witness for defendant, asking what could be proved against defendant); 1896, Philadelphia v. Reeder, 173 Pa. 281, 34 Atl. 17 (that the defendant's witness had charged corrupt conduct against one concerned with the plaintiff in the public work about which the suit was brought); *Tenn.* 1905, Creeping Bear v. State, 113 Tenn. 332, 87 S. W. 653 (soliciting against a pardon for defendant); *Va.* 1900, Wadley v. Com., 98 Va. 803, 835 S. E. 452 (whether he worked for an indictment of the defendant in order to compel the payment of a debt by defendant).

[6] The following rulings admitted the evidence, except where otherwise noted: *Ala.* 1904, Hanners v. State, 147 Ala. 27, 41 So. 973 (threats); *Ark.* 1899, Magness v. State, 67 Ark. 594, 50 S. W. 554, 59 S. W. 529 (expressions of hatred to Africans, the defendant being a negro); *Cal.* 1886, Hartman v. Rogers, 69 Cal. 646, 11 Pac. 581 (sundry conduct); 1891, People v. Thomson, 92 Cal. 509, 28 Pac. 589 (that the witness on hearing of the shooting went out to kill the defendant); 1896, Lange v. Schoettler, 115 Cal. 37[illegible], 47 Pac. 139 (threat to kill the opponent); *Conn.* 1830, Daggett v. Tallman, 8 Conn. 17[illegible] (refusing to leave the State to give a deposition for one party, but doing it for the other); *Fla.* 1903, Fields v. State, 46 Fla. 84, 35 So. 185 (quarrels); 1906, Vaughn v. State, 52 Fla. 122, 41 So. 881 (threats to kill); 1908, Telfair v. State, 56 Fla. 104, 47 So. 863 (expressions of hostility); 1909, Stewart v. State, 58 Fla. 97, 50 So. 642 (threats against defendant by a witness for the prosecution); *Ga.* 1888, Gardner v. State, 81 Ga. 144, 147, 7 S. E. 144 (adultery: letter showing that defendant's witness, with whom the adultery was charged, had conspired with defendant to blackmail a third person on a charge of criminal intercourse, excluded); 1897, Daniel v. State, 103 Ga. 202, 29 S. E. 767 (that he was "very intimate and friendly with the deceased and was his 'partner' "); *Ind.* 1900, Whitney v. State, 154 Ind. 573, 57 N. E. 398 (stoning the house of defendant's brother, where defendant was staying, held not evidence of bias); *Ia.* 1916, State v. Gardner, 174 Ia.

§ 951. **Details of a Quarrel on Cross-examination.** It is obvious that, in ascertaining the state of feeling from the fact of a quarrel or other circumstances, the mere fact alone has little significance; without a knowledge of the details, we cannot well know the extent of the ill-feeling and the allowance to be made against the testimony. This necessity for ascertaining details is recognized by some Courts without limitation:[1]

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

But in two ways inconvenience may ensue: (1) the detailed inquiries, the denials, and the explanations, are liable to lead to multifariousness and a

748, 156 N. W. 747 (reasons for a witness, change of testimony); *Ky.* 1914, Haywood v. Com., 161 Ky. 338, 170 S. W. 624; *Md.* 1909, Stockham *v.* Malcolm, 111 Md. 615, 74 Atl. 569 (that the plaintiff-witness would "spend $50,000 to whip the defendant in court", admitted); *Mass.* 1842, Perkins v. Adams, 5 Metc. 44 (defendant, a town clerk, was sued for not recording a mortgage; the mortgagor testified that the defendant had lost it; a letter from the mortgagor to a creditor threatening him with trouble if he sold on execution was admitted); 1852, Long *v.* Lamkin, 9 Cush. 365 (whether a witness had had a quarrel with the witness whom his testimony was discrediting); 1857, Starks *v.* Sikes, 8 Gray 609, 612 (hostility in another transaction, excluded); 1860, Chapman v. Coffin, 14 Gray 454 (a statement that the witness, having testified for the defendant, would if called again testify for the plaintiff); 1863, O'Neill *v.* Lowell, 6 All. 110 (declaration that the plaintiff "ought to get a good pile of money out of the [defendant] city"); 1867, Day *v.* Stickney, 14 All. 257 ("I mean to get the money on this bond of old F., so as to get back the rent I paid him for the M. House"); 1868, Clement *v.* Kimball, 98 Mass. 537 (reputation for unchastity of a man or woman associating with a woman or man, admissible, if known to the latter, to show the latter's disposition towards the former; because it involves in effect conduct significant of disposition or feeling); 1869, Blake *v.* Damon, 103 Mass. 209 (sundry conduct); 1873, Com. *v.* Kelley, 112 Mass. 452 (that a constable testifying to liquor found had made oath in the search-warrant that he believed the defendant had large quantities there; excluded in discretion); 1878, Com. v. Gallagher, 126 Mass. 55 (offering a third person money to go bail for the defendant); 1887, Com. *v.* Trider, 143 Mass. 180, 9 N. E. 510 (that the husband, testifying against his wife charged with adultery, had offered a servant money to watch the wife, and had habitually accused the wife without foundation of improper conduct: excluded); *Mich.* 1871, Strang *v.* People, 24 Mich. 8 (connivance at the defendant's alleged conduct, admitted); 1879, People *v.* Gordon, 40 id. 716 (burglary; questions to the police, whether the arrest was not by connivance of a confederate, allowed); 1904, People v. Rice, 136 Mich. 619, 99 N. W. 860 (helping to secure a conviction); *Mo.* 1875, State *v.* Breeden, 58 Mo. 508 (in general); 1896, State *v.* Punshon, 133 id. 44, 34 S. W. 25 (defacement of the opponent's pictures; excluded, in discretion); 1913, State *v.* Horton, 247 Mo. 657, 153 S. W. 1051 (threats by a witness who was mother of the prosecutrix in rape); *N. Y.* 1847, Starks v. People, 5 Den. 106 (expression of a plan to kill defendant); 1879, Gale *v.* R. Co., 76 N. Y. 595 (that the witness had been refused employment by the defendant; excluded); *Oh.* 1884, Kent *v.* State, 42 Oh. 428, 429 (sundry conduct); *Or.* 1903, State *v.* McCann, 43 Or. 155, 72 Pac. 137 (injured person's expressions, at the time of injury, excluded on the facts); 1920, State *v.* Holbrook, 98 Or. 43, 188 Pac. 947 (statements showing bias, etc., here excluded because termed "impeachment"; Bennett, J., diss., points out the obvious error); *S. D.* 1921, State *v.* Kenstler, 44 S. D. 446, 184 N. W. 259 (assault with a dangerous weapon; cross-examination of prosecuting witness to former expressions of hostility covering 2 years prior, admissible); *Vt.* 1837, Pierce *v.* Gilson, 9 Vt. 222 ("that a violent altercation has taken place, arising to personal violence"); *W. Va.* 1921, State *v.* Evans, 89 W. Va. 379, 109 S. E. 332 (sheriff's violence when arresting accused, not admitted on the facts).

§ 951. [1] *Accord:* 1872, Durham *v.* State, 45 Ga. 516 (details admissible).

confusion of issues; (2) the detailed facts of the dispute may involve a prejudice to the character of the witness, or of his opponent, which it would be desirable to keep out of the case. From this point of view, some line of limitation must be drawn, and an effort made to avoid these two drawbacks:

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

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

§ 952. **Same; Explaining away the Expressions or Circumstances; Details on Re-examination.** On the general principle of explaining away circumstantial evidence (*ante*, § 34), any circumstance of conduct or expression, or of the external situation, of the witness may be explained away as due to some other cause than the emotion desired to be shown by it, or as not indicating a deep-seated hostility:[1]

[2] CANADA: 1914, R. *v.* Prentice, 20 D. L. R. 791, Alta. (judge's discretion in not recalling a witness to details affecting a witness' bias, held improperly exercised; Stuart, J., diss., citing the above passage with approval); UNITED STATES: *Federal:* 1899, McKnight *v.* U. S., 38 C. C. A. 115, 97 Fed. 208 (letter of accused unfavorably criticising a witness, not admitted to show witness' probable bias, because of improper details contained in it); *Ala.* 1884, Jones *v.* State, 76 Ala. 15 (the fact and the gravity of the quarrel admissible, but not its merits or its details); 1877, Fincher *v.* State, 58 Ala. 215, 219 (extent of hostility may be inquired into); *Cal.* 1888, People *v.* Goldenson, 76 Cal. 349 (details may be excluded); 1915, People *v.* Vertrees, 169 Cal. 404, 146 Pac. 890 (details involving a crime, excluded); *Fla.* 1919, Sykes *v.* State, 78 Fla. 167, 82 So. 778 (but it must affirmatively appear that the confession was voluntary); *Ga.* 1878, Patman *v.* State, 61 Ga. 379 (excluded, the witness having admitted ill-feeling); 1905, McDuffie *v.* State, 121 Ga. 580, 49 S. E. 708 (details excluded; citing the intervening rulings); *Ill.* 1904, Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 (wife-murder by poison; the deceased's sister, being asked as to reasons for bias, answered that she disliked accused because he poisoned her sister; held erroneous; the ruling is indefensible, because the cross-examiner himself called for a specific answer); 1910, People *v.* Strauch, 247 Ill. 220, 93 N. E. 126 (criminal libel; the plaintiff having admitted hostile feelings, it was held not improper to forbid questions on cross-examination as to the plaintiff's having called the defendant a "perjurer", and having published a vituperative letter about the defendant; the opinion on the latter point states the rule too strongly in implying that prior utterances by the complainant in a libel charge are always inadmissible, even to show his bias); *Kan.* 1899, Boldon *v.* Thompson, 60 Kan. 856, 56 Pac. 131 (details of lawsuit with opponent, excluded); *Mass.* 1871, Com. *v.* Jennings, 107 Mass. 488 (the trial Court has discretion); 1872, Morrissey *v.* Ingham, 111 Mass. 65 (same); 1879, Com. *v.* Allen, 128 Mass. 48, 51 (same); *Mich.* 1905, Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613; *N. Y.* 1903, Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148 (the discretion of the trial Court determines); *N. D.* 1905, State *v.* Malmberg, 14 N. D. 523, 105 N. W. 614 (details of political rivalry, etc., allowed in discretion; good opinion by Engerud, J.); *P. R.* 1917, People *v.* Ramirez, 25 P. R. 242 (letter offered to show witness' bias for defendant, excluded because of other contents); *S. D.* 1911, Richardson *v.* Gage, 28 S. D. 390, 133 N. W. 692 (whether the plaintiff-witness had assaulted the opponent; not decided); *Vt.* 1837, Pierce *v.* Gilson, 9 Vt. 222 (only the fact of a quarrel admissible, not the nature of it); 1897, Bertoli *v.* Smith, 69 Vt. 425, 38 Atl. 76 ("the simple fact of trouble" alone allowed, in the trial Court's discretion); 1906, State *v.* Baird, 79 Vt. 257, 65 Atl. 101 (details excluded, in the trial Court's discretion).

§ 952. [1] *Accord: England:* 1838, R. *v.* M'Kenna, Cr. & Dix Abr. 579 (the witness on cross-examination admitted that some time had

1746, *Chadwick's Trial*, 18 How. St. Tr. 362; Prisoner's Counsel (to the chief prosecuting witness): "Had not you and the prisoner a quarrel at Carlisle?" Witness: "That I confess, and I will tell you what it was about; it was about a very foolish affair. Provisions being a little scarce at Carlisle [where both were in the Pretender's army], I had some sausages, and the prisoner would have them from me, and I not caring to part from them caused a quarrel, and we fought together. . . . I would not swear any man's life away for a sausage."

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

But there are limitations to the use of this evidence: (1) In the first place, the general principle (*post*, § 2113) that allows the whole of a conversation to be shown in order to explain the true sense of the fragment first offered must not be allowed to introduce purely *irrelevant matter;*[2] the object is to explain, and no more should be listened to than is strictly necessary for that purpose:

1820, ABBOTT, C. J., in *The Queen's Case*, 2 B. & B. 294 (a witness for the plaintiff on cross-examination stated that he had mentioned that he was to be a witness against the defendant; it was proposed to ask him about the whole conversation): "The counsel has a right upon re-examination to ask all questions which may be proper to draw forth the sense and meaning of the expressions used by the witness on cross-examination, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further and to introduce matter new in itself and not suited to the purpose of explaining either the expressions or the motives of the witness. . . . [The conversation] becomes evidence only as it may affect the character and credit of the witness,

elapsed before he disclosed his information to the officials. A re-examination for the purpose of explaining his reasons was objected to, but "Foster, B., permitted a re-examination on this point, and the witness thereupon in reply stated that he was prevented by sickness from sooner lodging the informations"); *U. S. Ala.* 1874, Hall *v.* State, 51 Ala. 15 (to prove improper intimacy between the defendant and a female witness, the fact that they were seen at a revival whispering at the back of the church had been admitted; to "repel the inference", the fact was admitted that other men and women were also seen there whispering); 1898, McAlpine *v.* State, 117 Ala. 93, 23 So. 130; *Ark.* 1908, Strong *v.* State, 85 Ark. 536, 109 S. W. 536 (bias explained away by threats; cited more fully *ante*, § 280); *Cal.* 1895, People *v.* Johnson, 106 Cal. 289, 39 Pac. 622 (zeal based on strong conviction of defendant's innocence); 1895, People *v.* Fultz, 109 Cal. 258, 41 Pac. 1040 (the witness had quarrelled with the defendant, her husband, and called him names; explanation was allowed that this was after defendant had struck her); *Conn.* 1896, Dennehy *v.* O'Connell, 66 Conn. 175, 34 Atl. 920 (the reason why a supposed dispute had taken place); *Me.* 1906, Lenfest *v.* Robbins, 101 Me. 176, 63 Atl. 729 (trespass for assault; the defendant allowed on re-examination to explain that the hostility "was not on his side"); *Mass.* 1871, Com. *v.* Jennings, 107 Mass. 488 (the trial Court's discretion controls); 1872, Morrissey *v.* Ingham, 111 Mass. 65 (same); 1875, Brooks *v.* Acton, 117 Mass. 204, 209; *N. J.* 1850, Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 500 (explanation allowed); 1919, State *v.* Young, 93 N. J. L. 396, 108 Atl. 215 (witness having answered on cross-examination that an indictment was pending on which he had been promised a nolle pros., on re-direct he was allowed to state that the indictment was jointly found for the offence on trial); *N. Y.* 1848, Clapp *v.* Wilson, 5 Den. 286, 289 (the defendant's witness was shown to be his son-in-law; counter-evidence admitted that they had for some time been at variance).

Compare the rule for *party's hostility* (*ante*, § 396).

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

which may be affected by his antecedent declarations and by the motive under which he made them; but when once all which had constituted the motive and inducement and all which may show the meaning of the words and declarations has been laid before the Court, the Court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is in my opinion irrelevant and incompetent."

(2) When to a witness is imputed hostility to the opponent, the true process of explanation consists in showing that the facts offered do not really indicate the conclusion suggested, *i.e.* the hostility. Thus, when the counter-evidence does not attempt to do this, but admits the hostility and desires to show that it was *justifiable by the opponent's conduct*, the offer is improper in two ways, first, because it does not at all explain away, but concedes that hostility exists, and, secondly, because it tends to prejudice unfairly the cause of the opponent by showing him to be an unjust man; and for these reasons such evidence may be excluded:[3]

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

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

[3] *Accord:* but usually laying down the rule too strictly: *Ariz.* 1919, McCann v. State, 20 Ariz. 489, 182 Pac. 96 (witness' expression of opinion as to accused's guilt, held improper); *Ark.* 1852, Cornelius v. State, 12 Ark. 787, 800 (rumors of previous similar crimes by the defendant, stated by the witness in detail on re-examination as the ground of his prejudice; excluded); 1879, Butler v. State, 34 Ark. 484 (details of charges reported to witness by H. as having been made against her by defendant, and causing ill-feeling on her part; excluded on cross-examination); *Fla.* 1886, Selph v. State, 22 Fla. 537, 541 ("It is permissible to prove that witness and prisoner had a controversy, from which hostility was engendered; it is of no consequence which was in the right in such controversy"); *La.* 1881, State v. Gregory, 33 La. An. 743 (details of reasons for animosity, excluded); 1902, State v. Frank, 109 La. 131, 33 So. 110 (details excluded); *Minn.* 1908, State v. Kight, 106 Minn. 371, 119 N. W. 56; *N. Y.* 1900, People v. Zigouras, 163 N. Y. 250, 57 N. E. 465 (admitted, subject to discretion of trial Court; three judges dissenting); *Or.* 1902, State v. Warren, 41 Or. 348, 69 Pac. 679 (admissible in the trial Court's discretion); *S. Dak.* 1902, State v. Stevens, 16 S. D. 309, 92 N. W. 420 (reasons for hostility, excluded); *Tex.* 1917, Eppison v. State, 82 Tex. Cr. 364, 198 S. W. 948 (pandering); *Vt.* 1900, Hyde v. Swanton, 72 Vt. 242, 47 Atl. 790 (details of a quarrel, excluded).

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

Distinguish the application of the rule for details of employment creating *interest* (*post*, § 696), as in State v. Bean, 77 Vt. 384, 60 Atl. 807 (1905).

He must, as a matter of principle; for the same reasons of fairness that require a witness to be given an opportunity of denying or explaining away a supposed self-contradictory utterance (*post*, § 1025) require him also to have a similar opportunity to deny or explain away a supposed utterance indicating bias. Should force be given to this principle, in spite of the absence of fixed common-law precedent? Under ordinary circumstances, it should be. But the rule requiring such an inquiry before proving a prior self-contradiction has been pushed so far, and applied so stiffly and arbitrarily, that on the whole it now does quite as much harm as good. To import it in its present shape into any subject where it does not strictly belong by precedent seems unwise. Were the rule properly administered, no doubt it should have a place here also.

Moved perhaps by these conflicting considerations, the different jurisdictions are found ranged on opposite sides in the present question.[1]

§ 953. [1] ENGLAND: here the inquiry seems to have been regarded as necessary: 1820, The Queen's Case, 2 B. & B. 313 (the broad rule is laid down that "the legitimate object of the proposed proof is to discredit the witness", "to bring the credit of the witness into question by anything he may have said or declared touching the cause", and hence in every such case the asking should be required); 1840, Patteson, J., in Carpenter *v.* Wall, 11 A. & E. 804 ("I like the broad rule that, when you mean to give evidence of a witness' declarations for any purpose, you should ask him whether he ever used such expressions"); 1847, Alderson, B., in Attorney-General *v.* Hitchcock, 1 Exch. 102 ("it is only just and reasonable that the question should be put", though implying that it is not necessary).

UNITED STATES: *Fed.* 1880, U. S. *v.* Schindler, 18 Blatchf. 230, *semble* (not necessary); 1899, McKnight *v.* U. S., 38 C. C. A. 115, 97 Fed. 208, 212, *semble* (necessary); *Ala.* 1843, Weaver *v.* Traylor, 5 Ala. 564 (necessary); 1915, Sexton *v.* State, 13 Ala. App. 84, 69 So. 341 (necessary); *Ark.* 1890, Hollingsworth *v.* State, 53 Ark. 387, 388, 14 S. W. 41 (left undecided); *Cal.* 1860, Baker *v.* Joseph, 16 Cal. 177 (necessary); *Del.* 1900, State *v.* Deputy, 3 Pen. 19, 50 Atl. 176 (necessary); *Fla.* 1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (not necessary); *Ill.* 1890, Aneals *v.* State, 134 Ill. 401, 414 (necessary); 1901, Blanchard *v.* Blanchard, 191 Ill. 450, 61 N. E. 481 (necessary); *Ia.* 1871, Lucas *v.* Flinn, 35 Ia. 14 (not necessary; the witness denied that he was biassed, and former expressions of enmity were subsequently offered against him); *Ky.* 1897, Horner *v.* Com., — Ky. —, 41 S. W. 561 (necessary); *La.* 1896, State *v.* Goodbier, 48 La. An. 770, 19 So. 755 (necessary); *Minn.* 1907, Goss *v.* Goss, 102 Minn. 346, 113 N. W. 690 (not decided); *Miss.* 1859, Newcomb *v.* State, 37 Miss. 383, 403 (necessary); *Nebr.* 1897, Davis *v.* State, 51 Nebr. 301, 70 N. W. 984 (necessary); *N. H.* 1851, Titus *v.* Ash, 24 N. H. 331 (unnecessary); 1857, Cook *v.* Brown, 34 id. 471 (same); *N. M.* 1918, State *v.* Kidd, 24 N. M. 572, 175 Pac. 772 ("probably" the question need not be put); *N. Y.* 1856, Stacy *v.* Graham, 14 N. Y. 492, 498 (necessary; here a confession of falsity; overruling in effect People *v.* Moore, 15 Wend. 419, 424, *semble*, *contra*); 1892, People *v.* Brooks, 131 N. Y. 325, 30 N. E. 184 (necessary); 1903, Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148 *semble* (not necessary); 1912, People *v.* Lustig, 206 N. Y. 162, 99 N. E. 183 (not necessary); 1920, People *v.* Michalow, 229 N. Y. 225, 128 N. E. 228 (witness' statements revealing that she was coaching other witnesses as to what to say; prior questioning not necessary); *N. C.* 1842, State *v.* Patterson, 2 Ired. 354 (necessary); and the following cases, *accord*: 1847, Pipkin *v.* Bond, 5 Ired. Eq. 101; 1848, Edwards *v.* Sullivan, 8 Ired. 304; 1856, Hooper *v.* Moore, 3 Jones 429; 1869, State *v.* Kirkman, 63 N. C. 248; 1876, State *v.* Wright, 75 N. C. 440; 1897, Burnett *v.* R. Co., 120 N. C. 517, 26 S. E. 819; *Or.* 1895, State *v.* Brown, 28 Or. 147, 41 Pac. 1042 (necessary); 1896, State *v.* Ellsworth, 30 Or. 145, 47 Pac. 199 (necessary); 1898, First Nat'l Bank *v.* Com. U. Ass. Co., 33 Or. 43, 52 Pac. 1050 (necessary "as a general rule"); *Va.* 1880, Davis *v.* Franke, 33 Gratt. 424, *semble* (necessary); *Vt.* 1837, Pierce *v.* Gilson, 9 Vt. 222 ("whenever the credit of a witness is to be impeached by proof of what he has said, declared, or done", this inquiry is proper; but it is not invariably to be required, for "we can see no reason why, in some such cases, the inquiry should be first made of the witness; the aggression may have been on the part of the party, and not of the witness; the witness may think that he entertains no ill-will towards the party"); 1847, State *v.* Goodrich, 19 Vt. 116, 119, *semble* (not necessary); 1869, Ellsworth *v.* Potter, 41 Vt. 689 (not applicable to the fact of a quarrel, but "there is some reason for apply-

Wherever the rule requiring this preliminary inquiry is in force, it carries with it, as of course, the developed details of the rule as established for self-contradictions (*post*, §§ 1029–1038). But the rule, in any case, applies only to *utterances*, not to conduct or circumstances such as an assault or an employment.

B. Corruption

§ 956. **General Principle.** The theoretical place of this sort of impeachment is not easy to determine. It is related in one aspect to Interest, in another to Bias, in still another to Character (*i.e.* involving a lack of moral integrity). It suffices to point out that the essential discrediting element is a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony.

Distinguish, however, the use of subornation or other corrupt expedients by the *party himself* (*or his friends or relatives*); this amounts to an admission by conduct (*ante*, § 278), and may raise the question how far inferences may be drawn *against the party* by reason of the acts of third persons done on his behalf (*ante*, § 280). But in the present place we are concerned only with the witness as such, and the question is, what sorts of conduct on his part admit of inferences *against the witness* a willingness to falsify. The testimony of one who exhibits such a willingness must suffer the same doubts as that of one who is prejudiced.

There are several distinct situations: (1) A prior expression by the witness of a general willingness to lie upon the stand; (2) an offer to give false testimony for money or other reward; (3) a statement, after testifying, that he has lied; (4) an attempt to bribe another witness; (5) the receipt of money for his testimony; (6) the rejection of money offered for his testimony; (7) habitual falsities, and sundry dishonorable conduct.

§ 957. **Willingness to Swear Falsely.** This, beyond any question, is admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence:[1]

ing the same rule [as for self-contradiction] to mere proof of ill-feeling which has only been evinced by unkind or threatening remarks about a party"); 1879, State *v.* Glynn, 51 Vt. 579 (holding that the witness' attention must be called, but not referring to Ellsworth *v.* Potter, *supra*); 1905, State *v.* Bardelli, 78 Vt. 102, 62 Atl. 44 (same); *Wis.* 1858, Martin *v.* Barnes, 7 Wis. 242, *semble* (not necessary).

§ 957. [1] 1781, De la Motte's Trial, 21 How. St. Tr. 791 (the witness had said "I swear anything", speaking of the trial in hand; admitted); 1793, Newhall *v.* Adams, 1 Root Conn. 504 ("he would swear to anything, if he could get 6s. by it", admitted); 1885, State *v.* Allen, 37 La. An. 685, 687 (trial Court allowed in discretion to exclude such questions as "Would you in order to save your own life swear to a falsehood?"); 1907, State *v.* Caron, 118 La. 349, 42 So. 960 (whether he had said that he would swear to anything that would help his brother, held allowable); Halley *v.* Webster, 21 Me. 461, 464 (statements "that he had lost his devotion; that he intended now to serve the devil as long as he had served the Lord", etc., excluded); 1854, Harrington *v.* Lincoln, 2 Gray Mass. 133 (that the witness had said he would lie on the stand; inadmissible, *semble*); 1864, Beaubien *v.* Cicotte, 12 Mich. 484 ("he played good Lord and good devil, because he did not know into whose hand he might fall", admitted); 1918, Caffery *v.* Philadelphia & R. R. Co., 261 Pa. 251, 104 Atl. 569 ("if they did not settle the case, he would go into court and lie them out of it", admitted); 1898, Sweet *v.* Gilmore, 52 S. C. 530, 30 S. E. 395 (willingness to lie, admissible).

1833, O'NEALL, J., in *Anon.*, 1 Hill S. C. 258: "It was proved that Nimrod Mitchell had said that 'if he heard any man say he would not swear a lie, he would not believe him, for on some particular occasions *he* would, for he thought any man would.' The substance of this declaration was that he would not, on some occasions, feel himself bound to declare the truth on oath. . . . The man who believes that he is under no legal or moral obligation at all times and under all circumstances to tell the truth under the sanction of an oath has destroyed the only test by which he can claim credit at the hands of men. Such evidence is not establishing a bad character from particular facts."

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

§ 959. **Confession that Testimony was False.** This is evidentially of the same value as the preceding conduct.[1] The difficulty is that it is apparently not circumstantial evidence at all, but testimonial (*i.e.* is to be taken as the assertion of a past fact), and therefore obnoxious to the Hearsay rule. If this were correct, it could be used only under the Hearsay Exception for Declarations against Interest, and yet it is barred there by the arbitrary

§ 958. [1] *Admitted:* 1861, Jackson *v.* Thomason, 8 Jur. N. S. 134 (admitting letters apparently implying a willingness to withhold for a bribe what he knew); 1887, Barkly *v.* Copeland, 74 Cal. 1, 5, 15 Pac. 307 (statements of a convict that he intended to testify falsely for C. in order to get the assistance of C.'s influence for a pardon, admitted); 1892, Roberts *v.* Com., — Ky. —, 20 S. W. 267 (an offer to swear for the opponent if he would help to clear the witness from a criminal charge, admitted); 1895, Alward *v.* Oakes, 63 Minn. 190, 65 N. W. 270 (letters "evincing a corrupt disposition to make his testimony in this case depend upon the pecuniary or other valuable consideration", etc., admitted); 1905, Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835 (question as to an offer for money to leave the State, when a witness in another suit, allowed in discretion).

Excluded, but very singular rulings: *New York:* 1833, People *v.* Genung, 11 Wend. 18 (a charge of obtaining a note by false pretences; an offer by the defrauded witness not to testify if the defendant would make a settlement, excluded); 1847, People *v.* Austin, 1 Park. Cr. C. 157 (an offer to refrain for money from testifying, by a father who had a claim under the statute for the loss of services of the son whose death was the subject of the charge, excluded).

§ 959. [1] *Admitted: England:* 1675 (?) Woodford's Case, Vin. Abr. XII, 40 (the confession of one who had falsely accused another of piracy and had deposed against him, held inadmissible only because of the former's subsequent attainder); 1855, Romilly, M. R., in Greenslade *v.* Dare, 20 Beav. 284, 290 (admitted testimony of a witness' admission of perjury, but declared that he paid no attention to it unless corroborated); *California:* 1898, People *v.* Prather, 120 Cal. 660, 53, Pac. 259 (previous confessions of falsehoods as to the matter in hand, allowed to be asked for on cross-examination); *Connecticut:* 1875, McGinnis *v.* Grant, 42 Conn. 77 (affidavit by the witness that his testimony had been falsely given for hire, admitted); *Georgia:* 1896, Georgia R. & B. Co. *v.* Lybrend, 99 Ga. 421, 27 S. E. 794 (admission that he had made a false affidavit in connection with the trial, admitted); *Indiana:* 1853, Perkins *v.* State, 4 Ind. 222 (statements of a prosecuting witness that he had falsely made the charge, admitted); *New York:* 1836, Savage, C. J., in People *v.* Moore, 15 Wend. 419, 424 ("If a witness, the moment he leaves the stand, should declare that his whole testimony was a fabrication", it would destroy his credit; admitting such a statement, made in jail after leaving the stand); 1856, Stacy *v.* Graham, 14 N. Y. 492, 498 (confession that the testimony was false, and that he regretted having so testified; assumed as admissible).

Excluded: 1898, People *v.* Arrighini, 122 Cal. 121, 54 Pac. 591 (questions to a defendant eliciting testimony that he had wilfully lied at the coroner's inquest, excluded; clearly unsound); 1883, Craft *v.* Com., 81 Ky. 253 (confession of perjury); 1905, State *v.* Wells, 33 Mont. 291, 83 Pac. 476 (cross-examining a witness who has identified his former testimony, "Is that testimony true or false?" not allowed; unsound; the pedantic error of such rulings can be seen by comparing the marvellously successful use of such a cross-examination by Sir Charles Russell with Pigott in the Parnell Case, quoted *post*, § 1260):

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

exclusion of confessions of a crime (here, perjury) by a third person (*post*, § 1476). That arbitrary limitation ought to be ignored, here as in other cases; but it is not necessary to resort to that expedient, for the evidence in question need not be treated as a hearsay assertion. It is in effect a self-contradictory statement (*i.e.* "I now say that the facts are just the opposite of what I formerly asserted"), and may therefore be used by virtue of the principle which admits them (*post*, § 1040). Such is the solution usually reached.

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

Distinguish the use of such evidence against a *party*, not a witness (*ante*, §§ 278, 280); in that aspect, it is necessary to show the *party's authority or connivance* with the corruption, while in the present aspect the party's authority or connivance is immaterial.

§ 961. **Receipt of Money for Testimony; Payment of Witness' Expenses.** The witness' receipt of money for testimony may indicate corruption in two ways: first, from the conduct in receiving it, may be inferred a *willingness to speak falsely;* secondly, from the fact of its having been received or promised, may be inferred an *interest* in favor of the cause of the giver, just as any fact of pecuniary interest makes probable such a partiality.

§ 960. [1] *Eng.* 1680, Lord Stafford's Trial, 7 How. St. Tr. 1401 (that the witness had offered a bribe to another in the same suit, admitted); 1681, Stapleton's Trial, 8 How. St. Tr. 519 (same); 1775, Trial of Maharajah Nundocomer, 20 How. St. Tr. 1035 (same); 1820, Queen Caroline's Trial, Linn's ed., III, 38, 45 (same); *U. S. Cal.* 1885, Luhrs *v.* Kelly, 67 Cal. 289, 291, 7 Pac. 696 (an attempt to bribe another witness; admissible only where the former has testified on material points); 1887, Barkly *v.* Copeland, 74 Cal. 1, 5, 15 Pac. 307 (an offer of the defendant's influence for a pardon, the witness being a convict, admitted); 1897, People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 833 (attempt to bribe another witness); *Ia.* 1897, State *v.* Van Tassel, 103 Ia. 6, 72 N. W. 497 (falsehood and deception by a detective in obtaining a confession may be considered); *Mass.* 1849, Cooley *v.* Norton, 4 Cush. 94 (attempt to bribe defendant, when witness in another suit, not to testify, excluded); 1909, Com. *v.* Min Sing, 202 Mass. 121, 88 N. E. 918 (attempted subornation admissible "to show his bias and affect his credibility"); *Mich.* 1884, People *v.* White, 53 Mich. 537, 540, 19 N. W. 174 (bastardy; questions allowed to the prosecutrix whether she had not said that she was going to get a prostitute to swear a case against the defendant); *Minn.* 1896, Matthews *v.* Lumber Co., 65 Minn. 372, 67 N. W. 1008 (attempt to corrupt a witness, admissible in discretion); *Mo.* 1883, State *v.* Stein, 79 Mo. 330 (offer for money to furnish testimony, admitted); 1893, State *v.* Hack, 118 Mo. 92, 23 S. W. 1089 (that she had offered a witness money to leave the city, admitted); 1903, State *v.* Thornhill, 177 Mo. 691, 76 S. W. 948 (attempt to induce an opposing witness to abscond); *N. Y.* 1882, Schultz *v.* R. Co., 89 N. Y. 248 (attempt to get another witness to testify falsely, admitted); *Or.* 1919, State *v.* Rader, 94 Or. 432, 186 Pac. 79, 81, 91 (murder; letter by defendant's sister offering money to a desired witness, held admissible, by a majority, "as evidence affecting the interest of the witness" if it had concerned the present case, but excluded because it was not shown to concern this case; the minority held it inadmissible without evidence of authorization by the defendant; the minority opinion treats the question as involving the principle of § 280, *ante*, and ignores the current of authorities cited above); *Pa.* 1898, Beck *v.* Hood, 185 Pa. 32, 39 Atl. 842 (attempt to corrupt a juror on the preceding trial of the same case, admitted, on cross-examination); *Tex.* 1913, Burnaman *v.* State, 70 Tex. Cr. 361, 159 S. W. 244 (here the special controversy was whether the rule applied to admit a corrupt attempt by the accused's brother who was a witness; properly held admissible; Davidson, P. J., diss. on the ground that the dominant purpose of the evidence was that purpose forbidden by § 280, *ante*).

It is important to distinguish the two kinds of inference, for the former inference can only legitimately be drawn where the money or other reward has been taken consciously with a view to *false* testimony; where such an understanding attends the bargain, the witness' conduct raises a clear inference of his willingness to speak falsely.[1]

But the second inference is not only of a different sort, but is much weaker; it is not from the witness' own conduct, but from the mere external circumstance that money has come or will come to him for his testimony; *i.e.* the element of knowing *false* testimony is lacking, and the inference may merely be that the money is likely to have some biassing effect of the same general sort that is attributable to all pecuniary interest (*post*, § 966). This second inference is ordinarily the only allowable one in the usual case where it is made to appear that a witness' expenses are paid by his party or that as expert he is to receive an extra fee from that party.[2] These facts may legitimately be

§ 961. [1] 1875. McMath *v.* Hammond, 47 303, 307 (an agreement for money not to testify, admissible); 1900, Schmertz *v.* Hammond, 47 W. Va. 527, 35 S. E. 945 (agreement to give witness a share in proceeds of judgment if recovered, admissible); 1918, Nicely *v.* Nicely, 81 W. Va. 269, 94 S. E. 749 (employment in a divorce case to obtain evidence by entrapping the wife, admitted); 1858, Martin *v.* Barnes, 7 Wis. 242 (a bargain by which a medical witness was to testify to imaginary injuries, admitted).

[2] *Federal:* 1905, Union Pacific R. Co. *v.* Field, 137 Fed. 14, 16, 69 C. C. A. 536 (that a witness for the defendant corporation "came to the trial upon passes . . . was not a proper subject of comment"; unsound); *Alabama:* 1901, Southern R. Co. *v.* Crowder, 130 Ala. 256, 30 So. 592 (payment of sundry expenses of attendance beyond the amount of legal fees, admissible); 1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012 (whether he paid his own travel expenses; held properly disallowed); 1904, Southern R. Co. *v.* Morris, 143 Ala. 628, 42 So. 17 (but payment of charges already due is not admissible); 1921, Payne *v.* Ray, 206 Ala. 432, 90 So. 605 (the witness may explain the reason for accepting more than the usual amount); *Arkansas:* 1906, Kansas C. S. R. Co. *v.* Belknap, 80 Ark. 587, 98 S. W. 363 (that the witnesses of defendant received free transportation, allowed); *California:* 1910, People *v.* Tomalty, 14 Cal. App. 224, 111 Pac. 513 (the fact of frequent employment as expert by one party may be inquired into, but not the details of amounts); *Florida:* 1899, Bryan *v.* State, 41 Fla. 643, 26 So. 1022 (that a witness' attendance was procured by fur[illegible] of a certain association, allowed); 1903, Sylvester *v.* State, 46 Fla. 166, 35 So. 142 (payment of fare by the party calling him, admitted); *Illinois:* 1898, North Chicago S. R. Co. *v.* Anderson, 176 Ill. 635, 52 N. E. 21 (relations of witness with party, including interviews with counsel, admissible; so also the fact that the witness had been promised pay for time lost in attendance); 1902, Kerfoot *v.* Chicago, 195 Ill. 229, 63 N. E. 101 (expert witnesses to land-value, testifying for the city, allowed to be cross-examined to the amount of money received by them in the preceding year as witnesses, and to other facts tending to show a professional occupation for the city as value-witness); 1903, Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818 (that a physician had been paid for his examination to qualify, admitted); 1904, Chicago City R. Co. *v.* Handy, 208 Ill. 81, 69 N. E. 917 (that an expert medical witness is to receive more than the statutory fee, and that he is frequently employed as such by one of the litigants, allowable); 1904, Chicago & E. I. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050 (that the witness was interested as a medical man in similar suits against other corporations, excluded); 1909, West Skokie Drainage District *v.* Dawson, 243 Ill. 175, 90 N. E. 377 (to an engineer, whether he had been promised "considerable money" if the proceedings "went through", allowed); 1915, O'Day *v.* Crabb, 269 Ill. 123, 109 N. E. 724 (that a medical witness received $100 per day from the party calling him, admitted); *Kentucky:* 1896, Jackson *v.* Com., — Ky. —, 37 S. W. 847 (whether she was paid anything for coming from an adjoining county to testify, allowed); *Minnesota:* 1879, State *v.* Tosney, 26 Minn. 262, 3 N. W. 345 (liquor-selling; receipt of money by witness as detective for such offences, admitted); 1895, State *v.* Hayward, 62 Minn. 474, 65 N. W. 63 (that a witness for the prosecution was being boarded by the State, admitted); *Pennsylvania:* 1898, Com. *v.* Farrell, 187 Pa. 408, 41 Atl. 382 (what contract for pay a detective had, allowed on cross-examination); *South Dakota:* 1903, State *v.* Mulch, 17 S. D. 321, 96 N. W. 101 (that witness fees of a dollar a day were promised, admitted); *Vermont:* 1922, State *v.* Long, — Vt. —, 115 Atl. 734 (whether he "received pay for the State", allowed, but not

brought out, but they are not to be understood as involving necessarily a corrupt intention.

Whether a *contract to pay more* than the legal fees is invalid on grounds of public policy is a different question (*post*, § 2203).

§ 962. **Mere Rejection of Offer of a Bribe.** Where the witness in question has merely been offered a bribe, no inference of any sort as to the witness' testimony can be drawn; the rejection of the bribe deprives the offer of all its force in that respect.[1] From the point of view of the party offering it, of course, such an attempt at corruption is admissible against him, as showing his consciousness of a bad cause (*ante*, §§ 278, 280); but this involves the necessity of proving the identity of the offerer with the party, — a matter not always feasible.

§ 963. **Habitual False Charges, and Sundry Corrupt Conduct.** In various ways a witness may indicate a state of mind which partakes of the nature of corruption and of bias, and is not easily to be exactly labelled; the nature and strength of the inference will vary in different circumstances.[1]

The only difficult question is presented by conduct indicating a disposition or habit or *general scheme to make false charges or claims*. On this point there is much difference of opinion.[2] The only distinction that is here legitimate is

"how much he was paid"; unsound as to the latter); *West Virginia:* 1881, Moats *v.* Rayner, 18 W. Va. 642, 645 (what fee is to be received by an attorney testifying for his client, admitted); *Wisconsin:* 1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49 (payment of expenses, etc., may be inquired into).

Compare the authorities cited for *interest*, *post*, § 969.

§ **962.** [1] 1820, The Queen's Case, 2 B. & B. 303 (to show the probability of testifying witnesses having been bribed, evidence that another person, not put on the stand, had been offered a bribe by the opponent's agent, excluded); 1847, Attorney-General *v.* Hitchcock, 1 Exch. 91 ("It is totally irrelevant to the issue that some person should have thought fit to offer a bribe to the witness . . . if that bribe was not accepted; it is no disparagement to a man that a bribe is offered to him; it may be disparagement to the person who makes the offer"). A question whether the witness had been offered a bribe in the name of the opponent was permitted in Com. *v.* Sacket, 22 Pick. 395 (1839), on the ground that an affirmative answer might be followed up by further questions leading to the fact of the acceptance of the bribe.

§ **963.** [1] 1778, Captain Baillie's Case, 21 How. St. Tr. 343 (an offer to suppress an inquiry, admitted); 1858, Winship *v.* Neale, 10 Gray 382 (whether certain proceedings in the case had not been taken really with a view to hampering the opponent's case; admitted in discretion); 1888, Hitchcock *v.* Moore, 70 Mich. 116, 37 N. W. 914 (an attempt to have the opponent made drunk at the time of trial; admissible, *semble*); 1905, Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918 (that the witness employed a person to negotiate with a judge for a corrupt decision in a prior stage of the cause, allowed); 1869, People *v.* Thompson, 41 N. Y. 6 (that a witness had left the jurisdiction in order to cause the trial's postponement, admitted).

Compare the cases cited *ante*, §§ 280, 950.

[2] With the following cases compare some of those cited *ante*, §§ 280, 340, 342: CANADA: *British Columbia:* 1902, D'Avignon *v.* Jones, 9 Br. C. 359 (the issue involved an alleged forgery of the plaintiff's name by the defendant; the witness to the forgery, B., was allowed to be impeached by evidence of a conspiracy between B. H. and the plaintiff, involving past transactions also, to give false evidence against the defendant); UNITED STATES: *Federal:* 1896, Hart *v.* Atlas K. Co., 23 C. C. A. 198, 77 Fed. 399 (breach of contract; whether the defendant had not about the same time cancelled similar orders to other business houses, admitted in discretion); *Arkansas:* 1912, Frauenthal *v.* State — Ark. —, 146 S. W. 491 (rape under age, the prosecutrix being 12–13 years of age; the defendant offered to show that the prosecutrix had asserted similar acts done to her by other men, and that these other charges were false — though this part of the offer is not clear; excluded on the ground that nothing short of mental derangement could be shown; such a dangerous ruling deserves protest; a perusal of Gross' "Criminal Psychology" and Healy's "Juvenile Delin-

between conduct indicating a corrupt moral character in general and conduct indicating a specific corrupt intention for the case in hand. Facts offered for the latter purpose could be proved by either mode (*ante*, § 943). There ought to be no doubt that such facts could be freely inquired into, whichever the purpose be; and even the character-rule does not forbid them on cross-examination (*post*, § 981).

It is time that the Courts took warning here, and became more liberal. They know, and all know, that the court-room has its quota of false claimants and pretended victims of wrongs; some are children, some eccentrics, some hysterics, some insane, some conscious blackmailers.[3] It is hard enough, at last, to detect and expose them. To hamper this exposure with the shibboleth 'res inter alios acta' is unpractical. And the injustice of the situation is often intensified by this maddening prohibition of the very evidence to which a common-sense tribunal would most quickly resort.

quent" is recommended; it ought to be well understood by criminal judges that some women and girls have at times precisely this trait, and that it is always proper to protect a possibly innocent man by an inquiry into the prosecutrix' trait); *Connecticut:* 1885, Russell *v.* Crittenden, 53 Conn. 564, 4 Atl. 267 (action on a warranty of a horse's soundness; a question as to how many other such purchases the defendant had in 20 years tried to revoke for unsoundness, excluded); *Idaho:* 1919, State *v.* Askew, 32 Ida. 456, 184 Pac. 173 (murder: "have you been in the habit of testifying in criminal cases here?" excluded); *Indiana:* 1910, Heath *v.* State, 173 Ind. 296, 90 N. E. 310 (rape under age; that the complainant witness and her father had filed affidavits charging other young men with similar acts, excluded); *Maryland:* 1919, Rau *v.* State, 133 Md. 613, 105 Atl. 867 (statutory rape; proof of the girl's prior false accusation of another man, excluded; erroneously applying the principle of § 987, instead of the present principle); *Massachusetts:* 1870, Com. *v.* Regan, 105 Mass. 593 (rape, former false charges against others of having made her pregnant, excluded); 1893, Miller *v.* Curtis, 158 Mass. 127, 131, 32 N. E. 1039 (charge of indecent assault; admissions of other similar false charges made against others, receivable to show a purpose to get money by such charges; but here the statements were not so construable); *Michigan:* 1888, People *v.* Evans, 72 Mich. 367, 377, 40 N. W. 473 (rape by father; former charges of a similar sort by the prosecutrix against all sorts of persons, and the falsity of the charges, admitted); 1912, People *v.* Wilson, 170 Mich. 669, 137 N. W. 92 (like People *v.* Evans, *supra*); *Montana:* 1909, State *v.* Pemberton, 39 Mont. 530, 104 Pac. 556 (the prosecuting witness was not allowed to be asked as to a similar robbery-story, falsely told by him on one occasion fourteen years before, nor was the story allowed to be proved by another witness: no authority cited); *New Hampshire:* 1879, Plummer *v.* Ossipee, 59 N. H. 55, 57 (highway injury; cross-examination of plaintiff's husband as to a prior claim against another town for the same injuries, held properly excluded in discretion); 1881, Watson *v.* Twombly, 60 N. H. 491 (assault; prior false charge of assault by the plaintiff against the defendant, held allowable or not in discretion; but here it was held erroneously excluded as being 'per se' irrelevant); *North Carolina:* 1896, Cecil *v.* Henderson, 119 N. C. 422, 25 S. E. 1018 (plea of the statute of limitations; whether he had not pleaded thus to various other claims, excluded); 1903, State *v.* Lewis, 133 N. C. 653, 45 S. E. 521 (larceny of money from G. when drunk; that G. was "in the habit of getting drunk and losing money, and accusing people of stealing same", admitted to discredit G.); *North Dakota:* 1920, Larson *v.* Russell, 33 N. D. 45, 176 N. W. 998 (personal injury in the nature of spinal neurosis, asserted by defendant to be simulated; to discredit the testimony of the plaintiff's brother, mother, and sister as to her injury, the defendant was allowed to show that shortly before this trial their testimony as to the mother's and son's estate, in a bankruptcy proceeding, had been found by the judge to be false; "the offer was to show that in another big fortune suit the Larson family had all come from swearing to a story incredible and preposterous"); *Pennsylvania:* 1899, Fairfield P. Co. *v.* Ins. Co., — Pa. —, 44 Atl. 317 (intentional misstatement in another proof of loss to the same defendant for goods lost in same fire, allowed to be proved).

[3] Any judge who has not heard of some of the instances in which such a complete investigation soon clears up the whole atmosphere should read Dr. Bernhard Glueck's article on "The Forensic Phase of Litigious Paranoia", in the Journal of the American Institute of Criminal Law and Criminology, V, 371 (Sep-

The double barrier erected by our strict precedents in this field may be instanced by the case nowadays common in our courts, a charge against an oldish man of indecencies with a young girl or child in his shop or house. Usually the facts are either that the man is a sexual pervert, or that the female is a sexual hysteric or a precocious little reprobate. If the former case, the prosecution tries to show that the man has a habit of treating little girls in that way. But, NO, that cannot be done; the character-rule forbids. If the latter case, the defence tries to show that the girl has been falsely charging other men with similar offenses. But, NO, that cannot be done; the witness-rule forbids. And so, whichever the truth may be, the Court ties up the case in these intellectual ropes, and lets the parties struggle away with the fragments of evidence that are permitted to be used. And yet we assume that this process is a skilled and worthy effort to establish the truth!

§ 964. **Preliminary Inquiry of the Witness.** Whatever rule is adopted as to the necessity of a preliminary inquiry to the witness about former expressions of Bias (*ante*, § 953) obtains also for proof of former expressions indicating corrupt intention; the two kinds of evidence are treated as standing practically on the same footing in this respect.[1]

C. Interest

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

tember, 1914, now reprinted in his "Studies in Forensic Psychiatry"); also Professor Hans Gross' "Criminal Investigation" (1907, transl. Adam), p. 171, and Dr. William Healy's "Pathological Lying, Accusation, and Swindling" (Boston, 1915). See also the materials cited *ante*, § 875.

§ 964. [1] *Eng.* 1820, The Queen's Case, 2 B. & B. 313, Linn's ed., III, 246, 258 (asking is necessary, before proving an act of corruption, since "an inquiry into the act of corruption will usually be, both in form and effect, an inquiry as to the words spoken by the supposed corrupter"; opinion by all the judges; erroneous, (1) because the object of asking is to afford an opportunity to explain an apparent inconsistency, and there is here no question of inconsistency and nothing to explain, (2) because to carry the rule this far would be in effect to apply it to all discrediting conduct, which would unfairly hamper the impeaching party and often render impeachment impracticable); *U. S.* 1853, Pleasant *v.* State, 13 Ark. 460, 477 (offer to stifle prosecution); 1921, State *v.* Smith, 44 S. D. 305, 183 N. W. 873 (adultery; rule not applied to questions as to corruption of witness to a confession); 1880, Davis *v.* Franke, 33 Gratt. Va. 424 (conversation in which an attempt to suborn a witness was made); 1858, Martin *v.* Barnes, 7 Wis. 242 (a bargain showing the witness' corrupt interest in the suit).

party or of a witness in the event of the cause is a circumstance available to impeach him:[1]

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

§ 967. **Accomplices and Co-indictees in a Criminal Case.** It bears against a witness' credibility that he is an *accomplice* in the crime charged and testifies *for the prosecution*;[1] and the *pendency of any indictment* against the witness indicates indirectly a similar possibility of his currying favor by testifying for the State;[2] so, too, the existence of a

§ 966. [1] The following rulings and statutes declare the general principle, which is unquestioned; the statutes are quoted in full, *ante*, § 488: *Alaska:* Comp. L. 1913, § 1865; *Ariz.* Rev. St. 1913, P. C. § 1226; *Ark.* 1901, Lancashire Ins. Co. *v.* Stanley, 70 Ark. 1, 62 S. W. 66; *Colo.* Comp. St. 1921, § 6555, *semble; Conn.* Gen. St. 1918, § 5705; *Ga.* Rev. C. 1910, § 5732; *Ill.* Rev. St. c. 51, § 1; 1897, West Chicago St. R. Co. *v.* Dougherty, 170 Ill. 379, 48 N. E. 1000; 1906, Hanchett *v.* Haas, 219 Ill. 546, 76 N. E. 845; *Ind.* Burns & Ann. St. 1914, § 530; *Ia.* Code § 4602, Comp. C. § 7309; *Kan.* Gen. St. 1915, § 7219, § 8130; *La.* Rev. Civ. C. § 2282; *Me.* Rev. St. 1916, c. 87, § 112; *Md.* Ann. Code, 1914, Art. 35, § 6; *Mich.* Comp. L. 1915, § 12551; *Minn.* Gen. St. § 5658; *Miss.* Code 1906, § 1915, Hem. § 1575, Code § 1923, Hem. § 1583 (quoted *post*, § 987); *Mo.* Rev. St. 1919, § 5410, § 4036; 1904, Conner *v.* Missouri P. R. Co., 181 Mo. 397, 81 S. W. 145; *Nebr.* Rev. St. 1922, § 8845; *Nev.* Rev. L. 1912, § 5419; *N. J.* Comp. St. 1910, Evid. § 3; *N. M.* Annot. St. 1915, § 2165; *Oh.* Gen. C. Ann. 1921, § 13659 (criminal cases); *Or.* Laws 1920, § 731; *Okl.* Comp. St. 1921, § 585; *P. I.* C. C. P. 1901, § 273 (like Ga. Code § 5732); 1910, U. S. *v.* Lasada, 18 P. I. 90; *S. D.* 1895, Hanson *v.* Red Rock, 7 S. D. 38, 63 N. W. 157; 1895, Trinity Co. Lumber Co. *v.* Denham, 88 *Tex.* 203, 30 S. W. 856; *Vt.* St. § 1236; *Wash.* R. & B. Code 1909, § 1211.

The few judicial rulings concern instructions in which counsel has attempted improperly either to control the jury's freedom of judgment or to juggle with words for the purpose of securing a judicial error; for example: 1905, Denver C. T. Co. *v.* Norton, 141 Fed. 599, 608, C. C. A. (party-opponent; an instruction may be demanded); 1900, North Chicago St. R. Co. *v.* Dudgeon, 184 Ill. 477, 56 N. E. 796 (whether an instruction is required); 1908, Helbig *v.* Citizens' Ins. Co., 234 Ill. 251, 84 N. E. 897; 1904, Steebin *v.* Lavengood, 163 Ind. 478, 71 N. E. 494 (form of instruction, considered); 1895, Rucker *v.* State, — Miss. —, 18 So. 121 (it is error to tell the jury that they should disregard the testimony of interested persons); 1898, Boice *v.* Palmer, 55 Nebr. 389, 75 N. W. 849 (interest is to be considered; but there is no doctrine that such a one "will not be as honest" as others); 1914, Ferebee *v.* Norfolk Southern R. Co., 167 N. C. 290, 83 S. E. 360, per Walker, J.

§ 967. [1] This is unquestioned; compare the authorities cited *ante*, §§ 526, 580 (accomplice not disqualified), and *post*, § 2056 (accomplice requires corroboration).

[2] *Ala.* 1919, Bigham *v.* State, 203 Ala. 162, 82 So. 192 (murder; "You haven't been charged with being down at the still when Mr. W. came down there to arrest these fellows?", excluded, for reasons not stated); 1916, Patton *v.* State, 197 Ala. 180, 72 So. 401 (murder: "you have been accused of this killing yourself?" excluded; unsound); *Cal.* 1868, People *v.* Robles, 34 Cal. 591, 593; 1895, People *v.* Dillwood, 106 Cal. 129, 39 Pac. 439 (that other charges are pending against the witness, admitted); *Colo.* 1910, Tollifson *v.* People, 49 Colo. 219, 112 Pac. 794 (burglary; the witness was under a charge of assault, held not improperly excluded in discretion); *Ga.* 1906, Hayes *v.* State, 126 Ga. 95, 54 S. E. 809; *Haw.* 1905, Terr. *v.* Boyd, 16 How. 660 (indictment for the same offence, admitted); *Kan.* 1866, Craft *v.* State, 3 Kan. 450, 478; *Mass.* 1858, Quinsigamond Bank *v.* Hobbs, 11 Gray 250 (existence of

promise or just expectation *of pardon* for his share as accomplice in the crime charged.[3]

When the co-indictee testifies *for the accused*, his situation here also may be considered as tempting him to exonerate the other accused and thus help towards his own freedom.[4]

§ 968. **Accused in a Criminal Case.** The fact of being a party in the cause (*ante*, § 966) and in particular a defendant in a criminal cause, may be considered as affecting the witness' credibility. The only question that arises in this connection is whether the judge, under the unfortunate modern

a criminal prosecution against a witness on the charge of doing that which he now denies he did, admitted): *Mo.* 1880, State *v.* Reavis, 71 Mo. 419 (to rebut the intimation that an accomplice was testifying for the prosecution as the price of freedom, two other pending indictments against him were offered, but were excluded because the fact of the defendant being joined in them might prejudice him); *N. J.* 1904, State *v.* Rosa, 71 N. J. L. 316, 58 Atl. 1010 (that the witness was arrested on the same charge, admitted on cross-examination); *N. Y.* 1880, Ryan *v.* People, 79 N. Y. 600 (a witness asked whether he had been indicted; held proper); *Okl.* 1909, De Graff *v.* State, 2 Okl. Cr. 519, 103 Pac. 538 (liquor-offence); *Tex.* 1912, O'Neal *v.* State, 66 Tex. Cr. 460, 146 S. W. 938. *Contra: Ill.* 1913, People *v.* Newman, 261 Ill. 11, 103 N. E. 589; 1920, People *v.* Green, 292 Ill. 351, 127 N. E. 50 (former indictments pending against a "defendant, not admissible to show his interest as a witness).

Compare the use of the same evidence to show *bad moral character* (*post*, §§ 982, 987), and to show *bias* (*ante*, § 949).

[3] 1905, Stevens *v.* People, 215 Ill. 593, 74 N. E. 786 ("Do you expect to be no further prosecuted in this matter?" allowed, whether or not his expectation was justified by any binding promise); 1915, People *v.* McKinney, 267 Ill. 454, 108 N. E. 652 (inducements to an accomplice to plead guilty and testify for the State, made by the police, though not sanctioned by the Court, may be inquired into); 1920, People *v.* Andrew, 295 Ill. 445, 129 N. E. 178 (certain questions as to promise of immunity, held proper); 1898, State *v.* Nelson, 59 Kan. 776, 52 Pac. 868 (questions as to agreement not to prosecute a witness turning State's evidence, held properly rejected on the facts); 1921, State *v.* Ritter, 288 Mo. 381, 231 S. W. 606 (arson; T. having turned State's evidence, a question as to her "hope and expectation that you would not be prosecuted?", held too vague; this is absurd); 1896, Territory *v.* Chavez, 8 N. M. 528, 45 Pac. 1107 (a hope of pardon, without an express promise, is relevant); 1895, State *v.* Kent, 4 N. D. 577, 62 N. W. 631 (here the fact that the accomplice was after some time still unprosecuted was used as indicating that he was under some hope of release); 1859, Allen *v.* State, 10 Oh. St. 288, 306 ("If A. is convicted, do you expect to be prosecuted?" allowed); 1879, Kilrow *v.* Com., 89 Pa. 480, 485, *semble* (promise of pardon); 1916, State *v.* Barretta, 47 Utah 479, 155 Pac. 343 (whether the witness-accomplice "understood" that his case was to be dismissed, etc., allowed).

On the principle of Explanation (*ante*, §§ 34, 952), the fact may be shown by the prosecution, even before express impeachment (because his relation to the cause is an implied impeachment), that no such promise has been made: *Contra:* 1903, Owens *v.* State, 82 Miss. 18, 33 So. 718 (a co-conspirator, already convicted of the murder charged against the defendant, testified for the State; the fact that he had been offered no inducement by the authorities to testify was excluded; an astonishing ruling, as also that of Madden *v.* State, 65 Miss. 176, 3 So. 328, followed as the authority).

[4] 1898, Titus *v.* State, 117 Ala. 16, 23 So. 77 (indictment of defendant's witness for same murder, admitted); 1904, Wilkerson *v.* State, 140 Ala. 165, 37 So. 265 (indictment for the same illegal sale of liquor; admitted); 1897, Shaw *v.* State, 102 Ga. 660, 29 S. E. 477 (train-wrecking; indictment of defendant's witness for robbing the cars of the same railroad, admitted); 1910, McCray *v.* State, 134 Ga. 416, 68 S. E. 62 (murder of W.; indictment against defendant and McK., a witness for defendant, for an assault on B., as a part of the same affair, admitted to show bias of McK.); 1841, Com. *v.* Turner, 3 Metc. Mass. 25 (that the witness' father was under indictment for being concerned in the same crime with the defendant in whose favor she was testifying, admitted); 1910, Gray *v.* State, 4 Okl. Cr. 292, 111 Pac. 825.

Contra: 1897, Lewis *v.* Com., — Ky. —, 42 S. W. 1127 (indictment of defendant's witness as accomplice, excluded on the theory that it involved character-impeachment; present principle ignored); 1920, People *v.* Weber, App. Div., 181 N. Y. Suppl. 774 (rape while riding in an automobile; indictment of witness called by defendant for rape upon another woman in the same party at the same time, excluded; unsound).

rule forbidding a charge to the jury upon the facts or upon the credibility of specific witnesses, is violating that rule in mentioning this proposition to the jury in a criminal case, — a question which has to do with the law of Trials, not of Evidence.[1]

§ 969. **Bonds, Rewards, Detective-Employment, Insurance, etc., as affecting Interest.** The circumstances which give to a witness an interest in the event of the cause and may therefore be suggestive of testimonial doubt or detraction have usually a significance so apparent that it is either idle to dispute or useless to maintain their admissibility. For the law to attempt to measure judicially the weight of a circumstance which the jury can equally well estimate by the unwritten and unconscious canons of experience is to encumber the law with needless rules. The abolition of the rules for interest-disqualification has left this subject practically untrammelled. Only a few situations have called for rulings, and these are plain enough in their reasoning.

(1) One who as a *spy* obtains information of a crime is not necessarily open to discredit thereby; [1] but one who for that purpose has employed trickery, or who has worked for hire in his investigations, or who by his function as a police or prosecuting officer has committed himself in a partisan manner, may under the circumstances be open to the suspicion of bias or interest.[2]

§ 968. [1] *Federal:* 1895, Reagan *v.* U. S., 157 U. S. 301, 305, 15 Sup. 610; 1904, Alexis *v.* U. S., 129 Fed. 60, 63 C. C. A. 502; 1919, Schulze *v.* U. S., 9th C. C. A., 259 Fed. 189; *Alabama:* 1888, Norris *v.* State, 87 Ala. 85, 88, 6 So. 371; *Arizona:* 1900, Halderman *v.* Terr., 7 Ariz. 120, 60 Pac. 876; *Arkansas:* 1901, Blair *v.* State, 69 Ark. 558, 64 S. W. 948; *California:* 1896, People *v.* Van Eman, 111, Cal. 144, 43 Pac. 520; 1904, People *v.* Wells, 145 Cal. 138, 78 Pac. 470; 1907, People *v.* Ryan, 152 Cal. 364, 92 Pac. 853; 1916, Fulton *v.* U. S., 45 D. C. App. 27, 49; *Idaho:* 1899, State *v.* Webb, 6 Ida. 428, 55 Pac. 892; *Illinois:* Ill. Rev. St. c. 38, § 426; 1882, Hirschman *v.* People, 101 Ill. 576; 1884, Rider *v.* People, 110 Ill. 11, 13; 1897, Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; 1900, Hellyer *v.* People, 186 Ill. 550, 58 N. E. 245; 1902, Henry *v.* People, 198 Ill. 162, 65 N. E. 120; 1904, Waller *v.* People, 209 Ill. 284, 70 N. E. 681; 1904, Schultz *v.* People, 210 Ill. 196, 71 N. E. 405 (form of instruction determined; prior rulings collected); 1911, People *v.* Arnold, 248 Ill. 169, 93 N. E. 786; 1920, People *v.* Maciejewski, 294 Ill. 390, 128 N. E. 489; *Indiana:* 1867, Dailey *v.* State, 28 Ind. 285, 287; 1876, Greer *v.* State, 53 Ind. 421; *Indian Terr.* 1899, Helms *v.* U. S., 2 Ind. T. 595, 52 S. W. 60; *Iowa:* 1880, State *v.* Moelchen, 53 Ia. 310, 316, 5 N. W. 186; 1887, State *v.* Sterrett, 71 Ia. 388, 32 N. W. 387; 1902, State *v.* Hossack, 116 Ia. 194, 89 N. W. 1077; *Kansas:* Gen. St. 1915, §§ 7219, 8130; *Louisiana:* 1898, State *v.* Wiggins, 50 La. An. 330, 25 So. 334; 1914, State *v.* Smith, 135 La. 427, 65 So. 598; *Michigan:* Mich. Comp. L. 1915, § 12552; 1895, People *v.* Resh, 107 Mich. 251, 65 N. W. 99; *Minnesota:* 1903, State *v.* Ames, 90 Minn. 183, 96 N. W. 330; *Missouri:* 1896, State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; 1898, State *v.* Summar, 143 Mo. 220, 45 S. W. 254; 1917, State *v.* Finkelstein, 267 Mo. 612, 191 S. W. 1002 (examining prior rulings), *Montana:* Rev. C. 1921, § 12177; *Nebraska:* Rev. St. 1922, § 10139; 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; 1899, Philamalee *v.* State, 58 Nebr. 320, 78 N. W. 625; 1907, Burk *v.* State, 79 Nebr. 241, 112 N. W. 753; *Nevada:* Comp. L. 1912, § 5419; *Oregon:* 1907, State *v.* Bartlett, 50 Or. 440, 93 Pac. 243; *Wisconsin:* 1899, Emery *v.* State, 101 Wis. 627, 78 N. W. 145; 1905, Schutz *v.* State, 125 Wis. 452, 103 N. W. 90.

It is regrettable that Courts are willing to waste time in discussing in their opinions such a self-evident proposition.

§ 969. [1] 1848, R. *v.* Mullins, 7 State Tr. N. S. 1110, 3 Cox Cr. 756; 1903, Terr. *v.* Sing Kee, 14 Haw. 586, 590 (informer).

[2] Besides the following cases, compare those cited under §§ 2060, 2066, *post* (corroboration of accomplices): *Can.* 1920, R. *v.* Nat Bell Liquors Ltd., 56 D. L. R. 523, 555, Alta. (keeping liquor illegally); *U. S. Ala.* 1905, Borck *v.* State, — Ala. —, 39 So. 580 (buyer of liquor illegally sold); *Ill.* 1890, Hronek *v.* People, 134 Ill. 139, 24 N. E. 681 (private detective's evidence is not necessarily open to be discredited); 1913, People *v.* Gardt, 258 Ill. 468, 101 N. E. 687 (Hronek *v.* People followed); *Mich.* 1894, People *v.* Rice, 103 Mich. 350, 61 N. W. 540

(2) That a witness is as *surety* or *bondsman* interested in the fate of one of the parties may also affect his credibility.[3]

(3) That he will receive a *reward* in case of conviction may affect the credibility of a witness for the prosecution;[4] so also that he has been promised or given a sum in *excess of the legal fees* (*ante*, § 961).

(4) That the party is *insured* against accidents does not indicate any additional partiality in a defendant-witness in an action for personal injuries;[5]

(that the witness was a hired detective in the case, admitted); *Mont.* 1921, State *v.* Showen, — Mont. —, 199 Pac. 917 (violation of liquor law; hired detectives as witnesses); *Nebr.* 1897, Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; 1899, Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713; 1901, Watson *v.* Cowles, 61 Nebr. 216, 85 N. W. 35; *N. C.* 1897, State *v.* Black, 121 N. C. 578, 28 S. E. 518; *P. R.* 1911, People *v.* Flores, 17 P. R. 166 ("testimony of policemen, detectives, and persons charged with the duty of investigating crimes must be judged equally with that of any other citizen"); *Vt.* 1905, State *v.* Bean, 77 Vt. 384, 60 Atl. 807; 1907, Taft *v.* Taft, 80 Vt. 256, 67 Atl. 703 (private detectives in divorce).

For the rule requiring *corroboration* of such witnesses, see *post*, § 2066.

[3] 1898, McAlpine *v.* State, 117 Ala. 93, 23 So. 130 (being surety on bond of G. indicted for a similar crime, excluded); 1903, Southern R. Co. *v.* Bunnell, 138 Ala. 247, 36 So. 380 (railroad passenger's ejection; whether the ticket agent testifying for the defendant, was under indemnity-agreement for the case, allowed); 1895, People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (that the deceased was on the bail bond of a third person charged with assaulting the defendant, admissible); 1908, Bates *v.* State, 4 Ga. App. 486, 61 S. E. 888; 1903, People *v.* Glennon, 175 N. Y. 45, 67 N. E. 125 (that the bail of a witness for the prosecution had been raised, so as to make it desirable for him to favor the prosecution and thus be released, admitted); 1897, Braden *v.* McCleary, 183 Pa. 192, 38 Atl. 623 (that the witness' mother-in-law had given a bond to protect the defendant, a sheriff, admitted).

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

[4] 1890, Hollingsworth *v.* State, 53 Ark. 387, 388, 14 S. W. 41 (the mere fact that a reward was offered, excluded); 1896, Myers *v.* State, 97 Ga. 76, 25 S. E. 252 (the fact of a reward for the apprehension of the accused, admissible against an apprehending officer, whether or not it appears to have influenced his action); 1922, People *v.* Todd, 301 Ill. 85, 133 N. E. 645 (larceny of automobile; the owner's payment of money to another person, charged with the theft, to come and testify against defendant, held not improperly excluded in the trial Court's discretion); 1908, Lenahan *v.* Pittston C. M. Co., 221 Pa. 626, 70 Atl. 884 (rule affirmed; but here a witness for the defendant was allowed to be asked if he, besides being an attorney for defendant, was attorney for a company insuring the defendant).

[5] Here the testimonial value of the fact is nothing, and its further disadvantage is that the jury might improperly be reckless in their award of damages: *Ala.* 1914, Watson *v.* Adams, 187 Ala. 490, 65 So. 528 (excluded); *Conn.* 1898, McQuillan *v.* El. Light Co., 70 Conn. 715, 40 Atl. 928 (whether defendant was protected by employers'-liability insurance; not admissible to show that defendant had no motive to testify falsely); *Ill.* 1902, Fuller Co. *v.* Darragh, 101 Ill. App. 664 (that an insurance company is defending a case, held improper to be asserted to the jury); *Iowa:* 1906, Hammer *v.* Janowitz, 131 Ia. 20, 108 N. W. 109 (defendant's insurance against employer's liability, not admitted); *Mich.* 1921, Church *v.* Stoldt, 215 Mich. 469, 184 N. W. 469 ("This Court has drawn the line at interrogating jurors on the subject while the jury is being selected; . . . beyond that point the subject is strictly excluded"); *Minn.* 1908, Gracz *v.* Anderson, 104 Minn. 476, 116 N. W. 1116 (cross-examination of defendant as to insurance, to affect his credibility, held properly excluded in the trial Court's discretion); *N. H.* 1898, Demars *v.* Mfg. Co., 67 N. H. 404, 40 Atl. 902 (whether an accident insurance company was defending the case; improper, but here not material); *N. J.* 1898, Day *v.* Donohue, 62 N. J. L. 380, 41 Atl. 934 (defendant, testifying to his due care as an employer, allowed to be asked whether he was insured against such losses, in trial Court's discretion); *N. Y.* 1911, Simpson *v.* Foundation Co., 201 N. Y. 479, 95 N. E. 10; *Or.* 1915, Walling *v.* Portland G. & C. Co., 75 Or. 495, 147 Pac. 399; *Wash.* 1902, Shoemaker *v.* Bryant L. & S. M. Co., 27 Wash. 637, 68 Pac. 380 (that defendant is insured, excluded; but here an officer of the defendant company was allowed, on the facts, to be asked about such insurance to contradict his prior statement and exhibit his interest); 1904, Iverson *v.* McDonnell, 36 Wash. 73, 78 Pac. 202 (that defendant was insured, excluded); 1904, Edwards *v.* Burke, 36 Wash. 107, 78 Pac. 610 (principle affirmed); 1905, Lowsit *v.* Seattle L. Co., 38 Wash. 290, 80 Pac. 431 (Iverson *v.* McDonald followed); 1905, Stratton *v.* Nichols L. Co., 39 Wash. 323, 81 Pac. 831 (similar); 1905, Dossett *v.* St. Paul & T. L. Co., 40 Wash. 276, 82 Pac. 273 (similar).

though it may otherwise have a bearing,—for example, in disqualifying a juror who is interested for or against an insured party, or in discrediting an interested witness.[6]

(5) That a witness, not a party, is the *injured person* in a prosecution for a crime may indicate a bias for the cause.[7]

These and such other instances as daily present themselves in trials are solvable without difficulty by the ordinary judgments of experience. Commonly, a ruling of exclusion is unnecessary, because the circumstance, if really worthless, would do no harm if admitted.

[6] Rulings as to *examining a juror on voir dire* as to bias or interest: *Cal.* 1911, Pierce *v.* United Gas & E. Co., 161 Ca. 176, 118 Pac. 700 (jurors should ordinarily not be asked questions emphasizing the fact of defendant's insurance); *Ida.* 1921, Wilson *v.* St. Joe Boom Co., 34 Ida. 253, 200 Pac. 884 (questions to jurors to discover ground for challenge, allowable, the circumstances to show the line between this legitimate purpose and that of placing improper matters before the jury; explaining Steve *v.* Bonners Ferry L. Co., 13 Ida. 384, 92 Pac. 363); 1922, Cochran *v.* Gritman, 34 Ida. 654, 203 Pac. 289 (malpractice; voir dire examination of jurors as to being interested in insurance companies, allowed); *Minn.* 1916, Wentworth *v.* Butler, 134 Minn. 382, 159 N. W. 828 (insurance admitted to indicate probability that plaintiff was feigning injury); *Vt.* 1917, Spinney's Adm'x *v.* Hooker, 92 Vt. 146, 102 Atl. 53 (personal injury; questioning of jurors as to holding stock in a particular insurance company, here held improper; "no general rule has or can be formulated that will accurately apply to every case"); *Wash.* 1918, Gianini *v.* Cerini, 100 Wash. 687, 171 Pac. 1007 (that plaintiff had been visited by an insurance attorney on behalf of defendant, allowed on the facts); *Wis.* 1906, Howard *v.* Beldenville L. Co., 129 Wis. 98, 108 N. W. 48 (proper mode of procedure in questioning jurors as to an interest in a casualty company, considered).

A *witness* not a party may be affected by his interest in an insurance company: CANADA: 1918, Gregg *v.* Grant & Horne, 44 D. L. R. 359, N. B. (personal injury; on cross-examination of a medical witness called by defendant, a question as to being employed by an insurance company, held improper); 1908, Longhead *v.* Collingwood Shipbuilding Co., 16 Ont. L. R. 64 (like Gregg *v.* Grant, *supra*); UNITED STATES: *D. C.* 1906, Capital C. Co. *v.* Holtzman, 27 D. C. App. 125, 138; *Fla.* 1905, Teston *v.* State, 50 Fla. 137, 138, 39 So. 787 (embezzlement from a labor union; witnesses being members of the union were allowed to be questioned as to the bonding company's non-liability for indemnity unless upon conviction); *Mass.* 1919, Dempsey *v.* Goldstein B. A. Co., 231 Mass. 461, 121 N. E. 429 (that a witness for defendant is an employee of the defendant's insurer may be shown); *S. D.* 1902, Hedlun *v.* Holy Terror M. Co., 16 S. D. 261, 92 N. W. 31 (cited *ante*, § 949, n. 4); *Wash.* 1918, Rust *v.* Washington T. & H. Co., 101 Wash. 552, 172 Pac. 846 (that a witness who testified to a release was an agent of an insurer of defendant, admitted).

Compare the citations *ante*, §§ 282, 393, 949, where still other principles are involved.

[7] 1897, Doyle *v.* State, 38 Fla. 155, 22 So. 272 (woman in rape); 1898, State *v.* Nestaval, 72 Minn. 415, 75 N. W. 725 (woman in bastardy); 1905, State *v.* Jackson, 128 Ia. 543, 105 N. W. 51 (prosecuting witness in false pretences; repudiating the prior intimation in State *v.* Rivers, 58 id. 102, that the motives of interest or bias thus created could be considered as evidence, not merely as to the credibility of the witness, but also as to guilt of the accused).

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

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

CHAPTER XXXII

A. MORAL CHARACTER, AS EVIDENCED BY PARTICULAR ACTS

§ 977. **General Principle.** In the foregoing sections have been examined the modes of evidencing Bias, Interest, and Corruption, — a class of evidence for which there is no discrimination against extrinsic testimony as the channel of proof. In the ensuing topics, namely, the mode of evidencing Moral Character and other general qualities, is found the starting-point and peculiar hold of that *discrimination against extrinsic testimony* which is a feature of such great practical importance and serves to divide discrediting evidence into two contrasted classes (*ante*, § 878).

The significance of this general expedient is that, while saying nothing as to the Relevancy of the facts offered, it prohibits them, on grounds of Auxiliary Policy, from being offered through other witnesses, and leaves them to be got at solely by the cross-examination of the witness himself who is desired to

be discredited thereby. This feature of our law, in its consequences, gives it in this respect a character peculiarly its own and different from that of the Continental system of evidence. On the one hand, it practically cuts off a great part of that method of investigating and discrediting the whole life of the witness which, in the latter system, impresses us as so unfair and so liable to abuse. On the other hand, it elevates into prominence the expedient of cross-examination, already so much more common and useful an expedient in our practice than in theirs, and it thus contributes additionally to the emphasis and the potency of that instrument on our system of trials.

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

§ 978. **Same: Relevancy and Auxiliary Policy, distinguished.** The exclusionary doctrine in question is purely one of Auxiliary Policy (*post*, §§ 1849, 1863), *i.e.* it excludes certain relevant facts, when offered by outside testimony, because of the objections of policy to that mode of presentation. Furthermore, there are in some jurisdictions similar objections, of a narrower scope, even to the extraction of such evidence on cross-examination.

In the class of evidence, then, questions of Relevancy, or logical probative value (*ante*, § 42), can arise in only two ways: (1) where by exception (*e.g.* for prior convictions of felony) the use of extrinsic testimony to the fact is allowed; (2) where the fact is obtained by cross-examination. The convenient order of treatment will be to examine at the outset the underlying principles, — first, those of Auxiliary Policy which exclude extrinsic testimony to particular acts, then those of Relevancy which affect particular acts exceptionally thus admitted, then the principles of both sorts which affect facts admissible on cross-examination; and, finally, to examine in detail the state of the decisions and statutes, in the separate jurisdictions, on all of the foregoing doctrines.

§ 979. **Particular Acts of Misconduct, not provable by Extrinsic Testimony.** Down to the 1700s no settled principle or rule of this sort was recognized; the witness' character might always be attacked by the testimony of others detailing the events of his past life and misconduct.[1] It

§ 979. [1] See *post*, § 986, for a detailed list of the English precedents of that century.

must be remembered that under the orthodox rule, then prevailing, as to proof of general character by opinion (*post*, § 1982), the witness could give his personal judgment of the impeached witness' character, based on the former's acquaintance and dealings with him; it was thus an easy concession to allow the impeaching witness to describe among his reasons such specific conduct, good or bad, as might have become known to him. For example, a sustaining witness would say, "I have had J. S. in my employ for ten years, and he is as honest a man as ever lived; I have trusted him with large sums of money, and he has never betrayed my trust";[2] while an impeaching witness would say, "I have had many dealings with J. S., and I know him to be corrupt and lying; he stole a sum of money from me when he was my servant, and he is known in the neighborhood as a false swearer and a cheat." It was natural enough to make no discrimination in such testimony.[3]

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

These reasons, in their varying phrasings, are illustrated by the following passages:

1696, *Rookwood's Trial*, 13 How. St. Tr. 209; Sir B. *Shower* (for the defendant): "We will call some other witnesses to Mr. Porter's [the chief witness for the Crown] reputation and behavior; we think they will prove things as bad as an attainder." . . . L. C. J. Holt: "You must tell us what you call them to." Sir B. *Shower:* "Why, then, my lord, if robbing upon the highway, if clipping, if conversing with clippers, if fornication, if buggery, if any of these irregularities will take off the credit of a man, I have instructions in my brief of evidence of crimes of this nature and to this purpose against Mr. Porter; and we hope that by law a prisoner standing for his life is at liberty to give an account of the actions and behavior of the witnesses against him. I know the objection that Mr. Attorney [-General] makes, — that a witness does not come prepared to vindicate and give an account of every action of his life, and it is not commonly allowed to give evidence of particular actions. But if those actions be repeated, and a man lives in the practice of them, and this practice is continued for several years, and this be made out by evidence, we hope that no jury that have any conscience will upon their oaths give any credit to the

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

[3] The effect of this tradition was long in disappearing; but the law to-day will not allow particular acts to be given even as grounds for an opinion of character; and the last sentence in the following passage is therefore not law: 1817, Sharp *v.* Scoging, Holt N. P. 541 (question whether the witness had been tried for perjury; Gibbs, C. J.: "You cannot ask them as to particular acts of criminality or parts of conduct, because the question is as to general credit. . . . But as no man is to be permitted to destroy a witness' character without having grounds to state why he thinks him unworthy of belief, you may ask him his means of knowledge and his reasons of disbelief"). Sir J. Stephen says (1883, Hist. of the Criminal Law, I, 436), referring to a trial of the late 1700s: "Most of the witnesses . . . gave their reasons on cross-examination. This is the modern practice." But this probably does not mean a practice of the sort above stated.

evidence of a person against whom such a testimony is given." . . . Mr. Attorney-General *Trevor:* "My lord, they themselves know that this sort of evidence never was admitted in any case, nor can be, for it must tend to the overthrow of all justice and legal proceedings, for, instead of trying the prisoner at the bar, they would try Mr. Porter. It has been always denied, where it comes to a particular crime that a man may be prosecuted for; and this, it seems, is not one crime or two, but so many and so long continued, as they say, and so often practised, that here are the whole actions of a man's life to be ripped up; which can never show any precedent when it was permitted, because a man has no opportunity to defend himself. Any man in the world may by this means be wounded in his reputation, and crimes laid to his charge that he never thought of, and he can have no opportunity of giving an answer to it, because he never imagined there would be any such objection. It is killing a man in his good name by a side-wound, against which he has no protection or defence. My lord, this must tend to the preventing all manner of justice; it is against all common sense or reason; and it never was offered at by any lawyer before, as I believe, — at least, never so openly; and therefore I wonder that these gentlemen should do it, who acknowledge — at least one of them did — that as often as it has been now offered it has been overruled; and I know not for what end it is offered but to make a noise in the Court." . . . Sir B. *Shower:* "My lord, . . . we conceive, with submission, we may be admitted in this case to offer what we have offered. Suppose a man be a common, lewd, disorderly fellow, one that frequently swears to falsehood for his life. We know it is a common rule in point of evidence that against a witness you shall only give an account of his character at large, of his general conversation. But that general conversation arises from particular actions; and if the witnesses give you an account of such disorderly actions repeated, we hope that will go to his discredit; which is that we are now laboring for." L. C. J. HOLT: "Look ye, you may bring witnesses to give an account of the general tenor of his conversation; but you do not think sure that we will try now at this time whether he be guilty of robbery or buggery."

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

1817, *R.* v. *Watson,* 2 Stark. 149; evidence of bigamy was offered against the prosecuting witnesses. *Wetherell* and *Copley,* for defendant, argued "that a man might be able to prove that a witness was not to be believed upon oath, by showing that he had been guilty of a number of criminal acts, although he could not produce a single record of conviction; that since it might be proved indirectly that the witness is not credible upon oath, it was too strong a proposition to say that the same conclusion might not be proved directly by actual proof of accumulated crimes which demonstrated the infamy of the witness; . . . that the consequences would be enormous and alarming to the administration of justice, if such evidence were to be shut out; a witness who had committed a multitude of crimes, but who had not been convicted of one, would stand as a fair and credible witness in a court of justice." ELLENBOROUGH, L. C. J.: "This is so clear a point and so entirely without a precedent that it would be a waste of time to call for a reply. . . . The Court does not sit for the purpose of examining into collateral crimes. It would be unjust to permit it, for it would be impossible that the party should be ready to exculpate himself by bringing forward evidence in answer to the charge; there would be no possibility of a fair and competent trial upon the subject, and therefore it is never done." BAYLEY, J.: "If this evidence were admissible, it would be impossible to proceed in the

administration of justice, because on every trial the Court would have to try one hundred different issues, and juries, instead of having one issue to try, would have their attention withdrawn from one single point to look into an indefinite number of crimes. The rule is that a party against whom a witness is called may examine witnesses as to his general character, but he is not allowed to prove particular facts in order to discredit him, . . . for although every man may be supposed to be capable of defending his general character, he cannot come prepared to defend himself against particular charges without notice. . . . If the witness were apprised of the charges, he might come prepared with evidence to show that, although there was 'prima facie' evidence against him, they were in reality unfounded."

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

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

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

1896, LEWIS, J., in *Oxier* v. *U. S.*, 1 Ind. T. 85, 38 S. W. 331: "There is a clear distinction, recognized by the authorities cited above, between impeaching a witness by proof of facts which discredit him, made independently of his examination, and by proof of the same facts elicited in his cross-examination. Proof of particular facts tending to impair his credibility, made independently of his own examination, is excluded for the

reason that its admission would engender a multiplicity of collateral issues, and would frequently surprise a witness with matter which he could not be prepared to disprove. But these reasons do not apply to his cross-examination as to the same facts, because the witness, better than any one else, can explain the impeaching matter, and protect himself to the extent that explanation will protect him; the cross-examining party being bound by his replies."

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

(2) It must be noticed that a judicial opinion sometimes misleadingly states the latter reason in this form, that the witness "cannot be expected to come prepared to defend every act of his past life", *i.e.* it implies that the charges are *true*, though not to be anticipated. Now on this assumption, obviously, there would be no reason for excluding the impeaching testimony; for, if the

charges were true, there would be nothing more to be said, and all the defensive testimony conceivable could not alter this fact and would therefore be useless. But, on the contrary, the real notion behind the reason is that the charges are *false*, and that there is no practicable way of showing their falsity. Instead of the form, "A witness cannot be expected to be prepared to *defend* every *act* of his life", the accurate statement is, "A witness cannot be expected to be prepared to *disprove* every *alleged act* of his life."

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

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

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

It has therefore been universally acknowledged that proof of a crime by *record of a judgment of conviction* may be made, not because an exception is carved out of the rule, but because the reason of the rule does not apply:

1857, STRONG, J., in *People* v. *Jackson*, 3 Park. Cr. 396: "[Conduct derogatory to the witness' character] may be proved provided it does not raise or tender a collateral issue. Thus, it may be proved that a proposed witness has been convicted of an infamous offence, by producing the record. That raises no collateral issue of fact, as the record is conclusive, and there can be no further inquiry. But it is not competent to prove that

[4] 1838, Cowen, J., in People *v.* Rector, 19 Wend. 569, 586 ("Counsel misconceive the reason for the cases going against an inquiry to [particular] facts. It is not because they do not impeach character, but because the inquiry in a particular form might unjustly ruin the character of any witness past redemption. The evil is held not to exist when his own account is appealed to, and received as conclusive if in his favor").

§ 980. [1] Some courts go so far, to be sure, as to allow the *witness himself* to allege and explain his innocence; but in general even this much of an issue is not allowed to be made; see *post*, § 1116, under Rehabilitation of Witnesses.

the witness has in fact committed a crime, if he has not been convicted, although the actual perpetration of the crime is what renders him unworthy of belief. That, if permitted, might raise a collateral issue for trial."

(2) The reasons of Auxiliary Policy not barring out such evidence, the question of Relevancy may properly be raised.

What crimes are relevant to indicate bad character as to credibility? There are here three answers possible on principle: (*a*) Whatever offences were formerly treated as disqualifying one entirely as a witness (*ante*, § 520) shall now be treated as available for impeachment. This is the commonest solution, and has come about usually by express proviso in the statutory abolition of the former disqualification. (*b*) If in a given jurisdiction general bad character is allowable for impeachment (*ante*, § 923), then *any offence* will serve to indicate such bad character. (*c*) If character for veracity only is allowable for impeachment (*ante*, § 923), then only such specific offences may be used as *indicate a lack of veracity-character*.[2] The following passages illustrate this long-standing difference of views:

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

1699, HOLT, L. C. J., in *R.* v. *Warden of the Fleet*, 12 Mod. 337, 341: "In respect to a person who had been burnt in the hand, if it were for manslaughter, and afterwards pardoned, it were no objection to his credit; for it was an accident which did not denote an ill habit of mind; but 'secus' if it were for stealing, for that would be a great objection to his credit, even after pardon."

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

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

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

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

[3] The authorities are collected under the various jurisdictions (*post*, § 987). Compare the same question arising from convictions *disqualifying a witness* (*ante*, § 523).

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

(5) On *cross-examination of the witness* to be impeached, may not the judgment of conviction be *inquired about* and *answered orally* instead of producing a copy of the record of the judgment? This involves a different principle, namely, the mode of evidencing the contents of the judicial record. At common law, it was generally held that a written copy, and not oral recollection, was the only proper mode; but this has almost everywhere been altered by statute.[5]

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

(7) Whether to the record of conviction must be added some evidence of *identity* of the person convicted and the witness, involves the presumption of identity of person from *identity of name* (*post*, § 2529).

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

One or two not uncommon inaccuracies in expressing this result, must be noticed. (1) It is sometimes said that the above objection of Confusion of Issues is obviated because the witness' answer, if in the negative, "must be taken for true", or "is *conclusive in his favor.*" This is obviously not correct. The jury are not obliged to take any witness' word as true; and they may or may not choose to believe this witness on this point. All that can be said, and all that it means, is that the opponent cannot proceed to prove the

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

[5] The authorities are collected under the appropriate principle, *post*, § 1270.

Of course the rule about asking the witness before proving a self-contradiction (*post*, § 1025) has no application here.

[6] *Post*, § 982.

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

§ 981. [1] See the passage quoted *ante*, § 979; and the following: 1862, Allen, J., in Newcomb v. Griswold, 24 N. Y. 299 (after mentioning the reasons of unfair surprise and confusion of issues: "These reasons are not controlling when the inquiry is made of the witness [himself] as to his own acts or offences, which he may well be supposed able to explain at any time, and when his answers are conclusive and preclude further inquiry, as is the case as to all collateral matters affecting his general credit, so that side issues cannot be made to embarrass the trial of his principal issue").

alleged fact by extrinsic testimony, and that, if he chooses to ask for testimony on this point from the witness himself, he must accept the chances of the jury believing a negative answer.

(2) It is sometimes said that a witness *cannot be contradicted* (*i.e.* shown to be in error) on facts affecting his character, because they are *collateral*. This is merely a confusion of the present rule with the rule forbidding a Contradiction on Collateral Matters (*post*, § 1003). This fact of Character-Conduct, to be sure, happens to be a collateral one, and therefore a contradiction on this point would not be allowable by that rule; but to invoke that rule in the present case, simply confuses separate principles, having a separate purpose and history.

That it has no essential bearing can easily be demonstrated. Suppose that rule (forbidding Contradiction on Collateral Matters) were abolished; it would still be unlawful to impeach a witness' character by extrinsic testimony of particular misconduct, for the reasons already explained, which would still be in force. Again suppose that the witness is not asked beforehand whether he did this act, so that the proof of it by extrinsic testimony does not involve a contradiction of him and is therefore not obnoxious to that rule; nevertheless, the testimony would be excluded, because it is extrinsic testimony of particular misconduct impeaching character. Historically, the rule forbidding impeachment of character by extrinsic testimony of particular misconduct existed a century before the rule forbidding contradiction on collateral matters was settled; so that in tradition as well as in principle they are entirely independent. It is thus clear that the invocation of the latter rule in the present connection is not only unsound but useless. Moreover, it is misleading. The confusion is apparent in some of the 'nisi prius' rulings of the last century (*post*, § 1005), when the rule as to Contradiction was in the process of settlement; but there is no longer any excuse for the perpetuation of the confusion.[2]

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

1853, *Common Law Practice Commission* (Jervis, Cockburn, Martin, Walton, Bramwell, and Willes), Second Report, 21: "Another test of the veracity of the witness is to be found in his general character. If he has been guilty of offences which imply turpitude and want of probity, and more especially absence of veracity — as, for instance, perjury, forgery, obtaining money or goods under false pretences, and the like —, there can be no

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

doubt that this is matter very proper to be taken into consideration in forming a due estimate of the value of his evidence, particularly if such evidence should be in conflict with that of another witness of unquestioned integrity."

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

1916, SCHALLER, J., in *State* v. *Price*, 135 Minn. 159, 160 N. W. 677, 681: "The character and the personality of every person testifying on a trial are incidentally involved. A witness brings his character to the stand with him. The law may suppress it, keep the knowledge from the jury, and sternly ignore it; but the witness who has spent his life in evil doing carries the effluvium of his wickedness and immorality into the courtroom with him, whether he be merely a witness or a defendant in a criminal prosecution. His immoral past accompanies him, and in spite of all rules of evidence the stench of a wicked life taints the moral atmosphere, and in some measure affects his credibility. It is one of the penalties which must be paid by a wrongdoer. 'As a man sows, so shall he reap'; and if, in a proper case, the cross-examination develops matters pertinent to the inquiry and tending to affect the credibility of the witness, the mere fact that the witness or a party to the action is prejudiced does not argue that error has been committed."

But in determining the limitations of Relevancy, two distinct attitudes are found on the part of the Courts:

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

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

(3) In Courts adopting either of the above attitudes, attention is sometimes given to distinguish misconduct itself from a mere *accusation of mis-*

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

1898, DOSTER, C. J., in *State* v. *Greenburg*, 59 Kan. 404, 53 Pac. 61: "An arrest is nothing more than an accusation of crime or other act of turpitude. That it is made in the form of a forcible restraint of the person, based upon a sworn complaint, makes it, for purposes of disgrace or discredit, no stronger evidence of the truth of the accusation than an oral statement by the accuser would be. No one would contend that a witness could be asked whether another person had not orally accused him of crime. Why should the rule be different when the accusation has been written out and sworn to? It is but an accusation in each case. Why should it be different when the sworn accusation is followed by an arrest? The arrest is but a reassertion of the accusation in another form. It is quite different, however, when the accusation has been proved. When the proceeding has passed from accusation to conviction, evidence of the turpitude of the witness exists, — not what somebody said of him, but what the judicial tribunals sitting in judgment upon the accusation have found against him."

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

(4) It must be added that some of the Courts that adopt the *rule of discretion* (described in the next section) virtually thereby ignore all questions of Relevancy. In leaving the whole scope of cross-examination on this

§ 982. [1] This was accepted by one of the most liberal thinkers of his time: Life of Sir S. Romilly, 3d ed., II, 85 (1808; "to have been tried is, in general, alone sufficient to destroy a man's character; . . . that a man comes out of jail is a fact which is plain and notorious"). See also (in Campbell's Life, II, 83) the Letter of Lord Melbourne to Mr. Attorney-General Campbell, June 19, 1836, relating to Melbourne's trial for crim. con.

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

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

subject to the discretion of the trial Court, they in effect leave it to rule as it pleases upon Relevancy, or to ignore Relevancy entirely. This may not be their clear intention, but it is the apparent result. Occasionally, however, a Court is found[3] insisting that while the trial Court's discretion is to control upon the considerations of fairness and policy, yet that discretion will not be allowed to admit a fact (for example, an arrest) which is clearly irrelevant.

§ 983. **Same: Relevant Questions excluded on grounds of Policy; Three Types of Rule; Cross-examination of an Accused Party.** Suppose that the questions on cross-examination deal with acts of misconduct that are relevant (by whichever of the above tests) to indicate bad character; may there be any other objection to them on the score of Auxiliary Policy?

Most Courts recognize that the allowance of a course of examination into particular misconduct places in the hands of cross-examining counsel an instrument which he may use not wisely but too well. Among the many circumstances that contribute to form that general complex of impressions which we choose to call a verdict upon the issue, experience shows that the moral obliquity of a witness tends abundantly to smirch the cause for which he testifies. Too many counsel give to this canon of experience so much weight that they devote themselves excessively (and sometimes with no great profit to their cause) to this process of besmirching the opposing witnesses. With unscrupulous counsel, the traditional direction (in paraphrased form) is observed, "No case; abuse the opponent's witnesses." It is possibly not the most important duty of the counsel to remember that (in the words of a considerate Court) "witnesses have rights as well as parties; it is too often the case that they are set up as marks to be shot at." But it certainly is the duty of the law and of the judges to see that due regard is paid to these rights, and that the witness-box does not unnecessarily become, in the words of an old Southern judge, "the slaughterhouse of reputations." There are two sufficient reasons for such restrictions:

The *first* reason, to be sure, is purely one of sentiment. The ordinary instincts of decency, not to say courtesy, are violated by such examinations, and every new instance makes us more sodden to the spectacle and tends to bring us towards the same level of degradation. It is the difference between the hunt and the slaughterhouse. One may well enough find sport in stalking the lion in the desert or beating the bush for the tiger, because there is a risk for the hunter which dignifies his sport, and there is a rapacity and a destructiveness in the hunted which leaves no room for sympathy; but the process of cutting the throat or knocking the head of a sheep or an ox penned in the shambles is both safe and brutal, and is to be justified only on the ground of its absolute necessity. The hunting down of a fleeing desperado, or the ensnaring of a chief of counterfeiters by the craft of detectives, is a process which does not violate instincts of fairness or principles of justice.

[3] As in some of the New York rulings.

But the ruthless flaying of personal character in the witness-box is not only cowardly — because there is no escape for the victim — and brutal — because it inflicts the pain of public exposure of misdeeds to idle bystanders —, but it has often not the slightest justification of necessity. Severe limits must be put to such conduct. As Lord Ellenborough said, "I will put it to your own feelings, your own good sense." Some weight must be allowed to the instincts of manly fairness and good sense.[1]

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

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

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

1794, *Thomas Hardy's Trial* (34 How. St. Tr. 710; indictment for treason, by a conspiracy to subvert the government by force: the witness here examined was supposed by the defense to be a paid informer who joined the society to obtain proof of its criminal conduct). *Edward Gosling* sworn. Examined by Mr. *Garrow*. . . . Cross-examined by Mr. *Erskine:* What is your Christian name? Edward. — Edward Gosling? Yes. — Are your father and mother living? Yes. — What are you by employment or trade? At present I am employed by Mr. Wickham. . . . — Have you always gone by the name of Gosling? I have not . . . and am willing to explain why I went by another name; as I find every advantage is wished to be taken of me, I trust the mercy of the Court will not suffer any improper question to be put to me. — Lord Chief Justice EYRE: As to any question which tends to accuse you of any crime, not immediately connected with this matter, I will protect you; but at the same time keep your temper, attend to the question, and give a direct answer. — Mr. *Erskine:* I have treated you with civility, I am sure. Did you ever go by the name of Douglas? I did. — When did you first assume the name of Douglas? I believe as much as ten years since. — How long did you continue the name of Douglas? I would wish to relate the circumstances under which I took that name. — Lord Chief Justice EYRE: You had better answer the question. — *Gosling:* I carried on the business of a hairdresser in that name, for I believe pretty near seven years. — . . . Mr. *Erskine:* Had you any particular reason for changing your name? I will state my reason. . . . As for taking the name of Douglas, I took it from a play bill. — I have no objection to a decent pride; you took a very good name. Pray how long did you play this part of Douglas? I continued near seven years in that name. — . . . Do you know a Mrs. Coleman? I do not. — Look across to the jury. I do not know a Mrs. Coleman, now. — *Did* you ever know a Mrs. Coleman? I did. — Had you any dealings of any sort with her? Certainly, she rented a shop of me. — Had you no dealings of any other sort? I am not putting a

§ 983. [1] These abuses of cross-examination were effectively satirized by Charles Dickens, in the trial scene in Bleak House, and by Anthony Trollope in Orley Farm (quoted *ante*, § 781). Serjeant Buzfuz and Mr. Chaffanbrass have become typical terrors of the court-room, to the lay mind.

question of any immoral nature? Certainly, I had business; she rented a shop of me. — Is that all? She died at my house, and I buried her. — Did she leave any will? Yes. — Whom did she leave her property to? Her property was partly left to one Burroughs, and partly to one James Leech. — Who made the will? I wrote it. — . . . There was no complaint made against you of any sort? There was no just cause of complaint. — Do not understand me to be doing so improper a thing as to be imputing any crime to you and to ask you to reveal it; far from it. I only ask whether anybody was wicked enough to make any complaint of your conduct in that case? I do not know that there was any complaint. — Will you swear there was none? Upon your oath, was there no complaint made against you upon the subject of this will? I cannot tell what complaint may have been made. — Upon your oath, was there not a complaint made against you, to your knowledge, for fabricating this will? Never, that I know of. — Will you swear that? I will swear I never heard any such thing. — . . . Who was that James Leech to whom this woman left this money? A son of my wife's. — Who was Burroughs, who was that other person? A cousin of hers, or some such thing. — Am I to take you that you mean to swear now, that no complaint was made against you as having forged that will? I swear, that to the best of my knowledge or recollection, I never heard such a thing. — Will you swear positively, you never have been charged with it; a man that is charged with a capital felony cannot forget it? I do not recollect that ever I was. — Good God! Do you mean to swear that you do not remember whether you were charged with a capital felony or not? I do not know that I ever was. — Will you swear positively that no such charge was brought against you? I can swear no farther than that to the best of my knowledge, it never was. — . . . Will you not go to the length of swearing that nobody ever did so? I can only speak to the best of my recollection and knowledge. — Mr. *Garrow:* I submit to your lordship that is the only answer a witness can make to such a question. — Lord Chief Justice Eyre: There is no occasion for your interrupting the examination; probably it is an answer; but he may be pressed to see whether he can answer farther or not. — Mr. *Erskine:* Whether anybody ever charged you with it in your presence? I never recollect that any person ever did. — . . . Were you a dealer in naval stores? What kind of stores? — Mr. *Erskine:* Naval stores; ship stores? I have purchased old cordage, bad sacking, and such kind of things; but those I do not consider to come under the denomination of naval stores. — . . . Then, perhaps, you have never said to anybody the direct contrary of what you are saying now to me? I did say the direct contrary; I was asked by Mr. Worship, when I went to buy a print, what I was? and what my address was? As I conceived he would not let me have the print if I told him I was with a magistrate, I told him I dealt in naval stores. — Did you ever say to anybody that you dealt in naval stores, and that you should think no more of cheating the king than of guillotining him? Never to my knowledge; I will swear positively, I never mentioned the word guillotining the king. — Did you never say to anybody, upon your oath, that you lived by smuggling, and cheating the king in his stores? Never upon my oath. — . . . But did you tell Mr. Worship that the way you dealt in stores was by feeing the storekeepers to condemn them? No, I did not tell him that. — When you were reproved for that, did you not justify your conduct, and say that you had followed the practice for years, and thought it no crime to cheat the king? Never. . . . — Lord Chief Justice Eyre (in summing up the evidence for the jury): . . . Gentlemen, I stated to you before, that this witness has given very important evidence. . . . All they rely upon to shake his credit is what turns out upon his cross-examination — the account he gives of himself, of his having told a man that he dealt in naval stores, for a vile purpose — having borne the name of Douglas — having acted about in that sort of way, and going there for the purpose of giving information to government. Gentlemen, it is your province to judge what degree of credit you think fit to give to this man's evidence.

1870, *Charles Darnáy's Trial* (Charles Dickens, A Tale of Two Cities, Book II, c. III); trial at the Old Bailey for treason, in furnishing the French enemy with lists of the British

forces and their disposition. The chief witness, John Barsad, was a former friend of young Darnay, and had become suspicious of Darnay's conduct in crossing the Channel frequently and showing certain lists to French gentlemen. The witness was a patriot, but, "in an evil hour detecting his friend's infamy, had resolved to immolate the traitor he could no longer cherish in his bosom, on the sacred altar of his country." Having released his noble bosom of its burden, he would have modestly withdrawn himself but that the wigged gentleman with the papers before him begged to ask him a few questions.

Mr. *Styrer* (counsel for the prisoner): "Had he ever been a spy himself? No, he scorned the base insinuation." — "What did he live upon? His property." — "Where was his property? He did n't precisely remember where it was." — "What was it? No business of anybody's." — "Had he inherited it? Yes, he had." — "From whom? Distant relation." — "Very distant? Rather." — "Ever been in prison? Certainly not." — "Never in a debtors' prison? Did n't see what that had to do with it." — "Never in a debtors' prison? Come, once again, never? Yes." — "How many times? Two or three times." — "Not five or six? Perhaps." — "Of what profession? Gentleman." — "Ever been kicked? Might have been." — "Frequently? No." — "Ever kicked down-stairs? Decidedly not; once received a kick on the top of a staircase, and fell down-stairs of his own accord." — "Kicked on that occasion for cheating at dice? Something to that effect was said by the intoxicated liar who committed the assault, but it was not true." — "Swear it was not true? Positively." — "Ever live by cheating at play? Never." — "Ever live by play? Not more than other gentlemen do." — "Ever borrow money of the prisoner? Yes." — "Ever pay him? No." — "Was not this intimacy with the prisoner, in reality a very slight one, forced upon the prisoner in coaches, inns, and packets? No." — "Sure he saw the prisoner with these lists? Certain." — "Knew no more about the lists? No." — "Had not procured them himself, for instance? No." — "Expect to get anything by this evidence? No." — "Not in regular government pay and employment to lay traps? Oh dear no." — "Or to do anything? Oh dear no." — "Swear that? Over and over again." — "No motives but motives of sheer patriotism? None whatever."

1831, Mr. *Daniel O'Connell*, in *R.* v. *Kennedy* (Kilkenny; Mongan's Celebrated Trials in Ireland, pp. 28): cross-examining a witness for the prosecution; the witness was a police-constable, and the charge was murder during a riot: "Have you a brother in the police?" "I have." . . . "You had an uncle in the police?" "I have not." "I said you *had* an uncle in the police?" "I had." "What is become of him?" "He is transported." "To Botany Bay?" "I dare say." "Can you even guess where he went to?" "I cannot." "By virtue of your oath, can you guess where your own dear uncle the policeman went to?" "I cannot." "You swear to that? Have you not sworn that you cannot guess?" "I can guess." "Now where do you guess he was transported to?" "I cannot tell what part he was transported to." "Where did you grow?" "In the Queen's County." "Are you anything to those Harveys that they said had a cave for stolen sheep?" "Yes." "What relation are you to the sheep-stealers?" "Brother." "Was it not in your own house that the stolen mutton was found?" "No." "Was it in your father's house that the key was found, that made them suspect it was in your father's house?" "I believe it was." "Was it for his good behavior that your uncle was transported?" "I cannot say." "For heaven's sake, who got *your* family into the police?" "A gentleman." "Has he a name?" "Yes." "What is his name?" "Mr. Steele. There were George and William Steele." "Where do they live?" "I cannot say."

1873, *R.* v. *Castro* (*Tichborne*), 32d day, Kenealy's ed., I, 396: Lord B., who had testified to the tattoo-marks on Roger Tichborne, was cross-examined: Dr. *Kenealy*, for defendant: "Did you play a practical joke [on Captain H.]?" . . . L. C. J. Cockburn: "It *may* be a practical joke of such a nature that the jury would disbelieve the evidence on his oath, on its being made known to them. We must leave that to the discretion of Dr. Kenealy." . . . Dr. *Kenealy:* "It was not a practical joke. Did you take away his wife?" Lord *B.:* "I cannot answer that question." . . . Dr. *Kenealy:* "Did you

seduce his wife and make her elope from her husband? . . . I am sorry to have to ask my lord to tell you you must answer it." L. C. J. COCKBURN: "I certainly shall not." Dr. *Kenealy:* "Indeed you must, my lord! It goes to the witness' credit. I must have it answered, my lord." . . . L. C. J. COCKBURN: "I am afraid, if the question is pressed, you [the witness] must answer it. It is one of the consequences of being brought into a court of justice as a witness that whatever he has done may be brought up against him."

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

1883, Sir *James Stephen*, History of the Criminal Law, I, 433: "The most difficult point as to cross-examination is the question how far a witness may be cross-examined to his credit by being asked about transactions irrelevant to the matter at issue, except so far as they tend to show that the witness is not to be believed upon his oath. No doubt such questions may be oppressive and odious. They may constitute a means of gratifying personal malice of the basest kind, and of deterring witnesses from coming forward to discharge a duty to the public. At the same time it is impossible to devise any rule for restricting the latitude which at present exists upon the subject, without doing cruel injustice. I have frequently known cases in which evidence of decisive importance was procured by asking people of apparent respectability questions which, when first put, appeared to be offensive and insulting in the highest degree. I remember a case in which a solicitor's clerk was indicted for embezzlement. His defence was that his employer had brought a false charge against him to conceal (I think) forgery committed by himself. The employer seemed so respectable and the prisoner so discreditable that the prisoner's counsel returned his brief rather than ask the questions suggested by his client. The prisoner thereupon asked the questions himself, in a very few minutes satisfied every person in court that what he had suggested was true. . . . It is also to be remembered that cross-examination to credit may be conducted in very different ways. It is one thing to throw an insulting question coarsely and roughly in the face of a witness. It is quite another thing to follow up a point by questions justified by the circumstances. . . . The most difficult cases of all are those in which the imputation is well founded, but is so slightly connected with the matter in issue that its truth ought not to affect the credibility of the witness in reference to the matter on which he testifies. The fact that a woman had an illegitimate child at eighteen is hardly a reason for not believing her at forty, when she swears that she locked up her house safely when she went to bed at night, and found the kitchen window broken open and her husband's boots gone when she got up in the morning. Cases, however, may be imagined in which a real connection may be traced between acts of profligacy and a man's credibility on matters in no apparent way connected with them. Seduction and adultery usually involve as gross a breach of faith as perjury, and if a man claimed credit on any subject of importance, the fact that he had been convicted of perjury would tend to discredit him. No general rule can be laid down in the matters of this sort. All that can be said is that whilst the power of cross-examining to a witness's credit is essential to the administration of justice, it is of the highest importance that both judges and counsel should bear in mind the abuse to which it is liable, and should do their best not to ask, or

permit to be asked, questions conveying reproaches upon character, except in cases in which there is a reasonable ground to believe that they are necessary." [2]

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

1865, PORTER, J., in *Third Great Western Turnpike Co.* v. *Loomis*, 32 N. Y. 127, 132 (the trial Court had excluded, as immaterial to the main issue, questions attacking the witness' character, no privilege having been claimed; the question of law was whether this could be done "in the sound discretion" of that Court; on intermediate appeal the answer was negative, but the trial Court's ruling was on further appeal sustained): "If the judgment of the Court below be upheld by the sanction of this tribunal, it will embody in our system of jurisprudence a rule fraught with infinite mischief. It will subject every witness who, in obedience to the mandate of the law, enters a court of justice to testify on an issue in which he has no concern, to irresponsible accusation and inquisition in respect to every transaction of his life affecting his honor as a man or his character as a citizen. It has heretofore been understood that the range of irrelevant inquiry for the purpose of degrading a witness was subject to the control of the presiding judge, who was bound to permit such inquiry when it seemed to him in the exercise of a sound discretion that it would promote the ends of justice, and to exclude it when it seemed unjust to the witness and uncalled for by the circumstances of the case. The judgment now under review was rendered on the assumption that it is the absolute legal right of a litigant to assail the character of every adverse witness, to subject him to degrading inquiries, to make inquisition into his life, and drive him to take shelter under his privilege or to self-vindication from unworthy imputations wholly foreign to the issue on which he is called to testify. The practical effect of such a rule would be to make every witness dependent on the forbearance of adverse counsel for that protection from personal indignity which has been hitherto secured from our courts, unless the circumstances of the particular case made collateral inquiries inappropriate. This rule . . . would perhaps operate most oppressively in trials before inferior magistrates, where the parties appear in person, or are represented by those who are free from a sense of personal responsibility. . . . The practice which has heretofore prevailed in this respect has been satisfactory to the community, the bench, and the bar. Questions of this nature can be determined nowhere more safely or more justly than in the tribunal before which the examination is conducted. Justice to the witness demands that the Court to which he appeals for present protection shall have the power to shield him from indignity, unless the circumstances are such that he cannot fairly invoke that protection. . . . [The opposite view] ignores the indignity of a degrading imputation when there is nothing in the circumstances of the case to justify it. It ignores, too, the humiliation of public arraignment by an irresponsible accuser, misled by an angry client, and shielded by professional privilege. Few men of character or women of honor could suppress, even on the witness-stand, the spirit of just resentment which such an examination, on points alien to the case, would naturally tend to arouse. The indignation with which sudden and unworthy imputations are repelled often leads to injurious misconstruction. A question which it is alike degrading to answer or to decline to answer should never be put, unless in the judgment of the Court it is likely to promote

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

the ends of justice. A rule which would license indiscriminate assaults on private character, under the forms of law, would contribute little to the development of truth and still less to the furtherance of justice. . . . Unless there be a plain abuse of discretion, decisions of this nature are not subject to review on appeal."

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

1896, BANTZ, J., in *Territory* v. *Chavez*, 8 N. M. 528, 45 Pac. 1107: "The extent to which cross-examination will be permitted is no doubt, in a large measure, in the discretion of the trial Court; and it is difficult to draw the line as to where the legal discretion as to the admission or the exclusion of such testimony commences, and where it ends. The truth is the thing to be sought. Assaults upon a witness by cross-examination into collateral matters cannot be allowed to gratify the caprice or the displeasure of those against whom he testifies; and intrusions into private affairs, which are calculated merely to wound the feelings, humiliate, or embarrass the witness, will not be permitted. . . . But a clear distinction is to be taken between those matters called for on cross-examination which merely excite prejudice against the witness, or tend to humiliate him or wound his feelings, and those matters, on the other hand, which are calculated, in an important and material respect, to influence the credit to be given to his testimony. As to the latter class, the witness cannot be shielded from disclosing his own character on cross-examination, and for the purpose he may be interrogated upon specific acts and transactions of his past life; and if they are not too remote in time, and clearly relate to the credit of the witness, in an important and material respect, it would be error to exclude them. How far justice may require such examinations to go, how much time should be spent upon them, what should be excluded for remoteness of time, and what for being trivial or unimportant, must depend in some measure upon the circumstance of each case; and these are questions addressed primarily to the discretion of the trial Court; but the discretion should be liberally exercised."

1899, HOOKER, J., in *People* v. *McArron*, 121 Mich. 1, 79 N. W. 944: "Counsel complain that they were not permitted to show, by the cross-examination of M. C., that she was a woman of low character and habits, and that they had a right to interrogate the daughter in relation to her father and mother. This cross-examination was merciless; and it is impossible to read it without regretting that the exigencies of modern trials may be thought to justify such, and wondering that counsel cannot see that they are fraught with more danger to the accused than possible benefit. Witnesses have rights as well as the accused; and, while the Courts allow an investigation of the character of a witness through cross-examination, there is a broad discretion lodged in the trial Court in such matters."

1899, MARSHALL, J., in *Buel* v. *State*, 104 Wis. 132, 80 N. W. 78 (excluding questions to a defendant charged with murder of one Nelson, as to killing another man in Nebraska, burning a house to get the insurance-money, etc.): "There is no rule by which the exercise of that discretionary power of the Court can be guarded with exactness. The range

is necessarily broad in order to fit the facts of particular cases, but there is a limit beyond which it cannot go. That limit is clearly reached and passed when questions are asked, manifestly, for the mere purpose of creating prejudice in the minds of the jurors, or the examination is carried on to such an extent and in such a manner as to become oppressive, and is not warranted by anything in the case. Questions as to previous convictions of criminal offences, or serving terms in prison or in jail from which convictions will be presumed, are uniformly permitted when the instances are not too remote, upon the theory that a person of that character will not be as likely to testify truthfully as a man whose life has not been thus blackened. . . . Questions relating to mere criminal charges, or acts which might be the foundation for criminal prosecutions, are usually rejected. They should not be permitted unless there are circumstances in the case suggesting that justice will or may be promoted thereby. It would be a clear abuse of judicial discretion to permit such questions where the indications are plain that the purpose is not to bring out the truth in regard to the witness' life and character, and to thereby discredit his testimony, but for the purpose of discrediting the witness, regardless of whether there is any warrant for the questions or not, and if he be a party, in that way to influence the minds of the jurors into a verdict against him. . . . A reading of the questions under consideration leads to the irresistible conclusion that no idea was entertained by the cross-examiner that proof would be elicited of the matters implied by them. We say 'implied' because the asking of the direct questions, in the manner in which they were asked, implied to some degree that the examiner was possessed of information upon which the questions were based, and although the answers were in the negative, the bad effect of the insinuations thrown out by the questions, was not and could not have been removed entirely from the minds of the jurors.[3] . . . The trouble here is that the cross-examination was allowed to be carried on manifestly without any reason except to create prejudice against the accused in the minds of the jurors."

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

(3) The third type of rule *prohibits entirely* such a cross-examination. If the discretion allowed by the preceding rule were properly exercised; if there existed at the American Bar in general that skill and professional self-restraint in cross-examination which is traditional at the English Bar; if there existed among the Judiciary the desire and the courage to check excesses of cross-examination and to err if at all on the side of repression; and if the Judiciary were accustomed to exercise their powers fully and freely, there could be no better solution than to vest the control in that discretion. But the judiciary to-day are not always inclined to show to the abuses of cross-examination the disfavor which those abuses deserve. The typical tendency

[3] For the impropriety of *insinuating by question* a fact which the cross-examiner does not believe to be true or capable of proof, see *ante*, § 780, and the citations *post*, § 1910. For passages from various sources discussing this subject from the point of view of *professional ethics*, see Costigan's Cases on Legal Ethics, 1917, p. 444.

of the modern American Judiciary is to abdicate that power of control over the trial which tradition and the due course of justice demand that they shall have, and to become mere umpires, who rule upon errors and make no attempt otherwise to check the misconduct of counsel.[4] For this reason, as well as because of the usual unprofitableness of cross-examination to Character, there is something to be said in favor of the rule that now obtains in several jurisdictions,[5] by which such misconduct is forbidden to be inquired into at all.

In some of these jurisdictions, to be sure, this rule has come about by a statutory enactment forbidding the proof into "particular acts"; the statute being probably framed on a misunderstanding of the rule against extrinsic testimony (*ante*, § 979) without perceiving that only extrinsic testimony was by that rule at common law intended to be excluded. But, whatever the accident of origin of those laws, the rule of total prohibition of cross-examination, as well as of extrinsic testimony, on these matters, has thus received sanction, and is perhaps the one most consonant with the needs of the time:

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

(4) Rarely a Court is found to discriminate, on the present principle solely, between the cross-examination of an ordinary witness and that of an *accused party*. The latter may well be in a different position respecting the extent to which he has *waived his privilege* against self-crimination, by voluntarily taking the stand; and upon this point there is much diversity of opinion. But even assuming the privilege to be waived or not claimed, it is still possible to discriminate in his favor from the present point of view, in order to prevent that unfair prejudice which might accrue against him as the accused, by means of a cross-examination to misconduct which would be legitimate enough for an ordinary witness. This discrimination, however, as independent of the question of privilege, is rarely taken.[6]

[4] *Ante*, § 21.

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

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

§ 984. **Privilege against Answers involving Disgrace or Crime.** Supposing that the questions deal with facts of character relevant to be admitted, and not obnoxious to exclusion because of the foregoing principle, the witness may still be able to invoke a *privilege of not disclosing* the desired fact. The privilege usually available under these circumstances is the privilege against Self-crimination (*post*, §§ 2250–2284). But is there no other?

A privilege against disclosing facts of mere Disgrace — not Criminality — was up to the last century also available for the witness, and is in some jurisdictions still maintained. Its treatment should not belong here, and so far as it is necessary to distinguish it clearly from the Self-crimination privilege, the two must be again compared (*post*, §§ 2216, 2255). But historically it is difficult to separate the English precedents which deal with this subject and that of the Scope of Cross-examination (*ante*, § 983). In those rulings, the evidence being excluded, it is often impossible to determine whether it is because the fact was regarded as irrelevant to credit, or because, though it was relevant and admissible, yet there was a privilege not to answer. The nature of the discussion, however, was usually indicated by the mode of stating the question at issue. If the fact itself was discussed as either irrelevant or undesirable to ask, the inquiry would be, "May the question be put?"; but if the existence of the privilege was debated, the inquiry would be, "Must the question be answered, if put?" The general view of the profession, towards the middle of the 1800s, was expressed in the conclusion that "the question may be put, but need not be answered."

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

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

of this privilege. The best statement of this view is that of Mr. Starkie, and, of the opposing view (defending the privilege), that of the Commissioners of 1853:

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

1853, *Common Law Practice Commission*, Jervis (later C. J.), Cockburn (later C. J.), Martin (later B.), Walton, Bramwell (later B.), and Willes (later J.), Second Report, 22: "With regard to questions which do not tend to expose the witness to prosecution or punishment, but which tend to degrade his character by imputing to him misconduct not amounting to legal criminality or the having been convicted of a crime the punishment of which has been undergone, the law of England, according to the better authorities, in like manner protects the witness from answering, unless the misconduct imputed, has reference to the cause itself. Should this rule be maintained? On the one hand, the witness may have been recently convicted of perjury or some other form of the 'crimen falsi'; he may have become infamous by his offences against the law or against society; he may have, to his own knowledge, acquired a bad repute for habitual mendacity; and it may be highly important that the jury who are to weigh his testimony should be made aware of the drawbacks which thus attach to it. On the other hand, it cannot be denied

that it would be an extreme grievance to a witness to be obliged to disclose past transactions of life which may have been long forgotten, and to expose his character afresh to evil report and obloquy when by subsequent conduct he may have recovered the good opinion of the world. As the law now stands, the question may be put, but the witness is not bound to answer; but if he does answer and denies the imputation, his denial is conclusive and cannot be controverted. It has been proposed to take away the privilege of the witness and to compel him to answer. We cannot bring ourselves entirely to concur in this view. We have already pointed out the effect which the dread of an inquiry of this nature may have in deterring a witness from appearing in court. To this may be added that, while under the present system the refusal to answer has practically the effect of an admission, the consequence of compelling the witness to answer would not improbably be to induce him to give an absolute denial, which would not be open to contradiction. On the balance, then, of these opposing considerations, we recommend that the existing law should be maintained, except that where the question relates to the conviction of the witness of perjury or any other form of the 'crimen falsi' and the witness either denies the fact or refuses to answer, the conviction should be allowed to be proved." [1]

As to the propriety of recognizing this privilege, two things may be said: (1) It is a compromise. From the point of view, therefore, of those who believe in the propriety of a total prohibition, this privilege is not adequate; but it is to be welcomed as entirely desirable and indispensable, in the absence of such prohibition. (2) It is much less effective than in theory it seems to be. Witnesses are seldom in a position to repudiate these questions with such dignity of manner and sincerity of principle as to convince the hearer that they are merely vindicating their rights and not evading a direct confession of the disgraceful fact. In practically every case the witness' refusal to reply answers all the purposes of the inquiring counsel, and is as good as an affirmative in effecting the desired discredit. It is mere hypocrisy to defend such a privilege on the ground that it gives the witness any real protection against the disclosure of his disgrace; he does not form the words of self-betrayal with his lips, to be sure, but he is saved from nothing more. Indeed, there have been some who have frankly accepted this as the inevitable result,[2] and have deprecated any attempt to abolish the privilege, on the ground that the failure to answer attained practically all that the abolition of the privilege could effect. It should better be abandoned altogether.[3] We may be content with the simple rule (*ante*, § 983) that the scope of cross-examination shall be allowed to include such questions and answers as the trial Court may in discretion permit and compel. In point of practice and tendency, the privilege against disgracing answers has, in the last generation or two, been more and more repudiated or ignored.[4]

§ 985. **Summary of the Preceding Topics.** For the purpose of ascertaining the state of the law in each jurisdiction upon the preceding closely-related topics it will be necessary, leaving for their proper places the subjects of the

§ 984. [1] Compare also (1827) Bentham, "Rationale of Judicial Evidence", b. IX, pt. IV, c. III, Bowring's ed., vol. VII, p. 464.

[2] Best, Evidence, 7th ed., § 130.

[3] The above view has received powerful support in the following essay, which opposes a bill of the Iowa Code Commission preserving this privilege: D. O. McGovney, "Self-Disgracing and Self-Criminating Testimony; Code Revision Bill" (Iowa Law Bulletin, V, 175, March, 1920).

[4] The cases are collected *post*, § 987.

Self-crimination privilege (*post*, § 2250) and the rule for Copies of Records of Conviction (*post*, § 1270), to group the statutes and rulings under four separate heads; in each of them is sought the answer to a separate inquiry, the principles of which have now been examined:

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

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

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

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

§ 986. **Same: History and State of the Law in England and Canada.** (1) *Extrinsic Testimony.* The rule excluding proof by extrinsic testimony was not fairly announced as settled until the opening of the 1700s, although it had been forecasted and occasionally invoked in the practice of the latter part of the prior century.[1] The turning-point seems to have been marked by the trial of Rookwood, in 1696; and within a generation thereafter the rule was accepted, beyond any question, in common-law trials.[2] It has never

§ 986. [1] 1653, Faulconer's Trial, 5 How. St. Tr. 323, 354 (the charge being perjury, it was testified that F. "hath been as wicked a man as any in England"; "that being at Petersfield, he drunk an health to the devil in the middle of the street"; that had said "our Saviour Christ was a bastard, and a carpenter's son"); 1679, Whitebread's Trial, 7 How. St. Tr. 311, 392 (offer to prove a case of cheating, allowed); 1679, Turberville *v.* Savage, Vin. Abr. XII, 39 (outside testimony to particular acts, excluded); 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1394, 1457 (similar testimony, admitted); 1686, Lord Delamere's Trial, 11 How. St. Tr. 509, 570 (similar); 1692, Harrison's Trial, 12 How. St. Tr. 863, 869 (keeping a house of ill-fame; no objection made; the Court refers to the evidence in the charge); 1696, Rookwood's Trial, 13 How. St. Tr. 209 (excluded; see quotation *ante*, § 979); 1696, Cranburne's Trial, 13 How. St. Tr. 264 (misconduct of the same witness as in the preceding trial was here allowed to be shown); 1696, Vaughan's Trial, 13 How. St. Tr. 518, 519 (L. C. J. Holt told the witness to keep to the matter or reputation, but afterwards allowed him to state that he knew the attacked witness had stolen money from him, and had threatened to swear falsely against him, his own brother); 1706, Feilding's Trial, 13 How. St. Tr. 1355, 1357 (that the woman-witness had had two bastard children, admitted); 1710, Willis' Trial, 15 How. St. Tr. 636, *semble* (admitted); 1716, Francia's Trial, 15 How. St. Tr. 936 (counsel alludes to the exclusion of such testimony as a rule); 1753, Barbot's Trial, 18 How. St. Tr. 1288 (similar); 1798, Bond's Trial, Ire., 27 How. St. Tr. 584 (rule conceded).

[2] The following later authorities recognize it: 1802, McNally, Evidence, 324 (with precedents); 1812, R. *v.* Hodgson, R. & R. 211, by all the Judges (rape; particular acts of intercourse by the prosecutrix with others, excluded; but it does not appear that ordinary impeachment was intended); 1817, R. *v.* Clarke, 2 Stark. 241, 243, Holroyd, J. (same); 1817, Sharp *v.* Scoging, Holt N. P. 541 (Gibbs, C. J.: "You cannot ask them as to particular acts of criminality or parts of conduct"); 1824, May *v.* Brown, 3 B. & C. 126, Bayley, J. ("a particular crime"); 1848, R. *v.* Duffey, 7 State Tr. N. S. 795, 896 (that the witness had been discharged for fraud, excluded); 1853, Second Report of Common Law Practice Commission, p. 22; 1908, Farrington's Case, 1 Cr. App. 113 (that the defendant was an associate of blackmailers, held improper); 1913, R. *v.* Cargill, 2 K. B. 271 (extrinsic evidence of unchaste acts by the girl, on a charge of rape under age, excluded).

Canada: 1876, McCreary *v.* Grundy, 39 U. C. Q. B. 316. The following ruling is anomalous: 1834, R. *v.* Noel, 6 C. & P. 336,

since been doubted; although under the modern statute permitting the accused to testify (*ante*, § 194*a*) it suffers virtually an exception in certain cases.

But in Chancery practice the rule was from the outset deliberately rejected. One of the reasons given by Lord Hardwicke was this:[3]

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

This reason, however, was erroneously understood by the learned Chancellor; for the unfair surprise that was feared did not consist in the difficulty of the witness' own recollection, but in the difficulty of having other witnesses ready. Another reason[4] was that as the examination by deposition, customary in Chancery, had to be prepared beforehand in the form of questions, it was practically difficult to cross-examine as to character in that way, and therefore extrinsic testimony was the sole practicable method.[5] But the real reason probably was merely that the common-law practice had received a development of its own, at the time when cross-examination was becoming a powerful instrument,[6] and that the rule had never happened to obtain a footing on the Chancery side.[7] The Chancery rule, then, as varying from the common-law rule (yet even this was doubted, to be sure, by the learned reporter Atkyns), was thus administered down into the 1800s, though its wisdom was questioned by such eminent Chancellors as Eldon and Kent.[8]

(2) *Scope of Cross-examination.* It has been maintained by Sir J. Stephen that in the earlier practice no cross-examination to misconduct was allowed.[9]

semble (that the witness was on bail on a charge of keeping a gaming-house, admitted).

[3] 1747, Gill *v.* Watson, 3 Atk. 522.

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

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

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

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

[8] 1814, Anon., 3 Ves. & B. 93 (an affidavit discrediting a petitioner stated that "he had been discharged from his employment by one attorney for fraud, and by another for communicating a brief to the hostile solicitor"; Eldon, L. C., ordered it taken off the file: "You may ask, whether the witness is to be believed upon his oath; which is the course at law, not going to particular facts. If the proceedings in this court are open to the defect that has been mentioned [*i.e.* no cross-examination to discredit], that does not make it fit to introduce all the scandal"); 1818, Troup *v.* Sherwood, 3 Johns. Ch. 558, 562, Kent, C. (regretting that the rule was not the same as at law).

[9] 1883, History of the Criminal Law, I, 436. Perhaps the learned historian had in mind the rulings on the privilege against disgracing answers (*post*). At any rate, the only plain authority seems to be the following: 1642, Onbie's Case, March, pl. 136 ("in examining of a witness, counsel cannot question the whole life of the witness, as that he is a whoremaster, etc., but if he hath done such a notorious fact which is a just exception against him, then they may except against him. That was Onbie's case, of Gray's Inn; and by all the judges it was agreed as before").

If this were so, it was natural enough in criminal cases, where (until the end of the 1600s) no witnesses were sworn for the accused, and the Crown's witnesses were favored by various protections. But by the 1700s, with cross-examination fully developed, this could not last; and during that century it is plain that the exploiting of the witness' life and associations, however discreditable, was freely allowed. The orthodox rule came to be that "*any* question tending to discredit" might be asked; and only rarely was there any interference from the Court.[10] Occasionally there was an intimation that the misconduct should have some relevance to the trait of veracity; and occasionally there was an exercise of discretion on grounds of policy. But it seems to have been thought that the witness' privilege against disgracing answers was the only protection needed. Whatever judicial interference took place was usually by way of an appeal to the counsel's own discretion and sense of propriety, and not to any settled rule of law:

1817, *Watson's Trial*, 32 How. St. Tr. 295, 297; that his friends were felons; that he was a bigamist; that he had been employed in a house of ill-fame, etc., were allowed to be the subjects of questioning. But limits were drawn; Mr. *Wetherell*, cross-examining: "Did you [being married] ever make proposals of marriage to any person within these three or four years?" L. C. J. ELLENBOROUGH: "How can that question be asked? I will put it to your own feelings, your good sense." Mr. *Wetherell:* "I will not carry it further." Another witness admitted one Dickens to have been his companion. Mr. *Wetherell*, cross-examining: "Do you not know that it is the same Dickens that was discharged at the Old Bailey as the associate of a man of the name of Vaughan in hatching up those conspiracies?" A. "I do not know." L. C. J. ELLENBOROUGH: "How can he know this?" Mr. *Wetherell:* "My object is, to show that this man's associates are all felons or the most base of mankind." L. C. J. ELLENBOROUGH: "This is really very irregular. . . . It is really corrupting all justice when such prejudices are introduced. The Court are of opinion that the question should not be put."

The modern practice has maintained this practically unlimited license of cross-examination, even after the middle of the 1800s, when the privilege

[10] 1746, Lord Lovat's Trial, 18 How. St. Tr. 651 (L. C. Hardwicke: "The other party is at liberty to cross-examine him either to the matter of fact concerning which he has been examined, or any other matter whatsoever that shall tend to impeach his credit or weaken his testimony; provided the questions that are asked him are such as the law allows"); 1780, Maskall's Trial, 21 How. St. Tr. 667 (cross-examination to being on bad terms with his wife was stopped by the Court); 1794, Rowan's Trial, 22 How. St. Tr. 1115 (on cross-examination, that the witness had attested a bond alleged to have been forged, that he had taken a note from an alleged insane person, etc., allowed); 1798, O'Coigly's Trial, 26 How. St. Tr. 1351, *semble* (that the witness was a common informer, allowed); 1795–1799, McNally, Evidence, 258 (citing several cases of cross-examination to arrests and accusations); 1820, R. v. Hunt, 1 State Tr. N. S. 171, 220, 234 (whether he had been discharged from his regiment, allowed; that he had been dismissed from a situation for taking his employer's money, allowed). The cases in par. 3, *infra*, also illustrate this free use of such questions; but these rulings must be only cautiously used as precedents; the main question in most of them was that of privilege against disgracing answers; moreover, most rulings are upon questions to the prosecutrix on a rape charge, and pains were then seldom taken to distinguish mere misconduct as affecting credibility from former intercourse as affecting the likelihood of present consent (*ante*, § 200); the latter inference was probably chiefly in the minds of the judges, though the true discrimination seems not to have been finally made until 1843, in R. v. Martin, 2 M. & Rob. 512, by Coleridge and Erskine, JJ. There can not be any doubt, however, that throughout all the period of these cases the free use of inquiries into misconduct on cross-examination was generally recognized.

against disgracing answers was no longer recognized, and even after the Rules of 1883, which in terms recognized the judge's power to forbid merely "vexatious" questions.[11]

(3) *Privilege against Disgracing Answers.* This privilege clearly existed in

[11] To the quotations *ante*, § 983, add the following authorities: ENGLAND: 1846, Smith *v.* Earl Ferrers, Cherer's Rep. 46 ff. (breach of marriage-promise; the plaintiff relied on a long series of letters; the defendant denied their genuineness and claimed that the plaintiff had written them herself; a chief witness to the handwriting for the plaintiff was a Reverend Mr. Arden, formerly chaplain to the defendant; his cross-examination, by Sir F. Thesiger, Attorney-General, was a masterly piece of work, and is one of the best illustrations of the accepted English method of discrediting a witness by the freest and fullest exposure of a discreditable past, significant as a whole if trivial in detail); 1848, R. *v.* Duffey, 7 State Tr. N. S. 795, 892 (question put as to having been charged with embezzlement); 1862, Henman *v.* Lester, 12 C. B. N. S. 776 (whether a witness had not lost a suit based on similar fraudulent representations, allowed); 1881 (?), L. C. J. Cockburn, article in 15 Ir. Law Times 346, quoted from Australian Law Times (opposes the unlicensed extreme); 1883, Rules of Court, Ord. 36, Rule 38 ("The judge may in all cases disallow any question put in the cross-examination of any party or other witness, which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter"); 1891, Nov. and Dec., Russell *v.* Russell (divorce), Osborne *v.* Hargreaves (theft of jewels), London (here the cross-examination was so unlicensed as to lead to much public correspondence, by barristers and others, as to the law and its propriety; see Law Times, vol. 92, pp. 89, 104, 138; Law Journal, vol. 26, pp. 767, 768, 783, vol. 27, pp. 15, 56; Lord Bramwell, "Cross-examination", Nineteenth Century, Feb. 1892; letters in the London Times, Jan. 4–9, 1892, and before that date); 1920, R. *v.* Biggin, 1 K. B. 213 (murder; cross-examination of the accused to prior irrelevant criminal conduct, merely to test credibility, held improper, under St. 1898, 61–2 Vict., c. 38, § 1, quoted *ante*, § 488). Compare the cases cited *ante*, § 194 *a*, construing the Criminal Evidence Act of 1898, making the accused competent; the accused's character is specially treated in that provision.

In modern English practice this license seems to be carried so far as to verge even on permitting proof by contradiction (*ante*, § 979) of a witness who denies the discreditable facts asked about on cross-examination; *i.e.* the cross-examiner, having named persons who could testify to the misconduct, is permitted to bring them into court and confront them with the witness, though without putting them on the stand; see a remarkable example in 1911, in Steinie Morrison's Trial, pp. 56, 67, 77 (Notable British Trials Series, 1922).

CANADA: *Dom.* 1877, Laliberté *v.* R., 1 Can. Sup. 117, 120, 139, 141 (rape; question to the prosecutrix as to intercourse with other men; held by Richards, C. J., that the question might be put, but the witness could decline to answer; by Ritchie, J., and Strong, J., that the trial Court had discretion to compel an answer; the three remaining judges not expressing an opinion); 1909, Brownell *v.* Brownell, 42 Can. Sup. 368 (divorce; plaintiff's counsel was examining the defendant as to a bigamous marriage which the defendant admitted; on being asked the name of the woman, the defendant refused to say, and the trial Court declined to compel the answer; by a majority the ruling was sustained; the opinions are excellent illustrations of the opposite points of view); *Alberta:* Rules of Court 1914, No. 199 (like Eng. Ord. 36, *supra*); *British Columbia:* St. 1902, c. 22, § 6 (the examination shall be confined to "questions relevant to the issues"; and "no irrelevant question shall be asked merely for testing the credibility of the witness"); St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 4 (repeals St. 1902, c. 22, § 6); *Newfoundland:* Consol. St. 1916, c. 83, Ord. 32, R. 23 (like Eng. Ord. 36, *supra*); *Nova Scotia:* Rules of Court, 1900, Ord. 34, R. 31 (like Eng. Ord. 36, *supra*); *Northwest Terr.* Con. Ord. 1898, c. 21, Rule 260 (like Eng. Ord. 36, *supra*); *Ontario:* R. S. 1914, c. 76, § 8 (adultery: quoted *ante*, § 488); Rules of Court, 1913, No. 255 (like Eng. Order 36, Rule 38); 1877, Hickey *v.* Fitzgerald, 41 U. C. Q. B. 303 (trial Court's discretion controls as to matters "irrelevant to the issue"); 1906, R. *v.* Finnessey, 11 Ont. L. R. 338 (rape on a woman who had been alone in company with B.; questions to the woman and to B. as to having intercourse at the time of being in company were disallowed on the trial; held, on appeal, that the former question was proper to be put, but the witness was "not generally compellable to answer", though "to some extent" the trial Court's discretion controls, citing R. *v.* Laliberté, *supra;* and that the latter question was additionally proper as evidencing bias, on the principle of § 949, *ante*, and an answer ought to have been compelled); *Yukon:* Consol. Ord. 1914, c. 48, Rule 270 (like Eng. Ord. 36, *supra*).

the early 1700s, at a time when the limits of the privilege against Self-crimination (*post*, § 2250) had not become clearly fixed:

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

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

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

[13] Of the following rulings, those which exclude the evidence do not always make it clear whether they go upon the ground of privilege or upon some other rule: 1791, R. *v.* Edwards, 4 T. R. 440 (whether he had not stood in the pillory for perjury, allowed); 1797, Franco *v.* Bolton, 3 Ves. Jr. 368 (discovery against a woman suing on a bond; defence, that plaintiff lived in adultery with defendant; discovery refused, as involving "not only the reproach, but the consequence" of adultery); 1802, McNally, Evidence, 258 (privilege applies to answers involving "his own turpitude or infamy"); 1803, R. *v.* Lewis, 4 Esp. 225 ("Whether he had not been in the House of Correction?", privileged; L. C. J. Ellenborough: "It would be an injury to the administration of justice if persons who came to do their duty to the public might be subjected to improper investigation", *i.e.* "the object of which was to degrade or to render infamous"; referring to it as a settled rule); 1803, Macbride *v.* Macbride, 4 Esp. 242 ("Whether the witness lived in a state of concubinage with the plaintiff?", privileged; Lord Alvanley: "I will not say that a witness shall not be asked to what may tend to disparage him; . . . I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness"); 1803, Millman *v.* Tucker, Peake Add. Cas. 222, L. C. J. Ellenborough (whether he had been imprisoned on conviction of forgery, privileged); 1809, R. *v.* Teal, 11 East 311, L. C. J. Ellenborough (a woman-witness; bastardy; criminal intimacy with several other persons, admitted, without objection on this ground); 1811, Yewin's Case, 2 Camp. 638, Lawrence, J. (whether he had been charged with robbing his master, privileged); 1812, R. *v.* Hodgson, R. & R. 211, all the Judges except four being present (rape; whether the prosecutrix had before had connection with any one or with a named person, privileged, because not bound "to criminate and disgrace herself"); 1814, Dodd *v.* Norris, 3 Camp. 519 (seduction; whether the daughter, testifying, had been criminally intimate with others, privileged; all the Judges approved); 1817, R. *v.* Clarke, 2 Stark. 241, 243, Holroyd, J. (rape; cross-examination of the prosecutrix as to committal to the House of Correction, allowed; also as to her past conduct with reference to chastity); 1823, R. *v.* Pitcher, 1 C. & P. 85, Hullock, B. (larceny by a woman; whether the prosecutor had behaved improperly with her at the time, privileged); 1823, R. *v.* Barnard, ibid., note, Hullock, B. (whether he had ever been charged with felony, etc., allowed); 1823, R. *v.* James, ibid., Bosanquet, Serj. (whether he had been turned out of office as constable for misconduct, privileged); 1823, Bate *v.* Hill, 1 C. & P. 100, Park, J. (seduction; whether the daughter, testifying, had kept improper company, allowed); 1829, R. *v.* Barker, 3 C. & P. 589 (rape; that the prosecutrix, testifying, had on one occasion acted the prostitute, excluded at first by Park, J., on authority of R. *v.* Hodgson, "though you may certainly give evidence of general lightness of character, and general evidence of her being a street-walker"; but on conferring with Parke, J., the question was allowed); 1827, Cundell *v.* Pratt, Moo. & M. 108 (Best, C. J.: "I do not forbid the question on the ground that it

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

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

(4) *Prior Conviction of Crime.* This was of course used chiefly, up to the middle of the 1800s, to affect the witness with incompetency, and exclude him altogether. But if for any reason it was unavailable for that purpose it could still be used in discredit.[17] When in the 1800s the disqualification was abolished, the statute sanctioned the use of convictions for all kinds of crimes by way of impeachment.[18] The subsequent statute, however, which

tends to degrade. I for one will never go that length; until I am told by the House of Lords that I am wrong, the rule I shall always act on is to protect witnesses from questions the answers to which may expose them to punishment. If they are protected beyond this, from questions that tend to degrade them, many an innocent man would suffer"); 1830, R. *v.* Jenkin, 1 Lew. Cr. C. 326, Parke, J. (whether his house was a gambling-house, privileged); 1834, R. *v.* Martin, 6 C. & P. 562, Williams, J. (evidence as in R. *v.* Hodgson, thought admissible); 1844, R. *v.* Parker, 1 Cox Cr. 76 (whether the witness had served a two-years' sentence in prison: Cresswell, J., recognized the right to put the question and the privilege to decline to answer it, because "of infamous nature", adding: "Some uniform rule of practice should be laid down by the Judges on this point, since there are so many contradictory dicta respecting it").

[14] Quoted *ante*, § 984.

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

[16] *Eng.* 1872, Day, Common Law Procedure Act, 4th ed., 278; 1877, Stephen, Digest of Evidence, 3d Eng. ed., Art. 129, Note XLVI; 1882, Best, Evidence, 7th ed., § 130; 1873, R. *v.* Castro (Tichborne), quoted *ante*, § 983; *Can.* 1877, Laliberté *v.* R., Can. Sup. (see citation *supra*); *Ont.* 1876, McCreary *v.* Grundy, 39 U. C. Q. B. 316, 324 (seduction; questions to witnesses called for the defence, whether they had had intercourse with the woman, held not privileged); 1897, Gross *v.* Brodrecht, 24 Ont. App. 687 (approving Laliberté *v.* R., *supra*); 1906, R. *v.* Finnessey, 11 Ont. L. R. 338 (cited *supra*, n. 11).

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

[18] ENGLAND: 1844, St. 6 & 7 Vict. c. 85; 1854, St. 17 & 18 Vict. c. 125, §§ 25, 103 ("A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor; and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction"); applied to criminal cases, in 1865, by St. 28 Vict. c. 18, § 6.

CANADA: Crim. Code 1892, § 695, R. S. 1906, c. 145, Evid. Act, § 12 (like Eng. St. 1854, c. 125, § 25, substituting "any offence;") *Alta.* St. 1910, Evidence Act, c. 3, § 22 (like Eng. St. 1854, c. 125, § 25, substituting "any crime"); *B. C.* Rev. St. 1911, c. 78, § 18 (like Eng. St. 1854, c. 125, § 25, substituting "any offence, indictable or not"); 1914, R. *v.* Mulvihill, 18 D. L. R. 189 (murder; the accused taking the stand was asked about a distinct offence at another place, viz. the discovery of 15 corpses of murdered men at a single spot, with the inquiry, "Were n't you one of the men that were indicted for killing those men?" "No, sir." "Were n't you indicted and tried and acquitted?" Held, that the trial judge had discretion to allow

made accused persons competent, expressly protected them from this,[19] — varying on this point from the general rule in the United States.

§ 987. **Same: State of the Law in the various Jurisdictions of the United States.** The state of the law upon the foregoing topics [1] illustrates the truth

the question, under Can. Evid. Act § 12; per Macdonald, C. J. A., Galliher, J. A., and Irving, J. A., even an irrelevant conviction may be asked about; per Martin, J. A., that the Crown had a "strict legal right" to ask the questions, but that "as a matter of forensic propriety" counsel should not have mentioned the subject when he knew that the witness had been acquitted; per McPhillips, J. A., that the trial judge should not have allowed this question, for the same reason, though his discretion controlled); *N. Br.* Cons. St. 1903, c. 127, § 18 (like Eng. St. 1854, c. 125, § 25, substituting "any crime"); *Newf.* Cons. St. 1916, c. 91, § 10 (like Eng. St. 1854, c. 125, § 25); *N. Sc.* Rev. St. 1900, c. 163, § 45 (like Eng. St. 1854, c. 125, § 25, substituting "any crime"); *Ont.* Rev. St. 1914, c. 76, § 19 (like Eng. St. 1854, c. 125, § 25, substituting "crime" for "felony or misdemeanor"); *P. E. I.* St. 1889, c. 9, § 18 (like Eng. St. 1854, c. 125, § 25); *Sask.* Rev. St. 1920, c. 44, Evidence Act, § 35 (like Eng. St. 1854, c. 125, § 25, substituting "any offence"); *Yukon:* Consol. Ord. 1914, c. 30, § 43 (like Eng. St. 1854, c. 125, § 25, substituting "any crime").

[19] 1898, St. 61 & 62 Vict. c. 36, § 1 (accused testifying shall not be asked as to former conviction of an offence); 1900, Charnock *v.* Merchant, 82 L. T. R. N. S. 89 (statute applied). For the cases interpreting this statute, see *post*, § 2276, n. 5, and *ante*, § 194 *a*.

§ 987. [1] The statutes and decisions are as follows; cross-references to related topics have been placed *ante*, under §§ 979–984, but the special statutes for *juveniles* are placed *ante*, § 196:

FEDERAL: 1. *Extrinsic Testimony* is excluded: 1840, U. S. *v.* Vansickle, 2 McLean 220; 1851, Wayne, J. (the others not touching the point) in Gaines *v.* Relf, 12 How. 554; 1898, Bird *v.* Halsy, 87 Fed. 671, 679; 1919, Rau *v.* U. S., 2d C. C. A., 260 Fed. 131 (failure to file income-tax return; on cross-examination to criminality and business improprieties impeaching defendant's credit, his answers were not allowed to be contradicted). 2. *Scope of Cross-examination:* 1827, U. S. *v.* Craig, 4 Wash. C. C. 732 (whether his petition for the benefit of the insolvent law had not been refused and he remanded to jail for fraud; excluded, but no principle given); 1861, Johnston *v.* Jones, 1 Black 209, 225 (rule of discretion, approved); 1895, Thiede *v.* Utah, 159 U. S. 510, 16 Sup. 62 (whether the witness had quarrelled with her husband, excluded); 1896, Smith *v.* U. S., 161 id. 85, 16 Sup. 483 (mere arrest; left undecided); 1897, Tla-koo-yel-lee *v.* U. S., 167 U. S. 274, 17 Sup. 855 (murder; a question to the wife of the defendant, testifying against him, as to her illicit relations with another witness for the prosecution, allowed); 1898, Tingle *v.* U. S., 30 C. C. A. 666, 87 Fed. 320 (fraudulent use of mails; to the defendant, whether his partner was under a similar indictment, excluded); 1902, Allen *v.* U. S., 52 C. C. A. 597, 115 Fed. 3, 11 (certain cross-examination, intended "simply to degrade the defendant", held improper); 1906, Glover *v.* U. S., 147 Fed. 426, C. C. A. ("a mere accusation or arrest", not allowed to be asked about); 1906, Miller *v.* Oklahoma, 149 Fed. 331, 336, C. C. A. (whether stolen property had been found in his possession, whether he had associated with persons reputed to be thieves, etc., not allowed); 1914, Nashville I. R. Co. *v.* Barnum, 2d C. C. A., 212 Fed. 634 (accepting the rule of Third Gt. W. Turnpike Co. *v.* Loomis, N. Y.); 1917, Coyne *v.* M. S., 5th C. C. A., 246 Fed. 120 (cross-examination of defendant to being indicted in Seattle, excluded; proof by copy of the indictment, excluded); 1918, Shea *v.* U. S., 6th C. C. A., 251 Fed. 433 (fraudulent use of the mails; cross-examination of defendant as to being charged or indicted for crime in various cities; not decided); 1919, Fetters *v.* U. S., 9th C. C. A., 260 Fed. 142 (illegal sale of liquor to military forces; cross-examination of defendant's wife as to her marriage, divorce, and children, held to be "carried too far"); 1920, Miller *v.* Continental Shipbuilding Co., 2d C. C. A. 265 Fed. 158 (action for money had and received; on cross-examination, the plaintiff was made to disclose that he came from Leipsic and Hamburg, being a native of Germany; the trial took place in November, 1918; held that no rule of evidence was violated; counsel on appeal had contended that in popular belief "Germans apparently had no regard for the truth"). 3. *Privilege against Disgracing Answers:* 1827, U. S. *v.* Craig, 4 Wash. C. C. 732 (recognized); 1840, U. S. *v.* Vansickle, 2 McLean 325, 329, *semble* (same; a question showing "her character to be infamous", excluded); Rev. St. 1878, § 103, Code 1919, § 142 ("No witness is privileged to refuse to testify to any fact or to produce any paper, respecting which he shall be examined by either House of Congress or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous"); Code 1919, § 3114 (privilege declared for naval courts); U. S. St. 1901, c. 809, Mar. 2, 31 Stat. L. 950 (civilians before a court-

martial; privilege recognized); St. 1916, Aug. 29, c. 418, § 3, 39 Stats., amending Rev. St. § 1342 (articles of War; Art. 24 gives a privilege for "questions which may tend to . . . degrade him"); St. 1920, June 4, 41 Stats. 787 (Articles of War; amends Art. 24 so as to read, "any question not material to the issue when such question might tend to degrade him"). 4. *Conviction of Crime:* 1893, Baltimore & O. R. Co. *v.* Rambo, 8 C. C. A. 6, 59 Fed. 75 (conviction of crime — here, burglary — held admissible in civil as well as criminal cases; here applying the rule in spite of the silence of the Ohio statute as to civil cases); 1920, MacKnight *v.* U. S., 1st C. C. A., 263 Fed. 832, 840 (defendant's conviction of crime may be shown, even though it contradicts defendant's denial on cross-examination).

ALABAMA. 1. *Extrinsic Testimony* is excluded; 1846, Sorrele *v.* Craig, 9 Ala. 539; 1850, Nugent *v.* State, 18 Ala. 521, 526 (acts of unchastity); 1880, Moore *v.* State, 68 Ala. 362 (whether he had fled from a charge of burglary); 1896, Feibelman *v.* Assur. Co., 108 Ala. 180, 19 So. 540 (witness for a policy-holder; evidence of two or three fires on his premises in one year, excluded); 1896, Crawford *v.* State, 112 Ala. 1, 21 So. 214 (illicit relations); 1897, Lord *v.* Mobile, 113 Ala. 360, 21 So. 366 (immorality). 2. *Scope of Cross-examination:* 1871, Boles *v.* State, 46 Ala. 206 ("whether she was of such ill-fame as to be excluded from society"; excluded, for though an ill-fame "such as impeaches her veracity" could be asked about, it did not appear what kind of ill-fame was here meant); 1901, Louisville & N. R. Co. *v.* Bizzell, 131 Ala. 429, 30 So. 777 (cross-examination to habits of profanity and drinking, allowed); 1904, Ross *v.* State, 139 Ala. 144, 36 So. 718 (concealed weapon; cross-examination to other misconduct, allowed); 1909, Smith *v.* State, 161 Ala. 94, 49 So. 1029 (cross-examination to illegal sale of liquor, excluded); 1909, Lowman *v.* State, 161 Ala. 47, 50 So. 43 (cross-examination as to being "charged with running after other men's wives", not allowed). 3. *Privilege against Disgracing Answers:* 1871, Boles *v.* State, *supra* (whether the witness was of ill-fame; privilege repudiated). 4. *Conviction of Crime:* Code 1907, § 4008, as amended in 1907 (quoted *ante*, § 488); 1853, Campbell *v.* State, 23 Ala. 44, 73 (conviction for libel, excluded, as not affecting veracity); 1892, Prior *v.* State, 99 Ala. 196, 13 So. 681 (petit larceny, admitted); 1901, Smith *v.* State, 129 Ala. 89, 29 So. 699 (under C. § 1795, an "infamous crime" retains its common-law definition; conviction for carrying a concealed weapon, excluded); 1901, Bodine *v.* State, 129 Ala. 106, 29 So. 926 (the judgment must be in a court having jurisdiction); 1902, Wells *v.* State, 131 Ala. 48, 31 So. 572 (theft, admitted), 1903, Castleberry *v.* State, 135 Ala. 24, 33 So. 431 (conviction for some crimes, but not of any crime, is admissible); 1903, Viberg *v.* State, 138 Ala. 100, 35 So. 53 (petit larceny, admitted; suspension of a judgment's execution pending an appeal does not prevent its use to impeach); 1904, Ross *v.* State, 139 Ala. 144, 36 So. 718 (indictment for assault to murder, excluded); 1904, Gordon *v.* State, 140 Ala. 29, 36 So. 1009 (conviction for throwing stones into a railroad train, excluded, under Code 1896, § 1795; the statute was not intended to include crimes not disqualifying at common law); 1904, Wilkerson *v.* State, 140 Ala. 165, 37 So. 265 (indictment for public drunkenness, excluded); 1906, Williams *v.* State, 144 Ala. 14, 40 So. 405 (only infamous crimes are admissible; hence, "Were you ever convicted of a crime?" is too general); 1906, Fuller *v.* State, 147 Ala. 35, 41 So. 774 (conviction for a statutory felony is admissible to impeach; distinguishing prior rulings as to misdemeanors, and admitting that they contain "expressions calculated to mislead"); 1907, Mitchell *v.* State, 148 Ala. 618, 42 So. 1014 (conviction for gaming, not admitted); 1915, Moore *v.* State, 67 Ala. App. 789, 67 So. 789 (conviction and sentence to penitentiary, admitted, under Code 1907, §§ 4008, 4009); 1915, Moton *v.* State, 13 Ala. 43, 69 So. 235 (cross-examination of defendant to conviction for forgery, allowed); 1919, United States Lumber & C. Co. *v.* Cole, 202 Ala. 688, 81 So. 664 (conviction of trespass, not admitted); 1921, Latikos *v.* State, 17 Ala. App. 655, 88 So. 47 (cross-examination to former conviction held proper, even though appeal was pending at the time and though subsequently the judgment was reversed); 1921, Lakey *v.* State, 206 Ala. 180, 89 So. 605 (murder; cross-examination to a conviction for distilling liquor, held inadmissible, as not involving "moral turpitude").

ALASKA: 1. *Extrinsic Testimony:* Comp. L. 1913, § 1501 (like Or. Laws § 1920, § 863). 2. *Scope of Cross-examination.* 3. *Privilege against Disgracing Answers:* Comp. L. 1913, § 1507 (like Or. Laws 1920, § 870). 4. *Conviction of Crime.* Comp. L. 1913, § 1507 (like Or. Laws 1920, § 863); § 1865 (like ib. § 731); 1906, Ball *v.* U. S., 147 Fed. 32, 38, C. C. A. (under C. C. P. 1900, § 669, the conviction may be of a misdemeanor, and may be of a court in another jurisdiction).

ARIZONA: 4. *Conviction of Crime:* Rev. St. 1913, P. C. § 1226 (quoted *ante*, § 488); 1921, Sage *v.* State, 22 Ariz. 151, 195 Pac. 534 (statutory rape; cross-examination to former acts of unchastity, etc., not allowed "as bearing upon the credibility of her testimony").

ARKANSAS: 1. *Extrinsic Testimony:* Dig. 1919, § 4145 (conviction of any crime, admissible; quoted *ante*, § 488); § 4187 (a witness may not be impeached "by evidence of particular wrongful acts, except that it may be shown by the examination of a witness or record of a judgment that he has been con-

victed of a felony"); 1879, Anderson *v.* State, 34 Ark. 257 (indictment for larceny, excluded); 1890, Hollingsworth *v.* State, 53 id. 387, 390, 393, 14 S. W. 41 (outside testimony to specific acts, inadmissible); 1904, Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845 (rape under age; acts of intercourse of prosecutrix with other men, excluded); 1910, Adams *v.* State, 93 Ark. 260, 124 S. W. 766 (seduction; woman's intercourse with another man, admitted, but only on the principle of § 1007, *post*); 1910, Belford *v.* State, 96 Ark. 274, 131 S. W. 953 (bastardy; woman's intercourse with others, admitted, but only on the principle of § 133, *ante*); 1911, McAlister *v.* State, 99 Ark. 604, 139 S. W. 684; 1922, Bogue *v.* State, — Ark. —, 238 S. W. 64 (contradiction of accused's denial of immoral conduct, held improper). 2. *Scope of Cross-examination:* 1853, Pleasant *v.* State, 13 Ark. 360, 377 (the trial Court's discretion predicated; here, a question as to compounding the prosecution, allowed); 1855, Pleasant *v.* State, 15 Ark. 624, 649 (compounding a felony; admissible, though covered by privilege; the trial Court apparently given some discretion); 1884, Carr *v.* State, 43 Ark. 99, 102 (whether he had been under indictment for the same murder, excluded); 1890, Hollingsworth *v.* State, *supra* (declining to lay down specific limits, but admitting answers disclosing gaming, fighting, and unlawful cohabitation, brought out by the ordinary questions as to residence and occupation; the preceding cases not cited); 1894, Holder *v.* State, 58 Ark. 478, 25 S. W. 279 (whether he had left other places because he had committed certain crimes, held improper; but the ruling is useless, because it confuses the privilege rule with the present one); 1895, Bates *v.* State, 60 Ark. 450, 30 S. W. 890 (question as to a prior indictment, excluded; "it raises no legal presumption of guilt"); 1899, Lee *v.* State, 66 Ark. 286, 50 S. W. 516 (whether a witness was not the mother of certain criminals, excluded); 1902, Stanley *v.* Ins. Co., 70 Ark. 107, 66 S. W. 432 (fire-insurance policy; cross-examination of the plaintiff to a former burning of an insured house, held improper, as not affecting credibility; so also questions as to being under indictment for the burning in issue); 1902, Bergstrand *v.* Townsend, 70 Ark. 600, 70 S. W. 307 (questions as to witness' occupation at a remote prior time, held properly excluded in the trial Court's discretion; 1905, Little Rock V. & I. Co. *v.* Robinson, 75 Ark. 548, 87 S. W. 1029 (questions as to immoral conduct, held not improperly excluded in the trial Court's discretion); 1906, Benton *v.* State, 78 Ark. 284, 94 S. W. 688 (certain questions as to past domestic life; some held proper, others not); 1911, McAlister *v.* State, 99 Ark. 604, 139 S. W. 684 (murder; cross-examination to the witness' former act of assassination, allowed). 3. *Privilege against Disgracing Answers:* 1853, Pleasant *v.* State, *supra* (question as to attempt to stifle prosecution; refusal merely because of tendency to degrade, improper); 1855, Pleasant *v.* State, *supra* (recognizing it for questions to the prosecutrix in rape as to intercourse with third persons, but not as to intercourse with the defendant); 1883, Polk *v.* State, 40 Ark. 482, 487 (complainant in seduction; whether she had had intercourse with other men; privilege recognized); 1890, Hollingsworth *v.* State, *supra* (apparently ignoring any privilege). 4. *Conviction of Crime:* Dig. 1919, § 4187 (quoted *supra*); 1905, Smith *v.* State, 74 Ark. 397, 85 S. W. 1123 (conviction of petit larceny, admitted, against a defendant-witness); 1920, Jordan *v.* State, 141 Ark. 504, 217 S. W. 788 (murder; cross-examination of a defendant to conviction for desertion by court-martial, allowed); 1920, Kyles *v.* State, 143 Ark. 419, 220 S. W. 458 (illegal sale of liquor; question to defendant on cross-examination as to conviction for shooting craps with negroes, held allowable; but defendant is entitled, on request, to an instruction limiting the use of such facts to affect credibility only); 1922, Turner *v.* State, — Ark. —, 239 S. W. 373 (unlawful gaming; cross-examination of defendant to conviction for felony, allowed).

CALIFORNIA: 1. *Extrinsic Testimony:* 1867, People *v.* Jones, 31 Cal. 565, 571 (excluded, in the principle of non-contradiction on collateral matters); 1872, Code Civ. Pr. § 2051 (a witness is not impeachable "by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony"); applied in the following cases: 1875, People *v.* Amanacus, 50 Cal. 233, 235; 1885, People *v.* Hamblin, 68 Cal. 101, 103, 8 Pac. 687; 1889, Sharon *v.* Sharon, 79 Cal. 637, 673, 22 Pac. 26, 131; 1890, Davis *v.* Powder Works, 84 Cal. 617, 627, 24 Pac. 387; Jones *v.* Duchow, 87 Cal. 109, 114, 23 Pac. 371, 25 Pac. 256; 1899, James' Estate, 124 Cal. 653, 57 Pac. 579, 1008; 1901, Steen *v.* Santa Clara V. M. & L. Co., 134 Cal. 355, 66 Pac. 321. 2. *Scope of Cross-examination:* 1868, Clark *v.* Reese, 35 Cal. 89, 96 (personal liberties with the plaintiff, in a breach of promise suit, *semble*, allowable); 1872, People *v.* Snellie, cited 48 Cal. 338 (whether he had been arrested for vagrancy, allowed); 1872, Code Civ. Pr. § 2051 (quoted *supra*); 1873, Reed *v.* Clark, 47 Cal. 194, 201 (trial Court's discretion sanctioned; but here character of the witness as party was in issue); 1874, People *v.* Manning, 48 Cal. 335, 338 (whether he had ever been arrested for vagrancy; not decided); 1880, Hinkle *v.* R. Co., 55 Cal. 627, 628, 632 (excluding inquires as to particular acts, without distinguishing between cross-examination and outside testimony; here, whether the witness had taken a bribe in another matter); 1885, People *v.* Hamblin, 68 Cal. 101, 103, 8 Pac. 687 (whether he had been arrested; excluded, because an arrest alone does not show guilt;

whether he had been doorkeeper at a gambling house, knowing it to be an unlawful business, excluded, on the particular-act doctrine); 1886, People *v.* Carolan, 71 Cal. 195, 12 Pac. 52 ("whether he had been arrested" and convicted; excluded, not noticing the arrest-question), 1888, Cockrill *v.* Hall, 76 Cal. 192, 196, 13 Pac. 18 (whether he had not been impeached at another trial, excluded); 1889, Sharon *v.* Sharon, 79 Cal. 633, 673, 22 Pac. 26, 131 (whether she had lunched, with other men than her husband, at a disreputable house; whether she had falsely asserted the sanity of her husband as testator; excluded, on the particular-act doctrine); 1890, Davis *v.* Powder Works, 84 Cal. 617, 627, 24 Pac. 387 (fraudulent official acts, excluded, on the same doctrine); People *v.* Tiley, 84 Cal. 651, 652, 24 Pac. 290 (whether a married man spent the night at a house of ill-fame, excluded); Jones *v.* Duchow, 87 Cal. 109, 114, 23 Pac. 371, 25 Pac. 256 (whether he had been arrested and had pleaded guilty, on a charge of beating a prostitute, excluded); 1893, People *v.* Wells, 100 Cal. 459, 462, 34 Pac. 1078 (questions as to forgery, marital improprieties, etc., excluded), 1895, People *v.* Un Dong, 106 Cal. 88, 39 Pac. 12 (whether he lived in a house of ill-fame, and whether he was connected with a gambling-house, excluded); 1895, People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (that she had been a prostitute, excluded); 1896, People *v.* Ross, 115 Cal. 233, 46 Pac. 1059 (of a woman-witness, as to prostitution, admitted); 1898, People *v.* Silva, 121 Cal. 668, 54 Pac. 146 (that he had been in prison charged with stealing, excluded); 1898, Pyle *v.* Piercy, 122 Cal. 383, 55 Pac. 141 (that she had lived with her husband before marriage, not allowed); 1899, James' Estate, 124 Cal. 653, 57 Pac. 579, 1008 (the writing of a "highly immoral" book, or unlawful intercourse, not admissible, even on cross-examination); 1899, People *v.* Crandall, 125 Cal. 129, 57 Pac. 785 (questions as to witness' prostitution, etc., not allowed; Temple, J., diss., and holding that the trial Court has discretion); 1900, Kasson's Est., 127 Cal. 496, 59 Pac. 950 ("whether the house you were keeping in M. was a house of prostitution?", excluded); 1900, People *v.* Clarke, 130 Cal. 642, 63 Pac. 138 (cross-examination to misconduct, excluded); 1901, People *v.* Owens, 132 Cal. 469, 64 Pac. 770 (same); 1901, People *v.* Harlan, 133 Cal. 16, 65 Pac. 9 (same); 1901, People *v.* Warren, 134 Cal. 202, 66 Pac. 212 (cross-examination to being indicted, excluded); 1903, People *v.* Derbert, 138 Cal. 467, 71 Pac. 564 (questions to a defendant as to various aliases, held improper); 1907, People *v.* Fong Chung, 5 Cal. App. 587, 91 Pac. 105; 1910, Gird's Estate, 157 Cal. 534, 108 Pac. 99 (cross-examination to a woman claimant's unchastity, not allowed); 1919, Broderick *v.* Broderick, 40 Cal. App. 550, 181 Pac. 402 (separate maintenance; cross-examination to an operation for abortion, admitted as being otherwise relevant). 3. *Privilege against Disgracing Answers:* 1857, Ex parte Rowe, 7 Cal. 184 (privilege applies "when the answer is not to any matter pertinent to the issue and the answer would disgrace him"); 1868, Clark *v.* Reese, 35 Cal. 89, 96 (personal liberties with a woman; undecided); 1870, People *v.* Reinhart, 39 Cal. 449 (former conviction, excluded); C. C. P. 1872, § 2065 (privilege not to give "an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony"; this last clause was added to the section as adopted from the prior Practice Act, § 408, and apparently annulled People *v.* Reinhart, *supra*); § 2066 ("It is the right of the witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor"); P. C. § 89 (privilege denied for witness on a charge of obtaining money to influence legislative vote); Pol. C. § 304 (same for witness before legislature or its committee). 4. *Conviction of Crime:* C. C. P. 1872, § 2051 (quoted *supra*); 1870, People *v.* Reinhart, *supra* (admitted); 1875, People *v.* Amanacus, 50 Cal. 233, 235 (admitted); 1886, People *v.* Carolan, 71 Cal. 195, 12 Pac. 52 (misdemeanor, excluded; unless, *semble*, involving "moral turpitude and infamy"); 1895, People *v.* Chin Hane, 108 Cal. 597, 607, 41 Pac. 697 (kind of felony may be stated); 1900, People *v.* Putnam, 129 Cal. 258, 61 Pac. 961 (same); 1901, People *v.* Ward, 134 Cal. 301, 66 Pac. 372 (verdict, lacking sentence, suffices); 1904, People *v.* White, 142 Cal. 292, 75 Pac. 828 (the conviction must be for a felony, not a misdemeanor); 1905, People *v.* Kelly, 146 Cal. 119, 79 Pac. 846 (conviction of five different felonies shown); 1906, People *v.* Gray, 148 Cal. 507, 83 Pac. 707 (arrest for drunkenness, excluded); 1906, People *v.* Soeder, 150 Cal. 12, 87 Pac. 1016 (felony; here against a defendant).

COLORADO: 2. *Scope of Cross-examination:* 1910, Tollifson *v.* State, 49 Colo. 219, 112 Pac. 794 (cross-examination to arrest or information, generally improper, but in trial Court's discretion). 4. *Conviction of Crime:* Comp. St. 1921, § 6555 (quoted *ante*, § 488); 1918, Dennison *v.* People, 65 Colo. 15, 174 Pac. 595 (Rev. St. 1908, § 7266, applied to allow cross-examination to conviction for a felony, etc.).

COLUMBIA (District): 2. *Scope of Cross-examination:* 1881, Guiteau's Trial, I, 743 (medical man allowed to be asked whether he was dismissed from a post in an asylum); 1892, U. S. *v.* Cross, 20 D. C. 373 (a question as to place of residence was disallowed, in discretion, because it was directed merely to obtain clues to further evidence). 4. *Conviction of Crime:* 1880, U. S. *v.* Neverson, 1 Mackie 152, 172 (larceny, admitted); Code 1919, § 1067 (quoted *ante*, § 488).

CONNECTICUT: 1. *Extrinsic Testimony* is excluded: 1856, State *v.* Randolph, 24 Conn. 363, 366; 1877, State *v.* Shields, 45 Conn. 256, 257, 260, 263 (specific instances of intoxication excluded, but former prostitution admitted, apparently only as against the prosecutrix in a rape case, according to § 62, *ante*); 1899, Spiro *v.* Nitkin, 72 Conn. 202, 44 Atl. 13 (that the witness swore falsely at another trial); 1918, Rich *v.* Johnston, 92 Conn. 599, 103 Atl. 1003 (services as gardener; competency of employees in issue; witness-employee allowed to be contradicted as to discharge for dishonesty, distinguishing proof of dishonest acts merely to impeach the witness' credit; Shailer *v.* Bullock *infra*, distinguished). 2. *Scope of Cross-examination:* 1881, State *v.* Ward, 49 Conn. 433, 442 (whether he lived with a woman who kept a house of ill-fame, allowed); 1898, State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769 (whether he had committed adultery; discretion of the trial Court to control); 1902, Dore *v.* Babcock, 74 Conn. 425, 50 Atl. 1016 (questions as to divorce for desertion, held improper, the subject not tending to "affect the veracity of a witness"); 1903, State *v.* Nussenholtz, 76 Conn. 92, 55 Atl. 589 (question to an accused as to his prior arrest, excluded); 1905, Shailer *v.* Bullock, 78 Conn. 65, 61 Atl. 65 (bastardy; questions to the defendant, a clergyman, as to prior charges of immorality, dismissal from employment, etc., in other communities, held to be allowable in the trial Court's discretion; yet "most of the foregoing questions . . . should have been properly excluded, because, if proved or admitted, they had no legitimate tendency to affect his character for truthfulness"); 1909, State *v.* Rivers, 82 Conn. 454, 74 Atl. 757 (particular acts of immorality and unchastity, either before or after the date of the alleged assault, admissible on cross-examination of the complainant, on a charge of rape under age); 1915, State *v.* Sleeper, 89 Conn. 417, 94 Atl. 363 (manslaughter by abortion; the accused, a doctor, had stated on direct examination, that he had "never been prosecuted or arrested"; on cross-examination it was held improper to ask him whether he was "prosecuted in the Medical Society" and expelled therefrom for abortion; erroneous; the opinion goes on the narrow ground that the Medical Society proceeding was not a prosecution, therefore his direct testimony was not self-contradicted; but in honor and honesty there was a contradiction, for the counsel had tried on the direct examination to give his client a clean status; secondly, the cross-examination was admissible, as affecting character, irrespective of the contradiction; thirdly, when a medical man tried for abortion testifies as a witness, the jury ought to be allowed to place him as a reputable regular practitioner or as an abortionist, rules or no rules of evidence; this decision shows just where the law is far away from life and good sense). 3. *Privilege against Disgracing Answers:* 1827, Northrop *v.* Hatch, 6 Conn. 361, 365 (the privilege does not the less apply because the crime asked about has been pardoned); 1881, State *v.* Ward, 49 Conn. 433, 442, *semble* (whether he lived with a woman who kept a house of ill-fame, privilege recognized); Gen. St. 1918, § 49 (no privilege shall be recognized, in legislative investigations, for facts which "may tend to disgrace him or otherwise render him infamous"); § 6635 (election bribery; no person to be excused because "his evidence may tend to disgrace" him); § 6475 (similar, for illegal gaming). 4. *Conviction of Crime:* 1856, State *v.* Randolph, 24 Conn. 363, 365 (such crimes are provable as disqualified at common law); Gen. St. 1918, § 5705 (quoted *ante*, § 488); 1920, Drazen *v.* New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 860 (conviction for statutory burglary, admissible; the whole subject of kinds of crime elaborately examined; a sad waste of time, in these days of appreciation of the psychological arbitrariness of the common-law doctrine).

DELAWARE: 1. *Extrinsic Testimony:* 1851, Robinson *v.* Burton, 5 Harringt. 335, 339 ("particular acts", excluded). 3. *Privilege against Disgracing Answers:* Const. 1897, Art. V, § 7 (electoral offenses; no privilege on the ground that testimony would "subject him to public infamy"). 4. *Conviction of Crime:* Rev. St. 1915, § 4215 (quoted *ante*, § 488); 1899, State *v.* Burton, 2 Marv. 446, 43 Atl. 254 (pointing a pistol; cross-examination of defendant as to conviction for a similar act excluded, as not relevant to credibility); 1905, State *v.* Powell, 5 Pen. Del. 24, 61 Atl. 966 (conviction for carrying a concealed weapon, excluded).

FLORIDA: 2. *Scope of Cross-examination:* 1898, Roberson *v.* State, 40 Fla. 509, 24 So. 474 (that the witness at a trial for assault had claimed to be feeble-minded, etc., excluded); 1899, Wallace *v.* State, 41 Fla. 547, 26 So. 713 (question as to "criminal charges pending against you", left to trial Court's discretion; so also other questions relating to "past life and history", etc.: but matters which do not affect credit should not be brought in); 1906, Baker *v.* State, 51 Fla. 1, 40 So. 673 (murder; a witness for the State, not allowed to be cross-examined as to being the mother of bastards; conviction of crime and character for veracity are alone available); 1908, Clinton *v.* Goodrich, 56 Fla. 57, 47 So. 389 (cross-examination to illegal fishing, held improper); 1920, Brown *v.* State, 80 Fla. 741, 86 So. 574 (burglary; question to defendant whether he had ever been convicted of a criminal offense, allowed). 3. *Privilege against Disgracing Answers:* 1899, Wallace *v.* State, 41 Fla. 547, 26 So. 713 (privilege not recognized). 4. *Conviction of Crime:* Rev. G. S. 1919, § 2706 (conviction of "any crime except perjury" is not to disqualify; but "such conviction

may be given to affect the credibility of the said witness"); 1920, Robinson *v.* State, 80 Fla. 736, 87 So. 61 (murder; conviction for disorderly conduct, allowed).

GEORGIA: 1. *Extrinsic Testimony* is excluded: 1860, Weathers *v.* Barkdale, 30 Ga. 888 (that the witness had borne a bastard child); 1878, Johnson *v.* State, 61 Ga. 305, 307 (adultery); 1886, Pulliam *v.* Cantrell, 77 id. 563, 565, 3 S. E. 280; 1887, Ratteree *v.* Chapman, 79 Ga. 577, 4 S. E. 684 (adultery); 1896, Killian *v.* R. Co., 97 Ga. 727, 25 S. E. 384 (that he had been charged with selling liquor illegally); 1904, Black *v.* State, 119 Ga. 746, 47 S. E. 370 (rape; extrinsic testimony to the woman-witness' acts of lewdness with third persons, excluded). 2. *Scope of Cross-examination:* Rev. C. 1910, § 5882, P. C. 1910, § 1053 ("particular transactions . . . cannot be inquired of on either side", except in testing the knowledge of an impeaching witness, on the principle of § 989, *post*); 1906, Allred *v.* State, 126 Ga. 537, 55 S. E. 178 (to a defendant, on cross-examination, whether he "had ever bought any spurious money", not allowed, under Code 1895, § 1027). 3. *Privilege against Disgracing Answers:* Rev. C. 1910, § 4554, § 5877 (privilege covers matters "which shall tend to bring infamy or disgrace or public contempt upon himself or any member of his family"). 4. *Conviction of Crime:* 1884, Georgia R. Co. *v.* Homer, 73 Ga. 251 (larceny, admitted, as a 'crimen falsi'); 1888, Doggett *v.* Simms, 79 Ga. 257, 4 S. E. 909 (same); 1893, Ford *v.* State, 92 Ga. 459, 17 S. E. 667 (an unspecified "crime involving moral turpitude", held admissible); 1894, Coleman *v.* State, 94 Ga. 85, 21 S. E. 124 (larceny, admitted); 1896, Killian *v.* R. Co., 97 Ga. 727, 25 S. E. 384, *semble* (illegally selling liquor, admitted); 1897, Shaw *v.* State, 102 Ga. 660, 29 S. E. 477 (conviction, for the same crime, of a joint indictee, testifying for the defendant, received); 1903, Andrews *v.* State, 118 Ga. 1, 43 S. E. 852 (misdemeanor not involving moral turpitude, excluded).

HAWAII: 1. *Extrinsic Testimony:* 1901, Lyman *v.* Hilo Tribune P. Co., 13 Haw. 453, 457 (extrinsic testimony to specific acts, excluded). 2. *Scope of Cross-examination:* 1894, Republic *v.* Tokuji, 9 Haw. 548, 552 (whether he lived under another name elsewhere, held properly excluded); 1897, Colburn *v.* Spitz, 11 Haw. 104 (cross-examination to "particular acts of misconduct", — here, fraudulent bankruptcy —, not allowed); 1898, Republic *v.* Luning, 11 Haw. 390 (questions as to habitual thievery and other crimes, held proper; "he may be questioned as to specific acts"; "the Court has large discretion"; preceding case not cited); 1900, Merricourt *v.* Norwalk F. L. Co., 13 Haw. 218, 220 (trial Court has large discretion); 1919, Terr. *v.* Goo Wan Hoy, 24 Haw. 721, 726, 741 (subject considered; defendant may be examined like any other witness). 3. *Privilege against Disgracing Answers:* Rev. L. 1915, § 2616 (no claim of privilege against a question which is "relevant and material to the matter in issue" on the ground that the answer may "disgrace or criminate himself" shall be allowed unless the Court is of opinion that the answer "will tend to subject such witness to punishment for treason, felony, or misdemeanor"). 4. *Conviction of Crime:* Rev. L. 1915, § 2617 (conviction of "any indictable or other offence" may be proved); 1894, Govt. *v.* Aloiau, 9 Haw. 399 ("any offence" allowable).

IDAHO: 1. *Extrinsic Testimony:* Comp. St. 1919, § 8038 (like Cal. C. C. P. § 2051); 1904, State *v.* Harness, 10 Ida. 18, 76 Pac. 788 (statute not applicable to misconduct affecting the witness' animus against the defendant). 2. *Scope of Cross-examination:* Comp. St. 1919, § 8038 (like Cal. C. C. P. § 2051); 1899, State *v.* Anthony, 6 Ida. 383, 55 Pac. 884 (statute applied); 1903, State *v.* Irwin, 9 Ida. 35, 71, Pac. 608 (questions to an accused, held improper on the facts); 1916, State *v.* Fong Loon, 29 Ida. 248, 158 Pac. 233 (whether witness lived in a gambling house, allowed). 3. *Privilege against Disgracing Answers:* Comp. St. 1919, § 8044 (like Cal. C. C. P. § 2065); § 103 (privilege denied for testimony before Legislature or committee thereof). 4. *Conviction of Crime:* Comp. St. 1919, § 8038 ("felony", admissible); § 1010 (like S. D. Rev. C. § 9972).

ILLINOIS: 1. *Extrinsic Testimony* is excluded: 1858, Sheahan *v.* Collins, 20 Ill. 329; 1876, Dimick *v.* Downs, 82 Ill. 573 (adultery, illegal sale of liquor); 1898, Rippetoe *v.* People, 172 Ill. 173, 50 N. E. 166. 2. *Scope of Cross-examination:* 1896, Goon Bow *v.* People, 160 Ill. 438, 43 N. E. 593, *semble* (question whether the witness kept an opium joint, allowed); 1904, Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195 (personal injuries; cross-examination as to domestic misconduct, excluded, as not concerning "the truth or falsity of his testimony"); 1910, People *v.* Bissett, 246 Ill. 516, 92 N. E. 949 (murder; defendant cross-examined as to having been a gambler and used aliases; said to be "prejudicial", but not passed upon); 1912, People *v.* Brown, 254 Ill. 260, 98 N. E. 535 (perjury; cross-examination of a woman-witness to chastity, held properly excluded, as abusive and unnecessary); 1913, People *v.* Newman, 261 Ill. 11, 103 N. E. 589 (former arrest, excluded); 1914, People *v.* Warfield, 261 Ill. 293, 103 N. E. 979 (confidence game by de luxe book-contracts; cross-examination of defendant to an alias, and of defendant's witnesses, book-dealers, to dishonest trade methods, not allowed; unsound; no authority cited); 1914, People *v.* Duncan, 261 Ill. 339, 103 N. E. 1043 (rape under age; cross-examination of defendant's wife to lewd conduct, excluded; unsound); 1920, People *v.* Miller, 292 Ill. 318, 127 N. E. 58 (receiving a stolen automo-

bile; "This is n't the first stolen property you've bought?", held improper). 3. *Privilege against Disgracing Answers:* Rev. St. 1874, c. 38, § 6 (privilege not to obtain for witness testifying before Legislature or a committee thereof); 1899, Halloway *v.* People, 181 Ill. 544, 54 N. E. 1030, *semble* (privilege not recognized). 4. *Conviction of Crime:* Rev. St. 1874, c. 38, § 426, c. 51, § 1 (quoted *ante*, § 488); 1882, Bartholomew *v.* People, 104 Ill. 601, 607 ("infamous offence" is provable; the same rule as at common law for disqualification); 1902, Matzenbaugh *v.* People, 194 Ill. 108, 62 N. E. 546 (the crimes are to be defined by the common-law rule as to incompetency; here a conviction for fraud in scheduling property for taxation was held not to be "of the class of offences denominated 'crimen falsi' "; of this ruling it may be said, first, that the Courts should be the last ones to minimize the civic evil of such a form of lying, and, secondly, that in the present case, where the assessor sought to charge the appellant with taxes, it was absurd to hold that he could not be discredited by a conviction for falsifying in just such a transaction); 1904, McKevitt *v.* People, 208 Ill. 460, 70 N. E. 693 (Rev. St. 1874, c. 38, § 279, as amended in 1899 to exempt from the civil consequences of infamy a person sentenced to the State Reformatory, does not affect the admissibility of a conviction under ib. § 426, where the sentence on such conviction is to the Reformatory); 1908, Clifford *v.* Pioneer Fireproofing Co., 232 Ill. 150, 83 N. E. 448 (conviction for an infamous crime, admissible; here, rape); 1913, People *v.* Green, 292 Ill. 318, 127 N. E. 50 ("You knew G. at Pontiac, did n't you?", Pontiac being the location of a penal institution, held improper); 1915, People *v.* Hamilton, 269 Ill. 390, 109 N. E. 329 (rape; cross-examination of accused as to being "locked up in Aurora for being drunk on the Fourth", excluded; no authority cited); 1914, People *v.* Fryer, 266 Ill. 216, 107 N. E. 134 (larceny; cross-examination of defendant, "Did you ever buy any stolen property?" "When you lived in M. were you ever arrested?" "Were you ever convicted of any misdemeanor or crime while you lived in M.?", held "all incompetent"); 1916, People *v.* Simmons, 274 Ill. 528, 113 N. E. 887 (cross-examination to a conviction for carrying a revolver, not allowed; 1917, People *v.* Schultz-Knighten, 277 Ill. 238, 115 N. E. 140 (a witness having stated on direct examination that she had never been convicted of crime, a question on cross-examination whether the Supreme Court had not reversed such a conviction was held improper; an extraordinary ruling, sanctioning the witness' evasion); 1919, People *v.* Reed, 287 Ill. 606, 122 N. E. 806 (pandering; cross-examination of defendant to conviction of larceny of an automobile, held improper, wholly ignoring the present principle); 1920, People *v.* Green, 292 Ill. 318, 127 N. E. 50 (conviction of assault with intent to commit robbery held not admissible to impeach, following Matzenbaugh *v.* People; "whether the crime is infamous, depends, not upon the common law, nor the Court's view of its moral aspects, but upon the statute"; true, but the anomaly remains of not being able to exhibit the witness' bad record of moral delinquency; and the error dates back to Bartholomew *v.* People, which should never have adopted a definition so arbitrary and inflexible; the passages quoted *ante*, § 520, show that the rule as now administered in Illinois is entirely out of harmony with the original principle or with any living principle; consult Professor Henry Schofield's trenchant article, "Petty Larceny; Infamous Crime and Infamous Punishments", Illinois Law Review, III, 108); 1920, People *v.* Andrae, 295 Ill. 445, 129 N. E. 178 (conviction followed by release on probation without sentence may nevertheless be used to impeach).

INDIANA: 1. *Extrinsic Testimony:* The principle has been always recognized, except in an early case; 1853, Hill *v.* State, 4 Ind. 112 (bastardy, other intercourse before gestation-time, allowed); but the distinction between conduct impeaching character and conduct showing consent in rape and bastardy cases (*ante*, §§ 200, 399), and conduct showing other parentage in bastardy cases (*ante*, § 133), has not always been observed: 1841, Walker *v.* State, 6 Blackf. 4 (falsehood); 1859, Townsend *v.* State, 13 Blackf. 358, *semble* (bastardy; other intercourse before gestation-time, excluded); 1859, Shattuck *v.* Myers, 13 Blackf. 50, *semble* (unchaste conduct of the daughter in a seduction case); Bersch *v.* State, 13 Blackf. 436 (passing a counterfeit bill); 1860, Long *v.* Morrison, 14 Ind. 599 ("a single act of immorality"); 1861, Wilson *v.* State, 16 Ind. 393 (rape; the prosecutrix' credibility as a witness not allowed to be impeached by "a particular act of immorality"); 1879, Cunningham *v.* State, 65 Ind. 379, 381 (unchaste conduct); Meyncke *v.* State, 68 Ind. 403, *semble* (unchaste conduct); 1884, South Bend *v.* Hardy, 98 Ind. 580 (in general); 1888, Bedgood *v.* State, 115 Ind. 275, 281, 17 N. E. 621 (rape; intercourse with a third person admitted; reasoning obscure); 1895, Griffith *v.* State, 140 Ind. 163, 39 N. E. 440 (excluded); 1904, Dunn *v.* State, 162 Ind. 174, 70 N. E. 521 (murder; testimony to an act of adultery with another person, eight years before, contradicting the defendant's denial of it on his cross-examination, held improper); 1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 614 (excluded). 2. *Scope of Cross-examination:* 1841, Walker *v.* State, 6 Blackf. 3, *semble* (bastardy; intercourse of the complainant with others, excluded as "irrelevant"); 1853, Hill *v.* State, 4 Ind. 112 (bastardy; other intercourse before gestation-time allowed); 1859, Townsend *v.* State, 13 Ind. 358 (like Walker's case); 1859, Bersch *v.*

State, 13 Ind. 436 (passing a counterfeit bill, excluded, as a "particular act"); 1877, Farley *v.* State, 57 Ind. 331, 333 (excluding even on cross-examination a question as to "an isolated act"); 1884, South Bend *v.* Hardy, 98 Ind. 579, 584 (the trial Court has discretion to permit, "if by affecting the credibility of the witness, it will subserve justice"; matters of sexual incontinence, *semble*, do not so affect credibility; here a former fraud of the plaintiff was held not improperly excluded); 1884, Bessette *v.* State, 101 Ind. 85, 88 ("It is proper, within the bounds of propriety, to be controlled by the trial Court, that the character and antecedents of a witness may be subjected to a test on cross-examination"; here, a rape on a minor; the prosecutrix' indecent conduct with her stepfather allowed to be inquired into); 1886, Spencer *v.* Robbins, 106 Ind. 580, 586, 5 N. E. 726 (action for partition of estate; cross-examination to adulterous pregnancy, held properly excluded; "it may be proper, however, under extraordinary circumstances", to ask as to character and antecedents, but "this is a matter within the sound discretion of the nisi prius Court"); 1888, Bedgood *v.* State, 115 Ind. 279, 17 N. E. 621 (rape; intercourse with a third person admitted; reasoning obscure); 1894, Parker *v.* State, 136 Ind. 284, 35 N. E. 1105 (of a defendant-witness, whether he had not been arrested and prosecuted, held proper in discretion); 1895, Blough *v.* Parry, 144 Ind. 463, 481, 40 N. E. 70, 43 id. 560 (cross-examination to particular misconduct, allowable in trial Court's discretion); 1897, Shears *v.* State, 147 Ind. 51, 46 N. E. 331 (like Blough *v.* Parry; here, questions as to former larceny); 1898, Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272, *semble* (cross-examination of a female witness as to acts of dishonesty or immorality, not improperly allowed in trial Court's discretion); 1898, Vanleave *v.* State, 150 Ind. 273, 49 N. E. 1060 (whether a defendant-witness had been convicted of larceny and was under indictment for robbery, allowed); 1898, Ellis *v.* State, 152 Ind. 326, 52 N. E. 82 (questions "as to certain prosecutions against him for criminal offences," allowed); 1900, Whitney *v.* State, 154 Ind. 573, 57 N. E. 398 (whether the witness, with a "gang", committed frequent assaults, excluded); 1910, Heath *v.* State, 173 Ind. 296, 90 N. E. 310 (rape under age; complainant witness' character, not evidenced by acts of intercourse with others); 1920, Bush *v.* State, 189 Ind. 467, 128 N. E. 443 (assault); 1921, Denny *v.* State, — Ind. —, 129 N. E. 308 (larceny of automobile tires; cross-examination of accused as to indictment for violation of liquor law, held allowable in trial Court's discretion). 3. *Privilege against Disgracing Answers:* 1841, Walker *v.* State, 6 Blackf. 1 (obscure); 1853, Hill *v.* State, 4 Ind. 112 (bastardy; other intercourse by the complainant, privilege repudiated); 1859, Townsend *v.* State, 13 Ind. 358 (same evidence; obscure ruling); 1859, Shattuck *v.* Myers, 13 Ind. 50 (unchaste conduct by the daughter in a seduction case; privilege recognized); 1880, Smith *v.* Yaryan, 69 Ind. 447 (same; but allowing the question for determining paternity, and thus apparently abandoning the privilege ground); 1884, South Bend *v.* Hardy, 98 Ind. 583 (privilege repudiated for all matters relevant to the issue or affecting credibility); 1888, Bedgood *v.* State, 115 Ind. 275, 280, 17 N. E. 621, *semble* (rape; question as to intercourse with others; privilege not recognized). 4. *Conviction of Crime:* Burns' Ann. St. 1914, § 530 (any fact formerly rendering incompetent may be shown to affect credibility); 1909, Dotterer *v.* State, 172 Ind. 357, 88 N. E. 689 (conviction for assault and battery, admitted; opinion not clear; applying Rev. St. 1897, § 519, being Burns' Annot. St. 1908, § 530); 1915, Rock *v.* State, 185 Ind. 51, 110 N. E. 212 (keeping a blind tiger; on cross-examination, questions as to having been arrested for illegal sale of liquor and pleading guilty were excluded; this is an astonishing decision, ignoring the distinction as to a conviction; Dotterer *v.* State is not cited; the cases cited are not cases of a judgment of conviction); 1919, Pierson *v.* State, 188 Ind. 239, 123 N. E. 118 (conspiracy to commit arson; cross-examination of defendant as to conviction for fornication, held admissible but only under instructions to restrict it to credibility).

INDIAN TERRITORY: 1. *Extrinsic Testimony:* 1896, Oxier *v.* U. S., 1 Ind. T. 93, 38 S. W. 331 (excluded, under the Arkansas statute quoted *supra*). 2. *Scope of Cross-examination:* 1896, Oxier *v.* U. S., 1 Ind. T. 93, 38 S. W. 331 (pointing out that the Arkansas statute *supra* is to be treated as excluding extrinsic testimony only; allowing such a cross-examination as will disclose "something of their character, antecedents, and credibility"; subject to the trial Court's power to prevent "an unreasonable or abusive cross-examination"; here admitting a question as to an arrest for larceny); 1897, Oats *v.* U. S., 1 Ind. T. 52, 38 S. W. 673 (same); 1902, Williams *v.* U. S., 4 Ind. T. 269, 69 S. W. 871 (Oxier *v.* U. S., approved); 1906, McCoy *v.* U. S., 6 Ind. Terr. 415, 98 S. W. 144 (to the defendant, "How many larceny cases have there been here against you?" allowed; Oxier *v.* U. S. followed, but the various rules are not carefully discriminated). 3. *Privilege against Disgracing Answers:* 1896, Oxier *v.* U. S., 1 Ind. T. 93, 38 S. W. 331 (recognized; here for a question as to former arrest).

IOWA: 1. *Extrinsic Testimony* is excluded: 1848, Carter *v.* Cavenaugh, 1 Greene, 171, 175 (in general); 1859, State *v.* Sater, 8 Ia. 420, 424 (reputation and arrest as a horse-thief). 2. *Scope of Cross-examination:* 1879, Madden *v.* Koester, 52 Ia. 693 (fraudulent transactions, *semble*, in this case excluded because used as a mere pretence for attacking character of the

defendant, not the witness); 1888, State *v.* Pugsley, 75 Ia. 743, 38 N. W. 498 (question as to being in jail at the time; held proper, since "it is competent to ask a witness what is his occupation and where he resides"; this is a quibble; here the witness was only under indictment and not yet tried); 1895, State *v.* Osborne, 96 Ia. 281, 65 N. W. 159 (the witness' occupation, admitted); 1897, State *v.* Watson, 102 Ia. 651, 72 N. W. 283 (to a defendant, as to using an assumed name, etc., allowed in discretion); 1898, State *v.* Chingren, 105 Ia 169, 74 N. W. 946 (questions as to occupation allowed, in trial Court's discretion); 1899, State *v.* Abley, 109 Ia. 61, 80 N. W. 225 (question as to some unspecified crime, held improper); 1900, Myers' Estate, 111 Ia. 584, 82 N. W. 961 (whether the witness had not "stolen" his own buggy, held improper); 1902, State *v.* Hogan, 115 Ia. 455, 88 N. W. 1074 (whether he had ever been in a reform school, not allowed); 1903, Germinder *v.* Machinery M. I. Ass'n, 120 Ia. 614, 94 N. W. 1108 (whether he had been accused of burning a barn, excluded); 1903, Livingston and Schaller *v.* Heck, 122 Ia. 74, 94 N. W. 1098 (mortgage claim; whether the witness had not been arrested on the charge of selling the mortgaged property in controversy "might properly have been received as affecting his credibility"); 1917, State *v.* Brooks, 181 Ia. 874, 165 N. W. 194 (statutory rape; cross-examination of complainant to unchaste conduct, allowed); 1920, Jones *v.* Spencer, 188 Ia. 94, 175 N. W. 855. 3. *Privilege against Disgracing Answers:* 1874, Brown *v.* Kingsley, 38 Ia. 220, 221 (seduction; illicit intercourse with other men, held privileged under the statute); 1888, Mahanke *v.* Cleland, 76 Ia. 405, 41 N. W. 53 (question as to fraud in a deed, held not to appear privileged on the facts; "no rule applicable to all cases is possible"); Code 1897, §§ 4612, 4613, Comp. Code §§ 7319, 7320 (answer tending "to expose him to public ignominy", privileged, except as to conviction for felony and specified offences, and in prosecutions for gaming and liquor offences); 4. *Conviction of Crime:* Code 1897, § 4602, Comp. Code § 7309 (quoted *ante*, § 488; facts formerly disqualifying may now be used to discredit); § 4613, Comp. C. § 7320 (witness may be asked as to "conviction of a felony" and specified offences as above); 1887, Hanners *v.* McClelland, 74 Ia. 318, 322, 37 N. W. 389 (not of *any* crime); 1890, State *v.* O'Brien, 81 Ia. 96, 46 N. W. 752 (felony in general); 1901, Palmer *v.* R. Co., 113 Ia. 442, 85 N. W. 756 (under Code 1897 § 4602, a conviction for selling liquor without paying the Federal tax was excluded, as not receivable at common law; in general, a Federal conviction is not admissible under § 4602, whether under § 4613, not decided); 1903, State *v.* Carter, 121 Ia. 135, 96 N. W. 710 (cheating by false pretences, a felony; admitted); 1913, Thorman's Estate, 162 Ia. 237, 144 N. W. 7 (cross-examination to disbarment, allowed); 1914, State *v.* Foxton, 166 Ia. 181, 147 N. W. 347 (false pretences; conviction of a similar offence in another State, admitted); 1919, State *v.* Gilliland, 187 Ia. 794, 174 N. W. 496 (weight to be given to conviction for felony).

KANSAS: 1. *Extrinsic Testimony* is excluded: 1888, State *v.* Johnson, 40 Kan. 266, 269, 19 Pac. 749. 2. *Scope of Cross-examination:* 1886, State *v.* Pfefferle, 36 Kan. 90, 92, 12 Pac. 406 (the limits held rest largely in the trial Court's discretion; here admitting questions as to former convictions for illegal liquor-selling); 1890, State *v.* Romain, 44 Kan. 719, 25 Pac. 225 (questions to an accused as to other crimes, held not in excess of discretion, or at any rate not prejudicial error); 1894, State *v.* Reed, 53 Kan. 767, 37 Pac. 174 (questions as to previous adultery, etc., held improperly allowed on the facts); 1894, State *v.* Wells, 54 Kan. 161, 37 Pac. 1005 (questions to an accused as to prior acts of violence, held properly allowed in discretion); 1898, State *v.* Greenburg, 59 Kan. 404, 53 Pac. 61 (questions as to previous civil arrests, allowed; the trial Court to prevent unreasonable use of such cross-examination to specific facts; Doster, C. J., diss., because a mere arrest does not involve the fact of guilt); 1902, State *v.* Abbott, 65 Kan. 139, 69 Pac. 160 (rape; questions as to the prior conduct of the chief witness of the prosecution, held proper); 1907, State *v.* Pugh, 75 Kan. 702, 90 Pac. 242 (trial Court's discretion); 1913, State *v.* Sexton, 91 Kan. 171, 136 Pac. 901 (illegal sale of liquor; cross-examination of the State's witness to sales by him, with a view to contradicting him if he denied, held improper; unsound; cross-examination is not objectionable because of the "outside issues brought in"; it brings in no issues; but if on cross-examination he had denied, then of course other witnesses cannot be called to contradict him; if, on the other hand, he had on cross-examination admitted the sales, the fact is thus quickly in the case, and the only question can be whether a man who himself sells liquor illegally is any the less credible thereby when he testifies against another alleged liquor-seller; the records of experience for centuries are that such persons are somewhat open to suspicion; is there not a fable of Æsop on the point?); 1915, State *v.* Killion, 95 Kan. 241, 148 Pac. 643 (murder; questions to the accused as to former fights, allowed, as affecting credibility only, in the trial Court's discretion); 1921, Zeigler *v.* Oil C. S. M. Co., 108 Kan. 589, 196 Pac. 603 (personal injury; cross-examination of a medical witness as to his practice of advertising and therefore of being ineligible to the local medical society, held improper, and the local code of medical ethics excluded; unsound); 1921, State *v.* Bowers, Davis' Appeal, 108 Kan. 161, 194 Pac. 650 (questions as to former arrest or indictment; trial

Court's discretion controls; State *v.* Pfefferle followed; defendant as witness may be examined as to former convictions unrelated to present charge). 3. *Privilege against Disgracing Answers:* 1886, State *v.* Pfefferle, *supra* (not recognized). 4. *Conviction of Crime:* Gen. St. 1915, § 7219 (quoted *ante*, § 488); § 8134 (criminal cases; "conviction of a crime may be shown to affect credibility"); 1886, State *v.* Pfefferle (cited *supra*); 1891, State *v.* Frobasco, 46 Kan. 310, 26 Pac. 749 (larceny, admitted); 1896, State *v.* Park, 57 Kan. 431, 46 Pac. 713 (larceny, held admissible); 1904, State *v.* Coover, 69 Kan. 382, 76 Pac. 845 (questions to defendant as to prior arrest and sentence to the reform school, allowed); 1915, State *v.* Marshall, 95 Kan. 628, 148 Pac. 675 (a person convicted of perjury but paroled is not disqualified by the mere conviction; here St. 1915, removing disqualification by conviction of crime was also held applicable).

KENTUCKY: 1. *Extrinsic Testimony* is excluded: C. C. P. 1895, § 597 (impeachment "by evidence of particular wrongful acts", except conviction of felony, is to be excluded); 1821, Hume *v.* Scott, 3 A. K. Marsh. 261 (in general); 1857, Thurman *v.* Virgin, 18 B. Monr. 792 (hog-stealer; prostitute); 1859, Henderson *v.* Haynes, 2 Metc. 348, *semble* (in general); 1868, Taylor *v.* Com., 3 Bush 511 (membership in a clique "banded to swear out negroes"); 1869, Young *v.* Com., 6 Bush 315 (hog-stealer); 1880, Campbell *v.* Bannister, 79 Ky. 205, 208; 1901, Welch *v.* Com., — Ky. —, 60 S. W. 185, 948, 1118 (sheriff's testimony to a pending warrant for arrest of witness, excluded); 1901, Roberts *v.* Johnson, — Ky. —, 64 S. W. 526; 1908, Leach *v.* Com., 129 Ky. 497, 112 S. W. 595 (murder; immoral intimacy between deceased and chief witness for the State, admitted, as evidencing bias; distinguishing the inadmissible use to evidence moral character). 2, 3, 4. *Scope of Cross-examination, Privilege against Disgracing Answers, and Conviction of Crime;* these three topics have in the last few decades become hopelessly confused and uncertain in the decisions of this State; nothing but a new expunging statute, recurring to first principles, can avail to clarify the law; one of the sources of confusion has been the injudicious practice of excluding certain formal opinions from official publication: C. C. P. 1895, § 597 (cited *supra*; compare the interpretation of the similar California statute *supra*); 1831, Bullock *v.* McGee, 5 J. J. Marsh. 424 (privilege applied to a fact "reflecting on his character, unless it be pertinent to the issue independently of its tendency to affect character"; here a question as to playing cards with a negro before or during the affray was held to embrace facts partly material and partly immaterial and therefore objectionable); 1870, [illegible] *v.* [illegible], [illegible] Bush [illegible] (whether the witness had had intercourse with the [illegible] daughter, held privileged); 1890, Mitchell *v.* Com., — Ky. —, 14 S. W. 489 (whether he had been in a State prison, held not privileged; questions which "only tend to disgrace a witness, he may be compelled to answer"; no authority cited); 1892, Burdette *v.* Com., 93 Ky. 77, 18 S. W. 1011 (questions whether he had been convicted of stealing or sent to the workhouse for breaking and stealing; admitted, such test to be applied "in a proper and pertinent manner and under control of the Court"; privilege as to disgracing answers, recognized); 1892, Roberts *v.* Com., — Ky. —, 20 S. W. 267 (allowing questions as to indictments for robbery, for conspiracy, etc.; the opinion erroneously assuming this question to have been settled in Burdette *v.* Com.); 1895, Saylor *v.* Com., 97 Ky. 190, 30 S. W. 390 (question to an accused as to other crimes; present question not raised); 1895, Com. *v.* Wilson, — Ky. —, 32 S. W. 166 (detaining a woman for carnal knowledge; questions to the prosecutrix as to her adultery excluded, because "particular instances of moral turpitude" are inadmissible, reputation alone being admissible; no citations); 1896, Warren *v.* Com., 99 Ky. 370, 35 S. W. 1028 (whether the defendant-witness had recently been at work, whether a witness had not made it a business to bleed election-candidates, how often he had been in jail, etc.; admitted as within the trial Court's discretion; though "we are not to be understood as holding that counsel are to be allowed unrestricted liberty in cross-examination of this character, or that a witness is to be compelled to submit to an exploration of the most remote passages of his past life, by means of fishing questions in regard to scandalous or discreditable acts"); 1897, Leslie *v.* Com., — Ky. —, 42 S. W. 1095 (whether he was not a gambler, frequented a house of ill-fame, etc., allowed; but not whether he had not been arrested for certain offences); 1898, McCampbell *v.* McCampbell, 103 Ky. 745, 46 S. W. 18 (privilege applies to collateral matters only); 1899, Baker *v.* Com., 106 Ky. 212, 50 S. W. 54 (inquiry as to indictments, etc., at a time long previous, held improper on the facts); 1899, Williams *v.* Com., — Ky. —, 50 S. W. 240 (that defendant had just come from the penitentiary, held inadmissible, until defendant himself testifies); 1900, Parker *v.* Com., — Ky. —, 51 S. W. 573 (questions as to indictments for acts of violence, excluded as involving "particular wrongful acts" under the statute); Pennington *v.* Com., — Ky. —, [illegible] S. W. [illegible] (same); 1901, Welch *v.* Com., 110 Ky. 105, 60 S. W. 948, 1118, 1121 (defendant as witness is privileged not to answer as to having been "accused of any crime, indicted for any crime, or convicted of any misdemeanor"; declaring Burdette *v.* Com., Roberts *v.* Com., and Mitchell *v.* Com. overruled in this respect; the opinion [illegible]

examining to such acts (*supra*, § 981), and claiming a privilege not to answer (*supra*, § 984), and is useless; Paynter, C. J., Hobson and White, JJ., diss.; the opinion of Hobson, J., points out this confusion, and justly complains of the reasoning of the majority opinion); 1901, Asheraft v. Com., — Ky. —, 60 S. W. 931 (questions to an accused as to other indictments against him, held improper; approving the preceding case); 1901, Howard v. Com., 61 Ky. 756, 61 S. W. 756 (similar; the same judges dissenting); 1901, Johnson v. Com., — Ky. —, 61 S. W. 1005 (question as to an indictment for perjury on a former trial, excluded; following Asheraft v. Com.); 1901, Welch v. Com., — Ky. —, 63 S. W. 984 (construing C. C. P. § 597; reviewing the preceding cases, approving those of Leslie, Baker, Parker, and Pennington, and disapproving those of Burdette and Roberts as decided without considering the statute; now pointing out (1) that questions as to specific wrongful acts not proved by a judgment of conviction are improper as seeking evidence of character, although questions as to "his life and his associates" are proper, and questions as to wrongful acts relevant to the cause are proper; (2) that questions as to mere indictments or accusations are improper, exc so far as they indicate bias, according to § 949, *ante*; (3) that an accused as a witness is in no less favorable a position than an ordinary witness; Paynter, C. J., and Hobson, J., diss.); 1902, Traboe v. Com., — Ky. —, 66 S. W. 718 (question as to whom the witness lived with, held proper); 1902, Asheraft v. Com., — Ky. —, 68 S. W. 847 (question as to a prior arrest, excluded); 1903, Hensley v. Com., — Ky. —, 74 S. W. 677 (questions as to prior indictments, excluded); 1904, Mullins v. Com., — Ky. —, 79 S. W. 258 (prior arrest, excluded; no authority cited); 1904, Sanborn v. Com., — Ky. —, 80 S. W. 223 (obscure); 1906, Henderson v. Com., 122 Ky. 200, 91 S. W. 1141 (conviction for forgery, admitted), 1906, Hutton v. Com., 123 Ky. 411, 96 S. W. 560 (murder, cross-examination of the accused as to killing a man in Virginia and being indicted for it, excluded, on the ground that it is "not competent to show any particular wrongful act that the witness has been guilty of or that he has been indicted for any offense"; [illegible] S. W. 624 (Ochsner v. Com., applied); 1921, Sparks v. Com., 193 Ky. 180, 235 S. W. 707 (murder of one who had sought to "break up a moonshine still" of defendant; the following cross-examination of witness for defendant was held proper, on the principle of § 949, *ante*, distinguishing prior cases on the present principle: "Q. Where do you live? A. On Wallow Hole, Elliott county. Q. What do you do for a living? A. Farm. Q. Is it not a fact that your chief occupation for the last two years has been moonshining? A. No, sir. Q. Are you not indicted in the Elliott circuit court in eight cases? Q. Were you not convicted and served a term in prison? A. Never was in Elliott county"); 1922, Posey v. Com., 194 Ky. 483, 240 S. W. 91 (conviction of a misdemeanor, not admissible).

Louisiana: 1. *Extrinsic Testimony:* 1843, Stanton v. Parker, 5 Rob. 108, 109, *semble* (general principle); 1852, State v. Parker, 7 La. An. 83, 85 (excluding "particular acts or charges", and regarding as not thereby excluded testimony that the witness had the character of defrauding, extorting, and cheating, and that he was idle and dissolute and had lewd associations); 1892, State v. Jackson, 44 La. An. 159, 161, 10 So. 600 ("collateral facts, and particular inquiries as to any particular act or any particular associates", excluded; here, the witness' lewd and criminal associations); 1893, State v. Taylor, 45 La. An. 605, 608, 12 So. 927 (general principle); 1898, State v. Wiggins, 50 La. An. 330, 23 So. 334. 2. *Scope of Cross-examination:* 1893, State v. Murphy, 45 La. An. 958, 960, 961, 13 So. 229 ("Have you ever been arrested for stealing?" allowed; the trial Court's discretion controlling to prevent "unreasonable or oppressive cross-examination"; yet on re-hearing the Court shows ignorance of the distinction between cross-examination and outside testimony, and leaves the rule uncertain); 1895, State v. Dudousat, 47 La. An. 977, 17 So. 495 (assumption of false name by prosecuting witness, excluded), 1899, State v. Southern, 48 La. An. 628, 19 So. 605 (a defendant testifying for himself, question whether he was then charged with another offense, admitted), 1901, State v. Hauk, 105 La. 240, 30 So. 726 (trial Court's discretion controlling; 1903 State v. Gillan, 109 [illegible]

State v. Leblea, 137 La. 1007, 69 So. 808 (trial Court's discretion). 4. *Conviction of Crime:* 1906, State v. Griggsby, 117 La. 1046, 42 So. 497 (conviction in a city court, admitted, here against a defendant-witness); 1913, State v. Manual, 133 La. 571, 63 So. 174 (murder; cross-examination of accused to a conviction for fence-cutting, allowed: the rule is not restricted to felonies).

Maine: 1. *Extrinsic Testimony* is excluded: 1841, Phillips v. Kingfield, 19 Me. 375, 378 ("no particular acts of immorality or crime can be stated"); 1842, Halley v. Webster, 21 Me. 461, 464 (language indicating an abandoned character); 1877, State v. Morse, 67 Me. 428. 2. *Scope of Cross-examination:* 1876, State v. Carson, 66 Me. 116 (whether he assaulted F. while drunk, excluded; impeachment by other crimes is not permissible on cross-examination; Holbrook v. Dow, Mass., *infra*, followed). 3. *Privilege against Disgracing Answers:* 1831, Tillson v. Bowley, 8 Me. 163 (bastardy; the complainant's intercourse with another privileged, because here criminal); 1841, Low v. Mitchell, 18 Me. 372, 374 (same). 4. *Conviction of Crime:* Rev. St. 1916, c. 87, § 124 (quoted *ante*, § 488); 1873, State v. Watson, 63 Me. 128 (any criminal offence); 1876, State v. Watson, 65 Me. 79; 1892, State v. Farmer, 84 Me. 440, 24 Atl. 985 (a conviction twenty-seven years before, admitted; "time may soften the effect of such a record, but cannot destroy its applicability"; here, for illegal liquor-selling).

Maryland: 1. *Extrinsic Testimony:* 1906, Richardson v. State, 103 Md. 112, 63 Atl. 317 (woman witness in bigamy). 2. *Scope of Cross-examination:* 1885, Smith v. State, 64 Md. 25 ("anything which will tend to throw light upon his character" as to credibility is allowable, subject to the discretion of the trial Court to some extent; here a question as to having been in jail was allowed); 1902, Bonaparte v. Thayer, 95 Md. 548, 52 Atl. 496 (indictment excluded, "that fact alone is not always equivalent to guilt"); 1913, Avery v. State, 121 Md. 229, 88 Atl. 148 (abortion; question to the accused's wife whether she had ever taken the girl to a house of ill fame, excluded, apparently accepting the rule of total exclusion of questions to chastity character); 1920, Annarina v. Boland, 136 Md. 365, 111 Atl. 84 (alienation of affections; to a witness for plaintiff whether he had not lived with his wife before marriage, not allowed); 1922, Brennan v. [illegible], 1[illegible] Md. [illegible], 116 Atl. 049 (cross-examination to an indictment held improper). 3. *Privilege against Disgracing Answers:* 1885, Smith v. State, *supra* [illegible]. 4. *Conviction of Crime:* Ann. Code 1914, Art. 35, § [illegible] (conviction of an infamous crime admissible); 1894, [illegible] v. [illegible], [illegible] Md. [illegible], [illegible] Atl. [illegible] (whether one has been in jail, the penitentiary, or the State prison, or any other place that would tend to impair his credibility,

admitted); 1915, Simond v. State, 127 Md. 29, 95 Atl. 1073 (conspiracy; whether witness had ever been fined for drunkenness in 1905, held not improperly excluded); 1920, Annarina v. Boland, 136 Md. 365, 111 Atl. 84 ("Have you ever been convicted of any crime?" held allowable).

Massachusetts: 1. *Extrinsic Testimony* has always been excluded: 1825, Com. v. Moore, 3 Pick. 194, 196, *semble* (bastardy; intercourse of the prosecutrix with others, not received to impeach credit); 1857, Gardner v. Way, 8 Gray 189 ("particular acts of misconduct" not admissible; here, false accounts); 1859, Holbrook v. Dow, 12 Gray 358 (quoted *infra*); 1870, Com. v. Regan, 105 Mass. 593, *semble* (rape; former declarations of pregnancy, etc., excluded); 1872, Com. v. McDonald, 110 Mass. 406, *semble;* 1885, Jennings v. Machine Co., 138 Mass. 594, 598 (here, commercial dishonesty; "independent evidence of particular acts of misconduct" inadmissible). 2. *Scope of Cross-examination:* the state of the law in Massachusetts has been marked by some wavering between the two types of rules described as (2) and (3) *ante*, in § 983, — *i.e.* between the rule leaving the examination to the discretion of the trial Judge, and the rule excluding entirely an examination as to facts reflecting on character. In 1843, in Hathaway v. Crocker, 7 Metc. 266, in the well-known passage already quoted *ante*, § 944, Chief Justice Shaw laid down the general doctrine of the latitude of cross-examination; in which he leaves to "the sound discretion of the Court" such questions as aim "to test the purity of principle" of the witness, "his life and habits", "and the like", "for the purpose of exhibiting the witness in his true light to the jury". The confusion seems then to have started with the opinion in Com. v. Shaw, 4 Cush. 593 (1849), where questions put to a witness for the prosecution, asking whether he had not secretly opened letters of the defendant, and having for their express object "to test the moral sense of the witness", were held properly excluded. Dewey, J., for the Court, justified this on two grounds, first, that these circumstances, as detracting from the moral credit of the witness, were not competent, and secondly, that the general discretion of the trial Court as to cross-examination (*ante*, § 944) would suffice to support the exclusion. Then in Com. v. [illegible], 10 Cush. [illegible], [illegible] (1852) and Com. v. Hills, 4 Cush. [illegible], questions excluded below as to the sexual immorality of a witness for the prosecution on a charge of receiving stolen goods were held to have been within this same discretion of the trial Court, that discretion covering new and entirely collateral matters. Yet in 1861, in Smith v. [illegible], [illegible] Gray [illegible], 112, questions to a witness allowed below as to having been expelled from the bar for perjury, were held improper: the trial Court's discretion was conceded, but here it was [illegible]

ried too far", i.e. in going beyond "his ordinary pursuits in life, and the like", and allowing inquiry into "certain charges of misconduct." In Com. v. Quin, 5 Gray 479, 480 (1855), a question why the witness had changed his name was held rightly excluded as "immaterial." In Gardner v. Way, 8 Gray 189 (1857) the plaintiff, relying on his account-books as proof of goods sold, was not allowed to be impeached by outside evidence of former dishonest charges; and without any distinction as to extrinsic testimony, it was said that "nothing is more clear than that the character of a witness for truth and veracity is not to be impeached by proof of any particular act of misconduct" irrelevant to the case. In 1859, in Holbrook v. Dow, 12 Gray 357, a cross-examination on facts of a similar sort, allowed below, "under the latitude of a cross-examination and to test the credibility", was held erroneously allowed; and the strict rule (3) of total exclusion was clearly laid down, by Merrick, J.: "It is a fixed and established rule in the law of evidence that it is not competent, for the purpose of creating a distrust of the witness' integrity and of thus disparaging his testimony, to prove particular acts of alleged misbehavior and dishonesty in relation to matters foreign to all questions which are involved in the trial." The next case, however, reverts to the discretion rule: 1865, Prescott v. Ward, 10 All. 204, 209 (promissory note; questions, excluded below, as to sexual misconduct and attempted blackmail, held to be within the discretion of the trial Court so far as they tended "to disparage her character"; no authorities cited). The next ruling declares a question, excluded below, to have been inadmissible, saying nothing about discretion. 1870, Com. v. Regan, 105 Mass. 593 (rape; former intercourse, and admissions of intercourse, by the prosecutrix; no authorities cited). In Com. v. Mason, 105 Mass. 163, 168, however, questions as to a former attempt to suborn a witness and as to a forgery were held to be within the discretion of the trial Court to exclude as "collateral and irrelevant." Then, in 1872, Com. v. McDonald, 110 Mass. 405 (rape; questions to the prosecutrix as to having been a common seller of liquor illegally; the discretion of the trial Court in excluding was sanctioned; the matters here

ing for the defence on a charge of milk-adulteration was asked to identify a letter from him as official assayer making a corrupt offer to one whose vinegar has been found deficient; the question and the introduction of the letter were held improper: "We are aware that in England and in some of the United States this latitude of cross-examination has sometimes been allowed, though not without protests that the practice ought to be restricted. In Massachusetts the rule has been that a witness cannot be asked on cross-examination, in order to affect his credibility, about his part in transactions irrelevant to the issue on trial. . . . We are satisfied that both witnesses and parties ought to be protected from being obliged to encounter such collateral charges." But in the same volume the discretion rule was reverted to: 1888, Sullivan v. O'Leary, 146 Mass. 322, 15 N. E. 775 (slander; cross-examination of the plaintiff to complaints of slander and foul language against the plaintiff by other persons, held improperly allowed in excess of the trial Court's discretion; Com. v. Schaffner not cited); and it is hard to say what the fixed rule is to be. Since the foregoing cases no settlement has been reached: 1902, Com. v. Foster, 182 Mass. 270, 65 N. E. 391 (trial Court's discretion in general controls); 1906, Taylor v. Schofield, 191 Mass. 1, 77 N. E. 652 (trial Court's discretion controls); 1920, Com. v. Homer, 235 Mass. 520, 127 N. E. 517 (robbery; cross-examination of defendant to a supposed bankruptcy, etc., held unfair, because unconscientious in offering nothing later to contradict his denial); 1921, Com. v. Kaplan, — Mass. —, 130 N. E. 485 (arson of insured property; cross-examination of defendant to being "constantly in the company of firemakers", and as to having a previous fire in another shop; the latter held not improper in the trial Court's discretion, the former not passed upon). 3 *Privilege against Disgraceful Answers*. 1841, Dewey, J., in Com. v. Turner, 3 Metc. 19 (privilege recognized); 1862, Com. v. Savory, 10 Cush. 545, 557 (left undecided). 4 *Conviction of Crime*. 1867, Com. v. Bonner, 97 Mass. 587 (larceny, breaking and entering, arresting a prisoner, admitted); 1868, Com. v. Chatham, 99 Mass. 420

presidential certificate of commutation, releasing after part service of sentence a person convicted of fraudulent concealment of assets from a trustee in bankruptcy, does not prevent the conviction from being used to discredit); 1922, Attorney-General *v.* Pelletier, 240 Mass. 264, 134 N. E. 406 (conviction if crime in a Federal court in New York [illegible] mitted). By St. 1913, c. 81, amended [illegible] further statutes in 1914, 1919, and 1920, the following bizarre production has become the law: Gen. L. 1920, c. 233, § 21: "The conviction of a witness of crime may be shown to affect his credibility, except as follows: First, the record of his conviction of a misdemeanor shall not be shown" after 5 years, "unless he has subsequently been convicted of a crime within 5 years of the time of his testifying; Second, the record of his conviction of a felony" not sentenced to penitentiary shall not be shown after 10 years, unless convicted again within 10 years, etc.; "Third, the record of his conviction of a felony" with penitentiary sentence shall not be shown after 10 years from expiration of minimum sentence, unless convicted again within 10 years, etc.; this intricately patterned rule, as a guide to grades of credibility, must have been revealed to the legislators by some seer of superhuman insight; certainly neither scientific nor legal annals record anything like it.

MICHIGAN: 1. *Extrinsic Testimony* is excluded: 1867, Wilbur *v.* Flood, 16 Mich. 44 (in general); 1870, People *v.* Knapp, 42 Mich. 267, 3 N. W. 927 (sexual improprieties); 1880, People *v.* Whitson, 43 Mich. 423, 5 N. W. 454 (prostitution; decided on another point); 1881, Hamilton *v.* People, 46 Mich. 188, 9 N. W. 247, *semble* (bastardy proceedings; intercourse with a third person at a distant period); 1882, Driscoll *v.* People, 47 Mich. 416, 11 N. W. 221 (crimes); 1886, People *v.* Mausauman, 60 Mich. 15, 21, 26 N. W. 797 (crimes); 1897, Kinston *v.* R. Co., 112 Mich. 40, 70 N. W. 316, 74 N. W. 230 (drunkenness, etc.). 2 *Scope of Cross-examination.* The satisfactory rule of Wilbur *v.* Flood has been adhered to with fair consistency, except in People *v.* Mills, a curious aberration which ought never to have occurred, 1867, Wilbur *v.* Flood 16 Mich. 43 ("such collateral matters as may enable the jury to appreciate them [the witness'] fairness and reliability"; "a large latitude is given, where circumstances seemed to justify it, in allowing a full inquiry into the history of witnesses and into many other things tending to illustrate their true character", so that within the trial Court's discretion, the cross-exam may cover "all antecedents which are really significant" and which will explain [illegible] credibility" [illegible] the fact of former conviction must in the State [illegible] was held within [illegible] 1871 Arnold's Sup. 91 Mich. 600, 52 N. W. [illegible] ought to be left to the discretion of the circuit judge [illegible] may in any case have [illegible] cording to circumstances, arbitrary rules of admission and exclusion . . . should not generally be allowed"; here the witness' character was being rehabilitated); 1872, Gale *v.* People, 26 Mich. 157 (questions as to former arrests, etc., excluded, merely because the defendant, by making a statement, did not become an ordinary witness); 1873, Beebe *v.* Knapp, 28 Mich. 53, 72 (discretion-rule applied, here to admit questions as to sexual misconduct, in an action for deceit); 1874, Hamilton *v.* People, 29 Mich. 183 (whether he had been charged with crime, or had deserted from the army, allowed); 1875, Bissell *v.* Starr, 32 Mich. 297 (examination into past life and character, held to be largely in the trial Court's discretion); 1878, Saunders *v.* People, 38 Mich. 218 (former rascality of an informer, in dealing with the defendant, inquired into to test credibility); 1879, People *v.* Knapp, 42 Mich. 267, 3 N. W. 927 (witness to adultery, allowed to be asked as to sexual improprieties with other persons); 1880, People *v.* Whitson, 43 Mich. 420, 5 N. W. 454 (questions as to prostitution, allowed); 1880, People *v.* Niles, 44 Mich. 608, 7 N. W. 192 (former charge of theft, admitted, *semble*); 1881, Marx *v.* Hilsendegen, 46 Mich. 337, 9 N. W. 439 (arrest for pension-fraud; trial Court's exclusion in discretion, affirmed); 1881, Hamilton *v.* People, 46 Mich. 188, 9 N. W. 247, *semble* (bastardy; questions as to illicit intercourse by the complainant beyond the period of gestation, admissible); 1882, Driscoll *v.* People, 47 Mich. 417, 11 N. W. 221 (arrest for robbery, admitted); 1890, Hedwig *v.* Lascowski, 82 Mich. 621, 46 N. W. 1033 (arrest and conviction; excluding discretion affirmed); 1892, People *v.* Harrison, 93 Mich. 596, 53 N. W. 725 (woman's unchastity; cumulative questions rightly excluded in trial Court's discretion); 1892, People *v.* Foote, 93 Mich. 38, 52 N. W. 1036 (that he had been arrested for another crime, allowed); 1892, People *v.* Kahler, 93 Mich. 625, 630, 53 N. W. 826 (whether he was in the habit of drinking, excluded); 1893 People *v.* Mills, 94 Mich. 630, 637, 54 N. W. 488 (cross-examination to chastity, "lack of chastity cannot be used to impeach the credibility of a female witness", nothing said about the trial Court's discretion, seven decisions cited from other jurisdictions, none from Michigan); 1896, People *v.* Butler land, 104 Mich. 676, 62 N. W. 1010 (how much time he had been drunk since the affair occurred, but whether he had been arrested for being drunk *semble* admissible, 1897, King [illegible] 112 Mich. 40, 70 N. W. 316, 74 N. W. 230 (as to "what his past life had been and what company he had kept in the past" allowed here, as to drunkenness, keeping a low saloon, etc.); 1897, People *v.* Brown, 112 Mich. 397, 70 N. W. 1011 (a thorough examination into his past life", held proper); 1898, People *v.* McAvoy, 117 Mich. [illegible] N. W. 1011 (ruling in the discretion of the trial Court

see quotation *supra*, § 983); 1900, People v. Gotshall, 123 Mich. 474, 82 N. W. 274 (questions as to witness' attempt at suicide, wife-beating, arson, etc., excluded, where the cross-examiner had no expectation that the facts would be admitted and the attempt was merely to raise suspicion); 1900, People v. Turney, 124 Mich. 542, 83 N. W. 273 (questions as to proposals to steal cattle, allowed); 1901, Lange v. Wiegand, 125 Mich. 647, 85 N. W. 109 (how many times the witness' husband had been arrested, etc., excluded); 1901, People v. Higgins, 127 Mich. 291, [illegible] N. W. 812 (certain cross-examinations to character, held proper); 1901, Travis v. Stevens, 127 Mich. 687, 87 N. W. 85 (cross-examination to illicit relations, excluded, citing People v. Mills); 1904, People v. Dowell 136 Mich. 306, 99 N. W. 23 (People v. Gotshall, *supra*, followed); 1912, Yanelli v. Littlejohn, 172 Mich. 91, 137 N. W. 723 (false representations in selling land; cross-examination of defendant to other false methods, allowed); 1913, Lunde v. Detroit United R. Co., 177 Mich. 374, 143 N. W. 45 (personal injuries; cross-examination of the woman to her past unchaste life, held allowable in the trial Court's discretion; reviewing prior cases); 1917, People v. Cutler, 197 Mich. 6, 163 N. W. 493 (wife's murder of husband; cross-examination of defendant to acts of unchastity, held allowable, as affecting credibility, in the trial Court's discretion; People v. Mills repudiated; Lunde v. D. U. R. Co. approved); 1918, Forsyth v. Nostrand, 201 Mich. 558, 167 N. W. 1002 (fraud in real estate sales-commissions; cross-examination of plaintiff held too broad). 3. *Privilege against Disgracing Answers* is not recognized; 1867, Wilbur v. Flood, 16 Mich. 43, *semble*; 1869, Clemens v. Conrad, 19 Mich. 174, *semble*; 1871, Strang v. People, 24 Mich. 1, 7 (rape prosecutrix); 1879, People v. Knapp, 42 Mich. 267, 3 N. W. 927 (witness to adultery); 1880, People v. Whitson, 43 Mich. 620, 5 N. W. 454 (prostitution); 1885, People v. McLean, 71 Mich. 309, 38 N. W. 917, *semble* (rape prosecutrix). 4. *Conviction of Crime* Comp. L. 1915, § 12551 (quoted *ante*, § 488), convictions were declared admissible in the following cases: 1867, Wilbur v. Flood, 16 Mich. 41 ("infamous crimes"); 1869, Clemens v. Conrad, 19 Mich. 174, *semble*; 1870, Dickinson v. Dunton, 21 Mich. 564 (disbarment of an attorney); 1882, People v. Driscoll, 47 Mich. 413, 11 N. W. 221 (misdemeanor, theft); People v. Montgomery, 49 Mich. 65, 21, 20 N. W. 707 (misdemeanor, theft); Hebert v. Lacrosse, 52 Mich. 624, 18 N. W. 394 (action allowed); 1888, Lansing v. Michigan [illegible] 71 Mich. 55, 38 N. W. 592 (disbarment of an attorney for criminal conduct); Hopkins v. Hopkins, 71 Mich. 348, 39 N. W. 472; People v. Hamilton, 121 Mich. 695, 80 N. W. 717; 1899, People v. Buckminster, 121 Mich. 690, 80 N. W. 803 (murder; cross-examination of defendant to conviction of various felonies, allowed); 1921, Niedzinski v. Coryell, 215 Mich. 498, 184 N. W. 476 (automobile collision; cross-examination of defendant to three former convictions of crime, allowed).

MINNESOTA: 1. *Extrinsic Testimony:* 1921, State v. Nelson, 148 Minn. 285, 181 N. W. 850 (murder). 2. *Scope of Cross-examination:* 1871, McArdle v. McArdle, 12 Minn. 98, 101, 107 (discretion of the trial Court; here, "Have you more than one wife living?", admitted); 1871, State v. McCartey, 17 Minn. 76, 84, 86 (discretion of the trial Court controls; here, "Did you not steal a gun since these cases have arisen?", admitted); 1901, State v. Renswick; 85 Minn. 19, 88 N. W. 22 (whether the witness had been arrested, excluded); 1903, State v. King, 88 Minn. 175, 92 N. W. 965 (trial Court's discretion); 1905, Malone v. Stephenson, 94 Minn. 222, 102 N. W. 372 (civil arson; questions as to domestic morals, etc., held improperly allowed in the trial Court's discretion); 1905, State v. Bryant, 97 Minn. 8, 105 N. W. 974 (liquor sale; cross-examination of the prosecuting witness as to a recent forgery, flight, and arrest, held properly excluded; foregoing cases not cited); 1906, State v. Peterson, 98 Minn. 210, 108 N. W. 6 (liquor-selling; trial Court's discretion confirmed); 1907, State v. Quirk, 101 Minn. 334, 112 N. W. 409 (murder; cross-examination of the defendant to his gambling career, held not improper in discretion); 1909, State v. Fournier, 108 Minn. 402, 122 N. W. 329 (cross-examination held improper on the facts); 1920, State v. Taylor, 144 Minn. 377, 175 N. W. 615 (indecent liberties; cross-examination of defendant to other similar conduct, held improper on the facts; Hallam, J., diss.); 1920, Wolf v. Mapson, 146 Minn. 174, 178 N. W. 318 (action for necessaries furnished to defendant's wife; cross-examination to indictment for incest not allowed); 1921, State v. Nelson, 148 Minn. 285, 181 N. W. 850 (murder; trial Court's discretion held to control, as to instances of former misconduct by defendant). 3. *Privilege against Disgracing Answers:* 1880, State v. Blunsky, 3 Minn. 246, 257 (recognizing a possible privilege for questions tending to "degrade or disgrace", repudiating any fixed distinction between collateral and material matters, adopting the rule that the privilege does not cover matters merely tending to show infamy, but within these limits leaving the whole matter to the sound discretion of the trial Court, here the question tended to show [illegible]); 4. *Conviction of Crime* (Gen. St. 1913, § 8604 (quoted *ante*, § 488); 1891, State v. Baker, 47 Minn. 280, 49 N. W. 775 ("crimes" is not restricted to those which at common law disqualified, because the common law on the subject did not prevail in Minnesota; "crimes" includes misdemeanors involving moral turpitude); State v. Adamson, 49 Minn. 281, 51 N. W. 1052 (same)

any unspecified "crime" sufficient); 1899, Harding *v.* R. Co., 77 Minn. 417, 80 N. W. 358 (personal injuries; question to plaintiff as to conviction for drunkenness, allowable; Sauer case approved); 1915, Brennan *v.* Minnesota D. & W. R. Co., 130 Minn. 314, 153 N. W. 611 (a mere indictment is not admissible); 1915, Thompson *v.* Bankers' M. C. Ins. Co., 128 Minn. 474, 151 N. W. 180 (under Minn. Gen. St. 1913, § 8504, conviction of a misdemeanor may be shown, and on cross-examination the nature of the offence; here, an attempt to kiss a married woman, as an assault); 1916, State *v.* Price, 135 Minn. 159, 160 N. W. 677 (murder; cross-examination of defendant to details of former crimes of which he admitted conviction, allowed).

MISSISSIPPI: 2. *Scope of Cross-examination*: Code 1906, § 1923, Hem. § 1583 (quoted *infra*); 1859, Anon., 37 Miss. 54, 58 (bastardy a question to the complainant, as to former intercourse generally, excluded, as exceeding the "latitude of inquiry" necessary "to inform the jury of the character of the witness"); 1870, Head *v.* State, 44 Miss. 731, 735, 751 (allowing a question to a woman as to being a prostitute); 1896, Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955 (that a female witness was in a brothel when arrested, excluded, unchastity being irrelevant); 1902, McMasters *v.* State, 81 Miss. 374, 33 So. 2 (murder; cross-examination of defendant's wife as to having bastard children, held improper); 1904, Ivy *v.* State, 84 Miss. 264, 36 So. 265 (murder; cross-examination of the defendant's mistress as to her children by other fathers, held improper); 1907, Starling *v.* State, 89 Miss. 328, 42 So. 798 (to a defendant, whether he had been charged with any other offence, excluded). 3. *Privilege against Disgracing Answers*: 1870, Head *v.* State, *supra* (privilege recognized for questions tending to "bring them into disgrace or reproach"; here said of questions as to a woman's prostitution); Code 1906, § 3017, Hem. § 5405 (privilege not to obtain for witness before Legislature); § 1923, Hem. § 1583 (quoted *infra*). 4 *Conviction of Crime*: Code 1906, § 1923, Hem. § 1583 ("any witness *may* be examined touching his interest in the cause or his conviction of any crime, and his answers may be contradicted, and his interest or his conviction of a crime established by other evidence; and a witness shall not be excused from answering any question, material and relevant, unless the answer would expose him to criminal prosecution or penalty"); 1905, Cook (Dan) *v.* State, 85 Miss. 738, 38 So. 111 (the preponderous ruling is made that convictions of crime to discredit cannot be used "unless the witness had at first denied it", no authority is or could be cited for this ruling); 1906, Cook (Dan) *v.* State, 87 Miss. 738, 40 So. 111 (similar to the preceding).

MISSOURI: 1. *Extrinsic Testimony* is excluded: 1861, State *v.* King, 70 Mo. 111 (not allowing the facts of prostitution and intemperance to be shown as traits of general character, on the principle of §§ 923, 924, *ante*); 1889, State *v.* Taylor, 98 Mo. 240, 245, 11 S. W. 570; 1895, State *v.* Sibley, — Mo. —, 31 S. W. 1033 (unchastity of a woman); 1899, State *v.* Vandiver, 149 Mo. 502, 50 S. W. 892; 1905, Wright *v.* Kansas City, 187 Mo. 678, 86 S. W. 452. 2. *Scope of Cross-examination:* in this State must also be compared, on this subject, the citations *post*, § 1885 (cross-examining to one's own case) and §§ 2276, 2277 (waiver of privilege): 1878, State *v.* Clinton, 67 Mo. 380, 390 (declaring the same freedom of cross-examination for a defendant as for any other witness); 1880, Muller *v.* Hospital Assoc., 73 id. 242 (affirming the opinion in 5 Mo. App. 401; admitting any facts tending to shake credibility by injuring the character; here a question to a Catholic priest whether he had broken his vows by marriage since ordination was allowed); 1890, State *v.* Miller, 100 Mo. 606, 621, 13 S. W. 832, 1051 (whether he had been in the penitentiary, admitted); 1892, State *v.* Houx, 109 Mo. 65, 19 S. W. 35 (questions as to "specific acts of alleged immorality commencing at a period twenty years previous, etc.," held improper); 1893, State *v.* Hack, 118 Mo. 92, 23 S. W. 1089 (questions whether she had "kept girls for the purpose of prostitution", held proper); 1894, State *v.* Gesell, 124 Mo. 531, 27 S. W. 1101 (the rule said (1) to exclude "specific past delinquencies", here adultery of a woman, but not "facts which go to show what the general moral character or reputation therefor are, and what the general moral character or reputation for truth"; but this seems inconsistent; (2) to prevent "raking in the ashes of long forgotten scandals", and a number of other processes of rhetorical indefiniteness); 1894, State *v.* Martin, 124 Mo. 514, 28 S. W. 12 (question as to how many times he had been in jail, allowed); 1895, Goins *v.* Moberly, 127 Mo. 116, 29 S. W. 985 (discretion of the trial Court); 1897, Hancock *v.* Blackwell; 139 Mo. 440, 41 S. W. 205 (an inquiry into domestic troubles, excluded); 1898, State *v.* Grant, 144 Mo. 56, 45 S. W. 1103 (custom as to taking whiskey home with him, excluded); 1900, State *v.* Hale, 156 Mo. 102, 56 S. W. 881 (a defendant taking the stand cannot be cross-examined to other offences not throwing light on the one charged; compare § 2276, *post*); 1903, State *v.* Boyd, 178 Mo. 2, 76 S. W. 979 (cross-examination to a female witness having an illegitimate child, held allowable in discretion); 1907, State *v.* Long, 201 Mo. 664, 100 S. W. 587 (cross-examination to the fact of a detestable crime, allowed in the trial Court's discretion); 1912, State *v.* Bobbitt, 242 Mo. 273, 146 S. W. 709 (cross-examination to improper conduct, held not improperly excluded in the trial Court's discretion); 1913, Wendling *v.* Bowden, 252 Mo. 647, 161 S. W. 774 (not clear); 1920, State *v.* Hildebrand, 285 Mo. 200, 225 S. W. 1000 (murder; cross-examina-

tion of defendant to other crimes, not admitted); 1922, State *v.* Lasson, — Mo. —, 238 S. W. 101 (robbery; cross-examination of defendant as to shooting craps, bootlegging, etc., held improper). 3. *Privilege against Disgracing Answers:* 1851, Clementine *v.* State, 14 Mo. 115 (recognized; but only for matters not "forming any part of the issue to be tried"; here presence in a bawdy-house was held not covered by the privilege); 1880, Muller *v.* Hospital Assoc., 73 Mo. 242, affirming 5 Mo. App. 401 (repudiating the privilege); 1881, State *v.* Talbott, 73 Mo. 359 (assuming that the privilege applies where infamy is directly involved); Rev. St. 1919, § 5439 (witness examined as to conviction for crime "must answer any question relevant to that inquiry"); § 5040 (corrupt electoral practices; no privilege for degrading answers). 4. *Conviction of Crime:* 1878, State *v.* Rugan, 68 Mo. 215, *semble* (admissible); 1887, State *v.* Loehr, 93 Mo. 103, 5 S. W. 696 (larceny, admitted); 1889, State *v.* Taylor, 98 Mo. 240, 244, 11 S. W. 570 (a mere misdemeanor or violation of local ordinance, excluded; here, frequenting a bawdy-house); 1890, State *v.* Miller, 100 Mo. 622, 13 S. W. 832, 1051 (of any crime, admissible; here, that he had been "in the penitentiary"); 1893, State *v.* Taylor, 118 Mo. 153, 24 S. W. 449 (that he had been in jail for larceny, allowed); 1894, State *v.* Pratt, 121 Mo. 566, 26 S. W. 556 (similar); 1894, State *v.* Smith, 125 Mo. 2, 28 S. W. 181 (of a felony; but "not a mere misdemeanor"); Rev. St. 1919, § 5439, Laws 1895, p. 284 (quoted *ante*, § 488; admitting conviction of a "criminal offence"); 1895, State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124 (restricted to infamous crimes; excluding a conviction for gambling); 1896, Gardner *v.* R. Co., 135 Mo. 90, 36 S. W. 214 (an "infamous crime", but not a misdemeanor; here, excluding a conviction, for disturbing the peace, and another unspecified); 1897, State *v.* Dyer, 139 Mo. 199, 212, 40 S. W. 768 (petit larceny, admitted); 1898, State *v.* Grant, 144 Mo. 56, 45 S. W. 1103 (selling liquor illegally, excluded); 1901, State *v.* Prendible, 165 Mo. 329, 65 S. W. 559 ("conviction of anything less than a felony does not impeach a witness"); 1903, State *v.* Blitz, 171 Mo. 530, 71 S. W. 1027 (under Rev. St. 1899, § 4680, Laws 1895, *supra*, the conviction may be of any criminal offence, including misdemeanors, for impeaching either the accused or any other witness; prior decisions repudiated; the statute held to have changed the law); 1903, Chouteau L. & L. Co. *v.* Chrisman, 172 Mo. 610, 72 S. W. 1062 (following State *v.* Blitz, *supra*); 1903, State *v.* Thornhill, 174 Mo. 364, 74 S. W. 832 (conviction for gambling, a misdemeanor, admitted; 1905, State *v.* Heusack, 189 Mo. 295, 88 S. W. 21 (statute applied to allow questions as to a misdemeanor); 1905, State *v.* Spivey, 191 Mo. 87, 90 S. W. 81 (but the question should ask directly for the conviction, and not as to being in the penitentiary, etc.); 1905, State *v.* Woodward, 191 Mo. 617, 90 S. W. 90 (compare the rule of § 1270, *post*); 1907, State *v.* Brooks, 202 Mo. 106, 100 S. W. 416 (conviction for manslaughter, admitted against defendant as witness); 1907, State *v.* Arnold, 206 Mo. 589, 105 S. W. 641 (conviction for misdemeanor, admissible); 1917, State *v.* Willard, — Mo. —, 192 S. W. 437 (murder; cross-examination of defendant's character-witnesses to his conviction for counterfeiting in Washington in 1901, held improper; the prior misconduct must be "so linked together in point of time as to leave no sufficient time or place for repentance"; this is unsound; in the first place, the ruling applies it to a case falling under the principle of § 988, *post*, not a genuine one under the present principle; secondly, the theory is totally unsound, for what counts is not repentance, but change of character, — many repent, but few change; thirdly, the situation calls for an actual change, not a mere possibility of change; fourthly, in practice, no such line could be drawn by trial Courts, without a theologian's or psychologist's advice); 1922, Page *v.* Payne, — Mo. —, 240 S. W. 156 (judgment of plaintiff's divorces, not admitted to discredit him, the defendant not having been a party).

MONTANA: 1. *Extrinsic Testimony* is excluded: Rev. C. 1921, § 10668 (like Cal. C. C. P. § 2051). 2. *Scope of Cross-examination:* Rev. C. 1921, § 10668, *supra;* 1895, State *v.* Gleim, 17 Mont. 17, 41 Pac. 998 (excluding a series of questions involving all kinds of degrading matters); 1899, State *v.* Yellow Hair, 22 Mont. 339, 55 Pac. 1026 (reasons for discharge from army, excluded); 1899, State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281 (to whom he paid rent, allowed on the facts); 1904, State *v.* Howard, 30 Mont. 518, 77 Pac. 50 (cross-examination as to being under arrest, allowed on the facts); 1904, State *v.* Rogers, 31 Mont. 1, 77 Pac. 293 (questions as to a plan to commit another crime, excluded); 1909, State *v.* Crowe, 39 Mont. 174, 102 Pac. 579 (cross-examination to the witness' prior misdeeds, excluded); 1912, State *v.* Biggs, 45 Mont. 400, 123 Pac. 410 (cross-examination held properly limited). 3. *Privilege against Disgracing Answers:* Rev. C. 1921, § 10674 (like Cal. C. C. P. § 2065); § 83 (privilege abolished for testimony before legislative committee); § 10846 (privilege abolished on trial for promising legislative bribery); § 1393 (privilege declared for witness before military court); 1895, State *v.* Black, 15 Mont. 143, 38 Pac. 674 (privilege recognized; here, a conviction of felony). 4. *Conviction of Crime:* Rev. C. 1921, § 10674 (conviction of "felony", admissible); Rev. C. 1921, § 11603 ("a person convicted of any offence" is competent, but "the conviction may be proved" to impeach him); 1895, State *v.* Black, *supra* (felony, admitted); 1921, State *v.* Stein, 60

Mont. 441, 199 Pac. 278 (illegal sale of liquor; under Rev. C. § 8024, cross-examination to conviction of a misdemeanor is not allowable).

NEBRASKA: 1. 1910, Wilson *v.* State, 87 Nebr. 638, 128 N. W. 38 (defendant's desertion from the army); 1914, Koepke *v.* Delfs, 95 Nebr. 619, 146 N. W. 962 (bastardy; extrinsic testimony to plaintiff's intercourse with others, excluded). 2. *Scope of Cross-examination:* 1894, Hill *v.* State, 42 Nebr. 503, 60 N. W. 916 (the discretion of the trial Court shall control, quoting Real *v.* People, N. Y.; here admitting questions as to former arrests for vagrancy, etc.); 1897, Myers *v.* State, 51 Nebr. 517, 71 N. W. 33 (rape; repeated insinuations of unchaste conduct of the complainant, *semble*, improper); 1905, Razee *v.* State, 73 Nebr. 732, 103 N. W. 438 (criminal libel; cross-examination of the accused as to domestic relations, etc., held improper; no authority cited); 1917, Goemaun *v.* State, 100 Nebr. 772, 161 N. W. 421 (former arrest, excluded). 3. *Privilege against Disgracing Answers:* 1894, Hill *v.* State, *supra* (intimating that such a privilege exists); Rev. St. 1922, §§ 8844, 8848 (answer which would tend "to expose him to public ignominy," not compellable, except for conviction of felony). 4. *Conviction of Crime:* Rev. St. 1922, § 10139 (quoted *ante*, § 488); 1900, Young Men's Ch. Ass'n *v.* Rawlings, 60 Nebr. 377, 83 N. W. 175 (conviction for offences below felony, inadmissible under statute).

NEVADA: 1. *Extrinsic Testimony:* 1876, State *v.* Larkin, 11 Nev. 314, 330 ("specific acts of immorality", excluded). 2. *Scope of Cross-examination:* 1876, State *v.* Huff, 11 Nev. 17, 26 (former arrests and convictions for battery, excluded; the questions must "legitimately affect his credit for veracity; . . . no legitimate inference of the untruthfulness of a witness can be drawn from the fact that he has been convicted of frequent assaults and batteries"). 3. *Privilege against Disgracing Answers:* 1876, State *v.* Huff, *supra* (privilege recognized); Rev. L. 1912, § 5437 (like Cal. C. C. P. § 2065). 4. *Conviction of Crime:* Rev. L. 1912, §§ 5419, 5420 (quoted *ante*, § 488); State *v.* Huff (cited *supra*); 1905, State *v.* Roberts, 28 Nev. 350, 82 Pac. 100 (conviction must be of felony); 1905, State *v.* Lawrence, 28 Nev. 440, 82 Pac. 614 (cross-examination of a defendant as to convictions of felonies, allowed).

NEW HAMPSHIRE: 1. *Extrinsic Testimony* is excluded: 1850, Hoitt *v.* Moulton, 21 N. H. 586, 592 (frequent intoxication). 2. *Scope of Cross-examination:* 1842, Clement *v.* Brooks, 13 N. H. 92, 99 (left undecided); 1866, State *v.* Staples, 47 N. H. 113, 117 (questions as to having falsely charged innocent persons with crime; the discretion of the trial Court said to control; the rule not distinguished from that about privilege); 1877, Gutterson *v.* Morse, 58 N. H. 165 ("necessarily regulated by a sound judicial discretion"; "a question of fact to be determined at the trial, in view of the appearance of the witness and all the circumstances of the case"); 1879, Merrill *v.* Perkins, 59 N. H. 343 (trespass and injury to health by being expelled from a house; whether he had not been expelled by legal force from every house he occupied within ten years, held not improperly excluded; "how far justice required the cross-examination to go in that direction was a question of fact to be determined at the trial term"); 1895, Lesser *v.* New Hampshire F. Co., 68 N. H. 343, 44 Atl. 490 (discretion of trial Court; here, in an action for price of goods, questions as to defendant's financial career allowed); 1901, Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260 (malpractice; that he did not possess a physician's license as required by law, allowed on cross-examination of the defendant). 3. *Privilege against Disgracing Answers:* 1842, Clement *v.* Brooks, 13 N. H. 92, 98, *semble* (privilege recognized); 1866, State *v.* Staples (cited *supra*). 4. *Conviction of Crime:* 1838, Chase *v.* Blodgett, 10 N. H. 22, 24 (held altogether inadmissible, on a misunderstanding of the principle of § 979, *ante;* probably the only case of its kind in our law, except in New York); 1842, Clement *v.* Brooks, *supra* (left undecided); 1850, Hoitt *v.* Moulton, 21 N. H. 592 (approving Chase *v.* Blodgett); this error was corrected by statute: St. July 13, 1871, now Pub. St. 1891, c. 224, § 26 (quoted *ante*, § 488); 1909, Genest *v.* Odell Mfg. Co., 75 N. H. 365, 74 Atl. 593 (conviction for drunkenness, excluded).

NEW JERSEY: 1. *Extrinsic Testimony* was once admitted: 1830, Fries *v.* Brugler, 12 N. J. L. 79, *semble* (seduction; the daughter's unchaste conduct with third persons); but this would not be followed; compare § 210, *ante;* 1903, State *v.* Hendrick, 70 N. J. L. 41, 56 Atl. 247. 2. *Scope of Cross-examination:* 1830, Fries *v.* Brugler, 12 N. J. L. 79 (seduction; whether the daughter had not said that a third person was the father of the child, allowed, as discrediting her); 1883, Paul *v.* Paul, 37 N. J. Eq. 25 (question as to being keepers of brothels, admitted); 1896, Roop *v.* State, 58 N. J. L. 479, 34 Atl. 749 (mere indictment, excluded); 1902, State *v.* Barker, 68 N. J. L. 19, 52 Atl. 284 (assault with intent to kill; questions to the defendant on cross-examination as to prior acts of violence, held improper); 1905, State *v.* Mount, 72 N. J. L. 365, 61 Atl. 259 (assault and battery; cross-examination of the defendant to prior convictions for assault, allowed). 3. *Privilege against Disgracing Answers:* 1807, State *v.* Bailly, 2 N. J. L. 396 (whether he had been convicted and punished for petit larceny; not to be answered, as a matter "which tends directly to dishonor and disgrace him"; the contrary rulings said to be "modern decisions" not in harmony with the "ancient law", 1811, Vaughn *v.* Perrine, 2 N. J. L. 534 (seduction; whether the daughter had had crim-

inal connection with others, and whether another witness had had connection with her or had sat up late with her; privileged, as tending to "disgrace", "infamy", "stigmatize or dishonor"; "the doctrine laid down by Mr. Swift is not law; the distinction between what is connected with the issue, and what is not, is without foundation"); 1830, Fries *v.* Brugle *supra* (seduction; whether the daughter had not said to a third person that he was the father of the child; privileged, as tending to "disgrace", serving to "disparage, disgrace, or discredit"); 1896, Roop *v.* State, *supra* (privilege repudiated); Comp. St. 1910, Crimes §§ 27*f*, 27*k*, 27*n* (privilege abolished for bribery and other offences). 4. *Conviction of Crime:* Comp. St. 1910, "Evidence", § 1 (quoted *ante*, § 488); 1896, Roop *v.* State, *supra* (keeping a disorderly house, admitted); 1901, State *v.* Henson, 66 N. J. L. 601, 50 Atl. 468, 616 (the crime may be of any kind under § 1, Gen. St., Vol. II., p. 1397; neither the list of crimes formerly disqualifying, nor the indefinite common-law list, was intended to limit the kind of crimes available); 1906, State *v.* Mount, 73 N. J. L. 582, 64 Atl. 124 (the accused, on a charge of assault, having admitted a prior conviction for assault, further inquiries as to the aggravated nature of the prior assault, and rebuttal testimony contradicting his version of it, held improper); 1909, Hill *v.* Maxwell, 77 N. J. L. 766, 73 Atl. 501 (State *v.* Henson followed; here on a civil trial for battery the defendant was asked as to having pleaded nolo contendere to an indictment for the battery).

New Mexico: 2. *Scope of Cross-examination:* 1895, Terr. *v.* De Gutman, 8 N. M. 92, 42 Pac. 68 (adultery of a woman, admitted); 1896, Terr. *v.* Chavez, 8 N. M. 528, 45 Pac. 1107 (quoted *ante*, § 983; here an inquiry into various acts of ruffianism and outlawry, and indictments therefor, was allowed); 1896, Borrego *v.* Terr., 8 N. M. 446, 46 Pac. 349 (discretion of trial Court; here admitting questions as to murders committed); 1915, State *v.* Perkins, 21 N. M. 135, 153 Pac. 258 (cross-examination to misconduct is in the trial Court's discretion). 3. *Privilege against Disgracing Answers:* 1894, Terr. *v.* De Gutman, *supra*, 68 (not recognized); 1896, Terr. *v.* Chavez, *supra* (same); 1896, Borrego *v.* Terr. *supra* (same). 4. *Conviction of Crime:* Annot. St. 1915, § 2165 (quoted *ante*, § 488; all facts formerly disqualifying may be shown to discredit); § 2179 (conviction for "any felony or misdemeanor" is admissible); 1896, Terr. *v.* Chavez, *supra* (felony, admitted; a pardon for the crime does not exclude the conviction).

New York: 1. *Extrinsic Testimony.* The doctrine of exclusion has been rigidly enforced since the first ruling. It is worth while to note, however, that though the reasons already set forth (*ante*, § 979) were correctly understood by the Courts as affecting, not particular acts in themselves, but only extrinsic testimony thereof, yet the prohibition absolutely of "particular acts" in the California Code and similar legislation seems to have been partly due to a misreading of the New York cases, and to a failure to appreciate that it was only the extrinsic testimony that is meant by them to be excluded: 1816, Jackson *v.* Lewis, 13 Johns. 504 (that the witness was or had been a public prostitute, excluded; "the inquiry as to any particular immoral conduct is not admissible against a witness"); 1827, Root *v.* King, 7 Cow. 635, per Savage, C. J. ("never allowed"); 1829, Jackson *v.* Osborn, 2 Wend. 558 (that the witness had been indicted for perjury and forgery, excluded; "the credibility of a witness is not to be impeached by proof of a particular offence, but by evidence of general bad character"); 1835, Bakeman *v.* Rose, 14 Wend. 105, 110, 18 id. 147 (same ruling as Jackson *v.* Lewis; "particular immoral conduct" excluded); 1838, People *v.* Abbot, 19 Wend. 198, per Cowen, J.; People *v.* Rector, 19 Wend. 580, per Cowen, J.; 1847, Howard *v.* Ins. Co., 4 Den. 502, 506; 1851, Corning *v.* Corning, 6 N. Y. 104; 1851, People *v.* Gay, 1 Park. Cr. 315; 1857, People *v.* Jackson, 3 Park. Cr. 395; 1859, People *v.* Blakeley, 4 Park. Cr. 183; 1859, Stephens *v.* People, 19 N. Y. 570 ("particular acts not directly involved in the issue"); 1862, Newcomb *v.* Griswold, 24 N. Y. 298; 1864, Wehrkamp *v.* Willet, 4 Abb. App. 556; 1866, LaBeau *v.* People, 34 N. Y. 230; 1878, People *v.* Brown, 72 N. Y. 573; 1881, Conley *v.* Meeker, 85 N. Y. 618; 1904, People *v.* De Garmo, 179 N. Y. 130, 71 N. E. 736; 1910, Potter *v.* Browne, 197 N. Y. 288, 90 N. E. 812 (witness plaintiff not allowed to state his expressed reasons for discharging C., on the pretext of explaining the bias of C. as a witness). 2. *Scope of Cross-examination:* There is in the following series of rulings a feature of irregular variegation which has made it almost impossible to say what the law will be after the next decision, and is due in the past chiefly to a habit of ignoring previous individual rulings. Three questions in particular call for mention. (1) The doctrine of the *trial Court's discretion;* this was clearly expounded in the cases of Turnpike Co. *v.* Loomis and LaBeau; was then more or less limited in the cases of Real, Stokes, Ryan, and others; and seems to have been more or less adhered to. (2) The doctrine that a *mere arrest*, etc., is irrelevant and never admissible; this was first clearly settled in Gay's case, and seems to have been consistently adhered to, after Brown's case; though it has had to be re-argued and re-explained several times since. (3) The doctrine that questions may be put to an ordinary witness that may not be put to a testifying *accused person;* this was started in the Brown and Crapo cases, though apparently ignored in the Clark and Giblin cases; the present fate of the doctrine seems to be uncertain; compare § 2276, *post*. The cases are as follows:

1838, People *v.* Rector, 19 Wend. 573, 581, 582 (whether he was living in adultery and frequenting drinking-houses at night, allowed); 1842, Carter *v.* People, 2 Hill 317, *semble* (whether he had been complained of and bound over on the charge of passing counterfeit money admitted); 1847, Howard *v.* Ins. Co., 4 Den. 504, 506 (false representations by the witness as to the business of the store that had been burned, question allowed); 1848, Lohman *v.* People, 1 N. Y. 385, *semble* (whether he had committed fornication, or had the venereal disease, allowed); 1852, People *v.* Gay, 1 Park. Cr. 312, 7 N. Y. 378, *semble* (whether he had been committed for trial on a charge of perjury; admitted below, but apparently disapproved on appeal, and Carter *v.* People similarly criticised, because the fact of a charge being made shows nothing as to guilt; but it is impossible to say whether these opinions mean merely that such answers do not sufficiently impeach character to allow good character to be shown in rebuttal, or that the questions themselves on cross-examination would have been excluded if objected to, evidently the practice at this time was to ask such questions without objection); 1862, Newcomb *v.* Griswold, 24 N. Y. 299 (permitting questions "tending to discredit and disgrace", "if the answer relate to the conduct of the witness and legitimately affect his credit for veracity"; but "the boundary and limit of such examination is not well defined, and the cases may not be in harmony touching the principle upon which whatever of rule there may be rests, or the extent to which the rule should be carried in permitting a cross-examination as to independent collateral acts of the witness affecting his moral character or as to specific acts of criminality or crime"); 1865, Third Great Western Turnpike Co. *v.* Loomis, 32 N. Y. 127, 132, 138 (quoted *ante*, § 983; questions affecting the witness' credit, if on matters not "bearing directly on the issue", are left entirely to the discretion of the trial Court, and may be excluded by him irrespective of whether the witness claims a privilege); 1865, Lipe *v.* Eisenlerd, 32 N. Y. 238 (whether he was under indictment for murder; excluded, on the authority of People *v.* Gay, as irrelevant to impeach credit; Turnpike Co. *v.* Loomis ignored); 1866, LaBeau *v.* People, 34 N. Y. 230 (questions excluded below as to sexual immorality; Turnpike Co. *v.* Loomis followed; "inquiries on irrelevant topics to discredit the witness, and to what extent a course of irrelevant inquiry may be pursued, are matters committed to the sound discretion of the trial Court"); 1867, Shepard *v.* Parker, 36 id. 517 (promissory note; defence, that it was given in settlement for a rape by A. on P.; P. being a witness, the question was allowed whether she had not secretly signalled A. to come to her house; this was held proper, within the trial Court's discretion); 1870, Brandon *v.* People, 42 N. Y. 265, 268 (whether she had been arrested for theft; held proper, only one judge noting that it was a matter of judicial discretion); 1870, Real *v.* People, 42 N. Y. 280 (whether he had ever been in the penitentiary, and how long, "or in any other place that would tend to impair his credibility", held proper; the extent of such cross-examination being "somewhat" in the trial Court's discretion); 1872, Connors *v.* People, 50 N. Y. 240 ("How many times have you been arrested?"; allowed, as within the discretion of the trial Court); 1873, Stokes *v.* People, 53 N. Y. 176 (whether she had not left her employer without consent or knowledge and taken things not belonging to her; held proper); 1874, Southworth *v.* Bennett, 58 N. Y. 659 (whether he was under indictment for usury; allowed, as within the discretion of the Court); 1878, People *v.* Casey, 72 N. Y. 393, 398 (questions as to other quarrels and other assaults; allowed, the matter to rest largely in the trial Court's discretion, and the general scope admissible covering answers "disclosing his past life and conduct and thus impairing his credibility"); 1878, People *v.* Brown, 72 N. Y. 571 ("How many times have you been arrested?"; departure made from former rulings; whether the question was proper for an ordinary witness, left undecided; but for an accused taking the stand, held improper; not because irrelevant to discredit, for it must "legitimately tend to impair the credit of the witness for veracity, either directly, or by its tendency to establish a bad moral character", but because of its unfair effect, since "every immorality, vice, or crime . . . is brought out ostensibly to affect credibility, but is practically used to produce a conviction for an offence for which the accused is being tried, upon evidence which otherwise would be deemed insufficient"; but the Court does not carefully distinguish between the present rule and the privilege against degrading questions); 1879, People *v.* Crapo, 76 N. Y. 288 ("Were you arrested on a charge of bigamy in 1869?", held erroneously allowed against an accused, not merely on the ground of the preceding case, but as totally irrelevant to discredit, and therefore inadmissible even against an ordinary witness, since such questions "should at least be of a character which clearly go to impeach his general moral character and his credibility as witness", and the above question, dealing with a mere charge of crime, did not do this); 1880, Ryan *v.* People, 79 N. Y. 597 (whether an ordinary witness had been indicted for an assault; held, 'obiter', improper, accepting the dictum in the preceding case, as irrelevant to affect credibility; the relation of this ruling to the doctrine of the trial Court's discretion pointed out; "a witness may be asked in the discretion of the Court as to transactions which affect his character, either for truth or veracity, or his moral character: but not as to such as do not have that effect"; two judges dissent, leaving all to the trial

Court's discretion); 1881, People *v.* Court, 83 N. Y. 436, 460 (questions of varied range; held admissible within the trial court's discretion, under the limitations of Ryan *v.* People); 1881, Nolan *v.* R. Co., 87 N. Y. 63, 68 (whether he had been expelled from the fire department; held improper, as irrelevant to discredit under the preceding rule); 1883, People *v.* Noelke, 94 N. Y. 137, 143 (whether he had been engaged in the lottery business held relevant, under the preceding rule); 1884, People *v.* Irving, 95 N. Y. 541 (questions as to an assault upon W.; held properly admitted within the trial Court's discretion, as relevant to impair the credit of the witness by its tendency to establish a bad moral character"; the doctrine of Ryan *v.* People and People *v.* Crapo affirmed, that "mere charges or accusations or even indictments may not so be inquired into, since they are consistent with innocence and may exist without moral delinquency"); 1886, People *v.* Clark, 102 N. Y. 736, 8 N. E. 38 (whether the accused had been charged with anything criminal or disgraceful, improper; up to those limits, the discretion of the trial Court prevails; no authorities cited); 1889, People *v.* Giblin, 115 N. Y. 196, 199, 21 N. E. 1062 (murder; question to the defendant, whether he had been in possession of counterfeiting dies and plates; held proper, as impeaching his credibility by "connecting him with a nefarious occupation" and the doctrine of People *v.* Brown and People *v.* Crapo ignored); 1891, Van Bokkelen *v.* Berdell, 130 N. Y. 141, 145, 29 N. E. 254 (to a defendant, whether he had been indicted for perjury, excluded, citing the cases of Crapo, Ryan, Noelke, and Irving only); 1892, People *v.* Tice, 131 N. Y. 651, 657, 30 N. E. 494 (trial Court's discretion to control, provided only that it relates to relevant matters or matters affecting credibility; the trial judge may properly restrict the cross-examination of accused persons within narrower limits than in ordinary cases, but the latitude allowed is a matter for the trial judge); 1892, People *v.* McCormick, 135 N. Y. 663, 32 N. E. 26 (to a defendant, as to a former act of violence, allowed); 1893, People *v.* Webster, 139 N. Y. 73, 84, 34 N. E. 730 ("It is now an elementary rule that a witness may be specially interrogated, upon cross-examination, in regard to any vicious or criminal act of his life"; the extent being "discretionary with the trial Court"; here, questions to a defendant as to his immoral relations with a woman were allowed); 1898, People *v.* Dorthy, 156 N. Y. 237, 50 N. E. 800 (whether he had been expelled by his church, not allowed; whether he had been removed from the bar, allowed, but not the details of the grounds therefor); 1899, People *v.* Braun, 158 N. Y. 558, 53 N. E. 529 (inquiries as to past career, family history, held to be within the trial Court's discretion); 1904, People *v.* DeGarmo, 179 N. Y. 130, 71 N. E. 736 (defendant allowed to be cross-examined, on a charge of manslaughter by beating, to other acts of violence); 1906, People *v.* Cascone, 185 N. Y. 317, 78 N. E. 287 (People *v.* Crapo approved, and the rule applied to an accused); 1909, People *v.* Morrison, 195 N. Y. 116, 86 N. E. 1120, 88 N. E. 21 ("the defendant in an action either civil or criminal cannot be asked on cross-examination whether he has been indicted"; and this rule applied equally to a witness not a party; following People *v.* Cascone); 1918, People *v.* Richardson, 222 N. Y. 103, 118 N. E. 514 (keeping a disorderly house; cross-examination of the housekeeper, a witness for defendant, as to having worked for defendant at other hotels which had been abated as disorderly houses, held improper; two judges diss.; the majority opinion is a good instance of applying the character rule, *ante*, § 194, in such a way as needlessly to obstruct the investigation of the truth; the very opinion itself, with its quotations of testimony, makes it plain that justice was ludicrously blind).

3. *Privilege against Disgracing Answers:* The privilege seems to be fully recognized as a part of the common law, though not always accurately distinguished from the question of the scope of cross-examination; the leading cases being those of Mather and Rector; but in latter years the partial statutory abolition of the privilege for criminal cases seems to have cast a doubt upon its validity in civil cases: 1816, People *v.* Herrick, 13 Johns. 82 (whether the witness had been convicted of petit larceny; excluded, partly as provable only by the record of conviction, partly as a fact which, producing infamy and thus disqualifying the witness, he is privileged from answering); 1826, Southard *v.* Rexford, 6 Cow. 254 (having fornication with the unmarried plaintiff; privilege allowed, but treated apparently as a matter of self-crimination); 1830, People *v.* Mather, 4 Wend. 237, 250 (whether the witness had been present at a certain house, objected to as involving disgrace, namely, a share in the abduction of William Morgan, the Mason; the privilege against answering a question of disgrace or infamy assumed by the Court without doubt to exist); 1838, People *v.* Rector, 19 Wend. 569 (allowed per Cowen, J., at 574, 586, Bronson, J., at 600, Nelson, C. J., at 610, the witness having been asked as to living in adultery, frequenting drinking-places, etc.); 1848, Lohman *v.* People, 1 N. Y. 379 (fornication by an unmarried woman, venereal disease; excluded; the privilege not applying to facts material to the issue); 1855, People *v.* Christie, 2 Park Cr. 581 ("whether he had a bias against Roman Catholics", excluded); 1857, Strong, J., in People *v.* Jackson, 3 Park. Cr. 398 (privilege recognized for "any act disconnected with the main transaction which would have a tendency to degrade him"); 1859, People *v.* Blakeley, 4 Park Cr. 181 (having a venereal disease since marriage; privilege allowed); 1862, Newcomb

v. Griswold, 24 N. Y. 299 ("tending to discredit and disgrace", used to define the privilege); 1865, Third G. W. Turnpike Co. *v.* Loomis, 32 N. Y. 127, 137 ("questions tending to disgrace", may be objected to, unless "bearing directly on the issue"; as to those not "relevant to the issue", the trial Court is apparently allowed a discretion to admit them and the privilege is subject to this discretion); 1866, La Beau *v.* People, 34 N. Y. 230 (preceding case affirmed); 1866, Shepard *v.* Parker, 36 id. 517 (privilege recognized); 1870, Brandon *v.* People, 42 N. Y. 269 (privilege recognized); 1878, People *v.* Brown, 72 N. Y. 573 (privilege recognized for the accused as a witness, and as to matters not relevant to the issue, no discretion permitted in admitting them; as the witness is also a party, his counsel is allowed to make objection for him); 1879, People *v.* Crapo, 76 N. Y. 290 (similar facts; but though the counsel here also made the objection, the Court intimate that that will not raise the question, and therefore decide the case on the ground of relevancy, not of privilege). So far as concerns conviction for crime, the privilege has been abolished: 1881, Penal Code, § 714: "[The conviction may be proved] . . . by his cross-examination, upon which he must answer any proper question relevant to that inquiry"; applied as follows: 1883, People *v.* Noelke, 94 N. Y. 144; 1889, Spiegel *v.* Hays, 118 N. Y. 661, 22 N. E. 1105; 1922, Gould *v.* Gould, Sup. App. Div., 194 N. Y. Suppl. 742 (action by wife against husband for necessaries; plea, conviction for adultery; the plaintiff held not privileged to decline answering as to the conviction on the ground of disgrace; the facts being "relevant to the issue"). 4. *Conviction of Crime.* The cases above cited in par. 1 show clearly that on principle a record of conviction was regarded as admissible; and this has been distinctly laid down a number of times: 1843, Carpenter *v.* Nixon, 5 Hill 260 (petit larceny, admitted); 1862, Newcomb *v.* Griswold, 24 N. Y. 298 (in general, admissible); 1877, West *v.* Lynch, 7 Daly 246 (admitted). The following rulings, excluding such evidence in civil cases, can hardly have been law; 1863, Gardner *v.* Bartholomew, 40 Barb. 327; 1878, Sims *v.* Sims, 75 N. Y. 472 (distinguishing on the erroneous theory that it "contravenes the rule that proof of particular acts or offences, except from the mouth of the witness himself", is improper). The admissibility is now settled by C. P. A. 1920, § 350, Con. L. 1909, Penal § 2444 (quoted *ante*, § 488; admitting conviction of "a crime or misdemeanor"); applied as follows: 1883, People *v.* Noelke, 94 N. Y. 137, 144; 1889, Spiegel *v.* Hays, 118 N. Y. 660, 22 N. E. 1105; 1922, People *v.* Joyce, 233 N. Y. 61, 134 N. E. 836 (murder; cross-examination of defendant, an ex-soldier, as to conviction for unspecified military offences, held improper; no authority cited).

NORTH CAROLINA: 1. *Extrinsic Testimony* is excluded: 1834, Downey *v.* Murphey, 1 Dev. & B. 84 (affirming the principle); 1830, Barton *v.* Morphes, 2 Dev. 520 (whether he had been charged with stealing); 1886, State *v.* Garland, 95 N. C. 672 (intoxication on one occasion); 1888, State *v.* Bullard, 100 N. C. 488, 6 S. E. 191 (affirming the principle); 1890, Nixon *v.* McKinney, 105 N. C. 27, 28, 11 S. E. 154 (that the witness had forged a deed); 1899, State *v.* Warren, 124 N. C. 807, 32 S. E. 552 (complainant in bastardy). 2. *Scope of Cross-examination:* 1842, State *v.* Patterson, 2 Ired. 346, 358 (questions having a tendency to disparage or disgrace may be asked); 1853, State *v.* Garrett, Busbee 358 (allowing a question as to being indicted, convicted, and whipped, for stealing); 1854, State *v.* March, 1 Jones L. 526 (whether he had committed perjury in another State, allowed); 1868, State *v.* Cherry, 63 N. C. 32 (allowing questions whether she had not been delivered of a bastard child; whether she had not had unlawful intercourse; here the witness was prosecutrix for an alleged rape; for the exclusion of similar facts, not asked from the point of view of credibility, by the same Court, see § 200, *ante*); 1920, State *v.* Bailey, 179 N. C. 724, 102 S. E. 406 (cross-examination of accused to character, allowed); 1922, State *v.* Winder, — N. C. —, 111 S. E. 530 (unspecified questions held proper). 3. *Privilege against Disgracing Answers:* 1842, State *v.* Patterson, *supra*, *semble* (recognized); 1853, State *v.* Garrett, *supra* (same); Con. St. 1919, § 6096 (in election contests, no witness shall be excused from discovering his qualification to vote, "except as to his conviction for an offence which would disqualify him").

NORTH DAKOTA: 1. *Extrinsic Testimony* is excluded: 1896, State *v.* Pancoast, 5 N. D. 516, 67 N. W. 1052. 2. *Scope of Cross-examination:* 1890, Terr. *v.* O'Hare, 1 N. D. 30, 44, 44 N. W. 1003 (cross-examination to character is "within the limits of a sound judicial discretion"); 1896, State *v.* Pancoast, *supra* ("if such other facts tend to weaken his credibility"; repudiating the rule of the Crapo Case, N. Y. that the fact of the witness being also the defendant makes any difference in the scope of questioning; excluding questions as to the finding of an indictment, the making of accusations, and other circumstances not involving actual guilt; also excluding crimes committed many years before); 1899, State *v.* Rozum, 8 N. D. 548, 80 N. W. 480 (keeping a liquor nuisance; question as to arrest for a similar offence and resistance to an officer, allowed); 1899, State *v.* Ekanger, 8 N. D. 559, 80 N. W. 482 (same; question as to being a professional gambler, allowed); 1909, State *v.* Nyhus, 19 N. D. 326, 124 N. W. 71 (cited more fully *post*, § 2276, n. 5); 1914, State *v.* Oien, 26 N. D. 552, 145 N. W. 424 (cross-examination to an arrest, not allowed); 1920, State *v.* Stepp, 45 N. D. 516, 178 N. W.

951 (statutory rape; questions to accused as to indecent exposure of person to complainant's mother, allowed). 3. *Privilege against Disgracing Answers:* Comp. L. 1913, § 245 (witness before State board of control may not claim to refuse evidence tending to "expose him to public ignoring"); § 9296 (corrupt political practices; no person to be excused on the ground that the testimony would "tend to degrade him"). 4. *Conviction of Crime:* 1919, Engstrom *v.* Nelson, 41 N. D. 530, 171 N. W. 90 (battery; conviction of crime, admissible).

OHIO: 1. *Extrinsic Testimony* is excluded: 1876, Webb *v.* State, 29 Oh. St. 351, 358. 2. *Scope of Cross-examination:* 1870, Wroe *v.* State, 20 Oh. St. 460, 469 (largely in the trial Court's discretion; to be excluded "when a disparaging course of examination seems unjust to the witness and uncalled for by the circumstances of the case"; here admitting questions as to being discharged from the police force, being under indictment for murder); 1871, Lee *v.* State, 21 Oh. St. 151 (the cross-examination of an accomplice held on the facts to have been unreasonably restricted); 1876, Coble *v.* State, 31 Oh. St. 102 ("How many times have you been arrested?" admissible); 1877, Hamilton *v.* State, 34 Oh. St. 86 (Wroe's Case approved; a question as to former indictment, excluded only because it included the defendant also, who had not testified); 1877, Bank *v.* Slemmons, 34 Oh. St. 142, 147 (Wroe's Case followed; the Court's discretion not disturbed in excluding a question as to a violation of the banking law); 1881, Hanoff *v.* State, 37 Oh. St. 180 (Wroe's Case approved; the trial Court's discretion given great range; examination "for the purpose merely of disgracing a witness, which neither relates to the issue nor seems to test the credibility", discountenanced; no other rule for an accused person than for an ordinary witness, the N. Y. doctrine of Crapo's Case not being accepted as a rule of evidence; here admitting questions as to previous arrests and indictments for assault and battery, etc.; Okey, J., dissenting). 3. *Privilege against Disgracing Answers:* 1870, Wroe *v.* State, *supra* (ignored); 1876, Coble *v.* State, *supra* (apparently recognized). 4. *Conviction of Crime:* 1876, Coble *v.* State, *supra* (violation of a city ordinance, excluded); Gen. Code Ann. 1921, § 13659 (quoted *ante*, § 488).

OKLAHOMA: 1. *Extrinsic Testimony:* 1912, Hooper *v.* State, 7 Okl. Cr. 43, 121 Pac. 1087 (illegal sale of liquor; information charging another sale, held inadmissible). 2. *Scope of Cross-examination:* 1904, Flohr *v.* Terr., 14 Okl. 477, 78 Pac. 565 (larceny; cross-examination of witnesses to adultery, excluded); 1905, Hill *v.* Terr., 15 Okl. 212, 79 Pac. 757 (discretion of the trial Court controls); 1908, Slater *v.* U. S., 1 Okl. Cr. 275, 98 Pac. 110 (whether he had ever been arrested, and for what, not allowed; forceful opinion, by Furman, P. J.); 1908, Price *v.* State, 1 Okl. Cr. 358, 98 Pac. 447 (cross-examination as to marrying a woman with whom he had committed adultery, not allowed); 1909, Cannon *v.* Terr., 1 Okl. Cr. 600, 99 Pac. 622 (cross-examination of defendant's wife as to prostitution, etc., allowed); 1909, Caples *v.* State, — Okl. —, 104 Pac. 493 (defendant's prosecution for statutory rape of his wife before marriage, admitted as relevant to disprove his alleged motive for killing; but the Court in referring to Price *v.* State and Slater *v.* U. S., *supra*, leave the precise rule for witness unstated); 1912, McKinnon *v.* Lively, 30 Okl. 433, 122 Pac. 124 (cross-examination to lawsuits and indictments, held improper); 1912, Watson *v.* State, 7 Okl. Cr. 590, 124 Pac. 1101 (murder; cross-examination of the accused to former killings, held improper on the facts); 1914, Castleberry *v.* State, 10 Okl. Cr. 504, 139 Pac. 132 (rape under age; woman-witness for defendant, allowed to be cross-examined to immodest conduct with him); 1914, Cobb *v.* Oklahoma Pub. Co., 42 Okl. 314, 140 Pac. 1079 (cross-examination of plaintiff, in a suit for libel charging the plaintiff with fraud; inquiry into other similar transactions, allowed in discretion); 1917, Sights *v.* State, 13 Okl. Cr. 627, 166 Pac. 458 (assault with intent to kill; cross-examination of the prosecuting witness as to being an associate of prostitutes and bootleggers, etc., held improper on the facts; explaining Slater *v.* U. S., and Price *v.* Terr., *supra*, and paring them down; this Court should be cautious about repudiating any stand taken by so wise a judge as Furman, P. J.); 1918, Smith *v.* State, 14 Okl. Cr. 348, 171 Pac. 341 (theft of mules; cross-examination of defendant to dissolute behavior with women, held improper); 1918, Byars *v.* State, 15 Okl. Cr. 308, 176 Pac. 253 (selling whisky to a minor; cross-examination of defendant, "You have been charged with bootlegging?" held improper; only a conviction, not a charge, can be asked about); § 1920, Wisdom *v.* State, — Okl. Cr. —, 193 Pac. 1003 (larceny of an automobile; cross-examination of defendant to illegal acts of transporting whisky not allowed); 1920, Winfield *v.* State, — Okl. Cr. —, 191 Pac. 609 (whether witness has been charged or arrested, not allowed; whether witness "knowingly associates with ex-convicts", allowed). 4. *Conviction of Crime:* Comp. St. 1921, § 585 (quoted *ante*, § 488); 1909, Keys *v.* U. S., 2 Okl. Cr. App. 647, 103 Pac. 874 (whether he had been in jail, not allowed); 1912, State *v.* Elliott, — Okl. Cr. —, 124 Pac. 86 (conviction for "bootlegging", admissible); 1913, Busby *v.* State, 10 Okl. Cr. 343, 136 Pac. 598 (conviction 17 years before, admitted); 1920, Winfield *v.* State, — Okl. Cr. —, 191 Pac. 609 (the crime must involve moral turpitude; assault and battery does not; "tarring and feathering" is not a known crime).

OREGON: 1. *Extrinsic Testimony* is excluded: Laws 1920, § 863 (like Cal. C. C. P. § 2051, substituting "crime" for "felony"); 1879, Steeples *v.* Newton, 7 Or. 110, 114, *semble*. 2. *Scope of Cross-examination:* Laws 1920, § 863, *supra;* 1879, Steeples *v.* Newton, *supra* (conduct not available through extrinsic testimony, but called out by the impeached witness' party on cross-examination, admitted); 1886, State *v.* Bacon, 13 Or. 143, 147, 155, 9 Pac. 393 (cross-examination to prior misdeeds is "within the sound discretion of the Court"; but "a sound discretion will never sanction inquiries the sole purpose of which is to disgrace the witness and not to test his credibility"; here a question as to prior arrest was allowed); 1886, State *v.* Saunders, 14 Or. 300, 309, 313, 12 Pac. 441 (approving the preceding case; but restricting the cross-examination of accused persons, by implication of statute, to facts involved in the issue, and excluding questions about prior misconduct as evidence of character); 1900, State *v.* Savage, 36 Or. 191, 60 Pac. 610, 61 Pac. 1128 (questions excluded on the facts); 1915, Gerlinger *v.* Frank, 74 Or. 517, 145 Pac. 1069 (breach of marriage-promise; cross-examination of the plaintiff to illicit intercourse with others, allowed). 3. *Privilege against Disgracing Answers:* Laws 1920, § 870 (like Cal. C. C. P. § 2065). 4. *Conviction of Crime:* Laws 1920, § 731 (quoted *ante*, § 488); § 863, *supra*; 1917, State *v.* Newlin, 84 Or. 323, 165 Pac. 225 (illegal sale of liquor; five prior convictions for the same kind of offence, held admissible).

PENNSYLVANIA: 1. *Extrinsic Testimony* is excluded: 1798, Stout *v.* Rassel, 2 Yeates 334, 338 (whether he had not been arrested as an accomplice of a fraudulent schemer for whom the defendant had gone surety; excluded, as "charges of particular offences of which he has not been convicted" were improper for impeaching); 1857, Elliott *v.* Boyles, 31 Pa. 65 (on the present ground and also on that of collateral contradiction; here said of the former commission of perjury). 2. *Scope of Cross-examination:* 1857, Elliott *v.* Boyles, *supra* (excluded entirely; here, the former commission of perjury; quoted *ante*, § 983); 1904, Com. *v.* Williams, 209 Pa. 529, 58 Atl. 922 ("Were n't you running a sporting-house?" to a woman, excluded; ignoring Elliott *v.* Boyles, *supra*, and erroneously treating it on the principle of § 924, *ante*); 1921, Marshall *v.* Carr, 271 Pa. 271, 114 Atl. 500 (ejectment, plaintiff claiming as son, and defendant as widower, of C. M.; defendant's marriage was placed in 1911; cross-examination of defendant as to living with a prostitute E. at another town in 1892, excluded, but cross-examination as to his improper relations with C. M. before marriage, allowed). 3. *Privilege against Disgracing Answers:* 1802, Respublica *v.* Gibbs, 4 Dall. 253, 3 Yeates 429, 437 (privilege recognized as applying to one pardoned for treason; compare § 2555 *post*, as to the theory of this case); 1803, Galbreath *v.* Eichelberger, 4 Dall. 515 (declining to compel an answer to a question whether a deed had been executed in fraud of creditors); 1811, Rush, Pres., in Bell's Case, 1 Browne 376 ("where the answer to a question would cover the witness with infamy or shame, I have refused to compel him to answer it"); 1857, Elliott *v.* Boyles, 31 Pa. 67 (privilege affirmed); St. 1901, June 4, Pub. L. 404, § 15, Dig. 1920, § 737 (privilege ceases for examination in insolvency proceedings by receiver). 4. *Conviction of Crime:* 1909, Com. *v.* Racco, 225 Pa. 113, 73 Atl. 1067 (murder; defendant allowed in discretion to be asked whether he had been convicted of larceny, battery, etc.); St. 1911, Mar. 15, § 1, Dig. 1920, § 8174, Crim. Procedure (cross-examination of accused; quoted *post*, § 2276, n. 5).

PHILIPPINE ISLANDS: 1, 2, *Extrinsic Testimony*, and *Scope of Cross-examination:* C. C. P. 1901, § 342 (like Col. C. C. P. § 2051). 3. *Privilege against Disgracing Answers:* P. C. 1911, Gen. Order 58 of 1900, § 56 (like Cal. C. C. P. § 2065). 4. *Conviction of Crime:* C. C. P. 1901, § 342 (like Cal. C. C. P. § 2051); P. C. 1911, Gen. Order 58 of 1900, § 56 ("a witness must answer to the fact of his previous conviction for felony"); 1913, U. S. *v.* Mercado, 26 P. I. 271 (assault in aid of S.; prior conviction of S. himself for assaults, admissible).

PORTO RICO: 1. *Extrinsic Testimony:* 1912, People *v.* Almestico, 18 P. R. 314, 329 (proof of particular acts of misconduct, excluded); Rev. St. & C. 1911, §§ 1526, 6276 (like Cal. C. C. P. § 2051); 2. *Scope of Cross-examination:* Rev. St. & C. 1911, §§ 1526, 6276 (like Cal. C. C. P. § 2051); 3. *Privilege against Disgracing Answers:* Rev. St. & C. 1911, § 1532 (like Cal. C. C. P. § 2065); 4. *Conviction of Crime:* Rev. St. & C. 1911, §§ 1526, 6276 (like Cal. C. C. P. § 2051).

RHODE ISLAND: 2. *Scope of Cross-examination:* 1901, Kolb *v.* R. Co., 23 R. I. 72, 49 Atl. 392 (question as to witness' having an illegitimate child, excluded). 4. *Conviction of Crime:* Gen. L. 1909, C. 292, § 43 (quoted *ante*, § 488); 1903, State *v.* Babcock, 25 R. I. 224, 55 Atl. 685 (question to a defendant as to prior conviction of the same offence of keeping a disorderly house, admitted); 1920, Wilmot *v.* Bartlett, — R. I. —, 110 Atl. 411 (trespass for assault; conviction for felonious threat to kill, admitted).

SOUTH CAROLINA: 1. *Extrinsic Testimony* is excluded: 1833, Anon., 1 Hill 257; 1890, State *v.* Wyse, 33 S. C. 592, 12 S. E. 556 (confusing the principle with that of correcting collateral errors); 1898, Sweet *v.* Gilmore, 52 S. C. 530, 30 S. E. 395. 2. *Scope of Cross-examination:* 1903, State *v.* Williamson, 65 S. C. 242, 43 S. E. 671 (question as to an indictment; point not decided); 1904, Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719 (ques-

tions to an unmarried woman as to her children, etc., held properly excluded in the trial Court's discretion); 1906, State *v.* Stukes, 73 S. C. 386, 53 S. E. 643 (murder; cross-examination to the defendant's relations with a woman connected with the case, allowed); 1908, State *v.* Mills, 79 S. C. 187, 60 S. E. 664 (murder; cross-examination of a defendant to prior "difficulties", allowable only so far as they affect credibility); 1920, State *v.* Gibbs, 113 S. C. 256, 102 S. E. 333 (murder; cross-examination of deceased's widow as to marrying him while still married to another husband, held properly excluded). 3. *Privilege against Disgracing Answers:* 1806, Miller *v.* Crayon, 2 Brev. 108 (privilege recognized for "any fact which might lead to expose him to infamy"); 1820, Torre *v.* Summers, 2 Nott & M. 269, 271, *semble* (recognized). 4. *Conviction of Crime:* 1833, Anon., *supra* (admitting "felony for the *crimen falsi*" only); 1890, State *v.* Wyse, *supra* (admitting conviction for petit larceny).

South Dakota: 2. *Scope of Cross-examination:* 1901, Ausland *v.* Parker, 14 S. D. 273, 85 N. W. 193 (questions needlessly insinuating personal vice, held improper); 1904, State *v.* Smith, 18 S. D. 341, 100 N. W. 740 (rape under age; cross-examination of the prosecutrix to prostitution, etc., excluded); 1913, State *v.* Sysinger, 25 S. D. 110, 125 N. W. 879 (questions as to living under assumed name, allowed); 1911, Richardson *v.* Gage, 28 S. D. 390, 133 N. W. 692 (question as to an arrest for stealing, held improper).

Tennessee: 1. *Extrinsic Testimony:* 1879, Merriman *v.* State, 3 Lea 393, 395 ("particular facts", excluded; here, that a woman-witness had had bastard children); 1896, Zanone *v.* State, 97 Tenn. 101, 36 S. W. 711 (extrinsic testimony, excluded); 1896, Ryan *v.* State, 97 Tenn. 206, 36 S. W. 930 (admitting indictments for other felonies and misdemeanors, except that if the record shows an acquittal or a 'nolle pros.' the indictment should be disregarded; no reference to the opinion in Zanone *v.* State, dated a month before, but written by another judge). 2. *Scope of Cross-examination:* to the earlier cases cited *infra*, under par. 3, add the following: 1892, Hill *v.* State, 91 Tenn. 521, 523, 19 S. W. 674 (whether he had not been charged with stealing; allowable, if it involves an indictment for an infamous crime, but not as implying "mere personal imputations"); 1896, Zanone *v.* State, *supra* (questions as to number of husbands living, domestic difficulties, etc., allowed; the following is a type: "Have you not recently torn the clothes off your husband, drawn a butcher-knife on him, called him a ———, and said you were going to kill him?"; the principle being that any question may be asked "throwing light on his or her moral character, provided they involve moral turpitude, whether they relate to domestic relations or other habits, if the tendency is to show that the witness is guilty of wanton, habitual violation and disregard of the most sacred marital relations, or of the law, or of the rules of decent society, involving the witness in moral turpitude", though *semble* the misdeeds must be of fairly recent date); 1896, Ryan *v.* State, *supra* (whether he had not been indicted for felonies and misdemeanors, allowed); 1912, Hughes *v.* State, 126 Tenn. 40, 148 S. W. 534 (murder; cross-examination of defendant to former murders, held proper). 3. *Privilege against Disgracing Answers:* 1858, Reed *v.* Williams, 5 Sneed 580, 582 (question as to fornication; undecided); 1860, Lea *v.* Henderson, 1 Cold. 146, 149 (same as next case); 1873, Love *v.* Masoner, 6 Baxt. 24, 33 (fornication; privilege allowed because fornication was a crime); 1874, Titus *v.* State, 7 Baxt. 134 (privilege repudiated entirely, settling the doubt formerly expressed); 1896, Zanone *v.* State, *supra* (privilege not recognized); 1896, Ryan *v.* State, *supra* (same).

Texas: 1. *Extrinsic Testimony* is excluded: 1859, Boon *v.* Weathered, 23 Tex. 675, 678; 1879, Johnson *v.* Brown, 51 Tex. 65, 76; 1892, Gulf C. & S. F. R. Co. *v.* Johnson, 83 Tex. 628, 633, 19 S. W. 151 (approving Boon *v.* Weathered); 1898, Red *v.* State, 39 Tex. Cr. 414, 46 S. W. 408; 1898, Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814; 1898, Kellogg *v.* McCabe, 92 Tex. 199, 47 S. W. 520 (that he had been elected mayor by carpet-baggers and scalawags, excluded); 1921, Hays *v.* State, 90 Tex. Cr. 355, 234 S. W. 898 (murder in quarrel over woman; the woman's specific immoral acts, not admitted against her as a witness). 2. *Scope of Cross-examination:* 1884, Evansich *v.* R. Co., 61 Tex. 24, 28 (admitting questions about "relevant facts"; and "any fact which bears upon the credit of the witness would be a relevant fact"; but the opinion confounds the present question with that, § 1885, *post*, as to cross-examining on one's own case); 1893, Carroll *v.* State, 32 Tex. Cr. 431, 24 S. W. 100 (question as to indictment for theft, allowed; but such cross-examination "must be kept within bounds by the Court", and allowed only "where the ends of justice clearly require it and the inquiry relates to transactions comparatively recent", etc.); 1894, Exon *v.* State, 33 Tex. Cr. 461, 26 S. W. 1088 (of a woman, whether she had lived as mistress with her husband before marriage, allowed); 1899, Crockett *v.* State, 40 Tex. Cr. 173, 49 S. W. 392 (whether he had not been indicted for assault with intent to murder, allowed); 1899, Smith *v.* State, — Tex. Cr. —, 50 S. W. 362 (inquiry of defendant as to indictment for another crime, allowable); 1899, Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73 (questions to the defendant as to a previous killing, excluded); 1899, Preston *v.* State, 41 Tex. Cr. 300, 53 S. W. 127, 881 (that he had sworn to a false account in a former trial of same defendant, excluded); 1900, Dickey *v.* State, —

Tex. Cr. —, 56 S. W. 627 (illegal liquor sales; defendant allowed to be cross-examined as to other illegal sales); 1902, De Lucenay *v.* State, — Tex. Cr. —, 68 S. W. 796 (bigamy; questions to the alleged second wife, as to her prior incest, apparently held admissible); 1902, Bowers *v.* State, — Tex. Cr. —, 71 S. W. 284 (cross-examination to a charge of murder 18 years before, excluded, as too remote); 1903, Carter *v.* State, 45 Tex. Cr. 430, 76 S. W. 437 (cross-examination of a rape-complainant as to her occupation in a disreputable wine-room, excluded on the facts; yet "a witness may be asked as to her or his vocation, environments, or associations"; "this matter is in the sound discretion of the Court"); 1911, Campbell *v.* State, 62 Tex. Cr. 561, 138 S. W. 607 (rape; cross-examination to libertinous conduct, held improper); 1911, Wright *v.* State, 63 Tex. Cr. 429, 140 S. W. 1105 (cross-examination to a former indictment allowable, but not to a former arrest on complaint merely); 1916, Sapp *v.* State, 80 Tex. Cr. 363, 190 S. W. 489 (cross-examination of an accused to crimes as to which "sufficient time has elapsed thereafter to show that the grand jury has had an opportunity to investigate and act upon it and have not found a bill of indictment", not allowed; this is a strange precaution to embody in the rule, for the witness is being asked whether he himself admits the crime, and if he does, the grand jury's failure to indict means nothing); 1921, Shamblin *v.* State, 88 Tex. Cr. 589, 228 S. W. 241 (cross-examination to arrest for forgery, held improper); 1921, Criner *v.* State, 89 Tex. Cr. 226, 229 S. W. 860 (forgery; cross-examination of defendant as to indictment or information for prior theft, held proper, but not as to mere arrest); 1921, Campbell *v.* State, 89 Tex. Cr. 243, 230 Pac. 695 (a woman may be cross-examined as to being a common prostitute); 1921, Rodrignez *v.* State, 89 Tex. Cr. 373, 232 S. W. 512 (assault; cross-examination of accused as to having been indicted for incest, allowed); 1921, Mobley *v.* State, 89 Tex. Cr. 646, 232 S. W. 531 (homicide; woman testifying for accused, allowed to be cross-examined as to her being unmarried though having children). 3. *Privilege against Disgracing Answers:* 1873, Morris *v.* State, 38 Tex. 603 (privilege recognized; charge of keeping a house of ill-fame); 1893, Carroll *v.* State, 32 Tex. Cr. 431, 24 S. W. 100 (privilege denied; good opinion by Simkins, J.); 1899, Crockett *v.* State, 40 Tex. Cr. 173, 49 S. W. 392 (privilege denied). 4. *Conviction of Crime:* 1893, Goode *v.* State, 32 Tex. Cr. 505, 508, 24 S. W. 102 (fine in City Court; excluded; the crime must involve "moral and legal turpitude"); 1893, Carroll *v.* State, 32 Tex. Cr. 431, 24 S. W. 100 (cross-examination to being in jail or the penitentiary, allowable); 1903, Lee *v.* State, 45 Tex. Cr. 51, 73 S. W. 407 (indictments admissible; Henderson, J., diss.); 1907, Fannin *v.* State, 51 Tex. Cr. 41, 100 S. W. 916 (rule of Lee *v.* State recognized, that prior indictments could be used to impeach); 1907, Cecil *v.* State, — Tex. Cr. —, 100 S. W. 390 (former indictment for felony against defendant as witness, admissible); 1912, Moore *v.* State, 65 Tex. Cr. 453, 144 S. W. 598 (discussing the question how far instructions should limit the use of such evidence); 1913, Vick *v.* State, 71 Tex. Cr. 50, 159 S. W. 50 (conviction of felony 13 years before, held inadmissible on the facts; the opinions differ as to the precise rule of law; in the opinion of Prendergast, J., the prior cases are collected); 1915, Leach *v.* State, 78 Tex. Cr. 55, 180 S. W. 122 (fraudulent use of another's railroad pass; defendant's conviction for cattle-larceny 12 years before, at the age of 15, held too remote to affect credibility); 1920, Rosa *v.* State, 86 Tex. Cr. App. 646, 218 S. W. 1056 (cross-examination to former convictions, etc., without having evidence to refute denials, held here improper); 1921, Lasater *v.* State, 88 Tex. Cr. 452, 227 S. W. 949 (murder; proof of a prior arrest for felony, here not allowed; whether anything short of conviction would suffice, does not appear); 1922, McIntosh *v.* State, — Tex. Cr. —, 239 S. W. 622 (statutory rape; question to a woman witness for the State as to conviction for prostitution, allowed; prior cases to the contrary overruled).

UTAH: 2. *Scope of Cross-examination:* 1875, Conway *v.* Clinton, 1 Utah, 215, 220 ("The Court in its discretion may permit disparaging questions to be asked"); 1909, State *v.* Williams, 36 Utah 273, 103 Pac. 250 (rape under age; cross-examination of accused to similar conduct with other little girls, excluded); 1911, State *v.* Thorne, 39 Utah 208, 117 Pac. 58 (a witness may not be asked as to "mere specific acts or conduct of a wrongful, culpable, or even incriminating character not amounting to the commission of a crime", this being the "prevailing rule" in the United States; no authority cited; this is the first time that the anomalous rule of the California Code has been described as the "prevailing rule"; it is the rule of a very small minority of States; Conway *v.* Clinton, *supra*, not cited); 1913, State *v.* Reese, 43 Utah 447, 135 Pac. 270 (bastardy; questions to a witness as to having himself embraced the prosecutrix' sister on the evening of the alleged act of intercourse, during a ride taken by all four, excluded, purporting to follow the quotation *ante*, § 983 from Third Gt. Western Turnpike Co. *v.* Loomis, N. Y., and to prohibit all questions as to chastity; the opinion fails to observe any distinction between the question and the privilege not to answer, though quoting Comp. L. 1917, § 3431, now Comp. L. 1917, § 7141; the opinion's concession that "a *few sporadic* cases hold such questions proper" is a cheerful way of treating the general rule in England and America; and its citation of State *v.* Shockley, 29 Utah 25, 80 Pac. 865, as supporting this

ruling, gives too much weight to a lamentable decision which ought rather to have been repudiated). 3. *Privilege against Disgracing Answers:* Comp. L. 1917, § 7141 (like Cal. C. C. P. § 2065); § 7950 (bribery, etc.; like Cal. P. C. § 89); 1875, Conway *v.* Clinton, 1 Utah 215, 220 (privilege conceded for facts not material to the issue; here, a conviction for crime). 4. *Conviction of Crime:* Comp. L. 1917, § 7141 (like Cal. C. C. P. § 2065); 1922, State *v.* Crawford, — Utah —, 206 Pac. 717 (the particular crime may be shown; the fact that an appeal is pending from a former conviction does not exclude it).

VERMONT: 1. *Extrinsic Testimony* is excluded: 1846, Crane *v.* Thayer, 18 Vt. 162 (that the witness was a notorious counterfeiter). 2. *Scope of Cross-examination:* 1896, State *v.* Fournier, 68 Vt. 262, 35 Atl. 178 (discretion of the trial Court); 1897, State *v.* Slack, 69 Vt. 486, 38 Atl. 311 (allowing the trial Court some discretion, particularly to exclude matters not affecting credibility); 1905, State *v.* Stimpson, 78 Vt. 124, 62 Atl. 14 (rape under age; cross-examination of prosecutrix as to prior prostitution, not admitted to affect credit); 1915, State *v.* Hodgdon, 89 Vt. 148, 94 Atl. 301 (burglary; cross-examination of defendant as to other arrests, held improper); 1922, State *v.* Long, — Vt. —, 115 Atl. 734 (improper relations with a woman, etc.; cross-examination held not improperly excluded in the trial Court's discretion). 3. *Privilege against Disgracing Answers:* left undecided: 1856, State *v.* Johnson, 28 Vt. 515 (whether the prosecutrix had had illicit intercourse). 4. *Conviction of Crime:* Gen. St. 1917, § 1897 (quoted *ante*, § 488); 1901, State *v.* Shaw, 73 Vt. 149, 50 Atl. 863 (murder, cross-examination of the defendant, as to a plea of guilty to a charge of assault, allowed); 1902, McGovern *v.* Hayes and Smith, 75 Vt. 104, 53 Atl. 326 (personal injuries; plaintiff allowed to be cross-examined as to conviction for illegal liquor-selling; but such proof of "an offence not involving moral turpitude" is in the trial Court's discretion); 1917, State *v.* Guyer, 91 Vt. 290, 100 Atl. 113 (conviction for stealing, etc., admitted).

VIRGINIA: 1. *Extrinsic Testimony* is excluded: 1811, Fall *v.* Overseers, 3 Mumf. 495, 505 (per Roane, J.; acts of unchastity by a woman); 1833, Rixey *v.* Bayse, 4 Leigh 332. 2. *Scope of Cross-examination:* 1906, Southern R. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. 1 (whether a collision was caused by a wrong setting of a switch; the switchman having testified that it was properly set, a cross-examination as to having made a similar mistake shortly before, was allowed "to test his accuracy, veracity, or credibility", on the principle of § 979, *ante*; but testimony from another witness would have been excluded); 1917, Allen *v.* Com., 122 Va. 834, 94 S. E. 783 (larceny of a check; question about another fraudulent mercantile transaction, excluded). 3. *Privilege against Disgracing Answers:* 1848, Howel *v.* Com., 5 Gratt. 664, 666 (questions to female witnesses as to their unchaste conduct, possession of stolen goods, etc., held privileged). 4. *Conviction of Crime:* Code 1919, § 4779 (conviction of "felony or perjury"; quoted *ante*, § 488); 1882, Langhorne *v.* Com., 76 Va. 1016 (must be of a crime affecting credibility); Anglea *v.* Com., 10 Gratt. 696 (under the Code, conviction of felony is admissible, even after a pardon); 1910, Davidson *v.* Watts, 111 Va. 394, 69 S. E. 328 (conviction for larceny may be shown, though the sentence has been served); 1921, Harris *v.* Com., 129 Va. 751, 105 S. E. 541 (robbery; defendant, having testified in chief to his whereabouts in former years, was allowed to be cross-examined to a sojourn in prison for part of the period, for an unspecified offense; Langhorne *v.* Com., distinguished).

WASHINGTON: 1. *Extrinsic Testimony* is excluded: 1913, State *v.* Shaw, 75 Wash. 581, 135 Pac. 20 (murder; the accused having admitted on cross-examination that he had been discharged from the army for bad conduct, a military certificate to the same effect was excluded, on the ground of the inadmissibility of a certificate; ignoring the present and better ground); 1921, State *v.* Demas, 114 Wash. 596, 195 Pac. 1001 (particular immoral acts, excluded); 1922, State *v.* Dale, — Wash. —, 206 Pac. 369 (proof of a former arrest denied on cross-examination, held improper). 2. *Scope of Cross-examination:* 1903, State *v.* Ripley, 32 Wash. 182, 72 Pac. 1036 (question as to arrest is "probably" not proper); 1904, State *v.* Eder, 36 Wash. 482, 78 Pac. 1023 (cross-examination of the defendant's wife to show that he had been confined in the penitentiary, held improper); 1905, State *v.* Mann, 39 Wash. 144, 81 Pac. 561 (question as to having been tarred and feathered, held properly excluded); 1906, State *v.* Belknap, 44 Wash. 605, 87 Pac. 934 (seduction; cross-examination of witnesses testifying to other intercourse with the prosecutrix was held to exceed the trial Court's discretion; unsound on the facts); 1910, State *v.* Katon, 47 Wash. 1, 91 Pac. 250 (trial Court's discretion controls); 1910, State *v.* Cottrell, 56 Wash. 543, 106 Pac. 179 (forgery; cross-examination to other frauds, held improper on the facts). 4. *Conviction of Crime:* R. & B. Code 1909, § 1212 (quoted *ante*, § 488); 1893, State *v.* Payne, 6 Wash. 563, 569, 34 Pac. 317 (petit larceny, excluded, as not infamous); 1903, State *v.* Ripley, *supra* (conviction of a felony, admissible; here, robbery); 1903, State *v.* Champoux, 33 Wash. 339, 74 Pac. 557 (conviction for murder, appealed from and pending, admitted); St. 1909, R. & B. Code 1909, § 2290 (quoted *ante*, § 488); 1912, State *v.* Overland, 68 Wash. 566, 123 Pac. 1011 (under Crim. Code 1909, § 38, Rem. & Ball.

(not as often judicially appreciated as it ought to be) that there are half a hundred independent jurisdictions within our boundaries, and that it is impossible to make use of all the rulings as though they were valid precedents for every jurisdiction. The shuttlecock citation of decisions, backward and forward, in and out of their proper jurisdictions, has done much to unsettle and to confuse the law. The greatest judicial service that can be rendered to-day is to keep the line of precedents clear and inflexible in each jurisdiction.

¶ In general, the state of the various laws on the foregoing topics may be thus summarized:

(1) *Extrinsic testimony* to particular acts is universally conceded to be

Code, § 2290, any crime may be shown, even a misdemeanor).

WEST VIRGINIA: 2. *Scope of Cross-examination:* 1880, State *v.* Conkle, 16 W. Va. 736, 742, 757, 764 (attempt to kill; a witness for the State lived in the house with the defendant and his wife; a question as to his intercourse with the latter was excluded; the reason being unascertainable from the lengthy but obscure opinion); 1902, State *v.* Hill, 52 W. Va. 296, 43 S. E. 160 (trial Court has discretion in allowing questions to facts affecting moral character; preceding cases examined and reconciled); 1902, State *v.* Prater, 52 W. Va. 132, 43 S. E. 230 (similar). 3. *Privilege against Disgracing Answers:* 1902, State *v.* Hill, *supra* (orthodox English rule applied); 1902, State *v.* Prater, *supra* (similar).

WISCONSIN: 1. *Extrinsic Testimony* is excluded: 1903, Paulson *v.* State, 118 Wis. 89, 94 N. W. 771. 2. *Scope of Cross-examination:* 1858, Ketchingman *v.* State, 6 Wis. 426, 430 (question to the woman with whom the defendant's adultery was charged to have been committed, whether an abortion had been produced upon her, not admitted to test credibility; no rule laid down: Smith, J., dissenting); 1859, Kirschner *v.* State, 9 Wis. 140, 143 (the witness' residence and associates, and the fact that he had assumed an alias, allowed as casting suspicion upon his character; whether he had been convicted of a crime, excluded on grounds of privilege and of proof by record); 1879, Ingalls *v.* State, 48 Wis. 647, 654, 4 N. W. 785 (conviction of a crime, excluded for the same reasons); 1881, McKesson *v.* Sherman, 51 Wis. 303, 311, 8 N. W. 200 ("A charge of crime is not in itself impeaching evidence", excluding a question as to a former arrest; also apparently opposing the preceding ruling); 1899, Buel *v.* State, 104 Wis. 132, 80 N. W. 78 (questions "Did you kill a man at Ord, Nebraska?", "Did the insurance company give you any reason for not giving you the insurance money?", held beyond the proper scope, for a defendant charged with murder and testifying for himself; see quotation *ante*, § 983); 1900, Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112 (questions as to "past life" of a defendant testifying, held not improper on the facts); 1902, Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170 (questions to a woman, as to a bastard child, held improper); 1903, Meehan *v.* State, 119 Wis. 621, 97 N. W. 173 (assault, question to the prosecuting witness, "whether he ran a sporting-house", excluded); 1905, State *v.* Nergaard, 124 Wis. 414, 102 N. W. 899 (violation of game law; questions to defendant as to prior arrest for a similar offence, held not prejudicial error, as he admitted his conviction therefor; questions as to being under police surveillance, held allowable in discretion); 1908, Dungan *v.* State, 135 Wis. 151, 115 N. W. 350 (assault with intent to rape; questions as to the accused's occupation with prostitutes, held allowable in the trial Court's discretion; good opinion by Dodge, J.); 1909, Farrell *v.* Phillips, 140 Wis. 611, 123 N. W. 117 (a single act of contempt of court many years before, held improperly admitted). 3. *Privilege against Disgracing Answers:* 1859, Kirschner *v.* State, *supra* (conviction for larceny; privileged because it "tended to degrade"); 1879, Ingalls *v.* State, *supra* (same); 1881, McKesson *v.* Sherman, *supra*, *semble* (same); 1899, Emery *v.* State, 101 Wis. 627, 78 N. W. 145 (privilege recognized); 1899, Crawford *v.* Christian, 102 Wis. 51, 78 N. W. 406 (same); Stats. 1919, § 13.29 (privilege repudiated for testimony before Legislature or a committee). 4. *Conviction of Crime:* Cases cited *supra;* Stats. 1919, § 4073 (quoted *ante*, § 488); 1906, Koch *v.* State, 126 Wis. 470, 106 N. W. 531 (arrest and conviction for being drunk and disorderly; question allowed; the statute held to include misdemeanors, but not violations of a city ordinance); 1909, Farrell *v.* Phillips, 140 Wis. 611, 123 N. W. 117 (contempt of court is not a conviction of crime; and the details of the offence cannot be read); 1921, Bruno *v.* Hickman, 174 Wis. 63, 182 N. W. 356 (assault; cross-examination of defendant to former conviction for assault, allowed).

WYOMING: 2. *Scope of Cross-examination:* 1909, Eads *v.* State, 17 Wyo. 490, 101 Pac. 946 (cross-examination to an arrest for shooting in a house of prostitution, held not improperly excluded in the trial Court's discretion).

inadmissible. Sporadic rulings of admission have usually been due to some other principle misapplied;

(2) For *cross-examination*, the rule of the trial Court's discretion is (in name, at least) the most widely adopted. The discretion, however, is in practice very often interfered with, to the detriment of the law's certainty. The contrast, nevertheless, is clear between this and the rule of absolute prohibition, on the one hand (which obtains in perhaps half a dozen jurisdictions) and the rule of absolute license, on the other hand (which is in this country nowhere conceded);

(3) The *privilege against disgracing answers* has in all but one or two jurisdictions disappeared. Its service, so far as it was useful, is better rendered by the rule of judicial discretion;

(4) *Convictions of crime* are everywhere conceded to be admissible. The tendency is to a simplicity of the rule defining the kinds of crime (*i.e.* either all crimes, or felonies only), instead of the common-law subtleties.

§ 988. **Rumors of Particular Misconduct, on Cross-examination of a Witness to Good Character, distinguished.** The settled rule against impeachment by extrinsic testimony of particular acts of misconduct (*ante*, § 979) is to be distinguished in its application from a kind of questioning which rests upon the principle that the *witness' grounds of knowledge* (*ante*, § 655) may always be inquired into. When witness A is called to support the character of B (either a witness or an accused), by testifying to his good reputation, that reputation must signify the general and unqualified consensus of opinion in the community (*post*, §§ 1610–1614). Such a witness virtually asserts either (a) that the testifier has never heard any ill spoken of the other or (b) that the sum of the expressed opinion of him is favorable. Now if it appears that this sustaining witness *knows* of bad rumors against the other, then, in the first instance, his assertion is entirely discredited; while, in the second instance, his assertion is deficient in good grounds, according to the greater or less prevalence of the rumors. On this principle, then, it is proper to probe the asserted reputation by learning whether such rumors have come to the witness' knowledge; for if they have, it is apparent that the alleged reputation is more or less a fabrication of his own mind.

It is to be noted that the inquiry is always directed to the witness' hearing *of the disparaging rumor* as negativing the reputation. There must be no question as to the *fact of the misconduct*, or the rule against particular facts would be violated; and it is this distinction that the Courts are constantly obliged to enforce:

1841, PARKE, B., in *R.* v. *Wood*, 5 Jur. 225 (the witness had testified that he had never heard anything against the defendant, and was on cross-examination asked whether he had not heard of the defendant being suspected of a certain robbery in the neighborhood; on objection): "The question is not whether the prisoner was guilty of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one."

1888, MCCLELLAN, J., in *Moulton* v. *State*, 88 Ala. 119, 6 So. 758: "Opinions, therefore, and rumors, and reports, concerning the conduct of particular acts of the party under inquiry, are the source from which in most instances the witness derives whatever knowledge he may have on the subject of general reputation; and, as a test of his information, accuracy, and credibility, but not for the purpose of proving particular acts or facts, he may always be asked on cross-examination as to the opinions he has heard expressed by members of the community, and even by himself as one of them, touching the character of the defendant or deceased as the case may be, and whether he has not heard one or more persons of the neighborhood impute particular acts or the commission of particular crimes to the party under investigation, or reports and rumors to that effect."

1921, SANFORD, J., in *Kelley* v. *State*, 17 Ala. App. 577, 88 So. 180 (prosecution for homicide): "There were numerous witnesses offered by the defendant, who testified to his good character, and, on cross-examination by counsel for the State, these witnesses testified that they had not heard about his shooting Alto Baxter; or about his knocking Den McLain in the head with a shotgun; nor his cutting John Dillara with a knife; or running into Willie Shipman with a razor; or about his interfering with Mr. Teal when he was about to arrest his (defendant's) sister. When these questions are asked, in good faith, they are permissible, to test the witness as to what he considers good character. Nothing appearing to show to the Court that the questions were not asked in good faith, the Court properly overruled the defendant's objections. In each case the witness answered that he had not, until the day of the trial, around the courthouse, heard of the incidents inquired about and embraced in the questions propounded by counsel for the state. . . . Upon redirect examination of each of these witnesses, defendant's counsel asked this question: 'If these things had happened you would have heard about them, would n't you?'

"The method of cross-examination allowed in the examination of character witnesses places in the hands of trial lawyers and courts a grave responsibility for perfect good faith on the part of counsel propounding the question, the right of full and free explanation in argument by counsel for both sides, and a clear and emphatic charge of the Court to the jury, confining the evidence thus obtained to the purposes for which such interrogatories and answers are legally permissible. To inquire if a witness has not heard that the defendant was guilty of a certain criminal offense, is calculated to carry with it the imputation of guilt, to his great prejudice, unless the court is careful to make clear to the jury the purpose of the question. Certainly defendant's counsel, while making his argument, should be allowed to aid in impressing the jury as to the import and meaning of the examination touching character, so long as he confines himself to statements of law applicable to the case."

On this principle such inquiries are almost universally admitted.[1] But

§ 988. [1] *England:* 1836, R. v. Hodgkiss, 7 C. & P. 298 (some definite charge against the supported witness, said to be usually the sole subject of examination); 1846, R. v. Rogan, 1 Cox Cr. 291 (circumstances of suspicion against the accused on the same night as the alleged robbery, excluded);
Federal: 1855, U. S. v. Whitaker, 6 McLean 342, 344 (whether he had not been charged with passing counterfeit money, admitted);
Alabama: rule acknowledged in the following cases: 1866, Bullard v. Lambert, 40 Ala. 204; 1880, Ingram v. State, 67 Ala. 72; 1882, DeArman v. State, 71 Ala. 361; 1884, Tesney v. State, 77 Ala. 38; 1885, Jackson v. State, 78 Ala. 472 (whether the witness had not said that the deceased was a bad man); 1889, Holmes v. State, 88 Ala. 29, 7 So. 193 (whether the accused had "worn stripes"); 1889, Moulton v. State, 88 Ala. 116, 120, 6 So. 758 (here excluded because the witness was asked "whether he did n't know" of the specific misconduct); 1893, Thompson v. State, 100 Ala. 70, 71, 14 So. 878; 1896, Evans v. State, 109 Ala. 11, 19 So. 535 (like the next case); 1896, White v. State, 111 Ala. 92, 21 So. 330 (excluding a question as to the witness' knowledge of such facts); 1898, Terry v. State, 118 Ala. 79, 23 So. 776; 1899, Jones v. State, 120 Ala. 303, 25 So. 204 (without going into the particulars); 1905, Harrison v. State, — Ala. —, 40 So. 57 (defendant's character); 1906, Williams v. State, 144 Ala. 14, 40 So. 405 (witness' character); 1908, Way v. State,

the serious objection to them is that practically the above distinction — between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts — cannot be maintained before

155 Ala. 52, 46 So. 273 (like Moulton *v.* State); 1909, Andrews *v.* State, 159 Ala. 14, 48 So. 858 (murder; "how many fights do you recall that he has had?" allowed); 1909, Lowman *v.* State, 161 Ala. 47, 50 So. 43 (cross-examination to charges of illegal liquor-selling, allowed); 1912, Ragland *v.* State, 178 Ala. 59, 59 So. 637 (the rumors cross-examined about must have been heard before the time of the alleged offence); 1913, Watts *v.* State, 8 Ala. App. 264, 63 So. 15 (wife-murder; re-direct examination of a witness to rumors of the accused having killed a prior wife, not admitted here; the witness having been first called for the State and having then on cross-examination testified only to a qualified good character of the accused); 1915, Hill *v.* State, 194 Ala. 11, 69 So. 941 (murder); 1916, Stout *v.* State, 15 Ala. App. 206, 72 So. 762 (keeping liquor illegally; cross-examination to having heard of defendant as a bootlegger, allowed); 1918, Vaughan *v.* State, 201 Ala. 472, 78 So. 378; 1921, Kelly *v.* State, 17 Ala. App. 577, 88 So. 180 (general principle stated; defendant's counsel may point out to the jury the limited purpose of the inquiry); 1920, Vaughn *v.* State, 17 Ala. App. 383, 84 So. 879 (murder; witnesses to a witness' good character, not allowed to be impeached by cross-examination as to hearing that the witness "had drank whisky, been drunk, or had played cards");

Arizona: 1921, Smith *v.* State, 22 Ariz. 229, 196 Pac. 420 (larceny); cross-examination to rumors of defendant's misconduct, admitted);

Arkansas: 1904, Long *v.* State, 72 Ark. 427, 81 S. W. 387, *semble;* 1920, Woodard *v.* State, — Ark. —, 220 S. W. 671 (allowed); 1920, Woodard *v.* State, 143 Ark. 404, 226 S. W. 124 (seduction; cross-examination of witnesses to defendant's reputation, allowed); 1921, Carr *v.* State, 147 Ark. 524, 227 S. W. 776 (murder; cross-examination of defendant's reputation-witness to notorious instances of violence, allowed);

California: 1896, People *v.* Mayes, 113 Cal. 618, 45 Pac. 860 (rule applied); 1898, People *v.* Burns, 121 Cal. 529, 53 Pac. 1096 (question not improper on the facts); 1894, People *v.* Gordon, 103 Cal. 573, 37 Pac. 535 (rule stated); 1904, People *v.* Perry, 144 Cal. 748, 78 Pac. 284 (rule applied); 1906, People *v.* Weber, 149 Cal. 325, 86 Pac. 671 (cross-examination as to being told of misconduct, allowed); 1912, People *v.* Burke, 18 Cal. App. 72, 122 Pac. 435;

Connecticut: 1917, Verdi *v.* Donahue, 91 Conn. 448, 99 Atl. 1041 (malicious prosecution; cross-examination of defendant's witness to peaceable repute, asking whether he had heard of an assault by defendant, here excluded);

Florida: 1915, Fine *v.* State, 70 Fla. 412, 70 So. 379 (murder; cross-examination of good-character witnesses to hearing of specific violence, allowed; as to Nelson *v.* State, 32 Fla. 244, "in so far as it announces the rule . . . to be different from that expressed in this case, it is overruled");

Georgia: Rev. C. 1910, § 5882, P. C. § 1053 ("particular transactions" can only be asked about "upon cross-examination in seeking for the extent and foundation of the witness' knowledge"); 1886, Pulliam *v.* Cantrell, 77 Ga. 563, 565, 3 S. E. 280 (the principle admitted; but the question held improper because it represented a crime as a fact, not as a rumor affecting reputation); 1909, Hunter *v.* State, 133 Ga. 78, 65 S. E. 154 (allowed); 1911, Dotson *v.* State, 136 Ga. 243, 71 S. E. 164 (murder; cross-examination of witness to defendant's good character, as to having seen defendant in a fight, allowed); 1914, Frank *v.* State, 141 Ga. 243, 80 S. E. 1016;

Illinois: 1899, Aiken *v.* People, 183 Ill. 215, 55 N. E. 695 (excluding such inquiries, misconceiving the nature of the problem and citing none of the cases pertinent; Cartwright, C. J., diss.); 1901, Jennings *v.* People, 189 Ill. 320, 59 N. E. 515 (similar; Carter, Cartwright, and Hand, JJ., diss.); 1917, People *v.* Donahue, 279 Ill. 411, 117 N. E. 105,

Indiana: 1873, Oliver *v.* Pate, 43 Ind. 134 (here excluded, in trial Court's discretion, because no contrary rumor was involved), 1883, McDonel *v.* State, 90 Ind. 324 (allowed); 1884, Wachstetter *v.* State, 99 Ind. 295 (whether he had heard of the witness' being arrested for larceny, being in the station-house, etc., admitted); 1892, Randall *v.* State, 132 Ind. 542, 32 N. E. 305 (whether he had heard of the witness' arrest for peace-breaking, housebreaking, etc., admitted); 1895, Griffith *v.* State, 140 Ind. 163, 39 N. E. 440 (rule applied); 1897, Shears *v.* State, 147 Ind. 51, 46 N. E. 331 (rule applied);

Iowa: 1856, Gordon *v.* State, 3 Ia. 415, *semble* (excluding questions as to specific misconduct known to the witness, because the matters were treated as fact and not merely as the subject of rumor); 1861, State *v.* Arnold, 12 Ia. 487 (similar questions allowed, because expressly treating the misconduct as reputed only); 1877, Barr *v.* Hack, 46 Ia. 310 (same); 1887, State *v.* Sterrett, 71 Ia. 387, 32 N. W. 387 (same as Gordon's case); 1887, Hanners *v.* McClelland, 74 Ia. 320 (questions excluded because the witness had not testified to reputation), 1890, State *v.* McGee, 81 Ia. 19, 46 N. W. 764 (same as Gordon's case); 1895, State *v.* Lee, 95 Ia. 427, 64 N. W. 284 (whether he had not heard of defendant's having burglarized other buildings, allowed); 1905,

the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus does three improper things, — (1) it vio-

State *v.* Richards, 126 Ia. 497, 102 N. W. 439 (where actual character has been testified to, the cross-examination may ask as to actual misconduct); 1911, State *v.* Kimes, 152 Ia. 240, 132 N. W. 180 (like State *v.* Arnold; but why should the opinion cite an Alabama case and ignore the other Iowa precedents?); 1915, State *v.* Rowell, 172 Ia. 208, 154 N. W. 488 (lucid opinion by Salinger, J.; Gordon *v.* State and State *v.* Kimes approved); 1921, State *v.* Van Hoozer, 192 Ia. 818, 185 N. W. 588 (larceny; cross-examination of witnesses to defendant's good character, as to rumors of other larcenies, held improper in the circumstances);

Kansas: 1896, State *v.* McDonald, 57 Kan. 537, 46 Pac. 967 (rule applied); 1915, State *v.* Killion, 95 Kan. 371, 148 Pac. 643 (murder; witnesses to defendant's good repute, allowed to be cross-examined to hearing of his prior violent acts);

Kentucky: 1914, McCreary *v.* Com., 158 Ky. 612, 165 S. W. 981 (rule applied); 1919, Turner *v.* Com., 185 Ky. 382, 215 S. W. 76 (rule applied; the Court on request must instruct the jury of the limited use of the answer);

Louisiana: 1893, State *v.* Donelon, 45 La. An. 744, 754, 12 So. 922 (the doctrine implied, but obscurely stated; here the cross-examination was as to the general bad reputation of the defendant's associates); 1896, State *v.* Pain, 48 La. An. 311, 19 So. 138 (whether he had not heard that the accused had whipped a woman, and had drawn a pistol on another person, admitted; 1903, Cook *v.* State, 111 La., 35 So. 665 (murder; cross-examination to the witness' hearing of acts of misconduct bearing on general character, allowed, the accused's witness not having been limited to character for peaceableness); 1906, State *v.* LeBlanc, 116 La. 822, 41 So. 105; 1911, State *v.* Green, 127 La. 830, 54 So. 45 (liquor-selling);

Massachusetts: 1876, Com. *v.* O'Brien, 119 Mass. 346 ("Particular facts may be called to the witness' attention, and he may be asked if he ever heard of them; but this is allowed, not for the purpose of establishing the truth of those facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given to his testimony");

Michigan: 1874, Hamilton *v.* People, 29 Mich. 173, 188, *semble* (rule applied); 1913, People *v.* Huff, 173 Mich. 625, 139 N. W. 1033 (cross-examination of a good character witness to the defendant's conduct after the date of the act charged, excluded);

Mississippi: 1890, Kearney *v.* State, 68 Miss. 233, 236, 8 So. 292 (a question referring to misconduct as a fact and not as a rumor, excluded; but the principle not alluded to); 1920, Herring *v.* State, 122 Miss. 647, 84 So. 699 (murder; cross-examination to hearing of a prior assault, excluded without noting the present principle);

Missouri: 1899, State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315 (rule applied); 1903, State *v.* Parker, 172 Mo. 191, 72 S. W. 650 (same); 1903, State *v.* Boyd, 178 Mo. 2, 76 S. W. 979 (same); 1891, State *v.* Crow, 107 Mo. 345, 17 S. W. 745 (rule applied); 1904, State *v.* Brown, 181 Mo. 192, 79 S. W. 1111; 1908, State *v.* Harris, 209 Mo. 423, 108 S. W. 28 (allowable in the trial Court's discretion); 1915, State *v.* Loesch, — Mo. —, 180 S. W. 875 (obtaining property by false pretences); 1916, State *v.* Dixon, — Mo. —, 190 S. W. 290; 1917, State *v.* Willard, — Mo. —, 192 S. W. 437 (murder; cross-examination of defendant's character-witnesses to a conviction for counterfeiting in Washington in 1905; held improper, on the ground of remoteness of time; "there ought to be allowed, not only 'locus penitentiæ,' but 'tempus penitentiae'"; unsound; the limitation in question belongs, if anywhere, under the principle of § 987 *ante*, but has no place under the present principle); 1919, State *v.* Steele, 280 Mo. 63, 217 S. W. 80 (abortion; cross-examination to repute as to defendant's having taken the whiskey-cure as a drunkard, allowed); 1920, State *v.* Seay, 282 Mo. 672, 222 S. W. 427 ("If you had heard that this defendant was charged with etc. etc., would you then say his reputation was good?" held an improper use of the present principle); 1920, State *v.* Wicker, — Mo. —, 222 S. W. 1014 (assault with intent to kill; defendant's witness to good character for peaceableness, allowed to be examined as to hearing of defendant's former conviction for assault with intent to rape); 1921, State *v.* McDonald, — Mo. —, 231 S. W. 927 (manslaughter; an objection to such inquiries merely on the allegation that they were "not asked in good faith", held properly overruled; unsound; the Court might have sent out the jury and required the prosecuting attorney to state whether he had credible evidence to justify him in asking the questions); 1922, State *v.* Affronti, — Mo. —, 238 S. W. 106; 1922, State *v.* Conley, — Mo. —, 238 S. W. 805; 1922, State *v.* Huffman, — Mo. —, 238 S. W. 430 (robbery);

Montana: 1914, State *v.* Jones, 48 Mont. 505, 139 Pac. 441 (enforcing the distinction stated above in the text);

Nebraska: 1881, Olive *v.* State, 11 Nebr. 1, 27, 7 N. W. 444 (witness to peaceable character, whether he had not heard of the defendant's drawing a revolver upon some one, excluded, on the erroneous notion that this was

lates the fundamental rule of fairness (*ante*, § 979) that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue.[2] Moreover, these are not occurrences of possibility, but of daily practice. This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the oppor-

the offering of a particular fact); 1894, Patterson *v.* State, 41 Nebr. 538, 59 N. W. 917 (same error); 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811 (whether the witness, testifying to defendant's character for peaceableness, had heard of a specific instance of his violence, allowed, in the trial Court's discretion, distinguishing and explaining Olive *v.* State and Patterson *v.* State);
Nevada: 1917, State *v.* Sella, 41 Nev. 113, 168 Pac. 278 (deceased in homicide);
New York: 1900, People *v.* Elliott, 163 N. Y. 11, 57 N. E. 103 (question as to a supporting witness' opinion of reputation if it should be proved that a judgment of divorce on specific grounds had been rendered, etc., excluded); 1908, People *v.* Laudiero, 192 N. Y. 304, 85 N. E. 132;
New Mexico: 1919, State *v.* Hawkins, — N. M. —, 184 Pac. 977 (principle applied);
North Carolina: 1830, Barton *v.* Morphes, 2 Dev. 520 (rule repudiated; first, "this would be doing that indirectly which the law forbids to be done directly, viz., impeaching the character of the witness in chief by specific charges", and, secondly, "if the witness in chief sustains a good general character from common reputation, the supporting witness said nothing untrue in attributing it to him"); 1861, Luther *v.* Skeen, 8 Jones L. 356 (rule applied); 1888, State *v.* Bullard, 100 N. C. 486, 6 S. E. 191 (Barton *v.* Morphes followed); 1896, State *v.* Ussery, 118 N. C. 1177, 24 S. E. 414 (rule apparently violated; confused opinion); 1898, Marcom *v.* Adams, 122 N. C. 222, 29 S. E. 333 (whether the witness had not "heard that defendant had committed forgery", excluded); 1905, Coxe *v.* Singleton, 139 N. C. 361, 51 S. E. 1019 (Barton *v.* Morphes, approved); 1912, State *v.* Wilson, 158 N. C. 599, 73 S. E. 812 (murder; cross-examination to repute of defendant as prostitute, allowed, but not repute of particular acts);
Ohio: 1907, State *v.* Dickerson, 77 Oh. 34, 82 N. E. 969 (cross-examination to rumored misconduct of the accused, here held improper, because the witnesses cross-examined had not testified to the accused's reputation, but to their personal opinion of his character, as allowed in this State);
Oklahoma: 1920, Russell *v.* State, — Okl. Cr. —, 186 Pac. 490 (rule applied); 1920, Jones *v.* State, — Okl. Cr. —, 190 Pac. 887 (murder; cross-examination to rumors, allowed);
Oregon: 1901, State *v.* Ogden, 39 Or. 195, 65 Pac. 449 (admissible; but the opinion states the principle confusedly); 1908, State *v.* Doris, 51 Or. 136, 94 Pac. 44 (allowed, but a defendant-witness may explain the rumors; the further details to be in the trial Court's discretion); 1919, State *v.* Bateham, 94 Or. 524, 186 Pac. 5 (indecent liberties; rule of trial Court's discretion applied); 1920, State *v.* Holbrook, 98 Or. 43, 192 Pac. 640 (rule applied to witness to defendant's "law-abiding" character, on a charge of murder);
Pennsylvania: 1911, Com. *v.* Colandro, 231 Pa. 343, 80 Atl. 571 (excluded; ignoring the present principle);
South Carolina: 1897, State *v.* Dill, 48 S. C. 249, 26 S. E. 567 (character for peace and good order; cross-examination to rumors as to illegal whiskey-making, allowed);
Texas: 1903, Holloway *v.* State, 45 Tex. Cr. 303, 77 S. W. 14 (here erroneously allowing proof of the acts, not merely the rumors); 1921, Lasater *v.* State, 88 Tex. Cr. 452, 227 S. W. 949 (murder; cross-examination of defendant's reputation-witness, allowed);
Virginia: 1880, Davis *v.* Franke, 33 Gratt. 426 (whether he had not heard certain people say the character was bad; here excluded, while conceding the principle, because not genuinely a test of accuracy, but a subterfuge to bring in hearsay);
Washington: 1919, State *v.* Presta, 108 Wash. 256, 183 Pac. 112 (arson; a good character witness not allowed to be asked whether he had heard "about the appellant having had a fire which destroyed the house in which he lived", though a question whether he had heard "that the appellant had been *accused* of burning his own house", would have been allowed).

[2] On this point see *post*, § 1114 (Rehabilitation of Witnesses).

tunities of its abuse by underhanded ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith.[3]

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

§ 989. **General Principles; Proof by Extrinsic Testimony.** Besides the qualities of Moral Character for veracity, of Bias, Interest, and Corruption, already examined, there are others which may discredit a witness. Their nature is indicated by the requirements for testimonial disqualifications (*ante*, § 478). If a witness is required to have a minimum of experience in order to testify (*ante*, § 555), then his degree of experience of and expert capacity will affect the weight of his testimony. If he is required to have certain opportunities for observing the facts in question (*ante*, § 650), and to be able to recollect them (*ante*, § 725), and to narrate them intelligibly (*ante*, § 766), then the degree of his capacities in those respects will affect the weight of his testimony.

But these qualities, as detracting from credit, can seldom be directly testified to as general and abstract qualities (*ante*, §§ 876, 939). The demonstration of these qualities must usually be made by particular circumstances, sometimes consisting in particular acts of conduct. The question thus arises whether they may be established by extrinsic testimony (from other witnesses), or only by cross-examination of the witness himself.

On this question, shall the analogy be followed of the rule for evidencing moral character (*ante*, § 979) or of the rule for evidencing bias and interest (*ante*, § 943)? This is here the chief, if not the only, question of controversy. In general, the rule may be said to be that extrinsic testimony is forbidden for evidencing specific acts of misconduct of the witness himself, but is allowed for evidencing other circumstances; for example, it would be forbidden for showing that a medical expert had blundered in a certain prior operation, but it would be allowed for showing that he had not used the proper instruments in making the experiments to which he testifies. The line of distinction is so indefinite that no settled rule or definition can anywhere be surely predicated. But the practice of exclusion is, on the whole, stricter than it ought to be.

The problem is complicated by the circumstance that the rule against contradiction on "collateral" matters (*post*, § 1000) is almost always equally applicable, and thus the scope of the present principle seldom comes to be defined. The witness is cross-examined to the desired fact, and then, on his denial, the subsequent proof of it is adjudged according to the rule for contradiction and not the present rule. Hence the doctrine upon the present

[3] For the rule that an *impeaching witness* may be cross-examined to the *names of persons who have spoken disparagingly*, see *post*, § 1111.

For the general rule forbidding counsel to *testify indirectly* by *asking questions*, see *post*, § 1808.

rule remains obscure. Nevertheless, so far as proof by cross-examination is concerned, the logical use of particular instances to evidence incapacity and to lessen thereby the weight of testimony is amply illustrated in the precedents.

§ 990. **Scientific Experimental Tests by Psychologists.** As the science of psychology progresses, broadening its scope and enlarging its discoveries of precise truths and methods, it will make copious contributions in this particular field of knowledge.[1] Judicial practice should liberally make use of such methods. All that should be required as a condition is the preliminary testimony of a scientist that the proposed test is an accepted one in his profession and that it has a reasonable measure of precision in its indications. Notice to the opponent, in season to attend, if the observations or experiments are made upon the witness out of court beforehand, would ordinarily be a fair requirement also (*ante*, § 1385).

The distinction between extrinsic testimony and cross-examination here has no significance. The usual objection (*ante*, § 990) to proof by extrinsic testimony should not be allowed to put any obstacle in the way of using expert testimony from psychologists. The main thing is for Courts to remember that those principles are merely means to an end. If Courts will open their minds to the realization that science can be applied to the judgment of testimonial credit, regardless of rules arising before the days of modern science, they will readily follow a liberal practice.

§ 991. **Evidencing Testimonial Incapacity by Particular Errors (Reading, Writing, Valuation, Experimentation, etc.).** Wherever a special qualification is required for testimony to a certain fact, the lack of that qualification is ascertainable logically by particular instances of the witness' failure to possess or to exercise it.

(1) On *cross-examination* there is no doubt that these particular instances may be brought out by questions to the witness himself, — subject to the trial Court's discretion in restricting an examination too trivial or too lengthy.[1] Questions relating to *prior instances* out of court are possibly less likely to be favorably treated, — for example, an inquiry to a medical witness to the presence of poison, whether he had not on two prior occasions made analyses which turned out to be erroneous; though there can be no sound objection to this frequently valuable method of exposing the possibility of error. But questions exhibiting, by the very *course of examination itself*, the witness' lack of capacity to understand the subject are common and indubitably orthodox. They are, naturally, most available on subjects requiring a certain skill which is really expertness, though not commonly so termed (*ante*, § 556) — for example, reading, writing, and the like. The method is illustrated in the following passages:

§ 990. [1] For references to scientific articles and books touching these methods, see the citation *ante*, § 875.

§ 991. [1] Compare the authorities cited *ante*, § 94, *post*, §§ 1004, 1368.

1754, *Canning's Trial*, 19 How. St. Tr. 577: The case turned chiefly on the whereabouts of a gypsy on certain days; Hannah Fensham testified to seeing her in the town on the 16th of January, her reason being that "there was a snow on the 15th at night, and the 16th it was wet; . . . my neighbors said, 'This snow is come in the right season, yesterday was the 15th': then I said, 'This must be the 16th', and not only that but I went to the almanack and looked that very day." The cross-examination followed: "Did you look directly to the almanack?" "No, sir, not till the 16th at night." — "Are you very well skilled in almanacks?" "Why not? I can read and write a little." — "Do you know which day of the week it is by the almanack?" "I can; I think so; my head is good enough for that." — "Look in this almanack, and tell me what day of the week it is." (She takes it in her hand; it was a common sheet-almanack, folded up into a book.) "I can't see by this, it is so small." — "Look at it again and take your time." "I cannot see without my spectacles" (she puts them on); "you shall not fool me so." — "Tell me by this the day of the week for the 14th of December." "This is not such an almanack as I look in; I look in a sheet almanack; I cannot tell by this." — "Give it me again, if you cannot tell; . . . now you have shown your skill in almanacks." Her own counsel then gives her the almanack and asks her to point out Sunday in the month of January. "She tells down from the 1st to the 7th day, and said that was Sunday which happened to be Tuesday."

1888, *Parnell Commission's Proceedings*, 48th day, Times' Rep. pt. 13, p. 102; in support of the charge, against Mr. Parnell and others, of using the Land League to commit crime and intimidation, the speeches to the public and the doings at the League meetings were often proved by Government constables, spies, or other prejudiced persons, and the reports were apt to be partial and misleading; every such witness was accordingly tested with reference to the correctness of his report; this testing turned out for one of them as follows: A. "Some months before Lyden's murder I was at a meeting at Mrs. Walsh's house. There were several persons assembled there. Varilly took the chair." Q. "Was anything proposed or said about any person's cattle?" A. "Yes. . . . A resolution was come to about the killing of these cattle. Some of those present left the room for the purpose of killing them." . . . On cross-examination: Q. "My learned friend has put several rather big words to you about some gentleman taking the chair. Was there a chair to take at Walsh's?" A. "I cannot understand you." Q. "Well; but you know you said that Mr. Varilly took the chair?" A. "He did." Q. "What do you mean?" A. "He was the chairman." Q. "What did he do?" A. "To attend the meetings." Q. "What did he do?" A. "He told them that there should be cattle drowned." Q. "You have been asked by my learned friend whether a resolution was passed. What is a resolution?" A. "I could not tell you." Q. "You have told us there was a resolution. Do you know what that meant?" A. "No." Q. "Was there a secretary?" A. "Yes." Q. "What is it?" A. "Not to tell anybody." Q. "Were you secretary?" A. "I was not." Q. "Was there a secretary?" A. "I do not know whether there was or not."

Circa 1875, *Mobile & O. R. Co. v. Steamer New South*, U. S. Distr. Ct., So. Distr. Ill.;[2] an action was brought by one steamboat company on the lower Mississippi against another for injuries sustained in the sinking of one of its vessels in a collision caused by the careless backing out of the Cairo harbor of a boat of the defendant company. Because of the harbor and pilot regulations, it was essential to the plaintiff's case to show that the collision had taken place in the middle of the river, and not two-thirds of the way across, as the defendant contended. Several colored deckhands of the defendant had sworn that the collision took place two-thirds of the way across. One in particular was vehement in his declarations that he *knew* it was two-thirds across, as he had noticed it definitely at the time. The counsel for the plaintiff, Mr. *W. B. Gilbert*, on the cross-exam-

[2] 'Ex relatione' Barry Gilbert, Esq., of the Chicago Bar.

ination, took a sheet of paper, folded it once at the centre, and said: "Now, that's half, is n't it?" "Yes, suh." Folding it over in halves again, he said, "Now, that's a third, is n't it?" "Yes, suh!" (promptly). Then opening out the sheet, thus creased, into four divisions, the lawyer said, pointing to the first, "John, here's one-third?" "Yes, suh." To the second, "Here's two-thirds." "Yes, suh." To the third, "That's three thirds." "Yes, suh." "John, we've got four thirds. What are we going to do?" "Dunno, suh; throw away the fourth one, I reckon. But I know, suh, that the two boats struck *right there at the end of the second third!*"

(2) Proof of such particular instances of error by *other witnesses* is generally regarded as inadmissible, and for reasons analogous to those of the character-rule (*ante*, § 979), namely, confusion of issues, by the introduction of numerous subordinate controversies involving comparatively trivial matters, and unfair surprise, by leaving the impeached witness unable to surmise the tenor or the time of supposed conduct which might be attributed to him by false testimony. Nevertheless, such instances may often be most effective evidentially, and the possible disadvantages may not always be present. The trial Court should therefore have the discretion to permit this mode of proof when it seems useful.[3]

Whether extrinsic testimony is admissible to prove other circumstances detracting from the witness' qualification is doubtful, as a matter of precedent, though not of principle. That a mining engineer's experience has been gained in a locality of a different sort from that of the case in hand, that a

[3] The precedents vary, and no precise rule is acknowledged; with the following cases compare those cited *post*, § 1004: *Eng.* 1885, Belt *v.* Lawes, Eng., Montague Williams' Reminiscences, II, 228 (issue as to the genuineness of a sculptor's work; the plaintiff-sculptor having claimed to be the author of a bust of P., of great merit, which the defendant asserted was not made by the plaintiff, because he was incapable of a work of that merit, and the plaintiff having made at the trial another bust of P. as a specimen of his skill, Sir F. Leighton, Mr. Thornycroft, and Mr. Millais, of the Royal Academy, testified that the latter bust, compared with the former, "had no artistic merit"; the plaintiff then proved the genuineness of the former by a person who had seen him working on it; "this rebutting evidence of course smashed entirely the mere hypothetical evidence of experts"); also more briefly mentioned in Lord Alverstone's Recollections of Bar and Bench, 105; *U. S. Fed.* 1814, Story, J., in Odiorne *v.* Winkley, 2 Gallis. 52 (in a suit for infringement of patent, priority of invention being pleaded, a witness to the identity of the two machines was shown a similar machine invented by a third person and was interrogated as to the points of identity and difference, in order to show by other testimony the witness' ignorance of mechanics, and thus his general incorrectness; the questions were rejected); *Ind.* 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 423, 3 N. E. 389, 4 N. E. 908 (witness to plaintiff's age; being asked to state his opinion of X's age as a test, his error was allowed to be shown); *Kan.* 1903, State *v.* Snyder, 67 Kan. 801, 74 Pac. 231 (illegal sale of beer; testing of a witness for the prosecution by his drinking from an offered bottle and then saying whether it was the same as that sold to him, excluded, on the ground of collateral issues); *Mass.* 1854, Boston & W. R. Co. *v.* Dana, 1 Gray 83, 90, 104 (an error, in another matter, by a cashier-witness, to show general inaccuracy in accounts, excluded in discretion); *Miss.* 1843, Wood *v.* Trust Co., 7 How. Miss. 609, 631 (notary's certificate impeachable by evidence of his custom to certify improperly; distinction noted between such impeachment and facts affecting character); *N. Y.* 1903, Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579 (an expert witness' error in declaring genuine certain spurious signatures, not otherwise in issue, but shown to him as a test, held not collateral, and therefore allowed to be established by other testimony; prior inconsistent cases repudiated; "the competency of a witness to express an opinion . . . is incidental to the main issue, because it attacks the foundation of the evidence"); 1906, People *v.* Pekarz, 185 N. Y. 470, 78 N. E. 294 (cross-examination of an alienist; Hoag *v.* Wright, *supra*, approved).

For the authorities upon discrediting *handwriting experts* in this manner, see *post*, § 2015.

medical witness' experience has been brief and insufficient, that an interpreter has lived in a part of the country using a different dialect, — circumstances like these would not be obnoxious to any rule against extrinsic testimony.[4] But all this should be left to the trial Court's discretion.

§ 992. **Same: Grounds of an Expert Opinion.** (1) The data on which an expert rests his specific opinion (as distinguished from the facts which make him skillful to form one at all) may of course be fully inquired into upon *cross-examination*.[1] Without them, the value of the opinion cannot be estimated.

(2) But may the incorrectness or insufficiency of such data be established by *calling other witnesses?* This is permissible and common, without doubt, so far as it involves merely the questioning of other expert witnesses upon their opinion of the validity of the first witness' grounds; for they are usually called primarily for the sake of their own opinion in the cause, and their discrediting of the first witness' grounds of opinion may incidentally be inquired into without encumbering the issues,[2] — for example, when a medical witness, testifying to the cause of death as drowning, states as a ground the presence of froth on the lungs, and then other medical witnesses, testifying to the cause of death, deny that froth on the lungs indicates death by drowning. But where the confuting of the data given requires the calling of witnesses who would not otherwise be in the cause, the propriety of this is open to doubt. Nevertheless, it may often become highly important for exposing error; and the trial Court should have discretion to permit it.[3] The following passages illustrate its possibilities:

1723, *Bishop Atterbury's Trial*, 16 How. St. Tr. 494, 672; treasonable letters had been attributed to the defendant; but when the Crown experts who claimed to have been able to decipher them were asked by him to produce the key on which they founded their translation, the request was refused on grounds of the public necessity of keeping the methods of such skilled persons a secret (*post*, § 2378). The Duke of *Wharton* thus attacked the ruling:

[4] Compare § 1004, *post*.

§ 992. [1] 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389; 1898, Shields *v.* State, 149 Ind. 395, 49 N. E. 351 (a witness held to have testified as an expert, so as to be cross-examined for qualifications; extent of cross-examination in Court's discretion); 1895, Manning *v.* Lowell, 173 Mass. 100, 53 N. E. 160 (value-expert; cross-examination to other sales, allowable in discretion); 1920, Van Fleet *v.* O'Neil, 44 Nev. 216, 192 Pac. 384 (whether a witness to reasonable value of attorney's fees agreed with certain ruling, of other courts, excluded); 1883, Neilson *v.* R. Co., 58 Wis. 516, 520, 17 N. W. 310 (cross-examination of witnesses to the extent of depreciation by land-condemnation, as to the elements and grounds of their estimate, allowable in discretion).

For the use of *other sales*, on cross-examination of *value-experts*, see the authorities collected *ante*, § 463.

On the abuses of this kind of cross-examination, see an article by Dr. John E. Lind, "The Cross-Examination of the Alienist" (Journal of Crim. L. and Criminology, 1922, XIII, 229).

[2] That they may be inquired into on the direct examination, see *ante*, § 655.

[3] 1921, State *v.* Wade, 96 Conn. 238, 113 Atl. 458 (murder of N. in conspiracy with Mrs. N., J., and R.; plea, insanity; psychological experts having applied the Stanford-Binet-Simon tests to all four, and having testified on both sides as to their opinion of W.'s mental condition based thereon, an offer by the State to show the result of the tests as to the other three, who had taken the stand, was rejected; the purpose of the offer was to assist in estimating the value of the opinion as to W.'s capacity; the ruling is unsound).

Compare the cases cited *post*, § 1004, § 2015.

"The person who is the decipherer is not to be confuted, and what he says must be taken for granted, because the key cannot be produced with safety to the public!, and consequently (if his conjectures be admitted to be evidence) our lives and fortunes must depend on the skill and honesty of decipherers, who may with safety impose on the Legislature when there are not means of contradicting them for want of seeing their key. . . . The greatest certainty human reason knows is a mathematical demonstration; and were I brought to your lordships' bar, to be tried upon a proposition of Sir Isaac Newton's, which he upon oath would swear to be true, I would appeal to your lordships whether I should not be unjustly condemned, unless he produced his demonstration that I might have the liberty of enquiring into the truth of it from men of equal skill."

1915, Lord ALVERSTONE, Recollections of Bar and Bench, p. 116: "In the course of the case I had a striking example of how essential it is to test expert testimony, and how frequently experts generalize from insufficient data, and confidently give evidence which is not based on actual knowledge and does not therefore justify the conclusions at which they arrive. The matter arose in this way. A medical expert, a chemist of very great experience and high reputation, was called for the plaintiff, and described the periods of infection, and at what stage the infection was most likely to be propagated; he agreed with the evidence upon which I was instructed, that the most dangerous period was when the skin began to dry, and the dust, or small particles of skin, were given off from the body. So far his view was in entire accordance with that of my witnesses, but on instructions I asked him whether it was not a fact that in smallpox cases the air-passages of the lungs and the interior of the body developed spots of the same character as those on the skin, and that it was the particles from these internal spots exhaled by the breath that were among the main causes of infection. He said that he believed that there was *one* case to be found in the books in which spots had been found in the interior passages of the lungs of a smallpox patient. I heard a groan behind me. I turned round, and one of my experts, a man of great practical experience, who had had charge of one of the large smallpox hospitals in the North of England, whispered to me: 'And this man calls himself an expert! I have made over a thousand post-mortem examinations of smallpox patients who had died from the disease, and I have never found any case in which the spots on the interior passages of the body were not present.'"

§ 993. **Knowledge; Testing the Witness' Capacity to Observe.** It is not doubtful that on *cross-examination*, so far as feasible by mere questions, the witness' physical capacity to observe (by sight, hearing, or the like) may be tested.[1] On the other hand, it is hardly less doubtful that *extrinsic testimony* to particular instances of his incapacity in those respects would not be permissible. But mere questions on cross-examination can seldom effect much; the useful thing is usually something of a mixed nature, *i.e. experiments made in court* to test the witness' powers. These should be freely allowed, subject to the discretion of the trial Court.[2]

§ 993. [1] 1850, Com. *v.* Webster, Mass., Benn. Rep. 264, 265 (witness to personal identity, cross-examined as to having weak eyes, using spectacles, etc.); 1908, Schwanenfeldt *v.* Chicago B. & Q. R. Co., 80 Nebr. 790, 115 N. W. 285 (a psychologist testified as to the reaction-time for responding to a warning and stopping at a crossing).

[2] 1795, Maguire's Trial, 26 How. St. Tr. 294 ("I desire that the prisoner may be brought forward to the front seat and some persons, as nearly of his own condition in appearance as may be, should be placed there along with him"; this was done); 1894, Heath *v.* State, 93 Ga. 446, 21 S. E. 77 (testing a witness' power of vision by sending him to the window, etc., held not improperly refused in discretion).

For other instances of *experiments to test sight and hearing*, see *ante*, § 460. Compare the cases cited *ante*, § 944, *post*, §§ 1004, 1368.

§ 994. **Same: Grounds of Knowledge and Opportunity to Observe.** Every witness must have had some fair opportunity to observe the matters to which he testifies (*ante*, § 650). The circumstances, therefore, which indicate that his opportunities of acquiring knowledge were less full and adequate than they might have been are always relevant to diminish the weight of his testimony:

Ante 1726, Chief Baron GILBERT, Evidence, 148: "Another thing that would render his testimony doubtful is the not giving the reasons and causes of his knowledge; for if a man could give the reasons and causes of his knowledge, and doth not, he is forsworn, . . . and that a man should know anything and not [be able to] tell how he comes to know it, is incredible."

1853, CHILTON, J., in *Campbell* v. *State*, 23 Ala. 78: "In order to ascertain the credit due to the testimony of a witness, the jury should be informed of his opportunity for observation, the accuracy with which that observation has been conducted, the fidelity of memory with which it is related, the witness' habits, pursuits, his conduct, disposition, situation in life, relation to the parties, etc."

(1) That these inquiries may be made on *cross-examination* is undoubted:[1]

1744, *Heath's Trial*, 18 How. St. Tr. 65; Mrs. Cole had testified to the presence of Mrs. Heath, another witness, on an important occasion; cross-examined: "Madam, do you remember that Mrs. Heath come to awaken your mother?" "I do remember that she came." — "Was there a light in the room?" "There was not." — "Had Mrs. Heath a light with her?" "She might have had a candle in her hand." — "Was there light or not?" "There was not; I believe there might be a fire." — "Had she a candle in her hand?" "Indeed, I cannot tell." . . . — "The reason of the question is this; look at that woman; will you swear positively that that is the woman that came into the room to call your mother?" "Mrs. Heath was the person, and I believe that is the same." — "How can you tell it was her when there was no light?" "I knew her voice."

(2) The circumstances thus detracting from the witness' opportunities of knowledge may also be established by *extrinsic testimony*, on the same principle (*ante*, §§ 948, 966) as the circumstances indicating bias and inter-

§ 994. [1] Besides the following, compare the authorities cited *ante*, § 944, *post*, §§ 1004, 1368; 1895, Jones *v.* R. Co., 107 Ala. 400, 18 So. 30 ("the opportunities of the witnesses for observing and knowing"); 1874, Hamilton *v.* People, 29 Mich. 173, 182 (testing as to "the force of the impression" made upon a witness at the time of hearing something); 1883, Peter *v.* Thickstun, 51 Mich. 589, 593, 17 N. W. 68 (assumpsit on a contract to sell shingles; cross-examination to the "extent, kind, and places of plaintiff's business", allowed, to show "his opportunities to know the facts he had testified to"); 1892, State *v.* Avery, 113 Mo. 475, 498, 21 S. W. 193 (a witness to a shooting; a question as to whether the moon was shining, allowed, "in order that the jury might know his opportunities and facilities for observing"); 1895, State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110 (asking one claiming an alibi where he really was); 1838, Nelson, C. J., in people *v.* Rector, 19 Wend. 610 ("The degree of credit to be given to a witness must chiefly depend upon his means of knowing the facts testified to", his intelligence, and his character); 1880, Koons *v.* State, 36 Oh. St. 199 (lack of knowledge of handwriting); 1897, Oregon Pottery Co. *v.* Kern, 30 Or. 328, 47 Pac. 917 (best opinion, by Bean, J.); 1892, Thomas *v.* Miller, 151 Pa. 486, 25 Atl. 127 (reasons for looking at an almanac to fix the date of a note); 1895, State *v.* Rutten, 13 Wash 203, 43 Pac. 30 ("Are you testifying by guess or testifying of what you know?" allowed).

That the grounds may be inquired into on the *direct examination*, see *ante*, § 655.

For testing *value-witnesses by other sales*, see *ante*, § 463.

For testing *reputation-witness*, see *ante*, § 988, *post*, § 1112.

est. Any other rule would frequently make a false witness' testimony impregnable:[2]

1857, *Armstrong's Trial* (John T. Richards, Lincoln the Lawyer-Statesman, 1916, p. 45): "On the evening of August 29, 1857, Duff Armstrong had become embroiled with one of his companions named Metzker, on the outskirts of a grove where a camp-meeting was being held in Mason County. On the same evening Metzker was struck on the back of the head with some hard instrument by a man named Norris, who had been drinking heavily. Within three days thereafter Metzker died, and Duff Armstrong and Norris were jointly indicted on the charge of murder. Armstrong claimed that he had struck Metzker only with his fist, while the marks found upon the body showed plainly that at least two blows, either of which might have caused death, had been struck with some heavy instrument, and it was charged that one of them had been struck by Armstrong with a slung-shot. . . . The principal witness against him was one Allen, who testified that at about eleven o'clock on the evening of August 29, 1857, he saw the accused strike Metzker with a slung-shot. Lincoln conducted the cross-examination of the witness, Allen, and in the course of it he asked him how near he was to Metzker at the time the blow was struck, and other questions, the answers to which indicated that Allen was a considerable distance away at the time — tradition fixes the distance at about 150 feet.

"Lincoln then inquired of the witness how at that distance he was able to see the blow struck at that hour of the night. Allen repiied that he saw it by the light of the moon. Lincoln caused the witness to repeat this answer several times, so that there could be no doubt in the mind of any one as to the statement of the witness. Allen also testified very positively that the moon was shining brightly at the hour named.

"Among other evidence on behalf of the accused, Mr. Lincoln introduced an almanac, by means of which he showed that on the night in question the moon had just completed its first quarter, that it set before midnight, and that at the hour named by Allen it was so dim, because so near the western horizon, as to render it impossible that Allen could have seen, by its iight, a blow struck by Armstrong. The result was that the jury disregarded the testimony of Allen and returned a verdict of not guilty."[3]

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

(1) Subject to the general principle (*ante*, § 944) that the trial Court's discretion controls the testing of a witness' capacity of recollection, *by cross-examination* upon other circumstances, even unconnected with the case in hand, is a recognized and common method of measuring the weight of his testimony.[1] Repeated instances of inability to recollect give the right to doubt

[2] 1881, Albert *v.* R. Co., 98 Pa. 316, 318, 321 (a witness had testified to seeing a field fire; outside testimony that his view was obstructed by an embankment, admitted). The cases involve usually also the question of *contradicting on a collateral point*, and are therefore collected *post*, § 1004.

[3] This incident of the Armstrong Trial was made use of by Mr. Eggleston, in the trial scene of "The Graysons" (ch. 27).

It may be noted that the slander, afterwards started, and chiefly given currency by Lamon's Life, that Lincoln had used a spurious almanac, was long ago amply refuted by a competent witness (Mr. James L. King, ex rel. Judge Bergen, in North American Review, 1898, vol. 166, p. 186); the evidence is fully collected and examined in Mr. John T. Richards' authoritative work, cited above.

§ 995. [1] On the principle of § 944, *ante*, the trial Court's discretion is usually conceded to control. 1890, Davis *v.* Cal. Powder Works, 84 Cal. 629, 24 Pac. 387; 1868, Kelsey *v.* Ins. Co., 35 Conn. 225, 233 (policy on the first wife's life; question as to the date of marriage with the second wife, admissible in discretion); 1885, Sewall *v.* Robbins, 139 Mass. 165, 29 N. E. 650 (the witness' inability to remember the number of days he attended the former trial; allowed in discretion); 1921, State *v.* Ford, 286 Mo. 624, 228 S. W. 480 (uttering a forged note, bearing S.'s signature as surety; S. denied the signature; evidence that S. had "signed many notes for the defendant", held admissible, as tending to show error of memory in S.); 1899, Willard *v.* Sullivan, 69 N. H. 491, 45 Atl. 400 (rests in trial Court's discretion); 1895, Cunningham *v.* R. Co., 88 Tex.

the correctness of an alleged recollection of a material fact; the force of the instances depending on the greater or less probability that the one thing could be forgotten while the other is remembered. Some of the most effective exposures of false testimony in the history of trials have been achieved by this method. All the great cross-examiners have relied upon it; though in ordinary hands it is often over-used:

1679, *Langhorn's Trial*, 7 How. St. Tr. 417, 452; Oates, the informer, had testified that the Popish Plotters met in London on April 24, and that he had come over to the meeting from the Jesuit College at St. Omer in France with Sir John Warner; one of the Jesuit attendants was put on by the defence to prove that Warner had not left the College at that time: Witness: "He lived there all that while." Mr. J. PEMBERTON: "Was Sir John Warner there all June?" Witness: "My lord, I cannot tell that; I only speak to April and May." L. C. J. SCROGGS: "Where was Sir John Warner in June and July?" Witness: "I cannot tell." L. C. J.: "You were gardener there then?" Witness: "Yes, I was." L. C. J.: "Why cannot you as well tell me, then, where he was in June and July, as in April and May?" Witness: "I cannot be certain." L. C. J.: "Why not so certain for those two months as you are for the other?" Witness: "Because I did not take so much notice." L. C. J.: "How came you to take more notice of the one than the other?" "Because the question that I came for, my lord, did not fall upon that time." L. C. J.: "That, without all question, is a plain and honest answer." Mr. J. DOLBEN: "Indeed, he hath forgot his lesson; you should have given him better instructions." L. C. J.: "Now that does shake all that was said before, and looks as if he came on purpose and prepared for those months."

1794, Mr. *Thomas Erskine*, cross-examining in *Hardy's Trial*, 24 How. St. Tr. 647 (the witness had testified to the instances at a seditious meeting): "Where did you live before you lived with this Mr. Kellerby?" "At Mr. Faulder's." — "Where before that?" "In Cheapside, with Mr. Smith." — "How long is that ago?" "That is between four and five years ago."—"What did you leave Smith for?" "We had some words." — "Had some words; what might the words be, think you?" — "I do not know, I am sure, exactly now; we had some words and upon that account we parted." — "You have an amazing good memory; you have repeated a whole speech a man made at a meeting, but you cannot remember the few words that passed between you and your master. Now try; I will sit down and give you time." . . . L. C. J. EYRE: "Why do you not give an answer?" "I cannot recollect the words, it is so long ago."

1820, *Queen Caroline's Trial*, Linn's ed., I, 67, 91, 95, 96; among the various charges of adultery and improper intimacy between the Queen (then Princess) and her servant Bergami during her tour in Germany, Austria, Italy, and the Mediterranean, one charge was made of adultery on board a polacca during a sea-voyage to Palestine; the witness Majocchi, a servant in her suite during most of her journeys, had testified specifically to this charge under the following questions from Mr. Solicitor-General *Copley:* "Did the Princess sleep under that tent [placed on deck] generally on the voyage from Jaffa home?" *Majocchi:* "She slept always under that tent during the whole voyage from Jaffa to the

534, 31 S. W. 629 (testing on cross-examination by questions as to omissions of things said to have been habitually done, allowed); 1906, Southern R. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. [illegible] (negligence of a switch-man cited *ante*, § 987, n. 1); 1897, State *v.* Shelton, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064 (the date of a sale of liquor; questions as to the dates of other sales allowed to test memory); 1894, Spear *v.* Sweeney, 88 Wis. 545, 60 N. W. 1060 (testing a plaintiff-witness' alleged weakness of memory, as caused by disease induced by the defendant's act, allowable in discretion).

For testing memory by *repetition of questions* compare also the authorities collected *ante*, § 781.

For testing the recollection of the witness as *evidence of his identity*, see *ante*, § 270.

time she landed." Mr. *Sol. Gen.:* "Did anybody sleep under the same tent?" *Majocchi:* "Bartolomo Bergami." Mr. *Sol. Gen.:* "Did this take place every night?" *Majocchi:* "Every night." On cross-examination Mr. *Brougham* sought to test his trustworthiness by inquiring as to other details of the sleeping arrangements of the suite:[2] "[On this voyage,] Where did Hieronimus sleep in general?"; *Majocchi:* "I do not recollect [*Non mi ricordo*]." Mr. *Brougham:* "Where did Mr. Howman sleep?" *Majocchi:* "I do not recollect." Mr. *Brougham:* "Where did William Austin sleep?" *Majocchi:* "I do not remember." Mr. *Brougham:* "Where did the Countess Oldi sleep?" *Majocchi:* "I do not remember." Mr. *Brougham:* "Where did Camera sleep?" *Majocchi:* "I do not know where he slept." Mr. *Brougham:* "Where did the maids sleep?" *Majocchi:* "I do not know." Mr. *Brougham:* "Where did Captain Flynn sleep?" *Majocchi:* "I do not know." Mr. *Brougham:* "Did you not, when you were ill during the voyage, sleep below [in the hold] under the deck?" *Majocchi:* "Under the deck." Mr. *Brougham:* "Did those excellent sailors always remain below in the hold with you?" *Majocchi:* "This I cannot remember if they slept in the hold during the night-time or went up." Mr. *Brougham:* "Who slept in the place where you used to sleep down below in the hold?" *Majocchi:* "I know very well that I slept there, but I do not remember who else." Mr. *Brougham:* "Where did the livery servants of the suite sleep?" *Majocchi:* "This I do not remember." Mr. *Brougham:* "Were you not yourself a livery servant?" *Majocchi:* "Yes." Mr. *Brougham:* "Where did the Padroni of the vessel sleep?" *Majocchi:* "I do not know." Mr. *Brougham:* "When her Royal Highness was going by sea on her voyage [at another time] from Sicily to Tunis, where did she sleep?" *Majocchi:* "This I cannot remember." Mr. *Brougham:* "When she was afterwards going from Tunis to Constantinople on board the ship, where did her Royal Highness sleep?" *Majocchi:* "This I do not remember." Mr. *Brougham:* "When she was going from Constantinople to the Holy Land on board the ship, where did she sleep then?" *Majocchi:* "I do not remember." Mr. *Brougham:* "Where did Bergami sleep on those three voyages of which you have just been speaking?" *Majocchi:* "This I do not know."[3]

1900, Hon. *J. F. Daly*, in "The Brief", III, 10: "One of the neatest effects ever witnessed was produced by a single question put by one of the young leaders at our bar in the course of an inquiry on 'habeas corpus' as to the sanity of an interested party. A medical expert had testified to his mental unsoundness, and had detailed with great clearness the tests he applied to his case, and the results which established to his satisfaction an advanced stage of paresis. He finished his direct examination one afternoon, and next day was cross-examined for the purpose of eliciting that many of the conditions he described could be found in every sane person. After being questioned as to the first indication of mental feebleness he had specified, he was then asked what was the second feature of the cases he had mentioned as indicating paresis. The witness was unable to recall which he had mentioned second. 'What, Doctor, you can't recall the second indication of progressive mental decay which you spoke of yesterday?' 'No, I cannot, I confess.' 'Well, that's funny. Your second indication was "loss of memory of recent events"!' The doctor admitted cheerfully that he had the symptoms himself in a marked degree."

1892, TILLINGHAST, J., in *State* v. *Ellwood*, 17 R. I. 767, 24 Atl. 782 (indictment for burglary and stealing a chain): "The witness M., a manufacturing jeweller, was asked in cross-examination to give the amount, approximately, of the business of his firm in the

[2] These questions were not all put in direct sequence; a few intervening questions are here omitted.

[3] In his opening address for the defence (II, 33), Mr. Brougham made forcible use of these significant answers of Majocchi, prophesying that "as long as the words 'I don't remember' were known to the English language, the image of Majocchi, without the man being named, would forthwith arise to the imagination"; and his iteration of that betraying phrase 'non mi ricordo' has indeed become an indelible episode of forensic history. In McDermott's Estate, 148 Cal. 43, 82 Pac. 842 (1905) is found the record of a witness whose testimony exhibited Majocchi's striking trait.

course of the year. It appeared in evidence that the chain in question was sold to H. by the witness seven or eight years ago, and this question was asked for the purpose of showing what recollection the witness would be likely to have of a transaction which took place so long ago. We do not think that this was a proper way to test the recollection of the witness. The extent of his business was his own private affair, and the defendant had no right to inquire into it in this way. Moreover, it appears by the subsequent examination of the witness by the defendant, that the extent of his business in the manufacture of chains similar to the one in question was inquired into, together with the size, style, weight, and price thereof. This was all that was pertinent to the inquiry which was then being made. And while considerable latitude is allowed in the cross-examination of a witness for the purpose of testing his recollection, yet this is no reason for permitting the cross-examiner to pry into the private affairs of the witness in regard to matters wholly foreign to the investigation."

(2) In proving the falsity of such a test-instance erroneously recollected,[4] or the falsity of a circumstance given as the ground of recollection,[5] it is more common to exclude *extrinsic testimony*. Nevertheless, in simple cases, where the effect might be important, this ought to be admitted. There is no propriety in a hard-and-fast rule; and the trial Court should be conceded a discretion.

§ 996. **Narration; Discrediting the Form of Testimony.** The trustworthiness of the form in which testimony is delivered (*ante*, § 766) is usually sufficiently ascertainable by the *demeanor* of the witness on the stand (*ante*, § 946).[1] But when the testimony is given in writing by *deposition*, or is a hearsay statement received by exception, it may be necessary to show by *extrinsic testimony* such circumstances as detract from the trustworthiness of the form of utterance.[2] There is here usually no means of obtaining these

[4] 1848, R. *v.* M'Donall, 6 State Tr. N. S. 1128 (seditious utterances; the informer having reported in detail a speech of the defendant's of some twenty lines, "Pollock proposed to read several sentences from a book and send the witness out of the court to make a report of them, as a means of testing his ability to report"; Cresswell, J.: "It has been a very common test in cases of this sort to read a sentence to a witness and ask him to repeat it; but though you have a right to the real statement of the witness, you have no right to send him out of court"; Pollock: "I have heard that one of the greatest men shut up a person in a room to make a Jacquard loom"; Cresswell, J.: "Not during the progress of a trial"; Pollock then read to the witness a passage of some ten lines: "Can you give any report of the general purport and meaning of that speech?"; Witness: "No"); 1878, Kennedy *v.* Com., 14 Bush 357, 360, *semble* (questions to test memory may be asked, but the answers not contradicted); 1834, Goodhand *v.* Benton, G. & J. 481, 484 (title to a slave, who was said to have been held by B. as trustee for his insane daughter; a witness T., son of a tenant of B., testified to seeing the slave in B.'s possession, and was cross-examined as to the state of accounts between B. and his father, whose administrator the witness was; to "impeach the accuracy of his recollection in regard to his having settled the account for rent and as to the time expended in investigating the claim before arbitrators", the opponent offered a probate account rendered by the witness, contradicting his testimony; neither the father, nor the witness, nor the account having in themselves any connection with the title to the slave; it was held properly excluded). See further the authorities collected *post*, § 1004.

[5] The authorities are collected *post*, § 1004, because the rule about contradiction is also always involved; the following case shows the sort of evidence involved: 1899, Jefferson *v.* State, — Tex. Cr. —, 49 S. W. 88 (perjury; a witness having testified to the defendant's being sworn and to remembering it because that trial preceded certain others, proof that the prior trial was a different one was allowed).

§ 996. [1] But the following ruling is sound: 1889, Graham *v.* McReynolds, 88 Tenn. 247, 12 S. W. 547 (that a third party had threatened the witness "if she did not swear plaintiff's child to the defendant he would send her to hell in a minute", admitted).

[2] 1897, Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568 (that interlineations in a deposition were

facts by cross-examination of the witness himself, and hence other testimony becomes indispensable.

in the handwriting of an interested person, admitted); 1836, People *v.* Moore, 15 Wend. 421 (showing that a deposition taken by a magistrate and signed by the witness, but not required by law to have been read over to him, was in fact not read over to him; admitted); 1857, Cook *v.* Brown, 34 N. H. 463, 471 (the witness said that the defendant had written out her deposition and she was going to sit up that night and learn it; admitted). The circumstances thus admissible in discredit are further ascertainable from the cases collected *ante*, §§ 786–788, 803–805 (deposition), §§ 753, 764 (memoranda to aid recollection), *post*, § 446 (dying declarations), § 1556 (regular entries).

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

TOPIC IV: SPECIFIC ERROR (CONTRADICTION)

CHAPTER XXXIII.

§ 1000. **Theory.** If an eye-witness to a homicide swears that the murderer bore a scar upon his cheek, and the accused is perceived by the jury to have no such scar, it is plain that on that particular point the witness is wholly in error. If the same witness should testify, among other circumstances, that the killing was done at night, by the light of the full moon, and a reference to an almanac should show that the moon did not appear in that place on that night, in a similar way his error on that point would be apparent. If his testimony should assert, among other things, that the assailant wore a white hat, and on the other side five unimpeachable eye-witnesses should attest that the assailant wore a black hat, then the same result would follow, provided the testimony of the opposing witnesses were believed. Suppose, again, that he makes the same assertion as to a white hat, and five unimpeachable witnesses swear that the accused never owned or possessed a white hat, the same result would follow, provided, first, that the testimony of the opposing witnesses were believed, and, secondly, that the impossibility also be accepted of the accused having been able to obtain temporarily a white hat.

Now in all four of these instances the probative effect is the same, namely, the witness is perceived by the tribunal *to be in error on a particular point;* the difference between the instances consists merely in the method of making the error clear to the tribunal. In the first instance, the senses of the tribunal

itself determine by inspection and without ordinary evidence; in the second instance, the error appears by means of hearsay testimony of an ordinarily incontrovertible sort; in the third instance it is necessary that faith be given to the opposing testimony before the error can be accepted; in the fourth instance, it is necessary, not only that the opposing testimony be believed, but also that certain circumstantial facts additionally be accepted as existing and as probative before the error can be accepted. Whatever the method of proving the contrary of the witness' asserted fact, the ultimate result aimed at is the same, namely, to persuade the tribunal that the witness has completely erred on that particular point.

Now the commonest instances in practice are the third and the fourth, *i.e.*, the marshalling of one or more witnesses (with or without other circumstantial evidence) who deny the fact asserted by the first witness and maintain the opposite to be the truth. Thus, the dramatic feature of the attempt to prove the error is a *contradiction* of the first witness by one or more in opposition. Yet this contradiction in itself does nothing probatively, not unless the contradicting witness or witnesses are believed in preference to the first one, *i.e.* unless *his error* is established. It is not the contradiction, but the truth of the contradicting assertion as opposed to the first one, that constitutes the probative end. Nevertheless, the contradiction, being the usual and prominent feature of the process by which that end is aimed at, has served as the common name to designate the probative end itself. This is not wrong, provided it be clearly understood what that end is.

Such being the real probative end which the contradiction is intended to serve, what is the exact nature of that probative effect? Assume that the end is accomplished, and that the tribunal accepts as a fact that the witness is completely in error on that particular point, what is the place of this fact in the general system of discrediting or impeaching evidence?

The peculiar feature of this probative fact of Error on a particular point is its *deficiency with respect to definiteness* and its *wide range with respect to possible significance.* Looking back over the various kinds of defects of testimonial qualifications already considered, it will be seen that the evidence was aimed clearly and specifically at a particular defect; it showed either that or nothing. Former perjury would indicate probably a deficient sense of moral duty to speak truth; relationship to the party, a probable inclination to distort the facts, consciously or unconsciously; misjudgment of a test-specimen of handwriting, a probable lack of skill in judging of writings; and so on. Now the present sort of fact is not offered as definitely showing any specific defect of any of these kinds, and yet it may justify an inference of the existence of any one or more of them. We know simply that an erroneous statement has been made on one point, and we infer that the witness is capable of making an erroneous statement on other points. We are not asked, and we do not attempt to specify, the particular defect which was the source of the proved error and which might therefore be the source of another

error. The source might be a mental defect as to powers of observation or recollection; it might be a lack of veracity-character; it might be bias or corruption; it might be lack of experiential capacity; it might be lack of opportunity of knowledge. As to all this, nothing can be specified. The inference is only that since, for this proved error, there was *some unspecified defect* which became a source of error, the same defect may equally exist as the source of some other error, otherwise not apparent. No doubt the repetition of instances affects the strength of the inference; *i.e.* if a witness has testified to ten separate points, and if his assertions are proved to be incorrect not merely upon one but upon six of these points, one is more inclined to believe that the underlying defective quality, whatever it may be, is radical and complete, and to assume easily that it applies to and annuls his assertions on all the remaining points. But it is still true that the error in itself does not definitely indicate any one specific defect; that there is no attempt consciously to analyze its bearings in that respect; and that the typical probative process is that of inferring a general defective trustworthiness on other points from proved defective trustworthiness on one point.[1]

It will thus be seen, as above suggested, that the *strength* and usefulness of this sort of evidence consists in the wide range of defective qualities which it opens to our inference; and that its *weakness* consists in the indefiniteness of its inference.

In view of this source of its weakness, there is no difficulty in appreciating the logical basis for a limitation that is well established in the law; and this is now to be considered:

§ 1001. **Error on Collateral Matters cannot be Shown; (1) Logical Basis.** In so far as the point on which the proved error exists is removed in conditions and circumstances from the point as to which the inference of other error is desired to be drawn, the possible explanations (in the way of defective qualities) multiply which may be accepted without necessarily accepting one which applies to the desired point; conversely, in so far as the conditions and circumstances are the same, then the explanations tend to become identical, *i.e.* so that the defective quality, whatever it was, that caused the proved error, must have operated, more or less certainly, to cause error also on the point at issue, so clearly connected with it in conditions and circumstances. For example, suppose a witness to testify that the accused struck the first blow in an affray; and suppose it to appear that this witness, four years ago, incorrectly asserted that a street-car conductor had not returned him the right amount of change after payment of fare; or that two years ago he incorrectly asserted that Yankton was the capital of South Dakota;

§ 1000. [1] See the opinion of Holmes, J., in Gertz *v.* Fitchburg R. Co., 137 Mass. 77, quoted *post*, § 1109.

From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 335–355.

or that one year ago he incorrectly asserted that his brother was in California; or that one month ago he incorrectly stated the day of the month; in all these instances the significance of the error is felt logically to be trifling, because the defect which was the source of any one of those errors may not be operating with respect to his assertion now in question, and the probability of its operating is so indefinite as not to be worth considering. But suppose it to appear that another assertion of this witness, that the deceased had no weapon in his hand when struck, is incorrect; now we may begin to attach significance to this error, because the source of it, while it *need* not be also operating as to the main assertion in question, is much more likely to be operating. Or, if the error consist in asserting that the deceased was knocked down by the accused's blow (when in truth he remained standing), the error is vital, because the defective source of that assertion must almost necessarily have operated also for the assertion that the accused struck first; and, if the former assertion appears to be untrustworthy, the latter must fall with it (so far as this witness' testimony is concerned).[1]

Thus, an error upon a distant and distinct matter is logically and psychologically much inferior in value to an error upon a closely connected matter, in its bearing upon the trustworthiness of the assertion in question. This seems to be the logical foundation for the readiness of our law to draw a distinction, in allowing proof of such errors, between matters "collateral" and other matters.

§ 1002. **Same: (2) Reason of Auxiliary Policy.** But it remains true that "collateral" errors, though only remotely probative, are still probative, *i.e.* relevant; and the controlling reason for exclusion is the reason of Auxiliary Policy (*ante*, § 42). This is the one emphasized by the Courts, with varying phrases and arguments:

1679, *Whitebread's Trial*, 7 How. St. Tr. 311, 374; the defendant offered to prove that Oates had made a false statement as to his companions, in his testimony at a prior trial for the Popish Plot. L. C. J. NORTH: "That is nothing to the purpose. If you can contradict him in anything that hath been sworn here, do." Defendant: "If we can prove him a perjured man at any time, we do our business." L. C. J.: "How can we prove one cause in another? . . . Can he come prepared to make good everything that he hath said in his life?" Another defendant: "All that I say is this, If he be not honest, he can be witness in no case." L. C. J.: "But how will you prove that? Come on, I will teach you a little logic. If you will come to contradict a witness, you ought to do it in a matter which is the present debate here; for if you would convict him of anything that he said in Ireland's trial, we must try Ireland's cause over again."

1680, *Earl of Castlemaine's Trial*, 7 id. 1067, 1081, 1107; on an offer to contradict on a collateral matter; Attorney-General: "If he may ask questions about such foreign matters as this, no man can justify himself; . . . any man may be catched thus." Defendant: "How can a man be catched in the truth?" L. C. J. SCROGGS: "We are not to hearken to it. The reason is this, first: You must have him perjured, and we are not now to try whether that thing sworn in another place be true or false; because that is the way to accuse whom you please, and that may make a man a liar that cannot imagine this will be put to him; and so no man's testimony that comes to be a witness shall leave himself safe."

§ 1001. [1] See the remarks of Story, J., in Santissima Trinidad, 7 Wheat. 283, 338.

1847, ALDERSON, B., in *Attorney-General* v. *Hitchcock*, 1 Exch. 104: "When the question is not relevant, strictly speaking, to the issue, but tending to contradict the witness, his answer must be taken (although it tends to show that he in that particular instance speaks falsely, and although it is [thus] not altogether immaterial to the issue) for the sake of the general public convenience; for great inconvenience would follow from a continual course of those sorts of cross-examinations which would be let in in the case of a witness being called for the purpose of contradiction." ROLFE, B.: "The laws of evidence on this subject, as to what ought and what ought not to be received, must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature and the time which it is practicable to bestow upon them. If we lived for a thousand years, instead of about sixty or seventy, and every case were of sufficient importance, it might be possible and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn."

1861, ROBINSON, C. J., in *R.* v. *Brown*, 21 U. C. Q. B. 334: ["These controversies] arise when a counsel, in cross-examination of a witness, uses a license which the practice allows him of asking a variety of questions having no apparent connection with the matter to be tried, in the hope of involving the witness in some contradiction. He is not in such cases obliged to explain the object of his questions, because that might often defeat his object; but he must be content to take the answers which the witness gives to any question that is irrelevant, and is not allowed to call witnesses to disprove the statements he makes in reply, because that would lead to the trial of innumerable issues irrelevant to the case, and would distract the attention of the jury. And besides, which is even a better reason, it would be unsafe and would be unjust towards the witness to infer, from any contradiction that might be given by another witness, that the one who has been cross-examined has sworn falsely and is unworthy of belief; since he could not have contemplated that he would be questioned upon points unconnected with the facts to be tried, and could therefore not be expected to be able on the sudden to support his testimony by the evidence of other persons, though it might be perfectly true in itself, notwithstanding the contradiction."

1847, ALLEN, J., in *Charlton* v. *Unis*, 4 Gratt. 62: "Any other rule would tend to divert the attention of the jury from the real enquiry before them, whether the witness was entitled to credit in the evidence he had given, to the enquiry whether he had told the truth upon some collateral question; and the danger is encountered that, upon this collateral issue raised on the trial, evidence may become proper, and so be let in, which would be illegal upon the trial of the issue between the real parties to the cause; and such illegal testimony may make an improper impression upon the minds of the jury, notwithstanding any instruction of the Court as to the proper bearing thereof."

1854, REDFIELD, C. J., in *Powers* v. *Leach*, 26 Vt. 277: "The issue attempted to be raised in regard to P.'s testimony was altogether collateral to the main issue in the case, and the Court might have rejected the testimony altogether and it would not have been error. We may suppose that such collateral issues might spring up in regard to the testimony of every witness upon the stand, and thus a single issue branch out into an indefinite number of subordinate and collateral ones, and these again into many more upon each point, so that it would become literally impossible ever to finish the trial of a single case. This rule, therefore, that one cannot be allowed to contradict a witness upon a matter wholly collateral to the main issue, becomes of infinite importance in the trial of cases before the jury. A judge may no doubt in his discretion allow a departure from the rule, but is not obliged to do so." [1]

§ 1002. [1] So also: 1896, Brickell, C. J., in Crawford *v.* State, 112 Ala. 1, 21 So. 214; 1897, Wallin, J., in State *v.* Haynes, 7 N. D. 70, 72 N. W. 923 (careful statement of the principle); 1900, Chase, J., in Cooper *v.* Hopkins, 70 N. H. 271, 48 Atl. 100.

It is here important to observe how far these reasons of policy coincide with the reasons which exclude extrinsic testimony of particular acts of misconduct to show bad moral character (*ante*, § 979). (1) There is a reason of Unfair Surprise (*post*, § 1849); one might contrive and charge upon the witness an error of any kind, time, or place; and it would obviously be unfair to expect him to be prepared to refute it, except so far as it bears directly upon the matter in litigation. This reason, then, is in general the same as in the other rule. (2) There is a reason of Confusion of Issues (*post*, § 1904); for the necessity of investigating each error alleged would add to the trial so much consumption of time and confusion of issues as to be intolerable. But here the reason points out a peculiar limitation; for while, in an issue of the witness' misconduct as relevant to show bad moral character, we are distinctly adding a mass of testimony otherwise irrelevant and out of place, yet this is not necessarily so with testimony directed to show the witness to be in error, since the point of the error may very well be a point already relevant in the case, and thus the testimony upon that point is no additional testimony, but is testimony which could have been in any case offered and must have been admitted if offered; on such a point, then, the proof of the witness' error is *not* an addition to the issues of the trial, and therefore is in no way obnoxious to the reason for exclusion.

§ 1003. **Test of Collateralness.** The reason above examined suggests immediately the limitation to the rule of exclusion. It is not the proof of *every* error that is obnoxious to the rule. The common term for designating the line of exclusion is "collateral"; *no contradiction, we are told, shall be permitted on "collateral" matters.*[1]

But this term furnishes no real test. If it be asked what "collateral" means, we are obliged either to define it further — in which case it is a mere epithet, not a legal test — or to illustrate by specific examples — in which case we are left to the idiosyncrasies of individual opinion upon each instance. The test that is dictated by the principle above explained, and the only test in vogue that has the qualities of a true test — definiteness, concreteness, and ease of application — is that laid down in Attorney-General *v.* Hitchcock: *Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?* This test was laid down in connection with the Self-contradiction doctrine, and is examined in further detail under that principle (*post*, § 1021). That the test is identical for both doctrines is perhaps not a necessary consequence of principle, though it may be (*post*, § 1019); but it is always accepted by the Courts as identical.

The test of Attorney-General *v.* Hitchcock (as explained *post*, § 1021) is as yet explicitly accepted by only a few Courts in this country for the doctrine

§ 1003. [1] 1824, Starkie, Evidence, I, 190 ("If a question as to a collateral fact be put to a witness for the purpose of discrediting his testimony, his answer must be taken as conclusive, and no evidence can be afterwards admitted to contradict it. This rule does not exclude the contradiction of the witness as to any facts immediately connected with the subject of inquiry)."

of Self-contradiction; but the same Courts apply it also to the present doctrine.[2] Other Courts are content to invoke simply the term "collateral", and to decide according to the circumstances of each case.[3]

[2] 1877, People *v.* Chin Mook Sow, 51 Cal. 597 ("When the question asked on cross-examination calls for a response in respect to a matter which the party asking the question would have a right to prove as an independent fact, the rule [as to collateralness] does not apply"; here a former conviction was admitted); 1882, Langhorne *v.* Com., 76 Va. 1019, *semble*. The term "immaterial" ought on principle to be equivalent to this, and is employed in some cases: 1834, Com. *v.* Buzzell, 16 Pick. 158 ("an immaterial fact"). In Chancery, it must be noted, a rule of special bearing arises as to questioning for the purpose of collateral contradiction, *i.e.* whether new interrogatories can be filed for that purpose after publication of the depositions; here collateral contradiction is allowed; see Purcell *v.* M'Namara, 8 Ves. Jr. 324 (1803), and note; Carlos *v.* Brook, 10 Ves. Jr. 49 (1804).

[3] In the following cases the rule was acknowledged and applied, but no specific test or useful illustration is furnished by them; in the ensuing sections (§§ 1004–1006) will be found those rulings which are concerned with some question of principle; the following list is not exhaustive, but the general rule is everywhere fully conceded, and a citation of every case in which it has been invoked is unnecessary: ENGLAND: 1805, R. *v.* Rudge, Peake Add. Cas. 232; 1806, Spenceley *v.* Wilmot, 7 East 108 (usury; the terms of other contracts with other persons of the same circle about the same time, not allowed to be contradicted); 1852, Palmer *v.* Trower, 8 Exch. 247 (the fact of a statement by a third party, inadmissible in itself; excluded); 1852, R. *v.* Dean, 6 Cox Cr. 23 (an irrelevant statement of the prosecutrix at a former time; excluded); 1860, Tolman *v.* Johnstone, 2 F. & F. 66; 1898, *Re* Haggenmacher's Patents, 2 Ch. 280.

UNITED STATES: *Federal:* 1898, Safter *v.* U. S., 31 C. C. A. 1, 87 Fed. 329; 1899, Scott *v.* U. S., 172 U. S. 343, 19 Sup. 209; *Alabama:* 1859, Rosenbaum *v.* State, 33 Ala. 361; 1896, Louisville J. C. Co. *v.* Lischkoff, 109 Ala. 136, 19 So. 436; 1896, Crawford *v.* State, 112 Ala. 1, 21 So. 214; 1897, Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568; 1900, Bessemer L. & I. Co. *v.* Dubose, 125 Ala. 442, 28 So. 380; *Arkansas:* 1879, Butler *v.* State, 34 Ark. 484; 1911, Brock *v.* State, 101 Ark. 147, 141 S. W. 756; *California:* 1878, People *v.* Bell, 53 Cal. 119; 1886, People *v.* Webb, 70 Cal. 120, 11 Pac. 509; 1888, People *v.* Dye, 75 Cal. 111, 16 Pac. 537; 1890, People *v.* Tiley, 84 Cal. 654, 24 Pac. 290; 1890, Davis *v.* Powder-Works, 84 Cal. 627, 24 Pac. 387; *Columbia* (Dist.): 1912, Thompson-Starrett Co. *v.* Warren, 38 D. C. App. 310; *Florida:* 1900, Stewart *v.* State, 42 Fla. 591, 28 So. 815; *Georgia:* 1903, Atlanta R. & P. Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494; *Illinois:* 1898, East Dubuque *v.* Burhyte, 173 Ill. 553, 50 N. E. 1077; *Indiana:* 1897, Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31; 1900, Barton *v.* State, 154 Ind. 670, 57 N. E. 515; 1901, Hinkle *v.* State, 157 Ind. 237, 61 N. E. 196; 1913, Sanger *v.* Bacon, 180 Ind. 322, 101 N. E. 1001 (falsification of a will); *Iowa:* 1906, State *v.* Arthur, 135 Ia. 48, 109 N. W. 1083 (burglary; B. being one of the persons breaking in, defendant's statement that he did not know B. was allowed to be contradicted); *Kansas:* 1890, State *v.* Blakesley, 43 Kan. 254, 23 Pac. 570; State *v.* Reick, 43 Kan. 636, 23 Pac. 1076; *Kentucky:* 1889, Com. *v.* Hourigan, 89 Ky. 312, 12 S. W. 550; 1898, Stephens *v.* Com., — Ky. —, 47 S. W. 229; *Louisiana:* 1898, State *v.* Wiggins, 50 La. An. 330, 23 So. 334; *Maine:* 1906, Finn *v.* New England T. & T. Co., 101 Me. 279, 64 Atl. 490 (a foreman's attempt to suppress a newspaper account of the accident, held collateral); *Maryland:* 1900, Baltimore City P. R. Co. *v.* Tanner, 90 Md. 315, 45 Atl. 188; *Massachusetts:* 1861, Com. *v.* Fitzgerald, 2 Atl. 297; 1881, Shurtleff *v.* Parker, 130 Mass. 297; 1889, Fitzgerald *v.* Williams, 148 Mass. 462, 466, 20 N. E. 100; 1905, Chalmers *v.* Mfg. Co., 164 Mass. 532, 42 N. E. 98; *Michigan:* 1866, Fisher *v.* Hood, 14 Mich. 190; 1916, Sykes *v.* Portland, 193 Mich. 86, 159 N. W. 325 (to rebut expert testimony that an electric shock "wears off" soon, testimony of one who continued for a year to feel effects); *Minnesota,* 1905, McKenzie *v.* Banks, 94 Minn. 496, 103 N. W. 497; *Missouri:* 1876, Iron Mountain Bank *v.* Murdock, 62 Mo. 70, 74; 1896, State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; *Montana:* 1903, Bullard *v.* Smith, 28 Mont. 387, 72 Pac. 761; *Nebraska:* 1894, Carpenter *v.* Lingenfelter, 42 Nebr. 728, 60 N. W. 1022; 1903, Burke Co. *v.* Fowler, — Nebr. —, 93 N. W. 760; 1904, Ferguson *v.* State, 72 Nebr. 350, 100 N. W. 800; *New Hampshire:* 1851, Hersom *v.* Henderson, 23 N. H. 506; 1858, Gerrish *v.* Pike, 36 N. H. 512, 517; *New Jersey:* 1900, State *v.* Sprague, 64 N. J. L. 419, 45 Atl. 788; *North Dakota:* 1897, State *v.* Haynes, 7 N. D. 70, 72 N. W. 923; *Ohio:* 1865, Mimms *v.* State, 16 Oh. St. 233; *Oklahoma:* 1917, Willis *v.* State, 13 Okl. Cr. 700, 167 Pac. 333 (homicide; "I know that fellow Willis, and he will kill him", held collateral); 1922, Phillips *v.* State, — Okl. Cr. —, 203 Pac. 902 (murder; false complaint by a witness on another charge, not admitted); *Oregon:* 1901, Williams *v.* Culver, 39 Or. 337, 64 Pac. 763; 1901, Oldenburg *v.* Oregon Sugar Co., 39 Or. 564, 65 Pac. 869; *Pennsylvania:* 1859, Schenley *v.* Com., 36 Pa. 61; 1861, Wright *v.*

The sound rule would be to leave the application of the rule entirely in the control of the trial Court;[4] but there is as yet little sign of such a practice.

§ 1004. **Two Classes of Facts not Collateral; (1) Facts relevant to the Issue.** In applying the test of Attorney-General *v.* Hitchcock, it is obvious that there are two different groups of facts of which evidence would have been admissible independently of the contradiction: (1) facts relevant to some issue in the case, and (2) facts relevant to the discrediting of a witness.

(1) *Facts relevant to some issue in the case.* The test in question usually causes here no difficulty in its application; the issues in the case indicate what facts would be relevant:

1834, *Com.* v. *Buzzell*, 16 Pick. 158; indictment for entering and burning, as members of a mob, an Ursuline convent; an exciting cause to the action of the mob was a rumor that one of the nuns was confined there against her will, and testimony to her insanity had been offered by the prosecution; the defendant then offered evidence of her sanity. PER CURIAM: "The question is whether the statement of an immaterial fact can be contradicted, if it comes out on the examination of a witness in chief. Now neither party can be allowed to show the internal condition of this institution, by way of excuse, justification, or apology for the attack made upon it; so upon an indictment for setting fire to a house of ill-fame, the bad character of the house is no ground of defence. . . . Now here the evidence as to the insanity of the nun was immaterial, . . . and the other party cannot call witnesses to contradict it."

1921, *Felstiner* v. *Widelitz*, — Sup. App. T. —, 191 N. Y. Suppl. 296; action to dispossess; landlord and tenant disputed as to the terms of the written lease, which was lost, and this was the only issue. The tenant, in a conversation with the landlord who was asking for an increase of rent and threatening expulsion, had said: "I got a wife and eight children to support. Now, after I put so much money in the building, why don't you leave me alone, and give me a chance to live? I pay always my rent on time; why bother me? I got a straight lease from the beginning. I got a straight lease for five years now. After five years, then you get the building. You got enough."

Cumpsty, 41 Pa. 110; 1867, Gregg *v.* Jamison, 55 Pa. 471; 1900, Coates *v.* Chapman, 195 Pa. 109, 45 Atl. 676; 1913, Launikitas *v.* Wilkesbarre & W. V. T. Co., 241 Pa. 458, 88 Atl. 703 (but why should the opinion quote six prior opinions and write five hundred lines, on a point settled for two hundred years past?); 1921, Com. *v.* Loomis, 270 Pa. 254, 113 Atl. 428 (murder); *South Carolina:* 1890, State *v.* Wyse, 33 S. C. 591, 12 S. E. 556; 1897, State *v.* Adams, 49 S. C. 414, 27 S. E. 451; 1898, State *v.* Sanders, 52 S. C. 580, 30 S. E. 616; 1921, State *v.* Thompson, — S. C. —, 110 S. E. 133 (murder); *Tennessee:* 1882, Rocco *v.* Parczyk, 9 Lea 328, 331; *Texas:* 1890, Sutor *v.* Wood, 76 Tex. 497; 1897, Texas & P. R. Co. *v.* Phillips, 91 Tex. 278, 42 S. W. 862; 1903, Connell *v.* State, 45 Tex. Cr. 142, 75 S. W. 512; *Vermont:* 1840, Stevens *v.* Beach, 12 Vt. 587; 1858, State *v.* Thibeau, 30 Vt. 101, 104; 1881, Smith *v.* Royalton, 53 Vt. 609; 1911, Comstock's Adm'r *v.* Jacobs, 84 Vt. 277, 78 Atl. 1017; *Virginia:* 1811, Fall *v.* Overseers, 3 Mumf. 495, 506; 1847, Charlton *v.* Unis, 4 Gratt. 61; 1873, Murphy *v.* Com., 23 Gratt. 965; *Washington:* 1903, State *v.* Carpenter, 32 Wash. 254, 73 Pac. 357; 1910, Wharton *v.* Tacoma F. D. Co., 58 Wash. 124, 107 Pac. 1057; 1912, State *v.* Stone, 66 Wash. 625, 120 Pac. 76; 1918, State *v.* Hood, 103 Wash. 489, 175 Pac. 27 (murder); *West Virginia:* 1901, State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

The following corollary seems sensible: 1910, People *v.* Leonardo, 199 N. Y. 432, 92 N. E. 1060 (murder; identity of defendant's mother's cameo ring; the prosecution allowed to contradict the defendant's assertions as to the ring, made on cross-examination, because the defendant, by calling the mother to corroborate the defendant, had "voluntarily assumed to make the collateral issue a material one").

[4] 1893, Spaulding *v.* Merrimack, 67 N. H. 382, 36 Atl. 253; Baldwin *v.* Wentworth, 67 N. H. 408, 36 Atl. 365; 1897, Perkins *v.* Roberge, 69 N. H. 171, 39 Atl. 583.

Contra: 1900, Cooper *v.* Hopkins, 70 N. H. 271, 48 Atl. 100.

The landlord's attorney did not move to strike out this testimony; but on cross-examination asked the tenant how many leases he had and how many houses he owned, and, on the tenant's counsel objecting to this as immaterial, argued, "This man had volunteered the information — and he did not do it of his own accord — that he was a man with a family of eight children, a poor man with eight children to support. My purpose is to show that this man is a man that has any number of houses that he owns in fee and dozens of houses on lease, and is a very rich man"; the objection was held valid. This ruling is unsound, because the offered fact was under the circumstances not collateral to the motive for agreeing to certain terms.

§ 1005. **Same: (2) Facts discrediting the Witness in respect to Bias, Corruption, Skill, Knowledge, etc.** Since, by the rule in Attorney-General *v.* Hitchcock, any fact which would be independently admissible may be made the subject of a contradiction, a second class of facts includes those which could *otherwise be receivable for the purpose of impeaching some specific testimonial quality*. The range of such modes of impeachment has already been considered (*ante*, §§ 943–996); and they must now be reviewed in the application of the present rule:

(*a*) *Moral character.* Particular *acts of misconduct* are not provable by extrinsic testimony to impeach moral character (*ante*, § 979); they are therefore also not provable merely in contradiction of the witness' statements on the stand;[1] except a *judgment of conviction of crime*, which, so far as it is

§ 1005. [1] ENGLAND: 1871, R. *v.* Holmes, L. R. 1 C. C. R. 334 (rape; intercourse of the prosecutrix with a third person); UNITED STATES: *Massachusetts:* 1880, Com. *v.* Dunan, 128 Mass. 422 (the witness' residence); *Michigan:* 1881, Hamilton *v.* People, 46 Mich. 186, 9 N. W. 247; 1882, Driscoll *v.* People, 47 Mich. 416, 11 N. W. 221; 1883, People *v.* Wolcott, 51 Mich. 617, 17 N. W. 78; 1909, People *v.* Connelly, 157 Mich. 260, 122 N. W. 80 (husband-murder; the wife's chastity before marriage, not allowed to be contradicted; Hooker, J., diss., on the facts; neither of the opinions cites any of the foregoing rulings in this jurisdiction); *New Hampshire:* 1863, State *v.* Knapp, 45 N. H. 154 (rape, intercourse with the prosecutrix); *New Jersey:* 1887, Pullen *v.* Pullen, 43 N. J. Eq. 136, 6 Atl. 887 (whether the witness had committed larceny); 1900, Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62; *New York:* 1862, Newcomb *v.* Griswold, 24 N. Y. 299; 1873, Stokes *v.* People, 53 id. 175 (a witness denied having "taken things"; error not allowed to be shown); 1881, Conley *v.* Meeker, 85 id. 618 (a witness answered evidence of his conviction for crime by declaring that he had since reformed; evidence of his having, since discharge, conducted gambling-houses, was rejected as collateral); 1888, People *v.* Greenwall, 108 id. 296, 300, 15 N. E. 404 (that the defendant, a witness, had committed a burglary, denied by him, excluded); *North Dakota:* 1909, Schnase *v.* Goetz, 18 N. D. 594, 120 N. W. 553; *Vermont:* 1922, State *v.* Long, — Vt. —, 115 Atl. 734 (murder; witness' immoral conduct held collateral); *Wisconsin:* 1891, Humphry *v.* State, 78 Wis. 571, 47 N. W. 386 (mere reflections on the complainant's character in a bastardy case, but not actual opportunities of intercourse with other men about the time in question, excluded).

In some of these cases, this prohibition of extrinsic testimony of misconduct is put on the sole ground of Collateral Contradiction; *e.g.* 1871, R. *v.* Holmes, L. R. 1 Cr. C. R. 334 (attempt at rape; the prosecutrix denied having had intercourse with one S., and a contradiction was refused). But this error is a fundamental one, for it ignores the vital distinction, of history as well as of principle, between the present rule and the rule against extrinsic testimony of particular misconduct. The distinction has been already pointed out *ante*, § 979. It is enough here to note that there is a double exclusion of such evidence, *i.e.* (1) it cannot enter for the purpose of showing Character, for reasons affecting that purpose of proof; and (2) it cannot enter as a Contradiction, for reasons already here explained. Compare Alderson, B., in Attorney-General *v.* Hitchcock (1847), 1 Exch. 103 ("the inadmissibility of such a contradiction [as to his personal character and as to his having committed any particular crime] depends, indeed, upon another principle altogether").

provable by extrinsic testimony to impeach character (*ante*, §§ 980, 987), is therefore also thus provable in contradiction.[2]

(*b*) *Bias.* Particular circumstances and expressions indicating bias are provable by extrinsic testimony (*ante*, §§ 948–950); they are therefore also provable in contradiction:[3]

1836, COLERIDGE, J., in *Thomas* v. *David*, 7 C. & P. 350 (assumpsit on a promissory note; the plaintiff's female servant had attested the signature; being asked, on cross-examination, "whether she did not constantly sleep in the same bed with her master, the plaintiff", and denying it, she was allowed to be contradicted): "If the question had been whether the witness had walked the streets as a common prostitute, I think that that would have been collateral to the issue, and that, had the witness denied such a charge. she could not have been contradicted. But here, the question is whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him to support a forgery, just in the same way as if she had been asked if she was the sister or daughter of the plaintiff and had denied that."

(*c*) *Corruption.* For the same reason as the preceding, a contradiction is permissible upon facts which tend to show (*ante*, §§ 956–963) the witness' corrupt testimonial intent for the case in hand.[4]

[2] 1920, MacKnight *v.* U. S., 1st C. C. A., 263 Fed. 832, 840; 1877, People *v.* Chin Mook Sow, 51 Cal. 597; 1909, Dotterer *v.* State, 172 Ind. 357, 88 N. E. 689 (accomplice denying his presence, impeached by a judgment of conviction for his part in the battery); 1909, Com. *v.* Racco, 225 Pa. 113, 73 Atl. 1067; and the cases cited *ante*, §§ 980, 987.

[3] *Accord: Eng.* 1858, O'Brien, J., in R. *v.* Burke, 8 Cox Cr. C. 49; *U. S. Ala.* 1905, Morris *v.* State, — Ala. —, 39 So. 608; *Ga.* 1903, Purdee *v.* State, 118 Ga. 798, 45 S. E. 606; *Ind.* 1900, Whitney *v.* State, 154 Ind. 573, 57 N. E. 398; *Ky.* 1901, Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976; *La.* 1906, State *v.* Craft, 117 La. 213, 41 So. 550 (similar to Thomas *v.* David, quoted *supra*); *Mich.* 1890, Helwig *v.* Lascowski, 82 Mich. 623, 46 N. W. 1033 ("the question of the status of the witness as to interest, relationship, or conviction of crime, is not now and never was a collateral one, in the sense that the party cross-examining him is bound by his answer"); *N. H.* 1852, Martin *v.* Farnham, 25 N. H. 199; 1881, Watson *v.* Twombly, 60 id. 491; *N. Y.* 1856, Van Wyck *v.* McIntosh, 14 N. Y. 439, 443; *N. Car.* 1896, Cathey *v.* Shoemaker, 119 N. C. 424, 26 S. E. 44; *N. Dak.* 1905, State *v.* Malmberg, 14 N. D. 523, 105 N. W. 614; *Ohio*, 1900, Hayes *v.* Smith, 62 Oh. 161, 56 N. E. 879; *Okl.* 1911, Gibbons *v.* Terr., 5 Okl. Cr. 212, 115 Pac. 129; *Tenn.* 1900, Livermore F. & M. Co. *v.* Union S. & C. Co., 105 Tenn. 187, 58 S. W. 270, *semble; Utah*, 1895, Fenstermaker *v.* Pub. Co., 12 Utah 439, 43 Pac. 112.

Add the similar cases on *self-contradiction*, *post*, § 1022.

Contra: 1879, Haley *v.* State, 63 Ala. 86, *semble;* 1882, Langhorne *v.* Com., 76 Va. 1019 (refusing to allow evidence of incorrectness in matters not admissible in chief to show bias, since the rule on the latter subject is strict in this State; see *ante*, § 950).

[4] 1850, Melhuish *v.* Collier, 19 L. J. Q. B. 493 (an attempt by a party to suborn testimony; admitted); 1889, Alexander *v.* Vye, 16 Can. Sup. 501, 502, 521 (that the defendant, denying the genuineness of a document, could be asked whether he had not changed his style of signature since action begun, and his denial refuted by documents bearing his signature, allowed; two judges diss. on the latter point); 1917, Johnson *v.* Samuels, 186 Ind. 56, 114 N. E. 977 (that a witness to testator S.'s insanity had gone to a person and said "If your mother will swear that S. was of unsound mind, I will see that she gets $25 out of it", held inadmissible, on the ground that it was a self-contradiction not on a "material matter in issue"; this ruling indicates an incredible confusion of the rules of evidence); 1897, State *v.* McKinistry, 100 Ia. 82, 69 N. W. 267 (an attempt to bribe); 1901, Powers *v.* Com., 110 Ky. 386, 63 S. W. 976 (bribery); 1899, Richardson *v.* State, 90 Md. 109, 44 Atl. 999 (attempt to bribe another witness); 1871, Strang *v.* People, 24 Mich. 7 (facts tending to show a corrupt agreement between the witness and his party).

Contra: 1811, Harris *v.* Tippett, 2 Camp. 637 (whether the witness had attempted to dissuade opponent's witness from attending; contradiction excluded, because "collateral", "irrelevant to the issue"; but this ruling has been universally treated as erroneous; see the exposition *post*, § 1023, under Self-contradiction).

(*d*) *Skill.* Particular instances of error indicating lack of expertness are usually not provable by extrinsic testimony, while circumstances other than these, diminishing the witness' qualifications, may perhaps be thus proved (*ante*, §§ 991, 992). Such facts, therefore, may or may not be provable in contradiction.[5] The trial Court should have discretion:

1908, *Arthur Train*, in the "Sunday Magazine" (Nov. 7, 1908): "Most cases turn on an unconsidered point. A prosecutor once lost what seemed to him the clearest sort of a case. When it was all over, and the defendant had passed out of the courtroom rejoicing, he turned to the foreman and asked the reason for the verdict. 'Did you hear your chief witness say he was a carpenter?' inquired the foreman. 'Why, certainly,' answered the district attorney. 'Did you hear me ask him what he paid for that ready-made pine door he claimed to be working on when he saw the assault?' The prosecutor recalled the incident and nodded. 'Well, he said ten dollars — and I knew he was a liar. A door like that don't cost but four-fifty!' It is, perhaps, too much to require a knowledge of carpentry on the part of a lawyer trying an assault case. Yet the juror was undoubtedly right in his deduction."

(*e*) *Intoxication, and Illness.* The facts of intoxication and of illness, at the time of the events observed or of giving testimony, are admissible to discredit the witness' testimonial powers (*ante*, §§ 933, 934). This class of facts is therefore also provable in contradiction.[6]

(*f*) *Opportunity of observing the events.* A necessary qualification in a witness is personal knowledge, *i.e.* an opportunity, as to place, time, proximity, and the like, to observe the event or act in question (*ante*, § 650), and the deficiency of such opportunity may be shown to discredit (*ante*, § 994).

The following case is peculiar: 1916, R. *v.* Baugh, 31 D. L. R. 6, Ont. (malicious conspiracy to prosecute S.; as a part of proving the purport of the prior prosecution and the defendant's conduct of it, the Crown here on cross-examination read the former judge's findings, including his expression of opinion as to the now defendant's lack of veracity in his then testimony; held improper, one judge dissenting).

For the application of the rule to proof of particular errors to *impeach the credit of a party's book of accounts*, see *post*, §§ 1531, 1557.

For proof of *prior false claims or charges* in impeachment, see *ante*, § 963.

[4] 1867, Whitney *v.* Boston, 98 Mass. 316 (error as to the dimensions of a shop, illustrating the witness' acquaintance with land valued by him; admitted); 1895, Kennett *v.* Engle, 105 Mich. 693, 63 N. W. 1009 (a physician was asked a test question unconnected with the case, and he was not allowed to be contradicted); 1918, Brosius & Co. *v.* First Nat'l Bank, — Okl. —, 174 Pac. 269 (action for a bank deposit; the bank officers having testified from their books, "this is not the first error that has occurred in your bank?", allowed);

Compare the citations *ante*, §§ 991, 992.

For proof of *other sales*, to discredit a *value-witness*, see *ante*, § 464.

[5] *Federal:* 1896, Ludtke *v.* Hertzog, 18 C. C. A. 487, 72 Fed. 142 (dates of occurrences being material, extrinsic testimony was admitted as to a gross error of date made by an aged witness on a point otherwise wholly immaterial); *Indiana:* 1908, Pittsburgh, C. C. & St. L. R. Co. *v.* O'Conner, 171 Ind. 686, 85 N. E. 969 (intoxication); *New Hampshire:* 1900, Cooper *v.* Hopkins, 70 N. H. 271, 48 Atl. 100 (trespass to an alleged shop-lifter; clerk testifying for defendant allowed to be contradicted as to her excitement at the time, because this affected her ability "to correctly observe what took place"; but not as to her statements that the trespassing clerk "had done the same thing before"); *New York:* 1893, People *v.* Webster, 139 N. Y. 73, 86, 34 N. E. 730 (that she was under the influence of opium at the time, allowed, since "the value of her testimony depended largely on the accuracy of her actions"), *North Carolina:* 1893, State *v.* Rollins, 113 N. C. 722, 732, 18 S. E. 394 (intoxication at the time of the events; because it did not affect his character, but "his capacity to know and remember with accuracy what took place", contradiction was allowed); *Wisconsin:* 1898, Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165 (contradiction allowed as to intoxication at and about the time of the events).

Hence, all facts which bear upon the position, distance, and surroundings, the bystanders and their conduct, the time and the place, the things attracting his attention, and similar circumstances, said by the witness to have been observed by him at the time of observing the main event testified to by him, are material to his credit in so far as they purport to have formed a part of the whole scene to his observation; thus, if an error is demonstrated in one of the parts observed, the inference (more or less strong) is that his observation was erroneous (or his narration manufactured) on other and more important parts also.

This source of discredit is of vast importance in the overthrow of false or careless testimony; and its permission must be provided for in any definition of the term "collateral":[7]

1684, *Lady Iry's Trial*, 10 How. St. Tr. 555, 569; the defendant's title depended on a pretended old deed, from one Marcellus Hall to one Stepkins, found opportunely by one

[7] The following cases illustrate this mode of contradiction:

England: 1679, Harcourt's Trial, 7 How. St. Tr. 311, 387 (Oates, the mainstay of the prosecution, had testified that one Ireland, another conspirator, not on trial, had in his presence parted from the defendant at London, between Aug. 8 and 12; it was proposed to show that this was false, Ireland being in the country at the time; L. C. J. Scroggs: "They [defendants] must have right, though there be never so much time lost, and patience spent. Say they, 'We must prove and contradict men by such matters as we can; people may swear downright things, and it is impossible to contradict them; but we will call witnesses to prove those particulars that can be proved'"; and it was by just such minor falsities as this that the whole monstrous fabric of Oates' perjury was later discovered and his punishment obtained); 1831, R. *v.* Campbell, Cr. & Dix Abr. 581 (contradiction as to the presence at the riot of one C., jointly indicted, but not on trial; admitted); 1838, R. *v.* McKenna, Cr. & Dix Abr. 580 (contradiction as to the presence at the murder of one M., jointly indicted with defendants, but now at large; admitted); 1842, R. *v.* Overton, 2 Moo. Cr. C. 263 (perjury; on a charge against H. of coursing with a dog without a license, the now defendant testified that the dog was his, and in giving the date of the receipt for his purchase from H. swore falsely; yet either date if correct would have exonerated H.; evidence of the incorrectness of the assertion admitted by all the Judges present); 1862, R. *v.* Dennis, 3 F. & F. 502 (eye-witness of a crime; present statement that she was not acquainted with the man; the contrary offered; admitted).

United States: *Colorado:* 1902, Barry *v.* People, 29 Colo. 395, 68 Pac. 274; *Georgia:* 1893, East Tennessee R. Co. *v.* Daniel, 91 Ga. 768, 18 S. E. 22 (contradiction allowed, against an alleged eye-witness, of his statement that immediately before arriving at the place he made a purchase at a store; "it contradicts the witness as to the train of events which led him to be present, and thus tends to discredit him as to the fact of his presence"); 1900, Tiller *v.* State, 111 Ga. 840, 36 S. E. 201 (four persons being defendants, testimony to the presence of all four at a place was allowed to be shown erroneous, as to one of the four, by another of the four); *Maryland:* 1834, Goodhand *v.* Benton, 6 G. & J. 481, 488 (title to a slave; whether the possession by B. was in the year 1816 or 1817 was material; a witness who testified that, on going to pay rent to B. in 1817 he saw the slave in B.'s possession, and that the final settlement occurred two years later, was allowed to be contradicted by evidence that the final settlement occurred in 1818, so that he was in error in one or the other statements); *New York:* 1859, Stephens *v.* People, 19 N. Y. 572 (charge of murder by arsenic; testimony for defence that the arsenic purchased by defendant was used for rats in the cellar where provisions were eaten by them; contradiction, that no provisions were kept in the cellar, allowed); 1904, Smith *v.* Lehigh Valley R. Co., 177 N. Y. 379, 69 N. E. 729 (plaintiff not allowed to contradict the defendant's engineer, who testified on cross-examination that the bell had been automatically ringing for several miles, by showing that it did not ring at certain points within that distance; the opinion by Parker, C. J., confuses the issue; Cullen, J., diss.).

Excluded, but erroneously: 1897, Chicago City R. Co. *v.* Allen, 169 Ill. 287, 48 N. E. 414 (contradiction of a witness explaining presence at a place as going there to vote, by showing that it was not his lawful voting place, excluded).

See the cases cited *post*, § 1006, for cross-examination only.

Knowles in his own garret; Knowles did not know that any Hall deeds affected the defendant's title, and he was questioned as to how he had known in his pretended search that this deed would be material. L. C. J. JEFFREYS: "Look you, then, we ask you how you came to know it was a deed belonging to Stepkins?" *Witness:* "I read the backside, and put my hand to it." *L. C. J.:* "How came you to put your hand to this deed as belonging to Stepkins, when you never looked into the deed [as you have already sworn]?" *Witness:* "When I found this deed to have written upon it 'Marcellus Hall', I did believe it was something that concerned the Stepkins'." *L. C. J.:* "Let us see the deed now. You say that was the reason, upon your oath?" *Witness:* "Yes, it was"; *L. C. J.:* "Give Mr. Sutton [the defendant's attorney] his oath. Look on the outside of that deed, and tell us whose handwriting that is"; *Sutton:* "All but the word 'Lect.' is my handwriting." *L. C. J.:* "Then how couldst thou, [Knowles,] know this to belong to the Stepkins' by the words 'Marcellus Hall' when you first discovered this deed in September, 1682, and you found it by yourself and put your hand to it, and yet that 'Marcellus Hall' be written by Mr. Sutton, which must be after that time?" *Counsel* for defendant: "Here are multitudes of deeds, and a man looks on the inside of some and the outside of others; is it possible for a man to speak positively as to all the particular deeds, without being liable to mistake?" *L. C. J.:* "Mr. Solicitor, you say well. If he *had* said, 'I looked upon the outside of some and the inside of others, and wherever I saw *either* on the outside *or* in the inside the name of Stepkins or Marcellus Hall, I laid them by and thought they might concern my lady Ivy', that had been something. But when he comes to be asked about this particular deed, and he upon his oath shall declare that to be the reason why he thought it belonged to Stepkins, [namely], because of the name of 'Marcellus Hall' on the outside and never read any part of the inside, when Sutton swears 'Marcellus Hall' was [later] written by him, what would you have a man say? . . . And you shall never argue me into a belief that it is impossible for a man to give a true reason, if he have one, for his remembrance of a thing"; and before long the defendant's counsel were obliged to withdraw the witness as a clear liar; the defendant was afterwards indicted for forging the deeds.

1861, ROBINSON, C. J., in *R.* v. *Brown*, 21 U. C. Q. B. 330, 336 (indictment for murder: M. testified that she saw the defendant and S. throw the deceased off a bridge, giving a detailed description of S.; the defendant offered a witness D. to show that S. was 50 miles away at that time; the judge insisted that S. himself should be called, and if contradicted, then D.; held, that D. also should have been called, the point of contradiction being material): "It appears to me that any fact so closely connected with the alleged offence as to be in fact a party of what was transacted or said to be transacted at the very moment cannot be treated as irrelevant in investigating the truth of the charge. If, for instance, the witness for the Crown, knowing a particular watch or some remarkable article of dress that the deceased usually wore, had sworn that she saw Brown take the article from his person before throwing him into the river, it would have been a material circumstance to be shown on the part of the prisoner, if it could have been, that the deceased had left the watch or the article of dress at home when he went out that evening, and if they could be produced to the jury on the trial. So if the Crown witness had sworn the offence was committed in some obscure hovel in the woods or in the town, which she pretended to describe with certainty and which she had known well, it could not have been irrelevant to the case to prove that that house or hovel had been totally destroyed by fire some weeks before the time spoken of, so that the murder could not have been committed in it. Yet in all these cases it must be admitted that if the crime of murder were committed by the prisoner, he would not the less be guilty of that crime because the deceased had not been robbed as well as murdered, or because he had not been killed in the place described by the witness; nor would the prisoner be less guilty of murder if he committed the deed alone, or without being assisted by Sherrick as the witness described."

1903, Hon. A. C. *Plowden*, Grain or Chaff; the Autobiography of a Police Magistrate, p. 154: "In the Tichborne Case, by a curious coincidence, at a sudden turn in the fortunes

of the case, I was enabled to volunteer a piece of evidence which was considered sufficiently important to require my being called as a witness for the Crown. A witness had been called for the defence, Jean Luie; he was afterwards convicted of perjury, but at the moment his evidence was damaging, and unless it could be controverted there was no chance of a conviction. It was one of the sensational episodes of the trial. Among other lies, he swore that he came to London from New York, by a steamer called the 'Circassian', arriving on a certain day in May. As it happened, I had landed at Liverpool that same day, [returning from my American tour,] and *my* steamer was the 'Circassian', — only it had sailed from Quebec, not from New York. The coincidence was so striking that I immediately whispered it to Mr. Hawkins, Q. C., who was conducting the case for the Crown, and behind whom I was seated. He at once asked leave of the Court to interpose me as a witness, and I was examined where I stood, in my wig and gown."

1911, *Steinie Morrison's Trial* (Notable English Trials Series, 1922, p. 224); the accused was charged with a murder committed on the night of Dec. 31, 1910; the deceased had been seen at a restaurant with the accused on that evening, and the accused had a long wrapped package said to look like a bar of iron; but he testified that it was a flute which he had just bought. The prosecution now attempted to discredit this story. Mr. *Muir* — "The accused said that on Saturday morning, 31st December, he had bought a flute at a stall in the market. I propose to call evidence as to what the state of the market was on that morning." Stephen Dart, examined by Mr. *Muir* — "I am a police constable, and I was on traffic duty at the top of Leman Street in the High Street, Whitechapel, between eight in the morning and twelve noon on Saturday, 31st December last. The plan (exhibit 76) shows where the stalls stand in that part. In the morning there is a hay market in the middle of the street, and no stalls are allowed to come any further towards Leman Street from the entrance to Aldgate Street Chambers." Mr. *Abinger* — "My lord, my learned friend cross-examined the prisoner upon certain matters on a certain issue, and he is now proceeding to call evidence to controvert the oath of the defendant. I submit that he can only do so where the matter that he is cross-examining about is relevant to the issue, and if it is not relevant to the issue he is bound by the defendant's answer." Mr. J. DARLING — "But why is this not relevant to the issue?" Mr. *Abinger* — "The issue in this Court is ay or no, did the prisoner murder Mr. Bernon?" Mr. J. DARLING — "But there are many other issues besides that; that is one issue." Mr. *Abinger* — "My lord, that is the issue." Mr. J. DARLING — "That is one issue, that is the main issue; but there are many other issues leading up to that. This is not merely as the general proof of the guilt of the prisoner. Mr. *Abinger* — "It is contradicting him." Mr. J. DARLING — "It is not merely as to his guilt." Mr. *Abinger* — "I have never heard it ruled yet that where a prisoner had been cross-examined and counsel for the Crown had closed the case he might call evidence to contradict the prisoner's oath on by-issues." Mr. J. DARLING — "You will find practically all the modern law on the subject in the judgment in *The King* v. *Crippen* which is reported." Mr. *Abinger* — "In the case of *The King* v. *Crippen* it was a different point altogether. In *The King* v. *Crippen* the question arose in this way — speaking from memory — whether a shirt which was found in the cellar was purchased a long time before the murder or after the murder, or about the time of the murder. The prisoner was cross-examined, and swore to a date when he purchased the shirt, which date made it impossible that he could have had the shirt when he committed the murder, because that particular shirt had only been manufactured afterwards. I submit that there is no analogy between the two cases. Your lordship sees how this question arises. The dispute here is this. The Crown allege that on the night of the murder the prisoner took away from Snelwar's restaurant a parcel containing a bar of iron. On the other hand, the prisoner says on the night of the murder, 'I took away a parcel which contained a flute.' That is strictly relevant to the issue. Now, my learned friend is trying to prove that the prisoner when in the box swearing that he bought that flute on that day was not telling the truth — that he bought it at some other date. That is not the issue.

The issue is, was this a bar of iron or a flute that the prisoner purchased? 'Non constat' that if he had bought it on some date — not that date — it might have been that parcel." Mr. J. DARLING — "I will give you the benefit of the doubt that you felt, and exclude the evidence."

A peculiar example of the operation of this principle is seen (in the cases cited *ante*, § 228, n. 6, § 231, n. 1, and § 263, especially the last) where a witness has testified to a rumor or repute as causing a party's alleged *belief* or deranged mental state, and then the opponent offers to *disprove the fact* thus alleged to have been rumored or reported; its non-existence makes less probable the alleged report of it, and thus discredits the witness; from the point of view of the present rule, there ought to be no obstacle.

(*g*) *Recollection.* When the memory is tested by asking for the witness' recollection of facts not otherwise material, his errors of recollection cannot be shown by extrinsic testimony (*ante*, § 995). But circumstances which form the alleged grounds of his recollection of material facts testified to by him should be subject to contradiction, for the same reason as in the preceding topic.[8]

(*h*) *Narration.* Circumstances affecting the witness' ability to narrate his story intelligently and correctly are material to his credit, and should be subject to contradiction.[9]

(*i*) *Prior consistent statements* of the witness are usually not provable to corroborate him (*post*, § 1124); hence, his error in affirming that he has made them is not provable by other witnesses, except in those situations in which those statements would have been admissible for him.[10]

In general, the exclusionary rule is too strictly enforced. "Everything," said Lord Denman, "is material that affects the credit of the witness." The discretion of the trial Court should be left to control. It is a mistake to lay down any fixed rule which will prevent him from permitting such testi-

[8] 1854, Com. *v.* Hunt, 4 Gray Mass. 422 (that a memorandum, said by the witness to have been written by him, and serving as a record of his past recollection, was in fact not in his writing; admitted); compare the cases cited *ante*, § 995.

[9] Cases cited *ante*, § 996, and the following case: 1906, State *v.* Goodson, 116 La. 388, 40 So. 771 (a Syrian witness having insisted that he could not speak English, and having testified through an interpreter, the fact of his ability to speak and understand it was allowed to be shown to discredit him; sensible opinion by Porter, J., trial judge).

The following case was erroneously decided by the majority; compare with it O'Connell's story, cited *ante*, § 811: 1858, R. *v.* Burke, Ire., 8 Cox Cr. 45 (witness who stated that he could not speak English and was therefore examined in Irish through an interpreter; not allowed to be contradicted as to having spoken in English within a few days; three judges diss.).

[10] 1861, M'Kewan *v.* Thornton, 2 F. & F. 599 (denial of the fact of a former complaint; correction allowed because the complaint would thus appear not to have been an afterthought, as claimed; this illustrates the principle, for the former statement would here have been admissible independently in corroboration); 1843, Whiteford *v.* Burckmyer, 1 Gill Md. 140 (the cross-examining party's own declarations in his favor, excluded); 1889, Morris *v.* R. Co., 116 N. Y. 556, 22 N. E. 1097 (a showing of error as to whether he had said what he now says, excluded).

But the following exceptional case "proves the rule"; 1906, Gulf C. & S. F. R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068 (a witness to the whereabouts of the deceased testified that he had told W. about the deceased M., soon after the death; W. was allowed to contradict this, because on the facts if the witness had not mentioned to anybody, on hearing of M.'s death, what he knew about M., it indicated that his testimony was fabricated; good opinion by Williams, J.).

mony as may expose a false witness. History has shown, and every day's trials illustrate, that not infrequently it is in minor details alone that the false witness is vulnerable and his exposure is feasible.[11]

§ 1006. **Same: Collateral Questions on Cross-Examination.** (1) The essential feature of this mode of impeachment is the *demonstration of the witness' error* (*ante*, § 1000). This not only can be but often is accomplished by *cross-examination alone* — and not only (as a matter of course) through the witness' own confession of error, but through an instant comparison of the witness' statement with truths of common knowledge (judicially noticeable) or with tangible objects already in the case.[1] The following anecdotes illustrate the possibilities of this mode:

Anon., Green Bag, 1898, X, 53: "My poor old confessor, Father Grady," said O'Connell, "who resided with my uncle when I was a boy, was tried in Tralee on the charge of being a Papish priest, but the judge defeated Grady's prosecutors by distorting the law in his favor. There was a flippant scoundrel who came forward to depose to Father Grady's having said mass. 'Pray, sir,' said the judge, 'how do you know he said mass?' 'Because I heard him say it, my Lord.' 'Did he say it in Latin?' asked the judge. 'Yes, my Lord.' 'Then you understand Latin?' 'A little.' 'What words did you hear him say?' 'Ave Maria.' 'That is the Lord's Prayer, is it not?' asked the judge. 'Yes, my Lord,' was the fellow's answer. 'Here is a pretty witness to convict the prisoner,' cried the judge. 'He swears Ave Maria is Latin for the Lord's Prayer.' The judge charged the jury for the prisoner, so my poor old friend Father Grady was acquitted."

Anon., Green Bag, 1892, IV, 319: "One of the witnesses to the will was the deceased man's valet, who swore that after signing his name at the bidding of his master, he then, also acting under instructions, carefully sealed the document by means of the taper by the bedside. The witness was induced to describe every minute detail of the whole process, the exact time, the position of the taper, the size and quality of the sealing-wax, 'which', said the counsel, glancing at the document in his hand, 'was of the ordinary red description?' 'Red sealing-wax, certainly,' answered the witness. 'My Lord,' said the counsel, handing the paper to the judge, 'you will please observe that it was fastened with a wafer.'"

[11] The following celebrated instance of perjury illustrates this: 1681, Colledge's Trial, 8 How. St. Tr. 549, 641 (Dugdale the informer, who had for three years helped send to the gallows many persons accused of the supposed Popish Plot, was in this case discredited by the charge that he had given out that the Papists had poisoned him, though in fact his disease was the French pox; whereon Dugdale on the stand said: "If any doctor will come forth and say he cured me of the clap or any such thing, I will stand guilty of all that is imputed to me"; whereon, later, "Dr. Lower, the most noted physician then in London, proved it at the Council board, both by his bills and by the apothecary, that he had been under cure in his hands for that disease; which was such a slur upon Dugdale's credit that he was never used as a witness more").

§ **1006.** [1] *Accord:* 1726, Gilbert, Evidence, 147 ("Now that which sets aside credit and overthrows his testimony is the incredibility of the fact . . . ; for if the fact be contrary to all manner of experience and observation, it is too much to receive it upon the oath of one witness"); 1887, Becker *v.* Koch, 104 N. Y. 394, 401, 10 N. E. 701 (the witness testified to an assignment in which apparently fictitious debts were included; on further explanation, however, he testified that the debts were not fictitious; the trial Court ruled that as no extrinsic contradiction of the testimony had been offered, the explanation must be accepted as true; held however, that the explanation could be shown false "by its own absolute and inherent improbability"; practically overruling Fordham *v.* Smith, 46 id. 683). *Contra*, but erroneous: 1887, People *v.* Ching Hing Chang, 74 Cal. 390, 16 Pac. 201.

For other good examples of this kind of demonstration, see a South Carolina cross-examination (1899, Marshall Brown, Wit and Humor of the Bench and Bar, 8); O'Connell's cross-examination (ib. 370).

1904, *James W. Osborne*, Esq., former Assistant District Attorney of New York City, in the "Sunday Magazine", Nov. 27: "The rule in the case of bias is the familiar one of 'give the witness rope.' In other words, give his bias full swing, and he will reveal it so unmistakably that the truth will come out. In an amusing instance of this kind in Brooklyn the late Charles Patterson revealed the quickness of his perceptions and his salient possession of that ingenuity which every lawyer needs in order to be a good cross-examiner. The case was one for damages, a peddler's cart having been run over by a train and the peddler having been killed. The point at issue was that which has been laid down by the Courts as 'look and listen.' The question was as to whether the peddler, in driving across the track, looked and listened and exercised proper care. A highly respectable farmer testified that he saw the wagon drive upon the track; that he did not see the peddler, who was thus presumably lying back in the cart, asleep or dozing, and that he distinctly and unmistakably heard the engine blow its whistle and ring its bell. He insisted upon this, and although it did not appear to Mr. Patterson that the blowing whistle and ringing bell were true, the evidence could not be shaken. He accordingly asked: 'You came to town with the engineer and fireman of the train, did n't you?' 'Yes.' 'Good fellows, are n't they?' 'Yes.' 'Good friends of yours?' 'Yes.' 'What did they do for you, while in town? Did they take you around?' 'Yes.' 'Where did they take you?' 'To the Eden Musée.' 'You saw all there was to see at the Eden Musée?' 'Yes.' 'Are you sure?' 'Yes.' 'Saw the Chamber of Horrors?' 'Yes.' 'All the curiosities?' 'Yes.' 'Saw the little toy locomotive going around on the track?' 'Yes.' 'Hear its little whistle blow in the darkness?' 'Yes.' 'Hear it ring its little bell?' 'Yes.' 'Plainly?' 'Yes.' 'Now, sir,' said Mr. Patterson, '*there is no little locomotive at the Eden Musée;* it never blew its whistle, and it never rang its bell. You explain to the jury how you can swear to such statements.' The bias of the witness who, Mr. Patterson said, could 'hear bells and whistles anywhere, at any time', had led him entirely astray, and his testimony, which was strongly biased, was completely discredited."

(2) Since the only object of the excluding rule to is prevent confusion of issues and unfair surprise by extrinsic testimony (*ante*, § 1002), it follows that the cross-examiner may at least *question upon even collateral points*, subject always to the general discretion of the trial Court (*ante*, § 944) to limit cross-examination.[2]

(3) The rule for prior inconsistent statements, requiring that the *witness be asked*, before the extrinsic testimony be produced (*post*, § 1025) has of course no application here.[3]

(4) The two expedients of Confrontation of Witnesses (*post*, § 1395) and Sequestration of Witnesses (*post*, § 1838), which have a probative operation similar to that of the present mode of impeachment, are not obnoxious to the present rule. By the former expedient, in its earlier form, the contradictory

[2] 1861, R. *v.* Brown, 21 U. C. Q. B. 334 (quoted *ante*, § 1005); 1871, R. *v.* Holmes, 12 Cox Cr. 143, per Kelly, C. B., *semble*. The contrary ruling, in Spenceley *v.* Wilmot, 7 East 108 (1806), has often been cited *obiter*, and sometimes followed: 1903, State *v.* Caudle, 174 Mo. 388, 74 S. W. 621; 1909, R. *v.* Butterfield, 18 Ont. L. R. 347 (cross-examination of a witness for the prosecution, on a charge of illegal liquor-selling, as to their knowledge of other sales on the same day, for which also a charge was pending against the same defendant, held refusable in the trial Court's discretion; following Spenceley *v.* Wilmot); 1920, Norfolk Southern R. Co. *v.* Fentress, 127 Va. 87, 102 S. E. 588.

But it is obviously inconsistent with the general right of the cross-examiner to test memory on all points (*ante*, § 995), and to refrain from stating the purpose of his questions (*post*, § 1871).

[3] 1903, Younger *v.* State, 12 Wyo. 24, 73 Pac. 551. *Contra:* 1905, Cook (Dan) *v.* State, 85 Miss. 738, 38 So. 110 (conviction of crime); 1861, Wright *v.* Compsty, 41 Pa. 110 (whether the witness had been indicted).

witnesses of opposing sides were confronted with each other and made to repeat their stories, in the expectation that the untruthful one would break down; but it was assumed that the contradiction was on a material point. By the latter expedient, the inconsistencies of narration in witnesses called on the same side were brought to light, and here the telling inconsistencies might involve only minor details, — as in Susannah's classical case. But no extrinsic testimony was involved; for the witnesses were by supposition in the case for other purposes, and a cross-examination would be all that was needed.

§ 1007. **Contradicting Answers on the Direct Examination; Supporting the Contradicted Witness.** Since the main object underlying the rule is to avoid Unfair Surprise and Confusion of Issues (*ante*, § 1002), the obvious expedient for this purpose is to cut off testimony which would not have been already proper for other purposes. But occasionally are found misapprehensions of the fundamental purpose of the rule.

(1) Occasionally, before the theory had been completely worked out by the Courts, the argument of Unfair Surprise was treated as the only objection, and it was thought that where the *assertion* desired to be contradicted had been *made on the direct examination* — *i.e.* had been "volunteered", as the phrase went, — the witness had himself only to blame if he was not prepared to support every statement thus volunteered; in short, that *all assertions made on the direct examination could be contradicted* and shown erroneous, and that the same freedom applied to assertions *volunteered on the cross-examination;* upon which, it was thought, there could not be any unfair surprise. This form of the rule still crops up occasionally.[1]

But this form of rule ignores the other coöperating reason for the rule, *i.e.* Confusion of Issues. Even if one conceded that this form sufficiently obviates the reason of Unfair Surprise, the other reason would still remain, and would be equally fatal, even when the assertion on the collateral matter was made on the direct examination. The following passage satisfactorily disposes of the error in question:[2]

§ **1007.** [1] *Federal:* 1893, Union P. R. Co. *v.* Reese, 5 C. C. A. 510, 56 Fed. 291; *Arkansas:* 1910, Adams *v.* State, 93 Ark. 260, 124 S. W. 766 (following McArthur *v.* State, 59 Ark. 431); 1920, Howell *v.* State, 141 Ark. 487, 217 S. W. 457 (carnal knowledge of a female under 16; contradiction of the woman's answer on direct examination as to intercourse with others, allowed; otherwise for answers on cross-examination); *California:* 1895, Redington *v.* Cable Co., 107 Cal. 317, 40 Pac. 435; 1896, People *v.* Roemer, 114 Cal. 51, 45 Pac. 1003; *Kansas:* 1921, State *v.* Curtis, 108 Kan. 537, 196 Pac. 445; *New York:* 1864, Carpenter *v.* Ward, 30 N. Y. 243; 1898, People *v.* Van Tassel, 156 N. Y. 561, 51 N. E. 274 ("must be material or relate to a fact brought out by adverse counsel"); *Vermont:* 1869, Ellsworth *v.* Potter, 41 Vt. 690 ("it was entirely for the Court to say how much, if anything, in their discretion was necessary to be heard to repel the prejudice calculated to be produced by the improper testimony"); *West Virginia:* 1919, State *v.* Panetta, 85 W. Va. 212, 101 S. E. 360.

For the nearly opposite error — that an answer concerning the cross-examiner's own case, *improperly inquired into on cross-examination*, cannot be contradicted, because of the rule against impeaching one's own witness, see *ante*, § 914.

[2] *Accord:* 1905, Louisville & N. R. Co. *v.* Quinn, 146 Ala. 330, 39 So. 756; 1921, Provosty, J., diss. in State *v.* Harris, 150 La. 214, 90 So. 574 (approving the text above); 1905, Lambert *v.* Hamlin, 73 N. H. 138, 59

1859, R. W. WALKER, J., in *Blakey's Heirs* v. *Blakey's Executrix*, 33 Ala. 619: "In *Dozier* v. *Joyce* [3] it seems to have been considered that the main reason for the rule which prevents a cross-examination upon immaterial matters for the mere purpose of contradicting the witness, is that he cannot be presumed to come prepared to defend himself on such collateral questions; and, as this reason fails when the testimony is voluntarily given, the rule itself does not in that case apply. The reason referred to is doubtless one of those on which the rule was founded, but it is not the only or even the chief one. The principal reasons of this rule are, undoubtedly, that but for its enforcement the issues in a cause would be multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points, the minds of jurors would thus be perplexed and confused, and their attention wearied and distracted, the costs of litigation would be enormously increased, and judicial investigations would become almost interminable. An additional reason is found in the fact that, the evidence not being to points material in the case, witnesses guilty of false swearing could not be punished for perjury. These reasons apply equally whether the evidence on such collateral matters is brought out on the examination in chief or upon cross-examination, and whether the witness gives it voluntarily or in response to questions calling for it."

(2) If the opposing party has succeeded in *introducing, without objection by the other*, testimony to contradict on a collateral point, this does not justify the other in proceeding to join issue and adduce new testimony in support of the original witness' statement.[4] The general rule that one irrelevancy does not justify another (*ante*, § 15) is not here controlling, for the collateral error may be relevant to discredit, and is objectionable for reasons of policy rather than of irrelevancy. It is the same reason of policy (*i.e.* Confusion of Issues) that here operates to stop the controversy from being carried any further; and there is no Unfairness, because the original party has only himself to thank for not preventing the introduction of the contradicting testimony. The argument that the cross-examiner has no right to object to the answering testimony because he himself began the contradicton [5] is beside the point; for it is not a question of rights, but of the discovery of truth, and in the interest of truth the confusion of issues by immaterial controversies is to be prevented.

§ 1008. '**Falsus in Uno, Falsus in Omnibus**'; **In general.** The maxim, "He who speaks falsely on one point will speak falsely upon all", is in strictness concerned, not with the admissibility, but with the weight of evidence. The jury are told by it what force to give to a falsity after the evidence has shown its existence. But the maxim occurs so often in connection with the use of Contradictions and of Self-Contradictions (*post*, § 1018) and throws so much

Atl. 941 (citing the text above); 1834, Com. *v.* Buzzell, 16 Pick. Mass. 158.

The ruling in Brown *v.* State, 142 Ala. 287, 38 So. 268 (1904), that the opponent cannot show error in a *statement of the testimony of an absent witness* not formerly introduced nor used is of course sound.

[3] 1838, 8 Porter 303.

[4] 1840, Philadelphia & T. R. Co. *v.* Stimpson, 14 Pet. 461 (*semble;* but here rejected on other grounds); 1840, Stevens *v.* Beach, 12 Vt. 587; 1847, Charlton *v.* Unis, 4 Gratt. 61 (where the plaintiff allowed without objection the defendant to offer evidence disproving a collateral statement contained in a prior self-contradictory affidavit of the plaintiff's witness; and the plaintiff was then not allowed to substantiate those statements).

[5] 1878, State *v.* Cardoza, 11 S. C. 242, *per* Willard, C. J.

light on their nature, that it is desirable to analyze the bearings of the maxim as applied by the Courts.[1]

It may be said, once for all, that the maxim is in itself worthless, first, in point of validity, because in one form it merely contains in loose fashion a kernel of truth which no one needs to be told, and in the others it is absolutely false as a maxim of life; [2] and secondly, in point of utility, because it merely tells the jury what they may do in any event, not what they must do or must not do, and therefore it is a superfluous form of words. It is also in practice pernicious, first, because there is frequently a misunderstanding of its proper force, and secondly, because it has become in the hands of many counsel a mere instrument for obtaining new trials upon points wholly unimportant in themselves.[3]

§ 1009. **Same: (1) First Form of Rule: The Entire Testimony must be Rejected.** The notion which was originally associated with this maxim was that the testimony of one detected in a lie was wholly worthless and must of necessity be rejected.[1] This notion was quite consistent with the artificial philosophy of testimony (*post*, § 2032) which prevailed as late as the 1700s, and was only abolished from the law (long after it had practically lost its social acceptance) as a result of Bentham's pungent criticisms. The philosophy of character which weighed testimony by numerical units and absolutely disqualified one who had been guilty of perjury would readily reject the testimony of one detected in a single lie. Its attitude is represented in the following passage:[2]

§ 1008. [1] The following statutes are the basis of some of the ensuing rulings: *Alaska:* Comp. L. 1913, § 1505 (like Or. Laws 1920, § 868, par. 3); *Cal.* C. C. P. 1872, § 2061 (3) ("a witness false in one part of his testimony is to be distrusted in others"); P. C. § 1102; *Ga.* Code 1910, § 5884 (if "wilfully and knowingly falsely", "ought to be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence"); *Mont.* Rev. C. 1921, § 10672, par. 3 (like Cal. C. C. P. § 2061); *Or.* Laws 1920, § 868, par. 3 (like Cal. C. C. P. § 2061); *P. R.* Rev. St. & C. 1911, § 1530 (like Cal. C. C. P. § 2061).

Compare also the now obsolete principle 'nemo turpitudinem suam allegans audiendus' (*ante*, § 525), which has certain relations with the present principle.

Distinguish the *general charge* that a witness' testimony may be rejected if the jury believe that he has not sworn truthfully in general: 1910, Waldrop *v.* State, 98 Miss. 567, 54 So. 66.

The doctrine of 'falsus in uno' is to be distinguished from the principle, of which our law is at present much enamored, that the judge may not express an *opinion upon the weight of the testimony;* in stating the maxim as applicable to a particular witness, this latter principle is often violated. With this question of trial procedure we have here nothing to do; see an example in Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23 (1895).

Whether an *instruction* on this principle of 'falsus in uno' may be demanded, is considered in Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464 (1905).

[2] For materials exhibiting the fallacy of the maxim from the point of view of psychology, see the present writer's "Principles of Judicial Proof, as given in Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 234–276, *et passim*.

[3] In Turner *v.* State, 95 Miss. 879, 50 So. 629 (1909), Smith, J., diss., approves the above views.

§ 1009. [1] 1743, Craig *v.* Earl of Anglesea, 17 How. St. Tr. 1421, per Bowes, C. B. The following case seems to be the earliest instance of its appearance in our law; 1684, Hampden's Trial, 9 How. St. Tr. 1053, 1101 (quoted by Mr. Williams, for the defence).

[2] The doctrine has been occasionally repeated: *Federal*, 1822, The Santissima Trinidad, 7 Wheat. 339, *semble; Ga.* 1853, Day *v.* Crawford, 13 Ga. 512; 1874, Pierce *v.* State, 53 Ga. 368; *Kan.* 1866, Campbell *v.* State, 3 Kan. 488, 496; 1871, Hale *v.* Rawallie, 8 Kan. 136, 142, *semble* (but this was overruled later: 1875, Shellabarger *v.* Nafus, 15 id. 547, 554); *N. Y.* 1799, Silva *v.* Low, 1 Johns. Cas. 184, 188, per Radcliff, J. (phrased in a limited

1824, Mr. *Thomas Starkie*, Evidence, I, 583: "A witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim 'falsum in uno, falsum in omnibus.' The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness' testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected."

1828, HENDERSON, J., in *State* v. *Jim*, 1 Dev. 510: "The jury's belief must be founded on that which is regarded in law as testimony. . . . I can see no difference in principle — and if so, there should be none in practice — between a person heretofore convicted and one who stands convicted before the jury in the case they are trying. Hence the maxim 'falsum in uno, falsum in omnibus.' Were it otherwise, the law would be untrue to itself."

1864, RANNEY, J., in *Stoffer* v. *State*, 15 Oh. St. 47, 56: "But it is said that he *may* still speak the truth upon other points, although perjured as to one or more. This is very true; very few men are so utterly false as not to be compelled, from the exigencies of their being, to utter more truth than falsehood. But it must also be admitted that the motive which has prompted him to commit perjury in one part of his testimony may and is very likely to lead him to make it effective by falsifying other material points. At least it is left entirely uncertain whether he has uttered truth or falsehood; and it is not consistent with that moral certainty of the existence of facts which the law requires before men are affected in their lives, liberty, or property, to act upon what may be true or false, or to use such corrupt and deceptive instrumentalities in the pursuit of truth."

§ 1010. **Same: (2) Second Form of Rule: The Entire Testimony may be Rejected.** But in spite of the careless perpetuation of this artificial notion by a few authorities, it had ceased to be the law of England by the beginning of the 1800s.[1] There are on principle two reasons which exhibit its unsoundness as a rule of law. (1) It is untrue to human nature. It is not correct that a person who tells a single lie is therefore necessarily lying throughout his testimony, not that there is any strong probability that he is so lying. The probability is to the contrary. (2) The jury are the part of the tribunal charged with forming a conclusion as to the truth of the testimony offered. They are absolutely free to believe or not to believe a given witness. Once the witness is determined by the judge to be qualified to speak, the belief of the jury in his utterances rests solely with themselves. Hence the judge cannot legally require them to believe or to disbelieve any portion of testimony.

Therefore there cannot be, for the jury, a "must" in this matter, but only a "may":

1855, PEARSON, J., in *State* v. *Williams*, 2 Jones L. 269: "When the credit of a witness is to be passed upon, each juror is called upon to say whether he believes him or not. This belief is personal, individual, and depends upon an infinite variety of circumstances. Any

form, the judge drawing inferences as a jury would); *Nebr.* 1880, Dell *v.* Oppenheimer, 9 Nebr. 456, 4 N. W. 51; *Oh.* 1864, Stoffer *v.* State, 15 Oh. St. 54; *Pa.* 1849, Miller *v.* Stem, 12 Pa. 390, *semble*.

§ 1010. [1] 1809, R. *v.* Teal, 11 East 309, per L. C. J. Ellenborough ("It may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the judge. . . . It goes only to the credit of the witness, on which the jury are to decide").

attempt to regulate or control it by a fixed rule is impracticable, worse than useless, inconsistent and repugnant to the nature of a trial by jury."

1856, APPLETON, J., in *Parsons* v. *Huff*, 41 Me. 411: "The truth or falsehood of testimony depends upon the motives, or the balance of motives, acting upon the witness at the time of its utterance. The motives which influence the human mind are as various as the feelings and desires of man. . . . There is no motive the action of which upon testimony is uniform. The same motive may lead to truth or to falsehood. . . . The witness may be exposed to the action of a different class of motives as to the several facts to which his testimony may relate. It is obvious therefore that, of the testimony of the same witness, part may be true and reliable and part false and mendacious. A rule of law which requires a jury to infer from one false assertion that all facts uttered by the witness are false statements is manifestly erroneous. . . . It is the determination of the trustworthiness or untrustworthiness of testimony in advance of its utterance, and in utter and hopeless ignorance of all facts essential to a correct decision."

1867, CAMPBELL, J., in *Knowles* v. *People*, 15 Mich. 412: "There has never been any positive rule of law which excluded evidence from consideration entirely, on account of the wilful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent to regard all that he says with strong suspicion, and to place no reliance on his mere statements. But when testimony is once before the jury, the weight and credibility of every portion of it is for them, and not for the Court to determine."

The correct principle, therefore, can go no farther than to say that the jury *may* disregard the testimony, not that they *must* disregard it; and this is the form of the rule as laid down in the great majority of jurisdictions.[2] The

[2] Only those cases are noted in which there has been controversy or confusion; those in which "may" is the regular and unquestioned term, used *obiter*, are not here enumerated; where otherwise not specified the orthodox form, that the jury "may" reject, is approved: *California:* 1879, People *v.* Sprague, 53 Cal. 493 (C. C. P. § 2061, declares that the witness "is to be distrusted"; McKinstry, J., interprets this that "the jury *may* reject the whole", — "that is to say, *must*" distrust him "and reject all, unless" they believe him corroborated; and thus the Code "by requiring a jury to distrust necessarily authorizes them to reject all"; here a "may" before "reject all" would reconcile the statements); Estate of Clark, 53 Cal. 355, per Crockett, J. (that the witness "is to be distrusted in others, and not that his whole testimony is to be absolutely rejected"); 1896, People *v.* Oldham, 111 Cal. 648, 44 Pac. 312 (may, not must; but here the instruction was absurdly construed to violate the rule); 1901, People *v.* Wilder, 134 Cal. 182, 66 Pac. 228 (may, not must); 1903, People *v.* Stevens, 141 Cal. 488, 75 Pac. 62 ("distrust"); 1906, Ex parte Vandiveer, 4 Cal. App. 650, 88 Pac. 993 (distrusted, not necessarily rejected); 1907, People *v.* Grill, 151 Cal. 592, 91 Pac. 515; *Idaho:* 1920, Baird *v.* Gibberd, 32 Ida. 796, 189 Pac. 56; *Illinois:* 1857, Dean *v.* Blackwell, 18 Ill. 337; 1873, Pollard *v.* People, 69 Ill. 152; 1875, Reynolds *v.* Greenbaum, 80 Ill. 416; 1881, Pennsylvania Co. *v.* Conlan, 101 Ill. 108; 1896, Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161 (but doubtingly stated); *Indiana:* 1834, M'Glemery *v.* Keller, 3 Blackf. 488; 1859, Terry *v.* State, 13 Ind. 72; *Kentucky:* 1859, Letton *v.* Young, 2 Metc. 565; *Maine:* 1840, Lewis *v.* Hodgdon, 17 Me. 273; *Massachusetts:* 1858, Com. *v.* Wood, 11 Gray 85, 93; 1867, Com. *v.* Billings, 97 Mass. 406; 1903, Root *v.* Boston El. R. Co., 183 Mass. 418, 67 N. E. 365; *Michigan:* 1870, Fisher *v.* People, 20 Mich. 146; 1880, O'Rourke *v.* O'Rourke, 43 Mich. 58, 61, 4 N. W. 531; *Minnesota:* 1920, Greenfield *v.* Unique Theatre Co., 146 Minn. 17, 177 N. W. 666 (Dibell, J.: "The maxim now states no positive rule of law guiding the jury in the weighing of testimony"); *Missouri:* 1867, Paulette *v.* Brown, 40 Mo. 57 (interpreting State *v.* Mix, 1851, 15 Mo. 153, 158, and intervening cases of State *v.* Dwire, 25 Mo. 553; State *v.* Cushing, 29 Mo. 215); 1895, State *v.* Duffey, 128 Mo. 549, 31 S. W. 98; *Nebraska:* 1895, Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382; 1909, State *v.* O'Rourke, — Nebr. —, 124 N. W. 138 (more inconclusive logic-chopping); 1921, Christiancy *v.* State, 106 Nebr. 822, 184 N. W. 945; *New York:* 1864, Dunn *v.* People, 29 N. Y. 529 (settling the effect of the following cases: 1823, Insurance Co. *v.* DeWolf, 2 Cow. 68, 108; 1825, People *v.* Douglass, 4 Cow. 37; 1825, Dunlop *v.* Patterson, 5 Cow. 23; 1829,

propriety of giving such an instruction is questionable; for it merely informs the jury of a truth of character which common experience has taught all of them long before they become jurymen.[3]

§ 1011. **Same: (3) Third Form of Rule: The Entire Testimony must be Rejected, unless Corroborated.** This is merely a variant of the first form of rule. It removes the injunction to treat the entire testimony as worthless, on condition that there is corroboration of the other portions by circumstances or by other testimony. This form of the rule is equally unsound and is rarely advanced.[1]

§ 1012. **Same: (4) Fourth Form of Rule: The Entire Testimony may be Rejected, unless Corroborated.** This form is an erroneous variant of the second. The objection to it is not only that it fetters the jury's action by attaching a condition to their discretion, but that this condition involves logically an impossible and wrong consequence, namely, that if there is such corroboration, the jury may not reject the testimony but *must* give it credit:[1]

1877, HENRY, J., in *Brown* v. *R. Co.*, 66 Mo. 588, 599: "Is the jury not at liberty to

Forsyth *v.* Clark, 3 Wend. 643; 1836, People *v.* Davis, 15 Wend. 607); then in People *v.* Evans, 40 N. Y. 5 (1869), the mandatory form was prescribed, apparently in ignorance of Dunn *v.* People; the rule of the latter case was reëstablished in the following series: 1874, White *v.* McLean, 57 N. Y. 672; 1875, Pease *v.* Smith 61 N. Y. 483. But in 1878, Deering *v.* Metcalf, 74 N. Y. 507, the Court is found saying (apparently without any real appreciation of the question involved) that when one has sworn "corruptly false", the jury "ought to disregard" his testimony; then follow: 1881, Moett *v.* People, 85 N. Y. 377 (a charge that "it is *sometimes* the duty of the jury to reject the whole" is approved, as not injurious to a defendant in a criminal case, but Deering *v.* Metcalf was expressly affirmed); 1898, People *v.* Van Tassel, 156 N. Y. 561, 51 N. E. 274 ("must" reject, is improper): *North Carolina:* 1855, State *v.* Williams, 2 Jones L. 258 (explaining and practically overruling State *v.* Jim, 1828, quoted *supra*, § 1009); 1869, State *v.* Brantley, 63 N. C. 515 (the instruction asked for told the jury they were "authorized to reject", and the judge's substitute that "they could believe a part, all, or none", was declared better); *Oklahoma:* 1911, Henry *v.* State, 6 Okl. Cr. 430, 119 Pac. 278; *Oregon:* 1914, State *v.* Goff, 71 Or. 352, 142 Pac. 564; *Pennsylvania:* 1906, Com. *v.* Ieradi, 216 Pa. 87, 64 Atl. 889; *Wisconsin:* 1854, Mercer *v.* Wright, 3 Wis. 645, 647; 1869, Morely *v.* Dunbar, 24 Wis. 185, 189; 1879, Mack *v.* State, 48 Wis. 271, 286, 4 N. W. 449; 1894, Little *v.* R. Co., 88 Wis. 402, 60 N. W. 705; 1895, Schmitt *v.* R. Co., 89 Wis. 195, 61 N. W. 834.

[3] In the following cases the rule was discarded: 1921, Prewitt *v.* State, 150 Ark. 279, 234 S. W. 35; 1894, Com. *v.* Clune, 162 Mass. 206, 215, 38 N. E. 435; 1909, Ducharme *v.* Holyoke St. R. Co., 203 Mass. 384, 89 N. E. 561 ("but it is also true that a jury may apply it"); 1907, Addis *v.* Rushmore, 74 N. J. L. 649, 65 Atl. 1036 (it is "not a mandatory rule of evidence"); 1897, State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813 (whole doctrine rejected, as involving a charge upon the weight of evidence; Brannon, J., diss.).

§ 1011. [1] 1877, Skipper *v.* State, 59 Ga. 63, 65; 1912, Pelham & H. R. Co. *v.* Elliott, 11 Ga. App. 621, 75 S. E. 1062; 1861, Crabtree *v.* Hagenbaugh, 25 Ill. 240; 1900, Hill *v.* Montgomery, 184 Ill. 220, 56 N. E. 320; 1900, Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425; 1922, People *v.* Pursley, 302 Ill. 62, 134 N. E. 128.

In Troxdale *v.* State, 9 Humph. 423 (1848), it is uncertain whether the Court is dealing with this rule. A practically equivalent form is that the jury may believe, in spite of the falsity, if the witness is corroborated: 1896, Duncan *v.* State, 97 Ga. 180, 25 S. E. 182; 1902, West Chicago S. R. Co. *v.* Lieserowitz, 197 Ill. 607, 64 N. E. 718.

§ 1012. [1] The following cases also reject this fallacy: *Fla.* 1898, Gantling *v.* State, 40 Fla. 237, 23 So. 857; 1903, Sumpter *v.* State, 45 Fla. 106, 33 So. 981; *Ga.* 1906, Chandler *v.* State, 124 Ga. 821, 53 S. E. 91, *semble; Mont.* 1907, State *v.* Penna, 35 Mont. 535, 90 Pac. 787; 1907, State *v.* Tracey, 35 Mont. 552, 90 Pac. 791; *Nebr.* 1905, Titterington *v.* State, 75 Nebr. 153, 106 N. W. 421; 1906, Barber *v.* State, 75 Nebr. 543, 106 N. W. 423; *Okla.* 1909, Rea *v.* State, 3 Okl. Cr. 269, 105 Pac. 381; 1922, Porter *v.* State, — Okl. Cr. —, 202 Pac. 1039; *S. Dak.* 1897, State *v.* Sexton, 10 S. D. 127, 72 N. W. 84, *semble; Wis.* 1909, Steber *v.* Chicago & N. W. R. Co., 139 Wis. 10, 120 N. W. 502.

disregard the testimony of one who has committed perjury in their presence, as to some fact testified to by him, because as to that or some other fact testified to by him he is corroborated? . . . That is not the law; the jury may or may not believe him; that is a matter for their determination, . . . notwithstanding he may have been corroborated as to that or any other fact to which he testified."

The Courts that have employed this form have spoken usually under a misconception of the permissive form (*ante*, § 1010); for they treat "may" as if it were "must", and then argue that it would be unfair to require a rejection in spite of corroboration; in short, they mean to lay down in effect the third rule above. But whether judged by their intention or by their expressed phrasing, they offer a test wholly unsound. Only occasionally is this form of rule found.[2]

§ 1013. **Same: There must be a Conscious Falsehood.** The notion behind the maxim is that, though a person may err in memory or observation or skill upon one point and yet be competent upon others, yet a person who once deliberately mis-states, one who goes contrary to his own knowledge or belief, is equally likely to do the same thing repeatedly and is not to be reckoned with at all. Hence it is essential to the application of the maxim that there should have been a conscious falsehood:

1743, BOWES, C. B., in *Annesley* v. *Anglesea*, 17 How. St. Tr. 1139, 1421: "You will permit me to observe that there is a great difference between not recollecting circumstances, and a witness swearing to those that are false. The not recollecting may consist with integrity; the swearing to a falsehood never can."

1841, HARRINGTON, J., in *Kinney* v. *Hosea*, 3 Harringt. 401: "But the disbelief of what any witness has testified to does not necessarily impute to him falsehood and perjury. This would compel the jury in every case of contradictory testimony to disbelieve that one or the other witness, or perhaps one set of witnesses or the other, must be wilfully perjured.

[2] Some of these Courts (*e.g.* in Illinois) are to be found also, in other rulings, employing the first or the second form above; there is too little effort at consistency: *Alabama:* 1905, Little *v.* State, 145 Ala. 662, 39 So. 674; *Arizona:* 1903, Trimble *v.* Terr., 8 Ariz. 273, 71 Pac. 932; *Georgia:* 1857, Richardson *v.* Roberts, 23 Ga. 218; Smith *v.* State, 23 Ga. 304 (but held to have been improperly applied); Ivey *v.* State, 23 Ga. 581; 1874, Pierce *v.* State, 53 Ga. 369; *Idaho:* 1905, State *v.* Waln, 14 Ida. 1, 80 Pac. 221; *Illinois:* 1864, Meixsell *v.* Williamson, 35 Ill. 531; 1865, Blanchard *v.* Pratt, 37 Ill. 246; 1867, Howard *v.* McDonald, 46 Ill. 124; 1866, Yundt *v.* Hartrumft, 41 Ill. 16 (where the phrases are used with full understanding); Chittenden *v.* Evans, 41 Ill. 254 (where the Court merely says that rejection "would not necessarily follow"); 1870, Martin *v.* People, 54 Ill. 226; Huddle *v.* Martin, 54 Ill. 260; 1872, Chicago & A. R. Co. *v.* Buttolf, 66 Ill. 348 (where rejection is distinctly forbidden); 1904, Chicago & Alton R. Co. *v.* Kelley, 210 Ill. 449, 71 N. E. 355 (but the corroborating evidence need not be believed by the jury, in order to make the rule applicable; this is a good instance of the jargon of futile intricacies to which this rule gives rise); 1904, Weston *v.* Teufel, 213 Ill. 291, 72 N. E. 908 (the corroboration must be by "credible", not merely "competent" witnesses; a vain quibble); 1906, United Breweries Co. *v.* O'Donnell, 221 Ill. 334, 77 N. E. 547; *Indiana:* 1895, White *v.* R. Co., 142 Ind. 648, 42 N. E. 456; 1897, Hank *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; 1921, Finch *v.* McClellan, — Ind. —, 130 N. E. 13; *Michigan:* 1893, Cole *v.* R. Co., 95 Mich. 77, 80, 54 N. W. 638; 1897, Heddle *v.* R. Co., 112 Mich. 547, 70 N. W. 1096, *semble; Montana:* 1906, State *v.* Fuller, 34 Mont. 12, 85 Pac. 369; *Oklahoma:* 1921, Cole *v.* State, — Okl. Cr. —, 195 Pac. 901 (correcting the supposedly contrary effect of Rea *v.* State, *supra*, n. 1); *Wisconsin:* 1894, Allen *v.* Murray, 87 Wis. 41, 51 N. W. 979; 1897, Dohmen Co. *v.* Ins. Co., 96 Wis. 38, 71 N. W. 69 (by circumstances or by testimony); 1900, Miller *v.* State, 106 Wis. 156, 81 N. W. 1020; 1904, Suckow *v.* State, 122 Wis. 156, 99 N. W. 440; 1909, Miller *v.* State, 139 Wis. 57, 119 N. W. 850 (this seems to be now the settled form in this State).

Nothing is further from the truth than such a conclusion. A thousand innocent mistakes are committed in courts of justice, for one intentional and corrupt falsehood; and it is the commonest duty of a jury to distinguish between conflicting testimony arising from the mistakes of witnesses."

This requirement is variously phrased by different Courts, and even by the same Court.[1] Occasionally, however, a Court is found declaring, through

§ 1013. [1] *Federal:* 1822, The Santissima Trinidad, 7 Wheat. 339 ("deliberate"); 1901, Singer Mfg. Co. v. Cramer, 48 C. C. A. 588, 109 Fed. 652; *Alabama:* 1897, Burton v. State, 115 Ala. 1, 22 So. 585; 1906, Hamilton v. State, 147 Ala. 110, 41 So. 940; *Arizona:* 1898, Schultz v. Terr., 5 Ariz. 239, 52 Pac. 352 (knowingly and intentionally); *Arkansas:* 1848, Yoes v. State, 9 Ark. 43 ("wilfully and knowingly"); 1900, Bloom v. State, 68 Ark. 336, 58 S. W. 41; 1904, Lee v. State, 72 Ark. 436, 81 S. W. 385 ("wilfully"); *California:* 1866, People v. Strong, 30 Cal. 155 ("wilfully"); 1879, People v. Sprague, 53 Cal. 493 (in which the Code phrase of § 2061, C. C. P., "a witness false", etc., is said to be properly construed "a witness wilfully false"); Estate of Clark, 53 Cal. 355 (same); 1886, People v. Treadwell, 69 Cal. 226, 238, 10 Pac. 502 ("wilful" not essential); 1898, People v. Luchetti, 119 Cal. 501, 51 Pac. 707 (like People v. Sprague); 1899, People v. Lon Yeck, 123 Cal. 246, 55 Pac. 984 (like People v. Treadwell); 1903, People v. Dobbins, 138 Cal. 694, 72 Pac. 339 (an instruction following C. C. P. § 2061, and omitting the requirement of wilfulness, is not improper); *Colorado:* 1876, Gottlieb v. Hartman, 3 Colo. 53, 60 ("intentionally"); 1896, Last Chance Co. v. Ames, 23 Colo. 167, 47 Pac. 382 ("wilfully or corruptly"); 1898, Ward v. Ward, 25 Colo. 33, 52 Pac. 1105 ("wilful or corrupt"); *Georgia:* 1857, Ivey v. State, 23 Ga. 581 ("wilfully and knowingly"); 1874, Pierce v. State, 53 Ga. 369 (same); 1877, Skipper v. State, 59 Ga. 63, 65 ("knowingly and wilfully"); 1902, Holston v. R. Co., 116 Ga. 656, 43 S. E. 29 (Code, § 5295, applied); 1904, Glenn v. Augusta R. & E. Co., 121 Ga. 80, 48 S. E. 684; *Illinois:* 1854, Brennan v. People, 15 Ill. 517 ("wilfully and knowingly"); 1861, Crabtree v. Hagenbaugh, 25 Ill. 240 ("wilfully"); 1866, Chittenden v. Evans, 41 Ill. 253 ("knowingly or corruptly"); 1868, Chicago v. Smith, 48 Ill. 107 ("wilfully and knowingly"); 1871, Pope v. Dodson, 58 Ill. 360, 365 ("wilfully and corruptly"); U. S. Express Co. v. Hutchins, 58 Ill. 45 ("intentionally"); 1873, Polland v. People, 69 Ill. 152 ("wilfully and knowingly"); 1881, Swan v. People, 98 Ill. 610, 612 ("knowingly and intentionally"); 1899, Overtoom v. R. Co., 181 Ill. 323, 54 N. E. 898; 1903, Perkins v. Knisely, 204 Ill. 275, 68 N. E. 486 ("wilfully and knowingly", "knowingly and corruptly or wilfully", "wilfully and corruptly and intentionally"; the counsel is here rebuked for propounding a defective instruction, "in view of the many decisions by this Court"; but it would seem that these "many decisions" have not yet made clear precisely what the tenor of the instruction should be; if a quibbling rule like this is to be enforced, the terms of the quibble should be tangibly prescribed); 1905, Maguire v. People, 219 Ill. 16, 76 N. E. 67 ("wilfully and corruptly"); *Indiana:* 1854, Shanks v. Hayes, 6 Ind. 59 ("wilfully and knowingly"); 1907, Pittsburg, C. C. & St. L. R. Co. v. Haislup, — Ind. —, 79 N. E. 1035 ("knowingly and intentionally"); *Indian Territory:* 1899, Noyes v. Tootle, 2 Ind. Terr. 144, 48 S. W. 1031 ("intentionally", equivalent to "knowingly and wilfully"); *Iowa:* 1868, Callanan v. Shaw, 24 Ia. 447 ("wilfully and knowingly"); 1877, State v. Wells, 46 Ia. 665 ("knowingly and intentionally"); *Kansas:* 1871, Hale v. Rawallie, 8 Kan. 136, 142 ("wilfully, or some word of kindred meaning"); *Maryland:* 1789, Sanders v. Leigh, 2 H. & McH. 380 (by the witness himself or known to him); *Michigan:* 1899, Wheeler v. Jenison, 120 Mich. 422, 79 N. W. 646; *Mississippi:* 1905, Sardis & D. R. Co. v. McCoy, 85 Miss. 391, 37 So. 706 ("wilfully, knowingly, and corruptly"); 1909, Turner v. State, 95 Miss. 879, 50 So. 629; 1922, Hinton v. State, — Miss. —, 91 So. 897 ("wilful" falsity is equivalent to "corrupt" falsity; Smith, C. J.: "The writer has not overlooked his dissent in Turner v. State, but is now of opinion that the case was correctly decided if the maxim is still to be permitted to be invoked at all"); *Missouri:* 1851, State v. Mix, 15 Mo. 153 ("wilfully"); 1858, State v. Dalton, 27 Mo. 16 ("wilfully"); 1876, Iron Mountain Bank v. Murdock, 62 Mo. 74 ("knowingly"); 1876, State v. Elkins, 63 Mo. 166 ("intentionally"; "designedly and wilfully"); *Montana:* 1907, State v. Penna, 35 Mont. 535, 90 Pac. 787; *Nebraska:* 1884, Buffalo Co. v. Van Sickle, 16 Nebr. 363, 367, 20 N. W. 261 ("knowingly and wilfully"); 1895, Stoppert v. Nierle, 45 Nebr. 105, 113, 63 N. W. 382 ("wilfully"); 1896, Omaha R. Co. v. Krayenbuhl, 48 Nebr. 553, 67 N. W. 447 ("knowingly and wilfully"); 1896, McComick Co. v. Seeman, 49 Nebr. 312, 68 N. W. 482 ("wilfully and intentionally"); 1897, Davis v. State, 51 Nebr. 301, 70 N. W. 984 ("wilfully"); 1900, Denney v. Stout, 59 Nebr. 731, 82 N. W. 18 ("wilfully and corruptly"); 1903, Nielson v. Cedar Co., 70 Nebr. 637, 97 N. W. 826 ("knowingly and wilfully"); 1904, Nielson v. Cedar Co., — Nebr. —, 98 N. W. 1090; 1921, Chris-

carelessness, that proof of a material error (contradiction) or self-contradiction will justify the application of the maxim.[2] There is no ground of logic or of precedent for such a conclusion; and it has frequently been repudiated when advanced.[3]

§ 1014. **Same: Falsehood must be on a Material Point.** It is commonly said that the falsehood must be upon a material point.[1] No doubt the Courts

tiancy *v.* State, 106 Nebr. 822, 184 N. W. 945 ("knowingly" is the same as "wilfully"); *New Jersey:* 1918, State *v.* Samuels, 92 N. J. L. 131, 104 Atl. 322 (approving the text above); *New Mexico:* 1895, Pacific Gold Co. *v.* Skillicorn, 8 N. M. 8, 41 Pac. 533 ("wilfully and knowingly"); 1912, Douglas *v.* Terr., — N. M. —, 124 Pac. 339; *New York:* 1875, Pease *v.* Smith, 61 N. Y. 484 ("wilfully"); 1878, Deering *v.* Metcalf, 74 N. Y. 505 ("intentionally", "corruptly"); 1881, Moett *v.* People, 85 N. Y. 377 ("deliberately", "intentionally"); *North Carolina:* 1828, State *v.* Jim, 1 Dev. 510 ("corruptly"); 1854, State *v.* Peace, 1 Jones L. 256 ("wilfully and corruptly"); *North Dakota:* 1896, McPherrin *v.* Jones, 5 N. D. 261, 65 N. W. 685 ("wilfully or knowingly or intentionally"); 1897, State *v.* Campbell, 7 N. D. 58, 72 N. W. 935 ("wilfully or knowingly"); 1905, State *v.* Johnson, 14 N. D. 288, 103 N. W. 565; *Oklahoma:* 1909, Kaufman *v.* Boismier, 25 Okl. 252, 105 Pac. 326 (a false statement is presumed to be wilful); *South Dakota:* 1900, Hurlburt *v.* Leper, 12 S. D. 321, 81 N. W. 631 ("wilfully"); 1901, Elrod *v.* Ashton, 14 S. D. 350, 85 N. W. 599; *Utah:* 1916, State *v.* Brown, 48 Utah 279, 159 Pac. 545; *Wisconsin:* 1896, Cahn *v.* Ladd, 94 Wis. 134, 68 N. W. 652 (mere falsity not enough); 1902, Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128.

[2] 1898, Churchwell *v.* State, 117 Ala. 124, 23 So. 72 (if any witness has been impeached, his testimony may be disregarded); 1905, Powell *v.* State, 122 Ga. 571, 50 S. E. 369 ("successfully impeached"); 1906, Georgia R. & B. Co. *v.* Andrews, 125 Ga. 85, 54 S. E. 76 ("successfully impeached" suffices; this is ruled under the authority of Code 1895, § 5295, Rev. C. 1910, § 5884, quoted *ante*, § 1008, n. 1, which does not justify it); 1870, Martin *v.* People, 54 Ill. 226; Huddle *v.* Martin, 54 Ill. 260 ("successfully impeached", suffices); 1895, White *v.* R. Co., 142 Ind. 648, 42 N. E. 456 (self-contradiction); 1854, Powers *v.* Leach, 26 Vt. 273, 278 (mistake).

For a discussion on the related scholastic quibble whether a witness who has been "impeached" can be believed, see Smith *v.* State, 109 Ga. 479, 35 S. E. 59 (1900); and compare §§ 2033, 2498, *post*.

Of course it is improper to charge that *self-contradiction* may 'per se' create a reasonable doubt of guilt in a criminal case: 1904, Brown *v.* State, 142 Ala. 287, 38 So. 268.

[3] *England:* 1828, R. *v.* Jackson, 1 Lew. Cr. C. 170, per Holroyd, J. (self-contradiction); *Illinois:* 1876, Gulliher *v.* People, 82 Ill. 146 (contradiction); 1896, Moran *v.* People, 163 Ill. 372, 45 N. E. 230 (self-contradiction; the principle being not clearly laid down, because of the unjudicial and impolitic assignment of a dissenting judge to state the opinion of the ruling majority); 1897, Chicago City R. Co. *v.* Allen, 169 Ill. 187, 48 N. E. 414 (mere exaggeration not sufficient; falsity necessary); 1903, Beedle *v.* People, 204 Ill. 197, 68 N. E. 434; 1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (but wilful and knowing "exaggeration" equally involves the rule); 1906, Chicago & S. L. R. Co. *v.* Kline, 220 Ill. 334, 77 N. E. 229 (yet the rule does not apply to a witness who has "knowingly belittled any material fact"); 1906, Chicago City R. Co. *v.* Ryan, 225 Ill. 287, 80 N. E. 116; 1907, Godair *v.* Ham Nat'l Bank, 225 Ill. 572, 80 N. E. 407; *Minnesota:* 1901, Hahn *v.* Bettingen, 84 Minn. 512, 88 N. W. 10 (self-contradiction); *New York:* 1870, Wilkins *v.* Earle, 44 N. Y. 182 (contradiction); 1875, Place *v.* Minster, 65 N. Y. 103 (self-contradiction); 1878, Deering *v.* Metcalf, 74 N. Y. 503 (contradiction); 1908, People *v.* Laudiero, 192 N. Y. 304, 85 N. E. 132; *Oregon:* 1911, State *v.* Meyers, 59 Or. 537, 117 Pac. 818 ("false" implies "wilfully"); *Pennsylvania:* 1849, Miller *v.* Stem, 12 Pa. St. 389 (self-contradiction); 1896, Sofferstein *v.* Bertels, 178 Pa. 401, 35 Atl. 1000 (contradiction); *Texas:* 1847, Jones *v.* Laney, 2 Tex. 349 (contradiction).

§ 1014. [1] *Cal.* 1898, People *v.* Plyler, 121 Cal. 160, 53 Pac. 553; *Ga.* 1872, McLean *v.* Clark, 47 Ga. 71 (because "it seems absurd to charge a witness with wilfully telling falsehoods immaterial to the issue in hand"); *Ill.* 1874, Fishel *v.* Ireland, 52 id. 636; 1861, Crabtree *v.* Hagenbaugh, 25 Ill. 240; 1871, U. S. Express Co. *v.* Hutchins, 58 Ill. 45; 1881, Swan *v.* People, 98 Ill. 612; *Iowa:* 1904, Doyle *v.* Burns, 123 Ia. 488, 99 N. W. 195; *Kan.* 1866, Campbell *v.* State, 3 Kan. 488, 496; 1871, Hale *v.* Rawallie, 8 Kan. 136, 142; 1872, State *v.* Horne, 9 Kan. 119, 131; *Minn.* 1920, Greenfield *v.* Unique Theatre Co., 146 Minn. 17, 177 N. W. 666; *Miss.* 1905, Boykin *v.* State, 86 Miss. 481, 38 So. 725; *Mo.* 1895, State *v.* Duffey, 128 Mo. 549, 31 S. W. 98; 1901, Holdrege *v.* Watson, — Nebr. —, 96 N. W. 67; *N. M.* 1895, Pacific Gold Co. *v.* Skillicorn, 8 N. M. 8, 41 Pac. 533; *N. Car.* 1854, State *v.* Peace, 1 Jones L. 256; *N. Dak.* 1902, First Nat'l Bank *v.* Minneapolis & N. E. Co., 11

have here been led away by the inapt analogy of the limitations upon the criminal law of perjury. In the nature of character, a person who would lie upon a collateral point is perhaps likely to be a more determined liar than one who dares it only upon a material point; at any rate, there is no less a call to distrust the former than the latter.[2] But Courts have not seen fit to accept this consequence.

§ 1015. **Same: Time of the Falsehood.** Perhaps it is not logical to say that only lies told within a specific time shall create this distrust of the witness' entire testimony; but the Courts which affect this maxim insist on fixing some such limitations to the operation of the jury's belief. They commonly hold that the lie, to have any derogatory operation, may appear to have been told at any stage of the proceedings,—not necessarily while on the stand at the present time, but at any former stage of the same proceedings.[1]

N. D. 280, 90 N. W. 436; 1915, Remington *v.* Geiszler, 30 N. D. 346, 152 N. W. 661; *Wash.* 1896, State *v.* Carter, 15 Wash. 121, 45 Pac. 745; *Wis.* 1903, Richardson *v.* Babcock, 119 Wis. 141, 96 N. W. 554.

It is not necessary that the lie should be "palpable" to the jury: 1906, Chicago C. R. Co. *v.* Shaw, 220 Ill. 532, 77 N. E. 139; this is another example of the wretched and wasteful sophistry to which the rule leads.

[2] 1884, Elliott, C. J., in Seller *v.* Jenkins, 97 Ind. 436: "A witness who tells a falsehood concerning a matter incidentally connected with the subject of the action is as likely to testify untruly as if the falsehood had directly affected the issue." For illustrations of this, see the cross-examinations quoted *ante*, §§ 1005, 1006.

§ 1015. [1] 1809, R. *v.* Teal, 11 East 309 (former testimony, now confessed to have been perjured; present prosecution being for the conspiracy to charge falsely); 1825, Dunlop *v.* Patterson, 5 Cow. 23; 1864, Dunn *v.* People, 29 N. Y. 529; 1828, State *v.* Jim, 1 Dev. 509 (former trial); 1855, State *v.* Williams, 2 Jones L. 260 (grand jury); State *v.* Woodly, 2 Jones L. 259, 279 (committing magistrate). In Lavenburg *v.* Harper, 27 Miss. 301 (1854), an instruction was declared erroneous because it did not confine the jury to the evidence before the Court as their basis of belief, and because it was under the circumstances hardly applicable.

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

TOPIC V: SELF-CONTRADICTION

CHAPTER XXXIV.

1. General Principle

§ 1017. **Theory of Relevancy.** The end aimed at by the present sort of impeaching evidence is the same as that of the preceding sort, namely, to show the witness to be in general *capable of making errors* in his testimony (*ante*, § 1000); for upon perceiving that the witness has made an erroneous statement upon one point, we are ready to infer that he is capable of making an

error upon other points. But the method of showing this is here slightly different; for, instead of invoking the assertions of other witnesses to prove his specific error, we resort simply to the witness' own prior statements, in which he has given a contrary version. We place his contradictory statements side by side, and, as both cannot be correct, we realize that in at least one of the two he must have spoken erroneously. Thus, we have detected him in one specific error, from which may be inferred a capacity to make other errors. Two important features of this method of proof are to be noticed.

(1) The general end attained is the same indefinite end attained by the preceding method (*ante*, § 1000), *i.e.* some *undefined capacity to err;* it may be a moral disposition to lie, it may be partisan bias, it may be faulty observation, it may be defective recollection, or any other quality. No specific defect is indicated; but each and all are hinted at. It has been often said that a Prior Self-Contradiction shows "a defect either in the memory or in the honesty" of the witness:[1]

1852, SHAW, C. J., in *Com.* v. *Starkweather*, 10 Cush. 60: "It is founded on the obvious consideration that both accounts cannot be true, and tends to prove a defect of intelligence or memory on the subject testified of, or, what is worse, a want of moral honesty and regard to truth; and so, in either case, that the witness is less worthy of belief."

1870, COLE, J., in *Knox* v. *Johnson*, 26 Wis. 43: "This circumstance is well calculated to throw suspicion on her accuracy and credibility. It shows that her memory is exceedingly unreliable and treacherous in reference to the times of payment of moneys by her, or that she does not realize the importance of adhering to actual facts when making statements under oath."

This may be roughly true in the majority of instances; but there is no such invariable, certain indication; the scope is much broader and more intangible. There has also sometimes been an inclination on the part of the bar to argue as if every Prior Self-Contradiction involved a lie and illustrated the maxim, 'Falsus in uno, falsus in omnibus' (*ante*, § 1008); but this also is without foundation; the discrediting effect of a Prior Self-Contradiction is independent of whether or not the jury believe it to involve a conscious lie.[2]

(2) The process of using a Self-Contradiction to show error is in one respect weaker, in another respect stronger, than the preceding process of using Contradiction by other witnesses. It is *weaker*, in that the proof of the specific error can never be as *positive* as is possible by the other mode.[3] For example, if five credible witnesses testify that the assailant had a scar upon his face, contradicting the first witness, a belief in his present error is more readily

§ 1017. [1] So, too, Best, Evidence, § 478.

[2] 1872, Craig *v.* Rohrer, 63 Ill. 326.

[3] See the opinion of Holmes, J., in Gertz *v.* Fitchburg R. Co., 137 Mass. 77, quoted *post*, § 1109.

From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 314-323.

reached than if a single former contradictory statement of his own is brought forward; in the latter case we are by no means compelled to believe that his statement on the stand is erroneous. On the other hand, in the present mode, the process of discrediting is in its chief aim incomparably *stronger*, because it *always* shows that the witness has made *some sort of a mistake* at some time, and thus demonstrates a capacity to make errors. In other words, both of his statements cannot be correct; one of the two must be incorrect; therefore, he shows a capacity to err. It is the repugnancy of the two that is fatal:

Ante 1727, Chief Baron GILBERT, Evidence, 147, 150: "Another thing that derogates from the credit of a witness is, if upon oath he affirmed directly contrary to what he asserts; . . . and this takes from the witness all credibility, inasmuch as contraries cannot be true. . . . Now that which sets aside his credit and overthrows his testimony is . . . the repugnancy of his evidence; . . . if what he says be contradictory, that removes him from all credit; for things totally opposite cannot receive belief from the attestation of any man."

Thus, the process of discrediting by Prior Self-Contradiction is on the whole the more effective. The capacity to err invariably appears, from the very fact of self-contradiction; while in the other process it does not appear unless we believe the opposing witnesses' assertions. Logically, therefore, the present process is more direct and effective, because self-operative. Practically, however, it may fall to the same level as the other, if the utterance of the self-contradiction is denied by the witness and is obliged to be evidenced by calling other witnesses; for them it requires (as in the other process) that we first believe the other witnesses.[4] Yet, even then, in compensation, it may acquire a double force, for if we believe the other witnesses, the first witness has twice erred and perhaps twice falsified, — once, in his self-contradiction, and once again in denying that he uttered it.[5]

§ 1018. **Same: not admitted as Substantive Testimony, nor excluded as Hearsay.** (*a*) Since, in the words of Chief Baron Gilbert (*ante*, § 1017), it is "the repugnancy of his evidence" that discredits him, obviously the Prior Self-Contradiction is not used *assertively; i.e.* we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary Contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other, — but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one; the one merely neutralizes the other as a trustworthy one. In short, the *prior statement is not primarily hearsay*, because it is not offered assertively, *i.e.* not testimonially. The Hearsay Rule (*post*, § 1362) simply forbids the use of extrajudicial utterances as credible testi-

[4] This becomes important under Mr. J. Cooley's theory of Corroboration (*post*, § 1126).

[5] This is the chief reason for disputing the policy of the rule in the Queen's Case, about showing the writing to the witness (*post*, § 1260).

monial assertions; the prior contradiction is not offered as a testimonial assertion to be relied upon. It follows, therefore, that the use of Prior Self-Contradictions to discredit is not obnoxious to the Hearsay Rule.[1]

(*b*) It does not follow, however, that Prior Self-Contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay rule. But the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination (*post*, § 1362). Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve.

The contrary view, however, is the orthodox one.[2] It is universally maintained by the Courts that Prior Self-Contradictions are not to be treated as having any *substantive* or *independent testimonial value*:[3]

§ 1018. [1] This was not always understood, and though we find this sort of evidence frequently used in the 1700s (*e.g.* 1679, Langhorn's Trial, 7 How. St. Tr. 451, 462, 467; Wakeman's Trial, 7 How. St. Tr. 653; 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1154, 1179; 1744, Heath's Trial, 18 How. St. Tr. 58, 77; 1761, Wright *v.* Littler, 3 Burr. 1244, 1255), yet the particular objection made to it (in the last two cases, for example) seems to have rested on a feeling that the Hearsay Rule was being infringed. Mr. Starkie, however, clearly pointed out the groundlessness of this notion (1824, Starkie, Evidence, I, 206). Today it is well understood that the Hearsay Rule interposes no obstacle: 1861, State *v.* Mulholland, 16 La. An. 377; 1867, State *v.* Johnson, 12 Minn. 488; 1882, Tabor *v.* Judd, 62 N. H. 292, *semble;* and many of the cases cited in the next note *infra*. A good example may be seen, in Robinson *v.* Blakely, 4 Rich. 589 (1851), of a statement, inadmissible when offered merely as hearsay, becoming admissible when the opponent had put the declarant on the stand and thus laid him open to contradiction by the utterance before inadmissible.

[2] The orthodox view was approved in the first edition of this Treatise. Further reflection, however, has shown the present writer that the natural and correct solution is the one set forth in the text above. Compare the theory of Admissions (*post*, § 1048).

[3] *Accord:* ENGLAND: 1908, Dibble's Case, 1 Cr. App. 155 (from a hostile witness cross-examined by the calling party).

CANADA: 1916, R. *v.* Duckworth, 31 D. L. R. 570, Ont. (former testimony at the inquest).

UNITED STATES: *Federal:* 1916, Southern R. Co. *v.* Gray, 241 U. S. 333, 36 Sup. 558; *California:* 1917, Albert *v.* McKay & Co., 174 Cal. 451, 163 Pac. 666; *Delaware:* 1838, Rash *v.* Purnel, 2 Harringt. 448, 457; *Georgia:* 1896, Ficken *v.* State, 97 Ga. 813, 25 S. E. 925; 1898, Bush E. L. & P. Co. *v.* Wells, 103 Ga. 512, 30 S. E. 533; 1906, Perdue *v.* State, 126 Ga. 112, 54 S. E. 820; *Illinois:* 1884, Moore *v.* People, 108 Ill. 487; 1889, Ritter *v.* People, 130 Ill. 255, 260, 22 N. E. 605 (former testimony at the coroner's inquest); 1892, Purdy *v.* People, 140 Ill. 46, 52, 29 N. E. 700 (same); *Indiana:* 1881, Davis *v.* Hardy, 76 Ind. 280; 1888, Conway *v.* State, 118 Ind. 482, 488, 21 N. E. 285; 1921, Hogan *v.* State, — Ind. —, 133 N. E. 1 (keeping liquor illegally); *Kentucky:* 1898, Jones *v.* Com., — Ky. —, 46 S. W. 217; 1900, Nussbaum *v.* R. Co., — Ky. —, 57 S. W. 249; 1902, Mullins *v.* Com., — Ky. —, 67 S. W. 824; 1902, Ashcraft *v.* Com., — Ky. —, 68 S. W. 847; 1904, Fletcher *v.* Com., — Ky. —, 83 S. W. 588; 1905, Whitt *v.* Com., — Ky. —, 84 S. W. 340; 1920, Brown *v.* Com., 188 Ky. 814, 224 S. W. 362; *Louisiana:* 1897, State *v.* Reed, 49 La. An. 704, 21 So. 732; *Maine:* 1872, State *v.* Reed, 60 Me. 553; *Maryland:* 1807, DeSobry *v.* DeLaistre, 2 H. & J. 220; 1875, Mason *v.* Poulson, 43 Md. 161, 176; *Massachusetts:* 1852, Com. *v.* Starkweather, 10 Cush. 60; 1890, Francis *v.* Rosa, 151 Mass. 535, 24 N. E. 1024; 1899, Manning *v.* Carberry, 172 Mass. 432, 52 N. E. 521; 1899, Harriman *v.* R. Co., 173 Mass. 28, 53 N. E. 156; 1904, McDonald *v.* N. Y. C. & H. R. R. Co., 186 *Mass.* 474, 72 N. E. 55; 1905, Donaldson *v.* N. Y. N. H. & H. R. Co., 188 Mass. 484, 74 N. E. 915; *Michigan:* 1878, Howard *v.* Patrick,

1847, ALLEN, J., in *Charlton* v. *Unis*, 4 Gratt. 60: "Such testimony of inconsistent statements is admissible only for the purpose of impeaching the credit of the witness, but cannot be received as evidence of any fact touching the issue to be tried; for that would be to substitute the statements of a witness, generally when not on oath, as evidence between the parties, for his evidence given under the saction of an oath upon the trial."

1855, SHAW, C. J., in *Gould* v. *Norfolk Lead Co.*, 9 Cush. 346: "It is no evidence whatever that the facts are as he formerly stated them; and, though appeals are sometimes made to a jury that it is so, it is the province of the Court to inform them that it is not so."

But this theoretical and artificial nicety is overworked by some Courts. It has influenced them in reaching the rule forbidding impeachment of one's own witness by self-contradiction (*ante*, § 904); and the opinions are full of directions to trial Courts to tell the jurors to use their mental force to ignore in such self-contradicting assertions that testimonial value which their natural reasoning persists in seeing there.

§ 1019. **Principle of Auxiliary Policy; Rules for avoiding Unfair Surprise and Confusion of Issues.** Reasons of Auxiliary Policy apply to limit the present process of proving error as they do to the preceding one (*ante*, § 1002). In addition to the inferior probative value of errors upon distant and unconnected points, there obtain here, as there, the two strong considerations of Unfair Surprise and Confusion of Issues. The reasons are phrased by the authorities in almost the same language and are treated as applying equally to both modes of impeachment:

1849, WOODS, J., in *Seavy* v. *Dearborn*, 19 N. H. 356: "A question not otherwise material or proper does not become so by force of any purpose of the examining party to make use of it to discredit the witness by contradicting his answers to it. The reason

38 Mich. 795, 804; 1883, Brown *v.* Dean, 52 Mich. 267, 269, 17 N. W. 837; 1887, Catlin *v.* R. Co., 66 Mich. 358, 364, 33 N. W. 515; 1892, Tisman *v.* District, 90 Mich. 510, 513, 5 N. W. 549; 1897, Eno *v.* Allen, 113 Mich. 399, 71 N. W. 842; 1904, People *v.* Miner, 138 Mich. 290, 101 N. W. 536; *Minnesota:* 1867, State *v.* Johnson, 12 Minn. 488; *Mississippi:* 1905, Simms *v.* Forbes, 86 Miss. 412, 38 So. 546; *Missouri:* 1877, Peck *v.* Ritchey, 66 Mo. 119; 1879, State *v.* Kilgore, 70 Mo. 558, *semble;* 1880, State *v.* Hughes, 71 Mo. 635; 1896, State *v.* Baker, 136 Mo. 74, 37 S. W. 810; *Nebraska:* 1899, Zimmerman *v.* Bank, 59 Nebr. 23, 80 N. W. 54; *New Jersey:* 1916, State *v.* Brunet, 88 N. J. L. 414, 97 Atl. 39 (instruction held erroneous); *New York:* 1871, Sloan *v.* R. Co., 45 N. Y. 127; *North Carolina:* 1914, Medlin *v.* County Board, 167 N. C. 239, 83 S. E. 483, Walker, J., diss. (here, a very pretty quibble, turning on the exquisite point that a witness' self-contradiction would not be "substantive evidence", but a party's admissions would be, on the theory of § 1048, n. 4, *post*); *North Dakota:* 1903, Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305; *Ohio:* 1829, Hand *v.* Elvira, 1 Gilp. 60; 1884, Kent *v.* State, 42 Oh. St. 433; *Oklahoma:* 1917, Thomas *v.* State, 13 Okl. Cr. 414, 164 Pac. 995; *Pennsylvania:* 1895, Dampman *v.* R. Co., 166 Pa. 520, 31 Atl. 244; 1908, Com. *v.* Deitrick, 221 Pa. 7, 70 Atl. 275, *semble; Texas:* 1894, Armstrong *v.* State, 33 Tex. Cr. 417, 421, 26 S. W. 829; 1897, Texas & P. R. Co. *v.* Johnson, 90 Tex. 304, 38 S. W. 520; *Utah:* 1912, State *v.* Chynoweth, — Utah —, 126 Pac. 276; *Vermont:* 1874, Law *v.* Fairfield, 46 Vt. 431; *Wisconsin:* 1879, Warder *v.* Fisher, 48 Wis. 344, 4 N. W. 470; 1889, Heddles *v.* R. Co., 74 Wis. 251, 42 N. W. 251, 76 Wis. 232, 45 N. W. 308.

Contra: 1921, Thomas *v.* State, 206 Ala. 416, 90 So. 295 (homicide; a prior self-contradictory statement of a witness for the prosecution having been allowed, held that the party "has the right to argue to the jury any facts and circumstances legitimately tending to show that they should believe the variant or contradictory evidence instead of said witness").

assigned by writers for these rules are that a contrary course of proceedings would introduce issues in interminable numbers and perplex and harass litigants in questions which do concern their cause."

1884, ELLIOTT, C. J., in *Seller* v. *Jenkins*, 97 Ind. 436: "The Courts do not put the rule [that a witness cannot be impeached upon collateral matters] on the ground that the nearer the false statement is to the main issue, the stronger is its effect upon the testimony of the witness. It is put upon an entirely different ground. By one Court it is put upon the ground that the time of the Court is too limited to permit collateral inquiries. An older and a stronger reason is . . . that such a practice would confuse the jury by an interminable multiplication of issues."

But these two considerations do not bear upon the present sort of evidence in precisely the same way as upon the preceding sort.

(*a*) Take, first, Confusion of Issues. The force of this objection is clear. But what remedy or limitation does it suggest? We cannot here say, as we could in dealing with Contradictions by outside testimony (*ante*, § 1002), that only such evidence shall be admitted as would have been otherwise admissible in any case; for no Prior Self-Contradictions would otherwise have been admissible. In the process of contradicting by extrinsic testimony, it was easy to draw the line by admitting only such testimony as would otherwise have been admissible, and thus the objection of Confusion of Issues was entirely obviated. In the present case, no such line is dictated by the logic of the situation. As a matter of history, however, Courts have always drawn the same line for both classes of evidence. Some line had to be drawn, and it was simpler to draw the same line for both. Its definition, and the application of it, are later examined (*post*, §§ 1020–1023).

(*b*) Next, the consideration of Surprise. It was seen, in dealing with Contradiction by extrinsic testimony (*ante*, § 1002), to expect the witness or his party to be prepared to refute alleged errors of his ceases to be unfair when the subject of the error is concerned with the matter in litigation or the qualifications of the witness; for upon such subjects they ought in any case to have come prepared. Thus the line is naturally drawn between Contradictions by other witnesses upon such subjects and Contradictions upon collateral subjects. But in the present class of evidence — Self-Contradictions — it is of no value to draw such a line. It is just as difficult to come prepared upon alleged Self-Contradictions dealing with the subject of litigation as upon other Self-Contradictions. For example, if after a witness has left the stand, the opponent offers (by a false witness) to prove that he formerly declared the assailant to be a tall man, whereas now he testifies that he was a short man, it is obviously impossible for any one but a prophet to have foreknown that the alleged self-contradiction would deal with this subject. By hypothesis, the witness has never made such an assertion and can so testify; but how can he have known until now what it is that he is to disprove? The fact that the matter is relevant to the case could not have warned him of the precise topic, time, and place of the fabricated remark. Thus, the line of distinction which naturally suggested itself to prevent surprise in the case of

Contradiction by extrinsic testimony has no bearing in preventing surprise in the case of Prior Self-Contradictions.

Another method of obviating surprise must be sought. It is this, as followed by nearly every Court to-day: The witness must be *asked in advance* — *i.e.* on cross-examination and before any other testimony to the Prior Self-Contradiction is offered — whether he made the contradictory statement which it is desired to prove. In this way he receives ample warning, and, if the alleged contradiction is a mere fabrication of the impeaching party, the other has ample time to prepare to disprove it, or to explain it away if it was made. Thus, the method of obviating the objection of Surprise is, not to draw a line between collateral and other matters, but to require that express warning be given to the opposing witness before any attempt is made to prove the alleged Self-Contradiction. This rule is later examined (*post*, §§ 1025–1038).

Surveying, then, the scope of these two objections, Confusion of Issues and Surprise, as applied to Contradictions by extrinsic testimony (*ante*, § 1000) and to Self-Contradictions (the present subject), it is seen that the objections themselves are of the same nature in both classes; that the rules naturally resorted to for obviating the objections are not necessarily the same; that for the former class of evidence a single rule suffices to obviate both objections — the rule excluding Contradictions on Collateral Matters (*ante*, § 1002); but that for the present class two rules are required, one excluding Self-Contradictions on Collateral Matters (thus obviating the objection of Confusion of Issues), the other requiring a Preliminary Warning (thus obviating the objection of Surprise). These two main rules may now be taken up in order.

2. Collateral Matters Excluded

§ 1020. **Test of Collateralness.** It has just been noticed that the test of collateralness is in fact, though not in logical necessity, the same for this class of evidence as for the preceding one, *i.e.* Contradiction by extrinsic testimony (*ante*, § 1003).

Here, as there, most Courts content themselves with invoking the term "collateral" as the test. Others employ the terms "material" or "relevant" as indicating the matters that may be the subject of a Prior Self-Contradiction. The difficulty with all these terms is that without further definition they are too indefinite to be useful. When we seek to learn what "collateral" means, we are obliged either to define further — in which case it is a mere epithet, not a legal test — or to illustrate by specific instances — in which case we are left to the idiosyncrasies of individual opinion.

The only test in vogue that has the qualities of a true test — definiteness, concreteness, and ease of application — is that laid down in Attorney-General *v.* Hitchcock: *Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self-contradiction?*

1847, *Attorney-General* v. *Hitchcock*, 1 Exch. 99. POLLOCK, C. B.: "My view has always been that the test whether the matter is collateral or not is this: If the answer of a witness is a matter which you would be allowed on your part to prove in evidence, if it have such a connection with the issue that you would be allowed to give in evidence, then it is a matter on which you may contradict him. . . . I think the expression 'as to any matters connected with the subject of inquiry' is far too vague and loose to be the foundation of any judicial decision. And I may say I am not all prepared to adopt the proposition in those general terms, that a witness may be contradicted as to anything he denies having said, provided it be in any way connected with the subject before the jury. It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness' testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of the inquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other. It is certainly allowable to ask a witness in what manner he stands affected toward the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as to what he said, — not with the view of having a direct effect on the issue, but to show what is the state of mind of that witness in order that the jury may exercise their opinion as to how far he is to be believed. But those cases, where you may show the condition of a witness or his connection with either of the parties, are not to be confounded with other cases where it is proposed to contradict a witness on some matter unconnected with the question at issue." ALDERSON, B.: "The question is this, Can you ask a witness as to what he is supposed to have said on a previous occasion? You may ask him as to any fact material to the issue, and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue. . . . The witness may also be asked as to his state of equal mind or impartiality between the two contending parties, — questions which would have a tendency to show that the whole of his statement is to be taken with a qualification, and that such a statement ought really to be laid out of the case for want of impartiality; [and these answers may be contradicted]. . . . Such, again, is the case of an offer of a bribe by a witness to another person, or the offer of a bribe accepted by a witness from another person; the circumstance of a witness having offered or accepted a bribe shows that he is not equal and impartial. . . . But with these exceptions I am not aware that you can with propriety permit a witness to be examined first and contradicted afterwards on a point which is merely and purely collateral."

This rule of Attorney-General *v.* Hitchcock is expressly accepted in only a few of the United States.[1]

Moreover, the rule is often misunderstood. Courts are found phrasing the test of admissibility in this way: "Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?",[2] or "Whether the question, the answer to which is proposed to be contra-

§ 1020. [1] See the cases cited *post*, § 1021.
[2] 1870, Hildeburn *v.* Curran, 65 Pa. 63; 1896, Williams *v.* State, 73 Miss. 820, 19 So. 826.

dicted, would be admissible if proposed by the party calling him?"[3] These are accurate enough as far as they go; but they omit to provide for an important class of matter clearly admissible, namely, facts relating to the bias, corruption, or other specific deficiencies of the witness. It is not merely matters which are a "part of the case" that may be the subject of a self-contradiction, but *any matter which would have been otherwise admissible in evidence*. The simple test is (in the language of Chief Baron Pollock) whether it concerns "a matter which you would be allowed on your part to prove in evidence" independently of the self-contradiction, — *i.e.* if the witness had said nothing on the subject.

It may be added that there is sometimes found an erroneous notion (precisely similar to that described already as obtaining sometimes for Contradiction by extrinsic testimony) that nothing said on the direct examination can be collateral and therefore a *Self-Contradiction of anything said on the direct examination* is admissible.[4] The history of this misunderstanding, and the reason why it is erroneous, have already been explained (*ante*, § 1007). The error has been frequently repudiated by other Courts.[5]

§ 1021. **Two Classes of Facts not Collateral; (1) Facts relevant to the Issue.** In applying the foregoing test, it is obvious that there are two classes of facts of which evidence would have been admissible independently of the self-contradiction: (1) facts relevant to some issue in the case under the pleadings; (2) facts admissible to discredit the witness as to bias, corruption, or the like.

(1) *Facts relevant to some issue in the case.* Here the circumstances of each separate case determine the admissibility; and no general principle can be laid down. Most rulings are useless as precedents.[1]

[3] 1859, Combs *v.* Winchester, 39 N. H. 16; said here to be "substantially the rule" of Attorney-General *v.* Hitchcook.

[4] 1864, Forde's Case, 16 Gratt. 557, *semble* ("It does not fall within the reason assigned, that the answer of a witness to collateral matter cannot be contradicted by the party asking it because it would be unjust to expect the witness to come prepared to prove the truth of every collateral statement; as he has embodied it himself in his own narrative of the transactions, he must be prepared to sustain it"); 1850, State *v.* Sargent, 32 Me. 429; 1864, Forde's Case, 16 Gratt. 556, *semble;* 1878, Furst *v.* R. Co., 72 N. Y. 544, *semble*.

[5] 1857, Dillon *v.* Bell, 9 Ind. 320: 1884, Seller *v.* Jenkins, 97 Ind. 437; 1896, Williams *v.* State, 73 Miss. 820, 19 So. 826.

§ 1021. [1] The following list does not include all the rulings in which the doctrine of "collateralness" has been incidentally sanctioned; it is everywhere conceded to be the law; compare also the cases and statutes cited *ante*, § 1004:

ENGLAND: 1827, Meagoe *v.* Simmons, 3 C. & P. 75 (usury; the consideration for a former bill discounted between the same parties at the same time); 1829, R. *v.* Phillips, 1 Lew. Cr. C. 105 (in using former utterings of forged notes to show guilty knowledge, the defendant's statements at the time of former uttering could not be contradicted by his statements "at a time collateral to a former uttering", "because the prisoner could not be prepared to answer or explain evidence of that description"); 1847, R. *v.* White, 2 Cox Cr. 192; 1853, R. *v.* Rorke, 6 Cox Cr. 196 (former testimony on a purely collateral point, admitted: Lefroy, C. J.: "No matter whether the question is relevant or irrelevant to the present issue, it goes to the inconsistency of her evidence on the two trials"; but refusing to make the ruling a precedent); 1862, Fowkes *v.* Ins. Co., 3 F. & F. 443 (denial by a medical examiner that he had before declared the life bad which he now testified he had accepted; allowed).

CANADA: 1874, Hamilton *v.* Holder, 15 N. Br. 223; 1874, McCulloch *v.* Ins. Co., 34 U. C. Q. B. 383, 387, and 32 U. C. Q. B. 614 (action on a fire policy; the plaintiff on cross-examination denied that he had told the de-

fendant's agent that he had not been burned out before; contradiction excluded).

UNITED STATES: *Federal:* 1806, Lamalere *v.* Caze, 1 Wash. C. C. 413 ("pertinent to the cause"; "relative to the cause"); 1840, U. S. *v.* Dickinson, 2 McLean 330; 1905, Dillard *v.* U. S., 141 Fed. 303, 310, 72 C. C. A. 451 (rule of Attorney-General *v.* Hitchcock applied); *Alabama:* 1848, Moore *v.* Jones, 13 Ala. 303; 1853, Ortez *v.* Jewett, 23 Ala. 663; 1859, Blakey's Heirs *v.* Blakey's Ex'x, 33 Ala. 618; 1879, Washington *v.* State, 63 Ala. 192; 1895, Orr *v.* State, 107 Ala. 35, 18 So. 142; 1921, Alabama C. G. & A. R. Co. *v.* Kyle, 204 Ala. 597, 87 So. 191 (execution of a note);
Arkansas: 1855, Atkins *v.* State, 16 Ark. 587; Dig. 1919, § 4187 (cited *ante*, § 923, ignores this limitation); 1909, Sellers *v.* State, 93 Ark. 313, 124 S. W. 770 (example of incorrect ruling);
California: 1852, McDaniel *v.* Baca, 2 Cal. 338; 1872, People *v.* Devine, 44 Cal. 458 (place of a homicide; admitted); 1898, Trabing *v.* N. & I. Co., 121 Cal. 137, 53 Pac. 644; 1905, Western Union O. Co. *v.* Newlove, 145 Cal. 772, 79 Pac. 542 (boundary);
Colorado: 1897, Askew *v.* People, 23 Colo. 446, 48 Pac. 524; 1913, Mitsunaga *v.* People, 54 Colo. 102, 129 Pac. 241;
Florida: 1901, Myers *v.* State, 43 Fla. 200, 31 So. 275;
Georgia: Code 1910, § 5881, P. C. § 1052 (allowable "as to matters relevant to his testimony and to the case"); 1899, Hudgins *v.* Bloodworth, 109 Ga. 197, 34 S. E. 364;
Illinois: 1884, Moore *v.* People, 108 Ill. 486;
Indiana: 1820, Shields *v.* Cunningham, 1 Blackf. 87 ("irrelevant and immaterial"); 1843, McIntire *v.* Young, 6 Ind. 497 (slander; that the witness proving the utterance did not know the plaintiff at the time, and held the same views as those uttered by defendant; excluded); 1853, Lawrence *v.* Lanning, 4 Ind. 194; 1869, Fogleman *v.* State, 32 Ind. 145; 1873, Burdick *v.* Hunt, 43 Ind. 388; 1883, Brown *v.* Owen, 94 Ind. 36; 1884, Seller *v.* Jenkins, 97 Ind. 434; 1885, Welch *v.* State, 104 Ind. 351, 3 N. E. 850; 1889, Staser *v.* Hogan, 120 Ind. 220, 21 N. E. 911, 22 N. E. 990 (in these two cases the misunderstood test is used: "Would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea?"); 1895, Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70; 1906, Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755 (intoxication of testator); 1920, Bush *v.* State, 189 Ind. 467, 128 N. E. 443;
Iowa: 1844, Wau-kon-chaw-neek-kaw *v.* U. S., 1 Morris 337; 1857, Cokely *v.* State, 4 Ia. 480; 1859, State *v.* Ruhl, 8 Ia. 451; 1921, McDonald *v.* Yellow Taxicab Co., 192 Ia. 1183, 184 N. W. 291 (automobile injury);
Kansas: 1907, State *v.* Sweeny, 75 Kan. 265, 88 Pac. 1078 (rule of Attorney-General *v.* Hitchcock applied);
Kentucky: 1859, Champ *v.* Com., 2 Metc. 23; 1878, Kennedy *v.* Com., 14 Bush 357; 1882, Loving *v.* Com., 80 Ky. 511; 1884, Crittenden *v.* Com., 82 Ky. 167; 1889, Com. *v.* Hourigan, 89 Ky. 311, 12 S. W. 550; 1896, Louisville & N. R. Co. *v.* Webb, 99 Ky. 332, 35 S. W. 1117, 1121; 1921, Duke *v.* Com., 191 Ky. 138, 229 S. W. 122 (murder);
Louisiana: 1896, State *v.* Scott, 48 La. An. 1418, 20 So. 909; 1896, State *v.* Conerly, 48 La. An. 1561, 21 So. 192; 1905, State *v.* Rogers, 115 La. 164, 38 So. 952; 1910, State *v.* Fletcher, 127 La. 602, 53 So. 877; 1921, State *v.* Harris, 150 La. 214, 90 So. 574 (extortion and forgery);
Maine: 1831, Ware *v.* Ware, 8 Greenl. 53 ("the true line of distinction is that which has been established between those questions which are merely collateral and have no immediate connection with the cause and those which intimately relate to the subject of the inquiry"); 1857, Brackett *v.* Weeks, 43 Me. 291; 1870, State *v.* Kingsbury, 58 Me. 243; 1872, Bell *v.* Woodman, 60 Me. 466, 468; 1874, State *v.* Benner, 64 Me. 287; Davis *v.* Roby, 64 Me. 429;
Maryland: 1913, Capital Traction Co. *v.* Contner, 120 Md. 78, 87 Atl. 904 (motorman's admission that he lost control of his car, held not collateral);
Massachusetts: Two points are here to be noted: (1) The doctrine of the modern rulings is that the trial Judge has discretion to determine whether matter is collateral and even to allow a cross-examination upon matters concededly collateral; hence, most of such rulings simply decide that the discretion below was not improperly exercised in admitting or excluding; (2) Self-contradictions of one's own witness (*ante*, § 905) are admitted by virtue of a statute. P. S. c. 169, § 22, Gen. L. 1920, c. 233, § 23; how far the discretion-doctrine affects this statutory evidence does not appear: 1843, Brockett *v.* Bartholomew, 6 Metc. 396; 1843, Hathaway *v.* Crocker, 7 Metc. 264; 1857, Benjamin *v.* Wheeler, 8 Gray 413; 1857, Lane *v.* Bryant, 9 Gray 247 (a statement as to the witness' former hearsay and inadmissible remarks, excluded); 1861, Fletcher *v.* R. Co., 1 All. 13 (same); 1863, Couillard *v.* Duncan, 6 All. 440 (fraudulent transfer; creditor's inconsistent statement of the amount of the debt; admitted); 1865, Prescott *v.* Ward, 10 All. 205, 208 (discretion rule); 1866, Marsh *v.* Hammond, 11 All. 486 (statements by an insolvent debtor, a fraudulent transfer being involved; admitted); 1867, Carruth *v.* Bayley, 14 All. 532 (statements by a transferee and by another creditor, as to former's knowledge of insolvency, and as to the existence of a claim corroborating the other testimony; admitted); 1868, Foot *v.* Hunkins, 98 Mass. 524 (issue as to C.'s ownership, C. denying it; C.'s lack of money and failure having been testified to by him, former statements by him that he had means were received); 1869, Ryerson *v.* Abington, 102 Mass. 530 (an inadmissible opinion; excluded); 1873, Com. *v.* McBean,

111 Mass. 438 (indecent assault while on a drive; a statement on another occasion that the prosecutrix would kiss the defendant if he took her to drive; admitted); 1873, Davis *v.* Keyes, 112 Mass. 436 (contract on a warranty of a horse's age; defendant's testimony that he did not know the horse's age, and had never warranted a horse, excluded); 1875, Woodard *v.* Eastman, 118 Mass. 403; 1876, Kaler *v.* Ins. Co., 120 Mass. 334; 1877, Eames *v.* Whittaker, 123 Mass. 342, 344; 1885, Batchelder *v.* Batchelder, 139 Mass. 1, 29 N. E. 61 (under statute; that the witness had not had a conversation with the testator's wife regarding a will prior to the one in issue; excluded); 1889, Phillips *v.* Marblehead, 148 Mass. 328, 19 N. E. 547 (cross-examination on collateral matters, discretionary); 1889, Alexander *v.* Kaiser, 149 Mass. 321, 21 N. E. 376; 1889, Roberts *v.* Boston, 149 Mass. 346, 352, 21 N. E. 668 (discretion doctrine); 1895, Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 229 (discretion doctrine); 1896, Howes *v.* Colburn, 165 Mass. 385, 43 N. E. 125 (discretion-doctrine; testimony of prior contradictions offered against a witness called in rebuttal); 1905, Robinson *v.* Old Colony St. R. Co., 189 Mass. 594, 76 N. E. 190 (motorman's conduct); 1906, American Woolen Co. *v.* Boston & M.R. Co., 190 Mass. 152, 76 N. E. 658 (records of a railroad);

Michigan: 1866, Fisher *v.* Hood, 14 Mich. 189; 1869, Patten *v.* People, 18 Mich. 329; 1878, Hitchcock *v.* Burgett, 38 Mich. 501, 505; 1881, Hamilton *v.* People, 46 Mich. 186, 188, 9 N. W. 247; 1882, Driscoll *v.* People, 47 Mich. 413, 417, 11 N. W. 221; 1882, People *v.* Broughton, 49 Mich. 339, 13 N. W. 621; 1886, Butterfield *v.* Gilchrist, 63 Mich. 161, 29 N. W. 682; 1887, McDonald *v.* McDonald, 67 Mich. 122, 34 N. W. 276; 1890, People *v.* Hillhouse, 80 Mich. 585, 45 N. W. 484; 1892, Electric Light Co. *v.* Grant, 90 Mich. 475, 51 N. W. 539; 1895, People *v.* De France, 104 Mich. 563, 62 N. W. 709; 1895, McClellan *v.* R. Co., 105 Mich. 101, 62 N. W. 1026 (a former expression of opinion, by one now testifying to a motorman's care, that the latter was to blame, admitted); 1904, People *v.* Row, 135 Mich. 505, 98 N. W. 13 (rape);

Minnesota: 1868, Hicks *v.* Stone, 13 Minn. 439; 1869, State *v.* Staley, 14 Minn. 115; 1897, Murphy *v.* Backer, 67 Minn. 510, 70 N. W. 799;

Mississippi: 1885, Jamison *v.* R. Co., 63 Miss. 33, 37; 1889, Jones *v.* State, 67 Miss. 111, 115, 7 So. 220; 1896, Williams *v.* State, 73 Miss. 820, 19 So. 826 (test, whether the matter would be admissible as part of the case); 1899, Garner *v.* State, 76 Miss. 515, 25 So. 363; 1905, Davis *v.* State, 85 Miss. 416, 37 So. 1018 (here an over-strict ruling); 1905, Bell *v.* State, — Miss. —, 38 So. 795 ("Would the cross-examining party be allowed to prove it as a part or in support of his case?"); 1905, Scott *v.* State, — Miss. —, 39 So. 1012; 1909, Cooper *v.* State, 94 Miss. 480, 49 So. 178;

Missouri: 1871, Harper *v.* R. Co., 47 Mo. 581; 1875, McKern *v.* Calvert, 59 Mo. 243; 1880, State *v.* Hughes, 71 Mo. 635; 1901, Hamburger *v.* Rinkel, 164 Mo. 398, 64 S. W. 104 (the facts must be such as are "pertinent to the issue and could have been shown in evidence as facts independently of the inconsistency");

Nebraska: 1884, George *v.* State, 16 Nebr. 321, 20 N. W. 311 (test, whether the same matter could be used affirmatively); 1897, Johnston *v.* Spencer, 51 Nebr. 198, 70 N. W. 982 (provable if "a part of his case, tending to establish his plea"); 1899, Zimmermann *v.* Kearney Co. Bank, 57 Nebr. 800, 78 N. W. 366, *semble* (test of Attorney-General *v.* Hitchcock adopted); 1904, Ferguson *v.* State, 72 Nebr. 350, 100 N. W. 800 (approving the last two Nebraska cases, but not noticing their difference);

New Hampshire: 1859, Combs *v.* Winchester, 39 N. H. 16 (Bell, J.: "It may always, we think, be determined whether evidence in contradiction of a witness is admissible by considering whether the question, the answer to which is proposed to be contradicted would be admissible if proposed by the party calling him. . . . But if the question is admissible only on cross-examination, it is merely collateral and cannot be contradicted"); 1861, Dewey *v.* Williams, 43 N. H. 385, 386; 1864, Summer *v.* Crawford, 45 N. H. 417;

New Jersey: 1830, Fries *v.* Brugler, 12 N. J. L. 80;

New York: 1830, Lawrence *v.* Barker, 5 Wend. 305; 1831, Jackson *v.* Warford, 7 Wend. 61; 1847, Howard *v.* Ins. Co., 4 Den. 504, 506 (a plea of fraudulent over-valuation to an action on a fire-policy; the witness, plaintiff's brother and business-manager, was asked whether he had, in originally making purchases, represented the plaintiff's capital (really $400) as $10,000; it was said *obiter* that the answer could not be contradicted); 1863, Plato *v.* Reynolds, 27 N. Y. 587; 1871, Sloan *v.* R. Co., 45 N. Y. 126 (negligence in not keeping the track in repair; prior inconsistent statements admitted of a witness to the condition of the track);

North Carolina: 1836, Radford *v.* Rice, 2 Dev. & B. 42 (the matter must be "relevant to the issue", "the fact in issue or its attendant circumstances or any facts immediately connected with the subject of inquiry"); 1869, State *v.* Kirkman, 63 N. C. 246 (allowed); 1871, Clark *v.* Clark, 65 N. C. 660 (details affecting bias; excluded); 1873, Kerrans *v.* Brown, 68 N. C. 43 (capacity of testator, his sanity being disputed; admitted); 1873, State *v.* Elliott, 68 N. C. 125 (circumstances of a killing; excluded); 1876, State *v.* Patterson, 74 N. C. 157 (filiation proceedings; whether prosecutrix had four years before had intercourse with a third person; excluded); 1879, State *v.* Scott, 81 N. C. 606 ("rather than be outdone by a negro, he would swear any

§ 1022. **Same: (2) Facts discrediting the Witness as to Bias, Corruption, Skill, Knowledge, etc.** A second class of matters which, by the rule in Attorney-General *v.* Hitchcock, may be the subject of a self-contradiction (because they concern facts which could have been introduced independently of the self-contradiction) includes all those which evidence specific discrediting qualities in the witness, — in particular, Bias, Interest, and Corruption, and occasionally also, lack of Skill, Knowledge, and the like. In this class, on the other hand, are not included facts of misconduct impeaching Moral Character. The admissibility of the self-contradiction thus depends indirectly on the scope of the rules governing the above kinds of facts (*ante*, §§ 948–996).

The general principle is to-day almost everywhere conceded, but it is in matters of bias, interest, and corruption that it receives most frequent mention: [1]

amount of lies"; excluded); 1880, State *v.* Parish, 83 N. C. 613 (similar to Pattersons' Case, *supra*, but involving a peculiar doctrine of this State); 1882, State *v.* Crouse, 86 N. C. 621 (like Patterson's Case); 1882, State *v.* Davis, 87 N. C. 524 (a fact indicating the witness to be an accessory after the fact and thus affecting his motive to testify falsely; admitted); 1897, Burnett *v.* R. Co., 120 N. C. 517, 26 S. E. 819;
Ohio: 1884, Kent *v.* State, 42 Oh. 434 (rule of Attorney-General *v.* Hitchcock said to be ordinarily the test; whether universally, is doubted);
Oklahoma: 1921, Freels *v.* State, — Okl. Cr. —, 195 Pac. 1094 (murder); 1921, West *v.* State, — Okl. Cr. —, 198 Pac. 99 (larceny of automobile);
Pennsylvania: 1870, Hildeburn *v.* Curran, 65 Pa. 63 (test, "Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?"); 1874, Schlater *v.* Winpenny, 75 Pa. 325; 1888, Zebley *v.* Storey, 117 Pa. 480, 489, 12 Atl. 569;
South Carolina: 1831, Smith *v.* Henry, 2 Bail. 118, 127; 1890, State *v.* Bodie, 33 S. C. 129, 11 S. E. 624;
South Dakota: 1897, State *v.* Davidson, 9 S. D. 564, 70 N. W. 879 (provable if "a part of his case, tending to establish his plea");
Tennessee: 1890, Franklin *v.* Franklin, 90 Tenn. 48, 16 S. W. 557; 1897, Saunders *v.* R. Co., 99 Tenn. 130, 41 S. W. 1031 ("as a part of and as tending to establish his case");
Utah: 1895, Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 117;
Vermont: 1858, Holbrook *v.* Holbrook, 30 Vt. 434; 1883, Lewis *v.* Barker, 55 Vt. 21; 1888, Alger *v.* Castle, 61 Vt. 57, 17 Atl. 727; 1901, Lynds *v.* Plymouth, 73 Vt. 216, 50 Atl. 1083;
Virginia: 1833, Daniels *v.* Conrad, 4 Leigh 402, 404, 405; 1882, Langhorne *v.* Com., 76 Va. 1019 (*semble*, the test of Attorney-General *v.* Hitchcock); 1895, Robertson *v.* Com., — Va. —, 22 S. E. 359;
Washington: 1900, State *v.* Coates, 22 Wash. 601, 61 Pac. 726 (confession of prior burglaries, admitted); 1922, State *v.* Carroll, — Wash. —, 206 Pac. 563;
Wisconsin: 1903, Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815 (here erroneously excluded, for the fact of bias was involved);
Wyoming: 1903, Horn *v.* State, 12 Wyo. 80, 73 Pac. 705 (prior statements showing motive, held not collateral).

§ 1022. [1] The rulings in the different jurisdictions are given below. The list given in the preceding note should also be consulted, as a strict line of division is sometimes difficult to draw. Compare also the cases cited *ante*, §§ 948–969, and §§ 990–996, which sometimes also throw light on the present rule.

ENGLAND: Some early rulings were inclined to treat all such matters as material: 1811, Yewin's Case, 2 Camp. 638, n. (whether a witness for prosecution had not said he would be revenged on defendant; allowed to be shown, "as the words were material to the guilt or innocence of the prisoner"); 1829, R. *v.* Barker, 3 C. & P. 590 (contradiction as to the loose conduct of the prosecutrix in a rape case; admitted); 1843, R. *v.* Robins, 2 M. & Rob. 512 (contradicting the prosecutrix in a rape case as to previous connection with other men; admitted); but other rulings were inclined to treat them as collateral, even where bias was distinctly involved: 1838, Harrison *v.* Gordon, 2 Lew. Cr. C. 156, Alderson, B. (excluding an apparent denial of circumstances indicating a hostile spirit); 1838, Lee's Case, 2 Lew. Cr. C. 154, Coleridge, J. (that the witness had said that the prisoner should be acquitted if it cost him £20; that he had tried to persuade witnesses for the prosecution not to testify; excluded). But this unsettled condition of the law was ended in 1847 by Attorney-General *v.*

Hitchcock, cited *ante*, § 1020 (admitting all matters involving bias or corruption; in this particular case the evidence was excluded as not really of that sort; the information was for making malt in an unregistered cistern; a witness testifying for the prosecution to the making was asked on cross-examination if he had not said that the Crown officers had offered him £20 to testify to that effect; this he denied, and another witness was called to prove it, but was rejected; Pollock, C. B.: "The reason is that it is totally irrelevant to the matter in issue that some person should have thought fit to offer a bribe to the witness to give an untrue account of a transaction, and it is of no importance whatever if that bribe was not accepted"); 1888, R. *v.* Shaw, 16 Cox Cr. 503, Cave, J. (bias, admissible).

UNITED STATES: *Federal:* 1840, U. S. *v.* Dickinson, 2 McL. 330; 1880, U. S. *v.* Schindler, 18 Blatchf. 230, Benedict, J. (the utterances showing prejudice "would have been admissible if no inquiry had first been made of W. in regard to them, and inquiry of and denial by him did not make them any the less admissible");
Alabama: 1858, McHugh *v.* State, 31 Ala. 320 (bias; admitted); 1859, Blakey's Heirs *v.* Blakey's Executrix, 33 Ala. 618 (excluded); 1860 Lewis *v.* State, 35 Ala. 386 (attempt to coerce a witness; admitted); 1866, Bullard *v.* Lambert, 40 Ala. 210 (bias; admitted); 1877, Fincher *v.* State, 58 Ala. 215, 219 (bias; admitted);
Arkansas: 1889, Crumpton *v.* State, 52 Ark. 274 (bias; admissible); 1890, Hollingsworth *v.* State, 53 Ark. 387, 388, 14 S. W. 41 (that the witness was working for a reward);
California: 1878, People *v.* McKeller, 55 Cal. 65 (length of residence in one place; excluded); 1897, People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 833 (that the witness had attempted to bribe another; admitted);
Connecticut: 1828, Atwood *v.* Welton, 7 Conn. 70 (bias; admissible); 1874, Beardsley *v.* Wildman, 41 Conn. 515 (same);
Delaware: 1911, Roberts *v.* State, 25 Del. 2 Boyce, 385, 79 Atl. 396 (lies told by defendant about having no money);
Illinois: 1914, People *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804 (opinion; excluded);
Indiana: 1859, Bersch *v.* State, 13 Ind. 435, *semble* (place of residence may affect credibility); 1869, Foglenman *v.* State, 32 Ind. 145 (the witness' motives for turning State's evidence in another cause; excluded); 1878, Scott *v.* State, 64 Ind. 400 (bias; admissible); 1881, Johnson *v.* Wiley, 74 Ind. 233, 238 (same); 1907, Cook *v.* State, 169 Ind. 430, 82 N. E. 1047 (murder; bias against the deceased; admitted); 1910, Miller *v.* State, 174 Ind. 255, 91 N. E. 930 (murder; erroneous ruling);
Iowa: 1898, State *v.* Heacock, 106 Ia. 191, 76 N. W. 654 (bias; excluded);
Kansas: 1912, State *v.* Swartz, 87 Kan. 852, 126 Pac. 1091 (that a witness was asleep at the time testified to, allowed);
Kentucky: 1855, Cornelius *v.* Com., 15 B. Monr. 545 (bias; admissible);
Maine: 1867, New Portland *v.* Kingfield, 55 Me. 176 (bias; admissible); 1874, Davis *v.* Roby, 64 Me. 428, 430 (a statement by the witness that her memory was poor and her husband had to keep telling her what to say admitted);
Massachusetts: 1854, Harrington *v.* Lincoln; 2 Gray 133 (a statement, after testifying, to another witness, that the former would lie on the stand under certain circumstances; excluded, as affecting only general morals, not bias in the case); 1857, Collins *v.* Stephenson, 8 Gray 439 (threats of revenge); 1857, Com. *v.* Farrar, 10 Gray 7 (a statement as to conduct alleged to show bias; excluded, because it did not); 1864, Tyler *v.* Pomeroy, 8 All. 483, 505 (bias; admissible); 1869, Swett *v.* Shumway, 102 Mass. 369 (that the witness had improperly offered money to obtain a copy of the contract from the opponent; admitted); 1875, Brooks *v.* Action, 117 Mass. 204, 209 (bias; admissible); 1882, Com. *v.* Donahoe, 133 id. 408 (that the defendant had not offered to pay him money to suppress his testimony; admitted, under the statute mentioned in the preceding section);
Michigan: 1871, Geary *v.* People, 22 Mich. 220 (unscrupulousness; admitted); 1874, Hamilton *v.* People, 29 Mich. 173, 182 (fabrication of testimony; admissible); 1904, People *v.* Row, 135 Mich. 505, 98 N. W. 13 (attempt to persuade persons not to go surety for defendant; allowed);
Mississippi: 1859, Newcomb *v.* State, 37 Miss. 383, 401 (bias; admissible); 1889, Jones *v.* State, 67 Miss. 115, 7 So. 220 (same);
Nebraska: 1892, Consaul *v.* Sheldon, 35 Nebr. 254, 52 N. W. 1104 (same); 1909, Boche *v.* State, 84 Nebr. 845, 122 N. W. 72 (the witness' statement that he had told two persons that one J. made utterances implicating J. as the real murderer, allowed to be contradicted; Root, J., diss.);
New Hampshire: 1851, Titus *v.* Ash, 24 N. H. 332 (same); 1852, Martin *v.* Farnham, 25 N. H. 99 (same); 1852, Folsom *v.* Brawn, 25 N. H. 122 (tampering with another witness; admitted);
New York: 1847, People *v.* Austin, 1 Park. Cr. C. 156 (an offer by deceased's father to compound for the former's death was held inadmissible independently, yet admissible to contradict denials of it by the witness, as not "collateral" because it showed "corrupt or revengeful feelings"); 1882, Schultz *v.* R. Co., 89 N. Y. 248 (procuring another witness to testify falsely, admitted);
North Carolina: 1842, State *v.* Patterson, 2 Ired. 353 ("the temper, disposition, or conduct of the witness in relation to the case or the parties"; here, whether the witness had been paid for coming from another State to testify, allowed); 1871, Clark *v.* Clark, 65 N. C. 661 ("Had the question upon cross-examination

1867, WELLS, J., in *Day* v. *Stickney*, 14 All. 258: "The credit of a witness, upon whose testimony in part the issue is to be determined, is not merely collateral, and cannot be immaterial. The weight of his testimony with the jury may depend entirely upon their supposition that he is under no influence to prevaricate. If he is prejudiced for or against one of the parties to the suit, or has a strong purpose or feeling of interest in relation to the matter in controversy, it is a circumstance which may materially affect his testimony. . . . Under the English rule requiring that the witness should himself be interrogated as to his interest, bias, or hostile feeling, before other witnesses could be called to prove it by his declarations, such proof always involved a question of [self-] contradiction, and was generally treated in this secondary aspect alone. But the whole investigation relating thereto was regarded as belonging to the province of impeachment. Its character is the same although the contradiction be omitted."

1881, ELLIOTT, J., in *Johnson* v. *Wiley*, 74 Ind. 239: "It can make no difference whether the motives arise from hatred, interest, or affection; the principle is the same. If it be proper to contradict a witness by proving that statements have been made indicating hostility and enmity, it surely must be competent to prove statements showing that the impartiality of the witness is affected by motives arising from friendship, affection, fear, or interest."

Two special cases need mention. (1) In the early part of the 1800s, little discrimination was shown between different sorts of facts tending to discredit; and thus facts indicating Corruption or Bias were occasionally treated as facts affecting Moral Character, and therefore such prior Self-Contradictions were excluded. This is seen in some of the earlier English rulings;[2] but in Attorney-General *v.* Hitchcock this misunderstanding was cleared up, and the distinction between Bias or Corruption and Character was firmly settled. (2) In some instances — for example, showing previous connection of a rape-prosecutrix with third persons — the fact may be regarded either as affecting her Moral Character as witness (*ante*, § 979) or as affecting the probability of her consent (*ante*, § 200); in the former view, a Self-Contradiction would not be admissible, while in the latter view it would be admissible if the jurisdiction in question recognized the admissibility of that class of evidence. But Courts differ on that point; thus, the propriety of using

been general, 'Are your feelings towards the plaintiff friendly or unfriendly?' and the answer been 'My feelings towards him are friendly', evidence in contradiction might have been offered as tending to show the animus. . . . But when the cross-examination, instead of being general, descends to particulars, then the party is bound by the answer and cannot be allowed to go into evidence 'aliunde' in order to contradict the witness"; this distinction is unsound);
1901, Carr *v.* Smith, 129 N. C. 232, 39 S. E. 831 (expressions indicating bias, held collateral, where the witness was a party);
Ohio: 1884, Kent *v.* State, 42 Oh. St. 428, 431 (bias, etc.; admissible);
Pennsylvania: 1865, Gaines *v.* Com., 50 Pa. 326, 328 (statements showing the witness possibly the real murderer and thus motivated to divert suspicion from himself, admitted);
South Carolina: (see the cases in the note *ante*, § 1021);
Tennessee: 1905, Creeping Bear *v.* State, 113 Tenn. 322, 87 S. W. 653 (here the witness had asked people not to sign a pardon for the defendant);
Vermont: 1862, Hutchinson *v.* Wheeler, 35 Vt. 340 (bias; admissible); 1869, Ellsworth *v.* Potter, 41 Vt. 690 (same);
Virginia: 1882, Langhorne *v.* Com., 76 Va. 1019 (bias, admissible; but limiting the evidence to declarations directly expressing hostility).

Presumably, the *impeaching witness himself* may also be impeached by a prior contradictory statement of what he now says the first witness said; *i.e.* this will not be a collateral matter: 1881, State *v.* Lawlor, 28 Minn. 222, 9 N. W. 698 ("at least within reasonable limits").

[2] Particularly in Harris *v.* Tippett, *ante*, § 1005.

a Self-Contradiction will there depend on the view taken by the Court of the other controversy.

§ 1023. **Cross-examination to Self-Contradiction, without Extrinsic Testimony.** Suppose that the witness is asked, "Did you at such a time and place say the contrary?", the matter being a collateral one; is this much allowable, provided no attempt is made by outside testimony to prove the self-contradiction if it is denied by the witness?

It has been sometimes said that even this much — *i.e.* the attempt to prove the collateral self-contradiction by the witness himself — is not allowable.[1] But on the principle there seems to be no objection. The reasons invariably advanced by the Courts (*ante*, § 1019) have reference solely to the formation of a new collateral issue for outside testimony; *i.e.* if the witness deny the prior utterance, the impeacher would proceed to prove it by other witnesses and the impeached would wish to disprove it by other witnesses, and it is to this process that the objections of Unfair Surprise and Confusion of Issues apply. They do not apply at all where the impeacher merely seeks to prove the utterance by the witness himself and rests content with the witness' admission or denial.

There is therefore no objection, either of principle or of policy, to such an attempt to prove the self-contradiction by the witness himself.[2]

Moreover, it is not uncommon to obtain, by cross-examination alone, an adequate exposure of the witness' inconsistencies; and no artificial limits should be set for its employment.[3] The following passages illustrate what may sometimes be thus effected:

1664, *Turner's Trial*, 6 How. St. Tr. 565, 606; it was vital to the defendant's case that he was at home on Thursday night and absent Friday night; his maid-servant being called for him, L. C. J. Hyde: "Did your master go forth on Friday night?" *Maid:* "No; he was at home and in bed all that night till 8 in the morning; and Thursday night before." *Defendant:* "A silly soul, she knows not what she says." L. C. J. Hyde: "I will ask you again; was your master at home on Friday night?"; *Maid:* "No, I think he was not."

§ 1023. [1] 1856, Gilbert *v.* Gooderham, 6 U. C. C. P. 46 (Draper, C. J.: "It very frequently happens that questions which in strictness are irrelevant are put and answered without objection. But I take the rule to be clearly established that no question can be legally put to a witness on cross-examination for the mere purpose of contradicting him. And if such question be put, the answer is conclusive"); 1905, Starke *v.* State, 49 Fla. 41, 37 So. 850; 1849, Seavy *v.* Dearborn, 19 N. H. 356; 1831, Jackson *v.* Warford, 7 Wend. N. Y. 61; 1911, Chase *v.* Hoosac T. & W. R. Co., 85 Vt. 60, 81 Atl. 236 (trial Court's discretion); 1904, Illinois Steel Co. *v.* Jeka, 123 Wis. 419, 101 N. W. 399; 1824, Starkie, Evidence, I, 189.

Compare the examples cited *ante*, § 1006, n. 2.

[2] *Accord:* 1871, R. *v.* Holmes, 12 Cox Cr. 143, per Kelly, C. B., *semble;* 1899, Spring Valley *v.* Gavin, 182 Ill. 232, 54 N. E. 1035 (trial Court has discretion); 1847, Howard *v.* Ins. Co., 4 Den. 504, 506.

Compare also the cases cited *ante*, § 1006.

For the propriety of *repeating the matter of the direct examination on the cross-examination*, in order to involve the witness in self-contradictions, see *ante*, § 782.

[3] 1871, Tichborne *v.* Lushington, Heywood's Rep. 148 (cross-examination of the claimant as to the reason for making his will in Australia; a good illustration); 1860, Wardlaw, J., in Chapman *v.* Cooley, 12 Rich. 660 ("there is no difference in principle between his contradiction of himself on the stand and outside of the court-house").

L. C. J. HYDE: "Why did you say so before?"; *Maid:* "I cannot remember, sir." C. J. BRIDGMAN: "She knows her master's mind."

1811, *Berkeley Peerage Trial*, Sherwood's Abstract, 189, 192, 273; the issue was whether Lord and Lady Berkeley were married before their eldest son was born, and this again turned mainly upon the genuineness or forgery of an entry in the marriage-register made in the name of Hupsman, the parish vicar; Lady Berkeley claimed its genuineness; Nicholas Hicks, an attorney, was offered to prove this, and swore convincingly, as being well acquainted with the writing; he was asked at the beginning of his cross-examination: "Have you been conversing with anybody lately as to this handwriting?" "I have not," the time of the trial being May; "You have not been at Spring Gardens, [Lady Berkeley's residence,] lately, have you?" "I have not; not to converse with anybody on the subject"; "Have you been there?" "I have been there several times"; "Whom did you go to there?" "I saw Lady Berkeley." "Do you mean to say you have not talked with anybody since you came to London as to the manner in which Hupsman wrote?" "I have not." After a long series of questions on other matters, the cross-examiner finally returned and asked how he came to be a witness, when he said that he had told Lady Berkeley that he could identify the register-entry; "When?" "I think in the month of April." "It was in Spring Gardens you went to Lady Berkeley?" "Yes"; "And you there told her you could swear to Hupsman's handwriting?" "Yes"; "And that was what passed between you?" "Yes"; whereupon his first answers above were read; and he was later committed to Newgate for contempt of the House.

3. Preliminary Warning Necessary

§ 1025. **Reason of the Rule.** It has been already noticed (*ante*, § 1019) that, to obviate the objection of Unfair Surprise, a natural expedient is to *ask the witness*, while on the stand under cross-examination, *whether he made the supposed contradictory statement*. He is thus warned that it will be offered against him by testimony later produced; and he may thus either prepare to deny it, if he claims not to have made it, or explain it, if he admits having made it. The reason and the nature of this preliminary question and warning have often been explained by the judges:

1820, ABBOTT, C. J., in *The Queen's Case*, 2 B. & B. 313 (s. c. Queen Caroline's Trial, Linn's ed., III, 259): "If it be intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which in our opinion is the most convenient course. . . . [If the witness denies the utterance or claims the privilege of silence], the proof in contradiction will be received at the proper season. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity of answering and of offering such explanatory or exculpatory matter as I have before alluded to; . . . not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost, for a witness who has been examined and has no reason to suppose that his further attendance is requisite often departs the Court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done, . . . and one of the

great objects of the course of proceeding established in our courts is the prevention of surprise, as far as practicable, upon any person who may appear therein."

1851, RANNEY, J., in *King* v. *Wicks*, 20 Oh. 91: "In addition to the reasons already stated [the fairness of giving opportunity for explanation], others equally cogent could be given. To make the truth manifest upon the issues joined between the parties is the object of all evidence. This testimony has no direct bearing upon any disputed fact, but raises a collateral issue upon the credit to be given to a witness, and with all collateral issues, is calculated to divert the minds of the jury from the points on controversy in the case. Such collateral inquiry may and often will become necessary; but it should be avoided where it can be, and I firmly believe it may be avoided in a majority of cases where the inquiry is first made of the witness himself, either by his confessing such contradictory statements or giving such explanations in regard to them as will convince the party that nothing is to be made by pursuing the matter further. Again, witnesses are required, willing or unwilling, to come into court and testify. They should appear there under the full confidence that their feelings and reputations will be respected and protected, so far as is consistent with the ends of justice. The witness suddenly finds himself on trial for his veracity. . . . A word imperfectly heard, forgotten, or omitted, may change his whole meaning, and make him say what he never thought of. . . . [A bitter strife may ensue] which might all have been avoided by one minute's explanation in the first instance from the party implicated in the presence of those brought to impeach him."

§ 1026. **History of the Rule.** But this rule is by no means an immemorial tradition. The reasons above explained were not worked out until well into the 1800s. The rule, as a rule, may be said to have had its birth with the response of the Judges in The Queen's Case (quoted above) in 1820. This utterance is said to have come as a surprise to the Bar; and up to that time no established requirement of the kind existed.[1] None of the treatises by practitioners, English or American, published prior to The Queen's Case mentions such a proviso. Add to this that, in all of the New England jurisdictions, the continuous traditions of practice down through the first half of the 1800s recognized no such requirement,[2] that in such others of the original States as Pennsylvania and New Jersey the rule has never found favor,[3] and that in New York,[4] Virginia,[5] and Georgia [6] traces of a similar sort appear.[7]

§ 1026. [1] It is said by Church, C. J., in 22 Conn. 267 (1853) and by Parker, C. J., in 17 Mass. 160 (1821), that the practice in England before The Queen's Case was not established, but that the circuits and judges differed. So far as extant decisions go, the matter seems to have been left unnoticed: 1732, Pendrell *v.* Pendrell, 2 Str. 925 (preliminary question not spoken of); 1761, Wright *v.* Littler, 3 Burr. 1247, 1255 (a dying declaration by an attesting witness that he had forged the will; no requirement of this sort is spoken of).

[2] *Mass.* 1821, Tucker *v.* Welsh, 17 Mass. 160; 1852, Gould *v.* Norfolk Lead Co., 9 Cush. 347 (Shaw, C. J.: "that is the English rule, but we have always adopted a different rule"); 1855, Com. *v.* Hawkins, 3 Gray 465; 1867, Day *v.* Stickney, 14 All. 260; *Conn.* 1853, Church, C. J., in Hedge *v.* Clapp, 2 Conn. 266; *Vt.* 1847, Davis, J., in Downer *v.* Dana, 19 Vt. 345 ("at that time [1821] I think no lawyer in Vermont had heard of such a rule here, and even now I do not find it naturalized anywhere except here"); *N. H.* 1851, Titus *v.* Ash, 24 N. H. 331; 1857, Cook *v.* Brown, 34 N. H. 471; *Me.* 1831, Ware *v.* Ware, 8 Greenl. 52, *semble;* 1850, Wilkins *v.* Babbershall, 32 Me. 184; 1867, New Portland *v.* Kingfield, 55 Me. 176; *R. I.* 1833, Avery's Trial (Newport), R. I., Hildreth's Report, 90 (before Eddy, C. J., Brayton, and Durfee, JJ.: "this question had been settled a year ago at Providence, where it was decided" that the witness must first be asked; counsel intimated that the prior practice had been to the contrary).

[3] 1830, Fries *v.* Brugler, 12 N. J. L. 80, *semble;* 1872, Walden *v.* Finch, 70 Pa. 463.

[4] In People *v.* Moore, 15 Wend. N. Y. 422 (1836), the rule seems to have been forgotten.

[5] 1855, Unis *v.* Charlton, 12 Gratt. Va. 497.

[6] 1846, Sealy *v.* State, 1 Kelly Ga. 218 (left undecided).

[7] See a forcible opinion by Church, C. J., in Hedge *v.* Clapp, 22 Conn. 266 (1853).

We may believe, therefore, that, as a requirement indispensable, the doctrine is an innovation dating from 1820. Thus, it may be fairly expected to stand upon its merits, and not upon long traditional membership in our system of evidence; and it is worth while to appreciate this, for the rule is open, in its more recent arbitrary form, to serious objection.

§ 1027. **Objections to the Rule.** The objection in brief is that in many cases it is impossible for the impeaching party to ask the question while the witness is on the stand, because it is often not until after the testimony is delivered that the prior contradictions are brought to the opponent's notice, and thus, wherever the witness becomes unavailable by death or absence, the contradictions cannot be used. As there is at least an equal chance that the alleged contradictions were really uttered and cannot be explained away, it is a poor policy that favors exclusively the witness to be impeached by exempting him from impeachment; justice demands with equal force that the impeaching party, if acting in good faith, should not be invariably the one to suffer, under a rigid enforcement of the rule. This argument has been well expounded in the following opinion:

1847, DAVIS, J., in *Downer* v. *Dana*, 19 Vt. 345: "Were the question 'res integra', I confess I could see no advantages to the cause of truth and justice, from the adoption of this rule of evidence, which are not equally well secured by the old practice of allowing the party whose witness has in that way been attacked to recall him, if he chose, for the purpose of contradicting or explaining the conduct or declarations imputed to him. Indeed, I have seen no objections of consequence to that course, except that it may sometimes happen that the witness may have departed from court supposing his attendance no longer necessary. Such an objection practically is entitled to very little weight, as it would be provided against by requiring, as is in fact generally done for other reasons, witnesses to remain in court until the testimony is finished. On the other hand, this rule would be productive of intolerable mischiefs, were it not mitigated by the somewhat awkward and inconvenient expedient of suspending the regular course of testimony, for the purpose of recalling the witness proposed to be impeached and laying a foundation for the impeaching testimony by interrogating him whether he did or said the things proposed to be proved. Besides, the privilege of doing this will be lost in all those cases where the witness has left court and cannot be found; the opposite party has every inducement to cut off this opportunity by immediately discharging all such as he may have reason to suspect are liable to be impugned. In addition to this, the avowed attempt to produce self-impeachment, made of course in a tone and manner evincing distrust of the general narrative, too often both surprises and disconcerts a modest witness. He answers hastily and confusedly, as is natural from having such a collateral matter hastily spring upon him. Everyone conversant with judicial proceedings must have often observed with pain an apparent contradiction produced in this way, when he is satisfied none would have existed under a different mode of proceeding. . . . To my mind these considerations present very formidable objections to the practice first authoritatively developed on the trial of the Queen in the House of Lords."

A due consideration for these arguments leads to the conclusion that in general the preliminary question should indeed be put, before producing the alleged contradiction; but that this requirement, instead of being rigid and invariable, should be open to exceptions, and should be dispensed with, in the

Court's discretion, where the putting of the question has become impossible and the impeaching party has acted in good faith. This sensible form of the rule is, however, in vogue in a few jurisdictions only. The modern tendency has been to enforce the rule with inconsiderate and arbitrary rigidity. To-day it does, upon the whole, as much evil as good, and it is to be hoped that a reaction will some day manifest itself.

§ 1028. **State of the Law in the Various Jurisdictions.**[1] In all but a few

§ **1028.** [1] The rule is sanctioned, where not otherwise noted:

ENGLAND: 1820, The Queen's Case, 2 B. & B. 313, by all the Judges; 1837, Andrews *v.* Askey, 8 C. & P. 7; 1840, Carpenter *v.* Wall, 11 A. & E. 803 (where in a seduction suit a former admission of the plaintiff's daughter that B. had seduced her was subjected to this rule, though it had also legitimate effect as showing lightness of conduct; the Court do not say that the rule would have been foregone had the other purpose of the evidence been the chief or the sole one; and it is not clear just when the line is to be drawn); St. 1854, c. 125, § 23 ("If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement"); St. 1854, c. 125, § 22 (like the last half of ib. § 23, *supra*, for adverse witnesses).

CANADA: the statutes are like the English statute *supra:* Dom. R. S. 1906, c. 145, Evid. Act, § 11; *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 21; *B. C.* Rev. St. 1911, c. 78, § 17; *N. Br.* Cons. St. 1903, c. 127, § 16; *Newf.* Cons. St. 1916, c. 91, § 8; *N. Sc.* Rev. St. 1900, c. 43; *Ont.* Rev. St. 1914, c. 76, § 18; *P. E. I.* St. 1889, c. 9, § 16; *Que.* 1876, Decary *v.* Poirier, 20 Low. Can. Jur. 167; *Sask.* R. S. 1920, c. 44, § 33; *Yukon:* Consol. Ord. 1914, c. 30, § 41.

UNITED STATES: *Federal:* 1840, McKinney *v.* Neil, 1 McLean 537; U. S. *v.* Dickinson, 2 McLean 329; Chapin *v.* Siger, 4 McLean 381; Conrad *v.* Griffey, 16 How. 46; 1858, U. S. *v.* Holmes, 1 Cliff. 114; 1890, Chicago, M. & St. P. R. Co. *v.* Artery, 137 U. S. 519, 11 Sup. 129; 1893, Hickory *v.* U. S., 151 U. S. 303, 309, 14 Sup. 334; 1894, Mattox *v.* U. S., 156 U. S. 237, 245, 15 Sup. 337;

Alabama: 1840, Lewis *v.* Post, 1 Ala. 69;

Alaska: Comp. L. 1913, § 1502 (like Or. Laws 1920, § 864);

Arkansas: Dig. 1919, § 4188 "Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning the same, with the circumstances of time and persons present, as correctly as the examining party can present them"); 1854, Drennen *v.* Lindsey, 15 Ark. 361; 1877, Collins *v.* Mack, 31 Ark. 694; 1881, Griffith *v.* State, 37 Ark. 328; 1896, Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900;

California: C. C. P. 1872, § 2052 ("before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made them, and if so, allowed to explain them"); 1866, Rice *v.* Cunningham, 29 Cal. 501; 1875, Leonard *v.* Kingsley, 50 Cal. 658; 1892, Young *v.* Brady, 94 Cal. 130, 29 Pac. 489; 1895, People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (applied to an offer to show that one identifying the accused as a murderer had at first identified a different person); 1897, People *v.* Wade, 118 Cal. 672, 50 Pac. 841 (under § 2052, C. C. P., asking is necessary);

Colorado: 1896, Mullen *v.* McKim, 22 Colo. 468, 45 Pac. 416; 1909, Jaynes *v.* People, 44 Colo. 535, 99 Pac. 325; 1919, Coplin *v.* People, 67 Colo. 17, 185 Pac. 254 (rule applied);

Connecticut: 1853, Hedge *v.* Clapp, 22 Conn. 266 (required, but subject to exceptions); 1875, State *v.* North, 42 Conn. 79 (similar); 1875, Tomlinson *v.* Derby, 43 Conn. 211 (similar); 1909, Adams *v.* Herald Pub. Co., 82 Conn. 448, 74 Atl. 755 (the prior warning is not indispensable, if the trial court "was of the opinion that the ends of fairness and justice would thereby be best served"; following Hedge *v.* Clapp);

Florida: Rev. G. S. 1919, § 2710 ("the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement");

Georgia: 1846, Sealy *v.* State, 1 Kelly 218 (left undecided); 1849, Williams *v.* Turner, 7 Ga. 351 (required); Johnson *v.* Kinsey, 7 Ga. 429; Williams *v.* Chapman, ib. 470; Rev. C. 1910, § 5881, P. C. § 1052 ("with as much certainty as possible to the time, place, person, and circumstances");

Hawaii: Rev. L. 1915, § 2619 (like Eng. St. 1854, c. 125, § 23);

Idaho: Comp. St. 1919, § 8039 (like Cal. C. C. P. § 2052);

Illinois: 1845, Regnier *v.* Cabot, 7 Ill. 41; 1856, Sigsworth *v.* Coulter, 18 Ill. 205;

Indiana: 1839, Doe *v.* Reagan, 5 Blackf. 219; 1843, McIntire *v.* Young, 6 Blackf. 497; 1861, Judy *v.* Johnson, 16 Ind. 371; 1862, Hill *v.* Goode, 18 Ind. 207, 209;
Iowa: 1889, Richmond *v.* Sundburg, 77 Ia. 258, 42 N. W. 184; 1895, Klotz *v.* James, 96 Ia. 1, 64 N. W. 648;
Kansas: 1872, State *v.* Horne, 9 Kan. 128 (required); 1888, Hughes *v.* Ward, 38 Kan. 454, 16 Pac. 810, *semble* (not required);
Kentucky: C. C. P. 1895, § 598 ("circumstances of time, place, and persons present, as correctly as the examining party can present them"); 1883, Craft *v.* Com., 81 Ky. 250 (Code rule held applicable to criminal cases);
Louisiana: 1853, State *v.* Cazeau, 8 La. An. 115; 1880, State *v.* Angelo, 32 La. An. 408; 1895, State *v.* Johnson, 47 La. An. 1225, 17 So. 789; 1896, State *v.* Delaneuville, 48 La. An. 502, 19 So. 550;
Maine: 1831, Ware *v.* Ware, 8 Greenl. 52, *semble* (not required); 1850, Wilkins *v.* Babbershall, 32 Me. 184 (same); 1867, New Portland *v.* Kingfield, 55 Me. 176 (same); 1920, Currier *v.* Bangor R. & E. Co., 119 Me. 313, 111 Atl. 333;
Maryland: 1839, Franklin Bank *v.* Navig. Co., 11 G. & J. 35; 1843, Whiteford *v.* Burckmyer, 1 Gill 139; 1890, Brown *v.* State, 72 Md. 475, 20 Atl. 140; 1896, Peterson *v.* State, 83 Md. 194, 34 Atl. 834;
Massachusetts: here, down to 1869, the question was not required at all (the early citations are given *ante*, § 1026, note); in that year a statute adopted the requirement where *one's own witness* was to be contradicted: St. 1869, c. 425; Gen. L. 1920, c. 233, § 23 ("before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and if so, shall be allowed to explain them"); 1869, Ryerson *v.* Abington, 102 Mass. 526, 531 (applies the statute strictly); 1876, Newell *v.* Homer, 120 Mass. 277, 283; 1883, Com. *v.* Thyng, 134 Mass. 191, 193 (mentioning person only, without time or place, and with no reason for the omission, is not sufficient); 1885, Batchelder *v.* Batchelder, 139 Mass. 1, 29 N. E. 61; but for an *opponent's witness*, the old rule remains unaltered: 1871, Blake *v.* Stoddard, 107 Mass. 111; 1895, Carville *v.* Westford, 163 Mass. 544, 40 N. E. 894; 1898, Allin *v.* Whittemore, 171 Mass. 259, 50 N. E. 618;
Michigan: 1842, Sawyer *v.* Sawyer, Walk. Ch. 48; 1852, Smith *v.* People, 2 Mich. 415;
Minnesota: 1869, State *v.* Staley, 14 Minn. 114;
Missouri: 1839, Garrett *v.* State, 6 Mo. 2, 4; 1851, Clementine *v.* State, 14 Mo. 115; 1858, State *v.* Dalton, 27 Mo. 15; 1860, State *v.* Davis, 29 Mo. 397; 1868, State *v.* Starr, 38 Mo. 279; 1920, Kersten *v.* Hines, 283 Mo. 623, 223 S. W. 586 (policeman's self-contradictory report of a crossing accident; excluded for lack of prior question);
Montana: Rev. C. 1921, § 10669 (like Cal. C. § 2052);
Nebraska: 1890, Wood River Bank *v.* Kelley, 29 Nebr. 597, 46 N. W. 86; 1892, Hanscom *v.* Burmood, 35 Nebr. 506, 53 N. W. 371; 1896, Columbia Bank *v.* Rice, 48 Nebr. 428, 67 N. W. 165;
New Hampshire: 1851, Titus *v.* Ash, 24 N. H. 331 (not required); 1857, Cook *v.* Brown, 34 N. H. 471 (same); 1905, Villineuve *v.* Manchester St. R. Co., 73 N. H. 250, 60 Atl. 748 (same as Titus *v.* Ash); 1921, Thompson *v.* Morin Co., — N. H. —, 114 Atl. 274 (Titus *v.* Ash followed);
New Jersey: 1830, Fries *v.* Brugler, 12 N. J. L. 80, *semble* (not required);
New Mexico: Annot. St. 1915, §§ 2178, 2180 ("the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement");
New York: 1837, Everson *v.* Carpenter, 17 Wend. 420, *semble;* 1847, People *v.* Austin, 1 Park. Cr. C. 159; People *v.* Jackson, 3 Park. Cr. C. 598; 1859, Stephens *v.* People, 19 N. Y. 570; 1871, Sloan *v.* R. Co., 45 N. Y. 127; 1872, Gaffney *v.* People, 53 N. Y. 423; 1872, Height *v.* People, 50 N. Y. 394;
North Carolina: 1842, State *v.* Patterson, 2 Ired. 354; 1847, Pipkin *v.* Bond, 5 Ired. Eq. 101; 1848, Edwards *v.* Sullivan, 8 Ired. 304; 1856, Hooper *v.* Moore, 3 Jones 429; 1869, State *v.* Kirkman, 63 N. C. 248; 1876, State *v.* Wright, 75 N. C. 440; 1879, Jones *v.* Jones, 80 N. C. 246, 247 (not necessary for points "pertinent and material to the inquiry", as distinguished from statements involving bias, etc.); 1881, Rhea *v.* Deaver, 85 N. C. 337, 339 (same); 1882, Black *v.* Baylees, 86 N. C. 527, 534 (same), 1884, State *v.* Mills, 91 N. C. 581, 598 (same); 1890, State *v.* Morton, 107 N. C. 890, 12 S. E. 112 (same); 1897, Burnett *v.* R. Co., 120 N. C. 517, 26 S. E. 819 (same);
Ohio: 1851, King *v.* Wicks, 20 Oh. 89;
Oregon: Laws 1920, § 864 (like Cal. C. C. P. § 2052); 1895, State *v.* Brown, 28 Or. 147, 41 Pac. 1042;
Pennsylvania: 1839, Sharp *v.* Emme, 5 Whart. 288, 300 (discretion of the trial Court); 1845, McAteer *v.* McMullen, 2 Pa. St. 32; 1845, Kay *v.* Fredrigal, 3 Pa. 221, 223 (discretion of the trial Court); 1847, McKee *v.* Jones, 6 Pa. 425, 429 (same); 1865, Gaines *v.* Com., 50 Pa. 328; 1872, Walden *v.* Finch, 70 Pa. 436 (to be applied with discretion); 1874, Brubaker *v.* Taylor, 76 Pa. 83, 87 ("in general", necessary); 1879, Rothrock *v.* Gallagher, 91 Pa. 108, 113 (discretion); 1898, Cronkrite *v.* Trexler, 187 Pa. 100, 41 Atl. 22 ("It is now settled" that the matter rests in the trial Court's discretion);
Philippine Isl. C. C. P. 1901, § 343 (like Cal. C. C. P. § 2052); 1919, U. S. *v.* Baluyot, 40 P. I. 385, 406 (rule expounded);
Porto Rico: Rev. St. & C. 1911, § 1527, 6277 (like Cal. C. C. P. § 2052); 1904, People *v.*

jurisdictions the rule is recognized, and is enforced as an inflexible one. In a few jurisdictions its enforcement is left to the trial Court's discretion. In a few others it is not recognized at all.

§ 1029. **Preliminary Question must be Specific as to Time, Place, and Person.** If the preliminary question is to be useful as a warning to enable the witness to prepare to disprove the utterance or to explain it away if admitted, it must usually specify some details as to the occasion of the remark. The witness may perhaps without this understand the occasion alluded to; but usually he will not, and in such a case this specification of the details is a mere dictate of justice. The modern tendency of American Courts, however, is to lose sight of the fact that this specification is a mere means to an end (namely, the end of adequately warning the witness), and to treat it as an inherent requisite, whether the witness really understood the allusion or not. The result of this is that unless the counsel repeats a particular arbitrary formula of question, he loses the use of his evidence, without regard to the substantial adequacy of the warning. Such a practice is impolitic and unjustified by principle. Add to this that the same Court is seldom uniform with itself in the elements of this fetish-formula which it prescribes as indispensable; and it will be seen that the rule on the whole is apt to produce to-day in its application as much detriment as advantage.

There are thus two ways of treating the rule that the details must be specified:[1] (1) It may be treated as a general requirement that the witness' atten-

Diaz, 5 P. R. 417 (murder; C. Cr. P. § 245 applied);
South Carolina: 1898, State *v.* Henderson, 52 S. C. 470, 30 S. E. 477;
Tennessee: 1837, Richmond *v.* Richmond, 10 Yerg. 346; 1848, Story *v.* Saunders, 8 Humph. 666; 1873, Cole *v.* State, 6 Baxt. 239;
Texas: 1864, Ayres *v.* Duprey, 27 Tex. 599;
Vermont: 1837, Pierce *v.* Gilson, 9 Vt. 222; 1847, Downer *v.* Dana, 19 id. 344; 1904, McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985 (former testimony excluded, for lack of the inquiry to the witness);
Virginia: 1853, Wormeley's Case, 10 Gratt. 689, *semble* (required); 1855, Unis *v.* Charlton's Adm'r, 12 Gratt. 497 (Daniel, J.: "Cases may be supposed in which the Courts may be strongly called upon to dispense with or to make exceptions to the rule; and I will not undertake to say that special exigencies may not occasionally arise requiring the Courts to depart from the rule rather than to sacrifice justice by sternly adhering to it"); 1880, Davis *v.* Franke, 33 Va. 424; St. 1889, Code 1919, § 6215 ("the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned");
Washington: 1903, Brown *v.* Gillett, 33 Wash. 264, 74 Pac. 386 (rule adopted);
Wisconsin: 1858, Ketchingman *v.* State, 6 Wis. 426, 431; 1888, Welch *v.* Abbot, 72 Wis. 515, 40 N. W. 223.

§ 1029. [1] ENGLAND: This part of the rule seems to have been first promulgated in 1829, in Angus *v.* Smith, Moo. & M. 474 (Tindal, C. J.: "You must ask him as to the time, place, and person involved in the supposed contradiction: it is not enough to ask him the general question whether he has ever said so and so").

CANADA: 1907, R. *v.* Clarke, 38 N. Br. 11 (the sufficiency of the question is in the trial Court's discretion; one judge diss.).

UNITED STATES: The *statutory provisions* on this point have been already cited *ante*, § 1028; the judicial rulings are as follows;
Alabama: 1840, Lewis *v.* Post, 1 Ala. 73 (time and person; here the witness asked for specifications, and the counsel refused them); 1841, State *v.* Marler, 2 Ala. 46 (where the witness had been asked as to statements to two named persons or any other; the two named were allowed to testify to contradictions, but not a third); 1847, Howell *v.* Reynolds, 12 Ala. 128; 1848, Moore *v.* Jones, 13 Ala. 303; 1849, Carlisle *v.* Hunley, 15 Ala. 625 (time, place, and person); 1851, Powell *v.* State, 19 Ala. 581 (time, place, and circumstances), 1851, Armstrong *v.* Huffstutler, 19 Ala. 53 (substance of the statement suffices); 1853, Nelson *v.* Iverson, 24 Ala. 15 (same; here the time stated was held reasonably accurate for the purpose); 1879, Atwell *v.* State, 63 Ala. 64 (time, place, and persons present); 1897, Southern R. Co. *v.* Williams, 113 Ala. 620, 21 So. 328 ("But the

rule is not ironclad, — that is, it does not require perfect precision as to either [time, place, circumstances, or persons]; when it is clear that the witness cannot be taken by surprise, an ample opportunity is afforded to make any explanation desired, the predicate is sufficient");
Arkansas: 1881, Griffith *v.* State, 37 Ark. 332 (time, place, and person spoken to); 1883, Frazier *v.* State, 42 Ark. 70 (held sufficient, on the facts);
California: 1860, Baker *v.* Joseph, 16 Cal. 177 ("time, place, and the precise matter"; "time, place, and occasion"); 1872, People *v.* Devine, 44 Cal. 457 (time, place, and person); 1897, People *v.* Bosquet, 116 Cal. 75, 47 Pac. 879 (statute applied); 1898, Plass *v.* Plass, 122 Cal. 4, 54 Pac. 372 ("persons present", construed); 1898, Green *v.* R. Co., 122 Cal. 563, 55 Pac. 577 (asking held not sufficient on the facts); 1901, Norris *v.* Crandall, 133 Cal. 19, 65 Pac. 568 (questions held not specific enough); 1902, Sinkler *v.* Silian, 136 Cal. 356, 68 Pac. 1024 (rule applied); 1918, Ash *v.* Soo Sing Iung, 177 Cal. 356, 170 Pac. 843; 1919, McLaughlin *v.* Los Angeles R. Co., 180 Cal. 527, 182 Pac. 44 (statement here held too variant from the statement subsequently offered to be proved);
Connecticut: 1904, Bradley *v.* Gorham, 77 Conn. 211, 58 Atl. 698;
Florida: 1903, Brown *v.* State, 46 Fla. 159, 35 So. 82 (question held sufficient on the facts, though no time was mentioned); 1907, Clinton *v.* State, 53 Fla. 98, 43 So. 312;
Georgia: 1849, Williams *v.* Turner, 7 Ga. 351 (time, place, person, and other circumstances); 1854, Wright *v.* Hicks, 15 Ga. 167 (rejected on the facts); 1861, Matthis *v.* State, 33 Ga. 29 (time, place, and person);
Illinois: 1853, Gotloff *v.* Henry, 14 Ill. 386 (time, place, and circumstances; yet not "every possible circumstance of identity", but such as will "direct the mind of a witness of ordinary apprehension to them"); 1855, Galena & C. U. R. Co. *v.* Fay, 16 Ill. 569 (time, place, and person, *semble*); 1864, Root *v.* Wood, 34 Ill. 286 (time and place); 1866, Miner *v.* Phillips, 42 Ill. 130 (person only named; excluded); 1867, Winslow *v.* Newlan, 45 Ill. 151 (time, place, and circumstances); 1872, Northwestern R. Co. *v.* Hack, 66 Ill. 242 (an omission in a former statement; the question whether he had omitted as alleged, held necessary); 1877, Richardson *v.* Kelly, 85 Ill. 493 (time and place);
Indiana: 1860, Joy *v.* State, 14 Ind. 141 (time, place, and person, etc.); 1864, Bennett *v.* O'Byrne, 23 Ind. 605 (time sufficiently described on the facts); 1876, Hill *v.* Gust, 55 Ind. 51 (time, place, and person); 1881, McIlvain *v.* State, 80 Ind. 72 (time and place omitted; question excluded); 1898, Roller *v.* Kling, 150 Ind. 159, 49 N. E. 948 (excluded because the statement testified to was not called for in the same terms as the prior question so as to admit of an answer "Yes" or "No"; this rule is entirely too strict; it would reduce the process of getting evidence to a mumbling of prearranged formulas); 1915, Miller *v.* State, 183 Ind. 319, 109 N. E. 205 (question held not specific enough, on the facts; over-strict);
Indian Territory: 1904, Staneliff *v.* U. S., 5 Ind. T. 486, 82 S. W. 882 ("time, place, and other surroundings");
Iowa: 1852, Glenn *v.* Carson, 3 G. Gr. 529 (time and place); 1859, State *v.* Ruhl, 8 Ia. 451 (merely asking "what he had sworn to"; excluded); 1862, Samuels *v.* Griffith, 13 Ia. 109 (time, place, person, and specific subject); 1863, Strunk *v.* Ochiltree, 15 Ia. 180; 1868, Callanan *v.* Shaw, 24 Ia. 454 (the witness was asked "what he thought he made oath to" before, excluded); 1871, State *v.* Collins, 32 Ia. 41 (time, place, and person); 1874, Nelson *v.* R. Co., 38 Ia. 565 (admitted on the facts); 1876, State *v.* Kinley, 43 Ia. 295 (time, place, and person); 1876, State *v.* McLaughlin, 44 Ia. 83 (excluded because time was not mentioned, though person was); 1908, Gibson *v.* Seney, 138 Ia. 383, 116 N. W. 325 (sufficient "if the witness understands that to which reference is made");
Kentucky: 1900, Helfrich L. & M. Co. *v.* Bland, — Ky. —, 54 S. W. 728 (time, place, and person); 1911, Higgins *v.* Com., 142 Ky. 647, 134 S. W. 1135;
Maryland: 1867, Higgins *v.* Carlton, 28 Md. 138 (excluded, on the facts); 1873, Pittsburg & C. R. Co. *v.* Andrews, 39 Md. 335, 339, 354 (admitted on the facts); 1896, Peterson *v.* State, 83 Md. 194, 34 Atl. 834 (time, place, and person);
Michigan: 1852, Smith *v.* People, 2 Mich. 415 (time, place, and person); 1880, Howard *v.* Patrick, 43 Mich. 121, 126, 5 N. W. 84 (time and place not sufficiently mentioned); 1895, People *v.* Considine, 105 Mich. 149, 63 N. W. 196 (asking a stenographer to read from his minutes what the witness formerly testified about a certain transaction);
Minnesota: 1868, State *v.* Hoyt, 13 Minn. 142 (time, place, and person); 1887, Jones *v.* State, 65 Minn. 183 (time, place, and person);
Missouri: 1870, Spaunhorst *v.* Link, 46 Mo. 198 (time, place, and person); 1886, State *v.* Reed, 89 Mo. 170, 1 S. W. 225 (time, place and person); 1888, State *v.* Parker, 96 Mo. 393, 9 S. W. 728 ("time, place, etc.");
Nebraska: 1890, Wood River Bank *v.* Kelley, 29 Nebr. 597, 46 N. W. 86 (time, place, and person); 1892, Hanscom *v.* Burmond, 35 Nebr. 506, 53 N. W. 371 (same); 1903, Barton *v.* Shull, 70 Nebr. 324, 97 N. W. 292;
New Jersey: 1899, Union S. N. Bank *v.* Simmons, — N. J. Eq. —, 42 Atl. 489 (asking as to a part only will admit proof of that part only);
New York: 1847, People *v.* Austin, 1 Park. Cr. C. 159 (admitted, where all the circumstances were mentioned except the name of the person spoken to); 1855, Patchin *v.* Ins. Co., 13 N. Y. 270 (substance of the statement suffices); 1871, Sloan *v.* R. Co., 45 N. Y. 127 (same;

tion be adequately called to the alleged utterance, the trial Court to determine whether this has been done in a given case; this is the practice in England, Alabama, and Vermont, for example. (2) It may be treated as an invariable formula, the same for all cases; this is the unfortunate practice in most American courts.

§ 1030. **Testimony of Absent or Deceased Witnesses; is the Requirement here also Indispensable?** Suppose that it has become impossible to put the preliminary question on account of the witness' absence or decease, or some other circumstance rendering him now unavailable; may the question then be dispensed with and the self-contradiction be shown without further proviso? On this subject great difference of judicial opinion exists.

It is to be observed that we are not dealing here with the case of an ordinary witness who has left the court-room *after* testifying and cannot now be found for recall; that case is regarded as governed by the general rule already examined; the witness is theoretically still available for recall (*post*, § 1036), and it is the impeacher's own fault that he was not detained in court.[1] We

leaving it to the trial Court's discretion); 1881, Hart *v.* Bridge Co., 84 N. Y. 59 ("time, place, and persons to whom or in whose presence");
North Carolina: 1903, State *v.* Crook, 133 N. C. 672, 45 S. E. 564 ("the rule must not be ironclad, and must not be reduced to a petty technicality"; here, the exact time held not necessary);
Oregon: 1879, State *v.* McDonald, 8 Or. 117 (statute applied); 1882, Sheppard *v.* Yocum, 10 Or. 408 (construing "persons present" to mean "person to whom the statement was made"); 1888, State *v.* Hunsaker, 16 Or. 499, 19 Pac. 605 (statute applied); 1896, State *v.* Ellsworth, 30 Or. 145, 47 Pac. 199 (time, place, and person; but person is unnecessary if the statement is otherwise sufficiently particularized); 1898, State *v.* Welch, 33 Or. 33, 54 Pac. 213 (question held specific enough); 1898, State *v.* Bartmess, 33 Or. 110, 54 Pac. 167 ("persons" need not be specified, in asking about former testimony); 1904, State *v.* Gray, 43 Or. 446, 74 Pac. 927;
South Carolina: 1881, State *v.* White, 15 S. C. 380, 390 (the place of making the statement must be mentioned);
South Dakota: 1896, State *v.* Hughes, 8 S. D. 338, 66 N. W. 1076 (not only time, place, and person, but also the specific statements; obscure);
Tennessee: 1851, Cheek *v.* Wheatly, 11 Humph. 558 ("time and occasion"; "time, place, and person"); 1873, Cole *v.* State, 6 Baxt. 239, 241 ("time, place, and person . . . and also the words or their substance", with other phrasings);
Texas: 1890, International & G. N. R. Co. *v.* Dyer, 76 Tex. 158, 13 S. W. 377 (time, place, and person);
Vermont: 1879, State *v.* Glynn, 51 Vt. 579 (particularity of question is much in the Court's discretion); 1921, Re Wood's Will, — Vt. —, 115 Atl. 231 (question not specifying time, place, or person, excluded on cross-examination; unsound; the only time to enforce the rule is when another witness is called to prove the former statement);
Virginia: 1902, Gordon *v.* Funkhouser, 100 Va. 675, 42 S. E. 677 (question naming time and person, but omitting place, held sufficient);
Washington: 1905, State *v.* Strodemier, 40 Wash. 608, 82 Pac. 915 (here the Court went to the other extreme, and rebuked a prosecuting attorney because in laying the foundation for impeachment of the defendant by his former testimony he asked the stenographer for the testimony "at the trial of the State of Washington *v.* Henry Strodemier"; this is finical: why might not the judge have tenderly suppressed all reference to the indictment in the present case, so as to prevent the unfortunate accused from being prejudiced by the grand jury's opinion of him);
Wisconsin: 1900, Miller *v.* State, 106 Wis. 156, 81 N. W. 1020; 1904, Wysocki *v.* Wisconsin L. I. & C. Co., 121 Wis. 96, 98 N. W. 950.

The following rulings seem reasonable: 1876, R. *v.* Mailloux, 16 N. Br. 498, 508, 511 (pointing out that "he cannot be asked generally to relate a conversation with another person, in order to enable the cross-examining counsel to discover" some variance); 1868, Callanan *v.* Shaw, 24 Ia. 454, *supra* (similar).

Distinguish the question whether to the *other witness, testifying to the self-contradiction*, the question as to its tenor may be *leading* (*ante*, § 779).

§ 1030. [1] But even here, where the calling party has culpably dismissed the witness out of reach, the rule may be dispensed with; *post*, § 1036, note.

are here concerned with cases where the witness' testimony is not given to the court orally and in person: thus, as required by the Hearsay Rule (*post*, § 1396), it is solely because he is personally unavailable that his testimony can be presented in this shape. There are at least five distinct situations of this sort: 1. Depositions; 2. Testimony at a Former Trial; 3. Dying Declarations, Statements against Interest, etc.; 4. Statements of an Attesting Witness to a Document; 5. Proposed Testimony admitted by Stipulation to avoid a Continuance. In all five cases the testimony cannot be offered in chief unless the witness is personally unavailable. But there is a distinction between the first two and the last three; in the former the impeacher has had the benefit of cross-examination, or an opportunity for it, for otherwise the testimony would not be admissible (*post*, § 1371); while in the latter the impeacher has had no such opportunity, the statements coming in as exceptions to the Hearsay Rule or as Judicial Admissions. It must also be observed, as to the first two, that, while at the moment in question the witness is unavailable, yet at the time of taking the deposition or of the former trial the impeacher may or may not have been aware of the alleged contradictory statement, — a material circumstance in the problem.

With these distinctions in mind, the arguments affecting each class of cases may be examined.

§ 1031. **Same**: (1) **Depositions**. The argument in favor of dispensing with the preliminary question is that, as the impeacher usually cannot know precisely what answers the deponent will give, he cannot be prepared at the time of the deposition to inquire as to contradictory statements, and he will therefore be cut off absolutely and unconditionally from any sort of impeachment by self-contradiction, unless the present rule be dispensed with:

1847, DAVIS, J., in *Downer* v. *Dana*, 19 Vt. 346: "The rule thus applied [of the necessity of calling attention] would impose on a party wishing the privilege of impeachment the necessity of attending, in person or by counsel, at the taking of every deposition to be used against him, with or without the State, which on any other account he might not be disposed to do. Besides, in many cases the deponent may be wholly unknown to him; he may have no knowledge of the matter to be testified to until actually given; the notice of the taking may be barely sufficient to enable him to reach the place perhaps hundreds of miles distant, in season to be present. It would be idle under such circumstances to expect a party to be prepared to go through with this preliminary ceremony. The result would be, he would be least able to shield himself against partial or false testimony precisely when such protection is most needed. It is true, the deponent, being absent from the trial, hears not the impeaching testimony and cannot be called upon to contradict or explain it. This may be an evil, but it is unavoidable from the nature of the case. It would be a worse evil to deny the right of impeaching depositions unless under regulations which would reduce the right to a nullity."

1872, AGNEW, J., in *Walden* v. *Finch*, 70 Pa. 463: "The practice has arisen out of regard to the witness himself, to enable him to explain any seeming discrepancy in his statements. Yet it must necessarily have its just boundary, or otherwise it leads to the sacrifice of the interests of the parties litigant. In some cases a Court would feel bound to require the witness intended to be contradicted to be first examined and his attention called to the supposed contradiction. Yet there are others where an unbending rule to

this effect would work great hardship. Thus, where, as in this case, the witnesses have already been examined under a rule or a commission at a distant place preparatory to the trial, it would often be difficult to foresee, sometimes impossible to foreknow, the questions to be put to the witness on cross-examination in order to lay ground to contradict him. Indeed, in such cases unworthy witnesses might be purposely examined at a distance in order to prevent the ground from being laid. The names of the witnesses are seldom given who are examined under rules within the State, and even when examined under commissions the witnesses are not always named. It would be unjust to the party in such a case to deprive him of the opportunity of contradicting unworthy witnesses. We are therefore of opinion that those decisions of our own Court are to be preferred which hold that the question is one of sound discretion in the judge trying the cause upon the circumstances before him. Where the witnesses are all present, and the contradiction tends seriously to impair the credibility of the witness or to reflect upon his character, a Court would feel bound to give him the opportunity of explanation or denial before suffering his testimony to be impeached by counter-statements. Under different circumstances a Court would feel it proper to relax the rule."

The answer offered to this argument is (1) that practically the opponent does know beforehand, in the ordinary instance, what any important witness is expected to testify to, and he is therefore sufficiently able to learn in advance about self-contradictions, and (2) that, even conceding that an inconvenience may occur, yet this is far outbalanced by the abuses which would be possible if alleged self-contradictions could be brought into Court at a time when no adequate opportunity remains for denial or contradiction:

1855, DANIEL, J., in *Unis* v. *Charlton's Adm'r*, 12 Gratt. 495: "The principal reason assigned by the learned judge who delivered the opinion of the Court [in *Downer* v. *Dana*, *supra*] for refusing to apply the rule to depositions is that such a practice would impose on a party wishing the privilege of impeachment the necessity of attending in person or by attorney at the taking of every deposition to be used against him within or without the State, which on any other account he might be disposed to do. This argument 'ab inconvenienti' is not wholly without show of reason when urged in behalf of the exercise of the privilege of impeachment by a party who has had no notice of the taking, or who, though notified, did not attend at the taking of a deposition which he seeks to discredit, but seems to me devoid of weight when extended to the case of a party who was present at the taking of the deposition, and had thus the same opportunity of cross-examining the witness and calling his attention to the imputed inconsistent statements that he would or might have had in case the witness had been examined in court. . . . The rule proceeds from a sense of justice to the witness; . . . these reasons, it is obvious, apply just as forcibly to depositions as to oral examinations in court. And indeed there are considerations which urge the application of the rule to the case of an impeachment of a witness who has given his testimony in the form of a deposition, which may not arise in an effort to discredit a witness who has been examined in court. In the latter case the witness usually remains in or about the court till the trial is concluded; and if an assault is made upon him by proof of inconsistent statements, he might, even before the adoption of the rule requiring him to be first examined as to such statements, be recalled and re-examined by the party in whose favor he had testified; and he may thus have an opportunity of repelling or explaining away the force of the assault; whereas the witness whose deposition has been taken is usually absent from the scene of the trial, and has no shield against attacks on his veracity other than that provided by the rule. . . . There are no peculiar considerations calling upon us to exempt this case from the operation of the rule; for it appears from the deposition that the plaintiff's counsel was not only present at the taking, but exercised on the occasion his privilege of cross-examining the witness."

1864, BRINKERHOFF, C. J., in *Runyan* v. *Price*, 15 Oh. St. 14: "It seems to me that a reason, in addition to any that I have yet heard stated, may be found in favor of our conclusion in the following considerations. 'Dead men tell no tales'; and if the rule be once established that the testimony of a deceased witness may be impeached by giving in evidence declarations alleged to have been made by him out of court differing from those contained in his testimony and when he has had no opportunity for explanation, when all opportunity for explanation by him has passed away, when few will have the motive and none the power to vindicate his integrity and truthfulness such as he would have if living, it seems to me that temptations to perjury and subornation would be not a little increased by the comparative impunity with which those crimes might be committed. Such declarations at best are the lowest kind of evidence, and the administration of justice will suffer little in any case by their exclusion; while, if admitted and they are falsely alleged against a dead witness, it would hardly be possible ever to disprove them."

It is hard to choose between these opposing considerations.[1] The truth

§ 1031. [1] *Federal:* 1840, McKinney *v.* Neil, 1 McLean 547 (deposition 'ex parte'; "it was in the power of the defendant on reading the deposition, to move for a continuance on the ground that he wished to take the deposition of the witness in regard to the statements, with a view of afterwards contradicting him"; question held indispensable); 1853, Conrad *v.* Griffey, 16 How. 38, 45, 47 (question held indispensable); 1889, Ayers *v.* Watson, 132 U. S. 394, 401, 10 Sup. 116 (there had been four jury-trials of the case; the testimony of one Johnson had been twice taken by the defendants by deposition, and the plaintiffs had cross-examined him on the deposition; before the fourth trial he died; and upon the fourth trial the plaintiffs offered, as inconsistent with his former-trial deposition used by the defendants, another deposition of his, taken on a trial between other parties, many years before any of the above four trials. The Court do not definitely say that even where it is impossible to call attention to the prior statement, the omission to do so would be fatal, but they declare it fatal in this case where Johnson's deposition had been twice taken, "and no reference made to his former deposition, nor any attempt to call attention to it"); *Alabama:* 1847, Holman *v.* Bank, 12 Ala. 409 (Ormond, J., says "the rule by the very terms in which it is proposed applies to the oral examination of witnesses; . . . it cannot in the nature of things apply to such a case as this [chancery depositions], because until the last deposition is taken it cannot be known that there will be any discrepancy between them"; while in Howell *v.* Reynolds, 12 Ala. 131, he had said "we can perceive no reason why a witness testifying in this mode [deposition of a party answering interrogatories] should not be entitled to the same protection as if he had testified orally in the presence of the Court and jury"; the self-contradiction of the learned judge (commented on in Doe *v.* Wilkinson, *infra*) disappears when we observe that in the Holman case he had before him a Chancery suit, in which presumably the depositions were kept secret and then all "published" at once, and of which his remarks therefore were strictly true; so that his ruling in that case at least was unimpeachable); 1860, Doe *v.* Wilkinson, 35 Ala. 470 (question indispensable; repudiating Holman *v.* Bank, *supra*); *Arkansas:* 1881, Griffith *v.* State, 37 Ark. 330 (question indispensable); *Colorado:* 1895, Ryan *v.* People, 21 Colo. 119, 40 Pac. 777 (question indispensable); *Connecticut:* 1830, Daggett *v.* Tolman, 8 Conn. 171, 177 (question dispensed with, the deponent not having been cross-examined); 1906, Chuny *v.* Hotchkiss, 79 Conn. 104, 63 Atl. 947, *semble* (the trial Court has discretion; the question not indispensable where there is no danger of surprise); *Georgia:* 1849, Johnson *v.* Kinsey, 7 Ga. 430 (question indispensable); 1849, Williams *v.* Chapman, 7 Ga. 470 (same); 1854, Wright *v.* Hicks, 15 Ga. 167 (same); 1901, Raleigh & G. R. Co. *v.* Bradshaw, 113 Ga. 862, 39 S. E. 555 (excluded, even for a contradictory utterance after the deposition was taken); *Kansas:* 1878, Greer *v.* Higgins, 20 Kan. 424 (the contradiction was in another deposition taken two years before the other, in a related action; question held indispensable); *Louisiana:* 1858, Fletcher *v.* Henley, 13 La. An. 192 (a second commission was sent to call the attention of the deponent to contradictions, but he could not be found; admitted in view of this "seasonable, though fruitless effort"); 1898, State *v.* Wiggins, 50 La. An. 330, 23 So. 334 (question indispensable); *Maryland:* 1863, Matthews *v.* Dare, 20 Md. 269 (question indispensable); *Missouri:* 1841, Able *v.* Shields, 7 Mo. 123, 124 (question indispensable); 1865, Gregory *v.* Cheatham, 36 Mo. 161 (question indispensable, even where the statement was subsequent to the deposition); 1913, Ebert *v.* Metropolitan St. R. Co., 174 Mo. App. 45, 160 S. W. 34 (rule properly applied to a prior written statement by deponent); *New York:* 1838, Davis *v.* Kimball, 19 Wend. 441 (question held

seems to be that either rule, if inflexible, will occasionally work hardship. It is best to take the middle path, and to leave the matter to the determination of the trial Court, based on the needs of each case. But it is not to be wondered that the authorities are divided.

§ 1032. **Same: (2) Testimony at a Former Trial.** Where the testimony to be impeached is that *given at a former trial* by a person now unavailable, the arguments for and against dispensing with the preliminary question are in effect the same as in the case of a deposition, — except that there is less reason for favoring the impeaching party, since he would have had a better opportunity upon a trial than at a deposition to learn of the contradictory statements. The precedents are few, but more harmonious in favoring the requirement.[1] It is not clear whether a given Court would necessarily decide the question in the same way both for a deposition and for former testimony.

indispensable, even where the contradiction was posterior in time; the reversal of the judgment in 25 Wend. 260 does not seem to have affected this point); 1856, Stacy *v.* Graham, 14 N. Y. 498 (deposition 'de bene'; here inconsistent statements, as well as a confession of the falsity of the deposition, were offered; the evidence being treated from both points of view; question held indispensable); *Ohio:* 1864, Runyan *v.* Price, 15 Oh. St. 14 (question indispensable); 1851, Hazard *v.* R. Co., 2 R. I. 62 (here the statute did not require notice and opportunity to cross-examine for depositions taken 100 miles distant; the Court said, "The question is whether this is an inflexible rule. . . . The defendant could not cross-examine the witness. . . . If he has no right to show that the witness has contradicted himself, he loses an important right without any fault of his"); *Texas:* 1879, Weir *v.* McGee, 25 Tex. Suppl. 20, 32 (question indispensable); *Vermont:* 1847, Downer *v.* Dana, 19 Vt. 338, *semble* (question not always necessary; see quotation *supra*); 1898, Billings *v.* Ins. Co., 70 Vt. 477, 41 Atl. 516 (deposition; calling attention to inconsistent letter, not necessary); 1915, Comstock's Adm'r *v.* Jacobs, 89 Vt. 133, 94 Atl. 497 (deposition; Downer *v.* Dana followed); *Virginia:* 1855, Unis *v.* Charlton's Adm'r, 12 Gratt. 495 (see quotation *supra*); *Washington:* 1903, Brown *v.* Gillett, 33 Wash. 264, 74 Pac. 386 (deposition; self-contradiction not admissible without asking); 1913, Scandinavian-American Bank *v.* Long, 75 Wash. 270, 134 Pac. 913 (a letter not allowed to be used to contradict a deposition for lack of the prior warning; but the date of the letter does not appear; careless opinion).

§ 1032. [1] *Federal:* 1894, Mattox *v.* U. S., 156 U. S. 237, 245, 15 Sup. 337, Shiras, Gray, and White, JJ., diss. (declarations made after the former trial; question indispensable); 1897, Carver *v.* U. S., 164 U. S. 694, 17 Sup. 228 (recognizing the Mattox case *obiter;* question indispensable); *California:* 1901, People *v.* Compton, 132 Cal. 484, 64 Pac. 849 (question indispensable); *Georgia:* 1895, Sharp *v.* Hicks, 94 Ga. 624, 21 S. E. 208 (question indispensable); *Kentucky:* 1883, Craft *v.* Com., 81 Ky. 252 (question indispensable; here the impeaching evidence was a confession of the falsity of the testimony); 1910, Wilson *v.* Com., Ky., 130 S. W. 793 (question required; no authority cited); *Massachusetts:* 1821, Tucker *v.* Welsh, 17 Mass. 164 (Parker, C. J.: "Suppose a witness who has once testified should afterwards acknowledge the falsity of his statements, and then die; the party interested in his testimony might upon another trial prove what he had once said upon the stand under oath; and shall not the other party be permitted to prove that what he said was a falsehood?"); *Michigan:* 1907, People *v.* Peck, 147 Mich. 84, 110 N. W. 495 (deceased witness' testimony at a former trial; rule enforced); *Minnesota:* 1906, Lerum *v.* Geving, 97 Minn. 269, 105 N. W. 967 (Mattox *v.* U. S., *infra*, followed); *Missouri:* 1900, Ely Walker D. G. Co. *v.* Mansur, 87 Mo. App. 105 (question not indispensable, in impeaching former testimony preserved in a bill of exceptions made admissible by Rev. St. 1899, § 3149, R. S. 1919, § 5401, cited *post*, § 1668, n. 2; careful opinion by Goode, J.); *Nebraska:* 1905, Omaha St. R. Co. *v.* Boesen, 74 Nebr. 764, 105 N. W. 303 (testimony at a second trial offered on the sixth trial; the testimony at the first trial, excluded, for lack of asking at the second trial); *New York:* 1865, Hubbard *v.* Briggs, 31 N. Y. 536 (question indispensable); 1892, McCullough *v.* Dobson, 133 N. Y. 124, 30 N. E. 641 (question indispensable, even where the contradiction is posterior in time); *Porto Rico:* 1904, People *v.* Ruiz, 7 P. R. 129 (question dispensable; here the prosecution had introduced one of two statements in its possession, and the defendant offered the other); 1913, Rodriguez *v.* Porto Rico R. L. & P. Co., 19 P. R. 613 (affirming People *v.* Ruiz, *supra*).

§ 1033. **Same: (3) Dying Declaration; (4) Attesting Witness, and other Hearsay Witnesses.** (3) When the testimony to be impeached is a *dying declaration*, or other statement exceptionally admitted without the test of cross-examination (*post*, § 1420), the situation of the impeacher is radically different. (*a*) In the first place, while for depositions and former testimony he has always theoretically — and usually in practice — had at least one opportunity to ask the preliminary question yet here it is clear that he can never have had that opportunity; so that if the argument of hardship is to avail in his favor, there is here the extreme case of hardship. (*b*) Since by hypothesis the statements admitted have not been subjected to cross-examination, the law deprives the impeacher, if it insists on requiring the preliminary question, of two of his most important weapons of defence, at one and the same time, — cross-examination and prior self-contradictions. It has been apparent on all hands that this would be pushing the rule too far; and almost all Courts have agreed, therefore, that a self-contradiction may in this situation be offered, although the preliminary question has of course not been asked and can never be:[1]

1892, GRUBB, J., in *State* v. *Lodge*, 9 Houst. 542, 33 Atl. 312: "The objection made always is that the accused is deprived of the opportunity of calling the attention of the person who supposed himself to be about to die to certain facts, which, if brought to his attention, he might modify his statement or make none at all; that there is no opportunity to test his judgment, the strength of his recollection, or his bias. But the law says that it insures justice in the greater number of cases, and that it is necessary to let it in, although it does deprive the defendant of testing the memory of the witness and his truthfulness by cross-examination. Then it is as though it says: 'Very well, if you

§ 1033. [1] *Accord: Federal:* 1897, Carver *v.* U. S., 164 U. S. 694, 17 Sup. 228 (distinguishing the case of a contradiction of former testimony, because there the benefit of cross-examination has been had; Brewer and Peckham, JJ., dissenting); *Alabama:* 1848, Moore *v.* State, 12 Ala. 764, 767 (point not raised); 1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259; *California:* 1863, People *v.* Lawrence, 21 Cal. 368, 371; 1901, People *v.* Amaya, 134 Cal. 531, 66 Pac. 794; *Colorado:* 1911, Salas *v.* People, 51 Colo. 461, 118 Pac. 992 (Garrigues, J., diss.); *Delaware:* 1906, State *v.* Fleetwood, 6 Pen. Del. 153, 65 Atl. 772; 1907, State *v.* Uzzo, 6 Pen. Del. 212, 65 Atl. 775; *Georgia:* 1884, Battle *v.* State, 74 Ga. 101, 104; 1908, Pyle *v.* State, 4 Ga. App. 811, 62 S. E. 540 (following Battle *v.* State); *Illinois:* 1898, Dunn *v.* People, 172 Ill. 582, 50 N. E. 137; *Indiana:* 1900, Green *v.* State, 154 Ind. 655, 57 N. E. 637; *Louisiana:* 1904, State *v.* Charles, 111 La. 933, 36 So. 29; *Mississippi:* 1850, Nelms *v.* State, 13 Sm. & M. Miss. 505; *Oregon:* 1893, State *v.* Shaffer, 23 Or. 555, 560, 32 Pac. 545; 1908, State *v.* Fuller, 52 Or. 42, 96 Pac. 456; *Tennessee:* 1836, M'Pherson *v.* State, 9 Yerg. 279 (point not raised); 1891, Morelock *v.* State, 90 Tenn. 528, 18 S. W. 258; *Texas:* 1906, Arnwine *v.* State, 50 Tex. Cr. 254, 96 S. W. 4); 1906, McCorquodale *v.* State, 54 Tex. Cr. 344, 98 S. W. 879 (excluded on the facts); *Washington:* 1906, State *v.* Mayo, 42 Wash. 540, 85 Pac. 251.

Contra: 1901, Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884 (declarations of J., deceased, not admitted to contradict other declarations of his already admitted under the Hearsay exception for boundary-statements; but the exclusion is placed on the principle of 'post litem motam', which however does not and was never before supposed to have any application to impeaching statements; but this is explained in State *v.* Segar, 1921, 96 Conn. 428, 114 Atl. 389, thus by Gager, J.: "We do not understand that the 'post litem motam' rule applies [to such statements]. . . . In the citation [by W. on Evidence] we think the opinion of Judge Baldwin in Hamilton *v.* Smith is misconstrued"); 1870, Wroe *v.* State, 20 Oh. St. 469; 1900, State *v.* Taylor, 56 S. C. 360, 34 S. E. 939; State *v.* Stuckey, 56 S. C. 576, 35 S. E. 263; 1918, State *v.* Brown, 108 S. C. 490, 95 S. E. 61 (adhering to State *v.* Taylor and State *v.* Stuckey, *supra*).

are deprived of that opportunity of ascertaining if that witness was wrong, and of bringing any witness to contradict him, when we let in the dying declarations, without an oath, you ought to have the right to put in testimony of previous declarations, without laying the ground.' . . . Therefore, as dying declarations are admitted on the ground of necessity, ought not proof of contradictory or inconsistent statements by the deceased to be also admitted on the same ground?"

(4) *Attesting Witness, and other Hearsay Witnesses.* The production of an attested document, the attesting witness being unavailable, and the proof of his handwriting, in effects admits the hearsay attestation of the witness that the document was properly executed (*post*, § 1505). This being so, the foregoing principle ought to apply, and a self-contradictory statement ought to be allowed to be shown, in spite of the fact that the preliminary question has not been and cannot be asked. This was the original English practice,[2] although the rulings hardly avail as precedents, since the requirement of a preliminary question dates only from 1820; but the practice is theoretically and upon policy correct, and has been approved in this country:[3]

1848, GIBSON, C. J., in *Hays v. Harden*, 9 Pa. St. 158: "I admit that there is force in this view of the case, and that such testimony calls for vigilance and strict scrutiny. But I cannot agree that this is a reason for the exclusion of such testimony altogether, thereby in many cases destroying the possibility of exposing fraud, forgery, and villainy of every description, so apt to be practiced on persons of weak understandings, particularly when debilitated by sickness and disease. It is better that we should incur the risk mentioned than that we should sanction fraud and imposition. The remarks of Baron Parke [in *Stobart* v. *Dryden*] show a distrust of Courts and juries, and if pushed to an excess would be an argument against all testimony whatever, which we all know has been and will continue to be abused; but that would be a flimsy reason for excluding it altogether. . . . It is not difficult to see how easy it would be to spirit away a subscribing witness on the eve of trial, prove his handwriting, thereby giving full effect to his testimony, and then excluding all testimony of his repeated declarations that the bond or will was a forgery or a conspiracy to cheat or defraud. Establish this doctrine, and we shall not be without instances of attempts to baffle justice by removing the witness and thereby preventing the introduction of proof which the guilty know would destroy their claim."

But this sound doctrine was later repudiated in England.[4]

[2] 1761, Wright *v.* Littler, 3 Burr. 1244, 1255, Lord Mansfield, C. J. (alleged confession of forgery by the witness); 1808, Durham *v.* Beaumont, 1 Camp. 210, Ellenborough, L. C. J., mentioning a ruling of Heath J. ("This confession [of the forgery of the will] only supplied the place of what might have been obtained from cross-examination, had the witness survived; and the propriety of admitting it was never questioned"); 1820, Doe *v.* Ridgway, 4 B. & Ald. 53, 55, per Bayley, J. (declarations as to a forgery of the instrument, admissible, because their benefit could have been had if he were alive).

[3] *Accord:* 1910, Mobley *v.* Lyon, 134 Ga. 125, 67 S. E. 668 (careful opinion by Atkinson, J.; Evans, P. J., and Holden, J., diss.); 1842, Losee *v.* Losee, 2 Hill N. Y. 609, note by N. Hill, afterwards judge; 1855, Reformed Church *v.* Ten Eyck, 25 N. J. L. 40, 47; 1860, Boylan *v.* Meeker, 28 N. J. L. 274, 294; 1848, Harden *v.* Hays, 9 Pa. 151, 155 (quoted *supra*); 1831, M'Elwee *v.* Sutton, 2 Bail. S. C. 129 (that the witness "had frequently said, and even made affidavit, that the deed had been antedated in order to protect the property", admitted); 1846, Smith *v.* Asbell, 2 Strobh. S. C. 141, 145 (attesting witness out of State and examined by commission; self-contradiction received without prior asking; point not raised).

Left undecided: 1878, Botts *v.* Wood, 56 Miss. 136, 139; 1890, Hesdra's Will, 119 N. Y. 615, 616, 23 N. E. 555.

[4] 1836, Stobart *v.* Dryden, 1 M. & W. 615 (declarations of a deceased attesting witness M., whose handwriting had been proved, were offered as amounting to an acknowledgment

Wherever any other statements are admitted, by exception to the Hearsay rule — for example, statements of *facts against interest* — the same principle is applicable, and the requirement of prior asking should be dispensed with.[5]

§ 1034. **Same: (5) Proposed Testimony admitted by Stipulation to avoid a Continuance.** Where by consent of the opponent, given in order to avoid a continuance, the proposed testimony of an absent witness is received, in the form of the party's affidavit of the tenor of the expected testimony (*post*, § 2595), it would seem that the rule of prior asking should be dispensed with, because here, as in the foregoing hearsay statements, there has been no opportunity for testing the witness by cross-examination.[1] Where, however (as by some statutes), the opponent is obliged to admit (as a condition of avoiding the continuance) that the proposed testimony *is true*, the self-contradiction would be excluded, because all modes of impeachment are implicitly foregone by him.[2]

§ 1035. **Self-Contradiction contained in other Sworn Testimony; is the Preliminary Question here necessary?** Where the contradictory statement that is to be used is contained in a deposition or other sworn statement made at a prior time *by the witness himself*, it has been often argued, and sometimes decided, that the preliminary question is here unnecessary, because its authenticity cannot be denied by the witness and he needs no preparation for disproving it.[1] This argument, however, loses sight of the double pur-

of forgery; excluded, in an opinion whose fallacies are too radical to be worth refuting); 1909, Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176 (deceased attesting witness' declarations negativing testator's capacity, excluded; careful opinion by McClain, J., following Stobart *v.* Dryden; the fallacy of the opinion seems to lie in its statement that "the will stands as to the mental capacity of testator upon a presumption of law *regardless of any testimony by subscribing witnesses* to that effect"; the better view, *post*, § 1511, n. 4, does not support this); 1864, Runyan *v.* Price, 15 Oh. St. 6 (contradictory declarations of a deceased attesting witness whose deposition had been used).

[5] Quoted, but held not applicable: 1912, Gordon v. Munn, 87 Kan. 624, 125 Pac. 1 (deceased husband's statements as to an antenuptial contract).

§ 1034. [1] *Accord:* 1878, State *v.* Miller, 67 Mo. 604, 608 (under statute); 1904, Nagel *v.* St. Louis T. Co., 104 Mo. App. 438, 79 S. W. 502; 1902, Hutmacher *v.* R. G. & E. Co., 63 S. C. 123, 40 S. E. 1029.

Contra: 1857, Pool *v.* Devens, 30 Ala. 676; 1900, Gafford *v.* State, 125 Ala. 1, 28 So. 406; 1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259; 1905, Funderburk *v.* State, 145 Ala. 661, 39 So. 672; 1867, State *v.* Shannehan, 22 Ia. 437; 1870, Williamson *v.* People, 29 Ia. 458; 1902, State *v.* Guy, 107 La. 573, 31 So. 1012; 1885, Fulton *v.* Hughes, 63 Miss. 61, 66; 1915, National Council *v.* Owen, 47 Okl. 464, 149 Pac. 231 (self-contradictions excluded); 1921, Coffey *v.* Jenkins, — S. C. —, 109 S. E. 117 (excluded, unless the party opposing continuance expressly reserves the right to contradict and this reservation is assented to); 1894, State *v.* Carter, 8 Wash. 272, 276, 36 Pac. 29.

[2] 1881, Rhea *v.* Deaver, 85 N. C. 337, 339.

§ 1035. [1] *Colorado:* 1888, Thompson *v.* Gregor, 11 Colo. 533, 19 Pac. 461 (deposition: here the wrong reason is given that the answer might incriminate by involving perjury); *Delaware:* 1838, Rash *v.* Purnel, 2 Harringt. 448, 456 (former testimony at a probate issue, admitted; no asking mentioned); *Georgia:* 1849, Williams *v.* Chapman, 7 Ga. 469 (question not required for a deposition in the same cause; the Court also denied the necessity of asking in *any* case where the supposed self-contradiction was made under oath or even in writing; this theory, however, is inconsistent with Stamper *v.* Griffin, 12 Ga. 454 (1853), and is not heard of again); 1853, Bryan *v.* Walton, 14 Ga. 196 (question not required for deposition in the same cause); 1860, Molyneaux *v.* Collier, 30 Ga. 745 (same); 1886, Klug *v.* State, 77 Ga. 736 (question not required for the defendant's own testimony before a magistrate); Code 1910, § 5881, P. C. § 1052 (asking required, "unless they

pose of the preliminary question, *i.e.* not merely to allow preparation for disproof, but to allow an opportunity for explanations if the statement is admitted genuine. There is still just as much need for this opportunity to explain, whether the statement was made in a deposition or not. The doctrine has usually been repudiated.[2]

§ 1036. **Recall for putting the Question; Showing a Writing to the Witness.** (1) Where the impeacher is in danger of losing the use of his evidence by not having asked the preliminary question on cross-examination, the witness may of course be *recalled in order to be asked*. But this recall, like all others (*post*, §§ 1867, 1899) is in the discretion of the trial Court,[1] — a discretion which will usually permit the recall where there has been nothing distinctly culpable on the part of the impeacher.

are written statements made under oath in connection with some judicial proceedings"); 1890, Georgia R. & B. Co. *v.* Smith, 85 Ga. 530, 11 S. E. 859 (rule of asking applies to former testimony reported in a brief of evidence not read over or assented to by him); *Vermont:* 1859, Robinson *v.* Hutchinson, 31 Vt. 449 (question not required for a deposition).

[2] *Alabama:* 1851, Powell *v.* State, 19 Ala. 5[illegible] 1860, Doe *v.* Wilkinson, 35 Ala. 471; [illegible]dford *v.* Barclay, 39 Ala. 37; these [illegible]s, repudiating Holman *v.* Bank, 12 [illegible]1847), per Ormond, J., hold that the qu[illegible] is necessary even where the contradiction is in a deposition; but in the later cases (1842, Hester *v.* Lumpkin, 4 Ala. 512, *semble;* 1846, Carville *v.* Stout, 10 Ala. 802, *semble;* 1860, Doe *v.* Wilkinson, 35 Ala. 471) an exception is made for a deposition taken in the same suit and one of several, for here it is in effect merely part of the same oral examination; *California:* 1872, People *v.* Devine, 44 Cal. 458 (question required for deposition before a magistrate in the same case); 1903, People *v.* Witty, 138 Cal. 576, 72 Pac. 177 (affidavit acknowledging the incorrectness of his deposition; asking required); *Iowa:* 1862, Samuels *v.* Griffith, 13 Ia. 106 (question required, even for deposition in the same case); 1865, State *v.* Ostrander, 18 Ia. 456 (question required for former testimony before a grand jury); 1867, State *v.* Shannehan, 22 Ia. 437 (question required for a deposition); 1871, State *v.* Collins, 32 Ia. 41 (same as Samuels *v.* Griffith); *Louisiana:* 1850, Fletcher *v.* Fletcher, 5 La. An. 408 (deposition); *Minnesota:* 1890, Hammond *v.* Dike, 42 Minn. 27, 44 N. W. 61 (question required for a deposition); *Nebraska:* 1892, Hanscom *v.* Burmood, 35 Nebr. 504, 506, 53 N. W. 371 (question required for former testimony); *Tennessee:* 1852, Nelson *v.* State, 2 Swan 237, 259 (before a committing magistrate; asking required); 1874, Titus *v.* State, 7 Baxt. 132, 137 (same).

§ 1036. [1] CANADA: 1921, R. *v.* Schiraba, 62 D. L. R. 308, Man. UNITED STATES: *Alabama:* 1841, State *v.* Marler, 2 Ala. 46 1874, Hall *v.* State, 51 id. 9, 14 (but not discretionary where the cross-examination has been suspended by consent); 1883, Bell *v.* State, 74 Ala. 420; 1890, Richmond & D. R. Co. *v.* Vance, 93 Ala. 144, 147, 9 So. 574; 1904, Vann *v.* State, 140 Ala. 122, 37 So. 158; 1906, Hammond *v.* State, 147 Ala. 79, 41 So. 761; 1906, Pitman *v.* State, 148 Ala. 612, 42 So. 993; *California:* 1875, People *v.* Keith, 50 Cal. 137, 139; 1896, People *v.* Shaw, 111 Cal. 171, 43 Pac. 593; *Florida:* 1903, Bryan *v.* State, 45 Fla. 8, 34 So. 243; 1908, Johnson *v.* State, 55 Fla. 46, 46 So. 155; *Illinois:* 1905, United States Wringer Co. *v.* Cooney, 214 Ill. 520, 73 N. E. 803; 1907, Hirsch & S. I. & R. Co. *v.* Coleman, 227 Ill. 149, 81 N. E. 21; *Iowa:* 1859, State *v.* Ruhl, 8 Ia. 447, 450; *Louisiana:* 1896, State *v.* Goodbier, 48 La. An. 770, 19 So. 755; 1904, State *v.* Brown, 111 La. 696, 35 So. 818; 1912, State *v.* Owens, 130 La. 746, 58 So. 557; 1916, State *v.* Rogers, 138 La. 867, 70 So. 863; *Minnesota:* 1900, Cooper *v.* Hayward, 79 Minn. 23, 81 N. W. 514 (here the witness was recalled to cure an insufficient inquiry already made); *Missouri:* 1886, State *v.* Reed, 89 Mo. 171, 1 S. W. 225; *Pennsylvania:* 1853, Com. *v.* Hart, 21 Pa. 495, 502; *South Dakota:* 1899, Ashton *v.* Ashton, 11 S. D. 610, 79 M. W. 1001; *Virginia:* 1905, Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668.

If the recall has been made impossible by the act of the *party first producing the witness*, the rule requiring asking may then properly be deemed dispensed with, on the theory of waiver: 1820, Queen Caroline's Trial, Linn's ed., III, 112, 119, 159 (a witness for the prosecution, not asked on cross-examination about a prior statement, but at the end of his examination sent abroad by the prosecution; prior statement allowed to be proved, the recall for asking being made impossible by the prosecution's act).

Whether an *accused taking the stand voluntarily* may be thus recalled may involve a question of the waiver of the privilege against self-crimination (*post*, § 2276).

(2) Where the contradiction is contained in a *writing by the witness*, the writing is required, by the rule in The Queen's Case to be shown to the witness before he can be asked whether he uttered the statement contained therein. This rule, unsound both on principle and in policy, purports to rest upon the principle that documentary originals must be produced. It can therefore best be examined under that head (*post*, § 1259).[2]

§ 1037. **Contradiction Admissible, no matter what the Answer to the Preliminary Question.** A notion that for a time obtained with some English judges before the principle of Self-Contradiction was thoroughly differentiated, and a notion not uncommon to-day at our Bar, is that the witness' answer to the preliminary question is the testimonial statement against which the impeaching contradictory statement is to be set off as inconsistent. Two fallacies, now generally discredited by the Courts, have cropped out as the result of this underlying notion.

One fallacy is that if the witness, when asked whether he did not say such-and-such a thing to the contrary, *does not respond* by some assertion — either by failing to remember or by otherwise evading the question — then the contrary statement cannot be offered, because there is no assertion to contradict.[1] In truth, however, his answer to the preliminary question is wholly immaterial. He has already made on the stand an assertion A; we wish to show that he has elsewhere made the opposite assertion A′; and, before introducing the latter we must ask him whether he made it; this preliminary question is simply to give warning and lay the foundation required by the rule; the contradiction already exists (if at all) between the assertions A and A′, and thus his answer to the preliminary question is of no consequence as forming a contradiction. It is the question alone that is essential; if the warning has been given, that is all that the law is concerned with:

1889, HEMMINGWAY, J., in *Billings* v. *State*, 52 Ark. 303, 12 S. W. 574: "[The cross-examination] is required in order that he may explain apparent contradictions and reconcile seeming conflicts and inconsistencies. If he cannot remember the fact, he is unable to do what the law affords him an opportunity to do. . . . The testimony is discredited because he affirms to-day what he denied yesterday; the legitimate effect of such contradiction cannot depend upon his power to remember it."

It follows that the *mere failure of the witness to recollect*, when asked the preliminary question, whether he made the other statement does not prevent the impeacher from offering it;[2] nor, for the same reason,

[1] But of course the *oral* asking is not necessary where the contradictory statement is in a *writing shown to the witness* as required by the rule in The Queen's Case (*post*, § 1259): 1903, Illinois C. R. Co. *v.* Wade, 206 Ill. 523, 69 N. E. 565.

§ **1037.** [1] 1830, Tindal, C. J., in Pain *v.* Beeston, 1 M. & Rob. 20; 1840, Abinger, L. C. B., in Long *v.* Hitchcock, 9 C. & P. 619 ("They cannot call one man to contradict another unless that other swears positively"); 1919, Bigham *v.* State, 203 Ala. 162, 82 So. 192 (approving Southern R. Co. *v.* Williams).

[2] Besides the following authorities, the statutes cited *ante*, § 1028, usually declare the rule:

ENGLAND: 1837, Parke, B., in Crowley *v.* Page, 7 C. & P. 789, whose ruling was accepted in subsequent practice ("If the rule were not so, you could never contradict a witness who said he could not remember");

does it matter whether in any other way his answer lacks in positiveness.[3]

Even where the witness *admits* having made the other statements, this does not prevent the opponent from offering it in evidence by his own witnesses;[4] for he may prefer to have it clearly brought out and emphasized, and it would be unfair to restrict him to the unemphatic mode of proving it by the witness' admission and to subject him to the necessity of disputing whether the admission has been full and exact.[5] The purpose of the question is not to prove

UNITED STATES: *Federal:* 1910, Searway *v.* U. S., 8th C. C. A., 184 Fed. 716; 1922, Woods *v.* U. S., 4th C. C. A., 279 Fed. 706; *Alabama:* 1877, Payne *v.* State, 60 Ala. 88; 1897, Southern R. Co. *v.* Williams, 113 Ala. 620, 21 So. 328; 1899, Henson *v.* State, 120 Ala. 316, 25 So. 23; 1919, Bigham *v.* State, 203 Ala. 162, 82 So. 192; *Arkansas:* 1889, Billings *v.* State, 52 Ark. 303, 12 S. W. 574; *Florida:* Fla. Rev. Gen. St. 1919, § 2711 (if the witness "does not distinctly admit that he has made such statement", it may be proved); *Georgia:* 1846, Sealey *v.* State, 1 Kelly 218; 1911, Waycaster *v.* State, 136 Ga. 95, 70 S. E. 883; *Illinois:* 1860, Ray *v.* Bell, 24 Ill. 451; *Indiana:* Burns Ann. St. 1914, § 532; *Iowa:* 1897, State *v.* Clark, 100 Ia. 47, 69 N. W. 257; *Kansas:* 1868, Lewis *v.* State, 4 Kan. 309; *Louisiana:* 1895, State *v.* Johnson, 47 La. An. 1225, 17 So. 789; *Michigan:* 1852, Smith *v.* People, 2 Mich. 415; 1892, Pickard *v.* Bryant, 92 Mich. 433, 52 N. W. 788; 1897, Pringle *v.* Miller, 111 Mich. 663, 70 N. W. 345; *Missouri:* 1877, Peck *v.* Ritchey, 66 Mo. 119; *New Hampshire:* 1860, Nute *v.* Nute, 41 N. H. 67; 1863, Sanderson *v.* Nashua, 44 N. H. 494; *New Mexico:* Annot. St. 19155, § 2178 ("If a witness . . . does not distinctly admit that he did make such statement, proof may be given that he did in fact make it"); *Oregon:* 1902, State *v.* Deal, 41 Or. 437, 70 Pac. 532; *Pennsylvania:* 1867, Gregg *v.* Jamison, 55 Pa. 471; *South Carolina:* 1896, State *v.* Kelley, 46 S. C. 55, 24 S. E. 60; *Tennessee:* 1873, Cole *v.* State, 6 Baxt. 240; *Texas:* 1860, Weir *v.* McGee, 25 Tex. Suppl. 25, 32; 1879, Johnson *v.* Brown, 51 Tex. 65, 75; *Virginia:* 1864, Forde's Case, 16 Gratt. 558; *West Virginia:* 1918, State *v.* Worley, 82 W. Va. 350, 96 S. E. 56 (overruling Robinson *v.* Pitzer, 3 W. Va. 335).

Suppose, however, that in the original assertion A (not in answer to the preliminary question) the witness is unable to recollect the details of an occurrence, then may a former assertion, giving the details in full, be offered as a Self-Contradiction? This is a question of what constitutes a Self-Contradiction, and is treated *post*, § 1042. The difference between that case and the present one is that here the witness merely cannot recollect whether he made the other assertion A′ as to the occurrence; while there the witness does not recollect the occurrence at all, and the question is *whether there is any assertion* A to be set off against assertion A′.

[3] *Accord:* 1912, People *v.* Singh, 20 Cal. App. 146, 128 Pac. 420; 1904, Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443 (here the witness said "he might have" made the statement); 1902, Sheldon *v.* Bigelow, 118 Ia. 586, 92 N. W. 701 (evasion); 1917, State *v.* Rodriguez, 23 N. W. 156, 167 Pac. 426; 1902, State *v.* Haworth, 24 Utah 398, 68 Pac. 155 (refusal); 1919, Lehan *v.* Chicago & N. W. R. Co., 169 Wis. 327, 172 N. W. 787 (defendant not allowed to ask the witness whether he wanted his memory refreshed by a former written statement made to defendant's agent; the opinion ignores the present principle, and makes a number of loose statements).

Contra: 1903, People *v.* Glaize, 139 Cal. 154, 72 Pac. 965 (the question being asked and on objection an answer being forbidden by the Court, it was held that the foundation was not sufficient for subsequent testimony; this is erroneous).

[4] 1840, Lewis *v.* Post, 1 Ala. 69; 1898, Singleton *v.* State, 39 Fla. 520, 22 So. 876, *semble* (with doubt); 1843, Hathaway *v.* Crocker, 7 Mete. 264; 1882, Markel *v.* Moudy, 13 Nebr. 322, 14 N. W. 409; 1895, Fremont B. & E. Co. *v.* Peters, 45 Nebr. 356, 63 N. W. 791 (allowing the contradiction to be introduced immediately).

[5] Moreover, the cross-examiner may *continue the probing* (if he cares to risk it) by further asking, "Is that former statement true or false?"; compare Sir Charles Russell's cross-examination of Pigott in the Parnell Case, quoted *post*, § 1260, and the cases cited *ante*, § 959, n. 1.

However, many Courts have unwisely conceded that an admission by the witness *does exclude further proof* by the opponent: *Eng.* 1837, Parke, B., in Crowley *v.* Page, 7 C. & P. 789; *Ill.* 1860, Ray *v.* Bell, 24 Ill. 451; 1893, Atchison T. & S. F. R. Co. *v.* Feehan, 149 Ill. 202, 214, 36 N. E. 1036; 1897, Swift *v.* Madden, 165 Ill. 41, 45 N. E. 979; 1903, Illinois C. R. Co. *v.* Wade, 206 Ill. 523, 69 N. E. 565, *semble;* 1905, Chicago & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865 (rule applied), *La.* 1896, State *v.* Goodbier, 48 La. An. 770, 19 So. 755; 1914, State *v.* Folden, 135 La. 791, 66 So. 223; *Mo.* 1884, State *v* Cooper, 83 Mo. 698, *Tex.* 1903, Bar-

the statement, but merely to warn that it will be proved; and there is no reason why an admission on the stand should here cut off the right to make such proof, for it does not ordinarily in other respects (*post*, § 1058) have such an operation.

§ 1038. **Assertion to be Contradicted must be Independent of the Answer to the Preliminary Question.** The other consequence of the loose notion above mentioned is a confusion of the assertion A, which is to be contradicted — this may be called the primary assertion — with the answer to the preliminary question. Counsel sometimes attempt to contradict the latter instead of the primary assertion, forgetting that there must be some primary assertion independent of the answer to the preliminary question.[1] Thus, suppose the witness is asked (on cross-examination, perhaps): "Did the assailant have a wart on his face?" and answers "No"; this is his primary assertion A; he is then asked the warning question, "Have you not said to X at such a time and place that the assailant did have a wart on his face?" and answers "No"; the opponent then proves that the witness has asserted that there was a wart; that is the contradictory assertion A′. Now the contradiction lies between the assertions A and A′; he now says that there was no wart; he formerly said that there was one; the contradiction is clear and material. But suppose that the primary question above was omitted, and only the preliminary or warning question asked; the result is that an error appears (*i.e.* he now says that he did not *make a certain remark*, while others prove that he did make it). But this is an ordinary contradiction (*ante*, § 1000) and not a self-contradiction; moreover, it is upon a wholly collateral point, for the fact of his formerly making a remark about the wart is wholly immaterial, and the only thing that is material is the existence of the wart, and upon this point he has as yet on the stand made no assertion at all which could serve as the basis of a self-contradiction. The extrinsic testimony of his former remark is therefore inadmissible, because it involves no self-contradiction, and is merely on a collateral point in any case:[2]

nard *v.* State, 45 Tex. Cr. App. 67, 73 S. W. 957; 1907, Rice *v.* State, — Tex. Cr. —, 100 S. W. 949; and the statutes cited *ante*, § 1028, and *supra*, note 2, also imply this.

§ 1038. [1] The fallacy above described was committed by Totten, J., in Cheek *v.* Wheatly, 11 Humph. 558 (1851).

[2] *Accord: Ala.* 1898, Naugher *v.* State, 116 Ala. 463, 23 So. 26; *Mass.* 1920, Bloustein *v.* Shindler, 235 Mass. 440, 126 N. E. 774 (personal injury; proof of a former statement about plaintiff's admission, excluded); *Mich.* 1863, Dunn *v.* Dunn, 11 Mich. 292 ("Did you not state so-and-so?", put on cross-examination, and direct examination not having touched the subject; excluded); *Miss.* 1905, Bell *v.* State, — Miss. —, 38 So. 795; *N. H.* 1859, Combs *v.* Winchester, 39 N. H. 18 (the witness was asked on cross-examination whether he had not said that he knew the carriage-bolt had no nut on it; whether or not it had was material, but the witness had not touched the subject on direct examination; his negative answer was not allowed to be contradicted); *N. Y.* 1854, Bears *v.* Copley, 10 N. Y. 93 (plea of negligent work to an action for wrongful discharge from employment; plaintiff's witness had not testified as to incompetency, but was asked on cross-examination whether he had not formerly stated that plaintiff was negligent; excluded, because no contradiction was involved, and what he formerly said was otherwise immaterial); *Tex.* 1898, Red *v.* State, 39 Tex. Cr. 414, 46 S. W. 408; 1898, Welch *v.* State, — Tex. Cr. —, 46 S. W. 812; 1898, Hoy *v.* State, 39 Tex. Cr. 340, 45 S. W. 916; 1921, Bryan *v.* State, 90 Tex. Cr. 175, 234 S. W. 83.

The Courts are perfectly clear on this point. The only error of which any traces appear is

1896, WHITFIELD, J., in *Williams* v. *State*, 73 Miss. 820, 19 So. 826: "Could the State, as a part of its case, have proven that Margaret Kelly said to Elsie Ross, 'I sent you word there was a plot to kill your husband, made three weeks ago', by defendant and his brother? Clearly not. It was competent to prove there was a plot. It was competent to prove it by the acts or declarations of the defendant. It was competent to prove that Margaret Kelly heard the defendant's declarations evidencing the plots. And, had she been asked as to these matters, and denied, she could have been impeached by showing that she had elsewhere stated that she did hear defendant make such declarations. But to permit her to be contradicted by a statement that she *had said* to Elsie Ross that she had sent her word that there was a plot, etc., is in no possible view proper. The exact test here is, What was the fact embodied in her unsworn statement? This: That she had sent Elsie Ross word that there was a plot, etc.; had said to her that there was a plot, etc. Was this fact — her mere statement to Elsie Ross that there was a plot, etc. — a substantive fact, relevant to the guilt or innocence of this defendant, which the State could have proved as a part of its case in chief? Most certainly not."

§ 1039. **Preliminary Question not necessary for Expressions of Bias, for a Party's Admissions, or for an Accused's Confessions; Impeaching one's Own Witness.** (1) The rule requiring a preliminary warning does not on principle apply to proof of *expressions of bias*, although many Courts so extend it.[1]

(2) The rule applies only to the discrediting of a witness, and not to the use of a *party's admissions*, whether or not he is also a witness.[2]

(3) For the same reason the rule does not apply to an *accused's confessions*.[3]

(4) But it does apply to the impeachment of *one's own witness*, and not merely of the opponent's.[4]

4. What Amounts to a Self-Contradiction

§ 1040. **Tenor and Form of the Inconsistent Statement (Utterances under Oath, Admissions and Confessions, Joint Writings, Inconsistent Behavior).** (1) In the present mode of impeachment, there must of course be a real *in-*

the supposition that the witness must have made his primary assertion upon the *direct* examination, and that unless he has there touched upon the subject the contradictory statement is not admissible. But this is not necessary. It is possible (though not usual), as in the illustration above used in the text, that the assertion to be contradicted may have been brought out on cross-examination; the only essential is that it should have dealt with a material, not a collateral, matter; and many material assertions may first come out on cross-examination: 1884, Sellers *v.* Jenkins, 97 Ind. 430, 437; and cases cited *ante*, § 1020.

It must be added that occasionally the answer to the preliminary question *may be* material, *i.e.* when the witness denies that he made a certain remark, this remark, in itself, may be independently material, and therefore its utterance may be shown. But this is rare, and in any case does not constitute a Self-Contradiction; it is merely the ordinary case of proving against the witness an error of fact on a material point. Thus, in proving former expressions of Bias, which the witness now denies having made, it is simply a case of proving a material fact, the fact of such expressions being otherwise admissible; hence it is not necessary to turn it into a case of Self-Contradiction by insisting that he should somewhere in the course of his testimony have asserted that he was not biassed. Cases cited under § 1043 rest on the same principle as those here cited.

§ 1039. [1] Cases cited *ante*, § 953.

Of course the rule has no application to proof of error by *contradiction* through other witnesses (*ante*, § 1006, n. 3); nor to proof of bad character by a *record of conviction for crime* (*ante*, § 980); nor, of course, does it apply to proof of any *conduct* of the witness: 1907, Bliss *v.* Beck, 80 Nebr. 290, 114 N. W. 162 (intoxication).

[2] Cases cited *post*, § 1051.

[3] For the question whether an *inadmissible confession* may be used as a self-contradiction, see *ante*, § 816.

[4] Cases cited *ante*, § 906.

consistency between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true (*ante*, § 1017). Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required. Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists. But it must appear 'prima facie' before the impeaching declaration can be introduced. As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done.[1] On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?

1858, CLIFFORD, J., in *U. S.* v. *Holmes*, 1 Cliff. 116: "Directness, in the technical sense, is not necessary to give the evidence that character, nor is it necessary that the contradiction should be complete and entire, in order to admit the opposing testimony. Circumstances may be offered to rebut the most positive statement, and it is only necessary that the testimony offered should have a tendency to explain, repel, counteract, or disprove the opposite statement in order to render it admissible."

1888, C. ALLEN, J., in *Foster* v. *Worthing*, 146 Mass. 607, 16 N. E. 572: "It is not necessary, in order to make the letter competent, that there should be a contradiction in plain terms. It is enough if the letter, taken as a whole, either by what it says or by what it omits to say, affords some presumption that the fact was different from his testimony; and in determining this question, much must be left to the discretion of the presiding judge."

In most rulings, the circumstances of the cases are individual, and they have no value as precedents.[2]

§ 1040. [1] The following cases illustrate the variety of circumstances: *Eng.* 1861, Jackson *v.* Thomason, 1 B. & S. 745 (several letters, taken together, amounting to a contradiction, though singly insufficient; admitted); *Can.* 1888, Miller *v.* White, 16 Can. Sup. 445, 452 (books of another firm, kept under the witness' direction, admitted); *U. S. Col.* (Dist.): 1819, Jackson *v.* U. S., 48 D. C. App. 269 (keeping a bawdy-house); *Ind.* 1884, Sellers *v.* Jenkins, 97 Ind. 439 (the amount or degree of inconsistency is immaterial); *Mass.* 1868, Brigham *v.* Clark, 100 Mass. 431 (testimony that "L. C. C. & Co." was used as a firm name, contradicted by documents so signed for private debts; admitted); 1871, Hook *v.* George, 108 Mass. 327, 330 ("in their spirit and general purport the letters were in conflict"; admitted); 1883, Hosmer *v.* Groat, 143 Mass. 16, 8 N. E. 431 (the defendant having denied that L. was his agent, letters declaring him to be so were admitted, although not addressed to the plaintiff); *Minn.* 1869, Tinklepaugh *v.* Rounds, 24 Minn. 300 (inconsistency "in any material particular" is enough); *Tenn.* 1848, Weatherhead *v.* Sewell, 9 Humph. 272, 283 (the declarations of an attesting witness that the will did not follow the draft-instructions, not received to contradict his attestation in the Probate Court, which could only have involved testimony that the document was signed or acknowledged).

[2] *Federal:* 1816, Evans *v.* Eaton, Pet. C. C. 388; *Alabama:* 1919, Birmingham & A. R. Co. *v.* Campbell, 203 Ala. 296, 82 So. 546 (remarks at a railroad accident); *California:* 1861, People *v.* Williams, 18 Cal. 190, 193; 1898, People *v.* Collum, 122 Cal. 186, 54 Pac. 589; *Connecticut:* 1822, Treat *v.* Browning, 4 Conn. 410, 418; *Columbia* (Dist.): 1892, U. S. *v.* Cross, 20 D. C. 390; *Georgia:* 1897, Harrison *v.* Langston, 100 Ga. 394, 28 S. C. 162; 1905, Cox *v.* State, 124 Ga. 95, 52 S. E. 150 (assault); *Indiana:* 1860, Thompson *v.* State, 15 Ind. 473; *Iowa:* 1880, Case *v.* Burrows, 54 Ia. 682, 7 N. W. 130 (where it was doubtful where the cattle referred to were the same ones); *Kentucky:* 1878, Kennedy *v.* Com., 14 Bush 357; 1916, Ohio Valley Mills *v.* Louisville R. Co., 168 Ky. 758, 182 S. W. 955 (contradiction in a deposition allowable, though the deposition is not filed and therefore would be inadmissible under C. C. P. § 585; the amount of careful judicial reasoning spent in the opinion exhibits the futile

(2) The *form* of the supposed contradictory assertion is immaterial. It may be oral or written; it may be an ordinary letter, or it may be a *sworn statement*, as, for example, a deposition,[3] or an oral repetition of a written statement already proved.[4]

(3) The contradictory utterance may be a party's *admissions*, and are usable in either character.[5] Whether the *confessions* of an *accused*, when inadmissible as such, may be used against him on the stand as self-contradictions, has been a matter of controversy.[6] But a witness' confessions of perjury ought undoubtedly to be received, under the present principle.[7]

unpractical technicalism of much which we call the law of Evidence); *Louisiana:* 1905, State *v.* Rogers, 115 La. 164, 38 So. 952 (letter excluded, on the facts); *Maryland:* 1880, Munshower *v.* State, 55 Md. 19; *Massachusetts:* 1863, Hamilton W. Co. *v.* Goodrich, 6 All. 197; 1871, Snow *v.* Moore, 107 Mass. 512; *Michigan:* 1907, Blickley *v.* Luce, 148 Mich. 233, 111 N. W. 752 (action against a landlord for loss of goods in a building which collapsed and then burned; the plaintiff's suit against the insurer claiming loss by fire, not admitted as inconsistent); *Minnesota:* 1890, Bennett *v.* Ins. Co., 43 Minn. 48, 44 N. W. 794; 1896, Swift *v.* Withers, 63 id. 17, 65 N. W. 85; 1913, Uggen *v.* Bazille and Partridge, 123 Minn. 97, 143 N. W. 112 (whether a warning was given, in the witness' understanding; the above text approved); *Mississippi:* 1913, Liles *v.* May, 105 Miss. 807, 63 So. 217 (alleged scrivener of a will; later statements indicating different belief as to the succession, admitted); *New Hampshire:* 1852, Martin *v.* Farnham, 25 N. H. 195; 1860, Nute *v.* Nute, 41 N. H. 67; *New York:* 1855, Patchin *v.* Ins. Co., 13 N. Y. 270; 1878, Furst *v.* R. Co., 72 N. Y. 545; 1906, Rossenbach *v.* Supreme Court, 184 N. Y. 92, 76 N. E. 1085 (insured's intoxication); *North Carolina:* 1836, Radford *v.* Rice, 2 Dev. & B. 43; *Ohio:* 1826, Lamb *v.* Stewart, 2 Oh. 230 (377); *Pennsylvania:* 1822, Stahle *v.* Spohn, 8 S. & R. 323; 1862, Travis *v.* Brown, 43 Pa. 18 (admitting where doubtful); 1874, Schlater *v.* Winpenny, 75 Pa. 325; *Texas:* 1859, Hall *v.* Simmons, 24 Tex. 227.

[3] There is no conceivable reason to the contrary, and it is hard to see why this point should have had to be decided so often: *England:* 1820, R. *v.* Hunt, 1 State Tr. N. S. 171, 250 (whether he gave the same evidence before the Ministry as he gave at the trial; allowed on cross-examination); *U. S. Federal:* 1890, Chicago M. & St. P. R. Co. *v.* Artery, 137 U. S. 519, 11 Sup. 129 (here the railroad company had sent its claim agent, after the injury to certain employees, to examine the others present at the time, and had secured written statements; one of these was shown to and acknowledged by one of these employees who took the stand for the plaintiffs, and was inconsistent with his testimony; held improperly excluded by the Court below); *California:* 1872, People *v.* Devine, 44 Cal. 458 (deposition); 1898, People *v.* Bushton, 80 Cal. 160, 161, 22 Pac. 127, 549 (deposition); *Georgia:* 1892, Lewis *v.* State, 91 Ga. 168, 170, 16 S. E. 986 (defendant's unsworn statement on former trial); *Hawaii:* 1869, R. *v.* Apuna, 3 Haw. 166, 170 (prior sworn statement in writing, admitted); *Kansas:* 1894, Southern K. R. Co. *v.* Painter, 53 Kan. 414, 418, 36 Pac. 731 (though the deposition is not filed nor admissible); *Michigan:* 1895, People *v.* Kennedy, 105 Mich. 434, 63 N. W. 405 (preliminary deposition); 1905, People *v.* Hoffmann, 142 Mich. 531, 105 N. W. 838 (defendant's own affidavit for a continuance, admitted); *Missouri:* 1905, Glasgow *v.* Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915 (deposition not certified nor filed, but signed); *South Carolina:* 1888, State *v.* Jones, 29 S. C. 201, 228, 7 S. E. 296 (affidavit; testimony at an inquest); *Wisconsin:* 1861, Thayer *v.* Gallup, 13 Wis. 54 (even one not used because of the witness' personal attendance).

In Pittsburg & C. R. Co. *v.* Andrews, 39 Md. 354 (1873), the impeaching witness was examined on a foreign commission, and by a majority opinion the impeaching testimony was declared admissible; why there should have been any doubt about it does not appear.

For additional instances of the use of sworn statements, see the succeeding notes in this section and the cases cited *ante*, § 278 n. 3 (false affidavits by the accused), and *post*, § 1075, n. 2 (depositions used). But distinguish the question *ante*, § 1034, whether here the preliminary warning is necessary.

[4] 1921, Borough *v.* Minneapolis & St. L. R. Co., 191 Ia. 1216, 184 N. W. 320.

[5] Cases cited *post*, § 1051.

[6] Cases cited *ante*, § 821.

Note that by the doctrine of *waiver of the privilege against self-crimination* an accused taking the stand could be impeached by former self-contradictions contained in testimony otherwise privileged under U. S. Rev. St. 1878, § 860 and similar statutes (quoted *post*, § 2281). But thus far the decisions have taken the opposite view: cases cited *post*, § 2283 and § 2276, n. 9.

[7] Cases cited *ante*, § 959.

(4) The utterance may be in form of a *joint statement* by the witness, signing a document with other persons.[8] If the statements did not accurately represent his own belief, he may absolve himself by explanation (*post*, § 1044).

(5) The inconsistency may be found expressed, not in words, but in *conduct* indicating a different belief.[9]

This sort of evidence is sought frequently to be used against *value-witnesses* and is here not sufficiently favored by the Courts.[10]

§ 1041. **Opinion as Inconsistent.** A common difficulty is to determine whether some broad assertion, offered in contradiction, really assumes or implies anything specifically inconsistent with the primary assertion.[1]

The usual case of this kind is that of a *general statement upon the merits of the controversy*, which is now offered against a witness who has testified to a specific matter. Thus, A testifies for the prosecution that he saw the defendant near the scene of the alleged arson; it is offered to show that he has

[8] 1839, Attorney-General *v.* Bond, 9 C. & P. 189 (a joint affidavit, only the part by the witness can be used); 1884, Smith *v.* R. Co., 137 Mass. 61 (a written statement signed by a physician-witness, though also signed by a physician employed by the opponent, admitted); 1889, Phillips *v.* Marblehead, 148 Mass. 329, 19 N. E. 547 (value-testimony; to contradict, the record of the selectmen, awarding damages for the same land, and signed by the witness with the other selectmen, was excluded, because the recorded damages did not necessarily represent his individual opinion of the amount proper); 1900, Healey *v.* R. Co., 176 Mass. 440, 57 N. E. 703 (time-book turned in by a foreman, though not made by him, admissible); 1921, Re County Ditch No. 33, 150 Minn. 69 , 184 N. W. 374 (a valuation of benefits by a jury of view, though inadmissible under § 1640, *post*, held receivable as a self-contradiction to discredit the testimony of a juror taking the stand); 1891, Dawson *v.* Pittsburgh, 159 Pa. 317, 326, 28 Atl. 171 (witness to betterment; report of viewers, of whom he was one, received).

The following distinction seems sound: 1899, Becker *v.* Cain, 8 N. D. 615, 80 N. W. 805 (counsel's argument before jury in a prior litigation, as to ownership of wheat, not admissible to impeach him testifying as plaintiff claiming ownership).

[9] 1798, DeSailly *v.* Morgan, 2 Esp. 692 (contradicting the teacher of a school, who testified to the good moral influence in the school, by a letter of his own to a former pupil containing many immoral passages); 1899, Huff *v.* State, 106 Ga. 432, 32 S. E. 348 (rape, complainant's attempts to settle the prosecution, admissible on cross-examination); 1875, Wallace *v.* R. Co., 119 Mass. 91 (that a plaintiff who had testified that he was confined to the house by an injury for six months was within that time seen walking the streets); 1896, Lewis *v.* Gaslight Co., 165 Mass. 411, 43 N. E. 178 (an expert testifying to the proper mode of work was allowed to be asked about other occasions when he had done it differently); 1896, Bonnemort *v.* Gill, 165 Mass. 493, 43 N. E. 299 (witness to a testator's incapacity; the witness' former treatment of him as capable of business admitted, but not as necessarily and always contradictory).

Further illustrations of this kind of evidence will be found *ante*, §§ 273–291, where many of the instances would be equally available against a witness.

[10] 1869, Swan *v.* Middlesex, 101 Mass. 174, 179 (a witness who thought cutting off the front of an estate would improve the value of it, asked what would induce him to allow taking his own frontage; held irrelevant); 1873, Miller *v.* Smith, 112 Mass. 472, 475, 476 (here a witness had testified that a horse was worth $9000, and on cross-examination the question whether he would give $3000 for it was held to be a proper matter for the judge's discretion); 1833, Daniels *v.* Conrad, 4 Leigh Va. 402 (that he had offered the same land for sale at a value lower than his estimate on the stand; admitted, "though it might not be as strong as the evidence of his declarations [of actual value], because he might be asking a lower price than he really thought the property worth").

Compare the cases cited in the next section.

§ **1041**. [1] Sundry illustrations: 1892, Young *v.* Brady, 94 Cal. 130, 29 Pac. 489 (assumpsit for money loaned; defendant's statement that he was thankful for certain services of the plaintiff and would reimburse him, excluded); 1859, Robinson *v.* Hutchinson, 31 Vt. 449 (witness to a will's execution; a statement that it was "a sort of boy's will", admitted); 1891, State *v.* Coella, 3 Wash. 107 (witness to good character of the defendant; prior statements as to fear of being killed by defendant and his friends, excluded).

elsewhere declared that he is sure that the defendant is innocent; is this admissible? The usual answer of some Courts is that the declaration should be excluded because it is mere opinion (*post*, § 1918). This is unsound, (1) because the declaration is not offered as testimony (*ante*, § 1018), and therefore the Opinion Rule has no application, and (2) because the declaration in its opinion-aspect is not concerned, and is of importance only so far as it contains by implication some contradictory assertion of fact. In short, the only proper inquiry can be, Is there within the broad statement of opinion on the general question some implied assertion of fact inconsistent with the other assertion made on the stand? If there is, it ought to be received, whether or not it is clothed in or associated with an expression of opinion. As a matter of precedent, the rulings vary more or less in the results reached;[2] most of them are vain quibbles.

[2] ENGLAND: 1831, Elton *v.* Larkins, 5 C. & P. 89, 390 (that a witness for defendant had said before trial "the defendants had not a leg to stand on"; admitted by Bosanquet, J., at the first trial, but rejected by Tindal, C. J., at the second, because it was not a contradiction of any matter of fact but only concerned a matter of judgment).

CANADA: 1856, Gilbert *v.* Gooderham, 6 U. C. C. P. 41, 45 (action on a contract of sale, the defendant denying the contract; a broker G. testified to the circumstances of the transaction and to his saying that he considered the bargain closed; a question whether before trial he had said there was no bargain was asked and excluded, because as an opinion it was not admissible; the test being whether such statements were otherwise admissible).

UNITED STATES: *Federal:* 1858, U. S. *v.* Holmes, 1 Cliff. 116 (the witness had said on board ship, "I believe the captain is crazy", but, before the trial, that the captain "was no more crazy than he was"; admitted); 1903, Chicago & N. W. R. Co. *v.* De Clow, 61 C. C. A. 34, 124 Fed. 142 (that he "hoped the plaintiff would not report" a certain jar of the train, admitted, to impeach a conductor who had testified denying the jar); 1917, Illinois Central R. Co. *v.* Norris, 7th C. C. A., 245 Fed. 927 (prior testimony of a conductor before the Industrial Board, based on hearsay, excluded; unsound);
Alabama: 1898, Luther *v.* State, 118 Ala. 88, 24 So. 43 (that the opponent's witness had said he was afraid not to testify for the opponent, allowed);
Colorado: 1912, Denver C. T. Co. *v.* Lomovt, 53 Colo. 292, 126 Pac. 276 (trolley-car track-homicide; eye-witness testifying for defendant; former statement that "the motorman ought to be lynched", admitted);
Florida: 1901, Myers *v.* State, 43 Fla. 500, 31 So. 275 (witness to defendant's admissions, not allowed to be cross-examined to expressions of opinion as to defendant's guilt; citing Com. *v.* Mooney, Mass., *infra*, now doubted in its own jurisdiction);
Georgia: 1901, Central of Ga. R. Co. *v.* Tramwell, 114 Ga. 312, 40 S. E. 259 (fire caused by a locomotive; to contradict a witness to facts tending to negative the setting of fire by the engine, the witness' expression that "the C. railroad burnt it" was admitted); 1904, Jordan *v.* State, 120 Ga. 864, 48 S. E. 1912 (seduction; a witness to lewd conduct of the prosecutrix impeached by expressions of belief in her chastity); 1908, Bates *v.* State, 49 Ga. App. 486, 61 S. E. 888 ("Sam is coming clear", admitted to impeach an eye-witness for the prosecution);
Idaho: 1904, State *v.* Crea, 10 Ida. 88, 76 Pac. 1013 (murder; a witness for the defendant having testified to seeing a part of the difficulty, it was held improper to admit his statement that he had "seen the killing of M., and that it was as cold-blooded as you ever saw"; this is indeed bigotry in favor of technicality);
Indiana: 1851, Rucker *v.* Beaty, 3 Ind. 71 (opinion as to motives of the party, excluded on the facts); 1885, Welch *v.* State, 104 Ind. 349, 3 N. E. 850 (testimony that defendant had not confessed; evidence that witness had said he knew defendant was guilty and had offered to bet that he was, excluded, as mere opinion); 1893, Pence *v.* Waugh, 135 Ind. 143, 156, 34 N. E. 860 (whether he continued business transactions with the testator; allowed to be asked of a witness testifying to insanity: distinguishing Staser *v.* Hogan, 120 Ind. 216, 21 N. E. 911, 22 N. E. 990, where the question whether the witness "would have taken a note" from the alleged insane person was disallowed); 1900, Stevens *v.* Leonard, 154 Ind. 67, 56 N. E. 27 (attesting a will implies a statement of sanity; hence, the attester's testifying to the testator's insanity discredits by its inconsistency with the attestation; see *post*, § 1511); 1913, Sanger *v.* Bacon, 180 Ind. 322, 101 N. E. 1000 (a legatee's opinions as to the testator's mental condition, here excluded);

Iowa: 1905, State *v.* Matheson, 130 Ia. 440, 103 N. W. 137 (the defendant's father, having testified that he, though present, did not see the defendant use his pistol, allowed to be impeached by a statement that the boy "has shot the deputy sheriff");
Kansas: 1886, State *v.* Baldwin, 36 Kan. 14, 12 Pac. 318 (a witness to the accused's innocent bearing; question whether he had not said he thought the accused impressed him as guilty, admitted);
Kentucky: 1898, Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986 (one testifying to defendant's planning of the crime; prior statement that he knew defendant had nothing to do with it, admissible); 1900, Ross *v.* Com., — Ky. —, 55 S. W. 4 (that the defendant had a bad case, and that it might go hard with him, excluded); 1903, Shinkle *v.* McCullough, 116 Ky. 960, 77 S. W. 196 (negligence of an automobile; the driver's statement that he considered himself responsible, admitted);
Maine: 1870, State *v.* Kingsbury, 58 Me. 241 (a statement that "he never would have done it if it had not been for others", admitted against one testifying in the defendant's favor);
Maryland: 1880, Munshower *v.* State, 55 Md. 11, 18 (murder; witness testifying to defendant's presence, etc., not allowed to be discredited by confession of his own guilt; plainly erroneous, so far as it was an assertion of his exclusive guilt); 1921, Pindell *v.* Rubenstein, 139 Md. 567, 115 Atl. 859 (injury at a gate; statement that "it is not your fault", admitted);
Massachusetts: 1863, Emerson *v.* Stevens, 6 All. 112 (a statement that the defendant-witness "had a right, if he saw fit" to commit the trespass denied, admitted); 1872, Com. *v.* Mooney, 110 Mass. 100 (testimony for prosecution as to details of a search of premises burned; former expression of belief in the defendant's innocence, excluded); 1873, Com. *v.* Wood, 111 Mass. 410 (by an eye-witness exonerating the defendant; a former statement that the defendant was guilty, admitted); 1896, Handy *v.* Canning, 166 Mass. 107, 44 N. E. 118 (ownership of a piano was in issue; the plaintiff's statements that she was not owner, admitted; "the test, in such a case as the present, for the purpose of contradicting the testimony of a witness, is whether, by common experience, different statements would mean different positions taken as to fact foundations, rather than as to the law conclusions"); 1902, Whipple *v.* Rich, 180 Mass. 477, 63 N. E. 5 (witness to a street accident, testifying that there was no obstruction of defendant's view, allowed to be contradicted by his statement that the defendant was not to blame; "the question is whether the specific facts testified to lead so directly to a conclusion that it is obviously unlikely that a man will believe a contrary conclusion if he believes the specific facts"; Com. *v.* Mooney doubted); 1905, Jacobs *v.* Boston El. R. Co., 188 Mass. 245, 74 N. E. 349 (a paper bearing the alleged signature of the witness, excluded; the reason for the ruling is unascertainable from the opinion); 1906, Cotton *v.* Boston El. R. Co., 191 Mass. 103, 77 N. E. 698 (damage by eminent domain; the petitioner's offer to sell at a price exceeding the value as testified to by him, admitted); 1907, Gleason *v.* Daly, 194 Mass. 348, 80 N. E. 486 (a witness present but not attesting a will; his statement "that it was a shame to make that man make a will, they might as well have a dead man", held not improperly excluded by the trial Court; the opinion sails rather close to the wind, in order to avoid overthrowing the trial Court's ruling); 1911, Smith *v.* Holyoke St. R. Co., 210 Mass. 202, 96 N. E. 135 (a witness in a personal-injury case to the fact of the car-gong not being rung until the collision; whether he could be contradicted by his opinion expressed to the conductor "it is no fault of you people", not clear);
Michigan: 1864, Beaubien *v.* Cicotte, 12 Mich. 487 (a physician's opinion of a testator's sanity contradicted by his former opinion that the will was not worth a snap of the fingers; allowed); 1882, People *v.* Stackhouse, 49 Mich. 76, 13 N. W. 364 (an expression of suspicion upon the general guilt of the defendant, for whom the witness testified; excluded); 1895, McClellan *v.* F. W. & B. I. R. Co., 105 Mich. 101, 62 N. W. 1025 (an inconsistent opinion as to negligence, admitted, Hooker and Grant, JJ., diss.);
Minnesota: 1905, O'Connell *v.* Ward, 130 Minn. 443, 153 N. W. 865 (log-scaling; contradictory opinion is admissible, but here held not relevant);
Missouri: 1881, State *v.* Talbott, 73 Mo. 347, 360 (the question of Munshower's case, Md., left undecided); 1920, State *v.* Nave, 283 Mo. 32, 222 S. W. 744 (larceny of mules; witness for defence not allowed to be contradicted by his utterance that "he thought M. N. the defendant had taken the mules"; this was termed "gross error"; but the error could never be so gross as the original one of foisting this suffocating Opinion rule upon the law of Evidence);
Nebraska: 1897, Johnston *v.* Spencer, 51 Nebr. 198, 70 N. W. 982 (false representations in a sale; a witness to the conditions of the business sold; whether he had said that this suit for false representations was an outrage, excluded as opinion); 1899, Zimmerman *v.* Bank, 59 Nebr. 23, 80 N. W. 54 (ownership of a note; that witness had inconsistently asserted ownership, admitted); 1909, Clow *v.* Smith, 85 Nebr. 668, 124 N. W. 140 (opinion admitted, on the facts);
New Hampshire: 1860, Nute *v.* Nute, 41 N. H. 71 (an opinion on the merits of the case, where the implication was indefinite, excluded); 1862, City Bank *v.* Young, 43 N. H. 460 (an opinion on the merits of the case, excluded);
New York: 1857, People *v.* Jackson, 3 Park. Cr. 597 (the prosecuting witness in a larceny

All Courts, however, concede that *expert opinions*, as well as other opinions ordinarily admissible, if inconsistent with those expressed on the stand, are receivable.[3]

§ 1042. **Silence, Omissions, or Negative Statements, as Inconsistent; (1) Silence, etc., as constituting the Impeaching Statement.** A *failure to assert* a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence (*post*, § 1071). There may be explanations, indicating that the person had in truth no belief of that tenor; but the conduct is 'prima facie' an inconsistency.

There are several common classes of cases: (1) Omissions *in legal pro-*

case had said he did not think the defendant would do anything wrong; admitted); 1863, Patchin *v.* Ins. Co., 13 N. Y. 270 (opinion as such is not excluded); 1874, Schell *v.* Plumb, 55 N. Y. 599 ("an opinion expressed by a witness upon the merits is inadmissible", because, apparently, it does not necessarily involve an assertion as to the particular fact testified to; here "the plaintiff ought to have $1000" was held to involve such an assertion); 1880, Mayer *v.* People, 80 N. Y. 377 (false representations; a witness for the defendant, corroborating his claim, asked whether he had not said that the defendant had been guilty of a great wrong, had acted like thieves; held proper, two judges dissenting); 1921, Enos Will, Sup. App. Div., 187 N. Y. Suppl. 757, 775 (an illustration of the pitiful nonsense made of the law by the Opinion rule in this application);
North Carolina: 1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283 ("Little did I think I would have married a murderer", admitted against the defendant's wife);
South Dakota: 1897, State *v.* Davidson, 9 S. D. 564, 70 N. W. 879 (mere opinion excluded; here, that a witness to disprove motive had said that he was convinced the defendant had killed the deceased); 1916, State ex rel. Kuhl *v.* Chambers, 37 S. D. 555, 159 N. W. 113 (bastardy; a physician who testified for defendant as to other intercourse of complainant, not allowed to be impeached by his statement that defendant was the father; unsound; Whiting, J., diss., approving the text above);
Tennessee: 1871, Sellars *v.* Sellars, 2 Heisk. 430 (attesting witness' declarations of testator's insanity, admitted, as contradicting his attestation); 1897, Saunders *v.* R. Co., 99 Tenn. 130, 41 S. W. 1031 (matter of opinion as to the fault of an injured party, excluded); 1907, Holder *v.* State, 119 Tenn. 178, 104 S. W. 225 (murder; to impeach a witness who testified to an alibi, her positive statement that the accused "did it", admitted);
Texas: 1904, Eastern Texas R. Co. *v.* Scurlock, 97 Tex. 305, 78 S. W. 490 (witness to the value of his own property); 1904, Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008 (defendant's daughter, not allowed to be impeached by the statement "I believe that my father killed T."); 1905, Kirk *v.* State, 48 Tex. Cr. 624, 89 S. W. 1067 ("I tried to keep K. from killing him", etc., excluded); 1917, McDougal *v.* State, 81 Tex. Cr. 179, 194 S. W. 944 ("murder; I tried to keep him from it, but I could n't do it", held inadmissible);
Vermont: 1905, Coolidge *v.* Ayers, 77 Vt. 448, 61 Atl. 40 (failure to assert a fact in former testimony, admitted);
Washington: 1913, State *v.* Hazzard, 75 Wash. 5, 134 Pac. 514 (murder by starvation; a prior statement by the prosecution's witness that the defendant had done nothing wrong, here excluded);
Wisconsin: 1903, Lowe *v.* State, 118 Wis. 641, 96 N. W. 417 (assault with intent to kill; defence, insanity; witness' prior contradictory statement as to defendant's insanity, held admissible).

[3] Add here some of the cases cited *ante*, § 1040, n. 10. *Ireland:* 1901, O'Regan *v.* Trench, L. R. 1 Ire. 274, 287, 297 (value of land; inconsistent statements admitted); *U. S. California:* 1872, People *v.* Donovan, 43 Cal. 165 (former opinion as to sanity); *Delaware:* 1851, State *v.* Windsor, 5 Harringt. 512, 526: *Columbia* (Dist.): 1881, Guiteau's Trial, D. C., II, 1237 (an expert witness for the prosecution on the issue of insanity was allowed to be discredited by the following postal card sent by him to the counsel for the defence before being called by the prosecution: "Accept my congratulations on the manner in which you have thus far directed the defence. It may not be popular, but it is right and just"); *Maine:* 1831, Ware *v.* Ware, 8 Greenl. 44, 55 (physicians testifying to a testator's insanity were discredited by former statements that the will could not be broken on the ground of insanity); *Massachusetts:* 1893, Liddle *v.* Bank, 158 Mass. 15, 32 N. E. 954 (physician's inconsistent opinion); 1896, Silverstein *v.* O'Brien, 165 Mass. 512, 43 N. E. 497 (a witness who valued property as worthless, asked as

ceedings to assert what would naturally have been asserted under the circumstances;[1] (2) Omissions to assert anything, or to speak with such detail or positiveness, *when formerly narrating*, on the stand or elsewhere, the matter now dealt with;[2] (3) *Failure to take the stand* at all, when it would have been

to former expressions imputing high value to it); *Michigan:* 1864, Beaubien *v.* Cicotte, 12 Mich. 487 (a physician's opinion as to a testator's sanity); *Minnesota:* 1921, Re County Ditch No. 33, 150 Minn. 69, 184 N. W. 374 (witness to value of benefits, contradicted by his different official valuation); *New Hampshire:* 1863, Sanderson *v.* Nashua, 44 N. H. 494 (experts in general); *New York:* 1898, Brooks *v.* R. Co., 156 N. Y. 244, 50 N. E. 945 (contrary opinion of a physician at a former trial); *Ohio:* 1915, Hoover *v.* State, 91 Oh. 41, 109 N. E. 626 (contradictory opinion stated at another time "concerning the same state of facts", admissible; but not when based on a hypothetical question); *Pennsylvania:* 1897, Krider *v.* Philadelphia, 180 Pa. 78, 36 Atl. 405 (the official assessment of property at a smaller value, to contradict the assessor as a witness to its value).

§ 1042. [1] *Fla.* 1895, Charles *v.* State, 36 Fla. 691, 18 So. 369 (voluntary dismissal of a previous suit through apparent inability to prove what the party now asserts; admitted); Ga. 1899, Merritt *v.* State, 107 Ga. 675, 34 S. E. 361 (assault with intent to rape said to have been witnessed by woman's father; his failure to complain that day or to appear as complainant in the warrant sworn out next day, admitted); *Mass.* 1868, Clement *v.* Kimball, 98 Mass. 536 (the wife's misconduct pleaded in an action against the husband for necessaries; to contradict the defendant's testimony that he had been informed of adultery with P. in 1865, testimony was received that he had in 1867 filed a divorce-libel charging adultery with specified persons but not with P.); *Mo.* 1918, State *v.* Drummins, 274 Mo. 632, 204 S. W. 271; *N. Car.* 1876, State *v.* Wright, 75 N. C. 439 (testimony that the prosecutrix, on applying for a warrant, "made various and contradictory statements", excluded, as too indefinite); *Pa.* 1877, Snyder *v.* Com., 85 Pa. 519, 521 (charging and testifying to the murder of the witness' infant daughter by the defendant, her father; a former complaint by her, after the time in question, admitted, in which incestuous adultery and rape only were charged, and not murder); 1897, Mullen *v.* Ins. Co., 182 Pa. 150, 37 Atl. 988 (failure to assert a claim now alleged, admitted); *Vt.* 1862, Nye *v.* Merriam, 35 Vt. 441, 445 (that the defendant by his counsel at the trial below defended the suit upon grounds wholly inconsistent with his present testimony); *Wis.* 1858, Conkey *v.* Post, 7 Wis. 137 (omission in the Court below to object to a note on the ground now claimed, namely, alteration).

Compare the cases cited *post*, §§ 1066, 1072.

[2] ENGLAND: 1678, Coleman's Trial, 7 How. St. Tr. 1, 25 (one of the chief weaknesses in the testimony of the notorious perjurer Oates was that at his original information to the Council he failed to state facts which he afterwards testified to on the trials of his various victims; each time bringing out new facts before unmentioned); CANADA: 1902, R. *v.* Higgins, 36 N. Br. 18, 24 (accused's silence, until his trial, as to G. being the real murderer, admissible; good opinion by Harrington, J.);

UNITED STATES: *Federal:* 1888, U. S. *v.* Ford, 33 Fed. 864, *semble* (an omission to mention a matter on a prior examination, admitted); *California:* 1901, People *v.* Bishop, 134 Cal. 682, 66 Pac. 976 (witness' hesitation in giving former testimony on the same subject; allowed to be shown on the facts); *Colorado:* 1889, Babcock *v.* People, 13 Colo. 519, 22 Pac. 817 (failure to mention important matters at a prior examination, admitted); *Florida:* 1905, Hampton *v.* State, 50 Fla. 55, 39 So. 421 ("Have you testified to material facts here to-day that you did not testify to before the coroner's jury?" excluded; this is unsound); *Georgia:* 1896, Miller *v.* State, 97 Ga. 653, 25 S. E. 366, *semble* (a supposed eye-witness; that he did not disclose the assailant's identity when it would have been proper to do so, admitted); *Illinois:* 1906, Larrance *v.* People, 222 Ill. 155, 78 N. E. 50 (failure to mention a fact in testimony at an inquest; not admitted, unless on a showing that he was asked on that point or asked for all relevant facts); *Maryland:* 1910, Parks *v.* State, 113 Md. 338, 77 Atl. 603 (robbery; prosecuting witness identified defendant; a letter of his, stating that he did not know who struck him, admitted); *Massachusetts:* 1855, Com. *v.* Hawkins, 3 Gray 464 ("alleging a fact at one time which he denied at another, or stating it in two ways inconsistent with each other" is admissible, but not "a mere omission to state a fact, or stating it less fully [at a former examination], unless the attention of the witness was particularly called to it at the former examination"); 1873, Hayden *v.* Stone, 112 Mass. 348, 352 (testimony that C. claimed ownership; former silence by witness when as appraiser of C.'s estate he should have mentioned C.'s claim, admitted); 1875, Perry *v.* Breed, 117 Mass. 165 (Morton, J.: "If a witness has made a previous statement of the transaction in regard to which he testifies, under such circumstances that he was called upon as a matter of duty or interest to state the whole truth as to the transaction, it might be competent to put

natural to do so.[3] In all of these much depends on the individual circumstances, and in all of them the underlying test is, Would it have been natural for the person to make the assertion in question?

§ 1043. **Same: (2) Silence, etc., as constituting the Testimony to be Impeached.** It ought to follow that, where the witness *now* claims to be *unable to recollect* a matter, a former affirmation of it should be admitted as a contradiction. But Courts have usually forbidden this, because the improper effect is apt to be to give a testimonial value (*ante*, § 1018) to the former statement; its aspect as a mere contradiction being naturally overshadowed.[1]

such previous statements in evidence, to show that he then omitted material parts of the transaction to which he now testifies"); 1885, Brigham *v.* Fayerweather, 140 Mass. 412, 416, 5 N. E. 265 (excluding a former failure of the witness to make the assertion he made on the stand, because the former occasion did not call for an expression on the subject); 1888, C. Allen, J., in Foster *v.* Worthing, 146 Mass. 607, 16 N. E. 572 ("Declarations or acts or omissions to speak or to act when it would have been natural to do so if the fact were as testified to, may be shown by way of contradiction or impeachment of the testimony of a witness, when they fairly tend to control or qualify his testimony"); 1896, Bonnemort *v.* Gill, 165 Mass. 493, 43 N. E. 299 (former omission to testify to the fact, admitted); 1920, Com. *v.* Homer, 235 Mass. 526, 127 N. E. 517 (robbery; complaining witness' omission in prior accounts to mention a pistol, admitted); *Michigan:* 1905, Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694 (witness' failure to deny a statement of R. in his presence, not admitted, there being on the facts no duty to speak); *Minnesota:* 1869, State *v.* Staley, 14 Minn. 117 (failure by an accused taking the stand to deny the truth of his confession, admitted); 1895, Alward *v.* Oaks, 63 Minn. 190, 65 N. W. 271 (a letter to the party detailing the facts which the witness would testify to, but omitting a vital fact asserted on the stand, admitted); *New Jersey:* 1904, State *v.* Rosa, 71 N. J. L. 316, 58 Atl. 1010 (omitting to state a material circumstance in former testimony, admitted); *New York:* 1899, Barrett *v.* R. Co., 157 N. Y. 663, 52 N. E. 659 (omission of a material fact in a former narration, admitted); *North Carolina:* 1890, State *v.* Morton, 107 N. C. 890, 12 S. E. 112 (silence when other persons were accused, admitted to impeach a purporting eye-witness of the defendant's act); *Utah:* 1915, Requa *v.* Daly-Judge Mining Co., 46 Utah 92, 148 Pac. 448 (injury in a mine); *Vermont:* 1862, Briggs *v.* Taylor, 35 Vt. 68 (same); 1906, Green *v.* Dodge, 79 Vt. 73, 64 Atl. 499 (former failure to dispute the amount of rent, admitted); *Wisconsin:* 1913, Hilton *v.* Hayes, 154 Wis. 27, 141 N. W. 1015 (excluded; no authority cited).

Contra: 1920, Thompson *v.* State, 88 Tex. Cr. 29, 224 S. W. 892 (misunderstanding the point).

But, on the principle of § 1072, *post*, silence in a court room *during legal proceedings* is usually not admissible; 1899, Turner's Appeal, 72 Conn. 305, 44 Atl. 310 (listening to another witness without interruption); 1903, Horan *v.* Byrnes, 72 N. H. 93, 54 Atl. 945 (witness' former silence at a trial when testimony was given as to her utterance of the biassed expression in question, excluded).

For failure of the *woman to make fresh complaint in rape*, etc., see *post*, § 1135.

[3] This will depend much on circumstances: 1855, Brock *v.* State, 26 Ala. 106 (a mother and a sister of the defendant, though present at the preliminary examination, failed to testify in his behalf, which, however, they afterwards did at the trial; excluded); 1895, Com. *v.* Smith, 163 Mass. 411, 40 N. E. 189 (Allen, J.: "The judge ruled, in effect, that, where a defendant now testifies that he is innocent of a criminal charge, the fact that he has heretofore refused to answer in relation to the subject, on the ground that his answers might tend to criminate him, may be considered as bearing upon the credibility of his present testimony. The defendant in such case now says that he is innocent. He formerly did not say that he was innocent, but that he would not answer lest he might criminate himself. This fact, though open to explanation, has some tendency to throw a doubt upon the truth of his present testimony, and thus has some bearing upon one material question; namely, the truthfulness of the witness"); 1896, People *v.* Wirth, 108 Mich. 307, 66 N. W. 41 (that a witness for the defendant saw the defendant bound over and did not at the time tell what he now tells, namely, that another person was the guilty one, admitted).

Compare the cases cited *post*, § 1072.

For the bearing of the *privilege against self-crimination*, as prohibiting the use of the *accused's* silence against him, see *post*, § 2272.

§ 1043. [1] ENGLAND: 1788, Warren Hastings' Trial, Lords' Journal, Feb. 29, April 10 (a question as to former affirmative testimony of a witness who now "disclaimed all knowl-

This is well enough as a caution. But the unwilling witness often takes refuge in a failure to remember,[2] and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort.[3] An absolute rule of prohibition would do more harm than good, and the trial Court should have discretion. In general, the risk (above noted) of permitting a testimonial value to be given to the extrajudicial assertion is greater for a witness examined by a party calling him, while the necessity for using it to expose a false witness is greater for the opponent of the witness; and the usual practice should follow this line of distinction.

5. Explaining away the Inconsistency

§ 1044. **In general.** In accordance with the logical principle of Relevancy (*ante*, § 34), the impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject, and therefore that there has been some defect of intelligence, honesty, or impartiality on

edge of any matter so interrogated", excluded); 1820, The Queen's Case, 2 B. & B. 299 (when a witness testifies that he does not know or that he does not remember the occurrence of a certain fact, the fact that he formerly mentioned the alleged matter in a conversation is not admissible); UNITED STATES: *Ark.* 1922, Murray *v.* State, — Ark. —, 236 S. W. 617; *Cal.* 1898, People *v.* Dice, 120 Cal. 189, 52 Pac. 477 (former statement of what he now fails to remember, excluded); 1904, People *v.* Creeks, 141 Cal. 532, 75 Pac. 101 (rule approved); 1905, People *v.* Cook, 148 Cal. 334, 83 Pac. 43 (rule affirmed); 1909, Bollinger *v.* Bollinger, 154 Cal. 695, 99 Pac. 196; *Ga.* 1899, Rickerson *v.* State, 106 Ga. 391, 33 S. E. 639 (denial of a fact which the party thought the witness would affirm is not the subject of self-contradiction); *Ky.* 1895, Saylor *v.* Com., — Ky. —, 33 S. W. 185 (testifying that he knows nothing; former assertion of something, excluded); 1897, Stevenson *v.* Com., — Ky. —, 44 S. W. 634 (testimony that he was not present at an affray; former statement that he did see the defendant shoot the deceased, excluded); 1913, South Covington & C. St. R. Co. *v.* Finan's Adm'x, 153 Ky. 340, 155 S. W. 742; *Me.* 1872, State *v.* Reed, 60 Me. 550 (here the matter was first referred to on cross-examination, and the witness could not recollect details; former detailed statements were excluded); *Mass.* 1914, Corsick *v.* Boston Elevated R. Co., 218 Mass. 144, 105 N. E. 600; *Miss.* 1903, Dunk *v.* State, 84 Miss. 452, 36 So. 609 (following, but misconceiving, the ruling in Williams *v.* State, Miss. quoted *ante*, § 1038); *N. J.* 1913, State *v.* D'Adame, 84 N. J. L. 386, 86 Atl. 414 (on failure to identify on the stand, a former identification was admitted), 1913, State *v.* Kysilka, 84 N. J. L. 6, 87 Atl. 79 (similar); *Or.* 1910, State *v.* Yee Gueng, 57 Or. 509, 112 Pac. 424 (a ruling which exhibits the useless quibbling induced by over-particularity in drawing this distinction); *Pa.* 1838, Stockton *v.* Demuth, 7 Watts 41 (a positive affirmation, not admitted against one who failed to recollect); *Tex.* 1907, Ozark *v.* State, 51 Tex. Cr. 106, 100 S. W. 927 (prior affirmative statements by the prosecution's witness, not allowed to be proved by the prosecution where the witness had failed to testify to that effect); *Wyo.* 1922, Crago *v.* State, — Wyo. —, 202 Pac. 1099 (prosecution's witness, being asked as to an admission made to him by defendant, remembered none; held, that his prior written statement of such an admission could not be received).

Compare also the cases cited *ante*, § 1038.

No prior contradictions, of course, can be received where the testimony contradicted has been *struck out:* 1876, Mayo *v.* Mayo, 119 Mass. 290.

Where the witness *now expressly denies* a fact, on direct examination, *contrary* to the expectation of the party calling, the principle of *impeaching one's own witness* by showing a former contrary assertion becomes involved (*ante*, §§ 905, 1018, n. 2).

[2] Compare Majocchi's "non mi ricordo", quoted *ante*, § 975.

[3] The following cases illustrate this view: 1897, People *v.* Turner, 118 Cal. 324, 50 Pac. 537 (a more positive identification, admitted): 1860, Hastings *v.* Livermore, 15 Gray 10 (a former petition signed, showing a knowledge of a fact denied on the trial, though the witness said he did not know its contents, admitted): 1860, Nute *v.* Nute, 41 N. H. 67 the (present statement was merely that the witness did not

his part; and it is conceivable that the inconsistency of the statements themselves may turn out to be superficial only, or that the error may have been based not on dishonesty or poor memory but upon a temporary misunderstanding. To this end it is both logical and just that the explanatory circumstances, if any, should be received:[1]

1843, GILCHRIST, J., in *State* v. *Winkley*, 14 N. H. 491: "Their effect upon his credibility might have been destroyed by evidence that they were made in an ironical manner and tone, by showing that they were connected with other remarks in such a way that they ought not to impair his credit, or that he could not have been supposed to be serious in making them."

1874, DANFORTH, J., in *State* v. *Reed*, 62 Me. 146: "The force of a contradictory statement must depend very materially upon the circumstances under which it was made and the influences at the time bearing upon the witness. It would therefore seem to be self-evident that witnesses so situated should be permitted to make such explanation as might be in their power. The first impulse of the mind in such a case is to inquire how this happened, what reason can be given, and more especially what can the party implicated say in excuse or extenuation. To refuse the opportunity to explain would be in effect to condemn a party without a hearing, and without that information which in many cases would be material to a correct judgment."

recollect a fact, and the former one affirmed it; admitted).

§ 1044. [1] *Accord:* ENGLAND: 1754, Canning's Trial, 19 How. St. Tr. 385 (explaining why a witness stayed away from the first trial); 1840, R. *v.* Woods, 1 Cr. & Dix 439 (the witness had contradicted himself as to seeing the deceased before the murder; he was allowed to explain that his former statement was made in fear of being involved in the case).

UNITED STATES: *Ala.* 1853, Campbell *v.* State, 23 Ala. 44, 76; 1860, Lewis *v.* State, 35 Ala. 384, 386 (that the witness' master had threatened to whip him unless he told the story offered in contradiction); 1895, State *v.* Henry, 107 Ala. 22, 19 So. 23 (in this State the singular doctrine that one may not testify to his own state of mind (*post*, § 1966) is held not to affect such explanations); *Cal.* 1895, People *v.* Dillwood, — Cal. —, 39 Pac. 438 (motive for change of testimony); 1898, People *v.* Shaver, 120 Cal. 354, 52 Pac. 651; 1898, People *v.* Lambert, 120 Cal. 170, 52 Pac. 307; 1903, People *v.* Glover, 141 Cal. 233, 74 Pac. 745 (explaining that the former statement was not true); *Ga.* 1896, Miller *v.* State, — Ga. —, 25 S. E. 366 (former silence, explained as the result of advice by others); 1898, Huff *v.* State, 104 id. 521, 30 S. E. 808 (that he had before sworn falsely in fear of threats, allowed); 1904, Spearman *v.* Sanders, 121 Ga. 468, 49 S. E. 296; *Ida.* 1895, Douglas *v.* Douglas, 4 Ida. 293, 38 Pac. 935; *Ill.* 1907, Hirsch & S. I. & R. Co. *v.* Coleman, 227 Ill. 149, 81 N. E. 21; *Ind.* 1878, Jones *v.* State, 64 Ind. 473, 482 (threats by defendant to witness before her prior statement, admitted); 1904, Strebin *v.* Lavengood, 163 Ind. 478, 71 N. E. 494 (affidavits); *Ky.* 1899, Louisville & N. R. Co. *v.* Alumbaugh, — Ky. —, 51 S. W. 18; *Mass.* 1871, Blake *v.* Stoddard, 107 Mass. 111 (that after making the contrary erroneous statement in answer to interrogatories he went to his counsel and informed him of the error, admitted); *Minn.* 1871, Jaspers *v.* Lano, 17 Minn. 296, 305 (even though the witness originally denied the statement); *Mont.* 1896, Du Vivier *v.* Phillips, 18 Mont. 370, 45 Pac. 554 (circumstances under which a letter was written, admitted); *Nebr.* 1895, Fremont B. & E. Co. *v.* Peters, 45 Nebr. 356, 63 N. W. 791; *Mich.* 1922, People *v.* Davis, — Mich. —, 187 N. W. 390; *Nev.* 1908, Tonopah Lumber Co. *v.* Riley, 30 Nev. 312, 95 Pac. 1001 (conversation with R., admitted by way of explanation); *N. Y.* 1848, Clapp *v.* Wilson, 5 Den. 286, 288; *N. C.* 1886, State *v.* Garland, 95 N. C. 672 (seduction; the fact that the prior declarations of the prosecutrix were made on the occasion of a formal visit of investigation from a church-elder, admitted); *Or.* 1903, State *v.* Howard, 43 Or. 166, 72 Pac. 880 (reasons for making a contradictory affidavit); *S. C.* 1887, State *v.* Jacobs, 28 S. C. 30, 37, 4 S. E. 799; *Utah:* 1906, Hoggan *v.* Cahoon, 31 Utah 172, 87 Pac. 164 (reasons for the inconsistent statements); *Wis.* 1888, Norwegian Plow Co. *v.* Hanthorn, 71 Wis. 534, 37 N. W. 825.

Compare the same rule for Admissions, *post*, § 1058.

For the use of *prior consistent statements*, to corroborate a witness who has been impeached by an inconsistent failure to speak on a former occasion, see *post*, § 1129.

§ 1045. **Putting in the Whole of the Contradictory Statement.** In making this explanation, it is obvious that in theory all that is allowable, where the witness wishes to show that the true significance of the former statement has been distorted by a fragmentary repetition of it, is the addition of *such other parts of the statement as explain* its true significance, — and not the entire conversation or writing, which may contain portions wholly irrelevant for the legitimate purpose of explanation. Such is the rule in England.[1] But in the United States it is common to say that *the whole of the conversation*, or of the *former testimony or the deposition*, may be received.

There is much to be said in favor of this looser doctrine, (1) because it affords a simpler test and avoids a continuous and petty wrangle over the various parts of the conversation or deposition, and (2) because the possible disadvantage of introducing some irrelevant matter may well be borne by the party who provoked this result by attempting to introduce a fragmentary portion. However, the whole subject is more fully developed by the Courts in dealing with the general principle of Completeness, and the judicial explanations quoted under that head (*post*, §§ 2113–2118) will indicate the practice upon the present subject.

§ 1046. **Joining Issue as to the Explanation.** When the self-contradiction is not upon a collateral point (*ante*, § 1020), either party may introduce other witnesses upon the issue *whether the utterance was made;* this is involved in the nature of the case.[1] But whether additional testimony may be introduced as to the *correctness of the explanation* given by the witness is doubtful, as a matter of precedent; convenience would seem usually to require its exclusion.[2]

§ 1045. [1] 1820, Abbott, C. J., for all the judges, in The Queen's Case, 2 B. & B. 294 (admitting "all which had constituted the motive and inducement and all which may show the meaning of the words and declarations", but not any other things which may have been said at the same time; see the quotation *ante*, § 952); 1838, Denman, L. C. J., in Prince *v.* Samo, 7 A. & E. 627 (admitting "everything said" at the time "that could in any way qualify or explain the statement as to which he had been cross-examined", but not "all that he said at the same time"; in this opinion, a part of the foregoing opinion, so far only as it bore on party's admissions, was repudiated; see the quotation *post*, § 2115).

[2] 1864, Beemer *v.* Kerr, 23 U. C. Q. B. 557 (the witness was contradicted by his own deposition before a magistrate, and explained that he was at that time confused, that he had not papers to refer to which he needed, and that not all that he said was reported; the opponent's testimony to disprove these excuses was excluded; Draper, C. J.: "If he offers explanations why his statements conflict, they are neither relevant to the issue tried, nor do they alter the fact that he has contradicted himself on oath, and any evidence as to the truth of his explanations, and not as to the fact in issue, to which his evidence relates, must be collateral and cannot be received"); 1896, State *v.* Goodbier, 48 La. An. 770, 19 So. 755 (disproof of the witness' explanation, rejected); 1879, Dufresne *v.* Weise, 46 Wis. 297 (explanation by the third witness on behalf of the impeached witness excluded).

See the treatment of a similar question as to Explanations of Bias, *ante*, § 952.

§ 1046. [1] 1881, R. *v.* Whelan, Ire., 14 Cox Cr. 595.

Contra: 1901, State *v.* Jackson 106 La. 413, 31 So. 52 (defendant having cross-examined a witness as to making an affidavit against him, the affidavit was not allowed to be used to show that the witness had not made it; the opinion ignores settled principles).

Sub-title II (*continued*): TESTIMONIAL IMPEACHMENT

Topic VI: ADMISSIONS

CHAPTER XXXV.

1. General Theory

2. What Statements are Admissions

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

1. General Theory

§ 1048. **Probative Status of Admissions.** The statements made out of court by a party-opponent are universally deemed admissible, when offered against him. What is their probative status? [1]

(1) Regarded from the point of view of ordinary *logic* and *psychology*, they are of course testimonial utterances (*ante*, § 475), like any other human assertion whether made in or out of court.

But, even from this point of view, they have two kinds of probative value:

(*a*) One is the ordinary value of any person's testimonial utterance; this value depending on his capacity to observe, etc., his means of knowledge, his bias or interest or lack of it, and so on. The Hearsay rule, of course, must be satisfied (*infra*), but that is a rule of law. Psychologically, however, all testimonial utterances stand on the same footing. If therefore the party's utterances become somehow admissible, they have such natural probative value as those of any person having similar testimonial qualities. From this point of view, their value would be the same whether they are offered *for* or *against the party*.

(*b*) But when offered *against* the party they have additionally, the same logical status as a *witness' self-contradiction*. Just as a witness' testimony is discredited when it appears that on another occasion he has made a statement inconsistent with that testimony (*ante*, §§ 1018 ff.), so also the party-opponent is discredited when it appears that on some other occasion he has made a statement inconsistent with his present claim against him. The witness speaks in court through his testimony only, and hence his testimony forms the sole basis upon which the inconsistency of his other statement is predicated. But the party-opponent, whether he himself takes the stand or not, speaks always through his pleadings and through the testimony of his witnesses put forward to support his pleadings; hence the basis upon which may be predicated a discrediting inconsistency on his part includes the whole range of facts asserted in his pleadings and in the testimony relied on by him. Thus, in effect and broadly, *anything said by the party-opponent may be used against him as an admission*, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony.

§ 1048. [1] In the following article is found an acute criticism of the theory of Admissions as originally here expounded, and in the light of that article the above text has been revised: Professor Edmund M. Morgan, "Admissions as an Exception to the Hearsay Rule", Yale L. Journal, 1921, XXX, 355. It is believed that the reasoning now set forth in §§ 1048, 1049, places the theory of Admissions on the sounder basis.

(2) But, regarded from the point of view of the *legal rules of admissibility*, the party's extrajudicial statements, like all other extrajudicial statements, are met and challenged by the Hearsay rule (*post*, § 1361). How is it, then (since they are nevertheless admissible against the party-opponent), that they are able to pass the gauntlet of the Hearsay rule?

Very simply. The answer is that the party's testimonial utterances do *not* pass the gauntlet of the Hearsay rule when they are offered *for* him (unless they can satisfy some exception to that rule); but that they do pass the gauntlet when they are offered *against* him as opponent, because he himself is in that case the only one to invoke the Hearsay rule and because he *does not need to cross-examine himself*. The theory of the Hearsay rule is that an extrajudicial assertion is excluded unless there has been sufficient opportunity to test the assertion by cross-examination by the party against whom it is offered (*post*, § 1362); *e.g.* if Jones had said out of court "The party-opponent Smith borrowed this fifty dollars", Smith is entitled to an opportunity to cross-examine Jones upon that assertion. But if it is Smith himself who said out of court, "I borrowed this fifty dollars," certainly Smith cannot complain of lack of opportunity to cross-examine himself before his assertion is admitted against him. Such a request would be absurd. Hence the objection of the Hearsay rule falls away, because the very basis of the rule is lacking, viz. the need and prudence of affording an opportunity of cross-examination. In other words, the *Hearsay rule is satisfied;* Smith has already had an opportunity to cross-examine himself (*post*, §§ 1371, 1372); or (to put it another way) he now as opponent has the full opportunity to put himself on the stand and explain his former assertion.

The Hearsay rule, therefore, is not a ground of objection when an opponent's assertions are offered *against* him; in such case, his assertions are termed Admissions. But the Hearsay rule is a ground of objection by the first party when the opponent's assertions are offered *in his favor;* and such statements are then not termed "admissions." [2]

(3) It follows that the subject of an admission is *not limited to facts against the party-opponent's interest at the time.* No doubt the weight of credit to be given to such statements is increased when the fact stated is against the person's interest at the time; but that circumstance has no bearing upon their admissibility. On principle, it is plain that the probative reason why a party-opponent's utterance is sought to be used against him is ordinarily the reason noted above, in par. (1) *b*, viz. that it exhibits an inconsistency with his present claim, tending to throw doubt upon it, whether he was at the time speaking apparently in his own favor or against his own interest. For example, a plaintiff who now claims a debt of $100 is clearly discredited by having made a demand a month ago for only $50, even if at the time

[2] Hence the basis for the play upon words in the well-worn professional jest: "I hear that you consider yourself the ablest lawyer in this State; how do you prove it?" "I do not have to *prove* it; I *admit* it!"

the debtor conceded only $25 and thus put the demandant in the position of *then* making an assertion purely in his own favor for the aggrandizement of his claim. If the principle upon which admissions were received rested at all upon the disserving quality of the fact asserted at the time of assertion, such a statement would be as certainly rejected when offered by the first party as it would be when offered by the opponent himself in his own favor. Nevertheless the fallacy is sometimes committed of placing the admissibility of such statements on that untenable ground.[3]

That it is a fallacy, in the fullest sense, is to be seen not only by reflecting upon the principle involved, but also by observing that no Court ever yet excluded an opponent's admission because of such a limitation. Daily practice and unquestioned tradition are here unmistakable. Sometimes, too, the Courts have expressly negatived the fallacy in question:[4]

1856, POLLOCK, C. B., in *Darby* v. *Ouseley*, 1 H. & N. 1: "The distinction is this: If a party has chosen to talk about a particular matter, his statement is evidence against himself."

1898, HAMERSLEY, J., in *State* v. *Willis*, 71 Conn. 293, 41 Atl. 820: "Admissions are not admitted as testimony of the declarant in respect to any facts in issue; . . . They are admitted because conduct of a party [-opponent] to the proceeding, in respect to the matter in dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue."

(4) The logical value, therefore, of the use of admissions is twofold. In the first place, all admissions may furnish, as against the opponent, the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction; the nature of this inference, both in its strength and in its weakness, has been already examined (*ante*, § 1018), and need not be here reconsidered. In the next place, all admissions, used against the opponent, satisfy the Hearsay rule, and, when once in, have such testimonial value as belongs to any testimonial assertion under the circumstances; and the more notably they ran counter to the natural bias or interest of the party *when made*, the more credible they become; this element adding to their probative value, but not being essential to their admissibility.

This double evidential utility explains the proposition, sometimes judicially sanctioned, that an admission is *equivalent to affirmative testimony* for the party offering it.[5] However, any attempt to stress this distinction tends to vain

[3] The following are typical passages: 1794, L. C. J. Eyre, in Thomas Hardy's Trial, 24 How. St. Tr. 1093 ("the presumption upon which declarations are evidence [against a defendant] is that no man would declare anything against himself unless it were true"): 1849, Bell, J., in Truby v. Seybert, 12 Pa. St. 101, 104 ("a man's acts, conduct, and declarations wherever made, provided they be voluntary, are admissible against him, as it is fair to presume they correspond with the truth; and it is his fault if they do not").

[4] *Accord:* 1882, State v. Anderson, 10 Or. 448, 453 (the admissibility "does not in any manner depend upon the question whether they were for or against his interest at the time they were made or afterwards"); 1899, State v. Mowry, 21 R. I. 376, 43 Atl. 871 (defendant's exculpative story on a charge of murder).

[5] *Cal.* 1867, Rhodes, J., in Hall v. The Emily Banning, 33 Cal. 525 ("when given in evidence, they tend, as does other competent evidence, to prove the fact in issue to which they relate"); *Ia.* 1905, Castner v. Chicago, B. & Q. R. Co., 126 Ia. 581, 102 N. W. 499 ("substantive evidence"); *Md.* 1879, Bartlett v. Wilbur, 53 Md. 485, 497 (they "may be offered to prove the truth of the matters admitted"):

logical quibbles, and should not be made the basis of any instruction on the weight of evidence.[6]

§ 1049. **Admissions, distinguished from the Hearsay exception for Statements of Facts against Interest; Death not necessary.** The use of Admissions is on principle not obnoxious to the Hearsay rule; for the reasons above stated in § 1048.

Nevertheless, because most statements used as admissions do happen to state facts against interest, judges have been found who, misled by this casual feature, have treated admissions in general as obnoxious to the Hearsay rule, and therefore as entering only under an exception to that rule.[1] That this is a mere local error of theory and in no sense represents a rule anywhere obtaining may be seen from three circumstances: first, that the limitation of the Hearsay exception to facts against pecuniary or proprietary interest (*post*, §§ 1461, 1476) has never been attempted to be applied to admissions; secondly, that the further requirement of the Hearsay exception, namely, that the declarant must first *be accounted for* as *deceased*, *absent* from the jurisdiction, or *otherwise unavailable* (*post*, § 1456), has never been enforced for the use of a party's admissions;[2] and thirdly, that if an opponent's Admissions fell under the protection of that Exception, they would be equally admissible in his favor: but of course they are not.

§ 1050. **Admissions, distinguished from Confessions; Admissions under Duress; Admissions Required by Law.** (1) A Confession is one species of Admission, namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge (*ante*, § 821). The peculiarity of Confessions in evidence is that they are subjected to an additional limitation when offered

Minn. 1908, McManus *v.* Nichols-Chisholm L. Co., 105 Minn. 144, 117 N. W. 223 (here the opinion was merely pointing out that admissions are something more than self-contradictions of the party's testimony if he testifies); *Wis.* 1879, Taylor, J., in Warder *v.* Fisher, 48 Wis. 344, 4 N. W. 470 ("are received also for the purpose of establishing the truth of the unsworn contradictory statement themselves").

[6] The following opinion illustrates the failure of justice that may occur where any stress is laid on this doctrine of admissions being "affirmative proof": 1909, Gibson *v.* Boston, 75 N. H. 405, 75 Atl. 103.

The oft-repeated warning against the *slight weight* of oral admissions or confessions on account of their liability to misunderstanding or distortion by the witness hearing them, is due to the principle of Completeness, and is considered thereunder (*post*, § 2094, *ante*, § 866).

§ 1049. [1] *E.g.* in Terry *v.* Rodahan, 79 Ga. 278, 293, 5 S. E. 38 (1887), and in the cases cited *ante*, § 1048, note 3.

[2] *Eng.* 1834, Woolway *v.* Rowe, 1 A. & E. 114 (declarations of a former proprietor admitted against the plaintiff; "the fact of his being alive at the time of the trial", held not to exclude them); *Can.* 1846, Payson *v.* Good, 3 Kerr N. Br. 272, 279; *U. S. Mass.* 1910, Abbott *v.* Walker, 204 Mass. 71, 90 N. E. 405; *Car.* 1819, Guy *v.* Hall, 3 Murph. 150; *W Va.* 1905, Stewart *v.* Doak Bros., 58 W. Va. 172, 52 S. E. 95; and also cases quoted *post*, § 1080.

The contrary seems never to have been sanctioned except in Gibblehouse *v.* Stong, 3 Rawle 436 (1832), Kennedy, J., diss. The confusion is perhaps a natural one in dealing with an ancestor's declarations of defect of title, where upon either principle the statement might be receivable; the difficulties are particularly analyzed *post*, §§ 1082–1087.

In the early days of American jurisdiction, the Supreme Court of Porto Rico found it difficult to convince the lawyers that "confessions are not hearsay"; 1904, People *v.* Rivera, 7 P. R. 325; 1905, People *v.* Dones, 9 P. R. 423, 428; 1905, People *v.* Rivera, 9 P. R. 454, 462; 1912, People *v.* Almestico, 18 P. R. 314, 323.

in criminal cases, — the limitation that they must have been made without any inducement calculated to destroy their trustworthiness (*ante*, § 822). The reason why such a limitation should be especially recognized for that species of Admissions has already been examined.

What remains to note is:

(*a*) Since a Confession is merely one sort of an Admission, *all admissions are usable against the accused in a criminal case* precisely as against a party in a civil case (*ante*, § 821); *i.e.* so long as they have satisfied the confessional rule, or fall without its scope, they are to be tested, like other admissions, by the ensuing principles common to all admissions;

(*b*) Since the Confessions-rule is peculiar to the situation of the accused in a criminal case, an *admission made under duress* by a party-opponent *in a civil case* is admissible, subject of course to comment on its weight (*ante*, § 815).

(2) Admissions made under a *duty imposed by law* stand on a peculiar footing. It would seem that nothing in the principles governing Admissions excludes them. But they may nevertheless come to be excluded upon two other principles:

(*a*) The statutes imposing such a duty usually require the statement in the shape of a *report to a public official*, *e.g.* a druggist's record of sale of poison or liquor, a corporation's report of assets, a common carrier's report of an injury done. In such cases the statute sometimes makes the communication confidential and expressly brings it under a privilege (*post*, § 2377). Without such express provision, the privilege might be implied, where policy obviously required it.

(*b*) In *criminal cases*, the foregoing kind of an admission, *e.g.* a report required by law, might receive protection from the privilege against self-crimination (*post*, § 2259*c*).

§ 1051. **Admissions, distinguished from Testimonial Self-Contradictions; Prior Warning not necessary.** An Admission is logically useful against the party in the same way as a prior Self-Contradiction against a witness (*ante*, §§ 1018, 1048), and its admissibility rests partly on that ground. It follows that certain deductions from this principle have a parallel application to the present sort of evidence, — notably in respect to implied admissions (*post*, § 1060) and to explanations of the admissions (*post*, § 1058). But there are two respects in which the distinction between a witness' self-contradictions and a party's admissions becomes important.

(1) The rule requiring that the witness must have been *warned when on the stand*, and asked whether he had made the statement about to be offered as a self-contradiction (*ante*, §§ 1025 ff.), has always been understood not to be applicable to the use of a party's admissions, *i.e.* they may be offered *without a prior warning to the party*.[1] The historical origin of this rule is plain enough;

§ 1051. [1] ENGLAND: 1837, Andrews *v.* Askey, 8 C. & P. 7; 1874, Day, Common Law Procedure Acts, 4th ed., 277 (the statute of 1854 does not apply to admissions); UNITED STATES: *Ala.* 1917, Hesk *v.* Ellis, 200 Ala. 17, 75 So. 329; *Ark.* 1877, Collins *v.* Mack,

for until the middle of the 1800s the opponent was neither competent nor compellable to take the stand as a witness in common-law trials (*ante*, § 577; *post*, § 2217), and hence it was impossible to ask him about his utterances; a requirement to that effect would have excluded all admissions.

Since parties have been made competent and compellable, this obstacle no longer exists in full force. But nevertheless the rule has persisted, and on two sufficient grounds, first, because the opponent may not in fact take the stand, and thus no opportunity for asking him would arise, and, secondly, because the only object of requiring the warning is to provide a fair opportunity of explanation before the witness' departure, whereas a party is in theory present during the trial, and has in fact ample opportunity to protect himself by taking the stand for any explanations which he may deem necessary after hearing the testimony to his alleged admissions. It may be added that in chancery practice, where the opponent was compellable to testify upon a bill of discovery, and thus the reason of the original rule was in part lacking, there was a practice which to some extent assimilated the rule for witnesses, *i.e.* the party's oral admissions, though received in evidence, would not be acted on as the basis of a decision unless they had been specifically inquired about beforehand in the interrogatories appended to the bill (*post*, § 1856).

(2) A further practical difference between a party's admissions and a witness' self-contradictions remains to be noticed. The statements of a *third person*, *i.e.* vicarious admissions, may often be used against the party as ad-

31 Ark. 694 (even where the party is also a witness); *Colo.* 1892, Rose *v.* Otis, 18 Colo. 59, 63, 31 Pac. 493 (same); *Del.* 1898, State *v.* Brown, Del., 1 Pennaville 286, 40 Atl. 938; 1911, Roberts *v.* State, 25 Del. 2 Boyce, 385, 79 Atl. 396; *Ga.* 1897, Belt *v.* State, 103 Ga. 12, 29 S. E. 451 (larceny; the prosecutrix not being a party, prior asking is necessary before using inconsistent statements); *Ida.* 1894, Coffin *v.* Bradbury, 3 Ida. 770, 35 Pac. 715, 722; *Ill.* 1897, Buck *v.* Maddock, 167 Ill. 219, 47 N. E. 208; *Ind. T.* 1897, Eddings *v.* Boner, I Ind. T. 173, 38 S. W. 1110; *Ia.* 1896, State *v.* Forsythe, 99 Ia. 1, 68 N. W. 446; 1900, Bullard *v.* Bullard, 112 Ia. 423, 84 N. W. 513; *Kan.* 1894, Southern K. R. Co. *v.* Painter, 53 Kan. 414, 418, 36 Pac. 731; *Md.* 1896, Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089; *Mich.* 1916, Cady *v.* Doxtator, 193 Mich. 170, 159 N. W. 151 (former testimony of now defendant); *Minn.* 1903, White *v.* Collins, 90 Minn. 165, 95 N. W. 765; 1911, Howard *v.* Illinois Central R. Co., 116 Minn. 256, 133 N. W. 557; *Mo.* 1905, State *v.* Wertz, 191 Mo. 569, 90 S. W. 838; 1907, Southern Bank *v.* Nichols, 202 Mo. 309, 100 S. W. 613; *Mont.* 1906, State *v.* Allen, 34 Mont. 403, 87 Pac. 177; *Nebr.* 1899, Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369 (even where also a witness); 1902, Dunafon *v.* Barber, — Nebr. —, 95 N. W. 198; *N. J.* 1901, McBlain *v.* Edgar, 62 N. J. L. 634, 48 Atl. 600 (even where also a witness); *Okl.* 1900, Drury *v.* Terr., 9 Okl. 398, 60 Pac. 101, *semble*; *Pa.* 1874, Brubaker *v.* Taylor, 76 Pa. 87 (even where also a witness); 1876, Kreiter *v.* Bomberger, 82 Pa. 59, 61 (same); *S. C.* 1895, State *v.* Freeman, 43 S. C. 105, 20 S. E. 974 (even where also a witness); 1907, State *v.* Emerson, 78 S. C. 83, 58 S. E. 974; *Vt.* 1905, Coolidge *v.* Ayers, 77 Vt. 448, 61 Atl. 40; *Wash.* 1898, Hart *v.* Pratt, 19 Wash. 560, 53 Pac. 711; 1905, State *v.* Strodemeier, 40 Wash. 608, 82 Pac. 915.

Contra: 1882, Nutter *v.* O'Donnell, 6 Colo. 253, 260 ("the rule is the same whether the witnesses sought to be contradicted are parties to the suit or third persons"); 1889, State *v.* Young, 99 Mo. 666, 681, 12 S. W. 879 (rule applicable to defendant testifying; Ray, C. J., and Black, J., diss.); 1881, State *v.* White, 15 S. C. 381, 391 (asking not required for admissions as such, even when the party takes the stand; otherwise, if the statements are offered to impeach him as witness).

Not decided: 1907, Goss *v.* Goss, 102 Minn. 346, 113 N. W. 690 (not decided).

It is to be noted that this exemption from asking is properly applied even where the party is also a witness; *i.e.* where his statement plays the double part of a party's admission and a witness' self-contradiction.

missions, — for example, admissions by a predecessor in title. But this use is subject to definite limitations (*post*, §§ 1069–1087). Hence, if such a person has taken the stand as a witness, his prior inconsistent statements may be available to discredit him as a witness, although they might have failed to satisfy the rule for admissions of a predecessor.[2] Conversely, they may satisfy the latter rule but not the former, even against a party.[3]

§ 1052. **Admissions, distinguished from Conduct indicating a Consciousness of Guilt (Flight, Fraud, Spoliation of Documents, Withholding of Evidence, and the like).** (1) Admissions are statements, *i.e.* assertions in words, and it is their inconsistency with the party's other assertions that discredits the latter. Hence *conduct cannot of itself be* treated as *an admission*.

Yet the various sorts of conduct, which indicate a guilty consciousness and are undoubtedly receivable in evidence, are sometimes spoken of as Admissions. The truth is that they are just what they seem to be, namely, acts, not assertions, and that their use in evidence is strictly a circumstantial one by way of inference from the conduct to the mental state beneath it, and from that to some ulterior fact. This kind of evidence, and the theory of it, has already been considered in detail (*ante*, §§ 265–293). What has led them to be by some judges described as Admissions is the casual feature that in most instances they are receivable only as against a party-opponent to the cause, *i.e.* subject to the limitation peculiar to admissions. The reason for this is that otherwise their unrestricted use would lead to a substantial evasion of the Hearsay rule. For example, if after an affray one of the participants, A, takes flight and one of the bystanders, B, pursues and arrests him, A's flight is cir-

[2] 1916, Carey *v.* Nissie, 145 Mich. 383, 108 N. W. 733 (vendor testifying); 1897, Vogt *v.* Baldwin, 20 Mont. 322, 51 Pac. 157 (similar ruling for statements of an assignor testifying); 1895, Josephi *v.* Furnish, 27 Or. 260, 41 Pac. 424 (where a vendor on cross-examination was asked as to statements made by him after the sale of chattels; these statements being in themselves inadmissible as admissions by one out of possession, but being also contradictory to his direct testimony as to the facts of the sale, and for the latter purpose only admissible).

So also the following peculiar situation: 1911, Johnson *v.* Johnson, 78 N. J. Eq. 507, 80 Atl. 119 (divorce for adultery, the adulterous act being a rape; the defendant's plea of 'nolo contendere' on the rape charge, here received to impeach the defendant testifying for himself, as involving both a crime and a self-contradiction; whether receivable as an admission, not decided; this hesitation of the Court was unfounded).

[3] 1878, Wallace *v.* Souther, 2 Can. Sup. 598, 604 ("whether it contradicts a previous statement [on the stand] or not," the party's statement is receivable); 1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (a defendant's testimony on a former trial may be read against him as containing admissions, though he does not take the stand now; three judges dissenting, on the principle of § 2272, *post*, citing no authority; the dissent is totally without grounds); 1902, State *v.* Deal, 43 Or. 17, 70 Pac. 534.

So, too, the rule against *impeaching one's own witness* may forbid using self-contradictions against the opponent called as a witness (*ante*, § 906), and yet the same statements may serve as admissions; 1871, Gibbs *v.* Linabury, 22 Mich. 479 (where to prove the execution of a note the defendant was called; he testified that he could not swear to the writing, and the plaintiff then testified that the defendant had admitted the signature's genuineness on the stand at the trial below; held proper, as an admission).

The following ruling is preternaturally finicky and marks an acme of technicalism: 1909, State *v.* Minnick, 54 Or. 86, 102 Pac. 605 (the defendant having testified and having denied certain contradictory statements, they were proved on rebuttal; held that if admissions, they should have been proved in chief, and if only testimonial self-contradictions, the Court should have limited them to that purpose).

cumstantial evidence of his consciousness of guilt and thus of actual guilt, while B's pursuit is no less a circumstance evidencing B's belief in A's guilt and thus similarly of the fact of guilt. Yet to admit B's belief as circumstantial evidence would be at least no better than to admit B's extrajudicial assertion of A's guilt, which would clearly be prohibited by the Hearsay rule. Therefore in general the conduct of third persons, so far as it is a means of arguing to their belief, and thus to the fact believed, is excluded. Nevertheless, there are exceptional instances enough, in which such conduct is admitted, to indicate that on principle such evidence has a genuine circumstantial use, and that its prohibition is the indirect result of the policy of the Hearsay rule, and not of logical necessity. Those rules of exception have been already fully considered (*ante*, §§ 268–272).

It is enough here to note that the various sorts of conduct which are thus received against a party-opponent are not on principle to be classed as Admissions, but as Conduct affording circumstantial inferences. The chief types of such conduct, already considered in the above-cited sections, may here be rehearsed for reference' sake: Demeanor during trial (§ 274); Refusal to undergo a superstitious test (§ 275); Flight, escape, resistance, or concealment (§ 276); Falsehood, fraud, fabrication and suppression of evidence, bribery, spoliation (§ 278); Precautions against injury, repairs of a machine or highway after an injury (§§ 282, 283); Failure to prosecute or to make claim (§ 284); and Failure to produce witnesses or documents (§§ 285–291).

(2) From the foregoing use of conduct circumstantially is to be distinguished the use of *silence* as embodying a genuine Admission. When *by a party's silence an assent is given* to the assertion of a third person, that assertion is thereby adopted by the party, and therefore may be used against him as his own statement and admission. It is the statement, however, that constitutes the admission; the conduct merely effects its adoption. Such admissions, forming one variety of vicarious admissions, are later examined in detail (*post*, § 1071).

§ 1053. **Admissions, as not subject to rules for Testimonial Qualifications; Personal Knowledge, Infancy; Opinion Rule.** A primary use and effect of an admission is to discredit a party's claim by exhibiting his inconsistent other utterances. It is therefore immaterial whether these other utterances would have been independently receivable as the testimony of a qualified witness. It is their inconsistency with the party's present claim that gives them logical force.[1]

(1) In particular, *personal knowledge*, as indispensable to a witness (*ante*, § 656), is here not required. If the party-opponent, for example, now claims that his contract, made by an agent in France, entitles him to a cargo of silk, his statement last month that his contract called for a cargo of ribbons would discredit his present claim, even though it may be apparent

§ 1053. [1] Accord: 1908, Binewicz v. Haglin, 103 Minn. 297, 115 N. W. 271.

that in neither case could he speak from personal knowledge. The conflict of claims is the significant circumstance, and the element of personal knowledge merely increases or lessens that significance. Since a party may make a claim and file averment of pleadings without regard to personal knowledge of the facts, it is fallacious to exact, in his contrary admissions, an element of personal knowledge which is not required for the original advancement of his claim. Such a requirement is repudiated in the better judicial view:[2]

1860, STEPHENS, J., in *Kitchen* v. *Robbins*, 29 Ga. 713, 716: "Are no admissions good against a party, unless founded on his personal knowledge? The admissions would not

[2] *Accord:* ENGLAND: 1836, Bishop of Meath *v.* Marquess of Winchester, 3 Bing. N. C. 183, 203 (case stated for counsel, made by a predecessor of the present bishop, concerning facts ranging 60 years before, received, though no "personal knowledge of the facts" could be supposed on his part; here the facts consisted chiefly of documents preserved, and the party had at any rate "with such, the best means of knowledge"); 1874, Bulley *v.* Bulley, L. R. 9 Ch. App. 739, 747, 751 (recital in a deed "sent to be executed for the) purpose of making a good title", received; but treated as having little weight, because it concerned a matter happening 120 years before, of which the party could have no personal knowledge); CANADA: 1917, Stowe *v.* Grand Trunk Pacific R. Co., 39 D. L. R. 127, Alta. (injury to horses; plaintiff's admission of a fact affecting due care, told him by his brother, held admissible, though not based on personal knowledge); affirmed in Can. S. C., 51 D. L. R. 685); UNITED STATES: *Ga.* 1860, Kitchen *v.* Robbins, 29 Ga. 713, 716 (see quotation *supra*); *Mass.* 1906, Stone *v.* Stone, 191 Mass. 371, 77 N. E. 845 (opinion); *Mich.* 1901, Wasey *v.* Ins. Co., 126 Mich. 119, 85 N. W. 459; 1915, Fitzgerald *v.* Lozier Motor Co., 187 Mich. 660, 154 N. W. 67 (cause of employee's injury; employer's report to insurer, based on foreman's report, and not on personal knowledge, held nevertheless admissible); *Minn.* 1908, Binewicz *v.* Haglin, 103 Minn. 297, 115 N. W. 271, *semble* (admissions of negligence); *Mo.* 1847, Sparr *v.* Wellman, 11 Mo. 230, 234 ("where a party believes a fact upon evidence sufficient to convince him of its existence, his declaration of the existence of that fact, if against his interest, is evidence against him"); *N. Y.* 1899, Reed *v.* McCord, 160 N. Y. 330, 54 N. E. 737 (if not merely in form an admission that he had heard of the fact); *Tenn.* 1835, Miller *v.* Denman, 8 Yerg. 237 ("whether he derives the facts admitted from his own knowledge or from information is perfectly immaterial"; but the Court wrongly declares that the source of the assertion cannot even affect the credit to be given by the jury to the admission); *Wis.* 1867, Shaddock *v.* Clifton, 22 Wis. 114, 118; 1870, Chapman *v.* R. Co., 26 Wis. 294, 302; 1913, Hilton *v.* Hayes, 154 Wis. 27, 141 N. W. 1015 (held not improperly excluded on the facts).

Contra: 1801, Chambre, J., in Roe *v.* Ferrars, 2 B. & P. 542, 548 ("where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer", and not so as to admit facts "stated by way of hearsay only"); 1913, Murdock *v.* Adamson, 12 Ga. App. 275, 77 S. E. 181 (father's action for son's death; father's admissions of son's negligence, based solely on son's statements, held inadmissible; no authority cited on the present point; opinion confused); 1897, Folk *v.* Schaeffer, 180 Pa. 613, 37 Atl. 104 (admission of liability by a partner, who had no personal knowledge, excluded in a suit against the firm).

Undecided: 1825, Rees *v.* Bowen, 1 McCl. & Y. 389, 391.

Note that under the present principle a *party's account-books* are always receivable *against* him, even though for lack of personal knowledge they might not be admissible under the Hearsay exception for regular entries (*post*, §§ 1530, 1557).

In *Porto Rico* and the *Philippine Islands*, under the Spanish system, the opposite principle prevails: *P. R.* Rev. St. & C. 1911, § 4305 ("Confession may be made either judicially or extrajudicially. In either case it shall be an indispensable condition for the validity of the confession that it should relate to personal acts of the confessor and that he should have legal capacity to make it"); *P. I.* Civ. C. § 1231 (like P. R. Rev. St. & C. § 4305).

But the principle does not require the reception of an admission which in form merely concedes that *some one else said something;* for here the fact admitted would itself be merely a hearsay statement (according to the distinction noted *ante*, § 664); 1842, Lord Trimlestown *v.* Kemmis, 5 Cl. & F. 749, 780, 784 (statement by a party's predecessor that he had heard his grandmother make a certain statement, held not receivable; Lord Brougham doubting); 1857, Stephens *v.* Vroman, 16 N. Y. 381, 383; 1899, Reed *v.* McCord, N. Y. (cited *supra*).

be made except on evidence which satisfies the party who is making them against his own interest, that they are true, and that is evidence to the jury that they are true. Admissions do not come in on the ground that the party making them is speaking from his personal knowledge, but upon the ground that a party will not make admissions against himself unless they are true. The fact that he makes them against his interest can be reasonably explained only on the supposition that he is constrained to do so by the force of the evidence. The source from which a knowledge of the facts is derived, is a circumstance for the jury to consider, in estimating the value of the evidence, but that is all."

(2) On the same principle, the admissions of an *infant* party would be receivable.[3] Theoretically, the admissions of a *lunatic* party would stand upon the same footing, although the weight to be given them might be 'nil.' The practical result of conceding this much upon principle would be that at any rate there would be no occasion for putting into force the detailed rules about testimonial capacity (*ante*, §§ 492–509).

(3) The *Opinion Rule* (*post*, § 1917) does not limit the use of a party's admissions.[4] The reason for that rule does not apply to a party's admissions. Moreover, every case presented in the allegations of pleadings and witnesses includes both facts and inferences; hence, the opponent's admissions will naturally range over both facts and inferences without distinction, *e.g.* as when a debtor's letter admits that he owes $20 out of the $45 claimed by the creditor. To extend the arbitrary trivialities of the Opinion Rule to parties' admissions would be the extreme of futility.

§ 1054. **Admissions, excluded as evidence of certain facts; (1) Contents of Documents; (2) Execution of Attested Documents; (3) Reports Required by Law; (4) Party-Opponent's Privilege.** For the purpose of proving certain classes of facts, the use of admissions has by some Courts been forbidden.[1]

[3] 1845, O'Neill *v.* Read, 7 Ir. L. Rep. 434 (admissions of facts tending to show that goods were necessaries, received; but the Court, rather oddly, declined to term the statements "admissions"); 1902, Chicago C. R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, *semble:* 1899, Atchison T. & S. F. R. Co. *v.* Potter, 60 Kan. 808, 58 Pac. 471 (infant's admissions receivable if the trial Court regards him as intelligent, even though he is incompetent to take an oath); 1920, Gebhardt *v.* United R. Co., — Mo. —, 220 S. W. 677; 1920, Gangi *v.* Fradus, 227 N. Y. 452, 125 N. E. 677; 1827, Mather *v.* Clark, 2 Aik. Vt. 209, 210.

Contra: 1904, Knights Templar & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 (this is "suggested").

Compare § 1063, n. 1, *post*, at the end (admissions of attorneys).

For a *guardian's admissions*, see *post*, § 1076.

[4] *Contra:* 1920, Negociacion Agricola *v.* Love, — Tex. Civ. App. —, 220 S. W. 224 (action for value of services rendered in 1912 and 1913; plea, fraud; held, assuming that the plaintiff's character for honesty was material, that a letter of recommendation signed by defendant, dated 1911, and describing the defendant as "a person completely honorable and able for any contract", was inadmissible, being an "individual opinion", and as a party's admission it could not be received since a party's admission must concern facts, not opinions; this ruling is an unfortunate but entirely erroneous misapplication of the Opinion rule; party's admissions are in no way limited by the Opinion rule, as every day's unquestioned practice shows; *e.g.* a defendant's admission that he has been negligent; in the present case, the admission was indeed of practically no weight, because made in 1911, prior to the alleged frauds of the plaintiff, and therefore not inconsistent with the pleadings).

§ **1054.** [1] The following anomalous statute belongs here: Wis. St. 1911, c. 123, p. 125, Stats. 1919, § 4079*m*: ("in civil actions for damages caused by personal injury no statement made or writing signed by the injured party within 72 hours of the time the injury happened or accident occurred shall be used in evidence against the party making or signing the same unless such evidence would be admissible as part of the 'res gestæ'";

(1) In evidencing the *contents of a document*, it has sometimes been thought that the opponent's admissions — at least, his oral admissions — should not be received until the original had been accounted for as lost or otherwise unavailable. This view, from time to time advanced in early English rulings, was definitely repudiated in Slatterie *v.* Pooley in a forceful opinion by Baron Parke; but has nevertheless obtained some vogue in the courts of this country. Its reasoning, and the state of the law, are examined elsewhere (*post*, §§ 1255–1257), in dealing with the rule requiring the production of documentary originals. That the fact of *loss* of the original may be evidenced by admissions has not been doubted (*post*, § 1196).

(2) In evidencing the *execution* of an *attested document*, the opponent's admissions were, by the orthodox common law, held inferior to the proof of the attesting witness' signature, and were not receivable until the latter was shown to be unattainable; though some American Courts declined to accept this result. The reason for it, and the state of the law, are elsewhere examined (*post*, §§ 1296–1300), in dealing with the attesting-witness rule. Apart from that rule, it has not been doubted that the execution of an ordinary *unattested document* may be evidenced by admissions (*post*, § 2132).

In *Louisiana*, a peculiar rule obtains that, if the *signature* of a document is disowned in the opponent's pleading, his admission will not be received to prove it.[2]

(3) Reports *required by law* to be filed with an administrative office by persons whose occupations are subject to administrative control will often contain statements sought to be used later as admissions; *e.g.* reports by an *employer* or a *common carrier* of *injuries received* by employees or passengers. Such statutes sometimes forbid the use of these reports in evidence; but the principle here involved is essentially one of Privilege, and the authorities are therefore considered under that head (*post*, § 2377).[3]

(4) *Party-Opponent's Privilege.* A party-opponent's admissions, so far as voluntarily made extrajudicially in oral statements overheard by other persons, or in writings possessed by other persons, were never privileged at common-law. But so far as contained in his own statements on the stand as a witness, or in writings possessed by himself, they were *privileged* from compulsory disclosure at common-law, *i.e.* they could not in general be obtained from him, by legal process, for use against him as evidence, without his consent. This privilege extended both to criminal and to civil matters;

this is a wretched piece of partisan legislation which merely adds another artificial gag-rule to that series of manœuvres that calls itself a trial; the basis of the statute is, of course, the supposed chicanery of defendants' claim-agents in securing admissions during the injured person's disabled condition; but the straightforward and effective remedy would be to punish a few such agents where sharp practice is proved).

[2] 1835, Plicque *v.* La Branche, 9 La. 560, 562 (under C. C. P. § 325, providing for proof of handwriting); 1849, Segond *v.* Roach, 5 La. An. 54. (rule not applicable to a lost document).

[3] That *lack of personal knowledge* is no ground of objection to the use of such reports as admissions has been noted *ante*, § 1053. Whether an *employee* making such an admission is an agent of the party for the purpose is another question (*post*, § 1078).

being absolute for the former (*post*, § 2250), and subject to exceptions for the latter (*post*, § 2217).

But in criminal cases the privilege has been annulled, for many classes of offences, by the so-called immunity statutes (*post*, § 2281), and in civil cases it has been entirely abolished (*post*, §§ 2218–2221).

§ 1055. **Admissions, as Insufficient for proof of certain facts**: (1) **Marriage**; (2) **Divorce**; (3) **Criminal Cases**. In proving certain kinds of facts, a few rules have grown up which do not forbid the use of the party's admissions, but merely declare them insufficient without additional evidence; these are rules of quantity, not of relevancy.

(1) There has been some recognition of a rule that, upon certain issues, the fact of *marriage* is not sufficiently evidenced by admissions alone (*post*, § 2068).

(2) In a proceeding for *divorce*, the rule adopted from the civil law obtains universally, that the opponent's admissions are not alone sufficient proof; the danger of collusion furnishing the reason for the rule (*post*, § 2067).

(3) In criminal cases, a rule prevails in many jurisdictions that the *accused's confession* is not alone sufficient to found a conviction upon (*post*, § 2070).[1]

(4) There is no fixed rule that in *civil cases generally* an opponent's extrajudicial admission is insufficient, without other evidence, as the foundation of a verdict for one or more facts. But when the admission concerns the main controverted fact in the case, and the opponent's admission is the only evidence offered, a few Courts show an inclination to follow a general maxim that it is insufficient, at least, when the admission is one of conduct only.[2] This is of course merely an application of the general function of the judge to control a verdict based on insufficient evidence (*post*, §§ 2494, 2551). There are also one or two local rules as to *corroboration* being required where only a party-opponent's admissions are offered (*post*, § 2066).

(5) In *Louisiana* and *Porto Rico* there is a series of special rules limiting the use of various sorts of admissions, and based on the theory of the Continental law of proof.[3]

§ 1056. **Weight of Admissions**. Except in the foregoing instances there are no specific rules which place a handicap on the use of a party's admissions. But there is a general distrust of testimony reporting any extrajudicial *oral statements* alleged to have been made, including a party's admissions.

§ 1055. [1] For the doctrine that *oral admissions* are to be received with caution, owing to their liability to being misunderstood and misreported, see *post*, § 2094, n. 4.

[2] 1908, Binewicz v. Haglin, 103 Minn. 297, 115 N. W. 271 (admissions of negligence).

[3] *Louisiana:* Rev. Civ. C. 1920, § 2249 ("Domestic books and papers are no proof in favor of him who has written them; they are proofs against him, 1, in all cases where they formally declare a payment received; 2, when they contain an express mention that the minute was made to supply the want of a title in favor of him for whose advantage they declare that an obligation was made"); § 2250 (creditor's indorsement of payment on the instrument is "good evidence when it tends to establish the discharge of the debtor"); § 2290 (an "extrajudicial confession, merely verbal, is useless in all cases of a demand in support of which testimonial proof would be inadmissible").

Porto Rico: Rev. St. & C. 1911, §§ 4305 ff.

This distrust reflects itself in several rules, which may notably affect a party's admissions, viz. (1) the rule about proving a *document's contents* (*post*, §§ 1196, 1255), (2) the Hearsay rule (*post*, § 1362), and (3) the rule for Verbal Completeness of Utterance (*post*, § 2094).

§ 1057. **Admissions, as distinguished from Estoppels, Warranties, Contracts, and Arbitrations; Admissions made to Third Persons, or after Suit Begun.** An admission, of the sort here concerned, is nothing but a piece of evidence. It is therefore to be distinguished from those statements of the party which become in themselves the foundation of independent rights for other persons, by virtue of some doctrine of substantive law, — in other words, from binding *estoppels*, *warranties*, and *representations*.

Thus, if A claims that his boundary line runs to an oak tree, and B admitted this, B's extrajudicial admission of the boundary's location is merely evidence for the truth of the other facts on which A rests his claim. But if B has made his statement to A under such circumstances that A was justified in acting on it and has since built up to the line he claimed, B's concession may by *estoppel* become the foundation of a new right for A, wholly irrespective of the validity of the grounds of his original claim. Here the field of substantive law, not that of evidence, is concerned. The statement or representation of B may, however, have been precisely the same in both cases, and it is A's reliance and action thereon that bring into effect the doctrine of the substantive law. Thus, the so-called "admission" being a common feature in both instances, there has been some tendency[1] to confound in one treatment the two wholly distinct things. There is, however, no ground for this confusion. It is simple enough to keep apart the evidential thing and the doctrine of substantive rights:

1860, BELL, C. J., in *Corser* v. *Paul*, 41 N. H. 24, 31: "There is a class of admissions which may be either express or implied from silence, or acquiescence, which are conclusive. Such are admissions which have been acted upon, or those which have been made to influence the conduct of others, or to derive some advantage to the party, and which, therefore, cannot be denied without a breach of good faith. As if, for example, in the present case, the defendant had stood by and seen this note offered to the bank for discount; and, being aware of what was doing, had been silent; or if, before the discount he had been spoken to by any of the officers of the bank in relation to the note, and, being aware of the facts, had forborne to deny the signature — by these tacit admissions he would be forever concluded to deny the note to be his, in case the bank discounted it. This is but an application of the same principle that is applied in the case of deeds of real estate, that he who stands by, at the sale of his property by another person, without objecting, will be precluded from contesting the purchaser's title."

So also a representation may become a *warranty* or other contract, and thus give rise to substantive rights, although, apart from such rights, the same representation might have been spoken of as a mere evidential admission; the occasional use of the term "admission" in such a connection (as, for example, when it is said that the indorsement of a bill of exchange admits —

§ 1057. [1] Notably in Greenleaf, Evidence, §§ 207 ff.

i.e. warrants — the genuineness of all prior indorsements [2]) must not be allowed to mislead us. So, too, the question whether a party has by his conduct assented to a contract [3] or to the possession of land, and has thus effected a change in his substantive rights, has no connection with the present evidential question (*post*, § 1073) whether by silence he has adopted another person's statement so as to make it his own admission.

So, too, the *acknowledgment* by a parent of an *illegitimate child*, by statute in many States, gives to the child the status of legitimacy; and this acknowledgment becomes, not merely an evidential admission, but an act of substantive law, fixing the parties' rights, and therefore "conclusive." [4]

Again, the award of an *arbitrator* revises and concludes the parties' rights by virtue of their contractual assent to the award, and hence the tenor of the parties' statements in submitting the matter to arbitration must be examined;[5] but this has no concern with the question (*post*, § 1062) whether a statement made to the arbitrators, where the arbitration has failed, is to be excluded as evidence, on the ground that it is an admission made in the course of an effort to compromise.

All these modes in which a party's statements become the basis of contractual or estoppel rights have no bearing on their use as mere evidence.[6]

It may be added that, in consequence, it is immaterial, when an opponent's statement is offered as an admission, that it was *uttered to a third person* and not to the other party to the cause.[7] Evidentially it is still an inconsistent statement and therefore receivable. If, on the other hand, it were put forward as the basis of an estoppel right, because acted upon by the other party

[2] 1809, Critchlow *v.* Perry, 2 Camp. 182.

[3] 1820, Batturs *v.* Sellers, 5 H. & J. 117, 119 (a buyer's silent acquiescence in the seller's writing of the former's name makes the latter the agent to write it, so as to satisfy the Statute of Frauds); 1922, Southern Coal & Iron Co. *v.* Schwoon, — Tenn. —, 239 S. W. 398 (abandonment of title to land; counsel's statements in another litigation, held not to invoke the doctrine of judicial estoppel).

[4] 1919, Dilworth *v.* Dilworth, 134 Md. 589, 108 Atl. 165 ("the acknowledgment by the father . . . fixed the status of the child, and that cannot be changed by anything the father or mother may do").

Distinguish here the use of *reputation* as an element in "*notorious*" *recognition*, required by statute (*post*, § 1606).

[5] 1794, Kingston *v.* Phelps, Peake 227 (insurance policy; defendant's consent to arbitration, held to make the award receivable; but in this case it was rejected, as the plaintiff himself had not consented to the submission); 1800, Gregory *v.* Howard, 3 Esp. 113 (arbitrator to settle accounts, received to prove the parties' admissions, on a plea that the claim sued for had been included in the settlement).

[6] An *admission* in evidence is different from a *waiver* in the substantive law of contracts, property, etc. Whether the *insurer's* sending of a *blank form for proof of claim*, after he knows of a fact negativing the claim, is a waiver, has been the subject of many rulings, but the use of the phrase in such forms "shall not be construed as an admission" is misleading; it may be an admission evidentially, yet not a waiver; *e.g.* 1909, McCord *v.* Masonic Casualty Co., 201 Mass. 473, 88 N. E. 6.

[7] 1792, R. *v.* Neville, Peake 91 (nuisance; defendant's bond to the parish where he formerly resided, acknowledging his trade to be a nuisance, received, subject to explanation, "as it shall appear that this place is more or less like that where he before resided"); 1794, Grant *v.* Jackson, Peake 203 (action on a bill of exchange; a defendant's admission in an answer in chancery to a bill by other creditors, received); 1853, Chapman *v.* Twitchell, 37 Me. 59, 62; 1916, Sanders Engineering Co. *v.* Small, 115 Me. 52, 97 Atl. 218 (letter to C. by defendant's attorney, admitted; following Chapman *v.* Twitchell, and approving the text above); 1914, Peterson *v.* Pittsburg S. P. G. M. Co., 37 Nev. 117, 140 Pac. 519; 1904, Lambeck *v.* Stiefel, 71 N. J. L. 320, 59 Atl. 460.

to the cause, there would be ground for holding that it must have been made to him directly or else he would not have been justified in relying upon it; and such would be the usual requirement, for purposes of estoppel.

For the same reason, it is no objection to an admission that it was made *after suit begun*.[8]

§ 1058. **Quasi-Admissions, as distinguished from Solemn or Judicial Admissions.** The law of Evidence has suffered, in its most vital parts, from an ailment almost incurable, — that of confusion of nomenclature. The term "admissions" exhibits this misfortune in one of its notable aspects. There are two principles, not at all connected, which for a century or more have had to be discussed by the aid of a single and common term. One of these principles is the subject of the present Chapter; it authorizes the receipt of any statement by an opponent, as evidence in contradiction and impeachment of his present claim. Such statements, here referred to in the loose and usual phraseology as "admissions", should better, with a view to discrimination and clearness, be designated Quasi-Admissions.

The true Admission, in the fullest sense of the term, is another thing, and involves a totally distinct principle. It concerns a method of escaping from the necessity of offering any evidence at all. The former is an item in the mass of evidence; the latter is a *waiver relieving the opposing party from the need of any evidence*. The former is involved in the subject of the present Book, "What Facts are admissible as Evidence"; the latter is concerned with the subject of Book IV, "Of What Propositions no Evidence need be offered"; and is dealt with elsewhere (*post*, §§ 2588–2595).

An Admission, in the latter and correct sense, is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true. The principal questions that arise in construing its principle are: What sort of a formal act is necessary; who may effectively do that act; what classes of facts may be thus disposed of; and how far, in time, is that act effective? With this genuine Admission we are not here further concerned, except in noting the distinction mentioned in the ensuing section, and also in considering (*post*, § 1066) the use of prior pleadings as quasi-admissions. Throughout the present discussion the term "admissions" will be understood to signify the ordinary or quasi-admission; the term "judicial admission" will be used to signify the formal waiver of proof.

§ 1059. **Same: Quasi-Admissions not Conclusive: Explanations; Corroboration by Prior Consistent Claims; Putting in the Whole of the Statement.** (1) A quasi-admission, of the present sort, being nothing but an item of evidence, is therefore *not in any sense final or conclusive*. The opponent, whose utterance it is, may none the less proceed with his proof in denial of its correctness;

[8] 1782, Morris *v.* Vanderen, 1 Dall. U. S. 64, 66; 1823, Marshall *v.* Sheridan, 10 S. & R. Pa. 268.

it is merely an inconsistency which discredits, in a greater or less degree, his present claim and his other evidence.

No one would ever have entertained doubts on this point, had not the two doctrines noticed in the preceding sections tended, by their superficial resemblance to the present doctrine, at certain points to produce confusion, — namely, the doctrines of estoppel and of judicial admission.[1] An Estoppel, *i.e.* a representation acted on by the other party, by creating a substantive right does oblige the estopped party to make good his representation, — in other words, but inaccurately, it is conclusive. So, too, but for an entirely different reason, a Judicial Admission is conclusive, in the sense that it formally waives all right to deny, for the purposes of the trial, *i.e.* it removes the proposition in question from the field of disputed issues. But statements which are not estoppels or judicial admissions have no quality of conclusiveness, and on principle cannot have.

This has always been conceded by the judges, in modern times:[2]

§ 1059. [1] The following utterance shows how obscurely the true principle was once conceived by eminent judges: 1803, Sir W. Grant, M. R., in Fairlie *v.* Hastings, 10 Ves. Jr. 123, 127: "A party is bound by his own admission, and is not permitted to contradict it."

[2] *Accord:* ENGLAND: 1797, Loveridge *v.* Botham, 1 B. & P. 49 (attorney's bill, followed by a second bill increasing the charge and adding new items; the Court, while at first confusedly speaking of the former as both "conclusive" and "presumptive" evidence, ended by declaring that "if errors or omissions in the former bill could be proved, they ought to be allowed for"); 1849, Newton *v.* Belcher, 12 Q. B. 921, 924 (mistake of law as to liability, allowed to be shown); 1849, Newton *v.* Liddiard, ib. 925 (same; the rule "is applicable to mistakes in respect of legal liability as well as in respect of fact").

CANADA: *N. Br.* 1844, Gilbert *v.* Porter, 2 Kerr N. Br. 390, 394; 1846, Payson *v.* Good, 3 Kerr N. Br. 272, 279; 1877, Raymond *v.* Cummings, 17 N. Br. 544 (book-account entries); *Sask.* 1911, Massey-Harris Co. *v.* Horning, 4 Sask. 448 (entries of payment in collection-books of the plaintiff creditor, held not conclusive against him).

UNITED STATES. *Federal:* 1909, Morgan *v.* U. S., 8th C. C. A., 169 Fed. 242 (affidavit allowed to be explained by defendant as to his purpose in making it); *Ala.* 1921, Churchill *v.* Walling, 205 Ala. 509, 88 So. 582 (damage to bailed goods; receipt allowed to be disputed and explained); *Cal.* 1892, Bush *v.* Barnett, 96 Cal. 202, 205, 31 Pac. 2; *Fla.* 1852, Carter *v.* Bennett, 4 Fla. 283, 301, 342 (admission by a "solemn oath of record", setting up a defence, held open to explanation); *Ga.* 1847, Solomon *v.* Solomon, 2 Ga. 18, 30 (mistake of law may be shown); 1901, Phœnix Ins. Co. *v.* Gray, 113 Ga. 424, 38 S. E. 992; *Ia.* 1907, Furlong & Meloy *v.* American Central F. Ins. Co., 136 Ia. 499, 113 N. W. 107 (plaintiff's invoices and inventories); *Me.* 1903, Davis *v.* Davis, 98 Me. 135, 56 Atl. 588 ("No mere admissions 'in pais', however express or formal, are conclusive, unless they operate as an estoppel"); *Md.* 1903, Nicholson *v.* Snyder, 97 Md. 415, 55 Atl. 484 (party's answer in bankruptcy); *Mass.* 1909, Conant *v.* Evans, 202 Mass. 34, 88 N. E. 438 (admissions in correspondence); *Nebr.* 1902, State *v.* Paxton, 65 Nebr. 110, 134, 90 N. W. 983 (mistake of law may be shown); 1904, Wesnieski *v.* Vanek, — Nebr. —, 99 N. W. 258 (malicious prosecution; plaintiff's plea of guilty in the criminal prosecution, not conclusive); *N. H.* 1860, Corser *v.* Paul, 41 N. H. 24, 31; N. Y. 1920, Gangi *v.* Fradus, 227 N. Y. 452, 125 N. E. 677 (leaving the weight of admissions entirely to the jury); *Or.* 1909, Mahon *v.* Rankin, 54 Or. 328, 102 Pac. 608; *Pa.* 1906, Com. *v.* Monongahela Bridge Co., 216 Pa. 108, 64 Atl. 1058 (pleadings in another suit; cited *post*, § 1066, n. 2); *P. I.* 1906, Oas *v.* Roa, 7 P. I. 20 (title); *Vt.* 1896, Welch *v.* Ricker, 69 Vt. 239, 39 Atl. 200 (account-book entries, as to the person charged); 1902, Laflam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526; *W. Va.* 1906, Mullins *v.* Shrewsbury, 60 W. Va. 694, 55 S. E. 736 (pleading in another suit); 1909, Dudley *v.* Niswander, 65 W. Va. 461, 64 S. E. 745 (controversy over a note; terms of a contract made by one of the parties allowed to be contradicted, being merely used as an admission); *Wyo.* 1913, Hamilton *v.* Diefenderfer, 21 Wyo. 266, 133 Pac. 1081.

Under the Canadian practice, answers of a party to *interrogatories of discovery* are binding, in the sense that an inconsistent defence of fact cannot be set up at the trial, without amending the answer; 1917, Pyne *v.*

1829, BAYLEY, J., in *Heane* v. *Rogers*, 9 B. & C. 577, 586 (referring to an admission of the title of an assignee in bankruptcy): "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him. But we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound."

1834, PARKE, B., in *Ridgway* v. *Philip*, 1 C. M. & R. 415: "An admission does not estop the party who makes it; he is still at liberty, so far as regards his own interest, to contradict it by evidence."

The only instances in which any apparent contradiction may be found are those in which questions of Estoppel (with which we have here nothing to do) were under discussion.

Distinguish from the foregoing principle another question, once in great vogue, and already here treated (*ante*, §§ 525–531), namely, whether the principle 'nemo allegans suam turpitudinem audiatur' would exclude the testimony of one who came forward to testify to his own prior falsity. So far as such a doctrine was ever recognized (and it is now wholly repudiated), it rested on the ground of moral obliquity, and applied to all witnesses alike, and not merely to parties, who indeed at that time were not qualified to testify at all.[3]

(2) It follows that an opponent whose admissions have been offered against him may offer any evidence which serves as an *explanation* for his former assertion of what he now denies to be the fact.[4] This may involve the showing of a mistake,[5] or the evidencing of circumstances which suggest a different significance to the words. The modes of explaining away a witness' self-contradictions (*ante*, § 1044) suggest analogies here.

(3) But such explanations must of course not violate other and independent principles of evidence. In particular, the rule against *opinion-testimony* (misguided as it is) may be construed to forbid the party to testify to his

Canadian Pacific R. Co., 37 D. L. R. 751, Man. (collecting prior cases).

Distinguish the effect of the *parol evidence rule*, *post*, §§ 2413, 2430, which forbids showing a mistake in a formal act constituting a substantive right.

[3] The following case illustrates the mingling of these two questions: 1829, Freeman v. Walker, 6 Greenl. Me. 68 (master's action for wages; whether defendant's allegation in a petition to the Federal authorities, relating to the master's misconduct, was disputable by him in this cause, not decided).

[4] 1867, Reid v. Warner, 17 Low. Can. 487 (handwriting); 1858, Smith v. Gifford, 33 Ala. 172; 1880, Dabney v. Mitchell, 66 Ala. 495, 505 (account filed); 1897, Posey v. Hanson, 10 D. C. App. 497, 508 (affidavit by one who could not read); 1896, Smith v. Mayfield, 163 Ill. 447, 45 N. E. 157 (the amount agreed to be due the admittant); 1906, State v. Morin, 102 Me. 290, 66 Atl. 650 (liquor-nuisance: why the defendant took out a Federal license, allowed to be explained); 1870, Janvrin v. Fogg, 49 N. H. 346; 1905, Chamberlain v. Iba, 181 N. Y. 486, 74 N. E. 481 (meaning of a letter, explained); 1897, Holmes v. W. R. E. Co., 20 R. I. 289, 38 Atl. 946 (words spoken jocularly, not an admission; here, of an agent); 1903, Boyer v. St. Louis, S. F. & T. R. Co., 97 Tex. 107, 76 S. W. 441 (assessors' books); 1920, Bonazzi v. Fortney, 94 Vt. 263, 110 Atl. 439 (malicious prosecution; on the facts as cited *post*, § 1066, n. 10, plaintiff was allowed to explain that the default was made on advice of an attorney); 1907, Yeska v. Swendrzynski, 133 Wis. 475, 113 N. W. 959 (explanation of an admission made in a plea of guilty to a prosecution for the same act, allowed).

[5] *Ante*, note 2.

real meaning and intention in making the statement.[6] Moreover, an explanation which attempts to rehabilitate the party by showing that he has, at still other times, made *claims consistent* with his present one is perhaps obnoxious to the general principle which forbids a witness' credit to be restored in this manner.[7]

(4) In this place, moreover, there often comes into application the general principle of Completeness, which permits the *remainder of any utterance* to be put in evidence by the other party, in order to present the full and correct significance of the fragment which the first party may have offered. This principle affects admissions as well as all other kinds of verbal utterances, and is elsewhere examined, in its bearing upon a party's admissions (*post*, §§ 2099, 2113, 2115).

The effect of this principle is sometimes difficult to distinguish from that of the Verbal Act doctrine (*post*, § 1772). The latter is concerned with the Hearsay rule, and defines the classes of utterances to which that rule is not applicable, *i.e.* it serves to remove the objection which that rule would otherwise interpose. The various sorts of statements which it thus serves to exempt from the Hearsay rule are elsewhere summarized (*post*, §§ 1777–1789). But it may here be noted that *any statement* of the opponent, *made at the time of certain conduct* of his which has been adduced as equivalent to an admission, may be offered in evidence so far as it presents the true complexion of his conduct and takes from it the quality of an admission.[8]

2. What Statements are Admissions

§ 1060. **Implied Admissions; Sundry Instances.** Whether from a certain express utterance some further statement is to be implied as necessarily included, or whether in certain conduct the utterance of a certain statement may be implied, is so much a question of the circumstances of each particular instance as hardly to become the legitimate subject of precedents. There are rulings recorded, but they depend upon no common principle.[1]

[6] 1897, Sutter *v.* Rose, 169 Ill. 66, 48 N. E. 411 (letter admitting knowledge, not allowed to be explained by writer's intention). This application of the rule is examined *post*, §§ 1954, 1963–1972.

[7] The cases are considered under that head, *post*, § 1126, § 1133, n. 7.

[8] 1846, Yarborough *v.* Moss, 9 Ala. 382, 387 (claim of interpleader to slaves attached by the defendant as creditor of T.; claimant had delivered the slaves to the sheriff when attached, and was allowed to prove what he then said: "if the plaintiff insists on this delivery for any purpose as evidence [by admissions], he is bound to take it with all the explanatory declarations and circumstances, as they constitute a part of the transaction itself. . . . If the entire declaration was received, it might appear that the claim of title would be perfectly consistent with the delivery"); 1860, Yates *v.* Shaw, 24 Ill. 368 (boundary dispute, the planting of a hedge by defendant on the line claimed by plaintiff, having been received as an admission, defendant's declarations of the line's incorrectness, while planting, received to explain away that inference).

Unless, of course, the doctrine of *estoppel by judicial admissions* applies: 1912, Central Trust Co. *v.* Culver, 23 Colo. App. 317, 192 Pac. 253.

§ 1060. [1] ENGLAND: 1818, Dickinson *v.* Coward, 1 B. & Ald. 677, 679 (assumpsit by assignee in bankruptcy; defendant's attendance to make claim and pay balance, at a meeting of the bankruptcy commissioners, held sufficient; L. C. J. Ellenborough: "I take it to be quite clear that any recognition of a person standing in a given relation to

Admissions *by conduct*, for the reason already set forth *ante*, § 1052, have been fully considered under another head (*ante*, §§ 274–281).

§ 1061. **Hypothetical Admissions; (1) Offer to Compromise or Settle a Claim; General Principle.** Whether an *offer to compromise* a claim, or to settle it by a partial or complete payment, amounts to an admission of the truth of the facts on which the claim is based, and is therefore receivable in evidence, is a question which has given rise to prolonged discussion and to varied but often unsatisfactory attempts at explanation.

The solution is a simple one in its principle, though elusive and indefinite in its application; it is merely this, that a *concession which is hypothetical only can never be treated as an assertion* representing the party's actual belief, and therefore cannot be an admission; and, conversely, an unconditional assertion is receivable, without any regard to the circumstances which accompany it. But, before considering the bearing of this solution, it is necessary to dispose of some inadequate theories that have been judicially given some prominence:

(*a*) It was in Massachusetts formally propounded, and has elsewhere sometimes been suggested, that there is a *privilege* protecting as confidential all overtures of settlement made to the opposing party, — and this upon a principle analogous to that of the privileges for confidential communications (*post*, §§ 2286, 2377):

others is 'prima facie' evidence, against the person making that recognition, that that relation exists"); 1833, Storr *v.* Scott, 6 C. & P. 241 (charging A, held receivable as an admission that credit was given to A, not to B);

UNITED STATES: *Federal:* 1905, Chadwick *v.* U. S., 141 Fed. 225, 238 (conspiracy to defraud; letters written by defendant, though not shown to have been sent, received as admissions); *Alabama:* 1898, Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666 (an unsigned note, to show indebtedness, admitted); *California:* 1889, White *v.* Merrill, 82 Cal. 14, 17, 22 Pac. 1129 (admission by defendant that a verdict against him at a former trial was just, received); *Massachusetts:* 1869, Ryerson *v.* Abington, 102 Mass. 525, 526, 530 (plaintiff's statements, after a prior trial of an action for the same personal injury, when warned by a friend for walking off so fast, that "it was all over now" and that "he knew how to play it on the judge", held admissible); 1898, Bertha Mineral Co. *v.* Morrill, 171 Mass. 167, 50 N. E. 534 (direction on goods sent, together with bill, etc., received as an admission as to whom credit was given); 1899, Manning *v.* Lowell, 173 Mass. 100, 53 N. E. 160 (value of land taken by eminent domain; owner's prior valuation given to assessor, admitted; price accepted by owner at attempted sale by him, admitted); *Michigan:* 1905, People *v.* Hoffmann, 142 Mich. 531, 105 N. W. 838 (defendant's affidavit for a continuance, used as an admission); 1905, Benson *v.* Raymond, 142 Mich. 357, 105 N. W. 870 (bill by a grantor to set aside his deed for mental incompetency; the Court held it proper to bring the complainant in court, "and afford the judge an opportunity of seeing him, and if he desired, of questioning him"); *Minnesota:* Gen. St. 1913, § 8457 (in actions by a corporation or firm upon a money instrument payable to the corporation or firm, the production of the instrument is 'prima facie' evidence of the existence of the corporation or firm); *Missouri:* 1897, Banking House *v.* Darr, 139 Mo. 660, 41 S. W. 227 (oath to a tax-list received as an admission; compare the cases of assessors' books, cited *post*, § 1640); *New Hampshire:* 1852, Nealley *v.* Greenough, 25 N. H. 325, 331 (a statement, when served with a writ, that he was "surprised this claim had not been paid" and had "meant to have sent on the money to pay it" is an admission of every fact essential to the claim); *Oklahoma:* 1911, Wichita F. & N. W. R. Co. *v.* Holloman, 28 Okl. 419, 114 Pac. 700 (admissions of owner as to value in condemnation suit, received).

See also the citations *post*, § 1071, and *ante*, §§ 1040–1042, for analogous instances.

For admissions by using or approving a witness' *testimony* or *deposition*, see *post*, § 1075.

1845, DEWEY, J., in *Dickinson* v. *Dickinson*, 9 Metc. 471, 474: "The rules of evidence exclude, to some extent, and under certain circumstances, the declarations and admissions of a party. Thus, the more fully to protect the rights of parties litigating, all their communications with counsel are held to be privileged. Evidence of this character has always been excluded, and the rule has been so broad as to exclude all admissions thus made. Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money, or other valuable consideration, with a view to a compromise of the matter in controversy. It must be permitted to men to endeavor to buy their peace, without being prejudiced by a rejection of their offers. Hence, evidence of such offers or proposals is irrelevant, and they are not to be taken as admissions of the legal liability of the party making them. But here a distinction exists between the cases of an offer to pay money to settle a controversy, and an admission of particular facts, connected with the case, made by a party pending a negotiation for a compromise. The more convenient rule might have been that which is applicable to communications between client and attorney, excluding, as testimony, everything communicated in this relation; which rule, if applied here, would exclude every admission made during the interview which was had for such compromise. To some extent this rule was attempted to be introduced, excluding all admissions of the parties, even admissions of particular facts, where it appeared that they were expressly stated at the time 'to be made without prejudice.' But the exception was soon introduced, that the evidence was competent where it was the admission of a collateral fact."

This theory is consistent enough with the general theory of privileged communications (*post*, § 2285), namely, that expeditious and extrajudicial settlements are to be encouraged and that privacy of communication is necessary in order to encourage them; and there is indeed a privilege for a party's statements to an official conciliator (*post*, § 2376). In policy, however, it may be doubted whether the recognition of such a privilege is in fact necessary in order to foster private settlement; or whether in fact the good that might be done by the diminution of litigation under such a privilege would be greater than the justice that is effected by the free use of the evidence made available through denying the privilege. At any rate, whatever the arguments of policy, the further and vital objection remains that the supposed privilege does not fit the rule of law as it is everywhere accepted and applied. Nowhere but in Massachusetts has this theory been definitely advocated; and even by its own expounders it is conceded not to explain the actual rule of law.

(*b*) Another theory, resting apparently on some notion of *contract*, is that an express reservation of secrecy (*e.g.* by the words "*without prejudice*") assimilates the offer to a contractual offer, so that if the terms are not accepted the offer is null and can have no evidential effect:

1871, MELLISH, L. J., in *Re River Steamer Co.*, L.R. 6 Ch. App. 822, 832: "If a man says his letter is 'without prejudice', that is tantamount to saying, 'I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all.' It appears to me, not on the ground of bad faith, but on the construction of the document, that when a man says in his letter it is to be without prejudice, he cannot be held to have entered into any contract by it if the offer contained in it is not accepted."

1889, LINDLEY, L. J., in *Walker* v. *Wilsher*, L. R. 23 Q. B. Div. 335: "What is the meaning of the words 'without prejudice'? I think they mean, without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms pro-

posed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."

It is hardly necessary to point out that the analogies of a contract-right can have no bearing on the probative use of such statements; since, conceding that an unaccepted offer amounts to nothing contractually, there may none the less remain for it an evidential value, over and above its defeated contractual purpose. Moreover, the practical objection to this theory is that, like the foregoing one, it does not adequately explain the rule of law; for, by general consensus, offers of compromise which do not contain the express words "without prejudice", may still be inadmissible in evidence, and conversely. Nevertheless, a professional tradition, especially among attorneys and solicitors in England, long enshrined the rule of thumb that a letter headed by the shibboleth "without prejudice" was safe from subsequent use as an admission, and that this phrase was necessary to protect it;[1] and this tradition has helped to cloud the discussion and to confuse the long line of rulings.

(*c*) The true reason for excluding an offer of compromise is that it *does not* ordinarily proceed from and *imply a belief that the adversary's claim is well founded*, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered; in short, the offer implies merely a desire for peace, not a concession of wrong done:

1823, BAYLEY, J., in *Thomson* v. *Austen*, 2 Dowl. & Ry. 358, 361: "The essence of an offer to compromise is that the party making that offer is willing to submit to a sacrifice and to make a concession."

1839, L. C. COTTENHAM, in *Tennant* v. *Hamilton*, 5 Cl. & F. 133: "Money paid upon a complaint made, paid merely to purchase peace, is no proof that the demand is well founded. . . . [If the defendant had so paid money here], that would be no evidence of the damage; it is money paid to buy peace and to stop a complaint. It is very often a wise thing, however unfounded a complaint may be, for parties to pay a sum of money in order to quiet the party making the complaint."

1855, THOMAS, J., in *Harrington* v. *Lincoln*, 4 Gray 563, 567: "Peace is of such worth that a reasonable man may well be presumed to seek after it even at the cost of his strict right and by an abatement from his just claim. The offer which a man makes to purchase

§ 1061. [1] The following amusing anecdote illustrates the inveteracy of this notion: 1840, Law and Lawyers, II, 305: "Mr. Chitty relates an anecdote of a young attorney who had been carrying on a correspondence with a young lady, in which he had always, as he thought, expressed himself with the greatest caution. Finding, however, that he did not perform what he had led the lady to believe that he would, she brought an action for breach of promise of marriage against him. When his letters were produced on the trial, it appeared that he had always concluded —'this *without prejudice*, from yours faithfully, C. D.' The judge facetiously left it to the jury to determine whether these concluding words, being from an attorney, did not mean that he did not intend any prejudice *to the lady*, and the jury found accordingly."

Another amusing instance (presumably originating in the same anecdote of Mr. Chitty) is found in Mr. Guppy's celebrated proposal "without prejudice", to Esther Summerson ("Bleak House", c. IX); cited by Mr. (now Judge) John Marshall Gest, of Philadelphia, in his richly interesting essay on "The Law and Lawyers of Charles Dickens" (44 Amer. Law Reg. N. S. 401; 1905; now reprinted in his "The Lawyer in Literature", Boston, 1913).

it is to be taken, not as his judgment of what he should receive at the end of litigation, but what he is willing to receive and avoid it. . . . If the plaintiff had made the offer of compromise in open town-meeting, proof of it would have been excluded."

By this theory, the offer is excluded because, as a matter of interpretation and inference, it does not signify an admission at all. There is no concession of claim to be found in it, expressly or by implication.

Conversely, if a plain admission is in terms made, it is receivable, even though it forms part of an offer to compromise; and this much has long been well understood:

1828, RICHARDSON, C. J., in *Sanborn* v. *Neilson*, 4 N. H. 501, 509: "The reason why a mere offer of money or other thing by way of compromise is not to be evidence against him who makes it, is very plain and easily understood, — such an offer neither admits nor ascertains any debt, and is no more than saying that so much will be given to be rid of the controversy. But where the offer has been grounded upon an express admission of a fact, and that fact afterwards comes to be controverted between them, there seems to be no ground on which the evidence of the offer can be excluded. Thus if A sue B for $100, and B offer to pay $20, this offer shall not be received as evidence, because it may have been made merely for the sake of peace where nothing was due. But in such a case, if B admit expressly that $20 are due, and offer to pay that sum, then it seems to us that both the admission and the offer are evidence. We are, therefore, of opinion, that the offer made by the defendant in this case was, under the circumstances, admissible in evidence."

So it is apparent that the *occasion of the utterance* is not decisive; that is, it may or may not have been accompanied by a reservation or an injunction of secrecy; and it may or may not have occurred during negotiations for a settlement or a compromise. What is important is the *form* of the statement, whether it is *hypothetical* or *absolute*. If, making all implications from the context and the circumstances, the statement assumes the adversary's claim to be well-grounded for the mere purpose of discussing a settlement which will avoid litigation, then nothing is actually admitted in any true sense; and therefore the party making it is in none the worse condition for having omitted the phrase "without prejudice", nor for having offered the full amount of the claim without any pretence of compromise. If on the other hand, the statement is absolute, so far as appears, it is not saved by any cabalistic phrase, nor by its occurrence in the course of compromise-negotiations. This solution of the question is amply elucidated in the following passages:

1822, HOSMER, C. J., in *Hartford Bridge Co.* v. *Granger*, 4 Conn. 142, 148: "The law on this subject has often been misconceived; and it is time that it should be firmly established. It is never the intendment of the law to shut out the truth; but to repel any inference which may arise from a proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made, *because it is a fact*, the evidence to prove it is competent, whatever motive may have prompted to the declaration. In illustration of this remark, it may be observed, that if A offer to B ten pounds, in satisfaction of his claim of an hundred pounds, merely to prevent a suit, or purchase tranquillity this implies no admission that any sum is due; and therefore, testimony to prove the fact must be rejected, because it evinces nothing concerning the merits of the controversy. But

if A admit a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy. The question to be considered is, what was the view and intention of the party in making the admission; whether it was to concede a fact hypothetically, in order to effect a settlement, or to declare a fact really to exist. There is no point of honor guarded by the Court, nor exclusion of evidence lest it should deter from a free conversation. But testimony of admissions or declarations taking facts for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good, is not admissible; truth being the object of evidence."

1889, DOE, C. J., in *Colburn* v. *Groton*, 66 N. H. 151, 156, 28 Atl. 95: "The preliminary question always is, not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission. It is a question, not of time or circumstances, but of intention. On that question the time and circumstances may be materiai evidence. . . . An offer of payment, whether accepted or rejected, is evidence, when the party making it understood it to be and made it as an admission of his liability. It is not evidence when he made it for the purpose of averting litigation, not intending to admit his liability. . . . An entire claim may be paid to avoid a law suit, the payer intending to admit nothing but his desire for peace. . . . 'Compromise' generally signifies a settlement in which there is a concession on both sides. Used in that sense, the word does not describe all cases in which peace is bought without an admission of liability, and is not an adequate statement of the law."

1901, SCHMUCKER, J., in *Pentz* v. *Ins. Co.*, 92 Md. 444, 48 Atl. 139: "He was then asked what offer of settlement he had made, and the Court, upon the objection of the defendant excluded the question. The word 'settlement', as ordinarily used, may mean a compromise for peace's sake of a claim the validity of which is denied, or it may signify the payment of a claim to the extent to which it is conceded to be due. If the witness in the present case, by the use of the expression 'settlement', meant it in the strict sense of a claim under the policy, although no loss was admitted, evidence of the compromise was not admissible. If, on the contrary, he meant, as his previous answers seem to indicate that he did, that there was a conceded loss under the policy, which he wished to settle, the dispute being merely as to the amount of the loss, the evidence was admissible . . . as sufficient evidence to go to the Court sitting as a jury, from which he might infer that the refusal to pay a greater amount of loss was upon other grounds than failure to furnish proof of loss, and that, therefore, there had been a waiver by the defendant of such proof. If the answer of the witness had been that the defendant had offered to settle the loss under the policy by payment of an amount which was admitted [by him] to be due, it would have been admissible."

(*d*) Certain discriminations must of course be made: (1) When the question of *costs* or of *laches* arises, and depends upon whether an offer of payment before trial had been made, the fact of such an offer may be evidenced, as made relevant by the rule of costs.[2] (2) The *payment of money into court* before trial is a procedure sometimes employed to narrow the issues in a cause and to affect the ultimate burden of costs. This procedure has no concern with the present rule of Evidence.[3] But so far as the tender or payment into court is a *conditional admission* in the nature of an offer to

[2] 1862, Williams *v.* Thomas, 2 Dr. & Sm. 29, 37 (costs); 1889, Walker *v.* Wilsher, L. R. 23 Q. B. D. 335 (costs; see citation *post*, § 1062); 1849, Collier *v.* Nokes, 2 C. & K. 1012; 1852, Romilly, M. R., in Jones *v.* Foxall, 15 Beav. 388, 397 (to "account for the lapse of time").

[3] 1876, Brown *v.* People, 3 Colo. 115; 1906, Mackey *v.* Kerwin, 222 Ill. 371, 78 N. E. 817 (though a tender pleaded or paid into court is a conclusive admission, a tender before trial not pleaded nor paid into court is not conclusive).

settle, it should not be made known to the jury.[4] (3) An offer of compromise from an *unauthorized person* cannot amount to an admission of the party himself.[5] Supposing it to be an admission in terms, then the question whether it can be used depends on whether the person making it is (upon the principles of §§ 1069–1087, *post*) one whose admissions may be used to affect the party. (4) When an offer has been *accepted*, it may, of course, be proved as the basis of a contract sued upon.[6] (5) All evidence given before a *board of conciliation* may be privileged (*post*, § 2376).

§ 1062. **Same: State of the Law in various Jurisdictions.** The correct solution of theory (noted in § 1061 (*c*)) seems to be fairly well accepted to-day, although the precedents within some jurisdictions, and particularly the long line of precedents in England, are difficult to reconcile.[1]

[4] The statutes and cases on this point are placed in § 1062, *post*.

[5] 1877, State *v.* Jaeger, 66 Mo. 173 (offer from defendant's wife); 1905, Cecil *v.* Terr., 16 Okl. 197, 82 Pac. 654 (rape under age; offer of settlement by defendant's father, excluded).

Here compare the rulings as to impeaching a witness or a party by his *agent's corrupt offers* (*ante*, §§ 278, 280, 962).

[6] 1884, Vardon *v.* Vardon, 6 Ont. 719, 725; 1884, Securities Co. *v.* Richardson, 9 Ont. 182.

§ **1062**. [1] The rulings are as follows (compare the cases cited under self-contradiction, *ante*, § 1040, conduct evidencing consciousness of guilt, *ante*, §§ 282, 284, and communications to boards of conciliation, *post*, § 2376).

ENGLAND: 1718, Turton *v.* Benson, 1 P. Wms. 496, 497 (bond: a ruling that "Mr. Turton's offers made and not accepted signified nothing; that Lord Cowper had often said a man should not be bound by an offer made during a treaty which afterwards broke off, or upon terms that were not accepted", was approved by L. C. Parker); 1716, Harman *v.* Vanhattan, 2 Vern. 717 (bond; an offer to surrender it, on the opponent's making up certain money, disregarded by L. C. Harcourt; "it was but 'nudum pactum', a voluntary offer, and on condition that the money was then paid, and it was not complied with"); 1750, Baker *v.* Paine, 1 Ves. Sr. 456, 459 (L. C. Hardwicke: "The offers by defendant are material; though, generally speaking, offers by the parties by way of compromise are not to have much weight in the merits of the case, nor to be made use of"); 1790, Slack *v.* Buchanan, Peake 5 (L. C. J. Kenyon said that he had hitherto not received admissions made under a reference, but acknowledged that he had gone too far; in future, he would "reject none but such as are merely concessions for the purpose of making peace and getting rid of a suit"); 1794, Walbridge *v.* Kennison, 1 Esp. 143 (during a treaty for settlement, the defendant, being asked as to his handwriting on a bill, "admitted that it was his": L. C. J. Kenyon received this, since, though "any admission . . . obtained while a treaty was depending, on the faith of it", was inadmissible, yet the identity of handwriting "stood on a different foundation; it was matter no way connected with the merits of the cause and which was capable of being easily proved by other means"); 1800, Gregory *v.* Howard, 3 Esp. 113 ("facts admitted before arbitrators" can be proved by them); 1809, Cumming *v.* French, 2 Camp. 106, note (on demand for settlement, the drawer of a bill offered to give another bill; held, that this was a conditional offer of compromise, and not an acknowledgment of liability); 1823, Thomson *v.* Austen, 2 Dowl. & R. 358 (the plaintiff said to the witness "he was so anxious to get out of the law that he would refer the question in dispute to the witness as arbitrator", and asked him to tell this to the defendant, to get him to compromise, at same time admitting the receipt of money on account, held on the facts "not to have originated in any desire to compromise", and therefore to be admissible); 1827, Doe *v.* Evans, 3 C. & P. 219 (abstract of title used in an arbitration, held to be not virtually a part of a compromise, but an ordinary admission); 1828, Lofts *v.* Hudson, 2 Man. & Ry. 481 (agreement to pay a litigated claim and two-thirds of the costs, held by a majority, to be a compromise, and at any rate not such an admission of liability as to allow recovery of the one-third costs in a suit on the original claim); 1830, Wayman *v.* Hilliard, 7 Bing. 101 (on a demand of £40, defendant "offered to give £17"; Bosanquet, J.: "There has been no acknowledgment of defendant here; the defendant merely makes an an offer to purchase peace"; and so it was held not to support an action upon an account stated); 1830, Cory *v.* Bretton, 4 C. & P. 462 (letter declaring at the opening that it was "not to be used in prejudice of my rights or in any future arrangement", excluded; Tindal, C. J.: "It is clearly a conditional statement"); 1830, Wallace *v.* Small, 1 M. & M. 446 (defendant's admission of the contract, while refusing to

The only phrasing that calls for special notice is that introduced in certain earlier New York and Massachusetts cases, and made popular by Professor

raise his offer of payment, received, because "not said to be without prejudice", and thus unrestricted "as to confidence"); 1830, Watts *v.* Lawson, 1 M. & M. 447, note (similar); 1835, Thomas *v.* Morgan, 2 C. M. & R. 496, Exch. (on demand for compensation for injury done by the defendant's dogs, he said: "if they had done it he would settle for it"; held, that this was "a fact to go to the jury, yet it ought to have little or no weight at all with them, for the offer may have been from motives of charity, without any admission of liability at all"); 1838, Healey *v.* Thatcher, 8 C. & P. 388 (Gurney, B., excluded a letter beginning "without prejudice" and offering to accept satisfaction); 1842, Paddock *v.* Forrester, 3 Man. & Gr. 903, 919 (trespass; letter of plaintiff, demanding compensation, but written as an "offer without prejudice, in case it is not agreed to", held inadmissible; and the answer thereto excluded also, though it did not contain such a reservation; Tindal, C. J.: "It is of great importance that parties should be left unfettered by correspondence which has been entered into upon the understanding that it is to be without prejudice"); 1846, Jardine *v.* Sheridan, 2 C. & K. 24 (statement made to the opponent's attorney, "with the object of obtaining a compromise", excluded); 1852, Hoghton *v.* Hoghton, 15 Beav. 278, 315, 321 (letters written, after dispute begun, with a view to compromise and "without prejudice", excluded; Romilly, M. R.: "Such communications made with a view to an amicable arrangement ought to be held very sacred"; even if the correspondence contained "any admission affecting the plaintiff's rights, I should disregard such admissions made solely with a view to compromise"); 1852, Jones *v.* Foxall, ib. 388, 396 (Romilly, M. R., excluded "offers made without prejudice", as being merely an attempt "to convert offers of compromise into admissions"); 1862, Williams *v.* Thomas, 2 Dr. & Sm. 29, 37 (defendant's offer "without prejudice" to compromise, made before bill filed, held available by defendant to affect the costs; but "it could not be used against him"); 1871, *Re* River Steamer Co., L. R. 6 Ch. App. 822, 831 (offer made "without prejudice", said *obiter* to be insufficient to revive a debt barred by statute; see quotation, *supra*); 1872, Richards *v.* Gellatly, L. R. 7 C. P. 127, 131 (false representations as to a ship's equipment; complaints of the plaintiff's fellow-passengers, followed by settlement by the defendant, excluded); 1889, Walker *v.* Wilsher, L. R. 23 Q. B. Div. 335 (letters written "without prejudice" during proposals for settlement, excluded, on an issue of probable cause affecting costs; Williams *v.* Thomas doubted); 1893, *Re* Daintrey, 2 Q. B. 116 (letter by debtor to creditor offering to compound the debt and declaring himself unable to pay and about to suspend if no composition could be made, headed "without prejudice"; held admissible, not being an offer of terms of settlement in a dispute or negotiation; 1922, La Roche *v.* Armstrong, 1 K. B. 485 (letters from one solicitor to another offering a sum of money; "this is all she has, and if you like to take this sum you can have it"; excluded, but on the ground that they were marked "without prejudice"); Rules of Court, 1883, Ord. XXII, R. 22, being Rule 9 of Nov. 1893 (an unaccepted tender into court is not to be evidence).

CANADA: *Alberta:* Rules of Court 1914, No. 74 (payment into court is not an admission of the claim); *Manitoba:* R. S. 1913, c. 46, Rule 552 (payment into court is not an admission); *New Brunswick:* Cons. St. 1903, c. 111, § 193 (no unaccepted offer to suffer judgment "shall be evidence against the party, making the same", in that or any other action); 1890, Stewart *v.* Muirhead, 29 N. Br. 273, 279 (an offer of a specific sum in settlement is admissible, unless stated to be confidential or without prejudice); 1912, Guimond *v.* Fidelity P. F. Ins. Co., N. Br. S. C., 2 D. L. R. 654, 662 (fire loss; Barker, C. J.: "Interviews and negotiations with a view to a settlement of dispute, especially where they are expressly stated to be without prejudice, are inadmissible); *Nova Scotia:* Rules of Court 1900, Ord. XXII, Rule 17 (like Eng. Rules of 1883); *Ontario:* 1856, Burns *v.* Kerr, 13 U. C. Q. B. 468 (letters stated to be "without prejudice", not admissible; with some hesitation); 1869, Clark *v.* G. T. R. Co., 29 U. C. Q. B. 136, 147 (defendant's letter proposing without prejudice a submission of the plaintiff's injuries to experts, and agreeing to abide their decision, and the answer accepting the offer, received on the facts, to rebut the imputation of bad faith, on behalf of the plaintiff); 1883, York Co. *v.* Toronto G. R. & C. Co., 3 Ont. 584, 593 (offers made without prejudice, held inadmissible); 1886, Pirie *v.* Wyld, 11 Ont. 422, 427 ("all communications made under the words 'without prejudice'" are inadmissible); 1887, Hartney *v.* Ins. Co., 13 Ont. 581 (letter offering a settlement, admitted, the reservation "without prejudice" here applying only to the waiver of conditions of the policy; but here the objection was not properly taken); 1913, Corby *v.* Foster, 29 Ont. L. R. 83, 13 D. L. R. 663 (father sued for son's tort; defendant's conduct showing an inclination to pay and settle, held no evidence of a 'scienter' of the son's dangerous propensity); Rules of Court 1913, No. 308 ("payment of money into court shall not, unless expressly so stated, be

Greenleaf's treatise, in the form that a "distinct" or "independent admission of a fact" is receivable. This inadequate expression (made more mislead-

deemed an admission of the cause of action' etc.); *Saskatchewan:* 1915, Bank of Ottawa v. Stameo, Ltd., 22 D. L. R. 679, Sask. (insolvency; letter marked "without prejudice to the bank or the writer", held not privileged from use);

UNITED STATES: *Federal:* 1876, Home Ins. Co. v. Baltimore W. Co., 93 U. S. 527 ("offer of compromise", held inadmissible); 1879, West v. Smith, 101 U. S. 263, 273 (the rule "is not that an admission made during or in consequence of an effort to compromise is inadmissible, but that an offer to *do* something by way of compromise, as to pay sums of money, allow certain prices, deliver certain property, or make certain deductions, and the like shall be excluded; these cannot be called admissions, as they were made to avoid controversy and to save the expenses of vexatious litigation"); 1908, New York Life Ins. Co. v. Rankin, 8th C. C. A., 162 Fed. 103 (correspondence between attorneys during an unsuccessful attempt to effect a compromise, excluded);

Alabama: 1896, Feibelman v. Assur. Co., 108 Ala. 180, 19 So. 540 (offer of compromise, excluded); 1904, Matthews v. Farrell, 140 Ala. 298, 37 So. 325 (performance of contract: admissions of "distinct facts" made in the course of compromise negotiations, received); 1906, Sanders v. State, 148 Ala. 603, 41 So. 466 (rape; offer of money to the prosecutrix' father, to "squash" the charge, excluded);

Alaska: Comp. L. 1913, §§ 1321, 1515 (like Or. Laws 1920, §§ 532, 879);

Arkansas: Dig. 1919, § 1337 (formal offer to allow judgment in a money action, if not accepted, "shall not be given in evidence"); § 1344 (offer to confess judgment in money action for part of amount "shall not be deemed to be an admission", nor be given in evidence);

California: C. C. P. 1872, § 997 (offer to allow judgment to be taken for a specified sum: "if the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial"); § 895 (offer to allow judgment in a justice court: "the offer and failure to accept it cannot be given in evidence"); § 2078 ("an offer of compromise is not an admission that anything is due"); 1896, Rose v. Rose, 112 Cal. 341, 44 Pac. 658 (offer by a husband to his wife to divide the property, describing it as community property; that statement admitted, not being affected by the compromise-concessions);

Colorado: Comp. St. 1921, C. C. P. § 313 (unaccepted offer to allow judgment, not admissible); 1890, Patrick v. Crowe, 15 Colo. 543, 554, 25 Pac. 985 (propositions of compromise are inadmissible; otherwise of the admission "of any independent fact" in the course of negotiations); 1894, Kutcher v. Love, 19 Colo. 542, 544, 36 Pac. 152 (an admission made without reservation during compromise negotiation is receivable); 1899, Chicago B. & Q. R. Co. v. Roberts, 26 Colo. 329, 57 Pac. 1076 (offers of compromise, inadmissible); 1899, Thomas v. Carey, 26 Colo. 485, 58 Pac. 1093 ("unaccepted offer of compromise", inadmissible);

Columbia (Dist.): 1918, McMahon v. Mathews, 48 D. C. App. 303 (an offer not admitting liability, excluded);

Connecticut: 1822, Hartford Bridge Co. v. Granger, 4 Conn. 142, 148 (an admission, intended distinctly as such, is receivable though made in the course of an attempt to compromise; see quotation *supra;* Peters, J., diss.); 1824, Fuller v. Hampton, 5 Conn. 416, 418, 426 (similar); 1836, Stranahan v. East Haddam, 11 Conn. 507, 512 (authority to agent to pay a certain sum on receiving a release, held not admissible); 1919, Riccio v. Montano, 93 Conn. 289, 105 Atl. 625 (admissions of fact made before an industrial accident commissioner, received);

Delaware: 1909, Hudson v. Williams, 6 Pen. Del. 550, 72 Atl. 985 (distinct admissions, though made during negotiations for compromise, receivable);

Georgia: 1833, Hicks v. Thomas, Dudley 218 (if an admission made "not with a view of avoiding a suit or to buy one's peace against a doubtful claim, but from a consciousness of the truth of the fact", it is receivable; hence the motive is important); 1853, Molyneaux v. Collier, 13 Ga. 406, 414 ("the condition, tacit or express, that no advantage will be taken of the admission, it being made with a view to and in furtherance of an amicable adjustment, is the test of this rule of evidence"); 1854, Parker v. Walden, 16 Ga. 27, 30 (letter held not an offer of compromise, on the facts); 1859, Lucas v. Parsons, 27 Ga. 593, 629, 631 (reply of a party when rejecting a compromise, admitted); Rev. C. 1910, § 5781 ("admissions or propositions made with a view to compromise", are inadmissible); 1869, Frain v. State, 40 Ga. 529, 534 (under the Code; an offer to pay, if the case was settled, excluded); 1873, McElrath v. Haley, 48 Ga. 641, 647 (the Code "enlarges the common-law rule, which did not exclude the admission of distinct facts"); 1878, Tufts v. Du Bignon, 61 Ga. 322, 326 (offer of compromise, excluded); 1879, Scales v. Shackleford, 64 Ga. 170, 172 ("independent statements of truth", even "though made while the parties were trying to settle", are admissible); 1883, Keaton v. Mayo, 71 Ga. 649, 652 ("any fact admitted as true without such reference to compromise would be admissible", but not facts "admitted as an inducement to reach such settlement or compromise"); 1884, Sasser v. Sasser, 73 Ga.

ing by its occasional rendering as " the admission of any independent fact ") is merely an attempt to phrase one aspect of the correct theory already noted

275, 283 (defendant's refusal to settle, admitted); 1884, Mayor *v.* Minor, 73 Ga. 484, 489 (offer of money to prevent rebuilding of a dam alleged to be a nuisance, excluded); 1885, Hatcher *v.* Bowen, 74 Ga. 840 ("offer to pay a debt with a mule, not made pending any negotiations to compromise", received); 1893, Akers *v.* Kirke, 91 Ga. 590, 18 S. E. 366 (admissions after an offer of settlement but independent of it, received); 1891, Emery *v.* Atlanta R. E. Exchange, 88 Ga. 321, 331, 14 S. E. 556 ("It is not only propositions [to settle], but also 'admissions' made with a view to compromise, which are not proper evidence"); 1900, Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782 (an offer of settlement, conceding a demand upon certain terms, and not as a part of a compromise, admitted); 1904, Teasley *v.* Bradley, 120 Ga. 373, 47 S. E. 925 (prior ruling in this case, 110 Ga. *supra*, affirmed); 1906, McBride *v.* Georgia R. & E. Co., 125 Ga. 515, 54 S. E. 674 (a subsequent offer to compromise does not exclude prior independent admissions); 1905, Georgia R. & E. Co. *v.* Wallace, 122 Ga. 547, 50 S. E. 478 (plaintiff's wagon and driver were injured by defendant's car; defendant's settlement with the driver for $25, not admitted on his re-direct examination);

Idaho: Comp. St. 1919, § 7192 (unaccepted offer to allow judgment, not admissible); 1888, Sebree *v.* Smith, 2 Ida. 329, 16 Pac. 915 (unaccepted offer of settlement, held inadmissible); 1903, Kroetch *v.* Empire M. Co., 9 Ida. 277, 74 Pac. 868 (offer of compromise, excluded);

Illinois: 1874, Barker *v.* Bushnell, 75 Ill. 220, 222 (offer to settle for less than the value in controversy, excluded); 1920, People *v.* Marx, 291 Ill. 40, 125 N. E. 719 (rape; prosecutrix' engagement of an attorney to secure a settlement for the civil claim, not admitted); 1922, Cook *v.* Korshak, 301 Ill. 603, 134 N. E. 49 (trover for a stolen diamond; defendant's refusal to accept an offer of settlement, excluded);

Indiana: Burns' Ann. St. 1914, §§ 538, 539 (unaccepted offer to allow or to confess judgment, according to statute, not to be used in evidence); 1844, Wilt *v.* Bird, 7 Blackf. 258 (an admission "constituting in itself the point yielded for the sake of peace" is to be excluded, but not "an independent fact admitted to be true"); 1857, Cates *v.* Kellogg, 9 Ind. 506 (admission made during a settlement may be receivable, unless made "not because the fact is so, but expressly or clearly for the sake and as a part of the compromise"); 1867, Pattison *v.* Norris, 29 Ind. 165 (obscure); 1878, Board *v.* Verbarg, 63 Ind. 107, 111 (offer to release for a certain sum, excluded); 1878, Dailey *v.* Coons, 64 Ind. 545, 547 (offer to pay half the claim, excluded); 1888, Binford *v.* Young, 115 Ind. 174, 176, 16 N. E. 142 (Wilt *v.* Bird, approved); 1888, Louisville N. A. & C. R. Co. *v.* Wright, 115 Ind. 378, 390, 16, N. E. 145, 17 N. E. 584 (same);

Iowa: Code 1897, §§ 3817–19, Comp. C. 1919, §§ 8375, 8376 (unaccepted offer to confess judgment, not to be considered); 1890, State *v.* Lavin, 80 Ia. 555, 558, 46 N. W. 553 (an offer by way of compromise is inadmissible; but an "admission of particular facts, though made during a treaty of compromise", is receivable); 1896, Kassing *v.* Walter, — Ia. —, 65 N. W. 832 (offer of compromise, inadmissible); 1897, Houdeck *v.* Ins. Co., 102 Ia. 303, 71 N. W. 354 (similar); 1903, Rudd *v.* Dewey, 121 Ia. 454, 96 N. W. 973 (offer of compromise, not containing an admission of fact, excluded); 1905, Castner *v.* Chicago, B. & Q. R. Co., 126 Ia. 581, 102 N. W. 499 (an admission may be explained by the party's uncommunicated intent to accept a lower amount in compromise); 1905, State *v.* Campbell, 129 Ia. 154, 105 N. W. 395 (defendant's settlement of a former claim against the defendant, excluded); 1908, State *v.* Richmond, 138 Ia. 494, 116 N. W. 609 (burglary; defendant's offer to settle with the robbed party, admitted); 1914, Langdon *v.* Ahrens, 166 Ia. 636, 147 N. W. 940 (offer to settle, admitted);

Kansas: 1879, Central B. U. P. R. Co. *v.* Butman, 22 Kan. 639, 642 (admissions contained in a letter offering to compromise, received); 1917, Basnett *v.* Cherryvale G. L. & P. Co., 99 Kan. 716, 163 Pac. 161 (compromise of another suit from the same explosion; not decided);

Kentucky: 1827, Evans *v.* Smith, 5 T. B. Monr. 363 ("offers of sums, prices, or payments, made during an attempt to compromise", are not receivable; otherwise, of an acknowledgment of facts made pending a negotiation for settlement); C. C. P. 1895, §§ 634, 635, 640 (offer to confess judgment for a money claim "shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence upon the trial"); 1900, Tyler *v.* Hamilton, 108 Ky. 120, 55 S. W. 920 (statute applied); 1900, Kelley *v.* Combs, — Ky. —, 57 S. W. 476 (statute applied); 1902, Illinois C. R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40 (independent admission, made in an offer of compromise, admissible); 1904, List's Ex'r *v.* List, — Ky. —, 82 S. W. 446 (rule applied);

Louisiana: 1812, Delogny *v.* Rentoul, 2 Mart. La. 175 ("Proposals made while a compromise is on the carpet do not bind; but conversations in which a fact is disclosed may be admitted"); 1841, Agricultural Bank *v.* Bark Jane, 19 La. 1, 11 ("I am willing either to sell the ship at a low price, or charter her, so as to pay what I may be indebted to the

(in § 1061 (*c*)), *i.e.* to declare that unqualified statements conceding the opponent's claim are receivable in spite of their occurrence as a part of an

bank", admitted); 1896, State *v.* Wright, 48 La. An. 1525, 21 So. 160 (offers to compromise are "generally" excluded);
Maine: 1852, Cole *v.* Cole, 33 Me. 542, 545 (conversation had for "ascertaining the claims really existing", and not "to purchase peace", received); 1906, Finn *v.* New England T. & T. Co., 101 Me. 279, 64 Atl. 490 (an offer of money, made before any demand for redress by the plaintiff, falls within the rule excluding offers of compromise); R. S. 1916, c. 87, § 40 (unaccepted offer to be defaulted for a specified sum, not admissible);
Maryland: 1859, Reynolds *v.* Manning, 15 Md. 510, 526 (an offer to compromise is inadmissible, even though not expressly said to be confidential or without prejudice); 1897, Caledonian F. I. Co. *v.* Traub, 86, Md. 86, 96, 37 Atl. 782 (offer to settle, "not by way of compromise, but in settlement of what was conceded" to be due, received); 1901, Pentz *v.* Ins. Co., 92 Md. 444, 48 Atl. 139 (mere authority to agent to compromise, not followed by any act of offering, excluded; see quotation *supra*); 1907, Acker M. & C. Co. *v.* McGaw, 106 Md. 536, 68 Atl. 17 (offer made with a view to compromise, excluded);
Massachusetts: 1824, Marsh *v.* Gold, 2 Pick. 284, 290 ("when parties are treating about compromise, admissions of particular facts" are receivable); 1826, Gerrish *v.* Sweetser, 4 id. 374, 377 (same principle applied; the exclusion "seems confined to the mere offer of compromise"); 1845, Dickinson *v.* Dickinson, 9 Metc. 471, 474 ("the admission by a party of any independent fact is admissible, though made under a treaty of compromise"; here the parties were discussing a settlement, the plaintiff said, "I demanded the colt, you recollect", and the defendant answered "Yes", and this was received); 1851, Snow *v.* Batchelder, 8 Cush. 513, 516 (during a conversation, had in order to offer a settlement, defendant "said he owed the note"; held admissible); 1855, Harrington *v.* Lincoln, 4 Gray 563, 567 (rule applied); Emerson *v.* Boynton, 11 Gray 395 (rule applied); 1875, Durgin *v.* Somers, 117 Mass. 55, 61 (rule applied); the offer of compromise admitted "only so far as it contained independent statements of facts"); 1878, Draper *v.* Hatfield, 124 Mass. 53, 56 (rule applied); Gen. L. 1920, c. 231, § 88 (no unaccepted tender of default and damages under § 74, to be evidence in the same or another action); 1903, Higgins *v.* Shepard, 182 Mass. 364, 65 N. E. 805 (ordinary offer of compromise, excluded); 1904, Snow *v.* N. Y. N. H. & H. R. Co., 185 Mass. 321, 70 N. E. 205 (plaintiff's letter of claim, admitted on the facts); 1910, Grebenstein *v.* Stone & Webster Eng. Co., 205 Mass. 431, 91 N. E. 411 (mere offer to compromise, held inadmissible);
Michigan: 1878, Campau *v.* Dubois, 39 Mich. 274, 279 ("offers in negotiations for compromise" are inadmissible); 1887, Manistee N. Bank *v.* Seymour, 64 Mich. 59, 70, 31 N. W. 140 ("all admissions not expressly made to make peace, and all independent facts admitted during negotiations for settlement" are receivable); 1895, Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552 (offers of compromise, inadmissible); 1898, Fox *v.* Barrett, 117 Mich. 162, 75 N. W. 440 (similar); 1899, Phillips *v.* U. S. Benef. Soc'y, 120 Mich. 142, 79 N. W. 1 (correspondence with a view to settlement, excluded); 1904, Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788 (injury to a traction engine and plaintiff at a bridge; the township's settlement with the engine-owner, excluded); 1904, Musselman G. Co. *v.* Casler, 138 Mich. 24, 100 N. W. 997 (offer to settle, excluded); 1912, Crane *v.* Ross, 168 Mich. 623, 135 N. W. 83 (offer to settle for $25, excluded); Comp. L. 1915, § 12592 (offer to confess judgment, if not accepted, is not admissible);
Minnesota: Gen. St. 1913, § 7826 (offer to allow judgment, if refused, not admissible); § 7827 (tender of damages, not admissible); 1900, Person *v.* Bowe, 79 Minn. 238, 82 N. W. 480 (offer of payment, admitted on the facts);
Mississippi: Code 1906, § 771, Hem. § 554 (offer of satisfaction by defendant, if unaccepted, "shall not be given in evidence");
Missouri: 1863, Ferry *v.* Taylor, 33 Mo. 323, 333 ("an offer to pay a debt in property instead of money is in no sense an offer of compromise"); Rev. St. 1919, §§ 1395–6 (unaccepted offer to allow judgment or liquidate damages, not admissible);
Montana: Rev. C. 1921, § 10684 (like Cal. C. C. P. § 2078); § 9770 (like Cal. C. C. P. § 997);
Nebraska: 1888, Kierstead *v.* Brown, 23 Nebr. 595, 612, 37 N. W. 471 (admissions in letters written in response to a proposition of compromise, held not receivable); 1890, Eldridge *v.* Hargreaves, 30 Nebr. 638, 647, 46 N. W. 923 (offer to pay a smaller sum in settlement, excluded); 1891, Olson *v.* Peterson, 33 Nebr. 358, 363, 50 N. W. 155 (offer of a sum in settlement of a bastardy claim, excluded); 1896, Callen *v.* Rose, 47 Nebr. 638, 66 N. W. 639 (offers of compromise, inadmissible); 1897, Hanover F. I. Co. *v.* Stoddard, 52 Nebr. 745, 73 N. W. 291 (same); 1897, Wright *v.* Morse, 53 Nebr. 3, 73 N. W. 211 (same); Rev. St. 1922, §§ 8661, 8666, 8667 (offer to allow judgment in action for money; if not accepted, not admissible on trial);
Nevada: Rev. L. 1912, § 5265 (like Cal. C. C. P. § 997);
New Hampshire: 1828, Sanborn *v.* Neilson 4 N. H. 501, 508 ("an admission of particular

attempt to compromise. Interpreting it in the light of the expositions already quoted, no inconsistency appears. Its only effect has been, appar-

facts made during a treaty for a compromise" is receivable, as also an offer of settlement founded thereon; see quotation *supra*); 1833, Hamblett *v.* Hamblett, 6 N. H. 333, 343 (preceding case approved; an admission made by one rejecting an offer of compromise is receivable); 1845, Rideout *v.* Newton, 17 N. H. 71, 73 (Sanborn *v.* Neilson approved; an offer of part payment, made after advice to offer it if his signature to the note was genuine, here rejected); 1853, Downer *v.* Button, 26 N. H. 339, 345 (an offer of settlement, made because "he was too poor to pay more", excluded); 1856, Bartlett *v.* Hoyt, 33 N. H. 151, 153, 165 (whether a statement was an independent admission or an offer of compromise may be submitted to the jury as a question of fact; clearly unsound); 1862, Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 154 (general principle approved); 1862, Perkins *v.* Concord R. Co., 44 N. H. 223, 225 (same); 1870, Coffin *v.* Plymouth, 49 N. H. 173 (that the defendant had paid the claim of another person injured in the same accident, admitted, by a majority); 1872, Plummer *v.* Currier, 52 N. H. 287, 296 (prior cases approved); 1872, Grimes *v.* Keene, 52 N. H. 330, 334 (highway injury; defendant's payment in satisfaction to another person injured in the same occurrence, received as an admission, no aspect of a compromise appearing; "it is the simple case of a claim made and a yielding to it"); 1878, Gray *v.* Rollinsford, 58 N. H. 253 (an unqualified offer to pay a claim for damages is receivable; preceding cases approved); 1889, Colburn *v.* Groton, 66 N. H. 151, 156, 28 Atl. 95 (whether an offer or a payment was intended to be an admission of a liability or an effort to avoid a controversy is a question of fact, depending on intent, to be determined by the trial judge; see quotation *supra*); 1896, Wason *v.* Burnham, 68 N. H. 553, 44 Atl. 693 (conversation in course of making a settlement of claims, admitted); 1899, Jenness *v.* Jones, 68 N. H. 475, 44 Atl. 607 (offer of compromise, inadmissible, but "any independent admission, though made in the course of negotiations for a compromise", receivable); 1899, Greenfield *v.* Kennett, 69 N. H. 419, 45 Atl. 233 (offers of compromise are inadmissible, and the finding of fact is not reviewable); 1902, Smith *v.* Morrill, 71 N. H. 409, 52 Atl. 928 (Colburn *v.* Groton approved; whether a statement is an admission or a mere offer of compromise depends upon the intent);

New Jersey: 1899, Richardson *v.* International Pottery Co., 63 N. J. L. 248, 43 Atl. 692 (offer of compromise held admissible, unless expressly stated to be without prejudice or unless due to opponent's suggestion of compromise; no precedents cited);

New York: 1816, Mount *v.* Bogert, Anthon 259 ("an admission of a fact independent of the compromise" is receivable); 1816, Tomb *v.* Sherwood, 13 John. 288 (offer to settle for a smaller sum, excluded as "a mere peace-offering"); 1825, Murray *v.* Coster, 4 Cow. 617, 635, per Colden, Sen. (like Sanborn *v.* Neilson, N. H., quoted *supra*, § 1061); 1831, Hyde *v.* Stone, 7 Wend. 354, 357 (offer to pay, if a release was given, held not an offer of compromise, on the facts); 1837, Mead *v.* Degolyer, 16 Wend. 638, 644, per Cowen, J. (an admission of a fact, made in the course of a treaty of compromise is receivable); 1846, Marvin *v.* Richmond, 3 Denio 58 (admission made during a negotiation for settlement, received; repudiating Williams *v.* Thorp, 8 Cow. 201); 1864, Bartlett *v.* Tarbox, 1 Abb. App. Cas. 120, 122 (admission of a distinct fact during a negotiation for settlement, held receivable; otherwise of an offer for the purpose of effecting a settlement); 1886, White *v.* Old Dominion S. S. Co., 102 N. Y. 661, 6 N. E. 289 ("The law excludes such admissions as appear to have been made tentatively or hypothetically, but admits those only which concede the existence of a fact"; here an admission during a negotiation for compromise was held to be in effect hypothetical only); 1888, Brice *v.* Bauer, 108 N. Y. 428, 433, 15 N. E. 695 (on the facts, "even the offer of a sum by way of compromise is held to be admissible, unless stated to be confidential or made without prejudice"; preceding cases not cited); 1895, Tennant *v.* Dudley, 144 N. Y. 504, 39 N. E. 644 (offer of compromise, held inadmissible); 1905, Misner *v.* Strong, 181 N. Y. 163, 73 N. E. 965 (compromise negotiations admitted; the error, if any, held harmless; two judges diss.); 1906, Hindley *v.* Manhattan R. Co., 185 N. Y. 335, 78 N. E. 276 (damage by eminent domain, the defendant pleading prescription; the defendant's settlement with two hundred other abutters, not admitted to rebut the claim of prescription; "the acknowledgment of title in Tom and Dick is not an acknowledgment by implication of title in Harry"); 1916, Bradley *v.* McDonald, — N. Y. —, 119 N. E. 340, 353 (admissions made during an interview, held receivable on the facts); C. P. A. 1920, §§ 176, 178 (unaccepted offer to liquidate damages cannot be proved on trial); 1921, Nadler *v.* Stearn, Sup. App., 190 N. Y. Suppl. 577 (automobile injury; that defendant had settled with another claimant, a witness for the plaintiff in this case, not admitted); 1922, Wemyss Furn. Co. *v.* Strober, — App. Div. —, 191 N. Y. Suppl. 783 (sale of goods; offer to settle, without admitting any facts, excluded);

North Carolina: 1846, State *v.* Jefferson, 6 Ired. 307 (rape; the husband's offer of compromise in the wife's presence, excluded);

ently, to lead to a stricter application of the principle, in certain courts, resulting in a more liberal reception of evidence; for the judges affecting

Con. St. 1919, §§ 896, 897 (offer to allow judgment, unaccepted, "cannot be given in evidence");
North Dakota: Comp. L. 1913, §§ 7856–59 (unaccepted offer to allow judgment or assess damages, inadmissible); St. 1921, c. 38, Mar. 10, § 6 (boards of conciliation; "no parts of the proceedings shall be admitted as evidence or considered at the trial of the case");
Ohio: 1875, Sherer *v.* Piper, 26 Oh. St. 476 (the mere fact of an offer of compromise, as well as its terms, held inadmissible); 1910, Toledo St. L. & W. R. Co. *v.* Burr & Jeakle, 82 Oh. 129, 92 N. E. 27 (defendant's offer of settlement for a fire loss, not allowed to be alluded to by counsel for the plaintiff in addressing the jury); Gen. Code Ann. 1921, § 11395 (offer to confess judgment, made under statute, not admissible);
Oklahoma: Comp. St. 1921, § 849 (offer to confess judgment in money-action, not to be "deemed an admission of the cause of action or the amount", "nor to be given in evidence upon the trial"); 1912, Anadarko *v.* Argo, 35 Okl. 115, 128 Pac. 500 (city council's committee recommendation of a sum to be paid in settlement, with a finding that the city was indebted to the plaintiff in that sum, admitted, but on the wrong theory);
Oregon: Laws 1920, § 879 ("An offer of a compromise is not an admission that anything is due; but admissions of particular facts, made in negotiation for compromise, may be proved, unless otherwise specially agreed at the time"); § 532 (substantially like Cal. C. C. P. § 997); 1911, Weiss *v.* Kohlhagen, 58 Or. 144, 113 Pac. 46 (injury by an excavation; that the defendant had settled with others "in the same position as plaintiff", allowed); 1917, State *v.* McLennan, 82 Or. 621, 162 Pac. 838 (larceny of a horse; defendant's expression of a "desire to get it settled", excluded). 1921, Marshall *v.* Olson, — Or. —, 202 Pac. 736 (personal injury; offer to settle for one half, excluded);
Pennsylvania: 1845, Sailor *v.* Hertzogg, 2 Pa. St. 182, 183 (issue of title by adverse possession; occupant's offer to hold under the claimant, held, on the facts, to be a "direct confession of a fact", and not "an offer to buy peace without regard to the title"); 1909, Rabinowitz *v.* Sullivan, 223 Pa. 139, 72 Atl. 378 (distinct admission, made during compromise proposals, admitted);
Philippine Islands: C. C. P. 1901, § 346 (like Cal. C. C. P. § 2078); 1905, Manila *v.* Del Rosario, 5 P. I. 227, 230 (C. C. P. § 346, applied); 1911, Lichauco *v.* Limjuco, 19 P. I. 12, 21 (offer of compromise is not admissible; applying C. C. P. § 346); 1914, U. S. *v.* Maqui, 27 P. I. 97 (theft; offer of compromise admitted, subject to explanation); 1915, U. S. *v.* Torres, 34 P. I. 994 (opium offence; similar);
Porto Rico: Rev. St. & C. 1911, § 5357 (like Cal. C. C. P. § 997); 1910, Colomé *v.* Guánica, 16 P. R. 442 (payment in settlement is not an admission of liability); 1911, Pérez *v.* Guánica Centrale, 17 P. R. 927 (personal injury; offer of settlement, excluded);
Rhode Island: 1874, Daniels *v.* Woonsocket, 11 R. I. 4 (land-damages; plaintiff's offer of settlement, excluded as "privileged"); 1901, Draper *v.* Horton, 22 R. I. 592, 48 Atl. 945 (admission of amount due, with offer to pay it without costs, receivable); 1920, Messler *v.* Williamsburg C. F. Ins. Co., 42 R. I. 460, 108 Atl. 832 (offer by defendant to compromise, excluded);
South Carolina: C. C. P. 1922, §§ 645, 662, 664 (offer to allow judgment, according to statute, not to be receivable if unaccepted); 1899, Robertson *v.* Blair, 56 S. C. 96, 34 S. E. 11 (statements "made in the course of negotiations looking to a compromise", inadmissible); 1904, State *v.* Wideman, 69 S. C. 119, 46 S. E. 769 (malicious arson; defendant's statement of willingness to pay, though denying his guilt, admitted); 1906, Nickles *v.* Seaboard A. L. R. Co., 74 S. C. 102, 54 S. E. 255 (railroad wreck; that one of the injured employees, testifying for defendant, had received a sum in settlement from the defendant, admitted, citing no authority; Woods, J., diss. on the present ground; but it was really admissible, if at all, on the principle of § 961, *ante*); 1911, Wade *v.* Southern R. Co., 89 S. C. 280, 71 S. E. 859 (death by wrongful act; defendant introduced a release; held that being in the case it might be considered, with reference to its interpretation as an admission of liability);
South Dakota: Rev. C. 1919, §§ 2596–2599 (like N. D. Comp. L. §§ 7856–7859);
Tennessee: 1872, Strong *v.* Stewart, 9 Heisk. 137, 142 (demand of settlement by payment of a certain sum in compromise within four days, with the alternative of forfeiting all advantages under the contract, excluded);
Utah: Comp. L. 1917, § 6893 (unaccepted offer to allow judgment, inadmissible); 1918, Holt *v.* Great Eastern C. Co., 53 Utah 543, 173 Pac. 1168 (personal injury; certain correspondence held not inadmissible as an offer of compromise);
Vermont: 1850, Stanford *v.* Bates, 22 Vt. 546 (a mere offer of settlement is not receivable; otherwise of "a distinct admission of a fact", though made "during a negotiation for a settlement"); 1877, Doon *v.* Ravey, 49 Vt. 293, 296 (an admission which is a part of a treaty of compromise is privileged; but an admission made because "it *is* a fact", though during a treaty, is receivable); 1895,

that phrase seem inclined — as in Massachusetts — to give little weight to the general hypothetical nature of discussions attending a compromise-negotiation, and to admit every statement not in itself distinctly conditional.

§ 1063. **Same: (2) Admissions in Pleadings; (*a*) Attorney's Admissions, in general.** Whether a pleading in another suit is receivable as an admission is a question that has led to surprising variety of opinion. Before examining the state of the controversy, it is worth while to notice some related matters of principle which have a bearing upon it; and, in doing this, something must be anticipated of doctrines which more properly belong later.

(*a*) In the first place, an *attorney* is not a person whose admissions may be used against the party-client, except so far as concerns the *management of the litigation;* and this principle applies equally to the quasi-admissions here concerned and to the solemn admissions already discriminated (*ante*, § 1057). The reason for this limitation is that the attorney's admissions can affect his client so far only as he has authority to act as agent in his client's place (on the principle of § 1078, *post*). That authority, so far as it is to be implied from the mere general appointment as attorney, and has not been enlarged in the particular case, extends only to the management of the cause. Yet, conversely, all his admissions during that management, including the utterances in the pleadings, do affect the client:[1]

Neal *v.* Thornton, 67 Vt. 221, 31 Atl. 296 (offer of compromise, held inadmissible; good opinion); 1919, Thayer *v.* Glynn, 93 Vt. 257, 106 Atl. 834 (offer to pay, made independently "of any treaty of compromise or settlement", admitted; unsound; how could an "offer to pay" be independent of a "treaty of settlement"? The two expressions mean the same thing. The opinion calls it "an indirect admission of liability"; but that is precisely what the principle excludes; only express admissions count here);

Virginia: 1797, Baird *v.* Rice, 1 Call. 18, 26, per Pendleton, P. ("Propositions on either side, made by parties in a treaty for compromising their differences, if that treaty be not effectual, are not to operate as evidence in a future contest in court"); 1817, Williams *v.* Price, 5 Munf. 507, 538 (unaccepted offer tending to a compromise, excluded); 1835, Brown *v.* Shields, 6 Leigh 440, 446, 452 (letter held on the facts not to be an offer of compromise, and to contain distinct admissions; Tucker, P., diss.); 1905, Chesapeake & O. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161 (an offer of settlement of claims, construed as not "an effort to buy peace", and admitted);

Washington: 1900, Long *v.* Pierce Co., 22 Wash. 330, 61 Pac. 142 (an offer made on the faith of a compromise is inadmissible; whether it was so made is a question for the jury; the latter part of the ruling is erroneous);

West Virginia: 1906, Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026 (an expression of willingness to compromise as to a boundary, held ineffective);

Wisconsin: 1839, Johnson *v.* Wilson, 1 Pinn. 65, 70 ("admissions made by one party to another while mutually engaged in effecting a compromise of their difficulties", held inadmissible); 1860, State Bank *v.* Dutton, 11 Wis. 371 (statements made "in negotiating for a settlement", excluded); 1902, Collins *v.* State, 115 Wis. 596, 92 N. W. 266 (offer to settle a prosecution by restoring the money, admitted); 1903, Pym *v.* Pym, 118 Wis. 662, 96 N. W. 429 (settlement in compromise, held admissible, though not conclusive); 1907, Taylor *v.* Tigerton Lumber Co., 134 Wis. 24, 114 N. W. 122 (offers made during negotiations for compromise, excluded); 1921, Tullgren *v.* Karger, 173 Wis. 288, 181 N. W. 232 (unaccepted offer to settle, under Stats. § 2789, here admitted, because it was "embodied in the answer itself"; otherwise, if in a separate document);

Wyoming: Comp. St. 1920, § 5745 (offer to confess judgment, made according to statute, is not to be "given in evidence or mentioned on the trial").

For additional instances sometimes verging upon this principle, see *post*, § 1070 (admissions by reference).

§ 1063. [1] *Accord:* ENGLAND: 1807, Young *v.* Wright, 1 Camp. 139 (attorney's admission that the bill was for accommodation, excluded; judicial admissions, "with intent to obviate the necessity of proving it", are presumed to be by authority; "but it is clear that

1846, WILDE, C. J., in *Watson* v. *King*, 3 C. B. 608: "The attorney is not the agent of the client for the purpose of making admissions, except in the cause and for the purpose of the cause. All that appeared here was (the defendant having been proved to have held the premises at a certain rent) that one of the plaintiff's witnesses heard the plaintiff's attorney say that there was an agreement in writing. That clearly was no evidence at all to affect the plaintiff."

whatever the attorney says in the course of conversation is not evidence in the cause"); 1815, Marshall *v.* Cliff, 4 Camp. 133 (attorney's undertaking, before suit begun, to appear in any suit against defendant; his then authority presumed, from his now being attorney of record, so as to receive an admission of ownership contained in the undertaking); 1817, Parkins *v.* Hawkshaw, 2 Stark. 239, Holroyd, J. (defendant's admission as to the execution of a deed, excluded; "matter of conversation with an attorney could not be received in evidence against a client"); 1825, Colledge *v.* Horn, 3 Bing. 119 (statements by counsel, in the client's presence, in an address to the jury at a former trial; undecided, but it was assumed that apart from express authority or from assent by silence — *post*, § 1071 —, the statement was inadmissible; Best, C. J.: "I cannot allow that the counsel is the agent of the party"); 1832, Wagstaff *v.* Wilson, 4 B. & Ad. 339 (letter threatening legal proceedings, but written before action begun, excluded); 1845, Doe *v.* Richards, 2 C. & K. 216 (statements relating to a demand for possession, made before action brought by the person now attorney of record, excluded for lack of other evidence of authority; on offering evidence of the person being attorney at the prior time, Patteson, J., still doubted whether the attorney's admission was receivable); 1846, Watson *v.* King, 3 C. B. 608 (see quotation *supra*); 1846, Petch *v.* Lyon, 9 Q. B. 147, 154 (admissions which were "merely a loose conversation" and not "said as an admission of a disputed fact in the cause", held not sufficient).

UNITED STATES: *Fed.* 1917, Attleboro Mfg. Co. *v.* Frankfort M. A. & P. G. Ins. Co., 1st C. C. A., 240 Fed. 573 (attorney's authority to make a settlement must be evidenced); *Ark.* 1922, Moore *v.* State, — Ark. —, 236 S. W. 846 (argument of defendant's counsel in another trial against an accomplice, excluded); *Conn.* 1919, Riccio *v.* Montano, 93 Conn. 289, 105 Atl. 625 (statements by defendant insurer's adjuster, before an industrial accident commissioner, admitted); *Cal.* 1921, Kinley *v.* Largent, 187 Cal. 71, 200 Pac. 937 (administrator and his attorney may waive a surviving opponent's incompetency by failing to object); *Del.* 1910, Godwin *v.* State, 1 Boyce, 24 Del. 173, 74 Atl. 1101 (bribery of a voter; the prosecuting attorney before offering evidence addressed the Court stating certain admissions by the defendant in conference with him; held that the silence of defendant's counsel was evidence of assent to the correctness of the statements thus made by the prosecuting attorney); *Ga.* 1903, Cable Co. *v.* Parantha, 118 Ga. 913, 45 S. E. 787 (conversation of one attorney with the other, after levy made, not admitted on the facts); *Ia.* 1908, McDermott *v.* Mahoney, 139 Ia. 292, 115 N. W. 32, *semble* (counsel's statements during a former trial making a concession upon the opponent's offer of evidence, admissible); *Kans.* 1903, Missouri & K. Tel. Co. *v.* Vandevort, 67 Kan. 269, 72 Pac. 771 (admission in an opening speech at a prior trial, received); *Me.* 1906, Liberty *v.* Haines, 101 Me. 402, 64 Atl. 665 (letter from the plaintiff's attorney stating an assignment of the claim, admissible); 1916, Sanders Engineering Co. *v.* Small, 115 Me. 52, 97 Atl. 218 (attorney's letter to third person, admitted); *Mass.* 1861, Currier *v.* Silloway, 1 All. 19 (attorney's agreement as to the amount of the verdict and admitting payment, received); 1864, Saunders *v.* McCarthy, 8 All. 42 ("mere matters of conversation", out of court, not relating to the suit, excluded); 1878, Lord *v.* Bigelow, 124 Mass. 185, 189 (attorney's offer, in another cause, to prove certain facts by the testimony of the party then on the stand, received as an agent's admission); 1887, Johnson *v.* Russell, 144 Mass. 409, 412, 11 N. E. 670 (attorney's agreement as to a verdict, excluded on the facts); 1888, Pickert *v.* Hair, 146 Mass. 1, 4, 15 N. E. 79 (conversation "relating to a fact in controversy, but not an agreement relating to the management and trial of a suit, or an admission intended to influence the procedure", held inadmissible); 1893, Loomis *v.* R. Co., 159 Mass. 39, 34 N. E. 82 (attorney's letter to the defendant, stating the circumstances of the alleged injury, held admissible; this ruling confirms the preceding doctrine as to the authority of an attorney under his retainer for litigation merely, and proceeds upon his authority in this case "to present and collect a claim", — a palpably sound distinction, which may at any time come into play where the latter sort of authority is in fact given; Lathrop, J., and Field, C. J., diss.); 1906, Cadigan *v.* Crabtree, 192 Mass. 233, 78 N. E. 412 (counsel's answer to a question of the judge at a prior hearing of the same issue, excluded); *N. J.* 1917, Christy *v.* New York C. & H. R. R. Co., 90 N. J. L. 340, 101 Atl. 373 (timber destroyed by fire; admissions made by defendant's attorney at a hearing before a State public service commission,

1849, BELL, J., in *Truby* v. *Seybert*, 12 Pa. St. 101, 105: "The concessions of attorneys of record bind their clients in all matters relating to the trial and progress of the cause. . . . [But] it has been ruled that what an attorney says in the course of casual conversation, relating to the controversy, is not evidence. The reason of the distinction is found in the nature and extent of the authority given; the attorney being constituted for the management of the cause in Court, and in England for nothing else."

§ 1064. **Same: (*b*) Common-Law Pleadings in the Same Cause, as Judicial Admissions.** (1) The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions (*ante*, § 1057), but judicial admissions (*post*, § 2588); *i.e.* they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.

This much being generally conceded, it follows that a *party may* at any and all times *invoke the language of his opponent's pleading on that particular issue* as rendering certain facts *indisputable;* and that, in doing this, he is on the one hand neither required nor allowed to *offer the pleading in evidence* in the ordinary manner, nor on the other hand forbidden to comment in argument without having made a formal offer; for he is merely advocating a construction of the *infra*-judicial act of waiver of proof:[1]

received); *N. C.* 1905, Hicks *v.* Naomi F. M. Co., 138 N. C. 319, 50 S. E. 703 (certain admissions of the attorney at a former trial, excluded); *Vt.* 1910, United States, for use of E. L. C. Co. *v.* U. S. Fidelity & G. Co., 83 Vt. 278, 75 Atl. 280 (counsel's admissions of fact of issue, made during presentation of evidence, held binding); *Va.* 1907, Virginia-Carolina C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725 (letter of an attorney naming the witnesses to be summoned, excluded).

The attorney's authority may be *delegated to a clerk:* 1831, Taylor *v.* Willans, 2 B. & Ad. 845, 855 (malicious prosecution; affidavit, as to bail, by the attorney's clerk, admitted; "if an attorney leaves the conduct of a cause to his clerk, what the latter does therein binds the party, as much as the act of the attorney himself"); 1832, Standage *v.* Creighton, 5 C. & P. 406 (offer of payment to stop litigation; managing clerk's statement received, "if the clerk had the management of the cause"); 1903, Lord, Owen & Co. *v.* Wood, 120 Ia. 303, 94 N. W. 842 (attorney's clerk).

It is sometimes said that the incompetency of evidence (here in a partition suit) cannot be waived by counsel for *infant* defendants: 1906, Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678 (no authority cited); 1904, Jesperson *v.* Mech, 213 Ill. 488, 72 N. E. 1194 (no authority cited); but surely this is erroneous; for if counsel are authorized to act at all, in particular, to raise objections, they are certainly empowered to waive them.

Compare § 1053, n. 2, *ante*, and § 1076, n. 7, *post*.

A counsel has of course the same authority for *infant's guardian ad litem* as for any other client: 1911, Byrnes *v.* Butte Brewing Co., 44 Mont. 328, 119 Pac. 788.

§ 1064. [1] *Accord: Ga.* Rev. C. 1910, § 5775 ("Without offering the same in evidence, either party may avail himself of allegations or admissions made in the pleadings of the other"); *Ill.* 1904, Yates *v.* People, 207 Ill. 316, 69 N. E. 775 (if introduced by the opponent, he is bound by them); *Ind.* 1878, New Albany & V. P. R. Co. *v.* Stallcup, 62 Ind. 345, 347 (pleadings are not to be read as evidence, but may be commented on; because the pleadings "constitute a part of its proceedings without being introduced in evidence"); 1879, Colter *v.* Calloway, 68 Ind. 219, 223 (they may be commented on without being offered in evidence); *Iowa:* 1893, Shipley *v.* Reasoner, 87 Ia. 555, 557, 54 N. W. 470 ("They go to the jury; not as evidence, but for the purpose of showing what the issues are"); *Ky.* 1905, Palmer T. Co. *v.* Eaves, — Ky. —, 85 S. W. 750 (here erroneously said that the opponent's pleadings may be "introduced in evidence"); *Nebr.* 1895, Woodworth *v.* Thompson, 44 Nebr.

1889, VANN, J., in *Tisdale* v. *R. Co.*, 116 N. Y. 416, 419, 22 N. E. 700: "The object of pleadings is to define the issue between the parties, and when an issue of fact is tried before a jury they cannot appreciate the evidence, as it is given, unless they know the nature of the issues to be decided. Hence it is customary and proper for counsel, in opening, to tell the jury what the issues are as well as what they expect to prove. In some States the case is ordinarily opened by reading the pleadings. The pleadings are before the Court, not as evidence, but to point out the object to which evidence is to be directed. While a party sometimes formally reads in evidence the pleading of his adversary, or some part thereof containing a distinct and unconditional admission, no legal advantage is gained thereby, as the admissions, properly so-called, contained in an adverse pleading admit of no controversy and require no proof. . . . It is the duty of the Court, in charging the jury, to state the issues of fact raised by the pleadings. While this is commonly done in a summary way by stating the precise questions of fact to be decided, no reason is perceived why it may not be done by reading and analyzing the pleadings, when they are not complicated, and thus pointing out the issues and the position of the respective parties. It is evident, therefore, that the established practice does not require that the contents of the pleading should be concealed from the jury, as improper evidence is required to be kept from their attention. On the contrary, as the pleadings mark the boundaries within which the proof must fall, counsel upon either side are permitted to point out where they claim those boundaries are, before they introduce their evidence. So, when summing up, they restate the issues in order to logically apply the evidence to them. If they do not agree as to the construction of the pleadings, a question of law is presented, and it becomes the duty of the Court to construe them, to determine their legal effect and meaning, and to instruct the jury accordingly. In this case the answer was modified, but not superseded, by the stipulation, and in order to state the issues and point out what was admitted and what denied, it was necessary to construe the complaint, answer, and stipulation together. While the stipulation narrowed the issues to the injury inflicted upon the plaintiff and the amount of damages sustained by her, as it was alleged in the complaint, and not denied by the answer as modified, that she was precipitated with the falling bridge and train a distance of about thirty feet into the bed of the feeder, this became an admitted fact, important to be known by the jury, as it bore directly upon the

311, 62 N. W. 450 (pleadings need not be formally put in evidence, when referred to as admissions); *N. J.* 1898, Lee v. Heath, 61 N. J. L. 250, 39 Atl. 729 (plaintiff's bill of particulars, not being part of the record, must be formally offered in evidence when used as an admission); *N. Y.* 1871, White v. Smith, 46 N. Y. 418, 420 (pleading may be used as an admission; the opinion not stating how advantage is to be taken of the admission); 1889, Tisdale v. R. Co., 116 N. Y. 416, 418, 22 N. E. 700 (opponent's pleadings may be read by counsel, even when not formally put in evidence; see quotation *supra*); 1890, Holmes v. Jones, 121 N. Y. 461, 466, 24 N. E. 701 (defendant's answer read to the jury; "there is no rule of law which requires a party in any action to put his adversary's pleadings in evidence before his counsel can be allowed to comment upon them in his address to the jury. Statements, admissions, and allegations in pleadings are always in evidence for all the purposes of the trial"); *Vt.* 1911, Holbrook v. Quinlan & Co., 84 Vt. 411, 80 Atl. 339 (plea of former judgment, held conclusive as to two items remitted therefrom); *Wis.* 1875, Leavitt v. Cutler, 37 Wis. 46, 53 (reading of an answer, held unnecessary; "it is awkward practice formally to put them in evidence"); 1922, Nelson v. Pauli, — Wis. —, 186 N. W. 217 (personal injury; defendant's counsel allowed in argument to read part of plaintiff's complaint, without having offered it in evidence).

In *Massachusetts*, the statute seems to have been strangely interpreted: Mass. Gen. L. 1920, c. 231, § 87 ("Pleadings shall not be evidence on the trial, but the allegations therein shall bind the party making them"); 1866, Walcott v. Kimball, 13 All. 460 (pleadings not to be treated as evidence, in argument to the jury, but only as definitions of the issue; statute approved, because the circumstances giving rise to the drafting are improper to consider, and because comment at the argument leaves no opportunity for contrary evidence); 1872, Phillips v. Smith, 110 Mass. 61 (preceding case approved; pleading not admitted in evidence); 1878, Lyons v. Ward, 124 Mass. 364 (subsequent clauses of an answer, following a general denial, not allowed to be used as admissions); 1885, Taft v. Fiske, 140 Mass. 250, 5 N. E. 621 (preceding doctrine approved).

extent of the injury. The fright naturally caused by being thrown that distance, amidst the crash of the breaking bridge and falling train, was also important. Was it not within the discretion of the trial Court to permit counsel, in summing up for the plaintiff, to call the attention of the jury to this allegation of the complaint, and to show by reading and by proper comments, fairly explaining the answer, that it was not denied?"

(2) How does this principle affect the use of the pleadings upon *another issue in the same cause?* It forbids any resort to a pleading upon another issue; because the object of each set of pleadings or counts is to raise and to define the separate issues, and any use of the one to aid the other would to that extent defeat this object and prevent the trying of the issue made. This result has always been conceded [2] (except, for a time, in Massachusetts [3]). It is a purely artificial rule, an exception to principle, and is rendered necessary solely by the peculiar theory of common-law pleading; for its fundamental object is "to separate the law from the facts, and to narrow the latter down to a single issue", [4] and the statute permitting multiple pleas did not and

[2] ENGLAND: 1786, Kirk *v.* Nowill, 1 T. R. 118, 125 (Buller, J.: "There was no such an idea before . . . that one plea might be supported by what is contained in another; each plea must stand or fall by itself; they are as unconnected as if they were on separate records"); 1813, Harington *v.* MacMorris, 5 Taunt. 228, 233 (Mansfield, C. J.: "It is every day's practice that the defendant's language in one plea cannot be used to disprove another plea; as in the familiar instance I have given of trespass and not guilty and a justification pleaded, where the justification would certainly if admissible prove the act, in case the reason of the justification fails"; excluding a bill of particulars furnished with a notice of set-off); 1839, Jones *v.* Flint, 2 Per. & D. 594, 595 (debt: pleas, first, nunquam indebitatus, invoking the Statute of Frauds, and, next, tender and payment into court; the plaintiff argued that the objection of the statute was obviated by the admission of the contract in the plea of payment; but Coleridge, J., said: "How can the admission made in one plea be called in aid of the issue joined on another?" and counsel answered, "It is conceded that it could not"); CANADA: 1841, Kinnear *v.* Gallagher, 1 Kerr. N. Br. 424, 425; UNITED STATES: *Fed.* 1917, Illinois Central R. Co. *v.* Norris, 7th C. C. A., 245 Fed. 927 (statements made in a motion below to quash a writ of certiorari to the Industrial Board, on the ground of jurisdiction, not received, the motion being in the nature of a demurrer; but an argument before the Board was apparently admitted); *Del.* 1903, Craig *v.* Burris, 4 Del. 156, 55 Atl. 353 (plea of confession and avoidance in the same cause, excluded); *Ind.* 1905, Fudge *v.* Marquell, 164 Ind. 447, 73 N. E. 895 (contract: confession and avoidance); *Me.* 1856, Nye *v.* Spencer, 41 Me. 272, 276 ("the language of a defendant in one plea cannot be used to disprove another plea"); *Md.* 1906, Fifer *v.* Clearfield & C. C. Co., 103 Md. 1, 62 Atl. 1122; *Mich.* 1905, People *v.* Hoffmann, 142 Mich. 531, 105 N. W. 838 (affidavit for a continuance); *Miss.* 1859, Morris *v.* Henderson, 37 Miss. 492, 508 ("The subject-matter of each plea is a distinct and separate ground of defence, which cannot be used in evidence when the case turns upon an issue presented by another plea"); *N. H.* 1842, Kimball *v.* Bellows, 13 N. H. 58, 66 (conflicting statements in another court or plea cannot be used as admissions; here, a count struck out since the former trial); *N. C.* 1900, Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931, *semble;* Gould on Pleading, c. 8, pt. I; *Tex.* 1921, Hines *v.* Warden, — Tex. Civ. App. —, 229 S. W. 957 (action for goods not delivered by a carrier; admission in another part of an answer, not usable as an admission to disprove a general denial in the answer).

On the question whether an *affidavit of defence* is a plea, in this sense, see the following: 1897, Mullen *v.* Union C. L. Ins. Co., 182 Pa. 150, 37 Atl. 988; 1902, Taylor *v.* Beatty, 202 Pa. 120, 51 Atl. 771.

[3] 1818, Jackson *v.* Stetson, 15 Mass. 39, 50 ("the confession or admission of the defendant in one plea may be used against him on the trial of another"; here laid down for a plea of justification in slander, and even under a statute allowing multiple pleas by permission): this ruling was followed in two cases: 1822, Alderman *v.* French, 1 Pick. 1, 4, 11 Am. Dec. 114 (careful opinion); 1827, Hix *v.* Drury, 5 Pick. 296, 303. But the law was altered by St. 1826, c. 107, for actions of defamation, and later for all actions: Gen. L. 1902, c. 231, § 90 ("If a defendant answers two or more matters in his defence, no averment, confession, or acknowledgment contained in one of them shall be used or taken as evidence against him on the trial of an issue joined on any other of them").

[4] Langdell, Summary of Equity Pleading, § 34.

could not destroy the primary scheme of keeping each issue independent for the purpose of submission to the jury. Thus, in order to secure for each of these issues an independent investigation, it becomes necessary, *during that trial*, to ignore, artificially, the existence of the other series of pleadings in the same cause.

§ 1065. **Same: (c) Bills and Answers in Chancery in Other Causes.** The moment we leave the sphere of the same cause, we leave behind all questions of judicial admissions. A judicial admission is a waiver of proof (*ante*, § 1057); and a pleading is, for the purpose of the very cause itself, a defining of the lines of controversy and a waiver of proof on all matters outside these lines of dispute. But this effect ceases with that litigation itself; and when we arrive at other litigation and seek to resort to the parties' statements as embodied in the pleadings of prior litigations, we resort to them merely as quasi-admissions, *i.e.* ordinary statements, which now appear to tell against the party who then made them. Hence, their use is to be determined by the principles peculiar to the present subject.

Such extrinsic pleadings, being upon their face direct and plain assertions made for a serious purpose, would naturally be supposed to be available as admissions; and the inquiry plausibly arises, Why should they not be? Viewed in the light of the principles of the present subject, there can be but two conceivable objections; one is the objection that they were not made by the party himself, nor by any one authorized to speak for him (on the principle of § 1078, *post*); the other is that they are conventional or hypothetical only, and not intended to be taken as sincere or absolute assertions. Before examining the validity of these objections for common-law pleadings, it must be noticed what result was reached, as a matter of law, for pleadings in chancery.

(1) An *answer in chancery*, in another suit, was always and unquestionably allowed to be used as an admission of the party.[1] Neither of the above-suggested objections, indeed, could by possibility be urged against it; for it was not made in the name of another person, but was subscribed to by the party himself; nor could it be regarded as conventional or hypothetical, for it was solemnly sworn to as the party's sincere and unqualified avowals.

§ **1065.** [1] 1767, Buller, Trials at Nisi Prius, 237 ("If the bill be evidence against the complainant, much more is the answer against the defendant, because this is delivered in upon oath"); 1812, Lady Dartmouth *v.* Roberts, 16 East 334, 339; 1903, Booth *v.* Lenox, 45 Fla. 191, 34 So. 566; 1860, Robbins *v.* Butler, 24 Ill. 387, 427; 1915, Allen *v.* U. S. Fidelity & Guar. Co., 269 Ill. 234, 109 N. E. 1035 (action by sureties against their indemnifier; the sureties' answer in chancery, filed in a suit by the obligee against them, together with stipulations and briefs, admitted; but the opinion ignores the distinctions of principle involved); 1855, Williams *v.* Cheney, 3 Gray Mass. 215, 220 (statutory discovery), 1855, Judd *v.* Gibbs, 3 Gray 539, 543 (same); 1875, Broadrup *v.* Woodman, 27 Oh. St. 553.

Contra: 1884, Arnold *v.* Caldwell, 1 Manit. 81, 155 (answer in discovery).

For other and distinct questions affecting the use of answers in chancery, see *post*, §§ 2111, 2121 (whether the *whole* must be offered or might be offered); *post*, § 1216 (whether the *original* must be offered); *post*, § 2158 (how the *signature* could be authenticated), *post*, § 1387 (whether the *issues* must be the same in the other suit); and *post*, § 1416 (whether the party's *absence* must be accounted for).

(2) A *bill in chancery* was originally considered as equally admissible.[2] The fact that it was not subscribed and sworn to by the plaintiff was regarded as at most requiring some further evidence of the party's authority, — to safeguard against the possibility of assuming to be his a bill which had been filed by a stranger in his name; and for this purpose the presence of the opponent's answer in the files was deemed a sufficient safeguard.[3] But there grew up, with the development of chancery pleading, a marked distrust of the significance of a bill. The practice in drafting was such that the allegations were commonly understood to be, in large part, mere conventional rigmarole; for, since every interrogatory of discovery put to the opponent had to be founded on some charge in the bill, and since the answer need be no more specific than the charge or the interrogatory,[4] it was necessary to frame specific and positive charge-allegations upon all topics on which the party desired specific discovery from the opponent; and hence, such charges could and did take the widest range of possibility, in the form of downright assertions of fact, merely as a preliminary to securing the discovery. In short, the allegations were (to a large extent) simply the interrogatories phrased in affirmative form for technicality's sake, and to that extent were no index at all of what the plaintiff really believed and meant to assert.[5] For these reasons the doctrine came to be settled that a *bill in chancery was not receivable* in another suit as an admission:

1828, L. C. HART, in *Kilbee* v. *Sneyd*, 2 Moll. 186, 208: "The Court never reads a bill as evidence of a plaintiff's knowledge of a fact; it is mere pleader's matter; the statements of a bill are no more than the flourishes of the draftsman. No decree was ever founded on the allegations of a plaintiff's bill as evidence of facts."

1847, Mr. *R. N. Gresley*, Evidence in Equity, 323: "Bills in equity are notoriously filled with fictitious matter. Neither is it allowed to be used against the plaintiff, the assertor of these false allegations, because it has been found by experience that under the present system of pleading no process is so efficacious as alleging, in eventually eliciting the truth. The

[2] 1665, Snow v. Phillips, 1 Sid. 220 (bill in chancery; objected that it is "not evidence, because it only contains matter suggested perhaps by counsel or solicitor without the privity of the party"; but, *per Curiam*, it was received, because "they will not intend that it was preferred without the privity of the party, and if it was, he has good remedy against those who had preferred it, in action on the case"; here the "privity" clearly means, not the relation of consultation between an engaged counsel and his client, but that of the original engagement without which the counsel may be acting for some stranger pretending to be the party named); 1767, Buller, Trials at Nisi Prius, 235 ("The bill in chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed true; nor shall it be supposed to be preferred by a counsel or solicitor without the party's privity, and therefore it amounts to the confession and admission of the truth of any fact"; yet there must have been further proceedings on it, otherwise it might be merely a false bill by a stranger; "it must be supposed to be the party's bill, where his adversary has been compelled by the process of the court of Chancery to answer it").

[3] Buller, quoted above.

[4] Langdell, Summary of Equity Pleading, §§ 56, 57, 64.

[5] 1797 (?), L. C. Eldon, in Twiss' Life, I, 301: "Lord Thurlow, when Lord Chancellor, called me into his room at Lincoln's Inn Hall, and among other things asked me if I did not think that a wooden machine might be invented to draw bills and answers in Chancery. I told him that I should be glad if such a machine could be invented, as my stationer's copy of my pleadings generally cost me more than the fees paid me by the solicitors." For another passage illustrating the common understanding as to the fictitious character of these allegations, see *post*, § 2111.

Court looks upon these allegations as the mere suggestions of counsel, and connives at statements and charges being made for the sole purpose of putting questions founded upon them to the defendant."

This doctrine, which (barring Mr. Justice Buller's adherence to the earlier practice [6]) became established in England by the end of the 1700s,[7] was generally accepted in the United States, and seems to have lasted even under improved methods of pleading in chancery;[8] although it may be supposed that where a bill is now required to be sworn to, the rule for answers would be applied.[9]

It is apparent, then, that the objection to the use of bills in chancery was, not that its words were those of counsel only (for this argument seems to have been commonly ignored [10]), but that its allegations were

[6] Quoted *supra*, note 2.

[7] 1730, Lord Ferrers *v.* Shirley, Fitzg. 195 (bill in chancery objected to as being "no more than the surmises of counsel for the better discovery of title"; excluded without giving a reason); 1737, Ives *v.* Medcalfe, 1 Atk. 63, 65 (L. C. Hardwicke: "At law, the rule of evidence is that a bill in chancery ought not to be received in evidence, for it is taken to be the suggestions of counsel only; but in this Court it has often been allowed"); 1797, Doe *v.* Sybourn, 7 T. R. 1, L. C. J. Kenyon (bill in chancery, excluded; it is to be taken "merely as the suggestion of counsel", and is admissible only "to show that such a bill did exist and that certain facts were in issue between the parties, in order to let in the answers or depositions of the witnesses"); 1799, Taylor *v.* Cole, 7 T. R. note (same); 1848, Boileau *v.* Rutlin, 2 Exch. 665, 676 (assumpsit for use and occupation; to prove an agreement to purchase, the defendant offered a bill in chancery, for specific performance, filed by the plaintiff, and setting out the agreement; excluded as an admission; Parke, B.: "Those, as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied to be proved, and ultimately to be submitted for judicial decision"); 1862, Malcomson *v.* O'Dea, 10 H. L. C. 593 (to prove a prescriptive title to a fishery, a bill and answer in equity of 1674 were read; "This bill and answer were not read as evidence of the facts stated therein", but as indicating a dispute and then its abandonment, and thus, in connection with other things, an admission by the one party).

The opinion of the judges in the Banbury Peerage Case, 1809 (extracted in 2 Selwyn's Nisi Prius, c. 18, 11th Eng. ed., p. 765), sometimes cited as excluding a bill on the present principle, is in truth not an authority, since the bill was offered on behalf of the descendant of the party making it, and the present question was not referred to.

[8] *Federal:* 1855, Church *v.* Shelton, 2 Curt. C. C. 271, 274 (libel in admiralty, in another suit, not admissible, even though privity appear; following Boileau *v.* Rutlin); *Ala.* 1838, Adams *v.* M'Millan, 7 Port. 73, 85 (unsworn bills in chancery held inadmissible, being "the mere suggestions of counsel"); 1842, Durden *v.* Cleveland, 4 Ala. 225, 227 (same; there must be some recognition of the bill, as by verifying oath); *Ga.* 1892, Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92 (see citation *post*, § 1066); *Ky.* 1817, Francis *v.* Hazelrig, 1 A. K. Marsh. 93 (except to identify the land described in a decree); 1820, Rankin *v.* Maxwell, 2 A. K. Marsh. 488, 491 ("We well know that counsel are not restricted in crowding into their bill numerous allegations to dress their case"); 1823, Rees *v.* Lawless, 4 Litt. 218 (similar); 1827, McConnell *v.* Bowdry, 4 T. B. Monr. 392, 395 (bill considered; opinion obscure); *Mass.* 1870, Elliott *v.* Hayden, 104 Mass. 180, 183, *semble* (see citation *post*, § 1066); *Nebr.* 1921, Macke *v.* Wagener, 106 Nebr. 282, 183 N. W. 360 (slander; defendant had afterwards in a supposed settlement of the claim given notes and mortgage, and had then brought a bill in equity to cancel them; held that the pleadings in the equity case were inadmissible); *Pa.* 1832, Owens *v.* Dawson, 1 Watts 149, 150.

Contra: 1893, Schmisseur *v.* Beatrie, 147 Ill. 210, 216, 35 N. E. 525.

[9] *Can.* 1862, Doe *v.* Ross, 5 All. N. Br. 346 (bill in chancery sworn to, admitted; "the maxim 'cessante ratio etiam cessante lex' is now made applicable"); *U. S.* 1916, Taylor *v.* Weingartner, 223 Mass. 243, 111 N. E. 909 (bill to avoid a foreclosure sale; plaintiff's allegations in a bill sworn to, held to be "admissions of the truth of the facts stated", though not usable in his favor); 1890, Buzard *v.* McAnulty, 77 Tex. 438, 445, 14 S. W. 138.

[10] See the comment on Snow *v.* Phillips, cited *supra*, note 2.

not intended as the sincere statements of either counsel or party, and were merely conventional utterances formally desirable for ulterior purpose.

§ 1066. **Same: (*d*) Common-Law Pleadings in Other Causes.** In the light of the considerations just noted (in § 1065), what objection could exist to the use of *common-law pleadings, filed in other causes*, and containing statements now serviceable as admissions?

The objections that have been advanced are the two already noticed, namely, that the utterances of the pleading are not in fact made by the party himself, and that they are frequently conventional and fictitious allegations; though these distinct reasons are seldom carefully discriminated:

1837, BRONSON, J., in *Starkweather* v. *Converse*, 17 Wend. 20, 22: "The party may make an admission in one suit or plea which he would be very unwilling to follow in another. A fact which is either directly or impliedly admitted in pleading will be deemed true for all the purposes of that issue. But it may still be that the fact does not exist and that it was only conceded in the particular case because the party did not think it important in relation to that matter to put it in issue."

1847, SHAW, C. J., in *Baldwin* v. *Gregg*, 13 Metc. 253, 255: "The pleadings are usually filed by the attorneys; and they are filed with a view of laying the merits of the respective parties before the court, in a technical form, and can hardly be considered as the act of the parties. It is not competent for the jury to hear evidence, and inquire and decide whether a specification of defence was filed 'bona fide or mala fide'. A bill of particulars filed by a plaintiff, or a specification of defence filed by a defendant, is usually a formal document, drawn up by counsel, after some examination of his client's case, and is made broad enough to cover all which the party can expect, in any event, to prove; and in most instances, probably, is not seen by the party in whose behalf it is filed."

The answers to these objections are not difficult to find. (1) That the statements of the pleading are *not those of the party himself* must be immaterial, since they are those of his authorized attorney. The appointment of attorney and counsel makes them agents to manage the cause in all its parts, including unquestionably the pleading. The agent's utterances for the principal in the pleadings bind the party as solemn judicial admissions; much more, then, may the agency suffice to admit them as informal quasi-admissions. If the fortunes of the party in the cause are irretrievably determined by the utterances of the attorney in the pleadings, it is difficult to argue that the attorney is not an agent for the purpose of making the same utterances receivable in evidence as quasi-admissions. (2) It is said that the utterances of the pleadings are merely conventional and therefore *fictitious allegations*, not to be taken as sincere and 'bona fide' statements. This is an objection which had weight when the common-law fictions of trover and ejectment and implied assumpsit were in vogue, and when the bill in chancery could be correctly said by John Wesley to be "stuffed with stupid, senseless, improbable lies", and by Jeremy Bentham, a century later, still to be "a volume of notorious lies." Even then, the recognized conventions could be distinguished by the practitioner from the plain unvarnished claims. But to-day, in the great majority of jurisdictions, the reforms in pleading deprive this

objection of all weight. (3) Furthermore, the only plausible objection, namely, that many defensive pleadings are purely *hypothetical* in their nature and form, concerns matter which is restricted in scope and lends itself readily to segregation. For example, affirmative pleas in confession and avoidance should in strictness speak hypothetically in the confessing part;[1] but the avoiding part is unqualified in its form and must be taken to be sincere and final. It would therefore be correct enough to reject the former part as not an admission, since in form (if properly drawn) it admits nothing but assumes the fact provisionally for the purpose of avoiding it. But, leaving aside such portions, there is no reason why the plaintiff's allegations and the defendant's substantive replies in avoidance should not be taken for what they purport to be, namely, absolute utterances. Indeed, any other view is stultifying to the theory of legal proceedings; for it represents the pleadings during the trial of the cause itself as solemn asseverations upon the faith of which the parties' rights and liberties are forever adjudged and vindicated, and then proceeds, in the ensuing cause, to brush them aside as mere academic and unmeaning disputations, idle feats of forensic logic. Such a view is a travesty upon the facts.

That the pleadings in prior causes, then, can be treated as the parties' admissions, usable as evidence in later causes, must be conceded:

1883, ELLIOTT, J., in *Boots* v. *Canine*, 94 Ind. 408, 412: "Our statute has adopted the equity practice; we treat pleadings as statutory facts, not fictions. . . . If it can be said that Courts can presume that an answer under our code does not state facts, then it may be logically said that it is not evidence; but if the presumption is, that it does state facts, then it is logically inconceivable that it should not be evidence against the party. . . . Our code imperatively requires that pleadings shall state facts, but it does not stop with this command. It provides that 'All fictions in pleading are abolished.' It is several times declared that pleadings not sworn to shall have the same effect as pleadings sworn to. It is simply absurd to say that under our code the statements in the pleadings are mere fictions, and if they are not fictions then they are facts, and if facts in some cases, and in others conclusive admissions of record, then they are evidence. An admission in a pleading is the admission of matters of fact; this seems so plain that it is difficult to understand how the contrary doctrine can be seriously asserted."

The rule of law,[2] however, as generally applied under the orthodox com-

§ 1066. [1] Not all the orthodox forms do so, but the following illustrate the correct practice: Chitty, Pleading, 14th Am. ed., III, 965 (plea of set-off: "[Because the plaintiff owed the defendant at the same time the sum of $100, which sum] exceeds the *supposed* debt due and owing from the said defendant to the said plaintiff and the damages sustained by the said plaintiff by reason of the detention of the *supposed* debt so *alleged* to be due and owing to the said plaintiff as in the said declaration mentioned, and out of which said sum of money . . . he the said defendant is ready and willing and hereby offers to set off and allow to the said plaintiff the full amount of the said *supposed* debt and damages"); III, 1061 (plea of accord and satisfaction to a trespass: "Because he says that the said *supposed* trespasses were committed by the said W. P. (*if at all committed by him*) jointly with the said defendant G. S., and that after the committing of the said several *supposed* trespasses" an accord and satisfaction was had).

[2] The cases representing the different rules are as follows:

ENGLAND: 1848, Boileau v. Rutlin, 2 Exch. 665, 676 (pleadings at common law in another suit, said *obiter* to be inadmissible; quoted *supra*, § 1065, note 7); 1851, Marianski v. Cairns, 1 Macq. Sc. App. 212, 225 (creditor's claim against an estate; plaintiff's plea, in a suit for alimony, not sworn to be signed, held

mon-law system of pleading, seems to have been to exclude all common-law pleadings filed in other causes. On the other hand, under most of the reformed systems (by which the pleadings, approximating the chancery prac-

admissible; Lord Brougham: "Being in writing and signed by himself, it is to be regarded in the light of an admission").

CANADA: 1877, R. *v.* Wright, 17 N. Br. 363, 373 (affidavit made in another cause, admitted, per Wright, J., citing Richards *v.* Morgan, *post*, § 1075); 1877, Domville *v.* Ferguson, 17 N. Br. 40 (record in another suit, showing an admission of ownership of a vessel, admitted).

UNITED STATES: *Federal:* 1858, Combs *v.* Hodge, 21 How. 397, 404 (petition and answer in another suit "signed by counsel and not by the parties", held not receivable as admissions; following Boileau *v.* Rutlin); 1885, Pope *v.* Allis, 115 U. S. 363 (pleading in equity or law, if sworn to by the party, is receivable as a "solemn admission"); 1889, Delaware Co. Com'rs *v.* Diebold S. & L. Co., 133 U. S. 473, 487, 10 Sup. 399 (complaint "not under oath nor signed by the plaintiff", excluded); Rev. St. 1878, § 860 (now repealed; quoted *post*, § 2281); 1904, Miller *v.* U. S., 133 Fed. 337, 350, 66 C. C. A. 399 (conspiracy to use the mails to defraud; arguments of the defendant's attorney before a State insurance commissioner when opposing a rival's attempt to do business there, not admitted); 1913, Oregon & Cal. R. Co. *v.* Grubissich, 9th C. C. A., 206 Fed. 577 (sworn answer in another suit bearing the party's name, but not shown to have been personally signed by or known to the party, excluded);

Alabama: 1920, Richardson *v.* State, 114 Ala. 124, 85 So. 789 (murder; deceased's answer and crossbill in a divorce suit, material to show the deceased's motive in his conduct in defendant's presence, admitted, though not sworn to by deceased, merely to show the assertion of a certain claim therein; McClellan, J., diss.);

California: 1874, McDermott *v.* Mitchell, 47 Cal. 249 (joint answer of R. and M., verified by R. alone, not received against M.; "it was the mere work of the attorney"; no authority cited); 1886, Duff *v.* Duff, 70 Cal. 503, 521, 12 Pac. 570 (petition for letters of administration; certain statements therein were excluded, as not required to be made and therefore not impliedly authorized, nor yet shown to be inserted with the petitioner's knowledge and sanction); 1887, Kamm *v.* Bank, 74 Cal. 191, 195, 15 Pac. 765 (claim against an estate; the action being brought by the party's consent, "complaint therein is evidence against him of the fact of suit brought and of the nature of the action"); 1889, Coward *v.* Clanton, 79 Cal. 23, 29, 21 Pac. 359 (said *obiter* that the attorney's presumed authority entitles the pleading to be "regarded as the admission of the party", subject to his showing that he did not in fact authorize it); 1894, Solari *v.* Snow, 101 Cal. 387, 389, 35 Pac. 1004 (complaint in another suit excluded, because not signed by nor known to the party);

Georgia: 1892, Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92 (bill to recover land, filed in another suit against another person about the same land, admitted, though not sworn to or signed by the complainant but only signed by the solicitor); 1897, Farmer *v.* State, 100 Ga. 41, 28 S. E. 26 (false representations; answer in a creditor's suit, signed by certain persons as defendant's attorneys, not received in absence of proof of his direction or knowledge; distinguishing Lama *v.* Pearre as a civil case requiring a less stringent rule); 1901, St. Paul F. & M. Ins. Co. *v.* Brunswick G. Co., 113 Ga. 786, 39 S. E. 483 (garnishee's admissions in an answer in litigation with a debtor of the same name, admitted); 1914, Harrison *v.* Davis, 22 How. 51, 53 (quieting title; defendant's answer in a prior partition suit, usable as an admission of common source of title);

Illinois: 1897, Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. 307 (plea of set-off, etc., in another suit between the same parties on the same matter, admissible, but not without the declaration);

Indiana: 1883, Boots *v.* Canine, 94 Ind. 408, 414 (pleadings in general are admissible, on the presumption that the client authorizes its terms; see quotation *supra*);

Iowa: 1864, Ayers *v.* Ins. Co., 17 Ia. 176, 187 (unsworn answer, admitted);

Kansas: 1876, Hobson *v.* Ogden, 16 Kan. 388, 394 (verified pleading admitted); 1883, Solomon R. Co. *v.* Jones, 30 id. 601, 608, 2 Pac. 657 (same);

Louisiana: 1842, Wells *v.* Compton, 3 Rob. 171 182 *semble* (petition in another suit, admitted);

Maine: 1851, Parsons *v.* Copeland, 33 Me. 370, 374 (pleading in another suit, admitted; point not raised); 1897, Rockland *v.* Farnsworth, 89 id. 481, 36 Atl. 989 (a declaration of town of residence in a writ in another suit still pending, excluded);

Maryland: 1903, Nicholson *v.* Snyder, 97 Md. 415, 55 Atl. 484 (answer in bankruptcy, admitted);

Massachusetts: 1847, Baldwin *v.* Gregg, 13 Metc. 253 (quoted *supra*); 1861, Currier *v.* Silloway, 1 All. 19 (writ bearing an affidavit, in another suit, admitted); 1861, Gordon *v.* Parmelee, 2 All. 212, 215 (declaration in former suits, received, as being "not a mere technical statement of a cause of action by an attorney", but an averment by an agent in his employment); 1861, Jones *v.* Howard, 3 All. 224 (action on contract for use and occupation; evidence of previous action on writ of entry,

tice, are required to be signed by the party, and sometimes to be sworn to) they are commonly ruled to be admissible if it appears that the party signed them. A few Courts concede the same result also when the party's personal

admitted, subject to explanation by plaintiff as the result of a mistake); 1866, Bliss *v.* Nichols, 12 All. 443, 445 (declaration in another suit, "made by her authority", received); 1866, Boston *v.* Richardson, 13 All. 146, 162 (record in another suit, admitted); 1870, Elliott *v.* Hayden, 104 Mass. 180, 183 (sworn bill in another suit, filed but afterwards withdrawn, received, "upon the same ground upon which sworn answers and pleas in chancery, or allegations concerning the substance of the action in a declaration at common law, have been held admissible"); 1876, Brown *v.* Jewett, 120 Mass. 215, 217 (bill in equity received, if the party had signed and sworn to it or had authorized counsel to bring the bill for the purpose set forth therein, so far as that involved the statement in question); 1883, Dennie *v.* Williams, 135 Mass. 28 (answer in another suit, excluded, there being "nothing to indicate how far the attorney was particularly instructed"; prior cases distinguished as touching allegations "obviously made by direction" of the party or adopted "by prosecuting the action upon them" after knowledge of them); 1887, Johnson *v.* Russell, 144 Mass. 409, 11 N. E. 670 (answer in a former suit, admissible, when it contains "particular and specific allegations of matters of action or defence which cannot be presumed to have been made under the general authority of the attorney but are obviously from specific instructions of the party"); 1899, Farr *v.* Rouillard, 172 Mass. 303, 52 N. E. 443 (answer in another suit, not signed by defendant himself, excluded); 1900, Smith *v.* Paul Boyton Co., 176 Mass. 217, 57 N. E. 367 (record containing answer in another cause, received to show defendant's admission of ownership of property in issue); 1902, Stone *v.* Com., 181 Mass. 438, 63 N. E. 1074 (the plaintiffs now denying their title, the fact that in a prior case the counsel for the plaintiff "argued and tried to prove" that title was in the plaintiff, held inadmissible); 1905, De Montague *v.* Bacharach, 187 Mass. 128, 72 N. E. 938 (subsequent pleading of defendant in a second suit concerning the same contract, admitted merely to show that the defendant had pleaded the statute of limitations; Dennie *v.* Williams, *supra*, distinguished); 1917, Peck *v.* New England Tel. & T. Co., 225 Mass. 464, 114 N. E. 674 (to impeach the plaintiff's testimony as to the amount of his salary lost by an injury, the defendant was allowed to introduce the record in a suit by the plaintiff against his employer for unpaid salary; "the declaration may be presumed to have been prepared under the instructions of the plaintiff");

Michigan: 1903, Cornelissen *v.* Ort, 132 Mich. 294, 93 N. W. 617 (affidavit in another cause, received); 1916, Cady *v.* Doxtator, 193 Mich. 170, 159 N. W. 151 (injury to a motor-car; declaration of now defendant in a prior suit against the now plaintiff for the same collision, admitted against the defendant);

Minnesota: 1884, Vogel *v.* Osborne, 32 Minn. 167, 20 N. W. 129 (receivable "if it was signed or verified by the party, or if it otherwise affirmatively appears that the facts stated therein were inserted with his knowledge or by his direction"; or perhaps "if the party stands by it by allowing it to remain the pleading in the case"); 1889, Rich *v.* Minneapolis, 40 Minn. 82, 41 N. W. 455 (preceding case approved); 1893, O'Riley *v.* Clampet, 53 Minn. 539, 55 N. W. 740 (former claim in another lien-suit, received); 1902, Yoki *v.* First State Bank, 87 Minn. 295, 91 N. W. 1101 (affidavit of destitution in a divorce suit, admitted in an action for personalty); 1913, Salo *v.* Duluth & I. R. Co., 121 Minn. 78, 140 N. W. 188 (original of an amended complaint, not verified nor signed by the plaintiff, excluded, following Vogel *v.* Osborne);

Missouri: 1874, Dowzelot *v.* Rawlings, 58 Mo. 75 (petition filed by attorney of R. "at the latter's instance", admitted, "whether R. had seen the petition after it was drawn up, or not"); 1885, Anderson *v.* McPike, 86 Mo. 293, 301 (though the pleading is 'prima facie' receivable, yet, if proved to have been filed by one not employed as an attorney in the case, it is inadmissible); 1888, Nichols *v.* Jones, 32 Mo. App. 657, 664 (allegations in a pleading in another suit are receivable, because 'prima facie' the party acquiesced; but stipulations of fact filed in one action are not admissible elsewhere unless acquiescence of the client is shown);

Montana: 1903, Tague *v.* Caplice Co., 28 Mont. 51, 72 Pac. 297 (admissible if "verified by the party or prepared under his instructions");

Nebraska: 1886, Bunz *v.* Cornelius, 19 Nebr. 107, 114, 26 N. W. 621 (former petition for specific performance, admitted; no rule stated); 1899, Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383 (other pleadings "either made by his direction or afterwards sanctioned by him", or signed or verified, are admissible); 1899, Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383 (official bond of treasurer for second term; prior suit brought against bondsmen for first term, taken as an admission that part of total defalcation occurred during first term);

New Jersey: 1921, Stewart *v.* Stewart, — N. J. Eq. —, 114 Atl. 851 (divorce for adultery; respondent's plea of guilty to a criminal charge of the adultery, admitted); 1922, Lincks *v.* Erie R. Co., — N. J. L. —, 116 Atl. 493 (death of an employee; defendant's pleading in

knowledge of the pleading's contents is otherwise shown. For the reasons already explained, all of these limitations and requirements must be regarded as unsound, and this a few Courts appear to hold.

Certain discriminations, however, resting on peculiar grounds or on special evidential uses, need to be made:

(1) A statement by a person as *counsel in another's cause*, may of course not be treated as his own admission usable against him personally.[3]

(2) A pleading, or other litigious allegation (such as plea of 'nolo contendere' or a case stated) may be in its terms merely hypothetical or ambiguous, and may therefore not be interpretable as an admission.[4]

(3) So far as the fact of the *existence of a record* or suit or claim is in issue, the pleading may be considered in order to evidence that fact.[5]

(4) The privilege *against self-crimination* does not forbid the use, in a criminal prosecution, of a plea in prior civil case admitting the fact now charged, because the plea, filed voluntarily, was a waiver of the privilege. Never-

former litigation, as to the intra-state nature of the commerce, here admitted);

New York: 1837, Starkweather *v.* Converse, 17 Wend. 20, 22 (bill of particulars in another suit, excluded; see quotation *supra*); 1870, Cook *v.* Barr, 44 N. Y. 156, 158 ("It must first be shown, by the signature of the party or otherwise, that the facts were inserted with his knowledge or under his direction and with his sanction"); 1893, Hutchins *v.* Van Vechten, 140 N. Y. 115, 118, 35 N. E. 446 (admissions in a pleading in another action are receivable, "if signed by the party with knowledge of its contents");

Pennsylvania: 1841, M'Clelland *v.* Lindsay, 1 W. & S. 360 (plea in abatement in another suit, received); 1849, Truby *v.* Seybert, 12 Pa. St. 101, 105 (record in another suit, received, and assumed to be "either immediately from the party himself or authorized or assented to by him"); 1906, Com. *v.* Monongahela Bridge Co., 216 Pa. 108, 64 Atl. 909 (quo warranto; the defendant's answer in a prior suit for taxes, admitted, but not as conclusive); 1917, Scott *v.* American Express Co., 257 Pa. 25, 101 Atl. 96 (personal injury; pleadings of defence in another suit for the same accident, excluded, because offered only by reason of omissions in them, to discredit a witness, the rules of pleading not requiring an inclusion of such facts);

Philippine Islands: 1909, Mijares de Fariñas' Estate, 13 P. I. 63 (pleading in a former suit, not signed by deceased party, excluded);

Texas: 1866, Wheeler *v.* Styles, 28 Tex. 240, 246 (answer and exhibit in another cause, admitted; "it was his statement, made under oath"); 1890, Buzard *v.* McAnulty, 77 Tex. 438, 445, 14 S. W. 138 (pleading sworn to by the party, received); 1902, Murmutt *v.* State, — Tex. Cr. App. —, 67 S. W. 508 (plea of guilty on a charge of theft, admitted on a charge of burglary);

Wisconsin: 1896, Lindner *v.* Ins. Co., 93 Wis. 526, 531, 67 N. W. 1125 (prior pleading, unverified, held admissible; "presumptively the answer was authorized by the defendant, but it might show the circumstances and that the allegations were inserted without proper authority"); 1898, Lee *v.* R. Co., 101 Wis. 352, 77 N. W. 714 (pleading of plaintiff in another suit, not signed by him, admitted).

[3] 1887, Wood *v.* Graves, 144 Mass. 365, 370, 11 N. E. 567 (defendant's assumption of a fact in a brief submitted as counsel, held not an admission); 1902, Stone *v.* Com., 181 Mass. 438, 63 N. E. 1074 (see citation *supra*).

[4] *Cases stated:* 1807, Elting *v.* Scott, 2 John. 157, 162 ("case made" for argument, in another cause, rejected, as made "by counsel without any communication with the parties"); 1835, M'Lughan *v.* Bovard, 4 Watts Pa. 308, 313 (case stated for a judge cannot be used as an admission, especially when the parties have abandoned it and gone to the jury); 1848, Hart's Appeal, 8 Pa. St. 32, 37 (case stated, excluded). *Plea:* 1873, State *v.* Bowe, 61 Me. 176 (a plea of guilty of adultery, which might refer to either the woman's or the man's previous marriage, was therefore excluded as ambiguous); 1900, White *v.* Creamer, 175 Mass. 567, 56 N. E. 832 (bill to restrain the sale of liquor; plea of 'nolo contendere' in a prosecution for illegal sale, followed by conviction and sentence, excluded); 1902, State *v.* La Rose, 71 N. H. 435, 52 Atl. 943 (careful opinion; plea of 'nolo contendere', excluded); 1901, State *v.* Henson, 66 N. J. L. 601, 50 Atl. 468, 616 (plea of 'nolo contendere', usable as an admission of guilt in discrediting a defendant-witness); 1921, Stewart *v.* Stewart, — N. J. Eq. —, 114 Atl. 851 (explaining State *v.* Henson, *supra*).

[5] 1848, Boileau *v.* Rutlin, 2 Exch. 665, 677.

theless, in order to deprive a civil party of the right to refuse to plead on that ground, statutes have been enacted in some jurisdictions, forbidding the use of such pleadings in criminal cases.[6] Whether such statutes accomplish their primary purpose depends upon the principle of the privilege (*post*, §§ 2281, 2282). But the converse use, that of an *accused's pleading in a subsequent civil case*, would seem to be proper, and not within the prohibition of such statutes.[7]

(5) The use here discussed, of informal or quasi-admissions, has nothing to do with the use of *pleadings as solemn or judicial admissions* (*ante*, § 1057). The latter are conclusive in their nature; but that effect is confined to the cause in which they are made. When used in other causes as ordinary admissions, they are of course *not conclusive* [8] (on the principle of § 1058, *ante*); and therefore, so far as their admissibility is made (by some Courts, as above noted) to depend on the party's actual knowledge of their contents, or (when that requirement is not made) so far as the purpose is to detract from their weight, it may be shown by appropriate evidence that the party was in fact unaware of their contents.[9]

(6) A *default* in another suit, leading to *judgment on default*, would make admissible against the then defaulting party in the present case the essential allegations of claim on which the default was entered.[10] But that is because the failure to deny may amount to an admission by silence, on the principle of § 1072, *post*.

(7) The complicated doctrine of *judicial estoppel* is here to be distinguished.[11]

(8) Most statutes upon procedure in *juvenile courts* provide that no judgment or pleading or even evidence given in any proceeding against a juvenile

[6] These statutes are collected *post*, § 2281. A few of them are so broad as to exclude the pleading in "any" subsequent proceeding.

For the necessity of *corroboration* for an accused's confession see *post*, § 2071.

[7] 1904, Wesnieski *v.* Vanek, — Nebr. —, 99 N. W. 258 (malicious prosecution; plaintiff's plea of guilty in the criminal prosecution, admitted); 1921, Stewart *v.* Stewart, — N. J. Eq. —, 114 Atl. 851 (divorce for adultery; plea of guilty to a criminal charge of the adultery, sufficient); 1919, Engstrom *v.* Nelson, 41 N. D. 530, 171 N. W. 90 (battery; defendant's conviction upon plea of guilty to a criminal charge for the same act, admitted); 1916, Russ *v.* Good, 90 Vt. 236, 97 Atl. 987 (assault and battery; plea, self-defence; defendant's plea of guilty on a prosecution for breach of the peace, admitted); 1855, Birchard *v.* Booth, 4 Wis. 67, 69, 72 (battery; the defendant's oral plea of guilty on a criminal prosecution for the same battery, admitted).

So, too, in a *criminal* case: 1839, Com. *v.* Ervine, 8 Dana Ky. 30 (plea of guilty on a former trial for which judgment had been set aside, held properly admitted but not conclusive).

Some instances of the use of a former plea in a *criminal* case used in a subsequent criminal case will be found in the citations *supra*, n. 2, and *post*, § 1067.

[8] 1867, Tabb *v.* Cabell, 17 Gratt. Va. 160, 166; 1916, Russ *v.* Good, 90 Vt. 236, 97 Atl. 987.

[9] 1912, Coleman *v.* Jones & Pickett, 131 La. 803, 60 So. 243 (attorney's testimony that the allegation was made without knowledge of the party); 1916, Spain *v.* Oregon & W. R. & N. Co., 78 Or. 355, 153 Pac. 470 (trespass and malicious arrest by defendant's agent; plea, that plaintiff was drunk and disorderly, and that he afterwards pleaded guilty when charged; the plea of guilty held not conclusive); 1835, M'Lughlan *v.* Bovard, 4 Watts Pa. 308, 313 (case stated for the Court).

Compare also the cross-references *ante*, § 1065, note 1.

[10] 1920, Bonazzi *v.* Fortney, 94 Vt. 263, 110 Atl. 439 (malicious prosecution; issue whether plaintiff had been partner with his father; plaintiff's default in an action against the two as partners, admitted).

[11] A careful examination of the doctrine and its precedents will be found in the following opinion by Provosty, J.: 1913, Farley *v.* Frost-Johnson L. Co., 133 La. 497, 63 So. 122.

offender shall be used in evidence against him subsequently in any court. Broad as this provision is, its object is mainly to exclude the conviction as evidence of character, under statutes permitting a sentence to be affected by a record of prior convictions. The authorities have therefore been noted *ante*, § 196, under the Character rule.

§ 1067. **Same: (*c*) Superseded or Amended Pleadings.** When a pleading is amended or withdrawn, the superseded portion disappears from the record as a judicial admission limiting the issues and putting certain facts beyond dispute. Nevertheless, it exists as an utterance once seriously made by the party. While thus denied all further effect as a pleading, may it not still be used as a quasi-admission, like any other utterance of the party?

The objection to this use of it has been thus stated:

1885, DEVENS, J., in *Taft* v. *Fiske*, 140 Mass. 250, 252, 5 N. E. 621: "The plaintiff here, by means of the answer first filed and that subsequently relied on, endeavored to show that the amended answer was a 'put up' defence. The force of his argument depended upon a comparison of the evidence afforded by the two answers. It would be a [redacted]us embarrassment to that liberal amendment of pleadings contemplated by our sta[redacted]f a party availing himself of the leave in this respect granted by the Court could only [redacted]so by subjecting himself to the imputation that his new form of statement, by its difference from that previously made, showed that he presented a simulated case. . . . The original statement of a party's case is often hurriedly prepared, with imperfect information of the facts, and sometimes under misapprehension of the law. New facts are revealed at the trial, and new views of the law applicable to them are suggested. It would be unjust, if, in a closing argument, the counsel could be allowed to compare the answer originally made with that finally relied on, without an investigation of all the circumstances under which the original answer was made. Yet such an investigation would be manifestly impossible. To permit counsel thus to comment after the evidence has been concluded, and when no opportunity for explanation remains, or indeed could ever be given, would often cause an entirely different effect to be attributed to the legal statements of a defence from that which they should properly bear."

So far as the argument from hurry and inadvertence is concerned, it would be equally valid against many extrajudicial utterances of the party. Yet no one has ever supposed that it afforded any reason for their rejection. The party is always at liberty to show the circumstances in explanation, to detract from the significance of his utterance. The other argument — that of the unfairness of allowing comment in argument, after the evidence closed — rests on incorrect premises, for the conceded rule (noted later) is that the superseded pleading, when thus used, must always be formally offered in evidence at the proper time, like all other matters of evidence. There is no reason why a retraction, based (perhaps) on better information, should effect the exclusion of this rather than of any other sort of statement, once made by the party and now offered against him:

1883, ELLIOTT, J., in *Boots* v. *Canine*, 94 Ind. 408, 416: "We should feel that we were doing an idle thing if we should undertake to cite authority upon the proposition that a party cannot be deprived of his right to give in evidence an admission because the latter had withdrawn it. Even in criminal cases, an admission made by the accused before the

examining magistrate is not rendered incompetent by a subsequent withdrawal. The withdrawal of an admission may, in proper cases, go in explanation, but it cannot change the rule as to its competency. We have never, until the argument in this case, known it to be asserted that the withdrawal of a confession or an admission destroyed its competency as evidence against the person making it. If it did, then criminals might destroy evidence by retraction, and parties escape admissions by a like course. The law tolerates no such illogical procedure. It is proper to show the withdrawal and all attendant circumstances, for the purpose of determining the weight to be attached to the admission, but not for the purpose of destroying its competency."

1903, Hon. *A. C. Plowden*, "Grain or Chaff; the Autobiography of a Police Magistrate", p. 156: "[When I was barrister on the Stafford Assizes,] I had been briefed to defend a man on a charge of horse-stealing; and, as briefs were scarce, I had no idea of letting the case go without a fight. As chance would have it, the prisoner was arraigned during the luncheon hour when I had left the court, and I was disgusted to find on return that he had actually pleaded 'Guilty.' I at once sought the judge, [Baron Bramwell,] and asked him privately to let the plea be withdrawn, explaining to him my position, and assuring him that had I been in court I should have advised the prisoner differently. The learned Baron demurred at first, but seeing my earnestness he gave way, and the prisoner was permitted to withdraw his plea. The trial came on; and after I had addressed the jury with much fervor, the learned [illegible] proceeded to sum up as follows: 'Gentlemen of the jury, the prisoner at the bar is indicted for stealing a horse. To this charge he has pleaded Guilty; but the learned counsel is convinced this was a mistake. The question, therefore, is one for you, gentlemen, which of them you will believe. If you should have any doubt, pray bear in mind that the prisoner was there and the learned counsel was n't.' Laughter from every part of the court seemed to follow this terse exposition. . . . I could not doubt, however, the absolute justice of the verdict that followed."

Such is the view generally accepted (although the rulings are by no means uniform) for *civil* cases.[1]

§ 1067. [1] *California:* 1876, Ponce *v.* McElvy, 51 Cal. 222 (superseded complaint, not allowed to be read); 1884, Johnson *v.* Powers, 65 Cal. 179, 180, 3 Pac. 625 ("Such statements, so far as they were contradictory of or inconsistent with his statements as a witness, were as much admissible, for the purpose of impeaching him, as if they were contained in a letter written by him to a third person or in an affidavit filed in a distinct proceeding"); 1886, Pfister *v.* Wade, 69 Cal. 133, 138, 10 Pac. 369 (superseded pleading does not bind; but it is receivable so far as it serves any purpose other than as a pleading; here, the plaintiff was allowed to use his own superseded pleading as containing an offer to pay money into court); 1886, Wheeler *v.* West, 71 Cal. 126, 128, 11 Pac. 871 (superseded complaint, held not admissible for defendant, the purpose not appearing in the report); 1889, Coward *v.* Clanton, 79 Cal. 23, 28, 21 Pac. 359 (answer in another suit on the same subject, received, though "superseded by the filing of another answer"; "no matter if it had ceased to exist as a pleading in the cause, it was still binding upon the respondent as an admission"; no authority cited); 1896, Ralph *v.* Hensler, 114 Cal. 196, 45 Pac. 1062 (superseded pleading held inadmissible in evidence); 1896, Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076 (original amended pleading, not received); 1897, O'Connor's Estate, 118 Cal. 69, 50 Pac. 4 (superseded pleading, admitted); 1902, Ruddock Co. *v.* Johnson, 135 Cal. 919, 67 Pac. 680 (withdrawn cross-complaint, held not evidence); 1907, Pollitz *v.* Wickersham, 150 Cal. 238, 88 Pac. 911 (the California rule as to superseded pleadings held not applicable to exclude a creditor's claim formerly presented by plaintiffs to defendant and differing from the later one relied on at the trial); 1921, Williams *v.* Seiglitz, 186 Cal. 767, 200 Pac. 635 (slander; the original verified answer admissible to impeach as a prior inconsistent statement); *Florida:* 1921, Watkins *v.* Sims, 81 Fla. 730, 88 So. 764 (promissory note; "the original pleas being superseded by the amended and additional pleas, it was improper for counsel to exhibit the former pleas to the jury", etc.); *Georgia:* 1902, Alabama Midland R. Co. *v.* Guilford, 114 Ga. 627, 40 S. E. 714 (superseded pleading, held admissible); *Illinois:* 1899, Wenegar *v.* Bollenbach, 180 Ill. 222, 54 N. E. 192 (superseded bill in same proceeding, excluded, where not verified by the party but drawn by the attorney under a misapprehension; no general rule laid down); *Indiana:* 1883, Boots *v.* Canine, 94 Ind. 408, 416 (see quotation *supra*);

Iowa: 1873, Mulligan *v.* R. Co., 36 Ia. 180, 189 (amended pleading, admissible); 1886, Raridan *v.* R. Co., 69 Ia. 527, 531, 29 N. W. 599 (same); 1893, Shipley *v.* Reasoner, 87 Ia. 555, 557, 54 N. W. 470 (same); 1897, Ludwig *v.* Blackshere, 102 Ia. 366, 71 N. W. 356; 1903, Caldwell *v.* Drummond, — Ia. —, 96 N. W. 1122 (same); 1918, Farmers' Handy Wagon Co. *v.* Casualty Co., 184 Ia. 773, 167 N. W. 204 (indemnity against injuries to employees; withdrawn answer, admitted); 1921, Second Nat'l Bank *v.* Hults, 191 Ia. 353, 182 N. W. 175 (forgery of a note; defendant's pleading before amended, held "a circumstance to be considered");

Kansas: 1909, Arkansas City *v.* Payne, 80 Kan. 353, 102 Pac. 781 (answer and dismissed cross-petition, allowed to be read); 1919, Morrison *v.* Montgomery, 105 Kan. 430, 184 Pac. 985 (statement in a brief filed on former appeal of the same cause, not admitted, on the facts of the case); 1918, Berry *v.* Dewey, 102 Kan. 392, 170 Pac. 1000 (death by wrongful act; an application for continuance in 1906, admitted; "abandoned pleadings . . . are admissible in that action");

Kentucky: 1903, Wyles *v.* Berry, 116 Ky. 377, 76 S. W. 126 (original amended pleading, signed and sworn, held admissible);

Massachusetts: 1847, Baldwin *v.* Gregg, 13 Metc. 253 (the filing and withdrawing of a specification of defence is not to be considered); 1885, Taft *v.* Fiske, 140 Mass. 250, 5 N. E. 621 (the filing of an amendment to a pleading is not a proper subject of comment in argument, nor can the original pleading be used in evidence; see quotation *supra*); 1900, Demelman *v.* Burton, 176 Mass. 363, 57 N. E. 665 (comments on the amended answer, held improper on the facts); 1889, Com. *v.* Brown, 150 Mass. 330, 23 N. E. 49 (accused's plea of guilty before the magistrate on complaint, admitted); 1920, Woodworth *v.* Fuller, 235 Mass. 443, 126 N. E. 781 (amended claim filed, increasing the amount from $4190 to $6624; on cross-examination, counsel, holding the pleadings in his hand, asked whether and when the party had furnished to his counsel a statement claiming only $4190; held proper; "the questions did not relate to the contents of the pleadings, but to declarations material to the issues on trial"; distinguishing Demelman *v.* Burton);

Michigan: 1888, People *v.* Gould, 70 Mich. 240, 38 N. W. 232 (request to the justice to be allowed to withdraw a plea of not guilty, and to plead guilty, admitted); 1904, Bernard *v.* Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396 (not decided);

Minnesota: 1884, Vogel *v.* Osborne, 32 Minn. 167, 20 N. W. 129 (superseded pleading, held admissible, but under a stricter rule, as to proof of the party's personal knowledge of it, than other pleadings); 1905, Stearns *v.* Kennedy, 94 Minn. 439, 103 N. W. 212 (verified amended answer, admitted); 1913, Salo *v.* Duluth & I. R. Co., 121 Minn. 78, 140 N. W. 188 (cited *ante*, § 1066, n. 2);

Missouri: 1897, Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928 (two former answers in the same cause, omitting to allege the present defence, received); 1906, Overton *v.* White, 117 Mo. App. 576, 93 S. W. 363 (abandoned answers, admitted);

Montana: 1897, Mahoney *v.* Hardware Co., 19 Mont. 377, 48 Pac. 545 (a part abandoned before trial, held not admissible);

Nebraska: 1895, Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 450 (original pleading, admitted); 1899, Miller *v.* Nicodemus, 58 Nebr. 352, 78 N. W. 618 (original of amended answer, receivable);

New York: 1889, Tisdale *v.* R. Co., 116 N. Y. 416, 420, 22 N. E. 700 (original answer, as modified by a stipulation narrowing the issue, allowed to be used);

North Carolina: 1882, Adams *v.* Utley, 87 N. C. 356 (amended answer, admitted; "as a declaration of the defendant, it can lose none of its vigor because of that circumstance"); 1906, Norcum *v.* Savage, 140 N. C. 472, 53 S. E. 289 (parts of an original answer, admitted);

North Dakota: 1909, Leistikow [illegible]elsdorf, 18 N. D. 511, 122 N. W. 340 (not decided);

Oklahoma: 1906, Page *v.* Geiser Mfg. Co., 17 Okl. 110, 87 Pac. 851 (here the original of an amended pleading in the probate court below was erroneously treated as a binding admission; "the plaintiff . . . is bound by the admissions made in his original answer"); 1906, Limerick *v.* Lee, 17 Okl. 145, 87 Pac. 859 (the original of an amended petition in a lien proceeding held admissible but not conclusive; this Court has not let its left hand know what its right was inditing, for this and the preceding opinion were written by the same judge, and were filed on the same day, but neither opinion distinguishes or refers to the other; illustrating that a youthful Commonwealth can quickly enough plunge into that mire of legal uncertainty which has been supposed to be an inheritance of the older ones only);

Oregon: 1899, Sayre *v.* Mohney, 35 Or. 141, 56 Pac. 526 (original of verified pleading, afterwards amended, receivable); 1909, Elliff *v.* Oregon R. & N. Co., 53 Or. 66, 99 Pac. 76 (withdrawn complaint, receivable); 1919, Garvin *v.* Western Cooperage Co., 94 Or. 487, 184 Pac. 555 (an action was brought by an administrator for the death of R.; a motion for a nonsuit was granted, the defendant's attorney pointing out that "it is disclosed by the evidence that the deceased has a mother" and the statute in such cases making the mother the plaintiff; the action was then renewed in the name of the mother, suing as an alien through the alien property custodian; on this trial the admission of the defendant's attorney in the first action as to the deceased having a mother was excluded; unsound and unfair; any rule which permits a party to play fast and loose in such manner reveals its unsoundness);

For *criminal* cases (where a withdrawn plea of guilty is later offered), the few authorities are divided.[2]

But, since the superseded pleading is offered, like any other statement of the party constituting a quasi-admission, as an item in the general mass of evidence against the party, it must of course be put in *at the proper time*. It therefore cannot be commented on in argument, unless (according to the principles of §§ 1806, 1866, *post*) it has been thus formally offered in due season:[3]

1886, ORTON, J., in *Folger* v. *Boyinton*, 67 Wis. 447, 30 N. W. 715: "The pleadings in the cause may be referred to by counsel or the Court to ascertain the nature and scope of the action and, if there is an answer, the real issues in the cause, and for no other purpose. But they cannot be referred to as proof of any fact unless they are introduced in evidence on the trial with at least some chance for explanation. The original complaint was sought to be read to the jury [during the closing argument] to show what the allegation of the plain-

Rhode Island: 1905, O'Connell v. King, 26 R. I. 544, 59 Atl. 926, *semble* (a withdrawn plea of tender may be used as an admission, subject to explanation);

South Dakota: 1896, Corbett v. Clough, 8 S. D. 176, 65 N. W. 1074 (superseded complaint, verified by the attorney only, held inadmissible, unless the party's direction or sanction is shown for the parts offered); 1903, La Rue v. St. Anthony & D. E. Co., 17 S. D. 91, 95 N. W. 292 (superseded complaint, signed by the attorney, held not admissible unless the plaintiffs had personally sanctioned its recital);

Texas: 1859, Coats v. Elliott, 23 Tex. 606, 613 (said *obiter* that a superseded pleading might properly have been excluded); 1896, Barrett v. Featherston, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245 (superseded answer, admitted; Boots v. Canine, Ind., followed; Hunter, J., diss., in the Civ. App. Ct.); 1902, Houston E. & W. T. R. Co. v. De Walt, 96 Tex. 121, 70 S. W. 531 (former unamended pleading, received); 1903, Orange R. M. Co. v. McIlhenny, 33 Tex. Civ. App. 592, 77 S. W. 428 (abandoned pleading, admitted); 1903, Texas & P. R. Co. v. Goggin, 33 Tex. Civ. App. 667, 77 S. W. 1053 (similar; that it is not signed or sworn to by the party is immaterial);

Utah: 1896, Kilpatrick Co. v. Box, 13 Utah 494, 45 Pac. 629 (original answer before amendment, admitted);

Washington: 1905, State v. Bringgold, 40 Wash. 12, 82 Pac. 132 (accused's plea of guilty before the justice of the peace, afterwards withdrawn, admitted);

Wisconsin: 1875, Leavitt v. Cutler, 37 Wis. 46, 53 (original and first amended answer, in an action for breach of marriage-promise, held inadmissible to enhance damages); 1886, Folger v. Boyinton, 67 Wis. 447, 30 N. W. 715 (original complaint under oath, in an action for a crop-contract, held admissible "by way of impeachment or as admissions of the plaintiffs"); 1896, Lindner v. Ins. Co., 93 Wis. 526, 530, 67 N. W. 1125 (loss by fire; portions of the answer withdrawn by the defendant, held receivable; Leavitt v. Cutler, distinguished); 1901, Hocks v. Sprangers, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113 (defendant's original default and subsequent reopening of the case, excluded); 1883, Norris v. Cargill, 57 Wis. 251, 256 (original of an amended answer, allowed to be read to the jury as an admission "for what it was worth"); 1905, Schultz v. Culbertson, 125 Wis. 169, 103 N. W. 234 (original of an amended pleading, unverified and unsigned, admitted); 1909, Schoette v. Drake, 139 Wis. 18, 120 N. W. 393 (original answer, admitted).

[2] 1889, People v. Ryan, 82 Cal. 617, 23 Pac. 121 (withdrawn plea of guilty, held improperly admitted); 1916, State v. Carta, 90 Conn. 79, 96 Atl. 411 (assault to kill; defendant's withdrawn plea of guilty, held admissible, merely as an extra-judicial admission inconsistent with the present plea of self-defence; careful opinion by Thayer, J.; two judges diss.); 1889, State v. Meyers, 99 Mo. 117, 12 S. W. 516 (withdrawn plea of guilty, held improperly admitted); 1907, U. S. v. Alonso, 8 P. I. 78 (plea of guilty on preliminary examination, admissible; Tracey, J., diss.);

For the necessity of *corroboration* to an accused's extra-judicial confession, see *post*, § 2071.

[3] *Accord: Ia.* 1893, Shipley v. Reasoner, 87 Ia. 555, 558, 54 N. W. 470 (explaining away Cross v. Garrett, 35 Ia. 480, 486; Hanners v. McClelland, 74 Ia. 318, 323, 37 N. W. 389; Brannum v. O'Connor, 77 Ia. 632, 635, 42 N. W. 504); 1896, Leach v. Hill, 97 Ia. 81, 66 N. W. 69; *Me.* 1906, Liberty v. Haines, 101 Me. 402, 64 Atl. 665 (attorney's letter, not offered in evidence, but merely placed on file for a motion, not regarded as introduced); *Nebr.* 1895, Woodworth v. Thompson, 44 Nebr. 311, 62 N. W. 450; 1908, Waapke & K. Co. v. Schmoeller & M. P. Co., 82 Nebr. 716, 118 N. W. 652 (but not when the amendment was made after trial begun); *Wis.* 1886, Folger v. Boyinton, 67 Wis. 447, 30 N. W. 715 (see quotation *supra*).

tiffs was as to the contract. This was to prove the admissions of the plaintiffs as to what it was, and therefore should have been introduced as any other testimony in the case, so as to give the plaintiffs a chance to explain such an admission. But that old complaint, not then being the complaint in the cause, should of course be introduced in evidence like the records in another case. . . . To read that complaint to the jury would not be reading any part of the pleadings in the cause, either to ascertain the issues or the nature and scope of the action. I never heard of such a practice as here attempted, and in my opinion it is as illogical as it is unlawful."

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

§ 1069. **In general.** Admissions, in the sense here concerned, are merely the prior assertions of the party, which, being inconsistent with his present claim, serve now to discredit it by their discrepancy (*ante*, § 1048). How, then, can the utterances of any *other person than the party himself* serve for that purpose? In other words, how do other persons' statements become receivable as vicarious admissions?

Three different modes suggest themselves as possible. By *preappointment*, or *reference*, the party may designate a person whose utterance he assents to beforehand as correct, and this utterance, when made, thus represents the party's own belief. By *adoption*, the party may assent to a statement already uttered by another person, which thus becomes effectively the party's own admission. By *privity of interest* and by *agency* the party's rights may in the substantive law be affected by the acts of another person, and thus the other person's admissions may equally be available evidentially. These various modes may now be noticed in order; though it will be found that some classes of statements have to be considered from more than one of these three points of view.

§ 1070. **Admissions by Reference to a Third Person.** If a party, instead of expressing his belief in his own words, names another person as one whose expected utterances he approves beforehand, this amounts to an anticipatory adoption of that person's statement; and it becomes, when made, the party's own. This species of admission is well recognized,[1] though not fre-

§ 1070. [1] ENGLAND: 1794, Lloyd *v.* Willan, 1 Esp. 178 (defendant proposed to pay, if the plaintiff's porter would make an affidavit of the delivery of the goods; the affidavit was made; the defendant was then "precluded from going into any evidence whatever on the case", on the ground of 'mala fides' and of unfairness in probing an opponent's evidence); 1804, Burt *v.* Palmer, 5 id. 145 (defendant, on a demand made, said "You must apply to J. A., and he will pay you"; A.'s admission received; "where a person is referred to, to settle and adjust any account or business, what he says, if it is connected with the business which is referred to him, is evidence"); 1806, Daniel *v.* Pitt, 1 Camp. 364 note (defendant said, "If C. will say that he did deliver the goods, I will pay for them"; C.'s statement held admissible); 1807, Brock *v.* Kent, 1 Camp., note (defendant "desired him to enquire of J. about it", J. being a person who had paid money; Jones' statement held admissible); 1808, Williams *v.* Innes, 1 Camp. 364 (defendant's letter told the plaintiff "if she wanted any farther information regarding the affairs of the deceased, she should apply to a Mr. R."; L. C. J. Ellenborough: "If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it, as much as if that had been said or done by himself"); 1822, Garnet *v.* Ball, 3 Stark. 160 (trover for a horse; the plaintiff had said "that if the defendant would take his oath that the horse was his, he should keep him"; the fact of the defendant's affidavit being made was received); 1828, Hood *v.* Reeve, 3 C. & P. 532 (defendant's letter "I refer you to him thereon", meaning one H., held to admit H.'s statement re-

quently available. In earlier times it had a prototype in a not uncommon contract-clause among merchants by which the obligor bound himself to perform when one or more specified persons should make an oath that certain facts existed, upon which the obligation became due, irrespective of the truth of the sworn statement; and litigation over such contracts was not infrequent up to the time of the Stuarts.[2] This admission by reference brings us, indeed, close to the principle of awards by arbitrators; for, though the validity of the award rests on a contractual basis (*ante*, § 1056) yet the process is one of reference to a third person's pronouncement.[3]

Admission by reference differs from admission by adoption in that in the latter form the third person's statement is already made; the varieties of this form we now proceed to consider.

§ 1071. **Third Person's Statement assented to by Party's Silence; General Principle.** 'Qui tacet consentire videtur', "silence gives consent", are ancient maxims, which have ever been taken to be unquestioned and have a larger scope than their application in the law of evidence. But, like all maxims, they merely sum up a broad principle, and cannot serve, without decided qualification, as practical and precise rules. Silence implies assent to the correctness of a communication, but on certain conditions only. The general principle of Relevancy (*ante*, § 29) tells us that the inference of assent may safely be made only when no other explanation is equally consistent with silence; and there is always another such explanation — namely, ignorance, or dissent — unless the circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been

specting the account, though H.'s statement was made at another time; "anything that he says about the account is admissible"); 1836, Sybray *v.* White, 1 M. & W. 435 (injury to a horse; defendant said that if a miners' jury would say that the shaft where the horse was killed was his, he would pay; the miners' verdict received to charge the defendant; "the jury are in the nature of his accredited agents"); 1884, R. *v.* Mallory, 15 Cox Cr. 45 (knowing receipt of stolen goods; the defendant referred the police to his wife for a list of the prices and dates of purchase of the goods, stating that he did not know them, and the next day the wife handed the police the list in his presence; the list was received, as an admission of the prices and dates).

UNITED STATES: *Federal:* 1869, Allen *v.* Killinger, 8 Wall. 480, 486 (rule recognized); *Conn.* 1856, Chadsey *v.* Greene, 24 Conn. 562, 572 (warranty of a horse; statements of N., to whom defendant referred plaintiff for information as to defendant's responsibility, received); *Ga.* Rev. C. 1910, § 5778 (third person's admissions receivable, "when the party refers to such third person for information"); *Ky.* 1904, Drake *v.* Holbrook, — Ky. —, 78 S. W. 158 (defendant told F. to tell the witness "anything I wanted to know"; admitted); *Me.* 1853, Chapman *v.* Twitchell, 37 Me. 59 ("Twitchell can show you where the corner is"; T.'s showing admitted); *N. Car.* 1878, Lambert *v.* People, 6 Abb. N. C. 181, 193 (statements held not on the facts an admission by reference); *N. Dak.* 1907, State *v.* Werner, 16 N. D. 83, 112 N. W. 60 (conversation in which the defendant referred a third person to a doctor for information, allowed to be proved by the doctor, though the doctor's own knowledge might have been privileged); *N. J.* 1904, Skidmore *v.* Johnson, 70 N. J. L. 674, 57 Atl. 450 (a letter written by the defendant's daughter, which he had directed her to write, "without her telling what to write or being told what she did write", admitted).

The following case belongs somewhere here: 1895, State *v.* Kent, 4 N. D. 577, 62 N. W. 631 (the witness had written at defendant's dictation a certain account, which he was allowed to read and hand in, as embodying the defendant's admission).

[2] See some early examples cited *ante*, § 7 *a* (contracts to alter or waive the rules of evidence).

[3] Distinguish the question whether the *party's own statements*, made to arbitrators, may be excluded as being made with a view to compromise (*ante*, § 1062, note).

correct. This much has always been conceded judicially when the question has been presented.

But the force of the brief maxim has always been such that in practice (and especially in the original English tradition) a sort of working rule grew up that *whatever was said in a party's presence* was receivable against him as an admission, because presumably assented to. This working rule became so firmly entrenched in practice that frequent judicial deliverances became necessary in order to dislodge it; for in this simple and comprehensive form it ignored the inherent qualifications of the principle. These qualifications, in varying phraseology, are expounded in the following passages:

1826, DUNCAN, J., in *Moore* v. *Smith*, 14 S. & R. 388, 393: "The reason why this species of evidence is given is because the party by his silence is supposed to acquiesce. 'Qui tacet consentire videtur.' That presupposes a declaration or proposition made to him which he is bound either to deny or to admit. . . . [In the present case], the only evidence is that he was present at the view [of the land]; that he was on the land, the tract; and he was acting as chain-carrier [when remarks were made by the litigants]. This is quite too loose. Two men, at this rate, might talk a third out of his whole estate, with a witness! Nothing can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be unless the evidence is of direct declarations of that kind which naturally calls for contradiction, — some assertion made to the man with respect to his right, which by his silence he acquiesces in."

1838, PHELPS, J., in *Vail* v. *Strong*, 10 Vt. 457, 463: "It is sometimes said that, if a fact, which makes against the party, is stated in his presence, and is not contradicted by him, his silence raises a presumption of its truth. To this position we cannot accede. The mere silence of the party creates no evidence, one way or the other. There are, indeed, cases where the silence of the party creates a presumption or inference against him; but this presumption derives all its force from the circumstances, under which the statement is made, which may call for a denial. If the party is under a moral or honorary obligation to disclose, or if his reputation or interest is jeoparded by the statement, he has a strong inducement to deny it, if he can do so with truth. His silence, under such circumstances, affords an inference against him, which is more or less strong, in proportion to the inducement to make the denial. But even here, the evidence, thus created, rests altogether upon the attendant circumstances. If, for instance, the party be engaged in defending his reputation or his rights, an assertion, bearing upon the subject under discussion, and unfavorable to him, calls for a denial, and if there be not a denial, a presumption of its truth arises. But we know of no obligation upon the party to answer every idle or impertinent inquiry. He has the right to be silent, unless there be good occasion for speaking. We cannot admit that he is bound to disclose his private affairs, at the suggestion of idle curiosity, whenever such curiosity is indulged, at the hazard of being concluded by every suggestion, which may be suffered to pass unanswered. The true rule we understand to be this. Evidence of this character may be permitted to go to the jury, whenever the occasion, upon which the declaration is made in the presence of the party, and the attendant circumstances, call for serious admission or denial on his part; but the strength of the evidence depends altogether upon the force of the circumstances and the motives, which must impel him to an explicit denial, if the statement be untrue. But if no good reason exist to call for disclosure, and the party decline to enter into useless discussion, or answer idle curiosity, no legitimate inference to his prejudice can be drawn from his silence."

1844, REDFIELD, J., in *Mattocks* v. *Lyman*, 16 Vt. 113, 119: "It seems to have been generally considered that all conversation had in the presence of a party, in regard to the subject of litigation, might properly be given in evidence to the jury. . . . There are many

cases of this character when one's silence ought to conclude him. But when the claim is made for the mere purpose of drawing out evidence, as, in the present case, it is obvious must have been the fact, or when it is in the way of altercation, or, in short, unless the party asserting the claim does it with a view to ascertain the claim of the person upon whom he makes the demand, and in order to know how to regulate his own conduct in the matter, and this is known to the opposite party, and he remains silent, and thereby leads the adversary astray, mere silence is, and ought to be, no ground of inference against any one. The liabilities to misapprehension, or misrecollection, or misrepresentation are such, that this silence might be the only security. To say, under such a dilemma, that silence shall imply assent to all which an antagonist may see fit to assert, would involve an absurdity little less gross than some of the most extravagant caricatures of this caricature-loving age. With some men, perhaps, silence would be some ground of inferring assent, and with others none at all. The testimony then would depend upon the character and habits of the party, — which would lead to the direct trial of the parties, instead of the case."

1847, SHAW, C. J., in *Com.* v. *Kenney*, 12 Metc. 235, 237: "In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them."

1891, BOWEN, L. J., in *Wiedemann* v. *Walpole*, 2 Q. B. 534, 539: "There must be some limitation placed upon the doctrine that silence when a charge is made amounts to evidence of an admission of the truth of the charge. The limitation is, I think, this: Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not."

These limitations cannot be questioned in point of abstract principle. But it is perhaps questionable whether the specified conditions should be required to appear in a particular case *before* receiving the third person's statement made in the party's presence. Such strictness was proper enough in earlier days, up to fifty years ago, when the party himself was disqualified as a witness and therefore could not by his own testimony protect himself against undue inferences drawn from his silence. But to-day there is ample opportunity thus to counteract the risk of misconstruction; moreover, the rigid enforcement of the conditions above specified would tend to introduce technicalities and to cumber the issues. It would seem to be better to rule at least that any statement made in the party's presence and hearing is receivable, unless he can show that he lacked either the opportunity or the motive to deny its correctness; thus placing upon the opponent of the evidence the burden of showing to the judge its impropriety. But the burden is in practice generally left upon the proponent to show that the requisite conditions

existed;[1] though the middle course is sometimes taken of leaving the question to the jury.[2]

§ 1072. **Same: Specific Rules; Statements made during a Trial, under Arrest; Notice to Quit; Omission to Schedule a Claim, etc.** (1) The application of the general principle is of course commonly attended by little difficulty; and such doubt as may arise depends on particular circumstances not leading to any specific rule. Most of the rulings cannot properly serve as precedents.[1]

§ 1071. [1] 1894, People *v.* Mallon, 103 Cal. 513, 514, 37 Pac. 512; 1859, Drumright *v.* State, 29 Ga. 430; 1911, Gibbons *v.* Terr., 5 Okl. Cr. 212, 115 Pac. 129; 1906, State *v.* Sudduth, 74 S. C. 498, 54 S. E. 1013.

Where all conditions exist except that it does not appear whether the party was *silent* or denied, an objection based on this point must specifically point it out at the time (applying the principle of § 18, n. 21, *ante*): 1908, Raymond *v.* State, 154 Ala. 1, 45 So. 895 (McClellan, J., diss.).

Compare other cases in the next section.

[2] 1824, State *v.* Perkins, 3 Hawks N. C. 377 (whether the defendant was by intoxication incapable of understanding what was said to him held properly left to the jury).

§ 1072. [1] ENGLAND: 1834, Hayslep *v.* Gymer, 1 A. & E. 162 (plaintiff's statements as to a gift, received because made to the defendant without dissent); 1877, Bessela *v.* Stern, L. R. 2 C. P. D. 265 (breach of marriage-promise; defendant's silence when taxed by the plaintiff with a promise, admitted, and also sufficient to go to the jury as corroboration under the statute); 1892, R. *v.* Mitchell, 17 Cox Cr. 503, 508 (dying declarations in defendant's presence excluded, because a denial at that moment was not to be expected).

UNITED STATES: *Federal:* 1853, Turner *v.* Yates, 16 How. 14, 27 (declarations admitted because they were "of such a character and made under such circumstances as imperatively to have required them to deny their correctness if they were untrue"); 1909, Hauger *v.* U. S., 4th C. C. A., 173 Fed. 54, 59 (defendant's wife's statements, in his presence, to the arresting officer, excluded);

Alabama: 1858, Fuller *v.* Dean, 31 Ala. 654, 657 (slander); 1876, Campbell *v.* State, 55 Ala. 80, 82 (larceny); 1876, Matthews *v.* State, 55 Ala. 187, 194 (rape); 1886, Williams *v.* State, 81 Ala. 1, 6, 1 So. 179 (homicide; co-defendant's declarations, admitted); 1895, Peck *v.* Ryan, 110 Ala. 336, 17 So. 733 (claim to a debt); 1902, Davis *v.* State, 131 Ala. 10, 31 So. 569; 1919, Braxton *v.* State, 17 Ala. App. 167, 82 So. 657 (wife's silence in presence of husband's statement that she had sold the whisky, not admitted); 1921, Delaney *v.* State, 204 Ala. 685, 87 So. 183 (general principle discussed, in application to accused's silence during conversations of accomplices);

California: C. C. P. § 1872, par. 3 ("an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto", is admissible); 1867, People *v.* McCrea, 32 Cal. 98; 1879, People *v.* Ah Yute, 53 Cal. 613; 1895, People *v.* Young, 108 Cal. 8, 41 Pac. 281; 1899, Tibbet *v.* Sue, 125 Cal. 544, 58 Pac. 160 (statement about a loan to a third person); 1906, People *v.* Weber, 149 Cal. 325, 86 Pac. 671 (a mother's statement in the defendant's presence, excluded); 1910, Snowball's Estate, 157 Cal. 301, 107 Pac. 598 (statements of ill-treatment, by testatrix in the presence of an heir, admitted); 1910, People *v.* Rollins, 14 Cal. App. 134, 111 Pac. 123 (evasive replies upon hearing letters read aloud to him; the letters admitted);

Connecticut: 1921, Kelly *v.* Waterbury, 96 Conn. 494, 114 Atl. 530 (negligence of employee);

Florida: 1903, Weightnovel *v.* State, 46 Fla. 1, 35 So. 856 (physician charged with abortion);

Georgia: Code 1910, § 5782, P. C. § 1029 ("acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission"); 1847, Carter *v.* Buchannon, 3 Ga. 513, 521 ("what one party says to another without contradiction is admissible, but what a stranger says to a party may, although uncontradicted, not always be evidence"); 1857, Morris *v.* Stokes, 21 Fla. 552, 571; 1859, Block *v.* Hicks, 27 Fla. 522, 524; 1859, Phillips *v.* State, 29 Fla. 105, 108; 1874, Markham *v.* O'Connor, 52 Fla. 183, 197; 1891, Small *v.* Williams, 87 Fla. 681, 685, 13 S. E. 589; 1892, Giles *v.* Vandiver, 91 Fla. 192, 194, 17 S. E. 115; 1899, Chapman *v.* State, 109 Fla. 157, 34 S. E. 369 (certain vague threats of a wife in defendant's presence, excluded); 1895, Ware *v.* State, 96 Fla. 349, 23 S. E. 410; 1903, Graham *v.* State, 118 Fla. 807, 45 S. E. 616 (mere silence when arrested, excluded);

Illinois: 1906, Kevern *v.* People, 224 Ill. 170, 79 N. E. 574 (rape; the father's repetition to the accused of his daughter's charge against him, admitted, but only "in substance", and not the precise words; this is trivial and unsound; three judges diss.); 1918, Pederson *v.* Mixon, 284 Ill. 421, 120 N. E. 323 (avoidance of deeds; lawyer's interview with the wife-grantor, in the husband's presence, not received); 1918, People *v.* Berger, 284 Ill. 47, 119 N. E. 975 (keeping a disorderly house);

Indiana: 1871, Pierce *v.* Goldsberry, 35 Ind. 317, 320; 1876, Blessing *v.* Dodds, 53 Ind. 95, 101; 1884, Surber *v.* State, 99 Ind. 71, 73; 1888, Conway *v.* State, 118 Ind. 482, 485, 21 N. E. 285;
Iowa: 1915, Geddes *v.* McElroy, 171 Ia. 633, 154 N. W. 320 (failure to claim consideration of a note);
Kentucky: 1898, Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986; 1906, Eaton *v.* Com., 122 Ky. 7, 90 S. W. 972 (general rule stated); 1906, Finch *v.* Com., — Ky. —, 92 S. W. 940;
Massachusetts: 1839, Com. *v.* Call, 21 Pick. 515, 521 (accomplice's statements); 1854, Boston & W. R. Co. *v.* Dana, 1 Gray 83, 104; 1854, Com. *v.* Harvey, 1 Gray 487; 1861, Larry *v.* Sherburne, 2 All. 34 (plaintiff's silence when offered payment by a third person, held not an admission of that person's liability); 1862, Hildreth *v.* Martin, 3 All. 371 (preceding case approved); 1879, Drury *v.* Hervey, 126 Mass. 519, 522 (not admissible "unless the circumstances are such that a denial would naturally be expected or an explanation of some sort would naturally be called for"); 1879, Whitney *v.* Houghton, 127 Mass. 527; 1883, Com. *v.* Brailey, 134 Mass. 527, 530; 1888, Com. *v.* Funai, 146 Mass. 570, 16 N. E. 458; 1895, Com. *v.* McCabe, 163 Mass. 98, 39 N. E. 777; 1901, Com. *v.* O'Brien, 179 Mass. 533, 61 N. E. 213;
Michigan: 1895, People *v.* Fowler, 104 Mich. 449, 62 N. W. 572;
Minnesota: 1907, State *v.* Quirk, 101 Minn. 334, 112 N. W. 409 (defendant's silence when his wife stated why he killed, admitted);
Mississippi: 1914, Riley *v.* State, 107 Miss. 600, 65 So. 882 (wife and husband, charged with a murder, the wife already tried and convicted; the wife says to him, "You know you killed that man and made me take it on myself", and he answers, "Hush, Bessie, if you go to the penitentiary, you won't be gone over 6 months before you get a pardon; but if they convict me, they will hang me"; excluded, on the theory that "it is not always conducive to domestic peace for a husband to contradict the statements of his wife"; a snap of the fingers for such reasoning; Reed, J., diss.);
Missouri: 1896, State *v.* Hill, 134 Mo. 663, 36 S. W. 223 (the party, when charged with being the father of a child, "kinder laughed"; admitted); 1911, State *v.* Lovell, 235 Mo. 343, 138 S. W. 523 (by deceased, in defendant's presence, admitted); 1916, State ex rel. Tiffany *v.* Ellison, 266 Mo. 604, 182 S. W. 996 (malpractice; defendant physician asked his clerk if she had the record in the M. C. case, and she answered " yes, the school-teacher that you dropped iodine in her eye and put it out"; excluded; Walker, J., diss.; the opinions argue the question elaborately);
Montana: Rev. C. 1921, § 10531, par. 3 (like Cal. C. C. P. § 1872);
New Hampshire: 1860, Corser *v.* Paul, 41 N. H. 24, 29 (demand of payment of a note);
New Jersey: 1857, Donnelly *v.* State, 26 N. J. L. 463, 504, 601, 612 (dying declarations as to the deceased's assailant; admitted); 1906, State *v.* Johnson, 73 N. J. L. 199, 63 Atl. 12 (liquor at a polling-place; remarks about it in defendant's presence, admitted); 1920, State *v.* Morris, 94 N. J. L. 19, 108 Atl. 765 (keeping a disorderly house; statement of inmates of the house, made in the defendant's hearing, admitted); 1921, Ollert *v.* Zielbell, — N. J. L. —, 114 Atl. 356 (personal injury; deceased wife's statement, charging defendant with negligence, made in his presence, admitted);
New York: 1887, People *v.* Driscoll, 107 N. Y. 414, 424, 14 N. E. 305 (similar to Donnelly *v.* State, N. J.); 1900, People *v.* Page, 162 N. Y. 272, 56 N. E. 750 (rape; silence when told by a third person that the prosecutrix was charging the defendant with the rape, excluded; unsound); 1902, People *v.* Smith, 172 N. Y. 210, 64 N. E. 814 (there must be a motive to respond or to act); 1903, Seidenspinner *v.* Metrop. L. Ins. Co., 175 N. Y. 95, 67 N. E. 123 (receipt of sick benefits is an admission by the beneficiary of sickness existing at the time); 1903, Stecher Lith. Co. *v.* Inman, 175 N. Y. 124, 67 N. E. 213 (there must be a motive to reply; applying this to a third person's statements as to defective goods; Parker, C. J., and two others, diss., on the wholly untenable ground that such evidence is admissible only in criminal cases);
North Carolina: 1877, Francis *v.* Edwards, 77 N. C. 271, 274 (unanswered remarks of an intoxicated person, treating defendant as a partner, held not admissible); 1883, Guy *v.* Manuel, 89 N. C. 83, 96 (declarations of a boundary, in the defendant's presence, before he had an interest, excluded); 1899, Webb *v.* Atkinson, 124 N. C. 447, 32 S. E. 737; 1902, Virginia C. C. Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1; 1913, Boney *v.* Boney, 161 N. C. 614, 77 S. E. 784;
North Dakota: 1898, Paulso Mercantile Co. *v.* Seaver, 8 N. D. 215, 77 N. W. 1001;
Ohio: 1915, Hoover *v.* State, 91 Oh. 41, 109 N. E. 626 (accusations made by the defendant's dying wife and the mother-in-law, at the bedside, admitted);
Oregon: 1922, Johnson *v.* Underwood, 102 Or. 680, 203 Pac. 879 (personal injury; statements to an officer by the participants in defendant's presence, admitted);
Pennsylvania: 1826, Moore *v.* Smith, 14 S. & R. 388, 392 (conversation between two others, in defendant's presence, during a survey, not admitted; see quotation *supra*); 1847, McClenkan *v.* McMillan, 6 Pa. St. 366; 1919, Com. *v.* Brown, 264 Pa. 85, 107 Atl. 676 (silence when the victim of a homicide was asked in defendant's presence who shot him, and named the defendant, admitted);
Philippine Islands: C. C. P. 1901, § 298, par. 3 (like Cal. C. C. P. § 1872); 1903, U. S. *v.* Muyot, 2 P. I. 177 (embezzlement; inference not drawn from accused's silence while his mother was negotiating for a settlement);

Among the commoner classes of cases, it may be noted that a *tenant's silence upon receiving a notice to quit* was formerly a common instance of the principle's application.[2] Under this principle, also, comes the inference from a party's *omission to file a claim or defence* in a list of debts or the like,[3] though this is is sometimes hardly to be distinguished from the analogous instances of silence at a trial (*infra*, par. 3), failure to answer a letter (*post*, § 1073) and failure to *deny in a pleading* the opponent's *assertion* (*ante*, § 1066); distinguish also the inference, from a party's *failure* to testify or to *make complaint*, of his consciousness of the weakness of his cause (*ante*, §§ 284, 289), where the inference does not involve an assent to a third person's statement.

Porto Rico: Rev. St. & C. 1911, § 1403, par. 3 (like Cal. C. C. P. § 1872, par. 3);
South Carolina: 1820, State *v.* Rawls, 2 Nott & McC. 331, 336 (gaming; defendant's silence, when called by other players with a certain name, held to be evidence of his name); 1905, State *v.* Major, 70 S. C. 387, 50 S. E. 13 (larceny);
South Dakota: 1906, State *v.* Mungeon, 20 S. D. 612, 108 N. W. 552 (incest; the father's silence when charged by the daughter as her child's father, in the presence of a Children's Home agent, admissible);
Tennessee: 1905, Phelan *v.* State, 114 Tenn. 483, 88 S. W. 1040 (defendant's silence, just after a homicide, when his wife stated that he had provoked the affray; an over-strict opinion);
Texas: 1909, Crowell *v.* State, 56 Tex. Cr. 480, 120 S. W. 897 (murder);
Utah: 1903, State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, 633 (statements made over the body of the deceased, admitted on the facts);
Vermont: 1838, Vail *v.* Strong, 10 Vt. 457, 463 (see quotation *supra*); 1839, Gale *v.* Lincoln, 11 Vt. 152, 155; 1844, Mattocks *v.* Lyman, 16 Vt. 113, 119 (see quotation *supra*); 1851, Hersey *v.* Barton, 23 Vt. 685, 688 (statements to a third person in defendant's presence, excluded); 1896, State *v.* Magoon, 68 Vt. 289, 35 Atl. 310.

[2] 1809, Doe *v.* Biggs, 2 Taunt. 109 (silence on receiving a notice to quit, received as evidence of an admission of the term of tenancy); 1811, Doe *v.* Wombwell, 2 Camp. 559 (notice to tenant to quit; his failure to object, with his language at the time, held to be an admission of the time of beginning of tenancy); 1811, Thomas *v.* Thomas, 2 Camp. 647 (failure to object, on personal service of notice to quit, may be an admission; but it "must depend upon circumstances"; *e.g.* the defendant might be illiterate, or the server might have left too soon for objection to be made); 1811, Doe *v.* Forster, 13 East 405 (the tenant's knowledge of contents and his demeanor may amount to an admission). Compare the rule for an *account rendered* (*post*, § 1073).

Distinguish the question whether the *landlord's receipt of rent without protest* amounts to a waiver of default in payment: 1810, Doe *v.* Calvert, 2 Camp. 387.

[3] ENGLAND: 1811, Hart *v.* Newman, 3 Camp. 13 (insolvent's failure to schedule a bill of exchange "is not enough to prove that the amount was not then due"); 1830, Nicholls *v.* Downes, 1 Mo. & Rob. 13 (excluded; L. C. J. Tenterden: "Can it be allowed that a party shall be admitted to claim, in a court of justice, a debt, after having on oath declared there was none such?" Counsel then cited "a similar case in which Lord Ellenborough had said that the defendant's having cheated his assignees was no reason why another person should cheat him" (which was begging the question); L. C. J.: "I cannot assent to that"); UNITED STATES: *Conn.* 1904, Watson *v.* Bigelow Co., 77 Conn. 124, 58 Atl. 741 (whether the acceptance of goods without protest is an admission that they comply with the contract); 1905, Nichols *v.* New Britain, 77 Conn. 965, 60 Atl. 655 (failure to include an item in a claim of damages; inference allowed); *Ill.* 1904, People *ex rel.* Hillel Lodge *v.* Rose, 207 Ill. 352, 69 N. E. 762 (St. 1901, May 10, applied and held constitutional; the statute makes a corporation's failure to file an annual report 'prima facie' evidence of non-user); *Me.* 1878, Eaton *v.* New England T. Co., 68 Me. 63, 66 (omission to claim the present property in a garnishee or trustee answer in another suit, received); *Mass.* 1859, Stevens *v.* Miller, 13 Gray 282 (plaintiff's settlement of a debt without mention of counterclaim arising from the same transaction, admissible); *Minn.* 1917, Thaden *v.* Bagan, 139 Minn. 46, 165 N. W. 864 (compensation for farm-land taken; the claim being required by tax-law to be listed, the plaintiff's failure to list it with the county auditor was evidence as "an admission of non-ownership"); *Mo.* 1919, State *v.* Levitt, 278 Mo. 372, 213 S. W. 108; *Pa.* 1840, Miller *v.* Heck, 9 Watts 439, 445 (executor's inventory, omitting a claim now made, received); *Vt.* 1911, Donovan *v.* Selinas, 85 Vt. 80, 81 Atl. 235 (ownership as between husband and wife; the husband's failure to make claim, admitted).

Compare the cases cited *ante*, § 284, which are sometimes hardly distinguishable in practice.

(2) By way of specific rule, carrying out the principle already examined, it is sometimes said that the proponent of the evidence must show, not merely that the party was *present* [4] when the remark was made (and "presence" of course implies "proximity within a distance sufficient to permit hearing"), but also that the party actually *heard and understood* what was said.[5] But this seems too strict; the presence of a party may be assumed to indicate that he heard and understood. So, also, it is sometimes said that the proponent must show that the party had *knowledge of the facts* stated, since otherwise he might have hesitated to contradict.[6] This, again, is perhaps too strict, for a party's admission (as already noted in § 1053) is receivable irrespective of his personal knowledge.

(3) On the other hand, if on the circumstances it appears that the party was in fact *physically disabled* from answering, his silence of course signifies nothing, and the statement is inadmissible.[7] So, too, if the party had plainly no *motive for responding*, his silence permits no inference; and this is often the case where the statement is addressed to another person, and not to the party himself.[8] Much more is the silence without significance

[4] This much is always understood nowadays: 1913, Gila Valley G. & N. R. Co. *v.* Hall, 232 U. S. 94, 34 Sup. 229 (person less than 20 yards away; left to the trial Court); 1903, People *v.* Philbon, 138 Cal. 530, 77 Pac. 650; 1905, State *v.* Rosa, 72 N. J. L. 462, 62 Atl. 695 (conversation in a jail); 1895, Josephi *v.* Furnish, 27 Or. 260, 41 Pac. 424 (a conversation held twelve feet away and around a corner out of sight, excluded).

[5] 1909, Sorenson *v.* U. S., 8th C. C. A., 168 Fed. 785 (Weightnovel *v.* State followed, in a ruling over-strict); 1903, Weightnovel *v.* State, 46 Fla. 1, 35 So. 856 (the defendant being outside the room); 1880, Jones *v.* State, 65 Ga. 147, 150 (the statement must be made in his presence and hearing, and the witness "must be certain thereby that his attention was arrested"); 1860, Queener *v.* Morrow, 1 Coldw. Tenn. 123, 130 ("it is indispensable that the party should have heard and understood the statement").

[6] 1841, Robinson *v.* Blen, 20 Me. 109; 1838, Edwards *v.* Williams, 2 How. Miss. 846, 849.

[7] *Federal:* 1896, Gowen *v.* Bush, 22 C. C. A. 196, 76 Fed. 349 (statements addressed to a plaintiff when he was semi-unconscious after an injury, excluded); 1906, Parulo *v.* Philadelphia & R. R. Co., 145 Fed. 664, 669, C. C. A. (remarks by a railroad employee to a physician in the presence of the injured plaintiff, excluded); *Ala.* 1895, Dean *v.* State, 105 Ala. 21, 17 So. 28 (remarks addressed to a party who was shot and unable to speak, excluded); 1899, Lalland *v.* Brown, 121 Ala. 513, 25 So. 997 (conversation in presence of defendant while ill, admitted); *Ark.* 1905, Bloomer *v.* State, 75 Ark. 297, 87 S. W. 438 (statement in the presence of the accused when drunk, excluded); *Ind.* 1893, Springer *v.* Byram, 137 Ind. 15, 25, 36 N. E. 361 (remark made by the brother of the injured plaintiff, before the latter in the ambulance, admitted); *N. J.* 1913, State *v.* Kysilka, 84 N. J. L. 6, 87 Atl. 79 (identification of the accused by a witness speaking another language; excluded); *N. Y.* 1897, People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730 (remarks in the presence of one unconscious, excluded, though there was evidence that he was shamming unconsciousness); *R. I.* 1903, State *v.* Epstein, 25 R. I. 131, 55 Atl. 204 (statements in the presence of an accused who was physically in such suffering as to be probably unable to understand or reply, excluded).

[8] *Ala.* 1852, Lawson *v.* State, 20 Ala. 65, 68, 80 (fornication; conversation in the presence of the female defendant, as to the party to be charged by the doctor, just after the delivery of the child, held inadmissible); *Ga.* 1851, Rolfe *v.* Rolfe, 10 Ga. 143, 145 (excluded on the facts); 1906, Lumpkin *v.* State, 125 Ga. 24, 53 S. E. 810 (excluded on the facts); *Mo.* 1890, State *v.* Mullins, 101 Mo. 504, 518, 14 S. W. 625 (remarks addressed to third persons in the defendant's presence, not admitted); *N. Car.* 1882, State *v.* Kemp, 87 N. C. 540 (adultery; the children of the female defendant in her presence called the male defendant "papa"; held an admission of parentage and therefore of intercourse); *Va.* 1895, Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500 (a conversation in D's presence but not addressed to him); *Wash.* 1907, State *v.* Barath, 47 Wash. 283, 91 Pac. 977 (statements by the injured person, made in adjoining room and not addressed to defendant, excluded, under the circumstances; also statements relating to matters prior to the assault).

when a positive deterrent motive, such as *fear*, was operating upon the party.[9]

Certain situations in particular may furnish a positive motive for silence without regard to the truth or falsity of the statement. Whether the fact that the party is at the time *under arrest* creates such a situation has been the subject of opposing opinions; a few Courts (for the most part in acceptance of an early Massachusetts precedent), by a rule of thumb exclude the statement invariably; but the better rule would seem to allow some flexibility according to circumstances.[10] But where the party is in a *court-room*, and a

[9] 1858, Bob *v.* State, 32 Ala. 560, 565 (remarks of white persons, in the master's house, charging guilt upon a slave, whose shoe-tracks were being measured, excluded, because of his condition of "subordination and discipline").

[10] The cases on both sides are as follows: ENGLAND: 1837, R. *v.* Bartlett, 7 C. & P. 832 (defendant's silence, when charged, while in custody, by his wife's remark to him, held sufficient to admit her remark); 1866, R. *v.* Jankowski, 10 Cox Cr. 365 (silence on being identified at the police station, admitted; but it "ought not to weight against him"); 1910, Thompson's Case, 4 Cr. App. 45 (accomplice's statement, read out by a policeman in the presence of the accused, who immediately said, "This is a pack of lies"; held admissible; the opinion shows a most singular and apparently hopeless misunderstanding of the principles applicable to this class of evidence; on appeal, [1910] 1 K. B. 640, affirmed, but the opinion, while repudiating the extreme view that only statements expressly admitted to be true are receivable, holds that any statement read in the accused's presence is admissible subject to such weight as may be given, and ignores the vital fact that the accused here promptly denied the statement 'in toto'; 1910, Norton's Case, 5 Cr. App. 7, 65, 2 K. B. 496 (rape under age; the child made a charge in the accused's presence, which he denied; held inadmissible; here an admirable opinion, by Pickford, J., accurately and fully expounds the principle); 1910, Atherton's Case, 5 Cr. App. 233 (Norton's Case followed); 1911, Murtrie's Case, 6 Cr. App. 128 (similar); 1911, Hickey's Case, 6 Cr. App. 200 (similar); 1911, Stroud's Case, 7 Cr. App. 38 (Norton's Case followed); 1914, Christie's Case, A. C. 45, 10 Cr. App. 141 (per Lord Atkinson: "a statement made in the presence of an accused person [under arrest], even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it in effect his own"; this is in theory an unsound statement; it would have been more correct to put it that the position of a person under arrest is not a position in which denial could reasonably be expected; because silence, where denial would be natural, *is* an "acceptance" of it; Lord Moulton did not approve the above statement, nor Lord Reading; the latter two questioned in part the definition by Pickford, J., in Norton's Case).

CANADA: 1892, R. *v.* Drain, 8 Manit. 535 (assaulted person's statement in the presence of the accused under arrest, admitted).

UNITED STATES: *Alabama:* 1852, Spencer *v.* State, 20 Ala. 24, 27 (declarations by a slave in defendant's presence, admitted); 1908, Raymond *v.* State, 154 Ala. 1, 45 So. 895 (larceny; the owner's statement, charging defendant under arrest, and not denied, admitted; approving the text above); 1913, Simmons *v.* State, — Ala. —, 61 So. 466 (statement in presence of accused under arrest, admitted); *California:* 1874, People *v.* Estrado, 49 Cal. 17 (co-defendant's statement to a police-officer, admitted; the defendant being afterwards allowed to make his statement); 1883, People *v.* Ah Fook, 64 Cal. 380, 1 Pac. 347 (statement of third person, admitted; 1898, People *v.* Doe, 122 Cal. 486, 497, 55 Pac. 581 (undecided); 1901, People *v.* Williams, 133 Cal. 165, 65 Pac. 323 (silence when under arrest, excluded on the facts); 1901, People *v.* Amaya, 134 Cal. 531, 66 Pac. 794 (undenied charges made against the defendant, under arrest, by the deceased on his death-bed, admitted; Com. *v.* Kenney, Mass., explained, and the doctrine repudiated that the mere fact of arrest excludes such statements); 1911, People *v.* Wong Loung, 159 Cal. 520, 114 Pac. 829 (excluded on the facts); 1920, People *v.* Ong Mon Foo, 182 Cal. 697, 189 Pac. 690 (homicide; Chinese accused, under arrest, in presence of the dying man and his wife, who charged him as the assailant; admitted);
Connecticut: 1922, State *v.* Ferrone, — Conn. —, 116 Atl. 336 (housebreaking; statements made by an officer to the accused while under arrest, and not replied to, excluded);
Georgia: 1902, Simmons *v.* State, 115 Ga. 574, 41 S. E. 983 (here excluded, the accused's hearing, etc., not being clearly shown); 1921, Johnson *v.* State, 151 Ga. 21, 105 S. E. 603 (homicide; statement of an accomplice made to a deputy sheriff in jail in defendant's presence, confessing the homicide, and not commented on by defendant in any way, excluded);

trial or other judicial proceeding is going on, his failure to deny statements made publicly by another person in the course of the proceeding would obviously admit of no inference against him, whether he attends as party or

Illinois: 1913, People *v.* Tielke, 259 Ill. 88, 102 N. E. 229 (interview between the accused under arrest, his sister, two policemen, and the prosecuting attorney; the sister's statements admitted, as being impliedly assented to by him); 1914, People *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804 (statements excluded on the facts); 1921, People *v.* Wilson, 298 Ill. 257, 131 N. E. 609;

Kentucky: 1901, Porter *v.* Com., — Ky. —, 61 S. W. 16 (silence of defendant, under arrest, during an accomplice's confession in his presence, excluded); 1904, Merriweather *v.* Com., 118 Ky. 870, 82 S. W. 592 (Com. *v.* Kenney, Mass., followed; here the defendant was under arrest, at a railroad depot, in the presence of spectators and fellow-prisoners);

Louisiana: 1882, State *v.* Diskin, 34 La. An. 919, 921 (murder; silence when charged by the dying man, not admitted; here the officer in charge told the defendant to be quiet); 1887, State *v.* Estoup, 39 La. An. 906, 908, 3 So. 124 (like the next case); 1899, State *v.* Sadler, 51 La. An. 1397, 26 So. 390 (silence when charged while under arrest, inadmissible); 1901, State *v.* Carter, 106 La. 407, 30 So. 895 (similar rule, deceased's declarations, excluded);

Massachusetts: 1847, Com. *v.* Kenney, 12 Metc. 235 (statements by an officer and by the complaining party, not received under the circumstances); 1866, Com. *v.* Walker, 13 All. 570 (identification of defendant by a witness, excluded); 1876, Com. *v.* Brown, 121 Mass. 69, 80 (statements not receivable, unless "he was at liberty to reply", and the statement "was made by such a person and under such circumstances as naturally call for a reply unless he intends to admit it"); 1877, Com. *v.* McDermott, 123 Mass. 440 (conversation between an officer and the defendant's companion, excluded); 1892, Com. *v.* Trefethen, 157 Mass. 180, 198, 31 N. E. 961 (rule in Com. *v.* Brown approved; effect of equivocal replies, considered); 1902, Smith *v.* Duncan, 181 Mass. 435, 63 N. E. 938 (statements by a police officer to the defendant after an injury, but without arrest, admitted on the facts);

Michigan: 1920, People *v.* Foster, 211 Mich. 486, 179 N. W. 295 (the mere fact of being in custody does not suffice to exclude);

Missouri: 1895, State *v.* Murray, 126 Mo. 611, 29 S. W. 700 (defendant's brother, a codefendant, declared in the presence of the defendant, under arrest, that the latter was the one who had fired the shot; excluded); 1898, State *v.* Foley, 144 Mo. 600, 46 S. W. 733 (silence when under arrest can never be receivable as an admission); 1905, State *v.* Swisher, 186 Mo. 1, 84 S. W. 911 (State *v.* Foley followed); 1905, State *v.* Ethridge, 188 Mo. 352, 87 S. W. 495 (defendant's wife's statements made in his presence to the constable arresting him, excluded); 1906, State *v.* Richardson, 194 Mo. 326, 92 S. W. 649 (State *v.* Foley followed); 1907, State *v.* Kelleher, 201 Mo. 614, 100 S. W. 470 (statements by the deceased in the presence of the accused under arrest, excluded);

Nebraska: 1907, O'Hearn *v.* State, 79 Nebr. 513, 113 N. W. 130 (excluded, on the facts);

New Jersey: 1921, State *v.* Claymonst, — N. J. L. —, 114 Atl. 155 (carnal abuse; defendant's silence when the assaulted child identified him, admitted);

New York: 1874, Kelley *v.* People, 55 N. Y. 565, 572 (that an accused is under arrest is no objection; here the identifying statement of the injured person was received; "the declaration was in substance a challenge to them to assert their innocence if they were not guilty"); 1900, People *v.* Kennedy, 164 N. Y. 449, 456, 58 N. E. 652 (identifying remarks, made in answer to a police officer's inquiry, excluded, the officer having forbidden the accused to reply); 1901, People *v.* Wennerholm, 166 N. Y. 567, 60 N. E. 259 (silence during statements to an officer just before arrest, admitted; Martin and Bartlett, JJ., diss.); 1902, People *v.* Smith, 172 N. Y. 210, 64 N. E. 814 (silence of husband, under arrest, at the bedside of his wife, who was semi-conscious, the physician having enjoined silence, held not sufficient to admit the wife's remarks and conduct); 1906, People *v.* Cascone, 185 N. Y. 317, 78 N. E. 287 (deceased's statement, made in the accused's presence, excluded, because on the facts, the parties being Italians but English also being used, it did not appear that the accused understood questions and answers); 1911, People *v.* Conrow, 200 N. Y. 356, 93 N. E. 943 (here the district attorney improperly recounted in detail the accomplice's story to which the defendant had refused to make answer); 1920, People *v.* Cascia, Sup. App. Div., 181 N. Y. Suppl. 855 (robbery; silence when under arrest and identified by the victim and his wife, admitted, following Kelley *v.* People);

Ohio: 1881, Murphy *v.* State, 27 Oh. St. 628 (two persons having stolen goods in their possession were taken into custody; the remarks of one, to the officer, in the other's presence and on his behalf, admitted); 1904, Geiger *v.* State, 70 Oh. 400, 71 N. E. 721 (wife-murder; the accused was brought before the chief of police, under arrest, and in his presence his child of four years recounted a story of the murder in answer to questions of the police; his silence was held not to admit this conversation; an over-strict ruling; the Court inappropriately stigmatizes the occasion as a "star-chamber investigation");

merely as witness; for in either case he is prevented by the dictates of decorum from making open interruption and he knows that he may at the proper time make all necessary denials:[11]

Pennsylvania: 1910, Com. v. Aston, 227 Pa. 112, 75 Atl. 1019 (failure to deny accomplice's confession before chief of police, admitted);
Rhode Island: 1903, State v. Epstein, 25 R. I. 131, 55 Atl. 204 (statements by the injured person and the police, the accused being present under arrest, excluded; narrow doctrine approved);
South Carolina: 1906, State v. Sudduth, 74 S. C. 498, 54 S. E. 1013 (dying victim's accusation of the accused in the jail, admitted); 1913, State v. McIntosh, 94 S. C. 439, 78 S. E. 327 (excluded on the facts);
South Dakota: 1917, State v. Guffey, 39 S. D. 84, 163 N. W. 679 (larceny; statements in the presence of officers, admitted on the facts);
Tennessee: 1896, Green v. State, 97 Tenn. 50, 36 S. W. 700 (confession of an accomplice made within hearing, admitted);
Texas: 1896, Gardner v. State, — Tex. Cr. —, 34 S. W. 945 (following the Massachusetts rule of exclusion); 1901, Funderburk v. State, — Tex. Cr. —, 61 S. W. 393 (same); 1901, Weaver v. State, 43 Tex. Cr. 340, 65 S. W. 534 (same); 1910, Couch v. State, 58 Tex. Cr. 505, 126 S. W. 866 (Gardiner Case approved); 1920, Kyle v. State, — Tex. Cr. App. —, 217 S. W. 943 (accomplice's confession in accused's presence, excluded);
Utah: 1896, People v. Kessler, 13 Utah 69, 44 Pac. 97 (the deceased charged the accused with shooting him, but the chief of police told the accused not to speak; excluded);
Washington: 1897, State v. McCullum, 18 Wash. 394, 51 Pac. 1044 (confession by co-defendant, in the presence of the defendant, kept there by compulsion, excluded);
West Virginia: 1899, State v. Dickey, 46 W. Va. 319, 33 S. E. 231 (statements by counsel of defendant under arrest, in the latter's presence, to the prosecuting attorney, excluded);
Wisconsin: 1912, Hardy v. State, 150 Wis. 176, 136 N. W. 638 (rape; identification of the accused, when arrested, by the victim, without response by the accused, admitted).

[11] ENGLAND: 1821, R. v. Appleby, 3 Stark 33 (defendant's silence when charged with guilt in the testimony of a co-defendant before the magistrate, held not to admit the testimony); 1825, Child v. Grace, 2 C. & P. 193 ("what was said by the magistrate before whom the matter had been investigated, in the presence of both plaintiff and defendant", excluded; Best, C. J.: "If such evidence is allowed, we shall have causes tried at the police offices before they come here"); 1829, Melen v. Andrews, M. & M. 336 (see quotation *supra*); 1830, R. v. Hollingshead, 4 C. & P. 242, *semble* (what a solicitor for the prosecution said in defendant's presence, before the magistrate, excluded); 1914, Mash v. Darley, 3 K. B. 1226 (bastardy; to corroborate the plaintiff, the face was held admissible that on a criminal charge of rape under age the defendant had at the magistrate's hearing put forward a certain defence which later at the jury trial he failed to put forward).

CANADA: 1894, Thompson v. Didion, 10 Manit. 246 (witnesses' testimony in the presence of the party in court, but not understanding their language, not taken as admissions).

UNITED STATES: *Federal:* 1853, Carr v. Hilton, 1 Curt. 390 (statement of counsel, arguing before a Supreme Court, that he had notified H., not then a party, not received against H. now plaintiff); *Alabama:* 1856, Abercrombie v. Allen, 29 Ala. 281 (contract for services; plaintiff's remarks on the subject, in defendant's presence, at another trial before a justice of the peace, excluded); 1884, Weaver v. State, 77 Ala. 26, 28 (remarks of the magistrate, excluded on the facts); 1895, Collier v. Dick, 111 Ala. 263, 18 So. 522 (C. present in court as spectator while statements were made by M. on the stand; excluded); *Georgia:* 1890, McElmurray v. Turner, 86 Ga. 215, 217, 12 S. E. 359 (testimony of the party's own witness at a former trial, excluded, on the theory that silence did not mean assent); 1894, Bell v. State, 93 Ga. 557, 559, 19 S. E. 244 (silence of accused during preliminary examination, excluded); *Indiana:* 1874, Broyles v. State, 47 Ind. 251, 253 (testimony of opposing witness in the party's presence, before a magistrate, excluded); 1880, Howard v. Howard, 69 Ind. 592, 600 (statements by a witness on the stand, the defendant being then present as a party, excluded); 1881, Johnson v. Holliday, 79 Ind. 151, 156 (defendant's failure to deny statements of a witness before the magistrate, excluded); 1882, Puett v. Beard, 86 Ind. 104, 106 (battery done at a trial before a justice of the peace; unanswered remarks of the opponent's attorney, as to the battery, admitted, the trial having been ended by the brawl); *Iowa:* 1906, Foster v. Hobson, 131 Ia. 58, 107 N. W. 1101 (plaintiff's silence during counsel's assertion in another trial, when she was not a party, that her husband owned the farm now claimed by her, held not an admission); *Maine:* 1904, Thayer v. Usher, 98 Me. 468, 57 Atl. 839 (statements of U. in a court on the stand, the defendant being present and not denying, excluded); *Massachusetts:* 1902, Keith v. Marcus, 181 Mass. 377, 63 N. E. 924 (declarations by the judge in the party's presence, not admitted on the facts); *Missouri:* 1890, State v. Mullins, 101 Mo. 514, 517, 14 S. W. 625 (silence of defendant at a coroner's inquest, excluded); 1900, State v. Hale, 156

1829, PARKE, J., in *Melen* v. *Andrews*, M. & M. 336 (excluding the testimony of a witness on a former trial in the present plaintiff's presence, now offered against the plaintiff): "It is true that the plaintiff might have cross-examined or commented on the testimony. But still, in an investigation of this nature, there is a regularity of proceeding adopted which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inferences therefore cannot be drawn from his silence or his conduct in this case which generally may in that of a conversation in his presence."

1830, Messrs. *Carrington* and *Payne*, Note to 4 C. & P. 243: "The reason why anything said in the presence of the prisoner is receivable in evidence against him is that, being said in his hearing, he might have contradicted it had he chosen. Now this seems hardly to apply to what takes place at the time of an examination before the magistrate; because, as the prisoner could not keep up a running commentary of contradictions, the reason of admitting such evidence appears to fail."

Here, however, must be distinguished the effort of another principle (*ante*, § 289), by which the party's *failure to produce testimony* (in particular, to testify himself) permits an inference as to his consciousness of the weakness of his cause. The difference is that there the inference arises from his failure formally to take the stand at the proper time; while here the inference, if any, would arise from his failure to speak out informally at an improper time.[12]

Mo. 102, 56 S. W. 881 (defendant on trial "nodded his head" when a witness said, "Don't you know that is the pocket-book?"; excluded, but erroneously, for this was an explicit assent); *New Hampshire:* 1903, Little v. R. Co., 72 N. H. 61, 55 Atl. 190 (argument of plaintiff, after evidence closed, challenging defendant to make experiments showing the time required for stopping a car, held improper); *New Jersey:* 1907, Hauser v. Goodstein, 75 N. J. L. 66, 66 Atl. 932 (defendant's silence during testimony to an agency, excluded); *New York:* 1883, People v. Willett, 34 N. Y. 29 (experiments as to identity, made during a coroner's inquest and in defendant's presence, not admitted; "the doctrine as to silence . . . does not apply to silence at a judicial proceeding or hearing"); *North Carolina:* 1849, Moffit v. Witherspoon, 10 Ired. 185, 191 (silence during remarks of counsel made in argument to the jury, held not to make them admissible); 1887, Blackwell D. T. Co. v. McElwee, 96 N. C. 71, 1 S. E. 676 (silence of defendant, and his failure later as a witness to make denial, concerning the terms of a letter admitted by his partner when giving a deposition, to be correct, held inadmissible; the second point of the ruling is erroneous); 1909, State v. Jackson, 150 N. C. 831, 64 S. E. 376 (silence during testimony at an election commissioners' hearing, not received as an admission); 1909, Thorp's Will, 150 N. C. 831, 64 S. E. 379 (testator's silence during a former trial when his counsel argued that he was insane, not received as an admission); *Pennsylvania:* 1903, Com. v. Zorambo, 205 Pa. 109, 54 Atl. 716 (accused's silence when charged by a witness speaking before the magistrate, after the hearing was over, but when he might still have supposed it going on, excluded on the facts); 1917, Scott v. American Express Co., 257 Pa. 25, 101 Atl. 96 (omissions of facts in a pleading; cited more fully *ante*, § 1066); *Tennessee:* 1911, Parrott v. State, 125 Tenn. 1, 139 S. W. 1056 (defendant's silence at other trials, when hearing witnesses' charges; inference not allowed); *Vermont:* 1853, Brainard v. Buck, 25 Vt. 573, 579 (statements at a chancery proceeding, by a party, in the presence of the now defendant as a witness, charging him with the receipt of money, and not denied by him, excluded); 1863, State v. Gilbert, 36 Vt. 145, 147 (statements of a witness in defendant's presence before a magistrate, held not admissible because of the party's silence).

Compare the cases as to a *witness' self-contradictions* (*ante*, § 1042).

[12] The confused recognition of this other principle has sometimes led to rulings which are correct enough, but are not clearly placed upon the proper ground: 1844, Jones v. Morrell, 1 C. & K. 266, 268 (defendant's depositions, offered before a magistrate at a prior hearing, admitted, because the plaintiff, then being there, after the reading was "called upon to answer it", and did answer not denying); 1848, Simpson v. Robinson, 12 Q. B. 512 ("We do not understand that case [of Melen v. Andrews, *supra*] as deciding that under no circumstances can such evidence be admitted; . . . for cases might certainly be conceived in which a party by not denying a charge so made might possibly afford strong proof that the imputation was unjust"); 1901, State v. Dexter, 115 Ia. 678, 87 N. W. 417 (testimony of wife of defendant at a former trial in his

(4) It ought not to be necessary to note that the party's *denial* of the third person's statement destroys entirely the ground for using it.[13] Furthermore, when by silence the statement is made admissible, the inference of the party's assent may always (on the logical principle of § 32, *ante*) be *explained away* in rebuttal by circumstances showing that the silence was due to other motives.[14]

(5) Certain distinct principles need here to be discriminated: (*a*) Silence on the part of an *accused person* has sometimes a circumstantial significance, not by way of assent to a third person's statement, but as indicative of a *consciousness of guilt*; this is better considered in connection with related topics dealt with elsewhere (*ante*, § 284, failure to explain innocence; *post*, § 1144, consistent exculpatory statements; and *post*, § 1781, explaining the possession of stolen goods). (*b*) Statements of third persons, not receivable by virtue of the present principle of assenting silence, may still be receivable against an *accused person*, as admissions of a *co-conspirator*[15] (*post*, § 1079), or as parts of an *entire conversation*[16] (*post*, §§ 2115, 2119). (*c*) Statements by a *wife in the husband's presence*, being admissible under the present principle, may still have to satisfy the rule prohibiting testimony of wife against husband (*post*, § 2232). (*d*) Silence may indicate assent in a *contractual* sense; this involves the substantive law, and is without the present purview.[17]

§ 1073. **Third Person's Document: Writing Sent to the Party or Found in his Possession; Unanswered Letter; Account rendered; "Proofs of Loss" in Insurance.** The written statements of a *third person* may be so dealt with *by the party* that his assent to the correctness of the statements may be inferred, and they would thus by adoption become his own statements. What sort of dealing with the document will suffice for this purpose has in several respects been a mooted question. Leaving aside for the moment the particular problems as to corporation-books and depositions, which are affected by independent considerations, the different situations may be grouped under

presence, admitted; he "had the opportunity to deny it on the witness stand").

Distinguish also the party's omission, *at a former trial*, to mention certain facts in his testimony, for that is equivalent to a contradiction of his present testimony (under § 1042, *ante*).

The party's *use of a witness' deposition* at a former trial rests on a different application of the principle (*post*, § 1075).

[13] *Cal.* 1903, People *v.* Morton, 139 Cal. 719, 73 Pac. 609; *Ill.* 1914, People *v.* Harrison, 261 Ill. 517, 104 N. E. 259 (the accused's reply that the narrator is a liar is a sufficient negation of silent assent to any part of the statement): *La.* 1899, State *v.* Robinson, 51 La. An. 694, 25 So. 380 (charges made against defendant in his presence, by deceased, and then denied by the former, excluded); *Miss.* 1901, Brown *v.* State, 78 Miss. 637, 29 So. 519; 1907, Johnson *v.* State, 90 Miss. 317, 43 So. 435; *N. J.* 1913, State *v.* D'Adame, 84 N. J. L. 386, 96 Atl. 414; *N. Y.* 1915, People *v.* Marendi, 213 N. Y. 600, 107 N. E. 1058 (murder; victim's statement in the accused's presence, denied by the latter, excluded); *S. Dak.* 1910, State *v.* Swenson, 26 S. D. 589, 129 N. W. 119; *Tenn.* 1901, Low *v.* State, 108 Tenn. 127, 65 S. W. 401.

[14] 1867, Flanagin *v.* State, 25 Ark. 92, 94 (threats or promises to the defendant, as explaining his silence, admitted); and cases cited *ante*, § 1058.

The further refinement, that the jury should be told that the statements of the third person as assented to are not to be taken as the *latter's testimony*, has been pointed out: 1914, State *v.* Wakefield, 88 Conn. 164, 90 Atl. 230; but is a needless quibble.

[15] 1867, State *v.* Fitzhugh, 2 Or. 227, 232.

[16] 1844, Redfield, J., in Mattocks *v.* Lyman, 16 Vt. 113, 119.

[17] 1822, Peele *v.* Ins. Co., 3 Mason 27, 81 (underwriters' silence, as forming an acceptance of the insured's abandonment of a vessel).

four heads: (1) Documents seen; (2) documents found in possession; (3) documents of demand, received but not answered; and (4) documents made use of.

(1) In some circumstances, the party's mere *sight* or *perusal* of a third person's document, without responsive protest of denial or explanation, may indicate an admission of correctness. But here each case virtually must stand by itself.[1]

(2) The party's *possession* of a document made by a third person may well be evidence of the party's knowledge of its contents (*ante*, § 260); but is it sufficient to justify an inference of assent to the statements contained therein? It is easy to imagine instances in which such an inference would be fallacious. Yet, since the party may always exculpate himself and disown the inference by proving the true reason for this retention of the document, the question remains whether the mere fact of possession ought not to suffice at the outset to make the document receivable, subject to explanations that may later be made.

This question was in orthodox practice answered in the affirmative: [2]

§ 1073. [1] *England:* 1877, Jones *v.* Botsford, 17 N. Br. 62 (document written by one under arrest, in the sheriff's presence, and forwarded by the latter to the former's attorney, admitted against the sheriff); *U. S. Ia.* 1902, Hull's Will, 117 Ia. 738, 89 N. W. 979 (obituary notice, published with a party's sanction, held on the facts not an admission of sanity); *Mass.* 1917, Leavitt *v.* Maynes, 228 Mass. 350, 117 N. E. 343 (services as physician; letter addressed to the husband, opened by the wife, and shown to the husband, not admitted on the facts); *Mich.* 1898, Raub *v.* Nisbett, 118 Mich. 248, 76 N. W. 393 (looking through an adversary's book of accounts, and stating no objection, makes the books receivable); 1906, Rogers *v.* Krumrei, 143 Mich. 15, 106 N. W. 279 (memorandum of a contract, made by one party in the sight of the other, admitted against the latter); *Minn.* 1896, Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31 (a letter read by the writer's husband, put into an envelope, and taken away to post, held an admission by him of the fact of marriage therein asserted); *N. Y.* 1875, Tilton *v.* Beecher, N. Y., Abbott's Rep. 1. 367 ff. (here the particular situation was that of a person who assisted in framing an answer to a letter received by him; and his failure to make an oral denial of its assertions was held not alone to admit the letter, and the written answer was held to be necessary in order to show how far he assented to the letter's statements); 1902, People *v.* Smith, 172 N. Y. 210, 64 N. E. 814 (defendant's statement that he had read a newspaper account, held not an admission of its truth); *Or.* 1905, Pacific Export L. Co. *v.* North P. L. Co., 46 Or. 194, 80 Pac. 105 (memorandum dictated by A in B's presence to a stenographer, typewritten, and a copy given to B, received for A as an admission of B); *Pa.* 1921, Marshall *v.* Carr, 271 Pa. 271, 114 Atl. 500 (ejectment; defendant's letter to the State Pardon Board, and his assistance in circulating M.'s petition thereto, held to make admissible M.'s description of herself in the petition as a widow); *Tex.* 1921, Terrell *v.* State, 88 Tex. Cr. 599, 228 S. W. 240 (wife-desertion; a letter to the defendant from another woman, in amorous terms, was received, opened, and read by the wife, who then "told him about it, and he just laughed at the idea", etc., held inadmissible because the defendant had not "acted upon it or adopted it"; this ruling is incorrect; it shows a radical misapprehension of the principle, and its fallacy is dangerous); *Vt.* 1895, Hamilton *v.* Gray, 67 Vt. 233, 31 Atl. 315 (taxation of costs by a clerk of court in a suit in which the person was a party).

[2] ENGLAND: 1717, Francia's Trial, 15 How. St. Tr. 897, 990 (treasonable correspondence; L. C. B. Bury: "To receive so many letters, and to keep them so long, is an evidence that he assented to the matter"); 1809, Doe *v.* Pembroke, 11 East 504 (plaintiff's predecessor charged with recognition of relationship of his grandfather and the ancestor of defendant, on the strength of a recital in a cancelled will of the grandfather, found in a drawer of plaintiff's predecessor the grandson); 1814, R. *v.* Plumer, R. & R. 264 (larceny of money from a letter; a letter and a money-bill being found on the defendant, *semble* the contents of the letter could be used to connect it with the bill); 1817, R. *v.* Watson, 2 Stark. 116, 140 (possession suffices); 1858, R. *v.* Bernard, 8 St. Tr. N. S. 887, 938 (conspiracy to murder Napoleon III; paper in A.'s handwriting, found in defendant's room bearing his handwriting, admitted to show knowledge of its contents, but not assent to them).

1794, *Horne Tooke's Trial*, 25 How. St. Tr. 1, 120; treason; a certain paper, addressed to Mr. Tooke and found at his house, was offered against him. Mr. *Tooke:* "I do not know what papers may have been taken from my house; but are letters written to me to be produced as evidence against me?" L. C. J. EYRE: "Being found in your possession, they undoubtedly are producible as evidence; but, as to the effect of them, very much will depend upon the circumstances of the contents of those letters, and whether answers to them can be traced, or whether anything has been done upon them. A great number of papers may be found in a man's possession which will be, 'prima facie', evidence against him, but will be open to a variety of explanations; and it is always a very considerable explanation that nothing appears to have been done in consequence of the paper being sent to him. But all papers found in the possession of a man are, 'prima facie', evidence against him, if the contents of them have application to the subject under consideration." Mr. *Tooke:* "The reason of my asking it is, I am very much afraid that, besides treason, I may be charged

UNITED STATES: *Fed.* 1901, Packer *v.* U. S., 46 C. C. A. 35, 106 Fed. 906 (unanswered letter to the accused from a victim of his fraud, found in the former's possession, excluded); 1909, Sorenson *v.* U. S., 8th C. C. A., 168 Fed. 785 (certain incriminating letters from defendant's wife, not admitted); 1916, Moy Wing Sun *v.* Prentis, 7th C. C. A., 234 Fed. 24 (letters addressed to defendant and found in the laundry where he and others worked, held not receivable without proof of his assent to their contents); 1917, Dean *v.* U. S., 5th C. C. A., 246 Fed. 568 (altering a postal money-order; memorandum-book taken from defendant's possession, admitted, as containing admissions by him and as containing handwriting by him to be used for comparison); *Cal.* 1895, People *v.* Colburn, 105 Cal. 648, 649, 38 Pac. 1105 (letter found on defendant, not admitted); 1899, Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264 (letter by stranger advising one whose fraudulent intent was in question to make a deed; mere receipt and possession of letter no evidence of acquiescence); *Ill.* 1894, Razor *v.* Razor, 149 Ill. 621, 624, 36 N. E. 963 (letter by X found in a wife's trunk, appointing an assignation, not received as implying assent, because not shown to be answered or acted on); 1909, Snell *v.* Wilson, 239 Ill. 279, 87 N. E. 1022 (similar to Razor *v.* Razor; cited more fully *ante*, § 260); *Ind.* 1905, Knox *v.* State, 164 Ind. 226, 73 N. E. 255 (letter found on the accused when arrested, admitted); *Mass.* 1848, Com. *v.* Eastman, 1 Cush. 189, 215 (conspiracy to defraud; letters found in defendants' possession, held not admissible "unless adopted or sanctioned by the defendants by some reply or statement or by some act done in pursuance of their suggestions"); 1863, Com. *v.* Jeffries, 7 All. 548, 561 (press copies in defendant's possession, received as "affecting him with an implied admission of the statements contained in them"); *Ia.* 1916, State *v.* Glaze, 177 Ia. 457, 159 N. W. 260 (embezzlement by cashier; defendant's knowledge, etc., required to be shown for a book containing entries by different persons); *N. Y.* 1837, Starkweather *v.* Converse, 17 Wend. 20, 24 (application of payments; defendant's retention of a document held on the facts no evidence of acquiescence); 1845, People *v.* Green, 1 Park. 11, 17 (letter from deceased, found in defendant's pocket, excluded on the facts); *Okla.* 1921, Goben *v.* State, — Okl. Cr. —, 201 Pac. 812 (murder; letter found in the bottom of a trunk marked by defendant's initials, the letter having no address nor surname signed, nor its date being shown; excluded); *P. I.* 1904, U. S. *v.* De Los Reyes, 3 P. I. 349 (treason; the possession of a revolutionary commission in defendant's trunk, held not sufficient); 1905, U. S. *v.* Nuñez, 4 P. I. 441 (brigandage; similar); 1906, U. S. *v.* Manalo, 6 P. I. 364 (similar); *Wash.* 1917, State *v.* Roberts, 95 Wash. 308, 163 Pac. 778 (robbery; letter from S., advising return to Seattle, and acted upon by the accused, admitted; another letter, held "probably inadmissible").

The following case is peculiar: 1912, State *v.* McFarland, 83 N. J. L. 474, 83 Atl. 993 (wife murder; the defendant's intention to rid himself of his wife being in issue, letters of his paramour addressed to him, referring to his expressed intention to get a divorce, and retained by him, were held inadmissible for the purpose, as not having been impliedly assented to; five judges dissenting; the dissent is clearly correct; the majority opinion overstrains the test of admissibility; mere possession should suffice, leaving the possessor to explain if he can; the learned judge's statement that the reference in the text above to the consideration that "the party may always exculpate himself", etc., is "an amazing suggestion in view of the disability of parties to testify at common law" might be answered by noting that that was precisely what Lord Chief Justice Eyre permitted Horne Tooke to do, *supra*, more than one hundred years ago; the eminent Chief Justice's remark made in that case contains the good sense of the whole subject).

Compare the cases cited *ante*, § 260 (possession as evidence of knowledge); the judges do not always distinguish the two principles in the application.

with blasphemy." Lord Chief Justice EYRE: "You are not tried for that." Mr. *Tooke:* "It is notorious I do not answer common letters of civility, but I have received and kept many curious letters. I received some letters from a man whose name is *Oliver Verall*, and he endeavored to prove to me that he was God the Father, Son, and Holy Ghost. He proved it from the Old Testament; in the first place that he was God the Father, because God is *O Veral;* that is, God over all. He proved he was God the Son, from the New Testament — verily, verily I am he; that is, *Veral I, Veral I,* I am he. Now, if these letters, written to me, which I, from curiosity, have preserved, but upon which I have taken no step, and to which I have given no answer, are produced against me, I do not know what may become of me." L. C. J. EYRE: "If you can treat all the letters that have been found upon you with as much success as you have these letters of your correspondent, you will have no great reason for apprehension, even if that letter should be brought against you."

1814, *De Berenger's Trial,* Gurney's Rep. 223. Mr. *Park,* for the defendant: "Am I to be answerable for all manner of things sent to me by my friends?" L. C. J. ELLENBOROUGH: "I think a paper found under the lock and key of the party is 'prima facie' readable against him. It is subject to observations. If you [the prosecutor] do not go farther, the reading this as found in his possession is doing little."

(3) The *failure to reply* to a *written communication* may sometimes suffice to permit an inference of the party's assent to the correctness of the statements made therein (upon the general principle of § 1071, *ante*). But the inference is not ordinarily so strong; and judges have always pointed out that the failure to reply in writing to a written communication does not have the same significance as a failure to reply orally to an oral communication:

1828, *Fairlie* v. *Denton*, 3 C. & P. 103. Mr. F. *Pollock* (arguing to admit a letter demanding money); "I submit that it is evidence, exactly the same as what is said verbally in the presence of a defendant is evidence against him, though he may make no answer." L. C. J. TENTERDEN: "I am slow to admit that. What is said to a man before his face he is in some degree called on to contradict, if he does not acquiesce in it. But the not answering a letter is quite different; and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth of the statements that letter contains. . . . You may have that single line read, in which the plaintiff makes a demand of a certain amount, but not any other part which states any supposed fact or facts."

1858, ALDIS, J., in *Fenno* v. *Weston*, 31 Vt. 345, 352: "The omission of a party to reply to statements in a letter about which he has knowledge, and which if not true he would naturally deny, when he replies to other parts of the letter, is evidence tending to show that the statements so made and not denied are true. So where there has been a correspondence between parties in regard to some subject-matter, and one of the parties writes a letter to the other making statements in regard to such subject-matter, of which the latter has knowledge, and which he would naturally deny if not true, and he wholly omits to answer such letter, such silence is admissible as evidence tending to show the statements to be true. Still all such evidence is of a lighter character than silence when the same facts are directly stated to the party. Men use the tongue much more readily than the pen. Almost all men will reply to and deny or correct a false statement verbally made to them. It is done on the spot and from the first impulse. But when a letter is received making the same statement, the feeling which readily prompts the verbal denial not unfrequently cools before the time and opportunity arrive for writing a letter. Other matters intervene. A want of facility in writing, or an aversion to correspondence, or habits of dilatoriness may be the real causes of the silence. As the omission to reply to letters may be explained by so many causes not applicable to silence when the parties are in personal conversation, we do not think the same weight should be attached to it as evidence."

So far as any definite rule is concerned, then, it seems impracticable; and the precedents indicate that each case must stand on its own facts.[3]

[3] ENGLAND: 1828, Fairlie *v.* Denton, 3 C. & P. 103 (money had and received; letter of demand by plaintiff to defendant, but unanswered, not read; see quotation *supra*); 1846, Draper *v.* Crofts, 15 M. & W. 166 (unanswered demand for rent of premises actually occupied by a co-tenant; Parke, B., after noting the difference of opinion: "My own opinion is that no attention at all need be paid to a letter asking for money which the party does not owe; it is a different case if he is bound by circumstances or by his situation to return an answer. I think, therefore, not that such evidence is absolutely inadmissible, but that it is worth very little when admitted"); 1850, Gaskill *v.* Skene, 14 Q. B. 664, 669 (money had and received; plaintiff's unanswered letters to defendant, admitted, so far as they were in general a demand of the claim, even though certain details of the claim are also mentioned; "to make an intelligible demand, some statement of the facts on which the demand arises must be made"); 1858, Keen *v.* Priest, 1 F. & F. 314 (distraint; unanswered letter from plaintiff's attorney to defendant, received on the facts; Bramwell, B.: "Silence may sometimes be conduct"); 1872, Richards *v.* Gellatly, L. R. 7 C. P. 127, 131 (false representations as to a ship's equipment; letters of complaint, unanswered, from the plaintiff's fellow-passengers to the defendant, excluded; Willes, J.: "That notion has been long exploded; . . . it may be otherwise where the relation between the parties is such that a reply might properly be expected"); 1891, Wiedemann *v.* Walpole, 2 Q. B. 534 (failure to answer a letter charging the defendant with having promised to marry, held no admission by the defendant of the promise; distinguishing the case as one of a charge of an offence which is usually ignored); 1920, Thomas *v.* Jones, [1920] 2 K. B. 399, [1921] 1 K. B. 22 (bastardy; unanswered letter not regarded as evidence on the facts).

CANADA: 1870, Gilbert *v.* Campbell, 1 Hann. N. Br. 474, 491 (an unanswered itemized demand, excluded on the fact).

UNITED STATES: *Fed.* 1876, U. S. *v.* Babcock, 3 Dillon, 571, 576 (unanswered telegrams to the defendant, held admissible, if, *semble*, under all the circumstances of the case the jury find that they called for an answer); 1906, Rumble *v.* U. S., 143 Fed. 772, 780, C. C. A. (unanswered letter, admitted on the facts); 1913, Thrush *v.* Fullhart, 4th C. C. A., 210 Fed. 1 (breach of marriage promise; plaintiff's letters to defendant after breach and after controversy arisen, excluded; no authority cited); *Cal.* 1919, People *v.* Lapara, 181 Cal. 66, 183 Pac. 545; *Colo.* 1890, Patrick *v.* Crowe, 15 Colo. 543, 555, 25 Pac. 985 (document submitted to the opponent in the course of a compromise, and not signed, but not specifically repudiated by him, excluded); *Col.* (Dist.) 1877, Meguire *v.* Corwine, 10 D. C. 81, 89 (unanswered letters demanding counsel fees, admitted; but a charge leaving to the jury to infer an admission of the claim, held properly refused); *Ga.* Code 1910, § 5741 ("In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving a letter from the other to answer within a reasonable time. Otherwise he presumed to admit the acts mentioned in the letter of his correspondent, and to adopt them"); *Ill.* 1903, Chicago *v.* McKechney, 205 Ill. 372, 68 N. E. 954, 987 (letters and reports of the plaintiff and his agents, sent to and read by the defendant's officers, but not by them answered or otherwise noticed, held not admissible); *Ia.* 1912, Seevers *v.* Cleveland Coal Co., 158 Ia. 574, 138 N. W. 793 (contract; certain unanswered letters, excluded, in a too finical ruling); *Md.* 1901, Biggs *v.* Stueler, 93 Md. 100, 48 Atl. 727 (failure to answer a letter, not equivalent to acquiescence); *Mass.* 1852, Dutton *v.* Woodman, 9 Cush. 257, 262 (letter to defendant, inquiring as to his liability as partner, admitted on the facts); 1862, Fearing *v.* Kimball, 4 All. 125 (unanswered letter, not admitted on the facts); 1865, Con. *v.* Edgerly, 10 All. 184, 187 (counterfeit utterance; letter received by defendant at a post-office, containing counterfeit bills, but taken from him before he read or opened it, held inadmissible); 1886, Sturtevant *v.* Wallack, 141 Mass. 119, 122, 4 N. E. 615 (letter demanding payment, etc., received as evidence of assent to the defendant's authority to T. as agent to order); 1905, Parker *v.* Farmers' F. Ins. Co., 188 Mass. 257, 74 N. E. 286 (insurer's failure to answer a letter of the insured about the agent, held not an admission of its statement; the ruling seems wrong on its facts); 1919, Sargent *v.* Lord, 232 Mass. 585, 122 N. E. 761 (services as architect; plaintiff's letter to defendant, received but not answered, not receivable against defendant, on the facts); *Mich.* 1904, State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20 (demand of money; failure to reply held not to admit the statement of claim; making an arbitrary distinction between written and oral statements); *Minn.* 1914, Sonnesyn *v.* Hawbaker, 127 Minn. 15, 148 N. W. 476 (letter of demand; failure to reply, admitted); *Nebr.* 1888, Kierstead *v.* Brown, 23 Nebr. 595, 613, 37 N. W. 471 (silence, upon the receiving of a written proposition for settlement, held not an admission); *N. J.* 1897, Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748 (failure to answer a letter making a claim, not an admission of the claim); *N. Y.* 1837, Bronson, J., in Starkweather *v.* Converse, 17 Wend. 20, 24 ("No man by doing wrong can make it the duty of another to complain of the injury at the risk

In one situation, however, there has been a uniform rule, namely, that the failure to dispute an *account rendered*, after the lapse of a reasonable time, amounts to an admission of its correctness.[4]

But in an action on an *account stated, i.e.* a specific document of contract, the opponent's *account-books* are not receivable, because the only issue

of being concluded by his silence"); 1872, Waring *v.* Tel. Co., 44 How. Pr. 69, 75 (undenied letter of claim to defendant, held not to amount to an admission on the facts); 1883, Talcott *v.* Harris, 93 N. Y. 567, 571 (failure of a party arrested on *ex parte* affidavits to answer them by motion to vacate the order, held not an admission); 1884, Learned *v.* Tillotson, 97 N. Y. 1, 8 (account, for partnership profits in stock proceeds; letter of plaintiff to defendant, making a demand, not admitted because of defendant's failure to reply); 1891, Bank of British N. America *v.* Delafield, 126 N. Y. 410, 418, 27 N. E. 797 (unanswered letter relating to a loan, excluded on the facts); 1894, Thomas *v.* Gage, 141 N. Y. 506, 509, 36 N. E. 385 (services in making a monument; unanswered letter to defendant, excluded on the facts); 1900, Gray *v.* Kaufman D. & I. C. Co., 162 N. Y. 388, 397, 56 N. E. 903 (preceding cases approved); 1905, Klein *v.* East River E. L. Co., 182 N. Y. 27, 74 N. E. 495 (receipt of a letter, of the defendant's attorney advising him that certain instruments were valid, held not an admission by the defendant); 1922, Israel *v.* Savoy Watch Co., Sup. App. T., 192 N. Y. Suppl. 333 (a reply with denial is of course no admission); *N. D.* 1915, Huston *v.* Johnson, 29 N. D. 546, 151 N. W. 774 (action for broker's commission; the plaintiff's letter received by defendant stating the facts of the sale, not admitted; over-strict ruling); *Tex.* 1912, Curtsinger *v.* McGown, — Tex. Civ. App. —, 149 S. W. 303 (statement of claim for services; failure to reply, held not an admission); 1916, Hollingsworth *v.* State, — Tex. Cr. —, 182 S. W. 465 (incest; letter of the woman to the defendant, unanswered, held inadmissible; the opinions by Harper, J., and by Prendergast, P. J., diss., discuss the general problem elaborately); *Utah:* 1911, State *v.* Greene, 38 Utah 389, 115 Pac. 181 (a statement charging the defendant with being the father of a bastard by M., shown to and read by him, and only partly denied; the statement admitted); *Vt.* 1856, Hill *v.* Pratt, 29 Vt. 119, 26 ("It would seem that the rule has never been extended to unanswered letters, particularly when the fact stated has relation to past transactions and upon which no future action of the party is contemplated"; here, a letter to an attorney, reporting the service of a writ, was excluded); 1858, Fenno *v.* Weston, 31 Vt. 345, 351 (failure to contradict a particular assertion, in answering a letter, and failure to reply to subsequent letters, held admissible; see quotation *supra*).

Distinguish the principle of Completeness, under which the question arises whether the *reply* to a letter *must* be offered in connection with it (*post*, § 2104) or *may* be offered in rebuttal (*post*, § 2120).

[4] England: 1741, Willis *v.* Jernegan, 2 Atk. 251 (a stated account need not be signed, to be set up in bar; it is "the person, to whom it is sent, keeping it by him any length of time without making any objection, which shall bind him"); 1750, Tickel *v.* Short, 2 Ves. Sr. 239 (L. C. Hardwicke: "If one merchant sends an account current to another in a different country, on which a balance is made due to himself, the other keeps it by about two years without objection, the rule of this Court and of merchants is that it is considered as a stated account");

Canada: 1850, Gilbert *v.* Palmer, 1 All. N. Br. 667 (mere presentment of an account in person, the opponent not conceding its correctness; excluded).

United States: *Fed.* 1809, Corps *v.* Robinson, 2 Wash. C. C. 388, 390 (account rendered to defendant by B. and A., and "retained by them without objection" held admissible to prove B. and A.'s partnership); 1812, Freeland *v.* Heron, 7 Cr. 147, 151 (the facts were held to afford "room for the application of a rule of the Chancery Court and of merchants to decide the controversy; it is this: When one merchant sends an account current to another residing in another country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the 'onus probandi' on him"); 1885, Leather Mfrs. Bank *v.* Morgan, 117 U. S. 96, 6 Sup. 657; 1921, First Nat'l Bank *v.* Farrell, 3d C. C. A., 272 Fed. 371 (action for balance due a depositor; the defendant bank had paid out sums on a power of attorney but in excess of the limit set; depositor's failure to notify bank of pass-book errors, held "an admission that the entries as shown are correct"); *Ala.* 1852, McCulloch *v.* Judd, 20 Ala. 703, 705; 1882, Burns *v.* Campbell, 71 id. 271, 286 (objection to one item only is "an implied admission of the correctness of the rest"); 1895, Peck *v.* Ryan, 110 id. 336, 17 So. 733; *Cal.* 1859, Terry *v.* Sickles, 13 Cal. 427, 429 (failure to object in a reasonable time amounts to an admission); *Fla.* 1904, Daytona Bridge Co. *v.* Bond, 47 Fla. 136, 36 So. 445 (the objection to the account need not have been made immediately, but within a reasonable time); *Haw.* Rev. L. 1915, § 2341 (account rendered, undis-

is the agreement as to the account;[5] though in ordinary actions for the price of goods or services, the opponent's account-book entries are of course receivable as admissions against himself.[6] Distinguish (*a*) the question of substantive law, what constitutes irrevocably an *account stated*, so as to create a new cause of action thereon;[7] (*b*) the question when an *account stated* may be *set aside* by a bill in equity with leave to surcharge and falsify.[8] The use of account-books of *parties* and of *third persons* under exceptions to the Hearsay rule is dealt with *post*, §§ 1517–1561.

(4) The party's *use of a document* made by a third person will frequently amount to an approval of its statements as correct, and thus it may be received against him as an admission by adoption. A common instance of this application of the principle is the *insured's* or *beneficiary's* presentation of the "*proofs of loss*" to the insurer.[9]

puted for six months, to be 'prima facie' evidence); *Mich.* 1895, Pabst Brewing Co. *v.* Lueders, 107 Mich. 41, 64 N. W. 872; 1898, Raub *v.* Nisbett, 118 Mich. 248, 76 N. W. 393 (failure to object in 30 days, not an admission as matter of law); *N. Y.* 1818, Murray *v.* Toland, 3 John. Ch. 569, 575; 1916, Bradley *v.* McDonald, — N. Y. —, 119 N. E. 340, 350 (action for engineering work; the plaintiff's daily and monthly accounts of work done, sent to the defendant, and "retained by them without criticism or objection", held receivable as admissions of the defendant); *N. C.* 1908, Davis *v.* Stephenson, 149 N. C. 113, 62 S. E. 900 (exception to the rule, here applied); *S. C.* 1821, McBride *v.* Watts, 1 McCord 384.

So also the principle applies where a *duplicate original* of a *delivery entry* is handed to the buyer at the time of a delivery: 1911, Federal U. Surety Co. *v.* Indiana L. & M. Co., 176 Ind. 328, 95 N. E. 1104.

[5] 1894, Sterling L. Co. *v.* Stinson, 41 Nebr. 368, 369, 59 N. W. 888.

[6] 1894, German N. Bank *v.* Leonard, 40 Nebr. 676, 683, 59 N. W. 107.

[7] 1844, Langdon *v.* Roane, 6 Ala. 518, 527; 1901, Louisville Banking Co. *v.* Asher, 112 Ky. 138, 65 S. W. 133; 1906, Little & H. I. Co. *v.* Pigg, — Ky. —, 96 S. W. 455; 1917, Isaacs *v.* Wishnick, 136 Minn. 317, 162 N. W. 297; 1920, Dodson *v.* Watson, 110 Tex. 355, 220 S. W. 771 (conclusiveness of an account stated); 1909, Ripley *v.* Sage L. & I. Co., 138 Wis. 304, 119 N. W. 108.

[8] Langdon *v.* Roane, Ala., *supra*.

[9] This much is generally assumed as unquestioned; the only matter of argument being the conclusiveness of such proofs by way of estoppel; in the following cases the "proofs" were received, except as otherwise noted: *Fed.* 1874, Insurance Co. *v.* Newton, 22 Wall. 32, 36 (coroner's verdict, admitted); 1877, Insurance Co. *v.* Higginbotham, 95 U. S. 380, 390 (foregoing case approved); 1889, Richelieu & O. N. Co. *v.* Boston M. Ins. Co., 136 U. S. 408, 435, 10 Sup. 934; 1900, Sharland *v.* Ins. Co., 41 C. C. A. 307, 101 Fed. 206 (coroner's verdict); 1917, Continental Life Ins. Co. *v.* Searing, 3d C. C. A., 240 Fed. 653 (here the special rule is laid down that "proofs of death" are not admissible at all as evidence for the jury, but go only to the judge upon the question whether a condition precedent to the right of action has been fulfilled); *Ala.* 1918, Union Mutual Aid Ass'n *v.* Carroway, 210 Ala. 414, 78 So. 792; *Cal.* 1884, Walther *v.* Ins. Co., 65 Cal. 417, 4 Pac. 413 (coroner's verdict); *Ill.* 1887, U. S. Life Ins. Co. *v.* Kielgast, 26 Ill. App. 567, 572 (coroner's verdict; "the delivery of the paper imported no admission that the verdict was true"); 1889, U. S. Life Ins. Co. *v.* Vocke, 129 Ill. 557, 562, 22 N. E. 467 (point reserved); 1903, Supreme Tent *v.* Stensland, 206 Ill. 124, 68 N. E. 1098; 1904, Knights Templar & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 (not conclusive); *Ind.* 1905, Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592; *Ia.* 1906, Jackman *v.* Brotherhood, 132 Ia. 64, 106 N. W. 350 (Supreme Tent *v.* Stensland, 206 Ill. 124, approved); 1917, Michalek *v.* Modern Brotherhood, 179 Ia. 33, 161 N. W. 125; *Ky.* 1904, American Benevolent Ass'n *v.* Stough, — Ky. —, 83 S. W. 126 (proofs of loss not receivable against the beneficiary, except as containing his own statements); 1908, Supreme Lodge K. of P. *v.* Bradley, — Ky. —, 109 S. W. 1178 (doctor's certificate); *Mich.* 1871, New York Central Ins. Co. *v.* Watson, 23 Mich. 486 (admission that other insurance existed); 1898, John Hancock M. L. Ins. Co. *v.* Dick, 117 Mich. 518, 76 N. W. 9 (physician's certificate); 1901, Wasey *v.* Ins. Co., 126 Mich. 119, 85 N. W. 459 (physician's affidavit; but a majority of the Court excluded such portions as were based on mere hearsay); 1906, Krapp *v.* Metrop. L. Ins. Co., 143 Mich. 369, 106 N. W. 1107 (proofs of death in general); 1915, Gilchrist *v.* Mystic Workers, 188 Mich. 466, 474, 154 N. W. 575 (coroner's verdict forwarded by beneficiary, held not an admission, purporting to follow Wasey *v.* Ins. Co., *supra*); *Nebr.* 1901, Modern Woodmen *v.* Kozak, 63 Nebr. 146, 88 N. W.

§ 1074. **Same: Books of a Corporation or Partnership.** Respecting the use of corporation-book entries as evidence of the facts recorded, some doubt and confusion has arisen, chiefly through a failure to keep in mind the history of the rule for parties' account-books. This aspect of the subject may best be disposed of at the outset.

(1) By a peculiar course of development (examined *post*, § 1518) a *party's account-book*, once receivable by custom, became inadmissible on his own behalf in England as early as the 1700s, through a combination of statute and judicial legislation. In the Colonies, this absolute prohibition never came to prevail; but the surviving use was limited in various ways; in particular, the transactions recorded must be of goods or services, and not of cash payments nor of special contracts, and the entrant must be the party himself. These limitations were later removed by statute in many jurisdictions; but in England, substantially till the end of the 1800s, the prohibition remained.

The account-books of a corporation-party, then, were in England not admissible, any more than the account-books of a natural person.[1] In the United States, they would have been admissible so far as any other party's account-books would have been; but obviously the above restrictions in fact excluded them, even when they related to entries of goods or services, because they were kept by a clerk. Nevertheless, they might have been and doubtless were used by calling the clerk to use them as memoranda of recollection, precisely as could be done by the clerk of any other party (*ante*, §§ 734 ff.). Moreover, after the statutory removal of some of the above restrictions — in particular, the restriction as to the nature of the transaction re-

248; *N. Y.* 1886, Goldschmidt *v.* Ins. Co., 102 N. Y. 486, 492 (coroner's verdict, expressly denied in the proofs to be true, excluded); 1896, Hanna *v.* Connecticut M. L. Ins. Co., 150 N. Y. 526, 44 N. E. 1099; 1917, Klein *v.* Prudential Ins. Co., 221 N. Y. 449, 117 N. E. 942; *N. D.* 1903, Stevens *v.* Continental C. Co., 12 N. D. 463, 97 N. W. 862 (excluded as against an infant); 1920, Fekjar *v.* Iowa S. L. S. Ins. Co., 44 N. D. 389, 177 N. W. 455; *Ohio:* 1883, Insurance Co. *v.* Schmidt, 40 Oh. St. 112 (physician's answers, based on hearsay excluded); *Or.* 1903, Cox *v.* Royal Tribe, 42 Or. 365, 71 Pac. 73 (held receivable as admissions; but here rejected because furnished by the insurer's agent); *Pa.* 1906, Felix *v.* Fidelity M. L. Ins. Co., 216 Pa. 95, 64 Atl. 903 (suicide; physician's statement, etc., in proofs of death admitted); 1922, Maculuso *v.* Humboldt Fire Ins. Co., 271 Pa. 489, 115 Atl. 828; *Tex.* 1921, Thornel *v.* Missouri State L. Ins. Co., Tex. — Civ. App. —, 229 S. W. 653 (proofs of death, inconsistent with claim, admitted); *Wash.* 1916, Armstrong *v.* Modern Woodmen, 93 Wash. 352, 160 Pac. 946; *Wis.* 1903, Voelkel *v.* Supreme Tent, 116 Wis. 202, 92 N. W. 1104 (coroner's certificate); 1904, Fey *v.* I. O. O. F. Ins. Soc'y, 120 Wis. 358, 98 N. W. 206; 1913, Krogh *v.* Modern Woodmen, 153 Wis. 397, 141 N. W. 276.

The question ought to be, in each case, whether the beneficiary has in fact adopted the statements as his own; there can be no general rule for all cases. The decisions are collected and examined in an article by Professor A. M. Kales, in 6 Columbia Law Review, 509 (1906), "Declarations of the Insured against the Beneficiary."

Distinguish the questions whether the admissions of the *deceased insured* may be used *against* the beneficiary (*post*, § 1081); whether the *testimony before the coroner* is admissible (*post*, § 1374); and whether there is a *privilege* for the physician's *certificate of death* (*post*, §§ 2385 *a*).

Distinguish also the question whether the insured or beneficiary may, *on his own behalf*, under the Hearsay rule offer *affidavits* contained in these "proofs" (*post*, § 1384), or whether the *coroner's verdict* may be offered by either party as an official report (*post*, § 1671), or may offer the "proofs" as part of the 'res gestæ' (*post*, § 1770).

§ 1074. [1] 1819, Marriage *v.* Lawrence, quoted *infra*.

corded — there was no reason why corporation account-books could not be used, on verification by the recorder, like any other books. They were and are neither more nor less admissible than any other party's books, either under the Parties'-Books branch of the Hearsay exception for Regular Entries (*post*, §§ 1537 ff.), or under the branch which admits Regular Entries by Deceased Persons (*post*, §§ 1521 ff.), or as verified memoranda of recollection (*ante*, §§ 734 ff.). There is no mystery about them, and no eccentricity.

But doubt was introduced by ignoring this point of view and fixing the attention on another principle, the test of which they could not satisfy:

(2) This principle was that of Official Statements, or *Public Records*, by virtue of which, as an exception to the Hearsay rule, official registers, by persons having a duty and authority, were receivable to evidence the facts stated. This principle sufficed to admit certain public registers, including the books of certain public corporations (*post*, § 1661); but it obviously could not cover the records of a private corporation or of a public corporation doing private acts.[2] Conceding this, the English Court found of course no other title for admitting corporate books as parties' entries, for the reason above explained. But, for the same reason, our own Courts, if they had kept in mind our peculiar tradition and statutes as to parties' books, might have correctly estimated the negative conclusion of the English Court, and might have laid hold of such other principle as plainly would have sufficed for the purpose in hand. This they did not do; they seem constantly to have ignored the likeness between the account-books of natural parties and of corporate parties.[3] The consequence is that (apart from unrecorded practice) they seem seldom to have supposed that there was any way of using corporate books otherwise than on the further principles now to be noticed; and the few Courts that have permitted their use have not done so with any firm and clear recognition of the sound reason for that result.

(3) No one doubted that the *records of a meeting* were receivable in proving the doings of the meeting. On the theory of the Parol Evidence rule (*post*, § 2451) those records *were* the doings; *i.e.* as with judicial and legislative records, the votes of the meeting are supposed not to be 'in pais,' or oral, but in writing; hence, in proving the acts of the meeting, as such, the acts are to be sought in the written records. Thus, the record is not somebody's hearsay testimony to the act; it is the act itself.[4] This rule, how-

[2] 1789, London *v.* Lynn, 1 H. Bl. 205, 215 (corporate tolls; same ruling as in the next case); 1819, Marriage *v.* Lawrence, 3 B. & Ald. 142 (right of a borough corporation to tolls; to show acts of prescriptive claim, the ancient corporate records of fines imposed and paid were not admitted; because though the books were public records, still "if the entry apply to private transactions alone, it will still fall within the rule applicable to private books" as a mere "minute made by a party in his own memorandum-book").

[3] *E.g.*, in Chase *v.* R. Co., 38 Ill. 215 (1865); Chesapeake & O. R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890 (1905).

Contra, in a good opinion: 1891, Terry *v.* Birmingham N. Bank, 93 Ala. 608, 9 So. 299 (stock-exchange corporation books); also (1922) Newton *v.* Gas Co., 258 M. S. 165, 176 (cost of gas), Trainor *v.* Ass'n, Ill., and Ganther *v.* Jenks, Mich., cited *infra*.

[4] 1820, Owings *v.* Speed, 5 Wheat. 420, 422 (land vested in trustees; the "book of the board of trustees", in which their proceedings

ever, though not disputed, sufficed only to admit what was actually done as a part of the corporate meeting; it still did not serve any purpose of proving matters that occurred apart from the meeting, such as the sale of goods, the erection of a building, the receipt of money, the subscription to shares, and the like.

Was there any other principle upon which the books could be used as evidence for these purposes? It is just here that the present principle of Admissions comes to be invoked:

(4) May not the account-books be used against a member of the corporation as *statements assented to* by him, by virtue of his presumed access to them? The books of a *partnership* are receivable against a partner, either on this principle or on the principle of agency.[5] May not *corporation account-books* be receivable in the same way, assuming that the opponent is shown to be a member, and that the object is to charge him with an admission of the correctness of the account? This question has generally been answered in the negative:[6]

were recorded, was admitted, because, per Marshall, C. J., "the books of such a body are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved"); 1902, Sigua Iron Co. *v.* Brown, 171 N. Y. 488, 64 N. E. 194.

In Chesapeake & O. R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890 (1905), there is a full collection of rulings; but the opinion of the majority does not appreciate the inherent distinctions of the subject; Brannon, P., diss. on this point, expounds the correct view, illustrating the discrimination above taken.

Compare §§ 1661, 2451, *post*.

[5] 1899, Chick *v.* Robinson, 37 C. C. A. 205, 95 Fed. 619 (special partner legally entitled to access to books; entries admitted); 1903, Safe Deposit & T. Co. *v.* Turner, 98 Md. 22, 55 Atl. 1023; 1908, Schlicher *v.* White, 74 N. J. L. 839, 71 Atl. 337 (suit for accounting); 1844, Allen *v.* Coit, 6 Hill N. Y. 318 (entries in the firm's books; "the knowledge of their agent was in this respect their own knowledge"); 1892, Kohler *v.* Lindenmeyr, 129 N. Y. 498, 501, 29 N. E. 957 (here excluding books of a prior partnership); 1824, Thommon *v.* Kalbach, 12 S. & R. Pa. 238; 1908, Garrido *v.* Asencio, 10 P. I. 691.

[6] ENGLAND: The cases on both sides are as follows: 1816, Alderson *v.* Clay, 1 Stark. 405 (a member of a company who had attended three meetings, held to be affected by all the recorded doings of the company kept in a book open to all members); 1833, Hill *v.* Manchester & S. W. Co., 2 Nev. & M. 573 (see quotation *supra*);

UNITED STATES: *Fed.* 1899, Hayden *v.* Williams, 37 C. C. A. 479, 96 Fed. 279 (usable only as admissions by the corporation against a member or between members; but, even here, not "as to his own dealings" with a corporation); *Ala.* 1898, Booth *v.* Fire-Engine Co., 118 Ala. 369, 24 So. 405 (books admitted, the member being present at the meeting); 1921, McMillan *v.* Aiken, 205 Ala. 35, 88 So. 135 (title to land through a corporation; minutes of meeting, admissible against a stockholder); *Cal.* 1877, Neilson *v.* Crawford, 52 Cal. 248 (not received against a stockholder to show the company's indebtedness to the plaintiff; Hill *v.* Manchester & S. W. Co. followed); 1896, McGowan *v.* McDonald, 111 Cal. 57, 69, 43 Pac. 418 (received in a case like the preceding; "the first fact to be established is the indebtedness of the corporation, and when that is established, the liability of the stockholder results as a necessary sequence"; attempting to distinguish Neilson *v.* Crawford); 1898, San Pedro L. Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410 (admitted as against an agent having charge of the books); *Colo.* 1911, Brown *v.* First Nat'l Bank, 49 Colo. 393, 113 Pac. 483 (embezzlement; bank's books admitted); *Conn.* 1904, Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499 (a corporation record-book, containing a certificate by a majority of the directors reciting a receipt of assets, excluded, as not a regular entry in a book of account); *Ga.* 1905, Lowry Nat'l Bank *v.* Fickett, 122 Ga. 489, 50 S. E. 396 (not clear); *Ill.* 1897, Anderson *v.* Life Ass'n, 171 Ill. 40, 49 N. E. 205 (directors' resolution of assessment, held 'prima facie' evidence against members); 1903, Trainor *v.* German A. S. L. & B. Ass'n, 204 Ill. 616, 68 N. E. 650 (books of account not admissible 'per se' against a stockholder; but admissible if fulfilling the requisites of books of account in general); *Kan.* 1917, Davis *v.* Sim, 100 Kan. 66, 163 Pac. 622 (allotment of land; corporate minutes, admitted); *Mich.* 1889, Ganther *v.* Jenks, 76 Mich. 510, 514 (entries of payment in the defendant company's books, admitted; "such

1833, *Hill* v. *Manchester & S. W. Co.*, 2 Nev. & M. 573, 579, 580, 582. PARKE, J.; "In the case put of a partnership, the books are evidence against the individual partner dealing with the partnership, because he has access to the books and may alter them, and his not doing so is evidence of acquiescence." *Campbell*, Solicitor-General: "In the case of a partnership, the books are evidence against a partner, not on the ground of access, but because they are kept by a clerk, who is his agent, or by a partner, who is also his agent"; PARKE, J.: "That is the true ground upon which they are evidence." DENMAN, L. C. J.: ". . . We are, however, of opinion that the principle on which partnership books are evidence against the partners is that they are the acts and declarations of such partners, being kept by themselves or, by their authority, by their servants and under their direction and superintendence. But the clerk of the company, once appointed, is subject to the control of no individual member; and the free access provided for [by the charter] is only for the purpose of inspection."

1891, EARL, J., in *Rudd* v. *Robinson*, 126 N. Y. 113, 117, 26 N. E. 1046: "There was no proof that the defendant had actual knowledge of the entries contained in the books which were used as evidence against him, or that he authorized such entries or caused them to be made. There was no proof from which the law would raise a legal presumption that he had knowledge of the entries, unless he is chargeable with such knowledge from the mere fact that he was a stockholder and trustee of the corporation. . . . The books of corporations for many purposes are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors and its financial condition when its solvency comes in question. But . . . can perceive no principle upon which the account-books of a corporation can be evidence against a member of the corporation, of the accounts and entries therein made in a suit brought by the corporation or its representatives against him to enforce his liability upon such account. The officers and book-keepers of a corporation are in no sense his agents. Individually he has no control over their acts, and has no responsibility thereof; and in making the entries they do not, in any legal sense, represent or bind him. As to the competency of such books, directors and stockholders of a corporation stand upon the same footing. It is quite true that a director stands in a more favorable position to know what is going on within the

books, when properly kept by the proper officers or agents of the company, are competent testimony" as regular entries); *Mo.* 1912, Howard *v.* Strode, 242 Mo. 210, 146 S. W. 792 (whether L. J. H., deceased, was in Decatur or St. Louis on Jan. 15, 1883; minutes of a stockholders' meeting in St. Louis, reciting the presence of L. J. H., signed by him as secretary, and dated Jan. 16, 1883, also an order-book with an entry by the same person on Jan. 15, 1883, admitted, as a regular entry in the course of business); *N. H.* 1858, Haynes *v.* Brown, 36 N. H. 545, 563, 566 (the corporation-books are evidence, "in the nature of public records, as to everybody, of the corporate proceedings", including the fact of a defendant being stockholder; but not of other matters of fact, including the state of accounts between a stockholder and the corporation; following Hill *v.* Manchester & S. W. Co.); *N. Y.* 1891, Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1046 (action by a receiver to charge a director with unlawful appropriation of corporate funds; corporate account-books held not admissible to charge a director or stockholder; see quotation *supra*); *Pa.* 1919, Fell *v.* Pitts, 263 Pa. 314, 106 Atl. 574 (corporate books admitted against directors); *Tenn.* 1902, Continental Bank *v.* First Nat'l Bank, 108 Tenn. 374, 68 S. W. 497 (corporate account-books held admissible, like other account-books, "either for or against a corporation, and against a stranger or as between two strangers"); *Vt.* 1920, Smith *v.* Reynolds, 94 Vt. 28, 108 Atl. 697 (statement of account, in possession of defendant when treasurer of the corporation, admitted on the facts); *Wis.* 1914, Rogers *v.* Rosenfeld, 158 Wis. 285, 149 N. W. 33 (deceit in the sale of mining stock; the corporation account-books admitted to show the conditions of the business, on the theory that both parties were stockholders).

Against an *active officer* the books are of course admissible, on the principle of § 1073, par. (2), *ante:* 1908, State *v.* Hoffman, 120 La. 949, 45 So. 951 (knowing receipt of deposits, while insolvent, by a bank cashier; bank-book entries admissible against defendant, though actual knowledge must also be believed by the jury before finding guilt).

corporation and to be more familiar with its books in some cases than a stockholder. He has the right to inspect the books of the corporation, and so has a stockholder. A stockholder having the ability is just as able to become familiar with the contents of the books of a corporation to which he belongs as a director; and there is no principle of law by which a director can be charged with knowledge of the entries in the books of a corporation which is not equally applicable to its stockholders. . . . It would be quite a dangerous and, we think, startling proposition to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal representatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action brought by an individual to enforce a claim against any defendant."

Hence, the account-books have generally been excluded, in *actions against stockholders*, unless actual access to the books was shown, or unless the indebtedness in issue was that of the corporation to the plaintiff (in which case the corporate entries, as its admissions, evidenced the debt, and would not be offered as the stockholder's own admissions). Yet it would seem, upon the principle already examined (in par. (1) *supra*), that the account-books should be received *against any person* and without any other restrictions than ordinarily are applied in the use of such books of natural persons.

The inadequacy of the result reached by the Courts is indicated by the statutes which in many jurisdictions have expressly declared corporate account-books admissible on certain conditions.[7]

(5) A similar question, lacking one circumstance, is presented when, in an action charging the defendant as stockholder, it is desired to use the corporate *stock-book* to prove him to be a *stockholder*. Here there is no room for arguing upon the principle of Admissions, because the assent to be presumed from the right of access presupposes the party to have that right as a stockholder, which is here the very fact in issue. Much more, then, should this use of the books be denied by the Courts which see no other point of view than the principle of Admissions. On the other hand, a Court which permits this use must implicitly assume that the principles of Regular En-

[7] The following list is partial only:

ENGLAND, St. 1908, 8 Edw. VII, c. 69, § 220 (Companies Act; "where any company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be 'prima facie' evidence of the truth of all matters purporting to be therein recorded");

UNITED STATES: *Fla.* Rev. Gen. St. 1919, § 5171 (in prosecution for false entry of transfer, fraudulent issue, etc., of corporate stock, books of "any corporation to which such person has access or the right of access" are admissible); *Ind.* Burns Ann. St. 1914, § 4365 (corporations for boards of trade, etc.; records admissible); ib. §§ 5771, 5794; *Mass.* Rev. L. 1920, c. 266, § 68 (corporation-books to be evidence in certain charges against one having access or the right of access to them); *N. Y.* Cons. L. 1909, Stock Corporation, § 32 ("books of account of every bank" to be presumptive evidence as against the corporation, officers, etc. or stockholders); C. P. A. 1920, § 373 (books of a foreign corporation, admissible "to prove an act or transaction" of the corporation); *N. Car.* Con. St. 1919, § 4948 (record of proceedings of agricultural society receiving money from State, may be "read in evidence in suits wherein the corporation may be a party"); *Tex.* Rev. Civ. St. 1911, § 3713 (records of any domestic corporation, admissible).

tries (noted above) apply to corporate-books, for there is no other available principle. In other words, the entry is, in effect, that A. B. by himself or his agent orally agreed to take shares of stock, or (where the subscription is in writing) that the purporting signature of A. B. is genuine. The judicial rulings are at variance;[8] but it is a little singular that there should appear

[8] ENGLAND: 1850, Bain *v.* R. Co., 3 H. L. C. 1, 21 (Lord Brougham said that at common law a corporation's share-book was not admissible to prove A. B. a shareholder; here applying a statute expressly making such books admissible).

CANADA: 1881, Stadacona Ins. Co. *v.* Rainsford, 21 N. Br. 309 (a charter made a certificate of the corporation evidence of a shareholder's indebtedness; held, that other evidence of the defendant being a shareholder must be given).

UNITED STATES: *Federal:* 1824, Rockville, & W. Turnpike Co. *v.* Van Ness, Cr. C. C. 449 (action by the corporation for a balance due on a subscription; the original subscription book being offered, without evidence of the signature's genuineness, the Court, "'nem. con.', was of opinion that the commissioners' book of subscriptions is 'prima facie' evidence that the subscriptions were genuine or made by persons duly authorized"); 1877, Turnbull *v.* Payson, 95 U. S. 418 (assignee's action for stockholder's assessed liability to the company; stock-book held admissible to show "that he is the owner of the stock"); 1892, Liggett *v.* Glenn, 2 C. C. A. 286, 51 Fed. 381 (trustee's suit to recover unpaid assessment of stockholder; stock-ledger and transfer-book held admissible to prove the defendant a stockholder, and sufficient therefor with evidence of identity; following Turnbull *v.* Payson); 1892, Taussig *v.* Glenn, 2 C. C. A. 314, 51 Fed. 409 (same principle applied); 1897, Carey *v.* Williams, 25 C. C. A. 227, 79 Fed. 906, 909 (action for an unpaid assessment; entries in the stock-books held inadmissible to prove the defendant a stockholder; the contract of membership must be shown by some act of assent; Turnbull *v.* Payson and Liggett *v.* Glenn treated as containing obiter statements only); 1898, Sigua Iron Co. *v.* Greene, 31 C. C. A. 477, 88 Fed. 207 (like the preceding case); 1905, Harrison *v.* Remington P. Co., 140 Fed. 385, 402, C. C. A. (Carey *v.* Williams, *supra*, followed; but here the defendant's admissions were received, in the shape of certificates signed on the stubs and corresponding assignments written in the certificate book); 1913, Oregon & Cal. R. Co. *v.* Grubissich, 9th C. C. A., 206 Fed. 577 (corporate records — here of the plaintiff — not admitted to show the contents of a deed purporting to have been made to the corporation 40 years before and copied in the minutes; Ross, J., diss.); 1906, State ex rel. Biddle *v.* Superior Court, 44 Wash. 108, 87 Pac. 40 (following Turnbull *v.* Payson, U. S.); *Cal.* 1867, Mudgett *v.* Horrell, 33 Cal. 25 (creditor's suit to charge a stockholder; stock-books held not admissible to prove defendant a stockholder; per Currey, C. J., and Shafter, J.); *Col.* (Dist.): 1899, National Expr. & T. Co. *v.* Morris, 15 D. C. App. 262, 274 (stock-book "entries are not 'per se' evidence sufficient to establish the fact of membership"; there must be some conduct of assent by the person charged); *Conn.* 1900, Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711 (excluded; yet admissible to prove time of membership commencing, if membership is otherwise evidence); *Me.* 1840, Coffin *v.* Collins, 17 Me. 440 (execution against a stockholder for the company's debts; *semble*, the corporate records were admissible); *Md.* 1872, Hager *v.* Cleveland, 36 Md. 476, 494 (corporation-books not admissible, "except perhaps in actions between the members"); *Minn.* 1921, Lebens *v.* Nelson, 148 Minn. 240, 181 N. W. 350 (stockholders' liability; the corporation records admissible to show defendants to be stockholders, under G. S. 1913, §§ 6177, 6183, 6194, 6203); *N. H.* 1858, Haynes *v.* Brown, 36 N. H. 545, 563 (admissible; see citation *supra*); *N. J.* 1904, French *v.* Millville Mfg. Co., 70 N. J. L. 960, 59 Atl. 214 (question not decided; here the books were used to refresh the secretary's memory); *N. Y.* 1813, Highland Turnpike Co. *v.* McKean, 10 John. 154 (books held admissible to show defendant a stockholder, if duly authenticated); *Va.* 1826, Grays *v.* Turnpike Co., 4 Rand. 578, 580, 582 (corporation-books used to prove its organization; defendant's subscription proved by his signature to the subscription-book); 1879, Stewart *v.* Valley R. Co., 32 Gratt. 146, 156 (stock-ledger and shareholders' list, admitted in an action by the company for the amount due from shareholders, to show the company's reliance on a subscription-paper signed by the defendant); 1888, Lewis *v.* Glenn, 84 Va. 947, 984, 6 S. E. 866 (preceding case approved); 1888, Vanderwerken *v.* Glenn, 85 Va. 9, 14, 6 S. E. 806 (action by a trustee of the company for the amount due from a shareholder; "that the stock-books of such a company are 'prima facie' evidence of who are its stockholders is well settled"); *W. Va.* 1882, Pittsburgh W. & K. R. Co. *v.* Applegate, 21 W. Va. 172, 180 (action for residue of shareholder's subscription; ledger and stockholders' list admitted to prove the defendant a stockholder, under express statute, Code 1860, c. 57, § 25); 1897, South B. R. Co. *v.* Long, 43 W. Va. 131, 27 S. E. 297 (similar).

more inclination to sanction the use of corporate-books to prove a defendant a stockholder than to sanction their use in an accounting against one who is otherwise proved a stockholder. Here, too, *statutes* have frequently intervened to make the stock-books admissible.[9]

§ 1075. **Same: Depositions in another Trial, Used or Referred to.** If a party *expressly states* that a certain piece of testimony by another person is correct, there can be no question that it becomes his statement by adoption, and is receivable as his admission.[1] But does he by implication approve and adopt as his all the *depositions*, testimonies, and affidavits that are *offered on his behalf* in a litigation, so that in a subsequent litigation these may be used against him as his admissions?

It is true that the rule against impeaching one's own witness was once explained upon the theory that a party guarantees the credibility of his witness, and (by inference) the correctness of the witness' statements (*ante*, § 898). But that impossible theory has long been exploded (*ante*, § 899), and cannot serve here. The question is purely one of implication from the facts.[2]

[9] ENGLAND: Companies Clauses Consolidation Act, 1845, § 28; Companies Act, 1862, §§ 25, 27; St. 1908, 8 Edw. VII, c. 69, § 33 (Companies Act; "the register of members shall be 'prima facie' evidence of any matters by this Act directed or authorized to be inserted therein"); CANADA: *Dom.* Rev. St. 1906, c. 79, § 107 (books admissible in actions against the company or a shareholder); *N. Sc.* Rev. St. 1900, c. 128, § 47 (certificate under corporate seal shall be evidence of shareholder's title); *Ont.* Rev. St. 1914, c. 178, § 123 (corporation stock-books to be evidence, in actions against the company or a shareholder); UNITED STATES: *Colo.* Comp. L. 1921, § 2268 (stock-book to be evidence against a stockholder); *Ind.* Burns Ann. St. 1941, § 4054 (corporate stock-book, admissible against a stockholder); *Me.* Rev. St. 1916, c. 51, § 22 (corporation stock-book, admissible to prove who are stockholders and amount held); *Mass.* Rev. L. 1920, c. 255, § 22 (stock and transfer books shall be "competent evidence"); *Mich.* Comp. L. 1915, § 8014 (banking); § 8065 (trust, security, and deposit); *Mo.* Rev. St. 1919, § 9773 (records of private domestic incorporation, admissible in any suit to which the corporation is a party); *N. Y.* Cons. L. 1909, Stock Corporation § 32 (stock-book of a corporation, admissible in suits against the corporation, officers, directors, or stockholders); *Tenn.* Shannon's Code 1916, § 5569 (actions between corporation and stockholders; subscription-books, admissible by certified copy); *Wash.* R. & B. Code 1909, § 3325 (bank stock-book to be presumptive evidence); *Wis.* Stats. 1919, § 2024–16 (bank stock-book to be evidence of "the facts therein stated").

For the *authentication* of corporate books, see *post*, §§ 2159, 2169; for proof of their *contents* by *certified copies*, see *post*, §§ 1223, 1683.

§ **1075**. [1] 1835, R. *v.* John, 7 C. & P. 324 (deposition of T., which had been admitted to be correct by the defendant in his examination, received); 1863, State *v.* Gilbert, 36 Vt. 145, 147 (an admission that the testimony of a witness on a former occasion was true makes the testimony receivable); and cases *ante*, § 1070.

[2] The rulings are as follows: ENGLAND: 1806, Johnson *v.* Ward, 6 Esp. 47 (to prove one D. an agent of defendant, an affidavit of D. on a motion to postpone trial was admitted, as used by defendant and known and adopted by him); 1837, Brickell *v.* Hulse, 7 A. & E. 454 (trover for goods seized on execution; plaintiff allowed to use affidavit of W., put in by defendant on motion in chambers, to show seizure by W. on defendant's behalf; see quotation *supra*); 1839, Gardner *v.* Moult, 10 A. & E. 464 (assumpsit by assignees in bankruptcy against a creditor; plaintiff allowed, in proving act of bankruptcy, to use a deposition made by agent of defendant, expressly at defendant's instance, to open bankruptcy proceedings; the deposition being "a particular statement which their agent was sent to make"); 1834, Chambers *v.* Bernasconi, 1 C. M. & R. 341, 352, 360, 367 (action by alleged bankrupt against assignees; depositions used by petitioning creditors in the opening proceedings, not admitted; the assignees' enrolment of them pursuant to law not being an adoption and affirmation of them); 1840, Cole *v.* Hadley, 11 A. & E. 807 (trespass *q. c. f.*; issue whether plaintiff was tenant of the soil; at a former trial of a criminal proceeding against defendant on the now plaintiff's information for a trespass, plaintiff had alleged himself to be tenant, and defendant had put in the deposition of one D., the landlord, denying

In the endeavor to define that implication, a distinction was at one time advanced that the use of an affidavit implied an admission of the correctness of its specific contents, while the use of a witness' deposition or oral testimony did not:

1837, DENMAN, L. C. J., in *Brickell* v. *Hulse*, 7 A. & E. 454, 456: "There can, I think, be no question but that a statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him. There is nothing to distinguish it from a statement made by the party himself. . . . [In equity proceedings a different rule may obtain];

plaintiff's tenancy; deposition admitted); 1845, White *v.* Dowling, 8 Ir. L. R. 128 (affidavit of plaintiff's clerk, used by him on an interlocutory motion in the same cause, not admitted for the defendant, by a majority of the Court, chiefly because it was used in his absence and without his knowledge); 1848, Boileau *v.* Rutlin, 2 Exch. 665, 680 (above cases referred to as sound, so far as the deposition, etc., was offered "for the purpose of proving a certain fact"); 1851, Pritchard *v.* Bagshawe, 11 C. B. 459, 462 (to prove D. to be an agent of the defendant in an act of conversion, an affidavit of D. on that point, used by the defendant in an action by him against one M., was admitted); 1863, Paget *v.* Birkbeck, 3 F. & F. 683, 686 (trespass *q. c. f.*; deposition made by witness for defendant in a Chancery suit in the same dispute, not admitted for the plaintiff: because not appearing to be so "used or adopted by the defendant to make it admissible against him in this action as an admission made by him or with his authority"); 1864, Richards *v.* Morgan, 10 Jur. N. S. 559, 4 B. & S. 641 (replevin for sheep; avowry, damage feasant; to prove title to the 'locus', the plaintiff offered depositions used by the defendant in a Chancery suit by one E. against the now defendant in which the same title was in issue, there being "no privity whatever" between E. and the now plaintiff; held admissible, by two judges out of three, because the depositions were formerly used for the specific facts as to which they were now offered); 1899, Evans *v.* Merthyr Tydfil, 1 Ch. 241, 250 (principle of Richards *v.* Morgan approved); CANADA: 1863, Thayer *v.* Street, 23 U. C. Q. B. 189, 192 (affidavit of M., filed and used by defendant in another suit, admitted); 1900, Livingstone *v.* Colpitts, 4 N. W. Terr. 441, 442 (defendant's cross-examination on his affidavit filed in the case, admitted; Richards *v.* Morgan followed; on appeal, this point was not decided).

UNITED STATES: *Fed.* 1903, Connecticut M. L. Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 Sup. 294 (affidavit of a witness J. H. B., put in evidence by the plaintiff on the cross-examination of W. J. B., held to be usable against the plaintiff as a part of her evidence, and not merely as affecting the credit of J. H. B.). *Ala.* 1840, Hallett *v.* Walker, 1 Ala. 585, 588 (deposition on affidavit filed in same or prior cause, but not read, is not admission); 1863, Wilkins *v.* Stidger, 22 Cal. 231, 236 (medical services; defendant had called the plaintiff as a witness, in an action before arbitrators against the person who had injured the defendant; plaintiff's testimony not received; "a party to a suit is not bound by or held to admit as true every statement made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time"; this is a misapplication of the principle of § 1072, *ante*); *Mass.* 1842, Hovey *v.* Hovey, 9 Mass. 216 (taking and filing a deposition, without using it, is not an admission of its truth); 1821, Martin *v.* Root, 17 Mass. 222, 227 (former witness' testimony not received; "then, he used him as a witness, and was obliged to content himself with all he was willing to swear to"); 1899, Knight *v.* Rothschild, 172 Mass. 546, 52 N. E. 1062 (statements of one affidavit expressly adopted in another, admitted); *N. J.* 1900, Bageard *v.* Consol. T. Co., 64 N. J. L. 316, 45 Atl. 620 (after showing plaintiff's inconsistent testimony on former trial, defendant was allowed to show that plaintiff then also brought a witness to testify to same effect; citing Richards *v.* Morgan); *N. D.* 1913, McCarty *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1007 (affidavit of a third person, filed with the defendant's affidavit, held not necessarily, to be taken as true in all parts); *Or.* 1908, Patty *v.* Salem B. Co., 53 Or. 350, 96 Pac. 1106 (testimony of F., called for defendant in another suit, not admitted; the opinion treats it as a question of § 1072, *ante*, and apparently ignores the present principle); *Pa.* 1907, Becker *v.* Philadelphia, 217 Pa. 344, 66 Atl. 564 (personal injuries; the testimony of a physician, offered by the plaintiff in a former suit against another defendant, admitted for the present defendant as "adopted and used as her own" by the plaintiff); *Va.* 1826, M'Mahon *v.* Spangler, 4 Rand. 51, 56 (affidavit of B. read by plaintiff below, allowed to be used by defendant).

In any case, however, the deposition may be offered to show the party's *knowledge* of the facts stated in it, if that is material; 1836, Lorton *v.* Kingston, 5 Cl. & F. 269, 344; and cases cited *ante*, § 260.

So, also, on other principles, a party's *own deposition or affidavit* may be used as a self-contradiction (*ante*, § 1040, n. 3) or as a falsification showing consciousness of guilt (*ante*, § 278, n. 3).

a party who uses such depositions does not know beforehand what they are; if he did, such cases would stand on the same footing as the present; he can only refer to what he expects will be produced; it is like the case of a witness called at Nisi Prius, whose evidence does not bind the party calling him. It is quite different from a case where a party produces, as part of his own statement, an affidavit of which he knows the contents."

But this view was in England afterwards repudiated for the more accurate view that *some depositions* or testimonies may be so used as to become admissions, while *some affidavits* may not be; the result depending upon whether in the case in hand the particular statement was offered knowingly for a specific purpose:

1864, COCKBURN, L. C. J., in *Richard* v. *Morgan*, 10 Jur. N. S. 559, 564: "In principle, there can be no difference whether the assertion or admission be made by the party sought to be affected against himself, or by some one employed, directed, or invited by him to make the particular statement on his behalf. In like manner, a man who brings forward another, for the purpose of asserting or proving some fact on his behalf, whether in a court of justice or otherwise, must be taken himself to assert the fact which he thus seeks to establish. . . . Where a witness is called for the purpose of proving a particular fact, this amounts to an assertion of that fact by the party who so uses his testimony. And in this respect I must observe, that I can see no difference between written and oral testimony. For while I concur in the position, that the evidence of a witness, called on a trial, is not necessarily, nor, to the full extent to which it may go, admissible against the party calling him in a future proceeding, yet if it can be shown that the witness was called to prove a specific fact, it appears to me that this would be admissible as an assertion of such fact by the party calling the witness. . . . On the other hand, as I have already said, I entirely concur in the position, that it is not because a witness is called for the purpose of proving a particular fact or facts, that *all* that he may say becomes admissible in any future proceeding against the party calling him. And here, again, I see no valid distinction between 'viva voce' and written testimony. It has, indeed, been said, that a party, calling a witness to be examined in court, may, in many instances, be ignorant how far the witness may make statements unfavorable to the party calling him, while a party using a written deposition does so with a full knowledge of what it contains, and after full opportunity of balancing the advantages and disadvantages of using it. But it must be borne in mind that the party in the one case calling the witness, in the other using the deposition, may do so, not only without the intention of abiding by all the witness may say, but with the deliberate intention of calling on the Court or jury to disbelieve so much of the evidence as makes against him. Just as at Nisi Prius, a party is sometimes under the necessity of calling a doubtful or even hostile witness, in order to prove some part of his case which cannot otherwise be made out; and, in the event of adverse statements being made by the witness, seeks to induce the jury to reject them, as unworthy of belief, or as contradicted by the rest of the evidence; so, in the case of written evidence, a deposition or affidavit may, under similar circumstances, be used with a view to the adoption of a part and the rejection of the rest. It would be in the highest degree unreasonable to suffer the party using the evidence to be affected by that portion which he may have repudiated or disregarded, on the ground, that the statements of the witness must be taken to be his. Bearing in mind, that the true ground on which such evidence is admissible, is, that a party seeking to establish a fact by evidence in a court of justice, must be taken [in that litigation] to assert the fact he so seeks to prove, it seems to me to follow, on the one hand, that oral evidence, so far as it shall appear to have been used to establish a specific fact, will [in subsequent litigation] be evidence against the party using it, as an assertion of that fact; and on the other, that written evidence will be admissible against the party using it, in a subsequent proceeding with a different party, not for the purpose of proving all the

statements it may contain, but only so far as it shall appear to have been used to establish a given fact or facts. It is not because a witness may have been called, or a deposition may have been used, that all the statements made are to be considered as having been adopted by the party using the evidence. In order to render this species of evidence admissible, as the assertion of a particular fact by the party using it, it must appear, either from the evidence itself, or from extrinsic circumstances, that it was used for the purpose of proving such fact. . . .

"I am not insensible to the inconvenience that may result from the admission of evidence of this sort. The evidence may have utterly failed in its effect in the original suit; the fact which was sought to be established may have been disproved by other evidence; the decision of the Court or jury may have been adverse; the party may long since have abandoned the ground which he formerly took; the production of such evidence in a subsequent suit may lead to collateral issues in the shape of inquiry into all the circumstances and bearings of the first. Counsel, too, may possibly be embarrassed in the conduct of a cause, as regards the production of evidence, by having to consider what may be its effects on the interests of their client beyond the present proceeding. But many of these difficulties would obviously apply in the case of statements made by the party irrespective of legal proceedings, which, if relevant to the matter in dispute, no one can deny to be admissible against him. All these difficulties exist equally in the case of affidavits and depositions in bankruptcy, both of which have been held to be admissible. The difficulty in which it is suggested that counsel would be placed in the conduct of a cause becomes reduced to a matter of small importance, when the admissibility of the deposition is limited by the qualification to which, in my view, it should be subject, namely, that it can only be used against the party to the extent of the purpose for which it was used by him in the former suit."

1840, COLLIER, C. J., in *Hallett* v. *Walker*, 1 Ala. 585, 589: "The mere filing of a deposition does not license the party against whom it was taken to read it as an admission to the jury. . . . The party taking the deposition may have discovered that it was inadmissible for him, or that the facts it proved were unfavorable to his interest, or were in themselves false. Under such circumstances he could not in justice be charged with having made an admission of its truth."

Certain other principles affecting the use of depositions must be discriminated. (1) Even if the party taking the deposition has not used it, so that by no possibility could it be treated as an admission, nevertheless it may be offered by the other party as a deposition, on showing the witness *deceased or otherwise unavailable*, if it was taken in the *same cause;* since the only objection to it arises from the Hearsay rule and that has been satisfied (*post*, § 1389). Thus the particular advantage to be gained by succeeding in treating it as an admission is that these restrictions do not then obtain. (2) The party's *silence* during *the giving of opposing testimony* cannot be treated as an admission of its correctness, for the reasons already examined (*ante*, § 1072, par. (3)).

§ 1076. **Admissions of Other Parties to the Litigation; Nominal and Real Parties; Representative Parties (Executor, Guardian, etc.); Stockholders; Joint Parties; Confessions of a Co-defendant.** A third mode (of those enumerated in § 1069) by which vicarious admissions may become receivable is by *privity of interest, i.e.* a relation which permits one person's rights, obligations, or remedies to be affected by the acts of another person, and thus also permits resort to such evidence as that other person may have furnished by

way of admissions. This privity may be of two sorts, namely, privity of *obligation* and privity of *title*.

But first it is necessary to distinguish those instances in which merely the *definition of a "party"* is involved. By hypothesis, an admission is a statement elsewhere made by the party and now offered against him as inconsistent with and contradictory of his present claim made in the pleadings or evidence (*ante*, § 1048). Who, then, is the "party", *i.e.* the litigating person, whose admissions may thus be now turned against himself?

(1) In the first place, so long as fictions were copiously employed in the formal conduct of litigation, the admissions of a *nominal*, or fictitious party, were in strict logical consequence obliged to be received. For example — the typical instance — so long as the suit of the assignee of a chose in action was at common law required to be brought fictitiously in the name of the assignor, the latter's admissions were receivable, as being those of the party himself;[1] even though they would have been inadmissible, if made after assignment, as those of an assignor, on the principle of privity of title (*post*, § 1085). But, since the universal reforms in procedure, this problem is no longer presented; although even before those reforms the spirit of judicial progress had in some jurisdictions refused to recognize this logical extension of the fiction.[2] Where, however, the relation is not a fiction, but represents a real relation of legal interest — as where the administrative and beneficial interests are divided between trustee and 'cestui que trust' — it would seem that the admissions of the trustee should be receivable. Conversely, so far as procedure still permits any litigation to be conducted without joining the real and beneficial *party in interest*, his admissions would nevertheless be received;[3] perhaps such a case is not likely to-day to arise. In a *criminal prosecution*, the person to whose injury the crime was done is in no legal sense a party, and his statements are not receivable,[4] except, of course, by way of self-contradiction

§ 1076. [1] 1798, Bauerman *v.* Radenius, 7 T. R. 663, 668; 1833, Gibson *v.* Winter, 5 B. & Ad. 96, 102; 1819, Bulkley *v.* Landon, 3 Conn. 76, 82; 1836, Johnson *v.* Blackman, 11 Conn. 342, 348. The following statute contains general statements; *Ga.* Rev. C. 1910, § 5776 (admissions of parties to the record, receivable, with certain exceptions specified).

[2] 1848, Dazey *v.* Mills, 10 Ill. 67; 1868, Shailer *v.* Bumstead, 99 Mass. 112, 127 ("In modern practice, at law even, the admissions of a party to the record who has no interest in the matter will not be permitted to be given in evidence to the prejudice of the real party in interest"); 1846, Sargeant *v.* Sargeant, 18 Vt. 371, 376.

[3] 1749, Hanson *v.* Parker, 1 Wils. 257 (action on a bond for the benefit of D.; "D. is to be considered as if she were really plaintiff"); 1809, Bayley, J., in R. *v.* Hardwicke, 11 East 578, 584 ("Bauerman *v.* Radenius only decided that the declarations of the nominal party on the record were evidence against him; but not that the declarations of the real party would not also have been evidence"); 1813, Smith *v.* Lyon, 3 Camp. 465 (action by a ship-master, for the benefit of the owner, on a charter contract; L. C. J. Ellenborough: "Although this action is in the name of the master, it is brought for the benefit of the owner; I am therefore of opinion that anything said by the latter is admissible evidence for the defendant").

But this would not necessarily be the rule where the trustee as party represented an entire estate and the *cestui* was interested in only a part of it, *e.g.* as life tenant: 1838, Doe *v.* Wainwright, 3 Nev. & P. 598, 605.

It would be apparently on the above principle that, to prove a *plea in abatement for non-joinder*, the admission of liability by the person sought to be joined would be receivable: 1827, Clay *v.* Langslow, M. & M. 45.

[4] 1875, Williams *v.* State, 52 Ala. 411, 412: 1901, Green *v.* State, 112 Ga. 638, 37 S. E. 885: 1884, Harper *v.* State, 101 Ind. 109, 111 (bastardy); 1898, Shields *v.* State, 149 Ind. 395, 49

as a witness. So, too, the *stockholder of a corporation* is not the real party in legal interest, and his statements cannot be received as admissions of the corporation.[5]

(2) Where the party sues in a *representative* capacity — *i.e.* as trustee, executor, administrator, or the like — the representative is distinct from the ordinary capacity, and only admissions made in the former quality are receivable; in particular, statements made before or after incumbency are inadmissible.[6] Conversely, his admissions as executor or the like would not be receivable against him as a party in his personal capacity. A *guardian*, so far as his powers place him in a representative capacity, is subject to the same rules;[7] but the function of a guardian 'ad litem' begins and ends with the litigation, and consequently his extrajudicial admissions are not receivable at all.[8]

N. E. 351 (murdered person); 1860, Com. *v.* Sanders, 14 Gray Mass. 394 (embezzlement); 1898, State *v.* Knock, 142 Mo. 515, 44 S. W. 235 (mother of a rape-prosecutrix); 1903, State *v.* Terry, 172 Mo. 213, 72 S. W. 513 (murdered man); 1904, State *v.* Brady, 71 N. J. L. 360, 56 Atl. 6 (rape-prosecutrix); 1905, State *v.* Hummer, 72 id. 328, 62 Atl. 388 (same); 1904, State *v.* Brady, 71 N. J. L. 360, 59 Atl. 6; 1902, State *v.* Deal, 41 Or. 437, 70 Pac. 534 (owner of a stolen horse); 1919, Com. *v.* Bednorciki, 264 Pa. 124, 107 Atl. 666 (murdered person); 1906, Brown *v.* State, 127 Wis. 193, 106 N. W. 536 (rape-prosecutrix).

[5] The contrary view was early taken in England for parish-inhabitants: 1809, R. *v.* Hardwicke, 11 East 578, 585; but it was repudiated by American Courts for town-proprietors; see Judge Redfield's note to Greenleaf on Evidence, I, § 175, 15th ed.

But the status of the parish-inhabitant and the town-proprietor was different from that of the modern shareholder in a private corporation; the admissions of a shareholder cannot affect the corporation: 1839, Fairfield Co. Turnpike Co. *v.* Thorp, 13 Conn. 173, 180. This is sometimes expressly provided by statute: *Mich.* Comp. L. 1915, § 12545 (like the Wisconsin statute); *N. Y.* C. P. A. 1920, § 340 (admissions of a corporation member not a party, inadmissible unless made by him as agent or as witness); *Wis.* Stats. 1919, § 4079 (admissions of a member of a corporation, not receivable unless he is a party or an agent).

Yet in some cases the contrary is a practically better rule: 1904, Starr B. G. Ass'n *v.* North L. C. Ass'n, 77 Conn. 83, 58 Atl. 467 (admissions of members of a corporation may sometimes be received against the corporation; good opinion by Hamersley, J.).

[6] *Canada:* 1915, Canadian Northern Western R. Co. *v.* Moore, 23 D. L. R. 646, Alta. (value of land; an affidavit by one of the parties, made as executor to a will, stating value, held admissible against him as executor; citing the above text with approval); *United States:* 1823, Plant *v.* McEwen, 4 Conn. 544, 548 (executor, before appointment); 1895, Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165 (guardian, after revocation); 1900, Horkan *v.* Benning, 111 Ga. 126, 36 S. E. 432 (administrator); 1914, Whisner *v.* Whisner, 122 Md. 195, 89 Atl. 393; 1906, Stone *v.* Stone, 191 Mass. 371, 77 N. E. 845 (executor; admitted); 1909, Gibson *v.* Boston, 75 N. H. 405, 75 Atl. 103; 1921, LeLong *v.* Siebrecht, Sup. App. Div., 187 N. Y. Suppl. 150 (letter written by defendant executor, before appointment, not received as an admission in an action against him as executor); 1898, Charlotte O. & F. Co. *v.* Rippy, 123 N. C. 656, 31 S. E. 879 (executor; excluded, unless connected with the settlement of the estate; this seems doubtful); 1922, McKay's Will, — N. C. —, 111 S. E. 5 (contested will); 1901, Williams *v.* Culver, 39 Or. 337, 64 Pac. 763 (administrator, before appointment); 1922, Johnson *v.* Underwood, 102 Or. 680, 203 Pac. 879 (administrator's suit for death by wrongful act; the statements of the now administrator, before appointment, not admissible).

For the case of *co-executors, co-legatees*, etc., see *post*, § 1081.

[7] *Contra:* 1904, Knights Templar & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066; 1846, Collis *v.* Bowen, 8 Blackf. Ind. 262.

But not of a guardian *against the minor:* 1905, Kidwell *v.* Ketler, 146 Cal. 12, 79 Pac. 514: this is really on the principle of § 1078, *post*.

For an *infant's admissions* against himself, see § 1053, *ante*, and § 1063, n. 1, at the end.

[8] 1921, Pindell *v.* Rubenstein, — Md. —, 115 Atl. 859 (mother of injured child, suing as next friend; admissions excluded; this shows how unreal are such technicalities); 1903, Stevens *v.* Continental C. Co., 12 N. D. 463, 97 N. W. 862 (infant); 1895, Chipman *v.* R. Co., 12 Utah 68, 41 Pac. 562.

A *counsel* has of course the same authority for an infant's guardian 'ad litem' as for any client: *ante*, § 1063, note 1.

(3) It will thus be seen that in receiving the admissions of a party as such, the only question can be, who the party is. The probative process consists in contrasting the statements of the same person made now as litigant and made formerly elsewhere, and it is in that view that it becomes necessary to define the identity of the person. It follows that the statements of one who is confessedly a distinct person B do not become receivable as admissions against A merely because B is also a party. In other words, the *admissions of one co-plaintiff or co-defendant are not receivable against another*, merely by virtue of his position as a co-party in the litigation.[9] This is necessarily involved in the notion of an admission; for it is impossible to discredit A's claims as a party by contrasting them with what some other party B has elsewhere claimed; there is no discrediting in such a process of contrast, because it is not the same person's statements that are contrasted. Moreover, ordinary fairness would forbid such a license; for it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions. It is plain, therefore, both on principle and in policy, that the statements of a co-party (while usable of course against himself) are not usable as admissions against a co-party.

The situation has often been obscured by the circumstance that the co-party's admissions are received against himself, and that they are sometimes received also against the other co-party because of a privity of obligation or of title (on the principle of §§ 1077 ff.). But it is not by virtue of the person's relation to the litigation that this can be done; it must be because of some privity of title or of obligation, which would indeed have admitted the statements even had the declarant not been made a co-party.

This principle, long recognized by the Courts, has not always been clearly appreciated by the profession:

1806, L. C. ERSKINE, in *Morse* v. *Royal*, 12 Ves. Jr. 355, 361: "So in trespass, where the defendants may be found severally guilty or not guilty, a witness may say he heard one acknowledge that he committed the act with the others; that is decisive against that one, and as it is legitimate evidence against him, the Court must hear it; though it is no evidence against the others."

1809, L. C. J. ELLENBOROUGH, in *R.* v. *Hardwicke*, 11 East 578, 585: "Evidence of an admission made by one of several defendants in trespass will not, it is true, establish the others to be co-trespassers. But if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass will be evidence[10] against all who are proved to have combined together for the common object."

[9] *Accord:* 1907, Postal Tel. C. Co. *v.* Likes, 225 Ill. 249, 80 N. E. 136; 1905, Illinois C. R. Co. *v.* Houchins, 121 Ky. 526, 89 S. W. 530 (but the Court must instruct as to its limited use); 1825, Dan *v.* Brown, 4 Cow. N. Y. 483, 492 (Woodworth, J.: "An admission by a party to the record is evidence against him who makes it; . . . but not against others who happen to be joined as parties to the suit"); 1916, Rutland R. L. & P. Co. *v.* Williams, 90 Vt. 276, 98 Atl. 85.

Otherwise, where the parties have a common interest independently of being joined as parties: 1903, Fourth Nat'l Bank *v.* Albaugh, 188 U. S. 734, 23 Sup. 450; 1910, McCullough Bros. *v.* Sawtell, 134 Ga. 512, 68 S. E. 89 (joint claim; admissions received).

[10] *I.e.* on the principle of § 1079, *post*.

The principle is particularly illustrated by the rule in regard to the admissions of a *co-defendant in a criminal case;* here it has always been conceded that the admission of one is receivable against himself only;[11] and thus, where A's confession, for example, implicates also a co-defendant B, it is allowed to be read against A, under express instructions to the jury not to consider it as affecting B; and some judges at one time favored the practice of omitting the name of B, or any other co-defendant, in the proof of the confession.[12] As for *answers in chancery,* it has never been doubted that the answer of one defendant is no evidence against another.[13]

§ 1077. **Privies in Obligation; Joint Promisor; Principal and Surety, etc.** So far as one person is privy in obligation with another, *i.e.* is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally. Not only as a matter of principle does this seem to follow, since the greater may here be said to include the less; but also as a matter of fairness, since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish. Moreover, as a matter of probative value, the admissions of a person having precisely the same interests at stake will in general be likely to be equally worthy of consideration. There being an identity of legal liability, the two persons are one so far as affects the propriety of discrediting one by the statements of the other.

When does this privity of obligation exist? This is plainly a matter for definition by the substantive law, not the law of Evidence. The rule of Evidence assumes whatever is otherwise established in the substantive law; and it would require a lengthy and inappropriate digression to examine here the conclusions of that law upon the variety of situations in which the question is presented. It is enough to note that the principle finds constant applica-

[11] 1664, Tong's Case, Kelyng 18; 1902, Terr. *v.* Castro, 14 Haw. 131 (adultery); 1868, Com. *v.* Thompson, 99 Mass. 444 (adultery); 1903, U. S. *v.* Caligagan, 2 P. I. 433; 1906, U. S. *v.* Paete, 6 P. I. 105; 1906, U. S. *v.* Manalo, 6 P. I. 364; 1908, U. S. *v.* Estabillo, 8 P. I. 674.

The ruling in Allen *v.* Allen, 1894, Prob. 248, that when the *co-respondent* and the respondent, in *divorce* for adultery, take the stand, then the testimony of either cannot be taken against the other, if no right of cross-examination is permitted, is erroneous, being based on the common-law rule forbidding such use of extra-judicial admissions of co-defendants. But testimony on the stand is entirely different from admissions, and nothing can prevent a witness' testimony, when credible, from being used to prove any relevant fact against any party. Compare § 916, *ante* (impeaching a co-defendant).

[12] The cases are collected *post,* § 2100, because they are concerned primarily with the principle of Completeness, there discussed.

For the use of a *confession of a deceased person,* implicating himself and *exonerating* the defendant, under the Hearsay exception for statements against interest, see *post,* § 1476.

For the use of admissions of *co-conspirators,* see *post,* § 1079.

[13] 1806, Morse *v.* Royal, 12 Ves. Jr. 355, 361; 1817, Leeds *v.* Ins. Co., 2 Wheat. 380, 383. But, of course, when the other party is a nominal one only, and thus is competent as a witness, his answer, if subjected to cross-examination, could be received. Distinguish also the admission of the other answer where one party makes it his own by reference (*ante,* §§ 1070, 1075).

tion chiefly to the admissions of a *co-promisor*,[1] of a *principal* (against his surety),[2] and of one or two other classes of liability.

These may now be examined in order to distinguish the present question from certain genuine rules of Evidence.

§ 1078. **Same: Agent; Partner; Attorney; Deputy-Sheriff; Interpreter; Husband and Wife.** (1) He who sets another person to do an act in his stead as *agent* is chargeable by such acts as are done under that authority, and so too, properly enough, is affected by admissions made by the agent in the course of exercising that authority. The question therefore turns upon the scope of the authority. This question, frequently enough a difficult one, depends upon the doctrine of Agency applied to the circumstances of the case, and not upon any rule of Evidence.[1]

§ 1077. [1] One of the most troublesome problems in this connection, namely, whether a promise or *acknowledgment by one joint promisor* serves to remove the bar of the *statute of limitations* against another, goes back to a ruling of Lord Mansfield, in Whitcomb *v.* Whiting, 2 Doug. 652 ("an admission by one is an admission by all"), and illustrates how the principle involved is one of the substantive law; this principle was confirmed in 1824, in Perham *v.* Raynal, 2 Bing. 306, 312, and in 1828, in Burleigh *v.* Scott, 8 B. & C. 36, 41. There is an interesting note upon it in Greenleaf on Evidence, 15th ed., I, § 112.

[2] *Eng.* 1821, Goss *v.* Watlington, 4 B. & B. 132, 137; 1828, Whitnash *v.* George, 8 B. & C. 556, 561 ("The entries [of the principal] were evidence against the surety because they were made by the collector [principal] in pursuance of the stipulation contained in the condition of the bond"); *Can.* 1915, Jordan School District *v.* Gaetz, 23 D. L. R. 739, Alta. (action against sureties of a treasurer; the treasurer's books admitted, but on different grounds by different judges; Harvey, C. J., citing the above text with approval); *U. S. Ida.* 1910, Sanders *v.* Keller, 18 Ida. 590, 111 Pac. 350; *Ill.* 1916, Scovill Mfg. Co. *v.* Cassidy, 275 Ill. 462, 114 N. E. 181 (surety for purchaser of goods); *Ind.* 1911, Federal U. Surety Co. *v.* Indiana L. & M. Co., 176 Ind. 328, 95 N. E. 1104; *Iowa:* 1904, Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173 (citing cases); 1908, Kuhl *v.* Chamberlain, 140 Ia. 546, 118 N. W. 776 (banker's books); *Mass.* 1911, Atlas Shoe Co. *v.* Bloom, 209 Mass. 563, 95 N. E. 952 (debtor's admissions not received against the guarantor); *Mo.* 1918, St. Charles S. Bank *v.* Denker, 275 Mo. 607, 205 S. W. 208 (defaulting cashier); *N. C.* Con. St. 1919, § 358 (suits on official bonds); *Vt.* 1906, Jangraw *v.* Perkins, 79 Vt. 107, 64 Atl. 449; *Wis.* 1911, United American F. Ins. Co. *v.* American Bonding Co., 146 Wis. 573, 131 N. W. 994.

This principle is occasionally ignored through the tendency to look only at the state of the parties under § 1076, *ante*; *e.g.*: 1904, McGowan *v.* Davenport, 134 N. C. 526, 47 S. E. 27 (trust deed of wife's separate property, to secure a debt recited to be that of husband and wife; the deceased husband's admissions that the debt was unpaid were excluded, because his estate was not a party to the action to foreclose).

It was on this principle that admissions of a *debtor* were held admissible against a *sheriff charged with his escape:* 1798, Sloman *v.* Herne, 2 Esp. 691 ("whatever evidence would be sufficient to charge the original defendants would do to charge a sheriff in such an action as the present").

The Hearsay exceptions for Statements against Interest (*post*, § 1455) and Regular Entries (*post*, § 1517) serve to confuse some of the earlier cases on this topic.

§ 1078. [1] The best of the earlier expositions is that of Sir W. Grant, M. R., in 1803, in Fairlie *v.* Hastings, 10 Ves. Jr. 123. Lord Kenyon, who became Chief Justice in 1788, had set himself against receiving any admissions by agents; and it was some time before the true principle was defined and accepted. For a collection of authorities applying the rule in Fairlie *v.* Hastings, see Wambaugh's Cases on Agency, 447 ff.; 1903, McEntire *v.* Levi C. M. Co., 132 N. C. 598, 44 S. E. 109.

The following Codes state the general principle:

Cal. C. C. P. 1872, § 1870, par. 5; *Ga.* Rev. C. 1910, § 5779; *Or.* Laws 1920, § 727, par. 5 *P. R.* Rev. St. & C. 1911, § 1403, par. 5 (like Cal. C. C. P. § 1870, par. 5);

The provision in *Georgia*, Code 1910, § 3606 that "the declarations of an agent . . . are not admissible against his principal unless they were a part of the negotiation and constituting the 'res gestæ', *or else the agent be dead*", has been properly construed to mean, not that a deceased agent's statements are always receivable though not a part of the 'res gestæ', but that, apart from the present rule of 'res gestæ', the deceased agent's statements may be received as exceptions to the Hearsay rule

The common phrasing of the principle is well represented in the following passage:

1839, BUCHANAN, C. J., in *Franklin Bank* v. *Pennsylvania D. & M. S. N. Co.*, 11 G. & J. 28, 33: "The principle upon which the declarations or representations of an agent, within the scope of his authority, are permitted to be proved, is, that such declarations, as well as his acts, are considered and treated as the declarations of his principal. What is so done by an agent, is done by the principal through him, as his mere instrument. So whatever is said by an agent, either in the making a contract for his principal, or at the time, and accompanying the performance of any act, within the scope of his authority, having relation to, and connected with, and in the course of the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal, and admissible in evidence; not merely because it is the declaration or admission of an agent, but on the ground, that being made at the time of and accompanying the contract or transaction, it is treated as the declaration or admission of the principal, constituting a part of the 'res gestæ', a part of the contract or transaction, and as binding upon him as if in fact made by himself. But declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an act, in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being part of the 'res gestæ', and are not admissible in evidence, but come within the general rule of law, excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted to be done, — not a part of the transaction, but only statements or admissions respecting it."

The most difficult field in the application of this principle is that of *tortious liability*. For example, if A is an agent to drive a locomotive, and a collision ensues, why may not his admissions, after the collision, acknowledging his carelessness, be received against the employer? Because his statements under such circumstances are not made in performance of any work he was set to do. If he had before the collision been asked by a brakeman whether the train would take a switch at a certain point, and had then mentioned receiving certain instructions from the train-dispatcher, this statement might be regarded as made in the course of performing his appointed work. Nevertheless, such problems naturally admit of much speculative and barren argument.[2]

In that class of cases, namely, cases involving tortious liability, and, in particular, liability for injury in a railway accident, the question is usually complicated by the applicability of the Hearsay exception for Spontaneous Declarations (*post*, § 1745), which admits statements made under the influence of excitment, before the declarant had "time to contrive or invent."

whenever they fulfil the requirements of any of those exceptions, *e.g.* as regular entries, statements against interest, etc.: 1905, Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969.

[2] *E.g.:* 1915, Northern Central Co. *v.* Hughes, 8th C. C. A., 224 Fed. 57 (superintendent of a coal company; "his general authority of superintendent gave him no such power"; and yet it is absurd to hold that the superintendent has power to make the employer heavily liable by mismanaging the whole factory, but not to make statements about his mismanagement which can be even listened to in court; the pedantic unpracticalness of this rule as now universally administered makes a laughing-stock of court methods).

The following enlightened opinion here marks a new departure: 1911, United American F. Ins. Co. *v.* American Bonding Co., 146 Wis. 573, 131 N. W. 994 (a report by an agent, made under a duty, but after his agency contract had expired, held admissible; opinion by Barnes, J.; Kerwin and Timlin, JJ., diss.)

This serves commonly to admit the immediate statements of the injured persons and the bystanders; and since the much-abused phrase 'res gestæ' has been commonly employed to suggest the limitations of that Hearsay exception, and has also been employed (though having nothing in common) to designate the scope of an agent's authority, it is natural that judges should sometimes have discussed the two principles, in their application to personal injuries, as if there were but one principle.[3] That there are two distinct and unrelated principles involved must be apparent; and the sooner the Courts insist on keeping them apart, the better for the intelligent development of the law of Evidence. Practically, the results of the two principles in application are decidedly different; for upon the principle of the Hearsay exception such statements may (if admissible) be received against either party; but, on the principle of Agency against the employer only; moreover, when offered against the employer, the limitations of the two principles would be in some respects more favorable, in others less favorable, to the reception of the evidence.

Upon the application of the principle to specific instances, it would be useless here to enter, for only the rules of the substantive law of Agency are involved.[4] It may be noted that the *fact* of agency must of course be some-

[3] This confusion is dealt with, *post*, § 1797. Examples of it may be found in opinions in the following cases: *Fed.* 1886, Vicksburg R. Co. *v.* O'Brien, 119 U. S. 99, 7 Sup. 118; 1919, Denver Omnibus & C. Co. *v.* Krebs, 8th C. C. A.; 255 Fed. 543 (personal injury); *Cal.* 1903, Luman *v.* Golden A. C. M. Co., 140 Cal. 700, 74 Pac. 307; *Md.* 1915, Pinkerton *v.* Slocumb, 126 Md. 665, 95 Atl. 965 (contract for repairs); *Mich.* 1917, Hyatt *v.* Leonard Storage Co., 196 Mich. 337, 162 N. W. 951 (wrecking crew); *Mo.* 1904, Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26; *N. C.* 1916, Johnson *v.* Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124 (tornado insurance); *Okla.* 1917, Chicago R. I. & P. R. Co. *v.* Jackson, 63 Okl. 32, 162 Pac. 823 (death by wrongful act); *Pa.* 1918, Brown *v.* Kittanning C. P. Co., 259 Pa. 267, 102 Atl. 948 (death by a derrick); *Tenn.* 1918, Frank *v.* Wright, 140 Tenn. 535, 205 S. W. 434 (automobile driver); *Utah:* 1893, Linderberg *v.* Mining Co., 9 Utah 163, 33 Pac. 692; 1917, White *v.* Utah Condensed Milk Co., 50 Utah 278, 167 Pac. 656 (personal injury); *Vt.* 1915, Patterson's Adm'r *v.* Modern Woodmen, 89 Vt. 305, 95 Atl. 692 (life insurance; defendant's examining physician's answer in certificate as to defendant's health, received as an admission); 1917, Spinney's Adm'x *v.* Hooker, 92 Vt. 146, 102 Atl. 53 (personal injury; defendant's general manager's report of the accident, excluded; unsound); *Wash.* 1904, Cook *v.* Stimson Mill Co., 36 Wash. 36, 78 Pac. 39.

For examples of the correct treatment of these two principles, see: 1920, Planters' G. & W. Co. *v.* Pitts Banking Co., 24 Ga. App. 731, 102 S. E. 183; 1913, Forrester *v.* Southern Pacific R. Co., 36 Nev. 247, 134 Pac. 753, 136 Pac. 705; 1902, Blackman *v.* West Jersey & S. R. Co., 68 N. J. L. 1, 52 Atl. 370; 1904, Havens *v.* R. I. Suburban R. Co., 26 R. I. 48, 58 Atl. 247.

[4] The following include merely casual recent decisions in various jurisdictions, which may serve as illustrations: *Federal:* 1886, Steamboat Co. *v.* Brockett, 121 U. S. 637, 649, 7 Sup. 1039; 1893, Louisville & N. R. Co. *v.* Stewart, 9 U. S. App. 564, 6 C. C. A. 147, 56 Fed. 808; 1894, St. Louis & S. F. R. Co. *v.* M'Lelland, 10 C. C. A. 300, 62 Fed. 116; 1895, Nelson *v.* Bank, 16 C. C. A. 425, 69 Fed. 802; *Alabama:* 1895, Postal Cable Co. *v.* LeNoir, 107 Ala. 640, 18 So. 266; Postal Cable Co. *v.* Brantley, 107 Ala. 683, 18 So. 321; 1897, Georgia H. I. Co. *v.* Warten, 113 Ala. 479, 22 So. 288; 1897, Louisville & N. R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163; *Arkansas:* 1893, Fort Smith Oil Co. *v.* Slover, 58 Ark. 168, 179, 24 S. W. 106; 1896, Ames Ironworks *v.* Pulley Co., 63 Ark. 87, 37 S. W. 409; *California:* 1895, Hewes *v.* Fruit Co., 106 Cal. 441, 39 Pac. 853; 1895, Mutter *v.* Lime Co., — Cal. —, 42 Pac. 1068; 1896, McGowan *v.* McDonald, 111 Cal. 57, 43 Pac. 418; 1898, Hearne *v.* DeYoung, 119 Cal. 670, 52 Pac. 150, 499; *Connecticut:* 1896, Builders' Co. *v.* Cox, 68 Conn. 380, 36 Atl. 797; *Georgia:* 1886, Krogg *v.* R. Co., 77 Ga. 202, 213; 1897, Southern R. Co. *v.* Kinchen, 103 Ga. 186, 29 S. E. 816; 1903, Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76 (agent of lands); 1904,

how evidenced *before the alleged agent's declarations* can be received as admissions; and therefore the use of the alleged agent's hearsay assertions that he is agent would for that purpose be inadmissible, as merely begging the very question.[5] Nevertheless, they might be received provisionally as verbal

National Bldg. Ass'n *v.* Quin, 120 Ga. 358, 47 S. E. 962 (contract of loan); *Hawaii:* 1914, Wall *v.* Focke, 22 Haw. 221 (real estate sale); *Illinois:* 1897, Pennsylvania Co. *v.* Bridge Co., 170 Ill. 645, 49 N. E. 215; 1904, Baier *v.* Selke, 211 Ill. 512, 71 N. E. 1074 (brewmaster); *Indiana:* 1895, Treager *v.* Mining Co., 142 Ind. 164, 40 N. E. 907; *Iowa:* 1895, Waite *v.* High, 96 Ia. 742, 65 N. W. 397; 1897, Irlbeck *v.* Bierl, 101 Ia. 240, 67 N. W. 200, 70 N. W. 207; 1898, Schoep *v.* Ins. Co., 104 Ia. 354, 73 N. W. 825; 1898, Metropolitan Nat'l Bank *v.* Com. St. Bank, 104 Ia. 682, 74 N. W. 26; *Kansas:* 1895, Cherokee Co. *v.* Dickson, 55 Kan. 62, 39 Pac. 691; 1896, First Nat'l Bank *v.* Marshall, 56 Kan. 441, 43 Pac. 774 (bank president); 1897, Atchison T. & S. F. R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286; 1898, Atchison T. & S. F. R. Co. *v.* Cattle Co., 59 Kan. 111, 52 Pac. 71; *Kentucky:* 1895, Louisville & N. R. Co. *v.* Ellis, 97 Ky. 330, 30 S. W. 979; 1896, Wash *v.* Cary, — Ky. —, 33 S. W. 728; 1896, Tarr Co. *v.* Kimbrough, — Ky. —, 34 S. W. 528; 1896, East Tenn. Tel. Co. *v.* Simms, 99 Ky. 404, 36 S. W. 171; 1897, Graddy *v.* Tel. Co., — Ky. —, 43 S. W. 468; 1897, C. & O. R. Co. *v.* Smith, 101 Ky. 104, 39 S. W. 832; 1904, Parker's Adm'r *v.* Cumberland T. & T. Co., — Ky. —, 77 S. W. 1109 (foreman); 1906, Shelbyville W. & L. Co. *v.* McDade, 122 Ky. 639, 92 S. W. 568 (engineer); *Massachusetts:* 1849, Coole *v.* Norton, 4 Cush. 95; 1897, Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508; 1897, Gilmore *v.* Paper Co., 169 Mass. 471, 48 N. E. 623; 1905, Bachant *v.* Boston & M. R. Co., 187 Mass. 392, 73 N. E. 642 (railroad station-agent); 1906, McDonough *v.* Boston El. R. Co., 191 Mass. 509, 78 N. E. 141 (motorman); *Michigan:* 1895, Ablard *v.* R. Co., 104 Mich. 147, 62 N. W. 172; 1897, Andrews *v.* Min. Co., 114 Mich. 375, 72 N.W. 242; 1898, Maxson *v.* R. Co. 117 Mich. 218, 75 N. W. 459; 1919, Jonescu *v.* Orlich, 208 Mich. 89, 175 N. W. 174 (personal injury; illustrating the absurd unpracticality of this rule as nowadays applied); *Mississippi:* 1898, State *v.* Spengler, — Miss. —, 23 So. 33; *Montana:* 1898, Wilson *v.* Harris Sax Co., 21 Mont. 374, 54 Pac. 46; 1905, Poindexter & O. L. S. Co. *v.* Oregon S. L. R. Co., 33 Mont. 338, 83 Pac. 886 (railroad section boss); *Nebraska:* 1902, South Omaha *v.* Wrzensinski, 66 Nebr. 790, 92 N. W. 1045; 1904, Clancy *v.* Barker, 71 Nebr. 83, 98 N. W. 440 (hotel); *New Hampshire:* 1894, Nebonne *v.* R. Co., 67 N. H. 531, 38 Atl. 17; *North Carolina:* 1895, Williams *v.* Tel. Co., 116 N. C. 558, 21 S. E. 298; 1896, Craven *v.* Russell, 118 N. C. 564, 24 S. E. 361; 1898, Albert *v.* Ins. Co., 122 N. C. 92, 30 S. E. 327; *Oregon:* 1896, North P. Lumber Co. *v.* W. S. M. L. & M. Co., 29 Or. 219, 44 Pac. 286; 1897, First Nat'l Bank *v.* Linn Co. Bank, 30 Or. 296, 47 Pac. 615; 1897, Wicktorwitz *v.* Ins. Co., 31 Or. 569, 51 Pac. 75; 1905, Alden *v.* Grande R. L. Co., 46 Or. 593, 81 Pac. 385 (foreman of a logging camp); *Pennsylvania:* 1895, Shafer *v.* Lacock, 168 Pa. 497, 32 Atl. 46; 1896, Giberson *v.* Mills Co., 174 Pa. 369, 34 Atl. 563; *South Dakota:* 1896, Estey *v.* Birmbaum, 9 S. D. 174, 68 N. W. 290; *Texas:* 1898, Houston E. & W. T. R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2; 1905, Austin *v.* Forbis, 99 Tex. 234, 89 S. W. 405 (injury by electricity); *Utah:* 1893, Linderberg *v.* Min. Co., 9 Utah 163, 33 Pac. 692; 1897, Moyle *v.* Congreg. Soc., 16 Utah 69, 50 Pac. 806; *Vermont:* 1915, Blunt *v.* Montpelier & W. R. R. R., 89 Vt. 152, 94 Atl. 106 (railroad injury; an extreme example of the principle applied to a conductor's admissions); *Virginia:* 1895, Rensch *v.* Cold Storage Co., 91 Va. 534, 22 S. E. 358; 1896, Norfolk & C. R. Co. *v.* Lumber Co., 92 Va. 413, 23 S. E. 737; 1895, Jammison *v.* R. Co., 92 Va. 327, 23 S. E. 758; *Washington:* 1906, Baker *v.* Washington I. Co., 44 Wash. 697, 86 Pac. 1125 (drover); *Wisconsin:* 1904, Kamp *v.* Coxe Bros. & Co., 122 Wis. 206, 99 N. W. 366.

[5] "This is never disputed, except by those counsel who have to receive elementary training at the hands of the Supreme Court: 1897, Union G. & T. Co. *v.* Robinson, 24 C. C. A. 650, 79 Fed. 420; 1917, Attleboro Mfg. Co. *v.* Frankfort M. A. & P. G. Ins. Co., 1st C. C. A., 240 Fed. 573; 1921, Deming Ladies Hospital Ass'n *v.* Price, 8th C. C. A., 276 Fed. 668 (personal injury); 1920, Navajo-Apache Bank & T. Co. *v.* Willis, 21 Ariz. 610, 193 Pac. 297; 1904, Russell *v.* Washington S. Bank, 23 D. C. App. 398, 406; 1900, Jones *v.* Harrell, 110 Ga. 373, 35 S. E. 690; 1906, Peyton *v.* Old Woolen M. Co., 122 Ky. 361, 91 S. W. 719; 1899, Norberg *v.* Plummer, 58 Nebr. 410, 78 N. W. 708; 1907, Ryle *v.* Manchester B. & L. Ass'n, 74 N. J. L. 840, 67 Atl. 87; 1905, Jackson *v.* American T. & T. Co., 139 N. C. 347, 51 S. E. 1015; 1914, Surbaugh *v.* Gutterfield, 44 Utah 446, 140 Pac. 757; 1913, Livingstone Mfg. Co. *v.* Rizzi, 86 Vt. 419, 85 Atl. 912; 1898, Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33; 1916, Auwarter *v.* Kroll, 89 Wash. 347, 154 Pac. 438.

Of course this does not prevent the alleged agent from *testifying upon the stand* to the fact of his agency; for here his testimony is not offered as an admission: 1898, American Expr.

acts (*post*, § 1770) indicating that he was acting on another's behalf, not his own, leaving it to subsequent proof to establish his connection as agent with the present party.[6]

It may be added that, conformably to the general doctrine (*ante*, § 4) by which the rules of Evidence are no different in criminal cases, the admissions of an agent may equally be received in a *criminal charge* against the principal. But whether the fact thus admitted by the agent would suffice to charge the principal criminally without his personal knowledge or connivance would depend upon the particular rule of criminal law involved.[7]

(2) An *attorney* is an agent to conduct litigation; his admissions, therefore, are under certain circumstances receivable; this application of the principle has already been examined (*ante*, § 1063).

(3) A *partner* charges the partnership by virtue of an agency to act for it; how far his admissions are receivable depends therefore on the doctrines of Agency as applied to a partnership.[8]

(4) The use of the admissions of a *deputy-sheriff* against his sheriff seems to rest on an application of the theory of Agency.[9]

(5) A *husband* or *wife* may, in the ordinary way, become an agent, one for the other, and the agent's admissions are then receivable. But the mere marital relation does not of itself make them agents.[10]

(6) An *interpreter* may be made an agent to converse, and then his translation is receivable as an agent's admission, without calling him to the stand. But otherwise his extrajudicial statements are excluded by the Hearsay rule.[11]

Co. *v.* Lankford, 2 Ind. Terr. 18, 46 S. W. 183; 1905, Aultman T. & E. Co. *v.* Knoll, 71 Kan. 109, 79 Pac. 1074; 1907, Superior Drill Co. *v.* Carpenter, 150 Mich. 262, 114 N. W. 67; 1921, Grove Lodge *v.* Fidelity P. Ins. Co., 191 Ky. 666, 231 S. W. 215; 1897, Wicktorwitz *v.* Ins. Co., 31 Or. 569, 51 Pac. 75; 1911, Marcus *v.* Gimbel Bros., 231 Pa. 200, 80 Atl. 75.

[6] 1899, Parker *v.* Bond, 121 Ala. 529, 25 So. 898; 1906, Fifer *v.* Clearfield & C. C. Co., 103 Md. 1, 62 Atl. 1122 (requiring the evidence of agency to precede the declarations); 1898, Nowell *v.* Chipman, 170 Mass. 340, 49 N. E. 631; 1905, Singer Mfg. Co. *v.* Christian, 211 Pa. 534, 60 Atl. 1087; 1911, Henderson *v.* Coleman, 19 Wyo. 183, 115 Pac. 439.

Compare the cases cited *post*, § 1777.

[7] 1806, Lord Melville's Trial, 29 How. St. Tr. 550, 765, quoted *ante*, § 4; 1880, R. *v.* Downer, 14 Cox Cr. 486, 489.

[8] *Uniform Acts:* Uniform Partnership Act, 1914 (National Conference of Commissioners on Uniform State Laws), § 11 ("An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Act is evidence against the partnership"); *Cal.* C. C. P. 1872, § 1870, par. 5, and the Codes following this model; *Mo.* 1920, Adair *v.* Kansas City T. R. Co., 282 Mo. 133, 220 S. W. 920 (examining the cases).

Some of the complicated problems here arising are discussed in a note to Greenleaf on Evidence, 15th ed., I. § 112.

Whether the admissions of a partner made *after dissolution* are receivable against the others, has been a much controverted point, probing deeply into the theory of partnership; the negative answer was made by Spencer, C. J., in Walden *v.* Sherburne, 15 Johns. N. Y. 409 (1818); the affirmative, by Wilde, J., in Cady *v.* Shepherd, 11 Pick. Mass. 400, 407 (1831), and in Rutland R. L. & P. Co. *v.* Williams, 90 Vt. 276, 98 Atl. 85 (1916).

[9] 1833, Snowball *v.* Goodricke, 4 B. & Ad. 541; except so far as by custom the sheriff (by reason of his bond of indemnity from the deputy) is treated as merely the nominal party, in which case (on the principle of § 1076, *ante*) the deputy's admissions are receivable without limitation, as being those of the real party; 1815, Tyler *v.* Ulmer, 12 Mass. 163, 166.

[10] The cases are collected *post*, § 2232 (marital privilege).

For admissions by either as *grantor of property*, see *post*, §§ 1080–1086, especially § 1086.

[11] The cases are collected *post*, § 1810 (Hearsay rule).

For other questions concerning interpreters, see *ante*, §§ 668, 811.

§ 1079. **Same: Co-conspirators; Joint Tortfeasors.** (1) A *conspiracy* makes each conspirator liable under the criminal law for the acts of every other conspirator done in pursuance of the conspiracy. Consequently, by the principle already exemplified in other relations (*ante*, § 1077) the admissions of a co-conspirator may be used to affect the proof against the others, on the same conditions as his acts when used to create their legal liability:

1843, PENNEFATHER, C. J., in *R. v. O'Connell*, 5 State Tr. N. S. 1, 710: "When evidence is once given to the jury of a conspiracy, against A, B, and C, whatever is done by A, B, or C in furtherance of the common criminal object is evidence against A, B, and C, though no direct proof be given that A, B, or C knew of it or actually participated in it. . . . If the conspiracy be proved to have existed, or rather if evidence be given to the jury of its existence, the acts of one in futherance of the common design are the acts of all; and whatever one does in furtherance of the common design, he does as the agent of the co-conspirators."

The tests therefore are the same, whether that which is offered is the act or the admission of the co-conspirator; in other words, the question is purely one of criminal law, or of conspiracy as affecting joint civil liability, and its solution is not to be sought in any principle of Evidence.[1]

§ 1079. [1] The following list of cases includes only certain leading English cases and some modern or leading American rulings:

ENGLAND: 1794, R. *v.* Hardy, 24 How. St. Tr. 451; 1794, R. *v.* Stone, 25 id. 1 et passim; 1817, R. *v.* Watson, 32 How. St. Tr. 80, 359, 538; 1817, R. *v.* Brandreth, 24 How. St. Tr. 766, 852; 1820. R. *v.* Hunt, 3 B. & Ald. 5, 66.

UNITED STATES: *Federal:* 1892, Logan *v.* U. S., 144 U. S. 263, 309, 12 Sup. 617; 1893, Brown *v.* U. S., 150 U. S. 93, 98, 14 Sup. 37; 1895, Clune *v.* U. S., 159 U. S. 590, 16 Sup. 125; 1896, Wiborg *v.* U. S., 163 U. S. 632, 16 Sup. 1127, 1197; 1903, Connecticut M. L. Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 Sup. 294; 1905, Sprinkle *v.* U. S., 141 Fed. 811, C. C. A. (revenue frauds); 1905, Brown *v.* U. S., 142 Fed. 1, C. C. A. (misappropriation of bank funds); 1909, Doyle *v.* U. S., 6th C. C. A., 169 Fed. 625; 1909, West Pub. Co. *v.* Edward Thompson Co., C. C. E. D. N. Y., 169 Fed. 833, 863 (digest and cyclopedia); 1910, Jones *v.* U. S., 9th C. C. A., 179 Fed. 584, 601 (fraudulent acquisition of public lands); 1912, Keliher *v.* U. S., C. C. A., 193 Fed. 8 (embezzlement); 1918, U. S. *v.* Leonhardt, U. S. Court for China, 1 Extraterr. Cas. 790; 1919, U. S. *v.* Wallace, ibid., 900; 1919, Heard *v.* U. S., 8th C. C. A., 255 Fed. 829 (robbery); *Alabama:* 1896, Hunter *v.* State, 112 Ala. 77, 21 So. 65; 1897, Everage *v.* State, 113 Ala. 102, 21 So. 404; 1899, McLeroy *v.* State, 120 Ala. 274, 25 So. 247; 1903, Collins *v.* State, 138 Ala. 57, 34 So. 993; 1920, Beech *v.* State, 203 Ala. 529, 84 So. 753 (murder); *Arizona:* 1913, Crowell *v.* State, 15 Ariz. 66, 136 Pac. 279 (murder); *Arkansas:* 1859, Clinton *v.* Estes, 20 Ark. 216, 225; 1899, Willis *v.* State, 67 Ark. 234, 54 S. W. 211; 1906, Chapline *v.* State, 77 Ark. 444, 95 S. W. 477 (bribery); 1906, Butt *v.* State, 81 Ark. 173, 98 S. W. 723; 1920, Housley *v.* State, 143 Ark. 315, 220 S. W. 40 (arson); *California:* C. C. P. 1872, § 1870, par. 6; 1896, People *v.* Oldham, 111 Cal. 648, 44 Pac. 312; 1899, People *v.* Winters, 125 Cal. 325, 57 Pac. 1067; 1900, People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; 1922, Budd *v.* Morgan, 187 Cal. 741, 203 Pac. 755 (alienation of affections); *Colorado:* 1873, Solander *v.* People, 2 Colo. 48, 64; 1888, Crawford *v.* People, 12 Colo. 290, 293, 20 Pac. 769; 1905, Johnson *v.* People, 33 Colo. 224, 80 Pac. 133 (abortion; the woman a co-conspirator); *Connecticut:* 1897, State *v.* Thompson, 69 Conn. 720, 38 Atl. 868; 1916, Cooke *v.* Weed, 90 Conn. 544, 97 Atl. 765 (fraud); *Florida:* 1898, Mercer *v.* State, 40 Fla. 216, 24 So. 154; *Georgia:* Rev. C. 1910, §§ 1025, 1035; 1918, Smith *v.* State, 148 Ga. 332, 96 S. E. 632 (murder); 1899, Carter *v.* State, 106 Ga. 372, 32 S. E. 345; 1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1; *Illinois:* 1887, Spies *v.* People, 122 Ill. 1, 153, 228, 12 N. E. 865, 17 N. E. 898; 1889, Van Eyck *v.* People, 178 Ill. 199, 52 N. E. 852; 1904, Miller *v.* John, 208 Ill. 173, 70 N. E. 27; 1904, Graff *v.* People, 208 Ill. 312, 70 N. E. 299; *Indiana:* 1901, Musser *v.* State, 157 Ind. 423, 61 N. E. 1; 1905, Knox *v.* State, 164 Ind. 226, 73 N. E. 255; 1907, Sanderson *v.* State, 169 Ind. 301, 82 N. E. 525 (murder); 1910, Baker *v.* State, 174 Ind. 708, 92 N. E. 14; 1911, Malone *v.* State, 176 Ind. 338, 96 N. E. 1; 1919, Roberts *v.* State, 188 Ind. 713, 124 N. E. 750 (conspiracy to commit a felony); 1916, Hawkins *v.* State, 185 Ind. 147, 113 N. E. 232 (conspiracy to commit larceny); 1921, Lincoln *v.* State, — Ind. —, 133 N. E. 351 (conspiracy for arson; three persons were indicted with defendant; the facts that two

In certain aspects, however, the rules of Evidence sometimes come to be involved, and a few discriminations must be noted. (*a*) The general principle affecting the *order of evidence* leaves it ultimately to be controlled by the trial Court's discretion, subject to certain provisional rules which obtain unless special considerations overthrow them (*post*, § 1867). In the present application, the rule for conditional relevancy (*post*, § 1871) naturally ap-

had been convicted and that the third had suicided, held improperly admitted); *Iowa:* 1904, State *v.* Walker, 124 Ia. 414, 100 N. W. 354; 1906, State *v.* Brown, 130 Ia. 57, 106 N. W. 379 (instigator of a crime); 1907, State *v.* Crofford, 133 Ia. 478, 110 N. W. 921 (murder); 1910, State *v.* Manning, 149 Ia. 205, 128 N. W. 345; 1911, State *v.* Gilmore, 151 Ia. 618, 132 N. W. 53 (abortion); *Kansas:* 1895, State *v.* Rogers, 54 Kan. 683, 39 Pac. 219; *Kentucky:* 1895, Twyman *v.* Com., — Ky. —, 33 S. W. 409; 1901, Powers *v.* Com., 110 Ky. 386, 61 S. W. 735; 63 S. W. 976; 1901, Howard *v.* Com., 110 Ky. 356, 61 S. W. 756; 1907, Com. *v.* Hargis, 124 Ky. 356, 99 S. W. 348; 1911, Higgins *v.* Com., 142 Ky. 647, 134, S. W. 1135 (murder); 1917, Allen *v.* Com., 176 Ky. 475, 196 S. W. 160 (arson); 1920, Welch *v.* Com., 189 Ky. 579, 225 S. W. 470 (murder); 1921, Sain *v.* Com., 193 Ky. 215, 235 S. W. 368 (murder); *Maryland:* 1906, Lawrence *v.* State, 103 Md. 17, 63 Atl. 96 (conspiracy to defraud); *Massachusetts:* 1897, Com. *v.* Hunton, 168 Mass. 130, 46 N. E. 404; 1902, Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; 1911, Com. *v.* Stuart, 207 Mass. 563, 93 N. E. 825; *Minnesota:* 1895, Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. 108; 1903, State *v.* Ames, 90 Minn. 183, 96 N. W. 330; 1919, State *v.* Lyons, — Minn. —, 175 N. W. 689 (fraudulent casting of ballots); 1918, State *v.* Dunn, 140 Minn. 308, 168 N. W. 2 (murder); *Missouri:* 1895, Hart *v.* Hicks, 129 Mo. 99, 31 S. W. 351; 1899, State *v.* Harris, 150 id. 56, 51 S. W. 481; 1903, State *v.* Kennedy, 177 Mo. 98, 75 S. W. 979; 1904, State *v.* Boatright, 182 Mo. 33, 81 S. W. 450; 1906, State *v.* Ruck, 194 Mo. 416, 92 S. W. 706 (the co-conspirator need not be a party to the record); 1906, State *v.* Darling, 199 Mo. 168, 97 S. W. 592; 1906, State *v.* Froshee, 199 Mo. 142, 97 S. W. 933; 1922, State *v.* Thompson, — Mo. —, 238 S. W. 786 (assault with intent to kill); *Nebraska:* 1897, Farley *v.* Peebles, 50 Nebr. 723, 70 N. W. 231; 1903, Lamb *v.* State, 69 Nebr. 212, 95 N. W. 1050; 1903, O'Brien *v.* State, 69 Nebr. 691, 96 N. W. 1908, 649; State *v.* Merchants' Bank, 81 Nebr. 704, 116 N. W. 667 (fraud on creditors); *New Hampshire:* 1892, Coburn *v.* Storer, 67 N. H. 86, 36 Atl. 607; *New Jersey:* 1915, State *v.* Dougherty, 86 N. J. L. 525, 93 Atl. 98 (larceny); *New Mexico:* 1896, Borrego *v* Terr., 8 N. M. 446, 46 Pac. 349; 1906, Terr. *v.* Neatherlin, 13 N. M. 491, 85 Pac. 1044; *New York:* 1874, Kelley *v.* People, 55 N. Y. 565, 575; 1897, People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; 1912, People *v.* Storrs, 207 N. Y. 147, 100 N. E. 730 (forgery); *North Carolina:* 1896, State *v.* Turner, 119 N. C. 841, 25 S. E. 810; *Oklahoma:* 1909, Spurgis *v.* State, 2 Okl. Cr. 362, 102 Pac. 57 (liquor-selling); *Oregon:* Laws 1020, § 727, par. 6; 1897, State *v.* Tice, 30 Or. 457, 48 Pac. 367; 1897, State *v.* Magone, 32 Or. 206, 51 Pac. 452; 1898, State *v.* Hinkle, 33 Or. 93, 54 Pac. 155; 1899, State *v.* Roach, 35 Or. 224, 57 Pac. 1016; 1902, State *v.* Aiken, 41 Or. 294, 69 Pac. 683; 1905, State *v.* Ryan, 47 Or. 338, 82 Pac. 703 (larceny); 1906, State *v.* White, 48 Or. 416, 87 Pac. 137; 1921, State *v.* Yee Guck, 99 Or. 231, 195 Pac. 363 (murder); *Pennsylvania:* 1895, Wagner *v.* Haak, 170 Pa. 495, 32 Atl. 1087; *Philippine Islands:* C. C. P. 1901, § 298, par. 6 (like Cal. C. C. P. § 1870); 1908, U. S. *v.* Empeinado, 9 P. I. 613 (murder); 1908, International Banking Co. *v.* Martinez, 10 P. I. 242; 1909, U. S. *v.* Raymundo, 14 P. I. 416, 440 (murder); 1915, People *v.* Diaz, 22 P. R. 177; 1918, People *v.* Mercado, 26 P. R. 107 (fraud on an insurer); *South Carolina:* 1897, State *v.* Rice, 49 S. C. 418, 27 S. E. 452; *Tennessee:* 1827, Cornwell *v.* State, Mart. & Y. 147, 153; 1896, Wiehl *v.* Robertson, 97 Tenn. 458, 37 S. W. 274; *Texas:* 1894, McKenzie *v.* State, 32 Tex. Cr. 568, 577, 25 S. W. 426; 1905, Smith *v.* State, 48 Tex. Cr. 233, 89 S. W. 817 (reviewing prior cases); 1908, Richards *v.* State, 53 Tex. Cr. 400, 110 S. W. 432 (whether the declarations of one already acquitted are admissible); 1920, Bouldin *v.* State, 87 Tex. Cr. 419, 222 S. W. 555 (robbery); *Utah:* 1898, State *v.* Kilburn, 16 Utah 187, 52 Pac. 277; *Washington:* 1896, State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; 1903, State *v.* Dix, 33 Wash. 405, 74 Pac. 570 (embezzlement); 1906, State *v.* Dilley, 44 Wash. 207, 87 Pac. 133 (robbery); 1912, State *v.* Wappenstein, 67 Wash. 502, 121 Pac. 984 (bribery); *Wisconsin:* 1905, Schutz *v.* State, 125 Wis. 452, 104 N. W. 90 (bribery); 1909, Miller *v.* State, 139 Wis. 57, 119 N. W. 850; 1911, Tarasinski *v.* State, 146 Wis. 508, 131 N. W. 889 (murder).

It is immaterial that the declarant has been *acquitted* of the charge, for that judgment does not affect the trial in hand: 1898, Holt *v.* State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829 (repudiating the 'obiter dictum' in Dever *v.* State, 37 id. 396, 30 S. W. 1071); see Richards *v.* State, Tex., cited *supra*.

plies; *i.e.* the statements of A being receivable against B on the hypothesis that A and B have conspired, some evidence of the conspiracy must ordinarily be furnished before offering the statements of A; in a given case, the trial Court's discretion may relax this rule.[2] (*b*) Where the alleged conspiracy was carried into effect by the acts of a *mob* or other *riotous assembly* or *seditious society*, the defendant whose instigation and leadership are proved becomes liable for the mob's acts, and thus the conduct and statements of any and all persons in the mob, whether identified or not, become a proper subject of consideration; and a field of somewhat indefinite extent is opened.[3] But in

[2] *Eng.* The cases vary more or less in their statement of the rule: 1820, The Queen's Case, 2 B. & B. 303; 1839, R. *v.* Frost, 4 State Tr. N. S. 85, 229, 244; 1848, R. *v.* Cuffey, State Tr. N. S. 467, 476; 1888, Parnell Commission's Proceedings, 9th day, Times Rep. pt. 3, p. 34; *Can.* 1904, R. *v.* Hutchinson, 11 Br. C. 24, 33 (good opinion, by Hunter, C. J.); *U. S. Cal.* 1899, People *v.* Compton, 123 Cal. 403, 56 Pac. 44; 1904, People *v.* Donnelly, 143 Cal. 394, 77 Pac. 177; *Colo.* 1873, Solander *v.* People, 2 Colo. 48, 64; *D. C.* 1904, Lorenz *v.* U. S., 24 D. C. App. 337, 373; *Conn.* 1898, State *v.* Thompson, 69 Conn. 720, 38 Atl. 868; *Ind.* 1907, Cook *v.* State, 169 Ind. 430, 82 N. E. 1047; *Ia.* 1904, State *v.* Walker, 124 Ia. 414, 100 N. W. 354 (good opinion, by McClain, J.); *La.* 1903, State *v.* Bolden, 109 La. 484, 33 So. 571; *Mass.* 1902, Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; *Mo.* 1897, State *v.* May, 142 Mo. 135, 43 S. W. 637; 1911, State *v.* Fields, 234 Mo. 615, 138 S. W. 518; *N. H.* 1902, Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800; *Okl.* 1904, Wells *v.* Terr., 14 Okl. 436, 78 Pac. 124; 1911, Thompson *v.* State, 6 Okl. Cr. 50, 117 Pac. 216; *Or.* 1897, State *v.* Moore, 32 Or. 65, 48 Pac. 468; *Wash.* 1912, State *v.* Wappenstein, 67 Wash. 502, 121 Pac. 989; *W. Va.* 1902, State *v.* Prater, 52 W. Va. 132, 43 S. E. 238.

[3] *England:* 1820, R. *v.* Hunt, 3 B. & Ald. 5, 66; 1821, Redford *v.* Birley, 1 State Tr. N. S. 1071, 1157, 3 Stark. 87 (battery in dispersing a mob; solicitations by persons present to others to join them, admitted); 1843, R. *v.* O'Connell, 5 id. 1, 244, 262, 276 (seditious assembly; inscription on an arch through which the persons passed, admitted as a part of its conduct; remarks, by persons about an hour after the meeting, excluded; document circulated in various portions of the meeting, received); *United States:* 1884, Carr *v.* State, 43 Ark. 99, 102; 1854, Brennan *v.* People, 15 Ill. 511, 515 (murder of S. by a crowd of men among whom was the defendant; indications of the crowd's purpose in pursuing S., admitted to ascertain whether they had a common purpose); 1919, State *v.* Davis, 177 N. C. 573, 98 S. E. 785 (murder; crowd's utterances, admitted).

In *Washington* a vain distinction has been adopted in certain classes of cases: 1921, State *v.* Gibson, 115 Wash. 512, 197 Pac. 611 (unlawfully giving aid to the I. W. W. as a group of persons "formed to advocate, advise, and teach crime", etc.; F. and K. testified to conversations with H. and R., who stated that they were members of the I. W. W. and explained the purposes of the group as above; held inadmissible, mainly on the ground that the membership of H. and R. was evidenced only by their own hearsay statements; the ruling seems unsound, from a practical point of view); 1921, State *v.* Kowalchuck, 116 Wash. 592, 200 Pac. 333 (sabotage; to prove the unlawful purposes of the organization, a witness who stated that he was formerly a member and acquainted with its leaders was allowed to testify "to the statements and declarations made by these persons to members of the organization as to their duties as such members" *e.g.* by injury to property, etc.; distinguishing State *v.* Gibson, *supra*); 1921, State *v.* Pettilla, 116 Wash. 589, 200 Pac. 332 (criminal syndicalism; State *v.* Gibson explained as follows: "The rule is that the ban of hearsay testimony must be placed upon the use of witnesses whose testimony is a recital of what they have been told by persons who they have reason to believe are I. W. W.'s, either by the discovery upon them of membership cards, or by their declarations of membership, or other facts which lead the witnesses to the belief of the membership in the organization of the persons with whom they have held the conversations touching the purposes and objects, the principles and teachings, of the organization; but that witnesses may testify as to statements and speeches and declarations made by members of the organization, or in their presence, at recognized meetings of the organization or assemblages of the organization in their various headquarters or halls, or in such places and on such occasions as are proven to have received the sanction and countenance of the organization, and that the witnesses may also testify as to conversations in which are revealed the principles and teachings, the purposes and objects of the organization, with members of the organization, whose membership is shown by competent testimony, and whose membership

such cases the utterances of members of the mob or of bystanders may also be receivable (under an exception to the Hearsay rule) for other purposes (*post*, § 1729); and accordingly the precise issue and object of the evidence must be discriminated. Elsewhere (*post*, § 1790) a summary survey is taken of the various questions that may arise in this connection. (*c*) That the *confession of a principal* is admissible, on the trial of the *accessory*, to evidence the commission of the crime by the principal, seems clear on the present principle, supposing some evidence of the defendant's coöperation to be first furnished.[4] But whether the *judgment of conviction* of the principal is receivable for the same purpose depends on the doctrine of the effect of judgments.[5]

(2) The admissions of one *joint tortfeasor* are receivable against another,[6] on the same principle and with the same limitations as those of conspirators; this is merely the same doctrine in its application to civil liability for torts.

§ 1080. **Privies in Title; General Principle; History of the Principle.** The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation (*ante*, § 1077). Having precisely the same motive to make correct statements, and being identical with the party (either contemporaneously or antecedently) in respect to his ownership of the right in issue, his admissions may, both in fairness and on principle, be proffered in impeachment of the present claim.

is proven to be of such a character as to show it carried with it the authority of the organization to make such declarations as to its purposes, objects, principles, and teachings").

[4] 1920, Mulligan *v.* People, 68 Colo. 17, 189 Pac. 5 (robbery); 1899, Howard *v.* State, 109 Ga. 137, 34 S. E. 330; 1915, State *v.* Roberts, 95 Kan. 280, 147 Pac. 828 (examining prior cases); 1899, Givens *v.* State, 103 Tenn. 648, 55 S. W. 1107; 1908, Gibson *v.* State, 53 Tex. Cr. 349, 110 S. W. 41 (leading opinion per Ramsey, J.); 1905, State *v.* Mann, 39 Wash. 144, 81 Pac. 561. *Contra:* 1912, State *v.* Beebe, 66 Wash. 463, 120 Pac. 122 (distinguishing State *v.* Mann, but certainly unsound in result).

[5] See the following cases: *England:* 1832, R. *v.* Turner, 1 Mood. Cr. C. 347 ("many of the judges appeared to think" that the conviction of a principal was not receivable); *Canada:* 1914, R. *v.* Walker, 18 D. L. R. 541, Que. (forfeiture of recognizance to keep the peace; record of conviction for assault, held under Quebec law not to "make proof", *i.e.* be conclusive, but "it is still evidence of the particular fact which it recites", *i.e.* "a breach of the peace, and consequently a violation of the condition of the recognizance"); *United States:* 1899, Kirby *v.* U. S., 174 U. S. 47, 19 Sup. 574 (a statute making the judgment of conviction of principal in embezzlement or larceny conclusive evidence of the fact of embezzlement or larceny of such goods, in a prosecution against a knowing receiver of such stolen or embezzled goods, held unconstitutional); Colo. Comp. L. 1921, § 7163 (in a civil action for damage done by a crime, the record of conviction is not admissible: a fatuous provision); 1911, State *v.* Stewart, 85 Kan. 404, 116 Pac. 489; 1855, Com. *v.* Elisha, 3 Gray Mass. 460; 1913, State *v.* Fiore, 88 N. J. L. 1039, 88 Atl. 1039 (judgment of conviction of principal, admissible to show principal's guilt in trial of accessory); 1915, Com. *v.* Vitale, 250 Pa. 548, 95 Atl. 723 (murder; to conviction of principal on trial of accessory is not admissible until the judgment becomes final by appeal or failure to appeal); 1916, Phillips *v.* Ohio Valley E. R. Co., 78 W. Va. 776, 90 S. E. 342 (action for eviction from a train for disorderly conduct; justice's conviction for disorderly conduct; not decided); and cases cited *post*, § 1346.

Hence the question whether a *plea of guilty* by one cannot be considered in the trial of another: 1920, State *v.* Stetson, — Mo. —, 222 S. W. 425 (witness' reference to "these two young men [the defendants], and the one that pleaded guilty held me up", excluded; if this is the consequence of the present rule, it merely demonstrates how artificial and unhealthy the rule is).

[6] 1809, R. *v.* Hardwicke, 11 East 578, 585 (see quotation *supra*, § 1076; and some of the civil cases cited *supra*, note 1).

But a *co-respondent in a divorce suit* founded on adultery is not necessarily a joint tortfeasor: 1921, Sargent *v.* Sargent, 92 N. J. Eq. 703, 114 Atl. 428.

In the following passages, both principle and policy are lucidly expounded from various points of view:

1819, HENDERSON, J., in *Guy* v. *Hall*, 3 Murph. 150: "The declarations or confessions of the person making them are evidence against such person and all claiming under him by a subsequent title, and for the plainest reasons. Truth is the object of all trials, and a person interested to declare the contrary is not supposed to make a statement less favorable to himself than the truth will warrant; at least there is no danger of overleaping the bounds of truth as against the party making the declarations. It is therefore evidence *against* him, and his subsequent purchaser stands in his situation; for he cannot better his title by transferring it to another, or thereby affect the rights of those who have an interest in his confessions. . . . It is asked, Why not swear him? The answer is, The [other] party likes his declarations better. He may, from some motive, vary his statement; and the party offering this evidence is alone to judge."

1832, KENNEDY, J., in *Gibblehouse* v. *Stony*, 3 Rawle 436, 445: "In the case before us the testimony offered and rejected was not of that character which in a technical and legal sense comes under the denomination of hearsay. It comes under what is considered the declarations or admissions of the party to the suit or his privies, that is, those under whom he claims; in respect to which the general rule of law is just as well settled that they shall be received in evidence as that hearsay shall not. All a man's own declarations and acts, and also the declarations and acts of others to which he is privy, are evidence, so far as they afford any presumption against him, whether such declarations amount to an admission of any fact, or such acts and declarations of others to which he is privy afford any presumption or inference against him. . . . The confessions of the party himself (which I do not understand to be denied) have always been considered good and admissible evidence of any fact admitted by them to be true, and may be given in evidence to prove it, notwithstanding the confessions might be such as to show that twenty witnesses were present who could all testify to its existence or non-existence, and who might all appear to be in the court-house at the time when such confessions should happen to be offered in evidence against the party making them. And this rule of admitting the confessions or declarations of the party extends not only to the admission of them against himself, but against all who claim or derive their title from him; in other words, between whom and himself there is a privity. There are four species of privity: privity in blood, as between heir and ancestor; privity in representation, as between testator and executor, or the intestate and his administrators; privity in law, as between the Commonwealth by escheat and the person dying last seised without blood or privity of estate; and privity in estate as between the donor and the donee, lessor and the lessee, vendor and the vendee, assignor and the assignee, etc. . . . Upon this same principle it is, that executors and administrators, as also devisees, legatees, heirs and next of kin, are all bound by the promises, whether written or verbal, of their respective testators or intestates, so far as they may have received estates from them that are liable, and the declarations and admissions of such testators and intestates are uniformly received in evidence against their devisees, legatees, heirs, and next of kin, so as to affect the estates which have passed to them. Privies in estates, such as vendee and vendor, assignee and assignor, stand upon the same footing in this respect to each other that privies in blood do. I know of no distinction. That which is binding upon the vendor will generally be equally so upon his vendee; and whatever would have been admissible as evidence against the former ought not only to be so against the latter, but ought to have the same effect too. . . . Lord Ellenborough has given the true reason of the rule for admitting the declarations of a party in evidence where he says it 'is founded upon a reasonable presumption that no person will make any declaration against his interest unless it be founded in truth.' If true when made, and therefore receivable in evidence, his selling or disposing of the property afterwards cannot make his former declarations in respect to it untrue, nor furnish any reason that I can perceive which ought to derogate from its character as evidence. But I cannot avoid be-

lieving that as long as the great object of receiving testimony is to aid in and to promote the investigation of truth, the declarations or admissions of a vendor or assignor against his interest, made before the sale or assignment, may be more safely relied on and received in evidence against his vendee or assignee than the testimony that would be given by such vendor or assignor himself, if the party claiming in opposition to his vendee or assignee must be compelled to resort to him."

1843, Messrs. *Cowen* and *Hill*, in Notes to Phillipps on Evidence, No. 481, p. 644: "[The owner's] estate or interest in the same property, afterwards coming to another, by descent, device, right of representation, sale or assignment, in a word, by any kind of transfer, whether it be the act of law or the act of the parties, whether the subject of the transfer be real or personal estate, corporeal or incorporeal, choses in possession or choses in action, the successor is said to claim under the former owner; and whatever he may have said affecting his own rights, before departing with his interest, is evidence equally admissible against his successor claiming from him, either immediately or remotely. And in this instance, it makes no difference whether the declarant be alive or dead; for though he be a competent witness, and present in court, his admissions are receivable. This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived; has taken it 'cum onere'; and as the predecessor might have taken a qualified right, or sold, charged, restricted, or modified an absolute right, and as he might furnish all the necessary evidence to show its state in his own hands, the law will not allow third persons to be deprived of that evidence by any act of transferring the right to another."

This principle is to-day nowhere denied.[1]

But its recognition was slow in coming. Of the fundamental and common doctrines of our law of Evidence, this was perhaps the latest to receive judicial recognition. Not until the period 1830–1850 can the full acceptance of the principle be said to have been established, either in England or in the United States. As late as 1824, Mr. Starkie, in his philosophical treatise,[2] ventured only to say that the admissions of a prior owner were "sometimes" receivable. In 1839, Mr. Esek Cowen and Mr. Nicholas Hill, Jr. (the former then a judge of New York, the latter afterwards), were obliged to devote a long excursus, in their edition of Mr. Phillipps' treatise,[3] to a demonstration of the various bearings of the principle in its logical completeness. It was mainly through their masterly exposition that clarity of doctrine became thenceforward apparent in the American rulings.

The reasons for the confusion and halting development in the prior generation are now not difficult to detect. Long enough before then, to be sure, a single aspect of the principle had been plainly enough known and constantly applied, — namely, the use of recitals in deeds of preceding proprietors;[4] for in the substantive law the rights of the successor were defined by the terms of his chain of prior deeds, and it was a simple matter to concede an analogous evidential force, against him, to those parts of the deed which were not strictly definitive of the scope of his title.[5] But this was not with full per-

§ 1080. [1] Except in one traditional respect in New York, firmly fixed too long ago to be now discarded; see § 1083, *post*.

[2] Evidence, II, 48.

[3] Note No. 481.

[4] 1704, Ford *v.* Lord Grey, 1 Salk. 286.

[5] The only controversy in this respect was whether the recitals were conclusive, on the principle of estoppel, — a question carefully considered by Mr. J. Story, in 1830, in Carver *v.* Jackson, 4 Pet. 1, 83, cited *post*, § 1256.

ception of the principle; and in respect to all other forms of admissions, particularly oral ones, there were strong counter-analogies which tended to obscure the further perception of the principle. By the end of the 1700s the rules of Evidence were beginning to be more carefully considered than ever before (*ante*, § 8), and the Hearsay rule was in particular strictly enforced. The exceptions to this rule were by no means yet fully established; the scope of the Exceptions for Statements of Facts against Interest was not finally determined till the first quarter of the 1800s (*post*, § 1455). For that exception the requirement was essential that the declarant should be deceased, — a circumstance immaterial for admissions (*ante*, § 1049). Since Admissions (as already observed) are commonly though not necessarily against interest at the time of making (*ante*, § 1048), it was natural enough, in this inchoate stage of the conception, to fail to distinguish admissions of parties from the general hearsay exception, then in formation, for statements of facts against interest. Accordingly, even after it began to be perceived that a predecessor's oral statements were assimilable to his deed-recitals as admissions, the notion persisted for a long time that his death was essential (by analogy to the Hearsay exception) for their reception; and not until 1830 or thereabouts, either in England or the United States, was this notion thoroughly dislodged.[6] The thought was, up to that time, that if the person were living, whether he were grantor or were totally disconnected from the cause, his statement was hearsay and his testimony on the stand must be required.

Another doctrine, also, combined to divert judicial attention from the development of the doctrine of admissions; this was the Verbal-Act doctrine (*post*, §§ 1772–1778). Still looking from the hearsay point of view, the judges perceived, in the early 1800s, that the rule was not applicable to verbal parts of acts necessary to be proved, and in particular to declarations of claim or disclaim accompanying and coloring the occupation of land, where the issue was merely one of possession. Such declarations commonly proceeded from prior occupants where the proof of adverse possession, in founding a prescriptive title, extended into prior generations; and the propriety of receiving them came soon to be conceded. Now, in most of the cases affecting real property, in which the declaration would have been receivable as an admission, it was also receivable on one or the other of the foregoing principles, *i.e.* either as a statement of a fact against proprietary interest (under the Hearsay exception), or as a verbal part of an act coloring the possession. Hence it was that a generation elapsed, after the opening of the 1800s, before the applicability of the doctrine of Admissions was fully conceived; for both counsel

[6] 1827, Gaselee, J., in Hedger *v.* Horton, 3 C. & P. 179: "I have always understood that, with respect to real estates, the declarations of a party, made before he parted with his interest, have been received in evidence, and not his declarations after. But I believe that this has been in cases where the party was dead." And yet, as soon after as 1834, Parke, J., says, in Woolway *v.* Rowe, 1 A. & E. 114, 117: "The point [above ruled] is quite new to me. I always thought the party's interest at the time of the declaration was the ground on which the evidence was admitted." Other authorities are collected *ante*, § 1049.

and judges were naturally restrained in the channel of their speculations by these competing analogies for the commonest species of admissions.[7]

In England Dartmouth *v.* Roberts, in 1812,[8] shows an evident logical effort, ending in the successful appreciation of the notion of a predecessor's admissions, in an issue concerning realty. Woolway *v.* Rowe, in 1834,[9] finds the doctrine unquestioned; though Hedger *v.* Horton, in 1827,[10] had shown it still clouded by the other analogies. For issues of personalty, Ivat *v.* Finch, in 1808,[11] had already opened the way; and a series of rulings on commercial paper, beginning with Kent *v.* Lowen, in the same year,[12] fully developed the principle before 1825.

In the United States the development proceeded by almost contemporaneous steps. The English reports were now fully in the hands of the American lawyers and judges; and the ambiguity and hesitation of the Westminster rulings were reflected in the discussions in the United States. In Connecticut, for example, the whole doctrine of predecessors' admissions was expressly under the ban as late as 1815,[13] and not until 1845 [14] did the new learning receive its settled sanction. In New York the principle was applied in realty issues as early as 1813;[15] but the rulings vacillated, and as late as 1843, in the much-argued case of Paige *v.* Cagwin,[16] the whole doctrine was put in jeopardy, and emerged to survive in only a mutilated form. In Vermont, the New York rule prevailed as late as 1845.[17] In Massachusetts, the principle seems to have been ignored throughout the first quarter of the 1800s.[18] In Pennsylvania alone, at the early period of 1782, a precocious but clear perception of the entire principle was found; [19] although even here in 1832 [20] it was still considered open to attack. After the publication of Messrs. Cowen and Hill's commentary, there was no longer room for misunderstanding or debate.[21]

[7] For example, Doe *v.* Jones, in 1808 (*post*, § 1458), might have been decided on the principle of admissions and not of statements against interest; and Stanley *v.* White, in 1811 (*post*, § 1778) and Doe *v.* Pettett (*post*, § 1778) need not have been decided on the verbal-act principle.

[8] 16 East 334. These and the following cases are further cited *post*, §§ 1082–1086.

[9] 1 A. & E. 114.

[10] 3 C. & P. 179.

[11] 1 Taunt. 141.

[12] 1 Camp. 177, by L. C. J. Ellenborough. The formative stage of the conception is interestingly shown by the same judge's ruling, only three years before, in a stronger case for admission (Duckham *v.* Wallis, 5 Esp. 151), excluding such statements on the express ground that to receive them "would be making the declarations of a third person evidence to affect the plaintiff's title when that person was not on the record." In Kent *v.* Lowen he correctly designated such a person as "one through whom the plaintiff made title"; he had seen the light.

[13] Beach *v.* Catlin, 4 Day 284; Barrett *v.* French, 1 Conn. 354.

[14] Smith *v.* Martin, 17 Conn. 399.

[15] Johnson *v.* M'Call, 10 John. 377.

[16] 7 Hill 361.

[17] Hines *v.* Soule, 14 Vt. 99; it was repudiated after a decade.

[18] Clarke *v.* Waite, 12 Mass. 439; Bridge *v.* Eggleston, 14 id. 245.

[19] Morris *v.* Vanderen, 1 Dall. 64.

[20] Gibblehouse *v.* Stong, 3 Rawle 436, quoted *supra*.

[21] The transitional confusion of theory, above set forth, is reflected in the Code provisions of those States founding their codes on the Field Draft New York Code; these provisions apply in part to the ensuing rules for admissions by privies in title (§§ 1081–1087), and in part to statements against interest by any deceased persons (*post*, § 1455); *Cal.* C. C. P. 1872, § 1848 ("The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another");

§ 1081. **Same: Decedent; Insured; Co-legatee, Co-heir, Co-executor; Co-tenant; Bankrupt.** The principle just examined may be phrased in this way: When by the hypothesis of the party himself his title as now claimed is identical with that of another person, as a prior holder, the statements of that other person, made during the time of his supposed title, are receivable against the party as admissions.[1] This question of identity of title depends obviously upon the substantive law of Property. In this respect it is without the scope of the law of Evidence, and does not call for consideration here. But a few of the commoner instances may be briefly examined for illustration's sake; and in particular the relation of grantor and grantee must be examined in detail, because of its many complicated relations with other rules of Evidence.

(1) No modern Court doubts that a *decedent,* whose rights are transmitted intact to his successor, is a person whose admissions are receivable against a party claiming the decedent's rights as *heir, executor,* or *administrator.*[2] The statutory claim, however, in an action for *death by wrongful act,* of the executor or other representative, is of an anomalous nature; in some features it is an action for a surviving claim of the deceased, while in others it is an action for an injury to the dependent relatives; there is therefore some ground for holding that the deceased's admissions are not receivable.[3] It may however equally be argued that, being admissible in one aspect, they should not

§ 1849 ("Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former"); § 1851 ("And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties"); § 1853 (quoted *post,* § 1455); § 1870, par. 4 (quoted *post,* § 1455); *Ga.* Code 1910, §§ 5767, 5768 (quoted *post,* § 1455); Rev. C. 1910, § 5780 ("The admissions of privies in blood, privies in estate, and privies in law are admissible as against the parties themselves; but declarations of privies in estate, after title has passed out of them, cannot be received").

§ 1081. [1] Or, in another form: wherever the other person could by his acts affect the title of the present party, the other person's admissions may be used as evidence in disproof of that title.

[2] *Eng.* 1836, Smith *v.* Smith, 3 Bing. N. C. 29, 33 (deceased's admissions as to a gift, received; "strictly speaking, the defendant claims under him"); *U. S.* 1906, Cross *v.* Iler, 103 Md. 592, 64 Atl. 33 (husband's admissions, in an action by his widow against the administratrix); 1905, Benson *v.* Raymond, 142 Mich. 357, 105 N. W. 870 (declarations of grantee of a deed, as to grantor's insanity, received against the grantee's heirs); 1903, Dixon *v.* Union Ironworks, 90 Minn. 492, 97 N. W. 375 (wife-administratrix' action for death of husband); 1922, Beck *v.* Utah-Idaho Sugar Co., — Utah —, 203 Pac. 647 (title to land; plaintiff's deceased husband's declarations that she was not his lawful wife, admitted against her, claiming title through marriage).

Compare the rule for *statements of facts against interest* (*post,* § 1461, n. 1).

So, too, the administrator 'de bonis non' is affected by the admissions of the executor or administrator, who is his direct predecessor; 1874, Eckert *v.* Triplett, 48 Ind. 174, 176.

Compare § 1076, *ante.*

[3] 1906, Jacksonville El. Co. *v.* Sloan, 52 Fla. 257, 42 S. O. 516 (action by a widow, in her own right, for the death of her husband); 1922, Republic Iron & Steel Co. *v.* Ind. Com., 302 Ill. 401, 134 N. E. 754 (dependents of deceased employee; admitted); 1919, Eldredge *v.* Barton, 232 Mass. 183, 122 N. E. 272 (death by wrongful act; the decedent's statement, "it is my fault, I am to blame", held admissible on a count for conscious suffering before death, but not admissible on a count for loss to next of kin; a most accurate and delicate distinction, revealing at the same time the futile unpracticability of this doctrine of admissions, totally unrelated to probative value); 1898, Camden & A. R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634 (undecided).

be excluded because the action has additional aspects; [4] moreover, they ought in any event to be receivable under the Hearsay exception for statements of facts against interest, as some Courts concede.[5] In a beneficiary's action for the sum conditioned in a policy of *life-insurance*, there is no legal identity of title between the deceased and the beneficiary, although the beneficiary's right is after all no more than the creation of the insured's contract; hence, unless the beneficiary has in the beginning been made a party to the contract so as to bind himself to be identified with the insured (and some forms of contract attempt this), the insured's admissions would not be receivable against the beneficiary. It must be conceded, however, that the situation admits of much refinement of reasoning, dependent on the theory of contract.[6] In any event the use of the insured's declarations as circumstantial evidence of his knowledge of his illness (*ante*, § 266) must be distinguished.[7]

(2) Where a title is created as a joint interest and by a single legal act, it would seem that the admissions of any one of the holders would be receivable against another as party. This would dictate the use of the admissions of a co-*obligee* in a joint contract,[8] but not of a *co-tenant* of realty,[9] nor of a co-*trustee*.[10] It seems also clear, and is conceded on all hands, that a *co-devisee* or *co-legatee* does not hold by a joint title, and therefore his admissions cannot be used to affect another.[11] But it does not follow (as is usually maintained)

[4] 1899, Georgia R. & B. Co. *v.* Fitzgerald, 108 Ga. 507, 34 S. E. 316 (wife's action for husband's death); 1896, Van Alstine *v.* Kaniecki, 109 Mich. 318, 67 N. W. 502 (action by a mother under the liquor-damage act); 1896, Hughes *v.* Canal Co., 176 Pa. 254, 35 Atl. 190 (wife's action for death of the husband).

[5] *Post*, § 1461.

[6] Compare the following rulings, *pro* and *con:* 1896, Mutual Life I. Co. *v.* Selby, 19 C. C. A. 331, 72 Fed. 980; 1903, Connecticut M. L. Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 Sup. 294; 1906, Hews *v.* Equitable L. A. Soc'y, 143 Fed. 850, C. C. A.; 1913, Logia Suprema *v.* Aguirre, 14 Ariz. 390, 129 Pac. 503; 1920, Brotherhood of Railroad Trainmen *v.* Merideth, 146 Ark. 140, 225 S. W. 337; 1903, Sutcliffe *v.* Iowa S. T. M. Ass'n, 119 Ia. 220, 93 N. W. 90; 1907, Taylor *v.* Grand Lodge, 101 Minn. 72, 111 N. W. 919; 1863, Rawls *v.* Ins. Co., 27 N. Y. 282, 290; 1890, Smith *v.* Benefit Soc'y, 123 N. Y. 85, 25 N. E. 197; 1922, Evans *v.* Junior Order, — N. C. —, 111 S. E. 526; 1880, Union Cent. L. I. Co. *v.* Cheever, 36 Oh. St. 201, 208; 1879, Mobile L. I. Co. *v.* Morris, 3 Lea 101, 103; 1896, Fidelity M. L. Ass'n *v.* Winn, 96 Tenn. 224, 33 S. W. 1045; 1920, Chadwick *v.* Beneficial Life Ins. Co., 56 Utah 480, 191 Pac. 240, 255; 1920, Spaulding *v.* Mutual Life Ins. Co., — Vt. —, 109 Atl. 22 (adopting the theory that under a policy reserving the right to change beneficiary the admissions are receivable); 1895, Thomas *v.* Grand Lodge, 12 Wash. 500, 41 Pac. 882; 1885, Schwarzbach *v.* Ohio V. P. Union, 25 W. Va. 622, 646; 1899, McGowan *v.* Supreme Court, 104 Wis. 173, 80 N. W. 603; 1902, Rawson *v.* Ins. Co., 115 Wis. 641, 92 N. W. 378.

The cases are exhaustively analyzed, and a tenable distinction lucidly expounded, in an article by Professor A. M. Kales, "Declarations of the Insured against the Beneficiary", 6 Columbia Law Rev. 509 (1906).

[7] For the question whether an *insurer's* admissions, as the real plaintiff in an action for *loss by fire*, are receivable, see a careful opinion by Gray, J., in Judd *v.* N. Y. & T. S. S. Co., 128 Fed. 7, 62 C. C. A. 515 (1904).

[8] 1812, Bell *v.* Ansley, 16 East 141, 143 (joint obligees of an insurance policy).

[9] 1824, Osgood *v.* Manhattan Co., 3 Cow. N. Y. 612, 622; 1825, Dan *v.* Brown, 4 Cow. 483, 492; 1918, Pope *v.* Hogan, 92 Vt. 250, 102 Atl. 937 (ejectment; certain admissions by husband and wife, partly received and partly rejected; cited more fully *post*, § 2232); in St. Louis O. H. & C. R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771 (1898), a co-tenant's admissions, as co-plaintiff, were received on the facts.

[10] 1800, Davies *v.* Ridge, 3 Esp. 101. Nor of a *prior mortgagee:* 1903, Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493 (a first mortgagee's admissions, not received against a second mortgagee).

[11] 1868, Shailer *v.* Bumstead, 99 Mass. 112, 127 ("Devisees or legatees have not that joint interest in the will which will make the admissions of one, though he be a party ap-

that they are not to be received at all, even against himself when he is a party. The fact that there can be but a single judgment, for or against the validity of the entire will, constitutes only an imaginary obstacle; for it is not inherently necessary that the case should be proved against each party by the same evidence; a joint promise, for example, could be evidenced against A by his handwriting, against B by his admission, and against C by one who saw the document signed, and yet it must be either a joint promise or none. The refinement of reasoning and scrupulosity of caution which practically shuts out all such evidence of admissions in will-causes seems to be ill-judged. It is nevertheless approved by most Courts to-day.[12] A few Courts are found

pellant or appellee from the decree of the probate court allowing the will, admissible against the other legatees; . . . such statements are only admissible when they are made during the prosecution of the joint enterprise", *i.e.* on the theory of conspiracy).

[12] *Federal:* 1889, Ormsby *v.* Webb, 134 U. S. 47, 65, 10 Sup. 478 (excluded, except to contradict as a witness, where the declarant was not sole legatee); 1913, *In re* Thompson, N. J. D., 205 Fed. 558 (bankrupt); *Alabama:* 1848, Roberts *v.* Thawick, 13 Ala. 68, 80 (mental incapacity); *California:* 1906, Dolbeer's Estate, 149 Cal. 27, 86 Pac. 695 (mental incapacity); 1908, Dolbeer's Estate, 153 Cal. 652, 96 Pac. 266; 1910, Snowball's Estate, 157 Cal. 301, 107 Pac. 598; *Columbia* (Dist.): 1906, Robinson *v.* Duvall, 27 D. C. App. 535, 548 (caveatee's admissions of testator's sanity, excluded, except to contradict him as a witness); *Connecticut:* 1893, Livingston's Appeal, 63 Conn. 68, 26 Atl. 470; 1902, Carpenter's Appeal, 74 Conn. 431, 51 Atl. 126; 1889, Dale's Appeal, 57 Conn. 127, 140, 17 Atl. 757 (undue influence); *Georgia:* Ga. Civ. C. 1910, § 3870 ("on an issue of devisavit vel non, the admission of an executor before qualification, or of a legatee unless the sole legatee, shall not be admissible in evidence to impeach the will, except the admission be in reference to the conduct or acts of the executor or legatee himself"); *Georgia:* 1914, Ginn *v.* Ginn, 142 Ga. 420, 83 S. E. 118 (applying the exception); *Illinois:* 1891, Campbell *v.* Campbell, 138 Ill. 612, 615, 28 N. E. 1080 (undue influence); 1912, Cunniff *v.* Cunniff, 255 Ill. 407, 99 N. E. 654 (excluding statements of undue influence made by one devisee; citing Campbell *v.* Campbell, 138 Ill. 612, but not Egbers *v.* Egbers, *infra*, n. 12); 1919, McCune *v.* Reynolds, 288 Ill. 188, 123 N. E. 317 (undue influence; one devisee's admission is "not admissible where the interests of the devisees are separate"; citing Campbell *v.* Campbell but not Cunniff *v.* Cunniff, *supra*, nor Egbers *v.* Egbers, *infra*, n. 12; is it not time to shepherd Egbers *v.* Egbers somewhere into the sheepfold?); 1920, Joyal *v.* Pilotte, 293 Ill. 377, 127 N. E. 741 (will-contest; the defendant legatees were S. P., the widow P. and an infant grandson given $5; the widow defaulted; admissions of undue influence by S. P. were excluded; this illustrates the irrationality of the rule); *Indiana:* 1898, Roller *v.* Kling, 150 Ind. 159, 49 N. E. 948; 1901, Hertrich *v.* Hertrich, 114 Ia. 643, 87 N. W. 689; 1879, Hayes *v.* Burkam, 67 Ind. 359, 363 (mental incapacity); 1913, Sanger *v.* Bacon, 180 Ind. 322, 101 N. E. 1001 (excluded; but noting that such statements may be admissible as self-contradictions); 1918, Ramseyer *v.* Dennis, 187 Ind. 420, 119 N. E. 716 (capacity to make a will; admissions of the sole beneficiary, receivable); *Iowa:* 1879, Ames' Will, 51 Ia. 596, 602, 2 N. W. 408 (undue influence); 1905, Fothergill *v.* Fothergill, 129 Ia. 93, 105 N. W. 377; 1912, Lawless *v.* Lawless, 156 Ia. 184, 135 N. W. 560; 1917, Liddle *v.* Salter, 180 Ia. 840, 163 N. W. 447 (here admitted, being utterances in the presence of the testatrix exhibiting influence); *Maryland:* 1820, Walkup *v.* Pratt, 5 H. & J. 51, 57; 1906, Kelly *v.* Kelly, 103 Md. 548, 63 Atl. 1082 (admissions of the testator's insane conduct, made before his death, by K., the executor and sole devisee, excluded; this is an 'absurditas absurditatum'); *Massachusetts:* 1804, Phelps *v.* Hartwell, 1 Mass. 71 (mental capacity; but see Atkins *v.* Sanger, 1822, 1 Pick. 192, *semble, contra*); 1891, McConnell *v.* Wildes, 153 Mass. 487, 26 N. E. 114 (undue influence); 1908, Gorham *v.* Moor, 197 Mass. 522, 84 N. E. 436 (but here admitted as self-contradictions to impeach); 1913, Aldrich *v.* Aldrich, 215 Mass. 164, 102 N. E. 487 (silence of a beneficiary of a will is not to be taken as an admission); 1919, Old Colony Trust Co. *v.* Di Cola, 233 Mass. 119, 123 N. E. 454; 1922, Neill *v.* Brackett, — Mass. —, 135 N. E. 690; *Michigan:* 1893, O'Conner *v.* Madison, 98 Mich. 183, 190, 57 N. W. 105 (undue influence); 1904, Roberts *v.* Bidwell, 136 Mich. 191, 98 N. W. 1000; *Minnesota:* 1919, Knutson's Estate, Benrud *v.* Anderson, 144 Minn. 111, 174 N. W. 617 (legatee's admissions excluded; nor can they be used as self-contradictions of the legatee as witness merely by calling her on cross-examination to lay a foundation); *Mississippi:* 1855, Prewett *v.* Coopwood, 30 Miss. 369, 388 (pecuniary

to withstand it,[13] following what must be regarded as the orthodox view which receives such admissions as against the party making them.[14]

(3) The estate of an *insolvent* or *bankrupt* passes to an assignee as the debtor's successor; and it has always been conceded that the debtor's admissions, while his estate was in him, are receivable against the assignee;[15] whether the date of divestiture should be taken to be that of the act of bankruptcy or that of the appointment of an assignee was at one time a matter of doubt.[16]

Where there is no general assignment, but merely a levy by an *individual execution creditor* upon the estate of the debtor, the creditor still is seeking merely to acquire the title of the debtor, and in claiming under him would

claim); *Missouri:* 1900, Schierbaum *v.* Schemme, 157 Mo. 1, 12, 57 S. W. 526; 1901, Wood *v.* Carpenter, 166 Mo. 465, 66 S. W. 173; 1905, King *v.* Gilson, 191 Mo. 307, 90 S. W. 367; 1906, Meier *v.* Buchter, 197 Mo. 68, 94 S. W. 883 (rule in Schierbaum *v.* Schemme *supra*, not applied, where the devisees were charged as co-conspirators to defraud); 1907, Seibert *v.* Hatcher, 205 Mo. 83, 102 S. W. 962 (Schierbaum *v.* Schemme followed); *Nebraska:* 1901, Stull *v.* Stull, — Nebr. —, 96 N. W. 196 (declarations of an executor not sole legatee, excluded); *New Hampshire:* 1888, Carpenter *v.* Hatch, 64 N. H. 573, 15 Atl. 219 (mental incapacity); *New Jersey:* 1907, Myers *v.* Myers, 75 N. J. L. 610, 68 Atl. 82; *New York:* 1901, Kennedy's Will, 167 N. Y. 163, 60 N. E. 442 (admissions of one heir not receivable in a will contest, since they are not admissible against the other heirs and there can be but one decree); 1906, Myer's Will, 184 N. Y. 54, 76 N. E. 920 (admissions of the principal legatee as to testatrix' incapacity, excluded); *North Carolina:* 1906, Linebarger *v.* Linebarger, 143 N. C. 229, 55 S. E. 709 (*semble*, not decided in general, but here excluded); *Ohio:* 1862, Thompson *v.* Thompson, 13 Oh. St. 356 (mental capacity); *Pennsylvania:* 1825, Nussear *v.* Arnold, 13 S. & R. 323; *Tennessee:* 1851, Mullins *v.* Lyles, 1 Swan 337 (fraud and undue influence); *Virginia:* 1899, Whitelaw *v.* Whitelaw, 96 Va. 712, 32 S. E. 358 (mental incapacity); *West Virginia:* 1871, Forney *v.* Ferrell, 4 W. Va. 729, 739 (undue influence).

Undecided: 1905, Arnold's Estate, 147 Cal. 583, 82 Pac. 252.

[13] *Ill.* 1898, Egbers *v.* Egbers, 177 Ill. 82, 52 N. E. 285 (it had been left undecided in Mueller *v.* Rebhan, 1879, 94 Ill. 142, 148); 1916, Lyman *v.* Kaul, 275 Ill. 11, 113 N. E. 944 (undue influence; E. C. P. and the contestant being the only beneficiaries, and E. C. P. being the principal one, her admissions were received; distinguishing Campbell *v.* Campbell, n. 11, *supra*, and purporting to follow Egbers *v.* Egbers); *Ind.* 1905, O'Brien *v.* Knotts, 165 Ind. 308, 75 N. E. 594 (indebtedness of an estate), *semble:* 1919, Davis *v.* Babb, — Ind. —, 125 N. E. 403 ("any declarations of a proponent or beneficiary evidencing some intention to unduly influence the testator are admissible"; citing no Indiana precedents; compare the citations in n. 11, *supra*); *Iowa:* 1902, Lundy *v.* Lundy, 118 Ia. 445, 92 N. W. 39 (admissions of a "principal beneficiary", received); *Ky.* 1841, Beall *v.* Cunningham, 1 B. Monr. 399 (lucid opinion by Roberson, C. J.); 1902, Gibson *v.* Sutton, — Ky. —, 70 S. W. 188 (following Beall *v.* Cunningham); 1904, Powers' Ex'r *v.* Powers, — Ky. —, 78 S. W. 152 (devisee's admissions); 1910, McConnell's Ex'r *v.* McConnell, 138 Ky. 783, 129 S. W. 106; *Mich.* 1902, Wood *v.* Zibble, — Mich. —, 92 N. W. 348 (admissions of the wife-proponent, received); *Tex.* 1914, Scott *v.* Townsend, 106 Tex. 322, 166 S. W. 1138 (second wife and her child as devisees); *Utah:* 1906, Miller's Estate, 31 Utah 415, 88 Pac. 338 (sole legatee's admissions, received).

Compare the following: 1902, Robinson *v.* Robinson, 203 Pa. 400, 53 Atl. 253 (legatee's statements, not offered as admissions of incapacity, received; prior cases distinguished).

[14] 1792, Jones *v.* Turberville, 2 Ves. Jr. 11.

For the same reason an *executor's* admissions should be receivable: *Contra:* 1911, Fowler's Will, 156 N. C. 340, 72 S. E. 357 (undue influence).

[15] 1794, Bateman *v.* Bailey, 5 T. R. 512; 1847, Ramsbottom *v.* Phelps, 18 Conn. 278, 283 ("Debts against an assigned estate stand on the same footing as debts against a deceased person whose estate is represented insolvent; and the admissions of the insolvent debtors are admissible for the same reason that the admissions of a deceased person, made while living, are admissible for the purpose of charging his estate"); 1846, Compton *v.* Fleming, 8 Blackf. 153; and many cases *passim*, §§ 1082–1086, *post;* so also, by exception, in New York: § 1083, par. 3, *post*. *Contra:* 1894, Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130 (debtor's admissions of receipt of full consideration for a mortgage, not received against the assignee for the mortgagee).

[16] 1824, Smallcombe *v.* Bruges, 13 Price 136, 150 (excluding all admissions after the act of bankruptcy, and not only after the date of the commission).

be affected by his admissions prior to the levy; and this is generally conceded.[17] But this merely evidential use of admissions must be distinguished from the doctrine of estoppel; a creditor is of course not "bound" (for example, by recitals of consideration or the like), in the sense that he may not dispute the truth of the debtor's assertions.[18]

§ 1082. **Grantor, Vendor, Assignor, Indorser**; (1) **Admissions before Transfer**; (*a*) **Realty; Admissions against Documentary Title; Transfers in Fraud of Creditors.** By the general principle (examined *ante*, § 1080) the statements of a *grantor of realty*, made *while title* was by hypothesis *still in him*, are receivable as admissions against any grantee claiming under him. The history and slow development of this principle have already been noticed (*ante*, § 1080). It is sufficient here to say that the principle is to-day fully and universally conceded,[1] subject only to a modification due merely to its conflict with another principle (par. 3, *infra*):

[17] *Post*, § 1086, par. (*b*), and cases *passim* in §§ 1082–1806.

[18] 1893, Milburn *v.* Phillips, 136 Ind. 680, 695, 34 N. E. 983, 36 N. E. 360.

§ 1082. [1] The precedents are as follows, and should be read in the light of the remaining remarks of the text of § 1082; where not otherwise noted, the admissions were received without qualification:

ENGLAND: 1697, Sussex *v.* Temple, 1 Ld. Raym. 310 (answer in chancery); 1704, Ford *v.* Grey, 1 Salk. 286, 6 Mod. 44 (deed-recitals; see the quotation from this case, *post*, § 1256); 1812, Dartmouth *v.* Roberts, 16 East 334, 339 (answer in chancery by a co-defendant L. in a former suit on the same issue of tithes, admitted; "the defendant stood in the same place by derivation of title and by legal obligation as L., and L. upon his oath in a suit against him by the vicar has declared that the tithe is due to the rector and not to the vicar, and now that same person, in effect, is deraigning the title of the rector in favor of the vicar; the reading of his answer therefore operates as a contradiction to him"); 1818, DeWhelpdale *v.* Milburn, 5 Price 485, 488 (answer in chancery by a former dean and chapter); 1829, Madison *v.* Nuttall, 6 Bing. 226 (a former rector's written register of tithes, received "as an admission by a preceding rector"); 1832, Doe *v.* Austin, 9 Bing. 41, 45 (admissions of the predecessor under whom defendant claimed, received against him); 1834, Doe *v.* Cole, 6 C. & P. 359, 361 (similar ruling to Madison *v.* Nuttall); 1834, Woolway *v.* Rowe, 1 A. & E. 114 (former proprietor's disclaimer of a right of inclosure, admitted); 1834, Doe *v.* Seaton, 2 A. & E. 171, 179.

CANADA: 1846, Payson *v.* Good, 3 Kerr N. Br. 272, 279; 1873, Niles *v.* Burke, 14 N. Br. 237 (boundaries); 1874, Hamilton *v.* Holder, 15 N. Br. 222, 225 (but they were excluded in Carter *v.* Saunders, 1864, 6 All. 147, 150); 1916, Taylor *v.* Vanderburgh, 30 D. L. R. 196, Ont. (conduct of a predecessor, amounting to an admission as to boundaries, admitted).

UNITED STATES: *Federal:* 1830, Carver *v.* Jackson, 4 Pet. 1, 83 (deed-recitals, admitted; see citation *post*, § 1256); 1876, Dodge *v.* Freedman's S. & T. Co., 93 U. S. 379, 383 (admissible, but "only to show the character of the possession" and "by what title he holds"; opinion confused; see *post*, § 1256); 1879, Baker *v.* Humphrey, 101 U. S. 494 (admissions of grantee as to the object of the conveyance to defeat creditors, received); 1897, Henderson *v.* Wanamaker, 25 C. C. A. 181, 79 Fed. 736; 1911, Northrup *v.* Columbian Lumber Co., C. C. A., 186 Fed. 770 (received, where made before title transferred);

California: C. C. P. 1872, § 1849 ("Where, however, one derives title to real property from another, the declaration, act, or admission of the latter, while holding the title, in relation to the property, is evidence against the former"); 1852, Kilburn *v.* Ritchie, 2 Cal. 145, 148, *semble;* 1859, Stanley *v.* Green, 12 Cal. 148, 163 ("It matters not whether the declarations relate to the limits of the party's own premises, or the extent of his neighbor's, or to the boundary line between them, or to the nature of the title he asserts"); 1867, Bollo *v.* Navarro, 33 Cal. 459, 466; 1877, McFadden *v.* Ellmaker, 52 Cal. 348; 1882, People *v.* Blake, 60 Cal. 497, 503, 511; 1898, Williams *v.* Harter, 121 Cal. 47, 53 Pac. 405; 1902, Harp *v.* Harp, 136 Cal. 421, 69 Pac. 28;

Connecticut (compare the historical summary *ante*, § 1080): 1805, Nichols *v.* Hotchkiss, 2 Day 121, 126 (excluded, because the grantors were neither dead nor disqualified by interest); 1815, Barrett *v.* French, 1 Conn. 354, 365 (he is claiming to set aside an ancestress' deed for undue influence; "it has been uniformly decided that the declarations of the grantor, when the grantee is not present, prior or subsequent to the execution," are inadmissible); 1818, Beers *v.* Hawley, 2 Conn.

1843, WALWORTH, C., in *Padgett v. Lawrence*, 10 Paige 170, 180: "As a general rule, declarations made by a person in possession of real estate as to his interest or title in the property, may be given in evidence against those who derive title under him, in the same manner as they could have been used against the party himself if he had not parted with

467, 471 (grantor's declaration as to time of a deed's delivery, made before his transfer, admitted against the grantees "who claim under him"; preceding cases ignored); 1826, Clark *v.* Beach, 6 Conn. 142, 149 (question not decided); 1829, Norton *v.* Pettibone, 7 id. 319, 323 (declaration by defendant's ancestor's grantor that he had taken his deed in fraud of his own grantor's creditors, admitted against defendant; Beers *v.* Hawley confirmed; Barrett *v.* French by implication repudiated on this point); 1833, Fitch *v.* Chapman, 10 Conn. 8, 12 (declarations of a mortgagor, who had bought in his land with money of the defendant, that he had bought for the defendant, not admitted against the plaintiff, a creditor of the mortgagor, because the latter was still competent as a witness; Norton *v.* Pettibone and Beers *v.* Hawley distinguished on this ground); 1837, Deming *v.* Carrington, 12 Conn. 1, 4 (issue as to a boundary; declarations of C., under whom defendant claimed, admitted against defendant, though C. was alive and qualified; distinction made in Fitch *v.* Chapman repudiated; "where such identity exists, they are admissible, although the person making them is alive and competent to testify"); 1845, Smith *v.* Martin, 17 Conn. 399, 401 (preceding rule approved; "it seems to be perfectly well settled in this State"); 1847, Ramsbottom *v.* Phelps, 18 Conn. 278, 285 (same); 1901, Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884 (Deming *v.* Carrington followed);

Georgia: Rev. C. 1910, § 5767 ("Declarations of a person in possession of property, in disparagement of his own title, are admissible in favor of any one, and against privies. Declarations in favor of his own title are admissible to prove his adverse possession");

Illinois: 1899, Gage *v.* Eddy, 179 Ill. 492, 53 N. E. 1008 (admitted; this ought to discredit Hart *v.* Randolph, 142 Ill. 521, 525, 32 N. E. 517, where the contrary statement was *obiter* made); 1915, Bald *v.* Nuernberger, 267 Ill. 616, 108 N. E. 724 (a printed sale bill, by a predecessor in title, omitting to name the tract in dispute, admitted as a disclaimer-admission; neither Gage *v.* Eddy nor Hart *v.* Randolph, *supra*, are mentioned in the opinion); 1922, Illman *v.* Kruse, 301 Ill. 408, 134 N. E. 107 (deed absolute as a mortgage; assignor's statements after parting with his interest, excluded);

Indian Terr. 1896, McCurtain *v.* Grady, 1 Ind. T. 107, 38 S. W. 65.

Iowa: 1876, Hurley *v.* Osler, 44 Ia. 642, 644; 1922, Mather *v.* Sewell, — Ia. —, 186 N. W. 636 (grantor's statements after a conveyance, not received to show its conditional nature);

Kansas: 1908, Kitchell *v.* Hodgen, 78 Kan. 551, 97 Pac. 369 (sale of realty);

Maine: 1839, Crane *v.* Marshall, 16 Me. 27, 29; 1861, Peabody *v.* Hewett, 52 Me. 33, 45;

Maryland: 1813, Dorsey *v.* Dorsey, 3 H. & J. 410, 420, 426; 1826, Coale *v.* Harrington, 7 H. & J. 147, 156; 1841, Clary *v.* Grimes, 12 G. & J. 32, 35;

Massachusetts: 1825, Davis *v.* Spooner, 3 Pick. 284, 288 (plaintiff and defendant claimed under deeds from A.; the plaintiff's deed being prior but unrecorded, A.'s admissions, made prior to the second deed, that the first existed, were received against the defendant, "considering that the defendant knew of the conveyance"; purporting to follow Bridge *v.* Eggleston, *post*); 1841, Proprietors *v.* Bullard, 2 Metc. 363, 368 (admissions of predecessor, while owner, received); 1861, Blake *v.* Everett, 1 All. 248, 249 (similar); 1867, Morrison *v.* Chapin, 97 Mass. 72, 77 (similar); 1910, Abbott *v.* Walker, 204 Mass. 71, 90 N. E. 405 (but here the Court erroneously states limitation of § 1567, *post*, *i.e.* that the declarations were made while on land);

Michigan: 1878, Cook *v.* Knowles, 38 Mich. 316 (grantor's admissions that his deed was falsely antedated, received; Cooley, J., diss., on the principle of § 1256, *post*); 1891, Merritt *v.* Stebbins, 86 Mich. 342, 48 N. W. 1084 (grantor's statements, excluded; obscure opinion);

Missouri: 1891, Meier *v.* Meier, 105 Mo. 411, 422, 430, 16 S. W. 223; 1898, Boynton *v.* Miller, 144 Mo. 681, 46 S. W. 754;

Montana: Rev. C. 1921, § 10510 (like Cal. C. C. P. § 1849);

Nebraska: 1892, Cunningham *v.* Fuller, 35 Nebr. 58, 60, 52 N. W. 836;

New Hampshire: 1821, Adams *v.* French, 2 N. H. 387 (admissions by the defendant's grantor, in a judgment obtained by the plaintiff, received against the defendant); 1826, Downs *v.* Lyman, 3 id. 486, 487 ("declarations of a person in possession of land, as to the nature of his possession", admissible against "all persons claiming under him"); 1844, Smith *v.* Powers, 15 N. H. 546, 563; 1858, Fellows *v.* Fellows, 37 N. H. 75, 84 (oral admissions as to non-title, held receivable); 1859, Little *v.* Gibson, 39 N. H. 505, 511; 1860, Hurlburt *v.* Wheeler, 40 N. H. 73, 76 (same); 1916, Barker *v.* Publishers' Paper Co., 78 N. H. 160, 97 Atl. 749 (title by adverse possession; declarations of one not a predecessor in title, excluded);

New Jersey: 1810, Townsend *v.* Johnson, 2 Penningt. 705 (declarations of defendant's predecessor, as to a boundary line, admitted against him); 1887, Miller *v.* Feenane, 50 N. J. L. 32, 11 Atl. 136;

his possession or interest; on the other hand, it is equally well settled that no declarations of a former owner of the property, made after he had parted with his interest therein, or which are overreached by the purchase of the party claiming through or under him, can be received in evidence to affect the legal or equitable title to the premises."

(1) It is to be noted that, upon this principle, statements made *before title accrued in the declarant* will not be receivable.[2] On the other hand, the time of divestiture, after which no statements could be treated as admissions, is the time when the party against whom they are offered has by his own hypothesis acquired the title; thus, in a suit, for example, between A's heir and A's grantee, A's statements at any time before his death are receivable against the heir; but only his statements before the grant are receivable against the grantee.[3]

New York: 1809, Jackson *v.* Bard, 4 John. 230; 1813, Jackson *v.* McCall, 10 John. 377; 1837, Varick *v.* Briggs, 6 Paige 323, 327; 1840, Luce *v.* Carley, 24 Wend. 451, 455; 1843, Padgett *v.* Lawrence, 10 Paige 170, 180 (see quotation *supra*); 1867, Vrooman *v.* King, 36 N. Y. 477, 483; 1877, Chadwick *v.* Fonner, 69 id. 404, 407;
North Carolina: 1803, Clark *v.* Arnold, 2 Hayw. 287 (declarations of the defendant's vendor, that he had not paid the purchase-money, not admitted against the defendant; but the Reporter, respectfully explaining this as an error in "the hurry of business", maintains the ruling wrong, as "too clear to need much illustration; . . . I cannot agree to disseminate wrong legal opinions out of respect to the opinion of any one"); 1819, Guy *v.* Hall, 3 Murph. 150 (grantor's declarations, admitting a prior sale, received against the later grantee; see quotation *supra*, § 1080); 1833, Hoyatt *v.* Phifer, 4 Dev. 273 (recitals in a deed, admissible against those claiming under it); 1838, May *v.* Gentry, 4 Dev. & B. 117, 119 (principle applied); 1852, Satterwhite *v.* Hicks, Busbee L. 105 (admissions of a debtor-grantor, that he was not indebted to the grantee, admitted against the latter on a creditor's behalf); 1902, Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887 (grantor's statements before transfer, admitted);
Oregon: Laws 1920, § 706 (like Cal. C. C. P. § 1849);
Pennsylvania: 1782, Morris *v.* Vanderen, 1 Dall. 64, 65 (letters of one P., admitted, since the defendant was lessee of P.'s heirs; the objection overruled was that "the defendant is not to be affected by the conduct of a third person"); 1810, Bonnet *v.* Devebaugh, 3 Binn. 175, 179 (deed-recitals; "no point of law is better established"); 1818, Diggs *v.* Downing, 4 S. & R. 347, 352 (deed-recital); 1818, Weidman *v.* Kohr, 4 S. & R. 174 ("the privity between that party and the plaintiff renders his confessions evidence against the plaintiff"; here, oral declarations as to the scope of a land-warrant); 1832, Gibblehouse *v.* Stong, 3 Rawle 436, 442 (declarations as to holding in trust, admitted; Huston, J., diss. on the principle of § 1256); 1832, Reed *v.* Dickey, 1 Watts 152, 154; 1919, Dawson *v.* Coulter, 262 Pa. 566, 106 Atl. 187 (dividing line between two tracts);
Philippine Islands: C. C. P. 1901, § 276 (like Cal. C. C. P. §§ 1848, 1849);
Porto Rico: 1920, Santiago *v.* Santiago, 28 P. R. 903, 909 (conveyance by P. to G.; in an action by P.; heirs to set it aside, P.'s documents received against them as admissions);
South Carolina: 1898, Levi *v.* Gardner, 53 S. C. 24, 30 S. E. 617 (admissible to show the character of his possession);
Utah: 1902, Church of Jesus Christ *v.* Watson, 25 Utah 45, 69 Pac. 531;
Vermont: 1841, Carpenter *v.* Hollister, 13 Vt. 552, 555 (grantor's admissions as to extent of possession, receivable; see *post*, § 1256); 1842, Hines *v.* Soule, 14 Vt. 99, 105 (Carpenter *v.* Hollister approved); 1918, Waterman *v.* Moody, 92 Vt. 218, 103 Atl. 325 (grantor's admissions received; careful opinion by Taylor, J., explaining prior cases);
Virginia: 1800, Walthol *v.* Johnson, 2 Call 275 (mortgagee's admissions received against the buyer on foreclosure); 1895, Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347 (boundaries); 1895, Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500 (boundaries);
West Virginia: 1905, Stewart *v.* Doak Bros., 58 W. Va. 172, 52 S. E. 95 (boundaries);
Wisconsin: 1866, Kelley *v.* Kelley, 20 Wis. 443, 446; 1901, Kreckeberg *v.* Leslie, 111 Wis. 462, 87 N. W. 450 ("declarations characterizing or defining his possession and claim", admissible); 1917, McGinty *v.* Brotherhood, 166 Wis. 83, 164 N. W. 249.

[2] 1857, Tyler *v.* Mather, 9 Gray Mass. 177, 185; 1871, Noyes *v.* Merrill, 108 Mass. 396, 399; 1880, Stockwell *v.* Blamey, 129 Mass. 312; 1911, Washoe Copper Co. *v.* Junila, 43 Mont. 178, 115 Pac. 917 (title not shown at all); 1872, Bullis *v.* Montgomery, 50 N. Y. 352, 358; 1885, Hutchins *v.* Hutchins, 98 N. Y. 56, 64.

[3] 1915, Halifax Power Co. *v.* Christie, 23 D. L. R. 481, N. S. (title claimed under deed

(2) The *death* of the declarant need of course not be shown (*ante*, § 1049); with Admissions, that circumstance is immaterial, for a grantor's as well as for those of the party himself. But if the grantor is deceased, the statement may thus become also admissible under the Hearsay exception (*post*, § 1458) for statements of facts against proprietary interest; and under this exception they are admissible for either party.[4]

(3) The principle requiring the *production of documentary originals* has sometimes been thought to override the principle of admissions, so as to preclude the use of a party's admissions to evidence the contents of a document until the loss of the document is first shown (*post*, § 1255). This doctrine in its present application would forbid the use of a grantor's admissions of lack of title whenever the party claiming under him had proved a documentary title in his grantor, because the admission would in effect be that some other document divesting that title had existed; and the offeror of the admission, in order to use it, must therefore apply it to some specific deed and prove that deed to be lost. Such is the doctrine that was finally worked out in New York, in a series of confusing rulings (*post*, § 1256) often cited elsewhere in fragments.

This doctrine, however, still permits the free use of a grantor's admissions either when the title derived from him purports to rest on adverse possession only, or when the admissions concern, not the documentary title, but only the extent of occupied boundaries or some other feature of possession. Thus in some jurisdictions it is common to state the general principle of Admissions in a limited form, namely, to be receivable so far as they concern the character or extent of the grantor's possession. This peculiar form is due chiefly to the foregoing doctrine, and also in part to the early traditional confusion (explained *ante*, § 1080) between a grantor's admissions and verbal acts of disclaim coloring a prescriptive possession. But, on the whole, this modified form seems merely fitted to confuse, and can hardly be said to be worthy of sanction. It has now become something more than a local rule of New York; but it has not been widely accepted.[5]

(4) In *Massachusetts*, at an early date, when the theory of predecessors' admissions was as yet everywhere inchoate in conception (*ante*, § 1080), its results were reached, in a special class of cases — namely, *sales in fraud of*

from heirs of M., and by prior grant to T. from M.; M.'s admission that he had sold to T., received against the heirs' grantee; following Ivat *v.* Finch cited *post*, § 1083, n. 2; no discrimination made between deceased person's declarations against interest and party's admissions); 1885, Davis *v.* Melson, 66 Ia. 715, 24 N. W. 526. So also the following instance: 1828, Forsyth *v.* Kreakbaum, 7 T. B. Monr. Ky. 97, 100 (father's gift to a child, followed by his sale to another; father's declarations before the sale, admitted against the vendee).

[4] *E.g.:* 1895, Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347 (deed established for plaintiff by statements against interest of a deceased prior grantor of plaintiff in a suit between the grantor and his grantee).

[5] In the foregoing collection of citations, in note 1, its effect is briefly noted where it is recognized; but the rulings which recognize it are collected and more fully stated *post*, §§ 1255–1257, in dealing with the rule for proof of documents. It may be assumed not to be law in jurisdictions where it has not been expressly adopted, as shown in those citations; but only a few jurisdictions have expressly rejected it.

creditors — on a different theory; the debtor's declarations before the sale were received as evidence of intent, being admissible either as circumstantial evidence (*ante*, §§ 242, 266) or as exceptions to the Hearsay rule (*post*, § 1729). This theory, sound enough in its application to that specific situation, was plainly enunciated in Bridge *v.* Eggleston, a ruling which had a great vogue and has since served as a precedent in other jurisdictions.[6] It is not to be found fault with, provided it does not cause us to ignore the principle of Admissions, which equally serves for the same class of cases and additionally covers a more extended scope.

§ 1083. **Same: (*b*) Personalty; New York Rule.** There is no reason why the general principle (*ante*, § 1080) of transferrors' admissions should not apply as well to the admissions of the vendor and assignor of *personalty* as to those of the grantor of realty. Indeed, the objection, already noticed (*ante*, § 1082, par. 3), due to the supposed infringement of the principle of producing documentary originals, here falls away in substance. Nor has any reason of policy ever been advanced against the use of vendors' admissions which did not equally attack the whole principle of transferrors' admissions; and Senator Lott, in the controlling opinion in Paige *v.* Cagwin,[1]

[6] Many of the following cases apply the doctrine to personalty: CANADA: 1857, Doe *v.* Fraser, 3 All. N. Br. 417 (defendant's father's declarations, not received to show the indebtedness or intent, unless made at or about the time of the deed); UNITED STATES: *California:* 1857, Landecker *v.* Houghtaling, 7 Cal. 391 (personalty; doctrine of Bridge *v.* Eggleston, Mass., approved); 1857, Visher *v.* Webster, 8 Cal. 109, 113 (preceding case approved); *Connecticut:* 1810, Beach *v.* Catlin, 4 Day 284, 292 (realty; debtor's prior declarations of fraudulent intent, excluded, "for the grantee ought not to be affected by the declarations of the grantor, unless they came to his knowledge"); 1823, Cook *v.* Swan, 5 Conn. 140, 145, 149 (realty; debtor's prior declarations, claiming a debt to the grantee, admitted for the grantee as "part of the 'res gesta'", citing Bridge *v.* Eggleston, Mass.); 1840, Pettibone *v.* Phelps, 13 Conn. 445, 450 (similar); *Illinois:* 1850, Prior *v.* White, 12 Ill. 261, 264 (personalty; mortgagor's declaration of intent, excluded unless knowledge of them prior to the mortgage is brought home to the mortgagee, "as tending to show his participation in the fraudulent scheme"; Bridge *v.* Eggleston, Mass., approved); *Maine:* 1854, Fisher *v.* True, 38 Me. 534, 536 (personalty; debtor's declarations admitted on the theory of Bridge *v.* Eggleston, Mass.); *Massachusetts:* 1815, Clarke *v.* Waite, 12 Mass. 439 (realty; debtor's statements excluded, without discrimination as to the time of their utterance); 1817, Bridge *v.* Eggleston, 14 Mass. 245, 250 (realty; debtor's declarations admitted, provided by other evidence the grantee's knowledge of the fraud is shown; Clarke *v.* Waite in this light explained; the opinion, however, does not treat the grantor's declarations as admissions at all, but as evidence of a fraudulent intent, under the principles of § 1729, *post*, and § 266, *ante*); 1831, Foster *v.* Hall, 12 Pick. 89, 99 (realty; Bridge *v.* Eggleston approved); 1867, Winchester *v.* Charter, 97 Mass. 140, 143 (realty); *New Hampshire:* 1842, Blake *v.* White, 13 N. H. 267, 273 (debtor's declarations, held admissible, on the theory of Bridge *v.* Eggleston); *Oregon:* 1902, Beers *v.* Aylsworth, 41 Or. 251, 69 Pac. 1025; 1902, Robson *v.* Hamilton, 41 Or. 239, 69 Pac. 651; *Washington:* 1892, O'Hare *v.* Duckworth, 4 Wash. 469; 474 (debtor's declarations admitted; citing Bridge *v.* Eggleston); *Wisconsin:* 1860, Gillet *v.* Phelps, 12 Wis. 437, 439, 446 (debtor's declarations, at the time of the sale, admitted to show his fraudulent intent); 1861, Bates *v.* Ableman, 13 Wis. 644, 650 (same principle sanctioned); 1861, Bogert *v.* Phelps, 14 Wis. 81, 95 (same).

Upon this question of evidencing fraudulent intent, another sort of evidence (frequently dealt with in the same rulings) must be distinguished, namely, *other fraudulent sales by the debtor at the same time;* this has been already treated in considering circumstantial evidence (*ante*, § 333).

One question of substantive law also usually arises in such cases, and must be distinguished from these evidential questions, — whether the knowledge by the creditor of the debtor's fraudulent intent is essential to avoiding the sale; an example may be seen in Foster *v.* Hall, 12 Pick. 89.

§ **1083.** [1] New York, *infra*.

expressly conceded that his opposition rested on those broad grounds and would have effected a total exclusion if precedent had permitted.

(1) Accordingly, the English Courts, and most American Courts, apply the principle consistently, and receive without question all admissions by the vendor of personalty made while title was in him.[2]

(2) In a few Courts, the early *Massachusetts* doctrine of Bridge *v.* Eggleston, (*ante*, § 1082, par. 4) is applied to admit a debtor's declaration before his sale of personalty, on an issue of fraud against his creditors.[3]

(3) In *New York*, after some vacillation, a rule of *exclusion* was finally settled upon for the admissions of a *vendor of personalty* when offered against a *purchaser for value*. In 1843, in Paige *v.* Cagwin, this doctrine received the sanction of a majority of the Court, and has ever since maintained itself, in spite of repeated attempts to pare it down.[4] The historical explanation of

[2] ENGLAND: 1808, Ivat *v.* Finch, 1 Taunt. 141 (trespass for taking three mares, the defendant justifying as lord of the manor; the prior tenant's admissions that she had given the stock to the plaintiff, received, "because the right of the lord of the manor depended upon her title"); UNITED STATES: *Fed.* 1903, Fourth Nat'l Bank *v.* Albaugh, 188 U. S. 734, 23 Sup. 450; *Ala.* 1854, Jennings *v.* Blocker, 25 Ala. 415, 422; 1856, Fralick *v.* Presley, 29 Ala. 457, 462; 1857, Cole *v.* Varner, 31 Ala. 244, 250; 1862, Arthur *v.* Gayle, 38 Ala. 259, 267; *Ill.* 1869, Randegger *v.* Ehrhardt, 51 Ill. 101, 103; *Ind.* 1858, King *v.* Wilkins, 11 Ind. 346; 1862, Boone Co. Bank *v.* Wallace, 18 Ind. 82, 85; 1862, Bunberry *v.* Brett, 18 Ind. 343; 1875, Campbell *v.* Coon, 51 Ind. 76, 78 (the foregoing cases in effect overrule the early case of Ashley *v.* West, 3 Ind. 170, 172); *Ia.* 1877, Moss *v.* Dearing, 45 Ia. 530, 532 (grantor's admissions of a debt to grantee, receivable against other creditors); 1897, Thomas *v.* McDonald, 102 Ia. 564, 71 N. W. 572 (vendor's admissions as to fraudulent intent, received); *Ky.* 1828, Forsyth *v.* Kreakbaum, 7 T. B. Monr. 97, 100; *Me.* 1833, Hatch *v.* Dennis, 1 Fairf. 244; 1836, Breene *v.* Harriman, 14 Me. 32 (anomalous; vendor's admissions as to payment, excluded); 1846, Holt *v.* Walker, 26 Me. 107; 1855, McLanathan *v.* Patten, 39 Me. 142; *Md.* 1830, Stocket *v.* Watkins, 2 G. & J. 326, 343, *semble* (but here a widow's admissions were held not receivable against her executor who claimed as her husband's administrator *d. b. n.*); *Pa.* 1826, Kellogg *v.* Krauser, 14 S. & R. 137, 141 (judgment); 1870, Magee *v.* Maignel, 64 Pa. 110.

For Vermont see *infra*, note 7.

[3] The precedents have been already noticed in § 1082, par. 4.

[4] 1806, Waring *v.* Warren, 1 John. 340 (admissions of defendant's wife before marriage, received to show title in plaintiff); 1814, Alexander *v.* Mahon, 11 John. 185 (execution-creditor claiming against distraining landlord; the debtor's admissions of the tenancy, excluded; "as C. was a good and competent witness, the plaintiff in error cannot avail himself of his confessions"; no authority cited); 1827, Hurd *v.* West, 7 Cow. 753, 759 (admissions of defendant's vendor, in possession of sheep before the sale, that he was a mere bailee from the plaintiff, excluded; "where one is competent as a witness for the party, the latter cannot avail himself of the confessions of the former"; citing the preceding case; Esek Cowen, Esq., afterwards judge, approves the ruling in a reporter's note); 1828, Austin *v.* Sawyer, 9 Cow. 39 (sale of wheat; the vendor's admissions, before sale, that it belonged to the plaintiff, were received without question; the same reporter notes this as over-ruling the preceding case); 1831, Kent *v.* Walton, 7 Wend. 256 (action by the second indorsee of a renewal note against the maker; the first indorsee's admissions that the first note was usurious, excluded; no authority cited); 1832, Whitaker *v.* Brown, 8 Wend. 490 (action by bearer against the maker of a note to R. or bearer; R.'s admissions that "the defendant was not liable", excluded, following Hurd *v.* West, N. Y., and Duckham *v.* Wallis, Eng., *post*, § 1084; repudiating Cowen's note to Austin *v.* Sawyer); 1834, Crary *v.* Sprague, 12 Wend. 41 (hides claimed by the plaintiffs as vendees against parties concerned in various executions against the vendor; to show a fraudulent combination on the part of the defendants' assignors of the judgment claims, the assignors' declarations "while engaged in bringing about the sale" were received as "giving character to the transaction of sale"); 1834, Bristol *v.* Dann, 12 Wend. 142 (action by the indorsee against the maker of a partnership note; the payee's admissions that defendant was not a member of the partnership, excluded, following Whitaker *v.* Brown; "the rule seems to be that a party who can call a witness shall not be permitted to prove

Paige *v.* Cagwin has been already noticed (*ante*, § 1080). No useful policy seems to support it; and it has thus far remained a distinctly local rule. The rule of Paige *v.* Cagwin is, however, held not to include in its scope the statements of a *bankrupt* made before assignment.[5] Moreover, a successful attempt to evade it seems to have been made for the admissions of a vendor offered against his vendee on an issue charging a *sale in fraud of creditors*.[6] In Ver-

his declarations; a former owner of real estate, through whom the title has passed, is said to be an exception"); 1841, Beach *v.* Wise, 1 Hill 612 (Kent *v.* Walton, Whitaker *v.* Brown, Bristol *v.* Dann, followed; but the Court, per Bronson, J., declares its dissatisfaction with the distinction excluding the admissions of a vendor or personalty; the decease of the predecessor held to be immaterial); 1844, Stark *v.* Boswell, 6 Hill 405 (doctrine applied); 1843, Paige *v.* Cagwin, 7 Hill 361 (admissions by the payee of a note, not received against a subsequent transferee for value after maturity; rule of exclusion affirmed for transfers of personalty in general, but confined to the case of a transferee for value, and not applied to a "privy by representation, as in cases of bankruptcy, death, and other cases of a similar character"; the decision was rendered by a majority of the Court of Errors, 13 to 7); 1847, Brisbane *v.* Pratt, 4 Denio 63 (preceding rule approved, but here not applied, the plaintiff not being a holder for value); 1852, Jermain *v.* Denniston, 6 N. Y. 276 (Paige *v.* Cagwin recognized, but held not to apply to a bank's admission, by pass-book entry, made while holding a note, that it had been paid; the rule is inapplicable where "the previous holder, while he owned the note, put into the hands of the maker, in the usual course of business, written evidence of its payment and discharge"); 1853, Booth *v.* Swezey, 8 N. Y. 276, 280 (Paige *v.* Cagwin approved, but said *obiter* not to apply to "a written receipt or discharge of debt which had been assigned by a former holder", because that would be "an act of the parties", and not a "mere conversation or ex parte admission"); 1854, Brown *v.* Mailler, 12 N. Y. 118 (Paige *v.* Cagwin recognized); 1858, Tousley *v.* Barry, 16 N. Y. 497, 500 (Booth *v.* Swezey followed); 1860, Foster *v.* Beals, 21 N. Y. 247 (mortgagee's written receipt for part payment of a bond and mortgage, not received against the assignee in good faith for value; Jermain *v.* Denniston distinguished, and the *obiter dictum* in Booth *v.* Swezey disapproved; Comstock, C. J., diss.); 1877, Chadwick *v.* Fonner, 69 N. Y. 404, 407 (Paige *v.* Cagwin approved); 1878, Von Sachs *v.* Kretz, 72 N. Y. 548, 554 (Paige *v.* Cagwin approved); 1879, Foote *v.* Beecher, 78 N. Y. 155, 157 (mortgagor's admissions of non-payment of a note, not received against a subsequent assignee of the equity); 1881, Truax *v.* Slater, 86 N. Y. 630, 632 (declarations of the assignor of a chose in action, held inadmissible); 1900, Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757 (rule of exclusion applied to a mortgagee's declarations; "the case of Paige *v.* Cagwin practically closed the judicial discussion in this State", — an odd remark, in view of the rulings that occurred since the discussion was "closed"); 1905, Conkling *v.* Weatherwax, 181 N. Y. 258, 73 N. E. 1028 (Foote *v.* Beecher, Merkle *v.* Beidleman, *supra*, approved, *obiter*); 1912, People *v.* Storrs, 207 N. Y. 147, 100 N. E. 730 (forgery by a wife of a marriage settlement, dated Aug. 21, 1909, by the husband, reciting the gift of an automobile, etc., to her; the deceased husband's declarations, made at some time in the summer of 1909, that he had so given the automobile, held admissible for the defence, on the theory that the Paige *v.* Cagwin is subject to an exception allowing a deceased owner's disclaimers to be used against his representative in defence to a claim of title; but this is hardly an exception, as the rule of Paige *v.* Cagwin was expressly limited to purchasers for value).

[5] 1843, Paige *v.* Cagwin, *supra;* 1878, Von Sachs *v.* Kretz, 72 N. Y. 548, 554 (bankrupt's admissions of a set-off, made before the assignment, admitted against the assignee; "the qualification found in Paige *v.* Cagwin that the vendee or assignee must be a purchaser for value in order to make the declaration inadmissible, is an essential part of the rule; . . . the assignee in bankruptcy is not a purchaser for value"; repudiating the contrary *obiter dictum* in Bullis *v.* Montgomery, 50 N. Y. 352, 359, that "there is no such identity of interest between an insolvent assignor in trust for creditors and his assignee"). Compare the cases cited *ante*, § 1081.

[6] 1869, Cuyler *v.* McCartney, 40 N. Y. 221, 226 (personalty; excluded; "It will not do to say that testimony to the assignor's admission is competent evidence against *him;* . . . evidence good as against the assignor only does not contribute in any way to defeat their [the assignees'] title"; here they had taken possession); 1876, Stowell *v.* Hazelett, 66 N. Y. 625 (personalty; debtor's declarations admitted against himself); 1888, Loos *v.* Wilkinson, 110 N. Y. 195, 211, 18 N. E. 99 (assignor's declarations admitted; "they were competent against the persons making them, . . . and being competent against them, they could not have been excluded by the Court"). Yet it must be remembered that both the first and the last of the above cases are still cited

mont, just before the ruling in Paige *v.* Cagwin, the same result had been reached;[7] but the anomaly was soon repudiated.[8]

§ 1084. **Same**: (*c*) **Negotiable Instruments.** The holder of a negotiable instrument receives it from a prior holder free of equities and other defences personal to the prior holder; in this lies the element of negotiability. Consequently, the second holder's title is not identical with and dependent upon that of the first holder; and the admissions of the latter would (on the principle of § 1080), not be receivable against the former. But wherever the element of negotiability is wanting — as where the transfer is made after maturity — this distinction ceases; identity of title is found; and the admissions are receivable:

1843, Messrs. *Cowen* and *Hill*, in Notes to Phillipps on Evidence, No. 481, p. 668: "The distinction that although the party, who acquires a bill or note by endorsement, delivery or otherwise, after it is due or dishonored, or with notice or without consideration, or in any other manner which deprives him of the character of a 'bona fide' holder, is so far identified with the previous owner, that his declarations, while owner, may be received against such party; yet, that where the latter is a 'bona fide' holder in the course of trade, he cannot be touched by such declarations, not only harmonizes with various other legal consequences growing out of that character, but the cases all speak directly and uniformly upon this branch of hearsay evidence. The principle is, that the 'bona fide' holder is not a mere privy in title or estate with the preceding owner, except with regard to certain grounds of defence, which we have noticed. Among them are usury or gaming, or the like vice, which nullifies the bill or note absolutely in the hands of the holder, whether 'bona fide' or 'mala fide'; even this is now qualified by statute in several countries. . . . But in other cases, the 'bona fide' holder, by his purchase of the bill or note, stands, in a great measure, independent of the former holder who endorsed or delivered the paper to him. The law disconnects him with the previous title, and takes him into its own charge, as deriving a right from itself. And hence, among other privileges, while it cuts him clear of all the previous hostile acts of his predecessor, it forbids that his declarations shall be used in derogation of those rights which he professed to confer."

This logical application of the theory of transferrors' admissions was finally worked out in England, after some confusion of rulings, and since Barough *v.* White has not been disputed.[1] In the United States it would

as law in later rulings dealing with a related question (*post*, § 1086).

[7] 1842, Hines *v.* Soule, 14 Vt. 99, 106 (excluded, on the theory that "if a person is still living and can be a witness, he must be called, and that his admissions are not evidence against his vendee or successor"; Bennett, J., diss.); 1845, Ellis *v.* Howard, 17 Vt. 330, 335 (preceding case approved).

[8] 1853, Read *v.* Rice, 25 Vt. 177 (in a note, C. J. Redfield repudiated the reason given for the ruling in Hines *v.* Soule); 1856, Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29, 39 (Hines *v.* Soule "has heretofore been considerably impugned"; "admissions made by the assignor of a chattel or personal contract prior to the assignment" are receivable against an assignee taking by that title); 1874, Downs *v.* Belden, 46 Vt. 674, 677 (preceding case approved); 1875, Alger *v.* Andrews, 47 Vt. 238, 241 (expressly announces that the decision in Hines *v.* Soule is overruled, "and for many years has not been regarded by the bench and bar of this State as declaring the true law of the subject"); 1918, Waterman *v.* Moody, 92 Vt. 218, 103 Atl. 325 (reviewing the foregoing cases).

§ **1084.** [1] Where not otherwise stated, the instrument was not overdue when transferred: 1808, Kent *v.* Lowen, 1 Camp. 177, L. C. J. Ellenborough (usury; letters of the payee, at the time of making the note, admitted as "an act done by C. & Co., who were the payees of the note and through whom the plaintiff made title"); 1824, Pocock *v.* Billing, Ry. & Mo. 127, 1 C. & P. 230, 2 Bing. 269, L. C. J. Best (declarations of a former holder of a bill, if made while the holder, receivable); 1824, Coster *v.* Symons, 1 C. & P. 148, L. C. J. Ab-

to-day probably be recognized by Courts in all jurisdictions, except New York.[2]

§ 1085. **Same: (2) Admissions after Transfer; Realty and Personalty, in general.** On the general principle (*ante*, § 1080), statements made by the transferror of realty or of personalty, *after transfer of title*, are not receivable as admissions against the transferee. This much is never disputed, in the general application of the principle.[1] There may, however, be other principles of Evidence upon which such statements can be brought in; these are pointed out elsewhere (*post*, § 1087). Moreover, where the transfer is at-

bott (declarations of the payee, admitting that the bill was discharged by a later one, received as "a declaration of the party under whom the plaintiff claims title"); 1824, Peckham *v.* Potter, 1 C. & P. 232, L. C. J. Gifford (payee's admissions of fraud in the consideration, admitted); 1824, Shaw *v.* Broom, 4 Dowl. & R. 730, K. B. (rule apparently conceded that the transfer must have been after maturity in order to make admissions receivable); 1825, Barough *v.* White, 6 Dowl. & R. 379, 4 B. & C. 325, K. B. (payee's declarations as to lack of consideration for a note payable on demand, excluded, unless the plaintiff "had been identified with A., by showing that he had taken the note without consideration, or after it was due"; Pocock *v.* Billing practically repudiated); 1825, Smith *v.* DeWruitz, Ry. & Mo. 212, L. C. J. Abbott (declarations held inadmissible "against a holder who had acquired the bill before it was due"); 1827, Hedger *v.* Horton, 3 C. & P. 179, Gaselee, J. (payee's declarations excluded, but not on the preceding principle); 1830, Beauchamp *v.* Perry, 1 B. & Ad. 89 (rule of Barough *v.* White followed); 1831, Haddan *v.* Mills, 4 B. & Ad. 486, C. J. Tindal (rule of Barough *v.* White followed); 1839, Phillips *v.* Cole, 10 A. & E. 106, 112 (same).

The converse doctrine, that the admissions would be excluded even if the transfer was after maturity, appeared at an early stage: 1805, Duckham *v.* Wallis, 5 Esp. 251, L. C. J. Ellenborough (admissions of payment, excluded; "It would be making the declarations of a third person evidence to affect the plaintiff's title when that person was not on the record"); but this rested on the early ignorance of the theory of admissions (as noted *ante*, § 1080), and was practically repudiated in the above line of rulings.

[2] *Cal.* 1911, Smith *v.* Goethe, 159 Cal. 628, 115 Pac. 223 (admissions by holders of notes as against subsequent holders taking after maturity, received); *Conn.* 1846, Roe *v.* Jerome, 18 Conn. 138, 151; 1847, Ramsbottom *v.* Phelps, 18 Conn. 278, 285; *Ill.* 1846, Williams *v.* Judy, 8 Ill. 282 (admitted; here usury made the note void; but it had become due before assignment); *Ind.* 1852, Blount *v.* Riley, 3 Ind. 471; 1854, Abbott *v.* Muir, 5 Ind. 444 (non-negotiable note); 1855, Stoner *v.* Ellis, 6 Ind. 152, 153 (statutory defence); *Me.* 1832, Shirley *v.* Todd, 9 Greenl. 83; 1833, Hatch *v.* Dennis, 1 Fairf. 244 (leading opinion: the chief argument opposed by counsel to the decision was that the payee of a negotiable instrument was not a party to the record and therefore was a competent witness; but the theory of privity of title was held to be paramount to this); 1852, Parker *v.* Marston, 34 Fairf. 386 (unindorsed note); *Mass.* 1833, Sylvester *v.* Crapo, 15 Pick. 92, 94; 1855, Bond *v.* Fitzpatrick, 4 Gray 89, 92; *Okl.* 1898, Frick *v.* Reynolds, 6 Okl. 638, 52 Pac. 391 (indorser's declarations as to unsoundness of horse for which note was given, made before transfer, admitted against subsequent holders if not 'bona fide'); *Vt.* 1856, Miller *v.* Bingham, 29 Vt. 82, 88. *Undecided:* 1827, Rose *v.* Knight, 4 N. H. 236, 239 (citing Pocock *v.* Billing).

In *New York*, the exclusionary rule of Paige *v.* Cagwin of course applies to choses in action, including overdue commercial paper, as well as to other personalty; the cases are placed *ante*, § 1083.

The Federal Supreme Court has once recognized this anomalous rule: 1876, Dodge *v.* Freedman's S. & T. Co., 93 U. S. 379, 383 (inadmissible; following Paige *v.* Cagwin).

§ 1085. [1] The cases collected *ante*, §§ 1082-1084, almost all imply this result also:

ENGLAND: 1842, Lord Trimlestown *v.* Kemmis, 5 Cl. & F. 749, 779 (abstract of title; statements "after he had parted with his interest", excluded).

CANADA: 1876, Philips *v.* Trueman, 16 N. Br. 391.

UNITED STATES: *Federal:* 1848, Many *v.* Jagger, 1 Blatchf. 372, 376; 1905, West *v.* Houston Oil Co., 136 Fed. 343, 348, 69 C. C. A. 169 (land); *Arkansas:* 1918, Peters *v.* Priest, 134 Ark. 161, 203 S. W. 1042 (land); *California:* 1875, Tompkins *v.* Crane, 50 Cal. 478; 1893, Ord. *v.* Ord. 99 Cal. 523, 525, 34 Pac. 83; 1901, Banning *v.* Marleau, 133 Cal. 485, 65 Pac. 964; *Georgia:* Rev. C. 1910, § 5780 (quoted *ante*, § 1080, n. 21); 1861, Howard *v.* Snelling, 32 Ga. 195, 203; 1875, Porter *v.* Allen, 54 Ga. 623 (even against a donee); 1891, Blalock *v.* Miland, 87 Ga. 573, 13 S. E. 551 (similar); 1895, Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 271; 1896, Ogden *v.*

tacked as being in fraud of creditors, a special application of the principle of admissions may come into play; but this, being complicated with other questions, must now be examined separately.

§ 1086. **Same: Transfers in Fraud of Creditors.** Where the transfer is attacked as *voidable* because of being made with the *intent to defraud creditors*,

Dodge Co., 97 Ga. 461, 25 S. E. 321; *Illinois:* 1854, Simpkins *v.* Rogers, 15 Ill. 397; 1866, Dunaway *v.* School Directors, 40 Ill. 247; 1869, Randegger *v.* Ehrhardt, 51 Ill. 101, 103; 1881, Bennett *v.* Stout, 98 Ill. 47, 51; 1884, Bentley *v.* O'Bryan, 111 Ill. 53, 62; 1892, Hart *v.* Randolph, 142 Ill. 521, 525, 32 N. E. 517 (even though while still in possession); 1893, Francis *v.* Wilkinson, 147 Ill. 370, 384, 35 N. E. 150; 1895, Miller *v.* Meers, 155 Ill. 284, 40 N. E. 577; 1897, Shea *v.* Murphy, 164 Ill., 614, 45 N. E. 1021; 1903, Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493; 1919, Delfosse *v.* Delfosse, 287 Ill. 251, 122 N. E. 484 (declarations of a grantor after execution and recording, excluded); *Indiana:* 1837, Doe *v.* Moore, 4 Blackf. 445 (even as against judgment-vendee, after date of judgment-lien accruing); 1861, Kieth *v.* Kerr, 17 Ind. 284, 286; 1861, Wynne *v.* Glidewell, 17 Ind. 446, 448; 1874, Burkholder *v.* Casad, 47 Ind. 418, 421; 1875, Harness *v.* Harness, 49 Ind. 384 (even as against the donee of an advancement); Woolery *v.* Woolery, 29 Ind. 249, and Hamlyn *v.* Nesbit, 37 Ind. 284, repudiated; 1875, Campbell *v.* Coon, 51 Ind. 76, 78; 1876, Garner *v.* Graves, 54 Ind. 188, 192; 1882, Somers *v.* Somers, 85 Ind. 599; 1887, Joyce *v.* Hamilton, 111 Ind. 163, 167, 12 N. E. 294; 1895, Robbins *v.* Spencer, 140 Ind. 483, 40 N. E. 263; *Iowa:* 1868, O'Neil *v.* Vanderburg, 25 Ia. 104, 107; 1881, McCormicks *v.* Fuller, 56 Ia. 43, 46, 8 N. W. 800; 1895, Neuffer *v.* Moehn, 96 Ia. 731, 65 N. W. 334; *Kentucky:* 1901, Fuqua *v.* Bogard, — Ky. —, 62 S. W. 480; 1906, Jones *v.* Tennis C. Co., — Ky. —, 94 S. W. 6; *Louisiana:* 1829, Dismukes *v.* Musgrove, 8 Mart. N. S. La. 375, 378; *Maine:* 1831, Hackett *v.* Martin, 8 Greenl. 77, 79 (commercial paper); *Maryland:* 1811, Thomas *v.* Denning, 3 H. & J. 242 (assignor's declaration after an alleged assignment of a bond, received; but apparently on the ground that the assignment was not sufficiently evidenced); *Massachusetts:* 1808, Bartlett *v.* Delprat, 4 Mass. 702, 707 (father's declarations denying a deed, not received against claimant under the deed, in favor of devisees of the father); 1817, Bridge *v.* Eggleston, 14 Mass. 245, 250 ("afterwards, he has no relation to the estate he has conveyed"); *Michigan:* 1896, Vyn *v.* Keppel, 108 Mich. 244, 65 N. W. 966; *Minnesota:* 1895, Kurtz *v.* R. Co., 61 Minn. 18, 63 N. W. 1; 1917, Jacobs *v.* Queen Ins. Co., 195 Mich. 18, 161 N. W. 936 (insurance policy); *Nebraska:* 1895, Consolidated T. L. Co. *v.* Pien, 44 Nebr. 887, 62 N. W. 1112; *New Hampshire:* 1825, Copp *v.* Upham, 3 N. H. 159 (admissions of a mortgagor, after assignment of his interest, not received for the mortgagee against the assignee; but the present principle is not invoked); *New York:* 1822, Frear *v.* Evertson, 20 John. 142 (debt); 1867, Vrooman *v.* King, 36 N. Y. 477, 483 (the offeror must show affirmatively that title was still in the declarant); 1893, Jones *v.* Jones, 137 N. Y. 610, 614, 33 N. E. 479; 1894, Holmes *v.* Roper, 141 N. Y. 64, 67, 36 N. E. 180 (note); 1902, Wangner *v.* Grimm, 169 N. Y. 421, 62 N. E. 569; 1905, Conkling *v.* Weatherwax, 181 N. Y. 258, 73 N. E. 1028 (a mortgagor, who was also executor; his admissions, made after execution of the mortgage, that the legacies had not been paid, not admitted against the mortgagee); *North Carolina:* 1846, Ward *v.* Saunders, 6 Ired. 382, 387 (but here received, when made before actual execution of the deed, which had been falsely antedated); *North Dakota:* 1898, Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797; 1905, Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308; *Ohio:* 1889, Hills *v.* Ludwig, 46 Oh. St. 373, 378, 24 N. E. 596; *Oregon:* 1895, Josephi *v.* Furnish, 27 Or. 260, 41 Pac. 424; *Pennsylvania:* 1805, Irwin *v.* Bear, 4 Yeates 262 (recitals in a patent); 1810, Bonnet *v.* Devebaugh, 3 Binn. 175, 179; 1815, Packer *v.* Gonsalus, 1 S. & R. 525, 535, 537; 1817, Wolf *v.* Carothers, 3 S. & R. 240, 245; 1822, Patton *v.* Goldsborough, 9 S. & R. 47, 55; 1825, Babb *v.* Clemson, 12 S. & R. 328; 1825, Morton *v.* M'Glaughlin, 13 S. & R. 107; 1868, Pringle *v.* Pringle, 59 Pa. 281, 289; 1898, McCullough *v.* R. Co., 186 Pa. 112, 40 Atl. 404 (by a grantor, after transfer, but during possession); 1915, Farmer's & Merchant's Bank *v.* Donnelly, 247 Pa. 518, 93 Atl. 761 (promissory notes); *Philippine Islands:* 1905, Manila *v.* Del Rosario, 5 P. I. 227, 230; *South Carolina:* 1909, Gowdy *v.* Gowdy, 83 S. C. 349, 65 S. E. 385 (by a mortgagee after sale); *Tennessee:* 1852, Carnahan *v.* Wood, 2 Swan 500, 502; *Vermont:* 1829, Bullard *v.* Billings, 2 Vt. 309, 312; 1842, Hines *v.* Soule, 14 Vt. 99, 105; 1901, Davis *v.* Buchanan, 73 Vt. 67, 50 Atl. 545; 1901, Ellis *v.* Watkins, 73 Vt. 371, 50 Atl. 1105 (note); *Virginia:* 1854, Smith *v.* Betty, 11 Gratt. 752, 763; 1883, Barbour *v.* Duncanson, 77 Va. 76, 83; 1885, Daily *v.* Warren, 80 Va. 512, 519; 1895, Brock *v.* Brock, 92 Va. 173, 175, 23 S. E. 224; *West Virginia:* 1874, Houston *v.* McCluney, 8 W. Va. 135, 156; *Wisconsin:* 1895, Matteson *v.* Hartman, 91 Wis. 485, 65 N. W. 58.

a variety of special considerations become applicable; and the efforts of the Courts to solve this puzzling problem have naturally been attended with some inconsistency and confusion. The source of it lies in the circumstance that distinct principles of Evidence may apply in certain conditions, and that opposite results would be reached according to the principle invoked.

At the outset, the cases obviously must be separated in which the debtor-transferror's statements are offered (*a*) against the *transferee*, and (*b*) against the *creditor* attacking the transfer and levying upon the property as still belonging to the debtor. The former situation, being the most common and the most involved, may be examined first:

A. Where the transferror's statements, made after the transfer of title, are offered *against the transferee* (usually consisting in plain admissions of fraud, or in assertions that the property is still his), it is clear that upon the principle of the preceding section, straightforwardly applied, they are inadmissible. This much is always conceded.

But there may be other ways of dealing with the evidence, by some of which (with or without the presence of special circumstances) the evidence may legitimately become admissible. At least five distinct theories, leading to that result, have been advanced by various Courts. Of these, the first three below enumerated invoke the principle of Admissions in one aspect or another; while the remaining two appeal to other established modes of evading the operation of the Hearsay rule. Of the five, it may be said that to-day the second would be nowhere disputed, and thus rarely arises for application by a Supreme Court. Of the other four, the third is also undisputed, but its requirements are more stringent than the others, and therefore it practically competes against them, because commonly the Courts which follow it repudiate the others. Nevertheless all five rest on established general doctrines and could conceivably be accepted by the same Court, so as to admit the evidence if it satisfied any one of the five. Finally, as between the competing theories, the third holds to-day the leading place, with the fourth apparently in next place for favor and tending to overtake. In some Courts, a pleasing eclecticism inclines them now to one and now to another theory; while on the part of a few Courts there is a sibylline obscurity of expression which baffles the attempt to interpret precisely their views.

The five theories, then, are as follows:

(1) The theory of Carnahan *v.* Wood, occasionally followed (in some other Court), seems to rest on this sequence of thought: Retention of possession is 'prima facie' fraudulent; fraud avoids the transfer; the *title is still in the debtor;* therefore, his admissions are made while title is still in him, and (on the principle of § 1082, *ante*) are receivable:

1852, MCKINNEY, J., in *Carnahan* v. *Wood*, 2 Swan 500, 502: "It is true, in general, that the declaration of a party, made after he has parted with his interest in the subject-matter of litigation, cannot be received to disparage the title or right of a party, acquired in good faith previous to the time of making such declaration. But this very just and

reasonable principle must be taken as inapplicable to cases of fraudulent sales of property. If, for example, a conveyance is made, absolute upon its face, and the vendor continues to retain the possession of the property as before, this being 'prima facie' evidence of fraud, a creditor impeaching such conveyance on the ground of fraud, may be admitted to prove the declarations of the vendor, thus retaining the possession, in relation to the ownership, or to the character of his possession of the property. The fraudulent conveyance, though valid as between the parties, is void as to creditors of the vendor. So far as relates to them, the right of property remains unchanged in the vendor."

Upon this theory, the rule would limit the debtor's statements to those made while retaining possession. As a theory, it is possible; but it produces a suspicion that somewhere within its sequence the fallacy of begging the question is committed. Moreover, it would seem that at least it applies only when the transferror is a party to the cause.

(2) The second theory is that the transferror's statements are receivable when made *in the presence of the transferee* and impliedly assented to by his silence; in other words, it invokes the established principle of assenting silence (*ante*, § 1071), and receives the statements as the transferee's own admissions, made his by adoption. No Court disputes this, and in the opinions it is a proviso often noted in passing. It is mentioned here, because it is a frequently feasible method of using the evidence, though it invokes a distinct aspect of the principle of Admissions and is applicable in special circumstances only.

(3) The third theory is that of admissions by *co-conspirators* (*ante*, § 1079). When a conspiracy, on the part of transferror and transferee, to defraud the former's creditors, can somehow be established, the former's admissions are received against the latter, irrespective of being made before or after transfer or during possession, or of the transferror's being a party to the cause. Retention of possession becomes important only as one circumstance in the evidence of conspiracy. Moreover, the evidence of conspiracy must of course (*ante*, § 1079) be independent of the declarations desired to be admitted:

1869, WOODRUFF, J., in *Cuyler* v. *McCartney*, 40 N. Y. 221, 227: "[The admissibility of these declarations is insisted upon for the reason] that other evidence showed that the assignor and assignees were combined in a conspiracy to defraud the creditors of William T. Cuyler, and therefore the acts and declarations of either conspirator, while carrying the common intent into execution, and in furtherance thereof, are competent evidence to affect all the co-conspirators. This rule is not questioned. . . . [But] it is not and cannot be successfully claimed that mere proof that assignor and assignee have concurred in an assignment providing for the payment of debts, establishes a conspiracy within the rule. Delivering and accepting such an assignment establishes a common intent, but not a common intent to defraud. If mere proof of concurrence in the execution and delivery of the assignment established a common intent within the principle making the acts and declarations of the conspirators, while carrying their common design into execution, evidence against each other, then the rule first above stated [*i.e.* that declarations after transfer of title are inadmissible] is made a nullity. No sooner is an assignment made than the assignor may, by his acts or declarations out of court, defeat it, if he be dishonest enough to collude with any creditor, or to resent any dissatisfaction with the trustees, and defeat it by such means. To make such admissions or declarations competent evidence, it must stand as a fact in the

cause, admitted or proved, that the assignor and assignees were in a conspiracy to defraud the creditors. If that fact exist, then the acts and declarations of either, made in execution of the common purpose, and in aid of its fulfilment, are competent against either of them. The principle of its admissibility assumes that fact. It necessarily follows that those declarations or admissions cannot be received to prove the fact itself. . . . So far then, as the admission of the evidence in this case, of declarations subsequent to the assignment, is sought to be sustained as evidence of the common fraud, on the ground of conspiracy, the argument wholly fails. A conspiracy cannot be proved against three, by evidence that one admitted it, nor against assignees by proof that the assignor admitted it; it is a fact that must be proved by evidence, the competency of which does not depend upon an assumption that it exists."

This theory is entirely sound so far as it goes. The only criticism to be made is that, though it is in itself entirely consistent with the ensuing two theories, yet the Courts which employ it commonly repudiate, expressly or impliedly, the remaining two, as well as the first above examined. Those may be or may not be unsound; but no Court need suppose that the recognition of this one is inconsistent with the recognition of the others; *i.e.* that the rejection of evidence because it does not satisfy the present one requires its absolute rejection without regard to the satisfaction of the others.

(4) The fourth theory appeals to the *verbal-act* doctrine (*post*, § 1772), and to that particular application of it which receives declarations by one in *possession of property* as *coloring the nature of the possession* and thus giving it a fraudulent or an honest complexion. The effect of this, when the transferror's declarations make for fraud, is to help to fortify the presumption of ownership from possession, and to fix fraud upon the transferror. The declarations do not affect the transferee, whose knowledge of the fraud is otherwise to be established (unless the presumption of ownership from possession be thought to satisfy). The theory has been thus expounded:[1]

1835, GASTON, J., in *Askew* v. *Reynolds*, 1 Dev. & B. 367, 369: "The possession of the slaves, having in this case been retained by the debtor, for eight or nine months after the execution of his bill of sale, was sufficient to impress upon the transaction the character of a fraudulent transfer, unless, from other facts and circumstances, another character could clearly be assigned to it. The plaintiff offered evidence, tending to remove the legal presumption, and to establish an actual 'bona fide' intention, which was properly submitted to the jury. The evidence is not set forth in the case made, but it must have tended to show, that the debtor retained the possession as the agent or bailee of the purchaser. The nature of that possession then became an important inquiry. Was it in truth a possession as the agent or the bailee of the purchaser, or colorably only as such, and actually as the beneficial temporary or permanent owner? If the first, the apparent repugnance between the title and the possession might be explained, and honestly accounted for; but if the second, then such colorable possession was but part of the machinery of the fraud. . . . Generally the acts or declarations of a grantor, after the conveyance made, are not to be received to impeach his grant; the rights of the grantee ought not to be prejudiced by the conduct of one who at the time is a stranger to him and to the subject-matter of those rights. But

§ 1086. [1] For another good exposition of it, see the quotation *post*, § 1779, from Burgert v. Borchert, 59 Mo. 80. The general principle of verbal acts in possession as affecting the *presumption of ownership*, apart from the case of sales in fraud of creditors, is fully expounded in passages quoted *post*, § 1778.

the acts and declarations in this case were those of the possessor of the property, — were connected with that possession, and formed a part of its attendant circumstances. They were collateral indications of the nature, extent, and purposes of that possession. They were to be admitted, not because of any credit due to him by whom they were done or uttered, but because they qualified and characterized, or tended to qualify and characterize, the very fact to be investigated."

This theory can hardly be impugned in its logic. Reduced to a rule, it admits the declarations when made during possession, whether or not the debtor is a party to the cause.

(5) The fifth theory is based on the same principle as Bridge *v.* Eggleston (*ante*, § 1082, par. 4), but carries its logic further. A part of the issue being the debtor-transferror's intent, all his *conduct and declarations which indicate his intent* when dealing with the property are to be receivable (on the principle of § 1729, *post*, and § 266, *ante*), — an ordinary application of established principles having a larger scope:

1823, PORTER, J., in *Guidry* v. *Grivot*, 2 Mart. N. S. La. 13, 15: "To set aside the conveyance, three things were necessary, — fraud on the part of the vendor, fraud on the part of the vendee, and an injury to the party claiming. The acts and declarations of the first are surely as good and as high evidence as any other that can be given to prove fraud in him. They are of course not sufficient to show the vendee acted from the same motives; for then, as it was justly said in argument, every purchaser would hold at the mercy of him from whom he bought. But it is not a good objection to the introduction of evidence that it does not make out at once the whole of the case in support of which it is presented."

This theory is a legitimate one, and attracts by its simplicity. Its natural limitation, when reduced to a rule, is that the transferror must be in possession at the time; for otherwise his utterances would be of a past, and not a present, intent in dealing with the property, and therefore inadmissible (*post*, § 1729). The only objection can be the one intimated in Bridge *v.* Eggleston (*ante*, § 1082, par. 4) that the declarant has after the nominal transfer a motive to deceive; but this objection is over-nice, because he has equal motives to deceive before the transfer, and because the likelihood after the transfer that he will wish to falsify for the creditor (his natural antagonist, who now offers the declarations) is relatively small.

Of these theories, so far as they compete in their limitations, it cannot be said that, from the point of view of practical policy, the more liberal ones are to be disparaged.[2] The more light that is thrown on such transactions, the

[2] Where nothing is noted, in the citations below, as to the debtor's possession, it is because the fact does not appear. All rulings which clearly appear to go upon the fourth theory above (verbal acts in possession) are placed under that head, *post*, § 1779. For *Massachusetts* and *Pennsylvania* additional cases will thus be found in § 1779, *post*, reaching the opposite result, on the verbal-act theory. For *Alabama*, *Missouri*, and *North Carolina*, all the cases whatever have been placed together in § 1779, *post*, because of their inextricable confusion of rulings; a few of the other jurisdictions represented below are by no means consistent in their rulings:

CANADA: *New Brunswick:* 1843, Doak *v.* Johnson, 2 Kerr 319 (declarations of the grantor's son in possession, not admitted for the grantor's creditor); 1858, Lawton *v.* Tarratt, 4 All. 1, 9 (debtor's declarations before and after the sale, admitted; no definite rule stated); 1890, McManus *v.* Wells, 29 N. Br. 449 (grantee's declarations excluded, though a party to the fraud, in an action against

better. There is just as much risk of injuring an honest creditor as of dispossessing an honest buyer. There is in common experience a great deal

the sheriff for the debtor's escape; Tuck, J., diss.):
UNITED STATES: *Federal:* 1885, Winchester & P. M. Co. *v.* Creary, 116 U. S. 161 (the "common purpose to defraud" must be "first established by independent evidence", and the declarations must "have such relation to the execution of that purpose that they fairly constitute a part of the 'res gestæ' "); 1885, Jones *v.* Simpson, 116 U. S. 609, 6 Sup. 538 (preceding rule applied); 1893, Grimes D. G. Co. *v.* Malcolm, 7 C. C. A. 426, 58 Fed. 670 debtor's declarations, after mortgage executed and delivery made, excluded);
Alabama: (see *post*, § 1779);
California: 1859, Paige *v.* O'Neal, 12 Cal. 483, 484, 496 (excluded, on the doctrine of Bridge *v.* Eggleston, Mass.); 1859, Visher *v.* Webster, 13 Cal. 58, 61 (declarations excluded where there was "no such clear and unequivocal possession as to admit them" on the ground of 'res gestæ'); 1860, Cohn *v.* Mulford, 15 Cal. 50, 55 (similar to Paige *v.* O'Neil); 1864, Long *v.* Dollarhide, 24 Cal. 218, 227 (declarations after an assignment, said never to be admissible); 1864, Cahoon *v.* Marshall, 25 Cal. 197, 202 (held inadmissible, unless perhaps when made in possession with the vendee's consent); 1864, Jones *v.* Morse, 36 Cal. 205 (foregoing qualification not noticed); 1869, Spanagel *v.* Dallinger, 38 Cal. 278, 282, 284 (declarations after possession taken by the grantee, held inadmissible); 1874, Hutchings *v.* Castle, 48 Cal. 152, 156 (similar); 1894, Murphy *v.* Mulgrew, 102 Cal. 547, 552, 36 Pac. 857 (personalty; vendor's declarations, after sale but in possession, admitted; following Cahoon *v.* Marshall); 1895, Emmons *v.* Barton, 109 Cal. 662, 670, 42 Pac. 303 (grantor's declarations while in possession of the realty held inadmissible; suggesting that for personalty the rule was different); 1898, Banning *v.* Marleau, 121 Cal. 240, 53 Pac. 692 (personalty; debtor's declarations "after the sale", excluded); 1898, Henderson *v.* Hart, 122 Cal. 332, 54 Pac. 1110 (personalty; debtor's declarations, after title and possession gone, excluded); 1901, Bush & M. Co. *v.* Helbing, 134 Cal. 676, 66 Pac. 967 (husband's declarations of claim, while in possession, admitted, on the theory of conspiracy, in a suit to set aside a deed to his wife);
Connecticut: 1786, Woodruff *v.* Whittlesey, Kirby 60, 62 ("though a person may confess for himself, he cannot for another"; here the time of the declarations did not appear); 1815, Barrett *v.* French, 1 Conn. 354, 365 (grantor's declarations after transfer, said to be inadmissible); 1844, White *v.* Wheaton, 16 Conn. 530, 535 (same);
Georgia: 1877, Oatis *v.* Brown, 59 Ga. 711, 716 (declarations while retaining possession, admitted "as part of the 'res gestæ' of the fraudulent enterprise"); 1880, Williams *v.* Hart, 65 Ga. 201, 207 (rule of the preceding case applied); 1884, Powell *v.* Watts, 72 Ga. 770, 774 (admitted, where the debtor remained in possession contrary to the terms of the conveyance; no precedent cited);
Idaho: 1903, Meyer *v.* Munro, 9 Ida. 46, 71 Pac. 969 (declarations of mortgagor, after execution, held admissible only where the mortgagee is "a party to a common unlawful purpose");
Illinois: 1860, Wheeler *v.* McCorristen, 24 Ill. 40 (declarations after possession and title transferred, excluded); 1861, Rust *v.* Mansfield, 25 Ill. 336, 339 (preceding case approved; it does not appear who had possession); 1861, Myers *v.* Kinzie, 26 Ill. 36 (like Wheeler *v.* McCorristen); 1866, Miner *v.* Phillips, 42 Ill. 123, 130 (like Wheeler *v.* McCorristen); 1869, Gridley *v.* Bingham, 51 Ill. 153 (preceding case approved; but here it did not appear who had possession); 1895, Milling *v.* Hillenbrand, 156 Ill. 310, 40 N. E. 941 (like Wheeler *v.* McCorristen);
Indiana: 1849, Caldwell *v.* Williams, 1 Ind. 405, 409 (admitted on the theory of conspiracy, following Waterbury *v.* Sturdevant, N. Y.); 1877, Tedrowe *v.* Esher, 56 Ind. 443 (same); 1881, Kennedy *v.* Divine, 77 Ind. 490, 493 (same); 1884, Daniels *v.* McGinnis, 97 Ind. 549, 551 (same); 1885, Riehl *v.* Evansville Foundry Ass'n, 104 id. 70, 73, 3 N. E. 633 (same); 1886, Hunsinger *v.* Hofer, 110 Ind. 390, 393, 11 N. E. 463 (admissible "wherever it appears, either by direct or circumstantial evidence, that the grantor and the grantee were acting in concert"); 1896, Higgins *v.* Spahr, 145 Ind. 167, 43 N. E. 11 (same; provided that a 'prima facie' case of fraud must first be made out to the satisfaction of the Court); moreover, where the grantor and grantee are joined as defendants, *e.g.* when they are husband and wife, it is held that the husband's admission is at least receivable against himself: 1880, Bruker *v.* Kelsey, 72 Ind. 51, 56; 1883, Hogan *v.* Robinson, 94 Ind. 138, 145; 1885, Riehl *v.* Evansville Foundry Ass'n, 104 Ind. 70, 73, 3 N. E. 633; 1898, Vansickel *v.* Shenk, 150 Ind. 413, 50 N. E. 381 (admissible, "where he is a party to the suit . . . to show his motive or purpose in making the conveyance"; though not as against the grantee: this is virtually on the fourth theory above);
Iowa: 1859, Savery *v.* Spaulding, 8 Ia. 239, 250 (debtor's declarations as to the amount of goods on hand, excluded); 1865, Blake *v.* Graves, 18 Ia. 312, 314 (declarations in possession, admitted; the remaining in possession, will "be deemed such evidence of a conspiracy," or at least will be deemed "such a connection with the property" as to invoke the shibboleth

more likelihood that the unscrupulous debtor will try to trick his creditor than that he will endeavor to overturn an honest sale by making evidence

'res gestæ'); 1876, Hurley *v.* Olster, 44 Ia. 642, 644, *semble* (theory of conspiracy employed to admit the declarations); 1878, Keystone Mfg. Co. *v.* Johnson, 50 Ia. 142, 144 (declarations after title and possession gone, excluded); 1879, Benson *v.* Lundy, 52 Ia. 265, 3 N. W. 149 (same); 1881, McCormicks *v.* Fuller, 56 id. 43, 46, 8 N. W. 800 (declarations in possession, excluded, there being no issue as to defrauding creditors; distinguishing Blake *v.* Graves, where the possession was held to be evidence of fraudulent conspiracy); 1884, Bixby *v.* Carskaddon, 63 Ia. 164, 170, 18 N. W. 875; s. c., 70 Ia. 726, 728, 29 N. W. 626 (same as Benson *v.* Lundy); 1888, Bener *v.* Edgington, 76 Ia. 105, 109, 40 N. W. 117 (same); 1890, Turner *v.* Hardin, 80 Ia. 691, 695, 45 N. W. 758 (same); 1897, Thomas *v.* McDonald, 102 Ia. 564, 71 N. W. 572 (same); 1904, Urdangen *v.* Doner, 122 Ia. 533, 98 N. W. 317 (Bixby *v.* Carskaddon followed);

Kansas: 1895, Burlington Nat'l Bank *v.* Beard, 55 Kan. 773, 42 Pac. 320, *semble* (declarations by debtor in possession, receivable to show intent);

Kentucky: 1833, Doyle *v.* Sleeper, 1 Dana 531, 532, *semble* (declarations after title gone, but during possession, excluded); 1842, Christopher *v.* Covington, 2 B. Monr. 357, 359 (same);

Louisiana: 1823, Guidry *v.* Guivot, 2 Mart. N. S. La. 13, 15 (admissible; see quotation *supra*); 1824, Martin *v.* Reeves, 3 Mart. N. S. 22 (same; explaining Highlander *v.* Fluke, 5 Mart. 442, 448);

Maine: 1854, Fisher *v.* True, 38 Me. 534, 537 (declarations after title and possession gone, excluded);

Massachusetts: 1804, Alexander *v.* Gould, 1 Mass. 165 (declarations after sale and during possession, held inadmissible, even where other evidence of the fraud of the vendee was in the case; Sedgwick, J., *semble, contra*); 1815, Clark *v.* Waite, 12 Mass. 439 (similar for realty; excluded); 1817, Bridge *v.* Eggleston, 14 Mass. 245, 250 (realty; excluded, because "he is interested to have such title defeated by his creditors", and because "afterwards he has no relation to the estate he has conveyed"); 1859, Aldrich *v.* Earle, 13 Gray 578 (realty; Bridge *v.* Eggleston followed); 1861, Taylor *v.* Robinson, 2 All. 562 (realty; similar); 1867, Winchester *v.* Charter, 97 Mass. 140, 142 (realty; declarations after execution of the deed and during possession, excluded); 1873, Holbrook *v.* Holbrook, 113 Mass. 74 (prior cases approved); 1882, Roberts *v.* Medberry, 130 Mass. 100 (same; but compare § 1779, *post*, where this case is cited); 1905, Hart *v.* Brierley, 189 Mass. 598, 76 N. E. 286 (personalty; excluded);

Michigan: 1896, Muncey *v.* Sun Ins. Office, 109 Mich. 542, 67 N. W. 563 (insurance policy; assignor's declarations excluded);

Mississippi: 1840, Ferriday *v.* Selser, 4 How. 506, 529 (grantor's declarations after execution of the deed, held inadmissible); 1876, Taylor *v.* Webb, 54 Miss. 36, 43 (declarations made "after he had parted with the land", excluded);

Missouri (see *post*, § 1779);

Montana: 1906, Borden *v.* Lynch, 34 Mont. 503, 87 Pac. 609 (debtor's declarations of fraud, prior to the plaintiff's mortgage, held admissible against him, but here excluded for lack of evidence of his knowledge of the fraud);

Nebraska: 1888, Campbell *v.* Holland, 22 Nebr. 587, 594, 35 N. W. 871 (declarations after transfer of title, excluded; theory of conspiracy doubted as inapplicable; opinion by Cobb, J.); 1889, White *v.* Woodruff, 25 Nebr. 797, 799, 805, 41 N. W. 785 (similar declarations, held admissible, in an opinion by the same judge, citing no precedents at all); 1889, Williams *v.* Eikenberry, 25 Nebr. 721, 724, 41 N. W. 770 (declarations by the debtor, after the vendee had taken possession, held inadmissible, except as contradicting the debtor's testimony on the stand; opinion by Reese, C. J.); 1889, Sloan *v.* Coburn, 26 Nebr. 607, 609, 42 N. W. 726 (declarations after transferring title and possession, admitted to show the debtor's "intention at the time they made the transfer", on the authority of the preceding case, no other being cited; opinion by Reese, C. J.); 1894, McDonald *v.* Bowman, 40 Nebr. 269, 273, 58 N. W. 704 (debtor's declarations, after a mortgage but in possession, admitted as indicative of his intent to defraud);

Nevada: 1883, Hirschfeld *v.* Williamson, 18 Nev. 66, 1 Pac. 201 (declarations after possession and title transferred, excluded);

New Hampshire: 1842, Blake *v.* White, 13 N. H. 267, 273 (debtor's declarations admitted, on the theory of Bridge *v.* Eggleston, Mass., *supra*, § 1082, par. 4, without discrimination as to their utterance before or after transfer; this is sound, upon the fourth theory above noted);

New York: 1809, Phœnix *v.* Dey, 5 John. 412, 426 (personalty; declarations after title and possession gone, excluded); 1814, Osgood *v.* Manhattan Co., 3 Cow. 612, 622 (same); 1834, Sprague *v.* Kneeland, 12 Wend. 161 (similar; place of possession obscure); 1834, Crary *v.* Sprague, 12 Wend. 41 (see the citation *supra*, § 1083; this ruling does not involve the precise question, but has been cited as authority in the later rulings); 1837, Waterbury *v.* Sturtevant, 18 Wend. 353 (assignor's admissions, six months after the conveyance, as to the fraudulent intent, held admissible, on the theory of conspiracy; though the reversal

for his creditor. Any theory which, by invoking some legitimate principle of Evidence, will admit more of the debtor's utterances is practically to be

of the judgment casts doubt on this point); 1851, Adams *v.* Davidson, 10 N. Y. 309, 313 (assignor's declarations, in possession, admitted to show fraud; this ruling is in the later opinions sometimes disapproved, sometimes distinguished); 1864, Ball *v.* Loomis, 39 N. Y. 412, 416 (declarations after possession and title transferred, excluded); 1869, Cuyler *v.* McCartney, 40 N. Y. 221, 227 (assignor's declarations, held admissible, even after possession surrendered to the assignee; if a conspiracy to defraud is shown, otherwise not; but the declarations themselves cannot suffice to evidence the conspiracy; see quotation *supra*); 1872, Newlin *v.* Lyon, 49 N. Y. 661 (similar); 1874, Tilson *v.* Terwilliger, 56 Id. 273, 276 (assignor's declarations, after renewing possession, not received as evidence of fraud); 1878, Burnham *v.* Brennan, 74 N. Y. 597 (declarations after title and possession transferred, excluded); 1881, Coyne *v.* Weaver, 84 id. 386, 392 (declarations after sale and delivery of possession, excluded; Cuyler *v.* McCartney approved); 1881, Tabor *v.* Van Tassel, 86 N. Y. 642 (Cuyler *v.* McCartney approved); 1888, Loos *v.* Wilkinson, 110 N. Y. 195, 211, 18 N. E. 99 (assignor's declarations, while in possession, held admissible "as bearing upon the questions of fraud", and as "part of a fraudulent scheme concocted by the three brothers, grantor and grantee"; Cuyler *v.* McCartney cited, but its limitations not observed); 1888, Bush *v.* Roberts, 111 N. Y. 278, 282, 18 N. E. 732 (similar to Tabor *v.* Van Tassel); 1892, Kain *v.* Larkin, 131 N. Y. 300, 312, 30 N. E. 105 (Cuyler *v.* McCartney approved); 1899, Lent *v.* Shear, 160 N. Y. 462 469, 55 N. E. 2 (declarations "after the transfer of both title and possession", excluded, there being no evidence of conspiracy);
North Carolina: (see *post*, § 1779);
North Dakota: 1898, Paulson Mercantile Co. *v.* Seaver, 8 N. D. 215, 77 N. W. 1001 (admissible only on the theory of conspiracy; this to be otherwise evidenced);
Oklahoma: 1904, Woods *v.* Faurot, 14 Okl. 171, 77 Pac. 346 (attachment of H.'s goods, F. claiming by prior sale from H.; H.'s declarations of claim to the sheriff, not admitted for the creditor; no authority cited);
Oregon: 1884, Krewson *v.* Purdom, 11 Or. 266, 3 Pac. 822 (vendor's declarations, after possession and title gone, held inadmissible "in the absence of any proof of fraud or collusion"); 1903, Walker *v.* Harold, 44 Or. 205, 74 Pac. 705 (vendor's declarations after deed, executed, admitted, after evidence of a "prior dishonest combination");
Pennsylvania: 1829, Wilbur *v.* Strickland, 1 Rawle 458, 460 (admitted, after evidence of continued possession, "to show that the transfer to S. was entirely colorable, fraudulent, and void"; but the principle was conceded that the fraudulent combination must first be otherwise evidenced); 1834, M'Kee *v.* Gilchrist, 3 Watts 230, 232 (principle of fraudulent conspiracy, held applicable); 1860, McDowell *v.* Rissell, 37 Pa. 164, 168 (declarations during possession, held admissible; "there must be some evidence of a common purpose or design; but a very slight degree of concert or collusion is sufficient"); 1868, Pringle *v.* Pringle, 59 Pa. 281, 289 (declarations during possession, excluded, there being no claim or evidence of fraudulent conspiracy); 1869, Hartman *v.* Diller, 62 Pa. 37, 43 (declarations admitted, after fraudulent collusion was otherwise evidenced); 1869, Pier *v.* Duff, 63 Pa. 59, 64 ("if there be any, even very slight evidence of complicity between the grantor and grantee in a design to defraud creditors", the grantor's declarations are admissible; the opinion also speaks loosely of admitting declarations by a possessor in general, to prove the character of the possession); 1903, Boyer *v.* Weimer, 204 Pa. 295, 54 Atl. 21 (conspiracy rule applied); compare also the cases *post*, § 1779;
South Dakota: 1903, Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917 (action by the wife for property taken by a creditor of the husband; declarations after transfer, excluded);
Tennessee: 1833, Perry *v.* Smith, 4 Yerg. 323 ("No posterior act of N. without the participation of S. could defeat the transaction"); 1846, Trotter *v.* Watson, 6 Humph. 509, 513 (the debtor's retention of possession inconsistent with a deed being "a badge of fraud which of itself connects him with the claimant in the suspicion of a confederacy to defeat creditors", his declarations are admissible; but not otherwise); 1852, Carnahan *v.* Wood, 2 Swan 500, 503 (see quotation *supra*); 1871, Vance *v.* Smith, 2 Heisk. 343, 353 (debtor's declarations, not admitted against beneficiaries "who had no knowledge of such declarations, and no agency in causing them to be made");
Texas: 1886, Hamburg *v.* Wood, 66 Tex. 168, 176, 18 S. W. 623 (declarations during possession, admissible "when a 'prima facie' case of combination or conspiracy has been made by other evidence"; and the vendor's remaining in possession with the vendee's consent makes a 'prima facie' case of fraud);
Vermont: Gen. L. 1917, § 1400 (subsequent admissions of a debtor after appearance of a later attaching creditor, as to validity of claim on which prior attachment is founded, not receivable); 1833, Denton *v.* Perry, 5 Vt. 382, 388 (declarations after title and possession gone, excluded); 1833, Edgell *v.* Bennett, 7 Vt. 534, 537 (same); 1845, Ellis *v.* Howard, 17 Vt. 330, 335 (same); 1856, Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29, 40 (same); 1906, Mower *v.* McCarthy, 79 Vt. 142, 64 Atl. 578

commended and employed. The effort should be to open, and not to close, any available avenue of evidence.

B. When the transferror's declarations (admitting that he has transferred and confirming the transfer as honest and valid) are offered *by the transferee against the creditor*, they are plainly admissible (on the principle of §§ 1080, 1081, *ante*), because the creditor claims only under the debtor, and thus all the latter's admissions, before levy on his alleged property, are admissions of a predecessor in title.[3] But some Courts, applying the verbal-act theory (in par. 4, *supra*), admit on that ground declarations during possession, ignoring the present principle.[4]

§ 1087. **Same: Other Principles affecting Grantor's Declarations as to Property, discriminated.** Statements of a grantor not admissible under any of the foregoing principles (in §§ 1082–1086) may nevertheless be admissible by virtue of other principles of Evidence, resting on different conditions. The chief of these are (1) the Hearsay exception for *statements of facts against proprietary interest* (*post*, § 1458); here the declarant must be shown to be deceased or otherwise unavailable, and other limitations apply; (2) the verbal-act doctrine, as applied to *declarations in possession* (*post*, § 1778); here the issue must be one of possession, but it is immaterial whether the declarant is dead, or whether the declarations are against or for his interest; (3) the same doctrine, as applied to the *presumption of ownership from possession* (*post*, § 1779); the application of this doctrine to transfers in fraud of creditors has been specially noted in the foregoing section, but it may become equally applicable to declarations by other grantors; (4) the Hearsay ex-

(defendant loaned money to his son to buy a stock of goods and took a mortgage; the son's declarations of intent to defraud creditors, not admitted against the father, except on evidence of conspiracy);
Virginia: 1828, Claytor *v.* Anthony, 6 Rand. 285, 290, 300 (declarations during possession, admitted partly on the principle that a "community of purpose" had been evidenced, partly as declarations of fraudulent intent accompanying the act of sale; Coalter, J., diss., on the facts);
Washington: 1898, Anderson *v.* White, 18 Wash. 658, 52 Pac. 231 (admissible only on the theory of conspiracy);
Wisconsin: 1861, Bates *v.* Ableman, 13 Wis. 644, 645, 650, 721, 728 (debtor's declaration during possession after assignment, excluded; "we see no principle of evidence upon which they could be admitted"); 1861, Bogert *v.* Phelps, 14 Wis. 88, 95 (similar; "in order to affect the vendee, his knowledge of and participation in the fraud of the vendor must also be proved"; though when offered on the principle of Gillet *v.* Phelps, *supra*, § 1082, par. 4, they may be admissible if "shortly after the sale, if made so near the time of it as fairly to indicate what was then passing in his mind"); 1861, Grant *v.* Lewis, 14 Wis. 487, 489 (declarations while still in possession, held admissible "for the purpose of showing fraud in the sale if they have that tendency"; preceding cases ignored); 1869, Knapp *v.* Schneider, 24 Wis. 70, 73 (preceding case approved, but the ruling held inapplicable, since here the declarant purported to be not a vendor but an agent to buy for the plaintiff);
Wyoming: 1896, Toms *v.* Whitmore, 6 Wyo. 220, 44 Pac. 56 (admissible only on the theory of conspiracy).

[3] 1867, Whitaker *v.* Wheeler, 44 Ill. 440, 442 (trover against a sheriff levying); 1855, Cavin *v.* Smith, 21 Mo. 444 (debtor's admissions, while in possession, that his title was only conditional, received against attaching creditor); 1855, Burgess *v.* Quimby, 21 Mo. 508 (same); 1822, Johnson *v.* Patterson, 2 Hawks N. Car. 183; 1906, Mower *v.* McCarthy, 79 Vt. 142, 64 Atl. 578.
Contra: 1896, Bertrand *v.* Heaman, 11 Manit. 205, 208 (Dubuc, J., diss.; here, a garnishment); 1899, Marshall *v.* May, 12 Manit. 381 (preceding case approved); 1903, Lumm *v.* Howells, 27 Utah 80, 74 Pac. 432 (no authority cited).

[4] These rulings are collected *post*, § 1779.

ception for *ancient deed-recitals*, which are admissible in a limited class of cases irrespective of privity of title (*post*, § 1573); (5) the Hearsay exception for *statements by deceased persons about a land-boundary;* these are receivable by a rule which takes three very different forms in different jurisdictions (*post*, §§ 1563–1570). Moreover, (6) the exclusionary rule must be noted, which forbids the use of a grantor's assertions of claim to be used in *rebuttal of his admissions* disclaiming title (*post*, § 1133); these sometimes lead to confusion, in that they might be admissible as coloring an adverse possession, if the issue is one of prescriptive title (on the principle of § 1778, *post*), but would be inadmissible on an ordinary issue of title to rebut admissions.

Distinguish also three principles not affecting the use of oral declarations, and yet often involved in the present class of cases: (*a*) the principle of circumstantial evidence that *possession of a part of a tract of land* may be evidence of possession of the whole of the tract (*ante*, § 378); (*b*) the principle of circumstantial evidence that the *execution of an old deed or lease* may be evidence of *possession of the land itself* (*ante*, § 157); (*c*) the rule of authentication of documents that *age*, *custody*, and *possession* may be *sufficient evidence of the genuineness* of a document purporting to be an old deed (*post*, §§ 2137 ff.).

SUB-TITLE III: TESTIMONIAL REHABILITATION (SUPPORTING THE CREDIT OF AN IMPEACHED WITNESS)

CHAPTER XXXVI.

INTRODUCTORY

§ 1100. **Distinction between (1) Admissibility of Evidence to Rehabilitate or Support a Witness, and (2) Stage of the Examination at which such Evidence can be offered.** In the process of rehabilitating an impeached witness, there are four possible *stages of the case* at which the attempt may be made; the *cross-examination* of the impeaching witness, the *re-examination* of the impeached witness, the direct examination of a *new witness* called in rebuttal, and the *reopening* of the case after both sides have closed. There are certain rules to be observed, for convenience' sake, as to the appropriate stage for certain kinds of evidence; some evidence must properly be put in at a specific appropriate stage or not at all, other evidence at another stage, and so on. Thus the question may arise whether the evidence offered in Rehabilitation is offered at an improper stage of the trial. With such questions there is no present concern; they are dealt with under the general subject of Order of Evidence (*post*, §§ 1866–1900).

But the present subject is the *Relevancy of the evidence* in itself, assuming that it is offered at the proper stage. We are concerned with the application of the general principles of Relevancy to facts offered to rehabilitate an impeached witness, — whether a fact is relevant, whether it is provable by other witnesses or only by cross-examination, and the like.

§ 1101. **Arrangement of Topics.** Having in view the various qualities already noticed as affecting and impeaching the credibility of a witness (*ante*, §§ 874–881), and the various kinds of facts and modes of testimony available to prove those qualities, the next inquiry is how such impeaching evidence can be met and denied or explained away by other evidence. The processes available are based on the logical possibilities, already noticed (*ante*, §§ 34, 35), of the modes of argument available for an opponent; though the special features of the position of one sustaining an impeached witness complicate the processes. The logical relation of Rehabilitation to Impeachment has already been fully considered under the latter head (*ante*, § 874). But it is not feasible to follow completely any logical analysis of the various sorts of supporting evidence; for some of them are so closely associated with the rules affecting certain sorts of impeaching evidence that it is practically more useful to treat them under the same rubric.

Moreover, in theory two arrangements are open to choice, neither of which can practically be employed throughout. The topics might be considered either according to the various *kinds of impeaching evidence* to be met, or according to the various *kinds of rehabilitating evidence* used to meet them.

Either of these, if exclusively followed, would cause the separation of practically related topics and consequent inconvenience. Accordingly, the former grouping is followed chiefly for the first three ensuing topics (A, B, and C), and the latter for the last topic (D).

A. Rehabilitation after Impeachment of Moral Character

§ 1104. (A) **Proving Good Character in Support; in General, Inadmissible until Impeached.** Good character for veracity is as relevant to indicate the probability of truth-telling as bad character for veracity is to indicate the probability of the contrary. But there is no reason why time should be spent in proving that which may be assumed to exist. Every witness may be assumed to be of normal moral character for veracity, just as he is assumed to be of normal sanity (*ante*, § 484). Good character, therefore, in his support is excluded *until his character is brought in question* and it becomes worth while to deny that his character is bad.[1]

It has been said, to be sure, by a few Courts that where, without actually introducing testimony, the opponent has effectively *insinuated the witness' impeachment*, his good character is then proper in rebuttal. But this extension is exceptional in its vogue.[2] Moreover, the exception when an *accused* in a criminal case takes the stand is apparent only; for it is as an accused that he may offer his good character in chief (*ante*, § 56), and that character must concern the trait involved in the charge (*ante*, § 59), and

§ 1104. [1] This, as a general principle, is universally accepted; all the rulings in the ensuing sections assume it. The following statutes reaffirm it: *Alaska:* Comp. L. 1913, § 1503 (like Or. Laws 1920, § 865); *Ark.* Dig. 1919, § 4189 (inadmissible "until his general reputation has been impeached"); *Cal.* C. C. P. 1872, § 2053 (not admissible until character "is impeached"); *Ida.* Comp. St. 1919, § 8040 (like Cal. C. C. P. § 2053); *Ky.* C. C. P. 1895, § 599 (inadmissible "until his general reputation has been impeached"); *Mont.* Rev. C. 1921, § 10670 (like Cal. C. C. P. § 2053); *Or.* Laws 1920, § 865 (like Cal. C. C. P. § 2053); *P. I.* C. C. P. 1901, § 344 (like Cal. C. C. P. § 2053); *P. R.* Rev. St. C. 1911, § 1528 (like Cal. C. C. P. § 2053).

It is commonly said that a witness' character is *presumed* to be good till impeached: 1922, State *v.* Pugh, — N. C. —, 111 S. E. 849. But it is more correct to say, as in the case of an accused's character (*ante*, § 290) that the witness' character is simply unknown and is not evidence one way or the other.

In *Connecticut* it has been said that such evidence should always be admitted on behalf of the *woman in a rape charge*, even without any attempt at impeachment: 1830, State *v.* DeWolf, 8 Conn. 93, 100 ("it would not be going too far, perhaps", to declare such a rule; but here left undecided); 1833, Rogers *v.* Moore, 10 Conn. 14, 17 (said to be settled).

In the same State a peculiar tradition also admits such evidence, even without impeachment, in favor of a "*stranger*", *before any impeachment of character* has been attempted: 1830, State *v.* DeWolf, 8 Conn. 93, 101 (a deaf-and-dumb person was treated as in effect a stranger); 1833, Rogers *v.* Moore, 10 Conn. 14, 17; 1850, Merriam *v.* W. Co., 20 Conn. 354, 364; 1881, State *v.* Ward, 49 Conn. 429, 433, 442 (not allowed for one resident in the State).

In *New Hampshire*, it is held that the *party to a divorce suit* may offer good character in support without waiting for impeachment: 1842, Kimball *v.* Kimball, 13 N. H. 222, 225; 1899, Warner *v.* Warner, 69 N. H. 137, 44 Atl. 908.

[2] 1856, Com. *v.* Ingraham, 7 Gray Mass. 46, 48 (admissible when by questions of the opponent the general character has been attempted to be impeached, even though the opposing witness answers favorably; because "in the manner in which the answer is given though in language apparently favorable to the witness, yet there might be conveyed the impression of doubt and uncertainty as to his reputation"); 1869, State *v.* Cherry, 63 N. C. 493, 495 (admitting it where the opponent had asked the witness himself about his bad character, and he had refused to answer).

thus since only his character for veracity can (in most jurisdictions) affect him as a witness (*ante*, § 922), his evidence of character at that stage will not usually be the same as that which he could later offer in his own support as witness.[3]

The question thus always arises, under this general rule, When is the witness' character *brought into question* by the opponent, so as to open the way to evidence of good character in denial? This must depend on the nature of the opponent's impeaching evidence. It may be a direct assault on the witness' character, in which case no doubt exists. But it may be evidence of a doubtful or ambiguous import, — for example, of bias, of a prior self-contradiction, of an error of fact, and so on through the whole series of kinds of discrediting evidence. It is obvious that the theory of each of these kinds of evidence must be considered before it can be said whether it affects the witness' character. In the ensuing applications of the rule, therefore, the result will depend much on the respective theories of Impeachment by Contradiction (*ante*, § 1000), by Self-Contradiction (*ante*, § 1017), and by Bias, Interest, or Corruption (*ante*, §§ 943–969).

§ 1105. **Same: (1) After evidence of General Character.** A direct impeachment of moral character by testimony (reputation or personal opinion) to a *general trait of character* plainly satisfies the rule and opens the way for the opposite party to rehabilitate his witness by testimony to his good character. No one has ever doubted this.[1]

But the character of a witness may also be expressly impeached (*ante*, §§ 977–988), not directly by his reputation or by others' personal opinion of a general trait of his character, but by particular acts of misconduct indicating a bad character. This may be done in two ways: by extrinsic testimony of conviction of crime; or, by answers on cross-examination of the witness himself as to instances of moral misconduct. These two modes are therefore also to be considered.

§ 1106. **Same: (2) After evidence of Particular Instances of Misconduct, by Cross-examination or Record of Conviction.** At first sight, there would seem to be here also no doubt about the propriety of rebutting by evidence of good character. The facts offered give an inference as to the witness' moral character, and an issue upon that character seems clearly to be opened. Such is the natural answer to this question:

[3] 1896, Hays *v.* State, 110 Ala. 60, 20 So. 322 (excluding the accused's character as to veracity in a larceny prosecution); 1921, Charley *v.* State, 204 Ala. 687, 87 So. 177; and cases cited *ante*, §§ 59, 890, 923, 925.

For the character of a *deceased person in homicide*, the woman in *rape* and *seduction*, and other uses of character not of a witness, see *ante*, §§ 62–79.

§ 1105. [1] The following minor points may be noted here: 1860, Prentiss *v.* Roberts, 49 Me. 127, 137 (it is immaterial that the testimony attacking the witness' general character is offered in the shape of the opponent's admissions); 1850, Morse *v.* Palmer, 15 Pa. 51 55 (the supporting character may cover another time or place than the impeaching one).

For the rebuttal of testimony to the *unchaste character* of the prosecutrix in *seduction*, see *post*, § 1620.

For *curing one irrelevancy by another*, see *ante*, § 15.

1838, NELSON, C. J., in *People* v. *Rector*, 19 Wend. 610 (after pointing out that good character, though an essential element of testimony, is assumed, and must first be attacked by the opponent): "Now what is the ground and reason for allowing a party to introduce general evidence in reply to fortify and support a witness who has been impeached? It surely is not because the impeachment has been effected by the testimony of witnesses, or by general evidence as to character, or in a particular way, — all this of itself can be of no importance; but it is because the impeachment, the effect of the proof, in whatever way introduced, tends directly to overcome the presumption of good character upon which the party had a right in the first instance to rely; because a material part of his proof is struck at by shaking confidence in the integrity and truth of the witness upon whom it depends. . . . If that [impeachment] can be removed, the presumption revives, and the facts are again sustained upon the good character of the witness. Regarding, then, the principle upon which testimony in reply to the impeachment of a witness is admitted, and the grounds and reasons upon which it rests, the Court should rather look to the effect of the impeachment than to the mode and manner in which it is brought about. It can be of little concern to a party whether the moral character of his witness is destroyed by the testimony of others called to speak to it, or by a cross-examination; the effect upon him, to the extent of the impeachment, is exactly the same; he loses the benefit of the evidence in both cases, and for the same cause, — the discredit of the witness. . . . There may indeed be more difficulty in the reply, in the case of an impeachment by cross-examination, than from general evidence. . . . But there is no intrinsic difficulty rendering a vindication impossible; the offer of the proof assumes that it is within the power of the party; cases may very well occur of particular vices and weaknesses, which cast a cloud over the moral character of the man and tend 'prima facie' to impeach his truth and integrity, but whose veracity could be vindicated by the concurrent testimony of all his neighbors and acquaintances. . . . But it is urged that, as the witness is upon the stand, he may be examined himself in explanation of the impeaching facts. The obvious answer to this is that the character of the witness for truth in the given case is proposed to be sustained by the evidence in reply *notwithstanding* the existence of the facts called out on the cross-examination. The case supposes explanation impossible, but that still his character for truth may be upheld by his neighbors and acquaintances."

In theory, to be sure, this conclusion is fallacious. It ignores the logical distinction between Explaining away and merely Denying (*ante*, § 34). Consider, first, questions on cross-examination. The misconduct, by hypothesis, being relevant and being proved by the witness' own admission on the stand, demonstrates the bad disposition behind it. If there had been any explanation of the act, the witness could give it (*post*, § 1117). But testimony to general good reputation explains away nothing; the damaging conduct is proved out of his own mouth. Testimony to his good reputation could only avail on the hypothesis that an attacking witness to bad reputation was speaking falsely and that the reputation was really good; but here it is by proved conduct and direct inference bad. Furthermore, records of convictions of crime similarly exhibit the bad character directly, and cannot be explained away by testimony as to good repute. This reasoning has found favor with some Courts:

1814, ELLENBOROUGH, L. C. J., in *Dodd* v. *Norris*, 3 Camp. 519: "The questions put to herself on cross-examination there was an ample opportunity of explaining, as far as the truth would permit, when she came to be re-examined."

1838, BRONSON, J., in *People* v. *Rector*, 19 Wend. 600: "Why should such evidence be

received, when the witness is on the stand to give any explanation of his conduct which the truth of the case will permit? G. was not obliged to proclaim his own infamy. . . . But aside from this consideration, if there was anything to extenuate his conduct in abandoning his family and living in adultery, he was at liberty to state it. He stood there to make a picture of himself, and it is not to be presumed that he would draw it in darker colors than the truth of the case absolutely required. Neither the party who produces a witness nor the witness himself has any right to complain that compurgators are not allowed, when there has been no impeachment beyond the facts disclosed by the witness himself."

In spite of this logic, however, practically the former rule is preferable; for it gives some protection against the insinuations of an unscrupulous cross-examiner, and does not leave the witness helpless to rebut those inferences which the jury may and do in practice make, even though in theory the rebuttal does not exactly fit the impeaching facts:

1823, *Note by the Reporters*, in *Bate* v. *Hill*, 1 C. & P. 100 (Park, J., had allowed corroboration by character; The Reporters, Messrs. Carrington and Payne): "The course allowed by Mr. Justice Park in the present case is much more conducive to the attainment of justice. . . . Lord Ellenborough [in *Dodd* v. *Norris*, *supra*] says that it is to be set right in re-examination. This looks very well in theory. Those used to courts of justice well know that if the character of a party seduced is attacked in her cross-examination, though the witness may deny the things insinuated, a jury often believe that though denied there is some foundation for the insinuation, if witnesses are not called to convince them of the contrary. It is a little too much to allow a defendant to blast the character of a person he has seduced by his insinuations and then not to allow her to clear her character by the best means in her power."

The former rule (permitting corroboration by good character) commands the support of most Courts.[1]

§ **1106.** [1] The authorities on both sides are as follows:

ENGLAND: 1753, Murphy's Trial, 19 How. St. Tr. 693, 724 (allowed after proof of an indictment); 1808, Bamfield *v.* Massey, 1 Camp. 460 (Ellenborough, L. C. J.; seduction; after evidence that the daughter had previously had a child by another man, good-character evidence was rejected, the contradiction of the specific charge being declared sufficient for the purpose); 1814, Dodd *v.* Norris, 3 Camp. 519 (Ellenborough, L. C. J.; seduction; the daughter, on cross-examination, admitted indelicate conduct with the defendant; good-character evidence rejected, as no general attack on it was thus involved; a re-examination declared sufficient for rehabilitation); 1817, R. *v.* Clarke, 2 Stark. 241 (rape; after an admission by the prosecutrix that she had been twice in the House of Correction, evidence of her good character since then was held admissible, to "repel the inference which might be drawn from her former misconduct", and "show that the witness is not so unworthy of credit as she might have been considered to be if these circumstances had not intervened"); 1823, Bate *v.* Hill, 1 C. & P. 100, Park, J. (facts like Dodd *v.* Norris, *supra;* character admitted); 1829, Provis *v.* Reed, 5 Bing. 435. 438 (deceased attesting witness' good character received "if it were imputed to S. that, having caused a will to be executed imperfectly, he had added an attesting witness after the death of the testator, — that in effect he had committed a forgery, [*i.e.*] if his moral character were thus attacked"); 1836, Doe *v.* Harris, 7 C. & P. 330 (Coleridge, J.; attorney drawing the will; after a cross-examination in which "it was sought to impeach his character", evidence of good character was excluded).

UNITED STATES: *Alabama:* 1860, Lewis *v.* State, 35 Ala. 386 (admitted, after evidence of subornation);
Arkansas: 1918, Lockett *v.* State, 136 Ark. 473, 207 S. W. 55 (assault to rape; the woman's good reputation for "truth and morality", not admitted, under Kirby's Dig. § 3140, quoted *ante*, § 1104; the unfairness of the rule of the statute is well illustrated in this case);
California: 1874, People *v.* Ah Fat, 48 Cal.

61, 64 (admitted, after impeachment by an offer of the witness to give testimony for money); 1875, People *v.* Amanacus, 50 Cal. 233 (admitted, after an admission that he had been convicted of felony);
Connecticut: 1833, Rogers *v.* Moore, 10 Conn. 14 (excluded; yet it does not appear how the cross-examination affected his character, except as indicating a share in a fraudulent grant at issue in the case); 1881, State *v.* Ward, 49 Conn. 429, 432, 442 (excluded; the witness had been testified to as an accomplice in an alleged larceny admitted to show intent in the larceny charged);
Iowa: 1899, State *v.* Owens, 109 Ia. 1, 79 N. W. 462 (not admitted after a cross-examination not resulting in answers involving misconduct);
Kentucky: 1909, Shields *v.* Conway, 133 Ky. 35, 117 S. W. 340 (good opinion, by Carroll, J.);
Louisiana: 1886, State *v.* Boyd, 38 La. An. 374 (obscure); 1892, State *v.* Fruge, 44 La. An. 165, 10 So. 621 (admitted, after questions as to former prosecution);
Maryland: 1869, Vernon *v.* Tucker, 30 Md. 456, 462 (allowable after "matter brought out on cross-examination", if it "amounts to an impeachment of the character for truth");
Massachusetts: 1829, Russell *v.* Coffin, 8 Pick. 143, 154 (admissible if the answers "impeach his general character"); 1855, Harrington *v.* Lincoln, 4 Gray 563, 567 (left undecided; in this case, however, the fact brought out was merely a charge of crime; and the witness' further answer stating his acquittal was held to remove the effect of the original answer); 1875, McCarty *v.* Leary, 118 Mass. 510 (cross-examination as to intoxication of the plaintiff-witness at other times than the assault in question; character for sobriety excluded, because it "would not have removed the imputation which resulted from his own testimony on the stand"; the preceding cases not cited); 1884, Gertz *v.* Fitchburg R. Co., 137 Mass. 77, 78 (record of conviction of crime; reputation for veracity admitted: good opinion by Holmes, J.);
Michigan: 1888, Hitchcock *v.* Moore, 70 Mich. 112, 114 (slander; good character excluded, after cross-examination to specific facts; "such specific facts cannot be met . . . with evidence of general reputation"); 1913, Kovacs *v.* Mayoras, 175 Mich. 582, 141 N. W. 662 (Hitchcock *v.* Moore followed);
Missouri: 1912, State *v.* Dipley, 242 Mo. 461, 147 S. W. 111 (allowed, after evidence of prize-fighting and assault); 1912, State *v.* Lovitt, 243 Mo. 510, 147 S. W. 484 (allowed, after evidence of unchaste conduct by a prosecutrix in rape); 1921, State *v.* Ritter, 288 Mo. 381, 231 S. W. 606 (after cross-examination "reflecting upon his standing", the witness' "good reputation for truth and veracity" cannot be shown; Orris *v.* R. Co., *post*, § 1108, affirmed; "the opinions of the courts of appeals holding to the contrary . . . are expressly overruled"; this ruling is adapted to give license to unscrupulous cross-examiners and to render the witness-stand a place of loathing for respectable citizens);
New York: 1838, People *v.* Rector, 19 Wend. 569, 584, 595 (admitted; Bronson, J., diss. and allowing it only (1) for deceased attesting witnesses — *semble*, to wills only — charged with fraud, and (2) for a witness who wishes to show a reform since the past delinquencies brought out on cross-examination; in this case, the witness admitted leading a dissolute life; see quotations *supra*); 1842, Carter *v.* People, 2 Hill 317 (the witness admitted having been arrested on a charge of counterfeiting; good character for truth allowed); 1842, People *v.* Hulse, 3 Hill 309, 314 (affirming People *v.* Rector, though Bronson, J., the mouthpiece of the Court, still expresses a liking for his doctrine in that case as dissenter; the rule here affirmed as law admits the supporting character after an attack "drawing out extrinsic facts going to general character on the cross-examination"); 1852, People *v.* Gay, 7 N. Y. 378, 381 (affirming People *v.* Hulse; the attack must consist in evidence on cross-examination going to impeach his general character; People *v.* Hulse is said to have overruled "in effect" the preceding cases, but this is clearly erroneous, as Welles, J., diss., points out at 382; the only point overruled is that of People *v.* Carter, which treats a mere arrest or charge as involving moral character, — a point expressly denied in the present case); 1856, Stacy *v.* Graham, 14 N. Y. 492, 501 (admitted after witness' admission of corruption; no authorities cited; Wright, J., diss.); 1890, Young *v.* Johnson, 123 N. Y. 226, 234 (rape; character excluded, after proof of the woman's loose conduct); 1916, Derrick *v.* Wallace, 217 N. Y. 520, 112 N. E. 440 (the witness-plaintiff, having on cross-examination admitted a conviction in 1896 for forgery, offered his present general good reputation; held admissible; careful opinion by Pound, J.);
Ohio: 1876, Webb *v.* State, 29 Oh. St. 351, 358 (admitted, after evidence of conviction of crime); 1894, Wick *v.* Baldwin, 51 Oh. 51, 36 N. E. 671 (cross-examination to conviction of crimes; reputation for truth admitted); 1918, Reed *v.* State, 98 Oh. 279, 120 N. E. 701 (cited more fully *ante*, § 68);
Oklahoma: 1907, First National Bank *v.* Blakeman, 19 Okl. 106, 91 Pac. 868 (admissible; leading case, with careful opinion by Burford, C. J.);
Pennsylvania: 1839, Braddee *v.* Brownfield, 9 Watts 124 (after cross-examination; opinion apparently self-contradictory, looking both ways);
Tennessee: 1885, Hoard *v.* State, 15 Lea 318, 323 (admitted, after cross-examination to character); 1900, Warfield *v.* R. Co., 104 Tenn. 74, 55 S. W. 304 (admissible after cross-examination affecting veracity);

§ 1107. **Same: (3) After evidence of Bias, Interest, or Corruption.** An act of Corruption directly affects moral character; and the corroboration should therefore depend upon the rule for acts involving character.[1] But Bias and Interest clearly do not involve any issue on the moral character of the witness, and there is no occasion for testimony to good character.[2]

§ 1108. **Same: (4) After evidence of Self-Contradiction.** The exposure of an error of a witness on a material point by his own self-contradictory statements is a recognized mode of impeachment (*ante*, § 1017), and serves as a basis for the further inference that he is capable of having made errors on other material points. This possibility of other errors, however, is not attributed specifically to any definite defect; it may be supposed to arise from a defect of knowledge, of memory, of bias, or of interest, or, by possibility only, of moral character (*ante*, § 1017). Thus, though the error may conceivably be due to dishonest character, it is not necessarily, and not even probably, due to that cause. If now we regard this remote contingency as important, it follows that he should be allowed to rebut this inference by evidence of good character. But if we regard this remote contingency as too slender to be taken into account, we shall refuse to believe that any issue of Character is involved.

It is according to these two opposing views of the situation that Courts admit or exclude such evidence.[1] The former view is represented in the following passages:

Texas: 1899, Smith *v.* State, — Tex. Cr. —, 50 S. W. 363, *semble* (allowable, after cross-examination to character, only if the witness is a stranger in the community): 1899, Luttrell *v.* State, 40 Tex. Cr. 651, 51 S. W. 930 (admissible after evidence of misconduct);
Vermont: 1848, Paine *v.* Tilden, 20 Vt. 554 564 (admitted, where the "character of the witness is attacked . . . by cross-examination"), 1892, Stevenson *v.* Gunning's Estate, 64 Vt. 601, 609, 25 Atl. 697;
Virginia: 1877, George *v.* Pilcher, 28 Gratt. 299, 312, 315 (*semble*, admissible); 1895, Reynolds *v.* R. Co., 92 Va. 400, 23 S. E. 770 (an endeavor on cross-examination to show that the plantiff's injuries existed before the accident, held not a sufficient impeachment);
Wisconsin: 1903, Kraimer *v.* State, 117 Wis. 350, 93 N. W. 1097 (admissible, after impeachment by conviction of crime).

§ 1107. [1] The cases have been placed in the foregoing section.

[2] 1907, First National Bank *v.* Blakeman, 19 Okl. 106, 91 Pac. 868 (admissible; careful opinion by Burford, C. J.); 1898, First Nat'l Bank *v.* Com. U. Ass. Co., 33 Or. 43, 52 Pac. 1050 (bias).

A *Chinese witness* is by Federal statute in certain cases required to be corroborated (*post*, § 2066); it would seem therefore that his good character for veracity ought in such cases to be received in chief. *Contra:* 1901, Woey Ho *v.* U. S., 48 C. C. A. 705, 109 Fed. 888 (in discretion).

§ 1108. [1] *Ala.* 1848, Hadjo *v.* Gooden, 13 Ala. 718, 720 (admitted); 1860, Lewis *v.* State, 35 Ala. 380, 386 (same); 1895, Holley *v.* State, 105 Ala. 100, 17 So. 102 (same); 1896, Towns *v.* State, 111 Ala. 1, 20 So. 598 (same); 1904, Brown *v.* State, 142 Ala. 287, 38 So. 268 (same); *Cal.* 1874, People *v.* Ah Fat, 48 Cal. 61, 64 (undecided); 1884, People *v.* Bush, 65 Cal. 129, 3 Pac. 590 (excluded; no cases cited); *Conn.* 1833, Rogers *v.* Moore, 10 Conn. 14, *semble* (excluded); *Fla.* 1898, Mercer *v.* State, 40 Fla. 216, 24 So. 154 (admitted); *Ga.* Code 1910, § 5881, P. C. § 1052 (allowable); 1853, Stamper *v.* Griffin, 12 Ga. 456 (excluded); 1879, McEwen *v.* Springfield, 64 Ga. 159, 165 (admitted); 1886, Pulliam *v.* Cantrell, 77 Ga. 563, 568, 3 S. E. 280 (same); 1903, Clark *v.* State, 117 Ga. 254, 43 S. E. 853 (statute applied); 1920, McBride *v.* State, 150 Ga. 92, 102 S. E. 865 (allowable; following Pulliam *v.* Cantrell); *Ind.* 1866, Paxton *v.* Dye, 26 Ind. 394 ("if by statements inconsistent with material evidence given by him in the body of his testimony, and which statements he does not admit that he made", admitted); 1868, Clark *v.* Bond, 29 Ind. 555 (admitted); Harris *v.* State, 30 Ind. 131 (admitted); 1870, Clem *v.* State, 33 Ind. 418, 427 (admitted, after careful reconsideration of the subject; see quotation *supra*); 1886,

1838, COWEN, J., in *People* v. *Rector*, 19 Wend. 583: "With great deference I ask. Do not discrepancies of statement in themselves go to general character? They are not like contradicting a witness on the fact itself, nor do they bring the matter to a mere test of memory. How do they operate in common understanding? Either to evince a dangerous levity and versatility, or downright dishonesty in representing a matter of fact."

1870, FRAZER, J., in *Clem* v. *State*, 33 Ind. 427: "The sole object in asking a witness whether he had made statements elsewhere not in accordance with his testimony, and upon his denial calling other witnesses to show that he did make such statements, is to create a belief that he is not a credible witness. Impeachment of a witness by proof of his bad character is intended to accomplish exactly and only the same thing. The statements and the bad character are alike immaterial, except for the single purpose of affecting the credit of the witness, and it is not easy to say that the two methods are not about equally efficient in accomplishing the end. In either case, the credibility of the witness is impaired. . . . If it is just in the one case that a party should be permitted to establish the credit of his witness by showing his good character, it is alike just in the other case."

The opposite view is represented by the following passage:

1860, WARDLAW, J., in *Chapman* v. *Cooley*, 12 Rich. L. 659: "The greatest rogue, under circumstances supervised by his neighbors, may simulate the course of honesty; one of good principles and the fairest reputation may be utterly unworthy of credit in his state-

Louisville N. A. & C. R. Co. v. Frawley, 110 Ind. 18, 26, 9 N. E. 594 (admitted); 1893, Board v. O'Conner, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16 (same); *Ia.* 1887, State v. Archer, 73 Ia. 320, 323, 35 N. W. 241 (excluded); 1899, State v. Owens, 109 Ia. 1, 79 N. W. 462 (excluded); 1907, State v. Hoffman, 134 Ia. 587, 112 N. W. 103 (excluded); *Kan.* 1917, Colvin v. Wilson, 100 Kan. 247, 164 Pac. 284 (admitted, but not as a "hard-and-fast rule"; the admissibility should be left "to the sound discretion of the trial Court)"; *Ky.* 1859, Vance v. Vance, 2 Mete. 581 (excluded); *La.* 1886, State v. Boyd, 38 La. An. 374 (admitted); *Md.* 1873, Davis v. State, 38 Md. 15, 49 (admissible); *Mass.* 1829, Russell v. Coffin, 8 Pick. 143, 154 (excluded); 1856, Brown v. Mooers, 6 Gray 450 (same); Com. v. Ingraham, 7 Gray 46, 48 (same); *Mo.* 1880, State v. Cooper, 71 Mo. 436, 442 (obscure); 1919, Orris v. Chicago R. I. & P. R. Co., 279 Mo. 1, 214 S. W. 124 (not admitted, after cross-examination to former statements suggesting lack of veracity; former ruling of the Court of Appeals reviewed and repudiated); 1921, State v. Ritter, 288 Mo. 381, 231 S. W. 606 (Orris v. R. Co. affirmed); *N. Y.* 1842, People v. Hulse, 3 Hill 309, 313 (excluded; no special exception allowed for rape cases; Cowen, J., diss.); 1847, Starks v. People, 5 Den. 106, 108 (excluded); 1856, Stacy v. Graham, 14 N. Y. 492, 498, 500 (admitted; no precedents cited; but here there were also admissions of corruption, and not merely self-contradictions); *N. C.* 1874, Isler v. Dewey, 71 N. C. 14 (admitted); *Ohio:* 1876, Webb v. State, 29 Oh. St. 351, 357 (excluded; pointing out that "if the impeaching evidence should appear from the conduct of the witness, or his contradictory statements made during his examination", his character would clearly be inadmissible, and yet the situation would be precisely the same); *Or.* 1874, Glaze v. Whitley, 5 Or. 164, 167 (admitted); 1882, Sheppard v. Yocum, 10 Or. 402, 413 (overruling the preceding decision, as representing an inferior rule); 1898, First Nat'l Bank v. Com. U. Ass. Co., 33 Or. 43, 52 Pac. 1050 (excluded); *Pa.* 1839, Braddee v. Brownfield, 9 Watts 124, *semble* (excluded); 1853, Wertz v. May, 21 Pa. 274, 279 (same); *S. C.* 1839, Farr v. Thompson, Cheves 37, 39, 43 (admitted, as it is "impossible to resort" to such testimony "without making a direct attack on the veracity and character of the witness"); 1860, Chapman v. Cooley, 12 Rich. L. 654, 658 (excluded; the preceding case being distinguished and in effect overruled); 1888, State v. Jones, 29 S. C. 201, 230 (excluded); 1897, State v. Rice, 49 S. C. 418, 27 S. E. 452 (excluded); *Tex.* 1857, Burrell v. State, 18 Tex. 713, 730 (admitted); 1900, Renfro v. State, 42 Tex. Cr. 393, 56 S. W. 1013 (not allowed where the cross-examiner merely used the prior statement to refresh the witness' memory); 1903, Runnels v. State, 45 Tex. Cr. 446, 77 S. W. 458 (admitted); *Vt.* 1840, State v. Roe, 12 Vt. 93, 97, 111 (admitted); 1848, Paine v. Tilden, 20 Vt. 554, 564 (same); 1848, Sweet v. Sherman, 21 Vt. 23, 29 (same); 1892, Stevenson v. Gunning's Estate, 64 Vt. 601, 608, 25 Atl. 697 (same); *Va.* 1877, George v. Pilcher, 28 Gratt. 299, 311, 315 (admissible, where "material facts" are the subject of the error); *W. Va.* 1899, State v. Staley, 45 W. Va. 792, 32 S. E. 198 (admissible).

ments of some transaction. Monomania is a state of mind universally recognized, and it may preclude one completely from the perception and narration of the truth. Intense ignorance or superstition, or some affection, may produce the same consequences. The great improbability of a narrative may produce disbelief, without impairing the confidence of the hearers in the probity of the narrator. A wise and good man may fail in his remembrance of any fact, and especially of its attendant circumstances. Surely, then, character and credit are distinct things, and every assault on the credit of a witness does not involve the imputation of perjury to him, nor, indeed, any reflection on his reputation."

The latter view seems to be much more in harmony with the needs of the situation. Considering the usual remoteness of the inference as to moral character, and the minor value of reputation-evidence in modern times, it is not worth while to cumber the trial with it for so trifling an occasion of use. As a matter of rule, the various jurisdictions are divided between the two views.

§ 1109. **Same: (5) After Contradiction by other Witnesses.** Contradiction by opposing witnesses has for its purpose to show an error by the first witness, so that from this error may be argued a capacity to commit errors upon other points as well (*ante*, § 1000). But here, as with the mode of impeachment just dealt with, it is only by contingency that Moral Character may be thought to be reflected upon. Thus, the same arguments *pro* and *con* as in the foregoing subject may here be raised, except that, since the insinuation against Moral Character is here more remote, the grounds for treating it as in issue and admitting rebutting evidence of good character are weaker

§ 1109. [1] The cases on both sides are as follows: *England:* 1808, Durham *v.* Beaumont, 1 Camp. 207 (a mere conflict of testimony: excluded); *Federal:* 1898, Spurr *v.* U. S., 31 C. C. A. 202, 87 Fed. 701 (excluded); 1902, Louisville & N. R. Co. *v.* M'Clish, 53 C. C. A. 60, 115 Fed. 285 (excluded; good opinion by Day, J.); *Alabama:* 1853, Newton *v.* Jackson, 23 Ala. 335, 344 (admitted); 1875, Mobile & G. R. Co. *v.* Williams, 54 Ala. 168, 172 (excluded; the preceding case not cited); 1894, Funderberg *v.* State, 100 Ala. 36, 14 So. 877 (excluded); 1900, Turner *v.* State, 124 Ala. 59, 27 So. 272 (mere contradiction, not used to impeach, insufficient); 1900, Bell *v.* State, 124 Ala. 94, 27 So. 414 (excluded); 1901, Lusk *v.* State, 129 Ala. 1, 30 So. 33 (bastardy; complainant's character admitted, after impeachment upon her assertion that she had not kept company with other men; but this would be justifiable under the principle of § 1106, *ante*); *California:* 1908, Title Ins. & Trust Co. *v.* Ingersoll, 153 Cal. 1, 94 Pac. 94 (accounting as trustee; defendant's good character of the defendant-witness not admitted where only contradictions of his testimony on minor points had been introduced); *Connecticut:* 1833, Rogers *v.* Moore, 10 Conn. 14 (excluded); *Florida:* 1886, Saussy *v.* R. Co., 22 Fla. 327, 330 (excluded); *Georgia:* 1895, Miller *v.* R. Co., 93 Ga. 480, 21 S. E. 52 (excluded; good opinion by Bleckley, C. J.); 1897, Bell *v.* State, 100 Ga. 78, 27 S. E. 669 (excluded); 1899, Anderson *v.* R. Co., 107 Ga. 500, 33 S. E. 644 (excluded); *Illinois:* 1884, Tedens *v.* Schumers, 112 Ill. 263, 266 (excluded; see quotation *supra*); *Indiana:* 1863, Pruitt *v.* Cox, 21 Ind. 15; Johnson *v.* State, 21 Ind. 329 (excluded); 1881, Presser *v.* State, 77 Ind. 274, 280 (same); 1882, Braun *v.* Campbell, 86 Ind. 516 (same); 1889, Louisville N. A. & C. R. Co. *v.* Frawley, 110 Ind. 18, 27, 9 N. E. 594 (same); *Iowa:* 1887, State *v.* Archer, 73 Ia. 320, 323, 35 N. W. 241, *semble* (excluded); *Kentucky:* 1859, Vance *v.* Vance, 2 Mete. 581 (excluded); *Louisiana:* 1895, State *v.* Desforges, 48 La. An. 73, 18 So. 912 (admissible, where a direct conflict exists and practically the integrity and veracity of the witnesses are involved); *Maryland:* 1869, Vernon *v.* Tucker, 30 Md. 456, 462 (excluded); 1873, Davis *v.* State, 38 Md. 15, 50, 59, 74 (allowable, after a showing of error on a material point; no authority cited; Stewart and Bowie, JJ., diss., citing the preceding case); *Massachusetts:* 1829, Russell *v.* Coffin, 8 Pick. 143, 154 (excluded); 1855, Heywood *v.* Reed, 4 Gray 574, 576, 581 (excluded; although incidentally the witness appeared as fraudulent assignor of property); 1856, Brown *v.* Mooers, 6 Gray 451 (excluded; even though knowledge of the falsity appears); Com. *v.* Ingraham, 7 Gray 46, 48,

The mixed arguments of logic and policy for rejecting it are seen in the following passages:

1839, EARLE, J., in *Farr* v. *Thompson*, Cheves S. C. 43: "It is obvious that it [*i.e.* proof that the facts are otherwise] may be resorted to without in the slightest degree impugning the veracity of the witness, so long as men view the same transaction in different lights, form different conclusions from the same premises, pay more or less attention to the same occurrences taking place before their eyes, and have memories more or less retentive."

1884, WALKER, J., in *Tedens* v. *Schumers*, 112 Ill. 263, 266: "If the practice sanctioned the calling of witnesses to prove general character whenever a witness is contradicted, it would render trials interminable. The greater portion of the time of courts would be liable to be engaged in the attack and support of the characters of witnesses. If permitted, each of the contradicting witnesses would have the same right; and not only so, but all of the supporting witnesses on each side contradicting each other would be entitled to the same privilege. It is thus seen that the rule must be limited to cases where witnesses are called to impeach the general character of a witness; otherwise, instead of reaching truth by the verdict, it would tend to stifle it under a large number of side issues calculated to obscure and not to elucidate them."

1884, HOLMES, J., in *Gertz* v. *Fitchburg R. Co.*, 137 Mass. 77, 78: "The purpose and only direct effect of the [impeaching] evidence are to show that the witness is not to be believed in this instance. But the reason why he is not to be believed is left untouched. That may be found in forgetfulness on the part of the witness, or in his having been deceived, or in any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general character for truth, as well as for the other virtues; and until the character of a witness is assailed, it cannot be fortified by evidence."

No Court favoring admission seems to have attempted a reasoned justification of its policy; and the great majority of jurisdictions agree in excluding such evidence.

§ 1110. **Same: Other Principles distinguished.** The witness' good moral character, though it may be inadmissible in some of the foregoing situations, may nevertheless be receivable from some other point of view, — particularly in a charge of rape (*ante*, § 62), seduction (*ante*, § 76), or defamation

semble (inadmissible); 1884, Gertz v. Fitchburg R. Co., 137 Mass. 77 (see quotation *supra*); *New York:* 1838, People v. Rector, 19 Wend. 569, 586 (excluded); 1842, People v. Hulse, 3 Hill 309, 313 (same); 1847, Starks v. People, 5 Den. 106, 108 (same); *North Carolina:* 1854, March v. Harrell, 1 Jones 329, 331, *semble* (admitted); 1874, Isler v. Dewey, 71 N. C. 14 (same); *Oklahoma:* 1907, First National Bank v. Blakeman, 19 Okl. 106, 91 Pac. 868 (excluded; except in special cases, in the trial Court's discretion); *Oregon:* 1874, Glaze v. Whitley, 5 Or. 164, 167 (admissible); 1882, Sheppard v. Yocum, 10 Or. 402, 413 (by implication overruling the preceding decision); 1915, State v. Louie Hing, 77 Or. 462, 151 Pac. 706 (excluded); *Pennsylvania:* 1839, Braddee v. Brownfield, 9 Watts 124 (excluded; even though the error involve a falsity); *South Carolina:* 1839, Farr v. Thompson, Cheves 37, 43 (excluded); 1860, Chapman v. Cooley, 12 Rich. 654, 660, *semble* (same); 1892, State v. Jones, 29 S. C. 201, 230, *semble* (same); *Tennessee:* 1837, Richmond v. Richmond, 10 Yerg. 343, 345 (admitted; but here the argument was that there had been false swearing); *Texas:* 1894, Texas & P. R. Co. v. Raney, 86 Tex. 363, 25 S. W. 11 (excluded); 1900, Jacobs v. State, 42 Tex. Cr. 353, 59 S. W. 1111 (excluded); 1914, McCue v. State, 75 Tex. Cr. 137, 170 S. W. 280 (excluded, even though the witness is a stranger in the county, distinguishing the rule of § 1106, n. 2, *ante*, Davidson, P. J., diss., and attributing the opposite effect to Jacobs v. State, *supra*); *Vermont:* 1892, Stevenson v. Gunning's Estate, 64 Vt. 601, 608, 25 Atl. 697 (excluded; in effect overruling the apparently opposite ruling in Mosley v. Ins. Co., 55 Vt. 142, 152 (1882), where the error involved a perjury); *Virginia:* 1877, George v. Pilcher, 28 Gratt. 295, 311, 315 (admitted); *Washington:* 1896, State v. Nelson, 13 Wash. 523, 43 Pac. 637 (excluded).

(*ante*, §§ 66, 76). Whether the proof of the character shall be by reputation (*post*, § 1608) or by personal opinion (*post*, § 1980) involves still other principles. Compare §§ 55–79, *ante*, for the use of character other than in impeachment of a witness.

§ 1111. (B) **Discrediting the Impeaching Witness; Cross-examining to Rumors of Misconduct.** In the foregoing sections, the object of the evidence offered in support was to establish the witness' good character, in *direct denial* of its impeachment, by bringing other witnesses to testify to the good reputed character. But the existence of the bad reputed character may also be *denied indirectly*, *i.e.* by discrediting the impeaching witness. This process raises certain special questions of its own.

(1) One mode of doing it is to *impeach the impeaching witness' own moral character*, or bias, or other quality affecting credibility, thus making the impeacher in turn an impeached witness. How far this can be done, with special reference to an impeaching witness, and to the necessity of ending the mutual recrimination at some reasonable point, has been already considered (*ante*, § 894).

(2) Another and more effective mode is to probe the grounds of the impeacher's *knowledge* as to the other's bad reputation, by requiring him to *specify the particular rumors of misconduct*, or *statements of individuals*, that have led him to assert the existence of the bad reputation. In theory, this rests upon the general principle (*ante*, § 994) that every witness may be discredited by exhibiting the inadequacy of his sources of knowledge. If a witness to another's bad reputation is speaking from a veritable knowledge of such a repute, he ought to be able to specify some of the rumored misconduct or some of the individual opinions that have gone to form that reputation. If he cannot do this, his assertion may be doubted:

1684, *Braddon's Trial*, 9 How. St. Tr. 1127, 1170. *Witness:* "The Wednesday and Thursday both, it was the common talk of the town all day long." WITHINS, J.: "Name one that spake it to you." *Witness:* "I cannot; it was the women as they came in and out of my shop, and as they went up and down the town." Counsel, Mr. *Wallop:* "My lord, we leave it with your lordship and the jury; he swears he then heard such a report." WITHINS, J.: "Do you believe that this man can speak truth when he says it was reported all about their town for two days before it was done, and yet cannot name one person that spake it?" *Witness:* "I keep a public shop, and do not take notice of every one that comes in and out, to remember particularly." WITHINS, J.: "You heard it up and down the town, you say; surely you might remember somebody."

1849, FLETCHER, J., in *Bates* v. *Barber*, 4 Cush. 109: "In point of principle it would seem proper to make this inquiry, because the witness is called on to state what is the reputation of the person impeached, what is his character for truth by report, what is said as to his character for truth; and it may be very material and important to know from whom in particular the reports come, and what persons they were who spoke against the character of the person impeached. Upon such inquiry, it may appear that all the persons from whom the witness has heard anything against the person impeached are his personal enemies, and so situated in regard to him that their speeches and reports against him are entitled to no consideration whatever. The inquiry may also be proper in order to test the extent and means of information possessed by the witness in regard to the character of the party im-

peached for truth and veracity; by allowing such inquiry, it may perhaps be made to appear that the imputed bad character is wholly fictitious and got up for a particular purpose."

1865, COOLEY, J., in *Annis* v. *People*, 13 Mich. 517: "There is no case where a thorough cross-examination is more important to an elucidation of the truth than where a witness is giving an answer to a general question which calls both for matter of fact and matter of opinion. If a witness can shield himself behind an answer so general that, even if false, the person who knows that fact cannot testify with definiteness on the subject, we may well believe that bad men will frequently resort to this species of evidence where the truth will not warrant it. And in nothing may parties be more easily mistaken than in judging of the general reputation of another for truth and veracity. They may either be mistaken in assuming the speech of one or two to be the voice of the community; or they may confound a reputation for something else with a reputation for untruth; or they may misconstrue reports; or they may honestly be mistaken in regard to their import. Nothing is more common in practice than to see a witness placed upon the stand to impeach the general reputation of another for veracity, when a cross-examination demonstrates that the reports only relate to a failure — probably an honest one — to meet obligations, while the party's real reputation for truth is above suspicion. Nothing short of a cross-examination which compels the impeaching witness to state both the source of the reports and their nature will enable the party either to test the correctness of the impeaching evidence or to protect the witness who is assailed, if he is assailed, unjustly."

The objections to such an inquiry are, first, the consumption of time and confusion of issues, and, secondly, the multiplication of petty scandal and the creation of hard feeling between the impeached witness and the innocent third persons whose names are brought into the dispute against their will and whose remarks may have been made in confidence. The first objection is no more serious here than for other cross-examination of all sorts. But the second objection undoubtedly discloses one of the unfortunate and degrading features of character-testimony. An answer, to be sure, is that, since testimony based on personal knowledge is now almost universally excluded (*post*, § 1980), and since reputation-testimony is notoriously so easily fabricated and its fabrication can be exposed only in this way, it would be inexpedient to destroy the only security against false impeaching testimony. The reply, however, to this may well be that it is better to go back to personal-knowledge testimony rather than to give a monopoly to a kind so easily fabricated and so inseparable from the vice of retailing neighborhood-scandal in court.

But the reasons above quoted are universally accepted (except by a few Courts which do not appreciate the reasoning); on cross-examination of the impeaching witness he may be asked as to the specific persons who have spoken against the impeached witness, and (usually) as to what misconduct they specified.[1]

§ **1111.** [1] Except as otherwise noted, the following rulings allow cross-examination as to the persons speaking against the impeached witness: *Canada:* 1900, Messenger *v.* Bridgetown, 33 N. Sc. 291 (cross-examination of a witness to bad reputation, as to the opinion of "individual neighbors", allowed); *U. S. Alabama:* 1873 Sonneborn *v.* Bernstein, 49 Ala. 171; 1884, Jackson *v.* State, 77 Ala. 18, 24 (whether he had not heard good reports from some, allowed); *Connecticut:* 1849, Weeks *v.* Hull, 19 Conn. 377 (good opinion by Church, C. J.); *Florida:* 1878, Robinson *v.* State, 16 Fla. 835, 840; *Georgia:* Code 1910, § 5882, P. C. § 1053 ("opinions of single individuals" may only be asked about "upon cross-exami-

This kind of *discrediting* examination is to be distinguished from the preliminary *direct* examination which some Courts require before a witness to reputation may speak as qualified (*ante*, § 691). The principle beneath both is the same. But there the object is to ascertain whether he is a qualified witness at all, while here he has already qualified and spoken, and the object is to discredit the sources of his knowledge.

Distinguish also the cross-examination of a witness to *good reputation*, concerning *rumors of misconduct* which he has heard (dealt with *ante*, § 988); this rests on an application of the same general principle, but it aims at the impeachment, not the support, of the impeached witness.

(3) May the impeaching witness, after thus naming certain persons or reports, be *contradicted* and shown to speak incorrectly on those points? The answer to this is usually negative,[2] on the theory that the contradiction concerns a collateral point (*ante*, § 1004). But this result seems unsound, for the denial can usually be summary and effective, and the effect on the im-

nation in seeking for the extent and foundation of the witness' knowledge"); *Iowa:* 1897, State *v.* Allen, 100 Ia. 7, 69 N. W. 274 (but here excluding questions in which the examiner himself specified certain persons); *Kentucky:* 1902, Barnes *v.* Com., — Ky. —, 70 S. W. 827 (and the answers are of course not to be excluded because they involve unfavorable rumors); *Maine:* 1841, Phillips *v.* Kingfield, 19 Me. 375, 381 ("for how long a time, and how generally, the unfavorable reports had prevailed, and from what person he has heard them"); *Michigan:* 1865, Annis *v.* People, 13 Mich. 511, 516 (allowing also questions as to what specific persons said; see quotation *supra*); 1874, Hamilton *v.* People, 29 Mich. 173, 185, *semble; Minnesota:* 1908, Harms *v.* Proehl, 104 Minn. 303, 116 N. W. 587 (allowing inquiry, not only to the names of the persons, but also to their statements); *Mississippi:* 1884, Pickens *v.* State, 61 Miss. 563, 566; 1885, French *v.* Sale, 63 Miss. 386, 393; *Missouri:* 1850, Day *v.* State, 13 Mo. 422, 426, *semble* (excluded; apparently treating it as an attempt to introduce hearsay); *New Hampshire:* 1838, State *v.* Howard, 9 N. H. 487; 1851, Titus *v.* Ash, 24 N. H. 331; *New York:* 1827, Lower *v.* Winters, 7 Cow. 265; 1830, People *v.* Mather, 4 Wend. 257, per Macy, Sen.; 1835, Bakeman *v.* Rose, 14 Wend. 105, 110, 18 id. 150 (here also direct examination allowed, in the trial Court's discretion, because the impeaching witness had volunteered the statement that some persons spoke for, and some against, the other witness); *North Carolina:* 1872, State *v.* Perkins, 66 N. C. 126; *Ohio:* 1862, McDermott *v.* State, 13 Oh. St. 335 (allowable to "ascertain from the witnesses their means of knowing her general reputation, the origin and character of any and all reports prejudicial to her, the extent to which those reports had prevailed, the time when and the persons from whom the witnesses had heard them, and, in short, everything which reflects the nature and general prevalence of the reputation"); *Oregon:* 1909, State *v.* Osborne, 54 Or. 289, 103 Pac. 62 (rape; defendant's witness to the woman's bad repute, not allowed to be cross-examined to his own knowledge of her good behavior; the Court mistakenly applies the rule of § 988, *ante*, as to a sustaining witness, and ignores the present rule); *Vermont:* 1858, Willard *v.* Goodenough, 30 Vt. 396 ("the cross-examination may extend to every matter of fact within the witness' knowledge bearing on the fact of the bad character to which he has testified").

Compare the rule about a *divided reputation* (*post*, §§ 1612, 1613).

[2] 1873, Sonneborn *v.* Bernstein, 49 Ala. 172; 1889, Robbins *v.* Spencer, 121 Ind. 596, 22 N. E. 660; 1884, State *v.* Woodworth, 65 Ia. 141, 21 N. W. 490; 1905, Hofacre *v.* Monticello, 128 Ia. 239, 103 N. W. 488 (Deemer, J.: "The writer would be inclined to adopt a contrary rule. . . . But as there seems to be nothing sustaining such a [contrary] rule save an unsupported remark of Professor W. in his new work on Evidence, § 1111, it is better, perhaps, to follow the current of authority"); 1908, Harms *v.* Proehl, 104 Minn. 303, 116 N. W. 587; 1862, McDermott *v.* State, 13 Oh. St. 3. *Contra:* 1905, Johnson *v.* State, 75 Ark. 427, 88 S. W. 905, *semble* (cited *post*, § 1117, n. 6); 1916, Johnson *v.* Ebensen, 38 S. D. 116, 160 N. W. 847 (admitting it, and approving the text above); 1913, Fort Worth Belt R. Co. *v.* Cabell, — Tex. Civ. App. —, 161 S. W. 1083 (after testimony to plaintiff's bad repute for truth and honesty, which the witness said was based on plaintiff's failure to pay his debts, plaintiff was allowed to explain the facts of his indebtedness).

peaching witness' credit is so direct that it cannot be termed collateral (*ante*, § 994).

§ 1112. (C) **Explaining away the Bad Reputation; (1) Reputation due to Malice, etc.; (2) Witness' Veraciousness unimpaired; (3) Witness Reformed.** Still another mode of meeting an impeachment of bad reputed character is, not to deny it directly by showing good reputed character, nor to deny it indirectly by discrediting the impeacher, but to *explain it away* by circumstances which diminish its significance, on the general logical principle of Explanation (*ante*, § 34).

(1) Conceding the reputation to exist, it may be argued that the reputation is untrustworthy because it has *originated* in the malice of a *few persons*, or in *specific facts* of conduct which do not justify it. But this course is open to all the evils of contradiction on collateral points (*ante*, § 1002), and would not be allowed;[1] except so far as it can be pursued on cross-examination of the reputation-witness (according to § 111, par. 2, *ante*).

(2) Conceding the reputation, in a jurisdiction where general bad character is relevant (*ante*, § 923), it may still be claimed that the witness' *reputation* for the trait of *veracity remains unimpaired*, so that the general bad character does not signify anything against his credibility. This seems to be generally conceded;[2] it does not involve proof of particular facts, and therefore is not obnoxious to other principles (*ante*, § 979).

(3) Conceding the reputation, and the actual character as then indicated by it, the claim may be made that the witness has since that time *reformed*, and has exhibited and now possesses the disposition of a generally good or veracious man. This, so far as it can be shown by reputation and without going into particular facts, would seem to be allowable;[3] though usually the same purpose is practically attained by simply adducing opposing witnesses to deny the bad character.

B. Rehabilitation after Impeachment by Particular Acts of Misconduct

§ 1116. **Denial of the Fact; Innocence of a Crime admitted on Cross-examination or proved by Record of Conviction.** There are but two ways,

§ **1112**. [1] 1890, Hollingsworth *v.* State, 53 Ark. 387, 393, 14 S. W. 1 (that the reputation was due to a specific vice only, excluded, on the theory that "it would extend controversies beyond all reason" to permit such issues to be raised, even on cross-examination of the impeaching witnesses; the latter clause is unsound); 1830, People *v.* Mather, 4 Wend. N. Y. 257 (evidence was excluded, to explain away evidence of a witness' bad reputation, that the reports against him originated from a particular body of men who had spread false rumors as to certain conduct; good opinion by Marcy, Sen.).

[2] 1851, Wayne, J. (the others not touching the point), in Gaines *v.* Relf, 12 How. U. S. 555; 1838, People *v.* Rector, 19 Wend. N. Y. 569, 579, 588; 1883, Anon., 1 Hill S. C. 258 (O'Neall, J.: "the party in whose favor he has testified may inquire whether, notwithstanding his bad character in other respects he has not preserved his character for truth, and if this inquiry is answered affirmatively, the jury may seize upon it as the floating plank in his general wreck, and believe him").

But compare the following: 1898, Barnwell *v.* Hannegan, 105 Ga. 396, 31 S. E. 116 (must involve general character only, under C. C. § 5293).

[3] See the cases cited *post*, § 1117.

as already noted, in which a witness' particular acts of misconduct can be proved to discredit his character, — his own admission on cross-examination (*ante*, § 981), and a record of a judgment of conviction for a crime (*ante*, § 980). Obviously, he cannot *deny* a fact shown by the former mode.[1] But may he deny a fact attempted to be established in the latter mode? The thing actually proved against him is the judgment of conviction; but is the judgment conclusive to establish the fact of the crime?

(1) The technical fact that it is here used as between other parties ought not to be an objection; for it is not used against him as a party or as concluding him in respect to a legal right. Moreover, if this objection does not prevent the judgment being offered in evidence, as it certainly does not, it need not prevent the usual effect of conclusiveness being allowed for it. It is therefore correct and not unfair to exclude any *attack by other witnesses* on the judgment. But the rule against proving particular facts by outside testimony (*ante*, §§ 979, 1002) is not the proper ground for this exclusion; that applies only to the party offering to raise an issue; it cannot apply to exclude testimony in denial by one against whom testimony to a fact has been offered; to allow one party to adduce evidence and to forbid the other to refute it would be grossly unfair.[2]

(2) This being so, and the judgment being conclusive, the witness' own *denials of guilt*, on re-examination, would be equally inadmissible;[3] though it has sometimes been thought, proceeding in part on the erroneous theory just noted, that they are receivable.[4]

(3) But, in any event, may not a *pardon* for the crime be admitted as negativing guilt? If a pardon were always granted on the ground of discovery of innocence, the answer would clearly be in the affirmative, especially since the objection of raising new issues by other witnesses is here practically obviated. But as a pardon has no such necessary significance (since it is usually granted for other reasons than innocence), Courts would probably be found excluding it,[5] on the analogy of the principle of § 980 *ante*. Nevertheless, it seems more proper to conclude that, since a pardon *may* signify innocence, it should be received. Certainly a reversal of the judgment would be.[6]

§ 1116. [1] See the cases in notes 3 and 4, *infra*.

[2] For the right to *explain*, see the next section. Where the witness has not admitted but has denied the imputation on cross-examination, there is no occasion to call other witnesses to corroborate this denial: 1860, Tolman *v.* Johnstone, 2 F. & F. 66 (Cockburn, C. J., after consulting the other Judges).

[3] 1874, State *v.* Lang, 63 Me. 215; 1876, State *v.* Watson, 65 Me. 79; 1878, Com. *v.* Gallagher, 126 Mass. 55; 1884, Gertz *v.* Fitchburg R. Co., 137 Mass. 77, 80; 1897, Lamoureux *v.* R. Co., 169 Mass. 338, 47 N. E. 1009 (quoted in the next section); 1863, Gardner *v.* Bartholomew, 40 Barb. 326 (on the theory that it is the crime that impeaches, but that the record of conviction is conclusive of the offence).

[4] 1902, Reed *v.* State, 66 Nebr. 184, 92 N. W. 321; 1878, Sims *v.* Sims, 75 N. Y. 473 (on the theory that the conviction is used as evidence of the crime, but is not conclusive in a civil case; and yet the opinion in a preceding passage maintains that it is the sentence and not the crime that disqualifies); 1904, People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1 (Sims *v.* Sims approved).

[5] 1904, Gallagher *v.* People, 211 Ill. 158, 71 N. E. 842.

[6] 1899, State *v.* Duplechain, 52 La. An. 448, 26 So. 1000 (that the conviction had been set

§ 1117. **Same: Explaining away the Fact; Reformed Good Character in Support.** Conceding the fact of misconduct, as shown by the witness' own cross-examination or by a judgment of conviction of crime, what *explanations* can be made, to diminish or repel the inference of bad moral character suggested thereby?

(1) As against misconduct proved by either of the above modes, the inference of bad character may be met by testimony denying the fact to be inferred, *i.e.* by *affirming the witness' good reputation*. This kind of evidence has been already considered (*ante*, § 1106).

(2) Again, equally after either of those modes of proof, the claim may be made that, while the moral character may then have been bad, as indicated by the fact of misconduct, nevertheless the witness has *reformed* and possesses now a good character. This can certainly be done by the ordinary method of showing his present reputation;[1] and may also properly be done (the objection of confusion of issues not applying) by the witness' own statement on re-examination.[2]

(3) After proof of a *judgment of conviction*, may the witness be allowed to *explain the circumstances of the offence*, as extenuating the act and diminishing its significance? The conclusiveness of the judgment seems here to be no objection. It is true that no issue could be allowed to be joined on the witness' explanations, and thus there would be no security against false statements by him. Nevertheless, having regard to the publicity of one's discredit on the stand and the necessity of guarding against the abuses of the impeachment-process and of preventing the witness-box from becoming a place of dread and loathing, it would seem a harmless charity to allow the witness to make such protestations on his own behalf as he may feel able to make with a due regard to the penalties of perjury.[3]

aside, and the case nolle prossed, allowed); and see the intimations in cases cited *ante*, § 980.

§ 1117. [1] Cases cited *ante*, § 1106, and the following: 1817, R. *v.* Clarke, 2 Stark. 241 (quoted *ante*, § 1106); 1886, Mynatt *v.* Hudson, 66 Tex. 66, 68, 17 S. W. 396.

[2] 1898, Tennessee C. I. & R. Co. *v.* Haley, 29 C. C. A. 328, 85 Fed. 534 (that an ex-convict was a "trusty", allowed); 1855, Holmes *v.* Stateler, 17 Ill. 453 (reform shown); 1881, Conley *v.* Meeker, 85 N. Y. 618, *semble* (conviction for crime shown; the witness' statement that he had reformed and led an honest and orderly life, admitted).

[3] *Accord:* 1922, Hopper *v.* State, — Ark. —, 236 S. W. 595 (conviction for robbing a post-office; explanation of the circumstances allowed); 1899, South Cov. & C. S. R. Co. *v.* Beatty, — Ky. —, 50 S. W. 239 (witness allowed to explain circumstances of his arrest and conviction); 1900, State *v.* McClellan, 23 Mont. 532, 59 Pac. 924 (explanation why he had been in jail, allowed); 1838, Chase *v.* Blodgett, 10 N. H. 22, 24.

Contra: 1897, Lamoureux *v.* R. Co., 169 Mass. 338, 47 N. E. 1009 (Holmes, J.: "Upon redirect examination the witness was asked to state the circumstances, the evidence being offered to show the extent of the wickedness involved in the act, and to show the circumstances. This evidence was excluded. Logically, there is no doubt that evidence tending to diminish the wickedness of the act, like evidence of good character, which is admissible, does meet, as far as it goes, the evidence afforded by the conviction, since that discredits only by tending to show either general bad character, or bad character of a kind more or less likely to be associated with untruthfulness. Nevertheless, the conviction must be left unexplained. Obviously, the guilt of the witness cannot be retried. It is equally impossible to go behind the sentence to determine the degree of guilt. Apart from any technical objection, it is impracticable to introduce what may be a long investigation of a wholly collateral matter into a case to which it is foreign, and it is not to be expected or allowed that the party producing the record should

(4) When, by the allowable process (*ante*, § 981) of *questioning upon cross-examination*, discrediting facts are brought out, there is usually but one type of fact that admits on principle of any explanation, *i.e.* whose force may be obviated, not by denial, but by the production of other facts, namely, the admission of an *indictment* or *arrest* or other charge of misconduct. In the jurisdictions where this is allowed to be brought out on examination (*ante*, §§ 982, 987), it is no more than fair that the witness should be allowed to explain that the arrest or charge was unfounded; for the arrest or indictment is only an 'ex parte' mode of inducing belief in the objective fact, *i.e.* the misconduct itself. But it would introduce all the evils of collateral issues (*ante*, § 979) if the showing were allowed to be made by extrinsic testimony; moreover, as the original fact is brought out on cross-examination of the witness himself, fairness is satisfied by confining the explanation within the limits of a re-examination of the witness himself.[4]

(5) As for *other facts drawn out on cross-examination*, supposing them open to any real explanation, it would doubtless be desirable to allow, in the trial Court's discretion, such explanation of them by the witness as seems worth listening to and does not require too much time.[5] In the same way,

also put in testimony to meet the explanation ready in the mouth of the convicted person. Yet, if one side goes into the matter, the other must be allowed to also"); 1913, O'Brien *v.* Boston Elevated R. Co., 214 Mass. 277, 101 N. E. 365 ("No evidence is competent to explain the circumstances of the particular crime"; but counsel may argue hypothetically on the principle of § 1807, *post*); 1912, Smith *v.* State, 102 Miss. 330, 59 So. 96; 1921, Fowler *v.* State, 89 Tex. Cr. 623, 232 S. W. 515 (witness' explanation that he had been acquitted on the ground of self-defence, held improper).

[4] *Eng.* 1795, R. *v.* Jackson, Dublin, Ridgeway's Rep. 63, 87 (the witness was asked whether he had been tried for perjury, and was allowed to explain that he had been acquitted and on what grounds; here a witness to corroborate him as to these facts was also admitted); 1834, R. *v.* Noel, 6 C. & P. 336 (the witness having been charged with keeping a gaming-house, he was allowed to explain that he was innocent); *U. S. Ill.* 1916, People *v.* Simmons, 274 Ill. 528, 113 N. E. 887 (a witness who had been indicted for perjury at a former trial was called, and the fact of the perjury was made known; held that the defendant was entitled to ask for the witness' explanation of his reason for changing his testimony); *Ind.* 1912, Neal *v.* State, 178 Ind. 154, 98 N. E. 872 (after the witness has on cross-examination answered negatively to questions about attempts to kill other persons, etc., he may not on re-direct examination explain the actually innocent complexion of the acts referred to in the questions; this is theoretically sound, but practically unfair; though the cross-examiner cannot prove the facts in contradiction, yet the insinuation is often equally effective (*ante*, § 983, *post*, § 1808), and the re-examination is the only means of removing its insidious effect); *Mich.* 1882, Driscoll *v.* People, 47 Mich. 417, 11 N. W. 221 (explaining the reasons for an arrest allowed); *Tenn.* 1892, Hill *v.* State, 91 Tenn. 521, 523, 19 S. W. 674 (protestation of innocence of an offence for which witness had been indicted, allowed); *Tex.* 1902, Stewart *v.* State, — Tex. Cr. —, 67 S. W. 107 (witness allowed to state the disposal of indictments used to discredit him, but not to explain the details of the charges); 1920, Ray *v.* State, 88 Tex. Cr. 196, 225 S. W. 523 (homicide; the prosecution having proved on defendant's cross-examination an indictment for theft; defendant's testimony to further proceedings showing his innocence, admitted); *Vt.* 1904, McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985 (assault; plaintiff's explanation of his plea of guilty to a charge of assault on the same occasion, allowed on re-examination).

[5] 1899, Sayles *v.* Fitzgerald, 72 Conn. 391, 44 Atl. 733 (to show bias, plaintiff testified that defendant's witness had been discharged by the former for drunkenness; plaintiff's testimony on cross-examination as to specific acts of witness' drunkenness, allowed to be contradicted by witness); 1898, Ellis *v.* State, 152 Ind. 326, 52 N. E. 82 (testimony "in excuse and extenuation", excluded); 1886, State *v.* Starnes, 94 N. C. 976, *semble* (allowing explanation of particular misconduct; but here the question put on cross-examination was otherwise objectionable); 1922, Polk *v.* State, — Tex. Cr. —, 238 S. W. 934 (seduction; the complainant al-

where such facts have improperly been received or insinuated on the *cross-examination of a supporting witness* to the good reputation of the impeached witness (*ante*, § 988), an explanation or a denial from the impeached witness himself should be allowed, because the opportunities for abuse in that use of cross-examination are great and every means of counteracting them should be freely allowed.[6]

C. Rehabilitation after Impeachment by Bias, Interest, Self-Contradiction, Admissions

§ 1119. **Denial of the Fact; Explaining away the Fact; Putting in the Whole of a Conversation, etc.; Good Character in Support.** The modes of rehabilitation after impeachment by evidence of bias, interest, or self-contradiction, are better considered elsewhere. A brief summary here suffices:

(1) A *denial* of the fact of bias or the like, by other testimony, is always allowable; for any testimony of the opponent admissible to prove a discrediting fact must of course in fairness be allowed to be met by testimony denying the alleged fact. The only apparent (not real) exceptions could be the cases of proof by record of conviction (where the principle of conclusiveness of judgments applies) and of cross-examination by the opponent; but the former does not here come into use, and the latter involves the rule in regard to improper contradictions on collateral matters (dealt with *ante*, § 1007), and in regard to self-contradictions on collateral matters (dealt with *ante*, § 1046).

(2) The modes of *explaining away* impeaching facts of the present sorts are considered already elsewhere, — including their application to evidence of Bias, Interest, or Corruption (*ante*, §§ 952–969); to evidence of Self-Contradictions or Inconsistent Statements (*ante*, §§ 1044–1046); to evidence of Admissions (*ante*, § 1058); and in regard to all of these, by offering good character in support of the impeached witness (*ante*, §§ 1107–1109).

There remains now to be considered the method of supporting a witness, after any kind of impeachment, by prior consistent statements:

D. Rehabilitation by Prior Consistent Statements

1. Witnesses in General

§ 1122. **General Theory.** Under the head of Explanation, in dealing with the various modes of Impeachment (by Character, Bias, Interest, Corruption, Contradiction, Self-Contradiction), it would have been logically proper to consider, with reference to each of these modes, how far the effect of the

lowed to call other witnesses to disprove acts of unchastity insinuated on her cross-examination).

Compare the rule for *curative irrelevancies* (*ante*, § 15); and the rule for a witness' right in general to *volunteer explanations* (*ante*, § 785).

[6] 1905, Johnson *v.* State, 75 Ark. 427, 88 S. W. 905 (*semble*, charges brought out by an impeaching witness to character, may be denied in rebuttal, if no rule of estoppel applies); 1882, Abernethy *v.* Com., 101 Pa. 322, 328 (where, on cross-examination of a witness to good character, derogatory facts had come out, an explanation of them was allowed in answer).

impeaching evidence might be explained away or rebutted by the circumstance that the witness had, at a former time, told a consistent or similar story. Whether he could in this manner effect anything towards rehabilitating his credit must depend on the kind of impeaching evidence that has been offered; for clearly this mode of explanation may be relevant and forceful for some kinds of impeaching facts, but not for others. It is, however, more convenient, for the sake of clearness and comparison, to consider the various uses of this kind of explanatory evidence here in one place.

§ 1123. **History.** Down through the 1700s the notion prevailed that a witness could always be corroborated, without any limitation, by the circumstance of having made at other times statements consistent with the testimony delivered by him in Court. This practice was based on a loose instinctive logic, popular enough to-day, that there is some real corroborative support in such evidence; and the only objection then thought of was the Hearsay rule.[1] This rule does not in truth apply to prohibit such evidence (*post*, §§ 1131, 1792), as is now clearly understood; but there are other and serious objections to its indiscriminate admission in chief, and before any impeachment whatever. These objections began to be felt and offered by the end of the 1700s;[2] but it was not until the 1800s that any definite discriminations were settled upon and accepted. Even to-day there is much difference of judicial opinion as to the extent to which such evidence may be considered.

§ 1124. **Offered (1) in Chief, before any Impeachment.** When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it.[1]

§ **1123**. [1] *Ante* 1726, Gilbert, Evidence, 68, 150 ("Though hearsay may not be allowed as direct evidence, yet it may be in corroboration of a witness' testimony, to show that he affirmed the same thing before on other occasions and that the witness is still consistent with himself; [he then makes an exception for former sworn testimony,] for if a man be of that ill mind to swear falsely at one trial, he may well do the same on the other on the same inducements; but what a man says in discourse without premeditation or expectation of the cause in question is good evidence to support him"). The following instances occur: 1679, Knox's Trial, 7 How. St. Tr. 763, 790; 1696, Sir John Freind's Trial, 13 How. St. Tr. 32; 1753, Squires' Trial, 19 How. St. Tr. 270; 1754, Canning's Trial, 19 How. St. Tr. 397 (of a defendant not testifying); 1767, Buller, Trials at Nisi Prius, 294 (like Gilbert); 1770, Boston Massacre Trial, Chandler's Amer. Crim. Tr. I, 303, 361; and cases cited in § 1364, *post* (history of the Hearsay rule). Lutterell *v.* Reynell, 1 Mod. 282 (1671), is usually cited as an instance of the old rule; yet apparently it represents an aspect of the rule still acknowledged as law, namely, that an accomplice's similar statements, made before promise of pardon, are admissible to rebut the inference that his testimony was composed under influence of the promise (*post*, § 1128).

[2] 1776, Halliday *v.* Sweeting, cited 3 Doug. El. C. 163 (former consistent statements, admitted at the trial; but held inadmissible on a motion for a new trial). The MS. cases cited by McNally (Evidence, 378) indicate that in Ireland, by 1795, the admission was being frequently opposed; but it was maintained through the century.

§ **1124**. [1] In point of exact psychology, this may not be the case. See the materials collected in the present author's "Principle of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), § 290.

Such evidence would be both irrelevant and cumbersome to the trial; and is rejected in all Courts.[2]

1836, STORY, J., in *Ellicott v. Pearl*, 10 Pet. 439: "His testimony under oath is better evidence than his confirmatory declarations not under oath; and the repetition of his assertion does not carry his credibility further, if so far as his oath."

1878, READE, J., in *State v. Parish*, 79 N. C. 612: "It can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement to-day under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath. . . . The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth. Indeed it has never been supposed by any writer or judge that the repetition had any force as substantive evidence to prove the facts, but only to remove an imputation upon the witness. . . . If he stood before the court unimpeached, it was unnecessary and mischievous to encumber the court and oppress the defendant with his garrulousness out of court and when not on oath."

§ 1125. **Offered (2) after Impeachment of Moral Character.** When a bad reputation for veracity has been introduced to impeach, proof of consistent statements is equally irrelevant and useless. Even assuming the existence

[2] *Accord* (and many of the cases in the ensuing sections also concede this): *Eng.* 1783, R. *v.* Parker, 3 Doug. 242 (excluded; but this case says nothing as to the conditions on which to-day such evidence is recognized as admissible); 1811, Redesdale, M. R., in Berkeley Peerage Case, as cited in Phillipps, Evidence, 5th Am. ed., 307 (not admissible for "confirming" testimony); *U. S. Fed.* 1858, U. S. *v.* Holmes, 1 Cliff. 104; *Ala.* 1895, Chilton *v.* State, 105 Ala. 98, 16 So. 797; 1895, Sanders *v.* State, 105 Ala. 4, 16 So. 935; 1897, James *v.* State, 115 Ala. 83, 22 So. 565; 1909, Bennett *v.* State, 160 Ala. 25, 49 So. 296; *Cal.* 1895, People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204; Shamp *v.* White, 106 Cal. 220, 39 Pac. 537; *Conn.* 1830, State *v.* DeWolf, 8 Conn. 93, 100 (left undecided); 1896, Builders' Co. *v.* Cox, 68 Conn. 380, 36 Atl. 797 (excluded); 1898, Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803 (same); 1900, Palmer *v.* Hartford D. Co., 73 Conn. 182, 47 Atl. 125 (same); *Ill.* 1919, People *v.* Foster, 288 Ill. 371, 123 N. E. 534 (burglary; a witness' written sales-report, confirming his testimony, excluded; such statements admissible only when "a part of the 'res gestæ' or made in the presence of the other party"; no prior rulings cited); *Ind.* 1837, Coffin *v.* Anderson, 4 Blackf. 395, 398; 1882, Bristor *v.* Bristor, 82 Ind. 276; *Ky.* 1871, Sullivan *v.* Norris, 8 Bush 519 (deposition); 1898, Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986; *La.* 1899, State *v.* Carter, 51 La. An. 442, 25 So. 385; 1903, State *v.* Wheat, 111 La. 860, 35 So. 955; *Me.* 1831, Ware *v.* Ware, 8 Greenl. 55; 1853, Smith *v.* Morgan, 38 Me. 468; 1875, Sidelinger *v.* Bucklin, 64 Me. 371; *Mass.* 1846, Deshon *v.* Ins. Co., 11 Mete. 199, 209; 1868, Com. *v.* James, 99 Mass. 438, 440, *semble*; 1897, Burns *v.* Stuart, 168 Mass. 19, 46 N. E. 399; *Miss.* 1901, Williams *v.* State, 79 Miss. 555, 31 So. 197; 1904, Boyd *v.* State, 84 Miss. 414, 36 So. 525; *Mo.* 1883, State *v.* Grant, 79 Mo. 113, 133; *Mont.* 1903, Farleigh *v.* Kelley, 28 Mont. 421, 72 Pac. 756 (absent attesting witness); *N. C.* 1878, State *v.* Parish, 79 N. C. 610; 1897, Burnett *v.* R. Co., 120 N. C. 517, 26 S. E. 819; Rittenhouse *v.* R. Co., 120 N. C. 544, 26 S. E. 922; *N. Y.* 1826, Jackson *v.* Etz, 5 Cow. 314, 320; 1834, People *v.* Vane, 12 Wend. 78; 1840, Robb *v.* Hackley, 23 Wend. 50; 1900, People *v.* Smith, 162 N. Y. 520, 56 N. E. 1001; *Okl.* 1916, Jackson *v.* State, 12 Okl. Cr. 406, 157 Pac. 946 (citing the above text with approval); *Pa.* 1823, Henderson *v.* Jones, 10 S. & R. 322, 324; 1835, Craig *v.* Craig, 5 Rawle 91; 1847, McKee *v.* Jones, 6 Pa. 425, 429; 1877, Hester *v.* Com., 85 Pa. 139, 158, *semble*; 1890, Crooks *v.* Bunn, 136 Pa. 368, 371, 20 Atl. 529; 1897, Frazer *v.* Linton, 183 Pa. 186, 38 Atl. 589; 1904, Ranck *v.* Brackbill, 209 Pa. 499, 58 Atl. 884; *S. D.* 1903, Tenney *v.* Rapid City, 17 S. D. 283, 96 N. W. 96; *Tenn.* 1852, Nelson *v.* State, 2 Swan 237, 258 (the accused's or a witness' deposition before the examining magistrate, not to be read for him); 1915, Dietzel *v.* State, 132 Tenn. 47, 177 S. W. 47 (murder); *Vt.* 1913, State *v.* Turley, 87 Vt. 163, 88 Atl. 562; 1917, Phelps *v.* Utley, 92 Vt. 40, 101 Atl. 1011 (crim. con.; testimony to the co-respondent's nervous conduct, as corroborative of her testimony, excluded; this is far-fetched); *Va.* 1901, Repass *v.* Richmond, 99 Va. 598, 39 S. E. 160; 1921, Gallion & Gregory *v.* Winfree, 129 Va. 122, 105 S. E. 539 (commission on sale of lands; plaintiff's own testimony to former consistent statements, excluded).

of the bad character alleged, a depraved witness may well have repeated a story consistently. The bad character indicates some probability of untrustworthiness; the evidence of repetition does not attempt to meet the charge of bad character or diminish its effect, but evades it by reporting with the irrelevant fact that the witness has been consistent. [redacted] a few Courts have seen fit to admit the evidence.[1]

§ 1126. **Offered (3) after Impeachment by Inconsistent Statements.** The field in which the controversy is most rigorous and the opposing reasons most plausible is that of impeachment by Prior Inconsistent Statements (*ante*, § 1017).

On behalf of the admission of the supporting evidence, the earlier and conventional argument is that if a contradictory statement counts against the witness, a consistent one should count for him—a bit of loose logic which is natural and plausible:

1815, TILGHMAN, C. J., in *Packer* v. *Gonsalus*, 1 S. & R. 536: "Both being without oath, one [statement] is as good as the other, and the jury will judge of his credit on the whole."

1879, SMITH, C. J., in *Jones* v. *Jones*, 79 N. C. 249: "The admissibility of previous correspondent accounts of the same transaction to confirm the testimony of an assailed witness delivered on the trial rests upon the obvious principle that, as conflicting statements impair, so uniform and consistent statements sustain and strengthen his credit before the jury. . . . Again, the accuracy of memory is supported by proof that, at or near the time when the facts deposed to have transpired and were fresh in the mind of the witness, he gave the same version of them that he testified to on the tri[redacted]

The answer to this argument is simply that, since the self-contradiction is conceded, it remains as a damaging fact, and is in no sense explained away by the consistent statement. It is just as discrediting, if it was once uttered, even though the other story has been consistently told a score of times. This answer has weighed with many Courts:[1]

1835, GIBSON, C. J., in *Craig* v. *Craig*, 5 Rawle 97: "As rebutting, it cannot be pretended that they disprove the fact of [self-]contradiction, or that they remove the impu-

§ 1125. [1] The cases on both sides are as follows: *Ala.* 1873, Sonneborn *v.* Bernstein, 49 Ala. 168, 171 (admitted); *Cal.* 1888, Mason *v.* Vestal, 88 Cal. 396, 398, 26 Pac. 213 (excluded); *Iowa:* 1868, State *v.* Vincent, 24 Ia. 570, 574 (excluded); *Ill.* 1853, Gates *v.* People, 14 Ill. 433, 438 (left undecided); 1873, Stolp *v.* Blair, 68 Ill. 541, 543 (excluded); *Me.* 1875, Sidelinger *v.* Bucklin, 64 Me. 373, 375 (excluded); *N. Car.* 1849, State *v.* Dove, 10 Ire. 469, 473 (admitted); 1854, March *v.* Harrell, 1 Jones L. 329 (same); State *v.* Thomason, 1 Jones L. 274 (same); *Pa.* 1823, Henderson *v.* Jones, 10 S. & R. 322 (admitted); *Vt.* 1839, Munson *v.* Hastings, 12 Vt. 346, 347, 350 (excluded, after impeachment as to no knowledge of a Supreme Being or of the obligation of an oath); 1841, Gibbs *v.* Linsley, 13 Vt. 208, 215 (same; general bad character).

In New York the evidence was at first received: 1826, Jackson *v.* Etz, 5 Cow. 314, 320; 1834, People *v.* Vane, 12 Wend. 78; 1838, People *v.* Rector, 19 Wend. 569, 583 (admissible after "general impeaching evidence"); but later decisions repudiated these: 1840, Robb *v.* Hackley, 23 Wend. 50.

Besides the above Courts, those mentioned *post*, § 1130, which admit prior consistent statements after "any impeaching evidence" would of course admit them after an impeachment of general character. For their use after impeachment by *particular crimes*, see *post*, § 1131.

§ 1126. [1] This latter argument is unsound, for no one has ever thought of requiring that the consistent statements, to be admissible, should have been made freshly after the event; except in rape cases (*post*, § 1134).

tation of inconsistency; for it follows not, because the witness had sometimes told the tale delivered by him at the bar, that he had never told a different one. If it be supposed that they rebut the inference to be drawn from the fact of contradiction by decreasing its force, they still leave the witness more exposed than ever to the charge of vacillation; and how he is confirmed by being left in a predicament so unfavorable to his veracity is not easy to comprehend."

1858, BIGELOW, J., in *Com.* v. *Jenkins*, 10 Gray 488: "It did not relieve the difficulty, or in any degree corroborate the last story told by the witness, to show that previously he had made similar statements of the transaction. . . . The utmost that could be claimed for it in this view would be that it rendered the last statement more probable and worthy of credit, because, although the witness had made a contradictory statement, he had made another statement similar to those to which he had testified before the jury. But such a corroboration is altogether too slight and remote; indeed, if admitted and followed out to its legitimate results, it might properly lead to a protracted inquiry to ascertain which of the two statements had been made most frequently by the witness; and when this was determined, then it would be necessary to ask the jury to believe the witness if he had repeated the statement made before them a greater number of times than the contradictory one which had been proved to impeach his evidence. It is obvious that such a course of inquiry would furnish no means by which the credit due to the testimony of a witness could be satisfactorily ascertained."

But this answer, forceful as it seems at first sight, is itself in one respect based on a fallacy. "The imputation on his veracity," says Mr. Phillipps,[2] and others use similar terms, "results from *the fact* of his having contradicted himself, and this is not in the least controverted . . . by the evidence in question." But is it a *proved fact* that he has uttered the self-contradiction? And may not the consistency of his other statements help with the jury to controvert the assumption that he did utter the contradiction? The jury have still to determine whether they will believe the witnesses who say that he did in fact utter it; and if his consistency at other times can assist them in reaching a conclusion upon this fundamental point, it is relevant. That it may so assist them has been clearly pointed out by a few Courts:

1871, COOLEY, J., in *Stewart* v. *People*, 23 Mich. 74: "This question appears to us to be one of no ordinary difficulty. If it were an established fact that the witness had made the contradictory statements, we should say that the supporting evidence here offered was not admissible. If a witness has given different accounts of an affair on several different occasions, the fact that he has repeated one of these accounts oftener than the opposite one can scarcely be said to entitle it to any additional credence. A man untruthful out of court is not likely to be truthful in court; and where the contradictory statements are proved, a jury is generally justified in rejecting the testimony of the witness altogether. But in these cases the evidence of contradictory statements is not received until the witness has denied making them, so that an issue is always made between the witness sought to be impeached and the witness impeaching him. The jury, therefore, before they can determine how much the contradictory statements ought to shake the credit of the witness, are required first to find from conflicting evidence whether he made them or not. . . . Now there are many cases in which, if evidence is given of statements made by a witness in conflict with those he has sworn to, his previous statements should not only be received in support of his credit, but would tend very strongly in that direction. If, for instance, the witness is himself the prosecutor, and has already made sworn complaint, there could be

[2] Evidence, 6th Am. ed., 307.

no doubt, we suppose, that the pendency of this complaint, its contents and the relation of the witness to it, might be put in evidence, and that they would raise a strong probability that the testimony as to conflicting accounts, as having been given about the same time, was either mistaken or corrupt. Suppose a person to be testifying in a case in which he had spent a considerable period of time and a large sum of money in pursuing an alleged criminal to conviction, and he is confronted with evidence of his own conflicting statements; the rule would be exceedingly unjust, as well as unphilosophical, which should preclude his showing, at least by his own evidence, such circumstances of his connection with the case as would make the impeaching evidence appear to be at war with all the probabilities. And other cases may readily be supposed in which, under the peculiar circumstances, the fact that the witness has always previously given a consistent account of the transaction in question might well be accepted by the jury as almost conclusive that he had not varied from it in the single instance testified to for the purpose of impeachment. — It is impossible to lay down any arbitrary rule which could be properly applied to every case in which this question could arise; but we think that there are some cases in which the peculiar circumstances would render this species of evidence important and forcible. The tender age of the principal witness might sometimes be an important consideration; and the fact that the previous statement was put in writing — as it was in this instance — at a time when it would be reasonably free from suspicion might very well be a controlling circumstance. We think the circuit judge ought to be allowed a reasonable discretion in such cases, and that though such evidence should not generally be received, yet that his discretion in receiving it ought not to be set aside except in a clear case of abuse." [3]

This argument seems unanswerable. It does not deny the correctness of the preceding argument, which points out that a consistent statement does not explain away a self-contradiction; but it shows that argument to rest upon the assumption that there has been a self-contradiction, and it reminds us that consistency of statement may serve to overthrow that assumption. This third view, however, has rarely been noticed.

Most Courts accept or reject this kind of evidence according as they are moved by the first or the second argument above.[4]

[3] A similar exposition is made by Johnson, J., in Lyles *v.* Lyles, 1 Hill Eq. S. C. 78 (1833); and the theory is approved, *semble*, in State *v.* Turley, 87 Vt. 163, 88 Atl. 562.

[4] ENGLAND: 1754, Canning's Trial, 19 How. St. Tr. 508, and *passim* (admitted);
UNITED STATES: *Federal:* 1816, Wright *v.* Deklyne, 1 Pet. C. C. 19, 203 (admitted); 1834, Ellicott *v.* Pearl, 1 McLean 206, 211 (excluded); 1836, Ellicott *v.* Pearl, 10 Pet. 412, 439 (same); 1850, Conrad *v.* Griffey, 11 How. 480, 490, *semble* (admissible);
Alabama: 1852, Nichols *v.* Stewart, 20 Ala. 358, 361 (excluded); 1873, Sonneborn *v.* Bernstein, 49 Ala. 168, 171, *semble* (same); 1895, Jones *v.* State, 107 Ala. 93, 18 So. 237 (same);
Arkansas: 1906, Burks *v.* State, 78 Ark. 271, 93 S. W. 983 (similar statements, not admitted, though the witness denied making the self-contradictory ones; rule of Cooley, J., in Stewart *v.* People, Mich., *supra*, repudiated);
California: 1874, People *v.* Doyell, 48 Cal. 85, 90 (excluded); 1887, Barkly *v.* Copeland, 74 id. 1, 4 (same); 1891, Mason *v.* Vestal, 88 id. 396, 389, 26 Pac. 213 (same);
Georgia: 1889, McCord *v.* State, 83 Ga. 521, 531, 10 S. E. 437, *semble* (excluded); 1874, Georgia R. Co. *v.* Oaks, 52 Ga. 410, 416 (excluded); 1893, Fussell *v.* State, 93 id. 450, 456, 21 S. E. 97 (same); 1901, Knight *v.* State, 114 id. 48, 39 S. E. 928 (same); 1906, Cook *v.* State, 124 Ga. 653, 53 S. E. 104 (same);
Illinois: 1873, Stolp *v.* Blair, 68 Ill. 541, 543 (left undecided); 1904, Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443 (excluded); 1909, Reavely *v.* Harris, 239 Ill. 526, 88 N. E. 238 (excluded);
Indiana: 1837, Coffin *v.* Anderson, 4 Blackf. 395, 398 (admitted, and in the following five cases); 1842, Beauchamp *v.* State, 6 Blackf. 299, 308; 1853, Perkins *v.* State, 4 Ind. 222; 1867, Dailey *v.* State, 28 Ind. 285; 1876, Brookbank *v.* State, 55 Ind. 169, 172; 1881, Carter *v.* Carter, 79 Ind. 466; 1885, Hodges *v.* Bales, 102 Ind. 494, 500, 1 N. E. 692 (excluded); 1888, Logansport P. & G. T. Co. *v.* Heil, 118 Ind. 135, 136, 20 N. E. 703, *semble* (same);

1892, Hobbs *v.* State, 133 Ind. 404, 407, 32 N. E. 1019 (admitted); 1897, Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31, *semble* (admitted); 1897, Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 158 (same); 1905, Hicks *v.* State, 165 Ind. 440, 75 N. E. 641 (admitted; but only such statements as corroborate the impeached parts, not other parts, of the testimony); 1913, Hopkins *v.* State, 180 Ind. 293, 102 N. E. 851 (admitted);
Iowa: 1868, State *v.* Vincent, 24 Ia. 570, 574 (excluded);
Kansas: 1883, State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050 (admitted; modifying State *v.* Petty, 21 Kan. 54); 1903, State *v.* Nelson, 65 Kan. 419, 70 Pac. 355;
Louisiana: 1894, State *v.* Cady, 46 La. An. 1346, 1349, 16 So. 195 (same);
Maine: 1874, State *v.* Reed, 62 Me. 147 (admitted);
Maryland: 1871, McAleer *v.* Horsey, 35 Md. 439, 465 (left undecided); St. 1874, c. 386, Ann. Code 1914, Art. 35, § 3 (prohibits such corroboration for parties to the cause; quoted *ante*, § 488); 1890, Mallonee *v.* Duff, 72 Md. 283, 287, 19 Atl. 708 (statute applied);
Massachusetts: 1858, Com. *v.* Jenkins, 10 Gray 485, 487 (excluded); 1890, Hewett *v.* Corey, 150 Mass. 445, 23 N. E. 223 (same); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127;
Michigan: 1868, Brown *v.* People, 17 Mich. 429, 435 (excluded); 1871, Stewart *v.* People, 23 Mich. 63, 74 (admissible or not in the trial Court's discretion; see quotation *supra*); 1921, People *v.* Purman, 216 Mich. 430, 185 N. W. 725 (knowing receipt of stolen goods; corroboration by prior similar statements, allowed, after cross-examination; purporting to follow Stewart *v.* People, but obviously not understanding its peculiar point);
Mississippi: 1870, Head *v.* State, 44 Miss. 731, 751 (excluded);
Missouri: 1896, State *v.* Taylor, 134 Mo. 109, 35 S. W. 92 (excluded); 1903, State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194 (similar statements of a dying declarant, excluded); 1904, State *v.* Sharp, 183 Mo. 715, 82 S. W. 134 (admitted, purporting to follow State *v.* Taylor, *supra*); 1913, State *v.* Maggard, 250 Mo. 335, 157 S. W. 354 (admitted, following State *v.* Sharp);
Montana: 1901, Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884 (excluded);
New Hampshire: 1833, French *v.* Merrill, 6 N. H. 465, 467 (admitted; but treated as involving a question of recent fabrication); 1860, Reed *v.* Spaulding, 42 N. H. 114, 117, 122 (excluded; the preceding case in this aspect discredited); 1866, Judd *v.* Brentwood, 46 N. H. 430 (excluded);
New York: the evidence was at first received: 1826, Jackson *v.* Etz, 5 Cow. 314, 320; 1834, People *v.* Vane, 12 Wend. 78; 1836, People *v.* Moore, 15 Wend. 420, 423; 1838, People *v.* Rector, 19 Wend. 569, 583, per Cowen, J.; Bronson, J., diss.: but later decisions repudiated these and declared the evidence inadmissible: 1840, Robb *v.* Hackley, 23 Wend. 50; Dudley *v.* Bolles, 24 Wend. 465, 472;
North Carolina: 1822, Johnson *v.* Patterson, 2 Hawks 183 (admitted); State *v.* Twitley, 2 Hawks 449 (same, and in following cases); 1848, State *v.* George, 8 Ire. 324, 328; 1849, Hoke's Ex'rs *v.* Fleming, 10 Ire. 263, 266; State *v.* Dove, 10 Ire. 469, 473; 1845, March *v.* Harrell, 1 Jones L. 329; State *v.* Thomason, 1 Jones L. 274;
Ohio: 1906, Cincinnati Traction Co. *v.* Stephens, 75 Oh. 171, 79 N. E. 235 (excluded, where the witness admitted the making of the inconsistent statements);
Oklahoma: 1908, Driggers *v.* U. S., 21 Okl. 60, 95 Pac. 612 (excluded);
Pennsylvania: 1807, Turnbull *v.* O'Hara, 4 Yeates 446, 451, *semble* (admitted); 1815, Packer *v.* Gonsalus, 1 S. & R. 526, 536 (same); 1821, Foster *v.* Shaw, 7 S. & R. 156, 162 (same); 1823, Henderson *v.* Jones, 10 S. & R. 322 (same); 1835, Craig *v.* Craig, 5 Rawle 91 (treating the matter as doubtful); 1847, McKee *v.* Jones, 6 Pa. 425, 428 (admitted); 1890, Crooks *v.* Bunn, 136 Pa. 368, 371, 20 Atl. 529 (admitted, but qualified as "sometimes and in some circumstances competent");
South Carolina: 1833, Lyles *v.* Lyles, 1 Hill Eq. 77 (admitted); 1848, State *v.* Thomas, 3 Strobh. 269, 271 (excluded, where "inconsistencies were apparent" in his testimony); 1904, State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384 (excluded);
Tennessee: 1848, Story *v.* Saunders, 8 Humph. 663, 666, *semble* (excluded); 1855, Dossett *v.* Miller, 3 Sneed 72, 76 (admitted; not citing the preceding case); 1860, Queener *v.* Morrow, 1 Coldw. 123, 134 (same); 1872, Third Nat'l Bank *v.* Robinson, 1 Baxt. 479, 484 (same); 1880, Hayes *v.* Cheatham, 6 Lea 1, 10 (same); 1890, Glass *v.* Bennett, 89 Tenn. 478, 481, 14 S. W. 1085 (same); 1891, Graham *v.* McReynolds, 90 Tenn. 673, 694, 18 S. W. 272 (reviewing the cases and discarding Story *v.* Saunders);
Texas: 1894, Goode *v.* State, 32 Tex. Cr. 505, 508, 24 S. W. 102 (admitted); 1898, Red *v.* State, 39 Tex. Cr. 414, 40 S. W. 408 (admissible, when "shortly after the occurrence and before any inducement to falsify his testimony"); 1920, Taylor *v.* State, 87 Tex. Cr. 330, 221 S. W. 611 (homicide; later consistent statements here admitted, apparently on the principle of Stewart *v.* People, Mich.);
Vermont: 1839, Munson *v.* Hastings, 12 Vt. 346, 350, *semble* (excluded); 1841, Gibbs *v.* Linsley, 13 Vt. 208, 215 (same); 1888, State *v.* Flint, 60 Vt. 307, 310, 319, 14 Atl. 178 (same); 1899, Lavigne *v.* Lee, 71 Vt. 167, 42 Atl. 1093 (same); 1913, State *v.* Turley, 87 Vt. 163, 88 Atl. 563;
Washington: 1900, State *v.* Coates, 22 Wash. 601, 61 Pac. 726 (admitted where the contradictory statement was made under duress).

From the foregoing prohibition, however (as obtaining in most Courts), must be distinguished the case where the impeaching inconsistency consists, not in an express statement, but in *conduct* (*ante*, §§ 1040, 1042) implying an inconsistency; for here the implication may convincingly be removed by statements at or about the time which explain the conduct and refute the imputation that the present explanation is an afterthought.[5]

It is sometimes said, by Courts admitting consistent statements, that they must have been *uttered before the self-contradiction;*[6] though this seem an unnecessary refinement.

It has also been said that the permission, when granted, to corroborate by consistent statements does not apply to a *party*, even when he is a witness, against whom admissions have been used;[7] but this is unsound.[8]

§ 1127. **Offered (4) after Impeachment by Contradiction.** A former consistent statement helps in no respect to remove such discredit as arises from a contradiction by other witnesses. When B is produced to swear to the contrary of what A has asserted on the stand, it cannot help us, in deciding between them, to know that A has asserted the same thing many times previously. If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible. Nevertheless, a few Courts see fit to receive the evidence, misled by the traditional notion that it has some force.[1]

[5] 1890, Hewitt *v.* Corey, 150 Mass. 445, 23 N. E. 223 (H. testified that a horse, the subject of an alleged conversion, was his wife's, not his own; his former inclusion of the horse in a chattel mortgage is shown in impeachment; he is allowed to show, in explanation, that it was so included by mistake, and that he so told the mortgagees shortly afterwards); 1880, Zell *v.* Com., 94 Pa. 258, 266, 273 (poisoning K.; R. testified to severe illness while calling at K.'s house at the same time; to discredit this, it was shown that on her way walking home she met two friends and did not mention the illness; to explain away this, evidence was admitted that on her way home she did stop at another friend's and told of her illness); 1859, State *v.* Dennin, 32 Vt. 158, 161 (arson; the identifying witnesses' former testimony at the preliminary examination being less positive and suggesting recent contrivance, evidence was admitted of their having caused the defendant's arrest immediately after the fire, as indicating a complete recognition at the time).

The following case shows the distinction between this and the ordinary principle: 1868, Brown *v.* People, 17 Mich. 429, 435 (to fix the date of an alibi, W. testified that it was Aug. 1; that he told another person on Aug. 2 that he had seen the defendant at the place the night before, excluded).

Compare the principles of §§ 1129, 1131, *post*.

[6] *Fed.* 1836, Ellicott *v.* Pearl, 10 Pet. 412, 440, per Story, J., *semble;* 1850, Conrad *v.* Griffey, 11 How. 480, 491 (because "it is possible, if not probable, that the inducement to make them is for the very purpose of counteracting those first uttered"); *Tenn.* 1860, Queener *v.* Morrow, 1 Coldw. 123, 134 (for this would otherwise allow "every unprincipled witness to bolster up his credit"; moreover, here the statements were made under apparent hope of obtaining thereby a discharge from jail); 1891, Graham *v.* McReynolds, 90 Tenn. 673, 697, 18 S. W. 272.

Contra: 1876, Brookbank *v.* State, 55 Ind. 169, 172; 1883, State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050; 1920, Taylor *v.* State, 87 Tex. Cr. 330, 221 S. W. 611.

[7] 1888, Logansport & P. G. T. Co. *v.* Heil, 118 Ind. 135, 20 N. E. 703; Md. St. 1874, c. 386, and Pub. Gen. L. 1888, Art. 35, § 2 (quoted *ante*, § 488); 1890, Mallonee *v.* Duff, 72 Md. 283, 287, 19 Atl. 708.

[8] Examples of such use (cited also *supra* and *infra*): 1860, Reed *v.* Spaulding, 42 N. H. 114, 117, 123; 1866, Judd *v.* Brentwood, 46 N. H. 430; 1868, Washington Fire Ins. Co. *v.* Davison, 30 Md. 92, 104; 1871, McAleer *v.* Horsey, 35 Md. 439, 464; 1881, McLeod *v.* Bullard, 84 N. C. 515, 529; 1894, Wallace *v.* Grizzard, 114 N. C. 488, 19 S. E. 760.

But whether, *without the party being a witness*, his consistent claims can be used in general to rebut his admissions is a different question: *post*, § 1133.

§ **1127.** [1] *Fed.* 1816, Wright *v.* Deklyne, 1

§ 1128. **Offered (5) after Impeachment by Bias, Interest, or Corruption; Statements of an Accomplice.** (1) A consistent statement, at a *time prior* to the existence of a fact said to indicate Bias, Interest, or Corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence. The former statements are therefore admissible:[1]

Pet. C. C. 199, 203, *semble* (excluded); 1906, Inman *v.* Dudley & D. L. Co., 146 Fed. 449, 456, C. C. A. (excluded); *D. C.* 1880, U. S. *v.* Neverson, 1 Mackey 152, 169 (admitted); *Ill.* 1873, Stolp *v.* Blair, 68 Ill. 541, 543 (excluded); *Ind.* 1881, Carter *v.* Carter, 79 Ind. 466, 468 (excluded); 1885, Hodges *v.* Bales, 102 Ind. 494, 500, 1 N. E. 692 (same); *Ia.* 1868, State *v.* Vincent, 24 Ia. 570, 574, *semble* (excluded); *Md.* 1823, Cooke *v.* Curtis, 6 H. & J. 93 (admitted, and in the following cases); 1868, Washington Fire Ins. Co. *v.* Davison, 30 Md. 92, 104; 1871, McAleer *v.* Horsey, 35 Md. 439, 463 (Stewart, J., diss.); 1874, Maitland *v.* Bank, 40 Md. 540, 559; 1878, Bloomer *v.* State, 48 Md. 521, 537; 1890, Mallonee *v.* Duff, 72 Md. 283, 287, 19 Atl. 708; 1901, Gill *v.* Staylor, 93 Md. 453, 49 Atl. 650 (entries in a book, treated as made by the witness himself, admitted to corroborate him, after impeachment by contradiction on a material point); 1905, Maryland Steel Co. *v.* Engleman, 101 Md. 661, 61 Atl. 314 (this sort of corroboration is not permitted for parties, under St. 1874, now Ann. Code 1914, Art. 35, § 3, cited *ante*, § 1126, n. 4); *Mo.* 1846, Riney *v.* Vanlandingham, 9 Mo. 807, 812 (excluded); *N. Y.* the evidence was at first received: 1834, People *v.* Vane, 12 Wend. 78, *semble;* but this case was later repudiated: 1840, Robb *v.* Hackley, 23 Wend. 50; Dudley *v.* Bolles, 24 Wend. 465, 472; *N. C.* 1854, March *v.* Harrell, 1 Jones L. 329 (admitted); 1874, Bullinger *v.* Marshall, 70 N. C. 520, 524 (same); 1879, State *v.* Blackburn, 80 N. C. 474, 478 (dying declarant); 1881, McLeod *v.* Bullard, 84 N. C. 515, 529; 1894, Wallace *v.* Grizzard, 114 N. C. 488, 19 S. E. 760; *Pa.* 1823, Henderson *v.* Jones, 10 S. & R. 322 (admitted); 1877, Hester *v.* Com., 85 Pa. 139, 158, *semble* (same); *Tenn.* 1890, Glass *v.* Bennett, 89 Tenn. 478, 481, 14 S. W. 1085, *semble* (admitted where the impeachment merely offered contrary facts, not self-contradictions, but the Court treated them as the latter); *Vt.* 1839, Munson *v.* Hastings, 12 Vt. 346, 350 (excluded).

§ 1128. [1] The evidence was held admissible, except as otherwise noted: *Eng.* 1803, Clare's Trial, 28 How. St. Tr. 899 (after insinuations that the witness had been motivated by a reward); *U. S. Ala.* 1895, Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; *Cal.* 1874, People *v.* Doyell, 48 Cal. 85, 90, *semble;* 1887, Barkly *v.* Copeland, 74 Cal. 1, 5, 15 Pac. 307 (before the time of an alleged offer of a bribe); 1888, Mason *v.* Vestal, 88 Cal. 396, 398, 26 Pac. 213, *semble; Ga.* 1889, McCord *v.* State, 83 Ga. 521, 530, 10 S. E. 437 (before the time of an alleged bribery); *Ill.* 1853, Gates *v.* People, 14 Ill. 433, 438; 1873, Stolp *v.* Blair, 68 Ill. 541, 543; 1904, Waller *v.* People, 209 Ill. 284, 70 N. E. 681; *Ia.* 1868, State *v.* Vincent, 24 Ia. 570, 575; 1868, Boyd *v.* Bank, 25 Ia. 257; 1917, Lingenfelter *v.* St. Clair, 179 Ia. 11, 161 N. W. 87, 93 (defendant's statement after a contract made, excluded on the facts); *La.* 1894, State *v.* Cady, 46 La. An. 1346, 1349, 16 So. 195 (*semble*, the principle conceded, but held not applicable where the proponent of the witness had himself shown the fact indicating bias); *Mass.* 1858, Com. *v.* Jenkins, 10 Gray 485, 488 (admissible, after evidence that "he is under a strong bias or in such a situation as to put him under a sort of mental duress to testify in a particular way"); 1890, Hewitt *v.* Corey, 150 Mass. 445, 23 N. E. 223 (same); *Mo.* 1896, State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; 1913, State *v.* Maggard, 250 Mo. 335, 157 S. W. 352; *N. H.* 1860, Reed *v.* Spaulding, 42 N. H. 114, 123; 1866, Judd *v.* Brentwood, 46 N. H. 430; *N. Y.* 1840, Robb *v.* Hackley, 23 Wend. 50 (admissible, after evidence that the witness speaks "under the influence of some motive prompting him to make a false or colored statement"); *N. C.* 1891, State *v.* Brabham, 108 N. C. 793, 13 S. E. 217 (deceased's son); *Okl.* 1908, Driggers *v.* U. S., 21 Okl. 60, 95 Pac. 612 (admissible); *Tenn.* 1855, Dossett *v.* Miller, 3 Sneed 72, 76; 1860, Queener *v.* Morrow, 1 Coldw. 123, 134; 1880, Hayes *v.* Cheatham, 6 Lea 1, 10, *semble;* 1890, Glass *v.* Bennett, 89 Tenn. 478, 481, 14 S. W. 1085, *semble;* 1900, Nashville C. & St. L. R. Co. *v.* Lawson, 105 Tenn. 639, 58 S. W. 480; 1903, Legere *v.* State, 111 Tenn. 368, 77 S. W. 1059 (rule conceded, but held not applicable on the facts); 1922, Lyles *v.* State, — Tenn. —, 239 S. W. 446 (murder; rule applied to exclude certain statements); *Tex.* 1906, Welch *v.* State, 50 Tex. Cr. 28, 95 S. W. 1035 (excluded on the facts); 1906, Anderson *v.* State, 50 Tex. Cr. 134, 95 S. W. 1037 (excluded on the facts); 1915, Blackburn *v.* State, Tex. Cr., 180 S. W. 268 (larceny; explaining Hudson *v.* State, 49 Tex. Cr. 24); 1915, Hopkins *v.* State, Tex. Cr., 180 S. W. 1096 (rape); 1916, Gleason *v.* State, — Tex. Cr. —, 183 S. W. 891; 1920, Marable *v.* State, 87 Tex. Cr. 28, 219 S. W. 455 (collecting prior cases); 1921, Coleman *v.* State, 90 Tex. Cr. 297, 235 S. W. 898 (larceny); 1922, Nations *v.* State, — Tex. Cr. —, 237 S. W.

1806, Mr. *W. D. Evans*, Notes to Pothier, II, 247: "If a witness speaks to facts negativing the existence of a contract, and insinuations are thrown out that he has a near connection with the party on whose behalf he appears, that a change of market or any other alteration of circumstances has excited an inducement to recede from a deliberate engagement, the proof by unsuspicious testimony that a similar account was given when the contract alleged had every prospect of advantage removes the imputation resulting from the opposite circumstance, and the testimony is placed upon the same level which it would have if the motives for receding from a previous intention had never had existence."

(2) An *accomplice*, whether a co-indictee or not, is always under a suspicion of discredit, implied from his interest to screen himself and to secure the conviction of his companions (*ante*, § 967); and he is usually required to be corroborated by other witnesses (*post*, § 2056). Is it permissible to support him by the fact that he told a consistent story before taking the stand? It would seem not;[2] unless by some mode of impeachment some other principle (*supra*, par. 1; *post*, § 1129) becomes applicable.

§ 1129. **Offered** (6) **after Impeachment as to Recent Contrivance.** Impeachment on the ground of Recent Contrivance must be distinguished (as it is not always) from the foregoing ground. It is more nearly connected with the case of impeachment by Self-Contradiction. The charge of Recent Contrivance is usually made, not so much by affirmative evidence, as by negative evidence that the witness did *not* speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now, *i.e.* as a Self-Contradiction (*ante*, § 1042). The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story.

In judicial rulings, this use of former similar statements is universally conceded to be proper;[1] though occasionally it is difficult to apply the principle to the facts.

570 (after evidence of a promise of immunity); *Utah:* 1898, Ewing *v.* Keith, 16 Utah 312, 52 Pac. 4 (the interest arising from being a party to the litigation, held not sufficient); *Vt.* 1888, State *v.* Flint, 60 Vt. 304, 307, 316, 14 Atl. 178 (undue influence of an interested person); 1905, State *v.* Bean, 77 Vt. 384, 70 Atl. 807 (State *v.* Flint followed); 1913, State *v.* Turley, 87 Vt. 163, 88 Atl. 562 (evidence held here not to be within the rule).

The statement in Reed *v.* Spaulding, 42 N. H. 123 (1860), that the sustaining statement "must have been, or at least appeared to be, directly against his interests," is not sound.

[2] 1895, State *v.* Callahan, 47 La. An. 444, 455, 17 So. 50 (by a majority); 1895, State *v.* Dudoussat, 47 La. An. 977, 17 So. 685; 1901, State *v.* Williams, 129 N. C. 581, 40 S. E. 84 (co-defendant, after verdict of not guilty entered by consent); 1906, Green *v.* State, 49 Tex. Cr. 238, 90 S. W. 1115.

Contra: 1834, People *v.* Vane, 12 Wend. N. Y. 78, 79; 1913, People *v.* Katz, 209 N. Y. 311, 103 N. E. 305 (People *v.* Vane said to be still law).

§ **1129**. [1] Compare with the following the cases in § 1126, *ante*, note 5: ENGLAND: 1913, Benjamin's Case, 8 Cr. App. 146 (detective's note-book entry); IRELAND: 1917, Flanagan *v.* Fahy, 2 Ir. R. 361 (will-forgery; similar statements made prior to the time of alleged motive of fabrication, admitted; Coll's Case, 24 L. R. Ire. 522, and other cases, explained; elaborate examination of the principle in the opinions); CANADA: 1819, R. *v.* Neigel, 39 D. L. R. 154, Alta. (murder; F. testifying for the prosecution as to an admission by defendant was discredited by evidence of a prior inconsistent statement; held that the

prosecution could show the witness' still earlier consistent statement; per Beck, J., "to rebut the charge that his story as told at the trial was an afterthought"; following R. *v.* Benjamin); UNITED STATES: *Federal:* 1836, Ellicott *v.* Pearl, 10 Pet. 412, 439 ("where the testimony is assailed as a fabrication of a recent date or a complaint recently made"); *California:* 1912, People *v.* Ferrara, 18 Cal. App. 271, 122 Pac. 1089 (identification of accused); *Georgia:* 1902, Atlanta K. & N. R. Co. *v.* Strickland, 116 Ga. 439, 42 S. E. 864 (not admitted, where the opponent had impeached the witness' testimony as "manufactured"; the opinion ignores the principle involved); 1904, Sweeney *v.* Sweeney, 121 Ga. 293, 48 S. E. 984; *Idaho:* 1911, State *v.* Louie Moon, 20 Ida. 202, 117 Pac. 757; *Illinois:* 1904, Waller *v.* People, 209 Ill. 284, 70 N. E. 681 (the witness was impeached by certain former narrations of his omitting an essential fact; his statement at the time of the occurrence, including that fact, was admitted); *Iowa:* 1865, State *v.* Cruise, 19 Ia. 312 (whether the defendant was at a place on the 14th was essential; the defendant admitted that he was there on the 7th; a statement of his made on the 9th, and speaking of having been there already, was admitted, as it was conceded that he had been there only once); 1868, State *v.* Vincent, 24 Ia. 570, 575; 1906, Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501 (the present exception held not applicable on facts); *Kansas:* 1900, Board *v.* Vickers, 62 Kan. 25, 61 Pac. 391; 1907, National Cereal Co. *v.* Alexander, 75 Kan. 537, 89 Pac. 923 (principle applied); *Louisiana:* 1895, State *v.* Dudoussat, 47 La. 977, 17 So. 685 (where the prosecuting witness' statements were charged to be fabricated); *Maryland:* 1896, Baltimore C. P. R. Co. *v.* Knee, 83 Md. 77, 81, 34 Atl. 252 (but here the impeachment was by testimony that the witness was absent at the time of the event he testified to, and a former general statement made a few days after the event was rejected as not "supplying a test of witness' recollection as well as of his integrity"); 1909, Lanasa *v.* State, 109 Md. 602, 71 Atl. 1058 (a statement made to a detective by a co-indictee 39 days after the crime, excluded); *Massachusetts:* 1854, Com. *v.* Wilson, 1 Gray 338, 340 (similar statement at the time of the original event, admitted after a cross-examination directed to show concealment of his testimony until recently; said to be admissible where the opponent "has sought to impeach the witness on cross-examination"); 1858, Com. *v.* Jenkins, 10 Gray 485, 489 (after a showing that he "formerly withheld or concealed the facts", admissible); 1890, Hewitt *v.* Corey, 150 Mass. 445, 23 N. E. 223 (same); 1904, Com. *v.* Kelly, 186 Mass. 403, 71 N. E. 807 (here, to rebut an alleged failure of the witness to identify the accused at the time); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (rule recognized); 1910, Webb G. & C. Co. *v.* Boston & M. R. Co., 206 Mass. 572, 92 N. E. 717 (the trial Court's discretion to control); *New Hampshire:* 1833, French *v.* Merrill, 6 N. H. 465, 467; 1860, Reed *v.* Spaulding, 42 N. H. 114, 123; *New York:* 1848, People *v.* Finnegan, 1 Park. Cr. C. 147, 151; 1890, Hesdra's Will, 119 N. Y. 615, 618, 23 N. E. 555 (deceased attesting witness' declarations during H.'s lifetime that H. had made a will, received to rebut his declarations after H.'s death that he had forged a will for H.; unsound); 1913, People *v.* Katz, 209 N. Y. 311, 103 N. E. 305 (accomplice testifying under promise of immunity; his statement written down shortly after arrest and a year before the promise, admitted); 1915, Ferris *v.* Sterling, 214 N. Y. 249, 108 N. E. 406 (ownership of an insurance policy; prior letters held admissible); *Oklahoma:* 1908, Driggers *v.* U. S., 21 Okl. 60, 95 Pac. 612 (admissible); *Pennsylvania:* 1835, Craig *v.* Craig, 5 Rawle 91, 98; 1847, McKee *v.* Jones, 6 Pa. St. 425, 429; 1912, Lyke *v.* Lehigh Valley R. Co., 236 Pa. 38, 84 Atl. 595 (rule not clearly stated); *South Dakota:* 1901, State *v.* Caddy, 15 S. D. 167, 87 N. W. 927; 1907, McClellan's Estate, 21 S. D. 209, 111 N. W. 540 (prior consistent statements, admitted to explain away the suggestion of recent fabrication; former opinion modified, as applied to the evidence here offered); *Tennessee:* 1860, Queener *v.* Morrow, 1 Coldw. 123, 134; 1880, Hayes *v.* Cheatham, 6 Lea 1, 10; 1890, Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085, *semble*; *Texas:* 1886 Lewy *v.* Fischl, 65 Tex. 312, 318 (partnership); 1901, Ætna Ins. Co. *v.* Eastman, 95 Tex. 34, 64 S. W. 863; *Utah:* 1894, Silva *v.* Pickard, § 481, 10 Utah 78, 89, 37 Pac. 86; 1897, State *v.* Carrington, 15 Utah 480, 50 Pac. 526, *semble*; *Vermont:* 1839, Munson *v.* Hastings, 12 Vt. 346, 350 ("cases where the silence of the witness would operate strongly to discredit the fact afterwards sworn to, as in the case of bastardy, rape, robbery, and the like"); 1888, State *v.* Flint, 60 Vt. 304, 309, 317, 14 Atl. 178 (testimony of an accomplice as to tools in the defendant's trunk; the suggestion being that the police had told him of their discovery, evidence was admitted that he so stated before they told him); *Virginia:* 1911, Jessie *v.* Com., 112 Va. 887, 71 S. E. 612 (statements by one also accused, made before the accusation, admitted); *Washington:* 1902, Callihan *v.* W. W. Power Co., 27 Wash. 154, 67 Pac. 697 (written report of car-conductor, made to his superior before knowledge of the injury to the plaintiff, admitted in corroboration); 1917, State *v.* Spisak, 94 Wash. 566, 162 Pac. 998 (assault; prior consistent statements admissible "when testimony is assailed as a recent fabrication"; earlier rulings explained); 1919, State *v.* Baniff, 105 Wash. 327, 177 Pac. 801 (larceny of horses; the statements here excluded);

An analogous situation seems the follow-

§ 1130. **Same: Statements Identifying an Accused, on a Former Occasion; Statements serving to Fix a Time or Place.** (1) Ordinarily, when a witness is asked to *identify* the assailant, or thief, or other person who is the subject of his testimony, the witness' act of pointing out then and there the accused (or other person) is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him.[1] The situation is practically the same as when Recent Contrivance is alleged. To corroborate the witness, therefore, it is entirely proper (on the principle of § 1129, *ante*) to prove that *at a former time*, when the suggestions of others could not have intervened to create a fancied recognition in the witness' mind, he recognized and declared the present accused to be the person. If, moreover (as sometimes is done) the person has been so placed among others that all probability of suggestion (by seeing him handcuffed, for example) is still further removed, the evidence becomes stronger. 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."

This is a simple dictate of common sense, and was never doubted in orthodox practice.[2] That some modern Courts are on record for rejecting such evidence

ing, where the evidence was thought admissible: 1878, State *v.* Parish, 79 N. C. 610, 613, per Reade, J. (where "from lapse of time his memory was impeached"); 1879, Jones *v.* Jones, 80 N. C. 247, 250 (same).

In Sugden *v.* St. Leonards, L. R. 1 P. D. 154, 189 (1876), the opinion of Hannen, J., admitted certain prior statements of the principal witness, made when her mind was presumably impartial.

§ **1130**. [1] For the light here thrown by experimental psychology, see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), particularly §§ 241, 290.

[2] *Accord:* ENGLAND: 1743, Annesley *v.* Anglesea, 17 How. St. Tr. 1139, 1195 ff.; 1847, R. *v.* Burke, 2 Cox Cr. 295 (quoted *supra*); 1853, R. *v.* Blackburn, 6 Cox Cr. 338 (like R. *v.* Burke, *supra*); 1866, R. *v.* Smith, London, Montague Williams' Reminiscences, "Leaves of a Life" (1890), I. 138 (the Cannon street murder; the police-inspector was allowed to prove the identification of the accused from among a number of other persons, by tests so devised as to avoid any suggestion); 1914, Christie's Case, A. C. 545, 10 Cr. App. 141 (indecent assault upon a little boy; the boy's identification of the accused, when arrested, within a few minutes after the act, held admissible, per L. C. Halsbury (without the details of the boy's statement), Lord Atkinson, and *semble* by Lord Reading).

UNITED STATES: *Alabama:* 1893, Beavers *v.* State, 103 Ala. 36, 15 So. 616 (murder; witness' recognition of the accused in custody, on the morning after the killing, admitted); *Kentucky:* 1920, Brown *v.* Com., 187 Ky. 829, 220 S. W. 1052 (rape; the woman's identification of the accused shortly after arrest, admitted); *Massachusetts:* 1820, Burk *v.* Kellough, 235 Mass. 405, 126 N. E. 787 (personal injury; the plaintiff's statement

is a telling illustration of the power of a technical rule of thumb to paralyze the judicial nerves of natural reasoning.

(2) Where the witness can verify his recollection of a *time* or *place* by the circumstance that *another person made a statement* to him, a different use of evidence is involved; the statement does not corroborate him by its similarity, for it may be otherwise irrelevant. The objection is based on the Hearsay rule (*post*, § 1791); but the cases are noted *ante*, § 416 (Identification).

§ 1131. **Offered (7) after Cross-examination or Impeachment of Any Sort.** The broad rule obtains in a few Courts that consistent statements may be admitted *after impeachment* of any sort, — in particular after any im-

identifying the spot where she fell, made at the time of taking a photograph, admitted to connect the photograph with the testimony); *New Jersey:* 1921, State *v.* Claymonst, — N. J. L. —, 114 Atl. 155 (rape; the child's identification of the accused at the hospital after the assault, admitted only because of the accused's silence; present principle not noticed); *Oregon:* 1921, State *v.* Won Wen Teung, 99 Or. 95, 195 Pac. 349 (murder; evidence admitted that a witness for the state "picked him out as the one I saw, the first time, in jail when the detective brought him in").

Contra: Arkansas: 1912, Warren *v.* State, 103 Ark. 165, 146 S. W. 477 (burglary; identification of the defendant by the house-occupant, immediately after arrest, excluded: "Prof. W.'s views on this subject are not in accord with the weight of authority"; but it is respectfully suggested that a more important inquiry would be whether they are in accord with sound principle, common sense, and universal practice in proof outside of the courtroom); *Illinois:* 1909, People *v.* Lukoszus, 242 Ill. 101, 89 N. E. 749 (no authority cited); *Iowa:* 1904, State *v.* Egbert, 125 Ia. 443, 101 N. W. 191; *New York:* 1914, People *v.* Jung Hing, 212 N. Y. 393, 106 N. E. 105 (identification at the police station just after arrest, to corroborate the witness' identification on the stand, excluded; it is really astonishing how reluctant modern courts are to accept this bit of common sense; the learned judge's reference to the above text pays it an undeserved compliment; because the above text unfortunately failed to express itself, as intended, to the learned reader; the text means to say that a prior act or utterance of identification by a now witness is, or ought to be, admissible *in chief*, whenever identity is in dispute, *without any conditions whatever as to impeachment on the ground of recent contrivance or any other ground*); 1916, People *v.* Bertlini, 218 N. Y. 584, 113 N. E. 541 (robbery; witnesses testified to the statements of the victim and a bystander, made in the magistrate's court, identifying the accused; held allowable here, because the defendant had introduced the subject and the prosecution was merely rebutting as to the spontaneity of the identification; distinguishing People *v.* Jung Hing, *supra;* this ruling nevertheless indorses the essential vice of the rule in People *v.* Jung Hing); 1917, People *v.* Seppi, 221 N. Y. 62, 116 N. E. 793 (homicide; identification by witnesses at the police office, excluded, following People *v.* Jung Hing); *Oregon:* 1903, State *v.* Houghton, 43 Or. 125, 71 Pac. 982 (like R. *v.* Burke, *supra;* excluded); 1920, State *v.* Evans, 98 Or. 214, 192 Pac. 1062 (assault and robbery; that the prosecuting witness identified accused when confronted in the jail, held inadmissible); *Texas:* 1899, Murphy *v.* State, 41 Tex. Cr. 120, 51 S. W. 940; 1906, Turman *v.* State, 50 Tex. Cr. 7, 95 S. W. 533 (rape; approving Murphy *v.* State, and prior cases; here the prosecutrix testified that as soon as she had identified the accused in the presence of the sheriff, and upon a further question by him, she fainted; the fainting was held improperly proved, as it "was calculated to greatly imperil and jeopardize the defendant's rights"; such a cautious rule defies reason); 1920, Cummings *v.* State, 87 Tex. Cr. 154, 219 S. W. 1104 (burglary; identification of the stolen shoes by persons seeing them when found, but in defendant's absence, held erroneous on principle, but not material error where afterwards at the trial the witnesses identified the articles; re-affirming the doctrine of Canada *v.* State, 29 Tex. App. 537, 16 S. W. 341, 24 S. W. 514); *Wisconsin:* 1908, Gillotti *v.* State, 135 Wis. 634, 116 N. W. 252 (a person robbed testified on cross-examination that he had shortly thereafter described the robbers to the sheriff; the sheriff's testimony to that description was excluded; Marshall, J., diss., in a careful opinion); 1920, State *v.* Hamilton, — Wis. —, 176 N. W. 773 (testimony of police-officers to the identification of defendant by P. at the police-station immediately after arrest, held "hearsay and incompetent"; following Gillotti *v.* State; is it not too advanced an age of intelligence for this heresy to receive any further sanction?).

Compare other cases cited *post*, § 1791 (verbal acts).

peachment by *cross-examination*.[1] But there is no reason for such a loose rule.

§ 1132. **Consistent Statements are not themselves Testimony; Impeached Witness himself may prove them.** (1) The consistent statements are not to be taken in themselves as additional testimony; being deemed (unsoundly) obnoxious to the Hearsay rule (*post*, § 1792); it is the fact of the consistent statement that affords the corroboration:[1]

1878, READE, J., in *State* v. *Parish*, 79 N. C. 614: "It must not be considered as substantive evidence of the truth of the facts any more than any other hearsay evidence. The fact that supporting a witness who testifies does indirectly support the facts to which he

§ 1131. [1] Some of these cases rest on the ground that moral character (*ante*, § 1125) is involved; the ruling favors admission, except as otherwise noted: *Illinois:* 1873, Stolp *v.* Blair, 68 Ill. 541, 543 (cross-examination); *Louisiana:* 1895, State *v.* Johnson, 47 La. An. 1225, 17 So. 789 (cross-examination to fraud); *Maryland:* 1823, Cooke *v.* Curtis, 6 H. & J. 93 ("where the credibility of a witness is attacked"); 1871, McAleer *v.* Horsey, 35 Md. 439, 467 (left undecided); 1913, Cross *v.* State, 118 Md. 660, 86 Atl. 223 (Cooke *v.* Curtis followed); *Massachusetts:* 1854, Com. *v.* Wilson, 1 Gray 338, 340 (cross-examination); *Missouri:* 1883, State *v.* Grant, 79 Mo. 113, 133 (if an "attack be made on the character of the witness"); 1890, State *v.* Whelehon, 102 Mo. 17, 21, 14 S. W. 730 (left undecided); 1896, State *v.* Taylor, 134 Mo. 109, 35 S. W. 92 (repudiating State *v.* Grant on this point, and denying this broad scope to the rule); 1904, State *v.* Sharp, 183 Mo. 715, 82 S. W. 134 (State *v.* Taylor approved); *New York:* 1834, People *v.* Vane, 12 Wend. 78 (an accomplice; evidence admitted); but later decisions entirely repudiate this principle, and sustain the foregoing case under the doctrine (*supra*, § 1128) of explaining away a supposed bias or interest: 1840, Robb *v.* Hackley, 23 Wend. 50, 53; *North Carolina:* 1822, State *v.* Twitty, 2 Hawks 449; 1848, State *v.* George, 8 Ire. 324, 328, *semble;* 1854, March *v.* Harrell, 1 Jones L. 329 (from "the nature of his evidence, from his situation, from bad character", from prior self-contradictions, or by imputations on cross-examination); State *v.* Thomason, ib. 274; 1874, Bullinger *v.* Marshall, 70 N. C. 520, 525; 1878, State *v.* Laxton, 78 N. C. 564; 1878, State *v.* Parish, 79 N. C. 610, 613; 1879, Jones *v.* Jones, 80 N. C. 246, 249 (admissible "to repel any imputations upon the credit of the witness"); 1880, Roberts *v.* Roberts, 82 N. C. 29, 31 (to sustain "assailed" testimony); 1885, State *v.* Rowe, 92 N. C. 629, 631; 1885, State *v.* Whitfield, 92 N. C. 831, 834; 1885, Davis *v.* Council, 92 N. C. 725, 730 (fraud); 1887, State *v.* Brewer, 98 N. C. 607, 3 S. E. 819 (impeachment on cross-examination); 1887, Davenport *v.* McKee, 98 N. C. 500, 506, 4 S. E. 545 ("when and however impeached"); 1888, State *v.* Freeman, 100 N. C. 429, 5 S. E. 921 ("whenever the witness is impeached and in whatever manner"); 1889, State *v.* Ward, 103 N. C. 419, 8 S. E. 814; 1890, State *v.* Morton, 107 N. C. 890, 12 S. E. 112; 1890, State *v.* Jacobs, 107 N. C. 873, 12 S. E. 248; 1891, Hooks *v.* Houston, 109 N. C. 623, 627, 14 S. E. 49; 1892, Gregg *v.* Mallett, 111 N. C. 74, 77, 15 S. E. 936; State *v.* McKinney, 111 N. C. 683, 16 S. E. 235; 1893, Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209; 1894, State *v.* Staton, 114 N. C. 813, 19 S. E. 96; 1894, Wallace *v.* Grizzard, 114 N. C. 488, 19 S. E. 760; 1897, Burnett *v.* Wilm. N. & N. R. Co., 120 N. C. 517, 26 S. E. 819; 1902, State *v.* Maultsby, 130 N. C. 664, 41 S. E. 97; 1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283 (why does the Court devote two pages discussing this rule, after it has been so long settled in this State?); 1912, Allred *v.* Kirkman, 160 N. C. 392, 76 S. E. 244; 1914, State *v.* Rodgers, 168 N. C. 112, 83 S. E 161; *Pennsylvania:* 1823, Henderson *v.* Jones, 10 S. & R. 332, *semble* (declaring in favor of "the generality of the rule"); 1877, Hester *v.* Com., 85 Pa. 139, 158, *semble* (approving the preceding case); 1890, Crooks *v.* Bunn, 136 Pa. 368, 372, 30 Atl. 529 (apparently approving Henderson *v.* Jones; but also apparently favoring a limitation to impeachment by prior self-contradictions); *Texas:* 1898, Scott *v.* State, — Tex. Cr. —, 47 S. W. 531 (admitting after impeachment by conviction of crime).

The following case is unique: 1914, People *v.* Jung Hing, 212 N. Y. 393, 106 N. E. 105 (besides the impeachment of the witness, it must be shown that the corroborating statements themselves "were made under circumstances which precluded the probability of their being inspired by others"; no authority is cited; the limitation is needless and unsound, and appears never to have been thought of by any other Court).

§ 1132. [1] 1850, Conrad *v.* Griffey, 11 How., 480, 492; 1895, Yarbrough *v.* State, 105 Ala. 43, 16 So. 758.

Such evidence is said to be an exception to the Hearsay rule in Maitland *v.* Bank, 40 Md. 559 (1874); but this is erroneous.

testifies does not alter the case; that is incidental. He is supported, not by putting a prop under him, but by removing a burden from him, if any has been put upon him."

(2) When, by any of the foregoing rules, the statements are admissible at all, there is no reason why the *impeached witness himself* may not testify to them;[2] even though this will usually be of less value than the testimony of other persons.

§ 1133. **Statements of Claim by a Party, to rebut his Admissions.** If the consistent statements of a witness are (as a majority of Courts hold) not admissible to explain or rebut his inconsistent statements (*ante*, § 1126), then is there any less or greater reason for permitting the admissions of a party (when he has not become a witness) to be rebutted or explained by his statements of claim, made at other times, consistent with his present claims under the pleadings? His admissions are relevant against him in analogy to the self-contradiction of a witness (*ante*, § 1048), and it would seem therefore that his consistent claims should be treated after the same analogy; *i.e.* they should be received or excluded in whatever situations a witness' consistent statements would be received or excluded (*ante*, §§ 1126–1129). Most Courts, however, exclude such statements unconditionally.[1]

[2] *Ind.* 1892, Hobbs *v.* State, 133 Ind. 404, 408, 32 N. E. 1019; *N. Car.* 1848, State *v.* George, 8 Ire. 324, 329; 1881, McLeod *v.* Bullard, 84 N. C. 515, 529; 1885, State *v.* Whitfield, 92 N. C. 831, 835; 1897, Burnet *v.* R. Co., 120 N. C. 517, 26 S. E. 818; *Tex.* 1893, Goode *v.* State, 32 Tex. Cr. 505, 508, 24 S. W. 102.

§ 1133. [1] *California:* 1903, Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant's testator to adopt and support the plaintiff; after admitting for the plaintiff declarations by the testator that plaintiff was his son, the Court excluded for the defendant declarations of the testator that he was only guardian; the present principle not noticed); *Colorado:* 1882, Nutter *v.* O'Donnell, 6 Colo. 253, 260 ("he cannot annul or explain them away by counter-declarations"); *Georgia:* 1878, Lewis *v.* Adams, 61 Ga. 559 (title to land); 1906, McBride *v.* Georgia R. & E. Co., 125 Ga. 515, 54 S. E. 674 (with possible exceptions; here in an action for personal injuries); 1908, Louisville & N. R. Co. *v.* Varner, 129 Ga. 844, 60 S. E. 162 (personal injury; excluded); 1912, Gordon *v.* Munn, 87 Kan. 624, 125 Pac. 1 (antenuptial contract; the widow having offered the deceased husband's statements that it was destroyed by mutual consent, the heir was allowed to offer other declarations of the deceased that the contract was lost and not destroyed); *Iowa:* 1872, Wilson *v.* Patrick, 34 Ia. 362, 368, 371 (an ancestor's declarations that he owned the land absolutely, not received to counteract his admissions that he owned it as security only); 1887, Wescott *v.* Wescott, 75 Ia. 628, 35 N. W. 649, *semble* (similar; here the declarations of the plaintiff's mother that money handed by her to the defendant was a loan, not a gift); *Maine:* 1887, Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615 (title to land); *Maryland:* (the statutes and cases are cited *ante*, § 1126, notes 4 and 8, and § 1127); *Massachusetts:* 1853, Hunt *v.* Roylance, 11 Cush. 117, 121 (excluded; "To show that a man denied being a member of a copartnership to A to-day does not prove or in any way tend to show that he did not admit that he was a member of the firm to B yesterday"); 1859, Com. *v.* Goodwin, 14 Gray 55 (arson); 1861, Blake *v.* Everett, 1 All. 248, 249 (right of way); 1866, Baxter *v.* Knowles, 12 All. 114, 119 (title to personalty); 1875, Pickering *v.* Reynolds, 119 Mass. 111, 113 (title to land); 1876, Hayden *v.* Stone, 121 Mass. 413 (dedication); *Michigan:* 1904, Bernard *v.* Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396 (the original unamended declaration of the plaintiff having been offered as an admission, his letter to his counsel stating the fact as now claimed was received); *Missouri:* 1846, Turner *v.* Belden, 9 Mo. 787, 790 (Foster *v.* Nowlin (1835), 4 Mo. 18, 22, repudiated); 1855, Criddle *v.* Criddle, 21 Mo. 522 (same rule); 1858, Clark *v.* Huffaker, 26 Mo. 264, 267 (partnership); *New Hampshire:* 1850, Hurlburt *v.* Wheeler, 40 N. H. 73, 76 (title to property); *New York:* 1806, Waring *v.* Warren, 1 John. 340, *semble*: *Pennsylvania:* 1819, McPeake *v.* Hutchinson, 5 S. & R. 294, 296 (advancement to child); 1822, Patton *v.* Goldsborough, 9 S. & R. 47, 55 ("A confession made at one time cannot be rebutted by a declaration at another time," because, "if that were permitted, a man might always destroy his confes-

Nevertheless, in property controversies, where usually the question arises, the same utterances are often receivable on some principle of Admissions (*ante*, §§ 1085–1087) or of Verbal Acts (*post*, § 1778), or, in other controversies, of Completeness of a conversation or correspondence (*post*, §§ 2115–2120).

2. Special Classes of Witnesses

§ 1134. **Complaint of Rape; History.** This class of corroborative statements is unusually complicated in principles and confused in precedents, — not because the principles themselves are inherently complex, but because the evidence admits of the application of three distinct general principles for its admission, and because the distinct bearings of these different principles have not always been borne in mind by the Courts.

Down to the beginning of the 1800s, evidence of this sort was received by the Courts as a matter of old tradition and practice, with little or no thought of any principles to support it. The tradition went back by a continuous thread to the primitive rule of hue-and-cry: and the precise nature of the survival is more fully explained in dealing with the Hearsay Exception of 'Res Gestæ' (*post*, § 1760). But as more and more attention began to be given, in the early 1800s, to the principles underlying every sort of evidence, there came to be felt a need of explaining on principle this inherited and hitherto unquestioned practice; the various aspects of its significance began to be thought of.

There are three possible principles, well enough established otherwise, upon which such evidence can be offered: 1, as an Explanation of a Self-Contradiction (*ante*, § 1042); 2, as a Corroboration by other Similar State-

sions by subsequent declarations to the contrary"); 1824, Galbraith *v.* Green, 13 S. & R. 85, 92; 1890, Crooks *v.* Bunn, 136 Pa. 368, 371, 20 Atl. 529; *South Carolina:* 1882, Ellen *v.* Ellen, 18 S. C. 489, 494 (adverse possession); *Texas:* 1854, Jones *v.* State, 13 Tex. 168, 176.

Contra: Canada: 1869, Key *v.* Thomson, 1 Han. N. Br. 295, 297, 301 (malpractice; defendant having assured the plaintiff that he would recover, his statement at the time to another person that the plaintiff would not recover, held admissible, as explaining that the first assurance was merely to keep up the plaintiff's spirits); *U. S. Federal:* 1899, Fidelity M. L. Ass'n *v.* Miller, 34 C. C. A. 211, 92 Fed. 63 (fraudulent plan to commit suicide after obtaining insurance; after evidence of the deceased's utterances showing such a plan, other utterances showing the contrary were admitted in rebuttal); *New York:* 1915, Ferris *v.* Sterling, 214 N. Y. 249, 108 N. E. 406 (ownership of an insurance policy; prior letters held admissible; to rebut admissions); *Pennsylvania:* 1811, Brackenridge, J., in Garwood *v.* Dennis, 4 Binn. 314, 333, 339 ("It goes to the evidence of the fact that he did at any time disclaim; for though a declaration at one time is not inconsistent with a contrary declaration at another, yet it diminishes the probability that such a declaration was made"; here, oral declarations of a predecessor of the defendant in title disclaiming title had been received; his deeds containing recitals of other deeds giving him title were declared admissible, as tending to show the improbability of such conversations; *contra*, Yeates, J.; compare the theory of Cooley, J., *ante*, § 1126); *Tennessee:* 1919, Gibson *v.* Buis, 142 Tenn. 133, 218 S. W. 220 (whether a check was handed to a legatee as a gift or an advancement; the legatee's statements of her conversation claiming it as a gift, admissible only to rebut admissions made by her, but not as "substantive testimony of the gift").

The principles of §§ 1725–1732, *post* (declarations of intent), will sometimes also suffice for such evidence.

Distinguish the question whether *the party when a witness* may be corroborated as such (*ante*, § 1126).

ments, under the present principle; 3, as a 'Res Gestæ' Declaration, excepted under the Hearsay Rule (*post*, § 1760). These may be noticed in order, with the precedents proceeding upon each theory.

§ 1135. **Same: (A) First Theory: Explanation of an Inconsistency; Fact of Complaint is admissible.** It has already been seen (*ante*, § 1042) that the fact of a failure to speak when it would have been natural to do so is in effect an Inconsistent Statement or Self-Contradiction, — as when on a former trial a witness said nothing about an important circumstance which he now asserts, or when he failed to testify at all, though present, when his testimony (if true) could have been highly valuable. This failure to speak, as also already seen (*ante*, § 1044), may perhaps be explained away in some fashion; but, unless so explained, it stands in effect as a Self-Contradiction.

(1) (*a*) Now, when a woman charges a man with a rape, and testifies to the details, and the accused denies the act itself, its very commission thus coming into issue, the circumstance that at the time of the alleged rape the woman said nothing about it to anybody constitutes in effect a Self-Contradiction of the above sort. It was entirely natural, after becoming the victim of an assault against her will, that she should have spoken out. That she did not, that she went about as if nothing had happened, was in effect an assertion that nothing violent had been done. Thus, the *failure of the woman*, at the time of an alleged *rape*, to *make any complaint* could be offered in evidence (as all concede) as a virtual self-contradiction discrediting her present testimony.[1]

(*b*) Now, where nothing appears on the trial as to the making of such a complaint, the jury might naturally assume that none was made, and counsel for the accused might be entitled to argue upon that assumption. As a peculiarity, therefore, of this kind of evidence, it is only just that the prosecution should be allowed to forestall this natural assumption by showing that the woman was *not silent, i.e.* that *a complaint was in fact made*.[2] This apparently

§ 1135. [1] That the woman's *subsequent friendly conduct* towards the accused, on a charge of rape, is admissible, stands upon another principle (*ante*, § 402).

[2] The English cases have always conceded that the *fact of the complaint* may be shown: they are collected *post*, § 1760 (under the Hearsay Exception), and need not be repeated here. The American cases here follow; but only the first ruling in each jurisdiction is given, except where later ones were needed to settle the doctrine; all the other cases, in the following sections, assume the doctrine as settled: *Ala.* 1871, Lacy *v.* State, 45 Ala. 80 ("the fact of making complaint immediately and before it is likely that anything should have been contrived and devised"); *Ark.* 1855, Pleasant *v.* State, 15 Ark. 624, 648; *Cal.* 1862, People *v.* Graham, 21 Cal. 261, 265, *semble;* 1901, People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202; *Conn.* 1830, State *v.* DeWolf, 8 Conn. 83, 99; *Ga.* 1852, Stephen *v.* State, 11 Ga. 225, 233; *Ind.* 1869, Weldon *v.* State, 32 Ind. 81; *Iowa:* 1871, State *v.* Richards, 28 Ia. 420; *La.* 1901, State *v.* Washington, 104 La. 57, 28 So. 904; *Mich.* 1871, Strang *v.* People, 24 Mich. 1, 5; 1874, People *v.* Lynch, 29 Mich. 273, 279; 1879, Maillet *v.* People, 42 Mich. 262, 264, 3 N. W. 854; 1920, People *v.* Luce, 210 Mich. 621, 178 N. W. 54; *Minn.* 1872, State *v.* Shettleworth, 18 Minn. 208, 212; 1877, Gardner *v.* Kellogg, 23 Minn. 463; *Mo.* 1875, State *v.* Jones, 61 Mo. 232, 235, *semble;* 1881, State *v.* Warner, 74 Mo. 83, 86; *Nebr.* 1881, Oleson *v.* State, 11 Nebr. 276, 9 N. W. 38, *semble;* 1900, Welsh *v.* State, 60 Nebr. 101, 82 N. W. 368; *N. H.* 1863, State *v.* Knapp, 45 N. H. 148, 155; *N. Y.* 1869, Baccio *v.* People, 41 N. Y. 265; *N. Car.* 1866, State *v.* Marshall, Phillips N. C. 49; *Oh.* 1848, Johnson *v.* State, 17 Oh. 593, 595; *Okl.*

irregular process of negativing evidence not yet formally introduced by the opponent is regular enough in reality, because the impression upon the tribunal would otherwise be there as if the opponent had really offered evidence of the woman's silence. Thus the essence of the process consists in the showing that the woman did not in fact behave with a silence inconsistent with her present story. The Courts have fully sanctioned this analysis of the situation:

1830, DAGGETT, J., in *State* v. *DeWolf*, 8 Conn. 99: "If a female testifies that such an outrage has been committed on her person, an inquiry is at once suggested why it was not communicated to her female friends. To satisfy such inquiry it is reasonable that she should be heard in her declaration that she did so complain."

1869, WOODRUFF, J., in *Baccio* v. *People*, 41 N. Y. 268: "It may be suggested, perhaps, that it is so natural as to be almost inevitable that a female upon whom the crime has been committed will make immediate complaint thereof to her mother or other confidential friend and, inasmuch as her failure to do so would be strong evidence that her affirmation on the subject when examined as a witness was false, that the prosecution may anticipate such a claim by affirmative proof that complaint was made. . . . Like outcries made at the time charged, the appearance and manner of the female immediately after, her instant complaints of the fact are all such as are natural and according to the ordinary course of events."

1900, BARTCH, C. J., in *State* v. *Neal*, 21 Utah 151, 60 Pac. 510: "The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to the relative or friend who naturally has the deepest interest in her welfare; and the absence of such a disclosure tends to discredit her as a witness, and may raise an inference against the truth of the charge. To avoid such discredit and inference, it is competent for the prosecution to anticipate any claim as to effects, and show, by affirmative proof of the victim and of her relative or friend to whom she narrated the circumstances of the outrage, that complaint was made recently after its commission."

(*c*) In the same way, and just as with ordinary Self-Contradictions (*ante*, § 1044), if the silence is conceded by the prosecution, the silence may nevertheless be *explained away* as due to fear, shame, or the like, so that it loses its significance as a suspicious inconsistency:

1863, BELLOWS, J., in *State* v. *Knapp*, 45 N. H. 155: "It is equally well settled also that the delay to make complaint may be explained by showing that it was caused by threats or undue influence of the prisoner. . . . It would then be clearly proper to show the reasons of such delay, — whether caused by the threats of the prisoner, inability caused by the violence, want of opportunity, or the fear of injury by the communication to the only persons at hand. . . . Upon a disclosure of all the circumstances the jury might properly find that the delay was neither unreasonable nor inconsistent with the testimony of the prosecutrix." [3]

1897, Harmon *v.* Terr., 5 Okl. 368, 49 Pac. 55; *Or.* 1897, State *v.* Sargent, 32 Or. 110, 49 Pac. 889; *Tenn.* 1848, Phillips *v.* State, 9 Humph. 246, 247; *Tex.* 1874, Pefferling *v.* State, 40 Tex. 486, 492; *Va.* 1853, Brogy's Case, 10 Gratt. 722, 728; *Vt.* 1874, State *v.* Niles, 47 Vt. 82, 86; 1905, State *v.* Willett, 78 Vt. 157, 62 Atl. 48; *Wis.* 1888, Hannon *v.* State, 70 Wis. 448, 450, 36 N. W. 1.

The only contrary ruling is based on inattention to the different theories: 1911, People *v.* Lewis, 252 Ill. 281, 96 N. E. 1005 (the fact of fresh complaint by the woman, excluded, because she had not testified, being dead before the trial).

[3] *Eng.* 1864, R. *v.* Rearden, 4 F. & F. 76; *U. S.* 1900, State *v.* Peterson, 110 Ia. 647, 82 N. W. 329; 1904, State *v.* Icenbice, 126 Ia. 16, 101 N. W. 273; 1895, People *v.* Ezzo, 104 Mich. 341, 62 N. W. 407; 1872, State *v.* Shettleworth, 18 Minn. 208, 212; 1863, State *v.* Knapp, 45 N. H. 148, 155 ("how much delay in making the complaint ought to weigh against the prosecution must depend upon the circumstances of each particular case"); 1900, People *v.* Flaherty, 162 N. Y. 532, 57 N. E. 73 (explana-

(*d*) Under the early rule of hue-and-cry, it was necessary that there should have been fresh complaint; and this notion has been perpetuated in the statement, usual in enunciating the modern rule, that *the complaint must have been recent*, in order that the fact of it may be admitted. A few Courts have applied this notion practically in their rulings, by excluding complaints made after a certain length of time.[4] But, if it be considered that the purpose of the evidence is merely to negative the supposed silence of the woman, it is perceived that the fact of complaint *at any time* should be received. After a long delay, to be sure, the fact is of trifling weight, but it negatives silence, nevertheless, and the accompanying circumstances must determine how far the delay has been successfully explained away.[5]

(2) The foregoing principles apply equally to *other charges* involving sexual intercourse with violence or irrespective of the female's consent, — though here there is found naturally some difference of opinion in applying the principle to specific offences. (*a*) The *failure to make complaint* should not be admissible on a charge of *rape under age of consent*, unless where the complainant is a child of tender years;[6] nor (unless in the same exceptional case)

tions nearly nine months later, excluded); 1914, Sanchez *v.* Gestera, 7 P. R. Fed. 279; 1892, State *v.* Wilkins, 66 Vt. 1, 10, 28 Atl. 323.

[4] *Eng.* 1896, R. *v.* Lillyman, 2 Q. B. 167 ("provided it was made as speedily after the acts complained of as could reasonably be expected"); *U. S.* 1898, People *v.* Lambert, 120 Cal. 170, 52 Pac. 307 (delay held too long on the facts); 1907, People *v.* Gonzalez, 6 Cal. App. 255, 91 Pac. 1013 (time is material); 1902, Lyles *v.* U. S., 20 D. C. App. 559, 563 (to a physician, four weeks later, when applying for an examination, excluded); 1916, People *v.* White, 194 Mich. 172, 160 N. W. 452 (indecent liberties; a complaint a week later, excluded); 1887, People *v.* O'Sullivan, 104 N. Y. 481, 490, 10 N. E. 881 (excluding, where the complaint was not made for nearly eleven months); 1915, State *v.* Mackey, 31 N. D. 200, 153, N. W. 982 (statements made more than a year after one alleged act, and a week after the last, in answer to interrogation by a committee, excluded); 1887, Dunn *v.* State, 45 Oh. St. 249, 252, 12 N. E. 826 (an unexplained delay of ten days excluded the evidence); 1906, State *v.* Griffin, 43 Wash. 591, 86 Pac. 951 (complaint six months afterwards, excluded, on the facts).

[5] *Ariz.* 1903, Trimble *v.* Terr., 125 Ariz. 494, 71 Pac. 932; *Conn.* 1908, State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054; *Ill.* 1922, People *v.* Mason, 301 Ill. 370, 133 N. E. 767 (assault with intent to rape; the female child lived with the defendant, her uncle; complaint made 4 days after leaving his home, though 2 months after the alleged assault, admitted); *Iowa:* 1903, State *v.* Bebb, — Ia. —, 96 N. W. 714 (made more than three months afterwards; admitted); 1904, State *v.* Bebb, 125 Ia. 494, 101 N. W. 189; 1910, Smith *v.* Hendrix, 149 Ia. 255, 128 N. W. 360; *Mo.* 1897, State *v.* Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; *Mont.* 1903, State *v.* Peres, 27 Mont. 358, 71 Pac. 162; *N. Y.* 1874, Higgins *v.* People, 58 N. Y. 378, *semble* ("there is and can be no particular time specified"); *S. Car.* 1898, State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408; *Tex.* 1899, Roberson *v.* State, — Tex. Cr. —, 49 S. W. 398; 1911, Conger *v.* State, 63 Tex. Cr. 312, 140 S. W. 1112; *Utah:* 1909, State *v.* Williams, 36 Utah 273, 103 Pac. 250 (complaint made nearly three years later, admitted; but the delay may affect its weight); *Vt.* 1874, State *v.* Niles, 47 Vt. 82, 86 (Royce, J.: "It has never been understood that mere lapse of time could be made the test upon which the admissibility of such evidence depended; the time that intervenes . . . is a subject for the jury to consider").

The following cases lay down no rule: 1902, State *v.* Snider, 119 Ia. 15, 91 N. W. 762; 1898, Legare *v.* State, 87 Md. 735, 41 Atl. 60 (complaint not too late on the facts); 1898, Com. *v.* Cleary, 172 Mass. 175, 51 N. E. 746 (trial judge's discretion controls as to time; whether lapse of time may ever exclude as a matter of law, undecided).

The *total failure to complain* is of course not fatal 'per se' to the prosecution: 1906, Garvik *v.* Burlington, C. R. & N. R. Co., 131 Ia. 415, 108 N. W. 327.

There is no reason why a *second* complaint should be excluded. *Contra:* 1896, Lowe *v.* State, 97 Ga. 792, 25 S. E. 676.

[6] *Excluded:* 1897, People, *v.* Lee, 119 Cal. 84, 51 Pac. 22, *semble;* 1912, Kramer *v.* Weigand, 91 Nebr. 47, 135 N. W. 230 (civil action

on a charge of *sodomy*;[7] nor, perhaps, on a charge of *taking indecent liberties*.[8] (*b*) Similarly, the *fact of complaint* should not be admissible on a charge of *seduction*,[9] nor ordinarily on a charge of *rape under age of consent*, except for children;[10] but should be admissible for *other offences* usually involving force.[11]

§ 1136. **Same: Consequences of this Theory; Details not admitted; Complainant must be a Witness.** When the complaint is admitted on this theory, certain limitations upon its use follow logically and necessarily.

(1) *Only the fact of the complaint, not the details.* The purpose is to negative the supposed inconsistency of silence by showing that there was not silence. Thus the gist of the evidential circumstances is merely not-silence, *i.e.* the *fact* of a complaint, but the fact only. That she complained of a rape, or an attempt at rape, is all that principle permits; the further terms of her utterance (except so far as to identify the time and place with that of the one charged) are not only immaterial for the purpose, but practically turn the statement into a hearsay assertion, and as such it is inadmissible (except on the third theory).[1]

for rape); 1899, State *v.* Birchard, 35 Or. 484, 59 Pac. 468.

Admitted: 1898, R. *v.* Kiddle, 19 Cox Cr. 77 (indecent assault on a child of six); 1905, R. *v.* Osborn, 1 K. B. 551 (indecent assault on a child of twelve; "such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix"); 1919, Colpin *v.* People, 67 Colo. 17, 185 Pac. 254 (rape under age; here admitted because consent was not alleged); 1905, State *v.* Oswalt, — Kan. —, 82 Pac. 513 (said to be "at least doubtful").

[7] *Excluded:* 1908, Soto *v.* Terr., 12 Ariz. 36, 94 Pac. 1104 (sodomy upon a child of four); 1897, Honselman *v.* People, 168 Ill. 172, 48 N. E. 304. *Admitted:* 1908, State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054.

[8] 1909, People *v.* Scattura, 238 Ill. 313, 87 N. E. 332 (excluded).

[9] *Excluded:* 1895, State *v.* Sibley, — Mo. —, 31 S. W. 1033.

[10] *Excluded:* 1908, State *v.* Hoskinson, 78 Kan. 183, 96 Pac. 138; 1920, State *v.* Langston, 106 Kan. 672, 189 Pac. 153; 1914, State *v.* Gay, 82 Wash. 423, 144 Pac. 711.

Admitted: 1907, People *v.* Gonzalez, 6 Cal. App. 255, 91 Pac. 1013; 1914, State *v.* Ellison, 19 N. M. 428, 144 Pac. 10 (statutory rape; good opinion by Parker, J., but not framing any fixed rule); 1906, State *v.* Winslow, 30 Utah 403, 85 Pac. 433 (incest with a minor daughter, there being no consenting fact); 1892, State *v.* Wilkins, 66 Vt. 1, 10, 28 Atl. 123 (admissible in corroboration, regardless of the question of consent); 1919, State *v.* Gile, 93 Vt. 142, 106 Atl. 829 (admissible for statutory rape also).

[11] *Admitted:* 1902, People *v.* Swist, 136 Cal. 520, 69 Pac. 223 (crime against nature, committed on a child); 1893, People *v.* Hicks, 98 Mich. 86, 89, 56 N. W. 1102 (indecent assault); 1912, Totten *v.* Totten, 172 Mich. 565, 138 N. W. 257 (civil action for rape); 1900, State *v.* Imlay, 22 Utah 156, 61 Pac. 557 (assault with intent to rape).

§ **1136.** [1] The English cases on this point are collected *post*, § 1760 (under the Hearsay Exception), and need not be repeated here; in the American following it is to be noted that many of these Courts do allow the details of the statement to be used under the second theory, as seen in the next section:

Alabama: 1871, Lacy *v.* State, 45 Ala. 80; 1872, Scott *v.* State, 48 id. 420; 1884, Griffin *v.* State, 76 id. 29, 31; 1905, Posey *v.* State, 143 Ala. 54, 38 So. 1019;

Arizona: 1921, Sage *v.* State, 22 Ariz. 151, 195 Pac. 534 n. 1 (statutory rape);

Arkansas: 1855, Pleasant *v.* State, 15 Ark. 624, 649; 1897, Davis *v.* State, 63 id. 470, 39 S. W. 356 (description given by a raped woman when shown the defendant);

California: 1862, People *v.* Graham, 21 Cal. 261, 265; 1893, People *v.* Stewart, 97 Cal. 238, 241, 32 Pac. 8; 1898, People *v.* Lambert, 120 Cal. 170, 52 Pac. 307; 1903, People *v.* Wilmot, 139 Cal. 103, 72 Pac. 838; 1904, People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098;

Georgia: 1852, Stephen *v.* State, 11 Ga. 225, 233; 1910, Huey *v.* State, 7 Ga. App. 398, 66 S. E. 1023 (Stephen *v.* State followed);

Idaho: 1904, State *v.* Harness, 10 Ida. 18, 76 Pac. 788; 1916, State *v.* Andrus, 29 Ida. 1, 156 Pac. 421;

Illinois: 1908, People *v.* Weston, 236 Ill. 104, 86 N. E. 188; 1915, People *v.* Hamilton, 268 Ill. 390, 109 N. E. 329;

Indiana: 1869, Weldon *v.* State, 32 Ind. 81; 1871, Thompson *v.* State, 38 Ind. 39; 1893, Polson *v.* State, 137 Ind. 519, 523, 35 N. E.

(2) *The woman must be a witness.* Since the only object of the evidence is to repel the supposed inconsistency between the woman's present testimony and her former silence, it is obvious that if she has not testified at all,

607; 1910, Pulley *v.* State, 174 Ind. 542, 92 N. E. 550 (the name of the alleged assailant must not be mentioned);
Iowa: 1871, State *v.* Richards, 28 Ia. 420; 1886, State *v.* Clark, 69 Ia. 295, 28 N. W. 606; 1886, State *v.* Mitchell, 68 Ia. 118, 26 N. W. 44 (but this does not exclude the fact that the complaint spoke of a rape); 1890, McMurrin *v.* Rigby, 80 Ia. 322, 325, 45 M. W. 877 (same); 1900, State *v.* Petersen, 110 Ia. 647, 82 N. W. 329 ("exact particulars" inadmissible); 1902, State *v.* Wheeler, 116 Ia. 212, 89 N. W. 978 (admissible only "in confirmation of the witness or to repel the presumption that her statement is a fabrication"; but the name of the ravisher as stated may be included in proof of the fact of complaint); 1905, State *v.* Andrews, 130 Ia. 609, 105 N. W. 215 (the precise scope of the "fact" of the complaint here seems to be enlarged to include "who her assailant was and what he did to her", with further qualifications; the rule is now loose and unsettled in this State; see § 1761, *post*); 1905, State *v.* Barkley, 129 Ia. 484, 105 N. W. 506 (the rule further obscured; preceding case not cited); 1910, State *v.* Dudley, 147 Ia. 645, 126 N. W. 812; 1911, State *v.* Novak, 151 Ia. 536, 132 N. W. 26 (preceding rule applied; but pointing out that details not receivable under the present principle may be admissible under the Spontaneous Declarations exception to the Hearsay rule, *post*, §§ 1139, 1760); 1914, State *v.* Vochoski, 170 Ia. 246, 150 N. W. 53;
Kansas: 1901, State *v.* Daugherty, 63 Kan. 473, 65 Pac. 695; 1920, State *v.* Langston, 106 Kan. 672, 189 Pac. 153 (but here a liberal application was made, the child being of tender years); 1917, State *v.* McLemore, 99 Kan. 777, 164 Pac. 161 (the assailant's name must not be stated);
Louisiana: 1903, State *v.* McCoy, 109 La. 682, 33 So. 730 (not clear);
Maine: 1892, State *v.* Mulkern, 85 Me. 106, 107, 26 Atl. 1017;
Michigan: 1877, Brown *v.* People, 36 Mich. 203 (admitted exceptionally; no principle laid down); 1879, Maillet *v.* People, 42 Mich. 262, 264, 3 N. W. 854 (left undecided); 1886, People *v.* Gage, 62 Mich. 271, 28 N. W. 835 (treated as properly excluded by the present principle, but nevertheless admitted exceptionally by the 'res gestæ' principle, *post*, § 1760); 1893, People *v.* Hicks, 98 Mich. 89, 56 N. W. 1102 (excluding the details, and not applying the 'res gestæ' exception); 1896, People *v.* Duncan, 104 Mich. 460, 62 N. W. 556 (same); 1898, People *v.* Bernor, 115 Mich. 692, 74 N. W. 184, *semble;* 1900, People *v.* Marrs, 125 Mich. 376, 84 N. W. 284 (details excluded, unless they are made at the time as 'res gestæ' or unless the complainant is a child);
Minnesota: 1872, State *v.* Shettleworth, 18 Minn. 208, 212;
Missouri: State *v.* Jones, 61 Mo. 232, 235;
Nebraska: 1881, Oleson *v.* State, 11 Nebr. 276, 279, 9 N. W. 38; 1886, Mathews *v.* State, 19 Nebr. 330, 337, 27 N. W. 234; 1907, Younger *v.* State, 80 Nebr. 201, 114 N. W. 170 (here the ruling goes further and admits the naming or describing of the assailant: the foregoing cases are not cited); 1909, Henderson *v.* State, 85 Nebr. 444, 123 N. W. 459 (unless the complaint was part of the 'res gestæ'); 1918, Rhoades *v.* State, 102 Nebr. 750, 169 N. W. 433 (rape under age);
New Hampshire: 1863, State *v.* Knapp, 45 N. H. 148, 155;
New Jersey: 1915, State *v.* Schaeffer, 87 N. J. L. 663, 94 Atl. 598, *semble;*
New York: 1869, Baccio *v.* People, 41 N. Y. 265, 271;
Oklahoma: 1897, Harmon *v.* Terr., 5 Okl. 368, 49 Pac. 55;
Texas: 1874, Pefferling *v.* State, 40 Tex. 486, 492;
Utah: 1898, State *v.* Halford, 18 Utah 3, 54 Pac. 819 (obscure); 1900, State *v.* Neel, 21 Utah 151, 60 Pac. 510 (not admissible, except when so fresh as to be of the 'res gestæ');
Vermont: 1874, State *v.* Niles, 47 Vt. 82, 86; 1892, State *v.* Bedard, 65 Vt. 278, 284, 26 Atl. 719, *semble;*
Virginia: 1853, Brogy's Case, 10 Gratt. 722, 726;
Washington: 1898, State *v.* Hunter, 18 Wash. 670, 52 Pac. 247; 1906, State *v.* Griffin, 43 Wash. 591, 86 Pac. 951 (statement naming the accused, excluded);
Wisconsin: 1888, Hannon *v.* State, 70 Wis. 448, 452, 36 N. W. 1 ("except . . . where the person ravished is very young", referring to the cases of § 1760, *post*); 1902, Bannen *v.* State, 115 id. 317, 91 N. W. 107 (same).

A few Courts have erroneously allowed the detailed statement to be used even when proceeding upon the present theory; but these rulings are probably due to a confusion of the first and the second theory: 1830, State *v.* DeWolf, 8 Conn. 93, 100; 1848, Johnson *v.* State, 17 Oh. 593, 595; 1872, Burt *v.* State, 23 Oh. St. 394, 401.

For the admissibility of a *child's* complaint compare § 1751, par. c, § 1761, n. 2, *post.*

Of course, if the *defence on cross-examination* asks for some of the details, then the prosecution may ask for all of them on *re-direct examination* (on the principle of § 15, *ante*): 1915, State *v.* Ellison, 19 N. M. 428, 144 Pac. 10.

there is no inconsistency to repel, and therefore the evidence is irrelevant.[2] In a rape, for instance, charged to have been committed on a frequented way, and testified to by several bystanders, without calling the woman herself to the stand, it is entirely immaterial whether she made complaint or not; there is no story of hers before the court, and there is therefore no suspicion about such a story and nothing to repel. On the other hand, if the woman has taken the stand, it is immaterial whether she has been impeached or cross-examined (a matter of importance under the next theory); the fact of complaint may be introduced immediately, even by her own testimony in chief.

§ 1137. **Same: (B) Second Theory; Rehabilitation by Consistent Statement.** It has been seen (*ante*, § 1122) that, under some circumstances, and with limitations differently accepted in different jurisdictions, a witness whose testimony has been impeached may be corroborated or rehabilitated by evidence of his similar statements made at other times. This principle has been resorted to for admitting the present sort of evidence. The story of the woman is corroborated by showing that she told the same story at the time of making complaint. Where a Court allows this form of corroboration for other witnesses, it is a legitimate application of the principle to admit such evidence here. Courts sometimes permit the evidence to be used "to test" or "verify" the woman's recollection; but this is merely another way of saying that her telling a similar story at the first occasion corroborates her testimony on the stand. But in certain respects the conditions of use under the present theory differ radically from those under the preceding one.

§ 1138. **Same: Consequences of this Theory; Details are admissible; Complainant must be a Witness, and Impeached.** (1) *The details of the statement are admissible.* Since the purpose is to show that she tells the same story as on the stand, the whole of the complaint as made by her, with its terms and details, is to be received, and not the mere fact of the complaint.[1]

(2) But it is obviously necessary, here as in the preceding theory, that *the woman must have testified.* This requirement is common to both theories;

[2] *England:* The English Courts have not been clear upon this point: 1839, R. *v.* Walker, 2 Moo. & Rob. 212, Parke, B. (obscure); 1840, R. *v.* Megson, 9 C. & P. 420, Rolfe, B., *semble, contra;* 1840, R. *v.* Guttridges, ib. 471, Parke, B., *semble, accord;* 1841, R. *v.* Alexander, 2 Cr. & D. 126, Pennefather, B., *semble, contra;* 1896, R. *v.* Lillyman, 2 Q. B. 167, 177, *semble, accord;* 1898, R. *v.* Kiddle, 19 Cox Cr. 77, *semble, contra* (indecent assault; the prosecutrix being too young to be sworn, her unsworn testimony was admitted by virtue of St. 1885, quoted *post*, § 1828; an objection to the admission of the complaint, on the ground that "there was no evidence on oath to be corroborated", was overruled), 1905, R. *v.* Osborn, 1 K. B. 551, 558, *semble, accord* (indecent assault; the opinion appears to proceed on this theory).

United States: Most American Courts fail to make the requirement; but its logical necessity has occasionally been perceived; 1919, Elmer *v.* State, 20 Ariz. 170, 178 Pac. 28; 1910, Huey *v.* State, 7 Ga. App. 398, 66 S. E. 1023; 1902, State *v.* Wolf, 118 Ia. 564, 92 N. W. 673; 1898, Com. *v.* Cleary, 172 Mass. 175, 51 N. E. 746; 1887, People *v.* O'Sullivan, 104 N. Y. 481, 486, 10 N. E. 880; 1853, Brogy's Case, 10 Gratt. Va. 722, 727 (left undecided); and cases cited *post*, § 1138, par. 2.

Compare the doctrines of §§ 284 and 1076, *ante*. Note also that in Michigan and Wisconsin (*supra*, par. 1), the rule is partly contrary, *i.e.* only when the female is too young to testify are details admitted.

§ 1138. [1] This is the doctrine accepted by all the cases in the next two notes.

for both assume that the purpose is to rehabilitate a witness, and if the woman has not testified, there is no one in that position.[2]

(3) *The witness must have been impeached.* According to the general theory of Corroboration by Similar Statements (*ante*, § 1124), there must be some kind of impeachment before the other statement can be offered. In different jurisdictions different views are taken (*ante*, §§ 1125–1131) of what this impeachment must amount to, — whether it may be by general bad character, by bias, by prior self-contradiction, or the like. The kind of impeachment, therefore, which will be sufficient to admit the rape-complaint will depend on the view taken of the general principle in the particular jurisdiction.[3]

[2] *England:* 1839, R. *v.* Walker, 2 Moo. & Rob. 212, Parke, B., *semble;* 1840, R. *v.* Megson, 9 C. & P. 420, Rolfe, B. ("to show her credit and the accuracy of her recollection"; here the woman had died); 1840, R. *v.* Guttridges, ib. 471, Parke, B., *semble; United States:* 1862, People *v.* Graham, 21 Cal. 261, 265 (the child had been called to the stand, but could not testify for weeping); 1869, Weldon *v.* State, 32 Ind. 81 (the child alleged to have been raped being incompetent through youth); 1871, Thompson *v.* State, 38 Ind. 39 (the woman not having testified); 1895, State *v.* Meyers, 46 Nebr. 152, 64 N. W. 697 (incapacity as witness); 1845, People *v.* McGee, 1 Denio N. Y. 19, 22 (excluded wherever the woman is incompetent or for other reasons has not testified); 1907, State *v.* Werner, 16 N. D. 83, 112 N. W. 60 (and noting that, on this theory, the statement need not be "so recently after the commission of the offence", as it must be when admitted on the theory of § 1761, *post*); 1913, State *v.* Apley, 25 N. D. 298, 141 N. W. 740 (following State *v.* Werner); 1848, Johnson *v.* State, 17 Oh. 593, 595; 1910, People *v.* Rosado, 16 P. R. 413 (not clear); 1912, People *v.* Ruiz, 18 P. R. 587; and cases *infra* in note 3, especially Hornbeck *v.* State, Oh., Phillips *v.* State, Tenn.

Compare the cases cited *ante*, § 1136, par. 2.

[3] The English rulings are obscure as to whether impeachment is necessary: 1839, R. *v.* Walker, 2 Mo. & Rob. 212, Parke, B., *semble* (after cross-examination as to her story); 1840, R. *v.* Megson, 9 C. & P. 420, Rolfe, B., *semble, contra;* 1860, R. *v.* Eyre, 2 F. & F. 579, Byles, J., *semble, contra;* 1877, R. *v.* Wood, 14 Cox Cr. 47, Bramwell, L. J., *semble, contra;* 1896, R. *v.* Lillyman, 2 Q. B. 167, 177, *contra* (admissible in chief, as bearing on the consistency of the prosecutrix' conduct with her testimony).

The American rulings *requiring* impeachment are as follows; where no special note is added, the Court simply requires impeachment of some sort without defining what kind, and this impeachment may even cover mere cross-examination: *Alabama:* 1872, Scott *v.* State, 48 Ala. 420 ("in corroboration . . . if she is assailed in the matter of her complaint"); 1884, Griffin *v.* State, 76 Ala. 29, 32 (after either cross-examination as to the particulars of the complaint or evidence introduced "to impeach the prosecutrix"); 1901, Bray *v.* State, 131 Ala. 46, 31 So. 107; 1902, Oakley *v.* State, 135 Ala. 15, 33 So. 23; 1910, Gaines *v.* State, 167 Ala. 70, 52 So. 643 (Oakley *v.* State approved); *Arkansas:* 1855, Pleasant *v.* State, 15 Ark. 624, 649 (after a general impeachment of credit); 1899, Lee *v.* State, 66 Ark. 286, 50 S. W. 517 (details admissible after impeachment as to the complaint); *Idaho:* 1907, State *v.* Fowler, 13 Ida. 317, 89 Pac. 757; *Indiana:* 1869, Weldon *v.* State, 32 Ind. 81, *semble;* 1871, Thompson *v.* State, 38 Ind. 39 (obscure as to the complaint itself; but requiring "impeachment" to admit other similar statements in general, following the usual rule for such evidence); *Iowa:* 1886, State *v.* Clark, 69 Ia. 294, 28 N. W. 606, *semble;* 1890, McMurrin *v.* Rigby, 80 Ia. 322, 325, 45 N. W. 877, *semble; Louisiana:* 1893, State *v.* Landford, 45 La. An. 1177, 14 So. 181 (admissible only after impeachment); *Michigan:* 1893, People *v.* Hicks, 98 Mich. 86, 56 N. W. 1102 (details admissible after impeachment; here excluded rape not being charged; but only indecent assault); *Missouri:* 1875, State *v.* Jones, 61 Mo. 232, 235; 1906, State *v.* Bateman, 198 Mo. 221, 94 S. W. 843; 1913, State *v.* Lawhorn, 250 Mo. 293, 157 S. W. 344 (affirming State *v.* Jones and State *v.* Bateman); *Nebraska:* 1881, Olsson *v.* State, 11 Nebr. 276, 279, 9 N. W. 38; *Nevada:* 1888, State *v.* Campbell, 20 Nev. 126, 17 Pac. 620 (excluded, unless after impeachment); 1905, *Re* Kelly, 28 Nev. 491, 83 Pac. 223 (State *v.* Campbell followed); *New Mexico:* 1899, Terr. *v.* Maldonado, 9 N. M. 629, 58 Pac. 350 (on direct testimony, details cannot be stated); *New York:* 1869, Baccio *v.* People, 41 N. Y. 265, 269, *semble; North Carolina:* 1866, State *v.* Marshall, Phillips 49, 51 (after a self-contradiction); 1899, State *v.* Brown, 125 N. C. 606, 34 S. E. 105 (declaration admitted after impeachment of prosecutrix on cross-examination); 1904, State *v.* Parker, 134 N. C. 209, 46 S. E. 511 (a technical rule laid down as to the judge's charge); *Oregon:* 1897, State *v.* Sargent, 32 Or. 110, 49 Pac. 889 (not admissible in chief); *Tennessee:* 1848, Phillips *v.* State, 9 Humph. 246, *semble; Texas:* 1874, Pefferling

§ 1139. **Same: (C) Third Theory: Spontaneous or Res Gestæ Declarations, as Exception to Hearsay Rule.** One of the exceptions to the Hearsay Rule permits the spontaneous declarations of a person suddenly excited by an extrinsic occurrence to be admitted as hearsay testimony (*post*, § 1747). The declarations of a woman under the fright of a sudden assault have been regarded by some Courts as receivable under this exception. The proper limitations are better considered in connection with the Hearsay Rule (*post*, § 1760). But the differences and similarities may be here pointed out between the rules of this theory and of the preceding ones:

(1) *The details of the statement are admissible*, because the rule is admitting a hearsay assertion, *i.e.* in effect, testimony.

(2) *The woman need not be a witness*, because the hearsay is admitted for its own sake, and not as corroborating her testimony or as in any way dependent upon it.

(3) If a witness, *she need not have been impeached*, because this requirement is wholly peculiar to the preceding theory.

(4) If the prosecutrix is *too young to be a witness*, nevertheless the statement is receivable.

§ 1140. **Summary.** (1) The *fact* of the complaint is always and legitimately admissible under the first theory above. (2) The *details* are legitimately receivable under either the second or the third theory; but the third has little vogue, while the second is widely accepted. Each has its own logical requirements, different from the other. (3) Both the first and the second theories may be accepted, without conflict. In most jurisdictions, the first theory is used to admit the fact of complaint, and then the second theory is invoked to admit the details; and this is proper enough, if the conditions of the second theory are observed.

§ 1141. **Complaint in Travail by a Bastard's Mother.** (1) At a time when

v. State, 40 Tex. 486, 492; 1894, Thompson *v.* State, 33 Tex. Cr. 472, 475, 26 S. W. 987 (not admissible in chief).

The American cases *not requiring impeachment* are as follows; they allow the complaint-details to be offered in chief: *Federal:* 1834, Ellicott *v.* Pearl, 1 McLean 206, 211; *Connecticut:* 1830, State *v.* De Wolf, 8 Conn. 93, 100 (but here there had been cross-examination on the facts of the charge); 1876, State *v.* Kinney, 44 Conn. 153, 155 (same); 1880, State *v.* Byrne, 47 Conn. 465; *Massachusetts:* 1898, Com. *v.* Cleary, 172 Mass. 175, 51 N. E. 746, *semble; New York:* 1845, People *v.* McGee, 1 Denio 19, 22; *North Dakota:* 1907, State *v.* Werner, 16 N. D. 83, 112 N. W. 60 (but without formally accepting either specific theory); *Ohio:* 1848, Johnson *v.* State, 17 Oh. 593, 595 (the declarations must be made "immediately" after the alleged offence); 1849, Laughlin *v.* State, 18 Oh. 99, 101 (same); 1858, McCombs *v.* State, 8 Oh. St. 643, 646 (same); 1872, Burt *v.* State, 23 Oh. St. 394, 401 ("immediately or soon after"; the particularity of the details being left to the trial Court's discretion); 1879, Hornbeck *v.* State, 35 Oh. St. 277, 279; 1887, Dunn *v.* State, 45 Oh. St. 249, 251, 12 N. E. 826 ("immediately"; yet they are admissible after a delay, if it is accounted for, the Court applying here the rule as to admitting the *fact* of complaint, *supra*); *Utah:* 1900, State *v.* Imlay, 22 Utah 156, 61 Pac. 557 (details admissible, in corroboration of the complainant's testimony, if made immediately after the act).

It will be noted that most of the rulings prescribe something as to the *time* of the complaint. But this is really unnecessary, under the present theory of Corroboration by Similar Statements; the time of the statements is immaterial (*ante*, § 1126). This requirement as to time comes simply from a confusion of the first theory above (admitting the fact of the complaint) with the second theory (admitting the details).

parties and interested persons were disqualified, an exception was made by statute (resting probably on old traditional practice [1]), in several of the colonial communities, and the *mother* permitted to *be a witness* in a prosecution for bastardy or suit for filiation; this was indeed probably the first statutory exception to the general disqualification (*ante*, § 575). But it was conditioned on the fact that the mother had *in her travail named and accused* as the father the very person now on trial as defendant. This was the law in Massachusetts and New Hampshire;[2] while in Maine and Connecticut the requirement was more rigid, and formed a condition precedent (as sometimes construed) to *maintaining the action*.[3]

The theory on which these travail-accusations were thus given force was a composite one. Partly it was the present theory of corroborating by con-

§ 1141. [1] 1637, Bishop of Lincoln's Trial, 3 How. St. Tr. 769, 773 (witnesses to P. as the father of a bastard testified "some by confession of herself being the mother of the child who were present at the time of her delivery").

There was current on the Continent a maxim which seems to point to a similar custom: "Creditur virgini dicenti se ab aliquo cognitam et ex eo praegnantem esse." But this maxim does not appear to be found in the Canon law; and presumably it referred to some rule affecting the use of the woman's deposition, regardless of time of childbirth (Baudry-Lacantinerie et al., Traité théorique et pratique de droit civil, 2d ed., 1902, vol. III, "Des Personnes", § 671, "Recherche de la paternité"; E. Bonnier, Traité théorique et pratique des Preuves, etc., 5th ed. by Larnaude, 1888, § 223).

[2] *Massachusetts:* 1807, Drawne *v.* Stimpson, 2 Mass. 441 (under St. 1785, c. 66, Mar. 16, the accusation during travail and the subsequent constancy is a condition precedent to her competency, and the facts must be evidenced by other witnesses); 1809, Com. *v.* Cole, 5 Mass. 517 (time of travail, determined); 1827, Bacon *v.* Harrington, 5 Pick. 63 (time of travail, determined); 1829, Maxwell *v.* Hardy, 8 Pick. 560 (variance of accusation before travail does not disqualify); 1838, M'Managil *v.* Ross, 20 Pick. 99 (travail-accusation required even for complaints filed after birth of child); 1852, Bailey *v.* Chesley, 10 Cush. 284 (form of accusation, determined); 1868, Stiles *v.* Eastman, 99 Mass. 132 (the travail-accusation is a condition precedent to the maintenance of the action, not merely to her competency); 1874, Ray *v.* Coffin, 123 Mass. 65, *semble* (the old requirement is abolished, through the repeal of the statute by Gen. St. c. 72, § 8); 1888, Leonard *v.* Bolton, 148 Mass. 66, 18 N. E. 879 (same); *New Hampshire:* 1825, Railroad *v.* J. M., 3 N. H. 135, 140 (the requirement of travail-accusation is not a condition precedent to the right of maintenance but only to the mother being a witness; here proceeding upon the construction of St. Feb. 11, 1791); 1845, Long *v.* Dow, 17 N. H. 470 (statute applied to admit the mother as witness, time of "travail", defined); 1846, Rodimon *v.* Reding, 18 N. H. 431, 435 (same; form of declaration, defined); *Pennsylvania:* see note 4, *infra*.

[3] *Maine:* Rev. St. 1916, c. 102, § 5 (complainant must file a declaration, stating constancy of accusation of similar tenor to that in Conn. and Mass.); 1830, Dennett *v.* Kneeland, 6 Me. 460 (travail-accusation, held a condition precedent to the mother's competency, under the statute); 1831, Tillson *v.* Bowley, 8 Me. 163 (accusation held sufficient); 1844, Burgess *v.* Bosworth, 10 Shepl. 573 (the required constancy dates from the time of first accusation of the defendant, not from the time of first accusation of any one); 1867, Wilson *v.* Woodside, 57 Me. 489 (voluntary accusation, without questioning, suffices); 1868, Totman *v.* Forsaith, 55 Me. 360 (form of accusation, determined); 1898, Palmer *v.* McDonald, 92 Me. 125, 42 Atl. 315 (under Pub. St. 1883, c. 97, § 6, accusation at travail and constancy in the accusation are both essential to the action; but the constancy does not relate to accusations between time of travail and time of charge before magistrate); *Connecticut:* 1788, Hitchcock *v.* Grant, 1 Root 107 (plea in bar allowed; applying a statute of 1702); 1796, Warner *v.* Willey, 2 Root 490; 1804, Davis *v.* Salisbury, 1 Day 278, 282 (but otherwise in a suit for maintenance by the selectmen, not the woman); 1823, Judson *v.* Blanchard, 4 Conn. 557, 565; 1825, Chaplin *v.* Hartshorne, 6 Conn. 41, 44 (same); 1876, Booth *v.* Hart, 43 Conn. 480, 485 (holding that the original statute required the travail-accusation and the subsequent constancy, merely as a condition precedent to the mother's testifying at the trial by way of exception to the general rule of disqualification for parties, and that therefore the statute of 1848, making all parties competent, removed the necessity of prior accusation as a condition precedent to competency); 1905, Shailer *v.* Bullock, 78 Conn. 65, 61 Atl. 65 (Booth *v.* Hart approved).

sistent statements, — in particular, by statements calculated to rebut the suspicion of recent contrivance (*ante*. § 1129). Partly the theory of the Hearsay exception for spontaneous utterances ('res gestæ') lent its aid (*post*, § 1747); for the painful circumstances of the occasion (as the judges repeatedly pointed out) gave some guarantee of sincerity. Partly, too, the Hearsay exception for dying declarations furnished a close analogy (*post*, § 1438), for the apprehension of death was present. These various considerations united to give a just evidential force to such utterances.

(2) Since disqualification by interest has been abolished, and the mother's competency no longer depends on this requirement, the use of such declarations involves solely a question of admissibility for their own sake. The result in the different jurisdictions has been diverse:

(*a*) In the States in which the requirement originally obtained, the use of the travail-accusation now survives as admissible evidence by express new statute, or by the preservation of former practice, and elsewhere statute has adopted the rule.[4]

[4] *Connecticut:* Gen. St. 1887, § 1207 (after the woman's complaint on oath, constancy of accusation when "put to her discovery in the time of her travail and also examined on the trial of the cause" is 'prima facie' evidence); Gen. St. 1918, § 6007 (similar statute, omitting the provisos; "if such woman shall continue constant in her accusation, it shall be evidence" of paternity); 1879, Robbins *v.* Smith, 47 Conn. 182, 189 (even since proof of constancy ceased to be a requirement, it still remained admissible; here also admitting declarations before the child's birth; Carpenter, J., diss. on the last point); 1889, Benton *v.* Starr, 58 Conn. 285, 20 Atl. 450 (the woman's constant accusations received, including details of time and place); 1896, Harty *v.* Malloy, 67 id. 339, 36 Atl. 259; 1908, State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054 (rule applied in a prosecution for rape under age, to admit the woman's statement made at the time of a miscarriage); 1919, Hellman *v.* Karp, 93 Conn. 317, 105 Atl. 678 ("all evidence admissible under the former statute is equally now admissible under the present statute"; applying Gen. St. 1918, § 5832);

Hawaii: St. 1913, No. 101, Rev. L. 1915, § 3010 (bastardy; "if upon examination under the provisions of § 3006, and also in the time of her travail, she accuses the same person of being the father of the child, and continues constant in such accusation, her accusation in time of travail shall be admissible in evidence upon the trial to corroborate her testimony");

Maine: 1874, Sidelinger *v.* Bucklin, 64 Me. 371 (repetition of the accusation, before and after the time of examination, excluded, as governed by the ordinary rule for witnesses); 1891, Mann *v.* Maxwell, 83 Me. 146, 21 Atl. 844 (accusations during travail, admitted);

Massachusetts: Pub. St. 1882, c. 85, § 16 (if, upon examination in writing under oath at time of making formal accusation, she accuses a certain man, and "being put upon the discovery of the truth respecting such accusation in the time of her travail she accuses the same man . . . and has continued constant in such accusation, the fact of such accusation in time of travail may be put in evidence upon the trial to corroborate her testimony"); Rev. L. 1902, c. 82, § 16 (statute rewritten, without material change of rule); 1862, Eddy *v.* Gray, 4 All. 435, 438 (statute applied); 1874, Reed *v.* Haskins, 116 Mass. 198 (by express statute, the mother may testify to her travail-accusation, even since interested parties are made competent); 1874, Ray *v.* Coffin, 123 Mass. 365 (if there was no travail-accusation, subsequent constancy, or the failure to accuse any other person, is inadmissible); 1887, Tacey *v.* Noyes, 143 Mass. 449, 9 N. E. 830 (time of travail determined); 1888, Leonard *v.* Bolton, 148 Mass. 66, 18 N. E. 879 (travail-accusation admissible, even when complaint is not filed till after birth); 1891, Scott *v.* Donovan, 153 Mass. 378, 26 N. E. 871 (time of travail determined); 1904, Burns *v.* Donoghue, 185 Mass. 69, 71 N. E. 1060 (statute applied); 1904, Baxter *v.* Gormley, 186 Mass. 168, 71 N. E. 575 (her testimony on the complaint-hearing suffices); 1917, Akeson *v.* Doidge, 225 Mass. 574, 114 N. E. 726 (under the proviso "continues constant in such accusations", a single statement accusing the same defendant, made one month prior to the examination by the magistrate, and four months prior to travail, is not admissible; this is an over-technical decision); Gen. L. 1920, c. 273, § 12 (the above statute now omitted);

Pennsylvania: St. 1860 (going back to St. 1705), Mar. 31, § 37, Dig. 1920, § 7865, Crimes (woman having a bastard child is guilty of

(*b*) In a few other States similar statutes have introduced a sanction, based directly on the theory of dying declarations.[5]

(*c*) Rarely, a Court is found recognizing on common-law principles the traditional admission of travail-accusations. There is no reason why this should not be the general rule.[6]

(*d*) Commonly, in the jurisdictions having no statutes, admissibility is not conceded.[7]

§ 1142. **Owner's Complaint after Robbery or Larceny.** (*a*) Statements made by the *owner* or *possessor of goods* after an alleged robbery or larceny of them may be affected by several principles:

(1) The failure of the person to make complaint would be conduct indicating a non-belief in the genuine occurrence of the injury charged, and would seem to be clearly admissible against him (under the principle of § 284, *ante*). Accordingly, to repel in advance this inference, it would be proper to show for the prosecution, as in a charge of rape (*ante*, § 1135), that the person was not silent but did in fact complain with reasonable promptness.[1] Upon this principle, however, as in the case of rape (*ante*, § 1136), only the *fact of the*

fornication as also the man, and "she persisting in the said charge, in the time of her extremity of labor or afterwards, in open court, upon the trial of such person so charged, the same shall be given in evidence, in order to convict such person of fornication").

In some jurisdictions of *Canada*, the action for support of a bastard is not maintainable unless the mother while pregnant or *within six months after birth* made affidavit charging the now defendant as father; but this affidavit is expressly declared not to be "evidence of the fact of the defendant being the father of the child": *Ont.* Rev. St. 1914, c. 154, §§ 314; *Br. C.* Rev. St. 1911, c. 107, § 62; *Sask.* R. S. 1920, c. 156, §§ 15, 16.

[5] *Del.* Rev. St. 1921, c. 185, § 5, inserting a new § 3085, par. 25, in Rev. Code 1915 (if the mother be dead at time of trial of bastardy charge, "her declaration made in time of travail and persevered in as her dying declaration shall be evidence"); *Miss.* Code 1906, § 276, Hem. 225 ("declarations in her travail, proved to be her dying declarations", of deceased mother in bastardy proceedings, admissible).

So also the Uniform Illegitimacy Act, § 26 (National Conference of Commissioners on Uniform State Laws, Proceedings, 1921, 1922; "In all cases where the mother is dead at the time of the trial, her declaration made in time of travail, and persevered in as a dying declaration, may be read in evidence"; so also if she "cannot be found at the time of the trial").

[6] 1905, Johnson *v.* Walker, 86 Miss. 757, 39 So. 49 (declarations of paternity made during travail are admissible to corroborate the mother's testimony apart from the statute cited *supra*, n. 5, and even though the mother is alive); 1919, King *v.* State, 121 Miss. 230, 83 So. 164 (seduction; woman's statement in travail as to child's paternity, not admissible, paternity not being in issue); 1887, Easley *v.* Com., — Pa. —, 11 Atl. 220 (declarations "in that extremity of labor", believing herself to be in peril of death, admitted).

[7] *Ala.* 1909, Palmer *v.* State, 165 Ala. 329, 51 So. 358 (excluded; no authority cited); *Ia.* 1858, State *v.* Hussey, 7 Ia. 409 (declarations of the mother "while in *extremo travail*", held not admissible); 1904, State *v.* Lowell, 123 Ia. 427, 99 N. W. 125 (since a complaint would be inadmissible, the failure to complain is equally so); *Mich.* 1905, People *v.* Stison, 140 Mich. 216, 103 N. W. 542 (incest; dying declarations of paternity, made at childbirth, excluded); *Minn.* 1898, State *v.* Spencer, 73 Minn. 101, 75 N. W. 893; *Mont.* 1894, State *v.* Tipton, 15 Mont. 74, 38 Pac. 222 (mother's declarations of paternity in travail, excluded); *Nebr.* 1895, Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382 (excluded at common law; here the statute admits the examination only, but by either party); *Tex.* 1899, Poyner *v.* State, 40 Tex. Cr. 640, 51 S. W. 377 (incest; the woman's accusation of the defendant, just after a child's birth, as the father, held inadmissible, except to explain away other inconsistent statements); *Wis.* 1865, Richmond *v.* State, 19 Wis. 307, 309.

Distinguish the use of the mother's *examination before the magistrate* (*post*, § 1417).

§ 1142. [1] Or, if in fact no complaint was made, the reason for silence may be shown: 1846, R. *v.* Gandfield, 2 Cox. Cr. 43 (to explain why a witness had not told of a burglary, her husband's directions to her not to tell of it because he was afraid of revengeful injuries were received).

complaint, and not the details of the statement, would be admissible. Such seems to be the English practice.[2]

(2) But on the theory of rehabilitating a witness, by showing his *prior consistent statements*, the details of the statement would become admissible; the ordinary conditions, however, would on this theory be (*ante*, §§ 1124–1131) that the injured person became a witness and that he was impeached as having recently fabricated the story. It is in this theory that some Courts act with reference to rape-complaints (*ante*, 1138); but it does not appear to be definitely applied by any Court for the present sort of evidence.[3]

(3) On the theory (*post*, § 1749) of the Exception to the Hearsay Rule for Spontaneous Exclamations (or 'res gestæ' statements) it would seem that, after some evidence of the robbery or larceny had been offered, the details of *complaints* or outcries made *shortly after the robbery* (or, if a larceny, shortly after the discovery of it) should be receivable. This is the attitude of some Courts towards rape-complaints (*post*, § 1761); and a number of Courts seem also to apply it to the present class of evidence. Such rulings might have founded themselves upon the ancient doctrine of hue-and-cry (*post*, § 1760), but no connection between the two seems to be assumed in the opinions; they proceed mainly upon a ruling in the Supreme Court of Michigan. The Courts admitting such statements seem not to go definitely upon either this or the preceding theory.[4]

(4) Some Courts, not accepting either of the two preceding theories as valid, reject altogether the details of such complaints.[5]

(*b*) Where the defendant is a *bailee charged with the loss of goods*, and he pleads robbery as an excuse, it would seem that he is in the same position evidentially as the owner or possessor in a prosecution for robbery. The fact of

[2] 1834, R. *v.* Wink, 6 C. & P. 397 (the prosecutor was allowed to state that he made complaint to a constable the next morning early, but not to state what person he named as the robber). But see R. *v.* Lundy, 6 Cox Cr. 477 (1854). See also an article by W. C. Maude, in 71 Justice of the Peace 411 (1907).

[3] See the cases in the next note.

[4] *Illinois:* 1896, Goon Bow *v.* People, 160 Ill. 438, 43 N. E. 593 (statements made in pursuit of the robber, admitted); *Iowa:* 1887, State *v.* Driscoll, 72 Ia. 583, 585, 34 N. W. 428 (outcry and declarations "in the effort to arrest the robbers", admitted; Rothrock, J., diss.); *Michigan:* 1874, People *v.* Morrigan, 29 Mich. 5 (the complainant, in a trial for larceny, was allowed to state that he had before described to a detective one of the stolen notes found on the defendant; Campbell, J.: "The conduct of a party complaining of a crime is often of considerable importance in determining his honesty", and is to be considered as 'res gestæ' rather than as hearsay); 1874, Lambert *v.* People, 29 Mich. 71 (similar); 1882, Driscoll *v.* People, 47 Mich. 416, 11 N. W. 221 (complaints of robbery, made immediately, were admitted as a part of the whole affair); 1882, People *v.* Simpson, 48 Mich. 479, 12 N. W. 662 (similar declarations admitted as "illustrative"); 1893, People *v.* Hicks, 98 Mich. 86, 89, 56 N. W. 1102 (restricting the rule of Lambert's case narrowly); *Oklahoma:* 1913, Robinson *v.* State, 8 Okl. Cr. 667, 130 Pac. 121 (complaint of owner received); *Washington:* 1901, State *v.* Smith, 26 Wash. 354, 67 Pac. 70 (complaint of the robber person, "almost immediately after the time of the alleged offence", admitted).

[5] 1892, Bolling *v.* State, 98 Ala. 80, 82, 12 So. 782 (larceny); 1867, People *v.* McCrea, 32 Cal. 98; 1895, Brooks *v.* State, 96 Ga. 353, 23 S. E. 413 (the claim made by the owner of goods stolen, when certain goods were shown him, excluded); 1893, Shoecraft *v.* State, 137 Ind. 433, 36 N. E. 1113 (excluded; to be treated apparently only on the ordinary principle of § 1749, *post*); 1890, Jones *v.* Com., 86 Va. 743, 10 S. E. 1004.

his speedy complaint should therefore be received (under (1) *supra*), as also the details of it (under (2) or (3) *supra*).[6]

§ 1143. **Statements by Possessor of Stolen Goods.** When, on a charge of larceny or robbery, the defendant's being found in posses ion of the stolen goods is relied upon in evidence against him, it would seem that his prior assertions, explaining his source of acquisition, should be admitted upon the principle (*ante*, § 1129) which admits consistent statements indicating that his explanation on the trial was not of recent contrivance. This presupposes, in strictness, that he has himself become a witness, and is thus open to rehabilitation in this manner. But since at common law the accused could not be a witness for himself, this application of the principle seems not to have been explicitly recognized. Its only limitation would be that the statements should have been made before the motive for deliberate contrivance could have arisen; and this would fairly represent the rule laid down in most of the cases. But, though such statements are by most Courts received, their admission is placed on a theory apparently that of the Verbal Act doctrine; and accordingly the precedents are examined under that head (post, § 1781).

§ 1144. **Accused's Consistent Exculpatory Statements.** It would seem that, in a liberal view of the principle of § 1129, *ante*, the statements of an accused person, made before or upon accusation made (*i.e.* before motive for deliberate contrivance could have operated), should be receivable, whether or not he becomes a witness. Probatively, an accused person's protestations of innocence, made in such circumstances, seem to have, for any one inquiring without prepossessions as to the rules of Evidence, a value similar to the class of statements dealt with in § 1129. Moreover, they serve to repel (as in the cases of the preceding sections) the inference from silence (*ante*, § 284). Most Courts dismiss them as ordinary hearsay assertions;[1] this result seems

[6] *Pa.* 1826, Tompkins *v.* Saltmarsh, 14 S. & R. 275, 279 (action against a bailee for careless losing; plea, robbery: "evidence ought to have been received of the hue and cry immediately after the discovery, his assiduous and indefatigable pursuit and strict search, both at the inn and the steamboat. If he had made no complaint or no inquiry, remained with his arms folded and his mouth shut, . . . the jury would have drawn the most unfavorable conclusions from it. . . . All this, however, is to be understood of acts immediately preceding and directly following, concurrent acts and declarations, not acts and declarations not known or commenced until after a lapse of time and suspicion afloat"); *Miss.* 1852, Lampley *v.* Scott, 24 Miss. 528, 534 (assumpsit for money delivered to defendant to be carried for plaintiff; defendant pleaded that he had been robbed; his declarations while in the swamp, where the alleged robbery occurred, to passers-by, his appeals for assistance, and his letter written to plaintiff immediately afterward, were admitted, following Tompkins *v.* Saltmarsh).

Contra: 1867, Tucker *v.* Hook, 2 Rush Ky. 85 (action for money collected; plea, robbery; defendant's declarations and conduct a few hours afterwards, excluded; no precedent cited).

§ 1144. [1] 1873, Ray *v.* State, 50 Ala. 104, 107 (defendant's denials on another occasion, excluded); 1891, U. S. *v.* Cross, 20 D. C. 365, 376 (denials, when arrested for murder, excluded); 1920, Durst *v.* State, — Ind. —, 128 N. E. 920 (illegal sale of liquor; defendant's statements shortly after a police raid, excluded); 1878, Turner *v.* Com., 86 Pa. 54, 71 (murder; declarations of innocence, excluded); 1897, State *v.* Carrington, 15 Utah 480, 50 Pac. 526 (made after knowing of the charge). Compare the cases cited *ante*, § 1133.

But the following case is sound: 1897, People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049 (declarations under hypnotic influence after arrest, excluded).

harsh and needless. But a few Courts indicate a willingness to accept them.[2] An accused's statements may of course be admissible under other principles, — for example, as exculpatory parts of a confession (*post*, § 2115), as statements of a mental condition (*post*, § 1732), or as spontaneous exclamations (*post*, § 1749); his conduct indicating consciousness of innocence (*ante*, § 293) may also be admissible.

What has been said elsewhere (*post*, § 1732, par. 3), as to the illiberal and over-technical judicial treatment of similar questions, may be urged again here.

So also the following: 1871, State *v.* Vandergraff, 23 La. An. 96 (R. S. § 1010, authorizing the accused's examination by a magistrate to be "evidence", does not admit it for the defendant); 1879, State *v.* Toby, 31 La. An. 756 (same; DeBlanc, J., diss.); 1879, State *v.* Dufour, 31 La. An. 804 (same).

[2] 1870, Pearson, C. J., in State *v.* Worthington, 64 N. C. 594, 595 ("[Evidence was offered] of what was said by the defendant when he showed the cotton to Wilson, who claimed it as his cotton and charged that it had been stolen out of his gin the night before. . . . When a man who is at liberty to speak is charged with a crime and is silent, his silence is a circumstance tending to show guilt. It follows that if he denies the charge, or says anything in explanation, these declarations may be given in evidence in his favor, to pass before the jury for what they are worth"); 1894, Boston *v.* State, 94 Ga. 590, 21 S. E. 603 (statements made within half an hour, when voluntarily surrendering himself, admitted).

TITLE III: AUTOPTIC PROFERENCE (REAL EVIDENCE)

CHAPTER XXXVII.

1. General Principle

2. Independent Principles incidentally affecting Autoptic Proference

3. Limitations germane to the Process itself of Autoptic Proference

1. General Principle

§ 1150. **Definition of the Process.** The three modes by which a tribunal may properly acquire knowledge for making its decisions have been already defined and distinguished (*ante*, § 24). They are Circumstantial Evidence, Testimonial Evidence, and "Real" Evidence. In arriving now at the Principles regulating the use of the third mode, it is necessary to recall briefly the nature of this mode as distinguished from the other two.

If, for example, it is desired to ascertain whether the accused has lost his right hand and wears an iron hook in place of it, one source of belief on the subject would be the testimony of a witness who had seen the arm; in believing this testimonial evidence, there is an inference from the human assertion to the fact asserted. A second source of belief would be the mark left on some substance grasped or carried by the accused; in believing this circumstantial evidence, there is an inference from the circumstance to the

thing producing it. A third source of belief remains, namely, the *inspection by the tribunal* of the accused's arm. This source differs from the other two in omitting any step of conscious inference or reasoning, and in proceeding by direct self-perception, or autopsy.

It is unnecessary, for present purposes, to ask whether this is not, after all, a third source of inference, *i.e.* an inference from the impressions or perceptions of the tribunal to the objective existence of the thing perceived. The law does not need and does not attempt to consider theories of metaphysics as to the subjectivity of knowledge or the mediateness of perception. It assumes the objectivity of external nature; and, for the purposes of judicial investigation, a thing perceived by the tribunal as existing does exist. There are indeed genuine cases of inference by the tribunal from things perceived to other things unperceived -- as, for example, from a person's size, complexion, and features, to his age; these cases of a real use of inference can be later more fully distinguished (*post*, § 1154). But we are here concerned with nothing more than matters directly perceived — for example, that a person is of small height or is of dark complexion; as to such matters, the perception by the tribunal that the person *is* small or large, or that he *has* a dark or a light complexion, is a mode of acquiring belief which is independent of inference from either testimonial or circumstantial evidence. It is the tribunal's self-perception, or autopsy, of the thing itself.

From the point of view of the litigant party furnishing this source of belief, it may be termed *Autoptic Proference*.[1]

§ 1150. [1] The word "autoptic" has a precedent in the language of C. J. Robertson, quoted in the next section. The word "proference" is coined, in analogy to "reference", "inference", "conference", "deference", from the Latin 'proferre', whose form 'profert' is intimately associated, in history and in principle, with the process of autoptic proference.

The term "real evidence" has sometimes been applied to this source of belief; but not happily; first, because "real" is an ambiguous term, and not sufficiently suggestive for the purpose; secondly, because the process is not the employment of "evidence" at all, in the strict sense; and, thirdly, because the inventor of the term (Bentham, Judicial Evidence, III. 26 ff.) used the phrase in a sense different from that above and different from that commonly now attached to it; he meant by it any fact about a material or corporal object, *e.g.* a book or a human foot, whether produced in court or not; it is only by later writers that the production in court is made the essential feature. As to the novelty of the term "autoptic proference", compare the "self-evidence" of Gilbert, C. B., and the "autopsy" of Robertson, C. J., quoted *post*.

In Morse *v.* State, 10 Ga. App. 61, 72 S. E. 534 (1911), the trial judge had charged the jury that "evidence may be autoptic proference." The Appellate Court per Powell, J. commented as follows: "Error is assigned as to this charge on two grounds: (1) that the statement is abstractly incorrect; and (2) that it is misleading. Considering these points in reverse order, we may say (to borrow a Hibernicism from the private vocabulary of an ex-Justice of the Supreme Court of this State) that the language excepted to is neither leading nor misleading. As to the other objection — that the language is abstractly incorrect — if incorrectness from a legal standpoint is intended, the objection may be disposed of by citing W. on Evidence, § 1150 et seq. If philological incorrectness is referred to, the objection is more tenable; for, while 'autoptic' is a good word, with a pride of ancestry, though perhaps without hope of posterity, the word 'proference' is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father (see W. on Evidence, § 1150, note 1). Despite all this, we cannot brand the statement as reversible error. This Court is rather liberal in allowing the judges on the trial bench the privilege of big words."

In Enyart *v.* People, 70 Colo. 362, 201 Pac. 564 (1921), Denison, J., said "Such evidence is called real or autoptic evidence."

The nature of this source of belief, as distinguished from that of inference from evidence, has more than once been noted in judicial utterances:[2]

Ante 1726, Chief Baron GILBERT, Evidence, 2: "All certainty is a clear and distinct perception; and all clear and distinct perceptions depend upon a man's own proper senses; . . . and when perceptions are thus distinguished on the first view, it is called Self-evidence, or intuitive knowledge. . . . Now most of the business of civil life subsists on the actions of men, that are transient things, and therefore oftentimes are not capable of strict demonstration (which, as I said, is founded on the view of our senses), and therefore the rights of men must be determined by probability. Now as all demonstration is founded on the view of a man's own proper senses, by a gradation of clear and distinct perceptions, so all probability is founded upon obscure and indistinct views, or upon report from the sight of others; . . . and this is the original of trials, and all manner of evidence."

1888, GARRISON, J., in *Gaunt* v. *State*, 50 N. J. L. 490, 495, 14 Atl. 600: "Inspection is like [an] Admission, in that, while not testimony, it is an instrument for dispensing with testimony."

1921, DAVIS, J., in *Philadelphia & R. R. Co.* v. *Berg*, 30 C. L. A. 274 Fed. 534 (injury to a seaman at a winch): "The questions whether or not the eyebolt was defective, and, if it was, whether or not that defect caused the hook to break, which resulted in the plaintiff's injury, as well as the question of contributory negligence of the plaintiff, were submitted to the jury. The defendant contends that there was no testimony from which the jury could draw the conclusion that the condition of the eyebolt could have caused the hook to break. . . . This contention does not take into consideration the 'real evidence' in the case. The jury had before it the hook, and the testimony as to how it was fastened in the eyebolt, and could readily draw its own conclusion. In addition to the usual methods of establishing facts by direct or positive evidence and circumstantial evidence, there is that of 'self-perception or self-observation.' We have three classes of evidence: (1) Direct or testimonial evidence; (2) indirect or circumstantial evidence; (3) autoptic proference, or real evidence. . . . The jury had the hook and eyebolt before it, and, being composed of men of common sense and experience, could determine for itself whether or not it was broken because it could not fully and properly enter the eye. It was thus not wholly dependent upon what was *said* about the hook and eyebolt."

It follows, on the one hand, that Autoptic Proference, for the tribunal's self-inspection, is to be distinguished from the use of testimonial and circumstantial evidence as the basis of an inference. Autoptic proference calls for no inference from the thing perceived to some other thing; and in this sense, but in this sense only, Autoptic Proference is "not evidence", *i.e.* not evidence in so far as evidence implies a process of inference. On the other hand, it is clear that Autoptic Proference *is* one of the three only sources of belief, and that it may be employed in litigation in order to convince the tribunal of desired facts. It is thus Evidence, in the sense that Evidence includes all

[2] Compare also the traditional phrase about a record "tried by inspection", *i.e.* its contents determined by direct perception; and also the language in the quotations in the next section. The following passage, though dealing with a judge's peculiar providence, rests upon the same thought: 1768, Blackstone, Commentaries, III, 331: "Trial by inspection, or examination, is when for the greater expedition of a cause, in some point or issue being either the principal question or arising collaterally out of it, but being evidently the object of senses, the judges of the Court, upon the testimony of their own sense, shall decide the point in dispute; . . . and therefore when the fact, from its nature, must be evident to the Court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the Court alone."

modes, other than argument, by which a party may lay before the tribunal that which will produce persuasion. It is something more than and different from Testimonial or Circumstantial Evidence, and it is to be included among the kinds of Evidence in the broader sense of that term. The due appreciation of this is of considerable practical consequence in solving one of the problems connected with a jury's view (*post*, § 1168).

§ 1151. **General Principle: Autoptic Proference always Proper, unless Specific Reasons of Policy apply.** It is obvious that, from the point of view of logic or probative value, none of the limitations have here to be examined which always affect the use of testimonial and circumstantial evidence. If we offer to prove that a man was of negro complexion by the circumstance that his grandchild is of negro complexion, it may be a question whether this fact is of enough probative value to be admissible. Or, if we offer to prove it by the assertion of a witness on the stand, the witness must first appear to be so qualified that his assertion is worth receiving. But when we offer to produce in Court the man himself, no inference is necessary, and the restrictions and preliminary inquiries that are due to the use of circumstantial or testimonial inferences are entirely dispensed with. There may be objections based on Materiality, or on Auxiliary Probative Policy (*post*, §§ 1157–1168), but there can be none based on Relevancy or probative value. There is always a question as to the relevancy of a circumstance, or the qualifications of a witness; there can never be a question as to the relevancy of the thing itself, autoptically produced. Add to this that, since either sort of evidence, testimonial or circumstantial, is one step removed from the thing itself to be proved, the production of the thing itself would seem to be the most natural and efficient process of proof. If the question is whether a shoe is fastened by laces or by buttons, the testimony of one who has seen the shoe or the circumstance that a button has fallen from the shoe, can at least be no more satisfactory than the inspection of the shoe in Court.

Accordingly, it might be asserted, 'a priori', that where the existence or the external quality or condition of a material object is in issue or is relevant to the issue, *the inspection of the thing itself, produced before the tribunal, is always proper*, provided no specific reason of policy or privilege bears decidedly to the contrary. Such ought to be, and such apparently is, the principle accepted by the Courts:

1811, COALTER, J., in *Hook* v. *Pagee*, 2 Munf. 379, 384 (allowing the inspection of an alleged slave): "There can be no objection to the other finding, to wit, 'that the plaintiff Nanny is a white woman.' The jury find this fact upon their own knowledge, — in other words, by inspection. Was this improper? . . . If the plaintiff Nanny had not been before the jury, they must have found their verdict upon the testimony of others, which would have amounted only to a probability. But here they have the highest evidence, the evidence of their own senses. . . . The jury believe their own senses, in preference to the opinions of the witnesses."

1835, ROBERTSON, C. J., in *Gentry* v. *McMinnis*, 3 Dana Ky. 382, 386 (the jury had been allowed to inspect the defendant, to see if she was a white woman): "The counsel denies

that personal inspection by the jurors on the trial is proper or allowable evidence. . . . To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. . . . Hence, *autopsy*, or the evidence of one's own senses, furnishes the strongest probability and indeed the only perfect and indubitable certainty of the existence of any sensible fact. . . . [Jurors,] when they decide altogether on the testimony of others, do so only because the fact to be tried is unsusceptible of any better proof. Their own personal knowledge of the fact would always be much more satisfactory to themselves, and afford much more certainty of truth and justice. . . . Hence the policy of having a jury of the vicinage; and hence, too, jurors have not only been permitted but required to decide on autoptical examination wherever it was practical and convenient."

1876, BECK, J., in *Stockwell* v. *R. Co.*, 43 Ia. 474 (admitting evidence of a trial in the jury's presence of the practicability of a train running a certain distance without steam): "The question involved is a physical fact. Its solution by the experiment would leave no chance for error in judgment or opinion. Why not employ the experiment to reach the truth, — the end and aim of all trials at law? . . . Suppose experts should differ as to the effect of the union of two chemical bodies; what objection could exist to an experiment before the jury to determine the true result? Suppose a question arose in a case as to the weight of a gold coin, the witnesses of the parties giving conflicting evidence on the subject; why not weigh it in the presence of the jury? Or suppose an alteration in a deed can only be determined by the use of artificial assistance, to the eye? Why should not jurors be permitted to use such aids to enable them to decide the case in accordance with the very truth? But the questions here presented we do not determine; we suggest these thoughts to show that there are arguments based upon the high considerations of justice and truth in support of the alleged experiment", if fairly conducted.

1877, RODMAN, J., in *Warlick* v. *White*, 76 N. C. 175, 179: "On general principles it would seem that, when the question is whether a certain object is black or white, the best evidence of the color would be the exhibition of the object to the jury. . . . Why should a jury be confined to hearing what other men think they have seen, and not be allowed to see for themselves?

"'Aut agitur res in scenis, aut acta refertur.
Segnius irritant animos demissa per aurem,
Quam quæ sunt oculis subjecta fidelibus, et quæ
Ipse sibi tradit spectator' (Horatius ad Pisones)."[1]

§ 1152. **Sundry Instances of Production and Inspection in Court.** This source of persuasion has been resorted to in a great variety of instances. Among the earliest examples of its recognition are the view of realty;[1] the proceeding 'de ventre inspiciendo' in cases of a widow professing to be with child entitled to inherit and of a convicted woman asking respite from execution on account of pregnancy;[2] the coroner's inquest over a deceased person; the inspection of a maimed person on a trial for mayhem;[3] the inspection of one pleading non-age or infancy;[4] and the Chancellor's examination of one protesting against being kept under restraint as an idiot or lunatic.[4] Proof is often made by the production of a person whose color is

§ 1151. [1] Quoted with approval in Moorhead v. Arnold, 73 Kan. 132, 84 Pac. 742 (1906). The poem is better known as 'De Arte Poetica.'

§ 1152. [1] See the authorities *post*, § 1162.

[2] The question in this case is rather one of a compulsory examination (*post*, § 1158).

[3] 1592, Abbot of Strata Mercella's Case 9 Co. Rep. 31 *a*; 1642, Austin v. Hilliers, Hardres 408; 1768, Blackstone, Commentaries, III, 332.

[4] See the authorities *post*, § 1154.

in issue;[5] of a person alleged to be intoxicated,[5] or incompetent,[6] or to be identical with another person,[5] or to resemble another person.[5] Tools, weapons, and other objects connected with a crime may be proved by production,[7] as well as the clothing or mutilated members of the deceased,[7] or the injured members of a plaintiff suing for compensation.[8] The nature of goods may be made to appear by the inspection of a sample,[9] or the operation of a force whose qualities are in issue by material instances of the effect of that operation.[10] In short, it does not appear that there is, in the nature of the process, any distinction to be taken as regards the *kind of fact* presented for inspection. Anything cognizable by the senses of the tribunal may thus be offered.

Nor is any distinction to be taken as regards the *mode of presentation* by the party. An object may be merely set forth for inspection, or some experimental process may be conducted in the tribunal's presence;[11] whether the mode involves a showing or a doing, either is in itself objectionable.

Nor is any distinction to be taken as to the *mode of inspection* by the tribunal. It may merely employ its senses directly; or it may use some suitable mechanical aid, such as a microscope.[12] It may merely look on, or it may take an active share in the process of experimentation;[13] or it may direct an inspection and report by experts.[14]

Nor is there any distinction as to the *place of inspection;* the thing may be brought into the court, or the tribunal may go to the place where the thing is.[15]

The discriminations that may serve to forbid this process of inspection by the tribunal are of two sorts: (1) Independent principles, connected with other subjects, may apply equally to the process of Autoptic Proference; (2) Limitations germane to the process itself may forbid its use. These may now be considered in order.

2. Independent Principles incidentally affecting Autoptic Proference

§ 1154. Irrelevant Facts are not to be proved (Color, Resemblance, Appearance, etc., to show Race, Paternity, Age, etc.; Changed Conditions of

[5] *Post*, § 1154.
[6] *Post*, § 1160.
[7] *Post*, § 1157.
[8] *Post*, § 1158.
[9] *Ante*, § 439; *post*, § 1159.
[10] *Ante*, §§ 445, 451.
[11] *Post*, §§ 1154, 1160, 1163; *ante*, § 445.
[12] *Conn.* 1906, State *v.* Wallace, 78 Conn. 677, 63 Atl. 448 (photograph of a building, examined with a magnifying glass); *Ind.* 1878, Short *v.* State, 63 Ind. 376, 380 (to discover a ring's erased inscription, the jury were allowed to examine it through a "magnifying or jeweller's eye-glass"; "if the eye-glass in question augmented the natural power of the eye to discover the inscription, it did that which in the light of science it was made for; and if it did not", no harm was done); *Mass.* 1906, Cotton *v.* Boston El. R. Co., 191 Mass. 103, 77 N. E. 698 (damage by eminent domain; the trial Court's refusal to allow the jury to look through a microscope at particles of steel collected in the building and emanating from the defendant road, held to be within his discretion); *Mich.* 1898, Morse *v.* Blanchard, 117 Mich. 37, 75 N. W. 93 (judge or jury may examine a writing with microscope to detect alteration); *N. Y.* 1897, People *v.* Constantino, 153 N. Y. 24, 47 N. E. 37 (the judge allowed to illustrate the length of a minute by taking his watch and marking the period for the jury).

Compare the cases cited *ante*, §§ 789, 790 (testimony based on the use of scientific instruments).

[13] See the preceding instance, and *post*, § 1160.
[14] *Post*, §§ 1862, 1863, 2484.
[15] *Post*, §§ 1161, 1162.

Premises, etc.). If, by some principle of Relevancy, a fact offered to be shown by Autoptic Proference is not admissible, because irrelevant, it cannot be shown, either in this or in any other way. For example, whether a person's color is black or white is best ascertained by inspecting the person; but if his color when ascertained would be irrelevant for the purpose concerned, an inspection to learn his color would obviously be unnecessary, and therefore improper. Thus, his color might be relevant to show his race-ancestry, but not to show his state of health; in the former case inspection would be allowed, in the latter case not, the ruling in each instance depending on the admissibility of the fact shown by inspection. In a large number of instances this is the real question.

(1) A person's *color* has always been regarded as some evidence of *race-ancestry;*[1] accordingly, the production of a person to ascertain his color as relevant for this purpose is proper;[2] so, also, to ascertain his *foot-formation* as evidence of race.[3]

(2) *Resemblance of features*, as evidence of *paternity*, in cases of bastardy, inheritance, or seduction, has been a matter of some controversy;[4] but, where the fact of resemblance has been regarded by the Court as having probative value, the production of the child for the better apprehension of the resemblance has been treated as proper.[5]

§ 1154. [1] Cases cited *ante*, § 167.

[2] CANADA: *Br. C.* St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 3 (the judge, jury, etc., "may infer as a fact the nationality or race of the person in question from the appearance of such person"; the foregoing to be § 53 of Rev. St. 1897, c. 71); UNITED STATES: *Federal:* 1904, U. W. *v.* Hung Chang, 134 Fed. 19, 23, 67 C. C. A. 93 (Chinese descent, evidenced by the person's appearance; "it is a case of 'res ipsa loquitur' "); *Ia.* 1911, State *v.* Nathoo, 152 Ia. 665, 133 N. W. 129 (rape; profert of the child, as resembling the Hindoo defendant; not decided); *Ky.* 1835, Gentry *v.* McMinnis, 3 Dana Ky. 382, 386 (inspection of an alleged slave to determine her color); 1839, Chancellor *v.* Milly, 3 Dana 24 (same); *Miss.* 1876, Garvin *v.* State, 52 Miss. 207, 209 (exhibition of a defendant to determine his color); *Mo.* Rev. St. 1919, § 3513 (the jury may determine negro-blood from appearance, on an issue as to a mixed marriage); *N. Car.* 1877, Warlick *v.* White, 76 N. C. 175, 179 (exhibition of a child to determine its parentage by its color); *P. I.* 1916, Que Quay *v.* Insular Collector, 33 P. I. 128 (appearance, characteristics, language, dress, manner, and deportment, may be used as evidence of race or nationality); 1916, U. S. *v.* Kong Fong, 33 P. I. 234 (similar); 1917, Co Puy *v.* Insular Collector, 37 P. I. 409 (similar); *Va.* 1806, Hudgins *v.* Wrights, 1 Hen. & M. 134, 141 (Roane, J.: "In the case of a 'propositus' of unmixed blood, I do not see but that the fact may be as well ascertained by the jury or the judge upon view as by the testimony of witnesses"; otherwise, additional evidence may be needed); 1811, Hook *v.* Pagee, 2 Munf. 379, 384, 386 (inspection of an alleged slave's complexion, allowed); 1851, Southard's Trial, Va., 2 Amer. St. Tr. 905, 909 (objection being made to certain witnesses as disqualified by negro blood, Caskie, J., ruled, "I have no doubt I might decide upon my own inspection").

[3] 1861, Daniel *v.* Guy, 23 Ark. 50, 51 (the foot-formation being evidential of race, the plaintiff in a suit for freedom was allowed to exhibit her bare feet to the jury).

[4] Cases cited *ante*, § 166.

[5] The exhibition was allowed, except as otherwise noted: *Federal:* 1914, Ex parte Chooey Dee Ying, D. C., N. D. Cal., 214 Fed. 873 (whether a Chinese immigrant was the son of a Chinese native of the U. S.; resemblance of the son and alleged father considered); *Alabama:* 1875, Paulk *v.* State, 52 Ala. 427, 429; 1902, Kelly *v.* State, 133 Ala. 195, 32 So. 56 (bastardy; child about a year old, allowed to be shown); 1913, Watts *v.* State, 8 Ala. App. 264, 63 So. 18 (seduction; exhibition of child, allowed); *California:* 1889, *Re* Jessup, 81 Cal. 408, 418, 21 Pac. 976, 22 Pac. 742; 1904, People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904 (seduction; child's presence in court held not improper); 1911, People *v.* Richardson, 161 Cal. 552, 120 Pac. 20; 1912, People *v.* Burke, 18 Cal. App. 72, 122 Pac. 435; 1916, Valencia *v.* Milliken, 31 Cal. App. 533, 160 Pac. 1086 (civil action for rape; the child of a year old,

(3) A person's *appearance*, as evidence of *age* (for example, of infancy, or of being under the age of consent to intercourse), is usually regarded as relevant;[6] and, if so, the tribunal may properly observe the person brought before it.[7]

exhibited to the jury); *Hawaii:* 1918, *Re* Ah Sam, 24 Haw. 591 (bastardy; mother's retaining the child in her arms while testifying, allowed); *Indiana:* 1862, Risk *v.* State, 19 Ind. 152 (doubted because of the irrelevancy of resemblance); 1870, Reitz *v.* State, 33 Ind. 187 (same); *Iowa:* 1878, State *v.* Danforth, 48 Ia. 43, 47 (seduction; exhibition of infant, held improper, because of irrelevancy of resemblance); 1880, State *v.* Smith, 54 Ia. 104, 6 N. W. 153 (child exhibited, to show resemblance); 1900, State *v.* Harvey, 112 Ia. 416, 84 N. W. 535 (doubted, on authority of Close *v.* Samm, cited *post*, § 1168); 1909, State *v.* Hunt, 144 Ia. 257, 122 N. W. 902 (exhibition of a child two months old, in a seduction trial held improper as evidence by resemblance); 1917, State *v.* Kurtz, 183 Ia. 480, 165 N. W. 355 (incest; exhibition of the child born to the woman, held not improper on the facts); *Kansas:* 1915, State ex rel. Rison *v.* Browning, 96 Kan. 540, 152 Pac. 672 (bastardy; child of 6 mos. allowed to be exhibited, in the trial Court's discretion); *Kentucky:* 1917, Frierson *v.* Com., 175 Ky. 684, 194 S. W. 914 (rape under age; not decided); 1921, James *v.* Com., 190 Ky. 458, 227 S. W. 562 (bastardy; profert of the child to show resemblance; "we do not feel called upon . . . to commit ourselves either one way or the other"); *Maine:* 1888, Clark *v.* Bradstreet, 80 Me. 454, 15 Atl. 56 (held improper for reasons of irrelevancy); *Maryland:* 1876, Jones *v.* Jones, 45 Md. 144, 151, *semble; Massachusetts:* 1867, Finnegan *v.* Dugan, 14 All. 197; 1869, Young *v.* Makepeace, 103 Mass. 50, 54; 1891, Scott *v.* Donovan, 153 Mass. 378, 26 N. E. 871 (bastardy; child allowed to be exhibited, with no "distinction according to age"); *Mississippi:* 1905, Johnson *v.* Walker, 86 Miss. 757, 39 So. 49 (not decided); *Missouri:* 1906, State *v.* Palmberg, 199 Mo. 233, 97 S. W. 566 (rape under age; child exhibited); *Nebraska:* 1904, Esch *v.* Graue, 72 Nebr. 719, 101 N. W. 978 (mere presence of the child, held not improper on the facts); *New Hampshire:* 1859, Gilmanton *v.* Ham, 38 N. H. 108, 112; 1900, State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083 (bastardy, defendant being a Jew; child allowed to be inspected); *New Jersey:* 1888, Gaunt *v.* State, 50 N. J. L. 490, 495, 14 Atl. 600; *North Carolina:* 1872, State *v.* Woodruff, 67 N. C. 89, *semble; Ohio:* 1892, Crow *v.* Jordon, 49 Oh. St. 655, 32 N. E. 750; *P. I.* 1914, Chua Yeng *v.* Insular Collector, 28 P. I. 591 (minor Chinese and alleged father);

The consideration of this resemblance was forbidden in Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489, on other grounds (*post*, § 1168).

Distinguish the following ruling, on the principle of § 1158, *post:* 1903, Hopkins *v.* Hopkins, 132 N. C. 25, 43 S. E. 506 (exhibition of defendant's child, in a divorce case, merely to excite sympathy, held improper).

[6] *Ante*, § 222.

[7] ENGLAND: 1312, Daniel *v.* Scadbury, Y. B. 5 Edw. II, Trin., No. 3, p. 130 (Bolland's ed., Selden Soc. Pub. vol. XXXIII, 1916; writ of entry; one of the claimants was said to be under age, *i.e.* 15 years, and it was prayed that the Court view him; apparently this was sanctioned); 1558, Langley *v.* Mark, Cary 53 (person adjudged "by inspection not above the age of 15 years"); 1586, Wood *v.* Wageman, Toth. 72 ("view of the body" had by Chancellor, to determine infancy); 1592, Abbot of Strata Mercella's Case, 9 Co. Rep. 31*a* (plea of non-age; the writ was a 'venire facias' "ut per aspectum corporis sui constare poterit præfatis justiciis nostris si prædictus A. sit plenæ ætatis"); St. 1904, 4 Edw. VII, c. 15, § 17 (offences concerning children; where "the child appears to the Court to be under that age" alleged, such child shall "be deemed to be under that age, unless the contrary is proved"). CANADA: *P. E. I.* St. 1910, c. 15, § 25 (neglected children; child's appearance as under age is sufficient as evidence). UNITED STATES: *Colo.* 1911, Quinn *v.* People, 51 Colo. 350, 117 Pac. 996 (but, if there is no other evidence, the jury's attention must be called, by instruction); *Ga.* 1899, Jones *v.* State, 106 Ga. 365, 34 S. E. 174 (rape of girl of 15 years; the jury allowed, in determining whether she had capacity to consent, "to take into consideration facts discovered by their own observation of the girl herself" in court); *Mass.* 1898, Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632 (appearance of a girl said to be under 16, allowed); *Mo.* 1900, State *v.* Thomson, 155 Mo. 300, 55 S. W. 1013; 1909, Stevenson *v.* Haynes, 220 Mo. 199, 119 S. W. 346 (defendant's presence before the jury is some evidence as to his being over 16 years of age); *N. Y.* Laws 1882, c. 340, C. P. A. 1920, § 334, Consol. L. 1909, Penal, § 817 (on a dispute as to a child's age, the child "may be produced and exhibited"); *N. Car.* 1851, State *v.* Arnold, 13 Ired. 184, 192 (whether a defendant was under 14; inspection allowed); *P. I.* 1913, Tan Beko *v.* Insular Collector, 26 P. I. 254 (minor son of Chinese immigrant); 1917, U. S. Agadas, 36 P. I. 246 (age of accused); 1919, Dy Keng *v.* Insular Collector, 40 P. I. 118 (immigrant's minor son); *Wis.* 1888, Hermann *v.* State, 73 Wis. 248, 250, 41 N. W. 171 (whether a girl's appearance was under 21, inspection allowed).

In Indiana, Texas, and Illinois, the con-

(4) A person's appearance and behavior is relevant as indicating his *intoxication*,[8] or his *lunacy*,[9] or even his *competency* as a workman;[10] and may therefore be learned by the tribunal's direct observation of the person.

(5) Where the *identity* of one person or thing with another is in issue, the features as observable by the tribunal are relevant.[11]

(6) The *present condition* of an object offered may not be the same as at the time in issue, nor so nearly the same as to be proper evidence of its former condition;[12] accordingly, autoptic proference is allowable only on the assumption that the condition is the same or sufficiently similar.[13]

(7) *Experiments* to show the quality or operation of a substance, a machine, etc., are often excluded because of the dissimilarity of circumstances or because of probable confusion of issues;[14] and for this reason the exhibition of such experiments before the tribunal may of course be forbidden.[15] The following classical example illustrates the propriety of experimentation when the fact ascertainable from it is a relevant one:

1800 (?), Lord ELDON, in Twiss' Life, I, 354: "When I was Chief Justice of the Common Pleas (I did like that court!) a cause was brought before me for the recovery of a dog which the defendant had stolen in that ground [lying in the fields beyond his house] and detained from the plaintiff its owner. We had a great deal of evidence, and the dog was brought into court and placed on the table between the judge and witness. It was a very fine dog, very large and very fierce, so much so that I ordered a muzzle to be put on it. Well, we could

sideration of appearance as evidence of age has been forbidden on the ground of § 1168, *post*, where the authorities are collected.

For the possible quibble here, under the Opinion rule, see *post*, § 1974.

[8] 1794, Walker's Trial, 23 How. St. Tr. 1154 (Mr. Justice Heath: "He has made himself so exceedingly drunk, it is impossible to examine him"); and cases cited *ante*, § 235.

[9] The authorities are collected *post*, § 1160, where the subject is considered from another point of view.

[10] 1885, Keith *v.* N. H. & N. Co., 140 Mass. 175, 180, 3 N. E. 28 (appearance of employee on the stand, allowed to be considered as affecting his competency for his duties).

[11] 1669, R. *v.* Buckworth, 1 Sid. 377 (perjury in a cause involving the birth of a posthumous child, said to have been falsely procured by the mother from another woman; the delivery of the child "was proved by the circumstances usual in such cases, and also by marks, and the child being in court was stripped and shown"); 1592, Abbot of Strata Mercella's Case, 9 Co. Rep. 30 (a person said to be dead); 3 Bl. Com. 332; 1743, Annesley *v.* Anglesea, 17 How. St. Tr. 1139, 1182; 1873, R. *v.* Castro (Tichborne Trial), charge of C. J. Cockburn, *passim;* La. C. Pr. 1900, § 139 (Court may order movable property brought into court to determine its identity). Compare the principles affecting Identification, *ante*, § 413.

For the identity of animals, see *infra*, this section, and *post*, § 1161.

[12] The principles are explained *ante*, § 437.

[13] 1892, French *v.* Wilkinson, 93 Mich. 322, 53 N. W. 530 (limb bitten by dog; exhibition three years afterwards, forbidden, the sameness of condition not being shown); 1898, State *v.* Goddard, 146 Mo. 177, 48 S. W. 82 (door of room of homicide, not changed in condition, admitted); 1878, King *v.* R. Co., 72 N. Y. 607 (broken hook with cross-cracks, shown, the iron being in the same condition); 1913, Baltimore & O. R. Co. *v.* Fouts, 88 Oh. 305, 104 N. E. 544, (negligence of an engineer in disobeying an arm-signal of the conductor, mistaking the go-ahead signal for the back-up signal; the witness' reproduction of the signal before the jury, held improper, the conditions of light and distance not being the same); 1903, Walker *v.* Ontario, 118 Wis. 564, 95 N. W. 1086 (pieces of a broken bridge, two years after the break, allowed to be shown, after testimony to the sameness of condition); and cases cited *post*, § 1164 (jury's view).

The following ruling is unsound: 1870, Jacobs *v.* Davis, 34 Md. 204, 208, 216 (whether rails and shingles had been injured; the rails and shingles not allowed to be shown, because they could not be "received as testimony to prove or disprove the fact of injury done to them"; a singular abuse of language).

[14] *Ante*, § 445.

[15] See *post*, § 1160, for an additional reason for exclusion; and cases cited *post*, § 1163.

come to no decision; when a woman, all in rags, came forward and said, if I would allow her to get into the witness-box, she thought she could say something that would decide the cause. Well, she was sworn just as she was, all in rags, and leant forward towards the animal, and said, 'Come, Billy, come and kiss me!' The savage-looking dog instantly raised itself on its hind legs, put its immense paws around her neck, and saluted her. She had brought it up from a puppy. Those words, 'Come, Billy, come and kiss me', decided the cause." [10]

§ 1155. **Privilege, as a ground for Prohibition (Self-Crimination, Plaintiff suing for Corporal Injury).** Another independent principle that may prohibit autoptic proference is the principle of privilege, protecting one who is unwilling to furnish evidence. Whether the privilege of an *accused person* not to criminate himself is violated by compelling the exhibition of his body or its members in court depends wholly on the theory of this privilege.[1] So also the question whether a *plaintiff* suing for *corporal injury* may be compelled to exhibit it to the jury or to medical witnesses is peculiarly one of privilege;[2] as also the propriety of granting a writ 'de ventre inspiciendo'[2] or of ordering an inspection in a suit for divorce on the ground of *impotency*.[2]

§ 1156. **Sundry Independent Principles sometimes involved (Handwriting, Hearsay, Photographs, etc.).** Certain other independent principles sometimes resulting in the prohibition of autoptic proference, or prescribing conditions for its use. need to be discriminated:

(1) Specimens of *handwriting*, as evidence of a person's style of writing, are in some jurisdictions not to be submitted to the jury.[1]

(2) Where an object has been obtained by *illegal means*, it has sometimes been made a question whether it should be allowed to be used in evidence.[2]

(3) The *Hearsay rule* forbids a jury at a view to hear testimony;[3] moreover, some things said or done in court by way of test or experiment may virtually involve a breach of this rule by calling for unsworn testimony.[4] Whether the accused in a criminal case must be present at a view involves also the scope of the Hearsay rule.[5]

(4) The use of *photographs*, *models*, *maps*, and the like, by a witness, is merely one way of giving testimony, and does not concern the present principle.[6]

(5) Whether the *Court* may decide by inspection, instead of the jury, is a question of the respective functions of judge and jury.[7]

(6) The rule of *Primariness*, *i.e.*, that the original of a writing must be presented autoptically to the tribunal, unless it is not available for production, involves a different question;[8] for there the question is whether the original

[10] For the relevancy of animal conduct of this kind, see *ante*, § 117.

Compare the unreasonable ruling in State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (1903), cited *post*, § 1163, n. 6.

§ 1155. [1] *Post*, § 2265.

[2] *Post*, § 2220.

§ 1156. [1] *Post*, § 2001.

[2] *Post*, § 2183.

[3] *Post*, § 1802.

[4] 1877, Com. *v.* Scott, 123 Mass. 222, 224, 234 (cross-examination of one identifying defendant by his voice; Court's refusal to allow defendant to speak to test the witness, held proper, the defendant not being on oath; *post*, § 1824); 1886, Osborne *v.* Detroit, 36 Fed. 36 (*post*, § 1158).

[5] *Post*, § 1803.

[6] *Ante*, § 790.

[7] *Post*, § 2550.

[8] *Post*, § 1179.

writing *must* be presented, while here the only question is whether it *may* be and the answer to the latter question has never been doubted.[9]

(7) A *chattel* or a document produced may need to be *authenticated, i.e.* evidenced as to its connection with the authorship or possession of a specific person.[10]

3. Limitations germane to the Process itself of Autoptic Proference

§ 1157. **Unfair Prejudice to an Accused Person (Exhibition of Weapons, Clothes, Wounds, etc.).** The autoptic proference to the jury of the weapons or tools of a crime, or of the clothing or the mutilated members of the victim of the crime, has often been objected to on grounds of Undue Prejudice (*post*, § 1863). The nature of this supposed prejudice is illustrated in the following passages:

1806, *Picton's Trial*, 30 How. St. Tr. 457, 480; the defendant was charged with inflicting torture, as governor of Trinidad, upon Luisa Calderon, by first tying the left foot and right hand together behind, and then suspending the body from the ceiling by a pulley-rope tied to the left wrist, so that the weight of the body rested, through the right foot, on a sharp wooden spike in the floor. Mr. *Garrow* (to the witness Luisa): "Is that a faithful description of it?" [showing the witness a coloured drawing]. Ans. "Yes, very good indeed." L. C. J. ELLENBOROUGH: "I do not approve of exhibiting drawings of this nature before a jury; and I shall not permit it till the counsel for the defendant has seen it. I have no objection to your showing a description to the jury, but the colouring may produce an improper effect. [The opposing counsel consented to its use.] The jury will consider it merely as a description of the situation in which she was placed; whether she was justifiably so placed is the question between you." Mr. *Garrow:* "I have one to which there can be no objection; it is a mere pen-and-ink sketch." L. C. J. ELLENBOROUGH: "Gentlemen, you will consider that as a description of the position, which we can easily understand from the words of the witness. Nobody wishes that any improper impression should be made by that drawing; it is only to show the nature of the process." When the counsel for the defence afterwards complained of the prejudice thus created, Lord ELLENBOROUGH said: "That you must attribute to me, or perhaps to yourself; for I distinctly asked you whether you would consent to their exhibition, and on your concurring, I cautioned the jury not to suffer their minds to be inflamed, but simply to look at the representation of the position of the prosecutrix in order to understand the testimony of the witness."

1820, *Ings' Trial*, 33 How. St. Tr. 1051, 1088; the "Cato-street conspiracy"; high treason; the defendant claimed that he was ignorantly drawn into the movement and did not know of the specific murderous designs of the leaders. A constable produced the conspirators' weapons. "Are there now placed upon the table the things which were taken in Cato-street?" "Yes."— "You gave us an enumeration yesterday of thirty-eight ball-cartridges, firelock and bayonet, one powder-flask, three pistols, and one sword, with six bayonet spikes, and cloth belt, one blunderbuss, pistol, fourteen bayonet spikes, and three pointed files, one bayonet, one bayonet spike, and one sword scabbard, one carbine and bayonet, two swords, one bullet, ten hand-grenades; [two fire-balls, nine hundred and sixty-five ball cartridges, eleven bags of gunpowder of a pound each;] I do not see them?" "Here they are," producing a bag. — "We must have them on the table." They were emptied out, and the jury inspected the various articles, the hand-grenades being broken open, and other weapons displayed. No objection was made to this proceeding, which was taken as a matter of course; but the counsel for the defence, Mr. *Adolphus*, thus referred to

[9] Except for the considerations referred to in notes 1 and 2, *supra*.

[10] *Post*, § 2129.

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

1856, Mr. *David Paul Brown*, in "The Forum", II, 448 (this famous Philadelphia advocate is recounting the story of a 'cause célèbre' of 1834, the homicide, by a disappointed lover, of the woman he loved): "During the course of the trial there was an occurrence which is entitled to notice. When I first called upon the prisoner, after he had furnished me with some of the prominent details, I asked him how the deceased was dressed at the time of the blow. He said, 'in black.' I observed, 'that was better than if the dress had been white.' Upon which the prisoner turned hastily round, and asked what difference that could make. The reply was, 'No difference in regard to your offence, but a considerable difference in respect to the effect produced upon the jury by the exhibition of the garments, which, no doubt, will be resorted to.' And so upon the trial it turned out. The black dress was presented to the jury, — the eleven punctures through the bosom pointed out; but no stain was observable, no excitement was produced. At last, however, they went further, and produced some of the white undergarments — corsets, etc., all besmeared with human blood. Upon this exhibition there was not a dry eye in the courthouse. And the current of opinion continued to run against the defendant from that moment until the close of the case, and finally bore him into eternity."

1882, ANDREWS, C. J., in *Walsh* v. *People*, 88 N. Y. 467: "The exhibition of the photograph of a young girl alleged to have been cruelly murdered was, as is claimed, calculated to excite the pity of the jurors for the unfortunate victim of the homicide, and correspondingly to excite their prejudice, against the accused. . . . [After conceding that the condition of the corpse was irrelevant to the disputes of fact in the case,] The extent to which counsel may go, in opening a case to a jury, cannot in the nature of things be regulated by precise rule. The Court may doubtless interfere in the interest of justice to restrain undue license on the part of counsel in addressing the jury. . . . But if the prosecuting officer, instead of exhibiting the picture, had described the deceased in terms calculated to excite the sympathy or pity of the jury, it would scarcely be claimed that an exception would lie to a refusal of the Court to interfere. It is neither a logical nor a reasonable inference that a jury dealing with the grave issue of life or death, in a case where the sole controverted question is as to the insanity of the prisoner when he committed the act, would be influenced by a description in words or by a representation in a picture of the personal appearance of the person alleged to have been murdered."

1878, Mr. *Pitt Taylor*, Evidence, 7th ed., I, § 557: "Though evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what

manner these articles are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirists, and many amusing illustrations of its effect might be cited from our best authors. Shakespeare makes Jack Cade's nobility rest on this foundation; for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, 'was by a beggar woman stolen away', 'became a bricklayer when he came to age', and was his father, one of the rioters confirms the story by saying, 'Sir, he made a chimney in my father's house, and the *bricks* are alive to this day to testify to it; therefore deny it not.' Archbishop Whately — who makes use of the above anecdote in his 'Historic Doubts relative to Napoleon Buonaparte,' — adds, 'Truly, this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold.'"[1]

1877, *Scintillæ Juris*, 58: "What is called 'real evidence'— mostly bullets, bad florins, and old boots — is of much value for securing attention. This is true even when these exhibits prove nothing, — as is generally the case. They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects. They who first carved for themselves a Jupiter from a log of wood knew very well that the idol could do nothing for them; but it enabled them easily to realize a power who could. A rusty knife is now to an English juryman just what a 'scarabæus' was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the reverence due to relics of the holiest martyrs."[2]

1909, BURCH, J., in *State* v. *Moore*, 80 Kan. 232, 162 Pac. 475: "On Sunday, December 27, 1906, appellant waylaid his wife as she was returning from church, shot her twice through the body, and killed her on a public street in the city of Arkansas City. . . .

"Error is assigned because the jacket which the deceased wore when she was shot was introduced in evidence. It was fully identified, was pierced in the back by two bullet holes, and its lining was stained with blood. It is argued that the introduction in evidence of the dead woman's bloody jacket destroyed the mental poise of the jury by riveting their minds upon a scene of carnage, to the exclusion of any calm consideration of appellant's sanity, the only matter finally disputed by way of defense. The State rested under the necessity of establishing a tragedy involving the violent death of a human being from mortal wounds deliberately inflicted with malice aforethought — a thing most likely to include some blood along with the wickedness, perhaps, too, the terrifying report of pistol shots in a peaceful street on a Sunday just after church, the piteous appeals for life, and the agonized death screams of a defenseless woman as she is being shot down, and other shocking things. Such a subject is never a nice one to investigate. Any of the details have a decided tendency to horrify and to appall, but a court cannot arrange for lively music to keep the jury cheerful while the State's case in a murder trial is being presented, and grewsome evidence cannot be suppressed merely because it may strongly tend to agitate the jury's feelings. . . . Generally physical objects, which constitute a portion of a transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation. . . .

"Of course spectacular exhibitions may be framed for the purpose of arousing prejudicial emotions, and all such improprieties should be thwarted or promptly suppressed. The production of real evidence should not be permitted to exaggerate, and should not be allowed,

§ 1157. [1] The great dramatist's example will occur to every one: "See, what a rent the envious Casca made! . . . Here is himself, marred, as you see, with traitors." For the extent to which the Roman advocates developed this method of tempting emotion to overwhelm reason, see Forsyth's Hortensius the Advocate, 3d ed., 92, 96.

[2] This 'libellus', by Mr. C. J. (later Justice) Darling, published at first anonymously, has since gone into its sixth edition.

through cunning presentation, to stir up passion or unduly excite sympathy or pity, and so lead the jury to act upon sentiment, instead of proof. But the proceeding is always under the control of the trial judge, who has authority to confine the use of such evidence to proper purposes and to regulate the time, manner, and extent of its presentation, and his discretion will not be interfered with unless abused with prejudicial consequences."

The objection thus indicated seems to be twofold. First, there is a natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons or of cruel injuries tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence.

The objection in its first phase may be at least partly overcome by requiring the object to be properly authenticated, before or after production; and this requirement is constantly enforced by the Courts (*post*, § 2130).

The objection in its second phase cannot be entirely overcome, even by express instructions from the Court; but it is to be doubted whether the necessity of thus demonstrating the method and results of the crime should give way to this possibility of undue prejudice. No doubt such an effect may occasionally and in an extreme case be produced; and no doubt the trial Court has a discretion to prevent the abuse of the process. But, in the vast majority of instances where such objection is made, it is frivolous, and there is no ground for apprehension. Accordingly, such objections have almost invariably been repudiated by the Courts.[3]

[3] To the cases following, add those quoted above, and also certain of the photograph cases cited *ante*, § 792:

ENGLAND: 1722, R. *v.* Reason, 16 How. St. Tr. 42 (murder by shooting: "the clothes [of the deceased] were produced, and by the hole in the waistcoat it appeared that the wound given by the pistol under the right pap could no way happen by any position of the pistols in the bosom of the deceased, by the pistol going off of itself").

UNITED STATES: *Alabama:* 1860, Mose *v.* State, 36 Ala. 211, 219, 229 (a chip from a tree containing a buckshot said to have been fired, shown); 1895, Dorsey *v.* State, 107 Ala. 157, 18 So. 199 (murder; coat with shot-hole, worn by deceased); Burton *v.* State, 107 Ala. 108, 18 So. 285 (hat of the deceased); 1896, Crawford *v.* State, 112 Ala. 1, 21 So. 214 (pistol-balls taken from the body of the deceased, admitted); 1897, Mitchell *v.* State, 114 Ala. 1, 22 So. 71 (showing a purse said to have contained the stolen money); 1909, Rollings *v.* State, 160 Ala. 82, 49 So. 329 (murder; a futile distinction drawn between the clothing, etc. and the suspenders, etc. of deceased); 1919, Terry *v.* State, 203 Ala. 99, 82 So. 113 (murder; deceased's clothing admitted);

Arkansas: 1896, Starchman *v.* State, 62 Ark. 538, 540, 36 S. W. 940 (burglar's tools exhibited); 1913, Tiner *v.* State, 109 Ark. 138, 158 S. W. 1087 (exhibiting deceased's clothing);

California: 1882, People *v.* Hope, 62 Cal. 291, 295 (burglar's tools exhibited); 1886, People *v.* McCurdy, 68 Cal. 576, 580, 10 Pac. 207 (hats of the deceased, the defendant, and F. D., shown to the jury at their request); 1893, People *v.* Hawes, 98 Cal. 648, 652, 33 Pac. 791 (murder; vest worn by deceased, exhibited); 1897, People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390 (articles taken in a robbery, admitted); 1900, People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101 (gun used in a murder, admitted); 1901, People *v.* Westlake, 134 Cal. 505, 66 Pac. 731 (clothing of the deceased, admitted);

Delaware: 1905, State *v.* Powell, 5 Pen. Del. 42, 61 Atl. 966 (photographs of wounds on the deceased, admitted);

Georgia: 1876, Wynne *v.* State, 56 Ga. 113, 118 (murder; the pistol and cartridges allowed to be placed before the jury for their inspection, with explaining testimony); 1893, Adams *v.* State, 93 Ga. 166, 18 S. E. 553 (perjury as to pantaloons; the pantaloons exhibited); 1899, Dill *v.* State, 106 Ga. 683, 32 S. E. 660 (rock used in an assault, admitted); 1903, Patton *v.* State, 117 Ga. 230, 43 S. E. 533 (causing the weeping mother of the murdered boy to show to the jury his bloody shirt and point out the bullet-holes, held improper); 1905, Roberts *v.* State, 123 Ga. 146, 51 S. E. 374 (curtain-pole as a weapon for killing, shown);

Illinois: 1887, Spies *v.* People, 122 Ill. 236,

§ 1158. **Unfair Prejudice to a Civil Defendant, in Personal Injury Cases.** In civil actions, an objection has often been made, on analogous grounds, to

12 N. E. 856, 17 N. E. 898 (Anarchist murders at Haymarket Square; bombs and cans of dynamite, etc., exhibited); 1893, Painter *v.* People, 147 Ill. 444, 466, 35 N. E. 64 (bedclothing of the murdered man, etc., allowed to be displayed; "the time and manner in which objects of this character shall be displayed in the presence of the jury is a matter wholly within the sound discretion of the Court"); 1896, Keating *v.* People, 160 Ill. 480, 43 N. E. 724 (a wad of paper substituted for stolen bills, exhibited); 1902, Henry *v.* People, 198 Ill. 162, 65 N. E. 120 (buggy and deceased's clothes, exhibited); 1903, Cleveland C. C. & St. Louis R. Co. *v.* Patton, 203 Ill. 376, 67 N. E. 804 (injured person's clothing, exhibited); 1912, People *v.* Morris, 254 Ill. 559, 98 N. E. 975 (clothing of murdered woman shown);

Indiana: 1883, McDonel *v.* State, 90 Ind. 320, 327 (hatchet inspected by the jury); 1884, Story *v.* State, 99 Ind. 413, 416 (inspection of deceased's pantaloons allowed); 1893, Davidson *v.* State, 135 Ind. 254, 258, 34 N. E. 972 (murder; clothing worn by the deceased, exhibited); 1897, Anderson *v.* State, 147 Ind. 445, 46 N. E. 901 (revolver used in resisting arrest, exhibited); 1899, Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95 (murder; skull of deceased exhibited); 1905, Osburn *v.* State, 164 Ind. 262, 73 N. E. 601 (knife found on defendant); 1917, Gibbs *v.* State, 186 Ind. 197, 115 N. E. 584 (larceny of chickens; to show the mode of identifying the chickens, by a hole punched in the feet, the chickens were exhibited);

Iowa: 1868, State *v.* Vincent, 24 Ia. 570, 576 (the severed head of the deceased, preserved in alcohol and exhibited to the Court and jury at the trial, then identified by witnesses); 1885, Barker *v.* Perry, 67 Ia. 146, 147, 25 N. W. 100 (cited *post*, § 1158); 1893, State *v.* Jones, 89 Ia. 182, 188, 56 N. W. 427 (murder; razor used, exhibited; defendant's admission of the fact of killing, immaterial); 1900, State *v.* Petersen, 110 Ia. 647, 82 N. W. 329 (rape; underclothing exhibited);

Kansas: 1909, State *v.* Moore, 80 Kan. 232, 102 Pac. 475 (murder; bloody jacket exhibited; leading opinion, by Burch, J.);

Kentucky: 1910, Catron *v.* Com., 140 Ky. 61, 130 S. W. 951 (bloody garment of witness, admitted);

Massachusetts: 1866, Com. *v.* Burke, 12 All. 182 (inspection of a stolen wallet, etc., to find whether "they were of some value", allowed);

Minnesota: 1894, State *v.* Smith, 56 Minn. 78, 84, 57 N. W. 325 (shooting a trespasser; signs on premises, warning trespassers, admitted); 1900, State *v.* Minot, 79 Minn. 118, 81 N. W. 753 (burglars' tools and arms, exhibited);

Mississippi: 1883, Powell *v.* State, 61 Miss. 319 (portion of stolen hog, shown for identification);

Missouri: 1897, State *v.* Wievers, 66 Mo. 13, 29 (murder; deceased's bones exhibited; "a party cannot, upon the ground that it may harrow up feelings of indignation against him in the breasts of the jury, have competent evidence excluded"); 1885, State *v.* Stair, 87 Mo. 268, 272 (blood-stained clothing of the deceased shown; "it was as competent for the jurors to get this information by their own sight as it was to get it through the medium of witnesses"); 1890, State *v.* Moxley, 102 Mo. 387, 14 S. W. 969, 15 S. W. 556 (spinal vertebræ of the deceased, allowed to be exhibited, if identified); 1893, State *v.* Murphy, 118 Mo. 7, 14, 25 S. W. 95 (rape; bloody underclothing exhibited); 1894, State *v.* Duffy, 124 Mo. 1, 10, 27 S. W. 358 (rape; defendant's clothing exhibited); 1908, State *v.* Harris, 209 Mo. 423, 108 S. W. 28 (clothes of deceased, showing place of wounds, admitted);

Montana: 1921, State *v.* Byrne, 60 Mont. 317, 199 Pac. 262 (murder; skull, bullets, etc., introduced);

Nebraska: 1901, Savary *v.* State, 62 Nebr. 166, 87 N. W. 34 (skull of deceased exhibited); 1922, King *v.* State, — Nebr. —, 187 N. W. 934 (murder; photographs of the body showing wounds, admitted);

New Jersey: 1897, Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949 (exhibition of defendant's boots and the tracks made by them, allowed); 1905, State *v.* Laster, 71 N. J. L. 586, 60 Atl. 361 (articles found on accused, exhibited); 1912, State *v.* Strong, 83 N. J. L. 177, 83 Atl. 506 (neck of the mutilated deceased person, said to have been strangled); 1914, State *v.* Cerciello, 86 N. J. L. 309, 313, 90 Atl. 1112 (murder; revolver and whiskey bottle shown, to corroborate a confession);

New Mexico: 1917, State *v.* Rodriguez, 23 N. M. 156, 167 Pac. 426 (murder; physician's exhibition of a bone of the deceased's skull, allowed);

New York: 1842, Colt's Trial, N. Y., 1 Amer. St. Tr. 455, 472 (murder by a hatchet; the skull and the hatchet were exhibited; William Kent, J., overruling an objection by Mr. Selden, "However painful it is, justice must be administered and the head produced, if the jury think it necessary"); 1866, Gardiner *v.* People, 6 Park. Cr. C. 155, 201 (murder; weapons used, and the deceased's clothing exhibited); 1852, People *v.* Larned, 7 N. Y. 445, 452 (burglary; tools exhibited); 1866, People *v.* Gonzalez, 35 N. Y. 49, 64 (murder; deceased's clothing exhibited); 1875, Foster *v.* People, 63 N. Y. 619 (burglar's tools shown); 1904, People *v.* Davey 179, N. Y. 345, 72 N. E. 244 (rape of a child; ask-

the exhibition of his corporal injuries by one suing for compensation.[1] This objection, like the preceding one, assumes that there is a double risk; the jury may heedlessly conclude, it is thought, first, that because the injury is perfectly patent therefore the defendant is to blame for it, and, secondly, that since the plaintiff is truly in a pitiable plight, some one at least should be found to compensate him, and the defendant rather than any one else; both of these risks being particularly great in actions against a corporation or a moneyed individual. No doubt there is in such cases a constant tendency to render

ing questions of the defendant as to similar acts upon other children who are made to stand up for identification by him, held improper on the facts); 1904, People *v.* Rimieri, 180 N. Y. 163, 72 N. E. 1002 (murder; the deceased left a widow and child, and there was some issue as to whether the deceased when shot was crossing the street to overtake the child or to seek the defendant; the widow testified that she was then pregnant with another child, and the living child was brought into court and shown; these facts were held to be hardly called for, but the error if any "entirely harmless"; this ruling, and People *v.* Davey, *supra*, are further commented on *ante*, § 21);

North Carolina: 1873, State *v.* Mordecai, 68 N. C. 207, 210 (burglary; accomplice's stick, exhibited); 1921, State *v.* Westmoreland, 181 N. C. 590, 107 S. E. 438 (murder; coat and trousers of deceased, exhibited);

Oklahoma: 1908, Reed *v.* Terr., 1 Okl. Cr. 481, 98 Pa. 583 (liquor offence; the whiskey bottle inspected and smelt by the jury); 1910, Saunders *v.* State, 4 Okl. Cr. 264, 111 Pac. 965 (deceased's coats and gloves, exhibited); 1911, Morris *v.* State, 6 Okl. Cr. 29, 115 Pac. 1030 (photographs of wounds on body, admitted); 1920, Jones *v.* State, — Okl. Cr. —, 190 Pac. 887 (murder; exhibition of deceased's clothing, allowed); 1921, Jones *v.* State, — Okl. Cr. —, 195 Pac. 789 (murder; exhibition of deceased's clothing, bearing fraternal badges, held not improper);

Oregon: 1903, State *v.* Miller, 43 Or. 325, 74 Pac. 658 (photographs of gunshot wounds on the deceased, excluded as "gruesome" and unnecessary; unsound on the facts);

Rhode Island: 1914, State *v.* Mariano, 37 R. I. 168; 90 Atl. 21 (skull of murdered man, admitted);

South Carolina: 1893, State *v.* Symmes, 40 S. C. 383, 387, 19 S. E. 16 (clothes exhibited, to show lack of powder-burns);

South Dakota: 1900, State *v.* Shields, 13 S. D. 464, 83 N. W. 559 (watch and chain of assaulted person, exhibited); 1910, State *v.* Jacobs, 26 S. D. 183, 128 N. W. 162 (revolver-experiments, to prove an immaterial fact, held improper, on the present ground);

Tennessee: 1890, Turner *v.* State, 89 Tenn. 547, 564, 15 S. W. 838 (murder; deceased's ribs and vertebra, exhibited);

Texas: 1882, King *v.* State, 13 Tex. App. 277, 280 (clothes of deceased, exhibited); 1883, Hart *v.* State, 15 Tex. App. 202, 228 (same; admissible, "no matter how the jury might be affected by them"); 1899, Roberson *v.* State, — Tex. Cr. —, 49 S. W. 398 (rape; complaining witness brought in to testify, in such a bruised and emaciated condition that she could testify only by moving the head or by writing; held allowable); 1899, Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73 (clothing of deceased, exhibited); 1904, Melton *v.* State, 47 Tex. Cr. 451, 83 S. W. 822 (deceased's bloody garments, held improperly exhibited by his wife, there being no controversy as to that part of the case); 1918, White *v.* State, 83 Tex. Cr. 252, 202 S. W. 737 (assault to kill; the victim's exhibition of his blood-stained coat, allowed); 1920, Grace *v.* State, 88 Tex. Cr. 301, 225 S. W. 751 (rape; exhibition of bloody clothing, bedclothes, etc., held improper on the facts);

Vermont: 1884, State *v.* Burnham, 56 Vt. 445 (breach of the peace by boxing-match; inspection of the gloves by the jury, apparently left to trial Court's discretion); 1909, State *v.* Roby, 83 Vt. 121, 74 Atl. 638 (assault, by throwing iron, etc., at the complainant's house; the articles of iron, etc., held not improperly exhibited; approving the above principle);

Washington: 1896, State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 17 Wash. 544, 50 Wash. 512 (clothing of the deceased and gun with which he was shot, exhibited);

Wisconsin: 1905, Roszczyniala *v.* State, 125 Wis. 414, 104 N. W. 113 (rape; accused's shirt and trousers, admitted); 1920, Krueger *v.* State, 171 Wis. 566, 177 N. W. 917 (murder; shoe containing bullet-holes, exhibited).

Compare also the cases cited *ante*, § 789, n. 3, as to *dramatic modes of testifying* so as to excite undue prejudice.

§ 1158. [1] 1892, Coleman, J., in Louisville & N. R. Co. *v.* Pearson, 97 Ala. 211, 219, 21 So. 176 ("Human feelings are easily excited by the description of great bodily injuries or ghastly wounds or the exhibition of objects which appeal to the senses. Sympathy or indignation, once aroused in the average juror, readily become enlisted, to the prejudice of the person accused as the author of the injury").

verdicts against defendants regardless of proved culpability; no doubt the danger is of greater frequency here than in the preceding class of cases; and no doubt the trial Court has a discretion, which it should firmly exercise, to prevent the abuse of such a mode of proof. But it seems too rigorous to forbid a party to prove his case by the clearest evidence; and a jury which through violent prejudice would not be restrained by the Court's instructions would probably give way to its prejudice even without this evidence. The Courts impose no prohibition, except so far as the discretion of the trial Court may prevent abuses.[2]

[2] CANADA: 1918, Richardson *v.* Nugent, 40 D. L. R. 700, N. B. (malpractice; exhibition of plaintiff's unhealed wound to the jury, being valueless for any evidential purpose, held improper); 1897, Sornberger *v.* R. Co., 24 Ont. App. 263 (railroad injury; plaintiff allowed to exhibit her injured limb, for the purpose of having a medical witness explain the injury); 1897, Laughlin *v.* Harvey, 24 Ont. App. 438 (malpractice; plaintiff not allowed to exhibit his injured part to the jury, where no explanation by medical testimony was purposed; preceding case distinguished).

UNITED STATES: *Federal:* 1886, Osborne *v.* Detroit, 36 Fed. 36, 38 (allowing the plaintiff to indicate to the jury the extent of a paralysis by submitting to the insertion of a pin into her body; "she was at liberty to exhibit her wounds if she chose to do so, as is frequently the case where an ankle has been sprained or broken, a wrist fractured, or any maiming has occurred"); 1901, Baggs *v.* Martin, 47 C. C. A. 175, 108 Fed. 33 (clothing of deceased, exhibited); *Alabama:* 1892, Louisville & N. R. Co. *v.* Pearson, 97 Ala. 211, 219, 12 So. 176 (shoe of brakeman killed on train, excluded on this ground); *California:* 1905, Anderson *v.* Seropian, 147 Cal. 201, 81 Pac. 521 (amputated hand preserved in liquid admitted); *Illinois:* 1889, Tudor Iron Works *v.* Weber, 129 Ill. 535, 539, 21 N. E. 1078 (plaintiff's torn clothing exhibited); 1891, Springer *v.* Chicago, 135 Ill. 552, 561, 26 N. E. 514 (general principle approved); 1894, Lanark *v.* Dougherty, 153 Ill. 163, 165, 38 N. E. 892 (injured limb examined by physician in jury's presence); 1899, Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038 (injured limb may be exhibited, in trial Court's discretion); 1905, Chicago & A. R. Co. *v.* Walker, 217 Ill. 605, 75 N. E. 520 (injured ankle); 1917, Wagner *v.* Chicago R. I. & P. R. Co., 114 Ill. 277, 115 N. E. 201 (personal injury causing amputation of foot; exhibition of foot and shoe held improper, because the sole purpose and effect was to "excite feeling"; erroneous); *Indiana:* 1884, Indiana C. Co. *v.* Parker, 100 Ind. 181, 199 (injured hand exhibited); 1887, Louisville N. A. & C. R. Co. *v.* Wood, 113 Ind. 544, 548, 14 N. E. 572, 16 N. E. 197 (plaintiff's injured limbs exhibited); 1893, Citizens' S. R. Co. *v.* Willoeby, 134 Ind. 563, 570, 33 N. E. 627 (physician allowed to exhibit the plaintiff's hip-joint injury and illustrate it by placing him in various poses); 1906, Pittsburgh C. C. & St. L. R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033 (injured foot exhibited); *Iowa:* 1885, Barker *v.* Perry, 67 Ia. 146, 147, 25 N. W. 100 ("In all actions for injuries to the person", and "in the trial of criminal assaults", the injury may be exhibited to the jury); 1902, Faivre *v.* Manderscheid, 117 Ia. 724, 90 N. W. 76 (plaintiff's husband's crippled limbs, allowed to be exhibited); 1914, Nolte *v.* Chicago R. I. & P. R. Co., 165 Ia. 721, 147 N. W. 192 (photograph of the deceased woman, admitted); *Kentucky:* 1895, Newport News & M. V. R. Co. *v.* Carroll, — Ky. —, 31 S. W. 132 (bones of injured arm, exhibited); 1898, Williams *v.* Nally, — id. —, 45 S. W. 874 (bones of fractured leg, shown to expert witnesses); 1907, Ford *v.* Providence C. Co., 124 Ky. 517, 99 S. W. 609 (plaintiff' amputated leg); *Maine:* 1899, Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299 (injured arm, allowed in discretion to be shown); *Michigan:* 1886, Carstens *v.* Hauselman, 61 Mich. 426, 430, 28 N. W. 158 (medical assistance to the defendant, a woman; trial Court's refusal to allow her to exhibit her injured limb to the jury, approved, the appearance not being a satisfactory source of inference); 1893, Langworthy *v.* Green, 95 Mich. 93, 96, 54 N. W. 697 (plaintiff's shrivelled limb allowed to be exhibited; argument of undue prejudice apparently repudiated); 1893, Graves *v.* Battle Creek, 95 Mich. 266, 268, 54 N. W. 757 ("the injured party may exhibit his wounds to the jury"); 1893, Edwards *v.* Three Rivers, 96 Mich. 625, 628, 55 N. W. 1033 (injured limb, exhibition allowed); 1895, People *v.* Sutherland, 104 Mich. 468, 62 N. W. 566 (wounds exhibited); 1909, Farrell *v.* Haze, 157 Mich. 374, 122 N. W. 197 (amputated bones, not allowed on the facts to be shown); *Minnesota:* 1885, Hatfield *v.* R. Co., 33 Minn. 130, 22 N. W. 176 (principle approved); 1901, Adams *v.* Thief River Falls, 84 Minn. 30, 86 N. W. 767 (plaintiff allowed in trial Court's discretion to make arm movements to illustrate her injury);

On the same principle, objection has been made to the plaintiff's testifying, *as a witness*, in a manner calculated to prejudice the defendant (*ante*, § 789). Whether the plaintiff in such suit is *compellable to exhibit* his injuries, for inspection by the jury and the defendant's witnesses, is a question of privilege, elsewhere considered (*post*, § 2220).

§ 1159. **Indecency, or other Impropriety; Liquor Sampled by Jurors.** When justice and the discovery of truth are at stake, the ordinary canons of modesty and delicacy of feeling cannot be allowed to impose prohibition upon necessary measures. If such matters were not unshrinkingly discussed and probed, many kinds of crime would remain unpunished. Nevertheless, needless offence to feelings of delicacy, especially by public exhibitions before idle spectators having no responsibility for the course of justice, may well be avoided. The limitations that may be applied are suggested in a passage from Chief Baron Hale:

Ante 1680, Sir MATTHEW HALE, Pleas of the Crown, I, 635: "I shall never forget a trial before myself of a rape in the county of Sussex. . . . There was an antient wealthy man of about sixty-three years old indicted for rape, which was fully sworn against him by a young girl of fourteen years old. . . . [The antient man alledged that he neither was nor could be guilty, since] he had for above seven years last past been afflicted with a rupture so hideous and great that it was impossible he could carnally know any woman, . . . and offered to show the same openly in court; which for the indecency of it I declined, but appointed the jury to withdraw into some room to inspect this unusual evidence; and they accordingly did so, and came back and gave an account of it to the Court, that it was impossible he should have to do with any woman in that kind; . . . whereupon he was acquitted."

Where it is a question of what would otherwise be an *indecency*, two limita-

Montana: 1907, Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45 (injured arm, exhibited, to illustrate the expert testimony); *Missouri:* 1919, Turnbow *v.* Kansas City R. Co., 277 Mo. 644, 211 S. W. 41 (exhibition of amputated limbs, allowed); *Nebraska:* 1898, Omaha S. R. Co. *v.* Emminger, 57 Nebr. 240, 77 N. W. 675 (injured woman's limb, exhibited); 1902, Crete *v.* Hendricks, — Nebr. —, 90 N. W. 215 (injured foot, exhibited); 1904, Chicago B. & Q. R. Co. *v.* Krayenbuhl, 70 Nebr. 766, 98 N. W. 44 (maimed leg exhibited, even though the defendant did not deny the injury); 1904, Minden *v.* Vedene, 72 Nebr. 657, 101 N. W. 330 (personal injury; the lame plaintiff's act of walking to the witness-stand, held not objectionable); 1904, Felsch *v.* Babb, 72 Nebr. 736, 101 N. W. 1011 (plaintiff's exhibition and movements of arm and legs, allowed); *New Hampshire:* 1895, Nebonne *v.* R. Co., 68 N. H. 296, 44 Atl. 521 (exhibition of amputated toes, allowed), 1909, Lapointe *v.* Berlin Mills Co., 75 N. H. 294, 73 Atl. 406 (here refused, because not offered in season); *New York:* 1864, Mulhado *v.* R. Co., 30 N. Y. 370 (plaintiff's injured arm, exhibited); *Oregon:* 1921, Patterson *v.* Howe, 102 Or. 275, 202 Pac. 225 (dental malpractice; exhibition to the jury of plaintiff's bone particles having no evidential value, held error; the jury's inspection of the plaintiff's jaw, allowed); *South Dakota:* 1898, Sherwood *v.* Sioux Falls, 10 S. D. 405, 73 N. W. 913 (bringing the plaintiff into Court on a cot, in action for personal injury; not improper, where not shown unnecessary); 1920, Dean *v.* Seaman, 42 S. D. 577, 176 N. W. 649 (malpractice; exhibition of the injured limb, allowed); *Tennessee:* 1900, Arkansas River P. Co. *v.* Hobbs, 105 Tenn. 29, 57 S. W. 278 (injured limb, allowed to be exhibited and moved); *West Virginia:* 1894, Carrico *v.* R. Co., 39 W. Va. 86, 89, 19 S. E. 571 (stump of amputated arm; exhibition allowed; "danger of inspiring sympathy" not to exclude); 1909, Ewing *v.* Lanark Fuel Co., 65 W. Va. 726, 65 S. E. 200 (injured limb exhibited); *Wisconsin:* 1901, Viellesse *v.* Green Bay, 110 Wis. 160, 85 N. W. 665 (injury at a defective sidewalk; pieces of rotten plank allowed to be exhibited).

tions seem appropriate; [1] (*a*) there should be a fair necessity for the jury's inspection, the trial Court to determine; (*b*) the inspection should take place apart from the public court-room, in the sole presence of the tribunal and the parties. Such seems to be the tendency of the Courts.[2]

There may also be an unnecessary impropriety in other ways. The exhibition of *repulsive* objects should not be allowed unless it is fairly necessary.[3] The consumption by the jury of *samples of liquor*, for the purpose of determining its intoxicating qualities, will also ordinarily be prohibited.[4]

§ 1160. **Incapacity of the Jury to Appreciate by Observation (Experiments in Court; Insane Person's Conduct).** The significance of the production of a thing or a person or the performance of an experiment before the jury may sometimes not be properly apprehensible by unskilled laymen through mere observation. Nevertheless, an accompanying explanation by an expert will generally obviate any danger that the jury may be misled; and Courts have rarely recognized any force in this objection. *Experiments*

§ 1159. [1] Compare also the general principle as to Indecent Evidence (*post*, § 2180).

[2] Fed. 1891, Union P. R. Co. *v.* Botsford, 141 U. S. 250, 255, 11 Sup. 1000 (exposure of person allowable, "with a due regard to decency, and with the permission of the Court"); *Ala.* 1889, McGuff *v.* State, 88 Ala. 147, 7 So. [illegible] (rape; inspection of complaining witness allowed); *Ida.* 1920, Kinzell *v.* Chicago M. & P. P. R. Co., 33 Ida. 1, 190 Pac. 255 (injury while coupling cars; examination of plaintiff's anus in court, to exhibit the nature of the injury, held not improper); *Ill.* 1898, Chicago & A. R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680 (rupture shown by injured person; allowable in discretion); *Ia.* 1904, Garvik *v.* Burlington C. R. & N. R. Co., 124 Ia. 691, 100 N. W. 498 (action for rape by D., an employee of the defendant; the trial Court permitted the jury to inspect the private parts of D., with his consent, in a separate room, on an allegation that the parts were defective; held improper, first, because it was not shown that the man's condition was the same as at the time alleged, and secondly, because it was a "shocking and indecent performance." As to the latter reason, such false judicial morality is so odd as to be incredible in these days; why was it "indecent" for the jury, but not for the experts, who made a similar examination? The Court declares that it found no authority for such examination, and "doubts if there is any to be found in the books"! It is regrettable for modern justice not only that Sir Matthew Hale, in the instance above cited, should have shown more good sense two centuries ago than we now possess, but that his celebrated example should even have become buried in oblivion from some of his learned successors); 1907, State *v.* Stevens, 133 Ia. 684, 110 N. W. 1037 (rape; the defendant's request to have the jury examine his parts in a private room was denied; following Garvik *v.* R. Co.); *Wis.* 1878, Brown *v.* Swineford, 44 Wis. 282, 284 (assault and battery; defendant's exhibition of his organs of generation to the jury, held improper; if material, a private examination by experts out of court should be made); 1901, Guhl *v.* Whitcomb, 109 Wis. 69, 85 N. W. 142 (personal injury; photograph of plaintiff's nude body, held improperly received).

[3] 1856, R. *v.* Palmer, Annual Register, 1856, pp. 422, 473, 475 (while allowing experiments as to the effect of strychnia upon dogs and rabbits to be described, the Court refused to allow dogs to be brought into the court-yard and killed by strychnia before the jury); 1887, Knowles *v.* Crampton, 55 Conn. 336, 341, 11 Atl. 593 (section of a human body, cut from a woman about the plaintiff's size and age, offered to show the character of rib and breast-bone formation, excluded, "the exhibit being of doubtful utility and offensive in its nature"; the trial Court's discretion to control).

[4] *Ala.* 1898, Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699 (that the jurors should test the intoxicating qualities of a liquor by taking bottles to their room, not allowed, because evidence must be publicly presented in Court); *Ariz.* 1921, Richardson *v.* State, — Ariz. —, 201 Pac. 845 (making intoxicating liquor; giving to the jury "the container, for inspection, or any other purpose", held improper); *Colo.* 1921, Enyart *v.* People, 70 Colo. 362, 201 Pac. 564 (selling whisky; jury permitted to examine and smell the liquor; "it is like shutting their eyes to the truth to do otherwise"; whether they may taste it, not decided); *Kan.* 1900, State *v.* Coggins, 10 Kan. App. 455, 62 Pac. 247 (liquor offence; held improper to allow the jury to examine and smell bottles of whiskey); 1905, State *v.* Schmidt, 71 Kan. 862, 80 Pac. 948 (liquor

and *samples* have frequently been shown for the personal observation of the jury.[1]

On an issue of *idiocy* or *insanity*, it was from an early period regarded proper that the person should appear before the Chancellor for inspection.[2] Since the Chancellor is upon the subject of insanity no less a layman than is a juryman, it seems equally proper, and has been perhaps equally long established,[3] that inspection by the jury should be an allowable mode of acquiring knowledge on an issue of insanity. It is almost universally agreed that a

sales; handling labelled bottles to the jury, held not improper on the facts); *Mass.* 1894, Com. *v.* Brelsford, 161 Mass. 61, 63, 36 N. E. 677 (offer to have jurors taste liquor, excluded); *Mich.* 1900, People *v.* Kinney, 124 Mich. 486, 83 N. W. 147 (whether a liquor was hard or sweet cider; jurors allowed to taste it); *Minn.* 1905, State *v.* Olson, 95 Minn. 104, 103 N. W. 727 (liquor offence; jurors allowed to take the sample as an exhibit, without tasting); *N. C.* 1922, State *v.* Simmons, — N. C. —, 110 S. E. 591 (possessing intoxicating liquor; the jury allowed to taste it).

§ 1160. [1] Besides the following, compare the cases cited *ante*, §§ 445, 451, 457, 460, 1154, and 1157: *England:* 1915, George J. Smith's Trial, Notable British Trials Series, 1922, p. 118 (wife-murder by drowning her in a bath-tub; the bath-tub was in the Court-room; Jury-Foreman: "One of the jury has expressed a wish that some one should be put in the bath for ocular demonstration"; Scrutton, J.: "I can only suggest to you that when you examine these baths in your private room, you should put one of yourselves in"); *Federal:* 1886, Osborne *v.* Detroit, 36 Fed. 36, 38 (allowing the plaintiff to test the extent of her paralysis by submitting to the insertion of a pin into her body in the jury's presence during the trial); 1898, Taylor *v.* U. S., 32 C. C. A. 449, 89 Fed. 954 (counterfeiting; plating-machine allowed to be operated before the jury); *California:* 1882, People *v.* Hope, 62 Cal. 291, 295 (experiments before the jury with burglar's tools to show their working, allowed); 1895, Thomas Fruit Co. *v.* Start, 107 Cal. 206, 40 Pac. 336 (a sample of prunes whose quality was in issue); *Florida:* 1905, Spires *v.* Stale, 50 Fla. 121, 39 So. 181 (experiment with a gun in the jury-room, refused in discretion; see the citation *ante*, § 460, n. 1); *Illinois:* 1859, Jumpertz *v.* People, 21 Ill. 375, 396, 408 (experiments with door-hooks, etc., to show the impossibility of the deceased's suicide as alleged; such an experiment before the jury, "to say the least, is very uncommon, and should be permitted by the Court with great caution"); *Iowa:* 1876, Stockwell *v.* R. Co., 43 Ia. 470, 473 (fire attributed to a locomotive; whether the engineer had not shut off the steam in running over a certain stretch was in issue, the practicability of doing so being denied; to show the practicability, a view having been ordered, a train was run over the stretch in question without steam; held proper); 1895, Moore *v.* R. Co., 93 Ia. 484, 61 N. W. 992 (collision on a railroad track; the jury having been taken to view the place, and an engine having been run over the track in their sight to illustrate the occurrence, this very sensible proceeding was held fatally improper); 1907, Chicago Telephone S. Co. *v.* Marne & E. T. Co., 134 Ia. 252, 111 N. W. 935 (sale of telephones; tests of the instruments in the jury's presence, held not improperly refused in the trial Court's discretion); *Massachusetts:* 1873, Brown *v.* Foster, 113 Mass. 136 (contract to make a suit of clothes; to show that they did fit the defendant, the plaintiff was allowed to produce them and with the defendant's assent to try them on him); 1879, Eidt *v.* Cutter, 127 Mass. 522 (whether the gases from the defendant's copperas works had discolored the paint on the plaintiff's house; boards, etc., used in experiments made out of Court, were shown to the jury); *Mississippi:* 1880, Dillard *v.* State, 58 Miss. 368, 386 (horse ridden by deceased, produced, and experiments by the jury as to the height of a rider, allowed); *Montana:* 1907, Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45 (paralysis evidenced by the medical witness sticking a needle into the plaintiff's hand); *New York:* 1906, Train, "The Prisoner at the Bar", 312 (N. Y.; a striking experiment in testing poisons was performed before the jury); *Virginia:* 1893, Taylor *v.* Com., 90 Va. 109, 117, 17 S. E. 812 (jury allowed to examine rifle and cartridge to determine manner of explosion).

[2] 1592, Abbot of Strata Mercella's Case, 9 Co. Rep. 31*a*; 1768, Blackstone, Commentaries, III, 332.

[3] *Ante* 1680, Hale, Pleas of the Crown, I, 29, 33 (" 'Idiocy or not' is a question of fact triable by jury, and sometimes by inspection. . . . Touching the trial of this incapacity [of dementia], . . . the law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in 'the same judgment, by the testimony of witnesses' 'viva voce' in the presence of the judge and jury, and by the inspection and direction of the judge").

lay-witness is qualified to testify to insanity;[4] and it seems to be universally accepted that, in whatever form the issue of insanity may be presented, the jury may take into consideration the behavior of the person as observed by them.[5]

§ 1161. **Physical or Mechanical Inconvenience of Production; Patent Infringements.** It may cause inconvenience, by obstruction of the court-room or by too great expense of time, to bring the desired object before the tribunal; and on this ground its production may be forbidden in the trial Court's discretion; though such a course has rarely been taken.[1] In Chancery, a Master may be ordered to examine and report.[2] In suits for *infringement of patents of invention*, the judge usually inspects the articles produced in court and may even allow machines to be produced and there operated.[3]

[4] *Ante*, § 568, *post*, § 1938.

[5] *Eng.* 1787, R. *v.* Steel, 1 Leach Cr. C., 3d ed., 451 (larceny; the accused not pleading on arraignment, a jury was sworn 'instanter', and found that she stood "mute by the visitation of God"); 1836, R. *v.* Pritchard, 7 C. & P. 303 (same); 1818, Ex parte Smith, 1 Swanst. 4, 7 (Lord Eldon, L. C.: "It is a practice by no means uncommon in cases of lunacy [in equity] (analogous to a practice very common in civil cases) that, when the lunatic cannot be removed to the jury, and it is inconvenient for the jury to examine the lunatic, one or two of the jury examine the lunatic and report their observations to the rest"); 1837, R. *v.* Goode, 7 A. & E. 535 (inquest of insanity: the defendant continued to show in Court "violent symptoms of mental derangement"; after evidence of his former condition, it was proposed to call a medical man as to his present condition; Denman, L. C. J.: "I think it is quite unnecessary; we can judge of that by what has passed in Court just now"); *U. S. Col.* (Dist.) 1881-2, Guiteau's Trial, Washington, D. C., *passim* (murder of the President; defence, insanity; the accused's annoying, insulting, and unruly behavior at the trial was allowed for the sake of the basis of inference thus placed before the jury as to his sanity; no express ruling on the subject seems to have been made); *Del.* 1873, State *v.* West, 1 Houst. Cr. 371, 385 (allowing production of a collection of articles — bottled snakes, an old shoe, a broken mirror, etc. — forming the "museum" of the defendant, and indicating his insanity); *Mass.* 1804, Com. *v.* Braley, 1 Mass. 103 (murder; the accused appearing at arraignment to be insane, "a jury was immediately empanelled" and found him insane); *Mich.* 1864, Beaubien *v.* Cicotte, 12 Mich. 459, 492 (jury's inspection said to be proper; "in all of these proceedings, while testimony is generally necessary, and in many cases scientific testimony is of the utmost value, yet the law has always regarded the subject as usually open to the common understanding and capable of being judged by personal appearance"); *N. Y.* 1845, *Re* Russell, 1 Barb. Ch. 38, 39 (inquisition of lunacy; Walworth, Ch.: "The jury also have the right to inspect and examine the lunatic; and they should do so in every case of doubt, where such an examination can be had").

For the statutory rule in most States that in *lunacy proceedings* the commission of physicians may and must personally examine the party, see *post*, § 2090.

§ 1161. [1] *Eng.* 1862, Line *v.* Taylor, 3 F. & F. 731 (bite of a dog; the dog allowed to be produced and inspected by the jury to determine whether he was ferocious; perhaps under C. L. Pr. Act 1854, § 58); 1879, Thurman *v.* Bertram, Exch. D., Pollock, B., London Mail, July 18, 1879, cited in 20 Alb. J. 150 (horse frightened by the "unusual and unsightly appearance" of an elephant; the elephant brought into the court-room for inspection); *D. C.* 1907, District of Columbia *v.* Duryee, 29 D. C. App. 327 (injury at a hitching-post; the post was dug up and exhibited at the trial); *Wash.* 1902, Moran Bros. Co. *v.* Snoqualmie F. P. Co., 29 Wash. 292, 69 Pac. 759 (contract concerning a regulator-box for a power-plant; the box weighing several thousand pounds, held not necessary to be produced); *W. Va.* 1886, Hood *v.* Bloch, 29 W. Va. 244, 255, 11 S. E. 910 (cheese inferior to agreed quality; trial Court's refusal to allow production of the cheese, held not improper in view of the large bulk of goods involved); and other instances *ante*, §§ 451-460, *ante*, § 1160, note 1, and *post*, § 1163, note.

[2] As is customary in actions for infringement of copyright, where the material is voluminous: 1799, — *v.* Leadbetter, 4 Ves. Jr. 681; 1826, Mawman *v.* Tegg, 2 Russ. 385, 398.

[3] With the following cases compare those cited *post*, § 2221, concerning the opponent's privilege to refuse inspection; 1870, Seymour *v.* Osborne, 11 Wall. 516, 559; 1878, Bates *v.* Coe, 98 U. S. 31, 45, 49.

§ 1162. **Production Impossible; View by Jury; (1) General Principle.** Where the object in question cannot be produced in Court because it is immovable or inconvenient to remove, the natural proceeding is for the tribunal to go to the object in its place and there observe it. This process, traditionally known as a "view", has been recognized, since the beginnings of jury-trial, as an appropriate one:

Circa 1258, H. *de Bracton*, fol. 315 (of a woman charged with waste of dower-property): "Since damage has thus been done in a corporeal thing which is manifest to the sight of the eyes, she cannot by her law [*i.e.* by oaths] deny that it is not so, for so the view would be contrary to the oath of the jurors. It is better, therefore, when the woman denies waste, that a view be taken of the thing wasted against the prohibition both in the quality of the act and in the quantity."

1891, CRAIG, J., in *Springer* v. *Chicago*, 135 Ill. 553, 561, 26 N. E. 514: "If the parties had the right upon the trial to prove by oral testimony the condition of the property at the time of the trial, . . . upon what principle can it be said the Court could not allow the jury in person to view the premises and thus ascertain the condition thereof for themselves? . . . If a plat or a photograph of the premises would be proper evidence, why not allow the jury to look at the property itself, instead of a picture of the same? There may be cases where a trial Court should not grant a view of premises where it would be expensive, or cause delay, or where a view would serve no useful purpose; but this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. . . . If at common law, independent of any English statute, the Court had the power to order a view by jury (as we think it plain the Court had such power), as we have adopted the common law in this State, our Courts have the same power."

§ 1163. **Same: (2) View allowable upon any Issue, Civil or Criminal; Statutes.** That the Court is empowered to order such a view, in consequence of its ordinary common-law function, and *irrespective of statutes* conferring express power, is not only naturally to be inferred, but is clearly recognized in the precedents.[1]

Nor can any distinction here properly be taken as to *criminal cases*. It is true that here, by some singular scruple, a doubt has more than once been judicially expressed.[2] But it is impossible to see why the Court's power to aid the investigation of truth in this manner should be restricted on criminal cases, and the better precedents accept this doctrine.[3]

§ 1163. [1] See Glanvil. b. XIII, c. 14; Bracton, f. 69, and f. 315, quoted in the foregoing section; Fitzherbert, Natura Brevium, 123 C, 128 B, 184 F; Lord Mansfield, in 1 Burr. 252, quoted in the next section; 1624, Dalton v. All Souls' College, Palmer 363.

[2] *Eng.* 1756, R. v. Redman, 1 Kenyon 384 ("Per Curiam: There can be no view in a criminal prosecution without consent; and the practice was so before the act [4 Ann. c. 16]"); *U. S. D. C.* 1899, Price v. U. S., 14 D. C. App. 391, 405 (not decided); *Haw.* 1904, Terr. v. Watanabe, 16 Haw. 196, 220 ("It has been the practice" to allow it; question left undecided); *Mass.* 1830, Com. v. Knapp, 9 Pick. 496, 515 (view allowed, with consent of accused, but "with hesitation", because the Court "had doubts whether they could hold the prisoner to his consent"); *Mo.* 1899, State v. Hancock, 148 Mo. 488, 50 S. W. 112 (denied, even on defendant's application); *N. Y.* 1855, Eastwood v. People, 3 Park. Cr. 25, 53, *semble* (Court may not authorize a view in criminal cases).

[3] Under some of the statutes *infra* it is expressly allowable; see the cases cited in the next section, and also the following: *England:* 1847, R. v. Whalley, 2 Cox Cr. 231 (objected to as not proper in a criminal case except where indictment is removed by certiorari to civil side; overruled); 1872, R. v. Martin, 12 Cox Cr. 204, 41 L. J. M. C. 113, L. R. 1 C. C. R. 378, 380 (view allowed after summing up: trial Court's discretion);

Nor need there be any distinction to the disadvantage of any *kind of civil case;* for, although traditionally the chief and perhaps exclusive use of the view occurred in cases involving waste, trespass, and nuisance,[4] it is clear that no strict line of definition was made, nor can any reason for it be seen in principle. A view should be allowable in whatever sort of issue it may appear to be desirable.[5]

Moreover, the process of view need not be applicable merely where land is to be observed; it is applicable to any kind of object, *real or personal* in nature, which must be visited in order to be properly understood.[6]

United States: Fla. 1916, Haynes *v.* State, 71 Fla. 585, 72 So. 180 (murder; view allowed, under Gen. St. 1906, § 3989); *Ind.* 1858, Fleming *v.* State, 11 Ind. 234 (jury's view of building burned, allowed under statute); *Mass.* 1850, Com. *v.* Webster, 5 Cush. 295, 298 ("the Court said that they had no doubt of their authority to grant a view, if they deemed one expedient, R. S. c. 137, § 10; and that views had been granted of late in several capital cases in this county"); *Mich.* 1913, People *v.* Auerbach, 176 Mich. 23, 141 N. W. 869 (murder; view of premises allowed, under Comp. L. § 11952); *Minn.* 1872, Chute *v.* State, 19 Minn. 271, 278 (view allowable in discretion); *N. C.* 1897, State *v.* Perry, 121 N. C. 533, 27 S. E. 997; *Va.* 1903, Litton *v.* Com., 101 Va. 833, 44 S. E. 923 (Code, § 3167, held to authorize a view in criminal cases; Buchanan, J., resting the result on St. 1887–8, c. 15, § 4048).

Whether the *accused* must have an opportunity to be *present at the view* is an entirely different question (*post*, § 1803).

[4] 1814, Attorney-General *v.* Green, 1 Price 130 (allowable under the statute "in case of land", and perhaps in "informations of intrusion . . . on the principle of analogy"; but not on an information against a glass factory for taxes, "where a model may answer every purpose"); 1824, Redfern *v.* Smith, 9 Moore 497 (waste; view held necessary); 1848, Stones *v.* Menhem, 2 Exch. 382 (Parke, B., refusing an order for a view of work done as carpenter, bricklayer, etc., on a house: "The language of the acts of Parliament, coupled with the practice, appears to me to show that this is not a case in which a view ought to be granted; the necessity of a view seems to me to apply chiefly to actions of a local nature, such as trespass *q.c.f.*, nuisance, and the like").

[5] See instances in the cases cited in the next section and *ante*, § 1160; and compare the similar controversy as to inspection (*post*, § 1862) and privilege (*post*, §§ 2194, 2221).

[6] See instances in the citations to the next section and § 1160, *ante*, and also the following: *Federal:* 1901, Olsen *v.* N. P. Lumber Co., 40 C. C. A. 427, 100 Fed. 388, 106 Fed. 298, 302 (view of the scene of an injury may include machinery in operation); *Alabama:* 1876, Campbell *v.* State, 55 Ala. 80 (tracks of the murderer were found in sandy soil; the defendant was allowed on the trial to make tracks in the sawdust on the court-house floor; but the trial Court refused to allow him to be taken by the sheriff out of the court to a place of sandy soil and there make tracks in the jury's presence, or to allow sandy soil to be brought into the court-room for the same purpose; held, that the trial Court had discretion to allow whichever mode it thought best); *Florida:* 1904, O'Berry *v.* State, 47 Fla. 75, 36 So. 440 (larceny of cattle; under Rev. St. 1892, §§ 1087, 2918, a view of the cattle was held proper); *Georgia:* 1891, Mayor *v.* Brown, 87 Ga. 596, 599, 13 S. E. 638 (injury at a street-crossing; jury's personal inspection of the place, held proper); *Iowa:* 1858, Nutter *v.* Ricketts, 6 Ia. 92, 96 (jury allowed to go out into the court-house yard and inspect the horse in controversy); 1913, Adamson *v.* Harper, 162 Ia. 56, 143 N. W. 844 (ownership of cattle; view held not improperly refused in trial Court's discretion); *Kentucky:* 1913, South Covington & C. St. R. Co. *v.* Finan's Adm'x, 153 Ky. 340, 155 S. W. 742 (jury's inspection of broken car-wheels out of court, held proper); *New Hampshire:* 1917, Carpenter *v.* Carpenter, 78 N. H. 440, 101 Atl. 628 (divorce for adultery at a town in Massachusetts; view by the judge of the place in question, held allowable; careful opinion by Walker, J.); *Ohio:* 1899, Schweinfurth *v.* R. Co., 60 Oh. St. 215, 54 M. E. 89 (jury allowed to go out and view experiments made with horse and buggy, engine and train, reproducing the conditions of the injury); *West Virginia:* 1899, Bias *v.* R. Co., 46 W. Va. 349, 33 S. E. 240 (jury allowed to view the railroad track and observe experiments as to distance of distinct vision).

Contra: Georgia: 1912, Peterson *v.* Lott, 11 Ga. App. 536, 75 S. E. 834 (mule levied by attachment; jury's view of the mule, refused, for lack of judicial power; one would think that Courts would not treat themselves like infants, insisting on being fed with a legislative spoon; even Lord Eldon was less conservative); *Montana:* 1903, State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (larceny of a mare; the jury went to view another mare claimed by the defendant to be the mother of the one in controversy; the mare claimed by the

Thus at common law there need be no limitations of the above sorts upon the judicial power to order a view. The regulation of the subject by statute, which began in England some two centuries ago,[7] was concerned

prosecuting witness to be the mother was also present, and the behavior of the mare in controversy "indicated a preference" for the latter; the Court held the view of the horses improper, going upon the narrow wording of P. C. § 2097, cited *infra*, n. 7, and citing no other authority on this point; although the behavior in question was plainly evidential on the principle of §§ 167, 177, 1154, *ante*, and the defendant himself had requested the view; this ruling, when compared with Lord Eldon's celebrated experiment, quoted *ante*, § 1154, seems to discountenance the optimistic belief that the world grows wiser as it grows older); *South Dakota:* 1901, Brady v. Shirley, 14 S. D. 447, 85 N. W. 1002 (view of horses, held improper, in the absence of statutory authority).

The cases where the rights of *inspection* by the *opponent before trial* (*post*, § 1862) and of *privilege* (*post*, §§ 2194, 2221) are involved, are sometimes not distinguished by the Courts.

[7] See Lord Mansfield's explanation, quoted in the next section. The English and Canadian statutes are as follows:

ENGLAND: 1705, St. 4 Anne, c. 16, § 8 ("in any action" at Westminster, where it shall appear to the Court that it will be "proper and necessary" that the jurors who are to try the issues should have the view of the lands or place in question, "in order to their better understanding the evidence" to be given at the trial, the Court may order special writs of 'distringas' or 'habeas corpora', commanding the selection of six out of the first twelve of the jurors therein named, or a greater number, to whom the matters controverted shall be shown by two persons appointed by the Court); 1730, St. 3 G. II, c. 25, § 14 (where a view shall be allowed, six of the jurors, or more, who shall be consented to on both sides, or if they cannot agree, appointed by the proper officer of the Court or a judge, "shall have the view, and shall be first sworn, or such of them as appear upon the jury" before *any* drawing; and so many only shall be drawn, to be added to the viewers, as shall make up the number of twelve); 1825, St. 6 G. IV, c. 50, §§ 23, 24 (in any case, civil or criminal, wherever "it shall appear . . . that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial", an order may appoint six or more, to be named by consent or, upon disagreement, by the sheriff, and the place in question shown them by two persons appointed by the Court; and "those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn", and only so many added as are needed to make up twelve); 1852, St. 15 & 16 Vict. c. 76, § 114 (writ of view not necessary; order of Court or judge sufficient); 1853, Second Report of Commissioners on Practice and Pleading, 37 (recommends the allowance of orders for inspection, by the jury or by the party or his witnesses, "of any premises or chattels the inspection of which may be material to determine the question in dispute"); 1854, St. 17 & 18 Vict. c. 125, § 58 ("Either party shall be at liberty to apply to a Court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property the inspection of which may be material to the proper determination of the question in dispute"; the judge to make the order on such terms as he sees fit; and the rules for views under preceding acts to apply as nearly as may be); 1883, Rules of Court, Ord. 50, R. 3 ("It shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection, of any property or thing, being the subject of such cause or matter or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence"); R. 4 ("It shall be lawful for any judge . . . to inspect any property or thing concerning which any question may arise therein"); R. 5 ("The provisions of Rule 3 of this order shall apply to inspection by a jury", which may be ordered as the Court "may think fit").

CANADA: *Dominion:* R. S. 1906, c. 144, Crim. C. § 958 (in criminal trials the Court may order a view of "any place, thing, or person", and prescribe the manner of showing); *Alberta:* Rules of Court 1914, No. 196 (Court may order inspection by the jury of "any person or any real or personal property whose inspection may be material", etc.); No. 197 (like Ont. Rule 265); St. 1921, c. 8, § 31 (juries; Court may order a view); *Manitoba:* Rev. St. 1913, c. 46, R. 604, 605 (like Ont. Rules 265, 266, but including the jury); Rule 891 (like ib. Rule 370); *New Brunswick:* Cons. St. 1903, c. 126, § 33, St. 1919, c. 3, § 33 ("when a view shall be considered

rather with the details of the process, than with the limits of the power. Statutes now regulate the process in almost every jurisdiction;[8] but it may

necessary by the Court, the jury sworn to try the cause shall make the view"; showers if necessary to be appointed by the Court); *Newfoundland:* Consol. St. 1916, c. 83, Ord. 46, Rule 4 (like Eng. Ord. 50, R. 3); Rules 5, 6 (like Eng. Rules 4, 5); *Nova Scotia:* Rules of Court 1900, Ord. 34, R. 36 (referee may "have any inspection or view" which he deems expedient); Ord. 50, R. 3 (like Ont. R. 370); ib. R. 4 (any judge on appeal may inspect "any property or thing" concerned); ib. R. 5 (Rule 3 above shall apply to "inspection by a jury"); *Ontario:* Rev. St. 1914, c. 64, § 86, the judge may order a view if it appears "that the jurors who are to try the issues in the case should have a view of the place or property in question in order to the better understanding of the evidence"); Rules of Court 1914, No. 265 (the judge "may inspect any property or thing concerning which any question arises"); No. 266 (inspection by party or witnesses may be ordered of "any property the inspection of which may be material to the proper determination of the question in dispute"); No. 370 (like Eng. Ord. 50, R. 3); No. 267 ("a view by the jury may be ordered by the judge"); *Prince Edward Island:* St. 1873, c. 22, § 107 ("It shall be sufficient to obtain a rule of the Court or judge's order directing a view to be had"); § 252 (view of "any real or personal property the inspection of which may be material to the proper determination" may be ordered).

[8] The statutes in the United States are as follows (but these should be compared with the statutes cited *post*, §§ 1862, 2194, 2221, dealing with the *privilege* of a party to refuse to allow inspection of premises or chattels; the one kind of statute has chiefly in mind the judicial power to permit the *jury to use* this mode of proof, the other has in mind the compulsory submission of the opponent to an *entry* upon his premises, *before trial*, by the *first party and his witnesses;* the contrast is shown in Rules 3 and 5, *supra*, of the English Court):

Alaska: Comp. L. 1913, § 1020 (like Or. Laws 1920, § 133).

Arizona: Rev. St. 1913, P. C. § 1061 (like Cal. P. C. § 1119);

Arkansas: Dig. 1919, § 3176 (criminal cases; like Cal. P. C. § 1119); § 1293 (like Cal. C. C. P. § 610, substituting "real property" for "property");

California: C. C. P. 1872, § 1954 ("Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of evidence, such object may be exhibited to the jury . . . [or testified to]. The admission of such evidence must be regulated by the sound discretion of the Court"); § 610 ("When in the opinion of the Court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred", the Court may order a view, the place to be shown by the Court's appointee); P. C. § 1119 ("When in the opinion of the Court it is proper that the jury should view the place in which the offence is charged to have been committed, or in which any other material fact occurred", it may order a view, the place to be "shown to them by a person appointed by the Court for that purpose"); Cal. St. 1917, p. 831, May, 23, § 19 (State industrial accident commission may "cause inspection of the premises where the accident occurred to be made");

Colorado: Comp. L. 1921, C. C. P. § 206 (like Cal. C. C. P. § 610); § 207 (in all proceedings involving mining rights, it shall be the Court's duty, on application of either party, to order a view; each party to nominate a guide approved by the Court, and such guide or guides to point out "such features in the premises as it is desirable that the jury should see, and answer all questions propounded by the jury", with specified restrictions); G. S. § 6320 (eminent domain; Court may order a view); 1903, McMillen *v.* Ferrum M. Co., 32 Colo. 38, 74 Pac. 461 (statute held not to make a view-order obligatory where the applicant had not other sufficient evidence to go to the jury);

Delaware: Rev. St. 1915, § 4279 (jury may view "the premises or place in question, or to which the controversy relates, when it shall appear to the Court that such view is necessary to a just decision");

Florida: Rev. G. S. 1919, § 6091 (in criminal cases, "the Court may order a view by the jury"); § 2695 (in civil proceedings, "the jury may in any case, upon motion of either party, be taken to view the premises or place in question, or any property, matter, or thing relating to the controversy between the parties, when it shall appear to the Court that such view is necessary to a just decision"); 1915, Crawford *v.* State, 70 Fla. 323, 70 So. 374 (murder; view held deniable in the trial Court's discretion);

Idaho: Comp. St. 1919, § 8964 (like Cal. P. C. § 1119); § 6850 (like Cal. C. C. P. § 610);

Illinois: Rev. St. 1874, c. 47, § 9 (jury in eminent domain proceedings "shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same"); St. 1897, June 14, § 25 (local improvements; the Court may direct a view);

Indiana: Burns' Ann. St. 1914, § 564 ("Whenever in the opinion of the Court it is proper for the jury to have a view of real or

be assumed that the judicial power to order a view exists independently of any statutory phrases of limitation.

personal property which is the subject of litigation, or of the place where any material fact occurred", the Court may order a view, the place to be shown by "some person appointed by the Court"); § 2140 (in criminal cases, "whenever, in the opinion of the Court and with the consent of all the parties, it is proper for the jury to have a view of the place in which any material fact occurred", a view may be ordered, the place to be shown by "some person appointed by the Court for the purpose"); St. 1905, p. 584, § 264 (re-enacts the foregoing);

Iowa: Code 1897, § 3710, Comp. C. 1919, § 7506 ("When in the opinion of the Court it is proper for the jury to have a view of the real property which is the subject of controversy, or the place where any material fact occurred", it may be ordered, the place to be shown by the Court's appointee); § 5380, Comp. C. 1919, § 9438 (in criminal cases, "when the Court is of the opinion that it is proper the jury should view the place in which the offence is charged to have been committed, or in which any other material fact occurred", it may order a view, the place to be shown by Court's appointee);

Kansas: Gen. St. 1915, § 7186 ("Whenever in the opinion of the Court it is proper for the jury to have a view of the place in which any material fact occurred, it may order a view of the place, which shall be shown to them by some person appointed by the Court for that purpose");

Kentucky: C. C. P. 1895, § 318 (view allowable, when Court deems proper, "of real property which is the subject of litigation or of the place in which any material fact occurred"; some person appointed by the Court is to show it to them); C. Cr. P. § 236 (view allowable in discretion when "necessary" for the jury to see the place of the alleged offence "or in which any other material fact occurred"; judge, prisoner, and counsel to accompany; the judge, or a shower appointed by the Court, to show the place);

Louisiana: C. Pr. 1900, § 139 (Court may order production of "the object in dispute, of which he is in possession, if it be such movable property as can be produced, in order that it may be shown by testimony that it is in reality the object claimed");

Maine: Rev. St. 1916, c. 24, § 92 (in actions for highway injuries, view may be ordered, when it would "materially aid in a clear understanding of the case"); c. 87, § 101 ("in any jury trial" a view may be ordered); c. 100, § 2 (view may be ordered in action for waste); c. 109, § 41 (view may be ordered in real actions, if in Court's opinion "it is necessary to a just decision"); c. 136, § 24 (view may be ordered in a criminal case);

Maryland: St. 1920, Apr. 16, c. 563 (in any civil action, the Court may "have the jury make an inspection of real property which is the subject of litigation or of the place where any material fact in issue took place");

Massachusetts: Gen. L. 1920, c. 234, § 35 (view may be ordered in criminal cases; in civil cases view may be had at the request of either party of "the premises or place in question, or any property, matter, or thing relative to the case", on tender of expenses, etc.); c. 80, § 9 (view in betterment cases to be had at the request of either party); c. 253, § 7 (same for flowage cases); c. 82, § 4 (view in highway cases when the jury think proper or at either party's request);

Michigan: Comp. L. 1915, § 12622 (when a court "shall deem it necessary that the jury view the place or premises in question, or any property or thing relating to the issues between the parties", the Court may order a view on either party's application, "and direct the manner of effecting the same"); § 15825 (view may be ordered in criminal cases "whenever such Court shall deem such view necessary"); § 361 (condemnation of land; court may order a view by jury);

Minnesota: Gen. St. 1913, § 7800 ("Whenever the Court deems it proper that the jury should view real property which is the subject of litigation, or the place in which any material fact occurred", a view may be ordered, the place to be shown by the judge or the Court's appointee); § 9204 (Court "may order a view" in criminal case);

Mississippi: Code 1906, § 2720, Hem. § 2213 ("When, in the opinion of the Court, on the trial of any cause, civil or criminal, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place at which the offence is charged to have been committed, or the place or places in which any material fact occurred, or any material object or thing in any way connected with the evidence in the case, the Court may at its discretion enter an order providing for such view or inspection"; the "whole organized court" is to go, and the thing "shall be pointed out and explained to the Court and jury by the witnesses in the case, who may at the discretion of the Court be questioned by him and by the representatives of each side, at the time and place of such view or inspection, in reference to any material fact brought out by such view or inspection"; the Court is to be regarded as still in session with full powers; and in criminal trials the view "must be had before the whole court and in the presence of the accused and the production of all evidence from all witnesses or objects animate or inanimate must be in his presence");

Montana: Rev. C. 1921, § 9350 (like Cal. C. C. P. § 610); § 10599 (like Cal. C. C.

§ 1164. **Same: (3) View allowable in Trial Court's Discretion.** The inconvenience of adjourning court until a view can be had, or of postponing the

P. § 1954); § 11996 (like Cal. P. C. § 1119, but after "occurred", inserting "or in cases involving the brand or mark or identity of live stock or other personal property", with other clauses suitable to this amendment; this amendment, made in 1907, apparently was designed merely to cure cases like State v. Landry, n. 6, *supra;* but why was not the Legislature courageous enough to give really unlimited powers, as in the English and Canadian statutes?),

Nebraska: Rev. St. 1922, § 10145 (criminal cases; like Kan. Gen. St. § 7186); § 8791 (in civil cases "whenever, in the opinion of the Court, it is proper for the jury to have a view of property which is the subject of litigation, or of the place where", etc., as in criminal cases);

Nevada: Rev. L. 1912, §7191 (like Cal. P. C. § 1119); § 5211 (like Cal. C. C. P. § 610);

New Hampshire: Pub. St. 1891, c. 227, § 19 (in actions involving right to real estate, or where "the examination of places or objects may aid the jury in understanding the testimony," the Court may in discretion direct a view);

New Jersey: Comp. St. 1910, Evidence § 30 (where inspection of "any premises or chattels or other property in the possession or under the control of either party" "would aid in ascertaining the truth of any matter in dispute", Court may order possessor to permit inspection by jury or opponent or witnesses, under proper regulations); Juries § 77 (upon trials of indictments, the Court may order a view of "any lands or place, if in the judgment of the Court such view is necessary to enable the jury better to understand the evidence given in the cause"; the Court to direct the manner of the view);

New York: C. Cr. P. 1881, § 411 (view in criminal cases allowable when "in the opinion of the Court it is proper"); Cons. L. 1909, Real Prop. § 528, as amended by St. 1920, c. 930 (in action for waste, view may be ordered in discretion);

North Dakota: Comp. L. 1913, § 10855 (like Cal. P. C. § 1119); § 7622 (civil cases; like Cal. C. C. P. § 610);

Ohio: Gen. Code Ann. 1921, § 13658 ("Whenever in the opinion of the Court it is proper for the jurors to have a view of the place at which any material fact occurred", the Court may order a view, an appointee of the Court to show the place); § 11054 (view allowable in eminent domain proceedings); § 11448 (like Code § 13658 *supra*, inserting after "view", the words "of the property which is the subject of litigation, or");

Oklahoma: Comp. St. 1921, § 2714 (criminal cases; like Cal. P. C. § 1119); § 543 (civil cases; like Cal. C. C. P. § 610);

Oregon: Laws 1920, § 133 (like Cal. C. C. P. § 610, substituting "real property" for "property"); § 792 (like Cal. C. C. P. § 1954, substituting "the exhibition of such object to the jury" for "the admission, etc.");

Pennsylvania: St. 1834, Apr. 14, §§ 158, 159, Dig. 1920, §§ 12947, 12948, Juries (when a view is allowed, "six of the first twelve jurors named in the panel, or more of them, shall be taken" to the place; "those of the viewers who shall appear [at the trial] shall first be sworn", and enough added to make up the twelve);

Philippine Isl. Civ. C. §§ 1240, 1241 (like P. R. Rev. St. & C. §§ 4314, 4315); C. C. P. 1901, § 332 (like Cal. C. C. P. § 1954 omitting "cognizable by the senses" and "or to make an item in the sum of the evidence");

Porto Rico: Rev. St. C. 1911, §§ 4314, 4315 ("personal inspection by the Court" is sanctioned); § 6290 (like Cal. P. C. § 1119); § 1463 (like Cal. C. C. P. § 1954); 1909, Perez v. Yabucoa Sugar Co., 15 P. R. 200, 209 (personal injury in a sugar mill; the judge, trying without a jury, took "ocular inspection" of the place; held proper, since the former Spanish procedure permitted it, though the new Evidence Act ignored it; but why add "in the absence of any objection"?); 1917, Martinez v. Rodriguez, 26 P. R. 5 (execution of a will; the judge, sitting without a jury, went to view the house where the testatrix signed the will; held that the "ocular inspection" by the judge was allowable under Civ. C. § 1183, but that the parties should have been present and a memorandum should have been recorded);

Rhode Island: Gen. L. 1909, c. 292, § 1 ("In all cases in which it shall seem advisable to the Court, on request of either party, a view by the jury may be allowed", and the Court shall regulate the proceedings);

South Carolina: C. C. P. 1922, § 559 ("the jury in any case may at the request of either party be taken to view the place or premises in question, or any property, matter, or thing relating to the controversy between the parties, when it appears to the Court that such view is necessary to a just decision"); Civ. C. 1922, § 5218 (condemnation of right of way; the jury "shall proceed to inspect the premises");

South Dakota: Rev. C. 1919, § 4895 (like Cal. P. C. § 1119); § 2507 (civil cases; like Cal. C. C. P. § 610);

Tennessee: Shannon's Code 1916, § 1856 (jury of inquest of damages by eminent domain may examine ground, etc.); § 3689 (jury for processioning boundaries of land may examine it); § 2947 (eminent domain; jury's view allowable if court deems it necessary); § 6467 (land condemnation; "such jury may examine personally the property, if any, to be assessed

trial for the purpose, may suffice to overcome the advantages of a view, particularly when the nature of the issue or of the object to be viewed renders the view of small consequence. Accordingly, it is proper that the trial Court should have the right to grant or to refuse a view according to the requirements of the case in hand. In the earlier practice, the granting of a view seems to have become almost demandable as of course; but a sounder doctrine was introduced by the statute of Anne (which apparently only re-stated the correct common-law principle); so that the trial Court's discretion was given its proper control:

1757, MANSFIELD, L. C. J., Rules for Views, 1 Burr. 252: "Before the 4 & 5 Anne, c. 16, § 8, there could be no view till after the cause had been brought on to trial. If the Court saw the question involved in obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the Court or judge, at the trial, 'that the nature of the question made a view not only proper but necessary'; for the judges at the assizes were not to give way to the delay and expense of a view unless they saw that a case could not be understood without one. However, it often happened in fact that upon the desire of either party causes were put off for want of a view upon specious allegations from the nature of the question that a view was proper, — without going into the proof so as to be able to judge whether the evidence might not be understood without it. This circuity occasioned delay and expense; to prevent which the 4 & 5 Anne, c. 16, § 8, impowered the Courts at Westminster to grant a view in the first instance previous to the trial. . . . [He then refers to the other statute of 3 G. II, and to the supposed rule as to the number of viewers necessary, treated *infra*.] Upon a strict construction of these two acts in practice, the abuse which is now grown into an intolerable grievance has arisen. Nothing can be plainer than the 4 & 5 Anne, c. 16, § 8. . . . The Courts are not bound to grant a view of course; the Act only says 'they *may* order it, where it shall appear to them that it will be *proper and necessary*,' . . . [He then refers to the abuse of repeated postponement of trial to obtain a view.] We are all clearly of opinion that the Act of Parliament meant a view should not be granted unless the Court was *satisfied* that it was proper and necessary. The abuse to which they are now perverted makes this caution our indispensable duty; and, therefore, upon every motion for a view, we will hear both parties, and examine, upon all the circumstances which shall be laid before us on both sides, into the propriety and necessity of the motion; unless the party who applies will consent to and move it upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side and the obstruction of justice."

with benefits", and city engineer etc. "may accompany such jury for the purpose of pointing out the property");
Utah: Comp. L. 1917, § 9000 (criminal cases; like Cal. P. C. § 1119); § 6807 (civil cases; like Cal. C. C. P. § 610);
Vermont: Gen. L. 1917, § 1887 (in actions for damages to real estate or concerning title to land, where a view is "necessary", it may be granted on motion of either party);
Virginia: Code 1919, § 6013 (in civil cases, at either party's request, the jury may be "taken to view the premises or place in question or any property, matter, or thing, relating to the controversy", when it appears to the Court "that such view is necessary to a just decision"; the requester to advance expenses);
Washington: R. & B. Code 1909, § 344 (like Cal. C. C. P. § 610, substituting "real property" for "property", and providing alternatively that the judge may act as shower); § 2160 (Court may order a view in a criminal trial);
West Virginia: Code 1919, c. 116, § 30 (like Va. Code, § 6013, for all classes of cases);
Wisconsin: Stats. 1919, § 4694 (the Court may order a view in a criminal case); § 2852 (civil cases; like Va. Code, § 6013); 1921, Ohrmundt *v.* Spiegelhoff, — Wis. —, 184 N. W. 692 (false representations in sale of land; view held to be in trial Court's discretion);
Wyoming: Comp. St. 1920, § 7535 (criminal cases (like Oh. Gen. C. Ann. § 13658, inserting "disinterested" before "person"); § 5770 (Court may order view when "of opinion it is proper for the jurors to have a view of the property which is the subject of litigation or of the place in which any material fact occurred").

Accordingly, this provision, leaving the granting of the view to the trial Court's discretion, is found in almost every statute on the subject; and this doctrine is constantly exemplified in judicial decision.[1] It may be noted,

§ 1164. [1] Compare the statutes *ante*, § 1163; in the following cases, except where otherwise noted, the doctrine of the trial Court's discretion is enforced; most of the rulings apply one of the statutes already mentioned:

ENGLAND: 1815, Anon., 2 Chitty 422 (whether there was a hole on certain premises; view refused, because "in this case it might mislead"); 1742, Davis *v.* Lees, Willes 344, 348;

CANADA: 1880, Anderson *v.* Mowatt, 20 N. Br. 255, *semble* (view after charge given, allowable);

UNITED STATES: *Federal:* 1920, Forbes *v.* U. S., 5th C. C. A., 268 Fed. 273 (condemnation proceedings; trial Court in discretion may order a view); *Alabama:* 1909, Louisville & N. R. Co. *v.* Wilson, 162 Ala. 588, 50 So. 188 (machine); *Arkansas:* 1875, Benton *v.* State, 30 Ark. 328, 345, 350 (discretion of trial Court controls as to necessity, under statute); 1880, Curtis *v.* State, 36 Ark. 284, 289 (same, as to time of view); 1914, Whitley *v.* State, 114 Ark. 243, 169 S. W. 952 (various details left to trial Court's discretion); *California:* 1897, People *v.* White, 116 Cal. 17, 47 Pac. 771 (premises of a burglary); 1897, Niosi *v.* Laundry, 117 Cal. 257, 49 Pac. 185 (place of a street accident); *Florida:* 1878, Coker *v.* Merritt, 16 Fla. 416, 421 (statute applied); *Georgia:* 1896, Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389 (whether both parties must consent, left undecided); 1899, Johnson *v.* Winship M. Co., 108 Ga. 554, 33 S. E. 1013 (defective machinery; order to view it, within judicial powers in absence of parties' consent, depends on trial Court's discretion); 1909, Jones *v.* Royster Guano Co., — Ga. —, 65 S. E. 361 (nuisance); *Illinois:* 1891, Springer *v.* Chicago, 135 Ill. 553, 561, 26 N. E. 514 (view allowable in any case in discretion; here, of property damaged by a viaduct; practically overruling Doud *v.* Guthrie, 13 Ill. App. 653, 658); 1894, Vane *v.* Evanston, 150 Ill. 616, 621, 37 N. E. 901 (same principle approved; here allowed for a special assessment on land); 1894, Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40 (eminent domain); 1895, Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567 (same); *Iowa:* 1872, King *v.* R. Co., 34 Ia. 458, 462; 1892, Morrison *v.* R. Co., 84 Ia. 663, 51 N. W. 75; 1906, Mier *v.* Phillips F. Co., 130 Ia. 570, 107 N. W. 621 (action for coal mined by the defendant under the plaintiff's land; view held properly refused; this ruling seems absurdly pedantic; the evidence was in conflict; is it an enlightened rule of law that forbids the jury to take the common-sense method of getting at the truth?); *Kansas:* 1883, State *v.* Furbeck, 29 Kan. 380 (view of wheat said to have been stolen); *Kentucky:* 1893, Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845; 1892, Kentucky C. R. Co. *v.* Smith, 93 Ky. 449, 460, 20 S. W. 392, *semble* (discretion as to time of view); 1900, Valley T. & G. R. Co. *v.* Lyons, — Ky. —, 58 S. W. 502 (discretion); 1900, Memphis & C. P. Co. *v.* Buckner, 108 Ky. 701, 57 S. W. 482 (discretion); 1898, Henderson & C. G. R. Co. *v.* Cosby, 103 Ky. 184, 44 S. W. 639 (discretion); 1904, Green's Adm'r *v.* Maysville & B. S. R. Co., — Ky. —, 78 S. W. 439 (discretion); 1904, Mise *v.* Com., — Ky. —, 80 S. W. 457 (homicide); 1906, Louisville *v.* Caron, — Ky. —, 90 S. W. 604 (discretion); 1906, Cohankus Mfg. Co. *v.* Rogers' Gdn., — Ky. —, 96 S. W. 438 (injury at a machine; view revised in discretion); 1917, Salisbury *v.* Wellman El. Co., 173 Ky. 462, 191 S. W. 289 (building contract; C. C. P. § 318 applied); *Massachusetts:* 1899, Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551 (discretion of trial Court controls); 1904, Blanchard *v.* Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94 (personal injuries; view of plaintiff in her home, held not improperly refused in the trial Court's discretion); 1907, Yore *v.* Newton, 194 Mass. 250, 80 N. E. 472 (time of view during trial is in the trial Court's discretion; but a motion by one of the parties is necessary); *Michigan:* 1893, Leidlein *v.* Meyer, 95 Mich. 586, 55 N. W. 367 (injury to land by flowage; view by jury in discretion of Court); 1896, Mulliken *v.* Corunna, 110 Mich. 212, 68 N. W. 141 (injury by falling on a defective sidewalk); 1906, Dupuis *v.* Saginaw V. T. Co., 146 Mich. 151, 109 N. W. 413 (view of the scene of a street-car accident, and an experiment under the same conditions); 1913, People *v.* Auerbach, 176 Mich. 23, 141 N. W. 869 (murder); *Minnesota:* 1872, Chute *v.* State, 19 Minn. 271, 278 (in discretion, under statute); 1895, Brown *v.* Kohout, 61 Minn. 113, 63 N. W. 248; 1901, Northwestern M. L. I. Co. *v.* Sun Ins. Office, 85 Minn. 65, 88 N. W. 272; *Montana:* 1904, Maloney *v.* King, 30 Mont. 158, 76 Pac. 4 (applying C. C. P. § 1081); 1907, Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45 (refusal to permit a view of the defendant's mine where the plaintiff was injured, held proper in discretion); *Nebraska:* 1920, Robison *v.* Troy Laundry, 105 Nebr. 267, 180 N. W. 43 (collision at a street-intersection); *North Carolina:* 1892, Jenkins *v.* R. Co., 110 N. C. 439, 441, 15 S. E. 193 (discretion of trial Court); *Ohio:* 1894, Jones *v.* State, 51 Oh. St. 331, 38 N. E. 79 (the view may be had in another county in the State); *Oklahoma:* 1920, Jones *v.* State, — Okl. Cr. —, 190 Pac. 887 (murder; trial Court's discretion affirmed, in allowing a view of the place of the homicide.

as one circumstance affecting the exercise of that discretion, that, since the present condition of an object is not always a good index of its prior condition at the time in issue (*ante*, § 437), a view may well be refused where such a change of condition is likely to have occurred that a view of the object in its present condition would probably be misleading.[2]

§ 1165. **Same: (4) View by Part of Jury.** According to the earlier practice, a view was obtained before the trial and before the final selection of the jurors; and it was not regarded as necessary that all of the jurors finally selected should have participated in the view:

1757, MANSFIELD, L. C. J., in 1 Burr. 252: the reporter states that after the 4 & 5 Anne, c. 16, § 8, views were granted upon motion, as of course; and under this act and 3 G. II, c. 25, § 14, a motion prevailed "that six of the first twelve upon the panel must view and appear at the trial; if they did not, there could be no trial, and the cause must go off." Where either party wished delay or vexation, he moved for a view. A thousand accidents might prevent a view, or six of the twelve from attending the view, or their attending the trial. He who wished them not to attend might by various ways bring it about. . . . Though twelve viewers should appear at the trial, yet according to the notion which prevailed if six of the first twelve upon the panel were not among them, the cause could not be tried. The tendency of this abuse to delay, vexatious expense, and the obstruction of justice, was so manifest that the Court thought it their duty to consider of a remedy; and Lord Mansfield for the Court announced the following rule: "The 3 G. II, c. 25, § 14, provides

under Rev. S. § 5897); *Pennsylvania:* 1891, Com. *v.* Miller, 139 Pa. 77, 95, 21 Atl. 138 (discretion of trial Court); 1898, Rudolph *v.* R. Co., 186 Pa. 541, 40 Atl. 1083 (land-damages; view in discretion); 1899, Mintzner *v.* Hogg, 192 Pa. 137, 43 Atl. 465 (street-injury); *Virginia:* 1858, Baltimore & O. R. Co. *v.* Polly, 14 Gratt. 447, 470 (excavation-contract; trial Court's refusal to order a view, held not improper); *Washington:* 1892, Klepsch *v.* Donald, 4 Wash. 436, 445, 30 Pac. 991 (injury received from a blast of rock); 1894, State *v.* Coella, 8 Wash. 512, 36 Pac. 474; 1898, State *v.* Hunter, 18 Wash. 670, 52 Pac. 247; *West Virginia:* 1892, Gunn *v.* R. Co., 36 W. Va. 165, 178, 14 S. E. 465 (death on a railroad track; trial Court's refusal to order view, held not improper); 1897, State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813 (view of locality of death; trial Court's discretion controls); 1903, Davis *v.* American T. & T. Co., 53 W. Va. 616, 45 S. E. 926; *Wisconsin:* 1871, Pick *v.* Rubicon H. Co., 27 Wis. 433, 446 (flowage; trial Court's discretion); 1882, Boardman *v.* Ins. Co., 54 Wis. 364, 366, 11 N. W. 417 (trial Court's discretion; here, a fire loss); 1892, Andrews *v.* Youmans, 82 Wis. 81, 82; 1901, Koepke *v.* Milwaukee, 112 Wis. 475, 88 N. W. 238 (defective sidewalk); 1913, Serdan *v.* Falk Co., 153 Wis. 169, 140 N. W. 1035 (foundry where the injury was received).

A view may be taken of a place in *another county*, unless a statute expressly limits the scope: 1908, Beck *v.* Staats, 80 Nebr. 482, 114 N. W. 633 (conveyance of land in another county; the trial Court in discretion authorised to order a view anywhere in the State; other cases collected in the opinion); 1894, Jones *v.* State, 51 Oh. St. 331 (cited *supra*); or even in *another State:* 1917, Carpenter *v.* Carpenter, 78 N. H. 440, 101 Atl. 628 (divorce for adultery in Massachusetts; cited more fully *ante*, § 1163).

Distinguish the rulings as to a *party's inspection before trial* (*post*, § 1862) and a *privilege* to refuse such inspection (*post*, §§ 2194, 2221).

[2] Compare also the cases cited *ante*, § 1154, par. (6): 1899, Seward *v.* Wilmington, 2 Marv. Del. Sup. 189, 42 Atl. 451 (street injury; view not ordered, because the injury had been received three years before and the place was not in the same condition); 1896, Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389 (the trial Court has a discretion to refuse, where a material alteration in the premises has occurred); 1893, Banning *v.* R. Co., 89 Ia. 74, 80, 56 N. W. 277 (locality of railroad injury; view allowed in discretion, the condition of the place not being shown to have changed); 1920, Louisville & N. R. Co. *v.* Scott's Adm'r, 188 Ky. 99, 220 S. W. 1066 (collision at a railway crossing in December; view of the place in September, held to be in the trial Court's discretion); 1863, State *v.* Knapp, 45 N. H. 148, 157 (rape; at a view of the place, the lack of a board in a fence, making an aperture by which witnesses said they had seen certain facts, had been replaced; notice not having been given by the State, the burden was upon it to show that no harm was done to the defendant's case).

'that where a view shall be allowed, the jurors who have had the view shall be first sworn, or such of them as shall appear, before any drawing,' which means, in opposition to such other jurors as are to be drawn by ballot, and *not* to establish that six at least of the first twelve shall be sworn. . . . It is infinitely better that a cause should be tried upon a view had by any twelve, than by six of the first twelve; or by any six, or by fewer than six, or even without any view at all, than that the trial should be delayed from year to year, perhaps forever"; and the Court accordingly announced that the view would thereafter be granted only upon consent to such terms as would be just [as quoted *ante*, § 1164]; and the reporter continues: "No party has ever since moved for a view without consenting to the terms; . . . as the non-attendance of viewers can now gratify neither party, both concur in wishing the duty performed"; he then gives the customary terms consented to for a special jury: "Consenting that in case no view shall be had, or if a view shall be had by any of the said jurors, whether they shall happen to be any of the twelve jurors who shall be first named in the said writ or not, yet the said trial shall proceed"; and also for common juries: "Consenting that in case no view shall be had, or if a view shall be had by any of the jurors, whether they shall happen to be six or any particular number of jurors who shall be so mutually consented to as aforesaid [referring to the consent to the statutory selection from the panel], yet the trial shall proceed." [1]

Under modern practice the view is commonly had after the complete impanelling of the jury; so that the reasons for being satisfied with a view by a part only of the jurors no longer exist. It may well be regarded as within the power of the trial Court to sanction no view in which the whole jury has not participated. Nevertheless, it should be noted that a participation by the entire number is no essential part of the orthodox and traditional notion of a view; and that the absence of one or more jurors need not be regarded as in itself fatal to the sufficiency of the view.[2]

§ 1166. **Same: (5) Unauthorized View.** That a view unauthorized by order of Court is improper, and that the information so obtained should be rejected, may easily be conceded. But it is important to distinguish the reasons for the impropriety. Assume that the whole number of the jury have attended, so as to obviate possible objection on that score; assume further that no witness or other person converses with the jury or attends them while viewing, so as to eliminate objections based on the Hearsay rule;[1] yet it would still be an improper proceeding. A view not had under the direction of the Court is improper because of the danger that the jury would view the wrong objects, and because of the difficulty for the party of ascertaining

§ 1165. [1] The error above-mentioned as to the earlier practice was founded apparently upon the following precedents: Brooke's Abridgment, "View", 89, 95; 1614, Gage *v.* Smith, Godb., 209 ("if six of the jury are examined upon a 'voyer dire' if they have seen the place wasted, that is sufficient"); 1628, Coke upon Littleton, 158 *b*. But the error had already been corrected judicially before Lord Mansfield's time: 1699, Anon., 2 Salk. 665, *semble* (where the practice of leaving out "so many of the principal panel who were not at the view" was disapproved). In the following cases, apparent irregularities have been thought harmless: 1578, Anon., 1 Leon. 267, pl. 359 ("In an action of wast, of wast assigned in a wood, the jury viewed the wood only, without entring into it; and it was holden that the same was sufficient, for otherwise it would be tedious for the jury to have had the view of every stub of a tree which had been felled"); 1863, R. *v.* Coroner, 9 Cox Cr. 373 (not viewing all at the same time.)

[2] Possibly some of the cases cited in the next section may have proceeded upon a doctrine contrary to that above set forth; but such a doctrine is without orthodox support.

§ 1166. [1] This question is dealt with *post*, § 1802.

whether they have viewed the right objects. Under the instructions of the Court, and with the official assistance furnished by the Court's order, these objections disappear; otherwise, they are serious and sufficient:

1893, MITCHELL, J., in *Aldrich* v. *Wetmore*, 52 Minn. 164, 172, 53 N. W. 1072: "The theory of jury trials is that all information about the case must be furnished to the jury in open court, where the judge can separate the legal from the illegal evidence, and where the parties can explain or rebut; but if jurors were permitted to investigate out of court, there would be great danger of their getting an erroneous or one-sided view of the case, which the party prejudiced thereby would have no opportunity to correct or explain."

Such unauthorized investigations by way of view have invariably been regarded as improper;[2] the only question has been whether the irregularity was dangerous enough to require a new trial.

§ 1167. **Same: Other Principles to be distinguished (Juror's Private Knowledge; Official Showers; Accused's Presence; Fence and Road Viewers).** The propriety of a view, as resting merely upon considerations inherent in the process of inspection, must be distinguished from other questions that sometimes arise in connection with a view.

(1) (*a*) A juror must proceed upon what he learns as a member of the jury and not upon his own *private belief* otherwise acquired (*post*, § 1800). Accordingly, the private and unauthorized investigation by a juror of some object connected with the trial may be regarded, not only as a violation of the foregoing principle (§ 1166), but also as an improper use of his private knowledge. (*b*) The acquisition of information from *other persons present* at a view is a violation of the Hearsay rule (*post*, § 1802). (*c*) The presence of *official* "*showers*" at a view is on principle not a violation of the Hearsay rule;—the

[2] This question being one peculiar to the law of new trials, no attempt has here been made to collect all the precedents; compare the cases cited *post*, § 1802; *Ill.* 1875, Stampofski *v.* Steffens, 79 Ill. 303, 306 (private inspection by one juror, held improper); *Ind.* 1884, Luck *v.* State, 96 Ind. 16, 19 (taking the jury to the place by way of exercise, not sufficient in itself to authorize new trial); 1885, Epps *v.* State, 102 Ind. 537, 555, 1 N. E. 491 (taking them among other people for exercise; same ruling); *Ky.* 1897, Tudor *v.* Com., — Ky. —, 43 S. W. 187 (conduct of the jury while taking exercise, held not a view); *Me.* 1878, Winslow *v.* Morrill, 68 Me. 362 (juror visited the location privately; held improper); *Mass:* 1893, Harrington *v.* R. Co., 157 Mass. 579, 32 N. E. 955; *Minn.* 1893, Aldrich *v.* Wetmore, 52 Minn. 164, 172, 53 N. W. 1072 (new trial granted for private inspection by three jurors); 1893, Woodbury *v.* Anoka, 52 Minn. 329, 54 N. W. 187 (similar); 1897, Rush *v.* R. Co., 70 Minn. 5, 72 N. W. 733 (view without order of Court or knowledge of parties, improper, because "the parties have no opportunity of meeting, explaining, or rebutting evidence so obtained"); 1901, Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417 (improper visit by jurors); *Mo.* 1878, State *v.* Sanders, 68 Mo. 202 (experiments made by some of the jury out of court to see whether worn-out boots, like some described, would make tracks as described, held improper, because done without leave of Court and after the case had been submitted; but here the *defendant's counsel himself* had suggested and urged the experiment: "this looks like allowing a party to take advantage of his own wrong, and therefore has caused some hesitation on our part"; there ought to have been no hesitation over so impudent an objection); *N. J.* 1849, Deacon *v.* Shreve, 22 N. J. L. 176 (private view by three jurors, where persons talked to them for the plaintiff, held improper); *N. Y.* 1855, Eastwood *v.* People, 3 Park. Cr. 25, 52 (unauthorized view by six jurors, held improper); 1885, People *v.* Court, 101 N. Y. 245, 4 N. E. 259 (one of the jurymen went alone to the scene of affray to observe it; *semble*, improper); 1888, People *v.* Johnson, 110 N. Y. 134, 144, 17 N. E. 684 (view allowable under C. Cr. P. § 411; failure to administer oath to officers, held to be waived); *Wis.* 1894, Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79.

reasons are examined elsewhere (*post*, § 1802). (*d*) Whether the *accused* in a criminal case is constitutionally *entitled to be present* at a view is a question involving the Hearsay rule (*post*, § 1803). (*e*) Whether the jury, after considering the information obtained at a view, may disregard the testimony of witnesses is a question of the jury's duty, and is not within the scope of the present subject; a principle bearing upon it is discussed in the next section.

(2) (*a*) The process by which, under statutes in many jurisdictions, *fence or road viewers* are appointed is entirely different from the process here dealt with as a "view." Such viewers form in effect a special and anomalous tribunal, and take in their own way all the evidence that they need. Their procedure has nothing to do with the view by an ordinary jury. (*b*) The ancient learning about the right which was possessed by a *tenant in formedon* to have a view of lands in which he was interested was an entirely different thing from a jury's view;[1] it was a right of inspection given him to protect his interests, and is in any case to-day of no importance.[2]

§ 1168. **Non-transmissibility of Evidence on Appeal; Jury's View as "Evidence."** (1) On a number of occasions in modern times the notion has been advanced that autoptic proference of the thing itself before the tribunal is to be excluded as a method of proof because it is impossible to transmit to the higher Court on appeal the source of belief thus laid before the tribunal below, and because thus the losing party cannot obtain a proper revision of the proceedings by the higher Court. The argument is best set forth in the following passage:

1872, DOWNEY, J., in *Jeffersonville M. & I. R. Co.* v. *Bowen*, 40 Ind. 548: "It is urged . . . that in no case where the jury has had a view of the place in which any material fact occurred . . . can the evidence be got into the record, as it would be impossible to put into the bill of exceptions the impressions made upon the minds of the jury by such view; and that in this way all benefit of appeal to this Court, so far as any question is concerned which depends upon all the evidence being in the record, would be wholly cut off. It is further contended that whether the jury shall have a view of the place, etc., is a matter entirely in the discretion of the Court, and that the Court may thus in its discretion deprive a party of the right to have questions depending on the evidence reviewed in this Court, even in cases of the greatest moment. It is urged that under the rule in that case [a contrary one] a party might be convicted and sentenced to be hanged on wholly insufficient evidence; yet if the prosecutor has got an order for the jury to view the place, and they have done so, it would be impossible to get the judgment reversed, no matter how insufficient the evidence might have been."

This heterodox notion (which never troubled Lord Mansfield and the other shapers of the common law) has been sanctioned in a few jurisdictions, in forbidding the inspection of a person's appearance as evidence of his age,[1] and of

§ 1167. [1] See its features discussed in William *v.* Gwyn, 2 Saund. 44 *a*, note 4.

[2] The following case is therefore founded on error: 1875, Smith *v.* State, 42 Tex. 444, 448 (apparently declaring all views unlawful, because of the statutory abolition of "vouchers, views, essoigns", and wagers of battle and of law, Pasch. Dig. art. 1468; a curious misunderstanding of the meaning of the "view" there referred to).

§ 1168. [1] *Illinois:* 1904, Wistrand *v.* People, 213 Ill. 72, 72 N. E. 748 (rape; the jury not allowed to consider the defendant's appearance "to fix his age"; citing and following

a child's features as evidence of another's paternity,[2] and also in forbidding the resort to a view by a jury.[3] But the notion has now been generally repudiated, even in the jurisdictions where it once obtained,[4] and the propriety of inspection or view by the tribunal is regarded as not to be impugned because of this consideration.[5]

the erroneous theory of Stephenson *v.* State, Ind., *infra*); 1915, People *v.* Kielczewski, 269 Ill. 293, 109 N. E. 981 (following Wistrand *v.* People; a sentence to the reformatory being required for persons between 10 and 21 years of age, the jury here found that the accused was "about the age of 20 years"; the only evidence of age was (1) the accused's own statement that he was 21, (2) the appearance as inspected by the jury; held (1) "that the appearance of an alleged minor may be considered in determining his age", but (2) that the above evidence was in some way insufficient; the learned Court *seems* to lay down the absurd rule that there must have been some witness testifying to the jury how old the accused appeared, even though the accused is before them!; this pedantic doctrine is based on the old fallacy as to evidence not presentable on appeal); *Indiana:* 1867, Stephenson *v.* State, 28 Ind. 272 (age of a defendant as over 14; the personal appearance of the defendant not to be considered because "it will, so far as that issuable fact is involved, deprive the defendant of this right of review"); 1876, Ihinger *v.* State, 53 Ind. 251, 253 (selling liquor to a minor; the appearance of the alleged minor not to be considered; "there is no mode of putting such evidence upon the record in order that it may be passed upon by an appellate tribunal"); 1878, Robinius *v.* State, 63 Ind. 235, 237 (selling liquor to a minor; same); 1878, Swigart *v.* State, 64 Ind. 598 (same); 1885, Bird *v.* State, 104 Ind. 385, 389, 3 N. E. 827 (same); *Texas:* 1891, McGuire *v.* State, — Tex. App. —, 15 S. W. 917 (knowingly selling liquor to a minor; the buyer's appearance forbidden to be considered by the jury, partly on this ground).

[2] 1885, Hanawalt *v.* State, 64 Wis. 84, 87, 24 N. W. 489 (inspection of an infant to determine resemblance, excluded partly because of no probative value, partly because "this Court upon appeal could not reverse their verdict", since not all the evidence would be presented on appeal).

[3] 1875, Smith *v.* State, 42 Tex. 444, 448 (disapproving a view of a sow, partly on this ground).

[4] Except perhaps in Wisconsin.

[5] *California:* 1875, Wright *v.* Carpenter, 49 Cal. 607, 610 (but the jury are not to "take into consideration the result of their own examination", on the theory of Close *v.* Samm, *infra*); *Indiana:* 1872, Jeffersonville M. & I. R. Co. *v.* Bowen, 40 Ind. 545, 547 (injury on a railroad track; the jury had viewed the premises; the sufficiency of the evidence considered, and the jury's inspection treated as proper, but not a source of evidence, following the reasoning of Close *v.* Samm, Iowa, *infra;* overruling Evansville T. & C. G. R. Co. *v.* Cochran, 1858, 10 Ind. 560); 1872, Gagg *v.* Vetter, 41 Ind. 228, 258 (fire attributed to sparks from a brewery chimney; the premises had been viewed by the jury; same ruling); 1875, Heady *v.* Turnpike Co., 52 Ind. 117, 124 (view is not "part of the evidence in the case"); 1880, Indianapolis *v.* Scott, 72 Ind. 196, 204 (same; jury's testing a rotten sleeper viewed, held not misconduct); 1885, Shular *v.* State, 105 Ind. 289, 295, 4 N. E. 870 (principle of Bowen's case reaffirmed); 1887, Louisville N. A. & C. R. Co. *v.* Wood, 113 Ind. 544, 550, 14 N. E. 572, 16 N. E. 197 (general doctrine of Cochran's case repudiated, except perhaps where inspection is the chief source of evidence in the case); 1906, Pittsburgh C. C. & St. L. R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033 (injured foot exhibited; L. N. A. & C. R. Co. *v.* Wood followed); *Iowa:* 1869, Close *v.* Samm, 27 Ia. 503, 507 (trespass by flowage upon land: a jury's view allowed; their view held not a source of evidence, so as to prevent a ruling as to the sufficiency of the evidence in the record; see quotation *post*); 1892, Morrison *v.* R. Co., 84 Ia. 663, 51 N. W. 75; 1895, Moore *v.* R. Co., 93 Ia. 484, 61 N. W. 992 (collision on a railway track; view held improper because of an experiment with an engine); 1906, Mier *v.* Phillips F. Co., 130 Ia. 570, 107 N. W. 621 (trespass in mining coal; "evidence afforded by the condition of the premises on a view" is not permissible); *Kansas:* 1889, Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419 (instruction to consider "the result of your observation in connection with the evidence", approved; theory that the results cannot be considered on appeal, repudiated); *Massachusetts:* 1834, Parks *v.* Boston, 15 Pick. 198, 200, 209 (Messrs. Rand and Dexter raised the point that if the knowledge acquired by a view were to be used, "a new trial could never be granted on the ground that the verdict was against the weight of the evidence in cases where a view was had; for it would be impossible to say how far the jury acted upon their own knowledge, and how far upon the testimony offered by the parties"; but Shaw, C. J., repudiated this and referred to "knowledge acquired by the view" as proper); *Missouri:* 1885, State *v.* Stair, 87 Mo. 268, 272 (bloodstained clothing of the deceased, identified by witness, shown to the jury; "the argument that these garments were not and could not be filed with the bill of exceptions,

(2) But unfortunately the reasons upon which this repudiation has proceeded have not always been sound ones, — have indeed sometimes been dangerous and misleading.

The correct reasons for the repudiation are the following:

First, the principle which allows a superior court to review the evidence given at a trial below does not necessarily imply that the evidence is to be stated and incorporated in its entirety but only so far as it is feasible to do so; and, so far as legislation has introduced new modes of revision by superior courts, it cannot be supposed to have intended by implication to change established modes of trial.[6] In the second place, there is not the slightest precedent for such a novel suggestion; for it was never made at the bar until 1834 and never judicially recognized until 1858, and yet jury-views and other modes of autoptic proference had long been established methods in procedure. In the third place, the Courts had already established a much more radical doctrine to the contrary effect, namely, that a verdict objected to as against the weight of evidence might nevertheless be supported on appeal for the very reason that the jury might have proceeded in part upon knowledge obtained at a view which could not be fully laid before the superior court:

1840, SHAW, C. J., in *Davis* v. *Jenny*, 1 Metc. 222 (denying the proposition that a Court cannot set aside a verdict based upon inspection): "The authority of the Court to set aside a verdict does not depend upon the nature and quality of the evidence upon which the jury have found it; though it often happens that the character of the evidence is such as to afford the jury much better means of judging of it than the Court can have of reviewing it, — as where much depends upon localities and the jury have a view, or upon minute circumstances and there is conflicting testimony, or upon the credit of a witness who is strongly impeached by one set of witnesses and supported by another. In all such cases the consideration that the jury had means of judging of facts which cannot afterwards be laid before the Court in their complete strength and fulness will always have a prevailing and often a decisive influence upon the judgment of the Court insupport of the verdict."[7]

and therefore should not have been examined by the jurors, is no reason for excluding them; the descriptive evidence is sufficient to enable this Court to pass upon the competency and relevancy of the evidence"); *South Carolina:* 1904, Rose *v.* Harllee, 69 S. C. 523, 48 S. E. 541 (a statute provided that a mortgage of chattels should not be valid unless the description in the document was "in writing or typewriting, but not printed"; in an action on such a mortgage, the jury found a verdict based on the document being valid, and the judge ordered a new trial because the description was printed; held, that the order could not be reversed "on the ground that there was no evidence of the description being printed"); *Texas:* 1883, Hart *v.* State, 15 Tex. App. 202, 228 (repudiating the doctrine entirely; see quotation *post*).

In Vermont the opposite extreme has been reached; a verdict is set aside upon the court's inspection of a chattel in the brief: 1919, Riggie *v.* Grand Trunk R. Co., 93 Vt. 282, 107 Atl. 126 (verdict set aside, the plaintiff having been injured by the slipping of the dog in a railroad jack; the opinion says that "the jack was a piece of real evidence, and of all proof was the most satisfactory and convincing").

[6] 1869, Wright, J., diss., in Close *v.* Samm, 27 Ia. 503, 513 ("The Legislature doubtless considered this very difficulty, and yet deemed it better to give this power (the Court judging when it should be exercised), even though the difficulty of knowing upon what the verdict was based, than to withhold it entirely"). Compare the following: 1899, Bridgewater *v.* State, 153 Ind. 560, 55 N. E. 737 (reproving the attachment of knives, etc., to the bill of exceptions on appeal).

[7] *Accord: Eng.* 1670, Vaughan, C. J., in Bushel's Case, 6 How. St. Tr. 999, 1011, Vaughan 135 ("The evidence which the jury have of the fact is much other than that [deposed in Court]; for . . . 4. In many cases the jury are to have view necessarily, in many by consent, for their better information; to this evidence likewise the judge is a stranger");

Finally, the sanction of such a doctrine as the present one would lead to the absurd and impracticable consequence that autoptic proference, as a source of the jury's belief, should be radically prohibited. The following passage expounds the correct reasons for repudiating such a doctrine:

1883, WHITE, P. J., in *Hart* v. *State*, 15 Tex. App. 202, 228: "[One of the objections to exhibiting the deceased's clothing was] 'because such testimony cannot be made a part of the record herein.' . . . Is it true, or is it a standard test, or even a test at all, that the legality and admissibility of evidence depends upon the fact that it must be such as can and must be incorporated into and brought up by the record? We know of no such rule announced by any standard work on the law of evidence. If it be true, then the identification, the pointing out of a defendant in Court, is not legitimate or admissible because he cannot be sent up here with the record. A witness' countenance, tone of voice, mode and manner of expression, and general demeanor on the stand, oftentimes influence the jury as much in estimating the weight they give and attach to his testimony as the words he utters, and yet they cannot be sent up with the record. . . . How they have impressed the jury and influenced their verdict are facts known only to themselves, facts which must necessarily be unknown to the defendant, to the trial Court, and to this Court, save as they may be manifested in the verdict, because they cannot be written in the record; and yet they are and always have been the best and most legitimate sources from which a correct estimate of the value of oral evidence is drawn. . . . The doubting Thomas of Scripture could not be made to believe that the resurrected Saviour was indeed the dead and crucified Jesus, until permitted to put his fingers into the nail holes shown in the holy hands and thrust his own hand into the wounded side whence the spear of the Roman soldier let out the life-blood of the dying Lord. In a recent case in England,[8] not at present accessible, the defendant was on trial for selling grain by a false measure; to solve the question of his guilt, the Court had the supposed false measure and a standard measure brought before the jury and the grain actually measured from the one into the other in the presence of the jury; will any one pretend to say that this was not the best and most satisfactory evidence to the minds of the jury which could possibly be adduced of the fact in issue before them? And could not the fact be sufficiently stated in the record so as to apprise this Court fully of the nature and character of the evidence and mode of proof upon which the verdict was founded? Clearly so, we think."

(3) But another mode, in favor with a few Courts, of repudiating the doctrine in question, is to propound the theory that the *jury's inspection is not an obtaining of evidence*, and to hold that the bill of exceptions may therefore be said to contain all the "evidence" notwithstanding the jury has had a view:

1869, COLE, J., in *Close* v. *Samm*, 27 Ia. 508 (the trial Court had instructed the jury to find "from all the evidence in the case, and from all the facts and circumstances disclosed on the trial, including your personal examination"; the Supreme Court discussed the objection that the jury should not have based their verdict "in any degree upon personal examination"): "It seems to us that it [the purpose of the statutory view] was to enable the

U. S. Cal. 1905, People v. Wood, 145 Cal. 659, 79 Pac. 367 (map used by witness); *Ill.* 1882, Peoria & F. R. Co. v. Barnum, 107 Ill. 160; *Me.* 1890, Shepherd v. Camden, 82 Me. 535, 537, 20 Atl. 91; *Mass.* 1863, Fitchburg R. Co. v. Eastern R. Co., 6 All. 98; *Nebr.* 1885, Omaha & R. V. R. Co. v. Walker, 17 Nebr. 432, 23 N. W. 348; 1907, Forbes v. Omaha, 79 Nebr. 6, 112 N. W. 326; *Okl.* 1905, Harmon v. Terr., 15 Okl. 147, 79 Pac. 757, 765.

Contra: 1913, Rockford v. Mower, 259 Ill. 604, 102 N. E. 1032.

[8] The learned judge possibly had in mind the case of Chenie v. Watson (cited *post*, § 1181), before Lord Kenyon, in 1797.

jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party. . . . [After referring to the additional objection that the bill of exceptions should contain all the evidence,] It is a general rule, certainly, if not universal, that the jury must base their verdict upon the evidence delivered to them in open Court, and they may not take into consideration facts known to them personally but outside of the evidence produced before them in Court; if a party would avail himself of the facts known to a juror, he must have him sworn and examined as other witnesses."

To this mode of evasion there are two conclusive answers. The first is that, if this theory were sound, then no valid bill of exceptions of any trial has ever been drawn up, since the demeanor of witnesses on the stand is always some evidence on the point of their credit [9] and no bill of exceptions has ever been able to embody this evidence with ink and paper. The second is that it is wholly incorrect in principle to suppose that an autoptic inspection by the tribunal does not supply it with evidence; for, although that which is received is neither testimonial nor circumstantial evidence, nevertheless it is an even more direct and satisfactory source of proof, whether it be termed "evidence" or not.[10] The suggestion that, in a view or any other mode of inspection by the jury, they are merely "enabled better to comprehend the testimony", and do not consult an additional source of knowledge, is simply not correct in fact:

1884, LYON, J., in *Washburn* v. *R. Co.*, 59 Wis. 364, 368, 18 N. W. 328: "The object of a view is to acquaint the jury with the physical situation, conditions, and surroundings of the thing seen. What they see they know absolutely. . . . For example, if a witness testify that a farm is hilly and rugged, when the view has disclosed to the jury, and to every juror alike, that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is needed to authorize the jury to find the fact as it is, in disregard of testimony given in court."

1898, BISSELL, J., in *Denver T. & F. W. R. Co.* v. *Ditch Co.*, 11 Colo. App. 41, 52 Pac. 224: "We are very frank to say we do not appreciate the refined distinction which is drawn by some of the authorities, wherein it is held that the jury are not at liberty to regard what they have seen as evidence in the case, but must utterly reject it otherwise than as an aid to the understanding of the testimony offered. The folly of it is apparent from the constitution of the human mind, and the well-understood processes by which juries arrive at conclusions. Many illustrations which forcibly express these ideas may be found in the cases. If a dozen witnesses should testify that there was no window on the north side of the house from which one man had sworn that he viewed the affray, and the jurors on view should see the window, all lawyers would know that it would be futile, on the argument, to insist to the jury that their verdict must be based on the non-existence of the window since the point had been sustained by a vast preponderance in the number of witnesses. In this mining community, lawyers who have had to do with litigations over lode claims, where the controversy respects the existence of an apex or the continuity of a vein, will understand that if a jury descended to inspect a mine, and the jury had on it a half-dozen miners, it

[9] *Ante*, § 946.

[10] *Ante*, § 1150.

would be folly to expect a verdict if those workmen, from their inspection, concluded that the crevice was a vein, and that it was or was not continuous. If the miners believed from their inspection that the crevice was a thing that they would follow, though a hundred men might swear they could not obtain an assay from it, and a hundred professional witnesses might swear that the vein was not continuous, yet, if these miners believed that the stained seam was a thing which they would have followed in the development of the property had they owned it, their verdict would be that it was a vein, and was continuous, providing the subsequent development showed that at the end of it there was a large body of valuable ore. We are therefore quite unable to appreciate the reasoning by which Courts hold that a charge of this description is necessarily erroneous [namely, that the jury are to determine according to the evidence and their observations]."

1898, HENSHAW, J., in *People* v. *Milner*, 122 Cal. 171, 54 Pac. 833: "[That the jury receive evidence] certainly is the case. If, for example, it were material to determine whether a hole in the panel of a door was or was not caused by a bullet, it would be permissible to remove the panel, to bring it into the court room, offer and have it received in evidence, and submit it to the inspection of the jury. It would not for a moment be doubted, if this procedure were adopted, but that the physical object was evidence in the case. If, instead of so doing, the Court should direct that the place where the material fact occurred should be viewed by the jury, and the jury should be conducted to the spot, and the panel of the door pointed out to them, would it be any the less the reception of evidence because obtained in this way? Certainly not."

1918, RITZ, J., in *State* v. *McCausland*, 82 W. Va. 525, 96 S. E. 938. "As to whether or not a view by the jury of some place connected with the matter before it is a taking of evidence is a question upon which there is a very decided conflict of authorities. Many of the courts hold that it is not, but is a part of the deliberations of the jury in arriving at a verdict; others say it is not the taking of evidence, but is simply allowing the jury to see the physical conditions in order that it may better understand the oral testimony; while still others assert that it is the presentation of physical conditions to the jury from which it may be informed as to some pertinent matter of inquiry. The purpose of introducing evidence is to inform the jury of the transaction in regard to which the trial is had, and anything pertinent to that end is proper for the purpose. Frequently in the trial of such cases material objects are introduced before the jury. In homicide cases the garments worn by the deceased are often introduced for the purpose of showing the place at which the wounds were inflicted. Can it be said that this is not evidence? It is stronger and more convincing to the jury than the oral testimony of any witness could possibly be. There can be no difference in the proffer of objects to the jury in the courtroom and such exhibition by taking the jury to view such objects, when they are not susceptible of being brought into court. The reason the jury is taken to view the ground is simply because it is physically impossible to bring it into the courtroom, and it is therefore necessary, in order that the jury may have all of the light obtainable upon the subject to which the inquiry is directed, that it be taken and shown these objects which form a part of the subject of inquiry. In this case can it be doubted that the actual demonstration made upon the ground to show whether or not certain objects were visible from a certain point was the strongest sort of evidence that could be introduced upon that question? Likewise, the view of the jury was the very strongest evidence as to the distance between the scene of the tragedy and the place where the witness was standing whose testimony was questioned. A dozen witnesses might testify that they observed this tragedy from a certain point, and the jury would not believe a single one of them, if from the observation made upon the ground the physical conditions were such as to preclude the possibility of the truth of the witnesses' statements."

The theory that a jury's view does not involve the obtaining of evidence has come before the Courts for consideration in many cases involving the propriety of instructions to juries and the *weight to be accorded by juries to wit-*

nesses' testimony; and, in spite of some favoring precedents, it has in most jurisdictions been repudiated.[11]

[11] The following list includes cases on both sides; the Indiana and Iowa cases have been placed *supra*, par. (1):
Federal: 1898, U. S. *v.* Seufert B. Co., 87 Fed. 35, 38 (eminent domain; view may furnish evidence); 1921, Philadelphia & R. R. Co. *v.* Berg, 3d C. C. A., 274 Fed. 534 (personal injuries; hook and eye-bolt shown to jury, as basis of inference about cause of break; quoted *ante*, § 1150);
California: 1875, Wright *v.* Carpenter, 49 Cal. 607 (the jury are not to consider the result of their inspection as evidence); 1886, People *v.* Bush, 68 Cal. 623, 630, 10 Pac. 169 ("It is impossible that a jury could go and view such a place without receiving some evidence, through one of their senses, viz., that of sight"); 1898, People *v.* Milner, 122 Cal. 171, 54 Pac. 833 (a view is the obtaining of evidence; Wright *v.* Carpenter repudiated; see quotation *supra*);
Colorado: 1898, Denver T. & F. W. R. Co. *v.* Ditch Co. (see quotation *supra*);
Connecticut: 1899, McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000 (after a view of premises by triors, "its situation and state . . . are as fully in evidence as if they had been presented to his consideration through descriptions given by witnesses under oath");
Illinois: 1874, Peoria A. & D. R. Co. *v.* Sawyer, 71 Ill. 361, 364 ("the facts derived from such examination would still have been a part of the evidence"); 1877, Mitchell *v.* R. Co., 85 Ill. 566 (view may furnish basis of conclusions as well as other evidence); 1883, Peoria & F. R. Co. *v.* Barnum, 107 Ill. 160 (jury's "personal observation" a source of evidence); 1884, Culbertson & B. Packing Co. *v.* Chicago, 111 Ill. 651, 655 (jury may "take into account such facts as they learned by viewing the property"); 1891, Springer *v.* Chicago (quoted *ante*, § 1162); 1892, Maywood Co. *v.* Maywood, 140 Ill. 216, 223, 29 N. E. 704 (an instruction to consider "such facts as they learned by the view, the same being in the nature of evidence and to be considered as such", approved); 1893, Peoria G. & C. Co. *v.* R. Co., 146 Ill. 372, 382, 34 N. E. 550 ("in the nature of evidence"); 1894, Vane *v.* Evanston, 150 Ill. 616, 621, 37 N. E. 901 (preceding cases distinguished as involving views under the eminent domain statute; for common-law views, the purpose is merely "to understand and apply the evidence"); 1898, Rock I. & P. R. Co. *v.* Brewing Co., 174 Ill. 547, 51 N. E. 572 (in eminent domain views, "the conclusions drawn by the jury from their view are in the nature of evidence"); and so the next two cases: 1902, Lanquist *v.* Chicago, 200 Ill. 69, 65 N. E. 681; 1903, East & W. I. R. Co. *v.* Miller, 201 Ill. 413, 66 N. E. 275; 1899, Seaverns *v.* Lischinski, 181 Ill. 358, 54 N. E. 1043 (rope exhibited to the jury; error can be assigned, even though the bill of exceptions cannot embody all the evidence; but a verdict cannot be "based exclusively on knowledge so acquired"; this is a correct way of stating such a rule); 1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; 1903, Groves & S. R. R. Co. *v.* Herman, 206 id. 34, 69 N. E. 36; 1904, Illinois & M. R. Co. *v.* Humiston, 208 id. 100, 69 N. E. 880; 1908, Mercer Co. *v.* Wolff, 237 Ill. 74, 86 N. E. 708; 1916, Chicago *v.* Lord, 276 Ill. 544, 115 N. E. 8 (condemnation of land);
Kansas: 1889, Kansas C. & S. W. R. Co. *v.* Baird, 41 Kan. 69, 21 Pac. 227 (a view may furnish evidence of the need of crossings); 1889, Topeka *v.* Martineau (cited *supra*, note 5); 1893, Chicago K. & W. R. Co. *v.* Parsons, 51 Kan. 408, 410, 32 Pac. 1083 (a view is "at most but one means of bringing evidence before them, letting the thing itself testify"); 1906, Moorhead *v.* Arnold, 73 Kan. 132, 84 Pac. 742 (ballots tampered with);
Maine: 1890, Shepherd *v.* Camden, 82 Me. 535, 20 Atl. 91 (jury have "a right to take into consideration what they saw"); 1919, State *v.* Slorah, 118 Me. 203, 106 Atl. 768 (right of accused to attend a view; "without modifying the prior views of this Court in land-damage cases as laid down in Shepherd *v.* Camden and Wakefield *v.* B. & M. R. Co., . . . the purpose of a view is not to receive evidence");
Massachusetts: 1883, Tully *v.* R. Co., 134 Mass. 499, 503 (objection that a ruling that the plaintiff had not offered sufficient evidence could not be made after a view, repudiated, because such a ruling should take into consideration the contingency that knowledge was obtained at a view; "in most cases of a view, a jury must of necessity acquire a certain amount of information, which they may properly treat as evidence in the case"); 1890, Menard *v.* R. Co., 150 Mass. 386, 388, 23 N. E. 214 (by a view the jury learned that a flagman had been placed at a crossing since the accident; whether this could be "treated as a part of the evidence", for purposes of comment in argument, not decided);
Michigan: 1922, People *v.* Harrigan, — Mich. —, 187 N. W. 306 (automobile injury; a view does not supply evidence);
Minnesota: 1894, Schultz *v.* Bower, 57 Minn. 493, 59 N. W. 631 (removing lateral support; the view is merely to apply the evidence); 1901, Northwestern M. L. I. Co. *v.* Sun Ins. Office, 85 Minn. 65, 88 N. W. 272 (the jury is not to use the knowledge obtained at a view);
Montana: 1903, State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (view of a mare; jury's view is only to "enable them to understand and apply the evidence");

The general result is, then, that it is no objection to the process of autoptic proference, at a view or in court, that the bill of exceptions cannot be made to transcribe faithfully the sources of belief thus laid before the jury; but that there are sound reasons for repudiating this objection without a resort to the unsound theory that a view, or any other form of autoptic proference, does not involve the consideration of evidence by the jury.

Nebraska: 1900, Chicago, Rock I. & P. R. Co. *v.* Farwell, 59 Nebr. 544, 81 N. W. 443 (a view "is evidence");
Nevada: 1919, Love *v.* Mt. Oddie U. M. Co., 43 Nev. 61, 184 Pac. 921 (title to mining claims; judge's view is not evidence; in any event, it does not suffice to sustain a judgment contrary to the other evidence);
New Hampshire: 1861, Dewey *v.* Williams, 43 N. H. 384, 387 (not clear); 1917, Carpenter *v.* Carpenter, 78 N. H. 440, 101 Atl. 628 (cited *ante*, § 1163; leading opinion by Walker, J.);
New Jersey: 1902, DeGray *v.* Tel. Co., 68 N. J. L. 454, 53 Atl. 200 (Close *v.* Samm, Ia., followed; jurors' view of telephone structures apparently held not to furnish evidence); 1908, Hinners *v.* Edgewater & F. L. R. Co., 75 N. J. L. 514, 69 Atl. 161 (jury's view may be used); 1919, Garland *v.* Furst Store, 93 N. J. L. 127, 107 Atl. 38 (an appellate court may set aside a verdict for insufficient evidence, even though the jury has had a view of premises; whether a view is "evidential", is needless to decide, "for in no event could it be conclusive");
Oklahoma: 1905, Blincoe *v.* Choctaw, O. & W. R. Co., 16 Okl. 286, 83 Pac. 903 (eminent domain; "you have a right to exercise your own judgment, based upon your inspection and observation, together with all the evidence, etc.", held a proper instruction; good opinion by Gillette, J.);
Oregon: 1916, Molalla El. Co. *v.* Wheeler, 79 Or. 478, 154 Pac. 686 (condemnation proceedings; "the findings of fact must be based on such testimony, in order that the decree rendered shall not be reversed on appeal"; this conception of exclusive judicial power in an appellate court is thoroughly unsound; once there were no appeals, but there was judicial justice);
Pennsylvania: 1890, Flower *v.* R. Co., 132 Pa. 524, 19 Atl. 274 (a view merely illustrates the testimony; said merely in cautioning the jury not to repudiate the testimony entirely); 1891, Hoffman *v.* R. Co., 143 Pa. 503, 22 Atl. 823 (approving the preceding case); 1899, Shano *v.* Bridge Co., 189 Pa. 245, 42 Atl. 128 (eminent domain; the jury may act upon "what they saw and knew"); 1913, Roberts *v.* Philadelphia, 239 Pa. 339, 86 Atl. 926 (approving Flower *v.* R. Co.);
Virginia: 1896, Kimball *v.* Friend's Adm'r, 95 Va. 125, 27 S. E. 901 (view does not authorize jury to base verdict on their inspection);
Washington: 1902, Seattle & M. R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498 (the jury "are told that, where there is a conflict in the testimony, they may resort to the evidence of their senses on the view to determine the truth; and this, we think, is correct"); 1912, Murphy *v.* Chicago M. & S. P. R. Co., 66 Wash. 663, 120 Pac. 525 (approving R. Co. *v.* Rœder);
West Virginia: 1894, Fox *v.* B. & O. R. Co., 34 W. Va. 466, 12 S. E. 757 (the view is to "better understand the evidence", but the jury may take into consideration the impressions gained by sight of the place); 1902, State *v.* Henry, 51 W. Va. 283, 41 S. E. 439 (a request that the jury "are not to take into consideration anything they saw or any impression they received at the view", held not improperly refused); 1907, Chadister *v.* Baltimore & O. R. Co., 62 W. Va. 566, 59 S. E. 523 (approving the preceding cases); 1918, State *v.* McCausland, 82 W. Va. 525, 96 S. E. 938, (see quotation *supra*);
Wisconsin: 1883, Neilson *v.* R. Co., 58 Wis. 516, 523, 17 N. W. 310 (jury's view of premises allowed to be taken as source of knowledge); 1884, Washburn *v.* R. Co., 59 Wis. 364, 368, 18 N. W. 328 (view may be taken by jury as a source of knowledge); 1885, Johnson *v.* Boorman, 63 Wis. 268, 275 (Washburn *v.* R. Co. approved); Munkwitz *v.* R. Co., 64 Wis. 403, 407, 25 N. W. 438 (view is to "assist in weighing and applying the evidence"); 1886, Seefeld *v.* R. Co., 67 Wis. 96, 100, 29 N. W. 904 (view is to "enable the jury to determine the weight of conflicting testimony"); 1887, Sasse *v.* State, 68 Wis. 530, 537, 32 N. W. 849 (an instruction "what they saw legally becomes a part of the evidence in the case", disapproved; the Washburn case misunderstood and practically repudiated); 1906, Hughes *v.* Chicago, St. P., M. & O. R. Co., 126 Wis. 525, 106 N. W. 526 (preceding rulings held not to forbid a juror testifying on a subsequent trial from knowledge obtained by a view at a former trial); 1909, American States S. Co. *v.* Milwaukee N. R. Co., 139 Wis. 199, 120 N. W. 844.

Distinguish the following: 1901, London G. O. Co. *v.* Lavell, 1 Ch. 135 (judge's inspection of omnibuses, upon the issue whether the defendant's was such an imitation of the plaintiff's as to deceive customers, held insufficient, without other evidence).

§ 1169. **View by the Judge.** Whenever the judge is the tribunal of fact, instead of the jury, the *judge may have view*, just as the jury might.

1. This is a time-honored part of the tradition; in the earlier periods, when the judge's share in the determination of fact-questions was much larger than it is nowadays, the annals show copious instances (*ante*, §§ 1152, 1154, 1163, 1164, *passim*).[1] Wherever, in modern practice, the facts are tried by a judge sitting without a jury, the judge's use of autoptic proference becomes an equally appropriate mode of ascertaining facts, and is a corollary of his general power to obtain evidence (*post*, § 2484). The English and Canadian legislation (*ante*, § 1164) explicitly recognizes this.

The judge, therefore, may equally well proceed *from the court-room to the place* in issue, wherever such a proceeding would be the suitable one for a jury, to take a "view" in the narrower sense.

2. If so, why may not this method be used *before trial?* Whenever a litigable occurrence is to be anticipated, and a view beforehand is practicable under the circumstances, such would be the dictate of common sense, *e.g.* when motor-speeding at a particular point is to be expected; in short, whenever any series of acts is recurring but could not be viewed after suit begun and would be attended by special doubt in weighing the conflicting testimony. —Such an expedient deserves to become one of the accepted methods of the future.[2]

§ 1169. [1] That a judge, sitting without a jury, may not take a private view of premises *without notice to the parties*, is held in Elston *v.* McGlauflin (1914), 79 Wash. 355, 140 Pac. 396. No doubt, as a matter of ordinary fairness, such should be the practice. But the reversal of the above judgment, merely because the judge did so, and because he happened also as a resident of the district to be less ignorant of conditions than most judges would be, is a serious error. It perpetuates the judicial straitjacket. It puts off the day when our judges shall be given more trust and more power — more discretion to bend stiff rules of substantive law where elasticity will do justice — more liberty to apply in the procedure of law-courts that directness and common sense which all of us employ outside the court-room. The perusal of the above opinion is commended to all lawyers who desire to test themselves. He who on reading it finds it perfectly natural in result and unrepugnant in reasoning, will know that he is as yet unaware of the spirit of the coming generation, and that he must seek earnestly for light. A good volume for him to read would be "The Science of Legal Method" (vol. IX of the Modern Legal Philosophy Series, 1915).

[2] The following instance of this, by an original-minded trial judge, is perhaps the first precedent: 1922, Aug. 19, Oregon Daily Journal, Portland, Or.: "Except by the lawless, there can be no divided opinion on Municipal Judge Ekwall's action in standing on a Portland street corner with two policemen to see the passing show of traffic violations go by. In two hours, 21 drivers were arrested. In court next day they appeared for a hearing of their cases. Some of them attempted to deny that they were guilty and were met by the announcement from the judge that he was present at the time of their arrest, that he knew them to be guilty, and that he had grown weary of hearing defendants deny charges brought by arresting officers. . . . In personally taking a stand on a street corner and himself viewing infractions of the law, noting the character of the violations and studying at first hand, traffic conditions and needs, Judge Ekwall has struck a new and intelligent note in law enforcement. His course is coöperation that coöperates."

PART II

RULES OF AUXILIARY PROBATIVE POLICY

INTRODUCTION

GENERAL SURVEY OF AUXILIARY RULES

CHAPTER XXXVIII.

§ 1171. **Nature of the Rules.** The subject of Relevancy, with which the preceding Part is concerned, is primarily one of logic, *i.e.* of the sufficiency of probative value, — the propriety of an inference. Taking the peculiar point of view of an investigation by judge and jury, the law asks whether a given fact, offered as the basis of an inference to a given proposition, is worth being admitted for the jury's consideration (*ante*, § 12). Whether the defective operation of another machine is probative to show the condition of the machine in question; whether the testimony of a person who was insane last January is admissible to show the existence of the fact which he asserts, — these are types of the questions with which the principles of Relevancy are concerned. It is true that, in examining those principles, it is often practically convenient (as noted *ante*, § 42) to treat at the same time the effect of certain principles of Auxiliary Probative Policy properly belonging here, in Part II, because the combined operation of the two sets of principles has often to be considered at one time in order to ascertain the resultant working rule. But this is merely on grounds of practical convenience in exposition.

Assume, then, that these principles of Relevancy have been satisfied, and that certain facts, so far as concerns their logical bearing and probative value, have passed the gantlet and are evidentially worthy to be considered. There still may remain for them another gantlet to pass. They may be amenable to certain other rules, applicable to specific classes of evidential material, and designed to strengthen here and there the evidential fabric and *to secure it against dangers and weaknesses pointed out by experience.* These Auxiliary Rules have nothing to do with Relevancy as such, *i.e.* regarded as the minimum requirement for Admissibility. They assume Rele-

vancy, and then under special circumstances apply an extra safeguard designed to meet special dangers. They may be said to be artificial as distinguished from natural rules; that is, they do not, as do the rules of Relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable. Moreover, their operation is on lines distinct from those of Relevancy; for the same fact, though it is always relevant to prove the same proposition, may or may not come under the ban of one of these auxiliary rules, according to circumstances having no connection with relevancy. For example, the circumstance that a person planned to execute a will of a certain tenor is regarded as relevant to show that a lost will executed by him was of that tenor; yet, by a certain rule of preference, the document itself must be produced, and only if it is unavailable may this circumstantial evidence be used. Again, by another rule, sometimes laid down, the circumstantial evidence alone will in such cases not be regarded; it first must be quantitatively strengthened by the testimony of one who has read the document. Again, the assertion of a father of a family as to the age of his child is a fact always relevant (in the sense that the assertor is a qualified witness) to show the child's age; nevertheless, it will, under some circumstances, not be received unless it is made on the stand, under oath and subject to cross-examination. Again, the testimony of any person who has seen a testator sign a will is relevant, in the sense that the person is a qualified witness; yet, if there is another person available who has attested the will by his signature, the latter must first be called to the stand before the former can be listened to.

These rules of Auxiliary Probative Policy, then, form a set of rules over and above and independent of the rules depending on the principles of Relevancy. They are distinguished from the rules of Relevancy (Part I) in resting not upon an analysis of the process of inference, but upon artificial expedients designed to avoid special dangers irrespective of the nature of the inference and affecting in common various kinds of evidence resting upon various inferences. They are distinguished from the rules of Extrinsic Policy (Part III) in that the latter do not aim at the strengthening of the mass of evidence but at the avoidance of collateral disadvantages unconnected with the object of securing good evidence. The Auxiliary Probative Policy rules include the most characteristic features of the Anglo-American law of evidence. They are, on the whole, and apart from minor abuses, justified by experience as a valuable part of the system.

§ 1172. **Summary of the Rules.** These rules may best be grouped and analyzed, not according to their respective policies — which may be complex and varied — but according to the actual operation of the rule — the result which the rule produces in its application. For this purpose the rules seem divisible into five great classes, which may be termed, respectively,

I. Preferential;

II. Analytic (or Scrutinative);

III. Prophylactic;
IV. Simplificative; and
V. Quantitative (or Synthetic).

I. The nature of the *Prefcrential* rules is that they *prefer one kind of evidence to another*. This they may do in one of two ways: (*a*) they may require one kind of evidence to be brought in *before any other can be resorted to*, and may refuse provisionally to listen to the latter until the former is procured or is shown to be inaccessible; or (*b*) they may prefer one kind of evidence absolutely, *i.e.* they may require its production, and, so long as it is available, *consider no other kind of evidence*, even after the preferred kind has been supplied.

With reference to the kinds of evidence thus preferred, these rules are of the following scope:

(1) There is a rule of Preference for the *inspection of the thing itself*, in place of any evidence, either circumstantial or testimonial, about the things; this is the rule of Primariness, as sometimes termed (treated *post*, §§ 1177–1282), and concerns itself solely with *documents*. The preference here is solely of the conditional sort above-named, and not of the absolute sort. The questions that here arise are, in general, to what objects this rule of preference applies, under what conditions — the object ceasing to be available for production — the preference ceases, and to what exceptions the rule is subject.

(2) There is, next, a preference as between various kinds of *testimonial evidence*. One kind of witness may, for various reasons, be required to be called in preference to another. Here the two kinds of preference, conditional and absolute, are both found. (*a*) The chief example of the former sort is the rule requiring an *attesting witness* to be called. Other examples of this kind of rule are sometimes found in requirements that the eye-witnesses to a crime must all be called, or that the owner of stolen goods must be called to prove their loss, or that the alleged writer of a document must be called to identify it. (*b*) Of the absolute preference of one witness above another, the chief example is the rule preferring a magistrate's *official report* of testimony delivered before him. The preference here, when held to be absolute, is so in the sense that this report is not allowed to be shown erroneous, *i.e.* the magistrate's report is preferred so as to stand against that of any other person whatever. Another example of such a rule is the preference given to the *enrolment of a statute* as certified to by the presiding officers of the Legislature, the Governor, and the Secretary of State; where this doctrine obtains, these persons' testimony is made to stand against that of any other persons.

II. The nature of the *Analytic* (or Scrutinative) rules is to subject a certain kind of evidence to *tests calculated to exhibit and expose its possible weaknesses* and thus to make clear to the tribunal the precise value that it deserves. There is in effect but one rule of this sort, the *Hearsay rule*. By this rule, two such tests or securities for trustworthiness are required to be applied to testimonial evidence, — the tests of Cross-examination and Conformation; but

the second is entirely subsidiary to the first, so that the essential purpose of this rule is that which is attained by bringing the witness to the stand and analyzing his assertions by the potent resolvent of cross-examination. The chief questions that arise in connection with this rule are whether the rule has in a given case been satisfied by adequate opportunity for cross-examination, whether certain classes of testimonial assertions are to be received exceptionally without undergoing these tests, and where the line is to be drawn between utterances to which the rule does and does not apply.

III. The nature of the *Prophylactic* rules is to endeavor by artificial expedients *to remove, before the evidence is introduced, such sources of danger and distrust* as experience may have shown to lurk within it. These are thus contrasted, on the one hand, with the Analytic rules, which achieve their purpose by exposing the weaknesses to plain view, and, on the other hand, with the Quantitative rules, which effect their object by cumulating a quantity of evidence sufficient to outweigh its individual weaknesses. The Prophylactic rules employ five expedients, — the Oath, the Perjury-penalty, Publicity proceedings, Separation of witnesses, and Prior Notice of evidence to the opponent. Their common aim is by these expedients to eliminate in advance the dangers which are inherent in certain kinds of evidence.

IV. The nature of the *Simplificative* rules is to *reject a certain kind of evidence which* though in itself relevant and trustworthy is *likely under certain conditions to confuse the process of proof*. These differ from the other four groups, as to practical effect, in that they do not accept the evidence when tested or strengthened by some artificial expedient — such as cross-examination, or oath, or numbers of witnesses — but simply exclude it, either absolutely or conditionally. The chief rules are those which exclude (1) evidence offered at an improper time, (2) testimony of an excessive number of witnesses, or of particular persons (such as a judge or counsel) likely to be over-influential, or of opinion, when superfluous and likely to be abused, (3) circumstantial evidence (such as an accused's moral character) likely to cause undue prejudice.

V. The nature of the *Quantitative* (or Synthetic) rules is that in given cases they require certain *kinds of evidence to be associated with other evidence* before the case will be allowed to go to the jury. There are three general classes of such rules. (1) A rule may prescribe a definite number of witnesses as the minimum. On a charge of treason, for example, two witnesses are almost universally required; and, on an issue of testamentary execution, two witnesses, or more, are generally required. (2) A rule may prescribe that in given cases one witness is not sufficient unless additionally there is circumstantial evidence of a specified sort. It is sometimes required, for example, that an accomplice's testimony must be thus corroborated, and that the testimony of a woman said to have been seduced or raped must be thus corroborated. (3) A rule may prescribe that one kind of circumstantial evidence shall on certain issues be insufficient without other circumstantial

evidence; for example, for the execution of an ancient document not testified to by witnesses, the circumstance of age alone may be held insufficient without the accompanying circumstances of appropriate custody, long possession, or the like; or the exchange of marriage consent may be regarded in certain issues as not sufficiently evidenced by the circumstance of cohabitation. These quantitative rules are in our system of law relatively few and unimportant.

There is no one term traditionally given to this group of auxiliary rules, here termed rules of Auxiliary Probative Policy; but it is necessary now to examine the scope of a phrase which has long been used as covering some of them, — the "Best Evidence" principle.

§ 1173. **"Best Evidence" Principle; History of the Phrase.** The history of the phrase has been traced, once for all and without the possibility of better statement, by Professor Thayer:

1898, Professor *James Bradley Thayer*, Preliminary Treatise on Evidence, 489: "The phrase first appears in our cases, I believe, after the English revolution, in C. J. Holt's time. That is an early period for anything like a rule of evidence, properly so-called. Such rules could not well come into prominence, or be much insisted on, while the jury were allowed to find verdicts on their own knowledge; and that power of the jury had been elaborately asserted as a leading ground of the judgment in Bushnell's Case in 1670, by Vaughan, C. J., speaking for the court. Finding the rule, then, at the end of the seventeenth century, let us trace it down, not too minutely. In the year 1699–1700, in *Ford* v. *Hopkins*, in allowing a goldsmith's note as evidence against a stranger of the fact that the goldsmith had received money, Holt, C. J. says that they must take notice of the usages of trade; 'the best proof that the nature of the thing will afford is only required.' This is the earliest instance of the use of the phrase that I remember. This or its synonyms is repeatedly used by Holt and others. . . . The phrase now became familiar, and it continued to hold a great place throughout the eighteenth century. Chief Baron Gilbert introduced the expression into his book on Evidence, and recognized the rule which requires of a party the best evidence that he can produce, as the chief rule of the whole subject. . . . It is said in Gilbert's book that 'the first, therefore, and most signal rule in relation to evidence in this, that a man must have the utmost evidence the nature of the fact is capable of.' . . . The true meaning of the rule of law that requires the greatest evidence that the nature of the thing is capable of is this, that no such evidence shall be brought which 'ex natura rei' supposes still a greater evidence behind, in the parties' own possession and power. Why did he not produce the better evidence? he asks; and he illustrates by what was always the stock example, the case of offering 'a copy of a deed or will where he ought to produce the original.' . . . The Courts also were using the same and even more emphatic language. In 1740, Lord Hardwicke declared that 'the rule of evidence is that the best evidence that the circumstances of the case will allow must be given. There is no rule of evidence to be laid down in this court but a reasonable one, such as the nature of the thing to be proved will admit of.' And in 1792 Lord Loughborough said 'that all common-law courts ought to proceed upon the general rule, namely, the best evidence that the nature of the case will admit, I perfectly agree.' But the great, conspicuous instance in which this doctrine was asserted and applied was in the famous and historical case of *Omychund* v. *Barker*, in 1744, growing out of the extension of British commerce in India, where the question was on receiving in an English court the testimony of a native heathen Hindoo, taken in India, on an oath conformed to the usages of his religion. In this case, Willes, J., resorted to this rule, and Lord Hardwicke, sitting as Chancellor, with great emphasis said: 'The judges and sages

of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.' . . . An old principle which had served a useful purpose for the century while rules of evidence had been forming and were being applied, to an extent never before known, while the practice of granting new trials for the jury's disregard of evidence had been developing, and judicial control over evidence had been greatly extended, — this old principle, this convenient, rough test, had survived its usefulness. A crop of specific rules and exceptions to rules had been sprouting, and hardening into an independent growth. It had become perfectly true that in many cases it made no difference whatever whether a man offered the best evidence that he could or not, — the best evidence that the nature of the case admitted, the best 'ex natura rei', as some judges said, or the best 'rebus sic stantibus', as others said; none the less it was, in many cases, rejected. . . . As regards the main rule of the Best Evidence, in its general application, the text-books which followed Gilbert, beginning with Peake in 1801, and continuing with the leading treatises of Phillipps in 1814, Starkie in 1824, Greenleaf in 1842, Taylor in 1848, and Best in 1849 all repeat it. But it is accompanied now with so many explanations and qualifications as to indicate the need of some simpler and truer statement, which should exclude any mention of this as a working rule of our system. Indeed it would probably have dropped naturally out of use long ago, if it had not come to be a convenient, short description of the rule as to proving the contents of a writing. Regarded as a general rule, the trouble with it is that it is not true to the facts and does not hold out in its application; and in so far as it does apply, it is unnecessary and uninstructive. It is roughly descriptive of two or three rules which have their own reasons and their own name and place, and are well enough known without it."

§ 1174. **Same: Scope of the Phrase.** The phrase about "producing the best evidence", then, is merely a loose and shifting name for various specific rules. Each of these stands upon its own basis of principle, and each of them has its own history, independent of the phrase. The rules were not created by deduction from the principle implied in the phrase; but the phrase came to be used as descriptive of the rules already existing. What were these rules?

(1) Chiefly, and usually, the phrase was employed for the rule that the terms of a document must be proved by the *production of the document* itself, in preference to evidence about the document (*post*, §§ 1177–1282). This is the use that has longest survived, and its illustrations are too numerous to need citation.

(2) It has also often been employed to designate the *Hearsay rule*, *i.e.* the rule excluding assertions, offered to prove the facts asserted, and made by persons speaking out of court and not subject to the test of cross-examination (*post*, §§ 1360–1810). Testimony on the stand is "best" in the sense that it is not regarded as trustworthy until it has been subjected to this great test of cross-examination. This usage has almost disappeared, but it was once not uncommon.[1]

(3) It was also much employed to designate the group of rules by which the testimony of certain classes of *witnesses* is *preferred* to that of certain others. The party is required to resort first to the former, because, for varying reasons, their testimony is regarded as "best." The rule requiring the production of an *attesting witness* (*post*, §§ 1287–1321) was the chief of

§ 1174. [1] *E.g.*, 1709, Holt, C. J., in Altham v. Anglesea, 11 Mod. 210.

these, and the one most frequently designated by the phrase "best evidence";[2] but this employment of it is also now not often met with.

(4) There are a few scattered instances of the employment of the phrase in connection with certain principles of substantive law. It is sometimes said, for example, that the record of a Court is the best evidence of its proceedings, as compared with other testimony or with the clerk's minutes or docket entries. But the truth is that the Court's written record is the proceeding itself,— the only thing which will be regarded as the 'acta' of the Court; and so the frequent questions involving this subject are in reality questions of the law as to what constitutes for legal purposes a judicial act (*post*, § 2450). Again, the notary's or magistrate's record of a married woman's acknowledgment of consent to her deed, though sometimes spoken of as the "best evidence", is, as generally treated, not as a preferred testimony to the act, but as the very judicial act itself and the only thing to which the law will attach legal consequences.[3] Again, the parol-evidence rule in general,[4] though sometimes associated with the phrase "best evidence",[5] is in truth not a doctrine about preferred testimony, but a doctrine of substantive law specifying what sorts of transactions are to be treated as acts for the purpose of giving them legal effect.

(5) Rarely, the phrase is still invoked in odd connections, to justify some rule already established on definite and independent grounds.[6]

The sooner the phrase is wholly abandoned, the better.[7]

§ 1175. **Primary and Secondary Evidence.** The distinction between the "best evidence" that is first required, and the inferior evidence that is allowed when the "best" is unattainable, has come to be designated (apparently through the currency given it by Mr. Christian's essay and by Mr. Best's treatise) by the terms Primary and Secondary Evidence. These terms, which are in themselves not wholly unsatisfactory, are open to serious objections. One is that the rule requiring the production of documents is not a rule requiring evidence, but a rule preferring the thing itself (*ante*, § 1150) to any evidence about the thing; what is produced is not "primary evidence," in any significant sense; and the term tends to conceal the true nature of the

[2] *E.g.*, 1796, Grose, J., in Stone's Trial, 25 How. St. Tr. 1313; 1804, *Per curiam*, in Jones *v.* Lovell, 1 Cr. C. C. 183. It was used in 1744, by Lord Hardwicke, L. C., in Omichund *v.* Barker, 1 Atk. 1, 45, to designate both (2) and (3) *supra;* it was used in 1812, by Kent, C. J., in Coleman *v.* Southwick, 9 Johns. 49, to designate both (1) and (2) *supra;* and such groupings of two or more of these three rules under the single phrase are elsewhere to be met with.

[3] *Post*, § 1352.

[4] *Post*, § 2400.

[5] *E.g.*, Best, C. J., in Strother *v.* Barr, 5 Bing. 136, 151; Ga. Code 1895, § 5166.

[6] *E.g.*, 1767, counsel arguing in Morris *v.* Miller, 4 Burr. 2057 (proof of marriage by eye-witness); 1866, Doe, J., in Boardman *v.* Woodman, 47 N. H. 120, 145, 146 (applying it to personal opinion by lay witnesses to sanity); 1886, Vigus *v.* O'Bannon, 118 Ill. 334, 348, 8 N. E. 778 (used in connection with evidence that a party had no notice of a fact); 1892, Stirling *v.* Wagner, 4 Wyo. 5, 31 Pac. 1032 (used in reference to one testifying to a long course of business without producing the books).

[7] Professor Thayer's just criticisms (quoted *ante*, § 1173) on the modern futility of the phrase had long ago been anticipated, in part, by the great exposer of legal cant: 1827, Jeremy Bentham, Rationale of Judicial Evidence, b. IX, pt. VI, c. IV (Bowring's ed., vol. VII, p. 554).

rule's effect. The other objection is that, so far as the term is understood to group together all rules exacting a certain quality of evidence when it is available,[1] it groups rules which are in practical tenor essentially distinct, — for the Hearsay rule and the Attesting Witness rule and the Documentary Original rule cannot be thus united. On the whole, it should be abandoned as more likely to confuse than to clarify the application of the various Auxiliary Rules which naturally form an independent group in our system of Evidence.[2]

§ 1175. [1] 1892, Lord Esher, M. R., in Lucas *v.* Williams, 2 Q. B. 113, 116 (" 'Primary' and 'secondary' evidence mean this: primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence").

[2] The following is an example of this unsound and futile use of the term: Cal. C. C. P. 1872, §§ 1829, 1830 ("Primary evidence is that kind of evidence which under every possible circumstance affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents. Secondary evidence is that which is inferior to primary").

TITLE I: PREFERENTIAL RULES

SUB-TITLE I: PRODUCTION OF DOCUMENTARY ORIGINALS

CHAPTER XXXIX.

INTRODUCTORY

A. 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"*

B. Exceptions to the Rule

C. RULES ABOUT SECONDARY EVIDENCE OF CONTENTS (COPIES, DEGREES OF EVIDENCE, ETC.)

INTRODUCTORY

§ 1177. **History of the Rule.** The rule requiring the production of writings before the tribunal is one of the few rules in our system of Evidence that run back earlier than the 1700s. In this rule we find a continuous existence, under one form or another, as far back as the history of our legal system takes us. But this history finds the rule in three stages: first, the stage of a form of trial, — trial by 'carta' or document; next, the stage of a rule of pleading in jury trial, — the rule of profert; and finally the modern rule of production in evidence. These stages overlap to some extent, but they are nevertheless distinct.

However, before seeking to understand the evolution of these stages, we must recall the special mental attitude of the medieval mind towards documents; for that attitude has now virtually disappeared, and its disappearance represents the transition from one stage to another of the present rule.

I. (1) In the primitive medieval conception *a document* directly affecting rights of property or contract (as we should nowadays say) was looked upon as *having in itself an extrinsic effect.* Its physical, material existence was what counted, and nothing else. Produced — and lo! its very parchment worked its spell. Not produced, — and it counted for nothing. The primitive Germanic peoples knew not the 'carta', or written document; they performed their jural acts by symbolic dramatic ceremonies or gestures. They lived in

an atmosphere of what we should now call formalism.[1] And when they migrated south and west, and were absorbed into the neo-Roman civilization, including the customs of transaction by document, the document was still (to them) merely one of the symbols that entered into the formalism of the transaction. Like the wand, the glove, and the knife, it had an efficacy, a magic, independent of its written tenor, — which indeed meant nothing to the parties who employed it, for they could not read.

This medieval conception was still in full force in the Norman times, when English law was shaping, and jury trial was making headway, — say the 1200s.[2]

(2) In such a state of thought, two consequences were inevitable.

In the first place, if a claim rested on a document, the *production of the document was in itself sufficient*, — just as, in a case dependent on witnesses, the mere oath-taking by the witnesses was the efficacious thing. Hence, "trial by documents" was a special form of trial, — distinct from "trial by witnesses" and from "trial by jury" (*infra*, par. II (*a*)).

In the second place (and most important for the present history), the *non-production of the document was incurable.* To lose one's deed was to lose one's *right*, — just as to-day to lose a money-coin is to lose its purchasing power. This formalistic conception of the document is copiously illustrated in the Year-Books:

1350, *Thomas of Utred* v. *Anon.*, Y. B. 24 Ed. III, fol. 24, Pl. 1; detinue for a writing delivered to defendant; defendant demands that plaintiff exhibit the indenture describing the livery. SHARDLOW, J.: "Where the action is wholly on a specialty, if the specialty is lost, the whole action is lost."

1402, *Anon.*, Y. B. 3 H. IV, fol. 19, Maynard's ed. fol. 17, Pl. 14; action on a contract for 20£; plea, as to 10£ he has a bond, and demurrer that the action should have been on the bond. Culpeper supposes that "the bond was burned or lost, and still we have the action on the bond." MARKHAM, J., "denied this, and said that this would be deemed your own foolishness in not better keeping it."

1426, *Topcleff's Case*, Y. B. 4 H. VI, fol. 17, pl. 1; debt for rent on a lease; during argument plaintiff suggested that even if the lease had been made by deed, and the deed were lost, he should not lose his rent. BABINGTON, J.: "I say that if it were as you say, and he had lost the deed, that it would be adjudged his foolishness for not keeping the deed safely."

This notion of substantive law, then, viz. that a right resting on a document not produced is no right at all; that the production is a necessary feature of the right; that the owner of the document has the whole risk of its

§ 1177. [1] The various aspects of this formalism are more fully noted *post*, §§ 2404, 2426, 2462 (history of the Parol Evidence rules), and § 2032 (history of rules of number of witness).

[2] Distinguish here the conception of the Parol Evidence rule of a document as constituting or embodying the right. This is a fairly modern conception (*post*, § 2426). The discrimination may to us seem a mere subtlety, and in any event our attempts to follow the medieval mind must be more or less speculative. But the medieval conception involved in the present principle is that the physical, material document, when shown, has an intrinsic magical effect in proving the case, just as does the endurance of the ordeal or the pronouncing of oath. On the other hand, the Parol Evidence rule signifies that a right is embodied in the document, not in the oral utterances of the parties; and this problem had not arisen for medieval thought.

existence; and that its non-production is inexcusable and incurable, is in the background of all procedure, and does not disappear entirely until the early 1800s; though it was gradually weakening and being whittled away through the preceding century or two.

Professor Ames has thus summed up its development:

1895, Professor *James Barr Ames*, Specialty Contracts and Equitable Defences (Harvard Law Review, IX, 49): "It has been often said that a seal imports a consideration, as if a consideration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view. It is now generally agreed that the specialty obligation, like the Roman 'stipulatio', owes its validity to the mere fact of its formal execution. The true nature of a specialty as a formal contract was clearly stated by Bracton: — 'Prescripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit sive non, obligatur ex scriptura.'

"The specialty being the contract itself, the loss or destruction of the instrument would logically mean the loss of all the obligee's rights against the obligor. And such was the law. 'If one loses his obligation, he loses his duty.' 'Where the action is upon a specialty, if the specialty is lost, the whole action is lost.' [3]

"The injustice of allowing the obligor to profit at the expense of the obligee by the mere accident of the loss of the obligation is obvious. But this ethical consideration was irrelevant in a court of common law. It did finally prevail in Chancery, which, in the seventeenth century, upon the obligee's affidavit of the loss or destruction of the instrument, compelled the obligor to perform his moral duty. A century later the common-law judges, not to be outdone by the chancellors, decided, by an act of judicial legislation, that if profert of a specialty was impossible by reason of its loss or destruction, the plaintiff might recover, nevertheless, upon secondary evidence of its contents."

(3) This medieval, magical, formal, technical view of a documentary right was of course bound to yield under the Rationalism of the 1700s. By the end of that century, even Lord Kenyon, a mainstay of conservatism, is found conceding that the conception was an anachronism:

1789, L. C. J. KENYON, in *Read* v. *Brookman*, 3 T. R. 151, 156: "It does seem to militate against every idea of reason and justice to say that because deeds, which are in their nature perishable, cannot always be preserved, a party who is to derive a benefit or title under them shall be bereaved of that title in the event of their being lost."

1802, L. C. ELDON, in *Ex parte Greenway*, 6 Ves. Jr. 812: "Since I have sat here, I have found in Lord Hardwicke's own hand (and he was one of the greatest lawyers who ever sat in Westminster Hall) his most positive declarations that upon such an instrument [a bond] it is impossible to maintain an action without a profert. The law is however now settled otherwise."

The change of rules to conform to the modern conception took place, as might have been expected, by gradual stages only. It came earlier in chancery than at common law; and it came at different times, and by different series of precedents, for deeds, for bonds, and for commercial paper. So slow was

[3] The authorities cited by Professor Ames include the Year-Book cases above quoted. Add the following: 1291, Haubrand's Bill (defendants detain from plaintiff "six charters of houses" as to which he is being sued, "and he cannot vouch without these charters"; Select Bills in Eyre, ed. Bolland, p. 8, Selden Society's Pub. vol. XXX, 1914).

Early instances of the Chancellor's intervention to give relief against the consequences of this principle are collected in Barbour's History of Contract in Early English Equity, p. 100 (Oxford Studies in Social and Legal History, IV, 1914).

its arrival for the latter class of instruments that, in the prolific era of American legislation of the early 1800s, it was still deemed worth while to enact statutes enabling the owner of lost commercial paper to maintain his action notwithstanding (*post*, § 1197).

II. Having thus traced the substantive conception of documentary right underlying the procedure, we are now in a position to follow the development of the procedure.

The party whose claim rested on a document must produce and show it, or lose his claim: such was, of course, the procedural consequence of the substantive idea. But the development of it passed through three broad stages:

(1) *Trial by Documents.* This is the primitive aspect of the rule:

1898, Professor *J. B. Thayer*, Preliminary Treatise on Evidence, 504, 13, 97, 104: "The vast majority of documents used in trials in early times were no doubt of the solemn, constitutive, and dispositive kind, — instruments under seal, records, certificates of high officials, public registers, and the like. Such documents, if the authenticity of them were not denied, 'imported verity', as the phrase was, — fixed liability and determined rights. As questions were tried by record and by Domesday Book, so they were tried by other documents. As has been said, 'If a man *said* he was bound [*e.g.* by a sealed instrument], he *was* bound.' Of course, therefore, whoever would use a document of this character must produce it, just as the Court had to have the jury in court, in trial (or proof) by jury, and the record, in trial (or proof) by record. As the trial by jury displaced one after another of the older modes of trial, sometimes these were mingled with it in a confused way; the procedure about joining attesting witnesses to deeds with the jury is probably an instance of this, — a combination of the old trial by witnesses with the newer trial by jury."

Thus in the first stage the contrast and competition is between trial before the judges with deed-witnesses and trial by the jury; but this contrast tends to disappear, and the witnesses go out with the jury and investigate the deed.

(2) *Profert in Pleading.* In the second stage, the contrast is between documents which are brought into court and formally presented in pleading to the consideration of the jury, and documents which are taken into consideration by the jury without this formal presentation. The jury at this time might freely go upon their own knowledge in reaching a verdict, and their consideration of documents not presented in court would thus at first not be an unnatural thing. Nevertheless, certain questions would arise:

1898, Professor *Thayer*, *ubi supra*, 105: "How if one who should have pleaded a charter or record did not plead it, relying, perhaps, on the jury, who might know of it? Could they find a matter of record or a deed without having it shown them? . . . Where a charter gave a ground of action or defence, it must regularly, as we have said, be pleaded; if admitted, it might save going to the assize. If it were not pleaded, one could not regularly use it in evidence to the jury; but the jury could have it if they wished: 'If a charter be put forward to inform the assize after they are sworn and charged, the charter will not be received unless they ask for it. To have the charter inform the assize, one should plead on the charter and say thus: "He did not die seised, etc., for he enfeoffed us by this charter", and then put forward the charter to inform.'[4] . . . In 1339[5] Scharshulle, J., is reported as

[4] 1292; Y. B. 20 & 21 Edw. I, 20.

[5] Y. B. 13 & 14 Edw. III, 80.

saying that since a warranty requires a specialty, if it be not pleaded or put in evidence, a finding of it by the assize shall not be received. . . . In 1419–20,[6] in a case much debated, it was held, with some difference of opinion among the judges, that a jury cannot in a special verdict find a deed which has not been pleaded or given in evidence; 'Hull [J.]: This deed is only the private intent of a man, which can be known only by writing; and if the writing be shown, it may lawfully be avoided in several ways, as for non-sane memory, being within age, imprisonment, or because it was made before the ancestor's death, and the like; things which the party cannot plead unless he have oyer of the deed and it be shown.' "

This last passage introduces us to the peculiar nature of the second stage, *i.e.* the rule of profert, as a doctrine of *pleading*. The notion that the jury might go upon private knowledge obtained by them anywhere and everywhere was not substantially repudiated until the 1700s; but in the meantime there were various streams of tendency in that direction. One of them is here seen in the policy of requiring the important documents to be presented before the jury in court and forbidding them to be dealt with by the jury unless so presented. This policy does not come into force suddenly; in 1340, the jury found a record, though it was not produced, in part, by "its being commonly said in the country that there was such a plea and such a judgment rendered in the said form."[7] But the rule of requiring profert in court tended to prevail and to become exclusive. Profert must be made (as the judge above quoted explains) so that the opponent, before the jury goes out, may have a proper opportunity to plead against the document and bring his defences to the jury's consideration.

At the earlier part of this stage the contrast is thus between the jury's use of a document properly produced to them in court and their use of one irregularly obtained afterwards. It is not a contrast between the formal allegation of a document in the pleadings and its later production in evidence; for pleadings were oral, the counsel constantly stated facts testimonially to the jury, in connection with the true pleading or statement of the claim, and the assertion or claim about a document — the pleading of it — would not be in essence a separate process from that of showing it, making profert, putting it in as evidence; the allegation and the showing or profert were a part of the same process.

But when the time came that oral pleading disappeared, and the written pleading became a process entirely separate from that of putting in evidence at the trial, the doctrine of profert took on a new phase, the distinctive one which it bears as it appears in our classical common-law treatises on pleading in the early 1800s, at a time when the doctrine was coming to its end. In this phase, the rule of profert now required that a certain *allegation be made in the written pleading*, namely, after the statement of title by document, the allegation that the document was hereby 'prolatum in curiam'; and though it was not actually produced and attacked, yet the opponent might crave *oyer* (*i.e.* the "hearing" it read, a relic of the days of oral pleading and

[6] Y. B. 7 H. V. 5, pl. 3.

[7] Y. B. 14 Edw. III. 25; cited in Thayer 109.

actual instant production) and the proponent's counsel must then send it to the opponent's representative and allow a copy to be taken.[8] In this degenerate and technical aspect of the rule as merely one of pleading, it need not further be considered here.[9] This contrast between the presence and absence of a purely formal allegation in the pleading has no significance for the present subject.

But it is necessary here to notice the limits of the rule of Profert, in order to understand the field that remained to be covered by a rule of Evidence applicable to documents in general. The rule of profert applied (1) in the first place only to *documents under seal*[10] and to judicial records.[11] This original restriction was natural enough, in the light of the history of the seal and its significance for documents. But the rule was later much enlarged. In any event it reflected the substantive idea already described (*supra*, par. I), viz. that a document on which a claim was based must without fail be produced by profert. (2) The rule of profert applied to *civil cases only*. This was also natural enough, and for the same reason.

'Pari passu' with the disappearance of the technical substantive idea of documents, the rule of Profert was dispensed with, at least by gradual steps, stretching over two centuries — where the document was lost,[12] or in the hands of the opponent,[13] or, in certain cases, in the hands of a stranger,[14] or was only collateral to the main issue;[15] and these stages took place (as already noted) at different times in chancery and at common law, and for deeds, bonds and commercial paper.

(3) *The rule of Production in Evidence.* The contrast that remains to investigate is that between a rule requiring the production in evidence of writings and the absence of such a rule.

It is apparent that, so far as the rule of Profert obtained, and from the earliest time of its obtaining, there was in effect a rule of Evidence on the subject; *i.e.* when, in the time of oral pleadings and evidence-production merged in one process, the rule required a document to be alleged and shown, this was a rule of Evidence at the same time that it was a rule of Pleading. Moreover, even in the later times of written pleadings, there would be a rule of evidence so far as there was a rule of pleading; for if it was necessary in the pleading to allege a fictitious showing of the document and then to give an actual oyer or sight of it to the opponent on request, the document would thus be ready for production in evidence also. The rule of profert in pleading, therefore, virtually enforced at the same time a rule of production in evidence. There was in practice no need of discriminating a separate rule of Evidence;

[8] Stephen, Pleading, 382, and note 86; the author there points out the historical fact that the profert rule was an indirect successor of trial by charter; so also Thayer, *ubi supra*, 504.

[9] It was abolished in England in 1852; St. 15 & 16 Vict. c. 76, § 55.

[10] 1685, Aylesbury *v.* Harvey, 3 Lev. 204; 1828, Tidd's Practice, 9th ed., I, 590.

[11] Tidd, 587.

[12] Cases cited *post*, § 1193.

[13] *Post*, § 1199.

[14] *Post*, §:1211.

[15] *Post*, § 1252.

and, so far as one was thought of, it would run on all fours with the rule of Pleading.

Nevertheless, the law of the early 1800s does present us with a rule of Evidence requiring production, which is by that time so far distinct from the rule of pleading that its *scope is much larger* and its requirements therefore more exacting, while its application is made as of a rule independent of the Profert-pleading rule. It is thus worth while to ascertain how this independent growth came about; for the pleading-rule of Profert had for some time been crystallized in a technical form and was no longer capable of contributing directly to this expansion of the rule of Evidence.

At what time, then, did the rule of Evidence come to include in its scope the documents exempted by the two above limitations of the rule of Profert?

(*a*) In *civil cases*, it is plain that during the 1500s no independent rule of evidence yet required the production of *writings in general*. At this period, whatever document was not brought in by virtue of the Profert rule in pleading might be established without any production; and this might sometimes suffice even for a record:

1571, *Newis* v. *Lark*, 2 Plowd. 403, 410 *a*; assize of disseisin; part of the evidence was a recovery suffered; objection, "that the recovery was not shewn under the seal, or at least the roll of it should have been alledged particularly, so that the Court might see it, because it is resident in this Court, and they might have informed the jury of it after they had perused it. . . . But all the other justices [except Harper] argued to the contrary. For . . . whatever they [the jury] may take conusance of themselves may be given in evidence by parol, or by copies, or by other argument of truth. But in pleading, a man cannot make himself a title in any case by a record without shewing it under the great seal; and if a record be pleaded in bar, the party shall have a day to bring it in under the great seal (as Weston, Justice, said), and so he shall plead it without shewing it. But such day to bring it in shall not be where it is given in evidence, but the finding by the jury is sufficient, and they may find it of themselves, although it is not shewn to them in evidence; . . . and as they may find it, so by the same reason they may take instruction concerning it from every circumstance that carries an appearance of truth."

Somewhere during the 1600s the expansion and independent growth of the rule of Evidence began. It was during this period that the jury came to be substantially restricted to information furnished them by evidence in court;[16] and the course of this development would naturally put emphasis on the production of all writings in court. Thus the early contrast between the jury's use of a document out of court and their use of it in court would become unimportant. The contrast would come to be between a document actually produced by a witness and a document merely spoken of by him; and the latter practice would be regarded as irregular. By the beginning of the 1700s and onwards the rule is found applied to *miscellaneous writings*;[17]

[16] *Post*, § 2032; Thayer, *ubi supra*, 122.

[17] 1699, Anon., 1 Ld. Raym. 731 (rule applied to a note); 1702, Geery *v.* Hopkins, 2 Ld. Raym. 851 (applied to East India Company's cash-book and transfer-book and a "note of acceptance"); 1724, Downes *v.* Mooreman, Bunbury 189 (applied to an agreement between abbot and monks); 1734, R. *v.* Canterbury, Ridgw. temp. Hardw. 81 (applied to statutes of All Souls College); 1737, Goodier *v.* Lake, 1 Atk. 446 (applied to "an original note of hand"); 1750, Cole *v.* Gibson,

although when a formal statement of it is made, the scope is still sometimes not so broad.[18] Only by the beginning of the 1800s do the practitioners who were writers of treatises explicitly state it to cover all kinds of writings.[19] Moreover, all through the 1700s the rule was understood not to apply to writings which were only "collateral" to the issue,[20] — a limitation borrowed from the profert tradition; and this restriction, though it did not expressly exempt from the rule unsealed writings, must no doubt practically have had some influence, for many of the miscellaneous writings, particularly letters, would usually be "collateral" to the issue. Nevertheless, that restriction does not account for the recorded practice, as the criminal trials show.

(*b*) In *criminal cases*, the rule appears, as late as the 1600s, not to have been settled upon as broadly applicable, even to records:

1640, *Earl of Strafford's Trial*, 3 How. St. Tr. 1427, 1432, 1434; the prosecution charged among other things, "1, that by proclamation he had restrained selling of flax; 2, that he had ordered the making of yarn of such and such lengths and number of threads; . . . for proof hereof they brought, 1, the proclamation about the restraint; 2, the warrant for seizing the forfeited goods"; then, proceeding, they charged the unlawful billeting of soldiers on private persons, and "Serjeant Savil was called, who produced the copy of the warrant upon which he had settled the soldiers"; then the defendant objected that this copy was no evidence, "1, because no transcript, but the original only, can make faith before the King's Bench in a matter of debt; . . . if copies be at any time received, they are such as are given in upon oath to have been compared with the originals which are upon record", and that this copy was not only not so sworn but that the Serjeant was prejudiced to swear in his own exculpation and was therefore incompetent; "the point seemed exceeding weighty, and in effect was the ground-work of the whole article [of charge]"; and "after a very hot contestation" the Lords "resolved that the copy should not be admitted, and desired them to proceed to other proofs", which consisted of impartial testimony that "he heard of such a warrant", and "he hath seen such a warrant under the deputy's hand and seal."

Certain it is that through this whole century no fixed rule of production existed for the miscellaneous writings that become relevant in a criminal trial. They were often produced, and often not produced nor accounted for; and when they were accounted for, the explanation was made, as likely as not, only on cross-examination, or to forestall the jury's suspicion or the judge's criticism, and not as a preliminary required by firm and accepted rule.[21]

1 Ves. Sr. 503, 505 (L. C. Hardwicke declared that there was no distinction as to "collateral" evidence; "so it is in the case of letters, which are always used by way of collateral, circumstantial evidence to prove the facts"); 1789, Cates *v.* Winter, 3 T. R. 306 (license to let horses); 1802, Livingston *v.* Rogers, 2 Johns. Cas. 488, 1 Cai. Cas. 27 (letter).

[18] 1749, Whitfield *v.* Fausset, 1 Ves. Sr. 387 (L. C. Hardwicke: "The rule is that the best evidence must be used that can be had; first the original; . . . this extends not only to deeds but to records"); *ante* 1767, Buller, Nisi Prius, 253 (deeds).

[19] 1801, Peake, Evidence, 97 ("Of private deeds, or other instruments, the production of the original, if in existence, and in the power of the party using it, is always required"); 1814, Phillipps, Evidence, 435 ("deeds, agreements, etc."); 1824, Starkie, Evidence, 368 ("deed, agreement, or other private instrument"); 1810, Swift, Evidence, 25, 31 (uses indifferently the terms "private writings", "deeds", "instrument").

[20] *Post*, § 1252.

[21] 1632, Sherfield's Trial, 3 How. St. Tr. 519, 527 (material document, not produced); 1637, Bastwick's Trial, 3 How. St. Tr. 711, 743

Under Lord Holt, however, the first quarter of the 1700s finds the rule (coincidently with its progress in civil cases) regularly acknowledged in practice, and applied to all kinds of writings.[22] And yet fifty years later it was possible to dispute and necessary to decide plainly that there was no difference in the doctrine for criminal cases.[23]

As a rule of Evidence, then, in contrast to a rule of Pleading, the last and largest stage of the modern rule as now universally accepted cannot be said to have been reached until the 1700s. No doubt its slow development was due in part to the difficulty of plainly differentiating it from the analogous but narrowly restricted doctrine of Profert in pleading.

(Bastwick's book having charged that the prelates had forged an Article of Religion, Archbishop Laud quoted his printed copies of the Articles to show the Article's presence, and then, since "it is not fit concerning . . . an Article of such consequence . . . you should rely upon my copies", produced "from the public records in my office, here under my officer's hand, who is a public notary", a copy of the original Article); 1637, Bishop of Lincoln's Trial, 3 How. St. Tr. 803, 804 (libellous letters produced); 1642, Duke of Richmond's Trial, 4 How. St. Tr. 111, 113 (letter produced); 1644, Archbishop Laud's Trial, 4 How. St. Tr. 315, 407 (same); 480 (another document not produced; defendant argues, "Why is not this paper produced? Out of all doubt it would [have been], had there appeared any such thing in it"); 1647, Morris' Trial, 4 How. St. Tr. 951, 954 (forgery of an act of Parliament; there was "a view of the said writings, being by their lordships' orders brought into the House"); 1649, King Charles' Trial, 4 How. St. Tr. 993, 1102 (warrant to the king's soldiers, produced as "the same original warrant"); 1653, Faulconer's Trial, 5 How. St. Tr. 323, 347, 349, 353 (perjury in a deposition; the original was carefully shown to have been lost, and was proved by copy; a certain petition, material in the proof, was produced in the original); 1656, Slingsby's Trial, 5 How. St. Tr. 871, 878 (a royal Commission produced and read; but a letter, testified to without production); 1678, Whitebread's Trial, 7 How. St. Tr. 79, 114, 118 (Oates having testified to the contents of a register of treasonable doings kept by the defendants, the Court tells the defendant, "You would do well to show us your book"; W.: "We never kept any"; then letters found in the defendant's papers were produced for the prosecution); 1679, same set of trials, 7 How. St. Tr. 311, 349, 355, 359 (testimony to a bill of exchange, not produced, because it had been taken by another person; but some letters were produced; L. C. J. Scroggs: "Then say you, 'It is wonderful that since they say they saw such and such letters, they should not produce them'? Why, they did not belong to them"); 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1318, 1443 (Dugdale, the informer, testifies to the contents of treasonable papers; afterwards, he is asked to explain why they are not produced, and states that they were destroyed); 1681, Plunket's Trial, 8 How. St. Tr. 447, 458 (documents' contents given without accounting for them), 475 (papers produced); 1682, Lord Grey's Trial, 9 How. St. Tr. 127, 147 (important letter of defendant referred to by plaintiff's witness, but not produced because she "had it not here"); 1685, Fernley's Trial, 11 How. St. Tr. 381, 423 (production not asked for); 1696, Charnock's Trial, 12 How. St. Tr. 1377, 1402 (same); 1696, Rookwood's Trial, 13 How. St. Tr. 139, 199 (list of names given to witness by defendant; testified to without producing or accounting for it); 1702, Swendsen's Trial, 14 How. St. Tr. 559, 582 (forcible marriage; the terms of the license testified to without producing it).

[22] 1696, Vaughan's Trial, 13 How. St. Tr. 485, 519 (Witness: "I had a letter about it"; L. C. J. Holt: "Where is that letter?"; Witness: "I have it not here"; L. C. J.: "Give not an evidence of a letter, without the letter were here; it ought to have been produced"); 1704, Tutchin's Trial, 14 How. St. Tr. 1095, 1111, 1114 (libel; certain original papers required to be accounted for); 1717, Francia's Trial, 15 How. St. Tr. 897, 921 (contents of letter stated without producing; but afterwards, on objection, production offered); 1722, Layer's Trial, 16 How. St. Tr. 93, 170, 176, 182, 186 (contents of letters stated without producing; afterwards their absence is accounted for on cross-examination). In 1802 McNally (on Evidence), writing chiefly for criminal cases, does not mention the rule.

[23] 1772, Buller, J., in Att'y-Gen'l *v.* Le Merchant, 2 T. R. 201 ("The rule of evidence in both cases [criminal and civil] is the same, that is, to have the best evidence that is in the power of the party to produce, which means that, if the original can possibly be had, it shall be required"; here, applying it to a letter); 1808, Com. *v.* Messinger, 1 Binn. 273, 274, 282.

§ 1178. **Analysis of Topics.** In following the application of the rule, it will be convenient to divide the subject under three heads: A. the Rule of Production itself; B. the Exceptions; C. the Accessory Rules applicable in case of non-production, — these last depending on separate principles of Evidence.

A. The Rule of Production may be stated, for convenience in examining its details and distinctions, in the following parts: [1]

(*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.*

A. The Rule Itself

(a) *"In proving a writing"*

§ 1179. **Reason of the Rule.** An important question is whether the rule is restricted to writings, or whether it includes also other chattels or material objects. It is necessary, for ascertaining this, first to examine the reasons of policy that have been put forward for the rule in general. These may be gathered from the following passages:

1611, *Dr. Leyfield's Case*, 10 Co. Rep. 92 *a*: "It was resolved that the lessee for years in the case at bar ought to shew the letters patent made to the lessee for life. For it is a maxim in the law that . . . altho' he who is privy claims but parcel of the original estate, yet he ought to shew the original deed to the Court; and the reason that deeds being so pleaded shall be shewed to the Court is that to every deed two things are requisite and necessary; the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the judges of the law; the other concerns matter of fact, *sc.* if it be sealed and delivered as a deed, and the trial thereof belongs to the country. And therefore every deed ought to approve itself, and to be proved by others, — approve itself upon its shewing forth to the Court in two manners: 1. As to the composition of the words be sufficient in law, and the Court shall judge that; 2. That it be not razed or interlined in material points or places; . . . 3. That it may appear to the Court and to the party if it was upon conditional limitation or power of a revocation in the deed. . . . And these are the reasons of the law that deeds pleaded in court shall be shewed forth to the Court. And therefore it appears that it is dangerous to suffer any who by the law in pleading ought to shew the deed itself to the Court, upon the general issue to prove in evidence to a jury by witnesses that there was such a deed, which they have heard and read; or to prove it by a copy; for the viciousness, rasures, or interlineations, or other imperfections in these cases will not appear to the Court, or peradventure the deed may be upon conditional limitation or with power of revocation, and by this way truth and justice and the true reason of the common law would be subverted."

1641, *Earl of Suffolk* v. *Greenwill*, Ch. Rep. 89, 92: "The Court held it very dangerous to admit the contents and sufficiencies of deeds to be proved by the testimony of witnesses, the construction of deeds being the office of the Court."

§ 1178. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), particularly §§ 241, 290, 357.

1696, HOLT, C. J., in *Steyner* v. *Droitwich*, Skinner 623, said that though an original may be evidence, "yet a copy would not, for it is liable to the mistake of the transcriber."

1811, Mr. *Burrowes*, arguing, in *Sheridan's Trial*, 31 How. St. Tr. 669: "There is nothing about which the law is more sacred than keeping away the vague and fluctuating recollection of the contents of written instruments, when it is possible to produce the instruments themselves."

1828, TENTERDEN, L. C. J., in *Vincent* v. *Cole*, M. & M. 257: "I have always (perhaps more so than other judges) acted most strictly on the rule that what is in writing shall be proved only by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken that I think the purposes of justice require the strict enforcement of the rule."

1852, MAULE, J., in *MacDonnell* v. *Evans*, 11 C. B. 942: "It is a general rule . . . that if you want to get at the contents of a written document, the proper way is to produce it if you can. That is a rule in which the common sense of mankind concurs. If the paper is in the possession of the party who seeks to have the jury infer something from its contents, he should let them see it."

These reasons are simple and obvious enough, as dictated by common sense and long experience. They may be summed up in this way: (1) As between a supposed literal copy and the original, the copy is always liable to errors on the part of the copyist, whether by wilfulness or by inadvertence; this contingency wholly disappears when the original is produced. Moreover, the original may contain, and the copy will lack, such features of handwriting, paper, and the like, as may afford the opponent valuable means of learning legitimate objections to the significance of the document. (2) As between oral testimony, based on recollection, and the original, the added risk, almost the certainty, exists, of errors of recollection due to the difficulty of carrying in the memory literally the tenor of the document.[1]

§ 1180. **Same: Spurious Reasons.** It is worth while to note the nature of these reasons, because currency has been given, since the quasi-philosophic treatise of Chief Baron Gilbert, to a reason which is superficially attractive in itself, yet is not only insufficient in principle but quite inconsistent with the detailed terms of the rule as everywhere accepted. This reason has been thus stated:[1]

Ante 1726, Chief Baron GILBERT, Evidence, 4: "There can be no demonstration of a fact without the best evidence that the nature of the thing is capable of. Less evidence doth create but opinion and surmise, and does not leave a man the entire satisfaction that arises from demonstration. For if it be plainly seen in the nature of the transaction that there is some more evidence that doth not appear, the very not producing it is a presumption that it would have detected something more than appears already. . . . No such evidence shall be brought which 'ex natura rei' supposes still a greater evidence behind in the party's

§ 1179. [1] In *Louisiana*, *Porto Rico*, and the *Philippine Islands*, the principles of Spanish law, on which their Civil Codes are based, differ radically from the Anglo-American law; hence the ensuing rules do not necessarily obtain in those jurisdictions, except so far as the rules of the California Code of Civil Procedure, which have also been made law in the latter two jurisdictions, may be deemed to prevail. The provisions of the Spanish system are quoted in § 1225, *post*.

§ 1180. [1] This reason has been often advanced; *e.g.*: 1840, Parke, B., in Slatterie *v.* Pooley, 6 M. & W. 664; and in Doe *v.* Ross, 7 id. 102; 1828, Marshall, C. J., in Tayloe *v.* Riggs, 1 Pet. 591, 596.

own possession and power; . . . for if the other greater evidence did not make against the party, why did he not produce it to the Court? As if a man offers a copy of a deed or will where he ought to produce the original, this carries a presumption that there is something more in the deed or will that makes against the party, or else he would have produced it."

1820, HOLROYD, J., in *Brewster* v. *Sewall*, 3 B. & Ald. 296, 302: "Now the reason why the law requires the original instrument to be produced is this, that other evidence is not so satisfactory, where the original instrument is in the possession of the party and where it is in his power to produce it or get it produced provided he gives notice. In either of these cases, if he does not produce it or take the necessary steps to obtain its production, but resorts to other evidence, the fair presumption is that the original document would not answer his purpose, and that it would differ from the secondary evidence which it gives."

The fallacy about this reason is that, even if it were shown not to exist, *i.e.* if the Court were satisfied that the proponent of the document was acting in perfect good faith (as, where he had no reason to believe that the original's terms would be needed or would be disputed), it would still be proper to require the document, in order to guard against honest errors of testimony and to allow the opponent to gain such enlightenment as he could from the appearance of the original; the rule should apply to honest as well as to dishonest parties. Moreover, that this is not the reason actually relied upon is seen in certain details of the rule; for the possession of the document by a disinterested third person would relieve the proponent from the suspicion of fraudulent suppression, yet the rule applies equally to that case; and the possession by the opponent himself with the right not to produce it will also serve to dismiss the suspicion, yet the rule applies equally to that case. Finally, if the above reason were the correct one, the rule would equally apply to objects other than writings; yet it is generally conceded that it does not. It may be added that, so far as concerns the above reason, it would have been sufficient to allow the jury to make an inference from the non-production (*ante*, § 291), and it would not have been necessary to require actual production. This reason, then, while it undoubtedly adds force to the rule in many instances, must be regarded as not forming the real and working reason of the rule.[2]

§ 1181. **Rule not applicable to Ordinary Uninscribed Chattels.** The real reason indicated for the rule shows why it has come to be generally accepted that only documents, or things bearing writing, can be within the purview of the rule. In the first place, it is in the terms and the construction of language that the special risk of error lies. To remember, for example, the color of a horse is a simple matter in comparison with remembering or even accurately transcribing the terms of a written warranty about the horse. In the second place, it is chiefly in respect to language that slight inaccuracies are likely to be of important legal consequence. A mistake, for example, in counting the number of bushels in a bin of wheat can hardly lead to serious consequences, but a mistake in a few letters of an ordinary deed may represent it as giving to Jones instead of to Jonas or as giving five hundred instead of four hundred acres.

[2] Compare the quotation from Attorney-General v. LeMerchant, *post*, § 1199.

For these reasons, it is entirely proper that a rule of such strictness should not be applied so broadly as to require the production of anything but writings; and such is the accepted doctrine:[1]

1874, COLERIDGE, C. J., in *R.* v. *Francis*, L. R. 1 C. C. R. 128, 132 (not requiring a cluster-ring, said to be false, to be produced): "When the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents. . . . But there is no case whatever deciding that when the issue is as to the state of a chattel, *e.g.* the soundness of a horse or the equality of the bulk of the goods to the sample, the production of the chattel is primary evidence and that no other evidence can be given till the chattel is produced in court for the inspection of the jury."

1844, MARSHALL, J., in *Clarke* v. *Robinson*, 5 B. Monr. 55 (declining to require production of a slave warranted sound): "It is now contended that as the evidence of one's own senses is the best of which extrinsic facts are susceptible, the testimony of witnesses is of an inferior grade, and therefore should not be allowed when the fact or thing itself to which it relates can be exhibited to the jury. This principle may have prevailed to some extent in the ancient jurisprudence of England, when the jury was brought from the actual vicinage of the transaction which they were to try, and in many cases affecting the realty were sent out to have a view of the premises. We suppose it was never required in cases involving mere personal property that the jury should act upon their own view of the thing. . . . The rule requiring the best evidence does not require that the jury shall in all cases where it is practicable be furnished with the means of personally knowing the fact. Except in cases of written instruments or records, although there may be more satisfactory means of knowledge, there is no higher grade of testimony as a means of communicating facts to a jury than the statement of a witness who has himself had the best means of knowledge. . . . We will not say that there may not be cases involving the condition or qualities of particular articles, in which the party having the custody may be permitted or perhaps even required to exhibit it to the jury as affording the most satisfactory means of knowledge; but the Court must have a discretion in these cases to prevent misconception or imposition."

Nevertheless, it is conceivable that upon occasion the particular features of an uninscribed chattel may be so open to misconstruction and may become so material to the issue that it would be proper to require production; in other words, if the two conditions above named as peculiar to writings occur for a thing not a writing, then the rule may well apply. Lord Kenyon's well-known ruling about the bushel-measure is an excellent illustration of this;[2]

§ 1181. [1] *Eng. Accord:* 1874, R. v. Francis, L. R. 2 C. C. R. 128 (not requiring the production of a ring said to be counterfeit); 1892, Lucas v. Williams, 2 Q. B. 113 (infringement of copyright of painting by publishing a photographic copy of it; proof of the photograph's being a copy, allowed without requiring the production of the painting); *U. S. Ind.* 1881, McClary v. State, 75 Ind. 260, 265 (failure of prosecution to produce the knife used in an assault, not error); *Ky.* 1844, Clarke v. Robinson, 5 B. Monr. 55 (warranty of slave's soundness; to show her condition, production not required: quoted *supra*); *Mass.* 1869, Com. v. Pope, 103 Mass. 440 (condition of clothes, etc., testified to without production); 1886, Com. v. Welch, 134 Mass. 473 (illegal liquor-selling; the contents of a tumbler said to contain liquor, and carried away by the witness, not required to be produced); *Mo.* 1899, State v. McAfee, 148 Mo. 370, 379, 50 S. W. 82 (deceased's shirt, not required to be produced); *Or.* 1882, Heneky v. Smith, 10 Or. 349, 355 (condition of hat of injured person; rule not applicable).

[2] 1797, Chenie v. Watson, Peake Add. Cas. 123 (assumpsit on a warranty that wheat should weigh 59 pounds per bushel; a witness being asked whether the plaintiff's bushel had not been tried and found to correspond with the public Belford bushel, and the latter but not the former measure being in court, Kenyon, L. C. J., "was of opinion that the question could not be asked . . . without producing the originals; . . . the best evidence the nature of the case would admit of was a production of both measures in court, and a comparison of them before the jury").

and a few other instances, less significant of principle, are recorded.[3] A correct solution is to leave to the discretion of the trial Court the occasional application of the rule to uninscribed chattels.

§ 1182. **Rule as applicable to Inscribed Chattels.** It is impossible to say that any settled doctrine has found favor respecting the application of the rule to material objects, not paper, bearing inscriptions in words. There are inherent difficulties. It is impracticable to base any distinction upon the material bearing the inscription; for a notice-board or a tombstone may deserve the application of the rule as well as a sheet of note-paper. Nor is it practicable to distinguish according to the number of words; for each number is but one higher than the preceding, and a broker's note of ten words or a baggage-check of a few initials may need inspection as much as a lengthy lease for ninety-nine years. Nor can the purpose of the words be material; for the memorandum-tick made for private verification may become as important as the deed intended for public registration.

No Court seems to have attempted, and certainly no Court has achieved, a satisfactory test for the distinction to be drawn. There are precedents requiring and precedents not requiring production, — precedents often entirely irreconcilable if one were seeking an inflexible rule.[1] But there is no reason

[3] 1835, Lewis *v.* Hartley, 7 C. & P. 405 (dog identifiable by marks; production required); and some of the cases in note 1, § 1182.

§ **1182.** [1] The precedents of both sorts are as follows: ENGLAND: 1706, Feilding's Trial, 13 How. St. Tr. 1347 (Witness: "I know Mr. Feilding by sight; he bought a gold ring of me, but I cannot remember the time"; Counsel: "Was there any posy in it?" "Yes, I graved a posy whilst he took a turn in the alley; the posy was by his direction, 'Tibi soli' "); 1805, R. *v.* Johnson, 7 East 65, 66, 29 How. St. Tr. 437 (postmark on an envelope; rule applied); 1842, R. *v.* Edge, Wills, Circ. Evid., 5th Am. ed. 212, Maule, B. (inscription on a coffin plate; rule applied); 1843, R. *v.* Hinley, 1 Cox Cr. 13 (rule applied to the address on a hamper, by Maule, J.; but he added: "Suppose an inscription on a bale marked 'XX'; would it be necessary to produce the bale?"); 1847, Burrell *v.* North, 2 C. & K. 680, 682, *semble* (rule applied to the direction on a parcel); 1864, R. *v.* Farr, 4 F. & F. 336, Channell, B. (stealing a ring; as a part of the description to identify it, a question was asked as to the inscription; rule applied).

UNITED STATES: *Federal:* 1876, U. S. *v.* Babcock, 3 Dillon 571, 574 (superscription on an envelope; rule not applicable); 1878, U. S. *v.* De Graff, 14 Blatchf. 381, 385 (evading customs laws; testimony to shipping-marks on barrel-heads; rule not applicable); *Alabama:* 1904, Kirkland *v.* State, 141 Ala. 45, 37 So. 352 (rule of production applied to the date and postmark of a letter); 1915, Benjamin *v.* State, 12 Ala. App. 148, 67 So. 792 (larceny of a dress; price-ticket on the dress, not required to be produced); *Colorado:* 1874, Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, 451, 462 (boxes of a passenger killed on railroad; inscription proved without production; "if a sign were painted on a house, it would hardly be contended that the house would have to be produced, nor can it be said that the law converts the court-room into a receptacle for wagons, boxes, tombstones, and the like, on which one's name may be written"); *Connecticut:* 1793, State *v.* Osborn, 1 Root 152 (passing a counterfeit sixteenpence; production required); 1793, State *v.* Blodget, 1 Root (forged paper-money; rule applied); *Illinois:* 1906, Young *v.* People, 221 Ill. 51, 77 N. E. 536 (a card inscribed: "L. Y., 3030 Indiana Avenue, phone Douglas 2685"; production required); *Indiana:* 1858, Whitney *v.* State, 10 Ind. 404 (selling lottery tickets, partly printed; production required); 1877, Frazee *v.* State, 58 Ind. 8, 11 (envelope bearing on the outside directions to the stakeholder for delivery of the stake within; production required); 1878, Caldwell *v.* State, 63 Ind. 283 (same); *Kansas:* 1920, State *v.* Lewark, 106 Kan. 184, 186 Pac. 1002 (knowing receipt of a stolen automobile; rule held not applicable to the number-tag, in the circumstances); *Maryland:* 1898, Wright *v.* State, 88 Md. 436, 41 Atl. 795 (rule applied to inscription on wrapper of butter-package); *Massachusetts:* 1858, Com. *v.* Blood, 11 Gray 74, 77 (labels of "rye whiskey" on jugs; production not required); *Minnesota:* 1906, Mattson *v.* Minn. & N. W. R. Co., 98 Minn.

for making such a rule; the rational and practical solution is to allow the trial Court in discretion to require production of an inscribed chattel wherever it seems highly desirable in order to ascertain accurately a material fact.

It should be added that the series of English rulings in which it was held, in certain prosecutions for *sedition*, that the banners bearing inscriptions alleged to import treasonable purposes, need not be produced,[2] must be regarded as wholly unsound. The very difference that existed, in some of the trials, in the testimonies of different witnesses as to the inscriptions' precise terms, and the materiality, in such trials, of these differences, should indicate the propriety of applying the rule, within discretionary limits; and it may be thought that those rulings would to-day not be followed even in England.[3]

§ 1183. **Rule applicable to all Kinds of Writings.** When the thing in question comes strictly within the class commonly termed "documents" or "writings", *i.e.* things of paper or parchment employed solely as a material for bearing words written or printed in the form of complete clauses or sen-

296, 108 N. W. 517 (death by a dynamite explosion; to prove the numbers marked on the wrappers of the dynamite sticks, the trial Court's refusal in discretion to order production of the dynamite in wrappers was held proper); *New Jersey:* 1921, Lamble *v.* State, — N. J. L. —, 114 Atl. 346 (murder; in proving identity of finger-prints, held not necessary to produce the automobile door bearing the prints; here evidenced by photographs); *Pennsylvania:* 1855, Bryant *v.* Stilwell, 24 Pa. 314, 317 ("maps, surveys, and drawings are not to be distinguished from other papers in this respect"; here, a plan of a house); *West Virginia:* 1914, State *v.* Davis, 74 W. Va. 657, 82 S. E. 525 (rule not applied to an explosive shell found near defendant's premises).

Compare also the criminal cases *post*, § 1205, where the rule was assumed to be applicable to paper-money, etc.

Whether in such a case a *layman* may testify by *comparison of specimens*, who had seen the lost original but did not know whose handwriting it was, is examined *post*, § 2004.

[2] 1746, Fletcher's Trial, 18 How. St. Tr. 353 (a flag with the motto, "Liberty and Property, Church and King"; rule not applied); 1781, Lord George Gordon's Trial, 21 How. St. Tr. 513 (banners inscribed "Protestant Association" and "No Popery"; rule not applied); 1820, R. *v.* Hunt, 1 State Tr. N. S. 171, 232, 252, 3 B. & Ald. 566, 569 (sixteen flags, with such mottoes as "No borough-mongering", "Unite and be free", "Equal representation or death", "Taxation without equal representation is tyrannical and unjust", "No corn laws", "The rights of man", were seized by the police at a meeting; Abbott, C. J.: "[1] There is no authority to show that, in a criminal case, ensigns, banners, or other things exhibited to public view, and of which the effect depends upon such public exhibition, must be produced or accounted for on the part either of the prosecutor or of the defendants. . . . Inscriptions used on such occasions are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings. . . . . [2] The difficulty of such a deduction [of identity of the things when produced], and the impossibility that must occur in many cases of either producing the things themselves or of showing what has become of them, shows the unreasonableness of requiring the proof of the things themselves"); 1820, R. *v.* Dewhurst, 1 State Tr. N. S. 529, 542, 594 (similar); 1833, R. *v.* Fursey, 6 C. & P. 81, 86, 3 State Tr. N. S. 543, 560 (proclamation, forbidding riotous meeting, posted on a building-wall; production not required, on the authority of R. *v.* Hunt, but the real reason apparently was that here the placard was affixed to a wall, — as in § 1214, *post;* banners bearing death's head, etc., and "Liberty or Death"; production not required); 1839, R. *v.* Stephens, 3 State Tr. 1189, 1196 (inscriptions on banners; production not required); 1843, R. *v.* O'Connell, 5 State Tr. 1, 245 (inscriptions on banners described, without producing the banners).

[3] 1843, R. *v.* Hinley, 1 Cox Cr. 13 (Maule, J., after quoting the passage of Abbott, C. J., in R. *v.* Hunt, *supra:* "I confess that is not very satisfactory to me, for the circumstances of its being a public expression of feeling is no reason why the best proof should not be given. The reason why the writings are to be produced is because that is so much better a way of proving it than having it from the memory of any one else"); 1859, Butler *v.* Mountgarret, 6 H. L. C. 639 (Lord Wensleydale, upon counsel alluding to the ruling that banners containing words need not be produced: "That is on account of the inconvenience, perhaps the impossibility, of procuring the banners").

tences expressing connected thought, there is no further distinction to be made. The rule is applicable to all kinds of writings. The original doctrine of profert affected only records and instruments under seal, and applied in civil cases only; but by a gradual development, already noticed (*ante*, § 1177), the rule requiring production in evidence came to be settled, by the 1700s, as including in its scope any and every kind of document, from a record or a deed to a letter or a memorandum, and as applicable equally in criminal and in civil cases.[1]

(b) *"Production must be made"*

§ 1185. **What constitutes Production; Witness testifying to a document not before him.** The notion of the rule is that the terms of the document shall be placed before the tribunal and the opponent for personal inspection.

(1) It is not necessary that the *proponent* of the document should *himself* be the one actually to bring it in; if it is in court when he wishes to prove its terms, that is enough.[1]

(2) When the tribunal has delegated its function of hearing testimony to a *lower tribunal* or officer, production there will be sufficient;[2] but production already made before a magistrate or trial Court would not suffice where on appeal the trial of facts is in theory commenced anew in the superior Court.

(3) Production implies either the *handing* of the writing *to the tribunal* for perusal, or, if that is not demanded, at least the reading aloud of the writing by counsel or witness;[3] that a witness, for example, tells about the writing's contents does not suffice, even though he has it at the time in his possession in Court.[4]

(4) The production is for the benefit of the tribunal, *not the opponent;*[5]

§ 1183. [1] The general principle is thus stated in the Codes founded on Field's Draft New York Code: Cal. C. C. P. 1872, § 1829 ("A written instrument is itself the best possible evidence of its existence and contents"); § 1937 ("The original writing must be produced and proved", except as in C. C. P. §§ 1855, 1919).

In Cobb's Georgia Code it is thus phrased: Rev. C. 1910, § 5828 ("Generally, the original writing must be produced and its execution proved. The excepted cases are prescribed by law").

For Louisiana, Philippine Islands, and Porto Rico, see the note to § 1178, *ante*.

§ 1185. [1] 1593, Wymark's Case, 5 Co. Rep. 75 ("When a deed is in court, one may take advantage of it without having it in hand. . . . When the deed is by one shewed to the Court, it is not respective as to him, but all others shall take advantage thereof"). So for production by the opponent: *post*, § 1209.

[2] Production before a referee to take testimony will usually be sufficient: 1873, Bohlman *v.* Coffin, 4 Or. 313, 316. But otherwise for production before an officer merely taking a deposition, unless a statute expressly gives exemption; *e.g.:* Minn. Gen. St. 1913, §§ 8439, 8440 (production, before officer taking deposition, of account-books or of verified letter-press copies of letters accounted for, to be equivalent to production at trial, copies being annexed to the deposition).

[3] 1860, Hanna, J., in Thornburgh *v.* R. Co., 14 Ind. 499, 501 ("Upon the introduction of a record it is usually read to the jury by the witness who may have it in charge, or by some attorney who may be engaged in the cause. It is not often, nor is it necessary, in ordinary cases, that it should be handed to each juror, unless in cases when inspection for a particular purpose is necessary").

[4] 1897, Mt. Sterling Bank *v.* Bowen, — Ky. —, 43 S. W. 483 (that the document is in the witness' hands is insufficient).

[5] 1874, Hilyard *v.* Harrison, 37 N. J. L. 170 (plaintiff offered tax warrants and duplicates in evidence at a hearing; an order to deliver them to defendant's possession for inspection, held improper; but an order of exhibition for inspection in open court or before a court officer or before the producing party or his attorney was held demandable).

his right of inspection, whether at or before trial, rests on other principles (*post*, §§ 1261, 1857–1861; *ante*, §§ 753, 762).

(5) The production is not for the benefit of a *witness;* hence, the document need not be perused by a witness or shown to him; except in consequence of certain independent principles, as follows:

(*a*) The rule (*ante*, § 1025) that a witness must be asked about a *self-contradictory statement*, before the opponent may prove it, has erroneously been held by some Courts to require that a writing containing such a statement must be shown to him before it is offered in evidence (*post*, § 1259);

(*b*) When a witness is asked to *identify the signature* of a document, the document must be before him (on the principle of §§ 653, 693, *ante*), because an observation of the specific document, as well as a knowledge of the type of handwriting, is necessary.[6] But where the witness has already seen the document before testifying, that is sufficient;[7] the usual instance is when the doc ment's production for other purposes is excused because of its loss.[8] Moreover, when the witness' testimony does not involve an identification of the handwriting of the document, he need not have it before him when testifying.[9] Whether a document must be *sent out of the jurisdiction* for an absent deponent ought to depend on the circumstances.[10] Statutes often provide for *sending a will* to an attesting witness who testifies by deposition.[11]

§ 1186. **Production of Original always Allowable.** The rule is that production *must* be made; it says nothing, in itself, as to whether production *may* be made. But it has already been seen (*ante*, § 1151) that autoptic proference, or production for the tribunal's inspection, of any evidential object is always allowable, in the absence of any specific rule of policy to the contrary. If then a party who, under the present principle, is exempted from producing

[6] 1841, Neale *v.* McKinstry, 7 Mo. 128, 132 (witness testifying by deposition to a note not before him, excluded).

[7] 1824, Dartnall *v.* Howard, Ry. & Mo. 169 (where it was necessary to identify the defendant as one who had signed an answer in Chuncery not produced, a person who had examined the signature was allowed to testify, without having the writing before him).

[8] 1849, Segond *v.* Roach, 4 La. An. 54; 1888, Vye *v.* Alexander, 28 N. Br. 89, 95; 1889, Alexander *v.* Vye, 16 Can. Sup. 501 (Gwynne, J., diss., quoted *ante*, § 697); 1890, Halifax Banking Co. *v.* Smith, 29 N. Br 462, 469 (Vye *v.* Alexander approved; here, a writing not produced. but admitted to be genuine).

[9] 1902, Harkless *v.* Smith, 115 Ga. 350, 41 S. E. 634 (a deed-copy may be used for a deposition, where the witness speaks only to the consideration of the deed as identified by its tenor); 1899, Clark *v.* Butts, 78 Minn. 373, 81 N. W. 11 (whether a name was in a deed before execution; deed need not be shown to witness; otherwise perhaps for expert opinion to alteration). 1915, Peters *v.* Lohr, 35 S. D. 372, 152 N. W. 504 (deposition based on a photographic copy of a record; following Harkless *v.* Smith and Clark *v.* Butts; cited more fully *ante*, § 797, n. 4).

[10] 1809, Amory *v.* Fellowes, 5 Mass. 219, 225 ("It may not be necessary to send the will back after it has been filed here, to obtain the testimony of the subscribing witnesses. . . . But a case may be so circumstanced that the will must be sent back to the subscribing witnesses"); 1854, Commercial Bank *v.* Union Bank, 11 N. Y. 203, 209 (draft shown by copy in the deposition-interrogatories; "a party is never called upon to risk the loss of valuable original papers, by annexing them to a commission to be transmitted to a distant State or country for execution").

[11] *Cal.* C. C. P. 1872, §§ 1308, 1310 (see quotation *post*, § 1304); *Colo.* Comp. L. 1921, § 5207; *D. Col.* Code 1919, § 132; *Miss.* Code 1906, § 1994, Hem. § 1659; *Mo.* Rev. St. 1919, § 520; *N. Y.* St. 1913, c. 412, p. 871 (amending C. C. P. § 2618). *R. I.* Gen. L. 1919, C. 310, § 15; *Va.* Code 1919, § 5252.

Compare the cases as to *photographic copies* of documents submitted to handwriting witnesses: *ante*, § 797, *post*, §§ 2010, 2019.

a document in proof of its contents, and might prove them by copy if he wished, prefers nevertheless to produce and show the original, he may of course do so.

This principle seems obvious enough, but it has constantly to be pointed out anew by the Courts:[1]

1878, CAMPBELL, J., in *Clymer* v. *Cameron*, 55 Miss. 593, 595: "It is only as a substitute for the original that a copy is ever admitted. The original is always the best evidence, and it is only because of the impossibility or inconvenience of producing the original that

§ 1186. [1] *Accord:* ENGLAND: 1720, Brocas *v.* Mayor, 1 Stra. 307 (municipal corporate records).

CANADA: 1841, Linton *v.* Wilson, 1 Kerr N. Br. 223, 232, 241, 245 ("When a statute says that a copy shall be evidence, I cannot think that it excludes the original unless it expressly says the copy shall be the only evidence").

UNITED STATES: *Federal:* 1903, Bradley T. Co. *v.* White, 58 C. C. A. 55, 121 Fed. 779 (court files); U. S. St. 1904, April 19, c. 1398, Stat. L. vol. 33, p. 186, Code § 683 (original applications, etc., in the land office, may be produced; cited more fully *post*, § 1676, n. 9); *Alabama:* 1842, Lawson *v.* Orear, 4 Ala. 156, 158 (Court record books); 1844, Carwile *v.* House, 6 Ala. 710, 711 (execution); 1887, Stevenson *v.* Moody, 85 Ala. 33, 35, 4 So. 595 (Probate Court record); *Colorado:* 1900, McAllister *v.* People, 28 Colo. 156, 63 Pac. 308; *Connecticut:* 1858, Gray *v.* Davis, 27 Conn. 447, 454 ("The object being to lay before the triers the real contents of the record, it would be absurd to hold that the best possible evidence, when adduced, should be excluded because inferior evidence by copy would be admissible"); *Florida:* 1903, Ferrell *v.* State, 45 Fla. 26, 34 So. 220 (record of marriage license); 1921, Wenske *v.* Salley, 82 Fla. 224, 89 So. 653 (original record of chancery suit, admitted); *Georgia:* 1855, Dobbs *v.* Justices, 17 Ga. 624, 629, 1884, Rogers *v.* Tillman, 72 Ga. 479, 481 (record of Court of another county, admitted; "a certified copy of this record could not have been higher or better evidence than the original"; but compare the Georgia cases *infra*, note 4); 1907, Sellers *v.* Page, 127 Ga. 633, 56 S. E. 1011 (record of same court); *Illinois:* 1870, Willoughby *v.* Dewey, 54 Ill. 266, 268 (original justice's docket); 1875, Stevison *v.* Earnest, 80 Ill. 513, 517 (records of Court; general principle affirmed); 1886, Taylor *v.* Adams, 115 Ill. 570, 573, 4 N. E. 837 (foreclosure proceedings); *Indiana:* 1860, Wiseman *v.* Risinger, 14 Ind. 461; 1865, Green *v.* Indianapolis, 25 Ind. 490, 492 (proceedings of a municipal corporation); 1874, James *v.* Turnpike Co., 47 Ind. 379, 381 (articles of association); 1876, Britton *v.* State, 54 Ind. 535, 541 (justice's judgment); 1878, Kennard *v.* Carter, 64 Ind. 31, 40 (same); 1878, Miller *v.* Harrington, 61 Ind. 503, 508 (same); 1880, Jones *v.* Levi, 72 Ind. 586, 591; 1881, Iles *v.* Watson, 76 Ind. 359, 360; 1881, Hall *v.* Bishop, 78 Ind. 370, 372; 1883, Anderson *v.* Ackerman, 88 Ind. 481, 492; *Kansas:* St. 1905, c. 323 (quoted *post*, § 1225, n. 1; nothing therein "shall prevent the production of the original"); *Louisiana:* 1817, Baudin *v.* Pollock, 4 Mart. 613 (notary's records); 1827, Priou *v.* Adams, 5 Mart. N. S. 691; *Maine:* 1874, Sawyer *v.* Garcelon, 63 Me. 25 (record of conviction; "strictly speaking, it is the best and only original evidence of the facts recited in it; a verified copy of the record, though admissible, is still only secondary evidence"); *Massachusetts:* 1839, Brooks *v.* Daniels, 22 Pick. 498, 500 (record of a court-martial's proceedings); 1850, Odiorne *v.* Bacon, 5 Cush. 185, 190 (record of a probate court; a statutory sanction for attested copies does not prevent the original's use); 1850, Greene *v.* Durfee, 6 Cush. 362 (bankrupt's order of discharge); 1859, Day *v.* Moore, 13 Gray 522, 524 (original writ, return, and execution); *Michigan:* 1856, Lacey *v.* Davis, 4 Mich. 140, 150 (deed recorded); *Mississippi:* 1878, Clymer *v.* Cameron, 55 Miss. 593 (official record of tax-sales); *Missouri:* 1907, Carp *v.* Queen Ins. Co., 203 Mo. 295, 101 S. W. 78 (judicial record); *New York:* C. P. A. 1920, § 394 (docket of justice in adjoining State may be produced, if properly authenticated by justice's oral testimony); *North Dakota:* 1913, Harmening *v.* Howland, 25 N. D. 38, 141 N. W. 131 (U. S. land-office records); *Ohio:* 1833, Winthrop *v.* Grimes, Wright 330; 1829, King *v.* Kenny, 4 Oh. 79, 83 (highway commissioners' records); 1867, Sheehan *v.* Davis, 17 Oh. St. 571, 580 (deed), *Pennsylvania:* 1826, Eisenhart *v.* Slaymaker, 14 S. & R. 153, 155; 1851, Garrigues *v.* Harris, 16 Pa. St. 344, 351; 1856, Miller *v.* Hale, 26 Pa. St. 432, 435 (assessment book); *Texas:* 1856, Houze *v.* Houze, 16 Tex. 598, 601 (judicial record); 1904, Manning *v.* State, 46 Tex. Cr. 326, 81 S. W. 957 (judicial record), *Virginia:* 1858, Bullard *v.* Thomas, 19 Gratt. 14, 18 (order-book from another Court). *Washington:* 1902, Smith *v.* Veysey, 30 Wash. 18, 70 Pac. 94 (homestead declaration), *Wisconsin:* 1867, Weisbrod *v.* R. Co., 21 Wis. 602, 616.

a copy is admitted in its stead in any case. . . . It is because the original is evidence that a copy may be received; and it is always allowable to introduce an original record where it can be produced."

The same principle allows the production of the *record-book* of recorded or registered *deeds*, so far as it may be regarded as an original with reference to certified copies of it;[2] but here the question may further arise how far the registration is authorized by law, and how far even the record-book as only a copy of the original is admissible; so that other principles (*post*, § 1224) must be understood to be equally involved.

In a few instances, *original public records* have been excluded; but those rulings may be attributed to one of four special considerations: (1) If the law forbids the removal of a document from a public office to produce it in court is to produce evidence obtained by a *violation of the law*. This, however, is generally regarded as no objection to the reception of evidence, and therefore should not in itself exclude a public document thus illegally removed.[3] (2) Irrespective of any specific prohibition against removal, it has been thought by a few Courts that the policy of *preserving public records from loss* or injury (*post*, § 2182) may be incidentally enforced by refusing to accept the original when removed from its proper place and offered in evidence.[4] (3) In some instances the exclusion is apparently due in part to the thought

[2] *Ala.* 1883, Huckabee *v.* Shepard, 75 Ala. 342, 344 (register of a deed); 1887, Stevenson *v.* Moody, 85 Ala. 33, 35, 4 So. 595 (record-book of exemptions kept in Probate Court); 1891, Jones *v.* Hagler, 95 Ala. 529, 532, 10 So. 345 (record of deed); 1892, Cofer *v.* Scroggins, 98 Ala. 342, 345, 13 So. 115 (same); 1895, Gay *v.* Rogers, 109 Ala. 626, 629, 20 So. 37 (mortgage record-book); *Cal.* C. C. P. 1872, § 1951, as amended March 1, 1889 (record of recorded instrument); *Colo.* 1873, Eyster *v.* Gaff, 2 Colo. 228, 230 (deed record-book); *Ga.* 1898, Richardson *v.* Whitworth, 103 Ga. 741, 30 S. E. 573 (re-record-book); *Ind.* 1872, Bowers *v.* Van Winkle, 41 Ind. 432, 435 (deed-record); 1874, Patterson *v.* Dallas, 46 Ind. 48 (same); 1881, Lentz *v.* Martin, 75 Ind. 228, 235 (same); *Mo.* 1887, Smiley *v.* Cockrell, 92 Mo. 105, 112, 4 S. W. 443 (deed-record); *Pa.* 1840, Harvey *v.* Thomas, 10 Watts 67, 76 ("The words of the law are that copies of the deeds, etc., are to be evidence; now the record-book is a copy of the deed or it is nothing; . . . copies from the record, or the record, have always been admitted as evidence"); *P. I.* C. C. P. 1901, § 331; *S. Car.* 1897, State *v.* Crocker, 49 S. C. 242, 27 S. E. 49 (distinguishing Duren *v.* Sinclair, 22 S. C. 361, on the ground that the statutory requirement of 10 days' notice, *post*, § 1225, applied properly to certified copies only, and not to the record itself, and that in that case no proof of loss was made; Jones, J., diss.).

Contra: 1859, Hanson *v.* Armstrong, 22 Ill. 442, 445 (record-book rejected); 1894, Johnson *v.* Drew, 34 Fla. 130, 15 So. 780 (record-book not admitted).

[3] See the cases collected under the general principle, *post*, §§ 2182, 2183, and the statutes collected *post*, § 2373.

[4] *Georgia:* 1892, Tharpe *v.* Pearce, 89 Ga. 194, 15 S. E. 46 (Alabama justice's docket, proved by himself, not admitted); 1896, Ellis *v.* Mills, 99 Ga. 490, 27 S. E. 740 (a plea and answer from another Court of the same county; excluded; Atkinson, J.: "The answer to this is that the law has pointed out one method of authentication only, and the Courts are not at liberty to recognize an entirely different manner of proving records. Aside from this, however, upon considerations of public policy, original documents should be excluded in courts other than those in which they are rendered, otherwise the temptation to attorneys and officers of the court to withdraw from the files original records for the purpose of using them as evidence in distant portions of the State might lead to their loss or destruction, and thus produce unnecessary confusion in the keeping of those things which should stand as permanent memorials of the action of the several courts"); 1902, Daniel *v.* State, 114 Ga. 533, 40 S. E. 805 (county commissioners' records, held improperly proved by original minutes); *Tennessee:* 1833, Nichol *v.* Ridley, 5 Yerg. 63, 65, *semble* (original papers of judicial records, not to be used because of danger to records).

Compare the similar cases cited *post*, § 2182.

that the *genuineness of the original* can not be as safely proved by a stranger bringing in the records, as by a clerk certifying to a copy in his office with the records in their place;[5] but this consideration is apparently influenced by other principles concerning Authentication (*post*, §§ 1278, 2158), and can have no proper bearing on the propriety of using the original when properly authenticated. (4) Finally, the exclusion has sometimes been due to a misunderstanding of the purpose of *statutes* making *certified copies evidence*.[6] Such statutes aim usually both to dispense with the original's production (*post*, § 1218) and to qualify the recording clerk to be a hearsay witness to the execution of the original (*post*, § 1677), — in other words, to supply additional kinds of evidence. It is therefore a total misapprehension of their meaning to rule that, because they merely make copies admissible, therefore originals are not made evidence; they are not expressly so made by the statute, because they were admissible already without the statute.[7]

§ 1187. **Dispensing with Authentication does not dispense with Production.** The Authentication of a document (*post*, §§ 2129–2169), *i.e.* proof that it was executed as it purports to be, is often dispensed with, by statute, where the opponent, by failing to traverse its genuineness, is taken as having admitted that fact. Nevertheless, the rule requiring Production still applies and must be satisfied.[1]

§ 1188. **Dispensing with Production does not dispense with Authentication.** Conversely, the satisfaction of the present rule, by some circumstance dispensing with Production, leaves it still necessary to authenticate the

[5] The following cases may be thus explained: 1883, Bigham *v.* Coleman, 71 Ga. 176, 192 (record of court in another county, proved by attorney, excluded; obscure); 1901, Cramer *v.* Truitt, 113 Ga. 967, 39 S. E. 459 (original record from superior court, not receivable in justice's court, where not admitted genuine); 1901, State *v.* Chaney, 93 Md. 71, 48 Atl. 1057 (original affidavit before justice on bastardy charge, held improperly transmitted to circuit court); 1855, Wallis *v.* Beauchamp, 15 Tex. 305, *semble;* 1883, Hardin *v.* Blackshear, 60 Tex. 132, 135.

[6] 1809, Burdon *v.* Rickets, 2 Camp. 121, note (a statute made the copy of a contract of purchase of a land-tax title evidence; held, that the original was not thereby made evidence); 1897, Belt *v.* State, 103 Ga. 12, 29 S. E. 451 (original declaration and judgment in another trial, excluded, because the certified copy was "primary evidence").

[7] Distinguish, however, the Hearsay question; *e.g.* if the question is whether a tax-assessor's list is admissible, the first question is whether the assessor's official assertion not made in court is admissible under the Hearsay rule (*post*, § 1640); if it is, then, so far as the present principle goes, the original list may be produced, even though a statute declares the official list provable by copy.

Distinguish also the question whether *ballots* produced are to be preferred as evidence to the finding or certificate of the election officers who first counted them (*post*, § 1351).

§ **1187.** [1] *Fed.* 1824, Sebree *v.* Dorr, 9 Wheat. 558, 563 ("The production of the originals might still be justly required, to ascertain its conformity with the declaration, to ascertain whether it remained in its genuine state, to verify the title by assignment in the plaintiff, to trace any payments which might have been made and endorsed, and to secure the party from a recovery by a 'bona fide' holder under a subsequent assignment"; here said of a note); *Conn.* 1872, New York H. & N. R. Co. *v.* Hunt, 39 Conn. 75, 80; *Fla.* Fidelity & D. Co. *v.* Aultman, 58 Fla. 228, 50 So. 991 (suit on injunction bond, the bond's execution not being denied); *Tex.* 1853, Matossy *v.* Frosh, 9 Tex. 610, 613.

Contra: 1899, Knight *v.* Whitmore, 125 Cal. 198, 57 Pac. 891, *semble*. For cases under Illinois statutes, see *post*, § 1225.

On an analogous principle, the applicability of the *presumption of a lost grant*, arising after twenty years' possession, does not exempt the claimant from producing or accounting for a specific deed which he also invokes in support of his claim: 1845, Reynolds *v.* Quattlebum, 2 Rich. S. Car. 140, 144.

absent document, by such evidence of execution as is sufficient according to the principles of Authentication (*post*, §§ 2129–2169); attention has frequently to be called to this plain principle.[1]

§ 1189. **Order of Proof as between Execution, Loss, and Contents.** The rules for Order of Proof form a seperate body of doctrine (*post*, §§ 1866–1900). But it will be here convenient to notice the order of proof proper to satisfy the requirements of these two preceding rules when applied to one and the same document.

(1) *Execution* vs. *contents*. Where, in consequence of the unavailability of the original, the contents are to be proved by testimony, the question whether the execution (authentication, or, as it is sometimes put, the existence, or the genuineness) of the document should first be shown, or its contents should first be shown, is not easy of solution. On the one hand, it is difficult to prove, for example, that A executed a deed of certain land, without to some extent referring to its tenor to identify it. On the other hand, to allow the contents to be first fully set forth and proved involves the risk of making an impression on the jury such as would be improper in case the proof of execution later falls to the ground. The latter consideration has usually been regarded as the more important, at least for the purpose of establishing a usual rule; and accordingly it has long been common to say that

§ 1188. [1] *Canada:* 1863, Dickson *v.* M'Farlane, 22 U. C. Q. B. 539.

United States: Fed. 1897, Carey *v.* Williams, 25 C. C. A. 227, 79 Fed. 906, 908; *Ala.* 1859, Shorter *v.* Sheppard, 33 Ala. 648; 1885, Comer *v.* Hart, 79 Ala. 389, 394; 1888, Potts *v.* Coleman, 86 Ala. 94, 101, 5 So. 780; *Ariz.* 1917, Lally *v.* Cash, 18 Ariz. 574, 164 Pac. 443 (libel); *Cal.* 1853, Sinclair *v.* Wood, 3 Cal. 98, 100; Cal. C. C. P. 1872, § 1937; *Colo.* 1873, Hobson *v.* Porter, 2 Colo. 28; *Conn.* 1847, Kelsey *v.* Hanmer, 18 Conn. 311, 317; *Ga.* 1858, Heard *v.* McKee, 26 Ga. 332; 1860, Bigelow *v.* Young, 30 Ga. 121, 124; 1860, Oliver *v.* Persons, 30 Ga. 391, 397; 1888, Calhoun *v.* Calhoun, 81 Ga. 91, 6 S. E. 913; 1898, Dasher *v.* Ellis, 102 Ga. 830, 30 S. E. 544; Rev. C. 1910, § 5761, P. C. § 1022 ("The existence of a genuine original is essential to the admissibility of a copy"); *Ind.* 1845, Murray *v.* Buchanan, 7 Blackf. 549; *Ia.* 1862, Corse *v.* Sanford, 14 Ia. 235; 1890, Bray *v.* Flickinger, 79 Ia. 313, 314, 44 N. W. 554; *Kan.* 1893, Stevens *v.* State, 50 Kan. 712, 715, 32 Pac. 350; *Ky.* 1818, Embry *v.* Millar, 1 A. K. Marsh. 300; 1821, McIntire *v.* Funk, Litt. Sel. C. 425, 427; 1823, Elmondorff *v.* Carmichæl, 3 Litt. 473, 479; 1897, Fox *v.* Pedigo, — Ky. —, 40 S. W. 249; 1898, Helton *v.* Asher, 103 Ky. 730, 46 S. W. 22; *La.* 1831, Thomas *v.* Thomas, 2 La. o. s. 166, 168; *Md.* 1840, Boothe *v.* Dorsey, 11 G. & J. 247, 252; *Minn.* 1889, Wakefield *v.* Day, 41 Minn. 344, 347, 43 N. W. 71; *Miss.* 1897, Weiler *v.* Monroe Co., 74 Miss. 682, 22 So. 188; *Mo.* 1852, Perry *v.* Roberts, 17 Mo. 36; 1873, Yankee *v.* Thompson, 51 Mo. 241, 244; *Mont.* Rev. C. 1921, § 10585; *N. H.* 1827, Colby *v.* Kenniston, 4 N. H. 262, 265; 1844, Bachelder *v.* Nutting, 16 N. H. 261, 263; *N. D.* 1902, Garland *v.* Foster Co. S. Bank, 11 N. D. 374, 92 N. W. 452; *Ohio:* 1828, Richmond *v.* Patterson, 3 Oh. 369 (record proved by examined copy must be shown to have been lawfully kept); *Pa.* 1845, Flinn *v.* M'Gonigle, 9 W. & S. 75, 76 ("Light evidence is sufficient for this purpose"); 1849, Slone *v.* Thomas, 12 Pa. 209 (lost note; genuineness not sufficiently evidenced); 1850, Porter *v.* Wilson, 13 Pa. 641, 646 (articles of partnership; proof held insufficient); 1870, Krise *v.* Neason, 66 Pa. 253, 258 ("evidence of the genuineness of the original . . . must be of the most positive and unequivocal kind"); *P. I.* C. C. P. 1901, § 321 (like Cal. C. C. P. § 1937); *S. C.* 1818, Howell *v.* House, 2 Mill Const. 80, 83; 1830, Stockdale *v.* Young, 3 Strobh. 501, 505.

Proof of contents and of execution may of course come from *different witnesses:* 1896, Painter *v.* Ladyard, 109 Mich. 568, 67 N. W. 901.

The following case is peculiar: 1911, Burgos *v.* Baez, 17 P. R. 599 (conciliation proceedings).

The judge's ruling is not *conclusive upon the jury:* 1916, St. Croix Co. *v.* Sea Coast C. Co., 114 Me. 521, 96 Atl. 1059 (alleged lost contract; careful opinion by Savage, C. J.).

there must first be evidence of execution before evidence of contents is offered: [1]

1737, *Goodier* v. *Lake*, 1 Atk. 446: "Where an original note of hand is lost, and a copy of it is offered in evidence to serve any particular purpose in a cause, you must shew sufficient probability to satisfy the Court that the original note was genuine, before you will be allowed to read the copy."

1826, *Kimball* v. *Morrill*, 4 Greenl. 368, 370: "When a party, on an issue to the country, would avail himself of an instrument in writing, lost by time and accident, he should first prove that an instrument was duly executed with the formalities required by law; . . . then, and not till then, he is permitted to give evidence of its contents."

Nevertheless, the trial Court ought to have a discretion to allow the evidence of contents to come first, where it is more convenient and where an assurance is given (on the principle of § 1871, *post*) that the other proof will be later put in; and such is the expressed doctrine of some Courts,[2] which others also would probably recognize on occasion. Moreover, where the execution is the real point in dispute, and the jury will have to consider it fully in any case, it would always be proper to receive the copy first and then go into the main matter in dispute.[3]

(2) *Execution vs. loss.* It is difficult to prove that a specific document is

§ 1189. [1] ENGLAND: 1696, R. *v.* Culpepper, Skinner 673 (though a copy is receivable, "yet they never permitted it except it be proved that there was such a deed executed"); 1749, Whitfield *v.* Fausset, 1 Ves. Sr. 387 (L. C. Hardwicke: "The law requires a proper foundation to be laid; . . . first, to prove that such a deed once existed"); UNITED STATES: *Cal.* C. C. P. 1872, § 1937 (after proof of loss, "together with proof of the due execution of the writing", the contents may be evidenced); *Del.* 1855, Bartholomew *v.* Edwards, 1 Houst. 17, 25 (first, existence, then loss, then contents); s. c. 1 Houst. 247, 250 (same; the first two being proved to the Court); *Ga.* Rev. C. 1910, § 5761 (but slight evidence suffices, where no "direct issue" is made); 1896, Baker *v.* Adams, 99 Ga. 135, 25 S. E. 28 (the original lost, and the maker having testified to its authenticity, a copy was received); 1898, Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287 (execution and existence must first be shown); 1898, Smith *v.* Smith, 106 Ga. 303, 31 S. E. 762 (must show not merely existence, but due execution); 1900, Garbutt L. Co. *v.* Gress L. Co., 111 Ga. 821, 35 S. E. 686 (same); 1900, Gibson *v.* Thornton, 112 Ga. 328, 37 S. E. 406 (same); *Ill.* 1861, Dickinson *v.* Breeden, 25 Ill. 186 (existence of original must first be proved); 1866, Deminger *v.* McConnell, 41 Ill. 227, 232 (intimating that the statute of 1861, *post*, § 1225, was passed to obviate the effect of the preceding ruling); 1866, Fisk *v.* Kissane, 42 Ill. 87 (declaring that the same affidavit or testimony used to prove loss need not speak to the existence of the original); *Mont.* Rev. C. 1921, § 10585 (like Cal. C. C. P. § 1937); *Pa.* 1899, McKenna *v.* McMichael, 189 Pa. 440, 42 Atl. 14 (will; some evidence of execution required first); *S. C.* 1830, Stockdale *v.* Young, 3 Strobh. 501, 504 (first existence and execution, then loss, then contents); 1895, Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305 (first loss, then execution, then contents).

[2] 1872, Groff *v.* Ramsey, 19 Minn. 44, 60 (the order of proof is in the trial Court's discretion), 1910, Felker *v.* Breece, 226 Mo. 320, 126 S. W. 424; 1827, Allen *v.* Parish, 3 Oh. 107, 121 (the regular order should be distinct, — existence, execution, loss, and contents; but at times it may be convenient to go into all at once, good opinion).

[3] 1870, Stowe *v.* Querner, L. R. 5 Exch. 155 (action on a policy of insurance; plea, no policy made; to show the terms of the policy, a copy of the document, already admitted by the defendant to be a copy, was received without preliminary settlement by the judge of the execution of an original, because that execution was the main issue; Bramwell, B.: "The distinction is really this: Where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence but defective in some collateral matter — as, for instance, where the objection is a pure stamp-objection —, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy and leave the main question to the jury").

lost without referring to some extent to its existence and its genuineness as existing. On the other hand (it is argued), to prove the existence and execution of a specific document, before it appears that the document cannot be produced, is on principle improper. These conflicting considerations have led to opposing rulings; by some Courts it is said that evidence of existence and execution must come before evidence of loss;[4] and by some the opposite order is laid down;[5] while sometimes it is properly left to the trial Court's discretion.[6] The problem may more easily be solved by noting the distinction between existence and execution; *e.g.* suppose A to be testifying to the loss of a deed of Blackacre purporting to be signed by X; while on the one hand it is not necessary for this purpose first to prove that X did sign it, yet on the other it may be impossible for A to describe what is lost unless he does refer to the purporting signature; in other words, proof of the existence of a document bearing certain features is necessary and proper before it can be shown lost, but proof of its due execution is not necessary or proper until after a showing of loss.

(3) *Loss* vs. *contents*. That a specific document was lost can hardly be shown without some general reference to its tenor; nevertheless, the rule being clear that the contents cannot be proved by testimony until loss or the like is shown, the reference to the tenor of the document in proving its loss must be no more than is necessary to describe its general features. It is always possible, however, for the trial Court, on the assurance (*post*, § 1871) that loss will later be proved, to admit first the testimony to the document's contents.[7]

§ 1190. **Production made; may a Copy also be offered?** If the rule is satisfied by the original's production, may a copy also be used? On principle, it may; for the principle requires merely that the inspection of the original be made as the preferred source of evidence, and does not exclude other competent evidence. Ordinarily, a Court would probably exclude a copy as superfluous.[1] But where a copy was in effect valuable testimony to the

[4] 1886, Terpening *v.* Holton, 9 Colo. 306 (proof of execution, then of loss, here allowed); 1851, Porter *v.* Ferguson, 4 Fla. 102, 104, *semble* (existence, then loss); 1837, Mattocks *v.* Stearns, 9 Vt. 326, 334 (the usual order of evidence is first the proof of existence, and then the proof of unavailability; no decision given as to possible reasons for a reversed order).

[5] 1901, Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663, 1832, Shrowders *v.* Harper, 1 Harringt. Del. 444 (loss first, then execution and contents); 1837, Hutchinson *v.* Gordon, 21 Harringt. 179, *semble* (same); 1844, State *v.* McCoy, 2 Speer S. C. 711, 714 (a question whether the witness had seen a certain power of attorney, excluded; rule repudiated that existence and execution must be shown before loss); 1858, Bateman *v.* Bateman, 21 Tex. 432 (loss, then existence and contents, here allowed); and compare some of the citations *supra*, note 1.

[6] 1848, Fitch *v.* Bogue, 19 Conn. 285, 290 (the order of proof, as between existence and loss, is not fixed, but depends on the case).

[7] *E.g.:* Cal. C. C. P. 1872, § 1937 (quoted *supra*, n. 1); Mont. Rev. C. 1921, § 10585 (like Cal. C. C. P. § 1937); 1880, Cross *v.* Williams, 72 Mo. 577, 579 (allowing proof of contents, then of loss); and compare the citations *supra*, note 1.

For the question whether an *opponent's destruction* of a document is an *admission of its terms* as the proponent claims them, without further evidence on his part, see *ante*, § 291.

For the question at what stage the *opponent's evidence* may be put in on the question of loss, etc., see *post*, § 1870.

§ 1190. [1] 1828, Dean *v.* Carnahan, 7 Mart. N. S. 258.

terms of the original—for example, where the original is claimed to have been altered since the time when the copy was made — it might properly be received.[2]

§ 1191. **Production may be Excused, when Contents are not in Dispute.** What is most needed to-day, for this rule in general, is flexibility. This could be given by the following provision (in analogy to the time-honored provision, *post*, §§ 1294–1296, for the attesting-witness rule): *Production of the original may be dispensed with, in the trial Court's discretion, whenever in the case in hand the opponent does not bona fide dispute the contents of the document and no other useful purpose will be served by requiring production.*

The general rule, sound at heart as it is, tends to become encased in a stiff bark of rigidity. Thousands of times it is enforced needlessly. Hundreds of appeals are made upon nice points of its detailed application which bear no relation at all to the truth of the case at bar. For this reason the whole rule is in an unhealthy state. The most repugnant features of technicalism (*ante*, §§ 8*a*, 21) are illustrated in this part of the law of Evidence.

The above proposed measure would serve to restore health to the rule. A brief colloquy between the trial judge and counsel would reveal whether the strict enforcement of the rule was needed for the protection of either party. If not, production of the original would be dispensed with.

In several Canadian provinces, the principle of unavailability has been abandoned, for certain documents in which ordinarily no real dispute arises. This measure is a sensible and progressive one and deserves universal adoption (*post*, § 1223). Its essential feature is that a *copy may be used unconditionally*, if the opponent has been given an opportunity to inspect it. Similar statutes but not permitting unconditional use, exist in many States for certain classes of documents required to be filed before trial (*post*, § 1848).

(c) *"Unless it is not feasible"*

§ 1192. **General Principle; Unavailability of the Original; Proof to the Judge.** (1) The essential principle of preferred evidence is that it is to be procured and offered *if it can be had* (*ante*, § 1172). That thought dominates both the present rule preferring production of the document itself and the ensuing class of rules preferring one kind of witness to another kind (*post*, § 1286). The thought is here not that a certain kind of evidence is absolutely necessary, but that a certain kind is to be used if it is available. If it is not available, then it is not insisted upon:

1831, PORTER, J., in *Thomas* v. *Thomas*, 1 La. 166, 168: "That rule which is the most universal, namely, that the best evidence the nature of the case will admit, shall be pro-

[2] 1902, Hong Quon *v.* Chea Sam, 14 Haw. 276 (like Walker *v.* Walker, *post*, § 1226, n. 7); 1847, Wilbur *v.* Wilbur, 13 Mete. Mass. 405 (the plaintiff offered a copy of an execution-levy; the defendant produced the original containing alterations; the question was whether the plaintiff or the defendant was bound to explain); 1853, Foulke *v.* Bray, 1 Wis. 104 (judgment); and cases cited *post*, § 1226, n. 7.

Compare the use of *photographic enlargements of handwriting*, *ante*, § 797.

duced, decides this objection; for it [the rule] is only another form of expression for the idea that when you lose the higher proof you may offer the next best in your power. The case admits of no better evidence than that which you possess, if the superior proof has been lost without your fault. The rule does not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control; it only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it."

Georgia, Revised Code 1910, § 5759: "In order to admit secondary evidence, it must appear that the primary evidence for some sufficient cause is not accessible to the diligence of the party."

The various classes of cases with which the following sections deal are but related instances of this general feature, that production of the writing itself is not required if production is under the circumstances not feasible. That the document is lost, detained by the opponent, held by a third person, physically irremovable, legally irremovable, practically irremovable, or otherwise unavailable without great inconvenience, — all these situations rest on the general notion that production is not feasible.

(2) *Historically*, this liberal and rational principle is not of ancient date. The more formal notions of the earlier methods of procedure stood on rigid requirements; and the modifications of these came in only gradually. Most of them were worked out while the doctrine of profert was still in force (*ante*, § 1177). The growth of each one can better be noticed under the respective heads. It will be seen that the profert, or showing of a deed or record in court, was dispensable, as early as Lord Coke's time, where the document was in the hands of a third person, under certain conditions (*post*, § 1211), or where it was detained in the custody of the law (*post*, § 1215), or where it had been destroyed by fire; but this last was an innovation of serious importance (*post*, § 1193); and the ordinary case of a lost document, *i.e.* one not demonstrably destroyed but simply not to be found, was not fairly settled, as dispensing with production, until the late 1700s (*post*, § 1193).

(3) The determination of this preliminary fact of unavailability is for the *judge*, not the *jury*, upon the general principle (*post*, § 2550) that questions of fact preliminary to the admissibility of evidence are for the judge.[1]

§ 1193. (1) **Loss or Destruction; History.** It was apparently a step of

§ 1192. [1] *Eng.* 1840, Smith v. Sleap, 1 C. & K. 48; *U. S. Ala.* 1858, Glassell v. Mason, 32 Ala. 719; *Cal.* 1858, Bagley v. McMickle, 9 Cal. 430, 449; *Conn.* 1848, Fitch v. Bogue, 19 Conn. 285, 290; *Ga.* Rev. C. 1910, §§ 5759, 5829; *Ill.* 1894, Grimes v. Hilliary, 150 Ill. 141, 145, 36 N. E. 977; *Mass.* 1834, Page v. Page, 15 Pick. 368, 374; *N. Y.* 1819, Jackson v. Frier, 16 John. 193, 195; *Or.* 1880, Rosendorf v. Hirschberg, 8 Or. 240, 242 (whether the original is lost, is for the Court; whether the copy is correct, for the jury); *N. C.* 1824, Eure v. Pittman, 3 Hawks 364, 371, 375 (where the secondary evidence, together with the evidence of loss or suppression, was conditionally but improperly submitted to the jury); 1844, Kelly v. Craig, 5 Ired. 129, 133; *Pa.* 1850, Porter v. Wilson, 13 Pa. St. 641, 646; *Tenn.* 1853, Tyree v. Magness, 1 Sneed 276, 277; 1870, Southern Express Co. v. Womack, 1 Heisk. 256, 262 (thus the ruling is presumed correct, if the evidence of loss is not embodied in the record of evidence).

As to the proper stage for introducing the *opponent's evidence*, see *post*, § 1870. That the *trial Court's discretion* governs the sufficiency of proof of loss, see *post*, § 1194.

some consequence when in 1611, in Dr. Leyfield's Case,[1] the Court resolved that "in great and notorious extremities, as by casualty of fire", profert of a deed might be dispensed with. Even this concession had to be enforced, during the ensuing century, by repeated rulings; and other instances of equally "great and notorious extremity" with fire, such as robbery, were added only slowly.[2] In these precedents, the "loss" of a document is frequently mentioned as equivalent to destruction by fire, in serving as an excuse; but the term evidently signified either an actual destruction or a disappearance through the acts of other persons, and not merely a disappearance through the party's own negligence or a mere impossibility of discovering a mislaid document; for the treatise-writers all through the 1700s,[3] and even later,[4] predicate of such an excusing loss that it must be without the party's fault or negligence and not a mere case of inability to find. It is not until the decision of Read *v.* Brookman, in 1789,[5] that all cases of genuine loss are

§ 1193. [1] 1611, Leyfield's Case, 10 Co. 88, 92 ("Yet in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there, if that should appear to the Judges, they may, in favor of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction").

[2] *Ante* 1661, Anon., Jenkins 19 ("In cases where charters have been lost by fire, burning of houses, rebellion, or when robbers have destroyed them, the law in such cases of necessity allows the proof of charters without shewing them. 'Necessitas facit licitum quod alias non est licitum' "); 1664, Knight *v.* Danler, Hardr. 323 (a burnt record of conviction; other evidence admitted, the conviction not being the main issue); 1696, R. *v.* Culpepper, Skinner 673 ("in the case of a deed lost or burnt they would admit a copy or counterpart of the contents"); 1696, Lynch *v.* Clerke, 3 Salk. 154, Holt, C. J. ("burnt or lost"; production excused); 1697, Barley's Case, 5 Mod. 210 (lost deed; production excused); 1699, Medlicot *v.* Joyner, 2 Keble 546, 1 Mod. 4 (a deed burnt, production excused); 1699, Underhill *v.* Durham, Freem. 509 (a survey burnt in the great fire of London; copy admitted); 1711, Sir E. Seymour's Case, 10 Mod. 8 (if lost "by inevitable accident", provable by copy); 1722, Robinson *v.* Davis, 1 Stra. 526 (robbery of a document in the mail; copy allowed); 1740, Villiers *v.* Villiers, 2 Atk. 71 (Hardwicke, L. C., allows an exemption in case of a loss and of proof of "the manner of its being lost; unless it happens to be destroyed by fire, or lost by robbery, or any unforeseen or unavoidable accident, which are sufficient excuses of themselves"); 1744, Omichund *v.* Barker, 1 Atk. 21, 49 (Hardwicke, L. C.: "Where the original is lost, a copy may be admitted"); 1744, Snellgrove *v.* Baily, 3 Atk. 214 (upon loss of a deed, copy allowable; but otherwise of a bond); 1754, Saltern *v.* Melhuish, Ambl. 247 ("a reasonable account of the deed being lost or destroyed" suffices); 1774, Mayor of Hull *v.* Horner, Cowp. 102 (Mansfield, L. C. J.; lost deed; copy admitted).

The history can be further seen in other lines of cases cited in Professor Ames' article, "Specialty Contracts and Equitable Defences", Harvard Law Review, IX, 49 (1895).

[3] *Ante* 1726, Gilbert, Evidence, 95 ("a man cannot make his own fault in losing of the deeds any part of his excuse"; but to prove them "burned with fire" suffices); *ante* 1767, Buller, Nisi Prius, 252 ("no party shall take advantage of his own negligence in not keeping of his deeds, which in all cases ought to be fairly produced to the court"); 1765, Blackstone, Commentaries, III, 368 ("if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like)", then production is excused).

[4] 1810, Swift, Evidence, 31 ("loss or destruction . . . by accident, without any fault on his part").

[5] 1789, Read *v.* Brookman, 3 T. R. 151 (a demurrer to a plea, excusing profert on the ground that it was "lost and destroyed by time and accident", was overruled. Buller, J.: "The rule laid down by Lord Coke [in Leyfield's Case] extends to all cases of extreme necessity; those which he mentions are only put as instances; and wherever a similar necessity exists the same rule holds. . . . It was said that the plaintiff was not without remedy, for that a Court of Equity would give him relief. But that argument is no answer in a Court of Law; we are not to consider what a Court of Equity in the plenitude of its power may do"); 1796, R. *v.* Metheringham, 6 id. 566 (loss of an order of removal of a pauper: oral proof allowed).

assimilated as instances of a general principle. From the time of that decision, the rule that an actual loss of any sort, making the document practically unavailable, suffices to excuse production, seems to have been fully accepted by the profession.[5]

§ 1194. **Same: General Tests for Sufficiency of Proof of Loss; Trial Court's Discretion.** In strictness, no doubt, a "destruction" signifies that the thing no longer exists, while a "loss" signifies merely that it cannot be discovered. Nevertheless, for practical purposes, the two come together for consideration in this rule. In the first place, the moment that the destruction becomes questionable at all (*i.e.* when not proved by eye-witnesses of a burning or tearing), the inquiry is raised whether the search for it has been sufficient; and, in the next place, the proof of a loss usually carries the implication that the thing not found has ceased to exist, and thus assimilates the case to one of destruction. Thus, the great question to which so many judges have devoted so much pains — the establishment of a test for the sufficiency of proof of loss — includes practically not only the cases of loss in the narrower sense but also the cases in which destruction is more or less explicitly put forward as the reason for non-production.[1]

The question thus resolves itself into an inquiry as to the *sufficiency of the search;* and the discovery of the island of Atlantis has occasioned no less arduous and no less vain efforts than the attempt to frame a fixed and just rule for the conduct of this inquiry. At the outset of the subject, then, it should be plainly understood — as great judges have so often told the bar, and as their successors and the bar have in new generations as often forgotten — that *there is not and cannot be any universal or fixed rule to test the sufficiency of the search* for a document alleged to be lost. The inquiry must depend entirely on the circumstances of the case. The following classical passages expound this doctrine in various forms:

1820, *Brewster* v. *Sewell*, 3 B. & Ald. 296; libel for charging the plaintiff with defrauding an insurance company; an expired policy was to be proved; whether the company or the plaintiff last had the policy was not certain; the plaintiff and his attorney had searched his premises in vain. ABBOTT, C. J.: "All evidence is to be considered with regard to the matter with respect to which it is produced. Now it appears to be a very different thing, whether the subject of inquiry be a useless paper, which may reasonably be supposed to be lost, or whether it is an important document which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned. . . . This being a case, therefore, where the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient."[2]

1846, POLLOCK, C. B., in *Gathercole* v. *Miall*, 15 M. & W. 319, 329: "The evidence of a document being lost, upon which secondary evidence may be given of its contents, may

[5] It has sometimes been doubted whether a lost *will* or *record* was provable with the same evidence as other lost documents (*post*, § 1267). A lost *negotiable instrument* may be proved by copy; but the restrictions that have been enforced in that connection are matters of substantive law (*post*, § 1197).

§ 1194. [1] As pointed out by Colcock, J., in Peay *v.* Picket, 3 McCord 318, 322 (1825).

[2] 1824, Best, J., in Freeman *v.* Arkell, 2 B. & C. 494 ("That principle [of relativity] is fully established by the case of Brewster *v.* Sewell").

vary much, according to the nature of the paper itself, the custody it is in, and indeed all the surrounding circumstances of the particular matter before the Court and jury. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper, which nobody would be likely to take care of." ALDERSON, B.: "The question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for. . . . If we were speaking of an envelope, in which a letter had been received, and a person said, 'I have searched for it among my papers, I cannot find it', surely that would be sufficient. So with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.', then I should have said you ought to go to A. B. and see if A. B. has not got that which it is proved he took away."

1833, THOMPSON, J., in *Minor* v. *Tillotson*, 7 Pet. 99: "The rules of evidence are adopted for practical purposes in the administration of justice. . . . The extent to which the rule is to be pushed, in a case like the present, is governed in some measure by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reasons for its non-production. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original."

1880, DEPUE, J., in *Johnson* v. *Arnwine*, 42 N. J. L. 451, 454: "Proof of loss or destruction so fully as to exclude every hypothesis of the existence of the original is not required. The question is always one of due diligence in the effort to procure the original before evidence of its contents is resorted to. As a general rule the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. If any suspicion hangs over the instrument, or there are circumstances tending to excite a suspicion that it is designedly withheld, the most rigid inquiry should be made into the reasons for its non-production. . . . No absolute rule has been or can be laid down, defining what search shall be considered as a search prosecuted with due diligence. The degree of diligence which shall be considered necessary in any case will depend on the circumstances, — the character and importance of the paper, the purposes for which it is proposed to use it, and the place where a paper of that kind may naturally be supposed to be likely to be found."

1896, STONE, C. J., in *Jernigan* v. *State*, 81 Ala. 58, 60, 1 So. 72: "In accounting for the absence of a writing, material testimony in the cause, so as to let in secondary evidence of its contents, no universal rule can be declared which will be applicable to every case. The testimony is addressed to the presiding judge, and he pronounces on its sufficiency. He must be reasonably convinced that it has been lost, destroyed, or is beyond the reach of the Court's process. A material inquiry in such cases is whether or not there was a probable motive for withholding this highest and best evidence. Whenever the Court is able to answer this inquiry in the negative, less evidence will satisfy its conscience than if suspicious circumstances attended the transaction. As a rule, there must be careful search at the place where it was last known to be, if its place of custody can be traced or remembered. If not, then such search must be made at any and every place where it would likely be found."

This general principle of relativity, that the sufficiency of the search depends upon the circumstances of the case, is sometimes expressed in the form of a standard of diligence; the search, it is said, must appear to have been made with *such diligence as was reasonable upon all the facts of the case in hand.*

The party proving the document must have used all reasonable means to obtain the original.[3]

It follows, properly, that the determination of the sufficiency of the search and in general of the proof of the fact of loss should be left entirely to the *trial Court's discretion*.[4] This important deduction has been admirably expounded in the following passage:

[3] ENGLAND: 1815, Ellenborough, L. C. J., in R. *v.* Morton, 4 M. & S. 48 ("The making search, and using due diligence, are terms applicable to some known or probable place or person, in respect of which diligence may be used"); 1827, Gully *v.* Exeter, 4 Bing. 290, 298 (depends upon "the importance of the deed and the particular circumstances of each case"); 1847, Alderson, B., in Doe *v.* Clifford, 2 C. & K. 448, 451 ("The law lays down rules to compel the production of primary evidence before secondary evidence can be given; but if a person has taken all reasonable means to produce primary evidence, then and then only he may give secondary evidence"); 1863, Quilter *v.* Jorss, 14 C. B. N. S. 747, 750 (reasonable exertions required).

CANADA: 1856, Tiffany *v.* McCumber, 13 U. C. Q. B. 159, 162 (the degree of diligence depends on the circumstances); 1865, Russell *v.* Fraser, 15 U. C. C. P. 375, 380.

UNITED STATES: *Connecticut:* 1837, Witter *v.* Latham, 12 Conn. 392, 399 (must "depend in a great measure on the circumstances of each particular case"); 1847, Kelsey *v.* Hanner, 18 Conn. 311, 316 (same); 1853, Waller *v.* School District, 22 Conn. 326, 334 (same); *Georgia:* 1849, Doe *v.* Biggers, 6 Ga. 188, 194 (depends on "the circumstances of each case", and is therefore left to the trial Court; but there are some general principles; "the object of the proof is to establish a reasonable presumption of the loss of the instrument; in general, the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case suggests and which were accessible to him; good faith and reasonable diligence are the requisites, and the diligence must have reference to the nature of the case"); *Illinois:* 1848, Mariner *v.* Saunders, 10 Ill. 113, 118 (depends on the circumstances); *Maine:* 1858, Simpson *v.* Norton, 45 Me. 281, 288 (depends "much upon the circumstances of the case"; an instructive illustration of the search required, — here, for a probate record); *Maryland:* 1852, Glenn *v.* Rogers, 3 Md. 312, 320 (depends much on the character and value of the instrument; the offeror must have "in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would suggest and which were accessible to him"); *New Hampshire:* 1852, Pickard *v.* Bailey, 26 N. H. 152, 167 ("each decision depends so much on the circumstances of the individual case that no inflexible rule can be laid down"); *New York:* 1819, Jackson *v.* Frier, 16 John. 193, 196 ("No precise rule" exists, except that "diligent search and inquiry should be made of those persons in whose custody the law presumes the deed to be"); 1820, Jackson *v.* Root, 18 id. 60, 73 (pointing out that less search is required for a document of slight value; here, an abandoned contract); *Ohio:* 1853, Wells *v.* Martin, 1 Oh. St. 386 ("The ruling must depend upon the circumstances of each particular case"); *Pennsylvania:* 1854, Woodward, J., in Bell *v.* Young, 3 Grant Pa. 175 ("When diligent search has been made unsuccessfully for a paper by the person in whose hands the law presumes it to be, it is in judgment of law a lost paper"); *South Carolina:* 1880, Congdon *v.* Morgan, 14 S. C. 587, 593 ("no absolute rule on the subject"; search for a deed here held sufficient on the facts); *Vermont:* 1861, Thrall *v.* Todd, 34 Vt. 97 (the offerer must show that "he has in good faith reasonably exhausted all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him").

[4] *Accord* (though sometimes with qualifications): *Fed.* 1919, Galbreath *v.* U. S., 6th C. C. A., 257 Fed. 648, 658; *Ala.* 1886, Jernigan *v.* State, 81 Ala. 58, 60; *Ark.* 1895, Wilburn *v.* State, 60 Ark. 141, 143, 29 S. W. 149; *Cal.* 1903, Kenniff *v.* Caulfield, 140 Cal. 34, 73 Pac. 803; *Conn.* 1882, Elwell *v.* Mersick, 50 Conn. 275; *Ga.* Rev. Code 1910, § 5829; 1871, Wallace *v.* Tumlin, 42 Ga. 462; 1880, Phillips *v.* Lindsey, 65 Ga. 139, 143; 1876, Graham *v.* Campbell, 56 Ga. 258, 260; *Md.* 1909, Robinson *v.* Singerly P. & P. Co., 110 Md. 382, 72 Atl. 828; *Mass.* 1890, Smith *v.* Brown, 151 Mass. 338, 340, 24 N. E. 31; *Mich.* 1871, Stewart *v.* People, 23 Mich. 63, 73 (to some extent); *Mo.* 1870, Christy *v.* Cavanagh, 45 Mo. 375, 377; 1892, Kleiman *v.* Geiselman, 114 Mo. 437, 443, 21 S. W. 796 ("the trial judge is to determine the sufficiency of the proof"); 1897, Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784; 1904, Liles *v.* Liles, 183 Mo. 326, 81 S. W. 1101; 1910, Felker *v.* Breece, 226 Mo. 320, 126 S. W. 424 (deed burned); *N. J.* 1880, Johnson *v.* Arnwine, 42 N. J. L. 451, 458; 1899, Longstreth *v.* Korb, 64 N. J. L. 112, 44 Atl. 934; 1904, Koehler *v.* Schilling, 70 N. J. L. 585, 57 Atl. 154; *Pa.* 1821, Leazure *v.* Hillegas, 7 S. & R. 313, 323; 1845, Flinn *v.* M'Gonigle, 9 W. & S. 75 ("Each case must depend on its peculiar circumstances; . . . it is a preliminary in-

1845, DENMAN, L. C. J., in *R.* v. *Kenilworth*, 7 Q. B. 642, 649; "I think that we may collect from *R.* v. *Morton* the only rule, namely, that no general rule exists. The question in every case is, whether there has been evidence enough to satisfy the Court before which the trial is had, that, to use the words of BAYLEY, J., in *R.* v. *Denio*, 'a "bona fide" and diligent search was made for the instrument where it was likely to be found.' But this is a question much fitter for the Court which tries than for us. They have to determine whether evidence is satisfactory, whether the search has been made 'bona fide', whether there has been due diligence, and so on. It is a mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted, if such questions are to be brought before us as matters of law!"

§ 1195. **Same: Specific Tests and Rulings.** Although the greater number of Courts have from time to time expressed approval of the controlling principle that the sufficiency of the search should be left to the trial Court, this principle is nevertheless often sinned against.

In the first place, there is an occasional tendency to prescribe some specific method of search in the shape of a fixed rule. It is sometimes said, for example, that the search must be made in the place where the document was last known to be, or that inquiry must be made of the *last custodian*, or that the last custodian must be summoned.[1] These requirements are sensible

quiry, addressed to the legal discretion of the judge"); 1892, Gorgas *v.* Hertz, 150 Pa. 538, 540, 24 Atl. 756 ("generally left to the discretion of the trial judge") *S. C.* 1896, Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797; 1901, Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122; 1905, Tucker *v.* Tucker, 72 S. C. 295, 51 S. E. 876; 1906, Leesville Mfg. Co. *v.* Morgan W. & I. Wks., 75 S. C. 342, 55 S. E. 768; *Tenn.* 1853, Tyre *v.* Magness, 1 Sneed 276, 277 ("what is proper diligence must depend much on the circumstances of the case"); *Vt.* 1874, Durgin *v.* Danville, 47 Vt. 95, 103 ("It is always a question of law in the given case whether the rule has been acted on and properly carried into effect"; but "whether the Court below have found facts correctly from the evidence bearing *pro* and *con* upon the existence of the facts of which the rule is predicable" will not be inquired).

Contra: 1904, Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519 (a reactionary ruling).

§ **1195.** [1] The following list of such utterances does not purport to be complete: *Alabama:* 1889, Foster *v.* State, 88 Ala. 182, 187, 7 So. 185 ("as a rule, careful search must be made where the document was last known to be or where it would most likely be found"); 1906, Saunders *v.* Tuscumbia, R. & P. Co., 148 Ala. 519, 41 So. 982 (approving Foster *v.* State); *Illinois:* 1860, Cook *v.* Hunt, 24 Ill. 535, 550 ("the rule is well settled that when a paper has a particular place of deposit, as when it is known to have been in a particular place, or in the hands of a particular person, then that place must be searched by the party setting up the loss, or the person produced or accounted for into whose hands or keeping it has been traced"); 1882, Rhode *v.* McLean, 101 Ill. 467, 470 (bond; loss sufficiently shown; rule of calling last possessor held not to be an invariable one); 1891, Mullanphy S. Bank *v.* Schott, 135 Ill. 655, 667, 26 N. E. 640 (corporation book; loss not sufficiently shown; rule of calling last possessor applied); 1904, Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 (libel in a letter printed in a newspaper; the rule is that "the person in whose possession it was last traced must be produced, unless shown to be impossible; in which case search among his papers must be proved, if that can be done"); *Indiana:* 1889, Howe *v.* Fleming, 123 Ind. 263, 24 N. E. 238 (record; it must appear "that careful and diligent search was made in the office and by one so fully acquainted with the office-records and papers as to make it probable that if the paper was in the office he would find it"; trial Court's discretion here approved); *Kansas:* 1880, Brock *v.* Cottingham, 23 Kans. 383, 388 (execution not sufficiently shown lost; the clerk of Court should have been called or his deposition taken; the last custodian's testimony is not always necessary, except in the above class of cases, but it should be "the general rule"); *New York:* 1883, Kearney *v.* Mayor, 92 N. Y. 617, 621; *South Carolina:* 1846, Drake *v.* Ramey, 2 Rich. 37, 39 ("a search in the place where it was most likely to be found" suffices); *Tennessee:* 1853, Pharis *v.* Lambert, 1 Sneed 228, 230 (warrant last seen in the offerer's attorney's hand; the attorney required to be sworn or accounted for); 1853, Tyree *v.* Magness, 1 Sneed 276, 278 (paper in the cause; search among the clerk's papers, but not by the clerk, insufficient); 1855, Vaulx *v.* Merriwether, 2 Sneed 683 (deed

enough as hints or warnings to the trial Court, but they are not fit to be erected into fixed rules.

In the second place, most Courts are found now and then deliberately disregarding the principle of the trial Court's discretion and reviewing on appeal all the circumstances bearing upon the *sufficiency of the search*.[2] These

of deceased grantee; search among the grantee's papers, without search at the registry or among the deceased's representative's papers, insufficient); 1870, Girdner *v.* Walker, 1 Heisk. 186, 191 (letters to C., deceased; inquiry of C.'s representative, etc., and search among C.'s papers, required); *Vermont:* 1851, Fletcher *v.* Jackson, 23 Vt. 581, 591 (Redfield, J.: "The general rule upon this subject is familiar, that reasonable search shall be made in the place where the paper is last known to have been; and if not found there, then its present place of deposit shall be searched out in the usual mode by making inquiry of those most likely to know its whereabouts, and that is of course of the person last known to have had its custody"); 1860, Moore *v.* Beattie, 33 Vt. 219, 223 (search is to be made by the last custodian; sufficiency of search is for trial Court's discretion).

[2] The decisions and statutes are as follows: ENGLAND: 1805, Johnson's Case, 29 How. St. Tr. 437, 7 East 65 (envelopes; "such probable evidence of the destruction of the thing as to let in parol evidence of its nature"; here a mass of papers, presumably including these, were thrown into the fire); 1807, Kensington *v.* Inglis, 8 East 273, 278, 288 (belligerent trading license, issued by a colonial governor; the expiration and return of the license being shown, the custom to destroy them as waste paper and the search for this one in the office, held sufficient); 1815, R. *v.* Morton, 21 M. & S. 48 (search for an indenture of apprenticeship, held sufficient); 1816, Bullen *v.* Michel, 4 Dow 297 (copies of old tithe-taxations admitted, search for the originals proving unavailable); 1824, Freeman *v.* Arkell, 2 B. & C. 494 (information for an indictment returned ignoramus; search at a clerk's office held sufficient on the facts); 1825, R. *v.* East Farleigh, 6 Dowl. & R. 147 (indenture of apprenticeship); 1827, R. *v.* Denio, 7 B. & C. 620, 622 (same); 1828, R. *v.* Stourbridge, 8 B. & C. 96 (same); 1834, R. *v.* Rawden, 2 A. & E. 156 (same); 1836, M'Gahey *v.* Alston, 2 M. & W. 206, 213 (cancelled check in the office of a successor as clerk; search sufficient on the facts); 1837, Fitz *v.* Rabbits, 2 Moo. & Rob. 60 (a lease; search made three years before, for another purpose, held sufficient on the facts); 1845, R. *v.* Kenilworth, 7 Q. B. 642 (indenture of apprenticeship); 1846, Gathercole *v.* Miall, 15 M. & W. 319, 322 (old newspaper, left at certain society-rooms; search among members of the society not necessary); 1846, R. *v.* Rastrick, 2 Cox Cr. 39 (parcel-memorandum taken from a shop); 1851, Richards *v.* Lewis, 15 Jur. 512 (search not sufficient); 1852, R. *v.* Saffron Hill, 1 E. & B. 93 (search for a document held not wrongly declared insufficient by the trial Court); 1863, Quilter *v.* Jorss, 14 C. B. N. S. 747 (agreement of shipment, taken from the bearer in New York by official searchers for secessionist dispatches); 1872, R. *v.* Hall, 12 Cox Cr. 159 (forged document, in a prosecution for forgery).

CANADA: *Alta.* 1916, R. *v.* Peterson, 31 D. L. R. 295 (perjury; loss of a check held sufficiently proved); *N. Br.* 1842, Little *v.* Johnston, 1 Kerr 496 (letters; search held not sufficient); 1852, Basterach *v.* Atkinson, 2 All. 439, 445 (agreement in third person's hands; loss held sufficiently evidenced); 1855, Lyman *v.* Cain, 3 All. 259 (note taken up; search held sufficient); *N. Sc.* 1859, Barto *v.* Morris, 4 N. Sc. 90; 1876, Hazell *v.* Dyas, 11 N. Sc. 36, 42.

UNITED STATES (besides the cases in the following list, those cited *post*, § 1225, should also be consulted, where a similar question sometimes arises in construing the statutes allowing affidavit-proof of loss of a *record* : *deed;* for loss of *books of entry*, see also §§ 15[illegible] 1557, *post*):

Federal: 1806, U. S. *v.* Lambell, 1 Cr. C 312 (warrant; loss sufficiently shown); 1806, U. S. *v.* Wary, 1 Cr. C. C. 312 (warrant; loss not sufficiently shown); 1822, Boulding *v.* Massie, 7 Wheat. 122, 131, 154 (loss of assignment sufficiently shown); 1824, Riggs *v.* Tayloe, 9 Wheat. 483, 486 ("If he did not tear it up, then it has become lost or mislaid", held sufficient); 1826, Riggs *v.* Tayloe, 2 Cr. C. C. 687, 689 (contract; loss not sufficiently shown); 1833, Minor *v.* Tillotson, 7 Pet. 99 (land-grant; search sufficiently shown); 1835, Winn *v.* Patterson, 9 Cr. C. C. 663, 676 (power of attorney; loss sufficiently shown); 1836, U. S. *v.* Lodge, 4 Cr. C. C. 673 (larceny of bank-notes; that they had been passed away, held sufficient evidence of non-availability); 1865, Simpson *v.* Dall, 3 Wall. 460 (letters; loss not sufficiently shown); 1892, Scanlan *v.* Hodges, 10 U. S. App. 352, 361, 3 C. C. A. 113, 52 Fed. 354 (loss not proved); 1902, Dupee *v.* Chicago H. S. Co., 54 C. C. A. 426, 117 Fed. 40, 44 (search held sufficient); 1904, Brown *v.* Harkins, 131 Fed. 63, 65 C. C. A. 301 (distiller's books and transcript in collector's office; loss not sufficiently shown on the facts);

Alabama: 1832, Mitchell *v.* Mitchell, 3 Stew. & P. 81, 84 (search by persons unable to read is insufficient); 1839, Swift *v.* Fitzhugh, 9 Port. 39, 52 (deed; loss sufficiently shown on the facts); 1849, Herndon *v.* Givens, 16 Ala. 261,

268 (loss of note sufficiently shown); 1857, Johnson v. Powell, 30 Ala. 113, 115 (executions; search held sufficient on the facts); 1861, Preslar v. Stallworth, 37 Ala. 402, 406 (by a clerk of Court, that a note filed was no longer on file and he did not know what had become of it, held insufficient); 1872, Bogan v. McCutchen, 48 Ala. 493 (search for a letter, not sufficient on the facts); 1876, Calhoun v. Thompson, 56 Ala. 166, 170 (letter left with a magistrate; search held insufficient); 1879, Watson v. State, 63 Ala. 19, 22 (loss of justice's records, not sufficiently proved on the facts); 1881, Donegan v. Wade, 70 Ala. 501, 506 (notice of contest in Probate Court; loss insufficiently proved); 1886, Jernigan v. State, 81 Ala. 58, 60 (note and mortgage; search sufficient on the facts); 1889, Tanner & D. E. Co. v. Hall, 89 Ala. 628, 629, 7 So. 187 (search for correspondence, held sufficient on the facts); 1892, Thorn v. Kemp, 98 Ala. 417, 422, 13 So. 749 (summons, etc.; loss, etc., presumed from trial Court's finding); 1893, Boulden v. State, 102 Ala. 78, 84, 15 So. 341 (dying declaration in writing; search insufficient); 1897, Phœnix Ass. Co. v. McAuthor, 116 Ala. 659, 22 So. 903 (search for a policy held insufficiently shown); 1897, O'Neal v. McKinna, 116 Ala. 606, 22 So. 905 (search for warrant handed to grand jury, held insufficient on the facts); 1901, Laster v. Blackwell, 128 Ala. 143, 30 So. 663 (deed; loss held sufficiently shown on the facts); 1905, Tagert v. State, 143 Ala. 88, 39 So. 293 (search for a note, held not sufficient on the facts); 1905, Alabama Const. Co. v. Meador, 143 Ala. 336, 39 So. 216 (similar, for a letter); 1906, Saunders v. Tuscumbia R. & P. Co., 148 Ala. 519, 41 So. 982 (mechanics' lien, search held sufficient on the facts);

Arizona: 1874, Rush v. French, 1 Ariz. 99, 142, 25 Pac. 816 (rules of search laid down);

Arkansas: 1921, Leake v. State, 149 Ark. 621, 233 S. W. 773 (forgery; search held sufficient);

California: 1852, McCann v. Beach, 2 Cal. 25, 30 (loss of papers said to have been in a trunk; proof not sufficient); 1855, Norris v. Russell, 5 Cal. 250 (municipal ordinance; notice of tax-sale; search insufficient); 1855, People v. Clingan, 5 Cal. 389 (certificate of election; loss sufficiently proved); 1856, Folsom v. Scott, 6 Cal. 460 (deed; search insufficient on the facts); 1861, Caulfield v. Sanders, 17 Cal. 569, 573 (loss of entry-book not sufficiently shown); 1861, Pierce v. Wallace, 18 Cal. 165, 170 (search for lost deed, held sufficient); 1867, King v. Randlett, 33 Cal. 318, 320 (bill of sale; search held insufficient); 1875, Taylor v. Clark, 49 Cal. 671 (search for lost deed, not sufficient on the facts); 1895, Samoset v. Mesnager, 108 Cal. 354, 41 Pac. 337 (letter; search held sufficient); C. C. P. § 1855 (a writing's contents must be evidenced by the writing itself; except, "when the original has been lost or destroyed; in which case proof of the loss or destruction must first be made");

Colorado: Comp. St. 1921, § 6548 (party offering any deed, etc., "or other writing", alleged to have been executed by the opponent, and lost or destroyed; contents cannot be proved "until said party, his agent, or attorney, shall first make oath to the loss or destruction thereof, and to the substance of the same"); C. C. P. § 391 (for proving contents by "other than the writing itself", "proof of loss or destruction shall first be made"); 1873, Hobson v. Porter, 2 Colo. 28, 31 (search for a contract, held not sufficient); 1876, Londoner v. Stewart, 3 Colo. 47, 49 (search for a power of attorney, held not sufficient); 1877, Lyon v. Washburn, 3 Colo. 201, 204 (loss of a letter, not sufficiently proved); 1883, Wells v. Adams, 7 Colo. 26, 1 Pac. 698 (loss of a letter, not sufficiently proved); 1886, Bruns v. Clase, 9 Colo. 225, 227, 11 Pac. 79 (execution; loss sufficiently shown); 1886, Oppenheimer v. R. Co., 9 Colo. 320, 322, 12 Pac. 217 (railroad tariff sheet; loss sufficiently shown); 1886, Billin v. Henkel, 9 Colo. 394, 400, 13 Pac. 420 (letter; loss not sufficiently shown); 1906, Mortgage T. Co. v. Elliott, 36 Colo. 238, 84 Pac. 980 (note; loss sufficiently shown);

Connecticut: 1830, State v. DeWolf, 8 Conn. 93, 100 (mere ignorance of its whereabouts, without search, insufficient); 1837, Witter v. Latham, 12 Conn. 392, 399 (bankrupt's certificate; bankrupt ignorant of its whereabouts; search not required); 1840, Stoddard v. Mix, 14 Conn. 12, 17, 22 (loss sufficiently shown); 1847, Kelsey v. Hanmer, 18 Conn. 311, 316 (deed; sufficient search shown); 1849, White v. Brown, 19 Conn. 577, 583 (note; loss insufficiently shown); 1853, Waller v. School District, 22 Conn. 326, 334 (subscription-paper; loss sufficiently shown);

Delaware: 1841, Armstrong v. Timmons, 3 Harringt. 342 (deed; loss sufficiently shown); 1855, State v. Gemmill, 1 Houst. 9, 12 (directions to sheriff; loss sufficiently shown); 1855, Bartholomew v. Edwards, 1 Houst. 247, 250 (deed; loss not sufficiently shown);

Florida: 1904, Rhodus v. Heffernan, 47 Fla. 206, 36 So. 573 (administrator's schedule; loss sufficiently shown); 1920, Neylans v. Herndon, 79 Fla. 213, 84 So. 89 (promissory note);

Georgia: in this State a Court rule governs some of the cases: 1849, Doe v. Biggers, 6 Ga. 188, 194 (execution; sufficient search shown); 1851, Ellis v. Smith, 10 Ga. 253, 259 (same); 1852, Harper v. Scott, 12 Ga. 125, 135 (agreement; sufficient search shown); 1853, Molyneaux v. Collier, 13 Ga. 406, 413 (execution; search not sufficient); 1853, Bryan v. Walton, 14 Ga. 185, 194 (will; search not sufficient); 1857, Allen v. State, 21 Ga. 217, 218 (bail process; search held sufficient); 1858, Morgan v. Jones, 24 Ga. 155, 160 (letters of administration; loss sufficiently shown); 1858, Poulet v. Johnson, 25 Ga. 403, 410; 1859, Sutton v. McLoud, 26 Ga. 637, 642 (grant; search held insufficient); 1861, Roe & McDowell v. Doe & Irwin, 32 Ga. 39, 48 (Court rule applied);

1870, Cameron *v.* Kersey, 41 Ga. 40 (Court rule applied); 1872, Jackson *v.* Jackson, 47 Ga. 99, 117 (contents of letter not produced, excluded); 1873, Brown *v.* Tucker, 47 Ga. 485, 492 (trust-deed; search held insufficient); 1880, Seisel *v.* Register, 65 Ga. 662, 664 (execution; search insufficient); 1876, Southern Georgia & F. R. Co. *v.* Ayres, 56 Ga. 230, 233 (Court rule applied); 1883, Imboden *v.* Mining Co., 70 Ga. 86, 112 (search for deeds sufficient); 1886, Noland *v.* Pelham, 77 Ga. 262, 269, 2 S. E. 639 (deed; search not sufficient); 1887, Silva *v.* Rankin, 80 Ga. 79, 83, 4 S. E. 756 (deeds, etc., sufficiently shown lost); 1888, Georgia P. R. Co. *v.* Strickland, 80 Ga. 777, 779, 6 S. E. 27 (original not accounted for); 1901, Lott *v.* Buck, 113 Ga. 640, 39 S. E. 70 (search held insufficient on the facts); 1903, Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76 (sheriff's *fi. fa.*, sufficiently shown lost);

Hawaii: 1904, Walters *v.* Redward, 16 Haw. 25 (bond; loss sufficiently shown);

Illinois: 1840, Dormady *v.* State Bank, 3 Ill. 236, 238, 244 (note); 1841, Palmer *v.* Logan, 4 Ill. 56, 60 (notes; loss insufficiently shown); 1848, Mariner *v.* Saunders, 10 Ill. 113, 118 (deed; search held insufficient); 1854, Doyle *v.* Wiley, 15 Ill. 576 (contract; search sufficient on the facts); 1859, Holbrook *v.* Trustees, 22 Ill. 539 (treasurer's bond; loss not sufficiently shown); 1860, Whitehall *v.* Smith, 24 Ill. 166 (warrant and affidavit; loss not sufficiently shown); 1860, Cook *v.* Hunt, 24 Ill. 536, 550 (contract; loss not sufficiently shown, because the person last having custody was not accounted for; see note 1, *supra*); 1860, Stow *v.* People, 25 Ill. 69, 73 (deed; loss not sufficiently shown); 1862, Holbrook *v.* Trustees, 28 Ill. 187 (bond; loss not sufficiently shown); 1862, Ellis *v.* Huff, 29 Ill. 449 (execution; loss sufficiently shown); 1863, Pardee *v.* Lindley, 31 Ill. 174, 184 (deed; search sufficient); 1864, Owen *v.* Thomas, 33 Ill. 320, 326 (deed; search apparently held insufficient); 1864, Kupfer *v.* Bank, 34 Ill. 328, 356 (draft; loss sufficiently shown); 1864, McMillan *v.* Bethold, 35 Ill. 253 (note; loss sufficiently shown); 1865, Wells *v.* Miller, 37 Ill. 276, 280 (title-document; loss sufficiently shown); 1866, Carr *v.* Miner, 42 Ill. 179, 189 (bill and answer; loss sufficiently shown); 1867, Sturges *v.* Hart, 45 Ill. 103, 106 (injunction; loss not sufficiently shown); 1869, Huls *v.* Kimball, 52 Ill. 391 (mortgage; loss sufficiently proved); 1872, Chicago & N. W. R. Co. *v.* Ingersoll, 65 Ill. 399, 403 (contract, loss not sufficiently shown); 1872, Case *v.* Lyman, 66 Ill. 229 (letters; loss sufficiently shown); 1873, Swearengen *v.* Gulick, 67 Ill. 208, 212 (deed; loss sufficiently shown); 1875, Wickenkamp *v.* Wickenkamp, 77 Ill. 92, 95 (note destroyed; secondary evidence admitted); 1875, Marlow *v.* Marlow, 77 Ill. 633 (notes; destruction sufficiently shown); 1875, Williams *v.* Case, 79 Ill. 356 (account filed in Court; loss not sufficiently proved); 1876, Hazen *v.* Pierson, 83 Ill. 241 (letter; loss not sufficiently shown); 1876, Crocker *v.* Lowenthal, 83 Ill. 579, 581 (deed; loss sufficiently shown); 1878, Moore *v.* Wright, 90 Ill. 470, 472 (note; loss not sufficiently shown); 1878, Protection L. I. Co. *v.* Dill, 91 Ill. 174 (policy of insurance; loss sufficiently proved); 1880, Taylor *v.* McIrvin, 94 Ill. 488, 492 (deed; loss sufficiently shown) 1881, Dugger *v.* Oglesby, 99 Ill. 405, 40 (deed; loss sufficiently shown); 1883, Golde *v.* Bressler, 105 Ill. 419, 429 (deed; loss sufficiently shown); 1884, Dowden *v.* Wilson 108 Ill. 257, 261 (copies of burned depositions used); 1888, Berdel *v.* Egan, 12 Ill. 298, 299, 17 N. E. 709 (deed; loss sufficiently shown); 1898, McDonald *v.* Stark, 176 Ill. 456, 52 N. E. 37 (loss of recorded town plats, sufficiently shown); 1899, Mayfield *v.* Turner, 180 Ill. 332, 54 N. E. 418 (declaration of trust; loss sufficiently shown); 1899, Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63 (deed; search sufficient on the facts);

Indiana: 1839, Burke *v.* Voyles, 5 Blackf. 190 (award; not sufficiently accounted for); 1843, McNeely *v.* Rucker, 6 Blackf. 391 (lease; loss not sufficiently shown); 1843, Depew *v.* Wheelan, 5 Blackf. 485, 487 (note; same); 1845, Murray *v.* Buchanan, 7 Blackf. 549 (execution; same); 1856, Meek *v.* Spencer, 8 Ind. 118, 119 (memorandum of sale; search insufficient); 1857, Littler *v.* Franklin, 9 Ind. 216 (letter; same); 1859, Little *v.* Indianapolis, 13 Ind. 364 (petition to city council; search sufficient); 1859, Cleveland *v.* Worrell, 13 Ind. 545 (note; same); 1861, Carter *v.* Edwards, 16 Ind. 238 (same); 1862, Steel *v.* Williams, 18 Ind. 161, 165 (transcript; same); 1879, Avan *v.* Frey, 69 Ind. 91, 93 (lease; destruction by defendant shown); 1883, Johnston Harv. Co. *v.* Bartley, 94 Ind. 131, 134 (contract; search held sufficient); 1884, Langsdale *v.* Woollen, 99 Ind. 575, 585 (letter; same); 1884, Curme *v.* Rauh, 100 Ind. 247, 253 (mortgage; same); 1886, McComas *v.* Haas, 107 Ind. 512, 516, 8 N. E. 579 (letter; same); 1887, Roehl *v.* Haumesser, 114 Ind. 311, 319, 15 N. E. 345 (same); 1887, McCormick H. M. Co. *v.* Gray, 114 Ind. 340, 346, 16 N. E. 787 (contract; loss sufficiently shown); 1888, McNutt *v.* McNutt, 116 Ind. 545, 565, 19 N. E. 115 (same);

Iowa: 1851, Steamboat Wisconsin *v.* Young, 3 Greene 268, 271 (search for invoice sufficiently shown); 1861, Horseman *v.* Todhunter, 12 Ia. 230, 232 (mortgage; loss not shown); 1868, McCormick *v.* Grundy Co., 24 Ia. 382, 384 (loss of note sufficiently shown, 1876); Grimes *v.* Simpson College, 42 Ia. 589, 590 (contract; loss not sufficiently shown); 1877, Crowe *v.* Capwell, 47 Ia. 426 (note; search insufficient); 1880, Howe M. Co. *v.* Stiles, 53 Ia. 425, 5 N. W. 577 (letters; loss insufficiently shown); 1880, Gimbal *v.* Salomon, 54 Ia. 389, 6 N. W. 582 (letter; loss not shown); 1880, Foster *v.* Bowman, 55 Ia. 237, 240, 7 N. W. 513 (loss of record sufficiently shown); 1882, Hausen *v.* Ins. Co., 57 Ia. 741, 742, 11 N. W.

670 (contract of sale; searching sufficient); 1883, Louis Cook M. Co. *v.* Randall, 62 Ia. 244, 17 N. W. 507 (contract; loss sufficiently shown); 1886, Hill *v.* Aultman, 68 Ia. 630, 27 N. W. 788 (letter; search held insufficient); 1887, Postel *v.* Palmer, 71 Ia. 157, 159, 32 N. W. 257 (positive testimony of loss by custodian; further search unnecessary); 1890, State *v.* Thompson, 79 Ia. 703, 705, 45 N. W. 293 (letters; loss not shown); 1895, Waite *v.* High, 96 Ia. 742, 65 N. W. 397 (search insufficient on the facts); 1899, Williams *v.* Williams, 108 Ia. 91, 78 N. W. 793 (contract as loss not sufficiently shown on the facts); 1919, Swanson Automobile Co. *v.* Stone, 187 Ia. 309, 174 N. W. 247 (search for certain assignments, held insufficient on the facts);

Kansas: 1893, Roberts *v.* Dixon, 50 Kan. 436, 437, 31 Pac. 1083 (no search at all; production required);

Kentucky: 1819, Hart *v.* Strode, 2 A. K. Marsh. 115 (bond; loss sufficiently shown on the facts); 1820, Hamit *v.* Lawrence, 2 A. K. Marsh. 366 (lease; same); 1821, McIntire *v.* Funk, Litt. Sel. C. 425, 427 (bond; same); 1824, May *v.* Hill, 5 Litt. 307, 309 (bond; same); 1853, Dickerson *v.* Talbot, 14 B. Monr. 60, 67 (deed; search sufficient on the facts); 1868, Nutall *v.* Brannin, 5 Bush 11, 18 (letter; search insufficient on the facts); 1870, Penny *v.* Pindell, 7 Bush 571, 574 (record; same); 1898, Helton *v.* Asher, 103 Ky. 730, 46 S. W. 22 (loss not shown); 1906, Interstate Inv. Co. *v.* Bailey, — Ky. —, 93 S. W. 578 (deed; loss sufficiently shown);

Louisiana: Rev. C. C. 188, § 2279 (when an "instrument in writing, containing obligations which the party wishes to enforce, has been lost or destroyed, by accident or force, evidence may be given of its contents, provided the party show the loss either by direct testimony or by such circumstances, supported by the oath of the party, as render the loss probable"); here it is difficult to separate the cases under this statute and at common law from those belonging under the other statute, *post*, § 1225: 1823, Robertson *v.* Lucas, 1 Mart. N. S. 187, 189 (agreement; loss not sufficiently shown, under the French rule); 1829, Tate *v.* Penne, 7 Mart. N. S. 548, 551 (marriage-contract; loss sufficiently shown); 1831, Baines *v.* Higgins, 1 La. 220, 222 (bill of sale; loss not sufficiently proved); 1842, Thomas *v.* Turnley, 3 Rob. 206, 210 (deeds; loss sufficiently shown); 1847, Prothro *v.* Minden Seminary, 2 La. An. 939 (corporate resolution; loss sufficiently shown); 1894, Cochran *v.* Cochran, 46 La. An. 536, 539, 15 So. 57 (agreement; search sufficient on the facts); 1901, Willett *v.* Andrews, 106 La. 319, 30 So. 883 (deed forming a link in the title to land; advertisement of loss held not necessary under Civ. C. §§ 2279, 2280);

Maine: 1848, Wing *v.* Abbott, 15 Shepl. 367, 373 (judicial record; search not sufficient on the facts);

Maryland: 1810, Rusk *v.* Sowerwine, 3 H. & J. 97 (power of attorney; search insufficient on the facts); 1814, Ringgold *v.* Galloway, 3 H. & J. 451, 455 (loss of commissions, etc., not sufficiently proved); 1830, State *v.* Wayman, 2 G. & J. 254, 283 (search for Chancery records, not sufficient on the facts); 1843, Mulliken *v.* Boyce, 1 Gill 60, 66 (horse-pedigree: search held insufficient on the facts);

Massachusetts: 1844, Foster *v.* Mackay, 7 Metc. 531, 537;

Michigan: 1850, Higgins *v.* Watson, 1 Mich. 428, 431 (note; loss sufficiently shown); 1868, Hogsett *v.* Ellis, 17 Mich. 351, 375 (records of a justice; loss not sufficiently shown); 1871, Stewart *v.* People, 23 Mich. 63, 73 (letter; search held sufficient); 1877, Bottomley *v.* Goldsmith, 36 Mich. 27 (letter; search held sufficient); 1877, King *v.* Carpenter, 37 Mich. 363, 369 (deed; loss sufficiently shown); 1878, People *v.* Gordon, 39 Mich. 259, 262 (loss of justice's files sufficiently shown); 1879, McKeown *v.* Harvey, 40 Mich. 226 (contractor's proposals; search sufficiently shown); 1883, Holcomb *v.* Mosher, 50 Mich. 252, 257, 15 N. W. 129 (deed; search held sufficient); 1885, Huff *v.* Hall, 56 Mich. 456, 457, 23 N. W. 88 (letter; loss sufficiently shown); 1886, Dalton's Appeal, 59 Mich. 352, 355, 26 N. W. 539 (petition for guardian; loss sufficiently shown); 1890, Shoulder *v.* Bonander, 80 Mich. 531, 534, 45 N. W. 487 (agreement; proof of loss "unsatisfactory"); 1895, Stanley *v.* Anderson, 107 Mich. 384, 65 N. W. 247 (contract recorded with a justice of the peace; loss sufficiently shown);

Minnesota: 1861, Guerin *v.* Hunt, 6 Minn. 375, 380 (letter; search not sufficiently shown); 1867, Thayer *v.* Barney, 12 Minn. 502, 510, 513 (account-book and receipt; loss sufficiently shown); 1871, Board *v.* Meagher, 17 Minn. 412, 422 (order for brick; search sufficiently shown); 1881, Molm *v.* Barton, 27 Minn. 530, 532, 8 N. W. 765 (bill of sale; loss sufficiently shown); 1886, Nelson *v.* Land Co., 35 Minn. 408, 410, 29 N. W. 121 (sheriff's certificate; search not sufficiently shown); 1896, Slocum *v.* Bracy, 65 Minn. 100, 67 N. W. 843 (search held sufficient); 1896, Windom *v.* Brown, 65 Minn. 394, 67 N. W. 1028 (search held sufficient); 1901, Hurley *v.* West St. Paul, 83 Minn. 401, 86 N. W. 427 (ancient copy of surveyor's report, not admitted where original was not searched for); 1920, Cookson *v.* Hill, 146 Minn. 165, 178 N. W. 591 (stock-books of a corporation; diligent search not shown, on the facts);

Mississippi: 1838, Doe *v.* M'Caleb, 2 How. 756, 767 (land-office certificate; search not sufficient); 1846, Smith *v.* R. Co., 6 Sm. & M. 179, 184 (receipt; loss sufficiently shown); 1854, Parr *v.* Gibbons, 27 Miss. 375, 378 (note; loss insufficiently shown);

Missouri: 1837, Miller *v.* Wells, 5 Mo. 6, 10 (bond; search held not to be sufficient); 1850, Finney *v.* College, 13 Mo. 266 (deposition shown to be lost or mislaid); 1852, Lewin

v. Dille, 17 Mo. 64, 69 (agent's instructions, not accounted for); 1862, Gould *v.* Trowbridge, 32 Mo. 291, 293 (draft; loss sufficiently shown); 1874, Parry *v.* Walser, 57 Mo. 169, 172 (destruction of records sufficiently shown); 1874, Shaw *v.* Pershing, 57 Mo. 416, 421 (loss of deed sufficiently shown); 1879, Studebaker Mfg. Co. *v.* Dickson, 70 Mo. 272 (contract; search sufficiently shown); 1884, Blondeau *v.* Sheridan, 81 Mo. 545, 556 (contract; search held insufficient); 1890, Henry *v.* Diviney, 101 Mo. 378, 383, 13 S. W. 1057 (letter; loss sufficiently shown);

Montana: Rev. C. 1921, § 10516; 1894, Brooke *v.* Jordan, 14 Mont. 375, 378, 36 Pac. 450 (deed; search held sufficient);

Nebraska: 1886, Post *v.* School District, 19 Nebr. 135, 26 N. W. 911 (bond; loss not sufficiently shown); 1886, Murphy *v.* Lyons, 19 Nebr. 689, 28 N. W. 328 (affidavit; loss not sufficiently shown); 1890, Myers *v.* Beals, 30 Nebr. 280, 287, 46 N. W. 479 (exhibit at former trial; loss not sufficiently shown); 1895, Baldwin *v.* Burt, 43 Nebr. 245, 252, 61 N. W. 601 (mortgage; loss sufficiently shown); 1896, Regier *v.* Shreck, 47 Nebr. 667, 66 N. W. 618 (legal papers in a case; loss sufficiently shown);

Nevada: 1869, Milenovich's Estate, 5 Nev. 160, 186 (order of Probate Court; less sufficiently shown);

New Hampshire: 1850, Forsaith *v.* Clark, 21 N. H. 409, 417 (loss of charters, held sufficiently shown); 1852, Pickard *v.* Bailey, 26 N. H. 152, 166 (list of lands; search sufficient);

New Jersey: 1820, Sterling *v.* Potts, 5 N. J. L. 773, 776 (search held insufficient); 1826, Fox *v.* Lambson, 8 N. J. L. 275, 278 (court records; search insufficient); 1832, Kingwood *v.* Bethlehem, 13 N. J. L. 221, 226 (indenture of apprenticeship; search held sufficient); 1832, Smith *v.* Axtell, 1 N. J. Eq. 494, 498 (written agreement between heirs and administrators; search held insufficient); 1865, Clark *v.* Hornbeck, 17 N. J. Eq. 430, 450 (action against an executor on a note given by him to the testator; search held sufficient); 1880, Johnson *v.* Arnwine, 42 N. J. L. 451, 459 (complaint and warrant last seen with the grand jury; search held sufficient); 1904, Koehler *v.* Schilling, 70 N. J. L. 585, 57 Atl. 154 (contracts; Johnson *v.* Arnwine followed);

New York: 1813, Jackson *v.* Neely, 10 John. 374, 376 (deed said to have been in a house destroyed by fire; sufficient search); 1814, Jackson *v.* Woolsey, 11 John. 446, 454 (deed; search held sufficient); 1825, Dan *v.* Brown, 4 Cow. 483, 491 (will; search held insufficient); 1826, Jackson *v.* Betts, 6 Cow. 377, 383 (will; search held sufficient); s. c. app. 9 Cow. 208, 222, 6 Wend. 173, 176 (same); 1826, Francis *v.* Ins. Co., 6 Cow. 404, 416 (British Consul's permit at Antigua; search held sufficient); 1830, Jackson *v.* Russell, 4 Wend. 543, 547 (will; search in the Surrogate's Office held sufficient); 1865, Leland *v.* Cameron, 31 N. Y. 115, 120 (lost execution; search held sufficient);

North Carolina: 1844, Kelly *v.* Craig, 5 Ired. 129, 133 (destruction not sufficiently shown); 1895, Blair *v.* Brown, 116 N. C. 631, 21 S. E. 434 (search held sufficient); 1902, Smith *v.* Garris, 131 N. C. 34, 42 S. E. 445 (certain legal papers; search held insufficient); 1904, Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519 (postal card; loss not sufficiently shown); 1912, Greene *v.* Messick Grocery Co., 159 N. C. 78, 74 S. E. 812 (telegram; here the ruling seems to be unconscionably strict);

North Dakota: 1901, McManus *v.* Commow, 10 N. D. 340, 87 N. W. 9 (loss of deed, sufficiently shown);

Ohio: 1833, Taylor *v.* Colvin, Wright 449 (note; loss sufficiently shown);

Oklahoma: 1893, Olds *v.* Congor, 1 Okl. 232, 238, 32 Pac. 337 (search held sufficient);

Oregon: Laws 1920, § 712, par. 2 (production excused when the original "cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default"); 1881, Howe *v.* Taylor, 9 Or. 268 (undertaking as clerk; loss sufficiently shown); 1902, Harmon *v.* Decker, 41 Or. 587, 68 Pac. 11 (search held not sufficient); 1904, State *v.* Leasia, 45 Or. 410, 78 Pac. 328 (letter; loss sufficiently shown);

Pennsylvania: 1813, Caufman *v.* Congregation, 6 Binn. 59, 63 (written agreement; search held sufficient); 1814, Meyer *v.* Barker, 6 Binn. 228, 234 (loss sufficiently proved); 1842, Weir *v.* Hale, 3 W. & S. 291, 294 (either due diligence or irretrievable loss must be shown); 1850, Porter *v.* Wilson, 13 Pa. St. 641, 649 (search held insufficient); 1854, Bell *v.* Young, 1 Pa. 175 (search held sufficient for promissory note); 1870, Krise *v.* Neason, 66 Pa. 253, 260 ("when a written agreement was placed by both parties in the hands of a common friend, who afterwards died, diligent search among his papers is all that is required"); 1875, American Life Ins. Co. *v.* Rosenagle, 77 Pa. 507, 514 (slight evidence of the loss of ordinary letters between relatives, held sufficient); 1920, Weber's Estate, 268 Pa. 7, 119 Atl. 785 (will); 1920, Muncey *v.* Pullman Taxi S. Co., 269 Pa. 97, 112 Atl. 30 (plaintiff's account-books; search held insufficient);

Philippine Islands: C. C. P. 1901, § 284 (like Cal. C. C. P. § 1855); 1915, Michael & Co. *v.* Enriquez, 33 P. I. 87;

South Carolina: 1803, Anderson *v.* Robson, 2 Bay 495, 497 (bill of exchange from over seas; evidence of loss at sea held sufficient); 1814, Velton *v.* Briggs, 4 Des. 465 (evidence of loss of deed, held sufficient); 1818, Sims *v.* Sims, 2 Mill Const. 225 (search for note, held insufficient); 1824, North *v.* Drayton, Harp. Eq. 34, 41, 45 (loss of bond held sufficiently evidenced); 1830, Stockdale *v.* Young, 3 Strobh. 501, 506 (evidence of loss of old deed, held sufficient); 1839, Smith *v.* Smith, Rice 232, 234, 237 (search for judicial records, sufficient); 1852, McQueen *v.* Fletcher, 4 Rich. Eq. 152, 155, 159 (search

often lengthy and laborious expositions of the facts and their sufficiency are ill-judged expenditures of effort for a Supreme Court. Such labor, in Lord Denman's emphatic words, is a "mere waste of time." As a test for the capabilities of a fine instrument, it would be interesting to set a steam-hammer to crack a nut; but as an habitual occupation, it would be plain folly. The Supreme Courts of Judicature spend overmuch time in cracking nuts. Long days of time and tedious pages of reports have been given up to investigations of detailed facts, under the present principle, resulting in rulings which never ought to be of any significance as precedents. It is to be hoped that this practice will fall completely into disuse.

§ 1196. **Same: Kinds of Evidence admissible in Proving Loss (Circumstantial, Hearsay, Admissions, Affidavits, etc.).** The ordinary principles otherwise established apply equally to the evidence used to prove the loss of a document. Certain kinds of evidence, however, occasionally raise specific questions concerning their use for the present purpose.

(1) *Circumstantial evidence* is of course proper;[1] it is in truth the commonest, for the evidence of a loss is usually reducible to the circumstance that a document after proper search has not been seen.[2]

(2) If the circumstances are such that the Court can raise a *presumption of loss*, as matter of law (*post*, §§ 2522, 2523), then this suffices to establish

for judicial records, held sufficient); 1852, Floyd *v.* Mintsey, 5 Rich. 361, 365, 372 (search held insufficient; that the last possessor was dead and had lived out of the jurisdiction did not excuse a failure to inquire of his representatives); 1857, Berry *v.* Jourdan, 11 Rich. 67, 76 (evidence of loss of deed, held sufficient); 1892, Brooks *v.* McMeekin, 37 S. C. 285, 299, 14 S. E. 1019 (search not shown sufficient);
Tennessee: 1871, Quinby *v.* N. A. C. & T. Co., 2 Heisk. 596 (insufficient proof of loss, on the facts); 1900, Whiteside *v.* Watkins, — Tenn. —, 58 S. W. 1107 (same); 1901, Davidson L. Co. *v.* Jones, — Tenn. —, 62 S. W. 386 (same);
Texas: 1854, Clifton *v.* Lilley, 12 Tex. 130 (deed; loss sufficiently shown); 1863, White *v.* Burney, 27 Tex. 50 (deed; loss sufficiently shown); 1883, Vandergriff *v.* Piercy, 59 Tex. 371 (deed; loss insufficiently shown; last custodian's declarations insufficient; he must be called or accounted for); 1885, Continental Ins. Co. *v.* Pruitt, 65 Tex. 125, 128 (schedule of property; loss sufficiently shown); 1889, Ruby *v.* Van Valkenburg, 72 Tex. 459, 468, 10 S. W. 514 (judgment-record; loss sufficiently shown); 1890, Mugge *v.* Adams, 76 Tex. 448, 450, 13 S. W. 330 (letter; loss not shown); 1895, Cabell *v.* Holloway, 10 Tex. Civ. App. 307, 31 S. W. 201 (search held sufficient);
Vermont: 1831, Bliss *v.* Stevens, 4 Vt. 88, 92 (search for an execution, held sufficient); 1834, Braintree *v.* Battles, 6 Vt. 395, 399 (search for a charter in the proper place of custody, held sufficient); 1839, Viles *v.* Moulton, 11 Vt. 470, 474 (search for lost note, held insufficient); 1842, Royalton *v.* R. & W. T. Co., 14 Vt. 311, 323 (contract with a town; search held insufficient); 1861, Thrall *v.* Todd, 34 Vt. 97 (assignment of claim; search held insufficient); 1863, Rutland & B. R. Co. *v.* Thrall, 35 Vt. 536, 547 (newspaper notice; proof of loss of whole edition not necessary; diligent search for a copy, sufficient);
Washington: 1898, State *v.* Erving, 19 Wash. 435, 53 Pac. 717 (letter; loss sufficiently proved); 1916, Case Threshing M. Co. *v.* Wiley, 89 Wash. 301, 154 Pac. 437 (search for a letter held insufficient);
Wisconsin: 1858, Conkey *v.* Post, 7 Wis. 131, 137 (note; loss sufficiently shown); 1880, Mullenback *v.* Batz, 49 Wis. 499, 501, 5 N. W. 942 (letter used at a former trial; loss sufficiently shown).
Wyoming: 1920, Caswell *v.* Ross, 27 Wyo. 1, 188 Pac. 977 (promissory note).

§ **1196.** [1] 1831, Swift *v.* Stevens, 8 Conn. 431, 437; 1825, Peay *v.* Picket, 3 McCord 318, 322.

[2] See the opinion of Colcock, J., in Peay *v.* Picket, *supra*. That direct testimony to the document's destruction is not needed, is apparently the meaning of Courts declaring that the loss *need not be proved with absolute certainty*: for example: 1882, Elwell *v.* Mersick, 50 Conn. 275 (a "reasonable presumption", even though by slight evidence); 1827, Taunton Bank *v.* Richardson, 5 Pick. Mass. 436, 441 (evidence of "absolute, irrecoverable loss" not necessary: "all due diligence having been used in searching for it" is enough); 1868, Corbett *v.* Nutt, 18

the loss; the lapse of time is a circumstance often thus availed of.[3] But it should be noted that, when the presumption of an unknown lost grant (*post*, § 2522) is appealed to, it does not avail to excuse the party from accounting for a specific deed by proving its loss.[4]

(3) The *hearsay statement* of a custodian or other person who has been applied to in the course of a search may be regarded in two aspects. (*a*) It may be distinctly offered as evidence that the assertion contained in it — the fact of loss or of search — is true, and is thus obnoxious to the Hearsay rule, and inadmissible;[5] though one Court has ruled otherwise on the ground that for proof to the judge (*ante*, § 4, *post*, § 2550) the ordinary rules do not apply.[6] (*b*) But it may also and better be regarded as merely one of the circumstances entering into the sufficiency of the search, *i.e.* not as testimony to the fact asserted, but as a circumstance tending to show that the searcher has not failed in reasonable diligence in not proceeding further (upon the principles of § 245, *ante*, § 1789, *post*). This view has been explained and recognized with approval in England,[7] and finds some favor in this country also,[8] as it should.

(4) *Testimony by the party* himself stands upon the same rules as other

Gratt. Va. 624, 633, 638 (proof beyond possibility of mistake, not required; a moral certainty is sufficient).

Compare the cases for *lost wills* (*post*, § 2106).

[3] *Eng.* 1843, R. *v.* Hinley, 1 Cox Cr. 13 (a hamper used for sending goods six months before; destruction here held doubtful); *Ala.* 1845, Pond *v.* Lockwood, 8 Ala. 669, 676 (notes paid off and received by the maker several years before, presumed destroyed); *Pa.* 1782, Morris *v.* Vanderen, 1 Dall. 64 (official list of original purchasers of land from William Penn, received, and production of their deeds not required); 1774, Hurst *v.* Dippe, ib. 20, *semble* (same, received); 1823, Kingston *v.* Lesley, 10 S. & R. 383, 387 (same; the deeds presumed unavailable); 1840, Tilghman *v.* Fisher, 9 Watts 441, 444 (loss of certain old papers presumed from lapse of time); *Vt.* 1871, Eddy *v.* Wilson, 43 Vt. 362, 375 (notice of sale posted, more than a year before; loss presumed).

[4] 1845, Reynolds *v.* Quattlebum, 2 Rich. 140, 144.

[5] *Can.* 1858, Bratt *v.* Lee, 7 U. C. C. P. 280 (testimony to a reported search by the plaintiff and his wife, who declared themselves to the witness to be unable to find, held insufficient); *U. S. Kan.* 1880, Brock *v.* Cottingham, 23 Kan. 383, 388 (clerk of Court's statements during search for execution by H. and clerk, excluded; his deposition or testimony should be had); *N. Car.* 1825, Governor *v.* Barkley, 4 Hawks 20 (declarations of the living administrator of the deceased possessor of the document, not admitted to show the loss); 1886, Justice *v.* Luther, 94 N. C. 793, 798 (depositary's hearsay reply, to the witness searching, that the document was lost, held insufficient); *Or.* 1912, Kenworthy *v.* Slooman, 62 Or. 604, 125 Pac. 273; *S. Car.* 1844, Cathcart *v.* Gibson, 2 Speer 661 (search and hearsay declarations of last possessor's search, insufficient); *Tex.* 1849, Dunn *v.* Choate, 4 Tex. 14, 18 (hearsay statements of the custodian, not sufficient; he must be called if living).

[6] 1850, Higgins *v.* Watson, 1 Mich. 428, 432 (hearsay confession of thief of document received, "this being a preliminary inquiry, and the testimony being given to the Court and not to the jury").

[7] 1845, Denman, L. C. J., in R. *v.* Kenilworth, 7 Q. B. 642, 649 (disapproving R. *v.* Denio, *infra:* "It would, I think, have been quite enough to say that the evidence of a 'bona fide' search was such as might satisfy the Sessions [trial Court]. . . . When the party got a reasonable account which showed that the documents could not be found, why was he to go farther?"; Williams, J.: "If you let that [declaration] in, there is quite enough to satisfy a reasonable man that the document is lost. If you do not, the search has been carried as far as, upon the admitted evidence, it can go. . . . It is not necessary to call the person who gives the answer, in order to show why he gave it"); 1858, R. *v.* Braintree, 1 E. & E. 51, 57 (indenture of apprenticeship; the inquiries to and answers by persons likely to have the document, held admissible; Campbell, L. C. J.: "Any questions may be put for the purpose of showing that there has been a reasonable and 'bona fide' search; though the answers to them may not be evidence in the ultimate question before the Court").

The rulings in England and Ireland, however, are not harmonious: 1815, R. *v.* Morton, 4 M. & S. 48, *semble* (admitted); 1827, R. *v.* Denio, 7 B. & C. 620 (excluded); 1828, R. *v.*

testimony, except in two respects. (*a*) When the *disqualification of a party* as witness prevailed (*ante*, § 577), it was often an especial hardship to satisfy the requirements of the present rule, because the party would commonly be the only person able to give information of the loss of his document. Accordingly an exception was established in almost every jurisdiction, by which the *party*, in spite of his disqualifying interest, was allowed to testify to the fact of loss; the exception being based by some Courts on the necessity of the case, by others on a broad principle that upon incidental matters provable to the judge the disqualification did not apply.[9] With the general removal of parties' disqualifications (*ante*, § 577), this exception ceased to exist as such; though it would on principle still apply for disqualified survivors (*ante*, § 578). (*b*) It became common, in some jurisdictions, to admit merely the *party's affidavit* for the above purpose; thus establishing an exception not only to the rule of disqualification, but also to the hearsay rule (*post*, § 1709).[10] When, therefore, in many jurisdictions, statutes made a certified copy of a recorded deed admissible to prove the execution and contents of the deed, if the original was unavailable, these statutes usually continued the old practice by providing that the party's affidavit should be admissible to prove the loss (*post*, § 1225). The disqualification of parties was by this time removed, so that they might have testified in person on the stand; and the affidavit-allowance was thus only an exception to the hearsay rule. The questions arising under these statutes (which usually allow the affidavit to prove that the document is either lost or out of the party's control) are considered under the subject of registered deeds (*post*, § 1225). The statutory exception, being in strictness only a survival of an exceptional common-law practice, of course does not authorize the use of a stranger's affidavit (*post*, § 1708).

Stourbridge, 8 B. & C. 96 (admitted); 1834, R. *v.* Rawden, 2 A. & E. 156 (not admissible, except when made by one in possession of the document); 1852, R. *v.* Saffron Hill, 1 E. & B. 93, 97 (whether admissible to show that search in other places was unnecessary, not decided); 1876, Smith *v.* Smith, 10 Ir. R. Eq. 273, 276, 280 (inquiries and replies admitted).

Compare the rule for a search for an *attesting witness* (*post*, § 1313), and the cases cited *ante*, §§ 158, 664.

[8] 1918, Virginia & W. V. Coal Co. *v.* Charles, D. C. W. D. Va., 251 Fed. 83 (loss of 1874 deed recorded in B. Co.: in 1903 the county clerk informed J. that the 1874 deed was destroyed by the B. Co. courthouse fire in 1885; J.'s testimony to this, admitted as showing diligent search); 1852, Harper *v.* Scott, 12 Ga. 125, 136 (admitted to lay the foundation for proof of search, the declarant being dead); 1906, Interstate Inv. Co. *v.* Bailey, — Ky. —, 93 S. W. 578 (deed); 1920, Weber's Estate, 268 Pa. 7, 110 Atl. 785 (testator's declaration that he had accidentally torn the will, considered; point not raised); 1868, Corbett *v.* Nutt, 18 Gratt. Va. 624, 633, 635 (inquiry for will and probate at the clerk's office, the clerk at the request of the witness making search and reporting the documents to have been among records burnt; held sufficient; though in case of suspicion the calling of the clerk might have been required).

[9] The following cases are only a few illustrating the principle: *Cal.* 1858, Bagley *v.* Eaton, 10 Cal. 126, 146; *N. J.* 1865, Clark *v.* Hornbeck, 17 N. J. Eq. 430, 450; *N. Y.* 1814, Butler *v.* Warren, 11 John. 57 (*contra*, but repudiated in the next case); 1819, Jackson *v.* Frier, 16 John. 193, 195; 1822, Chamberlain *v.* Gorham, 20 John. 144, 146; 1830, Betts *v.* Jackson, 6 Wend. 173, 177; 1841, Woodworth *v.* Barker, 1 Hill 172 (limiting the use); 1847, Vedder *v.* Wilkins, 5 Den. 64.

Occasionally a statute dealing with this old situation survives in the modern revisions; *e.g.* Minn. Gen. St. 1913, § 8432.

[10] See, for example: 1844, Bachelder *v.* Nutting, 16 N. H. 261, 264; 1852, Neally *v.* Greenough, 25 N. H. 325, 329; 1828, Tayloe *v.* Riggs, 1 Pet. 591, 596; and the cases cited *post*, § 1709.

It was sometimes contended that this affidavit of the party was *indispensable*, and not merely allowable; [11] but this misunderstanding of the principle was generally repudiated.[12]

(5) Proof of the loss may also be made by the *opponent's admission*.[13] It may also be made by the record of judgment in a statutory proceeding to establish the contents of a lost document.[14]

(6) In a *criminal prosecution* for larceny, it is enough to prove the fact of the loss of the document by stealing, in order to proceed to establish its contents without production; it is not necessary to prove first the stealing by the defendant.[15]

§ 1197. **Same: Discriminations between Loss and other situations.**

(1) The statutory conditions on which a certified copy of a *registered deed* will be admitted include usually other things than loss; and these statutory conditions can best be examined in another place (*post*, § 1225).

(2) The *fraudulent suppression* or destruction of a document by the opponent, which puts the proponent in the same position as a loss (with reference to the non-necessity of giving notice) may be considered under the head of detention by the opponent (*post*, §§ 1207, 1209).

(3) On a charge of *larceny*, so far as the possession is assumed to be in the defendant, the case is governed by the rules applicable to detention by the opponent (*post*, §§ 1200, 1207).

(4) The doctrines of the substantive law of *negotiable instruments*, in regard to the conditions upon which an action or a criminal prosecution may be maintained upon them, when lost or destroyed and not producible, are not here involved.[1] The survivals of the old idea that a lost instrument was

[11] 1791, Blanton *v.* Miller, 1 Hayw. 4 ("because no other can safely swear his want of possession").

[12] *Fed.* 1831, Doe *v.* Winn, 5 Pet. 233, 242 (a rule of Court of December, 1823, required the party's affidavit that the document was lost or destroyed and not in his control, as indispensable in addition to other evidence of loss; held, that if sufficient other evidence of loss existed, the rule of Court requiring additionally the affidavit was improper; Johnson, J., diss.); *Ga.* 1859, Sutton *v.* McLoud, 26 Ga. 637, 642; *Mass.* 1844, Foster *v.* Mackay, 7 Metc. 531, 537 (treated as not invariably requisite; here dispensed with, the record plaintiff being a nominal party only and having absconded); *Tenn.* 1849, Hale *v.* Darter, 10 Humph. 92 (affidavit by the party himself is not essential, if other sufficient evidence is given).

The rule regarding the necessity of an affidavit of loss in *going to equity for relief* is not within the present purview; see *post*, § 1197.

[13] 1895, Pentecost *v.* State, 107 Ala. 81, 18 So. 146.

For the case of the *opponent's own possession and loss*, and the necessity of giving notice in such a case, see *post*, § 1209. For the opponent's admission of the *contents*, see *post*, § 1255.

[14] For the sufficiency of a copy thus established, see *post*, §§ 1660, 1682; for the preference, if any, for such a copy, see *post*, §§ 1273, 1347.

For the use of *recitals in old deeds* as evidence of contents, see *post*, §§ 1573, 2143.

[15] The following ruling is of course absurd: 1864, R. *v.* Farr, 4 F. & F. 336 (burglary, and stealing a ring; a question about the inscription on the ring, not allowed; Counsel: "It is proved to have been stolen, so that we cannot produce it"; Channell, B.: "It is not proved to have been stolen by the prisoner, which indeed is the question to be tried").

§ 1197. [1] See, for example: 1809, Pierson *v.* Hutchinson, 2 Camp. 211 (action on a lost negotiable instrument); 1827, Hansard *v.* Robinson, 7 B. & C. 90 (same); Daniel, Negotiable Instruments, II, §§ 1475–1485, 4th ed.; 1901, Cross *v.* People, 192 Ill. 29, 61 N. E. 400 (forgery of a lost instrument may be prosecuted).

a lost right (*ante*, § 1177) are seen in the statutes enabling the owner of lost commercial paper to maintain an action, on specified conditions.[2]

(5) Certain statutes providing that lost pleadings or documents of title may be *supplied by affidavit* seem to concern only the providing of a copy for purposes of profert or of adjudication, and not to alter the ordinary rules as to proof of loss.[3]

§ 1198. **Same: Intentional Destruction by Proponent himself.** If it should appear that the party desiring to prove a document had himself destroyed it, with the object of preventing its production in court, the evidence of its contents, which he might then offer, could properly be regarded as in all likelihood false or misleading (*ante*, § 291). It is with this extreme case in mind that a few Courts have inconsiderately laid down an unconditional rule that the proponent's intentional destruction of the document bars him from evidencing its contents in any other way:

1824, EWING, C. J., in *Broadwell* v. *Stiles*, 8 N. J. L. 58, 60: "He who voluntarily, without mistake or accident, destroys primary evidence thereby deprives himself of the production and use of secondary evidence. The best evidence is required; and if a party, having such in his power, voluntarily destroys it, the law knows no relaxation for him, whatever may be given to accident or misfortune. . . . To admit of evidence under such circumstances is as repugnant to principle as to deny a party the cross-examination of the witnesses of his adversary."

But it is obvious that there may be many cases of intentional destruction which do not present the above extreme features. The intentional destruction may clearly appear to have been natural and proper, or it may be merely open to the bare suspicion of fraudulent suppression; and in such cases the evidence of its contents should be received, subject to comment on the circumstances. The more liberal view is represented in the following passages:

1824, TODD, J., in *Riggs* v. *Tayloe*, 9 Wheat. 483, 487: "It will be admitted that where a writing has been voluntarily destroyed with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such cases the secondary proof ought not to be received. But in cases where the destruction or loss, although voluntary, happens through mistake or accident, the party cannot be charged with default. In this case, the affiant states that if he tore up the paper, it was from a belief that the statements upon which the contract had been made were correct, and

[2] CANADA: *N. Br.* Consol. St. 1903, c. 111, § 257; *Newf.* Consol. St. 1916, c. 83, § 21; *Yukon:* Consol. Ord. 1914, c. 48, Rule 128; UNITED STATES: *Ala.* Code 1907, § 2491; *Colo.* Comp. L. 1921, § 6548; *La.* Rev. Civ. C. 1920, §§ 2279, 2280; *Md.* Ann. Code 1914, Art. 75, § 14; *Mich.* Comp. L. 1915, §§ 12543, 12544; *Minn.* Gen. St. 1913, § 8433; *N. Mex.* Annot. St. 1915, §§ 4220–4222; *N. Y.* C. P. A. 1920, § 333; *Wis.* Stats. 1919, § 4190.

[3] S. C., St. 1870, C. C. P. 1922, § 747 (if original "pleading or paper" is lost, Court may authorize use of copy); Tenn. St. 1819, c. 27, §§ 1–4, Shannon's Code 1916, §§ 5694–5696 (any instrument lost or wrongfully detained by the opponent "may be supplied" by affidavit; if put in issue, may be proved by "competent evidence of its contents").

Relics of the old notion that the loss of the instrument precluded any action upon the right which is represented are seen in certain surviving remedial statutes; *e.g.* Mo. Rev. St. 1919, § 1413.

In some States there is a rule of pleading requiring a *count to set up a lost deed:* 1900, Hatcher *v.* Hatcher, 127 N. C. 200, 37 S. E. 207 (at least, where the proof is not by certified copy).

For the requirement as to *lost wills and records*, see *post*, §§ 1267, 2106.

that he would have no further use for the paper; in this he was mistaken. If a party should receive the amount of a promissory note in bills and destroy the note, and it was presently discovered that the bills were forgeries, can it be said that the voluntary destruction of the note would prevent the introduction of evidence to prove the contents thereof? Or, if a party should destroy one paper believing it to be a different one, will this deprive him of his rights growing out of the destroyed paper? We think not."

1858, FIELD, J., in *Bagley* v. *McMickle*, 9 Cal. 430, 446: "The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible is the prevention of fraud; for if a party is in possession of this evidence and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes which its production would expose and defeat. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from the suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is, then, the controlling fact which must determine the admissibility of this evidence in such cases."

The view now generally accepted[1] is that (1) a destruction in the ordinary

§ 1198. [1] The cases on both sides are as follows: ENGLAND: 1805, R. *v.* Johnson, 7 East 65, 66, 29 How. St. Tr. 437 (envelopes destroyed by fire, after opening, in the ordinary course of business; contents shown); 1807, Kensington *v.* Inglis, 8 East 273, 278, 288 (similar; expired trading license).

UNITED STATES: *Federal:* 1824, Riggs *v.* Tayloe, 9 Wheat. 483, 487 (voluntary destruction, supposing the paper to be no longer needed; contents allowed; see quotation *supra*); 1824, Renner *v.* Bank, 9 Wheat. 581, 597 ("If the circumstances will justify a well-grounded belief that the original paper is kept back by design, no secondary evidence ought to be admitted"); 1832, U. S. *v.* Doebler, 1 Baldw. 519, 520 (letter sent by defendant to accomplice, and probably destroyed by him as a precaution; evidence of the contents, apparently from the accomplice, admitted);
Alabama: 1892, Rodgers *v.* Crook, 97 Ala. 722, 725, 12 So. 108 (throwing away a letter containing opponent's admissions; secondary proof allowed); 1896, Miller *v.* State, 110 Ala. 68, 20 So. 392 (bastardy; destruction of a letter from the defendant by the complainant at his request, held not to exclude oral evidence); Bracken *v.* State, 111 Ala. 68, 20 So. 636 (same);
California: 1858, Bagley *v.* McMickle, 9 Cal. 430, 435, 448 (destruction by consent; *semble*, production not necessary on the facts; see quotation *supra*); 1858, Bagley *v.* Eaton, 10 Cal. 126, 148 (the motive controls; if done under erroneous impression as to its effect, under circumstances free from suspicion of intended fraud, production not required); C. C. P. 1872, § 1855 (quoted *ante*, § 1195);
Colorado: 1875, Sellar *v.* Clelland, 2 Colo. 532, 535, 546 (fraudulent purpose must be negatived; here, a destruction by joint act of plaintiff and defendant, held not to exclude evidence of contents); 1883, Breen *v.* Richardson, 6 Colo. 605 (self-destroyed articles of partnership, allowed on the facts to be proved);
Connecticut: 1823, Bank of U. S. *v.* Sill, 5 Conn. 106, 111 (cutting a bill and sending the halves separately by mail, one half being lost; production not required);
Illinois: 1867, Blake *v.* Fash, 44 Ill. 302, 304 (voluntary destruction excludes secondary evidence, unless fraudulent design is disproved);
Indiana: 1859, Anderson Bridge Co. *v.* Applegate, 13 Ind. 339 (contract burned by promisee by way of cancellation; copy excluded); 1877, Rudolph *v.* Lane, 57 Ind. 115, 118 (letter torn up after reading; destruction with apparent fraudulent design bars other evidence, unless the fraud is rebutted); 1906, Gibbs *v.* Potter, 166 Ind. 471, 77 N. E. 942 (rule applied to an altered document);
Iowa: 1899, Murphy *v.* Olberding, 107 Ia. 547, 78 N. W. 205 (contract blurred by proponent's children with ink; after making a clean copy, he threw away the original; copy admitted);
Kentucky: 1899, Shields *v.* Lewis, — Ky. —, 49 S. W. 803 (breach of promise of marriage; voluntary destruction by plaintiff of defendant's letters, without fraud; other evidence admissible, in trial Court's discretion);
Maine: 1858, Tobin *v.* Shaw, 45 Me. 331, 344, 347 ("if it is satisfactorily shown that the act of destruction was not the result of fraudulent intent", other evidence is admissible; here, of letters from the defendant in an action for breach of promise of marriage, the plaintiff having been advised that they would not be needed by her);

course of business, and, of course, a destruction by mistake, is sufficient to allow the contents to be shown as in other cases of loss, and that (2) a de-

Maryland: 1898, Wright *v.* State, 88 Md. 436, 21 Atl. 795 (throwing away the wrapper of a butter-package; evidence of contents admitted);
Massachusetts: 1862, Joannes *v.* Bennett, 5 All. 169, 172 (voluntary destruction excludes other evidence, "in the absence of any proof that the destruction was the result of accident or mistake or of other circumstances rebutting any fraudulent purpose or design"); 1870, Stone *v.* Sanborn, 104 Mass. 319, 325 (approving Joannes *v.* Bennett);
Michigan: 1862, Gugins *v.* Van Goider, 10 Mich. 523 (grantee of an unrecorded deed consenting to destruction; evidence of contents excluded on the present principle); 1884, People *v.* Sharp, 53 Mich. 523, 525, 19 N. W. 168 (note not kept, and explanation sufficient; production not required); 1892, People *v.* Lange, 90 Mich. 454, 456, 51 N. W. 534 (embezzlement; defendant's employers' books suspiciously disappearing, the prosecution was not allowed to resort to evidence of their contents); 1895, Shrimpton *v.* Netzorg, 104 Mich. 225, 62 N. W. 343 (letter thrown, after reading, into the waste-basket; other evidence allowed); 1901, Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475 (contract burned, by all parties' consent, because considered useless; proof of contents allowed);
Minnesota: 1866, Winona *v.* Huff, 11 Minn. 119, 130 (when the document is 'prima facie' in the offeror's possession, he must show loss or destruction "without his culpability");
Missouri: 1846, Skinner *v.* Henderson, 10 Mo. 205 (burning by mutual consent of an illegal contract; contents provable in action to recover money paid); 1902, Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625 (copy admitted of a fly-leaf account, first torn into pieces by a child, and then thrown away after the account had been copied from the pieces by the party offering the copy);
Montana: 1899, State *v.* Welch, 22 Mont. 92, 55 Pac. 927 (mere destruction of letters according to custom, not sufficient to exclude evidence of contents);
New Jersey: 1824, Broadwell *v.* Stiles, 8 N. J. L. 58 (one who had voluntarily erased and blotted out his name as an indorser was not allowed to show otherwise that the name was forged; see quotation *supra*); 1833, Vanauken *v.* Hornbeck, 14 N. J. L. 178, 181 (voluntary burning of the note sued on, held to exclude secondary evidence, as an "intentional destruction"); 1863, Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401 ("If the instrument was voluntarily destroyed by the party, secondary evidence of its contents will not be admitted, until it be shown that it was done under a mistake, and until every inference of a fraudulent design is repelled"; admitting secondary evidence of a will destroyed by the residuary legatee after the testatrix' death after legal advice that it was invalid and under the honest belief that it was so); 1865, Clark *v.* Hornbeck, 17 N. J. Eq. 430, 451 ("voluntary destruction . . . would exclude all evidence of its contents"; said of a note);
New Mexico: 1911, Di Palma *v.* Weinman, 16 N. M. 302, 121 Pac. 38 (injury to business by destruction of goods and building and consequent removal; the case having been four times tried in eight years, the plaintiff's destruction of his invoices, etc. held to be sufficiently explained; approving the text above);
New York: 1802, Livingston *v.* Rogers, 2 Johns. Cas. 488, 1 Cai. Cas. 27 (a letter left with the attorney, who either carelessly lost it or else destroyed it thinking it useless; Lansing, Ch., was for exclusion on the ground of at least "inexcusable neglect"; the majority were for admission, there being no "reasonable grounds of suspicion of a suppression of the instrument" or "of mala fides in the plaintiff"); 1827, Jackson *v.* Lamb, 7 Cow. 431, 434 (papers buried during the war of the Revolution and thus probably lost or destroyed; contents admissible); 1834, Blade *v.* Noland, 12 Wend. 173 (voluntary destruction of a note, unexplained by the proponent, excludes secondary evidence); 1837, Clute *v.* Small, 17 Wend. 238, 243 (approving the preceding); 1864, Enders *v.* Sternbergh, 40 N. Y. (Keyes) 264, 269 ("If the paper be purposely destroyed by a party having an interest in its contents", it cannot be proved); 1881, Steele *v.* Lord, 70 N. Y. 280 (destruction by the plaintiff, in good faith and in the course of business, of drafts on which the advances sued for had been made; proof of contents allowed); 1882, Mason *v.* Libbey, 90 N. Y. 683 (a plaintiff's husband had destroyed old letters from the defendant, in order to reduce the bulk of household effects when moving to another city; evidence of contents admitted if "its destruction was not to produce a wrong or injury to the opposite party or to create an excuse for its non-production"; the trial Court's discretion to control in applying this principle);
North Carolina: 1854, McAulay *v.* Earnhart, 1 Jones L. 503 (a note paid off and then destroyed; secondary evidence allowed); 1873, Pollock *v.* Wilcox, 68 N. C. 46, 50 (same);
Ohio: 1834, Woods *v.* Pindall, Wright 507 (destruction of surrendered bond by plaintiff's predecessor; contents allowed to be proved);
Pennsylvania: 1841, Shortz *v.* Unangst, 3 W. & S. 45, 55 (copy admitted, the original having been burned by one who was a nominal plaintiff but really adverse);

struction otherwise made will equally suffice, provided the proponent first removes, to the satisfaction of the judge, any reasonable suspicion of fraud. The precedents, however, are not harmonious.

The question whether a *title* obtained by deed is *revested in the grantor* by the destruction of the deed with joint consent of grantor and grantee, or whether an *alteration avoids* the instrument, has sometimes, though improperly, been solved by invoking the present principle;[2] but the question is in truth one of the substantive law of property-transfer.[3]

§ 1199. (2) **Detention by Opponent; in General.** This excuse for non-production is *historically* one of the earliest recognized; yet there was a time when it was not conceded.[1] Only in the 1700s was the exemption, by repeated rulings, put beyond doubt.[2] To-day it is constantly enforced;[3] and it applies equally in criminal and in civil cases.[4]

Porto Rico: Rev. St. & C. 1911, § 1392 (like Cal. C. C. P. § 1855);
South Carolina: 1892, State *v.* Head, 38 S. C. 258, 260, 16 S. E. 892 (witness read to L. a letter addressed to L., and L. then took it and burnt it: production not required);
South Dakota: 1905, Nelson *v.* Nat'l Drill Mfg. Co., 20 S. D. 299, 105 N. W. 630 (letters destroyed without improper motives; other evidence of them admitted);
Tennessee: 1871, Anderson *v.* Maberry, 2 Heisk. 653, 655 (destruction by the offeror's wife of a paper left behind by him in his house; production not required, there being no suspicion of suppression).

For the *inference which may be drawn* from a fradulent motive in destroying the original, see *ante*, § 291.

[2] The following cases illustrate the argument: 1855, Speer *v.* Speer, 7 Ind. 178 ("The voluntary surrender and destruction of an unrecorded deed may have the effect of divesting the title of the grantee by estopping him from proving the contents"); 1857, Thompson *v.* Thompson, 9 Ind. 323, 328 (delivery to grantor by grantee with intent to surrender title; "he cannot be permitted to allege that a deed is lost and thereupon give parol evidence of its contents, when he has surrendered t to be cancelled; the deed is not lost in such a case"; rule held applicable only to parties to the deed).

[3] For the authorities, see Jones, Real Property, II, § 1259; 1906, Crossman *v.* Keister, 223 Ill. 69, 79 N. E. 58; 1904, Tabor *v.* Tabor, 136 Mich. 255, 99 N. W. 4; 1916, Wagle *v.* Iowa State Bank, 175 Ia. 92, 156 N. W. 991; and the exhaustive article by Professor S. Williston, Harvard Law Review, XVIII, 105 (1904), on "Discharge of Contracts by Alteration", and the same author's treatise on Contracts, 1920, §§ 1876–1917.

§ 1199. [1] 1631, Earl of Suffolk *v.* Greenvill, 3 Rep. Ch. 89 (deed alleged to be concealed by the defendant; "the Court held it very dangerous to admit the contents and sufficiencies of deeds to be proved by testimony of witnesses"); 1677, Anon., 1 Mod. 266 (the defendant "had gotten the deed into his hands," in an action on a grant of advowson; the Court: "When the law requires that the deed be procured, you have your remedy for the deed at law; we cannot alter the law, nor ought to grant an imparlance [*i.e.* stay]").

[2] 1633, Bradford's Case, Clayt. 15 (copy allowable where defendant "himself hath the deed . . . and will not produce it"); 1662, Negus *v.* Reynal, 1 Keb. 12 (a deed taken away by the defendant; a lease "embezzled" by the plaintiff's lessor; neither required to be produced); 1670, Moreton *v.* Horton, 2 Keb. 483 (a lease "burnt and taken out of the plaintiff's trunk by the defendant", proved orally); 1683, Carver *v.* Pinkney, 3 Lev. 82 (debt for fees due from one owning a rectory by indenture from the Dean of L.; held, the indenture need not be shown, "which the defendant 'penes se habet'"); 1696, Lynch *v.* Clerke, 3 Salk. 154, Holt, C. J. ("in the possession of the plaintiff [opponent] himself"; copy admissible); 1711, Sir E. Seymour's case, 10 Mod. 8 (deed possessed by opponent, provable even with oral testimony, "by a man that had no copy"); 1718, Young *v.* Holmes, 1 Stra. 70 (rule recognized); 1754, Saltern *v.* Melhuish, Ambl. 247 (rule recognized); 1773, Attorney-General *v.* Le Merchant, 2 T. R. 201, note (copies of letters of the defendant had been taken while in the hands of the bankruptcy assignees; in notice and failure to produce, on a charge of unlawful importation of tea, the copies were admitted); 1778, R. *v.* Watson, 2 T. R. 199, per Buller, J. (said generally).

[3] The following cases merely recognize the general principle without ruling upon any of the details; the more detailed provisions of the Codes which recognize it are cited in the ensuing sections: *Eng.* 1836, Calvert *v.* Flower, 7 C. & P. 386; *U.S. Cal.* C. C. P. 1872, § 1855 (proof by production of original is excused, "2. when

The *reason* for the excuse is clear; if the opponent detains the document, then it is not available for the proponent, and as the fundamental notion of the general rule is that production is not required where it is not feasible, the rule here falls away and the non-production is excused:

1773, BULLER, J., in *Attorney-General* v. *Le Merchant*, 2 T. R. 201, note: "It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common cases is because the party who has them in his custody, and does not produce them, is in some fault for not producing them; it is considered as a misbehavior in him in not producing them, and therefore in criminal cases a man who does not produce them is in no fault at all, and for that reason a copy is not admitted. But I do not take that to be the rule; it is not founded upon any misbehavior of the party, or considering him in fault; but the rule is this: the copies are admitted, when the originals are in the adversary's hands, for the same reason as when the originals are lost by accident; the reason is because the party has not the originals to produce."

It is clear that this notion of *detention by the opponent*, as an excuse for non-production, involves three essential elements: (a) *possession*, or more broadly, control, by the opponent; (b) *demand*, or notice, made to him by the proponent, signifying that the document will be needed; and (c) *failure*, or refusal, by the opponent *to produce* them in court. Only when these three circumstances coexist can it be said that the document is unavailable because the opponent detains it. The significance of this analysis is shown in the detailed rules.

§ 1200. **Same: (*a*) Opponent's Possession; What Constitutes Possession.** This element of possession, or control, is not to be tested by any of the technical definitions of possession applicable in other branches of the law. The question here is whether the proponent is unable to produce the document because the opponent has practically the control of it. It is enough for this purpose if the opponent has the control, whether technically named "possession" or not:

1833, LITTLEDALE, J., in *Parry* v. *May*, 1 Moo. & Rob. 280: "The instrument need not be in the actual possession of the party; it is enough if it is in his power; which it would be if in the hands of a party in whom it would be wrongful not to give up possession to him."

(1) It follows that the document need not be actually in the *personal custody* of the opponent himself; it is enough if it be held by a third person

the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice"); *Colo.* Comp. L. 1921, C. C. P. § 391; *Conn.* 1795, Sedgwick *v.* Waterman, 2 Root 434; *Iowa*: 1889, Gafford *v.* Invest. Co., 77 Ia. 736, 738, 42 N. W. 550; *Mass.* 1830, Thayer *v.* Ins. Co., 10 Pick. 326, 329; 1852, Almy *v.* Reed, 10 Cush. 421, 425; *Mich.* 1884, Van Ness *v.* Hadsell, 54 Mich. 560, 563, 20 N. W. 585; 1886, Pangborn *v.* Ins. Co., 62 Mich. 638, 641, 29 N. W. 475 (on cross-examination); *Minn.* 1919, Kenyon Co. *v.* Johnson, 144 Minn. 48, 174 N. W. 436 (date for a map); *Miss.* 1857, Cooper *v.* Granberry, 33 Miss. 117, 122; *Mont.* Rev. C. 1921, § 10516; *N. H.* 1856, Cross *v.* Bell, 34 N. H. 82, 88; *N. Y.* 1814, Jackson *v.* Woolsey, 11 John. 446; 1831, Life & Fire Ins. Co. *v.* Ins. Co., 7 Wend. 31, 34; *Or.* Laws 1920, § 712, par. 1 (like Cal. C. C. P. § 1855); *Pa.* 1900, Strawbridge *v.* Clamond Tel. Co., 195 Pa. 118, 45 Atl. 677; *P. I.* C. C. P. 1901, § 284 (like Cal. C. C. P. § 1855); *P. R.* Rev. St. & C. 1911, § 1392 (like Cal. C. C. P. § 1855).

[4] 1867, R. *v.* Elworthy, 10 Cox Cr. 579, 582, 583; and see numerous other instances in the ensuing notes.

on the opponent's behalf and subject to the opponent's demand.[1] The question whether notice to such a third person to produce is sufficient (*post*, § 1208) is a different one.[2]

(2) It is immaterial that the document is *out of the jurisdiction*, if it is held there on behalf of the opponent;[3] the only question can be as to the sufficiency of time allowed by the notice to produce (*post*, § 1208).[4]

(3) A *past recent possession*, not shown to have ceased, will ordinarily be assumed to continue.[5] A *transfer of possession* by the opponent to a third person after notice received will not take away the proponent's excuse for non-production.[6] Nor, in fairness, should a transfer shortly before notice

§ 1200. [1] The precedents cover various situations, and no more detailed rule can be or ought to be laid down:

ENGLAND: 1816, Baldney *v.* Ritchie, 1 Stark. 338 (an order of delivery sent to the captain of the defendant's vessel by the defendant; held the possession of the defendant): 1824, Partridge *v.* Coates, Ry. & Mo. 153 (agent's possession sufficient; banker held a customer's agent in holding a check); 1824, Sinclair *v.* Stevenson, 1 C. & P. 582, 585 (agent's possession is the principal's; here the opponent had given it to a third person and did not make it appear that he could not get it back); 1827, Burton *v.* Payne, 2 C. & P. 520 (a check with the defendant's bankers; no notice necessary to the latter; Bayley, J.: "The bankers are your [the defendant's] agents; you would have a right to go to the bankers and demand the check of them"); 1833, Parry *v.* May, 1 Moo. & Rob. 279 (a document in the hands of a common agent of the defendant and a third person, held not in the defendant's control; "he must have such a right to it as would entitle him not merely to inspect but to retain"); 1845, Robb *v.* Starkey, 2 C. & K. 143 (agent's possession sufficient, even though there is merely "evidence to go to the jury" of the defendant's agent's custody); 1860, Irwin *v.* Lever, 2 F. & F. 296 (Pollock, C. B.: "The possession of the plaintiff's attorney is the possession of the plaintiff; . . . though they [*i.e.* agents] *might* perhaps be subpœnaed, it is not *necessary* to subpœna them; when the principal is a party to the suit, it is sufficient to give the party notice"; here, the document was in the hands of an attorney in another suit, different from the one acting in the present suit; notice to the principal held sufficient); 1860, Blackburn, J., in Wright *v.* Bunyard, 2 F. & F. 193, 196 (opponent's banker's possession, held not sufficient); 1860, Pollock, C. B., in Irwin *v.* Lever, 2 F. & F. 296 (opponent's banker's possession sufficient).

UNITED STATES: *Federal:* 1782, Morris *v.* Vanderen, 1 Dall. 64, 65 (that deeds were detained by the opponent's lessor under whom he claimed, sufficient); 1832, U. S. *v.* Doebler, 1 Baldw. 519, 522 (forgery; letter sent by defendant to accomplice, asking for more of the forged notes, held to be constructively in defendant's possession); *Cal.* 1901, Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88 (possession of the attorney suffices); *D. C.* 1894, Main *v.* Aukam, 4 D. C. App. 51, 55 (possession by a co-defendant, subject to defendant's call, held the possession of defendant); *Ill.* 1906, Young *v.* People, 221 Ill. 51, 77 N. E. 536 (letter last seen in possession of K.; notice to K. required, before evidence of contents was admissible).

[2] Here the question is whether the opponent could control the document, irrespective of the time required to obtain it, and whether under any circumstances the proponent by giving notice can excuse himself; there the question is whether notice to the agent alone suffices; *i.e.* whether the third person had a duty to communicate it and time to surrender, or whether notice to the opponent alone allows him time to obtain the document.

[3] 1908, Cutter-Tower Co. *v.* Clements, 5 Ga. App. 291, 63 S. E. 58; 1874, Gimbel *v.* Hufford, 46 Ind. 125, 129 (though out of the State, yet it may nevertheless be within the party's own control).

[4] For the question whether notice is *necessary* (here the question is merely whether it is sufficient) to an opponent out of the jurisdiction, see *post*, § 1213.

The following case belongs here: 1913, Owner *v.* Bee Hive Spinning Co., [1914] 1 K. B. 105 (violation of factory act, plaintiff being an official inspector; to prove the contents of an abstract of the Factory Act as affixed to the wall in defendant's factory, the plaintiff offered secondary evidence; the law required the affixed abstract to be kept constantly affixed; defendant argued that notice to produce should have been given; held that the case was one of an irremovable document, and that the principle of § 1219, applied; Mortimer *v.* M'Callan, *post*, § 1219, cited).

[5] 1829, R. *v.* Hunter, 4 C. & P. 128 (former possession presumptively held to continue).

[6] 1819, Knight *v.* Martin, Gow 103.

served be an excuse, if the opponent did not duly advise the proponent, at the time of notice, that he had transferred it.[7]

§ 1201. **Same: Mode of Proving Possession; Documents sent by Mail.** Difficulties of principle sometimes arise with reference to the evidence offered to prove the opponent's possession so as to take advantage of the present excuse.

(1) In the first place, the opponent's possession *must be somehow shown* by the party offering a copy;[1] and the sufficiency of the proof is of course a preliminary question to be determined by the judge.[2]

(2) In the next place, it often happens that the only evidence of such possession is the *mailing of the document*, under cover duly stamped and addressed, to the opponent; this is on general principles (*ante*, § 95) to be regarded as sufficient evidence of its receipt by the addressee, and therefore ought to suffice as evidence of his possession in order to excuse the proponent's non-production after notice to the opponent.[3] This question must be

[7] *Contra:* 1860, Wright *v.* Bunyard, 2 F. & F. 193, 194 (the defendant had transferred it before notice served; copy not allowed, even though the proponent did not know, until the defendant so testified, what had become of it).

§ 1201. [1] The following citations include various instances of proof deemed sufficient on the facts: ENGLAND: 1819, Knight *v.* Martin, Gow 103; 1834, Whitford *v.* Tutin, 10 Bing. 395; UNITED STATES: *Fed.* 1825, Vasse *v.* Mifflin, 4 Wash. C. C. 519 (opponent denied receipt of letter; sending not shown; copy excluded); *Ala.* 1895, Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714; *Ariz.* 1917, Lally *v.* Cash, 18 Ariz. 574, 164 Pac. 443 (libel); *Ga.* 1857, Bell *v.* Chandler, 23 Ga. 356, 359 (execution, presumably on file); *Ill.* 1903, Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 (lease); *Ky.* 1830, Hughes *v.* Easten, 4 J. J. Marsh. 572; *Mich.* 1874, Sun Ins. Co. *v.* Earle, 29 Mich. 406, 411; 1886, Gage *v.* Meyers, 59 Mich. 300, 306, 26 N. W. 522 (mere proof of writing a letter to opponent, the latter denying its receipt, insufficient); *Minn.* 1860, Desnoyer *v.* McDonald, 4 Minn. 515, 518 (documents sufficiently traced to defendant's possession); 1867, Thayer *v.* Barney, 12 Minn. 502, 512 (same); 1893, Lovejoy *v.* Howe, 55 Minn. 353, 356, 57 N. W. 57 (possession traced to opponent on the facts); *Miss.* 1906, Elmslie *v.* Thurman, 87 Miss. 537, 40 So. 67 (bill to enforce a vendor's lien on land conveyed to defendants; the latter not denying execution, their possession of the deed was presumed); *N. J.* 1819, Wills *v.* M'Dole, 5 N. J. L. 501 (that a document was "believed" to be in the possession of the defendant's agent, held insufficient); 1823, Den *v.* M'Allister, 7 N. J. L. 46, 55; *N. Y.* 1906, People *v.* Dolan, 186 N. Y. 4, 78 N. E. 569 (forgery of notes; other forged notes being relevant to show knowledge, etc., the prosecution was excused from producing the originals, without proof of loss, due notice to produce having been given to the defendant, since here the course of business raised the inference "that they were all returned to the possession of the defendant"); *Okla.* 1912, Landon *v.* Morehead, 34 Okl. 701, 126 Pac. 1027; *Or.* 1916, Toomey *v.* Casey, 82 Or. 71, 160 Pac. 583 (assignment of lease by defendant to L.; plaintiff gave notice to produce; defendant denied possession or existence, but did produce an assignment by T. to L.; plaintiff then testified to contents of the alleged assignment; held, error, since the defendant's possession had not been evidenced and presumably the alleged document would be in the assignee's hands; applying Lord's Or. L. §§ 712, 782).

[2] 1841, Harvey *v.* Mitchell, 2 Moo. & Rob. 366; 1906, People *v.* Dolan, 186 N. Y. 4, 78 N. E. 569; *post*, § 2550.

[3] *Accord: Fed.* 1883, Rosenthal *v.* Walker, 111 U. S. 185, 193, 4 Sup. 382 (letters mailed, but said by addressee not to have been received; copies allowed); 1904, Supreme Council *v.* Champe, 127 Fed. 541, 63 C. C. A. 282 (press-copy admitted, the letter having been proved written, but its mailing and its receipt being doubtful), *Conn.* 1905, City Bank *v.* Thorp, 78 Conn. 211, 61 Atl. 428 (assignments sent to defendant, who denied their receipt and possession; copies admitted); *Ky.* 1899, Shields *v.* Lewis, — Ky. —, 49 S. W. 803 (letter mailed to opponent; evidence of contents receivable); *Mass.* 1837, Dana *v.* Kemble, 19 Pick. 112, 114 (letter left at a hotel, where the usage was to distribute regularly letters so sent, held sufficient; the question is "whether it is sufficiently proved that the letter or document has come to the hands and is in the possession and power of the opposite party"); 1875, Augur S. A. & G. Co. *v.* Whit-

carefully distinguished from another one; the question here is whether it is *sufficient* for the proponent, in excuse, to show this and give notice, as entitling him then to prove the contents; but the question may also be raised whether it is even *necessary* for him to give notice, *i.e.* whether he may not treat it as really a case of loss, and thus prove the contents without having given notice; this involves another consideration (*post*, § 1203).

(3) Whether an *attorney* may be asked as to his possession of a client's document involves the question of privilege (*post*, § 2309).

§ 1202. **Same: (*b*) Notice to Produce: General Principle.** The reason for the simple rule requiring notice has at times been the subject of some singular misunderstandings and fantastic inventions.

(1) It has been said, for example, that the opponent must be notified so that the proponent may not *impose a false copy* upon the Court.[1] The answer to this is, first, that giving notice does not remove this danger, for if the opponent does not produce the original, the proponent's copy may still be false, and, secondly, that the argument would be equally sound for a document in a third person's hands, for which concededly no notice need be given to the opponent.

(2) It has also been said that the notice must be given in order to prevent *surprise* on the opponent's part;[2] the answer to this is, first, that in general no party is obliged to guard against surprising his opponent by warning him of intended evidence (*post*, § 1845); secondly, that if here the purpose were to give the opponent time to discover evidence impeaching or confirming the document, the notice should allow time for such an investigation; yet the law is clear that only time enough to produce the document need be allowed; and, thirdly, that if in fact he is not surprised, it is in law still no excuse for not giving notice.

(3) The true reason is that which is naturally deducible from the proponent's situation. He is required to produce the document if he can; he has miscarried, and the case becomes one of loss, and therefore no notice at all is necessary; see *post*, § 1203.

tier, 117 Mass. 451, 453, 455 (letter mailed to opponent, and notice to produce; denial by him of the letter's receipt; a copy admitted); 1879, Dix *v.* Atkins, 128 Mass. 43 (letter delivered to opponent's clerk, but receipt denied by opponent; held sufficient evidence of possession); 1921, Eveland *v.* Lawson, — Mass. —, 132 N. E. 719 (letter sent by mail to opponent, and receipt denied by him); *Or.* 1895, Sugar Pine D. & L. Co. *v.* Garrett, 28 Or. 168, 42 Pac. 129 (letter properly mailed; sufficient on the facts).

Contra: 1851, Choteau *v.* Railt, 20 Oh. 132 (mere deposit in post-office addressed to opponent, not enough).

The only argument in favor of an adverse ruling seems to be that the opponent's *denial of receipt* overcomes the inference resting on the fact of mailing. But if so, as the proponent has shown the mailing and the opponent denies the arrival, the dilemma can be solved only by assuming that the document

§ **1202.** [1] 1803, Ellenborough, L. C. J., in Surtees *v.* Hubbard, 4 Esp. 203 ("the reason of giving notice . . . was to check a person from giving in evidence what was a false copy"); 1857, Merrick, C. J., in Williams *v.* Benton, 12 La. An. 91 ("The reason of the rule is that possibly the instrument, when produced, will be less favorable to the plaintiffs than the parol proof which they may obtain").

[2] 1811, Le Blanc, J., in How *v.* Hall, 14 East 274, 276 ("We see the good sense of the rule which requires previous notice to be given . . . that he may not be taken by surprise"); 1831, *Curia*, in Bank *v.* Brown, Dudley 62, 64 ("The rule is . . . to prevent his being taken by surprise, in cases where it is uncertain whether such evidence will be used by the adverse party").

says that he cannot, and shows that he cannot because the opponent has it and will not bring it in; but this essential proposition, that *the opponent will not bring it in*, can be supported only by showing that the opponent has been requested to do so and has failed to comply with the request. If we translate "notice" by "demand", we shall immediately appreciate the significance of the notice as a requirement. It is a demand for future production by the opponent; and this notice or demand is necessary, in Baron Parke's words,[3] "merely to exclude the argument that the party has not taken all reasonable means to procure the original; which he must do before he can be permitted to make use of secondary evidence." This reason is clearly the only correct one, and is not only consistent with the details of the rule but has frequently been pointed out by the Courts:[4]

1808, TILGHMAN, C. J., in *Com.* v. *Messinger*, 1 Binn. 273, 274: "Notice must be served on him or his attorney to produce it, because otherwise it cannot appear that the prosecutor might not have had the original if he had chosen to call for it."

1821, PORTER, J., in *Abat* v. *Riou*, 9 Mart. La. 465, 467: "The elementary principle, which requires that the best evidence the nature of the case permits of shall be produced, . . . refuses to a party permission to give secondary evidence of a written document on the ground of its being in possession of his adversary, until he has shown that by giving notice to that adversary to produce it, he has used every exertion in his power that the best evidence might be had."

The cases arising under this requirement involve two sets of questions: the *necessity* of the notice; and the *procedure* of giving notice. Under the first head may be considered, in order, cases in which the rule of notice is not applicable; cases in which the rule is satisfied; cases in which, by exception, notice is dispensed with.

§ 1203. **Same: Rule of Notice not Applicable; Documents Lost, or Sent by Mail.** (a) The rule requiring notice to the opponent proceeds on the assumption that the opponent has possession of the document, the object being to show a demand and refusal to produce. Hence, the *mere giving of notice* or demand, without showing that the opponent had the document demanded, is of no avail.[1]

(b) Conversely, the requirement of notice does not apply to the proponent

[3] In Dwyer *v.* Collins, quoted more fully *post*, § 1204.

[4] The following list contains sundry cases merely applying the rule without illustrating any of its details: ENGLAND: 1797, Molton *v.* Harris, 2 Esp. 549; 1835, Littledale, J., in Doe *v.* Morris, 3 A. & E. 46, 50 ("When a document is shown to have been in the possession of a defendant, the plaintiff is not at liberty to talk of it till he has given notice to produce it"); UNITED STATES: *Fed.* 1840, U. S. *v.* Winchester, 2 McLean 135, 138; *Ala.* 1893, Home Prot. Co. *v.* Whidden, 103 Ala. 203; *Ga.* 1896, Smith *v.* Holbrook, 99 Ga. 256, 25 S. E. 627; *Ind.* 1855, Smith *v.* Reed, 7 Ind. 242; 1858, Mumford *v.* Thomas, 10 id. 167, 169; *Ind. Terr.* 1897, Perry *v.* Archard, 1 I. T. 487, 42 S. W. 421; *Me.* 1859, State *v.* Mayberry, 48 Me. 218, 239 (Court Rule 27 merely affirms the existing law of evidence); *Md.* 1820, Kennedy *v.* Fowke, 5 H. & J. 63; 1861, Morrison *v.* Welty, 18 Md. 169, 174; *Minn.* 1871, Board *v.* Moore, 17 Minn. 412, 424; *Nebr.* 1877, Birdsall *v.* Carter, 5 Nebr. 517; 1890, Watson *v.* Roode, 30 Nebr. 264, 273, 46 N. W. 491; *Tenn.* 1858, Farnsworth *v.* Sharp, 5 Sneed 615.

§ 1203. [1] Cases cited *ante*, § 1201, requiring possession to be shown.

unless he is proceeding on the theory that the *opponent has possession;* for example, if he is accounting for the document as lost or destroyed, and not as in possession of the opponent, notice is unnecessary.[2] It follows that where the document can be shown to have been *lost or destroyed* while in the opponent's hands,[3] or is *admitted by the opponent* to have been destroyed or lost, even out of his own possession,[4] no notice is necessary; for it is no longer a case of opponent's possession, but of loss. Furthermore, where by the proponent's evidence the document is traced to the opponent's hands — as by the presumption from *mailing* — and the opponent denies the receipt of it, then, even taking the opponent's testimony at its highest value, the whereabouts of the document becomes an unexplainable mystery, and the case is virtually one of loss; so that the proponent should be allowed to prove the contents without having given notice; while, if we take the opponent's testimony as false and assume that he has in truth received the document, his denial is equivalent to an express refusal to produce, which equally puts the plaintiff in the position of being unable to obtain the document (*post*, § 1207), so that notice is unnecessary.[5]

[2] 1816, Teil *v.* Roberts, 3 Hayw. 138; 1840, McCreary *v.* Hood, 5 Blackf. 316; 1841, Linsee *v.* State, ib. 601, 603.

For the case of *fraudulent suppression* by the opponent, see *post*, § 1207.

[3] *Contra:* 1835, Doe *v.* Morris, 3 A. & E. 46 (notice necessary, even though the plaintiff claims that it can be shown to have been since destroyed).

[4] 1861, Indianapolis & C. R. Co. *v.* Jewett, 16 Ind. 273 (admission of opponent's agent, the custodian, sufficient to prove loss); 1903, Safe Deposit & T. Co. *v.* Turner, 98 Md. 22, 55 Atl. 1023; 1890, Barmby *v.* Plummer, 29 Nebr. 64, 68, 45 N. W. 277.

Contra: 1873, Olive *v.* Adams, 50 Ala. 373, 375 (notice required, even where the opponent in litigation ten months before had admitted that his bond for title was lost or destroyed); 1885, Burlington Lumber Co. *v.* W. C. & M. Co., 66 Ia. 292, 23 N. W. 674 (opponent's admission of the loss, etc., of a document, not sufficient to dispense; the opinion erroneously supposes that the reason of the rule aims at allowing the opponent to obtain evidence as to contents or to disprove the existence of the paper, and not merely at giving time for search).

But the following case seems to go too far: 1882, Hope's Appeal, 48 Mich. 518, 12 N. W. 682 (opponent's denial of existence of document relieves from necessity of production; here, a second will said to have revoked a first, but denied by opponent to exist).

[5] This situation has given some trouble to the Courts in its solution; but the majority of rulings take the above view; *Fed.* 1894, Dunbar *v.* U. S., 156 U. S. 185, 194, 15 Sup. 325 (letters said to be in defendant's possession; defendant denied possession; *semble*, no notice needed); 1916, Watlington *v.* U. S., 8th C. C. A., 233 Fed. 247 ("proved copies of letters sent to an accused may be admitted in evidence, without otherwise accounting for the originals"); 1918, Pilson *v.* U. S., 2d C. C. A., 249 Fed. 328 (illegal use of the mails; letters sent to defendant, proved by secondary evidence without notice to produce, the evidence being that he had never received them); *Ala.* 1884, Littleton *v.* Clayton, 77 Ala. 571, 575 (following Roberts *v.* Spencer, *infra*); 1903, Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946 (letters said to have been received by the opponent, but their receipt denied by her; no notice required); 1909, Jordan *v.* Austin, 161 Ala. 585, 50 So. 70 (approving the above conclusion); *Cal.* 1869, Jones *v.* Jones, 38 Cal. 584, 586 (paper presumed in defendant's possession; after notice, defendant disclaimed all knowledge of it; copy allowed); *Ga.* 1877, Carr *v.* Smith, 58 Ga. 361 (where the opponent denies the alleged possession or alleges loss, and thus the case is in effect one of loss for the opponent, no notice is necessary); *Ia.* 1906, Stark *v.* Burke, 131 Ia. 684, 109 N. W. 206 (plaintiff's document traced to R., a hostile witness, who denied possession of such a document; plaintiff not required to call R. to produce a document which he admitted having but asserted not to be the plaintiff's); *Mass.* 1877, Roberts *v.* Spencer, 123 Mass. 397, 399 (document mailed to opponent, but said by him not to have been received; no notice necessary); *Pa.* 1905, Neubert *v.* Armstrong W. Co., 211 Pa. 582, 61 Atl. 123 (copy of letter received without notice; but the point is not raised); *Vt.* 1901, Scott *v.* Bailey, 73 Vt. 49, 50 Atl. 557.

§ 1204. **Same: Rule of Notice Satisfied; (1) Document present in Court.** Where the document is at hand in the court-room, in the opponent's possession, an instant demand is sufficient, and no previous notice, *i.e.* before the trial, is necessary. A contrary view could rest only on some erroneous idea of the reason for requiring notice, — as, for example, that it is to allow the opponent to search for evidence. But, as the only reason for it is to make clear that the proponent has demanded and failed to obtain the document and has done all that he can to obtain it (*ante*, § 1202), a notice or demand made on the spot, for a document at the moment in court, is here equally satisfactory:[1]

1852, PARKE, B., in *Dwyer* v. *Collins*, 7 Exch. 639: "The next question is whether, the bill being admitted to be in court, parol evidence was admissible on its non-production, or whether a previous notice to produce was necessary. On principle, the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then no doubt a notice at the trial, though the document be in court, is too late. But if it be merely to enable the party to have the document in court, to produce it if he likes, and if he does not, to enable the opponent to give parol evidence, — if it be merely to exclude the argument that the opponent has not taken

Contra: 1879, Dix *v.* Atkins, 128 Mass. 43 (letter delivered to opponent's clerk, but receipt denied by opponent; notice said to be necessary); 1878, Ferguson *v.* Hemingway, 38 Mich. 159 (letter to opponent; opponent's failure to recollect receipt of it, no reason for dispensing with notice); 1898, Clary *v.* O'Shea, 72 Minn. 105, 75 N. W. 115 (plaintiff alleged a lease to the defendant, in the latter's possession; defendant denied the existence of such a lease; notice held necessary).

Compare the different but related questions in § 1201, *ante*, and § 1209, n. 1, *post*.

§ 1204. [1] In the following citations, the term "not necessary" means that notice before trial is unnecessary and that notice at the trial suffices:

ENGLAND: (here the rule was not settled until the case of Dwyer *v.* Collins, above quoted); 1769, Roe *v.* Harvey, 4 Burr. 2484, 2487 (the only question decided dealt with the presumption from non-production; on the present question the opinions are obscure); 1816, Doe *v.* Grey, 1 Stark. 283 (notice required); 1832, Cook *v.* Hearn, 1 Moo. & Rob. 201, before three Judges (notice in court insufficient, though presumably the document was in court); 1834, Bate *v.* Kinsey, 1 Cr. M. & R. 38, 43 (the plaintiff's attorney had the deed in court, but claimed the attorney's privilege; Gurney, B.: "The fact of the instrument being in court makes no difference with regard to the necessity of a notice to produce"); 1842, Parke, B., in Lloyd *v.* Mostyn, 2 Dowl. Pr. N. S. 476, 481 (left undecided); 1852, Dwyer *v.* Collins, 7 Exch. 639 (plea of gaming to an action on a bill of exchange; the bill being in court in the plaintiff's hands, the defendant was not required to give notice; quoted *supra*).

UNITED STATES: *Fed.* 1827, Rhoades *v.* Selim, 4 Wash. C. C. 715, 718 (not necessary); *Ala.* 1847, Brown *v.* Isbell, 11 Ala. 1009, 1022 (notice not necessary, "perhaps"); 1884, Littleton *v.* Clayton, 77 Ala. 571, 575 (not necessary); *Ga.* 1888, Crawford *v.* Hodge, 81 Ga. 728, 730, 8 S. E. 208, *semble* (not necessary); *Ill.* 1846, Ferguson *v.* Miles, 8 Ill. 358, 364 (not necessary); *Ia.* 1884, Bell *v.* R. Co., 64 Ia. 321, 322, 20 N. W. 456 (paper delivered at trial by opponent without notice; notice not necessary for proving missing portion); *Ky.* 1826, Lamb *v.* Moberly, 3 T. B. Monr. 179 (not necessary); 1829, Dana *v.* Boyd, 2 J. J. Marsh. 587, 592 (not necessary); *Mass.* 1857, McGregor *v.* Wait, 10 Gray 72, 73, 75, *semble* (not necessary); *Mich.* 1892, Hanselman *v.* Doyle, 90 Mich. 142, 144, 51 N. W. 195 (discretion of trial Court); *N. Y.* 1867, Howell *v.* Huyck, 2 Abb. App. 423 (action to foreclose a mortgage; plea, payment to the plaintiff's assignor; to prove the indorsements of payment on the mortgage, no notice was necessary, the papers being presumed to be in court in the plaintiff's possession); *Oh.* 1851, Choteau *v.* Raitt, 20 Oh. 132 (notice at trial "might be said to be reasonable"); *S. C.* 1845, Reynolds *v.* Quattlebum, 2 Rich. 140, 144 (not necessary); 1892, Bickley *v.* Bank, 39 S. C. 281, 293, 17 S. E. 977 (not necessary); 1898, Hampton *v.* Ray, 52 S. C. 74, 29 S. E. 537 (not necessary); *Wis.* 1861, Barker *v.* Barker, 14 Wis. 131, 150 (not necessary); 1863, Barton *v.* Kane, 17 Wis. 37, 45, *semble* (same).

all reasonable means to procure the original (which he must do before he can be permitted to make use of secondary evidence), then the demand of production at the trial is sufficient. . . . If this [the former] be the true reason, the measure of the reasonable length of notice would not be the time necessary to procure the document — a comparatively simple inquiry — but the time necessary to procure evidence to explain or support it, — a very complicated one, depending on the nature of the plaintiff's case and the document itself and its bearing on the cause; and in practice such matters have never been inquired into, but only the time with reference to the custody of the document and the residence and convenience of the party to whom notice has been given, and the like. We think the plaintiff's alleged principle is not the true one on which notice to produce is required, but that it is merely to give a sufficient opportunity to the opposite party to produce it and thereby secure if he pleases the best evidence of the contents; and a request to produce immediately is quite sufficient for that purpose, if it be in court. . . . It would be some scandal to the administration of the law if the plaintiff's objection had prevailed."

1829, MILLS, J., in *Dana* v. *Boyd*, 2 J. J. Marsh. 587, 592: "The design of the notice is that the party may be apprized of the necessity of bringing it in. If it is already there, demand of its production is sufficient notice."

§ 1205. **Same: Rule of Notice Satisfied; (2) Implied Notice in Pleadings; New Trial; Trover, Forgery, etc.** It is clear that the proponent's notification of his need for a specific document may be made otherwise than by an express writing formally calling upon the opponent to produce. Where by necessary implication the opponent has become informed to that effect, there is a sufficient notification, such that the opponent's failure to produce will place the proponent at liberty to prove the contents otherwise.

The chief instance of such a notice by necessary implication occurs where by the *pleadings* of the proponent the cause of action makes it clear that he will need to prove, as a material part of his case, the contents of a specific document in the opponent's possession:

1811, LEBLANC, J., in *How* v. *Hall*, 14 East 274, 277: "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice."

The principle is universally accepted; and a variety of cases — some of them more or less open to difference of opinion — illustrate its application.[1]

§ 1205. [1] ENGLAND: 1800, Anderson *v.* May, 2 B. & P. 237 (action by an attorney for services rendered; his bill had already been delivered to the defendant, though not by way of notice of the action, but in the ordinary way of a demand; no notice required); 1807, Jolley *v.* Taylor, 1 Camp. 143 (assumpsit upon a promise to carry three promissory notes; no notice required); 1817, Wood *v.* Stickland, 2 Meriv. 461 (notice not necessary for a Chancery hearing, where through the prior publication of the depositions the opponent knew that the document would be needed); 1827, Colling *v.* Treweek, 6 B. & C. 394, 398 ("where from the nature of the suit, the opposite party must know that he is charged with possession of the instrument"; here applied to an attorney's bill sued upon, the law requiring a delivery of it to the client one month before bringing suit); 1835, Read *v.* Gamble, 10 A. & E. 597 (the plaintiff sued on a check; plea, that it covered a gambling debt; the defendant held bound to give notice); 1839, Shearm *v.* Burnard, 10 A. & E. 593, 596, *semble* (plea that a note sued on was given in payment of an accommodation note; notice to produce the latter note required); 1840, Knight *v.* Waterford, 4 Y. & C. 283, 292 (action for tithes; bond to a predecessor in title for a lease of tithes; whether notice was not necessary, left undecided; Wood *v.* Stickland doubted).

CANADA: 1859, Bank of Montreal *v.* Snyder, 18 U. C. Q. B. 492 (action on a note; notice required, the plea not denying its genuineness but alleging fraud; unsound).

UNITED STATES: *Federal:* 1912, Ætna Ins. Co. *v.* Bank, C. C. A., 194 Fed. 385 (policyholder's notification to the defendant of a fire

A few cases call for special mention:

(*a*) In an action of *trover* for a document, there can be no doubt that on the present principle the plaintiff may prove the conversion of the document without having expressly notified the defendant to produce it, because the very nature of the action sufficiently notifies the defendant.[2] But, practi-

loss, held improperly proved orally; the present point was not raised, but should have been, and it is astonishing that a court of appeal will reverse a judgment in such a case without noticing so obvious a point to save the reversa[1]); *California:* 1886, Nicholson *v.* Tarpey, 70 Cal. 608, 610, 12 Pac. 778 (action on the contract for sale of land, the defendant having possession of the only remaining dupiicate original of the contract; notice not required); *Colorado:* 1878, Cole *v.* Cheovenda, 4 Colo. 17, 21 (action for breach of contract; notice at the trial sufficient); *Connecticut:* 1803, Ross *v.* Bruce, 1 Day 100 (civil action for money paid on forged note: no notice needed); *Georgia:* Rev. C. 1910, § 5843 (express notice not necessary "when the action is brought to recover the paper or set it aside"); 1887, Columbus & W. R. Co. *v.* Tillman, 79 Ga. 607, 610, 5 S. E. 135 (action on contract of carriage; notice required for bill of lading); *Illinois:* 1886, Spencer *v.* Boardman, 118 Ill. 553, 9 N. E. 330 (petition to sell deceased's estate; notice of use of ante-nuptial contract, implied by the pleadings); *Indiana:* 1862, Commonwealth's Ins. Co. *v.* Monninger, 18 Ind. 352, 361 (action on a policy; notice for notice of loss, not required); *Iowa:* 1862, Patterson *v.* Linder, 14 Ia. 414 (bill to quiet title by vendor who had given bond for a deed; notice required for the bond); *Kansas:* 1902, State *v.* Dreany, 65 Kan. 292, 69 Pac. 182 (conspiracy in restraint of trade; notice to produce the illegal agreement, held to be implied from the issue); *Minnesota:* 1893, Dade *v.* Ins. Co., 54 Minn. 336, 56 N. W. 48 (action on fire policy; notice required of proofs of loss sent by plaintiff to defendant); *Mississippi:* 1860, Griffin *v.* Sheffield, 38 Miss. 359, 362, 389, 393 (defendant in ejectment had furnished plaintiff with a bill of particulars of title, including a copy of a title-bond; plaintiff allowed to use this copy without notice, on defendant's refusal to produce original); 1902, Cook *v.* State, 81 Miss. 146, 32 So. 312 (illegal sale of liquor; express notice required for a Federal liquor-license in defendant's possession; ruling unsound); *Missouri:* 1837, Hart *v.* Robinett, 5 Mo. 11, 16 (action for not returning an execution; notice not necessary); 1880, Cross *v.* Williams, 72 Mo. 577, 580 (action by bond-surety, alleging the contract to be either lost or in defendant's possession; notice not needed); *New Hampshire:* 1852, Neally *v.* Greenough, 25 N. H. 325, 329 (action on a bill of exchange against the acceptor; notice not necessary); *New York:* 1820, Hardin *v.* Kretsinger, 17 John. 293 (covenant for a sum of money in obligations promised in consideration of a conveyance; notice not required); 867, Howell *v.* Huyck, 2 Abb. App. 423 (action to foreclose a mortgage; plea, payment to the plaintiff's assignor; to prove the plea, the defendant was allowed to testify that the mortgagor, his vendor, had shown him the mortgage with the indorsements of payment thereon; held, that notice to produce the instrument need not have been given by the defendant; "the pleadings were notice to produce the papers; this was not notice, it may be said, to produce them for the purpose of showing indorsements on them; but a notice to produce them for any purpose, it seems to me, ought to be sufficient to admit parol proof of any fact which the production of the paper would show"); *North Dakota:* 1901, Nichols & S. Co. *v.* Charlebois, 10 N. D. 446, 88 N. W. 80 (breach of warranty of machinery; pleadings held to give sufficient notice to produce a notice of breach as required under the contract); *Pennsylvania:* 1816, Alexander *v.* Coulter, 2 S. & R. 494 (action on partnership agreement to keep fair and regular books, for sums collected by partner's administrator; notice required, for a specific book; "it is not enough that the paper is referred to in the declaration"); 1851, Garrigues *v.* Harris, 16 Pa. St. 344, 350 (ejectment for land held under a fraudulent deed; notice not required); *South Carolina:* 1831, Pickering *v.* Meyers, 2 Bail. 113 (assumpsit for wages; notice of written agreement held necessary); 1801, Worth *v.* Norton, 60 S. C. 293, 38 S. E. 605 (action on a note; defence, statute of limitations; note required for the defendant seeking to prove the date; ruling unsound); *South Dakota:* 1899, Zipp *v.* Colchester R. Co., 12 S. D. 218, 80 N. W. 367 (action on contract; pleadings held to imply notice as to orders and letters from plaintiff to defendant); *Texas:* 1855, Dean *v.* Border, 15 Tex. 298 (action on two notes; plea, payment, with specification of items including "draft on J. A."; held, not sufficient as notice); 1855, Hamilton *v.* Rice, 15 Tex. 382, 385 (trespass to try title; answer, that a survey was made, but the field-notes were fraudulently obtained and kept by the plaintiff, etc.; held, sufficient notice); *Wisconsin:* 1867, Niagara F. Ins. Co. *v.* Whittaker, 21 Wis. 335 (contract mentioned in pleadings: no notice necessary; here the pleading alleged a duplicate original).

[2] *Eng.* 1811, How *v.* Hall, 14 East 274 (trover for a bond; Lord Ellenborough, C. J., "Is not the very nature of the action notice to the defendant to be prepared for the proof to be

cally, the same result is also reached by another principle (§ 1242, *post*); for the plaintiff, in proving the conversion, does not need to prove the terms of the document, but only the existence and identity of it, and its taking by the defendant; so that the rule of production does not apply; and thus a number of rulings (*post*, § 1249) reach the same result upon this latter principle. There would be this difference between the two principles, that if under the former the defendant should produce under the implied notice, the plaintiff might still not be able to use it if it were illegally without stamp; while under the latter principle the document need not be either produced or accounted for and its lack of stamp would be immaterial.

(*b*) In a *criminal prosecution* in which the gist of the charge is an unlawful dealing with a document by the defendant, the charge is a sufficient notice to produce the document if in his possession:

1832, BALDWIN, J., in *U. S.* v. *Doebler*, 1 Baldw. 519, 524: "If the note he is charged with forging, passing, or delivering, is of the same kind with others which he has disposed of or retained in his possession, he had notice in effect that, if practicable to procure it, evidence will be given of their counterfeit character, and of his having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form; notice in law is notice in effect; and either are sufficient. . . . Knowing that proof of all these facts is as competent to the prosecutor as the one specifically charged, no injustice is done him."

1865, ELLIOTT, C. J., in *McGinnis* v. *State*, 24 Ind. 500, 503 (after stating that production cannot be compelled): "The description of the instrument in the indictment must be such that it would always serve to notify the defendant of the nature of the charge against him, save him from surprise, and enable him to be prepared to produce the writing, when it was his interest to produce it. But when its production would be likely to work an injury to the defendant by aiding in his conviction, it could not be expected that he would produce it in response to the notice. It is therefore difficult to perceive what benefit could result, either to the State or to the defendant, from the giving of such notice; while to the defendant it is liable to work a positive injury, by producing an unfavorable impression against him in the minds of the jury upon his refusal to produce it after notice."

It seems settled, therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle.[1]

offered?"); 1835, Denman, L. C. J., in Read *v.* Gamble, 10 A. & E. 597 (notice not necessary); 1867, R. *v.* Elworthy, 10 Cox Cr. 579, 582 (Kelly, C. B.: "The ground of decision is this, that the defendant has notice by the action of the nature and contents of the document . . . and he could not be found guilty of the conversion without proof that the document had come into his possession"); *Can.* 1852, Tilly *v.* Fisher, 10 U. C. Q. B. 32 (trover for notes; original need not be accounted for; Draper, J., diss.); *U. S. Mich.* 1862, Rose *v.* Lewis, 10 Mich. 483, 484 (trover for a note; no notice required); *Pa.* 1820, McClean *v.* Hertzog, 6 S. & R. 154 (trover for notes; no express notice required, a notice being implied); *S. Car.* 1811, Oswald *v.* King, 2 Brev. 471 (trover for a deed; notice not necessary).

[1] ENGLAND: 1830, R. *v.* Haworth, 4 C. & P. 254, 256 (forgery of a deed; the defendant had since destroyed it; notice not required); 1853, R. *v.* Kitson, 6 Cox Cr. 159 (arson with intent to defraud the insurer; notice to produce the policy required); 1867, R. *v.* Elworthy, 10 Cox Cr. 579, 582 (perjury in stating that there was no draft of a certain statutory declaration; notice required; Littledale, J.: "The exception to the rule is when the other party is by the proceeding itself charged with the possession of the document. Here the indictment does not charge the defendant with the possession of the document, or give notice that it [is] meant to call on him to produce it in evidence").

UNITED STATES: *Federal:* 1832, U. S. *v.* Doebler, 1 Baldw. 519, 522 (forgery; a letter by defendant to an accomplice, asking for more

When, however, the writings to be offered are not the subjects of the very criminal charge — as when similar counterfeits are offered to evidence intent — the present doctrine may not avail to dispense with notice; and the further question will then arise whether such documents need be produced or accounted for at all, being "collateral" and their precise terms not always material (*post*, § 1249).

(*c*) It would seem that at a *subsequent trial* of the same issue, no new notice need be given for a material document formerly produced by the opponent or formerly demanded by the proponent to be produced by the opponent; for the renewal of the issues is notice that what was needed then will be again needed now.[4]

(*d*) A *ship's log-book* is in the custody of the master; but the traditional rules of admiralty do not follow the technical rules of the common law in applying the present principle.[5]

§ 1206. **Same: Rule of Notice Satisfied; (3) Notice of Notice.** At some time early in the 1800s it came often to be urged, and sometimes judicially

of the forged notes; notice not necessary, because the defendant by implication had notice "that the passing of other similar notes will be brought into question"); 1903, M'Knight *v.* U. S., — C. C. A. —, 122 Fed. 926 (no notice necessary for a document criminating and privileged); *California:* 1875, People *v.* Hust, 49 Cal. 653 (embezzlement; to prove agreement by which defendant took charge of the property, *semble*, notice necessary or other accounting for original); *Indiana:* 1859, Armitage *v.* State, 13 Ind. 441 (indictment for possessing counterfeit notes with intent; notice required; the Court proceeding upon analogy to civil cases and upon the erroneous notion that notice was always required in civil cases); 1861, Williams *v.* State, 16 Ind. 461 (larceny of pocket-book with bank-notes; same ruling); 1865, McGinnis *v.* State, 24 Ind. 500 (larceny of treasury-note; distinguishing the case of forgery as requiring greater particularity, and not passing upon the soundness of Armitage *v.* State, it is held that for larceny of written instruments no notice is required to produce the writings that are the subject of the larceny; overruling Williams *v.* State; see quotation *supra*); *Maine:* 1859, State *v.* Mayberry, 48 Me. 218, 239 (conspiracy by false pretences to obtain a promissory note and charge of having obtained possession of it; no notice required); *Michigan:* 1889, People *v.* Swetland, 77 Mich. 53, 57, 43 N. W. 779 (forgery of mortgage-discharge; notice not necessary, provided defendant's possession is shown; as it was not here); *Missouri:* 1893, State *v.* Flanders, 118 Mo. 227, 237, 23 S. W. 1086 (obtaining a warranty deed by false pretences; notice held necessary; no precedent cited; *New York:* 1816, People *v.* Holbrook, 13 John. 90, 92 (larceny of bank-notes; notice not required, either here or in trover for such things); *North Carolina:* 1887, State *v.* Wilkerson, 98 N. C. 696, 700, 3 S. E. 683 (false pretences in obtaining an order for money; express notice not required); *Oregon:* 1921, State *v.* Rowen, — Or. —, 200 Pac. 901 (forgery of a deed; notice not required for "documents which are the subject of the indictment"); *Pennsylvania:* 1808, Com. *v.* Messinger, 1 Binn. 273, 274, 278, 282 (larceny of a bill; express notice unnecessary; also put upon the ground that the accused's possession is not to be presumed).

The following type of statute seems to rest on this principle: Ala. St. 1909, No. 191, Spec. Sess. p. 63, Aug. 25, § 22½ (parol testimony of any U. S. internal revenue liquor tax stamp or license, admissible on a trial for illegal liquor sales, etc. under the prohibition law).

For the further bearing of the *privilege against self-crimination* by production, see *post*, § 1209.

For its bearing as making a notice *improper*, see *post*, §§ 2268, 2273.

For *fraudulent suppression*, see *post*, § 1207.

For *stealing* as equivalent to *loss*, see *ante*, § 1201.

[4] 1851, R. *v.* Robinson, 5 Cox Cr. 183 (notice served for the trial at a first session or term, sufficient where the trial was postponed to a later term); 1812, M'Dowell *v.* Hall, 2 Bibb 610, 612 (document used in former trial, then withdrawn from the file on Court order; notice at trial, sufficient on the facts). *Contra:* 1819, Knight *v.* Martin, Gow 103 (after a nonsuit, a new notice must be given for a second trial).

[5] U. S. Code 1919, §§ 7781–83, 8114, 8118, 8123, 8158 (ship's log-book; production compellable; stated more fully *post*, § 1641).

approved, that "notice to produce a notice" was not necessary before using a copy. This rule of thumb, obtaining a certain vogue, was then sought to be furnished with a reason based on convenience, namely, the necessity of stopping somewhere in the chain of notices.[1] Now this consideration applies in strictness to only one kind of notice, namely, the notice to produce. There, indeed, the chain would be endless if once begun; but it would not be so in the case of any other notice. This rule of thumb, so far as it is established, must be regarded as a distinct exception (*post*, § 1207) to the rule requiring a notice to produce.

But beyond the above-named instance (notice of a *notice to produce*) it cannot be said to be established except in a few jurisdictions. In England, the rulings have been in great conflict, though the exception seems also to have included the cases of a notice of a *bill's dishonor* and a *landlord's notice to quit*.[2] In this country, the phrase that "notice to produce a notice is unnecessary" has often been used in this broad form. Nevertheless, apart from the above single instance (notice to produce a notice to produce), most Courts from time to time recognize that the case of a notice — notice to *quit*, notice of *dishonor*, notice of *suit*, and the like — is to be governed merely by the general principle expounded in the preceding section, namely, where the pleadings by implication give notice to produce the notice, no express notice to produce it is necessary; but otherwise it is required. The rulings,

§ **1206**. [1] 1826, Gibson, J., in Eisenhart *v.* Slaymaker, 14 S. & R. Pa. 153, 156 ("Every written notice is, for the best of all reasons, to be proved by a duplicate original; for, if it were otherwise, the notice to produce the original could be proved only in the same way as the original itself; and thus a fresh necessity would be constantly arising 'ad infinitum' to prove notice of the preceding notice; so the party would at every step be receding instead of advancing").

[2] 1793, Shaw *v.* Markham, Peake 165 (a letter notifying of the dishonor of a note; Kenyon, L. C. J., required notice); 1796, Hammond *v.* Plank, Peake 165 note (written demand in trover; Lord Kenyon did not require notice; no reason given); 1796, Gotlieb *v.* Danvers, 1 Esp. 455 (notice to take away a crane improperly built; Eyre, L. C. J., required no notice, but not on this ground; see *post*, § 1243); 1803, Surtees *v.* Hubbard, 4 Esp. 203 (notice of an assignment of a ship and freight; Ellenborough, L. C. J., required no notice, but *semble* on other grounds); 1804, Langdon *v.* Hulls, 5 Esp. 156 (notice to a drawer of the acceptor's non-payment; notice to produce required); 1809, Philipson *v.* Chase, 2 Camp. 110 (attorney's bill; notice required, per Lord Ellenborough, though he conceded the contrary for the case of a notice to quit); 1811, Ackland *v.* Pearce, 2 Camp. 599, 601 (notice of a bill's dishonor; per LeBlanc, J., no notice required); 1815, Roberts *v.* Bradshaw, 1 Stark. 28 (Lord Ellenborough, C. J., required no notice for a letter telling of a bill's dishonor, because it "was in the nature of a notice"); 1817, Grove *v.* Ware, 2 Stark. 174 (notice to a surety of default by the principal; Lord Ellenborough held it "not properly a mere notice", and required notice to produce); 1822, Kine *v.* Beaumont, 3 B. & B. 288, by the C. P., consulting the K. B. (notice not necessary for notice of dishonor of a bill); 1827, Lanauze *v.* Palmer, M. & M. 31 (notice of dishonor; notice required, because the bills were not those sued on); 1827, Colling *v.* Treweek, 6 B. & C. 394 (notice not necessary for a notice, "as, a notice to quit, or a notice of the dishonor of a bill of exchange"; here, an attorney's bill, delivered according to law one month beforehand, was held "substantially in the nature of a notice" of the amount claimed and of his intention to sue unless paid); 1835, Swain *v.* Lewis, 2 C. M. & R. 261, by all the Judges (notice not necessary for notice of dishonor; approving Kine *v.* Beaumont); 1909, Turner's Case, 3 Cr. App. 103, 118, 157, [1910] 1 K. B. 346 (under St. 1908, 8 Edw. VII, c. 59, § 10, former convictions may be evidenced only if seven days' notice has been given to the accused; no copy of this notice had been preserved, and oral evidence was offered; "it is a general rule that you have not to give notice to produce a notice").

to be sure, are by no means harmonious, and often fail to disclose the principle relied upon.[3]

Certain other principles, however, sometimes applicable, have served to confuse the precedents on this point: (a) If a notice is made out in duplicate,

[3] *Federal:* 1813, Underwood *v.* Huddlestone, 2 Cr. C. C. 76 (notice of note's nonpayment; notice required); 1815, Bank of Washington *v.* Kurtz, 2 Cr. C. C. 110 (same); *Alabama:* 1857, Dumas *v.* Hunter, 30 Ala. 75 (written demand and notice precedent to action for unlawful detainer; notice required, since the statute made the demand, etc., a prerequisite); 1879, Watson *v.* State, 63 Ala. 19, 21 (notice of notice — here, against trespassing — not required); 1884, King *v.* Belling, 77 Ala. 594, 596 (treating Dumas *v.* Hunter as an exception to the general rule of Watson *v.* State); 1893, Home Protection *v.* Whidden, 103 Ala. 203, 15 So. 567, *semble* (letter notifying of a fire loss; notice required); *Arkansas:* 1851, Jones *v.* Robinson, 11 Ark. 504, 511 (notice to indorser; notice required); *California:* 1860, Lombardo *v.* Ferguson, 15 Cal. 372 (mining-claim notice posted by plaintiff: defendant, in offering copy, required to give notice to produce, or otherwise to account for it); C. C. P. 1872, § 1938 (notice not necessary "where the writing is itself a notice"); 1881, Gethin *v.* Walker, 59 Cal. 502, 506 (notice of rescission of contract; notice not required, under § 1938); *Delaware:* 1848, Jefferson *v.* Conoway, 5 Harringt. 16 (written demand for goods; notice necessary, except for duplicate original); *Georgia:* 1871, Frank *v.* Longstreet, 44 Ga. 178, 187 (notice required for a notice of suit); 1888, Crawford *v.* Hodge, 81 Ga. 728, 8 S. E. 208 (notice required for notice to sue; but here not necessary because of the latter's loss); *Idaho:* Comp. St. 1919, § 7962 (like Cal. C. C. P. § 1938); *Illinois:* 1872, Brown *v.* Booth, 66 Ill. 419 (notice to surety; notice to produce notice, not necessary); 1873, Williams *v.* Ins. Co., 68 Ill. 387, 390 (notice of assessment; notice to produce notice, not necessary); *Iowa:* 1886, McLenon *v.* R. Co., 69 Ia. 320, 321, 28 N. W. 619 (notice of injury; no notice required); *Kansas:* Kan. St. 1909, Gen. St. 1915, § 4995 (notice of demand for release of oil lease, etc.; a "letter-press or carbon or written copy thereof" may be used as if the original); *Kentucky:* 1828, Taylor *v.* Bank, 7 T. B. M. 576, 578 (notice for notice of dishonor, not required); *Louisiana:* 1821, Abat *v.* Riou, 9 Mart. 465, 467 (action against indorser of note, alleging notice of protest; notice not required); *Michigan:* 1845, Falkner *v.* Beers, 2 Doug. 117, 119 (notice to quit; notice required); 1885, Loranger *v.* Jardine, 56 Mich. 518, 23 N. W. 203 (notice by wife not to sell liquor to husband; notice not required); 1916, Holmes Realty Co. *v.* Silcox, 194 Mich. 59, 160 N. W. 465 (notice of cancellation of an option); *Missouri:* 1835, Hughes *v.* Hays, 4 Mo. 209 (notice of appeal; notice not required); 1874, Barr *v.* Armstrong, 56 Mo. 577, 586 (notice to creditor not to sell to wife; notice not required for any notice); *Montana:* Rev. C. 1921, § 10586 (like Cal. C. C. P. § 1938); *Nebraska:* 1883, Hawley *v.* Robinson, 14 Nebr. 435, 437, 16 N. W. 438 (notice to quit; notice apparently not required; here the paper was destroyed); *New Hampshire:* 1823, Leavitt *v.* Simes, 3 N. H. 14, 15 (action on a note against the indorser; notice to produce the notice of nonpayment, not required); *New York:* 1803, Peyton *v.* Hallett, 1 Cai. 363, 365, 380 (notice of abandonment of a vessel proved orally; case obscure); 1805, Tower *v.* Wilson, 3 Cai. 174 (notice served, proved orally; no reason given); 1816, Johnson *v.* Haight, 13 John. 470 (notice of dishonor of a note, proved by copy, on the principle that "a notice to produce a paper might be proved by parol"); *North Carolina:* 1829, Faribault *v.* Ely, 2 Dev. 67 (notice of dishonor; no notice required, apparently per Hall, J., because it was sufficient to show the fact of posting, under the law of the case; per Toomer, J., also because the action implied a notice); 1893, McMillan *v.* Baxley, 112 N. C. 578, 586, 16 S. E. 845 (notice of sale; notice held not necessary, but on improper grounds); *Oregon:* Laws 1920, § 782 (like Cal. C. C. P. § 1938); *Pennsylvania:* 1826, Eisenhart *v.* Slaymaker, 14 S. & R. 153, 156 (notice to produce any written notice unnecessary; see quotation *supra*); 1864, Morrow *v.* Com., 48 Pa. 305, 308 ("notice to produce a notice is unnecessary"; here, to remove a fence); *Philippine Isl.* C. C. P. 1901, § 322 (like Cal. C. C. P. § 1938); *Porto Rico:* Rev. St. & C. 1911, § 1453 (like Cal. C. C. P. § 1938); *Rhode Island:* 1912, Eastman *v.* Dunn, 34 R. I. 416, 83 Atl. 1057 (notice of a claim; copy allowed without notice to produce the original; but the opinion states the rule confusedly); *Utah:* Comp. L. 1917, § 7108 (like Cal. C. C. P. § 1938); *Vermont:* 1863, Rutland & B. R. Co. *v.* Thrall, 35 Vt. 536, 547 ("There are many cases where notices given during the progress of a cause — notices to produce papers and notices to quit — have been allowed to be proved by copies and in some instances by parole evidence, without proof of notice to produce the originals"; but this does not cover "notices essential to the cause of action", as here, a notice of assessment); 1894, Waterman *v.* Davis, 66 Vt. 83, 87, 28 Atl. 664 (notice of assessment; no notice required, for notices in general; though here a manifold copy was offered).

and one part is served and the other retained, the latter may be used, as a *duplicate original*, without notice to produce the former; some rulings dispose of the matter on this principle (*post*, § 1234). (b) If at the same time an *oral notice* or demand was uttered and a written one also was served, the oral one may be proved without accounting for the written one, because the latter's terms are not involved (*post*, § 1243). (c) The fact of the *delivery* of a notice, irrespective of its terms, may for the same reason be proved without accounting for the writing (*post*, § 1248).

§ 1207. **Same: Exceptions to the Rule of Notice; Opponent's Fraudulent Suppression; Recorded Deed; Waiver; Documents out of the Jurisdiction.** (1) On the principle of convenience considered in the preceding section, a direct exception may be made for a *notice to produce;* no notice of this need be given; further than this the exception cannot be properly extended (*ante*, § 1206).

(2) The *opponent's fraudulent suppression* of a document in his possession, or of a document collusively secreted by a third person (who thus virtually acts as the opponent's agent), should exempt from the requirement of notice; because this suppression amounts to a refusal to produce, and the only object of a notice (*ante*, § 1202) is to make it clear that the opponent's failure to produce amounts to a refusal. This exception is generally recognized.[1]

(3) The opponent's *absence from the jurisdiction*, or the absence of the documents out of the jurisdiction, does not dispense with the necessity for notice, even though in a given instance the opponent might be known beforehand to be unlikely to respond by production.[2]

§ 1207. [1] *England:* 1803, Leeds *v.* Cook, 4 Esp. 256 (the opponent had secreted a document fraudulently taken from a witness of the proponent summoned under a 'duces tecum'; notice not required); 1831, Doe *v.* Ries, 7 Bing. 724 (loss by a stealing instigated by the defendant; notice not necessary);
U. S. Cal. C. C. P. 1872, § 1938 (notice not necessary "where it has been wrongfully obtained or withheld by the adverse party"); *Ida.* Comp. St. 1919, § 7962 (not necessary where the writing "has been wrongfully obtained or withheld by the adverse party"); *Ia.* 1857, Sellman *v.* Cobb, 4 Ia. 534, 537 (defendant, obtaining from the plaintiff in Court a note for inspection, handed it to the sheriff to levy on as the plaintiff's; copy allowed without notice); La. 1855, Bell *v.* Hearne, 10 La. An. 515, 517 (land-patent cancelled and delivered; destruction by opponent, sufficient); *Mont.* Rev. C. 1921, § 10586 (like Cal. C. C. P. § 1938); *N. H.* 1852, Neally *v.* Greenough, 25 N. H. 325, 330 (fraudulent possession by opponent; notice not necessary); *N. C.* 1824, Eure *v.* Pittman, 3 Hawks 364, 373 (stated per Hall, J., but not decided, that opponent's fraudulent suppression dispenses with notice); *Or.* Laws 1920, § 782 (like Cal. C. C. P. § 1938); *Pa.* 1815, Gray *v.* Pentland, 2 S. & R. 23, 31 ("where the original is in the hands of the adverse party who has given it to a third person with a view of secreting it", *semble*, no notice necessary); *P. I.* C. C. P. 1901, § 322 (like Cal. C. C. P. § 1938); *P. R.* Rev. St. & C. 1911, § 1453 (like Cal. C. C. P. § 1938); *S. C.* 1831, Bank *v.* Brown, Dudley 62, 65, *semble* (destroyed in opponent's possession; no notice necessary); *Tex.* 1852, Cheatham *v.* Riddle, 8 Tex. 162, 166 (defendant's principal had fraudulently absconded with plaintiff's title-document: neither notice nor further search required); *Utah:* Comp. L. 1917, § 7108 (like Cal. C. C. P. § 1938); *Vt.* 1898, State *v.* Marsh, 70 Vt. 288, 40 Atl. 836 (defendant gave a note to the jail-housekeeper, to deliver to a co-defendant, and it was delivered; the housekeeper allowed to state its contents; whether the prosecution had intentionally put the original out of its power, depends on trial Court's discretion); *Wash.* 1915, State *v.* Morden, 87 Wash. 465, 151 Pac. 832 (statutory rape; letter sent by the female to the defendant held provable without notice to produce).

Compare the doctrines as to detention by a third person (*post*, §§ 1212, 1213) and as to loss (*ante*, § 1197).

[2] 1879, McAdam *v.* Spice Co., 64 Ga. 441

(4) That the documents are subject to the *privilege against self-crimination* is in itself no excuse; for the opponent might choose to produce without exercising the privilege, and until notice has been given it cannot be known whether he will do so.[3]

(5) Under statutory provisions allowing proof of a *recorded deed* to be made by copy when the original is "lost or out of the power" of the proponent (*post*, § 1225), the precise statutory conditions suffice to allow the use of a copy without notice, even though the opponent's possession is the fact which puts the original "out of the power" of the proponent.[4]

(6) An express *waiver* of notice, by agreement of counsel 'pro lite', or otherwise, suffices to exempt from notice; and there may be an implied waiver.[5]

(7) Where an agreement, or other transaction, turns out on the testimony to be in writing, and in the opponent's possession, the question may arise whether the party endeavoring to prove it may do so without having given notice to the opponent. This in truth involves the principle of the Parol Evidence (Integration) rule, for the answer depends upon the inquiry who has the *burden of showing the agreement to be in writing* (*post*, § 2447).

(8) A special exception is sometimes provided for the benefit of seamen.[6]

(rule applied even where the paper belonged to a party who was out of the State); 1880, Phillips *v.* Lindsey, 65 Ga. 139, 143 (same; but in such case notice to the local attorney suffices, of course); 1899, Missouri K. & T. R. Co. *v.* Elliott, 2 Ind. T. 407, 51 S. W. 1068 (documents kept by opponent without the jurisdiction; notice apparently required); 1860, Carland *v.* Cunningham, 37 Pa. 229 (opponent's absence from the jurisdiction does not dispense).

That notice to the *attorney* suffices in such a case, see *post*, § 1208.

The following statute creates a special exception; P. E. I. St. 1889, § 58 (in an action against an absent debtor, copies of writings to him may be used without notice to produce, if it is proved that the originals were delivered to him or received by him or duly mailed to him in time to receive them before leaving the place of the address).

[3] 1834, Bate *v.* Kinsey, 1 Cr. M. & R. 38 (refusal to produce on ground of privilege does not render notice unnecessary).

Contra: 1906, O'Brien *v.* U. S., 27 D. C. App. 263, 273 (copy of document delivered to the defendant charged with embezzlement; notice not required; the ruling goes upon a misunderstanding of the principle of McGinnis *v.* State, quoted *ante*, § 1205); 1908, Moore *v.* State, 130 Ga. 322, 60 S. E. 544 (notice not needed for insurance policies in defendant's possession; reasoning unsound); 1897, State *v.* McCauley, 17 Wash. 88, 49 Pac. 221 (the requirement of notice not to be adopted "as an invariable rule"; here checks were held by a defendant charged with using public moneys, and privilege could be claimed; notice held not necessary).

Compare the cases in which notice was *implied* from the nature of a criminal charge (*ante*, § 1205); they assume notice of some sort to be necessary.

For the right to *prove the contents* of a privileged document, see *post*, § 1209.

Distinguish the question whether by giving such notice the *privilege of the accused is violated* (*post*, §§ 1209, 2268, 2273).

[4] 1866, Bowman *v.* Wettig, 39 Ill. 416, 421 (statutory mode of testifying that recorded deed is not in offeror's power; notice to grantee in possession of original is not required); 1857, Gilbert *v.* Boyd, 25 Mo. 27 (under the statute, no notice to an opponent in possession is needed); 1904, Patton *v.* Fox, 179 Mo. 525, 78 S. W. 804 (like Gilbert *v.* Boyd).

But distinguish the rule of some statutes as to another kind of *notice* in such cases (*post*, § 1860).

[5] 1883, Duringer *v.* Moschino, 93 Ind. 495, 499 (agreement by counsel that all letters material would be produced without notice; notice not needed); 1853, Dwinell *v.* Larrabee, 38 Me. 464, 466 (a voluntary offer to produce suffices); 1855, Farmers' & M. Bank *v.* Lonergan, 21 Mo. 46, 50 (the plaintiff was not allowed to prove its books by deposition; the defendant also was then not allowed to prove the plaintiff's books by deposition without notice, the plaintiff's attempt to prove by deposition not being a waiver); 1804, Jackson *v.* Van Slyck, 2 Caines N. Y. 178 (the opponent's admission of a document's existence, on cross-examination, does not dispense with notice).

[6] Can. Dom. R. S. 1906, c. 113, § 335 (shipping articles; any seaman may prove the contents "without producing or giving notice to produce the agreement or any copy thereof."

§ 1208. **Same: Procedure of Notice; Person, Time, and Tenor.** (1) As to the *person notified*, the question arises whether, when the document is in the actual custody of a third person as agent for the opponent, notice to the *agent only* suffices. Here it would seem that such a notice was insufficient, unless it appeared that the agent was a person having a duty to communicate the notice to the opponent, and this will usually not be the case except for one who is an agent for the purposes of the trial, *i.e.* an attorney; as to this particular class of agents, it is well settled that notice to the attorney suffices. But this situation is often not distinguished in the rulings from another, namely, the case of notice to an agent for the trial, *i.e.* an attorney, who is not in possession of the document; here it would seem that the proper person is notified, and that it is merely a question as to the sufficient time allowed by the notice for getting the document. The precedents on these two situations are not harmonious.[1]

A notice to the *opponent only* is sufficient, even though the document is not in his actual custody but is held for him by a third person or agent; for the party from whom production is expected must always be regarded as the appropriate person to notify.[2]

The *person notifying* may be any one acting on behalf of the proponent for purposes of trial.[3]

(2) The *time of notice* depends on no technical considerations nor fixed rules; the question is merely whether the time allowed was such that the opponent was fairly and truly able to obtain it, ready for production, if he had wished to:

1845, ALDERSON, B., in *Lawrence* v. *Clark*, 14 M. & W. 250, 253: "All these cases depend on their particular circumstances; and the question in each case is whether the notice was given in reasonable time to enable the plaintiff to be prepared to produce the document

§ 1208. [1] ENGLAND: 1773, Attorney-General *v.* Le Merchant, 2 T. R. 201, note ("the rule which has always been followed . . . is that notice be given to the attorney or agent of the adverse party"); 1789, Cates *v.* Winter, 3 T. R. 306 (same; notice to opponent himself not necessary); 1795, Read *v.* Passer, 1 Esp. 213, 216, *semble* (notice to agent, insufficient, on the facts); 1816, Doe *v.* Grey, 1 Stark. 283 (to the wife of the defendant's attorney the night before, at her house, insufficient); 1829, Aflalo *v.* Fourdrinier, M. & M. 334, note (notice to the attorney two days before, the documents being with the client at a distance, held insufficient); 1832, Houseman *v.* Roberts, 5 C. & P. 394 (should be served on the attorney); 1838, Byrne *v.* Harvey, 2 Moo. & Rob. 89 (notice to an attorney not in time to communicate with the client, held insufficient); 1849, R. *v.* Hankins, 3 Cox Cr. 434, 436 (notice to attorney, sufficient); UNITED STATES: *Ga.* 1873, Lathrop *v.* Mitchell, 47 Ga. 610, 612 (notice to an agent, held insufficient on the facts); 1889, Phillips *v.* Lindsey, 65 Ga. 139, 143 (notice to attorney of an opponent out of the State, sufficient); *Miss.* Code 1906, § 229, Hem. § 206 (any notice required to be served, to be as valid if served on an attorney as on the party); *N. Y.* 1831, McPherson *v.* Rathbone, 7 Wend. 216 (notice to the opponent's attorney by subpœna, not sufficient as notice for documents in the party's own custody); *Vt.* 1837, Mattocks *v.* Stearns, 9 Vt. 326, 335 (opponent absconded from the State; notice to his attorney held sufficient; "the party cannot be required to follow him to the world's end").

[2] 1825, Taplin *v.* Atty, 3 Bing. 164 (to a sheriff's attorney, for a document in the undersheriff's hands, sufficient); 1897, Morehead Bkg. Co. *v.* Walker, 121 N. C. 115, 28 S. E. 253 (note in attorney's possession; notice to the client sufficient).

Distinguish the question already discussed *ante*, § 1200; there the inquiry is whether the *custody of a third person* is to be considered as the opponent's possession at all, irrespective of the proper method of notice.

[3] 1834, Seely *v.* Cole, Wright 681 (notice by any one by authority of the offeror, sufficient).

at the time of the trial." POLLOCK, C. B.: "What is sufficient in one case may not be so in another; and much therefore must be left to the discretion of the presiding judge, subject of course to correction by the Court."

The matter is therefore distinctly one for the determination of the trial Court, for it must depend entirely on the circumstances of each case. The numerous rulings on the subject ought not to be treated as precedents;[4] they were for the most part a wasteful expense of time for the appellate Judiciary.

[4] Besides the following cases, compare the rule for *documents present in Court* (*ante*, § 1204):

ENGLAND: 1803, Sims *v.* Kitchen, 5 Esp. 46 (notice at seven o'clock the evening before trial, to a servant of the attorney, held insufficient); 1829, Tindal, C. J., in Aflalo *v.* Fourdrinier, M. & M. 334, note ("There must be at least a possibility of getting the instruments in consequence of the notice"); 1830, R. *v.* Haworth, 4 C. & P. 254 (since the Assizes began, held insufficient; a reasonable time before the Assizes required); 1832, Houseman *v.* Roberts, 5 C. & P. 394 (notice on Saturday, for Monday's trial, not sufficient); 1832, Doe *v.* Spitty, 3 B. & Ad. 182 (notice the day before the Assizes, insufficient on the facts); 1833, Trist *v.* Johnson, 1 Moo. & Rob. 259 (notice served on the attorney after Assizes begun, held insufficient); 1833, R. *v.* Ellicombe, 1 Moo. & Rob. 260 (notice served on the defendant after Assizes begun, the defendant being in jail, held insufficient); 1836, George *v.* Thompson, 4 Dowl. Pr. 656 (notice to the attorney the day before the Assizes, insufficient; "it is peculiarly a question for the judge at the trial"); 1836, Atkins *v.* Meredith, 4 Dowl. Pr. 658 (notice "on the evening previous to the trial is in general sufficient"; but here to the attorney for books in the client's hands, held insufficient); 1839, Holt *v.* Miers, 9 C. & P. 191, 195 (the night before, insufficient); 1839, Sturge *v.* Buchanan, 10 A. & E. 598, 603 ("in all cases depends on circumstances"); 1840, Hughes *v.* Budd, 8 Dowl. Pr. 315, 317 (a notice served on Sunday, the night before the trial, on the attorney, distant from his office, held insufficient); 1840, Firkin *v.* Edwards, 9 C. & P. 478 (sufficiently early, on the facts; Williams, J.: "The question is whether under all the circumstances reasonable notice has been given"); 1840, Gibbons *v.* Powell, 9 C. & P. 634 (notice the night before to the attorney, held sufficient, the document being one which he and not the client would have); 1841, Foster *v.* Pointer, 9 C. & P. 718 (notice the day before, held sufficient where it appeared that the document was destroyed); 1842, Lloyd *v.* Mostyn, 2 Dowl. Pr. N. S. 476, 480 (Parke, B.: "[the principle is] that reasonable time to produce a document must be given"; here the defendant long knew that the document would be wanted, and a notice the day before trial was held sufficient); 1845, Lawrence *v.* Clark, 14 M. & W. 250 (notice in London the evening before a Middlesex trial, not sufficient); 1847, Sturm *v.* Jeffree, 2 C. & K. 442 (since the notice is "for general convenience and for the attainment of justice", notice during trial suffices if practically in ample time); 1849, R. *v.* Hankins, 3 Cox Cr. 434, 436 (the day before the trial, sufficient); 1852, R. *v.* Hamp, 6 Cox Cr. 167, 169 (notice the day before the trial to the London agents of the country attorney, sufficient); 1853, R. *v.* Kitson, 6 Cox Cr. 159 (notice the day before, at a residence thirty miles from court, insufficient).

CANADA: 1866, Abel *v.* Light, 6 All. N. Br. 423 (notice on the day before trial, held sufficient on the facts).

UNITED STATES: *Ala.* 1884, Littleton *v.* Clayton, 77 Ala. 571, 574 ("a reasonable time, — sufficiently long to enable a party to procure and produce it without due inconvenience"); *Cal.* 1859, Burke *v.* T. M. W. Co., 12 Cal. 403, 407 ("a question of discretion"); C. C. P. 1872, §§ 1855, 1938 ("reasonable notice"); 1898, People *v.* Vasalo, 120 Cal. 168, 52 Pac. 305 (opponent's refusal to produce within statutory time, whether that interval is needed or not; secondary proof allowed); *Conn.* 1889, State *v.* Swift, 57 Conn. 508, 18 Atl. 664 (notice at trial, with readiness to give time for production; opponent not asking time nor producing; held sufficient); *Haw.* 1876, R. *v.* Lenehan, 3 Haw. 714, 716 (the trial Court determines reasonableness); *Ida.* Comp. St. 1919, §§ 7962, 7970 ("reasonable notice"); *Ill.* 1842, Cummings *v.* McKinney, 5 Ill. 57 (discretion of the trial Court); 1861, Warner *v.* Campbell, 26 Ill. 282, 286 (two days before trial, sufficient on the facts); *Ia.* 1859, Greenough *v.* Shelden, 9 Ia. 503, 506 ("reasonable time"); 1898, Brock *v.* Ins. Co., 106 Ia. 30, 75 N. W. 683 (trial Court's discretion); *La.* 1844, Hills *v.* Jacobs, 7 Rob. 406, 413 (notice sufficient on the facts); 1849, Plympton *v.* Preston, 4 La. An. 360 (notice at the trial, sufficient on the facts); *Me.* 1829, Emerson *v.* Fisk, 6 Greenl. 200, 202, 206 (notice on the first day of the trial, the opponent's residence being a few rods away, held insufficient, under a rule of Court requiring notice before the trial); *Md.* 1836, Divers *v.* Fulton, 8 G. & J. 202, 208 (notice to the attorney two days before trial, held sufficient on the facts; the notice must be "reasonable in point of time"); 1852, Glenn

Where the *opponent* is *out of the jurisdiction*, it would seem that the time of notice should not be affected by this fact, since, in general, for the purposes of a trial, a party must himself bear the risk of his absence from the scene, — especially as in the present instance the only function of a notice is to make it clear that the proponent is reasonably unable to obtain the document. Where only the *document* is out of the jurisdiction, however, the reasonableness of the time of notice should be affected by this circumstance; for the opponent, being otherwise ready for trial, might be equally disposed to produce the document if notified in time to obtain it.[5] That the opponent is physically or legally *incapable of personal appearance* is of course immaterial as regards the time of notice.[6]

(3) As to the *tenor* and *form* of the notice, first, it should be in *writing*, — not so much because it is thereby more correctly or surely provable, as because it is intended to procure the document and thus is more likely to attain its purpose if filed with the other papers in the cause.[7] Next, the *particularity of the description* of the document desired should depend on no formal tests; it is enough if the document desired is so described that it could be readily known by the opponent and with certainty distinguished from others:[8]

v. Rogers, 3 Md. 312, 320 ("no precise rule can be laid down"; here notice just before drawing the jury was held insufficient): *Mich.* 1888, Julius K. Optical Co. *v.* Treat, 72 Mich. 599, 40 N. W. 912 (time unreasonable on the facts); *Minn.* 1866, Winona *v.* Huff, 11 Minn. 119, 129 ("depends upon the circumstances in each case, and is a preliminary matter addressed to the judgment of the Court"); *Mont.* Rev. C. 1921, § 10586 ("reasonable notice"); *Nev.* Rev. L. 1912, § 5417 ("reasonable notice"); *Or.* Laws 1920, § 782 ("reasonable notice"); *P. I.* C. C. P. 1901, § 322 (like Cal. C. C. P. § 1938); *P. R.* Rev. St. & C. 1911, § 1453 (like Cal. C. C. P. § 1938); *S. C.* 1901, Worth *v.* Norton, 60 S. C. 293, 38 S. E. 605 (two hours' notice for a document in another county, held insufficient); *Tenn.* 1808, Kimble *v.* Joslin, 1 Overt. 379 ("reasonable notice"); 1872, Burke *v.* Shelby, 9 Heisk. 175, 177 (notice given in the plea, sufficient); *Utah:* Comp. L. 1917, §§ 7108, 7117 ("reasonable notice").

[5] The rulings do not always make this distinction, and are not harmonious:

England: 1824, Drabble *v.* Donner, Ry. & Mo. 47 (four days' notice to a person domiciled in Denmark, but present in London, the documents presumably being in Denmark, held sufficient); 1825, Bryan *v.* Wagstaff, 2 C. & P. 125, 127 (party abroad, notice given two months before; Abbott, C. J.: "I think that a person leaving the country and putting his case into the hands of his attorney must be taken to leave in his attorney's hands papers material to the cause; . . . if it were not so, a man might, as soon as notice of trial was given, set sail for the East Indies, and the other party must then delay proceeding with his cause till his return"); 1840, Hughes *v.* Budd, 8 Dowl. Pr. 315, 317 (a week's notice, served during opponent's absence in the North, sufficient); 1848, Ehrensperger *v.* Anderson, 3 Exch. 148, 153, 154 (party from India notified while in London before the trial; intimated to be insufficient).

United States: 1862, Bushnell *v.* Colony, 28 Ill. 204 (letter in New York; a day or two's notice, not sufficient); 1889, Mortlock *v.* Williams, 76 Mich. 568, 573, 43 N. W. 592 (notice for letters in another State, insufficient on the facts); 1892, Pitt *v.* Emmons, 92 Mich. 542, 544, 52 N. W. 1004 (notice on same day, possessor being in another State, insufficient); 1893, Dade *v.* Ins. Co., 54 Minn. 336, 56 N. W. 48 (notice at trial for documents in another State, insufficient on the facts).

[6] 1851, R. *v.* Robinson, 5 Cox Cr. 183 (on the defendant in jail, sufficient; Erle, J.: "The argument [against it] . . . might be just as applicable to a case where the notice was served on a person bed-ridden or incapable of moving").

[7] It always is in writing, and is so assumed to be in the preceding cases (except when given at the trial, *ante*, § 1204); but the decisions to that effect are rare: 1842, Cummings *v.* McKinney, 5 Ill. 57; 1903, Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 (*semble*).

[8] The rulings vary in their requirements, and should not be taken as precedents for the specific facts:

1839, DENMAN, L. C. J., in *Rogers* v. *Custance*, 2 Moo. & Rob. 179, 181, "said that the Court did not mean to lay down any general rule as to what the notice ought to contain; that much must depend on the particular circumstances of each case; but where enough was stated on the notice to leave no doubt that the party must have been aware the particular instrument would be called for, the notice must be considered sufficient to let in secondary evidence."

§ 1209. **Same: (*c*) Failure to Produce; what constitutes Non-Production.** It has already been seen (*ante*, § 1199) that the present excuse for a proponent's non-production rests on the broad fact that he cannot obtain it from the opponent, — a fact involving three separate elements, namely, the opponent's possession, a demand or notice to produce, and his *failure to produce*. With this third element, as completing the fact upon which the proponent's excuse rests, we are now concerned.

(1) (*a*) Inquiring, first, what situation amounts to non-production, in the above sense, it may be noted that if the opponent produces a document which the proponent asserts *not* to be *the one desired*, the latter is not obliged to accept it as the one in issue, so as to be precluded from proving otherwise the contents of the desired document;[1] for the opponent's production of this one alone is virtually a failure to produce the one actually desired, and the proponent has thus established his excuse and may proceed to prove otherwise the terms of the true but non-apparent document.

(*b*) If the opponent refuses to produce because of a *privilege against self-incrimination*, is this refusal insufficient, for the purpose of establishing the

ENGLAND: 1816, Harvey *v.* Morgan, 2 Stark. 17, 19 (mistake in the title of the plaintiff assignees, held fatal); 1825, Jones *v.* Edwards, 1 McCl. & Y. 139 ("notice to produce letters and copies of letters, also all books relating to this cause", held insufficient); 1825, France *v.* Lucy, Ry. & Mo. 341 (to prove notice of dishonor, a general notice of all letters, papers, etc., held insufficient); 1837, Jacob *v.* Lee, 2 Moo. & Rob. 33 (a notice to produce "all and every letters written by the said plaintiff to the said defendant relating to the matters in dispute in this action", held sufficient); 1839, Rogers *v.* Custance, 2 Moo. & Rob. 179 (a general notice to produce all books, extracts, etc., held sufficient on the facts; see quotation *supra*); 1841, Morris *v.* Hauser, 2 Moo. & Rob. 392 (a general notice to produce all letters between the parties from 1837 to 1841, held sufficient); 1845, Lawrence *v.* Clark, 14 M. & W. 250, 251 (notice wrongly entitled as to the Court; held sufficient; Alderson, B.: "Would the notice be bad if one of the names were spelled wrong? The question is whether the party has had such a notice as to justify the Court in admitting the secondary evidence"; disapproving Harvey *v.* Morgan); 1847, Smyth *v.* Sandeman, 2 Cox Cr. 239 (notice specifying three letters "and also all others, etc., in the general words usually employed"; held insufficient, *semble*, as to any other than the three specified); 1858, Justice *v.* Elstob, 1 F. & F. 256, 258 (description of receipts held sufficient); 1858, Graham *v.* Oldis, 1 F. & F. 262 (description of agreement held sufficient).

UNITED STATES: *Fed.* 1825, Vasse *v.* Mifflin, 4 Wash. C. C. 519 (notice to produce all letters relating to moneys received under an award; sufficient); *Cal.* 1859, Burke *v.* T. M. W. Co., 12 Cal. 403, 408 ("Such description as will apprise a man of ordinary intelligence of the document desired is enough"); *Ind.* 1839, State *v.* Lockwood, 5 Blackf. 144 (terms of notice not sufficiently shown); *Mass.* 1840, Bemis *v.* Charles, 1 Metc. 440, 443 (notice sufficient where it was "impossible for the defendant to have doubted" what it referred to); 1895, McDowell *v.* Ins. Co., 164 Mass. 444, 41 N. E. 665 (notice to produce all letters, etc., received by defendant from plaintiff since the time of the fire alleged in the declaration, sufficient); *Miss.* 1873, Lockhart *v.* Camfield, 48 Miss. 471 (title bond already once produced on notice; ambiguous notice to produce a "deed", sufficient).

The "reasonable notice" of the Codes cited *supra*, par. 2, would apply also to the tenor of the notice.

§ **1209.** [1] 1859, Hill *v.* Tounsend, 24 Tex. 575, 580 (party held not bound to accept document tendered by opponent, but allowed

proponent's excuse and allowing him to prove the terms otherwise? By no means; for it is still a refusal, though an allowable one, and the proponent's excuse is equally established. The permission to the proponent to proceed to establish the document's terms by other evidence is not a violation of the privilege, for the privilege (*post*, § 2264) is merely that the possessor himself shall not furnish criminating evidence, and not that others shall not through their own witnesses do so.[2] Whether an unfavorable inference or admission should be drawn as to the contents from the claim of privilege is a different question (*post*, §§ 2272, 2273).

(2) It may be asked, Why should the opponent's mere failure or refusal to produce, in a case where he is not protected by a privilege, suffice to establish the proponent's excuse, namely, his inability to obtain the original? Since such an inability is the root-notion which allows him to prove the document's terms otherwise (*ante*, § 1199), how can he claim to be unable since by a *bill of discovery*, or in more modern times in a common-law court by a statutory order for production, he could compel the production? It is perfectly settled that this extreme step is not required of him;[3] and the reasons seem to be sound, namely, first, that the inconvenience of employing an equitable bill of discovery, or even a statutory order, for every document needed, would be such that for practical purposes the opponent's mere refusal on demand puts the proponent in the position of being unable to obtain the original, and secondly, because it does not fairly lie in the mouth of an opponent, refusing production without excuse and thus himself creating the dilemma, to insist upon so strict a test for judging the proponent's claim of inability to obtain the document.

to go on and prove contents of document desired); 1898, Helzer *v.* Helzer, 187 Pa. 243, 41 Atl. 40 (plaintiff had offered evidence of loss of note, and defendant then produced a document alleged to be the note; plaintiff not required either to accept it as the original or to submit it to her witness for identification).

The following case is peculiar: 1904, Romero *v.* N. I. M. & D. Co., 113 La. 110, 36 So. 907 (the plaintiff alleging a certain contract, the defendant admitting a contract but denying its terms to be as alleged and alleging its loss, the trial judge's order before trial, taking the contract to be as alleged by the plaintiff, was held erroneous).

Compare the cases cited *ante*, § 1203, n. 5.

[2] *Accord:* ENGLAND: 1773, Attorney-General *v.* LeMerchant, 2 T. R. 201, note ("But it is said that this [general rule] does not hold in criminal cases, because the consequence of it would be to compel a man to produce evidence against himself. . . . But the defendant, LeMerchant, is not compellable to produce those letters against himself; for he is liable to no punishment at all if he do not, but is left at his entire liberty either to do it or no; the only consequence must be that these copies (which must be sworn to be true copies) are read against him"); 1829, R. *v.* Barker, 3 C. & P. 591, 593; Oxford (Bishop of) *v.* Henly, [1907] Prob. 88, 104 (proceeding for ecclesiastical offence and canonical punishment; the respondent having refused to produce letters from the prosecutor to the respondent, copies verified by the prosecutor were admitted).

UNITED STATES: *Fed.* 1919, Bryant *v.* U. S., 5th C. C. A., 257 Fed. 378; *Ill.* 1910, People *v.* Everham, — Ill. —, 93 N. E. 373 (rape of a daughter under age; the other children wrote a letter to the defendant charging him with rape; a copy was offered and admitted, after notice to the defendant to produce the original; held that the privilege was not violated); *Ia.* 1897, State *v.* Boomer, 103 Ia. 106, 72 N. W. 424; *Mich.* 1911, People *v.* Aldorfer, 164 Mich. 676, 130 N. W. 351.

For the *necessity of notice*, even where the privilege would protect from production, see *ante*, §§ 1205, 1207, *post*, § 2268.

[3] 1852, McLain *v.* Winchester, 17 Mo. 49, 54; 1816, Alexander *v.* Coulter, 2 S. & R. Pa. 494.

§ 1210. **Same: Consequences of Non-Production for the Opponent (Exclusion of Evidence; Default; Inferences).** (1) Where an opponent in possession refuses to produce on demand, he is afterwards *forbidden* to produce the document in order to contradict the other party's copy or evidence of its contents.[1] This is in one sense a proper penalty for unfair tactics; but the original refusal may also be regarded as a judicial admission, in advance (*post*, § 2588), of the correctness of the first party's evidence to this extent.

(2) The same penalty (and sometimes even the more serious one of judgment for default) is provided by most of the statutes which entitle a party to *discovery and inspection* (*post*, § 1858) of the opponent's documents before trial.[2] But the two rules are independent.

(3) The jury is entitled to make certain *inferences from the non-production* of documents on demand; but this is the consequence of an independent principle (*ante*, § 291).

(4) Where the opponent fails to produce on notice, and has the *documents in court* the Court may order him to produce, without subpœna, the demanding party not being confined to his right to use secondary evidence (*post*, §§ 2219, 2200).

§ 1211. (3) **Detention by a Third Person; History.** Historically, this excuse for non-production was one of the earliest to be established. Under the doctrine of profert (*ante*, § 1177) it was well settled that profert was not necessary of an instrument belonging to a third person, for the reason that the proponent "hath not any means to obtain the deed";[1] though a modi-

§ 1210. [1] ENGLAND: 1769, Yates, J., in Roe *v.* Harvey, 4 Burr. 2484, 2489; 1834, Doe *v.* Cockell, 6 C. & P. 525, 528 (Alderson, B.: "You must either produce a document when it is called for or never"); 1835, Lewis *v.* Hartley, 7 C. & P. 405 (applied to a dog; defendant not allowed to produce it later, if not produced on notice by opponent); 1840, Doe *v.* Hodgson, 12 A. & E. 135 ("the party who refused to produce the writing could not afterwards be at liberty to give it in evidence"); CANADA: 1910, Cyr *v.* DeRosier, 40 N. Br. 373 (lease; Doe *v.* Hodgson followed); UNITED STATES: *Ky.* 1829, Bank *v.* M'Williams, 2 J. J. Marsh. 256, 259, *semble* (failure to produce precludes other evidence); *Mass.* 1827, Bogart *v.* Brown, 5 Pick. 18 (a defendant refusing to produce an original, not allowed to use a copy admitted by the plaintiff to be correct); 1873, Doon *v.* Donaher, 113 Mass. 151; 1881, Gage *v.* Campbell, 131 Mass. 566 ("a party who has suppressed a written document, and refused to produce it upon notice, and so compelled the adverse party to resort to secondary evidence thereof, is not afterwards entitled to offer proof of its contents"); *Minn.* 1888, McGinness *v.* School District, 39 Minn. 499, 41 N. W. 103; *Mo.* 1854, Munford *v.* Wilson, 19 Mo. 669, 673 (where defendant set up the custody of a third person, without stating the paper to be beyond the defendant's control, a copy was taken for true); *Okla.* 1899, Barnes *v.* Lynch, 9 Okl. 11, 156, 59 Pac. 995 (rule applied against a plaintiff who had removed his books from the jurisdiction to prevent inspection by receiver); 1895, Powell *v.* Pearlstine, 43 S. C. 403, 21 S. E. 328; *S. C.* 1910, C. C. P. 1920, § 728 (bills of lading; quoted *post*, § 2132, n. 5); *Vt.* Gen. Laws 1917, § 2082 (before referees etc., "a disputed account shall not be allowed upon the oath of a party, when it appears that he has an original book of entries thereof, which he fails to produce upon reasonable notice, if able so to do").

Contra: 1870, Moulton *v.* Mason, 21 Mich. 363, 370 (Campbell, C. J.: "It is not a rule calculated to further the eliciting of truth; it is simply an attempt to punish one party by allowing his adversary to recover what does not belong to him or to defend unjustly against a proper claim"); 1879, Tewksbury *v.* Schulenberg, 48 Wis. 577, 580, 4 N. W. 757.

[2] The statutes are collected *post*, §§ 1858–1860, with some rulings illustrating their use.

§ 1211. [1] 1537, Anon., Dyer 29 *b* (in trespass, defendant pleaded a lease for years from a lessee for life from the king by letters patent; and it was argued that the letters patent must be shewn; to which three judges agreed; but

fication of this was also established, not excusing from production where the proponent claimed anything in the right of the grantee owning the deed.[2] This early form of the doctrine, however, does not serve to solve the majority of our modern cases, because since the rule of profert applied only to documents under seal, *i.e.* chiefly title-deeds (ante, § 1177), and since the third person owning them was privileged not to disclose his title-deeds (*post*, § 2211), the case presented was the clear one of a third person from whom production could not be compelled by any process of law (*post*, § 1213). But nowadays virtually all documents are of a sort which would not be thus privileged under a subpœna duces tecum. In one respect, moreover, the rigor of the older rule no longer obtains; for the modification above-mentioned, by which non-production was not excused in a case of claim of right under the deed, left the proponent without the means of proving a document which it was legally impossible for him to obtain, — a result everywhere repudiated to-day, although certain analogous English rulings (*post*, § 1212) may be perhaps traced to the tradition of this older notion.

§ 1212. **Same: (*a*) Person within the Jurisdiction.** (1) If the person possessing the document is by reason of a *privilege* legally not compellable to produce it, this is clearly an excuse for non-production:

three others were opposed; "for a sub-collector, an under-sheriff, and an incumbent do not shew the king's patents, because they do not belong to them, and they have no means to make their masters or grantors shew them"); 1568, Estofte *v.* Vaughan, Dyer 277 *a* ('cestui' in remainder not required to produce the deed, because it "does not belong to him but to the feoffees"); 1591, Abbot of Strata Marcella's Case, 9 Co. 24 *a* (defendant claimed a certain privilege under feoffment from D., who was grantee of the fee of the manor from the King, who had by statute confiscated it from an abbot, who had the privilege by charter; held, that the abbot's charter need not be shown in profert; the plaintiff conceded that profert was not necessary for the charter, "because the charter was made to a stranger"); 1602, Dagg *v.* Penkevon, Cro. Jac. 70 (similar to Anon., *supra;* profert not required); 1609, Huntingdon *v.* Mildmay, Cro. Jac. 217 (similar to Estofte *v.* Vaughan, *supra*); 1631, Gray *v.* Fielder, Cro. Car. 209 (debt on bond assigned by bankrupt-commissioners; profert of bond not required, "because he comes in by act in law, and hath no means to obtain the obligation"); 1636, Stockman *v.* Hampton, Cro. Car. 441 (justification for trespass under a license from a remainderman; plea held good, "without showing the deed; first, because the deed doth not belong to him, . . . and he hath not any means to obtain the deed; and it should be mischievous to those who claim under such a deed if they should lose their estates unless they might produce it"); *ante* 1767, Buller, Nisi Prius, 252 ("Where a person is an utter stranger to a deed, there in pleading he is not compelled to shew it").

This doctrine is, in the earlier cases, not always to be distinguished from that of collateralness (*post*, § 1252).

[2] 1611, Dr. Leyfield's Case, 10 Co. Rep. 88 *a* (justification in trespass as servant of a lessee for years from a lessee for life by letters patent from the queen: it was argued that "the fee remains in the lessor or donor to whom the deed belongs and to no other, and therefore he shall not be compelled to shew the first deed"; but "the opinion of the whole Court was against the plaintiff, and the reason was because he is privy in the estate of the rent and claims by the first grant; . . . in many cases a man shall not plead a deed or release that doth not belong to him nor can have an action to recover, without shewing it; . . . so the lord by escheat shall not plead a release made to the disseisor by the disseisee without shewing it; neither shall he in remainder be received without shewing the deed: and yet it doth not belong to him, nor has he remedy to get it. . . . [But] there is another maxim in law, that where a man is stranger to a deed, and doth neither claim the thing comprised in the grant nor anything out of it, nor doth anything in the right of the grantee as bailiff or servant, there he shall plead the patent or deed without shewing it"); 1758, Titley *v.* Foxall, Willes 688 (justification of battery under process of a Court erected by letters patent; profert of letters not required, because the defendant was a stranger not claiming under them).

1848, POLLOCK, C. B., in *Sayer* v. *Glossop*, 2 Exch. 409, 410: "As the person who has the legal custody of the register is not by law compellable to produce it, the party who stands in need of the evidence which that document affords is not to suffer from its absence at the trial. . . . If in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were physically impossible."

The only argument to the contrary could be drawn from the possibility that the privilege would not be exercised, but this is at the most a contingency, and the ascertainment of the fact of such willingness might entail too much inconvenience. The orthodox doctrine is that where a privilege applies, other evidence of contents may be given.[1]

(2) It is also often said that where the third person is *hostile* and *fraudulently* detains the document, this fact of itself suffices to excuse non-production,[2] though such an instance is perhaps often equally well disposed of by the doctrine of loss (*ante*, § 1194) or of the opponent's possession by the hands of an agent (*ante*, § 1200).

(3) Where neither of the above situations exists, and the case is an *ordinary* one of possession by a *third person*, it is clear that a *demand* at least must have been made; and the question as to which a difference of opinion exists is whether the compulsory process of law should also have been invoked by subpœna duces tecum. A number of Courts seem to lay down the fixed rule that a subpœna is necessary;[3] direct decisions to the contrary are

§ 1212. [1] *Eng.* 1854, Phelps *v.* Prew, 3 E. & B. 430, 438 (here an attorney refused to produce his client's title-deed; held that the possibility that the client it called might have waived the privilege was not sufficient to prevent the offering of secondary evidence; here the client had given orders not to exhibit the deed; "an attorney may hold a deed for a great many persons", and it would be unreasonable to require their calling); 1861, *R. v.* Leatham, 3 E. & E. 658, 668 (per Hill, J., "a well-established rule of law", that production of a privileged document is excused); *U. S. Ariz.* 1905, De Leon *v.* Terr., 9 Ariz. 161, 80 Pac. 348 (jailer allowed to testify to the contents of a letter by the accused to his wife); *Conn.* 1806, Richards *v.* Stewart, 2 Day 328, 334, 336, 338 (whether the privileged person must be subpœnaed; decision not given, but arguments set out); 1807, Lynde *v.* Judd, 3 Day 499 (production excused, if privileged person refuses to produce); 1808, U. S. *v.* Porter, 3 Day 283, 285 (attendance must be compelled); *Minn.* 1913, Schall *v.* Northland M. C. Co., 123 Minn. 214, 143 N. W. 357 (original in possession of Federal bankruptcy trustee, production not excused, because no privilege applies); *N. Car.* 1897, State *v.* Durham, 121 N. C. 546, 28 S. E. 26 (production excused of document in hands of wife claiming privilege).

[2] *Ala.* 1845, Blevins *v.* Pope, 7 Ala. 371, 375 (trover for a note, which the defendant had since given to the maker, who by collusion failed to produce it when requested; production not required); *La.* 1817, Stockdale *v.* Escant, 4 Mart. La. 564, 567 (opponent's vendor retaining claimant's bill of sale by collusion; production not required, though — Martin, J., diss. — no subpœna had been issued); *Mass.* 1862, Grimes *v.* Kimball, 3 All. 518 ("If a party is deprived of the possession of written instruments which belong to him, by the fraudulent representations or devices of another person, who unjustly detains or secretly disposes of them so that they cannot be found or recovered", they may be proved as if lost); *N. J.* 1823, Den *v.* M'Allister, 7 N. J. L. 46, 48, 55 (a deed affecting the opponent's title was shown to be somewhere in the hands of adversaries, not parties; and this was held sufficient); *Pa.* 1815, Gray *v.* Pentland, 2 S. & R. 23, 31 ("where it has been in the hands of a third person, who, in collusion with the adverse party or with a view of screening him, has put it out of the way", secondary proof is admissible).

[3] *England:* 1795, R. *v.* Castleton, 6 T. R. 236 (where the third person had merely been asked when out of court and had replied that she could not find it); 1834, Whitford *v.* Tutin, 10 Bing. 395 (subpœna necessary); *U. S. Fed.* 1806, U. S. *v.* Long, 1 Cr. C. C. 373, *semble* (third person must be summoned); 1822, U. S. *v.* Lynn, 2 id. 309 (same); 1905, Security Trust Co. *v.* Robb, 142 Fed. 78, C. C. A.

rare.[4] The greater number of rulings give no definite solution and seem to have been based on the circumstances of the case in hand.[5] The truth is that, while for the purposes of a general rule, it is better to require the process of subpœna, yet in the discretion of the trial Court the failure to use a subpœna, provided a demand has been made, may not be treated as fatal, if in view of the nature of the document, the residence of the possessor and his relations to the case, the risk of collusion, and other circumstances, the service of a subpœna would have been an unnecessary effort. — If the document is in court; a subpœna would of course be unnecessary.[6] If after service of subpœna the possessor is recalcitrant and refuses to obey, the proponent should be excused from production.[7]

(letter in a third person's hands; subpœna necessary); *Ind.* 1835, Carlton *v.* Litton, 4 Blackf. 1 (subpœna necessary); 1839, Rucker *v.* M'Neely, 5 Blackf. 123 (same); *Ky.* 1850, Beall *v.* Barclay, 10 B. Monr. 261, 262 (mere possession by a person amenable to process, not sufficient); 1853, Dickerson *v.* Talbot, 14 B. Monr. 60, 63 (possession by a third person, with notice to produce, insufficient); *La.* 1827, Gardere *v.* Fisk, 6 Mart. N. S. 387, 390 (receipt given by offeror to opponent's predecessor; subpœna required); 1827, Erwin *v.* Porter, 6 Mart. N. S. 166, 167 (similar; subpœna required); *Miss.* 1845, Chaplain *v.* Briscoe, 5 Sm. & M. 198, 207 (mere possession by a third person insufficient, since the person may be compelled by subpœna to produce); *W. Va.* 1872, Dickinson *v.* Clarke, 5 W. Va. 280, 282 (document in hands of one giving deposition but refusing to file the document; copy excluded); *Wis.* 1906, Menasha W. W. Co. *v.* Harmon, 128 Wis. 177, 107 N. W. 299 (letters sent to the county clerk, who had not been subpœnaed; copies excluded).

[4] 1832, U. S. *v.* Reyburn, 6 Pet. 352, 365 (privateer's commission belonging to C.; inability to find C., sufficient on the facts; subpœna not necessary).

[5] *Ala.* 1920, Grand Lodge *v.* Goodwin, 204 Ala. 213, 85 So. 553 (letter sent to N.; copy excluded, N. being present at the trial and no effort to obtain it from him being shown); *Conn.* 1793, Smith *v.* Holebrook, 2 Root 45 (counterfeit note taken and kept from plaintiff by revenue-officer; insufficient); *Ga.* 1879, Bosworth *v.* Clark, 62 Ga. 286, 288 (service of subpœna, sufficient in trial Court's discretion); *Ia.* 1859, Greenough *v.* Shelden, 9 Ia. 503, 506 (witness subpœnaed and present with the document, but no demand made; evidence of contents excluded); 1875, Hawkins *v.* Rice, 40 Ia. 435 (assignment left by offeror with another clerk of Court, held not without offeror's control); 1899, Ruthven *v.* Clarke, 109 Ia. 25, 79 N. W. 454 (documents testified to in deposition of intervenor's agent; originals required to be accounted for); *N. C.* 1824, Eure *v.* Pittman, 3 Hawks 364, 370 (a will traced to T.'s hands: held, that T. should have been subpœnaed duces tecum or inquiries should have been made of her, before the inference of collusion or suppression could be drawn; Henderson, J., diss.); *Ohio:* 1833, Clark *v.* Longworth, Wright 89 (not clear); *Or.* 1918, Stevens *v.* Myers, 91 Or. 114, 177 Pac. 37 (marital wills made identically pursuant to contract; attorney's testimony to the contents of the husband's will, without production, held improper); *Pa.* 1815, Tilghman, C. J., in Gray *v.* Pentland, 2 S. & R. 23, 31 ("It will always be a question whether with proper exertions he might not have had it in his power"); *Vt.* 1851, Williams *v.* Ward, 23 Vt. 369, 376 (notification posted by selectmen; not presumed to be in power of party questioning village officer's acts); *Wis.* 1897, Newell *v.* Clapp, 97 Wis. 104, 72 N. W. 367 (no measures taken to obtain the document; production not dispensed with).

The rule for *loss* (*ante*, § 1194) sometimes verges close upon the present rule.

[6] 1847, Doe *v.* Clifford, 2 C. & K. 448, 451 (the third person, being in court with the deed, declined to produce it, and a copy was admitted; otherwise, if the deed had not been there).

[7] This is implied in the rulings cited *supra*, note 3, and is expressed in the following statutes: *Ga.* Rev. Code 1910, § 5846 (where subpœna *d.t.* is employed, and party "is unable thereby to procure" the document, other evidence is allowable); *Pa.* St. 1846, Apr. 22, Dig. 1920, § 10297 (after subpœna *d.t.* requiring papers, and refusal to produce, followed by imprisonment and discharge, parol evidence of contents is admissible); *S. C.* St. 1870, C. C. P. 1922, § 747 (if an "original pleading or paper" is "withheld by any person", the Court may authorize use of copy).

The following rulings are therefore absurd, and would not be followed to-day: *England:* 1835, Alderson, B., in Jesus College *v.* Gibbs, 1 Y. & C. 145, 156 ("You could not have proved it by secondary evidence unless the document had been in the possession of a party [*i.e.* person] not bound to produce it. . . . [The third person refuses,] it is true, at his own peril; but you have no remedy except

(4) Where the desired witness possessing the document is himself also a *party to the cause*, on the side of the proponent, his possession is of course no excuse for non-production.[8]

§ 1213. **Same: (*b*) Person without the Jurisdiction.** It has just been seen that the amenability of the possessor to legal process should not invariably and absolutely bar the proponent from proving the document's contents by other evidence. Conversely, the mere fact of the non-amenability of the possessor to legal process should not of itself excuse non-production. Legal process cannot avail to obtain a document held out of the jurisdiction; but four possible forms of effort exist, any one or more of which may be deemed proper by a Court before excusing for non-production. If the precise whereabouts of the document is unknown, *search* may be made; if the possessor be ascertained, he may be *requested to appear* with the document; or he may be *requested to deliver* the document for use at the trial; or his *deposition* may be taken with a copy furnished by him annexed to it. No one or more of these efforts could be required as a fixed rule, nor do the Courts seem to make any such fixed requirement.

The rulings fall into three general groups. In the first group, the Courts require that an *effort of some sort be made*, its nature depending more or less on the circumstances of the case.[1] In the second group, the Courts, either

against him"); 1853, R. *v.* Llanfaethly, 2 E. & B. 940 (Erle, J.: "The law does not admit the disobedience of a person served with a subpœna duces tecum as a sufficient excuse for not giving primary evidence of the contents of a document, where the person served is punishable for his disobedience"); *Canada:* 1852, Farley *v.* Graham, 9 U. C. Q. B. 438 (document in possession of the witness in court, but illegally refused to be produced; copy not allowed; "the party might have sought his remedy against the witness").

[8] 1874, Gimbel *v.* Hufford, 46 Ind. 125, 129 (where the person so in possession was the plaintiff himself, production was required); 1878, McMakin *v.* Weston, 64 Ind. 270, 274 (party annexing a copy to his deposition; excluded); 1877, Waterville *v.* Hughan, 18 Kans. 473 (document in another county in the hands of one of the plaintiffs or his attorney; production required).

Compare the case of the opponent's possession *out of the jurisdiction* (*post*, § 1213).

§ 1213. [1] England: 1855, Boyle *v.* Wiseman, 10 Exch. 647 (a document was in the hands of a person in France; the plaintiff's agent, in a libel-suit in which it was suggested that this document contained an admission of authorship, went to the holder and asked him for the letter, in order to bring it to England, not stating the purpose nor asking the holder whether he would bring it personally; the holder refused; held, that its non-availability was not shown).

Canada: 1894, Porter *v.* Hale, N. Br., 23 Can. Sup. 265, 270 (document in possession of C. in Scotland; inquiries addressed to C. and to other persons, held insufficient on the facts).

United States: *Federal:* 1853, Turner *v.* Yates, 16 How. 14, 26 (invoice in hands of London consignees; depositions "or some proper attempt made to obtain it", required); 1857, Comstock *v.* Carnley, 4 Blatchf. 58 (contract in third person's custody, in another State; copy not allowed, because the person could have been examined); 1865, Blackburn *v.* Crawfords, 3 Wall. 175, 183, 191, *semble* (private marriage-register in France; testimony about it excluded, where no effort was shown to obtain it or to take a copy); 1866, Dwyer *v.* Dunbar, 5 Wall. 318 (letter described by a deponent as forwarded to S. in Mexico, an agent of the opponent; original required to be accounted for); *Alabama:* St. 1915, No. 2, p. 8, § 17 (intemperance, in proving an order to ship liquor into the State, the original need not be produced or accounted for); *Colorado:* 1876, Londoner *v.* Stewart, 3 Colo. 47, 50 (there must be some effort to obtain the original; good opinion by Hallett, C. J.); *Connecticut:* 1812, Townsend *v.* Atwater, 5 Day 298, 306 (mere absence from the jurisdiction, insufficient; "the Court must be satisfied that the paper cannot be produced"); *Georgia:* 1904, New England M. S. Co. *v.* Anderson, 120 Ga. 1010, 48 S. E. (witness annexing a copy to his deposition; original required to be accounted for); *Illinois:* 1895, Bishop *v.* American Preservers'

by express decision or by failing to mention any requirement, excuse the non-production although *no such effort has been made*, the mere fact sufficing that the document is out of the jurisdiction.[2] In the third group, the effort ac-

Co., 157 Ill. 284, 307, 41 N. E. 765 ("due effort" must be made for "papers out of the jurisdiction"); 1907, McDonald *v.* Erbes, 231 Ill. 295, 83 N. E. 162 (contract between plaintiff and defendant, left in the hands of a third person, who testified that it was at his home in Wisconsin, if anywhere; copy excluded, since "no effort was made by the appellant to obtain the original agreement prior to the trial"; such being "the rule in this State"); *Iowa:* 1895, Waite *v.* High, 96 Ia. 742, 65 N. W. 397 (the Court intimated that it must also appear impossible to secure the document); 1916, Fisher & Ball *v.* Carter, 178 Ia. 636, 160 N. W. 15 (letter addressed and mailed to a third person in Missouri; copy excluded, for lack of due diligence); *Kansas:* 1872, Shaw *v.* Mason, 10 Kan. 184, 189 (contract in third person's hands in Missouri; production necessary, if nothing further is shown by way of excuse); *Louisiana:* 1829, Lewis *v.* Beatty, 8 Mart. N. S. 287, 289 (deed in neighboring State; no attempt made to procure it; secondary evidence excluded); *Michigan:* 1891, Phillips *v.* U. S. Benef. Soc'y, 120 Mich. 142, 79 N. W. 1 (document in Canada; attempt to take deposition required); *Minnesota:* 1868, Wood *v.* Cullen, 13 Minn. 394, 396 (mere possession by certain opponents out of the State, held not to "excuse from diligent effort to procure it"); 1920, Gasser *v.* Great Northern Ins. Co., 145 Minn. 205, 176 N. W. 484 (receipt in custody of M., resident in Nebraska, but testifying at the trial; defendant had asked M. for it some time before the trial, and M. had refused; trial judge's discretion in allowing oral testimony to contents, confirmed); *Missouri:* 1838, Haile *v.* Palmer, 5 Mo. 403, 417 (sworn copy of marriage register and certificate in Louisiana, excluded because it did not appear that the law of Louisiana made them official records; apparently unsound); 1862, Farrel *v.* Brennan, 32 Mo. 328, 333 (letters addressed by F. to his father in Ireland; evidence of search or the like required); *New York:* 1883, Kearney *v.* Mayor, 92 N. Y. 617, 621 ("the last person known to have been in possession of the paper must be examined as a witness", and "even if he is out of the State, his deposition must be procured if practicable, or some good excuse given for not doing so"); *North Carolina:* 1842, Deaver *v.* Rice, 2 Ired. 280 (a constable had moved to another State, leaving some of his papers with an agent, and the document desired was not among these; held insufficient for offering oral evidence of the contents); 1886, Justice *v.* Luther, 94 N. C. 793, 798 (the mere residence of the depositary in another State is not sufficient); *Oklahoma:* 1906, Pringey *v.* Guss, 16 Okl. 82, 86 Pac. 292 (action on a contract, the original being in the possession of R., living in Nebraska; copy excluded, no diligence being shown to procure the original); *Pennsylvania:* 1846, McGregor *v.* Montgomery, 4 Pa. St. 237 (lease in the hands of a third person, out of the State, who had been notified to produce; other evidence excluded); *South Carolina:* St. 1870, C. C. P. 1922, § 747 (quoted *ante*, § 1212); *Utah:* 1907, McCollum *v.* Southern P. R. Co., 31 Utah 494, 88 Pac. 663 (special ruling upon a railroad ticket); *Vermont:* 1914, State *v.* Alpert, 88 Vt. 191, 92 Atl. 32 (invoices of a Massachusetts business house, which had a rule against removal of documents, not allowed to be proved by copy, the State not having proved any further effort to obtain the originals; unsound); *Wisconsin:* 1835, Diener *v.* Schley, 5 Wis. 483, 525 (letter written to a person in Germany; loss must further be shown); 1906, Bruger *v.* Princeton & S. M. M. F. Ins. Co., 129 Wis. 281, 109 N. W. 95 (application for an insurance policy out of the jurisdiction; "some fair showing should be made of efforts to obtain the original, unless it is clear that they would have been fruitless").

The following ruling is unique, and of course unsound: 1838, Steinkeller *v.* Newton, 9 C. & P. 313 (in a foreign deposition, the witness alluded to the contents of a letter; held, that the inability to compel the witness to produce the letter did not suffice to admit his reference to it).

[2] ENGLAND: 1855, Bruce *v.* Nicolopulo, 11 Exch. 129, 134 (a printed placard posted on a wall in Turkey by the Russian commandant: copy received); 1889, Burnaby *v.* Baillie, L. R. 42 Ch. D. 283, 291 (French official marriage-register, not required to be produced).

CANADA: P. E. I. St. 1889, § 57 (on commissions for examinations taken out of the province, the "books of account or books of original entries" may be proved by copies "given in evidence" or extracts certified by the commissioner).

UNITED STATES: *Federal:* 1873, Burton *v.* Driggs, 20 Wall. 125, 134 (copy of a lost deposition of a witness beyond process, receivable, and a new taking of the deposition not necessary; documents in the possession of one "living in another State", provable "without further showing", by secondary evidence);
Alabama: 1831, Scott *v.* Rivers, 1 Stew. & P. 19, 22 (grantee in possession of deed, residing out of the State; copy receivable); 1878, Snow *v.* Carr, 61 Ala. 363, 368 (policies cancelled and returned to England; production not required); 1879, Whilden *v.*

Bank, 64 Ala. 1, 13, 30 (telegram in custody of person out of the State; production not required); 1880, Elliott *v.* Stocks, 67 Ala. 290, 300 (power of attorney in another State; production not required); 1880, Ware *v.* Morgan, 67 Ala. 461, 466 (bill of exchange in another State; production not required); 1883, Gordon *v.* Tweedy, 74 Ala. 232, 236 (books of a railroad company in another State; production not required); 1883, Martin *v.* Brown, 75 Ala. 442, 447 (letters in a foreign country; production not required); 1884, Pensacola R. Co. *v.* Schaffer, 76 Ala. 233, 237 (original of telegram in adjacent State; production not required); 1892, Alabama State L. Co. *v.* Kyle, 99 Ala. 474, 479, 13 So. 43 (certificate of entry out of State; copy received); 1906, Hoyle *v.* Mann, 144 Ala. 516, 41 So. 835 (ejectment; a writing "out of the State", held provable orally); 1907, Sellers *v.* Farmer, 151 Ala. 487, 43 So. 967 (unrecorded deed presumed to be in possession of grantee out of the State, proved orally);

Arkansas: 1876, Bozeman *v.* Browning, 31 Ark. 364, 371 (bond filed in a Court of another State; sufficient on the facts); 1902, Ritter *v.* State, 70 Ark. 472, 69 S. W. 262 (letters in possession of a third person, without the State; production not required);

California: 1856, Gordon *v.* Searing, 8 Cal. 49 (paper in hands of party out of the State, sufficient); 1893, Zellerbach *v.* Allenberg, 99 Cal. 57, 73, 33 Pac. 786 (letters mailed to a resident of Germany, presumed beyond the State, and thus "lost", under C. C. P. § 1963, subd. 24);

Connecticut: 1853, Shepard *v.* Giddings, 22 Conn. 282 (mere fact of possession out of the jurisdiction, sufficient);

Georgia: 1858, Goodwyn *v.* Goodwyn, 25 Ga. 203, 207 (execution on file out of the State; production not required); 1858, Lunday *v.* Thomas, 26 Ga. 537, 544 (in possession of a third person without the State; not required); 1869, White *v.* Clements, 39 Ga. 232, 242 (paper beyond the jurisdiction and not in the power of proponent; not required); 1871, Frank *v.* Longstreet, 44 Ga. 178, 187 (notice served without the jurisdiction; ruling obscure); 1875, Brown *v.* Oattis, 55 Ga. 416, 419 (deed in another State; proponent not required to try to get it); 1880, Schaefer *v.* R. Co., 66 Ga. 39, 45 (freight list, original out of the State; copy admitted); 1888, Calhoun *v.* Calhoun, 81 Ga. 91, 93, 6 S. E. 913 (deed beyond the jurisdiction, provable by copy); 1895, Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 271 (document in another State; copy allowable); 1897, Miller *v.* McKinnon, 103 Ga. 553, 29 S. E. 467 (possession of third person beyond jurisdiction; production not required);

Illinois: 1855, Mitchell *v.* Jacobs, 17 Ill. 235 (lease sent to California with a deposition; production not required); 1920, People *v.* Bond, 291 Ill. 74, 125 N. E. 740 (letter in hands of defendant's attorneys in another State; prosecution allowed to testify to its contents);

Indiana: 1866, Thom *v.* Wilson, 25 Ind. 370, 372 (paper owned by a witness living abroad; copy attached to deposition, sufficient); 1881, Hall *v.* Bishop, 78 Ind. 370, 371 ("under the control of a witness not within the jurisdiction"; copy allowed);

Iowa: 1916, Worez *v.* DesMoines City R. Co., 175 Ia. 1, 156 N. W. 867 (insurance application outside of the jurisdiction in a third person's hands; copy allowed);

Kansas: 1912, McCord-Collins M. Co. *v.* Dodson, — Kan. —, 121 Pac. 1085 (draft in a Missouri bank, retained by the deposing cashier; copy held sufficient); G. S. 1915, § 7288 (records, by third persons, of entries in course of business, admissible as quoted *post*, § 1519, are provable by sworn copies, when the originals are "kept without the county");

Kentucky: 1838, Lemon *v.* Johnson, 6 Dana 399 (removal from the State by the possessor, and his death abroad; sufficient on the facts); 1847, Waller *v.* Cralle, 8 B. Monr. 11, 14 (release in the hands of a non-resident; sufficient);

Massachusetts: 1904, Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979 (a lease presumed to be in D.'s possession out of the jurisdiction, and therefore provable orally);

Michigan: 1888, Woods *v.* Burke, 67 Mich. 674, 676, 35 N. W. 798 (out of the jurisdiction, sufficient); 1890, Knickerbocker *v.* Wilcox, 83 Mich. 201, 47 N. W. 123 (bond out of the State; production not required);

Minnesota: 1897, Kleeberg *v.* Schrader, 69 Minn. 136, 72 N. W. 59 (contract in Germany; production not required);

Missouri: 1845, St. Louis P. Ins. Co. *v.* Cohen, 9 Mo. 416, 439 (agreement in Wisconsin; production not required); 1848, Robards *v.* McLean, 8 Ired. 522, 524 (the plaintiff's slave had a document which the defendant wished to prove; that the slave had escaped to another State was held sufficient, nor was the chance of finding it in his possession sufficient to require an attempt to get it);

Montana: 1921, Nelson *v.* Gough, — Mont. —, 202 Pac. 196 (original in hands of a person returned to Sweden, and not found on inquiry there; copy received, under Rev. C. § 7872);

New Hampshire: 1836, Burnham *v.* Wood, 8 N. H. 334, 337 (corporation books in another jurisdiction; production excused);

New Jersey: 1903, Hirsch *v.* Leatherbee L. Co., 69 N. J. L. 509, 55 Atl. 645 (letter sent to a non-resident now deceased; copy admitted);

New York: C. P. A. 1920, § 374 (foreign corporation's books may be proved by copy on ten days' notice of such intention and pursuant to details prescribed; except by a corporation proving its own acts);

Ohio: 1846, Reed *v.* State, 15 Oh. 217, 223

tually made is *declared to be sufficient* without laying down any rule as to its necessity.[3]

(a counterfeit bank-note out of the jurisdiction; production not required);
Pennsylvania: St. 1837, Mar. 31, § 20, Dig. 1920, § 10351 (certified copy of extract from certain foreign burial registers, receivable); 1886, Otto *v.* Trump, 115 Pa. 425, 429, 8 Alt. 786 (records in another State, not required to be produced);
South Dakota: 1896, Hagaman *v.* Gillis, 9 S. D. 61, 68 N. W. 192 (document out of the jurisdiction; provable without notice to holder to produce);
Texas: 1854, Clifton *v.* Lilley, 12 Tex. 130, 136 (the last custodian resided in another State; "it was not necessary to call on him by subpœna *d. t.* or otherwise"); 1888, Veck *v.* Holt, 71 Tex. 715, 717, 9 S. W. 743 (vendee out of the jurisdiction; proof of inaccessibility of bill of sale, or of demand, unnecessary); 1890, Frost *v.* Wolf, 77 Tex. 455, 459, 14 S. W. 440 (deed in a notary's office in Louisiana; production excused); 1902, Missouri K. & T. R. Co. *v.* Dilworth, 95 Tex. 327, 67 S. W. 88 (contents of a way-bill in Kansas, held provable by deposition, where it appeared that an effort to obtain the original would have been unavailing);
Vermont: 1856, Hayward R. Co. *v.* Duncklee, 30 Vt. 29, 39 (letter to third persons, one deceased, the other out of the State; production not required); 1900, Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14, *semble* (original out of the jurisdiction; copy sufficient);
Virginia: 1806, Fitzhugh *v.* Love, 6 Call 5, 10 (a Liverpool notary's copy of an inaccessible protest by a London notary, excluded; *semble*, the London notary's copy admissible).

[3] *Can.* 1884, McDonald *v.* Murray, 5 Ont. 559, 570, 575 (document refused to be given up by a foreign official; production excused, without showing that by the foreign law it was irremovable); *U. S. Ala.* 1838, Mordecai *v.* Bell, 8 Port. 529, 535 (possession by one out of the State, and demand for it, sufficient on the facts); 1839, Swift *v.* Fitzhugh, 9 Ala. 39, 53 (same; deposition of holder need not be taken); 1844, Beall *v.* Dearing, 7 Ala. 124, 126 (demand of non-resident, sufficient; taking deposition, here equivalent to a demand); *Ga.* 1849, Doe *v.* Biggers, 6 Ga. 188, 196 (not decided); *Ill.* 1880, Fisher *v.* Greene, 95 Ill. 94, 99 (power of attorney held in New York and refused to be given up by holder; copy allowed); *Ia.* 1895, Bullis *v.* Easton, 96 Ia. 513, 65 N. W. 395 (sufficient where the possessor refused to give up the original, but this is not stated to be essential); *Ky.* 1898, Combs *v.* Breathitt Co., 20 Ky. 529, 46 S. W. 505 (in another county, beyond process, and after "due effort to obtain"; production not required); *La.* 1855, Montgomery *v.* Routh, 10 La. An. 316 (notes refused to be given up by holder out of the State; copies admitted); *Mass.* 1871, Binney *v.* Russell, 109 Mass. 55 (deponent out of the Commonwealth refused to annex a document, but annexed a copy; copy admitted); 1908, State Bank & T. Co. *v.* Evans, 198 Mass. 11, 84 N. E. 329; *Minn.* 1893, Thomson-Houston E. Co. *v.* Palmer, 52 Minn. 174, 181, 53 N. W. 1137 (document held by deponent in Kansas, and refused to be given up; production excused); *Mo.* 1854, Brown *v.* Wood, 19 Mo. 475 (document in Wisconsin, notice to produce having been given; production excused); *N. D.* 1906, Hanson *v.* Lindstrom, 15 N. D. 584, 108 N. W. 798 (document sent to a third person out of the State; diligence to procure it not being shown, secondary evidence was rejected); *Pa.* 1842, Ralph *v.* Brown, 3 W. & S. 395, 399 (deposition in the hands of one in another State who refused to give it up; production not required); 1875, American Life Ins. Co. *v.* Rosenagle, 77 Pa. 507, 513 (letters refused to be given up; question left undecided; here the holder was out of the jurisdiction); *S. C.* 1811, Bunch *v.* Hurst, 3 De Saus. 273, 290 (deed placed in the hands of a third person who had left the State and refused to give it up; the offeror himself having given it to the third person, the case was treated as one of suppression, and production required); *Tex.* 1899, Sayles *v.* Bradley & M. Co., 92 Tex. 406, 49 S. W. 209 (refusal of witness in another county, beyond the reach of subpœna, to attach paper to deposition; production not required); 1921, James *v.* State, 88 Tex. Cr. 656, 228 S. W. 941 (murder; defendant's application for deferred classification under U. S. St. 1917, May 18, being material, and the records of the local selective service board having been forwarded to Washington, D. C., the board clerk's oral testimony was received); *Wash.* 1921, State *v.* Payne, 116 Wash. 640, 200 Pac. 314 (criminal syndicalism; a police-officer from Chicago allowed to prove by photograph the contents of a book in custody of the State's attorney at Chicago, which original the State's attorney had declined on request to surrender; the facts held to excuse production under either rule); *Wis.* 1861, Bonner *v.* Ins. Co., 13 Wis. 677, 687 (railroad shipping book out of jurisdiction; secondary proof allowed; whether railroad's refusal to furnish must be shown, undecided); 1879, Wisconsin River L. Co. *v.* Walker, 48 Wis. 614, 4 N. W. 803 (stock-book in Illinois, which possessor refused to deliver; secondary proof allowed); 1903, Speiser *v.* Phoenix M. L. Ins. Co., 119 Wis. 530, 97 N. W. 207 (insurance-application in N. Y., the holder refusing to give it up; proved by copy attached to deposition).

The circumstance that the possessor of the

The proper practice is to leave the matter entirely in the hands of the *trial Court;* except that no effort need ever be required to obtain a foreign public or official document irremovable by the foreign law (*post*, § 1218). Whether, when the document is a public one in another jurisdiction, the proof of its contents should be by certified copy, involves a different principle (*post*, § 1273).

§ 1214. (4) **Physical Impossibility of Removal.** Production should not be required where the written characters exist on something so firmly fixed to the realty that its removal for production would be impracticable under the circumstances:

1842, PARKE, B., in *Jones* v. *Tarlton*, 1 Dowl. Pr. N. S. 625, 626: "The exceptions . . . [cover things] not easily removed, as in the case of things fixed in the ground or to the freehold; for the law does not expect a man to break up his freehold for the purpose of bringing a notice into court."

Something should no doubt depend upon whether the realty is in the possession of the proponent or of a third person; for in the latter case a slight degree of injury or disturbance would suffice to render removal impracticable. The trial Court's determination should suffice in each instance.[1]

§ 1215. (5) **Irremovable Judicial Records; General Principle (Records, Pleadings, Depositions, Wills, etc.; Statutory Rules).** The record of a court should not be taken away from its place of custody into another court. This irremovability is often expressly enacted by statute; but, whether it is so enacted or not, the principle has always been judicially sanctioned on grounds of policy. The removal into another court as evidence would make it impossible for the time being for others to use the records; there would be a

document is the *opponent*, and that therefore it might be obtained from abroad by legal process in the suit is immaterial; the case falls rather under the rule of § 1199, *ante:* 1900, Phillips *v.* U. S. Benevolent Soc'y, 125 Mich. 186, 84 N. W. 57 (insurance application filed at defendant's home office in Canada, provable by copy).

Contra: 1903, Central El. Co. *v.* Sprague El. Co., 57 C. C. A. 197, 120 Fed. 925 (minutes of the opponent corporation, in another State; the original or a certified copy required to be produced).

For the question whether the original *must be sent to a deponent* out of the jurisdiction, deposing to handwriting, see *ante*, § 1185.

§ 1214. [1] *Eng.* 1809, Cobden *v.* Bolton, 2 Camp. 108 (notice on a board inlaid in the wall of a coach-office; proved by an examined copy); 1833, R. *v.* Fursey, 6 C. & P. 81, 84 (notice affixed to a wall; copy admitted); 1834, Doe *v.* Cole, 6 C. & P. 359 (tablet in a church; production not required); 1839, Bartholomew *v.* Stephens, 8 C. & P. 728 (a notice painted on a board on a pole in a field; copy admitted); 1840, Mortimer *v.* M'Callan, 6 M. & W. 58, 63, 68 (handwriting on a wall; production not required); 1842, R. *v.* Edge, Wills, Circ. Evid., 5th Am. ed., 212, Maule, B. (an inscription on a coffin-plate; "being removable, it ought to have been produced"); 1842, Jones *v.* Tarlton, 9 M. & W. 65, 1 Dowl. Pr. N. S. 625 (a notice in a carrier's office, painted on a board fastened by a string to a nail; production required); 1848, Sayer *v.* Glossop, 2 Exch. 409, 411 (per Pollock, C. B., a writing pasted on a wall; per Rolfe, B., words chalked on a wall; used as examples of non-availability); 1888, Parnell Commission's Proceedings, 12th day, Times' Rep. pt. 3, p. 159 (testimony being offered as to a notice posted up forbidding the payment of rent, it was ruled that "it is not necessary to produce the actual notices that were posted up").

U. S. 1896, Harper *v.* State, 109 Ala. 28, 19 So. 857 (notices posted against trespassing; production not required); Ga. Rev. C. 1910, § 5757 (inscriptions on "walls, monuments, and other fixed objects", provable by copy); 1859, Stearns *v.* Doe, 12 Gray Mass. 482, 486 (name and port painted on the stern of a vessel, described by a witness; present point not raised).

serious risk of loss; and there would be a constant additional wear and tear upon the document. For the record of a court without the jurisdiction there is the added consideration that there is no legal means of obtaining the document.

(*a*) For these reasons (analogous to those affecting public records in general, *post*, § 1218) it is well settled that the record of *another court* may be proved without production:

Ante 1726, Chief Baron GILBERT, Evidence, 7: "Records, being the precedents of the demonstrations of justice, to which every man has a common right to have recourse, cannot be transferred from place to place to serve a private purpose; and therefore they have a common repository, from whence they ought not to be removed but by the authority of some other court; and this is in the treasury of Westminster. And this piece of law is plainly agreeable to all manner of reason and justice; for if one man might demand a record to serve his own occasions, by the same reason any other person might demand it; but both could not possibly possess it at the same time in different places, and therefore it must be kept in one certain place in common for them both. Besides, these records, by being daily removed, would be in great danger of being lost. And consequently it is on all hands convenient that these monuments of justice should be fixed in a certain place, and that they should not be transferred from thence but by public authority from superior justice. The copies of records must be allowed in evidence, for . . . the rule of evidence commands no farther than to produce the best that the nature of the thing is capable of; for to tie men up to the original that is fixed to a place, and cannot be had, is to totally discard their evidence, . . . for then the rules of law and right would be the authors of injury, which is the highest absurdity."

1811, NOTT, J., in *Tobin* v. *Seay*, 2 Brev. 470 (receiving an office copy of an execution): "An exemplification is all that a party can obtain. It is the best evidence the nature of the case admits of; because the Courts would not compel the clerks of courts to attend with the originals upon a subpœna 'duces tecum.'"

1868, JOYNES, J., in *Bullard* v. *Thomas*, 19 Gratt. 14, 18: "The usual mode of proving the record of another court is by the production of a certified copy. But the copy is not produced in such cases because it is better evidence than the original; it is received only on the ground of convenience, as a substitute for the original record. The reception of a copy avoids the inconvenience of removing the original record from place to place."

This rule applied to *inferior courts* also.[1] The docket of a *justice of the peace* is now provided for almost universally by statute (*infra*, note 11).

Distinguish the case where a lost judicial record is *restored by decree;* here the copy restored becomes the original, and the loss of the former need not be shown (*post*, § 1240).

(*b*) It follows that a writ, pleading, or the like, which appertains to the *trial at bar in the same court* and will become a part of the record in the suit, must be produced or accounted for like any other document.[2] Conversely,

§ 1215. [1] 1696, Holt, C. J., in R. v. Hains, Comb. 337: "We know that it is not usual for inferior courts to draw up their records, but only short notes; and copies of these short notes, being public things, are good evidence; otherwise of private things, for copies of rent-rolls are no evidence, but the original must be produced."

[2] *Eng.* 1807, Bayley v. Wylie, 6 Esp. 85 (a recital in a deposition of the commission authorizing it, held inadmissible; the commission required); *Ala.* 1880, Baucum v. George, 65 Ala. 259, 266 (execution, etc.; loss required to be shown); *Ga.* 1854, Ernest v. Napier, 15 Ga. 306, 308 (execution in the Court below; production held necessary, being obtainable by application to that Court or by mandamus in case of refusal); *Ill.* 1897, Roby v. Title Co., 166 Ill. 336, 46 N. E. 1110 (only the record allowable to prove rules of court;

a document which is part of the record in *another court* need not be produced, even though it is in fact in the control of the opponent and thus available.[3]

(*c*) The question will often arise whether a document is in legal theory a *part of the record* or is merely an incidental document which can be withdrawn from the other Court. An *answer in Chancery*, it was settled, need not be produced, although in strictness the Chancery in England was the central custodian of records for all Courts and although the Chancellor's permission for temporary removal was by tradition obtainable.[4] But an *affidavit*, it was thought, was not a part of the record and must be produced; though this would hardly be the ruling at the present day.[5] A *will* of land probated in the Ecclesiastical Court did not become a part of the record there, because that Court had no jurisdiction to render judgment upon a will of land (*post*, § 1238), and therefore the will must be produced at common law like any other document;[6] but statutes have everywhere changed this by creating courts with jurisdictions equally over wills of all kinds and by permitting the use of copies.[7] A *deed* offered in the other court for purposes

but it is singular that a Court cannot take notice of its own rules); *Tenn.* 1874, Currey *v.* State, 7 Baxt. 154, 155 (same as next case; here proof of loss was waived); 1880, Epperson *v.* State, 5 Lea 291, 294 (copy of minutes of indictment, usable on accounting for the original).

[3] 1853, Fouke *v.* Ray, 1 Wis. 104, 108 (even where the opponent has the original in court); 1858, Dupont *v.* Downing, 6 Ia. 173, 176 (original not required, even where the opponent was the custodian).

Contra: 1854, Millard *v.* Hall, 24 Ala. 209, 212, 223 (order of sale issued by clerk of another court; production required); 1855, Lunsford *v.* Smith, 12 Gratt. Va. 554, 563 (execution in another court, not accounted for; copy excluded).

[4] *Eng.* 1809, Salter *v.* Turner, 2 Camp. 87; 1812, Lady Dartmouth *v.* Roberts, 16 East 334, 340 (answer in Chancery in a suit between other parties); 1813, Hodgkinson *v.* Willis, 3 Camp. 401 (answer in Chancery in another suit); 1817, Hennell *v.* Lyon, 1 B. & Ald. 182; 1825, Ewer *v.* Ambrose, 4 B. & C. 25; 1840, Abinger, C. B., in Mortimer *v.* M'Callan, 6 M. & W. 58, 68 ("formerly the actual production was required", but the inconvenience of getting the Lord Chancellor's consent on each occasion led to a change); *U. S. N. Y.* 1830, Winans *v.* Dunham, 5 Wend. 47 (original of a Chancery decree, etc., need not be produced); *Va.* 1817, Gibson *v.* Com., 2 Va. Cas. 111, 120 (in a Superior Court, certified copy of judgment of the General Court suffices).

[5] 1726, Gilbert, Evidence, 56 ("the reason is, because the answer is an allegation in a court of judicature, . . . but a voluntary affidavit hath no relation to any court of justice, and . . . the affidavit itself must be produced as the best evidence"); 1767, Buller, Nisi Prius, 239; 1825, Graham, B., in Rees *v.* Bowen, 1 McCl. & Y. 383, 389 ("I think there is a marked difference between an affidavit and an answer or anything else which is properly called a record, in the instance of which an attested copy is perfectly sufficient. . . . Answers, or other records, where they are regular, are never permitted to be removed from the files; but nothing is more usual than for a judge, where a party has occasion to make use of an affidavit, to direct it to be taken off the file for the purpose").

Contra: 1827, Highfield *v.* Peake, 1 M. & M. 109, Littledale, J.; 1847, Garvin *v.* Carroll, 10 Ir. L. R. 323, 330 ("It is a record of the Court", and need not be produced, except on a charge of perjury).

Depositions are usually provided for by the statutes governing them (*post*, §§ 1380–1383).

[6] 1685, Anon., Skin. 174 ("If they will not after proof deliver back the original, then this Court will intermeddle, and a proof of the will cannot be by copy"); 1697, Hoe *v.* Nathrop, 1 Ld. Raym. 154 (probated will of realty; copy excluded).

[7] These statutes have been placed, to avoid repetition, under § 1681, *post;* they allow the use of a copy of the judgment of probate (under whatever name it goes); though in a few States they allow production of the original will to be required, *e.g.* on a suggestion of fraud.

The following rulings were made under such statutes: *Alabama:* 1893, Newsom *v.* Holesapple, 101 Ala. 682, 691 (original not required; applying the statute); *Illinois:* 1890, Purdy *v.* Hall, 134 Ill. 298, 25 N. E. 645 (original must be accounted for); 1894, Nicewander *v.* Nicewander, 151 Ill. 156, 161, 37 N. E. 698 (same); *South Carolina:* 1824, Franklin *v.* Creyon, Harp. Eq. 243, 249 (certified copy of

of proof was regarded as a part of the record, temporarily at least;[8] the question depends largely on the nature of the other proceeding and of the document.[9] Statutes often provide for the proof by copy of *sundry documents required to be filed* among court records.[10]

(*d*) In most jurisdictions *statutes* have expressly provided that the records of courts in general need not be produced. So far as these statutes brought within the rule certain judicial proceedings (such as those of justices of the peace), they may have served to make more certain or to amplify its operation. But for the most part these statutes merely declare, as to the present subject, that which was before never questioned; and their principal purpose was usually to amplify the rule (*post*, § 1681), concerning the exception to the Hearsay rule for certified copies by official custodians of documents.[11]

§ 1216. **Same: Exception for 'Nul Tiel Record' and Perjury.** (*a*) Where the plea of 'nul tiel record' was interposed, it seems to have been originally the practice to require production even from another court; the production

probated will, received, the Court records being burnt); 1856, Wardlaw *v.* Hammond, 9 Rich. 454 (the notice required by statute must be in writing); 1859, Gourdin *v.* Staggers, 12 Rich. 307 (statutory notice held insufficient in tenor); 1860, Sally *v.* Gunter, 13 Rich. 72, 75 (certified copy of domestic probated will, established on a copy of will probated in another State, received); *Tennessee:* 1848, Weatherhead *v.* Sewell, 9 Humph. 272, 283 (will required to be produced, on suggestion of fraud, etc.); *Texas:* 1886, Hickman *v.* Gillum, 66 Tex. 314, 315, 1 S. W. 339 (original not required); 1889, Rio Grande & E. P. R. Co. *v.* Bank, 72 Tex. 467, 10 S. W. 563 (same); *Virginia:* 1826, Dickinson *v.* M'Craw, 4 Rand. 158, 160 (statute applied; copy sufficient).

[8] *Ante* 1767, Buller, Nisi Prius, 253 (where a deed being pleaded "is tied up to one court, and is impossible to be removed, it shall be pleaded in another without shewing"); 1593, Wymark's Case, 5 Co. Rep. 75 ("If a deed be denied in one court, by which it remains there, this deed may be pleaded in another court without shewing it; for 'lex non cogit ad impossibilia'").

[9] *Eng.* 1817, Handley *v.* Fitzhugh, 1 A. K. Marsh. 24 (document unavailable because lodged in a court of law in another suit; whole record of that suit required to be read, to show the reason for non-production); 1849, Davidson *v.* Davidson, 10 B. Monr. 115 (award filed in another court of the State: original required); *Pa.* 1811, Miles *v.* O'Hara, 4 Binn. 108, 111 (judge's notes are not a record, and must be produced); *S. Car.* 1802, Fant *v.* McDaniel, 1 Brev. 173 (malicious prosecution: original indictment need not be produced); *Vt.* 1836, Mattocks *v.* Bellamy, 8 Vt. 463, 467 (habeas corpus writ, in files of court, provable by copy).

The question is properly one of the nature of a record, not of any principle of evidence, and the above cases are merely a few illustrations of the range of the controversy.

[10] The following statutes include only those in which the document is treated as *not* a part of the record and is *required to be produced or accounted for:* many other statutes, providing for proof by copy without producing the original, are collected, to avoid repetition, *post*, § 1681: *Conn.* Gen. St. 1918, § 4857 (bond filed in Probate Court: if lost, a certified copy is admissible); *Miss.* Code 1906, § 1971, Hem. 1631 (in action on a writing filed in a suit brought thereon in another court, a certified copy is admissible; but if execution is denied by plea, the clerk having custody must attend with the original); *N. H.* Pub. St. 1891, c. 226, § 9 (copy of recorded deposition 'in perpetuam', usable if the original is "lost or out of the possession and control" of the party); *N. C.* Con. St. 1919, § 1779 (writings "recorded or filed as records in any court", provable by keeper's certified copy under seal, unless the Court orders production of the original); *Okl.* Comp. St. 1921, § 2951 (certified copy by clerk of district court of indictment, information, or bond filed, admissible when original is "lost, destroyed, or stolen, or for any other reason cannot be produced at the trial"); *R. I.* Gen. L. 1909, c. 320, § 9 (bond filed in Probate Court, provable by certified copy if lost); *Tex.* Rev. Civ. Stats. 1911, § 3706 (in a suit on an instrument filed in another domestic court, a certified copy is admissible; but on affidavit denying execution, the clerk shall attend on subpœna with the original).

[11] To save repetition the statutes are collected *post*, § 1681.

being obtained through Chancery by 'certiorari.'[1] But afterwards it came to be settled that production of the record was here unnecessary, and was required only where the record in issue existed in the same court or in an inferior court.[2] The practice in this country seems to be to require production of a record in the same court,[3] but not usually of a record in an inferior court,[4] and of course not of a record in a foreign court.[5]

(*b*) On a charge of *perjury* in an answer in Chancery, it was customary to require the production of the answer; [6] but this was rather because the jurat of the Master or other official did not in itself suffice to identify the accused as the signer, and the principle involved was in truth that of Authentication (*post*, § 2158).

§ 1217. **Same: Discriminations (Dockets, Certified Copies, etc.).** (1) The question will of course arise whether the *docket-book*, clerk's *minutes*, and such documents, may constitute the record instead of the original papers or the judgment-roll; this involves the nature of a judicial record, which is not a question of the law of Evidence, but involves the "parol evidence" rule (*post*, § 2450). (2) A *sheriff's deed of sale* usually recites the judgment and execution upon which it is founded; whether those papers should be produced is a question involving in part the present principle, but involving also and chiefly, the admissibility under the Hearsay rule of the sheriff's official recitals (*post*, § 1664). (3) That the *original* record, if in fact available and in Court, *may* be used, is clear (*ante*, § 1186). (4) In using copies to prove the record, an exception to the Hearsay rule allows the use of *copies*

§ **1216.** [1] 1726, Gilbert, Evidence, 26 ("It is regularly true that when the record is pleaded and appears in the allegations, it must be tried on the issue 'nul tiel record'; but where the issue is upon fact, the record may be given in evidence [by copy] to support that fact. When the issue is 'nul tiel record', the record must be brought, 'sub pede sigilli'; but where the record is offered to a jury [as evidence], any of the forementioned copies are evidence": Editor's Note: "So that the difference of the two cases is this: In the former the issue goes to the Court; for 'nul tiel record' is an issue in which the record itself is the only proof; . . . but where the issue is on the fact, and the record is only inducement, . . . a copy may be given in evidence").

[2] 1742, Woodcraft *v.* Kinaston, 2 Atk. 317 (Lord Hardwicke, L. C.: "There is a great difference between the record itself and the tenor; for this is only a transcript or copy; indeed it must be literal, but still it is only a transcript." "If 'nul tiel record' be pleaded, the Court cannot have the record but by 'certiorari' and then the tenor [*i.e.* a copy], if returned, is sufficient as evidence of the record, and will countervail the plea of 'nul tiel record': but when the record is to be proceeded upon [in a superior court], the record itself must be returned").

[3] 1847, Alexander *v.* Foreman, 7 Ark. 252 (production required); 1850, Adams *v.* State, 11 Ark. 466, 473 (production required if in same court); 1796, Burk *v.* Tregg, 2 Wash. Va. 215 (same); 1805, Anderson *v.* Dudley, 5 Call Va. 529 (same).

[4] *Conn.* 1783, Allin *v.* Hiscock, 1 Root 88 (justice's record; certified copies used; variance appearing, the original was required); *Me.* 1851, Dyer *v.* Lowell, 33 Me. 260, 262 (on 'certiorari' for quashing an order of partition; copy sufficient); *Mass.* 1808, Ladd *v.* Blunt, 4 Mass. 402 (Parsons, C. J.: "We never direct the record of the Court of Common Pleas to be sent us on the trial of 'nul tiel record', but receive copies of their records attested by the clerk"); *N. H.* 1852, Willard *v.* Harvey, 24 N. H. 344, 350 (certified copy sufficient); *N. Y.* 1825, Vail *v.* Smith, 4 Cow. 71 (record of an inferior domestic Court may be proved by exemplification, and need not be brought by 'certiorari').

[5] 1820, Baldwin *v.* Hale, 17 John. 272 (foreign record, provable by examined copy; here of an U. S. Circuit Court); 1813, Mills *v.* Duryee, 7 Cr. U. S. 481, 484 (record in another State; exemplified copy sufficient); 1818, Hampton *v.* M'Connel, 9 id. 234 (same).

[6] 1812, Lady Dartmouth *v.* Roberts, 16 East 334; 1825, Ewer *v.* Ambrose, 4 B. & C. 25; 1847, Garvin *v.* Carroll, 10 Ir. L. R. 323, 330.

certified out of Court by the legal custodian; the detailed rules of this exception are elsewhere dealt with (*post*, § 1681). (5) There are certain *preferences* accorded to particular kinds of copies; these involve another principle (*post*, §§ 1269–1273). (6) Whether, when a *lost judicial record* has been *re-established* by a decree, the loss has to be shown otherwise than as recited in the decree, is considered *post*, § 1660; and the *conclusiveness* of the re-established record is considered *post*, § 1347.

§ 1218. (6) **Irremovable Official Documents; General Principle.** For reasons similar to those applicable to judicial records, documents belonging in any public office need not be produced, but may be otherwise proved. Their removal for production in evidence would delay and hinder the official use of the files, would make it impossible for other persons to consult the absent documents, would subject them to risk of loss, and would injure them by constant wear and tear. These reasons and the general principle have long been established:[1]

1774, Mansfield, L. C. J., in *Jones* v. *Randall*, Cowp. 17: "A copy of [the Lords' journals] may certainly be read in evidence; for the inconvenience would be endless if the journals of the House of Lords were to be carried all over the kingdom."

1817, Ellenborough, L. C. J., in *Hennell* v. *Lyon*, 1 B. & Ald. 182, 184: "The admission of copies in evidence is founded upon a principle of great public convenience, in order that documents of great moment should not be ambulatory, and subject to the loss that would be incurred if they were removable. The same has been laid down in respect of proceedings in courts, not of record, copies whereof are admitted, though not strictly of a public nature." Abbott, J.: "It is a general principle that copies are receivable in such cases without the originals, from the great inconvenience which would result if the documents were taken to different places. There would have been a danger of loss from such a practice, and besides, the documents might be wanted at different places at the same time."

1840, Abinger, L. C. B., in *Mortimer* v. *M'Callan*, 6 M. & W. 58, 69: "When the law is laid down that you cannot remove the document in which the writing is made, you are entitled to the next best evidence."

1844, Pollock, C. B., in *Doe* v. *Roberts*, 13 M. & W. 520, 530 (a statute required title-deeds, etc., to crown lands, to be deposited in a certain office): "When directed to be kept in any particular custody, and so deposited, they are provable by examined copies, not on the ground of their being books of a public nature such as that all the world may look at them, but on the ground of the great inconvenience of removing them."

1853, Lipscomb, J., in *Coons* v. *Renick*, 11 Tex. 134, 137 (holding a contract for military stores, filed with the quartermaster, to be a public document): "If Major Babbitt could be required to appear and produce the original in one of the courts, he would be equally liable to attend with his original contract all over the State, to the great hazard of a loss of the document, as well as to the great inconvenience of those interested in the contract from its being removed from the office of the quartermaster-general. It is impossible to foresee the extent of the inconvenience to the public service, if the rule should be laid down that the quartermaster could be called from his service, where his presence might be constantly necessary, to go with a document not his own but belonging to the government."

§ 1218. [1] *Accord: Cal.* C. C. P. 1872, § 1855 (proof by production of original is excused, "3, when the original is a record or other document in the custody of a public officer"); *Colo.* Comp. L. 1921, C. C. P. § 391; *Mont.* Rev. C. 1921, § 10516; *Or.* Laws 1920, § 712, par. 3 (like Cal. C. C. P. § 1855); § 712, par. 4 (like Cal. C. C. P. § 1855; quoted *post*, § 1225) *P. R.* Rev. St. & C. 1911, § 1392 (like Cal. C. C. P. § 1855).

It was once a phrase much used that a copy is admissible "where the original if produced would be evidence." [2] This was intended to be said of official documents; but it was not said as affording a test for the present purpose, nor could it do so; it was said with reference to the Hearsay exception for Official Statements (*post*, § 1630); and its meaning is that where the original document was admissible by exception as an official statement, there a copy of it would equally be admissible under the same exception to the Hearsay rule. So far as it has in later times been construed to mean that every official document admissible under the Hearsay exception may be proved by copy, it has been misunderstood; [3] for the principle of non-production does not depend on admissibility (for example, a government commission's report may not be admissible) but on its presence in official custody and its irremovability.

The conceivable scope of the principle may include several sorts of documents: (1) Where by statute or regulation a document in official custody is expressly or impliedly *forbidden to be removed*, it is clear that the principle applies and production is dispensed with.[4] (2) Where the document is one of the *working-documents* of the office, containing the official doings or being a paper made and consulted there officially in the course of office-duty, it is equally clear that it need not be produced. (3) Where the document is one made by a *private person* and *filed* in a public office, the principle does not apply if a statute or regulation does not expressly require it to be filed and kept there; if it does so require, then the principle applies; although the rulings lay down no clear distinction on the subject, and most of the instances are dealt with by a statute in general or specific terms. (4) Where the document is one made by a *private person* and required by law to be *recorded* in the public office but not to be kept there, the principle does not at common law apply; but in many instances a statute has provided for its application. (5) Where the document is made by a *public officer* and is *delivered*, after being recorded, *to a private person* (as, a government land-certificate), the principle does not apply; but by statute in many instances it has either been made to apply or the record has been constituted the basis of title, so that the record, as the original, being in official custody, need not be produced.

§ 1219. **Same: Specific Instances, at Common Law.** No definite and comprehensive test in applying the principle seems to have obtained acceptance at common law; and the rulings are varied and not entirely consistent. It may be noted that the practice as to producing *legislative journals* seems

In Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844 (1903), the utterly unfounded statement is made that "the right to make proof of official records and documents primarily by copy does not exist independent of statute." Perhaps the learned judge meant to say "by *certified* copy", but even that is scarcely true (*post*, § 1677).

[2] *E.g.*: 1696, Holt, C. J., in R. *v.* Hains, Comb. 337 ("A copy of any original is evidence wheresoever the original is evidence"), 1697, Hoe *v.* Northrop, 1 Ld. Raym. 154 ("Resolved per curiam that the immediate copy of an original is good evidence where the original itself is evidence").

[3] See, for example, the British statutes, *post*, § 1680.

[4] For the question whether the original *may* be removed and produced, see *ante*, § 1186, *post*, §§ 2182, 2367.

never to have been settled in England;[1] though in this country production is seldom required, and a statute often expressly thus provides.[2] The other kinds of documents ruled upon have led to no special or enlightening controversy.[3]

It may be noted that whether a document is an official one and need not be produced may be still a common-law question, even where a statute addi-

§ 1219. [1] 1653, Faulconer's Trial, 5 How. St. Tr. 323, 349 (journal produced); 1662, Sir Henry Vane's Trial, 6 How. St. Tr. 119, 150 (book produced); 1774, Jones *v.* Randall, Cowp. 17 (Lord Mansfield, C. J.: "A copy [of the Lords' journals] may certainly be read in evidence"); 1781, R. *v.* Lord Gordon, 2 Dougl. 590, 593 (Commons' journals; copies received without objection); 1806, Lord Melville's Trial, 29 How. St. Tr. 685 (the printed journals rejected); 1840, Abinger, C. B., in Mortimer *v.* M'Callan, 6 M. & W. 58, 67 (cites the preceding cases as not allowing copies, because "any one wishing to remove them could get the sanction of the Speaker to do so").

For the conclusiveness of the *certified enrolled statute*, see *post*, § 1350; for *judicial notice* of the journals, see *post*, § 2572; for *printed copies*, see *post*, § 1684.

[2] See these collected *post*, §§ 1680, 1684.

[3] ENGLAND: 1720, Brocas *v.* Mayor, 1 Stra. 307 (election record of the City of London; copy allowed); 1721, R. *v.* Gwyn, 1 Stra. 401 (municipal corporate records; copy not allowed because the letter in question was not a corporate act); 1788, R. *v.* King, 2 T. R. 234 (assessment-books of the land-tax in London; copy allowed); 1811, Eyre *v.* Palsgrave, 2 Camp. 605 (license-books of the Privy Council, licenses recorded in the Secretary of State's office, provable by copy); 1812, Walker *v.* Wingfield, 18 Ves. 443, 444 (marriage-register, provable by copy, but intimating that the registers were so often ill-kept that production should be required); 1813, Attorney-General *v.* Tomkins, 1 Dow 404 (to prove a clearance, in a prosecution for clearing with an undue number of persons on board, a copy was offered of the entry signed by the master in the custom-house book of clearances; the original entry held, *semble*, under the particular circumstances, provable by a copy); 1834, Alivon *v.* Furnival, 1 Cr. M. & R. 277, 291 (a French document deposited with a notary, and by usage, though not by law, irremovable; held "in effect out of the power of the party"); 1840, Abinger, C. B., in Mortimer *v.* M'Callan, 6 M. & W. 58, 68 (custom-house books provable by copy); 1848, Sayer *v.* Glossop, 2 Exch. 409 (public marriage-register; production not required); 1860, Reed *v.* Lamb 6 Jur. N. S. 828 (under statute; register of voters held to be of a "public nature"); 1873, R. *v.* Weaver, L. R. 2 C. C. R. 85 (official register of births, held provable by copy within the statute); 1913, Owner *v.* Bee Hive Spinning Co., [1914] 1 K. B. 105 (document kept by law affixed publicly in a factory; cited more fully *ante*, § 1200, n. 4).

CANADA: 1837, McLean *v.* McDonell, 1 U. C. Q. B. 13 (memorial upon a land-claim filed in the Governor-General's office; copy allowed); 1875, Burpee *v.* Carvill, 16 N. Br. 141 (public documents in Liverpool in the custom-house proved by examined copies).

UNITED STATES: some of the following cases were doubtless affected by statutes, and reference should be made to the statutes collected *post*, § 1680:

Federal: 1830, Ronkendorff *v.* Taylor, 4 Pet. 349, 360 (official assessment list; original not required); 1896, *Re* Hirsch, 74 Fed. 928 (unlawful liquor-selling by C.; the application of C. for a Federal license to sell liquors being admissible to show intent, the fact that the document was on file in the records of the Federal deputy-collector of internal revenue, held not to excuse its production in court); 1879, Corbett *v.* Gibson, 16 Blatchf. 334 (documents in military headquarters of Department of the East, provable by copy); 1919, Cohn *v.* U. S., 2d C. C. A., 258 Fed. 355 (correspondence between a naval officer and a purchaser, the defendant, filed with a court-martial record in the Navy Department, held to be documents required to be kept on file in a public office, and therefore provable by copy under U. S. Rev. St. § 882; but here the opinion holds that the originals should have been accounted for as unavailable; the precise grounds for the ruling are obscure);

Alabama: 1847, Doe *v.* Eslaya, 11 Ala. 1028, 1037, 1041 (certain Spanish records, etc.; under statute, production not required); 1869, Monts *v.* Stephens, 43 Ala. 217, 222 (judge's certified copy of constable's bond; original not required, *semble*, if goods as a statutory bond, but otherwise if valid only as a common-law bond); 1881, Donegan *v.* Wade, 70 Ala. 501, 506 (search required in Probate office of written contestation-grounds, before oral evidence of contents); 1889, Stanley *v.* State, 88 Ala. 154, 156, 7 So. 273 (reports of fees by clerk of Court to Auditor, provable by certified copies); 1892, Cofer *v.* Scroggins, 98 Ala. 342, 345, 13 So. 115 (claim of exemption, filed in Probate Court; production not required); 1893, Schwartz *v.* Baird, 100 Ala. 154, 156, 13 So. 497 (husband's written consent to wife's engaging in business, filed in Probate Court; production not required);

tionally applies; so that, if the statute is limited in its application, the original may still at common law not be required. Thus, the statutes covering the

1893, Willingham *v.* State, 104 Ala. 59, 16 So. 116 (certificate of incorporation recorded with Secretary of State; certified copy of record receivable, whether the certificate itself has been kept there or not);
Arkansas: 1892, Dawson *v.* Barham, 55 Ark. 286, 290, 18 S. W. 48 (swamp-land-office entries provable by certified copy); 1895, Woodruff *v.* State, 61 Ark. 157, 171, 32 S. W. 102 (report of State board, original being lost, proved by extracts in the Senate journal);
California: 1855, Norris *v.* Russell, 5 Cal. 250 (municipal ordinance; notice of tax sale; production required); 1857, Hensley *v.* Tarpey, 7 Cal. 288 (regulation of public office forbidding removal of papers, sufficient); 1857, Hensley *v.* Tarpey, 7 Cal. 288 (grant in Surveyor-General's office; production required); 1875, Vance *v.* Kohlberg, 50 Cal. 346, 349 (articles of consolidation filed by copy; certified copy sufficient without producing original); 1877, People *v.* Hagar, 52 Cal. 171, 173, 186 (certified copy of petition for reclamation, to the Board of Supervisors; original not required; same, for the register's notice thereof to the county-recorder); 1883, People *v.* Williams, 64 Cal. 87, 91 (certificate of U. S. census officer to contents, received, without producing original records);
Connecticut: 1841, Price *v.* Lyon, 14 Conn. 279, 290 (certificate of membership lodged with clerk of ecclesiastical society; production not required);
Illinois: 1884, Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 617, 623 (ordinance of city in Indiana; production of original not required); 1909, Chicago *v.* Mandel, 239 Ill. 559, 88 N. E. 226 (reports of the South Park Commissioners held not provable by printed copy without accounting for the originals; unsound; no authority cited);
Indiana: 1864, Wells *v.* State, 22 Ind. 241, 243 (books of county auditor; originals need not be produced); 1881, Waymire *v.* State, 80 Ind. 67, 69 (constable's bond; original not required);
Iowa: 1871, Bellows *v.* Todd, 34 Ia. 18, 26 (letters on file in the land-office; copies sufficient); 1878, Morrison *v.* Cond, 49 Ia. 571, 573 (contract not required to be filed; statute not applicable); 1889, Lyons *v.* Van Gorder, 77 Ia. 600, 601, 42 N. W. 500 (assessment of damages recorded with town-clerk; original accounted for); 1899, McPeek *v.* Tel. Co., 107 Ia. 356, 78 N. W. 63 (governor's proclamation of reward; original not required);
Kansas: 1895, Bowersock *v.* Adam, 55 Kan. 681, 41 Pac. 971 (statements of personal property for taxation; production not required, under Code § 372, unless proponent had control); 1906, State *v.* Nippert, 74 Kan. 373, 86 Pac. 478 (Federal revenue collector's records, proved by examined copy); 1906, State *v.* Schaeffer, 74 Kan. 390, 86 Pac. 477 (similar);
Louisiana: 1845, White *v.* Kearney, 9 Rob. 495, 499 (clearance and manifest of vessel at custom-house, not an official document);
Maine: 1881, State *v.* Wiggin, 72 Me. 425 (internal revenue record-book provable by certified copy); 1898, State *v.* Howard, 91 Me. 396, 40 Atl. 65 (records in U. S. tax-collector's office, provable by copy);
Michigan: 1876, Pierce *v.* Rehfuss, 35 Mich. 53 (bill of sale lawfully filed with town-clerk, provable by certified copy); 1895, People *v.* Clarke, 105 Mich. 169, 62 N. W. 1117 (election returns; loss shown); 1898, Deerfield Tp. *v.* Harper, 115 Mich. 678, 74 N. W. 207 (return of highway-taxes filed with supervisor; production required);
Mississippi: 1849, Routh *v.* Bank, 12 Sm. & M. 161, 185 (power of attorney authorized by Louisiana law to be kept on deposit by notary; certified copy admitted); 1855, James *v.* Kirk, 29 Miss. 206, 210 (same, bill of sale);
Missouri: 1823, Chouteau *v.* Chevalier, 1 Mo. 343 (marriage-contract deposited by Spanish custom among government archives, provable by copy); 1851, Harvey *v.* Chouteau, 14 Mo. 587, 597 (will codicil required by Louisiana law to be kept by notary, provable by copy); 1887, State *v.* Pagels, 92 Mo. 300, 310 (Illinois insane-hospital books not shown to be public); 1897, Carter *v.* Hornback, 139 Mo. 238, 40 S. W. 893 (a survey not official, and therefore not entitled to record; copy excluded);
New Hampshire: 1843, Woods *v.* Banks, 14 N. H. 101, 109 (proprietary records need not be produced); 1850, Forsaith *v.* Clark, 21 N. H. 409, 419 (proprietary character recorded; production not required); 1857, Willey *v.* Portsmouth, 35 N. H. 303, 309 (town records; production not required); 1858, Ferguson *v.* Clifford, 37 N. H. 86, 95 ("Books or records of this character [*i.e.* official registers or books kept by persons in public office], being themselves evidence, and being usually restricted to a particular custody, their contents may be proved by an immediate copy"); 1895, State *v.* Collins, 68 N. H. 299, 44 Atl. 495 (U. S. internal revenue collector's records, provable by copy);
New York: 1831, Jackson *v.* Leggett, 7 Wend. 377 (original certificate of incorporation of a society must be produced);
Ohio: 1840, Sheldon *v.* Coates, 10 Oh. 278, 282 (tax records; original not required);
North Carolina: 1816, Teil *v.* Roberts, 3 Hayw. 138, *semble* (postmasters' valuations, in the hands of the postmaster-general; production not required); 1817, Denton *v.* Foute, 4 Hayw. 73 (enlistment-contract of a soldier, kept at the Adjutant-General's and

present subject have for their chief purpose (as noted in the ensuing section) to authorize custodians to give certified copies which shall be receivable in spite of the Hearsay rule, and so a statute authorizing the use of a certified copy of a given document will still leave in force the common-law principle on the present subject; so that the document may be proved by an examined copy without production.[4]

§ 1220. **Same: Specific Instances, under Statutes.** In a vast number of instances, statutes have expressly provided that specific documents in official custody may be proved without production, *i.e.* by copy. In many jurisdictions a general rule has by statute been enacted, making the same provision in general terms for official documents as a class.[1] These statutes, however, usually do no more, as regards the present principle, than the Courts would otherwise have done under the common-law principle; the chief object of such statutes being usually to amplify the common-law exception to the Hearsay rule by which certified copies by official custodians may become admissible.

§ 1221. **Same: Exceptions at Common Law.** (1) There was no exception to the general principle at common law for a case where the official document happened to be *actually in court; i.e.* it could still be proved by copy.[1]

the Treasury; production not required); *Pennsylvania:* 1823, Kingston *v.* Lesley, 10 S. & R. 383, 387 (copy of official list in land-office; original not required); 1832, Oliphant *v.* Ferrant, 1 Watts 57 (statute applied to admit copies of land-office blotters); 1852, Strimpfler *v.* Roberts, 18 Pa. 283, 297 (same); *Tennessee:* 1869, Reeves *v.* State, 7 Coldw. 96 (account for expenses of taking escaped prisoner filed with Comptroller; production of original not required, as an official paper, in showing amount of money received by accountant; otherwise if a charge of forgery or perjury was based on the paper); 1879, Amis *v.* Marks, 3 Lea 568, 569, *semble* (constable's bond offered by certified copy; original must be accounted for);
Texas: 1853, Coons *v.* Renick, 11 Tex. 134, 136 (contract for military stores, filed in quartermaster's office; original not required); 1860, Dikes *v.* Miller, 25 Tex. (Suppl.) 281, 284, 290 (title-document filed in land-office, provable by copy, because irremovable though not lawfully filed); 1860, Highsmith *v.* State, 25 Tex. 137, 139 (account of assessor, etc., not lawfully a record of the Comptroller's office, not provable by copy);
Vermont: 1862, Briggs *v.* Taylor, 35 Vt. 57, 59, 67 (recorded appointment of deputy-sheriff; original not required); 1887, State *v.* Spaulding, 60 Vt. 228, 233, 14 Atl. 769 (internal-revenue record-book, provable by copy); 1898, State *v.* White, 70 Vt. 225, 39 Atl. 1085 (records in U. S. tax-collector's office, provable by copy); 1906, Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146 (State auditor's vouchers, filed in his office, held to be of a public nature).

[4] 1882, Shutesbury *v.* Hadley, 133 Mass. 242 (copy of a public marriage register sufficient, where the place of residence of parties was to be shown by the record, although a statute authorizing copies spoke only of using them to show the fact of marriage).

Contra: 1889, Martin *v.* Hall, 72 Ala. 587 (official bond filed; proof of original's loss, etc., required for the use of any but duly certified copy; this seems unsound).

Compare the cases for *recorded deeds* (*post*, § 1225); and the rule as between *different kinds of copies* (*post*, §§ 1269, 1273).

§ 1220. [1] To save repetition, such statutes are collected under that subject, *post*, § 1680, since by one and the same enactment they exempt from producing the original (applying the present principle) and also admit certified copies (applying the Hearsay exception). Sometimes the statute distinctly repudiates the application of the present principle, by requiring the original to be accounted for before copies can be used. A few classes of statutes, however, will be found under the following heads: (*a*) a few in which the document is treated as of the nature of a *judicial record* (*e.g.* a probate bond filed) have been mentioned *ante*, § 1215; (*b*) those providing for the proof of a *recorded conveyance* are specially dealt with *post*, § 1225; (*c*) those providing for *Government land-grants* are placed *post*, § 1239.

§ 1221. [1] 1798, Marsh *v.* Collnett, 2 Esp. 665 (to prove transfer of stock, a copy of the

(2) There was no exception for an issue of 'non est factum',[2] as there was (*ante*, § 1216) for 'nul tiel record.'

§ 1222. **Same: Discriminations.** (1) Whether a *certified* or other *copy* by an official not testifying in court may be used, instead of an examined or sworn copy by a witness testifying on the stand, is a question of the exception to the Hearsay rule (*post*, § 1677). (2) Whether a certified or an examined copy is *preferred* to oral testimony is a question of Preferred Testimony (*post*, §§ 1267–1275). (3) Whether an official *land-title* record, or the like, should be produced, depends often on whether by the land-law the official record or the official certificate issued to the owner is regarded as the investitive and original document of title (*post*, § 1239); this question being determined, the principles of the present subject and of deed-registration (*post*, § 1224) then control the result. (4) Whether a public document is *forbidden* to be proved, either by original or by copy, because of a *privilege of official secrecy*, involves other principles (*post*, §§ 2182, 2367).

§ 1223. (7) **Private Books of Public Importance (Banks, Corporations, Title-Abstracts, Marriage-Registers, etc.).** Where private documents are in such general and constant use and importance that their liability to removal for production as evidence would cause not merely individual but general inconvenience, there is ground for applying the reasons of the preceding two rules of exemption and for allowing such documents to be proved without production. No such broad principle was established by the common law;[1] but some instances were recognized in which the germ of such a principle is contained; and in a few other specific instances it has been recognized by statute:

1840, ALDERSON, B., in *Mortimer* v. *McCallan*, 6 M. & W. 58, 67: "Then if they are not removable, on the ground of public inconvenience, that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself. . . . The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed, supplies the reason of the rule."

1878, CAMPBELL, C. J., in *People* v. *Hurst*, 41 Mich. 328, 331, 1 N. W. 1027: "Banks are subject to the performance of duties to the public which might be seriously interfered with if they were compelled to carry the books needed in their business into every court or tribunal where testimony is to be introduced concerning them. Books belonging in public offices cannot be removed from their legal custody without some strong necessity for their production. While bank-books are not public to the same extent, yet the business

transfer taken from the Bank-books was received, though the books themselves were in court; Lord Kenyon, C. J., said "they were public books, which public convenience required should not be removed from place to place; and, though the books were in court, he would not, for the sake of example, break in upon a rule founded on that principle of public convenience").

Contra: 1818, Butler v. Carver, 2 Stark. 434 (where the witness produces the document in court, a copy is not allowed).

[2] 1843, Treasurers v. Witsall, 1 Speer S. C. 220, 221 (sheriff's bond; plea, 'non est factum'; certified copy sufficient).

§ 1223. [1] 1855, Pollock, C. B., in Boyle v. Wiseman, 10 Exch. 647, 654, suggested that there might be a like rule, in the case of "documents which though of a private nature are meant to be made public, such as commercial instruments", etc., as for public documents in the strict sense, *e.g.* court records; but he gives no reason for his view.

which the corporations are required to transact cannot be done unless the books are usually preserved where they belong. The blotter . . . must be in constant demand, and we see no reason why its contents may not be shown without production of the original, in ordinary cases, where no question of genuineness is likely to arise requiring a personal inspection."

Thus, at common law in England, the books of the *Bank of England* (legally a private institution) were not required to be produced; [2] and the same principle was applied to the books of the old *East India Company;* [3] and occasionally to other documents.[4]

In Canada and the United States, the principle has been applied to *banks* in a few instances at common law,[5] and in other instances by statute; [6] and also, by statute, to unofficial *marriage-registers,*[7] to *abstracts of title* privately owned but generally consulted,[8] and to specific kinds of privately-owned records in *various occupations*.[9]

[2] 1840, Mortimer *v.* M'Callan. 6 M. & W. 58, 67 (writing in the books of the Bank of England; copy receivable, since "the removal of them would be so inconvenient"; "the public inconvenience" as a principle "has been adopted in a variety of cases, and has never been questioned since").

So now, by statute, to all *bankers' books:* St. 1879, c. 11, §§ 3, 6, Bankers' Books Evidence Act (banker's book-entry provable by copy, verified on the stand or by affidavit; unless Court orders production); 1892, Parnell *v.* Wood, Prob. 137 ("The Act was passed mainly for the relief of bankers, to avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business").

[3] 1702, Geery *v.* Hopkins, 2 Ld. Raym. 851 (the cash-book of "the old East India Company", required to be produced); 1775, Trial of Maharajah Nundocomar, 20 How. St. Tr. 1057 (Council proceedings of the East India Company, provable by copy, because "the bringing the books and papers may subject them to the hazard of being lost and may impede the business"); 1771, Wynne *v.* Middleton, cited in 2 Dougl. 593 (transfer-books of the East India Company; Lord Mansfield, C. J., said "that the reason 'ab inconvenienti', for holding it not necessary to produce records, applied with still greater force to such public books as the transfer books of the E. I. Co.; for the utmost confusion would occur if they could be transported to any the most distant part of the kingdom whenever their contents should be thought material on the trial of a cause"); 1844, Parke, B., in Doe *v.* Roberts, 13 M. & W. 520, 532 (provable by copy).

[4] 1724, Downes *v.* Mooreman, Bunbury 189, 191 (copy of an old contract in the Bodleian Library of Oxford; the University statutes prohibited the taking out of books; the copy allowed "upon the very particular circumstances of this case").

[5] 1845, Crawford *v.* Branch Bank, 8 Ala. 79 (books of the State bank need not be produced); 1878, People *v.* Hurst, 41 Mich. 328 (see quotation *supra*).

[6] *Can. Newf.* Con. St. 1916, c. 92, § 3 (bankers' books, provable by copy, on certain conditions); *U. S. Kan.* Gen. St. 1915, § 7288 (books of account "kept without the county"; quoted *ante*, § 1213); *Mass.* Gen. L. 1920, c. 233, § 77 (domestic bank's, etc., books, provable by affidavit copy of bank custodian); *Pa.* St. 1883, June 22, Dig. 1920, § 10343 ("verified" copies of bank-book entries, receivable where bank is not a party, unless against affidavit of injustice); *Wis.* Stats. 1919, § 4189 *b* (bank-books provable, apart from special order, by copy sworn to by an officer of the bank on the stand or by affidavit; the original to be open to the inspection of the party); 1918, Merkel *v.* State, 167 Wis. 512, 167 N. W. 802 (Stats. § 4189 *b* applied).

[7] These statutes, which also make a certain kind of copy admissible, have been collected in one place, *post*, § 1683; the statutes for public registers are placed *post*, § 1680. There is even a common-law ruling: 1814, Stoever *v.* Whitman, 6 Binn. 416 (church-register allowed to be proved by sworn copy, as a "common-law proof").

[8] These statutes are collected in one place, *post*, § 1705.

[9] *Can. N. Sc.* Rev. St. 1900, c. 99, § 204 (minutes of railway corporation's meetings, provable by secretary's certified copy); § 214 (so for bylaws, etc.); *U. S. Ida.* St. 1913, c. 27, p. 126, § 6 (carriers of liquor; record required by law to be kept is provable by agent's copy); *Ind.* Burns Ann. St. 1914, § 4162 (camp-meeting corporation's records, provable by secretary's certified copy); §§ 5771, 5794 (records of telegraph and telephone companies, provable by attested copy, "when the interests of said corporation are concerned"); *La.* Ann. Rev. St. 1915, § 694 (books and records of railroad companies, provable by

In some jurisdictions, a statute of questionable policy has applied the rule to *corporation-books*.[10] This line of discrimination is both unsound and unfair. That a business is managed by corporate powers, or that it is extensive and wealthy, is no reason for distinction. It is just as inconvenient for the poor man or for the individual merchant to carry off his account-books into court; and he can even less afford to suffer it. These statutes miss the real point of the rule. It implies two circumstances, namely, the frequency of litigation involving such documents, and the consequent demand for them in court by litigant third persons or opponents. Such conditions exist for the books of a business of banking, of transportation (by rail or by express), of insurance, of communication (by telegraph or by telephone), and of a few others. But they have no relation to the corporate organization of the business, or to the relative size of it. They aim merely to protect a business which is liable to be called upon in an inordinate degree to make that contribution to justice which every citizen must make as a witness when needed (*post*, § 2192).

If then any further concession can properly be made to personal convenience, by exempting from production the account-books of an *ordinary business*,

secretary's certified copy under corporate seal); *Mich.* Comp. L. 1915, § 11232 (corporation for treating disease); *Mo.* Rev. St. 1919, § 13605 (workmen's compensation; records of "every hospital or other person" furnishing medical treatment to employee, provable by certified copy); *N. Y.* C. P. A. 1920, § 412 (records of a "public hospital" showing condition or treatment of a patient, are provable by copy, unless Court orders production of original); *R. I.* Gen. L. 1913, c. 292, § 48 (newspapers deposited with R. I. Historical Society, provable by certified copy); *Wis.* Stats. 1919, § 4182 *a* (certain insurance companies' books, not required to be produced, except by special order).

[10] CANADA: *Dom.* R. S. 1906, c. 145, §§ 24, 28 (corporation documents or book-entries; cited *post*, § 1680); *B. C.* Rev. St. 1911, c. 78, § 32 (like Dom. R. S.); *Man.* St. R. S. 1913, c. 65, § 15 (like Dom. R. S.); *N. Sc.* Rev. St. 1900, c. 163, § 11 (like Dom. R. S.); *Ont.* Rev. St. 1914, c. 76, § 26 (documents and books of "any corporation created by charter or statute in this province" are provable by certified copy); *Yukon:* Cons. Ord. 1914, 30, § 11 (like Dom. R. S.).

UNITED STATES: *Ga.* Code 1910, § 5823 (domestic corporation's books, provable without production, by chief officer's certified copy); 1900, Maynard *v.* Interstate B. & L. Assoc., 112 Ga. 443, 37 S. E. 741 (statute applied); *Ill.* Rev. St. 1874, c. 51, § 15 (papers and records of "any corporation or incorporated association", provable by certified copy of clerk, etc., under corporate seal, if any); 1895, Mandel *v.* Swan L. C. Co., 154 Ill. 177, 189, 40 N. E. 462 (certain corporate records, etc. held not properly proved under this statute by copies in a deposition); 1904, Chicago, W. & V. C. Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38 (contract between a miners' union and a coal company, held not properly proved under § 18 of the above statute by a sworn copy without seal); 1905, Chicago, B. & Q. R. Co. *v.* Weber, 219 Ill. 372, 71 N. E. 489 (a lease of the defendant railroad's entire property, evidenced by a copy certified by its secretary under corporate sale, held to be a "paper", under § 15 of the above statute); *Ind.* Burns Ann. St. 1914, § 489 ("acts and proceedings of corporations", provable by sworn copy); *Me.* Rev. St. 1916, c. 51, § 22 (corporation-books, *semble*, may be proved by copy); *Mo.* Rev. St. 1919, § 9773 (domestic corporation's records and papers on file, provable by certified copy); *Nev.* Rev. L. 1912, § 5417 (copy receivable "when the original is a record or other document in the custody of a public officer, or officer of a corporation"); *Pa.* St. 1897, May 25, Dig. 1920, § 18557, § 1 (quoted *post*, § 1519); *Tenn.* Shannon's Code 1916, § 5569 (in actions between corporations and their stockholders, books are provable by secretary's certified copy); 1900, Page *v.* Knights & Ladies, — Tenn. —, 61 S. W. 1068 (corporation books of a benefit society; originals required, except that as between stockholders and the corporation a copy certified under seal by the secretary suffices, under Code § 5569).

One Court seems to have reached the result at common law: 1858, Madison D. & P. R. Co. *v.* Whitesel, 11 Ind. 55, 57 (record-books of corporations, not required to be produced); 1862, Evans *v.* Turnpike Co., 18 Ind. 101, 103 (articles of association of turnpike company; original required); 1873, King *v.* Ins. Co., 45 Ind. 43, 59 (like 11 id. 55, *supra*).

it should be made without discrimination. There is already, in Canada, a class of statutes which avoid that objectionable feature.[11] As a progressive measure, the best rule would be one which left the general principle, in its application in a given case, to the trial Court's discretion.

§ 1224. (8) **Recorded Conveyances; General Principle; Four Forms of Rule.** That a deed has been lawfully recorded is of itself no reason why the ordinary rule of production should not apply where the deed's contents are to be proved. The deed, after being recorded, is returned to the grantee or other party entitled to its possession, and does not become a part of the official files so as to be affected by the principle of either of the two preceding exemptions (§§ 1218, 1223); so that, apart from other special considerations, the party offering to prove the deed's contents should either produce it or account for its absence by some one of the ordinary excuses for non-production. Such special considerations, however, in many jurisdictions, have long been acknowledged — at common law and apart from express statutory provisions — to apply to the case of a recorded conveyance.

In *England*, it is not entirely clear whether these considerations were ever recognized. There existed only limited provisions for the public recording of conveyances; one of these covered the old method of transfer by "bargain and sale";[1] the other consisted of a group of special statutes providing a recording system for specific districts, notably Middlesex and Yorkshire counties.[2] These statutes did not expressly provide that proof might be made without production of the original conveyances; and the precedents, being complicated by the consideration whether under the Hearsay rule the recorder's or register's certified copies were receivable (*post*, § 1650), do not indicate a final settlement of the principle; although there was apparently at one time a regular practice of not requiring production,[3] and the tradition to the same effect in the southeastern colonies is strongly corroborative of this practice.

[11] *Alta.* St. 1910, 2d Sess., Evidence Act, c. 3, § 50 (like Ont. R. St. 1914); *B. C.* Rev. St. 1911, c. 78, § 46 (commercial documents; like Ont. Rev. St. 1914, substituting 5 and 3 days' notice); *Man.* Rev. St. 1913, c. 65, §§ 27, 28 (substantially like Ont. Rev. St. 1897, c. 73, § 51, substituting three days for the counter-notice); *Ont.* Rev. St. 1914, c. 76, § 49 ("telegrams, letters, shipping-bills, bills of lading, delivery orders, receipts, accounts, and other written instruments used in business and other transactions" are provable by copy, on ten days' notice before trial to the opponent; unless the opponent, within four days after the time mentioned in the notice offering opportunity of inspection, gives notice of intention to dispute the correctness or genuineness of the copy and to "require proof of the original"); *P. E. I.* St. 1889, § 48 (like Ont. R. S. 1897, c. 73, § 51; but allowing only three days for the opponent to demand the original); *Sask.* R. S. 1920, c. 44, § 26 (like Ont. R. St. 1914).

§ 1224. [1] See *post*, § 1650, for these statutes.

[2] See *post*, § 1650.

[3] 1593, Wymark's Case, 5 Co. Rep. 75 ("Although a deed be enrolled in court, one cannot plead it in the same court without shewing it"; but otherwise of letters patent); 1613, Read *v.* Hide, 3 Co. Inst. 173, *semble* (deed-enrolled may be proved by exemplified copy of enrolment; see quotation *post*, § 1682); 1684, Lady Ivy's Trial, 10 How. St. Tr. 555, 595 (deed enrolled, proved by examined copy); 1694, Smart *v.* Williams, Comb. 247 ("they held a sworn copy of a deed enrolled good evidence"); 1696, Lynch *v.* Clerke, 3 Salk. 154 (Holt, C. J.: "Wherever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence; as, the copy of a bargain and sale or of a deed enrolled, of a church register,

In the *United States*, three kinds of results were evolved at common law; a fourth kind was added by statutory invention; and statutes also in many jurisdictions followed one or another of the common-law methods:[4]

(*a*) By one of these views (originating in the southeastern States) the statutory system of public registration is thought to imply, in its policy, a general resort to the public record as a source of proof, and, for the sake of public convenience, a general dispensation from the necessity of preserving as a muniment of title a class of documents whose legal importance is comparatively little apart from the record. Thus, the registration system implies that the original deed need not be produced *nor accounted for in any way:*

1825, COLCOCK, J., in *Peay* v. *Picket*, 3 McCord 318, 321: "From the earliest enactments of the British Parliament on this subject, to the present day, a period of about 280 years, it has been the established law of that country that a copy of a deed duly enrolled is as good evidence as the original itself; and I think I do not say too much when I assert that it was generally considered to be the law of this land from the first enactment on the same subject here, in 1731, to the decision of *Purris* v. *Robinson*, a decision much to be regretted."

1831, STORY, J., in *Doe* v. *Winn*, 5 Pet. 233, 241: "We think it clear that by the common law, as held for a long period, an exemplification of a public grant under the Great Seal is admissible in evidence, as being record proof of as high a nature as the original. . . . There was in former times a technical distinction existing on this subject which deserves notice. As evidence, such exemplifications of letters patent seem to have been generally deemed admissible. But where, in pleading, a profert was made of letters patent, there, upon the principles of pleading, the original under the Great Seal was required to be produced, for a profert could not be made of any copy or exemplification. It was to cure this difficulty that the statutes of 3 Edw. VI, c. 4, and 13 Eliz. c. 6, were passed, by which patentees and all claiming under them were enabled to make title in pleading by showing forth an exemplification of the letters patent as if the original were pleaded and set forth. These statutes, being passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law. A similar effect was given

etc."); *ante* 1767, Buller, Nisi Prius, 252 (an enrolment of a patent in the same court need not be proffered, though a deed enrolled must be, for the Court will take notice of the former public act, though not of the latter public act; but "by 10 Anne., c. 18, where any bargain and sale inrolled is pleaded with a profert, the party [offering it], to answer such profert, may produce a copy of the inrolment"); 1797, Molton *v.* Harris, 2 Esp. 549 (deed in opponent's hands: no notice being given, the "memorial of the conveyance" was excluded); 1826, Doe *v.* Kilner, 2 C. & P. 289 (after proof of loss of deed registered in Middlesex, examined copies from the registry were admitted); 1838, Collins *v.* Maule, 8 C. & P. 502 (Middlesex registry; a deed being shown lost, an examined copy of the registry was received); 1828, Rowe *v.* Brenton, 8 B. & C. 737, 755 (lease of land in duchy of Cornwall, the fee of which was alternately in the Duke and in the Crown; the enrolled record was clearly sufficient for a Crown lease, "because the Crown can only grant by matter of record"; the lease here was by a clause required to be enrolled; held, that the original need not be produced; Bayley, B.: "There is a regular office and an auditor for managing these matters, whose duty it is to enrol authentic documents only"); 1844, Doe *v.* Roberts, 13 M. & W. 520, 530 (enrolled leases of Crown lands in Wales, held provable by examined copies, on the ground that "the original documents . . . are kept among the muniments of the Crown" and could not be removed).

Compare the English precedents as to certified copies (*post*, § 1650).

[4] The earliest statutes appear to have been those of New Jersey in 1713, of Pennsylvania in 1715, and of South Carolina in 1731. Compare the history of the record system as further examined under the doctrine of certified copies (*post*, § 1651)

by the statute of 10 Anne, c. 18, to copies of deeds of bargain and sale, enrolled under the statute of Henry VIII, when offered by way of profert in pleading; and since that period a copy of the enrolment of a bargain and sale is held as good evidence as the original itself. Such, then, being the rule of evidence of the common law in regard to exemplifications under the Great Seal of public grants, the application of it to the case now at bar will be at once perceived, since by the laws of Georgia all public grants are required to be recorded in the proper State department."

(*b*) By another view, chiefly represented in New England and in the States about the Ohio River (and appearing about the same time in all), the result was based on the change of custom naturally introduced into the practice for title-deeds by the registration system. The continuous handing down of prior title-deeds to each successive grantee becomes no longer necessary, and each grantee keeps his own deed and receives no prior ones. Thus, the only person who may fairly be supposed to possess a deed is the grantee; and hence it is only *deeds in which the grantee is either the proponent or the opponent in the trial* that can be assumed to be in either party's possession, since the prior ones are in prior grantees' hands and are likely to be no longer in existence as not being of importance:

1828, *Per* CURIAM, in *Eaton* v. *Campbell*, 7 Pick. 10: "In England, on the conveyance of land, all the title-deeds are delivered to the purchaser, and it is reasonable to require him to produce the original deed given to a prior grantee. . . . [But] here the grantee takes only the immediate deed to himself, relying on the covenants of his grantor; he has no right to the possession of all the title-deeds of the estate; and to require him to produce all the original deeds for 20 years or more, and to bring in the subscribing witnesses, would be unreasonable and oppressive."

1854, SHAW, C. J., in *Com.* v. *Emery*, 2 Gray 80: "In all cases original deeds should be required if they can be had; but as this would be burdensome and expensive, if not impossible in many cases, some relaxation of this rule was necessary for practical purposes. . . . Our system of conveyancing, modified by the registry law, is that each grantee retains the deed made immediately to himself, to enable him to make good his warranties. Succeeding grantees do not, as a matter of course, take possession of deeds made to preceding parties so as to be able to prove a chain of title by a series of original deeds. Every grantee, therefore, is the keeper of his own deed, and of his own deed only. . . . When, then, he has occasion to prove any fact by such deed, he cannot use a copy, because it would be offering inferior evidence, when in theory of law a superior is in his possession or power; it is only on proof of the loss of the original, in such case, that any secondary evidence can be received. . . . [So also even where the opponent is the grantee of the deed, *i.e.*] where such original is in theory of law in possession of the adverse party, because upon notice the adverse party is bound to produce it", or allow secondary evidence.

1856, STORRS, J., in *Bolton* v. *Cummings*, 25 Conn. 410, 421: "In view of this practice [for every grantee to retain his own title-deeds], which would oftentimes render it extremely inconvenient to produce remote original title-deeds of lands, and of the provisions of our registry-system, which require those deeds to be recorded and upon official copies of the records of which reliance may safely be placed as to the contents of those deeds, our Courts have departed from the common-law rule in regard to the admission of secondary evidence of their contents, and held that where a conveyance of real estate which is required to be recorded is to a person not a party to the suit, it is competent, and sufficient in the first instance, to prove the contents of it by a copy certified by the recording officer, without laying a foundation for such proof by first accounting for the non-production of the original."

In strictness, it will be noted, this reasoning would exempt from producing only the prior title-deeds in the proponent's chain of title. The case of a collateral and accessible grantee — for example, in an action for rent against a tenant evicted by superior title, the deed of the grantee-evictor, desired to be proved by the tenant — is not covered; but in most of those jurisdictions the principle was extended to it; so that the rule became, not only that he was exempted from producing all prior deeds in his own chain of title, but from producing any deeds whatever not presumably in possession of a party to the suit.

(*c*) By a third view (obtaining perhaps in the greater number of jurisdictions until statutes intervened), neither the policy of the registry system nor the practices it encouraged were regarded as justifying any exemption from the ordinary rule that the deed must be produced or accounted for. The recorded deed must be *accounted for like any other:*

1795, WATIES, J., in *Purvis* v. *Robinson*, 1 Bay S. C. 493, 494: "If, by recording a deed, the necessity of producing it was dispensed with, then the proof of its validity would rest on the ex parte oath of one of the subscribing witnesses before any justice of the peace and without any examination. It would be very easy by this means to conceal, under the fair dress of a record, the foulest features of fraud manifest on the face of the original, and to give even to a forged deed all the effects of a valid one."

(*d*) The fourth type of rule (entirely statutory) exhibits a number of minor varieties; but its substance is that the proponent may proceed without production if he first proves (often by affidavit) that the deed in question is "*not within his possession or control.*" This rule falls short of the strict one last mentioned, in that the deed might be in the opponent's possession or in a third person's possession, and yet the proponent need make no effort to obtain it. The rule differs, too, from the second one above mentioned, in that for a non-grantee as proponent it is stricter, since he must at least make some proof that he has not control, while by the second rule this appears from the nature of the deed as alleged. The rule is, however, easier (than the second rule) for a grantee as proponent, since the proof that it is not in his "possession or control" may fall short of the proof by ordinary common-law rules that would be required of the grantee-proponent under the second rule. Furthermore, it is easier in that it does not require steps to be taken for production where the deed is in the opponent's possession (except by some statutes requiring prior notice). By one variety of this fourth form, the proponent is to show that the deed is "lost or out of his power." By another variety, he is to give notice a certain time beforehand that he intends to use a copy. Statutory enactments other than those taking the fourth form, or some variety of it, have usually adopted the first, *i.e.* in allowing unconditionally the use of a copy of the record without producing or accounting for the original.

§ 1225. **Same: Statutes and Decisions.**[1] The law to-day is in some juris-

§ **1225.** [1] The limitations of the following collections of decisions and statutes are above-noted in the text; these same statutes, however, are also to be consulted elsewhere in

their bearings on other principles, particularly the *kind of officer certifying copies* and the mode of certifying by seal, etc. (*post*, § 1651), and the necessity of *notice to the opponent* before using copies (*post*, § 1859*f*):

ENGLAND: the decisions have been collected *ante*, § 1224; the statutes are placed *post*, § 1650.

CANADA: *Dominion:* R. S. 1906, c. 145, Evid. Act § 27 (similar to Ont. R. S. 1914, c. 76, §§ 33, 34).

Alberta: St. 1906, c. 24, § 17 (land-titles; quoted *post*, § 1651).

British Columbia: Rev. St. 1911, c. 127, § 145 (registrar's certified copy of any recorded instrument, except a will, may be used "in the absence of the original when the absence of such original is duly accounted for, and if produced by a party not having the control of the original"); c. 78, § 38 (like Ont. R. S. c. 76, §§ 33, 34); c. 78, § 44 (instrument kept or registered in a land office or registry of a county or the Supreme Court; certified copy shall be evidence "of the original"); c. 127, § 147 (the land registrar's certified copies of "any instruments affecting land which may be deposited, kept, filed, or registered in his office", and affecting land in his district, are admissible "as 'prima facie' evidence of the document of which it purports to be a copy, without proof of the signature or seal of such registrar"); c. 192, § 29 (registered declaration of quieted title; quoted *post*, § 1681); 1899, Pavier *v.* Snow, 7 Br. C. 81 (instruments recorded under c. 135, § 94, are admissible under § 98, without proof of loss of original).

Manitoba: Rev. St. 1913, c. 171, § 169, Real Property Act (a certificate of land title, or any instrument deposited or registered in such office, is provable by certified copy "as if the original within such office was produced"); c. 172, § 51, Registry Act (certified copy of a registered instrument, except crown grants, orders in council, mechanics' lien claims, and notices, etc., under a mortgage power of sale, shall be "'prima facie' evidence of the contents and execution of the original", "in case of loss, destruction, or obliteration, or partial destruction or obliteration of the original"; compare the statutes cited *post*, § 1651); c. 17, § 19 (bill of sale or mortgage of chattels; clerk's certified copy to be evidence of registration only); c. 65, § 18 (Quebec notarial instruments; like Ont. R. S. c. 76, §§ 33, 34).

New Brunswick: Consol. St. 1903, c. 127, § 33 (Crown grants before the erection of the Province are provable "as hereinbefore provided"; compare *post*, § 1680); § 48 (deed or will registered in the sheriff-court books of Scotland is provable by certified copy, etc.); § 49 (Quebec notarial instruments; like Ont. R. S. c. 76, § 33); § 69 (filed notice of sale under mortgage power of sale; certified copy admissible, on notice as in § 64, and an affidavit that the original is on file or that it is "not in the possession of the person offering the same, his agent or attorney, and that he does not know where the same is to be found"); § 63 (duly registered instruments, other than wills, may be proved, "in the absence of the original instrument", by the registrar's certified copy, on affidavit "that such original is not under the control of the party, and that he does not know where the same may be found", and on six days' written notice to the opponent with a copy of the copy and affidavit); § 64 (when the offering party "resides out of the province, or at the time of the making of the affidavit is without the province", his agent or attorney may make affidavit that the party is non-resident and that the affiant "has not the possession of the original instrument and does not know where the same is or may be found, and that he has reason to believe that such person has not the original instrument in his possession and does not know where the same is or may be found", and that he has not left to evade making affidavit, and, on six days' notice and service of a copy of the affidavit, a certified copy may be used); § 67 (no certified copy of any registered instruments shall be received unless the original, or a duplicate original, "is in the possession of the adverse party, and not in the possession of the party offering such evidence, and that due notice shall have been given to produce the same"); § 70 (instruments filed under the Bills of Sale Act of 1893 are provable by the registrar's certified copy, on affidavit that "such originals or a duplicate thereof are not under the control of the party", and after six days' notice to the opponent and service of a copy of the copy and the affidavit); c. 151, § 57, and St. 1920, c. 6, § 57 (registered title); 1883, McCormack *v.* McBride, 23 N. Br. 12 (three deeds; an affidavit that they were not under his control, etc., excluded; the affidavit should have said that neither was; Wetmore, J., diss.); 1886, Doe *v.* Kennedy, 26 N. Br. 83 88, 94 (the affidavit need not be of the party himself; Wetmore, J., diss.).

Newfoundland: Consol. St. 1916, c. 91, § 22 (a "deed or document" duly registered may be proved by certified copy, if the original is "proved to be lost"); St. 1921, 12 Geo. V, c. 21, § 27 (recorded certificate of title quieted; copy admissible).

Northwest Territories (see also Dominion, *supra*): Consol. Ord. 1898, c. 43, § 30, c. 44, § 9 (mortgages and sales of chattels are provable by certified copy "as if the original instrument was produced").

Nova Scotia: Rev. St. 1900, c. 163, § 20 (crown grants provable, without production of the original, by certain certified copies); § 21 ("any deed, or any document from the books of registry" is provable by certified or examined copy, if it appears "by the affidavit of the party, his agent, or solicitor, that such original is not in the possession or under the control of the party, and that he is unable to procure

the same"); § 24 ("every bill of sale or other document, filed in any registry of deeds, may be proved" by producing a certified copy); § 27 (Quebec notarial instruments; substantially like Ont. R. S. c. 76, §§ 33, 34); St. 1910, 10 Edw. VII, c. 28 (amending Rev. St. 1900, c. 163, § 27; cited more fully *post*, § 1651); 1904, Nova Scotia Steel Co. *v.* Bartlett, 35 Can. Sup. 527 (under N. Sc. Rev. St. 1900, c. 163, § 20, *supra*, a plan on file, referred to in a duplicate original grant, is not provable by certified copy; the ruling is a perverse one, for if the theory of substantive law sufficed to make the plan a part of the grant by reference, why could not the same theory make the statute admitting certified copies of the grant suffice also for the plan forming part of the grant?).

Ontario: Rev. St. 1914, c. 76, §§ 33, 34 ("notarial act or instrument" in Quebec, filed, enrolled, or enregistered, is provable by notarial copy; compare the further quotation *post*, § 1651); § 46 (an "instrument or memorial" under the Registry Act is provable by certified copy); § 47 ("where it would be necessary to produce and prove an instrument or memorial" which has been registered in order to establish the contents, the foregoing certified copy may be used, on notice ten days before trial; unless the opponent within four days after receipt of notice gives notice that he "disputes its validity"); c. 122, § 2 (in completing contracts for the sale of land, "registered memorials of discharged mortgages" shall suffice without producing the originals, unless the former are shown inaccurate; and "the vendor shall not be bound to produce the mortgages unless they appear to be in his possession or power"; for other instruments, registered memorials twenty years old suffice, unless shown inaccurate, "if the memorials purport to be executed by the grantor, or in other cases, if possession has been consistent with the registered title"; the vendor "shall not be bound to produce the original instruments unless they appear to be in his possession or power; and the memorials shall be presumed to contain all the material contents of the instruments to which they relate"); c. 135, § 27 (chattel mortgage or sale filed; certified copy shall be received, but only to prove the fact of filing).

Prince Edward Island: St. 1889, § 42 (certified copy of a "deed or mortgage duly registered" is admissible if the Court is satisfied by the party's affidavit that the original "is not under his control, and that he does not know where the same may be found"); § 43 (seven days' notice must be given, with service of copies of the deed-copy and affidavit); § 44 (public lands commissioner's duplicate deed, provable on the same terms as in §§ 42, 43); § 45 (registered plan, provable like a deed); § 46 (Surrogate's registered license to sell real estate is provable by certified copy); § 49 (filed bill of sale or mortgage of chattels is provable by certified copy).

Saskatchewan: Rev. St. 1920, c. 67, § 20 (land-titles; like Alb. St. 1906, c. 24, § 38); c. 44, Evidence Act, § 21 (any instrument filed or registered in a land registration office is provable by the land-register's certified copy); c. 44, § 18 (Quebec notarial acts; like Ont. R. S. c. 76, §§ 33, 34); c. 200, § 36 (chattel mortgages; like Yukon Consol. Ord. c. 7, § 30).

Yukon: Consol. Ord. 1914, c. 7, § 30 (registered bills of sale and mortgages of personalty; the registration clerk's certified copy "shall be received as 'prima facie' evidence for all purposes as if the original instrument was produced"); c. 30, § 21 (copies of recorded deeds; quoted *post*, § 1651); ib. §§ 24, 26 (like N. Sc. Rev. St. 1900, c. 163, §§ 24, 26, for the Gold Commissioner's office).

UNITED STATES: *Federal:* 1826, Brooks *v.* Marbury, 11 Wheat. 78, 82 (statute requiring record but not exempting from production of original; production required; decision by majority of the Court); 1826, Peltz *v.* Clark, 2 Cr. C. C. 703 (original need not be accounted for); 1830, Beall *v.* Dick, 4 id. 18 (same); 1831, Doe *v.* Winn, 5 Pet. 233, 241 (see quotation *ante*, § 1224; exemplification under the State seal of Georgia of a land-patent there recorded; production not required; Johnson, J., diss.); 1834, Dick *v.* Balch, 8 Pet. 30, 33 (production of original not necessary, where record is required, even though the statute does not make the copy evidence; here, the law of Maryland); 1835, Owings *v.* Hull, 9 Pet. 607, 625 (bill of sale required by Louisiana law to be kept by notary; production not required); 1860, Gregg *v.* Forsyth, 24 How. 179, 180 (original shown lost; copy allowed); 1901, Stout *v.* Rigney, 46 C. C. A. 459, 107 Fed. 545 (Missouri military-bounty land; see Mo., *infra*).

The following rulings deal with the *assignment* of a *patent of invention;* compare the citations under § 1657, *post:* 1844, Brooks *v.* Jenkins, 3 McL. 432, 436 (original not required, except the one under which party claims); 1848, Parker *v.* Haworth, 4 McL. 370 (original of first assignment not required); 1860, Lee *v.* Blandy, 1 Bond 361 (original of assignment to offeror, not required); 1893, Paine *v.* Trask, 5 U. S. App. 283, 286, 5 C. C. A. 497, 56 Fed. 233 (whether the original of a patent-assignment recorded must be accounted for; undecided); 1894, New York *v.* R. Co., 26 U. S. App. 7, 9 C. C. A. 336, 60 Fed. 1016 (original required); 1908, Eastern Dynamite Co. *v.* Keystone P. M. Co., C. C. N. D. Pa., 164 Fed. 47 (certified copy of record of an assignment of patent, the assignment having been acknowledged before a notary; original required).

Alabama: Code 1907, §§ 3374, 3360 (conveyances, etc., duly acknowledged or proved and recorded; "if it appears to the Court that the original conveyance has been lost or destroyed or that the party offering the transcript has not the custody or control thereof,"

a certified transcript is to be received); § 3395 (same for conditional sales of personalty); § 4000 ("If the original of any paper, properly registered, is lost or destroyed, a certified copy from the registry shall be deemed good secondary evidence"); St. 1911, No. 52, p. 31, Feb. 20, § 2 (certified transcript of recorded corporate conveyance, admissible if "the original conveyance has been lost or destroyed, or the party offering a transcript has not the custody or control thereof", unless the corporation is in possession and forgery is pleaded); 1831, Sommerville *v.* Stephenson, 3 Stew. 271, 277 (deed from opponent to offeror; production required, under the statute, which merely declared the common law); 1832, Mitchell *v.* Mitchell, 3 Stew. & P. 81, 84 (grantee offering; loss must be shown); 1839, Swift *v.* Fitzhugh, 9 Port. 39, 52, 57 (wife claiming under marriage settlement; original must be accounted for); 1844, Beall *v.* Dearing, 7 Ala. 124, 127 (purchaser at sheriff's sale; unrecorded deed to debtor, presumed not in purchaser's possession, on the facts); 1847, Thompson *v.* Ives, 11 Ala. 239, 243, *semble* (both parties claiming as vendee under execution against same person; neither party presumed to be in possession of deeds to debtor or his predecessor so that a copy could be used on notice to opponent); 1849, Potier *v.* Barclay, 15 Ala. 439, 441, 452 (dower; deed to plaintiff's husband; production by her required); 1855, Hussey *v.* Roquemore, 27 Ala. 281, 290 (grantee presumed to have possession; if he is a party, notice is necessary; here, not under the statute); 1859, Shorter *v.* Sheppard, 33 Ala. 648, 653½ (deed to plaintiff's grantor-debtor, presumed to have been carried off by him when fleeing the country); 1866, White *v.* Hutchings, 40 Ala. 253, 258 (deed to offeror's predecessor in title, more than 30 years before; presumed not in offeror's control); 1872, Jones *v.* Walker, 47 Ala. 174, 183 (deed to claimant's grantor; production not required); 1875, Hendon *v.* White, 52 Ala. 597, 600 (purchaser at execution; deed to debtor presumed not in his possession); 1883, Huckabee *v.* Shepherd, 75 Ala. 342, 344 (grantee offering; required to show the original unavailable); 1884, Beard *v.* Ryan, 78 Ala. 37, 43 (deeds to his grantor and predecessors, not presumed to be in offeror's possession); 1888, Allison *v.* Little, 85 Ala. 512, 516, 5 So. 221 (similar to White *v.* Hutchings); 1890, Florence L. M. & M. Co. *v.* Warren, 91 Ala. 533, 537, 9 So. 384 (creditor proving tax-deed to his debtor as grantee; presumption that it remained with grantee, so as to relieve creditor from "the duty of accounting for the original"); 1891, Jones *v.* Hagler, 95 Ala. 529, 532, 10 So. 345 (offeror of deed to his grantor; original not required, but after testimony that he had never had its control), 1895, Farrow *v.* R. Co., 109 Ala. 448, 453, 20 So. 303 (deed in chain of title and in offeror's possession; production required); 1895, King *v.* Scheuer, 105 Ala. 558, 16 So. 923 (original must be accounted for); 1896, Farrow *v.* R. Co., 109 Ala. 448, 20 So. 303 (statute applied, and original required to be accounted for); 1900, Burgess *v.* Blake, 128 Ala. 105, 28 So. 963 (following Farrow *v.* R. Co.); 1902, Hammond *v.* Blue, 132 id. 337, 31 So. 357 (proponent must show not only his non-possession but also his non-control of the original); 1914, Ballard *v.* Bank, 187 Ala. 335, 65 So. 356 (Code 1907, § 3374, as amended by Sp. Sess. St. 1909, p. 14).

Alaska: Comp. L. 1913, §§ 525, 532, 534 (like Or. Laws 1920, §§ 9877, 9892, 9894); § 747 (mortgage of personalty; recorder's certified copy, admissible "if the original be lost or out of the power of the person wishing to use it").

Arizona: Rev. St. 1913, Civ. C. § 1743 ("Every instrument" permitted or required to be recorded with the county recorder is provable by the record or a certified copy "with the like effect as the original").

Arkansas: Dig. 1919, § 1531 (recorder's certified transcript of a duly recorded deed or other instrument affecting real estate, admissible, if the original appears to be "lost or not within the power and control of the party wishing to use the same"); § 1535 (duly recorded deeds of administrator, executor, guardian, commissioner in chancery, and sheriff; the original "or a certified copy thereof", admissible); § 7385 (chattel mortgages; recorder's certified copy admissible; but, if genuineness is questioned, recorder may produce original from his files); 1856, McNeill *v.* Arnold, 17 Ark. 154, 169, *semble* (production not required); 1856, Trammell *v.* Thurmond, 17 Ark. 206, 215 (production required, under territorial statute not expressly dispensing); 1860, Bright *v.* Pennywit, 21 Ark. 130, 133, 136 (deed to opponent; under the statute, offeror must show original not within his power or control; whether notice to produce must here also be given, undecided); 1885, Calloway *v.* Gibbins, 45 Ark. 81, 85 (unrecorded deed to offeror's predecessor; search held sufficient).

California: C. C. P. 1872, § 1855 (the original of a writing must be produced, except "4. when the original has been recorded and a certified copy of the record is made evidence by this code or other statute"); § 1893 (certified copy of a "public writing", admissible "in like cases and with like effect as the original writing"); § 1951, as amended March 24, 1874 (certified copy of duly recorded instrument affecting realty "may also be read in evidence with the like effect as the original on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy"); § 1951, as amended March 1, 1889 (so as to read: "be read in evidence with the like effect as the original instrument without

further proof"); Civ. C. § 1207 (certain old defectively recorded instruments affecting realty, provable by certified copy); § 1855 *a* (records destroyed by public calamity; abstracts may be used without proof of destruction of original; cited more fully *post*, § 1705); Pol. C. 1872, § 4142 *b* (county recorder's certified copy of re-recorded instruments to replace lost or destroyed records, admissible); St. 1915, p. 1932, Nov. 3, No. 1049 (land-title registration: when an original certificate of registration is lost, and a certified copy has been issued to the owner, by court order, this certified copy becomes the muniment of title, in place of the original; hence, when a certified copy of the registrar's certificate is desired for use merely as evidence in court, and not for the above purpose, the registrar may issue it "upon receipt by him of an order therefor, made by the Court, provided that such certified copy shall have written or stamped across the face thereof the words 'for use as evidence only'"); § 41 (in every action involving land title, "the certificate of title of a registered owner shall be held in every court to be conclusive evidence, except as herein otherwise provided, that the registered owner has a good and valid title," etc.); § 48 (If a registered instrument "is forged, or executed by a person under legal disability, such registration shall be void; provided that the title of a registered owner, who has taken bona fide for a valuable consideration, shall not be affected by reason of claiming title through some one the registration of whose right was void as provided in this section"); § 52 (registrar's certified copy of all instruments etc. filed in office of registrar of titles "shall be received in all cases in place of the original, and as evidence shall have the same force and effect as the original instrument"); 1855, Ord *v.* McKee, 5 Cal. 515 (mortgage; original required; but whether the copy rejected was certified from a record does not appear); 1856, Macy *v.* Goodwin, 6 Cal. 579 (deed; a statute receiving a copy with like effect "as the originals could be if produced" does not dispense with production of the original); 1857, Gordon *v.* Searing, 8 Cal. 49 (deed; production required; here the plaintiff claimed under the grantee) 1859, Fallon *v.* Dougherty, 12 Cal. 104 (offeror of deed to predecessor; production required; search without showing his own lack of possession, insufficient); 1859, Skinker *v.* Flohr, 13 Cal. 638 (offeror not connected with deed as grantee may account for non-production by declaring it not within his control; under statute); 1862, Pierce *v.* Wallace, 18 Cal. 165, 170 (offeror of deed to predecessor; loss required to be shown by search among grantee's papers, etc.); 1862, Lawrence *v.* Fulton, 19 Cal. 683, 689 (offeror of deed to his grantor made affidavit of non-possession, but by other testimony made it probable that his grantor had it; held insufficient to exempt); 1864, Hicks *v.* Coleman, 25 Cal. 122, 129 (grantee offering deed; proof that it was lost or not in his control, held sufficient, under the statute); 1864, Landers *v.* Bolton, 26 Cal. 393, 413 (power of attorney, sufficiently shown "not under the control of the party"); 1864, Hurlbutt *v.* Butenop, 27 Cal. 50, 54 (offeror of deed to predecessor; that he had "never had control of the original deed and it was not then in his power or control", sufficient; proof of loss or search unnecessary); 1865, McMinn *v.* O'Connor, 27 Cal. 238, 243 (offeror of deed to grantor; under statutes of 1851 and 1860, original need not be shown out of offeror's control, or otherwise accounted for); 1866, Roberts *v.* Unger, 30 Cal. 676, 680 (offeror's grantor's claim and affidavit, under Possessory Act; certified copy received, on evidence of non-possession and search); 1866, Reading *v.* Mullen, 31 Cal. 104, 106 (married woman's recorded declaration as sole trader; production required); 1869, Garwood *v.* Hastings, 38 Cal. 216, 222 (certified copies receivable, on proof of "loss or inability of the party to produce the original"); 1869, Mayo *v.* Mazeaux, 38 Cal. 442, 449 (must be shown not under party's control); 1874, Canfield *v.* Thompson, 49 Cal. 210, 212 (certified copy of recorded deed, offered by successor of grantee, held "primary", under C. C. P. § 1893, *i.e. semble*, original need not be accounted for); 1875, Vance *v.* Kohlberg, 50 Cal. 346, 348 (certified copy of U. S. patent recorded in the county; original not required); 1877, People *v.* Hagar, 52 Cal. 171, 186 (certified copy of private writing, original not required; here, corporate by-laws); 1881, Gethin *v.* Walker, 59 Cal. 502, 506 (certified copy of deed to offeror; production not required); 1886, Brown *v.* Griffith, 70 Cal. 14, 11 Pac. 500 (comparison of C. C. P. §§ 1855, 1893, 1951; settled that a certified copy of a recorded deed, or the record of the deed, is receivable only after a showing that the original is not in the "possession or control" of the offeror, according to § 1951; Canfield *v.* Thompson cited as referring to transactions before the adoption of § 1951, intervening cases not cited); 1889, Marriner *v.* Dennison, 78 Cal. 202, 214, 20 Pac. 386 (preceding case approved); 1894, Green *v.* Green, 103 Cal. 108, 110, 37 Pac. 188 (original required to be accounted for); but now see the amendment of the Code by the statute of 1889, *supra;*

Colorado: Comp. St. 1921, § 4901 (recorded instrument not duly proved or acknowledged; certified copy may be "proved or acknowledged" with same effect as original, but "such certified copy so proved" is not admissible for any person "except upon satisfactory proof that the original thereof has been lost or destroyed, or is beyond his power to produce"); § 4903 (duly recorded instrument in writing, provable by the record or a transcript, "upon affidavit of the party desiring to use the same that the original thereof is not in his possession

or power to produce"); § 8741 (recorder's certified copy of "all papers filed" and of records, admissible); § 5052 (certified copy of certificate of sale by trustee under trust deed, admissible); § 4907 (instruments affecting real estate in this State and executed before a notary in another U. S. State or Territory; [certified] copy admissible, "in case of the loss of the original"); § 5094 (chattel mortgages; county recorder's certified copy of record, admissible on affidavit that the original is lost or not in the power of the person to produce it); C. C. P. 391 (evidence of contents of a writing, "other than the writing", may be admitted "when the original has been recorded and a certified copy of the record is made evidence by statute"); 1874, Sullivan *v.* Hense, 2 Colo. 424, 432 (statute construed as to the affidavits necessary); 1889, Coleman *v.* Davis, 13 Colo. 98, 21 Pac. 1018 (proof of loss is not necessary; the statutory requirement suffices).

Columbia (District): Code 1919, § 1071 (duly recorded deed or other instrument, not testamentary, is provable by certified copy); § 519 ("the record or a copy thereof of any deed recorded", but defective, and covered by curative acts, is admissible).

Connecticut: Gen. St. 1918, § 1306 (certified copy of recorded tax-collector's deed, admissible); § 319 (recorded survey-map, provable by town-clerk's certified copy); 1808, Talcott *v.* Goodwin, 3 Day 264 (production not required of deeds to predecessor-grantees; but required of grantees themselves, and here of the grantee's assignee in bankruptcy); 1814, Cunningham *v.* Tracy, 1 Conn. 252 (production by ordinary grantee of deeds to predecessor, not required, the custom having been for the grantee not to take his deed; but production required of deeds to the party himself, or, as here, to the ancestor of one claiming by inheritance); 1815, Phelps *v.* Foot, 1 Conn. 387, 390 (production by indorser of deed to maker of note, not required, as being "not in his power"); 1842, Clark *v.* Mix, 15 Conn. 152, 161, 174 (deed of personalty in probate records; production not required); 1847, Kelsey *v.* Hanmer, 18 Conn. 311, 318 (like Cunningham *v.* Tracy); 1856, Bolton *v.* Cummings, 25 Conn. 410, 421 (general rule as above; but also declaring production necessary for a deed to the opponent; see quotation *ante*, § 1224); 1902, Cunningham *v.* Cunningham, 75 Conn. 64, 52 Atl. 318 (certified copy of deed to defendant, admitted for plaintiff, there being no specific objection as to the non-production of the original).

Delaware: Rev. St. 1915, § 1388 (county deed-recorder's record, or certified copy, of any instrument authorized by law to be recorded, admissible); § 3215 (deeds of land: "the said record or an office copy thereof shall be sufficient evidence"); §§ 3202, 3203, 3213, 3214 (recorded deeds of trustees of married insane persons, and certain recorded deeds defectively acknowledged, provable by certified copy); § 3238 (recorded deed by foreign corporation of land in Delaware, provable by certified copy); § 3887 (recorded chancery bond etc., provable by certified copy "upon proof of loss of the original").

Florida: Const. 1887, Art. XVI, § 21 ("any deed or mortgage" is provable by certified copy of the record, "provided it be made to appear that the original is not within the custody or control of the party offering such copy"); Rev. G. S. 1919, § 2720 ("deed, conveyance paper, or instrument of writing", lawfully recorded in a public office of this State or a county, provable by certified copy; but this shall not prevent the Court from requiring the original to be produced or accounted for, "if the same shall be deemed necessary or proper for the attainment of justice"); § 1036 (suits on official bonds, etc.; quoted *post*, § 1680); 1889, Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868 (under Const. 1887, Art. XVI, § 21, the custody and control of the original must first be accounted for); 1908, Florida Finance Co. *v.* Sheffield, 56 Fla. 285, 48 So. 42 (same).

Georgia: Rev. Code 1910, § 5798 (record in public office, provable by certified copy); § 5799 (such copies to be secondary only, for "such documents as by law properly remain in the possession of the party"); § 5806 ("if the original of any paper properly registered is lost or destroyed", it is provable by certified copy); § 4212 (on loss or destruction of original of duly recorded deed, copy from registry admissible); § 6299, Court Rule 40 (party's oath stating "his belief of the loss or destruction of the original and that it is not in his possession, power, or custody", sufficient); § 6300 (for a grant, the party's oath may state that "the original is not in his power or possession, and that he knows not where it is"); 1851, Beverly *v.* Burke, 9 Ga. 440, 445 ("copy-deed" to be "treated as the original"); 1851, Ratteree *v.* Nelson, 10 Ga. 439, 441 (by rule of Court, the original must be sworn to as lost or destroyed and out of the party's power); 1854, Marshall *v.* Morris, 16 Ga. 368, 372 (original to be accounted for); 1858, Morgan *v.* Jones, 24 Ga. 155, 161 (same); 1858, Churchill *v.* Corker, 25 Ga. 479, 490 *semble* (same for a probated will); 1859, Sutton *v.* McLoud, 26 Ga. 637, 641 (original required); 1859, Brooking *v.* Dearmond, 27 Ga. 58, 61 (same); 1874, Hadley *v.* Bean, 53 Ga. 685, 688 (must show loss or destruction or failure to obtain; here also notice to opponent required); 1897, Woods *v.* State, 101 Ga. 526, 28 S. E. 970 (original must be accounted for); 1898, Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287 (certified copy of marriage-contract, admissible after accounting for original); 1900, Smith *v.* Coker, 110 Ga. 650, 36 S. E. 105 (statute not satisfied on the facts); 1903, Cox *v.* McDonald, 118 Ga. 414, 45 S. E. 401 (Rule 42 of the superior courts, providing that the party's

oath of loss, etc., shall be "a sufficient foundation" for a copy applies only to instruments "between the parties litigant", being in derogation of the common-law practice; Rule 42 and Code § 3630 compared); 1906, Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918 (deed; search held not sufficient on the facts, under Code § 3630); 1906, Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175 (Cox *v.* McDonald, *supra*, followed, as to the trial Court's discretion).

Hawaii: Rev. L. 1915, § 3117 ("the record of an instrument duly recorded, or a transcript thereof duly certified", may be read "with the like force and effect as the original instrument").

Idaho: Comp. St. 1919, § 7969 (like Cal. C. C. P. § 1951 as amended in 1874); § 7970 (writing itself must be produced, except when it is recorded and a certified copy is made evidence by statute).

Illinois: Rev. St. 1874, c. 30, § 35 ("If it shall appear to the satisfaction of the Court that the original deed so acknowledged or proved and recorded, is lost, or not in the power of the party wishing to use it", a certified copy is admissible); § 36 ("Whenever upon the trial of any cause at law or in equity in this State, any party to said cause, or his agent or attorney in his behalf, shall, orally in court, or by affidavit to be filed in said cause, testify and state under oath that the original" of any instrument affecting land, duly recorded, "is lost or not in the power of the party wishing to use it on the trial of said cause, and that to the best of his knowledge said original deed was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original", the record or recorder's certified copy is admissible); c. 95, § 5 (chattel mortgages, duly recorded, provable like conveyances of land); c. 109, §§ 2, 11 (so for plats of subdivisions recorded); St. 1897, May 1, § 39 (certified copy of an original certificate of registered title, admissible); § 58 ("in the event of a duplicate certificate of title being lost, mislaid, or destroyed", the registrar may issue a certified copy of the original in his office, and "such certified copy shall stand in the place of and have like effect" as the missing duplicate certificate); 1849, Irving *v.* Brownell, 11 Ill. 402, 415 ("not in the power"; statute applied); 1851, Newsom *v.* Luster, 13 Ill. 175, 180 (under statute of 1845, party's affidavit is not necessary; any kind of evidence suffices, in Court's discretion); 1858, Booth *v.* Cook, 20 Ill. 130 (an affidavit in general terms that it is "not in his power" to produce is insufficient: diligent inquiry and reasonable efforts to produce must be shown in detail); 1858, Roberts *v.* Haskell, 20 Ill. 59 (same); 1859, Hanson *v.* Armstrong, 22 Ill. 442, 445 ("not in the power"; statute applied); 1861, Dickinson *v.* Breeden, 25 Ill. 186 (grantee's residence appearing, his deposition should be taken as to loss, etc.); 1863, Pardee *v.* Lindley, 31 Ill. 174 (affidavit; statute applied); 1864, Prettyman *v.* Watson, 34 Ill. 175 (statute of 1861 applied); 1866, Bowman *v.* Wettig, 39 Ill. 416, 421 (statute applied); 1866, Deininger *v.* McConnel, 41 Ill. 227, 232 (affidavit; statute applied); 1869, Newman *v.* Cobleigh, 52 Ill. 387 (under the statute, a showing of search made is not necessary); 1873, Richley *v.* Farrell, 69 Ill. 264 (burnt records; loss of deeds sufficiently shown); 1874, Dowden *v.* Wilson, 71 Ill. 485, 487 (principle applied to note and mortgage on foreclosure); 1880, Harding *v.* Forsythe, 99 Ill. 312, 324, 328 (proof of contents of deed not accounted for, excluded); 1898, Scott *v.* Bassett, 174 Ill. 390, 51 N. E. 577 ("not in the power", applied); 1899, 1900, Scott *v.* Bassett, 174 Ill. 390, 51 N. E. 577, 57 Ill. 835 (sufficiency of party's affidavit); 1902, Glos *v.* Cary, 194 Ill. 214, 62 N. E. 555 (affidavit held sufficient); 1902, Scott *v.* Bassett, 194 Ill. 602, 62 N. E. 914 (collective affidavit held deficient); 1905, Baltimore & O. S. W. R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523 (evidence held insufficient); 1906, Tucker *v.* Duncan, 234 Ill. 453, 79 N. E. 613 (proof held insufficient); 1906, People *v.* Wieners, 225 Ill. 17, 80 N. E. 45 (plat of an addition, from the recorder's office; under Rev. St. c. 30, § 35, and c. 109, § 2, *supra*, the original must be shown not to be within the offeror's control); 1910, Burke *v.* Glos, 244 Ill. 627, 91 N. E. 701 (affidavit omitting the proviso "not intentionally destroyed" etc., held insufficient); 1911, Ellison *v.* Glos, 248 Ill. 275, 93 N. E. 763 (collective affidavit applying to each deed held sufficient).

Indiana: Burns' Ann. St. 1914, § 478 (record of "deeds and other instruments", provable by keeper's attested copy under seal); § 3988 (certain deeds executed more than 20 years before date of Act [Feb. 28, 1857] and recorded in wrong county, provable by certified copy); § 8388 (recorded apprentice's indenture, provable by certified copy); § 3993 (same for recorded power of attorney to convey land); §§ 5830, 5836, 5848 (same for deeds re-recorded on change of county boundaries or creation of new county); § 9499 (same for certain re-recorded deeds); 1838, Bowser *v.* Warren, 4 Blackf. 522, 527 (original required only "if the deed is made to the party who relies upon it, or may be presumed from its character to be in his keeping"); 1839, Rucker *v.* M'Neely, 5 Blackf. 123 (grantee offering record; admitted after proof of deed's loss); 1839, Dixon *v.* Doe, 5 Blackf. 107 (non-grantee offering record of deed; admitted without accounting for original); 1840, Doe *v.* Holmes, 5 Blackf. 319 (same); 1842, Foresman *v.* Marsh, 6 id. 285 (general principle repeated); 1843, Daniels *v.* Stone, 5 Blackf. 450 (same); 1850, Pierson *v.* Doe, 2 Ind. 123 (deeds of plaintiff's title; copies allowed); 1860, Lyon *v.* Perry, 14 Ind. 515 (original not required); 1860, Morehouse *v.* Potter, 15 Ind. 477 (record-copy of mortgage;

expressly decided that under the statute it is immaterial whether the original is or is not in the hands of the offeror); 1865, Winship *v.* Clendenning, 24 Ind. 439, 443 (same); 1872, Bowers *v.* Van Winkle, 41 Ind. 432, 435 (original not required); 1874, Patterson *v.* Dallas, 46 Ind. 48 (same); 1876, Abshire *v.* State, 53 Ind. 64, 65 (same); 1888, State *v.* Davis, 117 Ind. 307, 30 N. E. 159, *semble* (unrecorded deed; original required); 1891, Adams *v.* Buhler, 131 Ind. 66, 30 N. E. 883 (mechanic's lien notice recorded in the wrong book; original required).

Iowa: Code 1897, § 4630, Comp. C. 1919, § 7337 ("any instrument" recorded in public office by authority of law is provable by the record or duly authenticated copy, "whenever, by the party's own oath or otherwise, the original is shown to be lost, or not belonging to the party wishing to use the same, nor within his control"); 1867, Williams *v.* Heath, 22 Ia. 519 (original to be accounted for; the fact that the deed is to another than the offeror does not of itself suffice); 1868, Ackley *v.* Sexton, 24 Ia. 320 (statute applied); 1871, Byington *v.* Oaks, 32 Ia. 488 (same); 1873, Scarf *v.* Patterson, 37 Ia. 503, 513 (same); 1876, McNichols *v.* Wilson, 42 Ia. 385, 393 (possession by offeror's brother, within control of Court, but not subpœnaed or requested to produce; copy allowed); 1876, Ingle *v.* Jones, 43 Ia. 286, 290 (offeror not in control, on the facts); 1879, Olleman *v.* Kilgore, 52 Ia. 38, 2 N. W. 612 (offeror not in control, on the facts); 1881, Bixby *v.* Carskaddon, 55 Ia. 533, 537, 8 N. W. 354 (deeds executed to third persons; Court may presume them not in offeror's control); 1884, Jaffrey *v.* Thompson, 65 Ia. 323, 325, 21 N. W. 659 (excluding copy of mortgage not accounted for); 1886, Laird *v.* Kilbourne, 70 Ia. 83, 85, 30 N. W. 9 (deed shown unavailable on the facts); 1886, State *v.* Penny, 70 Ia. 190, 30 N. W. 561 (chattel mortgage to prosecuting witness; that he did not have possession, insufficient); 1890, Collins *v.* Nalleau, 79 Ia. 626, 629, 43 N. W. 284, 44 N. W. 904 (re-record in another county from certified copy; original instrument need not be accounted for); 1890, Kreuger *v.* Walker 80 Ia. 733, 735, 45 N. W. 871 (deeds sufficiently accounted for); 1891, Rea's Assignment, 82 Ia. 231, 234, 48 N. W. 78 (mortgage sufficiently accounted for); 1891, Kenosha Stove Co. *v.* Shedd, 82 Ia. 540, 545, 48 N. W. 933 (conveyances not in offeror's control; copies sufficient); 1894, McCollister *v.* Yard, 90 Ia. 621, 633, 59 N. W. 477 (deed of adoption; not shown unavailable on the facts); 1898, Independent School Dist. *v.* Hewitt, 105 Ia. 663, 75 N. W. 497 (statute applied; original; to be accounted for); 1900, Hall *v.* Cardell, 111 Ia. 206, 82 N. W. 503 (original sufficiently shown not in party's control).

Kansas: Gen. St. 1915, § 7273 (record of "all papers authorized or required by law to be filed or recorded", admissible if "the original is not in the possession or is not under the control of the party desiring to use the same"); G. S. 1915, § 2077, G. S. 1868, c. 22, § 27 (recorded instruments "conveying or affecting real estate", provable by certified copy "upon proof of the loss or destruction of the original instrument, or that it is not under the control of the person desiring to use the same"; instruments recorded in other States for 10 years, and affecting land in this State, provable by certified copy, without mention of such showing); G. S. 1915, §§ 2078–83, G. S. 1868, c. 22, § 28 (instruments defectively acknowledged or recorded before passage of this act, provable by record or duly authenticated copy thereof, when "the original is shown to be lost, or not belonging to the party wishing to use the same, or not within his control"); G. S. 1915, § 2084, St. 1905, c. 324, § 1 (defectively acknowledged or recorded instruments, on record for 10 years, provable by record or duly authenticated copy, "without requiring the original instrument to be produced or accounted for"); 1876, Williams *v.* Hill, 16 Kans. 23 (statutory showing sufficient, as being less than the common-law requirement); 1890, Stratton *v.* Hawks, 43 Kans. 538, 23 Pac. 591 (the proof of the original's not being in possession or under control is sufficient if "to the satisfaction of the Court"); 1891, McLean *v.* Webster, 45 Kans. 644, 26 Pac. 10 (deed to adverse parties, presumed not in the possession or control of the proponent); 1893, Eby *v.* Winters, 51 Kans. 777, 783, 33 Pac. 471 (delivery to opponent, sufficient to exempt); 1901, Neosho V. I. Co. *v.* Hannum, 63 Kans. 621, 66 Pac. 631 (statute applied).

Kentucky: Stats. 1915, § 519 ("certified copies of all instruments legally recorded shall be 'prima facie' evidence"); § 1638 (instrument duly registered out of the U. S., provable by the keeper's attested copy); 1814, Gholson *v.* Lefevre, Litt. Sel. C. 191 (original not required of Virginia grant, under statute); 1814, Wells *v.* Wilson, 3 Bibb 264, 265 (copy admissible from one not a party to the deed; other cases left undetermined); 1815, Tebbs *v.* White, 4 Bibb 42 (copy admissible in all cases; here offered by the vendee of the grantee); 1820, Hood *v.* Mathers, 2 A. K. Marsh. 553, 558 (original not required); 1821, Brooks *v.* Clay, 3 A. K. Marsh. 545, 548, *semble* (same); 1832, Griffith *v.* Huston, 7 J. J. Marsh. 385, 386 (copy offered by grantee; original required); 1838, King *v.* Mims, 7 Dana 267, 269 (Virginia deed; original not required); 1853, Dickerson *v.* Talbot, 14 B. Monr. 60, 67 (original required; but here the deed had not been legally recorded).

Louisiana: in the statutes of this State, it is somewhat difficult, for those not familiar with the theory of the French law and its phraseology, to discriminate between the provisions bearing on the present principle and those dealing with the rules of certified

copies to prove the original's execution; the statutes have therefore been set out once only, under the latter head, *post*, § 1651; compare also the cases on notarial acts, *post*, § 1240, and the statute on lost documents in general (*ante*, § 1195). (1) The following seem to apply Rev. Civ. Code 1920, § 2279: 1827, Coleman *v.* Breaud, 6 Mart. N. S. 407, 408 (production required; here of a Tennessee deed); 1829, Lewis *v* Beatty, 8 Mart. N. S. 287, 289 (same; Georgia deed); 1839, Johnston *v.* Cox, 13 La. 536, 537 (statute applied); 1843, Wells *v.* McMaster, 5 Rob. La. 154, *semble* (original required); 1851, Winston *v.* Prevost, 6 La. An. 164 (deed; loss not sufficiently shown); 1854, Hall *v.* Acklen, 9 La. An. 219, 221 (warrant; loss sufficiently shown); 1857, Peace *v.* Head, 12 La. An. 582 (instrument sufficiently shown to be lost); 1858, Lawrence *v.* Burris, 13 La. An. 611 (deed; loss not sufficiently shown); 1878, Sharkey *v.* Bankston, 30 La. An. 891 (judgment; loss sufficiently shown). (2) The following apply Rev. Civ. Code, § 2280: 1847, Sexton *v.* McGill, 2 La. An. 190, 195 (original to be accounted for); 1848, Lacey *v.* Newport, 3 La. An. 227 (statute applied); 1853, Beebe *v.* McNeill, 8 La. An. 130 (§ 2280 does not apply to destroyed instruments); 1859, Andrew *v.* Keenan, 14 La. An. 705 (statute applied; Civ. C. § 2280); 1877, Ticknor *v.* Calhoun, 29 La. An. 277 (same). (3) The following apply Rev. Civ. C. § 2268: 1893, Chambers *v.* Haney, 45 La. An. 447, 450, 12 So. 621 (on the theory of a copy of a copy, production required). (4) The following require the production of an original not being a "public act": 1848, Leggo *v.* N. O. C. & B. Co., 3 La. An. 138; 1856, Boykin *v.* Wright, 11 La. An. 531, 533; 1857, Knight *v.* Knight, 12 La. An. 396; 1884, Hotard *v.* R. Co., 36 La. An. 450, 451.

Maine: Rev. St. 1916, c. 87, § 131 (in actions affecting realty, attested copies of a recorded deed are admissible, when the offeror is not grantee nor heir nor "justifies as servant" thereof); c. 12, § 19 (certain town proprietor's records, deposited with Maine Historical Society, provable by register of deeds' certified transcript); c. 14, § 38 (certain Indian deeds, recorded with Penobscot county register of deeds, provable by copy attested by Indian agent or register of deeds); 1831, Woodman *v.* Coolbroth, 7 Greenl. 181, 185 (grantee rule, as in Massachusetts; even though the original was in fact in the possession of the offeror of the office-copy, production not required of non-grantee); 1833, Knox *v.* Silloway, 1 Fairf. 201, 216 (approving the preceding case); 1834, Kent *v.* Weld, 2 Fairf. 459 (same, but this, *semble*, is allowable, under Court Rule 34, only "in actions touching the realty", "when the party offering such office-copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs"; not applicable, therefore, to a recorded power of attorney in an action for services rendered to an alleged agent of the defendant); 1901, Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246 (grantee rule applied).

Maryland: Ann. Code 1914, Art. 35, § 42 (any instrument required, by law of State or country where executed, to be registered, and lawfully registered, is provable by the keeper's certified copy); § 56 (land-office commissioner's certified copy of extract of deed transmitted by court clerk, admissible if the original deed and record are lost or destroyed); Art. 21, § 28 (recorded contract for conveyance of real estate provable by certified copy as fully as for deed); 1800, Gittings *v.* Hall, 1 H. & J. 14, 18 (copy of a deed not requiring enrolment, not receivable without express proof of loss, etc.); 1804, Cheney *v.* Watkins, ib. 527, 532 (same).

Massachusetts: Gen. L. 1920, c. 114, § 4 (cemetery conveyances recorded by the corporation, provable by certified copy like registered deeds); c. 185, § 54 (the owner's duplicate certificate of registered title, and a certified copy of the original certificate on file, is admissible); c. 185, § 111 ("if a duplicate certificate is lost or destroyed, or cannot be produced by a grantee, heir, devisee, assignee, or other person applying for the entry of a new certificate to him or for the registration of any instrument", a new duplicate may be issued, which shall "thereafter be regarded as the original duplicate for all the purposes of this chapter"); 1828, Eaton *v.* Campbell, 7 Pick. 10 (grantee need not produce originals of deeds prior to that made to himself; see quotation *ante*, § 1224); 1829, Poignand *v.* Smith, 8 Pick. 272, 277 (mortgage belonging to an assignee; original to be accounted for); 1832, Burghardt *v.* Turner, 12 Pick. 534, 538 (rule of Eaton *v.* Campbell applicable to a deed made to a common ancestor, there being no reason to attribute possession of it to one party rather than the other); 1833, Scanlan *v.* Wright, 13 Pick. 523, 527 (rule applicable even where the prior grantee is within the jurisdiction; production is required only where the person proving the deed is himself the grantee or some one who must be presumed to have the deed); 1834, Ward *v.* Fuller, 15 Pick. 185, 187 (general principle as above); 1853, Blanchard *v.* Young, 11 Cush. 341, 345 (same; applied, in an issue of a conveyance in fraud of the defendant's creditors, to the defendant's deeds to third persons); 1854, Com. *v.* Emery, 2 Gray 80 (charge of being a common seller; to prove the defendant's ownership of the premises, the district attorney offered a registrar's copy of a deed to the defendant; excluded, the original being obtainable by notifying the opponent; quoted *ante*, § 1224); 1854, Bourne *v.* Boston, 2 Gray 494 (following Com. *v.* Emery; to prove the plaintiff a resident of Boston, copies of deeds in which the plaintiff was grantee, offered by the defendant, were excluded); 1856, Pierce *v.* Gray, 7 Gray 67

(rule applied to mortgages of personalty recorded); 1863, Barnard *v.* Crosby, 6 All. 327, 331 (same); 1863, Thacher *v.* Phinney, 7 All. 146, 148 (rule applied to admit a copy of a deed to the defendant's grantor, offered by the plaintiff); 1870, Samuel *v.* Borrowscale, 104 Mass. 207, 209 (rule applied); 1870, Stockwell *v.* Silloway, 105 Mass. 517 (same); 1878, Draper *v.* Hatfield, 124 Mass. 53, 56 (copies of deeds to the opponent, excluded, because no notice had been given).

Michigan: Comp. L. 1915, §§ 11696, 11697, 11727, 11728, 11741, 11775, 11778, 11783, 12508, 12509, 12517 ("conveyances and other instruments" lawfully recorded are provable by the register's certified copy; also certain defectively recorded ones); 1863, Brown *v.* Cady, 10 Mich. 535, 538 (record not admissible unless lawfully recorded); 1889, People *v.* Swetland, 77 Mich. 53, 56, 43 N. W. 779 (forgery of a discharge of mortgage; record not admissible till original accounted for, "when the question of the forgery of the original instrument is in issue either in a criminal or civil suit").

Minnesota: Gen. St. 1913, § 8456 (instrument authorized to be recorded and duly acknowledged or proved, provable by record or register's certified copy); §§ 6903, 6907 (registration of title; similar to the Illinois act *supra;* provision made for using certified copies of the certificate of title and also of deeds, etc., filed with the registrar, etc.); 1866, Winona *v.* Huff, 11 Minn. 119, 127 (map of dedication recorded; loss of record and of original map required to be shown); 1885, Gaston *v.* Merriam, 33 Minn. 271, 275, 22 N. W. 614 (loss of original sufficiently shown).

Mississippi: Code 1906, § 1954, Hem. § 1614 (copies of record of "all instruments of writing which by the laws of any foreign country may be admitted to record upon acknowledgment or proof thereof", duly certified, admissible; but if execution is disputed on oath, "the original shall be produced or its absence accounted for before such copy shall be read in evidence"); Code § 1955, Hem. § 1615 (same for instrument "required or permitted to be" recorded in U. S. State or Territory or District of Columbia); Code § 1956, Hem. § 1616 (same for instrument "required or permitted to be" recorded in this State); 1844, Haydon *v.* Moore, 1 Sm. & M. 605 (original statute, requiring production of deed, applied); 1845, Chaplain *v.* Briscoe, 5 Sm. & M. 189 (same); 1846, Harmon *v.* James, 7 Sm. & M. 111, 118 (same); here a statute of 1844, abolishing the necessity of production, as above, became applicable in the later cases; 1848, Thomas *v.* Bank, 9 Sm. & M. 201 (original of a document not required to be recorded must be produced); 1860, Davis *v.* Rhodes, 39 Miss. 152, 156 (same, for document not recorded according to law).

Missouri: Rev. St. 1919, § 2208 (duly recorded instruments "conveying or affecting real estate", provable by certified copy when "it shall be shown to the Court by the oath or affidavit of the party wishing to use the same, or of any one knowing the fact, that such instrument is lost or not within the power of the party wishing to use the same"); § 2216 (duly recorded instruments dealing with military-bounty lands in this State, executed out of the State but in the U. S., provable by certified copy "upon proof of the loss or destruction of the original instrument"); § 5399 (certain ancient documents recorded 30 years before March 28, 1874, provable by certified copy if it appears "by oath or affidavit of the party wishing to use the same, or of any one knowing the fact, that such instrument is lost or not within the power of the party wishing to use the same"); § 5379 (any "bond, contract, or other instrument", for which provision for recording has been made, provable by certified copy when the original is "lost or not within the control of the party wishing to use the same"); § 5394 (certified copy of duly recorded marriage contract, admissible, when the original "is lost or is not in the power of the party wishing to use it"); §§ 5357, 5359 (conveyances, grants, records, etc., under French or Spanish government, deposited with recorder of land-titles or county recorder, provable by his certified copy "with like effect as the original"); § 5360 (when it appears that the original of such documents, after deposit and record, "cannot be found therein, or has been lost or destroyed, or that neither the original nor a duly certified copy thereof can be obtained by the parties wishing to use it, a copy of the record of such original, duly certified by the officer having charge of such record, shall be received"); § 5365 (where certain instruments not so recorded as ordinarily to be admissible are made admissible by lapse of time, etc., a certified copy is admissible if the original "has been lost or destroyed, or is not in the power of the party who wishes to use it"); § 5366 (where deed has been recorded more than 30 years, though not duly acknowledged, etc., and has been later duly proved and read on trial, then after loss or destruction of original, a copy, preserved in bill of exceptions contained in transcript filed in certain courts, is admissible when certified under seal of clerk of proper court); § 9285 (county recorder's certified copy of recorded plat, admissible); 1851, Walker *v.* Newhouse, 14 Mo. 373, 377 (deed to a third person; "in most cases", perhaps, efforts to procure would be required; here not, on the facts); 1851, Bosworth *v.* Bryan, 14 Mo. 575, 577 (deed to offeror's predecessor; copy allowed on proof of loss); 1858, Barton *v.* Murrain, 27 Mo. 235, 238 (ordinarily, if original is presumed to be in a third person's hands, not even the preliminary oath is necessary; if the deed deals with military-bounty land and is otherwise insufficiently recorded, then loss must be

shown); 1867, Attwell *v.* Lynch, 39 Mo. 519 (original not accounted for; copy excluded); 1867, Boyce *v.* Mooney, 40 Mo. 104 (deed to trustees-plaintiffs under a marriage-contract; original not presumed out of their power); 1870, Christy *v.* Kavanagh, 45 Mo. 375 (loss not sufficiently shown on the facts; trial Court's discretion should control); 1872, Strain *v.* Murphy, 49 Mo. 337, 340 (original sufficiently accounted for); 1872, Crispen *v.* Hannavan, 50 Mo. 415, 418 (military-bounty land; loss or destruction must be shown); 1874, Totten *v.* James, 55 Mo. 494, 496 (transfer of military-bounty land made in conformity to home law; original must be shown lost or destroyed); 1875, Tully *v.* Canfield, 60 Mo. 99 (overruling the preceding case; original need not be shown lost or destroyed; except for transfers made in another State according to its law); 1877, Sims *v.* Gray, 66 Mo. 613, 615 (administrator's deed in offeror's control; certified copy excluded); 1880, Crispen *v.* Hannavan, 72 Mo. 548, 554 (certified copies of deeds defectively acknowledged but recorded 30 years; original must be shown lost or destroyed, by implication of the statute); 1882, Boogher *v.* Neece, 75 Mo. 383, 385 (deed properly acknowledged out of the State but in conformity to home law; sufficient to show original not within offeror's power); 1885, Addis *v.* Graham, 88 Mo. 197, 202 (deed shown lost); 1887, Dollarhide *v.* Parks, 92 Mo. 178, 186, 5 S. W. 3 (deed shown lost); 1887, Hammond *v.* Johnston, 93 Mo. 198, 207, 6 S. W. 83 (under Stats. § 2395, the original of a recorded sheriff's deed need not be accounted for); 1893, Frank *v.* Reuter, 116 Mo. 517, 521, 22 S. W. 812 (deed must be accounted for); 1893, Hunt *v.* Selleck, 118 Mo. 588, 593, 24 S. W. 213 (same); 1898, Cazier *v.* Hinchey, 143 Mo. 203, 44 S. W. 1052, *semble* (widow proving husband's chain of title; loss must be shown); 1901, Stout *v.* Rigney, 46 C. C. A. 459, 107 Fed. 545, 551 (certified copy of deed to military-bounty land taken in Illinois according to Missouri law, admitted; following Tully *v.* Canfield, *supra*, proof that the original was not in the party's power sufficing under Rev. St., § 933, without proof of loss or destruction); 1903, Orchard *v.* Collier, 171 Mo. 390, 71 S. W. 677 (original not shown on the facts to be lost or out of the party's power); 1904, Patton *v.* Fox, 179 Mo. 525, 78 S. W. 704 (original shown to be in defendant's possession; no notice required; see the citations *ante*, § 1207, n. 4).

Montana: Rev. C. 1921, § 10516 (like Cal. C. C. P. § 1855); § 10598 (like Cal. C. C. P. § 1951, as amended by St. 1889, adding, for the class of instruments, "and every instrument authorized by law to be filed or recorded in the county clerk's office"); § 8284 (chattel mortgages recorded on acknowledgment; certified copy admissible "if said original be lost or out of the power of the person wishing to use it"); 1882, McKinstry *v.* Clark, 4 Mont. 370, 371 (mining location; certified copy admitted without requiring loss to be shown); 1886, Garfield M. & M. Co. *v.* Hammer, 6 Mont. 52, 64, 8 Pac. 153 (certified copy of recorded mining declaration and of deed, admissible without accounting for original); 1889, Flick *v.* Gold Hill & L. M. M. Co., 8 Mont. 298, 304, 20 Pac. 807 (principle of preceding cases approved); 1894, Manhattan M. Co. *v.* Sweteland, 14 Mont. 269, 36 Pac. 84 (originals required; repudiating the two earlier rulings above; compare the California rulings *supra*).

Nebraska: Rev. St. 1922, § 5609 (record of deed or certified copy, admissible "whenever, by the party's oath or otherwise, the original is known to be lost, or not belonging to the party wishing to use the same, nor within his control"); 1880, Delaney *v.* Errickson, 10 Nebr. 492, 500, 6 N. W. 600 (deed to offeror's grantor; presumed not in his possession, and need not be accounted for); 1888, Fremont E. & M. V. R. Co. *v.* Marley, 25 Nebr. 138, 145, 40 N. W. 948 (use of record-copies to establish title is in discretion of trial Court); 1889, Hall *v.* Aitkin, 25 Nebr. 360, 363, 41 N. W. 192 (mortgage filed; production not required); 1889, Buck *v.* Gage, 27 Nebr. 360, 41 N. W. 192 (deeds not to the offeror; statute presumed satisfied by proof to the Court below); 1892, Rupert *v.* Penner, 35 Nebr. 587, 591, 53 N. W. 598 (in trial Court's discretion to require production of original deeds, in ejectment suits).

Nevada: Rev. L. 1912, § 1044 ("conveyance, or other instrument conveying or affecting real estate", duly recorded, provable by certified copy); §§ 1100, 1636, 2424, 2429, 2432, 2467, 2473, 2475 (mining; sundry contracts, claims, transfers, etc., provable by certified copy); § 5414 (recorded conveyances of realty; like Cal. C. C. P. § 1951); § 5417 (original need not be produced when "the original has been recorded and a certified copy is made evidence by statute").

New Hampshire: Pub. St. 1891, c. 27, § 18; c. 43, § 44 (duplicate certified copies of mutilated records may be used as originals without showing loss of the latter); c. 224, § 23 (certified copy by proper officer of any document required by law to be recorded in a public office, admissible "where the originals would be evidence"); 1831, Southerin *v.* Mendum, 5 N. H. 420, 428 (grantee rule, following Eaton *v.* Campbell, Mass.; applied to powers of attorney); 1840, Pollard *v.* Melvin, 10 N. H. 554 (original dispensed with "only in a chain of title, where due proof has first been made of the execution of the last conveyance"; rule not applicable to third person's title); 1840, Loomis *v.* Bedel, 11 N. H. 74, 86 (same); 1843, Homer *v.* Cilley, 14 N. H. 85, 98 (same); 1844, Lyford *v.* Thurston, 16 id. 399, 404 (same; the rule held to cover copies of deeds in the chain of the opponent's as well as of the proponent's title); 1845, Andrews *v.* Davison, 17 N. H. 413, 415 (same;

is situate may be given in evidence"); 1796, Park *v.* Cochran, 1 Hayw. 410 (an office copy of a deed to the plaintiff, excluded, unless he accounted for the original); 1834, Smith *v.* Wilson, 1 Dev. & B. 40 (grantee offering a copy; original required; here a statute of 1846 intervened to excuse production conditionally); 1852, Burnett *v.* Thompson, 13 Ired. 379 (the registration of leases for years not being required, a copy from the registry does not dispense with the production of the original); 1854, Bohanan *v.* Shelton, 1 Jones L. 370 (statute applied to a bond to make title); 1893, Mitchell *v.* Bridger, 113 N. C. 63, 71, 18 S. E. 91 (contract to offeror's predecessor; original not required); 1902, Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887 (statute applied).

North Dakota: Comp. L. 1913, § 7916 ("every instrument conveying or affecting real property", provable by record or certified copy of record, "on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing such record or copy"); § 5597 (record of "all instruments entitled to record" is admissible, and may be read in evidence "without further proof thereof"); 1901, American Mge. Co. *v.* Mouse River L. S. Co., 10 N. D. 290, 86 N. W. 965 (statute applied).

Ohio: Gen. Code Ann. 1921, §§ 8540, 8557, 8558, 8571 (recorder's certified copy of a recorded power of attorney, "deed or other instrument of writing", and chattel mortgage, admissible); § 8822 (recorder's certified copy of grant of way or easement to railroad, admissible); § 8533 (recorded agreement fixing corner or line between adjoining owners; original or certified copy, admissible); 1833, Burnet *v.* Brush, 6 Oh. 32 (under the original recording act of 1820, the original was not required to be produced except where it was a deed from the offeror's immediate grantor; under the absolute terms of the act of 1831, held, that even this exception disappeared); 1839, Livingston *v.* M'Donald, 9 Oh. 168 *semble* (same); 1875, Kilbourn *v.* Fury, 26 Oh. St. 153, 161, *semble* (original must be accounted for).

Oklahoma: Comp. St. 1921, § 638 ("all papers authorized or required to be filed or recorded in any public office", provable by certified copy "when such original is not in the possession or under the control of the party desiring to use the same"); § 654 (records of public officers, admissible; "and when any such record is of a paper, document, or instrument authorized to be recorded, and the original thereof is not in the possession or under the control of the party desiring to use the same, such record shall have the same effect as the original"); § 5267 (all instruments affecting real estate and duly recorded are provable by certified copy, "in all cases where copies or other instruments might lawfully be used in evidence, and when not requiring record, by copy verified by oath or affidavit"); 1904, Enid & A. R. Co. *v.* Wiley, 14 Okl. 310, 78 Pac. 96 (record of a U. S. land-patent in a county registry of deeds; original required to be accounted for, under Rev. & Ann. St. 1903, § 4575); 1919, Smith *v.* Braley, 76 Okl. 220, 184 Pac. 587 (Rev. L. 1910, § 5099, now Comp. St. 1921, § 638, applied to admit county clerk's record of deeds shown not to be in the plaintiff's possession or control); 1915, Dyal *v.* Norton, 47 Okl. 794, 150 Pac. 703 (statute applied).

Oregon: Laws 1920, § 9877 (record or certified transcript of duly recorded conveyance, admissible "with like force and effect as the original conveyance"); § 712, par. 4 (like Cal. C. C. P. § 1855, par. 4); § 9858 (for deeds of land, duly executed in a foreign country and recorded here, the county clerk's certified copy shall "have the same effect as the original"); 1921, State *v.* Rowen, — Or. —, 200 Pac. 901 (forgery of a deed; certified copies held admissible, under Or. Laws § 9877; the opinion deals with a Missouri decision cited on the brief; but on this subject, it might have been well known that the Missouri rule was of a distinct type).

Pennsylvania: St. 1715, May 28, § 5, Dig. 1920, § 8824 Deeds (certified copies under seal of deeds duly recorded, receivable "as the original deeds themselves"); St. 1870, Jan. 26, § 1, Dig. § 8792 (same for land in more than one county); St. 1828, Jan. 25, § 1, Dig. § 10334 Evid. (deeds duly recorded in land-office, though not in proper county, provable by exemplification); St. 1905, Apr. 22, § 6, Dig. § 8840 Deeds (exemplified copy admissible, for sheriffs' deeds recorded with the Court of Common Pleas); St. 1853, Apr. 5, §§ 4, 5, Dig. §§ 8908–8909 Deeds (mortgage of coal-mining rights; certified copy of recorded instrument, when original is lost, receivable conditionally); St. 1887, Apr. 28, § 8, Dig. § 8923 Deeds (certified copies of recorded mortgages, etc., of iron ore and other specified personalty receivable); St. 1834, Feb. 21, § 1, Dig. § 10310 Evid. (record or exemplifications of papers lawfully recorded, receivable); St. 1846, Mar. 14, § 1, Dig. § 8796 Deeds (record or certified copies of duly recorded Commonwealth patents, sheriffs', coroners', marshals', and treasurers' deeds, and deeds under decree of Court, receivable); St. 1849, Apr. 5, § 2, Dig. § 8794 Evid. (same for deeds of county commissioners); St. 1849, Apr. 5, § 5, Dig. § 10312 Evid. (same for assignments of mortgages and attorney-powers authorizing satisfaction of mortgages); St. 1828, Apr. 15, 1866, 1850, Dig. §§ 8798–8801, Deeds (duly recorded written discharges of "any legacy or recognizance charged upon lands" in the State; copies under recorder's seal, receivable; also other specified releases to executors, etc.); St. 1885, June 3, § 1, Dig. § 8797 Evid. (letters of attorney relating to personalty, duly recorded; exemplification receivable); St. 1854, Dec. 14, Dig. § 8795 Deeds (letters of attorney relating to personalty, duly made

abroad before a U. S. officer or a notary, and here recorded, receivable, as also an exemplification, when the original is lost; also affidavits before a proper officer, duly certified, in another domestic State); 1810, Carkhuff *v.* Anderson, 3 Binn. 4, 7, 9 (copy allowable, under a statute by which the original deed was kept in the recording office); 1811, Vickroy *v.* McKnight, 4 Binn. 204, 208 (here the deed was not properly proved for registry by the required two witnesses; "if a deed is recorded without the authority of law, a copy of the record is not evidence"); 1857, Curry *v.* Raymond, 28 Pa. 144, 149 (mortgage; production not required).

Philippine Islands: Civ. C. §§ 1214–1216 (like P. R. Rev. St. & C. §§ 4288–4290); ib. 1217–1230 (like P. R. Rev. St. & C. §§ 4291–4304; on these, see the remark under Porto Rico, *infra;* C. C. P. 1901, § 284 (like Cal. C. C. P. § 1855); ib. § 299 (like Cal. § 1893); ib. § 331 (like C. C. P. § 1951); Admin. C. 1917, § 194 (any recorded instrument "affecting the title of unregistered land" is provable by the record or a certified copy); ib. § 198 (recorded chattel mortgage or filed instrument is provable by certified copy); Act No. 496, Nov. 6, 1902, § 47 (land registration; cited more fully *post*, § 1651);

Porto Rico: here the revisers have added to the original Spanish Code the texts of the California Code of Civil Procedure; the two rest on distinct theories of Evidence; it is difficult to see how they can both be given effect at the same time. Revised Statutes and Codes 1911, § 1987 ("An original instrument is one drawn up by a notary upon the contract or writing submitted to him for authentication and which is signed by the parties thereto, the witnesses to the document, or those having knowledge of the facts, as the case may be, and authenticated by the notary with his written signature, mark and seal, no stamped signature being allowed"); § 2001 ("By copy is understood a literal transcript of an instrument executed before a notary which the later, or the person who is lawfully in charge of the protocol, issues to the persons requesting same"); § 2006 ("A protocol is the collection, in proper order, of original documents, authenticated during one year by a notary"); § 4288 ("Proof of obligations devolves upon the persons claiming their fulfillment, and that of their extinction upon those opposing it"); § 4289 ("Proofs may be given by instruments, by confession, by the personal inspection of the court or judge, by experts, by witnesses, and by presumptions"); § 4290 ("Public instruments are those authenticated by a notary or by a competent public official, with the formalities required by law"); § 4291 ("Instruments in which a notary public takes part shall be governed by the notarial law"); § 4292 ("Public instruments are evidence, even against a third person, of the fact which gave rise to their execution and of the date of the latter. They shall also be evidence against the contradicting parties and their legal representatives with regard to the declarations the former may have made therein"); § 4293 ("Public instruments, made for the purpose of impairing a former instrument, between the same parties, shall be effective against third parties only when the contents of the former should have been entered in the proper public registry or in the margin of the original instrument, and in that of the transcript or copy, by virtue of which the third person may have acted"); § 4294 ("Copies of public instruments of which there is an original or protocol, contested by those they prejudice, shall have force of proof only when they have been duly collated. Should there be any difference between the original and the copy the contents of the former shall govern"); § 4295 ("Should the original instrument, the protocol, and the original record have disappeared, the following shall constitute evidence: 1. First, copies made by the public official who authenticated them. 2. Subsequent copies issued by virtue of a judicial mandate, after citing the persons interested. 3. Those which, without a judicial mandate, may have been taken in the presence of the persons interested and with their consent. In the absence of the said copies, any other copies, thirty, or more years old, shall be evidence, provided they have been taken from the original by the official who authenticated them or by any other in charge of their custody. Copies less than thirty years old, or which may be authenticated by a public official, in which the circumstances mentioned in the preceding paragraph do not concur, shall serve only as a basis of written evidence. The force of proof of copies of a copy shall be weighed by the courts according to the circumstances"); § 4296 ("The entry in any public registry of an instrument which may have disappeared shall be weighed according to the rules established in the last two paragraphs of the preceding section"); § 4297 ("An instrument which is defective by reason of the incompetency of the notary or by reason of any other fault in its form shall be considered as a private instrument when signed by the parties who executed the same"); § 4298 ("An instrument acknowledging an agreement or contract proves nothing against the instrument containing the same if by excess or omission, they disagree therewith, unless the novation of the former is expressly proven"); § 4299 ("A private instrument legally acknowledged shall have, with regard to those who signed it and their legal representatives, the same force as a public instrument"); § 4301 ("The date of a private instrument shall be considered, with regard to third persons, only from the date on which it may have been filed or entered in a public registry, from the death of any of those who signed it, or from the date on which it may have been delivered

to a public official by virtue of his office"); § 1392 (like Cal. C. C. P. § 1855); § 1416 (like Cal. C. C. P. § 1893); § 1462 (like ib. § 1951, adding that nothing herein shall exclude any instrument admissible under the Civil Code); 1907, Chavier's Estate *v.* Adjuntas, 13 P. R. 331, 339 (notarial copy purporting to be a copy of an original on file with the notary, held sufficient under Evidence Act §§ 70, 74).

South Carolina: St. 1731, Quit Rents, § 30 (record of all grants in auditor-general's office and "all grants and deeds duly proved before a justice of the peace according to the usual method, and recorded", and also attested copies thereof, "shall be deemed to be as good evidence in the same force and effect as the original would have been if produced"); St. 1803, C. C. P. 1922, § 712 (certified copy of grant of land from this State or the State of North Carolina, receivable on oath that "the original grant is lost, destroyed, or out of his, her, or their power to produce," and that the offeror has not "destroyed, mislaid, or in any way willingly previous to that time put it so out of his power with the intent to produce an office-copy"); St. 1843, C. C. P. 1922, § 713 (certified copy of any recorded deed, receivable, "subject to the same rules" as in the preceding section, and on ten days' notice); 1795, Purvis *v.* Robinson, 1 Bay 493 (under the early statute above quoted, held that the loss of the original must still be shown; see a careful criticism by the reporter in a note to Peay *v.* Picket, *post*, and the quotations *ante*, § 1224); 1803, Turner *v.* Moore, 1 Brev. 236 (slight evidence of loss sufficient); 1807, Rosamond *v.* M'Ilwain, 2 Brev. 132 (copy of a grant alone, received under the statute, without copy of the plat annexed; Trezevant, J., diss., because at common law production would have been necessary, and the statute was not strictly followed); 1821, Dingle *v.* Bowman, 1 McC. 177 (loss of the original must be shown); 1821, Turnipseed *v.* Hawkins, 2 McC. 272, 278 (certified copy of deed, *semble*, receivable without accounting for the original; but here its loss was shown); 1823, M'Mullen *v.* Brown, Harp. 76 (loss of the original must be shown; but here lapse of time was allowed to suffice); 1825, Bird *v.* Smith, 3 McC. 300 (object of the statute of 1803, relating to North Carolina grants, was to substitute the party's oath for ordinary proof of loss); 1825, Peay *v.* Picket, 3 McC. 318 (original required to be accounted for, following the rule in Purvis *v.* Robinson; see quotation *ante*, § 1224); 1843, Hinds *v.* Evans, 2 Speer 17 (copy rejected because search for original was not sufficient); 1843, Birchfield *v.* Bonham, 2 Speer 62 (search for recorded deed held sufficient to admit copy); 1843, State *v.* Hill, 2 Speer 150, 160 (same); 1845, McLeod *v.* Rogers, 2 Rich. 19, 22 ("the copy was evidence only on proof of the loss of the original; . . . Dingle *v.* Bowman seems to have been lost sight of"; noting the conflict of rulings); 1846, Darby *v.* Huffman, 2 Rich. 532 (before using an office-copy, the loss alone, and not also the existence, of the original, need be proved); 1905, Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253 (loss of original sufficiently proved by the admission of the opponents, residing in the house of the last custodian, that they did not have it).

South Dakota: Rev. C. 1919, § 2724 ("Every instrument in writing which is acknowledged or witnessed and duly recorded or duly filed" is provable by the record or a certified copy); § 2725 (similar, for instruments affecting real property, defectively recorded before Feb. 1, 1911); § 3095 (registration of land-title; rules for use of original certificate and certified copy); 1904, Reeder *v.* Wilber, 18 S. D. 426, 100 N. W. 1099 (statute applied).

Tennessee: Shannon's Code 1916, § 3704 (certified copy of acknowledgment of release of lien, receivable); § 3711 (copy of registered copy of deed of lands in different counties, receivable); § 3748 ("Any of said instruments [*i.e.* deeds, etc.] so proved or acknowledged and certified and registered shall be received as evidence"); extended to old or mutilated records re-copied, §§ 3778, 3786, 3792, 5575; § 3711*a* 1 (similar to § 3711, for power of attorney); 1806, King *v.* Hall, 1 Overt. 209 (grantee by warranty-deed need not produce prior deeds, which the grantor is supposed to keep); 1809, Cook *v.* Hunter, 2 Overt. 113 (same); 1812, McClellan *v.* Dunlap, 2 Overt. 183 (certified copy of mesne conveyance, received on affidavit that the original was beyond control; an alleged original was in Court, but, by hypothesis being altered, could not be regarded as the original in question); 1813, Smith *v.* Martin, 2 Overt. 208 (proof is needed that the original mesne conveyance is out of the control of the offeror, but "not the same necessity for strictness as with other sorts of copies"; here, an affidavit of the offeror or his agent was held sufficient); 1814, Jackson *v.* Dillon, 2 Overt. 261, 263 ("the law will always give an easy ear to the reception of affidavits respecting the loss or non-production of original papers which are required to be registered and have actually been registered agreeably to law"); 1817, Lannum *v.* Brooks, 4 Hayw. 121 (deed to the defendant; copy offered by plaintiff; production not required, because the plaintiff is presumed not to have possession; nor is notice to the defendant necessary); 1823, Norflet *v.* Nelson, Peck 188 (production required of deed offered by grantee himself or his heir); 1827, Anderson *v.* Walker, M. & Y. 201 (production dispensed with "only in those cases where the warrantor, not a defendant, was supposed to keep his title by him"; but here both grantor and grantee were joined as defendants, and the grantee therefore was obliged to account for a mesne deed to the grantor); 1844, Saunders *v.* Harris, 5 Humph. 345 (copy of recorded bill of sale to grantee, mother of plaintiff, excluded,

because the original was in his power); 1832, M'Iver *v.* Robertson, 3 Yerg. 84, 89 (under the original St. 1809, c. 14, § 8, the offeror of a registered deed-copy must show the original not to be in his power, by express statutory provision); 1869, Walker *v.* Walker, 6 Coldw. 571, 573, *semble* (wife proving deed to deceased husband; production unnecessary, without order); 1874, Sampson *v.* Marr, 7 Baxt. 486, 492 (certified copy of deed to ancestor of plaintiff, the heir; production of original required, as the plaintiff was presumed to have possession).

Texas: Rev. Civ. St. 1911, § 3699 ("all conveyances and other instruments of writing between private individuals, which were filed in the office of any alcalde or judge in Texas previous to the first Monday in February, 1837", are provable by certified copy); § 3700 ("Every instrument of writing" lawfully proved or acknowledged and recorded with clerk of county court, or actually recorded for 10 years, whether lawfully or not, is provable by certified copy "whenever any party to the suit shall file among the papers of the cause an affidavit" stating that any such instrument "has been lost or that he cannot procure the original"); § 6856 (all instruments permitted by law to be registered, and recorded before Feb. 9, 1860, provable by certified copy as if the proof or acknowledgment were in accordance with existing laws, provided it was made before certain specified officers); § 7749 (in trespass to try title, "proof of a common source may be made by the plaintiff by certified copies of the deeds showing a claim of title, etc.", if filed with the papers three days before trial and notice given "as in other cases"); in the following cases, where nothing is specially noted, the ruling concerns the statutory terms in regard to an affidavit of loss or lack of control: 1853, Styles *v.* Gray, 10 Tex. 503, 505 (statute applied to the record-book); 1853, Crayton *v.* Munger, 11 Tex. 234 (statute strictly applied, as to the affidavit); 1856, Graham *v.* Henry, 17 Tex. 164, 166; 1856, Fulton *v.* Bayne, 18 Tex. 50, 56 (as to the notice); 1857, Butler *v.* Dunagan, 19 Tex. 559, 566 (as to the affidavit); 1858, Bateman *v.* Bateman, 21 Tex. 432 (a ruling against sufficiency of proof of loss by affidavit does not preclude an additional affidavit at a later trial); 1864, Winders *v.* Laird, 27 Tex. 616 (statute does not apply to judicial records; here, a probated will; no notice necessary); 1867, Hooper *v.* Hall, 30 Tex. 154, 158 (affidavit held insufficient on the facts); 1871, Ury *v.* Houston, 36 Tex. 260, 268; 1882, Hines *v.* Thorn, 57 Tex. 98, 103; 1882, Dotson *v.* Moss, 58 Tex. 152, 154; 1883, Vandergriff *v.* Piercy, 59 Tex. 371; 1885, Kauffman *v.* Shellworth, 64 Tex. 179; 1885, Ross *v.* Kornrumpf, 64 Tex. 390, 394; 1888, Nye *v.* Gribble, 70 Tex. 458, 462, 8 S. W. 608; 1888, Boydston *v.* Morris, 71 Tex. 697, 699, 10 S. W. 331 (common-law rule applied to recorded chattel-mortgages); 1890, Hill *v.* Taylor, 77 Tex. 295, 299, 14 S. W. 366; 1890, Foot *v.* Silliman, 77 Tex. 268, 271, 13 S. W. 1032; 1898, Oxsheer *v.* Watt, 91 Tex. 402, 44 S. W. 67 (recorded mortgage; original not required).

Utah: Comp. L. 1917, § 7117 (substantially like Cal. C. C. P. § 1951 as amended 1874); § 7117, par. 4 (like ib. § 1855); § 477 (certified copy of filed chattel-mortgage admissible "if such original be out of the control of the person wishing to use it"); 1892, Wilson *v.* Wright, 8 Utah 215, 30 Pac. 754 (defendant a party to the deed; production required, though another person had the custody).

Vermont: Gen. L. 1917, § 2742 (attested copy of deed recorded by county clerk, receivable "if the records of a town in which such deed or other conveyance is recorded are destroyed"); § 2748 (certified copy of recorded power of attorney authorizing deed, receivable "when the original cannot be produced"); § 3875 (sheriff's commissions and accused's recognizances, recorded with county clerk, provable by certified copy in case of loss or destruction); St. 1919, Mar. 27, No. 72 (recorded deed in another State or foreign country, provable by certified copy); 1827, Williams *v.* Wetherbee, 2 Aik. 329, 336 (mesne conveyances to plaintiff's grantor or predecessor; originals not presumed to be in plaintiff's possession, and therefore production not required; citing the statutes above as to county clerks' copies and powers of attorney copies; "these expressions do not necessarily imply that such copies may be read without proof that the originals are out of the parties' power; but the course has been, ever since the Act passed, to admit regular copies of such deeds as do not belong to the party wishing to use them"); 1830, Booge *v.* Parsons, 2 Vt. 456, 459 (same principle; here a record of deed to plaintiff's testator himself was received after proof of loss); 1834, Braintree *v.* Battles, 6 Vt. 395, 399, *semble* (charter deposited in public office; loss of original required to be shown); 1850, Williams *v.* Bass, 22 Vt. 353, 356 (record of a deed "to a third person, and not to the party", suffices); 1861, Pratt *v.* Battles, 34 Vt. 391, 397 ("a party may prove the various links in this chain of title" without producing the originals, "except the deed to himself . . . because it is supposed to be in his custody"; whether or not, on a 'prima facie' case of fraud or forgery, production would be required, undecided).

Virginia: Code 1919, § 6195 (copies of deeds imperfectly recorded under certain early statutes receivable); § 6241 (no certified copy of deed, will, account, or other original paper required to be recorded in a Court is to be used as evidence in place of a destroyed original or record, until such copy has been admitted to record in substitution); 1797, Maxwell *v.* Light, 1 Call 117, 121, *semble* (original

dictions the result solely of judicial decision; in others, of one or more statutes super-imposed upon early decisions; and in others, of statutes from the beginning. For an accurate understanding of the present validity of the earlier rulings, a complete historical exposition of the course of legislation in each State would be necessary; but that is here impossible.

The data here to be considered include statutes and decisions affecting the production of recorded conveyances. They are therefore limited in the following respects: (1) They do not include an enumeration of the various specific *kinds of conveyances authorized to be recorded* — chattel mortgages, deeds of realty, powers of attorney, sheriffs' deeds, and the like. (2) The line of distinction between documents of the present class — conveyances — and those of the classes already dealt with (§§ 1215–1222) — *official documents* and *judicial records* — is sometimes obscure; certain provisions under those heads might by another interpretation belong equally or better under the present subject. (3) The proof of Government *grants* or *patents of land* is controlled by the present general principle, if it is applicable; but whether it is applicable depends upon the theory of substantive law as to which document constitutes the grant, *i.e.* the patent delivered to the grantee or the

of recorded deed must be shown unavailable); 1804, Hord *v.* Dishman, 5 Call. 279, 284 (a copy, "by long-established usage in this country", is admissible without accounting for the original); 1815, Rowletts *v.* Daniel, 4 Munf. 473, 482 (certified copy of recorded deed to offeror's predecessor in title, dated 1765, received without accounting for original); 1821, Baker *v.* Preston, Gilmer 235, 284, *semble* (certified copy of recorded deed, admissible without accounting for the original; but at pp. 286, 294, it is not clear whether this was the point decided); 1824, Ben *v.* Peete, 2 Rand. 539, 543, *semble* (search required in the recording-office, etc.; but here it turned out that the deed was not lawfully recorded); 1835, Petermans *v.* Laws, 6 Leigh 523, 529 ("It is not necessary to consider whether Baker *v.* Preston settles the law" exempting from production of a locally recorded original; here, an original recorded in another State must be accounted for, unless the law there dispenses with it); 1845, Pollard *v.* Lively, 2 Gratt. 216, 218, *semble* (certified copy receivable, "on account of the inconvenience which would be occasioned by the necessity of producing the original"); 1847, Pollard *v.* Lively, 4 Gratt. 73, 80, *semble* (certified copy receivable; but there are intimations of a modified requirement of production).

Washington: R. & B. Code 1909, § 1260 ("any deed, conveyance, bond, mortgage, or other writing", lawfully recorded or filed, is provable by certified copy); § 8760 (certified copy of instrument duly acknowledged abroad and recorded here, admissible "to the same extent and with like effect").

West Virginia: Code 1914, c. 130, § 4 (certain recorded deeds of Virginia, provable by copy); c. 73, §§ 7–11*a* (*semble*, a duly recorded deed, provable by certified copy; but the contents of a recorded deed not properly acknowledged or proved for record are thus provable only in case of loss of the original).

Wisconsin: Stats. 1919, § 4156 (the record in the proper registry of every conveyance or land-patent lawfully recorded is admissible without further proof; "whenever any presumptive effect as evidence is given by law to such patent, conveyance, or instrument", such record and certified copies "shall have the like effect"); § 4713*a* (certified copy of conveyance, admissible in criminal cases); § 4151*q* (when records of deeds showing a chain of title are destroyed etc., deed and affidavit showing chain of title for 10 years are admissible on conditions specified), 1881, Johnson *v.* Ashland L. Co., 52 Wis. 458, 463, 9 N. W. 464 (whether the original must be accounted for, not clear).

Wyoming: Comp. St. 1920, § 4588 (record or certified copy of a duly recorded instrument concerning any interest in land in this State, admissible "upon the affidavit of the party desiring to use the same, that the original thereof is not in his possession or power to produce"); § 3097 (livestock brands; recorded assignments of brands or marks to be proved by certified copy "as is now provided for certified copies of instruments affecting real estate"); § 4603 (letters of attorney and contracts for sale of lands, provable like conveyances); § 4689 (recorded chattel mortgage; "either the original or the certified copy" is admissible).

official record retained; the question thus raised — namely, the question which document is the legal original — is the chief matter of controversy and complicates most of the cases, and is dealt with elsewhere (*post*, § 1239).

§ 1226. **Same: Sundry Consequences of the Principle of not Producing Recorded Deeds.** (1) If *the form of proof* (usually a certified copy) expressly provided for by a statute is not or cannot be employed, the proceeding is not under the statute and the statutory exemption does not obtain; so that the original must be accounted for according to ordinary common-law doctrines.[1] For the same reason, the original must be accounted for by common-law methods if it is in fact recorded but not lawfully recorded.[2]

(2) Conversely, if proof is proposed to be made by common-law modes and not a statutory certified copy, any statutory requirements — for example, an affidavit or a notice of using a certified copy — which may be more rigorous, need not be followed.[3]

(3) The statutory rule of some States (*post*, §§ 1651, 2132) exempting from *proof of execution*, where the opponent has failed by plea or affidavit to put the execution in issue, does not exempt from production of the original to show the contents, if under the rule for proving recorded deeds such production is required.[4]

(4) The statutory *affidavit* often required is merely a means of proving loss or other excuse for non-production; the affidavit does not suffice to supply the contents, which must otherwise be duly proved.[5]

(5) Where the proponent is under the present principle exempted from producing the original and uses a copy, the *opponent also* has the advantage of the exemption.[6]

(6) Where the original is offered, a certified *copy also* may be offered so far as it may throw light on the disputed contents of the original.[7]

§ **1226.** [1] 1858, Brogan *v.* Savage, 5 Sneed 689, 692 (where the certified copy was inadmissible). Compare the different result reached *ante*, § 1219, in the case of official documents.

But this consequence would not be proper in a jurisdiction (*ante*, § 1224) where the rule had been reached without the aid of express statutes.

[2] 1853, Dickerson *v.* Talbot, 14 B. Monr. 60, 67; 1800, Gittings *v.* Hall, 1 H. & J. 14, 18; 1863, Brown *v.* Cady, 10 Mich. 535, 538; 1848, Thomas *v.* Bank, 9 Sm. & M. 201; 1860, Davis *v.* Rhodes, 39 Miss. 152, 156; 1880, Crispen *v.* Hannavan, 72 Mo. 548, 554; 1811, Vickroy *v.* McKnight, 4 Binn. 204, 208. *Contra:* 1865, McMinn *v.* O'Connor, 27 Cal. 238, 244 (certified copy of deed recorded but not properly proved for record; proof of execution required, but not production of original).

[3] 1859, Loftin *v.* Nally, 24 Tex. 565, 574; 1886, Blanton *v.* Ray, 66 Tex. 61, 7 S. W. 264; 1888, Pennington *v.* Schwartz, 70 Tex. 211, 8 S. W. 32.

[4] 1865, Younge *v.* Guilbeau, 3 Wall. 636 (Texas statute).

[5] 1872, Bounds *v.* Bounds, 11 Heisk. 318, 323 (where a statutory affidavit suffices to prove loss of the original, the contents must still be proved by testimony on the stand). For this affidavit, as originally an exception to the *party's disqualification*, see *ante*, § 1196.

[6] 1870, Samuel *v.* Borrowscale, 104 Mass. 207, 210 (where one party produced the copy, and the other was then allowed to testify that he had never signed such a deed, without producing the original).

[7] 1905, Senterfeit *v.* Shealy, 71 S. C. 259, 51 S. E. 142 (the original deed appearing to be mutilated, the record of it was shown in court); 1869, Walker *v.* Walker, 6 Coldw. Tenn. 571, 573 (where the original has an alteration, the registry copy may be looked to as an official statement of original's contents at time of registration).

Compare similar cases *ante*, § 1190, n. 7, and the cases cited *ante*, § 797, concerning photographic copies of handwriting.

(7) If the conveyance is *recorded in another jurisdiction* and according to its laws, then production should not be required if it is dispensed with by the law of that jurisdiction.[8]

§ 1227. **Same: Other Principles Discriminated (Certified Copies, Affidavits, Abstracts).** (1) The principle of Authentication (*post*, §§ 1648, 2130) requires that the execution of the recorded original be somehow proved; and an important question (for the settlement of which the foregoing statutes were chiefly intended) is whether under the Hearsay rule a *custodian's certified copy* of the recorded deed is admissible to prove the execution. This question is wholly independent of the rule of production; for example, if the rule of production be satisfied, as by showing the loss of the original, it is still to be determined whether a certified copy is proper evidence of the original's execution. This question is dealt with elsewhere (*post*, §§ 1651, 1682); and the distinctions between that and the present principle are there examined.

(2) By most statutes touching the present subject, the proof of loss or lack of possession (if that is required) may be made by *affidavit;* this involves the creation of an exception to the Hearsay rule, for that rule forbids the use of affidavits; in that aspect, the subject of affidavits is elsewhere dealt with (*post*, § 1710 and *ante*, § 1196).

(3) In some jurisdictions, a statute expressly provides for the use of *abstracts of burnt records.* These statutes add nothing to the present principle, since the non-production of a burnt original is always excused; but they involve the rule about a copy of a copy (*post*, § 1275), the rule about Completeness (*post*, § 2105), and the Hearsay exception for commercial documents (*post*, § 1705); under those heads the subject is further examined. So, also, the propriety of using a copy of a recorded conveyance, where the statutory provision for recording requires only an *abstract* to be recorded, involves the rule of Completeness (*post*, § 2105).

§ 1228. (9) **Appointments to Office.** There has been much difference of practice in regard to requiring the production of the written appointment to office, in proving a person to be an officer. The contents of the document would ordinarily be provable by production only, and it is upon the ground of the present principle that the rulings to that effect have proceeded.[1] But the best practice seems to have excused production, and to have done so for the specific reason either of the general inconvenience that such a rule would entail in actions for or against officers, or of the "collateral" nature (*post*, § 1252) of the issue.[2] There seems thus to be recognized this additional class

Such a statute as Kan. St. 1905, c. 323, *passim*. *Contra:* 1875, Tully *v.* Canfield, 60 Mo. 99, cited *ante*, § 1225.

§ 1228. [1] 1820, Holroyd, J., in Brewster *v.* Sewell, 3 B. & Ald. 296, 302.

[2] 1606, Bellamy's Case, 6 Co. Rep. 38 ("If the king's fermor brings a quominus in the Exchequer, he ought to alledge that he is the king's fermor to enable him to sue there; but

[8] 1852, Smith *v.* McWaters, 7 La. An. 145, 147; 1879, State *v.* Barrow, 31 La. An. 691, 692; 1895, Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024; and other cases cited *ante*, § 1225, providing that "the original when produced shall prevail over the record or copy" would probably not forbid the above use of a copy.

of cases of exemption. But the usual sufficient proof, in the Courts where production is not required, is held to be the facts of acting as officer and of having a reputation as officer, or, in another form, of notoriously acting as officer; and the doctrine can more conveniently be considered under this presumption (*post*, § 2535).[3]

§ 1229. (10) **Illegible Documents.** Where a document, though still in existence, has become illegible, through tearing, rubbing, fading, or otherwise, it is for all practical purposes lost, and its contents may be proved by other evidence; though production may in discretion be required, in order to prove its legible part, if any, or to make certain that the document is really illegible.[1] Upon this principle also is justified the use of photographic enlargements of handwriting.[2]

§ 1230. (11) **Voluminous Documents (Accounts, Records, Copyright Infringements, Absence of Entries).** Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements — as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank-ledger — it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper. Most Courts require, as a condition, that the mass thus summarily testified to shall, if the occasion seems to require it, be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available:

1854, BIGELOW, J., in *Boston & W. R. Co.* v. *Dana*, 1 Gray 83, 89, 104 (embezzlement; schedules showing the sales of tickets for certain periods were admitted): "It appears to us that questions of this sort must necessarily be left very much to the discretion of the judge who presides at the trial. It would doubtless be inexpedient in most cases to permit 'ex parte' statements of facts or figures to be prepared and submitted to the jury. It should only be done where books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements. . . . In a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of books and documents were put in evidence, it was the only mode of attaining to an intelligible view of the cause before the jury."

he need not show it to the Court, for that is meer collateral to the action").

[3] For related doctrines, see also the following places: § 2168 (official character of the person *signing* or *sealing* a document, presumed); § 1625 (*reputation*, as evidence of incorporation); § 2576 (*judicial notice* of an officer).

§ **1229**. [1] 1862, Dunning v. Rankin, 19 Cal. 640 (mining-claim notice on a tree, the notice now torn and illegible; production not required); 1883, Duffin v. People, 107 Ill. 113, 120 (signature faded and illegible; secondary evidence allowed); 1858, Little v. Downing, 37 N. H. 355, 365 (the ink had faded "the record, being illegible, was lost for all practical purposes").

[2] Cases cited *ante*, § 797, *post*, §§ 2010, 2019.

The most commonly recognized application of this principle is that by which the state of *pecuniary accounts* or other business transactions is allowed to be shown by a witness' schedule or summary.[1] So, also, in trying an issue

§ 1230. [1] ENGLAND: 1817, Meyer *v.* Sefton, 2 Stark. 274, 276 (value of a bankrupt's property; one who had examined his accounts allowed to testify, as "from the very nature of the case, such an inquiry could not be made in Court"); 1825, Gardner Peerage Case, LeMerchant's Rep. 61 (physician, having in Court a register of 9,000 cases of parturition, allowed to refer to notes of specific relevant cases taken from the register); 1847, Johnson *v.* Kershaw, 1 De G. & Sm. 260, 264 (expert's statement of the results of an examination of account-books, held conditional on the books being put in evidence).

UNITED STATES: *Federal:* 1873, Burton *v.* Driggs, 20 Wall. 125, 136 ("When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot conveniently be made in court, the results may be proved by the person who made the examination"); 1898, Rollins *v.* Board, 33 C. C. A. 181, 90 Fed. 575 (tabulated statements by an expert of records of county indebtedness, etc., the books being offered also, admitted); 1898, Northern P. R. Co. *v.* Keyes C. C. C., 91 Fed. 47 (similar); 1919, Galbreuth *v.* U. S., 6th C. C. A., 257 Fed. 648, 658 (statement of assets and liabilities);
Alabama: 1902, Willis *v.* State, 134 Ala. 429, 33 So. 226 (embezzlement; principle applied); 1917, Alabama Fidelity & C. Co. *v.* Alabama P. L. Bank, 200 Ala. 337, 76 So. 103 (embezzlement; rule applied);
Arkansas: 1895, Woodruff *v.* State, 61 Ark. 157, 170, 32 S. W. 102 (testimony to a balance of voluminous accounts, received on the facts, by a majority); 1902, Ritter *v.* State, 70 Ark. 472, 69 S. W. 262 (embezzlement; expert accountant allowed to testify to the shortage shown in voluminous bank-books);
California: C. C. P. 1872, §§ 1855, 1937 (production excused "when the original consists of numerous accounts or other documents which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole"); 1898, San Pedro L. Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410 (expert's schedule-summaries of account-books, admitted);
Colorado: Comp. St. 1921, C. C. P. § 391 (like Cal. C. C. P. § 1855); 1911, Brown *v.* First Nat'l Bank, 49 Colo. 393, 113 Pac. 483 (bank's books);
Connecticut: 1899, McCann *v.* Gould, 71 Conn. 629, 42 Atl. 1002 (state of accounts; summaries allowable, in trial Court's discretion, if the examination of items would consume time and confuse jury; but the originals must be produced if demanded);
Delaware: 1898, Curry *v.* Charles Warner Co., 2 Marv. Super. 98, 42 Atl. 425 (witness' schedule of results of account-books in court, allowed to be used);
Georgia: 1861, Gant *v.* Carmichael, 31 Ga. 737, 741 (results based on invoices, etc., not introduced; excluded); 1910, Cabaniss *v.* State, — Ga. —, 68 S. E. 849 (unlawful bank-dividend; principle applied to expert testimony to net earnings);
Idaho: Comp. St. 1919, § 7970 (like Cal. C. C. P. § 1855); 1913, State *v.* O'Neil, 24 Ida. 582, 135 Pac. 60 (false report by a bank officer; expert accountants' summaries, admitted; the above-cited statute ignored);
Illinois: 1902, Bartlett *v.* Wheeler, 195 Ill. 445, 63 N. E. 169 (testimony that certain books of account showed a shortage, not admitted on the facts); 1913, Reinke *v.* Sanitary District, 260 Ill. 380, 103 N. E. 236 (graphic summaries of statistics, admitted); 1917, Interstate Finance Co. *v.* Commercial Jewelry Co., 280 Ill. 116, 117 N. E. 440 (action for balance due; witness' schedules of accounts based on examination of the books, admitted); 1921, People *v.* Sawhill, 299 Ill. 393, 132 N. E. 477 (false pretences; an expert having testified to the summaries of voluminous accounts of defendant's company, held improper to refuse to direct the production of the original books in court, so as to be used in cross-examination of the expert);
Indiana: 1884, Rogers *v.* State, 99 Ind. 218, 228 (treasurer's accounts; experts' examinations of the books, received; "witnesses so testifying, to give their evidence weight, should be prepared to corroborate every statement by references to the records, in the presence of the jury, wherever either party desires it, on either the examination or cross-examination"); 1887, Hollingsworth *v.* State, 111 Ind. 289, 297, 12 N. E. 490 (defaulting treasurer; expert accountants' examination of the treasurer's books, etc., admitted, the documents being "voluminous and multifarious, and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts"); 1893, Equitable Acc. Ins. Co. *v.* Stout, 135 Ind. 444, 453, 33 N. E. 623 (insurance accounts; general principle sanctioned, but the pleadings here treated as excluding it); 1895, Chicago St. L. & P. R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451 (expert's statement of results of complicated account-books, admitted);
Iowa: 1890, State *v.* Cadwell, 79 Ia. 432, 441, 44 N. W. 700 (expert's statement of results of examination of accounts, the books being in evidence, allowed);
Kansas: 1915, Spaeth *v.* Kouns, 95 Kan. 320, 148 Pac. 651 (abstract of title; cited more fully *post*, § 1960, n. 3);

of *infringement of copyright*, the material passages may be culled from the

Kentucky: 1903, Louisville Bridge Co. *v.* R. Co., — Ky. —, 75 S. W. 285 (tables of tolls paid, summarizing the contents of thousands of waybills, admitted);
Louisiana: 1901, State *v.* Mathis, 106 La. 263, 30 So. 834 (embezzlement; an expert's statement as to the results of his examination of the defendant's books, admitted, the books being assumed to have been offered); 1909, Shea *v.* Sewerage & Water Board, 124 La. 299, 50 So. 166 (compilations from records of contractor's work, admitted);
Maryland: 1893, Lynn *v.* Cumberland, 77 Md. 449, 458, 26 Atl. 1001 (expert's summary of tax-figures, books being in court, admitted);
Massachusetts: 1854, Boston & W. R. Co. *v.* Dana, 1 Gray 83, 89, 104 (schedules of sales of tickets, admitted; see quotation *supra*); 1874, Walker *v.* Curtis, 116 Mass. 98, 100, *semble* (summary of estimates of days' work admitted; here the books were produced); 1894, Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130 (computations by an expert from an insolvent's account-books, admissible in trial Court's discretion);
Minnesota: 1891, Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528 (summary of accounts from the firm's books, brought into court, admitted; though "the regular way would have been to introduce the books" also formally in evidence); 1901, State *v.* Clements, 82 Minn. 434, 85 N. W. 229 (receipt of bank-deposit during insolvency; the journals being in evidence, an expert's summaries of them were received); 1902, State *v.* Salverson, 87 Minn. 40, 91 N. W. 1 (expert's summaries of a bank's books produced in court, held admissible);
Mississippi: 1878, State *v.* Lewenthall, 55 Miss. 589 (tax-collector's books; memoranda of voluminous contents excluded, because the books were not also offered); 1896, Hauenstein *v.* Gillespie, 73 Miss. 742, 19 So. 673 (account-books belonging to a witness testifying on deposition; that the books were not annexed as exhibits, but were set out by copies of entries, held proper);
Missouri: 1870, Ritchie *v.* Kinney, 46 Mo. 298, 299 (receipts and disbursements; condensed statement showing aggregates, not admitted, the account-books not being produced); 1888, Masonic M. B. Soc'y *v.* Lackland, 97 Mo. 137, 139, 10 S. W. 895 (expert's results of an examination of account-books, admitted, the documents being in court); 1890, State *v.* Findley, 101 Mo. 217, 223, 14 S. W. 185 (tax-receipts, etc.; the papers being present, an expert was allowed to state the result of his examination);
Montana: Rev. C. 1921, § 10516 (like Cal. C. C. P. § 1855);
Nebraska: 1898, Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744 (expert's examination of account-books, received, the books being in court); 1900, Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28 (state of complicated accounts; books must be present in court, for purposes of cross-examination); 1904, Mendel *v.* Boyd, 71 Nebr. 657, 99 N. W. 493 (summary statement of six simple transactions, excluded); 1906, Kannow & Sons *v.* Farmers' C. S. Ass'n, 76 Nebr. 330, 107 N. W. 563 (expert's computation of the result of weigh-checks in evidence, admitted); 1916, Bauer *v.* State, 99 Nebr. 747, 157 N. W. 968 (embezzlement; summary of books of account made by expert, admitted);
Nevada: Rev. L. 1912, § 5417 (like Cal. C. C. P. § 1855); 1871, State *v.* Rhoades, 6 Nev. 352, 376 (expert accountant allowed to state the net balance of receipts and disbursements in the State Treasurer's books as examined by him, so as to show the cash that ought to be on hand); 1905, State *v.* Nevada C. R. Co., 28 Nev. 186, 81 Pac. 99 (expert accountant's statements of the "net earnings" of a railroad company as shown by the books, excluded, partly on the principle of § 1960, *post*, and partly because the questions were not framed in proper application of the present principle);
New York: 1878, Von Sachs *v.* Kretz, 72 N. Y. 548 (witness' statement of results of examination of account-books in court, admissible in referee's discretion);
Oregon: Laws 1920, § 712, par. 5 (like Cal. C. C. P. § 1855); 1895, State *v.* Reinhart, 26 Or. 466, 38 Pac. 822 (expert's summary of account-books put in evidence, admitted); 1902, Salem L. & T. Co. *v.* Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675 (expert's testimony to the results of an examination of voluminous accounts, admitted, the books being in court);
Philippine Islands: C. C. P. 1901, § 284 (like Cal. C. C. P. § 1855); 1918, U. S. *v.* Razon, 37 P. I. 856 (mortgage account);
Porto Rico: Rev. St. & C. 1911, § 1392 (like Cal. C. C. P. § 1855);
Tennessee: 1874, Shepherd *v.* Hamilton Co., 8 Heisk. 380 (officer's failure to pay over funds; a witness not allowed to state "the results of his examination" of the books and vouchers); 1900, Galbreath *v.* Knoxville, — Tenn. —, 59 S. W. 178 (summary statement of book-balance, allowed, the books being in court); 1918, State ex rel. Stewart *v.* Follis, 140 Tenn. 513, 205 S. W. 444 (revenue collector's accounts);
Utah: Comp. L. 1917, § 7117 (like Cal. C. C. P. § 1855).
Wisconsin: 1909, Ruth *v.* State, 140 Wis. 373, 122 N. W. 733 (bank accounts).

Compare the cases cited *post*, § 1244, where a similar result may be reached, in some cases by a different principle.

entire volume and presented in such a way as to be conveniently compared.[2] Upon the same principle, summaries of official or corporate *records* might be presented;[3] and testimony, by one who has examined records, that *no record* of a specific tenor is there contained is receivable instead of producing the entire mass for perusal in the court-room.[4]

§ 1231. (12) **Any Document provable by Copy in Trial Court's Discretion.** Much of the petty disputatiousness and futile quibbling, observable in the application of the present rule (sound as the rule is in general policy) could be eliminated by leaving to the trial Court in discretion to sanction, *on any ground* the use of a copy without producing the original, where the nature of the controversy does not require an inspection of the original by the tribunal. Good headway has been made to this end in Canadian practice.[1]

(d) "*Of the Writing Itself*"

§ 1232. **What is the "Original" Writing? General Principle.** The fundamental notion of the general rule under consideration is that the terms of

For the *opinion* rule as applied to such testimony, see *post*, §§ 1957, 1959, 1978.

Whether an official custodian of records is a *preferred witness* is noticed *post*, § 1272.

[2] 1839, Lewis *v.* Fullerton, 2 Beav. 6, 8 (exhibits on both sides showing copied passages, etc., used by the Court to facilitate comparison); 1826, Mawman *v.* Tegg, 2 Russ. 385, 398 (same process sanctioned by Eldon, L. C.); 1869, Lawrence *v.* Dana, 4 Cliff. 1, 72 (testimony of experts as to the extent of copying in a voluminous work charged to infringe a copyright, received, although the Court also examined the original material for itself); 1897, West Pub. Co. *v.* Lawyers, Coöp. P. Co., 25 C. C. A. 648, 79 Fed. 756 (in ascertaining the extent of a borrowing of paragraphs of syllabi, tables prepared by witnesses who had examined thousands of cases were used as evidence of their contents, after the Court had tested their accuracy).

[3] *Federal:* 1896, Ludtke *v.* Hertzog, 18 C. C. A. 487, 72 Fed. 142 (testimony to the identity of an enrolled soldier as gathered from a perusal of the various archives containing his name and doings, admitted); *Arizona:* 1901, Schumacher *v.* Pima Co., 7 Ariz. 269, 64 Pac. 490 (expert's summaries of fee-records in probate court, admitted); *Florida:* 1896, Adams *v.* Board, 37 Fla. 266, 20 So. 266 (substance of a number of records of a Board, excluded); *Illinois:* 1921, People ex rel. Miller *v.* C. B. & Q. R. R., 300 Ill. 399, 133 N. E. 325 (delinquent taxes; testimony expert to results of examination of sales-records in M. Co., held admissible); *Indiana:* 1860, Thornburgh *v.* R. Co., 14 Ind. 499, 501 (witness producing corporation-record, allowed to state the aggregate footings); *Iowa:* 1897, State *v.* Brady, 100 Ia. 191, 69 N. W. 290 (to show a system of defrauding by false warrants, more than 500 in all, a tabulated statement from the voluminous records was admitted); 1899, Plano Mfg. Co. *v.* McCoid, — Ia. —, 80 N. W. 659 (to show insolvency, a list of the recorded mortgages, etc., made by one testifying, excluded); *Maryland:* 1902, Blum *v.* State, 94 Md. 375, 51 Atl. 26 (summary of claims proved under a receivership, verified by the receiver, admitted); *Oklahoma:* 1920, Muskogee Gas & El. Co. *v.* State, 81 Okl. 176, 186 Pac. 730 (exhibits compiled from the records of a public utility company, admitted, the original records being in court and the witness being open to cross-examination); *Oregon:* 1903, Scott *v.* R. Co., 43 Or. 26, 72 Pac. 594 (average of rainfall for 18 years, allowed to be testified to from official records without stating detailed entries); *Wisconsin:* 1900, Jordon *v.* Warner, 107 Wis. 539, 83 N. W. 946 (summary of complicated land-records and tax-rolls, the originals being before the court, admitted).

[4] 1897, Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095 (a clerk, allowed to testify that no records of a certain sort existed). The same result may be reached on the principle of § 1244, *post*, where other cases are cited.

Whether an *official custodian* may make a hearsay statement, by certificate, to the same effect, is a different question; see *post*, § 1678. For the *opinion* rule, see *post*, §§ 1957, 1978.

§ **1231.** [1] Besides the Canadian statutes so providing for *commercial documents* in general (*ante*, § 1223), the following statutes sanction this: *Ontario:* Rules of Court 1913, No. 350 (when a third person possesses a document liable to production and has given inspection of it before trial, the Court may order a certified copy to be prepared "which may be used for all purposes in lieu of the original"); and so in other Provinces.

a writing must be proved by producing it and not by offering testimony about them. It is commonly said that what is to be produced is the "original" and not a copy. What is meant by "original"?

"Original" is a *relative term only*. When a particular paper is said to reproduce the terms of another, the former is the "copy", the latter the "original." Thus, "original" and "copy" are words correlative, with reference to the succession of existence between them, and have no necessary connection with the present rule. Given merely two papers, A and B, of which A was copied from B, and A thus is the "copy" and B the "original", we still have no light at all on the application of the present rule, *i.e.* on the question whether paper A can be offered without accounting for the non-production of paper B. For example, paper A might be a libellous document handed by M to N, while paper B was kept by M in his private desk; so that to prove the publication of a libel, paper A and not paper B would be the document whose production the present rule would require; yet relatively to each other paper A is a "copy" and paper B an "original." Again, paper A may have been deposited for safe-keeping with N as bailee, and in an action for negligently injuring it, paper A is the document to be accounted for under the present rule, and paper B could be used only secondarily, although the former is only a "copy" and the latter is an "original." Thus, the terms "copy" and "original", being purely relative to each other, have no inherent relation to the present rule, and the term "original" has no real significance in indicating *which* paper it is (of all possible papers) whose production is required by the rule.

In order to state the rule, then, in terms which will indicate in the rule itself what documents are included in its scope, it must be noted that the production required is the production of *the* document *whose contents are to be proved in the state of the issues*. Whether or not that document was written before or after another, was copied from another, or was itself used to copy from, is immaterial. The question becomes: Is this the very document whose contents are desired to be, and, in the now state of the issues, by the substantive law may lawfully be proved? This inquiry is of course usually answered without hesitation; but there are numerous instances in which a difficulty of principle arises.

The cases in which a question may arise fall into four groups:

(1) Cases in which the document to be proved was *brought into physical existence in duplicate* (or multiplicate) *form*, — chiefly, the case of duplicate originals;

(2) Cases in which a document, first made by copying from another, has since been *acted upon* or *dealt with at other times*, by the same or another person, so that for the purposes of such later acts it is *the* document to be proved;

(3) Cases in which, of two or more documents, one or another of them will be the document in issue according to the *substantive law* of contract, property, etc., applicable to the case;

(4) Cases in which, by the rule of Integration, or *Parol Evidence* (*post*, § 2429), a document which would otherwise be the one in issue has been annulled or superseded by another one, which thus becomes the only one allowable by law to be proved and therefore the one necessary to be produced.

§ 1233. (1) **Duplicates and Counterparts: (*a*) Either may be used without producing the Other; (*b*) All must be accounted for before using Copies.** Where the writing constituting a bilateral transaction is executed by the parties in duplicate or multiplicate, each of these parts is "the" writing, because by the act of the parties each is as much the legal act as another. It can make no difference that one party has signed only the document taken by the other, except where it is desired to prove specifically the signature.

(*a*) Any one such a duplicate or counterpart, then, may be used *without accounting for the non-production of any other*, because the present rule is satisfied by the production of any one part: [1]

1809, ELLENBOROUGH, L. C. J., in *Philipson* v. *Chase*, 2 Camp. 110: "If there are two co-temporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered."

This result is generally accepted.

(*b*) Conversely: *all duplicates or counterparts must be accounted for before using Copies.* For, since all the duplicates or multiplicates are parts of the writing itself to be proved, no excuse for non-production of the writing itself can be regarded as established until it appears that *all* of its parts are unavailable (*i.e.* lost, detained by the opponent or by a third per-

§ 1233. [1] ENGLAND: 1842, Doe *v.* Pulman, 3 Q. B. 622 (to prove W. seised, a counterpart of a lease by him signed by the lessee was received, without accounting for the parts signed by W.); CANADA: 1858, Leonard *v.* Young, 4 All. N. Br. 111 (certain leases, held duplicate originals); UNITED STATES: *Fed.* 1828, Carroll *v.* Peake, 1 Pet. 18, 23 (opponent's copy of an agreement of lease, held an original, on the facts); *Mich.* 1868, Cleveland & T. R. Co. *v.* Perkins, 17 Mich. 296 (contract exchanged in duplicate; either receivable); *Minn.* 1907, International Harvester Co. *v.* Elfstrom, 101 Minn. 263, 112 N. W. 252 (contract executed in duplicate in one writing-act as to contents and signature, by placing a carbon between sheets, held a counterpart; and either usable without accounting for the other); *Miss.* 1876, Ketchum *v.* Brennan, 53 Miss. 597, 605, 608 (obscure); *Mo.* 1865, Carr *v.* Carr, 36 Mo. 408, 411, *semble* (either receivable); *N. Y.* 1827, Lewis *v.* Payn, 8 Cow. 71, 76 (two copies of a lease, each executed by both parties; "both are properly originals", on an issue of the existence of the tenancy); 1830, Jackson *v.* Denison, 4 Wend. 558 (counterpart of an agreement usable like the original); 1847, Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633, 730, *semble* (the lessor's counterpart of a lease is the original where it is offered as containing the lessee's declarations of a holding under the lessor); *Okl.* 1908, Reeves *v.* Martin, 20 Okl. 558, 94 Pac. 1058 (triplicate notice of breach of warranty); *S. C.* 1900, State *v.* Allen, 56 S. C. 495, 35 S. E. 204 (school certificates); 1907, Walker *v.* Southern R. Co., 76 S. C. 308, 56 S. E. 952 (bills of lading being made in triplicate, one signed by the shipper and filed with the carrier's auditor, another sent to the shipper with copied signature, and another filed by the carrier with copied signature, the first two were held to be duplicate originals, the third to be secondary).

The earlier practice seems to have been to treat the counterpart of a deed as a copy or secondary, as may be inferred from the utterances quoted *post*, § 1273, upon the preferred order of copies. Moreover the quotation in the next paragraph shows the persistence of this idea.

For the effect of an *agreement* that a specific counterpart shall be *deemed the original*, *i.e.* alone valid as to the text, see *post*, § 2449 (parol evidence rule).

son, or the like). This is well settled, though not always in the light of the correct reason:[2]

1825, BEST, C. J., in *Munn* v. *Godbold*, 3 Bing. 292: "When there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy. It is prepared with more care than any other copy, and the party who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy. The Courts have therefore always required that if one part of a deed be lost, and another part be in existence, it must be produced"; but ". . . merely as secondary evidence of the part that was lost."

In the foregoing passage, the counterpart is treated as merely a preferred variety of copy (*post*, § 1273); but the same result is necessarily reached, apart from any theory of preferred copies, from the nature of the general rule.

§ 1234. **Same: Duplicate Notices, Blotter-Press Copies, and Printing-Press Copies as Originals.** (1) A doctrine was early established that where a *notice* was made by writing it out twice, at the same sitting, the writings were in fact duplicates, though not written nor executed contemporaneously and that thus the one retained could be used without accounting for the non-production of the one delivered.[1] This theory seems to have been in part

[2] ENGLAND: 1740, Villiers v. Villiers, 2 Atk. 71, Hardwicke, L. C.; 1773, Ludlam's Will, Lofft 362 (Mansfield, L. C. J.: "If you cannot prove a deed by producing it, you may produce the counterpart"); 1795, R. v. Castleton, 6 T. R. 236 (indenture of apprenticeship); 1825, Munn v. Godbold, 3 Bing. 292 (quoted *supra*); 1834, Alivon v. Furnival, 1 Cr. M. & R. 277, 292; 1836, Doe v. Wainwright, 1 Nev. & P. 8, 12 ("a counterpart is the next best evidence"); UNITED STATES: *Ala.* 1904, Norris v. Billingsley, — Ala. —, 37 So. 564 (oral testimony of defendant's counterpart, excluded, where plaintiff's was not accounted for); *Ga.* Rev. C. 1910, § 5760; 1872, Breed v. Nagle, 46 Ga. 112 (lease in duplicate; in action by stranger against lessee, original of lessee, and not merely of lessor, to be accounted for); 1886, Cincinnati N. O. & T. P. R. Co. v. Disbrow, 76 Ga. 253 (duplicate contract; after accounting for both parts, a copy allowed); *Haw.* 1900, Rodriguez' Estate, 13 Haw. 202, 205 (counterparts of leases preferred to copies); *Ill.* 1871, White v. Herrman, 62 Ill. 73 (duplicate original of a contract, preferred to a copy); 1906, Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211; *Ind.* 1912, Pittsburgh C. C. & St. L. R. Co. v. Brown, 178 Ind. 11, 98 N. E. 625 (action on a bill of lading delivered to plaintiff by defendant; the plaintiff's original being lost, and the pleadings containing a copy conceded to be correct, held that notice to produce the defendant's duplicate original was not necessary); *La.* 1827, Erwin v. Porter, 6 Mart. N. S. 166, *semble*; *Me.* 1874, Dyer v. Fredericks, 63 Me. 173 (duplicate originals of a bill of lading; rule applied); *Mass.* 1829, Poignand v. Smith, 8 Pick. 272, 279 (counterpart of a mortgage required); 1906, Peaks v. Cobb, 192 Mass. 196, 77 N. E. 881 (duplicate of a lease required).

Contra: 1844, Hewlett v. Henderson, 9 Rob. La. 379, 381, *semble*.

§ 1234. [1] *England:* 1796, Gótlieb v. Danvers, 1 Esp. 455 (Eyre, C. J., said "that where two copies of any instrument or notice were made at the same time, both were to be deemed originals"; here a notice to take away a crane); 1799, Jory v. Orchard, 2 B. & P. 39 (a written statutory demand; the attorney "made out two papers for that purpose, precisely to the same effect, and signed them both for his client, one of which he delivered" and the other he kept; held that the latter, as counterpart or "duplicate original", could be used in evidence; the analogies of a notice to quit and a notice to a justice were considered to control, and the existing practice to use the "duplicate original" was confirmed; Rooke, J., diss.); 1803, Surtees v. Hubbard, 4 Esp. 203 (copy of a notice of assignment, written at the same time and signed by the party; admitted, *semble*, as a duplicate original, per Ellenborough, L. C. J.); *United States: Iowa:* 1874, Hollenbeck v. Stanberry, 38 Ia. 325, 327 (copy of original summons served upon party, equivalent to the summons itself); *Mo.* 1874, Barr v. Armstrong, 56 Mo. 577, 586 (two numbers of notice written at same time and one served; each held an original); *N. Y.* 1818, Johnson v. Haight, 13 John. 470 (notice of dishonor proved by copy made at the time, as "a duplicate original"); *Pa.* 1826, Eisenhart v. Slaymaker, 14 S. & R. 153, 156 ("every written notice is to be proved by a duplicate original").

Distinguish the following: 1921, Lorch v.

the origin of the rule of thumb, already considered (*ante*, § 1206), that no notice to produce a notice need be given; but though the theory would logically extend to any kind of a document written in duplicate at the same sitting, such an extension appears not to have occurred.[2]

The fallacy of the theory seems to lie in ignoring this circumstance, that what makes two numbers of any instrument counterparts and equivalent is that the legal act as consummated embraces them both; it is not the coincidence of writing (for the counterpart of a deed may be written after an interval), but the unity given by the final legal act. Thus, if both numbers of a notice were served, and then the server retained one, the two would indeed be duplicates; but the mere writing at one sitting, followed by a legal act of service performed with one number only, cannot make the other an equivalent "original" for the purposes of the present rule.

(2) A reproduction by *blotter-press* or letter-press cannot be considered as a duplicate;[3] and policy here supports principle, for such reproductions are by no means uniformly identical or accurate. The same must be said of any

Page, — Conn. —, 115 Atl. 681 (under a statute requiring service of "duplicate copies" of a notice to quit, the document served cannot be a "true and attested copy of the original notice"; much learning is spent on this point; its relation to the ultimate doing of justice between landlord and tenant does not appear).

[2] 1800, Anderson *v.* May, 2 B. & P. 237 (copy of a bill of costs delivered to the defendant; admitted, on the authority of Jory *v.* Orchard); 1809, Philipson *v.* Chase, 2 Comp. 110 (doctrine conceded, but held not to apply to a book entry of an attorney's bill); 1822, Kine *v.* Beaumont, 3 B. & B. 288, 291, *semble* (three judges could not see "any great difference" between "a duplicate original and a copy made at the time"); 1827, Colling *v.* Treweek, 6 B. & C. 394, 398 (an attorney's bill, signed; a copy, made at the same time, but not signed, but offered to be signed at the trial; undecided); 1880, Central Branch U. P. R. Co. *v.* Walters, 24 Kan. 504, 509 (a written demand was essential to the claim; a copy drawn up at the same time with the one served, held not equivalent to the original).

[3] ENGLAND: 1812, Nodin *v.* Murray, 3 Camp. 228; UNITED STATES: *California:* 1885, Spottiswood *v.* Weir, 66 Cal. 525, 529, 6 Pac. 381; 1890, Ford *v.* Cunningham, 87 Cal. 209, 210, 25 Pac. 403; *Georgia:* 1876, Watkins *v.* Paine, 57 Ga. 50; *Illinois:* 1873, Richards Iron Works *v.* Glennon, 71 Ill. 11; 1874, King *v.* Worthington, 73 Ill. 161, 163; *Indiana:* 1883, Duringer *v.* Moschino, 93 Ind. 495, 499; *Iowa:* 1887, State *v.* Halstead, 73 Ia. 376, 378, 35 N. W. 457; *Kentucky:* 1898, Seibert *v.* Ragsdale, 103 Ky. 206, 44 S. W. 653; 1899, Heilman Milling Co. *v.* Hotaling, — Ky. —, 53 S. W. 655; *Maryland:* 1871, Marsh *v.* Hand, 35 Md. 123, 127; *Massachusetts:* 1869, Goodrich *v.* Weston, 102 Mass. 362, *semble;* 1890, Smith *v.* Brown, 151 Mass. 338, 340, 24 N. E. 31 (title to a judgment; the assignment in issue); *Missouri:* 1895, Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1145; *Nebraska:* 1880, Delaney *v.* Errickson, 10 Nebr. 492, 501, 6 N. W. 600; 1883, Ward *v.* Beals, 14 Nebr. 114, 119, 15 N. W. 353; 1898, Westinghouse Co. *v.* Tilden, 56 Nebr. 129, 76 N. W. 416; *New York:* 1870, Foot *v.* Bentley, 44 N. Y. 166, 170; *Virginia:* 1905, Chesapeake & O. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161; *Wisconsin:* 1906, Menasha W. W. Co. *v.* Harmon, 128 Wis. 177, 107 N. W. 299 (letters).

Distinguish the following: 1859, Nathan *v.* Jacob, 1 F. & F. 452 (as an admission, a copy kept in a letter-book by the writer is equivalent to the letter itself, and is an original).

By statute the rule has sometimes been altered: *Arizona:* Rev. St. 1913, Civ. C. § 1753 ("The production of a letter-press copy of any letter, before the officer taking a deposition, shall be equivalent to producing the same at the trial, and when so produced a copy thereof may be attached to the deposition as an exhibit, and shall be evidenced of like force and effect as the letter-press copy itself; but such copies shall not be used if the original letters are produced at the trial"); *Hawaii:* Rev. L. 1915, § 2606 (original not required, where "any writing whatsoever shall have been copied by means of any machine or press which produces a facsimile impression or copy of such writing", on proof that the copy offered was so taken from the original); *Porto Rico:* Rev. St. & C. 1911, § 1452 (adopting Cal. C. C. P. § 1937 as amended but ineffectively in 1901; "an impression of a letter taken in a letter-press copy-book before the mailing of the original" is an original "equally with the letter so copied").

process of machine-reproduction which consists in obtaining repeated ink-traces from a single writing so prepared as to furnish such traces by pressure or by chemical operation.

(3) The case of a *type-machine* (the ordinary printing-press, or its equivalents) is different. Here, the only variances that can occur between different numbers reproduced by printing must arise from a change in the type or from the exhaustion of the ink. But the ordinary printing-press is now self-feeding in respect to ink; and, on the supposition that the type is not intentionally altered, all the reproductions from the same setting of type may be regarded for practical purposes as identical and equivalent. For the *printing-press* having fixed type, it is clear therefore that to prove the contents of any one such impression any other one may be used without accounting for the former.[4] In these days, to be sure, of numerous differing editions of newspapers within a single day, and even of plural editions of periodical magazines and of novels with alterations made since the printing of the first copies, the proof of the above preliminary condition, namely, the *absence of alteration in the type*, becomes a more difficult matter; but this aspect of the subject does not seem yet to have been recognized in judicial rulings.

(4) In those *type-writing office-machines* in which the paper is stationary and the writer's hand applies a movable type or a pen, producing an impression through several carbon sheets at once, the case is more difficult; for though the first few impressions may be identical, yet the lower sheets are likely to be imperfect:[5]

[4] 1817, R. *v.* Watson, 2 Stark. 116 (the defendant caused 500 placards to be printed and carried away 25 of them for posting; to prove the contents of those posted, one of the remainder was admitted; "every one of those worked off are originals, in the nature of duplicate originals"; "since it appears that they are from the same press, they must all be the same").

In the following case the principle was left undecided: 1837, Watts *v.* Fraser, 7 A. & E. 223, 232 (the defendant, to show provocation by the plaintiff's libel, offered a copy of a newspaper deposited under the law by the plaintiff at the public Stamp-Office; excluded, because knowledge of its contents by the defendant was not shown; whether, if knowledge of the contents of another number of the same issue had been shown, this number would have been received to prove contents, not decided).

In the following cases no common printing was shown, and thus the impressions in question could not be assumed to be identical: 1849, Boosey *v.* Davidson, 13 Q. B. 257, 266 (to prove prior publication of certain operatic pieces, production was required of copies alleged to have been seen elsewhere; for the identity of the contents with those of registered copies in court was to be shown, and there was by hypothesis no common printing); 1847, McGrath *v.* Cox, 3 U. C. Q. B. 332 (to prove a libel, the pamphlet charged as published could not be produced, nor was any one who had read it produced so as to be able to identify it with another pamphlet offered; a common printing was not shown, and the evidence of identity of general appearance, title-page, and dedication, was held not sufficient; Jones, J., diss.; the real error in the case lies in holding the proof of common printing insufficient; for the pamphlet was one circulated at an election and the general evidence of correspondence sufficed to dismiss doubt for any reasonable person not sitting in the judicial atmosphere of artificial reasoning).

In the following cases the principle stated in the text was ignored or repudiated: 1817, Williams *v.* Stoughton, 2 Stark. 292 (to show the contents of a prospectus received by a school-patron, another printed copy was rejected); 1881, Southwestern R. Co. *v.* Papot, 67 Ga. 675, 686 (newspaper itself the original, not some other printed copy, in proving publication of notice of sale).

[5] 1911, Federal U. Surety Co. *v.* Indiana L. & M. Co., 176 Ind. 328, 95 N. E. 1104 (a machine carbon-copy in triplicate; each one held an original); 1915, Wilkes *v.* Clark C. &

1907, ELLIOTT, J., in *International Harvester Co.* v. *Elfstrom*, 101 Minn. 263, 112 N. W. 252: "[In making the carbon copy of a contract here offered,] a sheet of carbon paper was placed between two sheets of order paper, so that the writing of the order upon the outside sheet produced a fac-simile upon the one underneath. The signature of the party was thus reproduced by the same stroke of the pen which made the surface, or exposed, impression. . . . We think . . that a clear distinction exists between letter-press copies of writings and duplicate writings produced as was the contract in the case at bar. It is well settled that, where a writing is executed in duplicate or multiplicate, each of the parts is the writing which is to be proved, because by the act of the parties each is made as much the legal act as the other. It is very generally held that a reproduction of a writing by a letter-press cannot be considered as a duplicate. The distinction between letter-press copies and instruments produced by the use of carbon paper, as in this instance, seems reasonably clear and satisfactory. What makes two numbers of an instrument duplicates and equivalents is the fact that the legal act of the parties as consummated embraces them both. Letter-press copies are produced by an act distinct from and subsequent to the consummation of the legal act of execution. It may or may not be the act of the parties to the contract. We know from common experience that such copies are ordinarily produced by the labor of clerks and other employes, and that the results are not always satisfactory. But all the numbers of a writing result from the completion of the legal act of the parties, although aided by mechanical devices or chemical agencies, meet the requirements of originals. If the reproduction is complete, there is no practical reason why all the products of the single act of writing the contract and affixing a signature thereto should not be regarded as of equal and equivalent value. In this instance the same stroke of the pen produced both signatures. The argument that the recognition of these instruments as duplicates would encourage fraudulent practices does not touch the principle involved."

(5) A more important circumstance is that the natural operation of the above simple principle is in practice complicated and disturbed by the intervention of other principles. Thus, (*a*) a printed impression may or may not be the writing to be proved, according as it or the *manuscript draft* constitutes the legal act desired to be proved (*post*, § 1235); (*b*) a specific printed impression may by the substantive law be the only one *in issue*, and then it must be accounted for before another can be used (*post*, § 1237); (*c*) and in that case, a question may arise (treated *ante*, §§ 415, 440) as to the sufficiency of the evidence of the *identity* or correctness of the copy offered; (*d*) a printed impression may be *read aloud* and then the words uttered may be proved, if material under the issues, without producing the printed impression (*post*, § 1243); (*e*) the act of *sending* or *delivery* may not require production (*post*, § 1248); furthermore, the *authentication* of the author or publisher of printed matter involves a different principle (*post*, § 2150).

§ 1235. (2) **Copy acted on or dealt with, as an Original for Certain Pur-**

G. Co., 95 Kan. 493, 148 Pac. 768 (bill of lading "made in triplicate by impression sheets"; consignee's set admitted); 1911, Goodman v. Saperstein, 115 Md. 678, 81 Atl. 695 (carbon-copy of a letter, held a duplicate original); 1907, International Harvester Co. v. Elfstrom, 101 Minn. 263, 112 N. W. 252 (carbon-copy produced by simultaneous impression on both sheets, held duplicate original; quoted *supra*, and cited more fully *ante*, § 1232, n. 1); 1906, State v. Teasdale, 120 Mo. App. 692, 97 S. W. 995 (a carbon-copy is not a duplicate original); 1907, Cole v. Ellwood Power Co., 216 Pa. 283, 65 Atl. 678 (duplicate notices, one being carbon-copy, executed in the same manner as the other, held counterparts); 1905, Chesapeake & O. R. Co. v. Stock, 104 Va. 97, 51 S. E. 161 (a carbon-copy made by the same impression of type is a duplicate original).

poses (Bailments, Admissions, Bank-books, Accounts, etc.). Where an act material to be proved consists in the adoption of a paper by acting upon it or dealing with it, the rule requiring production applies to this paper, as involving the terms of the act; so that it is immaterial whether the paper was first made by copying another paper. For the purposes of proving the act in question, the specific paper dealt with is *the* writing to be produced. For example, in an action against a *bailee* for wrongful dealing with a document deposited, the document deposited, whether a copy or an original, is the document to be accounted for.[1] Again, in proving the terms of an *admission* by an opponent, where he orally or otherwise has acknowledged the correctness of a certain document, the document thus acknowledged (usually a *bank-book*) is the one to be accounted for, whether it is a copy of something else or not.[2] Again, in proving an *account stated*, the statement furnished is the document to be proved, though it may be only a copy from books of account.[3] So also the criminal act to be proved may consist in the *reading* or *posting* of a document which otherwise may be but a copy from something else; [4] and other illustrations are of occasional occurrence.[5]

§ 1235. [1] See examples *ante*, § 1205.

[2] *Canada:* 1858, Lawton *v.* Tarratt, 4 All. N. Br. 1, 8 (a written statement by a debtor was shown by him to the creditor, who copied it in his presence; whether the creditor's writing was an original, not decided); *United States: Federal:* 1919, Cohn *v.* U. S., 2d C. C. A., 258 Fed. 355 (correspondence between defendant and an official M. being material, an inspector visited defendant, who produced letters from M. and initialled carbon copies of replies to M.; the inspector caused typewritten and photographic copies of these to be made; afterwards, the originals became parts of a Navy Department official file and could not be produced; here the typewritten and photographic copies were held erroneously admitted, partly because not verified as copies, and partly for other reasons indefinitely stated; if verified on the stand as correct, the only objection could be the supposed rule against a copy of a copy; because the defendant had admitted the authenticity of the carbons of the replies, and therefore the copies offered were first copies of originals); *Iowa:* 1887, State *v.* Halstead, 73 Ia. 376, 377 (embezzlement; in showing deposits by defendant in a bank, his deposit-tickets are not secondary to the bank-books made up from them); *North Dakota:* 1898, Kelly *v.* Elevator Co., 7 N. D. 343, 75 N. W. 264 (defendant's agent's stub-entries copied from original entries and offered by plaintiff as admissions; allowed, the originals here being destroyed; but, on principle, the latter showing was not necessary); *Washington:* 1897, State *v.* McCauley, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382 (to show the state of the defendant's account at a bank, the bank's books were introduced; held, that the defendant's checks need not be produced, because the defendant's examination of his pass-book, made up from the bank-books, was an admission of the latter's correctness; and thus the books came in as an admission, not as secondary evidence of the checks).

[3] 1835, Vinal *v.* Burrill, 16 Pick. 401, 407 (account stated; to prove its contents, the account delivered, and not the books from which it was taken, is the original); 1898, Missouri, P. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169 (plaintiff suing for medical expenses; physician's bill rendered, treated as original, not his account-books).

[4] 1817, R. *v.* Watson, 2 Stark. 116 (C. took a manuscript to a printer, who printed 500 copies as a placard; the defendant came and took away 25 of them; one of the remainder was offered, upon a trial for posting a treasonable proclamation; the rule held not to require the production of the manuscript, because the defendant "adopted the printing", and thus the printed placards became the originals); 1820, R. *v.* Hunt, 3 B. & Ald. 566, 568, 572 (seditious resolutions read at a meeting; a copy had been given to the witness by the defendant at the time as representing what was to be read, and the witness testified that they were read as in the copy; the copy held sufficient as an original for the purpose).

[5] 1904, Wright *v.* Michigan C. R. Co., 130 Fed. 843, 65 C. C. A. 327 (what is a "duplicate" bill of lading, under St. 1898, June 13, c. 448, 30 Stat. 459); 1887, Comer *v.* Comer, 120 Ill. 420, 430, 11 N. E. 848 (copy of letter; copy attached to contract and made a part of it becomes an original); 1904, Simonds *v.* Cash, 137 Mich. 558, 99 N. W. 754 (copy referred to in conversations).

So for a *letter-press copy: ante*, § 1234, note 3.

Compare the doctrine of § 1242, *post*.

§ 1236. (3) **Copy made an Original by the Substantive Law applicable**; (*a*) **Telegraphic Dispatches.** Of two or more documents, copied one from another, the substantive law of property, contracts, crimes, or torts, may indicate a specific one as the material one under the issue. In that case, it is immaterial whether or not the one thus indicated was, when first made, a "copy" from another; it must be accounted for. The principle is essentially the same as in the foregoing class of cases; the difference is merely that here it cannot be told which document is *the* writing to be produced, until some point of substantive law has been determined; when that is determined, it immediately indicates the document to which the present rule of evidence applies. Since the difficulty is raised and is determined solely by the substantive law, it is not necessary here to review all the various instances; it will suffice merely to indicate the bearings of the question in the cases of chief difficulty and commonest occurrence.

(*a*) Whether, in proving the terms of a *telegram*, the dispatch sent or the dispatch delivered and received is the one to be accounted for, depends upon the substantive law involved.[1] In an action, for example, by a customer

§ 1236. [1] ENGLAND: 1887, R. *v.* Regan, 16 Cox Cr. 203 (to prove a telegram sent by the accused, the writing handed to the telegraph office, not the copy received, is the original).

CANADA: *N. Br.* Con. St. 1903, c. 127, § 36 ("secondary evidence" may be given of a telegram "sent to the opposite party or shown to be in his possession" after the usual notice and failure to produce); *N. Sc.* Rev. St. 1900, c. 163, § 30 ("as proof of the contents of the original telegraphic message" the party may introduce "the message received by him from the telegraph office", on ten days' notice to the opponent, and provided he "proves that it was received at the telegraph office of the place to which it purports to be addressed"); *Ont.* 1859, Kinghorne *v.* Tel. Co., 13 U. C. Q. B. 60, 66 (action for failure to deliver telegram; question whether the dispatches satisfied the statute of frauds; for this purpose the dispatch as handed to the operator was considered); 1906, Flynn *v.* Kelly, 12 Ont. L. R. 440 (contract by telegram, the dispute being as to its terms; the defendants' message handed to the telegrapher, held the original, and the plaintiff bound to prove its loss or destruction; destruction not presumed after six months); *Yukon:* Con. Ord. 1914, c. 30, § 30 (like N. Sc. Rev. St. 1900, c. 163, § 30).

UNITED STATES: *Federal:* 1894, U. S. *v.* Dunbar, 60 Fed. 75 (admissions of contents of a telegram, received); 1895, Dunbar *v.* U. S., 156 U. S. 185, 196 (telegram received by B. and admitted by the defendant to have been sent by him, received); *Alabama:* 1879, Whilden *v.* Bank, 64 Ala. 1, 13, 30 (action on promise to pay bill of exchange; to prove telegrams sent to the defendant, the originals on file at the sending office were produced; allowed, the delivered message being out of the jurisdiction; question reserved, as to which was the original); 1884, Western Union T. Co. *v.* Fatman, 73 Ala. 285, 292 (action for failure to deliver telegram in season; received telegram admitted as the original); 1884, Pensacola R. Co. *v.* Schaffer, 76 Ala. 233, 237 (telegram received, treated as secondary, the message being by one who delayed performance of contract); *Georgia:* 1893, Conyers *v.* P. T. C. Co., 92 Ga. 619, 622, 19 S. E. 253 (action for failure to deliver with diligence; delivered message the original); 1893, Western Union T. Co. *v.* Bates, 93 Ga. 352, 355, 20 S. E. 639 (same as the Fatman case, *supra*); 1894, Western U. Tel. Co. *v.* Blance, 94 Ga. 431, 19 S. E. 255 (action for failure to deliver with diligence; delivered paper the original); *Illinois:* 1861, Matteson *v.* Noyes, 25 Ill. 591 (assumpsit; dispatch sent treated as the original, and dispatch received as a copy); 1871, Morgan *v.* People, 59 Ill. 58, 61 (party telegraphing the sheriff to stop a sale; dispatch received is the original); 1888, Anheuser-Busch B. Ass'n *v.* Hutmacher, 127 Ill. 652, 657, 21 N. E. 626 (assumpsit for services; telegrams sent by defendant to plaintiff; delivered dispatch held the original); 1906, Young *v.* People, 221 Ill. 51, 77 N. E. 536 (swindling by bets; sender's telegram filed in Wisconsin, held to be the original on the facts, and the copy filed in the Chicago receiving office, excluded); *Indiana:* 1874, Western Union Tel. Co. *v.* Hopkins, 49 Ind. 223, 227 (damages for failure to transmit message; dispatch handed to the operator treated as the original); 1888, Terre Haute & I. R. Co. *v.* Stockwell, 118 Ind. 98, 102, 20 N. E. 650 (that telegrams were sent by a conductor; oral testimony allowed, since it did not appear that the telegrams were in writing); *Iowa:* 1888, Riordan *v.* Guggerty, 74 Ia. 688, 693, 39 N. W.

against a broker for falsely reporting his bankruptcy to a third person, the dispatch sent would be the one to be proved; but in an action against a telegraph company by an addressee for delayed delivery, the dispatch delivered would be the material one; while in an action by an offeree against an offeror in which the acceptance of the offer is denied, the solution would depend on the rule in force as to the necessity of receipt of acceptance by the offeror; and in certain other actions both the sent and the received dispatches would have to be accounted for. These discriminations are accepted by most Courts, though in many rulings the grounds for decision are left obscure.

§ 1237. **Same: (*b*) Printed Matter.** If a contributor sues a magazine for an article accepted but not paid for, the manuscript accepted is the document to which the rule applies. If a person whose interview has been published in a newspaper is sued for libel, the words uttered are the thing to be

107 (whether defendant sent a telegram; copy made at the receiving office, admitted, the sent document being shown lost); *Maryland:* 1880, Smith *v.* Easton, 54 Md. 138, 145 (whether a contract was made by telegram; the promisor's telegram sent to the telegraph office, held the original, and here held not sufficiently authenticated); *Massachusetts:* 1895, Nickerson *v.* Spindell, 164 Mass. 25, 41 N. E. 107 (addressee's dispatch the original, unless a rule of law makes sender's dispatch binding); *Minnesota:* 1884, Wilson *v.* R. Co., 31 Minn. 481, 18 N. W. 291 (to prove a hiring by telegraph, the dispatch received in the original; on proof of its loss, oral testimony of its contents is admissible); 1890, Nichols *v.* Howe, 43 Minn. 181, 45 N. W. 14 (contract by telegram; production of the telegram required); *Mississippi:* 1859, Williams *v.* Brickell, 37 Miss. 682, 686 (hiring by telegram; plaintiff must produce the dispatch received); St. 1916, c. 133 (in actions against telegraph companies for non-delivery, etc., "the copy of the telegram received and transcribed by such company's operator at the office of final destination shall be conclusive evidence" of the original's filing by the sender, and may be introduced as "the best evidence of the filing of the original", etc.); *Montana:* 1904, Bond *v.* Hurd, 31 Mont. 314, 78 Pac. 579 (contract for medical services; message handed to telegrapher, held the original, on the facts); *Nebraska:* 1903, Yeiser *v.* Cathers, — Nebr. —, 97 N. W. 840 (telegram excluded on the facts); *New Hampshire:* 1869, Howley *v.* Whipple, 48 N. H. 487 (to show that J. G. had sent a telegram from Montreal, held, the dispatch as handed for transmission in Montreal was the original); *New York:* 1883, Oregon S. Co. *v.* Otis, 14 Abb. N. C. 388, 100 N. Y. 446, 453, 3 N. E. 485 (contract said to be made by the defendant as agent for the plaintiff; the "original message" said to be the primary evidence; opinion obscure); *South Dakota.* 1899, Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942 (contract of warranty; received dispatch from promisor, admitted for promisee, after evidence that telegraph company's rules required the destruction of originals after six months); 1902, Distad *v.* Shanklin, 15 S. D. 507, 90 N. W. 151 (breach of contract; sendee's copy admitted, the original having been destroyed by the telegraph company); *Texas:* 1887, Prather *v.* Wilkins, 68 Tex. 187, 4 S. W. 252 (no discrimination made on this point); *Vermont:* 1856, Durkee *v.* R. Co., 29 Vt. 127, 140 (action for commissions in raising loan for the defendant; to prove the contract, telegrams were involved; Redfield, C. J.: "It depends upon which party is responsible for the transmission across the line, or in other words whose agent the telegraph is"; where the received dispatch is the legally material document, it must be accounted for; a recorded copy of it would "ordinarily" be preferable to mere recollection; and the message as handed in by the sender "perhaps" might also serve as a copy; but "where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original"); 1877, State *v.* Hopkins, 50 Vt. 316, 323, 332 (to show knowledge by communication, the delivered form of a telegram delivered to the defendant was received; to prove the contents of a telegram sent by the defendant, a copy of the delivered form was received, on proof of destruction of the sent original by the telegraph company); *West Virginia:* 1905, Cobb *v.* Glenn B. & L. Co., 57 W. Va. 49, 49 S. E. 1005 (principle considered); 1916, Showalter *v.* Chambers, 77 W. Va. 720, 88 S. E. 1072 (contract for sale of hay; secondary evidence of a telegram, admitted; Cobb *v.* G. B. & L. Co., *supra*, distinguished); *Wisconsin:* 1876, Saveland *v.* Green, 40 Wis. 431, 440 (contract by telegram; received message here the original, under the law of contracts); 1882, Randall *v.* N. W. Tel. Co., 54 Wis. 140, 143, 11 N. W. 419 (undecided).

For *authentication* of *telegrams*, see *post*, § 2154.

proved, though the printed words would equally be provable if the printing was authorized by the defendant.[1] If the libel was charged as published in a newspaper or other printing of which multiple numbers existed, the number charged would in theory be the document to be proved,[2] though it would seem (on the principle of § 1234, *ante*), that the production of any other number printed from the same type-setting would satisfy the rule.[3] In this connection, there may also be involved the principles of § 1243, *post*, as well as of Authentication (*post*, § 2150) and of Identity (*ante*, §§ 415, 440).

§ 1238. **Same: (*c*) Wills and Letters of Administration.** (1) At common law, the Ecclesiastical Court had jurisdiction to administer personalty and to adjudicate *wills* of personalty, but not to adjudicate wills of realty. Hence, a will of personalty, when probated, became a part of that Court's records, but a will of realty remained, even after probate, merely a deed taking effect after death.[1] It followed that a will of personalty need not be produced, but could be proved by the Court record or a copy of it, while a will of realty must be produced or accounted for.[2] Modern legislation has given Probate Courts jurisdiction over both kinds of wills; so that this distinction no longer exists; but the statutes dealing with the matter provide sometimes that the will itself, and not merely the record or a copy of it, may be required by the Court to be produced or accounted for (*ante*, § 1215, *post*, § 1658).

(2) The Ecclesiastical Court's grant of *letters testamentary* to an executor of a will over which it had jurisdiction, or of *letters of administration* on intestate personalty, was a judicial act constituted by the record; so that

§ 1237. [1] 1824, Adams *v.* Kelly, Ry. & Mo. 157 (libel; the defendant had told the matter to a reporter, who had taken it in writing, and it had then been published by a newspaper, which was the libel charged; held, that the newspaper statement must be shown to be the same as that which the defendant made to the reporter, and therefore the writing became an original to be produced; here the words as printed had to be shown to be authorized by the defendant); 1904, Prussing *v.* Jackson, 207 Ill. 85, 69 N. E. 771 (action for libel against the author of a letter published in a newspaper; the letter held to be the original; unsound, for the declaration alleged publication in the newspaper, and the plaintiff offered to connect the defendant with it).

[2] 1835, Johnson *v.* Morgan, 7 A. & E. 233 (libel by a song; the particular copy whose publication was alleged had been lost; and this showing was held requisite before other copies could be resorted to); 1847, McGrath *v.* Cox, 3 U. C. Q. B. 332, 337 (Robinson, C. J.: "The plaintiff [in libel], as I conceive, must be looked upon always as prosecuting for the inquiry arising from publishing some one certain libel to which particular act of publication his cause of action is confined").

[3] Thus the preceding two cases would seem to be unsound. Compare the cases cited *ante*, § 1234.

§ 1238. [1] 1726, Gilbert, Evidence, 71 ("The probate of a will is good evidence as to the personal estate, and they are the records of that Court, and therefore a copy of them under the seal of that Court must be good evidence. . . . [But for real estate] he must have the original will, and not the probate only, for where the original is in being, the copy is no evidence, and the probate is no more than a true copy, under the seal of the Court, of a private instrument").

[2] 1695, Newport's Case, Skin. 431 (a copy of the record of the Ecclesiastical Court was received to show the contents of a will of personalty; "the act of the Court is the original, and the will is proved by the act of the Court, . . . and so a copy of the act of the Court is sufficient"); 1696, R. *v.* Haines, Skin. 583 ("A copy of a probate of a will where the Court has jurisdiction is good, because the probate itself in such case is an original act of the Court"); 1837, Doe *v.* Mew, 7 A. & E. 240, 253 (the will with a memorandum of the surrogate that the executor had proved the will and probate been sealed, admitted irrespective of the probate itself).

Contra: 1805, Jackson *v.* Lucett, 2 Cai. 363, 367, *semble* (record of judge of probate is secondary).

the letters themselves, *i.e.* the credentials given to the representative, were merely a copy of the judicial record; hence, in proving such an appointment, the Court record became the document to be proved, and for this purpose a certified copy of the record would suffice, without producing the letters, which were themselves legally only a copy of the record.[3] This also has been expressly regulated by modern statutes (*ante*, § 1215, *post*, § 1658).

§ 1239. **Same: (*d*) Government Land-Grants, Land-Certificates, and Land-Patents; Mining Rights; Recorded Private Deeds.** (1) An ordinary deed by a *private party* is itself the effective instrument of transfer, even under legislation making its public registration an additionally necessary element of validity. It has already been seen that, even where by common-law principles or by express statute the deed's contents may be proved by the registry or a copy of it, still the present rule is always thought of as applying to the deed itself, and its production is merely excused on the ground that it is practically unavailable, by reason of its proved loss or its possession by another or the inconvenience involved in requiring it (*ante*, § 1224). As to other deeds of transfer than Government land-grants, it is generally accepted that the *party's deed of conveyance* is the constitutive document (*i.e.* the original to be accounted for), and that the official register is merely a copy of that original.[1]

In transfers of *mining-rights* there occur certain partial modifications of this principle.[2]

The *Torrens system of title-registration* abandons it completely; here the "original certificate of title", *i.e.*, the registrar's official entry founded on a judicial decree, becomes the basis of the title, together with the "duplicate certificate" issued to the owner. The statutes establishing the system usually

[3] 1822, Plumer, M. R., in Cox *v.* Allingham, Jac. 514 ("The thing which it is required to prove is to whom the Ecclesiastical Court has granted the power of administering the property. The ordinary evidence is the probate; which is a copy of the will, with a certificate under the seal of the Court that probate has been granted to the executor. It is only the act of the Ecclesiastical Court that is to be proved. Now we have here the original book containing the entry of the act of the Court. The probate is only a copy of this act; this is the original and therefore the primary evidence").

Accord: 1807, Elden *v.* Keddell, 8 East 187; *Mo.* 1826, Lane *v.* Clark, 1 Mo. 658; *N. H.* 1834, Farnsworth *v.* Briggs, 6 N. H. 561 (record of the Court as to granting administration is the original, of which the letters are only a copy): *N. Y.* 1830, Jackson *v.* Robinson, 4 Wend. 436, 442 (records of Probate Court are the original, and therefore copies of them are receivable without showing the loss of the letters of administration); *N. C.* 1830, Hoskins *v.* Miller, 2 Dev. 360; *S. Car.* 1831, Browning *v.* Huff, 2 Bail. 174, 179 (action by administrator; the ordinary's record-book sufficient, for the letter of administration is merely a certificate that the order exists).

§ 1239. [1] 1826, Ewing, C. J., in Fox *v.* Lambson, 8 N. J. L. 275, 280 ("[The counsel] assimilates it to a common-law record, as for example of a judgment, and because such a record would be evidence he argued that the entry in question was so. But there is no analogy. The common-law record is in itself the original and supposes no other in existence. The record or registry of a deed or other instrument of writing is but a copy and presupposes an original"). *Accord:* 1886, Brown *v.* Griffith, 70 Cal. 14, 16; see *post*, § 2456, where the subject is treated from the point of view of the parol evidence rule.

[2] 1859, McGarrity *v.* Byington, 12 Cal. 426, 430 (same as next case); 1860, Atwood *v.* Fricot, 17 Cal. 37, 42 (record of transfer of mining-right; held an original, as showing compliance with regulations, but secondary to the document and fact of transfer); 1864, St. John *v.* Kidd, 26 Cal. 263, 270, *semble* (same). The statutes are placed *ante*, § 1225.

make express provision for the use of copies and originals in various situations.[3]

(2) But where the *Government* itself makes the grant of land, and not merely furnishes an office for registering the grants of private persons, the question arises whether the constitutive document of grant (and therefore the document to be produced or accounted for) is the Government's own entry or record of the grant, or is the certificate, patent, "testimonio", "expediente", or other document delivered to the grantee by the Government as his muniment of title. Herein is involved a question of property-law, not of Evidence. The rule of Evidence is easily applied, as soon as the question of property-law is answered.[4] If the first alternative above is taken, the original

[3] The statutes are placed *ante*, § 1225. The Uniform Land Title Registration Act, as adopted by the National Conference of Commissioners of Uniform State Laws, did not contain any provisions dealing with the evidential use of copies.

[4] Besides the following statutes and precedents directly dealing with the subject, other statutes and decisions more or less connected will be found elsewhere; (1) on *letters*, etc., *filed in a public office* (*ante*, § 1219, *post*, § 1680); (2) on *recorded conveyances* in general (*ante*, § 1225, *post*, § 1651); (3) on certain *record-books* of the land-office (*post*, § 1659); (4) on *judicial records* (*ante*, § 1215, *post*, §§ 1660, 1681); (5) on *official certificates* and *returns* (*post*, §§ 1672, 1674); (6) on *preferred copies of records* (*post*, § 1269);

Federal: U. S. Code 1919, § 683 (original application for entry of land, etc., on file in general land-office, when called for by subpœna duces tecum, is to be forwarded to register, authenticated by general land-office commissioner's seal, and "shall be received in evidence"); 1831, Doe *v.* Winn, 5 Pet. 233, 241 (exemplification under Georgia State seal of land-patent there recorded, admitted; Johnson, J., diss.; see quotation *ante*, § 1224); 1833, U. S. *v.* Percheman, 7 Pet. 51, 78, 84 (certified copy of Spanish land-grant, receivable, because the original decree is not issued but retained; the "copy is, in contemplation of law, an original"); 1833, Minor *v.* Tillotson, 7 Pet. 99 (land-grant in Louisiana; grant to patentee the original to be accounted for); 1840, U. S. *v.* Wiggins, 14 Pet. 334, 345 (certified copy of Spanish land-grant in Florida, received without accounting for the original); 1858, U. S. *v.* Sutter, 21 How. 170, 174 (Mexican land-grant in California; official record apparently treated as a copy; opinion obscure); 1860, U. S. *v.* Castro, 24 How. 346, 349 ("When therefore a party claims title to lands in California under a Mexican grant, the general rule is that the grant must be found in the proper office among the public archives; this is the highest and best evidence"; and accordingly the existence and loss of this public record must be shown; "written documentary evidence, produced by a claimant from a private receptacle" is not equivalent); 1902, Carr Land & L. S. Co. *v.* U. S., 55 C. C. A. 433, 118 Fed. 821 (a tract book prepared by the commissioner of the general land-office to replace the burned local records, and proved by the local register to be used as such, is not a copy which must be certified by the commissioner under U. S. Rev. St. § 2469); 1919, McGrew *v.* Byrd, 8th C. C. A., 255 Fed. 759 (land in Missouri; land register's certificate of purchase, not provable by certified copy of record); 1919, McGrew *v.* Byrd, 8th C. C. A., 257 Fed. 66 (certified copy of register's certificate of purchase, not admissible to evidence title, no Missouri statute requiring such record to be kept); 1880, U. S. *v.* Schurz, 102 U. S. 378 (delivery of a public land patent is not necessary to pass title); 1921, U. S. *v.* Caster, 8th C. C. A., 271 Fed. 615 (nature of U. S. public land record; the record passes title);

Alabama: Code 1907, § 3979 (patents of the United States or any State are admitted "without further proof"; also tract-books in county probate offices); § 3980 (land-office certificates, admissible; register's certified copy of land-office documents in this State are 'prima facie' evidence of the facts contained therein); 1841, Hines *v.* Greenlee, 3 Ala. 73, 75 (certified copy of U. S. record of land-patent, received without accounting for the first patent issued; Ormond, J.: "The patent [issued to patentee] is not the title, but merely evidence; . . . [the record] is a public act, and therefore a second patent which may issue is not a copy of the first, but is rather a republication of the original"); 1872, Jones *v.* Walker, 47 Ala. 175, 178, 183 (deed of Federal government-land to plaintiff, filed at the land-office; production required); 1888, Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 438, 6 So. 349 (transcripts of land-patents; Jones *v.* Walker, repudiated, since the document is in official files; Hines *v.* Greenlee followed; the original is the public record and of course cannot be produced); 1889, Ross *v.* Goodwin, 88 Ala. 390, 391, 396, 6 So. 682 (same); 1893, Beasley *v.* Clarke, 102 Ala. 254, 255, 14 So. 744 (same); 1895, Holmes *v.* State, 108 Ala. 24, 26, 18 So. 529 (same, for a letter of

and constitutive document being the Government record, not removable from official custody, it may be proved by a copy therefrom (*ante*, § 1218) with-

cancellation of entry); 1902, Hammond *v.* Blue, 132 Ala. 337, 31 So. 357 (U. S. land-patent or a certified copy is preferred to a tract book); 1905, Butt *v.* Mastin, 143 Ala. 321, 39 So. 217 (not a certified copy from a tract book, but the patent or a certified copy, held the original); the provision for tract-books in Code 1907, § 3979, *supra*, was added in 1907 to meet the ruling in Hammond *v.* Blue, *supra;* and wording of Code 1907, § 3980, was also rephrased so as to meet the ruling in Butt *v.* Mastin, *supra;*

Alaska: Comp. L. 1913, § 536 (like Or. Laws 1920, § 9896):

Arizona: Rev. St. 1913, Civ. C. § 1747 (certificate of purchase or of location or duplicate receiver's receipt of land in this State, etc., is evidence of title, except as against the U. S.);

Arkansas: Dig. 1919, § 4120 (certified copy, by register or receiver of land-office of the State, of entries in books or of papers filed, admissible); § 1533 (recorder's certified copy of recorded deed of commissioner of State lands, admissible); 1848, Finley *v.* Woodruff, 8 Ark. 328, 342 (State land-office claim-entries, etc., are primary, so that copies are receivable); 1892, Dawson *v.* Parham, 55 Ark. 286, 290, 18 S. W. 48 (entries of purchase in swamp-land-office, receivable); 1893, Steward *v.* Scott, 57 Ark. 153, 158, 20 S. W. 1088 (land-office entry, *semble*, held secondary to the certificate therefrom in showing title); 1905, Carpenter *v.* Smith, 76 Ark. 447, 88 S. W. 976 (State land commissioner's exemplification of a swamp-land patent, without accounting for the original patent, not admitted); 1905, Covington *v.* Berry, 76 Ark. 460, 88 S. W. 1005 (similar); 1905, Carpenter *v.* Dressler, 76 Ark. 400, 89 S. W. 89 (State land commissioner's certified transcript of his records, not admissible "without first accounting for the deed or certificate"; careful opinion by Hill, C. J., confirming Covington *v.* Berry, Carpenter *v.* Smith, *supra*, and explaining and modifying the opinion in Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011); 1909, Thornton *v.* Smith, 88 Ark. 543, 115 S. W. 677 (duplicate deed of State land commissioner, issued under § 4730, Kirby's Digest, held not a new deed, but a duplicate only);

California: C. C. P. 1872, § 1925 ("A certificate of purchase or of location of any lands in this State, issued or made in pursuance of any law of the United States or of this State, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein"); § 1927 (mineral land-patent to be evidence of date of location of claim); 1859, Geogory *v.* McPherson, 13 Cal. 562, 572, 574 (the grant of land by a Mexican governor, forming part of the 'expediente' or whole record of granting, is the original, of which the copy or certificate to the grantee is only a copy; a proof of the former may therefore be made without accounting for the latter; Mexican grant on file in U. S. Surveyor-general's office; examined copy allowed, there being an inability to remove original from office); 1860, Natoma W. & M. Co. *v.* Clarkin, 14 Cal. 544, 549 (Mexican grant on file in U. S. Surveyor-general's office; production not required, the presence of the original there being shown, and certified copy under the statute being used); 1861, Soto *v.* Kruder, 19 Cal. 87, 94 (Mexican grant on file in Surveyor-general's office; in using an examined copy at common law, the legal impossibility of taking the original from the file must be shown; but if under the statute a certified copy is used, the original need not thus be expressly accounted for); 1867, Donner *v.* Palmer, 31 Cal. 500, 509 (same as Gregory *v.* McPherson, for Alcalde's book of grants); 1874, Sill *v.* Reese, 47 Cal. 294, 348 (approving Donner *v.* Palmer); 1877, Bixby *v.* Bent, 51 Cal. 590 (translation only, without original or certified copy, of Mexican grant on file in land-office, excluded); 1891, Eltzroth *v.* Ryan, 89 Cal. 135, 139, 26 Pac. 647 (U. S. land-patent; certified copy from land-office receivable, without accounting for patentee's certificate);

Colorado: Comp. St. 1921, § 6540 (U. S. land-office register's certificate of entry on purchase, admissible, but a patent is to be paramount title); § 6545 (recorded patent provable by copy like recorded deed); § 1149 (certified copy of recorded deed of State land by Governor, admissible);

Florida: Rev. G. S. 1919, § 2724 (State lands; conveyances or title, etc., provable by certificate of State commissioner of agriculture); 1886, Liddon *v.* Hodnett, 22 Fla. 442 (certified copies of patents from U. S. general land-office, admitted); 1894, Sullivan *v.* Richardson, 33 Fla. 1, 98, 14 So. 692 (early Spanish grant; the grantee's document, on the facts, treated as an original, and admissible);

Georgia: Rev. C. 1910, § 6300 (party's oath that original grant is "not in his power or possession and that he knows not where it is", sufficient); 1878, Brown *v.* Driggers, 60 Ga. 114, 115; 62 Ga. 354, 355 (homestead plat given to party is the original, as against a certified copy);

Hawaii: Rev. L. 1915, § 2594 (in proving "any grant of land, lease, or other conveyance of any Government land or real estate, it shall not be necessary to produce the original patent, grant, lease or conveyance", but a certified copy under the hand and official seal of the proper officer suffices); § 340 ("land patents, leases, grants, or other conveyances of any government land or real estate", provable by the commissioners' certified copy under official seal, which is admissible "the same as the original instrument itself");

out regard to the whereabouts of the grantee's certificate, which is thus merely a copy of the official book. If, on the contrary, the latter alternative above

Idaho: Comp. St. 1919, § 7958 (like Cal. C. C. P. § 1925);
Illinois: Rev. St. 1874, c. 19, § 10 (deeds, etc., affecting land by trustees of Illinois and Michigan canal or canal commissioners, provable by certified copy of record); § 11 (books and entries of sale by the same, provable by certified copy under official seal of secretary or commissioners); c. 30, § 41 (St. 1879, May 29) (on affidavit by party or agent that "the required U. S. patent conveying or concerning the title to the lands" in question "is lost, or not in the power of the party wishing to use it on such trial of any such case, and that to the best of his knowledge said patent was not intentionally destroyed, or lost, or in any manner disposed of for the purpose of introducing a copy thereof in place of the original", and if the original has been recorded with the county recorder, then the record or recorder's certified copy is admissible); c. 51, § 20 (U. S. land-office register's certificate of entry on purchase of any tract of land in his district, admissible); § 21 (land-patent to be paramount title to register's certificate); § 22 (where State land has been sold and Governor's patent issued, and "said patent has been or shall purport to be recorded" in the county "and said patent shall be lost, or out of the power of the party desiring to use the same to produce in evidence", recorder's certified copy is admissible to prove issuance and contents of patent; rule to apply to U. S. land-patents and certain canal deeds); § 23 (certified copy by custodian of "book and entries" of sale of State lands, admissible; certificate of purchase or issuance of patent admissible, but patent is to be paramount title; custodian's certified copy of "books and entries" of sales of swamp and overflowed lands, admissible; officer's certificate of sale or entry thereof and execution of deed therefor, admissible in place of deed, "if the original deed be lost, or it be out of the power of the party wishing to use the same to produce it in evidence, and such original deed has never been recorded"; and whenever both the deed is lost, etc., and the books of sale, etc., "have also been lost or destroyed", and a proper return of such sales has been made to the auditor of public accounts, the auditor's certified copy under official seal of such return is admissible); c. 122, § 265 (recorded State patent for school lands, provable by certified copy); § 266 ("duplicate copies" of such certificates of purchase and patents, obtained after affidavit of "loss or destruction of the originals", admissible); 1844, Graves *v.* Bruen, 6 Ill. 167, 172 (an auditor's patent to public land; copy from the record in case of loss not receivable; duplicate patent necessary); 1855, Lane *v.* Bommelmann, 17 Ill. 95 (land-patent; original need not be produced because a public record); 1861, Lee *v.* Getty, 26 Ill. 76, 80 (land-office record or recorded paper; provable by exemplification); 1868, Huls *v.* Buntin, 47 Ill. 396, 397 (patent lost; certified copies of the land-office books of entry, admissible); 1883, Wilcox *v.* Jackson, 109 Ill. 261, 265 ("half-breed scrip" and locations under it); 1886, Gormley *v.* Uthe, 116 Ill. 643, 649, 7 N. E. 73 (land-office records proved by exemplified copy); 1870, Seely *v.* Wells, 53 Ill. 120 (records of U. S. land-office, admitted); 1909, Black *v.* Chicago B. & Q. R. Co., 237 Ill. 500, 86 N. E. 1065 (record of general land-office reciting a selection of a tract approved by the Secretary of the Treasury, admitted);
Indiana: Burns' Ann. St. 1914, §§ 482, 484, 491 (records of U. S. land-office or office for sale of Canal or Michigan road lands, provable by certified copies by keeper or State Secretary or auditor); § 492 (State or Federal patents of Indiana land, and record thereof, and certified copies, admissible); § 493 (record of all patents, certificates of purchase, etc., "whether issued by the U. S. or by this State, or made by any person or corporation", admissible like the original; also certified copies thereof); §§ 486, 487 (Wabash and Erie canal lands); 1838, Smith *v.* Mosier, 5 Blackf. 51, 53 (U. S. land-office patents; original must be accounted for; affidavit filed in local land-office, not being removable, copy admissible); 1842, Rawley *v.* Doe, 6 Blackf. 143 (first point of preceding case followed); 1847, Stephenson *v.* Doe, 8 Blackf. 508, 512 (same; but doubting for the case of a non-patentee offering the recorded copy);
Iowa: Code 1897, § 4633, Comp. Code, § 7340 (U. S. land-patents recorded in county, provable by recorder's certified copy); Comp. Code, §§ 7348, 7349 (land-office receiver's receipt or duplicate receipt; quoted *post*, § 1678, n. 2); 1853, Stone *v.* McMahan, 4 Greene 72 (land-office receiver's duplicate receipt is an original under the statute); 1858, Curtis *v.* Hunting, 6 Ia. 536 (recorded land-patent; original required); 1880, Chicago, B. & Q. R. Co. *v.* Lewis, 53 Ia. 101, 107, 4 N. W. 842 (certified copies of land-office selections, admitted);
Kansas: Gen. St. 1915, § 7284 (like Nebr. Rev. St. 1922, § 8917); § 7285 (certified copy, by register or receiver having custody, of papers lawfully deposited with U. S. land-office in the State and official communication thereto from any Federal department, admissible like the original); § 6792 (certified copies under official seal by register of deeds of U. S. land-patents recorded in county, admissible); § 6793 (U. S. land-patent, provable by certified copy "the same as the original"); § 10643 (State land-office records; register's certified copies under official seal to be "presumptive evidence of the facts to which they relate");

is taken, the grantee's patent, certificate, or other document, is the original, and the Government book is merely a copy of it, so that the necessity of pro-

Louisiana: Rev. Civ. C. 1920, § 1445 (recorded land-patent or register's certificate, or receiver's receipt, by officers of Louisiana or of general Government, provable by recorder's certified copy; provided the party "made affidavit that the original of such patent or certificate is not in his possession or under his control", and opponent may dispute genuineness); 1823, Roman *v.* Smith, 1 Mart. N. s. 473 (whether the Spanish Governor's 'decreto' or his grant was an original delivered to the grantee, or whether the official record of it was the original); 1836, Montreuil *v.* Pierre, 9 La. 356, 371 (Spanish notary's original, register, and 'traslado', examined); 1836, Vidal *v.* Duplantier, ib. 525 (Spanish 'testimonio'); 1841, Lavergne *v.* Elkins, 17 La. 220 (Spanish land-grant); 1859, Beauvais *v.* Wall, 14 La. An. 199 (title-deeds filed in land-office; production not required);

Maryland: Ann. Code 1914, Art. 35, § 57 (land-office commissioner's certified copy under seal of any patent, certificate, entry in book deposited, or paper filed, admissible); § 58 (same for certificate in land-office with surveyor's notes, etc.; admissible "as if it were the original paper and proved to be" in the surveyor's writing and the surveyor proved dead);

Michigan: Comp. L. § 11717 (land-patent provable by certified copy of record); § 12520 (documents, etc., filed or recorded in U. S. land-office in Michigan, provable by register's or receiver's certified copy); § 409 (same for Secretary of State's certified copy under seal of Federal approval of land selections); § 560 (same for his copy of land-patents for internal improvements); § 4168 (tax homestead land deeds issued by State land-office commissioner; custodian's certified copy of record, to be evidence like the original); 1856, Lacey *v.* Davis, 4 Mich. 140, 150 (certified copy of U. S. land-patent, received where the original was lost); 1876, Bradley *v.* Silsbee, 33 Mich. 328 (land-patents recorded in office of Secretary of State; original required, because not authorized to be so recorded);

Minnesota: Gen. St. 1913, § 8450 (receipt or certificate of register or receiver of any U. S. land-office as to entry, purchase, or location, to be evidence of title); § 8451 (certificate of register or receiver of any U. S. land-office within this State, as to entry under homestead, etc., laws, to be *prima facie* evidence of ownership); § 8454 (U. S. patents of land in this State, or duplicates from U. S. general land-office, recorded in county registry of deeds, provable by record or certified copy by register, like other conveyances of realty); § 8455 (survey-plats, provable by certified copy by register of land-office);

Mississippi: Code 1906, § 1959, Hem. § 1619 (certificates issued by authorized person, in pursuance of Act of Congress, founded on warrant, etc., from U. S., of land in this State, admissible); § 1961, Hem. § 1621 (copies from books of land-entries "kept in any land-office in this State, or in the office of the Secretary of State, or land-commissioner, or other public office", certified by the officer having charge, admissible like the original certificate or entry); 1838, Doe *v.* M'Caleb, 2 How. Miss. 756, 767 (land-office certificate; original must be accounted for); 1839, Wooldridge *v.* Wilkins, 3 How. Miss. 360, 367 (land-patent at registry must be produced, by subpœna if necessary; but entries in the registry-books, provable by copy); 1846, Sessions *v.* Reynolds, 7 Sm. & M. 130, 152 (land-office certificate; copy allowed); 1896, Boddie *v.* Pardee, 74 Miss. 13, 20 So. 1 (as between the original certificate of entry of public land and a certified copy of the book of entries, there is under Code §§ 1782–1784 no preference for the former; both being merely copies of the entry which determines the title);

Missouri: Rev. St. 1919, § 5354 (confirmations before commissioners of land claims or recorder of land-titles, provable by certified copy by recorder or by lawful custodian); § 5355 (certificate or record of land-titles for New Madrid earthquake sufferers, and "all other books and papers" required to be kept in his office, provable by his certified copy); § 5357 (grants, etc., in "Livre Terrein", and other French or Spanish records and evidences of title lawfully deposited with recorder of land-titles, provable by his certified copy); § 5371 (letters from U. S. land department, land commissioner's lists of land, etc., recorded by register of lands, provable by register's certified copy); § 5372 (certain ancient archives of French or Spanish Government, affecting land-titles, and deposited with St. Louis recorder, provable by certified copy); § 7024 (certified copy of record swamp-land-patent, admissible); § 10578 (county recorder's certified copy under official seal of recorded land-patents, admissible); § 5356 (old French and Spanish land-grants; cited more fully *post*, § 1676 *a*); § 5361 (all papers required to be kept in U. S. land surveyor's office, provable by his certified copy); 1838, Waldo *v.* Russell, 5 Mo. 387, 394 (land-patent, proved by copy); 1858, Barton *v.* Murrain, 27 Mo. 235, 237 (patent in land-office, provable by certified copy); 1879, Avery *v.* Adams, 69 Mo. 603, 604 (land-office patent by certified copy; original need not be accounted for);

Montana: Rev. C. 1921, § 6892 (U. S. or Montana letters patent; when lost or beyond the party's control, a certified transcript by the lawful custodian, when recorded, shall have "the same force and effect as the original, for title or for evidence, until the said original letters patent be recorded"); § 10575 (like Cal. C. C. P. § 1925);

Nebraska: Rev. St. 1922, § 5645 (certificates,

ducing or accounting for the grantee's document depends upon the rule of the particular jurisdiction adopted for the ordinary case of a recorded conveyance (*ante*, § 1225):

patents, etc., of U. S. land-office, locally recorded, provable by certified copy of register of deeds or county clerk); § 8917 (certificate of land-office receiver as to sale to individual admissible if duplicate receipt is lost or destroyed; but is not proof of title against the holder of actual patent);
Nevada: Rev. L. 1912, § 1044 (State or U. S. "contract or patent" for land, recorded, provable by certified transcript); § 5415 (U. S. or Nevada patents to land provable by county recorder's certified copy);
New York: Cons. L. 1909, Public Lands, § 5 (letters patent to public lands; State secretary's certified copy of recorded patent, admissible "with the same force and effect as the original"); 1832, Peck *v.* Farrington, 9 Wend. 44 (original Federal patent need not be produced);
North Carolina: Con. St. 1919, §§ 1751–1762 (grants of land from State; various methods provided for proof by certified copy, and special methods provided for lands in certain counties, etc.);
Ohio: Gen. Code Ann. 1921, § 8524 (auditor's certified copy of State deed, admissible if the deed is "lost or destroyed by accident");
Oklahoma: Comp. St. 1921, § 649 ("The usual duplicate receipt of the receiver of any land-office", or, if that be lost or destroyed or beyond the reach of the party, the receiver's certificate that the books of office show a sale, is proof "equivalent to a patent against all but the holder of an actual patent"); § 650 (certified copy, by register or receiver of U. S. land-office in this Territory, of papers lawfully there deposited and of official communication there received from any department of U. S. Government, admissible): 1904, Enid & A. R. Co. *v.* Wiley, 14 Okl. 310, 78 Pac. 96 (record of a U. S. land-patent in a county registry of deeds; original required to be accounted for, under Rev. Ann. St. 1903, § 4575);
Oregon: Laws 1920, § 9896 (record or certified transcript of duly recorded land-patent, admissible like the original); § 5561 (State lands; land board to preserve "a true copy of all such deeds", and "such copies shall be primary evidence of such conveyance"); § 5589 (irrigated desert land; similar to preceding statute); §§ 597, 598 (where deeds or patents to State or U. S. lands have been lost before record in county of location, certified copies from issuing office may be used for recording and admitted in evidence);
Pennsylvania: St. 1833, Feb. 16, § 1, Dig. 1920, § 10336, Evid. (record of patents for donation lands, receivable); St. 1828, Jan. 25, § 1, Dig. 1920, § 10334, Evid. (deeds duly recorded in the land-office, though not in the proper county, provable by exemplification); 1835, DeFrance *v.* Stricker, 4 Watts 327, 328 (land-patent; copy of the register "in a contest with a party not claiming under the original", receivable);
Philippine Isl. Civ. C. §§ 1216–1230 (like P. R. Rev. St. & C. §§ 4290–4304); 1909, Yacapin *v.* Jibero, 12 P. I. 510 (a deed from the State not recorded under the royal order of Jan. 12, 1893, is nevertheless valid and admissible);
Porto Rico: Rev. St. & C. 1911, §§ 4290–4304; (these provisions represent Spanish law, resting on principles different from the Anglo-American laws; quoted *ante*, § 1225);
South Dakota: Rev. C. 1919, § 569 (the record, or a certified copy, of the recorded copy of U. S. land-patents, etc., or of a recorded certified copy thereof, are "admissible in evidence without further proof"); St. 1921, c. 352, amending Rev. Code 1919, § 569 (certified copy of recorded letters patent, etc., admissible);
Tennessee: 1813, Duncan *v.* Blair, 2 Overt. 213 (certified copy of warrant containing land entry; the recorded entry, not the party's location for the entry, is the original); 1899, State *v.* Cooper, — Tenn. Ch. —, 53 S. W. 391 (certificate of survey of land-grant, not required to be produced; affidavit of loss required, but not strictly dealt with; affidavit of a single party suffices; the opinion contains a detailed history of the land-grant laws in Tennessee);
Texas: all the ensuing cases, except the last, deal with Spanish 'testimonios' and related documents: 1844, Smith *v.* Townsend, Dallam 569 (leading case); 1848, Houston *v.* Perry, 3 Tex. 390, 393; 5 Tex. 462, 464; 1851, Lewis *v.* San Antonio, 7 Tex. 288, 311; 1851, Herndon *v.* Casiano, 7 Tex. 322, 332; 1851, Paschal *v.* Perez, ib. 348 (leading case); 1852, Titus *v.* Kimbro, 8 Tex. 210, 212 (leading case); 1852, Hubert *v.* Bartlett, 9 Tex. 97, 102; 1853, Wheeler *v.* Moody, 9 Tex. 372, 375; 1856, Byrne *v.* Fagan, 16 Tex. 391, 398; 1859, Nicholson *v.* Horton, 23 Tex. 47; 1860, Word *v.* McKinney, 25 Tex. 258, 268; 1876, Blythe *v.* Houston, 46 Tex. 65, 77; 1877, State *v.* Cardinas, 47 Tex. 250, 286, 290; 1878, Gainer *v.* Cotton, 49 Tex. 101, 114; 1883, Houston *v.* Blythe, 60 Tex. 506, 513; 1886, Ney *v.* Mumme, 66 Tex. 268, 17 S. W. 407 (land-patent);
Utah: Comp. L. 1917, § 7098 (like Cal. C. C. P. § 1925);
Virginia: Code 1919, § 417 (State land-office register's certified copy of grant of public land, to be 'prima facie' evidence of title); 1796, Lee *v.* Tapscott, 2 Wash. 276 (attested copy of land-patent recorded in County Court, admitted, without production of land-register or other books, here the date being old and

1905, HILL, C. J., in *Carpenter* v. *Dressler*, 76 Ark. 400, 89 S. W. 80: "The first question for consideration is the effect to be given to a certified transcript from the office of the Land Commissioner, when offered in evidence to prove a transfer therein shown. The statute (§ 3064, Kirby's Dig.) only provides that, when properly certified, it shall be received in evidence of the existence of the records of which the transcript is a copy. It does not provide whether it shall be primary or secondary evidence, and the question here is whether such transcript can be received as original evidence to prove the issuance of a certificate or deed, without first accounting for the deed or certificate. In other words, does this statute make the record of the transaction required by law to be kept in the land office of the same grade of evidence as the certificate or deed issuing from the land office as a result of the transaction there recorded?

"One view to take of it is that the law requires a record to be had of the transaction, say a land sale, and as evidence of the consummation of that sale the deed is issued, and it is evidence, but not the only evidence, of the sale; for this record must precede the issuance of the deed, and the deed is based upon the transaction therein recorded. In this view the record and deed would be original evidence of equal grade, and this statute makes the certified transcript of the record equal to the record itself. This is the view taken, under closely analogous statutes, in Mississippi and Alabama. . . . The other view of the question is that the record in the land office is a public memorandum of the transaction, and that the primary evidence of the transaction is the deed or certificate issued by the Land Commissioner, and this public memorandum is only admissible evidence after the loss or destruction of, or inability of the party to produce, the original is shown, and then this public record (and by statute certified transcripts thereof) becomes the highest grade of secondary evidence to prove the transaction therein recorded. . . .

"This latter view is more consonant to the previous decisions of this Court."

The answer to this question of property-law has differed in different jurisdictions, and it would be without the present purview to examine the reasons for this variance in the results. It is enough to note that there are three different classes of Government grants involved, namely, the ordinary land-grants of the Federal and State Governments (having several sub-varieties — "patent", "scrip", "location", etc.), the land-grants of the Spanish Government (affecting chiefly titles in Louisiana, Missouri, and Texas), and the land-grants of the Mexican Government (affecting chiefly titles in Arizona, California, New Mexico, and Texas).

§ 1240. **Same: (*e*) Tax-Lists Ballots, Notarial Acts, and Sundry Documents.** Similar questions, depending wholly on some principle in another branch of the law, are to be noticed in various directions. For example, whether the

possession having followed; Lyons, J., diss.);
Washington: 1860, Ward *v.* Moorey, 1 Wash. Terr. N. S. 104 (land-office papers, proved by certified copies);
Wisconsin: Stats. 1919, § 4151 (any record, etc., of purchase or entry of land in U. S. general land-office or land-office located in this State, provable by certified copy by secretary of the interior, commissioner of the general land-office, or register of the land-office "respectively, having the custody thereof"); § 4151 *a* (certified copy of document, etc., lawfully kept in office of commissioners of public lands in this State, admissible); § 4152 (lists of land certified as conveyed to the State by the President, the head of any department of the U. S. Government, the commissioner of the general land-office, or "any other office of the Government", admissible); § 4165 (receiver's certificate of purchase of public lands, and official certificate of entry, etc., by any register or receiver, admissible to show title); § 4153 (certain official deeds and certificates of title to public lands, admissible);
Wyoming: Comp. St. 1920, § 4588 (if the certificate of purchase or payment by any land-office receiver be "lost or destroyed or beyond the reach of the holder, secondary evidence of its contents is proof of title to the lands therein described, equivalent to a patent against all, except the United States or a holder of a patent from the United States").

tax-list or *assessment-roll* as drawn up by the assessor or as placed in the hands of the collector, is the original to be proved, depends on the theory of tax-law.[1] Whether the *ballots* cast at an election, or the certificate of the election-officers, is to be regarded as the proper object of proof in establishing the result of an election, involves the theory of election-law.[2] The traditional doctrine of *notarial acts* is that the notary's book-entry is the original act, and that hence the protest-copy first sent need not be produced.[3] In these, and in similar cases depending on some principle of another department of law,[4] no question of evidence is raised, for the application of the rule of Evidence is simple enough when the other principle of law has been decided.

§ 1240. [1] See the following examples: *Ind.* 1836, Coman *v.* State, 4 Blackf. 241, 243 (assessment-roll is the original, as against the collector's transcript); 1884, Standard Oil Co. *v.* Bretz, 98 Ind. 231, 235 (tax-list duplicate; "each of the lists has all the force and effect of an original instrument"); *Tex.* 1886, Clayton *v.* Rhem, 67 Tex. 52, 2 S. W. 45 (assessment-roll); *W. Va.* 1885, Battin *v.* Woods, 27 W. Va. 58, 63, 72 (official list of lands redeemed from tax-sales; tax-receipts not held originals; Johnson, P., diss.).

For the admissibility of the *assessor's books*, see *post*, § 1640.

For testimony to the *fact of an entry* in such books, see *post*, § 1244.

Compare the statutes allowing *certified copies* (*post*, § 1680), and the *parol evidence* rule (*post*, § 2427).

[2] *Ariz.* 1898, Pusch *v.* Brady, 5 Ariz. 400, 53 Pac. 176 (oral testimony to contents of ballots not produced, not admissible); *Ind.* 1866, Wheat *v.* Ragsdale, 27 Ind. 191, 205 (ballot must be produced, if it is in existence and can be identified; otherwise, the voter may be asked for whom he voted; "we are aware that this course of examination would most probably be of but little practical importance, as but few voters would likely be able to identify their ticket; but, when insisted upon, it would be the proper course of examination, as being in conformity with the strict rules of evidence"); 1878, Reynolds *v.* State, 61 Ind. 392, 416, 424 (when preserved according to law, production required; certificate of canvassers is not sufficient, nor oral testimony of voters, as a substitute); 1892, Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711 (that the witness, a minor, voted for A; production of ballots unnecessary); *La.* 1880, Warren *v.* McDonald, 32 La. An. 987, 990; *Nebr.* 1912, Deeder *v.* State, 92 Nebr. 662, 138 N. W. 228 (fraudulent counting of ballots; production of the specific ballots, required); *Oh.* 1869, Sinks *v.* Reese, 19 Oh. St. 306, 319 (testimony by candidate and others that by counting ballots he had found errors in the returns; ballots, poll-book, and tally-sheet, required to be produced).

For the questions whether the results shown by the ballots are to *override the official canvass*, or whether the official canvass may be *disputed* by testimony of other persons, see *post*, §§ 1351, 2452.

For the question whether a *voter may testify* orally to his vote, in spite of the parol evidence rule, see *post*, § 2452.

[3] 1851, Geralopulo *v.* Wieler, 10 C. B. 690, 712 ("the general rule with respect to notarial instruments, that a duplicate made out from the original — or protocol — in the notarial book, is equivalent to an original made out at the time of the entry in the book"; here admitting a duplicate protest made after trial begun, instead of requiring secondary evidence of the one sent abroad at the time); 1851, Phillips *v.* Poindexter, 18 Ala. 579, 582 (original protest is the entry in notary's book, which is an official book, and therefore a copy of this may be received without accounting for the protest issued by him to the parties); 1857, McFarland *v.* Pico, 8 Cal. 626, 635 (certificate of record of protest equally good with the original). Compare the statutes dealing with the admissibility of the *notary's protest* (*post*, § 1675).

In *Louisiana*, for *sales*, the notary's record has perhaps a peculiar status: 1902, Hodge *v.* Palms, 54 C. C. A. 570, 117 Fed. 396 (Louisiana notary's copy of his record of an "act of sale" is a duplicate original; compare the cases cited *ante*, § 1225).

[4] *Eng.* 1824, Salte *v.* Thomas, 3 B. & P. 188 (to show the cause of a commitment to prison, an entry in the prison books, held merely a copy of the warrant of 'committitur', which was the true original); *U. S. Fed.* 1826, Catlett *v.* Ins. Co., 1 Paine C. C. 594, 612 (certified copy of ship's register; register the original); 1904, Brown *v.* Harkins, 131 Fed. 63, 65 C. C. A. 301 (distiller's books, and the transcript in the collector's office, required to be kept by U. S. Rev. St. 1878, §§ 3318 and 3330; status as originals, considered); *S. Car.* 1897, Long *v.* McKissick, 50 S. C. 218, 27 S. E. 636 (the sheriff's sale-book, and not the preliminary memorandum made at the sale); C. C. P. 1922, § 782 (bills of lading; quoted *post*, § 2132, n. 5); *Vt.* 1888, Lycoming F. I. Co. *v.* Wright, 60 Vt. 155, 521, 12 Atl. 103 (insurance license; no law

§ 1241. (4) **Records, Accounts, etc., as Exclusive Memorials under the Parol Evidence Rule.** By the principle of Integration or Parol Evidence (*post*, § 2425), a particular writing becomes under certain circumstances the exclusive repository of a transaction, superseding all other writings and rendering them legally immaterial. It follows that in proving the transaction this integrated document, or exclusive memorial, is the one, and the only one, to be produced or accounted for; the production of no other will suffice. Here, again, as in the two preceding groups of cases (§§ 1235, 1236), there is no controversy about the present rule of Evidence; the rule applies to whatever document is declared by the substantive law to be the one material to the issue, and when the substantive law declares that a specific document is the sole material one and that others are worthless, the rule of production plainly applies to the former. Thus, the problem involved is one of the Parol Evidence rule, not of the present rule. The question arises chiefly in two sorts of cases: (*a*) The law sometimes *requires* integration, *i.e.* makes a certain writing the exclusive memorial. The chief representative type of this class is the judicial record. The question thus arises whether, for example, a clerk's docket-book is the record and may be produced instead of the judgment-book, or whether an original writ is the record in the same sense.[1] (*b*) By *act of the parties* an integration may occur, *i.e.* the transaction may be embodied in a single written memorial, to the exclusion of all others; and then, in proving the transaction, the former must be produced, but the latter cannot be.[2]

(e) *"Whenever the purpose is to establish its Terms"*

§ 1242. **General Principle; Facts about a Document, other than its Terms, provable without Production.** (1) The fundamental notion of the rule requiring production is that in writings the smallest variation in words may be of importance, and that such errors in regard to words and phrases are more likely to occur than errors in regard to other features of a physical thing (*ante*, § 1181). Thus the rule applies only to the *terms of the document*, and not to any *other facts about* the document. In other words, the rule applies to exclude testimony designed to establish the terms of the document, and requires the document's production instead, but does not apply to exclude testimony which concerns the document without aiming to establish its terms:

requiring a record of it, the license itself is the original); *W. Va.* 1886, Singer *v.* Bennett, 28 W. Va. 16, 22 (original and duplicate of agreement of incorporation filed in separate State offices are both originals).

Compare the statutes admitting *certified copies* of *public records* (*post*, § 1680); the rule for *conclusive registers* or *certificates* (*post*, § 1352); and the *parol evidence* rule as applied to official documents (*post*, §§ 2427, 2453).

§ 1241. [1] These questions are dealt with *post*, § 2450.

[2] Questions of this sort are dealt with *post*, §§ 2427, 2429; though occasionally it is difficult to distinguish whether the principle involved is that of Parol Evidence or of § 1235, *ante*, for example, where it is asked whether a deposit-ticket or a pass-book is the document to be proved in showing a deposit received.

1826, MILLS, J., in *Lamb* v. *Moberly*, 3 T. B. Monr. 179 (allowing proof of the fact of purchase of a note, without production): "We cannot agree . . . that the production of the note was necessary. It could only be held necessary by not attending to the distinction between proving the existence and contents of a note and the sale of a note. Of the former, the note is the better evidence; but of the latter the note furnishes no evidence. . . . The existence of a note is as certainly perceived by the senses or acknowledged in conversation as that of any other article of commerce; and it might as well be urged that before the acknowledgments of a sale of any other article could be given in evidence the article itself must be produced in court in order that the Court might see that it really existed, as that a note thus sold should be produced."

1839, GREEN, J., in *Enloe* v. *Hall*, 1 Humph. 303, 310 (assumpsit for services in printing and publishing advertisements in a newspaper; production of the paper not required): "The work and labor for which this suit is brought was done upon the paper. . . . As well might the tailor be required to produce the coat or the watch-maker the watch as evidence that the work had been performed."

This much is generally accepted; the difficulty arises in applying the principle to specific cases. Testimony about a document cannot go very far without referring to its terms, and the instances in which some other fact about a document is material, and yet its terms are clearly not, are so few that in the other situations the natural tendency of Courts is to lean in favor of requiring production; since production would have to be made sooner or later in proving the terms as a material part of the issue. The line between testifying to terms or contents and testifying to other facts is not only thus difficult to draw in a given case, but its determination tends to become a matter of merely logical subtlety and verbal quibbling. There seems to be no way of invoking in its settlement any broad notion of policy definite enough to be useful in solving a given case. Moreover, apart from a few general classes of instances, the rulings depend generally upon the particular state of facts presented in each case and changing slightly in each instance, so that the rulings are generally of little profit as precedents.

(2) Besides this, the concurrent operation of the principle of *Integration*, or *Parol Evidence* (*post*, § 2429) has frequently to be distinguished. By that rule the oral part of a transaction may be legally annulled and made immaterial; so that though the oral part could be proved, so far as the present principle is concerned, without production, yet by the Integration rule the oral part is declared immaterial and ineffective and cannot be proved in any manner, so that the document becomes the exclusive transaction and must be proved and therefore produced. For example, the fact that a sheriff has served a writ or has read it aloud to the party is a fact separate from the terms of the document, and could therefore be proved without production of the writ, so far as the present principle is concerned; but, so far as the Parol Evidence rule declares that the sheriff's indorsement of service on the writ is the sole memorial of the act, the oral doings become immaterial, and in proving the act, the terms of the writing must be proved, and therefore production is necessary. In the same way, so far as the law does not recognize an oral transfer of land, the terms of the written document may alone

be proved; and, so far as the parties to any contract have voluntarily embodied it in a single writing, the writing alone, and no oral matters accompanying it, may be proved. Thus, in these cases, and in many other instances to be noted, the present principle would allow proof of an oral statement without producing a document concerned in it, and the requirement to produce the document is due solely to the operation of the Parol Evidence rule, which forbids the oral matter to be proved at all. The operation of the latter rule should not mislead us to attribute the result to any exception to the present principle or to an inconsistency in the judicial application of it.

(3) For the reason just noted, the controversy that often arises as to *who shall produce* a contract, is usually dependent in the same way on the Integration (or Parol Evidence) rule, and not on any doubt as to the present principle. For example, A sues B for work done on B's house, and upon the cross-examination of A's witness or upon the examination of B's witness, it is testified that the contract for the work was reduced to writing by the parties, and the question then arises which party shall produce it; for the party whose duty it is to produce it can go no further in his proof of the contract's terms without producing or accounting for it. In form, this is a question under the present rule; in reality, it is not. The question really is, under the Parol Evidence rule, whose duty it is to prove the contract to have been integrated, *i.e.* reduced to writing; is it the duty of the claimant alleging performance, or of the opponent alleging non-performance? So soon as this question as to the duty to prove the integration is settled, the present rule comes into application without any question, *i.e.* if it is A's duty to prove the writing, of course it is A who must produce or account for it, and 'vice versa'. This question is therefore dealt with elsewhere (*post*, § 2447).

§ 1243. **Application of the Principle: (1) Oral Utterances accompanying a Document read or delivered; (2) Document as the Subject of Knowledge or Belief.** (1) When an *oral utterance accompanies* a dealing with a document, and assuming that the oral utterance is not forbidden to be proved by the Parol Evidence rule (as noted in the preceding section), the oral utterance may be proved as a separate fact, without producing the document:

1808, ELLENBOROUGH, L. C. J., in *Smith* v. *Young*, 1 Camp. 439 (proof of a demand, in an action of trover, was oral, the witness stating that he had both orally demanded and also in writing served notice): "I may do an act of this sort doubly. I may make a demand in words and a demand in writing; and both being perfect, either may be proved as evidence of the conversion. If the verbal demand had any reference to the writing, to be sure the writing must be produced; but if they were concurrent and independent, I do not see how adding the latter could supersede the former or vary the mode of proceeding."

1875, *Tilton* v. *Beecher*, Abbott's Rep. I, 389: *Witness* for plaintiff: "[Mr. Tilton had written the story of the whole affair for publication and wanted Mr. Beecher to hear it before publication,] and Mr. Tilton said to Mr. Beecher, 'I will read to you one passage from this statement, and if you can stand that, you can stand any part of it', and he read to him a passage from that statement, which was about as follows as nearly as I can recollect." Mr. *Evarts*, for defendant: "The statement will speak for itself." Mr. *Fullerton*,

for plaintiff: "What did he read?" Mr. *Evarts:* "We want that paper and the part of it that was read, as it appeared in that paper, and it is not competent to recite out of a written paper by oral proposition what the written paper is the best evidence of." Mr. *Fullerton:* "I propose to show what communication was made by Mr. Tilton on that occasion to Mr. Beecher; I do not care whether it originated in his own mind, or whether it was read from a paper, printed or written; it makes no difference; what it was that he said to him is what I have a right to." Judge NEILSON: "I think the witness can state what was said to Mr. Beecher, although he stated matter that had been incorporated in writing."

This result is illustrated in a variety of cases.[1]

(2) Where a person's *knowledge or belief* about a document is material, the knowledge or belief may be shown as a fact separate from the document's terms, without producing it.[2]

§ 1244. **Same: (3) Identity of Document; (4) Summary Statement of Tenor of Multifarious Documents; (5) Absence of Entries.** (3) Where a document is referred to as *identical* with or the same as another document, or as helping to identify some transaction or some other physical object, the question is a difficult one; and the ruling will depend upon whether in the case

§ 1243. [1] *England:* 1801, Jacob *v.* Lindsay, 1 East 460 (to prove a defendant's admission of indebtedness, a witness was allowed to testify that he had taken the account-book to the defendant, gone over the items with him, and heard the defendant admit the receipt of each one; the book could not be produced, being without the required stamp; production held not necessary); 1820, R. *v.* Hunt, 1 State Tr. N. S. 171, 252 (sedition; resolutions read at a meeting; printed copy verified as correctly giving what was read, allowed without producing the writing actually read); 1820, R. *v.* Dewhurst, 1 State Tr. N. S. 529, 558 (sedition; resolutions read from a paper; objection of no notice overruled; Bayley, J., "No; that has been decided over and over again; though a man reads from a paper, a person may give an account of what he hears him say"); 1839, Trewhitt *v.* Lambert, 10 A. & E. 470 (the plaintiff read from a writing, and the defendant assented, not seeing the writing; held, that the oral transaction might be proved); *United States:* 1873, Paige *v.* Loring, Holmes U. S. 749 (fraudulent transfer to creditor; to show an admission, a witness was allowed to testify to the words of the defendant who took up a letter and read it to the witness, the thing to be proved being not the contents of the letter, but "what the defendant stated to him to be the contents"); 1902, Brown *v.* Equitable L. Assur. Soc'y, 14 Haw. 80, 82 (reading from a letter); 1869, First Nat'l Bank *v.* Priest, 50 Ill. 321 (that a cashier, asked for returns of sales, showed the plaintiff an account of sales; production not required; the thing proved being "the answer made to the inquiry"); 1906, Purinton *v.* Purinton, 101 Me. 250, 63 Atl. 925 (letters read aloud by the plaintiff; the defendant not required to account for the letters); 1852, Glenn *v.* Rogers, 3 Md. 312, 321 (a written demand for payment, delivered by messenger, production required, since no oral demand accompanied it).

Contra: 1904, State *v.* Leasia, 45 Or. 410, 78 Pac. 328 (rule applied to the defendant's reading aloud of a letter; unsound; no authority cited); 1909, Eads *v.* State, 17 Wyo. 490, 101 Pac. 946 (larceny of a horse; time of knowing about or authorizing a telegram whose contents were undisputed; production not required).

For other questions arising in such cases as R. *v.* Hunt, *supra*, where a *printed document* is concerned, compare *ante*, §§ 1233–1235, § 415.

[2] *Eng.* 1816, Wyatt *v.* Gore, Holt N. P. 299, 303 (in proving previous currency of similar rumors in mitigation of damages for libel, the fact of their circulation in a newspaper was offered; production not required); *U. S.* 1897, Scullin *v.* Harper, 24 C. C. A. 169, 78 Fed. 460 (issue as to good faith in making a charge against an employee; the charge having been made after reading a record in a time-book, held that the book need not be produced to show what was read); 1897, Kearney *v.* State, 101 Ga. 803, 29 S. E. 127 (whether a witness knew of a document affecting her interest, admitted without production); 1874, State *v.* Cohn, 9 Nev. 179, 188 (over-insurance as motive for arson; amount of insurance which insured believed he had, shown without production of policies).

Contra: 1844, Com. *v.* Bigelow, 8 Metc. 235 (conversation about a bill to show the defendant's knowledge of its counterfeit character; rule applied to require production of the bill).

in hand greater emphasis and importance is to be given to the detailed marks of peculiarity or to the document as a whole regarded as an ordinary describable thing:

1845, *Lawrence* v. *Clark*, 14 M. & W. 250, 252; plea of fraud, to an action on a bill of exchange; to identify the bill spoken of as fraudulent, the bill was required to be produced. POLLOCK, C. B.: "The difficulty is, how do you prove the identity but by the contents?" ROLFE, B.: "You want to show that when a certain writing took place on a certain piece of paper, certain concomitant circumstances attended it; but then you must show it to be *the same* writing, as that which is stated on the record."

There is here naturally some inconsistency in the rulings.[1]

(4) Where the total *balance of accounts* is desired to be stated, as by testimony to a person's solvency, or to a year's total sales, or to a year's aggregate profits, it is possible to regard the net result as something independent of the detailed terms of the account-books, and therefore provable without production; though there is here room for much difference of opinion.[2] But

§ 1244. [1] *Eng.* 1867, R. v. Elworthy, 10 Cox Cr. 579 (perjury in stating that there was no draft of a certain statutory declaration; the identity of the draft so sworn to became material, *i.e.* which of two drafts was referred to; for proving the contents of a document said to be the draft in question, the rule was held applicable; Bramwell, B.: "If the only question had been as to the existence of a draft, the point would not have arisen; but it was thought fit to give evidence of the contents of it", and so "the general rule applies"); *U. S. Fed.* 1862, Boucicault v. Fox, 5 Blatchf. 87, 91 (copyright; whether the incidents of a drama were the same as those of a book; production of the book and the play required); *Ark.* 1869, Peterson v. Gresham, 25 Ark. 380, 386 (to identify a quantity of cotton, evidence that a receipt for thirty-six bales had been given was admitted, without producing the receipt); *Ind.* 1879, Lingenfelser v. Simon, 49 Ind. 82, 89 (identification of note; production not required); *Ia.* 1885, Sunberg v. Babcock, 66 Ia. 515, 24 N. W. 19 (whether an invoice seen was the same as that in controversy; production required); 1900, Myers' Estate, 111 Ia. 584, 82 N. W. 961 (identification of letters; production not required); *Md.* 1867, Higgins v. Carlton, 28 Md. 135 ("whether the memorandum differed from the will in any other respects?" excluded); *Mass.* 1857, Newcomb v. Noble, 10 Gray 47, *semble* (that a horse at a place was the same one described in a mortgage; production of the mortgage not required merely for this purpose); *Mo.* 1845, St. Louis P. Ins. Co. v. Cohen, 9 Mo. 416, 439 (possession of a paper; it may be described to identify it without production); *N. J.* 1849, West v. State, 22 N. J. L. 212, 238 ("the witness had sworn that he believed that the deed in question was not identical with a deed which had been previously seen by him", describing the differences; production not required, because "it was a simple question of identity or diversity"); 1861, Gilbert v. Duncan, 29 N. J. L. 133, 139 (whether the note sued on or another was agreed to be given; production of the other not required).

[2] *Eng.* 1791, Roberts v. Doxon, Peake 83 (one who had seen the accounts; "though he could not state the particulars of the books without producing them, yet he might speak to the general amount; . . . what from his general observation he perceived to be the general state of their accounts"); *U. S. Ga.* 1910, Cabaniss v. State, 8 Ga. App. 129, 68 S. E. 849 (bank-officer's payment of unjustifiable dividend; principle applied to lists of notes, etc. charged off as insolvent, etc.); *Ill.* 1904, Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906 (a bookkeeper's statement of the footings of figures, etc. is admissible, but not of the amount of profits shown); *Mass.* 1864, Stratford v. Ames, 8 All. 577 (amount of a bill rendered; production required); *Mich.* 1882, Steketee v. Kimm, 48 Mich. 322, 325, 12 N. W. 177 (aggregate amount of sales, allowed without producing the books); *Pa.* 1827, Pipher v. Lodge, 17 S. & R. 214, 226, per Rogers, J. ("The proof of the state of a person's pecuniary affairs is general in its nature; . . . it never was required that you should show a bill of sale for his personal property or the title-deeds of his real estate"); *S. C.* 1898, Murdock v. Mfg. Co., 52 S. C. 428, 29 S. E. 856 (profits of a mill, as based on the books of the mill; production required).

For *solvency* testimony, as affected by the opinion rule, see *post*, §§ 1957, 1959.

For dispensing with the production of *voluminous accounts*, see *ante*, § 1230.

For accounts as subjected to the Integration rule, see *post*, §§ 1339 ff.

the fact that a specific entry or item *exists* or was made may directly involve the terms of the document, so far at least as the fact of the entry can be distinguished from a status or relation produced by it.[3]

(5) On the other hand, the fact that an *entry* in a record or account-book *does not exist*, while in a sense it involves the document's terms, yet is usually and properly regarded as not requiring the books' production for proof; this may be justified either on the present ground or on that of the inconvenience of producing voluminous documents (*ante*, § 1230); it is difficult to ascertain which reason is the one judicially approved.[4]

[3] *England:* 1801, R. *v.* Coppull, 2 East 25 (whether a person was assessed for parish rates; the books must be produced); 1813, Henry *v.* Leigh, 3 Camp. 499 (the fact of the allowance of a certificate of bankruptcy; certificate required); 1856, Darby *v.* Ouseley, 1 H. & N. 1, 5, 10 (whether a person's name is written in a book containing the names of members of an association; production required); *Canada:* 1880, Appleby *v.* Secord, 28 N. Br. 403 (testimony of one present at a trial, not admitted to show what the dispute and the decision were; production of record required); *United States: Ala.* 1837, Kennedy *v.* Dear, 6 Port. 90, 96 (of a justice, whether a certain case was before him, allowed without production); 1855, Doe *v.* Reynolds, 27 Ala. 364, 376 (facts of foreclosure and sale; record must be produced); 1893, Roden *v.* Brown, 103 Ala. 324, 327, 329, 15 So. 598 (whether a bank's books showed an account with B.; production required); *Ark.* 1872, Burk *v.* Winters, 28 Ark. 6 (that a person was assignee in bankruptcy; production required); *Colo.* 1895, Union Pacific R. Co. *v.* Jones, 21 Colo. 340, 40 Pac. 892 (whether a verdict had been recovered; record required); *Conn.* 1811, Arnold *v.* Smith, 5 Day 150, 155 (that a ship had been libelled and condemned; rule applied); 1871, Supples *v.* Lewis, 37 Conn. 568 (the fact that an execution had been issued and given to an officer; production not required); *Ill.* 1829, Humphreys *v.* Collier, 1 Ill. 297 (that a person had been discharged in insolvency; record required); *Ind.* 1861, Scott *v.* Scott, 17 Ind. 308 (that certain persons were assessed for land; assessment roll required); 1879, Binns *v.* State, 66 Ind. 428, 430 ("the pendency of a suit, the parties to it, and its subject-matter, may be proved by parol, where the record is not the ground of the action"); 1889, Hewitt *v.* State, 121 Ind. 524, 23 N. E. 83 (maliciously killing a dog; to prove that it was listed for taxation, tax-list not required); 1892, File *v.* Springel, 132 Ind. 312, 31 N. E. 1054 (that a mortgage was held and a mortgage-suit was begun; production of mortgage and record unnecessary); *Md.* 1795, Owings *v.* Wyant, 3 H. & McH. 393 (that the defendant was a common innkeeper, such persons being required to be licensed; production not required); *Mich.* Comp. L. 1915, §§ 2817, 3162, 3397 (village or city or county condemnation proceedings; register's testimony as to persons shown by records to be owners, admissible); *Nebr.* 1899, Reynolds *v.* State, 58 Nebr. 49, 78 N. W. 483 (that a person was divorced; production of decree or copy required); *N. J.* 1849, Chambers *v.* Hunt, 22 N. J. L. 552, 562 (fact of a trial involves the production of the record); 1849, Browning *v.* Flanagin, 22 N. J. L. 567, 577 (proving the existence of a judgment lien; production of the judgment required); *Oh.* 1848, Smiley *v.* Dewey, 17 Oh. 156, 159 (fact of appeal taken; record required); *R. I.* 1898, Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832 (by a member of a town council, that a road was a highway, excluded); *Vt.* 1841, Cross *v.* Haskins, 13 Vt. 536, 540 (testimony by one receiving oil that he had credited H. for it on his books; the books not required to be produced); 1844, Sherwin *v.* Bugbee, 16 Vt. 439, 444, *semble* (existence of school district; records not required); *W. Va.* 1874, Hubbard *v.* Kelley, 8 W. Va. 46, 52 (that an appeal had been taken; production required).

Compare some of the cases under § 1249, *post*.

For the fact of *conviction of crime*, see *post*, § 1270.

For *appointment to office*, see *post*, § 2535.

For the fact of *incorporation*, see *post*, § 1625.

[4] The following list includes also the few cases *contra*, which are expressly so noted: ENGLAND: 1831, R. *v.* Backler, S. C. & P. 118 (like People *v.* Eppinger, Cal.); 1834, R. *v.* Brannan, 6 id. 326 (same); 1852, Maule, J., in Macdonnell *v.* Evans, 11 C. B. 930, 938 ("Suppose a man is asked whether he made an entry in his day-book, and he says No; it cannot be necessary to produce the book"); UNITED STATES: *Federal:* 1865, Blackburn *v.* Crawfords, 3 Wall. 175, 183, 191 (that a marriage register did not contain an entry of a certain marriage; production required); 1873, Burton *v.* Driggs, 20 Wall. 125, 136 (absence of certain facts in record, allowed to be shown), 1917, Alabama Fidelity & C. Co. *v.* Alabama P. L. S. Bank, 200 Ala. 337, 76 So. 103 (embezzlement; expert's testimony to non-appearance of entries that should have been made to account for moneys, admitted);

§ 1245. **Same**: (6) **Fact of Payment of a Written Claim; Receipts.** (*a*) When a payment of money is made in discharge of a written claim — as, of a bond, a judgment — or in obedience to a written order, the *fact of paying*, including the amount paid, is usually a fact separate from the terms of the writing thus discharged, and the latter's production is not necessary. Nevertheless, in a given instance the terms of the writing may come to be drawn indirectly into the act of payment, — as where the question arises whether one draft or another was the object of the payment. For the ordinary situation first mentioned, it is generally agreed that production is unnecessary, but in instances of the latter sort production has been in some instances required.[1]

California: 1894, People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538 (forgery of check on B. C. Bank in name of H. & Co.; teller's testimony that no firm of that name "kept or had any account in his books", admitted); *Connecticut:* 1905, McPhelemy *v.* McPhelemy, 78 Conn. 180, 61 Atl. 477 (that no entry of a certain marriage occurred in a parish-book, allowed); *Georgia:* 1852, Elkins *v.* State, 13 Ga. 435, 440 (clerk allowed to testify that no liquor-license had been granted to E.; no record being required to be kept, the record is not complete; where a record is required, then it must be produced to show that no such part exists); 1886, Mayson *v.* Atlanta, 77 Ga. 663, 665 (like Elkins *v.* State); 1899, Aspinwall *v.* Chisholm, 109 Ga. 437, 34 S. E. 568 (absence of entry in account-books; production required); 1903, Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426 (that no tax returns were found in the records where they would properly be, admitted); 1907, Wilson *v.* Wood, 127 Ga. 316, 56 S. E. 457 (that no administration has been granted, admissible from one who has made a thorough examination of the records); *Illinois:* 1874, Chicago *v.* McGraw, 75 Ill. 566, 571 (that no sales of U. S. land in a district were made; production of records required); *Indiana:* 1853, Nossaman *v.* Nossaman, 4 Ind. 648, 651 (by a clerk, that no such marriage-record appeared, allowed); 1864, Board *v.* Reinhart, 22 Ind. 463 (that the defendant had never before in any transactions made a certain claim; production of the written transactions not required); 1871, Lacey *v.* Marnan, 37 Ind. 168, 170 (by the U. S. land-register, that no land-entry existed, allowed); *Iowa:* 1906, Colton's Estate, 129 Ia. 542, 105 N. W. 1008 (attorney's testimony to the absence of a decree of a certain tenor, admitted; the official custodian not preferred; Sykes *v.* Beckwith, N. D., disapproved; good opinion by Ladd, J.); *Kentucky:* 1907, Stamper *v.* Com., — Ky. —, 100 S. W. 286 (by the county clerk, that no deed of a certain sort was recorded, allowed); *Massachusetts:* 1902, Com. *v.* Best, 180 Mass. 492, 62 N. E. 748 (that no warrant for an arrest had been issued, admitted from one who had searched the record); *Michigan:* 1901, Wagner *v.* Supreme Lodge, 128 Mich. 660, 87 N. W. 903 (testimony of the clerk of a lodge to plaintiff's non-membership, excluded on the facts); *Missouri:* 1883, Burnett *v.* McCluey, 78 Mo. 676, 689 (that a part of a record did not exist; production required; after evidence of its existence and loss by opponent, evidence of its non-existence is admissible in rebuttal); *Nebraska:* 1895, Smith *v.* Bank, 45 Nebr. 444, 447, 63 N. W. 796 (principle conceded; but one who has merely searched the index of a registry of deeds may not speak as to the absence of a record); *North Dakota:* 1903, Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844 (attorney's testimony that the county records contained nothing of a certain tenor, excluded; the official custodian's testimony is required); 1903, Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132 (whether the tax records did not contain a warrant of levy; the custodian required to be called, in preference to an attorney who had searched the records); *Ohio:* 1834, Emrie *v.* Gilbert, Wright 764 (accounting; whether an order on K. was included in the accounts due; production not required); *Washington:* 1921, Hoptowit *v.* Brown, 115 Wash. 661, 198 Pac. 370 (by an official, that no rule existed requiring an Indian allottee to pay certain charges, allowed); *Wisconsin:* 1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49 (that no record of naturalization existed, allowed, for one who had made a search).

Compare the instances *ante*, § 1230.

Whether an *official custodian's certificate* that no entry or document exists is admissible is another question (*post*, § 1678).

Whether the *opinion* rule affects this kind of testimony is noticed *post*, § 1657.

Whether the *custodian's certificate* or testimony is preferred, is considered *post*, §§ 1272, 1273.

§ **1245**. [1] *Eng.* 1801, Bayne *v.* Stone, 4 Esp. 13 (action to recover half of a payment made to a joint obligee by a surety; the security-document not required to be produced); *U. S. Fed.* 1811, Fairfax *v.* Fairfax, 2 Cr. C. C. 25 (payment of bond; production and proof

(*b*) The fact that a *receipt* was given by the other party does not change the result, so far as the present principle is concerned.[2] But under the Integration (or Parol Evidence) rule the question may arise whether the receipt has not become the sole memorial of the transaction, so as to exclude the parol act of payment from consideration (*post*, § 2432). This question is generally answered in the negative.

(*c*) Where the medium of payment is not coin or paper-money, but a *check*, *note*, or other form of written obligation, the case for requiring production may be more clear (than in (*a*) *supra*), for in paying with money it is usually a mere matter of counting the number of pieces, while in paying with an instrument of obligation the terms of the writing may be of consequence; at any rate, when they do receive any emphasis under the issues, it would seem that the rule of production should apply.[3]

of execution not required); 1827, Patriotic Bank *v.* Coote, 3 Cr. C. C. 169 (assumpsit for overdraft; whether a check was drawn in a firm-name; production required): *Ala.* 1834, May *v.* May, 1 Port. 129 (whether payment had been made under a power of attorney to M.; to prove that the power was to S., production required); 1843, Planters' & M. Bank *v.* Borland, 5 Ala. 531, 543, 545 (that payment of certain drafts had been made, and that a payment on judicial process had been made; production not required, the contents not being material to the issue); 1912, Brannan *v.* Henry, 175 Ala. 454, 57 So. 967 (payment of taxes); *Ia.* 1874, Hollenbeck *v.* Stanberry, 38 Ia. 325, 327 (payment of judgment, provable without production); 1894, Shaffer *v.* McCrackin, 90 Ia. 578, 580, 58 N. W. 910 (same); *Md.* 1861, Cramer *v.* Shriner, 18 Md. 140, 146 (settlement of accounts made on the basis of a memorandum; since the verbal transaction was independent of the writing, production was not required); *Mich.* 1876, Mason *v.* District, 34 Mich. 228, 234 (that money was paid out on written orders; production required); *Minn.* 1867, Lowry *v.* Harris, 12 Minn. 255, 271 (payment for deed; production not required); *Mo.* 1830, Benton *v.* Craig, 2 Mo. 198 (payment of money, but not terms of the draft paid, admitted without production); 1836, Davidson *v.* Peck, 4 Mo. 438, 444 (payment by co-defendant of judgment, and action against the other for the amount; payment of the judgment provable without producing it before the witness or reciting it in his deposition; carefully reasoned opinion); *Mont.* 1898, Whiteside *v.* Hoskins, 20 Mont. 361, 51 Pac. 739 (payment of a judgment; judgment not produced); *N. H.* 1903, Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895 (whether certain fees had been paid, allowed without producing records); *Pa.* 1847, Milliken *v.* Barr, 7 Pa. 23 (that there was another note of similar date and indorsements, on which the payment pleaded had really been made; production of the other note required); *Vt.* 1846, Hayden *v.* Rice, 18 Vt. 353, 358 (action for contribution against joint promisor; to prove payment on execution, execution need not be produced).

[2] 1836, Wiggins *v.* Pryor, 3 Ala. 430, 433 (that money was paid and a receipt taken; production not required); 1877, Davis *v.* Hare, 32 Ark. 386, 390 (payment of taxes; the collector's books not required); 1832, Dennett *v.* Crocker, 8 Greenl. Me. 239, 244 (payment of taxes provable orally, without producing the receipted bills); 1849, Chambers *v.* Hunt, 22 N. J. L. 552, 562 ("It is clearly competent to prove payment by parol, or rather by verbal testimony, even though there may be written evidence as a receipt or order"; but where the giving of an order of payment on a third person, and its tenor, was to be shown as payment, production was required).

See also the cases cited *post*, § 2432.

[3] 1791, Breton *v.* Cope, Peake 30 (plea, payment of a bond by transfer of bank-stock to the plaintiff; rule applicable, and copy of the transfer-book required); 1803, Dover *v.* Maestaer, 5 Esp. 92, *semble* (bribery; that the defendant gave the witness a £5 note, for which the witness signed a note payable on demand, admitted without producing the documents); 1880, Ware *v.* Morgan, 67 Ala. 461, 466 (that a payment was made by bill of exchange; production not required); 1859, Daniel *v.* Johnson, 29 Ga. 207, 210 (that notes were given in payment, production not required); 1858, Ohio Ins. Co. *v.* Nunemacher, 10 Ind. 234, 237 (that in an offer of payment by check and note of a certain tenor was made; production required); 1890, Coonrod *v.* Madden, 126 Ind. 197, 25 N. E. 1102 (that a check was given in payment of note B, and not of note A, the one in suit; production of note B not required); 1865, Cecil Bank *v.* Snively, 23 Md. 253, 263 (that certain notes had been paid over by being sent to a bank and collected; production not required).

§ 1246. **Same: (7) Fact of Ownership; (8) Fact of Tenancy.** (7) The mere fact that a person is *owner* of property, whether real or personal, is a distinct thing from the terms of the document or documents by which he has become owner; although instances may be supposed in which the relation of ownership involves so directly the terms of a specific deed that the rule of production applies.[1] (8) The fact that a person occupies the relation of *tenant*, as to a piece of land or its owner, is a distinct fact; for he may have become tenant by parol or by writing, and the tenancy is the result of the transaction, and is not the transaction itself. Nevertheless, so far as the terms of a written tenancy are drawn into the question, the rule of production begins to be applicable.[2]

§ **1246.** [1] *Fed.* 1811, Wilson *v.* Young, 2 Cr. C. C. 33 (title-interest in an insured ship, production required); *Ala.* 1880, Street *v.* Nelson, 67 Ala. 504, 507 (contract for sale of personalty; title to personalty "can be proved as a fact by oral testimony", unless the question arises between the parties); 1890, Florence L. M. & M. Co. *v.* Warren, 91 Ala. 533, 537, 9 So. 384 (testimony that the witness had not title, admitted); 1892, Wolfe *v.* Underwood, 97 Ala. 375, 378, 12 So. 234 (petitioners testifying that they own stock; books not necessary); *Fla.* 1904, Leon *v.* Kerrison, 47 Fla. 178, 36 So. 173 (conversion of a yacht; production of the bill of sale to the plaintiff, not required); *Georgia:* 1858, Newsom *v.* Jackson, 26 Ga. 241, 245 (that B.'s wife owned certain negroes; deed required); *Ill.* 1890, Kirkpatrick *v.* Clark, 132 Ill. 342, 345, 24 N. E. 71 (whether a person was owner of land; oral testimony excluded); *Mass.* 1897, Westfield Cigar Co. *v.* Ins. Co., 169 Mass. 382, 47 N. E. 1026 (whether a person owned a building; "title by deed must ordinarily be proved otherwise than by the oral testimony of the owner"; but here the objection was not properly made); *Minn.* 1867, McMahon *v.* Davidson, 12 Minn. 357, 369 (that a person was owner of a steamboat, allowed, "in the absence of any evidence that there was any writing"); 1868, Fay *v.* Davidson, 13 Minn. 523, 525 (same); *Miss.* 1867, Baldwin *v.* McKay, 41 Miss. 358, 362 (whether the plaintiff owned cotton; production of bill of sale required); *N. J.* 1916, *Re* McCraven, 87 N. J. Eq. 28, 99 Atl. 619 (appointment of a guardian; sundry pedantic rulings as to the net effect of documents); *Oh.* 1834, Lloyd *v.* Giddings, Wright 694 (whether a lot was included within the boundaries of a conveyance produced; deeds adjoining the boundary not required to be produced); *Pa.* 1852, Strimpfler *v.* Roberts, 18 Pa. 283, 296 (letter claiming ownership; production of title-deeds not required); 1892, Gallagher *v.* Assur. Co., — Pa. —, 21 Atl. 115 (that a certain person owned a leasehold; production of bill of sale not required); *Tenn.* 1871, Hart *v.* Vinsant, 6 Heisk. 616 (replevin for rails cut; in showing the boundary of land by title-bond, production required); *Tex.* Rev. P. C. 1911, § 1292 (criminal destruction of timber on land of another; ownership of land is provable by State "by verbal testimony of title or of notorious use and possession of the land by some person other than the defendant").

For testimony to ownership as objectionable under the *Opinion rule*, see *post*, § 1960.

[2] *England:* 1810, Doe *v.* Morris, 12 East 237 (ejectment against a tenant; tenancy proved by evidence of the payment of rent); 1810, Doe *v.* Pearson, 12 East 239, note (same; no objection raised in either case from the present point of view); 1820, R. *v.* Castle Morton, 3 B. & Ald. 588 (to show the value of a tenement occupied by a pauper, the writing of lease was held to be necessary); 1825, Cotterill *v.* Hobby, 4 B. & C. 465 (case for injury to a reversioner's interest by cutting trees; the written lease required to be produced); 1827, R. *v.* Holy Trinity, 7 B. & C. 611 (to prove the occupation of a tenement, as involving the settlement of a pauper, and to prove the amount of rent paid, the rule was not applied; the fact of tenancy and the value of the rent were proved by cross-examination without producing the written lease); 1828, Strother *v.* Barr, 5 Bing. 136 (action for injury to the plaintiff's reversion; whether, to prove the fact of the reversionary interest, the written agreement of lease must be shown, left undetermined, Gaselee and Park, JJ., *contra*, Best, C. J., and Burrough, J., *pro;* all the preceding cases are examined); 1830, R. *v.* Merthyr Tidvil, 1 B. & Ad. 29 (amount of rental; lease required to be produced; distinguishing R. *v.* Holy Trinity, because there the amount was merely incidental as evidence of value, while the later law of settlement of paupers made the amount of agreed rental material); 1832, Doe *v.* Harvey, 1 Moo. & Sc. 374 (to prove the value of the premises, in an action for mesne profits, by showing the occupation by the defendant as tenant of P. and the amount of his rent, the rule was held

§ 1247. **Same: (9) Fact of Transfer of Realty, or (10) of Personalty.** (9) It would seem a hard rule that would forbid a witness to say "I bought a house" without producing the title-deed; and yet how otherwise are we to avoid the argument that, since transfers of title to land must be in writing, oral testimony to such a transfer is testimony to the contents of a document not produced? The truth seems to be that much depends on the emphasis to be given in the particular instance to the detailed elements of the transfer. If, for example, a witness is qualifying as an expert in land values by stating that he has bought and sold land, the emphasis is upon the net fact that he has acted as buyer and seller, and not at all on the terms of the transfer; but if he is justifying a trespass as landlord of the premises, the emphasis is upon the fact that a document exists naming him and describing the premises; production should be required in the latter case, but not in the former. The rulings therefore vary, as might be expected; but it may be noted that the negative result is reached in some Courts by invoking the rule (§ 1252, *post*) as to collateral matters.[1]

applicable; the fact of occupation as tenant might have been proved apart from the writing, but not the tenancy under P.).

United States: Ga. 1885, Central R. Co. *v.* Whitehead, 74 Ga. 441, 445, 447, 452 (action for personal injury on a road said to be leased by defendant; plaintiff allowed to prove that it was leased, without producing the writing; Hall, J., diss.); *Ind.* 1879, Hammon *v.* Sexton, 69 Ind. 37, 43 (fact of tenancy or occupancy provable by parol, in action by occupant against owner for taxes paid); *Mich.* 1870, Gilbert *v.* Kennedy, 22 Mich. 5, 18 (trespass by lessee; to prove tenancy, production of lease required); *Minn.* 1906, Minnesota Deb. Co. *v.* Johnson, 96 Minn. 91, 107 N. W. 740 (whether defendant claimed land under D., "Did you hold it under D.?" "Yes, I rented it from him", held proper without producing the lease; "the terms of the tenancy were not in issue"; lucid opinion by Elliott, J.); *Miss.* 1875, Storm *v.* Green, 51 Miss. 103, 106 (terms of a written lease; production required); *N. H.* 1855, Putnam *v.* Goodall, 31 N. H. 419, 423 (whether a factory was leased to a specific person; production required); *Va.* 1871, Taylor *v.* Peck, 21 Gratt. 11, 17 (unlawful detainer, brought by landlord; the defendant, to prove himself tenant in possession, offered the plaintiff's receipts for rent, without producing the lease; received, because "the terms of the tenancy or of the lease . . . was perfectly immaterial; if he held them at that time as tenant, no matter on what terms and conditions, he held them lawfully"; R. *v.* Holy Trinity followed).

Distinguish the question *which party has the burden* of showing the agreement to be in writing (*post*, § 2447).

§ 1247. [1] In the following list are included rulings upon other kinds of transfers (*e.g.* of slaves) required to be in writing: *Ala.* 1828, Cloud *v.* Patterson, 1 Stew. 394 (that a house and lot had been sold as the property of J. S.; production of deed required); 1896, Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443 (that land was sold by the sheriff as the plaintiff's; production required); *Ga.* 1859, Raines *v.* Perryman, 29 Ga. 529, 534 (that a slave was given to M.; deed required); 1876, Primrose *v.* Browing, 56 Ga. 369, 371 (that a conveyance was made to X; deed required); *Ill.* 1860, Snapp *v.* Pierce, 24 Ill. 156, 158 (that a deed was executed in satisfaction of a bond; production of bond required); *Ia.* 1851, Trimble *v.* Shaffer, 3 Greene Ia. 233 (that a deed was given, allowed without production); *Ky.* 1838, Nancy *v.* Snell, 6 Dana Ky. 148, 156 (sale of slave; bill of sale required); 1868, Calhoon *v.* Belden, 3 Bush 674, 676, *semble* (in proving lost deed, a deed, not an oral transfer, must be shown); *La.* 1847, Roebuck *v.* Curry, 2 La. An. 998 (that a slave had been emancipated; production of written act required); *Mass.* 1821, Tucker *v.* Welsh, 17 Mass. 160, 165 (assumpsit by the assignee of a policy; to disprove the existence of a consideration for a prior assignment, the fact of a mortgage was held orally provable, as a "collateral fact"); *Mich.* 1866, Thompson *v.* Richards, 14 Mich. 172, 183 (condition to give a deed: production required, in proving that a deed was given); 1869, Clemens *v.* Conrad, 19 Mich. 170, 173 (agreement to give deed; production not required, in testifying that a deed was given); 1873, Hatch *v.* Fowler, 28 Mich. 205, 210 (sale of land; production of contract required); 1891, Showman *v.* Lee, 86 Mich. 556, 563, 49 N. W. 578 (to whom a mortgage was given; production not required); *Minn.* 1913, Johnson *v.* Carlin, 121 Minn. 176, 141 N. W. 4 (lease of a farm: the

(10) The rule's application to the fact of a sale of *personality* depends upon the same considerations. It should be noted, however, that it is immaterial that the law does not require a writing for the sale of personalty, if in fact the sale was in writing.[2]

§ 1248. **Same**: (11) **Execution of a Document**; (12) **Sending or Publication of a Demand, Notice, etc.** (11) Where the *existence* or *execution of a document* is concerned, a good deal must depend on the emphasis in the particular instance. For example, to prove a pecuniary motive for murder, testimony that the defendant had seen the deceased receive a sum of money at the bank and give notes for it might be made without producing the notes; but, in an action for property transferred with intent to defraud creditors, the execution of other similar transfers to show intent could not be proved without producing or accounting for the documents. The rulings naturally are not harmonious; and again it is to be noted that the doctrine about "collateral" facts (*post*, § 1252) is often invoked to justify negative rulings.[1]

lease provided that "if the lessor sells said premises during the life of this lease etc."; held, that the fact of sale to H. could be evidenced without producing the deed to H.); *Miss.* 1839, Randolph *v.* Doss, 3 How. Miss. 205, 214 (that an administrator had sold land; production required); *Pa.* 1892, Gallagher *v.* Land Co., 149 Pa. 25, 24 Atl. 115 (that the witness had bought certain houses; production not required).

Compare also some cases under § 1249, *post*, and the New York cases under § 1256, *post*.

For the bearing of the *Opinion* rule, see *post*, § 1960.

[2] The cases are not harmonious: *Eng.* 1815, Davis *v.* Reynolds, 1 Stark. 115 (the plaintiff had bought a consignment of goods from the consignee, taking the indorsed bill of lading; his title allowed to be shown without the bill); *U. S. Cal.* 1863, Towdy *v.* Ellis, 22 Cal. 650, 659 (sale of goods in writing; production required); 1849, Thompson *v.* Mapp, 6 Ga. 260 (fact and time of a written sale of personalty; production not required); *Ky.* 1813, Luckett *v.* Anderson, Litt. Sel. C. 178 (assumpsit against one who sold a false banknote; production not required); 1818, Grimes *v.* Talbot, 1 A. K. Marsh. 205 (purchase of personalty; bill of sale required to be accounted for); 1826, Lamb *v.* Moberly, 3 T. B. Monr. 179 (assumpsit for the price of a note bought; the fact of purchase and promise proved without production); *Mich.* 1875, Sirrine *v.* Briggs, 31 Mich. 443, 446 (sale of stock of goods; production of writing not required, the terms not being material); *Or.* 1898, Price *v.* Wolfer, 33 Or. 15, 52 Pac. 759 (tracing chain of title to personalty by successive sales and deliveries; production of bill of sale, if any, in each case, required).

§ 1248. [1] ENGLAND: 1848, R. *v.* Duffy, 7 State Tr. N. s. 795, 938 (one who saw a document written, not allowed to name the author without producing the original); 1848, Sayer *v.* Glossop, 2 Exch. 409 (rule applies to proof of handwriting).

UNITED STATES: *Ala.* 1853, Dixon *v.* Barclay, 22 Ala. 370, 381 (signature of a note in payment of a debt; production not required; here, action for deceit in a sale); 1854, Snodgrass *v.* Branch Bank, 26 Ala. 161, 173 (that the witness had seen notes of S. in the bank's possession; production not required to prove "the fact of the existence of such notes"); 1876, Bell *v.* Denson, 56 Ala. 444, 448 (fact of execution of mortgage, as showing possession; production required); 1886, Hancock *v.* Kelly, 81 Ala. 368, 378, 2 So. 281 (that a written instrument "relating to her dower interest" was signed, admissible without production); *Conn.* 1828, Mather *v.* Goddard, 7 Conn. 304 ("I shipped, as per B. L."; production required); *Del.* 1819, De Pusey *v.* Du Pont, 1 Del. Ch. 77 ("The naked fact of the execution of a paper may certainly be proved, under circumstances, without the production of the paper"; here production required in proving the fact of indorsement of notes as involving mismanagement of a partnership); 1871, Plunkett *v.* Dillon, 4 Del. Ch. 198, 205 ("The execution of an agreement and the time, place, and circumstances of its being made, may for all purposes be proved by parol"); *Ga.* 1859, Holcombe *v.* State, 28 Ga. 66, 67 (the fact of writing a letter, admissible without production); *Ia.* 1870, St. Louis & C. R. R. Co. *v.* Eakins, 30 Ia. 279, 281 (to show performance of conditions of stock subscriptions, the fact of letting a contract, etc., proved without producing the writings); *Ky.* 1819, Dupey *v.* Ashby, 2 A. K. Marsh. 11 (existence of a written contract; rule applicable on the facts);

(12) The act of *delivering*, *sending*, or *publishing* a *document*, regarded as distinct from the terms of the document, may of course be proved without production; but, so far as such proof implies anything as to the document's terms and seeks to establish those terms by indirection, the rule is applicable and production necessary.[2]

§ 1249. **Same: (13) Sundry Dealings with Documents, — Conversion, Loss, Forgery, Larceny, Agency, Partnership, Corporation, Service of Writ, etc.** In an action of *trover* for the conversion of a document, the existence

Mich. 1889, Ranney *v.* Donovan, 78 Mich. 318, 325, 44 N. W. 276 (that the defendant asked him to sign a receipt of a certain tenor, that he refused, handed it back, etc.; production not required; "it was simply a part of the conversation"); 1891, Muskegon *v.* Lumber Co., 86 Mich. 625, 628, 49 N. W. 489 (whether he made a return of the tax-roll to the treasurer, allowed without production); *Mo.* 1830, Benton *v.* Craig, 2 Mo. 198 (who filed or signed a plea; production not required); *N. Y.* 1878, Bardin *v.* Stevenson, 75 N. Y. 164, 166 (a witness to handwriting who had seen the defendant sign his name was allowed to say what kind of instruments he had signed, as affecting the degree of attention which the witness might have given); *Oh.* 1833, Ellis *v.* Baldwin, 6 Oh. 15 (to prove the fact of issuance of a license, production not required); *Pa.* 1860, Shoenberger *v.* Hackman, 37 Pa. 87, 92 (action on a promise to pay heirs in consideration of their signing a release; "it was simply the act of signing the paper" that was to be proved; "it was therefore a collateral matter to the issue", and production of the release was not necessary); *Vt.* 1919, Wetmore & M. G. Co. *v.* Ryle, 93 Vt. 245, 107 Atl. 109 (notes said to have been cancelled in consideration of signing the note in action; rule held not applicable).

Compare the rules as to *order of proof* of execution, loss, and contents, *ante*, § 1189.

[2] ENGLAND: 1808, Smith *v.* Young, 1 Camp. 439 (to prove the fact of a written demand or notice, production is necessary); 1813, Doe *v.* Durnford, 2 M. & S. 61 (the fact of giving written notice to quit, held to require the production of the writing); UNITED STATES: *Georgia:* 1847, Bond *v.* Central Bank, 2 Ga. 92, 99, 107 (contents of notice in a newspaper; production required); 1849, Schley *v.* Lyon, 6 Ga. 530, 538 (same); *Idaho:* 1916, Rabb *v.* North American Acc. Ins. Co., 28 Ida. 321, 154 Pac. 493 (that proofs of loss on an accident policy were sent, allowed); *Illinois:* 1851, Pierce *v.* Carleton, 12 Ill. 358, 364 (that a paper was published in the State by H. & S., allowed by parol); 1898, Lingle *v.* Chicago, 172 Ill. 110, 50 N. E. 192 (fact of publication of notice; provable without production); 1899, McChesney *v.* Cook Co. Collector, 178 Ill. 542, 53 N. E. 356 (fact of newspaper publication of notice; production not required); *Indiana:* 1855, Unthank *v.* Turnpike Co., 6 Ind. 125, 127 (oath of publisher with one copy, sufficient to show publication on three occasions); *Iowa:* 1866, Des Moines *v.* Casady, 21 Ia. 570, 572 (that an ordinance was published in a newspaper, and the number of times; provable by oral testimony, without producing the printed document; its contents being otherwise in evidence); 1869, Burlington G. Co. *v.* Greene, 28 Ia. 289 (fact of a notice given, production not required); 1886, Bish *v.* Ins. Co., 69 Ia. 184, 186, 28 N. W. 553 (that a proof of loss blank had been filled out and sent; rule not applicable); 1890, Hagan *v.* Ins. Co., 81 Ia. 321, 332, 46 N. W. 1114 (proof of loss; preparation and sending, provable without production); *Louisiana:* 1835, Miller *v.* Webb, 8 La. 516 (fact of publication of notice; production not required); 1837, Baker *v.* Towles, 11 La. 432, 438, *semble* (same); *Maryland:* 1867, Beall *v.* Poole, 27 Md. 645, 652 (the fact that complaints had been made by letter; production required); *Nebraska:* 1886, Ponca *v.* Crawford, 18 Nebr. 551, 553, 26 N. W. 365, 23 Nebr. 662, 668, 37 N. W. 609 (whether a petition was presented; production not required); *New Mexico:* 1915, State *v.* McKnight, 21 N. M. 14, 153 Pac. 76 (fact of sending a letter; original not required); *New York:* 1803, Peyton *v.* Hallett, 1 Cai. 363, 365, 380 (notice of abandonment of a vessel given by letter delivered; *semble*, the fact of notice provable without production; case obscure); *Vermont:* 1863, Rutland & B. R. Co. *v.* Thrall, 35 Vt. 536, 546 (notice in newspaper as required by law; production of a copy of the newspaper required; "in cases where successive notices are required, we should incline to think that the production of one paper to show the contents, and proof by parole that there were successive publications of the same notice, would be enough"); *Virginia:* 1817, Moore *v.* Gilliam, 5 Munf. 346, 347 (editor's testimony to fact of publication of advertisement, received without producing it); *Wisconsin:* 1874, Sexton *v.* Appleyard, 34 Wis. 235, 239 (fact of publication of notice; oral testimony sufficient).

For the use of a *publisher's affidavit* as an exception to the Hearsay rule, see *post*, § 1710; for its use as preferred to other testimony, see *post*, § 1339.

and the taking of a document of a certain sort may be regarded as facts distinct from its detailed terms, and thus the rule of production is not applicable:[1]

1802, *Bucher* v. *Jarratt*, 3 B. & P. 145. HEATH, J.: "There is a material difference between an action of assumpsit on a promise contained in an instrument in writing and an action of trover for the instrument itself. In the former the promise must be proved as laid, and consequently can be best proved by inspection of the instrument. In the latter the gist of the action is the tort." ROOKE, J.: "Where the written instrument is to be used as a medium of proof by which a claim to a demand arising out of the instrument is to be supported, there [notice is required . . .] before evidence of its contents can be received. But this being an action of trover for the certificate of registry itself, I can see no sound reason why evidence should not be admitted of the existence of the certificate, in the same manner as evidence of a picture or other specific thing is constantly admitted where it is sought to be recovered in the same form of action."

The same reasoning applies in other cases where the fact to be proved is merely some dealing with the document as a material object, for example, by *larceny*, embezzlement, or loss;[2] but otherwise for forgery or counterfeiting.[3]

An *agency* may have been constituted by a written authority; but the repeated acting upon it, being equally a granting of authority, may be proved without production.[4] By the same reasoning, the fact that a *partnership*

Compare the other cases on *newspaper copies*, *ante*, § 1234.

§ 1249. [1] 1794, Cowan *v.* Abrahams, 1 Esp. 50 (trover for a bill of exchange; the declaration described it; Lord Kenyon, C. J., held the rule applicable, and the King's Bench concurred; practically overruled by the above case); 1813, Scott *v.* Jones, 4 Taunt. 865 (Gibbs, J.: "It used to be the practice in actions of trover for bills of exchange to give notice to produce the bill; it has very lately been held in the Court of King's Bench that such notice is unnecessary"; here, trover for an agreement for a lease); 1830, Whitehead *v.* Scott, 1 Moo. & R. 2 (trover for a deed; production not required). The same result might be reached by treating the rule as applicable, but implying from the pleadings a notice to produce (*ante*, § 1205). The practical difference between the former and the latter reasonings would be that, if the document could not be produced for want of a stamp, by the former doctrine this would be immaterial, by the latter it would prevent proof by copy; but, further, that by the latter it would be necessary to show possession by the defendant.

[2] 1802, Anon., cited in Bucher *v.* Jarratt, 3 B. & P. 145 (indictment for stealing a written instrument; notice to the defendant to produce, "certainly not the practice", and intimated to have been held unnecessary); 1898, First Nat'l Bank of B. *v.* First Nat'l Bank of N., 116 Ala. 520, 22 So. 976 (action for loss of a package of transfers of land-certificates deposited, the claim of damages being for expense incurred in procuring substitutes; rule held not to apply to the transfers).

[3] 1880, Fox *v.* People, 95 Ill. 71, 75 (forgery; rule applies to proof of former utterings); *Ia.* 1885, State *v.* Breckenridge, 67 Ia. 204, 25 N. W. 130 (other forged notes used to show intent; holding absolutely that production is necessary); 1886, State *v.* Saunders, 68 Ia. 371, 27 N. W. 455 (similar; holding that the document must be either produced or accounted for); *N. Y.* 1823, People *v.* Lagrille, 1 Wheeler Cr. C. 412 (uttering counterfeit bills; other counterfeits must be accounted for by proof of destruction or of defendant's refusal on notice); *Oh.* 1847, Reed *v.* State, 15 Oh. 217, *semble* (other counterfeit bills should be produced or accounted for); *Wis.* 1865, State *v.* Cole, 19 Wis. 129, 134 (uttering counterfeit bill; to prove the uttering of other counterfeits as evidence of guilty knowledge, the bills must be produced or else accounted for by showing defendant's refusal to produce on notice or prosecution's inability to obtain them otherwise).

Compare the cases cited *ante*, § 1205 (notice to produce), and *ante*, § 318 (evidencing intent by other forgeries).

[4] 1794, Neal *v.* Erving, 1 Esp. 61 (an agency proved by habitual action, without producing the instrument); 1812, Spencer *v.* Billing, 3 Camp. 310 (whether the plaintiff had habitually accepted bills addressed to him as partner; oral evidence allowed; otherwise, if the mode of dealing had varied, which would then involve the proof of "an individual written instrument"); 1814, Haughton *v.* Ewbank, 4 Camp. 88 (to prove an agency, the defendant's habit of paying upon such documents signed by the agent was proved orally, though the authority was in writing).

Compare the effect of the *Opinion rule* (*post*, § 1960).

or a *corporation* exists may be proved without producing the articles of partnership or the corporate charter.[5]

In a large number of other instances, the result seems to depend on the present principle, though the precise grounds and the classification of the opinions are open to difference of interpretation.[6] It may be noted that where the

[1] Here, however, the principle in a given case may perhaps really be the one referred to *ante*, § 1242, par. 3, *i.e.* that it is the *duty of the opponent to prove* that written articles of partnership exist; or the principle may be that of § 1255, *post*, that the articles may be proved by *oral admissions* of the opponent; or it may be that the partnership or corporate existence is a "*collateral*" fact, under § 1252, *post*. The opinions are seldom clear as to the precise principle invoked: *Cal.* St. 1907, p. 984, Mar. 23, § 6 (illegal trusts; in prosecutions, the trust may be proved "without proving or producing any articles of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all"); *Conn.* Gen. St. 1918, § 6636 (stealing a bank bill; act of incorporation need not be proved); *Fla.* Rev. G. S. 1919, § 5725 (trusts and combinations; production of "article of agreement or any written instrument on which it may have been based", not necessary); *Ida.* 1915, First National Bank *v.* Walker, 27 Ida. 199, 148 Pac. 46 (corporate existence of a national bank); *Ia.* 1871, Jones *v.* Hopkins, 32 Ia. 503, 506 (that a corporation was organized; rule applicable); *Mo.* 1875, Price *v.* Hunt, 59 Mo. 258, 261 (production not always required; but here required, the issue being whether a contract was one of partnership); *Oh.* Gen. Code Ann. 1921, § 6399 (illegal trusts, etc., may be proved "without producing the written instrument on which it may have been based"); *Pa.* 1810, Widdifield *v.* Widdifield, 2 Binn. 245, 249 (though by one witness the existence of a contract of partnership was proved, another was allowed to testify to the existence of a partnership, because they might have "afterwards formed a general partnership by parol"); *Tex.* Rev. P. C. 1911, § 940 (forgery of a bank bill; "proof of the existence of such bank by parol testimony" suffices); *Utah:* Comp. L. 1917, § 4495 (trust or combination may be evidenced without producing "any article of agreement or any written instrument on which it may have been based"); *Vt.* 1852, Cutler *v.* Thomas, 25 Vt. 73, 79 (suit by creditor against partner; articles need not be produced by plaintiff); 1855, Hastings *v.* Hopkinson, 28 Vt. 108, 117 (plaintiff charging a defendant as partner probably may prove the partnership as a fact independent of the articles; but a defendant defending by alleging partnership is invoking the articles and must produce them).

[2] *Eng.* 1807, Horn *v.* Noel, 1 Camp. 61 (since a Jewish ceremony of marriage was merely the ratification of a previously written contract, to prove the fact of marriage, the contract was required); *U. S. Fed.* 1822, Hutchinson *v.* Peyton, 2 Cr. C. C. 365 (expenses in procuring insurance; production of policy required); *Conn.* 1795, Morgan *v.* Minor, 2 Root 220 (that a certain prize in a lottery was drawn by his number; rule applicable); 1837, Dyer *v.* Smith, 12 Conn. 384, 391 (whether a person had a certain note in his possession; production not required); *Ga.* 1885, Harris *v.* Collins, 75 Ga. 97, 108 (that deeds of a certain description were deposited, given up again, etc., allowed, without production); 1913, Matthews & Son *v.* Richards, 13 Ga. App. 412, 79 S. E. 227 (that a later note was given in renewal of a prior one; production of the later note required); *Ill.* 1858, Rawson *v.* Curtiss, 19 Ill. 456, 473 (that he saw a "letter of credit", excluded; production necessary); 1905, Elgin, J. & E. R. Co. *v.* Thomas, 215 Ill. 158, 74 N. E. 109 (death of a person riding on cars; the fact that he had in his satchel a ticket between two named points, admitted, without producing the ticket); *Ind.* 1875, Miller *v.* Road Co., 52 Ind. 51, 60 (that steps were taken to organize a corporation and that articles were filed; production not required); *Ky.* 1811, M'Ilvoy *v.* Kennedy, 2 Bibb 381 (that a claim was set up under a bill of sale; production not required); 1897, Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772 (fact of receipt of a letter: rule not applied); *Mass.* 1853, Hunt *v.* Roylance, 11 Cush. 117 (mode of keeping accounts, etc; production of books required); *Mich.* 1886, Simpson *v.* Waldby, 63 Mich. 439, 444, 30 N. W. 199 (that drafts were protested, not paid, and returned; production required); *Minn.* 1894, Hobe *v.* Swift, 58 Minn. 84, 88, 59 N. W. 831 (measurement of printer's ems in an advertisement; production required); *N. C.* 1892, Shelton *v.* Reynolds, 111 N. C. 525, 16 S. E. 272 (fact of showing a paper, but not the contents; production not needed); *S. C.* 1803, Hurt *v.* Davis, 1 Brev. 304 (assumpsit for services performed in pursuance of a written agreement; production required); 1812, Ford *v.* Whitaker, 3 Brev. 244 (trespass *q. c. f.*; evidence that the trespassing person acted under written orders from the defendant; production required); *Tenn.* 1839, Enloe *v.* Hall, 1 Humph. 303, 310 (services in printing and publishing advertisements in a newspaper; production of the paper not required); 1873, Lacy *v.* Sugarman, 12 Heisk. 354, 363 (whether an

fact to be proved is some dealing with a document which goes to form a *judicial record* — as, the serving of a writ, the time of trial begun — the Parol Evidence rule (*post*, § 2450) may forbid the parol transaction to be shown at all, because the act in legal significance is constituted solely by the return on the writ or some other appropriate part of the record.[7]

§ 1250. **Same**: (14) **Miscellaneous Instances.** For a great many instances in which the present question arises it is unprofitable to pursue analysis more minutely or to seek a solution in any of the preceding generalizations.[1]

B. EXCEPTIONS TO THE RULE

§ 1252. (1) "**Collateral**" **Facts**; **History.** It was clearly enough settled, in the era of the rule of profert (*ante*, § 1177), that profert need not be made of a document whose contents were but an inducement to the claim alleged or, as it was commonly said, of a document which was "mere collateral to the action"; subject only to the qualification that profert of such a deed was nevertheless to be made if the deed was requisite 'ex institutione legis':

act was done within the lines of military occupation; the fact of actual occupation provable by parol, but to prove the limits as defined by military written order, the order must be produced); *Vt.* 1856, Houghton *v.* Paine, 29 Vt. 57 (services in "gathering data and writing a memoir"; production of the memoranda, etc., made by the plaintiff, not required); 1892, Johnson *v.* Marble Co., 64 Vt. 337, 353, 25 Atl. 441 (that the proceeds of a check were received by A and spent in a certain way; production unnecessary); *Va.* 1788, Dawson *v.* Graves, 4 Call 127 (smuggling; testimony by W. that he had received 71 hogsheads though he had taken out a permit for 50 only; production of the permit required).

[7] *Eng.* 1807, Thomas *v.* Ansley, 6 Esp. 80 (to prove the time of notice of a trial, the notice was required; and to prove the date of the trial at Nisi Prius, the record was required); 1837, R. *v.* Murphy, 8 C. & P. 297, 305 (the fact that a distraint was made under a warrant; rule not applicable); *Can.* 1851, Thorne *v.* Mason, 8 U. C. Q. B. 236 (malicious arrest; the writ required to be produced); *U. S. Ill.* 1886, Foster *v.* Magill, 119 Ill. 75, 82, 8 N. E. 771 (evidence of an act done to take possession of property does not require production of the record; but not so of a suit brought); *Ind.* 1876, Stanley *v.* Sutherland, 54 Ind. 339, 353 (that a farm had been sold on execution for a certain debt; allowed, the validity of the sale not being disputed); *Ky.* 1905, Goslin *v.* Com., 121 Ky. 698, 90 S. W. 223 (perjury; that a prosecution was pending; production required); *Mo.* 1856, Wynne *v.* Auburn, 23 Mo. 30 (that a mare was taken under a writ; production required); *Vt.* 1892, Bates *v.* Sabin, 64 Vt. 511, 521, 24 Atl. 1013 (services rendered in serving process; production unnecessary); 1905, State *v.* Costa, 78 Vt. 198, 62 Atl. 38 (illegal sale of liquors; a witness to search and finding under a warrant, not required to produce the warrant).

Compare the cases *ante* under §§ 1241, note 2, and 1244, note 3.

§ **1250.** [1] *Ala.* 1845, Graham *v.* Lockhart, 8 Ala. 9, 25 (fact of indebtedness as consideration for a deed "may as well be proved orally as by the production of the writing"); *Ala.* Lavretta *v.* Holcomb, 98 Ala. 503, 510, [illegible] 789 (that a person was president of a [illegible] minutes not required); *Cal.* 1858, Poole *v.* Gerrard, 9 Cal. 593 (to rebut evidence of marriage by habit and repute, testimony involving the terms of the contract were not received without the writing); *Mo.* 1830, Foster *v.* Wallace, 2 Mo. 231 (proving a cosigner of a bond to have signed merely as surety for the other; testimony to the fact of a debt allowable, without producing the instrument); *N. Y.* 1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (testimony that certain building work was extra; production of plans and contracts required); *Pa.* 1835, Ranl [illegible] Shewey, 4 Watts 218 (that an apparent surety on a bond was by another bond really co-obligor; production of the second bond required); *P. R.* 1918, People *v.* Mercado, 26 P. R. 107, 119 (conspiracy to defraud); *S. C.* 1892, Price *v.* R. Co., 38 S. C. 199, 204, 17 S. E. 732 (employee's action for death; written regulation of the defendant must be produced, in proving a regulation); *Tenn.* 1870, Smith *v.* Large, 1 Heisk. 5, 7 (debt on account for leather delivered; in showing the existence of a bond to deliver it, the bond must be produced).

For the case of an *appointment to office*, see *ante*, § 1228.

1606, Lord COKE, in *Bellamy's Case*, 6 Co. Rep. 38 (trespass de bonis asportatis; the defendant pleaded ownership of the land; the plaintiff pleaded a lease assigned to him; the defendant pleaded a condition not to assign without the lessor's license; the plaintiff pleaded a license by deed, without making profert; then the defendant demurred): "the reason and cause that deeds are shewed to the Court is because it belongs to the judges to adjudge of the sufficiency or insufficiency of them; yet it was resolved that the plaintiff need not shew it in this case for three reasons: 1. Because the plaintiff doth not claim by the said deed of licence any interest in the house, but the licence is meer collateral to the interest of it and pleaded only to excuse the forfeiture of the lease, and is not like a release or confirmat, for they transfer their right; 2. A good difference was taken and agreed when a deed is requisite 'ex institutionis legis' and when 'ex provisione hominis'; for when it is requisite 'ex institutione legis', there it ought to be shewed in court, although it concerns a collateral thing and transfers or conveys nothing." [1]

By some process of thought not clearly traceable, this limitation to the doctrine of profert was in England early repudiated as a limitation to the rule requiring production in evidence:

1750, L. C. HARDWICKE, in *Cole* v. *Gibson*, 1 Ves. Sr. 503, 505 (bill to set aside an annuity; a bond which had been a part of the transaction was required to be produced): "A distinction is endeavored between a bill to set aside the bond or other instrument, and a case wherein it is made use of only by collateral evidence; but there is no such distinction in point of evidence; the rule being the same whether it comes in by way of collateral evidence, or the very deed which the bill is brought to impeach." [2]

But in the United States the exception has survived, usually more or less below the surface, and potential only in occasional instances, though in some jurisdictions fully recognized and constantly enforced.

§ 1253. **Same: Principle.** Such a limitation most assuredly has a justification. In the great majority of instances where the terms of a document are not in actual dispute, it is inconvenient and pedantic to insist on the production of the instrument itself and to forbid all testimonial allusion, however casual, to its terms:

§ 1252. [1] *Accord:* 1555, Throckmerton *v.* Tracy, Plowd. 148 (profert not required of one not privy to the deed); 1602, Dagg *v.* Penkevon, Cro. Jac. 70 (debt for tithes, by a lessee for years from a lessee for life from the queen by letters patent; profert of the latter not required, because "the title shewn in the declaration is but a conveyance to the action"); 1636, Stockman *v.* Hampton, Cro. Car. 441 (justification for trespass under a license from one having a remainder after an estate tail, the plea traversing the opponent's claim of estate in fee for his ancestor: profert not necessary, "because it is but an inducement to the traverse and is not answerable"); *ante* 1767, Buller, Nisi Prius, 249 ("When a man shews a good title in himself, everything collateral to that title shall be intended, whether it be shewn or not"); 1800, Banfill *v.* Leigh, 8 T. R. 571 (plaintiff sued as assignee of debts under power of attorney, by which he had obtained an award under arbitration which defendant had promised to pay; in an action on the award, the plaintiff need not make profert of the assignment; Kenyon, L. C. J.: "It is not universally true that a profert must be made when the party pleading a deed derives title under it; . . . it is never necessary to make a profert of a deed which is pleaded only by way of inducement; and the deed in question is only inducement to the action").

[2] Yet this limitation is mentioned in the treatises of the 1800s: 1829, Phillipps, Evidence, 7th ed., I, 303 ("The general rule that the best evidence is to be produced which the nature of the thing admits to be understood as applying to deeds and agreements which form part of the issue or which are material to the issue"); 1842, Starkie, Evidence, 3d ed., I, 202; 1870, Best, Evidence, 5th ed., § 479.

1885, MULKEY, J., in *Massey* v. *Bank*, 113 Ill. 334, 338: "[The general principle] has no application to the facts above stated. We fully recognize the rule that whenever the existence of a deed or other writing is directly involved in a judicial proceeding, whether as proof of the precise question in issue or of some subordinate matter that tends to establish the ultimate fact or facts upon which the case turns, such deed or other writing itself must be produced, or its absence accounted for, before secondary evidence of its contents is admissible. Yet while this rule is fully conceded, it is also true that a witness, when testifying, may, for the purpose of making his statements intelligible, and giving coherence to such of them as are unquestionably admissible in evidence, properly speak of the execution of deeds, the giving of receipts, the writing of a letter, and the like, without producing the instrument or writing referred to. To hold otherwise would certainly be productive of great inconvenience, and in some cases would defeat the ends of justice. References to written instruments by a witness for the purpose stated are to be regarded as but mere inducement to the more material parts of his testimony. The present case well illustrates the principle in question. As remotely bearing upon the issue to be tried, the plaintiff sought to show the appellant had avowed a purpose not to pay the note [whose execution was in issue], — that he had said he was going to put his property out of his hands in order to defeat the claim. Now this, under the issue, is the important part of the answer to the question ['whether the note was a renewal note'], if indeed any of it can be so regarded. All, therefore, that was said about the deeding of the land, the giving of the mortgage, and getting the loan of $2000, we regard as mere matter of inducement to the more important part of the testimony."

The term "collateral", however, as a definition of the limits of this exception, is an unfortunate and elusive word, which is almost impossible of consistent application in practice. Yet a single satisfactory term or test is difficult to fix upon. If we say that production is not necessary where the terms of the document are not 'bona fide' disputed by the opponent we may go too far; for the opponent may not be prepared to dispute its terms and yet he may fairly desire the opportunity to see the document and not be obliged to accept the proponent's testimony to its contents. If, however, we recognize these possibilities, and leave to the trial Court to determine whether in the case in hand any useful purpose would be served by producing the original, even where its terms are not actually in dispute, we should be giving the needful flexibility to the rule. And such is the form already proposed (*ante*, § 1191).

In any case the misfortune of inconsistent precedents and the disadvantage of an obscure definition can be obviated by applying strictly that salutary doctrine of judicial discretion. Let the trial judge determine absolutely, and without review, the application of the principle to each case. Whether a document is "collateral" is practically a question whether it is important enough under all the circumstances to need production; and the judge presiding over the trial is fittest to determine this question finally (*ante*, § 16).

It should here be noted that the present exception has sometimes been confused with the *Integration* or *Parol Evidence rule* in a peculiar way. It is a part of that rule that an oral transaction, though reduced to writing, can be availed of where other parties are concerned, and the oral transaction is as between them the material one (*post*, § 2446). This does not mean that the writing's contents can be proved by oral testimony, but that the terms of

the oral transaction can be shown. Having erroneously in mind this different rule, the Court of at least one jurisdiction has phrased the present exception so as to allow the terms of such a writing to be proved, between other than the parties, orally and without production.[1] This is purely a local misunderstanding; it has never elsewhere been doubted that the present applies to all writings, whether or not the parties in the case were the parties to the document.[2]

§ 1254. **Same: Specific Instances.** There is naturally little to be found by way of further generalization in collating the precedents.[1] Each case has depended much on its own circumstances.

§ **1253.** [1] 1873, Pollock *v.* Wilcox, 68 N. C. 46, 49 (action to set aside a deed in fraud of creditors; the defendant was allowed to show orally the contents of notes surrendered and notes made by him as the price of the land; the rule not being applicable except between "the parties to a contract"); 1895, Carden *v.* McConnell, 116 N. C. 875, 21 S. E. 923 (action for slander of title; plaintiff's proof of a deed by him to I., allowed to be by parol, on the ground that the rule did not apply as between strangers to the deed); 1896, Archer *v.* Hooper, 119 N. C. 281, 26 S. E. 143 (title to personalty; plaintiff claimed under a bill of sale from B.; the bill not required to be produced).

[2] 1881, Smith *v.* Cox, 9 Or. 327, 331 (production required of a void deed between third persons).

§ **1254.** [1] For the reason stated at the close of the text above, many precedents have been placed *ante*, §§ 1242–1250; while the precedents below include only those rulings which more or less definitely mean to recognize a real exception of the present sort; the precedents in those sections should therefore also be consulted on all of the states of facts dealt with in the citations below; compare also a few cases cited *post*, § 2143 (authentication of ancient copies of deeds):

Alabama: 1831, Sommerville *v.* Stephenson, 3 Stew. 271, 278, *semble* (exception recognized); 1847, Brown *v.* Isbell, 11 Ala. 1009, 1020, *semble* (action on agreement to pay deficiency of amount of a bill if not paid out of certain funds; bill's production not required); 1876, Lewis *v.* Hudmon, 56 Ala. 186 (false representations as defence to action on premium note for policy; production of application required, as not collateral); 1877, East *v.* Pace, 57 Ala. 521, 524 (conversion of a mule; process under which it was taken, not required to be produced, being an "incidental or collateral matter"); 1884, Winslow *v.* State, 76 Ala. 42, 48 (exception recognized); 1885, Jones *v.* Call, 93 Ala. 170, 179 (rule not applicable to "mere notices"); 1892, Rodgers *v.* Crook, 97 Ala. 722, 725, 12 So. 108 (exception recognized); 1897, Torrey *v.* Burney, 113 Ala. 496, 21 So. 348 (to show the reason for ill-feeling, evidence was offered that the person had read a newspaper clipping that would cause it; the clipping required to be produced); 1898, Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1 (to show notice, rule not applicable); 1901, Griffin *v.* State, 129 Ala. 92, 29 So. 783 (assault on a person assisting a constable acting under a writ; writ not required to be produced, being collateral, and its contents not being in issue); 1901, Zimmerman *v.* State, — Ala. —, 30 So. 18 (similar); 1901, Costello *v.* State, 130 Ala. 143, 30 So. 376 (production not required of a written agreement which showed a witness' interest; compare § 1258, *post*); 1903, Webb *v.* State, 138 Ala. 53, 34 So. 1011 (rule not applied to a memorandum handed to witness by defendant); 1904, Garrison *v.* Glass, 139 Ala. 512, 36 So. 725 (contract for land; his ownership of adjoining land, "being a collateral or incidental matter", allowed to be shown by parol); 1905, Woodall *v.* State, 145 Ala. 662, 39 So. 718 (charge of desertion of family; questions as to the affidavit of complaint and the voter's registration, held collateral); 1905, Franklin *v.* State, 145 Ala. 669, 39 So. 979 (same, for notice of apprehension and arrest, in a charge of homicide); 1909, Mobile J. & K. C. R. Co. *v.* Hawkins, 163 Ala. 565, 51 So. 37 (letter); 1917, Woodward Iron Co. *v.* Collins, 200 Ala. 553, 76 So. 1911 (battery; letter only in issue incidentally, proved by copy); 1919, Empire Securities Co. *v.* Webb, 202 Ala. 549, 81 So. 51 (commissions as realty broker; that one of the parties to the exchange "made a deed", allowed, without producing or accounting for the deed).

Arkansas: 1848, Hammond *v.* Freeman, 9 Ark. 62, 67 (action against maker by indorsee for money paid on note to subsequent indorsee; in proving the intermediate indorsement to plaintiff, production required as not collateral); 1900, St. Louis & S. F. R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971 (expulsion by brakeman; placard on car not required to be produced, because "merely incidental");

California: 1887, Marriner *v.* Dennison, 78 Cal. 202, 213, 20 Pac. 386 (action by promisee

The present doctrine has been invoked in deciding many of the cases falling under another aspect of the general principle (*ante*, §§ 1228, 1242–1250). For example, in proving that a defendant paid money upon a note, the payment of the money is an act separate from and not involving the terms of the document, so that to prove the payment is not to prove the document's

under contract to sell land, the promisor having persuaded him to accept other lands by representing that he had a prior contract to sell to S.; testimony of S. offered to show that his contract was in truth subsequent; production of it not required); 1905, Wooldridge v. State, 49 Fla. 137, 38 So. 3 (signing of certain warrants);
Illinois: 1885, Massey v. Bank, 113 Ill. 334, 337 (whether a note in issue was a renewal note: incidental references to prior deed, mortgage, etc., allowed without production; see quotation *supra*);
Indiana: 1890, Coonrod v. Madden, 126 Ind. 197, 25 N. E. 1102 (to prove a plea of payment, in an action on a note, the defendant produced a check said to have been given in payment; the plaintiff then offered to testify that it was another note that had been paid by this check, and to give the date, amount, etc., of the other note, to identify it with the check; the rule was not applied to the other note); 1896, Lumbert v. Woodard, 144 Ind. 335, 43 N. E. 302, *semble* (a lease bearing on the case in an undisclosed way; rule not applicable);
Louisiana: 1915, Chapin v. Freeman, 138 La. 423, 70 So. 421 (tax election; bond for an injunction, held collateral);
Maine: 1904, State v. Mackinnon, 99 Me. 166, 58 Atl. 1028 (keeping a liquor nuisance; the telephone contract for the building, held a collateral document);
Massachusetts: 1784, Com. v. Fairfield, Dane's Abr., c. 84, art. 2, § 3 (that a witness owned land, as indicating his standing; provable by parol); 1898, Smith v. Bank, 171 Mass. 178, 50 N. E. 545 (covenant against incumbrances; report of engineer leading to sewer assessment, held collateral);
Michigan: 1864, Angell v. Rosenbury, 12 Mich. 241, 258 (contents of a deed; rule applies equally to collateral issues);
New Jersey: 1861, Gilbert v. Duncan, 29 N. J. L. 133, 139 (whether this note or another was agreed to be given up on receiving a third one; production of the different one not required, because the question was collateral, because "its contents are not material to the rights of the parties in the action", nor does the proponent "seek to avail himself of its contents as proof of any fact stated in it or of any obligation created or discharged by it"); 1896, New Jersey Zinc & I. Co. v. L. Z. & I. Co., 59 Mich. 189, 35 Atl. 915 (a contract recited by corporation minutes, the corporate action alone being material; rule not applicable);
New Mexico: 1918, State v. Goodrich, 24 N. M. 660, 176 Pac. 813 (assault in a dispute over land title; title shown by parol, the matter being collateral);
New York: 1813, Southwick v. Stevens, 10 John. 443, 446 (that a defendant was State printer and president of a bank; provable without production in an action for libel, as "collateral matter"; "it is every day's practice to give parol proof in such cases");
North Carolina: 1884, State v. Credle, 91 N. C. 640, 646 (notice posted warning against buying R.'s cattle, with the killing of which the defendant was charged; production not required); 1887, State v. Wilkerson, 98 N. C. 696, 699, 3 S. E. 683 (false pretences in obtaining an order for money for an alleged pauper; production of the order not required, the matter being collateral); 1893, McMillan v. Baxley, 112 N. C. 578, 586, 16 S. E. 845 (notice of sale; rule not applicable);
South Carolina: 1831, Lowry v. Pinson, 2 Bail. 324, 328 (to show fraud by other voluntary conveyances at the same time, the latter, being collateral, need not be produced); 1845, Gist v. McJunkin, 2 Rich. 154 (to show fraud in a sale of land, evidence may be given of a prior deed, as a collateral circumstance, without producing it); 1898, Hampton v. Ray, 52 S. C. 74, 29 S. E. 537 (letter-envelope held collateral, on the facts); 1901, Elrod v. Cochran, 59 S. C. 467, 38 S. E. 122 (resulting trust; production of the contract on which the money was paid, not required);
Tennessee: 1809, Stewart v. Massengale, 1 Overt. 479 ("When records, or evidence of a higher nature, are referred to incidentally, which have no effect upon or connection with the point in dispute", it is not necessary to produce such testimony of "higher nature"; here, "what was said at a trial" was testified to orally in sci. fac. against bail);
Vermont: 1797, Graham v. Gordon, D. Chip. 115 (action on promise to pay, in consideration of forbearance to sue on covenant of title broken by an ejectment; record of ejectment held not collateral, and required to be produced);
Washington: 1920, Proctor v. Appleby, 110 Wash. 403, 188 Pac. 481 (action for shares of stock in an amusement-concession corporation at Camp Lewis; voluminous documents showing title to the land occupied by the Camp, held not required to be produced, being "only collaterally involved");
West Virginia: 1908, State v. Clark, 64 W. Va. 625, 63 S. E. 402 (murder of an officer; oral testimony to his being constable, allowed).

contents, and therefore the rule of production does not apply; nevertheless many Courts express this by saying that the document is "collateral" and that hence the exception to the rule comes into play. Most of the cases in which the term "collateral" is invoked can be sufficiently explained by that principle.

§ 1255. (2) **Party's Admission of Contents; Principle.** The proposition that production should be dispensed with where the opponent has already admitted the contents of a document to be as alleged, is a plausible one, and its denial seems at first sight a mere insistence on an unnecessary formality. The doctrine that production is in such a case exceptionally dispensed with owes its best defence and its usual name to the following opinion of Baron Parke:

1840, PARKE, B., in *Slatterie* v. *Pooley*, 6 M. & W. 664: "If such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable. The reason why such parol statements are admissible, . . . is that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question."

But there is much to be said against the recognition of such an exception; and the sum of these objections is found in the following passages:

1845, PENNEFATHER, C. J., in *Lawless* v. *Queale*, 8 Ir. L. R. 382, 385: "I cannot subscribe to what was said by Parke, B., in that case. . . . The doctrine there laid down is a most dangerous proposition. By it a man might be deprived of an estate of £10,000 per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, had mortgaged or otherwise incumbered it; and thus, by this facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty. It is said, it is evidence against the person himself who made this admission, and that there is no danger of untruth in what a man admits against himself. Supposing the admission to be proved, is there no danger of mistake or misconception of the terms of a written instrument? It may be long and difficult; one part or clause may explain or qualify another; an unprofessional or ignorant man may be led to believe it may be so-and-so, whereas the real and true meaning may be the very reverse or something very different. But, produce the deed or writing, 'litera scripta manet.' On which side is the security, and why depart from the rule that, if you want to give evidence of the contents of a writing, the writing itself must be produced? Is there no danger of untruth or misrepresentation, when used against the party making the admission? That is the ground put by Parke, B., and in which I cannot agree, when I know by experience how easy it is to fabricate admissions, and how impossible to come prepared to detect the falsehood. Why are writings prepared at all but to prevent mistakes and misrepresentations? And why, having taken that precaution, with such writing at hand and capable of being produced, is the same to be laid aside and inferior and less satisfactory evidence resorted to?"

1850, MAULE, J., in *Boulter* v. *Peplow*, 9 C. B. 493, 501: "It [*Slatterie* v. *Pooley*] is certainly not very satisfactory in its reasons. . . . What the party himself says is not before the jury; but only the witness' representation of what he says."

Of the two arguments here offered in opposition, the first amounts to little. The possibility of error in an opponent's own understanding of the terms of a document is not great; and, so far as it exists, it can do little harm, because the opponent's extrajudicial admission is merely some evidence, and not conclusive (*ante*, § 1058); he may still prove the contents as he now knows them or may have the document produced. But the second argument — that it is easy to fabricate alleged oral admissions — is the real and serious objection to the doctrine. It may be conceded that the opponent's admission of contents is satisfactory evidence, *if* he made such an admission. But did he make it? Here we are left to choose between conflicting oral testimonies; and it does seem undesirable to leave the matter to depend on the credibility of this or the other witness when an inspection of the document itself would speedily settle the controversy.

The proper solution of the dilemma would be this: When an admission of the contents is testified to, let production be dispensed with; but if the fact of the admission is 'bona fide' disputed by the opponent and some testimony to that effect is put in by him, then let production be required or the document's absence be accounted for.

§ 1256. **Same: Forms of Rule in Various Jurisdictions.** The solution suggested in the preceding section does not seem yet to have been advanced by any Court. The results so far in the various jurisdictions have been either the entire rejection of the rule, or its entire adoption, or its recognition in a confused form.

(*a*) In England the rulings fluctuated until 1840, when the decision in Slatterie *v.* Pooley laid down the rule authoritatively.[1] That authority has ever since been accepted and followed in that jurisdiction, though often with reluctance and usually with an absurd modification, to be noticed.[2] In an

§ 1256. [1] Compare with the following the cases on duplicate originals (*ante*, § 1232): 1699, Anon., 1 Lord Raym. 732 (admission of a decree, by the opponent's witness, held sufficient); 1791, Breton *v.* Cope, Peake 30, *semble* (admission by opponent in a deed of the contents of a transfer-book of stock, held sufficient); 1793, Burleigh *v.* Stibbs, 5 T. R. 465 (action against a master on his indenture of apprenticeship; to prove the apprentice's execution of his part of the indenture, the defendant's recitals, admitting it, in his part were received); 1806, Roe *v.* Davis, 7 East 363, *semble* (acknowledgment by a lessee, in the landlord's counterpart of a lease, of the terms of the original, admitted as against an assignee of the lease); 1811, Flindt *v.* Atkins, 3 Camp. 115 (the former handing of a copy of a foreign judgment by the plaintiff to the defendant in proof of his claim, held not sufficient to enable the defendant to use the copy); 1812, Scott *v.* Clare, 3 Camp. 236 (defence, a discharge in insolvency; the plaintiff's oral admission of it held insufficient "to prove a judicial act of this sort", as "the plaintiff might be mistaken"); 1822, Summersett *v.* Adamson, 1 Bing. 73 (admission of a discharge in insolvency, sufficient); 1824, Sewell *v.* Stubbs, 1 C. & P. 73 (contents of a note; admission sufficient); 1825, Bloxam *v.* Elsie, 1 C. & P. 558, 563, Ry. & Mo. 187, Abbott, C. J. (oral admission insufficient); 1828, Paul *v.* Meek, 2 Y. & J. 116 (counterpart of a lease; admission sufficient); 1833, Earle *v.* Picken, 5 C. & P. 542 (contract; admission sufficient); 1835, R. *v.* Forbes, 7 C. & P. 224, Coleridge, J. ("strict proof" required; here a letter admitting a former forgery was received, though the other forged bill itself was not produced); 1836, Ashmore *v.* Hardy, 7 C. & P. 501, 503 (admission of a deed in an answer in chancery, allowed); 1840, Slatterie *v.* Pooley, 6 M. & W. 664 (to prove a deed of composition with creditors — which could not be produced for want of the required stamp —, the defendant's verbal admission of the contents of the instrument was received)

[2] 1840, Newhall *v.* Holt, 6 M. & W. 662 (ac-

early Irish ruling and in many jurisdictions in Canada and the United States the rule has received express and full adoption.[3]

(*b*) In some later Irish rulings and in many jurisdictions in the United States, the rule is repudiated, though perhaps in some cases for *oral admissions* only, not for written admissions;[4] and it should be noted that the sec-

count stated); 1841, Howard *v.* Smith, 3 Scott N. R. 574 (oral admission); Wollaston *v.* Hakewill, 3 Scott N. R. 593, 617 (here there was notice to produce); 1848, King *v.* Cole, 2 Exch. 628, 632 ("admission, either verbal or in writing, of the contents of a deed", is sufficient); 1849, Toll *v.* Lee, 4 Exch. 230 (a certificate of a deed of transfer, admitted as an admission of the deed's contents); 1850, Murray *v.* Gregory, 5 Exch. 467 (oral admissions of the contents and result of an award, received); 1850, Boulter *v.* Peplow, 9 C. B. 493, 506 (Williams, J.: "It is impossible for us to overrule Slatterie *v.* Pooley, though we may think the reasoning not quite satisfactory"; here a written admission); 1851, R. *v.* Basingstoke, 14 Q. B. 611 (support to a pauper; conduct held a sufficient admission of the contents of a certificate requiring such support); 1851, Pritchard *v.* Bagshawe, 11 C. B. 459, 463 (an abstract of deeds, received as an admission of contents); 1858, Sanders *v.* Karnell, 1 F. & F. 356 (Channell, B.: "The doctrine . . . is one not to be extended").

[3] IRELAND: 1843, Lord Trimlestown *v.* Kemmis, 5 Ir. L. R. 380, 396 (abstract of title); CANADA: *N. Br.* 1854, Doe *v.* Blanche, 3 All. N. Br. 180, 182 (admissions received; following Slatterie *v.* Pooley); UNITED STATES: *Federal:* 1894, Dunbar *v.* U. S., 156 U. S. 185, 196, 15 Sup. 325 (oral admission of sending a telegram, sufficient to allow a delivered copy to be used); *Alabama:* 1840, Sally *v.* Capps, 1 Ala. N. S. 121 (oral admission of the amount of a note, received; "the rule does not apply where the adversary has admitted the facts which are to be proved"); 1902, Barnett *v.* Wilson, 132 Ala. 375, 31 So. 521 (production of a copy admitted by opponent to be correct dispenses with the necessity of accounting for the original); *Connecticut:* 1893, Morey *v.* Hoyt, 62 Conn. 542, 556, 26 Atl. 127 (oral admission of contents of letter; Slatterie *v.* Pooley approved); *Iowa:* 1847, Gay *v.* Lloyd, 1 Greene Ia. 78, 83 (oral admission by defendant of transcript of judgment, received); *Maine:* 1877, Blackington *v.* Rockland, 66 Me. 332, 335 (records of a city, received as admissions of a notice; approving Slatterie *v.* Pooley; yet not deciding more than that a written admission is receivable); 1906, Purinton *v.* Purinton, 101 Me. 250, 63 Atl. 925 (rule of Slatterie *v.* Pooley, allowed to admit proof of letters by the opponent's oral reading aloud of their contents); *Massachusetts:* 1850, Smith *v.* Palmer, 6 Cush. 513, 520 (oral admission of contents of a record of judgment, execution, etc., allowed); 1851, Kellenberger *v.* Sturtevant, 7 Cush. 465 (same for acknowledgment in writing of a title to premises); 1857, Loomis *v.* Wadhams, 8 Gray 557, 562 (same for oral statement as to the contents of a deed); 1896, Com. *v.* Wesley, 166 Mass. 248, 44 N. E. 228 (same doctrine); 1899, Clarke *v.* Warwick C. M. Co., 174 Mass. 434, 54 N. E. 887 ("Admissions are evidence . . . although they relate to the contents of a written paper"; here a written admission); 1904, Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979, *semble* (Loomis *v.* Wadhams approved); *Mississippi:* 1847, Anderson *v.* Root, 8 Sm. & M. 362 (written receipt for a writing, sufficient to prove its contents); 1859, Williams *v.* Brickell, 27 Miss. 682, 686 (oral admission of contents of telegram, sufficient); *North Carolina:* 1906, Norcum *v.* Savage, 140 N. C. 472, 53 S. E. 289 (heirs of P.'s first wife claiming against heirs of his second wife, the land being on record as granted by deed to P., but plaintiffs claiming that this deed had been obtained by P. in place of a lost deed to his first wife; P.'s admissions that there was such a lost deed to his first wife, received); *Ohio:* 1878, Edgar *v.* Richardson, 33 Oh. St. 581, 592 (Slatterie *v.* Pooley approved; here, for admissions as to a record of divorce; *semble*, the record must be not obtainable); *South Carolina:* 1824, North *v.* Drayton, Harp. Eq. 34, 38 (recital of bond in mortgage, sufficient); *Virginia:* 1871, Taylor *v.* Peck, 21 Gratt. 11, 19 (landlord's receipt for rent received to show a lease; Slatterie *v.* Pooley followed).

Undecided: 1906, Minnesota Deb. Co. *v.* Johnson, 96 Minn. 91, 107 N. W. 740.

That the admissions need not be *verbally precise* or *complete*, see *post*, § 2105.

[4] IRELAND: 1845, Gosford *v.* Robb, 8 Ir. L. R. 217, *semble;* Lawless *v.* Queale, 8 Ir. L. R. 382 (positively decided; see quotation *supra*); 1849, Parsons *v.* Purcell, 12 Ir. L. R. 90 (admission in an answer in chancery of a release-deed); UNITED STATES: *Fed.* 1828, Carroll *v.* Peake, 1 Pet. 18, 22 (lease agreement; copy made by the defendant himself, admitted, without accounting for the original); *Ark.* 1861, Haliburton *v.* Fletcher, 22 Ark. 453 (guardian's admissions of record of appointment, excluded); *Cal.* 1860, Grimes *v.* Fall, 15 Cal. 63, 65 (charging the defendant as assignee of a contract to do that which was a trespass; the defendant's oral admission that he was assignee, excluded; no authority cited); 1872, Poorman *v.* Miller, 44 Cal. 269, 275 (declarations by offeror's own predecessor, excluded; question not raised); *Conn.* 1824.

ond objection above mentioned is practically obviated where a written admission exists, — so far, at least, as that writing is proved by production or by the opponent's refusal to produce it.

(*c*) The limitation has been attempted, and possibly obtains, in England, that an admission of the opponent *made on the stand* in testifying (usually, on cross-examination) shall not suffice to excuse non-production; *i.e.* the precedent of Slatterie *v.* Pooley is confined to precisely its same state of facts, namely, an admission made out of court.[5] An admission, however, made in testifying before judge and jury is authentic beyond dispute, and wholly escapes the above-described real objection to the doctrine, namely, the objection that testimony to the alleged admission might be easily fabricated. In other words, this proposed limitation involves the absurd result of excluding the admission in precisely the case where it might be received without danger and of admitting it in precisely the case where the danger exists. There is nothing in the modern rules of privilege (*post*, §§ 1856, 2218) to account for this result.

(*d*) A fourth type of result, in favor in some American jurisdictions, is to allow the proof by admissions whenever the document is shown to be *lost* or

• Buell *v.* Cook, 5 Conn. 206, 208 (oral admission of written lease, excluded); *Del.* 1871, Plunkett *v.* Dillon, 4 Del. Ch. 198, 205, *semble* (parol admissions by opponent, excluded, except, of course, where the writing is produced); *Ill.* 1839, Bryan *v.* Smith, 3 Ill. 47, 49 (oral admission of a tenancy in common under a deed, excluded); 1880, Fox *v.* People, 95 Ill. 71, 75 (forgery; former utterings are to be shown otherwise than by the defendant's admissions); 1904, Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 (libel in a letter printed in a newspaper; held, that until the loss of the original was sufficiently shown, the printed copy could not be used as equivalent, merely upon oral admissions of its identity by the defendant or his testimony on the stand to that effect; upon the latter point the ruling is unsound); *La.* 1843, Clark *v.* Slidell, 5 Rob. La. 330 (excluded); *Minn.* 1913, Swing *v.* Cloquet Lumber Co., 121 Minn. 221, 141 N. W. 117 (written admissions of contents, receivable; here, of a policy and premium note); *Mo.* 1843, Bogart *v.* Green, 8 Mo. 115 (oral admission of summons, insufficient); 1875, Cornet *v.* Bertelsmann, 61 Mo. 118, 126 (whether a vendee had notice of an encumbrance; oral admissions held insufficient unless corroborated).

For the rulings in *New York* and elsewhere on the special subject of *title to land*, see § 1257, *post*.

[5] *England:* 1856, Darby *v.* Ouseley, 1 H. & N. 1, 5, 10 (Pollock, C. B.: "If a party has chosen to talk about a particular matter, his statement is evidence against himself; . . . but it does not follow that the plaintiff could be compelled to make such an admission by asking him in the witness-box, 'Have you executed a release?'"); 1859, Farrow *v.* Blomfield, 1 F. & F. 653, Pollock, C. B. (allowing the opponent's admission on the stand to suffice without production, after St. 1854, c. 125, § 24; quoted *post*, § 1263); 1859, Wolverhampton N. W. Co. *v.* Hawksford, 5 C. B. N. S. 703 (interrogatories to opponent before trial as to contents of a document, allowed only on condition that they should not be used at the trial unless the document should be shown lost); 1862, Henman *v.* Lester, 12 C. B. N. S. 776 (question to a party as to the result of a former suit of his, admitted; Byles, J., diss.: "It can make no difference that the witness was a party to the suit; the doctrine laid down in Slatterie *v.* Pooley . . . cannot comprehend parol admissions of the contents of written documents extorted from parties under the pressure of cross-examination"; but Willes and Keating, JJ., thought that on a collateral matter touching credit only, the party's admission sufficed); *Canada:* 1857, Lynch *v.* O'Hara, 6 U. C. C. P. 259, 265 (a party's compulsory admissions on discovery do not suffice); *U. S. Federal:* 1905, Security Trust Co. *v.* Robb, 142 Fed. 78, C. C. A. (letter in the hands of a third person; the defendant's agent's admission on the stand that "the paper offered was a copy of it", not sufficient; "the most conclusive proof of its correctness will not render a copy available, without ground laid for dispensing with the production of the original"; this is in itself a perversely rigid rule; but furthermore the opinion shows no appreciation of the rule at issue and cites irrelevant precedents).

detained by the opponent.[6] But this is of course no longer a genuine exception; *i.e.* the admission as to contents does not serve to excuse the party from production; he is required to account for the non-production, and may then use the admissions, as he could any other evidence, to prove the contents.

(*c*) It has been suggested, though apparently nowhere accepted, that the exception should apply only to documents "*collateral*" to the issue.[7]

§ 1257. **Same: Related Rules (Deed-Recitals; Oral Disclaimer of Title; New York Rule).** (1) It is perfectly clear and well understood that, even where the rule of Slatterie *v.* Pooley is not accepted, a *judicial admission* (*post,* § 2588) — *i.e.* a formal admission for the purposes of trial — dispenses with the necessity of production;[1] such an admission is a waiver of dispute, and suffices to concede any fact whatever in issue.

(2) In proving a *partnership,* the acting as partners may with reference to third persons be the source of liability irrespective of the written articles;[2] or the acts of the partners as admissions of the terms of the partnership may be regarded, upon the principle of the preceding section, as dispensing with production of the articles;[3] or the fact of the partnership may be regarded as a net resultant fact independent of the articles, so that the rule of production is not applicable (*ante,* § 1249); it is generally difficult to ascertain the precise ground of rulings on this point.

(3) The rule that *recitals in a deed* are evidence, as between the parties to it or their successors, of the *contents of a former deed* recited, is in effect an application and recognition of the present exception. Its propriety from the present point of view has not been questioned.[4] The controversy has been

[6] *Ga.* 1850, Flournoy *v.* Newton, 8 Ga. 306, 310 ("You cannot ask the witness what the opposite party has said as to the contents of papers executed by him, without accounting for their non-production"); *Ky.* 1812, Peart *v.* Taylor, 2 Bibb 556, 558 (letter admitting contents of a deed, received, the deed being lost); 1817, Clevinger *v.* Hill, 4 Bibb 498 (oral admissions "perhaps" not admissible till the deed appears unavailable); 1832, Griffith *v.* Huston, 7 J. J. Marsh. 385, 387 (oral admissions of predecessor received after loss shown); *Me.* 1832, Thomas *v.* Harding, 8 Greenl. 417, 419 (admitted where the opponent had failed to produce on notice); *Oh.* 1827, Allen *v.* Parish, 3 Oh. 107, 110 (admissions of opponent's grantor as to deed's contents, received as corroborative evidence, where the deed was lost).

[7] 1845, Crampton, J., in Lawless *v.* Queale, 8 Ir. L. R. 382, 390.

Compare the majority's opinion in Henman *v.* Lester, *supra,* note 5.

Distinguish also the parol evidence rule (*post,* § 2465), as applied to title-deeds, that the parties' understanding is not to vary the terms; this may exclude admissions *contradicting* the deed: 1847, Maloney *v.* Purden, 3 Kerr N. Br. 515, 525 (predecessor's admissions, contradicting a deed, as to the land included).

§ 1257. [1] 1845, Gosford *v.* Robb, 8 Ir. L. R. 217, 221, per Crompton, J.; 1851, R. *v.* Basingstoke, 19 L. J. M. C. 99 (Patteson, J.: "It is well put by Mr. Smith, in his 'Leading Cases', II, 426, that . . . 'the estoppel professes, not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted'"); 1919, Reynolds *v.* Wallace, 125 Va. 315, 99 S. E. 516 (defendant's implied admission of the correctness of a survey, held not sufficient).

[2] 1821, Doane *v.* Farrow, 10 Mart. La. 74, 78.

[3] 1869, Edwards *v.* Tracy, 62 Pa. 375, 379 (admissions of a partnership, received; following Widdifield *v.* Widdifield, *ante,* § 1249).

[4] *England:* 1697, Sussex *v.* Temple, 1 Ld. Raym. 310, 311 (answer in chancery, acknowledging a deed, held admissible against a defendant claiming title under the party answering); 1699, Sherwood *v.* Adderley, 1 Ld. Raym. 734 (recital of a will in the admittance to a copyhold, held admissible against the lord in favor of the devisee, without producing the will); 1704, Ford *v.* Grey, 1 Salk. 286, 6 Mod. 44 ("a recital of a lease in a deed of release is

whether such recitals could be used, as hearsay evidence, against strangers to the deed (*post*, § 1573) and also whether such recitals were absolutely binding (*ante*, § 1058), and whether they were admissible if made by a predecessor in title (*ante*, § 1082).

(4) The rule of the Statute of Frauds forbidding proof of an *oral grant* or *disclaimer of title* is frequently difficult to distinguish from the question of the present rule. This convergence, and that of one or two other principles, is represented in a series of New York rulings, which have much influenced other Courts. Their results may be set forth as follows: (*a*) A declaration admitting that the declarant holds as *tenant only* may be used, if made by a *predecessor* in title, as an ordinary admission (on the principle of § 1082, *ante*); or, if made by a *deceased person*, though a stranger, as a declaration against interest (under the Hearsay exception, *post*, § 1458). (*b*) A declaration, by either the opponent's or the proponent's predecessor, *claiming* or *disclaiming title* may be used as a *verbal act* coloring the possession (on the principle of § 1778, *post*) where it is used in support of the proponent's *title by adverse possession*. (*c*) The admission, by an opponent or his predecessor of the *contents of a deed* which the proponent wishes to prove in support of a documentary title, might be used under the exception to the production-rule in Slatterie *v.* Pooley (*ante*, § 1255), if that exception were recognized; but in New York that exception is recognized only in the modified form of

good evidence of such lease against the releasor and those that claim under him; but as to others [*i.e.* strangers], it is not, without proving that there was such a deed and it was lost or destroyed"; the latter use, *i.e.* as an exception to the Hearsay rule for ancient recitals in general, is considered *post*, § 1573; the point of the present case is accurately expounded by Story, J., in Carver *v.* Jackson, *infra*); UNITED STATES: *Federal:* 1830, Carver *v.* Jackson, 4 Pet. 1, 83 (recital of lease in deed of release is "an estoppel, and binds parties and privies, — privies in blood, privies in estate, and privies in law; but it does not bind mere strangers, or those who claim by title paramount the deed; [*i.e.*], it does not bind persons claiming by an adverse title or person claiming from the parties by title anterior to the date of the reciting deed"); 1832, Crane *v.* Morris, 6 Pet. 598, 611 (same; conclusive as to contents and execution); *Georgia:* 1846, M'Cleskey *v.* Leadbetter, 1 Ga. 551, 557 (recital of a lease, admitted against the grantor's privies); 1856, Horn *v.* Ross, 20 Ga. 210, 220 (recitals, in a settlement deed, of ante-nuptial contract, admitted against creditors by a subsequent debt); *Pennsylvania:* 1811, Penrose *v.* Griffith, 4 Binn. 231, 235 (recital, in a deed, of a previous deed, admissible, against the grantor and privies, not otherwise); 1814, Stoever *v.* Whitman, 6 Binn. 416, 418 (recitals of a former deed, admitted against one claiming under the grantor); 1816, Bell *v.* Wetherill, 2 S. & R. 350 (recital of a deed in a predecessor's patent, not accompanied by possession, insufficient); 1816, Stewart *v.* Butler, 2 S. & R. 381 (recital in a patent of a previous conveyance, received against one claiming under the grantor); 1816, Downing *v.* Gallagher, 2 S. & R. 455 (same: but only against those claiming after the former grant); 1818, Whitmire *v.* Napier, 4 S. & R. 290 (recitals of title in a land-patent, receivable against one claiming by possession, not title); 1852, Gingrich *v.* Foltz, 19 Pa. St. 38, 40 (recitals in a land-patent as to previous warrant, etc., are evidence against one who relies on possession alone and shows no paper title, and also against one claiming under a right arising subsequent to the patent; but not against one claiming by right prior to the patent); *Vermont:* 1836, Lord *v.* Bigelow, 8 Vt. 445, 460 (legislative charter reciting former grant, admitted against privies); 1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (Carver *v.* Jackson approved); *Virginia:* 1830, Blow *v.* Maynard, 2 Leigh 29, 49 (recital, in post-nuptial settlement-deed, of an ante-nuptial contract not otherwise evidenced, is not binding on creditors); 1849, Wiley *v.* Givens, 6 Gratt. 277, 283 (recitals of an entry under a purchase from R.; not received against one claiming adversely by elder patent); 1852, Walton *v.* Hale, 9 Gratt. 194, 198 (preceding case approved); 1852, Hannon *v.* Hannah, 9 Gratt. 146, 150 (recital of a former deed, admissible against "parties and privies in blood, in estate, and law").

par. (*d*) of the preceding section, *i.e.* such admissions may be used if the document is shown to be *lost* or in the *opponent's control*.[5] (*d*) Where the opponent has *already shown a title by deed*, an *oral admission of non-title* (or, disclaimer of title), by himself or his predecessor, cannot be used against him to overthrow his proof of documentary title; for, though it is in one aspect merely an admission of the contents of some unspecified lost deed, yet standing as it does by itself, and no actual defeasing deed having been shown to exist, such a declaration amounts virtually to an oral defeasance or conveyance, and thus violates the Statute of Frauds requiring conveyances to be in writing. It practically sets up a title in somebody else through the sole medium of the oral declaration.[6] Were the existence of a specific defeasing deed to be shown, and were its loss or hostile control to be proved, then, under (*c*) *supra*, these admissions of this specific document's contents might be used. — With these more or less competing doctrines in view, the rulings are at least explainable, if not always reconcilable.[7]

[5] See the rulings *infra*, in 13, 17, and 18 Johnson, 7, 8, and 14 Wendell, and 68 New York.

[6] This doctrine, which is in itself not connected with the subject of Evidence, and is noticed only in order to discriminate it, is expounded in the following cases, besides those cited from New York in the next note: 1856, McMaster *v.* Stewart, 11 La. An. 546 (title to a slave; opponent's verbal admissions cannot be used to perfect title); 1846, Harmon *v.* James, 7 Sm. & M. Miss. 111, 118 (oral admission "that he had conveyed all his interests to M.", not received to prove a deed); 1908, Hudkins *v.* Crim, 64 W. Va. 225, 61 S. E. 166 (forceful opinion by Brannon, J.).

[7] The New York series of cases illustrating the above distinctions is here first given, those of other Courts then follow; the citations in the other sections named above (§§ 1082, 1458, 1778) may be compared:

New York: 1809, Jackson *v.* Bard, 4 John. 230 (parties claiming under competing deeds from the same person; admissions of the defendant's intermediary vendor, as to his title, received); 1810, Jackson *v.* Shearman, 6 John. 19, 21 (the defendant's oral acknowledgments of the plaintiff's title, excluded as "counteracting the beneficial purposes of the statute of frauds"; yet good "to support a tenancy", or "to satisfy doubts in case of possession"); the two foregoing cases thus led into two lines of decisions, each more or less ignoring the precedents of the other: 1810, Jenner *v.* Joliffe, 6 John. 9 (oral admission of an attachment, not received; principle applicable to specialties and records); 1810, Jackson *v.* Vosburgh, 7 John. 186 (after proof of a chain of title, the oral disclaimers of the plaintiff's lessors were not received, following Jackson *v.* Shearman); 1813, Hasbrouck *v.* Baker, 10 John. 148 (oral admission of a subpœna's contents, insufficient, where the proponent had the document in his possession); 1815, Jackson *v.* Belknap, 12 John. 96 (oral admissions by a predecessor of the plaintiff's title, received); 1815, Marks *v.* Pell, 1 John. Ch. 549, 598 (oral admissions by a deceased grantee that the deed was taken as a mortgage, excluded, as counteracting the policy of the statute of frauds); 1816, Mauri *v.* Heffernan, 13 John. 58, 74 (oral and written admissions of the contents of a document made abroad, and unobtainable, admitted); 1818, Jackson *v.* M'Vey, 15 John. 234, 237 (following the Shearman case); 1819, Jackson *v.* Cary, 16 John. 302, 306 (declarations disclaiming a larger title under certain deeds, excluded, as "parol proof to destroy or take away a title" contravening the statute of frauds); 1820, Brandt *v.* Klein, 17 John. 335, 339 (recitals in a deed of the contents of a will, admitted, the will being in the opponent's possession); 1820, Jackson *v.* M'Vey, 18 John. 330, 333 (admissions of an opponent as to a deed, receivable, *semble*, under the same circumstances); 1825, Jackson *v.* Cole, 4 Cow. 587, 593 (oral admissions by the defendant that the land belonged to his wife, whose heir the plaintiff was, admitted; the cases of exclusion are (1) parol disclaimer of title, which is forbidden by the statute of frauds, (2) admissions of the terms of written conveyances, which violate the rule requiring production; citing the Belknap and the M'Vey cases); 1827, Jackson *v.* Miller, 6 John. 751, 756 (defendant's oral admissions of adverse possession, excluded, a patent title having been shown); s. c. on appeal, 6 Wend. 228 (lower Court's ruling affirmed; defendant's admissions of a conveyance by him to plaintiff's ancestor, said to be receivable if the plaintiff proved his inability to produce the original); 1830, Jackson *v.* Denison, 4 Wend. 558, 560 (like the Cole case;

the same distinctions taken); 1831, Jackson *v.* Livingston, 7 Wend. 136, 139 (oral admissions of contents of a power of attorney, received, because the document was unavailable); 1831, Jackson *v.* Vail, 7 Wend. 125 (same, for a lost deed); 1832, Welland Canal Co. *v.* Hathaway, 8 Wend. 480, 486 (a written receipt admitting corporate organization, excluded; "the admissions of a party are competent evidence against himself only in cases where parol evidence would be admissible to establish the same facts", *i.e.* where the document is unavailable); 1834, Jackson *v.* Myers, 11 Wend. 533 (admissions of defendant's grantor, that he had received his deed from P. in fraud of P.'s creditors now claiming on execution sale, received; "the doctrine that parol declarations shall not be received to divest a legal title is not applicable in this case"; approving Jackson *v.* Bard); 1834, Northrup *v.* Jackson, 13 Wend. 85, *semble* (oral admission of a written contract, excluded); 1835, Van Duyne *v.* Thayre, 14 Wend. 235 (lost mortgage set up by defendant in an action of ejectment for dower-land; admissions of the plaintiff's husband during his lifetime, as to the mortgage, received; following Jackson *v.* Bard and Jackson *v.* Myers); 1835, Corbin *v.* Jackson, 14 Wend. 619, 623, 630 (oral admissions of the contents of a power of attorney, admitted, the loss of the document being proved by the same admissions; Tracy, Sen., dissenting, especially on the latter point); 1837, Varick *v.* Briggs, 6 Paige 323, 327 (predecessor's declaration as to a prior conveyance by him, admitted, the loss of the deed being shown); 1844, Hunter *v.* Trustees, 6 Hill 407 (title to a burying-ground claimed by dedication; plaintiff's admissions of non-ownership, received, not to "affect his paper title", but to "give character to his possessory acts"); 1848, Pitts *v.* Wilder, 1 N. Y. 525, 527 (admissions of defendant's predecessor, as to the title he claimed under, received); 1859, Walker *v.* Dunspaugh, 20 N. Y. 170, 172 (defendant "showed no paper title", but offered admissions of the plaintiff that they "held under a conveyance for lives", with the defendant in remainder; held, "a party cannot make title to land by a parol admission of his adversary"); 1866, Gibney *v.* Marchay, 34 N. Y. 301 (declarations of defendant's predecessor in possession, admitting purchase of the land with trust funds, *semble*, held not admissible to overthrow a title "of record"); 1876, Mandeville *v.* Reynolds, 68 N. Y. 528, 536 (oral admissions by the defendant of the existence and contents of a judgment-roll, admissible, the roll being lost); 1901, People *v.* Holmes, 166 N. Y. 540, 60 N. E. 249 (grantor's oral admissions as to title, excluded where the issue was merely whether land was within the boundary of a certain lot).

OTHER JURISDICTIONS: CANADA: *New Brunswick:* 1851, Doe *v.* Todd, 2 All. 261, 264 (oral admissions by the plaintiff's grantor, that he had conveyed to defendant's grantor, excluded; "it would entirely destroy the effect of the statute of frauds"); *Nova Scotia:* 1681, Fairbanks *v.* Kuhn, 14 N. Sc. 147, 154 (defendant's admissions of holding under a lease, not accounted for, the defendant having shown a title by deed, held not sufficient; *quaere* whether admissible); UNITED STATES: *Federal:* 1873, Smiths *v.* Shoemaker, 17 Wall. 630, 638 (claim of title by gift of K.; letters by the claimant in possession, acknowledging the title of J. C., received); 1876, Dodge *v.* Freedman's S. & T. Co., 93 U. S. 379, 383 (predecessor's admissions are not receivable "to sustain or destroy the record title"; following Jackson *v.* Miller, N. Y.); *Arkansas:* 1882, Dorr *v.* School District, 40 Ark. 237, 242 (testimony to acknowledgment of deed, used when offered "for a collateral purpose"); *California:* 1877, McFadden *v.* Ellmaker, 52 Cal. 348, 350 (question expressly reserved); 1882, People *v.* Blake, 60 Cal. 497, 503, 511 (McKee and Ross, JJ., dissented on apparently the principle of oral disclaimer in the New York cases; but the majority ignored the point); *Connecticut:* 1837, Deming *v.* Carrington, 12 Conn. 1, 6, *semble* (plaintiff's predecessor's admissions that a deed to himself as sole grantee was for the benefit of defendant, said to be inadmissible); *Iowa:* 1902, Walter *v.* Brown, 115 Ia. 360, 88 N. W. 832 (admissible, when "not in contradiction of the record title"; here, as to knowledge of a mortgage); *Maine:* 1904, Phillips *v.* Laughlin, 99 Me. 26, 58 Atl. 64 (issue whether J.'s recorded deed to C., under whom defendant claimed, was forged by C.; C.'s letters to J., during C.'s possession, admitting the forgery, excluded, as against the defendant claiming by recorded mortgage from C.; following the opinion of Cooley, J., in Cook *v.* Knowles, Mich., *infra*); 1905, Fall *v.* Fall, 100 Me. 98, 60 Atl. 718 (deed to M. by T., and will by M. to O.; C. claims apparently by adverse possession against M., T., and O.; M.'s declarations, that she was not the owner and C. was, excluded, following Phillips *v.* Laughlin; the opinion is obscure in naming the parties); *Massachusetts:* 1841, Proprietors *v.* Bullard, 2 Mete. 363, 368 (admissions received, but here the title admitted was prescriptive merely); 1861, Osgood *v.* Coates, 1 All. 77, 79 (admissions received; point not raised); *Michigan:* 1878, Cook *v.* Knowles, 38 Mich. 316 (grantor's admissions that his deed was falsely antedated, received, in order to oust his record-title by notice of a prior title; Cooley, J., diss., following Jackson *v.* Cole, N. Y., and distinguishing between "receiving declarations to overthrow a title by deed and a title where no deed or other writing is needful"); 1906, Rix *v.* Smith, 145 Mich. 203, 108 N. W. 691 (grantor's statements, contemporaneous with making the deed, as to the location of boundaries, admitted; opinion obscure, ignoring the principles involved); *New Hamp-*

(5) Certain minor discriminations need occasionally to be made. For example, an admission of a document's *execution* is always receivable;[8] an admission of *unspecified contents* is worthless;[9] an admission, though improper under the preceding section, is sufficient if brought out by the opponent's own questions.[10]

§ 1258. (3) **Witness' Admission of Contents, on 'Voir Dire'.** When the disqualification by interest prevailed (*ante*, § 576), it was well settled that, where the disqualifying fact was contained in a document, its terms might be established by the opponent's examination of the witness on 'voir dire.' The reasons given for this exception are not always the same; but the traditional and the correct one seems to be that, since the person to be called as witness might not be known in advance to the opponent, it would be practically impossible for him to have the document at hand:

1830, WESTON, J., in *Miller* v. *Mariner's Church*, 7 Greenl. 51, 54: "An objection to the witness on the ground of interest is often unexpectedly made. Neither the witness, therefore, nor the party producing him can be reasonably required to have with them written papers or documents which may happen to be referred to upon such an inquiry."

1852, Counsel, arguing in *Macdonnell* v. *Evans*, 11 C. B. 930, 937: "The rule as to examinations on 'voire dire' is thus stated in Russell [on Crimes, II, 987]: 'The party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection.'" MAULE, J.: "In many cases witnesses are called whom the opposite party has no reason to expect to see; the reason, therefore, given in that book is not a good one. An examination on the 'voire dire' is for the purpose of establishing something of which the Court is to be the judge, and

shire: 1849, Cilley v. Bartlett, 19 N. H. 312, 323 (defendant's admissions of plaintiff's title, held decisive, if believed; but here the plaintiff was grantee in the deed, and the defendant claimed as beneficiary); 1858, Fellows v. Fellows, 37 N. H. 75, 85 (oral admissions of non-title, held receivable); 1860, Hurlburt v. Wheeler, 40 N. H. 73, 76 (same); *New Jersey:* 1856, Ten Eyck v. Runk, 26 N. J. L. 513, 517 (admissions receivable so far as "the extent of the right does not appear on the face of the title-deeds"); *Pennsylvania:* 1782, Morris v. Vanderen, 1 Dall. 64 (ejectment; defendant's oral admission that he was lessee only, received); 1832, Gibblehouse v. Stong, 3 Rawle 436, 442 (declarations by a prior owner, that he had not paid the price but held in trust for another, admitted; Huston, J., diss., approving Jackson v. Shearman, N. Y., since here "the title of the plaintiff depended on facts and recorded deeds, and could not be affected by parol declarations of any prior owner"; yet declarations as to boundary would not be excluded by this rule); 1838, Criswell v. Altemus, 7 Watts 565, 578 (oral admissions of taking a lease, held sufficient as an admission of non-adverse possession); *Utah:* 1902, Scott v. Crouch, 24 Utah 377, 67 Pac. 1068 (M.'s admission that he had given a deed to D., received against M.'s administrator); *Vermont:* 1841, Carpenter v. Hollister, 13 Vt. 552, 555 (defendant's grantor in possession and before grant; his oral admissions that his own grantor, plaintiff's intestate, was insane when granting, excluded, against an innocent purchaser for value; because one holding by title good as appears of record should not "be defeated by the private concessions of any previous owner"; allowable only when made by occupier as to "character and extent of possession", *i.e.* that he possessed as tenant or according to certain boundaries); 1842, Hines v. Soule, 14 Vt. 99, 105 (Carpenter v. Hollister approved); *West Virginia:* 1897, High's Ex'rs v. Pancake, 42 W. Va. 607, 26 S. E. 537 ("Mere oral declarations to destroy title are inadmissible", because of the statute of frauds); 1906, Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026 (foregoing case approved).

[8] 1849, Doe v. Biggers, 6 Ga. 188, 201 (oral admissions of execution, received). See *post*, § 2132.

[9] 1845, Thompson v. Fry, 7 Blackf. 608 (admission that the items in a book, not produced, were correct; insufficient). But the terms of the document need not be precisely given: *post*, § 2105.

[10] 1831, Pettigru v. Sanders, 2 Bail. 549. Compare the English rule *supra*, § 1256.

not the jury. It may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury."

That the reason above-named, rather than the reason suggested by Mr. J. Maule, in the passage just quoted, was the true reason, is indicated by a qualification, laid down in some cases, that if the incompetency was clear and could be noticed merely on objection made, and a document removing it must clearly have been known beforehand to the party offering the witness, then he could not prove the removal of the incompetency by a re-examination without producing the document — *e.g.* a release — removing it.[1] But the general rule, irrespective of this modification, was well settled.[2]

§ 1259. (4) **Witness' Admission of Contents, on Cross-examination; Rule in The Queen's Case; Principle.** In the year 1820 an English decision, soon afterwards expressly annulled by legislation, but widely followed in this country in ignorance of its repudiation in the jurisdiction of origin, laid down a rule which for unsoundness of principle, impropriety of policy, and practical inconvenience in trials, committed the most notable mistake that can be found among the rulings upon the present subject. The doctrine laid down in The Queen's Case professed to apply the rule now under consideration, namely, that when the terms of a document are to be established, the document must be produced or accounted for; and its application here took the following shape: When a witness is to be asked on cross-examination as to the terms of a document written or signed by him, the document *must be at the time produced and shown or read aloud to him* before he can be asked as to its contents; in other words, he cannot be asked whether or not he said such and such things in the document, but the supposed document must be first shown to him before any questions upon its contents are allowable:

1820, *The Queen's Case*, 2 B. & B. 286; the House of Lords put the following questions to the Judges: "First, whether, in the courts below, a party on cross-examination would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents

§ 1258. [1] 1829, Goodhay *v.* Hendry, M. & M. 319, Best, C. J. (a bankrupt, desired to be shown discharged by his certificate); Anon., ib. 321, note, Tindal, C. J. (same), *semble*.

Contra: Wandless *v.* Cawthrone, ib. note, Parke, B.; 1839, Lunniss *v.* Row, 10 A. & E. 606 (objection to competency may be removed by oral evidence of a release-document, even though the objection was revealed to the party by the pleadings). So, too, the following variation: 1818, Butler *v.* Carber, 2 Stark. 433 (the witness having the document in court, production was held necessary).

[2] *Eng.* 1794, Butchers' Company *v.* Jones, 1 Esp. 160 (a question on the counter-examination allowed to show that a disqualification had ceased); Botham *v.* Swingler, 1 Esp. 164 (same; restoration to competency by oral evidence, allowed); 1811, R. *v.* Gisburn, 15 East 57 (a witness for a township, allowed to be asked whether he was rated for taxes, without producing the rate-book); 1824, Carlisle *v.* Eady, 1 C. & P. 234 (a bankrupt allowed to be asked as to his certificate of discharge); 1837, R. *v.* Murphy, 8 C. & P. 297, 304; 1852, Cresswell and Maule, JJ., in Macdonnell *v.* Evans, 11 C. B. 930, 937; *U. S. Ala.* 1849, Herndon *v.* Givens, 16 Ala. 261, 268; 1849, Robertson *v.* Allen, 16 Ala. 106, 108 (even by another witness); *Conn.* 1824, Stebbins *v.* Sackett, 5 Conn. 258, 262; *Ill.* 1863, Babcock *v.* Smith, 31 Ill. 57, 61 (that a judgment had been obtained against him, allowed); *Ky.* 1868, Nutall *v.* Brannin, 5 Bush 11, 18; *Me.* 1830, Miller *v.* Mariner's Church, 7 Greenl. 51, 54; *Vt.* 1844, Oaks *v.* Weller, 16 Vt. 63, 68 (where the witness is out of the State and his deposition is offered, another witness may testify to a release given to the deponent, without producing it).

to the like effect, *without having first shown* to the witness the letter, and having asked that witness whether the witness wrote that letter and his admitting that he wrote such letter? . . . Thirdly, whether, when a witness is cross-examined and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined, in the courts below, whether he did not in such letter make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein?" ABBOTT, C. J., for the judges, answered the first question in the negative: "The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness; if the witness admits that it is of his handwriting, the cross-examining counsel may at his proper season read that letter as evidence." The third question was answered thus: "The judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, enquire whether or no such statements are contained in the letter, but that the letter itself must be read to manifest whether such statements are or are not contained in that letter. . . . [The judges] found their opinion upon what in their judgment is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself and not by parol evidence."

1852, *Macdonnell v. Evans*, 11 C. B. 930; to show that the witness had been disgraced by a charge of forgery, he was asked: "Did you not write a letter [not in question] in answer to a letter charging you with forgery?" MAULE, J.: "If you want the jury to know that there was a letter containing a charge of forgery, the proper way to do so is by producing the letter itself. . . . Suppose the witness had said, 'I did write this letter in answer to another, which is in court', good sense obviously requires that the latter should be produced, if it is wished to get at its contents. . . . This seems to me to be just the sort of case where it is sought to give secondary evidence of the contents of a document in the power of a party who does not choose to produce it." CRESSWELL, J.: "Shift it as you will, it was a mere attempt to get in evidence of the contents of a written document without putting in the document itself." [1]

It may be noted that this doctrine was a pure creation of this decision of 1820, and had never before been advanced; [2] though by the pronouncement of the Judges in the House of Lords it was followed thereafter by the Courts as the law of the land.[3]

§ 1260. **Same: Arguments against the Rule.** It cannot be denied that there is a certain plausibility in the doctrine as expounded in the above passages, and this will account for its easy acceptance in other jurisdictions; and yet there are so many arguments against it and they have been so

§ **1259.** [1] In this case, note that the witness, by answering the first letter, put its contents on the same footing as his own, under the principle of § 2102, *post*.

[2] 1754, Canning's Trial, 19 How. St. Tr. 487 (doctrine not recognized); 1816, Graham *v.* Dyster, 2 Stark. 21, Ellenborough, L. C. J. (where the documents were part of defendant's case but in plaintiff's possession, and the defendant was not allowed to ask contents on cross-examination; but the reason was merely that it was an improper stage of the case, and no views were expressed on the point in question); 1817, Sideways *v.* Dyson, 2 Stark. 49 Ellenborough, L. C. J. (same situation, but defendant offered another witness to the contents, as the basis of a cross-examination; rejected, the proper time not having been reached).

[3] 1837, R. *v.* Murphy, 8 C. & P. 297, 304 (questions as to an article in a newspaper written by the witness; rule applied); 1839, R. *v.* Taylor, ib. 726 (rule applied); 1852, Macdonnell *v.* Evans, 11 C. B. 930 (quoted *supra*).

thoroughly exploited that its perpetuation in this country is somewhat surprising.

(1) In the first place, then, let it be granted for argument's sake that by asking the witness without producing the document the rule of production is broken in upon. Why not recognize for such a case an *exception to the rule?* (*a*) There can be no case in which the contents of the document could be more trustworthily established. It is the witness' own document. No one can know better than himself what is in it. If its contents as a lost document were to be proved, this person would be the very one to be called. (6) There can be no suspicion of misstatement, first, because the witness has been called for the other party, and, secondly, because the opponent now cross-examining is (in the usual case) desirous of discrediting the witness by the document (7) and the last thing to be feared is that the witness will misrepresent the document in favor of the cross-examiner. If the opponent is willing to take a hostile witness' statement of contents, who else needs to fear misrepresentation? (*b*) But the rule of production, — is it, then, indeed so sacred and inflexible? A number of instances have been noted in which production is dispensed with as a part of the rule itself. It has also been seen that there is a long-established exception for documents collaterally in issue (*ante*, § 1252); and where the witness (as is the usual case) is sought to be discredited by prior written statements, the principle of that exception is certainly satisfied.[1] It has also just been seen (*ante*, § 1258) that another exception is well-established for the case of a witness cross-examined to interest on the 'voir dire'; there the effect of allowing proof by questions is much more radical, for it wholly excludes the witness, while here it merely discredits him. It has also been seen (*ante*, § 1255) that another exception exists for a party's admissions of contents; and the only risk which there exists — the possibility of fabricated testimony to the admission — is here entirely obviated by the witness' admission being made on the stand. With so many recognized limitations and analogous exceptions to the rule of production, it is pedantic to treat the present question as involving a novel inroad upon a hitherto inviolable and inflexible rule. (*c*) But, it is said, a witness' admissions are not admissions in the sense that a party's are.[2] Very true; what a party says out of court is evidence, but not what a witness says out of court (*ante*,

§ 1260. [1] 1824, Starkie, Evidence, I, 203 ("It is a remarkable circumstance that the question was never, in the course of inquiry in the case which occasioned so much discussion on the subject, directly raised whether a cross-examination as to something written by the witness, for the purpose not of proving any fact in the cause but simply of trying the credit or ability of the witness, was subject to the same strict rules as governed examination for proving material facts. . . . The principle of the rule [that the best evidence should be adduced] is applicable only to evidence to prove a material fact, and is inapplicable where the object is merely to try the credit or ability of the witness"); so also Phillipps, Evidence, 302.

[2] 1852, Counsel in Macdonnell *v.* Evans, 11 C. B. 937 (quoting Taylor on Evidence, "as the parol admissions of parties are now receivable in evidence although they relate to the contents of deeds or records [citing Slatterie *v.* Pooley], the same rule would seem to render the answers of a witness admissible in the case just put"; Cresswell, J.: "There is this striking difference between the two cases: a party is allowed to affect his own rights by parol admissions, but here the admission [by a witness only] would affect the parties in the cause").

§ 1069). But this is not said out of court; it is said in court. It is testimony, not an admission in the common significance. Moreover, it is in the usual case (as above pointed out) decidedly trustworthy testimony, for it is against interest. (*d*) But, again it is said, there is no precedent for it. This, to be sure, is very little of an argument from a Court which in the same case upset the traditions of the Bar on another point by establishing another novelty already examined (*ante*, § 1026). But on this very point the Court itself in The Queen's Case cited no precedent in its own behalf; if there was no precedent for the present contention, there was at least no precedent against it. The Court alluded to the current practice as in harmony with its ruling; but (as above noted) the practice had before then not been in harmony with it, and the vigorous protests of Mr. Starkie, Mr. Phillipps, and other practitioners made shortly afterwards, indicate that the ruling was a surprise to the Bar. Moreover, the exceptions already pointed out, for a witness on 'voir dire' and for collateral documents were close enough in principle to serve as precedents.

In sum, then, such questions should be allowed as a matter of principle, even if their allowance involved a distinct exception to the rule of Production.[3]

(2) But in any event, the principle is misapplied. Assuming that the rule of production should suffer no exception even where the document is only collaterally to be used and even where the witness' statement is trustworthy because made against his interest, nevertheless the rule in The Queen's Case is fallacious in that it *does not correctly apply the principle* it professes to invoke. The rule of production, with which our concern has been, calls for the exhibition of the document itself to judge and jury, in distinction from evidence about the document by a witness. The judge and the jury are supposed to ascertain its contents by inspection, as a source of proof superior to the assertions of witnesses. Now this *production to judge and jury* has nothing to do with a *showing to a witness*. It is not any witness that is to determine the contents of the document, but the tribunal (*ante*, § 1185). Yet the Judges' answer to the first question in The Queen's Case requires a showing to the witness, by virtue of the rule for production of documents.[4] Such a showing has nothing whatever to do with that rule. There is no reason why

[3] The Judges in The Queen's Case also gave the following reason, based on the principle of Completeness (*post*, § 2102): "If the course which is here proposed should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper; and thus the Court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part." But this objection is amply disposed of: (1) in the first place, the document itself may be produced by the witness' party, if it is in court or in his possession, to show the total effect of it; (2) the witness on re-examination may testify to any other terms of the document which counteract the possible wrong impression given by a part, under the ordinary principle of Completeness (*post*, § 2116); (3) the whole would have to be produced, in any case, when offered.

[4] 'Their answer to the third question, it is true, does require merely a *reading* of the document, which is a legitimate way to satisfy the rule of production (*ante*, § 1185). But there is nothing in the correct rule which requires such a reading *at that stage of the case*, *i.e.* before the witness is asked; the reading could properly wait until the cross-examiner is ready to put in his own case; and this indeed the judges prescribe as the normal rule.

the document should be shown to this witness rather than to any other witness in the case. It cannot be that the preliminary asking which is required in preparing to impeach by proving inconsistent statements (*ante*, § 1026) calls for such a showing; that requirement calls only for a fair warning as to the subject of the statement, and, in some jurisdictions, a further specification of time, place, and person; it was never supposed, nor do the Judges in The Queen's Case contend, that the showing of the document to the witness was any consequence of the rule as to impeachment by inconsistent statements. Observe, then, the fallacious and inconsequential nature of this rule that the document must be shown, as laid down by The Queen's Case: A certain principle about proving a document by production to judge and jury is said to involve a rule requiring the showing of the document to a witness; do, then, what this supposed rule dictates — namely, show the document to the witness — and thus satisfy the supposed rule; yet you are still no nearer than before to satisfying the above general principle about proving documents by production. In other words, if the cross-examiner were to show the document to the witness and put it in his pocket again, he would have satisfied the rule laid down by the first answer in The Queen's Case, and yet he would not have satisfied the general principle of production from which that answer professed to deduce that rule.[5] This fallacy is worth noting, for it is fundamental. The showing to the witness for his perusal is precisely the thing which the cross-examiner (for tactical reasons noted later) wishes in the usual case to avoid, and this same showing is a process which is in no way properly involved in the general principle invoked in The Queen's Case.

(3) Hitherto, it has here been assumed that the principle of production does apply to require at least production, and that (as in (1) *supra*) the case may be met by establishing an exception to the general principle. But, in truth, in the usual case, that principle does *not* require production *at the time of asking* the witness. Let us take, as the usual case, an attempt to impeach a witness by showing that he has at a former time in writing made an inconsistent statement on a material point or expressed a bias or a corrupt design against the opponent. The rule of impeachment applicable to such an attempt requires (*ante*, § 1025) that he shall be asked before leaving the stand whether he has made the statement subsequently to be proved against him. Now this asking, so far as it is a requirement, is not for the purpose of then and there proving the statement, but merely for the sake of fairly notifying him that the proof is to be offered; the requirement is satisfied by the mere asking, no matter what his answer (*ante*, §§ 1025, 1037). The cross-examiner, then, need not, if he does not choose, take an affirmative answer as proof; he has asked merely to satisfy the rule of fairness, and will in due time make

[5] It may be said that the cross-examiner must in any case show it to the witness in order to get an admission of its execution. The answer to this is (1) it would be enough for this purpose to show the signature, (2) the cross-examiner might equally well prove the execution, if he pleased, by calling the same or some other witness when he came to put in his own case.

the proof by producing the other witness (if it was an oral statement) or the document (if it was a written statement). Since, then, the asking is not done for the sake of proving the statement, the rule about proving a document's contents by production is not violated by the asking; the proof of the statement will be made later by the production of the document. This is clear enough, where the witness' answer is a denial of making the statement; but it is also true even where the witness' answer is an affirmative one; for the cross-examiner is not violating the documentary rule if he does not seek to accept the witness' answer in proof but proposes later during his own case to prove the statement and satisfy the documentary rule by producing the document. If then the cross-examiner does propose to prove the statement by the subsequent production of the document, and repudiates any desire to use the witness' affirmative answer as such proof (the asking, of course, is forced upon the cross-examiner by the impeachment-rule), he is not violating the documentary rule by not producing the document at that stage. Yet The Queen's Case erroneously assumes that he is. In other words, the impeachment-rule forces the cross-examiner to ask the question, and then The Queen's Case rule forbids him to ask it by conclusively imputing to him an intention to use a possible affirmative answer in a way in which he does not propose to use it even if it is given. Such is another of the incongruities of that rule.[6]

(4) The great objection, however, to the rule of showing, laid down in the first answer in The Queen's Case is one of *practical policy*. The circumstance which brought about such active opposition to it at the English Bar is that it abolished a most effective mode of discrediting a witness on cross-examination. Suppose, for example, that it is desired to show that the witness has in writing made a statement contrary to his present one, or has in writing shown bias or a corrupt intent; it is no doubt something accomplished to prove this by producing the writing; but much more, perhaps the entire overthrow of the witness, can be achieved if it is also made to appear that he is ready to falsify upon the stand in denial of this statement, or that he cannot correctly remember what he then wrote. Almost every strongly-contested trial affords examples of such an exposure; and it was by the loss of this weapon that the great practitioners contemporary with The Queen's Case were most keenly touched. Their criticism was unsparing;[7] and the following passages forcibly illustrate their objections:

1824, Mr. *Thomas Starkie*, Evidence, I, 203: "That the permitting such a cross-examination may frequently supply a desirable test for trying the memory and the credit of a witness admits of little doubt. If, for example, a witness profess to give a minute and de-

[6] It is to be noted that the above criticism is expressly made applicable to the "usual case", *i.e.* of attempting to discredit by proving an inconsistent or biassed statement. Where, on the other hand, the attempt is to prove the contents of a document material under the pleadings, it is clear that the rule of production does forbid this, and that what is said in (3) above does not apply, although some of the considerations mentioned in (1) *supra* are still applicable.

[7] "Opposed as the answers were to the most elementary principles of evidence", said Mr. Best, for example.

tailed account of a transaction long past, such as the particulars of a conversation or the contents of a written document, and consequently where much depends upon the strength of his memory, it is most desirable to put that memory to the test by every fair and competent means. . . . If he either deny that he has made any representation on the subject, or be unable to recollect what statement he has made, the circumstance tends to impeach the faithfulness of his memory, even to a greater extent than if the representation had been merely oral, inasmuch as the act of writing is more deliberate and more likely to remain impressed on the memory than a mere oral communication. . . . A cross-examination of this nature affords no mean test for trying the integrity of the witness. An insincere witness, who is not aware that his adversary has it in his power to contradict him, will frequently deny having made declarations and used expressions which he is on cross-examination ultimately forced to avow; and it often happens that by his palpable and disingenuous attempts to conceal the truth he betrays his real character; and thus his denials, his manner and conduct, become of far greater importance, and much more strongly impeach his credit, than the answer itself does which he is at last reluctantly constrained to give. Where the party is confined to the mere production and reading of the paper, without previous cross-examination, all inferences of this nature are obviously excluded."

1828, Feb. 7, Mr. *Henry Brougham*, Speech on the Courts of Common Law, Hans. Parl. Deb., 2d ser., XVIII, 213, 219: "If I wish to put a witness' memory to the test, I am not allowed to examine as to the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any questions upon it, though by so doing he at once becomes acquainted with its contents, and so defeats the object of my inquiry. That question was raised and decided in the Queen's case, after solemn argument, and, I humbly venture to think, upon a wrong ground, namely, that the writing is the best evidence and ought to be produced, though it is plain that the object is by no means to prove its contents. Neither am I, in like manner, allowed to apply the test to his veracity; and yet, how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him to the contents of a letter, written by him, and which he believes to be lost? . . . I shall not easily forget a case in which a gentleman of large fortune appeared before an able arbitrator, now filling an eminent judicial place, on some dispute of his own, arising out of an election. It was my lot to cross-examine him. I had got a large number of letters in a pile under my hand, but concealed from him by a desk. He was very eager to be heard in his own cause. I put the question to him: 'Did you never say so and so?' His answer was distinct and ready, — 'Never.' I repeated the question in various forms, and with particularity, and he repeated his answers, till he had denied most pointedly all he had ever written on the matter in controversy. This passed before the rules in evidence laid down in the Queen's case; consequently I could examine him without putting the letters into his hand. I then removed the desk, and said, 'Do you see what is now under my hand?' pointing to about fifty of his letters. 'I advise you to pause before you repeat your answer to the general question, whether or not all you have sworn is correct.' He rejected my advice, and not without indignation. Now, those letters of his contained matter in direct contradiction to all he had sworn. I do not say that he perjured himself, — far from it. I do not believe that he intentionally swore what was false; he only forgot what he had written some time before. Nevertheless he had committed himself, and was in my client's power."

1849, Mr. *W. M. Best*, Evidence, § 478: "By requiring the document containing the supposed contradiction to be put into the hands of the witness in the first instance, the great principle of cross-examination is sacrificed at once. When a man gives certain evidence, and the object is to show that he has on a former occasion given a different account, common sense tells us that the way of bringing about a contradiction is to ask him if he has ever done so. . . . Yet, according to the practice under the resolutions in Queen Caroline's Case, if the witness had taken the precaution to reduce his previous statement to writing, the writing must be put into his hands accompanied by the question whether he wrote it, thus giv-

ing him full warning of the danger he had to avoid and full opportunity of shaping his answers to meet it." [8]

These criticisms expose the great fault in the ruling in The Queen's Case. It was unsound in principle because there is no reason why an adverse witness' testimony to contents on cross-examination should not — at least in the trial Court's discretion — be sufficient proof. But it also sinned against sound policy because it unnecessarily diminished the utility and effectiveness of that great instrument for the discovery of lies, — cross-examination. In the following passages from celebrated trials may be seen the efficiency of cross-examination, when unhampered by the rule, in exposing a falsifier:

1811, *Berkeley Peerage Trial*, Sherwood's Abstract, 120; Mrs. Jane Price, who had formerly lived as governess in the family of Lord Berkeley, was called to testify against the claim represented by Lady Berkeley; she had been asked: "Do you entertain any malice or ill-will towards Lady Berkeley, or any one of her family?" and had said, "Oh, none, upon my oath"; she was then asked as follows: "Did you not tell Lady Berkeley you would be her greatest enemy?" "Oh, never; Lady Berkeley cannot say it, for I never did." Afterwards the following paper was shown to the witness, and she was asked, "Is not the whole of this letter your handwriting?" — "Yes, the whole of this is mine." The same was then read, as follows: "Saturday, July 20th, 1799. Mrs. Price feels herself treated so unlike a gentlewoman in every respect in Lord Berkeley's family that she begs leave to say she wishes to be no longer engaged therein; though she does not mean to quit it without first informing her Ladyship, it is in Mrs. Price's power to be her greatest enemy."

1827, *M'Garahan* v. *Maguire*, Mongan's Celebrated Trials in Ireland, 16, 26; seduction of the plaintiff's daughter, the defendant being a priest; the case was shown by the evidence to be one of mere blackmail, but this was at the outset not apparent; the chief and first witness for the prosecution was Anne M'Garahan, the supposed victim of the defendant; and upon her cross-examination by Mr. *Daniel O'Connell*, the following passages took place: Mr. O'Connell: "Did you ever take a false oath about the business?" Witness: "Not that I recollect"; Mr. O'Connell: "Great God, is that a thing you could have forgotten?" Witness: "I believe I did not. I am sure I did not"; Mr. O'Connell: "Oh, I see I have wound you up. Perhaps, then, you will tell me now, did you ever swear it was false?" Witness: "I never took an oath that the charge against Mr. Maguire was false. I might have said it, but I never did swear it." . . . Mr. O'Connell: "Did you ever say that your family was offered £500 or £600 for prosecuting Mr. Maguire?" Witness: "I don't recollect"; . . . Mr. O'Connell: "Did you ever say that you would get £600 for prosecuting him?" Witness: "I never did"; Mr. O'Connell: "Or write it?" Witness: "Never"; Mr. O'Connell: "Is that your handwriting?" here a letter was handed to her; Witness: "It is"; Mr. O'Connell: "And yet you never wrote such a letter!" The letter read in part: "Dear Mr. Maguire, . . . I am the innocent cause of your present persecution. . . . Is there a magistrate in this county you can safely rely upon? If there is, let him call here as it were on a journey to feed his horse; let him have a strong affidavit of your innocence in his pocket; let me in the meanwhile know his name, that I may have a look out for him, and while his horse is feeding, I will slip down stairs and swear to the contents; I have already sworn to the same effect, but not before a magistrate. . . . £600 have been offered our family to prosecute you, but money shall never corrupt my heart." Witness: "I did not think when you were questioning me that you were alluding to this letter. I could not have supposed Mr. Maguire would have been so base as ever to have produced this letter, after swearing three solemn oaths that he would not. If I thought he

[8] See also the following criticisms: 1853, Common Law Practice Commissioners, Second Report, 20; 1820, Mr. Denman, arguing in The Queen's Case, Linn's ed. I, 465.

would, I should have certainly told my counsel about it." After further questioning, "the witness seemed overcome; and she turned to the defendant, exclaiming, 'Oh, you villain! you villain!'"

1888, *Parnell Commission's Proceedings*, 54th day, Times' Rep. pt. 14, pp. 194, 195; this was virtually an action by Mr. Parnell and others, against the London "Times", for defamation, in charging among other things that Mr. Parnell had approved the Phœnix Park assassination; this charge was based on alleged letters of Mr. Parnell, plainly admitting complicity, sold to "The Times" by one Richard Pigott, an Irish editor, living in part by blackmail, who claimed to have procured them from other Irishmen. Pigott himself turned out to have forged them; but the case for their authenticity seemed sound, until Pigott was placed on the stand for "The Times" and came under the cross-examination of Sir *Charles Russell*. The object of the ensuing part of the cross-examination was to bring out Pigott's shiftiness in first selling the letters as genuine to "The Times", and then offering to the Parnell party for money to enable them to disprove the letters' genuineness. The letters had been first published in a series of articles entitled "Parnellism and Crime", beginning March 7, 1887, and bringing temporary obloquy to the Parnell party and causing the passing of the Coercion Act. Archbishop Walsh, mentioned in the examination, was an intimate friend of Mr. Parnell. Pigott, in his prior examination, had claimed that he had handed the letters to "The Times" merely for the latter's protection, to substantiate the articles, and that the publication of the letters "came upon me by surprise"; the falsehoods exposed in the following answers were in a sense partly immaterial, but they served all the more to show the man's thoroughly false character: Q. "You were aware of the intended publication of that correspondence?" A. "No, I was not at all aware." Q. "What?" A. "Certainly not." . . . Q. "You have already said that you were aware, although you did not know they were to appear in 'The Times', that there were grave charges to be made against Mr. Parnell and the leading members of the Land League?" A. "I was not aware till the publication actually commenced." Q. "Do you swear that?" A. "I do." Q. "No mistake about that?" A. "No." Q. "Is that your letter (produced)? Don't trouble to read it." A. "Yes; I have no doubt about it." Q. "My Lords, that is from Anderton's Hotel, and is addressed by the witness to Dr. Walsh, Archbishop of Dublin. The date, my Lords, is March 4, 1887, three days before the first appearance of the first series of articles known as 'Parnellism and Crime.' (Reading.) 'Private and confidential. My Lord, — The importance of the matter about which I write will doubtless excuse this intrusion on your attention. Briefly, I wish to say that *I have been made aware of the details of certain proceedings that are in preparation* with the object of destroying the influence of the Parnellite party in Parliament.' (To witness.) What were these certain proceedings that were in preparation?" A. "I do not recollect." Q. "Turn to my Lords, Sir, and repeat that answer." A. "I do not recollect." Q. "Do you swear that, writing on the 4th of March and stating that you had been made aware of the details of certain proceedings that were in preparation with the object of destroying the influence of the Parnellite party in Parliament less than two years ago, you do not know what that referred to?" A. "I do not know really." Q. "May I suggest?" A. "Yes." . . . Q. "Did that passage refer to these letters, among other things?" A. "No, I rather fancy *it had reference to the forthcoming articles.*" Q. "I thought you told us you did not know anything about the forthcoming articles?" A. "Yes, I did. I find now that I am mistaken, but I must have heard something about them." Q. "Try and not make the same mistake again, if you please. (Reading.) 'I cannot enter more fully into details than to state that the proceedings referred to consist in the publication of certain statements, purporting to prove the complicity of Mr. Parnell himself and some of his supporters with murders and outrages in Ireland, to be followed in all probability by the institution of criminal proceedings against these parties by the government.' Who told you that?" A. "I have no idea." Q. "Did that refer, among others, to the incriminatory letters?" A. "I do not recollect that it did." Q. "Do you swear it did not?" A. "I will not swear it

did not." Q. "Do you think it did?" A. "No." Q. "Very well; *did you think that these letters, if genuine, would prove, or would not prove, Mr. Parnell's complicity with crime?*" A. "I thought they were very likely to prove it." Q. "Now, reminding you of that opinion, and the same with Mr. Egan, I ask you whether you did not intend to refer — I do not suggest solely, but among other things — to the letters as being the matter which would prove, or purport to prove, complicity?" A. "Yes, I may have had that in mind." Q. "You can hardly doubt that you had that in your mind?" A. "I suppose I must have had." Q. "(Reading.) 'Your Grace may be assured that I speak with full knowledge, and am in a position to prove beyond all doubt or question the truth of what I say.' Was that true?" A. "It could hardly have been true." Q. "Then you wrote that which was false?" A. "I did not suppose his Lordship would give any strength to what I said. I do not think it was warranted by what I knew." Q. "Did you make an untrue statement in order to add strength to what you had said?" A. "Yes." Q. "A designedly untrue statement, was it?" A. "Not designedly." Q. "Try and keep your voice up." A. "I say, not designedly." Q. "Accidentally?" A. "Perhaps so." Q. "*Do you believe these letters to be genuine?*" A. "I do." Q. "And did at that time?" A. "Yes." Q. "(Reading.) 'And I may further assure your Grace that *I am also able to point out how the designs may be successfully combated and finally defeated.*' (To witness.) Now if these documents were genuine documents, and you believed them to be such, how were you able to assure his Grace that you were able to point out how the designs might be successfully combated and finally defeated?" A. "Well, as I say, I had not the letters actually in my mind at that time, so far as I can remember. I do not recollect that letter at all." Q. "You told me a moment ago without hesitation that you had both in your mind?" A. "But, as I say, it had completely faded out of my memory." Q. "That I can understand." A. "I have not the slightest idea of what I referred to." Q. "Assuming the letters to be genuine, what were the means by which you were able to assure his Grace you could point out how the designs might be successfully combated and finally defeated?" A. "I do not know." Q. "Oh, you must think, Mr. Pigott, please. It is not two years ago, you know. Mr. Pigott, had you qualms of conscience at this time, and were you afraid of the consequences of what you had done?" A. "Not at all." Q. "Then what did you mean?" A. "I cannot tell you at all." Q. "Try." A. "I cannot." Q. "Try." A. "I really cannot." Q. "Try." A. "It is no use." Q. "Am I to take it, then, that the answer to my Lords is that you cannot give any explanation?" A. "I really cannot." . . . Q. "Now you knew these impending charges were serious?" A. "Yes." Q. "Did you believe them to be true?" A. "I cannot tell you whether I did or not, because, as I say, I do not recollect." . . . Q. "First of all, you knew then that you had procured and paid for a number of letters?" A. "Yes." Q. "Which, if genuine, you have already told me would gravely implicate the parties from whom they were supposed to come?" A. "Yes, gravely implicate." Q. "You regard that as a serious charge?" A. "Yes." Q. "Did you believe that charge to be true or false?" A. "*I believed that to be true.*" . . . Q. "Now I will read you this passage: — 'P.S. I need hardly add that *did I consider the parties really guilty of the things charged against them, I should not dream of suggesting* that your Grace should take part in an effort to shield them. I only wish to impress on your Grace that the evidence is apparently convincing, and would probably be sufficient to secure conviction if submitted to an English jury.' What have you to say to that?" A. "I say nothing, except that I am sure I could not have had the letters in my mind when I said that, because I do not think the letters convey a sufficiently serious charge to warrant my writing that letter." Q. "But as far as you have yet told us the letters constituted the only part of the charge with which you had anything to do?" A. "Yes, that is why I say that I must have had something else in my mind which I cannot recollect. I must have had some other charges in my mind." Q. "Can you suggest anything that you had in your mind except the letters?" A. "No, I cannot." . . . [On the next day, when Pigott resumed his examination]: Q. "Then I may take it that since last night you have removed from your mind — I think your bosom was the expres-

sion you used — that this communication of yours [to the Archbishop] referred to some fearful charges, something not yet mentioned?" A. "No, I told you so last night, but I am sure that it is not so. I will tell you my reason." Q. "You need not trouble yourself." A. "I may say at once that *the statements I made to the Archbishop were entirely unfounded.*" . . . Q. "Then in the letters I have up to this time read — or some of them — you deliberately sat down and wrote lies?" A. "Well, they were exaggerations; I would not say they were lies." Q. "Was the exaggeration such as that it left no truth?" A. "I think very little."

1888, *Parnell Commission's Proceedings*, 31st day, Times' Rep. pt. 8, p. 212; the "Times" had charged the Irish Land League and its leaders with complicity in crime and agrarian outrage; many of the witnesses to prove its case were suspected of offering testimony fabricated by themselves in the hope of finding a willing ear and obtaining a pleasant sojourn in London and good pay for their time; one Thomas O'Connor, who had presented on the stand a highly-colored story (which was claimed by the Land League to be an entire fabrication) was thus cross-examined by Sir *Charles Russell:* Q. "When you came over here to give your evidence did you expect any money?" A. "I expected to be sent back." Q. "Did you expect any money?" A. "Well, no; I expected that I should be sent back and paid for the time I should spend here." Q. "Anything more?" A. "Nothing more." Q. "You did not expect to make money out of *The Times?*" A. "No." Q. "Merely your bare expenses?" A. "Yes." Q. "You volunteered to come over solely in the interests of morality, truth, and justice?" A. "Yes, and in the hope of banishing the hell on earth that exists round my own place in Ireland." Q. "You had no thought of gain for yourself at all?" A. "I do not care about the gain." Q. "You had no thought of gain for yourself at all?" A. "No." Q. "Were you asked by anyone to make statements incriminating any of the popular leaders in Ireland?" A. "No." . . . Q. "Were you asked to tell queer things?" A. "Well, he told me to tell everything I knew." . . . Q. "Were you afraid that because you could not tell him the queer things he wanted you would not get the money which you expected?" A. "I was not afraid of that, because I did not expect any money." Q. "Take this letter in your hand. Do not read it, but look at the signature. Have you any doubt as to its being your signature?" A. "No, I have not." Sir *C. Russell:* "I will read this letter: — 'Dear Pat, — I was here in London since yesterday morning. I was in Dublin two days. I got myself summoned for *The Times.* I thought I could make a few pounds in the transaction, but I find I cannot unless I would swear queer things. I am afraid they will send me to gaol, or at least give me nothing to carry me home. I would not bother with it at all, but my health was not very good when I was at home, and I thought I would take a short voyage and see a doctor at their expense. But, instead of it doing me any good, it has made me worse a little. I will be examined tomorrow, Tuesday, the 4th.'"[9]

§ 1261. **Same: Details of the Rule.** (1) The rule of showing and reading ceases, of course, to apply when the document is shown to be *lost* or *otherwise unavailable;* for then production is dispensed with, according to the principles already noticed.[1]

[9] The following are also illustrative: 1875, Tilton *v.* Beecher, N. Y., "Official" Report, III, 6-8; III, 6-8, 40-41, 109-113 (Mr. Beecher's cross-examination, by Mr. Fullerton); II, 174 (cross-examination of Mrs. S. C. D. Putnam, by Mr. Fullerton).

One of the neatest illustrations is found in the examination of Mr. McClelland by Mr. Hughes, before the New York Legislative (Armstrong) Committee on Insurance, on Nov. 29, 1905.

§ 1261. [1] 1820, Abbott, C. J., in the answer to the first question, in The Queen's Case, *ante,* § 1259; Starkie, Evidence, I, 202; Phillipps, Evidence, I, 298; 1840, Davies *v.* Davies, 9 C. & P. 252 (an office-copy, admitted to be correct, of an affidavit in another Court; cross-examination on it allowed); 1883, Horton *v.* Chadbourn, 31 Minn. 322, 17 N. W. 865 (but here the rule was too strictly applied).

(2) When the cross-examiner, in asking as to a prior inconsistent statement, asks merely whether the witness made such-and-such a statement, he must, if objection is made, *specify* either a statement made *orally* or a statement made *in writing*, so that the present rule can be enforced in the latter case.[2]

(3) The witness may be shown *only the signature* or some other part for the purpose of obtaining an admission of the execution of the document; but, for the purpose of proving the contents, the document's production at the proper time is necessary, and without it the questions as to contents cannot be asked.[3]

(4) *The proper time for reading* the letter to judge and jury is, in the absence of special considerations, the time when the cross-examiner comes to put in his own case.[4]

[2] 1820, The Queen's Case, 2 B. & B. 292 (Abbott, C. J.: "A witness is often asked whether there is an agreement for a certain price for a certain article . . . or other matter of that kind, being a contract; and when a question of that kind has been asked at nisi-prius, the ordinary course has been for the counsel on the other side . . . to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side was or was not in writing; and if the witness answers that it was in writing, then the enquiry is stopped, because the writing itself must be produced").

[3] 1820, The Queen's Case, 2 B. & B. 286; 1903, Trentham *v.* Bluthenthal, 118 Ga. 530, 45 S. E. 421; 1848, Clapp *v.* Wilson, 5 Den. 285, 287.

For the question whether the *whole of the writing*, or only the parts strictly contradictory, may be introduced, see *post*, § 2113.

The following is of course sound: 1912, Larkin *v.* Nassau Electric R. Co., 205 N. Y. 267, 98 N. E. 465 (a statement typewritten by another person and signed by defendant is not inadmissible merely because he did not read it over).

[4] ENGLAND: 1820, The Queen's Case, 2 B. & B. 289 (Abbott, C. J.: "According to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel as part of his evidence in his turn after he shall have opened his case; that is the ordinary course. But if the counsel who is cross-examining suggests to the Court that he wishes to have the letter read immediately in order that he may, after the contents of that letter shall have been made known to the Court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below, and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel", but as still his evidence); UNITED STATES: *Ark.* 1901, St. Louis I. M. & S. R. Co. *v.* Faisst, 68 Ark. 587, 61 S. W. 374 (a writing may be read when cross-examining to lay the foundation, "if cross-examination upon the contents is desired and suggested to the Court"); *Conn.* 1902, Hennessy *v.* Ins. Co., 74 Conn. 699, 52 Atl. 490 (whether it is to be put in evidence during the cross-examination is in the trial Court's discretion); *Haw.* 1904, Terr. *v.* Boyd, 16 Haw. 660, 665 (the witness may be cross-examined to a document shown him, without necessarily filing it and making it evidence); *Ill.* 1898, Peyton *v.* Morgan Park, 172 Ill. 102, 49 N. E. 1003 (to be offered after cross-examination in the cross-examiner's case); *N. H.* 1872, Haines *v.* Ins. Co., 52 N. H. 470, 471 ("such matters as the identity of the paper and of the witness, and the genuineness of the signature, are not usually in dispute; and it would be well to wait and see what objections will be made to the introduction of the deposition when it is offered at the proper time"; but "no absolute rule can be laid down, because it is a matter of fact and reasonableness"); *N. Y.* 1872, Romertze *v.* Bank, 49 N. Y. 579 (document need not be offered till examiner's own case is put in; unless perhaps in the Court's discretion, in order to allow explanations by the witness); 1904, Hanlon *v.* Ehrich, 178 N. Y. 474, 71 N. E. 12 (like Romertze *v.* Bank); 1912, Larkin *v.* Nassau Electric R. Co., 205 N. Y. 267, 98 N. E. 465 (may be introduced "in the regular course of the trial"); *Tex.* 1920, Burgess *v.* State, 88 Tex. Cr. 146, 225 S. W. 182.

Compare § 1884 (documents on cross-examination).

For the question whether the *whole of the writing* must be *shown to the opponent's counsel* on request, see *post*, §§ 1861, 2125.

Distinguish also the question whether the whole *may* be put in evidence by the opponent (*post*, § 2113).

Of course the document must be *otherwise proved*, if the witness does not admit its execution: 1910, Belskis *v.* Dering Coal Co., 246 Ill. 62, 92 N. E. 575 (here the document con-

(5) *Opposing counsel*, as well as the witness, is entitled to inspect the document, at least before the witness leaves the stand; so as to be enabled to discover explanatory features in it and to re-examine the witness upon it.[5] All other analogies (*ante*, §§ 753, 762, *post*, § 1861), coincide to this purpose.

§ 1262. **Same: Rule as applied to Prior Statements in Depositions.** When a witness' testimony is taken down at a preliminary hearing for committal by a magistrate, or is taken by a commissioner in the shape of a deposition, it seems to be generally conceded that the written report is preferred testimony to his statements, *i.e.* it must be produced or accounted for before testimony can be given of the witness' oral words (*post*, §§ 1326–1332). This is not the same as holding that the magistrate's report *is* the witness' testimony (instead of the witness' oral words), — though this may be so where the witness has signed the report, and it is always taken to be so in the case of a deposition (in the strict sense) taken by a commissioner. However, waiving these objections (dealt with *post*, § 1349, with reference to the theory of such examinations), and assuming that the magistrate's written report or the commissioner's certified deposition *is* a statement in writing by the examinee or deponent, the rule in The Queen's Case obviously applies; *i.e.* a witness upon the stand cannot be asked as to any statements made in a deposition or at a magistrate's examination without producing and showing the document. This is simple enough as to a *deposition*, strictly so called. But as to a *magistrate's report of an examination*, the rule requiring it to be used as preferred proof of the witness' answers (*post*, § 1326) does not make it a preferred proof where it has omitted to record the answer in question, or at least where the answer or remark was not made during the course of the examination and thus was not required to be recorded by the magistrate (*post*, § 1326). There may thus have been oral answers of which the magistrate's report cannot be expected to furnish the written proof. Hence it would not be proper to cross-examine a witness about these statements, until it has been made to appear that the question refers to statements which could not have been in the magistrate's report or which could have been, but in fact are not, there found.

Such was, in England, the principle and effect of the Resolutions of the Judges in 1837.[1] The question had not attracted attention before that time,[2]

tained additions which the witness denied he had signed).

[5] 1918, State *v.* Worley, 82 W. Va. 350, 96 S. E. 56 (unsigned confession of accomplice, used in impeachment, required to be shown to defendant's counsel).

§ 1262. [1] 1837, circa February, Resolutions of Judges, 7 C. & P. 676 ((1) The witness cannot be asked whether he made a statement in his deposition before the magistrate, without reading the deposition as a part of his evidence; (2) So for questions as to other statements before the magistrate; the deposition must first be read to see whether it contains them; (3) So for questions as to any self-contradictions whatever; the question must specifically negative any reference to the deposition's statements); this last rule being established as a logical consequence of the first two, by R. *v.* Holden, 8 C. & P. 609 (1838) and R. *v.* Shellard, 9 id. 279 (1840); but R. *v.* Moir, 4 Cox Cr. 279 (1850) is *contra* to this Rule 3.

[2] The following case dealt with a slightly different point: 1832, Ridley *v.* Gyde, 1 M. & Rob. 197, Tindal, C. J. (where the witness was asked whether he had mentioned a fact when

because by the Prisoners' Counsel Act,[3] in 1836, a counsel's aid for the first time became available, for the purposes of cross-examination, to defendants accused of felony, and so such attempts to discredit a prosecuting witness by professional methods had just begun to be common. The bindingness of this rule was for a time disputed.[4] The chief reason for the stand taken by the Bar against them was the supposed absence of a right in the prosecuting counsel to address the jury in closing, if the defence had introduced no evidence of its own; for thus, if the defence could by mere cross-examination bring out these self-contradictions, the prosecution would have no right to make a closing address; while if the defence were obliged to put in the deposition as a part of its own case, the prosecution would gain the right to make a closing address. But it seems to have been settled soon afterwards that the prosecution had such a right in any case, though it had customarily not been exercised;[5] and thus the chief reason for opposition ceasing to exist, the Resolutions received thereafter a general enforcement.[6] Attempts to evade them by indirection were discountenanced. Thus, the rule was held to be violated where the witness was shown his deposition and asked to say, after reading it silently, whether he persevered in his statement just made on the stand; for in this way there is given to the jury an implication as to the contents of the deposition.[7] But merely asking the witness to take the deposition and refresh his memory therefrom, and then to say whether after refreshing it he perseveres in his statement just made on the stand does not necessarily convey such an implication, and would be allowable.[8]

Presumably the foregoing application of the rule in The Queen's Case would no longer be law in England, since the Statute 28 & 29 Vict.

examined before the bankruptcy commissioners; rule held not applicable).

[3] St. 6 & 7 Wm. IV, c. 114.

[4] In R. *v.* Coveney, 8 C. & P. 31 (January, 1837), Patteson, J., had allowed the question forbidden by Rule 1 to be asked and the affirmative answer to be taken as proof.

[5] April, 1837, R. *v.* Edwards, 8 C. & P. 26, 29, Coleridge, J. A compromise was in this case suggested, by which the judge should follow, deposition in hand, the witness' testimony on the stand, if he chose to do so in his discretion. But even here, "if the judge should refer to the depositions, and so introduce new facts in evidence", by questioning the witness about discrepancies, Coleridge, J., was not sure that the right to reply was lost.

[6] 1837, R. *v.* Edwards, 8 C. & P. 26, per Coleridge and Littledale, JJ.; at p. 31 is given a list of unreported rulings in which other judges affirmed the Resolutions. But they seem subsequently to have been confined to strict limits: 1861, R. *v.* Mohoney, 9 Cox Cr. 28 (on cross-examination a question allowed as to what the witness had said before the coroner, without producing the deposition, because the judges' rules applied only to examinations before a magistrate).

[7] 1850, R. *v.* Newton, 15 L. T. 26; 1851, R. *v.* Ford, 5 Cox Cr. 184: 1863, R. *v.* Brewer, 9 id. 409 (proposition to have the witness peruse the deposition and then say whether he adhered to his answer, rejected; the deposition must be "put in in the regular way"; following R. *v.* Ford). The following ruling rests on the same principle: 1849, R. *v.* Matthews, 4 Cox Cr. 93 (the witness not being able to read, counsel offered to have a court-officer read his deposition aloud to him, so as to refresh his memory and see whether he adhered to it; excluded, because it would make the officer a witness to contradict). But even since the statutory abolition of the rule in The Queen's Case, R. *v.* Ford may still in another aspect be correct; *i.e.* though the witness' testimony to the fact of contradicting himself would be proper without reading the document itself, yet if the witness said that he did "persevere in his statement", the implication that he had formerly stated the contrary might be in fact unjust, — the result of the counsel's trick. On this point, see *ante*, § 764.

[8] 1837, R. *v.* Edwards, 8 C. & P. 26, 31; 1850, R. *v.* Barnet, 4 Cox Cr. 269.

c. 18, § 5 (quoted *post*, § 1263) abolished the rule for criminal cases.[9]

It should, however, be noted that, irrespective of the rule in The Queen's Case (*i.e.* in jurisdictions where it is not in force), this use of a deposition to refresh memory raises some other and independent questions, (1) whether its use on cross-examination is dishonest under certain circumstances, as just mentioned (note 7, *supra;* and *ante*, § 764), (2) whether it may properly be done, the deposition not being a contemporary memorandum (*ante*, § 761), and (3) whether when done on re-direct examination it violates the rule against impeaching one's own witness (*ante*, § 904). Distinguish also the question whether the *whole of a document may* be put in evidence by the opponent (*post*, § 2113).

§ 1263. **Same: Jurisdictions recognizing the Rule in The Queen's Case.** In *England*, the rule laid down in The Queen's Case, so far as it applied to attempts to discredit a witness by cross-examining him to prior inconsistent or biassed or corrupt utterances, was unanimously condemned by the Bar. When the general revision of common-law procedure took place in 1854, a statute was passed which (*a*) expressly abolished the really indefensible part of the rule, namely, the requirement that the document *must be shown* to the witness before asking him about it, and (*b*) by implication abolished the requirement of then producing and *reading* the document, and thus allowed any document's terms to be proved by testimony of the writer on cross-examination without subsequent production; though in case of the witness' denial, production would of course be necessary; and in any case whatever the statute authorizes a judicial discretion to order production.[1] The judicial construction of the statute seems to accept these consequences fully.[2]

[9] For the American rulings on the subject of the above section, see the notes to the next section.

§ 1263. [1] 1854, St. 17 & 18 Vict. c. 125, § 24 ("A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit"); extended in 1865 to criminal cases: 28 & 29 Vict. c. 18, § 5; 1874, Day, Common Law Procedure Acts, 4th ed., 277 ("The effect is this: the witness in the first instance may be asked whether he has made such and such a statement in writing without its being shown to him. If he denies that he has made it, the opposite party cannot put in the statement without first calling his attention to it (showing it, or at least reading it to him) and to any parts of it relied upon as a contradiction").

It does not appear from the statute whether "calling his attention" means "showing the writing." But this is immaterial; the important thing is that the witness' readiness to lie or inability to remember can be tested by asking him before showing the writing to him.

[2] 1858, Sladden *v.* Sergeant, 1 F. & F. 322, Willes, J. (cross-examination on an affidavit made by the witness; production not necessary); 1858, Ireland *v.* Stiff, 1 F. & F. 340 (Willes, J.: "Strictly, the course is, to ask first if he received a letter of a certain date; then if he received a letter commencing, etc. It will come to the same thing [*i.e.*, as here, where counsel asked if he had received a letter in the following terms]; it is only for the purpose of identification"); 1859, Farrow *v.* Blomfield, 1 F. & F. 653 (Pollock, C. B., allowing a question to the plaintiff on cross-examination as to the contents of a letter inconsistent with his

In *Canada*, similar corrective statutes have been enacted; though they seem to have been by some Courts construed strictly.[3]

In the *United States*, the rule seems not to have existed before 1820; wherever it was advanced, it seems to have come directly by adoption of the ruling in The Queen's Case. The statutory abolition of the rule in England did not become known in this country except in a few quarters.[4] The singular spectacle was presented of many Courts in this country adopting a supposed rule which had been repudiated in its jurisdiction of origin a generation before. The question has not been passed upon in all of our jurisdictions; but the rule has been adopted in most courts where it has been invoked, although with little attempt to develop its details, particularly as regards the use of questions upon depositions.[5]

testimony: "If a question arises as to the contents of a written instrument, and you can get a witness to come and swear that he heard the plaintiff say it contained such and such expressions, that is good evidence of the contents of the instrument without producing it. And if the plaintiff is himself in the box, you may ask him as to the contents of the document, and his answer will be as good evidence as any previous statement. . . . The judge might say that the document ought to be produced; I should do so myself in some cases"); 1893, North Austr. T. Co. *v.* Goldsborough, 2 Ch. 381, 386; 1911, Steinie Morrison's Trial, p. 256 (Notable English Trials Series, 1922; Mr. Abinger: "I submit that, if you are cross-examining a man about his own letter, he is entitled to see it at the moment he is being cross-examined about it"; Mr. J. Darling: "No, not at the moment he is being cross-examined about it").

[3] *Dom.* R. S. 1906, c. 145, Evid. Act, § 10 (like Eng. St. 1854, c. 125, § 24; adding that a purporting deposition, duly produced, shall be presumed to have been signed by the witness); *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 20 (like Eng. St. 1854, c. 125, § 24); *B. C.* Rev. St. 1911, c. 78, § 16 (like Eng. St. 1854, c. 125, § 24); 1914, R. *v.* Mulvihill, 18 D. L. R. 189, B. C. (murder; the accused was allowed to be cross-examined to his testimony at the inquest without producing the written deposition; "he has no right to ask before answering that he wants to see or hear what has been taken down in the depositions"; but on denial the document must be produced if contradiction is to be proved); *N. Br.* Consol. St. 1903, c. 127, § 17 (like Eng. St. 1854, c. 125, § 24); 1859, Lawton *v.* Chance, 4 All. 441 (trial Court's discretion to order production under the statute, here exercised); 1862, Campbell *v.* Gilbert, 5 All. 420, 426 (trial Court's discretion exercised to require production of the original document being in England, not an office copy); 1880, R. *v.* Tower, 20 N. Br. 168, 190, 198 (cross-examination under the statute, without offering the paper in evidence, not allowed where it did not appear that the witness himself had written, signed or seen the paper); *Newf.* Consol. St. 1916, c. 91, § 9 (like Eng. St. 1854, c. 125, § 24); *N. Sc.* Rev. St. 1900, c. 163, § 44 (like Eng. St. 1854, c. 125, § 24); *Ont.* Rev. St. 1914, c. 76, § 17 (like Eng. St. 1854, c. 125, § 24); *P. E. I.* St. 1889, c. 9, § 17 (like Eng. St. 1854, c. 125, § 24); *Sask.* Rev. St. 1920, c. 44, § 34 (like Eng. St. 1854, c. 125, § 24); *Yukon*: Consol. Ord. 1914, c. 30, § 42 (like Eng. St. 1854, c. 125, § 24).

[4] Probably because the learned author of Greenleaf on Evidence died in 1853, the year before the statute, and The Queen's Case remained elaborately treated as law in his text, while the statute was only noticed in an obscure corner of the later editorial notes.

[5] For *depositions*, the cases cited *ante*, §§ 761, 764, 904, must be compared: UNITED STATES: *Federal*: 1884, The Charles Morgan, 115 U. S. 69, 77, 5 Sup. 1172 (must be shown to witness, "except under special circumstances"; "all that the law requires is that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can and desires to do so"; the trial Court to determine this); 1890, Chicago M. & S. P. R. Co. *v.* Artery, 137 U. S. 520, 11 Sup. 129 (The Queen's Case mentioned with approval, but on another point); 1892, Toplitz *v.* Hedden, 146 U. S. 254, 13 Sup. 70 (the plaintiff was asked whether in a former suit he had made a certain claim; an objection that the record should be produced was overruled; "if he wished to appeal to the prior record, to refresh his recollections he could call for it and do so; but the evidence as offered was competent, irrespectively of the record"); 1908, Jones *v.* U. S., 9th C. C. A., 162 Fed. 417, 430 (the defendant having cross-examined the prosecution's witness by reading parts of a former sworn statement, the prosecution was allowed to put in the whole, apparently on the theory that this was merely permitting what the defendant should originally have been required to do by the present rule; but of course it was also justifiable, irrespective of the present rule, on the principle of § 2115);

To save effective cross-examination, this misguided rule should once and for all be disposed of by a statutory measure similar to the English pro-

1909, Richards *v.* U. S., 8th C. C. A., 175 Fed. 911, 925, 942 (rule assumed to apply, in both majority and dissenting opinions): 1917, U. S. *v.* Phelan, D. C. S. D. Cal., 252 Fed. 891 (age of person failing to register under the Selective Service Act; defendant's mother having given July 13, 1886, as the date of birth, held that the rule requiring production was satisfied by showing to her photographic copies of an application by her on file in the U. S. Pension office, containing an inconsistent statement; as to the use of a photographic, instead of a certified copy, there was no reason for the Court's doubt; as to the necessity of showing either the original or copy, the Court reserves the question);

Alabama: 1883, Wills *v.* State, 74 Ala. 24 (writing must be shown and read; here, testimony before a committing magistrate); 1884, Phœnix Ins. Co. *v.* Moog, 78 Ala. 310 (same for deposition; here read aloud to witness, who could not read); 1886, Floyd *v.* State, 82 Ala. 22 (same rule: testimony before a committing magistrate); 1887, Gunter *v.* State, 83 Ala. 106 (same, preliminary examination of witness before justice of the peace); 1895, Sanders *v.* State, 105 Ala. 4, 16 So. 935 (cross-examination to former testimony reduced to writing, allowed without production): 1903, United States F. & G. Co. *v.* Dampskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344 (witness' memory of a contract tested without showing him the paper; 1911, Birmingham R. L. & P. Co. *v.* Bush, 175 Ala. 49, 56 So. 731 (Gunter *v.* State followed);

Alaska: Comp. L. 1913, § 1502 (like Or. Laws 1920, § 864);

Arkansas: Dig. 1919, § 4188 (if the statement 'is in writing, it must be shown to the witness, and he allowed to explain it");

California: C. C. P. 1872, § 2052 (impeachment by prior self-contradiction; "if the statements be in writing, they must be shown to the witness before any question is put to him concerning them"); § 2054 (quoted *post*, § 1861; it affects this point); 1872, People *v.* Donovan, 43 Cal. 162, 165, *semble* (writing must be shown to the witness); 1872, People *v.* Devine, 44 Cal. 452 (former testimony at inquest; after questions as to time and place, held proper to put in the deposition, though not shown or read to the witness; present point not considered); 1875, Leonard *v.* Kingsley, 50 Cal. 628, 630 (letters; "he should have called the attention of the witness to them"); 1882, People *v.* Hong Ah Duck, 61 Cal. 387, 394 (allowing contradiction by coroner's deposition; question not raised); 1887, People *v.* Ching Hing Chang, 74 Cal. 393, 16 Pac. 201 (testimony reduced to writing in foreign language must be translated); 1893, People *v.* Kruger, 100 Cal. 523, 35 Pac. 88 (question as to former statements, allowed, without reading over the writing); 1895, People *v.* Dillwood, — Cal. —, 39 Pac. 438 (testimony before magistrate; must be read, and shown to him if required); 1898, People *v.* Lambert, 120 Cal. 170, 52 Pac. 307 (the reading over of a deposition, if asked for by the witness as a substitute for showing, should not be allowed to cover the whole deposition, but only the self-contradictory parts); 1910, People *v.* Bond, 13 Cal. App. 175, 109 Pac. 150 (former testimony before the coroner; showing the transcript not required);

Florida: 1893, Simmons *v.* State, 32 Fla. 387, 391, 13 So. 896 (former testimony, reduced to writing by magistrate, must be shown to witness); 1909, Stewart *v.* State, 58 Fla. 97, 50 So. 642 (affidavit required to be shown);

Georgia: Rev. C. 1910, § 5881, P. C. § 1053 ("if in writing, the same should be shown to him, or read in his hearing, if in existence"); 1853, Stamper *v.* Griffin, 12 Ga. 454 (letter; the writing must be shown to the witness); but notice that since in this State the ruling for asking does not apply to prior sworn statements (*ante*, § 1035), the present rule also does not apply to them; 1900, Taylor *v.* State, 110 Ga. 150, 35 S. E. 161 (questions as to former testimony officially reported, allowed in order to test sincerity or memory, without production of report; but before proof of the former statements by the report, its contents should be "made known to her" and the report produced); 1905, Washington *v.* State, 124 Ga. 423, 52 S. E. 910 (rule applied to a letter);

Hawaii: Rev. L. 1915, § 2620 (like Eng. St. 1854, with "or prosecution" after the words "of the cause");

Idaho: Comp. St. 1919, § 8039 (like Cal. C. C. P., § 2052); 1918, Bumpas *v.* Moore, 31 Ida. 668, 175 Pac. 339 (whether a report of former testimony must be shown to the witness when asked about self-contradictions in it, under Rev. C. § 4231; not decided; Budge, J., diss., holds the affirmative, collecting prior cases);

Illinois: 1893, Atchison, T. & S. F. R. Co. *v.* Feehan, 149 Ill. 202, 214, 36 N. E. 1046 (witness apparently not shown a deposition, and the deposition then excluded because the witness' admission on cross-examination sufficed); 1897, Swift *v.* Madden, 165 Ill. 41, 45 N. E. 979 (contents of deposition read to the witness; no ruling on the present point); 1898, Peyton *v.* Morgan Park, 172 Ill. 102, 49 N. E. 1003 (similar); 1902, Momence Stone Co. *v.* Groves, 197 Ill. 88, 64 N. E. 335 (inquiry as to the contents of a written statement by the witness, held improper); 1905, Warth *v.* Loewenstein, 219 Ill. 222, 76 N. E. 378 (questions as to statements made by the witness in a deposition not introduced, allowed); 1910, Belskis *v.* Dering Coal Co., 246 Ill. 62, 92 N. E. 575 (question held proper, though the witness

vision; although correct common-law principles would amply suffice to prevent its establishment.

had signed a statement which was to be offered as the self-contradiction);
Iowa: 1861, Morrison *v.* Myers, 11 Ia. 539 (letter; showing necessary); 1868, Callanan *v.* Shaw, 24 Ia. 454 ("the better, and probably the correct practice" is to show it); 1871, State *v.* Collins, 32 Ia. 41 ("his attention must first be drawn to the time, etc."; nothing said about showing the document); 1879, Peck *v.* Parchen, 52 Ia. 46, 52, 2 N. W. 597 (document must be shown); 1883, Glenn *v.* Gleason, 61 Ia. 28, 33, 15 N. W. 659 (the whole of a letter must be shown, and not merely parts required to be read; asking about the contents of a letter admitted genuine, held improper);
Kentucky: C. C. P. 1895, § 598 ("if it [a different statement] be in writing, it must be shown to the witness, with opportunity to explain it"); § 604 (writing shown and proved must be read to jury before witness' testimony closed); 1901, Hendrickson *v.* Com., — Ky. —, 64 S. W. 954 (rule in The Queen's Case applied);
Kansas: 1908, Martin *v.* Hoffman, 77 Kan. 185, 93 Pac. 625 (questions on a letter identified by the witness, excluded, unless perhaps for testing credibility);
Louisiana: 1889, State *v.* Callegari, 41 La. An. 580, 7 So. 130 (testimony at a preliminary examination, reduced to writing; showing required); 1902, State *v.* Cain, 106 La. 708, 31 So. 300 (rule repudiated, no authority cited);
Maryland: 1914, Whisner *v.* Whisner, 122 Md. 195, 89 Atl. 393 (rule applied);
Massachusetts: 1873, Com. *v.* Kelley, 112 Mass. 452 (a constable, sought to be discredited by the contents of his oath made in getting a search-warrant; writing must be shown);
Michigan: 1868, Lightfoot *v.* People, 16 Mich. 513 (deposition; "If a party desires to cross-examine the witness on the subject of his former statements, he should read the entire deposition in evidence before doing so. If he does not desire to cross-examine on that topic, it is sufficient to read it at any time"); 1881, DeMay *v.* Roberts, 46 Mich. 160, 163, 9 N. W. 146 (rule applied to an affidavit); 1888, Toohey *v.* Plummer, 69 Mich. 345, 349, 37 N. W. 297 (minutes of former testimony by a stenographer, not called, read over in part to the witness; reading of the whole not required, the supposed contradiction not being in truth in writing; "the minutes are not like a deposition read to the witness and then signed by him"); 1892, Maxted *v.* Fowler, 94 Mich. 106, 111, 53 N. W. 921 (showing required); 1892, Austrian *v.* Springer, 94 Mich. 343, 353, 54 N. W. 50 (questions on cross-examination about contents of a letter, allowed without producing);
Minnesota: 1893, O'Riley *v.* Clampet, 53 Minn. 539, 55 N. W. 740 (must be not only shown but introduced in evidence); 1904, McDonald *v.* Bayha, 93 Minn. 139, 100 N. W. 679 (cross-examination of the plaintiff to letters, without showing them, held improper; the Court is so far unaware of the impolicy of its own rule that it stigmatizes the trial Court's procedure as "inquisitorial");
Mississippi: 1876, Scarborough *v.* Smith, 52 Miss. 517, 522 (mere questioning, apparently enough; nothing said about showing the paper; here, a memorandum of former testimony); 1879, Cavanah *v.* State, 56 Miss. 299, 307 (written report of former testimony must be shown to the witness); 1878, Mitchell *v.* Savings Inst., 56 Miss. 444, 448 (letter; the witness' "attention should have been directed to it"); 1891, Story *v.* State, 68 Miss. 609, 630, 10 So. 47 (cross-examination as to a telegram sent by the witness; the telegram required to be shown to him);
Missouri: 1865, Gregory *v.* Cheatham, 36 Mo. 161 (letter; showing required); 1875, Prewitt *v.* Martin, 59 id. 334 (showing required); 1877, Spoonemore *v.* Cables, 66 Mo. 579 (affidavit containing a contradiction, shown to the witness); 1883, State *v.* Grant, 79 Mo. 113, 132 (affidavit to contradict one testifying by deposition; must be produced and asked about); 1883, State *v.* Stein, ib. 330 (letter required to be shown); 1885, State *v.* Matthews, 88 Mo. 121, 124 (after the witness' admission of genuineness, the whole writing must be read, and not merely particular passages be read and inquired about); 1889, State *v.* Young, 99 Mo. 666, 681, 12 S. W. 879 (defendant's statement before coroner reduced to writing; attention must be called); 1913, Ebert *v.* Metropolitan St. R. Co., 174 Mo. App. 45, 160 S. W. 34 (deposition; a prior written statement not having been shown to the deponent, the statement was excluded);
Montana: Rev. C. 1921, § 10669 (like Cal. C. C. P. § 2052); 1896, State *v.* O'Brien, 18 Mont. 1, 43 Pac. 1091 (statute applied);
Nebraska: 1879, Cropsey *v.* Averill, 8 Nebr. 151, 157 (deposition must first be proved and read before cross-examination); 1901, Omaha L. & T. Co. *v.* Douglas Co., 62 Nebr. 1, 86 N. W. 936 (rule applied);
New Hampshire: 1872, Haines *v.* Ins. Co., 52 N. H. 467, 470 (cross-examination upon a deposition for the purpose of impeaching or showing any inconsistency is not allowable; asking questions to prove the signature or to identify the deposition is a matter within the discretion of the trial Court as to the time of doing so, and "no absolute rule can be laid down"); 1905, Villineuve *v.* Manchester St. R. Co., 73 N. H. 250, 60 Atl. 745 (Haines *v.*

Ins. Co. followed; here a signed unsworn statement: the practice here sanctioned seems a poor one); 1921, Thompson *v.* Morin Co., — N. H. —, 114 Atl. 274 (Villineuve *v.* R. Co. followed; the witness cannot be cross-examined about the statement till it is proved);
New Mexico: Annot. St. 1915, § 2177 (like Eng. St. 1854, without the proviso);
New York: 1832, Bellinger *v.* People, 8 Wend. 599 (a former examination before a magistrate, to show self-contradiction; the document must be shown or read); 1848, Clapp *v.* Wilson, 5 Den. 286, 288 (need not call attention to a particular passage, but must merely show the whole paper and get an admission of genuineness; but a deposition need not be shown to a witness to call his attention "being a sworn statement in writing"); 1862, Newcomb *v.* Griswold, 24 N. Y. 301 (a former affidavit, whether as cross-examiner's own evidence or as a contradictory statement does not appear; document must be shown or read); 1872, Romertze *v.* Bank, 49 N. Y. 578 (a deposition 'de bene', used to show self-contradiction, must be shown or read; but particular passages need not be called attention to); 1872, Gaffney *v.* People, 50 N. Y. 423 (must first be shown);
North Carolina: 1905, State *v.* Hayes, 138 N. C. 660, 50 S. E. 623 (rape; defendant allowed to cross-examine prosecutrix as to the contents of her letter in defendant's possession; decided on the theory of § 1252, *ante*);
Oregon: Laws 1920, § 864 (like Cal. C. C. P. § 2052); 1868, State *v.* Taylor, 3 Or. 10 (former testimony; the writing must be shown, even though the words asked about are in fact not in it); 1896, State *v.* Steeves, 29 id. 85, 43 Pac. 947 (statute applied); 1910, State *v.* Goodager, 56 Or. 198, 106 Pac. 638 (written statements must be shown; but a report of former testimony, not signed by the witness cannot be used for the purpose; this kind of ruling makes it very difficult for the party desiring to probe a liar);
Pennsylvania: St. 1887, May 23, §§ 3, 9, Dig. 1920, § 8172, Crim. Procedure, § 21859, Witnesses (former testimony to contradict a witness in criminal cases "may be orally proved"); 1909, Kann *v.* Bennett, 223 Pa. 36, 72 Atl. 342 (rule in The Queen's Case applied; no precedents cited, no consideration of the controversy);
Philippine Islands: C. C. P. 1901, § 343 (like Cal. C. C. P. § 2052);
Porto Rico: Rev. St. & C. 1911, §§ 1527, 1529, 6277 (like Cal. C. C. P. § 2052, 2054); 1915, Hermida *v.* Gestera, 23 P. R. 92 (questions as to contradictory admissions of a party-witness made in an affidavit, allowed without producing the affidavit);
Tennessee: 1872, Titus *v.* State, 7 Baxt. 132, 136 (deposition taken by magistrate need not be shown to witness before offering, because it is not the witness' writing; but a letter said to be the witness' must be shown);
Vermont: 1862, Randolph *v.* Woodstock, 35 Vt. 295 (letter need not be shown; "the plaintiffs were bound to first ask the witness before they would be allowed to contradict him, even by producing the letter. The plaintiffs must of course take the witness' statements as to what he wrote, unless they were prepared to contradict him by producing the letter, and could not prove its contents by witnesses without showing its loss"); 1898, Billings *v.* Ins. Co., 70 Vt. 477, 41 Atl. 516 (rule repudiated);
Virginia: St. 1899–1900, c. 117, § 3 (like Eng. St. 1854, c. 125, except that after the words "contradicting him", the words were added "and the said writing shall be shown to him"; this insertion, unless very liberally construed, was likely to have the perverse effect of nullifying the only value of the statute, by requiring precisely what the original statute was intended to abolish; the framers of this legislation seem hardly to have appreciated the real problem at issue; in the later Code, this phrasing was corrected: Code 1919, § 6216 "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, relative to the subject matter of the proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing his attention must, before such contradictory proof can be given, be called to the particular occasion on which the writing is supposed to have been made, and he may be asked if he did not make a writing of the purport of the one to be offered to contradict him, and if he denies making it, or does not admit its execution, it shall then be shown to him, and if he admits its genuineness, he shall be allowed to make his own explanation of it; but it shall be competent for the court at any time during the trial to require the production of the writing for its inspection, and the court may thereupon make such use of it for the purpose of the trial as it may think best. The provisions of this section shall apply as well to criminal as civil cases. But this section is subject to this qualification, that in an action to recover for a personal injury or death by wrongful act or neglect, no 'ex parte' affidavit or statement in writing other than a deposition, after due notice, of a witness as to the facts or circumstances attending the wrongful act or neglect complained of, shall be used to contradict him as a witness in the case").
Wisconsin: 1880, Kalk *v.* Fielding, 50 Wis. 339, 342 (letter received by opponent; cross-examination to contents, allowed without production; Taylor, J., diss.);
Wyoming: 1909, Eads *v.* State, 17 Wyo. 490, 101 Pac. 946 (in asking about an impeaching document, "the cross-examiner may accept an affirmative answer as proof of the contents", without production).

C. Rules about Secondary Evidence of Contents (Copies, Degrees of Evidence, etc.)

§ 1264. **In General.** When the rule under consideration is satisfied, by accounting for the non-production of the document itself, the function and effect of the rule ends. The rule itself says nothing about the ways of evidencing a document not produced. The rule requires that as a preferred source of proof, the document itself be produced for autoptic inspection, and recognizes certain exemptions from production. Any rules that may obtain as to the mode of proving an unproduced document, by testimony of one sort or another, rest upon some other principle of Evidence. Nevertheless, for the sake of practical convenience, such of them as can adequately be examined apart from those other general principles will be here considered, with references to the general principles under which they properly belong.

1. Rules preferring One Kind of Testimony above Another (Degrees of Evidence, etc.)

§ 1265. **General Principle.** Under another head (§§ 1285–1339) it will be seen that a group of rules is recognized in our law (Preferential Rules) by which one kind of witness to a certain fact is preferred above another; *i.e.* the former witness' testimony must be obtained if it is available, and the latter's may be used only when the former's appears to be unavailable. By one variety of such rules — less common — the one witness' testimony is absolutely preferred, *i.e.* it is the only kind that can be used, and the other will not be received even though the former is unavailable. The rules of this sort do not form a systematic group or a single body of doctrine; each of them owes its existence to the peculiar circumstances of some given situation, making a particular kind of testimony highly desirable. It is feasible, without doing violence to the exposition of those rules in their proper place, to consider here such of them as deal with evidence of the contents of documents by preferring one kind of testimony to contents above another. The general notion underlying the group of rules as a whole is elsewhere considered (*post*, § 1285); but in the present place will be examined all the rules and precedents specifically dealing with testimony to the *contents of a document*.

These rules of Preference deal with four general questions:

1. When is *testimony by copy preferred* to testimony by oral recollection?

2. When is testimony by *official copy* preferred to testimony by private copy?

3. When is *one kind of recollection testimony* preferred to another?

4. When is testimony by *direct copy* preferred to testimony by *copy of a copy*?

§ 1266. **Nature of Copy-Testimony, as distinguished from Recollection-Testimony.** What is a "*copy*", as distinguished from other testimony to contents? This is a fundamental inquiry; for a correct notion of the significance

of a copy will enable us to form a just idea of the reasons for making rules of preference.

A person who is qualified to testify to the contents of a document may present his knowledge in one of two ways: (1) He may, having at some time perused the document, summon up his recollection on the stand, and repeat the document's terms as furnished by that recollection. (2) Or, having in the same way perused the document, (*a*) he may have written down its words at the time of perusal, in successive stages, by writing the few words that he can carry precisely in his mind for the moment, and so on until the whole is transcribed; (*b*) or (as merely a variety of this method) he may have taken an alleged copy already made by another or by himself, and compared the original and this other, word for word or clause for clause; the only difference between these two sub-varieties (*a* and *b*) being that in the latter he has not had to carry any words in his mind during the time of transcribing, and has thus gained a greater probability of accuracy by reducing the necessary time of recollection to a minimum. Now between these two modes, (1) and (2), there is obviously a great difference in trustworthiness. By the former mode, the memory has had to be trusted for a considerable length of time,—perhaps for a day, perhaps for ten years. This recollection of the precise words of the document is sure to fade and to become less accurate than at the first moment after the perusal of each word or clause. The increasing degree of untrustworthiness (assuming the honesty and intelligence to be alike in the same witness for all kinds of testimony) will depend partly on the length of the document, partly on the circumstances likely to emphasize the words in his memory, and partly on the space of time that has elapsed between his perusal and his testimony on the stand. Thus his recollection-testimony may be highly trustworthy, and yet may be worthless. But his copy-testimony eliminates all these elements of untrustworthiness; the length of the document, the emphasis of words, the lapse of time, are all immaterial, for he transcribed or examined the copy word for word at such a time that there was practically no demand made upon his powers of memory; the transcription then permanently made in writing (and adopted on the stand as a record of past knowledge; *ante*, §§ 734, 739) preserves the words without any of the risk of change or disappearance that attends the operations of memory; moreover, the fact of a change, if it has occurred, is made known by the appearance of the writing.[1]

Such being the difference in trustworthiness between copy-testimony and recollection-testimony, does the law establish any rule of preference for the former over the latter? It is common to refer to this question by contrasting "oral evidence", or "parol evidence", with a copy; but the former terms are so loose and ambiguous (*post*, § 2400) that their further employment for

§ 1266. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913) particularly §§ 241, 290, 357.

purposes of discussion would be unpardonable. The proper contrast is between copy-testimony and testimony by present recollection.

§ 1267. **Is a Written Copy the Exclusive Form of Testimony? Proof of a Lost Record, Deed, Will, etc., by Recollection.** Is this relative untrustworthiness of recollection-testimony so great that such testimony will never be received to prove the contents of a document, even where copy-testimony is not available? In other words, is the latter absolutely preferred (*post*, § 1345) to the exclusion of the former?

Such a doctrine has never been suggested for ordinary writings. But it has often been urged as proper in application to *judicial records*, *deeds*, and *wills*. It is to be noted that the question is whether recollection-testimony is to be used, or else no evidence at all; for, by hypothesis, the original cannot be had, and copy-testimony is not available. Thus the question to be considered is whether the dangers of inaccuracy that may attend the reception of recollection-testimony are sufficiently great to over-balance the dangers attending the entire failure of evidence of the contents of lost or destroyed records and the like. On this point, it is clear that the answer must be in the negative; the considerations are well expounded in the following passage:

1799, HAYWOOD, J., note to *Haggett* v. ——, 2 Hayw. 243: "When there is no record or deed, nor any copy, parol evidence will in general relate the fact truly, and is as much better than no evidence at all as records and deeds are superior to itself. It ought to be received upon the same principle as they are, not because there is absolute certainty either in the one or in the other (for a record or deed may be altered, corrupted, substituted, or the like), but because, in choosing probabilities, it is wise to take the best that offers. To require the production of a record or deed, when there is undoubted proof of its destruction, is to require an impossibility, and 'lex neminem cogit ad impossibilia.' To say his right shall be lost with the record or deed that proves, though destroyed by invincible calamity, is to inflict punishment for the acts of Heaven, and 'actus Dei nemini facit injuriam.' It were far better to abolish the institution of deeds and records altogether than to admit the position under consideration as a consequence of them. . . . If it be argued that the party should take and preserve a copy of the record amongst his other evidences, and then the loss of the record would not prejudice him, and that it is his own fault if he neglects to do so and the record becomes extinct, the answer is, [Firstly] that in contemplation of law he is not bound to take a copy till his occasions require it, for the law itself has undertaken to keep and preserve the record for him, to the end he may have a copy when he wants it, and therefore the not taking or not keeping a copy cannot be imputed to his negligence; Secondly, if he take a copy, that as well as the record may be lost; yet according to the controverted position, he cannot be let into parol evidence."

1850, SCOTT, J., in *Davies* v. *Pettit*, 11 Ark. 349, 352: "It is known that not only the existence and loss but also the contents of lost bonds, bills, notes, and other memorials of contracts and various other written instruments, from time immemorial have been allowed to be proven by parol evidence; and that many of these relate to the most important transactions among men, and that they are in general executed in privacy and comparatively but few of them are ever submitted to the public gaze. And yet the inquest of centuries has failed to present this rule to the Legislature as a public grievance in promoting perjury, and for this reason to demand its eradication from our judicial regulations. If, then, the morals, and safety of society have received no serious injury from its operation in a wide field of temptation, where the suborned are for the most part unchecked by the public eye, can it be possible that the admission of parol evidence of the loss and the effect of judg-

ments at law, which are not produced in private like these private instruments of evidence, but are the result of the united action of the judge, jury, officers of Court, parties, their attorneys and witnesses, all under the eye of the bystanders, can be productive of the great evils apprehended from this source? On the contrary, is it not certain that of all the cases of the proof, by parol, of the contents of lost instruments of evidence, that of lost judgments, from the circumstances to which we have alluded, is most secured against the crime of perjury? — But it is supposed that a disastrous blow would be stricken against the sanctity of records, and in this that public policy would be greatly outraged. If records, while they existed, were allowed to be contradicted or established by parol, this would not fail to be the result. But how this is to result from the establishment of their tenor and effect when destroyed is not altogether clear. Surely judicial records are not so sacred that their very ashes must not be disturbed, and that, to minister to their quiet, the most important rights of men must be sacrificed, with Pagan superstition, to their names. Such a doctrine would have better befitted the days of the old barons of England, when chirography was so much esteemed that it was an indulgence for crime, than in our own times; and it is by no means certain that it obtained even in those days. Shall personal liberty be sacrificed at this altar, and a man be twice put in jeopardy of life or limb because his plea of former acquittal cannot be established by the ashes of a conflagrated record? Shall a man be twice punished for the same offence because the record of his former conviction, under which he was punished, from its destruction, cannot be produced to protect him from a second prosecution? Or shall the convicted forger be delivered from the penitentiary and set at large upon society because the same incendiary flame that destroyed the record of his conviction at the same time consumed the material evidence of his guilt? But these and many other startling consequences are by no means the only result of this supposed doctrine; for, let it be distinctly understood that the destruction of judicial records is the end of the public and private rights depending upon them while they exist, and at once a high premium for vice and crime is held out by the law, under the influence of which just fears might be apprehended for the safety of judicial records. . . . The law would be placed in the singular predicament of openly permitting the rude hand of crime to seize upon her highest muniments of truth and right, apply the incendiary torch, and hold the blazing sacrifice in the very face of justice. We cannot think that such a scene can be enacted under the auspices of the common law, whose oracles have ever claimed for it a capacity to afford a remedy for every wrong. On the contrary, we think that its recuperative energies are fully equal to the work of setting up, by the legitimate operation of its harmonious rules, every landmark of truth and right that may be at any time prostrated, either by the hand of crime, the inevitable accidents incident to men, or by the onward wear of time."

Such has been the rule unanimously accepted by the Courts. Since the disappearance of the old notion (*ante*, § 1177) that a lost document was a lost right, and the recognition of the principle that the rule of production is subject to certain excuses and exemptions, the proof of unproducible documents has always been allowed to be made by recollection-testimony (in the absence of such copy-testimony as is otherwise required, under the rules shortly to be noticed).

The proposed doctrine, that such recollection-testimony should be absolutely excluded, has been repudiated for *judicial* and *official records*,[1] although it

§ 1267. [1] In some of the following cases the thing admitted was a copy, but the rule is laid down in general terms for "parol" or "oral" evidence: ENGLAND: 1774, Kingston *v.* Horner, H. Cowper 102, 109 (Lord Mansfield, C. J.: "If a foundation can be laid that a record or a deed existed and was afterwards lost, it may be supplied by the next best evidence to be had"); UNITED STATES: *Federal:* 1806, U. S. *v.* Lambell, 1 Cr. C. C. 312 (warrant); *California:* 1859, Ames *v.* Hoy, 12 Cal. 11, 20 (judgment); 1863, Warfield's Will, 22 Cal. 51, 64 (probate petition); *Colorado:* 1878, Hittson *v.* Davenport, 2 Colo.

was for a time adopted in two jurisdictions.[2] Here distinguish the impro-

169, 174; *Connecticut:* 1839, Davidson *v.* Murphy, 13 Conn. 212, 219; *Delaware:* 1852, Polite *v.* Jefferson, 5 Harringt. 388; *Florida:* 1895, Edwards *v.* Rives, 35 Fla. 89, 17 So. 416 (must be clearly proved); *Illinois:* 1864, Aulger *v.* Smith, 34 Ill. 534 (lost deposition; recollection-evidence admitted); 1897, Gage *v.* Eddy, 167 Ill. 102, 47 N. E. 200 (deposition lost after filing; offeror may prove contents, without re-taking the deposition); *Indiana:* 1829, Jackson *v.* Cullum, 2 Blackf. 228 (judgment, etc.); 1853, Schwartz *v.* Osthimer, 4 Ind. 109 (plea); 1881, Johnson *v.* State, 80 Ind. 220, 221 (summons); 1886, McCullough *v.* Davis, 108 Ind. 292, 296, 9 N. E. 276 (title-records; "much latitude is allowable"); 1886, McFadden *v.* Fritz, 110 Ind. 1, 5, 10 N. E. 120 (writ); *Iowa:* 1859, Higgins *v.* Reed, 8 Ia. 298; 1864, Davis *v.* Strohm, 17 Ia. 421, 424, 427 (bond); *Kentucky:* 1840, Hawkins *v.* Craig, 1 B. Monr. 27 (writ); *Louisiana:* 1841, Childress *v.* Allin, 17 La. 37; 1893, Landry *v.* Landry, 45 La. An. 1113, 13 So. 672 (completing a partly burnt deed by oral evidence); *Maine:* 1843, Gore *v.* Elwell, 9 Shepl. 442; 1848, Wing *v.* Abbott, 15 Shepl. 367, 373; *Massachusetts:* 1815, Stockbridge *v.* W. Stockbridge, 12 Mass. 399, 402 (act of incorporation of town); 1836, Sturtevant *v.* Robinson, 18 Pick. 175, 179 (admitting a copy of a 'scire facias' writ, loss being shown; "it would be as correct to say that the loss of an original deed should affect the grantee's title to land" as to exclude such proof); 1839, Pruden *v.* Alden, 23 Pick. 184, 187 (admitting a copy of a license of sale shown to be lost); 1842, Sayles *v.* Briggs, 4 Metc. 421, 423; 1842, Eaton *v.* Hall, 5 Metc. 287, 291 (an order of Court directing reference to arbitrators; a copy admitted, on proof of loss; "the consideration that a particular document constitutes the basis of the jurisdiction of a Court does not essentially vary the rule in regard to secondary evidence, though it may require more care and vigilance in its application"); 1851, Com. *v.* Roark, 8 Cush. 210, 212 (complaint and warrant); 1854, Tillotson *v.* Warner, 3 Gray 574, 577; *Michigan:* 1857, People *v.* Dennis, 4 Mich. 609, 617 (indictment); 1874, Millar *v.* Babcock, 29 Mich. 526, 527 (attachment); 1878, Drake *v.* Kinsell, 38 Mich. 232, 234; 1886, People *v.* Coffman, 59 Mich. 1, 6, 26 N. W. 207; 1886, Blanchard *v.* DeGraff, 60 Mich. 107, 111, 26 N. W. 849; 1888, Cilley *v.* Van Patten, 68 Mich. 80, 83, 35 N. W. 831; *Minnesota:* 1866, Winona *v.* Huff, 11 Minn. 119, 128; 1908, Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 729 (Federal land-patent); *Mississippi:* 1850, Scott *v.* Loomis, 13 Sm. & M. 635, 641 (justice's docket); 1868, Martin *v.* Williams, 42 Miss. 210, 218, *semble; Missouri:* 1827, Ravenscroft *v.* Giboney, 2 Mo. 1 ("though the record may not have been very ancient"); 1871, Foulk *v.* Colburn, 48 Mo. 225, 230; 1873, Compton *v.* Arnold, 54 Mo. 147; 1884, State *v.* Schooley, 84 Mo. 447, 454 (tax-books); 1889, Crane *v.* Dameron, 98 Mo. 567, 570, 12 S. W. 251; *New Jersey:* 1849, Browning *v.* Flanagin, 22 N. J. L. 567, 571 (record); *North Carolina:* 1813, Stuart *v.* Fitzgerald, 2 Murph. 255 'capias'; 1835, Kello *v.* Maget, 1 Dev. & B. 414, 424; 1878, Rollins *v.* Henry, 78 N. C. 342, 347; 1887, Mobley *v.* Watts, 98 N. C. 284, 287, 3 S. E. 677; *Pennsylvania:* 1782, Morris *v.* Vanderen, 1 Dall. 64, 65 (lost survey); 1793, Todd *v.* Ockerman, 1 Yeates 295, 297 (same); 1821, Wolverton *v.* Com., 7 S. & R. 273, 276; 1847, Farmers' Bank *v.* Gilson, 6 Pa. 51, 57; *Tennessee:* 1816, Read *v.* Staton, 3 Hayw. 159 (judgment); *Vermont:* 1852, Spear *v.* Tilson, 24 Vt. 420, 423 (grand list of assessment); 1855, Brown *v.* Richmond, 27 Vt. 583 (attachment); *Virginia:* 1832, Newcomb *v.* Drummond, 4 Leigh 57, 60; *Wisconsin:* 1880, Wambold *v.* Vick., 50 Wis. 456, 458, 7 N. W. 438, *semble.*

Compare here the cases cited *post*, § 1273, n., that a proceeding for *judicial restoration of a lost record* is not the exclusive means of proof; the principle is related to those of §§ 1347 and 1660, *post*, and is there again referred to.

[2] *North Carolina:* 1799, Hargett *v.* ——, 2 Hayw. 76 (Moore, J.: "It is better to suffer a private mischief than a public inconvenience"; copy admissible, but oral evidence of a lost record's contents excluded); *Arkansas:* 1839, Smith *v.* Dudley, 2 Ark. 60, 65 (lost or destroyed record may not be proved by parol when it "constitutes the sole foundation of the proceeding or cause of action"; but only by "authenticated or sworn copy"); 1842, Williams *v.* Brummel, 4 Ark. 129, 137 (judicial record, not by parol, but only by certified copy); 1842, Fowler *v.* More, 4 Ark. 570, 573 (lost record may be proved by copy; at least "such portions as process and the like"); 1843, Bailey *v.* Palmer, 5 Ark. 208 (same); 1847, Alexander *v.* Foreman, 7 Ark. 252 (same); 1843, Wallace *v.* Collins, 5 Ark. 41, 48 (execution; if no objection is taken, any evidence admissible); 1849, Phelan *v.* Bonham, 9 Ark. 388, 393 (same for a notice); 1850, Davies *v.* Pettit, 11 Ark. 349, 351 (lost or destroyed judicial record may be established by parol; see quotation *supra*, overruling Smith *v.* Dudley, and the intervening cases); 1860, Gracie *v.* Morris, 22 Ark. 415, 418 (preceding case ignored; but copy of lost record allowed); 1870, Mason *v.* Bull, 26 Ark. 164, 167 (Davies *v.* Pettit approved); 1878, Gates *v.* Bennett, 33 Ark. 475, 489 (same); 1883, Mill *v.* State, 40 Ark. 488, 495 (indictment destroyed, and record not restored; secondary evidence allowed; Eakin, J., diss.); 1886, Hallum *v.* Dickinson, 47 Ark. 120, 125, 14 S. W. 477 (Davies *v.* Pettit approved).

priety of proving an oral judicial act (*post*, § 2450) from the propriety of proving a written judicial record by "oral" evidence.

It has been repudiated for *deeds*.[3] Note that this permission to prove a written conveyance by "parol" evidence of its contents is a different thing from proving an oral or "parol" conveyance forbidden by the statute of frauds or by the "parol evidence" rule (*post*, § 2437);[4] distinguish also the requirement as to the completeness of detail with which the deed's contents must be proved (*post*, § 2105), and the degree of positiveness which the proof must reach (*post*, § 2498).

A missing *negotiable instrument* may also be proved by recollection-evidence.[5]

In the case of a missing *will*, it is equally well settled that recollection-testimony is admissible.[6] But here certain other requirements apply which

[3] This result was (as might be inferred from the historical development noted *ante*, § 1177) at first not accepted in *England;* but by the end of the 1700s it was fully established; 1711 Seymour's Case, 10 Mod. 8 ("The Court seemed of opinion that in case a deed was lost by some inevitable accident, that there it might be proved by a copy; but in case there was no copy, the contents of it could not be proved from the memory of those that knew the deed; and though it were hard for a man that had no copy, to lose the benefit of his deed, yet the inconveniences of admitting that sort of evidence would be greater"; but otherwise if the defendant had the deed, "for that in this case the danger of allowing this sort of evidence was none at all; for if the defendant was wronged by the parol evidence, it was in his power to set all right by producing the deed"); 1721, Dalston *v.* Coatsworth, 1 P. Wms. 731 (burnt deed supplied by parol testimony); 1768, Blackstone, Commentaries, III, 368 (an "attested copy may be produced or parol evidence be given of its contents"); and the citations in note 1, *supra*.

In the *United States* the propriety of such evidence is everywhere conceded: *Alabama:* 1859, Shorter *v.* Sheppard, 33 Ala. 648, 653; *California:* Cal. C. C. P. 1872, § 1937 (of private writings, "by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness"); *Connecticut:* 1794, Kelley *v.* Riggs, 2 Root 126, 128; 1857, St. Peter's Church *v.* Beach, 26 Conn. 355, 359, 365; *Illinois;* 1887, Bush *v.* Stanley, 122 Ill. 406, 416 13 N. E. 249; *Kentucky;* 1847, Chisholm *v.* Ben, 7 B. Monr. 408, 414 (but for the mere loss of a will, as distinguished from fraudulent suppression, circumstantial evidence does not suffice); *Louisiana:* 1885, Lane *v.* Cameron, 37 La. An. 250; 1901, Willett *v.* Andrews, 106 La. 319, 30 So. 883; *Minnesota:* 1889, Wakefield *v.* Day, 41 Minn. 344, 347, 43 N. W. 71; *Missouri:* 1820, Gipson *v.* Owens, 286 Mo. 33, 226 S. W. 856 (deed of adoption); *New Hampshire:* 1827, Colby *v.* Kenniston, 4 N. H. 262, 265; 1844, New Boston *v.* Dunbarton, 15 N. H. 201, 205 (charter); 1844, Downing *v.* Pickering, 15 N. H. 344; 1850, Forsaith *v.* Clark, 21 N. H. 409, 417 (proprietary charter); 1852, Neally *v.* Greenough, 25 id. 325, 330 ("Generally the party who is driven by the loss or destruction of a paper . . . to resort to secondary evidence is confined to no particular species of evidence; it may be more or less direct, or merely circumstantial"); *New York:* 1831, Jackson *v.* Livingston, 7 Wend. 136, 140; *Pennsylvania:* 1861, Miltimore *v.* Miltimore, 40 Pa. 151, 154 (abstract); *Philippine Islands:* C. C. P. 1901, § 321 (like Cal. C. C. P. § 1937); *South Carolina:* 1798, Frost *v.* Brown, 2 Bay 135, 138 ("It is very clear that the existence and loss of a deed may be presumed by a jury from circumstances"); *Virginia:* 1895 Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347 (lost deed established by statements against interest in a chancery answer).

[4] 1861, Jenkins, J., in Roe & McDowell *v.* Doe & Irwin, 32 Ga. 39, 51 ("It is not evidence of a conveyance by parol. It is parol evidence of a conveyance by deed, the loss or destruction of which has been proven").

Here compare the New York cases (*ante*, § 1257) excluding certain admissions of parties as amounting to an oral conveyance.

[5] 1809, Jones *v.* Failes, 5 Mass. 101 (promissory notes); see citations *ante*, § 1197.

The following ruling is peculiar: 1869, Austine *v.* People, 51 Ill. 236, 239 (copy of a confession, made two years afterward from recollection alone, excluded).

[6] ENGLAND: 1824, Davis *v.* Davis, 2 Add. Eccl. 223, 224, 228; 1864, Wharram *v.* Wharram, 3 Sw. & Tr. 301 (pointing out the dangers of such evidence, but concluding that "at any rate" it "ought to be of a very cogent character"); 1858, Brown *v.* Brown, 8 E. & B. 876 (Lord Campbell, C. J.: "It was the common case of a lost instrument; and parol evidence of the contents of a lost instrument may be received as much when it is a will as if it were any other"); 1876, Sugden *v.* St.

must be distinguished, namely, the number of witnesses by which the contents or the execution must be proved (*post*, § 2052), the degree of positiveness or clearness which the evidence must attain in order to suffice (*post*, § 2498), the completeness of the details of the contents as thus evidenced (*post*, § 2106), the admissibility of circumstantial evidence, including the testator's belief as to the contents (*ante*, § 271), the admissibility of the testator's declarations (*post*, § 1734), and the conditional preference for a copy, if available, over recollection-testimony (*post*, § 1268).

§ 1268. **Is a Written Copy conditionally preferred to Recollection? Admissibility of Recollection before showing Copy unavailable.** Whether a copy must be offered, if available, *i.e.* whether a *copy is conditionally preferred* to recollection-testimony, is a question that is difficult to answer, both upon principle and upon precedent.

1. There are strong reasons on both sides of the question, and there has been little consistency of rulings even within single jurisdictions. The following passages expound the reasons for requiring such a preference:

1839, *Anon.*, in 4 Monthly Law Magazine, 265, 267: "The argument relied on to show that a distinction exists among the various species of secondary evidence is a supposed equitable extension of the principle which postpones all secondary evidence until the non-production of the primary is accounted for. . . . Does it not follow, [is the claim on this behalf,] as a necessary corollary from this proposition, that if certain species of secondary evidence be manifestly better and more likely to contain a true account of what was in the original than others, a party ought not to be allowed to resort to the latter until his incapacity to produce the former be demonstrated? . . . [The argument is that] a copy, the correct-

Leonards, L. R. 1 P. D. 154, 238 (Jessel, M. R.: "Can we admit, as a matter of course, secondary evidence in proof of a will? I should have thought that there could be but one answer to that question, and had it not been for the doubt thrown out by a very eminent judge in the case of Wharram *v.* Wharram, I should have thought it impossible to argue the question. . . . The whole theory of secondary evidence depends upon this, that the primary evidence is lost, and that it is against justice that the accident of the loss should deprive a man of the rights to which he would otherwise be entitled. I am at a loss to discover any reason whatever for distinguishing between the loss of a will and the loss of a deed"); 1890, Harris *v.* Knight, L. R. 15 id. 170, 179.

CANADA: 1903, Stewart *v.* Walker, 6 Ont. L. R., 495, 501 (Sugden *v.* St. Leonards followed; but some corroboration is required).

UNITED STATES: *Alabama:* 1884, Jacques *v.* Horton, 76 Ala. 238, 245; 1886, Skeggs *v.* Horton, 82 Ala. 353, 2 So. 110; *California:* C. C. P. 1872, § 1969 (a will instrument, except nuncupative, "must be produced, or secondary evidence of its contents be given"); *Delaware:* 1843, Kearns *v.* Kearns, 4 Harringt. 83; *Idaho:* Comp. St. 1919, § 7973 (like Cal. C. C. P. § 1969); *Illinois:* 1882, Anderson *v.* Irwin, 101, Ill. 411, 415; *Kansas:* G. S. 1915, § 11801; *Maine:* Rev. St. 1916, c. 68, § 9 (a lost will may be proved by a copy and subscribing witnesses' testimony, or by "any other evidence competent"); *Massachusetts:* 1825, Clark *v.* Wright, 3 Pick. 66, 68; 1844, Davis *v.* Sigourney, 8 Metc. 487; *Minnesota:* Gen. St. 1913, § 7279 (a will lost or destroyed or out of the State and unproducible is provable by "parol or other evidence"); *Missouri:* 1834, Graham *v.* O'Fallon, 3 Mo. 507; 4 Mo. 601, 607; *New Jersey:* 1863, Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401, 405; 1898, Coddington *v.* Jenner, 57 N. J. Eq. 528, 41 Atl. 874; *New York:* 1805, Jackson *v.* Lucett, 2 Caines 363, 367; 1863, Harris *v.* Harris, 26 N. Y. 433; *North Carolina:* Con. St. 1919, § 370 (destroyed will, "there being no copy thereof", may be established by proof of the "entire contents"); *Oregon:* Laws 1920, § 802; *Pennsylvania:* 1878, Foster's Appeal, 87 Pa. 67, 75 ("Its loss or accidental destruction differs not from the loss or destruction of any other solemn instrument, such as a deed, note or bond, or a record"), *South Carolina:* 1795, Potts *v.* Cogdell, 1 De Sauss. 454; 1795, Legare *v.* Ashe, 1 Bay 464; 1818, Reeves *v.* Reeves, 2 Mill Const. 334, *Tennessee:* Shannon's Code 1916, § 3911 (if the original is lost or mislaid, the trial may proceed upon a supposed copy); 1897, McNeely *v.* Pearson,

ness of which is sworn to by a witness who has compared it with the original is far more to be relied on than the mere memory of that witness as to the contents of the latter, — both on account of the comparative imperfection of all verbal testimony, when compared with written, and also that in such a case the utmost which any witness under ordinary circumstances can be expected to remember of the contents of a writing in which he is not interested is that he shall have a general recollection of its leading features, but that he is not likely to remember conditions, limitations, or particular words used in it, which might however have a most material effect in altering or qualifying its meaning; so that . . . [only when counterpart, copy, and abstract fail] he may then, but not till then, be allowed to resort to the dangerous and unsatisfactory proof deduced from the memory of a witness."

1849, NISBET, J., in *Doe* v. *Biggers*, 6 Ga. 188, 199: "Now the highest degree of secondary evidence is not required. The rule upon that point is this: When there is no ground for legal presumption that better secondary evidence exists, any proof is received which is not inadmissible by other rules of law, unless the objecting party can show that better evidence was previously known to the other and might have been produced; thus subjecting him by positive proof to the same imputation of fraud which the law itself presumes when primary evidence is withheld."

1856, GOLDTHWAITE, C. J., in *Harvey* v. *Thorpe*, 28 Ala. 250, 262: "[The American weight of authority requires that] the best kind of that character of evidence which appears to be in the power of the party to produce must be offered. We confess that the American rule appears to us more reasonable than the English; and we see great propriety, if there was an examined copy of an instrument in the possession of a party, in refusing to allow him to prove it by the uncertain memory of witnesses. A copy of a letter, taken by a copying press, would unquestionably be better evidence of the original than the recollection of its contents by a witness; and the same reasons which would require the production of the original if in the control of the party, would operate in favor of the production of the facsimile or of the examined copy. But in all these cases the strength of the proposition consists in the fact there is secondary evidence in its nature and character better than that which the party offers, and that it is in his power to produce it."

The arguments against making any such distinction are thus set forth:

1840, ABINGER, L. C. B., in *Doe* v. *Ross*, 7 M. & W. 102 (the question was whether an attested copy of a deed was to be preferred to the testimony of one who had read it): "Upon examination of the cases, and upon principle, we think there are no degrees of secondary evidence. The rule is that if you cannot produce the original, you may give parol evidence of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power which he does not produce, that is a fact to go to the jury, from which they might sometimes presume that the evidence kept back would be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another." ALDERSON, B.: "The objection [to secondary evidence] must arise from the nature of the evidence itself. If you produce a copy, which shows that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case; the existence of an original does not show the existence of any copy; nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original and the other side at the trial may defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all."

— Tenn. —, 42 S. W. 165; *Utah:* Comp. L. 1917, § 7115 (like Cal. C. C. P. § 1969); *Vermont:* 1842, Minkler *v.* Minkler, 14 Vt. 125, 127, 1868, Dudley *v.* Wardner, 41 Vt. 59.

1842, Professor *Simon Greenleaf*, Evidence, § 84, note: "On the other hand, it is said that this argument for the extension of the rule confounds all distinction between the weight of evidence and its legal admissibility; that the rule is founded upon the nature of the evidence offered, and not upon its strength or weakness; and that, to carry it to the length of establishing degrees in secondary evidence, as fixed rules of law, would often tend to the subversion of justice, and always be productive of inconvenience. If, for example, proof of the existence of an abstract of a deed will exclude oral evidence of its contents, this proof may be withheld by the adverse party until the moment of trial, and the other side be defeated, or the cause be greatly delayed; and the same mischief may be repeated, through all the different degrees of the evidence. It is therefore insisted, that the rule of exclusion ought to be restricted to such evidence only as, upon its face, discloses the existence of better proof; and that where the evidence is not of this nature, it is to be received, notwithstanding it may be shown from other sources that the party might have offered that which was more satisfactory; leaving the weight of the evidence to be judged of by the Jury, under all the circumstances of the case.[1] . . . The American doctrine, as deduced from various authorities, seems to be this; that if, from the nature of the case itself, . . . there is no ground for legal presumption that better secondary evidence exists, any proof is received, which is not inadmissible by other rules of law; unless the objecting party can show that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud, which the law itself presumes, when primary evidence is withheld."

1849, Lipscomb, J., in *Lewis* v. *San Antonio*, 7 Tex. 288, 315: "It is believed that the rule sanctioned by Greenleaf is more philosophical and harmonizes better with the progress of the more enlightened jurisprudence of the age on the subject of the admissibility of evidence, — that is, to curtail and limit the objections to the competency and let the evidence in, to go to the jury to judge of its weight or credibility. In every case where a party kept back a more satisfactory kind of evidence that was in his power to have produced and within his knowledge, it would operate strongly against such as he had offered, of less certainty, with the jury. This would prevent embarrassing discussions that would often arise suddenly, at the moment when testimony would be offered, whether it was most satisfactory and carried the most weight of any that could be afforded. The only question should be whether it was admissible and legal; the party offering it would take the risk of its being satisfactory to prove the fact for which it was offered to the jury."

It will be seen that the conflict of arguments is due on the one hand to the conceded desirability of employing a copy as better than mere recollection, and, on the other hand, to the hardship of exacting this invariably of a proponent who may be put to excessive trouble to obtain such a copy.

A simple solution, giving effect to some extent to both of these considerations, is the following: Let the proponent of recollection-testimony be required, before using it, to show that he has not within his control a copy; if he has not, then he may offer recollection-testimony; and the opponent may then, if there is any real dispute on his part as to the contents, put in a copy if one is available. This rule procures the benefit of a copy without putting an undue burden upon the proponent; for if a copy is available at all, elsewhere than in the proponent's own control, it is fitter that the opponent should have the risk and the trouble of procuring it. The rule then, briefly, would be: The party offering to prove the contents of an unavailable original

§ 1268. [1] See these arguments more fully set forth in the article in 4 Monthly Law Magazine 265, *supra*, where the author of the article concludes strongly against a rule of preference.

document, must offer a copy, if he has one in his control, in preference to recollection-testimony.

2. Coming to the rule of law as judicially enforced, it may first be noted that a fallacious definiteness has often been given to the question by referring (as in the passage above quoted) to the "English" rule as distinguished from the "American" rule. There is no such distinction. The English precedents are divided, though the ruling in Doe *v.* Ross (quoted above) finally established a rule for one class of cases; and the American jurisdictions are also divided. Moreover, any such generality as "there are no degrees of secondary evidence" [2] is of no value, because it is not correct; for there are at least two or three settled distinctions in that category (as the precedents in the ensuing sections indicate); such general remarks cannot safely be trusted and must be construed merely with reference to the distinction then before the Court.

As to the state of the precedents, it is clear that the orthodox English doctrine did for *deeds* prefer a copy before recollection-testimony;[3] and the same preference has been recognized in proving *various kinds of documents*, in rulings both English and American, although it does not usually appear clearly whether the preference is conditional on the copy being anywhere available or merely on its being in the proponent's control, nor whether it is for the opponent to show that such a copy is available or for the proponent to show that it is not available.[4] On the other hand, it is clear that by the

[2] 1833, Brown *v.* Woodman, 6 C. & P. 206 (Parke, J.: "There are no degrees in secondary evidence," except perhaps for duplicate originals); 1858, Fitzgerald *v.* Williams, 24 Ga. 243, 345 (there are no degrees); 1869, Goodrich *v.* Weston, 102 Mass. 362, *semble* (in general, "there are no degrees of legal distinction"); 1875, Elliott *v.* Van Buren, 33 Mich. 49, 52 ("There are no degrees of evidence, except where some document [must be produced in the original]"); 1873, Cornett *v.* Williams, 20 Wall. 226, 246 ("This Court has not yet gone the length of the English adjudications, which hold without qualification, that there are no degrees in secondary evidence").

[3] 1773, Lord Mansfield, C. J., in Ludlam's Will, Lofft 362 ("If you cannot prove a deed by producing it, you may produce the counterpart; if you can't produce the counterpart, you may produce a copy, even if you cannot prove it to be a true copy; if a copy cannot be produced, you may go into parol evidence of the deed"); 1740, Villiers *v.* Villiers, 2 Atk. 71 (Lord Hardwicke, L. C., places counterpart, copy, and parol evidence in this order); 1744, Omichund *v.* Barker, 1 Atk. 21, 49 (Lord Hardwicke, L. C., places a copy before "witnesses who have heard the deed; and yet it is a thing the law abhors to admit the memory of man for evidence").

For the rule requiring first a *counterpart as equivalent to the original*, see *ante*, § 1233.

[4] ENGLAND: 1791, Breton *v.* Cope, Peake 30 (Bank of England stock-books; written copy required); 1810, Rhind *v.* Wilkinson, 2 Taunt. 237 (license to trade during war; the register of licenses at the Secretary of State's office held a preferable source to the captain's recollection);

UNITED STATES: *Federal:* 1822, U. S. *v.* Britton, 2 Mason 464, 468 (examined copy, "if any such exist and can be found", preferred to oral testimony; here applied to a forged document); 1823, Riggs *v.* Taylor, 9 Wheat. 483, 486 ("[He] may read a counterpart, or if there is no counterpart, an examined copy, or if there should not be an examined copy, he may give parol evidence of its contents"); 1882, Stebbins *v.* Duncan, 108 U. S. 32, 43, 2 Sup. 313 (following Riggs *v.* Taylor, as to order of preference, and admitting oral testimony of contents of a deed by one who verified a certified copy not made by himself); 1899, Lloyd *v.* Supreme Lodge, 38 C. C. A. 654, 98 Fed. 66 (certified copy of lodge by-law, preferred to oral testimony); *Georgia:* 1849, Doe *v.* Biggers, 6 Ga. 188, 199 (copy preferred conditionally; see quotation *supra;* circumstantial proof of contents here allowed); 1867, Williams *v.* Waters, 36 Ga. 454, 458 (certified copies of contract, preferred to oral testimony); 1900, Shedden *v.* Heard, 110 Ga. 461, 35 S. E. 707 (use of a copy of insurance application excludes recollection-testimony of

ruling in Doe *v.* Ross the English rule has been changed, and no preference is now accorded to a copy, for proving deeds and other private documents; and this result has been accepted in not more than a minority of the American Courts that have ruled upon the question;[5] although it is to be remembered (as appears in § 1269, *post*) that such rulings must be understood as applying usually to private documents only, and that any general principle enunciated in them cannot ordinarily be construed to mean more than that.

3. In determining *what is a copy*, for the purposes of the present rule, an alleged copy submitted to the witness and verified by him as correct, though not made nor previously seen by him, would perhaps be treated as a copy;[6] though obviously it is not, since the witness is dependent upon his memory for verifying the correctness of the alleged copy, and his testimony is open

contents); *Illinois:* Rev. St. 1874, c. 116, § 28 (where an original conveyance, etc., is shown lost or out of the party's power, and the record is destroyed, "the Court shall receive all such evidence as may have a bearing on the case to establish the execution or contents" of the conveyance, record, etc.); 1899, Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63 (after fruitless search for a record of a lost deed, memoranda, etc., showing the contents are admissible); *Indiana:* 1858, Madison I. & P. R. Co. *v.* Whitesel, 11 Ind. 55, 57 (certified copy of corporation-records, preferred to oral testimony); 1861, Indianapolis & C. R. Co. *v.* Jewett, 16 Ind. 273 (sworn copy of corporation-records not preferred to oral testimony, where the secretary had refused to produce the original or to furnish a copy); *Maryland:* 1909, Robinson *v.* Singerly P. & P. Co., 110 Md. 382, 72 Atl. 828 (American rule as stated by Greenleaf, adopted); *Michigan:* 1875, Day *v.* Backus, 31 Mich. 241, 245 (whether fresh copies of a letter are preferable to oral testimony, not decided); 1900, Phillips *v.* U. S. Benevolent Soc'y, 125 Mich. 186, 84 N. W. 57 (insurance application filed in Canada; sworn or certified copy preferred; Montgomery, C. J., and Hooker, J., diss.); *New Jersey:* 1832, Smith *v.* Axtell, 1 N. J. L. 494, 498 (copy of written agreement preferred to oral testimony); *Pennsylvania:* 1862, Stevenson *v.* Hoy, 43 Pa. 191, 193, 196 (facsimile press copy preferred to copy from recollection); *Philippine Islands:* 1906, Timbol *v.* Manalo, 6 P. I. 254 (nuncupative will executed before a notary; the notary's protocols and archives being lost, a certified copy under the notary's seal, in the executor's possession, was held sufficient, under Civ. C. § 1221, quoted *ante*, § 1225); *Wisconsin:* 1885, Cleveland *v.* Burnham, 64 Wis. 347, 357, 359, 25 N. W. 407 (bank-books; certain stock-certificates held better evidence than oral testimony).

[5] England: 1807, Kensington *v.* Inglis, 8 East 273, 279, 289 (a memorandum book of trading licenses, kept by a governor's secretary, not preferred to his oral statement of a license's contents); 1808, Fisher *v.* Samuda, 1 Camp. 193 (letter; copy not preferred to recollection); 1834, Doe *v.* Cole, 6 C. & P. 359 (tablet on a church; oral description allowed); 1840, Doe *v.* Ross, 7 M. & W. 102 (as between an attested copy of a deed and the testimony of one who had read the deed, no preference was given to the former; see quotation *supra*);

United States: *Alabama:* 1884, Jaques *v.* Horton, 76 Ala. 238, 246 (copy of a lost will, not preferable to oral testimony); *Indiana:* 1858, Carpenter *v.* Dane, 10 Ind. 125, 132 (sworn copy of a bond, not preferred to oral testimony by recollection; no degrees "as a general rule" in secondary evidence; Coman *v.* State, 4 Blackf. 241, repudiated); *Michigan:* 1873, Eglow *v.* Mitchell, 26 Mich. 500, 205 (copy not preferred to oral testimony, for private writings not existing in counterpart); *Minnesota:* 1893, Minneapolis T. Co. *v.* Nimocks, 53 Minn. 381, 55 N. W. 546 (supposed copy of notice not preferred to sender's recollection); *Missouri:* 1906, State *v.* Barrington, 189 Mo. 23, 95 S. W. 235, *semble* (letter); *New York:* 1805, Jackson *v.* Lucett, 2 Caines 363 367 (deed is provable orally or by copy); 1805, Tower *v.* Wilson, 3 Caines 174 (notice served; no copy having been kept, it was proved orally); *North Carolina:* 1917, Universal Oil & F. Co. *v.* Burney, 174 N. C. 382, 93 S. E. 912 (plaintiff, the receiver of a letter from defendant, proved its loss; whether the copy retained by defendant was not required to be called for by defendant, in preference to his own recollection-testimony, not decided).

[6] 1833, R. *v.* Fursey, 6 C. & P. 81, 84 (a notice, Parke, J.: "The usual way in such cases is to give a copy to the witness and ask if it is a copy of what he saw. I do not say that parol evidence is inadmissible"); see other cases *post*, § 1280, where the admissibility of such a copy is considered.

to nearly all the possibilities of error to which ordinary recollection-testimony is open.

§ 1269. **Same: (*a*) Copy preferred for proving Public Records.** It has been noted (*ante*, § 1268) that the particular hardship of a rule of preference for copies lay in the circumstance that it imposed upon the proponent the burden of searching in possible places and of proving that a copy was not to be had. Such a hardship disappears when the original is kept in a known public office, whence copies may be obtained by any one upon request.

This is apparently the reason for a distinction well settled in all jurisdictions, namely, that *judicial records*, if in existence, must be proved by copy in preference to recollection-testimony.[1] It would seem that upon the same principle a copy would be preferred for proving a *document of any sort* in public *official custody;* this is the result accepted in a majority of jurisdictions;[2] though the contrary view finds some support.[3] Certainly some limi-

§ 1269. [1] See the cases cited *ante*, § 1215, and § 1244, where this is assumed, and also the citations in § 1267, and the following cases: *Canada:* 1904, R. *v.* Drummond, 10 Ont. L. R. 546 (perjury; the indictment and judgment of the other trial must be evidenced by an exemplified or sworn copy, or certificate of substance under Dom. Cr. C. § 691, and not by the clerk's minute book); *U. S. Ill.* 1908, Felix *v.* Caldwell, 235 Ill. 159, 85 N. E. 228 (destroyed probate decree evidenced by recollection and the recitals of the administrator's deed, since "there was in existence no other writing or memorandum"); *N. Y.* 1810, Brush *v.* Taggart, 7 John. 19 (sworn copy of a writ of *certiorari* preferred to oral evidence); 1815, Foster *v.* Trull, 12 N. Y. 456 (same, for a writ of arrest); *Pa.* 1886, Otto *v.* Trump, 115 Pa. 425, 429, 8 Atl. 786 (contents of a foreign record: a copy preferred to parol).

But when a copy has been offered, the opponent may well be allowed to *dispute its correctness* by recollection-testimony without endeavoring to obtain another copy; 1866, Estes *v.* Farnham, 11 Minn. 423, 437 (lost pleadings; incorrectness of a supposed copy may be shown by parol, where better evidence is not disclosed by the case); *Contra:* 1900, Shedden *v.* Heard, Ga., *semble*, cited *ante*, § 1268.

The extreme phrasing in Glos *v.* Holmes, 228 Ill. 436, 81 N. E. 1064 (1907), that the correctness of a sworn copy of records of a tax-sale in the county-clerk's office "could not be disputed by oral evidence" must be understood in the light of the special case; the ruling was, in effect, merely that where the original record was in court, the sworn copy's correctness was disputable only by the original, not by recollection-testimony.

[2] *Alabama:* 1881, Miller *v.* Boykin, 70 Ala. 469, 478 (postmaster's register of mail-arrivals, etc.; not allowed to testify from memoranda of the register; a sworn or a certified copy indispensable); *Arkansas:* 1896, Jones *v.* Melindy, 62 Ark. 203, 208, 36 S. W. 22 (register of mortgages testifying to contents of record not lost, excluded; proof must be by examined or certified copy); 1898, Redd *v.* State, 65 Ark. 475, 47 S. W. 119 (certified copy of pardon, if available preferred to oral testimony of it); 1910, Russell *v.* State, 97 Ark. 92, 133 S. W. 188 (certified copy of public land plats and maps, etc., preferred to oral testimony); *California:* C. C. P. 1872, § 1855 (for public or recorded documents, a copy is necessary; for documents lost or in the opponent's possession, "either a copy or oral evidence"); 1856, Brotherton *v.* Mart, 6 Cal. 488 (lost recorded deed; record copy preferred to other evidence); *Georgia:* Rev. C. 1910, § 5804 ("When a record has been burned, or otherwise destroyed, its contents may be proved by secondary evidence which does not disclose the existence of other and better evidence"); Rev. C. 1910, § 5807 (on the loss of record and original document, any evidence admissible "which does not disclose the existence of other and better evidence"); compare also § 5760 (examined copy preferred to oral evidence); 1873, Mobley *v.* Breed, 48 Ga. 44, 47 (sworn copy of assessment-proceedings, preferred to oral testimony); 1895, Bowden *v.* Achor, 95 Ga. 254, 22 S. E. 254 (document in another State; oral testimony sufficient, unless a certified copy were obtainable, as in the case of an official document); *Idaho:* Comp. St. 1919, § 7970 (for public records, or other documents in custody of a public officer, or recorded, a copy must be produced; for others, "either a copy or oral evidence of the contents"; *Illinois:* 1844, Williams *v.* Jarrot, 6 Ill. 120, 129 (clerk's certificate of letters of administration, preferred to oral evidence of appointment); 1848, Mariner *v.* Saunders, 10 Ill. 113, 121 (sworn or certified copy of a recorded deed, if available, preferred to recollection); *Iowa:* 1859, Higgins *v.* Reed, 8 Ia. 298, 300 (copy of

tations to such a general rule may well obtain, and there should be a judicial discretion to make exceptions.

Where the judicial or official record is *no longer in existence* at the time of trial, the reason for the rule falls away, and it should be enough to require the proponent to show, before using recollection-testimony, that he has no copy within his control.[4] But the fact that the record is *in another jurisdic-*

a public record preferred to oral evidence); 1861, Horseman *v.* Todhunter, 12 Ia. 230, 234 (certified copy of recorded mortgage preferred to oral evidence); *Louisiana:* 1912, State *v.* Oden, 130 La. 598, 58 So. 351 (illegal liquor-selling; by statute the collector's certificate of an issuance of a Federal revenue license was admissible to prove such a license; the certificate held to be the "best evidence", so that the defendant's own admissions on cross-examination could not be asked for; this is a most unpractical ruling; it is of the kind that puts the law far away in the jungle of logical unrealities, where it has nothing to do with actual needs); *Maine:* 1915, Inhabitants of Rumford *v.* Inhabitants of Upton, 113 Me. 543, 95 Atl. 226 (pauper supplies; testimony from recollection of entries in town treasurer's books, not received; a certified or an examined copy being preferred); *Massachusetts:* 1829, Poignand *v.* Smith, 8 Pick. 272, 279 (registry-copy of a mortgage preferred to oral testimony); 1832, Sheldon *v.* Frink, 12 Pick. 567 (oral testimony of a record's contents; a certified transcript preferred); *Michigan:* 1873, Platt *v.* Hauer, 27 Mich. 167 (exemplification of U. S. land-patent, preferred to oral testimony); *Montana:* Rev. C. 1921, § 10516 (like Cal. C. C. P. § 1855); 1878, Belk *v.* Meagher, 3 Mont. T. 65, 72 (official copy of original title-records, preferred to recollection of witness as to location); *Nevada:* Rev. L. 1912, § 5417 (like Cal. C. C. P. § 1855); *New Hampshire:* 1827, Colby *v.* Kenniston, 4 N. H. 262, 265, *semble* (record of lost deed, preferred to oral testimony); *North Carolina:* 1835, Kello *v.* Maget, 1 Dev. & B. 414, 424 (for bonds, records, etc.: order of preference is a copy, an abstract recollection); *Oregon:* Laws 1920, § 712 (like Cal. C. C. P. § 1855); *Tennessee:* 1808, Hampton *v.* M'Ginnis, 1 Overt. 286, 294 (official list of land-entries in lost books, preferred to oral evidence of the entries); 1809, Reid *v.* Dodson, 1 Overt. 395, 402 (copy of recorded plat, preferred to surveyor's testimony, to prove an alteration); *Texas:* 1849, Lewis *v.* San Antonio, 7 Tex. 288, 311 (whether a certified or sworn copy of a lost recorded original is preferred to oral testimony: discussed but not decided); 1868, Werbiskie *v.* McManus, 31 Tex. 116, 122, *semble* (certified copy of letters of administration, preferred to clerk's testimony on the stand); *Porto Rico:* Rev. St. & C. 1911, § 1392 (like Cal. C. C. P. § 1855); § 4295 ("Should the original instrument, the protocol, and the original record have disappeared, the following shall constitute evidence: 1. First, copies made by the public official who authenticated them. 2. Subsequent copies issued by virtue of a judicial mandate, after citing the persons interested. 3. 'Those which, without a judicial mandate, may have been taken in the presence of the persons interested and with their consent. The force of proof of copies of a copy shall be weighed by the courts according to the circumstances"); *Utah:* Comp. L. 1917, § 7117, par. 5 (like Cal. C. C. P. § 1855); *Wisconsin:* 1861, Sexsmith *v.* Jones, 13 Wis. 565, 568 (certified copy of record of lost mortgage preferred to oral testimony); 1881, Johnson *v.* Ashland L. Co., 52 Wis. 458, 463, 9 N. W. 464, *semble* (same).

For cases preferring the official custodian's testimony to the *absence of a record*, see *ante*, § 1244.

[3] *Fed.* 1832, U. S. *v.* Reyburn, 6 Pet. 352, 367 (privateer's commission by Government of Buenos Ayres; sworn or certified copy from the record, not preferred to testimony of one who had seen the commission, on the facte); *Mich.* 1906, People *v.* Christian, 144 Mich. 247, 107 N. W. 919 (oral testimony to a land-officer's letter, admitted, though a copy of the press-copy in the land office could have been had; "there are no degrees in secondary evidence"; no authority cited); *Mo.* 1835, Draper *v.* Clemens, 4 Mo. 52, 54 (copy of notary's register not preferred to the protest or to his testimony); *N. J.* 1866, Wells *v.* J. I. Mfg. Co., 47 N. H. 235, 256 (record in a town clerk's office; provable by parol, "where the case from its nature does not disclose the existence of other and better evidence"; here refusing to have a record made up anew); *Oh.* 1837, Blackburn *v.* Blackburn, 8 Oh. 81, 83 (lost deed; certified copy of record not preferred to oral recollection); *S. C.* St. 1911, No. 53, p. 91 (amending § 32 of St. 1907, Feb. 16; "records of the original books of the collector of internal revenue," showing payment of a U. S. liquor tax, may be evidenced "by the oath of any one who may have inspected the same").

Distinguish the principle of § 1244, *ante*, where the object of proof is not the terms of the record, but its net effect.

[4] *Colo.* 1878, Hittson *v.* Davenport, 4 Colo. 169, 174 (burnt judicial records; contents proved orally, the existence of better evidence not appearing), 1890, Conway *v.* John, 14 Colo. 30, 23 Pac. 170 (lost files, proved orally);

tion would not exempt from the requirement of a copy,[5] because a copy is obtainable and because the procuring a copy is no more difficult than the procuring a perusal for recollection-testimony.

§ 1270. **Same: (*b*) Copy of a Record of Conviction, as preferred to the Convict's Testimony on Cross-examination.** When it is desired to prove against a witness his conviction of crime, for the purpose either of excluding him as incompetent by infamy (*ante*, § 519) or of discrediting him by the conviction (*ante*, § 980), the object of the proof is the contents of the record embodying the judgment of conviction. A strict application, therefore, of the foregoing principle (*ante*, § 1269) would require the record's contents to be proved by a copy of it, and not by recollection-testimony:

1806, ELLENBOROUGH, L. C. J., in *R.* v. *Castell Carcinion*, 8 East 77, 79: "It cannot seriously be argued that a record can be proved by the admission of any witness. He may have mistaken what passed in court, and may have been ordered on his knees for a misdemeanor. This can only be known by the record."

1822, *Com.* v. *Green*, 17 Mass. 514, 537: "If anything short of a record should be admitted to impeach the competency of a witness, it would be easy for parties accused to protect themselves from punishment; and it would be in most cases impossible for the witness attacked without previous notice to defend his reputation."[1]

But, while it may be conceded that such should be the rule as against the recollection-testimony of a second witness called for the purpose of proving the conviction, it is surely a straining of technical requirements to forbid proof by the testimony of the impeached witness himself, given on cross-examination. Lord Ellenborough's sober suggestion that the witness "may have mistaken what passed in court" is a refinement of apprehension, and borders nearly on the ridiculous. That there is any real risk of reaching an erroneous result by taking the witness' own admission against his credit, extracted on cross-examination, is impossible; there is in such a case no need to insist upon a copy:

1869, COOLEY, C. J., in *Clemens* v. *Conrad*, 19 Mich. 175: "We think the reasons for requiring record evidence of conviction have very little application to a case where the party convicted is himself upon the stand and is questioned concerning it with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight that it may almost be looked upon as purely imaginary; while the danger that worthless charac-

Ill. 1907, Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767 (whether preliminary proof of lack of a certified copy of burnt records of a court should be required; not decided); 1911, People *v.* Cotton, 250 Ill. 338, 95 N. E. 283 (forged entry in a chattel mortgage acknowledged before a justice; to prove that the justice's lost docket did not contain a note of a certain chattel in the mortgaged lot, the contents were allowed to be evidenced by oral recollection of the justice, without preferring a copy made as a part of testimony before the master); *S. C.* 1895, Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305 (oral evidence of lost record's contents, admitted where no copy appeared to be in offeror's power).

[5] Otto *v.* Trump, Pa., Bowden *v.* Achor, Ga., in notes 1, 2, *supra*.

Contra: Va. 1803, Young *v.* Gregorie, 3 Call, 446, 452 (record in a foreign country may be proved by depositions, etc., without producing a copy of the record): 1809, Hadfield *v.* Jameson, 2 Munf. 53, 70, 76, 78 (preceding case approved).

§ 1270. [1] This, however, was said only of testimony by a second witness, and not of the first witness' cross-examination.

ters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent."

1904, POWERS, J., in *State* v. *Knowles*, 98 Me. 429, 527 Atl. 588: "Whether to impeach his credibility the conviction of a witness may be proved by questioning him on cross-examination, has been variously decided by different judicial tribunals. Formerly, when conviction of an infamous crime rendered a witness incompetent, it was universally held that for that purpose the conviction could be proved by the record alone. . . In a technical sense, the record may be the best evidence and the rule of primariness may require its production. This general rule, however, is of no great value unless in its application to the subject under consideration, it is necessary for the interests of justice to avoid error, exclude falsehood, and promote the truth. It can hardly be claimed that a record of conviction is any more convincing to the mind, or less liable to error, than is the witness' own admission of the fact under oath. He may well be presumed to know what the truth is. There is very little possibility of his being mistaken as to the fact of the conviction and none as to the identity of the party convicted. He has every inducement of self-interest to protect his good name and reputation, and it is inconceivable that he will falsely accuse himself. In many cases also the prompt and proper administration of justice requires the acceptance of a broader and more liberal rule of evidence. The opposing party frequently has no knowledge that the witness is to testify until he takes the stand. It may then be too late to obtain a record of his conviction from other courts or counties, or even from distant States, without delaying the trial. Even if possible to obtain it, its production may be accompanied by great expense. Why should this burden be imposed upon a party seeking to impeach the credibility of the witness, if the witness himself is willing to admit the fact sought to be proved? If he does not admit it, it must then be proved by the record and the record is conclusive. If he does admit it, it would seem only reasonable to explore the source of evidence which is ready at hand rather than to seek for that which is far away and which it may require considerable time and money to produce, when there is apparently as little liability of error in the one source of evidence as in the other. Reason is the life of the law. 'Cessante ratione legis cessat ipsa fex.'

Such, indeed, was the earlier rule, when on the 'voir dire' a witness' infamy could be proved by his own admissions.[2] But, by the end of the 1700s, the English Courts were discouraging, in every technical way possible, objections based on the outworn rules of incompetency; and thus it came about that, while the incompetency of infamy still existed, the absolute rule was enforced that proof must be made by a copy of the record.[3] The rule thus established was usually made applicable also (except where statute had expressly intervened) for the purposes of discrediting a witness, after the statutory reforms under which infamy ceased to disqualify; though the reasons for treating with disfavor such a method of excluding a witness had little force for the mere process of discrediting him.[4]

[2] 1787, R. *v.* Priddle, Leach Cr. L., 3d ed., I, 382 ("being examined on the 'voir dire', he acknowledged" a conviction, and was excluded); 1791, R. *v.* Edwards, 4 T. R. 440 ("whether he had not stood in the pillory for perjury"; allowed, and witness rejected). There had been an earlier case to the contrary: 1699, R. *v.* Warden of the Fleet, 12 Mod. 337, 341.

[3] 1763, Buller, Trials at Nisi Prius, 292 ("Note: the party who would take advantage of this exception to a witness must have a copy of the record of conviction ready to produce in Court"); 1806, R. *v.* Castell Careinion, 8 East 77; 1817, Ellenborough, L. C. J., in R. *v.* Watson 2 Stark. 116, 151 ("When a crime is imputed to a witness of which he may be convicted by due course of law, the Court know but one medium of proof, — the record of conviction"); 1852, Cresswell, J., in Macdonnell *v.* Evans, 11 C. B. 930, 935.

[4] In some Courts, however, the distinction is made; see the cases *infra* in Arkansas and Tennessee.

The result is that three types of rule now obtain in the different jurisdictions:[5] (1) the requirement of a *copy in all cases;* (2) the allowance of an

[5] In the following list the various statutes and decisions are collected: rulings dealing with such quibbling and evasive questions as "whether he had been in jail" are included here; statutes not here quoted (though cited) are quoted *ante*, § 488: the statutes which allow a clerk's certificate, summarizing the record, involve the principles of §§ 1678, 2110, *post*, but are noted here

ENGLAND: 1851, St. 14 & 15 Vict. c. 99, § 13 (record of conviction or acquittal is provable by the clerk's certified abstract); 1854, St. 17 & 18 Vict. c. 125, § 25 ("A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction: and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence", signed by the clerk or other custodian, shall suffice, "upon proof of the identity of the person"); 1865, St. 28 Vict. c. 8, §§ 1, 6 (extended to criminal cases); 1913, Mash *v.* Darley, [1914] 1 K. B. 1 (bastardy: prior conviction for carnal intercourse, evidenced by a police officer who had been present at the trial).

CANADA: the following statutes are like the English St. 1854, varying only as to the kind of crime (*ante*, § 986) thus provable: *Dom.* R. S. 1096, c. 145, Evid. Act § 12 (substituting "any offence"); St. 1909, 9 Edw. VII, c. 82, § 101 (liquor license act: previous convictions provable "by the production of a certificate under the hand of the convicting justices or police magistrate or of the clerk of the peace, without proof of his signature or official character, or by other satisfactory evidence"): *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 22 (like Eng. St. 1854, c. 125, § 25): *B. C.* Rev. St. 1911, c. 78, § 18; *N. Br.* Consol. St. 1903, c. 127, § 18, 46, § 22; *Newf.* Consol. St. 1916, c. 91, § 10; *N. Sc.* Rev. St. 1900, c. 163, § 45; *Ont.* Rev. St. 1914, c. 76, § 19; 1897, c. 73, § 19 (substituting "crime" for "felony or misdemeanor"); 1910, R. *v* Graves, 21 Ont. 329, 346 (under St. 1909, 9 Edw. VII, c. 82, § 101, held that "the oral evidence of bystanders" was not sufficient); *P. E. I.* St. 1889, c. 9, § 18, St. 1907, 7 Edw. VII, c. 3, § 25 (liquor offences; prior conviction provable by magistrate's certificate, "or other satisfactory evidence"); *Sask.* Rev. St. 1920, c. 44, § 35 (like Eng. St. 1854, c. 125, § 25); 1917, R. *v.* Tansley, 38 D. L. R. 339, Sask. (illegal sale of liquor; prior conviction for the same offence in the same court, held sufficiently evidenced by the magistrate's minutes, verified by the clerk, without producing "either the formal conviction or a certificate of the conviction"; though the Liquor Act § 59 refers to the latter modes only); *Yukon:* Consol. Ord. 1914, c. 30, § 43 (like Eng. St. 1854, c. 125, § 25, substituting "any crime").

UNITED STATES: *Federal:* 1834, U. S. *v.* Woods, 4 Cr. C. C. 484, 486 (allowed on cross-examination, but not by other testimony); 1893, Baltimore & O. R. Co. *v.* Rambo, 8 C. C. A. 6, 59 Fed. 75 (proof of the oral plea of guilty by one present in court at the time, excluded); 1906, Bise *v.* U. S., 144 Fed. 374, C. C. A. (for disqualification of a witness, a copy of the record is necessary; here applied for Indian Territory): 1921, Hanover Fire Ins. Co. *v.* Dallavo, 6th C. C. A., 274 Fed. 258, 266 (cross-examination of the witness to his former conviction allowed, but not extrinsic testimony, except a copy of the record);
Alabama: Code 1907, § 4009 ("A witness may be examined touching his conviction for crime, and his answers may be contradicted by other evidence"); 1882, Baker *v.* Trotter, 73 Ala. 277, 281 (question not allowed); 1893, Thompson *v.* State, 100 Ala. 70, 72 (same); 1895, Murphy *v.* State, 108 Ala. 10, 18 So. 557 (record required);
Alaska: Comp. L. 1913, § 1501 (like Or. Laws 1920, § 863);
Arkansas: Dig. 1919, § 4187 (a conviction "may be shown by the examination of a witness or record of a judgment"); 1886, Scott *v.* State, 49 Ark. 156, 158, 4 S. W. 750 (objection to competency; judge's report of convictions, excluded); 1893, Southern Ins. Co. *v.* White, 58 Ark. 277, 279, 24 S. W. 425 (objection to competency; production required); 1899, Cash *v.* Cash, 67 Ark. 278, 54 S. W. 744 (witness' admission on the stand, sufficient); 1902, Vance *v.* State, 70 Ark. 272, 68 S. W. 37 (to prove disqualification, and not merely impeachment of credit, the record-copy must be produced, the witness' admission not sufficing; the statute not applying to proof of a disqualifying crime; Riddick, J., diss.); 1906, Thrash *v.* State, 79 Ark. 347, 96 S. W. 360 (Vance *v.* State followed), 1911, Turner *v.* State, 100 Ark. 199, 139 S. W. 1124 (rule of Vance *v.* State affirmed);
California: C. C. P. 1872, § 2051 ("it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony"); 1870, People *v.* Reinhart, 39 Cal. 449 (question not allowed); 1870, People *v.* McDonald, 39 Cal. 697 (same); 1874, People *v.* Manning, 48 Cal. 335, 338 (rule not applicable to a question about an arrest); 1886, People *v.* Rodrigo, 69 Cal. 606, 11 Pac. 481 (question allowed); 1895, People *v.* Dillwood, — Cal. —, 39 Pac. 439 (question allowed);

admission on cross-examination of the witness to be impeached, but the requirement of a *copy* or an abstract *when proof is made by another witness*,

Colorado: Comp. St. 1921, § 6555 (quoted *ante*, § 488);
Columbia (Dist.): Code 1919, § 1067 (a conviction may be proved "either upon the cross-examination of the witness or by evidence 'aliunde'; 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");
Florida: 1900, Squires *v.* State, 42 Fla. 251, 27 So. 864 (allowed, on cross-examination); Rev. G. S. 1919, § 2706 (no conviction, except for perjury, shall disqualify; but "such conviction may be proved by questioning the proposed witness, or if he deny it, by producing a record of his conviction");
Georgia: 1873, Johnson *v.* State, 46 Ga. 118 (record-copy required); 1888, Doggett *v.* Simms, 79 Ga. 257, 4 S. E. 909 (the transcript must include the accusation or indictment); 1896, Killian *v.* R. Co., 97 Ga. 727, 25 S. E. 384 (record required); 1898, Huff *v.* State, 104 Ga. 384, 30 S. E. 868 (indictment; record required); 1921, Swain *v.* State, 151 Ga. 375, 107 S. E. 40 (under Civ. C. 1910, § 5748, conviction must be evidenced by the record, not by cross-examination);
Hawaii: Rev. L. 1915, § 2617 ("A witness may be questioned as to whether he has been convicted of any indictable or other offence"; the remainder substantially like Eng. St. 1854, c. 125); § 2603 (conviction or acquittal of an offence may be evidenced by a certificate of substance, made by the official custodian of the records and accompanied by evidence of identity);
Idaho: Comp. St. 1919, § 8038 (like Cal. C. C. P. § 2051);
Illinois: Rev. St. 1874, c. 51, § 1 (quoted *ante*, § 488; applies only to civil proceedings); c. 38, § 426 (conviction of crime "may be shown" in criminal cases; no method stated); 1882, Bartholomew *v.* People, 104 Ill. 601, 606 (copy required in criminal cases; "at least the caption, returning of the indictment into open court by the grand jury, the indictment and arraignment", are essential; thus, a mittimus with a copy of the judgment, given to the jailer, are insufficient); 1897, Gage *v.* Eddy, 167 Ill. 102, 47 N. E. 200 (testimony by another witness, allowed); 1904, McKevitt *v.* People, 209 Ill. 180, 70 N. E. 693 (copy of record required in criminal cases); 1906, O'Donnell *v.* People, 224 Ill. 218, 79 N. E. 639 (Bartholomew *v.* People followed); 1908, Clifford *v.* Pioneer Fireproofing Co., 232 Ill. 150, 83 N. E. 448 (in a civil case, a copy is not required, but "unless admitted by the witness or the party", enough must be proved "to show the jurisdiction of the court and a conviction", even where a copy is used); 1921, People *v.* Cardinelli, 297 Ill. 116, 130 N. E. 355 (questions to witness as to plea of guilty to charge of robbery, held improper);
Indiana: 1877, Farley *v.* State, 57 Ind. 333 (excluded on cross-examination; yet left doubtful); 1909, Dotter *v.* State, 172 Ind. 357, 88 N. E. 689 ("If answered affirmatively, what good ground can there be for demanding the record?" repudiating the doubt in Farley *v.* State, *supra*);
Indian Ter. 1898, Williams *v.* U. S., 1 Ind. Terr. 560, 45 S. W. 116 (record required); 1904, Bise *v.* U. S., 5 Ind. T. 602, 82 S. W. 921 (record required, to disqualify the witness; otherwise for mere impeachment);
Iowa: Code 1897, § 4613, Comp. Code, § 7320 ("A witness may be interrogated as to his previous conviction for a felony. But no other proof is competent except the record thereof");
Kansas: 1886, State *v.* Pfefferle, 36 Kan. 90, 92, 12 Pac. 406 (record not necessary); 1891, State *v.* Probasco, 46 Kan. 310, 26 Pac. 749 (cross-examination allowed): 1921, Cole *v.* Drum, 109 Kan. 148, 197 Pac. 1105 (on denial of the fact of conviction upon cross-examination, proof by the copy of the record is made ordinarily later, unless the trial Court permits it during the cross-examination);
Kentucky: C. C. P. 1895, § 597 (conviction may be shown "by the examination of a witness or record of a judgment"): 1892, Burdette *v.* Com., 93 Ky. 78, 18 S. W. 1011 ("previous conviction could not be more safely and satisfactorily shown by record evidence than by admission of the person himself who was convicted"); 1901, Wilson *v.* Com., — Ky. —, 64 S. W. 457 (allowed on cross-examination, in criminal cases); 1901, Mitchell *v.* Com., — Ky. —, 64 S. W. 751 (same); 1916, Blair *v.* Com., 171 Ky. 319, 188 S. W. 390 (former conviction not proved by a full copy of the record, excluded);
Louisiana: 1824, Castellano *v.* Peillon, 2 Mart. N. S. 466 (outside testimony excluded); 1900, State *v.* Robinson, 52 La. An. 541, 27 So. 129 (question to the witness himself, allowable); 1903, State *v.* McCoy, 109 La. 682, 33 So. 730 (whether he had been convicted and sent to the penitentiary, allowed);
Maine: 1904, State *v.* Knowles, 98 Me. 429, 57 Atl. 588 (cross-examination to conviction, allowed, as an application of common-law principles);
Maryland: Ann. Code 1914, Art. 35, § 6 (the whole record need not be produced, but only a certificate under seal); 1885, Smith *v.* State, 64 Md. 25 (whether he had ever been confined in jail, allowed); 1894, McLaughlin *v.* Mencke, 80 Md. 83, 30 Atl. 603 (question as to conviction, allowed); 1902, Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500 (allowed,

— this rarely by common-law decision, but widely by statute; (3) the allowance of *recollection-testimony* either from the witness to be impeached or from another, — this rarely, and by statute only.

on cross-examination); 1905, Deck *v.* Baltimore & O. R. Co., 100 Md. 168, 59 Atl. 650 (what there was in the witness' record that led an officer to arrest him, not allowed on cross-examination; "the proper evidence of such convictions should have been produced"; no authority cited);

Massachusetts: 1769, Advocate-General *v.* Hancock, 1 Quincy 461 (record required); 1822, Com. *v.* Green, 17 Mass. 514, 537 (see quotation *supra*); 1855, Com. *v.* Quin, 5 Gray 479 (record required); 1868, Com. *v.* Gorham, 99 Mass. 420, 421 (the record must include the final judgment, because the verdict may have been set aside); 1894, Com. *v.* Sullivan, 161 Mass. 59, 36 N. E. 583 (whether he had been in jail in Essex County; excluded); 1900, O'Brien *v.* Keefe, 175 Mass. 274, 56 N. E. 588 (upon a promise of late producing the record, the witness may be asked 'de bene' to identify him); 1907, Com. *v.* Walsh, 196 Mass. 369, 82 N. E. 19 (the common law rule of this State, not permitting the conviction to be proved orally by a witness, applies equally to a defendant testifying on cross-examination; prior practice and rulings followed); 1920, Com. *v.* Homer, 235 Mass. 526, 127 N. E. 517 (Com. *v.* Walsh followed);

Michigan: 1867, Wilbur *v.* Flood, 16 Mich. 44 (copy necessary for outside witness, but not for cross-examination; followed in ensuing cases); 1869, Clemens *v.* Conrad, 19 Mich. 170, 174 (see quotation *supra*); 1870, Dickinson *v.* Dustin, 21 Mich. 565 (here the record of an attorney's disbarment was technically defective); 1882, Driscoll *v.* People, 47 Mich. 416, 11 N. W. 221; 1886, People *v.* Mausaunau, 60 Mich. 15, 21, 26 N. W. 797; 1890, Helwig *v.* Lascowski, 82 Mich. 621, 46 N. W. 1033; Comp. L. 1915, § 15796 (justice's certificate of conviction, admissible); 1903, Pratt *v.* Wickham, 133 Mich. 356, 94 N. W. 1059 (allowed on cross-examination);

Minnesota: Gen. St. 1913, § 8504 (quoted *ante*, § 488); 1888, State *v.* Curtis, 39 Minn. 359, 40 N. W. 263 (statute applied); 1908, State *v.* Gordon, 105 Minn. 217, 117 N. W. 483;

Mississippi: Code 1906, § 1923, Hem. § 1583, § 1746 (cross-examination allowable; quoted *ante*, § 987); 1897, Jackson *v.* State, 75 Miss. 145, 21 So. 707 (question allowed);

Missouri: 1854, State *v.* Edwards, 19 Mo. 675, 676 (record required); 1878, State *v.* Rugan, 68 Mo. 214 (same); 1883, State *v.* Lewis, 80 Mo. 110, 111 (that the witness had been seen in the penitentiary as a convict, excluded); 1885, State *v.* Rockett, 87 Mo. 666, 669 (the record is the only evidence); 1890, State *v.* Brent, 100 Mo. 531, 13 S. W. 874 (excluded; on cross-examination); 1890, State *v.* Miller, 100 Mo. 606, 621, 13 S. W. 1051 (whether he had been in the penitentiary; record not required; preceding rulings ignored); 1893, State *v.* Taylor, 118 Mo. 153, 24 S. W. 449 (cross-examination allowed, "for the purpose of honestly discrediting him"); 1894, State *v.* Pratt, 121 Mo. 566, 26 S. W. 556 (similar); 1894, State *v.* Martin, 124 Mo. 514, 28 S. W. 12 (question as to number of times in jail; record not required); Rev. St. 1919, § 5439 (conviction is provable "either by the record or by his own cross-examination"; quoted *ante*, § 488); 1905, State *v.* Heusack, 189 Mo. 295, 88 S. W. 21 (statute applied); 1905, State *v.* Forsha, 190 Mo. 296, 88 S. W. 754 (after the witness' admission of conviction for common assault, the State was allowed to show a conviction for assault with intent to kill); 1905, State *v.* Spivey, 191 Mo. 87, 90 S. W. 81 (rule applied to a defendant cross-examined); 1905, State *v.* Woodward, 191 Mo. 617, 90 S. W. 90 (if the witness denies the conviction, the record-copy must be produced, if further proof is desired); 1920, Stack *v.* General Baking Co., 283 Mo. 396, 223 S. W. 89 (excluding a copy of the record, where witness admits the conviction; unsound; this is a misapplication of the principle of § 2591, *post*);

Montana: Rev. C. 1921, § 10668 (like Cal. C. C. P. § 2051); § 11603 (conviction may be proved by the record "or by his examination as such witness"); § 11120 (liquor offences; former conviction within the State provable by "the journal entry of judgment, or the docket or judgment-roll, or other proper court record"); 1895, State *v.* Black, 15 Mont. 143, 38 Pac. 674 (undecided); 1920, State *v.* Smith, 57 Mont. 563, 190 Pac. 36 (sedition; cross-examination of witness to prior conviction for sedition, allowed);

Nebraska: Rev. St. 1922, § 8848 (like Ia. Code § 7320); 1902, Leo *v.* State, 63 Nebr. 723, 89 N. W. 303 (questions held improper on the facts, because of abuse of the rule); 1910, Johns *v.* State, 88 Nebr. 145, 129 N. W. 992 (accused taking the stand may be questioned); 1921, Denker *v.* State, 106 Nebr. 779, 184 N. W. 945 (similar);

New Hampshire: 1862, Smith *v.* Smith, 43 N. H. 536, 538 (whether a witness had been bound over to appear on a charge of perjury; not allowed);

New Jersey: Comp. St. 1910, Evid. § 7 (conviction may be proved by "examination of such witness or otherwise", and he may be contradicted); 1899, Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811 (statute applied); 1904, State *v.* Fox, 70 N. J. L. 353, 57 Atl. 270 (the witness may be asked as to conviction of any

The second form is the only proper one, and now obtains in the majority of jurisdictions.

other crime "without specifying time or place"); 1905, State *v.* Mont, 62 N. J. L. 365, 65 Atl. 259 (statute applied); 1909, Hill *v.* Maxwell, 77 N. J. L. 766, 73 Atl. 501 (statute applied to allow the question to the witness himself); 1916, State *v.* Rombolo, 89 N. J. L. 565, 99 Atl. 434 (copy of entire record is admissible, subject to instructions);
New Mexico: Annot. St. 1915, § 2179 (substantially like Eng. St. 1854);
New York: 1816, People *v.* Herrick, 13 John. 82, 84 (question not allowed, but chiefly on account of the privilege against self-disgrace); 1817, Hilts *v.* Colvin, 14 John. 182, 184 (even where the record has been burnt, oral evidence is inadmissible where a certificate of its tenor was required by law to be filed in the court of Exchequer); 1862, Newcomb *v.* Griswold, 24 N. Y. 299 (record necessary); 1870, Real *v.* People, 42 N. Y. 273, 281 (whether he has been "in jail, the penitentiary, or the State prison", admissible; as to having been convicted, "a different rule may perhaps apply"); St. 1877, C. P. A. 1920, § 350 (in civil or criminal cases, the conviction may be proved "either by the record or by his cross-examination"); 1881, Perry *v.* People, 86 N. Y. 353, 358 (oral question as to conviction improper; but if not objected to because the record should be produced the answer is receivable); P. C. 1881, Cons. L. 1909, Penal, § 2444 ("[The conviction may be proved] either by the record, or his cross-examination"); 1883, People *v.* Noelke, 94 N. Y. 137, 144 (question on cross-examination allowed); 1889, Spiegel *v.* Hayes, 118 N. Y. 660, 22 N. E. 1105 (same); 1912, People *v.* Cardillo, 207 N. Y. 70, 100 N. E. 715 (the accused's confessions out of court are not admissible to show prior convictions of crime: the Code prescribing the only permissible modes);
Ohio: 1870, Wroe *v.* State, 20 Oh. St. 471 (left undecided);
Oklahoma: 1898, Asher *v.* Terr., 7 Okl. 188, 54 Pac. 445 (whether the witness had been in jail, allowed); 1899, Hyde *v.* Terr., 8 Okl. 69, 56 Pac. 851 (allowed on cross-examination);
Oregon: Laws 1920, § 863 (like Cal. C. C. P. § 2051);
Pennsylvania: 1909, Com. *v.* Racco, 225 Pa. 113, 73 Atl. 1067 (defendant allowed to be questioned as to former convictions; and a police officer allowed to testify to the defendant's admission thereof, to impeach his denial);
Philippine Islands: C. C. P. 1901, § 342 (like Cal. C. C. P. § 2051);
Porto Rico: Rev. St. & C. 1911, §§ 1526, 6276 (like Cal. C. C. P. § 2051);
Rhode Island: 1892, State *v.* Ellwood, 17 R. I. 763, 768, 24 Atl. 782 (allowable on cross-examination);
South Carolina: 1903, State *v.* Williamson, 65 S. C. 242, 43 S. E. 671 (Clemens *v.* Conrad, Mich., followed; here applied to a question about an indictment);
Tennessee: 1895, Boyd *v.* State, 94 Tenn. 505, 29 S. W. 901 (record required, where the witness is to be excluded, not merely discredited); 1896, Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046 (record required);
Texas: 1904, Gulf C. & S. F. R. Co. *v.* Johnson, 98 Tex. 76, 81 S. W. 4 (record required: and this must include the sentence, not merely the judgment on the verdict); 1906, Grabill *v.* State, — Tex. Cr. —, 97 S. W. 1046 (for disqualifying a witness, a copy of the record is required; but for impeachment, his answer on cross-examination suffices); 1907, Fannin *v.* State, 51 Tex. Cr. 41, 100 S. W. 916 (defendant's oral extra-judicial admission of conviction, excluded); 1918, Marshall *v.* State, 82 Tex. Cr. 623, 200 S. W. 836 (a questioning of accused as to prior conviction to disqualify, held on the facts to waive the necessity for producing written evidence of the pardon to restore competency);
Utah: Comp. L. 1917, § 7141 (like Cal. C. C. P. § 2065);
Vermont: 1897, State *v.* Slack, 69 Vt. 486, 38 Atl. 311, *semble* (record required); 1902, McGovern *v.* Hayes & Smith, 75 Vt. 104, 53 Atl. 326 (allowable on cross-examination);
Washington: 1893, State *v.* Payne, 6 Wash. 563, 568 (record required); R. & B. Code 1909, § 2290 (may be shown "either by the record thereof, or a copy of such record duly authenticated by the legal custodian thereof, or by other competent evidence, or by his cross-examination"); 1912, State *v.* Stone, 66 Wash. 625, 120 Pac. 76 (under Crim. Code 1909, § 37, Rem. & Ball. Code, § 2290, the witness may be cross-examined without producing the record-copy; "the rule stated in State *v.* Payne is no longer applicable"); 1912, State *v.* Overland, 68 Wash. 566, 123 Pac. 1011 (same);
West Virginia: 1902, State *v.* Hill, 52 W. Va. 296, 43 S. E. 160 (conviction may be proved by the witness' answer; in any case, the fact of having been in the penitentiary may be proved without the record-copy);
Wisconsin: Stats. 1919, § 4073 (quoted *ante*, § 488); 1859, Kirschner *v.* State, 9 Wis. 140, 144 (record required); 1879, Ingalls *v.* State, 48 Wis. 647, 654, 4 N. W. 785 (same); 1881, McKesson *v.* Sherman, 51 Wis. 303, 311, 8 N. W. 200, *semble* (same); 1900, Shafer *v.* Eau Claire, 105 Wis. 239, 81 N. W. 409 (allowed on cross-examination, but the time and place must be specified; this is merely a perversion of the rule of § 1025, *ante*); 1902, Cullen *v.* Hanisch, 114 Wis. 24, 89 N. W. 900 (question as to the mere fact of being in jail,

Where, for the purpose of discrediting, a *judgment in a civil suit* could be proved, it would seem that a similar rule should by analogy apply.[6]

§ 1271. **Same: (c) Copy of Foreign Statutory Law, as preferred to Recollection-Testimony.** The process of proving a foreign law raises a number of interesting questions of principle, not always sufficiently discriminated. Some of these have already been noticed, — the experiential qualifications necessary for a witness (*ante*, § 564), the necessity of personal knowledge by the witness (*ante*, §§ 668, 690), and the exemption from the rule requiring production of the original (*ante*, §§ 1213, 1218). Others involve subsequent principles, — the admissibility, under exceptions to the Hearsay rule, of certified copies (*post*, § 1680), of official printed volumes (*post*, § 1684), of private reports of cases (*post*, § 1703), and of legal treatises (*post*, § 1697), the effect of the Opinion rule (*post*, § 1953), the presumption as to the nature of an unproved foreign law (*post*, § 2536), and the part of the tribunal — judge or jury — to whom evidence is to be offered (*post*, § 2558).

The particular question here is whether the evidence of a foreign "written law" should be presented in the shape of a *copy* or merely by *recollection-testimony* of one qualified to know it.

That the "unwritten law", *i.e.* a customary law or a judicial decision, may be proved by the later mode has never been questioned. But on the principle already noted (*ante*, § 1269), when the law to be proved is a statute, the preferred mode of proof would be a *copy of the literal terms of the official record.* Is there any reason why the principle should suffer any modification in the present class of cases?

The argument in the negative is presented in the following passage:

1844, PATTESON, J., in *Baron de Bode's Case, infra:* "I quite agree that a witness conversant with the law of a foreign country may be asked what in his opinion the law of that country is. But I cannot help thinking that, as soon as it appears that he is going to speak of a written law, his mouth is closed. . . . The general rule is not denied, that when the contents of a written instrument are to be proved, the instrument itself should be produced, or, when the instrument from its nature is provable by an examined copy, then such examined copy. I cannot see why the rule should not be the same in the case of a foreign written law. . . . I think the rule would be just the same if the question related to the French code as existing at this moment. If a witness were asked what the law now is with respect to a bill of exchange in France, and were immediately cross-examined as to whether that law was not in writing, and answered that it was, I think a copy of the law must be produced."

excluded); 1903, Paulson *v.* State, 118 Wis. 89, 94 N. W. 771 (oral testimony to conviction is under the statute allowed only on cross-examination).

Wyoming: 1921, Anderson *v.* State, 27 Wyo. 345, 196 Pac. 1047 ("oral testimony, except on admission by the witness on cross-examination, is not admissible");

For the question whether *identity of name* suffices, without other evidence of identity of persons, see *post*, § 2529.

[6] 1862, Henman *v.* Lester, 12 C. B. N. S. 776 (question to party to discredit him as to losing a former civil suit; Byles, J., was for exclusion, because the record should be produced, the statute not affecting this sort of case; Willes & Keating, JJ., were for admission both in this case and that of a prior conviction, because either the person admits the judgment, which should suffice, or he denies it, when, apart from statute, he cannot be contradicted upon a collateral matter).

Compare the rules *ante*, §§ 1244 and 1256.

But the answer to this is clear. It may be conceded that, if the question were purely and simply directed to the contents of a specific statute, the proof should be by copy of its terms. But in the usual case this is not the question; the inquiry is as to the state of the law at the present time or at a given time past. This inquiry can be answered only by taking into consideration the appropriate statute, if any, the pre-existing rule of custom or judicial precedent as affected by the statute, the validity of the statute under some possible constitution, and the actual effect of the statute as determined by prior and subsequent judicial application of the constitution and by judicial construction of the statutory words. In short, an answer as to the state of the law at a given moment can never be a mere reproduction, offered in place of a copy, of statutory words; it is a statement (*ante*, § 1242) of a net fact separate from the words of a statute, and involving many considerations in which the words of a statute are but a single element. The acceptance of a mere copy of the statute, far from securing greater accuracy, would on the contrary tend rather to mislead, by ignoring these other material elements. This view of the question was expounded in masterly opinions in Baron de Bode's Case:

1844, *Baron de Bode's Case*, 8 Q. B. 250. DENMAN, L. C. J.: "The form of the question [as to the state of the law in France in 1789] is immaterial; in effect the witness is asked to speak to the decree. It is objected that this is a violation of the general principle that the contents of a written instrument can be shown only by producing the instrument or accounting for the non-production. But there is another general rule, that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men; and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law. . . . When Pothier states the law of France as rising out of an ordonnance made in a particular year, can we exclude that as being merely his account of the contents of a written instrument? I cannot conceive that in any civilized country a statement from Blackstone's Commentaries would be rejected, which set forth what the law was, when altered, and up to what time continued. Such a statement would not relate merely to the contents of the statute referred to, but to the state of the law before or after its passing." COLERIDGE, J.: "What, then, do we mean by a knowledge of the law? That question seems to me to go to the foundation of the whole matter; and it must be determined, with reference to the particular question before us, by a little subdivision. We must first inquire as to the sources of our knowledge, and, secondly, as to the time over which we are to range for our knowledge. Now, with regard to the sources of the knowledge, we are to find it partly in the actual documents, the writings first existing as laws, . . . [and where these are wanting,] from text-books, reported decisions, records, and local customs prevailing in particular districts. . . . Then, next, as to the time over which our knowledge is to range. When we talk of a man having a knowledge of the law, do we mean a knowledge of the law only as it exists in the courts of justice at the present day, or do we mean that knowledge of the law and the changes it has undergone which he has acquired in the course of study that gives him the character of a scientific witness? I apprehend we clearly mean the latter. . . . The question for us is, not what the language of the written law is, but what the law is altogether, as shown by exposition, interpretation, and adjudication. How many errors might result if a foreign Court at-

tempted to collect the law from the language of some of our statutes which declare instruments in certain cases to be 'null and void to all intents and purposes', while an English lawyer would state that they were good against the grantor and that the Courts have so expounded the statutes!"

1844, Lord BROUGHAM, in *Sussex Peerage Case*, 11 Cl. & F. 85, 115: "It is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it."

1846, ERLE, J., in *Cocks* v. *Purday*, 2 C. & K. 270: "The proper course, to ascertain the law of a foreign country, is to call a witness expert in it, and ask him on his responsibility what that law is, and not to read any fragments of a code, which would only mislead."

This solution is so plain that it is singular that judicial opinion waited so long to expound it. The opposite solution had been sanctioned by English common-law Courts on a few occasions before and after the year 1800;[1] but, in spite of these rulings, the overwhelming weight of English authority of that period, representing the original tradition, did not require proof by copy.[2] About the year 1845, the decisions quoted above removed for England the previous uncertainty of precedent.[3]

§ 1271. [1] In the following cases a copy was required: 1776, Sir G. Hay, in Harford *v.* Morris, 2 Hagg. Cons. 430 ("not by the opinions of lawyers, which is the most uncertain way in the world, but by certificates"); 1800, Boehtlinck *v.* Schneider, 3 Esp. 58 (on argument that the unwritten law, though not the written, could be proved orally, Kenyon, L. C. J., still insisted, for proof of the Russian law about stoppage 'in transitu', upon "an authenticated document of the laws"; and the K. B. concurred); 1812, Ellenborough, L. C. J., in Clegg *v.* Levy, 3 Camp. 166 (but here the witness was probably incompetent); 1815, Gibbs, C. J., in Millar *v.* Heinrick, 4 Camp. 155 (Russian admiralty regulations). In the following cases the ruling is obscure: 1797, Alves *v.* Hodgson, 7 T. R. 241, Kenyon, L. C. J.; 1800, Male *v.* Roberts, 3 Esp. 164, Eldon, L. C. J.; 1801, Inglis *v.* Usherwood, 1 East 520, K. B.

[2] The following cases are to that effect, though some of them do not expressly apply the doctrine to a statute: 1744, Hardwicke, L. C., in Gage *v.* Bulkeley, Ridgw. cas. temp. Hardw. 276; 1774, Mostyn *v.* Fabrigas, Cowp. 161, 174 (Mansfield, L. C. J.: "The way of knowing foreign laws is by admitting them to be proved as facts, and the Court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is; as evidence is received of customs in respect to trade"; no discrimination made on the present point); 1789, Kenyon, L. C. J., in Walpole *v.* Ewer, Ridgw. 276, note, *semble;* 1791, Kenyon, L. C. J., in Ganer *v.* Lady Lanesborough, Peake 18 (the fact of a Jewish divorce, according to custom in Leghorn, proved orally); 1791, Kenyon, L. C. J., in Chauraud *v.* Angerstein, Peake 44; 1802, Sir W. Wynne, in Middleton *v.* Janverin, 2 Hagg. Cons. 443 (written and unwritten laws); 1806, Ellenborough, L. C. J., in Picton's Trial, 30 How. St. Tr. 509 (written laws); 1807, Ellenborough, L. C. J., in Richardson *v.* Anderson, 1 Camp. 66, *semble;* 1807, Buchanan *v.* Rucker, 1 Camp. 63 (mode of service of process in Tobago; the written law not required); 1812, Abbott, C. J., in Lacon *v.* Higgins, 3 Stark. 178, Dowl. & R. N. P. 44 (where also a text was offered); 1828, Trotter *v.* Trotter, 4 Bligh N. S. 504, House of Lords; 1834, Trimby *v.* Vignier, 4 Moore & S. 703 (by consent; Tindal, C. J., and Ct. of C. P.); 1834, Alivon *v.* Furnival, 1 C. M. & R. 291, Parke, B., and the Ct. of Exch.

[3] ENGLAND: 1844, Sussex Peerage Case, 11 Cl. & F. 85, 114 (expert allowed to state the law of marriage in Rome, and to refresh his memory by looking at law-books at the same time); 1844, Baron de Bode's Case, 8 Q. B. 208, 246 (expert opinion as to the law of inheritance at a particular time in Alsace, that feudal law had been there ended by a decree of the French Assembly of Aug. 4, 1789, allowed without producing a copy of the decree; Patteson, J., diss.); 1845, Nelson *v.* Bridport, 8 Beav. 527, 539 (expert opinion of Sicilian law "upon several points", admitted); 1846, Cocks *v.* Purday, 2 C. & K. 269 (whether a parol transfer sufficed in Bohemian law, allowed); 1852, R. *v.* Newman, 3 C. & K. 252, 262, Lord Campbell, C. J. (proof of foreign Court's jurisdiction made by parol); 1863, Di Sora *v.* Phillipps, 10 H. L. C. 624, 633 (expert opinion as to legal effect of marriage contract in Italian law, admitted without requiring copies); CANADA: *Man.* Rev. St.

But in the meantime, in the United States, the just proportion of the minority of the English rulings not being perceived, some of them served to establish the erroneous view in a few early rulings in our Courts. Thus, unfortunately, in a majority of our jurisdictions the erroneous doctrine came to prevail (though later legislation has in some jurisdictions corrected it) that, wherever a statute was in any way involved, a copy of the statute was the preferred evidence required.[4]

1913, c. 65, § 32 (for the purpose of ascertaining foreign law judicially noticed, the judge may require "evidence upon oath", "oral or written, or by certificate or otherwise, as may seem proper"); 1917, Ex parte Thomas, 38 D. L. R. 716 *N. B.* (extradition; proof of Massachusetts law of larceny held sufficiently made by exemplified copy of the statute without calling an expert witness); *N. Sc.* Merritt *v.* Copper Crown Co., 36 N. Sc. 383, 393 (West Virginia statute proved by an admission); *Ont.* 1850, Short *v.* Kingsmill, 7 U. C. Q. B. 354; 1852, Arnold *v.* Higgins, 11 id. 446.

For the British statutes providing for the use of a *judicial certificate* of the law as obtaining in a foreign country or in some other part of the British Dominions, see *post*, § 1674.

[4] The cases on both sides, with the statutes, are as follows: UNITED STATES: *Federal:* 1804, Church *v.* Hubbart, 2 Cr. 238, *semble* (statute not provable orally); 1810, Livingston *v.* Ins. Co., 6 Cr. 274, 280 (foreign trade regulations not shown to be in writing, provable by parol); 1807, Robinson *v.* Clifford, 2 Wash. C. C. 1 (statute not provable orally); 1808, Seton *v.* Ins. Co., 2 Wash. C. C. 175 (same); 1808, Jaffray *v.* Dennis, 2 Wash. C. C. 253 (same); 1816, Consequa *v.* Willings, 1 Pet. C. C. 229 (same); 1843, Wilcocks *v.* Phillips' Ex'rs, 1 Wall. Jr. 49, 53 (same; though here the difficulty of getting a copy of a law of China was allowed to exempt from the rule); 1852, Ennis *v.* Smith, 14 How. 426, *semble* (general rule as above); 1882, Pierce *v.* Insdeth, 106 U. S. 551, 1 Sup. 418, *semble* (same); 1901, Herbst *v.* Asiatic Prince, 47 C. C. A. 328, 108 Fed. 289 (law of Brazil, as to delivery of goods under the customs law, proved by a lawyer's testimony); 1902, Mexican N. R. Co. *v.* Slater, 53 C. C. A. 239, 115 Fed. 593, 606 (expert testimony "as to the proper construction of a statute of a foreign country and written in a foreign tongue", the terms of the statute having been proved by copy, held admissible); 1903, Badische A. & S. F. *v.* Klipstein, 125 Fed. 543 (testimony of German lawyers, that certain records of incorporation in Baden, proved by copy, were legally sufficient to incorporate, admitted);
Alabama: 1840, Innerarity *v.* Mims, 1 Ala. 666 (oral evidence of statute inadmissible);
Arizona: Rev. St. 1913, Civ. C. § 1734 (like Del. Rev. St. § 4222);
Arkansas: 1850, Barkman *v.* Hopkins, 11 Ark. 168, *semble* (oral evidence of statute admissible); 1856, McNeil *v.* Arnold, 17 Ala. 154, 164 (oral testimony to registry-statutes, excluded); 1878, Bowles *v.* Eddy, 33 Ala. 645, 649 (same; usury statutes); 1884, Blackwell *v.* Glass, 43 Ala. 209, 211 (oral testimony to usage as to sufficiency of return, admitted);
California: C. C. P. 1872, § 1902 ("The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a sister State or foreign country"; this by implication preserves the erroneous rule);
Delaware: Rev. St. 1915, § 4222 ("The existence and the tenor or effect of all foreign laws may be proved as facts by parole evidence; but if it shall appear that the law in question is contained in a written statute or code, the Court may, in its discretion, reject any evidence of such law that is not accompanied by a copy thereof");
Florida: Rev. G. S. 1919, § 2717 (like Del. Rev. St. § 4222);
Florida: Rev. G. S. 1919, § 2716 (unwritten or common law of U. S. or a State or Territory "may be proved as facts by parol evidence");
Idaho: Comp. St. 1919, § 7946 (like Cal. C. C. P. § 1902);
Illinois: 1858, Merritt *v.* Merritt, 20 Ill. 65, 80 (oral testimony to unwritten law, admissible); 1858, Hoes *v.* Van Alstyne, 20 Ill. 201 (specific statute not provable orally); 1868, Merritt *v.* Merritt, 45 Ill. 80, *semble* (same); 1873, McDeed *v.* McDeed, 67 Ill. 545, 548 (common-law provable orally); 1874, Milwaukee & S. P. R. Co. *v.* Smith, 74 Ill. 197, 199 (same);
Indiana: Burns' Ann. St. 1914, § 500 (like Del. Rev. St. 1915, § 4222, for "the laws of any foreign country"); 1840, Comparet *v.* Jernegan, 5 Blackf. 376 (oral evidence of statute, inadmissible); 1854, Heberd *v.* Myers, 5 Ind. 94 (like next case); 1860, Line *v.* Mack, 14 Ind. 330 (statute of domestic State, oral testimony excluded, but for foreign States, the Court has a discretion);
Iowa: Code 1897, § 4652, Comp. Code § 7359 ("unwritten or common law" provable by parol evidence); 1855, Lattourett *v.* Cook, 1 Ia. 1, 8 (deposition to statute excluded); 1859, Greasons *v.* Davis, 9 id. 223 (oral evidence of common law, admissible); 1874, Crafts *v.* Clark, 38 Ia. 241 (same); 1885, State *v.* Cross, 68 Ia. 180, 195, 26 N. W. 62 (statute as to notaries; expert testimony excluded);
Kansas: Gen. St. 1915, § 7271 (like Okl. C. S.

The provision, in most of the reforming statutes, that the Court may in its discretion require that testimony from an expert be accompanied by a copy

§ 636); 1882, Brenner *v.* Luth, 28 Kan. 588 (oral evidence of the law, admitted; its nature does not appear); 1915, Spaeth *v.* Kouns, 95 Kan. 320, 148 Pac. 651 (abstract of title to Missouri land; Missouri lawyer and abstracter admitted to testify to merchantable and vested title);
Kentucky: Stats. 1915, § 1640 (the unwritten law of another of U. S. is provable by "parol evidence of persons learned in the law"); § 1641 (substantially like Del. Rev. St. § 4222); 1831, Talbot *v.* Peoples, 6 J. J. M. 200 (statute as to legal rate of interest; oral evidence excluded); 1847, Tyler *v.* Trabue, 8 B. Monr. 306 (whether a note was negotiable; depositions allowed);
Louisiana: 1843, Rosine *v.* Bonnabel, 5 Rob. 163, 166 (foreign law in general; provable orally); 1847, Isabella *v.* Pecot, 2 La. An. 387, 391 (statute not provable orally); 1915, Walsh *v.* Walsh, 137 La. 157, 68 So. 392 (Irish law as to married women's capacity; Irish lawyers' testimony received, there being no evidence of a statute on the subject; of course);
Maine: Rev. St. 1916, c. 87, § 130 (parol evidence of foreign law which "appears to be existing in a written statute or code", may be rejected unless accompanied by copy); 1838, Owen *v.* Boyle, 15 Me. 149, *semble* (statute not provable orally);
Maryland: 1857, Wilson *v.* Carson, 10 Md. 75, *semble* (U. S. State statute provable orally); 1867, Baltimore & O. R. Co. *v.* Glenn, 28 Md. 123 (U. S. State statute; not provable orally); 3869, Zimmerman *v.* Helser, 32 Md. 278 (same; both erroneously go upon Gardner *v.* Lewis, 7 Gill 394);
Massachusetts: Gen. L. 1920, c. 233, § 71 ("The unwritten or common law of any other of the United States or of the territories thereof may be proved as facts by parol evidence"); § 72 ("The existence, tenor, and effect of all foreign laws shall be proved as facts by parol evidence; but if it appears", etc. as in Delaware); 1811, Legg *v.* Legg, 8 Mass. 99, *semble* (foreign law not provable orally); 1817, Frith *v.* Sprague, 14 Mass. 455, *semble* (*contra*); 1825, Raynham *v.* Canton, 3 Pick. 293, 296 (statute provable orally; "to require [an exemplification, etc.] would put the citizens to an unnecessary burden and expense"; but statute-book preferred to oral testimony); 1829, Haven *v.* Foster, 9 Pick. 112, 130 ("if written, it must be proved by documentary evidence"); 1868, Kline *v.* Baker, 99 Mass. 254, *semble* (expert may testify to statute); Bowditch *v.* Soltyk, 99 Mass. 138, *semble* (same);
Michigan: 1858, People *v.* Lambert, 5 Mich. 349, 360 (foreign statute not provable orally); 1863, Kermott *v.* Ayer, 11 Mich. 184 (statute not provable orally; that the law is statutory, not assumed, at least where the consequence would be the reversal of a judgment otherwise good); 1880, Kopke *v.* People, 43 Mich. 43, 4 N. W. 551, *semble* (statute not provable orally);
Minnesota: Gen. St. 1913, § 8417 (unwritten or common law of any State of the U. S., provable "as facts by parol evidence"); § 8413 (like Del. Rev. St. § 4222);
Mississippi: 1852, Stewart *v.* Swanzy, 23 Miss. 502 (statute not provable orally);
Missouri: 1857, Charlotte *v.* Chouteau, 25 Mo. 465, 473 (statute not provable orally);
Montana: Rev. C. 1921, § 10552 (like Cal. C. C. P. § 1902);
Nebraska: Rev. St. 1922, § 8903 ("the unwritten or common law" is provable by parol evidence); § 8927 (same); 1907, Cook *v.* Chicago R. I. & P. R. Co., 78 Nebr. 64, 110 N. W. 718 (witness to contents of statutes of Idaho, no copy being offered, excluded);
New Hampshire: 1851, Watson *v.* Walker, 23 N. H. 471, 496 (oral testimony excluded for written law, *semble*, even where it does not appear whether the law was written); 1854, Emery *v.* Berry, 23 N. H. 473, 485 (of a foreign State, only by an exemplified copy under the seal of State or by a sworn copy; of a domestic State, also by official printed copy; but not orally); 1868, Hall *v.* Costello, 48 N. H. 176, 179 (expert testimony to British enlistment statute, admitted);
New York: 1806, Kenny *v.* Clarkson, 1 Johns. 394 (statute not provable orally); 1829, Chanoine *v.* Fowler, 3 Wend. 177 (same); 1830, Hill *v.* Packard, 5 Johns. 375, 384, *semble* (same); 1831, Lincoln *v.* Battelle, 6 id. 475, 482 (same); 1840, Re Roberts' Will, 8 Paige Ch. 448, *semble* (same); 1880, Hynes *v.* McDermott, 82 N. Y. 52 (same);
North Carolina: Con. St. 1919, § 1749 (the unwritten or common law may be proved "as a fact by oral evidence");
North Dakota: Comp. L. 1913, § 7910 (like Okl. Comp. St. § 636); 1912, Paterson's Estate, 22 N. D. 480, 134 N. W. 751 *semble* (an over-technical decision);
Ohio: Gen. Code Ann. 1921, § 11499 (unwritten law is provable as facts by parol evidence);
Oklahoma: Comp. St. 1921, § 636 ("The unwritten or common law of any other State, Territory, or foreign government, may be proved as facts by parol evidence");
Oregon: Laws 1920, § 749 (like Cal. C. C. P. § 1902);
Pennsylvania: 1826, Dougherty *v.* Swett, 15 S. & R. 87 (statute not provable orally; but law will not be assumed to be statutory); 1840, Phillips *v.* Gregg, 10 Watts 161, 169 (the difficulty of obtaining information as to the Spanish or other laws in the early Louisiana

of the statute in question, is a wise one. — It may be noted, finally, that, on the one hand, oral testimony merely to the words of a statute and to nothing more has never been claimed to be proper; [5] while, on the other hand, expert testimony to the technical construction of the words or phrases of a statute whose terms are otherwise properly proved is on all hands considered to be receivable.[6]

§ 1272. **Preferences as between Recollection-Witnesses.** Where no preference for a copy applies, and recollection-testimony is allowable, no further rule of preference can properly be laid down as between different kinds of recollection-witnesses, — for example, a rule preferring the writer of a lost document to a witness who had read it.[1]

territory was regarded as sufficient to admit parol evidence);
Philippine Islands: C. C. P. 1901, § 302 (like Cal. C. C. P. § 1902);
Rhode Island: 1870, Barrows *v.* Downs, 9 R. I. 446 (statute provable orally; following the arguments of Baron de Bode's Case and Sussex Peerage Case);
South Carolina: C. C. P. 1922, § 707 (printed copies of foreign written law receivable; unwritten or common law "may be proved as facts by parol evidence"); 1907, Free *v.* Southern R. Co., 78 S. C. 57, 58 S. E. 952 (whether a North Carolina statute can be evidenced by a North Carolina Supreme Court decision; not decided);
South Dakota: Rev. C. 1919, § 2718 (like Okl. Comp. St. § 636);
Texas: 1847, Bryant *v.* Kelton, 1 Tex. 436, *semble* (statute not provable orally); 1854, Martin *v.* Payne, 11 Tex. 292, 295 (oral testimony as to rate of interest, excluded);
Utah: Comp. L. 1917, § 7085 (like Cal. C. C. P. § 1902, adding "Territory");
Vermont: 1803, Woodbridge *v.* Austin, 2 Tyl. 364, 366 ("if a written law, it must be produced"); 1827, Danforth *v.* State, 1 Vt. 259, 260, 266 (testimony that a deposition-caption was according to the statute of Massachusetts, received); 1855, Smith *v.* Potter, 27 id. 304, 307, 309 (statute not provable orally); 1870, State *v.* Horn, 43 Vt. 20 (bigamy; proof of authority of a Pennsylvania justice to perform a marriage, required to be proved "by production of the statute"); 1914, Frederick *v.* Morse, 88 Vt. 126, 92 Atl. 16 (crim. con.; similar);
West Virginia: Code 1914, c. 13, § 4 (in noticing the law, "statutory or other", of the U. S. or any other State or country, the judge "may consult any printed book purporting to contain, state, or explain the same, and consider any testimony, information, or argument that is offered on the subject");
Wisconsin: Stats. 1919, §§ 4138, 4139 (the common law of the U. S., a State or Territory is provable by parol; remainder substantially like Del. Rev. St. § 4222);
Wyoming: Comp. St. 1920, § 5810 (like Ok. Gen. C. § 11499).

[5] This seems to have been assumed without decision.

[6] 1857, Bremer *v.* Freeman, 10 Moore P. C. 362; 1902, Mexican N. R. Co. *v.* Slater, C. C. A., *supra;* 1857, Walker *v.* Forbes, 31 Ala. 10; 1837, Dyer *v.* Smith, 12 Conn. 384, 390; 1898, Canale *v.* People, 177 Ill. 219, 52 N. E. 310.

Compare the *opinion rule* (*post*, § 1953).

§ 1272. [1] *Eng.:* 1816, Liebman *v.* Pooley, 1 Stark. 167 (writer of original not preferred to another who had seen it, in giving parol evidence of contents); *U. S. Ill.* 1869, Huls *v.* Kimball, 52 Ill. 390, 395 (maker of mortgage not preferred to mortgagee); *Ia.* 1906, Colton's Estate, 129 Ia. 542, 105 N. W. 1008 (see the citation *ante*, § 1244, n. 4); *La.* 1816, Las Caygas *v.* Larionda, 4 Mart. La. 283, 287 (official certificate of a notary's office and signature, not preferred to ordinary witness); 1843, Rosine *v.* Bonnabel, 5 Rob. La. 163, 166 (same); *Tex.* 1883, Johnson *v.* Skipworth, 59 Tex. 473, 475 (last custodian of a lost record, not preferred to other witnesses); *Vt.* 1896, Brown *v.* Stanton, 69 Vt. 53, 37 Atl. 280 (the town clerk is not the exclusive witness of the contents of the town records; any one who has examined them may testify to the absence of a certain record); *Wis.* 1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49 (clerk of court is not a preferred witness to a search of records).

Contra: 1895, Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470 (deed-register's clerk is alone competent to prove existence and contents of his records, though any person may prove absence of a conveyance in record; a distinction indefensible); 1843, Whiteford *v.* Burckmyer, 1 Gill Md. 127, 141 (the addressee of a letter, held a preferred witness to its contents); 1903, Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844 (cited *ante*, § 1244, note 4); 1903, Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132 (similar).

Compare also the cases cited *post*, § 1278.

§ 1273. **Preference as between Different Kinds of Written Copies; Certified and Sworn Copies.** Every copy (except the sort mentioned *post*, § 1280, par. (2)), is in strictness an "examined" copy, in the sense that the original and the copy have been examined or compared together by the witness, either in his own act of transcription or by taking some one else's transcription and comparing it with the original (*ante*, § 1265). But the term "examined copy" has by tradition come to be associated with a copy made by a private person not the official custodian of the document. Thus the terms "examined" or "sworn" are used for copies sworn to upon the stand as correct, in distinction from "certified" or "attested" or "office" copies, *i.e.* copies made in the public office by the official custodian, where the document is an official one. This distinction, however, had its origin and maintains its importance in a very different field of the law, namely, the Hearsay rule; for, under the exception for Official Statements (*post*, § 1677) the question arises how far such official (or "certified", "attested", "office") copies are receivable; and whenever their admission, under that exception, is not justifiable, the copy must be verified by a witness on the stand, *i.e.* must be a "sworn" or "examined" copy. Thus, under that exception to the Hearsay rule, but there only, the distinction between certified and sworn or examined copies is a solid one.

It is because of this distinction, created and maintained under another principle of the law of Evidence, that there has been a tendency to recognize some distinction, for the present principle also, between the two kinds of copies, and to require a *certified in preference to a sworn copy*, in proving the contents of official documents.

Such a distinction has no support, either in orthodox tradition or in reasons of policy. So far as the traditional practice is concerned, the sworn copy was in England for a long time almost the exclusive mode of proving official documents other than judicial records, because the Hearsay exception allowing the use of certified copies was there recognized (until statutory changes occurred) to only a limited extent (*post*, § 1177). In the United States, however, owing to the broader scope given to this common-law exception, and owing to its liberal expansion by statute at an early date, the certified copy came into more general, if not almost exclusive use; so that the youngest generation of practitioners in many jurisdictions seldom use or even see a sworn copy of an official record. Add to this that the statutes enlarging the exception to the Hearsay rule and making all kinds of official documents in almost all jurisdictions provable by certified copy have sometimes been misapprehended by the Courts, *e.g.* a provision intended merely to enable such a copy to be used where it could not be used before has sometimes been ignorantly treated as though nothing not specified in the statute could be used as a copy, and thus a statute provided an exclusive mode (*ante*, § 1186, *post*, § 1676). In [illegible] ways as these the notion has been strengthened in a few jurisdictions that a certified copy should be preferred to a sworn copy.

That this notion is wholly unfounded, the following passages indicate:

Ante, 1726, Chief Baron GILBERT, Evidence, 15: "*Objection.* But if exemplifications under the Broad Seal are the highest evidence that the nature of the thing is capable of, then why are any proofs admitted but them? . . . *Answer.* [The rule does not mean] that nothing under the highest assurance possible should have been given in evidence to prove any matter in question. To strain the rule to that height would be to create an endless charge and perplexity, for there are almost infinite degrees of probability, one under the other; . . . a contract attested by two witnesses gains more credit than a contract attested by one, and therefore by the same argument one witness would be no good proof of a contract; and all these are plainly as good reasonings as to say that the sworn copy of a record ought not to be admitted because a copy under the Broad Seal is a stronger evidence."

1885, PETERS, C. J., in *State* v. *Lynde*, 77 Me. 561, 562, 1 Atl. 687: "Examined copies are in England resorted to as the most usual mode of proving records. The mode . . . seems to have prevailed in many of the States, including Pennsylvania and New York. It was at an early date adopted in some of the Federal Courts. It is not an unknown mode of proof in New England. . . . Why not admissible? The evidence is as satisfactory certainly as a certified copy. In the latter case we depend upon the honor and integrity of an official, and in the former upon the oath of a competent witness. In either case, an error or fraud is easily detectible. Probably the reason why such a mode of proof had not been much known, if known at all, in our practice, is that it is cheaper and easier to produce [certified] copies; and if a witness comes instead, it is more satisfactory to have [as here] the officer who controls the records bring them into court."

The precedents fall under the following heads:

(1) There is properly no preference for a *certified* or office copy over a *sworn* or examined copy;[1] though a few Courts have recognized such a preference in some instances.[2]

§ 1273. [1] *New Brunswick:* Consol. St. 1903, c. 127, § 28 (record or document recorded or deposited "in any public office in this province" may be proved by an examined copy); UNITED STATES: *Alabama:* 1876, Blackman v. Dowling, 57 Ala. 78, 80 (statutory certified copy not preferred to examined copy); *Illinois:* Rev. St. 1874, c. 51, § 18 (records, etc., provable by certified copy, "may be proved by copies examined and sworn to by credible witnesses"); 1887, Union R. & T. Co. v. Shacklet, 119 Ill. 232, 240, 10 N. E. 896 (foreign administrator's appointment; certified copy not preferred to examined copy); *Indiana:* 1837, Harris v. Doe, 4 Blackf. 369, 370 (certified copy of land-petition not preferred to sworn copy, on the facts); 1842, Rawley v. Doe, 6 Ind. 142, 145 (similar); 1881, Hall v. Bishop, 78 Ind. 370, 371 (tax list; certified copy not preferred); *Kansas:* 1906, State v. Nugent, 74 Kan. 371, 86 Pac. 476 (Federal revenue records, an examined copy admitted, the officer having refused to certify a copy); State v. Schaeffer, 74 Kan. 390, 86 Pac. 477 (similar; general rule as to preference not decided); *Kentucky:* 1820, Bowman v. Bartlett, 4 A. K. Marsh. 80, an examined copy of probate of a will, not preferred); *Maine:* 1885, State v. Lynde, 77 Me. 561, 1 Atl. 687 (see quotation *supra*); *New Hampshire:* 1895, State v. Collins, 68 N. H. 299, 44 Atl. 495 (internal revenue record; certified copy not preferred); *North Carolina:* 1881, Manney v. Crowell, 84 N. C. 314 (certified copy of registered lost contract for title, not preferred to a sworn copy); *Pennsylvania:* 1886, Otto v. Trump, 115 Pa. 425, 429, 8 Atl. 786 (certified copy under Federal statute about foreign records, not preferred to examined copy); *Texas:* 1887, Harvey v. Cummings, 68 Tex. 599, 602, 5 S. W. 513 (certified copy of judicial record, not preferred to examined copy); 1904, Terry v. State, 46 Tex. Cr. 75, 79 S. W. 320 (U. S. collector's records); 1906, Smithers v. Lawrence, 100 Tex. 77, 93 S. W. 1064 (certified copy, not preferred to examined copy of land-office records).

So, too, for proof of a revocation of the document, 1840, McConnel v. Reed, 3 Ill. 371 (certified copy of recorded deed, not preferred).

And all the jurisdictions *ante*, § 1265, not preferring a copy to parol testimony, they would probably also not prefer a certified to a sworn copy.

[2] *Federal:* 1824, Hunter v. Hunt, 9 Wheat.

(2) There is no preference for a copy *judicially established* under statutes[3] providing a mode for establishing a record of the contents of a lost or destroyed document.[4]

(3) There is no preference for the *transcriber personally* over any other person competent to verify the copy.[5]

(4) There is probably, and ought to be, a preference for a *copy* over an *abstract*, *i.e.* a copy ought to be shown unavailable before an abstract can be used.[6]

581, 597 (notarial copy of a note, not preferred, where the offeror is not shown to have one); *Arkansas:* 1910, Russell *v.* State, 97 Ark. 92, 133 S. W. 188 (under Kirby's Dig., §§ 3589–3594 public land plats and maps etc. can be proved only by the originals or certified copies); *California:* Cal. C. C. P. 1872, § 1907 (examined or sworn copy of foreign judicial record, receivable only when also attested by the proved seal of the Court, or if none, or if not the record of a Court, by the legal keeper's proved signature); *Connecticut:* Gen. St. 1918, § 5734 (examined copy of proceedings of any Court, community, corporation, society, or public board, admissible when clerk is absent or disabled); *Georgia:* 1846, Bryant *v.* Owen, 1 Ga. 355, 369 (certified copy of probate-bond, preferred to copy established *instanter*); 1895, Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470 (cited *ante*, § 1272; the astonishing rule is laid down that while any person who has examined the records may testify that a particular conveyance is *not* there, yet in showing the existence and contents of a record "this fact could not be proven by any witness other than the clerk; nor by him, except by a certified copy of such record under his hand and seal"); *Indiana:* 1877, Donellan *v.* Hardy, 57 Ind. 393, 402 (a certified transcript of judgment, preferred to an official printed report of decision); 1880, Jones *v.* Levi, 72 Ind. 586, 590 (a sworn copy of record ranks next to an attested copy); *Massachusetts:* 1836, Davidson *v.* Slocomb, 18 Pick. 464, 466 (the records of a justice of the peace may be proved by sworn copies, but only where the magistrate's certified copies are unavailable); *North Carolina:* 1824, State *v.* Isham, 3 Hawks 185 (record of another Court provable by exemplified copy, where the Court seal's indistinctness prevented the copy from being considered); *South Carolina:* 1832, Thomson *v.* Gaillard, 3 Rich. 418, 425 (certificate of the clerk of a Legislative body, preferred, in proving the contents of the journal, to the testimony of another person); *Texas:* 1877, State *v.* Cardinas, 47 Tex. 250, 290 (certified copy of Mexican archives, preferred to other copies, on the facts); 1886, Clayton *v.* Rhem, 67 id. 52, 2 S. W. 45 (certified copy of a tax roll in the comptroller's office, preferred to other copies in the assessor's hands)

Compare the North Dakota cases cited *ante*, § 1244, note 4.

[3] For these statutes, see *post*, §§ 1660, 1682, where are examined also certain other questions arising under them.

[4] *Georgia:* 1878, Jernigan *v.* Carter, 60 Ga. 131, 133; 1880, Cross *v.* Johnson, 65 Ga. 717, 719; 1897, Haug *v.* Riley, 101 Ga. 372, 29 S. E. 44; *Illinois:* 1898, Forsyth *v.* Vehmeyer, 176 Ill. 359, 52 N. E. 55; *Maine:* 1873, Nason *v.* Jordan, 62 Me. 480, 484 (oral evidence of a burned record of partition, not made secondary to a copy authorized to be recorded in place of the burnt record); *Michigan:* 1878, Drake *v.* Kinsell, 38 Mich. 232, 235; *Missouri:* 1874, Parry *v.* Walser, 57 Mo. 169, 172; *North Carolina:* 1887, Mobley *v.* Watts, 98 N. C. 284, 289, 3 S. E. 677; 1893, Varner *v.* Johnston, 112 N. C. 570, 576, 17 S. E. 483 (will probated and records burnt); 1893, Williams *v.* Kerr, 113 N. C. 306, 310, 18 S. E. 501 (foreclosure, record); 1899, Cox *v.* Beaufort C. L. Co., 124 N. C. 78, 32 S. E. 381; 1910, Hughes *v.* Pritchard, 153 N. C. 23, 135, 68 S. E. 906, 69 S. E. 3 (homestead appraisal); *Texas:* 1883, Johnson *v.* Skipworth, 59 Tex. 473, 475.

Compare the cases cited *post*, § 1347.

[5] See the citations *post*, § 1278.

[6] 1836, Doe *v.* Wainwright, 1 Nev. & P. 8, 12 (Patteson, J.: "It is certainly laid down in the books that a counterpart is the next best evidence, — that a copy is the next. The abstract of a deed is the next best evidence after the copy has been accounted for"; but whether, if a copy had been shown to exist, it would have been preferred to the abstract, was expressly left undecided); 1874, Illinois Land & L. Co. *v.* Bonner, 75 Ill. 315, 323 (copy of lost will, sent to the proponent, preferred to an abstract).

For abstracts, as violating the principle of Completeness, see *post*, §§ 2105, 2107; for statutes allowing the use of *abstracts of burnt records*, see the same place, and also the Hearsay exception, *post*, § 1705.

An *abstract* should not be preferred to an *extract:* 1892, Converse *v.* Wood, 142 Ill. 132, 136, 31 N. E. 314 (under Burnt Records Act of 1887, abstracts are not preferred to extracts or minutes in the sense that the former must first be shown unavailable).

(5) A few other miscellaneous instances of preference are now and then recognized.[7]

§ 1274. **Discriminations against a Copy of a Copy; in General.** The phrase "copy of a copy" has long been used[1] as in itself implying some sort of disparagement. This has in some quarters given rise to the loose notion that a copy of a copy (or "mediate copy", as it may better be termed, in contrast to an immediate copy) is in itself and always an improper mode of proof of contents.[2] This notion, indeed, finds some countenance in a passage of an early writer; who, however, probably did not mean any more than that a mediate copy was inferior to an immediate one:

1726, Chief Baron GILBERT, Evidence, 8: "A copy of a copy is no evidence; for the rule demands the best evidence that the nature of the thing admits, and a copy of a copy cannot be the best evidence; for the farther off a thing lies from the first original truth, so much the weaker must the evidence be."

Certainly there is in the nature of a mediate copy nothing that makes it 'per se' defective. When paper A is copied into paper B and this paper into C, the last is in theory as accurate a reproduction as B is. There is merely the possibility that an error may have occurred in the second transcription; but this possibility exists for the first also; there is merely a doubling of the total number of chances.

It must be concluded, then, that the discrimination, if any, against a mediate copy, is rather in the nature of a rule of preference, requiring first the use of an immediate copy, if one is available. This is the view taken in Mr. Justice Story's classical utterance:

1835, STORY, J., in *Winn* v. *Patterson*, 9 Pet. 663, 677: "We admit that the rule, that a copy of a copy is not evidence, is correct in itself, when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with it, for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being still in existence by law deemed as high evidence as the original, for then also it is

[1] 1705, Stillingfleet v. Parker, 6 Mod. 248 (a copy of the enrolment of a lease, required to be enrolled, preferred to a copy in an ancient book of leases); 1849, Schley *v.* Lyon, 6 Ga. 530, 539 (newspaper publisher's sworn copy of his files, preferred to copy by another person); N. Y. C. P. A. 1920, § 374 (examined copy of foreign corporation's books preferred; details of verification by witness, specified).

For the question whether the *recitals of a sheriff's deed* are admissible instead of a copy of the judgment recited, see *post*, § 1664.

For the question whether a *printed volume of statutes* is receivable instead of a certified copy of the statute, see *post*, § 1684.

For the question whether *letters of administration* or *letters testamentary* are preferred to a copy of the probate record, see *ante*, § 1238.

The preference as between *clerk's docket-entries* or *minutes* and other evidence of a judicial record involves, not a rule of evidence, but the substantive law as to what constitutes the record; this matter is not within the purview of this treatise, but is dealt with briefly *post*, § 2450.

§ 1274. [1] One of its first appearances seems to be in 1653, Faulconer's Trial, 5 How. St. Tr. 323, 349, 356, cited in the next section.

[2] 1838, Alderson, B., in Everingham v. Roundell, 2 Moo. & Rob. 138 ("There would be no limit to the reception of secondary evidence, if that were so. . . . This is but the shadow of a shade").

a second remove from the record. But it is quite a different question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not in law deemed as high evidence as the original; or where the copy of a copy is the highest proof in existence. On these points we give no opinion; because this is not in our judgment the case of a mere copy verified as such, but it is the case of a second copy verified as a true copy of the original [being R.'s copy of a record-copy, the latter being made by himself and compared with the original]. . . . In effect, therefore, he swears that both are true copies of the original power, [and either would be admissible]."

1871, FOSTER, J., in *Cameron* v. *Peck*, 37 Conn. 763: "The rule that a copy of a copy is not evidence properly applies [1] to cases where the original is still in existence and capable of being compared with it, or [2] where it is the copy of a copy of a record, the record being still in existence, and being by law as high evidence as the original."

§ 1275. **Same: Specific Rules of Preference as to Copy of Copy.** 1. In ascertaining whether there are any specific rules of preference properly applicable to the detriment of a mediate copy, we must first distinguish those situations in which a mediate copy would be excluded or admitted upon *independent principles*.

(*a*) On the one hand, assuming proof by a copy of a copy to be legitimate, the very notion implies that the intermediate document was a correct copy; and until the *correctness of the intermediate document* is shown, there is nothing to verify the second copy as being correct, for it is based on the anonymous hearsay of the person who made the first document, purporting to be but not shown to be really a copy of the original. Without such testimony by some one to the correctness of the intermediate document as a copy, the copy of it (on the principle of § 1278, *post*) is plainly inadmissible.[1]

(*b*) On the other hand, a copy which happens to have been first transcribed from an intermediate copy can be made itself an immediate copy, by *comparing* and *verifying* it directly *from the original*.[2] Moreover, a mediate copy used as a memorandum, by one knowing the original, to *refresh recollection* of the original (*ante*, § 760) and not offered as a copy, is not offered as a copy of a copy, and is therefore available, wherever (*ante*, § 1268) recollection-testimony is proper.[3]

2. It then remains to ascertain what definite *rules of preference* apply

§ 1275. [1] *Eng.* 1814, Teed v. Martin, 4 Camp. 90 (to prove an affidavit of ship-ownership, an official clerk who had made an entry from a certificate of registry made by another clerk who alone had seen the affidavit, not admitted): *U. S. Cal.* 1884, Dyer v. Hudson, 65 Cal. 372, 4 Pac. 235 (stenographer's copy of certified copy read in evidence at former trial, original document being lost, excluded: but here the stenographer was not called to verify it, nor the reader of the certified copy); *Ill.* 1898, Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715 (copy of a record which was a copy of a copy of a document not proved, excluded); *Mich.* 1875, Fowler v. Hoffman, 31 Mich. 215 (copy of a copy, the latter not shown to be correct, inadmissible; unless the former can be verified from recollection as correct); 1882, People v. McKinney, 49 Mich. 334, 13 N. W. 619 (copy by one stenographer of another's notes without subsequent comparison of copy and original, excluded, the notes being lengthy and covering over 100 pages).

[2] 1835, Winn v. Patterson, 9 Pet. 663, 677 (copy of a record-copy of an original, both apparently being made and verified by R., receivable); 1859, Gregory v. McPherson, 13 Cal. 562, 574 (copy of a copy, compared anew with the original, received).

[3] 1843, Dunlap v. Berry, 5 Ill. 326, 331 (copy of a copy may be used to refresh memory as to the original); 1875, Fowler v. Hoffman, 31 Mich. 215, *supra*, note 1.

against a mediate copy as such, *i.e.* assuming that it is proved to be what it purports to be. These legitimate rules of preference are based upon the general notion that, where the original is still accessible (though not producible, under § 1218, *ante*) for the purpose of obtaining an immediate copy, there an immediate copy may be fairly required to be obtained and offered.

(*a*) In the first place, if the *original* is *an existing public record*, and the immediate copy *not*, a mediate copy from the latter (it seems well settled) should be excluded; since the original is still accessible for obtaining an immediate copy.[4]

(*b*) In the next place, if the original and also the immediate copy are *both existing public records*, the same rule would seem to apply, for it is still as feasible to obtain an immediate copy from the original record, though here is found some difference of judicial opinion and statutory rule.[5]

[4] ENGLAND: 1685, Anon., Skin. 174 ("If the original [will] be burnt or lost, etc., a copy of their [*i.e.* Ecclesiastical Court's] registry hath been often given in evidence; but a copy of a copy cannot"); UNITED STATES: *Iowa:* 1862, Sternberg *v.* Callanan, 14 Ia. 251 (copy of copy of declaration; excluded on the facts); *Kansas:* 1897, Drumm *v.* Cessnun, 58 Kan. 331, 49 Pac. 78 (copy of judicial records should be of the originals, not of the transcript); *Massachusetts:* 1869, Goodrich *v.* Weston, 102 Mass. 362 (Wells, J.: "Whenever a copy of a record or document is itself made original or primary evidence, the rule is clear and well settled that it must be a copy made directly from or compared with the original; . . . so long as another may be obtained from the same source, no ground can be laid for resorting to evidence of an inferior or secondary character"); *Minnesota:* 1864, Lund *v.* Rice, 9 Minn. 230 (record of a copy of recorded deed, inadmissible apart from statute); *New York:* 1831, Lincoln *v.* Battelle, 6 Wend. 475, 484 (copy of a certified copy of a foreign decree, excluded); *Oregon:* 1881, Goddard *v.* Parker, 10 Or. 102, 106 (certified copy of certified copy of official map, excluded); *Texas:* 1890, Lasater *v.* Van Hook, 77 Tex. 650, 655, 14 S. W. 270 (certified copy of deed-record, original being lost, preferred to examined copy of certified copy); *Vermont:* 1843, Carpenter *v.* Sawyer, 17 Vt. 121, 124 ("a copy of a certified copy of a record is not evidence").

[5] In this class of cases the commonest instance of statutory change is the allowance of the use of copies from the re-record, in another county, of a judicial record or the like: UNITED STATES: *Federal:* Rev. St. 1878, §§ 897, 898, Code §§ 1400, 1401 (transcripts of certain judicial records into new books, admissible); *Arizona:* Rev. St. 1913, C. C. § 1751 (certified copies of records of new county transcribed from records of original county, admissible); *Arkansas:* 1851, State *v.* Crow, 11 Ark. 642, 656 (justice's judgment-transcript filed in Circuit Court; clerk's copy of this sufficient); *Colorado:* Comp. St. 1921, § 4918 (certified copies of records transcribed on formation of new county, admissible); *Illinois:* 1873, Miller *v.* Goodwin, 70 Ill. 659 (transcript of official copy of original legislative minutes, admitted); *Indiana:* 1876, Nelson *v.* Blakey, 54 Ind. 29, 35 (articles of incorporation filed with county recorder, certified copy of this record filed with Secretary of State; certified copy from the Secretary's office, excluded as a copy of a copy of a copy not authorized by the statute); *Iowa:* Code 1897, § 4639 Comp. Code, § 7346 (documents in office of U. S. surveyor-general, though themselves copies, provable by copy); 1862, Niles *v.* Sprague, 13 Ia. 198, 202 (a foreign certificate of marriage must be proved by direct copy, and not by a copy of the clerk's record); *Kentucky:* 1816, Hedden *v.* Overton, 4 Bibb 406 (copy of a book of record, itself containing copies of Virginia patents, admitted, under a statute admitting copies of "records and other papers" of the register's office); 1816, Owings *v.* Ulery, 4 Bibb 450 (Maryland will, probated there, and recorded by copy in this State; copy of record admitted); 1817, Rogers *v.* Barnett, 4 Bibb 480 (similar); 1818, Spurr *v.* Trimble, 1 A. K. Marsh. 278, 279 (copy of power of attorney, certified by Virginia notary as recorded by him, then recorded by local clerk of Court; a copy of this, excluded); *Louisiana:* 1831, Lum *v.* Kelso, 2 La. 64, 67 (copy of record of judgment made in another court, excluded); 1851, Look *v.* Mays, 6 La. An. 726 (transcript of lower Court's transcript of Supreme Court's order of reversal, received); 1857, West Feliciana R. Co. *v.* Thornton, 12 La. An. 736 (similar); 1859, Wood *v.* Harrell, 14 La. An. 61, 63 (certified copies of recorded copies received on the facts); *Minnesota:* Gen. St. 1913, § 900 (county register of deeds' transcribed record of sheriffs' certificates of sale prior to 1862, admissible); § 902 (similar, for railroad grant lists, condemnation proceedings, etc., etc.); *Mississippi:* Code 1916, § 1984, Hem.

Where the original is out of the jurisdiction, the requirement may well be relaxed.[6]

3. Such are the legitimate and easily defended rules of preference. There remain to be noticed certain situations, in which it would seem that no rule of preference can properly exist, *i.e.* situations in which the *original is no longer accessible* for purposes of immediate copying.

Here a mediate copy may well be used as freely as an immediate copy, because otherwise the unfair burden (similar to that spoken of *ante*, § 1268) would be imposed on the proponent of searching for possible immediate copies and of proving them unobtainable. Any rule requiring in such a case the immediate copy to be accounted for must proceed on the radical principle that a mediate copy is so inferior to an immediate copy that the latter must always be used if any one pre-existing specimen can by possibility be found. It is one thing to require (as in par. *b*) that, where new direct copies can be obtained 'ad libitum', such a copy shall be procured at a definite office; but it is taking a much further step to say that, though no new ones can now be created, yet search must be made in unspecified places for any that may have been previously taken and may still exist. To such an extent very few Courts are willing to go.

Four varieties of this situation may be distinguished:

(*a*) Where the *original* and the *first copy* are both *lost* or *destroyed*, [illegible] clear that the mediate copy should be admitted; and this seems not to have been disputed.[7]

§ 1644 (records of county or court or office, transcribed by order of board of supervisors; copy or transcribed records to have same effect as original); *Missouri:* Rev. St. 1919, § 12730 (county surveyor's certified copy of filed certified copy of U. S. field-notes, admissible); 1827, Bettis *v.* Logan, 2 Mo. 2 (transcript of transcribed record filed in another court, admissible); *Nevada:* Rev. L. 1912, § 1636 (certified copies of certain transcribed mining records, admissible); *North Carolina:* 1824, State *v.* Welsh, 3 Hawks 404, 407, 409 (certified copy of a statute reciting another statute, admissible; Henderson, J., diss.); Con. St. 1919, § 609 (certified copy of judgment recorded with county recorder, admissible); *Pennsylvania:* St. 1798, Mar. 21, § 2, Dig. 1920, § 7608 Court Rec. (exemplifications of Phila. County Court records of roads, copied from original record, receivable); St. 1833, Feb. 16, §§ 1, 21, Dig. 1920, § 10336 Evid. (official copies of copies of official drafts of donation lands, receivable); *Texas:* Rev. Civ. St. 1911, §§ 3703, 3704 (certified copies of transcribed records for new counties, admissible); §§ 6767–6777 (transcribed records in general; provisions for using); *Virginia:* 1814, Whitacre *v.* M'Ilhaney, 4 Munf. 310, 312 (copy of a record containing copies of decree, etc., excluded); *West Virginia:* St. 1881, c. 5, Code 1914, § 1539 (transcribed records in circuit and county courts).

[6] *Fed.* 1917, Werlich's Will, U. S. Court for China, 1 Extraterr. Cas. 668 (British certified copy of probate of a will already probated elsewhere, admitted, the original and the first copy being out of the jurisdiction; citing the above text with approval); *Ky.* 1900, Knoxville Nursery Co. *v.* Com., 108 Ky. 6, 55 S. W. 691 (certified copy of a foreign corporation's certificate of incorporation locally filed, admissible; the foreign certificate is not here the original, because the local certificate is itself a new admission of corporate existence); *Mass.* 1900, Com. *v.* Corkery, 175 Mass. 460, 56 N. E. 711 (corporation commissioner's certified copy of a copy filed with him of foreign articles of incorporation, admitted); *Va.* 1868, Corbett *v.* Nutt, 18 Gratt. 624, 633, 637 (certified copy of a will and probate from a court in D. C., where it had been probated from an authenticated copy from court of original probate, received, the second probate being out of the State; whether a copy of this second copy could be received, not decided).

[7] 1873, Cornett *v.* Williams, 20 Wall. 226, 245 (copy of a certified copy of a judgment, both original and certified copy being destroyed, admitted).

(*b*) Where the *original* is *lost* or *destroyed*, and the *first copy* is not producible because it is an *official record*, practically the same situation as the preceding is presented, since neither original nor first copy is producible. It is generally conceded that the mediate copy may be used; and the statutes which authorize the official copying of *torn* or *illegible* records provide usually for admitting copies of these copies.[8]

(*c*) Where the *original* is a *deed lawfully recorded* and therefore need not be produced (*ante*, §§ 1224, 1225), the *first copy* being the *official record* and thus also not producible, practically the same situation is again presented, except that here it is still possible to copy directly from the original if it could be discovered by search. But the object of such statutory provision for recording is generally understood to be to facilitate the use of the record for the purpose of obtaining copies, — the ordinary case of a recorded deed being the typical one. Hence, whatever may be the rule as to exempting from the production of the original deed (*ante*, § 1225), nevertheless, whenever a copy is receivable at all, — *i.e.* either after or without accounting for the original — it may be a copy from the official record; the objection that it is a mediate copy not being recognized as having force for such a case:

1835, STORY, J., in *Winn* v. *Patterson*, 9 Pet. 663, 677: "It is certainly a common practice to produce in the custody of the clerk, under a 'subpœna duces tecum', the original records of deeds duly recorded. But in point of law a copy from such record is admissible in evidence upon the ground stated in Lynch *v.* Clerk,[9] that where an original document of a

[8] Add also the statutes cited *infra*, note 12: ENGLAND: 1653, Faulconer's Trial, 5 How. St. Tr. 323, 349, 356 (a deposition being lost, but being recorded in Haberdasher's Hall, "the proper court where it ought to remain" and examined copy of the record, and another copy in the House journals, were used, though objected to as "but a transcript of a transcript, a copy of a copy"); UNITED STATES: *Arizona:* Rev. St. 1913, C. C. § 4722 (certified copies of transcribed defaced records, admissible); *Illinois:* Rev. St. 1874, c. 124, § 11 (certified copies of copies of lost enrolled laws in office of Secretary of State, admissible); *Indiana:* Burns' Ann. St. 1914, §§ 1290–1329 (copy of copy of lost records restored, admissible); § 1379 (re-recorded mutilated, etc., records of Supreme Court, provable by clerk's certified copy under court seal); *Kentucky:* Stats. 1915, §§ 1632–1634 (transcription of torn, etc., records, equivalent to original); *Maryland:* Ann. Code 1914, Art. 35, § 56 (land-office commissioner's certified copy under seal of an extract from a deed transmitted by court clerk, admissible if deed and record are lost or destroyed); *Missouri:* Rev. St. 1919, § 10609 (re-recording of records, torn, etc.; certified copies admissible); *New Jersey:* Comp. St. 1910, §§ 49, 129, Conveyances (mutilated, torn, etc., records may be proved by re-record or certified copy thereof); St. 1920, Mar. 26, c. 46 (public record office; custodian's certified copy of old, defaced, restored, etc. records re-copied, admissible); *North Carolina:* Con. St. 1919, § 3557 (certified, copies of old records, etc., transcribed, admissible); *Ohio:* Gen. Code Ann. 1921, §§ 2774, 2775 (copy of copies of old records re-copied, admissible); *Pennsylvania:* St. 1833, Feb. 16, § 2, Dig. 1920, § 10338, Evid. (certified copies of official copies of defaced ancient official papers in surveyor-general's office, receivable); St. 1844, Apr. 29, § 3, Dig. 1920, § 10315, Evid. (copies by register of probate of entries from certain Orphans' Court papers, receivable "in the event of the loss or destruction" of such papers); *Rhode Island:* 1904, New York, N. H. & H. R. Co. *v.* Horgan, 26 R. I. 448, 59 Atl. 310 (certified copy of an authorized record-copy of a dilapidated record of a town-meeting vote, admitted); *Vermont:* Gen. L. 1917, § 3979 (certified transcript of town records, to be used as originals if the originals are lost or destroyed); *West Virginia:* Code 1914, c. 73A, § 10 (proceedings of commissioners to establish contents of burnt records, usable when "no higher or better evidence can be had"); § 10*a* (county clerk's certified copy of re-recorded copy of lost or destroyed record, admissible); *Wisconsin:* Stats. 1919, §§ 4151*j*–4151*o* (certified copies of re-recorded lost records, admissible).

[9] 3 Salk. 154.

public nature would be evidence if produced, an immediate sworn copy thereof is admissible in evidence; for as all persons have a right to the evidence which documents of a public nature afford, they might otherwise be required to be exhibited at different places at the same time."

1848, *Stetson* v. *Gulliver*, 2 Cush. 494, 499: "When the book of the register would be evidence, a certified copy is entitled to have the same effect; there being very little ground to apprehend any mistake from that cause, and upon consideration of the great public inconvenience which would result from having the books of record removed from their proper custody and place of security."

This is universally conceded where the first copy is contained in an official register (as with deeds of land usually), and is expressly declared in the statutes of registration (*ante*, § 1225); the only arguable case seems to be that of a copy required to be *filed* but not recorded in a book.[10] It is upon this principle also, or an extension of it, that a copy from an *authorized re-record* in general (*e.g.* in another county) is receivable;[11] and this principle, combined with that of 3 (*b*) above, admits copies of *re-records* of *conveyances whose original records are destroyed*, *i.e.* without requiring the copy to be taken from the original conveyance though in existence.[12] The use of an

[10] *Eng.* 1694, Smart *v.* Williams, Comb. 247 (a copy of a will recorded at the Prerogative Office, opposed "because it is but a copy of a copy; but the Court allowed it, for the entry in the ecclesiastical books is the original 'quoad hoc'; otherwise to make a title to lands by devise"; on the latter point, see the reason *ante*, § 1238); *U. S. Ala.* 1882, Martin *v.* Hall, 72 Ala. 587 (certified copy of record of official bond, required to be filed but not to be recorded, excluded); *Cal.* 1875, Vance *v.* Kohlberg, 50 Cal. 346, 349 (certified copy of officially filed copy of articles of consolidation, receivable); Cal. C. C. P. 1872, § 1855 (for public or recorded documents, a copy of the record suffices; for documents lost or in opponent's possession, "either a copy or oral evidence"); *Ill.* 1873, Toledo W. & W. R. Co. *v.* Chew, 67 Ill. 378, 381 (corporate articles; copy filed by law; copy of this official record, admitted as copy of duplicate original); *Ind.* 1879, Board *v.* May, 67 Ind. 561, 566 (certified copy of official record of soldier's discharge, etc., admitted); *Mass.* 1848, Stetson *v.* Gulliver, 2 Cush. 494 (see quotation *supra*); 1869, Goodrich *v.* Weston, 102 Mass. 362 (same); *Or.* 1876, Willamette F. C. & L. Co. *v.* Gordon, 6 Or. 175, 177, *semble* (copy of recorded document, admissible); *Pa.* 1900, Hilliard *v.* Enders, 196 Pa. 587, 46 Atl. 839 (certified copy of a record-copy, required to be filed, of a deed, admissible); *P. R.* Rev. St. & C. 1911, § 1392 (like Cal. C. C. P. § 1855).

Compare the cases on *foreign corporate articles*, cited *supra*, note 6.

[11] *Ala.* Code 1907, § 3995 (transcribed records of any court or office to be evidence like the original); *Fla.* 1906, Mansfield *v.* Johnson, 51 Fla. 239, 40 So. 196 (certified copy from the record of H. county court, of a judgment there recorded on certified copy from D. county court, admitted); *Ill.* Rev. St. c. 30, § 29 (certified copies of recorded certified copy of deed of lands in different counties, admissible); *Ia.* 1890, Collins *v.* Valleau, 79 Ia. 626, 629, 43 N. W. 284, 44 N. W. 904 (re-record in another county; re-record admitted); *Mich.* Comp. L. 1915, §§ 11729, 11731, 11732, 11739, 11766 (certain re-recorded deeds, provable by certified copy); *Mo.* Rev. St. 1919, § 10581 (deed affecting land in another county or in new subdivided county); 1880, Crispen *v.* Hannavan, 72 Mo. 548, 556 (re-recorded deed provable under statute by certified copy); *N. H.* St. 1913, c. 137, § 3 (central office of copies of ancient records; certified copy under seal of State by the Secretary of State to be evidence); *N. C.* Con. St. 1919, §§ 1768–1772 (records in specified counties); *Wis.* Stats. 1919, § 4151 *b*.

No attempt is made to collect all such statutes here, because they are too numerous to be set forth accurately, and because they almost always expressly make copies admissible. It may be noted that the statutes cited under 2 (*a*) *supra*, providing for transcribed *public records in general*, will thus usually cover the present case of deed-records.

[12] The statutes almost always expressly so provide; the following list is not complete, and those cited *supra* 3 (*b*) will also usually cover this case of deed-records; *Fed.* 1918, Virginia & W. V. Coal Co. *v.* Charles, D. C. W. D. Va., 251 Fed. 83 (certified copy of a record made from an attested copy, the original record not being in existence, admitted under Va. Code 1904, § 3339); *Cal.* St. 1906, Spec. Sess., c. 55, p. 73, June 6, § 1; *Colo.* Comp. St. 1921, § 5026 (recorder's certified copy under official seal of re-recorded docu-

abstract from such a record, however, involves the principle of Completeness, and may be better considered under that head (*post*, §§ 2105, 2107).

(*d*) The fourth variety of situation occurs where the *original* is *lost* or *destroyed* and the *first copy* is not an official record and is *not* shown to be lost or otherwise *accounted for*. This presents the only situation in which a supposed strict rule of preference can practically make any difference to the proponent's disadvantage. In the preceding cases there is virtually a general agreement that the mediate copy can be used because the immediate copy cannot be had; and the question here is really, Must it be shown that an immediate copy cannot be had? Is the mediate copy receivable without such a showing? The objection to such a rule, as already noted (*ante*, § 1275), is the excessive burden of search and proof placed on the proponent, — a burden disproportionate to the small risk of error involved in the use of a mediate copy.

As regards the state of the law, it is just here that the place of really debatable and still unsettled doctrine is found. It has already been seen (in paragraph 1, above) that there is no support for the extreme notion that a copy of a copy is absolutely inadmissible; it has also been seen, on the other hand (in paragraph 2, above) that a copy of a copy is generally conceded not to be receivable so long as the original is accessible for direct copying, and also (in paragraphs 3(*a*)–(*d*), above) that by general concession a copy of a copy is receivable when neither original nor first copy are to be had. But none of these concessions answers the present inquiry, namely, When the original is not accessible for a direct copy, but the intermediate copy copied from (or some other pre-existing direct copy) is by possibility available, must the latter be produced or accounted for? The orthodox English doctrine seems clearly to have laid down such a rule.[13] But, for the reasons above suggested, this unnecessarily strict requirement has been rejected by a majority of American Courts,[14] although, in view of the numerous discrim-

ments whose original records are destroyed, admissible); *Fla.* Rev. G. S. 1919, § 3834 (certified copies of re-recorded instruments or copies of deeds whose records have been burnt, admissible); *Ill.* Rev. St. 1874, c. 116, §§ 6–8, 11, 22 (certified copies of conveyances, etc., or certified copies thereof, re-recorded to supply the loss of original records, admissible); *La.* St. 1910, No. 234 (destroyed records of district clerk and parish recorder); *Mo.* Rev. St. 1919, § 2204 (re-recorded conveyances where records have been destroyed by fire, admissible); *N. Car.* Con. St. 1919, § 1778 (wills in a certain county); *Oh.* Gen. Code Ann. 1921, § 2479 (re-recorded surveys, etc.); *Wis.* Stats. 1919, §§ 4151*c*, 4151*e*.

[13] *Eng.* 1767, Tillard *v.* Shebbeare, 2 Wils. 366 (copy of a Bishop's institution-book entry, copying a presentation: the book itself called for; "the true point is, Might not the plaintiff have produced better evidence?"); 1816, Liebman *v.* Pooley, 1 Stark. 167 (letter; copy of a copy left at home, excluded); 1838, Everingham *v.* Roundell, 2 Moo. & Rob. 138, Alderson, B. (writ; copy of a copy left at home by the witness, excluded); *U. S. Ga.* 1849, Schley *v.* Lyon, 6 Ga. 530, 538 (witness copied from newspaper file, then copied the copy; excluded, even though files were unavailable); *Ia.* 1899, State *v.* Cohen, 108 Ia. 208, 78 N. W. 857 (copy of copy of policy, excluded, the first copy not being shown unavailable); *Pa.* 1782, Morris *v.* Vanderen, 1 Dall. 64, 65 (copy of a certificate of a survey, excluded).

[14] *Conn.* 1871, Cameron *v.* Peck, 37 Conn. 763 (admitting a copy of a press-copy of a letter); *Ga.* 1860, Womack *v.* White, 30 Ga. 696, 700 (copy of sale-advertisement, admitted; newspaper itself not required); *Mass.* 1869, Goodrich *v.* Weston, 102 Mass. 362 (lost letter; the copy of a letter press copy, the latter not accounted for, was accepted;

inations above noted, it can hardly be said that any clear and settled doctrine exists except in a few jurisdictions.

2. Rules as to Qualifications of Witness to Copy

§ 1277. **In general.** A copy, merely as a piece of paper, has no standing as evidence. In order even to be termed "copy" it must have the support of a witness qualified to say that it represents the contents of the original document:

Ante 1726, Chief Baron GILBERT, Evidence, 96: "A copy of the deed must be proved by a witness that compared it with the original; for there is no proof of the truth of the copy, or that it hath any relation to the deed, unless there be somebody to prove its comparison with the original."

A copy, in short, is merely one mode (*ante*, § 799) of presenting the testimony of a witness. The witness, therefore, must be qualified; and thus the general principles of witnesses' qualifications have here certain special applications.

§ 1278. **Witness to Copy must have Personal Knowledge of Original.** A general principle for witness' qualifications is that he must speak from personal observation of the event or thing to be testified to, and that therefore in general a witness is not qualified who bases his testimony, not on his own personal observation, but on imagination, or inference, or the hearsay of others (*ante*, § 657). Upon this principle, then, a person who proposes to testify to the contents of a document, either by copy or otherwise, *must have read it*. He may not describe its contents merely on the credit of what another has told him it contains, even though his informant purports to have read it aloud in his presence.

This rule is not always enforced by Courts; and no doubt there are cases in which the trial Court's discretion may properly allow exceptions. But the general rule is a proper one, and is constantly invoked.[1] Upon the same

"there are no degrees of legal distinction in this class of evidence"); 1890, Smith *v.* Brown, 151 Mass. 338, 340, 24 N. E. 31 (two successive assignments of a judgment; the first being lost, the second was held not preferable to a copy of the first; "if there are several sources of information of the same fact, it is not ordinarily necessary to show that all have been exhausted before secondary evidence can be resorted to"); *Mich.* 1916, Bartholomew *v.* Walsh, 191 Mich. 252, 157 N. W. 575 (minutes of corporate meetings; copy of a copy, admitted only after evidence of later alteration of the original); *N. Y.* 1821, Robertson *v.* Lynch, 18 Johns. 451, 452, 457, *semble* (copy of a letter-book copy, receivable); 1830, Jackson *v.* Cole, 4 Cow. 587, 595 (copy of a copy of appraisers' certificate received, the original being lost); *S. C.* 1896, Howard *v.* Quattlebaum, 46 S. C. 95, 24 S. E. 93 (a copy from a certified copy of a will, the will and the record having been destroyed by fire, admitted); 1909, Pineland Club *v.* Robert, 4th C. C. A., 170 Fed. 341 (a record of a certified copy of a will, not admitted, under S. C. St. 1866, Dec. 20, the probate of the will being defective and the existence of the will not being otherwise established; the principle of §§ 1658 and 2110, *post*, being thus not satisfied; Howard *v.* Quattlebaum distinguished); *Tenn.* 1813, Duncan *v.* Blair, 2 Overt. 213, 214 (the recorded entry of land being lost, a copy of a warrant containing a copy of the entry and a copy of an abstract of the entries was received).

§ 1278. [1] In the following list the cases on both sides are included: ENGLAND: 1672, Peterborough *v.* Mordaunt, 1 Mod. 94 (the witness to a copy, "being asked whether he did see the very deed and compare it with that copy, he answered in the negative," whereupon his testimony was disallowed); 1830, R. *v.*

principle, testimony to contents by a *foreigner* or an *illiterate* person is ordinarily inadmissible.[2] It is upon this principle that a *copy of a copy*, as already noted (*ante*, § 1275, par. 1), may be excluded where it does not appear that the intermediate document was really a copy.[3]

Abstracts of title, as commonly made up, would of course be excluded on a

Haworth, 4 C. & P. 254, 256 (must have read the original); UNITED STATES: *Ala.* 1896, Edisto Phos. Co. *v.* Standford, 112 Ala. 493, 20 So. 613 (the witness must have seen the document); 1901, Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663, 133 Ala. 337, 32 So. 166 (testimony of persons who had heard a deed read, admitted); 1910, Lacy *v.* Meador, 170 Ala. 482, 54 So. 161 (one L., an illiterate, had dictated a letter to one E., who wrote it; a witness who had heard some one read aloud the letter was excluded; citing the text above); *Ark.* 1853, Hooper *v.* Chism, 13 Ark. 496, 501 (one who had heard a bill of sale read, by an unspecified person; insufficient); *Cal.* 1910, Guinasso's Estate, Guinasso *v.* Arata, 13 Cal. App. 518, 110 Pac. 335 (one who heard B. read a will aloud, not competent); *Ill.* 1878, Weis *v.* Tiernan, 91 Ill. 27, 30 (a person who had heard or read that records were destroyed, excluded); *Mass.* 1848, Hodges *v.* Hodges, 2 Cush. 460 (one testifying from statements of the signer, excluded); *Mo.* 1846, Matthews *v.* Coalter, 9 Mo. 696, 699, 701 (one who heard a paper read, allowed to testify to the reading of contents, on the 'res gestæ' principle); *N. J.* 1892, Rice *v.* Rice, — N. J. Eq. —, 25 Atl. 321 (copy of a letter dictated, the writer not seeing the original nor the dictator the copy; received, with reservation that for formal documents, essential to a claim, etc., cross-reading, or the like, might be required); 1897, Schubert Lodge *v.* Schubert Verein, 56 N. J. Eq. 78, 38 Atl. 347 (printed copy of the constitution of a secret order; the State-lodge secretary received it from the Supreme-lodge secretary; the former's testimony held sufficient); *N. Y.* 1874, Nichols *v.* Kingdom Co., 56 N. Y. 618 (letter; even though the letter is now destroyed, not provable by one who has not read it); 1875, Edwards *v.* Noyes, 65 N. Y. 126, *semble* (same); *N. C.* 1880, Nelson *v.* Whitfield, 82 N. C. 46 (a lost will having been shown to be probated, its contents were proved by others who had heard read what purported to be the will or a copy); 1894, Propst *v.* Mathis, 115 N. C. 526, 20 S. E. 719 (rejecting a witness who testified to the contents of a lost will read over to him by the clerk; distinguishing Nelson *v.* Whitfield, *supra*, because here the same witness was expected to suffice for both the contents and the fact of probate); *Pa.* 1827, Pipher *v.* Lodge, 17 S. & R. 214, 221, 232 (a copy by a clerk of a deposition, not clearly shown to have been based on the original, receivable, per Tod, J., excluded, per Gibson, C. J., and Rogers, J.); 1869, McGinniss *v.* Sawyer, 63 Pa. 266 (lost document; witness must have seen and read it); 1870, Coxe *v.* England, 65 Pa. 212, 222 (one who saw a few words of a letter which another read aloud, not competent, because "her knowledge was hearsay"); *Tex.* Rev. Civ. Stats. 1911, § 3272 (lost will may be proved by one "who has heard it read"); *Vt.* 1871, Johnson *v.* Bolton, 43 Vt. 303, 304 (testimony by an illiterate who heard another person read a letter, excluded).

On the same principle it has been held that a *bystander* may not testify to the accuracy of a report of the *examination* of an *illiterate accused:* 1834, R. *v.* Chappell, 1 Moo. & R. 395 (Denman, L. C. J.: "For if the prisoner signs his name, this implies that he can read, and that he has read the examination and adopted it. But if he has not signed it, or has only put his mark, there are no grounds to infer that he can read or that he knows the contents, and no person can swear that the examination has been correctly read over to him except the person who read it").

Accord: 1834, R. *v.* Richards, 1 Moo. & R. 396, n., Patteson, J.

Contra: 1835, R. *v.* Hope, 1 Moo. & R. 396, n., Patteson and Vaughan, JJ., for certain cases.

[3] *Cal.* 1884, Russell *v.* Brosseau, 65 Cal. 605, 607, 4 Pac. 643 (testimony to contents of notice by one unable to read or write, excluded); *Tenn.* 1870, Cheek *v.* James, 2 Heisk. 170, 172 (a boy from 5 to 8 years old at the time of execution of a bond, held not competent to testify to its contents).

Contra: Colo. 1883, Breen *v.* Richardson, 6 Colo. 605 (a foreigner, executing articles of partnership read over to him, allowed to testify to the contents of the destroyed original); *D. C.* 1915, Chalvet *v.* Huston, 43 D. C. App. 77 (plaintiff allowed to testify to contents of a lost letter, written by defendant, in German, and read over to plaintiff by his wife, since dead); *Tenn.* 1872, Morris *v.* Swaney, 7 Heisk. 591, 597 (contents of a lost will allowed to be shown by illiterate persons who had heard it read aloud by others; the analogy of examined records invoked, in which cross-reading is not necessary).

[2] That a *party's admission* may suffice, though not based on personal knowledge, see *ante*, §§ 1053, 1255.

What personal knowledge is required as to the *genuineness of the original* from which the copy was taken is dealt with *post*, § 2158.

For copies of *telegrams*, see *post*, § 2154.

strict application of this principle;[4] but it has never been thought to be the real obstacle to using abstracts of title; the rule for originals (*ante*, § 1223), the hearsay rule (*post*, § 1705), and the rule for completeness (*post*, § 2105), also are to be faced. Statutes have in many States made an exception to all of these rules (*post*, § 1705).

§ 1279. **Same: Exception for Copy of Official Records; Cross-Reading not Necessary.** To the preceding rule there is a classical and settled exception, covering the case of the copy made of an *official record*. Here it has never been doubted that, if the witness "cross-read" with another person (usually the record-keeper or his clerk) — *i.e.* held the copy and followed it as the other read aloud the original, then followed the original while the other read aloud the copy — his testimony to the copy's correctness would be admissible; although it is obvious that his testimony is none the less based on hearsay. The only objection here raised has been that there should at least be a cross-reading, *i.e.* that a single co-reading, *i.e.* one or the other of the above parts of the process, *is insufficient;* but even this objection has been by long tradition and practice almost unanimously repudiated.[1]

§ 1280. **Same: Sundry Distinctions (Press-Copies; Witness not the Copyist; Double Testimony; Impression or Belief; Spoliation).** (1) Where a process of copying — by *blotter-press* or the like — is in its general operation fairly accurate, it should be enough that the witness has gone through the process, even though he has not afterwards verified the copy with the original.[1] The same principle should apply to *photographic copies* (*ante*, §§ 793, 795).

[4] 1915, Hitt *v.* Carr, 62 Ind. App. 80, 109 N. E. 456 (abstractor's testimony to contents of a lost summons-return, held inadmissible, on the ground that "his information was obtained from notes or secondary evidence procured by some member of the office force"; this would effectually exclude all abstracts; Indiana needs a liberal statute on the subject).

§ 1279. [1] 1808, Reid *v.* Margison, 1 Camp. 469 (Wood, B.: "Had the witness who was called done all that the defendant requires, still the other person engaged in the examination might by possibility have misread the copy as well as the original; and it would come to this, that to prove a copy of a record there must always be two witnesses, the man who read and the man who examined. But this would be a great public inconvenience, and there is no rule of law to require it").

Accord: Eng. 1795, M'Neil *v.* Perchard, 1 Esp. 264 (writ); 1808, Gyles *v.* Hill, 1 Camp. 471, note (official record); 1809, Rolf *v.* Dart, 2 Taunt. 52 (judgment); 1833, Fyson *v.* Kemp, 6 C. & P. 72 (bill of costs); 1839, R. *v.* Hughes, 1 Cr. & D. 13 (record of conviction); *Conn.* 1807, Lynde *v.* Judd, 3 Day 499; *U. S. N. H.* 1852, Pickard *v.* Bailey, 26 N. H. 152, 169; *N. Y.* 1830, Beardsley, Sen., in Hill *v.* Packard, 5 Wend. 375, 387 ("Copies of records are to be proved, as other transcripts, by a witness who has compared the copy line for line with the original, or has examined the copy while another person read the original"); *Pa.* 1870, Krise *v.* Neason, 66 Pa. 253, 260 (whether cross-reading is necessary; held not here, because the reader was the agent of both parties); *Tenn.* 1872, Morris *v.* Swaney, 7 Heisk. 591, 597, *ante*, § 1278, note 2.

Contra: 1837, Slane Peerage Case, 5 Cl. & F. 23, 42 (for public documents); 1892, Rice *v.* Rice, — N. J. Eq. —, 25 Atl. 321, *semble*, *ante*, § 1278, note 1.

Not clear: 1848, Crawford and Lindsay Peerages, 2 H. L. C. 534, 545 (cross-reading of an ancient document in Latin; both readers and the copyist called, on the facts).

That the personal knowledge of an *officer giving a certified copy* is not required, see *post*, §§ 1635, 1677.

§ 1280. [1] 1842, Simpson *v.* Thornton, 2 Moo. & Rob. 433; 1890, Ford *v.* Cunningham, 87 Cal. 209, 210, 25 Pac. 403; Haw. Rev. L. 1915, § 2606 ("where any writing whatsoever shall have been copied by means of any machine or press which produces a facsimile impression or copy of such writing", the copy suffices, on proof of being so taken, "without any proof that such impression or copy was compared with the said original").

(2) The witness to a copy need not be *himself* the transcriber or *copyist*. If he has at some time compared the original and the alleged copy made by another, he is qualified to verify the copy. If a period has elapsed between his sight of the original and his sight of the copy, so that he is virtually nothing more than a recollection-witness (*ante*, § 1266) — as where he is first shown the alleged copy in court and is asked to say whether it is a copy of the original as he remembers it — then it is possible that he should be regarded as an inferior witness to a copy-witness in the strict sense (as noted *ante*, § 1268); but that he is at least a qualified witness has not been doubted.[2]

(3) On the same principle, a paper may be shown a copy by the *united testimony* of *two persons* neither of whom alone could testify to all the elements. The typical instance is that of paper A shown by one witness to be a copy of a certain paper B, another witness then showing paper B to be identical with the absent original in issue.[3]

(4) On the principle of Knowledge (*ante*, § 658), it is not necessary that the quality of a witness' knowledge or belief should be that of absolute certainty; his *belief* or *impression*, if fairly certain and definite, will suffice. But it is of course difficult to draw the line precisely between the sufficient and the insufficient degrees of positiveness.[4]

[2] *Eng.* 1833, R. *v.* Fursey, 6 C. & P. 81, 84 (for proving notices, the usual way is "to give a [alleged] copy to the witness and ask if it is a copy of what he saw"); 1837, R. *v.* Murphy, 8 C. & P. 297, 306, 307, 308, *semble* (testimony that a paper was similar to one in evidence, admitted); *U. S. Ill.* 1875, Lombard *v.* Johnson, 76 Ill. 599, 601 (the copyist himself need not come, if another qualified person can verify the copy); *Ky.* 1820, Barbour *v.* Watts, 2 A. K. Marsh. 290 (one who has first seen the copy some time after seeing the original; not decided); *Mass.* 1837, Dana *v.* Kemble, 19 Pick. 112, 116 (a paper in the handwriting of the deceased writer of an original; this paper testified to be of the same tenor as the original; held sufficient); *Mo.* 1851, Harvey *v.* Chouteau, 14 Mo. 587, 597 (the witness need not have the original before him, if the correctness of the copy is otherwise known to him); *Nebr.* 1894, Nostrum *v.* Halliday, 39 Nebr. 828, 833, 58 N. W. 429, *semble* (copy of a plat not made by witness nor compared with original, excluded); *N. J.* 1832, Smith *v.* Axtell, 1 N. J. L. 494, 498 ("It has not been compared; the witnesses who state it to be a copy, speak only from their recollection of the original"; admitted, though a copy in the strict sense was held preferable); *Wis.* 1881, Kollock *v.* Parcher, 52 Wis. 393, 400, 9 N. W. 67 (a defective official-copy may be verified by another person so as to be admissible); 1895, Althouse *v.* Jamestown, 91 Wis. 46, 64 N. W. 423 (the fact of serving a particular notice being in existence, and the testimony of the person who made the copy offered not being available, the testimony of one who had read the original and also the copy was received).

The *length of time* elapsing between seeing the original and making the copy is immaterial; it is then at least as good as recollection-testimony: 1913, Walter *v.* Calhoun, 88 Kan. 801, 129 Pac. 1176.

[3] *Eng.* 1699, Medlicot *v.* Joyner, 2 Keble 546 (a deed-copy "made by the witness to carry about to counsel, but never examined with the original", admitted, because "this is good evidence as well as [*i.e.* together with] testimony of a witness of the contents of the deed burnt"); 1817, R. *v.* Watson, 2 Stark. 116, per Lord Ellenborough, C. J. ("When you wish to prove that a party has notice of the contents of a newspaper, you show by one witness that he had a copy of the paper and by another what the contents were"); *U. S.* 1885, Huff *v.* Hall, 56 Mich. 456, 457, 23 N. W. 88 (lost letter; B testifies to a letter shown him by A; A testifies that the letter was one received from the defendant; allowed); 1827, Bullitt *v.* Overfield, 2 Mo. 4 (copy verified by one witness for an original identified by another, admitted).

That the witness to an *examined copy of a public record* must show that the document examined was really the desired record, is dealt with under Authentication (*post*, § 2158).

[4] 1844, State Bank *v.* Ensminger, 7 Blackf. Ind. 104, 108 (copy made by clerk in such a hurry that he could not swear to accuracy; held sufficient, opponent possessing the original); 1886, Re Gazett, 35 Minn. 532, 533, 29 N. W. 347 (that a paper "seemed to be" a copy of a pleading, insufficient); see also *ante*, § 658.

(5) A document's contents may be inferred from circumstantial evidence, — in particular, from *spoliation* or *suppression* by the opponent (*ante*, § 291).

3. Rules depending on the Hearsay Rule and its Exceptions

§ 1281. **Witness must be called, unless by Exception to the Hearsay Rule for Certified Copies, etc.** A paper offered as a copy but not supported by any person's testimony in Court is a hearsay — *i.e.* extrajudicial — statement, obnoxious to the Hearsay rule (*post*, § 1362). Hence, some person must be *called to the stand* to verify the paper as the copy that it purports to be. A paper offered anonymously as a copy, or offered without calling some witness to verify it, is inadmissible. This principle, never disputed, is, with occasional lapses, constantly enforced in excluding supposed copies;[1] though in earlier times there was undoubtedly more laxity in this respect.[2]

But there are *exceptions* to the Hearsay rule, under which copies made by specific classes of persons may be admitted. (1) Under the exception for Official Statements (*post*, § 1677), copies made by *officers* lawfully *authorized to give copies* — *i.e.* exemplified, certified, attested, or office copies — are receivable. (2) Upon a similar principle, statutory provision is often made for the establishment, by *judicial proceedings*, of a copy of a lost or destroyed document (*post*, § 1682). (3) There is an early and limited exception, nowadays not much invoked, allowing the use of *recitals in one deed* of the contents of another as evidence of the latter's contents (*post*, § 1573). (4) There was also once an exception recognized for *ancient copies* of *ancient lost records* (*post*, § 1573). (4) There is an exception in favor of *private reports* of *judicial decisions* in other jurisdictions (*post*, § 1703), and, by statute, for copies certified by the clerks or other custodians of certain private documents such as *corporate records* (*post*, § 1683).

4. Sundry Principles

§ 1282. **Completeness of Copy; Abstracts.** The general principle of Completeness (*post*, §§ 2105–2111) requires that, where the terms of a document are to be proved, the whole of the contents, whether in the original or by copy, be presented to the tribunal. It is impracticable to separate from the general treatment of that principle the specific rules applicable to the proof of a document's contents, and the various questions are there dealt with; in particular, the questions whether the whole of a document must be contained in the copy, and not a mere extract or an abstract, whether a copy must be stated to have been "truly" or "correctly" copied, and the like.

§ 1281. [1] *Eng.* 1807, Fisher *v.* Samuda, 1 Camp. 190, 192 (a copy made by the plaintiff himself, incompetent from interest, excluded, because such testimony "must be of a nature which the law would receive in other instances"); *U. S. N. J.* 1819, Wills *v.* M'Dole, 5 N. J. L. 501 (copy insufficiently proved); 1906, Hall *v.* Callingham, 74 N. J. L. 211, 65 Atl. 123 (purporting copy of a letter, not verified by any witness, excluded); *N. Y.* 1885, Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 453, 3 N. E. 485 (the writing delivered to the telegraph office being the original, and destroyed, the transcript delivered to the sendee was taken as a copy, in the absence of any objection to its accuracy; compare § 2154, *post*); *N. Car.* 1844, Kelly *v.* Craig, 5 Ired. 129, 131 (paper delivered by a clerk to a sheriff, purporting to be a copy of the tax-list, excluded).

[2] 1707, Winne *v.* Lloyd, 2 Vern. 603 (copies by a deceased person admitted).

SUB-TITLE II: RULES OF TESTIMONIAL PREFERENCE

CHAPTER XL.

TOPIC I: PROVISIONAL (OR CONDITIONAL) TESTIMONIAL PREFERENCES

SUB-TOPIC A: PREFERENCE FOR AN ATTESTING WITNESS

(a) "Where the execution of any document"

(b) "Purports to have been attested"

(c) "A party desiring to prove its execution"

(d) "Against an opponent entitled in the state of the issues to dispute execution"

(e) "Must, before using other evidence"

(f) "Either produce the attester as a witness"

(g) "Or show his testimony to be unavailable"

§ 1285. **Nature and Kinds of Testimonial Preference.** In the preceding Chapter has been examined that sort of preference which is accorded to the original of a writing; its production before the tribunal is preferred, if feasible, instead of testimonial or circumstantial evidence about the contents. The preference now to be examined is a preference for *one kind of testimonial evidence* (*i.e.* one kind of witness) *over another.*

The rules of Preference here are of two sorts, one less stringent than the other. By one sort of preference, it is required that a particular witness or class of witnesses be called before any other can be resorted to, so that the latter cannot be used until the former is produced or is shown to be unavailable. This sort of preference may be termed *provisional* (or *conditional*) — formerly referred to as an application of the "best evidence" rule (*ante*, § 1174). By the other sort, the preferred witness or class of witnesses is not only first required, but if it is available, it is made the exclusive source of proof; that is, if the preferred witness is available, his testimony is taken as so trustworthy that no other testimony to the same point is received, nor is his testimony allowed to be shown incorrect. This sort of preference may be termed *conclusive* (or *absolute*). The various rules of conditional preference are dealt with in §§ 1286–1339; the rules of absolute preference in §§ 1345–1353. They are few in number, and rest upon considerations peculiar to the case of each one.

Topic I: PROVISIONAL (OR CONDITIONAL) TESTIMONIAL PREFERENCES

§ 1286. **General Nature and Policy of these Rules.** The general notion of preference which insists that a particular witness shall be called before another can be called rests on the supposed excellent position of that particular witness to obtain knowledge of the matter more accurately than any other person. His opportunities of knowledge, it must be supposed, have been not only better than those of others, but so much better that it would be a palpable risking of injustice to proceed in the trial without endeavoring to obtain him. Moreover, such a rule should be applied only where the class of witnesses thus preferred can be designated with some precision and certainty; because the party required to call him must in fairness be able to know be-

forehand, in order to summon them, the person or persons to whom the rule will be applied by the Court on the trial. Finally, such a rule obviously assumes nothing as to the precise nature of the witness' testimony. He may, on appearing, affirm or deny the existence of the fact in question; he is required to be used, but without any assumption that he will say the one thing or the other thing, and merely with the assumption that whatever he can contribute will be worth hearing. In other words, such a rule is a rule imposed by the law by way of insuring a supply of trustworthy testimony which otherwise the partisan interests of either side might fail to furnish.

Now the situations in which these combined considerations apply must necessarily be few. There are doubtless many classes of witnesses who might be supposed to have better opportunities of knowledge than others; but there are not many in which it can be securely assumed, for the purposes of a fixed rule, that they have had opportunities so far in excess of others that they must invariably and positively be utilized. Moreover, the precise definition of such persons by specific rules is still less often feasible. Finally, and most important of all, the cases in which the law needs, of its own motion, and independently of the litigants' efforts, to insist upon their attendance are decidedly few in number. The whole spirit of the Anglo-American system of trials is to leave the search for evidence in the hands of the parties themselves (*post*, § 2483). Their interested zeal is regarded as sufficient to insure a full and exhaustive marshalling of all the evidential data on either side; and this attitude of the law, whether originally wise or not, has so thrown the parties upon their own efforts that in practice parties do exert themselves as effectively as could be desired.[1] In fact, our system of partisan responsibility for the purveying of evidence, while it is marked by the natural defects of partisanship, is at least more successful in the thorough canvassing of all sources of evidence than any system of judicial responsibility could be in this country, or (perhaps) than in any other country such a system actually appears to be to-day. Under such conditions, then, the cases might well be extremely few in which it would be necessary for the law to step in and to insist, independently of the parties' probable efforts, on the presence of a specific witness. Such indeed is the fact in our law; for these rules are extremely few.

In general, then, there may be assumed to be no place in our system of evidence for rules of testimonial preference. A few do exist; but they exist as exceptions to a general principle.[2] Apart from these few definite exceptions, there is no general principle that the "best evidence" must be

§ 1286. [1] Compare the influence of this spirit on other rules (*post*, §§ 1847, 2251).

[2] It might be thought that, of possible considerations leading to such exceptions, one might be the consideration that this preferred witness should be a person not likely to be known to one of the parties; and that another might be the consideration that the burden of showing such a witness unavailable should in fairness fall upon one party rather than the other; and these may be noticed as evidently having force in the maintenance of certain of the rules.

procured,[3] in the sense that a *specific witness, presumably better qualified* than other competent witnesses, *must be produced or accounted for* before the others can be used:

1834, STORY, J., in *U. S.* v. *Gibert*, 2 Sumner 19, 81 (refusing to require the calling of one who saw a fire, in preference to one who saw it set): "It appears to me that the whole basis of the argument is founded upon a mistake of the meaning of the rule of law as to the production of the best evidence. The rule is not applied to evidence of the same nature and degree; but it is applied to reject secondary and inferior evidence in proof of a fact which leaves evidence of a higher and superior nature behind in the possession or power of the party. Thus, if the party offers a copy of a paper in evidence, when he has the original in his possession, the copy will be rejected, for the original is evidence of a higher nature. . . . But the rule does not apply to several eye-witnesses testifying to the same facts or parts of the same facts, for the testimony is all in the same degree, and where there are several witnesses to the same facts, they may be proved by one only. All need not be produced. If they are not produced, the evidence may be less satisfactory or less conclusive, but still it is not incompetent."

1875, CAMPBELL, J., in *Elliott* v. *Van Buren*, 33 Mich. 49, 52 (repudiating any preference for a physician's testimony to an injured person's condition): "The term 'best evidence' is confined to cases where the law has divided testimony into primary and secondary; and there are no degrees of evidence, except where some document or other instrument exists the contents of which should be proved by an original rather than by other testimony which is open to the danger of inaccuracy. But where living witnesses are placed on the stand, one is in law on the same footing as another. If he can testify at all, he can testify in the presence as well as in the absence of those who may be supposed wiser or more reliable. There are some questions on which some witnesses cannot testify at all, for want of knowledge. No one can be allowed to prove what he has never learned, whether it be ordinary or scientific facts. But one who can testify under any circumstances upon the facts on which he is examined may do so as well where his superiors are to be found as where he knows as much as any other."

It remains to examine the few specific rules which appear in our law as deviations from this general principle.

Sub-topic A: PREFERENCE FOR AN ATTESTING WITNESS

§ 1287. **History.** The rule requiring the calling of a person who has attested a deed by his subscription comes down to us as the survival of a very early procedure. The connection by tradition is direct, though the original rule belongs to an epoch wholly alien in its ideas of proof and trial. Its history has been thus set forth:[1]

1898, Professor *James Bradley Thayer*, Preliminary Treatise on Evidence, 502: "[The rule] has a clear and very old origin. Such persons belonged to that very ancient class of

[3] See *ante*, § 1174, for a further examination of the fallacies of this "best evidence" phrase.

§ 1287. [1] Substantially the same account had been given, in 1808, by Chief Justice Kent, in Fox *v.* Reil, 3 John. 477.

The function of the attesting documentary witness in the early Germanic system of proof is set forth in the following works: 1892, Brunner, Deutsche Rechtsgeschichte, I, 420–426; 1877, Ficker, Beiträge zur Urkundenlehre, I, §§ 61 ff.; 1887, Posse, Die Lehre von Privaturkunden, 70; 1889, Bresslau, Handbuch der Urkundenlehre, I, 489, 790–814; 1894, Giry, Manuel de diplomatique.

This feature of Germanic procedure was also of great importance, in the history of our parol evidence rule, in relation to the use of the seal; and it is therefore considered more particularly *post*, § 2426.

transaction or business witnesses, running far back into the old Germanic law, who were once the only sort of witnesses that could be compelled to come before a court. Their allowing themselves to be called in and set down as attesting witnesses was understood to be an assent in advance to such a compulsory summons. Proof by witnesses could not be made by those who merely happened casually to know the fact. However exact and full the knowledge of any person might be, he could not, in the old Germanic procedure, be called in court as a witness, unless he had been called at the time of the event as a preappointed witness. It was a part of such a system and in accordance with such a set of ideas that witnesses formally allowed their names to be written into deeds in large numbers. When jury trial, or rather proof by jury, as it originally was, came in, the old proof by witnesses was joined with it when the execution of the deed was denied; and the same process that summoned the twelve, summoned also these witnesses. The phrase of the precept to the sheriff was 'summone duodecim' (etc. etc.) 'cum aliis.' The presence of these witnesses was at first as necessary as that of the jury. Great delays and embarrassments attended such a requirement where the number of witnesses might be so great; the jury was cumbersome enough anyway. Accordingly, in 1318, the presence of the witnesses was made no longer absolutely necessary; they must still be summoned, but the case might go on without them. After another century and a half the process against the witness became no longer a necessity. It was not issued unless it were called for. After still another century, in 1562–3, process against all kinds of witnesses was allowed, requiring them to come in, not with the jury or as a part of the jury, but to testify before them in open court, and then the old procedure of summoning such witnesses with the jury seems to have died out; [but they must still be summoned as witnesses.] . . . As late as the early part of the eighteenth century it was doubtful whether a deed could be proved at all, if the attesting witnesses came in and denied it. Half a century later, Lord Mansfield, while reluctantly yielding to what he stigmatized as a captious objection that you must produce the witness, declared that 'It is a technical rule that the subscribing witness must be produced; and it cannot be dispensed with unless it appeared that his attendance could not be produced.'"

§ 1288. **Reason and Policy of the Rule.** This ancient rule thus continued to be enforced long after the disappearance of the primitive system of trial and the notions of proof in which it had its origin. By the end of the 1700s (*ante*, § 8) rules of Evidence began to be argued out and to be maintained or repudiated according as they seemed to possess or to lack a reason for existence. What was the reason that sufficed to maintain this rule as a part of the new and ratiocinative system of Evidence that began to be formed by the end of the 1700s?

Here is found considerable difference of opinion, — a difference natural enough in view of the fact that no sound reason could in truth be furnished for the strict and entire perpetuation of the rule. Under such circumstances, insufficient and inconsistent reasons were likely to be advanced by those who could not see the way to a radical departure from long tradition.

(1) A favorite reason was that *the parties* to the document *had agreed* to make the attester their witness to prove execution:[1]

1815, ELLENBOROUGH, L. C. J., in *R.* v. *Harringworth*, 4 M. & S. 350: "Inasmuch as they are the plighted witnesses, the knowledge they have upon the subject is essential, and if it can be procured must be forthcoming."

§ 1288. [1] *Accord:* 1796, Grose, J., in Barnes *v.* Trompowsky, 7 T. R. 265; 1826, McMurtry *v.* Frank, 4 T. B. Monr. Ky. 39.

1851, CRESSWELL, J., in *Gerapulo* v. *Wieler*, 10 C. B. 690, 696: "It is not on the ground that his is the best evidence; . . . but because he is the witness agreed upon between the parties."

1853, POLLOCK, C. B., in *Whyman* v. *Garth*, 8 Exch. 803: "The attesting witness must be called to prove the execution of a deed for this reason, that by an imperative rule of law the parties are supposed to have agreed 'inter se' that the deed shall not be given in evidence without his being called to depose to the circumstances attending its execution."

The difficulty about this reason is that no such agreement can be implied, particularly where attestation is required by law. Moreover, were such the reason, the rule would not apply between others than the parties to the document, — which is not the fact. Furthermore, this assumes that the opponent charged as obligor or maker is a party to the document, — which, if the execution is denied, is an assumption of the very point in issue:[2]

1807, SPENCER, J., in *Hall* v. *Phelps*, 2 John. 451: "The notion that the persons who attest an instrument are agreed upon to be the only witnesses to prove it, is not conformable to the truth of transactions of this kind, and, to speak with all possible delicacy, is an absurdity."

1895, BURKET, J., in *Garratt* v. *Hanshue*, 53 Oh. 482, 42 N. E. 256: "Another reason given for the rule is because the parties themselves, by selecting the witnesses, have mutually agreed to rest upon their testimony in proof of the execution of the instrument and of the circumstances which then took place, and because they know those facts which are probably unknown to others. This supposed mutual agreement is a pure fiction, and rarely, if ever, exists in fact. If in any case it has a real existence, and can be shown, it may perhaps be enforced; but the mere fiction is entitled to no weight and to no respect."

(2) Another reason, suggested almost as often, is that the opponent is entitled to the *benefit of cross-examining* the attesting-witness as to the circumstances of execution; or, put in another way, that the attester may not only know more than some other person observing the execution, but may be able to speak as to fraud, duress, or other matters of defence:

1779, ASHHURST, J., in *Abbot* v. *Plumbe*, 1 Doug. 216: "[The opponent] would be deprived of the benefit of cross-examining him concerning the time of the execution of the bond, which might be material."

1801, ALVANLEY, L. C. J., in *Manners* v. *Postan*, 4 Esp. 241: "The rule was founded on the principle that there should be an investigation from the subscribing witness of what took place at the time of the execution of the instrument."

1803, LEBLANC, J., in *Call* v. *Dunning*, 4 East 54: "A fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction."

The objections to this reason are numerous. First, it is inconsistent with the rule itself; for the rule applies even where fraud, duress, and time are not in issue, and even where the maker himself is competent as a witness. Again, the attester is in practice not usually a person who knows anything about the circumstances preceding the document's execution, or knows more than any other person who by being present would be a qualified witness. Finally,

[2] *Accord:* 1834, Parker, J., in Farnsworth v. Briggs, 6 N. H. 561, 565.

if the witness does possess special knowledge about some affirmative issue, the opponent is the proper person to call the witness, if he desires him. This reason for the rule, then, is no more capable of defence than the first.[3]

(3) Has the rule, then, no justification in policy? It certainly has none, in its original broad form. But in most jurisdictions it has by statute been limited to documents required by law to be attested (*post*, § 1290); and in this shape it seems to be entirely justifiable. In the first place, the attestation is in such cases required by law as a special precaution against forgery;[4] thus the attestation itself must in any case be proved as an element in the validity of the document, and there seems to be no special hardship in obtaining the witness rather than in obtaining evidence of his signature. In the next place, such documents are, in most jurisdictions, wills of deceased persons and deeds of illiterate persons; for such documents, the maker himself being either deceased or not acquainted with writings, the attester's testimony is almost inevitably the most desirable and most trustworthy source of information as to the fact of execution; moreover, it is in such cases that the defences of fraud or undue influence are most likely to be made, and here also the attester's testimony is likely to be of use and ought to be obtained if possible. Still further, in these and all other cases where attestation is legally required, the situation is one in which by hypothesis the risk of a false document is serious, and the determination ought not to be left to the unsupported denial of the alleged maker (even assuming him competent and testifying). Finally, between the two parties, the burden of producing the witness or proving him unavailable ought fairly to be placed upon the party of whose case it is a part to prove the due execution and attestation. For these reasons, it seems unwise to dispense with the rule to any further extent.

§ 1289. **Tenor of the Rule.** The rule at common law may be thus stated:

Rule: (a) *Where the execution of any document* (b) *purports to have been attested,* (c) *a party desiring to prove its execution,* (d) *against an opponent entitled in the state of the issues to dispute execution,* (e) *must, before using other evidence,* (f) *either produce the attester as a witness,* (g) *or show his testimony to be unavailable* (h) *and also authenticate his attestation, unless it is not feasible.*

Such is the scope of the rule as it obtained in its orthodox and broadest form. This broadest form, however, was not adopted or maintained in all jurisdictions; and certain modifications, now more or less common, are to be noticed under the various parts.

[3] See some of these objections set forth in the following opinions: 1834, Parker, J., in Farnsworth *v.* Briggs, 6 N. H. 561, 565; 1895, Burket, J., in Garratt *v.* Hanshue, 53 Oh. 482, 42 N. E. 256. See, further, the reasons of the Common Law Procedure Commissioners, quoted *post*, § 1290, objecting to the scope of the rule as applicable to documents not required by law to be attested. The great critic of our Evidence system has also had his say against the rule: 1827, Bentham, Rationale of Judicial Evidence, b. VII, c. VI (Bowring's ed., vol. VII, p. 190).

[4] See the quotations *post*, § 1304.

(*a*) "Where the Execution of any Document"

§ 1290. **Kinds of Documents covered by the Rule; at Common Law, all Documents were included; Statutory Modifications.** At common law the rule was applied to *all kinds of documents* whatever, when purporting to bear an attestation, whether or not the document was sealed, whether or not it was in the nature of a specialty, and whether or not the attestation was required by law as an element of the document's validity.[1]

But by the beginning of the 1800s the unnecessary hardship and the mere technicality of the rule in this broadness of scope began to be recognized. It may be supposed, too, that the then increasing resort to handwriting-testimony (*post*, § 1993) made it easier to rely less upon attesting witnesses. In 1853, the objections to it found effective expression in the following passage in the Report of a Parliamentary Commission notable for the authoritative character of its members:

> 1853, *Common Law Procedure Commission* (Jervis, Martin, Walton, Bramwell, Willes, Cockburn), Second Report, 23: "We do not purpose to meddle with the preappointed evidence of execution required either by the Legislature or by persons creating powers; but we think it deserving of serious consideration whether this formal proof of the execution of written documents may not in other cases be dispensed with, where the execution is either admitted or capable of other proof. The principle on which the necessity for producing the attesting witness rests is that the witness is supposed to be conversant with all the circumstances under which the deed was executed. But it is notorious that in practice the attesting witness in the majority of instances knows nothing of the transaction; the instrument having been prepared, a clerk, a servant, or a neighbor is called in to attest it. Added to which, as parol testimony is not admitted to contradict or vary the terms of a written instrument, the occasions are few indeed where the evidence of the attesting witness goes further than to prove the execution of the writing. On the other hand, the necessity of calling the attesting witness, where the execution of the document is not the real matter in dispute and where there are no concomitant circumstances to be inquired into, is often attended with difficulty and expense, and sometimes leads to the defeat of justice. Cases have occurred where, in tracing a title, numerous witnesses from distant parts have been rendered necessary to prove the formal execution of deeds, though their execution was not really in dispute and the handwriting to all might have been proved by a single witness, and doubtless would have been admitted but for the difficulty which it was thought would by the existing rule be thrown in the way of the party alleging title. It also sometimes happens in the course of a cause that the adversary's case renders it necessary to give in evidence a document which it was not supposed would be required, or a document is produced by a witness on his subpœna which turns out, contrary to the expectation of the party requiring it, to be attested; the attesting witness is not at hand; yet the signature of the party might be easily proved, or the witness producing the instrument

§ 1290. [1] The American rulings are placed in note 4, *infra*; there was in England no question as to this proposition: 1810, Wardell *v.* Fermeur, 2 Camp. 282, 284 (refusing to distinguish between a lease-assignment and a post-obit bond; Ellenborough, L. C. J., said it did not depend on "the nature of the deed to be proved; it must depend upon the possibility of procuring the attendance of the attesting witness, not upon the testimony he is likely to give"); 1817, Higgs *v.* Dixon, 2 Stark. 180 (applied to a warrant to distrain); 1848, Streeter *v.* Bartlett, 5 C. B. 562 (applied to the proof in the Common Pleas of a debtor's schedule required by the Insolvent Debtor's Court to be attested, but not by the insolvency-statute).

may have heard him admit the execution; nevertheless the document cannot be received and the party requiring it loses his cause. When the genuineness of the document is not really in dispute, it is clear that the parties ought not to be limited to any particular witness to prove the execution. When the genuineness is in dispute, the party producing it will be sure to call the attesting witness, as the absence of the latter would throw the greatest discredit on the instrument. We therefore recommend that, except in cases where the evidence of attestation is requisite to the validity of the instrument, an attesting witness need not be called." [2]

Accordingly, in 1854, *England* restricted the rule thereafter to documents *required by law to be attested*, and this restriction has been adopted in *Canada* also.[3]

In the *United States*, the common-law doctrine was recognized to have the same scope as in England, except that by a few Courts it was confined to documents under seal. In many jurisdictions, however, a statutory restriction has been enacted similar to that of England;[4] under such restrictions,

[2] Compare the arguments set forth *ante*, § 1288.

[3] ENGLAND: 1854, St. 17 & 18 Vict. c. 125, § 26 ("It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto"); 1854, St. 17 & 18 Vict. c. 104, § 526 (the attesting witness need not be called for shipping documents required by this Act to be attested); 1886, Re Rice, L. R. 32 Ch. D. 35 (appointment by attested deed, attestation not being requisite to validity; Cotton, L. J.: "In petitions in lunacy and in chancery, it has been usual since the Act to require proof by the attesting witness").

CANADA: the following statutes follow the wording of Eng. St. 1854, c. 125; *Dom.* R. S. 1906, c. 145, Evid. Act § 32; *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 52 (like Eng. St. 1854, c. 125, § 26, up to the semicolon); 1913, Nichols & S. Co. *v.* Skedanuk, Alta. S. C., 11 D. L. R. 199 (mortgage of land under Land Titles Act; whether it is a document required to be attested and thus the attesting witness must be called, not decided); *B.C.* Rev. St. 1911, c. 78, § 47; *N. Br.* Consol. St. 1903, c. 127, § 19; 1877, c. 46, § 23; *Newf.* Consol. St. 1916, c. 91, § 20; *N. Sc.* Rev. St. 1900, c. 163, § 32; *Ont.* Rev. St. 1914, c. 76, § 51; *P. E. I.* St. 1889, c. 9, § 19; *Yukon:* Consol. Ord. 1914, c. 20, § 32.

[4] Where no rulings or statutes are found, the Court would presumably apply the orthodox rule. In the following list, the statute in each jurisdiction is placed last, though in time the statute may have preceded some of the judicial rulings. In some jurisdictions (*e.g.* South Carolina) the statute does not go as far in restriction as the English statute; in others (*e.g.* Florida and California) the statute has in appearance gone farther:

Alabama: Code 1907, § 4004 (subscribing witness "must be produced in all cases", except as named); Code 1897, § 1797, Code 1907, § 4006 (quoted *post*, § 1291, n. 3); 1881, Ellerson *v.* State, 69 Ala. 1, 3 (applies to "every private writing"; here, a contract for cropping); 1896, Martin *v.* Mayer, 112 Ala. 620, 20 So. 963 (bill of sale); 1897, Jones *v.* State, 113 Ala. 95, 21 So. 229 (mortgage of personalty); 1899, Stamphill *v.* Bullen, 121 Ala. 250, 25 So. 928 (proof by joint maker, not sufficient under statute for co-maker's execution); 1904, Ballow *v.* Collins, 139 Ala. 543, 36 So. 712 (under Code § 1797, the maker's testimony suffices ordinarily; but where attestation is required for the validity of execution under Code § 2151, — here, an illiterate's mortgage, signed by mark, — the attestation also must be proved by the maker; as to whether an illiterate's mark is identifiable, see *ante*, § 693); 1915, Barksdale *v.* Bullington, 194 Ala. 624, 69 So. 891 (rule of Code § 4004 applied to a note and mortgage on "one black mare mule named Mat");

Arkansas: 1843, Brock *v.* Saxton, 5 Ark. 708 (applicable to all attested documents);

California: C. C. P. 1872, § 1940 ("any writing" is provable either by one seeing the execution, or by evidence of the maker's hand, or by a subscribing witness; but this clearly was not intended to override C. C. P. § 1315, quoted *post*, § 1310); 1906, Castor *v.* Bernstein, 21 Cal. App. 703, 84 Pac. 244 ("The Code makes no distinction in rank between the various modes in which a writing may be proved"; here said of an attested release);

Florida: Rev. G. S. 1919, § 3608 (probate may be granted on the oath of the executor, or if he is interested, "of any other credible person having no interest under the will, that he verily believes the writing exhibited" to be the testator's last will);

Georgia: 1878, Davis *v.* Alston, 61 Ga. 227 (a written contract for the sale of land; assimilated to a deed, and tested by "the rule of law applicable to deeds", *i.e.* about preferred

the rule comes into application chiefly for *wills* and for *illiterates' deeds*, and, in England, for powers of appointment. Moreover, even where the common-law rule obtains in strictness, the principle (*post*, § 1318), which dispenses with it for proof by copies of registered instruments, relieves nowa-

witnesses); 1895, Giannone *v.* Fleetwood, 93 Ga. 491, 21 S. E. 76 (applicable to all attested documents);
Hawaii: Rev. L. 1915, § 2622 (like Eng. St. 1854, c. 125); 1913, Kaeo *v.* Ozaki, 21 Haw. 633 (assignment of a claim; witness need not be called);
Idaho: Comp. St. 1919, § 7964 (like Cal. C. C. P. § 1940);
Illinois: Rev. St. 1874, c. 51, § 51 (whenever any instrument "not required by law to be attested by a subscribing witness" is offered in a civil cause, "and the same shall appear to have been so attested, and it shall become necessary to prove the execution of any such deed or other writing otherwise than as now provided by law, it shall not be necessary to prove the execution of the same by a subscribing witness to the exclusion of other evidence, but the execution of such instrument may be proved by secondary evidence without producing or accounting for the absence of the subscribing witness or witnesses");
Maine: Rev. St. 1916, c. 87, § 126 (like Mass. Gen. L. 1920, c. 233, § 68);
Maryland: Ann. Code 1914, Art. 35, § 7 (attested document's execution may be proved as if not attested, except for proof of will);
Massachusetts: 1839, Valentine *v.* Piper, 22 Pick. 85 (rule applicable to "an instrument under seal and commonly requiring attesting witnesses"); Gen. L. 1920, c. 233, § 68 ("A signature to an attested instrument or writing, except a will, may be proved in the same manner as if it were not attested");
Michigan: Comp. L. 1915, § 12538 (a attested instrument may be proved without calling the subscribing witness, "except in cases of written instruments to the validity of which one or more subscribing witnesses are required by law");
Montana: Rev. C. 1921, § 10588 (like C. C. P. § 1940);
New York: 1829, Henry *v.* Bishop, 2 Wend. 575 (does not apply "to instruments not under seal, or at least in regard to negotiable paper"); 1829, Jackson *v.* Rice, 3 Wend. 180, 183 (applicable to instruments under seal); C. P. A. 1920, § 331 (the subscribing witness need not be called, except for instruments to the validity of which a subscribing witness is necessary);
North Carolina: Con. St. 1919, § 370 (special rule provided for proving a copy of a lost probated will); § 1782 ("It is not necessary to prove by the attesting witness instruments to the validity of which the attestation is not requisite, and such instruments may be proved by admission or otherwise as if there had been no attesting witness thereto");
North Dakota: 1897, Brynjolfson *v.* Elev. Co., 6 N. D. 450, 71 N. W. 555 (holding the rule applicable to a chattel mortgage required to be attested under Rev. Code 1895, § 4738; but not clearly declaring how far R. C. §§ 3579, 3581, 3582, providing for proof before a recorder of deeds, abrogate the common-law doctrine); Comp. L. 1913, § 5890 ("In proving any written instrument or contract to which there is a subscribing witness, or to which there are two or more subscribing witnesses, it shall not be necessary to call said witness or any one of two or more of said subscribing witnesses; but the instrument or contract may be proved, except for purposes of filing or recording the same, by the same evidence by which an instrument or contract to which there is no subscribing witness may be proved"); 1901, McManus *v.* Commow, 10 N. D. 340, 87 N. W. 9 (applying § 3888*a*, Rev. Code 1899);
Ohio: 1877, Warner *v.* R. Co., 31 Oh. St. 265, 270 (applied to a contract);
Oregon: 1899, Hannan *v.* Greenfield, 36 Or. 97, 58 Pac. 888 (rule applied to agency-contract); Laws 1920, § 784 (common-law rule maintained);
Philippine Isl. C. C. P. 1901, § 324 (like Cal. C. C. P. § 1940); 1917, Antillon *v.* Barcelon, 37 P. I. 148 (documents provable by notarial certificate under the Spanish system; the witnesses need not be called);
Porto Rico: Rev. St. & C. 1911, § 1455 (like Cal. C. C. P. § 1940); 1915, San Juan Fruit Co. *v.* Carrillo, 8 P. R. Fed. 176, 179 (notarial deed not signed by grantor or grantee, but by a witness; the witness required to be called or accounted for); 1906, People *v.* Roman, 10 P. R. 532 (bill of sale of horse, proved by one who saw it executed);
Rhode Island: Gen. L. 1909, c. 292, § 46 (calling not required for "any instrument to the validity of which attestation is not requisite"; proof may be made "as if there had been no attesting witness thereto");
South Carolina: 1804, Madden *v.* Burris, 1 Brev. 387 (St. 1802, applied to an indorsement on a note); 1806, Gervais *v.* Baird, 2 Brev. 37 (same applied to signature by mark); 1807, Paisley *v.* Snipes, 2 Brev. 200 (St. 1802; the maker's signature suffices, even though a mark, if distinguishable); 1810, Shiver *v.* Johnson, 2 Brev. 397 (maker's peculiarity of mark, sufficient for St. 1802); 1825, Townsend *v.* Covington, 3 McC. 219 (St. 1802 does not apply to a written agreement for sale of land not under seal); 1827, Edgar *v.* Brown, 4 McC. 91 (bond executed in another State; St. 1802 applied); 1840, Blackman *v.* Stogner, Cheves Eq. 175 (St. 1802 applied in Chancery;

days in most instances from its harshness. Finally, the practice of using attesters having been almost universally abandoned where not prescribed by law, the rule of Evidence has fallen into desuetude, for documents not thus requiring attestation, even in the jurisdictions which have not legislated.

In order to apprehend the precise scope of the statutory rule, it is therefore in most jurisdictions necessary to note what documents are required by law to be attested as an element of their validity; but this is a matter of substantive law, not within the present purview. From such statutes, however, three special kinds of statutes should be distinguished:

(1) A statute (as in Pennsylvania) which prescribes merely that a document shall be "*proved*" by (any) two or more witnesses involves a rule of Quantity (dealt with *post*, §§ 2048, 2049), and not a rule of Preference; *i.e.* any two or more competent witnesses suffice, and there is therefore no preference for attesting witnesses above others.[5]

(2) A statute providing that documents presented for *registration* must be

"proved" to the registrar by the maker's acknowledgment or the statement of an attesting witness does not in itself concern the mode of proof before

suit); 1841, Trammell *v.* Roberts, 1 McM. 305 (here the defendant made oath, and the exemption of St. 1802 did not apply); 1902, Swancey *v.* Parrish, 62 S. C 240, 40 S. E. 554, *semble* (the Court inclined to hold the rule not applicable to documents not requiring attestation; here, a chattel mortgage); St. 1731, C. C. P. 1922, §§ 716, 717 (deeds, bonds, etc., attested as proved before a mayor, governor, or notary of a domestic or foreign State, receivable "as if the witnesses to such deeds were produced and proved the same 'viva voce'"; with limitation as to claims against residents of this State, conditioned on "such foreign country" according similar treatment); St. 1802, C. C. P. 1922, §§ 701, 702 ("The absence of a witness to a bond or note" shall not be cause for postponement, "but the signature to such bond or note may be proved by other testimony", unless the opponent expressly disputes its genuineness); 1921, Matheson *v.* Caribo, — S. C. —, 109 S. E. 102 (rule not held applicable to a note); *South Dakota:* Rev. C. 1919, § 2724 ("The execution of witnessed instruments, except wills, may be proven in the same manner as the execution of unwitnessed instruments"); 1905, Mississippi L. & C. Co. *v.* Kelly, 19 S. D. 577, 104 N. W. 265 (statute applied to a witnessed note; the statutes for proof to a recording officer held not applicable);
Tennessee: 1834, Suggett *v.* Kitchell, 6 Yerg. 425, 428 (will of personalty; subscribing witnesses, or at least more than one, need not be called); 1850, Moore *v.* Steele, 10 Humph. 562, 564, *semble* (subscribing witnesses to a will of personalty not preferred); 1850, Jones *v.* Arterburn, 11 Humph. 97, 101 (where there are in fact subscribing witnesses to a will of personalty, the rules of preferred witnesses are to be applied); St. 1789, c. 23, § 1, Shannon's Code 1916, § 3904 ("written wills with witnesses thereto", if not contested, are required to be proved by "at least one of the subscribing witnesses, if living"; if contested, every will, "written or nuncupative", by "all the living witnesses, if to be found, and by such other persons as may be produced to support it");
Utah: Comp. L. 1917, § 7110 (like Cal. C. C. P. § 1940);
Virginia: 1794, Turner *v.* Strip, 1 Wash. 319, 322 (proof of deed need not be by subscribing witness, under St. 1748);
Wisconsin: 1846, Carrington *v.* Eastman, 1 Pinney 650, 656 (rule applied to a receipt);
Wyoming: 1907, Bosweli *v.* First National Bank, 16 Wyo. 161, 92 Pac. 624 (power of attorney; not decided).

[5] 1784, Hight *v.* Wilson, 1 Dall. 94 (it is not necessary "that the proof of the will should be made by those who subscribed as witnesses", under the Act of 1705 requiring wills to be "proved by two or more credible witnesses, upon their solemn affirmation, or by other legal proof"); 1788, Lewis *v.* Maris, 1 Dall. 278, 288, *semble* (same); 1868, Carson's Appeal, 59 Pa. 493, 496 (same; under St. 1833).

See also *post*, § 1304.

A statute, however, providing for both "proving" and attesting does involve also a rule of preference for the attesters: 1815, Clarke *v.* Bartlett, 4 Bibb 201 (statute requiring manumissions to be "attested and proved by two witnesses"; held, that the two proving it must be the two attesting it).

a judicial tribunal, but only the conditions precedent to lawful registration, and does not make attestation a necessary element of validity so as to affect the application of the present rule.[6]

These statutes sometimes provide that the "proof" by attesting witness is to be made before a judge, whose certificate then suffices to entitle the deed to registration; but the proceeding is nevertheless not a judiciary one, in that it does not purport to establish the fact of execution, but merely to entitle the deed to registration.[7]

(3) The rule for proof of *nuncupative wills* by persons present involves both a rule of Preference and a rule of Quantity; but is better examined under the latter head (*post*, § 2050).

(4) Statutes sometimes provide for acceptance of a *probate judgment*, of ancient date or of another jurisdiction, based on the testimony of one attesting witness only, or of none. These statutes generally involve the principle of § 1304, *post*, and are there considered.

§ 1291. **Documents Incidentally or "Collaterally" in Issue.** Where the document whose execution is to be proved is not a document necessarily involved in the pleading, but is a minor document coming incidentally into issue in the course of the details of proof, there is much reason in dispensing with the rule. In the first place, the document is not of such importance as to call for the rigorous precaution of the rule; and secondly, it is not possible for the proponent to anticipate every minor turn in the course of the proof, and he may thus without fault be taken by surprise and be unprepared with the attester and yet otherwise able to make sufficient proof:

1813, BRACKENRIDGE, J., in *Heckert* v. *Haine*, 6 Binn. 16, 20 (here the plaintiff wished to prove the receipt of money from A, by the defendant's intestate for the use of the plaintiff, the payor A having taken an attested receipt): "The receipt is a matter collateral to his case and not directly in issue. . . . [The witness] could not legally be supposed to be in his keeping, as a witness called by a party to subscribe a writing is supposed to be. . . . In the case of a third person, even where it is the foundation of a suit and comes in collaterally, I do not see the reason. . . . I would then restrain the rule to a case where the execution of a writing is directly in issue, unless notice shall have been given that it was material to have this proof. . . . Coming in collaterally, it would be taking a party by surprise to render it necessary to produce the subscribing witness."

1845, GILCHRIST, J., in *Rand* v. *Dodge*, 17 N. H. 343, 357: "When one not a party or privy to the contract, nor claiming any benefit, or exemption from the fulfilment of its exigencies or the violation of its terms, has occasion for a collateral purpose to show that such a contract existed, . . . when the existence of the writing is of no consequence or significance but as a part of the 'res gestæ' which a stranger seeks to prove and to characterize with reference to his own rights, then the reason of the rule entirely fails and the rule itself has no application."

[6] For the exemption from the rule in the case of proof by copies of a registered deed, see *post*, § 1318.

Compare the following: 1909, Eadie v. Chambers, 9th C. C. A., 172 Fed. 73 (whether attestation is requisite to validity between the parties).

[7] Examples of the statutes are as follows: Vt. Gen. L. 1917, §§ 2751, 2752 (proving signature, for record, of deed of a grantor absconding or dying without making acknowledgment of deed, or refusing to make acknowledgment).

This limitation to the rule was never recognized in England;[1] but in the United States it has found frequent judicial support; accordingly, in many jurisdictions the rule is not applied in such cases.[2] The precise terms of this limitation are not uniformly defined, and are difficult to define; the trial judge's determination should be allowed to control. The term "collateral", often used, is elusive and unsatisfactory; and it is sometimes mistakenly employed to designate the principle of certain other cases (*post*, § 1293), where the rule is also not applied.

(*b*) "Purports to have been attested"

§ 1292. **Who is an Attesting Witness.** The notion of an attesting or subscribing witness is that of a person who, at the request or with the consent of the maker, places his name on the document for the purpose of making

§ 1291. [1] 1791, Breton *v.* Cope, Peake 30 (rule applied to a deed cancelled and offered only as containing an admission); 1801, Manners *v.* Postan, 4 Esp. 239 (action for penalties for usury; in proving the usury, an attested warrant of attorney, held subject to the rule).

[2] *Accord: Alabama:* Code 1907, § 4004, par. 4; 1881, Ellerson *v.* State, 69 Ala. 1, 3 (indictment for removing personal property subject to lien; witness to contract creating lien required to be called); 1892, Steiner *v.* Trainum, 98 Ala. 315, 318, 13 So. 365 (trover for a horse; note given at the sale; exempted); 1892, Lavrette *v.* Holcombe, 98 Ala. 503, 510 (same; affidavit); *Georgia:* 1890, Hudson *v.* Puett, 86 Ga. 341, 12 S. E. 640 (claim for rent; to show reasonable value, a contract of lease of same property to another, held not collateral); 1893, Giannone *v.* Fleetwood, 93 Ga. 491, 493, 21 S. E. 76 (execution on property claimed under mortgage; bill of sale used to rebut evidence of fraud, held not collateral); 1895, McVicker *v.* Conkle, 93 Ga. 584, 595, 24 S. E. 23 (rule not applicable to document offered only as standard for comparison of hands); 1897, Summerour *v.* Felker, 102 Ga. 254, 29 S. E. 448 (action for rent; note given for the rent, not collateral); Rev. C. 1910, § 5833 (production not necessary if paper is "only incidentally or collaterally material to the case"); *Kentucky:* 1816, Brashear *v.* Burton, 4 Bibb 442 (title to personalty; bill of sale incidentally in chain of title; rule not enforced); *Maine:* 1830, Drew *v.* Wadleigh, 7 Greenl. 94 (rule not applied to document used to discredit a witness as containing an inconsistent statement); 1841, Ayers *v.* Hewitt, 1 Appl. 281, 285 (if it is a document "wholly 'inter alias', under whom neither party can claim to deduce any right, title, or interest to himself", the rule does not apply; as here, to a bill of sale corroborating a witness' testimony to a third person's insolvency); 1845, Pullen *v.* Hutchinson, 12 Shepl. 249, 253 (the preceding case approved; here the rule was held applicable to a bill of sale to the defendant affecting his claim); *Michigan:* 1880, Hess *v.* Griggs, 43 Mich. 397, 399, 5 N. W. 427 (plaintiff in replevin, resting on possession under a contract with a third person by the defendant; rule applied); *New Hampshire:* 1845, Rand *v.* Dodge, 17 N. H. 343, 357 (rule not applied to a contract making G. the agent of an ancestor or to do acts of prescriptive possession; see quotation *supra*); *Pennsylvania:* 1813, Heckert *v.* Haine, 6 Binn. 16, 20 (see quotation *supra*); *Tennessee:* 1874, Demombreun *v.* Walker, 4 Baxt. 199 (to rebut a contention that the will under which the plaintiff claimed was procured by undue influence, the plaintiffs offered a former will of a similar tenor; held, that the rule did not apply, where a paper "comes incidentally in question", as here); 1874, Henly *v.* Hemming, 7 Baxt. 524 (rule not applicable to a bill of sale of goods sued for in replevin); *Vermont:* 1849, Curtis *v.* Belknap, 21 Vt. 433 (the plaintiff was hired by T. to perform work, but T. abandoned the contract; the defendant then hired the plaintiff to complete the work at the same prices: held, the rule did not apply to the writing between T. and the plaintiff, which "was only incidentally in question", and of which "the parties to his contract had never constituted the subscribing witness . . . the exclusive witness of their contract").

Contra: 1826, Roberts *v.* Tennell, 3 T. B. Monr. 247, 250; 1831, Goodall *v.* Goodall, 5 J. J. M. 596, 598; 1871, Kalmes *v.* Gerrish, 7 Nev. 31, 34.

Undecided: 1857, Com. *v.* Castles, 9 Gray 121 ("collaterally or incidentally"; left undecided).

Distinguish the cases cited *post*, § 1293.

thereby an implied [1] or expressed statement that the document was then known by him to have been executed by the purporting maker.[2]

(1) In the first place, then, a person who, though he saw the execution, and though his name is on the document, did *not write it himself*, is not an attesting witness, because he did not in fact make the attestation.[3]

(2) For the same reason, a *fictitious person* whose name is signed is not an attesting witness.[4]

(3) Again, an *officer*, whose signature is required by law or by rule of Court to give validity to a document or to enable it to be filed for a specific purpose, is an attesting witness,[5] though he signs for a different purpose; and for the same reason an officer authorized to take an acknowledgment and to give a certificate thereof admissible as evidence under the Hearsay exception (*post*, §§ 1676, 1682) would be an attesting witness.[6]

§ 1292. [1] A clause expressly using words of attestation is unnecessary, if the real purpose of signing was to attest: 1848, Chaplain *v.* Briscoe, 11 Sm. & M. 372, 379, 382 (persons signing in the usual place, but not named as witness, required to be called); and cases cited *post* § 1511.

The placing of the signatures of the alleged witnesses *before the attestation clause*, and of the testator's after it, is not fatal: 1922, Haber's Will, Surr. Ct., 192 N. Y. Suppl. 616.

[2] Distinguish the question of substantive law whether the attestation, as an element in the *validity of a document* required to be attested, suffices under that substantive law. See for examples: 1835, Doe *v.* Burdett, 4 A. & E. 1 (under what circumstances a general attestation is sufficient); 1855, Clay *v.* Holbert, 14 Tex. 189, 200.

Whether a person signing may under the "parol evidence" rule show that his *intention was merely to attest* and not to be an obligor is a different question (*post*, § 2419).

Whether the witness is *competent* or *credible* by the substantive law, so as to affect the validity of the attestation, is also a different question (*post*, § 1510).

[3] 1843, Cussons *v.* Skinner, 11 M. & W. 161, 168 (the attesting witness' name was written by another person in pencil; held, not necessary to call him; Abinger, L. C. B.: "It is not the mere presence of a person at the time of the execution of an instrument that makes him an attesting witness; for if five hundred persons were, if they do not sign as attesting witnesses, you are not bound to call one of them"); 1816, Jackson *v.* Lewis, 13 Johns. N. Y. 504 (signature of a second witness by the first, treated as if attested by one only); 1814, Allen *v.* Martin, 1 Law Repos. N. C. 373 (the maker had himself written the witness' name; rule not applicable).

The primitive notion of an attestation was quite otherwise, under the Germanic system of proof, by which a person might write the names of any number of his absent friends to his deed and get their consent afterwards; "a witness to a deed, according to the popular conception, was not necessarily one who had seen it executed, but one who was willing to give it credit by his name"; Thayer, Preliminary Treatics on Evidence, 98, citing instances; 1543, Rolfe *v.* Hampden, Dyer 53 *b*; and see another instance, since published, in the Selden Society's Select Civil Pleas, I, No. 76; see also the accounts in the German writers cited *ante*, § 1287, particularly Bresslau, pp. 536–538, 548, 790–814.

[4] 1791, Fasset *v.* Brown, Peake 23; 1805, Burrowes *v.* Lock, 10 Ves. Jr. 470, 474.

[5] *Contra:* 1844, Bailey *v.* Bidwell, 13 M. & W. 73 (an attorney attesting a petition in the Bankruptcy Court, where such attestation was required for filing; not necessary to be called); Ala. Code 1907, § 4004, par. 2 ("official bonds required to be approved or tested by a particular functionary"). *Accord:* 1916, Bybee's Estate, 179 Ia. 1089, 160 N. W. 400 (notary public).

[6] *Accord:* 1902, Hayes *v.* Banks, 132 Ala. 354, 31 So. 464, *semble* (notary's defective certificate of acknowledgment); 1903, Kelly *v.* Moore, 22 D. C. App. 9 (collecting cases); 1920, Tilton *v.* Daniels, 79 N. H. 368, 109 Atl. 145 (justice of the peace certifying to the execution of two witnesses' signatures; here a third witness was necessary, and the justice was deemed a witness; the opinion cites other precedents). *Contra:* Ala. Code 1907, § 4004, par. 6 (subscribing witness need not be produced "if the document is self-proving or properly acknowledged"); 1922, McDonough's Estate, Sup. App. Div., 193 N. Y. Suppl. 734 (notary). *Undecided:* 1907, Gump *v.* Gowans, 226 Ill. 635, 80 N. E. 1086 (notary).

In Lavretta *v.* Holcombe, 98 Ala. 503, 510, 12 So. 789 (affidavit acknowledged before a notary; held not an attesting witness requiring preference, though he might be to give validity

(4) A person who, though he sees the execution, does not *then sign*, is not an attesting witness;[7] for the object of attestation is to secure the written record of his knowledge before any doubt can arise as to its correctness.

(5) A person who attests, but is *at the time incompetent* to act as attesting witness, under the substantive law prescribing the qualities of a valid attestation, is without the scope of the rule and need not be called.[8] Whether his attestation *may* be used, by proving the signature, as evidence of execution, is another question (*post*, § 1510). Also the questions whether a *subsequently-arising* incompetency to testify exempts from production (*post*, § 1316) or invalidates the will (*post*, § 1510), involve other principles.

In all the preceding instances the rule of calling the witness does not apply, and other evidence may be used; although, the attestation being a nullity, the document may, under substantive law requiring it to be attested, be after all excluded as invalid.

(6) An *illiterate* person may be an attesting witness, subscribing by mark; but the proof of the mark may raise a difficulty (*ante*, § 693, n. 2).

(*c*) ". A party desiring to prove its execution"

§ 1293. Rule applies only in proving Execution, not in using the Document for other Purposes. The object of attestation is to provide a witness who shall be able to testify to the execution of the document by the person making it, *i.e.* to authenticate its genuineness. Hence, so far as the party is engaged in proving something about the document other than its mere execution — *e.g.* its *contents*, its *delivery*, or the like — the attesting witness is not a preferred witness.[1] For this reason, the rule does not apply where a

to a document), the distinction between the rule of substantive law and the rule of evidence seems unsound; if the official as an attester gives validity to the will, the rule of evidence applies to him, and conversely.

For the rule of substantive law as to the *sufficiency*, for purposes of attestation, of a defective or unauthorized certificate of acknowledgment, see Keely *v.* Moore, 196 U. S. 38, 25 Sup. 169 (1904), collecting the cases.

[7] *Cal.* C. C. P. 1872, § 1935 ("A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party *thereupon* signs his name"); *Ky.* 1914, McNamara *v.* Coughlin, 159 Ky. 810, 169 S. W. 555 (a witness to handwriting of a holographic will); *Minn.* 1915, Reid's Estate, Williams *v.* Reid, 130 Minn. 256, 153 N. W. 324 (under Gen. St. 1913, § 7240, as to a declaration of parentage of an illegitimate child, made "in writing and before a competent attesting witness", a person who merely sees the act of signing the document is not an attesting witness); *N. Y.* 1829, Henry *v.* Bishop, 2 Wend. 575, 577 (one who saw the execution but signed afterwards, not an attesting witness).

By the law of Georgia, an *interpreter* communicating the testator's wishes to the scrivener "must be sworn on the motion for probate": Rev. C. 1910, § 3845.

[8] 1848, Doe *v.* Twigg, 5 U. C. Q. B. 167, 170 ("the attestation . . . is a mere nullity", and the maker's execution is to be proved otherwise); 1853, Packard *v.* Dunsmore, 11 Cush. 283, 285 (may be proved "as if there had been no attesting witness").

The following case is peculiar, but seems sound; 1849, Potts *v.* House, 6 Ga. 324, 346 (a negro, incompetent as a witness, was the interpreter making a will, and was required to be called; perhaps under the statute cited *supra*, n. 7).

§ 1293. [1] Besides the following cases, the authorities to the same effect, for proof of *execution in general*, cited *post*, § 2132, would be applicable; *Ky.* 1837, Hancock *v.* Byrne, 5 Dana Ky. 513 (identifying a note; on the theory that the writing itself is better than a witness, calling the witness held not necessary); *Mass.* 1879, Skinner *v.* Brigham, 126 Mass. 132 (trover for chattels obtained from the plaintiff in exchange for an invalid deed by third persons purporting to convey certain

deed is used to show color of title or extent of claim by one claiming title through adverse possession (*post*, § 1778); for the claimant does not rest upon the authenticity of the deed, but upon its contents as embodying the extent of his claim.[1] Whether the rule should apply to one who desires to *disprove the genuineness* of a document is a difficult question;[2] but it would seem that, since by hypothesis the party alleging its execution must already have been excused or exempted from producing the witness, the party denying should not be put in a less favorable position, and the rule should not apply.

(*d*) "Against an opponent entitled in the state of the issues to dispute execution"

§ 1294. **Execution not Disputable** (1) **because of Estoppel or other rule of Substantive Law.** Where the opponent by his prior conduct is *estopped* from denying execution, the execution cannot be put in issue by him, and the party offering the document need not in any manner evidence its execution (*post*, § 2132). Since the production of the attesting witness is required solely for the purpose of evidencing execution, the rule of production therefore does not apply.[1] For the same reason, whenever a rule of substantive law forbids the execution to be denied, the rule does not apply; and this seems to include the case of a document whose execution the opponent was *officially bound* to secure and can therefore not now deny.[2]

§ 1295. **Execution not Disputable** (2) **because of the rule of Pleading.** So far as any rule of pleading requires that the execution of a document named in the declaration must be expressly traversed, the failure to plead in denial must, under such a rule, be equivalent to a confession of the allegation of exe-

land; witnesses not required, because the delivery of a paper, not the signing of a deed was to be proved); *Mich.* 1873, Eslow *v.* Mitchell, 26 Mich. 500, 502 (not required in proving contents); 1875, Raynor *v.* Norton, 31 Mich. 210, 213 (same); *Mo.* 1830, Foster *v.* Wallace, 2 Mo. 231 (that a co-signer of a bond had executed merely as surety for the other; production not required); *Pa.* 1813, Heckert *v.* Haine, 6 Binn. 16, 17 (to prove a written receipt the witness must be called, but not to prove the fact of payment); 1824, Babb *v.* Clemson, 10 S. & R. 419, 426 (same, for a bill of sale); 1826, Wishart *v.* Downey, 15 S. & R. 77, 79 (same, for a receipt); *Vt.* 1836, Harding *v.* Craigie, 8 Vt. 501, 508 (a note signed by three persons, with S. as witness; to prove that S. in fact witnessed only one signature, and that the others were added after attestation, S. need not be called).

[1] 1854, Jordan *v.* Faircloth, 13 Ga. 544 (not applicable to one calling the maker to deny the genuineness of a deed in his name); 1856, Stamper *v.* Griffin, 20 Ga. 312, 320 (claim of adverse possession under a bond in the name of Z., but admitted to have been forged; claimant must call witness, "whether the object be to prove that a writing is genuine or that it is spurious", since he "is the person who knows better than all others that the writing is genuine, if it is genuine, and spurious, if it is spurious"); 1859, Wells *v.* Walker, 27 Ga. 450, 452 (deed read by defendant to jury without producing witnesses; plaintiff may then, to deny execution, call a witness other than the subscribing ones; on the principle that he should be no worse off than if defendant had not been exempted from calling them).

§ 1294. [1] 1849, Perry *v.* Lawless, 5 U. C. Q. B. 514 (representations as to genuineness of a note, made before the plaintiff's purchase).

[2] 1822, Scott *v.* Waithman, 3 Stark. 168 (action against a sheriff for taking insufficient sureties on a replevin bond; the sheriff's duty being to take the bond, the due execution was taken as admitted by him); Ga. Rev. C. 1910, § 5833 (rule not applicable to "office bonds required by law to be approved or tested by a particular functionary").

cution in the declaration, and thus the execution is not in issue on the trial, and the present rule does not apply. Accordingly, at common law, so far as a plea of 'non est factum', or other form of *specific traverse* distinct from the general issue, was required for putting the execution into issue, and of course so far as the opponent failed to plead the general issue or any specific traverse, the rule for calling the attesting witness did not apply,[1] though no liberality was shown in interpreting this principle.[2]

In more recent times, and since the improvement of common-law pleading, the place of this principle has generally been taken by statutory enactments expressly providing that the opponent's *failure to put in issue* a document whose execution is alleged in the opponent's pleading shall be taken as an admission of its execution, and the execution cannot be denied. These statutes provide for the joining of issue sometimes merely in the pleading, sometimes additionally by affidavit; but the principle and the effect are practically the same in all. These statutes, and the decisions interpreting them, involve a rule of pleading, and are therefore without the present purview.[3]

§ 1296. **Execution not Disputable** (3) **because of Judicial Admission.** For the purposes of proof, a judicial admission of the opponent — *i.e.* an express agreement for the purposes of the trial — has the same effect as a failure to plead in denial; it is a waiver of proof on the subject (*post*, § 2588). Hence when a document's execution is judicially admitted, the present rule does not apply.[1] Such judicial admissions, however, must be distinguished from

§ 1295. [1] 1818, Cooke *v.* Tanswell, 8 Taunt. 450 (Gibbs, C. J.: "In cases where 'non est factum' is not pleaded, . . . I never yet heard it contended that it was necessary to call the subscribing witness").

[2] 1811, Williams *v.* Sills, 2 Camp. 519 (Ellenborough, L. C. J.: "The defendant by refraining from the plea of 'non est factum' has only admitted so much of the deed as is expanded upon the record; and if the plaintiff would avail himself of any other part of the deed, he must prove it by the attesting witness in the common way"); 1838, Gillett *v.* Abbott, 7 A. & E. 783 (a plea admitting the execution of a deed of indemnity sued on, the deed's recital setting out in part a deed of trust, does not dispense with the witness to the deed of trust); 1841, Jackson *v.* Bowley, Car. & M. 97 (on an issue of 'plene administravit', in an action against an executor, the witness to a deed to the testator must be called).

[3] They are further noticed under *Judicial Admissions* (*post*, § 2594).

The curious result may occur, where such a statute exists, and where the limitation about documents incidentally in issue (*ante*, § 1290) does not exist, that the essential documents in the case need not be authenticated at all, while minor documents must be proved according to the rigor of the present rule; *e.g.* 1826, Roberts *v.* Tennell, 3 T. B. Monr. 247, 250.

Distinguish the following: 1878, Holden *v.* Jenkins, 125 Mass. 446 (failure to deny a signature, under a statute requiring a specific denial, does not relieve from proof of the attesting witness' signature for the purpose of availing of a longer statutory bar for attested documents; but "might relieve" from calling the witness to prove the maker's signature).

§ 1296. [1] 1800, Laing *v.* Kaine, 2 B. & P. 85 (warrant of attorney; since "it appeared that the defendant did not merely acknowledge the instrument, but agreed [for the purpose of legal proceedings] that the plaintiff should act upon it as if the witness himself had been produced", the calling was not required); 1839, Bringloe *v.* Goodson, 8 Scott 71, 83, per Tindal, C. J.; 1885, Coleman *v.* State, 79 Ala. 49; 1890, Richmond, etc. R. Co. *v.* Jones, 92 Ala. 226, 9 So. 276; 1893, Hawkins *v.* Ross, 100 Ala. 459, 464, 14 So. 278; 1881, Jones *v.* Henry, 84 N. C. 320, 323; 1834, Grady *v.* Sharron, 6 Yerg. Tenn. 320, 321, 324 (admission by counsel exempts from calling witnesses).

Contra, but clearly wrong: 1844, Hylton *v.* Hylton, 1 Gratt. Va. 161, 165 (admission, during trial, of the due execution of a will, not sufficient to dispense with the testimony required by law).

The following statute goes upon this principle: *Mass.* Gen. L. 1920, c. 192, § 2 (if a will-probate is "assented to in writing" by all heirs, etc., "it may be allowed without testimony").

ordinary or extra-judicial admissions, with which they have nothing in common except the name. The use of the latter sort in the present connection raises a different question (*post*, § 1300).

§ 1297. **Execution not Disputable (4) because of Opponent's Claim under the Same Instrument.** Where the opponent's claim, as expressly set forth in the pleadings or as developed in the course of proof, predicates the genuineness of the very document which the proponent now desires to prove, it is clear that the former is in precisely the same situation as if he had by pleading or by judicial admission conceded the document's execution. It is obviously inconsistent for him to assert its execution as an element of his present claim or defence, in one part of the proceedings, but in another part in effect to deny the execution by putting the proponent upon proof of it. So long as the opponent maintains the former attitude, he must relinquish the latter one; so long as the document is genuine for his purposes, it is also (so far as he is concerned) genuine for the proponent's purposes. The execution thus not being disputable, the rule requiring the attesting witness to prove it does not apply.

This has long been judicially conceded;[1] although the precise terms defin-

§ 1297. [1] ENGLAND: 1726, Gilbert, Evidence, 98 (a claim by the opponent under a deed A reciting a deed B exempts from proof of deed B); 1818, Knight *v.* Martin, Gow 26 (assignor against assignee of a lease; the defendant's possession of the instrument, claiming under it, dispenses with the witness); 1819, Gorton *v.* Dyson, 1 B. & B. 219, 221 (action against executors; their claim under the will, held to dispense with calling the witnesses); 1821, Orr *v.* Morice, 3 B. & B. 139; 6 Moore 347 (action for use and occupation against assignees in bankruptcy; the production by the defendants of the assignment, together with their occupation of the premises, held a "claim of beneficial interest", and the witness dispensed with); 1826, Doe *v.* Deakin, 3 C. & P. 402; 1826, Burnett *v.* Lynch, 8 D. & R. 368, 375, 5 B. & C. 589, 600, 604 (action on the covenants of a lease, by the lessee against the assignee, who had himself assigned to a third person; per Bayley, J., "if a party has taken under a deed all the interest which the deed is calculated to give", he cannot dispute execution); 1826, Doe *v.* Hemming, 9 D. & R. 15 (lease to a defendant by an ancestor of the plaintiff in ejectment; the plaintiff had obtained possession of the document and refused to produce or show it until the trial; no proof of execution required, because the plaintiffs "intended to derive a benefit from the possession of the lease, and their conduct . . . was such as clearly admitted its validity"); 1831, Bradshaw *v.* Bennett, 1 Moo. & Rob. 143, 5 C. & P. 48 (action to get back a deposit on a sale rescinded; the rule dispensed with as to the agreement of sale, the defendant being one "taking an interest" under it); 1835, Doe *v.* Wilkins, 4 A. & E. 86 (ejectment, the defendant claimed under a deed which the plaintiff offered; extrinsic evidence to show this claim held proper, and proof of execution dispensed with); 1835, Carr *v.* Burdiss, 1 C. M. & R. 782, 784 (trover for goods taken under a fraudulent assignment; the defendants pleaded the assignment; the plaintiff not required to call the witness to prove it, even though he was impeaching it as fraudulent; "the object which the parties have in calling for its production" is immaterial); 1836, Doe *v.* Wainwright, 1 Nev. & P. 8, 12 (ejectment, defendant possessing and claiming under a deed offered by the plaintiff; witness dispensable); 1839, Bringloe *v.* Goodson, 8 Scott 71, 83 (will; calling dispensed "where the will is recited in a deed under the seal of the party and some advantage is taken by him under it"); 1843, Bell *v.* Chaytor, 1 C. & K. 162 (action on a contract to employ; the defendant's claim that the contract was not broken held to dispense with the witness); 1810, Pearce *v.* Hooper, 3 Taunt. 60 (cited *post*, § 1298, n. 2).

CANADA: 1851, Chisholm *v.* Sheldon, 2 Grant U. C. 178 (conveyance produced by an opponent claiming an interest thereunder; no proof of execution necessary).

UNITED STATES: *Fed.* 1827, Rhoades *v.* Selin, 4 Wash. C. C. 715, 719 (admissible without authentication, if the opponent producing is "a party to it or claims a beneficial interest under it"); *Cal.* C. C. P. 1872, § 1941 (quoted *post*, § 1302); *Ga.* 1860, Herring *v.* Rogers, 30 Ga. 615, 617 (production by opponent, and claim under it, sufficient); Rev. C. 1910, § 5832 ("The production of the paper by

ing the situation are not uniformly expressed, and the application of the principle to particular states of facts is open to more or less difference of opinion.

§ 1298. **Same: Execution Disputable, and Rule Applicable, where the Opponent merely Produces the Instrument, without Claiming under it.** Towards the end of the 1700s a doctrine was started that, where the document to be proved was in *possession* of the opponent, and was *produced by him* on notice, the proponent need not prove its execution, and therefore, of course, need not call the attester.[1] This singular doctrine was placed, in the first ruling, on the ground that the proponent would have been ignorant of the attester's name, and therefore the attester was in effect unavailable (on the principle of § 1314, *post*). But in later rulings it seems to have been supported rather on a confused notion of its identity with the principle just considered (in § 1297), *i.e.* the opponent's claim under the document. This latter ground is certainly unsound; for there is an essential difference between the opponent's mere custody of the document and his making claim under it; the former can never in itself be equivalent to a judicial admission of genuineness. The earlier reason is scarcely more tenable. The proponent's ignorance of the names might have been remedied by a bill for discovery, or by a motion for a continuance after learning the names on production; under modern statutes, the names could always be learned by demanding inspection before trial. Moreover, it is difficult to see why, even if the ignorance was irremediable, the proponent should be excused from all proof of execution; he might be excused from calling the attesters, but not from making some other proof of execution; there is a hiatus here, which indicates that this earlier reason was not so much the real one as the later one, above noted. Finally, as a matter of policy, it does not seem fair that an opponent who happens to possess a document should be obliged to have it taken against him as genuine merely because of that chance possession. The doctrine, in short, can only

the opposite party, if he claims any benefit under it, dispenses with the necessity of proof"); 1905, McBrayer *v.* Walker, 122 Ga. 245, 50 S. E. 95 (administrator of grantee, claiming under the deed; the grantor allowed to use without authentication an admission of usury indorsed by the grantee on the deed); *Haw.* 1898, Brown *v.* Mendonca, 12 Haw. 249, 251 (production by the opponent, claiming "any interest of a substantial and abiding nature", even though not concerning the subject of the suit, suffices); *Ky.* 1821, Lewis *v.* Ringo, 3 A. K. Marsh. 247; 1857, McGregor *v.* Wait, 10 Gray 72, 73, 75 (plea of a right of way in an action of trespass; rule not applied to plaintiff's proof of deed under which defendant claimed); *N. Y.* 1819, Jackson *v.* Kingsley, 17 Johns. 158; *P. I.* C. C. P. 1901, § 325 (like Cal. C. C. P. § 1941); *P. R.* Rev. St. & C. 1911, § 1456 (like Cal. C. C. P. § 1941); §§ 1548–1557 ("closed" or olographic wills; special rules, based on the Spanish law); *Tenn.* 1829, Duncan *v.* Gibbs, 1 Yerg. 256, 259 (plaintiff used a deed to defendant to prove D. incompetent for defendant as warrantor; held that defendant could use the deed though not legally recorded so as to prove execution).

§ **1298.** [1] 1787, R. *v.* Middlezoy, 2 T. R. 41 (pauper settlement; the other parish proving a hiring in M. parish, the latter in rebuttal claimed a prior apprenticeship of the pauper in the former, and gave notice to produce the indenture; but, on its production by the opponent, offered no evidence of execution; held, unnecessary; Buller, J.: "In civil actions . . . the deed when produced [from the opponent's custody] must 'prima facie' be taken to be duly executed, because the plaintiff, knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution of the deed; therefore, an instrument coming out of the hands of the opposite party must be taken to be proved"; and two such unreported rulings of Lord Mansfield were cited).

be termed, in the language of Mr. Justice Washington, "a kind of legal legerdemain."

After some fluctuation of rulings the doctrine of R. *v.* Middlezoy was in England finally repudiated.[2] It had already obtained some footing in this country;[3] but it has also been discountenanced in as many jurisdictions;[4] though the question has seldom come up for adjudication.

(Where the opponent *refuses to produce*, or otherwise suppresses the document, it would seem that his refusal would certainly (on the principle of § 291, *ante*) be some evidence of the document's genuineness, and might fairly dispense with the rule requiring production of the attester.[5]

[2] *England:* 1793, Bowles *v.* Langworthy, 5 T. R. 366 (R. *v.* Middlezoy approved; trover by assignees in bankruptcy; here the defendant had produced at the commissioners' hearing a bill of sale, claiming under it); 1807, Johnson *v.* Lewellin, 6 Esp. 101 (Ellenborough, L. C. J., thought that R. *v.* Middlezoy "appeared to have been decided without due consideration", and declined to follow it); 1807, Gordon *v.* Secretan, 8 East 548 (Ellenborough, L. C. J., "said that the case of R. *v.* Middlezoy, which was much questioned at the time, had been since overruled"; the production by the opponent "did not supersede the necessity of proving it by one of the subscribing witnesses, if any, as in ordinary cases"; counsel argued the difficulty of learning the names of the witnesses; but the Court pointed out that this was outweighed by the disadvantage that, "however questionable its execution might be, and even though he [the opponent] had impounded it because it was forged or had been obtained by fraud", yet the mere possession would in that case suffice to authenticate it; but a stay was granted to give an opportunity to call the witnesses); 1809, Wetherston *v.* Edgington, 2 Camp. 94 (Heath, J.: "The old rule was the sensible one, that an instrument coming from the opposite side was 'prima facie' taken to be duly executed"; but he conceded that the rule had been changed); 1810, Pearce *v.* Hooper, 3 Taunt. 60 (trespass for entering a close in C.; the defendant called for the deed of C., which would show that the close was not the plaintiff's; attesting witnesses unnecessary); 1821, Orr *v.* Morice, 3 B. & B. 139, C. P. (the fluctuations in the preceding rulings reviewed; Pearce *v.* Hooper regarded as taking a middle ground, *i.e.* possession, plus the claim of a beneficial estate; per Dallas, C. J., and Richardson, J., Gordon *v.* Secretan held to represent the law, qualified by Pearce *v.* Hooper; per Burrough, J., R. *v.* Middlezoy was still law; per Park, J., undecided on that point); 1826, Burnett *v.* Lynch, 8 D. & R. 368, 375 (lessee against assignee of the lease, who had assigned to D.; admitted "coming as it did out of the hands of the defendant, or of a person who claimed under him", per Holroyd, J.; "the deed came out of the possession of the party", per Bayley, J.); 1841, Collins *v.* Bayntun, 1 Q. B. 117 (assumpsit for money had and received; plea, partnership; an alleged agreement of partnership, proved by the defendant, but produced by the plaintiff; the witness held indispensable).

Canada: 1844, Joplin *v.* Johnston, 2 Kerr N. Br. 541 (mere production not sufficient).

[3] *Cal.* C. C. P. 1872, § 1941 (quoted *post*, § 1300); *Ga.* 1884, Hobby *v.* Alford, 73 Ga. 791; *Ky.* 1828, Stevenson *v.* Dunlap, 7 T. B. Monr. 134, 137, *semble*; *N. Y.* 1815, Betts *v.* Badger, 12 Johns. 223 (the practice here "has been in conformity with what Mr. J. Heath calls the old rule", *i.e.* of R. *v.* Middlezoy; "if the party producing the instrument is one of the parties to it", this dispenses with proof of execution); *N. Car.* 1898, Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884 (deed and bond produced on order by defendants, presumed genuine); *P. I.* C. C. P. 1901, § 325 (like Cal. C. C. P. § 1941); *P. R.* Rev. St. & C. 1911, § 1456 (like Cal. C. C. P. § 1941).

[4] 1827, Rhoades *v.* Selin, 4 Wash. C. C. 715, 719 (production of an instrument by one who is a party to it and claims a beneficial estate under it, necessary to dispense); 1819, Jackson *v.* Kingsley, 17 John. 158; 1859, Hill *v.* Townsend, 24 Tex. 575, 580, *semble*.

Delaware has added an interesting quibble to the rule: 1914, Saulsbury *v.* American V. Fibre Co., 5 Del. 182, 91 Atl. 536 (where a document is produced by the opponent upon a common-law notice to produce, and the calling party inspects it, and desires to use it, "it becomes evidence without further proof"; but where the document is produced by order of the court, under the statute adopting chancery discovery on motion, the calling party "must prove it just as though he had been in possession of it himself").

[5] 1818, Cooke *v.* Tanswell, 8 Taunt. 450 (the opponent refused to produce on notice; "if he wished to throw on the plaintiff the burthen of calling the subscribing witness, he might have produced the deed"); 1838, Poole *v.* Warren, 3 Nev. & P. 693 (copy of a notice to quit; proof of execution not neces-

(*e*) " Must, before using other evidence"

§ 1299. **Attester preferred to any Third Person, including the Maker of the Document.** By the very notion of a rule of preference, the rule for an attester's testimony prefers it in priority over the testimony of any *other person present* and observing the execution of the document.[1]

But is the rule so rigid that even the testimony to execution of the person actually purporting to be the *maker of the document* (not being a party to the suit) is not to dispense with the calling of the attester? Such was the orthodox acceptance:

1815, ELLENBOROUGH, L. C. J., in *R.* v. *Harringworth*, 4 M. & S. 350 (pauper-settlement; the pauper's own testimony, not a party to the suit, to his indenture, excluded): "The rule is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by trying whether in its application it may not be productive of some inconvenience."

This extreme result has been maintained in England and in some American jurisdictions.[2] But there seems no good reason for it. It partakes of the pedantic and the obstinately technical to insist on the calling of the attester when the very person whose execution is to be proved is willing to take the responsibility of charging himself on oath with the act of execution. That he may possibly be a partisan of the proponent's is no more reason for excluding him than for excluding any other partisan witness, and is no more likely to be the case with his testimony than with that of the attester:

1858, ROBERTS, J., in *White* v. *Holliday*, 20 Tex. 679, 682: "When are they [the witnesses] needed? Are they needed at all when the parties are both agreed upon the same thing, about the execution and objects of the contract, and have no issue or dispute in relation to it? If it be an essential element in their creation and capacity that they must be produced when the parties are agreed, a party litigant cannot admit his deed by plea or other writing filed in court; [yet] that has never been doubted. . . . By what stronger evidence can it be made to appear that the parties to the deed do agree about its execution

sary, following Cooke *v.* Tanswell). This effect would certainly follow under those statutes in some jurisdictions (*ante*, § 1295, *post*, § 1859) by which an opponent may be defaulted for refusal to produce on notice.

§ **1299**. [1] 1856, Tudor *v.* Tudor, 17 B. Monr. Ky. 383, 390 (will not provable by draughtsman); 1823, Labarthe *v.* Gerbeau, 1 Mart. N. s. La. 486 (attester preferred even to the testimony of the parish judge certifying it); 1855, Barry *v.* Ryan, 4 Gray Mass. 523 (excluding proof by another person present). *Contra:* 1895, Garratt *v.* Hanshue, 53 Oh. 482, 42 N. E. 256 (not preferred to the officer taking the acknowledgment of the maker).

[2] *England:* 1794, Johnson *v.* Mason, 1 Esp. 89 (maker of the deed under which the plaintiff held); 1815, R. *v.* Harringworth, *supra:* 1853, Whyman *v.* Garth, 8 Exch. 803 (maker of a deed); *U. S. Ala.* 1881, Coker *v.* Ferguson, 70 Ala. 284, 286, 288; 1882, Russell *v.* Walker, 73 Ala. 315, 317 (mortgagor for mortgagee); 1913, Swindall *v.* Ford, 184 Ala. 137, 63 So. 651; *Ga.* 1849, Tyler *v.* Stephens, 7 Ga. 279 (grantor); 1889, Baker *v.* Massengale, 83 Ga. 137, 142, 10 S. E. 347 (maker's testimony, as assignor to plaintiff); 1895, Fletcher *v.* Perry, 97 Ga. 368, 23 S. E. 824; *Ind.* 1844, Sampson *v.* Grimes, 7 Blackf. 176; *Ky.* 1808, Reading *v.* Metcalf, Hardin 535 (release to interested witness; releasee's proof of execution not sufficient); 1816, Brashear *v.* Burton, 4 Bibb 442; 1820, M'Clain *v.* Gregg, 2 A. K. Marsh, 454, 456, *semble;* 1821, McIntire *v.* Funk, Litt. Sel. C. 425, 427; 1823, Rees *v.* Lawless, 4 Litt. 218; 1826, McMurtry *v.* Frank, 4 T. B. Monr. 34; *Mass.* 1862, Brigham *v.* Palmer, 3 All. 450 (mortgagee calling a mortagor in an action against third person; excluded); *Mo.* 1847, Glasgow *v.* Ridgeley, 11 Mo. 34, 39.

(and thereby dispense with the subscribing witnesses) than for the grantee to assert the execution in his petition and to procure the grantor to appear in open court on the trial and as a witness swear to the execution as alleged by the grantee? . . . [After pointing out that fraud, lack of consideration, etc., were not in issue and therefore the testimony of a witness could not be better than that of the disinterested grantor,] . . . This is not an exception under the rule that the subscribing witnesses must be called or accounted for, but a case above the rule and superseding it, and in accordance with that which enjoins that the best evidence must be adduced."

This desirable view has been accepted in a number of jurisdictions.[3] It is occasionally put on the ground of the statutory abolition of parties' disqualifications; but this is erroneous, for at common law the maker, though not incompetent by interest, was nevertheless excluded. If the attesting witness is called, but *fails to testify* (*post*, § 1302), the maker's testimony is then receivable.[4]

§ 1300. **Attester preferred to Opponent's Extra-judicial Admissions.** If the opponent has extra-judicially admitted the execution of the document, need the rule requiring the attester's testimony still apply? The distinction between a judicial or solemn admission and an ordinary or circumstantial admission (*ante*, §§ 1048, 1057) is here important; the former is an absolute waiver of proof on the whole matter, and relieves the proponent from offering any evidence of execution (*ante*, § 1296); the latter is simply an inconsistent utterance, offerable as one piece of evidence, going with the other evidence to discredit the opponent's present claim. The proponent is therefore here not relieved from proving execution; but the question is whether, of the various sorts of evidence available to him, he must employ the attester's testimony in preference to the extra-judicial utterances of his opponent. These utterances, it may be observed, if receivable, are equally receivable whether the opponent was (as usually) himself the maker of the document or not; in the former case they are more probative; but they come in, if at all, not because he was the maker, but because he is the opponent in the suit.

Now, so far as concerns their practical trustworthiness, for the purpose of dispensing with the attesting witness, it is to be observed, as already noticed

[3] *Ala.*: Code 1907, § 4006 ("The execution of any instrument of writing attested by witnesses may be proved by the testimony of the maker thereof, without producing or accounting for the absence of the attesting witnesses"); § 4004, par. 5 (attester need not be produced "if the party executing the instrument testifies to its execution"); 1902, Hayes *v.* Banks, 132 Ala. 354, 31 So. 464 (statute applied); 1904, Ballow *v.* Collins, 139 Ala. 543, 36 So. 712 (statute applied; see the citation *ante*, § 1290, n. 4); *Ga.* Rev. C. 1910, § 5833 (attester not required if the maker "testifies to its execution"); 1904, Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348 (statute applied); *Mo.* 1874, Bowling *v.* Hax, 55 Mo. 447, 448, *semble*; *N. Y.* 1813, Jackson *v.* Neely, 10 John. 374, 376 (deed; testimony of the maker sufficient); *Oh.* 1895, Garrett *v.* Hanshue, 53 Oh. 482, 42 N. E. 256; *Tex.* 1858, White *v.* Holliday, 20 Tex. 679 (grantor of a deed, not a party, called to stand; witnesses dispensed with); 1878, Wiggins *v.* Fleishel, 50 Tex. 57, 63 (preceding case approved; but the grantee's testimony held not to dispense with subscribing witnesses); 1879, Texas Land Co. *v.* Williams, 51 Tex. 51, 59 (approving the preceding case; but making an exception where the deed is lost; the distinction rests on a misunderstanding of the phrase "secondary evidence").

[4] 1896, Kelly *v.* Sharp S. Co., 99 Ga. 393, 397, 27 S. E. 741 (maker's testimony received, where witnesses were called but could not prove execution).

in dealing with the same evidence for proving a document's contents (*ante*, § 1255), that the real objection to them rests only on the possibility of fabricated testimony to oral admissions. The possibility of error in an opponent's actual admission of the document's execution is very small. If in a writing produced to the Court, such an admission clearly appears to have been made, there is no reason why such evidence should not serve at least to dispense with the evidence of the attesting witness. But where the alleged admission is an oral utterance, and the opponent denies it, and the testimony of some witness has to be believed before we can assume that the admission was really uttered, here it seems less desirable to abandon the ordinary preference for the attesting witness and to replace it by evidence open to such uncertainties. In short, where the supposed admission is contained in a writing produced to the Court, it should suffice to dispense with the attesting witness; but not where it is alleged as a mere oral utterance and is denied by the opponent.

The rulings have been by no means harmonious. No express and final settlement of the point seems to have been reached in England; but apparently a *written admission* was sufficient to dispense; and there is some authority to the same effect for an *oral admission*.[1] In the United States the distinction between a written and an oral admission has seldom been taken, and the majority of Courts do not allow extra-judicial admissions to dispense with the rule.[2]

§ 1300. [1] 1701, Dillon *v.* Crawly, 12 Mod. 500 (the witness to a deed was subpœnaed but did not appear; an indorsement of the party himself on the deed, acknowledging it, was offered, but objected to; Holt, C. J.: "Can there be better evidence of a deed than to own it and recite it under his hand and seal?"; and all the Court agreed); 1779, Abbot *v.* Plumbe, 1 Doug. 216 (a bankrupt's extra-judicial oral acknowledgment of a bond, excluded, in an action of trover by the assignees, who wished to prove the petitioning creditor's debt); 1793, Bowles *v.* Langworthy, 5 T. R. 366 (trover by assignees in bankruptcy against one holding under a sale; to prove the bill of sale, as an act of bankruptcy, the defendant's admissions as to its execution were received; Abbot *v.* Plumbe distinguished because the defendant was there no party to the document); 1811, Jones *v.* Brewer, 4 Taunt. 46, *semble* (admissions excluded); 1841, Wollaston *v.* Hakewill, 3 Scott N. R. 593, 617 (a memorial — or recorded copy — of a deed, made by one of the parties, apparently held to dispense); 1845, Lord Gosford *v.* Robb, 8 Ir. L. R. 217 ("no admission of a party" can dispense; here, certain conduct of a landlord held not to dispense with the proof of a power of attorney to execute the lease); 1845, Fishmongers' Mistery *v.* Robertson, 1 C. B. 60, 74 (undecided); same case, 6 C. B. 896, 903 (a subsequent memorandum on a contract, admitting execution, held to dispense); 1856, Houghton *v.* Koenig, 18 C. B. 235, 238, *semble* (the acknowledgment by the lease, in the counterpart, of the holding on the terms of the lease is sufficient authentication of the lease).

[2] *Federal:* 1802, Smith *v.* Carolin, 1 Cr. C. C. 99 (admissions excluded); 1820, Turner *v.* Johnson, 2 id. 202 (same); 1848, Savage *v.* D'Wolf, 1 Blatchf. 343 (party's admission of contract not under seal, sufficient, by N. Y. law); *Alabama:* 1833, Bennet *v.* Robinson, 3 Stew. & P. 227, 240 (note; admissions by the maker, defendant's intestate, not sufficient; Hall *v.* Phelps, N. Y., repudiated; a well-reasoned opinion); 1882, Russell *v.* Walker, 73 Ala. 317 (admissions excluded); 1885, Coleman *v.* State, 79 Ala. 49 (mortgage; oral admissions of mortgagor-defendant, not 'in justicio', excluded); 1890, Richmond, etc. R. Co. *v.* Jones, 92 Ala. 226, 9 So. 276 (admissions excluded); 1893, Hawkins *v.* Ross, 100 Ala. 459, 464, 14 So. 278 (same); 1903, Sledge *v.* Singley, 139 Ala. 346, 37 So. 98 (Code § 1797, quoted *ante*, § 1299, n. 3, applies only to testimony on the stand or by deposition; hence the alleged maker's extra-judicial admissions do not dispense with calling the attester of a deed); 1905, Lewis *v.* Glass, — Ala. —, 39 So. 77 (admissions excluded); *California:* 1863, Holborn *v.* Alford,

Distinguish here, however, (1) the exclusion of oral *admissions of title*, forbidden because in effect violating the Statute of Frauds (*ante*, § 1257); (2) the case of an attesting witness testifying to the maker's *oral acknowledgment* of execution on the faith of which the attester signs in attestation;[3] here the rule is satisfied by calling the witness, and the maker's acknowledgment is an adoption of his previously-placed signature and is itself equivalent to execution in the attester's presence (*ante*, § 1292).

§ 1301. **Attester preferred to Opponent's Testimony on the Stand.** When the opponent also becomes *witness as well as opponent* — *i.e.* when he is placed upon the stand or makes discovery on interrogatories — and thus his utterances are not only ordinary admissions but also testimony, the objections against dispensing from the rule disappear entirely. The principal objection

22 Cal. 482, 484 (note; Hall *v.* Phelps, N. Y., apparently approved); C. C. P. 1872, § 1942 (where "evidence is given that the party against whom the writing is offered has at any time admitted its execution", it is enough if the writing is more than 30 years old or is "produced from the custody of the adverse party and has been acted upon by him as genuine"; this clause unites in hopeless confusion several distinct principles, and it is not worth while to attempt to disentangle them; the Commissioners' amendment of 1901 correctly drew the section, by substituting for the entire sentence the following: "A writing may also be proved by evidence that the party against whom it is offered has at any time admitted its execution, or by evidence that it is produced from his custody and has been acted upon by him as genuine"; but this amendment never became law); *Connecticut:* 1794, Low *v.* Atwater, 2 Root 72 (admissions excluded); *Georgia:* 1851, Ellis *v.* Smith, 10 Ga. 253 (same); 1871, Mills *v.* May, 42 Ga. 623 (same); *Idaho:* Comp. St. 1919, § 7966 (like Cal. C. C. P. § 1942, omitting the clause for ancient documents); *Kentucky:* 1816, Fearn *v.* Taylor, 4 Bibb 363, 365 (admissions of predecessor in title; "perhaps" witnesses must be called; here there were none); 1817, Cartmell *v.* Walton, 4 Bibb 488 (oral admission by defendant, excluded); 1828, Stevenson *v.* Dunlap, 7 T. B. Monr. 134, 137 (admissions of predecessor used on the facts); *Missouri:* 1826, Smith *v.* Mounts, 1 Mo. 671 (acknowledgment by maker of deed, excluded); *Montana:* Rev. C. 1921, § 10590 (like Cal. C. C. P. § 1942); *New Hampshire:* 1848, Cram *v.* Ingalls, 18 N. H. 613, 617 (recognition, in a deed, of an attested mortgage, evidence of its execution); *New York:* 1807, Hall *v.* Phelps, 2 John. 451 ("An instrument, though attested by a subscribing witness, may be proved by the confession of the party who gave it"; here a note, by the defendant's extra-judicial admission); 1808, Fox *v.* Reil, 3 John. 477 (a bond by the defendant; admissions excluded; Kent, C. J., distinguished the ruling in Hall *v.* Phelps as applying only to a note; "the rules of evidence may be more safely relaxed in the one case than in the other"); 1819, Shaver *v.* Ehle, 16 John. 201 (note orally admitted genuine by the defendant-maker; excluded, because the admission did not relate specifically to the note offered); 1824, Rowley *v.* Ball, 3 Cow. 303, 311 (similar admissions held sufficient, because applying to the specific note); 1835, Corbin *v.* Jackson, 14 Wend. 619, 623, 630 (oral admissions of the execution of an attested power of attorney, held sufficient; Tracy, Sen., diss.); 1844, Hollenback *v.* Fleming, 6 Hill 303, 305 ("confession or acknowledgment of the party" will not dispense); *North Carolina:* 1881, Jones *v.* Henry, 84 N. C. 320, 323 ("as a general rule", the admission of an obligor is not sufficient); *Ohio:* 1827, Zerby *v.* Wilson, 3 Oh. 42 (contract affecting realty; defendant's admissions not dispensatory); 1877, Warner *v.* R. Co., 31 Oh. St. 265, 270 (grantor's admissions, held not dispensatory); 1895, Garrett *v.* Hanshue, 53 Oh. St. 482, 42 N. E. 256 (same); *Oregon:* Laws 1920, § 786 (like Cal. C. C. P. § 1942); *Pennsylvania:* 1804, Taylor *v.* Meekly, 4 Yeates 79 (oral and written admissions received, where one witness could not remember and the others seemed fictitious); 1849, Williams *v.* Floyd, 11 Pa. St. 499 (promissory note; admissions before a justice, sufficient, following Hall *v.* Phelps, N. Y.); *Philippine Islands:* C. C. P. 1901, § 326 (quoted *post*, § 2132); *Porto Rico:* Rev. St. & C. 1911, § 1457 (like Cal. C. C. P. § 1942 as sought to be amended in 1901); *Rhode Island:* 1852, Kinney *v.* Flynn, 2 R. I. 319, 323 (admissions excluded); *Utah:* Comp. L. 1917, § 7112 (like Cal. C. C. P. § 1942, omitting the clause as to ancient writings); *Vermont:* 1802, Adams *v.* Brownson, 1 Tyl. 452 (note by deceased partner of defendant; deceased partner's admission allowed to dispense with witness); 1839, Hodges *v.* Eastman, 12 Vt. 358 (admission of note's execution, receivable in action on promise to pay in consideration of the note).

[3] 1794, Powell *v.* Blackett, 1 Esp. 97.

(noted *ante*, § 1300), that his extra-judicial oral admissions may be evidenced by fabricated testimony, is here of no force, for his testimony to the execution is delivered in the very presence of the tribunal. It is an excess of pedantry to insist on the production of the attester when the opponent himself (usually also the maker of the document) can be found testifying, on the stand or in a sworn answer, to the desired fact of execution. Nevertheless, this insistence is found in a number of jurisdictions;[1] though others properly here dispense with the rule and do not require the calling of the attester.[2] The latter result has sometimes been reached as a supposed consequence of the statutory abolition of parties' incompetency (though erroneously, for the question could and did come up at common law in regard to an answer obtained by a bill of discovery); the effect thus being, on this supposition, to admit also (for example) the testimony on his own behalf of a grantee-plaintiff to his grantor-defendant's execution.[3] But this result, though fair enough, is not maintainable on the same ground as the use of an opponent's testimony, and in truth goes beyond any of the foregoing principles of exemption.

(*f*) "Either produce the attester as a witness"

§ 1302. **Attester need not Testify Favorably; Witness Denying or not Recollecting; Attester's Favorable Testimony not Conclusive.** The notion of the rule of Preference for the attesting witness is that of the general desirability, in the furtherance of truth, of obtaining his knowledge on the subject (*ante*, § 1288). What may be the tenor of the witness' testimony, remains to

§ 1301. [1] *Eng.* 1803, Call *v.* Dunning, 4 East 53, 5 Esp. 16 (admission in an answer to a bill of discovery); 1836, Ashmore *v.* Hardy, 7 C. & P. 501, 503 (answer in chancery, admitting execution of a deed from W. to defendant); 1853, Whyman *v.* Garth, 8 Exch. 803 (the opponent, the maker of the deed, was not allowed to be called; Pollock, C. B.: "If in the course of the proceedings in the cause the party to the deed admits the execution, or if by his pleadings he does not require the execution to be proved, he may be very reasonably said to have waived the [implied] agreement [to call the subscribing witness]"; but not otherwise); *U. S. Ala.* 1884, Askew *v.* Steiner, 76 Ala. 218, 221 (testimony of plaintiff-grantee under mortgage, not sufficient to exempt from production); 1890, Richmond & D. R. Co. *v.* Jones, 92 Ala. 218, 226, 9 So. 276 (even questioning the party and maker on the stand, insufficient); 1895, Winter *v.* Judkins, 106 Ala. 259, 17 So. 627; *Ga.* 1851, Ellis *v.* Smith, 10 Ga. 253 (sworn answer, insufficient); 1878, Davis *v.* Alston, 61 Ga. 225, 227 (admissions on the stand, insufficient); *Ky.* 1826, Roberts *v.* Tennell, 3 T. B. Monr. 247, 250 (answer in chancery, insufficient); *Mass.* 1862, Brigham *v.* Palmer, 3 All. 450, *semble* (insufficient notwithstanding the abolition of parties' disqualifications); *Tenn.* 1874, Henly *v.* Hemming, 7 Baxt. 524, 526 (rule applies even since abolition of parties' disqualification).

[2] 1876, Doe *v.* Nevers, 16 N. Br. 614 (Whyman *v.* Garth, held not law for a deed executed since Consol. St. c. 46, § 23, quoted *ante*, § 1290); Ala. Code 1907, §§ 4004, 4006 (quoted *ante*, § 1299); Cal. C. C. P. 1872, § 1942, as sought to be amended in 1901 (quoted *ante*, § 1300); Ga. Rev. C. 1910, § 5833 (quoted *ante*, § 1299); 1885, Rayburn *v.* Lumber Co., 57 Mich. 273, 274, 23 N. W. 811 (proof by calling the opponent, allowed without requiring the attester); *P. I.* C. C. P. 1901, § 326 (quoted *post*, § 2132); *P. R.* Rev. St. & C. 1911, § 1457 (like Cal. C. C. P. § 1942 as sought to be amended in 1901); 1858, White *v.* Holladay, 20 Tex. 679, *semble* (quoted *ante*, § 1299).

[3] 1874, Bowling *v.* Hax, 55 Mo. 447, 448 (since parties are made competent, the witness need not be called; here, a plaintiff suing on a contract, executed by plaintiff and defendant, was allowed to prove it). *Contra:* 1879, Wiggins *v.* Fleishel, 50 Tex. 57, 63, *semble* (cited *ante*, § 1299).

be seen; the object of the law is to obtain his knowledge, irrespective of the side in whose favor it may bear.

(1) Accordingly, it is *not necessary*, as a part of the rule, *that he should testify in favor of execution.* The rule is satisfied by calling him, *i.e.* by making *his testimony available* for the trial. If his testimony fails to evidence the execution, the present rule says nothing about the consequences, — whatever any other rule may say. The present rule's force is absolutely spent when the witness is produced for examination. Here also policy agrees with principle; for the practical working of the rule, if it required that the witness should not only testify but testify favorably (*i.e.* if the party desiring to prove execution must fail if the attesters failed to prove it) would be unfair and disastrous, especially in testamentary causes:

1839, TUCKER, P., in *Clarke* v. *Dunnavant*, 10 Leigh 13, 33: "It never could have been the design of the statute to vacate a will which was duly executed, whenever the witnesses to it have forgotten any material circumstances attending the attestation. They are indeed always called upon to prove the will, not because the statute requires that they shall prove a compliance with all the requisites of the law, but because they would be most likely to prove or disprove them, and because upon principles of common law the attesting witness to every instrument must be produced if living and within the power of the Court."

1862, DENIO, J., in *Tarrant* v. *Ware*, 25 N. Y. 425, 426: "Prior to any adjudication upon the subject, it might have been argued with some plausibility that the nature and objects of the provisions declaring a certain number of subscribing witnesses necessary to a valid will required that the number specified should unite in testifying to an execution and attestation of the instrument in the manner required by the act; or at least that the will could not be established if a part or all of them should deny the existence of the facts requisite to show a proper execution. The witnesses were supposed to be persons selected by the testator to bear witness that he had actually executed the paper with a knowledge of its contents and in the form prescribed by law and that he was of suitable age and capacity and not under restraint; if the persons thus selected could not or would not affirm the existence of these facts, the intention of the law (it might be said) would not be answered; . . . [and] if the testimony of the chosen witnesses, when unfavorable to the will, could be disregarded, a will may be set up and established by testimony not authorized by the statute and which the Legislature had not considered perfectly safe in ordinary cases. But, on the other hand, it was soon seen that the attesting witnesses might forget the facts to which they had once attested, and that it was not impossible that they might be tampered with by interested parties and thus be induced to deny on oath the facts which they had been selected to witness and to depose to. This view prevailed with the Courts. . . . Whether their [the witnesses'] denial of what they had attested proceeds from perversity or want of recollection, the testament may in either case be supported."

1895, LUMPKIN, J., in *Gillis* v. *Gillis*, 96 Ga. 1, 15, 23 S. E. 107: "[The attesting witnesses are,] unless accounted for, indispensably necessary witnesses; but the testimony, even as to the 'factum' of the execution, is not confined to them. The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony, or their absence is explained. The inquiry, as in other cases, is whether, taking all the testimony together, the fact is duly established. It is not required that any one or more of the essential facts should be proved by all or any number of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be."

Accordingly, the failure of the attester, *from lack of memory*, to prove execution, is not in itself any breach of the present rule; and though the proponent has still to prove the execution in some sufficient way, he is no longer hampered by any rule about attesting witnesses.[1]

(2) For the same reason, the attester's positive *denial* of the facts of exe-

§ 1302. [1] Besides the following cases, the statutes and cases in the next note are also authorities to the same effect: ENGLAND: 1728, Dormer *v.* Thurland, 2 P. Wms. 506, 510 (obscure); 1844, Burgoyne *v.* Showler, 1 Roberts. Eccl. 5, 10 (even if they forget, the execution is assumed); 1848, Leach's Goods, 12 Jur. 381; UNITED STATES: *Alabama:* Code 1907, § 4005 (quoted *post*, § 1310); 1843, Lazarus *v.* Lewis, 5 Ala. 457, 459; 1861, Hall *v.* Hall, 38 Ala. 131, 133; 1895, Barnewall *v.* Murrell, 108 Ala. 366, 18 So. 831; *California*. C. C. P. 1872, § 1941; *Georgia:* 1857, Reinhart *v.* Miller, 22 Ga. 402, 416; 1895, Gillis *v.* Gillis, 96 Ga. 1, 14, 23 S. E. 107; 1896, Kelly *v.* Sharp S. Co., 99 Ga. 393, 398, 27 S. E. 741; 1898, Buchanan *v.* Grocery Co., 105 Ga. 393, 31 S. E. 105; *Illinois:* 1902, Webster *v.* Yorty, 194 Ill. 408, 62 N. E. 907. But by a queer forgetfulness of the present principle, the words of the local statute were for a time made to reach a contrary result: 1906, Greene *v.* Hitchcock, 222 Ill. 216, 78 N. E. 614 (by Rev. St. c. 148, § 2, quoted *post*, § 1304, n. 6, the oath of two attesting witnesses "that they were present and saw the testator sign, etc.", "shall be sufficient proof of the execution"; in this case, the will bore a full attestation clause, but one of the attesters could testify only that he did not remember whether he saw the testatrix sign, but that he would not have signed it except in her presence nor have let her sign it except in his presence, etc.; this was held insufficient, ignoring the present principle and citing no authority whatever, and then invoking the peculiar local rule of § 1303, n. 3, *post*, to exclude all other testimony; the result was to establish an unjust rule of hardship, contrary to two centuries of settled law. But the ruling in Greene *v.* Hitchcock was within a year practically repudiated: 1907, Mead *v.* Presbyterian Church, 229 Ill. 526, 82 N. E. 371 (the opinion does not mention Greene *v.* Hitchcock, though the briefs cited it); 1908, Schofield *v.* Thomas, 236 Ill. 122, 86 N. E. 122 (issue whether the testatrix was present at the attesters' signing; the attesters testified not, but another person testified that she was; due attestation was not found; but the opinion points out that the attesters' negative testimony was not of itself fatal, if other testimony to due attestation had been believed; approving Gould *v.* Seminary, 189 Ill. 282, 59 N. E. 536; not mentioning Greene *v.* Hitchcock, *supra*, but effectually repudiating it); 1915, O'Brien *v.* Rhembe's Estate, 269 Ill. 592, 109 N. E. 1044 (approving Mead *v.* Church); 1916, Britton *v.* Davis, 273 Ill. 31, 112 N. E. 283 (witness' failure to remember the circumstances of execution, while acknowledging the genuineness of his signature; here the failure of memory was in the probate court trial, and was not repeated in the circuit court trial); 1915, Thompson *v.* Kurme, 268 Ill. 168, 172, 108 N. E. 1101 (failure of the subscribing witnesses to testify to an essential fact, held not fatal); 1917, Dubach *v.* Jolly, 279 Ill. 530, 117 N. E. 77; 1918, Flynn *v.* Flynn, 283 Ill. 206, 119 N. E. 304; 1919, Rupp *v.* Jones, 289 Ill. 596, 124 N. E. 560 (attestation clause held sufficient evidence, even where the attesting witnesses do not recall the essentials; following O'Brien *v.* Rhembe's Estate); *Kentucky:* 1832, Griffith *v.* Huston, 7 J. J. Marsh. 385, 387; *Maine:* 1840, Quimby *v.* Buzzell, 4 Shepl. 470, 473; *Massachusetts:* 1829, Russell *v.* Coffin, 8 Pick. 143, 150; 1840, Dewey *v.* Dewey, 1 Metc. 349, 353 (if recollection were required, "the validity of a will would depend not upon the fact whether it was duly executed, but whether the testator had been fortunate in securing witnesses of retentive memories"); 1916, Hammill *v.* Weeks, 225 Mass. 245, 114 N. E. 203 (where two of the three attesters were called, held that it was not necessary that both should testify to every fact required for execution); *Michigan:* 1879, Abbott *v.* Abbott, 41 Mich. 540, 542, 2 N. E. 810; *Minnesota:* 1917, Baxter's Estate, 136 Minn. 59, 161 N. W. 261; *Missouri:* 1890, Mays *v.* Mays, 114 Mo. 536, 540, 21 S. W. 921 (failure to testify to sanity); 1896, Morton *v.* Heidorn, 135 Mo. 608, 37 S. W. 504; *Pennsylvania:* 1823, Marshall *v.* Gougler, 10 S. & R. 164, 167; 1832, Miller's Estate, 3 Rawle 312, 318 ("The law is not so unreasonable as to declare that the grantee must lose his right wherever they have lost their memory"; here, of a will); *Philippine Islands:* C. C. P. 1901, § 632; *South Carolina:* 1855, Welch *v.* Welch, 9 Rich. 133, 136 (that one subscribing witness cannot recollect the facts, immaterial, if otherwise proved; here, by the other subscribers); 1897, Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555 (where two of three witnesses admitted their signatures, but could not recollect the circumstances); 1910, Mordecai *v.* Canty, 86 S. C. 470, 68 S. E. 1049 (failure to testify to sanity); *South Dakota:* 1904, Schouweiler *v.* McCaull, 18 S. D. 70, 99 N. W. 95 (mortgage); *Texas:* 1922, Allen *v.* Massey, — Tex. Civ. App. —, 236 S. W. 501 (failure of recollection by one witness; good opinion by Hamilton, J.); *Virginia:* 1839, Clarke *v.* Dunnavant, 10 Leigh 13, 22 (quoted *supra*).

cution, contradicting the statements implied or expressed in his attestation, leaves the proponent still free to prove by other testimony, if he can, the facts of due execution; a permission demanded not only by principle but also by policy, inasmuch as the proponent might otherwise be defeated of his rights by a corrupt attester.[2]

[2] ENGLAND: 1683, Hudson's Case, Skinn. 79 (two of the three swore that he was incapable and his hand was guided; but others proved the will); 1694, Dayrell *v.* Glascock, Skinn. 413; Austin *v.* Willes, Buller N. P. 264 ("notwithstanding the three witnesses all swore to its not being duly executed, the devisee obtained a verdict"); Pike *v.* Bradbury, Buller N. P. 264 ("the first and second witnesses denying their hands, it was objected he should go no farther; for it was argued that, though, if you call one witness who proves against you, you may call another, yet if he prove against you too, you can go no farther; but the Chief Justice admitted him to call other witnesses to prove the will, and he obtained a verdict"); 1729, Rice *v.* Oatfield, 2 Stra. 1096 (the preceding case, cited in argument, was apparently approved); 1762, Lowe *v.* Jolliffe, 1 W. Bl. 365 (besides the attesting witnesses themselves, "a dozen servants of the testator all unanimously swore him to be utterly incapable of making a will", etc.); 1779, Mansfield, L. C. J., in Abbot *v.* Plumbe, 1 Doug. 216 ("It was formerly doubted whether if the subscribing witness denies the deed, you can call other witnesses to prove it", but no longer); 1790, Ley *v.* Ballard, 3 Esp. 173, note (neither of the attesters had seen the execution; Kenyon, L. C. J.: "If they disavow having seen it executed, other persons who saw it executed, or can prove the party's handwriting, may be called"; so, too, even if they "prove contrary to what their attestation purport, namely, that the party did not execute it"); 1798, Kenyon, L. C. J., in Jordaine *v.* Lashbrook, 7 T. R. 599, 604 (approves Lowe *v.* Jolliffe); 1815, R. *v.* Harringworth, 4 M. & S. 350 (Ellenborough, L. C. J., "His testimony is indeed not conclusive, for . . . the party may go on to prove him such [untrustworthy] and may call other witnesses to prove the execution"); 1815, Bootle *v.* Blundell, 19 Ves. Jr. 494, 501, 507 (Eldon, L. C.: "If they had all denied their attestations, but it could be proved by circumstances that they unjustly denied it, the will might be proved to be a good will by other circumstances").

UNITED STATES: *Alabama:* 1895, Barnewall *v.* Murrell, 108 Ala. 366, 18 So. 831; *Arkansas:* 1853, Rogers *v.* Diamond, 13 Ark. 474, 483; *California:* Cal. C. C. P. 1872, § 1941 ("If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence"); *Colorado:* 1906, Shapter's Estate, 35 Colo. 578, 85 Pac. 688; *Delaware:* 1858, Rash *v.* Purnel, 2 Harringt. 448, 454; 1848, Talley *v.* Moore, 5 Del. 57; *Georgia:* 1857, Reinhart *v.* Miller, 22 Ga. 402, 416; 1895, Gillis *v.* Gillis, 96 Ga. 1, 14, 23 S. E. 107 (execution may be otherwise proved, no matter how the attesting witness testifies; see quotation, *supra*); 1913, Brock *v.* Brock, 140 Ga. 590, 79 S. E. 473 (Gillis *v.* Gillis followed); *Idaho:* Comp. St. 1919, § 7965; *Illinois:* 1917, Hutchison *v.* Kelly, 276 Ill. 438, 446, 114 N. E. 1012 (attestation clause and other evidence, held sufficient, even though one attester denied some of the facts of execution); 1918, King *v.* Westervelt, 284 Ill. 401, 120 N. E. 241; 1918, Kuehue *v.* Malach, 286 Ill. 120, 121 N. E. 391; 1921, Jenkins *v.* White, 298 Ill. 502, 131 N. E. 634 (even where one of the witnesses testifies to non-performance of some requirement; following Rupp *v.* Jones, *supra*, n. 1); *Indiana:* 1827, Booker *v.* Bowles, 1 Blackf. 90; *Iowa:* Code 1897, § 4619; Rev. Code, § 7326; *Kentucky:* 1907, Carmical *v.* Carmical, 32 Ky. L. 171, 104 S. W. 1037; 1917, Caddell's Heirs *v.* Caddell's Ex., 175 Ky. 505, 194 S. W. 540; *Maryland:* 1854, Barry *v.* Hoffman, 6 Md. 78, 87; *Massachusetts:* 1834, Whitaker *v.* Salisbury, 15 Pick. 534, 544; *Mississippi:* 1878, Martin *v.* Perkins, 56 Miss. 204, 209 (their testimony as to incapacity does not conclude the propounder of a will); 1918, Williams *v.* Morehead, 116 Miss. 653, 77 So. 658; *Montana:* Rev. C. 1921, § 10589; *Nebraska:* Rev. St. 1922, § 8853; *New York:* 1830, Jackson *v.* Christman, 4 Wend. 278, 282; 1861, Orser *v.* Orser, 24 N. Y. 51, 52; 1862, Tarrant *v.* Ware, 25 N. Y. 425, note (quoted, *supra*); 1862, Auburn Seminary *v.* Calhoun, 25 N. Y. 422, 425; S. C. A. 1920 (surrogates' courts; "if all the subscribing witnesses to the will be dead or incompetent by reason of lunacy or otherwise to testify or unable to testify, or are absent from the State and their testimony has been dispensed with, . . . or if a subscribing witness has forgotten the occurrence or testifies against the execution of the will, or was not present with the other witness at the execution of the will, the will may nevertheless be established"; remainder quoted *post*, § 1320); *North Carolina:* Crowell *v.* Kirk, 3 Dev. 356, 358, per Ruffin, J.; 1919, Deyton's Will, 177 N. C. 494, 99 S. E. 424 (whether the witness signed in the testatrix' presence); *Oregon:* Laws 1920, § 785; *Philippine Islands:* C. C. P. 1901, § 325 (like Cal. C. C. P. § 1941); *Porto Rico:* Rev. St. & C. 1011, § 1456 (like Cal. C. C. P. § 1941); *Rhode Island:* 1909, Newell *v.* White, 29 R. I. 343, 73 Atl. 798; *South Carolina:* 1817, Pearson *v.* Wightman, 1 Mill

(3) Conversely, the testimony of the attesting witnesses is of course *not conclusive in favor of* execution even when all agree and when no personal impeachment is attempted. This would follow from the general principle examined *post*, § 1348. But, specifically, the unanimous testimony of the attesters may fail of credit even though the only opposing evidence is that of the alleged *maker's handwriting* as analyzed by *expert witnesses.*[3] The circumstantial evidence afforded by the handwriting may in a given case be more convincing than the testimony of the attesters. This possibility is one of the results of the modern scientific study of handwriting.[4]

§ 1303. **Same: Discriminations (Refreshing Recollection; Implied Attestation Clause; Impeaching One's Own Witness, or One's Own Attestation; Illinois Rule admitting only Attesting Witnesses in Probate).** (1) May not the attester, though not actually recollecting the circumstances, adopt his *signature as a record of past recollection*, and base his testimony on the faith of his signature, which he would not have put there had he not witnessed the execution? That he may, is clear by the principle of Recollection (*ante*, § 737, under which this mode of testifying has already been considered.

(2) If the witness' testimony on the stand wholly fails through lack of recollection, may not his signature and attestation, on being proved by himself or some one else, suffice as an *implied testimony to the facts of due execution?* To use the attestation in this way is to use a hearsay (*i.e.* extrajudicial) statement, but for this case a well-recognized exception to the Hearsay rule exists. Moreover, the question arises how far this implied statement can be regarded as covering all the facts essential to due execution; both these questions, involving the existence and scope of a Hearsay exception, are better considered under that head (*post*, §§ 1510–1512).

Whether the failure of recollection *excuses from calling the witness* is a different question (*post*, § 1315).

(3) If the attester, when called by the proponent, denies the facts of execution, in contradiction to his attestation, is it not a violation of the rule against *impeaching one's own witness* to allow the proponent to go on to prove

Const. 336, 340 ("It would be a terrible consequence if such testimony were not admissible; for how often and how easily might witnesses be tampered with to deny their own attestation?"); 1911, Merck *v.* Merck, 89 S. C. 347, 71 S. E. 969; 1921, Matheson *v.* Caribo, — S. C. —, 109 S. E. 102 (note signed by mark and witnessed; the witness' denial of execution, held not to take the case from the jury); *Tennessee:* 1850, Jones *v.* Arterburn, 11 Humph. 97, 99 (attesting witness denying signature; signature may be proved); 1860, Rose *v.* Allen, 1 Coldw. 23, 27 (even if all deny due execution, the fact may be otherwise proved); 1869, Alexander *v.* White, 7 Coldw. 126, 128 (same); 1891, Simmons *v.* Leonard, 91 Tenn. 183, 190, 18 S. W. 280 (fact of attestation denied); *Texas:* Rev. C. Cr. P. 1911, § 813; *Utah:* Comp. L. 1917, § 7111 (like Cal. C. C. P. § 1941); *Virginia:* 1846, Pollock *v.* Glassell, 2 Gratt. 439, 461; 1877, Lamberts *v.* Cooper, 29 Gratt. 61, 67 (sanity; witness who contradicts his attestation is to be viewed with suspicion); 1878, Cheatham *v.* Hatcher, 30 Gratt. 56, 64; *West Virginia:* 1881, Webb *v.* Dye, 18 W. Va. 376, 380; *Wisconsin:* 1878, Jenkins' Will, 43 Wis. 610; 1878, Meurer's Will, 44 Wis. 392, 401.

In particular, the attester therefore need not testify to a testator's *sanity;* 1902, Re Wells, 96 Me. 161, 51 Atl. 868.

[3] 1920, O'Connor's Estate, O'Connor *v.* Slaker, 105 Nebr. 88, 179 N. W. 401; 1917, Baird *v.* Shaffer, 101 Kan. 585, 168 Pac. 836.

[4] See Albert S. Osborn, Questioned Documents (N. Y., 1910), The Problem of Proof (1922).

due execution in spite of the attester's testimony? It is not, in truth; but even if it were a case coming under the rule, it would be excused by the exception for a necessary or compulsory witness (*ante*, § 917).

(4) If the supposed attester *denies the genuineness of his signature*, then, if this denial be *taken as true*, he is no attesting witness, and, the document thus not being attested, it is not necessary to call him as such (on the principle of § 1292, *ante*); the proponent may therefore take this as true and go on to prove execution by other testimony.[1] However, if the document is one required by law to be attested as a condition of validity, then it is of no use to the proponent to take the attester's denial as true, for, if he does, the document is invalid for lack of attestation; and he must therefore (and may, under the principle of § 1302) go on if possible to prove the signature's genuineness by other testimony.[2]

(5) That the attester, if he admits his signature, may not testify to the *falsity of his own attesting statements* (for example, by denying the identity of the maker) was a notion at one time much urged, in virtue of the supposed rule 'nemo allegans turpitudinem suam audiendus est'; but this doctrine never received final sanction (*ante*, § 528).

(6) In *Illinois*, by an odd statutory rule of early local origin, it was once the law that, on an appeal to a Superior Court from a *refusal* to allow probate of a will, *any other testimony* to execution might be produced, but on an appeal from a *grant* of probate, *only the attester's testimony* could be received.[3] But this statute was later amended, so that the limitation is narrowed to apply

§ 1303. [1] 1792, Grellier *v.* Neale, Peake 146 (Kenyon, L. C. J.: "The subscribing witness not having seen the deed executed, it is the same as if there was no witness at all; and in that case the handwriting may be proved by another witness"); 1805, Burrowes *v.* Lock, 10 Ves. Jr. 470, 474 ("If he denies that [*i.e.* execution in his presence], other evidence is admissible from circumstances, as where there were no attesting witnesses"); 1811, Fitzgerald *v.* Elsee, 2 Camp. 635 (indenture of apprenticeship; the witness had not seen the execution; handwriting allowed; Lawrence, J.: "It is to be treated as if there were no attesting witness"); 1810, Lemon *v.* Dean, 2 Camp. 636 note, LeBlanc, J. (note; same ruling); 1812, M'Craw *v.* Gentry, 3 Camp. 232 (the witnesses had seen the defendant acknowledge, but not sign the note; held, that it was as if there were no attesting witness; and thus the defendant's acknowledgment sufficed).

[2] 1808, Phipps *v.* Parker, 1 Camp. 412 (the witness had not seen the execution; Ellenborough, L. C. J.: "If it was not executed in his presence, the conclusion of law is that it [a policy] was never executed as a deed, although it may have been signed by these two directors. . . . Now appearing certainly not to have been executed in the presence of the witness, I think it must be considered as invalid"; distinguishing Lowe *v.* Jolliffe, where the truth of the attesters was denied, and the requirements of attestation might have been in reality fulfilled).

[3] 1840, Walker *v.* Walker, 3 Ill. 291; 1860, Duncan *v.* Duncan, 23 Ill. 365; 1867, Andrews *v.* Black, 43 Ill. 256 (explaining the principle fully); 1875, Crowley *v.* Crowley, 80 Ill. 469; 1895, Hobart *v.* Hobart, 154 Ill. 610, 615, 39 N. E. 581 (the rule excluding other testimony on appeal from grant of probate does not apply to other testimony to testator's signature where an attesting witness is dead); 1898, Thompson *v.* Owen, 174 Ill. 229, 51 N. E. 1046; 1901, Illinois Masonic Orphans' Home *v.* Gracy, 190 Ill. 95, 60 N. E. 194; 1902, Webster *v.* Yorty, 194 Ill. 408, 62 N. E. 907; 1902, Re Tobin, 196 Ill. 484, 63 N. E. 1021; 1902, Kohley's Estate, 200 Ill. 189, 65 N. E. 699; 1904, O'Brien *v.* Bonfield, 213 Ill. 428, 72 N. E. 1090 (rule held constitutional); 1905, Senn *v.* Greundling, 218 Ill. 458, 75 N. E. 1020; 1905, Barry's Will, 219 Ill. 391, 76 N. E. 577; 1906, Greene *v.* Hitchcock, 222 Ill. 216, 78 N. E. 614; 1906, Stuke *v.* Glaser, 223 Ill. 316, 79 N. E. 105 (meaning of the proviso as to "fraud", determined); 1909, Dean *v.* Dean, 239 Ill. 424, 88 N. E. 149; 1917, Hutchison *v.* Kelly, 276 Ill. 438, 114 N. E. 1012.

The relevant statutory clauses are printed in part *post*, § 1304.

only to the *contestants* of the will, but is extended to include appeals from both a *refusal* and a *grant* of probate.[4]

§ 1304. **Number of Attesters required to be Called.** The object of placing more than one attestation upon a document, whether at the parties' voluntary instance or by requirement of law, is ordinarily not to demand the combined testimony of all at the trial, but merely to provide by way of caution a number of witnesses; so that the contingencies of death, removal of residence, and the like, may be guarded against, and one witness at least may be expected to be available. If a statute expressly required the document to be "proved" by a specified number (*post*, § 2048), the case would be different. But a main object in statutes requiring attestation as an element of validity is to surround the act of execution with certain safeguards; the object of securing evidence for litigation is a secondary one. So far, therefore, as such an object exists, it can hardly be implied to have in view anything beyond what is above noted, *i.e.* a precautionary supply of persons from whom a testifier is likely to remain available in spite of the accidents that might have totally destroyed the supply if there had been but one person provided in advance.

No doubt, statutes often negative the above view by expressly providing not only that a certain number shall attest, but also that all of the required number shall be called to testify. But, in the absence of express statements, such a requirement is not properly to be implied; and it was not implied in common-law practice:

1765, Lord CAMDEN in *Doe* v. *Hindson*,[1] 1 Day 41, 51: "The Legislature set up these witnesses as a guard, to protect the testator from fraud in that critical minute when he was about to execute his will. . . . There is a great difference between the method of *proving* a fact in a Court of justice and the *attestation* of that fact at the time it happens. . . . The new thing introduced by this statute [of Frauds] is the attestation; the method of proving this attestation stands as it did upon the old common-law principles. Thus, for instance, one witness is sufficient to prove what all three have attested; and, though that witness must be a subscriber, yet that is owing to the general common-law rule that, where a witness has subscribed an instrument, he must be always produced, because it is the best evidence. This we see in common experience; for after the first witness has been examined, the will is always read. . . . This [above distinction], I am afraid, has not always been attended to; but some persons have been apt to reason upon this point as if the statute had directed the will to be *proved* by three credible witnesses; forgetting the difference between the *subscription* and the *proof* of that subscription."

1834, TINDAL, C. J., in *Wright* v. *Tatham*, 1 A. & E. 3, 23: "It may be observed, however, that the Statute of Frauds did not look primarily to the mode of proving the will when contested, but to the security of the testator at the time of the execution of the will;[2] the statute intending that three witnesses should be in the nature of guards or securities,

[4] The statutory amendment, St. 1909, June 5, p. 472, is quoted *post*, § 1304. It was applied in the following cases: 1919, Mayer *v.* Schrenkler, 286 Ill. 324, 121 N. E. 604 (prior rulings examined, and the effect of the amending statute of 1909; Speer *v.* Josenhans, 274 Ill. 237, overruled on a certain point); 1919, Chandler *v.* Fisher, 290 Ill. 440, 125 N. E. 324.

§ 1304. [1] Reprinted s. v. Hinds *v.* Kersey. Burn's Ecclesiastical Law, IV, 118.

[2] So also, Temp. G. II, Allen *v.* Hill, Gilbert 257, 261.

to protect him in the execution of his will against force or fraud or undue influence. The proof of the will by the three witnesses, supposing it should afterwards come in contest, is only an incidental and secondary benefit, derived from that mode of attestation. . . . It is well settled that in an action at law it is sufficient to call one only of the subscribing witnesses, if he can speak to the observance of all that is required by the statute."

In England, this was the view of the common law. For attested *documents in general*, the rule has always been that but *one attester* need be called.[3] For *wills*, the rule was clearly the same in the common-law Courts.[4] But in *Chancery* (while the precedents were not harmonious) the practice seems to have been to call *all the required number of attesters*, — at least unless the Chancellor's discretion was exercised to the contrary.[5]

In the *United States*,[6] several forms of the rule find representation. The

[3] *Eng.* 1733, Holdfast *v.* Dowling, 2 Str. 1254; *U. S. Ala.* 1843, Thomas *v.* Wallace, 5 Ala. 268, 275; 1898, Sowell *v.* Bank, 119 Ala. 92, 24 So. 585; *Conn.* 1888, O'Sullivan *v.* Overton, 56 Conn. 102, 105, 14 Atl. 300; *Ga.* 1896, Cooper *v.* O'Brien, 98 Ga. 773, 26 S. E. 470; *Ky.* 1815, Allen *v.* Trimble, 4 Bibb 21; Md. 1800, Collins *v.* Elliott, 1 H. & J. 1; *Mass.* 1829, Russell *v.* Coffin, 8 Pick. 143, 150 ("unless there is some reason to believe or suspect that the instrument has been forged"); 1851, Gelott *v.* Goodspeed, 8 Cush. 411 ("in ordinary cases, where the mere formal execution" is involved); 1851, White *v.* Wood, 8 Cush. 413 (although the other witness was in court); *N. H.* 1860, Melcher *v.* Flanders, 40 N. H. 139, 157; *Tenn.* 1809, Shepherd *v.* Goss, 1 Overt. 487; 1855, Harrell *v.* Ward, 2 Sneed 610, 612; *Va.* 1849, Jesse *v.* Parker, 6 Gratt. 57, 61, 64.

[4] *Ante* 1726, Gilbert, Evidence, 103 (one suffices, "unless they show such characters of fraud as would make it necessary to produce the rest"); 1763, Buller Nisi Prius, 264 ("The devisee need produce only one [witness], if that one prove all the requisites", the opponent being at liberty to call the others); 1816, Eldon, L. C., in Bullen *v.* Michel, 4 Dow 297, 331 (at common law "they usually call only one witness [to a will], . . . leaving it to the other side, if they think proper, to call the other witnesses"); 1834, Wright *v.* Tatham, 1 A. & E. 3, 22 (see quotation *supra*). *Contra:* 1748, Townsend *v.* Ives, 1 Wils. 216 ("It is a rule that all the witnesses, if living, must be examined to prove the will").

[5] 1748, Ogle *v.* Cook, 1 Ves. Sr. 177 (all required, by Hardwicke, L. C.); 1752, Grayson *v.* Atkinson, 2 id. 454, 460 (all to be accounted for; here two testified, and the third was beyond seas; but here the fact of the execution in his presence was not otherwise proved; the plaintiff conceded that all must be called if available, but claimed that "it was formerly not required to have all the three witnesses examined; it was first established by Lord Talbot in this Court"); 1760, Binfield *v.* Lambert, 1 Dick. 337 (Clarke, M. R., said "that the will could not be said to be strictly proved agreeably to the statute; but his conscience being satisfied", he would not require all, but would execute the trusts of the will; here the third witness could not be found); 1780, Bird *v.* Butler, 1 Dick. 337, n. (same facts, though the search not so thorough; trusts carried out, but the will not declared proved); 1789, Powel *v.* Cleaver, 2 Bro. C. C. 499, 504 (in practice, but not by absolute rule, all are to be called); 1793, Fitzherbert *v.* Fitzherbert, 4 Br. C. C. 231; 1800, Carrington *v.* Payne, 5 Ves. Jr. 404, 411, *semble* (all required); 1815, Bootle *v.* Blundell, 19 Ves. Jr. 494, 500, 505, 509 (Eldon, L. C.: "The rule of this Court requiring that to establish a will of real estate all the three witnesses shall be examined is not by any means, as it has been represented, a technical rule"; for after ordering an issue at law the testimony there may be reviewed, and before granting the devisee an issue at law, the witnesses may be examined; the general rule admitting necessary exceptions, and perhaps not applying where the will is not wholly, but only partially in question); 1829, Winchelsea *v.* Wauchope, 3 Russ. 441, 453, *semble* (all are not invariably required); 1831, Tatham *v.* Wright, 2 Russ. & Myl. 1, 8, 16 (the Court of Chancery may inform its conscience as it thinks best and may send an issue back to be tried by calling all the attesting witnesses; yet Brougham, L. C., at p. 30, speaks of "the rule which makes it imperative to call all the witnesses to a will", but regards it as applying only to a devisee who moves to establish a will, and not where an heir moves to set one aside).

Canada: Rules of Court 1914, No. 978 ("one or more of the witnesses", for proof in solemn form); *N. Br.* St. 1915, c. 23, §§ 20, 47 (quoted *post*, § 1310); *P. E. I.* St. 1873, c. 21, § 24 (quoted *post*, § 1310).

[6] *Alabama:* Code 1907, § 4004 (in general; "the subscribing witness" must be called); § 6185 (wills; "must be proved by one or more"); 1845, Bowling *v.* Bowling, 8 Ala. 538 (where probate is contested, all

rule in perhaps most jurisdictions is to call but one attester, for probate in common form, and to call all the required number, for probate in solemn

must be produced; where not contested, one "might be sufficient"; no statute at this time); *Arizona:* Rev. St. 1913, Civ. C. §§ 746, 751 (in uncontested probate, the Court "may admit" on the testimony of one witness; if contested, "all the subscribing witnesses" available must be produced);
Arkansas: Dig. 1919, § 10518 (wills; all required by implication; quoted *post*, § 1320); 1843, Campbell *v.* Garven, 5 Ark. 485, 491, *semble* (both necessary); 1876, Janes *v.* Williams, 31 Ark. 175, 180 (statute applied; proof by calling one witness only, insufficient);
California: C. C. P. 1872, §§ 1308, 1315 (in uncontested wills, by one subscribing witness only, if he testifies to the execution "in all particulars as required by law, and that the testator was of sound mind at the time of its execution"; in contested wills, by all);
Colorado: Comp. St. 1921, § 5203 ("It shall be the duty of each and every witness to any will" to appear and testify); § 5204 (the will is to be allowed if "it shall satisfactorily appear by the testimony of two or more of the subscribing witnesses" that it was duly executed);
Columbia (Dist.): Code 1919, §§ 131, 122 (quoted *post*, § 1310);
Connecticut: 1869, Field's Appeal, 36 Conn. 277 (one suffices for a will);
Delaware: 1838, Rash *v.* Purnel, 2 Harringt. 448 (all must be called, on an issue out of Chancery to establish a will, because the judgment is final; otherwise, in trying a will at common law in ejectment, where the heir, if defeated, may again bring ejectment);
Florida: Rev. G. S. 1919, § 3605 (at a probate contest, "such witnesses as the parties may produce shall be examined");
Georgia: Rev. C. 1910, §§ 3855, 3856 (one suffices, for probate in common form; all are necessary, in solemn form); 1855, Walker *v.* Hunter, 17 Ga. 364, 390, 407 (not clear); 1874, Evans *v.* Arnold, 52 Ga. 169, 179 (all required); 1921, Smith *v.* Smith, 151 Ga. 150, 106 S. E. 95 (will burnt; one witness being dead, the failure to call the other two was held fatal, although a partial admission of the tenor of their testimony had been made by the opponent);
Idaho: Comp. St. 1919, § 7455 (wills; like Cal. C. C. P. § 1315); § 7450 (like Cal. C. C. P. § 1308);
Illinois: Rev. St. 1874, c. 148, § 2 (a will is to be signed by two or more credible witnesses, "two of whom, declaring on oath or affirmation, before the county court . . . shall be sufficient proof of the execution"); § 3 ("It shall be the duty of each and every witness to any will . . . executed in this State, as aforesaid, to be and appear before the county court on the regular day for the probate . . . to testify of and concerning the execution and validity of the same"); § 5 (if the county judge is an attester, he shall make oath in circuit court, and then "if there are other witnesses to said will, the county Court shall take their evidence . . . as in other cases"); § 13 (in case of refusal of probate by a county court, the proponent may support it in the circuit court "by any evidence competent to establish a will in chancery"); 1851, Rigg *v.* Wilton, 13 Ill. 15, 19 (at the trial of a will-issue out of chancery, the attesting-witness need not be called, because his probate deposition is usable (see *post*, § 1305); but, *semble*, at the probating both must be called); 1886, Re Page, 118 Ill. 576, 578, 8 N. E. 852 (one suffices to "establish" a will); 1897, Harp *v.* Parr, 168 Ill. 459, 48 N. E. 113, *semble* (same); 1898, Slinghoff *v.* Bruner, 174 Ill. 561, 51 N. E. 772 (same); 1902, Kohley's Estate, 200 Ill. 189, 65 N. E. 699 (the two must be produced); 1906, Greene *v.* Hitchcock, 222 Ill. 216, 78 N. E. 614 (on a grant of probate, the two attesters must testify); St. 1909, June 5, p. 472 (amending Rev. St. c. 148, § 13, so as to apply the rule to probate of a will "allowed or refused", and not merely to a probate refused);
Indiana: Burns' Ann. St. 1914, § 3141 (a will "shall be proven by one or more of the attesting witnesses"); 1871, Hayes *v.* West, 37 Ind. 21, 26 (one suffices);
Kansas: Gen. St. 1915, § 11764 ("The Court shall cause the witnesses to the will" to come and testify);
Kentucky: 1819, Lindsay *v.* M'Cormack, 2 A. K. Marsh. 229 (one suffices; the later rulings are the same); 1820, Harper *v.* Wilson, 2 A. K. Marsh. 465; 1821, Overall *v.* Overall, Litt. Sel. C. 501, 503; 1822, Turner *v.* Turner, 1 Litt. 101, 103; 1823, Elmendorff *v.* Carmichael, 3 Litt. 473, 479; 1829, Hall *v.* Sims, 2 J. J. M. 509, 511; 1833, Carrico *v.* Neal, 1 Dana 162 (if "direct, positive, and explicit"); 1840, Swift *v.* Wiley, 1 B. Monr. 114, 116; 1850, Cornelison *v.* Browning, 10 B. Monr. 425, 427;
Louisiana: C. Pr. 1900, § 933 (a will is to be proved "by the number of witnesses required for that purpose by law"); Rev. Civ. C. 1920, § 1646 (the judge shall proceed to proof of a testament "in the presence of the notary and the witnesses who were present at the making of it, and who are on the spot or duly called"); see further the provisions for *nuncupative* wills and *holographic* wills (*post*, §§ 2050, 2051) which in this State trench partly on the field of the ordinary will;
Maine: Rev. St. 1916, c. 68, §§ 7, 9 (where there is no objection, a will may be probated on the testimony of "any one or more" of the witnesses; where the original cannot be obtained, execution may be proved by the

form. But statutes loosely drawn have introduced some confusion. How-

subscribing witnesses or by "any other evidence competent");
Maryland: Ann. Code 1914, Art. 93, § 350 (all are to be examined);
Massachusetts: 1815, Sears *v.* Dillingham, 12 Mass. 358, 362 (all are required); 1820, Brown *v.* Wood, 17 id. 68, 73 (same); Mass. Gen. L. 1920, C. 192, § 2 (for uncontested wills, probate may be granted upon the testimony of one witness only, by affidavit);
Michigan: Comp. L. 1915, § 13782 (in uncontested probate "the Court may in its discretion" act upon "the testimony of one of the subscribing witnesses only"); 1879, Abbott *v.* Abbott, 41 Mich. 540, 543, 2 N. W. 810 ("Our statute does not in terms require all the subscribing witnesses to be sworn on a contest, except inferentially in the Probate Court. This requirement, if it exists, is only implied"); 1879, Fraser *v.* Jennison, 42 Mich. 206, 223, 3 N. W. 882 (question not decided); 1915, Barney's Will, Barney *v.* Barney, 187 Mich. 145, 153 N. W. 730 ("the production of both is not mandatory", but here the absence of the second was accounted for, and what the Court meant was that both must be called or accounted for);
Minnesota: Gen. St. 1913, § 7268 (for uncontested wills the "testimony of one of the subscribing witnesses only" suffices in the Court's discretion); § 7271 (in case of contest, "all the subscribing witnesses who are within the State, and are competent and able to testify" must be produced);
Mississippi: Code 1906, § 1991, Hem. § 1656 (a will must be proved "by at least one of the subscribing witnesses"); 1848, Evans *v.* Evans, 10 Sm. & M. 402, 403 (all required); 1850, Kirk *v.* State, 13 Sm. & M. 406 (for personalty, only one is required to attest; hence, only one need be called); 1850, Ragland *v.* Green, 14 Sm. & M. 194, 199 (land; all must be called); 1858, Crusoe *v.* Butler, 36 Sm. & M. 150, 169 (land; only one need be called; preceding cases not cited);
Missouri: Rev. St. 1919, §§ 522, 523 (all are required by implication to be called); 1834, Graham *v.* O'Fallon, 3 Mo. 507, 510 (one suffices); 1917, Bell *v.* Smith, 271 Mo. 619, 197 S. W. 128 (proof by one only, without accounting for the others, not sufficient); 1921, Lindsay *v.* Shaner, — Mo. —, 236 S. W. 319 (will-contest; both witnesses required to be produced or accounted for);
Montana: Rev. C. 1921, § 10030, 10035 (like Cal. C. C. P., §§ 1308, 1315);
Nebraska: Rev. St. 1921, § 1259 (if not contested, the Court "may in its discretion grant probate thereof on the testimony of one of the subscribing witnesses only");
Nevada: Rev. L. 1912, § 5873 (in uncontested wills, the Court may admit on the "testimony of one of the subscribing witnesses only"); § 5875 (if contested, "all of the subscribing witnesses", if available, must be examined);
New Hampshire: Pub. St. 1891, c. 187, § 6 (a non-contested will may be probated on the testimony of one witness, "though the others are living and within process of the Court");
New Jersey: 1806, Den *v.* Allen, 2 N. J. L. [24] 32 (not clear); 1902, Ward *v.* Wilcox, 64 N. J. Eq. 303, 51 Atl. 1094 (even for contested wills, one witness may suffice);
New Mexico: Annot. St. 1915, § 5878 (the judge shall "examine the attesting witnesses to the will");
New York: S. C. A. 1920, §§ 141, 142 ("two at least" must be produced, "if so many are within the State and competent and able to testify"; where one has been for cause dispensed with, "and one subscribing witness has been examined", the will may be probated on the latter's testimony alone); 1822, Jackson *v.* Legrange, 19 John. 386 (one of the witnesses is enough, "if he can prove the execution"; "but if the witness cannot prove these requisites, the other witnesses ought to be called"); 1825, Dan *v.* Brown, 4 Cow. 483, 489 (one witness held sufficient; though here one of the other two names was not known); 1825, Jackson *v.* Luquere, 5 Cow. 221, 225 (one witness sufficient); 1828, Jackson *v.* Vickory, 1 Wend. 406, 412 (one is sufficient, "if he can prove its perfect execution", otherwise the others must be called); 1859, Hunt *v.* Johnson, 19 N. Y. 279, 293 (one suffices, if he can prove the necessary facts); 1862, Tarrant *v.* Ware, 25 N. Y. 425, note (all required); 1862, Auburn Seminary *v.* Calhoun, 25 N. Y. 422, 425 (same); 1867, Cornell *v.* Woolley, 42 N. Y. (Keyes) 378, 379 (one suffices);
North Carolina: Con. St. 1919, § 4144, par. 1 (two witnesses, *i.e.* all required to attest, must be called); 1906, Steadman *v.* Steadman, 143 N. C. 345, 55 S. E. 784 (rule applied to a will dated 1877);
North Dakota: Comp. L. 1913, § 8640 (uncontested will; the Court "may in its discretion grant probate . . . on the testimony of one only of the subscribing witnesses); § 8641 (contested will; "all the subscribing witnesses" are required);
Ohio: Gen. Code Ann. 1921, § 10516 (Court is to cause "the witnesses to such will" to be examined); § 4156 (certain ancient wills, in certain counties, validated on proof by one witness only);
Oklahoma: Comp. St. 1921, § 1104 (probate of uncontested will may be granted on testimony "of one of the subscribing witnesses only"); § 1108 (if a will is contested, "all the subscribing witnesses", if available, must be produced and examined);
Oregon: Laws 1920, § 784 (one is sufficient);
Pennsylvania: See *post*, § 2048 (wills in Pennsylvania);

ever, even where the entire number of those required to attest must be called, no more need be called, even though still others have in fact attested.[7]

From the above requirements of the present rule, the following doctrines must be distinguished: (1) By the substantive law prescribing the *elements of a valid execution*, it may be necessary to prove signing, delivery, presence of the maker, and the like. Now, if the present rule in a given jurisdiction requires but one attester to be called, and if he is unable to testify to all these elements, the present rule is satisfied, but the elements of the execution are not yet made out; so that the proponent may have to call others to prove the remaining facts of his case.[8] This, however, is not because of the present rule, but because otherwise the requirements of his particular case under the substantive law are not fulfilled. It is to this that the common expression refers, in the rulings above cited, that "one witness suffices, provided he can prove the requisites of a valid execution."

(2) Where a *statute* requires that execution be "*proved*" by a certain

Philippine Islands: See *post*, §§ 2050, 2051 (nuncupative and holographic wills); C. C. P. 1901, § 631 (for uncontested wills, one witness only); 1916, Cabang *v.* Delfinado, 34 P. I. 291 (contested will, all the required number of witnesses must be called; careful opinion by Trent, J.);

Porto Rico: See *post*, §§ 2050, 2051 (nuncupative and holographic wills); Rev. St. & C. 1911, § 1548–1557 ("closed" wills; special rules, based on the Spanish law);

South Carolina: Civ. C. 1922, §§ 5569, 5570 (for probate in common form, one witness is sufficient; in solemn form, all are required); 1798, Hopkins *v.* De Graffenreid, 2 Bay 187, 192 (one suffices "though if they are all alive it is best to produce them"); 1803, Hopkins *v.* Albertson, 1 Brev. 240, 2 Bay 484 (one suffices); 1818, Howell *v.* House, 2 Mill Const. 80, 82 (one suffices);

South Dakota: Rev. C. 1919, § 3211 (uncontested will; Court may admit to probate on testimony of one only); § 3226 (contested will; all must be "produced and examined");

Tennessee: St. 1789, Shannon's C. 1916, §§ 3904, 3910 ("Written wills with witnesses thereto, where not contested, shall be proved by at least one of the subscribing witnesses, if living; and every last will and testament, written or nuncupative, when contested, shall be proved by all the living witnesses, if to be found, and by such other persons as may be produced to support it"); 1812, Allen *v.* Allen, 2 Overt. 172 (under St. 1784 and 1789, the production of one witness suffices, where the other claims a privilege as interested, the will being contested); 1838, Crockett *v.* Crockett, Meigs 95 (by St. 1789, all the witnesses are required; *semble*, not so before); 1850, Jones *v.* Arterburn, 11 Humph. 97, 103 (will of personalty; all must be produced);

Texas: Rev. Civ. St. 1911, § 3267 ("one of the subscribing witnesses" suffices);

Utah: Comp. L. 1917, § 7572 (for uncontested wills, one witness; for contested, all);

Vermont: Gen. L. 1917, § 3220 (for wills uncontested, one suffices); 1855, Dean *v.* Dean, 27 Vt. 746, 749 (if contested, all should be called); 1866, Thornton *v.* Thornton, 39 Vt. 122, 151 (all must be called; the Chancery rule followed);

Virginia: 1846, Pollock *v.* Glassell, 2 Gratt. 439, 461 (one at law, two in chancery or probate); 1877, Lamberts *v.* Cooper, 29 Va. 61, 67, *semble* (all required);

Washington: St. 1917, Mar. 16, c. 156, (Probate Code, §§ 10–12; by implication, all must be called);

Wisconsin: Stats. 1919, § 3788 (for uncontested probate, "one of the subscribing witnesses only" suffices); 1897, Jones' Will, 96 Wis. 427, 70 N. W. 685 (holding (1) that the statute applies only to uncontested wills, (2) that by the common law one witness only is required if the other is unavailable, *i.e.* in effect, both must be called or accounted for);

Wyoming: Comp. St. 1920, § 6714 (quoted *post*, § 1310); § 6690 (for uncontested wills, "one of the subscribing witnesses only", suffices).

[7] 1898, Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887, *semble* (not more than the law requires need be called); 1857, Shirley *v.* Fearne, 33 Miss. 653, 664 (deed; one only being required to attest, one only need prove); 1903, Lorts *v.* Wash, 175 Mo. 487, 75 S. W. 95. *Not decided:* 1903, O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788 (whether all must be called, not decided; here the trial Court's ruling that the fifth must be called, being in court, was held not improper). Compare § 1309, *post*.

[8] See, for an illustration, Burrowes *v.* Lock, 10 Ves. Jr. 470, 474.

number of witnesses, that number must be called, and each must presumably testify to all the elements of a valid execution. But that is merely a rule of Quantity (*post*, § 2048), and has nothing to do with the Preferential rule. The requirement may be for example, that two witnesses prove execution; but these two may be any competent persons, whether or not they are the ones who have attested the document, and whether or not the document is attested at all. Statutes of this sort obtain in a few jurisdictions for proof of written wills, and in many jurisdictions for nuncupative wills.[9]

(3) Statutes in a few states have provided that a will *defectively probated*, in another State or at some prior time, may be accepted as valid. Usually the defect of probate mentioned is that only one attesting witness was called. Such curative or validating statutes virtually represent a special exception to the rule requiring two or more witnesses.[10]

§ 1305. **Same: Rule Satisfied when One Competent Witness testifies by Deposition or Affidavit.** Supposing the rule in a given jurisdiction to require only one witness to be called to furnish testimony, what amounts to such furnishing of testimony? Must he actually take the stand at trial? It is of course essential that he should be competent to testify.[1] But, assuming him competent, may he not testify by deposition, if the circumstances are such that a deposition would otherwise be admissible; *i.e.* supposing the requirements of the Hearsay rule satisfied, which allow the use of a deposition or of testimony at a former trial on certain conditions (*post*, §§ 1373–1384, §§ 1401–1414), is such a mode of testifying sufficient to satisfy the present rule that the testimony of one attesting witness must be offered? There should be no doubt that it is sufficient; the only objection can come through the Hearsay rule, and this is by hypothesis satisfied:

1834, TINDAL, C. J., in *Wright* v. *Tatham*, 1 A. & E. 3, 22 (not requiring a surviving witness to be called, where the testimony at a former trial of another deceased subscribing witness was offered): "[If the offer had been merely to prove the handwriting of B., the deceased subscribing witness, the survivor P. would have been preferable.] Such testimony might fairly be considered as evidence of a higher and better nature than mere presumption arising from the proof of the witness' handwriting. . . . The effect, however, of B.'s examination is not merely to raise a presumption; it is evidence as direct to the point in issue, and as precise in its nature and quality, as that of P. when called in person."

Wherever, then, by the general principles of the Hearsay rule, a deposition or former testimony would be receivable, its use will satisfy the present rule

[9] That they do not require the production of attesting witnesses, see the citations *ante*, § 1290. The general subject of these statutes is examined *post*, §§ 2048–2051.

[10] 1921, Sluder *v.* Wolf Mountain L. Co., 181 N. C. 69, 106 S. E. 215 (will probated in Maryland on testimony of one witness only; St. 1913, ex. sess., c. 142, curing defects in will probates, held applicable and valid).

§ 1305. [1] 1897, Houston *v.* State, 114 Ala. 15, 21 So. 813 (where the one called had subscribed by mark only, and could neither read nor write). The same result is implied in those rulings (*post*, § 1316) which allow proof of the witness' signature where he has become incompetent since attestation. A *blind witness*' testimony would apparently suffice (*post*, § 1316).

Distinguish the question of substantive law whether, under a statute requiring attestation of a will by "credible" witnesses, an *attestation is valid* if the attester subsequently becomes incompetent; in those cases it is conceded that he would be incompetent to satisfy the rule by testifying at the trial.

requiring an attesting witness to furnish testimony.[2] In some jurisdictions, a statute expressly provides for the use of attesting witnesses' prior testimony or depositions in testamentary cases (*post*, §§ 1411, 1413, 1416).[3] The practical bearing of this principle is that otherwise the providing of testimony by deposition or former testimony would be insufficient, and some other attesting witness would have to be called or accounted for.

An *affidavit* is ordinarily not receivable, under the Hearsay rule; but statutes occasionally provide for their employment by attesting witnesses in testamentary cases (*post*, § 1710); in such instances, they would presumably satisfy the present rule.

§ 1306. **Same: When all Witnesses unavailable in Person, One Attestation only need be Authenticated.** Under the principles of § 1320 and § 1505, *post*, when none of the attesters are available in person, the execution *may* be evidenced by authenticating the signature — *i.e.* the extra-judicial statement — of the attester; and in many jurisdictions (as noted in § 1320, *post*) the execution *must* be so evidenced. In that mode of proof, then, the same doctrine of numbers ought to apply, as regards the number of attestations to be authenticated, *i.e.* if in the particular jurisdiction the orthodox common-law rule obtains (under § 1304) that one attester's testimony suffices, then proof of one attestation also suffices; or, if the rule (under § 1304) requires the testimony of all the attesters to be furnished, then the attestations of all must be authenticated. The reason is that the attestation is in effect the extra-judicial statement of the attester to the fact of due execution, admitted under the Hearsay exception (*post*, § 1505), and being admissible so far as concerns the Hearsay rule, it is governed, so far as concerns the present rule, by the general principle in regard to the number of attesters required to be called. In short, if one attester suffices on the stand, one attester suffices when allowed to speak extra-judicially in the attestation-clause.

Accordingly, for *attested documents in general*, the rule (though perhaps once otherwise [1]) has long been generally settled to be that proof of a single attester's signature suffices,[2] just as the calling of a single attester to the stand

[2] But a deposition testifying to the execution of a specific document must ordinarily be made with the *document before the deponent: ante*, § 1185.

[3] Distinguish the question *post*, § 1312, whether the deposition of a witness out of the jurisdiction *must* be taken.

§ 1306. [1] 1694, Smart *v.* Williams, Comb. 247 (the two witnesses being dead, "if there be full evidence to prove one of their hands, and any evidence that endeavors have been used to find one to prove the other's hand, it is sufficient").

[2] In the following list, this is the doctrine maintained, except where otherwise noted: *Eng.* 1744, Omychund *v.* Barker, 1 Atk. 21, 49, Hardwicke, L. C.; 1798, Adam *v.* Kerr, 1 B. & P. 360; *Can.* 1848, Doe *v.* Twigg, 5 U. C. Q. B. 167, 170; *U. S. Federal:* 1882, Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. 313; *Ala.* 1843, Thomas *v.* Wallace, 5 Ala. 268, 275; 1897, Smith *v.* Keyser, 115 Ala. 455, 22 So. 149; *Ga.* 1863, Webb *v.* Wilcher, 33 Ga. 565, 568, *semble; Ky.* 1829, Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 434; *N. Car.* 1852, Burnett *v.* Thompson, 13 Ired. 379, 381; *S. Car.* 1798, Hopkins *v.* De Graffenreid, 2 Bay 187, 191; 1803, Turner *v.* Moore, 1 Brev. 236; 1804, Manigault *v.* Hampton, 1 Brev. 394, *semble* (though lapse of time here excused the proof of one of the hands); 1823, Young *v.* Stockdale, 2 McC. 531 (handwriting of both witnesses required, but that of one was here dispensed with as not attainable); 1827, Sims *v.* De Graffenreid, 4 McC. 253 (signature of both witnesses required).

suffices. For *wills*, however, the differences of practice obtaining in regard to the number to be called to the stand (*ante*, § 1304) are also noticeable here in regard to the number of attesting signatures to be proved, *i.e.* in some jurisdictions one suffices, in others all are required, with varying distinctions.[3] It will be noted that there is no objection on principle to the former rule merely in the fact that the attestation of the others is also an element in the validity of execution (as of a will); for the express or implied statement of the attester is (*post*, § 1511) that all the requisites of execution took place, which includes an assertion that the other attestations were made as they purport to be.

The question does not frequently occur for decision, because now by statute, in the instance of most common occurrence — the proof of a will — an express rule as to the number of signatures to be proved is usually laid down.[4]

(*g*) "Or show his Testimony to be Unavailable"

§ 1308. **General Principle of Unavailability.** The notion of a rule of preference among witnesses (*ante*, § 1286) is that the preferred witness must be used *if he can be had*. Accordingly the rule's force is spent if it appears that his testimony is not available. Conversely, the attester, if he is not produced, must be shown unavailable.

This general notion of unavailability has seldom been broadly defined in judicial opinion. The law upon the subject has usually been enunciated by rulings specifying particular situations as exempting from production: but the following passage is comprehensive:

1842, WOODS, J., in *Dunbar* v. *Madden*, 13 N. H. 311, 314: "It is believed to be the well-established general rule of law on this subject, that proof of the handwriting of the witness may be given in all cases when from physical or legal causes it is not in the power of the party to produce the witness at the trial."[1]

[3] *New York:* 1814, Jackson *v.* Burton, 11 John. 64 ("There is no fixed rule requiring proof of the hand of all the witnesses"; here one was sufficient); 1822, Jackson *v.* Legrange, 19 John. 386, 389 (if there is no witness who can prove all the requisites of execution, *semble*, the hands of all or of the rest must be proved); 1825, Jackson *v.* Luquere, 5 Cow. 221, 225 (same, because "the testator may have acknowledged his signing to the witnesses separately"); 1828, Jackson *v.* Vickory, 1 Wend. 406, 412 (approving the preceding); *North Carolina:* 1837, Bethel *v.* Moore, 2 Dev. & B. 311, 315, *semble* (all required); *South Carolina:* 1803, Hopkins *v.* Albertson, 2 Bay 484, 1 Brev. 240 (all required, since one may be forged, "in which case it would only be witnessed by two witnesses, which is not an execution" according to law; Bay, J., diss.); 1817, Pearson *v.* Wightman, 1 Mill Const. 336, 344 *semble* (all required); 1821, Sampson *v.* White, 1 McC. 74 *semble* (one suffices); *Tennessee:* 1850, Jones *v.* Arterburn, 11 Humph. 97, 103 (will of personalty; handwriting of all, if feasible, must be proved).

[4] These statutes, however, deal also with several matters involving proof by signature, and accordingly have been for convenience collected in a single place (*post*, § 1320), to which reference may be made.

Whether *also the maker's signature* must be proved, is a different question, dealt with *post*, §§ 1320, 1513.

§ 1308. [1] It would perhaps have been more accurate to add that it must be beyond the party's power to produce the witness "for purposes of examination", for this more clearly includes the case of a witness rendered incompetent by interest.

Other broad phrasings are as follows: 1779, Abbott *v.* Plumbe, 1 Doug. 216 (Mansfield, L. C. J.: "unless it appears that his attendance could not be procured"; Buller, J.: "unless some reason can be shown for his absence"); 1813, Logan, J., in Hart *v.* Coram, 3 Bibb 26 ("in a situation which renders his

§ 1309. **All the Attesters must be shown Unavailable.** The rule prefers an attester as a witness; the rule's force is therefore not spent until it appears that no attester can be had; in other words, if there is more than one attester, *all must be shown unavailable* before resort can be had to other testimony. This is ancient and settled doctrine; [1] though it must be noted that, where the law requires a certain number to attest, no more than that number need be accounted for (on the analogy of § 1304, *ante*), even though more than the required number have attested.[2]

§ 1310. **Statutory Enumerations of Causes of Unavailability.** Before considering the common-law doctrines as to sufficient causes of unavailability, it may be noted that statutes [1] have almost always come to deal expressly with

examination impracticable"); 1806, Taylor, J., in Baker *v.* Blount, 2 Hayw. 404 ("divers exceptions, founded on necessity"); 1831, Clarke *v.* Courtney, 5 Pet. 319, 344 (Story, J.: "dead, or cannot be found, or is without the jurisdiction, or otherwise incapable of being produced"); 1814, Hill *v.* Nall, 2 Overt. 241 (absence "must be accounted for in some satisfactory manner").

§ 1309. [1] *Eng.* 1744, Omychund *v.* Barker, 1 Atk. 21, 49 Hardwicke, L. C.; 1764, Forbes *v.* Wale, 1 W. Bl. 532 (one dead, but the other living); 1790, Wallis *v.* Delancey, 7 T. R. 266, note (proof that the other witness was in foreign parts, required before going to handwriting); *Can.* 1848, Doe *v.* Twigg, 5 U. C. Q. B. 167, 170; *U. S. Ga.* 1898, Howard *v.* Russell, 104 Ga. 230, 30 S. E. 802; *Ind.* 1827, Booker *v.* Bowles, 1 Blackf. 90; *Ky.* 1829, Chambers *v.* Handley, 3 J. J. Marsh. 98; *Me.* 1845, Woodman *v.* Segar, 12 Shepl. 90, 92; *N. Y.* 1826, Jackson *v.* Gager, 5 Cow. 383, 385; 1830, Jackson *v.* Christman, 4 Wend. 278, 283; *Pa.* 1785, Davison *v.* Bloomer, 1 Dall. 123; 1835, Congregation *v.* Miles, 4 Watts, 146, 149.

The statutes quoted *post*, § 1310, usually mention this part of the rule.

[2] 1887, Snider *v.* Burks, 84 Ala. 53, 57, 4 So. 225 (will; where two of the three were dead, and proof of their handwriting was allowed).

The interesting question here is this: Supposing only one attester to be required to be called as a witness (*ante*, § 1304), and supposing him to have no recollection when called, may his signature then be proved as sufficient? This question really is: Has the rule been satisfied as to one witness? If so, the rule's force is spent. Now it would seem that at least the witness should, if called, also *testify*; i.e. it is immaterial (*ante*, § 1302) how he testifies, so far as the rule's application to himself is concerned; but so far as going on to other evidence is concerned, the other attesters must be first tried if the first attester is unavailable; and the present notion of unavailability of all as a condition precedent must be thought to include not merely an excused non-production, but also a production which through failure of recollection has resulted in no testimony at all. Accordingly, if the first one, though having no present recollection, adopts his attestation as a record of past recollection, he has in effect testified (*ante*, §§ 745, 754); but if he does not, he is a nullity as a witness, and the remaining attesters must be tried before other evidence can be used.

Compare here the principles of §§ 1302, 1303, *ante*, and 1315, *post*.

§ 1310. [1] The statutes deal with the causes noted in the ensuing sections, but to avoid repetition are placed together here. The judicial rulings noted in the later sections, §§ 1311–1318, include those made in application of these statutes to specific causes of non-availability; but rulings merely construing the statute generally are placed here with the statute; for statutes providing that the *deposition* of a witness out of the State, etc., *may* be used, see *post*, § 1411, under Depositions:

CANADA: *Alta.* Rules of Court 1914, No. 978 (for proof in solemn form, the propounder produces "one or more of the witnesses to the will, if he or they are alive"); *N. Br.* Consol. St. 1903, c. 28, § 42; St. 1915, c. 23, § 19 (proof in common form may be made "by the oath of a subscribing witness administered in the form B"); §§ 20, 49 ("when all the witnesses to any will are dead, or some are dead and the others reside out of the province, or the whole do so reside", proof "by 'viva voce' testimony of the handwriting of the witnesses and the testator" suffices; on proof in solemn form and whenever the judge may deem necessary, a commission may be ordered to take the testimony of "the witnesses to the will" and others; but for witnesses in the country, the judge shall himself attend to take their evidence, if "such witness is by reason of age, illness, or other cause unable to travel"); *Newf.* Consol. St. 1916, c. 83, § 179 (quoted *post*, § 1320); *N. Sc.* Rev. St. 1900, c. 158, § 18 ("when the witnesses live out of the province, or more than thirty miles distance from the registry, or by reason of age or illness are unable to appear and give evidence in court", their depositions are receivable); *Ont.* St. 1919,

the same subject, especially for will-witnesses. These statutes are often obscurely phrased, and seldom enumerate more than two or three causes for

c. 27, § 1 (probate of the will of a soldier, mariner, or seaman in active military or naval service at the time of execution; if it appears that "the witnesses are dead or are incompetent, or that the whereabouts of the witnesses, or either of them, is unknown", the judge may "accept such evidence as he may consider satisfactory"); *P. E. I.* St. 1873, c. 21, § 24 ("If the only living witness to any will be out of the jurisdiction, proof of the fact of the death of the other witness, and of the handwriting of either of such witnesses, together with that of the testator, unless he be a marksman, in which case proof of his signature may be dispensed with, shall be sufficient evidence"; unless proof in solemn form is required, "in which case a commission may issue and evidence may be taken under the same in such manner as the surrogate may direct").

UNITED STATES: *Alabama:* Code 1907, § 6185 ("[a will] must be proved by one or more of the subscribing witnesses, or if they be dead, insane, or out of the State, or have become incompetent since the attestation", then by handwriting); § 6186 ("If none of the subscribing witnesses to such will are produced, their insanity, death, subsequent incompetency, or absence from the State, must be satisfactorily shown before proof of the handwriting of the testator or of any of the subscribing witnesses can be received"); § 4005 ("Whenever the subscribing witnesses to an instrument in writing are dead, insane, incompetent, or are without the state, or their residence is unknown, or being produced, they do not recollect the transaction, then proof of the actual signing by, or of the handwriting of, the alleged maker or subscribing witness shall be received as primary evidence of the fact of execution; and if such evidence be not attainable, the court may admit evidence of the handwriting of the subscribing witnesses, or other secondary evidence, to establish such fact of execution"); 1895, Barnewall *v.* Murrell, 108 Ala. 366, 378, 18 So. 831 ("if any one or more" is unavailable, the secondary grade may be resorted to; misconstruing the statute and misunderstanding Snider *v.* Burks, cited *supra*, § 1309);

Arizona: Rev. St. 1913, Civ. C. § 751 (in contested wills, all must be produced "who are present in the county and who are of sound mind"; if none reside in the county, other testimony may be admitted);

Arkansas: Dig. 1919, §§ 10517, 10518 (quoted *post*, § 1320);

California: C. C. P. 1872, § 1315 (in contested wills, "all the subscribing witnesses who are present in the county and who are of sound mind must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the Court; if none of the subscribing witnesses reside in the county at the time appointed for proving the will, the Court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of such execution", it may admit evidence of handwriting); § 1308 (in uncontested probates, the testimony of one subscribing witness suffices; if at the hearing "none of the subscribing witnesses resides in the county, but the deposition of one of them can be taken elsewhere, the Court may direct it to be taken, and may authorize a photographic copy of the will to be made and presented to such witness on his examination, who may be asked the same questions with respect to it and the handwriting of himself, the testator, and the other witness, as would be pertinent and competent if the original will were present. If neither the attendance in court nor the deposition of any of the subscribing witnesses can be procured, the Court may admit the testimony of any other witness as provided in § 1317");

Colorado: Comp. St. 1921, § 5209 ("in all cases where any one or more of the witnesses to any will shall die or remove to some distant country, unknown to the parties concerned, or cannot be found, so that his or her testimony cannot be procured", other evidence is allowable);

Columbia (District): Code 1919, § 131 ("all the witnesses" to a will "who are within the District and competent to testify must be produced and examined, or the absence of any of them satisfactorily accounted for"); § 132 (in wills of realty, for the testimony of a resident witness "unable from sickness, age, or other cause, to attend court, the register of wills may with such will attend upon said witness and take his testimony. If the testimony of resident attesting witnesses or witness to such will shall have been taken, and any other such witness to said will shall reside out of the District, but within the United States, it shall be sufficient to prove the signature of such witness so out of the District. If the sole witnesses to such will shall be out of said District as aforesaid, or if one or more should be within the United States and one or more be in some foreign country, then it shall be sufficient to take the testimony of any one or all within the United States, as the Court may determine, and to prove the signatures of those whose testimony is not required to be taken. If all such witnesses shall be out of the United States, then it shall be sufficient to take the testimony of such of them as the Court may require, and to prove the signature or signatures of the others"; the testimony of those out of the District to be taken by commission, with the will annexed);

excuse. Whatever were the inner intentions of the Legislators, it would be

Delaware: Gen. St. 1915, § 3334 ("In case any attesting and subscribing witness to a will shall be dead or not within the State", other proof may be used);
Georgia: Rev. C. 1910, §§ 5833–5834 ("if from any cause the witness cannot be produced or sworn", he need not be; when witnesses are "dead, insane, incompetent, or inaccessible, or being produced, do not recollect the transaction", then other evidence is allowable); § 3856 (will-witnesses; they must be produced if "in existence and within the jurisdiction of the Court");
Idaho: Comp. St. 1919, § 7455 (like Cal. C. C. P., § 1315);
Illinois: Rev. St. 1874, c. 148, § 6 (where "any one or more of the witnesses of any will . . . shall die, be insane, or remove to parts unknown to the parties concerned, so that his or her testimony cannot be procured", handwriting and other evidence may be resorted to);
Indiana: Burns' Ann. St. 1914, § 3141 (if "dead, out of the State, or have become incompetent from any cause", then proof by handwriting may be used); § 3143 (all the witnesses must be shown unavailable by death, etc., before proving signatures);
Kansas: Gen. St. 1915, § 11767 (if "any witness" has "gone to parts unknown", or has become "incompetent" since execution, the will may be allowed "upon such proof as would be satisfactory, and in like manner as if such absent or incompetent witness were dead");
Louisiana: Rev. Civ. C. 1920, §§ 1646–1654 (death or absence from the State suffices; quoted in full *post*, §§ 2050, 2051);
Maryland: Ann. Code 1914, Art. 93, § 350 ("all the witnesses thereto shall be examined if their attendance can be had"; the depositions may be taken "of any or all of the witnesses thereto who from any cause cannot conveniently attend to the office of said register of wills, wherever he may find such witness or witnesses, whether within the State of Maryland or beyond its jurisdiction"; and further the Orphans' Court "may in their discretion accept proof of any will in the manner prescribed in § 337 of this article, when the attendance of the witnesses thereto cannot in the judgment of the said Court be conveniently had"); Art. 93, § 353 ("If any witness or witnesses to any will shall die before probate thereof, or if at the time of the probate of any will any witness or witnesses shall be nonresidents or beyond the jurisdiction of the Orphans' Court, or if for any other reason their presence cannot be secured, then proof by any credible witness of the signature of the testator or of the signature of any such deceased or absent witness shall have the same effect" as if the witness had testified in court to execution);
Michigan: Comp. L. 1915, § 13783 ("If none of the subscribing witnesses shall reside in this State", other testimony may be admitted or proof of handwriting); § 11821 ("their subsequent incompetency, from whatever cause it may arise", shall not prevent probate of a will otherwise proved); 1897, Sullivan *v.* Sullivan, 114 Mich. 189, 72 N. W. 135 (How. § 5803 refers to living witnesses; in How. § 5789, "incompetency, from whatever cause it may arise", includes sickness, death, etc.);
Minnesota: Gen. St. 1913, § 7269 ("If none of the subscribing witnesses reside in the State", the Court may admit other evidence); § 7271 (contested wills; quoted *ante*, § 1304);
Mississippi: Code 1906, § 1991, Hem. § 1656 (one at least must prove, "if alive and resident in the State, and competent to testify; but if none of the subscribing witnesses can be produced", then other evidence may be used); § 1992, Hem. § 1657 (if no contest, witness' affidavit suffices);
Missouri: Rev. St. 1919, § 523 (when the attesting witnesses are "dead, insane, or their residences unknown", then other evidence may be used);
Montana: Rev. C. 1921, § 10035 (like Cal. C. C. P. § 1315);
Nebraska: Rev. St. 1921, § 1260 ("If none of the subscribing witnesses shall reside in this State" at the time, the Court may in discretion "admit the testimony of other witnesses"); § 1245 ("subsequent incompetency, from whatever cause it may arise", shall not prevent probate, if other proof is made); § 8853 (if a subscribing witness is absent from the county, other evidence is allowable);
Nevada: Rev. L. 1912, § 5873 (in uncontested wills, "the testimony of one of the subscribing witnesses only" suffices whenever the witness "resides at a distance of more than 25 miles" from the place of trial, his affidavit to due execution and sanity shall suffice instead of calling him in person); § 5875 (in contested wills, all who "are present in the county, and who are of sound mind", must be examined; "and the death, absence, or insanity of any of them shall be satisfactorily shown to the Court");
New Hampshire: Pub. St. 1891, c. 187, § 12 (if attesting witnesses "become incompetent from any cause", proof may be made by "other satisfactory evidence");
New Mexico: Annot. St. 1915, § 5878 (witnesses shall be examined "if their attendance is obtainable"; "if not", evidence of signatures, etc., is admissible); § 5877 (if any witness is "not a resident of the county", or is "incapacitated by sickness or age from attending", deposition may be taken and used);
New York: S. C. A. 1920, § 142 (testimony of a subscribing witness may be dispensed with in case of "death, absence from the State, incompetency by reason of lunacy or otherwise", or when he "cannot with due diligence be found within the State, or cannot be examined by reason of his physical or mental condition"; surrogate may order testimony taken by com-

unfortunate to be obliged to construe the statutory enumeration as exhaus-

mission if the witness "is absent from the State and his testimony can be obtained with reasonable diligence");
North Carolina: Con. St. 1919, § 4144, par. 1 (will-witness must be called "if living", but if "any one or more" are dead, or reside out of the State, or cannot be found within the State, or are insane, or otherwise incompetent to testify, then proof of handwriting suffices);
North Dakota: Comp. L. 1913, § 8641 (in contested probate, all "who are present in the county and who are of sound mind must be produced and examined; if none of the subscribing witnesses resides in the county and is present", other witnesses may be called); § 8642 ("Before the presence of a witness . . . can be dispensed with, it must be shown by affidavit or other competent evidence to the satisfaction of the Court that he is dead or disqualified, or that he cannot after due diligence be found within this State, or if within the State that he is so aged, sick, or infirm that his presence cannot safely be required");
Ohio: Gen. Code Ann. 1921, § 10517 (if "any witness is gone to parts unknown", or if "the witnesses to a will" have become incompetent, or if "the testimony of any witness cannot for any reason be obtained within a reasonable time", then the Court may give probate "upon such proof as would be satisfactory, and in like manner as if such absent or incompetent witness were dead");
Oklahoma: Comp. St. 1921, § 1108 (all of the witnesses "who are present in the county, and are of sound mind", must be produced; "and the death, absence, or insanity of any of them must be satisfactorily shown to the Court. If none of the subscribing witnesses reside in the county, and are not present at the time appointed for proving the will", other testimony may be admitted);
Oregon: Laws 1920, § 784 (attesting witness must be called "if he be living and within the State and can testify"); St. 1921, Feb. 16, c. 97 (in non-contested probate, affidavits of attesting witnesses "may be used in lieu of the personal presence of said witness", but on motion the Court may require personal production or deposition);
Philippine Islands: C. C. P. 1901, § 633 ("If none of the subscribing witnesses reside in the Philippine Islands at the time of the death of the testator, the court may admit the testimony of other witnesses to prove the sanity of the testator, and the due execution of the will, although the subscribing witnesses are living; and as evidence of the execution of the will, it may admit proof of the handwriting of the testator and of the subscribing witnesses, in cases where the names of the witnesses are subscribed to a certificate stating that the will was executed as required in this chapter. In case one or more of the subscribing witnesses has deceased, the sanity of the testator and the due execution of the will may also be proven in the manner in this section heretofore provided");
South Carolina: Civ. C. 1922, §§ 5569, 5570 (on probate of a will in common form, "death or removal from the State" suffices; in solemn form, it suffices if he is "dead or insane");
South Dakota: Rev. C. 1919, § 3227 (witnesses "who are present in the county, and are of sound mind must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the Court. If none of the witnesses reside in the county, and none are present at the time appointed", then other testimony is admissible); § 3211 (uncontested will; if no witness resides in county, deposition may be taken by commission, with the will or a photographic copy annexed);
Tennessee: Shannon's Code 1916, §§ 3904, 3910 (wills; if not contested, proof suffices by one witness "if living"; if contested by "all the living witnesses if to be found");
Texas: Rev. Civ. Stats. 1911, § 3267 ("If all the witnesses are non-residents of the county, or those resident of the county are unable to attend court", the deposition of one suffices; if none are living, then evidence of handwriting is admissible);
Utah: Comp. L. 1917, § 7572 (like Cal. C. C. P. § 1315);
Vermont: Gen. L. 1917, § 3221 (will-witness; if none reside in the State at the time of the testator's death, then other evidence is receivable);
Virginia: Code 1919, § 5252 (when an attesting witness "resides out of this State" or "is confined in another county or corporation under legal process, or is unable from sickness, age, or any other cause, to attend", the will "may be proved by the deposition of the subscribing witness or witnesses");
Washington: St. 1917, Mar. 16, c. 156, Probate Code, § 12 ("When one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence be unknown, then proof shall be taken of the handwriting of the testator, and of the witnesses dead, insane, or residence unknown, and all such other circumstances as would be sufficient to prove such will"); § 13 ("If it should appear, to the satisfaction of the Court, that all the subscribing witnesses to any such will are dead, insane, or their residence unknown, the Court shall take and receive proof of the handwriting of the testator and subscribing witnesses, to the will, and such other facts and circumstances as would tend to prove the will");
Wisconsin: Stats. 1919, § 3788 ("If none of the subscribing witnesses shall reside in this State . . . or if any one or more of them shall have gone to parts unknown and the Court shall be satisfied that such witness, after due diligence

tive; and this the Courts are apparently not inclined to do.[2] The statutes, therefore, leave the broad principle of the common law untouched, and merely confirm or correct its precedents.

§ 1311. **Causes of Unavailability**; (1) **Death**; (2) **Ancient Document.** (1) If there is to be any excuse at all for not producing the attester, it is clear that *death* supplies it; and this is universally accepted, although the earlier reports show traces of a rigor not recognizing even this exemption.[1]

(2) Where a document purports to be so old that attesters cannot be supposed to be yet alive, the same ground for exemption exists. An "*ancient*" *document*, in this sense, has long been defined by a fixed rule, *i.e.* a document purporting to be thirty years old. This rule applies not only to *documents in general*,[2] but also to *wills*.[3] Not only is the production of the attester

sued, cannot be found", then other testimony is admissible);
Wyoming: Comp. St. 1920, § 6714 (for contested wills, "all the subscribing witnesses who are present in the county and who are of sound mind must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the Court; if none of the subscribing witnesses reside in the county", at the time of probate, others may be admitted; and "as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses or any of them").

[2] 1849, Holmes *v.* Holloman, 12 Mo. 536 (heirs claimed privilege as parties; production excused; the statutory exemptions for death, etc., held not to be taken as " 'expressio unius exclusio alterius', but are merely a codification of what was already the common law, and a recognition of the principle upon which secondary evidence may be admitted"); 1850, Jones *v.* Arterburn, 11 Humph. Tenn. 97, 99.

§ 1311. [1] 1673, Phillips *v.* Crawly, Freeman 83 (death sufficient); 1840, Henley *v.* Phillips, 2 Atk. 48 (same); 1748, Grayson *v.* Atkinson, 2 Ves. Sr. 454, 460 (Hardwicke, L. C.: "If the witness was dead, it might possibly be sufficient; that is the act of God"); 1796, Barnes *v.* Trompowsky, 7 T. R. 265 (death sufficient); 1874, Harris *v.* Tisereau, 52 Ga. 153, 163 (Code § 2431 does not prohibit probate of will on the death of witnesses, except by Probate Court); 1890, Maxwell *v.* Hill, 89 Tenn. 584, 15 S. W. 253 (death suffices).

[2] *England:* 1788, R. *v.* Farringdon, 2 T. R. 466 (certificate of pauper settlement required to be attested); 1795, Chelsea Water Works *v.* Cowper, 1 Esp. 275 (bond); 1798, Marsh *v.* Collnett, 2 Esp. 665 (Yates, J., *ex rel.* Kenyon, L. C. J., ruled "that he would not break in upon a rule so well established as that deeds of 30 years' standing proved themselves, by requiring the subscribing witness to be called"); 1828, Doe *v.* Wolley, 8 B. & C. 22, 24 ("the principle . . . is that the witnesses may be presumed to have died"; he need not be called, even if in fact he is living); 1845, Lord Gosford *v.* Robb, 8 Ir. L. R. 217, 219, *semble* (per Pennefather, C. J.); *Canada:* 1848, Doe *v.* Turnbull, 5 U. C. Q. B. 129, 131 (even if the witness is in fact alive); 1864, Orser *v.* Vernon, 14 U. C. C. P. 573, 587, *semble; United States:* *Fed.* 1830, Hinde *v.* Vatlier, 1 McLean 110, 116; 1835, Winn *v.* Patterson, 9 Pet. 663, 674 (applicable to all deeds of thirty years' standing, no matter how proved); 1920, Smythe *v.* New Providence, 3d C. C. A., 263 Fed. 481 (town bonds of the year 1868; signatures of the subscribing witnesses not required to be proved); *Ala.* Code 1907, § 4004, par. 1; 1888, Allison *v.* Little, 85 Ala. 512, 516, 5 So. 221; 1904, O'Neal *v.* Tennessee C. I. & R. Co., 140 Ala. 378, 37 So. 275; *Ga.* Code 1895, § 5244; 1850, Settle *v.* Allison, 8 Ga. 201, 205 (even if the witnesses are alive); 1876, Gardner *v.* Granniss, 57 Ga. 539, 555 (same); *Ill.* 1858, Smith *v.* Rankin, 20 Ill. 14, 23 (but not if the witness is living); *Mass.* 1900, Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2 (even if the witness is alive and in court); *Mo.* 1874, Shaw *v.* Pershing, 57 Mo. 416, 421 (even though the witnesses were alive); *N. Y.* 1808, Jackson *v.* Blanshan, 3 Johns. 292, 295, 298, *semble* (even where the witness is alive); 1826, Jackson *v.* Thompson, 6 Cow. 178, 180; 1830, Jackson *v.* Christman, 4 Wend. 278, 282 (even where the witness is alive and available); 1840, Northrop *v.* Wright, 24 Wend. 221, 228 (same); 1847, Willson *v.* Betts, 4 Den. 201, 212; *N. C.* 1793, Jones *v.* Brinkley, 1 Hayw. 20; *Pa.* 1811, Garwood *v.* Dennis, 4 Binn. 314, 326; 1823, McGennis *v.* Allison, 10 S. & R. 197, 199 ("perhaps . . . even if they were in full life"); *S. C.* 1840, Edmonston *v.* Hughes, Cheves 81, 84, *semble.*

[3] *Eng.* 1803, M'Kenire *v.* Fraser, 9 Ves. Jr. 5, *semble;* 1817, Rancliffe *v.* Parkyns, 6 Dow 149, 202, *semble;* 1826, Doe *v.* Passingham, 2 C. & P. 440; 1826, Doe *v.* Deakin, 3 C. & P. 402 (Vaughan, B.: "The rule of 30 years is founded on the presumption that the witnesses are dead"); 1828, Doe *v.* Wolley, 8 B. & C. 22; 1835, Doe *v.* Burdett, 4 A. & E. 1, 19 ("even

excused, even though he is alive and available,[4] but the execution is upon certain other evidence assumed to have been valid; in this aspect, the rule for ancient documents, with the history of its peculiar limitation to thirty years, is elsewhere examined (*post*, §§ 2137–2146).

§ 1312. **Same**: (3) **Absence from the Jurisdiction.** A person not within the jurisdiction is not compellable by the Court's process to appear, and therefore is in effect unavailable as a witness:

1842, WOODS, J., in *Dunbar* v. *Madden*, 13 N. H. 311, 313: "The reason is that the process of the Court cannot reach the witness effectively in a foreign government or country, and consequently it is not within the power of the party, legally speaking, to produce him."

This general doctrine, though not positively established till the end of the 1700s,[1] is now universally accepted;[2] although there is considerable difference

were they all alive"); *U. S.* 1917, Jarboe's Appeal, 91 Conn. 265, 99 Atl. 563 (will of 1860; witness not accounted for nor his signature proved); 1820, Duncan *v.* Beard, 2 N. & McC. S. Car. 400, 408 (in the form of a presumption of death).

[4] See the citations in the preceding notes. Distinguish the following ruling: 1815, Manby *v.* Curtis, 1 Price 225 (a receipt of 53 years before, offered as a hearsay statement against interest, excluded on hearsay grounds, because the writer was not shown deceased; the authentication question apparently not decided).

§ 1312. [1] 1673, Phillips *v.* Crawly, Freeman 83 (attested deed; "because they did not prove the witnesses dead, nor that they were gone to sea — though they alleged it — it was not permitted at first to be given in evidence"); 1740, Henley *v.* Phillips, 2 Atk. 48 (requiring stricter proof of death for witnesses living long abroad, *i.e.* apparently because if really alive their presence abroad would not satisfy the rule); 1779, Coghlan *v.* Williamson, 1 Doug. 93 (sufficient, where the witness was shown to have gone to India five years before); 1786, St. 26 Geo. III. c. 57 (where the attesting witness resides in the East Indies, proof of the handwriting of witness and party suffices); 1792, Holmes *v.* Pontin, Peake 99 (the witness was in France, and would not come over; Kenyon, L. C. J., referring to the preceding case: "It was considered as an innovation at the time; but was found to be so beneficial that it has since been adhered to"); 1793, Cooper *v.* Marsden, 1 Esp. 1 ("where it appeared that he was abroad", sufficient); 1796, Barnes *v.* Trompowsky, 7 T. R. 265 ("If residing abroad, by sending out a commission to examine him, or at least, by proving his handwriting, which last indeed is a relaxation of the old rule, and admitted only of late years"); 1798, Adam *v.* Kerr, 1 B. & P. 360 (out of the jurisdiction, sufficient).

[2] ENGLAND: 1802, Prince *v.* Blackburn, 2 East 250 (here the general doctrine was for the first time definitely established; moreover, mere absence, not necessarily domicile or permanent absence, suffices); 1809, Ward *v.* Wells, 1 Taunt. 461 (mere absence suffices); 1815, Hodnett *v.* Forman, 1 Stark. 90 (mere absence, without a request by the party to the witness to attend, sufficient); 1828, Kay *v.* Brookman, 3 C. & P. 555 (proof of disappearance, with intention of leaving the country, sufficient); 1840, Glubb *v.* Edwards, 2 Moo. & Rob. 300, Maule, J. (here the point was raised because the Common Law Courts had recently been given power to issue a foreign commission).

UNITED STATES: here the statutes *ante*, § 1310, are to be compared; the fact of absence was sufficient in the following cases, except as otherwise noted: *Federal:* 1804, Jones *v.* Lovell, 1 Cr. C. C. 183 (removal from the jurisdiction, sufficient); 1805, Welford *v.* Eakin, 1 Cr. C. C. 264 (residence without, sufficient); 1809, Cooke *v.* Woodrow, 5 Cr. 13 (witness going out of district and last heard of in Norfolk; handwriting not allowed, without proof of inability to find at N.); *Alabama:* 1851, Foote *v.* Cobb, 18 Ala. 585, 587 ("residing"); 1881, Allred *v.* Elliott, 71 Ala. 224, 226 (residence in another county, insufficient; "absent from the State when last heard from", sufficient); 1884, Guice *v.* Thornton, 76 Ala. 466, 473 ("absent from the State"); 1890, Caldwell *v.* Pollak, 91 Ala. 353, 359, 8 So. 546 ("residing"); 1897, Smith *v.* Keyser, 115 Ala. 455, 22 So. 149; *Arkansas:* 1838, Brown *v.* Hicks, 1 Ark. 233, 242 (absence from home, to return in a few months, insufficient); 1839, Wilson *v.* Royston, 2 Ark. 315, 327 (deed executed in another State; further evidence of witnesses' absence from jurisdiction required); 1860, Tatum *v.* Mohr, 21 Ark. 349, 352 ("being out of the jurisdiction"; but in fact he resided without); *California:* 1859, Stevens *v.* Irwin, 12 Cal. 306 (out of the county, not sufficient); *Georgia:* 1906, Terry *v.* Broadhurst, 127 Ga. 212, 56 S. E. 282 (at-

of phrasing, even within the same Court's rulings, as to the sufficiency of mere temporary absence, and not permanent residence, without the jurisdiction.

tendance at school in another State, sufficient); *Hawaii:* 1856, Bullions *v.* Loring, 1 Haw. 209, 213 (residence out of the kingdom, held here sufficient); *Illinois:* 1844, Wiley *v.* Bean, 6 Ill. 302, 305 (absence from the State, sufficient); 1848, Mariner *v.* Saunders, 10 Ill. 113, 121 (residence in another State, sufficient); *Indiana:* 1819, Jones *v.* Cooprider, 1 Blackf. 46 (residence in another State, sufficient); 1828, Ungles *v.* Graves, 2 Blackf. 191 (same); 1845, State *v.* Bodly, 7 Blackf. 355, 357 (same); 1881, Herbert *v.* Berrier, 81 Ind. 1, 7 (will-statute applied); *Iowa:* 1870, Ballinger *v.* Davis, 29 Ia. 512 (absence from the jurisdiction in unknown place, sufficient); *Kentucky:* 1812, M'Dowell *v.* Hall, 2 Bibb 610, 612; 1813, Hart *v.* Coram, 3 Bibb 26 ("in a situation which renders his examination impracticable, as being absent in a foreign country or beyond the process of the Court or the Court's control"; here not shown on the facts); 1815, Clarke *v.* Bartlett, 4 Bibb 201, 203 (residence in another State, sufficient); 1816, Sentney *v.* Overton, 4 Bibb 445 (removal to an adjoining State, sufficient); 1817, M'Cord *v.* Johnson, ib. 531 (in an adjoining State on a transient visit, insufficient, though perhaps not "actual domicile" abroad would be necessary, and "long absence" might suffice); 1817, Creighton *v.* Johnson, Litt. Sel. C. 240 (transient absence in the adjoining State, insufficient); 1820, Bowman *v.* Bartlett, 3 A. K. Marsh. 86, 91 ("the absence from a State, or rather his residing abroad", suffices), 1822, Turner *v.* Turner, 1 Litt. 101, 104 ("out of the State"; sufficient in case of a will, provided one witness has proved the will); 1829, Kemper *v.* Pryor, 1 J. J. Marsh. 598 (removal from the State, and diligent inquiry, sufficient); *Louisiana:* 1819, Lynch *v.* Postlethwaite, 7 Mart. 69, 209 (absence from jurisdiction); 1823, Crouse *v.* Duffield, 12 Mart. 539, 542 (same); 1825, Villere *v.* Armstrong, 4 Mart. N. s. 21 ("left the State"); *Maine:* 1840, Emery *v.* Twombly, 5 Shepl. 65 (absence suffices; even though they lived within 30 miles of the place of trial); *Massachusetts:* 1809, Dudley *v.* Sumner, 5 Mass. 439, 444, 462, *semble* (absence from jurisdiction); 1814, Homer *v.* Wallis, 11 Mass. 309, 311 (same); 1851, Gelott *v.* Goodspeed, 8 Cush. 411 (same); 1860 Ela *v.* Edwards, 16 Gray 91, 95 (same); *Mississippi:* 1838, Downs *v.* Downs, 2 How. 915, 924 (gone from the jurisdiction, sufficient); *Missouri:* 1826, Little *v.* Chauvin, 1 Mo. 626, 631 (residence out of the State, sufficient); 1838, Maupin *v.* Triplett, 5 Mo. 422 (in another county, not sufficient); 1843, Lawless *v.* Guelbreth, 8 Mo. 139 (residence just over the State line, sufficient); 1857, Clardy *v.* Richardson, 24 Mo. 295, 296 (residence out of the State, sufficient); *Nebraska:* 1894, Jewell *v.* Chamberlain, 41 Nebr. 254, 59 N. W. 784 (absence from the State suffices under Code § 343); *New Hampshire:* 1835, Montgomery *v.* Dorion, 7 N. H. 475, 483 (absence from jurisdiction); 1842, Dunbar *v.* Madden, 13 N. H. 311, 313 (same); *New Jersey:* 1909, Worman *v.* Seybert, 78 N. J. L. 176, 73 Atl. 529 (residence in Philadelphia, held to suffice); *North Carolina:* 1806, Baker *v.* Blount, 2 Hayw. 404 (the witness had fraudulently evaded process by removing from the county; held sufficient); 1826, Selby *v.* Clark, 4 Hawks 265, 273 (temporary absence without change of domicile, held usually not sufficient, because of the danger of collusion; but absence as a member of Congress, sufficient; permanent absence is always sufficient); 1814, Allen *v.* Martin, 1 Law Repos. 373 ("living beyond the process of the Court", held sufficient); 1832, Crowell *v.* Kirk, 2 Dev. 355, 356, per Daniel, J. (that he "is abroad", is sufficient); 1837, Bethel *v.* Moore, 2 Dev. & B. 311 (living in another State, sufficient); 1848, Edwards *v.* Sullivan, 8 Ired. 302, 305 (same); *Ohio:* 1824, Clark *v.* Boyd, 2 Oh. 280 (57) (absence from jurisdiction); 1858, Richards *v.* Skiff, 8 Oh. St. 586 (same); *Pennsylvania:* 1807, Engles *v.* Burlington, 4 Yeates 345 (will; absence from jurisdiction); 1810, Clark *v.* Sanderson, 3 Binn. 192, 195 (bond; "it is always to be understood that there must be no fraud or collusion in getting the witness out of the way"); 1816, Hautz *v.* Rough, 1 S. & R. 349 (residence without the county, not sufficient); *South Carolina:* 1902, Swancey *v.* Parrish, 62 S. C. 240, 40 S. E. 554 (out of the jurisdiction, sufficient); *Tennessee:* 1850, Jones *v.* Arterburn, 11 Humph. 97, 99 (the statutory phrase, for contested wills, "if to be found", includes absence from the State, as exempting from production; but if his deposition has in fact been obtained, it must be read); 1855, Herrel *v.* Ward, 2 Sneed 610, 613 (absence "for a temporary purpose, where the return of the witness within a limited time is reasonably certain", insufficient; though not "as an inflexible rule", *e.g.* where the absence has been long, no collusion is suspected, and diligence has been used); *Texas:* 1854, Frazier *v.* Moore, 11 Tex. 755 (absence from jurisdiction); *Vermont:* 1800, Pearl *v.* Allen, 1 Tyl. 4 (if residing within process of the Court, he must be produced); *Virginia:* 1826, Nalle *v.* Fenwick, 4 Rand. 585, 589, *semble* (absence from the State, sufficient; but here it was alleged that "every legal means had been taken to procure their attendance"); 1827, Smith *v.* Jones, 6 Rand. 33, 37 ("removed from the State"; sufficient); *Wisconsin:* 1845, Garrison *v.* Owens, 1 Pinney 544 (absence from jurisdiction); 1863, Silverman *v.* Blake, 17 Wis. 213, *semble* (same).

It is immaterial that the proponent knew of the witness' intended absence and might have taken his deposition;[3] though a collusive procurement of the witness' absence would of course annul the excuse for non-production.[4] But at least must not the proponent have sought to obtain (by commission or otherwise) his *deposition* while in absence? Can it be said that the witness' testimony is unavailable, so long as it does not appear that his deposition could not with due diligence have been procured? The answer to this was at first given in the negative, — that is to say, in the period when the present excuse was with hesitation beginning to be accepted, this proviso as to taking the deposition was insisted on.[5] But the extreme inconvenience of sending abroad for the deposition was soon recognized as disproportionate to the benefit obtained; and in most jurisdictions to-day[6] no such proviso

[3] 1859, Jackson *v.* F. R. W. Co., 14 Cal. 18, 22 (lack of diligence, in not obtaining his testimony before departure, immaterial).

[4] See Clark *v.* Sanderson, Harrel *v.* Ward, and other cases in note 2, *supra*.

[5] 1748, Grayson *v.* Atkinson, 2 Ves. Sr. 454, 460 (Hardwicke, L. C.: "It is not necessary to presume that it is out of your power to get him if you please; . . . you may have a commission to examine the witness beyond sea; for in this Court you are not under the difficulty as in a Court of law where it must be 'viva voce'"); 1793, Fitzherbert *v.* Fitzherbert, 4 Bro. C. C. 231 (witness in America; commission required); 1796, Barnes *v.* Trompowsky (see quotation in note 1, *supra*).

[6] Besides the following cases, compare the statutes *ante*, § 1310:

ENGLAND: 1751, Webb *v.* St. Lawrence, 3 Bro. P. C. 640, 645 (witness in Holland; deposition not required); 1752, Banks *v.* Farquharson, 1 Dick. 167 (same; witness in Scotland); 1790, Wallis *v.* Delancey, 7 T. R. 266, note (Kenyon, L. C. J.: "The expense of sending out a commission would in many cases be more than the value of the sum in dispute"); 1800, Carrington *v.* Payne, 5 Ves. Jr. 404, 411 (not required; here, a will).

UNITED STATES: *Federal:* 1804, Jones *v.* Lowell, 1 Cr. C. C. 183 (not required); *Alabama:* Ala. Code 1907, § 6187 (the judge "may issue a commission"); § 4005 (quoted, *ante*, § 1310); *Georgia:* 1850, Settle *v.* Allison, 8 Ga. 201, 205 (not required); *Indiana:* 1819, Jones *v.* Cooprider, 1 Blackf. 46 (not required); 1845, State *v.* Bodly, 7 Blackf. 355, 357 (same, even though the opponent has had it taken; but if the proponent uses this deposition, it is not improper to reject proof by handwriting of the witness); *Iowa:* 1870, Ballinger *v.* Davis, 29 Ia. 512 (not required); 1897, Allison's Estate, 104 Ia. 130, 73 N. W. 489 (same: even though the deposition is in fact obtainable, and was taken upon other points, proof of handwriting suffices; the fact of non-residence allows the use of the inferior grade); *Kentucky:* 1816, Sentney *v.* Overton, 4 Bibb 445, 447 (not required; "though the Court has the power *to* award the commission, it has no power to coerce its execution"); 1820, Bowman *v.* Bartlett, 3 A. K. Marsh. 86, 91 (same); 1822, Turner *v.* Turner, 1 Litt. 101, 104 (same); *New Hampshire:* 1842, Dunbar *v.* Madden, 13 N. H. 311, 316 (that the witness' whereabouts is known, immaterial); *North Carolina:* 1798, Irving *v.* Irving, 2 Hayw. 27 (not required); 1814, Allen *v.* Martin, 1 Law Repos. N. C. 373 (same); 1837, Bethell *v.* Moore, 2 Dev. & B. 311, 314 (same); *Pennsylvania:* 1810, Clark *v.* Sanderson, 3 Binn. 192, 196 (same); *South Carolina:* 1792, Oliphant *v.* Taggart, 1 Bay 255 (handwriting of the witness usually sufficient; but here, the opponent producing an affidavit of the witness denying it, a commission abroad was ordered); 1804, Price *v.* M'Gee, 1 Brev. 373, 376 (not required); 1853, Brown *v.* Wood, 6 Rich. Eq. 155, 165, *semble* (same); *South Dakota:* 1904, Schouweiler *v.* McCaull, 18 S. D. 70, 99 N. W. 95 (one witness called, the other out of the county; other testimony then allowed); *Tennessee:* 1807, Love *v.* Peyton, 1 Overt. 225 (if in another domestic State, deposition should be taken); 1809, Shepherd *v.* Goss, 1 Overt. 487 (same: otherwise, if he has "removed to some foreign nation"); 1818, Stump *v.* Hughes, 5 Hayw. 93 (preceding cases overruled; residence in another domestic State is sufficient, or absence there till the end of the trial; the delay, risk, and inconvenience of sending for a deposition are unnecessary); 1818, Den *v.* Mayfield, 5 Hayw. 121 (same; here, absence for 10 years, unheard from); 1838, Crockett *v.* Crockett, Meigs 95 (neither summons by subpœna nor attempt to get deposition is necessary); *Vermont:* 1803, Rich *v.* Trimble, 2 Tyl. 349 (though residing without the State, if his residence is known and is within reasonable distance, deposition required); 1888, Denny *v.* Pinney, 60 Vt. 525, 527, 12 Atl. 108 (the witness resided in another State, but had stayed for a few days since action begun at the testatrix' town in the State; deposition not required).

is recognized, and it is not necessary to have endeavored to obtain the absent witness' deposition.[7]

The sufficiency of the *proof of absence* at the time of trial has been the subject of many rulings, which cannot profitably be treated as precedents;[8] the matter should be left entirely to the discretion of the trial Court.[9] For one detail, however, there seems to have arisen a uniform rule, namely, that the attester's *residence abroad* at the time of execution — or, in another form, the occurrence abroad of the acts of execution and attestation — is sufficient proof that the attester is out of the jurisdiction at the time of the trial.[10]

§ 1313. **Same: (4) Absence in Unknown Parts.** If the attester's whereabouts cannot be discovered, he is practically unavailable;) and this (though historically there was the same hesitation that has been noted for the preceding exemptions [1]) is now universally recognized as an excuse for not pro-

[7] Distinguish, however, the question whether the absent witness' deposition *may* be taken and used. This depends on the general principles applicable to the use of depositions, *post*, §§ 1373, 1402, 1417; statutes sometimes expressly provide for the depositions of attesting witnesses. So far as the deposition is thus allowable, its use satisfies the present rule requiring the attester's "testimony", as noted *ante*, § 1305.

[8] See the rulings *passim* in note 2, *supra*, and also the following: *Eng.* 1790, Wallis *v.* Delancey, 7 T. R. 266, note (evidence that there had been abroad in 1774, at the place of execution, a person of the same name, held sufficient to show absence now); 1849, Austin *v.* Rumsey, 2 C. & K. 736 (inquiry of the witness' parents, sufficient); *U. S. Fed.* 1802, Rhodes *v.* Rigg, 1 Cr. C. C. 87; *Ark.* 1842, Nicks *v.* Rector, 4 Ark. 251, 277 (departure from the State four years before, and no news from him, sufficient); 1862, Delony *v.* Delony, 24 Ark. 7, 11 (evidence of absence insufficient on the facts); *Ind.* 1849, Gordon *v.* Miller, 1 Ind. 531 (continued residence abroad up to 15 months previous, held sufficient); *Mo.* 1838, Waldo *v.* Russell, 5 Mo. 387, 394 ("reported and believed to have died in Texas", sufficient).

For admissibility of the *replies received while searching*, as evidence of diligence, see the following: 1907, Cuff *v.* Frazee S. & C. Co., 14 Ont. L. R. 263 (former witness now absent; inquiries and replies, excluded as evidence of absence, but considered as evidence of inability to find), and compare the cases cited *ante*, §§ 261, 664, 1196, and *post*, § 1789.

For the admissibility of the witness' declarations of *intent not to return*, see *post*, § 1725.

[9] 1876, Jones *v.* Roberts, 65 Me. 273, 276.

[10] *Cal.* 1864, Landers *v.* Bolton, 26 Cal. 393, 408 (attestation out of the State by non-residents, sufficient, in the absence of evidence to show that the witness ever was within the State); 1865, McMinn *v.* O'Connor, 27 Cal. 238, 245 (same); 1865, McMinn *v.* Whelan, 27 Cal. 300, 310 (same); *Ky.* 1817, Gibbs *v.* Cook, 4 Bibb 535, 536 (parties' residence abroad, etc., on the facts held to raise presumption of witness' absence); 1820, Bowman *v.* Bartlett, 3 A. K. Marsh. 86, 91 (residence of the maker abroad, etc., on the facts held to raise presumption of witness' residence abroad); *La.* 1823, Crouse *v.* Duffield, 12 Mart. La. 539, 542 (execution abroad; witnesses presumed abroad); 1832, Barfield *v.* Hewlett, 4 La. 118, 119 (same); *Mass.* 1839, Valentine *v.* Piper, 22 Pick. 85 ("If the instrument was apparently executed in a foreign country, we think that fact raised a sufficient presumption that the subscribing witnesses were not within the jurisdiction of the Court."); *Mo.* 1857, Clardy *v.* Richardson, 24 Mo. 295, 297 (non-residence at time of execution raises a presumption of continued non-residence); *Vt.* 1858, Sherman *v.* Transp. Co., 31 Vt. 162, 165, 174 (witness to document executed out of the State; no evidence of the witnesses having been in the State; held properly dispensed with; Valentine *v.* Piper approved); *Wyo.* 1907, Boswell *v.* First National Bank, 16 Wyo. 161, 92 Pac. 624 (residence and attestation in other States, with other evidence, held to raise the presumption of absence, so as to exempt from proof the witnesses' signatures).

Contra: 1826, Jackson *v.* Gager, 5 Cow. 383, 385 (power of attorney executed in Massachusetts; witnesses not presumed out of the jurisdiction).

§ 1313. [1] 1701, Anon., 12 Mod. 607 ("that he has made strict enquiry after them and cannot hear of them", sufficient); 1796, Barnes *v.* Trompowsky, 7 T. R. 265 (see quotation in note 4, *infra*); 1808, Crosby *v.* Percy, 1 Taunt. 364, 366 (Mansfield, C. J.: "The law has been much relaxed in this particular within the period of my practice; the increased commerce of the country, and the number of persons who every year go out of it, first rendered it necessary to admit secondary evidence in the case

ducing him.[2] But it is necessary, first, to exclude the suspicion that the witness may be secreting himself by collusion with the proponent,[3] and, secondly, to show that the proponent's ignorance of his whereabouts is not due to lack of effort to discover him; accordingly, it must be shown that *honest and diligent search* for the attester has been made.[4]

The sufficiency of this search has been dealt with in a number of rulings, not profitable for use as precedents; [5] the matter should be left entirely to the determination of the trial Court.[6] That the search should include a sheriff's search with subpœna seems unnecessary; [7] nor, on the other hand, should a sheriff's search and return of "not found" be invariably sufficient.[8]

of witnesses being abroad; the dispensation was next extended to the case of witnesses who were not to be found").

[2] *Eng.* 1810, Wardell *v.* Fermour, 2 Camp. 282; *U. S. Federal:* 1802, Broadwell *v.* McClish, 1 Cr. C. C. 4; *Ark.* 1910, Thompson *v.* King, 95 Ark. 549, 129 S. W. 798; *Ill.* 1875, Hartford L. Ins. Co. *v.* Gray, 80 Ill. 28; *Pa.* 1815, Powers *v.* M'Ferran, 1 S. & R. 44, 46; *Tenn.* 1855, Harrel *v.* Ward, 2 Sneed 610, 614, *semble.*

[3] 1810, Ellenborough, L. C. J., in Wardell *v.* Fermour, 2 Camp. 283: "I will watch very narrowly your proof of search. . . . If the attesting witness knows too much of the transaction, and his examination would hazard the validity of the deed, he may be sent out of the way, and we may be amused at the trial with an account of his having absconded."

[4] Various phrasings of this requirement are as follows: 1796, Barnes *v.* Trompowsky, 7 T. R. 265 ("If no intelligence can be obtained respecting the subscribing witness after reasonable inquiry has been made"; . . . if he "has been sought for and could not be found, so as to furnish a presumption that he is dead"); 1802, Cunliffe *v.* Sefton, 2 East 183 ("due diligence without effect"; "diligent inquiry"; here the place of execution was unknown, and search at the places of obligor and obligee was held sufficient); 1808, Crosby *v.* Percy, 1 Taunt. 364 (Mansfield, C. J.: "In all cases it must appear to the Court that there was a fair, serious, and diligent inquiry, and no evasion, or attempt to keep the witness out of the way"; here, on inquiry at the last abode, the party had been told that the witness had absconded to escape his creditors; advertising was not required); 1811, Waring *v.* Bowles, 4 Taunt. 132 (the Court required the party to show, not merely diligent inquiry, but "the particular search that had been made for the witness, and where he had been last seen or known to reside, and when he was last heard of, and what endeavors had been made to find him"); 1853, Crane *v.* Ayre, 2 All. N. Br. 577 ("all the circumstances must therefore be looked to in each case"); 1804, Manigault *v.* Hampton, 1 Brev. S. C. 394 (reasonable diligence required).

[5] ENGLAND: 1810, Parker *v.* Hoskins, 2 Taunt. 223; 1821, Burt *v.* Walker, 4 B. & Ald. 697 (the witness a clerk to the defendant, and disappearing somewhat suddenly; search held sufficient on the facts); 1822, Pytt *v.* Griffith, 6 Moore 538 (not sufficient where the witness was merely "keeping out of the way to avoid an arrest" for debt, unless at the instance of the opponent; unsound); 1823, James *v.* Parnell, Turn. & R. 417; 1842, Falmouth *v.* Roberts, 9 M. & W. 469, 471.

CANADA: 1846, Tylden *v.* Bullen, 3 U. C. Q. B. 10; 1848, Doe *v.* Twigg, 5 id. 167, 170.

UNITED STATES: *California:* 1853, Powell *v.* Hendricks, 3 Cal. 427, 430; *Louisiana:* 1839, Thompson *v.* Wilson, 13 La. 138, 142; *Maine:* 1820, Whittemore *v.* Brooks, 1 Greenl. 57; *Michigan:* 1879, McMillan *v.* Larned, 41 Mich. 521, 522, 2 N. W. 662; *New York:* 1811, Mills *v.* Twist, 8 John. 121; 1814, Jackson *v.* Burton, 11 John. 64; 1828, Jackson *v.* Cody, 9 Cow. 140, 149; 1832, Jackson *v.* Chamberlain, 8 Wend. 620, 624; 1833, Pelletreau *v.* Jackson, 11 Wend. 110, 123; 1838, Van Dyne *v.* Thayre, 19 Wend. 162, 165; *Pennsylvania:* 1847, Truby *v.* Byers, 6 Pa. St. 347 (mere ignorance of abode, without search, not enough); 1892, Gallagher *v.* Assoc. Co., 149 Pa. 25, 24 Atl. 115 (search for one having no fixed place of abode and going from place to place to get employment, held sufficient on the facts).

For the admissibility of the *replies received in the search*, as evidence of diligence, see cases cited *ante*, §§ 261, 664, 1196 and *post*, §§ 1725 and 1789.

[6] 1845, Woodman *v.* Segar, 12 Shepl. Me. 90, 92 ("in some measure"); 1823, McGennis *v.* Allison, 10 S. & R. Pa. 197, 200 (Duncan, J.: "What is reasonable inquiry? There can be no fixed and settled rule; every case must stand on its own bottom; and this point must be left with some latitude of discretion").

[7] 1829, Dismukes *v.* Musgrove, 8 Mart. N. s. 375, 379. *Contra:* 1838, Crockett *v.* Crockett, Meigs Tenn. 95 (return of subpœna, *semble*, necessary where the witness is not specifically shown to be out of the State).

[8] 1836, Jerman *v.* Hudson, 2 Harringt. Del. 134 (subpœna, and return "not found", suffi-

§ 1314. **Same: (5) Witness' Name Unknown, through Loss or Illegibility of Document.** It is clear that where the very name of the attester cannot be ascertained, the attester is unavailable for the purpose of furnishing his testimony. This situation occurs where the document is *lost;* here the proponent is exempt from producing the attester; [1] unless of course the name has otherwise before trial become known to the proponent;[2] for in that case his testimony, though not of great value without the document before him, might at least help to establish the fact that such a document did or did not once exist.[3]

Where the name of the attester is *illegible*, the same reason for exemption from production exists.[4]

§ 1315. **Same: (6) Illness or Infirmity; (7) Failure of Memory; (8) Imprisonment.** (6) When the attester is at the time of trial so *ill*, or so *infirm from age*, that it is impracticable, without danger to his life or health, to compel his attendance in Court, his production should be dispensed with.[1] There is little judicial authority on the subject, partly because statutes applicable to will-witnesses have frequently dealt with the point; in applying the statutory terms the analogies of the statutes excusing the non-attendance of deponents (*post*, § 1406) would be useful. But though attendance at the trial would seem properly excused, there is no reason why at least the attester's *deposition* should not be taken.[2]

(7) A *failure of memory*, so far as it involves a general mental disability,

cient); 1847, Sexton *v.* McGill, 2 La. An. 190, 195 (same; insufficient); 1833, M'Donald *v.* M'Donald, 5 Yerg. Tenn. 307 ("if to be found", in St. 1789, c. 23, § 1, as to will-witnesses, is satisfied by a return of "not found" by the officer having the subpœna).

§ 1314. [1] *England:* 1796, Keeling *v.* Ball, Peake Add. Cas. 88 ("It did not appear that the plaintiff could by any possibility know who the subscribing witnesses were", and proof by the extra-judicial admissions of the maker allowed); 1853, R. *v.* St. Giles, 1 E. & B. 642 (per Erle, J., applying it to the case where the name is known, but the person cannot be found or identified; "it is the case of an attesting witness, unknown"); *United States: Ga.* 1854, Felton *v.* Pitman, 14 Ga. 530, 535 (deed lost and witnesses unknown; exempted); 1887, Terry *v.* Rodahan, 79 Ga. 278, 294, 5 S. E. 38 (deed lost and witnesses dead; exempted); 1892, Turner *v.* Cates, 90 Ga. 731, 744, 16 S. E. 971 (neither witness nor maker is then preferred); *Me.* 1831, Hewes *v.* Wiswell, 8 Greenl. 94, 96; 1833, Mellen, C. J., in Knox *v.* Silloway, 1 Fairf. 201, 219 (even though the witness be present; this seems unsound); *Mass.* 1829, Hathaway *v.* Spooner, 9 Pick. 23, 25; *Mich.* 1875, Raynor *v.* Norton, 31 Mich. 210, 213; *N. H.* 1827, Colby *v.* Kenniston, 4 N. H. 262, 265; 1835, Montgomery *v.* Dorion, 7 N. H. 475, 483, *semble; N. J.* 1832, Kingwood *v.* Bethlehem, 13 N. J. L. 221, 226 (indenture of apprenticeship; calling excused, "for the knowledge of them had been lost with the indenture itself"); *N. Y.* 1819, Jackson *v.* Kingsley, 17 John. 158, 160, *semble* (witnesses' names torn off); 1831, Jackson *v.* Vail, 7 Wend. 125, 129; *S. C.* 1880, Congdon *v.* Morgan, 14 S. C. 587, 593.

Contra: 1819, Gillies *v.* Smithers, 2 Stark. 528 (Abbott, C. J.: "The evidence of the attesting witness is essential to show that the bonds ever existed"; here they were said to have been destroyed).

[2] 1859, Smith *v.* Brannan, 13 Cal. 107, 115 (calling required, where by a copy the names of the witnesses appeared); 1819, McMahan *v.* McGrady, 5 S. & R. 314 (known attester must be called; repudiating the argument that it is useless to call him since there is nothing to testify to).

[3] Gillies *v.* Smithers, Eng., McMahan *v.* McGrady, Pa., *supra*.

[4] 1829, Kemper *v.* Pryor, 1 J. J. Marsh. 598.

§ 1315. [1] 1811, Jones *v.* Brewer, 4 Taunt. 46 ("even perhaps in some instances of sickness", his presence is not required, per Mansfield, C. J.; *contra, semble*, Heath, J.; all agreed in refusing to authorize a deposition to be taken, leaving the matter to be determined at the trial). *Contra:* 1796, Gordon *v.* Payne, 1 Mart. N. C. 72 (the witness when last heard from had been given up by his physician; handwriting not allowed). There could be no doubt on this point to-day.

[2] 1820, Jackson *v.* Root, 18 John. 60, 80 (aged and infirm and unable to attend, but

organic in its nature, and analogous to insanity (*post*, § 1316), should excuse entirely from production of the person and of his deposition. But a mere casual failure of memory as to the facts of execution obviously cannot excuse; for it cannot be ascertained except after production to testify. — When it appears after such production, other principles come into play; (*a*) the witness may adopt his attesting signature as a *record of past recollection*, and upon the faith of it verify the facts of execution as thus known to him to have occurred (*ante*, §§ 98, 737, 747); (*b*) if he fails to do this, his *signature* may be otherwise proved, and his attestation taken as sufficient evidence of the facts of execution (*post*, 1511); (*c*) in any case, upon his failure to recollect, the facts of execution may be *proved by other* qualified persons (*ante*, § 1302); whether, in case of such a failure to recollect, the other *attesters* must first be called, is another question (*ante*, § 1309).

(8) Where the attester is *imprisoned* under sentence of law, and it is thus legally impossible to secure his attendance, it should be excusable for the same reason as in the case of illness;[3] but his deposition, if he is qualified to testify, should be taken.

§ 1316. **Same: (9) Incompetency, through Interest, Infamy, Insanity, Blindness, etc.** Where the attester has become, since the act of attestation, disqualified to give testimony, it would be useless to produce him, and production is therefore excused.

(*a*) This doctrine as applied to a supervening disqualification by *interest* has long been recognized. In some early rulings it was held not to apply where the interest had been voluntarily acquired by the attester;[1] this limi-

within the jurisdiction; deposition required). Compare § 1404, *post*.

[3] The statutes cited *ante*, § 1310, sometimes specify this cause of excuse.

§ 1316. [1] To the following citations should be added the statutes cited *post*, § 1510, providing that subsequent incompetency "shall not prevent the probate and allowance of the will." In the following rulings, subsequently acquired interest in general is treated as an excuse, except where a special proviso is noted: ENGLAND: 1715, Anon, cited in 1 P. Wms. 289, *semble;* 1717, Godfrey *v.* Norris, 1 Str. 34 (the witness to a bond became administrator *d. b. n.* of the obligee; his hand allowed to be proved; so also of a witness to a will afterwards becoming devisee); 1798, Buckley *v.* Smith, 2 Esp. 697; 1802, Cunliffe *v.* Sefton, 2 East 183; 1829, Hovill *v.* Stephenson, 5 Bing. 493 ("We do not dispute the authority of any of those decisions", and even an interest acquired in a partnership would not be fatal, but here the interest acquired was purely in the specific contract attested, and "the plaintiff cannot complain that his witness is disqualified, when he himself has been the cause of the disqualification"); CANADA: 1843, Hamilton *v.* Love, 2 Kerr N. Br. 243, 250, 253 (Parker, J., doubting); 1848, Doe *v.* Twigg, 5 U. C. Q. B. 167, 170; UNITED STATES: *Alabama:* 1833, Bennet *v.* Robinson, 3 Stew. & P. 227, 240 (interest as administrator, etc., sufficient, but not as assignee, this being purely voluntary and for personal benefit); 1848, McKinley *v.* Irvine, 13 Ala. 681, 706 (interest acquired by voluntary act; handwriting excluded); 1849, Robertson *v.* Allen, 16 Ala. 106, 107 (interest as legatee and heir; handwriting allowed); 1850, Cox *v.* Davis, 17 Ala. 714, 717 (in general; interest sufficient); *Louisiana:* 1826, Buard *v.* Buard, 5 Mart. N. S. 132, 134; *Maine:* 1820, Whittemore *v.* Brooks, 1 Greenl. 57; *Massachusetts:* 1809, Dudley *v.* Sumner, 5 Mass. 439, 444, 462, *semble;* 1815, Sears *v.* Dillingham, 12 Mass. 358, 362 (will); 1841, Amherst Bank *v.* Root, 2 Metc. 522, 532; *Michigan:* 1858, Jones *v.* Phelps, 5 Mich. 218, 222 (justice of the peace disqualified as the trial judge; no exemption from calling him, the disability being the result of the party's act); *Mississippi:* 1856, Tinnin *v.* Price, 31 Miss. 423; *Missouri:* 1849, Holmes *v.* Holloman, 12 Mo. 536 (otherwise, "the purposes of a testator might be defeated by events which no precaution on his part could anticipate or prevent"); *North Carolina:* 1792, Nelius *v.* Brickell, 1 Hayw. 19, *semble;* 1801, Hampton *v.* Garland, 2 Hayw. 147; 1804, Hall *v.* Bynum, 2 Hayw. 328 (not received, for a

tation is proper enough as a punishment, where by collusion with the proponent of the document the interest has been acquired with the purpose of disqualifying the attester; but otherwise it is harsh and improper, and the disqualification, however occurring, should suffice to excuse, the opponent having liberty to compel the attester to testify if there appears to be a need of it. Whether the *attestation itself* is void and the document invalid in substantive law, is a different question (*post*, § 1510).— Where the disqualification was not acquired subsequently to attestation, but existed at the time of it, the attestation is void as such, and the person does not count for any purpose as an attester (*ante*, § 1292).

(*b*) Disqualification occurring through *infamy*, subsequently to attestation, is equally an excuse for non-production.[2]

(*c*) Disqualification through *insanity*, arising subsequently to attestation, is also an excuse.[3]

(*d*) *Blindness* would prevent the attester from identifying the maker's signature and his own; but it would not prevent him from testifying by recollection to the execution of such a document by such a person. Since, therefore, he is still qualified to testify in part at least, there would seem to be no reason for excusing his non-production as a rule, although upon a question purely as to the identity of a signature it would be useless to call him.[4]

§ 1317. **Same: (10) Refusal to Testify, Privileged or Unprivileged.** (*a*) Where the attester is *privileged* not to testify, and is thus not compellable, the proponent should be excused from production.[1] Whether it is necessary to call him and learn whether he will claim his privilege in court, or whether

bond, where the witness had become assignee and had then assigned to the plaintiff; reason, the supposed danger of collusion and trickery); 1832, Crowell *v.* Kirk, 3 Dev. 355, 357; 1840, Saunders *v.* Ferrill; 1 Ired. 97, 101 (sufficient, whether acquired by law or by his own act; except for negotiable instruments); *Pennsylvania:* 1785, Davison *v.* Bloomer, 1 Dall. 123; 1813, Hamilton *v.* Marsden, 6 Binn. 45, 47 (sufficient, even when acquired by his own act voluntarily); 1851, Loomis *v.* Kellogg, 17 Pa. 60, 63 (one who by accepting an executorship becomes incompetent may by his attestation be a "full witness"; when he is objected to as incompetent, "they put him in the predicament of a witness dead or out of reach of process"); *Rhode Island:* 1852, Kinney *v.* Flynn, 2 R. I. 319, *semble* (wife of the maker of a note); *South Carolina:* 1833, Lever *v.* Lever, 1 Hill Ch. S. C. 62, 68 (incompetency as executor, note signed by mark; witness' handwriting insufficient, unless note is shown to have existed before interest accrued); *Tennessee:* 1850, Jones *v.* Arterburn, 11 Humph. 97, 99 (the statutory phrase, "if to be found", for contested wills, "is not to be construed literally", and covers subsequent incompetency, as exempting production).

[2] 1729, Jones *v.* Mason, 2 Str. 833 ("as if dead"); 1815, Sears *v.* Dillingham, 12 Mass. 358, 361 (will).

[3] 1804, Bernett *v.* Taylor, 9 Ves. Jr. 381; 1813, Currie *v.* Child, 3 Camp. 283.

[4] The rulings are not harmonious: 1699, Wood *v.* Drury, 1 Ld. Raym. 734 *semble* (excused); 1833, Pedler *v.* Paige, 1 Moo. & Rob. 258, Parke, B. (not called; but "there is great weight in the reasons urged for calling the witness", *i.e.* that "the circumstances attending the execution might be proved by him"); 1839, Cronk *v.* Frith, 9 C. & P. 197; s. c. as Crank *v.* Frith, 1 Moo. & Rob. 262 (Abinger, L. C. B.: "He might from his recollection give most important evidence respecting it"; here the pleas to an action on a bond set up fraud and intoxication at the time of execution); 1847, Rees *v.* Williams, 1 De G. & Sm. 314, 320 (not excused); 1915, Reynolds *v.* Sevier, 165 Ky. 158, 176 S. W. 96 (witness unable to identify his handwriting, because of failure of eyesight, testified to execution by recollection, and other witnesses testified to due execution; held sufficient); 1806, Taylor, J., in Baker *v.* Blount, 2 Hayw. N. C. 404 (excused).

For *illiterate* attester, see *ante*, § 693, n. 2.

§ 1317. [1] 1849, Holmes *v.* Holloman, 12 Mo. 535 (heirs claimed privilege as parties; production excused); 1812, Allen *v.* Allen, 2

it is sufficient if it appears otherwise that he will if called exercise his privilege, should be left to the determination of the trial Court.[2]

(*b*) Where the attester, though *not privileged*, nevertheless *refuses* to testify, the proponent should be excused, provided it is made to appear that there is no collusion;[3] for there is no reason why the innocent proponent should be punished for the witness' fault, especially as the latter's refusal may be designed to aid his own or the opponent's interests.

§ 1318. **Same: (11) Document proved by Registry-Copy.** Where a document's execution is allowed to be proved by a certified copy from an official registry, the document's execution having been duly authenticated to an officer before registration (*post*, § 1648), the attester of the document need not be called.[1] This result may be justified on three grounds: (*a*) The object of the registration system is to provide a convenient and speedy method of authenticating a document duly registered (*post*, § 1648), and among the other advantages thus intended to be secured is the freedom from the inconvenience of searching for and producing the attesters; (*b*) Since the original document in such a case is not required in such jurisdictions to be produced (*ante*, § 1225), the value of the attester's testimony without the document and the original signatures before him would be slight; (*c*) In those jurisdictions (*ante*, § 1290) where the present rule is now by statute confined to documents required by law to be attested, the rule cannot apply to documents — for example, conveyances — required to be authenticated before a notary or a registrar by an attesting witness, because that requirement does not make attestation an element in the validity of the conveyance, but

Overt. Tenn. 172 (under St. 1784 and 1789, a claim of privilege by an interested witness exempts from producing him, even where the will is contested).

[3] Compare the analogous cases of a *privileged document*, *ante*, § 1212.

[2] 1828, Bomford *v.* Wilme, 1 Beatty 252 (the witness refused to be examined, even after attachment for contempt; held, that handwriting could be proved only after a hearing in which the opponent should have an opportunity to show collusion).

§ 1318. [1] *Canada:* 1844, Smith *v.* Millidge, 2 Kerr N. Br. 408, 413, *semble; United States: Federal:* 1802, Edmondson *v.* Lovell, 1 Cr. C. C. 103; 1892, Paine *v.* Trask, 5 U. S. App. 283, 288; 1830, Carver *v.* Jackson, 4 Pet. 1, 82, *semble; Alabama:* 1893, Hawkins *v.* Ross, 100 Ala. 459, 464, 14 So. 278; 1898, Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; *Georgia:* 1885, Fletcher *v.* Horne, 75 Ga. 134, 137; *Illinois:* 1840, Doe *v.* Johnson, 3 Ill. 522, 528; 1848, Job *v.* Tebbetts, 10 Ill. 376, 379 (without any other preliminary proof; repudiating the contrary 'obiter dictum' in s. c. 9 id. 143, 151); *Massachusetts:* 1828, Eaton *v.* Campbell, 7 Pick. 10, 12; 1829, Hathaway *v.* Spooner, 9 Pick. 23, 25, *semble;* 1832, Powers *v.* Russell, 13 Pick. 69, 75 ("where the production of a deed is dispensed with and an office copy is competent evidence, . . . the necessity of calling them is dispensed with", because the witness could not be expected to remember without seeing the original); 1854, Com. *v.* Emery, 2 Gray 80, per Shaw, C. J. (except where the original's production is required, because in the party's hands as a grantee, according to § 1225, *ante*); 1870, Samuel *v.* Borrowscale, 104 Mass. 207, 209; 1872, Gragg *v.* Learned, 109 Mass. 167 (if "not made to either party to the action, nor presumed to be in the custody of either"; according to § 1225, *ante*); *Missouri:* 1842, Moss *v.* Anderson, 7 Mo. 337, 340 (though evidence of identity may be required; and "cases may arise" in which a Court might require the attesting witness); *Nevada:* 1868, Sharon *v.* Davidson, 4 Nev. 416; *Pennsylvania:* 1810, Carkhuff *v.* Anderson, 3 Binn. 4, 7, 10; *South Carolina:* 1821, Dingle *v.* Bowman, 1 McC. 177; 1845, McLeod *v.* Rogers, 2 Rich. 19, 22; S. Car. St. 1731, Code 1922, C. C. P. §§ 716, 717 (quoted *ante*, § 1290); *Vermont:* 1827, Williams *v.* Wetherbee, 2 Aik. 329, 335 (here an original); *Wisconsin:* 1864, Hinchcliff *v.* Hinman, 18 Wis. 130, 135.

Compare also the statutes cited *ante*, § 1310.

merely provides a lawful mode of authenticating the instrument for registration.

But the principle should not apply to a document merely *filed in a public office;* the contents may be provable without production (*ante*, § 1218), but unless a mode of authentication has been provided by statute as a condition precedent to the filing or registration (*post*, § 1680), it would seem improper to dispense with the attester's testimony.[2]

§ 1319. **Same: Summary.** The foregoing various causes for exempting from production of the attester may be grouped under four general heads: (*a*) Cases where the attester cannot be communicated with at all, either because he is non-existent, or because his whereabouts or his identity is unknown; (*b*) cases where, though he can be communicated with, he cannot be brought into court; (*c*) cases where, though he can be brought into court, his testimony cannot be obtained; (*d*) cases where, though his testimony can be obtained, other considerations excuse its employment. It does not appear, however, that anything turns in practice upon the distinctions between these four classes; except that in cases under the second head, as already noted, the attester's deposition may be required in lieu of his testimony on the stand.

(*h*) "And also authenticate his attestation, unless it is not feasible"

§ 1320. **If the Witness is Unavailable, must his Signature be proved, or does it Suffice to prove the Maker's?** The question here is, as usually put: When the production of the attester is excused because he is unavailable, must at least his signature be authenticated, or may the *maker's signature alone be proved*, without proving that of the attester?

The nature of the question, however, can be better understood if we recollect, and force into expression in the question, the true significance of proof of the attester's signature in such a case. What is it to prove his signature? It is in effect to offer in evidence the hearsay statement of the attester. The signing of a document in attestation by a witness, whether or not an express clause of attestation accompanies the signature, involves a statement by the attester that the person purporting to be the maker did then execute the document (*post*, § 1511). This extrajudicial statement, expressed or implied, is always, when the attester is unavailable, admissible by exception to the Hearsay rule (*post*, §§ 1505–1514). The question here is, not merely whether it is admissible, but whether it is *preferred* to any other testimony to the maker's execution. It is assumed that the attester is personally unavailable (for one of the causes noticed); and that the rule of preference is therefore to that extent disposed of, so that, if nothing more belonged to the rule, use could now be made of any competent testimony to prove the maker's execution. Is it, then, further, a part of the rule of *Preference* that, before thus going to other testimony, the *attester's hearsay statement must be used?*

[2] *Contra:* 1878, Lee *v.* Wisner, 38 Mich. 82, 87 (bond filed in court).

Stated in this way, the precise and singular nature appears of the supposed requirement of proving the attester's signature. That a preference should be given to any extrajudicial statement over testimony on the stand under cross-examination is an extraordinary measure, assuming for such a statement a value not at all to be attributed ordinarily to such statements. Nevertheless, such a preference unquestionably existed as a part of the orthodox common-law rule in England. The preference seems rarely to have been supported by any reason; and the following seems to be the most distinct effort to that end:

1834, TRACY, Sen., in *Jackson* v. *Waldron*, 13 Wend. 178, 197: "I acknowledge the reason of this preference is not at first glance perfectly obvious; and that it is not as induced some learned judges, without (I am now satisfied) due reflection, to question the wisdom of the rule, and by their doubts throw over it a shade of discredit. But . . . I am persuaded that good reasons may be found for maintaining it, over and above the consideration of its being so long settled and acknowledged. One of them, which strikes me as very apparent and forcible, is the greater risk a person incurs in forging the signatures of both witnesses and party than of the party alone; coupled with which consideration is the important one that in the suit on the obligation the person whose name was forged as the subscribing witness would be a competent witness to prove the forgery of his signature, while a party might be compelled to sit silently by (as I have myself witnessed) and see an instrument to which he was an utter stranger proved by evidence of his handwriting to have been executed by him."

In the United States, the rule was early perceived to have in most instances no more than a technical and traditional significance, and a number of Courts, believing that "a technical and artificial rule had prevailed over our right reason",[1] refused to accept it, and declined to require proof of the attester's signature in preference to proof of the maker's. Their reasoning was as follows:

1851, TRUMBULL, J., in *Newsom* v. *Luster*, 13 Ill. 175: "Why proof of the handwriting of a subscribing witness should be better evidence of the execution of an instrument than that of the obligor is not very apparent, and the attempts to give a reason have not in my judgment been very satisfactory. . . . [Stating the argument of Senator Tracy, quoted *supra*, as to forgery,] No one can doubt that proof of the handwriting of both the subscribing witness and party would be more satisfactory than that of either one. But this is a begging of the question, which is not whether a person would incur greater risk in forging the signature of both witness and party than of the party alone. . . . Surely a person would incur no greater risk in forging his [the witness'] signature than that of the party. . . . Another reason given for the rule is that the witnesses who subscribe at the time of the execution are agreed upon by the parties to be the only witnesses to prove it, which, in the language of the Supreme Court of New York, . . . is an absurdity. . . . Proof of the handwriting of the grantor to a deed furnishes altogether more satisfactory evidence of its execution than would proof of the handwriting of the subscribing witness. When the attesting witness cannot be had, the law requires the next best evidence, which means the next best evidence of those facts to which the attesting witness if present would be called upon to testify, — that is, not merely that he signed the paper as a witness, but that the party executed the instrument. It is difficult to account for the signature of a party to a writing which he did not execute; but it is easy to imagine how a forged instrument might be

§ 1320. [1] 1849, Lumpkin, J., in Watt v. Kilburn, 6 Ga. 356, 358.

established against him when it is only necessary to procure the name of a person as a subscribing witness to such an instrument, and then establish it by proof of the handwriting of the witness."

1895, ATKINSON, J., in *McVicker* v. *Conkle*, 96 Ga. 584, 592, 24 S. E. 23: "The real question, then, upon the execution of a deed being as to the actual signing [by the maker], the primary inquiry should be as to the fact. . . . [The witnesses' handwriting] might be proven beyond controversy, and still the deed be a forgery; for, while the persons alleged to be subscribing witnesses may have signed the paper, that does not, except by inference, connect the alleged maker with the transaction, nor otherwise establish the execution of the deed by him. If, however, on the other hand, it be shown that the alleged maker in fact signed the identical paper offered in evidence, such evidence not only establishes directly the execution of the instrument, but likewise connects the maker directly with the transaction to which it relates. In the former case, the fact of execution would be established by inference only; in the latter, by direct evidence, and who will question that a rule is purely artificial and arbitrary which makes the former of higher proof than the latter?"

In order to ascertain the state of the law in the various jurisdictions, the following distinctions should be noted: (1) So far as concerns documents required by law to be attested, *i.e.* chiefly, *wills*, the question is ordinarily of little importance, because the attestation has to be authenticated in any case, as an element of validity. Furthermore, wherever by statutory restriction (*ante*, § 1290) the whole rule preferring the attester is confined to *documents required by law to be attested*, the present question disappears from consideration in regard to any other attested document; for the attester's signature need not be proved at all. Thus, the old controversy would to-day in such jurisdictions be of no consequence whatever, were it not for the will-statutes next to be mentioned.

(2) In many jurisdictions, the *statute* dealing with *proof of wills* lays down an express rule in regard to the proof of signatures where the attester is unavailable. Now some of these statutes prescribe proof of the signatures of "either the testator or the witnesses", "of the witnesses and the testator or any of them", and the like. Thus it may arise that, though (as above noted) the attester's signature ought to be proved as an element of the validity of the execution, yet under such a statute even this seems to be improperly dispensed with; and a Court may in this obscure state of things fall back upon the common-law rule of the jurisdiction.

(3) As regards the *common-law rule* itself, the decisions include two classes, — those which require the attester's signature to be proved in preference to the maker's and those which do not require it.[2] Now from this question must

[2] The rule on the present subject in the various jurisdictions may be gathered from the cases and statutes collected below.

For convenience' sake, the *statutes* dealing with the question of § 1306, *ante* (whether all the witnesses' signatures need be proved), and the question of § 1513, *post* (whether the maker's or testator's signature must be proved), have also been placed here once for all, as a single statutory clause usually deals with all three points:

ENGLAND: 1796, Barnes v. Trompowsky, 7 T. R. 265 (witness' signature preferred);

CANADA: *New Brunswick:* Consol. St. 1903, c. 118, § 28, St. 1915, c. 23, § 20 (proof of "the handwriting of the witnesses and the testator" may be made); *Newfoundland:* Consol. St. 1916, c. 83, § 179 ("If both the subscribing witnesses to a will are dead, or if from other circumstances no affidavit can be obtained from either of them", other persons present at the execution may be resorted to;

be discriminated a question arising under a different principle, namely, whether the *maker's signature must also be proved*, *i.e.* whether the *attester's*

if no such person's affidavit is obtainable, affidavit must be obtained "of that fact and of the handwriting of the deceased and the subscribing witnesses");
Prince Edward Island: St. 1873, c. 21, § 24 (quoted *ante*, § 1310).

UNITED STATES: *Federal:* 1805, Wellford *v.* Eakin, 1 Cr. C. C. 264 (witness' signature not required); 1810, Whann *v.* Hall, 2 Cr. C. C. 4, *semble* (required); 1830, Walton *v.* Coulson, 1 McLean 120, 123 (required); 1831, Clarke *v.* Courtney, 5 Pet. 319, 344 (same); 1882, Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. 313 (same);
Alabama: Code 1907, § 6185 ("[wills] must be proved by one or more of the subscribing witnesses, or if they be dead . . . then by proof of the handwriting of the testator and that of at least one of the witnesses to the will"); § 6186 (death, etc., must be shown, before proof of "the handwriting of the testator or of any of the subscribing witnesses" is admissible); § 4005 (quoted *ante*, § 1310); 1842, Mardis *v.* Shackelford, 4 Ala. 493, 503 (bond; witness' signature not needed); 1843, Lazarus *v.* Lewii, 5 Ala. 457, 459, *semble* (deed; same; but here one witness was called, though he could not recollect delivery); 1850, Cox *v.* Davis, 17 Ala. 714, 717 (deed; same; the rule "appears to have been settled here"); 1887, Snider *v.* Burks, 84 Ala. 53, 56, 4 So. 225 (will; same); 1913, Swindall *v.* Ford, 184 Ala. 137, 63 So. 651 (deed; proof of attestation required);
Arizona: Rev. St. 1913, Civ. C. § 751 (the Court "may admit proof of the handwriting of the testator, and of the subscribing witnesses, or any of them");
Arkansas: Dig. 1919, § 10517 ("when one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence unknown, then such proof shall be taken of the handwriting of the testator and of the witnesses dead, insane, or absent, and of such other circumstances as would be sufficient to prove such will on a trial at common law"); § 10518 ("If it shall appear to the satisfaction of the Court that all the subscribing witnesses are dead, insane, or absent, the Court or clerk shall take and receive such proof of the handwriting of the testator and subscribing witnesses to the will, and of such other facts and circumstances as would be sufficient to prove such will in a trial at law"); 1839, Wilson *v.* Royston, 2 Ark. 315, 328 (deed; witness' signature required); 1862, Delony *v.* Delony, 24 Ark. 7, 11 (not required where witness signed by mark only);
California: C. C. P. 1872, § 1315 (if none are in the county, the Court "may admit the testimony of other witnesses", and "as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses or any of them"); 1864, Landers *v.* Bolton, 26 Cal. 393, 411 (witness' signature not required; laid down, "after deliberation, as 'a general rule'; but this rule might not apply to instruments which the law requires to be attested by witnesses"); 1864, McMinn *v.* O'Connor, 27 Cal. 238, 245 (same); 1864, McMinn *v.* Whelan, 27 Cal. 300, 310 (same);
Colorado: Comp. St. 1921, § 5209 ("in all cases where any one or more of the witnesses" are unavailable, evidence is allowable "of the handwriting of any such deceased or absent witness as aforesaid, and such other secondary evidence as is admissible in courts of justice generally to establish written contracts generally, in similar cases");
Columbia (Dist.): Code 1919, §§ 131, 132 (quoted *ante*, § 1310);
Delaware: Gen. St. 1915, § 3334 (if a witness is unavailable, "proof of the signature of such witness shall be sufficient; if that cannot be made, then proof of the signature of the testate shall be sufficient"); 1832, Boyer *v.* Norris, 1 Harringt. 22 (bill; witness' signature required); 1836, Jerman *v.* Hudson, 2 Colo. 134 (same: assignment of judgment);
Georgia: Rev. C. 1910, § 5834 (if the witnesses are unavailable, proof of the maker's signature is "primary evidence"; if that is unavailable, witnesses' handwriting "or other secondary evidence" may be admitted); § 3856 (wills: proof "of their signatures and that of the testator", necessary for wills); 1849, Watt *v.* Kilburn, 7 Ga. 356, 358 (witness' signature a mark only, and therefore "a nullity"; maker's signature sufficient); 1895, McVicker *v.* Conkle, 96 Ga. 584, 585, 24 S. E. 23 (witness' signature required; rule affirmed as settled; but policy doubted by Atkinson, J.); 1896, Baker *v.* Adams, 99 Ga. 135, 25 S. E. 28 (trial held before the statute, *supra;* the witnesses deceased; the maker's testimony admitted by consent); 1898, Standback *v.* Thornton, 106 Ga. 81, 31 S. E. 805 (witness' signature not necessary, under the statutes); 1914, Strickland *v.* Babcock Lumber Co., 142 Ga. 120, 82 S. E. 531 (cited more fully *post*, § 1513, n. 3);
Idaho: Comp. St. 1919, § 7455 (like Cal. C. C. P. § 1315);
Illinois: Rev. St. 1874, c. 148, § 6 (where one or more witnesses are dead, etc., "it shall be lawful . . . to admit proof of the handwriting of any such deceased, insane, or absent witness, as aforesaid, and such other secondary evidence as is admissible in courts of justice, to establish written contracts generally in similar cases"); 1851, Newsom *v.* Luster, 13 Ill. 175 (witness' signature not required, for instruments not required to be attested; quoted *supra*); 1865,

signature alone suffices. This assumes that proof has voluntarily been made of the attester's signature, and asks whether the maker's additionally is needed.

Fash v. Blake, 38 Ill. 363, 368, *semble* (deed; not required);
Indiana: Burns' Ann. St. 1914, § 3141 (if the witnesses are dead, etc., "then by proof of the handwriting of the testator or of the subscribing witness thereto"); 1838, Bowser *v.* Warren, 4 Blackf. 522, 524 (witness' signature required); 1848, Yocum *v.* Barnes, 8 B. Monr. 496, 498 (convenant; witness' signature not required);
Kansas: Gen. St. 1915, § 11769 (if any witness "shall die, be insane, or remove to parts unknown", so that his testimony "cannot be procured", the Court may admit proof of the handwriting of such witness, "and such other secondary evidence as is admissible in courts of justice to establish written contracts generally in similar cases");
Louisiana: Rev. Civ. C. 1920, §§ 1649, 1654 (testaments not acknowledged before a notary; signatures of both testator and witnesses must be proved; quoted in full *post*, §§ 2050, 2051); 1832, Barfield *v.* Hewlett, 4 La. 118, 119, *semble* (witness' signature not required); 1845, Grand Gulf R. & B. Co. *v.* Barnes, 12 Rob. 127, 130 (same);
Maine: 1845, Woodman *v.* Segar, 12 Shepl. 90, 93 (not required; but here it was intimated that the proof of the witness' handwriting was dispensed with merely because he never had been in the State and the proof was not accessible);
Maryland: Ann. Code 1914, Art. 93, § 353 (quoted *ante*, § 1310); 1864, Keefer *v.* Zimmerman, 22 Md. 274, *semble* (not required in certain cases);
Massachusetts: 1814, Homer *v.* Wallis, 11 Mass. 309, 311 (witness' signature not required, for documents not required to be attested); 1839, Valentine *v.* Piper, 22 Pick. 85 (not required; the maker's is "more direct and satisfactory than that of the handwriting of the witnesses"); 1851, Gelott *v.* Goodspeed, 8 Cush. 411 (same); 1892, Smith Charities *v.* Connolly, 157 Mass. 272, 276, 31 N. E. 1058 (mortgage; same);
Michigan: Comp. L. 1915, § 13783 (the Court "may admit proof of the handwriting of the testator and of the subscribing witnesses");
Minnesota: Gen. St. 1913, § 7269 (if the witnesses are not resident, the Court "may admit proof of the handwriting of the testator and of the subscribing witnesses");
Mississippi: Code 1906, § 1991, Hem. § 1656 (if no witnesses can be produced, then "it may be established by proving the handwriting of the testator, and of the subscribing witnesses to the will, or of some of them"); 1838, Downs *v.* Downs, 2 How. 915, 925 (deed; grantor's signature and acknowledgment sufficient);
Missouri: Rev. St. 1919, § 522 (when one witness is examined, and the others are "dead, insane, or their residences unknown, then such proof shall be taken of the handwriting of the testator and of the witnesses dead, insane, or residences unknown, and of such other circumstances as would be sufficient to prove such will on a trial at common law"); § 523 (if all the witnesses are dead, etc., then shall be taken "such proof of the handwriting of the testator and subscribing witnesses to the will, and of such other facts and circumstances as would be sufficient to prove such will in a trial at law"); neither of these carelessly constructed sections can be said to be intelligible; both evidently misunderstood the former law; and words "common law" and "law" are ambiguous precisely where certainty was needed; 1857, Clardy *v.* Richardson, 24 Mo. 295, 297, *semble* (deed; witness' signature not required);
Montana: Rev. C. 1921, § 1005 (like Cal. C. C. P. § 1315);
Nebraska: Rev. St. 1921, § 1260 (if none of the witnesses are resident, etc., the Court "may admit proof of the handwriting of the testator, and of the subscribing witnesses");
New Hampshire: 1834, Farnsworth *v.* Briggs, 6 N. H. 561, 563 (a note; witness' signature required; Parker, J., agreeing solely on authority, and approving the policy of requiring also proof of the grantor's signature); 1848, Cram *v.* Ingalls, 18 N. H. 613, 616 (possibly dispensable, when attestation is not required by law);
New Mexico: Annot. St. 1915, § 5878 (if the witnesses are not attainable, others shall be examined "to prove their signatures");
New York: S. C. A. 1920, § 142 (a will "may be established" upon proof of the testator's and witnesses' handwriting "and also of such other circumstances as would be sufficient to prove the will upon the trial of an action"); 1834, Jackson *v.* Waldron, 13 Wend. 178, 183, 197 (for a sealed instrument, the witness' signature required; "although many able judges have declared their dissatisfaction with the rule", per Walworth, C.; but Tracy, Sen., approved the rule); 1847, Willson *v.* Betts, 4 Den. 201, 209 (same, applied to a deed);
North Carolina: Con. St. 1919, § 4144, part 1 (proof of a will "may be taken of the handwriting, both of the testator and of the witness or witnesses so dead", etc., "and also of such other circumstances as will satisfy" of its execution; in all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the State or are insane or otherwise incompetent to testify it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead", etc., shall suffice); 1795, Jones *v.* Blount, 1 Hayw. 238 (grantor's signature ob-

This involves the inquiry what is implied by the attestation, and whether proof of it suffices (not whether it is necessary), and is elsewhere considered (*post*, § 1513), in dealing with the Hearsay exception for Attesting Witnesses. Thus, though the question is there sometimes, in form, whether both must be proved, the real inquiry is whether the maker's (not the witness') signature must additionally be proved. Courts requiring the maker's also, when the attester's is offered, need not be Courts requiring the attester's also if only the maker's is offered, though they frequently coincide; *i.e.* a Court might conceivably require a party proving the attester's to add the maker's, because of the insufficiency of the former (under § 1513, *post*), while the same Court,

jected to because the signature was not essential and did not import delivery; objection repudiated);

North Dakota: Comp. L. 1913, § 8644 (the Court "may admit the testimony of any competent witness respecting the execution of the will, the capacity of the testator, or other material fact, and may also admit proof of the handwriting of the testator or of a subscribing witness and such other evidence as is admissible in courts of justice to establish or disprove written contracts in similar cases"); § 5890 (instruments in general; "nor shall it be permissible to prove such instrument or contract in any case by proof of the handwriting of said subscribing witness or witnesses as the case may be, but in all cases such instrument or contract must be proved in the same manner as one having no subscribing witness whatever"); § 8641 (if subscribing witnesses are not produced, the Court may admit "proof of the handwriting of the testator and the subscribing witnesses or any of them");

Ohio: 1824, Clark *v.* Boyd, 2 Oh. 280 (57) ("under proper circumstances . . . either may be sufficient");

Oklahoma: Comp. St. 1921, § 1108 (if the subscribing witnesses are unavailable, the Court "may admit proof of the hand-writing of the testator and of the subscribing witness, or any of them");

Oregon: Laws 1920, § 784 ("the handwriting of one of them, and that of the party, shall be proved");

Philippine Isl. C. C. P. 1901, § 633 (quoted *ante*, § 1310);

Porto Rico: Rev. St. & C. 1911, §§ 1548–1557 ("closed" wills; special rules, based on the Spanish law);

South Carolina: Civ. C. 1922, §§ 5569, 5570 (for probate in common form, handwriting of the testator and the witnesses "or any other secondary evidence admissible and sufficient by the rules of the common law"; for solemn form, handwriting of the witnesses and the testator); 1803, Taylor *v.* Meyers, 2 Bay 506, 1 Brev. 245 (under the statute exempting from calling witnesses to notes and bonds, their handwriting need not be proved; the Court's first opinion, which alone is given in 1 Brev., was to the contrary); 1806, Gervais *v.* Baird, 2 Brev. 37, *semble* (witness' handwriting not needed, under the same statute); 1821, Corneil *v.* Buckley, 1 McC. 466 (deed; witness' signature required); 1829, Hill *v.* Hill, 2 Hill 542, note (deed; proof of maker's signature not sufficient);

South Dakota: Rev. C. 1919, § 3227 (like Okl. Comp. St. § 1108);

Texas: Rev. Civ. Stats. 1911, § 3267 (if the witnesses are unavailable, probate may be granted "on proof by two witnesses of the handwriting of the subscribing witnesses thereto, and also of the testator if he was able to write"); 1922, Rogers *v.* Rogers, — Tex. —, 240 S. W. 1104 (R. S. § 3267, applied);

Utah: Comp. L. 1917, § 7572 (like Cal. C. C. P. § 1315);

Vermont: Gen. L. 1917, § 3221 (will-witnesses; if none reside in the State, the testimony of "other witnesses" may be received, and the Court "may admit proof of the handwriting of the testator and of the subscribing witnesses, in cases where the names of the witnesses are subscribed to a certificate stating that the will was executed as required in this chapter"); 1858, Sherman *v.* Transp. Co., 31 Vt. 162, 165, 175 (handwriting of a grantor, sufficient, where the attestation is "not required to the operative effect of the contract");

Virginia: 1826, Gilliam *v.* Perkinson, 4 Rand. 325 (contract; witness' handwriting dispensed with where he signs by mark only; *semble*, in other cases also); 1829, Raines *v.* Philip, 1 Leigh 483 (maker's handwriting can be resorted to only when proof of witness' handwriting is unavailable; here, of a bond); *Washington;* St. 1917, Mar. 16, c. 156, Probate Code §§ 12, 13 (quoted *ante*, § 1310);

Wisconsin: Stats. 1919, § 3788 (if the attesters are unavailable, the Court may admit other testimony to prove sanity "and the execution of the will, and may admit proof of his handwriting and of the handwriting of the subscribing witness");

Wyoming: Comp. St. 1920, § 5714 (quoted *ante*, § 1310); 1907, Boswell *v.* First National Bank, 16 Wyo. 161, 92 Pac. 624 (not decided; cited more fully, *ante*, § 1312).

under the present principle, might not require the attester's if the maker's is offered. Accordingly, so far as such decisions require "both", in the sense that the attester's is needed, even when the maker's is offered, they belong here; while so far as they require "both", in the sense that the maker's is needed, even when the attester's is offered, they belong there (*post*, § 1513). Nevertheless, comparison should be made of the two sets of rulings in examining the law upon either point.

§ 1321. **Proof of Signature dispensed with, where not Obtainable.** Just as the rule of Preference for the attester's testimony on the stand is not enforced where it appears that his testimony cannot be had (*ante*, § 1308), so also, in those jurisdictions where proof of his signature is next preferred, this requirement is abandoned where it appears that such proof cannot be had.

(*a*) The most common instance is that in which testimony to the identity of the handwriting cannot by *honest and diligent search* be obtained. The sufficiency of the search ought to be left to the determination of the trial Court; the rulings can seldom be taken as binding precedents; it seems generally accepted, however, that the search need not extend out of the jurisdiction.[1]

(*b*) Where the witness has *subscribed by mark*, it may be thought impracticable to attempt to identify it in the same way as handwriting; and it is on this ground that a few Courts have dispensed with such evidence in the case of a subscription by mark.[2]

(*c*) Where the attesting signature is not to be had for purposes of authentication, either by the *loss of the document* or the *illegibility* of the writing, evidence of the attester's signature is impracticable.[3]

§ 1321. [1] *California:* 1864, Landers *v.* Bolton, 26 Cal. 393, 409 (attestation and residence out of the State, sufficient to show non-availability; approving Newsom *v.* Luster, Ill., *infra*); 1865, McMinn *v.* O'Connor, 27 Cal. 238, 245 (same); 1865, McMinn *v.* Whelan, 27 Cal. 300, 310 (same); *Illinois:* 1851, Newsom *v.* Luster, 13 Ill. 175 ("all that can be required in any case is that reasonable diligence should be used to procure evidence of the handwriting"; here a search for the witness in the neighboring State, where the deed was executed, or throughout the former State, was held unnecessary); *Indiana:* 1838, Bowser *v.* Warren, 4 Blackf. 522, 525 (diligence not shown on the facts; mere fact of delivery in Illinois near the border, insufficient to exempt from search); *Kentucky:* 1824, Ford *v.* Hale, 1 T. B. Monr. 23 (need not go out of the State for testimony); *New York:* 1833, M'Pherson *v.* Rathbone, 11 Wend. 96, 99 (search for evidence held sufficient on the facts); 1833, Pelletreau *v.* Jackson, 11 Wend. 110, 123 (search held insufficient); 1834, Jackson *v.* Waldron, 13 Wend. 178, 200, 223 (same); 1844, Northrop *v.* Wright, 7 Hill 476, 485 (a will more than 30 years old; no presumption of inability to find handwriting witnesses, and search held insufficient); 1847, Willson *v.* Betts, 4 Den. 201, 210 (such a presumption doubted; here search held sufficient); *North Carolina:* 1840, McKinder *v.* Littlejohn, 1 Ired. 66, 71 (no "precise rule of law" can be made; and the trial Court's discretion as to the ability to find evidence should control); *Pennsylvania:* 1820, Miller *v.* Carothers, 6 S. & R. 215, 223 (search held sufficient on the facts); *South Carolina:* 1798, Hopkins *v.* De Graffenreid, 2 Bay 187, 192 (search to prove the hand of an old woman "who did not sign her name more than once probably in 50 years", held not necessary in the present case; here, the grantor's signature); 1839, Dawson *v.* Dawson, Rice Eq. 243, 254 (proof of witness' handwriting, unavailable on the facts).

[2] See the cases *passim* cited in § 1320.

[3] 1796, Keeling *v.* Ball, Peake Add. Cas. 88 (the witnesses being unknown, proof by the maker's admissions was allowed); 1853, R. *v.* St. Giles, 1 E. & B. 426 (Erle, J., declaring squarely that "in no case whatever, where the instrument is lost and the attesting witness is dead, can it be necessary to prove his hand writing"; Wightman and Crompton, JJ., merely holding that proof of the fact of attestation, and of identity of an attesting person and a deceased person, was in this case equiv-

(*d*) Distinguish the case where the attestation is to be proved as an element in the *validity of the document;* for here (apart from any such express statutory exemption as is noted in the preceding section) the genuineness of the attester's signature must somehow be proved, like any other element; and if evidence is not offered, the proponent fails, even though it was out of his power to obtain it.[4]

alent to proof of handwriting of the witness). Compare the general principle as to *lost documents* (*ante*, § 1314).

(not excused, *semble*, where instruments are required by law to be attested); and compare § 1513, *post*.

[4] 1848, Cram v. Ingalls, 18 N. H. 613, 616

SUB-TITLE II (*continued*): RULES OF TESTIMONIAL PREFERENCE

TOPIC I (*continued*): PROVISIONAL TESTIMONIAL PREFERENCES

CHAPTER XLI.

SUB-TOPIC B: PREFERRED REPORTS OF PRIOR TESTIMONY

SUB-TOPIC C: SUNDRY PREFERRED WITNESSES

Sub-topic B: PREFERRED REPORTS OF PRIOR TESTIMONY

§ 1325. **Introductory.** As another exception to the general principle (*ante*, § 1286) that no classes of witnesses are preferred in our law, there is a well-established doctrine preferring a certain kind of witness in proving the *terms of another person's testimony delivered infra-judicially* prior to the trial in which it is offered. In determining the scope of this doctrine it is necessary to discriminate between five different sorts of prior testimony, (*a*) the examination of an *accused* person before a committing magistrate, (*b*) the examination of a *witness* before a committing magistrate, a coroner, or the like, (*c*) the testimony of a witness at a *former trial*, (*d*) the *deposition* of a witness taken 'de bene esse' before an official for the purposes of the present trial, (*e*) *dying declarations*, or other statements admissible under Hearsay exceptions.

§ 1326. (*a*) **Magistrate's Report of Accused's Statement; General Principle.** The theory here is that, since the magistrate is required by law to take down in writing the statement of the accused, the written report thus made at the time is preferred to mere oral (or recollection) testimony of the terms of the statement; *i.e.* the official report is preferred not only to the recollection of any ordinary hearer but even to the recollection of the magistrate himself:

1722, EYRE, J., in *R.* v. *Reason*, 16 How. St. Tr. 35: "That which is set down in writing, if it be an examination taken in writing of a prisoner before a justice of the peace, you cannot give evidence of that examination 'viva voce', unless the examination be lost."

Ante 1726, Chief Baron GILBERT, Evidence, 59: "What is reduced to writing by an officer sworn to that purpose, from the very mouth of the witness, is of more credit than what a stander-by retains in memory of the same oath; for the images of things decay in the memory, by the perpetual change of appearances, but what is reduced to writing continues constantly the same."

1839, PARKE, B., in *Leach* v. *Simpson*, 5 M. & W. 309, 312: "The written deposition is the best evidence of what was said, and must first be produced before you can inquire by other means as to what passed on the occasion."

1850, WILDE, C. J., *R.* v. *Christopher*, 2 C. & K. 994, 1000, 4 Cox Cr. 81: "The reason why a deposition is the primary evidence of what passes before the magistrate is that the law casts a duty on the magistrate of taking down what the witnesses say, and the presumption is that he has done it. And therefore that which he so does becomes the best evidence."

Considering the easy accessibility of the testimony thus preferred, and the slightness of the burden imposed in preferring it (*ante*, § 1286), the rule may be regarded as a sound one.

But it will be noticed that it rests on two assumptions, — first, that the written report contains the *entirety of what was said*, and, secondly, that the report was made *in pursuance of an official duty* expressly imposed by law.[1]

§ 1326. [1] The following list of statutes includes also those affecting other kinds of testimony, and will be from time to time referred to in the ensuing §§ 1327–1332, 1349; it is probably not complete as to some kinds of judicial proceedings:

ENGLAND: 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"); 1555, St. 2 & 3 P. & M. c. 10 ("The said justice or justices, before he or they shall commit or send such prisoner to ward, shall take the like examination of the prisoner and the information of those who bring him, and shall put the same in writing within two days after the said examination"); 1826, St. 7 Geo. IV, c. 64, § 2 (the justice shall take the examination of the prisoner "and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing"); 1849, St. 11 & 12 Vict. c. 42, § 17 (the justices shall "take the statement on oath" of the witnesses, and "shall put the same into writing", and cause the witnesses to sign these depositions); § 18 (the justice shall read these depositions to the accused and ask him whether he wishes to say anything in answer, "and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him and shall be signed by the said justices"; provided that nothing herein shall prevent the prosecution from introducing "any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person"; for other parts of this statute, see the quotation *ante*, § 848.

CANADA: *Dom.* R. S. 1906, c. 146, Cr. C. § 682 (the testimony before a committing magistrate "shall be taken down in writing in the form of a deposition"); § 684 ("whatever the accused then says in answer thereto [the magistrate's warning] shall be taken down in writing"); *N. Sc.* Rev. St. 1900, c. 36, § 5 (the coroner "shall reduce the statement on oath of any witness to writing"); c. 100, § 121 (similar, for prosecutions for illegal sale of liquor).

UNITED STATES: *Federal:* § 6306 (in U. S. consular courts, "in all cases, criminal and civil, the evidence shall be taken down in writing");
Alabama: Code 1907, § 7600 (committing magistrate must reduce testimony to writing);
Alaska: Comp. L. 1913, §§ 2420, 2424 (like Or. Laws 1920, §§ 1785, 1789; §§ 2382, 2444, 2447, 2480 (like Or. Laws 1920, §§ 1736, 1810, 1840);
Arizona: Rev. St. 1913, P. C. §§ 881 (examination of witnesses before the magistrate "must be reduced to writing as a deposition" in homicide, and in other cases on demand of the prosecuting attorney; the certified report "shall be 'prima facie' a correct statement of such testimony");

(1) As to the first requirement, its non-fulfilment would perhaps not affect the propriety of the present rule of mere preference so much as the propriety

Arkansas: Dig. 1919, § 2930 (committing magistrate in his minutes shall "make a general statement of the substance of what was proved"); § 1581 (testimony before coroner of suspected persons "may be . . . reduced to writing"); § 1582 ("the testimony of each witness, if material, shall be reduced to writing");
California: P. C. 1872, § 702 (threatened offence; the magistrate "must take their depositions in writing" of the informer and his witnesses); § 704 (if the charge is controverted "the evidence must be reduced to writing and subscribed by the witnesses"); § 869 (in cases of homicide, before the committing magistrate, "the testimony of each witness . . . must be reduced to writing; and in other cases, upon the demand of the prosecuting attorney, or the defendant, or his counsel"; it must be "corrected or added to until it conforms to what he [the witness] declares is the truth"; when taken in shorthand and transcribed and "certified as being a correct statement of such testimony", it "shall be 'prima facie' a correct statement of such testimony and proceedings"); § 1545 (testimony before coroner must be reduced to writing "by him or under his direction"); § 1539 (testimony before magistrate on search-warrant "must be reduced to writing," as in P. C. § 869); § 1811 (on information laid, magistrate must take witnesses' depositions in writing);
Colorado: Comp. St. 1921, § 6296 (examination of complainant and accused in bastardy "shall be taken down in writing"); § 8780 (testimony before coroner "shall be reduced to writing");
Columbia (Dist.): Code 1919, § 194 (for the coroner, "it shall be his duty . . . to reduce the testimony of the witness to writing");
Connecticut: Gen. St. 1918, § 233 (coroner "shall reduce to writing" the testimony before him);
Delaware: Rev. St. 1915, § 1350 (coroner; testimony of each witness "if material, shall be reduced to writing" and signed; voluntary examination of suspected person shall "be reduced to writing" and signed by him if willing); § 3971 (committing magistrate shall reduce to writing the voluntary examination of accused, in cases of felony; he shall also reduce the witness' testimony to writing, "if material", and have it signed);
Florida: Rev. G. S. 1919, § 6198 (at coroner's inquest, "the evidence of such witnesses shall be in writing, subscribed by him or her");
Georgia: P. C. 1910, § 935 (defendant's statement; "it shall be the duty of the Court to reduce it to writing"); § 936 (in felony charge, "the Court shall cause an abstract of all the evidence to be made and returned"); § 1347 (coroner "shall commit to writing the substance of the testimony");
Hawaii: Rev. L. 1915, § 3701 (testimony at an inquest "shall be reduced to writing by the Coroner or some other person by his direction"); § 1087 (evidence on committal of insane person shall be reduced to writing); § 2308 (district magistrates shall preserve in writing "the substance of the testimony" taken);
Idaho: Comp. St. 1919, § 9314 (testimony at coroner's inquest "must be reduced to writing"); § 8754 (before committing magistrate, testimony "must be reduced to writing, as a deposition"); § 8633 (testimony on information of threatened offence "must be reduced to writing"); § 8709 (information before magistrate; he "must" take witness' "depositions in writing");
Illinois: Rev. St. 1874, c. 38, §§ 320, 348 (complaint to magistrate shall be reduced to writing); c. 32, § 18 (coroner is to have testimony of each witness "written out and signed by said witness"); Ill. St. 1907, May 17, p. 213 (re-enacting this part of c. 32, § 18, *supra*);
Indiana: Burns' Ann. St. 1914, § 1019 (justice must reduce to writing the woman's examination in bastardy); § 9440 (coroner shall reduce to writing "all testimony");
Iowa: Rev. Code, 1897, § 3219 (testimony before coroner shall be reduced to writing); § 9181 (committing magistrate "shall" cause the "substance of the testimony" to be written out); § 9195 (when defendant waives examination, magistrate "shall take the evidence in writing of the State's witnesses", on county attorney's demand);
Kansas: Gen. St. 1915, § 7960 (committing magistrate shall reduce testimony to writing "when he shall think it necessary"); § 2607 (testimony before coroner "shall be reduced to writing"); ib. § 5120 (bastardy; justice shall reduce to writing the mother's testimony); § 11764 (will-probate testimony "shall be reduced to writing");
Kentucky: Stats. 1915, § 530 (coroner shall "commit to writing the substance of the evidence"); C. Cr. P. § 64 (committing magistrate shall in his minutes state the substance of the testimony);
Louisiana: Rev. Civ. C. 1920, § 662 (testimony at coroner's inquest "shall be reduced to writing"); R. S. 1870, § 1010 (preliminary examinations of accused; magistrate's duty is "to reduce to writing" the statements of accused and of witnesses);
Maine: Rev. St. 1916, c. 141, § 5 (testimony at inquest "shall be reduced to writing and signed"); c. 135, § 12 (at preliminary examination, magistrate may reduce to writing and have signed any witness' testimony, "when he thinks it necessary");
Massachusetts: Gen. L. 1920, c. 276, § 40 (committing magistrate; witness' testimony

of the rule of the conclusiveness of the report (*post*, § 1349). Moreover, although the statutes do not in all cases expressly require the whole to be

is to be reduced to writing, and, if the Court requires, to be signed by witness); c. 38, § 11 (inquests; in certain classes of cases, the magistrate "shall cause a verbatim report of the evidence to be made"); c. 148, § 4 (State fire marshal shall reduce examinations to writing);

Michigan: Comp. L. 1915, § 15628 (magistrate examining complainant shall "reduce such examination to writing"); § 15650 (testimony before justice at an inquest "shall be reduced to writing"); § 15680 (testimony before committing magistrate "shall be reduced to writing");

Minnesota: Gen. St. 1913, § 1000 (testimony before coroner "shall be reduced to writing"); § 9082 (testimony before committing magistrate shall be reduced to writing); § 3215 (bastardy; examination shall be reduced to writing);

Mississippi: Code 1906, § 888, Hem. § 4055 (coroner "shall put in writing so much of the evidence given to the jury before him as shall be material");

Missouri: Rev. St. 1919, § 3825 ("in cases of homicide, but in no other", the evidence before a committing magistrate "shall be reduced to writing"); § 524 (testimony of probate in support of will "shall be reduced to writing"); § 5929 (testimony before coroner "shall be taken down in writing");

Montana: Rev. C. 1921, §§ 11638, 11783 (like Cal. P. C. §§ 702, 869); § 12386 (testimony before coroner "must be reduced to writing");

Nevada: Rev. L. 1912, §§ 6930, 6977, 6982, 6997 (various provisions for testimony before a committing magistrate);

New Hampshire: Pub. St. 1891, c. 252, § 7 (testimony "may be reduced to writing by the magistrate, or under his direction, when he deems it necessary, and shall be signed by the witness"); §§ 8, 9 (magistrate "may take the examination in writing of the accused person" where the case requires it, "if the accused after being cautioned consents thereto"; the caution warning him that "the questions and answers will be written and preserved and may be evidence upon his trial"), c. 262, § 12 (testimony before coroner "shall be drawn up in writing and subscribed"); St. 1905, c. 60, amending St. 1903, c. 134 (the testimony before a medical referee as coroner "shall be reduced to writing");

New Jersey: Comp. St. 1910, Coroners § 14 (the coroner "shall put in writing the effect of so much of the evidence given to the jury before him as shall be material");

New Mexico: Annot. St. 1915, § 3261 (magistrate committing "any criminal case"; testimony is to be "reduced to writing" by stenographer for transmission to grand jury); § 5878 (testimony of will witnesses shall be "reduced to writing");

New York: C. Cr. P. 1881, § 87 (testimony before magistrate must "be reduced to writing" and subscribed); § 778 (testimony before coroner "must be reduced to writing" by him); § 204 (testimony before committing magistrate must be reduced to writing and subscribed);

North Carolina: Con. St. 1919, § 4563 (testimony of accused before magistrate "shall be reduced to writing"); § 4560 (same for witnesses);

North Dakota: Comp. L. 1913, § 10411 (threatened offences; evidence before magistrate "must on demand of the defendant be reduced to writing"); § 3416 (testimony before coroner "must be reduced to writing"); § 10608 (on demand of State or defendant, "all the testimony in the case must be reduced to writing" as depositions, or by stenographer if both parties consent);

Ohio: Gen. Code Ann. 1921, § 12112 (magistrate is to reduce to writing testimony of bastardy complainant); § 10677 (same for proceedings against one embezzling decedent's property); § 2856 (the testimony before the coroner "shall be reduced to writing");

Oklahoma: Comp. St. 1921, § 2365 (threatened offence; evidence must "on demand of the defendant be reduced to writing"); § 2492 (before committing magistrate, on defendant's demand "all the testimony in the case must be reduced to writing in the form of depositions"); § 1106 (testimony of subscribing witnesses to will "must be reduced to writing"); § 1122 (so also for witnesses to lost or destroyed will); § 739 (so also for examination of insolvent debtor); § 5876 (testimony before coroner "shall be reduced to writing");

Oregon: Laws 1920, § 1785 (statement of defendant before committing magistrate "must be reduced to writing"); § 1789 (testimony of witnesses "need not be reduced to writing", except that depositions are taken at time of complaint made); §§ 1736, 1810 (complaint must be reduced to writing and witnesses' depositions taken); § 1840 (testimony before coroner "must be reduced to writing");

Pennsylvania: St. 1869, Apr. 17, § 4, Dig. 1920, § 10948, Fires (testimony of witnesses at fire inquest "shall be reduced to writing");

Rhode Island: Gen. L. 1909, c. 356, § 17 (coroner "shall cause the testimony to be reduced to writing" and subscribed);

South Carolina: C. Cr. P. 1922, § 1035 (the coroner is to take testimony of witnesses in writing);

South Dakota: Rev. C. 1919, § 4476 (like N. D. Comp. L. § 10411); § 3228 (at a will-probate, "the testimony of each witness,

taken down, it is also true that the original English statutes under which the rule grew up did not require the whole to be taken.

(2) As to the second requirement, it is clear that there is no general principle in the law of Evidence which makes an official report a preferred testimony to the facts reported (*ante*, § 1286). On the contrary, the official duty leading to the report is merely that which suffices to make the report admissible at all, under an exception to the Hearsay rule (*post*, § 1632), instead of calling the reporter to the stand; the fact of an official duty barely suffices to secure admissibility, and cannot be thought in itself and in general to go so far as to create a preference. While it may be conceded, then, that the preference for the magistrate's report is in the specific instance a satisfactory rule, this result is to be regarded as an exceptional and unusual step, taken solely because of the official duty requiring the report; and therefore it is at least necessary that such an official duty should be expressly imposed by law. A report made merely by custom, or casually, and not under such a statutory duty, is not to be accorded such a preference.

reduced to writing and signed by him, shall be taken"); § 4619 (testimony on search-warrant proceedings must be reduced to writing); § 10184 (testimony before coroner "shall be reduced to writing"); § 4504 (complaint to magistrate; testimony "shall be reduced to writing"); § 4575 (preliminary examination; on demand of defendant, "all the testimony in the case must be reduced to writing");

Tennessee: Shannon's Code 1916, §§ 7017, 7021 (accused's statement to be taken in writing by magistrate, and signed by accused or refusal noted; witness' testimony to be taken in writing by magistrate or under his direction, and signed by witness);

Texas: Rev. Civ. Stats. 1911, §§ 3273, 3274 (testimony on will-probate "shall be committed to writing"); Rev. C. Cr. P. 1911, § 295 (accused's statement before magistrate "shall be reduced to writing"); § 300 (the witnesses' testimony also "shall be reduced to writing"); § 976 (justice of the peace examining witness for disclosure of crime "shall reduce said statements to writing"); § 1065 (testimony at coroner's inquest "shall be reduced to writing"); § 1086 (so also at fire inquest);

Utah: Comp. L. 1917, § 8568 (threatened injury; magistrate "may take their depositions in writing" of complainant and his witnesses); § 8573 (on the hearing, "the evidence, on demand of the person complained of, must be reduced to writing"); § 8750 (preliminary examination; like Cal. P. C. § 869, omitting "or the defendant or his counsel"); § 3228 (coroner "may require the testimony to be written"); § 7573 (testimony at will-probate "shall be reduced to writing");

Vermont: Gen. L. 1917, §§ 2571, 6613, 6617 (justices in criminal cases and inquests "shall take in writing the substances" of the testimony; at inquest by county or municipal judge, "a stenographer . . . shall take and transcribe the testimony");

Virginia: Code 1919, § 4844 (committing magistrate may reduce testimony to writing if he "deems it proper"); § 4810 (coroner "shall" reduce testimony to writing);

West Virginia: Code 1914, c. 154, § 4 (testimony before coroner "shall be reduced to writing" and subscribed); c. 156, § 14 (testimony before committing justice shall be, "when the justice deems it proper or the accused shall desire it");

Washington: R. & B. Code 1909, § 1302 ("all the testimony adduced in support of the will [at probate] shall be reduced to writing, signed by the witnesses, and certified by the judge of the court"; so also § 1314); § 1938 (threatened offence; magistrate shall reduce testimony to writing); § 1953 (preliminary examination; testimony "shall be reduced to writing by the magistrate, or under his direction, when he shall think it necessary"); § 1962 (witness before magistrate, recognizing for appearance; magistrate "shall immediately take the deposition of such witness"); § 4019 (testimony before coroner "shall be reduced to writing" "in all cases where murder or manslaughter is supposed to have been committed");

Wisconsin: Stats. 1919, § 4790 (testimony before committing magistrate "shall be reduced to writing"); § 4818 (threatened offence; magistrate shall "reduce such complaint to writing"); § 4872 (testimony before coroner "shall be reduced to writing");

Wyoming: Comp. St. 1920, § 1534 (testimony before coroner "shall be reduced to writing").

The terms of the statutes in the various jurisdictions have therefore to be kept in mind.

This rule of preference, then, though not conceived in England until the second century following the enactment of the earliest statute requiring the magistrate's report in writing,[2] has long been there established.[3] In the United States, it seems to be generally accepted (with variances) wherever a statute makes it the magistrate's duty to report the statement in writing.[4]

Whether the report is *conclusive*, *i.e.* may be shown to be erroneous or incomplete, is a question dealt with elsewhere (*post*, § 1349).

§ 1327. **Same: Magistrate's Report not required if lost or not taken.** The notion of conditionally preferred testimony (*ante*, § 1286) is that it must be used before any other, *if it can be*. Hence, if the preferred testimony is unavailable, either because it is lost or otherwise inaccessible, or because it never existed, the requirement of its use ceases. The magistrate's report, then, is not required, and any other testimony to what was said may be used, if the magistrate's report is lost or otherwise inaccessible,[1] or if it was irregularly taken so as to be inadmissible,[2] or if it was never taken in

[2] The doctrine first appears about 1720, in the time of R. *v.* Reason and of Gilbert's treatise, quoted *supra;* before that time the magistrate came on the stand and testified orally, usually referring to his notes of the examination; for example: 1679, Green's Trial, 7 How. St. Tr. 159, 192, 194 (the officer taking the examination testifies to the utterances without reading the examination); 1682, Coningsmark's Trial, 9 How. St. Tr. 1, 23 (same; though the written examinations were in Court).

[3] See the cases cited in the ensuing sections. Compare the comments of Mr. Gulson, in his treatise cited *post*, § 1349, n. 1.

[4] *Alabama:* 1910, Davis *v.* State, 168 Ala. 53, 52 So. 939 (oral testimony not admissible, unless magistrate's report is accounted for); *Connecticut:* 1792, Benedict *v.* Nichols, 1 Root 434 (defendant's examination on oath touching possession of deceased's effects; being "officially taken", it was "not to be proved by parol testimony"); *Georgia:* 1896, Leggett *v.* State, 97 Ga. 426, 24 S. E. 165 (magistrate's report of accused's testimony, preferred to oral evidence); *Mississippi:* 1874, Wright *v.* State, 50 Miss. 332 (written examination by justice must be used); *New York:* 1835, People *v.* White, 14 Wend. 111, 123 (statements at examination not orally provable, unless the examination was never reduced to writing); 1836, People *v.* Moore, 15 Wend. 419, 421, *semble* (deposition must be produced, if taken); *Porto Rico:* 1911, People *v.* Flores, 17 P. R. 166 (notes by district attorney's clerk, not required to be used); *South Carolina:* 1909, State *v.* Winter, 83 S. C. 153, 65 S. E. 209; *Tennessee:* 1853, Alfred *v.* Anthony, 2 Swan 581, 590 (magistrate's writing preferred); *Texas:* 1902, Grimsinger *v.* State, 44 Tex. Cr. 1, 69 S. W. 583 (confession reduced to writing by the clerk of the grand jurors; writing not required to be put in).

See also the cases in the ensuing sections, where the doctrine is assumed to exist; and also the cases requiring the written examination to be produced in proving an inconsistent statement to *impeach the accused's testimony* (*ante*, §§ 1262, 1263).

It has been sometimes improperly preferred *where no statutory duty* exists; 1879, State *v.* Branham, 13 S. C. 389, 396 (deposition of accused, taken without statutory authority; writing must be produced as preferred testimony, "where there was no obstacle"). But see this case explained *post*, § 1328.

The magistrate, if it is his duty, is *presumed* to have made a written report: *post*, § 1327.

§ 1327. [1] R. *v.* Reason, quoted *ante*, § 1326; and the citations in the next section; and the following cases: 1898, R. *v.* Troop, 30 N. Sc. 339 (witness' contradictory testimony at the preliminary hearing, allowed to be proved by one present, the magistrate's report being lost; good opinion by Henry, J.; two judges thought that its loss was immaterial); 1901, Marx *v.* Hart, 166 Mo. 503, 66 S. W. 260 (statements of the opponent, at the time of taking his deposition, admitted, the deposition being lost).

[2] 1791, Lambe's Case, 2 Leach Cr. L. 3d ed. 625 (quoted in the next section); 1829, R. *v.* Hayman, M. & M. 403; 1838, R. *v.* Wilkinson, 9 C. & P. 662 (other evidence of a defendant's statement admitted, where a magistrate had merely returned a subsequent memorandum noting that the defendant had said nothing); 1843, Jeans *v.* Wheedon, 2 Moo. & Rob. 486.

writing at all.[3] But the party wishing to use such other testimony *must show* that the preferred testimony is *unavailable;* for, if a law imposed a duty for the magistrate to report in writing, it is properly assumed that the magistrate performed his duty and that such a report exists.[4]

§ 1328. **Same: Written Examination usable as Memorandum or as Written Confession.** If the magistrate's written report is inadmissible as such, because not taken regularly under the statute, it may still be employed in other aspects.

(1) It may be referred to by the magistrate as *refreshing his present memory* or as a record of his past recollection (*ante*, §§ 737, 761):

1722, PRATT, C. J., in *Layer's Trial*, 16 How. St. Tr. 214: "Your objection would prevail if they were going to read a confession as evidence which was neither read to him nor signed by him. But if there is no examination reduced into writing and signed by the party, the consequence of that is that the witness is at liberty to give an account of what was said, and he may look to his notes to refresh his memory. . . . You say there is no precedent for it; for God's sake, recollect yourself; it is every day done at the Old Bailey; if a person confesseth and it be not in writing, they do prove his confession 'viva voce.'"[1]

(2) It may have been *orally acknowledged by the accused* to be correct, after it was read over to him, and may thus be receivable, not as the magistrate's report of the accused's statement, but as the statement itself in writing; an oral acknowledgment and adoption of its terms being the same in effect as a signing of it. In such a case, if the writing is produced, it is not as the preferred magistrate's report, but as the confession itself made in writing:

1791, GROSE, J., in *Lambe's Case*, 2 Leach Cr. L. 3d ed. 625, 630 (an examination before a magistrate reduced to writing, but not signed by magistrate or accused, but orally acknowledged by the latter to be true when read over to him by the clerk): "The intention of the Legislature in passing the statute is clear and obvious. Its only object is to enable Justices of the Peace to take such information and to transmit what passes before the com-

[3] *England:* 1722, Layer's Trial, 16 How. St. Tr. 214 (quoted in the next section); *U. S. California:* 1910, People *v.* Luis, 158 Cal. 285, 110 Pac. 580 (here a confession in answer to the district attorney); *New York:* 1835, People *v.* White, 14 Wend. 111, 123; *North Carolina:* 1794, State *v.* Irwin, 1 Hayw. 112 ("There is certainly an impropriety in saying that evidence may be received of a confession made before a private man and that the same confession made before a justice shall not [be] because he hath omitted to perform his duty. This would put it in the power of a justice to make the confession evidence or not, at his election, and is a power the law never meant to give him. The Act is only directory; and if the Justice should not do his duty in the obeying it, that shall not be of so much prejudice to the State that the evidence shall be lost by it"); 1853, State *v.* Parish, Busbee L. 239 (oral evidence allowed, where the examination was not reduced to writing).

[4] 1779, Jacobs' Case, 1 Leach Cr. L., 3d ed., 347 (as also in Hinxman's Case and Fisher's Case, cited in a note); 1830, R. *v.* Hollingshead, 4 C. & P. 242; Phillips *v.* Wimburn, 4 C. & P. 273; 1837, R. *v.* Coventry, 7 C. & P. 667 (it is presumed that all was taken); 1848, R. *v.* Martin, 6 State Tr. N. S. 925, 989; 1852, R. *v.* McGovern, Ire., 5 Cox Cr. 506, Torrens, J. (with hesitation); 1899, Overtoom *v.* R. Co., 181 Ill. 323, 54 N. E. 898 (a coroner, required by law to take in writing); 1874, Wright *v.* State, 50 Miss. 332, 335.

§ 1328. [1] *Accord:* 1819, R. *v.* Telicote, 2 Stark. 483 (noticing its availability as a memorandum for the clerk); 1825, Dewhurst's Case, 1 Lew. Cr. C. 46 (the accused neither signing nor admitting the truth of the writing, oral evidence of the accused's oral statement was given by the clerk, using the writing to refresh his memory; two other cases noted, *accord*); 1831, R. *v.* Bell, 5 C. & P. 162 (the clerk reading in the third person); 1833, R. *v.* Pressley, 6 C. & P. 183; R. *v.* Tarrant, 6 C. & P. 182; 1851, R. *v.* Watson, 3 C. & K. 111.

mitting magistrate to the Court of Oyer and Terminer or Gaol Delivery, to enable the judge and jury before whom the prisoner is tried to see whether the offense is bailable, and whether the witnesses are consistent or contradictory in the evidence they give. . . . There is not a single expression in either of the statutes from which it is to be collected that the examination was directed to be taken merely as evidence against the prisoner. Nor indeed is the examination in practice ever given in evidence as a matter so required by the statutes, but containing a detail of circumstances taken under the solemnity of a public examination for a different purpose, it is more authentic on account of the deliberate manner in which it is taken. . . . The examinations which they directed to be taken became evidence, where they contained confessions, by operation of law, leaving all other confessions, good or bad, as they were before those statutes were made. . . . The examination, or paper-writing, . . . was under the circumstances of the case well received." [2]

If, then, this written confession is desired to be proved, the writing must be produced or accounted for (*ante*, § 1230). Nevertheless, it would seem that the oral statement of the accused and his subsequent adoption of the written report are in fact two distinct statements, and therefore if it were desired to prove the first and oral one, it would not be necessary to produce the second and written one.[3]

It should be noted, however, that so far as the accused's statement as such is inadmissible by the rules applicable to confessions before a magistrate (*ante*, §§ 842–852), then both the official report and the oral acknowledgment of it are alike inadmissible.

§ 1329. (*b*) **Magistrate's or Coroner's Report of Witness' Testimony.** So far as the law imposes on a committing magistrate or a coroner the duty of making a written report of the testimony delivered before him, the principle just examined (*ante*, § 1326) makes this official report a preferred testimony, to be used in preference to any other:

1742, *Annesley's Trial*, 17 How. St. Tr. 1121; a deposition before the coroner was read; the coroner was asked: "Are these all the minutes that you took?" *Coroner:* "If I may say anything more from my memory, I will do it." *Counsel:* "Then we will go upon the parole evidence." *Counsel for the opponent:* "When an officer has taken things down in writing, it is of dangerous consequence to admit parole evidence to be given of the same things." *Counsel:* "We do not insist upon it."

1839, ABINGER, L. C. B., in *Leach* v. *Simpson*, 7 Dowl. Pr. 513, 515: "When testimony has been reduced to writing by a person of competent authority, the writing is in the first instance, the only proper evidence of that testimony"; PARKE, B.: "That deposition is the best evidence of what was said."

1875, BRETT, J., in *R.* v. *Taylor*, 13 Cox Cr. 77: "Being before the magistrates, and the law saying that the deposition is primary evidence, the deposition should be put in; but for that reason only."

[2] *Accord:* 1794, R. *v.* Thomas, 2 Leach Cr. L. 3d ed. 727 (after a first reading, the accused acknowledged its correctness; upon a later reading, he denied it; admitted); 1827–8, Foster's Case and Hirst's Case, 1 Lew. 46 (a confession read over, the accused not signing nor asked to sign; excluded, because "there was nothing to show that she admitted it to be true"); 1913, State *v.* Harris, 74 Wash. 60, 132 Pac. 735, *semble*.

[3] *Accord:* 1906, Lowe *v.* State, 125 Ga. 55, 53 S. E. 1038, *semble*. *Contra:* 1879, State *v.* Branham, 13 S. C. 389, 397 (though the magistrate has no duty to examine and report in writing, yet if he does, and the accused signs, the writing must be produced).

This application of the principle, like the preceding one, was not recognized till the 1700s;[1] but since that time it has been unquestioned in England.[2] In the United States also it is accepted, with only an occasional contrary ruling; for there is no reason to discriminate between an accused's statement and a witness' testimony, except so far as the statute may in the latter case not impose the duty of reporting it in writing.[3]

The same qualifications here apply that have been noted for the case of an accused's statement in the preceding sections. The preference being only conditional upon the availability of the magistrate's report, any qualified witness is receivable if the official written report is lost or otherwise inac-

§ 1329. [1] 1679, Wakeman's Trial, 7 How. St. Tr. 591, 651 (Oates' examination before the Council, proved orally by one of the Councillors); 1679, Knox's Trial, 7 How. St. Tr. 763, 789 (justice's examination proved orally by the justice).

[2] *Eng.* 1789, Warren Hastings' Trial, Lords' Journal, May 27 (Nuncomar's examination having been taken down in writing, an oral report of it was excluded); 1839, R. *v.* Taylor, 8 C. & P. 726; 1839, Leach *v.* Simpson, 5 M. & W. 309, 7 Dowl. Pr. 513 (applied to civil and criminal cases equally); 1877, R. *v.* Dillon, 14 Cox Cr. 4 (an information in writing before a magistrate, the charge itself being made orally; the written information required); *Can.* 1905, Farlinger *v.* Thompson, 37 Sup. 513, 534 (examination of a debtor).

[3] To the following, add the cases, cited *ante*, §§ 1262, 1263, requiring a deposition to be produced for contradicting a witness, and the cases in the next notes *infra*: *Alabama:* 1905, Sandford *v.* State, 143 Ala. 78, 39 So. 370; *Arkansas:* 1839, Dunn *v.* State, 2 Ark. 229, 248 (defendant's affidavit before coroner, and coroner's testimony on the stand as to the examination before him, excluded, the written report of the examination being available); 1855, Atkins *v.* State, 16 Ala. 568, 588 (witness' prior inconsistent testimony before magistrate; deposition must be produced if available); 1876, Talbot *v.* Wilkins, 31 Ala. 411, 421 (testimony before bankruptcy-commissioners; written deposition "the only admissible evidence"); 1878, Shackelford *v.* State, 33 Ala. 539, 542 (deceased witness before examining magistrate, the law requiring only a reduction of the substance in general to writing; oral evidence allowed); 1894, Cole *v.* State, 59 Ala. 50, 52, 26 S. W. 377 (defendant's inconsistent testimony at inquest; coroner's report required); *California:* 1866, People *v.* Robles, 29 Cal. 421, *semble* (magistrate's report not required); 1872, Hobbs *v.* Duff, 43 Cal. 485, 490, *semble* (written record necessary; here it showed that there had been nothing to record); 1872, People *v.* Devine, 44 Cal. 452, 458 (contradiction in deposition; showing the deposition not required); 1875, People *v.* Curtis, 50 Cal. 95 (under P. C. § 869, the magistrate's report is not preferred); *Georgia:* 1875, Cicero *v.* State, 54 Ga. 156, 158 (magistrate's examination, if taken, preferred to oral report, and must be accounted for); 1882, Williams *v.* State, 69 Ga. 11, 30 (whether the magistrate's report of testimony is preferred to any other, left undecided); 1900, Haines *v.* State, 109 Ga. 526, 35 S. E. 141 (magistrate's report, not preferred); 1904, McKinney *v.* Carmack, 119 Ga. 467, 46 S. E. 719 (neither committing magistrate's nor coroner's report is preferred, where the testimony is used in impeachment; prior cases not cited); 1905, Green *v.* State, 124 Ga. 343, 52 S. E. 431 (coroner's report of testimony, not preferred); *Illinois:* 1899, Overtoom *v.* R. Co., 181 Ill. 323, 54 N. E. 898 (coroner's report of inquest-testimony, preferred to party's stenographer's report); 1905, Briggs *v.* People, 215 Ill. 330, 76 N. E. 499 (coroner's minutes of testimony need not be used; no authority cited); *Indiana:* 1878, Woods *v.* State, 63 Ind. 353, 357 (oral testimony excluded, where the examination had been reduced to writing, in accordance with the law; unless the writing is unavailable); *Iowa:* 1919, Wildeboer *v.* Petersen, 187 Ia. 1169, 175 N. W. 349 (civil action for rape; to show plaintiff's inconsistent statements made before the grand jury, members of the grand jury were allowed to testify, apparently irrespective of proof that no minutes were recorded or that the record was lost); *Michigan:* 1868, Lightfoot *v.* People, 16 Mich. 507, 513 (said to be "presumptively the best evidence"); 1889, People *v.* Hinchman, 75 Mich. 587, 589, 42 N. W. 1006 (preliminary examination; report is the "only admissible evidence", when "present in Court"); *New Jersey:* 1824, State *v.* Zellers, 7 N. J. L. 220, 236 (coroner being obliged to take the testimony in writing, other evidence of it was rejected); *South Carolina:* 1888, State *v.* Jones, 29 S. C. 201, 227, 7 S. E. 296 (coroner's report of testimony, termed the "best evidence"; Branham case, *ante*, § 1328, approved); *Tennessee:* 1872, Wade *v.* State, 7 Baxt. 80, 81, *semble* (any one may report the testimony, even if the magistrate has taken it in writing); 1872, Titus *v.* State, 7 Baxt. 132, 137 (magistrate's writing is the "best evidence of what she did say").

cessible,[4] or if it is inadmissible because irregularly taken,[5] or if it was never taken in writing at all;[6] and it is assumed, until the contrary is shown, that the magistrate has done his duty by making a written report.[7]

Whether the report may be shown to be erroneous or incomplete is another question (*post*, § 1349).

§ 1330. (c) **Report of Testimony at a Former Trial.** (1) There has never been, in the practice of the common law, any person required or even authorized by law to take in writing the testimony of the witnesses. Hence, the rule from the beginning has always been that no preferred witness is recognized, in proving testimony given at a former trial; in other words, any one who heard it may testify from recollection, with or without the aid (*ante*, §§ 737, 761) of written notes:[1]

1810, MANSFIELD, C. J., in *Doncaster* v. *Day*, 3 Taunt. 262: "What a witness has sworn . . . may be given in evidence either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given."

(2) The report of a *stenographer* is of course more trustworthy in the ordinary case than mere recollection; but, regard being had to the serious burden of searching for a preferred source of evidence and of showing it to be unavailable (*ante*, § 1286), the advantage to be gained by requiring a stenographic report to be used if available does not seem worth the inconvenience; and such an innovation is discouraged by the Courts:[2]

[4] 1722, R. v. Reason, 16 How. St. Tr. 31, 35 (magistrate's report required, "unless you show you are disabled to do it by some accident or other"; "unless the examination be lost"); 1844, Pearce v. Furr, 2 Sm. & M. 54, 58 (lost report of examination by magistrate; magistrate allowed to testify to the witness' testimony itself; but the Court assumed this to be equivalent to the contents of the paper).

[5] *Ala.* 1881, Roberts v. State, 68 Ala. 515, 525 (reduced to writing, but not signed; any one who heard, admissible); *Ind.* 1880, Brown v. State, 71 Ind. 470, 475 (the testimony being taken irregularly in writing, oral report was admitted); *La.* 1906, State v. Thompson, 116 La. 829, 41 So. 107 (the magistrate's report of the testimony being excluded for irregularity, the testimony of one who heard the former testimony was received); *N. Y.* 1840, People v. White, 24 Wend. 520, 533 (the witness' statement before the coroner may be proved orally to contradict him, where the coroner's writing was inadmissible); *Tex.* 1874, Alston v. State, 41 Tex. 40 (irregularly taken; oral report admissible).

[6] 1877, Nelson v. State, 32 Ark. 192, 196 (perjury before a coroner; the testimony not being reduced to writing, oral evidence allowed); 1914, Bennett v. State, 66 Fla. 369, 63 So. 842; 1882, Robinson v. State, 68 Ga. 833; 1872, Wade v. State, 7 Baxt. Tenn. 80, 81.

[7] 1779, R. v. Fearshire, 1 Leach Cr. L. 3d ed., 240; and cases cited *ante*, § 1327. *Contra:* 1875, People v. Curtis, 50 Cal. 95, *semble*.

§ 1330. [1] *Accord:* 1685, Fernley's Trial, 11 How. St. Tr. 381, 434; *Ga.* Rev. C. 1910, § 5773, P. C. § 1027 (provable by "any one who heard it"); *Ill.* 1870, Roth v. Smith, 54 Ill. 431; 1871, Hutchings v. Corgan, 59 Ill. 70 (by a juror, admitted); *N. Y.* 1911, McRorie v. Monroe, 203 N. Y. 426, 96 N. E. 724; *Tenn.* 1850, Kendrick v. State, 10 Humph. 479, 488.

The same point is implied in many of the rulings cited *post*, § 2098 (whether the *precise words* must be proved).

Whether in *malicious prosecution* the former testimony can be proved only by the witness himself involves another question (*post*, § 1416).

[2] *Accord: Alabama:* 1895, Sanders v. State, 105 Ala. 4, 16 So. 935, *semble; Arkansas:* 1905, Petty v. State, 76 Ark. 515, 89 S. W. 466 (the witness may read his memorandum to the jury; of course; it is curious that a Court should dignify such an objection by noticing it); *Delaware:* 1893, Maxwell v. R. Co., 1 Mary. 199, Del. Super., 40 Atl. 945 (report of testimony taken before grand juryman: a juryman may testify to testimony there given yet not found in the report); *Kansas:* 1904, v. State v. Harmon, 70 Kan. 476, 78 Pac. 805; *Nebraska:* 1894, German N. Bank v. Leonard, 40 Nebr. 676, 684, 59 N. W. 107; *Oregon*; 1904,

1891, McIver, J., in *Brice* v. *Miller*, 35 S. C. 537, 549, 15 S. E. 272: "While it may be true that what a witness writes down himself, or what is contained in some paper written by another and signed by himself, may be the best evidence of what the witness has said on a former occasion, it does not follow that where a third person, be he stenographer or not, takes down in writing what a witness said, this writing is the best evidence, in such a sense as to exclude any other. Stenographers are no more infallible than any other human beings, and while as a rule they may be accurate, intelligent, and honest, they are not always so; and therefore it will not do to lay down as a rule that the stenographer's notes when translated by him are the best evidence of what a witness has said, in such a sense as to exclude the testimony of an intelligent bystander who has heard and paid particular attention to the testimony of the witness."

That the *stenographer* is an *official* one does not make the case any stronger so far as concerns the probable accuracy of the report; nor does it bring the case within the principle of the preceding sections, for the stenographer does not act as an independent officer of the Court, but only under the orders of the judge or the State's counsel; in most jurisdictions the official duty of the stenographer has not even sufficed to admit the reports as an exception to the Hearsay rule (*post*, § 1669), and there seems little judicial disposition to require such reports to be produced as preferred testimony.[3]

State *v.* Woolridge, 45 Or. 389, 78 Pac. 333; 1906, State *v.* Martin, 47 Or. 282, 83 Pac. 849 (here because the stenographer could not verify the completeness and accuracy of the report); *South Carolina:* 1891, Brice *v.* Miller, 35 S. C. 537, 549, 15 S. E. 272 (quoted *supra*); 1898, Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341 (stenographer's report not preferred to counsel's notes); *Washington:* 1897, Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. 344 (stenographer's report of testimony of defendant in malicious prosecution, not preferred to defendant's own account of it); *Wisconsin:* 1883, Rounds *v.* State, 57 Wis. 45, 51, 14 N. W. 865 (stenographic report of testimony of defendant and witnesses, not preferred).

Contra: Ohio: Gen. Code Ann. 1921, § 11496 ("If such evidence has not been taken by a stenographer, it may be proved by witnesses who were present at the former trial having knowledge of such testimony").

Conversely, recollection-testimony is not *preferred:* 1916, Spires *v.* The King, 28 D. L. R. 146, Que. (perjury; the perjured testimony proved by the stenographer verifying the shorthand report, without any other witness to the hearing of the words).

Compare the cases of *contradictory testimony* (*ante*, § 1263).

[3] *Not required: Alabama:* 1918, Harper *v.* State, 16 Ala. App. 538, 79 So. 632 (perjury; official stenographer's report of testimony, not exclusive; explaining away Todd *v.* State, 13 Ala. App. 301); 1921, Pressley *v.* State, — Ala. App. —, 88 So. 291 (perjury; oral testimony to the utterances admissible, though there was an official stenographic record; clearing up former inconsistent rulings); *California:* 1905, Meyer *v.* Foster, 147 Cal. 166, 81 Pac. 402 (not preferred to oral testimony from memory); *Georgia:* 1886, Brown *v.* State, 76 Ga. 626; *Illinois:* 1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (official stenographer's report; "we have no statute giving any special weight to stenographic notes"); *Indiana:* 1897, Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157; 1908, Studabaker *v.* Faylor, 170 Ind. 498, 83 N. E. 747; *Iowa:* 1911, State *v.* Kines, 152 Ia. 240, 132 N. W. 180); *Kentucky:* 1906, Austin *v.* Com., 124 Ky. 55, 98 S. W. 295 (cited *post*, § 1669); *Maine:* 1876, State *v.* McDonald, 65 Me. 467 (it "may be proved by any one who heard and recollects it"); *Missouri:* 1918, State *v.* Barnes, 274 Mo. 625, 204 S. W. 267; *New York:* 1911, McRorie *v.* Monroe, 203 N. Y. 426, 96 N. E. 724; *Oklahoma:* 1905, Harmon *v.* Terr., 15 Okl. 147, 79 Pac. 765 (official report, not preferred to the stenographer's testimony on the stand from his carbon copy); *Wisconsin:* 1905, Wells *v.* Chase, 126 Wis. 202, 105 N. W. 799 (a perverse ruling, excluding the official stenographer's sworn verification of his notes on the stand, because they were not "certified" by him under Rev. Sts. 1898, § 4141, cited *post*, § 1669, which declares his certified minutes admissible without calling him in person; the object of the statute was merely to make the minutes admissible without calling him, and his sworn testimony was of course at least as good as his certificate; here the Court, citing no authority, turned the abundant caution of the trial counsel into an error).

Required: California: 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (under P. C. § 869; cited *post*, § 1669, n. 2); *Florida:* Rev. G. S. 1919, § 2723 (stenographic transcript required in certain cases; quoted *post*, § 1668, n. 2); *Missouri:* 1905,

Whether former testimony *may* be proved at all by a judge's notes or by any other hearsay reports is another question (*post*, §§ 1666–1669).

§ 1331. (*d*) **Deposition taken 'de bene esse'; Affidavit.** A deposition, in the narrow sense of the word, *i.e.* testimony given extrajudicially before a specially authorized officer for the purpose of subsequent use of a trial, stands upon a footing entirely different from that of the preceding sorts of testimony. In a deposition, the testimony *is* the writing taken down by the officer and signed by the deponent. The officer's writing is not his report of the witness' oral deposition; there is only one testimonial utterance, — the writing.

It is on its face singular that this difference of theory should be so solidly established between a deposition in the narrow sense and the testimony before a committing magistrate, because in both cases the writing is commonly required to be signed by the witness. But the explanation seems to lie in the history of the two kinds of testimony. In the common-law theory of trials, the testimony was what the witness said orally before the jury or the magistrate. In the statute of 1554 (quoted *ante*, § 1326) the magistrate was required to reduce it to writing; but the general theory continued unaltered. But at that time, and until the 1800s, there were in common-law practice no depositions 'de bene' (*post*, 1376). The power to order these taken was conceived to be exercisable in Chancery alone, and the statutory recognition of these powers on the common-law Courts in the 1800s was merely a grant of such power and practice as had been recognized in Chancery. Now the Chancery practice was moulded after the practice of the Canon law in the Ecclesiastical Courts; and in this practice all testimony was taken in writing, and in the theory the testimony or deposition was the writing and nothing else. The result was that the statutory adoption of the Chancery deposition-practice in the common-law Courts involved naturally the adoption of its theory of testimony as applied to depositions. Thus, side by side, in the common-law Courts, was found one theory for ordinary testimony and another for depositions 'de bene.'

It results from this, of course, that the *written deposition*, being itself the only testimonial utterance, *must be produced*, like any other writing, — a rule unquestioned. Furthermore, if the written deposition is *lost*, the whole is lost, for there is no other testimonial utterance; hence the terms of the lost writing are the thing to be proved, not the oral answers to the ques-

Estes *v.* Missouri P. R. Co., 111 Mo. App. 1, 85 S. W. 909 (citing none of these cases); *W. Virginia:* 1894, Carrico *v.* R. Co., 39 W. Va. 86, 90, 19 S. E. 571 (but where the witness made an illustration not reported, it was shown by other testimony).

Compare Pa. St. 1887, May 23, §§ 3, 9, Dig. 1920, § 8172, Crim. Procedure, § 21859, Witnesses (notes of former testimony may be used; but oral proof suffices where the testimony is used merely to contradict); and the cases cited *ante*, § 1263.

The proper method is exemplified in State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810 (1903).

The following doubt is unnecessary: 1904, People *v.* Lewandowski, 143 Cal. 574, 77 Pac. 467 (the witness having identified a person in his former testimony by saying, "There is one; that fellow", and pointing, the stenographer was offered to identify the now defendant as the person pointed out; the Court remarks, "There is certainly much force in the contention that the statutory deposition cannot be thus added to"; on the contrary, there is no reason for doubting that it can be thus supplemented).

tions.[1] So, too, if the written deposition, being irregularly taken, is inadmissible the oral answers cannot be proved.

For an *affidavit*, as for a deposition, the writing is the sole testimonial utterance; and the deductions from this theory apply equally to affidavits.[2]

§ 1332. (*e*) **Dying Declarations, Confessions, and other Extra-judicial Statements.** Here it is necessary to notice three discriminations. (a) Where A orally makes a statement, and afterwards makes in writing a statement on the same subject, the two are distinct, and the oral one may be proved without regard to the writing. (b) Where A makes an oral statement, and B writes down its terms, B's writing is merely B's statement of what A has said; and unless B is a preferred witness, A's oral statement may be proved by any hearer without calling for B's writing. (c) Where A and B are negotiating, and the terms of the transaction are reduced to a writing adopted by both, the oral negotiations become immaterial, and the writing, being the only act recognized in law, may alone be used, on the principle of integration (*post*, § 2425). With these distinctions in mind, it remains to examine the rules applicable to written testimonial statements admissible under Hearsay exceptions.

(1) *Dying declarations.* (a) Where an auditor has made a *written statement* of the declarant's oral utterances, this written statement is not preferred testimony, and therefore need not be produced;[1] for there never was any principle in the law of Evidence preferring one person's written memorandum of testimony to another's oral or recollection-testimony. Nor is the case changed because the person thus making a written statement was a magistrate having power to administer oaths or take testimony on a preliminary hearing;[2] for such a person has no duty or authority by law to report dying declarations, and it is solely by virtue of an express duty, as we have seen, that a magistrate's report of testimony is preferred to other witnesses. (b) Where a written memorandum thus taken down is read over to the declarant and *signed by him*, the writing becomes a second and distinct declaration by him, and therefore on principle his first and oral declaration is provable by any auditor without producing the second and written one. Such is the result accepted by a few Courts;[2] but the majority, misapprehending the nature of the written utterance, and proceeding apparently on the mistaken analogy of a deposition, require the writing to be produced.[2] Of course, if the written one is desired to be proved, it must be produced. (c) Where the declarant makes one oral statement, and afterwards on a separate occasion a *second statement*, the latter being in writing or orally

§ 1331. [1] 1840, Com. *v.* Stone, Thacher Cr. C. 604, 608 (a deposition 'in perpetuam' was not recorded in season; on a charge of perjury in it, the deposition not being receivable, the parol testimony was excluded). *Contra*, and on this point preferable: 1904, State *v.* Woolridge, 45 Or. 389, 78 Pac. 333 (cited *post*, § 1349, n. 12; collecting authorities).

[2] 1877, State *v.* Kirkpatrick, 32 Ark. 117, 119 (perjury by affidavit; 'production required).

§ 1332. [1] Cases cited *post*, § 1450.

[2] Cases cited *post*, § 1450.

made but taken down in writing and signed, there are here clearly two distinct statements (whatever view may be held as to (b) *supra*), and therefore the first or oral statement may be proved without producing the other or written statement; this is generally accepted.[3] Distinguish from this question the operation of the principle of Completeness (*post*, § 2099), which requires the whole of a single utterance to be proved, and not merely fragments; this principle has nothing to do with the mode of utterance as written or oral; it requires that the whole, whether written or oral, be proved, and it permits one separate utterance to be proved without regard to another separate utterance, whether either or both are oral or written.

(2) *Confessions, and statements admitted under Hearsay exceptions.* In general, as already noted, the writing down of one person's hearsay statement by another person without a legal duty to report, cannot make the latter's writing a preferred testimony.[4] It need only be added that the statements admissible under exceptions to the Hearsay rule are in many instances originally and solely written statements, — as, entries in the course of business, certifications of copies, and the like, — so that the writing is required to be produced as the statement itself, and not merely as one person's report of another's statement.

Sub-topic C: SUNDRY PREFERRED WITNESSES

§ 1335. **Official Certificates.** In general, our law of Evidence regards with no special favor the certificate of an official as to a thing done or seen by him. It does not ordinarily even admit such a certificate as evidence under an exception to the Hearsay rule (*post*, § 1674). So far as statutory provision has cured the objection of the Hearsay rule and made them admissible, it has done nothing more; no weight attaches to them so that in general they become a preferred source of testimony. The effect of such statutes is occasionally misunderstood, and their purpose as curing the Hearsay defect is exaggerated into a purpose to prefer them as testimony; but such rulings must be looked upon as heterodox.[1]

Barring these heterodox rulings, the general principle is so well established as to need only occasional decision, that an *official certificate is not a preferred source of testimony*, as against other witnesses.[2] It follows, in the spirit of

[3] Cases cited *post*, § 1450.

[4] 1910, People v. Luis, 158 Cal. 265, 110 Pac. 580 (confession); 1855, Fackler v. Chapman, 20 Mo. 249, 253 (declarations of slaves written down by persons questioning them; writing not preferred); 1914, State v. Kubaszewski, 86 N. J. L. 250, 92 Atl. 387 (confession taken down; not decided).

Compare the cases cited *ante*, § 863 (Confessions).

§ 1335. [1] 1876, Fornette v. Carmichael, 41 Wis. 200 (official scaling of logs, preferred testimony); 1882, Steele v. Schricker, 55 Wis. 134, 140, 12 N. W. 396 (same).

[2] 1850, Com. v. Damon, 128 Mass. 423 (like the next case); 1913, Com. v. Borasky, 214 Mass. 313, 101 N. E. 377 (record of autopsy, not preferred to testimony of operating physician); 1899, State v. Vaughan, 152 Mo 73, 53 S. W. 420 (coroner's report of post-mortem autopsy not preferred to an attendant physician's testimony); 1897, Duren v. Kee, 50 S. C. 444, 27 S. E. 875 (survey by judicial order not preferred).

So also a publisher's *statutory affidavit of publication* is not preferred: 1882, Matthews v. Supervisors, 48 Mich. 587, 12 N. W. 863; 1893, Seattle v. Doran, 5 Wash. 482, 484, 32

the same general notion, that such a certificate is not preferred to the testimony on the stand of the official himself.[3]

The practical difficulty, however, lies in distinguishing the application of this settled principle from the principle of the "parol evidence" rule, or rule of Integration (*post*, §§ 2427, 2450). By the latter principle, when an act is done in writing or is required by law to be done in writing, the only thing that can be material and provable is the writing itself. A parol act is nothing, has no legal effect, and therefore cannot be proved. The question thus often arises whether a particular official writing is merely an official report of a distinct act done in parol and legally effective in parol, or whether the official writing is the sole effective act; for in the former aspect, the official report of it is not a preferred testimony, and the parol act may be proved by any competent witness; while in the latter aspect the official writing, being exclusively the act itself, must be produced. The solution of such a question depends entirely on the substantive law defining the nature of the act; it is enough here to point out the nature of the problem.[4]

The foregoing statement of principle is of course inapplicable in *Louisiana*, *Philippine Islands*, and *Porto Rico*, where the Continental legal tradition prevails and the use of official documentary evidence stands on a peculiar footing.[5]

§ 1336. **Same: Record or Certificate of Marriage or Birth as preferred to Other Eye-witnesses.** (1) In spite of long tradition to the contrary, the effort is frequently made to persuade a Court to declare the celebrant's or the official's *register* or *certificate of the performance of a marriage-ceremony* to be preferred testimony to that of other eye-witnesses of the ceremony. No doubt the evidence of a certificate is more trustworthy, in that to be false its falsity would involve either forgery or a crime equivalent to perjury, while that of a witness on the stand would involve only perjury. But this relative advantage is not to be considered (*ante*, § 1286) in view of the serious burden of search

Pac. 105, 1002 (similar; repudiating Wilson *v.* Seattle, 2 Wash. 543, 549, 27 Pac. 474).

But distinguish Iverslie *v.* Spaulding, 1873, 32 Wis. 394, 396 (affidavit of posting of notice of tax-sale; being a part of the record of proceedings, its production was required).

[3] 1889, People *v.* Paquin, 74 Mich. 34, 36, 41 N. W. 852 (non-payment of liquor-tax; county treasurer's record not preferred to oral testimony of his deputy); 1824, Perry *v.* Block, 1 Mo. 484 (survey-plat not preferred to testimony of surveyor); 1830, Jackson *v.* Russell, 4 Wend. N. Y. 543, 547 (statutory certificate of a Surrogate that no will was filed, not preferred to other testimony; "his certificate was made evidence for greater convenience, not because it was a higher species of evidence than his oath in open court").

Whether the official may *contradict his own certificate* is a different question (*ante*, § 530).

[4] The following cases will serve as illustrations: compare the cases cited *post*, §§ 1352, 2427, 2453: *Federal:* 1895, Nelson *v.* Bank, 16 C. C. A. 425, 69 Fed. 800, 32 U. S. App. 554 (notary's certificate not required in proving demand, presentment, and notice); *Mass.* 1859, Stearns *v.* Doe, 12 Gray 482, 486 (register of ship not preferred to prove ownership; possession or acts of ownership held competent); 1870, Wayland *v.* Ware, 104 Mass. 46, 51 (record at the War Department of enlisted volunteers credited to a town, not preferred evidence as to D.'s having been included in that enlistment; the fact being one "which may exist in and be proved by a record, but which is not necessarily so to be proved"); 1895, Com. *v.* Walker, 163 id. 226, 39 N. E. 1014 (prison-keeper's record of prisoner's account of himself, not preferred); *Mich.* 1892, Curtis *v.* Wilcox, 91 Mich. 229, 237, 51 N. W. 992 (clerk's note of filing of mortgage, treated as the best evidence).

[5] The Code provisions are quoted *ante*, §§ 1179, 1225, *post*, § 1336.

or proof of loss involved in preferring its production; while the testimony of the celebrant is in itself no more valuable than that of any credible eye-witness. That the register or certificate of marriage is not preferred to testimony of other eye-witnesses has long been settled:[1]

1840, Dr. LUSHINGTON, in *Woods* v. *Woods*, 2 Curt. Eccl. 516, 522: "A register is not to be considered the best evidence of a marriage, nor has it ever been so considered in the books and authorities bearing on the question. The rule respecting best evidence is that you are not allowed, where there is evidence of a superior character, to give inferior evidence, unless you account for the non-production of the best evidence; the effect of which is to exclude all other evidence till the absence of the best evidence is accounted for. But I am of opinion that the register is not in contemplation of law the best evidence, for these reasons: first, that registration is not necessary for the marriage itself; secondly, that no error or blunder in the register could affect the validity of the marriage; and thirdly, that registration is not like an agreement or a deed in writing and the contents of which cannot be proved by 'viva voce' evidence, but it is a mere record afterwards of what has been done, . . . not the compact itself."

It has also been at times maintained that the particular persons *signing* the *register* as attesting witnesses are preferred to other eye-witnesses. This, and the supposed rule that in actions for criminal conversation and prosecutions for bigamy the eye-witnesses of the marriage-ceremony must be produced (in the old phrase, that a "marriage in fact" must be proved), are in essence rules of Quantity, not of Preference, and are therefore elsewhere examined (*post*, §§ 2085–2088).

(2) On the same principle, there is no preference for an *official record of birth or baptism*.[2]

(3) Here, however, in both foregoing cases, *Louisiana*, *Philippine Islands*, and *Porto Rico*, maintain the Continental legal tradition, which exalts official documentary statements (the "register of civil status") to a special testimonial rank. The effect of this is seen in a statutory rule preferring the official record of baptism or marriage on an issue of legitimacy.[3]

§ 1336. [1] The cases are more conveniently collected *post*, § 2088, with other rules for proof of marriage.

[2] 1921, State *v.* Berry, 192 Ia. 191, 182 N. W. 781 (statutory rape; prosecutrix' age evidenced by herself, the physician, and others, without the record); 1886, Com. *v.* Stevenson, 142 Mass. 466, 8 N. E. 341; 1888, Hermann *v.* State, 73 Wis. 248, 41 N. W. 171 (baptismal certificate or register, not preferred to the mother's testimony).

[3] For the history and legislation of the Continental "register of civil status", see Brissaud's History of French Private Law, §§ 573–576 (1912; vol. III of the Continental Legal History Series):

Louisiana: Rev. Civ. C. 1920, §§ 193–195 (legitimacy; proof by marriage register preferred first, then proof by repute); § 196 ("If there be neither register of birth or baptism, nor this general reputation, or if the child has been registered under a false name, or if" etc. etc., then "the proof of his legitimate filiation may be made either by written or oral evidence"); 1829, Broussard *v.* Mallet, 8 Mart. N. S. 269; 1834, Duplessis *v.* Kennedy, 6 La. 231, 242; 1836, Stein *v.* Stein, 9 La. 278, 280. But the rule is not applied in criminal cases: 1903, State *v.* Menard, 110 La. 1098, 35 So. 360; 1906, State *v.* Romero, 117 La. 1003, 42 So. 482; *Philippine Isl.* Civ. C. §§ 53–55 (like P. R. Rev. St. & C. §§ 3223–3225 but substituting at the end of § 3223: "unless such books have never been kept, or have disappeared, or the question arises in litigation, in which cases the marriage may be proved by evidence of any kind"); §§ 326, 327 (like P. R. §§ 3389, 3390); 1912, Adriano *v.* De Jesus, 23 P. I. 350 (baptismal certificate of 1870; "as the civil registry was never established in these Islands during the former sovereignty", a canonical certificate of baptism "constitutes as a public document proof of the facts . . . though it

§ 1337. **Same: Official or Certified Copies of Documents, as preferred to Examined or Sworn Copies.** There have also been occasional attempts to introduce a rule of preference for an official or certified copy of a public document as against a sworn or examined copy. In the traditions of the common law, the former sort was given so little regard, obnoxious as it was to the Hearsay rule, that only in a narrow class of cases — since much enlarged by statute in later times — was it admitted at all (*post*, § 1677); much less did it receive recognition as a preferred source of testimony. The reasons for this, and the occasional success of the effort to lay down a rule of preference, have already been dealt with in considering the rules for proving the contents of documents (*ante*, § 1273).

§ 1338. **Preference of Copy-Witness to Recollection-Witness.** In proving the terms of a document not available in court, there is a decided difference of value between a witness who has written down the terms directly upon reading the original — *i.e.* has made a copy — and a witness who trusts wholly to recollection. Whether in any or in all cases the superior value of a copy-witness should so outweigh the burden of requiring his production

can be impugned and assailed by contrary proof"); 1916, Baltazar *v.* Alberto, 33 P. I. 336 (inheritance; "birth, marriage, and death certificates issued by the parish priests under the Spanish régime are merely presumptive evidence of the facts contained in them"); *Porto Rico:* Rev. St. & C. 1911, §§ 3223–3225 (record of marriages preferred; quoted *post*, § 2085); § 3389 ("The registry of civil status shall include the records or entries of births, marriages, emancipations, acknowledgments and legitimations, and deaths, and shall be in charge of the municipal judges in Porto Rico"); § 3390 ("The records in the registry shall be evidence of the civil status, and any other evidence can be admitted only when such records have never existed or the books of the registry should have disappeared or when a litigation is instituted before the courts"); 1912, People *v.* De Jesús, 18 P. R. 575 (rape on a female under 14; whether the registry certificate of birth is the best evidence, not decided); 1912, García *v.* Garzot, 18 P. R. 835, 845 (records of ecclesiastical proceeding, under the former Spanish system of jurisdiction, finding birth and baptism, held valid proof, being a judgment); 1912, People *v.* Diaz, 19 P. R. 497 (manslaughter; death is provable by physicians who made an autopsy, without accounting for the civil registry entry; citing Civ. C. § 320 and P. C. 206); 1913, Camacho *v.* Balasquide, 19 P. R. 564, 575 (filiation of natural child; certificate of inscription in the civil registry is not "an incontrovertible document", under Civ. C. § 320 and Evid. Act § 71; here contrary testimony as to date of birth was received); 1915, Assise *v.* Curet, 22 P. R. 518 (dissolution of marriage with a woman of 14; the mother's testimony to the woman's age, held properly admitted without proof by the registry there being no objection; it is not law that "the civil register must always be the only evidence of the age of a person", under Civ. C. § 320); 1916, Iturrino *v.* Iturrino 24 P. R. 439 (similar to García *v.* Garzot, *supra*; here held effective as to an acknowledgment of a natural child; the theory and practice of the Spanish ecclesiastical proceedings are here fully explained); 1917, Fortis *v.* Fortis, 25 P. R. 64 (heirship; the baptismal records being destroyed, other evidence of birth was admitted, under Rev. Civ. C. § 320); 1917, Montaloo *v.* Montaloo, 25 P. R. 800 (Iturrino *v.* Iturrino cited, as to using baptismal certificates of 1916 for a birth of 1893); 1917, Rodriguez' Succession *v.* Perez, 25 P. R. 73, 78 (heirship, in an action for title; "plaintiffs claiming as heirs in a reivindicatory action may prove status by oral testimony"; but here certificates of birth, baptism, and death were duly introduced, and the opinion's reference is probably to the non-necessity of producing a formal decree of heirship obtained in a special action 'ad hoc'); 1919, Morales *v.* Romea, 27 P. R. 17 (declaration of heirship; judgment in another suit for filiation, held binding); 1919, Ex parte Otero, 27 P. R. 315 (declaration of heirship; baptismal record of 1854, reciting maternal relationship of a natural child, admitted as an ancient record, on the principle of § 1573, *post*).

For the admissibility of such registers to evidence the further details of civil status, see the cases cited *post*, § 1646.

For the Louisiana, Philippines, and Porto Rico rule as to required proof of an *illegitimate's recognition* by the parent, see *post*, § 1606.

that a rule of preference should be established (*ante*, § 1286) is a matter that has much concerned the Courts. All the questions that concern rules of Preference as between copy-witnesses and recollection-witnesses, and between different kinds of copy-witnesses, have already been considered elsewhere (*ante*, §§ 1265–1275), in dealing with the modes of proving the contents of documents.

It need here only be said that to a limited extent, and depending on special considerations, in harmony with those here noted (*ante*, § 1286), there is a rule of preference for *copy-witnesses* over *recollection-witnesses*. This forms therefore the third established specific rule of Conditional Preference.

§ 1339. **Sundry Preferences for Eye-witnesses and other Non-Official Witnesses (Writer of a Document, to prove Forgery; Bank President or Cashier, to prove Counterfeiting; Surveyor, to prove Boundary; Ship's Log-Book; etc.).** It has already been seen (*ante*, § 1286) that there is in general no principle of preference among witnesses; that such rules of preference are limited to a few definite cases, of which the attesting-witness to a document's execution, the magistrate's official report of testimony, and the copy-witness to a document's contents are the only established ones, — each of these resting on a peculiar tradition or policy. Apart from these cases, a few attempts are recorded, from time to time, to establish a rule of preference in sundry situations where one class of persons is presumably better equipped testimonially than another. These attempts for the most part invoke as authority a ruling[1] delivered under the influence of that indefinite "best evidence" notion so often invoked for various purposes up to the end of the 1700s (*ante*, §§ 1173, 1174). This ruling in Williams *v.* East India Co. has long been repudiated in England;[2] but for a time it tended to produce considerable effect upon the law of Evidence in this country. In a few distinct lines of cases its authority was thought particularly suggestive:

(1) It was thought that for proving the *genuineness of a document* the alleged *writer* was a preferred witness;[3] but it is generally conceded that no such rule of preference exists.[4]

§ 1339. [1] 1802, Williams *v.* East India Co., 3 East 193 (injury by an explosive put on board a ship without due notice; the defendant's officer delivered it, and the first mate, deceased, received it; the plaintiff was held bound to call the defendant's officer, as the only remaining eye-witness; and his failure to call him was held ground for a non-suit).

[2] 1826, Koster *v.* Reed, 6 B. & C. 19 (insurance on a ship that never arrived; a rumor being offered that the ship had foundered but the crew escaped, held that it was not necessary to call some of the crew or show diligent search for them; repudiating such an application of the best-evidence principle; Williams *v.* E. I. Co. was cited in argument).

[3] 1796, Grose, J., in Stone's Trial, 25 How. St. Tr. 1313 ("Whenever you bring evidence for the purpose of proving a fact, you must give the best evidence. The fact intended to be proved to the jury is that this came from Mr. Stone, written by his order. Who is the best evidence to prove that? Why, the man who wrote it, in this and in every case, whether the matter be criminal or civil").

[4] *Alabama:* 1905, Washington *v.* State, 143 Ala. 62, 39 So. 388 (forgery); *Georgia:* 1885, Royce *v.* Gazan, 76 Ga. 79; 1910, McCray *v.* State, 134 Ga. 416, 68 S. E. 62 (magistrate's signature on a warrant, the magistrate, though present, held not a perferred witness to the signature); *Louisiana:* 1821, Abat *v.* Riou, 9 Mart. La. 465, 466 (not decided); *Minnesota:* 1873, Smith *v.* Valentine, 19 Minn. 452, 454 (proving a decree signed by a judge; the judge not preferred to the clerk of the court); *Tennessee:* 1836, Osborne *v.* State, 9 Yerg. 488 (issuing justice not preferred to a constable, to

(2) As a specially fitting application of the preceding rule, it was for a long time (until the era of State bank-currency ended) a much-agitated question whether in proving the *forgery* of a document — particularly a *bank-note* — the person whose name was forged (for example, the president or the cashier of the bank) was not a preferred witness, as against (for example) one who was familiar with the signature. This requirement received scanty judicial support,[5] and was generally negatived.[6] Yet statutes were in many jurisdictions thought necessary for repudiating it.[7] To-day, it may be supposed that no Court would sanction such a rule.

authenticate an execution); 1848, McCully *v.* Malcom, 9 Humph. 187, 192 (genuineness of a warrant; the issuing justice not a preferred witness, though present in court).

[5] 1830, Cayford's Case, 7 Greenl. 57, 60 (president or cashier of a domestic bank must be called; but not of a bank in another State).

[6] 1801, R. *v.* M'Guire, 1 Leach Cr. L., 4th ed., 311, note, Chambre, J.; 1802, R. *v.* Hughes, 1 Leach Cr. L., LeBlanc, J. (cashier, not preferred); 1886, Lefferts *v.* State, 49 N. J. L. 26, 27, 6 Atl. 521 (testimony of the supposed signer of a document, as to the signature's genuineness, not preferred to one who knows his handwriting); 1831, Hess *v.* State, 5 Oh. 5, 7 (teller of a bank, admitted to testify to forgery of signatures of president and cashier; "there is not such a distinction between one whose knowledge is of his own handwriting and the knowledge of another's on the same subject as constitutes the former evidence of a superior degree to the latter"); 1843, Foulke's Case, 2 Rob. Va. 836, 841.

Compare also the cases cited *ante*, §§ 570, 705, some of which imply the same result, and arose out of the same controversy.

[7] A few of these statutes, however (as in Florida and Massachusetts), still recognize a modified preference:

CANADA: R. S. 1906, c. 146, Crim. C. § 980 (on a trial involving counterfeit coin, "any witness suffices", and no mint officer, etc., need be called);

UNITED STATES: *Arizona:* Rev. St. 1913, P. C. § 1048 (forgery, etc., of bill or note of corporation or bank; "persons of skill", competent to prove forged nature of document);
Alaska: Comp. L. 1913, § 1966 (like Or. Laws 1920, § 2007);
California: P. C. 1872, § 1107 (forgery, etc., of bank-bill; "persons of skill", admissible to prove counterfeit nature of bill);
Colorado: Comp. St. 1921, § 6774 ("persons of skill", admissible to prove forgery of bill or note of bank or company on prosecution therefor);
Florida: Rev. G. S. 1919, § 6083 (in prosecutions for forgery, etc., of bank-notes, "the testimony of the president and cashier of such banks may be dispensed with, if their place of residence is out of the State or more than 40 miles from the place of trial; and the testimony of any person acquainted with the signature of such president or cashier, or who has knowledge of the difference in the appearance of the true and counterfeit bills" is admissible);
Idaho: Comp. St. 1919, § 8954 (forging, etc., a bill, etc., of an incorporated company or bank; "persons of skill", admissible to prove forgery);
Indiana: Burns' Ann. St. 1914, § 2114 ("cashier of a bank purporting to have issued" a note, bill, draft, certificate of deposit, or other instrument, is a sufficient witness to genuineness);
Iowa: Code 1897, § 4870, Comp. Code § 8771 (forgery of bank-bill, etc.; "persons of skill", admissible to prove bill, etc., to be counterfeit);
Kansas: Gen. St. 1915, § 8137 ("persons of skill, or experts" may testify to genuineness of bill, etc., "or other writing");
Maine: Rev. St. 1916, c. 123, § 8 (forgery of bank-bills, etc.; like Mass. Gen. L. 1921, c. 267, § 14);
Massachusetts: Gen. L. 1920, c. 267, § 14 (in charges connected with counterfeit bank-bills, the testimony of president or cashier is not preferred if residing out of the State or more than 40 miles from place of trial, and testimony of other persons competent to distinguish the forgery is admissible);
Michigan: Comp. L. 1915, § 15441 (in prosecutions for forgery, etc., of bank-bills, "the testimony of the president and cashier of such bank may be dispensed with, if their place of residence shall be out of this State or more than 40 miles from the place of trial, and the testimony of any person acquainted with the signature of the president or cashier of such banks, or who has knowledge of the difference in appearance of the true and counterfeit appearance of such bills or notes" may be admitted);
Minnesota: Gen. St. 1913, § 8461 (substantially like Or. Laws 1920, § 2007);
Montana: Rev. C. 1921, § 11983 (like Cal. P. C. § 1107);
Nevada: Rev. L. 1912, §§ 6684, 7175 ("persons of skill", admissible to prove forged nature of bill or note of incorporated company or bank, on trial for forgery, etc.);
New Mexico: Annot. St. 1915, § 1600 (substantially like Mich. Comp. L. § 15441);

(3) It was suggested in a few jurisdictions that the *surveyor of a boundary* was to be preferred to any other competent witness; but this never received any sanction.[8] But in a few States a preference is given to an *official surveyor*, by forbidding the use of any other person's survey unless by mutual consent;[9] so also an official *log-scaler's* record is sometimes preferred.[10]

(4) Where lack of consent was an essential element in a crime, — as, the *owner's lack of consent*, in *larceny*, — it was suggested that the only person who could certainly know the fact was the owner himself, and that he should be called. This rule, however, which obtained a foothold in a few jurisdictions, seems not to be in truth a rule of Preference, and is elsewhere dealt with (*post*, § 2089).

(5) That which was merely a common practice in England came to be in a few American jurisdictions a fixed rule; namely, that *all the eye-witnesses of a crime*, so far as available, must be called by the prosecution, — a rule particularly invoked in prosecutions for homicide. It is not a rule of Preference, however, but a rule of Quantity, and is elsewhere dealt with (*post*, §§ 2079–2081).

(6) A *ship's log-book*, containing the *master's entries*, is by long maritime custom now enshrined in statute, the preferred evidence in almost all issues, civil or criminal, involving the happenings on a voyage. The statutory details, however, follow no one principle consistently.[11]

North Dakota: Comp. L. 1913, § 10862 (like Cal. P. C. § 1107);
Oklahoma: Comp. St. 1921, § 2721 (like Cal. P. C. § 1107);
Oregon: Laws 1920, § 2007 (in prosecutions for forging, etc., bank-bill, "the testimony of any person acquainted with the signature" of the officer authorized to sign, "or who has knowledge of the difference in appearance of the true and counterfeit bills or notes thereof", is admissible to prove the bill's counterfeit character);
Pennsylvania: St. 1860, Mar. 31, § 55, Dig. 1920, § 8173, Criminal Procedure (testimony of expert witnesses to counterfeit paper, or coin, admissible, without requiring proof "of the handwriting or the other tests of genuineness" as heretofore);
Rhode Island: Gen. L. 1909, c. 346, § 6 (counterfeit bank-bill; testimony of purporting signer shall not be required when he is out of the State or resides out of it or more than 30 miles distant, but any competent witness knowing his hand, or familiar with the difference between false and true bills and skilled therein, is admissible);
South Carolina: Crim. L. 1922, § 354 (on a trial for counterfeiting State bank notes, "the bank shall cause its cashier or some competent witness" to attend and give evidence);
South Dakota: Rev. C. 1919, § 4902 (like Cal. P. C. § 1107);
Utah: Comp. L. 1917, § 8987 (like Cal. P. C. §1107);
Wisconsin; Stats. 1919, § 4626 (substantially like Fla. Rev. G. S. § 6083);
Wyoming: Comp. St. 1920, § [illegible] trial for forgery, etc., of bill or note [illegible] ated company or bank, "any perso [illegible] may be witness" to prove the forgery)

Add also the statutes which admit the *affidavit of a State or Federal treasurer* to prove the forgery of government paper (*post*, § 1710).

[8] *Haw.* 1907, Forrester *v.* Hurtt, 18 Haw. 256 (land location; surveyor not preferred); *Ky.* 1809, Bowling *v.* Helm, 1 Bibb 88 (the surveyor running a boundary, not preferred to any other witness); 1818, Grubbs *v.* Pickett, 1 A. K. Marsh. 253 (surveyor not preferred to prove boundary-correspondence); *Md.* 1860, Richardson *v.* Milburn, 17 Md. 67 (line of a fence-survey; the testimony of the surveyor held not preferable to that of an eye-witness); *Mo.* 1853, Weaver *v.* Robinett, 17 Mo. 459 (boundary lines provable by any one knowing them; field notes, survey, surveyor, or a witness of the survey, not preferred); *W. Va.* 1899, King *v.* Jordan, 46 W. Va. 106, 32 S. E. 1022 (in ejectment, a plat or survey of the lines is not essential evidence).

That a *map* need not be official, nor a *photograph* be proved by the photographer, is noticed *ante*, § 794.

[9] Statutes cited *post*, § 1665, n. 5 (surveyor's records).

[10] Cases cited *ante*, § 1335.

[11] *Can.* Dom. R. S. 1906, c. 113, § 288 (seamen's offences; if the log-book entry is

(7) In a few casual instances, attempts have been made, usually unsuccessful, to introduce some specific rule of preference for which no authority exists.[12]

From all such suggested rules of preference should be distinguished (as already noted in § 1335) questions involving the principle of "parol evidence" or *Integration* (*post*, §§ 2425, 2429), *i.e.* whether in a given instance the act was done in writing. If an act is done in writing, the writing must be produced in order to prove the terms of the act; but if the act as legally done and effective was in parol, and the doer merely wrote down a memorandum of it, then the parol act may be proved without producing the writing, because there are no rules of preference which can require it instead of other testimony. In which of these aspects a given transaction is properly to be viewed depends entirely on the intent of the parties and the substantive law applicable; it is enough here to call attention to the nature of the problem.[13]

not produced or proved, the Court "may refuse to receive evidence of the offence"); *U. S.* Rev. St. 1878, § 4597, amended by St. 1898, Dec. 21, §§ 19, 20, Code 1919, §§ 7781–7783, 8114, 8118, 8123, 8158 (the Court in admiralty may refuse to receive evidence of offences by seamen when not entered in the official log; cited also *post*, § 1641); 1906, The Amazon, 144 Fed. 153, D. C. (statute applied).

A *ship's register* is ordinarily not conclusive as to title; 1830, Colson *v.* Bonzey, 6 Greenl. 474 (action for supplies furnished).

Compare the cases cited *ante*, § 1240, *post*, §§ 1641, 1647.

[12] *Fla.* 1915, Carter *v.* State, 68 Fla. 143, 148, 66 So. 1000 (family Bible entry, not preferred to oral testimony); *Ky.* 1814, Beeler *v.* Young, 3 Bibb 520 (in proving age, a family Bible entry is not preferred to oral testimony); St. 1916, Mar. 18, p. 162 (age for school attendance; certain written evidence preferred; quoted *post*, § 1644); *Mich.* 1875, Elliott *v.* Van Buren, 33 Mich. 49, 52 (fact and condition of bodily injuries; medical testimony not preferred); *Mo.* 1825, Buckner *v.* Armour, 1 Mo. 535 (book-entrant not preferred, to prove items of goods sold, etc.); *N. Y.* 1896, Domschke *v.* R. Co., 148 N. Y. 337, 42 N. E. 804 (the testimony of an owner, collecting his rents by an agent, as to their amount, excluded in the absence of a reason for not producing the agent, "who had personal knowledge", the former's testimony being "not the best evidence of the fact"); *Oh.* 1840, Vairin *v.* Ins. Co., 10 Oh. 223, 225 (authority by vendee to vendor to hold a boat as collateral security; vendee not a preferred witness to the facts).

[13] The following cases will serve as illustrations: *Ala.* 1841, Pharr *v.* Bachelor, 3 Ala. 237, 246 (written appraisal of value, not preferred); 1850, Sparks *v.* Rawls, 17 Ala. 211, 212 (invoice of goods; testimony by maker as to value, received without producing invoice); 1910, Stewart *v.* Sloss-Sheffield S. & I. Co., 170 Ala. 544, 54 So. 48 (account-books do not exclude testimony of one having independent knowledge); *Ark.* 1890, Pelican Ins. Co. *v.* Wilkerson, 53 Ark. 353, 356, 13 S. W. 1103 (inventory required by insurance policy to be kept; upon its loss without fault, other evidence of amount of goods lost is admissible); *Mo.* 1899, Rissler *v.* Ins. Co., 150 Mo. 366, 51 S. W. 755 (account-books not preferred as evidence of sales); *N. Y.* 1834, People *v.* Peck, 11 Wend. 604, 611 (register of authorized church-voters, authorized by statute, not preferred to other evidence).

Compare the useful remarks of Mr. Gulson, in his treatise cited *post*, § 1349, n. 1.

SUB-TITLE II (*continued*): RULES OF TESTIMONIAL PREFERENCE

TOPIC II: CONCLUSIVE (OR ABSOLUTE) PREFERENCES

CHAPTER XLII.

§ 1344. **Nature of a Conclusive Testimonial Preference.** The nature of a Conclusive Preference as distinguished from a Provisional Preference (*ante*, § 1285) is in itself simple. In the latter, the preferred witness is to be called first, so that his knowledge, whatever it amounts to, may be availed of; but when this has been done, the field is still open for the other witnesses; these may support or they may contradict the preferred witness; his testimony is in no sense final. In short, the preference for him is *provisional* only, and as against other witnesses it lasts only until his testimony is finished. But in the former class, the preferred witness is not merely called first; his testimony, when produced, is taken as final. No other witnesses will be allowed; the error of his testimony, if any, cannot be shown by other and contradicting witnesses. In short, his testimony is *conclusive*.

That such a strict and absolute effect should be conceded to any human being's testimony is indeed extraordinary, and it may well be asked whether our law of Evidence recognizes any rule of preference of the conclusive sort. May not the apparent cases of conclusive preference be explainable as in truth results of other independent principles of substantive law, sometimes

loosely dealt with in terms of "conclusive evidence"? No doubt this is the true explanation of most of the instances in which such a term is employed, and it remains to ascertain whether, after all such explanations, there exist any instances of conclusive preference in the shape of genuine rules of evidence. The various instances to which the term "conclusive evidence" has been more or less plausibly applied may be grouped into three classes, *i.e.* two classes of rules clearly non-evidential, and one class clearly evidential (so far as it has any recognition). The first two must here be briefly considered.

§ 1345. **Cases involving the Integration ("Parol Evidence") Principle, distinguished (Corporate Records, Judicial Records, Contracts, etc.).** There are innumerable cases in which a writing is regarded as the sole and exclusive object of proof because of the "parol evidence" or Integration principle (*post*, §§ 2400, 2478). This principle assumes that, by some provision of law, or by the parties' intent, the act effective in law is a single written memorial, and that no parol act is to be regarded as of any effect for the purpose. Where this is the situation, it is obvious that the terms of the writing are alone to be proved; the writing must be produced, or, if it is unavailable, its terms must be proved. Here it is clear that the writing is not "evidence", nor "conclusive evidence", of the act; for it *is* the act. That the writing cannot be shown to represent inaccurately some prior parol conduct, is not because the writing is conclusive evidence of what that parol conduct was, but because the parol conduct is immaterial and ineffective, and therefore (*ante*, § 2) cannot be proved at all. It is not because we trust conclusively to the writing's testimony of what the parol conduct was, but because we do not care what the parol conduct was, and are not allowed to ascertain.

In consequence of this principle of Integration, then, the question is constantly presented whether a specific writing has become the sole act material to the case; and this is purely a question of the substantive law applicable to the kind of transaction involved. It is not a question of a rule of Evidence, — as later more particularly noted (*post*, § 2400).

The treatment of such questions would be here out of place and impracticable. It will be enough to note some illustrations of the kind of problem presented. For example, whether a corporate record can be shown to be incorrect depends on whether by the substantive law a corporate doings to be effective must be done in writing, — even though the question may be expressed by asking whether the written record is conclusive.[1] So where a surety gives bond to answer for an official's defalcation, to hold that the State auditing books are not conclusive is to say that he, the surety, has contracted to be responsible for the actual amount missing, and not for the amount recorded in the books as missing.[2] So where a statute prohibited a town to maintain as a schoolmaster a person not having a certain certificate of quali-

§ 1345 [1] 1851, Greeley v. Quimby, 22 N. H. 335, 338 ("as the law required that the return of the selectmen laying out the road should be in writing, no other proof can be substituted for it"); and cases cited *post*, § 2461.

[2] 1878, State v. Newton, 44 Ark. 270, 284

fications, to hold that those qualifications could not be shown by evidence without producing the certificate is not to hold the certificate conclusive evidence of them, but to hold that the only fact material under the law was the possession of a specific writing.[3] So, in a prosecution for publishing a seditious article in a newspaper, to hold that the proprietor's filing a sample copy at the registry-office as required by statute is "conclusive of publication" is merely to hold that the filing of such a copy *is* an act of publication for the purposes of the penal law.[4] Again, in an issue over the boundary of land granted by the Government, a ruling that the official survey is conclusive is not necessarily a ruling as to its conclusive testimonial effect but signifies that the survey is a part of the grantor's description of the land conveyed, and is therefore part of the deed of grant.[5] Other illustrations are furnished in those cases where certain judicial action will be taken according as a specific document does or does not exist, irrespective of any attempt to ascertain and establish the truth of the assertions in the document. For example, a person claiming to be a foreign envoy will be treated judicially as such if the Executive has recognized him as such, irrespective of the truth of the case;[6] a foreign commission carried by a ship will be held "conclusive" of its national character, *i.e.* no attempt to investigate further will be made;[7] a judge's certificate as to what passed at a trial will be treated as "conclusive" in an application for a new trial,[8] *i.e.* so far as concerns the terms for granting a new trial, one of them is that the trial judge's certificate shall state certain things. In some jurisdictions the answer of a garnishee as to how far he is chargeable shall be "conclusive",[9] *i.e.* for the purpose of allowing the use of garnishee-process, one of the terms of its allowance is that the garnishee's statements, whether true or not, shall be the basis of action. Finally it may be noted that a Court record is "conclusive" as to the proceedings of the Court, not because it is a preferred source of evidence of the things actually done in parol, but because it *is* itself the judicial act and the parol matters are not the judicial acts.[10]

§ 1346. **Cases involving the Effect of Judgments, distinguished (Judgments, Certificates of Married Women's Acknowledgments, Sheriffs' Returns, Judicially Established Copies, Certificates of Naturalization, etc.).** In considering the effect to be given to a judgment in another Court or cause, and especially a foreign judgment, when offered to sustain an action brought to enforce it or pleaded in defence to another action brought for the same claim, it is common to speak of the judgment in terms of Evidence and to describe its effect by the

[3] 1819, Com. *v.* Dedham, 16 Mass. 141.

[4] 1848, R. *v.* O'Doherty, 6 State Tr. N. s. 831, 874.

[5] 1901, Allmendinger *v.* McHie, 189 Ill. 308, 59 N. E. 517 (refusing to let a surveyor impeach a recorded plat made by statute equivalent to a deed); 1814, Ringgold *v.* Galloway, 3 H. & J. 451, 461; 1897, Carter *v.* Hornback, 139 Mo. 238, 40 S. W. 893.

[6] *Post*, § 2574.

[7] 1822, Santissima Trinidad, 7 Wheat. 283, 335.

[8] 1718, R. *v.* Motherwell, 1 Stra. 93; 1874, Exp. Gillebrand, L. R. 19 Ch, App. 52.

[9] 1896, Phillips *v.* Meagher, 166 Mass. 152 44 N. E. 136.

[10] *Post*, § 2450.

phrase " conclusive evidence."[1] Is a judgment, then, an instance of a rule of conclusive preference, making the other Court's certificate that Doe has or has not a certain cause of action a conclusive testimony to that fact?

By no means. The theory of the use of judgments is not a matter to be lightly dogmatized about; yet it seems clear that the operation of recognizing it, when produced from another court, in support of a plaintiff or in defence of a defendant, is upon analysis not at all an employment of evidence. It is rather the *lending of the Court's executive aid, on certain terms*, to a claimant or a defendant, *without investigation* of the merits of fact. The closest analogy is that of an alias execution; when the legal effectiveness of a first execution has expired without the party's obtaining satisfaction of the judgment, he may without a new trial reinvoke the executive aid of the Court and obtain a second writ of execution, because the original judgment or order of the Court to make satisfaction has not yet been fulfilled. In such a case the Court lends its executive aid because of its own order or judgment already rendered; there is no question of re-trying the facts of the claim, but merely of whether and on what terms it will grant anew its executive aid. Now the act of the Court in giving effect through its own officers to a judgment in another Court or cause does not in its nature differ from the issuance of an alias execution; it differs only in regard to the terms upon which this effect and aid will be granted. Not upon the mere existence of another Court's judgment will the second Court lend its own aid; but only for certain kinds of judgments from the other Court. If the present Court believes that there was in the other Court a fair and full investigation of the facts, including a due summoning of parties bound to obey the summons, an opportunity for the full hearing of evidence on both sides, and an honest and intelligent deliberation by the tribunal over the evidence, then the present Court will lend its enforcing aid as if to its own judgment. The fairness, fulness, and legality of the

§ 1346. [1] *E.g.* Ellenborough, L. C. J., in Hall *v.* Obder, 11 East 118 ("evidence of the debt"); Brougham, L. C., in Houlditch *v.* Donegall, 2 Cl. & F. 470 ("a foreign judgment is only 'prima facie', not conclusive evidence of a debt"); 1910, Chantangco *v.* Abaroa, 218 U. S. 476, 31 Sup. 34 (where it is discouraging to find this Court discussing a judgment-bar in terms of its being "admissible in evidence").

The use of judgments of other Courts for relieving the party from proof of incidental facts needs much liberalizing. The principal instances are:

(1) Using a judgment of conviction of a *principal in larceny*, on the trial of the accessory; some cases are collected *ante*, § 1079, n. 5.

(2) Using a judgment of conviction to *impeach a witness;* this is unquestioned: *ante*, §§ 980, 987.

(3) Sundry uses:

Excluded: 1911, Lillie *v.* Modern Woodman, 89 Nebr. 1, 130 N. W. 1004 (beneficiary who had murdered her husband; the judgment in the criminal case held not admissible; the opinion declares this to be "fundamental and elementary", and it doubtless is, as matter of law; nevertheless, it reveals an instance where some of our fundamental law is fundamental nonsense); 1918, Keller & Co. *v.* Ellerman & B. S. Co., 38 P. I. 514 (non-delivery of imported goods; judgment on a criminal charge of theft of the goods, not admitted).

Admitted: 1910, In re Crippen, [1911] 1 P. 108 (application of a convicted felon, or his representative, to establish claim resulting from his own crime; conviction admissible); 1913, Mash *v.* Darley, [1914] 1 K. B. 1 (In re Crippen approved; here, on a bastardy complaint, the defendant's conviction for carnal intercourse with the complainant was received); 1908, Sheibley *v.* Fales, 81 Nebr. 795, 116 N. W. 1035 (libel on S., charging a defalcation as county officer; judgment against S. in a suit by the county, admitted, on the theory that defendant, as a resident taxpayer, was privy to the other suit).

other Court's investigation are merely the main circumstances affecting the present Court's willingness to lend its judicial aid and to treat the other Court's judgment or order as it own.

That a *domestic* judgment is ordinarily conclusive and cannot be collaterally attacked involves in truth merely a general duty and practice of domestic Courts to aid in enforcing one another's judgments without attempting to investigate anew the truth of the facts thereby adjudged to exist. That a *foreign* judgment by a Court not having jurisdiction, or by a Court imposed upon by fraud, or by a Court acting itself fraudulently, will not be enforced, is a proposition which in legal theory is precisely what it purports to be; namely, not the declining to take certain testimony as conclusive, but the failure to give enforcement to an order by another Court which cannot be enforced by this Court's officers unless this Court chooses to order it. The important feature is that in either case — whether treating or not treating the judgment as conclusive — there is no process of judicial investigation, resulting in taking the judgment as the conclusive testimony to some ulterior and main issue before the Court, but there is merely a declining or a granting the Court's aid to carry out an order of another Court. If the judgment is recognized as conclusive, then the plaintiff offering it is given an order to enforce it, or, when it is pleaded in bar, is denied an order to enforce his claim. If the judgment is not recognized as conclusive, then an action or a defence based on it is rejected, and the state of facts as to the original claim is investigated in a practically distinct proceeding, in which the prior judgment plays no part except in sometimes affecting the burden of proof.

The mode of dealing with a judgment, therefore, involves two alternatives. On the one hand, the Court may act upon and enforce the other Court's judgment without investigating the facts adjudged. On the other hand, it may decline to aid in enforcing the other Court's order, and may investigate the facts for itself. In neither alternative is the judgment used as conclusive evidence.[2]

It follows, then, that so far as any certificates, orders, findings, or other official determinations are to be assimilated to judicial judgments, they will be accepted by the Court and acted on as "conclusive", *i.e.* without allowing a new investigation of the facts. How far certain kinds of official determinations are thus to be assimilated to judicial judgments because of the judicial nature of the proceedings in the course of which they were rendered, is a question belonging to the law of Judgments, and not to the law of Evidence.

It may, however, be noted here that there are five sorts of such documents (other than formal judgments of other Courts) as to which this question of "conclusiveness" has been most commonly raised.

[2] This theory of the nature of the act of enforcing another Court's judgment seems to harmonize with that of Mr. (later C. J.) F. Piggott in his acute and philosophic treatise on Foreign Judgments, p. 20.

(1) The certificate of the magistrate, notary, justice, or other officer, taking the *privy examination and acknowledgment of a married woman* that a deed signed by her was executed of her own free will and with full knowledge, was at common law not open to disproof of its correctness, because it was regarded as in the nature of a judicial determination; but other views have in some jurisdictions prevailed, often in virtue of express statutory provision.[3]

(2) A *sheriff's return*, besides being admissible as an official statement (*post*, § 1664), is also usually treated as conclusive (*i.e.* not to be shown erroneous) to the same extent that the other parts of the same judicial proceeding are conclusively determined by the judgment, *i.e.* as against the parties and their privies; while as against the sheriff himself it will be affected by the doctrines of estoppel.[4]

(3) The establishment of a *copy of a lost deed* by judicial proceedings allowed by statute for that purpose might be regarded as conclusive of the

[3] See the different theories expounded in the following cases: *Federal:* 1828, Elliott *v.* Peirsol, 1 Pet. 328; *Ill.* 1898, Davis *v.* Howard, 172 Ill. 340, 50 N. E. 258; *Ind.* 1843, McNeely *v.* Rucker, 6 Blackf. 391; *Kan.* 1898, Heaton *v.* Bank, 59 Kan. 281, 52 Pac. 876 (citing cases); *Ky.* 1870, Woodhead *v.* Foulds, 7 Bush 222; *Mich.* 1880, Johnson *v.* Van Velsor, 43 Mich. 208, 219; *Minn.* 1861, Dodge *v.* Hollinshead, 6 Minn. 25, 39; *Va.* 1840, Harkins *v.* Forsyth, 11 Leigh 294, 301.

The following list will give a clue to the chief distinctions and authorities: *Alabama:* 1893, Edinburgh A. L. M. Co. *v.* People, 102 Ala. 24, 14 So. 656; 1905, Chattanooga N. B. & L. Ass'n *v.* Vaught, 143 Ala. 389, 39 So. 215; *Arkansas:* 1885, Petty *v.* Grisard, 45 Ark. 117; *Florida:* 1920, Hutchinson *v.* Stone, 79 Fla. 157, 84 So. 151; 1916, Bank of Jennings *v.* Jennings, 71 Fla. 145, 71 So. 31; *Idaho:* 1920, Myers *v.* Eby, 33 Ida. 266, 193 Pac. 77 (acknowledgment taken by telephone by justice of the peace); *Illinois:* 1911, Huston *v.* Smith, 248 Ill. 396, 94 N. E. 63; *Indiana:* Woods *v.* Polhemus, 8 Ind. 60, 66; *Iowa:* 1859, Tatum *v.* Goforth, 9 Ia. 247; *Kentucky:* 1870, Ford *v.* Teal, 7 Bush 156; 1877, Pribble *v.* Hall, 13 Bush 61, 65; 1904, Hall *v.* Hall, 118 Ky. 656, 82 S. W. 269; *Mississippi:* 1873, Lockhart *v.* Camfield, 48 Miss. 470, 489; *Missouri:* Mays *v.* Pryce, 95 Mo. 603, 612, 8 S. W. 731; *North Carolina:* 1897, Spivey *v.* Rose, 120 N. C. 163, 26 S. E. 701; 1901, Johnson Lumber Co. *v.* Leonard, 145 N. C. 339, 59 S. E. 134; 1915, Butler *v.* Butler, 169 N. C. 584, 86 S. E. 507; 1920, Frisbee *v.* Cole, 179 N. C. 469, 102 S. E. 890; *Ohio:* 1862, Truman *v.* Lore, 14 Oh. St. 144, 151; *Texas:* 1910, Veeder *v.* Gilmer, 103 Tex. 458, 129 S. W. 595; *Washington:* 1903, Western Loan & S. Co. *v.* Waisman, 32 Wash. 644, 73 Pac. 703.

The rule for proving the incorrectness of the certificate of examination by "clear and convincing evidence", instead of by a "mere preponderance" is a rule for *measure of proof* (*post*, § 2498).

[4] The following cases will give a clue to the distinctions and authorities: England: 1809, Gyfford *v.* Woodgate, 2 Camp. 117 (not conclusive as to the consent of the plaintiff to an alias fi. fa.); United States: *Arkansas:* 1848, State *v.* Lawson, 8 Ark. 380, 384 (conclusive against himself, and in actions between third persons, but not against the plaintiff in action against the sheriff for wasting goods levied on); 1882, Hunt *v.* Weiner, 39 Ark. 70, 75 (creditor's bill; return of 'nulla bona' conclusive); *Connecticut:* 1827, Watson *v.* Watson, 6 Conn. 334 (not conclusive on execution or mesne process); *Illinois:* 1908, Hilt *v.* Heimberger, 235 Ill. 235, 85 N. W. 304; 1920, Chapman *v.* North American Life Ins. Co., 292 Ill. 179, 126 N. E. 732 (sheriff's return of service cannot be contradicted after term of court of rendering judgment); *Iowa:* 1917, McWilliams *v.* Robertson, 180 Ia. 281, 163 N. W. 198 (service of notice of suit); *Massachusetts:* 1842, Niles *v.* Hancock, 3 Metc. 568, 569 (return of service of copy of citation; conclusive as to the copy's correctness); *Nebraska:* 1897, Campbell Co. *v.* Marder, 50 Nebr. 283, 69 N. W. 774 (not conclusive); *New Jersey:* 1849, Browning *v.* Flanagin, 22 N. J. L. 567, 573 (held conclusive as between debtor and creditor and their privies, and also against the sheriff himself always, but not in the sheriff's favor; here, not in an action for escape; cases copiously cited); *North Carolina:* 1917, Lake Drainage Com'rs *v.* Spencer, 174 N. C. 36, 93 S. E. 435; *West Virginia:* 1921, Nuttallbury S. M. F. Co. *v.* First Nat'l Bank, — W. Va. —, 109 S. E. 766 (service on corporation).

See a learned note by R. D., "False Sheriff's Return still Conclusively True in Pennsylvania" (U. of Pa. Law Rev., LXIX, 152, Jan. 1921).

terms of the deed, provided the result of the proceeding were regarded as a judgment affecting all persons concerned; but such does not seem to be the effect generally conceded.[5]

(4) The obsolete "*trial by certificate*" (as when the fact of bastardy was determined by certificate of the bishop offered in a common-law court) was in reality the acceptance of a judgment of an ecclesiastical or other tribunal upon a matter committed to its jurisdiction.[6]

(5) A *certificate of naturalization* is in theory a copy of a judgment, and is therefore not admissible in any independent litigation to evidence age or birthplace.[7]

§ 1347. **Same: Determinations by Executive or Administrative Officer or Commission (U. S. Land Office, Chinese, Indians, Land Titles).** The foregoing doctrine of the "conclusiveness" of a judgment applies equally to the determinations of an executive or administrative official or commission. When jurisdiction has been given to such an official to determine the facts in a given class of controversial cases, the determination (or finding, or judgment) settles the controversy, and can be used in other proceedings to relieve from renewed inquiry into the facts, precisely as in the case of a judicial judgment.

Whether a legislative measure handing over such determinations conclusively to the Executive branch of government is *constitutional* is another question (briefly examined *post*, § 1353). And whether such officials need observe the usual rules of Evidence is still another question (already considered *ante*, § 4*a*). It is enough here to note the principal types of official determination which have been judicially passed upon in terms of "conclusive evidence."

(1) The certificate or ruling of an officer of the *Federal land office* is, upon certain matters, in effect the judgment of a competent tribunal, and is therefore "conclusive."[1]

(2) The certificate or finding of a Federal or a foreign official as to *occupation and identity of a Chinese person* or of other kinds of *immigrants* has been given a conclusive effect, by Federal statute.[2]

(3) The facts of *age* and *race*, as affecting the persons entitled to share

[5] Cases cited *ante*, § 1273; *post*, § 1660.

[6] 1309, Bayeux *v.* Beryhale, Maitland's Year-books, II, 110, 3 Edw. II, No. 15 (Selden Soc. vol. XIX) (the bishop's certificate "suffices for ever" to prove a man legitimate); 1591, Abbot of Strata Mercella's Case, 9 Co. Rep. 31*a*; 1628, Coke upon Littleton, 74*a*; 1768, Blackstone, Commentaries, III, 333; 1793, Ilderton *v.* Ilderton, 2 H. Bl. 145, 156 (trial by bishop's certificate, held not applicable in a Scotch dower case; the opinion brings out the jurisdictional nature of the controversy).

[7] 1875, Mutual Benefit L. Ins. Co. *v.* Tisdale, 91 U. S. 238. But it ought to be at least admissible, though not conclusive: 1915, Colbert's Estate, 51 Mont. 455, 153 Pac. 1022 (foreign nativity).

§ 1347. [1] 1903, De Cambra *v.* Rogers, 189 U. S. 119, 23 Sup. 519; 1908, Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739; 1906, Kennedy *v.* Dickie, 34 Mont. 205, 85 Pac. 982 (citing cases); and cases cited *ante*, § 4*c*.

[2] A statute, making conclusive, for certain purposes, a *Chinese immigrant's certificate of occupation*, has been enforced: U. S. 1884, July 5, c. 220, Code §§ 3656, 3657; 1891, Wan Shing *v.* U. S., 140 U. S. 424, 11 Sup. 729; 1904, U. S. *v.* Gin Hing, 8 Ariz. 416, 76 Pac. 639. Compare the rulings on *constitutionality* of immigration officials' findings (*post*, § 1355).

Indian lands in some regions, became material and were to be found and recorded in the *census-proceedings* of the Commissioners to the Five Civilized Tribes; and by statute these records were made "conclusive evidence"; virtually this was a judicial inquisition and perhaps a judgment. But certain other reports of Federal officials, provided for by statute to ascertain the status and property of Indians, do not have that effect; and some discrimination is therefore necessary between these several statutes.[3]

(4) The *certificate of title to land*, given by the registrar under the Torrens land-title registration system (*ante*, § 1239) is virtually an adjudication, and is therefore "conclusive."[4]

[3] *Federal:* 1894, Hegler *v.* Faulkner, 153 U. S. 109, 14 Sup. 779 (special Indian agent's finding under U. S. St. 1854, July 31, as to the age of an Indian, held not conclusive, because age was not material in the finding); U. S. St. 1908, May 27, 35 Stat. L. 312, c. 199; certain questions arising under this statute are dealt with in the following cases (compare also the cases cited *post*, § 1671, n. 11): 1914, Malone *v.* Alderdice, 8th C. C. A., 212 Fed. 668 (commission to the Five Civilized Tribes of Oklahoma, to enrol their citizens, held a quasi-judicial body having power to determine, and its determinations of material facts held conclusive, including the fact of minority of age before 1900; but not conclusive as to facts not material, *i.e.* as to precise age); 1917, U. S. *v.* Wildcat, 244 U. S. 111, 437 Sup. 561 (allotment of Indian land in Oklahoma; on the issue whether T. a Creek Indian died prior to April 1, 1899, the enrolment by the Dawes Commission to the Five Civilized Tribes showed his name as alive in May, 1901; the opponent offered evidence that he died in January, 1899, and the evidence was rejected; held that the enrolment was conclusive, under St. 1898, June 28, Curtis Act, "there was thus constituted a quasi-judicial tribunal whose judgments, within the limits of its jurisdiction, were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable; . . . a correct conclusion was not necessary to the finality and binding character of its decisions"); 1918, U. S. *v.* Ferguson, 247 U. S. 175, 38 Sup. 434 (conveyance by Seminole Indian allottee; the enrolment under St. 1898, June 28, and St. 1908, May 27, held conclusive as to the quantum of Indian blood in the grantor); 1920, U. S. *v.* Atkins, 8th C. C. A., 268 Fed. 923;

Oklahoma: 1914, Scott *v.* Brakel, 43 Okl. 655, 143 Pac. 510 (the enrolment records under U. S. St. 1908, May 27, held not conclusive of the age of any Indian citizen or freeman in the determination of rights accrued prior to the date of the statute; distinction pointed out between the "enrolment record", the "approved roll", and the "census card"; leading opinion, by Kane, C. J.); 1914, Phillips *v.* Byrd, 43 Okl. 556, 143 Pac. 684 (similar); 1914, Grayson *v.* Durant, 43 Okl. 799, 144 Pac. 592 (similar, but holding the records inadmissible; the opinion loosely confuses several doctrines); 1915, Diamond *v.* Perry, 46 Okl. 16, 148 Pac. 88 (a Creek Nation enrolment record, made under U. S. St. 1908, May 27, is evidence of the age of an allottee named as grantor in a deed); 1915, Harris *v.* Hart, 49 Okl. 143, 151 Pac. 1038 (enrolment records of the Five Civilized Tribes are not conclusive as to an allottee's age, when material for a transaction prior to May 27, 1908, the date of the statute); 1916, Scott *v.* Quimby, 56 Okl. 301, 155 Pac. 1154 (enrolment as an adopted Seminole under St. 1906, Apr. 26, is not an adjudication as to quantum of Indian blood); 1916, Hart *v.* West, 62 Okl. 71, 161 Pac. 534 (title to land; under U. S. St. 1908, May 27, the Indian enrolment record, though conclusive as to year-age, leaves open to other evidence the precise date of birth); 1916, Gilcrease *v.* McCullough, 63 Okl. 24, 162 Pac. 178 (age of Creek Indian; similar to Hart *v.* West, *supra*); 1917, Miller *v.* Thompson, 65 Okl. 86, 163 Pac. 528 (Indian enrolment records made under U. S. St. 1908, May 27, are not admissible to show age in transactions completed before the statute took effect); 1921, Colbert *v.* Patterson, — Okl. —, 201 Pac. 256 (findings of the Commission to the Five Civilized Tribes are final); 1922, Minshall *v.* Berryhill, — Okl. —, 205 Pac. 932 (under the supplemental Creek Treaty of June 30, 1902, the absence of a name from the enrolled list by the Commission to the Five Civilized Tribes is not conclusive as to the inheritance of a Creek citizen whose father was on the tribal rolls; distinguishing the effect of the Seminole Treaty);

Texas: 1920, Langford *v.* Newsom, — Tex. —, 220 S. W. 544 (enrolment record of Commissioner to the Five Civilized Tribes, held conclusive evidence of age under U. S. St., May 27, 1908; rolls of citizenship and freedmen, approved by the Secretary of the Interior, distinguished).

[4] Uniform Land Registration Act, § 51 ("(1) Every certificate of title entered in the register of titles as aforesaid, together with the

§ 1348. **Genuine Instances of Rules of Conclusive Preference; General Considerations of Policy and Theory applicable to them.** After thus discriminating those instances of conclusiveness which in reality involve some application of the principle of Integration or the principle of Judgments, it is practicable to examine the cases in which some genuine rule of conclusive testimonial preference is put forward for recognition. Certain general considerations must first be noticed.

(1) The *practical mark of distinction* between instances of the "*parol evidence*" (or *Integration*) principle and genuine instances of *Conclusive Preferences* is this: When the writing in the former instance is *lost or otherwise unavailable* in Court, then its terms must be proved by copy or otherwise, and if it never existed as required by law, then nothing can be proved (*post*, §§ 2425, 2453); while in a case of conclusive testimonial preference, if the preferred testimony is not to be had, then the field is open to any other evidence of the fact. For example, if a judicial record never was made, the oral proceedings cannot be proved, because the only effective judicial act is the writing (*post*, § 2450); and if the record was made but has been lost, then the terms of the lost writing, not the parol proceedings, must be proved. But in the case of a magistrate's report of testimony taken before him (*ante*, § 1327, *post*, § 1349), or an election commission's certificate of the result of the election (*post*, § 1351), or the official enrolment of a legislative act (*post*, § 1350), the effective and material legal act is still the testimony uttered, or the vote cast, or the yeas and nays voiced. Though conclusive credit may be given to the report by the magistrate, or the commission, or the presiding officer, still his document can never be legally anything more than a testifying to the act of another person; hence, though this report if available may be treated as conclusive, yet if the report was never made, then the effective act of testifying or voting may be otherwise proved, and if the report was made but is unavailable through loss or destruction, then also the testifying or voting may be otherwise proved. The preference applies only when there exists a testimony available for the purposes of preference; and the loss of the preferred testimony therefore leaves the testifying or voting (since it is throughout the effective act for legal purposes) still provable by such evidence as remains available.

(2) Upon what *general considerations of policy*, if at all, should any rule of Conclusive Preference be recognized?

It is obvious that the recognition of such a rule is an extreme step to take. It amounts almost to an abdication of the Court's judicial functions (*post*,

memorials thereon, if any, shall be known as 'the certificate of title.' (2) Said certificate shall be conclusive evidence of all matters contained therein, except as otherwise provided in this Act"); § 71 ("Whenever a duplicate certificate of title is lost or destroyed, . . . upon satisfactory proof that said duplicate certificate has been lost or destroyed, the court may direct the issuance of a new duplicate certificate, which shall be appropriately designated and take the place of the original duplicate"); the several State statutes are cited *ante*, § 1225.

§ 1353). To forego investigation into the existence of a fact because a certain officer not having judicial powers or opportunities of investigation has declared it to exist or not to exist, and to accept his statement as conclusive and indisputable, is in effect to refuse to exercise, as regards that specific fact, that function of the investigation and final determination of disputes which is the peculiar attribute of the Judiciary as distinguished from the Executive and the Legislature. That the Court may, if it chooses, in dealing with evidence, take such a step seems clear, — though whether the Legislature may constitutionally oblige it to do so is another question (*post*, § 1353). But obviously it is a step which will not be taken except when clearly indispensable as the best practical method of settling disputes and giving stability to the interests of all concerned.

For this reason, it would seem, 'a priori', that such a rule does become the most practical solution in two kinds of situations, and in two only:[1]

(*a*) A judicial judgment binds only the parties to the specific litigation, and therefore the same question of fact must be investigated anew, even innumerable times, between parties not affected by prior judgments. There may therefore be an analogous situation in which *innumerable parties will be affected by a fact common to the rights or duties of all;* and this fact, in the absence of a judicial proceeding binding on all, may be from time to time differently determined by different juries and judgments in successive litigations. In such a case, all the rights of the innumerable parties affected by this fact might be doomed to a perpetual instability; for no one concerned can predict what the issue will be in the possible litigation of innumerable successive adversaries. It would therefore be highly desirable, if a definite and trustworthy official certification of the fact had been authentically and openly made, for the judiciary to announce as a settled rule that this official certification would invariably be accepted in a judicial investigation as conclusive. Thus all the vital advantages of stability would be secured, and the disadvantages of possible error could be regarded as comparatively trifling. The typical, though not the sole, case fulfilling these conditions is that of the officially enrolled copy of a legislative act, used as conclusive evidence of the terms of the legislative enactment and the proceedings of its adoption (*post*, § 1350).

(*b*) It may occur that shortly after the doing of a legal act *all ordinary evidence* of its doing and its terms is likely to become *practically unavailable*, either because documents are destroyed or lost, or because witnesses are tampered with or become incompetent or non-compellable to testify. If a class of cases existed in which this dearth of satisfactory evidence habitually occurred, and if at the same time a trustworthy official statement of the fact as it was had been made close to the time of the fact and with the most satisfactory data before the officer, it might well be thought that on

§ 1348. [1] Mr. J. R. Gulson, in his treatise on Philosophy of Evidence (1905), at §§ 392–426, analyzes these problems in a careful and enlightening manner.

the whole a closer approach to the truth could be reached by accepting the official statement as conclusive, instead of by making the attempt to weigh the scanty or untrustworthy evidence that might be available for the purposes of the subsequent judicial investigation. It would be essential for such a situation that the official statement should be especially trustworthy, that the ordinary evidence subsequently available should be especially untrustworthy or scanty, and that both of these features should habitually be present in that class of disputes; but, given these three conditions, the case would seem to present a fair justification for refusing to investigate in the ordinary way and for taking the official statement as conclusive testimony to the fact in issue. The typical, though not the sole case, fulfilling these conditions, is that of an election officer's certificate as to the number and tenor of votes cast and the qualifications of the voters (*post*, § 1351).

It may be added, finally, that wherever a rule of conclusive preference can be laid down at all, it can apply only to a *written official statement*, not *to testimony on the stand*. The statement must be *official*, because the sanctions of the official oath should at least be present, or else the statement is no more trustworthy than any other person's. The statement must be in *writing*, because otherwise the recollection-testimony, even of an official, is no better than another's recollection. No one has ever thought of suggesting a rule of conclusive preference for any testimony other than official written statements.

§ 1349. **Same**: (1) **Magistrate's Report of Testimony.** Where a committing magistrate is required by law to make a written report of the statement of the accused person under examination and of the testimony of the witnesses, this report, as already noticed (*ante*, §§ 1326–1329), must be produced as a preferred testimony to the words of the statement and the testimony. But is this report to be given such further and paramount weight that it is to stand as *conclusive* and irrefragable by any evidence of its error?

In the first place, it can hardly be contended that the express legal duty of the magistrate to make the report invests it with such conclusiveness; there is certainly no such general principle applicable to statements made under official duty. In the next place, the magistrate's report is not governed by the "parol evidence" theory of judicial records (*post*, § 2450); for testimony is not a judicial act; and the theory of judicial records is merely that the judicial act is originally done and constituted in writing, and the testimonial utterance of a witness or the accused is distinct from any judicial act done as a part of the record. Furthermore, neither of the general considerations of necessity and policy (mentioned in § 1348, *ante*) can apply to the present case to make it desirable to take the magistrate's report as conclusive. Finally, considering the circumstances under which such reports are drawn up and the unfair consequences that may often follow from the inability to expose their errors, policy seems rather to require that they should not be treated as conclusive:

1844, *Reporters' Note* to *Jeans* v. *Wheedon*, 2 Moody & Robinson 487 (approved by ALDERSON, B., in 1 Den. Cr. C. 542, as "admirably discussed"): "[Questions may arise] as to the extent to which other evidence is to be excluded; in the determination of which the necessity of the case, in some instances, the purposes of the enactment in others, must be looked to. Thus, judicial records are not only primary, but from their nature conclusive evidence of the decisions of Courts of justice. . . . [But as to depositions taken in criminal trials,] evidence is admissible by way of explanation, or to prove that the party made other statements besides those reduced into writing; otherwise the safety of prisoners and the credit of witnesses would depend on the honesty and accuracy of the clerks who take the examination. . . . Even if the entire examinations of the witnesses and the committal of a prisoner take place at the same time, it would seem most inconvenient, as well as unreasonable, to make the written examination conclusive as to all the preliminary statements of the witnesses on which it is founded."

The precedents on the subject must be considered separately for the case of an *accused person's* statement and that of a *witness'* testimony; for the doctrine has received different treatment in the two cases. In connection with both, it is to be remembered that the statutes on the subject of the magistrate's duty (*ante*, § 1326) often require him to take down no more than "the substance" of what was said or "so much as may be material":

(*a*) The rule seems to have become settled in England during the 1800s that the magistrate's report is *conclusive* as to the *statement of the accused.*[1] But this rule has been accepted in only a few American jurisdictions.[2] The rule, as accepted, applies only to such utterances as the magistrate has *purported to take down;* hence, utterances made at another time than the formal statement, or at that time but apart from the formal statement, may be proved by other testimony; the general notion being that so far as the magistrate's report goes, it is not to be contradicted.[3] It must be noted, on the one hand,

§ 1349. [1] 1816, R. *v.* Smith, 1 Stark. 242 (evidence denying the administration of the oath to the defendant when examined, excluded; Le Blanc, J., "could not allow that which had been sent in under the hand of a magistrate to be disputed"); 1833, R. *v.* Bentley, 6 C. & P. 148 (mistake in entering the defendant's statement as a complaint, not allowed to be shown); 1833, R. *v.* Lewis, ib. 161; 1836, R. *v.* Walter, 7 C. & P. 267; 1839, R. *v.* Pikesley, 9 C. & P. 124 (that the accused had been sworn).

[2] See the cases in the next note, and also these: *Miss.* 1874, Wright *v.* State, 50 Miss. 332 ("no parol evidence of what the prisoner may have said on that occasion can be received"; unless the writing cannot be had); 1898, Powell *v.* State, — Miss. —, 23 So. 266 (other testimony inadmissible, where this is available; it is "exclusive"); 1901, Cunning *v.* State, 79 Miss. 284, 30 So. 658 (Wright *v.* State approved); 1905, Bell *v.* State, — Miss. —, 38 So. 795 (Wright *v.* State approved); *P. I.* 1908, U. S. *v.* Estabillo, 9 P. I. 668.

[3] Such seems to be the principle of the sometimes obscure precedents:

ENGLAND: 1835, R. *v.* Spilsbury, 7 C. & P. 187 (remarks by the defendant during the examination of the witnesses, and not when himself examined, admitted); 1838, R. *v.* Morse, 8 C. & P. 605 (blanks cannot be filled; certain names here omitted in the clerk's written report of the testimony); 1846, R. *v.* Weller, 2 C. & K. 223 (remark of the defendant made while a witness was testifying, excluded); 1850, R. *v.* Christopher, 2 C. & K. 994 (the magistrate's notes having been given to the clerk to write them up in deposition-form, the clerk at his office asked some additional questions, and wrote them in; then in Court the depositions were later read over before the defendant and signed by the witnesses; held that the answers made to the clerk could be asked for orally, as no part of the depositions).

UNITED STATES: *Arkansas:* 1881, Griffith *v.* State, 37 Ark. 332 (testimony not allowed for answers not recorded, but allowed for magistrate's warning questions not recorded); *Indian Terr.* 1906, Willis *v.* U. S., 6 Ind. Terr. 424, 98 S. W. 147 (under a statute requiring the magistrate to make only a "general" statement in writing, the testimony of witnesses who heard is admissible); *Louisiana:* 1920, State *v.* Bailey, 146 La. 624, 83 So.

that even such utterances are not admissible if by the principles of *confessions* (*ante*, §§ 842–852) the whole statement is not receivable.[4] On the other hand, where the report has been read over to the accused and he has expressly assented to its correctness by oral acknowledgment or by signature, the writing is thus adopted as his own and becomes a statement by him in writing; he thus can no longer deny that it represents what he said.[5] In the absence of such an acknowledgment, the whole doctrine that the report is conclusive is (as already noted) ill-founded, and should be repudiated. It may be added that the doctrine itself applies only so long as the conclusively preferred testimony is available (*ante*, § 1348); and therefore if the magistrate's report was *never taken* or if it was *lost*, the case is open for ordinary testimony.[6]

(*b*) The doctrine was also applied in England[7] to the magistrate's report of the testimony of a *witness*, but was strictly confined to the testimony taken in a criminal case before the committing magistrate.[8] It has been occasionally recognized in this country.[9] The limitations already noted for the

854; *New Jersey:* 1790, State *v.* Wells, 1 N. J. L. 424, 429 (other confessions at other times receivable; but not other testimony of the statements deposed to the magistrate); *New York:* 1910, People *v.* Giro, 197 N. Y. 152, 90 N. E. 432.

[4] 1833, R. *v.* Lewis, 6 C. & P. 161; and cases cited *ante*, § 1328.

[5] 1840, State *v.* Eaton, 3 Harringt. Del. 554 (preferred and conclusive, but only when signed by the accused or expressly admitted true); State *v.* Harman, 3 Harringt. Del. 567 (same); 1904, State *v.* Busse, 127 Ia. 318, 100 N. W. 536, *semble* (a confession before a sheriff, written down by a bystander, read to the defendant, sworn and signed by him); 1905, State *v.* Usher, 126 Ia. 287, 102 N. W. 101 ("Such we conceive to be the rule", citing State *v.* Busse); 1896, State *v.* Steeves, 29 Or. 85, 43 Pac. 947 (the written record of an oral statement made by an accused, not under any statute, to a chief of police, and signed by the former; "Oral statements, intended to be reduced to writing, when committed to paper and signed by the person making them, are supplanted, and must of necessity be excluded, by the writing").

Nevertheless, on principle, the two are distinct statements (as noted *ante*, § 1332); and if the attempt is not to contradict the writing, but to show what the first and oral statement really was, this would seem proper.

Compare the cases on *dying declarations* (*post*, § 1450).

[6] Cases cited *ante*, §§ 1327, 1329, and the notes *supra*.

[7] But not originally; see § 1326, *ante*, and the following: 1679, Langhorn's Trial, 7 How. St. Tr. 417, 467 (the Lords' Journal of an examination before them was offered to show that Bedlow, the informer, did not there charge the defendant; L. C. J. Scroggs: "It is but a memorial taken by a clerk, and do you think that his omission shall be conclusive to us?").

[8] *Eng.* 1838, Robinson *v.* Vaughton, 8 C. & P. 252, 254 (applicable only in felony, "because by an act of Parliament magistrates are bound to take down what the witnesses say"); 1843, Jeans *v.* Wheedon, 2 Moo. & Rob. 486, Creswell, J., *semble* (not applicable in malicious prosecution); 1860, Filipowski *v.* Merryweather, 2 F. & F. 285, 287 (where the plaintiff's silent acquiescence, as an admission of the witness' statements, was to be shown, the deposition was not required); 1896, R. *v.* Erdheim, 2 Q. B. 260, 269 (statute providing for the taking down of a bankrupt's examination, reading over, and signing by him; held, not exclusive of other reports of the examination; here, of oral testimony of the shorthand-writer; compare Rowland *v.* Ashby, *infra*); *Can.* 1910, R. *v.* Prasiloski, 15 Br. C. 29 (per-jury; statements made by the witness, allowed to be orally proved, the magistrate not having purported to take down his entire testimony).

[9] 1904, Godfrey *v.* Phillips, 209 Ill. 584, 71 N. E. 19 (clerk's certificate of testimony of witnesses at probate of a will, under Rev. St. c. 148, § 7, cannot be contradicted as to the date by the clerk); 1874, Broyles *v.* State, 47 Ind. 251, 254 (after using report of examination before justice, oral evidence not allowed); 1906, State *v.* Jennings, 48 Or. 483, 87 Pac. 524 (but the coroner was here allowed to prove the witness' oral statement, to impeach him, because the witness denied the correctness of the signed written report).

Contra: Ark. 1881, Griffith *v.* State, 37 Ark. *semble* (contradicting a deceased witness by prior inconsistent statements; the magistrate's writing did not show that he had been asked about them on the examination; oral evidence of bystanders that he was asked, allowed; the

report of an accused's statement would generally apply here also, 'mutatis mutandis'; in particular, other testimony may be used to prove utterances made on a distinct occasion, or on the same occasion but not as a part of the formal testimony, or even during the formal testimony but on matters additional to and not purporting to be covered by the magistrate's report.[10] The whole doctrine of conclusiveness, in the present application, as in the preceding, is unsound.

(*c*) A magistrate's report of a *dying declaration* involves somewhat different considerations.[11]

(*d*) A magistrate's report of a *deposition* 'de bene' involves a distinct theory.[12]

(*e*) An *official stenographer's report* is not conclusive (*ante*, § 1330).

§ 1350. **Same: (2) Enrolled Copy of a Legislative Act; may the Journals override it?** After a proposed bill has been reported, amended, read on different occasions, passed by the originating House, sent to the other House and there dealt with in the same way, the document thus enacted into a statute consists of one or more sheets of the original paper together with other writings or printings containing the tenor of the various legislative dealings with them. This complex, representing the net result of those dealings, is then copied out as a single document, and is certified by the presiding officers of each House, in England also by the Great Seal, and in this country usually by the Governor or President, and sometimes by a Secretary, to be the act as passed. This certified copy, or enrolment, was by English practice deposited in Chancery, but is in American practice usually deposited with the Secretary of State. When the precise terms of the act, or the legislative proceedings affecting its validity, are in issue, is this enrolled copy conclusive?

(1) It seems clear, at the outset, that the *enrolment is only somebody's certificate and copy*, because the effective legal act of enactment is the dealing

preferable mode being to have the magistrate amend his return); *Cal.* 1875, People *v.* Curtis, 50 Cal. 95 (not conclusive, under P. C. § 869, quoted *ante*, § 1326; at any rate, when not signed by the witness); *Ia.* 1868, State *v.* Hull, 26 Ia. 293, 297 (not conclusive); *N. Car.* 1909, State *v.* Hooper, 151 N. C. 646, 65 S. E. 613 (here the justice had only made notes).

[10] 1825, Rowland *v.* Ashby, Ry. & Mo. 231, Best, C. J. (commissioners in bankruptcy; additions allowed, but the remarks must be shown by "clear and satisfactory evidence"); 1832, R. *v.* Harris, Mood. Cr. C. 338, by all the Judges (additions allowed); 1833, Venafra *v.* Johnson, 1 Moo. & Rob. 316, C. P. (held proper to prove "anything the party had said as a part of his information, beyond what was put in writing, either for the purpose of explanation or addition"); 1837, R. *v.* Coveney, 7 C. & P. 667, Alderson, B., and Patteson, J. ("There is a difference between adding and contradicting: I apprehend the object was to see that witnesses did not swear a thing before the magistrate and contradict it at the trial"); 1837, Resolutions of Judges, 7 C. & P. 676, Rule 3 (where a deposition does not mention a statement as having been made at the examination, either the witness may be asked to admit it, or, if he denies it, other witnesses may prove it); 1839, Leach *v.* Simpson, 7 Dowl. Pr. 513, 5 M. & W. 309, 312 (Parke, B.: "If it appear, on production of the deposition, that any particular statement alleged to have been made is not contained in it, you may add to it by parol evidence of that statement").

[11] Cases cited *post*, § 1450.

[12] Examined *ante*, § 1331.

Whether *perjury* may be committed in testifying by deposition where the deposition is not perfected so as to be admissible, is in theory a different question; and if the oral utterances constitute perjury, they should be provable: 1904, State *v.* Woolridge, 45 Or. 389, 78 Pac. 333 (citing authorities).

of the Legislature with the original document, *i.e.* the 'viva voce' vote. The Legislature has not dealt by vote with the enrolled document; the latter therefore can be only a certificate and copy of the transactions representing the enactment.[1] The enrolment is thus not a record in the sense of a judicial record, *i.e. the* act done in writing (*post*, § 2450).

(2) Furthermore, it is clear that the *legislative journals* are *not the original enactment*, for the 'viva voce' vote is not given upon them. They are but official statements of what has been done at a prior time, although the House may have heard them read and approved them as correct. Thus, the question whether the enrolled copy shall be conclusive as against the journal is only a question whether an official report and copy of one degree of solemnity and trustworthiness is to be preferred against another of a less degree.

(3) On the other hand, it is well settled that the enrolled copy cannot be shown erroneous or valid by *any other testimony than that of the journals*, — for example, by the oral testimony of a member as to the number of votes or readings, or the terms of an amendment, or a draft bill.[2] Furthermore, it is equally conceded on all hands that the journal cannot be shown erroneous by similar testimony.[3]

§ 1350. [1] 1875, Moore, J., in Blessing *v.* Galveston, 42 Tex. 641, 656 ("the signature of its officers and the approval of the Governor cannot, unquestionably, make that law which has not been enacted by the Legislature. They only furnish evidence, conclusive or otherwise, as may be held, of the enactment of the alleged law by the Legislature").

[2] *Federal:* 1855, Pease *v.* Peck, 18 How. 595 (whether the manuscript of a statute as reported by the commissioners should control the printed law as sanctioned by the Legislature in repeated revisions); *Georgia:* 1898, Cutcher *v.* Crawford, 105 Ga. 180, 31 S. E. 139 (whether a preliminary local election had been held; the statutory preamble not to be contradicted by a minority report in the journal nor by an election return); 1890, Speer *v.* Athens, 85 Ga. 49, 11 S. E. 802 (that public notice had not been given for a local act; not admitted); *Illinois:* 1904, People *v.* McCullough, 210 Ill. 488, 71 N. E. 602 ("the departure . . . has never been extended beyond an inspection of the journals"); *New Jersey:* 1884, Passaic Co. *v.* Stevenson, 46 N. J. L. 173, 184 (under a constitutional provision requiring public notice of a local bill, and the preservation of the evidence of notice, the fact of notice may be proved otherwise than by the act and the journals; Dixon, J., diss.); *North Carolina:* 1870, Brodnex *v.* Groom, 64 N. C. 244, 248 (fact of no public notice of a local bill, not provable).

[3] *Alabama:* 1906, State *v.* Brodie, 148 Ala. 381, 41 So. 180; *Colorado:* 1905, Andrews *v.* People, 33 Colo. 193, 79 Pac. 1031 (Speaker's testimony excluded); 1908, Rio Grande S. Co. *v.* Catlin, 40 Colo. 450, 94 Pac. 323 (printed journals held conclusive as against a report of a committee; but the point is not clearly stated in the opinion); 1912, People *v.* Leddy, 53 Colo. 109, 123 Pac. 824 (entry of names of members voting); *Delaware:* 1910, Rash *v.* Allen, Ross *v.* Allmond, 1 Boyce Del. 444, 76 Atl. 370; *Georgia:* 1896, Fullington *v.* Williams, 98 Ga. 807, 27 S. E. 183 (as to notice of intention required before offering a bill); *Idaho:* 1897, Cohn *v.* Kingsley, 5 Ida. 416, 49 Pac. 985 (whether a bill was read the second time); *Indiana:* 1858, McCulloch *v.* State, 11 Ind. 424, 430 (though where they are silent, lawful action will be presumed); 1909, State *v.* Wheeler, 172 Ind. 578, 89 N. E. 1 (oral testimony not admissible against the journals); *Iowa:* 1883, Koehler *v.* Hill, 60 Ia. 543, 560, 14 N. W. 738, 15 N. W. 609 (oral testimony by a member of the Senate, not receivable to contradict the journal, if in existence); *Kentucky:* 1900, Taylor *v.* Beckham, 108 Ky. 278, 56 S. W. 177; *Michigan:* 1887, Attorney-General *v.* Rice, 64 Mich. 385, 389, 31 N. W. 165 (whether a bill's title expressed its object; parol testimony to contradict the journal, inadmissible); 1889, Sackrider *v.* Supervisor, 79 Mich. 59, 66, 44 N. W. 165 (same); *Nebraska:* 1898, Re Grander, 56 Nebr. 260, 76 N. W. 588 (journals not allowed to be contradicted by original draft of bill with indorsements); *North Carolina:* 1903, Wilson *v.* Markley, 133 N. C. 616, 45 S. E. 1023; 1904, State *v.* Armour Packing Co., — N. C. —, 47 S. E. 411; *Ohio:* 1832, State *v.* Moffitt, 5 Oh. 223, 5 Hamm. 358; 1886, State *v.* Smith, 44 Oh. St. 348, 364, 7 N. E. 447, 12 N. E. 829.

Add also the cases as to *bribery*, note 11.

With this preliminary survey of the limits of the problem,[4] we are in a position to consider the question whether the copy enrolled under the hands of the presiding officers authorized thereto is conclusive in every sense so as to exclude contradiction by the testimony of the official journal.[5]

[4] The following questions are also to be distinguished: (1) Whether the *enrolled* copy overrides a *printed copy: Fed.* 1904, Gibson *v.* Anderson, 131 Fed. 39, 42, 65 C. C. A. 277 (the "published statutes of the U. S." showed that a joint resolution was approved May 27, 1902; plaintiff not allowed to show that the true date was after June 1; unsound; erroneously taking as authority Field *v.* Clark, U. S., *infra*, note 5); 1906, Clagett *v.* Duluth, 143 Fed. 824, 827, C. C. A. (a printed official compilation of statutes, held not to prevail over "the original legislation"); *Mo.* 1883, Pacific R. Co. *v.* Seifert, 79 Mo. 210, 212 (a printed law imposed a fine of $20; the statute-roll reading "$90", held not to override this in action for penalty); *Nebr.* 1896, Bruce *v.* State, 48 Nebr. 570, 67 N. W. 454 (the enrolled act, properly certified, approved, and deposited, is conclusive as against the official statute-book); *Oh.* 1909, State *v.* Groves, 80 Oh. 351, 88 N. E. 1096 (enrolled statute prevails); *Tex.* 1870, Central R. Co. *v.* Hearne, 32 Tex. 546, 562 (certified copy of the enrolled act is the "best evidence", as against a printed copy); (2) Whether the journal is receivable for *other purposes than to overthrow the enrolment:* 1878, State *v.* Smalls, 11 S. C. 262, 286 (bribery by a member of the Senate; the journal received to show the matter pending); (3) Whether the *original of the journal* must be produced; *ante*, § 1219; (4) Whether the *printed copy of the journals* is admissible: *post*, § 1684; (5) Whether, if the journal may be consulted, its *omissions* are to be fatal or may be cured by presumption: 1898, Re Taylor, 60 Kan. 87, 55 Pac. 340; 1898, State *v.* Long, 21 Mont. 26, 53 Pac. 645 (under the constitutional rule requiring the fact of the signing of a bill to be entered on the journal, the omission of the journal to show the fact of signature was held immaterial); and cases cited *infra*, note 5; (6) Whether the *enrolled copy* may be impeached in a *collateral proceeding:* 1870, Brodnax *v.* Groom, 64 N. C. 244, 247 (whether 30 days' notice of application for a private act had been given; the certified copy not impeachable collaterally; here, not in an application to enjoin the collection of a tax under the statute); (7) Whether a *recital* or *preamble* in a statute is conclusive: *post*, § 1352; (8) Whether by *stipulation*, or judicial admission, an unconstitutional defect in the enrolled copy can be *waived: post*, § 2591; (9) Whether the rule applies to the *veto of a governor also:* 1912, State ex rel. Crenshaw *v.* Joseph, 175 Ala. 579, 57 So. 942 (failure to veto); 1907, Powell *v.* Hayes, 83 Ark. 448, 104 S. W. 177; 1904, People *v.* McCullough, 210 Ill. 488, 71 N. E. 602 ("Only record evidence can be introduced to show that the Governor filed the bill in the office of the Secretary of State with his objections, in case the bill was vetoed by him"); 1905, Commissioners *v.* Warfield, 100 Md. 516, 60 Atl. 599 (here the Governor had signed by mistake and afterwards erased his signature); 1913, Tuttle *v.* Boston, 215 Mass. 57, 102 N. E. 350; 1907, Wrede *v.* Richardson, 77 Oh. 182, 82 N. E. 1072 (the record of the Governor, kept pursuant to law, stating the presentation of an act to him for approval on a specified date, is conclusive as to the fact of presentation).

[5] In the following summary most of the rulings against conclusiveness proceed upon the ground that the Constitution expressly requires certain legislative proceedings to be done or to appear to be done; this, as above noted, ought properly not to affect the result; nevertheless such Courts might at the same time hold the enrolment conclusive as to the *tenor of the act;* the nature of the fact to be proved has for that reason been noted below; but lack of space forbids noting the constitutional provisions. In point of numbers, the jurisdictions are divided almost equally *pro* and *con* the general principle (of these two or three have changed from their original position), two or three adopt a special variety of view (as in Illinois), three or four are not clear, and a small number have not yet made their decision:

England: 1606, the Prince's Case, 8 Co. Rep. 13, *semble* (enrolment conclusive); 1617, R. *v.* Arundel, Hob. 109 (whether a certain provision was in a private act, such acts being filed without enrolment but under the Great Seal; "Now suppose that the journal were every way full and perfect, yet it hath no power to satisfy, destroy, or weaken the act, which being a high record must be tried only by itself, 'teste meipso.' Now journals are no records, but remembrances for forms of proceeding to the record: they are not [kept] of necessity, nor have they always been. They are like the docket of the prothonotaries or the particular to the King's patents. . . . The journal is of good use for the observation of the generalty and materialty of proceedings and deliberations as to the three readings of any bill, the intercourses between the two houses, and the like; but when the act is passed, the journal is expired"); 1637, Hampden's Trial, 3 How. St. Tr. 825, 1153, 1236 (the statute 'de tallagio non concedendo', conceded to be a statute, though not found on the Rolls of Parliament); 1649, Bowes *v.* Broadhead, Style 155 ("Upon view of the Parliament

The arguments in favor of *allowing the journals to be consulted* for that purpose are sufficiently stated in the following passage, and in the succeeding quotations dealing with the answers to them:

1852, MURRAY, C. J., in *Fowler* v. *Pierce*, 2 Cal. 165, "If such matters cannot be inquired into, the wholesome restrictions which the Constitution imposes on legislative and executive action become a dead letter, and Courts would be compelled to administer laws made

Roll, . . . it was found that the Statute was rightly recited, notwithstanding what had been objected and the journal-book of Parliament produced to the contrary; . . . and the Court said they were to be ruled by the Parliament Roll, and not the journal-book"; and in another case the same day the Roll was ordered produced, "to make it appear whether an adjournment of Parliament was well recited", and the Court "would not credit the journal-book"); 1650, Jurisdiction of the Court of Chancery, 1 Ch. Rep., App. 52 (an account of the making up of a statute-roll and of the mode of determining a disputed text; nothing said of the journals); 1653, Streater's Trial, 5 How. St. Tr. 365, 387 (L. C. J. Roll: "Now whereas you say, it is but an order of Parliament, and has not been three times read in the House; how can you tell but that it has been three times read? . . . But if it were but once read, we cannot call it into question, but must conceive it was on just grounds"); 1725, L. C. Macclesfield's Trial, 16 How. St. Tr. 767, 1334, 1388 (here it appears that under the original system there was a "parliament-roll" and a "statute-roll", but the former, from which the latter was made up, appears to have been entirely distinct from the journal); *ante*, 1726, Gilbert, Evidence, 7, 10 ("the memorials of the legislature . . . are authentic beyond all manner of contradiction"); 1764, R. *v.* Robotham, 3 Burr. 1472 (a clear mistake of words in the enrolment appeared, but no resort was had to the journals); 1831, R. *v.* Middlesex, 2 B. & Ad. 818, 821 (until a certain statute, "if two acts of Parliament passed in the same session were repugnant, it was not possible to know which of them received the royal assent first, for there was then no indorsement on the roll of the day when bills received the royal assent"); for the modern method of drafting and enacting a bill in England, see Ilbert's Legislative Methods and Forms (1901), 89, 105.

UNITED STATES: *Federal:* 1857, Thompson's Case, 9 Op. Attorney-General, 1, 3, per Black (in a forceful opinion denying to executive officers the right of such consultation; "we must take the acts of Congress as we find them, without addition or diminution"); 1867, Gardner *v.* Barney, 6 Wall. 499 (the date of the President's signature to a bill not being an essential part of the record, the legislative journals may be looked to with other evidence; and whenever "the existence of a statute" is in question, the Court may look to "any source of information" that is helpful); 1891, Field *v.* Clark, 143 U. S. 649, 670, 12 Sup. 495 (whether a clause was omitted from the engrossed act; journals not to be consulted; whether the failure to observe the constitutional rule requiring entry of yeas and nays on the journal could be thus inquired into, not decided); for Federal rulings interpreting the law of individual States, see *infra*, under California, Illinois, Nebraska, and North Carolina;

Alabama: 1868, Jones *v.* Hutchinson, 43 Ala. 721, 723 (whether a portion of a bill had been concurred in, etc.; journals consulted, "to ascertain whether it has a legal existence"; citing only the California and Illinois cases, with P. *v.* Purdy, New York, but affirming the doctrine as "well settled"); 1872, Moody *v.* State, 48 Ala. 116 (whether certain amendments as passed were omitted; journals examined); 1875, State *v.* Buckley, 54 Ala. 599, 613 (whether yeas and nays were taken; journals consulted); 1876, Harrison *v.* Gordy, 57 Ala. 49 (doctrine applied to notice of a bill); 1877, Walker *v.* Griffith, 60 Ala. 361, 364 (journals may be looked to, for ascertaining the constitutional requirements; but their silence does not require investigation; though in constitutionally specified cases their silence is conclusive); 1884, Sayre *v.* Pollard, 77 Ala. 608 (doctrine applied to error in enrolment); Moog *v.* Randoph, 77 Ala. 597, 600 (same); 1885, Abernathy *v.* State, 78 Ala. 411, 414 (same); Stein *v.* Leeper, 78 Ala. 517, 521; 1886, Hall *v.* Steele, 82 Ala. 562, 565, 2 So. 650 (doctrine applied to notice of a bill); 1898, 'Ex parte' Howard H. I. Co., 119 Ala. 484, 24 So. 516 (terms of an act; journals consulted); 1899, O'Hara *v.* State, 121 Ala. 28, 25 So. 622 (whether a bill was properly signed and voted for: journals consulted); 1900, Montgomery B. B. W. *v.* Gaston, 126 Ala. 425, 28 So. 497 (whether a bill was duly passed; journals consulted; another case illustrating the practical disadvantages of this rule); 1901, Robertson *v.* State, 130 Ala. 164, 30 So. 494 (journals consulted); 1902, Jackson *v.* State, 131 Ala. 21, 31 So. 380 (same; terms of an amendment); 1904, Yancy *v.* Waddell, 139 Ala. 524, 36 So. 733 (similar);

Arizona: 1876, Graves *v.* Alsap, 1 Ariz. 274, 282, 310, 318, 25 Pac. 836 (whether a statute not found among the certified files was in existence; journals not examined; Dunne, C. J., diss., because the attempt was merely to show the contents of the certified statute as a lost

in violation of private and public rights, without power to interfere. The fact that the law-making power is limited by rules of government, and its acts receive judicial exposition from the Courts, carries with it, by implication, the power of inquiring how far those exer-

document and not to question its evidential force); 1895, Harwood *v.* Wentworth, 4 Ariz. 378, 42 Pac. 1025 (journals not to be consulted; here the purpose was to show that two sections were omitted from the bill after passing and before enrolling); 1913, Allen *v.* State, 14 Ariz. 458, 130 Pac. 1114 (referendum note; legislative record and governor's proclamation, held conclusive);

Arkansas: 1857, Burr *v.* Ross, 19 Ark. 250 (whether a bill was voted to passage; journals examined); 1871, Knox *v.* Vinsant, 27 Ark. 266, 278 (whether a bill was read three times; journals consulted); 1873, English *v.* Oliver, 28 Ark. 317, 320 (whether a bill was read three times, etc.; journals consulted); 1877, State *v.* R. Co., 31 Ark. 701, 711, 716 (whether an act took effect within a certain time after adjournment; journals consulted to learn the time of adjournment; whether a bill was read three times, etc.; journals consulted); 1877, Worthen *v.* Badgett, 32 Ark. 496, 511 (whether a bill was read three times, etc.; journals consulted); 1878, Smithee *v.* Garth, 33 Ark. 17, 25 (whether the votes had been entered, etc.; journals consulted); 1879, State *v.* Crawford, 35 Ark. 237, 243 (whether a bill was properly read; journals consulted); 1882, Chicot Co. *v.* Davies, 40 Ark. 200, 205 (whether a bill was read three times; journals consulted; whether the enrolled act corresponded to the bill passed; journals and original draft consulted); 1883, Smithee *v.* Campbell, 41 Ark. 471, 475 (whether an amendment was enacted; journals consulted); 1884, Webster *v.* Little Rock, 44 Ark. 536, 547 (whether a bill had been duly read; journals consulted; rule treated as settled, but disapproved); 1886, Davis *v.* Gaines, 48 Ark. 370, 384, 3 S. W. 184 (doctrine not applied to notice of a bill required by Constitution); 1887, Dow *v.* Beidelman, 49 Ark. 325, 333, 5 S. W. 297 (doctrine applied to error in enrolment); 1889, Glidewell *v.* Martin, 51 Ark. 559, 566, 11 S. W. 882 (doctrine applied to question of due reading; but disapproved); 1904, Rogers *v.* State, 72 Ark. 565, 82 S. W. 169 (tenor of the act; journals consulted, citing Chicot Co. *v.* Davies but no other of the thirteen foregoing cases); 1909, State *v.* Bowman, 90 Ark. 174, 118 S. W. 711 (Smithee *v.* Garth followed); 1915, Arkansas State Fair Ass'n *v.* Hodges, 120 Ark. 131, 178 S. W. 936 (whether the governor had first approved before vetoing a bill; journals considered); 1920, Rice *v.* Lonoke-Cabot R. I. Dist., 142 Ark. 454, 221 S. W. 179 (omitted parts of a bill; the enrolled bill not conclusive);

California: 1852, Fowler *v.* Pierce, 2 Cal. 165 (whether an act was approved after adjournment; oral evidence received; quoted *supra*); 1866, Sherman *v.* Story, 30 Cal. 253, 256 (whether a rejected amendment had been incorporated in the act; journals not to be consulted, nor the original bill; as to Fowler *v.* Pierce, "possibly it may be distinguished, . . . but if not, it must be overruled"); 1872, People *v.* Burt, 43 Cal. 560, 564 (Sherman *v.* Story approved); 1880, Weill *v.* Kenfield, 54 Cal. 111 (whether there was due reading; journals consulted; prior rulings ignored); 1882, Railroad Tax Case, 8 Sawyer 238, 293, per Sawyer, J. (whether a bill was finally passed; journals consulted); 1886, Oakland P. Co. *v.* Hilton, 69 Cal. 479, 489, 496, 11 Pac. 3 (constitutional amendment required by Constitution to be entered on journals when proposed; journals consulted; but Sherman *v.* Story treated as law); 1889, People *v.* Dunn, 80 Cal. 211, 22 Pac. 140 (question not decided); 1896, Hale *v.* McGettigan, 114 Cal. 112, 45 Pac. 1049 (question reserved); 1901, Yolo Co. *v.* Colgan, 132 Cal. 265, 64 Pac. 403 (whether the required number of votes had been given; journals not consulted; Sherman *v.* Story followed); 1901, People *v.* Harlan, 133 Cal. 16, 65 Pac. 9 (preceding case approved);

Colorado: 1881, Re Roberts, 5 Colo. 525 (due passage; journals may be consulted); 1888, Hughes *v.* Felton, 11 Colo. 489, 492, 19 Pac. 444 (doctrine implied); 1894, Nesbit *v.* People, 19 Colo. 441, 446, 451, 36 Pac. 221 (whether proposed constitutional amendments were validly passed; journals consulted); 1894, Robertson *v.* People, 20 Colo. 279, 283, 38 Pac. 326 (due concurrence of vote of Houses; journals consulted); 1905, Andrews *v.* People, 33 Colo. 193, 79 Pac. 1031 (whether a bill was read, printed, etc.; journals consulted); 1906, Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642 (Lieutenant-governor's signature; Re Roberts followed); 1912, People *v.* Leddy, 53 Colo. 109, 123 Pac. 824 (approving the Robertson and Andrews cases);

Connecticut: 1849, Eld *v.* Gorham, 20 Conn. 8, 15 (certified published copy of revised statutes, deposited with the Secretary of State and legislatively declared authentic, is the sole record of the law); 1906, State *v.* Savings Bank, 79 Conn. 141, 64 Atl. 5 (whether a bill was duly passed; journals, etc., consulted; here the Secretary of State had not recorded it; no precedents cited);

Dakota Terr.: 1889, Terr. *v.* O'Connor, 5 Dak. T. 397, 415, 41 N. W. 746 (question reserved);

Delaware: 1910, Rash *v.* Allen, Ross *v.* Allmond, 1 Boyce Del. 444, 76 Atl. 370 (number of votes; journals consulted and held conclusive under a constitutional requirement for entry of vote therein; two judges diss.);

Florida: 1884, State *v.* Brown, 20 Fla. 407, 419 (whether an amendment had been omitted from the enrolment, and whether due reading

cising the law-making power have proceeded constitutionally. . . . It is said that parties would in every case dispute the existence of the law, and that such practice would lead to confusion and perjury. I have already said that this is a question for the Court. And

had occurred: journals consulted); 1888 State *v.* Deal, 24 Fla. 293, 294, 4 So. 899 (error in enrolment; journals consulted); 1893, Mathis *v.* State, 31 Fla. 291, 303, 12 So. 681 (due enactment of revised statutes: journals consulted); 1895, State *v.* Hocker, 36 Fla. 358, 18 So. 767 (that an act was not read in the Senate, and was not read by sections in either House: journals consulted); 1906, Wade *v.* Atlantic L. Co., 51 Fla. 628, 41 So. 72 ("This Court is firmly committed to the holding"); 1918, Amos *v.* Moseley, 74 Fla. 555, 77 So. 619 (State *v.* Brown followed);

Georgia: 1910, De Loach *v.* Newton, 134 Ga. 739, 68 S. E. 708 (whether a majority vote was given; enrolled act conclusive; careful opinion by Fish, C. J.);

Idaho: 1895, Wright *v.* Kelly, 4 Ida. 624, 43 Pac. 565 (journals not to be examined in a collateral proceeding; here, mandamus against county officers); 1896, Blaine Co. *v.* Heard, 5 Ida. 6, 45 Pac. 890 (journals may be examined to see whether constitutional requirements were complied with); 1897, Cohn *v.* Kingsley, 5 Ida. 416, 49 Pac. 985 (journals may be consulted); 1897, State *v.* Boise, 5 Ida. 519, 51 Pac. 110 (in passing upon constitutionality, copy of the journals must be produced);

Illinois: 1846, People *v.* Campbell, 8 Ill. 466, 468 (journals referred to on the question of a third reading, and a joint resolution held invalid); 1853, Spangler *v.* Jacoby, 14 Ill. 297 (whether a final vote was had, journals consulted, because the Constitution required the votes on final passage to be entered in the journal); 1855, Turley *v.* Logan, 17 Ill. 151 (whether a bill was properly read; journals consulted); 1857, Prescott *v.* Board, 19 Ill. 324 (whether a bill had been amended and enacted; journals consulted); 1861, Board *v.* People, 25 Ill. 181 (whether a bill was read three times; journals consulted); 1863, People *v.* Hatch, 33 Ill. 9, 132 (adjournment before executive disapproval; journals consulted); 1864, People *v.* Starne, 35 Ill. 121, 135 (whether a bill was acted on; journals consulted; doctrine rested on the constitutional requirement as to enactment, and doubted as a matter of policy); 1865, Wabash R. Co. *v.* Hughes, 38 Ill. 174, 185 (whether a bill was presented to the Governor and returned; journals consulted); 1867, Illinois C. R. Co. *v.* Wren, 43 Ill. 77 (whether the yeas and nays were called; journals may be consulted); 1867, Bedard *v.* Hall, 44 Ill. 91 (same doctrine implied); 1871, People *v.* DeWolf, 62 Ill. 253 (whether a majority had concurred: journals consulted); 1872, Hensoldt *v.* Petersburg, 63 Ill. 157 (doctrine implied); 1873, Ryan *v.* Lynch, 68 Ill. 160, 164 (due reading; doctrine applied); 1873, Miller *v.* Goodwin, 70 Ill. 659 (whether a statute was properly passed; journals consulted); 1874, Plummer *v.* State, 74 Ill. 361, 362 (propriety of act's title; journals consulted); 1875, Larrison *v.* R. Co. 77 Ill. 11 (whether a bill was properly read, etc.; journals consulted): 1876, Binz *v.* Weber, 81 Ill. 288 (propriety of title; journals consulted); 1879, People *v.* Loewenthal 93 Ill. 191, 205 (due passage of amendment; journals consulted); 1876, Ottawa *v.* Perkins, 94 U. S. 260 (the Illinois rule declared to admit reference to the journals to overthrow the enrolled act; four judges dissenting, but on the question whether the journals must be offered in evidence); 1881, Post *v.* Supervisors, 105 U. S. 667 (same decision); 1881, Wenner *v.* Thornton, 98 Ill. 156, 163 (due passage; journals consulted); 1887, Burritt *v.* Com'rs, 120 Ill. 323, 332 (due passage; journals consulted); 1902, Chicago Telephone Co. *v.* Northwestern T. Co., 199 Ill. 324, 65 N. E. 329 (prior doctrine applied); 1912, Neiberger *v.* McCullough, 253 Ill. 312, 97 N. E. 660 (whether a bill was printed in final form before passage); 1915, Dragovich *v.* Iroquois Iron Co., 269 Ill. 478, 109 N. E. 993 (whether amendments were printed before final vote; journals consulted); 1917, People ex rel. Zeno *v.* Illinois State Board, 278 Ill. 144, 115 N. E. 852 (whether a bill was read three times; Neiberger *v.* McCullough followed);

Indiana: 1851, Skinner *v.* Dening, 2 Ind. 558 (whether a two-thirds vote had been given; journals consulted; purporting to follow Purdy *v.* People, N. Y.); 1856, Coleman *v.* Dobbins, 8 Ind. 156, 159 (whether a bill was read three times; journals proper to be examined); 1858, McCullock *v.* State, 11 Ind. 424, 429, 435 (whether a constitutional majority voted; journals examined); 1869, Evans *v.* Browne, 30 Ind. 514 (whether a constitutional quorum had voted; journals not allowed to overthrow the duly certified act; preceding rulings repudiated); 1876, Bender *v.* State, 53 Ind. 254 (whether an act was duly presented to the Governor before adjournment; enrolment conclusive); 1880, Edger *v.* Board, 70 Ind. 331, 338 (rule maintained; but journals consulted to interpret); 1894, State *v.* Boice, 140 Ind. 506, 513, 39 N. E. 64, 40 N. E. 113 (Evans *v.* Browne affirmed); 1894, Western Union Tel. Co. *v.* Taggart, 141 Ind. 281, 40 N. E. 1051 (Evans *v.* Browne affirmed); 1897, Lewis *v.* State, 148 Ind. 346, 350, 47 N. E. 675 (Evans *v.* Browne affirmed); 1909, State *v.* Wheeler, 172 Ind. 578, 89 N. E. 1 (whether a bill was vetoed; Evans *v.* Browne followed; but, for some reason not very clear, the Court proceed nevertheless to examine the journals);

Iowa: 1857, State *v.* Clare, 5 Ia. 508 (certified act on file is the "ultimate proof of the law"; here, as against a printed copy); 1859, State *v.*

why should not the citizen whose life, property, or liberty is made forfeit by the operation of a particular law, be allowed to show to the Court, if it is not advised of the fact, that the same was passed in violation of his constitutional rights, or that it has been placed among

Donehey, 8 Ia. 396 (similar): 1861, Duncombe *v.* Prindle, 12 Ia. 1, 11 (whether a passage was omitted from the original bill; "behind this [the enrolled act] it is impossible for any Court to go for the purpose of ascertaining what the law is"); 1883, Koehler *v.* Hill, 60 Ia. 543, 558, 591 (contents of a constitutional amendment, under a requirement that the terms be entered at length upon the journal; the journal held to override the enrolled act; Beck, J., diss., in a valuable opinion);

Kansas: 1874, Haynes *v.* Heller, 12 Kan. 381, 383, 393 (question not decided); 1875, Division of Howard Co., 15 Kan. 194, 211 (error in enrolment; journals may be consulted, but not engrossed bill); 1876, Commissioners *v.* Higginbotham, 17 Kan. 62, 78 (whether a bill was duly passed; journals consulted); 1881, Constitutional Prohibitory Amendment, 24 Kan. 700 (proposed constitutional amendment required to be entered on journals; journals consulted); 1882, State *v.* Francis, 26 Kan. 724, 731 (whether a majority voted; journals consulted); 1882, Vanderberg's Petition, 28 Kan. 243, 254 (whether a two-thirds majority voted; journals consulted); 1886, Weyand *v.* Stover, 35 Kan. 545, 553, 11 Pac. 355 (whether a due reading, etc., occurred; journals consulted); 1889, State *v.* Robertson, 41 Kan. 200, 204, 21 Pac. 382 (dates of origin and passage, etc.; journals consulted); 1898, Re Taylor, 60 Kan. 87, 55 Pac. 340 (where certain parts of an act were duly passed; journals consulted); 1902, State *v.* Andrews, 64 Kan. 474, 67 Pac. 870 (conformity of a title; journals consulted; Ellis, J., for the majority, doubts the propriety of this rule); 1906, Belleville *v.* Wells, 74 Kan. 823, 88 Pac. 47 (title of bills; journals consulted); 1907, Missouri K. & T. R. Co. *v.* Simons, 75 Kan. 130, 88 Pac. 551 (consututional majority; rule re-affirmed); 1918, State *v.* Fleeman, 102 Kan. 670, 171 Pac. 618 (an enrolled bill is "well-nigh conclusive");

Kentucky: 1869, Com. *v.* Jackson, 5 Bush 680, 684 (question not decided); 1878, Auditor *v.* Haycraft, 14 Bush 284, 288 (same); 1892, Norman *v.* Kentucky Board, 93 Ky. 537, 546, 563, 20 S. W. 901 (same; but Pryor, J., explicitly declared in favor of holding the enrolment conclusive); 1913, Hamlett *v.* McCreary, 153 Ky. 755, 156 S. W. 410 (journal cannot be used even to uphold validity of an act; here, the enrolled bill was not signed by the Senate President);

Louisiana: 1871, Louisiana State Lottery Co. *v.* Richoux, 23 La. An. 743 (whether a bill was properly read, etc.; journals not to be consulted);

Maine: 1889, Weeks *v.* Smith, 81 Me. 538, 18 Atl. 325 (whether a bill was approved; enrolled act conclusive);

Maryland: 1858, Fouke *v.* Douglass, 13 Md. 392, 412 (the engrossed and the printed statute corresponded; the legislative journals held not to override this); 1870, Mayor *v.* Harwood, 32 Md. 471, 477 (the final engrossment as constitutionally attested, held conclusive as to the statute's contents); 1874, Berry *v.* R. Co., 41 Md. 446, 463 (terms of act; journals consulted); 1874, Legg *v.* Annapolis, 42 Md. 203, 220 (substitution of false bill in second House; journals consulted); 1877, Strauss *v.* Heiss, 48 Md. 292, 295 (general doctrine approved; governor's testimony to time of signing two bills, received); 1915, Thrift *v.* Towers, 127 Md. 54, 95 Atl. 1064 (change of title of bill);

Michigan: 1844, Green *v.* Graves, 1 Doug. 351, 372 (whether a two-thirds majority had been given; journals consulted, but present question not discussed); 1865, People *v.* Mahaney, 13 Mich. 481, 491 (whether the vote included members not lawfully seated; journals may be consulted in general to determine validity of statutes); 1867, People *v.* Onondaga, 16 Mich. 254, 257 (error in engrossment of title; journals consulted); 1882, Pack *v.* Barton, 47 Mich. 520, 11 N. W. 367 (whether a bill was introduced in time; journals consulted); 1884, Attorney-General *v.* Joy, 55 Mich. 94, 100, 20 N. W. 806 (whether a two-thirds vote had been given; journals consulted); 1886, Callahan *v.* Chipman, 59 Mich. 610, 617, 26 N. W. 806 (whether a bill was introduced in time; journals consulted); 1887, Attorney-General *v.* Rice, 64 Mich. 385, 31 N. W. 203 (whether a bill's title expressed its object; journals consulted); 1888, Hart *v.* McElroy, 72 Mich. 446, 40 N. W. 750 (whether the proper readings were had; journals consulted); 1889, Sackrider *v.* Supervisors, 79 Mich. 59, 66, 44 N. W. 165 (like A. G. *v.* Rice); 1890, Stow *v.* Grand Rapids, 79 Mich. 595, 597, 44 N. W. 1047 (whether an error had occurred in engrossment; journals consulted); Rode *v.* Phelps, 80 Mich. 598, 608, 45 N. W. 493 (whether errors occurred in engrossment; journals consulted); Caldwell *v.* Ward, 83 Mich. 13, 46 N. W. 1024 (whether a bill was introduced in time; journals consulted); 1891, People *v.* Burch, 84 Mich. 408, 411, 47 N. W. 765 (whether bill had been properly voted on; journals consulted);

Minnesota: 1858, Board *v.* Heenan, 2 Minn. 330, 338 (whether a bill had been properly read; journals consulted); 1877, State *v.* Hastings, 24 Minn. 78, 81 (whether a bill was properly read; journals consulted); 1884, Burt *v.* R. Co., 31 Minn. 472, 477, 18 N. W. 285, 289 (whether a two-thirds vote had been given; journals may be offered in evidence); 1888, State *v.* Peterson, 38 Minn. 143, 145, 36 N. W. 443 (whether a bill was properly read;

the archives of government by fraud or mistake, and never had a legal existence? Is there no way of ascertaining whether the approval of the executive was forged, or whether officers have acted contrary to their constitutional obligations? It is no sufficient answer that we

journals consulted); 1891, Lincoln v. Haugan, 45 Minn. 451, 48 N. W. 196 (whether a proper vote was had; journals consulted); 1915, State ex rel. Kohlman v. Wagner, 130 Minn. 424, 153 N. W. 749 ("We are not disposed at this time to overrule" the foregoing decisions);
Mississippi: 1856, Green v. Weller, 32 Miss. 650, 684, 702, 735, 33 id. 735 (whether an act had been voted by the required number, journals not to overthrow the enrolled act; careful opinion; Smith, C. J., and Fisher, J., diss.); 1866, Swann v. Buck, 40 Miss. 268, 295 (whether a bill was properly read; enrolled act conclusive); 1874, Brady v. West, 50 Miss. 68, 77 (errors in enrolment; journals consulted; "qualifying" Green v. Weller); 1886, 'Ex parte' Wren, 63 Miss. 512, 528 (whether amendments were omitted; enrolled act held conclusive in a weighty opinion by Campbell, J., quoted *supra;* Brady v. West repudiated);
Missouri: 1821, Douglas v. Bank, 1 Mo. 24 (whether an act was duly passed; journals consulted, as "better and higher testimony"); 1836, State v. McBride, 4 Mo. 303 (whether a proper majority had voted; journals consulted to overthrow the enrolled document); 1856, Pacific R. Co. v. Governor, 23 Mo. 353, 362 (propriety of proceedings after a veto; journals not to control; opinion careful and detailed); 1875, Bradley v. West, 60 Mo. 33, 44 (doctrine implied that journals might be consulted); 1879, State v. Mead, 71 Mo. 266, 270 (whether a bill was properly read and signed; journals consulted under new Constitution); 1893, State v. Field, 119 Mo. 593, 606, 24 S. W. 752 (whether a bill's title was contained during passage; journals examined); 1907, Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675 (rule applied to a municipal ordinance);
Montana: 1906, Palatine Ins. Co. v. Northern P. R. Co., 34 Mont. 268, 85 Pac. 1032 (due passage by entering the vote, etc., journals consulted, repudiating anything to the contrary in State v. Long, cited *supra*, n. 4, par. 5); 1909, State v. Erickson, 39 Mont. 280, 102 Pac. 336 (whether amendments were adopted; journals not consulted to determine contents of bill);
Nebraska: 1876, Hull v. Miller, 4 Nebr. 503, 505 (whether an act was properly voted upon; journals consulted); 1879, Cottrell v. State, 9 Nebr. 125, 128, 1 N. W. 1008 (whether a bill was properly signed and voted on; journals consulted); 1880, State v. Liedtke, 9 Nebr. 462, 4 N. W. 68 (question not decided); 1885, Ballou v. Black, 17 Nebr. 389, 393, 23 N. W. 3 (whether a bill was properly entitled and amended; journals consulted); 1885, State v. McLelland, 18 Nebr. 236, 25 N. W. 77 (whether an error occurred in enrolment; journals consulted); 1886, State v. Robinson, 20 Nebr. 96, 29 N. W. 246 (similar); 1888, State v. Van Duyn, 24 Nebr. 586, 590, 39 N. W. 612 (whether certain parts of an enrolled act were properly voted upon; journals consulted); 1893, State v. Moore, 37 Nebr. 13, 15, 55 N. W. 299 (whether an error of terms was made in the engrossment; journals consulted); 1894, Ames v. R. Co., 64 Fed. 165, 168 (journals may be consulted under Nebraska law); 1898, Re Granger, 56 Nebr. 260, 76 N. W. 588 (terms of an act; journals consulted); 1898, Webster v. Hastings, 56 Nebr. 669, 77 N. W. 127 (journals may be consulted; Irvine, C., and Sullivan, J., diss.); 1899, State v. Abbott, 59 Nebr. 106, 80 N. W. 499 (whether certain appropriations were made in an act; journals may be referred to, but nothing else, *e.g.* original bill, etc.); 1900, Webster v. Hastings, 59 Nebr. 563, 81 N. W. 510 (change of title after passage; journals consulted); 1900, State v. Frank, 60 Nebr. 327, 83 N. W. 74 (same rule reiterated; but held not to allow the silence of a mutilated journal to overthrow the enrolment; the facts and opinion well illustrate the dangers and uncertainties to which the rule leads; that in these days the journals could be kept in the manner shown in this case is a disgrace to the State and a warning to others); 1901, Simpson v. Union Stockyards Co., C. C., 110 Fed. 799 (enrolled bill is controlled by the journals; here said of a Nebraska act); 1901, State v. Frank, 61 Nebr. 679, 85 N. W. 956 (approving the original decision, *supra*); 1904, Colburn v. McDonald, 72 Nebr. 431, 100 N. W. 961 (like State v. Frank, *supra*);
Nevada: 1875, State v. Swift, 10 Nev. 176, 179 (whether a bill as enrolled was properly passed; journals not to be consulted; full and careful opinion by Beatty, J.); 1883, State v. Glenn, 18 Nev. 34, 38, 1 Pac. 186 (preceding case affirmed); 1887, State v. Tufly, 19 Nev. 391, 12 Pac. 835 (whether a proposed constitutional amendment was entered upon the journals; journals consulted); 1895, State v. Nye, 23 Nev. 99, 101, 42 Pac. 866 (same as State v. Glenn); 1899, State v. Beck, 25 Nev. 68, 56 Pac. 1008 (whether a bill was properly read; journals not consulted);
New Hampshire: 1858, Opinion of the Justices, 35 N. H. 579 (the journals are the authentic records, to be resorted to for determining whether the two Houses concurred in assent to the law); 1872, Opinion of the Justices, 52 N. H. 622 (same);
New Jersey: 1866, Pangborn v. Young, 32 N. J. L. 29 (whether amendments made in the Senate were contained in the bill as approved: the filed and authenticated document held conclusive, and the journals not to be considered as evidence to the contrary; quoted

must rely on the integrity of the executive or other officers, and that the record of facts is conclusive evidence of the truth of such acts. Our notions of free institutions revolt at the thought of placing so much power in the hands of one man, with no guard upon it but his

supra); 1884, Passaic Co. *v.* Stevenson, 46 N. J. L. 173 (rule of Pangborn *v.* Young approved); 1890, Standard Underground C. Co. *v.* Att'y-Gen'l, 46 N. J. Eq. 270, 19 Atl. 733 (similar); 1907, Bloomfield *v.* Board, 74 N. J. L. 261, 65 Atl. 890 (that a bill was not approved within sixty days after adjournment; enrolled attested statute not allowed to be overthrown collaterally);

New Mexico: 1915, Kelley *v.* Marron, 21 N. M. 239, 153 Pac. 262 (whether bills were read in full; journals not consulted);

New York: 1839, Thomas *v.* Dakin, 22 Wend. 9, 112 (whether a law had been passed by a two-thirds vote; conclusiveness of the printed statute or of the certified original, expressly left undecided); 1840, Warner *v.* Beers, 23 Wend. 103, 125, 137, 168, 190 (whether a law had been passed by a two-thirds vote; Walworth, C., left the question undecided whether the printed statute's correctness could be examined on demurrer to a plea; Verplanck, Sen., was for examining both the certified original and the journals; Bradish, Pres. Sen., was for taking the certified original as conclusive, under R. S., tit. 4, ch. 7, § 11, making it "conclusive evidence"; the question was apparently decided by the Court of Errors without passing upon the point); 1841, Hunt *v.* Van Alstyne, 25 Wend. 605, 611 (same question, left undecided); 1841, People *v.* Purdy, 2 Hill 31 (same question; left undecided; but Bronson, J., on the principle that the unconstitutional exercise of legislative power must be prevented, thought that at least the certified original could be examined); s. c. appealed, *s. v.* Purdy *v.* People, 4 Hill 384, 390, 419 (Walworth, C., thought the certificate not conclusive; the Court voted against his opinion, without expressing itself on the particular point); 1845, De Bow *v.* People, 1 Den. 9, 14 (same question; "it seems that the journals . . . may be consulted"); 1846, Commercial Bank *v.* Sparrow, 2 Den. 97, 101 (the printed statute-book not conclusive; the other question not raised); 1853, People *v.* Supervisors, 8 N. Y. 317, 327 (whether the yeas and nays had been entered on the journal; *semble*, the journal not to be consulted, but it was); 1865, People *v.* Devlin, 33 N. Y. 269, 279, 286 (whether a bill had been passed by a three-fifths vote; *semble*, that the journals could not be consulted); 1873, People *v.* Com'rs, 54 N. Y. 276, 279 (whether a statute had been enacted by a two-thirds vote; "the original act is conclusive"); 1883, People *v.* Petrea, 92 N. Y. 128, 137, 139 (whether a statute was based on a bill reported by commissioners to revise the statutes; the journals may be resorted to); 1891, Rumsey *v.* R. Co., 130 N. Y. 88, 92, 28 N. E. 763 (certificate of enrolment being defective, the journals were consulted to sustain the act; but whether a complete certificate would be conclusive is left undecided; the Court citing both People *v.* Purdy and People *v.* Devlin, and improperly leaving the matter unsettled); Laws 1892, c. 682, § 40, Cons. L. 1909, Legislative, § 40 (presiding officer's certificate is to be "conclusive evidence" that a law was passed by the proper number of votes); 1896, New York & L. I. B. Co. *v.* Smith, 148 N. Y. 540, 42 N. E. 1088 (journals consulted, to learn whether a two-thirds vote was received); 1906, Stickney's Estate, 185 N. Y. 107, 77 N. E. 993 (journals consulted to determine the constitutional quorum);

North Carolina: 1870, Brodnax *v.* Groom, 64 N. C. 244, 248, *semble* (enrolled statute, conclusive); 1895, Carr *v.* Coke, 116 N. C. 223, 233, 22 S. E. 16 (whether a bill was duly read; enrolled copy held conclusive, in a careful opinion); 1896, Union Bank *v.* Commissioners, 119 N. C. 214, 221, 25 S. E. 966 (whether the yeas and nays were entered on the journals as required by the Constitution; journals consulted to overthrow the act; distinguishing Carr *v.* Coke); 1897, Commissioners *v.* Snuggs, 121 N. C. 394, 398, 28 S. E. 539 (same ruling); 1899, Board *v.* Coler, 37 C. C. A. 484, 96 Fed. 284 (journal considered, under a constitutional requirement in North Carolina that for certain legislation the yeas and nays must be entered on the journal); 1901, Commissioners *v.* DeRosset, 129 N. C. 275, 40 S. E. 43 (Carr *v.* Coke approved; journals here consulted as to the several readings of a bill); 1903, Wilson *v.* Markley, 133 N. C. 616, 45 S. E. 1023 (journals not to be consulted; except for ascertaining the due passage of certain private acts coming under the provisions of Const. Art. 2, § 14); 1904, State *v.* Armour Packing Co., — N. C. —, 47 S. E. 411 (triple reading after amendment, etc.; authentication is conclusive, except so far as the Constitution requires that certain matters must appear in the journal); 1905, Bray *v.* Williams, 137 N. C. 387, 49 S. E. 887 (private act; like Wilson *v.* Markley); 1904, Board *v.* Traveler's Ins. Co., 128 Fed. 817, 825, 63 C. C. A. 467 (first reading; following Carr *v.* Coke, N. C., *supra*, the journals were consulted); 1906, Board *v.* Tollman, 145 Fed. 753, 764, C. C. A. (roll-call; N. C. rule applied);

North Dakota: 1901, Power *v.* Kitching, 10 N. D. 254, 86 N. W. 737 (whether a bill was amended; journals not consulted); 1901, Pickton *v.* Fargo, 10 N. D. 469, 88 N. W. 90 (journals of a municipal council may be consulted); 1911, Woolfolk *v.* Albrecht, 22 N. D. 36, 133 N. W. 310 (whether the enrolled is conclusive as to an amendment's passage, not decided); 1919, State *v.* Schultz, 44 N. D.

own integrity; and our Constitution has wisely so distributed the powers of government as to make one a check upon the other, thereby preventing one branch from strengthening itself at the expense of the coördinate branches and of the public. Such evidence should be

269, 174 N. W. 81 (whether a vote on third reading took place; enrolled act not conclusive);
Ohio: 1854, Miller *v.* State, 3 Oh. St. 475, 479 (question raised but not decided); 1870, Fordyce *v.* Godman, 20 Oh. St. 1, 16 (whether a two-thirds vote had been given; journals consulted); 1886, State *v.* Smith, 44 Oh. St. 348, 363, 7 N. E. 447, 12 N. E. 829 (whether a bill was duly voted on; journals examined); 1887, State *v.* Kiesewetter, 45 Oh. St. 254, 256, 12 N. E. 807 (whether a bill was properly signed; journals consulted); 1916, Ritzman *v.* Campbell, 93 Oh. 246, 112 N. E. 591 (reviewing earlier cases; the enrolled bill, if shown by the journal *to* have been passed by the proper majority, is not "under any circumstances subject to impeachment as to its contents or the mode of its passage");
Oregon: 1883, Mumford *v.* Sewall, 11 Or. 67, 72, 4 Pac. 585 (whether a bill was properly read; journals and original bill consulted); 1887, State *v.* Wright, 14 Or. 365, 372, 12 Pac. 708 (error in an amendment; journals consulted); 1892, Currie *v.* Southern P. Co., 21 Or. 566, 570, 28 Pac. 884 (whether a bill received a sufficient vote; journals consulted; Bean, J., hesitating; Lord, J., reserving his opinion); 1892, State *v.* Rogers, 22 Or. 348, 364, 30 Pac. 74 (same ruling); 1897, McKennon *v.* Cotner, 30 Or. 588, 49 Pac. 956 (journals may be consulted; an amendment appearing on the journal, it was presumed that it had been reconsidered and defeated, and thus the enrolment could be sustained); 1904, Portland *v.* Yick, 44 Or. 439, 75 Pac. 706 (journals will be consulted only to determine whether mandatory provisions there appear to have been observed); 1921, Boyd *v.* Olcott, 102 Or. 327, 202 Pac. 431 (whether House amendments were concurred in, etc.; Harris, J.: "This Court has in prior decisions approved and followed the journal-entry rule. . . . The reasons given in support of the enrolled-bill rule are not only greater in number, but also are more persuasive in quality, than those given in support of the journal-entry rule; . . . we do not by anything here stated wish to be understood as receding from or overruling any of those prior decisions");
Pennsylvania: 1853, Speer *v.* P. R. Co., 22 Pa. 376 (the certificate is "conclusive" as to enrolment; main question not considered); 1856, Southwark Bank *v.* Com., 26 Pa. 446, 450 (the Legislature repealed a section of a pending bill; the journals consulted to identify the bill, and the section, though part of the bill as signed, treated as void); 1877, Kilgore *v.* Magee, 85 Pa. 401, 412 (whether a bill was properly entitled, read, etc.; enrolment conclusive); 1884, Com. *v.* Martin, 107 Pa. 185, 189, 204 (whether an act was properly entitled; enrolment conclusive);
South Carolina: 1870, State *v.* Platt, 2 S. C. 150 (whether the statute required "Court to be held at Barnwell or at Blackville; the enrolled act read originally "Barnwell", which was altered to read "Blackville"; the journals consulted: the chief argument relied on is the necessity of preventing the violation of constitutional safeguards; Moses, C. J., diss.); 1879, Bond Debt Cases, 12 S. C. 200, 226, 233, 289 (whether a two-thirds vote had been given; journals consulted); State *v.* Hagood, 13 S. C. 46, 54, 61, 70 (whether a bill was properly read; journals consulted; McIver, J., diss. in part, in a forcible opinion);
South Dakota: 1894, Somers *v.* State, 5 S. D. 321, 28 N. W. 804 (two statutes, approved the same day, having inconsistent provision; journal examined to see which was intended as repealing the other); 1901, Narregang *v.* Brown Co., 14 S. D. 357, 85 N. W. 602 (journals not to be consulted to impeach the enrolled act); 1901, State *v.* Bacon, 14 S. D. 394, 85 N. W. 605 (same);
Tennessee: 1879, State *v.* McConnell, 3 Lea 332, 341 (whether a bill was properly read; journals consulted, but the question not raised); 1880, Gaines *v.* Horrigan, 4 Lea 608, 611 (whether an amendment was properly passed; journals consulted; but question reserved in part); Williams *v.* State, 6 Lea 549, 553 (whether a proper majority voted; journals may be consulted); 1887, Hayes *v.* State (unreported oral opinion: cited in next two cases as in accord with them); 1888, Brewer *v.* Huntingdon, 86 Tenn. 733, 9 S. W. 166 (whether a bill was rejected: journals consulted); 1888, State *v.* Algood, 87 Tenn. 163, 167, 10 S. W. 310 (whether a bill had passed after amendment; journals consulted); 1892, Nelson *v.* Haywood Co., 91 Tenn. 596, 599, 20 S. W. 1 (whether a bill was duly passed, signed, etc.; journals consulted); 1911, Jackson *v.* Weis & L. M. Co., 124 Tenn. 421, 137 S. W. 757 (State *v.* Algood affirmed);
Texas: 1875, Blessing *v.* Galveston, 42 Tex. 641, 656 (question discussed, but not decided); 1880, Houston & T. R. Co. *v.* Odlum, 53 Tex. 343, 351 (whether an act was certified after adjournment; journals consulted to determine date of passage); 1881, Usener *v.* State, 8 Tex. Cr. App. 177 (State *v.* Swift, Nev., *supra*, followed); 1886, Hunt *v.* State, 22 Cr. App. 396, 400 (whether a bill was properly signed; journals consulted); 1890, 'Ex parte' Tipton, 28 Cr. App. 438, 442 (error in enrolment; journals not to be consulted, where no constitutional provision requires a matter to appear therein); 1890, Re Duncan, 139 U. S. 449, *semble* (the validity

of the most satisfactory character; and there is less to be apprehended from the subornation of witnesses, subject to the tests which the law imposes, than from the exercise of so great a power without restraint or accountability."

The answers to these arguments are represented in the following passages, dealing in various ways with one or more of the forms of argument against the conclusiveness of the enrolment:

1841, NELSON, C. J., in *Hunt* v. *Van Alstyne*, 25 Wend. 605, 610: "There are only two modes of contradicting it [the certified enrolment]: 1. By the journals of the two Houses, and 2. by parol testimony. The presiding officer had all the benefit of the first; the ayes and noes are taken, and the journal made up, under his supervision and control. His means of ascertaining and determining the fact, when he declares the law to be passed, exceed those of any other tribunal that might be called upon to inquire into it. Besides, the hurry and looseness with which the journals are copied, and the little importance attached to the printed copies, necessarily impairs confidence in their correctness. They are most uncertain data upon which to found a judicial determination of the rights of property, much more of great constitutional questions. As to the second mode of contradicting the certificate, the evidence would if possible be still more fallible and unsatisfactory. Indeed, we can scarcely imagine a case where from its nature the proof would be so subject to the doubtful and conflicting recollection of witnesses. Nothing short of absolute necessity could justify a resort to it. It would hardly deserve much weight in contradicting the journal itself, — much less the certificate of the presiding officer affixed to the law."

of a Texas statute, under the rule of Usener *v.* State, *infra*, held not to be a Federal question); 1891, Ewing *v.* Duncan, 81 Tex. 230, 233, 16 S. W. 1000 (whether a two-thirds vote had been given; journals consulted; none of the above cases cited); 1892, Williams *v.* Taylor, 83 Tex. 667, 19 S. W. 156 (whether a bill had been duly reported; journals not consulted; good opinion by Gaines, J.; this case practically affirms Usener *v.* State, 8 Cr. App. 177, and expressly affirms 'Ex parte' Tipton, 28 Cr. App. 438, and distinguishes Ewing *v.* Duncan, *supra*, on the ground that the date of taking effect was in issue and did not furnish the data for determining whether a sufficient majority for giving immediate effect had voted); 1897, Missouri, K. & T. R. Co. *v.* McGlamory, 92 Tex. 150, 41 S. W. 466 (journals examined to see whether an act took effect from date of passage); 1907, El Paso & S. W. R. Co. *v.* Foth, 45 Tex. Civ. App. 275, 100 S. W. 171 (Williams *v.* Taylor followed); 1916, Teem *v.* State, — Tex. Cr. —, 183 S. W. 1144 (time of enactment, journals not to be consulted);

Utah: 1896, Ritchie *v.* Richards, 14 Utah, 345, 47 Pac. 670 (whether the yeas and nays were taken, the Constitution requiring the fact to be entered on the journals on demand of five members; held, that the enrolled bill, duly signed, approved, and deposited, was the final record of the statute, and the journals could not be consulted; Batch and Miner, JJ., diss); *Vermont:* 1844, Re Welman, 20 Vt. 653, 656 (time when an act took effect; enrolment conclusive; though "in some instances" journals may be consulted); St. 1894, § 31, Gen. L. 1917, § 39 (the engrossed or typewritten copy kept by Secretary of State "shall be taken to be" the act);

Virginia: 1884, Wise *v.* Bigger, 79 Va. 269, 271, 281 (whether a two-thirds vote was given; journals consulted);

Washington: 1893, State *v.* Jones, 6 Wash. 452, 34 Pac. 201 (whether the constitutional requirements had been fulfilled; journals not to be consulted; opinion by Hoyt, J., perhaps the best on the subject);

West Virginia: 1871, Osburn *v.* Staley, 5 W. Va. 85, 89 (whether the required number of votes was given; journals consulted);

Wisconsin: 1866, Watertown *v.* Cady, 20 Wis. 501 (whether a vote was properly taken; question not decided); 1878, Bound *v.* R. Co., 45 Wis. 543, 557 (whether an act was properly passed; journals consulted); 1885, Meracle *v.* Down, 64 Wis. 323, 327, 25 N. W. 412 (same); 1891, McDonald *v.* State, 80 Wis. 407, 411, 50 N. W. 185 (whether a bill was passed as constitutionally required; journals may be consulted);

Wyoming: 1872, Brown *v.* Nash, 1 Wyo. T. 85, 93 (whether a proper vote was given; journals may be consulted); Union Pacific R. Co. *v.* Carr, 1 Wyo. T. 96, 103 (same); 1892, White *v.* Hinton, 3 Wyo. 753, 756, 30 Pac. 953 (whether a bill was passed and approved after expiration of the session; journals not consulted); 1904, State *v.* Cahill, 12 Wyo. 225, 75 Pac. 433 (signing, etc., of a bill; journals may be consulted for facts constitutionally required to be recorded); 1904, Younger *v.* Hehn, 12 Wyo. 289, 75 Pac. 443 (preceding case approved).

1866, BEASLEY, C. J., in *Pangborn* v. *Young*, 32 N. J. L. 29, 34: "[1] It is impossible for the mind not to incline to the opinion that the framers of the Constitution, in exacting the keeping of these journals, did not design to create records which were to be paramount to all other evidence with regard to the enactment and contents of laws. . . . If intended for any purpose whatever in any course of judicial investigation, can any one conceive that these registers would have been left in the condition in which by the Constitution we find them? In the nature of things they must be constructed out of loose and hasty memoranda, made in the pressure of business and amid the distractions of a numerous assembly. There is required not a single guarantee to their accuracy or to their truth; no one need vouch for them, and it is not enjoined that they should be either approved, copied, or recorded. . . . [2] These are the sanctions [the signatures of the two presiding officers and of the Governor] which the Legislature has provided for the authentication of its own acts, both to the public and to the judicial tribunals; and the question is therefore presented whether such authentication must not be deemed conclusive, or in other words, whether the Legislature does not possess the right of declaring what shall be the supreme evidence of the authenticity of its own statutes. This question, in my opinion, must be answered in the affirmative. How can it be otherwise? The body that passes a law must of necessity promulgate it in some form. . . . It is the power which passes the law which can best determine what the law is which itself has created. The Legislature in this case has certified to this Court, by the hands of its two principal officers, that the act now before us is the identical statute which it approved, and, in my opinion, it is not competent for this Court to institute an inquiry into the truth of the fact thus solemnly attested. . . . [3] I think the rule thus adopted accords with public policy. Indeed, in my estimation, few things would be more mischievous than the introduction of the opposite rule. . . . The rule contended for is that the Court should look at the journals of the Legislature to ascertain whether the copy of the act attested and filed with the Secretary of State conforms in its contents with the statements of such journals. This proposition means, if it has any legal value whatever, that, in the event of a material discrepancy between the journal and the enrolled copy, the former is to be taken as the standard of veracity and the act is to be rejected. This is the test which is to be applied not only to the statutes now before the Court, but to all statutes; not only to laws which have been recently passed, but to laws the most ancient. To my mind, nothing can be more certain than that the acceptance of this doctrine by the Court would unsettle the entire statute law of the State. We have before us some evidence of the little reliability of these legislative journals. . . . Can any one deny that if the laws of the State are to be tested by a comparison with these journals, so imperfect, so unauthenticated, the stability of all written law will be shaken to its very foundations? . . . We are to remember the danger, under the prevalence of such a doctrine, to be apprehended from the intentional corruption of evidences of this character. It is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals. . . . [4] The principal argument in favor of this judicial appeal from the enrolled law to the legislative journal . . . was that the existence of this power was necessary to keep the Legislature from overstepping the bounds of the Constitution. The course of reasoning urged was that if the Court cannot look at the facts and examine the legislative action, that department of government can at will set at defiance in the enactment of statutes the restraints of the organic law. This argument, however specious, is not solid. The power thus claimed for the Judiciary would be entirely inefficacious as a controlling force over any intentional exorbitance of the law-making branch of the government. If we may be permitted, for the purpose of illustration, to suppose the Legislature to design the enactment of a law in violation of the principles of the Constitution, a judicial authority to inspect the journals of that body would interpose not the slightest barrier against such transgression; for it is obvious that there could not be the least difficulty in withholding from such journals every fact evincive of such transgression. A journal can be no check on the actions of those who keep

it, when a violation of duty is intentional. . . . [5] Besides, if the journal is to be consulted, on the ground of the necessity of judicial intervention, how is it that the inquiry is to stop at that point? In law, upon ordinary rules, it is plain that a journal is not a record and is therefore open to be either explained or contradicted by parol proof. And yet, is it not evident that the Court could not, upon the plainest grounds, enter upon such an investigation? In the case now in hand, if an offer should be made to prove by the testimony of every member of the Legislature that the journals are false, and that as a matter of fact the enrolled law did receive in its present form the sanction of both houses, no person versed in jurisprudence, it is presumed, would maintain that such evidence would be competent. The Court cannot try issues of fact; nor, with any propriety, could the existence of statutes be made dependent on the result of such investigations. With regard to matters of fact, no judicial unity of opinion could be expected; and the consequence would necessarily be that the conclusion of different Courts as to the legal existence of laws from the same proofs would often be variant, and the same tribunal which to-day declared a statute void might to-morrow be compelled, under the effect of additional evidence, to pronounce in its favor. The notion that Courts could listen upon this subject to parol proof is totally inadmissible; and it therefore unavoidably results that if the journal is to be taken into consideration at all, its effect is uncontrollable; neither its frauds can be exposed nor its errors corrected. And if this be so, and the journal is to limit the inquiry of the judicial power, how obvious the inadequacy, if not futility, of such inquiry! . . . [6] In the frame of our State government the recipients and organs of this threefold power are the Legislature, the Executive and the Judiciary, and they are coördinate, in all things equal and independent. Each within its sphere is the trusted agent of the public. With what propriety, then, is it claimed that the judicial branch can erect itself into the custodian of the good faith of the legislative department? It is to be borne in mind that the point now touched does not relate to the capacity to pronounce a law, which is admitted to have been enacted, void by reason of its unconstitutionality. That is clearly a function of Judicature. But the proposition is, whether, when the Legislature has certified to a mere matter of fact, relating to its own conduct and within its own cognizance, the Courts of the State are at liberty to inquire into or dispute the veracity of that certificate. . . . In my opinion, the power to certify to the public the laws itself has enacted is one of the trusts of the Constitution to the Legislature of the State."

1869, FRAZER, J., in *Evans* v. *Browne*, 30 Ind. 514, 524: "It is important, certainly, that the question whether the enactment of a statute is valid shall be made capable of ready and correct solution, and that it shall not depend upon doubtful or conflicting evidence. When all are bound to know the law, they should have the means of knowledge, and not merely reasons for conjecture, uncertainty, and doubt. . . . It is argued that there is an appeal to these [legislative journals], from the official attestation of the presiding officers and to the archives in the executive department. Would the journals be as satisfactory to the mind? Such journals, it is notorious, are and must be made in haste, in the confusion of business, and are often inaccurate. Their reading is frequently omitted, so that these errors go without correction. They do not show the nature of the bill as introduced, but merely the amendments which have been proposed to it. They are not required to contain anything by which it could be even identified and its passage traced. . . . By what reason or analogy can we sustain ourselves in holding that the journal should override the signatures upon the enrolled act? Surely not because it is in the nature of things more likely to speak the whole truth upon the question in hand. . . . But it is argued that if the authenticated roll is conclusive upon the Courts, then less than a quorum of each House may by the aid of corrupt presiding officers impose laws upon the State in defiance of the inhibition of the Constitution. It must be admitted that the consequence stated would be possible. Public authority and political power must of necessity be confided to officers, who being human may violate the trusts reposed in them. This perhaps cannot be avoided absolutely. But it applies also to all human agencies. It is not

fit that the Judiciary should claim for itself a purity beyond all others; nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise coördinate departments and correct or prevent abuses of their authority. It cannot authenticate a statute; that power does not belong to it; nor can it keep a legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. . . . If it may [look beyond the enrolled act], then for the same reason it may go beyond the journal, when that is impeached; and so the validity of legislation may be made to depend upon the memory of witnesses, and no man can in fact know the law which he is bound to obey. Such consequences would be a large price to pay for immunity from the possible abuse of authority by the high officers who are, as we think, charged with the duty of certifying to the public the fact that a statute has been enacted by competent Houses. Human governments must repose confidence in officers. It may be abused, and there may be no remedy. — Nor is there any great force in the argument which seems to be regarded as of weight by some American Courts, that some important provisions of the Constitution would be a dead letter if inquiry may not be made by the Courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the Constitution, or else it assumes that they will wilfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the Judiciary only will be faithful to its obligations."

1896, ZANE, C. J., in *Ritchie* v. *Richards*, 14 Utah 345, 47 Pac. 670: "Objections may be urged to either means of proof. Minutes and memoranda may not always be correctly transcribed upon the journals. And the minutes and memoranda are sometimes made amid circumstances calculated to confuse and distract the attention, and to divert it from the business in hand. Bills may sometimes be enrolled, and signed by presiding officers, and approved by the governor, that have never been duly passed. Either source is subject to possible error. Courts and lawyers will differ as to which is the surest and best source of information. However, when statutes are published people shape their actions and conduct with respect to them; they incur obligations, acquire rights, and discharge duties in reliance upon them. If such a law, in any instance, should turn out to be void, because some requirement of the Constitution had not been observed in its passage, great injustice would be likely to follow. We must regard the enrolled bill, duly signed, approved, and deposited in the public archives, as a more accessible and convenient source of authentication, and, if referred to, less liable to overturn law, and quite as reliable as the journals of the two Houses. The people ought not to be required to ransack such journals to ascertain whether laws have been duly passed, and they cannot be expected to do so. Nor should lawyers, before advising clients, be required to search such journals. Statutory enactments should not depend nor stand upon such a sandy and uncertain foundation, if a better one can be found. Laws evidenced by the signatures of the presiding officers, and the approval and signature of the governor, and the filing in the public archives, ought not to be overthrown by memoranda on the journals which the Constitution does not require to be made."

1898, IRVINE, C., in *Webster* v. *Hastings*, 56 Nebr. 669, 77 N. W. 127: "We are in this case for the first time confronted with its [*i.e.* the opposite rule's] mischievous results. If the fact of the due enactment of a statute is to be tried on any available evidence, certain results follow, of such character as to bid us pause and re-examine our premises. Being an issue of fact, it is to be tried by the triors of fact, — in many cases, a jury. Being an issue of fact, its determination in one court or in one case will be no bar to its retrial in other courts, or in the same court in an action where the parties are different. One jury or one judge may, on conflicting evidence, find that a statute was passed, and is therefore the law of the State. Another may find that it was not passed, and is therefore inoperative. The law will be one thing for one man, and another thing for another man, depending upon the diligence of his counsel, and the temper, or perhaps prejudice, of a jury. A city will be governed by one law when A sues it,

and by a different law when B sues it. An issue of bonds will be valid after their maturity only when in a suit thereon a jury shall say that the Legislature passed the law authorizing the issue, and then they will be valid only as to the specific bonds in action. I need not amplify the illustrations. Such a state of affairs produces a confusion in our statute law suggesting anarchy." [6]

The arguments against conclusiveness seem to be reducible to three: first, the argument of legal theory, *i.e.* that the enrolment is not a record; second, that of practical policy, *i.e.* that there is danger of error and fraud; and third, that of constitutional necessity, *i.e.* the impossibility of securing in any other way the enforcement of constitutional restrictions on legislative action. — The first argument, on which stress is seldom laid, is met by the principle that there may be conclusive preferences for testimony, irrespective of records (*ante*, § 1348). — The second argument cannot for a moment stand (as the above passages make plain) against the considerations that there is equal or greater danger of error and fraud in the journals, and that the use of the latter plunges the community into the uncertainty of repeated litigation on a question never capable of final settlement; the first of the considerations already outlined (*ante*, § 1348 (2)). applies here in all its force. — The third argument, that of constitutional necessity, is the one most frequently pressed, and the one really responsible for almost all of the decisions against conclusiveness. But it seems, after all, to be but a spectral scruple, created by a false logic:

(1) In the first place, note that it is impossible of consistent application. If, as it is urged, the Judiciary are bound to enforce the constitutional requirements of these readings, a two-thirds vote, and the like, and if therefore an act must be declared no law which in fact was not read three times or voted upon by two thirds, this duty is a duty to determine according to the actual facts of the readings and the votes. Now the journals may not represent the actual facts. That duty cannot allow us to stop with the journals, if it can be shown beyond doubt that the facts were otherwise than therein represented. The duty to uphold a law which in fact was constitutionally voted upon is quite as strong as the duty to repudiate an act unconstitutionally voted upon. The Court will be going as far wrong in repudiating an act based on proper votes falsified in the journal as it will be in upholding an act based on improper votes falsified in the enrolment. This supposed duty, in short, is to see *that the constitutional facts* did exist; and it cannot stop short with the journals. Yet, singularly enough, it is unanimously conceded that an examination into facts as provable by the testimony of members present is not allowable.[7] If to support this it be said that such an inquiry

[6] The opinions by Hoyt, J., in State *v.* Jones, 6 Wash. 452, 34 Pac. 201, and Beasley, C. J., in Pangborn *v.* Young, 32 N. J. L. 29, are easily the best on the subject both for comprehensiveness and keenness of analysis and for clearness of exposition. The latter opinion is the best known; but the former, though rarely cited, would alone render superfluous all the other deliverances on the subject. It is not quoted here, because it does not lend itself to partial quotation; but it ought to be read in its entirety by every one desiring to make an argument on the subject.

[7] Cases cited *supra*, note 3.

would be too uncertain and impracticable, then it is answered that this concedes the supposed constitutional duty not to be inexorable, after all; for if the duty to get at the facts is a real and inevitable one, it must be a duty to get at them at any cost; and if it is merely a duty that is limited by policy and practical convenience, then the argument changes into the second one above, namely, how far it is feasible to push the inquiry with regard to policy and practical convenience; and from this point of view there can be but one answer.

(2) In the second place, the fact that the scruple of constitutional duty is treated thus inconsistently and pushed only up to a certain point suggests that it perhaps is based on some fallacious assumption whose defect is exposed only by carrying it to its logical consequences. Such indeed seems to be the case. It rests on the fallacious notion that every constitutional provision is 'per se' capable of being enforced through the Judiciary and must be safeguarded by the Judiciary because it can be in no other way. Yet there is certainly a large field of constitutional provision which does not come before the Judiciary for enforcement, and may remain unenforced without any possibility or judicial remedy. It is not necessary to invoke in illustration such provisions as a clause requiring the Governor to appoint a certain officer, or the Legislature to pass a law for a certain purpose; here the Constitution may remain unexecuted by the failure of Governor or Legislature to act, and yet the Judiciary cannot safeguard and enforce the constitutional duty.[8] A clearer illustration may be had by imagining the Constitution to require the Executive to appoint an officer or to call out the militia whenever to the best of his belief a certain state of facts exists; suppose he appoints or calls out when in truth he has no such belief; can the Judiciary attempt to enforce the Constitution by inquiring into his belief?[9] Or suppose the Constitution to enjoin on the legislators to pass a law upon a certain subject whenever in their belief certain conditions exist; can the Judiciary declare the law void by inquiring and ascertaining that the Legislature, or its majority, did not have such a belief?[10] Or suppose the Constitution commands the Judiciary to decide a case only after consulting a soothsayer, and in a given case the Judiciary do not consult one; what is to be done? These instances illustrate a general situation in which the judicial function of applying and enforcing the Constitution ceases to operate. That situation exists where the Constitution enjoins duties which affect the motives and judgment of a particular independent department of government, — Legislature, Executive, and Judiciary. Such duties are simply beyond enforcement by any other department if the one charged fails to perform them. The Constitu-

[8] These cases suggest the disputed question as to the Judiciary's use of the mandamus, and are therefore open to dispute.

[9] *Post*, § 2369.

[10] 1887, Day Land & C. Co. v. State, 68 Tex. 526, 4 S. W. 865 (a legislative preamble declaring an emergency to exist, justifying the suspension of the rule requiring three several readings, as permitted by the Constitution, is conclusive; "the Legislature . . . is made the sole judge whether facts exist to authorize the immediate passage of a bill").

tion may provide that no legislator shall take a bribe, but an act would not be treated as void because the majority had been bribed.[11] So far as the Constitution attempts to lay injunctions in matters leading up to and motivating the action of a department, injunctions must be left to the conscience of that department to obey or disobey. Now the act of the Legislature as a whole is for this purpose of the same nature as the vote of a single legislator. The Constitution may expressly enjoin each legislator not to vote until he has carefully thought over the matter of legislation; so, too, it may expressly enjoin the whole Legislature not to act finally until it has three times heard the proposition read aloud. It is for the Legislature alone, in the latter case as well as in the former, to take notice of this injunction; and it is no more the function of the Judiciary in the one case than in the other to try to keep the Legislature to its duty:

1877, *Per* CURIAM, in *Kilgore* v. *Magee*, 85 Pa. 401, 412: "So far as the duty and the consciences of the members of the Legislature are involved, the law [of the Constitution] is mandatory; they are bound by their oaths to obey the constitutional mode of proceeding; . . . [it is] a question of regularity in the conduct of those who have the power to enact a law and to declare it to be such. . . . But when a law has been passed and approved and certified in due form, it is no part of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage."

1886, CAMPBELL, J., in Ex parte *Wren*, 63 Miss. 512, 533: "It is the admitted province of the Courts to judge and declare if an act of the Legislature violates the Constitution. But this duty of the Courts begins with the completed act of the Legislature; it does not antedate it. . . . From necessity the judicial department must judge of the conformity of the legislative acts to the Constitution; but what are legislative acts must be determined by what are authenticated as such according to the Constitution. That instrument contains many provisions as to the passage of bills which are admitted to be addressed to legislators exclusively, and for the observance of which there is confessedly no remedy which Courts can apply. . . . [They are] to be enforced by the oath required of members, and not admitted to the Courts."

The truth is that many have been carried away with the righteous desire to check at any cost the misdoings of Legislatures. They have set such store by the Judiciary for this purpose that they have almost made them a second and higher Legislature. But they aim in the wrong direction. Instead of trusting a faithful Judiciary to check an evil Legislature, they should turn to improve the Legislature. The sensible solution is not to

[11] *Fed.* 1810, Fletcher *v.* Peck, 6 Cr. 87, 123, 130, 144; 1891, U. S. *v.* Des Moines, N. & R. Co., 142 U. S. 510, 544 ("The knowledge and good faith of a Legislature are not open to question; . . . the bill [here] alleges that its [the act's] passage was induced by the [defendant] Navigation Co., by false representations and threats of suits; but that amounts to nothing"); 1893, U. S. *v.* Old Settlers, 148 U. S. 427, 466; *Ark.* 1884, Eakin, J., in Webster *v.* Little Rock, 44 Ark. 536, 548 ("the rule everywhere recognized"); *Ill.* 1910, Murphy *v.* Chicago, Rock Island & P. R. Co., 247 Ill. 614, 93 N. E. 381 (rule applied to a city ordinance, said to have been passed for corrupt motives); *Ind.* 1906, State *v.* Terre Haute & I. R. Co., 166 Ind. 580, 77 N. E. 1077 (corruption); *Pa.* 1849, Jones *v.* Jones, 12 Pa. 350, 357; 1859, Lowrie, C. J., in Sunbury & E. R. Co. *v.* Cooper, 33 Pa. 278, 282 ("May the Judiciary sit in judgment upon a charge that the Legislature have been faithless to their oaths, to the Constitution, and to the public interests? . . . We cannot hesitate a moment on this question").

Compare Story, Commentary on the Constitution, § 1090 (whose arguments apply to the present problem).

patch and mend casual errors by asking the Judiciary to violate legal principle and to do impossibilities with the Constitution; but to represent ourselves with competent, careful, and honest legislators, the work of whose hands on the statute-roll may come to reflect credit upon the name of popular government.

§ 1351. **Same: (3) Certificate of Election.** The mode of dealing with election returns is everywhere regulated by statutes more or less voluminous, and frequently subjected to amendment; and it would be impossible to state here the condition of the law of Evidence in each jurisdiction without a consideration of all the provisions of the general election law. It will be enough to note broadly the considerations recognized as affecting the evidential doctrine of conclusive testimony.

(*a*) The certificate of the returning officer or commission that a *certain person has been elected* is generally held not to be conclusive; and the Court will therefore examine, with the aid of other sources (chiefly, the ballots themselves) into the fact in issue, of which the certificate is the provisional preferred testimony, *i.e.* into the total number and tenor of votes by qualified electors:

1765, WILMOT, J., in *R.* v. *Vice-Chancellor*, 3 Burr. 1647, 1649, 1661 (an order to compel the University proctors to declare who had the majority of votes): "I think it [their 'declaration'] immaterial; for the question depends not upon that, but upon the real majority of legal votes. Their declaration cannot alter or affect that. . . . Even if such declaration had been contrary to the truth of the fair and legal right, the Court must have taken up the matter upon the true and real merits."

1835, ROGERS, J., in *Com.* v. *County Commissioners*, 5 Rawle 75, 79: "It is a startling doctrine that in case of a notorious fraud or a palpable violation of the law a constable could palm an officer on the public by the force of his return, — that, by merely omitting to state the place where the election was held, he could control the election. when it was admitted that it was not in fact held at the place appointed by the act. If this be the law, it is useless to go through the mockery of an election; the constable may return whom he pleases, always taking care that his return is correct upon its face. It would be better to give the appointment to the constable at once, without the useless ceremony of an election."

1855, WHITON, C. J., in *Attorney-General* v. *Barstow*, 4 Wis. 567, 792: "The question is whether the canvass or the election establishes the right of a person to an office. It seems clear that it cannot be the former, because by our Constitution and laws it is espressly provided that the election by the qualified voters shall determine the question. . . . But it has been repeatedly contended in the course of this proceeding that, although the election by the electors determines the right to the office, yet the decision of the persons appointed to canvass the votes cast at the election settles finally and completely the question as to the persons elected, and that therefore no Court can have jurisdiction to inquire into the matter. It will be seen that this view of the question, while it recognizes the principle that the election is the foundation of the right to the office, assumes that the canvassers have authority to decide the matter finally and conclusively. . . . [As to this, we say that] Courts which have the power to entertain proceedings by 'quo warranto' have authority to determine who has this right, without being compelled to limit the proof of the right to the acts of those who by law are appointed to canvass the votes and make statements of them." SMITH, J.:[1] "It is said the Legislature has erected the board of State canvassers

§ 1351. [1] At pp. 781, 786.

into a judicial tribunal, — supreme, final, and unquestionable. This is indeed strange doctrine. . . . Can this board of canvassers be considered a judicial tribunal when they have no power to issue a subpœna for nor to compel the attendance of witnesses, to summon parties before them, to grant a trial by jury? . . . If the decision of one board can oust the supreme judicial tribunal of the State of jurisdiction and paralyze its functions, so can another. The clerk of a board of supervisors and two justices of the peace of his own selection become the Court of the first and last resort in which the most sacred rights of freemen are adjudged and determined without appeal; and that, too, without a chance of being heard, without process, without a jury, without the privilege of appearing before the power which may pronounce upon their rights." [2]

1863, DAVIES, J., in *People* v. *Pease*, 27 N. Y. 45, 55: "What is it that confers title to the office and the legal right to the reception of its emoluments? It surely is the fact that the greatest number of qualified voters have so declared their wishes at an election held pursuant to law. It is not the canvass or estimate of certificate which determines the right. These are only evidences of the right; but the truth may be inquired into and the very right ascertained."

1865, WELCH, J., in *Howard* v. *Shields*, 16 Oh. St. 184, 191: "The question to be decided in an election contest is, Which party received the greatest number of legal votes? If the Court can, as it necessarily must, go behind the abstract, why should it not also go behind the poll-books and tally-sheets? . . . To hold that, when an election has been in fact held, and the majority of the legal voters have in fact and according to the prescribed forms of law cast their ballots for the candidates of their choice, the constitutional rights of the voters and of their candidates can be defeated by a mere misprision or omission of the judges or clerks, would be manifestly unjust and contrary to the plain intent and spirit of our election laws. Such a result should be permitted only in cases of necessity arising from the want of proper means to ascertain with reliable certainty the facts of the case."

Nevertheless, when the chief source of evidence, the ballots themselves, cannot be trusted because they have been tampered with, or when by law they have been destroyed, the condition already pointed out (*ante*, § 1348 (2) a) may exist, namely, the official certificate may become more trustworthy than any verdict that could be reached upon the scanty or suspicious evidence available. In such a situation the certificate, or some subordinate certificate such as the tally-list, may well be taken as conclusive. But this result has seldom been reached by the Courts except under express direction of a statute.[3] Most Courts, however, while not treating the certificate as conclusive, do lay down, upon the same considerations, a rule for measuring the relative value of the evidence, *i.e.* they refuse to decide according to the evidence of the ballots if the ballots have been so tampered with as to be untrustworthy; the chief difference of opinion here occurs merely on the question whether the ballots will be taken as reliable until the tampering is shown, or whether they will be taken as unreliable until the fact of tampering is negatived.[4]

[2] The most forceful exposition of the whole subject is to be found in the masterly arguments of Mr. (afterwards C. J.) Ryan, at pp. 674, 684, and Mr. (afterwards J.) Orton, at p. 703, in the above case.

[3] See the following: 1897, Weakley v. Wolf, 148 Ind. 208, 47 N. E. 466 (tally-sheets and certificates to be conclusive as to unprotested ballots, which are not to be looked at or testified about; the law having provided expressly for their destruction, R. S. 1894, § 6248).

[4] The following are illustrations: *Arizona:* 1898, Oakes v. Finlay, 5 Ariz. 390, 53 Pac. 173 (ballots not controlling where not clearly shown

(*b*) The certificate includes an assertion that the person named was voted for by the *required number of qualified electors*. Conceding that the certificate is not conclusive testimony to the net fact that the person named was elected, may it not at least be taken to be conclusive that the votes were cast by qualified electors?[5] The argument to this effect has occasionally been rested on the idea that the election officers were given a quasi-judicial function in determining to accept the vote of given electors. But the stronger argument, advanced in the more weighty opinions, is that the case presented involves the conditions already noted (*ante*, § 1348 (2)) namely, a dearth of evidence for the proper investigation of the facts at a judicial trial. These arguments are set forth in the following passages:

1863, DENIO, C. J., diss., in *People* v. *Pease*, 27 N. Y. 45, 77: "The real question is who, according to the arrangements which the Constitution and laws have provided for determining that question, received the greatest number of votes, and was elected to the office. If the law has left it as an open question, to be determined like ordinary matters upon which

to have been preserved unaltered); *Arkansas:* 1887, Dixon v. Orr, 49 Ark. 238, 241, 4 S. W. 774 (poll-books and tally-sheets are preferred evidence; if unavailable, other evidence by observers is receivable); 1887, Wheat v. Smith, 50 Ark. 266, 282, 7 S. W. 161 (original and duplicate returns being lost, the election officers' testimony of their contents was received); 1890, Jones v. Glidewell, 53 Ark. 161, 176, 13 S. W. 723 (contents of stolen returns shown); 1891, Merritt v. Hinton, 55 Ark. 12, 16, 17 S. W. 270 (contents of lost or destroyed returns shown); *California:* 1865, People v. Holden, 28 Cal. 123, 131 (the statute providing for ballot-preservation, the tally-list of the election-officers may be overthrown: by the results of an inspection of the ballots themselves; ballots presumed not to have been tampered with); 1884, Coglan v. Beard, 65 Cal. 58, 63, 2 Pac. 737 (the election officers' certificate may be overturned by the ballots, if they are in the same condition as when delivered by the election-judges); 1905, People v. Davidson, 2 Cal. App. 100, 83 Pac. 161; *Illinois:* 1872, Knox Co. v. Davis, 63 Ill. 405, 418 (poll-books and returns having been rejected for fraud, other evidence of the votes cast was received); 1880, Kingery v. Berry, 94 Ill. 515 (ballots to control if not tampered with); 1887, Lawrence Co. v. Schmaulhausen, 123 Ill. 321, 332, 14 N. E. 255; 1897, Dooley v. Van Hohenstein, 170 Ill. 630, 49 N. E. 193 (neither ballot-count in Court nor election judges' return is conclusive; but the former is to be preferred when not under suspicion of tampering); 1900, Jeter v. Headley, 186 Ill. 34, 57 N. W. 784 (ballots control, if not tampered with); 1913, Rottner v. Buchner, 260 Ill. 475, 103 N. E. 454; 1919, Strubinger v. Ownby, 290 Ill. 380, 125 N. E. 363 (ballots control, if not tampered with); *Indiana:* 1904, Strebin v. Lavengood, 163 Ind. 478, 71 N. E. 494 (construing the law as to gravel-road elections); *Kansas:* 1877, Hudson v. Solomon, 19 Kans. 177 (Brewer, J.: "The necessities of the case make it [the certificate] 'prima facie' evidence, but, unless expressly so declared by statute, it is never conclusive"); 1906, Moorhead v. Arnold, 73 Kan. 132, 84 Pac. 742 (good opinion by Burch, J.); *Kentucky:* 1900, Taylor v. Beckham, 108 Ky. 278, 56 S. W. 177 (refusing to review the action of the Legislature, which was here the election board); 1902, Edwards v. Logan, 114 Ky. 212, 70 S. W. 852; 75 S. W. 257 (ballots control, if preserved intact); 1920, Craft v. Davidson, 189 Ky. 378, 224 S. W. 1082; *Massachusetts:* 1897, Attorney-General v. Drohan, 169 Mass. 534, 48 N. E. 279; 1909, Con. v. Edgerton, 200 Mass. 318, 86 N. E. 768; *Nebraska:* 1892, Albert v. Twohig, 35 Nebr. 563, 568, 53 N. W. 582 (ballots control the officers' returns, if properly preserved); *New Hampshire:* 1908, Sheehan v. Manchester, 74 N. H. 445, 68 Atl. 872; *New York:* 1825, People v. Van Slyck, 4 Cow. 297, 323 (Woodworth, J.: "The trial is had upon the right of the party holding office; the certificate is not conclusive; the Court will decide upon an examination of all the facts"); 1909, People v. Wintermute, 194 N. Y. 99, 86 N. E. 818 (voting-machine); *North Dakota:* 1899, Howser v. Pepper, 8 N. D. 484, 79 N. W. 1018; *Oklahoma:* 1913, Moss v. Hunt, 40 Okl. 20, 135 Pac. 282 (election officers' testimony not receivable, until the ballots are shown to be not identifiable or to have been probably tampered with); *Washington:* 1913, Quigley v. Phelps, 74 Wash. 73, 132 Pac. 738; *West Virginia:* 1905, Stafford v. Sheppard, 57 W. Va. 84, 50 S. E. 1016; 1906, Williamson v. Musick, 60 W. Va. 59, 53 S. E. 706; *Wisconsin:* 1899, State v. Luy, 103 Wis. 524, 79 N. W. 776.

[5] See the authorities cited *supra*, note 4; the local statutes are so lengthy and so complicated with other rules of law that it is impracticable to collect the authorities here.

private rights depend, or, which is much the same thing, if the certificate of the canvassers is made only 'prima facie' evidence of the state of the poll, as is argued, the right can only be definitely settled by the verdict of a jury. But the nature of the subject would lead us to conclude, 'a priori', that such could not be the system organized by the Legislature. . . . I am of opinion that the policy of the legal provisions which have been enacted upon this subject is to secure record evidence of the result of the election, which, save in a few exceptional cases to be presently mentioned, is conclusive upon the public and upon all individuals, and against the verity of which no allegation can be admitted. I do not proceed upon one of the grounds relied upon by the plaintiffs' counsel, namely, that the inspectors of elections are made judges of the qualifications of persons claiming to be elected and who may offer to vote. . . . But while I disclaim any reliance upon the alleged judicial character of the inspectors, I am still of opinion that, so far as the value of the vote is concerned, the voter is made a competent and effectual witness respecting his qualifications to vote. Should he swear falsely, he is liable to indictment and punishment for perjury; and the act directs the preservation of so much of the evidence of his having voted as shall be necessary to establish the fact upon the trial of an indictment. . . . The Legislature considered that if one claiming to be a voter came forward, openly and publicly, before the inspectors and the public, who would be likely to be his neighbors and acquaintances, and offered to vote and no one questioned his right, or swore positively to his qualifications if challenged, it would be quite safe to assume that he possessed the requisite qualifications; for the inspectors and the whole community would not be likely to conspire in the interest of illegal voting. The law, therefore, provided that in such a case the vote should be received without other evidence. As to those whose right should be challenged, the legislative will was that the voter should be questioned on oath by the inspectors; that if doubts as to his right should be entertained, these doubts should be stated to him and the law explained, and that then it should be left to his conscience whether to affirm upon his oath, under the peril of temporal punishment for perjury, and of such religious and moral responsibility as might affect his mind, or to abstain from voting. . . . No doubt the determination of the right is left to depend essentially upon the voter's oath, and that there is a possibility that a false or mistaken oath may sometimes be taken. But is the hazard of a perversion of the franchise under these arrangements, so great as to require us to hold, against the plain language of the statute, that a right is implied to reëxamine the question before a jury, in case the right of the prevailing candidate shall afterwards be called in question? I think not."

1868, Campbell, J., in *People* v. *Cicott*, 16 Mich. 283, 294: "The first inquiry, therefore, is whether an election can be defeated as to any candidate by showing him to have received illegal votes. . . . And where the illegality consists in the casting of votes by persons unqualified, unless it is shown for whom they voted, it cannot be allowed to change the result. The question of the power of Courts to inquire into the action of the authorities in receiving or rejecting votes is, therefore, very closely connected with the power of inquiring what persons were voted for by those whose qualifications are denied. . . . The reasons why such an inquiry should be prevented do not necessarily rest on any assumption that the inspectors act throughout judicially, although under our registration system that objection has a force which would not otherwise be so obvious. Neither do they rest in any degree upon the assumption that one rule or another is most likely to induce perjury, as very hastily intimated in People *v.* Ferguson, 8 Cow. 102 [quoted *post*]. But a very strong ground for them is found in the fact that our whole ballot system is based upon the idea that unless inviolable secrecy is preserved concerning every voter's action, there can be no safety against those personal or political influences which destroy individual freedom of choice. . . . Under our statutes there is no general provision which makes the canvass for local officers conclusive in all cases, and, therefore, the rule is recognized that the election usually depends upon the ballots, and not upon the returns. These being written and certain, the result of a recount involves no element of difficulty or ambiguity beyond the risk of mistakes in counting or footing up numbers, which may in some respects be more

likely in examining the ballots of a whole county, than in telling off those of a town or ward, but which involves no great time or serious disadvantage. But the introduction of parol evidence concerning single voters in a considerable district can rarely reach all cases of illegality effectually, and must so multiply the issues as to seriously complicate the inquiry. . . . No system can be devised which will prevent all illegal voting. But it cannot be said our legislation is not as likely to shut it out as any means open to judicial control would be. The registration law forbids the board from recording any name of which they have well-founded doubts, and it is practically impossible for any stranger to succeed in defrauding the law, with the publicity given to all the proceedings. Where a person applies for registration on election day, the inspectors act upon discretion, and are not compelled to admit a vote unless satisfied of its legality. The challengers on both sides, as we all know, canvass every district beforehand, and expect to challenge every one who is not known. While the inspectors cannot reject a registered voter who takes the proper oath, yet the means of previous inquiry, and the imminent risk of detection and punishment, have reduced the dangers of illegal voting within very narrow limits. . . . I am, therefore, of opinion that the election must be determined solely by the ballots received according to law; and that where the election proceedings are not irregular, and the law has been complied with in correcting the lists and preserving the ballots, the means of determining the result must be in the main arithmetical."

The arguments against the conclusiveness of the certificate as to the voter's qualifications are set forth in the following passages:

1827, SAVAGE, C. J., in *People* v. *Ferguson*, 8 Cow. 102 (repudiating the ruling of the trial judge that a voter's testimony to the tenor of an ambiguous ballot was inadmissible because "such a principle would be of the most dangerous tendency, as it would lead to subornation of perjury"): "The elector who put in the ballot is certainly higher evidence as [to] the person designated by it than the opinion of any other. Such elector is competent, unless he is to be excluded from principles of public policy. . . . It is true, if the voter should swear falsely, you probably cannot convict him of perjury. But are we to reject every witness who comes to swear under such circumstances that, if he swears false, he cannot be convicted of perjury? I know of no such rule of evidence."

1863, SELDEN, J., in *People* v. *Pease*, 27 N. Y. 45, 65: "The first ground upon which this position is attempted to be sustained is, that inspectors of elections are judicial officers, whose decisions in receiving the ballots are final and conclusive. . . . Inspectors are required to decide some questions, but they are such as ministerial officers are often required to decide. A county clerk, before recording a deed, must decide whether it is legally proved or acknowledged, but his decision is not conclusive; a sheriff must decide whether the person whom he arrests is the person described in his process, but his decision is not judicial, and he acts at his peril. . . . The inspectors may be required to decide important questions, and their decisions, for the purpose for which they are made, that of determining whether the votes shall be received or rejected, are final; but I do not think they are conclusive with regard to the legality of the votes when the question is presented in an action properly instituted to try the right of persons elected to office, or defeated, by the result of the decisions. They cannot call witnessses — they can receive no oral testimony excepting the oath of the voter, and no documentary evidence, unless the challenge is based on an alleged conviction of crime. . . . Their decision leaves the question open for more deliberate adjudication whether the voter had or had not a right to vote. Great interests often depend upon these questions. They lie at the foundation of the government, and it is of the utmost importance that the means of detecting and exposing fraud and imposition, and correcting error, should be such as to secure the confidence of the people in the ultimate result of elections. . . . The greatest number of lawful votes alone gives the right to an elective office in this State; and as no adjudication can be had to determine the lawful-

ness of votes before they are received, that question must be open to examination by Courts afterwards, or there is no power anywhere in the government to discriminate between those which are lawful and those which are unlawful. Indeed, if the rule contended for by the plaintiffs be adopted, the distinction between lawful and unlawful votes ceases to exist when they reach the ballot-box."

1868, CHRISTIANCY, J., in *People* v. *Cicott*, 16 Mich. 283, 311: "I cannot go to the extent of holding that no inquiry is admissible in any case into the qualification of voters, or the nature of the votes given. Such a rule, I admit, would be easy of application, and as a general rule might not be productive of a great amount of injustice, while the multitude of distinct questions of fact in reference to the great number of voters whose qualification may be contested, is liable to lead to some embarrassment, and sometimes to protracted trials, without a more satisfactory result than would have been attained under a rule which should exclude all such inquiries. Still I cannot avoid the conclusion that, in theory and spirit, our Constitution and our statutes recognize as valid those votes only which are given by electors who possess the constitutional qualifications; that they recognize as valid such elections only as are effected by the votes of a majority of such qualified electors. And though the election boards of inspectors and canvassers, acting only ministerially, are bound in their decisions by the number of votes deposited in accordance with the forms of law regulating their action, it is quite evident that illegal votes may have been admitted by the perjury or other fault of the voters; and that the majority to which the inspectors have been constrained to certify and the canvassers to allow, has been thus wrongfully and illegally secured. And I have not been able to satisfy myself that, in such a case, these boards acting thus ministerially, and often compelled to admit votes which they know to be illegal, were intended to constitute tribunals of last resort for the determination of the rights of parties claiming an election. If this were so, and there were no legal redress, I think there would be much reason to apprehend that elections would degenerate into mere contests of fraud. The person having the greatest number of the votes of legally qualified electors, it seems to me, has a constitutional right to the office, and if no inquiry can be had into the qualification of any voter, here is a constitutional right depending upon the mode of trial unknown to the Constitution, and, as I am strongly inclined to think, opposed to its provisions. I doubt the competency of the Legislature, should they attempt it, which I think they have not, to make the decision of inspectors or canvassers final under our Constitution. The extent of the inquiry into the qualification of voters, and how they have voted, may be limited or qualified by other provisions of the Constitution. . . . He may, if he sees fit, testify in court to the vote which he has given. . . . And whenever the person who has voted admits that he was not constitutionally qualified, or the fact clearly appears, so that it no longer remains a question for the jury, he can claim no protection from this privilege."

§ 1352. **Same: (4) Sundry Official Certificates (Certificates of Jurat, of Acknowledgment of Deed, of Record of Deed, of Ship Registry, of Protest of Commercial Paper, of Chemical Analysis; Legislative Recitals in Statutes).** The suggestion has been made in many other instances that an official certificate should be taken as conclusive testimony to the fact certified; but this suggestion has been almost invariably repudiated by the Courts. Such cases, however, involve the necessity of distinguishing the rules of the substantive law bearing on the issue, and the law of judgments (as already noted in § 1346), and it would be impossible here to deal justly with the various questions. A few instances only may be noted, to illustrate the nature of the problem.

(1) A *recital* of fact in a *statute*, though it may in some conditions be admissible as an official statement (*post*, § 1662), is not conclusive testimony.

The Legislature's recitals are commonly intended merely as explanations of motives and purposes, and not as determinations of controverted fact. They could not, without gross injustice, be made evidentially conclusive, and this is generally conceded.[1] As a contract or an estoppel, or otherwise, the recital may be binding;[2] but that would not be due to a rule of Evidence.

(2) A *jurat* or *certificate of the taking of an oath* is ordinarily not conclusive testimony and may be shown erroneous.[3] But in a given case the law may prescribe, as a condition precedent to certain legal consequences, that certain documentary forms of oath be observed; and then, if those forms are not observed, it is of no effect that the oath or other act was done without those forms; here all will depend on the significance of the statutory requirement.[4]

(3) For the same reason, the conclusiveness of a *deed's certificate of acknowledgment* will depend upon the view taken of the policy of the Legislature in requiring certain conditions for the validity of a transfer under the registra-

§ 1352. [1] *U. S.* 1921, Block *v.* Hirsh, 256 U. S. 135, 41 Sup. 458 (rent-restriction statute, with a recital of the emergency growing out of war-conditions; "A legislative declaration of facts that are material only as the ground for enacting a rule of law — for instance, that the use is a public one — may not be held conclusive by the Courts; but a declaration by a Legislature concerning public conditions that by necessity and duty it must know is entitled at least to great respect"); *Cal.* C. C. P. 1872, § 1903 (recitals in a public statute are conclusive only "for the purpose of carrying it into effect"; in a private statute, only "between parties who claim under its provisions"); *Ga.* 1849, Birdsong *v.* Brooks, 7 Ga. 88, 92 (statutory recital not conclusive; quoted *post*, § 1353); *Ia.* 1883, Koehler *v.* Hill, 60 Ia. 543, 564, 14 N. W. 738, 15 N. W. 609 (preamble of a statute by one Assembly reciting the terms of an act of a former one, not conclusive); *Mont.* Rev. C. 1921, § 10553 (like Cal. C. C. P. § 1903); *Or.* Laws 1920, § 750 (like Cal. C. C. P. § 1903). *Contra:* 1921, Tims *v.* Mack, Mason *v.* Mack, 147 Ark. 112, 227 S. W. 393 (legislative act naming a list of lands subject to betterment assessment, held conclusive).

[2] 1921, U. S. *v.* Lumpkin, D. C. N. D. Ga., 276 Fed. 581 (killing mourning doves, being migratory birds, as forbidden by U. S. St. 1918, July 3, forbidding the killing of birds mentioned in a treaty, which recited: "The high contracting powers declare that the migratory birds . . . shall be as follows: . . . doves"; evidence that mourning doves are not migratory was held immaterial because "it does not lie in the mouth of any citizen to raise that issue"); 1902, Fraser *v.* James, 65 S. C. 78, 43 S. E. 292 (under a constitutional provision permitting the Legislature to establish new counties upon certain conditions, the existence of those conditions as recited in the statute establishing a new county cannot be disputed, apart from fraud or deceit by the Legislature); 1921, State ex rel. Short *v.* Hinkle, 116 Wash. 1, 198 Pac. 535 (constitutionality of a statute whose preamble recited that "the revenues of the State are insufficient to support the State government"; Mackintosh, J.: "Courts will inquire into the fact as to whether such a necessity exists, an inquiry necessarily based upon proof, but proof limited by law to so-called judicial knowledge"). Consult Endlich, Interpretation of Statutes (1888), § 375.

[3] 1700, Thurston *v.* Slatford, 1 Salk. 284 (a clerk's record as to an official not taking the oath; "if there be a mis-entry, it might be supplied and corrected by other evidence, for he should not be concluded by the mistake or negligence of the officer"); 1808, R. *v.* Emden, 9 East 437 (jurat of an affidavit, not conclusive as to the place of the swearing); 1904, Markey *v.* State, 47 Fla. 38, 37 So. 53 (on a charge of perjury); 1903, Nicholson *v.* Snyder, 97 Md. 415, 55 Atl. 484 (notary's certificate of oath to an answer in bankruptcy, not conclusive); 1899, Baumer *v.* French, 8 N. D. 319, 79 N. W. 340 (jurat of an affidavit, not conclusive).

Compare the similar question for *perjury in a deposition* (*ante*, § 1331, n. 1).

[4] *Arkansas:* 1911, St. Louis I. M. & S. R. Co. *v.* Webster, 99 Ark. 265, 137 S. W. 1103, 1199 (St. 1905, § 4, p. 779, May 11, providing that if signature of a deposition is waived, "the officer . . . must so certify", held not to forbid oral testimony to the waiver; Wood, J., diss.); *Illinois:* 1898, Ryder *v.* Alton, 175 Ill. 94, 51 N. E. 821 (assessment commissioner's report sworn to before a notary; commissioner not allowed to deny having sworn); *Maine:* 1823, Hale *v.* Cushing, 2 Greenl. 218, 220 (oath of an assistant assessor; if not recorded, provable orally; the statutory requirement being directory only); 1831, Tripp *v.* Garey, 7 Greenl. 266, *semble* (certificate of a militia commander as to the clerk's appointment is by statute the exclusive evi-

tion system, and also on the judicial or merely 'ex parte' character (*ante*, § 1347) of the proceeding in which the acknowledgment is taken.[5]

(4) So also the theory of the substantive law (*ante*, §§ 1225, 1239) must disclose whether, under the usual *recording* system of land-transfer, the *recorder's registration of a deed* is conclusive as to its contents,[6] or as to the execution of an entry of satisfaction of a mortgage,[7] or as to the time of entry for registration,[8] or as to other facts material to the re-

dence); 1860, Hathaway *v.* Addison, 48 Me. 440, 443 (oath of collector and assessor; same as Hale *v.* Cushing); 1876, Farnsworth Co. *v.* Rand, 65 Me. 19, 21 (oath of a collector before a town clerk; if never recorded, provable orally); *Massachusetts:* 1812, Bassett *v.* Marshall, 9 Mass. 312 (a justice of the peace made no record of an oath to a militia clerk; the parol fact was allowed; "since the magistrate made no record, . . . the evidence admitted was the best that could be required"); 1826, Sherman *v.* Needham, 4 Pick. 66 (certificate of oath of appointment of militia clerk prescribed by statute; "this is not like the case where the regular evidence has been lost and inferior evidence is admitted; the Legislature seem to have prescribed the mode of taking the oath"; and so the prescribed certificate alone would suffice); 1827, Com. *v.* Sherman, 5 Pick. 239 (same); *Nebraska:* 1906, Sebesta *v.* Supreme Court, 77 Nebr. 249, 109 N. W. 166 (foreign notary's certificate of taking of an affidavit, the certificate itself reciting only the fact of signature, not of oath-taking, excluded under statutory wordings; here the ruling however, is perversely technical, because the affidavit itself recited that the signers were "each duly sworn upon their oaths").

For the conclusiveness of the *purging oath* of one charged with contempt, see *post*, § 1815, n. 2.

[5] See the following cases: *Federal:* 1911, Bonvier & Jaeger Coal Land Co. *v.* Sypher, C. C., 186 Fed. 644, 660; *Alabama:* 1910, Orendorff *v.* Suit, 167 Ala. 563, 52 So. 744; *Arkansas:* 1898, Merrill *v.* Sypert, 65 Ark. 51, 44 S. W. 462; *Columbia* (Dist.): 1906, Ford *v.* Ford, 27 D. C. App. 401, 408 (collecting the authorities); *Illinois:* 1867, Hill *v.* Bacon, 43 Ill. 477; 1899, Tuschinski *v.* R. Co., 176 Ill. 420, 52 N. E. 920; 1902, Parlin & Orendorff Co. *v.* Hutson, 198 Ill. 389, 65 N. E. 93; 1904, Walker *v.* Shepard, 210 Ill. 100, 71 N. E. 422 (notary's certificate of acknowledgment is not conclusive as to the grantor's mental capacity); 1909, Kosturska *v.* Bartkiewicz, 241 Ill. 604, 89 N. E. 657; *Iowa:* 1916, Roberts *v.* Roberts, 176 Ia. 610, 156 N. W. 399; *Kansas:* 1909, People's Gas Co. *v.* Fletcher, 81 Kan. 76, 105 Pac. 34; *Massachusetts:* 1899, Ayer *v.* Ahlborn, 174 Mass. 292, 54 N. E. 555; *Minnesota:* 1907, Skajewski *v.* Zantarski, 103 Minn. 27, 114 N. W. 247; *Missouri:* 1921, O'Bannon *v.* McArron, — Mo. —, 236 S. W. 48 (sheriff's deed; clerk's certificate of acknowledgment, held not conclusive); *Oklahoma:* 1915, Dyal *v.* Norton, 47 Okl. 794, 150 Pac. 703; *Philippine Islands:* 1911, Robinson *v.* Villafuerte, 18 P. I. 171, 187; 1918, Alpuerto *v.* Perez Pastor, 38 P. I. 785 (date of execution; effect of Civ. C. §§ 1225, 1227, considered; elaborate opinion by Street, J.); *Washington:* 1916, Chaffee *v.* Hawkins, 89 Wash. 130, 154 Pac. 143; *West Virginia:* 1905, Swiger *v.* Swiger, 58 W. Va. 119, 52 S. E. 23; 1916, South Penn Oil Co. *v.* Blue Creek D. Co., 77 W. Va. 682, 88 S. E. 1029.

Compare § 1347, *ante*, and the cases there cited for a *married woman's* acknowledgment. Certificates of this kind may by statute be judicial acts. Compare Jones on Mortgages, § 538.

For the *measure of proof* required in overturning such a certificate, see *post*, § 2498.

[6] See the following illustrations: 1856, Harvey *v.* Thorpe, 28 Ala. 250, 263; 1885, Gaston *v.* Merriam, 33 Minn. 271, 276, 22 N. W. 614; 1829, Hastings *v.* B. H. T. Co., 9 Pick. Mass. 80, 83; 1836, Ames *v.* Phelps, 18 Pick. Mass. 314.

[7] See the following illustrations: 1854, Fleming *v.* Parry, 24 Pa. 47, 51 (an entry of satisfaction of mortgage on the registry; that it was not intended as a satisfaction of the bond, allowed to be shown; the entry not being a record "to which that maxim applies, the proper application of which is to judicial records"); 1871, Lancaster *v.* Smith, 67 Pa. 427, 433 (deed-recorder's attestation of a discharge of mortgage, not conclusive; the act being that of the party and the recorder being merely the attester of the party's act).

[8] See the following illustrations: *Eng.* 1817, R. *v.* Reed, 3 Price 495, 506, 511; *U. S. Mass.* 1834, Tracy *v.* Jenks, 15 Pick. 465, 468 (register's certificate of time of receiving and recording deed, conclusive as between creditors); *Pa.* 1841, Musser *v.* Hyde, 2 W. & S. 314 (conclusive as to time, in favor of a purchaser for value on the faith of the entry); *Vt.* 1803, Taylor *v.* Holcomb, 2 Tyl. Vt. 344 (town clerk's endorsement of time of record of deed, conclusive; but here allowed to be interpreted by his usage in recording); 1846, Morton *v.* Edwin, 19 Vt. 77, 80 (justice's certificate of time of record of execution, not conclusive);

corded title.[9] Under the *title-registration* (Torrens) system, the registrar's certificate of title is conclusive as an adjudication (*ante*, § 1347).

(5) So also a *notary's certificate of protest*, regarded from the point of view of evidence, is not conclusive.[10] Yet it is possible for the law of negotiable paper to make a certificate in a certain form sufficient or indispensable for fixing liability, — just as it may make the mere mailing of a notice, irrespective of its receipt, sufficient for the same purpose.

In *Louisiana*, *Philippine Islands*, and *Porto Rico*, the Continental principle of proof prevails, viz. that certain official notarial certificates, particularly for the execution of contracts, wills, deeds, etc., are conclusive, except for specified purposes. Transactions and documents ("acts") so drawn up are termed "authentic," which signifies "executed before a public officer and certified by him." The Code Civil of France, the model for the Louisiana Code, provides (§ 1319): "An authentic act makes full proof of the agreement contained in it, against the contracting parties and their assigns."[11]

(6) The certificate of a State *inspector of materials* — the State *chemist*[12] or the State *grain inspector*[13] — has occasionally been declared by a Legislature to be "conclusive evidence" of the facts found by him.

(7) *Sundry other documents*[14] from time to time are presented as having a

1850, Chandler *v.* Spear, 22 id. 388, 401 (clerk's certificate of time of record of tax-sale bill, not conclusive); 1861, Bartlett *v.* Boyd, 34 Vt. 256, 261 (town-clerk's statutory certificate of date of mortgage-record and filing, not conclusive); 1868, Johnson *v.* Burden, 40 Vt. 567, 571 (town-clerk's certificate of date of filing for record, not conclusive); *Va.* 1845, Horsley *v.* Garth, 2 Gratt. 471 (not conclusive as to date of filing and recording).

[9] 1827, Hubbard *v.* Dewey, 2 Ark. 312, 315 (clerk's certificate of fact of record of deed or execution, not conclusive); 1827, Myers *v.* Brownell, 2 Ark. 407, 409 (clerk's certificate of filing of deed with directions to delay recording, not conclusive); 1843, Carpenter *v.* Sawyer, 17 Vt. 121, 123 (clerk's certificate of source of record of notices, not conclusive). On the foregoing points, compare the cases cited *ante*, §§ 1225, 1239.

[10] 1875, Boit *v.* McKenzie, 54 Ala. 112; 1883, Martin *v.* Brown, 75 Ala. 442, 447; 1871, Rogers *v.* Stevenson, 16 Minn. 68; 1843, Wood *v.* Trust Co., 7 How. Miss. 609, 630; 1895, Cook *v.* Bank, 72 Miss. 982, 18 So. 481; 1821, Stewart *v.* Allison, 6 S. & R. Pa. 324.

[11] The application of this principle may be seen in the following case: 1912, Block's Succession, 131 La. 101, 59 So. 29 (notary's certificate of execution of a nuncupative will). Compare the Code sections quoted *ante*, §§ 1179, 1225, 1336, and *post*, § 1680.

[12] *Can. N. Sc.* St. 1918, c. 8, Temperance Act, § 44 (liquor offences; inspector's production of certificate of analyst of liquor "shall be conclusive evidence", if approved by the inspector-in-chief); *Ga.* Rev. C. 1910, § 1790 (State chemist's analysis of fertilizer to be "conclusive evidence of the facts" in an action between vendor and vendee); *N. C.* 1915, Carter *v.* McGill, 168 N. C. 507, 84 S. E. 802 (sale of fertilizer; State chemist's analysis, not required); *Tenn.* Shannon's Code 1916, § 325*a* 73 (State agricultural director's certificate of analysis of commercial fertilizer, etc.; "only said official analysis . . . shall be admissible . . . on the trial of any issue involving the merits", etc.)

But distinguish the question whether the parties can by *contract* make such certificate conclusive (*ante*, § 7*a*), and whether such a statute is *constitutional* (*post*, § 1355).

[13] *Minn.* Gen. St. 1913, § 4591 (State inspector's certificate of grade of hay or straw, to be "conclusive"); § 4594 (similar certificates to be 'prima facie' evidence); § 4458 (State inspector's certificate of grade and dockage of grain; his "decision shall be conclusive" and his certificate "shall be evidence thereof").

For the *constitutionality* of such statutes, see *post*, § 1355.

[14] *Arkansas:* 1920, Sherrin *v.* Coffman, 143 Ark. 8, 219 S. W. 348 (the county surveyor testified on the stand to the correctness of a survey line; the trial Court told the jury that this was " 'prima facie' evidence of the correct line"; but the Supreme Court held that since by statute a certified copy of the county surveyor's record was made 'prima facie' evidence, "it is only a certified copy of the record of the county surveyor which shall be

conclusive testimonial value. But in the few instances when an official certificate, entry, record, or the like is forbidden to be disputed, it is usually not a genuine instance of conclusive testimony, but rather a consequence of some rule of substantive law.

The only plain instances of a rule of conclusive testimony, recognized on common-law principles, seem to be those of the magistrate's report of testimony, the enrolment of a statute, and the return of an election officer (*ante*, §§ 1349–1351).

§ 1353. **Constitutionality of Statutes making Testimony Conclusive; General Principles.** It remains now to consider the constitutionality of statutes purporting to make a rule of "conclusive evidence."

It has been suggested (*ante*, § 1348) that a Court takes an extreme step, amounting to a temporary and partial renunciation of its vital functions, when it foregoes a search among all available sources of evidence and accepts the testimony of a specific pre-determined person as conclusive of a fact to be judicially determined. That a Court may do this, when it believes the result to be a more likely approach to truth than its own investigations could obtain, cannot be doubted. But in such a case the Court acts voluntarily, and exercises its choice. Being charged constitutionally with the exclusive function of determining facts in controversy, it may believe this duty to be best carried out by accepting a certain person's statement (or a certain inference from a circumstance) as the most satisfactor ysource of reliance in reaching that determination. But can such a course be forced upon the Judiciary by another department of government? *Can the Legislature prescribe a rule of conclusive evidence?*

(1) On the one hand, so far as a so-called rule of conclusive evidence is not a rule of Evidence at all, but a rule of *substantive law*, it is clear that the Legislature is not infringing upon the prerogative of the Judiciary to determine the truth of a fact in issue. For example, a rule that an indorser's

admitted as 'prima facie' evidence"; it is discouraging to find that any such mechanical rule could be attributed to the Legislature; the decision is due to that false notion of legislative rules mentioned *post*, § 1680); *California:* 1877, People *v.* Hagar, 52 Cal. 171, 187 (certified copy of petition on file; whether certificate of correctness of copy can be attached, not decided); *Georgia:* 1854, Peterson *v.* Taylor, 15 Ga. 483 (certificate by a clerk, as to papers filed; not conclusive); *Iowa:* 1887, Mussel *v.* Tama Co., 73 Ia. 101, 34 N. W. 762 (township trustees' certificate of pauper supplies furnished, conclusive under statute, except for fraud); *Kentucky:* Gen. Stats. 1899, c. 81, § 17, Stats. 1915, § 3760 ("Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which by law he is required to make a statement in writing, either in the form of a certificate, return, or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer"); 1906, Husbands *v.* Polivick, 128 Ky. 652, 96 S. W. 825 (statute applied as a rule of presumption to a tax-collector's return on a tax sale); *Massachusetts:* 1903, O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788 (magistrate's certificate of taking of deposition, not conclusive); *Montana:* Rev. C. 1921, § 2289 (assessor's poll-tax receipt "is the only evidence of payment"); *Washington:* 1922, State *v.* Gibbons, — Wash. —, 203 Pac. 390 (unlawful possession of liquor; certified copy of record of former conviction, *semble*, not conclusive under St. 1917, c. 19, § 15).

Compare the additional instances cited and distinguished, *ante*, §§ 1346, 1347, *post*, § 2453.

Whether the *officer himself* is forbidden to impeach *his own certificate*, though it is otherwise not conclusive, is a different question (*ante*, § 530).

liability can be fixed by showing a notary's certificate of protest is not necessarily a rule making the certificate conclusive evidence of demand and notice, but a rule of the law of Negotiable Instruments; because the law might be that no demand or notice at all was necessary for fixing an indorser's liability; and thus, to require a notary's certificate is merely to require a formal official instrument irrespective of its truth, *i.e.* something half-way between requiring actual notice and requiring no notice at all. Again, to make a rule that as between successive grantees the recorder's certificate of the time of filing deeds shall be conclusive, is not to make a rule of Evidence, but merely to provide in the law of land-transfer that a deed found to be recorded as of a prior date shall take effect against a deed found to be recorded as of a subsequent date, irrespective of the actual time of entry and record. In such cases, and countless others, the use of the term " conclusive evidence " cannot conceal the true nature of the rule as a rule of substantive law making a certain right or obligation depend upon the existence of a certain official writing irrespective of its truth.[1] Such statutes do not in any way infringe the prerogative of the Judiciary to satisfy itself by inquiries of fact, because they make no rule of Evidence at all.

It is true that such statutes may in some other aspect be invalid because of *express constitutional limitations* of legislative power as to some substantive right. For example, in either of the above instances, if the statute was enacted to govern notes and deeds made prior to its passage, it might violate the constitutional prohibition against laws impairing the obligation of contracts or taking property without due process of law. Again, a law providing that an assessor's or collector's deed of land sold for taxes shall be conclusive evidence that all due proceedings have been taken in the forfeiture may be obnoxious to the prohibition against taking property without due process; for the law in effect provides that the property may be taken although in fact due proceedings have not been had, — in short, while purporting to make a rule of Evidence, it really makes a rule of Property-Law, by which certain acts are declared unnecessary which the Constitution has declared necessary. In such ways, various constitutional provisions may be violated; but the Legislative attempt is invalid, not because it deals with a rule of Evidence, but because it deals with a constitutional rule of substantive law.

(2) In order, then, to contrive a real test of the Legislature's power to make a rule of *conclusive evidence* in the genuine sense, there must be given a case in which fact A, said to be conclusively proved by fact B, is and remains the real and unchangeable fact in issue, to which fact B can never bear anything more than an evidential relation. Such a case, it will be seen, can hardly occur except when fact A is *constitutionally preserved* as the ultimate fact on which the right or obligation depends; because, were there no such constitutional sanction, all instances of such laws (except where the statute

§ 1353. [1] Compare § 1346, *ante*.

clearly showed the contrary legislative intention) could be (and usually should be) supportable as virtually substituting fact B for fact A in the substantive law (as, where a notary's certificate is substituted for actual notice); and thus the statute resolves itself into a change of a rule of substantive law, and not the making of a rule of conclusive evidence.

Such instances, then, genuinely presenting a rule open only to interpretation as a rule of conclusive evidence, must be extremely rare. One instance, however, would seem to be a statute making an election certificate conclusive evidence of a candidate's election. Now constitutionally the votes actually cast are the effective facts of an election; the certificate of an official can never be anything more than evidence in relation to the facts of the votes cast. This, and a few other cases, present fairly the question whether the Legislature can constitutionally oblige the Judiciary to forego its own investigation and accept some person's testimony as determining the fact in issue.

To this question the answer can hardly be doubtful. It is one thing for the Judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the Judiciary to be forbidden altogether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of conclusive evidence, compulsory upon the Judiciary, is to attempt an infringement upon their exclusive province.[2]

§ 1354. **Same: (1) Statutes affecting Substantive Liability in Tort, Contract, or Crime.** It remains to distinguish these two principles as they have been judicially invoked for various legislative provisions.

(1) A statute which in reality deals with some rule of *substantive* law cannot be obnoxious to the present principle, — although it may be obnoxious to some constitutional proviso which protects the rule of substantive law in question.

Thus, a statute which makes more stringent the rule of *responsibility for a tort*, by substituting some other test than negligence, may be constitutional.[1]

[2] 1849, Nisbet, J., in Birdsong *v.* Brooks, 7 Ga. 88, 92 (holding a statutory recital not conclusive; "The Legislature has no power to legislate the truth of facts. Whether facts upon which rights depend are true or false is an inquiry for the Courts to make, under legal forms. It belongs to the judicial department of the government").

§ 1354. [1] *Federal:* 1896, St. Louis & S. F. R. Co. *v.* Mathews, 165 U. S. 1, 22, 17 Sup. 243 (statute making railroad companies liable absolutely, without regard to negligence, for fire communicated by its engines, held valid; an instruction declaring that the setting of the fire was only 'prima facie' evidence of negligence, held properly refused); 1897, Jones *v.* Brim, 165 U. S. 180, 17 Sup. 282 (statute making one who drives a herd of cattle over a highway along a hillside liable 'ipso facto' for damage by rocks rolled down or banks destroyed, held constitutional); *Arkansas:* 1878, Little Rock & S. F. R. Co. *v.* Payne, 33 Ark. 816 (*contra* to R. Co. *v.* Mathews, *supra*, on the ground that negligence is an essential of liability, and that the Legislature cannot "divest rights by prescribing to the Courts what should be conclusive

So also a statute which enlarges the rules of *contract* by creating an *estoppel* may be constitutional, — as when the terms of a bill of lading [2] or of a policy of insurance [3] or other contract [4] are declared to be "conclusive" in certain respects.

On the other hand, a statute making a *tax-collector's deed of property* "conclusive evidence" of the validity of the tax-sale is ineffective, so far as it virtually sanctions the divestiture of property whose owner is not in default; as is usually said, the essential facts which are constitutionally required for a "taking by due process of law" cannot be abolished by the Legislature, although the unessential details are entirely within the control of the Legislature to suspend or to abolish, conditionally or absolutely.[5] So, too, any

evidence"; this is an ignoring of the history of the law of negligence); *Michigan:* 1918, Hatter *v.* Dodge Bros., 202 Mich. 97, 167 N. W. 935 (St. 1915, No. 302, § 29, Comp. L. 1915, § 4825, that when a family member is driving a motor vehicle "it shall be conclusively presumed that said motor vehicle is being driven by the consent or with the knowledge of such owner", held a provision of substantive law; approving the above passage in § 1353); 1920, Hawkins *v.* Ermatinger, 211 Mich. 578, 179 N. W. 251 (similar); *Ohio:* 1899, Baltimore & O. R. Co. *v.* Kreager, 61 Oh. 312, 56 N. E. 203 (statute making a railroad company absolutely liable, regardless of negligence, for loss by "fire originating upon the land belonging to such railroad company, caused by operating such railroad", held valid).

There is a bulky literature on the subject of *liability without fault*. No attempt is made here to collect the authorities on its constitutional aspect.

[2] *Accord:* 1889, Hazard *v.* Illinois C. R. Co., 67 Miss. 32, 7 So. 280; 1904, Yazoo & M. V. R. Co. *v.* Bent, 94 Miss. 681, 47 So. 805 (quoting this section). *Contra:* 1917, Shellabarger Elev. Co. *v.* Illinois Cent. R. Co., 278 Ill. 333, 116 N. E. 170 (loss of grain shipped; St. 1871, Apr. 25, Hurd's Rev. St. 1916, c. 114, § 118, making the shipper's sworn statement of amount conclusive, held invalid; two judges diss.; authorities collected); 1902, Missouri K. & T. R. Co. *v.* Simonson, 64 Kan. 802, 68 Pac. 653 (statute making a bill of lading "conclusive proof of the amount, etc. so received by such railway company", held unconstitutional, on the ground that such statutes precluding judicial inquiry are an "invasion of the judicial province and a denial of due process of law"; Doster, C. J., and Smith and Ellis, JJ., diss., on the ground that, though statutes which "bind interested parties by the adversary action of others" may be invalid, the above statute merely applied the doctrine of estoppel to the party's own act).

[3] 1898, Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 565, 19 Sup. 281 (Missouri, valued-policy statute, held valid); 1896, Daggs *v.* Ins. Co., 136 Mo. 382, 38 S. W. 85 (statute forbidding an insurer against fire "to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured thereon", held valid).

Legislators frequently seem to believe that something is gained by labelling such statutes as rules of evidence; *e.g.*, Fla. St. 1897, c. 4554 (in actions on fire insurance policies, "the insurer shall not be permitted to deny that the property insured" was of the value insured; this was entitled "an act prescribing a rule of evidence").

[4] 1914, Street *v.* Farmers' Elev. Co., 34 S. D. 523, 149 N. W. 429 (S. D. P. C. § 495 declared a grain elevator receipt to be "conclusive evidence", as against the issuing bailee, that the grain was owned by the bailor, and that he is entitled to receive the grain promised to be delivered; held not to amount to a rule of evidence, but to an "enlargement of the rules of contract by creating an estoppel", and held constitutional).

[5] *Federal:* 1876, Callanan *v.* Hurley, 93 U. S. 387, 392 (statute making tax-deed conclusive as to certain parts of the proceeding, held valid); *Alabama:* 1872, Stoudenmire *v.* Brown, 48 Ala. 699, 709; 1876, Doe *v.* Minge, 50 Ala. 123; *Arkansas:* 1877, Walker, J., in Cairo & F. R. Co. *v.* Parks, 32 Ark. 131, 145; *Iowa:* 1864, Dillon, J., in Allen *v.* Armstrong, 16 Ia. 508, 513 (an element "so indispensable that without its performance no tax can be raised", cannot be abolished by statute); 1870, Cole, C. J., in McCready *v.* Sexton, 29 Ia. 356, 388 ("This power of the Legislature extends only to those things over which it is supreme; as to the essential and jurisdictional facts, so to speak, which the Legislature cannot annul or change, it cannot excuse the non-performance of them, and of course *cannot make the doing of any other thing a substitute for them* or conclusive evidence of their being done. To restate the proposition succinctly: Whatever the Legislature is at liberty to authorize or not, it may waive or estop denial; but not so as to that which it must require"); *Kentucky:*

other statute dealing with *property rights* or *personal rights* is to be tested by the question whether any legislative alteration of those rights is constitutionally forbidden, either by the general rule against 'ex post facto' laws (*ante*, § 7) or by some particular provision.[6]

In its control over the substantive *criminal law*, the Legislature seems to be unlimited except by the provisions against 'ex post facto' laws, against cruel punishments, and against deprivation of life and liberty without due process;[7] it may therefore, within those limits, create and define such crimes as it thinks best.[8] The unwritten constitutional principle, therefore, which

1906, Husbands *v.* Polivick, — Ky. —, 96 S. W. 826 (tax-deed is presumptive only); *Louisiana:* 1887, Re Lake, 40 La. An. 142, 3 So. 479 ("The exercise of legislative power has never been sanctioned so as to make such deeds conclusive as to essential prerequisites"); *Wisconsin:* 1863, Smith *v.* Cleveland, 17 Wis. 556, 566 (statute declaring certain irregularities in tax-sale proceedings not to invalidate the sale, held valid; "the Legislature might have fixed the time and provided for a sale without notice or advertisement; they may surely, by proper legislation in advance, guard against errors and cure mistakes when notice is required").

Compare the cases cited *post*, § 1356.

[6] *Fed.* 1854, Webb *v.* Den, 17 How. 576, 578 (statute making a conclusive presumption, after 20 years' registration of a deed, that it was properly acknowledged, etc., held valid); *Cal.* 1880, People *v.* Boggs, 56 Cal. 648 (statute declaring official surveyor's county lines conclusive is constitutional, for the Legislature has merely sanctioned beforehand such lines as he runs); 1905, Calkins *v.* Howard, 2 Cal. App. 233, 83 Pac. 280 (statute declaring that a sale in bulk without notice is "conclusively presumed to be fraudulent and void" as against creditors, enforced as valid); *Ind.* 1920, Collwell *v.* Bedford S. & C. Co., — Ind. App. —, 126 N. E. 439 (rule of "conclusive presumption" of dependency, under St. 1919, p. 165, held a rule of substantive law); *Fla.* 1922, Atlantic Coast Line R. Co. *v.* Gainesville, 83 Fla. —, 90 So. 118 (St. 1911, June 6, declaring certain railroad property to be "held and treated as property fronting or abutting upon said street" for purposes of taxation, held void; the Legislature cannot "declare a thing to be so that in fact is not so"); *Minn.* 1888, Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513 (statute giving a building lien, and making the landowner's failure to forbid by law conclusive evidence of consent, held invalid as "a destruction of vested rights without due process of law"); *N. Y.* 1860, Cooper's Case, 22 N. Y. 67, 90 (statute making the grantee of the diploma of a certain law school entitled to admission to the bar, held valid, because the Legislature possessed the power of regulating the terms of admission); *N. Car.* 1907, Re Applicants for License, 143 N. C. 1, 55 S. E. 635 (a statute providing that applicants for the bar who file a certificate of good character signed by two attorneys, and satisfy the Court as to their legal knowledge shall be admitted, makes the certificate conclusive as to character, and is valid; the above distinction is recognized: "if a Legislature, having prescribed certain qualifications, should undertake to direct whether an applicant did or did not possess them, this might be an unconstitutional exercise of judicial power; but not so here", for the Legislature prescribed in effect the possession of such a certificate as a qualification; compare on this case Mr. Lee's article, cited *post*, § 1355); *R. I.* 1917, Glanta *v.* Gardiner, 40 R. I. 297, 100 Atl. 913 (bulk-sales law);

The following case was therefore decided upon the wrong theory: 1862, Goshen *v.* Richmond, 4 All. Mass. 458 (statute declaring that the validity of a marriage shall not be questioned on certain grounds in a collateral proceeding, held valid as a mere change in the admissibility of evidence).

[7] *Ga.* 1907, Powell, J., in Mulkey *v.* State, 1 Ga. App. 521, 57 S. E. 1022 (cited more fully *post*, § 1356); *N. Y.* 1824, Sandford, C., in Barker *v.* People, 3 Cow. 686, 705 ("Though no crime is defined in the Constitution, and no species of punishment is specially forbidden to the Legislature, yet there are numerous regulations of the Constitution which must operate as restrictions upon this general power"); 1856, A. S. Johnson, J., in Wynehamer *v.* People, 13 N. Y. 378, 420 ("There may, in respect to offences attempted to be created by legislation, a question arise, capable of being considered by Courts of justice, whether the thing forbidden is an essential part of either of those secured private rights [of life, liberty, or property] so essential that without it the right cannot exist at all").

[8] 1892, State *v.* Kingsley, 108 Mo. 135, 18 S. W. 994 (a statute declaring that "every person who shall obtain board or lodging . . . by means of any trick or deception . . . shall be held to have obtained the same with the intent to cheat . . . and shall be guilty of a misdemeanor", held valid, because "it is morally wrong to obtain board by means of a trick . . . and hence it is competent for the law-making power to declare it a crime").

some judges have recognized,[9] that the Legislature cannot declare to be a crime that which is in judicial opinion not so, is no more valid for criminal law than for other departments.

§ 1355. **Same: (2) Statutes making Official Reports, Certificates, etc., Conclusive; Finality of Findings of Administrative Officials, Boards, etc.** (2) Turning now to look for statutes which genuinely deal with a *rule of evidence*, it seems to be generally conceded, on the grounds already noticed (*ante*, § 1353, par. 2), that a legislative attempt to interfere with judicial powers by forbidding investigation of facts, through declaring certain testimony or other evidential data to be conclusive, is invalid.

The genuine instances of this sort, indeed, are rare; most statutes purporting to do this are really attempts to change the substantive law under the guise of a rule of Evidence, and therefore may or may not be valid, according to their interpretation, in the light of the considerations already noted (*ante*, § 1354). In the present class, however, would belong statutes which, while plainly recognizing one fact as still dominant in the substantive law, and not desiring to change it, should make another fact conclusive proof of it. Such a statute is almost inconceivable; but in the abstract it has often been declared futile, in the judicial utterances.[1]

[9] *Ala.* 1913, Ex parte Woodward, 181 Ala. 97, 61 So. 295; *N. Car.* 1887, State *v.* Divine, 98 N. C. 778, 4 S. E. 477 (statute making the president, etc., of a railroad criminally liable for the killing or injury of stock by the railroad, regardless of the person's actual share in the causing of the injury, held invalid; the opinion confuses this and the 'prima facie' question); *Oh.* 1908, Hammond *v.* State, 78 Oh. 15, 84 N. E. 416 (Rev. St. § 4427-6, Gen. C. Annot. 1921, § 6399, providing that, on a charge of being engaged in a trust-combination to control trade, "the character of the trust or combination alleged may be established by proof of its general reputation as such" is unconstitutional, as being in effect a "rule of conclusive evidence . . . that shall be binding"); *R. I.* 1882, State *v.* Kartz, 13 R. I. 528 (statute making it a crime to "keep a place in which it is reputed that intoxicating liquors" are kept for illegal sale, held invalid; "to introduce into the law the principle that a person can be punished for what other people say about him is to render all the constitutional safeguards of life, liberty, and property unavailing for his protection", in particular, the protection of "due process of law").

Compare here some of the judicial utterances quoted *post*, § 1356, which tend to the same view.

In the following case the point was not decided: 1880, State *v.* Thomas, 47 Conn. 546 (statute making it an offence to keep a place "where it is reputed that intoxicating liquors" are illegally sold, held constitutional; but the opinion evades the real issue by holding that the reputation only when "unexplained and uncontradicted" is to be "conclusive evidence"; the argument of Mr. Curtis for the defendant is ably put). Compare the cases and statutes merely *admitting reputation* as evidence (*post*, §§ 1620–1626).

§ 1355. [1] Besides the rulings of § 1354, which in effect assume this, are the following: *Illinois:* 1854, Pittsfield & F. P. R. Co. *v.* Harrison, 16 Ill. 81 ("The Legislature may not, indeed, deprive the party of all means of establishing the facts upon which his rights depend"); *Indiana:* 1862, Wantlan *v.* White, 19 Ind. 470 (Federal statute that "the oath of enlistment taken by a recruit shall be conclusive as to his age", held not to prevent a minor's guardian, demanding his release, from showing the fact); 1890, Mitchell, J., in Voght *v.* State, 124 Ind. 358, 24 N. E. 680; *Iowa:* 1864, Dillon, J., in Allen *v.* Armstrong, 16 Ia. 508, 513 ("If the Legislature should pass an act declaring that merely being found in the possession of property which had been stolen should be conclusive evidence of guilt, Courts would be very apt to hold that this was an assumption and exercise of a power which it did not possess"); *Minnesota:* 1899, Vega S. S. Co. *v.* Consol. Elev. Co., 75 Minn. 309, 77 N. W. 973 (Gen. St. 1894, § 7675, declaring the certificate of weight of grain, etc., by the State weighmaster, "shall be conclusive upon all parties", held unconstitutional, as "an arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his right"; the plaintiff was here allowed to prove the actual amount of grain delivered, in opposition to the certificate's figures); *New York:* 1876, Howard *v.* Moot, 64 N. Y. 262, 269 ("It may

Conceding that conclusiveness cannot constitutionally be attributed by the Legislature to any testimonial evidence as such (*ante*, § 1353), there still remain two apparent but not real exceptions, in which conclusiveness (though not in the testimonial sense) can lawfully be created under some circumstances; one is the finding of an *inferior court*, and the other is the finding of an *executive officer* within his province of action:

(*a*) So far as constitutionally the organization of courts and the prohibition of appeals is within the legislative powers of regulation, it is obvious (*ante*, § 1347) that a statute which merely regulates the *right of appeal* from inferior judicial officers is valid.[2]

(*b*) So far as the Executive may constitutionally render *decisions upon issues of fact*, independent of the Judiciary organization, the determinations of the Executive lie without the sphere of the Judiciary; therefore, those determinations have finality, and must be given faith and acceptance, without reopening the issue, when they come before a court incidentally to a controversy, and without obstructing them by independent process directed to annul them.

This independent jurisdiction the Executive possesses inherently in a certain limited field, involving facts which concern directly the performance of its own duties. But the Legislature from time to time, in the vast and complex development of modern government, enlarges the Executive fields by creating new administrative offices and committing to them new subjects of civic life, often involving interests of the individual citizen in his relation to the State. In this field also (as in the orthodox judicial field) issues of fact are presented for official determination. Thus the question arises,

be conceded, for all the purposes of this appeal, that a law that should make evidence conclusive, which was not so necessarily in and of itself, and thus preclude the adverse party from showing the truth, would be void, as indirectly working a confiscation of property or a destruction of vested rights"); *Pennsylvania:* 1788, Shippen, P., in Pleasants *v.* Meng, 1 Dall. 380, 383 ("The nature of evidence necessarily implies an adverse right to controvert and repel"); *Vermont:* 1909, Ex parte Allen, 82 Vt. 365, 73 Atl. 1078 (physician's sworn certificate of insanity, which was required by statute before committal, held not conclusive under the statute; and a statute which made it conclusive would be void).

The following case would raise the question: 1903, Snyder *v.* Bonbright, C. C., 123 Fed. 817 (by a statute of 1885, making the owner of a building liable for injuries caused through lack of a satisfactory fire escape, the certificate of an inspector that the fire escape is satisfactory was conclusive; the question of constitutionality was not here raised).

See an able and learned article by Mr. Blewett Lee, 13 Harv. Law Rev. 233, 252 ("Constitutional Power of the Courts over Admission to the Bar").

[2] *Federal*, 1871, Chase, C. J., in U. S. *v.* Klein, 13 Wall. 128, 145 (here a statute making a pardon conclusive evidence of certain facts before the Court of Claims was held to be inconsistent with the right of appeal as otherwise guaranteed; Miller and Bradley, JJ., diss.); *Ind.* 1877, Hunter *v.* Turnpike Co., 56 Ind. 213, 224 (the report of an inspector of a road as to the fact of completion was made conclusive by statute; held valid; but here a privilege of appeal from the report to the Court existed); *N. Y.* 1854, Van Alstyne *v.* Erwine, 11 N. Y. 331, 341 (statute making the Court's appointment, on notice, of trustees for the property of an absconding debtor "conclusive evidence that the debtor therein named was a concealed, etc., debtor", applied); *Pa.* 1788, Pleasants *v.* Meng, 1 Dall. 380 (statute making a bankrupt's certificate of bankruptcy, etc., by the commissioners "sufficient evidence"; held here not to signify "conclusive evidence", *i.e.* without appeal to examine the proceedings of the commissioners).

whether the Legislature may constitutionally *commit such issues to the administrative officials for final determination without review by the Judiciary.*

This question is not one of "conclusiveness" in the testimonial sense, but rather one of the finality of another functionary's determination, — analogous to the finality of another court's judgment (*ante*, § 1347). Whether such administrative proceedings should have to observe the usual rules of judicial evidence in jury trials is an incidental inquiry already considered (*ante*, § 4 *a*). In the present aspect, the only constitutional question can be how far their proceedings must involve the elements of due process of law; and the Judiciary is entitled to review their findings for the purpose of ascertaining whether those requirements have been complied with. Any attempted bestowal of finality by the Legislature upon such Executive determinations would of course be ineffective. It is in this aspect that the "conclusiveness" of such findings, under various statutory grants of power, has been judicially passed upon.

These administrative officers and commissions are numerous, though a purporting conclusiveness for findings of fact has been attempted by the Legislature for only a small number of them. These include Federal and State commissions having supervision of *railroads*, *public utilities*, *corporations*, *trade*, and *industrial accidents*;[3] Federal officials having supervision of *immigration*;[4] and Federal officials of the *treasury*,[5] the *postal service*,[6] and the *land-office*.[7]

[3] The following are merely a few of the earlier examples: *Federal:* 1889, Chicago M. & S. P. R. Co. *v.* Minnesota, 134 U. S. 418, 452, 461, 464, 10 Sup. 462, 702 (statute making railroad commissioners' schedule of rates conclusive as to reasonableness, held invalid, because the question of reasonableness "is eminently a question for judicial investigation, requiring due process of law for its determination"; Bradley, J., and two others, diss., because the question, being a legislative one, could be delegated for investigation to the commission, "and such a body, though not a court, is a proper tribunal for the duties imposed upon it; . . . due process of law does not always require a court; it merely requires such tribunals and proceedings as are proper to the subject in hand"); *Minn.* 1888, State *v.* Chicago, M. & S. P. R. Co., 38 Minn. 281, 37 N. W. 782 (statute making railroad commissioners' schedule of rates conclusive as to reasonableness, held valid, on the ground that a common carrier's charges were within legislative control and hence no judicial ascertainment was necessary).

Here again there is a current notion that the language of the law of evidence can be used to evade the issue: Ark. St. 1901, Feb. 27, No. 24 ("An act to define a rule of evidence in certain cases: In all actions between private parties and railroad companies brought under the law establishing a railroad commission . . . [the commission's rates prescribed] shall be held, deemed, and accepted to be reasonable, fair, and just, and in such respects shall not be controverted therein").

[4] The following include only the most notable in a long line of rulings. The general result shows a shifting of position; in the earlier rulings little more is required of the administrative proceedings than the recording of a finding; then specifically the opportunity of a hearing is made essential; and later the elements of a fair hearing are more exactly scrutinized and required; distinctions are made as to requirements for different kinds of facts in issue; but the principle involved is that of due process of law, and not of conclusive evidence in the testimonial sense; so far as specific rules of Evidence are required to be followed, this has been noted *ante*, § 4 *c*; 1891, Nishimura Ekiu *v.* U. S., 142 U. S. 651, 660, 12 Sup. 336 (a Federal statute making conclusive the decision of an immigration inspector that an alien immigrant is within the classes prohibited from entering, held valid; Brewer, J., diss.); 1892, Fong Yue Ting *v.* U. S., 149 U. S. 698, 713, 732, 742, 754, 761, 13 Sup. 1016 (preceding case approved and applied to a deportation statute; "the power of Congress to expel, like the power to exclude aliens, . . . may be exercised entirely through executive officers"; the prior cases marking the boundary between executive and judicial matters are here collected; Brewer and Field, JJ., and Fuller, C. J., diss.); 1895, Lem Moon Sing *v.* U. S., 158

Whether the *specific rules of Evidence* for jury trials are applicable in hearings before these administrative officers is of course a different question (*ante*, § 4 *a*).

§ 1356. **Same: (3) Statutes declaring Rebuttable Presumptions or 'Prima Facie' Evidence.** (3) There remains a question which has no concern with the question of conclusive evidence, but has often been assimilated to it, and

U. S. 538, 15 Sup. 967 (proceeding cases approved); 1901, Fok Yung Yo *v.* U. S., 185 U. S. 296, 22 Sup. 686; 1901, Lee Gon Yung *v.* U. S., ib. 306, 22 Sup. 690; 1901, Chin Bak Kan *v.* U. S., 186 U. S. 193, 22 Sup. 891; 1903, Kaoru Yamataya *v.* Fisher, 189 U. S. 86, 23 Sup. 611 (Nishimura Ekiu's case followed; but the statute implies at least "an opportunity to be heard" before the executive department "upon the questions involving his right to be and to remain in the U. S."); 1902, Japanese Immigrant Case, 189 U. S. 86, 99, 23 Sup. 611 (the arbitrariness of an executive officer's action under such a statute will be reviewed); 1903, Gonzales *v.* Williams, 192 U. S. 1, 15, 24 Sup. 177 (passing on St. 1903, Mar. 3, c. 1012, 32 Stats. 1913); 1903, Re Lea, 126 Fed. 234, D. C. (under the immigration laws, a claim of citizenship is a judiciable question); 1903, U. S. *v.* Hung Chang, 126 Fed. 400, 405, D. C., *semble* (the deportation of a native-born citizen is unconstitutional; hence the issue whether a particular person to be deported is native-born is a judiciable one); 1904, Hopkins *v.* Fachant, 130 Fed. 839, 65 C. C. A. 1 (St. 1903, Mar. 3); 1904, Tom Hong *v.* U. S., 193 U. S. 517, 24 Sup. 517; 1904, U. S. *v.* Sing Tuck, 194 U. S. 161, 24 Sup. 621, overruling Sing Tuck *v.* U. S., 128 Fed. 592, C. C. A. (U. S. St. 1894, Aug. 18, c. 301, § 1, makes the decision of the Secretary of Commerce and Labor conclusive, after a due hearing, upon the fact of non-citizenship of a person of Chinese parentage claiming entrance as a native-born citizen; constitutionality of the statute, not decided); 1905, U. S. *v.* Ju Toy, 198 U. S. 253, 25 Sup. 645 (constitutionality of the preceding statute affirmed; "with regard to him [a returning citizen], due process of law does not require a judicial trial; . . . the decision may be entrusted to an executive officer"; three judges dissenting; Brewer, J.: "Such a decision is to my mind appalling; . . . an obnoxious class may be put beyond the protection of the Constitution by ministerial officers of the State proceeding in strict accord with exactly similar rules"); 1906, Moy Suey *v.* U. S., 147 Fed. 697, C. C. A. ("Nativity gives citizenship, and is a right under the Constitution; it is a right that Congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the Courts, in the usual and ordinary way of adjudicating constitutional rights"; distinguishing U. S. *v.* Sing Tuck on the ground that here the alleged citizen is within the country, and not seeking to re-enter it after departure); 1907, Chin Yow *v.* U. S., 208 U. S. 8 (habeas corpus by a Chinese claiming citizenship by birth, and alleging that he was not permitted to adduce available testimony; Holmes, J.: "As between the substantive right of citizens to enter, and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the commissioner's fiat on the other, when one or the other must give way, the latter must yield"); 1908, In re Tang Tun, In re Gang Gong, In re Can Pon, D. C. W. D. Wash., 161 Fed. 618, 625 (here Hanford, J., emphasizes the gravity of danger in a law submitting to executive officials the determination of the constitutional right of citizenship by birth); 1909, Re Can Pon, 9th C. C. A., 168 Fed. 479 (procedure of immigration officers, prescribed); 1909, Re Tang Tun, 9th C. C. C., 168 Fed. 488 (similar); 1909, Liu Hop Fong *v.* U. S., 209 U. S. 453, 28 Sup. 576 (an order of deportation made by the district judge on the commissioner's findings, without other evidence, held improper under the circumstances); 1910, U. S. *v.* Chu Hang, D. C. S. C., 179 Fed. 564 (similar to Tang Tun's Case, per Brawley, J.); 1914, Hanges *v.* Whitfield, D. C. N. D. Ia., 209 Fed. 675 (deportation of an immigrant under St. 1907, Feb. 20, as amended by St. 1910, Mar. 26, c. 128, 36 Stats. L. 263); 1914, Ex parte Lam Pui, D. C. E. D. N. C., 217 Fed. 456 (forcible opinion by Connor, J., emphasizing the necessity of a fair hearing and sufficient evidence); 1915, Choy Gum *v.* Backus, 9th C. C. A., 223 Fed. 487 (a finding based in part on ex parte affidavits may be sustained, if "the inquiry appeared to be fair and impartial"); 1920, Kwock Jan Fat *v.* White, 253 U. S. 454, 40 Sup. 566 ("It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen should be permanently excluded from his country").

[5] 1855, Murray *v.* Hoboken L. & I. Co., 18 How. 272, 284 (statute making a warrant of distress for debt due from a government collector to the United States conclusive evidence of the indebtedness, held valid as covering a matter not essentially one of determination by the judicial power).

[6] 1904, Public Clearing House *v.* Coyne, 194 U. S. 497, 24 Sup. 789 (order excluding fraudulent communications from the mails).

[7] *Ante*, § 1347, n. 7. Compare also the authorities cited *ante*, § 4 *a* and § 4 *c* (rules of evidence in administrative tribunals).

has received an undeserved importance and a needless confusion by that association, namely, the question of the constitutionality of statutes creating *rules of presumption* or *'prima facie' evidence.*

A rule of presumption is simply a rule changing the burden of proof, *i.e.* declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced (*post*, § 2490). There is not the least doubt, on principle, that the Legislature has entire control over such rules, as it has over all other rules of procedure in general and evidence in particular (*ante*, § 7) — subject only to the limitations of the rules of Evidence expressly enshrined in the Constitution. If the Legislature can abolish the rules of disqualification of witnesses and grant the rule of discovery from an opponent, it can shift the burden of producing evidence. Yet this elementary truth has been repeatedly questioned, and Courts have repeatedly vouchsafed an unmerited attention to the question, chiefly through a hesitation in appreciating the true nature of a presumption and a tendency to associate in some indefinite manner the notion of conclusively shutting out all evidence and that of merely shifting the duty of producing it. Fortunately, sound principle has almost everywhere prevailed, though at an unnecessary expense of argument and hesitation:

1910, LURTON, J., in *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43: "The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end, and the question of negligence is one for the jury upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the 'prima facie' case is enough as matter of law. The statute does not, therefore, deny the equal protection of the law or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference.

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defence to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issues, there is no ground for holding that due process of law has been denied him."

1914, LUMPKIN, J., in *Griffin* v. *State*, 142 Ga. 636, 639: "With certain limitations, the Legislature may enact that when specified facts have been proved, they shall, even in a criminal case, be 'prima facie' evidence of the guilt of the accused, and shift the burden of proof. On this power there are limitations, the principal one of which is that the fact or facts which will raise the presumption and shift the burden of proof must have some fair relation to, or material connection with, the main fact as to which the presumption is raised. The inference or presumption from the facts proved must not be merely arbitrary, or wholly

unreasonable, unnatural, or extraordinary, but must bear some reasonable relation to the facts proved. To illustrate, if the Legislature should declare that every man found wearing a straw hat in September should be presumed to have committed any forgery which took place in that month, such an act would be invalid, because there is no rational connection between forgery and wearing a straw hat, and the presumption would be purely arbitrary. But if the Legislature should declare that one found in possession of stolen goods shortly after a larceny should be 'prima facie' presumed to be the thief, and that the burden of rebutting the presumption should rest on him, this would be valid, the presumption not being purely arbitrary but there being a reasonable connection between the possession of the stolen goods and the commission of the larceny. Moreover, the presumption so raised must not be final, but the accused must be allowed a fair opportunity to make his defence and show all of the facts bearing on the issue, and to have the whole case submitted to the jury for decision, after considering all of the evidence as well as the 'prima facie' presumption, if the facts from which it arises have been proved to exist."

Statutes giving presumptive or 'prima facie' weight have therefore been held constitutional in application to *tax-collectors' deeds*, as raising a presumption of regularity of proceedings;[1] to conduct indicating a *banker's knowledge of insolvency;*[2] to conduct indicating illegal *gaming*[3] or illegal *liquor-selling*[4]

§ 1356. [1] To the cases cited *ante*, § 1354, n. 5, which almost all concede this, add the following: *Fed.* 1851, Pillow *v.* Roberts, 13 How. 472, 476; 1893, Marx *v.* Hanthorn, 148 U. S. 172, 181, 13 Sup. 508; 1912, Reitler *v.* Harris, 223 U. S. 437, 32 Sup. 248 (Kan. St. 1907, c. 373, making an entry of forfeiture of school land for default in payment 'prima facie' evidence of proper preliminary steps); *Cal.* 1893, McDonald *v.* Conniff, 99 Cal. 386, 390, 34 Pac. 71; 1894, Clarke *v.* Mead, 102 Cal. 516, 519, 36 Pac. 862; *Ill.* 1888, Gage *v.* Caraher, 125 Ill. 451, 17 N. E. 777; *N. Y.* 1855, Hand *v.* Ballou, 12 N. Y. 541; *Wis.* 1856, Delaplaine *v.* Cook, 7 Wis. 44 (well-reasoned opinion by Whiton, C. J.).

[2] 1894, Robertson *v.* People, 20 Colo. 279, 38 Pac. 326 (statute making a bank's failure within 30 days of a deposit 'prima facie' evidence of knowledge of insolvency, held constitutional); 1914, Griffin *v.* State, 142 Ga. 636, 83 S. E. 540 (Ga. P. C. 1910, § 204, providing that "every insolvency" of a bank, etc., "shall be deemed fraudulent", but "the defendant may repel the presumption of fraud by showing" etc., held constitutional, since "the presumption was not intended to be conclusive"); 1896, Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 991 (insolvent bankers' statute, held constitutional); 1896, State *v.* Beach, 147 Ind. 74, 43 N. E. 949 (statute making failure of a bank within 30 days after receiving a deposit to be 'prima facie' evidence of intent to defraud, held constitutional); 1894, State *v.* Buck, 120 Mo. 479, 25 S. W. 573 (insolvent bankers' statute, held valid).

So also the following: 1903, Crane *v.* Waldron, 133 Mich. 73, 94 N. W. 593 (fraudulent conveyances).

[3] 1904, Adams *v.* New York, 192 U. S. 585, 24 Sup. 372 (policy slips; possession as raising a presumption of knowledge); 1888, Morgan *v.* State, 117 Ind. 569, 17 N. E. 154 (statute declaring the fact of gaming, etc., to a lessor's knowledge to be sufficient evidence of renting for the purpose of gaming, held constitutional); 1890, Voght *v.* State, 124 Ind. 358, 24 N. E. 680 (same statute held constitutional, and treated as merely defining a presumption); 1896, Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503.

[4] *Fed.* 1922, Hawes *v.* Georgia, 258 U. S. 1, 42 Sup. 204 (knowing permission to others to use premises for illegal making of liquor; Ga. St. 1917, Ex. Sess. p. 7, § 22, providing that the finding of apparatus on premises "shall be 'prima facie' evidence that the person in possession had actual knowledge of the existence of the same", held constitutional; "undoubtedly there must be a relation between the two facts; that is, if one evidence the other, there must be connection between them, a *requirement that reasoning insists on*, and necessarily the law"; but since when was a legislature obliged to be logical at the risk of being unconstitutional? Can we afford to put so much legislation in danger!); *Ala.* 1910, Toole *v.* State, 170 Ala. 41, 54 So. 195 (statute making the keeping of liquor etc., 'prima facie' evidence of intent to sell, held constitutional); *Conn.* 1856, State *v.* Cunningham, 25 Conn. 195 (a statute making the possession of spirituous liquors presumptive evidence of keeping with intent to sell, held constitutional); 1917, Dees *v.* State, 16 Ala. App. 97, 75 So. 645 (St. 1915, p. 31, making possession 'prima facie' evidence, held constitutional); *Ill.* 1908, People *v.* McBride, 234 Ill. 146, 84 N. E. 865 (statute making the issuance of an internal revenue stamp 'prima facie' evidence, held constitutional, following Meadowcroft *v.* People, *supra*, n. 2); *Kan.* 1902, State *v.* Sheppard, 64 Kan. 451,

(though here there is one line of singularly perverse decisions[5]), or *illegal transactions of other sorts;*[6] to the findings of an *auditor* or *referee* in a

67 Pac. 870 (Kan. St. 1901, c. 232, § 8, providing that the possession of intoxicating liquors shall be 'prima facie' evidence of keeping for sale, held constitutional; "the Legislature has some power over the rules of evidence"); *Mass.* 1856, Com. *v.* Williams, 6 Gray 1 (statute declaring delivery of intoxicating liquor 'prima facie' evidence of a sale, held valid; Thomas, J., diss.); 1856, Com. *v.* Wallace, 7 Gray 222 (same; but Thomas, J., not diss.); 1859, Com. *v.* Rowe, 14 Gray 47 (same); *N. Y.* 1886, Board *v.* Merchant, 103 N. Y. 143, 149, 8 N. E. 484 (statute making the drinking of liquor on premises 'prima facie' evidence of the occupant's sale with intent that the liquor should be there drunk, held valid); 1893, People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759 (statute making the possession of marked bottles without the owner's consent 'prima facie' evidence of unlawful purchase, held valid); *N. C.* 1915, State *v.* Barrett, 138 N. C. 630, 50 S. E. 506 (St. 1903, c. 434, making the possession of liquor under certain circumstances 'prima facie' evidence of intent to sell, held constitutional; quoting the above text with approval); *Okl.* 1915, Caffee *v.* State, 11 Okl. Cr. 485, 148 Pac. 680 (St. 1913, c. 26, § 6, making the keeping of certain quantities of liquor 'prima facie' evidence of intent to sell, held constitutional; quoting the above text with approval); 1915, Sellers *v.* State, 11 Okl. Cr. 588, 149 Pac. 1071 (similar); *Tenn.* 1910, Diamond *v.* State, 123 Tenn., 348, 131 S. W. 666 (illegal liquor sale; a statute making the procuring of a Federal revenue license 'prima facie' evidence of being in the liquor business, held valid).

[5] *R. I.* 1881, State *v.* Beswick, 13 R. I. 211 (statute making the "notorious character" of premises or their frequenters "'prima facie' evidence that said liquors are kept on such premises for the purposes of sale", held invalid, as depriving of liberty without "the law of the land", because "it virtually strips the accused of the protection of the common-law maxim that every person is presumed innocent until he is proved guilty"; yet the same ruling holds that another clause of the statute placing on the accused the burden of proof of a license is valid; the opinion discloses confused notions as to the nature of presumptions and burden of proof); 1881, State *v.* Higgins, 13 R. I. 330 (statute making the sale of liquor in a place "'prima facie' evidence that the sale is illegal", held valid, as in effect merely placing on the defendant the burden of proving a license; prior case distinguished); 1882, State *v.* Mellor, 13 R. I. 666 (similar case to the preceding, but apparently inconsistent); 1885, State *v.* Wilson, 15 R. I. 180, 1 Atl. 415 (a statute making reputation merely evidence of the character of a place as a liquor nuisance, leaving the jury "free to find the accused guilty or not", held constitutional).

So also in *Louisiana:* 1917, State *v.* Wilson, 141 La. 404, 75 So. 95 (St. 1908, No. 40, making the U. S. internal revenue collector's certificate of license issued admissible as 'prima facie' evidence of guilt of illegal liquor selling, held invalid; State *v.* Donato, 127 La. 393, "must be considered overruled"; the opinion is a typical illustration of the acute legal mind dwelling and reasoning in a lofty cloud-cuckoo-land of its own creation, thousands of parasangs distant from the world of men).

[6] *Federal:* 1910, Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35, 31 Sup. 136 (negligence of railroad company; quoted *supra*); 1910, Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61, 31 Sup. 337 (a statute making the pumping of certain waters 'prima facie' evidence of an offence under the statute, and putting on such party the burden of showing that he comes within an exception, held valid); 1911, Bailey *v.* Alabama, 219 U. S. 219, 227, 31 Sup. 146 (Ala. Code 1896, § 4730, as amended, Code 1907, § 6845, making it a penal offence for a person after receiving money in advance from an employee under a contract to refuse to perform the service with intent to defraud, provided that the refusal to perform without returning the money and without just cause, should be 'prima facie' evidence of intent to defraud; held unconstitutional, two judges dissenting; Mobile R. Co. *v.* Turnipseed, *supra*, distinguished; the decision is unsound); 1917, Ng Choy Fong *v.* U. S., 9th C. C. A., 245 Fed. 305 (concealment of opium; St. 1909, Feb. 9, §§ 2, 3, declaring that the possession of opium raised a presumption, etc., held valid); *Georgia:* 1907, Mulkey *v.* State, 1 Ga. App. 521, 57 S. E. 1022 (St. 1903, Aug. 15, p. 90, punishing fraudulent contracts to render service, and making non-performance presumptive evidence of fraudulent intent, held constitutional, but not applicable to remote acts; weighty opinion by Powell, J., the best on the subject); 1912, Wilson *v.* State, 138 Ga. 489, 75 S. E. 619 (P. C. 1910, § 715, making non-performance of a contract of service presumptive evidence of fraudulent intent, held valid); *Kansas:* 1920, State *v.* Nossaman, 107 Kan. 715, 193 Pac. 347 (unlawful traffic in cigarettes; statute making possession 'prima facie' evidence of violation of act, held constitutional); *Massachusetts:* 1904, Com. *v.* Anselvich, 186 Mass. 376, 71 N. E. 790 (a statute making the possession of registered bottles, etc., 'prima facie' evidence of crime); 1911, Opinion of the Justices, 208 Mass. 619, 94 N. E. 1044 (bill to prohibit labor in excess of 8 hours a day ex-

trial;[7] to the schedules of rates of a *railroad commission;*[8] and to sundry other data of inference, circumstantial or testimonial.[9]

cept in certain cases, providing that work more than 8 hours should be "'prima facie' evidence of the violation", etc.; clause held unconstitutional, because it made a presumption from "a fact which in ordinary cases has no tendency to establish guilt"; opinion unsound, both on principle and in application); *Mississippi:* 1922, Hollins *v.* State, — Miss. —, 90 So. 630 (St. 1914, c. 171, placing the burden of proving unchastity on the defendant for statutory rape, held constitutional because merely creating a "'prima facie' presumption"); *Montana:* 1921, State *v.* Pippi, 59 Mont. 116, 195 Pac. 556 (statute making the receipt of money from a prostitute presumptive evidence of lack of consideration); *Nevada:* 1921, State *v.* Rothrock, — Nev. —, 200 Pac. 525 (statute making certain acts 'prima facie' evidence of embezzlement, held constitutional); *New York:* 1918, People *v.* Woronoff, 222 N. Y. 456, 118 N. E. 102 (grand larceny; S. Consol. L. 1909, Business and Trade, § 442, making the failure to produce books of account to customer presumptive evidence of falsity of representations as to assets, held constitutional); *North Carolina:* 1911, State *v.* Griffin, 154 N. C. 611, 70 S. E. 292 (Rev. St. § 3431, making non-performance of labor 'prima facie' evidence of intent to cheat, as in the Alabama statute, held unconstitutional, following Bailey *v.* Alabama, U. S.); 1918, State *v.* Price, 175 N. C. 804, 95 S. E. 478 (statute making reputation admissible to evidence the character of a bawdy-house, held valid); *Texas:* 1869, Faith *v.* State, 32 Tex. 372 (St. 1866, Nov. 13, p. 223, making the possession of certain animals without written document of conveyance 'prima facie' evidence of illegal possession, held constitutional).

The following opinion is peculiar and unsound: 1916, McFarland *v.* American Sugar Ref. Co., 241 U. S. 79, 36 Sup. 498 (by La. St. 1915, extra session, No. 10, the business of sugar refining was declared to be impressed with a public interest because of being a monopoly, and regulations for the buying of raw sugar were made; § 7 provided that any person engaged in the refining business "who shall systematically pay in Louisiana a less price for sugar than he pays in any other State shall be 'prima facie' presumed to be a party to a monopoly"; § 8 made a similar presumption from the closing of a refinery for more than one year; these rules of presumption were held invalid, on the ground that they "had no foundation except with tacit reference to the plaintiff", and thus violated the 14th Amendment as to equal protection of the laws; the opinion dismisses the subject curtly, without due consideration of the principle involved; it maintains that the Legislature cannot "declare an individual presumptively guilty of a crime"; but here the Legislature makes no such declaration, the description becomes individualized only by the party's own conduct in doing the acts described).

[7] 1877, Holmes *v.* Hunt, 122 Mass. 505, 516 (statute making the report of an "auditor", or referee in civil cases, 'prima facie' evidence, held valid).

Contra: 1860, Plimpton *v.* Somerset, 33 Vt. 283 (statute making a referee's report 'prima facie' evidence in common-law cases, held invalid, because the jury's verdict "becomes but the mere recording of a verdict made for them by others"; Barrett, J., diss.).

Compare Re Peterson, 253 U. S. 300 (1920), 40 Sup. 543, cited *post*, § 2484.

For the state of the doctrine in New Hampshire, which rested largely on historical grounds, see the following cases: 1875, Copp *v.* Henniker, 55 N. H. 179; 1876, Doyle *v.* Doyle, 56 N. H. 567; 1876, Perkins *v.* Scott, 57 N. H. 55; 1876, King *v.* Hopkins, 57 N. H. 334, 354, 359; in the last case, the opinion of Foster, C. J., deals with the question of evidence, and, while apparently conceding the legislative power to make rules of 'prima facie' evidence, it regards this statute as a virtual substitution of another tribunal for the jury; but his argument is labored: the answer of Cushing, C. J., is ample.

[8] 1915, Meeker *v.* Lehigh Valley R. Co., 236 U. S. 412, 35 Sup. 328 (U. S. St. 1906, July 29, § 16, making the findings of the Interstate Commerce commission "'prima facie' evidence of the facts therein stated", held constitutional, as "only establishing a rebuttable presumption"); 1894, Chicago B. & Q. R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247 (statute making railroad commissioners' schedule of rates 'prima facie' evidence of their reasonableness, held constitutional); 1891, Burlington C. R. & N. R. Co. *v.* Dey, 82 Ia. 312, 48 N. W. 98 (statute making railroad commissioners' schedule of rates 'prima facie' evidence of reasonableness, held constitutional).

[9] *Federal:* 1910, Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35, 31 Sup. 136 (Miss. Code 1896, § 1985, making injury inflicted to persons or property "by the running of the locomotives or cars" of a railroad 'prima facie' evidence of negligence, held constitutional); 1913, Luria *v.* U. S., 231 U. S. 9, 34 Sup. 10 (U. S. St. 1906, June 29, § 15, on naturalization, providing that the return of a naturalized citizen for permanent residence in a foreign country, within 5 years after naturalization, should be 'prima facie' evidence of initial lack of intent to become a permanent citizen, held constitutional, following Mobile R. Co. *v.* Turnipseed); *Illinois:* 1898, Baltimore & O. S. W.

It has occasionally been suggested that these legislative rules of presumption, or any legislative rules of evidence, must be tested by the standard of *rationality*, and are invalid if they fall short of it.[10] But this cannot be conceded. If the Legislature can make a rule of Evidence at all (*ante*, § 7), it cannot be controlled by a judicial standard of rationality, any more than its economic fallacies can be invalidated by the judicial conceptions of economic

R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833 (Rev. St. 1874, p. 814, St. 1869, Mar. 29, making the communication of fire by railroad locomotives 'prima facie' evidence of negligence, held constitutional); 1904, People ex rel. Hillel Lodge *v.* Rose, 207 Ill. 352, 69 N. E. 762 (St. 1901, May 10, declaring the failure of a corporation to file an annual report 'prima facie' evidence of non-user, is constitutional; otherwise if a rule of conclusiveness had been declared; Magruder, J., diss. on other grounds); *Kentucky:* 1905, Andricus' Adm'r *v.* Pineville Coal Co., 121 Ky. 724, 90 S. W. 233 (statute making a mine inspector's report 'prima facie' evidence, held constitutional); *Louisiana:* 1911, Learned *v.* Texas & P. R. Co., 128 La. 430, 54 So. 931 (St. 1886, No. 70, § 1, making the fact of injury or death of stock sufficient in an action against a railroad company, unless the defendant disproves negligence, held constitutional; "the rules of procedure and evidence are of course within legislative control"); *Maine:* 1921, Mansfield *v.* Gushee, 120 Me. 333, 114 Atl. 296 (statute making 'prima facie' evidence a party's suppletory oath to a book of accounts); *Massachusetts:* 1918, Duggan *v.* Bay State St. R. Co., 230 Mass. 370, 119 N. E. 757 (St. 1915, c. 553, changing the burden of proof as to contributory negligence, held constitutional); *Missouri:* 1919, Cunningham *v.* Chicago & A. R. Co., — Mo. —, 215 S. W. 5 (St. 1913, p. 578, § 40, and St. 1913, p. 177, amending Rev. St. 1909, § 3121, placing upon a common carrier the burden of proof that delay in transit was not due to negligence, held constitutional); *North Dakota:* 1918, Stoeber *v.* Minneapolis St. P. & S. S. M. R. Co., 40 N. D. 121, 168 N. W. 562 (Comp. L. 1913, § 4644, making injury to stock 'prima facie' evidence of negligence, held valid); *Oklahoma:* 1905, Williams *v.* Fourth Nat'l Bank, 15 Okl. 477, 82 Pac. 496 (sales in bulk); *Vermont:* 1909, Ex parte Allen, 82 Vt. 365, 73 Atl. 1078 (statute making a physician's sworn certificate 'prima facie' evidence of insanity in committal proceedings, held valid); *Washington:* 1905, State *v.* Lawson, 40 Wash. 455, 82 Pac. 750 (official records of physicians' licenses).

[10] *Ida.* 1920, State *v.* Grimmett, 33 Ida. 203, 193 Pac. 380 (larceny of cattle; Comp. St. 1919, § 1948, providing that any person slaughtering cattle must retain the hide without alteration for 30 days, and that a failure to comply with this is "'prima facie' evidence of the commission of the crime of grand larceny", held unconstitutional, because the disposition of a hide within 30 days "is an act innocent in itself", and "the Legislature cannot indirectly accomplish the result [of taking away the presumption of innocence] by enacting that proof of a fact which has no rational tendency to prove that the defendant is guilty of a certain crime shall be 'prima facie' evidence thereof"; replying to the doctrine of the text above by invoking "the due process provision of the Constitution", which is "a limitation upon the power of the Legislature in the enactment of statutory rules of evidence"; if so, it would now be an apt exercise of due process for this Court to deconstitutionalize some of the really irrational rules of evidence invented by common-law judges themselves; Budge, J., diss., in a well-reasoned opinion); *Ind.* 1896, Monks, J., in State *v.* Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145 ("a statute which makes an act 'prima facie' evidence of a crime, which has no relation to a criminal act and no tendency whatever to establish a criminal act", would be unconstitutional); *N. Y.* 1856, Selden, J., in Wynehamer *v.* People, 13 N. Y. 378, 446 (statute making delivery 'prima facie' evidence of sale of liquor, declared invalid, on the ground that "all these fundamental rules of evidence . . . are placed by the Constitution beyond the reach of legislation . . . and are of course in their nature unchangeable"; this was *obiter*, the other judges not noticing the point); 1893, Peckham, J., in People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759 ("The limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must be not merely and purely arbitrary, or wholly unreasonable, unnatural, and extraordinary").

In State *v.* Price (1918), 175 N. C. 804, 95 S. E. 478, Walker, J., after alluding to the above text continues: "Without conceding that the rationality of the legislative rule of evidence is in no case open to judicial examination, it is probably safe to assume that the Courts will be reluctant, except in extraordinary cases, to declare that the legislative rule is so irrational as to be invalid."

See also the judicial utterances quoted *ante*, § 1354, n. 9.

truth. Apart from the Constitution, the Legislature is not obliged to obey either the axioms of logic or the axioms of economic science. All that the Legislature does in such an event is either to render admissible a fact which was before inadmissible, or to place the burden of producing evidence on the opposite party. When this has been done, the jury is free to decide; or, so far as it is not, this is because the party has voluntarily failed to adduce contrary evidence. There is here nothing conclusive, nothing prohibitive. So long as the party may exercise his freedom to introduce evidence, and the jurors may exercise their freedom to weigh it rationally, no amount of irrational legislation can change the result.

The advice may be ventured that if the Judiciary had long ago resented as unconstitutional that ill-advised species of legislative interference which forbade them to comment to juries upon the weight of evidence, they need never have cared about the evidential effect of enactments of the present sort.

§ 1357. **Contracts making Specific Evidence Conclusive.** Whether the parties may validly contract that a specified kind of evidence shall be conclusive, is part of a larger question whether in general contracts to alter or to waive the usual rules of Evidence are valid. This subject has already been considered elsewhere (*ante*, § 7*a*).